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The Scope of a Bargain and the Value of a Promise

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THE SCOPE OF A BARGAIN AND THE VALUE OF A PROMISE

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> If . . . Contract . . . is to continue with us, . . . then we are faced with a body of doctrine about *day to day transactions* which originated in Elizabeth's time, which was built out heavily in a 19th Century that had only begun to foreshadow modern conditions, *and which has never at any stage been critically restudied as a whole in terms of wherein it serves well, wherein it is out of joint.*[1]

> It has sometimes been proposed that the doctrine of consideration be "abolished." . . . What needs abolition is not the doctrine of consideration but a conception of legal method which assumes that the doctrine can be understood and applied without reference to the ends it serves.[2]

I. INTRODUCTION

In domestic sales contracts, a seller's promise is legally enforceable if it creates an express warranty.[3] Although the criteria for determining whether a

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1. K.N. Llewellyn, *On the Complexity of Consideration: A Foreword*, 41 COLUM. L. REV. 777, 782 (1941).

2. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 824 (1941).

3. *See* U.C.C. § 2-313 (1977) (amended 2003). Regarding manufacturers of goods that do not sell directly to buyers, enforceability may also depend on whether a state's privity requirements bar

promise creates an express warranty include a bargain test, the application of the test by most courts still owes much to the tort principles on which warranty law was originally based.[4] Thus, whether a promise becomes part of the "basis of the bargain" usually depends on whether the promisee relied on it.[5] The logic, of course, is that a promisee could not truly have bargained for a promise that it did not rely upon.[6] The application of the bargain test has therefore significantly limited the enforceability of promises made in sales transactions.[7] Some courts, for instance, have stated that a seller is not liable for promises made in advertisements the buyer did not see, read, or hear.[8] Others have stated that a seller is not liable for promises the buyer had reason to doubt based on the buyer's experience with the good.[9] This Essay argues that, as a general matter, holding manufacturers and sellers—especially the manufacturers and retailers of mass produced consumer goods—to strict legal obligations for their promises would better serve both economic efficiency and social ethics.

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enforcement of the promise. *Compare* Twin Disc, Inc. v. Big Bud Tractor, Inc., 582 F. Supp. 208, 215 (E.D. Wis. 1984) (citing Barlow v. DeVilbiss Co., 214 F. Supp. 540, 543 (E.D. Wis. 1963); Paulson v. Olson Implement Co., 319 N.W.2d 855, 859 (Wis. 1982); City of LaCrosse v. Schubert, Schroeder & Assocs., Inc., 240 N.W.2d 124, 126 (Wis. 1976)) (stating that Wisconsin law requires privity of contract to find liability on breach of express warranty), *with* Rogers v. Toni Home Permanent Co., 147 N.E.2d 612, 615–16 (Ohio 1958) (applying Ohio law and removing the privity requirement for enforcement of an express warranty). As a general matter, most states have dropped the privity bar to express warranty claims. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11–7, at 407–08 (5th ed. 2000). All of the arguments in this essay pertaining to sellers are also meant to apply to manufacturers that sell through intermediaries.

4. *See* James J. White, *Freeing the Tortious Soul of Express Warranty Law*, 72 TUL. L. REV. 2089, 2090–97 (1998).

5. *See infra* Part IV.

6. *See infra* Part IV.

7. Indeed, the doctrine of consideration as it has been applied under the bargain theory of contracts has served to narrow the scope of enforceable promises much more generally. *See* Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 375–76 (2002).

8. *See, e.g.*, Cipollone v. Liggett Group, Inc., 893 F.2d 541, 567 (3d Cir. 1990) ("[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, rev'd in part on other grounds*, 505 U.S. 504, 525–27 (1992); DiIenno v. Libbey Glass Div., Owens-Ill., Inc., 668 F. Supp. 373, 376 (D. Del. 1987) ("There is no evidence in the record to suggest that [the plaintiff] ever saw the [defendant's] catalog.").

9. *See, e.g.*, Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1101 n.4 (11th Cir. 1983) (noting that the court should consider the defendant's expanded knowledge from many purchases of copying machines in deciding whether the seller's representations formed the basis of the bargain); Royal Bus. Machs., Inc. v. Lorraine Corp., 633 F.2d 34, 44 (7th Cir. 1980) ("An affirmation of fact which the buyer from his experience knows to be untrue cannot form part of the basis of the bargain." (citing City Mach. & Mfg. Co. v. A. & A. Mach. Corp., 4 U.C.C. Rep. Serv. (CBC) 461, 465 (E.D.N.Y. 1967))).

Part II outlines the origins and consequences of the basis of the bargain requirement for the creation of an express warranty in modern sales law. Part III elaborates on the lemons problem and presents the main theoretical argument of the Essay. Part IV examines the history of the reliance requirement in the basis of the bargain test. Part V elaborates on three basic questions that arise in the application of the bargain test: (1) whether a seller should bear any legal obligations for promises it made in advertisements that the buyer did not see, read, or hear prior to contracting; (2) whether a seller should bear any legal obligations for promises that the buyer had reasons to doubt based on the buyer's experience with the good; and (3) whether a seller should bear any legal obligations for a promise that the buyer knew with epistemic certainty to be false at the time of contracting. Finally, Part V concludes that unless (1) sellers specifically disclaim affirmations of fact or promises made about their goods at the time of contracting, or (2) sellers state affirmations of fact or promises the buyer knows to be false, courts should hold sellers to strict legal obligations for such affirmations or promises, regardless of whether their buyers saw, read, or heard the promises prior to contracting or whether their buyers had or should have had reason to doubt their promises based on prior experience with the seller's good.

II. PROMISES AND BARGAINS

Promises play an essential role in the social, economic, and moral life of every culture.[10] People plan their weddings, careers, childbearing, and myriad other important activities and events in part on the promises that have been made to them and their expectations about whether those promises will be kept. Most cultures therefore attach great moral importance to the keeping of promises, and anyone who breaches one may be subjected to criticism, ostracism, or other social expressions of moral disapprobation.

The central role that promises play in our lives and the important moral implications of the decisions we make about whether to make, keep, or breach promises raise an inevitable question—when should promises be legally enforceable? Under the bargain theory of contracts that has dominated American jurisprudence for the last century, a promise is legally enforceable only when it is made in return for some kind of consideration.[11] Consideration is

10. *See generally* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 41–60 (1979) (offering a historical overview of the philosophical writings on promises since Hobbes).

11. *See generally* ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE 15–42 (2007) (providing a recent historical overview of consideration). As Kreitner notes, one of the effects of the developments in the consideration doctrine during the late nineteenth and early twentieth centuries was to make promises the central

any promise, performance, or forbearance offered in exchange for the promise—it is essentially evidence of a bargain.[12] Of course, a nominal promise, performance, or forbearance—the kind that parties might make or undertake merely to satisfy the formal consideration requirement—would not provide evidence of a true bargain, and courts have declined to enforce promises when there is only nominal consideration.[13] Under the bargain theory of contracts, promises are enforceable only when they are truly bargained for.[14]

The modern consideration doctrine was a product of the economic and commercial developments in the nineteenth and early twentieth centuries that made the enforcement of commercial transactions the essential focus of contract law.[15] The rise of the mass production manufacturing industries at the end of the nineteenth century created pressures for uniformity and predictability not only in the transactions necessary to organize mass production activities, but also in the transactions necessary for the distribution and marketing of new consumer products.[16] Commercial pressures manifested themselves both in the National Conference of Commissioners on Uniform State Laws' attempts to codify commercial laws, including sales law,[17] and in the American Law Institute's attempts to bring greater coherence and harmony to private laws through its restatements, including the *Restatement of Contracts*.[18] Prominent legal academics led the quest for unified principles of contract, which was an important part of the Formalist movement in American law in the early twentieth century.[19]

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focus of contracts. *Id.* at 19. Indeed, this focus served to distinguish contracts as an independent field of law. *Id.* at 20.

12. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981) ("To constitute consideration, a performance or return promise must be bargained for.").

13. *See, e.g.*, *In re* Greene, 45 F.2d 428, 430 (S.D.N.Y. 1930) (holding that a payment of $1 in return for an executory promise to pay thousands of dollars was only nominal consideration and therefore did not make the executory promise enforceable).

14. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981).

15. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 112 (1992) (describing the increasing pressure for objective standards in contract law); KREITNER, *supra* note 11, at 1–7 (explaining how contract law developed against the backdrop of the Industrial Revolution).

16. *See* HORWITZ, *supra* note 15, at 112; Teeven, *supra* note 7, at 291–92.

17. *See* WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 25–26 (1991).

18. *See* John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615, 621 (1998) (providing that the practical needs of "'business, commerce and industry'" inspired the *Restatement*).

19. Teeven, *supra* note 7, at 291–94 ("The leadership for [the] doctrinal reexamination of the doctrine of consideration emanated from legal treatise writers, who were also teachers in the emerging national law schools . . . and would be the drafters of restatements and partial codifications of contract law.").

There are legitimate debates within the legal academy today about whether the bargain theory of contracts offers either an adequate positive or normative theory of contract law.[20] Indeed, one esteemed scholar has famously lamented the "death" of the consideration doctrine[21] and argued that it no longer provides an adequate basis for a positive theory of contract.[22] As courts increasingly look to the doctrines of promissory estoppel and quasi-contract to enforce promises without consideration[23] and increasingly reject privity defenses,[24] the bargain theory of contracts seems to offer weaker predictions about when promises will be enforced and less convincing explanations as to why they should be enforced.

Other moral arguments can support the bargain theory of contracts,[25] but the theory has a natural affinity with the consequentialist tradition of moral reasoning and the law and economics approach to legal analysis.[26] It is not surprising, therefore, that some scholars have objected to the normative implications of the bargain theory from nonconsequentialist moral perspectives.[27] As a general matter, however, the nonconsequentialist moral arguments usually imply the necessity of enforcing a broader range of promises than merely those that are bargained for.[28] The debate about the role of the consideration doctrine in contract law is thus primarily about which promises should be enforceable and which should not be enforceable. There is a

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20. There is no question that the expansion of the doctrines of promissory estoppel and quasi-contract (or the "material benefit" rule) has eroded the predictive power of the bargain theory. *See* GRANT GILMORE, THE DEATH OF CONTRACT 69–77 (1974). However, the expansion of these doctrines may not mark such a drastic departure from the bargain theory as one might think. Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 349 (1969). Henderson argues that the manner in which courts have applied the doctrine of promissory estoppel has simply expanded the scope of the exchange contexts in which courts will enforce promises rather than taken enforceable promises out of exchange contexts altogether. *Id.*

21. GILMORE, *supra* note 20, at 3–4.

22. *Id.* at 62.

