Article Two Warranties in Commercial Transactions

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SPECIAL PROJECT

ARTICLE TWO WARRANTIES IN COMMERCIAL TRANSACTIONS

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INTRODUCTION

Warranties. They are a natural response to the natural law—Murphy's Law—that if something can go wrong, it will. Ideally, warranties protect those who buy goods that are not as good as they should be. Yet lawyers squirm beneath the mass of words and rules that grew from this simple seed.

The drafters of the Uniform Commercial Code endeavored to disentangle warranty law from much pre-Code terminology and some pre-Code concepts. Unhappily, some courts have failed to recognize or refused to accept the Code's scheme. This Project attempts to explicate the Code's design and to shed light on particular problems courts have encountered. Because consumer sales implicate special policies and bodies of law, the ensuing discussion focuses on sales of goods to be used in buyers' businesses.

I

THE SCOPE OF THE WARRANTY SECTIONS

Before he ventures very far toward judgment, the warranty plaintiff must determine whether he is on the right road. Although section 2-102 defines the scope of Article Two as "transactions in goods," the language of the warranty sections seems to limit their applicability to contracts for sale. But many courts have spread the protection of Code warranties to certain nonsale transactions, most commonly, sale-service hybrids and chattel leases.

A. Sale-Service Hybrids

Although the most familiar sale-service cases arise in the consumer context, many also arise in commercial transactions. A

1 Section 2-314 states that "a warranty that the goods shall be merchantable is implied in a contract for their sale." (Emphasis added.) Although neither § 2-313 nor § 2-315 is as explicit, all three sections use the term "seller," and § 2-315 uses the term "buyer," to describe the parties to the warranties. Moreover, § 2-313, Comment 2, quoted in text following note 21 infra, limits express warranties to those "made by the seller as part of a contract for sale."

2 See generally J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6 (1972) [hereinafter cited as WHITE & SUMMERS]. Most of the cases that consider the extension of warranty protection to nonsale transactions involve implied warranties.

finding that a warranty exists may depend upon whether the sales or the service element predominates. This determination turns on the nature of the transaction, the intent of the parties as reflected in the agreement, and a common-sense judgment of whether the buyer paid for goods or for services.


A transaction involving the medical care and treatment of a patient at a hospital is regarded in its entirety, and may not be broken down so as to label some parts of it as sales and others as contracts for services. Where that entirety is actually directed to a restoration of the patient's health the whole contract is categorized as one for services.


Throughout the contract plaintiff is denominated "Owner" not buyer, and defendant is denominated "Contractor" not seller. The agreement expressed a desire by plaintiff to have an ammonia plant "designed, constructed and completed" by defendant, not a desire to purchase the facility from defendant. Defendant was represented as being engaged in the business of "designing and constructing" rather than selling. The agreement called for defendant to do all process, design and engineering work. It did not call for defendant to sell anything to plaintiff. With respect to the converter and other component parts, defendant was to "procure, expedite, receive, install and erect all equipment." No mention is made of selling equipment. Defendant's sole fixed fee was to be compensation for services including "purchasing services, including the services of buyers, expediters and inspectors." Most important to our determination are two provisions found in Article VIII of the contract. As noted above, section 8.2 placed ultimate control of purchasing decisions in the hands of plaintiff, not defendant. Under section 8.23 "title to all machinery and equipment and supplies for the work shall, as between Owner and Contractor, be in Owner." Thus defendant never had title to any component part of the plant, including the converter.

We believe the foregoing demonstrates that the contract clearly and unambiguously was intended by the parties as one for the provision of services exclusively, not a contract of sale.

7 See, e.g., Aluminum Co. of America v. Electro Flo Corp., 451 F.2d 1115, 1118, 10 U.C.C. Rep. 88, 92 (10th Cir. 1971):

Electro Flo did not order or contract for engineering. Alcoa's full charge was for materials furnished; it's offer was by price quotation for the products only, and it did not bill for engineering services or seek compensation therefor save as the cost of such services entered into the price for the materials delivered.
Public utilities contracts, for example, give rise to suits involving property damage caused by defective utility services. By analogy to the Code, at least two courts have imposed warranties where defective electrical equipment caused fires. In another case, however, a court denied recovery under the Code for damages caused by an explosion of natural gas. The defect, reasoned the court, arose in the meters and service lines rather than in the gas. Yet another court refused to impose warranty protection in the sale and supply of water, reasoning that water, as a nonmovable, does not fit within the Code definition of "goods." No "transaction in goods" arose, therefore, to trigger Article Two.

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8 See Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 196 N.W.2d 316, 10 U.C.C. Rep. 977 (1972); Wivagg v. Duquesne Light Co., 73 Pa. D. & C.2d 694, 20 U.C.C. Rep. 597 (C.P. 1975). In these cases, the courts took distinct yet similar approaches. The Buckeye court held that the Code did not govern a contract for the supply of electricity because electricity does not fit the definition of "goods" under § 2-105(1). Although it thus declined to find a sale of goods, the court did conclude that supplying electricity constitutes a sale of a service, which gives rise to an implied warranty. 38 Mich. App. at 328-30, 196 N.W.2d at 317-18, 10 U.C.C. Rep. at 979.

The Wivagg court, on the other hand, drew the line between sales and services rather than between goods and services. This court rejected a rigid sale-service dichotomy and concluded that although the supply of electricity contains elements of a service contract, it "is sufficiently analogous to a 'sale' to justify the extension of the code's warranty protection." 73 Pa. D. & C.2d at 702, 20 U.C.C. Rep. at 602.

The differences between these two approaches appear more semantic than conceptual. Each court concluded that no sale of goods took place (Buckeye emphasizing the word "goods," Wivagg emphasizing "sale"), and each focused on the rendering of services for consideration. The Wivagg court noted the social policy considerations specifically applicable to supplying electricity to consumers:

1. Public interest in safeguarding the consumer from his own inability to protect himself from harm caused by the defectively manufactured product;
2. Societal pressure upon those who market and advertise the product to meet their implied assurances of the safety of the goods, and
3. The superior risk-bearing ability of the manufacturer and seller to spread the cost of the injury through the price of the product or by liability insurance.

Id. at 701, 20 U.C.C. Rep. at 601. These policy considerations parallel those supporting implied warranties in sales of goods. See note 162 infra.


10 "What was sold was the gas, and it would be the gas, and not the defendant's equipment that would be covered by the provisions of the Uniform Commercial Code." Id. at 15-16, 329 N.E.2d at 233, 17 U.C.C. Rep. at 65. We question the court's inelastic approach. Enjoymont of the gas depends upon the functioning of the lines and meters. A sounder inquiry would find implied warranties on the entire transaction using the nexus test proposed in the text following note 18 infra.


"Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the
Courts frequently find warranties in contracts that encompass both the sale of goods and their installation. In such cases, the warranties may apply to the installation as well as to the goods. Similarly, courts have imposed warranties in crop spraying contracts, but without discussing the hybrid nature of the transactions.

As the foregoing discussion indicates, courts frequently apply Code warranties, or their common-law counterparts, to sale-service hybrids. Once a court employing the predominance test determines that the sale element of the transaction predominates, the court must decide whether to apply warranties to the service element as well. Cases may arise where the service component is so peripheral that extending warranty protection to it would be unreasonable. On the other hand, the service might be so intimately wrapped up in the sale that it falls within the reasonable reach of Article Two. Rarely, however, do courts articulate any

money in which the price is to be paid, investment securities ... and things in action.

The court relied upon Comment 1 to that section, which reads in part: "The definition of goods is based on the concept of movability and the term 'chattels personal' is not used. It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed."


Apart from statute, implied warranties may apply. They may apply to the sale of services as well as to the sale of goods... Here we have a combination of factors. The services involved the installation of goods supplied by the supplier. The statutory implied warranty applies to the goods being installed.... [T]he goods being installed were to be used for handling electricity, a dangerous force. We do not hesitate to rule that under such circumstances there is an implied warranty of fitness and merchantability with respect to the manner in which the goods were installed.

Id. at 412, 222 N.W.2d at 324-25, 15 U.C.C. Rep. at 762 (footnote omitted).


Suppose a wholesaler sells asphalt to a retailer for resale and, at the same time, agrees to pave the retailer's parking lot with asphalt that the retailer has purchased elsewhere. The two parts of the transaction are sufficiently severable to fail the nexus test proposed in the text following note 18 infra. In such a case, a warranty might properly apply to the asphalt sold for resale, but not to the paving service.

Suppose a paving company agrees to pave a supermarket's parking lot. The consideration covers the paving services and the cost of the asphalt. Here, the transaction would
systematic rationale for applying Code warranties to the service component of sale-service hybrids.

One attempt at articulation arose in a cattle feed case. A manufacturer sold feed supplements to a feed lot operator and also provided the services of staff nutritionists for the selection and use of the feed. The plaintiff claimed that both the feed supplement and the nutritionists' advice were defective. The court extended Code warranties to the transaction, tersely stating: "It is commercially unrealistic to treat separately the sale of the ration supplement and the rendering of professional advice and assistance." The court found its way to the right conclusion but, unfortunately, it left no discernible trail.

We propose a nexus test: Where a sale would not be made but for the accompanying services, a sufficient nexus exists to justify applying Code warranties to both components of the transaction. Similarly, a nexus exists where the service is necessary to the enjoyment of the goods. Of course, the tail cannot wag the dog—courts must find that the transaction is predominantly a sale before employing the nexus test. This approach draws no bright lines, but it should provide courts with a rational and predictable system for determining liability.

B. Leases

Chattel leases occupy another region on the fringes of the Code. When determining whether to bring leases within the grasp of warranty law, courts employ and often combine four distinct approaches.

1. Judicial Deference to the Legislature

Some courts refuse to apply warranties to lease transactions in the absence of an express legislative command. These courts treat Article Two, which does not govern lease transactions, as though it preempted the warranty field. The drafters of the

pass the nexus test proposed in the text following note 18 infra, and warranties could apply to the asphalt and to its installation.

18 Id. at 668, 9 U.C.C. Rep. at 220.
Code, however, did not expect such trepidation. Section 1-102(1) states: "This Act shall be liberally construed and applied to promote its underlying purposes and policies." As one commentator has noted:

[T]he Code's rule of thumb for construction is in the form of a command from the legislature to the courts: unless a given construction or application in determining a particular dispute clearly contravenes the statute, either by commission or omission, courts should not defer to the legislature for a change in the rules. In short, "passing the buck" to the legislature is no longer a fashionable means by which a court may reach an admittedly unjust or illogical result.21

Beyond this general denunciation of abdication to the legislature, the Code's drafters specifically invited courts to take an expansive view toward warranty protection. Comment 2 to section 2-313 provides:

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

Neither the drafters nor the legislatures have stolen the ball from the courts' court. Comment 2 does not take a stand on whether warranties should apply in nonsales contexts; it only suggests who the decisionmaker should be.

2. "Transactions in Goods"

Some support exists for applying Article Two to chattel leases as "transactions in goods" within the meaning of section 2-102.22 Although the warranty sections ostensibly reach only sales,23 some

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22 U.C.C. § 2-102 provides in part: "Unless the context otherwise requires, this Article applies to transactions in goods ...."
23 See note 1 supra.
courts stretch them further. In *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, Inc.*,24 the court reasoned that "[t]he use in some sections, of the words, 'contract for sale', and in others, of the word 'contracts', can also be taken to mean that the scope of the article was not limited to a transaction involving solely a 'sale' with 'title' and 'property' as its symbols and marks."25 The *Hertz* court26 and others have also noted that section 2-102's use of the word "transactions" instead of "sales" invites a broader sweep.27

Although section 1-102 requires liberal construction of the Code "to promote its underlying purposes and policies," the drafters probably did not intend Article Two to apply directly to chattel leases. Recall Comment 2 to section 2-313: "[T]his section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale . . . ." The Comment endorses judicial expansion of warranty coverage, but not directly under the aegis of the Code. Note too that the title of Article Two is "sales."28 The drafters likely intended that the common law, not Article Two, govern the quality terms of lease transactions. Moreover, blanket application of the Code's warranty provisions to leases might obscure the policy considerations in any given case.

3. Disguised Sales

Some courts apply the warranty sections of Article Two to leases that look like sales.29 These courts consider factors similar

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25 Id. at 230, 298 N.Y.S.2d at 397, 6 U.C.C. Rep. at 136.
26 See id. at 230, 298 N.Y.S.2d at 396, 6 U.C.C. Rep. at 136.
28 U.C.C. § 1-109 states: "Section captions are parts of this Act."
to those used in determining whether a lease constitutes a security interest under Article Nine.\(^{30}\) Thus, if the lessee has an enforceable option to purchase, or if title automatically passes to the lessee at the end of the lease term, Article Two warranties will likely apply.\(^{31}\) Similarly, a provision requiring purchase of the goods upon cancellation of a long-term lease may bring the transaction within Article Two's domain.\(^{32}\)

Although the disguised-sale approach demonstrates some preference for substance over form, it requires no examination of the warranty sections' underlying policies.\(^{33}\) Fortunately, some courts have adopted the more policy-oriented technique of reasoning by analogy to the Code.

4. Reasoning by Analogy to the Code

We would impose warranties upon lease transactions by analogy to the Code. The Code, as a general legislative statement of


Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.


\(^{33}\) Several commentators have criticized the disguised-sale approach. See, e.g., Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653, 667-69 (1957); Miller, A "Sale of Goods" as a Prerequisite for Warranty Protection, 24 Bus. Law. 847,
public policy regarding commercial transactions, becomes a premise for judicial reasoning. Commercial realism underlies the analogy approach. Its advocates point to the increased use of leases in business transactions and the resemblance of many leases to sales.

When courts adopt the analogy approach, the characterization of a lessor as a "merchant" under section 2-314 becomes problematic. Often, lessors serve primarily as financiers and not suppliers; in effect, they lend money to lessees who wish to acquire certain merchandise. Other lessors look more like sellers in their expertise and familiarity with the goods. Courts must determine whether the policies underlying Code warranties apply to the particular lease transaction. For example, the Idaho Supreme Court, in All-States Leasing Co. v. Bass, determined that a lessor of automatic car wash systems did not bear sufficient resemblance to a merchant to justify imposing an implied warranty of merchantability.

It is true that prior to the execution of the lease in issue, [the lessor] handled between forty to fifty transactions over a period of six to eight months, concerning the same Budg-O-Matic Car Wash System that is the subject of this dispute. However, this in our mind does not make All-States Leasing a "merchant" for purposes of the Code. The record discloses that [the lessor] does not build, manufacture or sell any equipment or


For general discussions of reasoning by analogy to the Code, see 5 F. HART & W. WILLER, supra note 21, § 12.02[1], at 1-64; Note, The Uniform Commercial Code as a Premise for Judicial Reasoning, 65 COLUM. L. REV. 880 (1965).


Several tenets of consumer protection may occasionally apply to commercial transactions: the greater reliance by a lessee on a lessor than by a buyer on a seller; the greater ability of a lessor to control the quality of the goods and bear the loss; and the frequency with which lessors double as vendors of the same goods. See, e.g., KPLR TV, Inc. v. Visual Elecs. Corp., 327 F. Supp. 315, 324-25, 9 U.C.C. Rep. 649, 662 (W.D. Ark. 1971), modified on other grounds, 465 F.2d 1382, 11 U.C.C. Rep. 50 (8th Cir. 1972).

For a discussion of § 2-314's "merchant" requirement, see notes 164-182 and accompanying text infra.

See Note, supra note 30, at 147. An example is "where the lessor advances money to the lessee who purchases the chattel and conveys it to the lessor who then leases it back to the lessee." Id.

machines of any kind, but rather is in the business of purchasing or financing the purchase of equipment specifically selected and specified by an approved lessee.\textsuperscript{39}

Although correct in its result, the All-States court applied the merchant requirement mechanically, failing to probe the Code's policies. In a later case,\textsuperscript{40} the same court applied the All-States analogy approach; this time, it more closely examined the policies underlying Article Two and found that the lessor of heavy construction equipment qualified as a "merchant" under section 2-314.

In this lease transaction, the same considerations which give rise to creation of implied warranties in a sales transaction are present. [The lessor] was a merchant specializing in the sale and leasing of heavy construction equipment and [the lessee] argues that it relied on [the lessor's] expertise. [The lessor] placed the product into the stream of commerce and sought to reap economic benefits from the lease of the products. Finally, [the lessor] was in a better position to control the antecedent factors which affect the condition of the product.\textsuperscript{41}

The Idaho Supreme Court set a good example. Article Two does not impose quality terms in leases, but courts can. And courts should, with the guidance of historical warranty policies and the refinements available by analogy from the Code.\textsuperscript{42}

\section*{II \hfill \newline
Express Warranties—Section 2-313}

Express warranties are chisels in the hands of buyers and sellers. With these tools, the parties to a sale sculpt a monument representing the goods. Having selected a stone, the buyer and seller may leave it almost bare, allowing considerable play in the qualities that fit its contours. Or the parties may chisel away inexactitudes until a well-defined shape emerges. The seller is

\textsuperscript{39} Id. at 880, 538 P.2d at 1184, 17 U.C.C. Rep. at 942.


\textsuperscript{41} Id. at 225, 541 P.2d at 1193, 18 U.C.C. Rep. at 350.

bound to deliver, and the buyer to accept, goods that match the sculpted form.  

Section 2-313 of the Uniform Commercial Code states:

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

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

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

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

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

Section 2-313 thus provides a skeletal blueprint of express warranties that is thinly fleshed out by the Official Comments. The section identifies two elements essential to the creation of an express warranty. First, the seller must make a representation of quality that takes one of three forms: an affirmation of fact or promise that relates to the goods, a description of the goods, or a sample or model of the goods. The seller need not intend to create a warranty, nor must he utter any magical words such as "guarantee" or "warranty."

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43 A manufacturer may by express warranty assume responsibility in connection with its products which extends beyond liability for defects... [D]efects in the product may be immaterial if the manufacturer warrants that a product will perform in a certain manner and the product fails to perform in that manner. Defects may be material in proving breach of an express warranty, but the approach to liability is the failure of the product to operate or perform in the manner warranted by the manufacturer.

Second, the quality representation must become "part of the basis of the bargain." Undefined in both the section and the Comments, this phrase generates more litigation than any other in section 2-313, and courts have not reached a consensus on its meaning.

A. The Quality Representation

1. Affirmations of Fact or Promises

The simplest method of creating a warranty is to make an affirmation of fact or promise. The Code does not distinguish affirmations of fact from promises. A court applying section 2-313 would, for example, treat the following contractual clauses identically: "The airplane instruments are shock resistant" and "Seller promises that the airplane instruments are shock resistant."

Affirmations may arise in many contexts, such as letters, advertisement brochures, dealer production manuals, product labels, billboard and magazine advertisements, and order forms. Affirmations may be oral as well as written, but oral

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statements must satisfy the parol evidence rule.51

2. Descriptions

Subsection (1)(b) provides that descriptions of the goods may also give rise to express warranties. Like affirmations, descriptions can arise from such writings as brochure advertisements,52 repair logbooks,53 quotation forms,54 labels,55 and order forms.56 They may also derive from the spoken word, subject to the same parol evidence hurdles that affirmations face.57 Nor need these descriptions flow from lay language. Comment 5 to section 2-313 states: "A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them."58

identical to goods ordered); Peter Pan Seafoods, Inc. v. Olympic Foundry Co., 17 Wash. App. 761, 763, 565 P.2d 819, 821, 21 U.C.C. Rep. 1231, 1233 (1977) (oral statement that, inter alia, engines would deliver certain horsepower at certain r.p.m.).


U.C.C. § 2-202 codifies the parol evidence rule. Counsel for buyers might circumvent the rule by classifying the oral statements as mere interpretations or clarifications, not substantive additions, to the warranty terms. For example, where a seller in writing guaranteed a machine against "operational failure," the court admitted in evidence several oral statements that defined the diverse capabilities of the machine: "The statements and representations of [the seller] must be read together with the written warranty .... " Acme Pump Co. v. National Cash Register Co., 32 Conn. Supp. 69, —, 337 A.2d 672, 675, 16 U.C.C. Rep. 1242, 1245 (1974). The preferred method, of course, is to write every affirmation and description in the contract. This precaution is especially important if the contract includes a merger clause. See generally WHITE & SUMMERS, supra note 2, at §§ 2-9 to 2-12.


57 See note 51 supra.

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One court citing Comment 5 interpreted "and the like" to include illustrations in a purchasing guide. Relying on the seller’s catalog, a municipal buyer purchased a resurfacing tank for an outdoor ice-skating rink. The guide’s language addressed only the size of the tank. An illustration, however, showed the water release handle close to the pushing bar and a blade in front of the tank that was considerably wider than the tank itself. The unit delivered conformed to the written description, but not to the illustration. Noting an increase in the prevalence of illustrated advertisements, the court ruled that the illustration created an express warranty that the goods would conform to it.

The traveling salesman has been replaced by the catalogue. Multi-colored catalogues are thrust upon the public as invitations to purchase. Description by words is limited, but drawings, photographs and blueprints are profusely used to guide and entice the purchaser. It is axiomatic that "a picture is worth a thousand words".

It is often difficult to distinguish between Code affirmations of fact and descriptions; "one inch sheet-rock," for example, could be either. Yet the two categories do not overlap completely. The Code requires that affirmations of fact, but not descriptions, be "made by the seller." This distinction recognizes that a buyer cannot make an affirmation of fact relating to goods he has not received, but can describe the goods he wants. "Thus," says Professor Nordstrom, "when a buyer sends his purchase order to the seller [describing] the goods he wishes to purchase and the seller responds by shipping goods, a description warranty has been created." The difference between subsections (1)(a) and (1)(b) reflects a practical distinction between the buyer and the seller, and should not be read to do more. Thus,


60 Id.


62 Comment 3 to § 2-313 suggests that affirmations of fact are a subset of descriptions: "In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods ...."

63 U.C.C. § 2-313(1)(a), (b), reprinted in text following note 43 supra.

an affirmation of fact originally made by a third party and subsequently conveyed by the seller to the buyer would be "made by the seller" within the meaning of section 2-313(1)(a). Once an affirmation becomes part of the basis of the bargain, its third-party origin is irrelevant.

Descriptions that create express warranties may range from epic to haiku. Professors White and Summers appear to suggest the extreme: "that a generic title such as 'auto' or 'haybaler' is an express warranty that the machine described will carry passengers on the highway or bale hay." We disagree, humbly. It seems more likely that the quality promise described in the quote above is not expressed in "haybaler" but implied in law. True, a buyer who pays good money for what is obviously a haybaler can reasonably expect a machine that bales hay. But his expectation probably does not arise from the magical word "haybaler"; it would arise even if the seller had merely quoted a price and remained otherwise mute. By identifying the goods as a "haybaler" the seller describes their general nature and function, but he has not expressly characterized their quality. Professors White and Summers concede that a generic description warranty would "not normally promise more than an implied warranty of merchantability would give," but suggest that a buyer could use the former when the seller had effectively disclaimed the latter. Such a result would negate the effect of a bargained-for disclaimer on the strength of a single word that, as noted above, probably has little to do with the buyer's expectations. Even if a

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66 White & Summers, supra note 2, § 9-3, at 276 (footnote omitted).

67 Id. at 276 n.26. For discussion of the standards of merchantability, see notes 183-228 and accompanying text infra.

68 A generic description argument was rejected in Alan Wood Steel Co. v. Capital Equip. Ents., Inc., 39 Ill. App. 3d 48, 349 N.E.2d 627, 19 U.C.C. Rep. 1310 (1976). The seller of a used crane had identified the machine as a "75 ton, 40 foot boom Brownhoist Steam Locomotive Crane." Id. at 50, 349 N.E.2d at 630, 19 U.C.C. Rep. at 1313. The plaintiff complained that because the crane could lift only 15 tons, the seller had breached an express warranty that it could lift 75 tons. The agreement contained the following clause: "All equipment is subject to inspection and descriptions are approximate and intended to serve as a guide . . . ." Id. at 57, 349 N.E.2d at 635, 19 U.C.C. Rep. at 1320. Referring to this language, the "used" condition of the crane, the absence of any affirmative representations that the crane would lift 75 tons, and the buyer's reliance on its inspectors' examination of the crane, the court held that the generic description did not create an express warranty. Id. at 58, 349 N.E.2d at 636, 19 U.C.C. Rep. at 1320-21.
generic title were read as a quality description, the buyer's surrender of his implied warranty of merchantability would appear to preclude his reasonable reliance on a similar express warranty. Nevertheless, the Code does not explicitly bar the generic express warranty, and the cagey seller will qualify appropriately: "This is a haybaler, for purposes of identification only."

3. Samples and Models

Section 2-313(1)(c) provides that goods must conform to any sample or model that becomes part of the basis of the bargain. Comment 6 to this section analogizes samples and models to verbal statements regarding the quality of the goods:

The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction.

Without actually defining the terms, the Comment differentiates samples from models:

This section includes both a 'sample' actually drawn from the bulk of goods which is the subject matter of the sale, and a 'model' which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Buyers asserting generic titles as express warranties might seek solace in Comment 4 to § 2-313:

[A] contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316 [Exclusion or Modification of Warranties].

Because it assumes that the seller has made a description and incurred obligations, this language merely begs our question. Comment 4 qualifies itself and then shows the buyer another ray of hope:

This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

How much a buyer pays for goods may well reflect what he expects from them. See Alan Wood Steel Co. v. Capital Equipment Ents., Inc., 39 Ill. App. 3d 48, 58 n.2, 349 N.E.2d 627, 636 n.2, 19 U.C.C. Rep. 1310, 1322 n.2 (1976). Even so, his acceptance of a contract disclaiming implied warranties may indicate his willingness to gamble on receiving more quality than the seller has guaranteed.
A recent Utah case demonstrates the difficulties courts encounter in determining what constitutes a sample or model. In *Pacific Marine Schwabacher, Inc. v. Hydrosift Corp.*, the seller gave the buyer a piece of molded acrylic, representing that it was of the thickness used in the construction of boats he would sell to buyer. The acrylic on the boats subsequently delivered was thinner than the molded piece submitted for inspection. The court concluded that the acrylic piece did not create an express warranty via “sale by sample” under subsection (1)(c), apparently because it represented only a part and not a whole unit of the goods. Nevertheless, the court affirmed a judgment against the seller, finding that “the piece of molded acrylic and the representations made in regard thereto could be found to constitute express warranties under [section 2-313(1)(a) or (b)].”

The *Pacific Marine* court could have reached the same result without resort to the affirmation or description subsections. Section 2-313(1)(c) and Comment 6 are easily broad enough to include examples of components and materials. To limit “samples” and “models” to integrated units ignores a common business practice and may frustrate the parties' intent to communicate a quality standard. That frustration cuts deep where, unlike *Pacific Marine*, the buyer has no other source of warranty protection.

**B. The Basis of the Bargain**

Section 2-313 requires that affirmations, descriptions, samples and models become “part of the basis of the bargain” before they can qualify as express warranties. This slippery fish muddies the waters of case and commentary. The contents of the rule surface only when its history and comments are dredged.

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

The basis-of-the-bargain test replaced the Uniform Sales Act's express requirement that the buyer purchase goods in reliance upon the seller’s affirmations. The ambiguity of the Code’s re-

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70 Id. at 618, 15 U.C.C. Rep. at 359.
71 Section 12 of the Uniform Sales Act provided:
Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement
placement prompted Professor Honnold to remark in the 1955 Report of the New York Law Revision Commission: "There remains the central question: What is the meaning of 'basis of the bargain'? Possibly for lack of any other meaningful standard, courts must employ the test of whether buyer relied on the affirmation or promise ... ." The language and comments of section 2-313 indicate the contrary; they indicate that Professor Honnold was closer to the mark when he later noted that "the Code's rejection of the present reliance language might well imply an intent to modify present law."

The Uniform Sales Act appeared to require that 1) the buyer prove that he 2) actually and 3) reasonably relied upon the seller's affirmation 4) at the time he purchased the goods. Although the issue is far from clear, we would read section 2-313 to modify all but the "reasonableness" requirement. Seller's affirmation, whenever made, should become part of the basis of the bargain unless seller can show that a reasonable buyer aware of the affirmation would not expect the promised quality.

Nevertheless, some courts insist that, to establish an express warranty, the buyer must prove actual reliance on the seller's quality representations. The buyer may be required to prove "that he acted on the basis of the representations," or that the representation "would naturally tend to and does induce a bargain." For these courts, reliance becomes a major component

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purporting to be a statement of the seller's opinion only shall be construed as a warranty.


73 Id. at 393.


76 Terry v. Moore, 448 P.2d 601, 602 (Wyo. 1968) (emphasis in original) (citing Nielsen v. Hermansen, 109 Utah 180, 183, 166 P.2d 536, 537 (1946)).
of, or perhaps synonymous with, basis of the bargain. A few courts, apparently combining the Uniform Sales Act requirement with the Code's test, treat reliance as an independent requirement for express warranty claims. For example, a Texas court required that the buyer asserting an express warranty prove that the "affirmation of fact or promise became a part of the basis of the bargain; [and] . . . that the injured party, in making the purchase, relied on the representations, affirmations of fact or promises . . . ." 79

Courts that require buyers to prove their reliance cannot be relying upon the Official Comments. Comment 3 to section 2-313 provides in part:

In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.

Thus, Comment 3 recognizes a presumption that the seller's affirmations go to the basis of the bargain. By proving that the seller has made an affirmation of fact relating to the goods, the buyer establishes prima facie an express warranty. 80

77 Of course, even where courts require reliance, it need not be the exclusive motivation for the bargain. U.C.C. § 2-313 requires only that affirmations, descriptions, samples and models become "part of the basis of the bargain" (emphasis added) for an express warranty to arise.


Even before the enactment of the Code, Professor Williston cautioned against conditioning a buyer's warranty recovery on proof of specific acts of reliance:

There is danger of giving greater effect to the requirement of reliance than it is entitled to. Doubtless the burden of proof is on the buyer to establish this as one of the elements of his case. But the warranty need not be the sole inducement to the buyer to purchase the goods; and as a general rule no evi-
A seller seeking to rebut the buyer's presumption must first determine what Comment 3 presumes, that is, what the basis-of-the-bargain test requires. In *Sessa v. Riegle,* a federal district court adopted the Code's presumption but revived the Uniform Sales Act's requirement of actual reliance. Sessa bought a horse upon the recommendation of his friend and agent, Maloney, who had inspected the horse. The only thing lamer than Maloney's advice was Sessa's new horse. Sessa claimed that the seller, Riegle, had expressly warranted a sound horse. The court disagreed, finding that the seller's statements were not affirmations but mere opinions. But, the court continued, "even assuming that [seller's] statements could be express warranties, it is not clear that they were 'part of the basis of the bargain' . . . . This is essentially a reliance requirement . . . ." Echoing Comment 3, the court concluded that Riegle's statements were not part of the basis of the bargain. Apparently, Sessa's reliance upon his agent supplied "clear affirmative proof" that he had not significantly relied upon the seller.

A number of courts and at least two state legislative committees heap doubt upon *Sessa*'s requirement of actual reliance.
Comment 3 to section 2-313 suggests why. It refers to reliance just once, and then to emphasize that "no particular reliance . . . need be shown." In contrast to the Uniform Sales Act, Comment 3 tiptoes around reliance. Thus, "affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods." To overcome this presumption, the seller attempts "to take [his] affirmations, once made, out of the agreement." Had the drafters reached a firm decision on the role of reliance in express warranties, they could easily have said so. Apparently, they decided to let the courts decide.

Comment 7's treatment of post-delivery affirmations adds logical force to the semantic case against actual reliance:

The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification and need not be supported by consideration if it is otherwise reasonable and in order . . . .

One commentator has argued: "If an affirmation or description is made by the seller after the closing of the deal, it could hardly have been relied upon by the buyer in entering into the contract." Basis of the bargain, the commentator concludes, cannot logically require reliance.

The Second Circuit tracked this analysis in Bigelow v. Agway, Inc. Mr. Bigelow, "Vermont's Outstanding Farmer in 1972," bought chemical spray designed to retard mold in baled hay, allowing farmers to bale early without risking spontaneous combustion. After Bigelow purchased the "Hay Savor," the seller's rep-

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88 Comment 7 to § 2-313 cites § 2-209, which is reprinted in note 658 infra.
90 Clearly, the type of reliance normally associated with express warranties—reliance in the inducement—cannot support a post-delivery warranty. Professors White and Summers, however, suggest that the buyer may rely on the seller's post-delivery promises by foregoing his practical option to return the goods soon after the sale. WHITE AND SUMMERS, supra note 2, § 9-4, at 280-81. Nothing in Comment 7 suggests that post-delivery warranties arise only in such a narrow range of cases.
representatives visited his farm. These traveling salesmen examined the unbaled hay and told the farmer that, with one spritz of the Hay Savor, he could safely bale away. Although the hay's moisture content exceeded the level recommended on the product's label for safe baling, Bigelow followed the salemen's instructions and stored the hay in his barn. The baled hay caught fire. Vermont's outstanding (but barnless) farmer sued on an express warranty allegedly created by the seller's post-delivery affirmations. Reversing a directed verdict for the seller and remanding for a new trial, the court concluded:

Although defendants might conceivably contend that since [the salesmen's] representations postdated the delivery of the Hay Savor ..., [they] ... could not be the "basis of the bargain" as required for recovery under [section 2-313], it is undisputed that the [salesmen's] visit on June 15th was to promote the sale of the product. Thus they might constitute an actionable modification of the warranty.92

The Bigelow court understood that sellers build valuable goodwill—"promote the sale of the product"—by providing post-delivery assistance beyond what their contracts require.93 This assistance may take the form of further representations of quality. Section 2-313, as interpreted in Comment 7, permits these representations to become part of their bargain without further consideration. Comment 7 implicitly recognizes that post-delivery representations will create expectations in the buyer, will benefit the seller, and thus may fairly be enforced against the seller.


93 Courts could include post-delivery affirmations in the basis of the bargain by treating them as extensions of the bargain beyond the time of delivery. A "bargain" is not something that occurs at a particular moment in time, and is forever fixed as to its content; instead, it describes the commercial relationship between the parties in regard to this product. The word "bargain" is not en-crust ed with pre-Code concepts which had attached themselves to contract formation—notions that a contract came into existence at some specific point in time, some split second when offer and acceptance coincided, thereafter to be binding unless a new contract complete with the trappings of agreement and consideration superseded the old one. The Code's word is "bargain"—a process which can extend beyond the moment in time that the offeree utters the magic words, "I accept."

In sum, we think that courts should read section 2-313 to abandon the Uniform Sales Act’s requirement of actual reliance on express warranties. Express warranties fundamentally differ from the implied warranty of fitness, which does require actual reliance. The law thrusts the latter upon the parties to protect the buyer’s reliance. In contrast, the seller normally introduces express warranties into the agreement and is more likely to incorporate their cost to him into the price of the goods. Thus, a buyer should receive the quality promised him, even if he purchased in reliance upon the representation of a third party, and even if he would have paid the same amount for the same goods without the seller’s promise. It follows from this that an express warranty results even if the buyer does not learn of the affirmations until his goods go bad and he reads his contract for the first time on the eve of litigation.

The basis-of-the-bargain test, then, is one of reasonable, constructive expectation based on the context of the sale and assuming the buyer’s awareness of the seller’s affirmations. Courts uncomfortable with new-fangled language can still speak in terms of reliance: “If the buyer had heard seller’s affirmations, would he be justified in relying upon them?” In the discussion that follows, this Project uses “reliance” as a shorthand for the formulation suggested here.

2. Samples and Models as the Basis of the Bargain

Samples and models typically pose two questions for lawyers litigating the basis-of-the-bargain issue: (1) does the presumption that affirmations form part of the basis of the bargain apply to samples and models; and (2) to what characteristics of the exhibited sample or model must the goods conform?

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94 See notes 251-74 and accompanying text infra.
95 The analysis here would apply as well where the buyer introduced the quality term in a purchase order and the seller acquiesced by shipping goods.
96 One might argue for a distinction between affirmations in a contract and affirmations—for example, in a brochure or a catalogue—not directed exclusively at or signed by the particular buyer. It may be less appropriate to presume knowledge of the latter than the former. Cf. Interco Inc. v. Randustrial Corp., 533 S.W. 2d 257, 261-62, 19 U.C.C. Rep. 464, 469-70 (Mo. Ct. App. 1976) (no particular reliance necessary, but buyer must at least have read brochure) (dictum). Further, Comment 1 to § 2-313 states that “‘Express’ warranties rest on ‘dickered’ aspects of the individual bargain.” Yet the language of § 2-313 and the Comments seems to favor holding the seller to his promises, whether he makes them to an individual buyer or to buyers in general. Cf., e.g., U.C.C. § 2-313, Comment 4 (“[T]he whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell.”).
ARTICLE TWO WARRANTIES

a. The Basis-of-the-Bargain Presumption. Comment 6 to section 2-313 states:

In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact.

Thus, where the facts undermine the presumption, it may collapse. For example, in a Sixth Circuit case,\(^9^7\) an okra seed seller attempted to escape the force of an affirmation by pointing to an inconsistent express warranty by sample.\(^9^8\) The seller claimed that prior sales to the buyer from the same seed lot constituted samples to which the seed in question conformed. Rejecting this contention, the court stated:

In order for past descriptions or samples to become part of the bargain, both parties must mutually agree to the arrangement and the descriptions or samples must conform to the understanding. . . . [Seller] has pointed to no such mutual understanding; rather, [buyer] testified that it purchased the seed in question from [seller] because of the "good experience" it had in the past with the [warranted variety of] okra seed, not because of past descriptions or samples.\(^9^9\)

That the "samples" alluded to were prior sales defeated the basis-of-the-bargain presumption.\(^1^0^0\) But some courts have ignored Comment 6's presumption even in the absence of such facts. Rejecting a buyer's claim that samples of coal presented during the contract negotiations created an express warranty, one court said: "The exhibition of a sample does not necessarily create


\(^{98}\) U.C.C. § 2-317(b) provides: "A sample from an existing bulk displaces inconsistent general language of description."


\(^{100}\) Although one could read this case to mean that the buyer must prove a mutual understanding, such a reading exceeds the facts of the case. Here the seller attempted to establish the existence of an express warranty based on a prior sample in order to displace an inconsistent, stricter warranty. One might narrowly interpret the case, then, as holding that a seller cannot use goods from prior sales as samples in present sales to avail himself of the presumption Comment 6 creates in the buyer's favor. The case is in keeping with Comment 6's "question of fact" language. Finally, Comment 5 appears more apposite than Comment 6. Comment 5 treats past deliveries as warranties by description under § 2-313(1)(b), not warranties by sample under § 2-313(1)(c): "Past deliveries may set the description of quality, either expressly or impliedly by course of dealing."
an express warranty; the agreement must evidence an intention to
contract by sample."  

Sometimes samples or models enter the basis of the bargain
without dispute. A buyer may withhold his order until he receives
the samples or models, or he may refer explicitly to them in his
order form. These tend to be “easy” cases, because the facts
show that the parties indisputably acted with reference to the
samples.

b. Qualities of the Sample or Model Included in the Basis of the Bargain.
To what extent must the goods conform to the sample or model?
Even the simplest item displays multiple qualities. If all of the
qualities are incorporated into the bargain, the seller must deliver
duplicate goods. If the basis of the bargain includes a few of the
qualities, the goods may differ significantly from the sample or
model without breaching any express warranty.

The surrounding circumstances help determine the degree of
conformity required. Comment 6 to section 2-313 explains:

[I]n mercantile experience the mere exhibition of a “sample”
does not of itself show whether it is merely intended to
“suggest” or to “be” the character of the subject-matter of the
contract. The question is whether the seller has so acted with
reference to the sample as to make him responsible that the
whole shall have at least the values shown by it. The cir-
cumstances aid in answering this question.

Language accompanying the sale may constitute an important
surrounding circumstance. Thus, if the seller said, “This sample is
identical to the goods I am selling,” the court should require

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104 For example, a wholesaler of shoes might point to a brown cement brick as demonstrating the color of goods he is selling to a retailer. The retailer, however, would not expect the shoes to possess the same texture, size, and durability as the brick.
complete conformity. If the seller said, "The sample and the goods match in color only," the court should not require more. 105

Comment 6 suggests that greater conformity should be required for samples than for models. 106 For example, a manufacturer of wiglet cases provided a model which apparently became part of the basis of the bargain. 107 The buyer contended, to no avail, that the thickness of the cases' walls failed to conform to the model's thickness. Citing Comment 6's weakened presumption for models, the court answered that "a variation in thickness, even if it did exist, would not necessarily constitute a breach of the warranty expressed by the sample." 108

One final caveat. However closely the goods must ultimately conform, the standard is the sample or model, not the buyer's particular purpose. A sale by sample does not create an express warranty of fitness that the goods will satisfy the buyer's needs.


a. Introduction. An affirmation, description, sample, or model will not become part of the basis of the bargain, and consequently will not create an express warranty, unless the buyer would be justified in relying upon it. 109 Of course, courts should not delve into the reasonableness of the quality agreements themselves. Allowing such interference would undercut the very purpose of en-

105 If the seller intended this language as a disclaimer to an independent express warranty, § 2-316(1) may render the disclaimer inoperative. For example, where the seller also stated that the goods would conform to the sample in regard to thickness, the disclaimer would not attach. Assuming the sample referred to constitutes the only possible source of express warranty, the language undermines that warranty not by disclaimer but by the removal of the sample from the basis of the bargain. That is, the sample fits within "conduct relevant to the creation of an express warranty" under § 2-316(1), which throws the issue back to § 2-313(1)(c) for the basis-of-the-bargain determination. See notes 589-606 and accompanying text infra.

106 If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong .... U.C.C. § 2-313, Comment 6.


108 Id. at 1027, 18 U.C.C. Rep. at 648.

109 What statements by the seller were part of the basis of the bargain? This should be determined probably on a more objective standard rather than subjective, although good argument can be made for utilizing the subjective base
forcing express warranties—granting parties the freedom to determine the quality of goods they must deliver and accept. Only substantive inequality approaching unconscionability as determined under section 2-302 should trigger an examination of the reasonableness of the warranty agreement. At least in commercial cases, such examinations will be rare indeed.

The question of the reasonableness of a buyer's reliance often masquerades under another inquiry: Are the seller's affirmations unenforceable sales talk? Section 2-313 (2) provides the applicable rule:

[A]n 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.

This section, commonly known as the "puffing" section, expresses the contrapositive of the basis-of-the-bargain test—puffs are statements upon which the buyer cannot reasonably rely. Comment 8 to section 2-313 provides:

Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain.

Some courts pose the puffing question differently. Instead of or in addition to asking whether a seller's affirmation is reasonably part of the basis of the bargain, they ask if the affirmation is a fact or an opinion. Except at the extremes, this approach of a particular buyer. What was he led to believe and what could he justifiably rely upon?


See generally WHITE & SUMMERS, supra note 2, §§ 9-2, 9-3.

requires courts to make distracting theoretical distinctions. It is easy to distinguish between "This horse is sound" and "I believe this horse is sound," but harder to categorize "This corn seed has 'good blight tolerance.'"

Despite superficial differences in approach, courts that attempt to distinguish between affirmations of fact and opinions and that examine reasonableness of reliance weigh the same factors. These factors include specificity, "hedging," the experimental nature of the goods, and the buyer's actual or imputed knowledge of the true condition of the goods.

b. Elements of the Reasonableness Requirement.

i. Specificity. The more specific a quality statement, the more likely it is to become an express warranty. Specific representations that goods are fit for a buyer's particular purpose usually create express warranties of fitness for that purpose. In addition,
courts and parties appear to assume that affirmations expressed with mathematical precision cannot be mere opinions, but that affirmations clothed in generalities usually are. Bickett v. W.R. Grace & Co. illustrates the danger to the buyer of the seller's verbal imprecision. Plaintiffs purchased seed-corn seed from the defendant company, which also furnished plaintiffs with a Dealer's Product Manual. The manual listed such seed characteristics as "very good standability, can stand high population under adequate fertility program, good blight tolerance, [and] high test weight." The plaintiffs relied principally upon the "good blight tolerance" language as the source of an express warranty. The court dissected this language to demonstrate that no express warranty arose. First it focused on the word "good": "The word 'good' is defined in Webster's New World Dictionary of the American Language as 'a general term of approval or commendation, meaning as it should be, or better than average.' The court also relied on the case of Olin Mathieson Chemical Corp. v. Moushon. In Olin, a seller of explosives told the buyer that the explosives were "of good quality, that good results would be obtained and he would be pleased with the breakage and the whole operation." The Olin court affirmed on appeal the trial court's finding that the statements represented "the seller's opinion or sales talk rather than matters of express warranty."


122 Id. at 633.
123 Id. at 634.
125 Id. at 281-82, 235 N.E.2d at 264, 5 U.C.C. Rep. at 363-64.
126 Id. at 282, 235 N.E.2d at 264, 5 U.C.C. Rep. at 364. Of course, the Bickett affirmation that the seed corn had "good blight tolerance" appears to be more specific than Olin's promise of "good results." Thus, although common language appeared in the two cases,
The *Bickett* court also focused on the word "tolerance": "The word 'tolerance' does not mean immunity, or absolute absence of a condition to those engaged as both buyers and sellers in the seed corn trade." The court found support in *Whittington v. Eli Lilly & Co.* In that case, a pamphlet accompanying the sale of birth control pills stated that "[w]hen taken as directed, the tablets offer virtually 100% protection." The *Bickett* court explained: "[Whittington] held that the word 'virtually' is defined in Webster's as 'almost entirely', and that it clearly does not mean 'absolutely'. Neither does 'good blight tolerance' mean that there will never be blight." The *Bickett* court concluded that the Dealer's Product Manual contained mere "expressions of the seller's opinion or commendation," not express warranties.

*Bickett* illustrates that imprecise affirmations may constitute mere puffing rather than express warranties. The unreasonableness of relying on vague affirmations that an engine "will fill the bill" or that a "horse is sound" has prompted courts to question or deny a buyer's right to recovery. In any given case, however, other circumstances may make a buyer's reliance on imprecise affirmations reasonable. A seller should not assume, therefore, that he can safely lure a buyer into a bargain merely by adorning his quality representations in glittering generalities.

ii. *Hedging.* A second factor courts examine in deciding whether a quality term has become part of the basis of the bar-

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127 12 U.C.C. Rep. at 634.
129 Id. at 100, 9 U.C.C. Rep. at 1180.
130 12 U.C.C. Rep. at 641.
131 *Id.* The *Whittington* court did not conclude that the seller's representations were mere opinion; it simply held that the parties created no warranty of absolute protection. 333 F. Supp. at 100, 9 U.C.C. Rep. at 1180-81. Presumably, if a disproportionately large number of women using the pills had become pregnant, the less stringent express warranty would have been breached. *Bickett* differed because in that case no warranty existed.
135 And be these juggling fiends no more believed, That palter with us in a double sense,
gain is the degree to which the seller has equivocated. In Matlack, Inc. v. Hupp Corp., a trailer operator wanted to purchase equipment that would allow it to haul dry cement. In a letter concerning whether the engine of the pneumatic process used to unload the cement could be started while engaged to the blower, the seller stated that its engineers did not want to commit themselves because of their "scant knowledge about the application." However, the letter went on to state: "we do believe that we have the engine that will 'fill the bill' in all categories so far as your application is concerned." Although the court denied the seller's motion for summary judgment, it noted: "Set against the background of the essentially novel character of the pneumatic unloading arrangement, it seems to us that the statement that the engine would 'fill the bill in all categories' makes out a pitifully weak case of express warranty." In all likelihood, the seller's equivocation, as well as the lack of specificity and the experimental nature of the goods, contributed to the court's conclusion.

Sometimes the buyer's hedging may defeat his express warranty claim. The buyer of an experimental valve-setting machine claimed that the seller expressly warranted a "turnkey" device, that is, one which operates fully from the day received. The seller's letter equivocated: "With few reservations the automatic valve setter would be a turnkey operation." The buyer compounded this hedging in its purchase order by requesting that the seller deliver a machine "substantially as per" its attached letter. The buyer's letter closed by stating: "It is probable that some tolerances on this will have to be established but deviations from our basic specification can be determined when the machine is checked out." The court held that no express "turnkey" warranty was created.

The context of the equivocations may also bear upon the reasonableness of reliance. In a case involving the sale of insec-

That keep the word of promise to our ear
And break it to our hope!

137 Id. at 155, 12 U.C.C. Rep. at 424.
138 Id. at 156, 12 U.C.C. Rep. at 424.
139 Id. at 157, 12 U.C.C. Rep. at 426.
141 Id. at 481, 269 N.E.2d at 669, 9 U.C.C. Rep. at 24 (emphasis added).
142 Id. at 482, 269 N.E.2d at 669, 9 U.C.C. Rep. at 24.
143 Id. at 482, 269 N.E.2d at 669, 9 U.C.C. Rep. at 25.
The insecticide bags contained conspicuous labels that read: "Chevron Ortho Bux Ten Granular for control of corn rootworm larvae (insecticide)." In fine print on the reverse side, however, the bags read:

Critical and unforeseeable factors beyond Chevron's control prevent it from eliminating all risks in connection with the use of chemicals. Such risks include, but are not limited to, damage to plants and crops to which the material is applied, lack of complete control, and damage caused by drift to other plants or crops.

The court held that the conspicuous language created an express warranty despite the fine-print hedging.

iii. Experimental Goods. The experimental nature of the goods sold may belie the reasonableness of a buyer's reliance on a seller's representations. In *U.S. Fibres, Inc. v. Proctor & Schwartz, Inc.*, a manufacturer agreed to produce resinated cotton pads through an "unproven process." Although the contracts created an "express warranty against defects in materials or workmanship," they also stated that "in view of the variables present effecting [sic] the capacity of the machine, no guarantee can be extended." The agreements also contained language precisely describing the machine. The court held that because of the machine's experimental nature the descriptions created no express warranty.

The court's holding promotes sound social policy. If affirmations and descriptions of experimental machines generally created express warranties, manufacturers might hesitate to produce and market new products. Of course, when the circumstances of a sale indicate that such representations clearly did form the basis of the bargain, courts should recognize express warranties. Novelty should be only one factor used in determining whether a warranty attaches.

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145 Id. at 41, 18 U.C.C. Rep. at 70-71.
146 Id. at 41-42, 18 U.C.C. Rep. at 71.
147 Id. at 42, 18 U.C.C. Rep. at 72.
149 Id. at 1046, 16 U.C.C. Rep. at 3.
150 Id. at 1045, 16 U.C.C. Rep. at 2.
151 Id. at 1046, 16 U.C.C. Rep. at 3-4.
152 For example, the court in Uganski v. Little Giant Crane & Shovel, Inc., 35 Mich. App. 88, 100, 192 N.W.2d 580, 586, 10 U.C.C. Rep. 57, 65 (1971), upheld a trial court's finding of an express warranty in the sale of a type of crane the seller had never before
iv. Buyer's Knowledge and Expertise. Buyers often acquire first-hand knowledge of the quality of goods by inspecting them. Actual knowledge that a power tool is unsafe or that a truck is not in good mechanical condition precludes reasonable reliance on the seller's affirmations to the contrary. On the other hand, a reasonable inspection that does not reveal the defect should not remove the quality representation from the basis of the bargain. Between these poles of known and unknowable lies a marshy middle ground. A buyer may refuse the seller's invitation to inspect, or he may agree to inspect but carelessly overlook a discoverable defect. A seller's inspection offer may betray sufficient doubt about the goods to preclude buyer's reasonable reliance upon his contemporaneous quality representations. In addi-

produced. The trial court had considered such factors as the good reputation and experience of the seller and the seller's good faith belief that it could adequately modify an existing model to meet the buyer's requirements.


155 Misguided courts requiring actual reliance (see notes 71-96 and accompanying text supra) might take a different tack. One court analyzed the issue as follows: "[S]ignificant reliance by the buyer on his examination of the product before the deal is completed has been held by prevailing case law to indicate that buyer's lack of reliance on seller's affirmations or descriptions precluded the creation of an express warranty." Alan Wood Steel Co. v. Capital Equip. Enters., Inc., 39 Ill. App. 3d 48, 57, 349 N.E.2d 627, 635, 19 U.C.C. Rep. 1310, 1320 (1976). See Simmons v. Williams, 32 Agric. Dec. 1427, 1430, 14 U.C.C. Rep. 355, 357 (1973). Comment 8 to § 2-316, the section on exclusions and modifications of warranties, appears to support these courts:

Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty. (Emphasis added.) Although this language suggests a requirement of actual reliance, courts should bear in mind that it attaches to a section dealing with the exclusion, not the creation, of warranties. Second, read literally, it poses a sufficient and not a necessary condition to the creation of an express warranty. Third, it alludes to actual reliance as if that were enough to establish an express warranty, ignoring the reasonableness required by the basis-of-the-bargain test. Finally, it suggests that the buyer must take the initiative in establishing an express warranty, despite the teaching of Comment 3 to § 2-315 that "no particular reliance . . . need be shown." In sum, courts cannot reasonably rely on this language from Comment 8.

Even if actual reliance were necessary, this approach fails to recognize that reliance on an examination is not clear affirmative proof that the buyer did not rely on the seller's affirmations; a buyer may rely on more than one source of information when purchasing goods. See Werner v. Montana, 378 A.2d 1130, 1137, 22 U.C.C. Rep. 894, 904 (N.H. 1977).
tion to the usual factors involved in the basis-of-the-bargain question, reasonableness in this context will vary inversely with the urgency of the inspection offer—invitation, request, or demand—and its proximity to the quality representation.

A buyer's knowledge of the trade may also affect the determination of reasonableness. For example, the custom in the horse trade is to treat sellers' representations of soundness as mere opinions unless "there is an 'understanding' that an ignorant buyer, is relying totally on a knowledgeable seller not 'to make a mean deal.'" Nevertheless, a buyer's trade knowledge is inherently more tenuous than knowledge acquired through examination. Trade knowledge is thus of less help to sellers; courts have held it insufficient against a strong showing of actual reliance or when other circumstances make deviation from the normal dependence on trade practice reasonable.

III
IMPLI ED WARRANTIES—SECTIONS 2-314 AND 2-315

Experience has been not only the life of the law, but the progenitor of implied warranties. The idea of imposing warranties of quality by law was probably conceived in the experience of the unfortunate who bought the unfit from the unscrupulous. Dean Prosser encapsulates the concept's evolution:

Early in the nineteenth century the slow growth of a business practice by which reputable sellers stood behind their goods, and a changing social viewpoint toward the seller's responsibility, led to the development of "implied" warranties of

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157 See Bigelow v. Agway, Inc., 506 F.2d 551, 554, 15 U.C.C. Rep. 769, 773-74 (2d Cir. 1974) (trade custom not to bale hay until moisture level below 25% did not make reliance on seller's representations that use of chemical product allowed baling at higher moisture level unreasonable as a matter of law).
158 See Young & Cooper, Inc. v. Vestring, 214 Kan. 311, 521 P.2d 281, 14 U.C.C. Rep. 916 (1974). Trade usage normally barred warranties that cows were brucellosis-free absent a blood test. The buyer knew the test had not been performed. Other circumstances, however, lent credence to the buyer's reliance: the state's department of agriculture and the United States Department of Agriculture allowed cows to be brought into the state only if the cows were reasonably certain to be clean. Id. at 326-28, 521 P.2d at 292-94, 14 U.C.C. Rep. at 932-34.
quality, which were attached by the law to certain types of sales, and which in effect made the seller an insurer of his goods.\textsuperscript{160}

An implied warranty "is a curious hybrid, born of the illicit intercourse of tort and contract"\textsuperscript{161}—a contractual term promising quality but imposed by law rather than agreement. While strict liability in tort developed in personal injury and property damage cases as a detour around contract defenses, the implied warranty was codified in the Uniform Sales Act and, later, in sections 2-314 and 2-315 of the Uniform Commercial Code.\textsuperscript{162}

A. The Implied Warranty of Merchantability—Section 2-314(1), (2)

Section 2-314(1) of the Uniform Commercial Code provides in part:

Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

Thus, a court may find an implied warranty of merchantability only where (1) the warranty has not been excluded or modified; (2) a contract for the sale of goods exists; and (3) the seller is a merchant with respect to goods of that kind. This Project discusses the first two conditions elsewhere;\textsuperscript{163} we focus here on the third.

\textsuperscript{160} W. Prosser, Handbook of the Law of Torts § 95, at 636 (4th ed. 1971) (footnotes omitted) [hereinafter cited as Prosser ON Torts].
\textsuperscript{161} Id. at 634.
\textsuperscript{162} One commentator has identified four reasons for imposing warranties in sales: These are: (a) public policy which requires that the party which puts goods into the stream of commerce should bear the risk of harm caused by defective goods, rather than the person injured by it; (b) the fact that one party has induced the reliance of the consumer on his skill and knowledge; (c) the fact that the former is in a better position to control the antecedents which affect the quality of the product; and (d) the fact that he is better able to distribute the loss.

Note, supra note 42, at 140-41. These reasons, based on the relative position of sellers and buyers in the marketplace and in the manufacturing and selling processes, are primarily consumer-oriented. The Code, however, recognizes that they often apply to commercial buyers as well.

