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The Last Best Argument for Eliminating Reliance from Express Warranties: Real-World Consumers Don't Read Warranties

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THE LAST BEST ARGUMENT FOR ELIMINATING RELIANCE FROM EXPRESS WARRANTIES: "REAL-WORLD" CONSUMERS DON'T READ WARRANTIES

ROBERT S. ADLER*

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I. INTRODUCTION

For forty years, a heated debate has revolved around the interpretation of seven words found in section 2-313 of the Uniform Commercial Code. These words, "part of the basis of the bargain,"¹ provide a necessary element for affirmations, descriptions, and samples to become express warranties that obligate sellers to buyers.²

The debate centers on whether these words require a buyer to rely on the seller's representations to maintain an action for breach of an express warranty and, if so, to what extent the buyer must prove reliance. Unfortunately, the words, by themselves, are quite unclear,³ leading to strong disagreement

1. U.C.C. § 2-313(1)(a) (1987).

2. Specifically, § 2-313 provides:

- (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warranty" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

U.C.C. § 2-313 (1987).

3. See, e.g., JOHN M. STOCKTON, *SALES IN A NUTSHELL* 181 (2d ed. 1981) (noting that "[T]he 'basis of the bargain' language is new. At common law and under the Sales Act there had to be 'reliance' by the buyer on a promise or affirmation fact. The extent to which the 'basis of the bargain' test changes the 'reliance' test is not clear."); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 9-5, at 398 (3d ed. 1988) (indicating that the extent to which the addition of the words "part of the basis of the bargain" changed the law is "thoroughly unclear"); Thomas W. Coffey, *Creating Express Warranties Under the U.C.C.: Basis of the Bargain — Don't Rely on It*, 20 U.C.C. L.J. 115, 117 (1987) (noting that "the case law interpreting the new basis of the bargain concept is strikingly and embarrassingly split and unclear"); Steven Z. Hodaszy, *Express Warranties Under the Uniform Commercial Code: Is There A Reliance Requirement?*, 66 N.Y.U. L. REV. 468, 476 (1991) (noting that "[t]his phrase continues to be a source of confusion and contention . . ."); Wayne K. Lewis, *Toward a Theory of Strict "Claim" Liability: Warranty Relief for Advertising Representations*, 47 OHIO ST. L.J. 671, 686 (1986) (stating that the significance of adding the words "part of the basis of the bargain" remains "unsettled in both the literature on the subject and in the courtroom"); John E. Murray Jr., *"Basis of the Bargain": Transcending Classical Concepts*, 66 MINN. L. REV. 283, 304 (1982) (noting that "[a] summary of the case law adumbration of 'basis of the bargain' reveals mass confusion and little assistance."); Douglas Whitman, *Reliance as an Element in*

among courts⁴ and numerous commentators⁵ as to the words' exact meaning. Given the potentially powerful reach of section 2-313⁶ and the potentially

Product Misrepresentation Suits: A Reconsideration, 35 Sw. L.J. 741, 749-50 (1981) (noting "some confusion" in the courts over whether reliance must be established in cases involving § 2-313 of the U.C.C.).

4. For a list of cases interpreting the words "part of the basis of the bargain" as requiring buyers to prove reliance, see *infra* note 67. For a list of "no reliance" cases that do not require buyers to prove reliance, see *infra* note 106.

5. Several commentators argue that reliance is still generally required in § 2-313 cases. See 2 WILLIAM D. HAWKLAND, *Uniform Commercial Code Series (Sales)* § 2-313:05, at 437-38 (1993); WHITE & SUMMERS, *supra* note 3, § 9-5 at 403; and Hodoszy, *supra* note 3. Other commentators argue that § 2-313 generally does not require reliance. See, e.g., Coffey, *supra* note 3, at 124; Whitman, *supra* note 3, at 742; Murray, *supra* note 3, at 284; ROBERT J. NORDSTROM, LAW OF SALES §§ 66-68 (1970) (stating that the Code dropped the reliance test, maintaining it only for implied warranties); Morris G. Shanker, *The Seller's Contractual Obligation Under U.C.C. 2-313 to Tell the Truth*, 38 CASE W. RES. L. REV. 40 (1987) (discussing the "basis of the bargain" language as evidence of the Code drafters' intent to provide a different test for express warranties); Charles A. Heckman, "Reliance" Or "Common Honesty of Speech": The History and Interpretation of Section 2-313 of the Uniform Commercial Code, 38 CASE W. RES. L. REV. 1, 39 (1987) (acknowledging that commentators are not letting go of the reliance concept). Some commentators take no official position. See Lewis, *supra* note 3, at 691; Richard A. Lord, *Some Thoughts About Warranty Law: Express and Implied Warranties*, 56 N.D. L.REV. 509 (1980); see also Marshall S. Shapo, *Advertising and the Liability of Product Sellers*, 21 PROD. SAFETY AND LIAB. REP. (BNA) 510, 512 (May 7, 1993) (noting the split in opinion on the reliance requirement); Victor E. Schwartz, *Violation of Express Warranty: A Useful Tort That Must Be Kept Within Rational Boundaries*, 3 PROD. LIAB. L.J. 147 (1992) (discussing the reliance requirement under the tort theory of express warranties); Matthew A. Victor, *Express Warranties Under the U.C.C.—Reliance Revisited*, 25 NEW ENG. L. REV. 477 (1990) (contending that the U.C.C. has dropped the reliance requirement but the courts have not).

6. According to Victor Schwartz, an industry lawyer and author of one of the leading tort textbooks, express warranty litigation may well become the "1990's darling of the organized plaintiffs' bar" for two reasons:

First, from the plaintiffs['] lawyer point of view, express warranty claims are the very least expensive way to try a product liability lawsuit. All the plaintiffs['] lawyer needs to prove is the advertising statement, its violation, and the causal relationship between his client's injury and that violation — very often an expert will not be required.

Second, and of greatest importance, is the tremendous legal punch behind express warranty claims. If one can prove the basic elements of the tort, it is virtually defenseless. For example, in almost every jurisdiction, "state of the art," however broadly construed, is no defense to an express warranty claim. In other words, one cannot defend a case by proving that it was absolutely impossible under the science of the time to make a product as safe as the express warranty suggested. One cannot defend a case by showing that a manufacturer legitimately and sincerely believed the statement about safety to be true. Also, plaintiff's fault, usually, is not a defense. Express warranty can overcome the "assumption of the risk defense," if the plaintiff can show that he was really told by the express warranty that there was no risk. Express warranty also can withstand the defense of contributory fault.

Schwartz, *supra* note 5, at 155 (footnotes omitted). Schwartz notes these features of express

large sums of money at stake in express warranty litigation,⁷ it is not surprising that so many voices have been heard on the topic.

The issue of reliance arises most starkly in cases involving advertisements, catalogs, and warranty cards placed inside packages. The following hypothetical illustrates this point. Assume that a buyer does not see an express warranty in an advertisement, catalog, or brochure until *after* purchasing a product. Can the buyer, notwithstanding the failure to discover the seller's representations before the sale, maintain a claim under section 2-313 based on these representations if the representations turn out to be untrue?

For reasons discussed in this article, the answer is that the buyer should be permitted to recover despite his or her non-reliance on the warranty. Those courts and commentators who insist on a showing of reliance advance an unworkable and unfair test that, if followed to its logical extreme, would eliminate most express warranties from the marketplace. This point becomes evident when examining a data source that commentators and courts have overlooked in the section 2-313 debate — empirical studies relating to “real-world” consumer behavior.⁸ Unfortunately, the most recent draft revisions of section 2-313 fail to take proper notice of these studies and fall short in resolving the Code's frustrating ambiguity regarding reliance.⁹

This article reviews the legislative history and the courts' interpretations of section 2-313, demonstrates how recent empirical studies show the illogic of applying a reliance requirement for the section, discusses recent proposals to amend section 2-313, and recommends an alternative approach. In recommending a carefully measured approach to abolish reliance, the article makes clear that such a step presents little risk of opening the floodgates to numerous meritless warranty claims.

warranty with concern, arguing that they call for “rational and reasonable boundaries,” including retaining the reliance requirement. *Id.* at 156.

7. For example, the potential liability of the tobacco industry would run into the hundreds of millions, if not billions, of dollars should it be found that companies, such as the Liggett Group in *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), *rev'd on other grounds*, 112 S. Ct. 2608 (1992), made express warranties in their advertising.

8. See *infra* notes 127-53 and accompanying text.

9. At the time the author submitted this article for publication, he sent extensive excerpts of it to the Reporter in charge of revising Article 2. In the author's view, the draft revisions as of February 17, 1993, continued the Code's improper focus on reliance. Subsequently, as of September 10, 1993, a much improved version that purports to abolish reliance in public advertising cases, has circulated. Unfortunately, even this improved version contains excessive ambiguity. Even more unfortunate, while expanding consumers' rights with respect to reliance, the draft substantially diminishes consumer rights with respect to privity in revised § 2-318 by excluding from warranty protection “family members, bystanders and the like.” See *infra* note 206 and accompanying text.

II. THE HISTORY OF SECTION 2-313

The National Conference of Commissioners on Uniform State Laws and the American Law Institute promulgated the Uniform Commercial Code in 1951.¹⁰ Article 2 governs the sale of goods.¹¹ Section 2-313 defines the method of creating express warranties in the sale of goods.¹² The history of section 2-313 provides guidance for understanding the issue of reliance.

A. THE UNIFORM SALES ACT AND THE UNIFORM REVISED SALES ACT

The Code's predecessor was the Uniform Sales Act (USA), drafted by Professor Samuel Williston¹³ in 1906.¹⁴ Section 12 of the Uniform Sales Act provided with respect to express warranties:

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 purporting to be a statement of the seller's opinion only shall be construed as a warranty.¹⁵

No one disputes that section 12 required reliance on the part of the buyer to maintain a breach of express warranty claim. What is disputed is the meaning of the change in language from section 12 to section 2-313 of the U.C.C. Section 2-313, in contrast to section 12 of the USA, never mentions "reliance." Section 2-313 requires only that a seller's affirmations, descriptions, or samples be a "part of the basis of the bargain" for a buyer to bring an express warranty claim.

Commentators have explored the historical record of section 2-313 to determine whether its drafters intended to retain the reliance requirement.¹⁶ Interestingly, the two who appear to have delved most deeply, Professor Charles Heckman and Professor Steven Hodaszy, reach diametrically opposite

10. Hodaszy, *supra* note 3, at 469 n.2. Every state except Louisiana has adopted the code, with minor variations. *Id.* Although the U.C.C. establishes a comprehensive set of uniform state laws on commercial transactions, it excludes things such as the sale of realty, insurance contracts, and bankruptcy. White & Summers, *supra* note 3, § 2.

11. U.C.C. § 2-102 (1987).

12. *Id.* § 2-313.

13. See Heckman, *supra* note 5, at 3.

14. The Uniform Sales Act was enacted in 34 states. Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799 (1958).

15. UNIF. SALES ACT § 12 (1906) (amended 1941) (emphasis added).

16. See, e.g., Heckman, *supra* note 5, at 3-18; Hodaszy, *supra* note 3, at 469-75; Murray, *supra* note 3, at 285-91; Whitman, *supra* note 3, at 750.

conclusions. By focusing on preliminary versions of the U.C.C. and examining the writings of its principal drafters, Chief Reporter Karl Llewelyn and Assistant Reporter Soia Mentschikoff, Professor Heckman concludes that the drafters intended to expunge reliance from section 2-313.¹⁷ Professor Hodaszy, in looking to the writings of Samuel Williston, contends that the U.C.C. incorporates Williston's view that the law should moderate, but not eliminate, the reliance requirement in express warranties.¹⁸

Both authors note that Professor Williston voiced dissatisfaction with the courts' early reading of the requirement for reliance as he wrote it in section 12 of the Uniform Sales Act.¹⁹ In implementing section 12, the courts initially required plaintiffs to demonstrate that the sole or primary inducement that led them to make a purchase was the representation that gave rise to the express warranty claim.²⁰ Williston criticized these early rulings:

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 evidence of reliance by the buyer is necessary other than the seller's statements were of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods.²¹

To Hodaszy, Williston's words suggest a two-part reliance test. He contends Williston advocated the following approach:

If a seller's affirmation had the "natural tendency" to induce reliance — that is, if it would induce a reasonable person in the situation of the purchaser to buy the goods — then no proof of actual reliance was required. If, however, such a "natural tendency" could not be shown, plaintiff bore the burden of proving actual reliance.²²

The Uniform Sales Act was amended in 1944 and became the Uniform Revised Sales Act (URSA). The words "basis of the bargain" are used with respect to express warranties for the first time in section 37 of the URSA.²³

17. See Heckman, *supra* note 5, at 28.

18. See Hodaszy, *supra* note 3, at 472-75 (Noting that "[i]n short, there is powerful historical evidence that U.C.C. section 2-313 was intended to adopt Williston's . . . reliance test"). *Id.* at 475.

19. See Heckman, *supra* note 5, at 5; Hodaszy, *supra* note 3, at 472.

20. For a list of these early cases, see Hodaszy, *supra* note 3, at 471 n.16.

21. *Id.* at 472 n.18, quoting SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* § 206 (rev. ed. 1948).

22. *Id.* at 472 (footnotes omitted).

23. Section 37 read:

According to Hodaszy, the drafters of the URSA incorporated Williston's two-part reliance test in section 37.²⁴ In particular, he points to a comment to section 37 that states:

In life, affirmations of fact which relate to the goods and which are made by a seller in connection with a bargain about goods are taken as part of the description of the goods contracted about; in life, no particular reliance needs to be shown in order to weave such affirmations into the fabric of the agreement. Instead, what needs an affirmative showing is that there has been any fact which gives clear objective justification for the unusual result of taking such affirmations out of what has been agreed upon.²⁵

To Hodaszy, this comment indicates that reliance remains essential for express warranties, but that the burden of proof shifts to defendant sellers to demonstrate non-reliance by buyers. Hodaszy argues that section 37, containing only a few technical revisions, eventually became section 2-313 of the Uniform Commercial Code. Accordingly, he concludes that the drafters intended to adopt Williston's two-part test in section 2-313.²⁶

Professor Heckman has a different interpretation of the legislative history and wording of section 37 of the URSA. He notes that Karl Llewelyn, one of the principal drafters of the U.C.C.,²⁷ also principally drafted the URSA. In section 37, Llewelyn and his colleagues did far more than simply clarify the role of reliance in express warranties. To the contrary, they moved warranties

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- (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise which relates to the goods and is made by the seller to the buyer as a part 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 a basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made a 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. No affirmation merely of the value of the goods and no statement purporting to be merely the seller's opinion or commendation of the goods creates a warranty.