23. *Id.* at 63–64, 73–74.

24. JOHN O. HONNOLD & CURTIS R. REITZ, SALES TRANSACTIONS: DOMESTIC AND INTERNATIONAL LAW 272 (3d ed. 2006).

25. *See* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 164–65 (1993).

26. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 119–26 (7th ed. 2007).

27. *See, e.g.*, CHARLES FRIED, CONTRACT AS A PROMISE: A THEORY OF CONTRACTUAL OBLIGATIONS 19 (1981) (articulating a moral obligation to keep promises based on principles of trust and respect); TREBILCOCK, *supra* note 25, at 166 (articulating the theory that keeping promises increases social welfare by encouraging beneficial forms of reliance).

28. Some prominent legal scholars, for instance, have argued that a sounder normative basis for contract law lies in the imperative of respecting the freedom of autonomous individuals to make promises that bind their future behavior. TREBILCOCK, *supra* note 25, at 164–65 (citing FRIED, *supra* note 27, at 7–8). This approach, which is rooted in the Kantian moral tradition, presumes that all promises should be legally enforceable, regardless of whether they were bargained for. *Id.* at 165.

widespread consensus that promises should be legally enforceable if they are truly bargained for;[29] the controversial question is whether any other promises should also be legally enforceable.

The development of the consideration doctrine has thus helped to define the modern field of contracts. As the contours of modern contract law formed around the idea of bargained for consideration in the late nineteenth and early twentieth centuries, other legal doctrines developed to address the problems raised by gifts and unilateral promises.[30] Contract law simultaneously became more focused on facilitating commercial transactions and less concerned with defining the legal obligations of parties in exchange relationships.[31] This is ironic because one of the striking facts about modern American contract law is that so many of the promises made in the context of commercial transactions are not legally enforceable.

III. WARRANTIES AND THE LEMONS PROBLEM

In modern American sales law, controversy about when a seller's promises should be legally enforceable is rooted in disagreements about the appropriate interpretation to give to the provisions in section 2-313(1)(a) of the Uniform Commercial Code (UCC) governing the creation of express warranties.[32] The increasing complexity of the media through which parties make promises that might be construed as creating express warranties exacerbates the difficulty of interpreting section 2-313.[33] Section 2-313(1)(a) states that a seller creates express warranties that are legally enforceable only when the seller makes an "affirmation of fact or promise . . . which relates to the goods and becomes part of the basis of the bargain."[34] But when does a seller's promise become part of the basis of the bargain? Does a buyer have to see, read, or hear the promise?[35] What if a seller communicates a promise to a buyer after the parties reach an

29. *See* TREBILCOCK, *supra* note 25, at 167.

30. KREITNER, *supra* note 11, at 43–67.

31. *See id.* at 3–7.

32. *See* discussion *infra* Part IV. All references to the UCC in this Essay are to the pre-2003 version.

33. *See* Matthew A. Victor, *Express Warranties Under the U.C.C.—Reliance Revisited*, 25 NEW ENG. L. REV. 477, 477–78 (1990) (arguing that in light of commercial developments and new fact patterns, the case law construing express warranties under the UCC is developing on a case by case basis and hence is increasingly incoherent).

34. U.C.C. § 2-313(1)(a) (1977) (amended 2003).

35. For instance, what if a seller makes promises about its product in radio or television advertisements and a buyer purchases the product without ever seeing or hearing the advertisements? *See infra* text accompanying notes 82–101.

agreement?[36] Can a promise become part of the basis of the bargain if a buyer knows it is false?[37] And most perplexing of all, what if a buyer does not "know" that a promise is false with anything approaching epistemic certainty, but nonetheless has reason to doubt its veracity?[38] In short, what role, if any, should a buyer's reliance on a seller's promise play in the creation of an express warranty? Neither the courts nor the commentators have found cogent answers to these questions.[39]

This Essay argues that both economic efficiency and basic principles of social ethics require courts applying the UCC to enforce a broader range of promises than most courts currently do. From an economic perspective, the purpose of a sales warranty is to alleviate the lemons problem.[40] The lemons

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36. For example, what if an owner's manual or other writing delivered to a buyer after a sale includes promises not communicated to the buyer during contracting? This question is closely related to the foregoing question, although it has generated much less controversy because most observers believe the UCC offers a clear and compelling answer. *See infra* notes 102–106 and accompanying text.

37. Suppose, for instance, a seller represents a painting to a buyer as an authentic work of Francis Bacon, but by virtue of the buyer's expertise, the buyer knows with certainty that it is not the authentic work of Bacon. *See* discussion *infra* Part V.C.

38. Suppose a buyer has made previous purchases from a seller and, on the basis of the buyer's own experience with the seller's product, the buyer has reasons to doubt the veracity of the seller's promises. *See* discussion *infra* Part V.B.

39. *See* discussion *infra* Parts V.A–C.

40. Nobel Prize-winning economist George A. Akerlof developed the idea of the lemons problem in his seminal article, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 494 (1970). Akerlof's article has spawned a significant body of literature on the role of warranties as signals of product quality. Some scholars have cited empirical evidence that extensive warranties do not always signal high quality products. *See, e.g.*, Jennifer L. Gerner & W. Keith Bryant, *Appliance Warranties as a Market Signal?*, 15 J. CONSUMER AFF. 75, 80–84 (1981) (concluding that warranties across a diverse group of consumer appliances with differing technologies and failure rates "were remarkably similar"); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1326–27 (1981) (examining the relationship between warranty duration and life expectancy of various mechanical parts and finding "only a very crude relationship" between a product's life expectancy and its warranty duration). Others have constructed specific models that suggest warranties may not always provide signals of high quality goods. *See, e.g.*, Esther Gal-Or, *Warranties as a Signal of Quality*, 22 CANADIAN J. ECON. 50, 52–60 (1989) (constructing a theoretical model which shows that in oligopolistic markets, warranties only serve as signals of quality in special cases); Nancy A. Lutz, *Warranties as Signals Under Consumer Moral Hazard*, 20 RAND J. ECON. 239, 240–45 (1989) (creating a theoretical model which shows that warranty and product quality are not positively correlated). But the most general analyses indicate that where warranties involve affirmations of fact or promises that consumers can objectively verify or refute, the warranties will provide reliable information about the quality of goods on the market. *See, e.g.*, Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & ECON. 461, 470–77 (1981) (arguing that warranties are accurate signals for product quality when the product quality is easily verifiable); Michael Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 REV. ECON. STUD. 561, 569–71 (showing that where at

problem arises whenever there is asymmetric information between sellers and buyers.[41] In the classic scenario, the price that buyers are willing to pay for a good depends on its quality, but buyers have less information about the quality of the good than sellers.[42] Although the seller has superior information, the seller's information is private and the buyer cannot verify it.[43] Since buyers cannot distinguish the quality of various sellers' goods, buyers will only pay a price appropriate for goods of the average quality of all goods of the same type on the market.[44] An individual seller therefore has no incentive to produce a good of a quality that is higher than the average quality of all goods of the same type on the market.[45] Thus, low quality sellers force high quality sellers out of the market[46] and buyers end up with no alternative to low quality goods, even if they are willing to pay a premium for goods of verifiable high quality.[47]

An express warranty allows a seller to make binding commitments to the quality of its product. Under UCC section 2-313(1)(a), a seller can distinguish its goods from other goods on the market by making promises or affirmations of fact that create legally binding obligations as to its goods' quality.[48] In theory, if

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the time of purchase consumers observe the level of producer liability for a product, the level of producer liability is an effective market signal for the probability the product will fail).

41. *See* URS BIRCHLER & MONIKA BÜTLER, INFORMATION ECONOMICS 277–78 (2007). The study of asymmetric information is central to the literature on principal–agent problems and an important part of the field of information economics more generally. See *id.* at 255–399 for a recent survey.

42. *See* Akerlof, *supra* note 40, at 490.

43. *Id.* There are two basic kinds of asymmetric information problems: "hidden action" problems and "hidden information" problems. Manuel A. Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540, 552 n.37 (1995). Hidden action problems inhere in situations where one of the parties to a transaction cannot observe the other's actions. *See* Yane Svetiev, *Antitrust Governance: The New Wave of Antitrust*, 38 LOY. U. CHI. L.J. 593, 642 (2007). Hidden action problems typically give rise to moral hazard problems. *See id.* For instance, an insurance company cannot foresee how an automobile insurance policy will affect the driving behavior of its insured driver. Will the insured party drive with less care? How much less? Hidden information problems, on the other hand, inhere in situations where one party to a transaction has information that is of value to the other party but that is usually strategically withheld. *See id.*; *see also* BIRCHLER & BÜTLER, *supra* note 41, at 277 (explaining hidden information problems in the health insurance context). The lemons problem is a classic example of the hidden information problem. See Bengt Holmström, *Moral Hazard and Observability*, 10 BELL J. ECON. 74 (1979), for a classic treatment of asymmetric information problems.

44. BIRCHLER & BÜTLER, *supra* note 41, at 279–80. Indeed, the buyers will only pay a price that is appropriate for a product of average quality if they are risk-neutral; if they are risk-averse they will pay less than that.

45. *Id.* at 282–83.

46. *Id.* at 283.

47. *Id.* In other words, they end up with no alternative but to buy a "lemon."

48. U.C.C. § 2-313(1)(a) (1977) (amended 2003) ("Express warranties by the seller are created as follows: Any affirmation of fact or promise made by the seller to the buyer which relates

the seller's promises or affirmations prove to be false, a buyer will have a claim for damages for a breach of an express warranty.[49] In practice, however, difficult questions arise when the buyer never saw, read, or heard the promises, or when the buyer had reason to doubt whether they were true. In those circumstances, courts have often declined to enforce the seller's promises on the grounds that the buyer did not rely on them and that the promises were therefore not part of the basis of the bargain.[50] While it comports with the idea of bargained for consideration, in these contexts the reliance requirement has significantly narrowed the scope of promises that many courts have been willing to enforce in commercial transactions.