\textsuperscript{163} See notes 629-748 and accompanying text infra; notes 1-42 and accompanying text supra.
ARTICLE TWO WARRANTIES

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

Section 2-104(1) defines “merchant” as

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

A merchant is thus someone who possesses special knowledge or skill relating either to the business practices or to the goods involved in the transaction, or to both. Section 2-314(1) limits the class of merchants subject to an implied warranty of merchantability to those who are merchants “with respect to goods of that kind.” Consequently, sellers with knowledge of the practices involved but without special knowledge or skill as to the goods fall outside the coverage of section 2-314(1).

This distinction derives from the rationale underlying the “merchant” requirement of section 2-314(1). The implied warranty of merchantability is a codified version of strict liability, imposed on the merchant seller because of his supposedly superior position in the marketplace in general and relative to the particular goods. The reasons justifying this heavy obligation lose force as we turn from merchants knowledgeable about the goods themselves to merchants familiar only with the trade practices, and dissipate entirely with nonmerchant sellers. Whether the Code holds the seller responsible for the quality of goods depends upon his expertise.

Comment 2 to § 2-104 adds:
The term “merchant” as defined here roots in the “law merchant” concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

The Comment goes on to indicate that, under § 2-314, the warranty of merchantability is implied only ‘if the seller is a merchant with respect to goods of that kind.’ Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods.

See White & Summers, supra note 2, § 9-6, at 286.

See note 162 supra.

The breadth of the "merchant" definition exemplifies the salutary flexibility of Article Two. Code merchants may be found at all market levels and in all occupations. Manufacturers as well as wholesalers and retailers and, occasionally, auctioneers may qualify as merchants under section 2-314(1). A mechanical contracting firm that supplied manufactured goods on order was a merchant; a finance lessor that did not build,

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This "merchant" limitation on the warranty of merchantability is related directly to the fact that section 2-314 imposes a heavy obligation with respect to merchantability. Merchants can satisfy this obligation because they should know what kind of goods pass in the trade without objection. If the goods in question are not of such "fair average" quality, they should realize this fact and protect themselves by an appropriate quality term or by a disclaimer. An inexperienced seller, such as a housewife selling her used sewing machine does not have this knowledge, nor does she know how to protect herself. Furthermore, the buyer should not rely on a casual seller to the same extent he does on a professional dealer with respect to quality. For these reasons, the Code imposes no warranty of merchantability on the non-merchant seller.

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168 See U.C.C. § 1-102, Comment 1.

Of course, a sham organization cannot be a merchant. Thus, a trust company that had no employees, "was formed solely as a tax-saving device," and purchased and leased equipment to the buyer "simply because at the time [the buyer] was low on cash," was not a merchant under § 2-104(1). Brescia v. Great Rd. Realty Trust, 373 A.2d 1310, 1311-12, 21 U.C.C. Rep. 769, 770 (N.H. 1977).
manufacture, or sell any of the carwash systems it leased was not. In short, merchant status depends upon the circumstances of each case viewed in light of the language and policies of sections 2-314(1) and 2-104(1).

Comment 3 to section 2-314 provides an important corollary: "A person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply." The Comment presumes that a person who makes an isolated sale neither deals in nor by his occupation represents that he has special knowledge or skill with respect to the goods sold. Even where a seller possesses such knowledge or skill, however, courts read Comment 3 literally. For instance, one court held that a beer producer was not a merchant of carbon dioxide, which it made for use in its beer production, because its direct sale of excess carbon dioxide was an isolated event. Similarly, the isolated-sale rule helped a sawmill owner escape section 2-314(1) liability in the sale of a saw to another sawmill. But a court could easily find that the brewer dealt in carbon dioxide (albeit indirectly) or held himself out by his occupation as having knowledge or skill peculiar to sellers of carbon dioxide. So also with the sawyer and his saw. Yet courts interpret Comment 3 to require not only that the seller's "merchanthood" be based upon the goods, but also that he deal in them directly. Special knowledge or skill related to the goods and derived from the seller's occupation will not, without more, trigger an implied warranty of merchantability.

We would interpret the Comment to say only that a person who makes an isolated sale is presumed not to deal in goods of that kind. If the buyer demonstrates that the seller has by his occupation held himself out as knowledgeable or skillful in regard to the goods, the buyer has rebutted the presumption. That the sale is isolated should then not preclude the court from finding


that the seller is a merchant for purposes of section 2-314(1). In
light of the policies behind section 2-314(1), a seller's close rela-
tion to the goods justifies finding an implied warranty in an iso-
lated sale.\footnote{See notes 165-67 and accompanying text supra. Refusing to find a warranty in an isolated sale may create the anomalous result of placing greater liability on a retailer who knows nothing about the goods than on a seller with substantial expertise as to the goods and upon whose reputation a buyer could more reasonably rely.}

One limitation on the isolated-sale rule arises when a mer-
chant who sells a variety of products allegedly breaches the im-
plied warranty of merchantability on a particular product he has
never before sold. In such cases, "[t]he limiting concept of being a
merchant 'with respect to goods of that kind' [should] be liberally
construed so as to embrace any products that are sold within the
general category in which the defendant had been dealing."\footnote{178 In \textit{Blockhead, Inc. v. Plastic Forming Co.},\footnote{402 F. Supp. 1017, 18 U.C.C. Rep. 636 (D. Conn. 1975).} a manufacturer who blow-molded plastic equipment was held to be a merchant of wig-
let cases, even though the instant contract was apparently its first
wiglet case contract and probably represented only a small part of
its total business. Wiglet cases easily fall within the general cate-
gory of blow-molded products.\footnote{The \textit{Blockhead} court approached but missed the general-category analysis. The court first noted that the seller "has contended that it was not a merchant of wiglet cases but a blow-molding equipment manufacturer and custom molder. The implication of this contention is that manufacturers who produce a variety of goods would never fall within the broad scope intended for ... 2-314." \textit{Id.} at 1025, 18 U.C.C. Rep. at 654. The court then concluded that because the manufacturer was familiar with the process that produced the}
material supplier sold a particular hammer and bit that it did not ordinarily sell, an implied warranty of merchantability arose because the supplier customarily sold the manufacturer's general line of merchandise.181 Another court applied section 2-314 to an auction sale of restaurant equipment:

Clearly an auctioneer who regularly sells merchandise of a particular kind would come within the coverage of section 2-314. . . . But it seems to me almost equally plain from the standpoint of the language of the section as well as its purpose that it applies also to auctioneers who sell different kinds of goods on an ongoing basis under circumstances that imply the likelihood of repetition with regard to the goods in question.182

defects, it had held itself out "as having knowledge or skill peculiar to the practices . . . involved in the transaction" (id. (emphasis in original)) within the meaning of § 2-104(1).

Two flaws mar this analysis. First, although the court's analysis addresses the manufacturer who produces a variety of goods, it fails to account for the seller who sells such a variety. Because a seller who is not a manufacturer will probably be unfamiliar with production processes, he may not fall within the court's interpretation of "practices" under § 2-104. The Blockhead court thus failed to put forth a unified theory able to encompass both manufacturers and sellers unfamiliar with production processes. Second, the court failed to recognize that § 2-314(1) renders the "practices" component of § 2-104(1)'s merchant definition inapplicable to implied warranties of merchantability. See text accompanying note 164 supra. Mercanti v. Persson, 160 Conn. 468, 280 A.2d 137, 8 U.C.C. Rep. 969 (1971), cited in Blockhead as analogous authority, involved the definition of merchant for purposes of § 2-509, to which the "practices" component does apply. In Valley Iron & Steel Co. v. Thorin, 278 Or. 103, 562 P.2d 1212, 21 U.C.C. Rep. 760 (1977), a manufacturer of cast iron products was held a merchant with respect to hoedad collar castings which the buyer ordered, even though the seller had never made such castings before. Citing Blockhead, the Thorin court based its reasoning on the "practices" component of § 2-104(1).

A better approach would hold that a manufacturer of a class of products, who sells a new product within that class, is a merchant as to that product because of his working knowledge of the class. The plastics manufacturer in Blockhead would be a merchant with respect to blow-molded products in general and thereby be subject to § 2-314 in the sale of wiglet cases. This approach would preserve the merchant categories outlined in Comment 2 to § 2-104, and thus prevent the over- or under-extension of any of the special merchant provisions of Article Two.


Note the analysis in the quoted language. First, auctioneers who regularly sell the kind of goods in question "deal" in those goods within the meaning of § 2-104. Second, the court discusses auctioneers who may not be familiar with the goods in question, but whose established business practices "imply the likelihood of repetition with regard to [those] goods." Such auctioneers have, by their ongoing sales of various kinds of goods, implied that they have "knowledge or skill peculiar to the practices or goods involved." U.C.C. § 2-104(1).

Logically extended, this analysis states: Auctioneers who do not and are not likely to regularly sell the goods are not merchants. Such auctioneers generally serve as mere con-
In sum, the section 2-314 requirement that the seller be a merchant with respect to the particular goods sold ensures that the heavy obligation of merchantability rests only on those capable of bearing it. The isolated-sale rule of Comment 3 helps to weed out those sellers upon whom the obligation should not fall. Courts should not, however, transform that guideline into a tether, lest commercial sellers thereby escape obligations they properly should bear.

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

Once an implied warranty of merchantability arises under section 2-314(1), section 2-314(2) sets the standards of merchantability:

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

These standards of merchantability are not entirely discrete, nor are they exhaustive. Moreover, the conjunctive language

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183 The criteria for the concept of merchantability largely duplicate one another. Most courts have employed the "ordinary purpose" or the "fair, average" tests found in § 2-314(2)(b) and (c). Practically, therefore, it may be said that merchantable goods must be of fair and average quality and fulfill the ordinary purpose for which such goods are used. W. HAWKLAND, SALES AND BULK SALES 86 (3d ed. 1976) (emphasis in original).

184 Subsection (2) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is "must be at least such as . . .," and the intention is to leave open other possible attributes of merchantability. U.C.C. § 2-314, Comment 6.
of section 2-314(2) indicates that the breach of any one of these standards constitutes a breach of warranty.185

Reasonableness, not perfection, lies at the heart of the merchantability standards,186 as the case of the lame racehorse187 demonstrates. A horseracing enthusiast paid a merchant $25,000 for a horse named Tarport Conaway. Tarport might have been better named "Tarpit." The buyer soon discovered tendinitis in the animal's front legs. This affliction soon disappeared, only to be replaced by lameness in the hind legs. After rest and treatment, the undaunted beast won three of the thirteen races it entered, earning a scant $1,306, surely a disappointing return on the $25,000 investment. Even assuming that the alleged defects existed at the time of sale, the court dubbed the steed merchantable:

The standard established does not require that goods be outstanding or superior. It is only necessary that they be of reasonable quality within expected variations and fit for the ordinary purposes for which they are used....

Even with tendinitis and intermittent claudication Tarport Conaway met this standard. The tendinitis was merely temporary and of no long term effect. The intermittent claudication did not prevent him from becoming a creditable if unspectacular race horse. After rest and recuperation, he won three races in thirteen starts in 1975. Certainly he did not live up to Sessa's hopes for a preferred pacer, but such disappointments are an age old story in the horse racing business. Anyone who dares to deal in standardbreds knows that whether you pay $2500.00 or $250,000.00, a given horse may prove to be a second Hambletonian or a humble hayburner. Consequently, since Tarport Conaway was able to hold his own with other standardbreds, he was reasonably fit for the ordinary purposes for which race horses are used, and was merchantable.188

Thus in the speculative field of standardbred racing, one might read section 2-314 to say simply that there is no such thing as a sure bet.

As this case poignantly illustrates, whether goods pass the reasonable fitness test of section 2-314(2) may depend upon how

185 See R. Nordstrom, supra note 64, § 76, at 233.
188 Id. at 769-70, 21 U.C.C. Rep. at 758-59.
they stack up against the competition. If the goods "are of average grade, quality and value of similar goods sold under similar conditions," courts will probably find them merchantable. But if the goods are substandard, courts will find them unmerchantable. For instance, one court declared a printing press with certain defects unmerchantable because "[a]ll of the defects in the press ... are not present in other presses of the same type whether they be machines sold by other companies or the defendant company." Reasonable fitness, in other words, is a relativistic standard defined in large part by the norms of the marketplace rather than by notions of perfection.

From this core concept of reasonable fitness radiate subsection (2)'s particular standards of merchantability.

a. *Pass Without Objection in the Trade.* To be merchantable under section 2-314(2)(a), goods must "pass without objection in the trade under the contract description." Although few cases have interpreted this paragraph, *Ambassador Steel Co. v. Ewald Steel Co.* aptly illustrates the fundamental concept. The court held that, to be merchantable, steel must have a carbon content of 1010 to 1020, for such was the custom and usage of the trade. "[P]laintiff breached the implied warranty of merchantability in selling to defendant steel of a different quality than ordinarily sold in the custom and usage of the steel business, and not fit for the ordinary purposes for which such goods are used." The court reached this conclusion via Comment 2 to section 2-314, which provides in part:

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

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189 This comparison with similar goods is reflected in § 2-314(2)(b). See notes 199-202 and accompanying text infra.
192 For detailed analysis of these standards, see R. Nordstrom, supra note 64, at § 76.
194 Id. at 502, 190 N.W.2d at 279, 9 U.C.C. Rep. at 1023.
Although Comment 2 appears to clarify section 2-314(2)(a), the Ambassador Steel court only briefly mentioned that standard. Instead, the court stressed the more general concepts of custom and usage of trade as the source of the warranty, citing sections 1-205(2) and 1-205(3) for the definitions of trade usage. The specificity of section 2-314(2)(a), however, makes resort to section 1-205 unnecessary. The court should simply have said that steel that does not have a carbon content of 1010 to 1020 can not "pass without objection in the trade under the contract description." Where a trade usage provides standards of quality for goods described in a contract, goods falling short of those standards will ordinarily not satisfy the implied warranty of merchantability.

b. Fair Average Quality (Fungible Goods). Like paragraph (a), paragraph (b) of section 2-314(2) controls few cases. To be merchantable under paragraph (b), fungible goods must be of "fair average quality" within the contract description. According to Comment 7,

[paragaphs (a) and (b) of subsection (2) are to be read together. Both refer ... to the standards of that line of the trade which fits the transaction and the seller's business. "Fair

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195 U.C.C. § 1-205(2) states:
A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

196 U.C.C. § 1-205(3) provides:
A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

197 Although § 1-205 alone should adequately protect the buyer's right to goods that "pass without objection in the trade," § 2-314(2)(a) is not mere surplusage. The value of § 2-314(2)(a) derives from its separateness and its specificity, which focus the attention of aggrieved buyers on the precise quality assurances the statute affords them. For a similar discussion of course of dealing warranties arising under § 2-314(3), see notes 299-314 and accompanying text infra.

198 Of course, for a product to "pass without objection in the trade under the contract description," a "trade" in goods of that kind must exist. Thus where a seller-manufacturer agreed to design and build three valve-testing machines, a court found no breach of an implied warranty of merchantability. "[B]ecause the machines were 'semi-experimental' prototypes ... [t]here was no showing that the machines were not 'such as pass without objection in the trade under the contract description,' UCC § 2-314(2)(a), for there was no trade in goods of the same kind." Axion Corp. v. G.D.C. Leasing Corp., 359 Mass. 474, 484, 269 N.E.2d 664, 670, 9 U.C.C. Rep. 17, 26 (1971).
"Average" is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass "without objection." Of course a fair percentage of the least is permissible but the goods are not "fair average" if they are all of the least or worst quality possible under the description. In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.199

Two cases citing paragraph (b) illustrate the overlap between the merchantability standards. In *Mindell v. Raleigh Rug Co.*,200 the buyer purchased floor tiles which soon yellowed. The court combined the language of sections 2-314(2)(a) and (b) in declaring that tile "which discolors shortly after installation, is not of 'fair average quality that would pass without objection in the trade' as required by [section 2-314] . . . . It must not only be durable but also hold its pattern and color for a reasonable length of time consistent with the degree of quality selected."201 Similarly, the Sixth Circuit affirmed a finding that warped lumber was unmerchantable because seller did not send to [buyer] building studs which were of "fair average quality" within the description or sample agreed upon. The District Court found that the majority of the studs in question were much lower in quality than the "#2 spruce studs" agreed upon. These delivered studs were not "fit for the ordinary purposes" for which such studs were to be used, the construction of buildings which would meet minimum general construction standards.202

At best, then, paragraphs (a) and (b) of section 2-314(2) provide handy synonyms for the basic reasonable fitness test, the former paragraph focusing primarily on trade practices, the latter on comparisons with similarly described goods.

c. *Fit For Ordinary Purposes.* Paragraph (c) of section 2-314(2), which provides that goods must be "fit for the ordinary purposes for which such goods are used," is "[t]he most widely quoted of

199 See also DUSENBERG & KING, supra note 109, at § 7.01[3][c].
201 Id. at 1125.
the synonyms in subsection (2).” 203 As one commentator maintains, fitness for ordinary purposes “is the key thought—the heart—of the merchantability warranty.” 204 To meet this standard, goods must be reasonably safe when put to their ordinary use 205 and reasonably capable of performing their ordinary functions. 206

To prove a breach under paragraph (c), a party must establish first, the ordinary purposes of the goods and second, that the goods are unfit for such purposes. 207 All goods are unfit for some purposes: an automobile is unfit for transoceanic transportation; a C. B. radio, for extraterrestrial communication. Difficulties arise, however, in proving that a given purpose is one of the “or-

203 White & Summers, supra note 2, § 9-7, at 293.

204 R. Nordstrom, supra note 64, at 235. Similarly, Comment 8 to § 2-314 explains that “[f]itness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section.”


207 See W. Hawkland, supra note 183, at 86.
ordinary" purposes for which the goods are used. For instance, a buyer sued because his new valve-testing machines failed to set valves within plus or minus five percent.\textsuperscript{208} He lost because he failed to produce "any evidence which proves the existence of any purpose other than merely setting valves .... Moreover, because the machines were 'semi-experimental' prototypes they had no record of past use on which to base a determination of their ordinary purpose."\textsuperscript{209} On the other hand, a clamp ordinarily used to straighten sheet metal was applied to its ordinary purpose when the buyer used it to straighten an automobile body made of sheet metal.\textsuperscript{210} When goods are used under conditions placing abnormal demands upon them, the goods are probably not being put to their "ordinary purposes."\textsuperscript{211} Also, the ordinary purpose of custom-made goods may depend upon the intended use that the buyer communicates to the seller when he orders them.\textsuperscript{212}

\textsuperscript{209} Id. at 483, 269 N.E.2d at 670, 9 U.C.C. Rep. at 26. See note 198 supra.
\textsuperscript{210} Mattos, Inc. v. Hash, 279 Md. 371, 380-81, 368 A.2d 993, 998, 21 U.C.C. Rep. 473, 480-81 (1977). The court also stressed the seller's representation that the clamps were appropriate for the buyer's intended use, apparently implying that the seller was therefore estopped from denying that the clamps were being put to their ordinary purpose. Such representation, however, would more appropriately support a claim under an express warranty (§ 2-313) or an implied warranty of fitness for a particular purpose (§ 2-315).
\textsuperscript{211} For instance, in Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709, 19 U.C.C. Rep. 106 (1976), plaintiff purchased equipment for a water filter plant. Apparently as a result of excessive water pressure, the equipment failed to filter the water sufficiently to meet governmental regulations. The court concluded that "[t]he evidence ... merely establishes that the distributor heads were not fit for use under excessive water pressure as contained by the Water Corp.'s system, which was not the ordinary purpose for which the goods were sold." Id. at 688, 222 S.E.2d at 712, 19 U.C.C. Rep. at 109. See Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp., 445 F. Supp. 537, 548, 22 U.C.C. Rep. 920, 935 (D. Mass. 1977) (where ordinary purpose of pollution control device was normal air cleaning or oil mist control, failure to control large quantity of plastic particles and odors did not demonstrate unmerchantability).
\textsuperscript{212} See, e.g., Valley Iron & Steel Co. v. Thorin, 278 Or. 103, 108, 562 P.2d 1212, 1216, 21 U.C.C. Rep. 760, 765 (1977): "The ordinary purpose of custom-made castings depends upon their designated use. Without such a tag the uses would vary so much that any function could be isolated as 'ordinary.'" Because the manufacturer "knew that the castings were to join the handle and blade in the tree-planting impact tools which occasionally would strike rock," and "the castings were not fit for this purpose, the warranty was breached." Id.
d. *Run of Even Kind, Quality, and Quantity.* Section 2-314(2)(d) requires that goods "run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved." Thus where a buyer purchases a quantity of goods from a merchant seller, the Code imposes a uniformity requirement. Anxious to avoid the "hobgoblin of little minds,"213 Comment 9 emphasizes that "precautionary language has been added as a reminder of the frequent usages of trade which permit substantial variations both with and without an allowance or an obligation to replace the varying units." Surprisingly, no reported cases raise the issue of uniformity.214

e. *Adequately Contained, Packaged, and Labeled.* Paragraph (e) of Section 2-314(2) requires that goods be "adequately contained, packaged, and labeled as the agreement may require." Adequate packaging generally entails protection of the goods or persons using the goods from harm. For example, a distributor shipped automobile parts that had sharp projections in a box without any covering on the projections or warning about them.215 The court held that the seller breached his implied warranty "that the package was reasonably safe to open and that the receiver of the package could safely introduce his hand into the package and extract the merchandise and that the potentially dangerous parts of the product were covered and protected."216 In a case involving protection of goods, the glass lining of a chemical reactor broke in transit as a result of defective bracing.217 The court held that "the shipper, when it loaded the reactor on the trailer for shipment to the plaintiff, impliedly warranted that the reactor was properly braced for shipment by motor freight,"218 and that the shipper breached this warranty.

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214 For discussions of the uniformity issue, see 1 R. Anderson, *supra* note 89, at § 2-314:79; Duesenberg & King, *supra* note 109, at § 7.01[3][d]; R. Nordstrom, *supra* note 64, at 236.
216 Id. at 231.
218 Id. at 1034, 319 N.Y.S.2d at 463, 9 U.C.C. Rep. at 427. The court concluded that "[t]he bracing installed inside the reactor was just as much a part of the sale of goods as the reactor itself." Id. at 1033, 319 N.Y.S.2d at 462, 9 U.C.C. Rep. at 426. Such an approach centering on whether the defective element was "part of the sale" is unnecessary under a literal reading of § 2-314(2)(e), and could lead a court astray. For instance, Ander-
Inadequately labeled goods may be unmerchantable.\textsuperscript{219} Whether the goods are adequately “labeled as the agreement may require”\textsuperscript{220} hinges on the particular circumstances of the transaction. In one case, a subcontractor ordered bathroom hardware of the brand required by his construction contract.\textsuperscript{221} The goods arrived in large cartons marked with the correct brand name, but the cartons contained individual packages marked with another brand name. Apart from their packages, the goods appeared unidentifiable. The buyer notified the seller of the problem, but rejected the goods before receiving assurance that they were the correct brand. To show that the goods were adequately labeled, the seller introduced evidence demonstrating that the correct labels were on the large shipping cartons, that no labeling requirement appeared in the buyer’s order, and that even without labels the fixtures could be identified by persons in the trade. The buyer tried to show “that brands of bathroom fixtures cannot be identified by characteristics and customarily are put in labeled individual cartons.”\textsuperscript{222} Since reasonable inferences could be drawn from the evidence in support of either party’s contentions, the court refused to overturn the jury’s verdict in favor of the seller.\textsuperscript{223}

\textsuperscript{219}see, e.g., Agricultural Servs. Ass’n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1065, 21 U.C.C. Rep. 443, 452 (6th Cir 1977) (mislabeled okra seed unmerchantable).

\textsuperscript{220} U.C.C. § 2-314(2)(e) (emphasis added).


\textsuperscript{222} Id. at 801.

\textsuperscript{223} Id. at 802.
f. Conform to Representations on Container or Label. To be merchantable under section 2-314(2)(f), goods must "conform to the promises or affirmations of fact made on the container or label if any." Based on express representations, this standard of merchantability apparently coincides with the express warranty of section 2-313. For instance, a farmers' cooperative in Oklahoma sold seed labeled "Sorghum Sudangrass Hybrid" to a farmer who intended to seed cattle pastures. The plant failed to perform as "Sorghum Sudangrass Hybrid" normally does. The court held that since the goods did not conform to the label description, and the description formed the basis of the bargain, the seller had breached both the express warranty and the implied warranty of merchantability.

Despite its overlap with express warranties, section 2-314(2)(f) may possess greater independent significance than some commentators recognize. Suppose a farmer buys an insecticide to spray on his wheat crop. He later notices a label on the package indicating fitness for corn as well as wheat. Pleasantly surprised, the farmer sprays his corn crop, which promptly dies. A court might find that no express warranty arose because the label's representation did not go to the basis of the bargain. Under section 2-314(2)(f), however, the farmer could still show a breach of the implied warranty of merchantability, assuming the conditions of section 2-314(1) are satisfied.

3. Used Goods

The implied warranty of merchantability often applies to the sale of used as well as new goods. Although the Code is silent on the issue, Comment 3 to section 2-314 states that

A contract for the sale of second-hand goods ... involves only such obligation as is appropriate to such goods for that is their contract description.

Because the seller of second-hand goods is often their past user and not a merchant, the implied warranty of merchantability at-

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224 See notes 43-158 and accompanying text supra.
226 See, e.g., DUESENBERG & KING, supra note 109, at § 7.01[3][f].
227 A court reading § 2-313 (express warranty) to require actual reliance by the purchaser might exclude post-delivery affirmations from the basis of the bargain. See notes 88-93 and accompanying text supra.
228 See 1 W. HAWKLAND, supra note 167, at 69-70.
taches less frequently to used than to new goods. Suppose Sam purchases a new car from Ace Motors. After using the car for two years, Sam sells it to Joe. Unless Sam is an automobile merchant, no merchantability warranty attaches to the transaction between him and Joe. Moreover, Joe's ability to recover from Ace Motors depends upon the privity rules of his jurisdiction. Even if privity creates no barrier, Joe could sue Ace Motors only for latent defects that existed when Ace had the automobile.

If the seller of used goods is a merchant within section 2-314(1), the extent of his obligation depends upon the circumstances of the transaction. In holding that no implied warranty of merchantability attached to the sale by auction of used restaurant equipment, one court said:

The specific question here is whether a breach of warranty is made out by evidence that used restaurant equipment bought at an auction did not function upon delivery, in the absence of any competent evidence establishing the character of the defect. The standard formulated in the Official Comment clearly requires careful attention to the realities of the individual transaction.

What we are concerned with here are two pieces of restaurant equipment—a dishwasher and an ice-maker—undoubtedly larger and more complex than similar equipment intended for home use—both of which had undergone the heavy wear and tear normal in the operation of a restaurant. The possibility that individual components might be worn out or otherwise defective, requiring replacement or repair, is surely implicit in such a transaction.

Where such pieces of equipment are purchased for continued commercial use at a significant discount from new equipment of the same kind, more is surely required to estab-

229 See notes 164-82 and accompanying text supra.
230 See notes 953-90 and accompanying text infra.
231 As a remote purchaser, Joe may experience difficulty in proving that the defects arose while the goods were in Ace's control, and not during Sam's intervening possession. Joe's claim could also run aground on the statute of limitations (see notes 1013-29 and accompanying text infra), or disclaimers or limitations of remedy included in the original contract (see notes 629-748, 769-904 and accompanying text infra).
Trax, Inc. v. Tidmore, 331 So.2d 275, 19 U.C.C. Rep. 92 (Ala. 1976), presents a variation on this theme. Tidmore sold his used tractor to Trax and subsequently rented or
lish a breach of the warranty than the bare circumstance that
they did not operate upon delivery.\footnote{233}

The court recognized that any number of things can foul the op-
eration of complex machinery and, in the case of used goods, not
all of these problems amount to a breach of the warranty of mer-
chantability. Moreover, under the approach endorsed by Com-
ment 3, the extent of prior use, the buyer's knowledge that the
goods are used, and whether the goods were significantly dis-
counted help determine what standards of quality will apply to
the transaction.

Only Texas courts have categorically refused to require mer-
chantability of second-hand goods. \textit{Chaq Oil Co. v. Gardner Machin-
ery Corp.}\footnote{234} involved the sale of a used "crawler-tractor." Uncon-
cerned with details, the court of civil appeals followed Texas
common law in holding that "no implied warranty of merchant-
ability is appropriate in the case of goods purchased with the
knowledge that they are used or second-hand."\footnote{235} This case has
been justly criticized.\footnote{236} If the drafters of the Code had intended
to rule out warranties of used goods, they could easily have made
this exclusion explicit in the statute or used stronger language in
the Comment. Only careful analysis of the facts surrounding a
transaction can reveal when an implied warranty of merchant-
ability should attach to used goods.

\section*{B. The Implied Warranty of Fitness for a Particular Purpose—
Section 2-315}

Section 2-315 of the Code provides:

\begin{quote}
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.
\end{quote}

\footnote{bought it back. The court held that no implied warranty of merchantability attached to the
rental/repurchase because "Tidmore had owned the tractor, used it, and knew much more of
its quality and condition than did Trax." The court emphasized that its holding was
limited to the unique factual setting. \textit{Id.} at 277, 19 U.C.C. Rep. at 96.

\footnote{233 Regan Purchases & Sales Corp. v. Primavera, 68 Misc. 2d 858, 860, 328 N.Y.S.2d


\footnote{235 \textit{Id.} at 878, 13 U.C.C. Rep. at 808.

(Colo. App. 1977); Note, \textit{supra} note 232, at 641.}
The rationale for this warranty is clear. A seller's conduct in selecting or furnishing goods for a buyer when the seller has reason to know the buyer's purpose and that the buyer is relying on his skill or judgment amounts to a tacit representation that the goods are suitable for the buyer's purpose.\(^2\) This representation closely resembles an express warranty of fitness for a particular purpose.\(^3\) But given the requisite facts, the act of selling the goods will itself trigger the implied warranty. Section 2-315 holds the seller to his tacit representation and protects the buyer's justifiable reliance. Professors White and Summers identify three elements of the warranty:\(^4\)

1. The seller's "reason to know any particular purpose for which the goods are required";
2. The buyer's reliance in fact; and
3. The seller's reason to know that the buyer is relying on his "skill or judgment to select or furnish suitable goods."

This Project will refer to the first element as "knowledge of purpose" and the last two elements as "reliance."

1. Knowledge of Purpose

A buyer claiming an implied warranty of fitness for a particular purpose must prove that the seller had "reason to know" the buyer's particular purpose.\(^5\) As White and Summers have said:


[When the seller is or should be aware of the particular use or purpose for which the goods are designed and has knowledge, superior to that of the buyer, of their suitability for that purpose, there exists a disparity of bargaining power. This disparity is curtailed by the warranty of fitness for a particular purpose since the seller incurs liability if he overreaches in the bargaining process by misusing his superior knowledge.]

\(^3\) The seller creates the express warranty by his affirmation that the goods are fit for the buyer's purpose.

\(^4\) White & Summers, supra note 2, § 9-9, at 297.

\(^5\) This test modifies its predecessor, Uniform Sales Act § 15(1):

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(Emphasis added.) Note that the Code requires that the seller have constructive, not actual, knowledge of the buyer's purpose. Moreover, under the Code, the buyer need not make his purpose known to the seller; the source of the seller's reason to know is immaterial. See note 242 and accompanying text infra.
The most common circumstance in which one meets the warranty of fitness for a particular purpose is where one businessman buys goods that have to be specially selected or particularly manufactured and assembled for his business. In such cases, the "particular purpose" of the buyer is communicated to the seller in the course of the negotiations and occasionally through the contract itself.  

A buyer can satisfy the knowledge requirement by showing that he communicated his particular purpose to the seller, or that the seller through other means knew the buyer's purpose. Attempts to sell the buyer goods for his particular purpose tend to show the seller's knowledge. Documents, such as sales certificates, may also demonstrate the seller's knowledge of the buyer's purpose. In some instances, the seller's knowledge may be obvious from the circumstances of the sale so that the buyer need not prove that he communicated his purpose. For example, the goods sold might be so specialized that their particular purpose is common knowledge; or the buyer might purchase the goods for

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241 White & Summers, supra note 2, § 9-9, at 297-98.
244 For instance, in Lanpnhier Constr. Co. v. Fowco Constr. Co., 523 S.W.2d 29, 39-41, 17 U.C.C. Rep. 713 (relevant language edited out of U.C.C. Rep.) (Tex. Ct. App. 1975), seller's certificate expressly declared that certain paving material was appropriate for the particular project to which buyer applied it. This certificate supported a subcontractor's contention that the seller knew of the intended use for the material.
use in business dealings with which the seller is familiar; or the parties might have a long-term course of dealing with each other. From a planning perspective, the buyer should always communicate any particular purpose to the seller during the course of negotiations, preferably in writing.

The seller need not actually know the buyer's particular purpose. Section 2-315 requires only "reason to know," and Comment 1 elaborates:

Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. Ignorance is not bliss for the seller who had reason to know the buyer's purpose. Proof that the seller neither knew nor had reason to know the buyer's purpose will, however, defeat the warranty.

Heads indicates not only to a company experienced in the business, but to any layman, that the sprinklers should discharge water in case of a fire and remain safe from such discharge until such emergency. Id. at 254, 13 U.C.C. Rep. at 826. In such a case the implied warranty of merchantability will probably apply as well because the buyer used the goods for their ordinary purpose. See notes 203-12 and accompanying text supra.


\textsuperscript{247} See, e.g., Utah Coop. Ass'n v. Egbert-Haderlie Hog Farms, Inc., 550 P.2d 196, 19 U.C.C. Rep. 1095 (opinion not reprinted) (Utah 1976). The court, finding a fitness warranty in the sale of hog feed to a farmer, said: "In view of the fact that there had been a course of dealing between the [seller] and the [buyer] for a period of approximately two years it must be inferred that the [seller] knew of the purpose to which the feed was being put by the [buyer] ...." Id. at 198.

\textsuperscript{248} (Emphasis added.) As the Comment indicates, this "reason to know" standard applies to both the buyer's reliance and his particular purpose. See note 251 and accompanying text infra.

\textsuperscript{249} See DUESENBERG & KING, supra note 109, § 7.02[1], at 7-23.

\textsuperscript{250} See Fear Ranches, Inc. v. Berry, 470 F.2d 905, 907-08, 12 U.C.C. Rep. 27, 31 (10th Cir. 1972) (sellers of cattle had no reason to know buyer's purpose where buyer "did not tell [sellers] what his plans were for the cattle he purchased from them and they did not inquire nor was there any discussion of the kind of ranching activity [buyer] was engaged in"); Axion Corp. v. G.D.C. Leasing Corp., 359 Mass. 474, 484, 269 N.E.2d 664, 670, 9 U.C.C. Rep. 17, 26 (1971) (no fitness warranty where buyer failed to prove that seller of valve testing machines had reason to know particular purpose at time of contracting); Ambassador Steel Co. v. Ewald Steel Co., 33 Mich. App. 495, 501, 190 N.W.2d 275, 279, 9 U.C.C. Rep. 1019, 1022 (1971) (no fitness warranty where seller of steel not made aware of intended purpose); Tracor, Inc. v. Austin Supply & Drywall Co., 484 S.W.2d 446, 448, 11 U.C.C. Rep. 75, 78 (Tex. Ct. App. 1972) (no fitness warranty where buyer did not inform seller of particular purpose intended for sheetrock).
2. Reliance

Reliance is the other leg of the fitness warranty. For the warranty to arise, the buyer must rely, and the seller must have reason to know of his reliance. In the absence of any explicit agreement by the parties, the law has injected into their contract a protection for the buyer's reliance. If the seller had no reason to know he was being relied upon, his conduct in providing goods cannot fairly be deemed a tacit representation of their suitability for a particular purpose. And if the buyer did not in fact rely, then the principal justification for imposing a fitness warranty disappears.

The seller's reason to know and the buyer's actual reliance are two sides of an evidentiary coin. At trial, the buyer will introduce circumstances of the transaction to convince the court and jury that he actually relied upon the seller; the same circumstances probably gave the seller reason to know of the buyer's reliance. Thus when we speak in the following pages of the buyer's reliance, we implicitly include the seller's reason to know.

Occasionally, direct evidence establishes that the buyer forthrightly told the seller of his reliance upon the seller to select suitable goods. Such evidence easily satisfies the reliance require-

251 See U.C.C. § 2-315, Comment 1; WHITE & SUMMERS, supra note 2, § 9-9, at 298-99. Some courts seem to suggest that the fitness warranty will arise only where the seller has special skill or judgment regarding the goods. See, e.g., Prince v. LeVan, 486 P.2d 959, 965, 9 U.C.C. Rep. 367, 376 (Alas. 1971); Janssen v. Hook, 1 Ill. App. 3d 318, 321, 272 N.E.2d 385, 388, 9 U.C.C. Rep. 846, 849 (1971). The statutory language, however, requires only that the buyer rely on the seller's skill or judgment. Section 2-315 is silent as to seller's actual skill or judgment. A seller without actual skill or judgment as to the goods will less often have reason to know of the buyer's reliance than will the experienced seller, and hence will be subject to the fitness warranty less often. But where the inexperienced seller has reason to know of the buyer's misplaced reliance, the underlying rationales of tacit representation and disparity of bargaining power apply, and the buyer deserves warranty protection. See note 237 and accompanying text supra. See also DUSENBERG & KING, supra note 109, § 7.02[3], at 7-28:

It would even seem immaterial whether or not the seller had any particular skill or judgment to use. The mere fact that he is selling the goods would be an indication to the buyer that he has the requisite skill and judgment and he should not thereafter be able to defend on the ground that he was just an ordinary retailer who did not know the qualities of the goods.

Of course, the seller's lack of special skill or knowledge does affect the comparative expertise of the parties, and may therefore lead to a conclusion that the more experienced buyer did not in fact rely.

252 Compare the Code's treatment of reliance upon the seller's express warranties, notes 71-96 and accompanying text supra.
ment. Often, however, courts simply infer reliance from the circumstances surrounding the transaction. These cases commonly involve buyers who make their general needs known to sellers who then select the particular goods accordingly. Express representations of fitness by the seller or instructions that the buyer follows in using the goods may also establish reliance. In planning, the careful buyer will inform the seller, preferably in writing, of his reliance on the seller's skill or judgment to provide

253 See, e.g., Lewis v. Mobil Oil Corp., 438 F.2d 500, 504, 8 U.C.C. Rep. 625, 632 (8th Cir. 1971) (fitness warranty applied where buyer "made it clear that the oil was purchased for his system, that he didn't know what oil should be used, and that he was relying on [seller] to supply the proper product").


suitable goods. Similarly, a prudent seller will try to elicit from the buyer a statement to the contrary whenever he can do so without jeopardizing the sale.

The most effective way to defeat a buyer's claim that he relied on the seller to select suitable goods is to show that the buyer participated in the selection process. A buyer who examines and selects the goods he will purchase probably does not rely on the seller's skill or judgment. Evidence that the buyer incurred expenses in inspecting the goods bolsters this argument. Moreover, any such examination performed by the buyer's agent indicates that the buyer is relying on his agent's skill or knowledge rather than on the seller's. On the other hand, the buyer's reliance on a third party's recommendation of a seller does not necessarily rule out a fitness warranty. The third party may simply have pointed out a seller upon whom the buyer subsequently relied. Inspection of the manufacturer's literature describing the goods may also defeat an allegation of reliance. Finally, a buyer who selects the process by which the goods are manufactured may be relying on his own, rather than on the seller's, skill or knowledge.


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

See notes 704-726 and accompanying text infra.

257 See, e.g., Donald v. City Nat'l Bank, 295 Ala. 320, 325, 329 So. 2d 92, 96, 18 U.C.C. Rep. 891, 895 (1976) (no reliance where buyer had boat inspected at own expense).


Courts often examine the comparative expertise of the buyer and seller in determining whether the buyer relied on the seller to provide suitable goods.\textsuperscript{262} A finding that the buyer has less experience with or knowledge of the goods than has the seller lends support to a finding of reliance.\textsuperscript{263} At times, the disparity in expertise between the two parties is so great that the buyer is at the seller's mercy and, in essence, \textit{must} rely on the seller's skill or judgment to select the goods.\textsuperscript{264} On the other hand, a buyer pos-

\textsuperscript{262} See White & Summers, \textit{supra} note 2, \S 9-9, at 298.


sessing knowledge and skill superior to that of the seller probably has not relied on the seller, and no fitness warranty attaches to the sale.  

When a buyer purchases goods according to precise specifications, he has not relied on the seller's skill or judgment in selecting the goods. For example, the builder of a water and sewer system in North Pole, Alaska, ordered pipe by precise specifications. Upon exposure to the cold, part of the pipe's interior lining had cracked away from the outer casing, rendering it unfit for use in the water and sewer system. The seller might have faced the dilemma of complying either with the specifications or with the fitness warranty, since the two were incompatible. The court avoided this problem by focusing on the absence of reliance and held that no fitness warranty arose in the transaction.

[Buyers] Lewis and Sims ordered a specific size and type of pipe and ... any deviation from the coal-tar enamel lined pipe that was manufactured would not have been accepted by Lewis.

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The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer.

and Sims. In short, neither Liberty [the seller] nor Northwest [the manufacturer] was asked for its recommendations, nor did either select the pipe or lining to be used. Liberty merely filled a specific purchase order for pipe—a job it held itself out to do. Moreover, Mr. Sims testified that he knew exactly what he was ordering from Liberty and that it would not have been within Liberty's province to substitute another type of pipe. The warranty for fitness for a particular purpose was not meant to be applied in a situation such as we face today. The central tenet—reliance upon the skill, judgment, or experience of the seller—is not manifested. What is apparent is the fact that both parties to this action knew what was desired, and that desire was fulfilled.268

Ordering goods by their brand name usually precludes a finding of reliance.269 Such a purchase indicates that the buyer has selected the brand of goods before communicating with the seller. The "patent or other trade name" exception of the Uniform Sales Act was not adopted by the Code,270 so that designation of goods by trade name "is only one of the facts to be considered on the question of whether the buyer actually relied on the seller."271 Nevertheless, absent strong affirmative evidence of reliance, courts should normally not impose a fitness warranty where a buyer purchases goods by trade name.

Finally, past dealings between the buyer and seller may also bear on the reliance issue. In one case, farmers purchased a herbicide to battle weeds in their corn fields.272 The herbicide weakened the corn, leaving it defenseless against the parasitic disease known as "common smut." In finding a breach of the fitness warranty, the court took into account past reliance by these buyers on this seller, as well as common knowledge that the class to which the buyers belonged generally relied on the class to which the seller belonged.273 Thus, where an individual or class has in

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268 Id. at 624-26, 557 P.2d at 1322-23, 20 U.C.C. Rep. at 1152-53.
270 Section 15(4) of the Uniform Sales Act provided: "In the case of a contract to sell or a sale of a specified article under its patent or other tradename, there is no implied warranty as to its fitness for any particular purpose."
271 U.C.C. § 2-315, Comment 5. See DUESENBERG & KING, supra note 109, at § 7.02(2).
273 The court found that "[p]laintiffs had dealt with the defendants for several years and had relied on their advice in the past." Id. at 199, 491 P.2d at 1349, 10 U.C.C. Rep. at 45.
the past relied on another individual or class in the sale of goods, courts might infer similar reliance in a subsequent transaction between the same parties.\textsuperscript{274}

3. \textit{Overlap with Other Warranties}

The quality warranties of Article Two may overlap. For instance, when an express warranty of fitness for a particular purpose arises, so may the related implied warranty, assuming the buyer demonstrates reliance.\textsuperscript{275} Of course, where the elements of section 2-315 exist in the absence of any affirmations, promises, descriptions, samples or models, the implied warranty of fitness arises although its express counterpart does not.\textsuperscript{276}

Authorities disagree as to whether the implied warranty of merchantability and the implied warranty of fitness overlap. Comment 2 to section 2-315 makes clear that the warranties may coexist.\textsuperscript{277} To borrow the Comment's example, if a seller selects shoes for a buyer to use for climbing mountains, then the buyer may be protected by both a warranty that the shoes are fit for walking on ordinary ground (their ordinary purpose), and a warranty that they are fit for the particular purpose of climbing mountains.

That the warranties coexist, however, does not necessarily mean they overlap. Suppose the shoe purchaser gives the seller reason to know that he is relying on the seller to select shoes suitable for normal terrain. The implied warranty of merchantability normally will protect such a buyer, since merchantable goods must be fit for their ordinary purpose.\textsuperscript{278} Suppose, however, that the

\begin{footnotes}
\footnote{An underlying assumption in all reliance cases is that the buyer and seller are in fact different persons or entities. Thus, where a trust company, formed as a tax-saving device, leased a crane to a corporation, and the sole stockholder of the trust company was also the sole stockholder of the lessee corporation, the court said: "To speak of 'reliance' in these circumstances would be to indulge in an absurdity." Brescia v. Great Rd. Realty Trust, 373 A.2d 1310, 1313, 21 U.C.C. Rep. 769, 772 (N.D. 1977).}
\footnote{See notes 237-38 and accompanying text \textit{supra}.}
\footnote{See notes 44-70 and accompanying text \textit{supra}.}
\footnote{"A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose." U.C.C. § 2-315, Comment 2.}
\footnote{See notes 203-12 and accompanying text \textit{supra}.}
\end{footnotes}
merchantability warranty is unavailable.\footnote{For example, an implied warranty of merchantability cannot arise if the seller is not a merchant with respect to goods of the kind in question. See notes 164-82 and accompanying text \textit{supra}. Comment 4 to § 2-315 suggests that the fitness warranty may occasionally apply to such sales:}

Could the buyer recover for breach of the implied warranty of fitness for a particular purpose, even though his purpose was perfectly ordinary?

The North Carolina Supreme Court says he can.\footnote{Tennessee Carolina Transp., Inc. v. Strick Corp., 283 N.C. 423, 196 S.E.2d 711, 12 U.C.C. Rep. 1055 (1973).} A Tennessee trucking company purchased 150 trailers from a Pennsylvania manufacturer. When used for their ordinary hauling purposes, the trailers broke in two. In the ensuing action, the buyer inexplicably “stipulated that it was not relying on the implied warranty of merchantability . . . . Therefore, the suit was only for breach of the implied warranty of fitness for a particular purpose . . . .”\footnote{\textit{Id.} at 431, 196 S.E.2d at 717, 12 U.C.C. Rep. at 1062.} Rejecting the seller’s contention that the buyer’s particular purpose cannot be the product’s ordinary purpose, the court said:

Although the primary purpose of [section 2-315] is indeed to protect a buyer who purchases goods with the intention of using them in a “particular” manner, meaning a manner in which they would not normally be expected to be used, we do not think that section is limited exclusively to purchases of such a nature. That warranty also protects a buyer when his particular purpose is the general or ordinary purpose.\footnote{\textit{Id.} at 432, 196 S.E.2d at 717, 12 U.C.C. Rep. at 1063 (emphasis in original). For commentary on this case, see 26 \textit{Baylor L. Rev.} 248 (1974); 10 \textit{Wake Forest L. Rev.} 169 (1974). See R. Nordstrom, \textit{supra} note 64, at § 78; L. Vold, \textit{supra} note 237, § 90, at 438-39. \textit{But see} Covington & Medved, \textit{supra} note 237. Cf. 1 R. Anderson, \textit{supra} note 89, at § 2-315:14 (“A particular purpose within the scope of Code § 2-315 is a use to which the goods are not ordinarily put.”).}

No other cases have expressly held that a fitness warranty can arise where the buyer uses the goods for their ordinary purpose. Yet several decisions implicitly condone the merging of the two warranties.\footnote{See, \textit{e.g.}, cases cited in Annot., 17 A.L.R.3d 1010, at § 24[a].} For example, in a case involving a defective book-
keeping machine, the court found that both implied warranties had been breached, although no purpose out of the ordinary seemed implicated.\(^{284}\) A sprinkler head installed in a building for fire protection breached its fitness warranty when the sprinkler discharged water without provocation, damaging the buyer's property.\(^{285}\) Certainly the buyer was using the sprinkler head for its ordinary purpose. Pregnant or "breeding" livestock sold for the purpose of propagation violated the fitness warranty, even though their unfitness apparently related only to their ordinary purpose.\(^{286}\) Finally, a defective manufacturing machine, apparently put to its ordinary purpose, breached the implied warranty of fitness for a particular purpose.\(^{287}\)

Despite these implicit holdings that an ordinary purpose may qualify as a particular purpose under section 2-315, other courts treat the purposes as mutually exclusive. For instance, no fitness warranty attached to the sale of wiglet cases because "[t]he wiglet cases were never intended for any purpose other than the ordinary purpose of carrying hairpieces and accessories."\(^{288}\) Nor did section 2-315 protect the buyer who bought a milk truck to deliver milk but could not "show that such use would differ from the ordinary use of trucks in general."\(^{289}\) Similarly, a court denied relief under a fitness warranty theory to a buyer of defective carpets because his purpose—resale—was not a "particular pur-


pose" under section 2-315.290 Another court found no fitness warranty in allegedly defective recreational vehicles because "[n]o purpose other than that for which an all terrain vehicle is generally used is involved in this case."291

The issue of overlap pierces to the heart of the two warranties. If the essential difference between the warranties rests in the nature of the buyer's purpose, then the purposes must be mutually exclusive. We think, however, that the fundamental distinction between the warranties lies not in the nature of the buyer's purpose but in the origin and object of the buyer's reliance.

Both implied warranties protect and promote the buyer's reliance upon the seller. Under the warranty of merchantability, the seller's status as a merchant entitles the buyer to count on receiving goods of a standard quality.292 Given the seller's merchant status, the Code presumes the buyer's general reliance. Under the warranty of fitness, the circumstances of the transaction entitle the buyer

291 Recreatives, Inc. v. Myers, 67 Wis. 2d 255, 264, 226 N.W.2d 474, 478, 16 U.C.C. Rep. 1258, 1262 (1975). Another court, in dictum, expounded the same conclusion. Although holding that a breach of warranty action in the sale of a tractor was time-barred, the court also stated: "In this case, the tractor was sold and used for ordinary farm work, which includes, without question, heavy-duty plowing. Thus, section 2-315 is not relevant in this case, and the implied warranty of merchantability (§ 2-314), is the only relative [sic] concept here." Wilson v. Massey-Ferguson, Inc., 21 Ill. App. 3d 867, 870, 315 N.E.2d 580, 582, 15 U.C.C. Rep. 654, 657 (1974). For similar cases finding no fitness warranty, see Bogacki v. American Mach. & Foundry Co., 417 F.2d 400, 405-06 (3d Cir. 1969) (bowling alley pin setters used for ordinary purpose); Giant Mfg. Co. v. Yates-American Mach. Co., 111 F.2d 360, 365 (8th Cir. 1940) ("Particular purpose", as used in [Uniform Sales Act § 15(4)] means a usage other, or different (in kind or extent), than the ordinary uses the article was made to meet."); Regula v. Gerber, 34 Ohio Op. 206, 209, 70 N.E.2d 662, 665 (C.P. 1946) (under Uniform Sales Act § 15(1), automobile purchased for "general purpose" of transportation); Ford Motor Co. v. Taylor, 60 Tenn. App. 271, 293-94, 446 S.W.2d 521, 531, 6 U.C.C. Rep. 798, 801-02 (1969) (no fitness warranty where tractor used for general farming purposes). Covington and Medved discuss several reasons for maintaining a clear distinction between the two warranties. First, confused courts might require the buyer to show that the goods are defective before finding a breach of the fitness warranty. In fact, all that the warranty requires is unsuitability for the buyer's purpose. Second, confusion might undermine the distinctness of the disclaimer requirements for the two warranties (see notes 629-37 and accompanying text infra). Third, nonmerchant sellers lacking knowledge of the buyer's purpose might be held responsible for unmerchantable goods via § 2-315. On the other hand, courts might apply § 2-315 only to merchant sellers. See Covington & Medved, supra note 237, at 160-65. Although these are valid reasons for keeping the two warranties distinct, they do not rule out all overlap. A broad definition of "particular purpose" should not undermine the fundamental distinctions between the two warranties.
to count on receiving goods fit for a specific purpose (whether ordinary or not) actually or constructively communicated to the seller. By furnishing goods when he knows or ought to know of the buyer's specific reliance, the seller obligates himself to meet the buyer's needs.

The section dealing with fitness for a particular purpose requires something more than a mere sale by a merchant to be shown to establish an implied warranty. Under this latter section, the emphasis shifts to an actual reliance upon the skill and knowledge of the merchant. Under the former section of merchantability, reliance is not relevant save when positive acts by the buyer demonstrate that he is in fact not relying on the merchant's skill or knowledge but rather upon his own examination of the goods in question.\(^2\)\(^9\)\(^3\)

In essence, the reliance-related factors of section 2-315 serve a function analogous to the merchant requirement of section 2-314.

Admittedly, the Code's drafters created section 2-315 with the nonordinary purpose in mind.\(^2\)\(^9\)\(^4\) That is not to say, however, that they intended to place ordinary purposes beyond the section's reach. Seldom will a buyer who is using goods for their ordinary purpose satisfy the requirements of the fitness warranty yet lack protection under the merchantability warranty.\(^2\)\(^9\)\(^5\) The drafters may not have contemplated these rare cases. The "particular purpose" language of section 2-315 probably does not represent a conscious determination by the drafters to leave a gap in the protection offered by sections 2-314 and 2-315. Courts should use warranty policies to bridge superficial gaps, lest deserving buyers fall in.

The policies underlying the fitness warranty apply regardless of the buyer's purpose for the goods. Aware of the buyer's purpose and reliance, the seller selecting the goods tacitly represents their particular suitability.\(^2\)\(^9\)\(^6\) Such a tacit representation may exist even where the buyer's purpose happens to be ordinary. Moreover, the presence of the fitness elements often suggests a

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\(^{293}\) Lorensen, supra note 292, at 161.

\(^{294}\) Comment 2 to § 2-315 states:
A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.

\(^{295}\) See note 279 supra.

\(^{296}\) See notes 237-38 and accompanying text supra.
disparity of bargaining power.\textsuperscript{297} Section 2-315 seeks to relieve buyers from the oppression such disparity might engender.\textsuperscript{298} The presence of bargaining disparity does not depend upon the nature of the buyer's purpose for the goods. Hence to advance fully the policies underlying the implied warranty of fitness, courts should not require that the aggrieved buyer's purpose be other than ordinary.

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

No contract exists in a vacuum. The drafters of the Code recognized this when they provided in section 1-205(3) that courses of dealing and trade usages "give particular meaning to and supplement or qualify terms of an agreement."\textsuperscript{299} As noted above,\textsuperscript{300} section 1-205(3) overlaps section 2-314(2)(a), which provides that goods must "pass without objection in the trade under the contract description" to be merchantable. Each of these sections appears to overlap yet a third, section 2-314(3), which provides:

Unless excluded or modified (section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Comment 12 to section 2-314 explains:

Subsection (3) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties and thus subject to exclusion or modification under Section 2-316.

Section 2-314(3) thus performs a limited function; it tells parties that they may label some of the terms endorsed by section 1-205(3) "warranties."

What's in a name? By affixing the warranty label to otherwise nameless entities, the Code subjects them to the hazards of section 2-316. The significance of section 2-314(3) thus depends upon the extent to which section 2-316's reach exceeds that of the Code provisions governing avoidance of run-of-the-mill supplemental terms.

Section 2-316 provides three methods of disclaiming supplemental implied warranties—"as is" disclaimers (section

\textsuperscript{297} See note 237 supra.
\textsuperscript{298} See note 237 supra.
\textsuperscript{299} The full text of § 1-205(3) is reprinted in note 196 supra.
\textsuperscript{300} See notes 193-98 and accompanying text supra.
2-316(3)(a), \(^{301}\) buyer's examination (section 2-316(3)(b)), \(^{302}\) and "course of dealing or course of performance or usage of trade" (section 2-316(3)(c)). \(^{303}\) "As is" disclaimers pose no additional threat to supplemental implied warranties. Any language satisfying section 2-316(3)(a)'s requirements necessarily meets the standards of section 1-205(4)'s broader language:

The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

Similarly, disclaimers effective under section 2-316(3)(c) throw no new hurdles into the path of supplemental terms. Section 1-205(3) incorporates supplemental exclusions, as well as warranties, into commercial agreements, and section 2-208 allows exclusions created by course of performance to override supplemental implied terms. \(^{304}\)

Only paragraph (b) of section 2-316(3) introduces a mechanism peculiar to the warranty field. A buyer's examination of or refusal to examine the goods represents an exclusion by conduct as to those "defects which an examination ought in the circumstances to have revealed to him." Section 1-205 parallels this only to the extent that such exclusions can arise from course of dealing and usage of trade. Thus, a facial analysis of these Code sections indicates that the only independent significance of

\(^{301}\) See notes 678-703 and accompanying text infra.

\(^{302}\) See notes 704-26 and accompanying text infra.

\(^{303}\) See notes 727-48 and accompanying text infra. Section 2-316(2) addresses only implied warranties of merchantability and fitness for a particular purpose, and therefore may not apply to supplemental implied warranties.

\(^{304}\) Section 2-208 provides:

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such a course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.
section 2-314(3) rests in the buyer's undoubtedly unwanted power to waive supplemental warranties by examining or refusing to examine the goods under section 2-316(3)(b).