Id. at 474 n.29 (quoting UNIF. REVISED SALES ACT § 37 (1944 draft)).

24. Hodaszy, *supra* note 3, at 475.

25. *Id.* at 474 (citing UNIF. REVISED SALES ACT § 37 comment). Heckman looks at the same words, but reaches a different conclusion. See *infra* notes 27-36 and accompanying text.

26. See Hodaszy, *supra* note 3, at 475.

27. Heckman quotes Grant Gilmore as saying: "Make no mistake: this Code was Llewelyn's Code; there is not a section, there is hardly a line, which does not bear his stamp and impress; from beginning to end he inspired, directed and controlled it." Gilmore, *In Memoriam: Karl Llewelyn*, 71 YALE L.J. 813, 814 (1962), quoted in Heckman, *supra* note 5, at 2 n.4.

of descriptions, samples, and models — which previously were considered *implied warranties not requiring reliance* under the Uniform Sales Act²⁸ — from other sections of the Uniform Sales Act²⁹ into section 37 of the URSA. Heckman argues that Llewelyn retained the “no reliance required” feature of the implied warranties of descriptions, samples, and models, extending the feature to the affirmations and promises in Section 12 of the Uniform Sales Act.³⁰

Heckman buttresses his argument by pointing to a case, *Alaska Pacific Salmon Co. v. Reynolds Metals Co.*,³¹ that particularly concerned Karl Llewelyn and Soia Mentschikoff, the drafters of the U.C.C. In *Alaska Pacific Salmon*, the Second Circuit ruled that the plaintiff could not hold the defendant to representations contained in a letter transmitted after the parties entered into a contract for the purchase of packaging for dehydrated soups. The plaintiffs had vigorously argued that the parties did not reach contractual agreement until after the letter containing the representations arrived.³² Inexplicably, according to Heckman, the court rejected these arguments and selected as the “magical moment of contract” a date that neither plaintiffs nor defendants likely would have chosen.³³ Mentschikoff took part in the trial and appeal

28. See Heckman at 9-12.

29. Former sections 14 (implied warranties by description) and 16 (implied warranties by sample or model) of the Uniform Sales Act were incorporated as express warranties in section 37 of the Uniform Revised Sales Act. See *id.* at 9-10.

30. Heckman quotes the same language in the comment to section 37 of the Uniform Revised Sales Act invoked by Hodaszy. See *supra* notes 23 & 25. However, Heckman reaches the opposite conclusion:

“This comment also makes another important matter perfectly clear: reliance is no longer the crucial factor in express warranty. Unfortunately, even though equivalent language was carried over in the final comment 3 to section 2-313, modern courts have not always accepted it seriously.” Heckman at 14. Heckman also points to the fact that section 37(1)(a), which formerly presented the only way to create an express warranty, does not use the term “basis of the bargain.” On the other hand, sections 37(1)(b) and (1)(c), which formerly concerned implied warranties not requiring reliance, use the term “basis of the bargain.” Section 2-313 extends the term “basis of the bargain” to all three types of warranty. This suggests to Heckman that the term, when extended to § 37(1)(a) warranties, carries no reliance requirement.

Id. at 12-14.

31. 163 F.2d 643 (2d Cir. 1948).

32. *Id.* at 643.

33. See Heckman, *supra* note 5, at 21. As Heckman observes, the court’s analysis was overly technical and unfair:

This kind of analysis was exactly what the drafters of the U.C.C. were trying to make irrelevant. This is a laborious common law [sic] type of analysis: offer, counter-offer, and finally acceptance. The magical moment of contract appears, in this analysis, to be April 7. Nothing would have surprised the plaintiff or defendant more, at the time of their dealings, than to realize that their legal rights were being permanently shaped by a letter which purported neither to make nor accept an offer,

on behalf of the unsuccessful plaintiffs.³⁴

Heckman contends that, in drafting section 2-313 and other sections of the Code, Llewelyn and Mentschikoff sought to ensure that rulings based on extremely technical notions of offer and acceptance would not occur under a modern U.C.C. In particular, Heckman argues that comment 7 to section 2-313³⁵ reflects Llewelyn's and Mentschikoff's desire to provide greater flexibility to buyers seeking to hold sellers to promises made during discussions relating to a sale — even those promises technically made after the closing of a deal when no reliance by the buyer could have occurred.³⁶ In Heckman's view, one important step that Llewelyn and Mentschikoff took in promoting this greater flexibility was the abolition of reliance.

Although Hodaszy's and Heckman's resort to historical analysis seem plausible, both cannot be correct. Unfortunately, neither analysis is dispositive in any "smoking gun" sense. Each looks at the same words, but each reaches a different conclusion regarding the drafters' intentions.³⁷ If one reviews Hodaszy's and Heckman's arguments, one does find convincing the notion that Williston, the author of the Uniform Sales Act, considered reliance to be

but in fact was merely trying to make a trivial adjustment in the wording to be printed on the package.

Id. By focusing on this date, the court excluded the later representations by the defendant that, according to Llewelyn, should have governed the terms of the deal. Heckman argues that Llewelyn ensured, in § 2-313, that no technical cut-off date for contract formation would defeat an appropriate express warranty claim. *Id.* at 21-25.

34. *Id.* at 18.

35. Comment 7 states:

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 (Section 2-209).

U.C.C. § 2-313 cmt. 7 (1987).

36. According to Heckman:

The *Alaska Pacific* case . . . contains a general lesson for interpreting the Code's language in section 2-313. Today one views the Code through a glass highly colored by the pro-consumer activities of the last twenty years. The Code was drafted, in fact, to cope with problems of merchants, as typified by *Alaska Pacific*, as well as the problems of consumers. The language of comment 7 to section 2-313 (dealing with the timing of warranty creation) makes much more sense if viewed in terms of *Alaska Pacific* rather than in terms of a consumer who buys a can of paint at the hardware store and gets an assurance from the clerk as he leaves the front door.

Heckman, *supra* note 5, at 24-25 (footnotes omitted).

37. See *supra* note 22 and accompanying text. Hodaszy insists that these words incorporate a two-part reliance test fashioned by Williston. *Id.* Heckman argues that the comment makes an "important matter perfectly clear: reliance is no longer the crucial factor in express warranty." Heckman, *supra* note 5, at 14.

essential to the creation of an express warranty.³⁸ However, this conclusion falls far short of resolving the debate. The more critical question is whether Llewelyn, the drafter of the U.C.C., intended to adopt or abandon Williston's views regarding reliance. The answer to this question is less clear. Heckman's argument that Llewelyn wished to discard reliance when he drafted the U.C.C. is plausible but speculative, because Llewelyn did not clearly and unequivocally abandon reliance. Ultimately, insufficient evidence exists in the historical record to prove the matter conclusively.

Further, given the lack of precise explanations in the words and comments of the Uniform Revised Sales Act and the Uniform Commercial Code regarding reliance and express warranties, Hodaszy and Heckman engage in substantial speculation regarding the motives of the drafters and the meanings of their words. Carefully considering the two commentators' analyses and finding no clear answer, one turns to the courts' interpretations of section 2-313 and to policy considerations surrounding the section.

B. THE LANGUAGE AND COMMENTS OF SECTION 2-313

Although section 2-313 does not clearly spell out the U.C.C.'s position regarding reliance, examining the words and the several comments³⁹ to this section is useful.

To begin, there is little doubt that section 2-313 no longer contains the explicit requirement for reliance found in section 12 of the Uniform Sales Act. What has been substituted, however, is difficult to discern by reading the new words. How does an affirmation of fact or a promise relating to goods become "part of the basis of the bargain?" The abandonment of the explicit reliance words suggests, at a minimum, that a different and less demanding requirement exists in place of reliance. What this requirement is and how much less demanding simply cannot be determined from the words of section 2-313.

Several comments to section 2-313 raise the issue of reliance. Comment 3 states:

The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part

38. See *supra* notes 21-25 and accompanying text for a discussion of Williston's views.

39. Although comment language does not carry the same weight as the enacted language of the Code, the comments were drafted by the same individuals who wrote the Code and therefore carry enormous persuasive effect. See Murray, *supra* note 3, at 287, n.20.

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. The issue normally is one of fact.⁴⁰

Many words and phrases in this comment raise important questions. When the comment refers to affirmations made by the seller about the goods "during a bargain," does it refer solely to words spoken face-to-face with the buyer? Might it include words in an advertisement, catalog, or brochure that the buyer merely reads, but about which he or she does not dicker?

The answer clearly appears to be that an advertisement, catalog, or brochure can contain representations that constitute an express warranty even when a warranty is not intended.⁴¹ What is not clear, however, is whether the buyer must read and rely on the words before entering into the contract.

White & Summers examine the language in comment 3 and place themselves solidly in the "reliance is necessary" camp, stating:

It is clear that an advertisement can be a part of the basis of the bargain, and it is only fair that it be so. However, the language in Comment 3, from which some have found a presumption, is limited to "affirmations of fact made by the seller about the goods during a bargain" In the usual case one would not regard an advertisement as being made "during a bargain," and therefore no statement in an advertisement would normally qualify for the presumption that may be authorized in

40. U.C.C. § 2-313 cmt. 3 (1987) (emphasis added).

41. Cases holding that statements made in advertisements, catalogs, or brochures can constitute express warranties even though not specifically incorporated into a written contract include: *Neville Constr. Co. v. Cook Paint & Varnish Co.*, 671 F.2d 1107 (8th Cir. 1982); *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598 (2d Cir. 1968); *Keith v. Buchanan*, 220 Cal. Rptr. 392 (Cal. Ct. App. 1985); *Fundin v. Chicago Pneumatic Tool Co.*, 199 Cal. Rptr. 789 (Cal. Ct. App. 1984); *Harris v. Belton*, 65 Cal. Rptr. 808 (Cal. Ct. App. 1968); *Crest Container Corp. v. R.H. Bishop Co.*, 445 N.E.2d 19 (Ill. App. Ct. 1982); *Scheuler v. Aamco Transmissions, Inc.*, 571 P.2d 48 (Kan. Ct. App. 1977); *Hawkins Constr. Co. v. Matthews Co.*, 209 N.W.2d 643 (Neb. 1973); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 181 N.E.2d 399 (N.Y. 1962); *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612 (Ohio 1958); *Drier v. Perfection, Inc.*, 259 N.W.2d 496 (S.D. 1977); *see also Nordstrom, supra* note 5, at 204 (noting that statements "made in national advertising to the public generally" can constitute express warranties); WHITE & SUMMERS, *supra* note 3, § 9-5 at 401 (stating that "[i]t is clear that an advertisement can be part of the basis of the bargain, and it is only fair that it be so."); Lewis, *supra* note 3, at 686 (noting that "courts have had little trouble finding that an advertisement, although not part of the written contract, can nevertheless create express warranty liability, so long as it is 'part of the basis of the bargain'"); Victor, *supra* note 5, at 499 (acknowledging that "[r]ecently, the courts have with increasing frequency held that advertisements can create express warranties even though the advertisements themselves might not become part of written contracts.").

Comment 3. At minimum a plaintiff in such a case should have to testify that he (or his agent) knew of and relied upon the advertisement in making the purchase.⁴²

Professor Heckman, invoking the writings of Karl Llewelyn, sharply challenges White and Summers. He finds the use of the word “description” in comment 3 to be particularly significant, stating:

Comment 3 to section 2-313 reads: “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.” What is the significance of calling such affirmations *descriptions*? It is that under the Uniform Sales Act, description was an implied warranty and the buyer had to show neither knowledge nor reliance. Llewelyn regarded description as creating a warranty that the parties could not avoid even by mutual consent: “Section 14 [of the Revised Uniform Sales Act], then, requiring *minimum flat compliance with description*, stands, it is submitted, as distinguished from ‘merchantability’ and ‘fitness for particular purpose’ and ‘express warranty,’ in sense and law — as an iron section.” It is not conceivable that Llewelyn intended that the U.C.C., his greatest statutory achievement, should disregard one of his most firmly held views.⁴³

Another set of words in comment 3 that adds to the confusion is “particular reliance.”⁴⁴ Had the comment stated simply that “no reliance” is necessary to weave affirmations of fact, descriptions of goods, or samples into the fabric of the agreement, the debate over reliance might never have arisen. Does the addition of “particular” to modify “reliance” indicate that some type of reliance remains as an element of express warranties? Or, is the word simply surplusage? Unfortunately, no convincing evidence to support either view exists.

Comment 7 presents similar, if not more serious, problems of interpretation. Comment 7 states:

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

42. WHITE & SUMMERS, *supra* note 3, § 9-5 at 401.

43. Heckman, *supra* note 5, at 38 (footnotes omitted) (emphasis in original).

44. See U.C.C. § 2-313 cmt. 3 (1987).

warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209).⁴⁵

Not surprisingly, the significance of this comment has been hotly debated. Professors White and Summers struggle to fit it into their conceptual framework given the comment's apparent inconsistency with their notion that reliance is required for a provision to form part of the contract. The idea that one is potentially bound by a warranty made after a contract has been formed makes little sense to them.⁴⁶ Accordingly, they interpret the comment as applying solely to "face-to-face dealings that occur while the deal is still warm."⁴⁷ Any seller's statement "made more than a short period beyond the conclusion of the agreement" should not be considered a warranty.⁴⁸ White and Summers suggest that this approach "recognizes the practical realities even though it does some violence to normal contract doctrine."⁴⁹

Professor Murray vigorously disputes their approach to comment 7, asserting that their view represents an archaic interpretation of the Code.⁵⁰ Murray views comment 7 as fundamental evidence of "a novel concept of bargain, a concept well beyond and different from a bargained-for-exchange idea involving inducement or reliance."⁵¹ The fact that postformation statements on which the buyer clearly did not rely when entering into the contract can be considered integral parts of the contract strongly suggests to him that section 2-313 of the Code has jettisoned reliance completely when dealing with express warranties.⁵²

Professor Hodaszy challenges Murray's position, arguing that the Code's drafters would never base the Code "upon a radically different conception of 'bargain' without articulating that conception anywhere in the Code."⁵³ Hodaszy interprets comment 7 in a more modest fashion. He argues that comment 7 serves to rectify problems caused by the pre-existing duty rule,⁵⁴

45. *Id.* § 2-313 cmt. 7 (emphasis added).