From a policy perspective, this is a regrettable consequence of an unduly doctrinal approach to contract questions in a world where commercial transactions clearly no longer fit the neat doctrinal box that classical contract theorists fashioned for them in the nineteenth and early twentieth centuries—if they ever did.[51] Sellers' promises can and should be much more widely enforced. In most sales transactions—certainly in those involving a sophisticated merchant seller of a widely marketed good—there is no morally defensible reason for allowing the seller to evade responsibility for its promises.[52] Indeed, save for the extremely rare case where a buyer knows with

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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.").

49. *Id.* § 2-714(2) (allowing recovery of expectation damages for breach of warranty); *id.* § 2-715 (allowing recovery of incidental and consequential damages).

50. *See* discussion *infra* Part V.A–B.

51. *See generally* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977) (providing a historical overview of commercial production and distribution in the United States). By the late nineteenth century, it was already common for manufacturers to mass produce consumer goods and ship them to distant states. *Id.* at 207. The manufacturers often sold the goods to retailers who resold them to the consumers. *Id.* There was thus no privity of contract between the manufacturers and the consumers who ultimately bought the goods. The lack of privity barred consumers from bringing express warranty claims against the manufacturers and still bars warranty claims in some states. *See, e.g.*, Twin Disc, Inc. v. Big Bud Tractor, Inc., 582 F. Supp. 208, 215 (E.D. Wis. 1984) (citing Barlow v. DeVilbiss Co., 214 F. Supp. 540, 543 (E.D. Wis. 1963); Paulson v. Olson Implement Co., 319 N.W.2d 855, 859 (Wis. 1982); City of LaCrosse v. Schubert, Schroeder & Assocs., Inc., 240 N.W.2d 124, 126 (Wis. 1976)) (stating that Wisconsin law requires privity of contract to find liability on breach of express warranty). Most courts eventually dropped the privity requirement for an express warranty claim. *See* WHITE & SUMMERS, *supra* note 3. They recognized that the requirement of an actual bargain between manufacturers and consumers was merely a technical impediment to a legitimate contract claim. Courts' widespread rejection of the privity requirement for express warranty claims reflects the limitations of any narrow conception of the bargain theory of contracts.

52. This is not to say there is never any morally defensible reason to excuse a seller from its contractual obligations. The question of whether a court should excuse a seller from performing its contractual obligations is very different from that of whether a seller's promises create an obligation in the first place. *See generally* Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227

something very close to epistemic certainty that a seller's promise is false and the seller genuinely does not,[53] any diminution of sellers' legal obligations for promises they make about their goods only inhibits their efforts to surmount the lemons problem by making legally enforceable promises about their products. To the extent that courts have invoked the reliance requirement to narrow the enforceability of merchant sellers' promises, they have undermined the efficiency of markets by reducing the amount of reliable information available to buyers.

Because the logic for construing the basis of the bargain test under UCC section 2-313(1)(a) to include a reliance requirement derives largely from the premise that promises cannot be bargained for if buyers do not rely upon them, the doctrine of consideration raises a formal impediment to the enforcement of many of the promises that merchant sellers make in commercial transactions. If there was any countervailing rationale for upholding the formalities of the consideration doctrine in these contexts that might justify sacrificing some of the economic and other social benefits of enforcing promises more widely. None of the traditional rationales for having a formal consideration requirement, however, appear to outweigh the damage it does by undermining the enforcement of merchant sellers' promises.

Contract scholars struggled with the formality of the consideration doctrine well into the twentieth century.[54] In an influential article that is still widely cited, Professor Lon Fuller distinguished between the formal and substantive functions of the consideration doctrine.[55] He identified the three formal functions as (1) evidentiary, (2) cautionary, and (3) channeling.[56] The evidentiary function is obvious: bargained–for consideration provides evidence of an enforceable agreement.[57] The cautionary function is somewhat less obvious: requiring consideration in return for a promise ensures the promise is of value to the promisee because promisees will take care to ensure the promises owed them are worth the consideration they must offer in return. The consideration requirement thus serves a cautionary function by helping to prevent the enforcement of impulsive promises that parties make without sufficient deliberation.[58] The channeling function is perhaps the least obvious:

(2004) (concluding that the impracticability doctrine can potentially improve efficiency and productivity in relational contracts).

53. This is clearly not going to happen very often, especially in transactions between merchant sellers and nonmerchant buyers.

54. *See* Symposium, *On the Complexity of Consideration*, 41 COLUM. L. REV. 777 (1941).

55. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

56. *Id.* at 800–01.

57. *See id.* at 800.

58. *See id.*

the consideration requirement helps parties channel their agreements into those that are legally enforceable and those that are not.[59]

According to Fuller, legal formalities are necessary when they help to induce deliberation and when economic activities do not already fit clear-cut business categories.[60] The kind of promises that manufacturers and retailers make when they market mass produced goods are not exactly those for which contract law needs to encourage either deliberation or channeling. Merchant sellers should and almost invariably do deliberate carefully about the promises they make in their advertisements and writings, and they clearly understand that the purpose of placing their goods in the distribution chain ultimately is to make a sale. Moreover, there is little need for evidence of a bargain in commercial transactions involving the distribution and marketing of a mass produced good. To the extent that a formal consideration requirement merely serves the evidentiary, cautionary, and channeling functions Fuller identified, it hardly appears to be necessary in circumstances where a merchant seller makes promises in the marketing of a mass produced good. To the extent that the reliance requirement under section 2-313(1)(a) derives from the consideration doctrine, therefore, the reliance requirement hardly appears to be necessary either.

Fuller also identified three substantive functions of contract law: (1) to respect and support parties' private autonomy by enforcing with legal sanctions rules they have set for themselves by voluntarily making promises,[61] (2) to protect parties who rely on promises that are not kept,[62] and (3) to prevent unjust enrichment.[63] None of these functions support restricting the enforcement of merchant sellers' promises about their products either, regardless of whether the sellers' promises are bargained for. Clearly, sophisticated sellers who deliberate carefully and make their decisions intentionally incur moral obligations whenever they make promises, and not only when they offer promises in return for consideration. Of course, if a buyer does not provide consideration in return for a promise, the buyer cannot have actually relied on the promise. Nonetheless, as Fuller argued, the reliance function of contract supports the enforcement of a promise whenever there is *some likelihood* that a buyer may rely on it and not just when there is *actual reliance*.[64] A merchant seller who makes a promise in a commercial context clearly understands that there is some likelihood that the buyer will rely upon the promise. Given the difficulties of proving actual reliance upon the promise, Fuller argued that strict

59. *See id.* at 801.
60. *See id.* at 806.
61. *Id.* at 806–07.
62. *Id.* at 810.
63. *Id.* at 812–13.
64. *Id.* at 811–12.

enforcement would serve as "a kind of prophylactic measure against losses through reliance which will be difficult to prove if they occur."[65]

Fuller regarded the unjust enrichment question as an "aggravated case of loss through reliance."[66] But in this regard, it would be best to keep Fuller's distinction between the likelihood of reliance and actual reliance in mind. A merchant seller who is not held to strict legal obligations for promises made in the marketing and distribution of its product almost certainly enriches itself unjustly at others' expense. Of course, if the buyer in a particular case does not actually rely on the promise one might argue that no unjust enrichment has occurred. But this would make application of the unjust enrichment doctrine subject to all the evidentiary problems that Fuller decried in addressing the reliance problem generally.

Moreover, as the discussion below elaborates, sophisticated merchant sellers often attempt to use advertising to influence potential buyers' general impression of the quality and attributes of the sellers' products.[67] Sellers typically hope to influence the decisions of a much wider range of potential buyers than those that actually see, read, or hear their advertisements. Even if a particular buyer cannot recall a seller's advertisement, there is some likelihood that the advertisement may influence the buyer's decision to purchase the product indirectly through the influence of other buyers who did see, read, or hear the advertisements. If a seller's advertising promises are not enforceable, therefore, the seller may unjustly enrich itself by making false promises, regardless of whether a buyer can prove actual reliance.

IV. THE ROOTS OF RELIANCE IN THE BASIS OF THE BARGAIN TEST

Modern warranty law under the UCC has its roots in the tort of fraudulent misrepresentation.[68] Most courts hold that a fraudulent misrepresentation occurs when a defendant, with the intent to deceive, knowingly makes a false representation to the plaintiff that induces the plaintiff to act in reliance and causes an injury.[69] Reliance is thus an essential element of the tort. Indeed, prior to the Uniform Sales Act, warranty claims sounded in tort rather than contract.[70] Thus, when Samuel Williston drafted the Uniform Sales Act, he expressly

65. *Id.* at 812.

66. *Id.*

67. *See* discussion *infra* Part V.A.

68. DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 4:4, at 133 (3d ed. 2000); *see* White, *supra* note 4, at 2090–92.

69. *See* Deery v. Peek, (1889) 14 App. Cas. 337, 374 (H.L.) (appeal taken from Eng.) (first stating the elements of the rule); *cf.* DAN B. DOBBS, THE LAW OF TORTS § 470, at 1345 (2000) (providing elements of fraudulent misrepresentation).

70. White, *supra* note 4, at 2090.

included a reliance requirement in the express warranty provision.[71] Some scholars believe that Karl Llewellyn attempted to eliminate the vestiges of the tort underpinnings in express warranty law when he drafted Article 2 of the UCC and replaced the reliance requirement with a basis of the bargain requirement.[72] As Llewellyn drafted it, a seller creates an express warranty under section 2-313(1)(a) by an "affirmation of fact or promise . . . which relates to the goods and becomes part of the *basis of the bargain* . . . ."[73]

The problem, of course, was that the reliance requirement had become deeply rooted in the case law, and lawyers, scholars, and judges had widely accepted it by the time Llewellyn drafted the UCC.[74] Moreover, regardless of Llewellyn's intent, it is not at all clear from the drafting history of the UCC that section 2-313 eliminates the reliance requirement.[75] Thus, as James White quipped, "If Llewellyn did not intend basis of the bargain to be a proxy for a diluted form of reliance, he has fooled many courts."[76] While some courts interpret the basis of the bargain language in UCC section 2-313 to imply a reliance requirement of some kind, most courts do not clearly state the precise

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71. UNIF. SALES ACT § 12 (1906) ("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.").