Buyers may fail to cite section 2-314(3) for at least four reasons. First, there may be no relevant course of dealing or usage of trade to create a supplemental warranty. Second, if the buyer can prove the existence and breach of any other warranty, he need not resort to section 2-314(3), although he would be wise to raise it in the alternative. Third, the seller may have effectively disclaimed all implied warranties under section 2-316(3), leaving the buyer no implied warranty protection. Finally, the buyer may confuse this genus of implied warranty with the implied warranty of merchantability because of their shared location in section 2-314. Thus, failing to establish a merchantability obligation, the buyer may cry "uncle," unaware that sections 1-205(3) and 2-314(3) provide additional protection. Or, if the seller has effectively disclaimed only the merchantability and fitness warranties under section 2-316(2), the buyer may not realize that such disclaimers leave section 2-314(3) warranties intact.

Although the few cases that discuss section 2-314(3) shed no light on its relation to section 1-205, they do reveal a peculiarity about the type of obligation imposed. The only two cases that substantially discuss section 2-314(3) indicate that it may create warranties that "are not restricted to what might ordinarily be regarded as warranties but also include obligations related to a seller's performance." A section 2-314(3) warranty may involve a remedy or ancillary service rather than an obligation that directly relates to the quality of the goods. Comment 12 to section 2-314 lends support to this analysis: "A typical instance [of a supplemental warranty] would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog or blooded bull." Thus one court, citing section 2-314(3), found an implied warranty that a seller of semitrailers would repair or replace defective parts.

305 1 R. Anderson, supra note 89, at § 2-314:82.
306 The Comment may not support this "warranty of performance" analysis as fully as it appears to. Because of the special nature of the sale of a pedigreed animal, the pedigree papers may be part of the "goods," and the animal delivered without papers may be "defective." For a fuller treatment of the warranty-remedy distinction, see notes 826-33 and accompanying text infra.
Adams v. J. I. Case Co.\textsuperscript{308} presents a more convoluted analysis involving the sale of a crawler loader tractor. The sale included a written "warranty" that the manufacturer or dealer would repair and replace defective parts. The warranty also contained a provision excluding liability for consequential damages and disclaiming all other warranties. Of course, the tractor was defective. According to the buyer, the seller failed to repair the tractor until fifteen months after the buyer called the defects to the seller's attention. This delay cost the buyer several bulldozing jobs.\textsuperscript{309}

Reversing the trial court's dismissal of the buyer's implied warranty claim, the appellate court held that the seller's alleged dilatoriness may have constituted a repudiation of its express warranty, which included the limitation of liability. The court stated: "The limitations of remedy and of liability are not separable from the obligations of the warranty. Repudiation of the obligations of the warranty destroys its benefits."\textsuperscript{310} Thus, the seller's dilatoriness may have nullified its warranty disclaimer and limitation of liability. Having overcome the disclaimer barrier, the court suggested that "an implied warranty for reasonably prompt and timely repairs upon breach of the express warranty"\textsuperscript{311} may have arisen under section 2-314(3).

In essence, the court indicated that section 2-314(3) may create a remedy in place of the one that failed of its purpose.\textsuperscript{312} Because the blurring of the warranty-remedy distinction creates problems in other contexts,\textsuperscript{313} however, we think courts should limit section 2-314(3) to obligations relating to the goods rather than to the seller's performance.\textsuperscript{314}

Seldom used and seldom useful, section 2-314(3) is a rough-hewn arrow in the buyer's quiver. Buyers should consider it when more conventional warranties fail them. Sellers should disclaim all implied warranties, not just those for merchantability and fitness. And courts must exercise care in distinguishing supplemental

\textsuperscript{309} Id. at 396-97, 261 N.E.2d at 5-6, 7 U.C.C. Rep. at 1279-74.
\textsuperscript{310} Id. at 402, 261 N.E.2d at 7, 7 U.C.C. Rep. at 1276. The court held that the exclusive remedy may have failed of its essential purpose within the meaning of § 2-719(2).
\textsuperscript{311} Id. at 403, 261 N.E.2d at 8, 7 U.C.C. Rep. at 1277.
\textsuperscript{312} "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." U.C.C. § 2-719(2).
\textsuperscript{313} See notes 826-33 and accompanying text infra.
\textsuperscript{314} Because of the overlap with § 2-314(2)(a), a supplemental warranty as defined here may have significance only where a course of dealing creates an obligation stricter than that imposed by the trade, or where the merchantability warranty, but not the supplemental warranty, is effectively disclaimed.
warranties from other terms to properly apply the disclaimer rules.

IV

DAMAGES

There comes a time when Bert Buyer has run the obstacle course of sections 2-313 through 2-315 and leaped or lumbered over hurdles of privity, notice, exclusion and limitation erected by Sam Seller. Finally he faces the Door of Remedies. In haste he pushes ahead, spurning the four lines of script artfully etched in the rough-hewn oak. The ancient door creaks open upon the arched brilliance of a rainbow bridging the Sea of No Recovery.315 A pot of gold glimmers at the distant end. Bert shinnies up the near end but alas, becomes lost in the clouds; he cannot see clearly enough to count the coins in the pot.

Had Bert paused but a moment to ponder the runes on the Door, somewhere over the rainbow he might have found something to sing about. For the runes spell out four principles available to buyers and sellers alike as they follow the Uniform Code:

(1) The court awarding damages for a breach of warranty should endeavor to place the aggrieved party in the position in which performance would have placed him; no more and no less.316

(2) The court should encourage the parties to minimize the damage flowing from a breach of warranty.317

315 The soulless perfectionist would say "the Sea of Diminished Recovery." Buyers establishing breach of warranty liability seldom leave the courtroom empty-handed. The difference between damage awards, like the difference between the North Pole and the South Pole, is one of degree.

316 U.C.C. § 1-106(1) declares:

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

317 Comment 1 to § 1-106 states that "[T]he Act . . . makes it clear that damages must be minimized. Cf. Sections 1-203, 2-706(1), and 2-712(2)." Section 1-203 establishes the requirement of good faith in the performance and enforcement of every contract. This omnipresent duty is made incontrovertible by § 1-102(3). From merchants, § 2-103 requires a special measure of good faith: "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The definition of "merchant" contained in § 2-104(1) and Comments 2 and 3 indicates that this special standard will normally apply to the commercial parties to transactions covered in this Project. It is the essence of commercial reasonableness that waste be avoided and that goods be put to their best use. Thus,
(3) The court, where consistent with public and statutory policies, should respect the intentions of the parties.\textsuperscript{318}

(4) The court should be guided not by semantics but by common sense, commercial practicality and Code policies.\textsuperscript{319}

Where the buyer has accepted and retained nonconforming goods, he may seek damages from the seller under section 2-714.\textsuperscript{320} The injuries the buyer has suffered fall into two

\textsuperscript{318} Section 1-102(2)(b) declares that one of the "[u]nderlying purposes and policies of this Act [is] ... to permit the continued expansion of commercial practices through custom, usage and agreement of the parties" (emphasis added). Moreover, § 1-102(3) permits parties to vary the effect of the Code within certain boundaries. Comment 2 elaborates: "Subsection (3) states affirmatively at the outset that freedom of contract is a principle of the Code . . . ."

\textsuperscript{319} See generally Note, How Appellate Opinions Should Justify Decisions Made Under the U.C.C., 29 STAN. L. REV. 1245 (1977). The author contrasts the "Formal Style" of opinion writing with the "Grand Style" and finds the latter superior. The Formal Style mechanically applies a legal rule while ignoring its rationale, often working injustice in the individual case or contorting the rule to achieve an equitable result. The Grand Style overtly "encompasses the rules, the reasons for the rules and the common sense of the court." Id. at 1249. The author contends that Karl Llewellyn, Chief Reporter for the Code, adopted the Grand Style because it fosters recognition of relevant legal and commercial values and enhances predictability of results. The Code itself mandates this approach in § 1-102:

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

(2) Underlying purposes and policies of this Act are

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

Comment 1 adds:

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

. . . .

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

\textsuperscript{320} Section 2-714 provides:

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

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

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

Comment 1 adds that § 2-714 "deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by."
categories which we shall call "primary" and "resultant." To the extent that the goods are worth less than they were warranted to be, the buyer has suffered primary damages. The magnitude of primary damages in commercial cases varies widely, depending upon the nature of the goods and their nonconformity. Any other damages the buyer might sustain fall into the box marked "resultant." These damages may include property damage, personal injury, lost profits, and collateral expenditures made in reliance upon the seller's warranties but converted to losses by the breach. Section 2-714(3) allows recovery for resultant damages "in a proper case," as determined under section 2-715. Although the standard of proof may vary with the nature of the injury alleged, the buyer bears the burden of proving the existence and extent of damage, whether primary or resultant, caused by the seller's breach.

A. Primary Damages—Section 2-714(2)

Section 2-714(2) provides a formula for measuring primary damages in warranty cases but does not identify the variables to plug in:

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

Although the abstract concept of "value" may fill jurisprudes with sound and fury, to the working lawyer it signifies nothing. The buyer's burden of proving his damages necessarily requires flesh-
ing out the formula. The case law reveals several approaches to the buyer’s task.

1. Cost of Repair

When a reasonable expenditure will bring the goods into conformity with their warranties, the cost of repair may provide an objective measure of the difference in their value as warranted and as received.\(^3\) Courts deciding whether cost of repair is an appropriate measure of primary damages must bear in mind the formula in section 2-714(2). Thus, repair costs exceeding the full value of the goods as warranted could not logically represent the difference in value.\(^2\) This does not mean that the buyer must premise his demand for repair costs upon a showing that


\(^2\) For a discussion of warranted value, see notes 345-53 and accompanying text infra.

the same figure would result from subtracting value as received from value as warranted. Such a requirement would cripple the repair measure as a commercially practical shortcut to section 2-714(2). Courts should presume that cost of repair accurately represents the buyer's primary damages unless the seller presents evidence to the contrary. 328

Once a court decides to measure primary damages by the cost of repair, it must have available a means of measuring that cost. As an abstract concept, cost of repair represents a reliable estimate 329 by the "reasonable mechanic." But reality complicates life.

Suppose, for example, that the frustrated buyer chooses to desert his sinking ship. He would prefer to junk the goods, grab his damages, and run. Because section 2-714 provides monetary relief and not specific performance, the court may award estimated repair costs although the buyer never actually repairs the goods. On the other hand, if the buyer is more tenacious and repairs have been made by the time of suit, the ultimate roost of the repair bill will depend upon the circumstances of the repairs and contractual allocations of risk. 330

When the buyer has paid to have the goods repaired, he may recover the cost of repairs as primary damages if that amount fairly represents the difference in value of the goods. 331 Similarly, where repairs are appropriate and buyer has made them himself, he should recover his out-of-pocket expenses and the reasonable value of his labor. The commercial buyer should also


329 Two consumer cases deal specifically with estimates of repair costs. In Jones v. Abriani, 350 N.E.2d 635, 19 U.C.C. Rep. 1102 (Ind. Ct. App. 1976), the court used the buyer's lump-sum estimate for repairs of numerous defects in a mobile home:

While the testimony as to the actual cost of repairs may not be as precise as defendants would like, the difficulty . . . is due . . . to the nature of the damages. There is no question but that substantial defects are present . . . as opposed to purely speculative elements of damage . . . usually frown[ed] upon. Id. at 646, 19 U.C.C. Rep. at 1117. Accord, Sellinger v. Freeway Mobile Home Sales, Inc., 110 Ariz. 573, 521 P.2d 1119, 14 U.C.C. Rep. 958 (1974) (where buyer's witness estimated cost of repair at $2,000, and seller offered no contrary figure, award of $690 inadequate).

330 Where the contract excludes recovery for consequential damages, for example, buyer could not recover "consequential" repair expenses. See generally notes 333-44 and accompanying text infra.

331 The same considerations apply to actual as to estimated repair costs (see notes 325-28 and accompanying text supra). Nevertheless, courts may show more deference toward repair as a fait accompli than as an incorporeal estimate.
receive a reasonable sum to cover fixed costs allocable to the time spent on repairs, and opportunity costs in the form of profit that he would have made by devoting to his business the time he spent repairing.\(^{332}\) If repair costs exceed the difference in value, the buyer is not necessarily barred from recovering the excess. The buyer who can show that he effected the repairs in an attempt to minimize the overall injury caused by the seller’s breach may be entitled to recover the excess cost as a resultant damage under sections 2-714(3) and 2-715.\(^{333}\) In any case, he should recover no more than the reasonable cost of the work actually performed.\(^{334}\)

Efforts to repair the goods may fail or achieve only partial success. The cost to the buyer of attempts that utterly fail does not represent the difference in value of the goods, but might be

\(^{332}\) "Profit," in this sense, is compensation for repairs. In Robert T. Donaldson, Inc. v. Aggregate Surfacing Corp. of America, 47 A.D.2d 852, 366 N.Y.S.2d 194, 17 U.C.C. Rep. 375 (2d Dept), appeal dismissed, 37 N.Y.2d 793, 337 N.E.2d 612, 375 N.Y.S.2d 106 (1975), buyer was entitled to expenses plus reasonable profit for repair work made necessary by seller’s breach of warranty. “If another contractor had been hired to perform the repair work it would have been entitled to a profit.” \textit{Id.} at 853, 366 N.Y.S.2d at 196, 17 U.C.C. Rep. at 377. The opinion does not reveal whether buyer repaired the goods in question or other property injured by the defective goods, that is, whether repair costs were primary or consequential damages. The principle applies equally to both classes of damages, however, because in either case the buyer is diverted from other profit-making activities. Of course, buyer should not benefit from seller’s breach. In Willred Co. v. Westmoreland Metal Mfg. Co., 200 F. Supp. 59, 1 U.C.C. Rep. 181 (E.D. Pa. 1961), the court denied profits to a buyer who hired extra labor to repair defective furniture.

This is not a case ... in which employees and equipment that “could have been otherwise utilized on profitable jobs” were diverted to repair work ... [But for the breach] the extra labor ... simply would not have been employed ... and, though the [buyer] is entitled to be made whole ... he is not entitled to make a profit out of the breach.

\textit{Id.} at 66 (language edited out of U.C.C. Rep.) (citations omitted).

\(^{333}\) Expenses incurred in mitigation of damages should be treated as resultant damages. See notes 414-75 and accompanying text infra. Suppose a buyer orders goods worth $400. The goods prove worthless, and substitute goods are not readily available. The buyer can reasonably expect to lose $10,000 in profits if he does not repair the goods. He therefore repairs them, but the repairs cost $1,000 and he unavoidably loses $5,000 in profits. The buyer should be able to recover $400 (the difference between the value of the goods as warranted and as delivered) as primary damages under \S\ 2-714, and $5,600 (the excess cost of repair plus lost profits) as consequential damages under \S\ 2-715(2)(a).

\(^{334}\) In Cagney v. Cohn, 13 U.C.C. Rep. 998 (D.C. Super. Ct. 1973), the court required that buyer prove the reasonableness of the cost of repairing his motorcycle. Moreover, the court warned that buyer’s “failure to do so may result in a judgment in favor of [seller].” \textit{Id.} at 1007. This dictum is puzzling in light of the court’s assertion that it was “[c]onvinced that the cost of repairs is substantial.” \textit{Id.} at 1002, n.1. To the extent that the court threatened forfeiture, we disagree. If buyer’s claim is excessive it should be reduced, not extinguished. \textit{But cf.} Foremost Mobile Homes Mfg. Corp. v. Steele, 506 S.W.2d 646, 649, 14 U.C.C. Rep. 657, 661 (Tex. Ct. App. 1974) (buyer’s failure to show reasonableness of repair cost extinguishes claim) (alternative holding).
recoverable as a resultant damage. In some cases, it may be appropriate to treat the cost of the seller's fruitless efforts as a resultant damage to be allocated according to the contract and the Code. Costs of attempts that contribute to the ultimate success of later repairs should be considered primary damages to the extent of their contribution. Similarly, where the quality of the goods has improved but still falls short of the warranty, repair costs are primary to the extent of the improvement, and resultant

335 The costs of unsuccessful repairs are consequential damages under our analysis at notes 417-66 and accompanying text infra, and therefore must meet the tests of § 2-715(2). Basically, this means that seller must have been able to foresee at the time of contracting that buyer would attempt repairs if the goods proved defective. Furthermore, buyer's conduct in connection with the attempt must be reasonable. For example, buyer's attempt to repair his delivery truck to avoid losing profits might be reasonable. His attempt to tinker with a complex piece of accounting equipment not immediately essential to his operations, on the other hand, would probably be both unreasonable and unforeseeable.

The distinction between primary and resultant damages acquires importance if the contract excludes consequential damages. The categorization suggested here may be criticized for discouraging buyer's attempts at self-help. But a court awarding as primary damages the cost of unsuccessful or unreasonably expensive repairs would frustrate the parties' intent. The consequential damages exclusion was clearly meant to bar buyer from recovering profits lost while the goods were inoperative. The buyer should not be permitted to shift this risk back to the seller by gambling on repairs that, if successful, would prevent lost profits, and then recovering the cost of the repairs when they fail. Although the gamble may be a reasonable attempt to minimize overall losses, it should be financed by the buyer in accordance with the contractual allocation of risks. But see Curtis v. Murphy Elevator Co., 407 F. Supp. 940, 948, 19 U.C.C. Rep. 145, 156-57 (E.D. Tenn. 1976) (buyer recovers cost of unsuccessful repair attempt despite clause excluding consequential damages).

336 Seller's attorney should remain alert to his client's failed repair attempts where the contract excludes consequential damages. Seller might claim reimbursement for his good faith attempts wherever a third-party repairman would be so entitled. On the other hand, as a party protecting his own goodwill in an existing relationship, seller may not be entitled to all the rights of a disinterested repairman hired through arms-length dealing.

Seller's attorney might too easily ignore pretrial attempts at repair made or paid for by his client. In Louis DeGidio Oil & Gas Burner Sales & Serv., Inc. v. Ace Eng'r Co., 302 Minn. 19, 225 N.W.2d 217, 15 U.C.C. Rep. 801 (1974), the seller of defective institutional furnaces had deducted $8,637 from the purchase price to account for pretrial maintenance done by buyer. Noting that "this adjustment was not treated by the parties as an element in the case" at trial (id. at 30, 225 N.W.2d at 224, 15 U.C.C. Rep. at 811), the court ignored it on appeal and sustained a jury award of the full purchase price plus resultant damages (id). The jury could accept expert testimony that the eleven furnaces were valueless, even though ten were still in use at the time of trial, because "[seller] offered no evidence whatever of [their] value ...." Id. at 28, 225 N.W.2d at 223, 15 U.C.C. Rep. at 809. If the furnaces in fact remained worthless after the pretrial maintenance, then seller's expenditures became consequential losses. More probably, by offering his $8,637 maintenance expense as evidence of value added after delivery, seller might have reduced his primary damage liability by explaining the mysterious utility of the "valueless" furnaces.
thereafter. The balance of the buyer's primary damages is the difference in value that remains after the repair attempts.\(^{337}\) Just as repairs may fall short of bringing the goods into full conformity, they may also overshoot that mark. For instance, if a defect present at the time of acceptance surfaces later, repair may involve replacing parts or all of the defective goods with new, conforming goods. If seller bears the full expense of these repairs, buyer receives as a windfall the use-value of the original goods while they lasted.\(^{338}\) A Texas case, *General Supply & Equipment Co. v. Phillips*,\(^{339}\) illustrates the problem. The buyer purchased for his commercial greenhouses a number of plastic panels warranted to remain clear for five years. The panels darkened after two years. The court held that the buyer should recover "the reasonable cost of replacing the defective paneling with [paneling of] equal quality as that represented by [the seller], less the salvage value, if any, of the defective paneling."\(^{340}\) Because replacement panels of the warranted quality would last five years, the buyer under this holding would receive a total of seven years' use of paneling for the price of five. The court, by requiring an award of full replacement, treated the original paneling as valueless despite its two years of utility. Ironically, the buyer's windfall increases as the original goods last longer.

It would be more reasonable to allocate the cost of the improvement in value to the buyer.\(^{341}\) Thus, another Texas case\(^{342}\) reversed a jury award of the estimated repair cost of a used truck

\(^{337}\) "The buyer is not limited to repair costs when repair does not completely restore the goods to the value which they would have had if built in conformity with the contract; remaining diminution in value may also be recovered." Soo Line R.R. v. Fruehauf Corp., 547 F.2d 1365, 1377-78, 20 U.C.C. Rep. 1181, 1193 (8th Cir. 1977). Cf. Northern Petrochem. Co. v. Thorsen & Thorshov, Inc., 297 Minn. 118, 124-25, 211 N.W.2d 159, 165 (1973) (in non-Code case, court awards cost of repairing defectively constructed building plus remaining diminution in value).

\(^{338}\) Of course, many factors may operate to reduce buyer's windfall, including the interruption of his business and the costs of recovering damages from seller. However, buyer may recover the former as a resultant damage under § 2-715, and is generally denied the latter by operation of law.


\(^{340}\) *Id.* at 920, 12 U.C.C. Rep. at 44. The court referred to this part of the award as "incidental damages." *Id.* However, the costs of repair or replacement of defective goods more appropriately represent primary damages under § 2-714(2). See notes 325-28 and accompanying text supra.

\(^{341}\) The court should place the buyer in as good a position as if the seller had fully performed, but no better. See note 316 and accompanying text supra.

scale, where repairs included new parts and cost more than the purchase price of the used scales. The court reasoned that the buyer "purchased an old used scale . . . and his recovery is for the cost of a new scale. . . . [T]here is a difference in value between a used and a new item of mechanical equipment."

Bravo. An aggrieved buyer should not be surcharged for unsolicited "improvements" that are of no practical value to him, but the commercial buyer should pay for improvements, such as greater efficiency or longer life, that do benefit him in the ordinary course of his business.

2. Independent Indicia of Value

Where repair of the goods is impossible or otherwise inappropriate to measure his primary damages, the buyer must independently establish "the value of the goods accepted and the value they would have had if they had been as warranted."

a. Value as Warranted. Although section 2-714(2) designates no indicia of "value as warranted," two principal contenders—purchase price and fair market value at the time of acceptance—dominate the field. Where ascertainable, fair market

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343 Id. at 878, 12 U.C.C. Rep. at 257.
value provides the more appropriate standard. This measure leaves the parties with the bargain they originally struck. To illustrate: Buyer agrees on Friday to pay $1,000 for a shipment of hot-selling, punk-rock bumper stickers to be delivered on Monday. By Monday, punk-rock music is passé and the fair market value of the warranted stickers has fallen to $50. Furthermore, because the stickers adhere poorly to automobile bumpers, their fair market value drops to $49. Upon discovering this defect, buyer stops weeping and sues seller for breach of warranty. If the court equates purchase price with value as warranted, buyer’s recovery, $951, will include the $950 he lost by gambling on the perseverance of punk-rock. In contrast, a court using market value at the time of acceptance would award buyer $1, thereby giving him the equivalent of performance.

Similarly, the buyer making a good bargain should retain the fruits of his acumen. If our hypothetical buyer were blessed by a punk-rock explosion, with the market value of the bumper stickers soaring to $2,000 by Monday, the buyer should recover primary damages of $1,951. Thus, where the market defines value as warranted, the buyer’s primary damages may exceed the purchase price of the goods.

A buyer in a falling market might contend that section 2-714(2) contemplates a subjective measurement of warranted value to the particular buyer, best represented by the price he


One court has described fair market value as
"the highest price . . . for which a product would have sold on the open market, the seller having a reasonable time within which to sell and being willing to sell but not forced to do so; the buyer being ready, willing and able to buy, but not forced to do so, and a full opportunity to inspect the property . . . ."
Soo Line R.R. v. Fruehauf Corp., 547 F.2d 1365, 1379, 20 U.C.C. Rep. 1181, 1195 (8th Cir. 1977) (quoting with approval trial court charge to jury). The problem of proving the relevant market value is beyond the scope of this Project. For a general discussion, see 1 W. HAWKLAND, supra note 167, at 250-52, and WHITE & SUMMERS, supra note 2, § 6-4, at 190.

"It is to be noted that [§ 2-714(2)] uses the term 'value', rather than contract or purchase price. . . . [The buyer] is entitled to the benefit of his bargain . . . ." Ricklefs v. Clemens, 216 Kan. 128, 134, 581 P.2d 94, 100, 16 U.C.C. Rep. 322, 329 (1975).

agreed to pay for the goods. After all, section 2-714 refers only to "value," not to "fair market value." By contrast, other Code damage sections expressly mandate the use of "market price" in computing damages.\footnote{U.C.C. §§ 2-708, 2-713.} If "market price" were the intended measure of value in section 2-714(2), the drafters would have included a similar express provision, or so the argument goes.

Two observations undermine this position. First, the purchase price often does not equal the subjective value the buyer places on the goods. Where a ready market exists for the goods, the purchase price is determined by the going market price at the time of contract formation, not by the particular buyer's independent valuation. Thus purchase price might simply represent an outdated market price. Because section 2-714(2) focuses on value at the time the goods are accepted,\footnote{"Special circumstances," such as the buyer's ignorance of the defect at the time of acceptance, may alter the time-frame for determining market value. See notes 390-400 and accompanying text infra.} the current market price is the more appropriate measure.

Second, the Code's drafters may have used "value" instead of "market price" to allow flexibility where the fair market value of warranted goods cannot readily be determined. The contract price may then present the best evidence of warranted value. Incidentally, it is in these cases—where there is no general market for the goods—that the contract price is most likely a product of the buyer's subjective valuation.\footnote{See, e.g., Puritan Mfg., Inc. v. I. Klayman & Co., 379 F. Supp. 1306, 1314, 15 U.C.C. Rep. 1055, 1064 (E.D. Pa. 1974) ("there is no question ... that both parties felt the value of the [goods] was the purchase price").}

Most courts applying one of the indicia do not mention the other, presumably because the parties' attorneys have not contested the choice.\footnote{This may be the rule with many standardized consumer-goods sales, as in the new-automobile cases cited in note 345 supra. In contrast, the sale price of a used car is more likely to differ from its market value as warranted. Similarly, the volatility of commercial markets will vary with the nature of the goods involved.} In many cases the purchase price will be the same as the market price, or so similar as to render uneconomical the effort necessary to establish the latter.\footnote{See, e.g., Puritan Mfg., Inc. v. I. Klayman & Co., 379 F. Supp. 1306, 1314, 15 U.C.C. Rep. 1055, 1064 (E.D. Pa. 1974) ("there is no question ... that both parties felt the value of the [goods] was the purchase price").} Nevertheless, to as-
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sure his client the benefit of his bargain, the attorney must watch for those situations where the indicia significantly diverge.

b. Value as Accepted. When proving warranted value, the buyer normally has at least one easily established evidentiary fact—the contract price. No such constant star illuminates the actual value of defective goods. Nevertheless, most commercial buyers can draw on one of two objective measures of value as accepted—resale price and fair market value.

Courts have recognized, as evidence of actual value, the price obtained when the buyer or seller resells defective goods. Three criteria should determine the propriety of using the resale measure. First, the goods must be resold in a reasonable market. Standardized goods freely traded in a commercial market will usually meet this test. Resale of custom-made goods in a noncompetitive market or in other than arms-length transactions does not provide a reliable measure of their value. Second, the resale must be timely. The degree of promptness required will depend on the nature of the goods; the goods themselves may be perishable or the market for them may fluctuate dramatically. Thus, a buyer waiting over one month to resell defectively marked eggs could not use the price received as their value at the time of acceptance.

Courts require less haste in reselling nonperishable goods in a stable market. In one case, the price brought by defective automatic carwash equipment, resold several months after delivery, provided evidence of its value as accepted. Courts require less haste in reselling nonperishable goods in a stable market. In one case, the price brought by defective automatic carwash equipment, resold several months after delivery, provided evidence of its value as accepted.

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price obtained on resale will accurately reflect the goods' actual value only if the resale purchaser knew of the defects.\textsuperscript{358}

Although courts often use fair market value to measure value as accepted,\textsuperscript{359} the appropriate market price is likely to be even more elusive for defective goods than for conforming goods. Nevertheless, it may be ascertainable. In \textit{Soo Line Railroad Co. v. Fruehauf Corp.},\textsuperscript{360} the Eighth Circuit affirmed an award based in part on expert testimony of the market value of a number of railroad hopper cars with structural defects.\textsuperscript{361} The buyer had also

\begin{itemize}
\item Even buyer's resale of the goods at a profit might not preclude primary damages, if the resale purchaser was unenlightened. In \textit{Louis DeGidio Oil & Gas Burner Sales & Serv., Inc. v. Ace Eng'r Co.}, 302 Minn. 19, 225 N.W.2d 217, 15 U.C.C. Rep. 801 (1974), a contractor purchased furnaces and installed them in various institutions. When the furnaces subsequently exhibited various defects, the contractor recovered his full purchase price from the original seller, although he had at that time replaced a defective burner for only one of the contracting institutions. The decision may be criticized as awarding the contractor-buyer damages he had not sustained, especially when, as the court indicated in dictum, the original seller may incur double liability if sued by the institutional consumers. \textit{Id.} at 26-27, 225 N.W.2d at 222, 15 U.C.C. Rep. at 808.
\item Although either party could have made the institutional consumers parties to the action and resolved all questions of liability, neither did so. Nevertheless, the court could have avoided the double-liability problem by limiting the contractor's award to expenses he had already incurred and ordering the seller to agree to indemnify the contractor in any subsequent warranty actions brought by the contracting institutions. \textit{See, e.g.}, \textit{Lycos v. Gray Mobile Home Sales, Inc.}, 76 Mich. App. 165, 256 N.W.2d 63, 22 U.C.C. Rep. 404 (1977) (affirming court-ordered indemnity agreement between seller of defective mobile home and buyer facing potential actions by finance company or FHA for balance of purchase price).
\item 547 F.2d 1365, 20 U.C.C. Rep. 1181 (8th Cir. 1977).
\end{itemize}
introduced evidence of the cost of past and prospective repairs on the goods.\textsuperscript{362}

3. "Special Circumstances"

Laymen lament that law complicates life. Every lawyer knows the opposite. Marshalling the facts of a large commercial lawsuit and fitting them into section 2-714(2) is like counting the legs on a dancing centipede.\textsuperscript{363} The drafters of the Code attempted to assure that a buyer receiving clearly defective goods would not be frustrated by difficulties of proof or rigid application of a well-intended formula. Thus, they explain that section 2-714(2) "describes the usual, standard and reasonable method of ascertaining damages in the case of breach of warranty but it is not intended as an exclusive measure."\textsuperscript{364} Nevertheless, courts are not free to dispense with that method at will. The difference-in-value standard controls buyer's primary damages "unless special circumstances show proximate damages of a different amount."\textsuperscript{365} Neither Code nor Comment defines "special circumstances." But nature abhors a vacuum, and courts have discovered a number of uses for so attractive an escape clause.

a. Courts most often cite the clause to introduce resultant damages, that is, the incidental and consequential damages allowed under section 2-715.\textsuperscript{366} These courts err. In view of section 2-714(3)’s express provision for resultant damages "[i]n a

\textsuperscript{362} 547 F.2d at 1378, 20 U.C.C. Rep. at 1194.
\textsuperscript{363} You know there are a hundred, but try to prove it.
\textsuperscript{364} U.C.C. § 2-714, Comment 3.
\textsuperscript{365} U.C.C. § 2-714(2). South Dakota's Supreme Court recently observed:
The duality of standards between [§ 2-714(1) & (2)] is taken from precode law [Uniform Sales Act] § 69(6), (7)] and presumably courts will continue to interpret the more specific rule ... as governing where applicable. Thus defects relating to the goods, their quality or their title (rather than to the manner of their delivery) will invoke the "formula" of [§ 2-714(2)] ....

This construction of "special circumstances" renders one clause or the other superfluous. This error may generate wrong results in two ways. First, courts reading "special circumstances" as a threshold to resultant damages have applied common-law rules that differ from the requirements of section 2-715. Second, courts reading "special circumstances" as an escape from section 2-714(2) into section 2-715 have confused matters by treating primary damages and resultant damages as mutually exclusive.

Nevertheless, the reference to "proximate damages" immediately following "special circumstances" lends some support to these courts' reading of the clause, since proximate-ness is a concept ordinarily associated with resultant damages. To hang statutory construction on so slim a semantic thread, however, is to abandon the common-sense approach to the Code. See note 319 and accompanying text supra.

"[N]either consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law." U.C.C. § 1-106(1). One might argue that "other rule of law" refers to states' common law, whether or not consistent with the Code. However, the drafters clearly meant to exclude something. Section 2-715 is positive law; conflicting pre-Code case law must yield to the statutory criteria governing resultant damages.

Under the guise of "special circumstances," the "tacit agreement" test for consequential damages survived in Pennsylvania long after its banishment from the Code.

"Special circumstances" entitling the buyer to [resultant damages] exist where the buyer has communicated to the seller at the time of entering into the contract sufficient facts to make it apparent that the damages subsequently claimed were within the reasonable contemplation of the parties. Keystone Diesel Engine Co. v. Irwin, 411 Pa. 222, 225, 191 A.2d 376, 378, 1 U.C.C. Rep. 184, 186 (1963). The Pennsylvania Supreme Court recently overruled Keystone, retired the "tacit agreement" test, and returned "special circumstances" to its proper place. See R.I. Lampus Co. v. Neville Cement Prods. Corp., 474 Pa. 199, 206, 378 A.2d 288, 291-92, 22 U.C.C. Rep. 1172, 1177-79 (1977) ("Section 2-714(2) is concerned with value of the goods damages and not with incidental . . . or consequential damages") (emphasis in original). See generally notes 491-97 and accompanying text infra.

Section 2-714(3) makes clear that § 2-715 resultant damages supplement but do not supplant § 2-714(2) primary damages: "In a proper case any incidental and consequential damages under the next section may also be recovered." (Emphasis added.) Nevertheless at least two courts, misreading § 2-714(2), appear to have overlooked § 2-714(3). In Lanphier Constr. Co. v. Fowco Constr. Co., 528 S.W.2d 29, 17 U.C.C. Rep. 718 (Tex. Ct. App. 1975), a subcontractor had purchased defective asphalt and used it in a school project. The subcontractor received his reasonable expenditure in replacing the asphalt but the court mislabeled the items of damage:

Since the asphalt was defective, it had no value. . . . [§ 2-714(2)] is not applicable because of special circumstances showing proximate damages of a different amount. The proximate damages, in this case consist of incidental and consequential damages as provided by [§ 2-715].

Id. at 42, 17 U.C.C. Rep. at 720 (citations omitted). Presumably, replacement costs included the price of new asphalt and the cost of putting it down. The first element should be considered primary under § 2-714(2) and the second, consequential (see notes 467-75 and accompanying text infra). Suppose the sale contract had excluded consequential damages. The court's characterization would then bar all recovery, or force the court to mislabel
b. Courts faced with complex fact patterns have found support in "special circumstances" for awards that appear fair but ill-fitted to the framework of sections 2-714(2) and 2-715. In such cases, "special circumstances" furnishes entry into the comfortably broad language of section 2-714(1), providing recovery for "the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." Although apparently permissible under the Code, this maneuver is probably unnecessary and potentially dangerous.


Comment 2 to § 2-714 indicates that § 2-714(1) applies to "any failure of the seller to perform according to his obligations under the contract," including "breaches of warranties." Accord, 1 W. Hawkland, supra note 167, at 263. See American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 454 n.34, 19 U.C.C. Rep. 1009, 1025 n.34 (S.D.N.Y. 1976) ("Read together, subsections (1) and (2) of § 2-714, provide that plaintiff may recover for its direct damages in any manner which is reasonable.").

We foresee no situations in which the difference-in-value formula of § 2-714(2), thoughtfully applied together with § 2-715, would inadequately compensate a breach of warranty plaintiff. Not all courts agree:

The difference [in value standard] ... is not the exclusive measure of damages in breach of warranty cases. The rule is more generous where special circumstances are present. In essence, the loss directly and naturally resulting is the measure of damages. ... The damages awarded should essentially place the plaintiff in the same position as it would have been in if the defendant had fully performed its agreement.

Acme Pump Co. v. National Cash Register Co., 32 Conn. Supp. 69, __, 337 A.2d 672, 677, 16 U.C.C. Rep. 1242, 1248 (1974) (citations omitted). Sections 2-714(2) and 2-715 are not less "generous" than § 2-714(1), but simply more precise. Consequently, they provide a truer, albeit narrower, path to the goal of full performance.

Courts in complex cases need not "pigeonhole" every item of damages, but fitting elements of damage into Code categories may simplify conceptualization. The difference-in-value formula of § 2-714(2) defines primary damages that are clearly distinguishable from the resultant (incidental and consequential) damages of § 2-715. In American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 19 U.C.C. Rep. 1009 (S.D.N.Y. 1976), buyer had purchased a turbine generator under a contract that effectively excluded consequential damages (id. at 459, 19 U.C.C. Rep. at 1032), and incorporated it into his production process before its defects surfaced. Having shunned § 2-714(2) in favor of § 2-714(1), the court struggled to distinguish consequential from primary damages: "[T]he
Courts turning to "special circumstances" as an escape from rigorous analysis of damage awards should recognize that even the right result, wrongly explained, makes poor precedent.

c. "Special circumstances" might serve as more than a mere passageway from section 2-714(2) to sections 2-715 and 2-714(1). Courts could use the clause to modify the difference-in-value formula from within. Professors White and Summers suggest that "special circumstances" exist when the value of the defective goods to the particular buyer differs from their value to a general class of buyers. Instead of the objective market value, "[s]ection 1-106 . . . suggests that the court should use a subjective measure, at least in those cases in which an objective measure would overcompensate the buyer." 375

When the particular buyer values the defective goods more highly than does the market, the court should employ a subjective standard of value as received. The resulting decrease in the buyer's primary damages is appropriate; he simply has not suffered injury in the amount that the goods' value to him exceeds their fair market value. This approach makes commercial sense because it emphasizes practical performance over technical conformity. If the commercial victim of an economically harmless breach of warranty loses confidence in his supplier he may take

precise demarcation between direct and consequential damages is a question of fact, and the commercial context in which a contract is made is of substantial importance in determining whether particular items of damages will fall into one category or the other." 418 F. Supp. at 459, 19 U.C.C. Rep. at 1033. The court further elucidated: "[E]xpenditures which are not incurred as a consequence of the breach, but were instead incurred before the breach occurred and in reliance on the contractual warranties, are recoverable as direct damages." Id. at 460 n.44, 19 U.C.C. Rep. at 1033-34 n.44. To the extent that the court permits primary (the court calls them "direct") damages to exceed the warranted value of the goods, it abandons the Code scheme expressed in § 2-714(2). Section 2-715(2) does not confine consequential damages to post-breach expenditures, but addresses all losses (including prior expenditures converted to losses) resulting from the breach. By allowing the boundaries of the damage categories to vary with the facts of each case, the court weakens the consequential damage exclusion as a certain allocation of risk and impedes the predictability of contract planning.

Further, despite its apparent breadth, § 2-714(1) may be read to exclude some consequential damages that § 2-715 would allow. In Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp., 62 A.D.2d 982, 984, 403 N.Y.S.2d 322, 325, 24 U.C.C. Rep. 84, 88 (2d Dept '78), the court affirmed a denial of damages for harm to buyer's reputation because, applying § 2-714(1), such injury was beyond "the ordinary course of events." Section 2-715(2) would allow any foreseeable damages whether or not they were "ordinary."

374 WHITE & SUMMERS, supra note 2, § 10-2, at 310.

375 Id.
his business elsewhere.\textsuperscript{376} For these adjustments, the marketplace offers a better arena than the courtroom.\textsuperscript{377}

An Illinois case\textsuperscript{378} poses the issue. A contractor purchased and poured ready-mix concrete with a compressive strength warranted at 3,000 pounds per square inch. Although the concrete's actual strength was only 2,400 pounds per square inch, tests showed it to be satisfactory for the contractor's purposes. The court did not discuss the value of the defective concrete,\textsuperscript{379} but the analysis above suggests that the contractor should not recover the difference in market value of the concrete.\textsuperscript{380}

\textsuperscript{376} The key adjectives in this sentence are "commercial" and "economically." The frustration and disappointment of the mail-order buyer receiving a red patio set instead of the white one he ordered is, for two reasons, primarily a consumer problem. First, aesthetic or noneconomic qualities are usually more important to consumers than to commercial buyers. Although § 2-714(2) makes no explicit distinction between classes of buyers, the words "value" and "special circumstances" invite such distinctions. The essence of "value" in the archetypical commercial setting is usefulness in production; to the consumer, "value" means personal satisfaction. Even in consumer cases, however, "value" will probably not be wholly personalized; courts may refuse to account for idiosyncracies of the buyer which are neither specially communicated to the seller nor widely shared by other consumers. Second, the individual consumer is likely to have less market power and, consequently, greater need for legal protection than a commercial buyer.

\textsuperscript{377} We reach this conclusion by applying Code principles of damages. However, common-law principles may supplement Code principles (see U.C.C. § 1-103) and thereby modify the result. For example, a seller who induces a buyer to purchase higher quality goods than buyer needs, all the while intending to provide inferior goods, may be guilty of fraud. The buyer may then be entitled to rescind the contract and return the goods or keep them and pay the seller their actual market value. This latter option may create a windfall for the buyer to the extent that his subjective value of the goods exceeds their market value. The conniving seller, however, is hardly in a position to complain.

Even absent fraud, the seller may make a greater profit by delivering inferior goods than by delivering the warranted goods. This would most likely be true if the goods were not merely defective examples of the model ordered, but different models costing seller less to produce. Here, the difference in the seller's costs might constitute unjust enrichment recoverable by the buyer in quasi-contract.


\textsuperscript{379} The court affirmed a judgment for the seller in the amount representing the value of the concrete the buyer accepted, set off by a judgment for the buyer for the cost of testing the concrete and purchasing additional concrete from another seller after the original seller stopped deliveries. \textit{Id.} at 357-58, 350 N.E.2d at 325, 19 U.C.C. Rep. at 1130.

\textsuperscript{380} The commercial buyer who orders higher quality goods than his business circumstances require and receives goods of lower yet sufficient quality might object to the use of a subjective standard. In the cement case described above an imaginary Bert Buyer and Sam Seller might argue as follows:

\textit{Sam:} Why sue me? The 2,400 PSI I gave you works perfectly as well as the 3,000 PSI you ordered.

\textit{Bert:} I ordered 3,000 PSI and not 2,400 PSI because I wanted a 600 PSI margin of safety in compressive strength. That security was important to me, I paid for it, and you deprived me of it.
The buyer's subjective valuation of defective goods may be difficult to measure. Where this standard would decrease the buyer's primary damages under section 2-714(2), requiring the buyer to prove subjective value would be unfair.\textsuperscript{381} Although the warranty plaintiff must prove his damages, courts should recognize a presumption in favor of the objective standard. A buyer showing primary damages by reference to the market value of defective goods is entitled to recover that amount unless the seller offers substantial evidence indicating a higher subjective value.\textsuperscript{382}

When the market values the defective goods more highly than does the aggrieved buyer, the subjective standard will not always be appropriate.\textsuperscript{383} Suppose a warehouseman pays the market price, $20,000, for a forklift guaranteed capable of lifting 4,500 pounds. In fact, the forklift will lift only 3,500 pounds and is thus unable to budge the two-ton spools of cable which constitute the bulk of buyer's stock. Such a forklift is worth $4,000 to the buyer for spare parts, but would bring $15,000 on the open market.

\textbf{Sam:} You can't get damages for lost security because you can't measure its value.  
\textbf{Bert:} Nonsense. That margin of compressive strength was worth just what I paid for it—the difference in price between 2,400 PSI and 3,000 PSI concrete.  
\textbf{Sam:} That's clever, Bert, but it won't wash. First, if I give you the difference in price it would be as if you had ordered 2,400 PSI to begin with. You can't ignore our contract just because I breached my warranty. The Code gives damages, not reformation. Second, the difference in price results from the needs of the whole class of buyers, not from the value you attach to security.  
\textbf{Bert:} Well, I've lost something in this deal.  
\textbf{Sam:} Granted, but your feeling of security is not compensable under the Code scheme. True, we can properly read "value" to allow a subjective measurement of value to the particular buyer. But look at § 2-608(1), allowing the buyer to revoke a commercial unit whose nonconformity "substantially impairs its value to him . . . ." (Sam's emphasis). For commercial buyers like you, courts extend this particularization only to business circumstances, not to personal preferences. Read Hays Merchandise, Inc. v. Dewey, for example, right there in 78 Wash. 2d 343, 347-48, 474 P.2d 270, 272-73, and 8 U.C.C. Rep. 31, 34-35 (1970). Your risk-aversion is a personal trait, not a business necessity. Your loss of security might be compensable if you were a consumer. [Here Sam cites Zabriskie Chevrolet v. Smith, 99 N.J. Super. 441, 458, 240 A.2d 195, 205, 5 U.C.C. Rep. 30, 42 (1968), where a consumer buyer's lack of faith in a new car offered by seller in an attempt to cure under § 2-508 supported buyer's rejection, but he forgets about Eckstein v. Cummins, 46 Ohio App. 2d 192, 347 N.E.2d 549, 19 U.C.C. Rep. 1140 (1975), where the buyer's preoccupation with and unsuccessful attempts to remedy defects in a new car were not "special circumstances" entitling him to damages exceeding the difference in objective value.]

\textsuperscript{382} Professor Peters would not only allow the buyer to rest on a showing of objective market value as received, but would also deny seller the right to show a higher subjective value. See id. Professor Peters goes a step farther than we would.  
\textsuperscript{383} But see WHITE & SUMMERS, supra note 2, § 10-2, at 310-11 (§ 1-106 "would seem to argue for the use of a subjective standard in cases in which that standard would increase the buyer's damages").
market. Under a subjective standard, buyer recovers $16,000 (purchase price minus spare parts value), and may then resell the lift for $15,000, realizing a windfall of $11,000 on seller's breach of warranty. 384 Under an objective standard, buyer recovers only $5,000 (purchase price minus market value); he must then resell in order to break even. 385 The latter standard encourages the buyer to put the goods to their best use, and does not allow him to profit from the seller's breach. 386

But what if resale is uneconomical 387 or impossible? 388 Where the objective market standard reduces his recovery, buyer is made whole only if he is able to resell in the open market and recover his costs of reselling from seller. These costs must be less than the increased valuation of the goods by resale for overall

384 It is not clear whether White and Summers would account in their "subjective" standard for the price which the buyer could obtain on reselling the goods. See id.

385 Of course, courts using the objective standard should also allow buyers to recover their reasonable expenses in resale. Under the subjective standard, such expenses diminish the buyer's windfall.

386 Consider Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208, 15 U.C.C. Rep. 45 (6th Cir. 1974). Buyer learned the hard way that his $20,000 boat was not seaworthy in rough seas beyond Lake Erie's 12 mile limit as guaranteed. Seller repaired the damaged boat but could not render it fit for heavy seas. The court awarded buyer $10,000 against the likelihood of future damages in heavy seas. Assuming the boat was fit for use in light seas and could be resold for such use at a price greater than $10,000, an objective standard of actual value would properly have given buyer the difference between the purchase price (or market price as warranted) and the resale price. By putting the goods to their best use, the total damages flowing from the breach are minimized.

A related problem arises when the buyer, by the time he sues seller, has resold the defective goods and realized more than their subjective value to him. If the third party knew of the defects before the resale, the resale price (less reasonable costs of resale) supplies the best measure of value as received. But in one such case a court held that the resale price of a concrete pump to an informed third party was not conclusive of value as received. See ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 462, 229 S.E.2d 814, 822, 20 U.C.C. Rep. 1067, 1075 (1976). Apparently, the subjective value of the pump to the buyer was less than its resale price, for it was seller who urged the court to use the latter. See id. To the extent that the buyer recovered primary damages in excess of his actual monetary loss, employing a subjective value as received granted him a windfall.

A different result should follow if the third party was ignorant of the defects at the time of resale. The third party may have a cause of action against the buyer. In Louis DeGidio Oil & Burner Sales & Serv., Inc. v. Ace Eng'r Co., 302 Minn. 26-27, 225 N.W.2d 217, 222-23, 15 U.C.C. Rep. 801, 808 (1974), discussed in note 358 supra, the court, effectively, treated buyer's dormant liability to resale purchasers as a consequential damage.

387 The expenses of reselling may exceed the added value accruing to the goods by resale (i.e., the resale expense exceeds the difference between the resale price and the subjective use-value to the buyer).

388 Buyer may have incorporated the goods into his production process to the point where they cannot economically be withdrawn and resold. This "impossibility" is an extension of the cost of resale mentioned in notes 373 and 387 supra.
primary loss to be minimized. Absent these conditions, the court should apply a subjective standard of value to the particular buyer.

The subjective-objective dichotomy, although theoretically accurate, may be unnecessarily confusing. A simpler approach would speak only of value to the particular buyer, while recognizing that the buyer should obtain the maximum value possible from the goods, whether this requires using them or reselling them. The buyer may recover primary damages from the seller only to the extent that the maximum realizable value of the goods falls short of their warranted value.

d. There is another way courts could use "special circumstances" to modify the difference-in-value formula from within. We suggest that the drafters intended "special circumstances" to allow a shifting of the time-frame for assessing primary damages. Section 2-714(2) requires courts to compute the difference between the goods' warranted and actual value "at the time and place of acceptance." Comment 3 adds:

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389 Seller might argue that any increased liability resulting from buyer's particular needs must pass the foreseeability test of Hadley v. Baxendale, 156 Eng. Rep. 145 (Exch. 1854). But the Code incorporates the Hadley test only in reference to consequential damages under § 2-715(2). See notes 491-97 and accompanying text infra. Furthermore § 1-106(1), reprinted in note 316 supra, makes clear the Code policy of giving the buyer the full value of the goods he purchased, even where he is unable to recover resultant damages.

390 This construction of "special circumstances" does not bar courts from using a subjective standard for value as received in the manner described in notes 374-89 and accompanying text supra. "Value" invites a subjective construction without the aid of the "special circumstances" clause. See Peters, supra note 381, at 260. But see White & Summers, supra note 2, § 10-2, at 311 (expansive definition of "special circumstances" avoids need for "bending the word 'value'").

Pre-Code law supports this temporal reading of "special circumstances." In Perkins v. Minford, 235 N.Y. 301, 139 N.E. 276 (1923), a seller had delivered less sugar than his contract called for. Buyer, unable to discover the deficiency until the bill of lading reached him and the price of sugar had soared, sued under § 67(3) of the Uniform Sales Act, which provided:

Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Said the New York Court of Appeals: "'Special circumstances' are present, showing 'proximate damages of a greater amount' than those provided for by the general rule. The time as to when the damages are measured is shifted. It is now the date when the buyer knew or should have known of the default." 235 N.Y. at 305, 139 N.E. at 277. See White & Summers, supra note 2, § 6-4, at 183 (discussing Perkins, U.S.A. § 67, and U.C.C. § 2-713).
ARTICLE TWO WARRANTIES

If, however, the non-conformity is such as would justify revocation of acceptance, the time and place of acceptance under this section is determined as of the buyer's decision not to revoke.\textsuperscript{391}

Courts have expressly found such "special circumstances" only in section 2-312 warranty of title cases.\textsuperscript{392} Beyond these largely consumer-oriented cases, the primary damages awarded a commercial buyer may turn on the time-frame in which they are viewed. This can occur in two ways.

First: value as accepted. Suppose a farmer purchases a flock of sheep guaranteed to be healthy. Upon delivery, most of the flock is pure as virgin wool, but one sheep carries a bacterial infection not discovered during the farmer's reasonable inspection. The farmer accepts the flock under a contract which effectively excludes consequential damages. When the infected sheep suddenly drops dead two months later, medical tests reveal that the entire flock has become contaminated and must be destroyed. Because of the consequential damages exclusion, the farmer must try to recover the value of the flock as primary damages. A court might find "special circumstances" demanding that the actual value of the flock be measured at the time the farmer could have revoked, (i.e., when the breach of warranty surfaced), rather than at the time of acceptance.

Of course, the seller might argue that Comment 3 is inapposite because the buyer could not have revoked. In order to justify revocation, a nonconformity must substantially impair the value of the goods to the buyer within the meaning of section 2-608(1). Since only one sheep was infected at the time of the acceptance, the seller could contend that the value of the entire flock was not substantially impaired. Courts have not treated this issue under

\textsuperscript{391} The quoted passage is a veritable debutant; we have not found it cited in any case or commentary.

\textsuperscript{392} See, e.g., Ricklefs v. Clemens, 216 Kan. 128, 531 P.2d 94, 16 U.C.C. 322 (1975); Itoh v. Kini Sales, Ltd., 74 Misc. 2d 402, 345 N.Y.S.2d 416, 13 U.C.C. 64 (Civ. Ct. 1973); Schneidt v. Absey Motors, Inc., 248 N.W.2d 792, 21 U.C.C. Rep. 536 (N.D. 1976). In these cases, seller has breached a duty to deliver good title to the merchandise sold. Buyer's primary damages are measured from the time he lost the use of the goods. The goods' actual value to the buyer is zero and their warranted value is determined as of the time buyer's possession was disturbed. This method compensates buyer for improvements he has made upon the goods and, by discounting for depreciation, roughly accounts for the use-value he has derived from the goods. But in Trial v. McCoy, 553 S.W.2d 199, 22 U.C.C. Rep. 48 (Tex. Ct. App. 1977), buyer recovered the purchase price of an antique pistol confiscated by police. This was a proper recovery if the pistol's market value had not changed since the sale. It is unlikely that the antique depreciated, and it would be hard to affix a value to the buyer's passive enjoyment during his term of possession.
Comment 3, nor have they inquired into the buyer’s right to revoke, nor have they hesitated to award the full loss mushrooming from minor but latent defects.\(^{393}\)

These courts apparently recognize that goods with undiscoverable flaws are no more valuable at acceptance than they will be when the flaws surface. The flock is a commercial unit only as healthy as its sickest contagious sheep. It would be unfair to deny full primary damages for smoldering defects merely because the buyer had no right to revoke.\(^{394}\)

**Second: value as warranted.** As noted earlier,\(^{395}\) courts should preserve the parties’ bargain by employing an objective standard to measure the value of the goods as warranted. In using the fair market value at the time of acceptance, that discussion assumed that the buyer learned of the defects when he accepted the goods or, in the case of latent defects, that their market value as warranted had not changed since the time of acceptance. However, where the warranted fair market value of latently defective goods fluctuates between the time of acceptance and the time of discovery, the latter is the relevant time-frame.

Suppose a sweater manufacturer purchases pre-dyed wool in January at the current market price of $50 per hundred-yard. By February, when he receives, inspects, and accepts the wool, its market value has risen to $100 per hundred-yard. In early March, rampant bacterial infection decimates western sheep flocks. Thus, by the time the manufacturer processes the wool, its market value has soared to $150. Unfortunately, the dye in the wool is not colorfast, as warranted; it fades badly when processed, reducing to

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\(^{393}\) See Downs v. Shouse, 18 Ariz. App. 225, 501 P.2d 401, 11 U.C.C. Rep. 481 (1972) (primary damages for extensive injury to airplane when loose bolt caused oil leak); W & W Livestock Ents. v. Dennler, 179 N.W.2d 484, 8 U.C.C. Rep. 169 (Iowa 1970) (primary damages on entire slew of pigs exposed to latent diseases). In Holm v. Hansen, 248 N.W.2d 503, 20 U.C.C. Rep. 870 (Iowa 1976), a farmer received 51 head of cattle, one or more of which carried latent brucellosis and spread the disease throughout the herd. The court found the buyer entitled to recover primary damages on the entire herd:

> We also find the [trial] court erred in limiting plaintiff’s damages for loss of the purchased herd to the difference between its value as warranted and its actual value at the time of purchase. We think this is a proper case for application of the exception in [§ 2-714(2)], which is to be used when special circumstances show proximate damages of a different amount.

*Id.* at 510, 20 U.C.C. Rep. at 883.

\(^{394}\) Cf. § 2-607(2) (acceptance, even where irrevocable, “does not of itself impair any other remedy provided by [Article Two]”).

\(^{395}\) See notes 345-48 and accompanying text *supra*. 
$15 the fair market value of the wool. The buyer must decide whether to revoke under section 2-608 or keep the wool and seek damages under sections 2-714 and 2-715. If he revokes, sections 2-711 and 2-713 allow him to recover his purchase price ($50) plus the benefit of his bargain ($100) (the warranted value at the time of discovery ($150) minus the purchase price ($50)). If he keeps the wool, his primary damages depend upon the time-frame the court selects. At the time of acceptance, his difference-in-value damages were only $85 ($100 market value as warranted minus $15 market value as received). At the time he discovers the breach and decides not to revoke, his primary damages total $135 ($150 minus $15). Thus, the revoking buyer recovers $150; the retaining buyer recovers $150 ($135 damages plus $15 wool) if the court applies the Comment 3 version of "special circumstances," and $100 ($85 damages plus $15 wool) if it does not.