46. See WHITE & SUMMERS, *supra* note 3, § 9-5 at 402 (stating that "[i]t is far from self-evident that a seller's post-sale words uttered during delivery are an 'agreement of modification,' and one can hardly attribute that bilateral connotation to an advertisement that is not published until after the sale.").

47. *Id.* § 9-5, at 402-03.

48. *Id.* at 403.

49. *Id.*

50. See *infra* notes 162-70 and accompanying text for a full discussion of Murray's views.

51. Murray, *supra* note 3, at 289.

52. See *infra* notes 162-68.

53. Hodaszy, *supra* note 3, at 508.

54. The pre-existing duty rule bars enforcement of new obligations based on prior legal or contractual obligations. For example a law enforcement official generally cannot claim a reward for capturing a criminal within the official's jurisdiction because the official, having an existing duty to apprehend criminals, did not provide new consideration to support a contractual claim for

which the drafters of the U.C.C. sought to eliminate. According to Hodaszy, comment 7 clarifies that postpurchase affirmations can bind the seller, regardless of whether the buyer provides additional consideration.⁵⁵ Hodaszy states:

[Murray's] argument . . . is essentially that the rules with respect to postformation-warranty modifications that comment 7 sets forth are universalized under section 2-313 to provide that reliance is never necessary for the creation of express warranties. This is a flawed reading of section 2-313. Murray reads comment 7 as setting forth a rule to apply in all cases, rather than only in the case of postformation warranties. Yet it is much more plausible to read comment 7 as an exception to the general rule set forth by section 2-313 rather than as a statement of that rule itself.⁵⁶

Hodaszy seems correct in suggesting that the Code's drafters intended to lay the pre-existing duty rule to rest in comment 7. The question, however, is whether they had any other intentions. If they wanted only to address the pre-existing duty rule, what is the reader to conclude from the language in the first two sentences in comment 7 that have much broader implications?⁵⁷ These two sentences indicate that the precise time of warranty formation is not material and that "[t]he sole question is whether the language or samples or models are fairly to be regarded as part of the contract."⁵⁸ The comments go beyond what is needed to reiterate section 2-209's abolition of the pre-existing duty rule, seemingly expanding the notion of how and when an express warranty is created. Whether the comments validate Murray's point that the notion of bargain has been given a radically new meaning is not clear. However, they appear to establish a broad principle regarding the formation time of an express warranty.

Further, comment 4, which states in part that "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell . . . ,"⁵⁹ buttresses Murray's contention that the U.C.C. offers a new

the reward. See *Denney v. Reppert*, 432 S.W.2d 647, 649 (Ky. Ct. App. 1968).

55. See Hodaszy, *supra* note 3, at 491.

56. *Id.* at 506. Hodaszy also notes that comment 7 makes specific reference to section 2-209, which provides for modifications of existing contracts without additional consideration. He views this section as confirming the Code's emphasis on abolishing the pre-existing duty rule rather than on carving out a new approach to the concept of bargains. *Id.* at 506-07.

57. See U.C.C. § 2-313 cmt. 7 (1987).

58. *Id.*

59. U.C.C. § 2-313 cmt. 4 (1987). The first paragraph of comment 4 states in full:

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, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material

approach to bargains. If the focus is on what the seller has agreed to sell rather than on what the buyer has agreed to buy, then reliance becomes irrelevant, and the main job in analyzing an express warranty claim is determining what responsibility the seller has undertaken. Professor Lewis, using comment 4 as authority, insists that the Code should be read as establishing "strict claim liability;" that one who makes a representation must stand behind it whether a claimant was aware of or relied on it.⁶⁰ Thus, "when a representation about a product is made in a media available to *any* consumer, that representation becomes a part of the basis of the bargain for *all* consumers since it describes what it is the seller intends to sell."⁶¹

Comment 8 also contains language that is relevant to the reliance versus no reliance debate. This comment addresses the question of what is included as part of the basis of the bargain:

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.⁶²

This comment, as with comments 3 and 7, comes tantalizingly close to indicating whether reliance is necessary for a seller's representation to become part of the basis of the bargain, but ultimately fails to resolve the point. Comment 8 states that the seller's affirmations become part of the basis of the bargain "unless good reason is shown to the contrary."⁶³ Is good reason shown when the seller demonstrates a lack of reliance by the buyer? Unfortunately, neither section 2-313 nor comment 8 answers this question. The reference in the comment to statements or predictions that "cannot fairly be viewed as entering into the bargain"⁶⁴ as set forth in section 2-313(2) merely establishes that puffing, or enthusiastic sales talk containing neither

deletion of the seller's obligation. Thus, 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.

Id.

60. See Lewis, *supra* note 3, at 692.

61. *Id.*

62. U.C.C. § 2-313 cmt. 8 (1987).

63. *Id.*

64. *Id.*

affirmations of fact nor promises,⁶⁵ does not constitute an express warranty. The more critical issue, however, is whether language that would create an express warranty fails to do so if the buyer does not rely on the language. Comment 8, as with the other comments, does not answer that question.

In short, despite vigorous argument to the contrary by a number of respected commentators, a careful review of section 2-313's legislative history, language, and comments does not definitively answer whether reliance remains a basic element of an express warranty.

III. THE COURTS' INTERPRETATION OF SECTION 2-313

Although confusion remains regarding the U.C.C. drafters' purpose in adopting the basis of the bargain language, some relaxation of the reliance requirement under the Uniform Sales Act was intended.⁶⁶ How courts have decided express warranty cases under the U.C.C. and whether their decisions have reduced the perceived unfairness of earlier rulings presents another issue.

A significant number of courts have ruled on the issue of reliance under section 2-313. The majority have interpreted the section as requiring reliance in some form.⁶⁷ Most do so in a fairly cursory fashion, stating merely that

65. In the words of subsection (2), "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." U.C.C. § 2-313(2) (1987). The line between puffing and express warranties is not bright. See WHITE & SUMMERS, *supra* note 3, § 9-4, at 394 (stating that "anyone who says he can consistently tell a 'puff' from a warranty may be a fool or a liar").

66. As previously noted, Professor Williston, who wrote section 12 of the Uniform Sales Act, criticized the courts' requirements for reliance in express warranties. See *supra* notes 19-21 and accompanying text.

67. See, e.g., *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 567 (3d Cir. 1990) (stating that "we believe that the New Jersey Supreme Court would hold that a plaintiff effectuates the 'basis of the bargain' requirement of section 2-313 by proving that she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise"), *aff'd in part and rev'd in part on other grounds*, 112 S. Ct. 2608 (1992); *Hobco, Inc. v. Tallahassee Assocs.*, 807 F.2d 1529, 1533 (11th Cir. 1987) ("Under Florida law, an express warranty may arise only where justifiable reliance upon assertions or affirmations is part of the basis of the bargain."); *General Foods Corp. v. Valley Lea Dairies, Inc.*, 771 F.2d 1093, 1099 (7th Cir. 1985) (holding that there was no prejudicial error in the instruction that knowledge, experience, and reliance by a buyer are proper considerations in determining whether the seller created an express warranty); *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983) (stating that "absence of reliance will negate the existence of an express warranty"); *Overstreet v. Norden Lab., Inc.*, 669 F.2d 1286, 1291 (6th Cir. 1982) (stating, "A warranty is the basis of the bargain if it has been relied upon as one of the inducements for purchasing the product.") (citing KY. REV. STAT. ANN. § 355.2-313(1)(a) cmt. 1(C) (Baldwin 19); *Van Duren Hardware Co. v. John H. Presha & Sons*, 5 S.W.2d 1052 (Ky. Ct. App. 1928); Note, *The Uniform Commercial Code and Greater Consumer Protection Under Warranty Law*, 49 KY. L.J. 240 (1960)); *Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395, 397 (10th Cir. 1967) (finding that in a sale of stud fasteners, no express warranty was created because the buyer did not rely on "any statement in

the phrase "part of the basis of the bargain" has not abolished reliance. Others indicate that the phrase, although carrying a reliance requirement, imposes a more relaxed notion of reliance.⁶⁸

the [seller's] pamphlet, any promise, or any description of the product"); *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641, 652 (N.D. Miss. 1986) (concluding that the buyer failed to prove the buyer relied on statements in the seller's brochure prior to or contemporaneously with making the contract and could not recover for breach of express warranty); *Sessa v. Riegle*, 427 F. Supp. 760, 766 (E.D. Pa. 1977) (stating that the "part of the basis of the bargain" requirement is "essentially a reliance requirement"), *aff'd*, 568 F.2d 770 (3d Cir. 1978); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 680 (D.N.H. 1972) (finding that no warranty was created in sale of a hammer when the buyer did not rely on statements contained in the seller's catalogue); *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 146-47 (Ark. 1992) (finding that Ciba-Geigy's advertising materials contained an express warranty for an herbicide that would have entitled the farmer to damages had he seen and relied on the warranty and that, because buyer was "not influenced by the advertising materials when purchasing [the herbicide], . . . they were not a basis of the bargain."); *Thursby v. Reynolds Metals Co.*, 466 So.2d 245, 250 (Fla. Dist. Ct. App. 1984) (finding that the buyer must justifiably rely as part of basis of bargain) (citing *Escombria Chem. Corp. v. Industrial-Marine Supply Co.*, 223 So.2d 773 (Fla. Dist. Ct. App. 1969)); *Keating v. DeArment*, 193 So.2d 694 (Fla. Dist. Ct. App., *cert. denied*, 201 So.2d 230 (Fla. 1967)); *Coryell v. Lombard Lincoln-Mercury, Merkur*, 544 N.E.2d 1154, 1158 (Ill. App. Ct. 1989) (holding that "the buyer must show reliance on the seller's representations in order for an express warranty to exist") (citing *Hrosik v. J. Keim Builders*, 345 N.E.2d 514 (Ill. App. Ct. 1976)); *Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315, 321 (Me. 1982) (finding no evidence of reliance and thus no express warranty when the buyer could not show having seen the owner's manual prior to the sale); *Interco, Inc. v. Randustrial Corp.*, 533 S.W.2d 257, 262 (Mo. Ct. App. 1976) (holding that a catalogue, advertisement, or brochure can constitute an express warranty, but "must have at least been read as the U.C.C. requires the proposed express warranty be part of the basis of the bargain") (citing *Pioneer Hi-Bred Int'l, Inc. v. Talley*, 493 S.W.2d 602 (Tex. Ct. App. 1973)); *Wendt v. Beardmore Suburban Chevrolet*, 366 N.W.2d 424, 428 (Neb. 1985) (holding that the buyer must prove reliance on express warranty to make it part of the basis of the bargain); *Scaringe v. Holstein*, 477 N.Y.S.2d 903, 904 (N.Y. App. Div. 1984) (finding that the buyer failed to show reliance on the seller's assurances that a used car was in excellent condition); *Thomas v. Amway Corp.*, 488 A.2d 716, 720 (R.I. 1985) (finding no express warranty in a sale of liquid soap when the buyer did not show reliance on statements printed on the bottle); *Indust-Ri-Chem Lab., Inc. v. Par-Pak Co.*, 602 S.W.2d 282, 293 (Tex. Ct. App. 1980) (stating, "Obviously, if the buyer knows that a representation of the seller is untrue, that representation cannot be a part of the basis of the bargain."); *General Supply & Equip. Co. v. Phillips*, 490 S.W.2d 913, 917 (Tex. Ct. App. 1972) (stating that to recover the injured party must show reliance "on the representations, affirmations of facts or promises").

68. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 568 (3d Cir. 1990) ("We hold that once the buyer has become aware of the affirmation of fact or promise, the statements are presumed to be part of the 'basis of the bargain' unless the defendant, by 'clear affirmative proof,' shows that the buyer knew that the affirmation of fact or promise was untrue."), *aff'd in part and rev'd in part on other grounds*, 112 S. Ct. 2608 (1992); *Sessa v. Riegle*, 427 F. Supp. 760, 766 (E.D. Pa. 1977) (concluding that, although the Code retains reliance as a requirement in express warranties, it does not require a "strong showing of reliance"), *aff'd*, 568 F.2d 770 (3d Cir. 1978); *Ewers v. Eisenkopf*, 276 N.W.2d 802, 805 (Wis. 1979) (stating, "The statutory language 'a basis of the bargain' does not require the affirmation to be the sole basis for the sale,

For those persons who favor retaining reliance, *Cipollone v. Liggett Group, Inc.*⁶⁹ provides a recent and comprehensive judicial analysis. In *Cipollone* the husband of a deceased smoker brought a product liability action on behalf of himself and his wife's estate against a tobacco manufacturer. The plaintiff contended that a number of Liggett's ads represented its cigarettes as safe,⁷⁰ creating an express warranty under section 2-313 of the U.C.C.. In response Liggett argued that it should be permitted to show that Mrs. Cipollone never relied on the representations.⁷¹ In its early opinion, the district court "suggested that reliance by a buyer was presumed by the fact of the making of the affirmation or promise but that the warrantor could rebut this presumption."⁷² Upon reconsideration, however, the court concluded that reliance was irrelevant to a determination of whether a statement becomes part of the basis of the bargain.⁷³ On appeal, the Third Circuit reversed and upheld the requirement that reliance be demonstrated.⁷⁴ In reaching its

only that it is a *factor* in the purchase.").