72. *See, e.g.*, 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, 3, 14 (1987) (stating that Llewellyn's comments to the Uniform Revised Sales Act make clear that reliance is no longer the "crucial factor" in creating an express warranty); Richard L. Savage III, Comment, *Laying the Ghost of Reliance to Rest in Section 2-313 of the Uniform Commercial Code: An "Endpoints" Analysis*, 28 WAKE FOREST L. REV. 1065, 1073–74 (1993) (suggesting that the purpose of the basis of the bargain requirement in section 37 of the Uniform Revised Sales Act clearly took a different approach than earlier authorities in dropping the reliance language) (citing UNIF. REVISED SALES ACT § 37 cmt. 1, at 148–49 (Proposed Final Draft No. 1, 1944)). Other scholars are more circumspect. *See, e.g.*, White, *supra* note 4, at 2095 ("Perhaps [the comments to UCC section 2-313] are an admission that if [Llewellyn] had his own way and was free of the restraint of the drafting committee . . . he might abandon all the trappings of tort, and make express warranty simply a matter of contract.") (citing U.C.C. § 2-313 cmts. 3, 7 (1977) (amended 2003)).

73. U.C.C. § 2-313(1)(a) (1977) (amended 2003) (emphasis added).

74. *See* Heckman, *supra* note 72, at 3.

75. *See* Cipollone v. Liggett Group, Inc., 893 F.2d 541, 565 (3d Cir. 1990) (noting that the New Jersey Study Comments did not mention the change), *aff'd in part, rev'd in part on other grounds*, 505 U.S. 504, 525–27 (1992). In *Cipollone*, the seller argued that if the UCC drafters intended section 2-313 to eliminate the reliance requirement for an express warranty, one might have expected that they would have noted this change. *Id.*

76. White, *supra* note 4, at 2106.

role reliance plays in the rule.[77] Most courts cite the official comments when addressing the matter.[78] Official Comment 3 states:

> In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.[79]

Although the wording does not indicate that section 2-313 in any sense requires reliance, the comment's reference to facts which might take a seller's promises out of the agreement is sometimes understood to mean facts which refute a buyer's reliance on such promises.[80]

V. SHOULD EXPRESS WARRANTIES BE CREATED EVEN IN THE ABSENCE OF RELIANCE?

A number of important cases have rejected express warranty claims on the grounds that the buyer did not rely on the seller's promises.[81] Although courts have not widely followed these cases, courts have not widely rejected or criticized these cases either, and these cases stand as persuasive authorities that courts in other jurisdictions may follow. Courts have rejected buyers' express warranty claims in three distinct sets of circumstances: (1) those in which a seller made promises in advertisements prior to contracting with a buyer, but the buyer did not read, see, or hear the advertisements; (2) those in which a seller made promises in a series of repeated transactions with a buyer, and the buyer's experience with the seller's goods in the earlier transactions should have raised doubts about the veracity of the seller's promises in the later transactions; and (3) those in which a seller made promises that a buyer knew to be false at the time of contracting. Unfortunately, only in the last set of circumstances does the

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77. *Id.* at 2102.

78. Debra L. Goetz et al., Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1174 (1987).

79. U.C.C. § 2-313 cmt. 3 (1977) (amended 2003).

80. WHITE & SUMMERS, *supra* note 3, § 9–5, at 352. Section 2-313(1)(a) indicates that either affirmations of fact or promises may create express warranties. There is a subtle difference between the two, but for practical purposes an affirmation of fact about the quality of a product is essentially the same as a promise about the quality of the product. For convenience, the discussion here will treat affirmations of fact as promises.

81. *See* discussion *infra* Part V.A–C.

rejection of an otherwise valid warranty claim make any sense in terms of either economic efficiency or social ethics.

A. *Promises the Buyer Did Not See, Read, or Hear*

Consider the first scenario: In *Cipollone v. Liggett Group, Inc.*,[82] the Third Circuit held that the district court erred by not requiring the plaintiff to prove that his wife, Rose Cipollone, saw, read, or heard the affirmations of fact that the defendant, Liggett Group, Inc. (Liggett), had made in its advertisements.[83] Mrs. Cipollone had become ill with lung cancer and alleged the cancer resulted from smoking Liggett's cigarettes.[84] She and her husband asserted a variety of actions against Liggett.[85] She based her express warranty claim on statements Liggett made in some of its advertisements, such as the statement that Liggett's new filter tipped cigarettes were "just what the doctor ordered."[86] The Cipollones won a judgment for breach of an express warranty at trial, but Liggett appealed, arguing in part that the trial judge erred in preventing it from proving that Mrs. Cipollone was not aware of or did not believe its advertisements.[87] Liggett further argued that the trial judge erred by not instructing the jury on the reliance requirement in section 2-313(1)(a).[88]

The Third Circuit noted that while some courts have rejected a reliance requirement for section 2-313(1)(a), a majority has said there is a reliance requirement of some kind.[89] Moreover, the court noted that some distinguished commentators have also taken this position.[90] The court also pointed out that although the UCC clearly replaced the Uniform Sales Act's express reliance requirement with the basis of the bargain language, the New Jersey Study Comments did not discuss the change.[91] Further, the court cited an earlier Third Circuit case[92] that interpreted section 2-313 to mean that courts were to consider the reliance requirement under the Uniform Sales Act as a factor in assessing

82. 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in part on other grounds*, 505 U.S. 504, 525–27 (1992).

83. *Id.* at 569.

84. *Id.* at 551–52.

85. *Id.* at 552. By the time the case went to trial, Mrs. Cipollone had died. *Id.*

86. *Id.* at 551 (internal quotation marks omitted).

87. *Id.* at 547.

88. *Id.* at 555.

89. *Id.* at 564.

90. *Id.* (citing WHITE & SUMMERS, supra note 3, § 9–5, at 351).

91. *Id.* at 565.

92. *Id.* at 566 (citing Pritchard v. Liggett & Meyers Tobacco Co., 350 F.2d 479 (3d Cir. 1965), *amended by* 370 F.2d 95 (3d Cir. 1966)).

the basis of the parties' bargain.[93] With a show of deference to New Jersey state law, the *Cipollone* court stated its opinion:

> [W]e 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. Such proof will suffice "to weave" the affirmation of fact or promise "into the fabric of the agreement," . . . and thus make it a part of the basis of the bargain.[94]

Cipollone stands for the proposition that promises or affirmations made by sellers in advertisements in media such as newspapers, magazines, radio, or television prior to buyers' purchases do not become part of the basis of the bargain unless the buyers can prove they actually saw, read, or heard them. If there is a reliance requirement for the creation of an express warranty, as many courts believe,[95] this is hardly contentious: buyers cannot rely on promises or affirmations they are unaware of at the time of contracting. The issue, of course, is whether reliance should be required.

Other courts have followed *Cipollone*'s logic. For example, in *Stuto v. Corning Glass Works*,[96] the plaintiff made a breach of express warranty claim based on advertisements in which Corning Glass Works stated its dishes were unbreakable.[97] The district court held that the plaintiff could not have relied on advertisements she could not remember.[98] In *DiIenno v. Libbey Glass Division, Owens-Illinois, Inc.*,[99] the plaintiff made a breach of express warranty claim based on statements in the Libbey Glass Division, Owens-Illinois, Inc. (Libbey

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93. *Pritchard*, 350 F.2d at 491 n.7 (citing U.C.C. § 2-313 cmt. 3 (1977) (amended 2003)) ("The comment[s] by the drafters . . . make it clear that what was formerly described as reliance is now absorbed as a factor which is made a basis of the bargain.").

94. *Cipollone*, 893 F.2d at 567–68 (citations omitted).

95. *See, e.g.*, Holdridge v. Heyer-Schulte Corp. of Santa Barbara, 440 F. Supp. 1088, 1104 n.9 (N.D.N.Y. 1977) (citing Friedman v. Medtronic, Inc., 345 N.Y.S.2d 637, 643 (N.Y. App. Div. 1973)) ("In order to recover for breach of express warranty, a party must normally show that he relied upon the warranty in making the purchase . . . ."); Stamm v. Wilder Travel Trailers, 358 N.E.2d 382, 385 (Ill. App. Ct. 1976) (finding the plaintiffs did not establish an express warranty absent evidence of reliance); Hillcrest Country Club v. N.D. Judds Co., 461 N.W.2d 55, 61 (Neb. 1990) ("This court has held that '[s]ince an express warranty must have been "made part of the basis of the bargain," it is essential that the plaintiffs prove reliance upon the warranty.'" (quoting Wendt v. Beardmore Suburban Chevrolet, Inc., 366 N.W.2d 424, 428 (Neb. 1985))).

96. [1990–1991 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 12,585, at 37,578 (D. Mass. July 23, 1990).

97. *Id.* at 37,579.

98. *Id.* at 37,582.

99. 668 F. Supp. 373 (D. Del. 1987).

Glass) catalog promising that its jars would open and close properly.[100] The court granted Libbey Glass summary judgment because the evidence showed that the plaintiff had never even seen the catalog.[101] *Stuto* and *DiIenno* illustrate that *Cipollone*'s application of the reliance requirement to precontractual promises in advertisements was hardly sui generis.

The question of whether courts should enforce promises made in advertisements a buyer has not seen, read, or heard is, in fact, conceptually related to questions about whether courts should enforce promises or affirmations made in writings—consumer brochures, owners' manuals, etc.—and given to buyers only after the parties have contracted. Buyers cannot rely on promises that sellers communicate to them only after the buyers have made a purchase decision any more than buyers can rely on promises in advertisements that they did not see, read, or hear.

There is an important difference, however, between postcontractual promises that sellers communicate to a buyer through writings such as product brochures and owners' manuals and precontractual promises that sellers communicate to a buyer through advertising media such as newspapers and television. Although the UCC does not offer any specific authority to enforce precontractual promises made in advertisements, it offers some authority for the enforcement of postcontractual promises made in writings delivered to the buyer with the goods.[102] Thus, some courts will enforce postcontractual promises as contractual modifications.[103] Under section 2-209(1), contractual modifications do not require consideration to be binding.[104] However, the modifications must be made in good faith.[105] Since courts can regard

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100. *Id.* at 376.

101. *Id.*

102. *See* U.C.C. § 2-313 cmt. 7 (1977) (amended 2003) (suggesting that postcontractual promises can be treated as contractual modifications). Comment 7 states, "If language is used after the closing of the deal . . . , the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order . . . ." *Id.*

103. *See, e.g.*, Bigelow v. Agway, Inc., 506 F.2d 551, 555 n.6 (2d Cir. 1974) (finding adequate evidence to present a jury question on a breach of warranty claim because a post-sale assurance "might constitute an actionable modification of [a] warranty"); Mountaineer Contractors, Inc. v. Mountain State Mack, Inc., 268 S.E.2d 886, 892 (W. Va. 1980) (finding that oral promises made after an original contract became "subsequent oral modification[s] of the contract").

