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Implied and Express Warranties and Disclaimers Under the Uniform Commercial Code

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community at large, is embodied in the statement by former Attorney General Brownell that:

So long as there is to be a government of and by law, we hold no doubt that the burden of prosecution is a community responsibility. . . . Equally, the burden of providing a fair trial is upon the community. The right to representation is a concomitant of fair trial, and though it is personal to the defendant and may vary with his choice and means, it cannot be permitted to fail just because the accused is a poor person. At that point the community must supply the deficiency.1

Betts v. Brady is interred, the way has been cleared, and a framework provided—the community must now respond to the challenge to meet its responsibilities.

IMPLIED AND EXPRESS WARRANTIES AND DISCLAIMERS UNDER THE UNIFORM COMMERCIAL CODE

It has been noted that one-third of all sales litigation involves warranty obligations in sales contracts.1 It is expected, moreover, that the warranty provisions in the Uniform Commercial Code2 and the changes in existing warranty law which it effectuates will continue to provide a major source of litigation. Even with the changes, simplifications and clarifications which it has introduced into warranty law, the Code is in no way a utopian problem-solving piece of legislation for the commercial community. As evidenced by the extensive literature on the subject3 warranty law under the Uniform Commercial Code continues to be a


2. Unless otherwise indicated, the citations are to the 1958 Official Draft which is effective in Indiana on July 1, 1964.

major problem area. The following is an attempt to illuminate the key warranty sections of the Code, to foresee some of the problems that may arise in future litigation and to suggest possible solutions to these problems.4

**EXPRESS WARRANTIES: SECTION 2-313**

Under section 2-313, the express warranty section of the Code, there are three methods by which a seller may create an express warranty. The first method is contained in section 2-313(1)(a) which provides that "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." The most patent problem of section 2-313(1)(a) appears to be that of language since the Code provides no definition of the key terms affirmation of fact, promise and basis of the bargain. Moreover, the use of the word or between affirmation of fact and promise indicates there might be distinguishable methods of creating warranties under this section.

**Affirmation of Fact or Promise.** The affirmation of fact or promise terminology was used in the Uniform Sales Act6 and, as in the Code, no explanation was provided as to why the different terms were used or needed. Some insight, however, is gained by an investigation of the historical development of warranty law.

At common law, a mere affirmation of fact7 was not treated as a warranty8 and some courts declared that an affirmation of fact was not even evidence of a warranty.9 To give rise to a warranty obligation, the seller had to be explicit in his language by saying, "I warrant. . . ."10

The theory behind this common law distinction was that the warranty

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4. At certain points, an investigation of existing law will be helpful in understanding relevant sections of the Code, but this will not be the major method of presentation.
5. **Uniform Commercial Code** § 2-313(1)(a).
7. Affirmation of fact is not easy to define in such a manner that it would apply to all situations. It is probably best defined in terms of any positive statements or representations as to an existing fact. See Stove v. McCarthy, 64 Cal. App. 158, 220 Pac. 690 (1923); Long v. Carpenter, 154 Neb. 862, 50 N.W.2d 67 (1951); Ralston Purina Co. v. liams, 143 Neb. 588, 10 N.W.2d 452 (1943). In many instances an affirmation of fact would raise an implication of a promise.
10. See **Honnold, Cases on the Law of Sales and Sales Financing**, 32 (2d ed. 1962). Williston suggested two reasons why an affirmation of fact would not create an express warranty: (1) the substitution of assumpsit as a remedy for breach of warranty and (2) the definition of warranty as an agreement in section 62 of the English Sale of Goods Act. 1 WILLISTON, SALES, § 194 (rev. ed. 1948).
obligation was contractual in nature and required the use of language which evidenced an intent to warrant. A mere affirmation of fact, as opposed to a promise, was not considered sufficient to satisfy this formal requirement. This was a very restrictive view considering the situations where the seller's language was so ambiguous as to deny a clear picture of his warranty obligations. Any practical or theoretical distinction between an affirmation of fact and a promise, however, was rendered moot by the Sales Act which abolished the early common law distinction and accepted either an affirmation of fact or a promise as an express warranty. The Code continues the Sales Act policy and, in effect, any statement by the seller could be sufficient to create an express warranty.

Basis of the Bargain. In section 2-313(1)(a) of the Code, a more complex problem is presented by the use of the phrase basis of the bargain, which seems to set forth a different standard of express warranty than the standard which appeared in the Sales Act. In the Sales Act any affirmation of fact or promise which had a natural tendency to induce the buyer to purchase and upon which he relied created an express warranty. Some authorities have thus concluded that basis of the bargain imputes reliance by the buyer. This conclusion, however, is fallacious in two respects. First, the comments to section 2-313 specifically provide that "no particular reliance on [the seller's] statements need be shown in order to weave them into the agreement." Secondly, if the drafters of the Code had wanted to recodify the reliance standard of the Sales Act, they could have used the Sales Act language to avoid the confusion. The fact that they did not reiterate the specific language of the Sales Act supports the proposition that the Sales Act standard has been rejected, and reliance by the buyer on the seller's affirmations of fact or promises need not be shown to establish a warranty.

13. This term is not defined in the Code.
14. IND. ANN. STAT. § 58-112 (Burns 1962). The language of the Sales Act created an objective standard, i.e., would a reasonable man have naturally tended to rely on such statements by the seller.
16. UNIFORM COMMERCIAL CODE § 2-313, comment 3.
17. See generally Cosway, Sales—A Comparison of the Law in Washington and the Uniform Commercial Code, 35 WASH. L. REV. 617, 621 (1960); Ezer, supra note 3, at 284-95; Mason, supra note 3, at 13; Winston, Article 2—Sales, 22 TENN. L. REV. 785,
Since the Code does not define *basis of the bargain*, some difficulty is created in ascertaining the new standard of section 2-313(1)(a). There is a strong implication in the comments to the section that basis of the bargain is the agreement of the parties. The same implication is reached from another avenue of Code interpretation by a general investigation of the rights and remedies of a buyer when a seller has breached an express warranty. Under the Sales Act there was a specific provision for the buyer's rights and remedies when there was a breach of warranty. There is no comparable provision in the Code. A buyer's remedies for breach of warranty must, therefore, be found in section 2-711, the buyer's remedies section of the Code. A buyer can only invoke this section if he has rightfully rejected or justifiably revoked acceptance, but a buyer can only reject the goods or revoke his acceptance of the goods if the goods fail to conform to the contract. Therefore, unless *basis of the bargain* means the same thing as *contract*, a buyer could not reject or revoke his acceptance for a breach of warranty. Since a remedy for a breach of warranty depends on a right of rejection or a right of revocation, it must be concluded that *basis of the bargain* means the contract of the parties as defined by the Code. *Basis of the bargain* is, therefore, the legal obligation which results from the agreement

797 (1953). Although most authorities place much reliance on the comments, it should be noted that usually the text of the Code is enacted by the legislature, while the comments are not. For a succinct warning as to the use of the comments, see Honnold, *op. cit. supra* note 10, 17-19.

18. "'Express' warranties rest on 'dickered' aspects of the individual bargain...." Uniform Commercial Code § 2-313, comment 1. "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 to weave them into the fabric of the agreement." Uniform Commercial Code § 2-313, comment 3. "In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell...." Uniform Commercial Code, § 2-313, comment 4.