If the court limits primary damages to the time of acceptance, the rational buyer will protect the benefit of his bargain by revoking. The goods must then be passed from the buyer (who might have put them to use) back to the seller (who must now find another buyer). Such transfers increase the overall cost of the breach and will normally be borne by the seller as incidental damages under section 2-715(1). On the other hand, if the court adopts the approach suggested here, the buyer can opt to keep the goods and recover damages computed by reference to the same market in which he might obtain substitute or supplementary goods. Thus, the "special circumstances" of

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396 Section 2-711(1) allows the revoking buyer to recover his purchase price and then seek damages under § 2-713. Section 2-713 grants buyer "the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach." (Emphasis added.)

397 Of course, the court would probably use the $15 measure of value as received only where the fair market value of defective goods has not varied with the market or is not ascertainable for the time of acceptance. Where a different value for defective goods at the time of acceptance is ascertainable, a court using time of acceptance for measuring warranted value would most likely use the same time-frame for value as received.

398 See notes 417-66 and accompanying text infra.

399 But cf. 1 W. HAWKLAND, supra note 167, at 262-63: "A buyer who has accepted the goods does not have the problem of cover. . . . In most cases, the time and place of acceptance are more reliable guides to establish his loss. Subsection 2-714(2) makes the time and place of acceptance the rule for measuring damages in warranty cases." Hawkland does not mention the "special circumstances" of § 2-714(2) in this context, nor does he discuss Comment 3. Comment 3's authorization for shifting the time-frame applies only where the circumstances justify revocation. Under § 2-608(1), the nonconformity must substantially impair the value of the goods to the buyer in order to justify revocation. Where the value
section 2-714(2), as developed by Comment 3, makes commercial sense. 400

4. Proving Primary Damages

We have discussed numerous ways in which the buyer could show the difference in value between the goods he received and those he was promised. We emphasize that these indicia—cost of repair, purchase and resale price, market value, and usefulness to the particular buyer—merely evidence diminution in value. The appropriateness of each will vary with the circumstances. The Code demands flexibility in the proof of primary damages, 401 and courts generally refrain from reading section 2-714 as exclusively requiring any one of these indicia. 402

If courts generally have been flexible, some have been downright loose with sellers' money. Some goods are really no good. They may have been destroyed by their own defects, 403 or consumed in the natural course of buyers' use of them. 404 Insec-
ticides are common examples of the latter situation. But nonconforming goods often have some value. Nevertheless, many buyers have recovered the entire value of goods inaccurately described as worthless. This phenomenon occurs in commercial, as well as consumer, cases. The commercial buyer will normally glean some value from the goods, whether by use, resale on the market, or resale for scrap. By declaring these goods worthless, the court grants the buyer the equivalent of a revocation while allowing him to keep the goods. In Puritan Manufacturing, Inc. v. I. Klayman & Co., a federal district court attempted to side-step this double-compensation problem: “Since the [refrigeration units] were of no use to [buyer], except for scrap, the entire value may be recovered as damages. In fairness, [buyer] should tender the [goods] to [seller] which can then reclaim any salvage there might be in the machinery.” Although the district court’s approach appears reasonable, it lacks support in the Code. The result would have been correct had the buyer justifiably revoked under section 2-608. But

411 Id. at 1314, 15 U.C.C. Rep. at 1064.
section 2-714(2), which the court cited,\textsuperscript{413} would leave the goods with the buyer and grant the seller an offset equal to their scrap value.

B. Resultant Damages—Section 2-715

Commercial buyers who receive defective goods routinely sustain losses beyond the diminution in the value of the goods purchased.\textsuperscript{414} Section 2-715 outlines the rules governing recovery of these resultant damages:

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

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

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

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

A buyer may seek resultant damages not only for breach of warranty, but also for any other breach of seller's obligations.\textsuperscript{415} Where the buyer has accepted and retained defective goods, section 2-714(3) provides entry into section 2-715.\textsuperscript{416}

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

Which resultant damages are incidental, and which consequential? In many cases it makes no difference which label applies, and courts awarding resultant damages often do not differentiate

\textsuperscript{413} See 379 F. Supp. at 1314, 15 U.C.C. Rep. at 1063-64.

\textsuperscript{414} See text accompanying notes 321-24 supra.

\textsuperscript{415} Where "the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes," § 2-711 refers the buyer to §§ 2-712 and 2-713, both of which allow him to seek incidental and consequential damages.

\textsuperscript{416} "In a proper case any incidental and consequential damages under the next section may also be recovered." U.C.C. § 2-714(3).
between the two. Nevertheless, inaccurate classification of resultant damages may skew results in two ways. First, section 2-715(2) places on the recovery of consequential damages certain restrictions not expressly imposed by section 2-715(1), which requires only that incidental damages be "reasonably incurred" as a result of the breach. A court mislabeling a consequential loss as incidental might improperly employ the "reasonableness" test in lieu of the more restrictive analysis section 2-715(2) imposes. Second, the importance of the distinction between incidental and consequential damages looms largest where the parties have contractually excluded consequential damages. By mislabeling elements of the buyer's loss, a court risks rewriting the parties' agreement.

The following discussion of the language of the Code, the experience of the courts, and the intent of the parties demonstrates that a buyer who has accepted and retained defective goods should never recover damages labeled "incidental."

a. The Code's Language. Section 2-715 does not define incidental or consequential damages, rather, it enumerates examples


418 These restrictions involve the foreseeability and certainty of damages. See notes 489-582 and accompanying text infra.

419 Suppose the owner of a small commercial hothouse orders a $25 "Insta-Tan" personal sun-lamp through a mail-order catalogue. Seller ships the lamp in October, unaware that buyer needs it to keep his buds warm through the winter. In mid-December the lamp, which the seller had unconditionally guaranteed for two years, breaks down. Buyer stands to lose hundreds of dollars in frozen flora if the lamp is not back in service within two days. Unable to find a ready replacement, buyer has the lamp repaired for $85. Since the lamp had a total value of $25, buyer cannot recover more than that amount under § 2-714(2). A court applying § 2-715(1) might award buyer the excess as a "reasonable expense incident to the delay or other breach." Cf. Indiana Farm Bureau Cooper. Assoc. v. S.S. Sovereign Faylene, 24 U.C.C. Rep. 74, 80-83 (S.D.N.Y. 1977) (buyer's mitigation expenses labeled "incidental"). However, a court treating the same expense as a consequential loss under § 2-715(2) would disallow the excess repair cost, although reasonably incurred, because it was not a "loss resulting from ... needs of which the seller at the time of contracting had reason to know."


421 "'Consequential' or 'special' damages ... are not defined in terms in the Code, but are used in the sense given them by the leading cases on the subject." U.C.C. § I-106,
and describes situations in which buyers may recover these damages. Section 2-715(1) and Comment 1 identify three factors which control recovery of incidental damages:

(1) Seller's conduct—section 2-715(1) broadly allows incidental damages for seller's "delay or other breach." Comment 1 restates this as "non-conformity or non-delivery."

(2) Types of expenses—section 2-715(1) provides a laundry list of expenses typically involved in handling defective goods or obtaining cover. Comment 1 reiterates that this list of expenses is "merely illustrative."

(3) Buyer's conduct—section 2-715(1) refers expressly to expenses connected with "goods rightfully rejected" and "effecting cover." Comment 1 makes explicit that the object of the drafters' concern is "the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked, or in connection with effecting cover." Apparently, then, a buyer must reject, revoke, or cover to activate section 2-715(1). Buyer's conduct in retaining the goods and suing for breach of warranty damages renders section 2-715(1) irrelevant.

Admittedly, the meaning of section 2-715(1) is veiled. We offer this construction, not as wordplay, but as statutory authority for the pragmatic arguments that follow.

Comment 3. However, the Uniform Sales Act, predecessor to U.C.C. Article 2, contained no provision for incidental damages, and "recognized [consequential damages] only inferentially as 'special damages.'" 1955 N.Y. LAW REVISION COMM'N, supra note 72, at 700-01. Thus, it is not surprising that pre-Code law offers little assistance in understanding the distinction between consequential and incidental damages.

422 U.C.C. § 2-715, Comment 1 provides:

[2-715(1)] is intended to provide reimbursement for the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked, or in connection with effecting cover where the breach of the contract lies in non-conformity or non-delivery of the goods. The incidental damages listed are not intended to be exhaustive but are merely illustrative of the typical kinds of incidental damage.

423 Section 2-712(1) defines "cover" as the buyer's purchase of substitute goods. Under § 2-711(1), buyer is considered to "cover" only after nondelivery, repudiation, rejection, or revocation.

424 The drafters of the Comment to Minnesota's version of § 2-714 threw their hands up in frustration: "[U]nder the Code the distinction between the damages allowed by subsection 2-714(1) and the 'incidental' and 'consequential' damages allowed by U.C.C. § 2-715 is unclear." 21A MINN. STAT. ANN. § 336.2-714 (West 1966) (McClure, Minn. Code Comment).

The astute reader might raise three arguments against our "bright-line" interpretation of § 2-715(1). First, he might point to the broad language at the end of the section—"and any other reasonable expense incident to the delay or other breach"—as encompassing any
b. The Nature of Incidental Damages. Commentators list examples and attributes of incidental damages but, like the Code, they stop short of definition.\footnote{425} Comment 1\footnote{426} best describes incidental damages. Under the Comment's description, incidental damages arise from expenses naturally and inextricably intertwined with the buyer's rejection, revocation, or cover. Once a buyer chooses one of these courses of conduct, his incidental losses do not depend upon his needs, but on the nature of the goods themselves and on the requirements of the Code.\footnote{427} Since the buyer does not keep the goods, he cannot obtain value from them.\footnote{428}

Attributable damages regardless of the buyer's conduct. This language, however, could just as easily be read as presupposing a requirement of rejection, revocation, or cover, and simply opening the statute to all expenses flowing from such conduct of the buyer.

Second, one could contend that the use of the words "may be justifiably revoked" in Comment 1 to § 2-715 (emphasis added) suggests that incidental damages, like primary damages, are recoverable even when the buyer chooses not to revoke. This construction would require courts to determine the revocation rights of buyers who had not asserted them. Courts should avoid such gymnastics absent the degree of reason and authority behind the construction of § 2-714(2)'s "special circumstances" offered in notes 390-400 and accompanying text supra. There, Comment 3's explicit focus upon "the buyer's decision not to revoke" fits nicely into § 2-714(2)'s "special circumstances." By contrast, the intent of Comment 1 to § 2-715 is neither clear nor tied to any language in the statute. Here, the drafters might simply have been loose in their use of language without intending to extend incidental damages to buyers choosing to retain the goods.

Third, and perhaps most important, the discerning reader might point to § 2-714(3) and Comment 4, which seem to indicate that the retaining buyer may recover incidental damages. Section 2-714(3) states that, where the buyer has accepted and kept defective goods, "in a proper case any incidental and consequential damages under [§ 2-715] may also be recovered," and Comment 4 reiterates. Here again, the drafters may simply have been sloppy. Section 2-714(3) and Comment 4 probably do not authorize incidental damages—that is the job of § 2-715(1)—but merely remind aggrieved buyers that primary damages are not the sole compensation the Code provides.

\footnote{425} White & Summers appear to reaffirm the limited applicability of § 2-715(1) to cases involving rejection, revocation, and cover. \textit{White & Summers}, supra note 2, § 10-3, at 512. However, they cite Lewis v. Mobil Oil Corp., 438 F.2d 500, 8 U.C.C. Rep. 625 (8th Cir. 1971), discussed in text accompanying notes 432-37 infra, as an application of § 2-715(1) to a warranty case.

The New York Law Revision Commission, in its Study of the Uniform Commercial Code, noted that "[m]any items of incidental damage . . . arise 'naturally and directly' from the contract breach," but referred only to rejection, revocation, delayed delivery, and cover as exemplary circumstances. 1955 N.Y. \textit{Law Revision Comm'n, supra note 72, at 701.}\footnote{426}

\footnote{427} Section 2-602(2)(b) requires the rejecting buyer who has possession of the goods "to hold them with reasonable care at the seller's disposition." Additional duties accompany the rejecting buyer's "merchant" status under § 2-603. Section 2-604 provides several options to buyers attempting to salvage rejected goods. Finally, § 2-608(3) imposes on the revoking buyer the same obligations that the Code places on the rejecting buyer.

\footnote{428} This statement is wrong in fact but correct in Code theory. A buyer may indeed derive use-value from the defective goods before revoking. Even so, § 2-711 enables him to recover the full amount he has paid seller, with no offset for use-value derived. If the
Therefore, his rejection or revocation not only commits him to future expenses,\footnote{See note 427 supra.} it automatically converts into loss any prior expense of handling the goods. In contrast, where the buyer retains the goods, the extent of his resultant damages will depend upon his particular needs.

Suppose Bert Buyer purchases goods and pays a carrier to deliver them from seller. If the goods are defective and Bert rejects, he automatically suffers loss in the amount of the shipping charges. Furthermore, the Code may require that he store and care for the goods\footnote{See note 427 supra.}—added expense from which he derives no benefit. If, however, Bert retains the goods, he has not necessarily sustained a loss of the shipping charges. Once he is compensated for his primary loss and any consequential damages, his necessary handling expenses are no more a loss than if the goods had properly performed. Any increase in handling expenses resulting from the breach will also depend on the particular buyer's situation and, therefore, must survive scrutiny under section 2-715(2)'s criteria for recoverable consequential damages.\footnote{See, e.g., R. SPEIDEL, R. SUMMERS & J. WHITE, Teaching Materials on Commercial and Consumer Law 1101 (2d ed. 1974); W. WARREN, W. HOGAN & R. JORDAN, Cases and Materials on Commercial and Consumer Transactions 292 (2d ed. 1978); WHITE & SUMMERS, supra note 2, § 10-3, at 313.}

c. Confusion in the Courts. Ambiguity in the Code and ambivalence among commentators inevitably stirs confusion among the courts applying section 2-715(1). Consider the oft-cited dam-

drafters contemplated this use-value, they apparently considered it de minimis or justified as compensation for otherwise uncompensated losses of aggrieved buyers (time, court costs, etc.). But at least one court has side-stepped this problem by treating revocation under § 2-608 as equivalent to the equitable remedy of rescission:

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ages case of Lewis v. Mobil Oil Corp. The seller had breached his implied warranty of fitness for a particular purpose by supplying oil of the wrong grade for Lewis' sawmill equipment. Lewis' incidental damages, said the Eighth Circuit, included his outlay for excessive quantities of nonconforming oil and for repair and replacement of his damaged equipment. The court of appeals mislabeled both items of damage. First, the cost of nonconforming oil qualifies as a primary damage under section 2-714(2). The oil was of no value to Lewis nor, by the time it revealed its nonconformity, to anyone else. The second item, the cost of equipment repairs necessitated by the breach, falls squarely within the category of consequential damages described by section 2-715(2)(b): "injury to person or property proximately resulting from any breach of warranty." Although the Lewis court's errors proved harmless, other courts have been less fortunate. When clear plastic panels violated their five-year warranty by darkening after two years, a Texas court spurned section 2-714(2) in favor of section 2-715. The court awarded as incidental damages the replacement cost of new five-year panels, overlooking the value the buyer derived from using the original panels for two years. Had the court focused instead on the difference-in-value formula of section 2-714(2), it might have avoided this forty-percent primary damage windfall.

The second sin of the Lewis court—mistaking consequential for incidental damages—was magnified by a sister circuit in Coun-

433 438 F.2d 500, 8 U.C.C. Rep. 625 (8th Cir. 1971).
434 Id. at 507, 8 U.C.C. Rep. at 636-37.
435 Reprinted in note 320 supra.
436 See generally notes 354-62, 393, and accompanying text supra. In Tarter v. MonArk Boat Co., 430 F. Supp. 1290, 2 U.C.C. Rep. 33 (E.D. Mo. 1977), the purchaser of a defective houseboat recovered the amount he had spent for replacement parts, materials, and service plus the estimated cost of completing repairs. The district court allowed future repair costs under § 2-714(2) and then, citing Lewis, granted the out-of-pocket replacement and service expenses as incidental damages. Thus, the court considered some primary damages primary and others incidental. The court did not explain its dichotomy, other than to gather the latter items under the umbrella of § 2-715(1): "reasonable expense incident to the delay or other breach." Read this way, the omniverous language of § 2-715(1) could swallow all damages.
438 Lewis would have been entitled to recover the same damages under correct labels.
The buyer purchased, from a steel fabricator, a $2,299 pressure vessel which he incorporated into a boiler unit and resold for a total of $5,859.73. Because the pressure vessel was defective, the buyer incurred liability to his customer in the amount of $13,455.21 ($5,859.73 purchase price plus $5,095.48 labor and repairs plus $2,500 removal of defective boiler and installation of new boiler). The buyer sought indemnification from the fabricator under their contract, which barred recovery for the "cost of removing, returning or replacing defective parts or for other consequential damage." The court of appeals found it "difficult to visualize a clearer way to express an exclusive limitation on the measure of damages." Nevertheless, in addition to a refund of the contract price ($2,299), the court allowed "incidental" damages consisting of buyer's expenses in adding to, shipping, and starting-up the boiler, plus $5,025.48 for labor and attempted repairs by buyer's customer. Beyond a passing reference to the "merely illustrative" qualifier in Comment 1 to section 2-715, the court's opinion utterly failed to consider the nature of incidental damages. Although this sort of end-run around the parties' intent may appear fair at first blush, it violates the Code's policy of contractual freedom in commercial settings.

Some of the losses described above cannot properly be called incidental even when the buyer rejects or revokes. The property damage in Lewis and the failed repair attempts in Council Brothers, for example, were losses arising from the buyer's particular situation, and should have been treated as consequential damage.

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441 Id. at 403 n.3, 11 U.C.C. Rep. at 1130 n.3.
442 Id. at 406, 11 U.C.C. Rep. at 1135.
443 The court cited Lewis. Id. at 408, 11 U.C.C. Rep. at 1137.
444 Id. at 407, 11 U.C.C. Rep. at 1136. U.C.C. § 2-715, Comment 1, is reprinted in note 422 supra.
445 The Code is not without a sense of fairness. But fairness in a commercial context does not necessarily mean splitting losses down the middle or placing them all upon the breaching party. The Code allows parties of comparable bargaining power to allocate most risks. See, e.g., U.C.C. §§ 2-303, 2-316, 2-718, 2-719. Most of the parties to transactions covered within this Project could insure against economic losses, directly or through their market behavior. To the extent that small commercial parties begin to look more like consumers, courts may shield them with the unconscionability doctrine in § 2-302. But by shifting items of damage in and out of amorphous categories, courts impair the outcome-predictability necessary when evenly-matched parties plan transactions.
446 If buyer's repairs have improved the goods, and he subsequently relinquishes the goods to the seller, his repair expenses may come within § 2-715(1) as reasonable "care and custody" of the goods. This recovery is no more than restitution for the value added to his
Most challenging, however, are cases where the buyer retains the goods and incurs expenses that resemble those listed in section 2-715(1). In one such case, a buyer incurred expenses in isolating 130,000 pounds of contaminated cheese mixed in a four million pound shipment purchased from the manufacturer. Although the court considered these to be incidental inspection expenses, we would characterize them as primary. Because the entire shipment was tainted, its market value as accepted was diminished not only by the value of the contaminated portion, but by the necessary expense of separating that portion from the rest of the commercial unit. By removing the taint, the inspection “repaired” the defect in the noncontaminated cheese.

Finally, cases may arise where a buyer would not formally revoke, even though the goods are absolutely worthless. Suppose that under a contract excluding consequential damages, a food market chain accepts a shipment of fresh mutton later discovered to be wholly contaminated by a bacterial toxin. The buyer pays to have the meat, initially worthless and rapidly spoiling, carted away and buried. In his subsequent suit, the buyer claims damages under sections 2-714 and 2-715 for breach of warranty on accepted goods. A court applying our analysis to the cause of action framed by the buyer might deny him the cost of dumping the mutton. However, a buyer revoking under section 2-608 could


448 Id. at 512, 9 U.C.C. Rep. at 417-18. The court quoted § 2-715(1) but omitted the reference to rejection. Id. at 512 n.24, 9 U.C.C. Rep. at 418 n.24.

449 This characterization should also signal the court that the buyer cannot recover inspection costs exceeding the value of the goods unless he passes § 2-715(2)’s tests governing consequential damages. See notes 327, 333, and accompanying text supra. See also S.M. Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc., 39 Ill. App. 3d 353, 350 N.E.2d 321, 19 U.C.C. Rep. 1125 (1976), where a buyer recovered for tests costing over five times the purchase price of defective concrete he had already used in a job site. The tests, which were probably justified because they cost less than removing the cement, were labeled both incidental and consequential by the court.

450 Section 2-715(1)’s incidental damages are unavailable where buyer has not rejected, revoked, or covered; any consequential damages are barred by the contract. Arguably, the cost of dumping resulted in a negative value of the goods as accepted, which the court could award as part of buyer’s primary damages. This expansive reading of § 2-714(2) is unnecessary under the analysis that follows.
recover such expenses as incidental damages. This divergence in remedies is unjustified because, with truly worthless goods, it makes no practical difference to the parties whether the buyer declares his revocation or merely dumps the goods. Common sense and Comment 6 to section 2-608 indicate that the drafters envisioned as revocation the buyer’s disposal of worthless goods. The court should, therefore, treat the buyer’s claim as one for revocation, and award him the incidental damages he seeks.

Courts adopting the proposed construction of sections 2-714 and 2-715 need not sacrifice flexibility in awarding proper warranty damages. The categories labeled “consequential” and “incidental” fundamentally differ from open-ended Code principles such as “reasonableness”; only the latter were meant to draw their meaning anew from the particular context of each case. Damage categories have two functions: (1) Precision—to provide an analytical framework for courts to use in assessing damages accurately; and (2) Planning—to allow the parties to allocate risks under the contract. If applied haphazardly, the Code’s damage categories serve neither goal.

d. Intent of the Parties. When a commercial contract incorporates Code terms that the Code itself leaves undefined, courts should consider the meaning commonly attached to those terms by the business community. In warranty cases, exclusions of consequential damages illustrate this principle. It would be difficult for a common commercial understanding of such exclusions to root in the arid soil of inconsistent and inscrutable damage awards. Nevertheless, most parties probably intend the consequential damage exclusion to limit the seller’s liability to the difference in the value of the goods he promised and those he delivered. A

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451 Cost of dumping appears to fit within “expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected,” and Comment 1 points out that § 2-715(1) applies to revocation as well as to rejection. 452 Sections 2-602, 2-603, and 2-604 set forth the buyer’s rights and duties as to rejected goods. Section 2-608(3) imposes the same rights and duties upon a buyer who revokes. Depending upon the circumstances of the transaction, the Code may require buyer to hold the goods, follow seller’s reasonable instructions, or resell them. These provisions appear inapposite to worthless goods, especially when delay in their disposal will cause additional damage. Accordingly, Comment 6 to § 2-608 flatly states: “Worthless goods ... need not be offered back ....”


454 See note 319 supra.

455 Comment 3 to § 2-715 states: “Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy.”
businessperson\textsuperscript{456} might reasonably wish to risk no more in a transaction than he expects to receive as revenue. Moreover, the buyer is often in a better position to insure against consequential losses because such losses depend upon his particular situation. An express limitation of remedies to repair, replacement, or return of the purchase price evidences the same general intent to place a ceiling on liability.\textsuperscript{457} Significantly, consequential damage exclusions and exclusive remedies often travel together.\textsuperscript{458} This occurred in Council Brothers v. Ray Burner Co.,\textsuperscript{459} presented earlier as an example of an improper award of incidental damages.\textsuperscript{460} The manufacturer's warranty clearly evidenced an intent to limit his liability to the value of the goods sold.\textsuperscript{461} Although the court properly refused to restrict the buyer to the enumerated remedies,\textsuperscript{462} it failed to recognize that the exclusion of consequential damages was designed to make the buyer bear all resultant dam-

\textsuperscript{456} We recognize that differences of interpretation will exist not only among individual businesspersons, but among whole classes of commercial parties. To the attorney, the term "consequential damages" might invoke pre-Code notions of "special" or extraordinary damages. The businessperson, on the other hand, may contemplate the common usage of consequential as "following as an effect, result, or outcome; resultant," \textit{Random House Dictionary of the English Language} 312 (unabridged ed. 1967), thus including true incidental damages in his interpretation.

\textsuperscript{457} These approaches, however, are not functionally equivalent. A limitation to the purchase price allows a buyer to recover any type of damage permitted by the Code, but limits the \textit{amount} to the price he paid for the goods. But a consequential damage exclusion limits the \textit{types} of loss recoverable, and only indirectly restricts their total amount. The former approach allows primary or resultant damages up to the purchase price; the latter permits only primary damages, which may exceed the purchase price. The exclusive remedy of repair or replacement is similar to the consequential exclusion because it allows only the equivalent of primary damages and establishes a ceiling not necessarily determined by the purchase price.


\textsuperscript{459} 473 F.2d 400, 11 U.C.C. Rep. 1126 (5th Cir. 1973).

\textsuperscript{459} See notes 440-46 and accompanying text \textit{supra}.

\textsuperscript{460} The warranty provided in part:

\textit{If any part of the equipment appears to be defective . . . and if such part is returned to the [manufacturer's] factory, transportation charges prepaid, . . . and if the same is found by [manufacturer] to be defective . . ., it will be replaced or repaired, free of charge, F.O.B. [manufacturer's] factory . . ., or, at its option, [manufacturer] may refund the price paid for said part. No claim for cost of removing, returning or replacing defective parts or for other consequential damage will be allowed.}

\textsuperscript{458} 473 F.2d at 403 n.3, 11 U.C.C. Rep. at 1133 n.3 (emphasis added).

\textsuperscript{462} Because the warranty did not expressly make exclusive the remedies of repair, replacement, or refund, it failed to meet the requirements of § 2-719(1)(b) for limitations of remedies. 473 F.2d at 405-06, 11 U.C.C. Rep. at 1133-34. \textit{See generally} notes 834-47 and accompanying text \textit{infra}.
ages. The buyer recovered its expenses for repairing and replacing the defective boiler it had sold. The court, in effect, found only lost profits to be consequential.463

Had the seller in Council Brothers shared the court's understanding of section 2-715, he would have specifically excluded incidental damages in order to assure the protection he apparently sought. However, amid the arsenal of imaginative limitations employed by nervous sellers, we have discovered only one express exclusion of incidental damages.464 Neither timidity nor philanthropy accounts for this phenomenon. Rather sellers, unlike courts, are more concerned with the amount of their liability than with fine distinctions of terminology. Even when they do recognize specific types of resultant losses, most businesspersons probably do not consider them legally distinct.

Courts should consider the parties' understandings when interpreting undefined Code terms. But courts should not rewrite the parties' contract or the Code. Thus, a consequential damage exclusion should not reach true incidental damages even if the parties intended to bar all resultant damages. As we interpret it, the Code draws a clear and reasoned line between consequential and incidental damages, depending on whether the buyer retains the goods or returns them to the seller.465 Further, section 2-719 expressly allows parties to exclude consequential damages, but it is silent as to incidentals. Whether a court should give effect to an express exclusion of incidental damages is considered later in this Project.466

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

Where the buyer has accepted and retained defective goods, his consequential losses include all losses beyond the diminution in the value of the goods received. The catalogue of consequential damages available to commercial plaintiffs in warranty cases in-

463 The court apparently considered the express exclusion of removal and reinstallation costs as independent of the consequential exclusion. But it seems clear from the warranty that the seller included removal and reinstallation as illustrations of consequential loss.
464 See Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 355 n.9, 22 U.C.C. Rep. 945, 954 n.9 (Minn. 1977).
465 See notes 427-31 and accompanying text supra.
466 See note 782 infra.
includes physical injuries to person\textsuperscript{467} or property,\textsuperscript{468} and economic losses such as unsuccessful attempts to repair the warranted goods,\textsuperscript{469} investments made in reliance on seller's promises but converted to losses by his breach,\textsuperscript{470} increased production costs,\textsuperscript{471}

\textsuperscript{467} Although primarily consumer phenomena, personal injuries occur in commercial cases when buyer's employees are injured (see, e.g., Auto-Teria, Inc. v. Ahern, 352 N.E.2d 774, 20 U.C.C. Rep. 336 (Ind. Ct. App. 1976); notes 973-83 and accompanying text infra), or when the breach causes buyer to incur liability for the injury of a third party.


\textsuperscript{469} Unsuccessful repair costs are best viewed as items of consequential loss, which will vary with the needs of the particular buyer (see notes 335-36 and accompanying text supra), and should undergo scrutiny pursuant to § 2-715(2).


A buyer may also recover profits lost when a breach of warranty frustrates plans to resell the warranted goods or to employ them in revenue-generating activities. Finally, courts


have allowed recovery for injury to the buyer's business reputation or goodwill.\textsuperscript{475}

Section 2-715(2) supplies the litmus used by courts to determine which consequential losses a particular buyer may recover. The provision makes no per se exclusions; a buyer may recover any type of consequential damages that he can carry over the following hurdles.

\textbf{a. Loss.} Code sections 2-712(2) and 2-713(1) require that the court reduce the buyer's damage award by any "expenses saved in consequence of the seller's breach." Indeed, the essence of the term "damage" in contract law precludes the award of an amount exceeding the net injury sustained. It follows that the set-off provisions of sections 2-712(2) and 2-713(1) merely express the implicit rule governing warranty damages under sections 2-714 and 2-715.\textsuperscript{476} Once again, the rule is more simply stated than applied.


\textsuperscript{476} Comment 4 to § 2-713 provides: "This section carries forward the standard rule that the buyer must deduct from his damages any expenses saved as a result of the breach."
Although conceptually distinguishable, the types of losses described in this Project often appear to overlap. In many cases, courts find it more convenient to award general damages than to identify the primary damages, reliance costs, increased operating costs, and lost profits that constitute the lump sum. This approach is acceptable so long as courts take care not to award both the integrated whole and its component parts. However, a case recently decided by the South Dakota Supreme Court demonstrates the danger of failing to differentiate between elements of damage. When insecticide applied to a farmer’s corn crop failed to control corn rootworm, the court assessed damages according to the standard most commonly applied in cases of injury to growing things: the difference between the crops’ probable value at maturity had the goods performed as warranted and their actual value at maturity, less any savings in labor and expenses attributable to the reduced yield. This award alone was sufficient to put the buyer in the position he would have occupied had the insecticide performed effectively. But the court also allowed the buyer to recover the full price of the “worthless” insecticide, citing section 2-714(2). Although it properly characterized the farmer’s primary damages, the court doubly compensated him for the ineffective insecticide. Nevertheless, courts and counsel have generally avoided such mistakes.


479 See generally note 373 supra.


481 Even if the contract had excluded consequential damages, buyer would be entitled to recover the difference in value of the insecticide.

482 In Eichenberger v. Wilhelm, 244 N.W.2d 691, 20 U.C.C. Rep. 63 (N.D. 1976), an almost identical situation, the court recognized that the seller was entitled to a set-off in the amount of his crop-spraying fee. Id. at 698, 20 U.C.C. Rep. at 72-73. Cf. Soo Line R.R. v. Fruehauf Corp., 547 F.2d 1365, 1378, 20 U.C.C. Rep. 1181, 1194 (8th Cir. 1977) (buyer cannot recover finance charges on defective railroad hopper-cars as lost reliance expense where court had already awarded gross revenue lost by buyer’s inability to use them during repairs); Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 383, 21 U.C.C. Rep. 80, 103-04 (E.D. Mich. 1977) (denying recovery for extra labor required to
Just as seller's attorney must be wary of double recovery, his adversary must keep an eye on what is being deducted as expenses saved by the breach. Seller's breach does not reduce buyer's fixed expenses, so a court should deduct only variable expenses from buyer's recovery of gross revenue. Furthermore, the deduction should consist of expenses that would accompany perfect performance, not those that buyer would have incurred had he never made the contract. Assuming no change in the buyer's output, his past expenses will most likely exceed his expected expenses, else he would not have purchased the goods. Deducting past expenses leaves the buyer where he was before the contract, and leaves his expectancy interest unprotected. Some-supervise malfunctioning machine because buyer failed to show how much supervision machine required when functioning properly; Baden v. Curtiss Breeding Serv., 380 F. Supp. 243, 244, 15 U.C.C. Rep. 400, 401 (D. Mont. 1974) (buyer recovered value of lost calf crop for failure of artificial insemination but court did not award cost of semen); Burgess v. Curly Olney's, Inc., 198 Neb. 153, 159, 251 N.W.2d 888, 892, 21 U.C.C. Rep. 794, 798 (1977) (buyer's evidence of lost profits not sufficient because failed to show expected cost of transporting goods to place of resale); Protection Serv., Inc. v. Brown, 18 U.C.C. Rep. 1214, 1218 (Pa. C.P. 1975) (buyer entitled to seek difference between cost of straightening metal pieces by hand and cost of doing same job by machine had machine performed as warranted).

Dold v. Sherow, 220 Kan. 350, 356-57, 552 P.2d 945, 950-51, 19 U.C.C. Rep. 1356, 1359-60 (1976), demonstrates the ease with which even a careful court may confuse overlapping elements of injury. When a number of cows purchased for breeding were unfit for that purpose, buyer recovered his primary damages, lost profits from the anticipated calf crop, and the cost of feeding the unproductive cows. Although the court did not explain how lost profits were to be determined, it apparently awarded the value of the anticipated calves at birth, or the gross revenue they would bring on resale less the cost of their nurture. Neither standard would deduct the cost of feeding the breeding cows from the buyer's recovery, even though the buyer had already recovered this necessary expense of obtaining calves. The court cited cases awarding the reliance expense of feeding unproductive livestock. None of these cases, however, supports the double recovery achieved by awarding both lost profits and the cost of feeding the breeders.

Problems of deductions and double recovery are not unique to agriculture; machines need to be fed and maintained just as crops and cattle do. Thus, the Arkansas Supreme Court accurately described the resultant damages of a buyer whose automatic icemaker malfunctioned: "Since damages ... are intended to be compensatory, not punitive, [buyer could] recover only the amount by which the cost of purchasing ice and preparing it for use exceeded its cost of manufacture by use of the machinery if it had performed properly." Kohlenberger, Inc. v. Tyson's Foods, Inc., 256 Ark. 584, 602, 510 S.W.2d 555, 567, 14 U.C.C. Rep. 1281, 1293 (1974).


what simpler are those cases where the defect in the goods reduces their productivity without preventing their use or reducing the buyer's cost of using them. In such cases there are no "expenses saved in consequence of the seller's breach."

Not all double compensation results from neglecting to deduct expenses avoided by seller's breach. The same injury masquerading in different costumes may be redressed more than once. For example, a buyer recovering for damage to his goodwill, or to the overall value of his business, should not also recover prospective profits prevented by the same breach. Conversely, when a number of distinct items comprise the buyer's injury, the attorney who fails to recognize one or more of these items fails his client. The analysis suggested in this Project can minimize the risk that an attorney focusing on lost profits, for example, will overlook primary damages.

hiring last minute help to untangle buyer's books ($24,412.32), the court deducted not the cost of operating the warranted machine, but the price buyer had paid in previous years to have his books done by an outside accounting firm. The decision to invest $35,000 in accounting machinery reflected buyer's expectation that he would save money by producing his own records. Thus, the court's award placed buyer where he was before making the contract rather than where seller promised he would be.


486 In R.E.B., Inc. v. Ralston Purina Co., 525 F.2d 749, 18 U.C.C. Rep. 122 (10th Cir. 1975), defective feed damaged buyer's herd of breeding hogs. Although entitled to profits lost during his use of the feed and to the diminution in the value of his business when sold two to three years later, the buyer could not recover profits lost after he had stopped using the feed. Id. at 754-55, 18 U.C.C. Rep. at 129. The court considered the injury to be complete when buyer stopped using seller's feed, and apparently related the diminution in herd value back to the time of the injury. This award was proper, since the calculation of decrease in herd value took into account the profits the buyer lost subsequent to the injury. When the injury was complete, buyer had the option of selling the herd or keeping it and drawing some profit from it. He could not hold the herd and later sue for its diminished value and for the profits he had lost during the interim.

487 See, e.g., Aldon Indus., Inc. v. Don Myers & Assoc., 517 F.2d 188, 189, 17 U.C.C. Rep. 1002, 1004 (5th Cir. 1975) (buyer seeking loss of prospective profits failed to seek primary damages for defective carpets). In Addressograph-Multigraph Corp. v. Zink, 273 Md. 277, 329 A.2d 28, 15 U.C.C. 1025 (1974), a lessee receiving defective printing equipment defaulted on his lease and recovered from the manufacturer for the deficiency judgment taken by the lessor. Applying the Code, the court upheld the award and noted: [F]or reasons not clear to us, [lessee] chose not to recover the difference between the value of the equipment as delivered, and... as warranted, together with any expense to which he may have been put. Instead, [lessee]... claimed, as consequential damage, only the amount that [he was] forced to pay [lessor] under the guaranty.

Id. at 288, 329 A.2d at 35, 15 U.C.C. Rep. at 1034. Furthermore, although lessee proved the cost of farming out the work the equipment could not handle (id. at 283-84, 329 A.2d...
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b. Causation.488 Section 2-715(2) allows only those losses "resulting from" the seller's breach. The most fleeting reference to the causation requirement belabors the obvious, yet the most rigorous analysis punctuates with a question mark. Because issues related to cause-in-fact and proximate cause will weave throughout the fabric of the buyer's case, we interlace them throughout this Project.

c. Foreseeability and Certainty. For as long as the common law has encouraged reliance on promises by granting relief for their breach, courts have struggled to encourage the making of promises by carving limits into that relief.489 The rules outlined here—that a breaching party is liable only for losses that he could have foreseen at the outset of the contract, and that an aggrieved party must prove his consequential damages with reasonable certainty—represent the law's principal attempts at line drawing.490

Foreseeability. Among the readers of this Project, several may have memorized, most will have read, and all should at least have heard of Hadley v. Baxendale.491 That cornerstone of consequential damages proclaimed that aggrieved parties could recover damages

such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at

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488 ... and now remains
That we find out the cause of this effect,
Or rather say, the cause of this defect,
For this effect defective comes by cause ....
W. Shakespeare, Hamlet, Act 2, sc. 2, lines 100-03.


491 156 Eng. Rep. 145 (Exch. 1854). Baron Alderson's opinion has been run through the mill. See, e.g., McCormick, supra note 490, §§ 138-41; White & Summers, supra note 2, § 10-41, at 314-18; Farnsworth, supra note 489, at 1199-1210.
the time they made the contract, as the probable result of the breach of it.492

Because the pre-Hadley standard had allowed unlimited liability for contractual breach, the 1854 case signaled a marked increase in bench control over jury damage awards.493

Great waters of legal scholarship part on the proper interpretation of Hadley. Did the case require that the parties tacitly agree that the breaching party would be liable for consequential loss,494 or merely that they know the facts that make such loss a foreseeable result of the breach?495 For the law of sales, the Code closed the seas upon Hadley's conservative standard-bearers, preserving its more liberal interpretation.496 Section 2-715(2)(a) and Comment 2 express the drafters' desire to bury forever the "tacit agreement" test.497

494 See Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903) (Holmes, J.); McCormick, supra note 490, § 141; Barton, supra note 490, at 296.
495 The weight of authority favors this more liberal construction. See, e.g., 5 A. Corbin, Contracts § 1007 (1964) [hereinafter cited as Corbin]; McCormick, supra note 490, § 138, at 565; 11 Williston on Contracts, supra note 493, § 1355.
496 The Code appears slightly more liberal than Hadley in one minor detail. Hadley required that the injury be foreseeable to both parties at contract time, whereas § 2-715(2)(a) addresses only the seller's knowledge.
497 Hadley required that the injury be the foreseeable result of facts actually known to the seller:

[1]f the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

156 Eng. Rep. at 151. But § 2-715(2)(a) (quoted in text accompanying note 106 supra) does not expressly require foreseeability of injury or actual knowledge of facts. The section does not make clear whether seller must have had "reason to know" of buyer's "requirements and needs" (constructive knowledge of facts) or "reason to know" of the "loss" that might result (foreseeability of injury). Comment 2 suggests that the statute requires "foreseeability": "The 'tacit agreement' test . . . is rejected . . . [T]he older rule at common law which made the seller liable for all consequential damages of which he had 'reason to know' in advance is followed . . ." (Emphasis added). Comment 5, on the other hand, indicates that the seller need only have constructive knowledge of facts: "[T]he seller is liable for conse-
Rarely does the foreseeability requirement deprive a commercial buyer of consequential damages clearly shown to arise from a breach of warranty. This result is hardly surprising. The commercial buyer often communicates his special needs to the seller via contract or negotiation, and his general needs may be notorious because they are common to an entire class of buyers. Seller's knowledge of buyer's status or occupation also suggests foreseeable damages in all cases where he had reason to know of the buyer's general or particular requirements at the time of contracting." (Emphasis added.)

Perhaps the drafters dismissed the distinction between knowledge of the buyer's needs and foresight of the injuries that will result if those needs are not fulfilled as carrying no practical significance. Comments 2 and 3 suggest that § 2-715(2)(a) combines the two concepts, albeit ungracefully; constructive knowledge is allowed and foreseeability is required. See, e.g., Dold v. Sherow, 220 Kan. 350, 356-57, 552 P.2d 945, 950-51, 19 U.C.C. Rep. 1356, 1360 (1976) (buyer who told seller he wanted cows only for breeding recovered for lost calf crop and feeding costs of cows too old to breed); Boring v. Geis Irrigation Co., 547 P.2d 988, 992, 17 U.C.C. Rep. 445, 446-47 (Okla. Ct. App. 1975) (buyer who informed seller of plans to feed 10,000 pigs recovered lost profits from inability of equipment to feed more than 2,777).

The relationship between buyer and seller can help determine whether seller had "reason to know" of the damages likely to follow his breach. In R.E.B., Inc. v. Ralston Purina Co., 525 F.2d 749, 752-53, 18 U.C.C. Rep. 122, 125-26 (10th Cir. 1975), the seller of defective feed actively advised buyer on the operation of his hog breeding farm and therefore became liable for buyer's lost profits and goodwill damages. Similarly, in Murray v. Kleen Leen, Inc., 41 Ill. App. 3d 436, 443-44, 354 N.E.2d 415, 422, 20 U.C.C. Rep. 298, 304-05 (1976), the court held a lessor of defective breeding hogs liable for the cost of extensive preparations made at his direction on lessee's land and converted to loss by the breach. Conversely, in Chrysler Corp. v. E. Shavitz & Sons, 536 F.2d 743, 19 U.C.C. Rep. 519 (7th Cir. 1976), buyer could not recover profits lost as a result of customer dissatisfaction when seller failed to make timely delivery of goods intended for resale. The court held that the damages were unforeseeable, in part because the relationship between buyer and seller was not long-term but ad hoc. Id. at 744-45, 19 U.C.C. Rep. at 522.


Whether a court should charge a seller with knowledge of the needs of members of a particular trade may depend upon the degree of seller's familiarity with that trade. See Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588, 598-99, 11 U.C.C. Rep. 261, 269 (4th Cir. 1972) (seller experienced in building spinning mills had reason to know defective knitting equipment would cause increased operating expenses); Franklin Grain & Supply Co. v. Ingram, 44 Ill. App. 3d 740, 743, 358 N.F.2d 922, 925, 21 U.C.C.
ability. Thus, the buyer need not make explicit his plans to resell the goods if the seller is aware that resale is part of the ordinary course of the buyer's business.\(^{500}\) On the other hand, if the buyer is not primarily a middleman, he may be barred from lost resale profits unless he initially communicated to the seller his intent to resell.\(^{501}\)

A different problem arises when neither party at the time of contracting possessed actual knowledge of events that would subsequently combine with seller's breach to produce or exacerbate buyer's damage. The seller could hardly be excused by an intervening event the avoidance of which was the *raison d'être* of the contract. Thus, where the burglar alarm malfunctions, only a bold seller would argue that the burglar was unforeseeable.\(^{502}\) However, where prevention of the intervening event was not the primary purpose of the sale, courts may deny recovery on foreseeability grounds. In *Cannon v. Yankee Products Co.*,\(^{503}\) the buyer's restaurant business languished after a patron discovered a worm in a serving of the seller's peas. The customer had promptly rallied thirty fellow diners and departed to spread the news. The court limited the buyer's recovery to nominal damages because the injury to his business was caused as much by the utterances of the obviously upset customer as by the presence of the worm and the fact that no one was made ill by the alleged unwholesome food would seem

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\(^{501}\) See *Everett Plywood Corp. v. United States*, 512 F.2d 1082, 1091 (Ct. Cl. 1975) (seller had no reason to know plywood manufacturer wanted logs to export as logs).


to take the loss of customers out of the natural and probable consequences of the breach.\footnote{504}

The \textit{Yankee Products} court applied a sterner test than section 2-715(2)(a) sets out. Had the worm turned up in a six-ounce can plucked from the supermarket shelf, the holding would be correct. But the buyer here made weekly bulk purchases from seller's representative who, cognizant of his product's ultimate destination, promised that "this is the very best brand you can buy, good flavor, wholesome and will please your customers thus increasing your business."\footnote{505} That an eatery loses customers by serving worm-ridden food should surprise no one; it is certainly not unforeseeable as a matter of law.

There is, in fact, little that lies beyond reasonable foreseeability in the normal commercial case. Increased operating costs, lost profits, and diminished reputation all flow naturally from interruptions of production, and a "manufacturer should know that defective goods will disrupt production."\footnote{506} Foreseeability under the Code requires neither fault on the part of the seller nor that he


\footnote{505}{21 U.C.C. Rep. at 527.}


Under § 2-715(2)(b), injuries to person and property must follow proximately from the breach, but need not pass the foreseeability test of § 2-715(2)(a). See, e.g., Wisniewski v. Great Atl. & Pac. Tea Co., 226 Pa. Super. Ct. 574, 582-83, 323 A.2d 744, 748-49, 14 U.C.C. Rep. 599, 603 (1974). The exemption of personal and property injury from the foreseeability requirement represents an attempt to promote social policy while preserving judicial candor. Yet some courts achieve the former without the latter. Consider Huebert v. Federal Pac. Elec. Co., 208 Kan. 720, 494 P.2d 1210, 10 U.C.C. Rep. 545 (1972), where the court paid lip service to foreseeability. Seller had expressly warranted that the door to his electrical switch would not open while the current was on. The system was struck by a bolt
consciously accept an insurer's liability.\textsuperscript{507} Section 2-715(2) does not appear to require that the seller have contemplated the extent of consequential loss; only its occurrence must be foreseeable.\textsuperscript{508} Nevertheless, some courts continue to cloak in "foreseeability" their notions of equitable risk allocation.\textsuperscript{509} The significant lesson of cases embracing the Code standard is this: The foreseeability doctrine is far too dull a knife with which to carve precise limits into commercial liability.

\textbf{Certainty.} Like the foreseeability doctrine, "the standard of 'certainty' was developed, and has been used, chiefly as a convenient means for keeping within the bounds of reasonable expectation the risk which litigation imposes upon commercial enterprise."\textsuperscript{510} The effect of this nineteenth century American case-law development is "to increase the injured party's burden of persuasion well beyond the usual one of making out his case by the 'preponderance or greater weight of the evidence.'"\textsuperscript{511} The classic expression of the rule required that "the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture."\textsuperscript{512} An "absolute certainty" standard was probably never fancied, and the rule has

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\textsuperscript{507} See U.C.C. § 2-715, Comment 3.
\textsuperscript{510} McCormick, supra note 490, § 28, at 105. Professor McCormick notes that the "certainty" rule refined an earlier per se ban on lost profits. \textit{Id.}, § 25, at 98-99. In this respect the certainty doctrine differs from the foreseeability requirement whose development it paralleled. The latter curbed the contract litigant's right to recover; the former relaxed a prior absolute bar to recovery, yet preserved for the courts substantial control over jury beneficence.
\textsuperscript{511} Farnsworth, supra note 489, at 1210-11.
\textsuperscript{512} Griffin v. Colver, 16 N.Y. 489, 491 (1858).
\end{flushright}
long been qualified to require no more than "reasonable certainty." 513

Article Two of the Code did not continue the common-law standard of certainty. Although the text of section 2-715 is silent on matters of proof, Comment 4 makes clear that the drafters viewed the doctrine as one more wooden rule to be swept from the law of sales. 514 In its place the drafters envisioned a supple standard: "Loss may be determined in any manner which is reasonable under the circumstances." 515 Here, as in other areas where it tinkers with entrenched common-law doctrine, the Code has met resistance in the courts.

Both the common law and the Code purport to apply their respective standards of proof uniformly to all varieties of consequential loss. Courts and commentators have long recognized, however, that the certainty doctrine has little or no impact outside the realm of lost profits. 516 The doctrine's limited reach results primarily from the relative ease and precision with which other

513 See, e.g., McCormick, supra note 490, § 26, at 100.
514 The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies [1-106] rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.

515 Id. Even the lissome language of Comment 4 would not ensure consequential damages to every deserving buyer. The allowance of any reasonable manner of proof does not guarantee its availability in a particular case. Nevertheless, in Matsushita Elec. Corp. of America v. Sonus Corp., 362 Mass. 246, 284 N.E.2d 880, 10 U.C.C. Rep. 1363 (1972), the court affirmed a lump-sum award based on an informed conjecture of lost profits resulting from breaches of warranty and other obligations in the sale of component parts. The manufacturer of a new and innovative product, buyer aggressively presented his case and convinced the court of its merit. The court upheld the award, citing § 1-106 ("[the remedies provided by this [Act] shall be liberally administered") and an excerpt from Comment 1 to § 1-106 ("Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more."). 362 Mass. at 264, 284 N.E.2d at 890, 10 U.C.C. Rep. at 1375. If the latter statement applied to consequential damages, as the court assumed, it would represent a more forceful rejection of the certainty rule than does Comment 4 to § 2-715 (reprinted in note 514 supra). It would commend a "hands-off" approach to the bench with respect to jury awards. But Comment 1 to § 1-106 explicitly states that "compensatory damages . . . do not include consequential . . . damages." Apparently, the drafters held sacrosanct the buyer's restitutionary interest but were more reluctant to consecrate consequential damages. Given the finite nature of primary damages and the open-ended risk of consequential loss, the latter calls for greater judicial supervision.
516 See McCormick, supra note 490, § 28, at 105-06. As the court explained in Aldon Indus., Inc. v. Don Myers & Assocs., 517 F.2d 188, 191, 17 U.C.C. Rep. 1002, 1007 (5th Cir. 1975), "proof of anticipated profits contains an inherent element of conjecture and therefore . . . a plaintiff has a more difficult time in bearing his burden of proving the fact and amount of damages to a reasonable certainty."
forms of loss, such as property damage, increased production costs, and frustrated reliance expenditures, may be ascertained. It may also indicate that courts are more firmly committed to protecting reliance than to protecting expectancy interests.

Courts employ the certainty requirement in three ways to control juries. At trial, the judge may instruct the jury that the plaintiff must prove his damages with reasonable certainty. At the trial or appellate level, the court may find that plaintiff's proof falls short of the standard as a matter of law. Finally, the court may declare a particular kind of loss per se incapable of proof to a reasonable certainty, regardless of plaintiff's evidence. Because the first application has not been contested in the cases, this section focuses on the second two. The role played by the certainty doctrine in any warranty case will depend upon the situation of the buyer and the nature of the injury for which he seeks satisfaction.

Where a breach of warranty prevents the buyer from reselling the goods at a profit, the certainty doctrine presents no special impediment to recovery. He may establish his opportunity to resell by identifying an available market for the goods.\(^5\) Evidence of gross revenue lost, however, may not suffice to prove profits; the buyer must deduct expenses saved due to his inability to resell.\(^5\)

When the buyer purchases goods to incorporate into his own product or production process, rather than to immediately resell


Of course, the proof must be genuine. The buyer may not recover for lost profits from a sham resale opportunity conjured up for the purpose of proving damages. See Burgess v. Curly Olney's, Inc., 198 Neb. 153, 159, 251 N.W.2d 888, 892, 21 U.C.C. Rep. 794, 798 (1977).

them, he adds new links to the chain connecting his lost profits with the seller's breach of warranty. Each link is another contingency, and every "if" must be resolved in the buyer's favor before he can recover.\textsuperscript{519} It is one thing for the retailer to say: "Had I received conforming alfalfa seeds, I'd have resold them the next day for profit." It will be much more difficult for the farmer to prove: "If I'd received good seeds, I'd have planted them on time, gotten decent weather, frightened off the crows, bought forty head of healthy breeding cows, fed them with the alfalfa, and sold their calves in the spring." Although both plaintiffs carry the same burden of proof, any standard approaching certainty sits more heavily on the latter.\textsuperscript{520} Sympathetic courts have responded with the "fact-amount" doctrine.

Various expressions of the fact-amount doctrine appear in the cases,\textsuperscript{521} but the effect of each is to relax the certainty stand-

\textsuperscript{519} See Corbin, supra note 495, § 1022, at 135-39.

\textsuperscript{520} Conversely, the fewer the links in buyer's profitmaking chain, the less formidable the certainty requirement. For example, in Drier v. Perfection, Inc., 259 N.W.2d 496, 23 U.C.C. Rep. 323 (S.D. 1977), the buyer of a defective printing press had to channel work to other printers. The buyer's testimony as to lost revenue and ordinary profit percentage, supported by his other job records, fulfilled the reasonable certainty requirement. Id. at 505-07, 23 U.C.C. Rep. at 332-34.

\textsuperscript{521} See, e.g., Brauer v. Republic Steel Corp., 460 F.2d 801, 805, 10 U.C.C. Rep. 1146, 1150 (10th Cir. 1972) ("When [buyer] proves the fact of damage with reasonable certainty 'recovery will not be denied because the damages are difficult of ascertainment.") (quoting Garcia v. Mountain States Tel. & Tel. Co., 315 F.2d 166, 167-68 (10th Cir. 1963)); Great Am. Music Mach., Inc. v. Mid-South Record Pressing Co., 393 F. Supp. 877, 883, 17 U.C.C. Rep. 381, 388 (M.D. Tenn. 1975) ("The rule which precludes the recovery of uncertain damages applies to such damages as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.") (quoting Acuff v. Vinsant, 59 Tenn. App. 727, 737, 443 S.W.2d 669, 674 (1969)); Jerry Alderman Ford Sales, Inc. v. Bailey, 154 Ind. App. 632, 652, 291 N.E.2d 92, 106, 12 U.C.C. Rep. 47, 57 (1972) ("less certainty is required to prove amount of loss than is required to prove the fact that profits were in truth lost"); Uganski v. Little Giant Crane & Shovel, Inc., 35 Mich. App. 88, 110, 192 N.W.2d 580, 590, 10 U.C.C. Rep. 57, 71-72 (1971) ("Where injury to some degree is found, we do not preclude recovery for lack of precise proof. We do the best we can with what we have.") (quoting Godwin v. Ace Iron & Metal Co., 376 Mich. 360, 368, 137 N.W.2d 151, 156 (1965) (quoting Purcell v. Keegan, 359 Mich. 571, 576, 103 N.W.2d 494, 496 (1960))); Leoni v. Bemis Co., 255 N.W.2d 824, 826, 21 U.C.C. Rep. 1057, 1059 (Minn. 1977) ("Once the fact of loss has been shown, the difficulty of proving its amount will not preclude recovery so long as there is proof of a reasonable basis upon which to approximate the amount."); Hardesty v. Andro Corp.-Webster Div., 555 P.2d 1030, 1034, 20 U.C.C. Rep. 352, 357 (Okla. 1976) ("The prohibition of recovery of damages because of uncertainty and too speculative in nature applies to the fact of damage and not to the amount of damage.") [sic] (quoting Martin v. Griffin Television, Inc., 549 P.2d 85, 92 (Okla. 1976)); Swenson v. Chevron Chem. Co., 234 N.W.2d 38, 43, 18 U.C.C. Rep. 67, 73-74 (S.D. 1975) ("mere difficulty in the assessment of damages [is not] a sufficient reason for refusing them where the right to them has been established") (quoting 22 Am. Jur. 2d Damages § 23, at 42 (1965)); Murray v. Holiday
ard as to the amount of loss, once the buyer has convinced the court that he has, in fact, suffered some loss. The doctrine has been criticized as premised upon an artificial distinction, because proof of the fact of loss necessarily proves some minimal amount. Nevertheless, the doctrine strikes a responsive chord in our aversion to procedural rules that smack of forfeiture.

It has been offered, in support of a lowered threshold of proof, that the party whose wrong created the uncertainty should not benefit therefrom. But fault-based rationales are inappropriate in the warranty context. Ample justification for mitigating the harshness of the certainty doctrine can be found without resort to concepts of fault. Where the buyer establishes the probability of some loss, such proof is “reasonable under the circumstances” within the meaning of Comment 4 to section 2-715. Confronted with the alternative of probable undercompensation, courts should not balk at the mere possibility of windfall. By excising an element of the buyer's claim, a court relinquishes control over the magnitude of potential error; the certainty rule brooks no compromise. In contrast, by stepping aside and allowing the buyer to petition the jury, the court minimizes the risk of

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Rambler, Inc., 83 Wis. 2d 406, 432, 265 N.W.2d 513, 526, 24 U.C.C. Rep. 52, 70 (1978) (buyer “must prove by credible evidence to a reasonable certainty that such damages were suffered and must prove, at least to a reasonable probability, the amount of these damages”); cases cited in 22 Am. Jur. 2d Damages § 172 (1965 & Supp. 1978); McCormick, supra note 490, § 27. But see Aldon Indus., Inc. v. Don Myers & Assoc., 517 F.2d 188, 191, 17 U.C.C. Rep. 1002, 1006 (5th Cir. 1975) (“amount of damages must be capable of proof to a reasonable certainty”); Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209, 221, 92 Cal. Rptr. 111, 119, 8 U.C.C. Rep. 643, 654 (1971) (“loss of prospective profits may . . . be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof” (emphasis in original)); Robert T. Donaldson, Inc. v. Aggregate Surfacing Corp. of America, 47 A.D.2d 852, 853, 366 N.Y.S.2d 194, 196, 17 U.C.C. Rep. 375, 376-77 (2d Dep't 1975) (“damages [to reputation] must be reasonably certain in amount and must be traceable with reasonable certainty to the breach”) (citations omitted).