104. U.C.C. § 2-209(1) (1977) (amended 2003) ("An agreement modifying a contract within this Article needs no consideration to be binding.").

105. *See id.* § 2-209 cmt. 2 ("[M]odifications made [under section 2-209] must meet the test of good faith . . . ."). Comment 2 states that "'good faith' between merchants or as against merchants includes 'observance of reasonable commercial standards of fair dealing in the trade' . . . and may in some situations require an objectively demonstrable reason for seeking a modification." *Id.* (citing U.C.C. § 2-103 (1977) (amended 2003)). Thus, despite what Official Comment 7 to section 2-313 says, it is not clear that postcontractual promises in brochures and owners' manuals are within the kind of modifications contemplated by section 2-209. *See* White, *supra* note 4, at 2109 (arguing that sellers should be liable for postcontractual promises made in

postcontractual promises or affirmations in brochures, owners' manuals, and other similar writings as contractual modifications, there has not been as much controversy about their enforceability.[106]

Nonetheless, because of the similarities between precontractual promises in advertisements and postcontractual promises in brochures and owners' manuals, there is some irony in the fact that courts may treat them differently. Under the court's logic in *Cipollone*, promises in advertisements are enforceable only if the buyer saw, read, or heard the promises because only then could the promises have been part of the basis of the bargain.[107] Because the official comments to the UCC offer a rationale for enforcing postcontractual promises as unilateral contractual modifications,[108] however, these promises may be enforceable even though buyers could not possibly have seen, read, or heard them prior to contracting, could not possibly have relied on them, and could not possibly have made them part of the basis of the bargain.

The fact that the UCC allows unilateral modifications subsequent to the formation of a sales contract[109] does create an important difference between precontractual and postcontractual promises. But it also raises some difficult questions. Suppose a buyer saw, read, or heard promises in advertisements that a seller made after the buyer had purchased a good (perhaps on television or in the latest issue of a monthly magazine). Would the promises be binding as unilateral modifications? Suppose the seller placed the advertisements before the buyer purchased the good, but that the buyer saw, read, or heard them only after making the purchase (perhaps while perusing some old issues of a monthly magazine)? Would these precontractual promises unilaterally modify the contract? The logic of cases such as *Cipollone* and *Stuto* clearly suggests the answers would be an emphatic "No."[110]

From a policy perspective, however, there is little, if any, reason to draw such a sharp distinction between precontractual promises made in advertisements and postcontractual promises made in writings delivered with the product. Advertising is costly, and usually only merchant sellers will go to

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writing and given to a buyer but disputing whether courts should treat these promises as contractual modifications under section 2-209).

106. *See* Joan Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 596–97 (1985) (noting that consumers obviously do not rely on post-purchase promises or affirmations and suggesting that a reliance requirement would eliminate express warranty protection "in many consumer purchases"). That is not to say there is no disagreement. *See* White, *supra* note 4, at 2109.

107. Cipollone v. Liggett Group, Inc., 893 F.2d 541, 567–68 (3d Cir. 1990), *aff'd in part, rev'd in part on other grounds*, 505 U.S. 504, 525–27 (1992).

108. U.C.C. § 2-313 cmt. 7 (1977) (amended 2003).

109. *Id.* § 2-209.

110. *See generally* White, *supra* note 4, at 2103–05 (citing 150 cases that examine promises made at various times in relation to the purchase).

the expense of making promises in advertisements in electronic or print media. Any rational seller would carefully weigh the costs of an advertisement against its expected benefits. The expected benefits typically include not only increased demand from potential buyers that actually see, read, or hear the advertisement, but also some increased demand from other potential buyers who may hear about the promises made in the advertisement indirectly from others.

Indeed, one of the important motives for mass market advertising is to improve the general reputation of a product, even among potential buyers who never actually see, read, or hear the advertisement.[111] Thus, many consumers might think that Corning warrants its dishware to be unbreakable, even though the consumers cannot remember any advertisement in which Corning made such a promise. The expected benefits to a seller from making a promise in an advertisement are potentially much greater, therefore, than simply the increase in sales to buyers who actually see the advertisement. Under the logic of cases such as *Cipollone*, however, those buyers who purchase the advertised good without seeing the advertisement will have no legal recourse for enforcing the seller's promises. The seller, on the other hand, will benefit from making the promises without having any legal obligation to keep them or bearing any liabilities for breaking them, at least not to those buyers who purchased the good without knowledge of the advertised promise.

This may create some perverse incentives, and it may have some unfortunate consequences. Sellers may, for instance, have an incentive to make promises in advertisements that buyers will have difficulty recollecting. This would allow sellers to reap the benefits of their promises while bearing fewer of the obligations. Of course, it would also undermine the reliability of sellers' promises generally and make potential buyers more skeptical about relying on sellers' reputations. This incentive would frustrate the basic purpose of advertising and compound the lemons problem. Sellers' promises would provide less reliable information, and buyers would have even more difficulty distinguishing between the qualities of various products on the market.

It is difficult to see, therefore, how cases such as *Cipollone* and *Stuto*, which construe the reliance requirement to relieve sellers of express warranty obligations for promises in advertisements a buyer cannot recall, can do much good. Although such cases may preserve the formality of the bargain test in sales contracts, they undermine the economic purpose of sellers' promises and diminish the efficiency of markets rather than improve them. Moreover, they discourage sellers from adhering to socially responsible business ethics.

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111. *See* BEN MCCONNELL & JACKIE HUBA, CREATING CUSTOMER EVANGELISTS 51–52 (2003) (explaining that memes, basic ideas or units of information that propagate through a population, can transmit "from person to person like a handshake" and help consumers understand what a seller is offering).

One of the bedrock propositions of Kantian moral theory is that people should never make promises they do not intend to keep.[112] From a Kantian perspective, therefore, it would be unethical for a seller to make a promise in an advertisement if the seller did not intend to keep it, regardless of whether anyone read, saw, or heard the advertisement. By making a promise, a seller incurs a moral obligation to keep it. Cases that construe the reliance requirement for an express warranty to allow a seller to avoid any obligations for promises a buyer did not see, read, or hear not only have adverse economic consequences, they also discourage sellers from upholding their moral obligations.

Of course, holding a seller to strict legal obligations for all of the promises made in its advertisements would raise other questions. Once made, would the seller always be obligated to keep the promise—even many years after the seller had stopped making it? Should a seller be offered any means of disclaiming promises made in its ads? These are difficult questions, and any answers are likely to seem arbitrary. Nonetheless, it does seem possible to offer reasonable guidelines. In fact, there is an analogy between the kind of legal obligation that this Essay proposes for a promise in an advertisement and the implied warranty of merchantability.[113] The bargain theory of contracts does not imply the need to enforce an implied warranty of merchantability either. Like the kind of legal obligation this Essay proposes for promises made in advertisements, the implied warranty of merchantability can only be rationalized on other grounds. In fact, legal scholars struggled with the appropriate rationale for the implied warranty of merchantability well into the twentieth century.

One view was that the doctrine of merchantability was implied as a matter of law.[114] From this perspective, merchantability clearly cannot be rationalized using a bargain approach to contract. In fact, it is better understood as a legal regulation on parties' transactions. Absent an acceptable waiver, the law implies a warranty of merchantability. And of course, the law regulates the acceptable manner in which a seller can waive the warranty.

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112. B. Sharon Byrd & Joachim Hruschka, *Kant on "Why Must I Keep My Promise?"*, 81 CHI.-KENT L. REV. 47, 47 (2006) ("The duty to keep promises is a categorical imperative.").

113. *See* U.C.C. § 2-314 (1977) (amended 2003).

114. John Barker Waite, *Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494, 498 (1936) ("[I]mplied warranty exists if the court thinks that public policy requires a seller's liability in the particular case."). Using beans as an example of a good, Waite argued:

> [I]t would be the height of unreason to assume that the seller intended, or the buyer could have thought he intended, to imply anything more than a representation that the beans were to the best of his knowledge and belief edible. If this matter of the fair and proper inference from the seller's actions were left to a jury, the writer believes that in nine verdicts out of ten the jury would deny any assumption of absolute liability.

Id. at 502.

Another view was that the doctrine of merchantability was implied in fact.[115] On that view, there is a warranty of merchantability implicit in every sales contract, but the parties refrain from stating it in executing their agreement.[116] A warranty of merchantability can more easily be rationalized under this theory using a bargain approach, but the theory does not seem historically accurate; the roots of modern warranty law lie in tort rather than contract,[117] and courts declined to enforce implied warranties in many pre-UCC sales cases.[118]

Ultimately, of course, the theoretical rationale for the implied warranty of merchantability does not really matter because the drafters of the UCC codified it in section 2-314.[119] Indeed, according to one scholar, in the end the two theoretical rationales come to imply the same outcome.[120] If courts initially apply the warranty under a theory that it is implied in law, parties will come to expect that merchantability will be implied in their contracts by default. In other words, parties will believe a merchantability term is a part of their contracts unless waived. If courts initially apply the warranty under a theory that it is

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115. William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 123 (1943). Prosser argued:

> The warranty has in fact been agreed upon by the parties as an unexpressed term of the contract of sale. . . . [T]he court, by interpreting the language used, the conduct of the parties and the circumstances of the case, finds that it is there. Such a contract term "implied in fact" differs from an express agreement only in that it is circumstantially proved.

Id. (citing Lombard v. Rahilly, 149 N.W. 950, 950 (Minn. 1914)).

116. *Id.*

117. *Id.* at 118 ("In its inception, breach of warranty was a tort. The action was . . . for breach of an assumed duty, and the wrong was conceived to be a form of misrepresentation . . . .")

118. *E.g.*, Fleetwood v. Swift & Co., 108 S.E. 909, 910 (Ga. Ct. App. 1921) (stating there is no implied warranty where a dealer sells a good in its original package and knows as much about the good as the buyer); Scruggins v. Jones, 269 S.W. 743, 744 (Ky. 1925) (citing Walden v. Wheeler, 154 S.W. 1088, 1090 (Ky. 1913); Bigelow v. Me. Cent. R.R. Co., 85 A. 396, 399 (Me. 1912)) (finding that a retailer is not liable for product defects unless the retailer makes an express warranty); *Bigelow*, 85 A. at 399 ("[I]n the absence of an express warranty the defendant is not liable."); West v. Emanuel, 47 A. 965, 965–66 (Pa. 1901) (holding that a druggist selling medicine patented and furnished by a compounder cannot be liable for negligence where the medicine is defective). *See generally* Robert C. Brown, *The Liability of Retail Dealers for Defective Food Products*, 23 MINN. L. REV. 585 (1939) (discussing whether courts should impose an implied warranty of merchantability for food products).