22. See Uniform Commercial Code § 2-711(1).


24. In various sections of Article 6 (Breach, Repudiation and Excuse) and Article 7 (Remedies) of the Code, the standard is in contractual terms. See, e.g., § 2-607 which deals with the effect of acceptance and speaks in terms of *non-conformity* to the *contract and breach*; § 2-612, dealing with installment contracts, talks about *non-conformity*; § 2-714 deals with the buyer's damages for breach in regard to accepted goods. All these sections use contractual terms and *basis of the bargain* never appears, but all of these sections deal with rights and remedies for breach of warranty.

25. Section 1-201(11) of the Code defines *contract* as "the total legal obligation which results from the parties' agreement...." Uniform Commercial Code § 1-201(11).
of the parties, and an express warranty is any statement by the seller which becomes part of the legal obligation of the parties.

Sale by Description or Sample. There are two other methods of creating an express warranty under the Code. Section 2-313(1)(b) provides that "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," and section 2-313(1)(c) provides that "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." Under the Sales Act a sale by description or sample created an implied warranty that the goods must conform to the description or sample. The change in the Code seems analytically sound in that it is not necessary to imply a warranty since a description is clearly an affirmation of fact or promise, and in a sale by sample a seller is telling the buyer that a particular unit is average.

Express Warranties: Conclusion. To understand, in a factual context, how an express warranty is created it should be noted that there are various levels of potential warranty-creating seller activity. If a seller does or says nothing, no express warranty is created. For example, a seller makes no express warranty when a buyer purchases a head of lettuce in a self-service store. The theory behind express warranties requires that a seller do something before a warranty arises.

The next level of seller activity is where a seller says or does a minimum, manifesting the name of the product. For example, seller offers to sell buyer a car and buyer accepts. Here an express warranty has been created that the goods shall conform to the affirmation or description of a car since the name of the product is either an affirmation of fact or a description of the article. The delivery of a boat would be a breach of the express warranty because the proposition that a car is not a boat is fundamental and poses no problem. On the other hand, suppose the seller delivers a car without a windshield or a car with one sparkplug missing, with eight sparkplugs missing, with the motor missing. All of these situations raise the question of whether the seller has breached the express warranty that what he is selling conforms to the affirmation or description of a car.

29. Williston foresaw this change, see 1 Williston, op. cit. supra note 10, § 223; as did a federal court, see Universal Major Elec. Appliances, Inc. v. Glenwood Range Co., 223 F.2d 76 (4th Cir. 1955).
The question is more than academic in a situation where the total obligation of the seller is what the name of the product creates. Assume a seller sells a buyer a car with an appropriate disclaimer of all express and implied warranties in the written agreement. Assume further that the car at the time of the sale has defective brakes; and that buyer is injured because of the defective brakes. He brings an action, not for breach of any implied warranty (because of the disclaimer) or for breach of an express warranty (because no warranty was made concerning the brakes), but for the breach of the express warranty created by the name of the product, i.e., a car with defective brakes does not conform to the affirmation or promise of a car. It is no answer to say that this is a jury question, because the point is whether or not the name of the product is enough seller-talk to permit the buyer to get to the jury when this theory is the only possible avenue of recovery for him.

In most situations, however, a seller does more than name the product. In the typical sales transaction, there are many statements by a seller which can be construed as either an affirmation of fact or as a promise. Whether the statements are to be called a collective group of affirmations of fact or promises, or whether the term description is applied to a seller's statements, it is not difficult to say that a seller should be bound by the express warranties he makes.

It can be seen from the above analysis that the more a seller talks or writes, the greater an obligation he is creating to deliver a product that conforms to his statements. In some situations, however, sellers have been able to persuade the triers of fact that no express warranties have been created because the seller was only giving the buyer his opinion, puffing or using dealer's talk. The drafters of the Code conceded that "some statements or predictions cannot fairly be viewed as entering into the bargain," but they have provided no assistance in determining where the line is going to be drawn between warranty and opinion. It is suggested that unless some standard is created, the courts and juries will look to the justifiable reliance of the buyer on the statements of the seller to determine whether such statements contained a warranty or were only an expression of opinion. The use of this standard will destroy for all purposes the attempt of the drafters to eliminate the reliance requirement of the Sales Act as a test for an express warranty.

31. It seems that in this area one of the most litigated questions concerns whether a statement by a seller that an animal is sound is a warranty or an opinion. The courts have not reached consistent results. See generally 1 Williston, op. cit. supra note 10, § 203.
IMPLIED WARRANTIES: SECTIONS 2-314 AND 2-315

A. THE IMPLIED WARRANTY OF MERCHANTABILITY: SECTION 2-314

Historically, the seller's obligation as to quality has been developed in the area of implied warranties. It has long been recognized that if a man sells something, he promises that it is fit for some purpose. This promise, condition or warranty, as it has come to be known, arises not because of the seller's express manifestations, but by operation of law as a result of the sales transaction.

The difficulty with this approach lay not in the creation of a quality obligation, but rather in the determination of how much of a quality obligation a seller created by entering into a sales transaction. Early courts and statutes developed the theory that in a sale a seller must deliver goods that are merchantable. What merchantable meant, however, was never uniformly decided, and the courts developed many diverse standards for merchantability.

The Sales Act continued the implied warranty of merchantability, but limited it to sales by description. The Code continues the implied warranty of merchantable quality in section 2-314 but changes the prior

32. See generally Honnold, op. cit. supra note 10, at 55-69.
33. See Jones v. Bright, 5 Bing. 533, 130 Eng. Rep. 1167 (Ex. 1829).
34. See Jones v. Just, L.R. 3 Q.B. 197 (1868); British Sales of Goods Act § 14 (1893).
35. After a review of several hundred cases, Prosser felt that when a seller undertook to deliver merchantable goods the extent of his obligation was at least that the goods were: (1) genuine according to the name and description, (2) saleable in the market under the designation, (3) fit for the ordinary uses and purposes of such goods and (4) free from defects interfering with the sale or ordinary use. There was also some type of quality guarantee, but the price a buyer paid had little consideration in the cases. Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117, 125-39 (1943); see generally Annot., 21 A.L.R. 367 (1922).
36. See Ind. Ann. Stat. § 58-115(2) (Burns 1962); Rinelli v. Rubino, 68 Ind. App. 314, 120 N.E. 388 (1918); contra, Bulldog Concrete Forms Sales Corp. v. Taylor, 195 F.2d 417 (7th Cir. 1952) (sale not by description). See also Torpey v. Red Owl Stores, 228 F.2d 117 (8th Cir. 1955) (because the buyer selected the goods in a self-service store, there was no sale by description).
37. Uniform Commercial Code § 2-314 states that:
   (1) Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
   (2) Goods to be merchantable must at least be 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
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law in three ways: (1) the implied warranty of merchantability is not limited to sales by description; (2) the warranty extends to sales of food or drink; and (3) for the first time in statutory form, the minimal requirements of merchantability are stated.