69. 893 F.2d 541 (3d Cir. 1990).

70. Among the claims plaintiffs alleged constituted warranties under section 2-313 were several ads on the Arthur Godfrey Show. Godfrey, a nationally known radio and television personality, served as a spokesman for Chesterfield cigarettes for many years. In one typical ad, Mr. Godfrey asserted:

[I have] a client here, the Chesterfield people, Liggett and Myers are their names. [T]he firm . . . is an honorable one, a trustworthy one. For years and years and years that they have been advertising, you never heard them make an unsubstantiated claim—ever! Certainly not during the time that I've been with 'em. They came out, not so long ago, with a report by an eminent physician—it's a good report—I suppose there are those who wonder about it.

If you believe in me, and over the 23 years I've been in the radio, you know that I have never yet misled you with advertising. Nobody has been able to buy me enough to do that. If you believe in me, then you take my word that I know this—that the Liggett and Myers people don't make statements that they can't substantiate. And when they say that after this test that they made with the doctor, that after he made it, he comes up and say [sic], quote—'It is my opinion that the ears, nose, throat, and accessory organs of all participating subjects examined by me, were not adversely affected in the six-months period by smoking the cigarettes provided.'

And they mean what they say—that specialist said it. Liggett and Myers have substantiated it. Remember that when you're wondering about cigarettes. Smoke Chesterfields—they're good.

Id. at 550 n.2 (alteration in original).

71. *Id.* at 563.

72. *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208, 213 (D.N.J.) (citing *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1987 (D.N.J. 1988)), *aff'd in part and reversed in part*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part and reversed in part on other grounds*, 112 S. Ct. 2608 (1991).

73. *Id.*

74. *Cipollone*, 893 F.2d at 567.

conclusion, the Third Circuit conceded that the legislative history of section 2-313 is unclear with respect to reliance⁷⁵ and that the section's comments appear inconsistent on the point.⁷⁶

Notwithstanding these "seemingly inconsistent mandates on the reliance question,"⁷⁷ the court ruled that reliance was required, stating:

We believe that the most reasonable construction of section 2-313 is neither Liggett's reliance theory, which fails to explain how reliance can be relevant to "what a seller agreed to sell," or the district court's purely objective theory, which fails to explain how an advertisement that a buyer never even saw becomes part of the "basis of the bargain." Instead, we believe that the New Jersey Supreme Court would hold that a plaintiff effectuates the "basis of the bargain" requirement of section 2-313 by proving that she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise. . . . We hold that once the buyer has become aware of the affirmation of fact or promise, the statements are presumed to be part of the "basis of the bargain" unless the defendant, by "clear affirmative proof," shows that the buyer knew that the affirmation of fact or promise was untrue.⁷⁸

The argument that seemed to persuade the court is similar to the argument that convinced White and Summers the reliance requirement was necessary. That is, it seems wrong to permit a buyer who had no knowledge of a seller's statement about the product at the time of purchase (or shortly thereafter) to recover simply because the buyer later discovered that the statement was false.⁷⁹ The Third Circuit's approach reflects the majority view of section

75. *Id.* at 565 (acknowledging, "The history of section 2-313(1)(a), although informative, fails to give a clear answer as to whether reliance is required.").

76. The court read comment 3 as supporting the need for reliance, stating: "In other words, even though 'no particular reliance need be shown,' the seller can 'take [an] affirmation . . . out of the agreement' by showing that the buyer did not rely." *Id.* at 566 (alteration in original).

On the other hand, the court concluded that comment 7 presented substantial difficulties to those who read section 2-313 as requiring reliance:

The reliance requirement does not comport well with U.C.C. Official Comment 7 to section 2-313. . . . If a post-closing promise—on which, by definition, a seller cannot rely in deciding to make a purchase—can create a warranty, then it is difficult to see why a pre-closing promise can create a warranty only if relied upon.

Id. at 567. Comment 4 also perplexed the court.

Additionally, a reliance requirement seems inconsistent with U.C.C. Official Comment 4 to section 2-313. Comment 4 states that "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell."

Reliance is irrelevant to what a seller agrees to sell.

Id. (quoting N.J. STAT. ANN. § 12A:2-313 U.C.C. cmt. 4 (West 1962)).

77. *Id.*

78. 893 F.2d at 567-68 (footnotes omitted).

79. See 893 F.2d at 567; see also WHITE & SUMMERS, *supra* note 3, § 9-5, at 403 (stating

2-313. The court apparently felt that its ruling occupied the middle ground and that it reasonably accommodated the legitimate interests of both buyer and seller. However, the ruling actually favors the seller. This point is most obvious when one examines cases in which a seller has clearly used words that would constitute an express warranty, but where the buyer cannot demonstrate having seen them.

For example, in *Ciba-Geigy Corp. v. Alter*⁸⁰ the seller distributed advertising materials to farmers that stated, among other things, “‘Crop injury? You don’t have to worry when you use Dual. Gives you peace of mind. That’s worth alot [sic].’”⁸¹ The Arkansas Supreme Court, on appeal from a \$100,000 verdict in the buyer’s favor, reversed and remanded.⁸² Addressing the buyer’s express warranty claim, the court concluded that the advertising materials distributed to farmers by Ciba-Geigy contained an express warranty that a farmer need not worry about crop injury when using Dual. Nevertheless, the court ruled that the plaintiff could not base a claim on the warranty in the ads because he could not recall reading the advertising materials.⁸³ Although the court did leave the plaintiff with a possible warranty claim based on oral representations made to him by the defendant’s salesman,⁸⁴ proving the specifics of an oral warranty obviously presents a more daunting task for the plaintiff than establishing the contents of a written ad.

Barring consumers from pursuing a warranty claim because they cannot specifically remember having seen the warranty produces two adverse effects. First, this approach will prevent buyers who relied on representations in ads from recovering if, after time has elapsed between the sale and the breach, they cannot remember whether they read and relied on the advertisement.

the argument: “Why should one who has not relied on the seller’s statement have the right to sue?”). Other commentators have made powerful and persuasive responses to this question. See *infra* notes 161-66 and accompanying text.

80. 834 S.W.2d 136 (Ark. 1992).

81. *Id.* at 138.

82. The issue leading to reversal was the trial court’s failure to bifurcate the trial, separating a settlement contract claim from other claims. *Id.* at 138.

83. According to the court:

The advertising materials distributed to farmers by Ciba-Geigy contained an express warranty that a farmer need not worry about crop injury when using Dual. Alter, however, did not recall reading any of the advertising materials. An affirmation of fact must be part of the basis of the parties [sic] bargain to be an express warranty. When a buyer is not influenced by the statement in making his or her purchase, the statement is not a basis of the bargain. Clearly, Alter was not influenced by the advertising materials when purchasing Dual, and hence they were not a basis of the bargain.

Id. at 146-47 (citing *Currier v. Spencer*, 772 S.W.2d 309 (Ark. 1989)) (citation omitted).

84. *Id.* at 147.

Second, this approach will encourage perjury by litigants, which undermines the integrity of the judicial system. Ciba-Geigy, having placed these warranty words in ads to sell its product and having represented that the product would not cause harm, could use this ruling to challenge every claim based on its representations by insisting that the claimants prove they relied on the ads when purchasing Ciba-Geigy's product. In effect the company could gain the benefits of extra sales induced by its ads while avoiding the consequences of having to live up to the ads.

In *Schmaltz v. Nissen*⁸⁵ the Supreme Court of South Dakota reversed a lower court ruling that a statement on a seed bag, which said: "This quality seed is protected by Heptachlor insecticide treatment to help ensure stronger stands, superior quality and increased yields,"⁸⁶ constituted an express warranty upon which a claim could be pursued. According to the court:

In this case the trial court need not determine whether the language on the seed bags constitutes an express warranty, since it is clear that such language did not in any way become the basis of the bargain. Both [plaintiffs] admit that they purchased the seed prior to seeing the bag containing the seed. Neither read the language supposedly creating the express warranty until after the sale was completed. Without having read or even known of this language, it is impossible to say this language was part of the basis of the bargain.⁸⁷

Although the court affirmed the claim against the seed company on an implied warranty theory,⁸⁸ the ruling is unsatisfactory. Had the seller successfully disclaimed all implied warranties, the buyers would have been left without an effective remedy despite the words the seller placed on its seed bag.

In *DiLenno v. Libbey Glass Division*⁸⁹ an injured consumer sued a jar manufacturer for injuries sustained to her right hand when an allegedly defective jar shattered as she attempted to replace its lid. The plaintiff claimed that a catalogue containing an illustration showing that the jar would open and close properly constituted an express warranty.⁹⁰ The court rejected her claim, stating:

It is clear that a successful action for breach of an expressed warranty may not be maintained in Delaware absent some reliance by the buyer on the

85. 431 N.W.2d 657 (S.D. 1988).

86. *Id.* at 659.

87. *Id.* at 661.

88. *See id.* at 661.

89. 668 F. Supp. 373 (D. Del. 1987).

90. *See id.* at 376.

warranty. There is no evidence in the record to suggest that [the plaintiff] ever saw the Owens-Illinois catalog let alone relied on it when she purchased the jar. Absent such evidence, [the plaintiff's] claim for breach of an expressed warranty must fail.⁹¹

It is doubtful that the court would have imposed liability even if it had found that the illustration constituted an express warranty and even if it had not insisted on a demonstration of reliance by the buyer. The court was persuaded by evidence that the damage to the jar was as likely to have resulted from misuse of the jar by the plaintiff or her customers as by any defect in the product.⁹² Nevertheless, the plaintiff would have been denied recovery even if she could clearly demonstrate a breach of warranty because she was unable to show reliance.

In *Thomas v. Amway Corp.*⁹³ a consumer who suffered a persistent, severe rash for over a year after using the defendant's liquid soap claimed that a label on the product stating "leaves skin feeling silky clean . . . Gentle for all uses" constituted an express warranty.⁹⁴ The court, insisting that these words did not constitute a warranty and that she did not rely on them, dismissed her claim. The court noted:

The plaintiff who claims breach of express warranty has the burden of proving that the statements or representations made by the seller induced her to purchase that product and that she relied upon such statements or representations. In the case at bar, defendant had not printed on the bottle that the product would not produce a rash, thus plaintiff had no representation to rely upon. As the trial justice properly noted, "there is no evidence in this case that Mrs. Thomas made her bargain on anything contained on the container." [sic] Without this evidence, we affirm the trial justice's decision that plaintiff cannot recover for breach of express warranty.⁹⁵

The court's analysis seems unusually shallow. To rule that a serious rash⁹⁶ does not constitute a breach of a representation that a soap is gentle for all uses because the representation fails to provide that the soap would not cause a rash is unconscionable. Moreover, to insist that the plaintiff demonstrate that the representations induced her to buy the product is to return

91. *Id.* at 376 (citing DEL. CODE ANN. tit. 6, § 2-313 cmt. 1 (1974)).

92. *See id.* at 379.

93. 483 A.2d 716 (R.I. 1985).

94. *Id.* at 720.

95. *Id.* (alteration in original) (citing *Alan Wood Steel Co. v. Capital Equip. Enters.*, 349 N.E.2d 627 (Ill. App. Ct. 1976); *Rogers v. Zielinski*, 209 A.2d 706 (R.I. 1965)).

96. The plaintiff contended that, shortly after using defendant's soap, she developed irritated and inflamed skin with large red blotches that would often bleed, causing her clothes and bed sheets to stick to her body—a painful condition that persisted for over a year. *Id.* at 718.

to the pre-U.C.C. approach of the Uniform Sales Act so condemned by Williston⁹⁷ and to ignore the real-life buying patterns of consumers.⁹⁸

In *Hagenbuch v. Snap-On Tools Corp.*⁹⁹ a worker who was partially blinded when a hammer chip hit his eye based an express warranty claim on language in defendant's catalogue that the hammer was "[e]xcellent for the repair work since it has plenty of 'beef' to handle heavy tires. Also can be used for many other jobs such as straightening frames, bumper brackets, bumpers, puller work, etc."¹⁰⁰ The catalogue also stated, "'Federal Specs: GGG-H-86A applies to the BH-123 Hammer.'"¹⁰¹ Despite evidence that the plaintiff received the catalogue and that the hammer failed to meet the federal specifications described in the catalogue, the court ruled that the plaintiff could not maintain an express warranty claim, reasoning:

In order to find an express warranty, it must be shown that the representations of fact describing the hammer were made "part of the basis of the bargain." In other words, plaintiff has the burden of showing that he acted on the basis of the representations. There was evidence that plaintiff received the 1969 Snap-On Catalogue, but no evidence that he relied on the Catalogue description when he purchased the hammer. I rule, therefore, that plaintiff is not entitled to recover for breach of an express warranty.¹⁰²

The court did uphold a verdict based on strict tort liability. However, the plaintiff's recovery was reduced by twenty percent because the plaintiff was contributorily negligent.¹⁰³ This reduction in damages might not have occurred if the express warranty claim had been upheld.¹⁰⁴

Although some of the cases that require reliance permit the plaintiff to

97. See *supra* note 21 and accompanying text (stating Williston's view).

98. See, e.g., Lord, *supra* note 5, at 529. Lord argues that the problem with insisting that a particular representation be the inducing factor that led to a purchase is that this view ignores the fact that most bargains are based on "multiple, rather than single, factors." *Id.*

Buyers typically do not purchase solely on the basis of one or even several factors; neither do they distinguish among the myriad of assertions which accompany most sales, so that it is impossible to accurately determine whether a particular assertion was "basic," "important," "meaningful," "useful," or "ignored." Rather, buyers buy on the basis of an overall impression, and to the extent that any assertion by a seller contributes to that overall impression, the buyer ought to be able to expect that the asserted qualities will exist.

Id. See also *infra* notes 152-60 and accompanying text.

99. 339 F. Supp. 676 (D.N.H. 1972).

100. *Id.* at 677 (alteration in original).

101. *Id.*

102. *Id.* at 680 (citing *Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967)).