119. U.C.C. § 2-314(1) (1977) (amended 2003).

120. Ingrid Michelsen Hillinger, *The Merchant of Section 2-314: Who Needs Him?*, 34 HASTINGS L.J. 747, 778 n.145 (1983). Hillinger argued that the distinction between the two theories of merchantability may be artificial and misleading:

> The buyer's actual reasonable expectations may be identical to the common expectations aroused by such a sale. 'Implied warranties reflect society's judgments about the basic understandings of the foundation of most deals. . . .' [and] . . . [t]hese societal judgments arise from common understandings, *i.e.*, the buyer's actual and reasonable understanding in the transaction.

Id. (citing DOUGLAS J. WHALEY, WARRANTIES AND THE PRACTITIONER 21 (1981)).

implicitly a part of parties' bargains, the courts have thus made it a part of parties' contracts as a matter of law. Once a jurisdiction adopts the rule, as in section 2-314, the initial rationale for its adoption becomes irrelevant.

Nonetheless, if courts hold sellers to strict legal obligations for the promises they make in their advertisements, the analogy with the implied warranty of merchantability bears consideration. We could consider the sellers' promises to be implied in the contract as a matter of fact or a matter of law. Thus, the facts of a sales contract could imply that the promises sellers make in their advertisements will become part of the sales contracts regardless of whether buyers see, read, or hear them. Alternatively, sellers' obligations for their promises could be implied as a matter of law—the enforcement of such promises could be construed as a legal regulation on all sales contracts. Of course, once a jurisdiction adopts the new rule, the theoretical rationale would matter less than the legal reality. The point is that sellers' obligations for their promises do not have to be rationalized using the doctrine of consideration and the bargain theory of contracts. The implied warranty of merchantability provides an example of another kind of contractual obligation that does not neatly fit the consideration doctrine or the bargain theory of contracts.

Of course, sellers can disclaim the implied warranty of merchantability.[121] To the extent that the analogy with the implied warranty of merchantability is useful, therefore, a seller should also be able to disclaim any promises it makes in its advertisements. Of course, section 2-316(2) regulates a seller's attempts to disclaim the implied warranty of merchantability,[122] and it only seems reasonable that similar regulations should be placed on a seller's attempts to disclaim any promises it has made in its advertisements. At the very least, such disclaimers should be conspicuous and clearly state which promises the seller disclaims.

It would seem unreasonably burdensome, however, to require a seller to disclaim promises made in its advertisements many years after it had stopped making them. Some kind of limit should be placed, therefore, on the life of a seller's promise. A bright line rule would probably be best. For instance, the rule could require a seller to disclaim promises made in advertisements for one year, or three years, or even five years after the seller has stopped making them. Alternatively, perhaps the rule could require a seller to continue disclaiming the promises made in advertisements for as long as the seller had made the promises. For example, if the seller ran the advertisements for three years, then the seller should make the disclaimers for three years after ending the advertisements.

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121. U.C.C. § 2-316(2) (1977) (amended 2003).

122. *Id.* ("[T]he language must mention merchantability and in case of a writing must be conspicuous . . . .").

B. *Promises the Buyer Should Not Have Believed*

Consider another scenario: In *Royal Business Machines, Inc. v. Lorraine Corp.*,[123] the Seventh Circuit held that the defendant, Royal Business Machines, Inc. (Royal), would not be liable for promises or affirmations it made to the plaintiff, Booher, if the plaintiff should have known the promises were false through its prior experience with the product.[124] Royal had sold a number of photocopiers to Booher in a series of separate transactions over a period of well over a year.[125] Royal made several promises about its copiers in each of the transactions.[126] Some of these promises amounted to no more than sales puffery or otherwise failed to meet the test in section 2-313(1)(a) for an express warranty,[127] but others did meet the test for an express warranty, at least in the initial transactions.[128] Booher sought damages for Royal's breach of its promises in all of the parties' transactions.[129] The problem, however, was that Booher had acquired considerable experience with the copiers over the course of his dealings with Royal.[130] In the Seventh Circuit's view, Booher may have had sufficient experience with the copiers to make Booher doubt whether Royal's promises were true, and in that case Booher could not have relied on them.[131] If so, this would have taken the promises out of the basis of the bargain under section 2-313.[132]

The Eleventh Circuit adopted the Seventh Circuit's reasoning in a similar case, *Royal Typewriter Co. v. Xerographic Supplies Corp.*[133] On essentially the same fact pattern—indeed, involving the same type of photocopiers as in *Royal Business Machines*—the Eleventh Circuit noted that "[t]he buyer's knowledge or absence of reliance [would] negate the existence of an express warranty," but stated that the buyer had established its initial reliance on the seller's promises by proving it lacked any prior experience with the copiers.[134] In a footnote, however, the Eleventh Circuit cited *Royal Business Machines* and concurred in the view that any experience the buyer acquired with the copiers through its

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123. 633 F.2d 34 (7th Cir. 1980).

124. *Id.* at 44–45 ("[T]he district court should determine at what stage Booher's own knowledge and experience prevented him from blindly relying on the representations of Royal.").

125. *Id.* at 40.

126. *Id.* at 41.

127. *Id.* at 41–43.

128. *Id.*

129. *Id.* at 40.

130. *Id.* at 44.

131. *Id.*

132. *Id.* ("The same representations that could have constituted an express warranty early in the series of transactions might not have qualified as an express warranty in a later transaction if the buyer had acquired independent knowledge as to the fact asserted.").

133. 719 F.2d 1092 (11th Cir. 1983).

134. *Id.* at 1101.

dealings with the seller could negate the existence of an express warranty in subsequent transactions.[135]

Other cases have followed the same logic,[136] but no case is more striking than *Stuto v. Corning Glass Works*.[137] In *Stuto*, the plaintiff was injured when some dishware manufactured by Corning Glass Works (Corning) broke and cut her hand.[138] Corning had stated that the dishware was unbreakable in some of its advertisements.[139] Stuto could not remember ever seeing the advertisements.[140] The court followed logic similar to *Cipollone*,[141] which by itself would have been enough to take the statements out of the basis of the bargain and defeat her express warranty claim.[142] But the court went even further and stated that Stuto's knowledge that Corning's affirmations that its dishware was unbreakable were false also negated the creation of an express warranty.[143] Apparently, Stuto knew that two other dishes from the same set had broken prior to the incident that caused her injury.[144] This, in the court's view, would have been sufficient to negate any express warranty that the dishes were unbreakable even if Stuto could have remembered seeing the advertisements.[145] What is most remarkable about the case is not only that the dishes had been a gift to Stuto,[146] but also that Stuto had no prior dealings with Corning of any kind.[147] Any doubts she may have had about the truthfulness of Corning's

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135. *Id.* at 1101 n.4 (citing *Royal Bus. Machs.*, 633 F.2d at 44) ("[W]ith each purchase, [the buyer] acquired expanded knowledge of the capacities of [the copiers]. This expanded knowledge should be considered in deciding whether the representations formed the basis of the bargain.").

136. *See, e.g.*, Overstreet v. Norden Labs., Inc., 669 F.2d 1286, 1291 (6th Cir. 1982) (citing *Royal Bus. Machs.*, 633 F.2d at 44; Janssen v. Hook, 272 N.E.2d 385, 388 (Ill. App. Ct. 1971)) ("A buyer does not disregard any special knowledge he possesses or his accumulated experience with a product in determining whether to enter the bargain."); Cambridge Eng'g, Inc. v. Robertshaw Controls Co., 966 F. Supp. 1509, 1524 (E.D. Mo. 1997) (citing *Royal Bus. Machs.*, 633 F.2d at 44) (holding that affirmations were no longer part of the bargain once the buyer continued to make purchases after learning of the good's defect).

137. [1990–1991 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 12,585, at 37,578 (D. Mass. July 23, 1990).

138. *Id.* at 37,579.

139. *Id.*

140. *Id.* at 37,580.

141. Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in part on other grounds*, 505 U.S. 504, 525–27 (1992).

142. *Stuto*, [1990–1991 Transfer Binder] Prod. Liab. Rep. (CCH) at 37,582.

143. *Id.* at 37,583.

144. *Id.*

145. *Id.*

146. *Id.* at 37,580. Thus, a lack of privity did not bar Stuto's express warranty claim. Why should a court require reliance for her express warranty claim if it did not require privity of contract?

147. *Id.*

statements could only have come from her experience with the one set of dishes that she received as a gift.

Stuto stretches the logic of *Royal Business Machines* and *Royal Typewriter* well beyond the breaking point. But the Seventh Circuit's and Eleventh Circuit's logic in those cases does not stand up to rigorous scrutiny anyway. The cases essentially raise a question about which party in a sales contract should bear the liabilities for a dubious promise—the seller who makes the promise or the buyer who may have had reason to doubt the veracity of the promise by virtue of the buyer's course of dealings with the seller. From an economic perspective, the party that is best situated to avoid the liabilities should bear them.[148] In general, this is the seller. It is the seller who makes the promise; the seller can avoid creating any potential liabilities for making false promises simply by not making them. Of course, the buyer can avoid bearing any costs from the seller's false promises simply by not relying on the promises, so the real issue is whether the buyer or the seller is in a better position to evaluate the veracity of the seller's promises. Where the seller is a merchant, the presumption must be that the seller knows more about the veracity of its promises than the buyer, even if the buyer has had prior experience with the seller's product. Where the seller is a nonmerchant, the buyer is highly unlikely to be a repeat customer and so the issue would be largely moot.

Most large scale manufacturers take measures to assess and control the quality of the goods produced in their manufacturing processes.[149] Because a manufacturer is able to sample from the entire universe of the goods it produces, it is in the best position to determine what kinds of promises about its products will be reliable. Some of the manufacturer's goods will almost inevitably fail to live up to the promises. But the manufacturer is in the best position to decide whether the benefits of making the promises exceed the costs associated with any liabilities if and when the promises turn out to be false. Normally, any buyer of the goods will only be able to draw inferences about the veracity of the manufacturer's promises from a small and possibly biased sample of the manufacturer's total production—the goods actually delivered to the buyer. The manufacturer, on the other hand, is able to draw inferences from a much larger and unbiased sample of the goods—a sample that is possibly as large as the entire universe of the goods the manufacturer produces. Thus, it is the manufacturer's inferences that should be more reliable.