The Meaning of Merchantability. In defining certain minimal requirements of merchantability, some interpretation problems are presented by section 2-314(2) of the Code. Sections 2-314(2)(a) and (b) provide that "Goods to be merchantable must at least be such as . . . pass without objection in the trade under the contract description; and . . . in the case of fungible goods, are of fair average quality within the description. . . ." Some confusion is created by subsections (a) and (b) because of the implications of "contract description" and "description." It would seem that the express warranty section of the Code creates a warranty obligation if there is a description in the contract and will create a conflict when the seller attempts to disclaim his implied warranties, i.e., if the implied warranty is disclaimed, is the same obligation enforced because of the express warranty created by the description?

Further problems arise with subsections (a) and (b) because the comments to section 2-314 state that these subsections must be read together. Considering them together it appears that non-fungible goods

(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.

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

38. See generally 1 ANDERSON, op. cit. supra note 3, § 2-314:3 (1961); HAWKLAND, op. cit. supra note 1, at 43 (1955); COSWAY, supra note 17, at 625; WINTON, supra note 17, at 798; 15 U. Pitt. L. Rev. 331, 335 (1954).
39. See UNIFORM COMMERCIAL CODE § 2-314(1).
40. See UNIFORM COMMERCIAL CODE § 2-314; see generally 1 ANDERSON, op. cit. supra note 3, § 2-314; JAEGGER, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR USE; RECENT DEVELOPMENTS, 16 Rutgers L. Rev. 493 (1962); 15 U. Pitt. L. Rev. 331 (1954). In order for the implied warranty of merchantability to arise, the seller must be a merchant with respect to the goods of the kind being sold. UNIFORM COMMERCIAL CODE § 2-314(1). Under the Sales Act, the implied warranty arose whether the seller was the grower or manufacturer or not. See Ind. Ann. Stat. § 58-115(2) (Burns 1962). The absence of these words in the Code does not restrict this section. See UNIFORM COMMERCIAL CODE § 2-314, comment 2.
41. UNIFORM COMMERCIAL CODE § 2-314(2)(a), (b). The drafters in these subsections were loose with their language, raising the implication that there had to be a sale by description. But this has been negatived by subsequent interpretations. See note 36 supra. A problem with hidden defects is raised by § 2-314(2)(a), i.e., goods with a hidden defect could pass without objection in the trade. This situation would be covered by § 2-314(2)(c) and the goods would not be merchantable, because they would be unfit for ordinary uses.
42. The problem is also presented by the § 2-314(2)(d) language "within the variations permitted by the agreement."
43. See note 26 and accompanying text supra.
44. UNIFORM COMMERCIAL CODE § 2-314, comment 7.
must at least pass without objection, but fungible goods must be of fair average quality and pass without objection—the inference being that the standard of fair average quality does not apply to non-fungible goods. This inference poses no problem, but problems are raised by the Code definition of fungible, which states that fungible:

[M]eans goods . . . of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Act to the extent that under a particular agreement or document unlike units are treated as equivalents.  

By this definition any time a sales transaction includes more than one equivalent unit it is a sale of fungible goods. The drafters state in the comments that fungible goods is a term appropriate to agricultural bulk products. This creates a significant ambiguity since only by negative implication is there an indication that manufactured products were not intended to be considered fungible and are not subject to the standard of fair average quality. Yet any multi-unit sale of manufactured goods would seem to fit the definition of fungible goods.

Another problem in subsections (a) and (b) of section 2-314(2) of the Code is the determination of what is fair average quality for purposes of a warranty of merchantability on fungible goods. As defined in the comments, fair average quality means good centering around the middle belt of quality, not the least, nor the worst, but such as pass without objection. It would seem, therefore, that irrespective of any fungible—non-fungible definitional problems, both types of goods are to be tested by the same standard. Section 2-314(2)(a) provides that non-fungible goods must pass without objection and the comments indicate that the standard of fair average quality for fungible goods means those goods which will likewise pass without objection.

Subsections (e) and (f) of section 2-314(2), in setting standards

45. Uniform Commercial Code § 1-201(17).
46. See Uniform Commercial Code § 2-314, comment 7.
47. Inasmuch as the definitional section is a part of the Code proper and hence enacted by the legislature while the comments are not enacted, it would seem that the stronger argument is that fungible goods include manufactured goods and agricultural goods. One authority believes that the reason for the apparent conflict is a reaction to the hostility to an earlier draft of the Code which applied the fair average standard to all goods. Mercantile interests attack this and one authority states that the drafters of the Code were ambiguous in the present draft, hoping to raise the standard of non-fungible goods to that of fungible goods, i.e., fair average quality. See Ezer, supra, note 3, at 293-94.
49. See Honnold, op. cit. supra note 10, at 75.
of merchantability of the Code, present a possible conflict with section 2-313, the express warranty section of the Code. In subsections (e) and (f), goods to be merchantable must also be "adequately contained, packaged and labeled as the agreement may require." In addition, they must "conform to the promises or affirmations of fact made on the container or label if any. . . ." It would seem that the express warranty provision of the Code would create a warranty obligation in the situations mentioned in these subsections. If an express warranty can be determined by looking at the agreement of the parties, it would not be difficult to fit an affirmation on the label into the agreement. Moreover if the agreement itself requires packaging, then clearly this would be an express warranty. It would be no defense by a seller that the label warranties arose subsequent to the contract and, hence, were invalid in the absence of new consideration, as was the rule under the Sales Act. The drafters of the Code declared explicitly that the time of the making of the express warranty was immaterial if part of the original agreement. If the warranty is made after the agreement, the warranty becomes a modification and, if reasonable and in order, it needs no new consideration.

Assume that a seller agrees to sell a buyer 5,000 units and the agreement requires that each unit be wrapped in a certain manner. Seller disclaims the implied warranty of merchantability. When the units are delivered to the buyer, 1,000 units are defective in wrapping. To the seller's defense that he disclaimed the implied warranty of merchantability which required that the goods be adequately packaged as the agreement may require, the buyer should be able to argue that although the implied warranty had been disclaimed, the express warranty in the agreement has not been disclaimed and recovery should be allowed for the defective packaging because of the breach of an express warranty.

Section 2-314 and the Ultimate Consumer and Commercial Buyer. The adaptability of section 2-314 of the Code as a means of creating

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51. Uniform Commercial Code § 2-314(2) (e).
52. Uniform Commercial Code § 2-314(2) (f).
53. See note 25 and accompanying text supra.
55. See Uniform Commercial Code § 2-313, comment 7.
56. See Uniform Commercial Code § 2-313, comment 7; see also § 2-209 which provides the requirements for modification.
57. There would be no problem in this situation if the seller disclaimed both implied and express warranties. As will be developed later, however, it will be seen that a disclaimer of an express warranty is almost impossible, while the disclaimer of the implied warranty of merchantability is relatively easy.
quality obligations on sellers can only be determined in the light of a distinction which is overlooked by some writers. This distinction concerns the types of parties that are involved in sales transactions and the distinction creates different problems in analyzing the Code standard of merchantability.

Section 2-314 seems to envisage a sales transaction in which there is an agreement and some type of negotiation, but in the sale to an ultimate consumer there usually is no agreement or negotiation. For example, a buyer walks into a seller's store, picks certain items from the shelves, goes through the check-out aisle, pays for the goods and walks out of the store. In these situations the only possible requirement that the seller must fulfill is that the goods are fit for the ordinary purposes\(^8\) and conform to any promises or affirmations of fact on the label.\(^9\) In the majority of situations these requirements are sufficient buyer protection, but there are some frontier problems in consumer purchasing to which the Code offers no solution.