522 17 MINN. L. REV. 194, 196 (1933).

523 See 46 HARV. L. REV. 696, 701 (1933). Cf. Willred Co. v. Westmoreland Metal Mfg. Co., 200 F. Supp. 59, 65-66, 1 U.C.C. Rep. 181 (relevant language edited out) (E.D. Pa. 1961) (breach of exclusive distributorship contract). This rationale has been applied in non-sales (see, e.g., Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263-66 (1946) (where antitrust conspiracy had anticompetitive effect on market, conspirators not allowed to evade damages by pointing to lack of evidence of competitive market conditions)), and is as ancient as the famous case of the chimney sweep (Armory v. Delamirie, 1 Strange 505 (1722) (where defendant goldsmith failed to prove value of jewel which he had wrongfully converted, damages in trover action calculated according to jewel's greatest possible value)).

524 The law of warranties, like the law of strict liability in tort, operates independent of fault concepts. See generally PROSSER ON TORTS, supra note 160, § 75; WHITE & SUMMERS, supra note 2, § 9-1. Seller’s due care may be evidence that the goods were not defective (see Comment 13 to § 2-314), but it is no defense to an established breach of warranty.
judicial error. The jury is free to discount the buyer's proof and award a compromise figure that reflects an intuitive valuation of the buyer's "ifs." 525

But a court should not let go of all its reins. It can protect the seller from unnecessary risk of error by requiring the buyer to use the best available evidence of damages. 526 Should the jury's estimate grossly exceed the court's own, the court may exercise its power to reduce the award. 527

Courts can ascertain proper guidelines for judicial action. Judicial deference to jury approximation will naturally increase as the buyer's evidence of the fact of harm waxes persuasive. Furthermore, the court's reluctance to bar an element of damages should mount in proportion to the alleged magnitude of the in-


jury; a large claim may signal a strong likelihood that damage indeed occurred.\textsuperscript{528} More important, the "certainty" doctrine's inherent danger of forfeiture keeps pace with the amount in controversy. High stakes place a premium on compromise. Where high uncertainty accompanies high stakes, the court can protect the seller by narrowing the allowable range of jury awards.\textsuperscript{529} Once these judicial safeguards are applied, fairness dictates that the seller share the uncertainty risk emanating from his contract with the buyer.

d. \textit{Problems of Proof: Lost Profits, New Businesses, and Goodwill}. Regardless of the evidentiary standard he faces, the alert buyer need seldom approach the bench with young Oliver's naked appeal: "Please, sir, I want some more."\textsuperscript{530}

\textit{Lost Profits}. Where he has marketed a product and can trace its subsequent rejection to the seller's breach, the buyer may establish the amount of his loss with evidence of refunds or credits given to his customers.\textsuperscript{531} Courts have not required that the refunds satisfy a legal obligation of the buyer,\textsuperscript{532} but like all consequential damages they must be reasonable and foreseeable.\textsuperscript{533}

The buyer who has marketed his product, but thanks to the seller's breach of warranty has received less revenue than he reasonably expected, stands in a similar position. The defect in

\textsuperscript{528} This holds true where the buyer's difficulty lies in establishing the amount of his loss or in apportioning his known loss among several causal factors. But where the injury is discrete, the damage observable, and the issue one of cause in fact, the magnitude of buyer's claim should not affect his right to a jury verdict.

\textsuperscript{529} The buyer, of course, may not bluff his way through a bad case by raising the ante. U.C.C. § 1-203 demands good faith in all aspects of commercial dealing, and judges and juries alike are well able to detect frivolity.

\textsuperscript{530} \textsc{C. Dickens, Oliver Twist} ch. II (1837-1838).


\textsuperscript{532} \textit{See} \textit{White & Summers, supra} note 2, § 10-4, at 321. In \textit{Texsun Feed Yards v. Ralston Purina Co.}, 447 F.2d 660, 9 U.C.C. Rep. 211 (5th Cir. 1971), the court rejected seller's attempt to treat this element as a claim for indemnity, which would require prior judicial ascertainment of buyer's liability to his customers. \textit{Id.} at 665-66, 9 U.C.C. Rep. at 217-18.

\textsuperscript{533} To recover, of course, the buyer must show that he suffered a loss. Whether courts should treat a credit, as opposed to a refund, as a total loss may depend upon the nature of buyer's business. A credit most nearly resembles a refund where a customer cashes it in for goods he would have purchased whether or not he had a credit (except that the customer receiving a refund holds the cash in the interim). But when the subsequent purchase would not have taken place but for the customer's need to spend his credit, the buyer has not lost any profit.
the seller's goods may have caused the buyer's product to decline in quality.\textsuperscript{534} or, as with products normally sold in lots, in quantity.\textsuperscript{535} The accomplished sale may help to prove the existence of a market for the buyer's goods, leaving him to prove that seller's breach caused their devaluation. Comparisons to similarly situated operations may suffice to prove either a loss of quantity\textsuperscript{536} or a decrease in marketability.\textsuperscript{537}

Buyers often support claims for lost profits from the interruption of established businesses by pointing to profits made before the breach. But past profits do not assure continued success, and the buyer should present any evidence available to prove that the breach prevented him from taking advantage of existing opportunities. The buyer strengthens his claim by introducing sub-

\textsuperscript{534} See, e.g., Kassab v. Central Soya, 12 U.C.C. Rep. 258 (Pa. C.P. 1970) (cows worth $49,000 as breeders sold for beef at $5,500 due to defective feed); Dobias v. Western Farmers Ass'n, 6 Wash. App. 194, 491 P.2d 1346, 10 U.C.C. Rep. 42 (1971) (corn infested with common smut due to defective herbicide sold as silage).

Quality, as used here, refers to market value. Thus, a defect that forces the buyer to sell his product in an unfavorable market may have the same impact upon the buyer as would a defect that directly harmed the goods. In Karlen v. Butler Mfg. Co., 526 F.2d 1373, 18 U.C.C. Rep. 400 (8th Cir. 1975), a leaky silo forced the buyer to evacuate and sell his wheat in May. He alleged that he had planned to sell the wheat the following December. The going rate for wheat was higher in the later month. In Karlen, however, the buyer was not entitled to recover lost profits because he failed to prove that he would indeed have waited until December to sell. Id. at 1379-80, 18 U.C.C. Rep. at 408-09.


The model operation, however, must resemble buyer's operation. In Melms v. Mitchell, 266 Or. 208, 223-24, 512 P.2d 1336, 1343-44, 13 U.C.C. Rep. 223, 234 (1973), the court refused to award the buyer of a cordwood business profits lost by the seller's failure to provide sufficient wood. Although the seller had previously operated the business at a profit, the buyer had little experience. The court did not find seller's past success persuasive proof of buyer's prospective profits.
sequent profits to show that his operation returned to normal after the breach.\textsuperscript{338}

\textit{New Businesses.} Here lie more complicated problems of proof. Courts vary considerably in their willingness to award lost profits for the delay or demise of a new enterprise. Several jurisdictions demonstrate hostility by retaining per se prohibitions against such claims.\textsuperscript{339} Others adhere to "general rules" that appear less drastic but no less effective.\textsuperscript{340}

\textsuperscript{338} See, e.g., Lewis v. Mobil Oil Corp., 438 F.2d 500, 511, 8 U.C.C. Rep. 625, 642 (8th Cir. 1971) (profits lost during interruption of saw mill proved by showing past and subsequent profits and receptive but unfulfilled market); Gramling v. Baltz, 253 Ark. 352, 360, 485 S.W.2d 183, 189, 10 U.C.C. Rep. 1121, 1127-28 (1972) (lost profits from incapacitation of truck supported by showing available but unfulfilled hauling contracts and average daily net income while in operation); Jerry Alderman Ford Sales, Inc. v. Bailey, 154 Ind. App. 632, 651-55, 291 N.E.2d 92, 105-07, 12 U.C.C. Rep. 47, 56-59 (1972) (evidence of average profits supports recovery for profits lost while buyer deprived of use of commercial truck, but does not support losses accruing after return of truck).

\textsuperscript{339} The Florida rule is that future loss of profits is not recoverable for a breach of warranty unless the plaintiff's business is established. New Amsterdam Casualty Co. v. Utility Battery Manufacturing Co., 122 Fla. 718, 166 So. 856 (1935). A business is established when "'it had such stability and regularity as to give its past record of profits some probative value as indicating the probable subsequent profit.'"...


\textsuperscript{340} It has been frequently stated that if a business is new, it is improper to award damage for loss of profits because absence of income and expense experience renders anticipated profits too speculative to meet the legal standard of reasonable certainty .... However, the rule is not a hard and fast one and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof.

Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209, 221, 92 Cal. Rptr. 111, 118-19, 8 U.C.C. Rep. 643, 653-54 (1971) (emphasis in original) (citations omitted). Not surprisingly, the Gerwin buyer failed to meet his burdens. Quoting the Gerwin language, the Nebraska Supreme Court recently ordered remittitur of a jury award of lost profits from diminished sales of pizza, despite evidence of customer complaints while the defective pizza oven was in use and a 20% increase in sales after the oven was replaced. El Fredo Pizza, Inc. v. Roto-Flex Oven Co., 199 Neb. 697, 261 N.W.2d 358, 23 U.C.C. Rep. 342 (1978). Similarly, in Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781, 12 U.C.C. Rep. 1088 (5th Cir. 1973), the court silenced a claim for lost prospective profits of a new television station while denying adherence to a per se rule: "When the business is new and unestablished, future profits have been consistently denied under Texas law.... [T]he factor that the enterprise was new was not controlling, but rather what was conclusive was the record of profits of the enterprise." Id. at 803, 12 U.C.C. Rep. at 1112. But compare Leoni v. Bemis Co., 255 N.W.2d 824, 826, 21 U.C.C. Rep. 1057, 1060 (Minn. 1977), where the court approved an award of lost prospective profits to a buyer who showed that
Should his new business survive the trauma of defective goods, buyer may be able to transpose a record of subsequent earnings onto the period of delay.\textsuperscript{541} Similarly, the buyer may establish the profit potential of a new extension of his business by referring to the success of established branches of the same enterprise.\textsuperscript{542} But the certainty rule weighs heavily on the gambler. The type of business that is likely to absorb initial losses in search of long-term gains makes a poor candidate for recovery of profits.\textsuperscript{543} Innovative courts could use market data and financial experts to gauge the success potential of such enterprises.\textsuperscript{544} Fi-

\textsuperscript{541} In Multivision Northwest, Inc. v. Jerrold Elec. Corp., 356 F. Supp. 207 (N.D. Ga. 1972), a television station operator failed to prove that electrical equipment had fallen short of its warranties. In dicta, however, the court approved the buyer's use of market and accounting data and financial experts to transpose subsequent profit records onto the period of the breach. \textit{Id.} at 216-17 n.4.


\textsuperscript{543} See, e.g., Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781, 12 U.C.C. Rep. 1088 (5th Cir. 1973) (denying lost profits to television station folding after breach, having made no profit during fleeting existence); Aluminum Co. of America v. Electro Flo Corp., 451 F.2d 1115, 10 U.C.C. Rep. 88 (10th Cir. 1971) (buyer did not appeal trial court's ruling disallowing lost profits on development of innovative project frustrated by breach); Great Am. Music Mach., Inc. v. Mid-South Record Pressing Co., 393 F. Supp. 877, 883, 17 U.C.C. Rep. 381, 388 (M.D. Tenn. 1975) (no consequential recovery where defective record pressing undermines financial investment in prospective showbusiness career: "The question of allowable damages in this case is made more difficult by the speculative nature of the business venture . . . . The proof clearly indicates the extremely hazardous nature of an undertaking to produce a 'hit' record and create a 'star' . . . .")

\textsuperscript{544} McCormick counsels that the success potential of a new enterprise can be evaluated and that courts should accept such evidence where the wrong was done deliberately. \textit{McCormick, supra} note 490, § 29, at 108. This approach should govern all warranty cases, regardless of the seller's state of mind. The techniques available for assessing potential profitability have become more reliable since \textit{McCormick} wrote in 1935, and the willfulness of seller's breach has no bearing on the determination of buyer's loss in a commercial warranty case. \textit{See} note 524 \textit{supra}.

Courts have long valued expert opinion on profits lost by \textit{established} enterprises. \textit{See}, e.g., Hardwick v. Dravo Equip. Co., 279 Or. 619, 569 P.2d 588, 22 U.C.C. Rep. 968 (1977) (award of lost profits from lost use of revoked logging machine supported by expert testimony on productivity and expenses of buyer's operations). The buyer himself, or a member of his organization, may qualify to give his opinion. \textit{See}, e.g., Burrus v. Itek Corp., 46 Ill. App. 3d 350, 360 N.E.2d 1168, 21 U.C.C. Rep. 1009 (1977) (awarding lost profits on estimate by buyer's printing press operators and proof that productivity of press di-
nally, courts have considered evidence of the commercial climate surrounding a new business,\textsuperscript{545} and of the particular buyer’s ability to capitalize on his opportunities.\textsuperscript{546}

In response to the difficulties noted above, it has been suggested that, “[w]hen it is not certain whether plaintiff’s business venture would have produced any profit, courts should award plaintiff damages corresponding to the ‘value of the chance’ to make profits which was lost because of the breach.”\textsuperscript{547} This approach focuses on the buyer’s interest in the \textit{chance to profit}, rather than the \textit{actual profit} that might have resulted but for the breach. The buyer would have to prove by a preponderance of the evidence that the breach was a proximate cause of the enterprise’s failure, but he need not show that, absent the breach, his enterprise would have succeeded.\textsuperscript{548}

\textsuperscript{545} In denying lost profits for a new television station, the court in Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781, 804, 12 U.C.C. Rep. 1089, 1112-13 (5th Cir. 1973), noted: “[Buyer] was also operating in an unfavorable business climate. Its ... UHF station, was in competition in the same town with a VHF station. [Buyer] admitted that a UHF station was not as favorable as a VHF station ....” \textit{Cf.} Matsushita Elec. Corp. of America v. Sonus Corp., 362 Mass. 246, 254, 284 N.E.2d 880, 885, 10 U.C.C. Rep. 1363, 1368 (1972) (upholding award for profits lost from interrupted marketing of new product, court notes that product “received much free and favorable publicity ... reaching widespread audiences ... throughout the country”).

\textsuperscript{546} \textit{See} Melms v. Mitchell, 266 Or. 208, 512 P.2d 1336, 13 U.C.C. Rep. 223 (1973) (denying lost profits to inexperienced buyer taking over formerly profitable business).

\textsuperscript{547} Project, \textit{supra} note 525, at 1024. \textit{Cf.} 46 \textit{Harv. L. Rev.} 696, 699 (1933) (American courts have rejected British rule allowing recovery for value of chance where abandoned endeavor involved no risk of loss). We wish to thank Professor Ian R. Macneil of the Cornell Law School for his helpful insights into the value-of-the-chance concept. Any mistakes are ours.

\textsuperscript{548} Suppose Bert, former sheep farmer, decides to be a country and western recording star. Bert forms the Bighorn Band and asks Sam’s Record Pressing Company to press 40,000 promotional copies of his first song: “Your Bleating Heart.” Sam knows that Bert will use all of his capital—$60,000—on advertisements promoting this first record. Sam promises perfect pressing, aware that anything less spells disaster in the fast-paced music industry. Because the records Sam distributes across the country are warped, they are seldom played by disc jockeys and, consequently, are ignored by distributors and the public. Debts come due and Bert’s Bighorn Band goes bankrupt. Bert sues Sam for breach of warranty, and the court finds a sale of goods subject to Article Two. Bert cannot prove
ahounds with demonstrations of the value of a chance. Lottery
tickets, horserace bets, and stock options are bought and sold like
any other property. Few would contend that a parimutuel stub
has no value unless the holder can prove to a reasonable certainty
that his horse will win the race.

The ideal measure of the value of a chance is the expected
income if the venture succeeds discounted by the odds against
success. Few courts or parties will have access to this informa-
tion. Nevertheless, roughly similar estimates underlie the com-
mercial buyer's decision to invest in a venture. His investment
thus provides the handiest measure of the value of his chance.

If the goods themselves constitute the buyer's entire investment,
adequate compensation consists of primary damages. But the av-
erage buyer will have made other investments, both before and
after the sale, which are wholly or partially converted to losses
when the venture fails.

Although the buyer's investment provides a convenient
yardstick, it does not conclusively establish the value of his chance.
If the seller can show that the buyer's investment was unreason-
ably large in light of the odds of his success, the excess should not
be recoverable. Conversely, the buyer is entitled to show that
the value of his chance exceeded his investment. Expert testi-
mony, market analysis and statistics on the success rates of simi-
larly situated entrepreneurs may help to establish an objective
"value of the chance."

that, but for Sam's breach, "Your Bleating Heart" would have "hit the charts," making the
deleavor successful. The certainty standard would deny Bert not only lost profits but also
promotional costs, because these reliance expenditures would have become losses, regard-
less of the breach, unless Bert's music had appealed to the public. Nevertheless, the breach
fleeced Bert of the property he purchased with his investment—the chance to have his
music heard and evaluated by the public. This loss Bert can prove and should recover.

In our hypothetical (note 548 supra), suppose that the odds of selling one's first coun-
try and western record are one in ten, and that the average income from a successful
record is $500,000. The value of Bert's chance would be $50,000.

In our hypothetical (notes 548-49 supra), Bert invested $60,000 in promoting his
song, presumably believing that his chance of success was worth at least that much.

The investments referred to here are not confined to out-of-pocket expenditures, but
may include other costs such as time, labor, and opportunity costs. Not all business invest-
ments become losses if the venture fails. Buyer often can resell equipment and sublet
rented space. Only that part of his investment that is converted to loss upon failure prop-
erly reflects the price buyer paid for his gamble.

Thus, in our hypothetical (notes 548-50 supra), if Sam can show that Bert overesti-
imated the objective value of his chance by $10,000 (Bert's investment ($60,000) less income
from success discounted by odds against success ($500,000 x .10= $50,000)), Bert should
recover only the objective value.
By treating the buyer's chance of future profits as if it were present property, the court properly uses a fiction to divide the risk of uncertainty between the parties. Absent uncertainty, however, the fiction is unnecessary and unjustified. The seller may be able to show, with the aid of hindsight, that the buyer's venture would have failed even if the goods had performed as warranted. The seller should then escape consequential liability, for he did not insure the buyer against failure of his venture, only against failure of the goods.553

Goodwill. Like the hopes of a new business, goodwill is an intangible property that has perplexed courts awarding damages. Goodwill has been defined as "that which attaches to a business on account of name, location, reputation for competency and the imponderables which cause buyers to return."554 For anyone who has had occasion to choose between two brands of fig bars, the concept holds little mystery. In 1936 the Texas Supreme Court matter-of-factly stated:

Good will is property. It may be sold and it may also be damaged. There is no principle of law making any distinction between it and other property with respect to the right of the owner thereof to recover damages for its destruction....

... Good will, though intangible, is in [sic] integral part of the business the same as are the physical assets.... The rule for measuring such damages is the same as that for measuring damages to any other property.555

This common-sense approach has not enjoyed wide recognition in warranty cases. In fact, thirty-six years later, Professors White and Summers observed that "no court has yet granted recovery under the Code for lost profits resulting from a loss of customer good will."556 Nothing in section 2-715 explains this phenomenon, and courts have since begun to allow recovery for

553 Thus, in our hypothetical (notes 548-50, 552 supra), if "Your Bleating Heart" violated a litigious songwriter's copyright, then the song never had a chance, and there appears no justification for shifting Bert's loss to Sam. Cf. Great Am. Music Mach., Inc. v. Mid-South Record Pressing Co., 393 F. Supp. 877, 884, 17 U.C.C. Rep. 381, 389 (M.D. Tenn. 1975) (seller offers expert testimony that poor musical quality would have prevented success of record even if properly pressed).


556 WHITE & SUMMERS, supra note 2, § 10-4, at 322.
injury to goodwill.\textsuperscript{557} Even in the absence of a per se bar, however, the certainty rule may defeat the buyer’s recovery of goodwill damages.\textsuperscript{558}

The type of evidence useful in assessing injury to any property depends upon the nature of the property. Goodwill is a function of expected profit:

The specific elements to be considered in calculating the “good will” value of a business are: “(1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner?; (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation?”\textsuperscript{559}


\textsuperscript{559} Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690, 698 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976).
The method of proving injury to goodwill may vary with the nature of the enterprise. A buyer catering to a few significant customers may establish his loss by showing that specific patrons have left the fold because of the breach. Where this tactic is unavailable, the buyer may introduce his records of profits earned before and after the injury. Because diminished profitability is crucial to his case, the buyer whose income pattern is erratic, or whose profits actually increased following the breach, will find it difficult to prove goodwill damages. As the owner of goodwill property, the buyer may be competent to testify to its worth before and after the breach, but if his opinion is unsupported by other evidence, it will probably not carry him to the jury. If the buyer sells his business, the difference between its sale price and its pre-breach value as a going concern will help ascertain the amount of his goodwill loss.

The drafters of the Code made no explicit allowance for goodwill damages; nor could they, in a workable Code, itemize all manner of injury. Instead, they established a policy of liberal recovery of damages, proved in any manner reasonable under the circumstances, and designed to make the plaintiff


562 See, e.g., Aldon Indus., Inc. v. Don Myers & Assocs., 517 F.2d 188, 17 U.C.C. Rep. 1002 (5th Cir. 1975) (amount of goodwill injury too speculative where buyer's sales pattern erratic, nature of his business changing, competition increasing, and buyer not expanding to meet market).

563 See, e.g., Robert T. Donaldson, Inc. v. Aggregate Surfacing Corp. of America, 47 A.D.2d 852, 366 N.Y.S.2d 194, 17 U.C.C. Rep. 375 (2d Dep't 1975); Kwipco, Inc. v. General Trailer Co., 267 Or. 184, 515 P.2d 1317, 14 U.C.C. Rep. 125 (1973). Courts should not deny goodwill damages merely because profits have surged after breach, as long as the buyer can show that diminished reputation prevented an even greater surge.


566 See U.C.C. § 1-106(1), reprinted in note 316 supra.

This spirit underlay the opinion in *Westric Battery Co. v. Standard Electric Co.* Westric sought damages for injury to its goodwill caused by defective components incorporated in the batteries it sold. Evidence admitted to establish the injury consisted of (1) the estimate of a competitor who had considered buying Westric and had appraised Westric's goodwill prior to the breach; and (2) the testimony of an expert who calculated the anticipated profit attributable to Westric's goodwill, both before and after the breach. The court upheld an award for Westric, stating: "Although intangible (and not easy to prove), good will is nonetheless real." Furthermore, the "amount cannot and hence need not be proven with absolute precision." The *Westric* decision displays judicial recognition of commercial reality. When hard-headed businesspersons trade daily in the property of commercial reputation, no court can justifiably continue to sweep goodwill under a carpet already crowded with leprechauns and UFO's.

This Project endorses a flexible approach to the proof of consequential damages. Where they survive, per se rules precluding recovery for the lost profits of a new business, and for injury to commercial reputation, should be laid to rest. In their wake, courts should permit juries to estimate damages on the best evidence the case permits, subject to supervision by the trial judge. When considering damages to reputation or the lost profits of a new business, courts should focus on the property interest of the buyer at the time of the breach. Treating goodwill and the "value of the chance" as assets, rather than aspirations, conforms with commercial practice, and appears less like prophesy. Both courts and litigants should find this a more palatable approach than "winner-take-all."

e. The Issue Restated. The fear that "allowing full compensation might impose on the party in breach a crushing burden, greatly out of proportion to the benefit that he originally expected to derive from his bargain," has haunted the law for years. In their quest for fair limits on the liability of commer-

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568 See U.C.C. § 1-106(1), reprinted in note 316 supra.
569 522 F.2d 986 (10th Cir. 1975).
570 Id. at 988.
571 Id. at 987.
572 Id. at 987 n.2.
573 Farnsworth, supra note 489, at 1199-1200.
cial sellers, courts have attempted to employ doctrines unsuited for the task. If foreseeability has proved to be a dull knife, the certainty doctrine is a meat axe—a hit-or-miss evidentiary standard with no inherent relation to the needs or intent of the parties.

f. Suggestions. The Code has gone part way toward reducing the seller's risk by inviting him to disclaim warranties and limit remedies. Such devices allow parties to allocate risk at the outset rather than gamble on judicial hindsight once the deal has soured. Courts ought not to disturb these provisions, where conscionable, only to narrow newly-opened doors with foreseeability and certainty. Many commercial parties, however, do not contemplate disaster or do not provide for it in their agreements; nor is it satisfactory to answer that they should or could have and, because they did not, seller must bite the bullet.

The problem may expose its own Achilles heel. Perhaps some sellers do not attempt to limit their liability for breach of implied warranties because they are unaware that the law has imposed them. Implied warranties arise by operation of law, reflecting a policy decision favoring the buyer's right to rely on receiving quality goods, regardless of the seller's intent. Since the warranty emanates from policy rather than intent, perhaps policy should draw its boundaries. Courts have long used the doctrine of proximate cause to carve out case-by-case limits on tort liability, regardless of the foreseeability of the damage or its ease of proof. A similar approach to implied warranty cases could acknowledge the disproportionality of the damage to the seller's expected revenue, the relative ability of the parties to absorb or distribute the loss, and the remoteness of the injury.

A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service would be a serious hindrance to the operations of commerce and to the transaction of the common business life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform and to the compensation paid and received therefore.


"Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy." U.C.C. § 2-715, Comment 3.

See generally Prosser on Torts, supra note 160, §§ 41-45.

Courts are generally assumed to consider these factors already, in the guise of foreseeability and certainty. See notes 489-90, 509-10 and accompanying text supra.
applying the Code have occasionally referred to proximate cause in this sense but have not squarely addressed the issue. At least one court has expressly found sufficient connection between warranty and tort theory to allow doctrinal migration from one to the other. And in Baden v. Curtiss Breeding Service, a federal district court drew the kind of line one would expect to find in a case decided under tort theory. The buyer was allowed to recover for the anticipated calf crop lost when seller's artificial insemination service failed, but, as a matter of law, could not recover for the would-be progeny of the first generation calves. The court beefed up its discussions of foreseeability and certainty by revealing what may have been its ultimate theme: "[T]he purpose of the Uniform Commercial Code, taken with other applicable law, is to reach some reasonable rule of damages."

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579 Goblirsch v. Western Land Roller Co., 246 N.W.2d 687, 691, 20 U.C.C. Rep. 869, 872 (Minn. 1976) (assumption of risk proper defense to personal injury because "breach of warranty is in part a tort theory subject to traditional tort defenses").


581 It may seem arbitrary to hold that the uncertainties up to the first calf crop may be tolerated but that no matter what the proof is the uncertainties beyond that point will not be. At some point, however, the degree of uncertainty permitted becomes a question of law. . . . In the case of the second calf crop we must project a supposititious calf into a period of supposititious fertility followed by a supposititiously successful breeding which is in turn followed by a supposititiously successful calving, and hence motherhood.

Id. at 245, 15 U.C.C. Rep. at 403. To speak of certainty while drawing a line beyond which no proof can go hardly seems consistent. This "supposititious" chain the court constructs may conjure up a seminal case on proximate cause, Ryan v. New York Cent. R.R., 35 N.Y. 210 (1866). The railroad company negligently set fire to its own building. The fire spread to a neighbor's house, and the neighbor sued. The court, recognizing the need to draw a line that would shelter negligent parties from potentially infinite liability, held that the injury to the neighbor's property was too remote to justify holding the railroad liable. Id. at 216-17. Similarly, proximate cause rulings in implied warranty cases could reflect a policy decision to choose a point and draw a line.

LIMITATIONS ON WARRANTY LIABILITY

We have thus far examined the circumstances that create both express and implied warranties in commercial sales. In addition, we have explored the range of remedies available to a buyer whose seller has breached his warranty obligations. Often we have presupposed a passive seller, content to leave the resolution of warranty issues to the Code rather than the contract. The presupposition is, of course, unrealistic; through careful contract drafting, sellers can significantly limit their exposure to warranty liability. By effectively employing section 2-316, a seller may negate all implied warranties in virtually all commercial transactions. Although express warranties are more resistant to disclaimer efforts, section 2-719 authorizes significant limitations on buyer recovery for breach of warranty.

Our focus now shifts to contractual limitations on warranty liability. Some tension exists between the application of the relevant Code sections to commercial and consumer transactions. The drafters recognized the commercial utility of permitting parties to allocate contractually the risks inherent in any sale. But the drafters tempered the ability of sellers to alter the Code's allocation of risk by imposing procedural and substantive requirements designed largely to protect unsophisticated buyers. As we shall see, courts are less likely to insist upon strict compliance with these requirements in commercial cases, where the policy basis for their applicability is weakest.

A. Disclaimers and Express Warranties—Section 2-316(1)

Because express warranties by definition go to "the basis of the bargain," sellers should not be allowed to disclaim them. Section 2-316(1) sets forth the Code's position toward conflicts between express warranties and language of disclaimer:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit war-

583 The drafters of the Code might have exhibited less concern for unsophisticated buyers if the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1976), had been in effect at the time the Code was drafted.
584 See notes 71-158 and accompanying text supra.
585 "The very idea that a seller may disclaim an express warranty may seem illogical or dishonest." WHITE & SUMMERS, supra note 2, § 12-2, at 351.
ARTICLE TWO WARRANTIES

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.

The message is plain: A seller may not disclaim an express warranty created by the parties' agreement. Although earlier drafts expressed the principle more forthrightly,\textsuperscript{586} the present version remains consistent with the subsection's goal to protect the buyer from surprise.\textsuperscript{587} Courts regularly refuse to disturb express warranties even in the face of explicit attempts at negation.\textsuperscript{588} Nevertheless, the subsection as presently worded guards against overbroad application by buyer-oriented courts; it ensures that language of disclaimer will prevail where the basis-of-the-bargain test or the parol evidence rule prevents warranties from arising.

1. Warranty Language in the Written Agreement—Consistency

a. Words of Disclaimer and the Basis of the Bargain. An express warranty, once created, will survive any attempted disclaimer. Yet words of disclaimer may forefend express warranties at an earlier stage of analysis by keeping warranty language out of the basis of the bargain. By emphasizing that words of warranty and words of disclaimer can often be construed consistently, subsection (1) reminds courts that the underlying goal of buyer protection does not override section 2-313's express warranty requirements.

\textsuperscript{586} The 1952 version of § 2-316(1) provided: "If the agreement creates an express warranty, words disclaiming it are inoperative."

\textsuperscript{587} Comment 1 to § 2-316 explains the section's purpose:

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 denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

Section 2-316(1)'s approval of consistent construction especially aids sellers of experimental goods. Descriptive language in such contracts will necessarily be more aspirational than factual. *U.S. Fibres, Inc. v. Proctor & Schwartz, Inc.*, for example, involved the sale of experimental manufacturing equipment. The contract expressly warranted materials and workmanship but stated that no other express warranties would arise unless the word "guarantee" was used. The contract further provided that, "in view of the variables present affecting (sic) the capacity of the machine, no guarantee can be extended." Despite these words of disclaimer, the buyer alleged that the following language created an express warranty: "This conveyor is especially designed with a deflection tolerance of ± 1/32" across each conveyor plate." If the description of deflection tolerance created an express warranty, it would supersede words purporting to remove it from the same agreement. The Code, however, requires courts to read warranty language together with words of disclaimer to determine whether an express warranty actually arose. The *U.S. Fibres* court, noting both the buyer's awareness that the equipment was unproven and the language of disclaimer, held that no express warranty was created. No inconsistency existed under section 2-316(1) because the descriptive language did not reach the basis of the bargain.

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590 *Id.* at 1045, 16 U.C.C. Rep. at 3.
592 *Id.*, 16 U.C.C. Rep. at 3.
593 The 1952 draft (quoted in note 586 supra) could be read to require courts to ignore disclaimer language when determining whether express warranties have been created. See 1955 N.Y. LAW REVISION COMM'N, supra note 72, at 405-06.
594 *Accord*, Alan Wood Steel Co. v. Capital Equip. Ents., 39 Ill. App. 3d 48, 57, 349 N.E.2d 627, 635, 19 U.C.C. Rep. 1310, 1320-21 (1976). In *Alan Wood Steel*, the court held that a disclaimer and a provision that "descriptions are approximate and intended to serve as a guide" indicated that identification language was not part of the basis of the bargain. Consequently, no express warranty arose as to the lifting capacity of the hoist crane sold.

By admonishing courts to examine words of disclaimer in the basis-of-the-bargain determination, § 2-316(1) enables a seller to state his warranty generally and then define its contours. For example: "Seller warrants these tires against all damage attributable to road hazards. Road hazards do not include fire or other vehicles." Although the first sentence, alone, could create a warranty covering damage from fire or other vehicles, the second sentence removes such hazards from the basis of the bargain. If, however, the second sentence were to cut deeper into the common understanding of "road hazard," it might become inappropriate to read the words consistently.

595 In *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537, 546-47, 22 U.C.C. Rep. 920, 933 (D. Mass. 1977), the seller's statement that a pollution control device would "handle Plastisol fumes" merely referred to the product's intended use and thus created no inconsistency problem. *Gilbert* could be read to hold either that the rep-
A caveat is in order. In *U.S. Fibres*, the court indicated that, had the conveyor been tried and proven, the description might have created an express warranty despite the words of disclaimer.\(^{596}\) The careful seller whose products are not experimental or whose buyers are unsophisticated should avoid words of description altogether.

b. "Time Warranties"—A Special Problem of Consistency. Sellers frequently make express warranties of limited duration. The time qualification may assume either of two forms: a direct limit on duration or a limit on the time from delivery in which a buyer must notify the seller of any breach. The latter form cannot be justified as a clause setting the time from discovery for notification of breach,\(^ {597}\) nor as a shortened statute of limitations.\(^ {598}\) Its real effect is to exclude warranties covering nonconformities that are not reasonably discoverable within the time period. Since the Code frowns upon sellers' modifications of express warranties, courts should not permit sellers to evade its prescribed procedures by mislabeling their disclaimers.

Where the buyer cannot reasonably detect a nonconformity until after the warranty's purported expiration, the court faces two choices under section 2-316(1): either the warranty does not reach the "undiscoverable defect" or the time limit fails as incon-
sistent with the express warranty. In *Wilson Trading Corp. v. David Ferguson, Ltd.*, an affirmation that yarn was "merchantable" directly clashed with a clause that disallowed all claims made after processing. The buyer processed, the yarn shaded, the buyer sued, and the seller hid behind his time limit. Citing section 2-316(1), the court rejected the seller's defense:

[Section 2-316(1)] provides that warranty language prevails over the disclaimer if the two cannot be reasonably reconciled. Here, the contract expressly creates an unlimited express warranty of merchantability while in a separate clause purports to indirectly modify the warranty without expressly mentioning the word merchantability. Under these circumstances, the language creating the unlimited express warranty must prevail over the time limitation insofar as the latter modifies the warranty.

The seller could have avoided consistency problems by limiting his express warranty to defects actually discovered prior to processing.

A closer case would arise under the following clause: "Seller warrants these goods to be free of defects in materials and workmanship. This warranty is limited to one year." Since the first sentence creates an unlimited warranty, the subsequent disclaimer as to defects not discovered within one year seems irreconcilable. Yet such warranties abound. In most instances, a finding that the time limitation is inconsistent with the language creating the express warranty would exceed the buyer's legitimate expectations. These clauses loudly proclaim a promise limited in duration. Only within the stated period may the buyer reasonably rely on the promise; only within that period does the warranty become part of the basis of the bargain. Whether a time limitation is consistent with an unbridled quality representation should depend upon the proximity of the language, the length of the time period, and the nature of the goods sold. For example, an inconsistently worded ten-day limitation in a sale of complex equipment, where most

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600 Relevant portions of the contract are quoted in text accompanying note 857 infra.

defects would remain hidden until much later, so saps the warranty as to nullify the deadline under section 2-316(1). Less drastic limitations, however, regularly prevail. 602

Even consistent time limitations have succumbed to buyers' claims of unreasonableness. In Transcontinental Gas Pipe Line Corp. v. Ingersoll-Rand Co., 603 the seller limited the express warranty on compressor parts to fifteen months from shipment. The court held that the fifteen month period might be an unreasonable limitation on warranty because the seller apparently knew that the vital spare part could not be purchased elsewhere. 604 Despite such precedent, "reasonableness" attacks are difficult to justify. Express warranties are created by contract. Where a seller warrants only against defects discovered within a specified period, the Code provides no basis for judicial extension of the express warranty. Moreover, courts often can permit recovery for latent defects without resort to a "reasonableness" analysis. Words of description outside the warranty clause may create additional warranties, permitting a finding of inconsistency based upon the factors mentioned above. 605 Further, no evidence in Transcontinental Gas suggested that the seller had complied with the Code's requirements for modifying the implied warranty of merchantability. Courts should permit buyers to recover under implied

602 See, e.g., Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 14 U.C.C. Rep. 1080 (10th Cir. 1974) (limit on warranty to six months or 100 hours of operation upheld in commercial sale of rebuilt aircraft); Christopher v. Larson Ford Sales, Inc., 557 P.2d 1009, 20 U.C.C. Rep. 873 (Utah 1976) (manufacturer of motor home protected by "12 month or 12,000 mile" warranty in ultimate consumer's claim based on defects occurring two years after original sale).


604 For another example of such "reasonableness" analysis, see Majors v. Kalo Labs., Inc., 407 F. Supp. 20, 18 U.C.C. Rep. 592 (M.D. Ala. 1975) (citing undiscoverability of defects in soybean inoculant, court voided provision requiring buyer to give notice of any defect within 120 days of delivery).

605 See text accompanying note 602 supra. Thus, in the sale of a "new Ford truck," the descriptive language might create a warranty that the engine will function for more than one year despite a one-year limitation in the seller's warranty clause. The Transcontinental court did not address the possibility of inconsistency under § 2-316(1). Similarly, in Community Tel. Servs., Inc. v. Dresser Indus., Inc., 435 F. Supp. 214, 22 U.C.C. Rep. 686 (D.S.D. 1977), the court found a six month limitation of warranty "unreasonable" in the sale of a television broadcasting tower and permitted the buyer to recover for the tower's collapse during a blizzard. Since the express warranty of wind resistance appeared in the specifications, separate from the time limitation, the court could have reached the same result by finding inconsistency under § 2-316(1).
warranties of unlimited duration despite limitations on express warranties.606

2. Parol Warranties

In addition to making disclaimer language relevant in basis-of-the-bargain determinations, section 2-316(1) further protects sellers by ensuring that their warranty liability will be determined entirely by what the Code recognizes as the parties' agreement. The subsection refers explicitly to section 2-202,607 making it clear that the same standards of admissibility apply to evidence of express warranties as apply to evidence of other terms of the agreement.608 Shore Line Properties, Inc. v. Deer-O-Paints & Chemicals, Ltd.609 illustrates this uniform application. The case involved a sale of large quantities of paint for use in a housing project. The written agreement provided: "Deer-O-Paints are warranted to conform to formula and sample, but not as to use or application."610 Despite the disclaimer, the buyer attempted to introduce an alleged oral representation that the product required only a one coat spray application. Conceding the statement's inadmissibility under section 2-202, the buyer argued that section 2-316(1) creates an exception for parol warranties. The court disagreed: "We recognize that these are precisely the same representations which the trial court excluded under the parol evidence rule. In our opinion, they are not now rendered admissible

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606 A limit on the duration of an express warranty should not affect the duration of ineffectively modified implied warranties. See notes 760-63 and accompanying text infra.
607 U.C.C. § 2-202 provides:
   Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
   (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
   (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
608 Comment 2 to § 2-316 bolsters the conclusion that alleged parol warranties should not receive the same treatment as language in the written agreement. The Comment states: "The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence . . . ."  
610 Id. at 333, 538 P.2d at 762, 17 U.C.C. Rep. at 354.
merely because appellant chooses to characterize them as express warranties.”

A resourceful buyer will not easily forsake his effort to circumvent the parol evidence rule. Comment 1 to section 2-313 provides some solace: “‘Express’ warranties rest on ‘dickered’ aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms.” Read separately from section 2-316(1), this Comment might suggest that even parol express warranties would survive disclaimer language. This specious reasoning has met with some success in consumer cases. Commercial buyers, however, probably could not convince courts that the Comment negates section 2-316(1)’s clear reference to section 2-202.

A thorough analysis of the Code’s parol evidence rule exceeds the scope of this Project. Generally, courts in commercial cases do not hesitate to give literal effect to section 2-202 when buyers allege parol warranties. Section 2-202 excludes all parol evidence that contradicts “a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein.” Thus, a blanket disclaimer will normally preclude oral warranties. Even in the absence of a disclaimer, a

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611 Id. at 334, 538 P.2d at 763, 17 U.C.C. Rep. at 356. In other words, parol representations inadmissible under § 2-202 are not “words . . . relevant to the creation of an express warranty” within the meaning of § 2-316(1).


613 For more extensive commentary on § 2-202, see White & Summers, supra note 2, §§ 2-9 to 2-12, 12-4, at 65-81, 354-56, and Broude, The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code, 1970 Duke L.J. 881.


finding of integration—that "the writing [was] intended also as a complete and exclusive statement of the terms of the agreement"—\(^{616}\) will nullify all parol warranties.\(^{617}\) Of course, a buyer who successfully establishes the ambiguity of warranty or disclaimer language in the writing will be able to introduce otherwise inadmissible evidence for interpretative purposes.\(^{618}\) Where the writing contains neither disclaimer nor integration language, the path should be clear for incorporating parol warranties.\(^{619}\)

Even a disclaimer that has been overridden by a written express warranty may prevail over an alleged parol representation.

disclaimer can never be consistent with express warranties, the buyer seeking to recover on parol warranties must establish that the writing containing the disclaimer was not intended to be "a final expression of their agreement." See O'Neil v. International Harvester Co., 575 P.2d 862, 23 U.C.C. Rep. 1152 (Colo. Ct. App. 1978) (admitting evidence of seller's oral representations and conduct to determine finality of writing containing disclaimer and merger clauses); Drier v. Perfection, Inc., 259 N.W.2d 496, 23 U.C.C. Rep. 323 (S.D. 1977) (parol evidence admissible to prove express warranty despite disclaimer where writing not intended as final). Of course, a limited disclaimer that contradicts the proffered evidence will exclude it as effectively as a blanket disclaimer. See Shore Line Props., Inc. v. Deer-O-Paints & Chems., Ltd., 24 Ariz. App. 331, 538 P.2d 760, 17 U.C.C. Rep. 353 (1975), discussed in text accompanying notes 609-11 supra.

\(^{616}\) U.C.C. § 2-202(b).


Comment 3 to § 2-202 sets forth one instance where a court should exclude evidence of parol warranties even though the terms are not contradictory nor the writing complete:
If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.
Suppose a beer manufacturer purchases a bottling machine. In the written agreement, the seller expressly warrants the machine against defects in materials and workmanship. Immediately following the warranty language appear the words: "There are no other warranties, express or implied." A separate paragraph of the contract describes the machine as capable of filling "45 bottles per minute." Moreover, the buyer claims that the seller orally represented that the product would cut spillage to less than one percent. In the six months since the sale, the machine has functioned without defect. However, spillage has hovered at about five percent (not a defect because this figure is commonly expected in the trade), and the product has consistently filled only thirty bottles per minute.

Damaged by this sluggishness and waste, the buyer sues on two counts of breach of express warranty. He convinces the court that the contractual reference to capacity entered the basis of the bargain, where it found sanctuary against the disclaimer of "other warranties." Nevertheless, the disclaimer should override the alleged parol spillage representation. Although earlier drafts of section 2-316(1) appeared to render words disclaiming express warranties entirely inoperative, the current version only limits the disclaimer's scope. The disclaimer fails to operate only to the extent that it conflicts with warranty language contained in the writing; it remains a term of the agreement sufficient under section 2-202 to exclude contradictory oral statements.

Not even a tight writing gives the seller a license to deceive. Section 2-721 may explain why courts so readily apply section 2-202 to parol express warranties. Under section 2-721, the Code's remedies for breach of warranty extend in full to buyers victimized by fraud or misrepresentation. Most courts correctly refuse to apply section 2-202 where buyers raise these tort

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620 The seller relies on U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043, 16 U.C.C. Rep. 1 (6th Cir. 1975) (discussed in notes 589-96 and accompanying text supra), but the court distinguishes U.S. Fibres on two grounds: (1) the absence of disclaimer language directly pertaining to descriptions, and (2) the nonexperimental nature of the goods.

621 See notes 586-88 and accompanying text supra.

622 See note 586 supra.

623 See note 615 and accompanying text supra.

624 U.C.C. § 2-721 provides:

Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.
claims. Professors White and Summers, however, caution courts to “be wary of turning the fraud exception into an exception that swallows up the entire parol evidence rule.” In one case, at least, this may have occurred. Minnesota law apparently does not require intent to deceive or even recklessness for actionable fraud. The Eighth Circuit Court of Appeals, applying Minnesota law, found that integration and disclaimer language is ineffective against innocent oral misrepresentations unless the contract “explicitly states a fact completely antithetical to the claimed misrepresentations.”

B. Express Disclaimers of Implied Warranties Under Section 2-316(2)

The Code in section 2-316(2) establishes one procedure by which a seller can effectively disclaim the implied warranties of merchantability and fitness for a particular purpose. Subsection (2) provides:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

1. Language Requirements

a. Mentioning “Merchantability.” Under section 2-316(2), sellers attempting to exclude or modify the implied warranty of merchantability must use the word “merchantability.” In Roto-Lith,
the First Circuit apparently ignored this requirement. The court upheld a disclaimer that read: “Seller hereby expressly excludes any and all warranties . . . .” A seller could argue that this clause was sufficient to disclaim all implied warranties under section 2-316(3)(a) because the language “makes plain that there is no implied warranty.” Such a finding, however, would effectively rewrite section 2-316(2) to exclude the requirement that the disclaimer mention “merchantability.” One court explicitly refused to employ subsection (3) (a) as an escape hatch from the requirements of subsection (2), and most decisions enforce the latter without reference to the former.

b. Language to Disclaim the Implied Warranty of Fitness. Comment 4 to section 2-316 states simply:

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(3)(a) treats disclaimers using “as is” or similar language. See notes 678-700 and accompanying text infra.

Comment 1 to U.C.C. § 2-316 notes that the section is “designed principally to deal with those frequent clauses in sales contracts which seek to exclude ‘all warranties, express or implied.’” If the Roto-Lith clause can disclaim under § 2-316(3)(a), it is difficult to imagine a situation where the absence of the word “merchantability” would be decisive.

In Tareyton Elec. Composition, Inc. v. Eltra Corp., 21 U.C.C Rep. 1064, 1069, 1075 (M.D.N.C. 1977), the court did not permit the following language to operate as an “as is” disclaimer: “The service and replacement provisions above are expressly in lieu of all warranties, express or implied . . . .” But see Recreatives, Inc. v. Myers, 67 Wis. 2d 255, 226 N.W.2d 474, 16 U.C.C. Rep. 1258 (1975) (disclaimer negated implied warranty of merchantability under § 2-316(3)(a) without mentioning “merchantability”).


(Emphasis added.) Few courts have said what language excludes the fitness warranty, perhaps because disclaimers often fail the conspicuousness requirement or because many buyers also have access to the merchantability warranty (merchantability may provide overlapping protection making fitness unimportant, and if the seller thought to mention “merchantability,” his language would normally pass the less demanding test for exclusion of the fitness warranty). Courts that reach the issue appear receptive to general disclaimatory language. See, e.g., Smith v. Sharpensteen, 521 P.2d 394, 14 U.C.C. Rep. 649 (Okla. 1974) (disclaimer of any warranty against “patent or latent defects in materials, workmanship or
2. Conspicuousness

Section 2-316(2) requires also that implied warranty disclaimers be conspicuous. Resolution of disputes over a written disclaimer's conspicuousness forces courts to make a policy choice. The drafters apparently felt that the goals of certainty, long-run buyer protection, and avoidance of difficult fact questions counseled against looking beyond the "four corners" of the written instrument. But a court convinced that the buyer saw the disclaimer will be tempted to enforce the small print and do justice in the particular case. For reasons developed below, we disapprove of judicial inquiries into buyers' actual knowledge and offer instead a "modified objective test" based upon what the particular buyer should have noticed.

a. The Objective Test. Section 1-201(10) defines conspicuousness:

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: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

This language suggests an objective test focusing on whether the disclaimer is "so written" that a "reasonable" buyer ought to have noticed it. Presumably the court would not consider evidence

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capacity [or] that the equipment will satisfy the requirements of any law, rule, specification or contract which provides for specific machinery or operators, or special methods' sufficient to exclude implied warranty of fitness). Cf. Mendenhall v. Marion Foods Corp., 57 A.D.2d 1041, 395 N.Y.S.2d 808, 22 U.C.C. Rep. 54 (1977) (question of fact whether language excluding all implied warranties as to "quality, type and productiveness" of seed extended to exclude implied warranty of fitness for particular purpose). There are limits, however, to what a court will permit. See Auto-Teria, Inc. v. Ahern, 352 N.E.2d 774, 777, 20 U.C.C. Rep. 336, 339 (Ind. Ct. App. 1976) (seller's statement that "[t]here is no magic implied" in sale of car wash equipment failed to disclaim implied warranty of fitness for particular purpose).

The Code requires disclaimers of the implied warranty of fitness for a particular purpose to be written. Disclaimers of the implied warranty of merchantability, however, apparently may be oral. Although § 2-316(2) extends the conspicuousness requirement only to written disclaimers, one decision intimates that oral disclaimers must also be conspicuous. Regan Purchase & Sales Corp. v. Primavera, 68 Misc. 2d 858, 861, 328 N.Y.S.2d 490, 493, 10 U.C.C. Rep. 300, 304 (Civ. Ct. N.Y. 1972), which in dicta applied the
as to the buyer's actual awareness or his experience and bargaining position. Many courts base their decisions as to conspicuousness on the written words alone. For example, one line of cases suggests that a seller must make adequate reference on the front of a form to a disclaimer that appears elsewhere.\textsuperscript{639} Other decisions condemn disclaimers that do not significantly contrast with the rest of the instrument.\textsuperscript{640}

A seller must also avoid highlighting only those words in a disclaimer that intimate the presence of warranty. Even though the entire disclaimer is set in contrasting type, capitalization of only the words "WARRANTY" and "MERCHANTABILITY" might be so potentially misleading as to nullify the disclaimer. The court in \textit{Dorman v. International Harvester Co.}\textsuperscript{641} examined a provision referring to an express warranty and stating: "[N]o other warranties, express or implied, including without limitation, the implied warranties of merchantability and fitness for a particular purpose shall apply."\textsuperscript{642} After noting that the writing contained no effective heading such as "DISCLAIMER OF WARRANTIES," the court stated:

The attempted disclaimer of implied warranties in the instant case is ineffective for another reason. Construing the language of the provision strictly . . ., the construction of the wording is ambiguous and could easily be misleading. A purchaser glancing at the provision would reasonably observe the italicized language . . . and would be lulled into a sense of security.\textsuperscript{643}

\textsuperscript{642} Id. at 15, 120 Cal. Rptr. at 519, 16 U.C.C. Rep. at 955 (emphasis in original).
\textsuperscript{643} Id. at 19, 120 Cal. Rptr. at 522, 16 U.C.C. Rep. at 959 (emphasis in original).
b. Evidence of Buyer Awareness. 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.\(^6^{44}\)

True, according to section 2-316's Comment 1, the conspicuousness rule is designed to protect buyers from surprise.\(^6^{45}\) Professors White and Summers point out that "[t]his purpose should be accomplished when the buyer becomes aware in fact of the seller's disclaimer."\(^6^{46}\) They remain unconvinced, however, that the drafters intended anything but "a rigid adherence to the conspicuousness requirement in order to avoid arguments concerning what the parties said about warranties at the time of the sale."\(^6^{47}\)

_Tennessee Carolina Transportation, Inc. v. Strick Corp._\(^6^{48}\) depicts a court grasping for statutory permission to examine a buyer's knowledge.\(^6^{49}\) Although the disclaimer failed because it appeared

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\(^{645}\) U.C.C. § 2-316, Comment 1, provides in part that § 2-316 "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."

\(^{646}\) _WHITE & SUMMERS_, supra note 2, § 12-5, at 361.

\(^{647}\) _Id._


\(^{649}\) The Code may permit a court to consider the buyer's awareness when the seller has called the buyer's attention to the provision. Such action might constitute a valid oral disclaimer of the implied warranty of merchantability if the seller mentioned "merchantability."
in a security agreement, the court disagreed with the lower court's finding that it was inconspicuous. The court relied heavily on Comment 1 to section 2-316, which states in part that section 2-316 permits "the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise."

Focusing on the italicized language, the court reasoned: "Although the emphasized language might refer only to [section 2-316 (3)], certainly actual awareness of the disclaimer is another circumstance which protects the buyer from the surprise of unexpected and unbargained language of disclaimer."

c. The Modified Objective Test. The court in Strick suggested that the "other circumstances" of Comment 1 might refer only to the methods of negating implied warranties set forth in section 2-316(3). This was understatement. As White and Summers indicate, the buyer's knowledge is the very fact issue the drafters intended to avoid by focusing the court's attention on the writing itself. To admit evidence of state of mind—normally a fact question—conflicts with the Code's determination to make conspicuousness a question of law. Finally, courts that allow a

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650 For a discussion of security agreement disclaimers, see notes 673-77 and accompanying text infra.

651 (Emphasis added.)


The court further supported its decision by stating: "Perhaps an additional circumstance of this sort arises where, as here, the buyer is a non-consumer with bargaining power substanti-


Some consumer-oriented courts have required actual knowledge of a disclaimer as a condition to its effectiveness. See, e.g., Zahriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195, 5 U.C.C. Rep. 30 (1968); Hügel v. General Motors Corp., 544 P.2d 983, 18 U.C.C. Rep. 901 (Colo. 1975) (en banc) (as modified on denial of rehearing and clarification (1976)). In Hügel, which involved a conspicuous disclaimer in the sale of a car to a consumer, the result turned on the nature of the buyer:

[Although a general disclaimer clause may negate implied warranties if there is a negotiated contract between a commercial seller and a commercial buyer, it is not appropriate to a consumer sale. This is so unless it is shown that "the so-called disclaimer was clearly brought to the attention of the buyer and agreed to by him ... ."


653 See notes 646-47 and accompanying text supra.

654 Section 1-201(10) assigns the determination of conspicuousness to the court.
buyer’s actual knowledge to resurrect an inconspicuous disclaimer undercut the long-run goal of encouraging sellers to make their disclaimers conspicuous.

We propose an alternative approach for those courts that wish to turn their attention toward the buyer. Although 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. This test would allow courts to focus 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 would enable 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. Although no court has based a finding of conspicuousness solely on the size and experience of the buying enterprise, some courts either allude to the possibility or weigh the factor heavily.655

In commercial litigation, focusing on the buyer permits courts to consider trade usage or prior course of dealing when determining what buyers ought to have noticed. For example, in Velez v. Craine & Clarke Lumber Corp.,656 the buyer and seller had dealt with each other for fifteen years using the same invoice. The job superintendent who ordered lumber knew that past invoices contained


tained disclaimers. The court held that "these circumstances . . . rendered the disclaimer . . . sufficiently conspicuous so that he ought to have noticed it despite the smallness of the type used."\(^{657}\)

3. Disclaimer or Limitation of Remedy Subsequent to Contracting

A disclaimer of implied warranties or other limitation of liability operates only when it is an element of the parties' agreement. Because implied warranties arise when the parties enter into a contract for sale, any subsequent attempt to disclaim them must comply with section 2-209 on contract modification.\(^{658}\) Section 2-209 does not require consideration for modification, but the parties must agree to the change. Courts are reluctant to find buyer assent to a term that operates solely to his disadvantage.\(^{659}\) Moreover, section 2-209(3) may require that the parties comply with section 2-201's statute of frauds. Hard questions arise in the common situation where a printed disclaimer accompanies or fol-

\(^{657}\) Id. at 749, 341 N.Y.S.2d at 252, 12 U.C.C. Rep. at 73. See Checker Taxi Co. v. Checker Motor Sales Corp., 376 F. Supp. 997, 999, 15 U.C.C. Rep. 371, 374 (D. Mass. 1974) (remanding implied warranty action for explanation of finding that "a reasonable commercial buyer would not have noticed [disclaimer] on an order form used for more than 10 years"). For further discussion of warranty exclusion through course of dealing and trade usage, see notes 727-48 and accompanying text infra.