Of course, the manufacturer may distribute its goods through an intermediary. In this situation the manufacturer will not be the buyer's seller.

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148. *See* POSNER, *supra* note 26, at 98 (asserting that the "right economic result" is for the best cost avoider to bear the liabilities).

149. *See generally* DOUGLAS C. MONTGOMERY, INTRODUCTION TO STATISTICAL QUALITY CONTROL (6th ed. 2009) (providing an overview of modern statistical methods used for quality control and improvement).

Most jurisdictions now allow buyers to make express warranty claims against remote manufacturers,[150] so this does not limit the moral force of the argument that manufacturers should be liable to the ultimate purchasers of their goods for any of the promises they make about their goods. It does, however, raise questions about the responsibilities of the intermediaries in the distribution chain. In some cases, retailers of the manufacturer's goods may have little more information about the goods than the ultimate buyers. Retailers may nonetheless make various promises about the goods in order to enhance their sales.[151] To the extent that they do so, they should bear the same legal obligations for those promises as any manufacturer that makes such promises.[152] Retailers are much better situated to acquire information about the manufacturers' goods they sell than are their customers. Retailers can protect themselves contractually from their reliance on any misinformation about the goods provided to them by the manufacturers. Even though they might not have as much information about the goods as the manufacturers, retailers will typically have far more information than any of their own customers.[153]

This approach is consistent with the one taken by the Second Circuit in *Rogath v. Siebenmann*.[154] In that case the buyer, Rogath, purchased a painting from Siebenmann.[155] In the bill of sale, Siebenmann vouched that the painting was by Francis Bacon and that he was unaware of any challenges to the authenticity of the painting.[156] After Rogath sold the painting to another party, however, the other party learned of a challenge to the painting's authenticity and requested that the transaction be rescinded.[157] Rogath agreed, but subsequently sued Siebenmann for breach of an express warranty.[158]

The trial court found that Siebenmann knew there had been a challenge to the authenticity of the painting when he sold it to Rogath and awarded Rogath significant damages.[159] On appeal to the Second Circuit, Siebenmann conceded

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150. *See* WHITE & SUMMERS, *supra* note 3.

151. Retailers' profits depend heavily on their markups and their sales rates. The faster they can turn over their inventories, the better.

152. The UCC clearly holds retailers liable for any express warranties they create through an "affirmation of fact or promise which . . . relates to the goods and becomes part of the basis of the bargain." U.C.C. § 2-313(1)(a) (1977) (amended 2003).

153. A retailer will generally sell goods to many customers. As a result, it will likely receive many complaints and warranty claims that provide information about the veracity of promises made in the marketing of a good. The retailer can thus draw inferences about the promises from a much wider sample than the one available to any individual buyer.

154. 129 F.3d 261 (2d Cir. 1997).

155. *Id.* at 262–63.

156. *Id.* at 263.

157. *Id.*

158. *Id.*

159. *Id.*

that he had made promises and representations about the authenticity of the painting but argued that Rogath was fully aware of the challenges to the painting's authenticity at the time of sale, and therefore Rogath could not have relied on the promises.[160] The court found some truth to Siebenmann's claim.[161] The question, therefore, was whether Rogath's doubts about Siebenmann's promises defeated his express warranty claim. The Second Circuit noted that, while this had been an unsettled question in the state of New York,[162] the New York Court of Appeals had rejected the tort theory of express warranties in favor of a contract based theory in a non-UCC case.[163] From this perspective, the question was not "whether the buyer believed in the truth of the warranted information . . . but whether [he] believed [he] was purchasing the [seller's] promise [as to its truth]."[164]

The Rogath approach treats an express warranty as if it were an insurance policy on the veracity of the seller's promise. As the Second Circuit has noted, however, a seller may attempt to disclaim its promise in writing at the time of sale.[165] In *Galli v. Metz*, the court reasoned that

> Where a buyer closes on a contract in the full knowledge and acceptance of facts *disclosed by the seller* which would constitute a breach of warranty under the terms of the contract, the buyer should be foreclosed from later asserting the breach. In that situation, unless the buyer expressly preserves his rights under the warranties . . . , we think the buyer has waived the breach.[166]

Following *Galli*, a buyer could only preserve his rights in the face of a seller's attempts to disclaim its promises by expressly stating that any disputes regarding the accuracy of the seller's warranties are unresolved and that the buyer does not waive any of its rights to enforce the warranties by signing the agreement.[167]

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160. *Id.*

161. *Id.* at 265–66.

162. *Id.* at 263.

163. *Id.* at 264 (citing CBS Inc. v. Ziff-Davis Publ'g Co., 553 N.E.2d 997, 1001 (N.Y. 1990)).

164. *Id.* (quoting *CBS*, 553 N.E.2d at 1000–01) (alteration in original) (internal quotation marks omitted).

165. Galli v. Metz, 973 F.2d 145, 151 (2d Cir. 1992).

166. *Id.* (emphasis added).

167. *Id.*

Although the Second Circuit did not mention it, the seller in *Rogath* was a merchant,[168] so it is unclear whether the court meant to extend its holding to cases involving nonmerchant sellers. Nonetheless, it is clear that *Rogath* would hold merchant sellers to strict contractual obligations for their promises unless they explicitly disclaimed the promises during execution of a contract. In this regard, the Second Circuit's approach to dealing with the problem that arises when a buyer has reason to doubt a seller's promise is completely analogous to the approach recommended in the preceding section of this Essay for dealing with sellers' promises in advertisements. Thus, *Rogath* not only offers a compelling answer to the question of what to do when a buyer has reasonable doubts about a seller's promise, but its logic is also compatible with a much more general and yet simple rule: courts should hold sellers to strict contractual obligations for all their promises regardless of whether they are made in precontractual advertisements or in postcontractual brochures and manuals; regardless of whether the buyer reads, sees, or hears them; and even if the buyer has serious reasons to doubt whether they are true.[169]

C. Promises the Buyer Knew Were False

Cases such as *Royal Business Machines*[170] and *Stuto*[171] in which a buyer acquires some knowledge of a merchant seller's product through personal experience should be distinguished from cases in which a defendant seller may allege that a buyer knows its promises are false for other reasons—most likely because of the buyer's expertise in merchandise of the kind being sold, but perhaps also by happenstance.[172] They should also be distinguished from cases

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168. While the court did not explicitly state that the seller was a merchant, the discussion of the seller's extensive interactions with other art dealers suggests this was the case. *See Rogath*, 129 F.3d at 265.

169. *Cf.* Robert S. Adler, *The Last Best Argument for Eliminating Reliance from Express Warranties: "Real-World" Consumers Don't Read Warranties*, 45 S.C. L. REV. 429, 472 (1994) ("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.").

170. Royal Bus. Machs. v. Lorraine Corp., 633 F.2d 34 (7th Cir. 1980).

171. Stuto v. Corning Glass Works, [1990–1991 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 12,585, at 37,578 (D. Mass. July 23, 1990).

172. Indeed, these will be analogous to cases in which a seller makes a unilateral mistake and a buyer knows the seller is making a unilateral mistake. Such cases will be rare. Cases in which a seller makes a unilateral mistake about the price of a good are more common. *See, e.g.*, Aviation Sales, Inc. v. Select Mobile Homes, 548 N.E.2d 307, 311 (Ohio Ct. App. 1988) (explaining that for a seller to succeed with a claim that it made a unilateral mistake in pricing, it must prove the buyer

in which the seller knowingly makes false promises with the intent to deceive the buyer, since in these cases the law of fraudulent misrepresentation would clearly apply.[173] Indeed, they are essentially cases in which a seller makes a unilateral mistake. There are four possible situations in which a seller might make promises in good faith that a buyer knows to be false: (1) the seller is a nonmerchant and the buyer is a merchant, (2) both the seller and buyer are nonmerchants, (3) the seller is a merchant and the buyer is a nonmerchant, and (4) both the seller and buyer are merchants.

Although there is a strong argument for holding sellers to strict legal obligations for their promises in cases such as *Royal Business Machines* and *Stuto*, where a buyer may doubt whether a seller's promises are true by virtue of personal experience with the good, the question here is quite different. Here the question is not whether courts should hold the seller to strict legal obligations for promises the buyer has reason to doubt. The question is whether courts should hold the seller to strict legal obligations for promises that the buyer knows to be false with epistemic certainty.[174]

For example, suppose a seller asserts to a buyer that a watch is a Rolex, but the buyer is absolutely certain that it is in fact a much less expensive Swatch watch; or suppose a seller asserts to a buyer that a vase is an antique from the Ming Dynasty, but the buyer is absolutely certain that it is merely a cheap imitation of a Ming Dynasty vase. These scenarios raise unique ethical issues. If the law holds sellers to strict legal obligations for all promises, then a seller would be liable for a breach of an express warranty created by a promise that a buyer knew with absolute certainty to be false at the time of contracting. The buyer could purchase the goods with the intention of making a breach of express warranty claim. In fact, a perfectly rational, utility maximizing buyer not otherwise constrained by a moral conscience *would* sue unless the expected legal costs of the lawsuit exceeded the expected damages. Holding the seller to strict legal obligations in these circumstances would thus allow the buyer to unjustly enrich itself at the seller's expense. It would appear not merely to allow the buyer to take advantage of the seller's false promise, but to *encourage* the buyer to do so. If the seller has indeed made the promise without realizing it was false, such a rule would hardly encourage desirable social ethics.

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recognized and appreciated the seller's miscalculation); Gen. Elec. Supply Corp. v. Republic Constr. Corp., 272 P.2d 201, 202–03 (Or. 1954) (refusing to rescind a contract because the buyer did not know and could not have reasonably known the seller made a mistake in quoting the price).

173. *See supra* text accompanying notes 68–69.

174. It is difficult to define epistemic certainty. The basic idea is that it is a certain belief. The Stanford Encyclopedia of Philosophy defines epistemic certainty simply as a belief that "has the highest possible epistemic status." Baron Reed, *Certainty*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), http://plato.stanford.edu/archives/sum2008/entries/certainty/.