The leading example is, of course, the allergy cases\(^6\) which represent about twenty per cent of all products liability cases. Under the Sales Act there had been a split of authority in allowing recovery for plaintiffs.\(^6\) The minority rule allows recovery if the allergic plaintiff can prove (1) that the product caused the injury and (2) that the product would cause injury to an appreciable class of persons.\(^6\) The majority rule, while also requiring casual proof, denies recovery if the plaintiff is not a normal person.\(^6\) It does not appear that the standards in section 2-314 are going to resolve this conflict of authority. Assume a buyer comes into a seller's store, purchases a jar of nationally known de-

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58. See Uniform Commercial Code § 2-314(2) (c).
59. See Uniform Commercial Code § 2-314(2) (f).
60. The allergy cases are sufficient for present purposes to discuss the problems of merchantability under the Code. Another frontier area which has caused a split in the courts concerns the purchase of a food product with matter in it which cannot technically be called foreign. See, e.g., Adams v. Great Atl. & Pac. Tea Co., 251 N.C. 565, 112 S.E.2d 92 (1960) (crystalized grain of corn in a box of corn flakes); Betchia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960) (chicken bone in chicken sandwich); see generally Boshkoff, Some Thoughts About Physical Harm, Disclaimers and Warranties, 4 Boston Col. Ind. & Com. L. Rev. 285 (1963); Annot. 143 A.L.R. 1421 (1943).
62. See generally 46 Cornell L.Q. 465 (1960) which contains a synthesis of the case law on allergies. Under prior law, the author of this article felt that the type of warranty (implied warranty of merchantability, as opposed to the implied warranty of fitness for particular purpose) should not affect any decisions.
odorant and, subsequently, develops an allergy. Assuming no express warranties, recovery must be based on an implied warranty of merchantability which under the Code requires proof that the deodorant was not fit for the ordinary purposes for which such goods are used.65

A court which has followed the majority rule in the allergy cases under prior law could rationalize that the implied warranty of merchantability does not protect a non-normal user. A minority court could refuse recovery on the ground that because the product does not cause injury to an appreciable class of persons, the product is fit for ordinary use. Obviously such courts would be acting under the influence of local policy which is possible under the broad merchantability concept of the Code. The Code, however, does not restrict the courts to a following of earlier precedents. It is quite possible for courts to espouse a broad standard of buyer protection and hold that an injury to one person makes the product unfit for ordinary purposes. The drafters of the Code foresaw that the standards of merchantability might require changes to adapt to new factual situations and policy considerations. The language categorically informs lawyers and courts that if, in any given situation, it is felt that a buyer should be allowed to recover, the courts may impose a new quality obligation on a seller. The drafters specifically expressed an intention to leave open other attributes of merchantability thereby allowing courts to establish new standards if none have been defined, and reject old ones when necessary.66

In the commercial buyer and seller situation, the problems of quality obligations revolve around the relative bargaining strength of the parties. If the buyer is in the stronger bargaining position, no problem is raised because he can exact adequate warranty protection from the seller. If the seller is in the stronger bargaining position, however, an analysis must be made of the consequences of a sales transaction under the Code.

Typically, after the negotiations are ended, the seller will have disclaimed all of his implied warranties. Recent developments in the courts, however, indicate that these disclaimers are not well received. Here the factual problem is different than in the consumer market and the Code has declared a policy of giving the commercial buyer some, but not complete, quality protection. Generally the courts will hold the sellers liable on their implied warranties, but the Code specifically provides that a contractual limitation of consequential damages, where the loss is commercial, is not unconscionable and, hence, enforceable.67 This seems to be

67. See Uniform Commercial Code § 2-719(3).
a more rational shifting of the burden of the risks in a sales transaction between a commercial seller and buyer, and it would seem to invite commercial sellers to avoid using the disclaimer of implied warranties. It provides a buyer with some amount of protection, but at the same time, allows a seller to limit his liability for consequential damages.

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

The Code continues the Sales Act implied warranty of fitness for particular purpose, although modifying some of the standards of the warranty. Under the Sales Act, before the implied warranty for particular purpose was imposed on the seller, the buyer had to make known to the seller the particular purpose. Under section 2-315 of the Code, on the other hand, the implied warranty arises if the seller has reason to know the purpose intended and that the buyer is relying. In other words, there no longer is a duty on the buyer to inform the seller of his particular purpose. Even though the seller does not actually know of the particular purpose, if he has reason to know of the particular purpose, then he is subject to liability for breach of an implied warranty.

For example, assume a buyer comes into a seller's camera shop and asks for a roll of camera films. Three possible situations could arise: (1) the seller could sell buyer a roll of camera film used by amateur photographers and no implied warranty of fitness for particular purpose

66. See IND. ANN. STAT. § 58-115(1) (Burns 1962); see generally 1 WILLISTON, SALES, § 235 (rev. ed. 1948).
68. See UNIFORM COMMERCIAL CODE § 2-315; see generally 1 ANDERSON, UNIFORM COMMERCIAL CODE § 2-315 (1961); Collins, Warranties of Sale Under the Uniform Commercial Code, 42 IOWA L. REV. 63 (1956); Corman, Implied Sales Warranty of Fitness for Particular Purpose, 1958 WIS. L. REV. 219 (1958); Jaeger, supra note 40, at 506. Both a warranty of merchantability and a warranty of fitness for particular purpose may co-exist and recovery may be based on either one. Crotty v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960).
71. UNIFORM COMMERCIAL CODE § 2-315. There is a conflict between the language of the Code proper and the commentary, i.e., § 2-315 requires that the seller have reason to know the purpose intended and that the buyer is relying. Comment 1 requires that the seller has reason to realize the purpose intended or that the reliance exists. Despite the apparent change of the statute, in the comments, both statutory requirements must be met. See Loomis Bros. Corp. v. Queen, 17 Pa. D. & C.2d 482, 46 Del. Co. 79 (1958); see generally Collins, supra note 69, at 69; 15 U. PITTS. L. REV. 331, 342 (1954).
72. It has been suggested that the reason to know standard imposes a duty on the seller to investigate information which would reasonably lead him to believe that the buyer may be purchasing the goods for a particular purpose and is relying on the seller. See Collins, supra note 69, at 69-70. This suggestion is not supported by statutory or commentary language and would result in unrealistic hardship upon the seller. See Corman, supra, note 69, at 242-43.
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would arise under the Sales Act or the Code; (2) if the buyer would tell the seller that he needs a special film to be used in photographing wild life, an implied warranty of fitness for particular purpose would arise under both the Sales Act and the Code; (3) if the buyer tells the seller nothing, but the seller has reason to know that the buyer intends to photograph wild life (e.g., because the buyer belongs to a wild life organization which is presently engaged in photographing wild life), then under the Sales Act, no implied warranty of particular purpose would arise, but under the Code, the implied warranty of fitness for particular purpose would be imposed.73

Particular Purpose. A particular purpose is defined as one which envisages a specific use by the buyer.74 The comments to section 2-315 distinguish between walking shoes and mountain climbing shoes. The comments state: "For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains."75 This example seems too broad and may mislead the courts, since a sale of mountain climbing shoes for mountain climbing envisages no specific use by the buyer.76 It would seem that a warranty for a particular purpose must arise in a more narrowly defined category. In other words, if a buyer requested from a seller a pair of mountain climbing shoes, it would appear that the only warranty which would arise from this transaction would be an implied warranty of merchantability.77 Seller would have no reason to know any particular purpose for those mountain climbing shoes and would be justified in selling the buyer a pair of ordinary or regular mountain climbing shoes.