103. See *id.* at 680-85.

104. Professor Heckman finds this point disturbing. See Heckman, *supra* note 5, at 30-31.

recover on an alternative theory, such as implied warranty or strict liability, these cases carry the potential for manifest unfairness. By requiring the plaintiff to demonstrate reliance on representations contained in an ad or on a label when purchasing a product, the courts create an opportunity for companies to attract numerous purchasers through extravagant claims, yet to avoid liability for these claims because consumers cannot remember whether they saw the claims prior to purchasing the product. Shifting the burden to the defendant to demonstrate nonreliance, as *Cipollone* and other courts suggest, hardly solves the problem.¹⁰⁵

Most courts continue to require reliance under section 2-313. Nevertheless, some claim to have discarded the requirement.¹⁰⁶ Not every court that makes this claim does so to the same extent. Some courts, for example, still require reliance, but shift the burden of proof to the defendant seller.¹⁰⁷

105. Because most consumers do not read warranties until after they have purchased the product, defendants will often find it easy to meet this burden of proof. See, e.g., *infra* notes 127-53 and accompanying text.

106. See, e.g. *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 644 (10th Cir. 1991) (holding that a buyer who relied on his history of purchasing seed and not on the seller's promotional literature could sue for breach of warranty based on promotional literature); *Winston Indus. v. Stuyvesant Ins. Co.*, 317 So.2d 493, 497 (Ala. Civ. App.) (finding that § 2-313 does not contain reliance requirements), *cert. denied*, 317 So.2d 500 (Ala. 1975); *Keith v. Buchanan*, 220 Cal. Rptr. 392, 394 (Ct. App. 1985) (holding that "actual reliance on the seller's factual representation need not be shown by the buyer"); *Jensen v. Seigel Mobile Homes Group*, 668 P.2d 65, 71 (Idaho 1983) (stating that "the buyer of goods need not rely on an 'affirmation of fact or promise' or 'description' for the same to become 'part of the basis of the bargain' and hence an express warranty") (citing *Autzen v. John C. Taylor Lumber Sales*, 572 P.2d 1322 (Or. 1977)); *Young & Cooper, Inc. v. Vestring*, 521 P.2d 281, 291 (Kan. 1974) (stating that "particular reliance upon the express warranty need not be shown"); *Interco Inc. v. Randustrial Corp.*, 533 S.W.2d 257, 261 (Mo. Ct. App. 1976) (stating that the U.C.C.'s adoption abandoned the old concept of reliance) (citing Mo. Rev. Stat. § 400.2-313 U.C.C. cmt. 3 (1965)); *Hawkins Constr. Co. v. Matthews Co.*, 209 N.W.2d 643, 655 (Neb. 1973), *overruled on other grounds as recognized by* *Murphy v. Selts-Schultz Lumber Co.*, 481 N.W.2d 422 (Neb. 1992); *Gladden v. Cadillac Motor Car Div.*, 416 A.2d 394, 396 (N.J. 1980) (stating, "Particular reliance on such statements of description or quality need not be shown . . ." (citing N.J. STAT. ANN. § 12A:2-313 U.C.C. cmt. 3 (West 1962))); *Perfetti v. McGhan Medical*, 662 P.2d 646, 652 (N.M. Ct. App.) (stating that no independent showing of reliance is required on an affirmation of fact that is the basis of the bargain), *cert. denied*, 662 P.2d 645 (1983); *Lonzrick v. Republic Steel Corp.*, 218 N.E.2d 185, 192 (Ohio 1966); *Villalon v. Vollmering*, 676 S.W.2d 220, 222 n.1 (Tex. Ct. App. 1984) (stating that the buyer's reliance is not a proper element for recovery on an express warranty) (citing *Indust-Ri-Chem. Lab., Inc. v. Par-Pak Co.*, 602 S.W.2d 282 (Tex. Ct. App. 1980)); *Elanco Prods. Co. v. Akin-Tunnell*, 474 S.W.2d 789, 793 n.4 (Tex. Ct. App. 1971) (stating that buyer reliance "is not a determinative element under the Code") (quoting Editor's Note, 2 U.C.C. Rep. Serv. 916 (Callaghan 1965)).

107. See, e.g. *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983); (quoting *Royal Business Mach. v. Lorraine Corp.*, 633 F.2d 34, 44 n.7 (7th Cir. 1980)); *Royal Business Mach.*, 633 F.2d at 44 n.7 (quoting *Sessa v. Riegle*, 427 F. Supp. 760, 766 (E.D. Pa. 1977), *aff'd*, 568 F.2d 770 (3d Cir. 1978)); *Sessa*, 427 F. Supp. at 766.

Others announce in unequivocal terms that reliance is no longer required, but then demand some proof that the buyer knew of and considered the representations constituting the warranty in making their purchase.¹⁰⁸

Some courts, however, appear to have abandoned reliance. In *Lutz Farms v. Asgrow Seed Co.*,¹⁰⁹ buyers of onion seed that produced unmarketable double onions brought an action against the seller on a variety of theories, including breach of express warranty. The plaintiff based the express warranty claim on representations about the quality of the seed contained in the seller's promotional publications. Despite the buyer's testimony that he relied on favorable past experience with the seed rather than on the seller's brochures, the court upheld the express warranty claims. In doing so, the court noted: "It appears that the majority of jurisdictions which have addressed the issue have found it unnecessary to require reliance from the buyer before a statement by the seller can be considered an express warranty."¹¹⁰ While this statement is factually incorrect, the court's ruling appears to be correct. A company that represents that the quality of its product meets certain standards should not be able to avoid liability simply because the purchaser honestly—and, from hindsight, naively—admitted that his past experience with the product, and not statements in brochures, motivated him to buy it.

In *Daughtrey v. Ashe*¹¹¹ the buyer purchased a diamond bracelet for his wife from the defendant. After the buyer agreed to purchase the bracelet and paid the defendant, the defendant's business associate placed the bracelet, together with an appraisal form, in a box and handed the box to the buyer. The appraisal stated that the diamonds were of "v.v.s. quality," which is "one of the highest ratings in a [gem] quality classification system"¹¹² In fact, the diamonds were of substantially lower quality than v.v.s.. Upon discovering this, the buyer sued. The lower court denied recovery on the basis of an express warranty because, among other reasons, the purchaser had not relied on the appraisal when purchasing the bracelet.¹¹³

The Virginia Supreme Court reversed, holding that the representation of v.v.s. quality did constitute an express warranty upon which a claim could be based.¹¹⁴ Although the buyer probably did not see the appraisal form until after the sale's completion, the court held that the representation about v.v.s.

108. See, e.g., *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1261 (Ala. 1983); *Keith v. Buchanan*, 220 Cal. Rptr. 392, 397-98 (Cal. Ct. App. 1985); *Interco, Inc. v. Randustrial Corp.*, 533 S.W.2d 257, 261-62 (Mo. Ct. App. 1976); *Gladden v. Cadillac Motor Car Div.*, 416 A.2d 394, 396 (N.J. 1980).

109. 948 F.2d 638 (10th Cir. 1991).

110. *Id.* at 645.

111. 413 S.E.2d 336 (Va. 1992).

112. *Id.* at 337.

113. See *id.*

114. See *id.* at 338.

quality constituted part of the basis of the bargain.¹¹⁵ Rather than focusing on what the purchaser knew at the time of purchase, the court focused on what the seller represented, stating:

We conclude from the language used in Code [§ 2-313] and the Official Comment thereto that the drafters of the Uniform Commercial Code intended to modify the traditional requirement of buyer reliance on express warranties. . . .

. . . .
[The defendant] introduced no evidence of any factor that would take his affirmation of the quality of the diamonds out of the agreement.¹¹⁶

This case assumes particular significance because it represents a typical buying pattern that the courts and commentators often ignore in analyzing reliance in express warranty cases. Most consumers do not read, and may not even know about, the representations made by sellers until after the purchase has been made. To insist that purchasers know of the representations prior to purchase means that a substantial number of legitimate claims will be barred.

In *Winston Industries v. Stuyvesant Insurance Co.*¹¹⁷ an insurer, as subrogee of the insured, brought an action against the manufacturer of a mobile home for breach of express warranty. At trial the purchaser testified that he never received a copy of the warranty and did not know about a warranty. He had received a bill of sale stating that the mobile home carried a factory guarantee, but the bill provided no further details. Although the purchaser did not receive and was unable to recall the existence of a warranty, the court found that a warranty existed, reasoning:

As this court perceives it, the determining factor in this case under the newly enacted Uniform Commercial Code is not reliance by the purchaser on the seller's warranty, but whether it is part of the "basis of the bargain."

In fact, it is not necessary to show any particular reliance by the buyer to give rise to such warranties.

. . . .
The question before us, in this instance, is whether the warranty is to be regarded as part of the contract, to wit, whether it is part of the basis of the bargain. Referring once again to the aforementioned bill of sale which states that "new trailers bear usual factory guarantee," we find it is indeed a basis of the bargain.¹¹⁸

115. See *id.* at 339.

116. 413 S.E.2d at 339.

117. 317 So.2d 493 (Ala. Civ. App. 1975).

118. *Id.* at 497 (citing *Young & Cooper, Inc. v. Vestring*, 521 P.2d 281 (Kan. 1974); *Hawkins*

One might ask whether the court would have ruled the same way if the bill of sale had not mentioned the factory guarantee. There is no clear answer, but it is hard to see why this condition should have changed the court's opinion. Although the facts are murky on the point, nothing in the case suggests that the purchaser noticed or relied on the bill of sale in making his purchase. Therefore, if the mobile home dealer generally offered an express warranty, whether the purchaser looked at the bill of sale at the time of the sale or after the sale's completion should make no difference.

IV. RELIANCE AND CONSUMER BEHAVIOR

Courts and commentators who have wrestled with the issue of reliance have generally done so with little knowledge of the real life implications of their positions. They have simply analyzed legal issues in the abstract. In theory, barring parties from claiming rights under a contract that they never bargained for and never realized existed when entering the contract is logical. The notion of "mutual assent" in contract law rests upon this assumption.¹¹⁹ Unfortunately, both theoretical and practical problems plague any approach that is too purist in applying this principle.¹²⁰

Parties act in ways that bear little relation to the theory of mutual assent. Real life buyers and sellers often ignore important contractual elements or fail to draft agreements precisely. To accommodate such real world consumer behavior, the U.C.C. has developed various approaches. The Code, for example, provides rules to address circumstances when the parties fail to state their intentions with respect to critical terms,¹²¹ hold conflicting notions

Constr. Co. v. Matthews Co., 209 N.W.2d 643 (Neb. 1973); Elanco Prods. Co. v. Akin-Tunnell, 747 S.W.2d 789 (Tex. Ct. App. 1971); 1 RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE § 2-313:18 (2d ed. 1970)).

119. See, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS (3d ed. 1987) § 2-1, at 25 (stating, "Usually an essential prerequisite to the formation of a contract is an agreement: a mutual manifestation of assent to the same terms.") (citing Russell v. Union Oil Co., 86 Cal. Rptr. 424 (Ct. App. 1970); Quality Sheet Metal Co. v. Woods, 627 P.2d 1128 (Haw. Ct. App. 1981); Brown v. Considine, 310 N.W.2d 441 (Mich. Ct. App. 1981) (per curiam); Christenson v. Billings Livestock Comm'n Co., 653 P.2d 492 (Mont. 1982); Cessna Fin. Corp. v. Mesilla Valley Flying Serv., 462 P.2d 144 (N.M. 1969), cert. denied, 397 U.S. 1076 (1970)).

120. To insist, for example, that only those elements of an agreement that a party actually considered and accepted in his or her mind invites endless squabbling about to what the parties have agreed. Because the courts cannot read the parties' true subjective intentions, the courts have substituted an objective test for assessing contractual intent that focuses on what a party says and does rather than on what the party actually thinks. If a party wishes to sell a green car, but mistakenly states, "I offer to sell you my red car for \$5,000," that party will be held to have offered to sell the red car whatever the true intent if a reasonable person in the shoes of the offeror would assume that this statement were a genuine offer to sell the red car. See *id.* at 74. The objective test guarantees that, on occasion, the parties' real intentions will not be accorded their true measure by the courts. *Id.*

121. If the parties truly intend to enter into a contract, but fail to spell out necessary terms, §

about the agreement's terms,¹²² overlook important obligations,¹²³ or agree to oppressive terms.¹²⁴ In all cases, the courts must construct or rearrange the terms of a contract to address the fact that people do not act as carefully or comprehensively as assumed by the theory of mutual assent. Substantial unfairness and impracticality would plague the legal system if the Code rigidly enforced the contract terms, including only the terms explicitly thought about and agreed to by the parties.

That terms establishing an express warranty present concerns similar to those in general contract formation is not surprising. Actual consumer behavior is different from the behavior required by the reliance test, even from a weak test that shifts the burden to defendants to demonstrate non-reliance.¹²⁵ The vast majority of consumers who purchase products would find themselves without legal recourse if sellers widely challenged buyers' warranty claims. Fortunately, most sellers do not insist on verifying their customers' reliance when they process warranty claims.¹²⁶ Unfortunately, sellers do invoke reliance to challenge buyers' warranty claims when the financial stakes are highest and the need for warranty protection is greatest, such as when severe personal injury, substantial property damage, or death is involved.

2-204 of the U.C.C. provides that the contract will not fail for indefiniteness. *See* U.C.C. § 2-204(3) (1987). The Code sets forth a variety of gap fillers establishing terms that prevail when the parties neglect to include such terms in their contract. *See, e.g., id.* § 2-305(1) (providing that if the parties have not set a price, "the price is a reasonable price at the time for delivery"); *id.* § 2-307 ("Unless agreed . . . otherwise all goods . . . must be tendered in a single delivery . . ."); *id.* § 2-308(a) ("Unless otherwise agreed . . . the place for delivery of goods is the seller's place of business . . ."); *id.* § 2-309(1) (stating, "The time for delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time."); *id.* § 2-310 ("Unless otherwise agreed . . . payment is due at the time and place at which the buyer is to receive the goods . . .").