Moreover, holding sellers to strict legal obligations for false promises might also have economically undesirable consequences. In particular, it might discourage buyers from informing sellers about the falsity of the sellers' promises.[175] The market would then lose a mechanism for correcting the spread of misinformation—any reasonable seller would cease to make false promises to other buyers as soon as the seller became aware they were false.[176] In this respect, when a buyer knows with something close to epistemic certainty that a seller's promises are false, denying the buyer damages for breach of an express warranty may have a socially beneficial external effect on transactions between the seller and other buyers.

Indeed, a rule favoring the mistaken seller might serve as an information forcing device similar to the kind Ian Ayres and Robert Gertner suggested for some contract default rules more generally.[177] In the face of a seller's false promise, the rule would encourage a buyer to reveal private information about the falsity of the seller's promises as part of the negotiation process. If the buyer wanted to convince the seller to lower the price, the buyer could do so by pointing out that the seller's promise has no value because it is not only false but will not create a legally enforceable warranty. This would at least apprise the seller of the error. The social benefits of bringing the error to the seller's attention would accrue from forestalling the seller from making the same false promise to other buyers. Although the buyer would derive no benefit individually, other buyers would benefit from an improvement in the accuracy and reliability of the seller's promises.

One could draw on the Coase Theorem to argue that it would not really matter whether the rule assigned the liabilities for the false promise to the buyer or the seller. The Coase Theorem suggests that the parties could always contract around the rule to internalize any positive externalities through a market transaction.[178] Of course, this solution to the problem would require sellers to

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175. A buyer might rely on the legal enforceability of a false promise as a means of extracting damages from a seller after the sale. If the buyer could not legally enforce the promises, this would not be an option, and the buyer would have a clear incentive to inform the seller about the falsity of the promise as a strategy for bargaining down the price of sale.

176. Any rational seller would certainly want to avoid creating obligations and bearing liabilities for making false promises to other buyers.

177. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 94 (1989) ("[E]fficiency-minded lawmakers should sometimes choose penalty defaults that induce knowledgeable parties to reveal information by contracting around the default penalty.").

178. ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 89 (5th ed. 2008) ("When transaction costs are zero, an efficient use of resources results from private bargaining, regardless of the legal assignment of . . . rights."). The logic is that regardless of how the parties assign legal rights they will bargain after the fact so that the party who most values the legal rights will hold them in the end. *Id.* at 88. Ironically, this was not what Coase meant to imply. Coase was more

reward buyers for informing them when their promises are false. It seems unlikely that this would happen. It is doubtful whether many sellers would announce a policy of rewarding buyers for providing that kind of information in advance of contracting, and the transaction costs of negotiating a reward after a buyer discovers the falsity of a seller's promise would probably be prohibitive.[179] Given the high transaction costs, it would probably be better not to hold a seller to strict legal obligations for promises that a buyer happens to know are false if the objective is to rely on market transactions to prevent the seller from making the same false promise to other buyers.[180]

There is an additional economic consideration, however, that may in some contexts argue for holding a seller liable for false promises even when a buyer knows they are false. One important objective of such a rule might be to reward parties for their investments of time, effort, and finances.[181] As a general matter, this will encourage not only the development of new production facilities and other physical infrastructure,[182] but also the creation of new knowledge.[183] Of course, intellectual property laws allow parties to exercise property rights in their inventions, creations, and expressions,[184] but they do not generally reward the parties for their knowledge and expertise unless it is covered by a patent or copyright.[185] As Anthony Kronman has suggested, one way of rewarding a buyer for the knowledge or expertise that allows the buyer to know a seller's promise is false is to allow the buyer to exercise a right in the information.[186] In

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concerned with understanding how positive transaction costs would affect the allocation of resources given the assignment of legal rights. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19 (1960).

179. The Coase Theorem assumes zero transaction costs. COOTER & ULEN, *supra* note 178, at 89. As Robert Cooter has argued, this requires that the parties to a transaction be able to negotiate an agreeable division of the surplus from their transaction with no bargaining costs. *See* Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 17. In this respect, it is unrealistically optimistic about the potential for private cooperation through market transactions. *See id.* at 14–20.

180. Coase himself would probably concur. *See* Coase, *supra* note 178, at 19 (explaining that high transaction costs create a challenge in modifying the arrangement of the parties' established legal rights).

181. *See* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 15–16 (1978).

182. *See id.* at 11–12.

183. *Id.* at 16.

184. *See id.* at 15.

185. *See* Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1930) One of the basic rules of property law is that a party cannot claim property rights in an idea or knowledge unless the idea or knowledge is covered by a patent or copyright. *Id.* ("In the absence of some recognized right at common law, or under the statutes . . . a man's property is limited to the chattels which embody his invention. Others may imitate these at their pleasure.") (citations omitted).

186. Kronman, *supra* note 181, at 14–15 ("One effective way of insuring that an individual will benefit from the possession of information . . . is to assign him a property right in the information itself . . . . Imposing a duty to disclose upon the knowledgeable party deprives him of a

this context, that would mean holding the seller to a strict legal obligation and allowing the buyer to make a breach of express warranty claim.

Kronman's analysis, however, was directed at the duty to disclose more generally.[187] It was not directed at the specific type of problem under contemplation here—one that arguably has unique moral nuances. In particular, Kronman did not contemplate the kind of positive economic externality which may figure prominently in cases where a buyer may be able to forestall a seller from making false promises to other buyers. Moreover, as Kronman suggested, the argument for not requiring disclosure is strongest when the party with the information (here, the buyer) acquired it by dint of deliberate and costly efforts; the argument is weakest when the party (the buyer) acquired it casually or by happenstance.[188] Thus, he suggests that economic considerations may strengthen the argument for imposing a duty to disclose on a case-by-case basis.[189]

This would accord with a situational approach to the problem. In some important ways, moral judgments are often situational, that is, deeply imbedded in the unique circumstances in which ethical deliberations must be made.[190] The most important situational factors in the particular disclosure problem here are whether the seller and buyer are merchants or nonmerchants. Thus, the important situations in which the problem may arise are the four situations identified at the outset of this section.[191] There are four main considerations to be weighed in each of the four possible situations: (1) the seller's moral obligation to honor its promises, (2) the buyer's moral obligation not to take advantage of the seller's vulnerability, (3) the economic benefit of preventing the seller from making the false promise to other buyers, and (4) the economic benefit of encouraging parties to invest in acquiring expertise and knowledge.

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private advantage which the information would otherwise afford. A duty to disclose is tantamount to a requirement that the benefit of the information be publicly shared and is thus antithetical to the notion of a property right which—whatever else it may entail—always requires the legal protection of private appropriation.").

187. *See id.* at 2 ("The aim of this paper is to provide a theory which will explain why some contract cases impose such a duty [to disclose] and others do not.").

188. *Id.* at 15–16.

189. *Id.* at 16. He points out, however, that the difficult factual issues may make a case-by-case approach expensive and impractical. *Id.* at 17.

190. *See* JOSEPH FLETCHER, SITUATION ETHICS: THE NEW MORALITY 26–29 (1966) (arguing that virtually all moral judgments are situational and that ethical behavior is always defined relative to its context). For instance, a sale by a merchant seller to a nonmerchant buyer occurs in a very different moral context than a sale by a nonmerchant seller to a merchant buyer. The asymmetry in the parties' sophistication is reversed; to the extent that people generally have a duty not to take advantage of others' vulnerabilities, a merchant seller has a higher moral obligation to a nonmerchant buyer than a nonmerchant seller has to a merchant buyer.

191. *See supra* p. 231.

As a general matter, sellers always have moral obligations to honor their promises,[192] so if the law allows a seller to avoid any liabilities for false promises, it might appear to undermine responsible business ethics. The first consideration argues for holding the seller liable in all four situations.[193] Most people would probably consider a buyer opportunistic if the buyer sued a seller for a false promise that the buyer knew to be false at the time of contracting. The second consideration argues for relieving sellers of their obligations in all four situations.[194]

The third consideration—the social benefit of preventing the seller from making the same false promise to other buyers—argues against holding the seller to strict legal obligations in all four situations, although the argument may actually be the strongest when the seller is a merchant. Since a merchant seller is in the business of selling goods of the kind in question, whereas a nonmerchant seller is more likely only making a one time sale, a merchant seller is much more likely to make the false promise to other buyers.

The fourth consideration—the social benefit of rewarding buyers for their knowledge—also argues in favor of holding the seller liable in all four situations, although in this case the argument may be strongest when the buyer is a merchant rather than a nonmerchant. A merchant buyer is more likely to have acquired the knowledge by virtue of an investment of time and effort, whereas a nonmerchant buyer is more likely to have acquired the information by happenstance.

The situational considerations are thus quite nuanced. Indeed, a case-by-case approach might well result in an incoherent and unpredictable body of precedents when what is needed is a simple, bright line rule. The rule that makes the most sense is one that draws on the analogy with a unilateral mistake: courts should not hold a seller to any legal obligations for making a promise that a buyer knows to be false.[195] While this might diminish the economic incentives for parties to invest in acquiring information and allow sellers to evade their moral obligations, it would also encourage buyers to inform sellers about the

192. *See supra* text accompanying note 112.

193. Of course, one might argue that merchant sellers generally have a stronger moral obligation to honor promises than nonmerchant sellers. Thus, the strength of the argument may depend on the circumstances.

194. As with the first consideration, the strength of the argument may again depend on the circumstances. A merchant buyer may have a stronger moral obligation not to exploit the vulnerabilities of a nonmerchant seller than a nonmerchant buyer has toward a merchant seller.

195. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981) ("Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.").

falsity of their promises and thus help forestall the sellers from making the same false promises to other buyers. Moreover, it would discourage buyers from behaving opportunistically by taking advantage of sellers' vulnerabilities.

VI. CONCLUSION

Both economic and moral considerations weigh in favor of holding sellers to stricter legal obligations for their promises than some courts currently hold them in applying the basis of the bargain test under section 2-313(1)(a). As a general matter, courts should hold sellers to strict legal obligations for any affirmations of fact or promises that they make about their goods unless they specifically and conspicuously disclaim such promises at the time of contracting. Courts should hold sellers to strict legal obligations for their promises regardless of whether their buyers had or should have had any reason to doubt their promises by virtue of any prior experience with the sellers' goods, unless the sellers specifically and conspicuously disclaim the promises at the time of contracting. The only situation in which a seller should be able to avoid strict legal obligations for its promises is the one the law of unilateral mistake contemplates: where the seller honestly states an affirmation of fact or promise that a buyer knows with something very close to epistemic certainty to be false.