However, if in the same transaction, the seller had reason to know that the buyer was going to scale Mount X (if buyer told seller, or the seller is located in a resort town where Mount X is the only climbing attraction), which has peculiar characteristics in its rock, as everyone knows, and which quickly wears out the cleats of most mountain climbing shoes, the seller would select a shoe with a cleat of a special material.

73. See Uniform Commercial Code § 2-315, comment 1. See, e.g., Allen v. Savage Arms Corp., 52 Luzerne Leg. Reg. Rep. 159 (Luzerne County Pa. Ct. 1962) (where a merchant sold a shotgun to a buyer and several months later sold him shells which the merchant knew would be used in the shotgun, the warranty of particular purpose was imposed); see generally Winston, Article 2—Sales, 22 Tenn. L. Rev. 785, 797 (1953).
74. Uniform Commercial Code § 2-315, comment 2; but see, 1 Anderson, op. cit. supra note 69, § 2-315:5 ("A particular purpose . . . is a use to which the goods are not ordinarily put.").
75. Uniform Commercial Code § 2-315, comment 2.
76. See 1 Anderson, op. cit. supra note 69, § 2-315:5.
77. See Uniform Commercial Code § 2-314(2) (c).
Then the warranty of particular purpose should apply.\textsuperscript{78}

Another problem presented by section 2-315 is the change of the Sales Act requirement that the goods be \textit{reasonably} fit for the particular purpose.\textsuperscript{79} Under the Code, the goods must be "fit for such purpose."\textsuperscript{80} Initially this would indicate that the implied warranty of particular purpose may become a strong buyer's section because the reasonable man standard which afforded the seller some protection under the Sales Act has been eliminated under the Code. For example, assume that a pair of mountain climbing shoes are fit for the particular purpose of climbing Mount X. However, unknown to anyone, an avalanche has uncovered a new type of rock that will wear out even the special type of cleats on these shoes. The buyer is injured because the cleats wore out while climbing Mount X. Under the Sales Act no liability would be created on the seller because the shoes were reasonably fit for the particular purpose. A strict judicial interpretation of section 2-315, however, would require the seller to foresee and guard against all remote possibilities in order to escape liability and might well force sellers into disclaimers that they ordinarily would not make. Therefore, it will probably be better to judicially read \textit{reasonable} into this section since a strict interpretation would, in fact, ultimately give less protection to the buyer.

\textit{Patent or Trade Name.} Under the Sales Act there was no implied warranty of fitness for a particular purpose if the buyer purchased an article by its patent or trade name.\textsuperscript{81} This limitation has been omitted in the Code, and according to the comments, the designation of an article by its patent or trade name is now one of the facts to be considered in determining whether the buyer relied on the seller.\textsuperscript{82} It has been suggested

\textsuperscript{78} The use of the broad example in comment 2 plus the use of \textit{any} in front of particular purpose in the Code proper implies that the drafters were attempting to expand the coverage of the implied warranty of particular purpose to include any purpose of the buyer. The same implication is present in comment 5 which refers to a patented article as being "adequate for the buyer's purposes," and not "adequate for the buyer's particular purposes." In the example, whether or not the seller selects a shoe with a special cleat, the implied warranty of particular purpose is still imposed.


\textsuperscript{80} \textit{Uniform Commercial Code} § 2-315.


\textsuperscript{82} \textit{Uniform Commercial Code} § 2-315, comment 5.
that this is the most important change from prior law. If this is so, why did the drafters make the change in the comments instead of in the Code proper? Once the issue is raised, however, no court should hold that the limitation in the Sales Act continues under the Code for two reasons: (1) the limitation was expressly included in the Sales Act and is expressly excluded under the Code; (2) quick reference may be had to the intent of the legislators by referring to the comments whenever the section is construed.

The Warranty of Particular Purpose: Express or Implied? The main problem with section 2-315 is the labeling of the warranty as an implied warranty. For example, assume the seller, after negotiations, enters into a sales transaction for the sale of a furnace to heat a twenty-five room house. If the written contract specifies a heating unit for a twenty-five room house, why must a warranty for particular purpose be implied since the seller was quite express about it? Even if no written contract is entered into, the buyer's particular purpose will be communicated to the seller. Moreover, in the normal situation the seller will manifest in some way that the product is fit for the buyer's particular purpose. In many situations, therefore, no warranty will have to be implied since the seller will make a promise or affirmation of fact that the goods are fit for the buyer's particular purpose.

Although the labeling, express or implied, does not raise a problem in the creation of warranties, a significant problem will arise in an attempted disclaimer; i.e., if a seller has sold an article for a buyer's particular purpose, mentioning in the contract or in the negotiations the buyer's particular purpose, what is disclaimed if the seller disclaims all implied warranties? It would seem that, if the product is not fit for the particular purpose, the seller's disclaimer of the implied warranty of particular purpose should not be a defense and the seller should be held liable because he breached his express warranty. Additionally, before a buyer can recover under section 2-315 he must show that he relied on the seller's skill and judgment. At the same time under section 2-313, the express warranty section, no reliance on the express warranty is required. Consequently if a buyer does not rely on a seller's skill and judgment, no implied warranty of particular purpose can arise but by expressly warranting the particular purpose, the seller loses any defense of no reliance by the buyer on the seller's skill and judgment.

83. See Hawkland, Sales and Bulk Sales (Under the Uniform Commercial Code) 44 (1955); Corman, supra note 69, at 243.
84. Uniform Commercial Code § 2-315.
85. See note 17 and accompanying text supra.
C. IMPLIED WARRANTIES: CONCLUSION

Although there are some changes in the Code treatment of implied warranties, the basic distinction between implied warranties and express warranties is still important. Whereas an express warranty arises because of some action on the part of the seller other than entering into a sale, an implied warranty arises from the mere entering into a sales agreement. It is imposed by law and does not depend on the agreement of the parties. The general approach of an implied warranty is to give the buyer some quality protection. Too much quality protection, however, may force many sellers to disclaim their implied warranties thus giving the buyer no protection at all.

The most difficult question of Code interpretation is presented by the many situations when the standards creating an implied warranty conflict with the standards of express warranties. When a seller attempts to disclaim any of his warranty obligations, the key issue will be whether a particular warranty is implied or expressed. Therefore, although the determination that a warranty exists will affect the seller's liability, the main consequence of the decision to label a warranty as express or implied will be in the area of disclaimer, because the method, construction and effect of the disclaimer will depend on which type of warranty is being disclaimed. It is for this reason that the labeling of a warranty as express or implied is relevant.