122. When the parties have clearly expressed contractual intent, but the acceptance of an offer carries either additional or different terms, § 2-207 of the U.C.C. provides a mechanism for determining whether the terms are incorporated into the agreement. *See* U.C.C. § 2-207 (1987).

123. The U.C.C. establishes important obligations when the parties have been silent on terms. For example, the Code imposes warranties of title, *see id.* § 2-312, merchantability, *see id.* § 2-314, and fitness for a particular purpose, *see id.* § 2-315, on the parties by implication even though neither party bargained for the warranties.

124. The U.C.C. gives the courts the authority to invalidate "unconscionable" contract terms notwithstanding a party's agreement to them. *See* U.C.C. § 2-302(1) (1987).

125. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 568 (3d Cir. 1990), *aff'd in part and reversed in part on other grounds*, 112 S. Ct. 2608 (1991).

126. To maintain good customer relations, many sellers go far beyond what the law requires with respect to servicing products and accepting returns. Consumers who are accustomed to large retailers' providing refunds automatically when they return products would be surprised to learn how limited their rights of rejection and revocation of acceptance truly are under the U.C.C. *See generally* U.C.C. §§ 2-601 to 616 (1987).

Equally unfortunate is the failure of the courts to understand the unfairly proseller and anticonsumer nature of the reliance requirement. To appreciate this inequality, one must look to how and when consumers rely on express warranties.

First, one must note that most express warranties are not dickered over in the sense that they arise from face to face discussions between seller and buyer. Most express warranties are provided on printed forms inserted in boxes or packages that are not opened until after completion of the sale and delivery of the goods. If warranties are not provided in this form, then they typically arise from affirmations or promises contained in advertising pitched broadly to numerous potential customers.

One turns to data showing how consumers process these warranties. By far, the most compelling evidence of consumer behavior with respect to express warranties comes from studies published by the Federal Trade Commission in 1979¹²⁷ and 1984.¹²⁸ These studies, designed to assess the impact of rules¹²⁹ promulgated under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act,¹³⁰ demonstrate convincingly that consumers rarely look at or know about express warranties before purchasing products. By implication, those courts that insist on reliance under section 2-313 would bar redress to enormous numbers of consumers.

The 1979 FTC Study surveyed 3063 households¹³¹ to determine, among other things, “Measures of warranty information usage by consumers, including information on how consumers obtained such information, when they obtained it, and how well they felt they understood the terms of warran-

127. ARTHUR YOUNG & CO., FTC, WARRANTIES RULES CONSUMER BASELINE STUDY (1979) [hereinafter 1979 FTC STUDY].

128. FTC, OFFICE OF IMPACT EVALUATION, WARRANTIES RULES CONSUMER FOLLOW-UP: EVALUATION STUDY (1984) [hereinafter 1984 FTC STUDY].

129. The FTC studied three rules promulgated under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act. See *infra* note 124. Current versions of these rules are:

- (a) Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 C.F.R. § 701 (1993);
- (b) Pre-Sale Availability of Written Warranty Terms 16 C.F.R. § 702 (1993); and
- (c) Informal Dispute Settlement Procedures, 16 C.F.R. § 703 (1993).

130. 15 U.S.C. §§ 2301-12 (1988).

131. The respondent universe for the . . . Study consisted of a randomly-selected sample of 4,300 households drawn from an established national Consumer Mail Panel (CMP) of 61,552 cooperating households. These households [were] identical to the United States population with respect to characteristics such as geographic regional totals of U.S. households in census regions, income categories and age distributions. Additionally, for each household, certain demographic information [was] known; examples include age and sex of household members, education level of members and marital status . . .

1979 FTC Study, *supra* note 127, at v. of the 4,300 CMP households, 3,063 responded, a 71.2% response rate. *Id.*

ties.”¹³² Several responses to the survey illustrate the problem of requiring reliance for express warranties.

When asked whether they thought a product had a warranty before purchasing it, about eighty-four percent of the respondents answered “yes.”¹³³ Although this percentage may seem reassuring, it is not particularly useful. First, the survey asks only whether, before making a purchase, the respondents thought the product carried a warranty, not whether the product actually had a warranty.¹³⁴ Second, because this study relies on consumer’s self-reporting, this result and others in the study probably inflate the actual percentage because of consumers’ overreporting.¹³⁵

132. Other measures included:

Measures of product purchase behavior, such as shopping time, brand consideration, awareness of warranty, knowledge of warranty details

Measures of warranty complaint-related behavior, such as frequency of product problems, frequency of contacting individuals or organizations about product problems, levels of satisfaction with the way in which product problems were handled by warrantors

Measures of both product attributes and warranty attributes that consumers said they valued most in considering the purchase of a product having a warranty

Measures of what consumers perceive warranty coverage to be on various categories of products

. . . .

Measures of how satisfied consumers said they were with how products having warranties performed and how well consumers said they were satisfied with the way their product complaints were handled

Measures of how warrantors behaved, as reported by consumers, with particular emphasis on how long it took a warrantor to repair a product, how many repair attempts were made, and so forth.

Id. at iii-iv.

133. *Id.* at 128.

134. It is doubtful that any court requiring reliance under § 2-313 would conclude that an unsupported expectation of warranty protection provides sufficient evidence to support the existence of a warranty.

135. As stated in the 1979 FTC study:

[One major source of] bias regarding consumer’s recall of warranty provisions stems from the possibility that consumers responding to this survey, in an effort to portray themselves as informed, or “good” consumers, over-reported their levels of warranty reading or warranty-related consumer complaint behavior. In fact, consumers, to the extent that their product purchase behavior is represented by the behavior of purchasers responding in this survey, may not have read warranties to the extent reported in this Final Report. This problem will have to be recognized in any future Warranties Rules Study in order to avoid “ceiling effects” emerging at the time of that future study.

1979 FTC STUDY, *supra* note 127, at x.

Another source of potential bias results from the gap of eight to 20 months between the time that respondent purchasers bought a product and the time that they reported on the product in the survey.

Id. at ix.

Of greater importance, when asked whether they knew any details of the warranty before buying the product,¹³⁶ only 55.4% of the respondents indicated knowing about the details of the warranty.¹³⁷ Moreover, only 28.4% of those who reported that they had a warranty indicated that they had read it *prior* to purchase¹³⁸ even though 81.6% of the respondents indicated that the warranty was available to read just before they made their purchase.¹³⁹

The 1984 FTC Study,¹⁴⁰ undertaken to determine whether the marketplace had changed after the FTC warranty rules had been in effect for roughly six years,¹⁴¹ provides no indication that consumers increased their pre-purchase awareness of warranties.¹⁴² Indeed, the 1984 results show a decline in warranty awareness; the number of consumers claiming to have some warranty information prior to purchasing a product dropped from fifty-five percent to forty percent between 1979 and 1984.¹⁴³ Sixty percent of the respondents had *no* warranty information prior to making their purchase. Courts that insist on reliance will not grant warranty protection to consumers

136. Note that this question asks whether respondents knew *any* details. It does not ask which details they knew and which details they did not know. Whether a limited knowledge of the details of a warranty would satisfy the courts that insist on reliance under § 2-313 is unclear.

137. 1979 FTC STUDY, *supra* note 127, at 55. This, of course, means that 45 % knew *no* details of their warranty when they purchased a product. Of those in the 1979 FTC Study who claimed to know warranty details before purchasing a product, 48.7 percent indicated that they learned them from a salesperson, *Id.* at 224. Unfortunately, salespeople are not always the best sources of information.

138. *Id.* at 58.

139. *Id.* at 225. Section 702 requires that warranties be made available to consumers before purchase. 16 C.F.R. § 702.3 (1993).

140. For the 1984 FTC Study, survey questionnaires were sent to 8691 Market Facts' Consumer Mail Panel members. Of these, 6418 households (73.8%) responded. 1984 FTC STUDY, *supra* note 128, at E.S.1.

141. *Id.*

142. According to the authors of the 1984 FTC Study:

While the questionnaires used in the baseline [1979 FTC Study] and follow-up warranties rules studies are sufficiently different to rule out direct comparisons on many important measures, it is probably fair to say that the two studies do not paint radically different pictures of the marketplace. There is certainly no indication that pre-purchase consumer knowledge about the details of warranties has increased since the warranties rules went into effect.

Id. at 134.

143. *Id.* at 48. The 1979 FTC Study asked: "Did you know any of the details about the warranty before you bought the product?" 1984 FTC STUDY, *supra* note 128, at 48 n.17. Fifty-five percent responded that they did. *See supra* note 121 and accompanying text. The 1984 FTC Study asked: "Did you have any information about the warranty on this product *before* you bought it?" 1984 FTC STUDY, *supra* note 128, at 48 n.17. Although the questions were worded similarly, the authors of the report indicated that some methodological problems in the first survey make a close comparison of the two results risky. *Id.*

who do not have at least some prepurchase information. Even the small number of consumers claiming to have read a warranty prior to purchasing a product is undoubtedly inflated.¹⁴⁴ Respondents, apparently believing that they should have read the warranty, indicated that they had even when they had not.¹⁴⁵

The number of respondents who actually read the warranty *prior* to purchase remained small in the 1984 survey. Only 23.1% of those claiming to have prepurchase warranty information obtained any information by reading the warranty.¹⁴⁶ This figure obviously inflates the number of warranty readers because it excludes those who did not indicate that they had prepurchase information. A more realistic measure of prepurchase warranty reading is a comparison of the total number of purchases of warranted products (10,813) to the number of these purchases for which respondents indicated they had read the warranties (980).¹⁴⁷ The result (9.1%) is disturbingly small¹⁴⁸ and, as indicated, even this number is probably inflated.¹⁴⁹

One encouraging statistic is the number of respondents who claimed to have read the warranty *after* purchasing the product. Of those who bought products with warranties, nearly twice as many reported reading the warranty carefully after buying the product (40.1%) than those who reported doing so before (22%).¹⁵⁰ An additional 31.4% said they glanced briefly at the warranty.¹⁵¹ Only 26.2% of the buyers reported that they had not read the

144. When comparing the results of several questions, the authors found a surprising number of inconsistent responses. Roughly 39% of the consumers who claimed, on the one hand, to have read the warranty "carefully" before purchasing a product also claimed, on the other hand, to have had no prior knowledge of the warranty. This discrepancy provoked some exasperation on the part of the authors: "While it is possible that a brief look at the warranty was uninformative, it is unreasonable to believe that 660 people carefully read warranties and learned absolutely nothing. Yet, that is precisely what their responses indicate." *Id.* at 53. Equally frustrating was the report by 54 respondents on one question that they had read the warranty prior to purchasing a product but four questions later they reported not having read it. *Id.* at 55.

145. *Id.*

146. 1984 FTC STUDY, *supra* note 128, at 50. Respondents claimed that they obtained warranty information from salespersons and newspaper or magazine articles more often than from actually reading the warranty. *Id.* Again, the reliability of such sources is questionable.

147. *See id.* at 51-52.

148. One marketing expert succinctly explained that "one conclusion can be drawn from the 182 Survey results: in the post-Act marketplace, most purchases are not preceded by the reading of a product's warranty." Joshua L. Weiner, *An Evaluation of the Magnuson-Moss Warranty and Federal Trade Commission Improvement Act of 1975*, 7 J. PUB. POL'Y & MKTG. 65, 69 (1988).

149. As pointed out in the study, "Even this number may be an overestimate of the actual amount of warranty reading which takes place." 1984 FTC STUDY, *supra* note 128, at 52. *See also supra* note 139 and accompanying text.

150. 1984 FTC SURVEY, *supra* note 128, at 67.

151. *Id.*

warranty at all after making the purchase.¹⁵² Unfortunately, the data on post-purchase warranty reading do not indicate precisely when the respondents looked at their warranties.¹⁵³

The legal implications of the FTC studies are ominous. If the courts require, as a necessary element of reliance, buyers to have glanced at or read the warranty prior to the sale, the vast majority of consumers will be barred from making express warranty claims. Even under a lower reliance standard,¹⁵⁴ a plaintiff must prove only that "she read, heard, saw or knew of the . . . affirmation of fact or promise"¹⁵⁵ to preclude most warranty claims.

Under a reliance test, most consumers have faith and vague expectations but no demonstrable basis for claiming warranty rights at the time they purchase a product. As Professor Morris Shanker wryly observed, arguments that insist on reliance

restrict express warranty protection to the most unlikely buyers; namely, those precious few and rather odd persons who prior to a sale take the time to read all the language on and within the packaging. The more typical buyer—those who do not go through this unlikely exercise—are denied express warranty protection.¹⁵⁶

Emerging knowledge about consumer behavior in response to modern marketing techniques confirms that a reliance test is unrealistic. Marketers spend millions of dollars to understand what motivates consumers to purchase products.¹⁵⁷ Each year, without a clear idea of which advertising techniques work, the top 100 advertisers spend roughly \$35 billion on advertising.¹⁵⁸ Researchers know that "a complex combination of marketing factors interplay

152. *Id.*

153. Because the survey asked consumers to respond for purchases of up to three products during the past 12 months, one can assume that all post-purchase warranty reading occurred within a 12 month period after purchase. See *id.* at ES-1. One obvious question about postpurchase warranty reading is whether comment 7 of § 2-313 would permit the buyer to claim that representations contained in the warranty constitute a modification and thus are incorporated as "part of the basis of the bargain." White and Summers would obviously oppose such claims. See *supra* notes 46-49 and accompanying text.

154. See *supra* notes 68-78 and accompanying text.

155. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 567 (3d Cir. 1990), *rev'd in part on other grounds*, 112 S. Ct. 2608 (1992) (footnote omitted).

156. Shanker, *supra* note 5, at 41.

157. Robert S. Adler & R. David Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 1 YALE J. ON REG. 159, 163 (1984) (stating that "[m]erchandising and marketing remain more art than science, more intuition than reason").