\(^{658}\) U.C.C. § 2-209 provides:

1. An agreement modifying a contract within this Article needs no consideration to be binding.

2. A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

3. The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

4. Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

5. A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

\(^{659}\) In Cambern v. Hubbling, 307 Minn. 168, 238 N.W.2d 622, 18 U.C.C. Rep. 653 (1976), many of the 179 calves delivered by seller under an oral agreement subsequently died of bronchopneumonia. At the time of delivery, the buyer signed a receipt purporting to relieve the seller of liability for loss due to the health of the cattle. The court found no assent to the seller's attempt at modification because the buyer was unaware of the disclaimer's presence in the receipt. See note 664 and accompanying text infra. Comment 2 to U.C.C. § 2-209 suggests that in some situations a seller may need "an objectively demonstrable reason for seeking a modification" even against a commercial buyer.
allows the delivery of the goods. Section 2-207*660 referees the ensuing "battle of the forms."

a. Frequently Encountered Fact Patterns. In a simple retail sale, a conspicuous disclaimer on the outside of a package should be effective. 661 The term is an element of the seller's offer which the buyer accepts when he purchases the goods. In contrast, a disclaimer hidden inside a sealed package would normally fail the Code's conspicuousness test. 662

A seller wishing to disclaim should do so when he enters into an oral or written agreement with the buyer. Failing this, the seller who later delivers goods with disclaimers tacked on may find himself stuck with implied warranties. 663 His disclaimers are merely proposals for modification, and the buyer's acceptance of the goods does not constitute agreement to modify. 664 On the

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660 U.C.C. § 2-207 provides in pertinent part:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.


662 A disclaimer not visible on the face of the goods might nevertheless be conspicuous if a trade usage or course of dealing puts the buyer on notice of its probable presence. See notes 730-37 and accompanying text infra.


other hand, if the seller had enclosed equivalent provisions in prior transactions, he could argue that this course of dealings incorporated the belated disclaimer into the agreement.\textsuperscript{665}

In some transactions, the seller's first communication with the buyer is his delivery pursuant to the buyer's order. The seller's timing of acceptance should not affect the result. The shipment of the goods with disclaimer affixed operates as an acceptance by the seller of the buyer's offer,\textsuperscript{666} and section 2-207 treats the disclaimer as a proposed additional term.\textsuperscript{667} A disclaimer of implied warranties materially alters an agreement\textsuperscript{668} and, therefore, will

\textsuperscript{665} See notes 730-37 and accompanying text \textit{infra}. The case of Geo. C. Christopher & Son, Inc. v. Kansas Paint & Color Co., 215 Kan. 185, 523 P.2d 709, 14 U.C.C. Rep. 1256 (1974), \textit{modified on other grounds}, 215 Kan. 510, 525 P.2d 626, 15 U.C.C. Rep. 370 (1974), illustrates several strategies in the battle of the forms. A seller orally agreed to make a series of deliveries of primer paint to a buyer he had dealt with over a number of years. Along with each delivery, the seller sent an invoice disclaiming implied warranties. Seller alleged that he had followed this same course pursuant to similar agreements with buyer in years past. In vain, seller offered three arguments to save his disclaimers. First, he alleged that the agreements of years past validated the disclaimers by course of dealing that applied to all deliveries in the most recent agreement. \textit{Id.} at 191, 523 P.2d at 715-16, 14 U.C.C. Rep. at 1263. The court apparently misunderstood this plausible contention and brushed it aside. \textit{Id.} at 192, 523 P.2d at 716, 14 U.C.C. Rep. at 1264. Second, seller argued that each delivery under the recent agreement formed a new contract including the disclaimers. \textit{Id.} The court ruled, however, that the parties had entered into a complete contract when buyer accepted seller's bid, long before the first delivery. \textit{Id.} at 192-94, 523 P.2d at 716-17, 14 U.C.C. Rep. at 1264-66. (Even if each delivery had formed a new contract, the disclaimers would normally be excluded, by § 2-207, as mere proposals for modifications that the buyer never agreed to. Seller might have answered that the series of prior deliveries, each a discrete contract, formed a course of dealing validating disclaimers in each subsequent delivery.) Third, seller argued that, even if the deliveries were not discrete contracts, they established a course of performance of the agreement that incorporated the disclaimers. \textit{Id.} at 194, 523 P.2d at 717, 14 U.C.C. Rep. at 1266. The court disagreed, citing § 2-316(2), because the disclaimers were inconspicuous. \textit{Id.} at 194-95, 523 P.2d at 717-18, 14 U.C.C. Rep. at 1266-68.

\textsuperscript{666} See U.C.C. § 2-206(1)(b).

\textsuperscript{667} Under § 2-207(1), the seller's delivery operates as an acceptance even though it proposes an additional term.


Comment 4 to § 2-207 includes disclaimers among the types of clauses that would normally materially alter the contract.
not become part of the contract unless the buyer expressly agrees to it.669

One line of cases seemingly obviates the need for a section 2-207 analysis. In holding a disclaimer on the label of a herbicide ineffective, a Washington state court670 set forth a broad rule for determining a disclaimer's validity:

A disclaimer to be effective must be bargained for. . . . Disclaimers of warranty are disfavored in the law and ineffectual unless explicitly negotiated between the buyer and seller, and set forth with particularity showing the particular qualities and characteristics of fitness which are being disclaimed.671

A negotiation requirement, however, would unduly hamper sellers' attempts to disclaim warranties. The Code imposes no such condition to a disclaimer's effectiveness.672

669 A proposed additional term that materially alters the contract does not become a contract term unless the other party expressly agrees. U.C.C. § 2-207(2)(b) & Comment 3. In essence, the Code treats a material term as a proposal for modification, and the buyer's acceptance of delivery would not constitute his agreement. See note 664 and accompanying text supra. In jurisdictions following Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497, 1 U.C.C. Rep. 73 (1st Cir. 1962), the same facts would result in an effective disclaimer of implied warranties. See Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp., 445 F. Supp. 537, 547, 22 U.C.C. Rep. 920, 934 (D. Mass. 1977) (court followed Roto-Lith but made additional findings "[i]n the event that the First Circuit overrules Roto-Lith"). Roto-Lith held that a party's acceptance, if it proposes an alteration advantageous only to him, is conditional on assent to the proposed alteration. This widely criticized rule transforms the seller's acceptance into a counter-offer which the buyer accepts when he takes delivery. See WHITE & SUMMERS, supra note 2, § 1-2, at 29.

Of course, a disclaimer requiring the buyer to return the goods if he does not accept the additional term excludes implied warranties in any jurisdiction if the buyer accepts delivery. Section 2-207(1) would characterize the seller's delivery as an acceptance "expressly made conditional on assent to the additional or different term." In effect, the delivery would constitute a counter-offer which governs the agreement upon the buyer's acceptance. See Bickett v. W.R. Grace & Co., 12 U.C.C. Rep. 629 (W.D. Ky. 1972) (court gave effect to disclaimer attached to seed bags which made buyer's power to accept delivery contingent on exclusion of implied warranties).


672 The drafters apparently thought that the conspicuousness requirement sufficed to protect buyers from unbargained-for language of disclaimer. See U.C.C. § 2-316, Comment 1.
ARTICLE TWO WARRANTIES

b. Security Agreement Disclaimers. Section 9-206(2) provides that Article Two governs disclaimers of warranties in purchase money security agreements. Comment 3 explains:

[Subsection (2)] prevents a buyer from inadvertently abandoning his warranties by a "no warranties" term in the security agreement when warranties have already been created under the sales arrangement. Where the sales arrangement and the purchase money security transaction are evidenced by only one writing, that writing may disclaim, limit or modify warranties to the extent permitted by Article Two.

Thus in Holton v. Bivens, a disclaimer of express warranties in a security agreement which alone evidenced the contract excluded a seller's alleged parol representations. But in Tennessee Carolina Transportation, Inc. v. Strick Corp., where a written contract for the sale of 150 truck trailers contained no warranty exclusion, the court refused to validate disclaimers of implied warranties in six subsequent security agreements. Although the result in Strick is consistent with the Comment's language, the statute merely states that a security agreement must comply with Article Two to disclaim warranties. The security agreements could thus have worked a modification under section 2-209.

C. Express Disclaimers of Implied Warranties Under Section 2-316(3)(a)

Section 2-316(3)(a) seems wholly to undermine section 2-316(2)'s disclaimer requirements. Section 2-316(3)(a) provides:

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

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673 U.C.C. § 9-206(2) provides:
When a seller retains a purchase money security interest in goods the Article on Sales (Article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties.


677 U.C.C. § 2-209 is reprinted in note 658 supra.
Since subsection (2) is "[s]ubject to subsection (3)," and subsection (3) can be satisfied "[n]otwithstanding subsection (2)," a seller can argue that subsection (3)(a) effectively negates the conspicuousness requirement, the need to mention "merchantability," and the requirement that a disclaimer of the implied warranty of fitness for a particular purpose must be in writing.\textsuperscript{678} In most cases, however, courts have resisted the temptation to read the subsection expansively.\textsuperscript{679}

1. Language Requirement

The record before the Alabama Supreme Court in \textit{Mobile County Gas District v. National Cash Register Co.}\textsuperscript{680} illustrates the confusion caused by section 2-316(3)(a). The seller, who was seeking the balance due on a contract for the sale of an automatic billing machine, persuaded the trial judge to give the following charge: "[A]ll implied warranties in a contract are excluded by language which in common understanding calls the buyer's attention to the exclusion of warranties."\textsuperscript{681} The appellate court held the charge erroneous for failing to require conspicuousness.\textsuperscript{682} Except for omitting "unless the circumstances indicate otherwise," however, the lower court had accurately restated the poorly drafted section 2-316(3)(a).

Although courts regularly validate disclaimers that use "as is" language,\textsuperscript{683} they hesitate to recognize other expressions as effective subsection (3)(a) disclaimers.\textsuperscript{684} Consider the following at-
tempts to disclaim: (1) "buyer accepts the goods AS IS"; or (2) "there are no implied warranties." Clearly the language in the second disclaimer best "makes plain that there is no implied warranty." But most courts agree that the second statement will not disturb the implied warranty of merchantability. Any other result would render meaningless the section 2-316(2) requirement that "merchantability" be mentioned.

Litigation in this area should decrease as contract draftsmen gain more familiarity with the Code's requirements, but unusual attempts to disclaim persist. For example, there is some conflict whether a recital that the buyer accepts goods "in their present condition" or agrees that they are "in good condition" excludes implied warranties. Courts have shown some acceptance of "present condition," equating it with "as is," but at least one court has drawn the line to exclude "good condition."

(3)(a)); Smith v. Sharpensteen, 521 P.2d 394, 14 U.C.C. Rep. 649 (Okla. 1974) (statement that lessor makes "no warranty" and "all liabilities ... are assumed by lessee" satisfies requirements of subsection (3)(a)). Comment 7 to U.C.C. § 2-316 adds "as they stand" to the expressions sanctioned by subsection (3)(a).

See notes 635-36 and accompanying text supra.


Anderson suggests that the effectiveness of "present condition" language should depend on surrounding circumstances. See 1 R. Anderson, supra note 89, § 2-316:37, at 705. Where the statement means only that no alterations will be made, the language does not relate to implied warranties. The presence of "unless the circumstances indicate otherwise" in subsection (3)(a) permits the same approach toward "as is" and "with all faults" provisions.

We believe acceptance of an automobile in its "present" condition is significantly different from acceptance of a car in "good" condition. The term, "present condition," we agree, is like "as is" and "with all faults," since those terms make no direct assertion that the vehicle is qualitatively either good or bad, but, instead, imply a warning to the buyer that he may be purchasing a car in its present condition with whatever faults it may possess. On the other hand, to state that a vehicle is in "good condition" at the time of delivery does not, in our opinion, call the buyer's attention to the exclusion of any warranties, but simply seeks to reassure the buyer that the car he is purchasing is a "good" one.
2. Conspicuousness

The apparent absence of a conspicuity requirement for "as is" disclaimers receives more attention than the vaguely worded subsection demands. One commentator suggested that section 2-316's underlying policy of preventing buyer surprise requires that "as is" disclaimers be conspicuous. Professors White and Summers are less anxious to rewrite the Code, but would consider conspicuity as one factor in section 2-316(3)(a) analyses.

Some courts refer to the language of subsection (3)(a) and hold the conspicuousness requirement inapplicable to "as is" disclaimers, but the majority of decisions cite the goal of buyer awareness and test subsection (3)(a) disclaimers according to the conspicuousness standard set forth in subsection (2). Fairchild Industries v. Maritime Air Service, Ltd. exemplifies the rationale of

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Id. at 356, 292 N.E.2d at 174, 11 U.C.C. Rep. at 954.

A recital that a buyer has examined the goods and finds them to be in good condition may help determine whether implied warranties are disclaimed under § 2-316(3)(b). See notes 724-26 and accompanying text infra.

"The draftsmen took pains to state that the rules in subsection (2) operate 'subject to subsection (3)' and that subsection (3) provisions are operative 'notwithstanding subsection (2).' Consequently it seems that the 'as is' language need not be conspicuous." Hogan, The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code, 48 CORNELL L.Q. 1, 7 n.29 (1962).

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

1 W. HAWKLAND, supra note 167, at 77.

It probably violates the intent of the draftsmen to read such a requirement into subsection (3) (a)—after all, they could easily have provided for it expressly. But conspicuity, should be relevant in determining whether the term was sufficient to call the buyer's attention to the disclaimer and make its meaning plain to him.

WHITE & SUMMERS, supra note 2, § 12-6, at 366.


those courts that refuse to read the statute literally. In *Fairchild Industries*, the purchase agreement for a helicopter contained an inconspicuous “as is” clause. Beginning with the premise that subsection (3)(a) is unclear as to which subsection (2) requirements are dispensed with, the court searched for legislative intent:

In light of the legislative purpose of § 2-316 to insure that exclusions of warranties are brought to the attention of the buyer, we are persuaded by the argument that, while expressions like “as is” put the buyer on notice of the disclaimer, they do so only when brought to the buyer’s attention. This means that in the case of a written disclaimer, the writing must be conspicuous. Acceptance of the argument advanced by Fairchild would mean that a written exclusion of the implied warranty of merchantability, expressly mentioning that word, would be ineffective unless conspicuous; and that the written language, “There are no warranties which extend beyond the description on the face hereof,” would be equally ineffective to exclude a warranty of fitness unless conspicuous. Yet, the words “as is” even if buried in the fine print of a lengthy document, would exclude all implied warranties. We fail to see how this anomalous result would further the avowed purpose of § 2-316 “to protect a buyer from unexpected and unbargained language of disclaimer.” The words “as is” are sufficient to put the buyer on notice that there are no implied warranties, but only when they are brought to the attention of the buyer.

3. A Narrow Reading of Section 2-316(3)(a)

We urge courts to read subsection (3) narrowly in order to prevent the erosion of subsection (2)’s buyer protections, but we disagree with the *Fairchild Industries* approach. Instead of sweeping the statutory language under the rug, courts should dust off subsection (3)’s phrase: “unless circumstances indicate otherwise.” White and Summers suggest that consumer sales might

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694 Professor Hogan demonstrates the weakness of this premise. *See note 688 supra.*

695 274 Md. at 187, 333 A.2d at 316-17, 16 U.C.C. Rep. at 667-68. Compare *Fairchild Industries* with Regan Purchase & Sales Corp. v. Primavera, 68 Misc. 2d 858, 328 N.Y.S.2d 490, 10 U.C.C. Rep. 300 (Civ. Ct. N.Y. 1972). Citing both subsections (2) and (3), *Primavera* stated that “the Uniform Commercial Code explicitly provides that written disclaimers of warranties must be ‘conspicuous.’” Since the court apparently misread the statute, its rationale will not likely be followed.

696 For a rare example of analysis under the phrase, see *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345, 7 U.C.C. Rep. 1257 (1970). *Gindy* involved the sale of new semi-trailers. By custom of the trade, “as is” clauses were common in the sale of used vehicles but not in the sale of new ones. Relying on the introductory
constitute such "circumstances," and that courts might recognize subsection (3)(a) disclaimers only in commercial transactions. Comment 7 to section 2-316 characterizes subsection (3)(a) as "merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade." Since a usage of trade will not bind a noncommercial buyer who is not held to be aware of it, the drafters may not have intended "as is" disclaimers to work against consumers. If courts confine the section to commercial transactions, the conspicuousness issue will lose significance due to courts' increasing willingness to examine the particular buyer's knowledge and experience when adjudicating the validity of disclaimers.

4. "As Is" and Express Warranties

By its terms, subsection (3)(a) applies only to implied warranties. However, pre-Code law generally recognized an "as is" clause as a disclaimer of parol express warranties as well. Because the Code contains no language requirement for excluding express warranties, courts should continue the pre-Code pattern. Section 2-316(1) would prevent an "as is" clause from negating an express warranty in a written agreement, but the phrase should over-ride parol representations. As a blanket disclaimer of express warranties, the "as is" provision would contradict alleged parol warranties, thereby rendering them inadmissible under section 2-202.

language of § 2-316(3)(a), the court held that the trade custom neutralized the "as is" clause in the sale of new trailers. 111 N.J. Super. at 397, 268 A.2d at 353, 7 U.C.C. Rep. at 1266.

697 White & Summers, supra note 2, § 12-6, at 365.

698 See U.C.C. § 1-205(3).

699 Cf. Knipp v. Weinbaum, 351 So. 2d 1081, 1084, 22 U.C.C. Rep. 1141, 1144 (Fla. Dist. Ct. App. 1977) ("the clause 'unless the circumstances indicate otherwise' ... precludes a finding that automatic absolution can be achieved in the sale of used consumer goods merely by the inclusion in a bill of sale of the magic words 'as is'").

700 See notes 644-57 and accompanying text supra.


702 See notes 586-88 and accompanying text supra.

D. Disclaimers Implied from Circumstances

1. By Examination—Section 2-316(3)(b)

Section 2-316(3)(b) provides:

Notwithstanding subsection (2)

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

Under pre-Code law, implied warranties did not arise as to those defects that the buyer would have discovered if he had exercised an opportunity to examine. Subsection (3)(b) modifies this rule. Under this section, implied warranties will arise even where the buyer has had an opportunity to inspect unless, before entering the contract, the buyer has (1) examined the goods or sample or model "as fully as he desired," or (2) ignored the seller's demand to examine the goods. Nevertheless, some courts still apply the seller-oriented pre-Code rule.

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704 See Uniform Sales Act § 15(3); 1 W. Hawkland, supra note 167, at 77.
705 See Calloway v. Manion, 572 F.2d 1033, 1035 n.2, 23 U.C.C. Rep. 1143, 1145 n.2 (5th Cir. 1978) (implied warranties excluded as to horse where buyer did not examine after seller's demand). Comment 8 to § 2-316 evidences the drafters' intent to modify the "opportunity to inspect" rule:

In order to bring the transaction within the scope of "refused to examine" in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand.


706 See, e.g., Rock Creek Ginger Ale Co. v. Thermice Corp., 352 F. Supp. 522, 528, 12 U.C.C. Rep. 810, 818 (D.D.C. 1971) ("Opportunity to inspect the product in question which has been declined or not pursued precludes the existence of implied warranty, except as to a defect which would not be revealed upon a reasonably careful examination." (emphasis added)); Georgia Timberlands, Inc. v. Southern Airway Co., 125 Ga. App. 404, 188 S.E.2d 108, 10 U.C.C. Rep. 789 (1972) (no actual inspection or demand to examine used airplane, but question of fact whether buyer should have discovered defects). Cf. Richards
Courts have not explicitly defined what must occur before a buyer has examined "as fully as he desired." A buyer who requests an examination and thereby obtains a reasonable opportunity to inspect might lose his implied warranties whether or not he has actually examined the goods. In *Michael-Regan Co. v. Lindell*, a seller furnished samples of tabletops at the buyer's request. The wood warped and the buyer sued. Pursuant to a finding that the buyer "had an opportunity to inspect, test, and examine the [sample] tabletops furnished by [the seller]," the court held that the buyer had waived the implied warranty of merchantability. These facts justified the court's apparent lack of concern with the extent to which the buyer actually examined the goods. Where a buyer's conduct leads a seller reasonably to conclude that the buyer examined the goods, no implied warranties against discoverable defects should arise.

The buyer has examined the goods "as fully as he desired" even though he has not examined them at all. A cautious seller will demand inspection and disclaim warranties; a smart seller will do both in writing.

The statute and Comment emphasize that for an examination to exclude implied warranties, it must occur prior to the making of the contract. Acceptance after a post-contractual inspection may preclude rejection or revocation of acceptance, but the in-

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707 527 F.2d 653, 17 U.C.C. Rep. 958 (9th Cir. 1975).

708 Id. at 661, 17 U.C.C. Rep. at 961.

709 But in *Austin Lee Corp. v. Cascades Motel Inc.*, 123 Ga. App. 642, 182 S.E.2d 173, 9 U.C.C. Rep. 462 (1971), the Court refused to find implied warranties disclaimed even though the buyer requested and received bedspread samples for the purpose of examination. The Court focused on the absence of a seller demand and did not consider the possibility that the buyer had examined as fully as he desired.

The *Austin Lee* decision is also notable for the implication that a refusal of a seller's demand to examine a sample can negate implied warranties. However, Professors White and Summers note:

While the words "sample or model" are used in connection with an actual examination by the buyer, they are not used in connection with his refusal to examine. This wording would indicate that a disclaimer does not arise by virtue of paragraph (b) when the buyer refuses to examine a sample or model.

*White & Summers, supra* note 2, § 12-6, at 367 n.85.

710 U.C.C. § 2-316, Comment 8 provides in part:

"Examination" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract.

711 See U.C.C. § 2-607.
ARTICLE TWO WARRANTIES

spection itself will not limit the buyer's freedom to invoke implied warranties.\textsuperscript{712} The following clause from a contract for a sale of railroad cars illustrates this point:

All construction is subject to inspection by you or your authorized agent who may have access to any part of our plant where any of this work is in progress. Cars to be satisfactory in every respect before acceptance and final inspection and acceptance to be at our plant. Should you waive inspection, then inspection for the Purchaser will be performed by our regular inspection forces and said inspection will constitute acceptance of the cars at our works by your Company.\textsuperscript{713}

This clause should not affect implied warranties. Even if the language can be construed as a demand for inspection, the right to examine does not arise until after the creation of the contract.\textsuperscript{714} Nevertheless, some decisions have erroneously applied subsection (3)(b) to examinations occurring after contract formation.\textsuperscript{715}

\textsuperscript{712} A buyer's use of a product when he has actual or constructive knowledge of defects may affect his ability to recover consequential damages. See notes 915-27 and accompanying text infra.


\textsuperscript{714} "When the right to inspect arises after the creation of the contract ..., acceptance of goods, even with knowledge that they do not conform to the contract, may preclude rejection but it does not impair any other remedy." \textit{Id.} at 1372-73, 20 U.C.C. Rep. at 1190 (8th Cir. 1977) (emphasis in original). The \textit{Soo Line} court found that the contract language did not affect express warranties and therefore permitted the buyer to recover. See Murray v. Kleen Leen, Inc., 41 Ill. App. 3d 436, 354 N.E.2d 415, 20 U.C.C. Rep. 298 (1976) (examination after formation of contract did not affect implied warranty of fitness for a particular purpose). Cf. Young & Cooper, Inc. v. Vestring, 214 Kan. 511, 525, 521 P.2d 281, 290, 14 U.C.C. Rep. 916, 929 (1974) (implied warranty may be excluded or modified where inspection made before, but not after, contract formation) (dictum).

\textsuperscript{715} In Davis v. Pumpco, Inc. 519 P.2d 557, 14 U.C.C. Rep. 89 (Okla. Ct. App. 1974), the court cited subsection (3)(b) (omitting the words "before entering into the contract") in holding that a buyer's examination after acceptance of pipe glue used in a mobile home project disclaimed an implied warranty of fitness for a particular purpose. Cf. Georgia Timberlands, Inc. v. Southern Airway Co., 125 Ga. App. 404, 188 S.E.2d 108, 10 U.C.C. Rep. 789 (1972) (court denied summary judgment as to exclusion of implied warranties by examination because fact question existed as to whether defects should have been discovered prior to acceptance); Michigan Sugar Co. v. Jebavy Sorenson Orchard Co., 66 Mich. App. 642, 645-46, 239 N.W.2d 699, 695, 19 U.C.C. Rep. 100, 102 (1976) (applicability of subsection (3)(b) turns on whether inspection occurs prior to acceptance). In some cases, the acceptance of goods and the contract formation may coincide. See note 669 and accompanying text supra. It is unclear whether this was the case in either \textit{Georgia Timberlands} or \textit{Michigan Sugar}.

Of course, the buyer's use of a product after he should have discovered its defects may limit his ability to recover for breach of implied warranty. Comment 8 to § 2-316 provides that under these circumstances the breach might not be the proximate cause of the buyer's
To negate implied warranties, the seller need not demonstrate that the buyer actually discovered defects in the goods. Subsection (3)(b) merely requires that the examination "ought in the circumstances" to have revealed the defects. Where circumstances permit only a limited examination, implied warranties will remain in force against defects that only a more thorough examination could have uncovered.\(^7\) Where an examination is less complete than circumstances allow, however, the buyer waives warranties against all defects that an appropriate examination would have revealed.\(^1\)

Comment 8 indicates that a court should consider the buyer's skill when determining what defects the buyer's examination should have revealed.\(^7\) Courts apply this principle without hesitation to exonerate sellers from liability to commercial buyers. In *Blockhead, Inc. v. Plastic Forming Co.*,\(^7\) a buyer of wiglet cases approved samples after examination. The buyer did not discover a damage. Thus, although the court in *Davis* erred in allowing the buyer's post-agreement examination to negate the implied warranty, it probably was correct in denying consequential damages to the buyer. See notes 915-27 and accompanying text infra.


The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. ... A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

U.C.C. § 2-316, Comment 8.

defect in the handle housing during the pre-contract inspection, but the court would not permit recovery based on the implied warranty of merchantability.

The scope of the exclusion obtained through a buyer's examination depends not only on the examination made, but on the examination that should have been made by the particular buyer. . . . In the present situation we are not confronted with a consumer who would not notice imperfect construction or defects apparent only to a trained eye. Rather the plaintiff Friedman was an informed buyer who designed the product in issue and held mechanical and design patents covering similar cases. . . . Had the cracking in fact resulted from a defectively thin handle housing, that weakness cannot be said to have been latent so as to have been undiscoverable during Friedman's examination.\textsuperscript{720}

Although subsection (3)(b) applies only to implied warranties, a pre-agreement examination can affect express warranties as well. For example, examinations can remove affirmations or descriptions from the basis of the bargain.\textsuperscript{721} But when the buyer cuts his examination short in justifiable reliance on a seller's statements and consequently fails to uncover defects, the express warranties should not be affected.\textsuperscript{722} Nor should the failure to inspect for defects covered by the express warranty negate im-

\textsuperscript{720}Id. at 1025, 18 U.C.C. Rep. at 646 (citations omitted). Cf. Michael-Regan, Inc. v. Lindell, 527 F.2d 653, 17 U.C.C. Rep. 958 (9th Cir. 1975) (buyer experienced in wood industry should have discovered wooden tabletops' potential to warp); Chaq Oil Co. v. Gardner Mach. Corp., 500 S.W.2d 877, 879, 13 U.C.C. Rep. 806, 808-09 (Tex. Ct. App. 1973) (visual examination should have revealed to buyer-engineer that machine not in running condition); Valiga v. National Food Co., 58 Wis. 2d 232, 206 N.W.2d 377, 12 U.C.C. Rep. 830 (1973) (mink food expert should have discovered contaminants). Because the \textit{Valiga} court found that the buyer's examination negated the reliance necessary for an implied warranty of fitness for a particular purpose to arise under § 2-315, and that the seller did not breach the implied warranty of merchantability, it did not need to reach § 2-316(3)(b). Likewise, in \textit{Blockhead} the court found insufficient reliance for an implied warranty of fitness. Thus, where a buyer's claim is based only on a § 2-315 fitness warranty, the court should determine whether the elements of the warranty exist before plunging into a § 2-316(3)(b) exclusion analysis.

\textsuperscript{721}See notes 153-54 and accompanying text \textit{supra}. Express warranties should remain in force even where a buyer's examination reveals a defect if the buyer still has reason to expect a delivery conforming to the seller's representations. See \textit{generally} I R. Anderson, \textit{supra} note 89, at § 2-316:46.

plied warranties against the same defects; the seller's assurance would constitute "circumstances" removing the defects from the ambit of what the examination should have revealed.  

Occasionally a contract recites that "buyer has examined the goods fully and accepts them in good condition." Since subsection (3)(b) requires that the buyer either actually examine the goods or refuse to do so, such a clause should not exclude warranties.  

To regard the clause as determinative would allow the seller to circumvent the language requirements of subsection (2). Coupled with a buyer opportunity to examine, however, the clause might evidence a seller demand which could satisfy subsection (3)(b).  

Moreover, if the word "present" were substituted for "good," the clause could constitute a subsection (3)(a) disclaimer.  

2. By Course of Dealing, Trade Usage, or Course of Performance—Section 2-316(3)(c)

Section 2-316(3)(c) provides:

Notwithstanding subsection (2)

.....

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

723 In Young & Cooper, Inc. v. Vestring, 214 Kan. 311, 323, 521 P.2d 281, 291, 14 U.C.C. Rep. 916, 929 (1974), the court noted that the buyer's visual examination did not exclude implied warranties as to the health of the livestock even though testing facilities were available. The court based this conclusion on the seller's failure to demand that the buyer fully examine the livestock. Since the buyer actually examined the goods, however, the court could more appropriately have characterized the seller's assurances as "circumstances" which removed the defects from among those which the buyer ought to have discovered.  


The parol evidence rule should not exclude evidence of lack of an actual examination. First, it is difficult to view an acknowledgement that an examination occurred as a "term" of the agreement sufficient to exclude contradictory evidence under § 2-202. Second, § 2-316(3)(b)'s requirement of an actual examination should enable a court to inquire into what actually occurred. Finally, even if the acknowledgement is a contract term, its only purpose is to disclaim warranties. Since the acknowledgement of examination fails to mention "merchantability," it is invalid under § 2-316(2).  

725 In Quality Acceptance Corp. v. Millon & Albers, Inc., 367 F. Supp. 771, 774, 14 U.C.C. Rep. 78, 81 (D. Wyo. 1973), the buyer's opportunity to inspect coupled with a clause acknowledging that inspection had occurred provided one basis for finding no implied warranties in a lease of business machines. However, the court appeared to regard the contract clause as the sole determinant of warranty exclusion.  

726 See notes 686-87 and accompanying text supra.  

727 U.C.C. § 1-205 defines course of dealing and usage of trade:
Arguably, this subsection serves no purpose since other Code provisions ensure that evidence of course of performance, course of dealings, and usage of trade may supplement the parties’ agreement.\footnote{228} Perhaps the drafters added subsection (3)(c) anticipating that courts might view section 2-316’s methods for disclaiming warranties as exclusive.\footnote{229}

As noted above,\footnote{230} a trade usage or course of dealing can breathe life into an otherwise ineffectual disclaimer clause. Courts have applied this doctrine to give effect to written disclaimers or remedy limitations injected into an already existing contract\footnote{231} as

\begin{enumerate}
\item A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
\item A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
\end{enumerate}

\textbf{U.C.C. § 2-208(1) defines course of performance:}

\begin{enumerate}
\item Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.\footnote{228} Under § 1-205(3), a course of dealing or trade usage may “give particular meaning to and supplement or qualify terms of an agreement.” Section 2-208(1) makes course of performance “relevant to determine the meaning of the agreement.” Moreover, § 2-202 (reprinted in note 607 supra) enables all three types of evidence to supplement the terms of a written agreement.\footnote{229}
\end{enumerate}

\footnote{230} For a similar discussion concerning § 2-314(3), see notes 299-304 and accompanying text supra.

well as to inconspicuous disclaimers\textsuperscript{732} and disclaimers that fail to mention merchantability.\textsuperscript{733} A court should recognize a "post-agreement" disclaimer where a course of dealings or trade usage indicates that the buyer should have expected its presence.\textsuperscript{734} An inconspicuous disclaimer which is familiar from past party dealings or is common in the trade presents greater analytical difficulty. If a court focuses on what the particular buyer ought to have noticed, a course of dealings or trade usage can render the disclaimer conspicuous.\textsuperscript{735} Courts employing an objective test\textsuperscript{736} should require actual knowledge of past inconspicuous disclaimers because the Code presumes that buyers do not notice such language. Even then, the terms of the disclaimer should be defined by the trade usage or course of dealings alone rather than by the writing.\textsuperscript{737}


\textsuperscript{733} In Agricultural Servs. Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1066, 21 U.C.C. Rep. 443, 453 (6th Cir. 1977), the court suggested that it would uphold a modification failing to mention "merchantability" if it was present in prior dealings. Since § 2-316(2) intimates that a disclaimer lacking the magic word fails to notify the buyer that the merchantability warranty is excluded, the seller wielding § 2-316(3)(c) should have to show that the buyer understood the impact of the disclaiming language. In Agricultural Services, however, the court mistakenly treated a damage ceiling as a warranty modification. See generally notes 769-78 infra.

\textsuperscript{734} In such cases, the disclaimer becomes a term of the seller's offer or part of the seller's acceptance conditioned on the buyer's acceptance of the additional term. See U.C.C. §§ 1-205(3), 2-207(1). When the post-agreement disclaimer differs materially from disclaimers in the trade or prior party dealings, the language of the past disclaimers should govern the seller's warranty liability. If the post-agreement disclaimer increases the seller's exposure, the buyer may successfully argue that the disclaimer represents an agreement to modify the course of dealings or trade usage, but he would then be bound by the disclaimer in the present transaction.

\textsuperscript{735} See cases cited in note 732 supra.

\textsuperscript{736} See notes 638-43 and accompanying text supra.

\textsuperscript{737} In "objective test" jurisdictions the court should ascertain the trade usage or course of dealings by examining prior disclaimers. The inconspicuous disclaimer in question would be important only to show that the parties had not agreed to modify trade usage or prior dealings.
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Warranty exclusions through course of dealings are most common where prior agreements between the parties contained disclaimers.\(^{738}\) Conceivably, though, "a sequence of previous conduct between the parties" could imply a demand for an examination, thereby negating warranties under subsection (3)(b). Also, a course of performance in a prior transaction could create a course of dealings exclusion in the present one. In *J.D. Pavlak, Ltd. v. William Davies Co.*,\(^{739}\) a contract for the sale of meat provided: "If the product tests less than 85% Lean by chemical analysis, seller will allow for excess fat content at invoice price and buyer will accept such as full settlement."\(^{740}\) After determining that the contractual remedy for breach of express warranty was exclusive, the court rejected the buyer's claim for recovery under section 2-714 for breach of implied warranty; the buyer's acceptance of the contract settlement formula in a prior transaction, coupled with the present contract's language, excluded the implied warranty of merchantability as to the fat content of the meat.\(^{741}\)

Many sellers demand that their buyers pay for repairs. If a buyer accedes to such demands, he may, through course of performance, have forfeited his implied warranties.\(^{742}\) Occasionally a buyer will wish to disregard implied warranties for the sake of preserving an ongoing business relationship. The course of performance and course of dealings decisions should caution buyers to pay for repairs only after declaring that they are not waiving their rights as to future breaches.

Courts most often invoke subsection (3)(c) to exclude implied warranties through trade usage. To qualify under the subsection, a seller must establish that the trade usage exists,\(^{743}\) that the particular transaction falls within its scope,\(^{744}\) and that the buyer is either a trade member or possesses actual or constructive knowl-


\(^{740}\) Id. at 4, 351 N.E.2d at 245, 20 U.C.C. Rep. at 396.

\(^{741}\) Id. at 3, 351 N.E.2d at 247, 20 U.C.C. Rep. at 399.


edge of the trade usage. Trade usages frequently exclude implied warranties in agricultural transactions and in sales of used goods in certain industries. Sellers' attempts to apply trade usage to other types of sales meet with varying success.

E. Cumulation and Conflict of Warranties—Section 2-317

Under pre-Code law, express warranties often displaced implied warranties. Section 2-317 has significantly altered the rules governing the cumulation and conflict of warranties. It provides:

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

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


749 See generally Annot., Express Warranty as Excluding Implied Warranty of Fitness, 164 A.L.R. 1321 (1946).
(b) A sample from an existing bulk displaces inconsistent general language of description.
(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Before proceeding under section 2-317, the court must make a threshold finding that it is unreasonable to construe warranties consistently. Moreover, Comments 2 and 3 indicate that the three specific rules of section 2-317 are designed to help ascertain the parties' intent, not to supplant it. Thus, a court must look to the circumstances surrounding a sale before the rules in subsections (a), (b), and (c) come into play. But a seller who has led the buyer to believe that all warranties could be complied with is estopped from asserting any inconsistency as a defense to the buyer's claim.

1. Consistency Among Warranties—A Test

When are warranties inconsistent? The text of section 2-317 leaves the question essentially unanswered. In an attempt to increase buyer protection, the drafters created a strong presumption that warranties are cumulative. Professors White and Summers point out that this presumption is consistent with the policy embodied in section 2-316 that warranties are preserved unless the seller complies with explicit disclaimer requirements. Comment 2 to section 2-317 indicates that warranties

Comment 2 states that "[t]he rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from the circumstances of their transaction shall prevail." Comment 3 adds: "These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable."

See U.C.C. § 2-317, Comment 2. Comment 1 to § 2-317 reiterates that "all warranties are made cumulative unless this construction of the contract is impossible or unreasonable."

For two reasons we believe that courts should exercise some restraint in ruling that multiple warranties are inconsistent. First, 2-316 provides several devices for disclaiming warranties, and the comments to that section indicate a policy of preserving implied warranties unless the seller complies with the prescribed formal requirements. Second, in nearly all cases the seller drafts the sales agreement including the express warranty clause; in those cases it seems reasonable to place the burden of multiple warranties on the seller, since he had the opportunity to resolve any possible inconsistencies. White & Summers, supra note 2, § 12-7, at 375.
are consistent if the seller can comply with all of them. By applying this test, courts could maximize buyer protection without forcing sellers into warranty dilemmas.

2. Consistency Between Express and Implied Warranties

Comment 9 to section 2-316 articulates the Code's position toward conflicts between express and implied warranties in sales by specifications:

The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with [section 2-317] on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.

Mohasco Industries, Inc. v. Anderson Halverson Corp. addressed the problem anticipated by Comment 9. A Las Vegas hotel used detailed specifications in purchasing carpeting. The Nevada Supreme Court reversed an award of damages for excessive shading in the carpeting. Noting that the seller had complied precisely with the specifications and that any "defect" resulted directly from the type of yarn that the buyer had specified, the court ruled that the express warranty by specifications negated the implied warranty of merchantability. Any other result would have forced the seller to breach either the express or implied warranty.

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754 U.C.C. § 2-317, Comment 2, provides in part:
To the extent that the seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.

755 For a discussion of cases dealing with the implied warranty of fitness for a particular purpose in sales involving specifications, see notes 266-68 and accompanying text supra.


757 Id. at 119, 520 P.2d at 236, 14 U.C.C. Rep. at 609.

758 Accord, Murphy v. Eaton, Yale & Towne, Inc., 444 F.2d 317, 327, 9 U.C.C. Rep. 805, 819 (6th Cir. 1971) (buyer's employee could not recover under implied warranties for in-
The question of consistency arises as well when an implied warranty reaches a defect that an express warranty does not. A buyer's precise specifications as to the materials and design of a car's interior, for example, should not displace an implied warranty of merchantability as to the car's engine. A finding of inconsistency would effectively undo section 2-317's carefully designed presumption of cumulativeness and reinstitute the pre-Code rule that an express warranty negates all implied warranties.

White and Summers perceive inconsistency in asserting an implied warranty of merchantability for an alleged defect which had been covered by an expired express warranty. Even in the absence of a disclaimer complying with section 2-316, they would hold that a "24,000 mile or 24 month" express warranty of no defects as to certain parts displaces the implied warranty of merchantability as to those same parts. They reason that the parties probably intended the express warranty to be exclusive, and apparently weigh this more heavily than the policy of requiring compliance with section 2-316 to disclaim. But if construing these warranties as consistent is reasonable, then section 2-317 makes


In Ruskamp, the pigs did not breed because they were inflicted with rhinitis, a disease unmentioned in the warranty. Since the implied warranty of merchantability did not conflict with the express warranty but was merely broader in scope, the buyer could have relied upon it as well as on the implied warranty of fitness for a particular purpose.

See White & Summers, supra note 2, § 12-7, at 373-75.
party intent irrelevant. A finding of cumulativeness merely requires the seller to provide goods free of latent defects and to rid them of nonconformities discoverable within the warranty period. Since the seller can comply with both warranties, his obligations are not inconsistent. Even so, a court could find all implied warranties disclaimed under section 2-316(3)(c) if trade members generally regard the express warranty as exclusive. Similarly, an item that outlives its express warranty may be merchantable. But, section 2-317 is triggered only where the seller faces inconsistent obligations.

761 Implied warranties arise regardless of party intent. See U.C.C. §§ 2-314, 2-315, discussed in notes 159-314 and accompanying text supra. Under § 2-317, party intent becomes significant only after a finding of inconsistency.

762 See WHITE & SUMMERS, supra note 2, § 12-7, at 374.


Although courts divide on this issue, most seem to support our analysis. For example, in Gable v. Silver, 258 So. 2d 11, 10 U.C.C. Rep. 316 (Fla. Dist. Ct. App.), aff'd, 264 So. 2d 418 (Fla. 1972), the court permitted recovery for defects in an air conditioning system under common law warranties of merchantability and fitness despite the expiration of a one-year guarantee on equipment, materials, and workmanship. Citing Koellmer v. Chrysler Motors Corp., 6 Conn. Cir. Ct. 478, 276 A.2d 807, 8 U.C.C. Rep. 668 (1970), cert. denied, 160 Conn. 590, 274 A.2d 884 (1971), discussed in WHITE & SUMMERS, supra note 2, § 12-7, at 374, the court stated: "[T]he has consistently been held that an express warranty is not inconsistent with, does not negate or exclude implied warranties of fitness and merchantability. They may easily coexist. We hold such a coexistence lies here." 258 So. 2d at 14, 10 U.C.C. Rep. at 320. But see Christopher v. Larson Ford Sales Inc., 557 P.2d 1009, 20 U.C.C. Rep. 873 (Utah 1976) (mobile home retailer unable to recover from manufacturer after expiration of one-year express warranty).

Essentially the same issue arises when the express warranty is still in effect, but a buyer elects to pursue an implied warranty. This occurs most frequently where a limitation of remedy seems to apply only to express warranties. See notes 848-52 and accompanying text infra. We would view the warranties as coexistent unless compliance with both is not reasonably possible. See Stream v. Sportscar Salon, Ltd., 91 Misc. 2d 99, 103-05, 397 N.Y.S.2d 677, 681-82, 22 U.C.C. Rep. 631, 636-37 (Civ. Ct. N.Y. 1977) (buyer permitted to sue under ineffectively disclaimed implied warranty of merchantability as well as unexpired express warranty); General Instr. Corp. v. Pennsylvania Pressed Metals, Inc., 366 F. Supp. 139, 13 U.C.C. Rep. 829 (M.D. Pa. 1973) (single defect breached both express and implied warranties), aff'd mem., 506 F.2d 1051 (3d Cir. 1974). However, courts should apply contractual limitations of remedy in all actions for breach of warranty unless the contract language plainly precludes such application. See Beaunit Corp. v. Volunteer Nat'l Gas Co., 402 F. Supp. 1222, 18 U.C.C. Rep. 697 (E.D. Tenn. 1975) (court did not reach question of warranty coexistence because limitation of remedy applied to all warranties). Cf. Lankford
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Questions of consistency between express and implied warranties usually involve the implied warranty of merchantability. Section 2-317(c) provides that an inconsistent express warranty will not displace the implied warranty of fitness for a particular purpose; the buyer reliance required for the fitness warranty to arise precludes reliance on an inconsistent express warranty.

3. Conflicts Among Express Warranties

Sections 2-317(a) and (b) govern conflicts among express warranties. Under the Code's hierarchy, the more specific of seller's conflicting representations presumptively governs the buyer's expectations. However, party intent may supersede the Code's rules. Suppose Bert, whose Beer Palace serves "the tallest drafts in town," is attracted by a brochure boasting nineteen-inch taps for draft beer. His present nineteen-inch taps are rather drab, and he decides to investigate further. Pursuant to a quick and somewhat confused telephone conversation, the seller drops by with a fourteen-inch sample tap. Bert screws the tap onto an extra keg and finds to his pleasure that his employees like it. He submits a purchase order for thirty new taps "as per sample and brochure specification," and the seller understandably responds by delivering fourteen-inch taps. To his dismay, Bert discovers that the new taps, when affixed to his bar, are too short to fill the town's tallest glasses. In the ensuing lawsuit, he argues that under section 2-317(a) his specification that the taps conform to the brochure should prevail over the express warranty created by the sample. The court appropriately dismisses Bert's suit. On these facts, the parties apparently intended the sample to govern their


765 A court may not need to consider § 2-317 where an express warranty apparently conflicts with an implied warranty of fitness for a particular purpose. If the buyer satisfies the implied warranty's reliance requirement, the inconsistent express term might not reach the basis of the bargain. Conversely, an express term that forms part of the basis of the bargain probably precludes the reliance necessary for the inconsistent implied term.

766 See 1 W. HAWKLAND, supra note 183, at 74-75; WHITE & SUMMERS, supra note 2, § 12-7, at 375.

767 See notes 750-51 and accompanying text supra.
dealings, and the seller complied with the consequent "fourteen-inch" warranty.\textsuperscript{768}

F. Remedy Limitations

1. Distinguished from Disclaimers

Section 2-316 authorizes sellers to use disclaimers to prevent warranties from arising. Once a warranty is effectively disclaimed, the seller is safe from the possibility of any liability under it. Similarly, section 2-317 allows certain warranties to override other, inconsistent warranties, thereby limiting buyers' rights. Yet even where warranties exist, the Code allows sellers to narrow the scope of their resulting liability. For better or worse, the drafters chose to make the procedures for disclaiming warranties and for limiting remedies entirely distinct. Section 2-316(4) sends sellers to sections 2-718 and 2-719 if they desire to limit remedies for breach of express or implied warranty.\textsuperscript{769} Comment 2 to section 2-316 resolves any statutory ambiguity by explaining that the drafters envisioned separate treatment of the two techniques for limiting buyer recovery:

This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no

\textsuperscript{768} In Stewart-Decatur Sec. Sys. v. Von Weise Gear Co., 517 F.2d 1136, 17 U.C.C. Rep. 24 (8th Cir. 1975), the buyer extensively tested a model gear motor for opening the jail doors it manufactured. Pursuant to the buyer's requests, the seller made several changes in the model, but the buyer expressed no dissatisfaction with the model's input speed of 3200 r.p.m. The buyer finally approved the model, but the purchase order he submitted specified an input speed of 1590 r.p.m. When motors identical to the model arrived and proved inadequate for his needs, the buyer claimed that under § 2-317(a) his specifications should constitute the express warranty as to input speed. Although the court held § 2-317 inapplicable, it noted that, according to Comments 2 and 3, the § 2-317 hierarchy only suggests party intent and should not be applied rigidly. \textit{Id.} at 1140 n.12, 17 U.C.C. Rep. at 30-31 n.12. See notes 750-51 and accompanying text \textit{supra}. The court found that the parties intended the model to govern their dealings and held that the seller performed in accordance with the agreement. \textit{Id.} at 1140, 17 U.C.C. Rep. at 30.


\textsuperscript{769} U.C.C. § 2-316(4) provides:

Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (sections 2-718 and 2-719).
warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

Commentators, noting the extent to which a remedy limitation can cut off the recovery of a damaged buyer, have criticized the separate treatment of disclaimers and remedy limitations. Some courts ignore the Code's distinction and impose the requirements of section 2-316 on attempts to limit remedies as well as to disclaim warranties. For example, *Zicari v. Joseph Harris Co.* held that a limitation of remedy in an action based on the implied warranty of merchantability was ineffective because it did not mention "merchantability." The court reasoned that the limitation was a "modification" of the implied warranty of merchantability within the meaning of section 2-316(2).

The *Zicari* court failed to account for the distinction between warranty disclaimers and limitations of remedy. An effective warranty exclusion negates express or implied quality obligations; there is no warranty for the seller to breach. A limitation of remedy, on the other hand, does not affect the scope of a warranty's coverage; it merely determines the applicable remedy once a breach occurs. Under this analysis, the *Zicari* court should not have classified the remedy limitation as a warranty modification subject to section 2-316(2).

In *Orroxx Corp. v. Rexnord, Inc.*, a federal district court noted and rejected *Zicari*. The buyer claimed that the seller breached an implied warranty of merchantability. The seller argued that the following clause excluded all liability:

NO OTHER WARRANTY SHALL BE IMPLIED, AND ANY STATUTORY WARRANTIES SHALL BE DEEMED WAIVED. It is expressly agreed that we shall have no liability for consequential dam-

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772 Id. at 22-23, 304 N.Y.S.2d at 924-25, 6 U.C.C. Rep. at 1251-52. Similarly, in Gramling v. Baltz, 253 Ark. 352, 485 S.W.2d 183, 10 U.C.C. Rep. 1121, rehearing denied, 253 Ark. 361, 485 S.W.2d 189, 11 U.C.C. Rep. 710 (1972), the court initially applied the conspicuousness requirement to an exclusion of consequential damages. In denying rehearing, however, the court refused to apply the conspicuousness requirement, holding instead that the exclusion did not expressly apply to breach of implied warranty.


ages... and that our liability shall in no event exceed the purchase price of the equipment.775

After determining that the clause did not disclaim the implied warranty because it lacked the word "merchantability,"776 the court examined the effect of the remedy limitation.

This court is impressed that, while § 2-316(1), (2), (3) applies to the exclusion or modification of warranties, Subsection (4) is merely a reference to §§ 2-718 and 2-719 which involve limitations in remedies or damages for breach of warranty; that neither §§ 2-718 nor 2-719 contains any provision or requirement for expressly mentioning "merchantability" and that, therefore, the parties, within the contemplation of the wording of § 2-719, "may limit or alter the measure of damages recoverable under this Article..." without specific mention of "merchantability."... Accordingly, it is the opinion of this Court that a limitation of damages for breach of an implied warranty of merchantability is not a modification of the warranty and that it may be effected without specific reference to merchantability.777

The Orrax court captured the drafters' intent, and a majority of cases treat disclaimers and remedy limitations distinctly.778 Nevertheless, one might question the wisdom of the drafters' choice. One commentator suggests that courts should impose identical controls on disclaimers and remedy limitations because

775 Id. at 442-43, 16 U.C.C. Rep. at 355-56.
776 Id. at 444-45, 16 U.C.C. Rep. at 359. The court properly rejected the argument that an effective § 2-316(3)(a) disclaimer had been made. See notes 630-36, 683 and accompanying text supra.
777 Id. at 445-46, 16 U.C.C. Rep. at 359-60 (footnote omitted).
both types of liability limitation can have the same effect.\textsuperscript{779} This reasoning fails to recognize that the Code's unconscionability doctrine prevents remedy limitations from acting as disclaimers in disguise.

2. Unconscionability and Liability Limitations

The drafters of the U.C.C. left the development of the unconscionability doctrine largely to the courts. Although commentators express varying degrees of satisfaction with this approach, they agree that the Code itself offers no workable definition.\textsuperscript{780} Section 2-302 provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.\textsuperscript{781}

Unconscionability bears directly on three types of liability limitations: disclaimers of implied warranty, exclusions of consequential damages,\textsuperscript{782} and exclusions or limitations of primary

\textsuperscript{779} See Note, supra note 770, at 791, 797.


\textsuperscript{781} Comment 3 amplifies the first phrase of § 2-302(1): “The present section is addressed to the court, and the decision is to be made by it.” Nevertheless, at least one court has referred the question of conscionability to the jury. See Adams Van Serv., Inc. v. International Harvester Corp., 14 U.C.C. Rep. 1142, 1149 (Pa. C.P. 1973).

\textsuperscript{782} Unconscionability may also bear on attempts to limit recovery of incidental damages, but we have discovered only one case involving such a limitation. In Durfee v. Rod Baxter Imports, Inc., 22 U.C.C. Rep. 945 (Minn. 1977), the court struck down an exclusion of incidental damages in the sale of a new car as having failed of its essential purpose under § 2-719(2). The court stated: “Where a buyer has justifiably revoked acceptance, [§ 2-719(2)] precludes the invocation of a clause limiting liability with respect to the recovery of incidental damages. To withhold incidental damages from a buyer revoking acceptance is to make cancellation of the contract a less than adequate remedy.” Id. at 956-57. The court's analysis is flawed. The "incidental" damages involved in the case were costs of repair and maintenance of the defective automobile. Such costs, however, should be characterized as either primary or consequential, depending upon the circumstances. See notes 417-66 and accompanying text supra. Moreover, an incidental damage exclusion, like a...
damages. In examining the relation of section 2-302 to each type of limitation, we adopt as our guide the analytical framework posited by Professor Leff and refined by subsequent commentators. Briefly, Professor Leff distinguishes procedural unconscionability ("bargaining naughtiness") from substantive unconscionability ("evils in the resulting contract"). He explains that the Code and Comments lack clarity because the drafters were unwilling to decide what, if any, bargaining niceties could immunize an oppressive clause from judicial invalidation.

a. Warranty Disclaimers. The Code's explicit authorization of implied warranty disclaimers suggests that courts are not free to brand such clauses substantively unconscionable. A damaged buyer must show not only that the clause operates harshly, but that the seller introduced it in an objectionable manner. Both Professor Leff (who would subject disclaimers only to the demands of section 2-316) and his most ardent critics agree that warranty disclaimers are never per se unconscionable. Given this initial consequential damage exclusion (see note 855 and accompanying text infra) can never fail of its essential purpose. Presumably, the purpose of such a clause is to exclude incidental damages, and thus it will succeed unless the court chooses to deny it effect. However, exclusions of incidental damages may be vulnerable to unconscionability attacks. Although § 2-719(3) expressly authorizes sellers to exclude consequential damages, nowhere does the Code explicitly endorse incidental damage exclusions. Since incidental damages are intimately connected with the rights of rejection and revocation, exclusions of these damages may deter buyers from exercising these rights. Moreover, many incidental damages arise by virtue of the duties the Code imposes upon the rejecting or revoking buyer. See note 427 supra. It may be unfair for the Code to require a buyer to incur expenses connected with the seller's default and then not require the seller to reimburse him. In short, a buyer who justifiably rejects or revokes nonconforming goods, but is deprived of recovering the costs accompanying his rejection or revocation, may be receiving less than the "fair quantum of remedy" the drafters envisioned.

Absent parol evidence questions, a court should not resort to § 2-302 to invalidate a disclaimer of express warranties. Any express warranty in the agreement would prevail over the disclaimer. See notes 586-88 and accompanying text supra. But see Industralease Automated & Scientific Equip. Corp. v. R.M.E. Ents., Inc., 58 A.D.2d 482, 488-89, 396 N.Y.S.2d 427, 431, 22 U.C.C. Rep. 4, 10-11 (2d Dep't 1977) (absent parol evidence barriers court resorted to unconscionability to overcome disclaimer of express warranties). Where a disclaimer bars parol evidence of express warranties, the court should examine the writing's finality and the possibility of fraud before addressing its conscionability. Where a disclaimer bars parol evidence of express warranties, the court should examine the writing's finality and the possibility of fraud before addressing its conscionability. See notes 615-17, 624-28 and accompanying text supra.