DISCLAIMER OF WARRANTIES: SECTION 2-316

One of the basic notions of contract law is that the parties should be free to contract the particular aspects of an agreement in their own terms. Prior to the passage of the Code, it was well settled that a seller could disclaim any express or implied warranty. The Sales Act specifically provided for the limitation of implied warranties, and the courts allowed the disclaimer of an express warranty for the reason that the parties should be free to contract that the buyer take certain risks. In many situations, however, there was, as there is now, no freedom to contract; and, if a buyer wanted a particular product, he had to buy from

86. See generally 17 ALBANY L. REV. 1, 28 (1953).
88. See IND. ANN. STAT. § 58-601 (Burns 1962).
89. See generally HAWKLAND, op. cit. supra note 83, at 46.
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seller under the seller’s terms. In other situations, although not considered a rule of law, it was a matter of general knowledge, that, because of the so-called battle of the forms, the parties were not aware of anything other than the basic terms of the agreement until they asked the courts to, in a word, arbitrate the battle and tell the parties what they agreed to in their contract. In both situations many buyers did not know of the existence of a disclaimer until it was too late. In light of the severity of such disclaimers, the courts eventually began to avoid them by strictly construing the language of the disclaimer against the seller or by declaring the disclaimer void as against public policy.

A. DISCLAIRER OF EXPRESS WARRANTIES: SECTION 2-316(1)

As previously indicated, an express warranty is an affirmation of fact or promise relating to the goods which forms part of the basis of the bargain. For example, seller and buyer enter into an agreement for the sale of a new car. The contract has specific terms dealing with the finance terms, the accessories, the type of transmission, the year, make, model, color, etc., plus a warranty that the dealer will replace all parts and provide maintenance for a certain period of time or mileage. At the end of this warranty is a statement that “This warranty is expressly in lieu of any other express or implied warranty or any obligation on the part of the seller.” In many instances the contract which the seller pre-

90. If it be admitted that some or all of these manufacturers’ warranty clauses are unfair to the buyer, it may be urged that the buyers are at fault in accepting such inadequate protection and deserve no sympathy. This argument, however, ignores a certain limitation on freedom of contract in such cases. Many manufacturers . . . have formed trade organizations and agreed to the universal use of these limited warranty clauses. Many buyers have no choice. If they desire to purchase . . . they must accept the standard, uniform contract.


91. It is not within the scope of this note to discuss the problems presented by the battle of the forms. The Code attempts to resolve the problem in § 2-204(2).

92. See, e.g., Wade v. Chariot Trailer Co., 331 Mich. 576, 50 N.W.2d 162 (1951); Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927); 23 Minn. L. Rev. 789 (1939).


94. In the Code, the traditional language of disclaimer has been discarded in favor of negation and limitation in § 2-316(1) (dealing with express warranties) and exclude and modify in § 2-316(2) (dealing with implied warranties). In the comments, however, the drafters return to the traditional language of disclaimer. Why the drafters did not use similar terms in § 2-316 as opposed to four different terms is not apparent. In other words, is it possible to exclude or modify an express warranty (the terms which appear in the implied warranty section) or negate or limit an implied warranty (the terms which appear in the express warranty section)? For purposes of space and clarity, the traditional language will be used in this note.

95. See note 25 and accompanying text supra.
sents to the buyer to be signed is written in terms that the buyer is the one who wrote it, e.g., a buyer’s purchase order. In effect, seller is saying: “Although I promised buyer a car with particular attributes and affirmed that it would have certain characteristics, I now warn buyer that I am promising nothing.”

Based on a formal interpretation that all terms of an agreement should be consistent, the absurdity of allowing a seller to disclaim an express warranty is apparent. This is particularly true when one considers that if a seller is allowed to disclaim generally, he has probably negated the majority of his duties or obligations under the agreement. In an attempt to solve this problem,\(^9\) the earlier drafts of the Code provided that “If the agreement creates an express warranty, words disclaiming it are inoperative.”\(^7\) Based on the policy of protecting a buyer from unexpected and unbargained for language of disclaimer, the drafters were merely applying a general contract construction rule that, if general language conflicts with specific language, the specific language controls.\(^3\) The elimination of disclaimers of express warranties was generally acclaimed by most authorities and writers as analytically resting on sound logic and good policy.\(^9\) This treatment, however, implied that the sales agreement was not to be read as a whole, but rather each part of the agreement was to be read separately, e.g., the express warranty was to be read and given effect before reading any other part of the agreement, including the disclaimer. By declaring that disclaimers were inoperative, the drafters of the Code prevented the seller from making any argument that the disclaimer was evidence that no warranty was ever created, as opposed to a created warranty disclaimed.

Under the present draft of the Code, the unequivocal language of the earlier drafts of section 2-316(1) has been changed\(^10\) and replaced by a seemingly verbose and confusing mass of language:\(^10\)

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100. “Subsequently subsection (1) of the 1952 official draft was rewritten and subsection (3)(a) and (3)(b) changed for clarification to meet criticism by the New York Commission.” American Law Institute, 1956 Recommendation of the Editorial Board for the Uniform Commercial Code, 40 (1956). The criticism of the New York Commission appears in 1 State of New York Law Revision Commission, Study of the Uniform Commercial Code, 403-06 (1955).
101. “The noble intent of the drafters of the Code was blunted by the criticisms of the New York Law Revision Commission . . . and the revision of the provision in response to that criticism has been obscurity.” Lorensen, The Uniform Commercial Code Sales Article Compared with West Virginia Law, 64 W. Va. L. Rev. 142, 169-70
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Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.\textsuperscript{102}

To understand this language specific fact situations of an express warranty in the agreement or an alleged oral express warranty, both with a general and specific disclaimer, should be analyzed.

\textit{An Express Warranty in the Written Agreement With a General Disclaimer}. In the majority of disclaimer or express warranty situations, the general disclaimer is used. The Code abolishes this disclaimer\textsuperscript{103} by relying on the rule of construction that, if there is a conflict between general and specific provisions, the specific provision prevails.\textsuperscript{104}

\textit{An Express Warranty in the Written Agreement With a Specific Disclaimer}. Where an express warranty is met by a specific disclaimer, most authorities agree that the specific disclaimer must be given some consideration. Such consideration is merited not on the theory that an express warranty has been disclaimed, but, as one authority states, on the theory that the specific disclaimer, being a part of the basic agreement, is evidence under the reasonable construction rule that the seller created no express warranty.\textsuperscript{105} If the express warranty appears in the written agreement, however, it is difficult to comprehend how a specific disclaimer could be evidence that no express warranty has been created.

Furthermore, analyzing the situation on general contract principles is impossible. The rule that a specific provision prevails over a general provision is inapplicable due to a head-on meeting of two specific provi-


\textsuperscript{103} See \textit{Uniform Commercial Code} § 2-316(1), comment 1. See generally 49 Ky. L.J. 240, 253 (1960). \"[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.\" \textit{Uniform Commercial Code} § 2-313, comment 4.

\textsuperscript{104} \textit{Restatement, Contracts} § 236(c) (1932).