158. R. Craig Endicott, *P&G Spends \$2.28 Billion, Surges to Head of Top 100*, 62 ADVERTISING AGE, September 25, 1991, at 1,1.

with one another and result in a buying decision.”¹⁵⁹ To insist that consumers demonstrate that a particular representation or statement constituted the primary factor, or even a minor factor, that led them to purchase a product is unrealistic. Pinpointing a motivating factor for a purchase when the media and nationwide advertising often appeal to subconscious and emotional needs is impossible.¹⁶⁰ Whitman argues that most consumer purchases result from numerous motivating factors, including friends and neighbors, brand loyalty, reputation of seller, labels, marketing display, and distribution.¹⁶¹ Accordingly, Whitman argues that courts “should permit a rebuttable presumption that reliance on a representation exists unless proven otherwise by the defendant.”¹⁶²

If nothing else, because mass media product promotion and advertising, as opposed to direct contact with the seller, is responsible for most consumer information, this type of information should be carefully scrutinized. To the extent mass media advertising provides misleading information to the public, we should bear in mind that such information might have a subconscious effect on consumer behavior even though an injured plaintiff cannot recall seeing or hearing the advertisement in question.¹⁶³

Another problem with advertising is that its role, although powerful, is often indirect. For example, a representation in an ad that convinces an opinion leader¹⁶⁴ to purchase a product might lead many others to make the same purchase with the others relying not on the ad but on the opinion leader. None of those who followed their friend's or relative's lead, for example, would have a claim under a reliance test. As one writer has noted, advertising often does not have a direct effect on sales.¹⁶⁵ Instead, it generates word-of-mouth communications that trigger purchases.¹⁶⁶ Those seeking warranty protection who have relied on word-of-mouth communications from one who

159. Whitman, *supra* note 3, at 742.

160. See generally VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957) (arguing that marketers use subtle signals to trigger emotional responses to motivate consumers to purchase products).

161. Whitman, *supra* note 3, at 765.

162. *Id.* at 742.

163. See Whitman, *supra* note 3, at 743.

164. This term was first used in 1944 by a group of researchers analyzing voter decision-making during election campaigns. The researchers found that substantial numbers of voters in deciding for whom to vote relied not on the claims of candidates in the mass media but rather on the advice of certain people called opinion leaders who are most concerned and articulate about an issue. PAUL F. LAZARSFELD ET AL., *THE PEOPLE'S CHOICE* 49-51 (1944).

165. Barry L. Bayus, *Word of Mouth: The Indirect Effects of Marketing Efforts*, J. ADVERTISING RESEARCH, June/July 1985, at 31.

166. *Id.* at 37.

saw an advertisement often have no idea that the recommendation stemmed mainly from an affirmation or promise in the advertising. This problem strongly suggests a need to retire traditional requirements for reliance.

V. POLICY CONSIDERATIONS

Decisionmakers must weigh many policy considerations in deciding how to deal with reliance under § 2-313. On balance, the arguments favor abandoning the reliance requirement.

A. *Non-Reliance and the Right to Sue*

White and Summers offer a succinct and compelling challenge to those who advocate abandoning reliance: "Why should one who has not relied on the seller's statement have the right to sue? Such a plaintiff is asking for greater protection than he would get under the warranty of merchantability, far more than he bargained for. We would send him to the implied warranties."¹⁶⁷ Some unjust enrichment may occur when protection is provided to a purchaser who never knew about that protection at the time of purchase. Yet, there are a number of compelling answers to White and Summers' argument.

Professor Murray responds that the two commentators fail to comprehend the major changes wrought by the U.C.C. According to Murray, White and Summers equate the reliance requirement with the notion of "bargained-for-exchange" in general contract law.¹⁶⁸ This proposition, Murray asserts, is wrong.¹⁶⁹ By giving effect to postformation express warranties in comment 7 of section 2-313, the drafters made clear that they intended something broader.¹⁷⁰ What the drafters intended is a modern approach that looks

167. WHITE & SUMMERS, *supra* note 3, at 403.

168. Murray states:

By insisting upon knowledge on the part of the buyer or his agent, [White's and Summers's analysis] suggests that a buyer somehow must know of and "accept" a seller's statement relating to the goods just as an offeree must know of and accept the offer. White and Summers appear to base their insistence of a showing of reliance on the notion that reliance is similar to the bargained-for-exchange idea, which requires at least inducement reliance.

Murray, *supra* note 3, at 306.

169. *Id.*

170. Murray argues:

To properly understand Comment 7, one must realize that the U.C.C. describes an expanded notion of basis of the bargain. The basis of the bargain is not limited to the traditional law of contracts, nor is it restricted to situations involving inducement or reliance. White and Summers further reveal their misunderstanding of these precepts in the particularly narrow scope they give to postformation warranties.

expansively at the contract between the parties and that does not freeze the parties' agreement in time so that postformation warranties become unenforceable.¹⁷¹ Murray argues that a superior approach is a "reasonable expectations" test, stated: "What are the reasonable expectations of the buyer?"¹⁷² Answering his own question, Murray explains that

The reasonable expectations of the buyer are not relegated to those induced by the seller's promise. Nor are they relegated to those expectations which the buyer also relied upon in making the purchase. Rather they are those expectations created by all of the "affirmations of fact made by the seller about the goods during a bargain."¹⁷³

Furthermore, Murray states that

[A] buyer expects to receive . . . that which all other buyers, similarly situated, receive as part of their deals for the identical product. It would be quite difficult to convince buyers that they are not entitled to the features they learn about some time, even a relatively long time, after the contract is formed. It would be virtually impossible to convince buyers that a seller who refuses to provide the features that the seller promised to provide, albeit after the time of contract formation, is operating in good faith and is not simply using technical arguments to avoid delivering "what it is that the seller has in essence agreed to sell."¹⁷⁴

Murray's thesis has been both praised¹⁷⁵ and challenged.¹⁷⁶

Murray's reading involves some unnecessary vagueness in interpreting section 2-313 since one must analyze when a consumer's expectations about warranty coverage become reasonable and cease to be reasonable. Rather than using this analysis, one should focus on whether the buyer fits within the class of persons to whom the seller made representations or promises that constitute express warranties. This question is easier to apply and more consistent with

Id. at 309.

171. *Id.* at 325.

172. *Id.* at 317.

173. Murray, *supra* note 3, at 304 (quoting § 2-313 cmt. 3).

174. *Id.* at 313 (quoting § 2-313 cmt. 4).

175. *E.g.*, Heckman, *supra* note 5, at 35 ("[Murray's] conclusion, with which this Article heartily agrees, is that the U.C.C. has rejected the reliance concept in favor of a more modern approach which looks at the entire scope of dealings between the parties and does not focus on any particular moment of contracting or reliance."); Coffey, *supra* note 3, at 122 (referring to Murray's "excellent" article and stating: "As Murray suggests, the drafters were working with a new concept of contract law, one that gave importance to every action and reaction of the parties during the bargaining process.").

176. *See, e.g.*, *supra* notes 53-56 and accompanying text.

the language and spirit of section 2-313. The emphasis should be on the person to whom the seller made a pitch and not whether the buyer reasonably interpreted the seller's affirmations of fact.¹⁷⁷ Nevertheless, Murray's willingness to read the U.C.C. as going beyond traditional doctrines seems correct.

Heckman offers a different answer when White and Summers question why one who has not relied on the seller's statement should have the right to sue:

One can answer White and Summers's final rhetorical question with another question: Why should a seller be permitted to deny the validity of statements he has made in a sale context, whether or not the buyer has relied on them at the time of negotiation? To do so surely does not promote commercial honesty.¹⁷⁸

Heckman's response to White and Summers is powerful. Denying recovery to purchasers who cannot prove reliance ensures that sellers will be able to misrepresent the features of their products and yet often avoid the consequences. This result seems unfair.¹⁷⁹

White and Summers contend that permitting a buyer to recover on promises or affirmations upon which he or she did not rely gives the buyer greater protection than the buyer bargained for.¹⁸⁰ Their objection misses the mark widely in light of what is known about modern marketing practices and consumer behavior.¹⁸¹ Most consumers do not "bargain" in a face-to-face setting nor do they even know many of the terms set forth in the contracts they sign.¹⁸² If one were to apply White and Summer's analysis consistently, it would exclude large numbers of contractual rights that the two commentators would likely want to keep. For example, to insist that a purchaser "rely" on a contractual term before having the right to invoke it means that he or she would lose the right to enforce the following terms: those not read, those misunderstood, those not known, and those ignored by the purchaser. It would also exclude terms known to the purchaser, but about

177. Under Murray's approach, those sellers who have made the most outrageous affirmations of fact or promises escape liability if they convince a court that a reasonable purchaser would not have believed their representations.

178. Heckman, *supra* note 5, at 28-29.

179. See *supra* notes 121-60 and accompanying text.

180. If White and Summers mean that consumers receive benefits not paid for, they are wrong. To the contrary, sellers can sell more products and charge higher prices when they misrepresent a product's qualities. Sellers do not offer discounts to those who have not "relied" on a warranty. If they can avoid warranty obligations, they will be unjustly enriched. See *infra* notes 193-200 and accompanying text.

181. See *supra* notes 127-53 and accompanying text.

182. *Id.*

which the purchaser was indifferent—even if the purchaser later concluded that the terms were important. Only those terms that, in some fashion, induced the buyer to purchase the product would be enforceable. Anything in contract, no matter how critical at some later point, upon which the buyer did not rely at the time of purchase would bar him or her from relief.

It is hard to believe that White and Summers would take such a hard line with respect to what it takes to bind a party to contract terms. One presumes that they believe that the rule they propose for interpreting section 2-313 would result in few successful challenges on the basis of reliance. Unfortunately, the likelihood of massive injustice under a strict reliance scheme is great. However, even if the probability is low that defendants could block warranty claims, fairness considerations lead to the conclusion that even a small probability should not exist.

B. Tort Remedies as an Alternative Approach

White and Summers do not flatly reject providing legal relief to claimants for sellers' representations. Rather, they prefer that such claims be pursued in other ways.¹⁸³ Nevertheless, the authors' alternative approach is not as helpful as one might think. First, as Heckman notes, "implied warranties can be, and frequently are, disclaimed,"¹⁸⁴ leaving buyers unprotected against sellers' false promises and misrepresentations. Second, section 402B of the Restatement (Second) of Torts,¹⁸⁵ which White and Summers refer to as establishing a cause of action for sellers' misrepresentations, fails to provide

183. When speaking of postsale representations, for example, White and Summers state:

We find enough vitality and merit in the reliance requirement that we would not find such post-deal representations to be warranties under 2-313 unless they could be proved as modifications under the terms of 2-209. However, a buyer would not necessarily be deprived of all recourse against his seller on a post-deal statement that misled him but did not qualify as a warranty. Like any advertiser, the seller might be liable in tort to those he misleads by his advertising. In most cases, we would send the buyer who had relied on a post-sale representation down the tort road.

WHITE & SUMMERS, *supra* note 3, at 403 (footnote omitted).

184. See Heckman, *supra* note 5, at 39.

185. Section 402B states:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402B (1965).

adequate protection to injured consumers.¹⁸⁶ Although subsequent users of a product who have suffered injuries need not show reliance under this section, the section requires that the *original* purchaser relied on the misrepresentation.¹⁸⁷ Unfortunately, requiring the original purchaser to demonstrate reliance dooms many valid claims.¹⁸⁸

Of course, consumers need not use tort law alone, but rather, can use both tort and contract law. The distinction between the two areas of law is increasingly artificial.

The common law lawyer, steeped in the tradition of treating warranty coverage solely as a matter of contract, may object to [unread advertisements' being considered warranties]. How can a buyer claim the *consensual* protection of an affirmation or a promise when the buyer knows nothing of the affirmation or promise? Posing the question in this way overlooks the history of warranty protection. The buyer sues "on a contract" only because the legal system has forced him to classify his cause of action as contract or tort. What is involved are a product and an injury, either to a person or to property. The court's task is to determine whether that injury was caused by a defect in the product, and any statements made by the seller designed to induce the public to buy his product are relevant in making this determination. The "basis of the bargain" includes the dickered terms, but is not limited to them. The "basis of the bargain" is also the item purchased, and a part of that bargain includes the statements which the seller made about what he sold.¹⁸⁹

The critical need is to provide recovery to those injured by sellers' misrepresentations. The particular legal theory invoked is less important. Express warranty theory is perfectly appropriate as a vehicle for recovery. After all, section 2-313 applies only when sellers, by their own actions, have created warranties.¹⁹⁰ If a seller does not want to give a warranty, that seller need only refrain from offering affirmations of fact or making promises. If the seller chooses to make such promises or affirmations then the seller should be accountable if his or her affirmations or promises are false.

186. Schwartz, *supra* note 5, at 149.

187. *Id.* at 150 (citing comment j of § 402B).

188. *See supra* notes 127-53 and accompanying text.

189. NORDSTROM, *supra* note 5, at 209 (footnotes omitted) (emphasis in original).

190. There is, of course, always room to debate whether a given statement or promise constitutes a warranty or merely a "puff." That debate should be considered independently. The question here is whether those statements that clearly constitute warranties should be enforceable by purchasers who have not relied upon them.

C. Pricing and Express Warranties

Without delving deeply into economic theory, one can fashion a pricing argument that strongly supports abandoning reliance. It runs as follows.

One of the major reasons that sellers provide express warranties is to induce consumers to purchase their products. A product sold without a warranty, other things being equal, will command a lower price than one sold with a warranty. Similarly, sellers who claim that a product has more favorable qualities than it actually has will be able to charge a premium for that product. If this were not so, sellers would not constantly be tempted to make inflated claims about their products. To permit a seller, through misrepresentations in advertising, to sell more products at higher prices, but to deny relief to buyers who cannot prove reliance provides unjust enrichment for deceptive sales practices.

Sellers actually charge the same price to all purchasers whether or not the purchasers relied on a warranty. Yet, if the courts require reliance, sellers will have far fewer obligations to the "nonreliors" than to the "reliors." Therefore, purchasers will have been unfairly required to pay for rights they never received.¹⁹¹ Accordingly, sellers who have made affirmations of fact or promises to the public should be held accountable even to nonreliors.