See Leff, supra note 780.
E.g., Ellinghaus, supra note 780.
Leff, supra note 780, at 487.
Professor Leff suggests that the drafters of § 2-302 were caught between the difficulty of prescribing conscionable bargaining procedures and the unpopularity of declaring certain contractual provisions unconscionable per se. "Thus faced with a dilemma, ... the draftsmen opted for a third solution. They fudged." Id. at 501.
Id. at 523.
See, e.g., Ellinghaus, supra note 780, at 793.
substantive validity, coupled with the buyer's procedural protec-
tions outlined in section 2-316(2), it is not surprising that courts
rarely apply section 2-302 to disclaimers in commercial transac-
tions. Koehring Co. v. A.P.I., Inc.,\textsuperscript{790} typifies the judicial response to
a commercial buyer's assertion of unconscionability. The seller
brought an action to foreclose a lien on industrial equipment, and
the buyer counterclaimed for damages based on breach of express
and implied warranties. The seller moved to dismiss the coun-
terclaim, pointing to a contractual disclaimer of implied warran-
ties and a limitation of remedies to repair and replacement. The
buyer countered that the seller, by refusing to repair or replace
the equipment, defeated the disclaimer and caused the remedy
limitation to fail of its essential purpose under section 2-719(2).
Refusing to dismiss the counterclaim, the court held that whether
the remedy limitation on express warranties failed of its purpose
was a question of fact to be determined at trial.\textsuperscript{791} Turning to
the disclaimer of implied warranties, however, the court noted
that the seller had complied with section 2-316, and stated:

There is some question whether language that complies
with UCC 2-316 could be unconscionable under 2-302. There is
also an argument that unconscionable conduct which obviates
a limitation of liability clause under UCC 2-719(3) would also ob-
viate a disclaimer of warranties clause under that same sec-
tion.... If there is some conduct that could render a disclaimer
of warranties ineffective in a commercial setting, such conduct
is not present in the case at bar. At trial, [buyer] will not be
allowed to recover damages that otherwise would have been re-
coverable but for the disclaimer of warranties language in the
contract.\textsuperscript{792}

\textsuperscript{791} \textit{Id.} at 890, 14 U.C.C. Rep. at 378.
\textsuperscript{792} \textit{Id.} at 891, 14 U.C.C. Rep. at 378-79. See \textit{Avery} v. Aladdin Prosds. Div., Nat'l Serv.
condition" disclaimer valid under § 2-316(3)(a) not unconscionable); Westinghouse Credit
claimer valid under § 2-316(2) not unconscionable) (citing \textit{Avery}); Bill Stremmel Motors,
438 (1973) (disclaimer in lease of communications equipment between parties of equal bar-
gaining power not unconscionable); Ford Motor Co. v. Moulton, 511 S.W.2d 690, 693-94,
14 U.C.C. Rep. 312, 315 (Tenn.) (disclaimer in sale of automobile cannot violate § 2-302 if
it complies with § 2-316(2)) (dictum), cert. denied, 419 U.S. 870 (1974). \textit{But see Sarafati v.
442, 444 (2d Dep't 1970) (manufacturer's disclaimer of implied warranties unconscionable
as to commercial buyer of automobiles as well as to buyer's lessee), aff'd mem., 30 N.Y.2d
b. **Consequential Damage Exclusions.** As with warranty disclaimers, the drafters were generally permissive toward consequential damage exclusions. Section 2-719(3) permits such clauses, and is neutral as to their conscionability in the commercial context. Comment 3 to section 2-719 calls them "merely an allocation of unknown or undeterminable risks." Thus, unless the seller has introduced it in an unfair manner, a court should enforce a consequential damage exclusion in a commercial sales contract.

Nevertheless, some courts have struck down consequential damage exclusions where "latent" or "undiscoverable" defects have caused large losses. In *Majors v. Kalo Laboratories, Inc.*, for example, a seller of soybean inoculant represented his product as "100% GROWER GUARANTEED" but in the same clause excluded consequential liability. The buyer could not discover the product's ineffectiveness until after he had incurred large expenses for cultivating, planting and harvesting a crop that ultimately

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793 U.C.C. § 2-719(3) provides:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Professors White and Summers criticize several early consumer cases which used § 2-719(3) to invalidate disclaimers in personal injury actions. WHITE & SUMMERS, supra note 2, § 12-12, at 992-96. See Knipp v. Weinbaum, 351 So. 2d 1081, 1084, 22 U.C.C. Rep. 1141, 1144 (Fla. Dist. Ct. App. 1977) (grant of summary judgment to seller on basis of disclaimer in consumer personal injury action would contravene policy of § 2-719(3)). Comment 3 to § 2-719 emphasizes the independence of §§ 2-316 and 2-719: "The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316."


795 Some of these courts invalidate consequential damage exclusions by declaring that they have failed of their essential purpose within the meaning of § 2-719(2), a court might refuse to enforce an accompanying exclusion of consequential damages. See notes 877-86 and accompanying text infra. The failure of purpose does not affect the exclusion's conscionability; a contract clause is unconscionable, if at all, from its outset. See U.C.C. § 2-302.


failed. Emphasizing that "the remedy left to a purchaser after operation of the exclusion is grossly disproportionate to the expenditures an injured party would be expected to make in order to avail himself of the value of the product," the court declared the exclusion unconscionable.

The court missed the mark. A consequential damage exclusion is not substantively unconscionable when applied to a latent defect. A seller may exclude liability altogether for such defects by disclaiming implied warranties or limiting an express warranty's duration. The Code does not distinguish discoverable from latent defects. Indeed, the drafters expressly approved the contractual allocation of "unknown" risks. As Professor Eddy points out, it is probably the buyer's inability to avoid consequential losses that tempts courts to place the risk of "undiscoverable" defects on the seller. Nevertheless,

[It] does not follow that because the loss is not avoidable, the parties should not be free to allocate it as they see fit. One can imagine a spectrum with risks avoidable only by the seller on one end and risks avoidable only by the buyer on the other. In between fall two other classes of risks: those avoidable by both parties and those avoidable by neither. It is difficult to see what is unfair about two contracting parties shifting a risk from either class of risks in this central portion of the spectrum to one or the other party. If there is a type of risk allocation that

\[ \text{Id. at 22, 18 U.C.C. Rep. at 595.} \]

\[ \text{Id. at 22-23, 18 U.C.C. Rep. at 595.} \]

\[ \text{On the facts before it, the Majors court could have found for the buyer without placing undue focus on the latency of the defect or the extent of the resultant damages. Tests of the soybean inoculant had established "grave doubt" about its effectiveness, but the seller failed to convey this information to the buyer. Id. at 22, 18 U.C.C. Rep. at 595. The seller's conduct might, therefore, have given the buyer a cause of action in tort for misrepresentation or negligence which the liability limitation would be unlikely to reach. Moreover, U.C.C. § 1-203 imposes an obligation of good faith upon contracting parties which § 1-102(3) prohibits them from disclaiming. Thus, the court could have found that the manufacturer exercised bad faith by keeping the doubts about his product to himself, and that he was therefore estopped from asserting the liability limitation. Instead, the court glanced only cursorily at the seller's behavior, and pronounced exclusions unconscionable when applied to latent defects that cause extensive damages. See 407 F. Supp. at 22-23, 18 U.C.C. Rep. at 596.} \]

\[ \text{U.C.C. § 2-719, Comment 3; V-M Corp. v. Bernard Distrib. Co., 447 F.2d 864, 869, 9 U.C.C. Rep. 670, 675 (7th Cir. 1971) ("Section 2-719 was intended to encourage and facilitate consensual allocations of risks associated with the sales of goods. This is particularly true where commercial, rather than consumer sales are involved"). At the planning and bargaining stage, the commercial buyer is better able than his seller to estimate potential consequential loss from latent defects.} \]

should be subject to special scrutiny, it is probably the shifting
to one party of a risk that only the other party can avoid.\textsuperscript{803}

Courts that disallow claims of substantive unconscionability in
commercial transactions are even less likely to be impressed with
arguments focusing on the bargaining process. Statements that
"unconscionability rarely exists in a commercial setting" pervade
the case law,\textsuperscript{804} and recent cases reveal only one successful buyer. In \textit{Johnson v. Mobil Oil Corp.},\textsuperscript{805} a service station operator alleged
that defective gasoline supplied by the defendant oil company
cauased a fire which destroyed his property. The dealership con-
tract excluded consequential damages, but the court did not. In
view of the Code's recognition of such damage limitations, the
court noted that "a determination of unconscionability cannot . . .
be based on their substantive content alone."\textsuperscript{806} Focusing instead
on the buyer's limited education, the absence of bargaining, and
the inflexibility of the seller's carefully drafted form contract, the
court voided the provision.\textsuperscript{807}

The peculiar facts of \textit{Johnson} suggest that the case will proba-
bly have only minimal impact on consequential damages clauses in
commercial sales; a retail dealer contract which was the fruit of
great bargaining disparity effectively locked the buyer into his re-

\textsuperscript{803} \textit{Id.} at 47 (emphasis in original). An early draft of § 2-719 may shed some light on the
drafters' intent. Section 57-A(2) of the Second Draft of the Revised Uniform Sales Act
provided that a contract may, "[b]etween merchants, provide that consequential damages
are limited or excluded, notwithstanding that they flow from defects not reasonably discov-
erable by the buyer, if such defects are not due to avoidable fault on the part of the seller."
Revised Uniform Sales Act § 57-A(2) (2d draft 1941).

\textsuperscript{804} \textit{See}, e.g., Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364,
381, 21 U.C.C. Rep. 80, 101 (E.D. Mich. 1977); County Asphalt, Inc. v. Lewis Welding &


\textsuperscript{806} \textit{Id.} at 268, 20 U.C.C. Rep. at 641.

\textsuperscript{807} The \textit{Johnson} court indicated that "the voluntary, knowing assent of the other party"
forms the crux of procedural conscionability. \textit{Id.} at 269, 20 U.C.C. Rep. at 641. As relevant
factors in determining whether this standard is met, the court listed "age, education, intel-
ligence, business acumen and experience, relative bargaining power, who drafted the con-
tract, whether the terms were explained to the weaker party, whether alterations in the
printed terms were possible, [and] whether there were alternative sources of supply for the

Since conspicuousness is all that most courts require for a valid disclaimer even in
consumer cases, a more stringent "knowing assent" test for less drastic liability limitations is
difficult to justify. At least one court has held conspicuousness relevant to the conscionabil-
ity of a remedy limitation. \textit{See} Schroeder v. Fageol Motors, Inc., 86 Wash. 2d 256, 260, 544
erable latent defects,” a significant erosion of the long line of
cases dismissing claims of unconscionability in commercial settings
seems unlikely.808

c. Primary Damage Limitations. The Code, as interpreted by
the Comments, makes one form of damage exclusion substantively
unconscionable even in commercial transactions. Comment 1 to
section 2-719 provides:

[I]t is of the very essence of a sales contract that at least
minimum adequate remedies be available. If the parties intend
to conclude a contract for sale within this Article they must ac-
cept the legal consequence that there be at least a fair quantum
of remedy for breach of the obligations or duties outlined in
the contract. Thus any clause purporting to modify or limit the
remedial provisions of this Article in an unconscionable manner
is subject to deletion and in that event the remedies made avail-
able by this Article are applicable as if the stricken clause had
never existed. Similarly, under subsection (2), where an appar-
ently fair and reasonable clause because of circumstances fails
in its purpose or operates to deprive either party of the sub-
stantial value of the bargain, it must give way to the general
remedy provisions of this Article.

A clause that does not, on its face, provide a “fair quantum of
remedy” is not “apparently fair and reasonable,” and therefore
fails the Code’s test of conscionability. Although section

808 See U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043, 1048, 16 U.C.C.
Rep. 1, 5-6 (6th Cir. 1975) (dictum); Cryogenic Equip., Inc. v. Southern Nitrogen, Inc.,
490 F.2d 696, 699, 14 U.C.C. Rep. 420, 425 (8th Cir. 1974); Posttapes Assoc. v. Eastman
Rep. 631, 637 (S.D.N.Y. 1974); Boone Valley Coop. Processing Ass’n v. French Oil Mill
Pavlak, Ltd. v. William Davies Co., 40 Ill. App. 3d 1, 4-5, 351 N.E.2d 243, 246, 20 U.C.C.
Rep. 394, 398-99 (1976); Kansas City Structural Steel Co. v. L.C. Barcus & Sons, Inc., 217
Ag. Chems., 303 Minn. 320, 227 N.W.2d 566, 16 U.C.C. Rep. 718 (1975); Architectural
Alum. Corp. v. Macarr, Inc., 70 Misc. 2d 495, 499-500, 333 N.Y.S.2d 818, 823-24, 10
689, 695-96, 220 S.E.2d 361, 366, 18 U.C.C. Rep. 359, 364-65 (1975), aff’d, 290 N.C. 502,
permits parties to limit or alter available remedies, Comment 1 warns sellers that they cannot exclude all recovery for breach. Where a seller does not properly disclaim warranties under section 2-316, he may not completely thwart a buyer's expectations of protection through a "remedy limitation." Professor Leff agrees that the Comment describes a minimum standard of conscionability which operates without regard to procedural fairness. He fails, however, to discern the "fair quantum of remedy" a seller must provide, concluding only that an exclusion of all remedy falls below the standard. We think the Comment, read in its statutory context, hints at a more precise definition of the conscionable minimum.

First, section 2-719(3) and Comment 3 allow sellers to exclude consequential damages for commercial loss. Comment 1 further suggests that a fair and reasonable clause must merely preserve the "substantial value of the bargain" for a victim of breach. Professor Eddy convincingly argues that "value of the bargain" refers to the value of conforming goods. Similarly,
the exclusive remedies suggested by section 2-719(1)\(^8\) (repa-
ment of the price or repair or replacement of defective parts) will
normally ensure that the buyer receives the value of the goods as
warranted. One can infer, therefore, that a remedy limitation cut-
ting substantially into a buyer's primary damage recovery is sub-
stantively unconscionable.\(^8\)

The above rule should apply in sales of standardized goods,
where the price paid generally reflects the value of the goods as
warranted. With custom-made or experimental goods, however,
the conscionable minimum may be significantly less. If a seller
shows that he reduced the purchase price in exchange for a dra-
tic remedy limitation, the contractual remedy may still be
adequate. Of course, a court can uphold the limitation without
compromising the Comment's apparent prohibition of primary
damages exclusions; when the buyer pays substantially less than
the value of the goods "as warranted," words of warranty may not
reach the basis of the bargain.\(^8\)

provide an economic means of assuring goods of warranted characteristics." Eddy, supra
note 802, at 59.

\(^8\) Reprinted in note 809 supra.

U.C.C. Rep. 631, 639 (Civ. Ct. N.Y. 1977) (limitation of remedy to one repair or replace-
ment of automobile engine "might very well be unconscionable") (dictum).

\(^8\) Raybond Elecs., Inc. v. Glen-Mar Door Mfg. Co., 22 Ariz. App. 409, 528 P.2d 160,
16 U.C.C. Rep. 121 (1974), illustrates the process by which commercial parties may bargain
for a conscionable remedy limitation substantially below the value of functioning goods.
After considerable negotiation, the parties settled on most of the contract terms governing
the sale of a system for curing glue used in the production of doors. The seller warranted
the system against defects and excluded consequential damages. The buyer's real interest
in the system, however, was its output, and it negotiated vigorously for a guarantee that
the system could produce a door every ten seconds. The seller was unwilling to go quite so
far and instead consented to a "Special Agreement":

Glen-Mar Door Mfg. Co. may return the two 50KW output generators,
freight prepaid, anytime within 3 months of delivery, if the heating cycles ex-
ceed 10 seconds on hollow core doors. If the generators are returned, Raybond
will credit Glen-Mar Door Mfg. Co. with 2/3rds of the original sales price.

\(^8\) Id. at 412, 528 P.2d at 163, 16 U.C.C. Rep. at 126 (emphasis in original).

Despite the seller's conscientious efforts, the system failed repeatedly when operated at
the desired capacity. In the ensuing litigation, the buyer focused its unsuccessful uncon-
scionability attack on the exclusion of consequential damages. Had the buyer challenged
instead the apparent primary damage limitation, it doubtless would have fared no better.
Since the buyer was "aware that the system might not be capable of producing a door
every ten seconds," (id at 415, 528 P.2d at 166, 16 U.C.C. Rep. at 129), no express war-
ranty as to capacity arose. The court recognized that the "Special Agreement" was merely
an allocation of business risk in the sale of an experimental product.
3. Problems of Party Characterization

a. A Rationale for the Distinction Between Disclaimers and Remedy Limitations. As the preceding discussion suggests, the drafters anticipated that sellers might attempt to dodge section 2-316's requirements by eliminating all remedies under section 2-719. Section 2-719 and Comment 1 short-circuit this route. The Code itself thus denies that a disclaimer and a remedy limitation can have the same effect; it requires courts to categorize such provisions according to the result sought rather than the language used by the parties. Although section 1-102(3) authorizes parties to vary the effect of most Code provisions,818 sections 2-316 and 2-719 impose specific restrictions on efforts to alter warranties or remedies. For example, a seller may not disclaim implied warranties except by conspicuous language,819 and a limited remedy will not operate if it fails of its essential purpose.820 Sellers should not be allowed to escape these requirements by mislabeling disclaimers or remedy limitations.

Consider the following clauses:

1. Buyer may not recover damages for defects in stationary parts.
2. The implied warranty of merchantability is not applicable to stationary parts.821

The clauses seek the same result: to preclude an action for damages attributable to stationary parts. If both clauses are inconspicuous, it would be absurd indeed to recognize the first as a valid limitation of remedy while striking the second as a disclaimer; where a seller extends no remedy at all for defects in specified parts, he makes no warranty as to those parts.822

818 Section 1-102(3) provides:

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

819 See notes 638-57 and accompanying text supra.

820 See notes 853-904 and accompanying text infra.

821 Note, supra note 770, at 797.

822 Even as a "remedy limitation," the first clause is substantively unconscionable—it provides no remedy for breach of warranty. See notes 809-12 and accompanying text supra.
court should ignore the parties' characterization and apply section 2-316 to each of the above clauses.\textsuperscript{823}

The relative laxity of the Code's requirements for limitations of remedy appears to be the product of line-drawing by the drafters. For any particular nonconformity, a total exclusion of liability must survive more stringent tests than a partial exclusion of liability. Admittedly, a limitation of remedy, such as an exclusion of consequential damages, might exclude all meaningful remedy for a particular breach. For example, defects in a two-dollar can of oil can ruin a million-dollar machine. The policy that underlies section 2-316's conspicuousness requirement for disclaimers—preventing buyer surprise—seems equally applicable to such limitations. In a proper situation, a court can and should apply some form of the conspicuousness test to remedy limitations. For example, a number of courts point to the conspicuousness of a clause as affecting its conscionability.\textsuperscript{824} Conspicuousness may also help determine whether a limited remedy is "expressly agreed to be exclusive" under section 2-719(1)(b), a reading which gains support from Comment 2's admonition that a remedy's exclusivity must be "clearly expressed."\textsuperscript{825}

\textsuperscript{823} Failure to look beyond form to substance leads to the appearance of anomalous Code treatment of the two clauses in the text. This error led one commentator to recommend that courts ignore the Code's dichotomy between disclaimers and limitations. See Note, supra note 770, at 797.

\textsuperscript{824} See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449, 2 U.C.C. Rep. 955, 959 (D.C. Cir. 1965) (whether "important terms [are] hidden in a maze of fine print" is one circumstance to consider in determining unconscionability). In Schroeder v. Fageol Motors, 86 Wash. 2d 256, 544 P.2d 20, 18 U.C.C. Rep. 584 (1975), involving a sale of a truck to a commercial buyer, the court reversed a lower court's application of § 2-316(2) to a consequential damage exclusion. Remanding for a determination as to conscionability, the court noted that "'conspicuousness' and 'negotiations' are factors, albeit not conclusive, which are certainly relevant when determining the issue of conscionability in light of all the surrounding circumstances." Id. at 260, 544 P.2d at 23, 18 U.C.C. Rep. at 589 (emphasis in original).


In most negotiated commercial sales contracts, it will make little practical difference whether courts apply the conspicuousness requirement to remedy limitations, thanks to their increasing willingness to focus on what the particular buyer noticed or should have noticed. See notes 644-57 and accompanying text supra. A requirement that "merchantability" be mentioned to limit remedy for breach of the implied warranty of merchantability would have greater impact. There appears to be no policy reason, however, for accepting this approach, adopted in Zicari v. Joseph Harris Co., 33 A.2d 17, 304 N.Y.S.2d 918, 6 U.C.C. Rep. 1246 (4th Dep't 1969) (discussed in notes 771-73 and accompanying text supra). The significance of a limitation of remedy does not vary with the warranty to which it
b. "Warranties of Repair." Another problem of characterization arises when a seller promises to repair or replace defective parts. Consider the following clauses:

1. Seller warrants the goods to be free of defects in materials and workmanship for one year. Seller's liability under this warranty is limited to repair and replacement of defective parts.

2. Seller warrants that he will repair or replace parts found to be defective in materials and workmanship for one year. Seller makes no other warranty.

These provisions convey the same message, and proper application of the Code demands that courts characterize each as an express warranty with an exclusive remedy for its breach. Nevertheless, a number of courts have treated such clauses as "warranties of repair." These courts fail to account for section 2-719(1)(a)'s treatment of repair and replacement as a remedy. Nor does a promise to repair goods fit the Code's definition of an express warranty. Section 2-313(1)(a) requires that promises relate "to the goods" in order to constitute express warranties. If a promise to repair relates to the goods, then so would nearly every provision in a contract of sale. We think that a promise to repair relates not to the goods, but to the seller's performance. A New applies. Thus, a rule imposing different standards for different warranty breaches will only add confusion to an already muddled field of law.

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827 U.C.C. § 2-719(1)(a) provides in part: "[T]he agreement may ... [limit] the buyer's remedies ... to repair and replacement of non-conforming goods or parts ...."

828 U.C.C. § 2-313 is reprinted in text following note 43 supra.


Jersey case\textsuperscript{830} illustrates the confusion rampant in the courts. A seller had promised to repair a camera "at no charge within one year after purchase, except for damage caused by accident or abuse," but warned that, "[e]xcept as mentioned above, no other warranty, express or implied, applies to this camera."\textsuperscript{831} The lower court permitted the buyer to recover the purchase price, finding that the seller breached an express warranty against defects and that the parties had not expressly agreed that the remedy of repair would be exclusive, as required by section 2-719 (1)(b).\textsuperscript{832} The supreme court reversed, holding that the clause was not a warranty against defects, but merely a warranty that the seller would repair such defects as might occur.\textsuperscript{833} The contract language entitled the buyer to believe he had a warranty—a warranty that, under the Code, could only relate to the camera itself. By blurring the distinction between warranty and remedy, the court avoided considering whether the repair remedy was exclusive.

\textsuperscript{830} Herbstman v. Eastman Kodak Co., 68 N.J. 1, 342 A.2d at 258, 18 U.C.C. Rep. at 21 (emphasis in original).
\textsuperscript{831} Id. at 7, 342 A.2d at 184, 17 U.C.C. Rep. at 42.
\textsuperscript{832} 131 N.J. Super. 439, 447, 330 A.2d 384, 388, 16 U.C.C. Rep. 133, 137-38. See note 835 infra. We discuss the requirement that parties must expressly agree to make a remedy exclusive in notes 834-47 and accompanying text infra.
\textsuperscript{833} 68 N.J. at 11-12, 342 A.2d at 186-87, 17 U.C.C. Rep. at 46.
4. Exclusiveness of Remedy—The Language Requirement of Section 2-719(1)(b)

Section 2-719(1)(a) permits the parties to provide remedies in addition to those extended by the Code, but the seller who promises, for example, to repair or replace defective parts usually desires to supplant and not supplement Code remedies. To achieve exclusivity, he must harken to section 2-719(1)(b):

[R]esort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

Courts have considerable discretion when evaluating words of exclusivity.834 Whether the remedy was "expressly agreed to be exclusive" will often depend upon how sophisticated the buyer is. When the buyer is a consumer, the court will scrutinize the contract language closely and often override the apparent intent of the parties.835

Section 2-719(1)(b) does not require any particular words; it only requires express terms clear enough to inform the particular buyer that the remedy is exclusive.836 In most commercial cases, the intent of an express provision should control.837 In Fredonia

834 See White & Summers, supra note 2, § 12-9, at 379.
835 Perhaps the most frequent victim of insufficiently explicit language in consumer cases is the seller who makes a promise to repair or replace defective goods "in lieu of other warranties or obligations." Ford Motor Co. v. Reid, 250 Ark. 176, 465 S.W.2d 80, 8 U.C.C. Rep. 985 (1971), held that such a clause did not make an automobile purchaser's remedy of repair exclusive, and permitted the consumer to recover the consequential property damages resulting from a fire in his car. The court reasoned: "There is no language anywhere in the warranty form 'expressly' stating that the remedy of repair or replacement of defective parts is to be the exclusive remedy. The language ... goes only to 'obligations' and 'warranties,' not to remedies." Id. at 184, 465 S.W.2d at 85, 8 U.C.C. Rep. at 990. See Gramling v. Baltz, 253 Ark. 361, 485 S.W.2d 189, 11 U.C.C. Rep. 710 (1972) (repair remedy not expressly exclusive); Herbstman v. Eastman Kodak Co., 131 N.J. Super. 439, 350 A.2d 384, 16 U.C.C. Rep. 133 (1974) (exclusive warranty of repair did not create exclusive remedy for breach of warranty in sale of camera), rev'd on other grounds, 68 N.J. 1, 342 A.2d 181, 17 U.C.C. Rep. 39 (1975); Stream v. Sportscar Salon, Ltd., 91 Misc. 2d 99, 106, 397 N.Y.S.2d 677, 682-83, 22 U.C.C. Rep. 631, 638 (Civ. Ct. N.Y. 1977) (used car seller limited "liability" rather than "remedy" to repair and replacement, enabling buyer to recover purchase price).
836 U.C.C. § 2-719, Comment 2 authorizes courts to require clarity:

Subsection (1) (b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed.

837 In J.D. Pavlak, Ltd. v. William Davies Co., 40 Ill. App. 3d 1, 351 N.E.2d 243, 20 U.C.C. Rep. 394 (1976), the seller represented that the fat content of meat would not exceed 15%. The contract further provided that "seller will allow for excess fat content at
Broadcasting Corp. v. RCA Corp., a contract for the sale of broadcasting equipment provided that “repair or replacement ... shall constitute the fulfillment of all RCA's obligations in respect of the equipment furnished hereunder.” The court upheld the seller's contention that repair or replacement constituted the sole remedy for breach of warranty without quibbling about the difference between an “obligation” and a “remedy.”

The language of limitation ... does not state explicitly that the remedy provided for is to be the exclusive remedy. However, it is clear that the contractual limitation is intended to be exclusive because the language of the contractual limitation states that repair and replacement “shall constitute the fulfillment of all RCA's obligations in respect of the equipment furnished.”

Even in commercial sales, the contract must express at least some intent to make a remedy exclusive. As an apparent exception to this rule, however, courts have held that a trade usage or course of dealing may limit a buyer to a stated remedy. The

invoice price and buyer will accept such as full settlement.” Id. at 3, 351 N.E.2d at 245, 20 U.C.C. Rep. at 397. Finding the allowance to be the buyer's sole remedy, the court stated: “A remedy will be held to be exclusive when that is the reasonable construction of the contract despite any failure to employ the word 'exclusive.'” Id. Accord, Calloway v. Manion, 572 F.2d 1083, 23 U.C.C. Rep. 1143 (5th Cir. 1978) (court upheld arguably unclear statement of exclusivity made orally to knowledgeable buyer of borse); Aetna Cas. & Sur. Co. v. Eastman Kodak Co., 10 U.C.C. Rep. 53 (D.C. Super Ct. 1972) (promise to replace film "without other warranty or liability" valid limitation of remedy). But see Curtis v. Murphy Elevator Co., 407 F. Supp. 940, 19 U.C.C. Rep. 145 (E.D. Tenn. 1976) (provision that replacement of defective materials sole warranty did not create exclusive remedy because intent not clearly expressed).

838 481 F.2d 781, 12 U.C.C. Rep. 1088 (5th Cir. 1973), rev'd on rehearing on other grounds, 569 F.2d 251 (5th Cir. 1978).

839 Id. at 798, 12 U.C.C. Rep. at 1105.

840 Compare this result with that in Ford Motor Co. v. Reid, 250 Ark. 176, 465 S.W.2d 80, 8 U.C.C. Rep. 985 (1971), discussed in note 835 supra. The promise to repair or replace is both a remedy and an obligation. Breach of the obligation is relevant in a failure-of-purpose determination. See notes 869-76 and accompanying text infra.

841 Id. (emphasis in original).


Code allows such circumstances to supplement an agreement, but a term born of trade usage can hardly be christened "express." Yet there appears no sound policy against exclusivity by trade usage or course of dealing, since the same practices may exclude large elements of damages or disclaim warranties altogether. The drafters probably did not consider the full impact of the "expressly agreed" requirement, and courts should queue-up in the lengthening line of commercial cases.


844 See U.C.C. § 1-205(3).

845 U.C.C. § 2-314(3) provides that warranties are implied when created by trade usage or course of dealing. Thus, one can reasonably infer that other terms arising from course of dealing and trade usage are implied.

Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751, 19 U.C.C. Rep. 832 (3d Cir. 1976) illustrates the difficulty of finding express agreement through an implied term. In remanding for a determination whether there was a trade usage that limited the commercial buyer to replacement of defective film, the court explained:

Section 2-719 permits individuals to limit their damages by agreement, and in its definition of "agreement," § 1-201(3) includes the course of dealing or usage of trade as "circumstances" to establish "the bargain of the parties in fact." § 1-205(3) provides that "any usage of trade . . . of which they are or should be aware give[s] particular meaning to and supplement[s] or qualify[es] terms of an agreement." That a party is bound by a trade usage of which he "should be aware" implies that a limitation of damages may be imposed even if the parties did not explicitly and expressly negotiate it. The totality of the agreement, however, must include a provision, present in the trade usage, or otherwise expressed, that the limited remedy is an exclusive one.

Id. at 756, 19 U.C.C. Rep. at 839. On remand, the buyer argued that to prove the trade usage, the seller should be required to show "the repeated assertion of claims against Kodak and the invocation of the limitation by Kodak in response to these claims." 450 F. Supp. 407, 409, 23 U.C.C. Rep. 855, 859 (E.D. Pa. 1978). The court disagreed, holding that evidence that industry members accept a trade usage limiting remedies suffices to sustain a jury finding that such a usage exists. Id. at 410, 23 U.C.C. Rep. at 860.

A similar problem arises when buyers attempt to persuade courts that implied warranties may "explicitly" extend to future performance under § 2-725. See notes 1019-22 and accompanying text infra.

846 There is no requirement that an agreement to exclude consequential damages be express. See U.C.C. § 2-719(3).

847 See notes 727-48 and accompanying text supra.
5. Scope of Remedy Limitations

A second language requirement extends to every remedy limitation, whether an exclusive remedy, a consequential damage exclusion, or a ceiling on damages. This requirement arises not from the Code itself, but from general principles of contract interpretation. Consider the following clause:

Seller warrants these goods against defects in materials or workmanship. Seller's obligation if the goods do not meet this warranty is limited solely to replacing or repairing defective parts. The above remedy is exclusive and there are no other warranties express or implied.

Because the word "merchantability" is absent, the clause does not effectively disclaim the implied warranty of merchantability. Moreover, express warranties may lurk elsewhere in the agreement despite disclaimer language. Since the remedy limitation applies only to "this warranty," poor draftsmanship has exposed the seller to unexpectedly broad liability. A careful seller will draw his remedy limitation to corral all warranty breaches. And the truly cagey seller might extend the limitation to claims based on negligence or strict tort liability. Many courts uphold such limi-

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848 Section 2-316(2) requires that a disclaimer of the implied warranty of merchantability use the word "merchantability." See notes 630-36 and accompanying text supra.
849 See note 605 and accompanying text supra.
tations in commercial sales contracts, although most jurisdictions require clear language.852

6. Failure of Purpose—Section 2-719(2)

Although initially conscionable, a remedy limitation may subsequently "fail of its essential purpose" under section 2-719(2).

a. When Applicable. Section 2-719(2) provides:

Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

Professor Eddy argues convincingly that section 2-719(2) was drafted with a single type of remedy limitation in mind: repair or replacement of defective goods.853 The generality of the language in subsection (2) seems to preclude so narrow an interpretation, but the phrase "failure of purpose" makes little sense when applied to some other liability limitations.854 For example, an exclusion of consequential damages cannot fail of its essential purpose.855 Comment 3 to section 2-719 describes such an exclusion as "merely an allocation of unknown or undeterminable risks." When a court denies recovery for consequential loss, the damage limitation achieves its only purpose.

Nor can a warranty modification fail of its purpose. A clause that allocates to the buyer all risk of damage from certain deficiencies accomplishes precisely what the parties intended. But courts may overlook this truism. In Wilson Trading Corp. v. David Ferguson, Ltd.,856 yarn purchased for the manufacture of sweaters


853 See Eddy, supra note 802, at 39. For another recent treatment of the failure-of-purpose doctrine, see Anderson, Failure of Essential Purpose and Essential Failure on Purpose: A Look at Section 2-719 of the Uniform Commercial Code, 31 Sw. L.J. 759 (1977). Of course, not every "repair or replacement" remedy can fail of its purpose. Section 2-719(2) applies only to "exclusive or limited" remedies and is inapplicable where the repair or replacement clause merely furnishes the buyer with an alternative course of action in the event of breach. See Lincoln Pulp & Paper Co. v. Dravo Corp., 436 F. Supp. 262, 276-77, 22 U.C.C. Rep. 407, 423-24 (D. Me. 1977) (alternative holding).

854 For a discussion of other plausible applications of the phrase, see notes 895-98 and accompanying text infra.

855 Unfortunately, some courts hold provisions that exclude consequential damages to fail of their essential purpose when latent defects cause extensive losses. See notes 888-94 and accompanying text infra.

shaded considerably after processing. In pertinent part, the contract read as follows:

2. No claims relating to ... shade shall be allowed if made after weaving, knitting or processing, or more than 10 days after receipt of shipment.

4. ... It is expressly agreed that no representations or warranties, express or implied, have been or are made by the seller except as stated herein, and the seller makes no warranty, express or implied, as to the fitness for buyer's purposes of yarn purchased hereunder, seller's obligations, except as expressly stated herein, being limited to the delivery of good merchantable yarn of the description stated herein.\textsuperscript{857}

The New York Court of Appeals assumed that the buyer could not reasonably have discovered the "shading defects" before knitting and processing. Noting that the provision would "eliminate any remedy for shade defects not reasonably discoverable within the time limitation period," the court held that the "remedy limitation" may have failed of its essential purpose under section 2-719(2).\textsuperscript{858}

The court correctly perceived the effect of the clause, but failed to see the logical consequence of its observation. The provision was analytically identical to a time modification of warranty.\textsuperscript{859} Yet, while purporting to exclude latent defects from warranty coverage, it failed to mention merchantability and was inconsistent with the express warranty. Implied and express warranties therefore extended to every aspect of quality, rendering the clause ineffective as a remedy limitation as well; to the extent it excluded all liability for breach of warranty, the clause was substantively unconscionable under section 2-719.\textsuperscript{860} Only "an apparently fair and reasonable clause" can fail of its purpose, and Comment 1 to section 2-719 indicates that a provision excluding all remedies does not qualify.\textsuperscript{861} Thus, although it properly

\textsuperscript{857} Id. at 401, 244 N.E.2d at 686, 297 N.Y.S.2d at 110, 5 U.C.C. Rep. at 1214.
\textsuperscript{858} Id. at 404, 244 N.E.2d at 688, 297 N.Y.S.2d at 112-13, 5 U.C.C. Rep. at 1217.
\textsuperscript{859} See notes 597-602, 818-22 and accompanying text supra. In effect, the clause disclaimed warranties against defects not discoverable until processing.
\textsuperscript{860} See notes 809-17 and accompanying text supra.
\textsuperscript{861} Absent procedural deficiencies, a remedy limitation cannot both be unconscionable and fail of its essential purpose. Comment 1 to § 2-719 stresses that, to qualify for failure of purpose analysis, a clause initially must have been fair and reasonable. That is, it must have sought to provide a minimum adequate remedy for all breaches of warranty. Other-
found for the buyer, the court employed the "failure of purpose" doctrine to perform a task for which unconscionability alone was suited.

b. Failure of an Exclusive Remedy of Repair or Replacement. An exclusive remedy of repair or replacement can fall short of its essential purpose. That purpose, observed one court,

is to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct and consequential damages that might otherwise arise. From the point of view of the buyer the purpose of the exclusive remedy is to give him goods that conform to the contract within a reasonable time after a defective part is discovered.862

Professor Eddy, also focusing on conformity to the bargain, concurs: "Such a 'repair or replace' provision not only operates equitably but also minimizes senseless economic waste. It assures that in the end the buyer will receive substantially what was bargained for—a functioning item meeting the contract description."863

Comment 1 states that a limited remedy breaks down under section 2-719 when it "fails in its purpose or operates to deprive either party of the substantial value of the bargain." One commentator reasons that "under 2-719(2) the test for continued efficacy of a remedy limitation clause is substantial bargain deprivation, in addition to, or instead of, failure of essential purpose."864 We reject so expansive a reading. The exclusive remedy of repair or replacement seeks simultaneously to exclude resultant damages and provide a "means of assuring goods of warranted characteristics."865 Similarly, the remedy of refund substantially restores the

wise, it was substantively unconscionable (see notes 809-17 and accompanying text supra) and therefore invalid under § 2-302, without ever triggering § 2-719. See Anderson, supra note 853, at 771 ("section 2-302 speaks to a provision unconscionable at the time of making the contract whereas 2-719(2) . . . speak[s] to an agreement valid at its inception which is rendered questionable by intervening circumstances"). Professor Eddy would alter Comment 1's analytical sequence. He would prefer that a court ask first whether the parties intended the limited remedy to apply under the circumstances. If they did, the remedy succeeds of its purpose, and the court would then address the remedy's conscionability. Eddy, supra note 802, at 31-32. Despite the reversed order of issues, both Professor Eddy's and Comment 1's approaches treat failure of purpose and unconscionability as nonoverlapping zones of attack against remedy limitations.

863 Eddy, supra note 802, at 61-62.
864 Anderson, supra note 853, at 766 (emphasis added).
865 Eddy, supra note 802, at 39.
warranted value of goods while disallowing further recovery.\textsuperscript{866} When the contract provides such a remedy, the buyer has bargained for goods of warranted value and a remedy to ensure that he receives that value in goods or cash.\textsuperscript{867} If the remedy succeeds of its purpose, the buyer receives the value of his bargain.\textsuperscript{868} Thus, the Comment's reference to "value of the bargain" simply clarifies, without expanding, the phrase "fails of its essential purpose."

When does an exclusive remedy of repair or replacement of defective goods "fail of its essential purpose?" Since the purpose of the remedy is to give the buyer conforming goods, the remedy fails whenever the seller does not perform his obligation. In 

\textit{Soo Line Railroad Co. v. Fruehauf Corp.},\textsuperscript{869} freight cars developed serious structural defects. The Eighth Circuit held that the seller's refusal to repair had caused the limited remedy to fail of its purpose, and enunciated a workable rule: "A limited remedy fails of its purpose whenever the seller fails to repair goods within a reasonable time. Section 2-719(2) becomes operative when a party is deprived of its contractual remedy and it is unnecessary to prove that failure to repair was willful or negligent."\textsuperscript{870}

Courts split on whether a seller's good faith should shield him when a buyer pleads failure of purpose. A number of recent cases support \textit{Fruehauf}'s implication that the seller's state of mind is not relevant in deciding whether a remedy of repair has failed of its purpose,\textsuperscript{871} but other courts seem to intimate that the seller's

\textsuperscript{866} We discuss failure of this remedy in notes 887-904 and accompanying text \textit{infra}. Recall that remedies must aim to restore at least the warranted value of the goods to pass the test of substantive conscionability and become subject to failure-of-essential-purpose analysis. \textit{See} notes 809-17, 861, and accompanying text \textit{supra}. Indeed, restoration of this conscionable minimum may be the \textit{essential} purpose to which § 2-719(2) refers.

\textsuperscript{867} The buyer has not bargained for damages in excess of the goods' warranted value in situations where the remedy succeeds of its essential purpose. We discuss recovery of consequential damages after a failure of purpose in notes 877-86 and accompanying text \textit{infra}.

\textsuperscript{868} Some courts have employed an expansive reading of the Comment to upset remedy limitations under § 2-719(2) where a buyer suffers large resultant losses. \textit{See} notes 888-91 and accompanying text \textit{infra}. These courts equate consequential damages with bargain value and, in so doing, ignore the language of § 2-719(2). When the limited remedy aims to restore the value of the goods while excluding resultant damages, consequential losses alone will not cause it to fail. If the provided-for remedy is enforced, the buyer will receive the value of his bargain, and the purposes of the limited remedy will be achieved in every respect.

\textsuperscript{869} 547 F.2d 1355, 20 U.C.C. Rep. 1181 (8th Cir. 1977).

\textsuperscript{870} \textit{Id.} at 1371 n.7, 20 U.C.C. Rep. at 1187 n.7.

\textsuperscript{871} In \textit{Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.}, 428 F. Supp. 364, 21 U.C.C. Rep. 80 (E.D. Mich. 1977) the court found a failure of purpose despite the seller's conscientious efforts to repair:
good faith and best efforts to repair will save the remedy. The latter decisions underplay the significance of the seller's breach of warranty. Regardless of the seller's diligence, the buyer who receives a promise or affirmation that has become part of the basis of the bargain should not have to bear the cost of nonconforming goods. The exclusive remedy is invariably termed "repair or replacement," not "best efforts to repair or replace." Indeed, if the seller's sole obligation were to exercise his best efforts, the fairness of the buyer's "quantum of remedy" would be in doubt.

Professor Eddy agrees that failure of purpose should turn "upon the result obtained, rather than the character of the warrantor's behavior." He further urges courts to consider the nature of the goods warranted when evaluating the success of re-

Had the numerous repairs seller performed actually remedied the principal defects in the H-100 and enabled it to run as an automatic machine should have, buyer's remedy for breach would have been meaningful. As circumstances stand, the repairs were not effective to completely cure the breach and make the machine operate in an automatic fashion, yet buyer has now exhausted the limited remedy afforded him. Where such circumstances cause a limited remedy to fail of its essential purpose, [section 2-719(2)] provides that buyer may have his remedy as provided by the Code generally.


873 A "best efforts" rule could easily deprive buyers of any recovery for breach of warranty. See notes 809-17 and accompanying text supra.

874 Eddy, supra note 802, at 72. Accord, Anderson, supra note 853, at 780 (cases focusing on sellers' fault generally nonsensical).
Thus, more promptness and conformity should be required in repairs of standardized goods than of complex, custom-made equipment.\textsuperscript{876}

c. Effect of Separate Consequential Damage Exclusions After Failure of Purpose. Once a buyer vaults the “exclusive” remedy, he must overcome an even more imposing barrier to full recovery—the everpresent “no consequential damages” clause.\textsuperscript{877} Although section 2-719(2) gives the buyer remedies “as provided in this Act” when a limited remedy fails, section 2-719(3) explicitly authorizes limitations of consequential damages. \textit{County Asphalt, Inc. v. Lewis Welding & Engineering Corp.}\textsuperscript{878} vindicated a consequential damages exclusion even though the seller’s exclusive obligation to repair or replace parts of industrial equipment had failed of its essential purpose.

Plaintiff would have UCC 2-719 read in such a fashion as to result in all limitations whatsoever being stricken in any event in which an exclusive remedy should fail of its essential purpose. A better reading is that the exclusive remedy clause should be ignored; other clauses limiting remedies in less drastic manners and on different theories would be left to stand or fall independently of the stricken clause. Since the clause excluding consequential damages has been held not unconscionable, and is not otherwise offensive, it will be applied.\textsuperscript{879}

\textsuperscript{875} Eddy, supra note 802, at 76-79.

\textsuperscript{876} At the extreme end of the spectrum, Professor Eddy would place experimental goods such as the conveyer-oven involved in U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 358 F. Supp. 449, 13 U.C.C. Rep. 254 (E.D. Mich. 1972), aff’d, 509 F.2d 1043, 16 U.C.C. Rep. 1 (6th Cir. 1975) (\textit{discussed in} notes 589-96 and accompanying text \textit{supra}). Eddy, \textit{supra} note 802, at 77. He notes the lower court’s adoption of a “best efforts” standard, but suggests that the parties’ clear understanding that the seller might fail is more pertinent. \textit{Id.} at 79.

The Eighth Circuit preferred to rest on a finding that no express warranty arose as to the oven’s capabilities. 509 F.2d at 1046, 16 U.C.C. Rep. at 3-4.


\textsuperscript{879} \textit{Id.} at 1309, 8 U.C.C. Rep. at 448-49. The court noted, however, that a seller’s bad faith might invalidate the consequential exclusion on an estoppel theory. \textit{Id.} at 1308, 8 U.C.C. Rep. at 447.
Other courts have held otherwise. Courts that require bad faith for failure of purpose similarly point to the seller's wrongful conduct when allowing consequential damages.\textsuperscript{880} The court in \textit{Koehring Co. v. A.P.I., Inc.}\textsuperscript{881} denied summary judgment to a seller who had allegedly refused to repair defective equipment and now sought shelter in its consequential damage exclusion.

At trial the defendants may be able to prove that the plaintiff's conduct was such as to make the remedy provided by the contract fail of its essential purpose.... [T]his court feels that it would not be equitable to allow the seller to refuse to perform the one remedy available to the buyer and then be freed of any responsibility caused by this failure. In a sense, there are two breaches of the contract; the first being the failure to deliver goods conforming to the express warranty, and the second being the failure to correct the nonconformity as was promised in the party's \textit{[sic]} agreement.\textsuperscript{882}

\begin{footnotesize}
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  \item \textsuperscript{882} Id. at 890, 14 U.C.C. Rep. at 378.
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The Koehring rationale should presumptively apply to purpose failures regardless of the seller’s efforts. Normally, the buyer has bargained away his right to consequential damages in reliance on the seller’s promise to repair or replace. When the seller fails to meet the obligation, the exclusion should logically and equitably collapse. However, courts should heed Koehring’s suggestion that a buyer’s consequential damages should not exceed those flowing from the limited remedy’s failure. Since a “repair or replace” remedy allows the seller a reasonable time to make goods substantially conform to his warranties, a court should honor the parties’ allocation of consequential damages arising prior to the time of failure. The actual failure of purpose was the only unanticipated event. When, after the remedy has failed, the seller persists in futile repair efforts despite the buyer’s clearly expressed dissatisfaction, remedy limitations should not ordinarily bar the buyer from recovering resultant damages. The damages in such a case flow directly from the seller’s failure to fulfill his contractual obligation.

d. Failure of Price Repayment Remedies and Damage Ceilings.
An exclusive refund remedy typically seeks to return the substantial value of warranted goods while excluding resultant damages. If the seller makes prompt payment, this purpose is met. A clause limiting damages to the purchase price should never fail of its essential purpose. Like exclusions of consequential damages and modifications of warranty, a damage ceiling may not create an “exclusive or limited remedy” within the meaning and purview of

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883 A seller’s good faith might be relevant when the seller fails to comply with a nonexclusive “repair or replacement” remedy. Such a remedy cannot fail of its purpose (see note 853 supra), but a buyer who gives the seller a chance to make the goods conform is sacrificing immediately available alternative remedies. If the buyer then suffers consequential losses flowing from the seller’s bad faith in repair and replacement, the seller should not be able to assert a separate exclusion as to such losses. Cf. Lincoln Pulp & Paper Co. v. Dravo Corp., 436 F. Supp. 262, 274-78, 22 U.C.C. Rep. 407, 420-26 (D. Me. 1977) (consequential damage exclusion enforced without discussion of seller’s good faith).

884 See Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 382, 21 U.C.C. Rep. 80, 101-02 (E.D. Mich. 1977) (consequential damage exclusion ineffective despite numerous repair efforts by seller). Professor Eddy, however, would uphold consequential damage exclusions whenever the seller had made good faith repair efforts. Eddy, supra note 802, at 84-88. We would presume that the parties did not intend to exclude consequential damages flowing from a failure of essential purpose. However, since this notion rests on the assumption that the buyer was relying on the remedy’s success, the seller should be allowed to demonstrate a contrary intent.

885 See notes 862-76 and accompanying text supra.

886 Accord, Anderson, supra note 853, at 776-77 (unconscionable to read consequential damage exclusion as applicable to damages resulting from failure of essential purpose of limited remedy).
section 2-719(2). In any event, since its only apparent purpose is to exclude resultant damages, it will "fail" only if a court refuses to enforce it. Nevertheless, refund remedies and damage ceilings have occasionally been held to fail under section 2-719(2) when defects are undiscoverable before the buyer sustains large losses.

In Neville Chemical Co. v. Union Carbide Corp., a buyer receiving contaminated oil sustained large losses in settlements with its own customers. The court held that a clause limiting recovery to the purchase price failed of its essential purpose under section 2-719(2) because it left the buyer with "below a bare minimum in quantum" of remedy. The court reasoned that the remedy was designed to restore the buyer to his pre-contractual position and had failed due to the undiscoverability of the contaminant. So construed, the limitation would fail whenever damages exceeded the purchase price. The holding sapped the exclusionary clause of any meaning and permitted the buyer to recover resultant damages which he had agreed to bear himself.

Neville Chemical typifies those cases that apply unconscionability and failure-of-purpose analysis interchangeably to avoid resultant damage limitations. The courts reason that an undiscoverable defect caused a buyer to lose his "value of the bargain" or "fair quantum of remedy," and that the limitation therefore failed of its essential purpose or is unconscionable. These courts fail to recognize that the clause generally leaves the buyer the value of his bargain (measured by the parties as the price of the goods) and that the clause at the outset permits a fair quantum of remedy (the value of the bargain). When a remedy's purpose includes loss allocation, it does not fail merely because loss

887 See text accompanying note 855 supra.
889 Id. at 655, 5 U.C.C. Rep. at 1224.
891 A remedy limitation cannot fail of its essential purpose and be unconscionable at the same time. See note 861 and accompanying text supra.
occurs.\textsuperscript{892} Moreover, absent seller’s bad faith,\textsuperscript{893} the undiscoverability of defects should not make a bargained-for allocation of risk unconscionable.\textsuperscript{894}

Nevertheless, a price-repayment remedy could fail of its purpose. For example, the exclusive remedy would fail where the seller wrongfully refuses to refund the price.\textsuperscript{895} Moreover, if the purpose of price repayment is to enable the buyer to promptly acquire substitute goods, even an undelayed refund may cause the remedy to fail; substitute goods might not be readily available.\textsuperscript{896}

\textsuperscript{892} In Posttape Assocs. v. Eastman Kodak Co., 450 F. Supp. 407, 23 U.C.C. Rep. 855 (E.D. Pa. 1978), a buyer of defective film sought consequential damages despite the presence in the agreement of an exclusive remedy of replacement. Citing Neville Chemical, the buyer argued that the defect’s undiscoverability had caused the remedy to fail despite the seller’s willingness to comply with its duty to replace. Pointing out that the latency of defects was the primary reason the seller attempted to limit recovery, the court concluded that “rather than failing of its essential purpose the limitation of remedy clause operated exactly in the circumstance it was intended.” \textit{Id.} at 411, 23 U.C.C. Rep. at 862.

\textsuperscript{893} As in Majors v. Kalo Labs., Inc., 407 F. Supp. 20, 18 U.C.C. Rep. 592 (M.D. Ala. 1975) (discussed in notes 797-803 and accompanying text \textit{supra}), the seller’s bad faith provided the Neville Chemical court a more appropriate rationale for voiding the liability limitation. The bad faith inherent in the seller’s failure to notify the buyer about a new substance in the oil should have precluded the seller from asserting the damage ceiling. In affirming Neville Chemical, the Third Circuit focused on the seller’s negligence and held the remedy limitation inapplicable.

\textsuperscript{894} See \textit{Eddy, supra} note 802, at 46-48; notes 800-03 and accompanying text \textit{supra}. The consequences of a discoverable breach may be just as severe to a buyer. J.D. Pavlak, Ltd. v. William Davies Co., 40 Ill. App. 3d 1, 351 N.E.2d 243, 20 U.C.C. Rep. 394 (1976), involved a sale of meat in which the exclusive remedy for excessive fat content was an adjustment in price presumably measuring the difference between the value of the goods as warranted and as delivered. The seller breached an “85% lean” warranty, causing large consequential losses arising from the buyer’s inability to comply fully with its contracts for resale. Nevertheless, the value of his bargain was preserved, and the court refused to allow other methods of recovery. The court noted that an exclusive remedy does not fail of its purpose “whenever a contracting party loses money because a limited remedy provision prevents him from being fully reimbursed for the damages caused by the other party’s breach.” \textit{Id.} at 4, 351 N.E.2d at 246, 20 U.C.C. Rep. at 398.


In \textit{Jones}, a contract for the sale of a turbine generator permitted the buyer to reject any defective equipment up to one year. Upon such rejection the seller’s liability was limited to repair or replacement “within a reasonable time ... and in the event of failure by
or the market price may have risen sharply since the time of contracting. Absent an explicit understanding to the contrary, however, courts probably should not hold that a repayment remedy fails merely because the buyer cannot obtain a substitute in a reasonable time. Usually the buyer should be able to foresee the possibility of breach and the problems of substitution. Thus, although the prompt acquisition of substitute goods may form one purpose of a repayment remedy, the essential purpose is most likely the return of consideration.

The recent trend toward employing failure-of-purpose analysis to negate exclusions of consequential damages may lead more sellers to draft "alternative exclusive remedies." Consider the following clauses:

1) Buyer's sole remedy for breach of warranty or other obligation is repair or replacement of defective parts by the seller, or, in the event the seller fails to repair or replace within a reasonable time, refund of the purchase price by the seller.
2) In no event shall the buyer be entitled to consequential damages.

the seller so to do, the Purchaser [could] make such replacement" at the seller's expense. Id. at 549 n.1, 22 U.C.C. Rep. at 698 n.1. A separate clause excluded any recovery of consequential damages. The seller contended that the exclusive remedy could not fail because it granted the buyer an alternative in case the seller failed to repair or replace.

In refusing to grant summary judgment to the seller on the issue of consequential damages, the court observed that an essential contractual purpose might be the receipt by the buyer of conforming goods within a reasonable time. Id. at 550, 22 U.C.C. Rep. at 700. To the extent that the buyer was unable to obtain substitute goods after a failure of the seller to live up to his promise to repair or replace, the remedy would fail of its essential purpose. Assuming that the seller's failure resulted from lack of good faith the buyer could recover consequential damages for any subsequent delay in procuring substitute goods.

The buyer may then be deprived of the value of his bargain within the meaning of Comment 1 of § 2-719.

In J.A. Jones Constr. Co. v. City of Dover, 372 A.2d 540, 22 U.C.C. Rep. 697 (Del. Super. Ct.), appeal dismissed, 377 A.2d 1 (Del. 1977) (discussed in note 896 supra), the court's characterization of the remedy's purpose as a means of providing the buyer with conforming goods was probably appropriate. The contract explicitly referred to replacement by the buyer rather than a mere price refund. If the buyer was unable to obtain a replacement, the remedy likely failed of its essential purpose. In Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Haw. 466, 480, 540 P.2d 978, 987, 17 U.C.C. Rep. 1126, 1139 (1975), however, the court relied on the large losses resulting from the defect's undiscoverability rather than identifying the remedy's purpose as enabling prompt reacquisition. For discussion of the fallacy of overriding resultant damage limitations on the basis of undiscoverable defects, see notes 796-803 and accompanying text supra. The court in Marr Ents. v. Lewis Refrigeration Co., 556 F.2d 951, 955, 21 U.C.C. Rep. 1322, 1327-28 (9th Cir. 1977), examined a similar remedy of replacement or refund but distinguished Jorgensen on the ground that defects in a refrigeration unit were discoverable at an early stage.

See Marr Ents. v. Lewis Refrigeration Co., 556 F.2d 951, 954, 21 U.C.C. Rep. 1322, 1325 (9th Cir. 1977); J.A. Jones Constr. Co. v. City of Dover, 372 A.2d 540, 549 n.1, 22
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This provision reduces the likelihood of a finding of failure of purpose. At the point where an exclusive remedy of repair or replacement would fail of its essential purpose, the seller may still refund the price and avoid an award of consequential damages. There is nothing unfair in this. Normally, a buyer bargains away his right to consequential damages in reliance upon the seller's promise to repair or replace. The seller's non-compliance with that promise than justifies an award of consequential damages. The first hypothetical clause, however, allows for no such reliance. The contract makes clear that the parties contemplate the possibility of noncompliance, and provides a substantively conscionable remedy for that event. Only where the seller neither repairs nor replaces nor refunds the price within a reasonable time should the buyer be able to override a separate exclusion of consequential damages.

VI

DEFENSES TO WARRANTY ACTIONS

A. Buyer's Contributory Conduct

Comment 13 to section 2-314 describes a vital link between seller's breach of warranty and buyer's recovery of damages.

In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In


An exclusive remedy of repair or replacement fails of its essential purpose when the seller fails to repair or replace within a reasonable time. See notes 862-76 and accompanying text supra.

Without the "alternative exclusive remedy" the seller would likely be liable for consequential damages at least from the point where it became clear that the seller could not repair or replace. See notes 877-86 and accompanying text supra.

See notes 883-86 and accompanying text supra.

Recall that a mere promise to exercise best efforts to repair or replace is probably a substantively unconscionable remedy for breach of warranty. The additional promise to refund the price, however, assures the buyer of the substantial value of his bargain. See notes 809-17, 873 and accompanying text supra.

Of course, a court might construe the price refund remedy as intended to give the buyer substitute goods. In that case, even prompt refund might not prevent failure of essential purpose. See notes 895-98 and accompanying text supra.
such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense.\(^9\)

Unhappily, courts and parties becloud the causation issue with terminology borrowed from tort law.\(^9\) Although lawyers must learn the jargon of their jurisdictions,\(^9\) the fundamental

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\(^9\) (Emphasis added.)

\(^9\) The effect of a buyer's contributory conduct on his recovery "is a question that masquerades in many costumes." \textit{White & Summers}, supra note 2, § 11-7, at 335. Sellers and courts toss about such labels as contributory negligence, assumption of risk, misuse of the product, lack of proximate cause, intervening cause, contributory fault, unjustified reliance, and mitigation of damages.