\textsuperscript{105} See generally Hawklund, \textit{op. cit. supra} note 83, at 47. In Alaska Pacific Salmon Co. v. Reynolds Metals Co., 163 F.2d 643, 657 n.12 (2d Cir. 1947), Judge Frank stated that a disclaimer was evidence that no express warranty ever arose, not that a warranty had been disclaimed. It appears the New York Commission accepts the new statutory language. See \textit{Commission on Uniform State Laws, New York Annotations to Uniform Commercial Code and Report of Commission on Uniform State Laws to Legislature of New York State}, 44-45 (1961).
sions. Any argument that such an inconsistency should be ruled in favor of the buyer is met by the argument that parties are free to contract as they please and that freedom of contract allows a seller to be grossly inconsistent. The drafters of section 2-316(1), however, have evidently accepted a position that a seller should not benefit by his inconsistencies by providing that words creating an express warranty and words of disclaimer shall be construed whenever reasonable as consistent with each other. Obviously, a written express warranty and a specific disclaimer cannot be reasonably construed as consistent with each other and to give effect to one and not the other would be unreasonable. In that situation, section 2-316(1) explicitly provides that "negation or limitation is inoperative to the extent that such construction is unreasonable."

Considering only express warranties in a written agreement, it would seem that the present treatment of disclaimers differs only in statutory language from the previous Code treatment. Under the prior drafts all disclaimers of express warranties were inoperative, whereas, under the present draft, if the express warranty appears in the written agreement then a general or specific disclaimer is inoperative. There is, however, one situation where the change in the present draft of the Code is important. That is where the express warranty which the buyer seeks to enforce does not appear in the written agreement.

Express Warranties Not Appearing in the Written Agreement: Specific Disclaimer. There are two situations in which the buyer may be attempting to enforce an express warranty which does not appear in the written agreement of the parties: (1) an oral express warranty, or (2) other situations, for example, where past deliveries have expressly set the description of quality by a course of dealing.

Under prior drafts of the Code, a disclaimer of an express warranty was inoperative. If a buyer, therefore, was seeking to recover on an alleged oral express warranty and a seller had specifically disclaimed the alleged oral express warranty, the court would have to allow the buyer to prove his alleged oral express warranty. The seller would, of course, argue that the parol evidence rule prevented the buyer from proving the alleged oral express warranty because the alleged oral express warranty would conflict with the specific disclaimer which was intended by the

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106. Uniform Commercial Code § 2-316(1).
107. See note 97 and accompanying text supra.
108. See Uniform Commercial Code § 2-313, comment 5.
parties as a final expression of their written agreement. Section 2-202, the parol or extrinsic evidence section of the Code provides, as it did in prior drafts, that "Terms . . . set forth in a writing intended by the parties as a final expression of their agreement . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." Thus it would appear that the seller attempting to defeat an alleged oral express warranty would have a strong argument. In order to accept this argument the court would have to give effect to the specific disclaimer as a term of the agreement, which would contradict the statutory language of the earlier drafts of the Code which declared that all disclaimers of express warranties were inoperative.

By omitting the inoperative language, however, the courts have afforded a seller protection against express warranties claimed by a buyer which do not appear in the written agreement. If the seller has not disclaimed the oral express warranty which the buyer is alleging, there is no term in the agreement with which the alleged oral express warranty conflicts and the buyer is given an opportunity to prove the warranty upon which he is relying. By allowing the seller to disclaim specifically, the seller faced with an alleged oral express warranty can argue that the parol evidence section of the Code prevents the buyer from proving the alleged oral express warranty. For example, assume in a sales agreement for a car that a provision states, "The seller does not warrant the mileage of the car." If the buyer seeks to prove that the seller promised the buyer that the car would have 5,000 miles on it, the seller could argue that the specific disclaimer shows that, as to that particular point, the parties intended that the written specific disclaimer be the final expression of their agreement and not contradictable by evidence of an oral express warranty.

To anticipate every possible express warranty which a buyer could allege and specifically disclaim each one would impose a tremendous, if not impossible, burden on the seller. The question presented, therefore, is whether or not there is any way the seller could insert a general disclaimer of all oral express warranties indicating that the written agreement is the final expression of the parties.

Express Warranties Not Appearing in the Written Agreement: General Disclaimer. As previously indicated, if the express warranty appears in the written agreement, the drafters of the Code have declared that the general disclaimer must fall because of certain construction

112. Ibid.
rules. If a general disclaimer of an oral express warranty, however, appears in the written agreement, no construction problem is presented until the oral express warranty is introduced into evidence. An attempt by the buyer to introduce the alleged oral express warranty into evidence is met by the argument that the parol evidence rule of section 2-202 of the Code prevents the buyer from proving the warranty, because the general disclaimer of oral express warranties indicates that the parties have reduced all express warranties to writing and the alleged warranty conflicts with the general disclaimer of oral express warranties. Since the alleged express warranty cannot be introduced into evidence, no inconsistency need be resolved under section 2-316(1) of the Code; and the seller, by generally disclaiming all oral express warranties, has given himself protection against fraudulent claims, without having to resort to a specific disclaimer of every possible oral warranty.

Disclaimer of Express Warranties: Conclusion. Earlier drafts of the Code declared that all disclaimers were inoperative. This position would tend to place the seller in the precarious position of possible liability due to fraudulent oral express warranty claims of the buyer. The prior drafts, in doing this, discarded key contract construction rules.

In section 2-316(1), the disclaimer of express warranties section of the present Code, the language is difficult to understand, basically because the attempt of the drafters is to resolve a conflict between disclaimers and express warranties through construction principles rather than by eliminating completely the ability of a seller to disclaim express warranties. The present treatment is more consistent with the general construction rules that a contract must be read as a whole so as to give effect to each part if reasonably possible; and, if there is a conflict between general and specific provisions, the specific provisions prevail. If the express warranty appears in the written agreement, the buyer receives the maximum protection. If the express warranty does not appear in the written agreement, the seller can take certain measures whereby he can receive the maximum protection.

B. Disclaimer of the Implied Warranties: Sections 2-316(2) and 2-316(3)

The implied warranties of merchantability and fitness for particular

113. See note 104 and accompanying text supra.
114. See Restatement, Contracts § 236 (1932); Ahlborn v. City of Hammond, 232 Ind. 12, 111 N.E.2d 70 (1953).
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purpose are imposed by operation of law upon the terms of the sale and require no action by the seller. As a result of the imposition by law, no construction or inconsistency problems, such as appeared in express warranty disclaimers, are present in disclaimers of implied warranties. Therefore, special implied warranty disclaimer rules are required.\textsuperscript{116} Section 2-316(2), the disclaimer of implied warranties section of the Code 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 \textquoteleft\textquoteleft There are no warranties which extend beyond the description on the face hereof.\textquoteright\textquoteright\textsuperscript{117}