The Supreme Court recently applied somewhat similar reasoning in *Basic Inc. v. Levinson*,¹⁹² a case involving a group of shareholders who sold stock at a lower price than it was worth after a corporation had issued three public statements falsely denying that it was engaged in merger negotiations. The shareholders sued for fraud under the 1934 Securities Act. In response, the defendants argued that the shareholders should have been required to prove that they relied on these false statements when they sold their stock. In rejecting the defendants' argument, Justice Blackmun wrote that the courts could generally presume reliance in these situations:

The courts below accepted a presumption, created by the fraud-on-the-market theory and subject to rebuttal by petitioners, that persons who had traded Basic shares had done so in reliance on the integrity of the price set by the market, but because of petitioners' material misrepresentations that price had been fraudulently depressed. Requiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted if omitted material

191. Of course, a seller might flip the argument and counter that the nonrelior is paying a purposefully low cost that accounts for the seller's lack of duties while the relior is receiving a windfall for his diligence. However, this argument assumes that the seller has included a warranty without a corresponding increase in the price, essentially giving security away for free on the assumption that no one will take advantage of the situation. The reality of market economics forecloses this explanation of the transaction.

192. 485 U.S. 224 (1988).

information had been disclosed . . . or if the misrepresentation had not been made, . . . would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market.¹⁹³

Notably, the *Basic* court did provide defendants with an opportunity to rebut the presumption of reliance.¹⁹⁴ The *Basic* court's rebuttable presumption of reliance, however, should not be confused with the Third Circuit's test in *Cipollone v. Liggett Group, Inc.*¹⁹⁵ *Cipollone* required proof by the plaintiff that, prior to purchasing a product, the plaintiff "read, heard, saw or knew of" the representation.¹⁹⁶ Only after receiving such proof did the Third Circuit permit the burden to shift to the defendant to demonstrate with clear, affirmative proof that "the buyer knew that the affirmation of fact or promise was untrue."¹⁹⁷

In sharp contrast, the Supreme Court in *Basic* did not require proof that the plaintiffs *themselves* knew about the material misrepresentations. In fact, it seems clear that evidence demonstrating the plaintiffs' complete ignorance regarding the defendants' misrepresentations would not have changed the *Basic* court's view. The critical factor to the court was that the *market* had relied on the defendants' misrepresentations, thereby affecting the price of the shares.¹⁹⁸ The only credible rebuttal evidence to the court would be information demonstrating that the misrepresentation "in fact did not lead to a distortion of price or that an individual plaintiff traded or would have traded despite his knowing the statement was false."¹⁹⁹

Extending this reasoning to express warranties, if the seller has made representations to the public through advertising then individual buyers should

193. *Id.* at 245 (citations omitted).

194. *Id.* at 250.

195. 893 F.2d 541, 567 (3d cir. 1990), *rev'd in part*, 112 S. Ct. 2608 (1992).

196. *Id.* at 567.

197. *Id.* at 568.

198. According to the court:

In face-to-face transactions, the inquiry into an investor's reliance upon information is into the subjective pricing of that information by that investor. With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. Thus the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.

485 U.S. at 244 (*quoting In re LTV Securities Litigation*, 88 F.R.D. 134, 143 (N.D. Tex. 1980)).

199. *Id.* at 248 (citing *Levison v. Basic Inc.*, 786 F.2d 741, 750 n.6 (6th Cir. 1986), *vacated and remanded*, 485 U.S. 224 (1988)).

not have to show that they personally relied to pursue a warranty claim. A seller should be able to invalidate a warranty claim only by showing: (1) that the buyer would have bought the product even knowing that the claims were false or (2) that the price of the product did not reflect the seller's representations.²⁰⁰

Applying this approach would mean that section 2-313 should provide nonrelying buyers the same express warranty rights as relying buyers. As a defense, the seller could prove that the nonrelying buyers paid a lower price than the relying buyers because no warranty was provided to the nonrelying buyers. To prevail on a nonreliance defense, sellers would have to prove more than a buyer's ignorance of a seller's representations. When sellers have made affirmations of fact or promises to the public but then seek to avoid accountability, sellers should have the burden of proving that the buyers would have paid the same price for the product even without the affirmations or promises, or that the sellers gave a discount to those getting no warranty. A recent American Bar Association task force analysis reached this conclusion while analyzing proposals to reform Article 2 of the U.C.C.:

Why should a buyer who has not read an advertisement or an owner's manual not have the advantage of a warranty when he is paying the same price as one who has read the advertisement or owner's manual and will have warranty protection? A warrantor who publishes affirmations which pass beyond the line of puffing must contemplate the possibility that every potential purchaser will read and rely on them. Presumably, that warrantor, engaging in such activity to induce reliance and promote sales, will price its product to include the cost of the warranty. Why should it not be required to stand behind its affirmations even if an individual buyer has not demonstrated direct reliance?²⁰¹

This argument has a cynical response that should be rejected. Mass merchandising sellers, knowing that most buyers would fail a reliance test and not be eligible for warranty protection, might set lower prices for their products than they would set if they had to live up to their warranties. Public policy surely ought to reject such an utterly irresponsible and deceptive approach to providing warranties.

200. This second requirement is, as it should be, a difficult requirement to meet.

201. Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code, A.B.A., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1102 (1991).

D. *The Limits of Express Warranties*

One concern about abandoning reliance is whether sellers will be bound to offer warranty rights to all buyers for every representation they have ever made about their product. If buyers can avail themselves of warranty protections even when they have never seen the seller's representations, what prevents them from claiming rights from every statement - no matter how distant in the past or how far in the future - made by the seller about its products?

While no simple answer exists, there surely are some limits. First, if a seller has merely made a "puff" about a product, no warranty liability should attach.²⁰² Only when the seller's representation rises to the level of an affirmation of fact or promise under section 2-313 of the U.C.C. should it be considered a warranty. Even in this case, some circumstances might demonstrate that the representations did not constitute part of the basis of the bargain.

For example, one circumstance that would eliminate a representation from being the basis of the bargain is staleness. If the seller can demonstrate that its "statements [were] made so long before the contract of purchase that a reasonable person in the place of the buyer ought to have realized that the seller's past representations were no longer applicable,"²⁰³ then the seller should not have to stand behind those statements.

Another circumstance that would protect sellers is the explicit exclusion of particular products from warranty claims. Murray offers the following example: "[I]f the seller has made a statement relating to one model of the goods, and the buyer indicates an interest in another model, the seller's statement that the second model does not have the feature attributed to the first is an obvious withdrawal of the express warranty."²⁰⁴

Another situation, a subset of explicit exclusions, is the exclusion of certain geographic areas from the coverage of a warranty. For example, a product that performs fully only in warm weather climates should not be held to perform in cold weather if the seller has made clear in its promotional materials that the claims are good only in warm weather.²⁰⁵

In short, a seller can easily control the coverage of express warranties. By setting clear and conspicuous boundaries and disclaimers, the seller can expand or limit the warranties offered. If a seller does not want to face excessive warranty claims, then the seller should not make unjustifiable representations about a product.

202. For a description of "puffing," see U.C.C. § 2-313(2).

203. NORDSTROM, *supra* note 5, at 211-12.

204. Murray, *supra* note 3, at 323.

205. For an extensive discussion of such an example, see Lewis, *supra* note 3, at 692-93.

VI. A WORKABLE TEST

Because the words and comments of section 2-313 do not provide clear direction with respect to reliance, policy considerations help provide a proper interpretation of the section. The case for eliminating reliance is the stronger argument.

If one accepts the validity and implications of the FTC studies and other marketing studies, then one quickly abandons the notion of retaining reliance. Any test that requires proof by consumers that they knew, even in a general fashion, the terms of an express warranty will guarantee that the vast majority of purchasers will lose all express warranty protection.

The fairest test is a simple one: Buyers who can demonstrate that they fit into the class of persons to whom an affirmation of fact or promise has been targeted should be permitted to claim the benefits of the affirmations or promises under section 2-313's "part of the basis of the bargain" language. Only if the seller can demonstrate that the buyer was not affected by such representations or that the buyer's purchase price did not in any way rest upon the representations should the seller escape warranty liability.

A. Current Draft Revisions of Section 2-313

Unfortunately, efforts to reform section 2-313 of the Code do not go far enough. Currently, a discussion draft of this section circulated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws still permits sellers to exclude warranty coverage for advertisements when the sellers can demonstrate that buyers were not aware of the advertisements. As redrafted, section 2-313 would read as follows:

(a) Subject to subsection (b):

(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods becomes part of the agreement between them and creates an express warranty that the goods will conform to the affirmation or promise. To create an express warranty by affirmation or promise it is not necessary that the seller use formal words, such as "warrant" or "guarantee," or have a specific intention to make a warranty.

(2) Any description of the goods made or any sample or model displayed or exhibited by the seller to the buyer becomes part of the agreement between them and creates an express warranty that the goods will conform to the description or that the whole of the goods will conform to the sample or model.

(3) Any affirmation of fact or promise made by a seller, including a manufacturer, to the public which relates to goods to be sold creates an express warranty to any buyer that the goods will conform to the affirmation or promise, whether or not the express warranty is part of

the agreement between the buyer and its immediate seller. Subject to Section 2-318, the buyer may enforce the express warranty directly against the seller.

(b) If the seller proves by clear and convincing evidence that the buyer was unreasonable in concluding under subsection (a) that the affirmation, promise, description, or sample became part of the agreement or was made to the public, no express warranty is made.²⁰⁶

As revised, the section jettisons the exasperatingly ambiguous words “basis of the bargain” and states directly that affirmations of fact or promises made by the seller to the buyer which relate to the goods become part of the agreement between the parties. Even more helpful, subsection (a)(3) indicates that affirmations of fact or promises made to the public by the seller about the goods create express warranties to *any* buyer of the goods whether or not the express warranties are part of the agreement between the buyer and the immediate seller.

Although one might be tempted to celebrate what appears to be the demise of reliance, the Reporter’s Note provides a troubling interpretation of this new language:

The *Cipollone* cigarette litigation dealt with public advertising followed by the purchase of cigarettes over an extended period of time. Assuming that the ads were affirmations and promises about health, the Third Circuit rejected the seller’s argument that the buyer must prove that he or she relied on them in purchasing the product. They became part of the basis of the bargain without proof of reliance. On the other hand, the seller should have an opportunity to prove by clear and convincing evidence that the buyer was not aware of the advertising or, if aware, did not believe or otherwise rely upon it. This result is consistent with current text of and comments to § 2-313, at least where there is privity of contract, and is clearly expressed in revised § 2-313(a) & (b).

The revision, however, creates a conclusive presumption in public advertising cases. See § 2-313(a)(3). If the advertising is current at the time of contracting and other buyers were aware of and believed it, there is no reason to protect the seller against claims by buyers who purchased without information or with disbelief. All buyers paid a market price for an advertised product, and the seller should be held to the public warranties made. This result avoids the proof problems in particular cases and puts the responsibility on the person best able to make decisions about how much to advertise, the seller. The seller, however, may establish my [sic] clear and convincing evidence that no express warranty was made to the

206. U.C.C. § 2-313 (Proposed Official Draft September 10, 1993 draft).

public.²⁰⁷

The creation of a conclusive presumption in public advertising cases, although a significant step towards abolishing reliance, does not go far enough. By its terms, the presumption applies only to affirmations or promises made to the public through advertising. By negative implication, one might conclude that it would not apply in other circumstances, for example, to written warranties included inside a product's packaging. The written warranty may never have been publicly advertised. Does the seller remain free to challenge claims by buyers who never knew whether they obtained a warranty at the time of purchase and who waited six months before reading a written warranty accompanying the product? One hopes that revisions in the Reporter's Notes will explain that the revised section 2-313 protects the buyer in the nonadvertising cases to the same extent that it protects the buyer in public advertising cases.

Moreover, although privity under section 2-318 of the Code falls outside the scope of this article, one cannot avoid noting and objecting to the reference to revised section 2-318's exclusion of family members, bystanders, and the like from express warranty protection.²⁰⁸ Expanding the scope of express warranties hardly helps consumers if the class of consumers protected is radically narrowed.

B. A Preferred Approach

A preferred approach to the revised section suggested above abandons reliance completely. One possible way to word the section is as follows:

(a) Subject to subsection (b), any affirmation of fact or promise made by the seller to the buyer or to the public that relates to the goods, or any description, or any sample or model, of the goods becomes part of the agreement between them and creates an express warranty that the goods shall conform to the affirmation or promise or the description, sample, or model unless, in the case of affirmations or promises made through advertising, the buyer was not a person or part of a class of persons targeted by the seller's advertising. If the buyer was such a person or part of a class of such persons targeted by the seller's advertising, the buyer need not demonstrate that the buyer saw or relied upon the affirmation or promise in the advertising prior to purchasing the product in order to have the express warranty made to the buyer.

(b) If the seller proves by clear and convincing evidence that the

207. *Id.* at Reporter's Note.

208. *Id.* § 2-318.

buyer was not a person targeted by the seller's advertising, no express warranty is made to the buyer.

The benefit of this wording to the buyer is the clarification that the buyer need not rely in order to receive warranty rights. The benefit to the seller is equally strong. To prevent unreasonable or excessive warranty claims, a seller need only clarify the limits of an ad with respect to expiration date, geographical area, type of purchaser, or any other point of demarcation the seller wishes. Otherwise, the seller is liable for the warranty claims it makes to all of those whom the seller targeted as potential customers and who actually made purchases.

VII. CONCLUSION

It remains difficult to convince observers that requiring reliance in express warranties potentially works a massive injustice on buyers. Only upon reflection and examination of the way the marketplace actually operates can one see that the time has come to abandon reliance. Doing so does not open the floodgates to ill-conceived warranty claims. To the contrary, sellers can always tailor their representations to fit those, and only those, whom they wish to include as recipients of express warranty protection. Moreover, retaining reliance provides crafty sellers with the means to take advantage of their misrepresentations to the public and avoid the consequences of their misrepresentations in more cases than is justified. The law should now recognize this injustice and remove the strict reliance requirement from express warranty suits.