Despite the apparent disparities in doctrine, differences among jurisdictions are often more semantic than real. See 1 R. \textit{Anderson}, \textit{supra} note 89, § 2-314:23, at 542-43. See generally \textit{White & Summers}, \textit{supra} note 2, § 11-7, at 336-37. For instance, many jurisdictions will not allow the seller to introduce evidence of the buyer's conduct under a contributory negligence defense, but do allow that evidence when phrased in terms of lack of proximate cause. See, e.g., Imperial Die Casting Co. v. Covil Insul. Co., 264 S.C. 604, 609-10, 216 S.E.2d 532, 534, 17 U.C.C. Rep. 728, 730-31 (1975); \textit{White & Summers}, supra note 2, § 11-7, at 337 u.41.

\(^9\) The reported cases fail to demonstrate a consensus as to the applicability of tort-based defenses to warranty cases. For instance, courts are divided about whether contributory negligence is a defense to a breach of warranty or a products liability claim. Some courts allow one or more forms of the contributory negligence defense, but do allow that evidence when phrased in terms of lack of proximate cause. See, e.g., Imperial Die Casting Co. v. Covil Insul. Co., 264 S.C. 604, 609-10, 216 S.E.2d 532, 534, 17 U.C.C. Rep. 728, 730-31 (1975); \textit{White & Summers}, supra note 2, § 11-7, at 337 u.41.
question underlying the Comment remains: Does the buyer's conduct "sufficiently attenuate the causal connection between defendant's act and plaintiff's injury" to bar or diminish recovery?\(^{908}\)

To prove causation, the buyer must show that defects in the goods were both the "cause in fact" and the "proximate cause" of his loss. He may also have to prove that he complied with conditions precedent, such as the seller's instructions for using the goods.\(^{909}\) In order to reduce the buyer's recovery, the seller for his part may attempt to show that the buyer failed to mitigate his damages.\(^{910}\) The following discussion focuses on buyers' conduct that may diminish or bar damages recoveries.

1. Cause in Fact

As part of his warranty case, the buyer must prove that his loss would not have occurred "but for" the defects in the goods.\(^{911}\)


Other breach of warranty and products liability cases using the tort concepts of contributory negligence or assumption of the risk are collected in Annot., 46 A.L.R.3d 240 (1972), and Annot., 4 A.L.R.3d 501 (1965 & Supp. 1978).

\(^{908}\) WHITE & SUMMERS, supra note 2, \$ 11-7, at 336.

\(^{909}\) See notes 928-37 and accompanying text infra.

\(^{910}\) See notes 938-52 and accompanying text infra. Unlike contributory conduct, which takes place before the defect manifests itself in injury and which may bar recovery, mitigation takes place after the buyer discovers the defect and failure to mitigate will merely reduce the recovery. Mitigation issues often blur into foreseeability issues. See, e.g., Prutch v. Ford Motor Co., 574 P.2d 102, 105, 23 U.C.C. Rep. 637, 640 (Colo. Ct. App. 1977) (citing unavailability of substitute and loss that would have resulted had buyer not used equipment, court rejected seller's argument that, since buyer used farm equipment with knowledge of alleged defects, consequential damage not foreseeable); Whitaker v. Farmhand, Inc., 567 P.2d 916, 922, 22 U.C.C. Rep. 375, 384 (Mont. 1977) (consequential damages allowed for malfunctioning irrigation system where buyer's failure to repair or obtain substitute result of financial inability).

Because most warranties describe the quality of the goods at the time of delivery, the buyer must normally show that the goods were defective when they left the warrantor's control. If the defect appears some time after delivery, the buyer must show that he took proper care of the goods in the interim. Similarly, a seller can defend by showing that someone or something else caused the buyer's loss; either the goods were not defective or their defect did not injure the buyer.

2. Proximate Cause

In addition to cause in fact, Comment 13 to section 2-314 requires the buyer to show "that the breach of the warranty was normal operating conditions, was caused by latent defects attributable to the manufacturer"; Chatfield v. Sherwin-Williams Co., 266 N.W.2d 171, 175, 24 U.C.C. Rep. 285, 290-92 (Minn. 1978) (defect in paint need not be proved by chemical analysis); Nelson v. Wilkins Dodge, Inc., 256 N.W.2d 472, 476, 21 U.C.C. Rep. 1001, 1006 (Minn. 1977) (since vehicles fit for ordinary purposes did not display enumerated defects, trial court should have allowed jury to decide cause based on circumstantial evidence); Pearson v. Franklin Labs., Inc., 254 N.W.2d 133, 140, 22 U.C.C. Rep. 351, 358-59 (S.D. 1977) (testimonial of veterinarians and circumstantial evidence that cows vaccinated from one particular batch of vaccine became ill while others did not, sufficed to prove that vaccine defective). But see the unfortunate dictum in Heil v. Standard Chem. Mfg. Co., 301 Minn. 315, 325, 223 N.W.2d 37, 43, 15 U.C.C. Rep. 345, 352 (Minn. 1974), that "proof of causation cannot be established through negative implication."


Once a buyer establishes a defect, however, the seller can only argue that the defect did not cause the buyer's consequential damages. See, e.g., Edwards-Warren Tire Co. v. J.J. Blazer Constr. Co., 565 F.2d 401, 404, 22 U.C.C. Rep. 906, 910 (6th Cir. 1977) (buyer recovers where seller failed to show "product misuse or other intervening cause" after buyer established nonconformity); Jacobs Pharmacy Co. v. Gipson, 116 Ga. App. 760, 762, 159 S.E.2d 171, 174, 4 U.C.C. Rep. 909, 911 (1967) (jury questions whether buyer's use of drug contrary to package instructions barred recovery for burns suffered when pharmacist sold more concentrated drug than prescription called for); Shamrock Fuel & Oil Sales Co. v. Tunks, 406 S.W.2d 483, 490-91 (Tex. Ct. App. 1966) (misuse of product bars plaintiff's recovery, even where product nonconforming, if injury would have occurred were product conforming) (dictum).

Counsel for buyers, however, should not ignore the distinction. Proof of a defect entitles the buyer to recover primary damages as to goods accepted and retained (see notes
the \textit{proximate} cause of the loss sustained.\textsuperscript{915} Thus, even if the loss would not have occurred "but for" the breach, where an intervening cause attenuates the connection between the breach and the loss, a court may bar\textsuperscript{916} or reduce proportionately\textsuperscript{917} the buyer's consequential damage recovery. Despite its tort law origins, the proximate cause concept is firmly woven into the fabric of the Code.\textsuperscript{918}

\textsuperscript{915} (Emphasis added.) See, e.g., S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 527, 24 U.C.C. Rep. 1, 6 (3d Cir. 1978); Aldon Indus., Inc. v. Don Myers & Assoc., 517 F.2d 188, 191-92, 17 U.C.C. Rep. 1002, 1007-08 (5th Cir. 1975); Kopper Glo Fuel, Inc. v. Island Lake Coal Co., 436 F. Supp. 91, 97-99, 22 U.C.C. Rep. 1117, 1126-28 (E.D. Tenn. 1977); Geiger v. Sweeney, 201 Neb. 175, \textemdash, 266 N.W.2d 895, 899-99 (1978); Herman v. Midland Ag Serv., Inc., 200 Neb. 356, \textemdash, 264 N.W.2d 161, 172, 24 U.C.C. Rep. 590, 594 (1978). As the \textit{Herman} and \textit{Geiger} cases demonstrate, courts may often interpret proximate cause to mean cause in fact. In \textit{Geiger}, the seller claimed that an act of God (severe winds), rather than a structural defect, was the proximate cause of a grain bin being blown away from its foundation. 201 Neb. at \textemdash, 266 N.W.2d at 899-900.

\textsuperscript{916} For example, a carpet dealer claimed loss of customers and goodwill because carpeting supplied to it for resale was defective. The court held that the proximate cause of the dealer's loss was not the carpeting's defectiveness, but rather his foisting of the goods on his customers. "It was not the defective carpet per se, but the fact that [the dealer] knew of the defects, yet authorized the installation without bringing the defects to the attention of school officials, that caused [his] removal [from county school board bidding lists]." Aldon Indus., Inc. v. Don Myers & Assoc., 517 F.2d 188, 192, 17 U.C.C. Rep. 1002, 1007-08 (5th Cir. 1975).

\textsuperscript{917} The court may reduce the buyer's recovery if his negligence or fault contributed causally to his own injury. For example, in Signal Oil & Gas Co. v. Universal Oil Prods., 24 U.C.C. Rep. 555 (Tex. 1978), the buyer ignored the seller's warning that a defect in a reactor heater made the heater unsafe. The Texas Supreme Court held:

\textit{[t]his is a cause of action for breach of an implied warranty the buyer may not recover consequential damages to the extent that the buyer's negligence or fault was a concurring proximate cause of such damages. To the extent the product was unsuitable and proximately caused the damages, the buyer may recover consequential damages for breach of warranty. Under the present holding where both the unsuitable product and the buyer's negligence are found to be proximate causes of the damage, an additional determination must be made by the trier of fact: that being the respective percentages (totaling 100 percent) by which the concurring causes contributed to the consequential damages.}


\textsuperscript{918} The Code contains a proximate cause requirement in § 2-715(2)(b): "Consequential damages resulting from the seller's breach include ... injury to person or property proximately resulting from any breach of warranty." The absence of similarly explicit language in § 2-715(2)(a) suggests that the proximate cause test applies only to personal injury and property damage. But the Official Comments undermine this view. Comment 13 to § 2-314 does not limit the proximate cause requirement to personal injury and property damage cases. Moreover, according to Comment 5 to § 2-715, "[s]ubsection (2)(b) states the usual rule as to breach of warranty, allowing recovery for injuries 'proximately' resulting from
Simply putting the warranty to the test will not bar the buyer's recovery.\footnote{Hensley v. Sherman Car Wash Equip. Co., 33 Colo. App. 279, 283, 520 P.2d 146, 148, 14 U.C.C. Rep. 940, 943 (1974). See Brown v. Chapman, 304 F.2d 149, 153 (9th Cir. 1960) (Uniform Sales Act); Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254, 258 (6th Cir. 1960) (Uniform Sales Act).} Suppose Burt Buyer runs a newsstand in Manhattan. A cigar grows from the side of his mouth. Occasionally, he removes the cigar to berate a customer, placing it on a pile of yesterday's *Times*. Worried about this fire hazard, Burt buys a warranted fire extinguisher from Sam Seller. One day, during an especially long harangue, the newsstand catches fire. Burt's fire extinguisher fizzles and fails while his newsstand burns to the ground. Burt sues Sam for the loss of his newsstand and lost profits. Can Sam prove Burt's contributory negligence as a bar to recovery? No! Burt relied upon the warranty for protection against his carelessness.\footnote{See Brown v. Chapman, 304 F.2d 149, 153 (9th Cir. 1962) ("One may well rely upon a warranty as protection against aggravation of the consequences of one's own carelessness.").} He put the warranty to the test.\footnote{Putting the warranty to the test should, however, have its limits. Burt's friend Boris has a nastier habit: he enjoys setting fire to copies of prestigious law reviews. Not wanting to set his highbrow newsstand on fire, Boris also buys a warranted fire extinguisher. During one of his more enlightening debauches, Boris turns to his fire extinguisher, which naturally fails to operate. In the final analysis, whether Boris's conduct proximately caused the loss may depend upon whether it was reasonable for Boris not to test or inspect the fire extinguisher before setting his fires. See notes 923-27 and accompanying text infra.}

On the other hand, suppose Burt tries the fire extinguisher and discovers that it does not work, but continues to use yesterday's *Times* as an ashtray. Burt should recover only primary damages; the loss of the newsstand and profits are his to bear. Comment 5 to section 2-715 states: "[If the buyer] did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty."\footnote{It would appear that an individual using a product when he had actual knowledge of a defect or knowledge of facts which were so obvious that he must have known of a defect, is either no longer relying on the seller's express or implied warranty or has interjected an intervening cause of his own, and therefore a breach of such warranty cannot be regarded as the proximate cause of the ensuing injury. Erdman v. Johnson Bros. Radio & Tel. Co., 260 Md. 190, 196-97, 271 A.2d 744, 747, 8 U.C.C. Rep. 656, 661 (1970).} The buyer's conduct intervenes between the defect and his loss.
If Burt remains unaware of the defect, a court may bar recovery for failure to inspect the goods. According to Comment 5 to section 2-715, "[w]here the injury involved follows the use of goods without discovery of the defect causing the damage, the question of 'proximate' cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects." Whether the buyer's failure to inspect is reasonable may depend upon such factors as the difficulty of inspection, the buyer's degree of expertise and prior experi-


The seller may explicitly warn the buyer of the dangerous state of the product. In Phillips v. Allen, 427 F. Supp. 876, 21 U.C.C. Rep. 74 (W.D. Pa. 1977) seller delivered an electric horsewalker (a carousel-like device for exercising horses) without a proper electrical ground. Buyer ignored seller's admonition not to use the device until an electrician had connected it properly. Id. at 877, 21 U.C.C. Rep. at 75. In denying recovery for the electrocution of one horse and injuries to three others, the court found that although the seller had breached implied warranties of fitness and merchantability, the jury correctly concluded that the buyer's assumption of the risk barred recovery. Id. at 879-80, 21 U.C.C. Rep. at 77-79.

Cf. Barefield v. La Salle Coca-Cola Bottling Co., 370 Mich. 1, 3-5, 120 N.W.2d 786, 788-89 (1963) (jury could find that buyer should have examined soft drink before consuming the remainder of it after she found or should have found that it contained glass particles) (non-Code).

As Comment 5 indicates, even if the buyer does make an inspection, his conduct may be unreasonable if the inspection does not turn up the defect. Comment 13 to § 2-314 supports this: "Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury." (Emphasis added.)

In General Instr. Corp. v. Pennsylvania Pressed Metals, Inc., 366 F. Supp. 139, 13 U.C.C. Rep. 829 (M.D. Pa. 1973), aff'd mem., 506 F.2d 1051 (3d Cir. 1974), a buyer's failure to discover that sleeve bearings for bomb fuses were packed in oil of the wrong thickness barred him from consequential damages. The nondiscovery was unreasonable because "[a] mere visual inspection of the whole contents of the bag would at least have put anyone who regularly handled these bearings on notice that something was amiss." Id. at 149, 13 U.C.C. Rep. at 836. Cf. Ambassador Steel Co. v. Ewald Steel Co., 33 Mich. App. 495, 503-04, 190 N.W.2d 275, 278-80, 9 U.C.C. Rep. 1019, 1023-24 (1971) (where only test for carbon content and not an ordinary examination would have revealed defects in structural steel, § 2-316(3)(b) would not exclude or modify the implied warranty of merchant-
ence with the goods,\textsuperscript{925} or the magnitude of potential loss.\textsuperscript{926} If the seller assures the buyer that the goods are not defective or that the defect is cured, a court may require the buyer to show that his subsequent reliance was reasonable.\textsuperscript{927}

Because of the inherent malleability of tort-based concepts like proximate cause, courts can often do what social policy and fairness demand. In general, policies pertinent to commercial transactions argue for holding a commercial buyer to a more stringent duty to inspect the goods. The commercial buyer is better able to discover or insure against a breach of warranty than is the consumer and, in some cases, the seller.

3. Conditions Precedent

A condition precedent is a contractual duty that the buyer must fulfill before the seller's warranty obligation becomes enforceable.\textsuperscript{928} Unlike other kinds of contributory conduct, therefore, failure to comply with a condition precedent does not bar recovery by interrupting the chain of causation between the breach and the loss;\textsuperscript{929} it simply prevents the warranty from maturing.

\textsuperscript{925} In General Instr. Corp. v. Pennsylvania Pressed Metals, Inc., 366 F. Supp. 139, 13 U.C.C. Rep. 829, 834-36 (M.D. Pa. 1973), aff'd mem., 506 F.2d 1051 (3d Cir. 1974), discussed in note 924 supra, a bomb manufacturer received sleeve bearings packed in nonconforming oil of a different color than the specified oil. Id. at 148, 13 U.C.C. Rep. at 835. In holding unreasonable the bomb manufacturer's failure to timely discover the defect, the court stated: "Prior to [the present shipment], plaintiff had received and handled approximately 1,500,000 properly impregnated bearings. A frequent buyer of a particular product must be held to a higher standard in discovering defects in that particular product than a casual buyer." Id. at 149, 13 U.C.C. Rep. at 836.

\textsuperscript{926} The disproportionality between the contract price and the foreseeable consequential loss may alone indicate that the buyer should have inspected the goods more carefully.

\textsuperscript{927} See, e.g., Hensley v. Sherman Car Wash Equip. Co., 33 Colo. App. 279, 285, 520 P.2d 146, 149, 14 U.C.C. Rep. 940, 945 (1974) (buyer can recover for injuries caused by malfunctioning safety hood if, in view of her own observations, she reasonably relied on seller's assurance that hood had been repaired).


Conditions precedent take various forms, from the simple "use as directed" instructions\textsuperscript{930} common in advertisements, to requirements that the buyer notify the seller of defects that the seller has promised to cure,\textsuperscript{931} to complex maintenance and record-keeping requirements.\textsuperscript{932} As with other aspects of the warranty, a condition precedent's vitality depends upon whether it has become part of the basis of the bargain.\textsuperscript{933} Once this threshold is crossed, the buyer must prove compliance with the condition.\textsuperscript{934}

The buyer's failure to satisfy a contractual responsibility relating to the goods may be characterized in terms of either condition precedent or proximate cause. The distinction makes a difference. Condition-precedent theory automatically bars recovery because the warranty never became enforceable.\textsuperscript{935} Proximate cause theory


\textsuperscript{932} See, e.g., Melcher v. Boesch Motor Co., 188 Neb. 522, 525, 198 N.W.2d 57, 60, 10 U.C.C. Rep. 1131, 1133 (1972) (action on express warranty in sale of pickup truck barred where buyer failed to prove he performed required maintenance and received certificate of compliance).


\textsuperscript{935} In Melcher v. Boesch Motor Co., 188 Neb. 522, 198 N.W.2d 57, 10 U.C.C. Rep. 1131 (1972), a Ford dealer warranted a truck subject to the condition that buyer not only maintain the vehicle but also present to any Ford dealer evidence of such maintenance to receive written confirmation. Without a dealer's written confirmation, seller was not obligated to repair. The farmer changed the oil and filters himself, but he did not present proof of such for a dealer's certification. Although the seller did not challenge the adequacy of the buyer's maintenance, the court denied warranty protection to the buyer. \textit{Id.} at 525-27, 198 N.W.2d at 62-64, 10 U.C.C. Rep. at 1134-35. Failure to meet a condition precedent may thus bar recovery even though the buyer's loss did not result from that failure.

To hold otherwise and permit recovery despite the findings of non-compliance with the conditions precedent would, in our opinion, not only render nugatory
impedes recovery only if the buyer's conduct contributed significantly to *causing* his loss.\textsuperscript{936} We favor the proximate cause approach. Conditions precedent encourage buyers to properly use and care for the goods. Yet courts should hesitate to deny recovery because of buyer's conduct that has no causal connection with his loss. Courts should apply proximate cause analysis unless the agreement explicitly and conspicuously hinges seller's warranty obligation on buyer's compliance.\textsuperscript{937} Otherwise, conditions precedent may unfairly frustrate buyer's reasonable expectation of warranty protection.

4. Mitigation

Although the buyer establishes breach of warranty and causation, section 2-715(2)(a) allows him to recover only that loss "which could not reasonably be prevented by cover or otherwise."\textsuperscript{938} Although the mitigation concept traditionally encompasses the buyer's behavior *after* he discovers the breach, section 2-715(2)(a) does not compel this limitation. A court might reasonably deny recovery to a commercial buyer for losses he could have

and meaningless the very basis of the bargain found to exist between the parties, but would sanction a new and different express warranty that the promisor had not made at the time of the sale.  

\textsuperscript{936} See notes 915-27 and accompanying text *supra*.

\textsuperscript{937} In Chatfield v. Sherwin-Williams Co., 266 N.W.2d 171, 176, 24 U.C.C. Rep. 285, 292 (Minn. 1978), a buyer of paint failed to follow directions printed on the paint cans' labels. In affirming a judgment for the buyer, the court distinguished cases in which "compliance with the directions [was]... a condition precedent to the existence of the express warranty sued on. Here no comparable stress was laid on the importance of the directions, and they certainly were not specific and precise... ."

\textsuperscript{938} A buyer might try to avoid the mitigation requirement in § 2-715 (2)(a) by seeking consequential damages under subsection 2(b): "injury to person or property proximately resulting from any breach of warranty." Unlike subsection 2(a), subsection 2(b) does not contain a foreseeability requirement (see WHITE & SUMMERS, *supra* note 2, at 324; note 918 *supra*) or an explicit mitigation responsibility. The drafters probably envisioned some overlap between the coverage of the subsections. Nevertheless, subsection 2(a) expresses a commercial focus by referring to "loss" instead of injury and by its foreseeability requirement, which suggests parties can control the risk through contractual planning. Subsection 2(b) appears designed for consumer situations and discrete injuries suffered by consumer or commercial buyers. Thus, although it could be called a "property injury" under subsection 2(b), the loss resulting from a leaky silo that rots the corn stored within fits best under subsection 2(a). But if a defective foundation causes the silo to collapse and kill a sheep, the event fits best as an injury to property under subsection 2(b). Courts should not allow commercial buyers to avoid the mitigation doctrine by suing under subsection 2(b). The "good faith" commercial reasonableness required by § 2-103(1)(b) certainly encompasses the commercial buyer's duty to minimize damages flowing from a breach. See note 317 *supra*. Further, Comment 2 to § 2-715 mentions good faith as a requirement of "subparagraph (2)," not just subsection 2(a).
In any event, the breaching seller generally has the burden of proving that the buyer could have avoided or minimized the loss by reasonable effort and expense. The buyer's unreasonable failure to minimize his loss will reduce, but not bar, his damage recovery. Moreover, at least one court suggests that a buyer will not be penalized for failing to mitigate where the seller passed up an equivalent opportunity to do so.

The buyer's duty to mitigate is not "absolute" or "unlimited." To receive full consequential damages, he need not have chosen what in hindsight appears to have been the best course of action. The buyer must simply have acted reason-

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939 Suppose the operation of buyer's factory, a $1 million-a-day enterprise, depends on an inexpensive cotter pin, available only by mail. If the cotter pin breaks and buyer has neglected to procure a spare, should the factory owner recover for profits lost in the time it takes to order a new part? The buyer could argue that he simply put the warranty to the test. See notes 919-21 and accompanying text supra. The seller, in turn, may argue that in not keeping spare parts, the buyer failed to act in a commercially reasonable manner under § 2-103(1)(b). Alternatively, the seller could frame his argument as one for "anticipatory mitigation," that is, that the buyer has a pre-breach duty to minimize his potential loss. Where the buyer can prevent most consequential losses by a trivial expenditure, perhaps he should be required to do so. The strength of this argument increases as the potential loss grows larger relative to the preventive expense. Anticipatory mitigation fits quite nicely into the "reasonably be prevented" language of § 2-715(2)(a). On the other hand, anticipatory mitigation adds a pre-breach foreseeability requirement for the buyer. The drafters use of the word "cover" in § 2-715(2)(a) may indicate that the buyer need only prevent losses that he foresees or should foresee after the breach occurs.


At least one court places the burden of proof on the buyer to show that he could not reasonably have "covered." See Cargill, Inc. v. Fickbohm, 252 N.W.2d 739, 742, 21 U.C.C. Rep. 1226, 1230 (Iowa 1977).

941 See, e.g., Dunn Buick, Inc. v. Belle Isle Plumbing, Heating & Air Cond. Co., 9 U.C.C. Rep. 827, 831 (Okla. Ct. App. 1971) ("failure to mitigate goes only to the amount of damages and is not a complete bar to Buyer's action").

942 "Where both the plaintiff and the defendant have had equal opportunity to reduce the damages by the same act and it is equally reasonable to expect the defendant to minimize damages, the defendant is in no position to contend that the plaintiff failed to mitigate." S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 530, 24 U.C.C. Rep. 1, 10 (3d Cir. 1978) (alternative holding).


944 U.C.C. § 2-712, Comment 2, provides:

The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may
ably under the circumstances; and whether he has done so is a question for the jury.

Circumstances may prevent the buyer from attempting to mitigate. For example, the buyer may have no reason to know of the ongoing consequences of the defect, or he may not be able to reasonably afford measures to limit his loss. In such cases, the buyer can safely keep and use the goods without endangering his consequential damage recovery.

When mitigation is feasible, it may take one of several forms. If the buyer rejects or never receives the goods, he may cover under section 2-712. If he accepts the goods, he might supplement perceived deficiencies, alter commercial plans to make the best of a bad situation, or make do until some later time when a reasonable alternative materializes. In sum, the seller

later prove that the method of cover used was not the cheapest or most effective.

See, e.g., S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 529-30, 24 U.C.C. Rep. 1, 8-11 (3d Cir. 1978) (although trial court's preference for one of several mitigation alternatives may have been best choice, buyer's decision to continue performance with unsatisfactory contractor was reasonable) (alternative holding).

See, e.g., S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 528, 24 U.C.C. Rep. 1, 7 (3d Cir. 1978); Indiana Farm Bureau Coop. Ass'n v. S.S. Sovereign Faylenne, 24 U.C.C. Rep. 74, 81-82 (S.D.N.Y. 1977) (unreasonable for buyer to resell nonconforming pre-planting fertilizer piecemeal when it could have shipped whole cargo to its plants for regrinding and resell as "out-of-condition" bulk fertilizer).


Moreover, the buyer's reasonable mitigation expenses should be considered consequential damages of the breach. See notes 335, 414-16 and accompanying text supra.


will be unable to attack the buyer's conduct to reduce the consequential damage recovery so long as the buyer acts reasonably to minimize his loss.

B. Privity—Section 2-318

"Privity" denotes the relationship between contracting parties. Where no contractual relationship exists, no privity of contract exists. Until recently, the absence of privity shielded remote manufacturers and sellers from liability to persons aggrieved by defective or unsafe products. Manufacturers owed no duty to nonprivity plaintiffs to exercise care in the manufacture of their products; privity thus formed a prerequisite to products liability torts. Similarly, only a party, assignee, or intended third-party beneficiary to a contract could recover damages from a party in breach of the contract. Because warranty is a hybrid of tort and contract, lack of privity provided an effective defense against warranty actions.

In this century, American legislatures, courts, and commentators have crippled the privity doctrine in the products liability field. The assault on privity has proceeded primarily on four

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553 Black's Law Dictionary 1362 (rev. 4th ed. 1968) defines "privity of contract" as "that connection or relationship which exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant in respect of the matter sued on." Id. at 1362. See 4 Corbin, supra note 495, at § 778; White & Summers, supra note 2, § 11-2, at 327.


555 See note 953 supra.


(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and
policy fronts. First, manufacturers and suppliers seem best able to distribute losses caused by unsafe products because they can pass on the cost of products liability or liability insurance in the price of the goods they sell. Second, strict liability of remote manufacturers to ultimate consumers and bystanders serves the dual purpose of compensating injured parties for the harm they suffer and deterring the manufacture of unreasonably dangerous products. Third, "[t]he supplier, by placing the goods upon the market, represents to the public that they are suitable and safe for use; and by packaging, advertising or otherwise, he does everything that he can to induce that belief." Courts will thus obligate the supplier to make good his representations. Finally, the purchaser of an unsafe product could ordinarily recover damages from the retailer, who in turn could seek indemnity from the manufacturer. A direct avenue of recovery from the purchaser to the manufacturer avoids the waste and risk entailed in that circuitous route to recovery.

Some of the policies underlying the judicial assault on privity apparently influenced the drafters of the Code. In the 1952 draft they included section 2-318, which read:

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

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.


See Prosser, supra note 956, at 1122-23.

Id. at 1123. As Prosser has noted, the intermediate seller is usually a mere conduit, and his position on the distributive chain should not preclude recovery where the manufacturer has induced reliance on the quality of his product. Id. See Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 59-60, 207 A.2d 305, 309, 2 U.C.C. Rep. 599, 603 (1965); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, --, 161 A.2d 69, 84 (1960).


(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over
(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.
A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.\textsuperscript{962}

This section, which is now Alternative A of the three alternative provisions recommended by the Code drafters, amounts to a legislative designation of third-party beneficiaries to a warranty, thereby extending the warranty beyond contractual designations.

Three aspects of Alternative A deserve mention. First, the designated third-party beneficiaries include only members of the buyer's family or household, or guests in his home, and then only those reasonably likely to use, consume, or be affected by the goods. Second, the harm covered by Alternative A is specifically limited to personal injury, where the policies for expanding liability are strongest. Third, Alternative A erodes the horizontal privity requirement but is silent about vertical privity. Horizontal privity exists when a person occupies a contractual position, no matter how remote, on the same chain of distribution as the manufacturer. A buyer is thus in horizontal privity with the retailer from whom he buys the goods, with the supplier who sold to the retailer, and with the manufacturer of the goods. The buyer's friend who uses the goods is not in horizontal privity with anyone. Vertical privity, on the other hand, exists only between parties occupying adjacent links on the distributive chain.\textsuperscript{963} The buyer of goods is in vertical privity with the retailer but not with the supplier or manufacturer.

Alternative A represents a legislative declaration that a buyer's family, household, or guests, if foreseeably affected by the goods, will have the same cause of action against sellers of defective products as does the buyer. Alternative A thus dispenses with the horizontal privity requirement as to certain nonprivity users.


The drafters acknowledged Alternative A's silence on the issue of vertical privity in Comment 3 to section 2-318:

The first alternative expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. On its face, this Comment indicates that Alternative A is not meant to affect the requirement of vertical privity, leaving the matter to judicial determination. Some courts, however, find in the Comment a license to extend the legislative inroads on horizontal privity, and to provide a cause of action to parties not on the distributive chain who are not specifically mentioned in section 2-318. In essence, these courts read Alternative A more as a minimum guarantee to consumers than as a precise allocation of risk. The Permanent Editorial Board, however, has read a negative inference into the section "limiting beneficiaries to the family, household and guests of the buyer." This suggests that

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964 (Emphasis added.)


Plaintiff's right of recovery should not be made to depend on a narrow distinction between horizontal privity and vertical privity, which is a distinction without a difference as far as concerns lack of contractual relationship. If either horizontal or vertical privity is lacking between plaintiff and defendant, the result is the same: a lack of contractual relationship. Since such a lack of contractual relationship was held in [Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848, 5 U.C.C. Rep. 925 (1968), a vertical privity case] not to be a bar to recovery in assumpsit for breach of implied warranty, we determine that in this case as well, plaintiff-employee is not barred from his assumpsit action based on implied warranty. 224 Pa. Super. Ct. at 385, 307 A.2d at 403, 12 U.C.C. Rep. at 774. Cf. McNally v. Nicholson Mfg. Co., 313 A.2d 913, 14 U.C.C. Rep. 381 (Me. 1973) (although Comment 3 to § 2-318 explicitly allows case law growth on vertical privity only, Comment 2 to § 2-313 suggests that literal specifications of § 2-318 are mere guideposts and not restraints on erosion of horizontal privity requirements).

966 PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 3, at 13 (1967) (emphasis added). According to the report, some states also viewed § 2-318 as restrictive, and rejected the section entirely or drafted more expansive versions. Id. One commentator suggests that Comment 3 precludes reading § 2-318 with a negative inference. Skilton, Some Comments on the Comments to the Uniform Commercial Code, 1966 Wis. L.
courts exceeding Alternative A’s horizontal limits overstep the judicial role by amending existing legislation,\textsuperscript{967} and frustrate the Code’s underlying policy of uniformity.\textsuperscript{968}

Recognizing that courts in certain jurisdictions had already exceeded the parameters of Alternative A, the Permanent Editorial Board in 1966 drafted two more legislative alternatives in hopes of preventing the proliferation of non-uniform approaches to privity.\textsuperscript{969}

\textbf{Alternative B}

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

\textsuperscript{967} See Hargrove v. Newsome, 225 Tenn. 462, 469-70, 470 S.W.2d 348, 352, 9 U.C.C. Rep. 398, 402 (1971) ("[T]o extend to any person not within the categories mentioned in the statute the right to bring an action upon warranty without privity of contract would, in effect, be amending the statute under the guise of judicial construction. This we should not do."), cert. denied, 405 U.S. 907 (1972).

\textsuperscript{968} According to U.C.C. § 1-102(2)(c), one purpose of the Code is “to make uniform the law among the various jurisdictions.”

Because the drafters have clearly spoken on the issue of horizontal privity in Alternative A, an extension of protection beyond its explicit limits would contravene the drafters' intent. Thus, Alternative A courts that defer to the legislature on horizontal privity issues would not be guilty of the buck-passing practiced by courts that refuse to apply warranties in lease transactions, an issue upon which the drafters have not spoken. See notes 20-21 and accompanying text supra.

\textsuperscript{969} Comment 3 to § 2-318 explains:

The second alternative is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d § 402A (Tentative Draft No. 10, 1965) in extending the rule beyond injuries to the person ....

The 1966 Report of the Permanent Editorial Board explained the history of the § 2-318 Alternatives.

[Alternative A] was criticized in California as “a step backward,” and was omitted from the Code as enacted in California and in Utah. Non-uniform versions were enacted in ten states, and proposals for amendment have been made elsewhere. There appears to be no national consensus as to the scope of warranty protection which is proper, but the promulgation of alternatives may prevent further proliferation of separate variations in state after state. Alternative B is therefore promulgated in substantially the 1950 form, and Alternative C is drawn to reflect the trend of more recent decisions as indicated by Restatement of Torts 2d § 402A (Tentative Draft No. 10, 1965), extending the rule beyond personal injuries.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. As amended 1966. 970

Alternatives B and C broaden the class of warranty beneficiaries, both horizontally and vertically. 971 Although Alternative B perpetuates the personal injury limitation, Alternative C appears to also allow recovery for property damage and economic loss. 972

The two most commonly litigated issues regarding privity in commercial settings are (1) whether a buyer's employee may recover from the manufacturer or supplier for personal injuries caused by a defective product—a horizontal privity issue; and (2) whether a buyer may recover damages for economic loss from a remote manufacturer or supplier—a vertical privity issue.

1. Employees as Third-Party Beneficiaries

Under Alternatives B and C, employees should easily qualify as persons "who may reasonably be expected to use, consume or

970 As of publication, 28 jurisdictions have adopted Alternative A or similar provisions: Alaska, Arizona, Connecticut, District of Columbia, Florida (extends to employees), Georgia, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Virgin Islands, Washington, West Virginia, and Wisconsin.

Five jurisdictions have adopted Alternative B or similar provisions: Alabama, Kansas, Maryland, New York, and Vermont.

Eleven jurisdictions have adopted Alternative C or similar provisions: Arkansas, Colorado, Delaware, Hawaii, Iowa, Minnesota, North Dakota, Rhode Island, South Dakota, Utah, and Wyoming.

Five jurisdictions have adopted their own expansive provisions: Maine, Massachusetts, New Hampshire, South Carolina, and Virginia. Texas has simply adopted a statute declaring the matter of privity one for judicial rather than legislative action; California has omitted the section altogether.

971 Alternative A is definitely aimed at horizontal privity, referring only to beneficiaries normally not positioned on the distributive chain. Alternatives B and C are more inclusive, referring to any persons likely to be affected by the goods. The sweeping language of these two Alternatives includes persons on the distributive chain. Before the advent of Alternatives B and C, Comment 3 stated that the section was neutral as to vertical privity. After Alternatives B and C were added, the Comment, referring to Alternative A, was amended to state that "the section in this form" (emphasis added) is neutral as to vertical privity, thus making it clear that this neutrality did not extend to Alternatives B and C.

972 Professors White and Summers suggest that Alternative C should be limited to personal injury and property damage and should not extend to economic loss. They draw this conclusion from the Permanent Editorial Board's explicit reference to Restatement 402A
be affected by" goods purchased by their employers. Courts in Alternative A jurisdictions, however, split as to whether employees may recover damages for personal injuries from manufacturers of defective products purchased by their employers. The Supreme Court of California, where privity is entirely the child of the courts, has apparently accepted the argument that an employee is "a member of the industrial 'family' of the employer—whether corporate or private—and ... thus stand[s] in such privity to the manufacturer as to permit the [employee] to be covered by warranties made to the purchaser-employer." In Alternative A jurisdictions, however, such an argument distends the statutory language.

Some courts in Alternative A jurisdictions read Comment 3 to section 2-318 as a license to ignore the statute in defining the

(see note 969 supra) which is limited to personal injury and property damage. See White & Summers, supra note 2, at § 11-5. Although we do not believe that the Board's ambiguous reference to the Restatement is dispositive, we agree with the policies, put forth by White and Summers, that militate against allowing nonprivity plaintiffs to recover economic loss. See notes 988-91 and accompanying text infra.

Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 347, 5 Cal. Rptr. 863, 869, 353 P.2d 575, 581 (1960). Although the Peterson court may have accepted the plaintiff's "industrial family" argument, it relied more heavily on two other factors:

In the first place, it is a matter of common knowledge, and of course known to vendor-manufacturers, that most businesses are carried on by means of the assistance of employees and that equipment or supplies purchased by employers will in actual use be handled by the employees, who in this respect may be said to stand in the shoes of the employer. Moreover the term "privity" itself appears to be of uncertain origin and meaning and to have been developed by the courts and applied in various contexts. ... One of the customary definitions is that "privity" denotes mutual or successive relationship to the same thing or right of property; it implies succession.... Thus, in the present context, the employee had the successive right to the possession and use of the grinding wheel handed over to him by his purchaser-employer; and, we believe, should fairly be considered to be in privity to the vendor-manufacturer with respect to the implied warranties of fitness for use and of merchantable quality upon which recovery is here sought.

Id. at 347-48, 5 Cal. Rptr. at 869, 353 P.2d at 581. The first principle, although appropriate in the common-law context, would fall short in an Alternative A jurisdiction. The narrow language of Alternative A does not allow for a "common knowledge" approach that expands the section's scope. Nor is the court's definitional approach satisfactory either at common law or within the Code. The definition of privity contemplates a succession of property interests. An employee usually has no interest or right of possession in the property of his employer. Rather, most employees possess only a duty of use. An employee is thus generally not in privity with the vendor of his employer's equipment.

The Tenth Circuit has nevertheless adopted a "common knowledge" approach within the context of the Code. See Speed Fasteners, Inc. v. Newsom, 382 F.2d 395, 4 U.C.C. Rep. 681 (10th Cir. 1967) (applying Oklahoma law and upholding employee's recovery against manufacturer of product owned by employer).
parameters of protection. At least two courts, recognizing the narrowness of Comment 3’s language, have turned instead to Comment 2 to section 2-313, which provides:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. . . . The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

Because this Comment is more ambiguous than Comment 3 to section 2-318, courts could more easily read it as condoning judicial erosion of the horizontal privity rule. If, however, the “one particular area” that Alternative A addresses is horizontal privity, then courts are free to roam only “[b]eyond that” area.

Employees in jurisdictions that read Alternative A narrowly could normally recover for personal injuries, despite the lack of horizontal privity, under a strict liability theory. Alternatively, if the seller of the goods has expressly warranted their safety, the employee could perhaps show that he is the intended beneficiary of the express warranty.

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974 See notes 965-68 and accompanying text supra.
976 (Emphasis added.)
977 The Comment’s reference to § 2-318 may fairly be read as directed towards Alternative A only, since the Comment was on the books before Alternatives B and C appeared. The latter two Alternatives, which extend warranty protection beyond the limits of vertical privity, thus do not preclude this interpretation of “one particular area.” The court in McNally v. Nicholson Mfg. Co., 313 A.2d 913, 14 U.C.C. Rep. 381 (Me. 1973) approached then veered away from this analysis. The court recognized that the “one particular area” that Alternative A deals with is horizontal privity, but it proceeded to explain that horizontal privity remains subject to judicial abrogation informed by § 2-318’s “guideposts.” Id. at 920, 14 U.C.C. Rep. at 390.
In most jurisdictions, Alternative A constitutes a substantial if not insurmountable barrier to breach of warranty actions by employees. Even where courts acknowledge the expansive language of the Official Comments, they often consider the adoption of Alternative A, rather than one of the more liberal alternatives, as expressing a legislative unwillingness to abolish entirely the privity requirement in breach of warranty actions.\textsuperscript{980} Other courts cleave to the words of Alternative A without explicitly referring to its selection over B or C as an expression of legislative intent.\textsuperscript{981} These courts conclude that Comment 3 leaves vertical, but not horizontal, privity to judicial determination.\textsuperscript{982} This deference to the legislature appears best to reflect the intent of the drafters.\textsuperscript{983}

2. Economic Loss

Our society places greater value in protecting against bodily injury and property damage than in ensuring that people receive the benefits of their bargains. Although anti-privity policies are less compelling when applied to economic loss, some courts have allowed such recoveries to plaintiffs not in vertical privity with the defendants. Several approaches achieve this result. New Jersey, for example, expanded its tort doctrine of strict liability without privity, developed in personal injury cases, to embrace economic loss.\textsuperscript{984} Alternatively, some courts fit the parties within the con-


\textsuperscript{982} See notes 963-64 and accompanying text supra.

\textsuperscript{983} See notes 966-68 and accompanying text supra.

tours of traditional contract theory. For example, a court may characterize a remote manufacturer and an ultimate consumer as a seller and buyer dealing directly with one another. Where express warranties exist, a court can overcome strict privity requirements by determining that the plaintiff is a third-party beneficiary of the warranty between the manufacturer and the seller.

Most courts deny recovery for economic loss to nonprivity plaintiffs asserting breach of warranty claims. The case law reveals three distinct yet overlapping rationales. First, many courts simply adhere to traditional contract notions, holding that privity is absolutely essential to recovery. Second, courts may defer to the legislature; Alternatives A and B of section 2-318 apply only to personal injury cases. Many courts construe those provisions narrowly, rejecting the more expansive interpretation seemingly condoned by Comment 3. Third, some courts focus on the inapplicability of recognized anti-privity rationales to cases not involving personal injury or property damage. Viewed together,


Unlike Alternatives A and B, Alternative C is not limited on its face to any particular type of harm. Comment 3's reference to the Restatement of Torts, however, suggests that the drafters may have intended Alternative C to apply only to personal injury and property damage cases. See note 972 and accompanying text supra.


In James Sausage Co. v. Novalco, Inc., 17 U.C.C. Rep. 1027 (Okla. Ct. App. 1975), the court discussed the inapplicability of the circuitry-of-actions and risk-spreading rationales (see notes 958, 961, and accompanying text supra) and concluded: "The UCC
these three rationales strongly support the requirement of vertical privity for the recovery of economic loss.

C. Notice—Section 2-607(3)(a)

Code section 2-607(3)(a) provides:

Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . .

The buyer who fails to give his seller timely notice forfeits his right to damages, revocation of acceptance, and specific performance.991 Yet despite the ease and importance of compliance, the case law is crowded with remorseful buyers who have failed to give timely notice.

Notice requirements, whether emanating from section 2-607(3)(a) or from contractual terms,992 serve two basic purposes. First, by affording the seller an opportunity to remedy the defect voluntarily,993 timely notice prevents needless litigation and minimizes damages.994 The notice requirement deters buyers from lulling sellers into a false sense of security while damages mount.995 Second, notice promotes fairness of litigation by allowing the seller time to gather evidence and prepare for trial.996

adequately affords the buyer who chooses his seller with care a remedy for his economic loss. We find no compelling justification for extending the ambit of such liability to parties remote from the transaction." Id. at 1034. See WHITE & SUMMERS, supra note 2, § 11-5, at 334-35; Note, supra note 958, at 943-58.


992 For a discussion of contractual provisions relating to notice, see note 597 and accompanying text infra.

993 WHITE & SUMMERS, supra note 2, § 11-9, at 344.

994 For a discussion of mitigation of damages, see notes 938-52 and accompanying text supra.

995 See U.C.C. § 2-607, Comment 4.


A final, and less important policy behind the notice requirement is to give the defendant that same kind of mind balm he gets from the statute of limitations.
Section 2-607(3)(a) serves as a gapfiller, designed to set notice requirements where none have been agreed upon. This accounts for its generality. Rather than dictating results in particular cases, the section directs courts to the commercial settings of the transactions and the general policies of the Code. Two questions focus this investigation: (1) what is the content of an effective notification? and (2) what is a reasonable time?

1. Content

Comment 4 to section 2-607 provides that proper notice under that section “need only be such as informs the seller that the transaction is claimed to involve a breach.”997 Courts occasionally straitjacket buyers by requiring more specificity than the Code demands.998 But the protests normally made by disappointed buyers usually satisfy section 2-607(3)(a).999 The seller’s efforts to repair the defect should establish, prima facie, that he received effective notice. Upon discovering a possible defect, how-

There is some value in allowing a seller, at some point, to close his books on goods sold in the past and to pass on to other things.

White & Summers, supra note 2, § 11-9, at 344. Because the duty to notify arises only after the buyer discovers or should discover the breach, latent defects can dilute the seller’s “mind balm” by stretching the effective notice period into the indefinite future.

Comment 4 to § 2-607 provides in part:

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer’s rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer’s rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

997 In KLPR TV, Inc. v. Visual Elec. Corp., 465 F.2d 1382, 11 U.C.C. Rep. 50 (8th Cir. 1972), the court of appeals found that a lessee forfeited any warranty rights it might have possessed by failing to give the lessor timely notice of a breach. Id. at 1385, 11 U.C.C. Rep. at 54. In light of the district court’s finding that the lessor “had continual notice of the unsuitability of the equipment by reason of [lessee’s] constant complaints... from the date of... delivery” (327 F. Supp. 315, 325, 9 U.C.C. Rep. 649, 663 (W.D. Ark., 1971)), the Eighth Circuit appears to have applied § 2-607(3)(a) too restrictively. Neither of the principal policies behind the notice requirement supported the lessor; the lessee’s complaints provided the lessor ample opportunity to cure and to prepare for negotiation or litigation.

ever, a prudent buyer will plainly state in writing that he claims the goods are not as warranted.

As Comment 4 indicates, the buyer need not state all the objections upon which he intends to rely. But his failure to alert the seller to the full extent of the breach may preclude recovery. In *Michigan Sugar Co. v. Jebavy–Sorenson Orchard Co.*, the buyer of 800 bags of sugar returned sixty-eight bags containing excessive "pan scale." Although the buyer noticed some "pan scale" in the 732 bags remaining, it proceeded to use the sugar for processing frozen diced apples. The buyer's customer rejected the apples because of the "pan scale," and the court rejected the buyer's warranty claim for lack of notice. The court felt that once the seller had corrected the sixty-eight defective bags, it was entitled to relax; notice as to the sixty-eight bags lulled the seller into believing that the other 732 were of good quality.

2. Reasonable Time

A buyer discovering a breach of warranty should give notice as quickly as he can dial the seller's phone number. But not all buyers play it safe. Whether notice reached the seller within a reasonable time is a "vexatious and frequently litigated" fact question because the answer in any particular case depends upon a variety of factors. These factors include the commercial context, past conduct of the parties, and the discoverability of the defect. Any formula that focuses on only one factor distorts the results. Thus, courts generally eschew rigid time limits, although an occasional dictum calls some calendar period unreasonable as a matter of law.

Factual variations may run the gamut from a consumer injured by a latent defect in an electric toaster to a wholesaler receiving a bad shipment of potatoes. Comment 4 admonishes courts to treat these cases differently:

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1000 *See* Eckstein v. Cummins, 41 Ohio App. 2d 1, 6, 321 N.E.2d 897, 901, 16 U.C.C. Rep. 373, 376 (1974); note 997 *supra*.
1002 *Id.* at 647, 239 N.W.2d at 696, 19 U.C.C. Rep. at 103 (alternative holding).
1003 *Id.*
1004 WHITE & SUMMERS, *supra* note 2, § 11-9, at 343.
1005 "What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." U.C.C. § 1-204(2).
1006 *See*, e.g., Bickett v. W.R. Grace & Co., 12 U.C.C. Rep. 629, 645 (W.D. Ky. 1972) ("any notice after more than one month is generally unreasonable").
The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The policies of commercial good faith and protection of the seller's ability to take prompt remedial action figure most prominently in the determination of a reasonable time. Thus, while the produce wholesaler may have only hours to contact his seller about nonconforming potatoes, a manufacturer may have several weeks to notify his component parts supplier about customer complaints. Of course, no duty to notify arises until the buyer "discovers or should have discovered" seller's breach of warranty.

The seller by his conduct may extend the period for notice. Assurances that a problem does not exist or will disappear, such as "that's the way it's supposed to sound," or "they always take a while to break in," operate as an equitable toll. The buyer's conduct may also affect the reasonableness of a time period. Notice of a breach of warranty following close on the heels of seller's action for the price smacks of commercial bad faith and may be held tardy. So too, the buyer who knowingly uses

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1007 See White & Summers, supra note 2, § 11-9, at 344.
1009 See U.C.C. § 2-607(3)(a). At what point the buyer should have discovered latent defects is a question of no small import and no simple resolution. In Waddell v. American Breeders Serv., Inc., 161 Mont. 221, 505 P.2d 417, 11 U.C.C. Rep. 1157 (1973), a cattle rancher bought semen for artificial insemination of his cows. The buyer put the inseminated cows in a pasture with a "clean-up" bull to cover any cows that had not been successfully impregnated. When the buyer discovered that the clean-up bull was "overused," he replaced it with another bull. Months later, when the failure of his calf crop made it clear that the semen had been defective, the buyer notified and sued the seller. The seller protested that the buyer should have given notice when he replaced the clean-up bull; he should have known that the semen was not working when he saw how hard the bull was working. Unpersuaded, the court held that the buyer's later notice was timely. Id. at 227, 505 P.2d at 421, 11 U.C.C. Rep. at 1161. But compare Brunner v. Jensen, 215 Kan. 416, 524 P.2d 1176, 15 U.C.C. Rep. 64 (1974), where the buyer of cows warranted to be pregnant saw that some of the cows had come in heat and notified the seller of a possible breach within a week of receipt. Id. at 419-20, 524 P.2d at 1179, 15 U.C.C. Rep. at 68.
defective goods, but does not give notice until it is too late for the seller to remedy the defect, may be denied recovery.\textsuperscript{1012}

D. The Statute of Limitations—Section 2-725

Section 2-725 provides in part:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

In most commercial warranty cases, application of section 2-725 is a simple matter. The buyer must bring his action within four years after seller tenders the goods. Section 2-725, however, allows variation both in the timing of accrual and in the ensuing period of limitation.

1. Timing of Accrual

Statutes of limitations force plaintiffs to strike while the evidentiary iron is hot.\textsuperscript{1013} Thus, a tort cause of action accrues at the time of injury because the primary evidence is then ripe.\textsuperscript{1014}


\textsuperscript{1013} The purpose of all statutory limitations is fairness to the defendant, courts, and the public in general, by protecting them from the disruptive effect of tenuous claims asserted after witnesses and evidence have been lost. 75 W. VA. L. REV. 201, 206 (1972). See Developments in the Law—Statutes of Limitations, 63 HARV. L. REV. 1177, 1185 (1950).

\textsuperscript{1014} See WHITE & SUMMERS, supra note 2, § 11-8, at 339-40. New York Court of Appeals Chief Judge Breitel has offered a related reason:

[A] tort is a wrong committed between persons not in contractual relationship or at least not dependent upon the contract. . . . For most torts, there is no cause of action until injury occurs . . . . Hence, it is all but unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one.
In contrast, a Code warranty claim normally accrues at tender of delivery, presumably because the condition of the goods at the time of delivery is central.

Defects lurking in tendered goods, however, may not surface within four years after delivery. Section 2-725's accrual at the time of tender may seem unfair to the buyer who is time-barred before he can reasonably discover the breach. Nevertheless, by ensuring that liability will terminate at a definite time, section 2-725 allows sellers to properly plan their businesses.

Section 2-725(2) strikes a different balance "where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance." The seller cannot use the Code's time bar to indirectly modify or vitiate his express promise of durability. In such cases, the four-year period does not begin to run until "the breach is or should have been discovered."

Courts uniformly refuse to recognize this exception in actions under sections 2-314 and 2-315, because implied warranties by definition cannot "explicitly" extend to future performance.

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Buyers injured in their person or property by latent defects may be able to avoid § 2-725's accrual rule by suing on negligence or strict tort liability theories. Causes of action in tort generally accrue at the time of injury. See note 1014 supra. Whether a court should apply the tort time bar or § 2-725 is primarily a consumer-oriented issue that is beyond the purview of this Project. For a general discussion, see WHITE & SUMMERS, supra note 2, § 11-8, at 339-40. Nevertheless, the commercial buyer should not overlook the possibility of recovering economic losses in a strict liability action. See Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305, 2 U.C.C. Rep. 599 (1965) (plaintiff recovered in strict tort for diminution in value of deteriorating goods).

Section 2-725 may work even greater hardship on a plaintiff not on the distributive chain. A guest injured by the goods in the buyer's home, for example, would probably have had no knowledge of the time when his warranty claim accrued and no opportunity to inspect the goods when tendered. The availability of strict liability in tort could undo any unfairness to plaintiffs not in privity. Less harshness occurs if the plaintiff is a buyer. The buyer, who lacks vertical privity with the remote manufacturer, can sue his immediate seller. Such a warranty cause of action accrues upon tender to the buyer rather than upon the manufacturer's tender to the seller.

The Official Comment to § 2-725 refers to the four-year period "as the most appropriate to modern business practice. This is within the normal commercial record-keeping period."

U.C.C. § 2-725(2).

Id.
Although goods might be unmerchantable unless they last for more than four years,¹⁰²⁰ and a "particular purpose" could conceivably extend into the future,¹⁰²¹ courts have applied section 2-725 strictly to bar recoveries.¹⁰²² Even beneficiaries of express warranties have difficulty convincing courts that their warranties explicitly extend to future performance. Professors White and Summers suggest that the "life time guarantee" and the promise "that an automobile would last for 24,000 miles or four years whichever occurred first" exemplify warranties of future performance.¹⁰²³ Yet some courts and commentators read such warranties to describe only a present capability to endure.¹⁰²⁴ These folks err. It is hard to envision a

[Note: Further text and references are included, discussing specifics on warranty periods, court decisions, and legal interpretations.]
more explicit warranty of future performance than a promise that a product will last a given number of years. Any prospective warranty necessarily includes a statement about present condition, because the future performance of goods depends, in part, upon their present state.

Although a future performance warranty must explicitly refer to the future,\textsuperscript{1025} it need not specify a particular time. Thus, a warranty that a burial vault "will give satisfactory service at all times" fit the future performance exception.\textsuperscript{1026}

In order to invoke the exception in section 2-725(2), prospective language must describe "the performance of the goods." Here, the distinction between warranties and remedies plays a crucial role.\textsuperscript{1027} Thus, a seller's promise to remedy defects surfacing within a specified period of time will not postpone the accrual of a cause of action on the underlying warranty.\textsuperscript{1028}

2. Period of Limitation

Once his Code cause of action has accrued, the plaintiff normally has four years in which to sue. But section 2-725(1) allows the parties, in their original agreement, to reduce that period to not less than one year. Courts should require that language asserted to shorten the limitation period actually refer to the time in which a plaintiff may bring suit. Language specifying the time in which the buyer must notify the seller of breach, or language

\textsuperscript{1025} See Binkley v. Teledyne Mid-America Corp., 333 F. Supp. 1183, 1186-87, 10 U.C.C. Rep. 111, 115 (E.D. Mo. 1971) (machine's production capacity warranty that did not refer to future not prospective, despite buyer's inability to discover breach until future time), aff'd, 460 F.2d 276 (8th Cir. 1972). But in Perry v. Augustine, 37 Pa. D. & C.2d 416, 417-18, 3 U.C.C. Rep. 735, 736-37 (C.P. 1965), the court held a warranty of a heating system to be prospective, despite the absence of an explicit reference to future performance, where the breach could not be discovered until cold weather came. Perry disregarded the conjunctive language of § 2-725, which requires both future reference and latency of breach.


\textsuperscript{1027} For a discussion of the warranty-remedy distinction, see notes 826-33 and accompanying text supra.

\textsuperscript{1028} In Centennial Ins. Co. v. General Elec. Co., 74 Mich. App. 169, 253 N.W. 2d 696, 21 U.C.C. Rep. 1088 (1977), a written agreement accompanying the sale of a transformer read in part: "If [defects appear] ... within one year from the date of shipment ... the [seller] shall thereupon correct any defect." Id. at 171 n.1, 253 N.W.2d at 697 n.1, 21 U.C.C. Rep. at 1089 n.1 (emphasis omitted). The court correctly construed this language "not as a warranty for future performance, but rather, a specification of the remedy." Id. at 171, 253 N.W.2d at 697, 21 U.C.C. Rep. at 1090.
creating remedies or express warranties of limited duration, should not alter the time bar.\textsuperscript{1029}

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\textsuperscript{1029} In Dennin v. General Motors Corp., 78 Misc. 2d 451, 357 N.Y.S.2d 668, 15 U.C.C. Rep. 102 (Sup. Ct. 1974), seller's warranty covered defects for "a period of 12 months or 12,000 miles, whichever first occurs." \textit{Id.} at 451, 375 N.Y.S.2d at 669, 15 U.C.C. Rep. at 103. The court rejected seller's claim that this language reduced the period of limitation to one year.