Subject to an exception to be discussed below, the fine print general disclaimer of the implied warranty of merchantability is doomed under section 2-316(2). If the implied warranty of merchantability is to be disclaimed in the written contract, it must be in writing and conspicuous.\textsuperscript{118} If, on the other hand, the disclaimer of the implied warranty of merchantability is oral, it must only mention merchantability.\textsuperscript{119} Since the Code does not specify in what situations the disclaimer of the implied warranty of merchantability must be in writing,\textsuperscript{120} an obvious implication would have been to require that if an agreement is reduced to writing, the disclaimer of the implied warranty of merchantability must also be in writing to be effective. Section 2-316(2), however, does not legislate a rule in this direction. It therefore seems that, subject to the parol evidence rule, a seller would be allowed to prove an oral disclaimer even though the agreement has been reduced to writing. As a practical matter, proving an oral disclaimer of an implied warranty would be very

\begin{itemize}
  \item \textsuperscript{116} Although there might be a policy argument that a duty imposed by law (implied warranty) is even higher than a duty imposed by a party on himself (express warranty) and, therefore, should be harder to eliminate, it is apparent that the drafters of the Code did not consider this policy argument too convincing.
  \item \textsuperscript{117} \textit{Uniform Commercial Code} § 2-316(2).
  \item \textsuperscript{118} \textit{Ibid.} \textquoteleft\textquoteleft Conspicuous\textquoteright\textquoteright: 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. . . . Language in the body of a form is \textquoteleft\textquoteleft conspicuous\textquoteright\textquoteright if it is in larger or other contrasting type or color." \textit{Uniform Commercial Code} § 1-201(10).
  \item \textsuperscript{119} See \textit{Uniform Commercial Code} § 2-316(2).
  \item \textsuperscript{120} The 1952 Official Draft of § 2-316(2) provided: \textquoteleft\textquoteleft Exclusion or modification of the implied warranty of merchantability or of fitness for a particular purpose must be in specific language and if the inclusion of such language creates an ambiguity in the contract as a whole it shall be resolved against the seller."
difficult when the agreement has been reduced to writing. Consequently sellers, rather than rely on oral disclaimers, should make a disclaimer a part of the written agreement.

Section 2-316(2) requires that to exclude or modify the implied warranty of particular purpose there must be a conspicuous writing, although the language may be general. As previously indicated, there is some discontent with labeling the warranty of particular purpose as implied in the first instance since it is arguable that such a warranty has more characteristics of an express than an implied warranty. In an earlier draft of the Code the drafters seemed to acknowledge this discontent with the warranty of particular purpose and required that specific language similar to that of an express warranty disclaimer be used to effectively disclaim that the goods would be fit for a particular purpose.

In the present draft of section 2-316(2), the drafters return to an implied warranty treatment and allow the disclaimer to be general, although it does have to be in writing. The reason, according to the drafters, was "to relieve the seller from the requirement of disclaiming the warranty of fitness in specific language and yet afford the buyer an adequate warning of such disclaimer." If the warranty of fitness for particular purpose is to be regarded as an implied warranty, then the approach of the present draft is more consistent in that the disclaimer is more like a disclaimer of an implied warranty. If, however, the warranty is regarded as implied for traditional purposes, but analytically is more like an express warranty, then the present draft is inadequate in its present treatment. Since most sellers will, in fact, expressly warrant the particular purpose in their sales transactions, they should be warned that the general disclaimer of the implied warranty of fitness for particular purpose may not meet the ends they desire.

Disclaimer of Implied Warranties by the Use of Certain Terms: Section 2-316(3)(a). In addition to the general statutory language dealing with the disclaimer of an implied warranty, section 2-316 of the Code also allows a disclaimer by the use of certain terms. Subsection (3) provides:

122. In the 1952 Official Draft, § 2-316(2) provided: "Exclusion or modification of the implied warranty . . . of fitness for a particular purpose must be in specific language. . . ."
123. American Law Institute, Supplement No. 1—Uniform Commercial Code, 10 (1955). No explanation was given as to why the seller had to be relieved of this requirement.
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. . . . 124

The drafters noted in the comments that "Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved." 125 This comment creates some difficulty because now sellers do not have to state in their contracts: "This warranty is expressly in lieu of any other express or implied warranty or any obligation on the part of the seller," or "The seller hereby disclaims the warranty of merchantability." All the seller is required to state is that "The buyer buys the product as is." The basic theory of implied warranties was to create a quality obligation on the seller. The basic theory of the previous sections of disclaimer was to warn the buyer that certain quality obligations were being disclaimed, but certainly buyer warning and protection are disregarded by section 2-316(3) (a). In the commercial world there might be some basis in fact that the terms do indicate to a buyer that he is taking the quality risks, but this argument falls when dealing with the ultimate consumer who probably has no knowledge of the meaning of the terms. The effectiveness of section 2-316(3) (a), therefore, may be placed in doubt when an injured buyer must overcome the use of certain terms in order to recover. The courts may find no difficulty in avoiding these disclaimers on the grounds of public policy.

Now comes the finishing touch to the destruction of the theory that the Code affords the buyer protection when the seller disclaims his implied warranties. Subsection (2) of section 2-316, the disclaimer of implied warranties section, is introduced by the phrase "Subject to subsection (3) . . . ."; and it is in subsection (2) that the rule is declared that a written disclaimer must be conspicuous. Subsection (3) of section 2-316, which deals with the use of the terms "as is," etc., begins with the language "Notwithstanding subsection (2) . . . ." The use of the introductory language of these two subsections allows for only one con-

124. Uniform Commercial Code § 2-313(3)(a). Note that in § 2-316(3)(a) there is some confusion in the language. Although clearly talking about implied warranties, the Code states "[O]ther language which in common understanding calls the buyers attention to the exclusion of warranties. . . ."

125. Uniform Commercial Code § 2-316, comment 7. There is no Indiana case law on the use of the terms, but the Code seems to be in accord with prior law. See 1 Williston, op. cit. supra note 68, § 239.
clusion; if the implied warranties are disclaimed generally in the written agreement, it must be conspicuous, but if certain terms, which supposedly warn buyers that their warranties are being disclaimed, are used, they do not have to be conspicuous. Yes, the general disclaimer of implied warranties is doomed by the Code. This is not for the reason that the Code desires to protect buyers from unbargained for language. The general disclaimer is doomed, because under the present draft of the Code, the general disclaimer of implied warranties is too verbose and would be too conspicuous. All sellers have to say is that the buyer buys "as is" and the language can be as minute and as hidden in the contract as it has been in the past.

Disclaimer of Implied Warranties: Conclusion. Section 2-316(2) and (3), the disclaimer of implied warranties section of the Code are verbose and confusing.126 Allowing a general disclaimer of the implied warranties, even though conspicuous, and in writing, may not reflect the contemporary trend in American law. This indicates that the drafters of the Code may be somewhat antedated in this respect. Permitting a seller to disclaim all of his implied warranties by the use of the term "as is" completely destroys any concept that the Code is giving the buyer protection in regard to the quality of the products.

Actually there is very little change from prior law in the area of disclaimer of implied warranties. As such, the courts with or without the aid of the Code are going to avoid these disclaimers.127 With the hostility of the courts toward disclaimers becoming more apparent, sellers in the commercial world of today may do well to take the implied advice of the drafters of the Code and forget about using the disclaimer of the implied warranties to limit their liability. The wisest thing sellers can do is limit the remedies which the buyer can use. In other words, although the general trend of the warranty sections of the Code is for more buyer protection, the seller can, through negotiations, limit the amount the buyer may recover for the seller's breach of warranty. Section 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)."128

Sections 2-718 and 2-719, in essence, allow the parties to liquidate or

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126. "Could the central idea of these provisions have been made clear to reasonably intelligent judges with fewer words and fewer technical distinctions?" Honnold, Cases on the Law of Sales and Sales Financing, 112 (2d ed. 1962).
127. See cases cited in note 87 supra.