

Winter 6-1-2020

The Unnecessary Implied Warranty of Fitness for a Particular Purpose

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CHAPMAN LAW REVIEW

Citation: Robert D. Brain, *The Unnecessary Implied Warranty of Fitness for a Particular Purpose*, 23 CHAP. L. REV. 163 (2020).

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*Robert D. Brain**

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* B.S., M.S. Stanford University; J.D. Berkeley Law. I would like to thank the very talented research assistants who were very valuable in the preparation of this Article: Natalie Camacho, Sona Patel, and Hakop Ter-Akopyan. I am also grateful to my colleague, Bryan Hull, who not only encouraged me to write this piece, but was also understanding in having the work on this Article take away time from a joint project, and my colleague Dean Justin Levitt who provided much appreciated editorial advice. I also want to thank and acknowledge the help of Professor Jennifer S. Martin of the St. Thomas University School of Law who, having heard the germ of this Article at a conference, was kind enough to offer needed help, advice, and materials. I also appreciate the comments of my Loyola colleague Professor Ted Seto who provided me with valuable advice concerning the scope and focus of the Article. Finally, I am indebted to the LMU Loyola Law School summer grant program which assisted in providing the time for this Article to be finished.

I. INTRODUCTION

You own a dry cleaner shop.¹ In the winter, it gets cold, both for your employees and your customers. But, you have a commercial steamer that has a lot more capacity to produce steam than you ask of it. Maybe you can use that excess steam to run a heater and keep everybody warm.

So, you contact a commercial heating company and explain that you want a heating system that will run off of the excess steam produced by your existing equipment. The owner of the heating company, Pat, comes to your shop, takes some measurements, does some calculations, and recommends a heating system for you.

You sign a contract for the system Pat recommended, looking only to see that the amount you are going to pay and the installation dates are what were agreed upon. You don't notice that there is no promise about the heating system being able to be powered by your existing equipment, because, well, Pat seemed to know what he was doing and you are sure Pat understood what you wanted. And anyway, you're not a lawyer. But when the system gets installed, it turns out it needs more steam to work properly than your steam machine can produce.

You sue the heating company, saying there was a breach of warranty. After all, you told Pat your requirements for the heating system and he suggested and installed one thereafter. Pat's lawyers, however, point out that there was a clause in the contract that disclaimed the warranty of fitness for a particular purpose. You ask your lawyer about it and she says she will fight for you, but Pat's lawyers have a point. She explains if *Pat* had articulated a promise to provide you with a heating system that would be powered by your existing equipment, then Pat would have made an "express warranty"² and the disclaimer in the contract would be inoperative.³ But because *you* said you wanted a heating system that would be powered by your existing equipment, and Pat just recommended a particular unit knowing you were relying

¹ This hypothetical is based on *Thorman v. Polytemp, Inc.*, 1965 WL 8338, 2 U.C.C. Rep. Serv. 772, 774 (N.Y. Cty. Ct. May 11, 1965). For a discussion of the case in greater detail, see *infra* notes 109–115 and accompanying text.

² There would be an express warranty in this situation because the seller would have made an "affirmation of fact" about the heating system, which became part of the "basis of the bargain." See *infra* note 11 for the text of U.C.C. § 2-313, which codifies the requirements to establish an express warranty, and see *infra* note 13 for a discussion of the meaning of the "basis of the bargain."

³ This is the dictate of U.C.C. § 2-316(1), see *infra* text accompanying note 126.

on his recommendation, what you got is what is called a “warranty of fitness for a particular purpose,”⁴ which *can* be disclaimed.⁵

You shake your head and argue that Pat *did* promise to install a system that met your needs—he heard what your needs were, and recommended, sold, and installed such a system. Aren’t Pat’s acts the same as a promise that the product Pat recommended would meet your needs? Your lawyer counsels that it might seem that way to a lay person, but in the law, there is a difference on which warranty you get depending on who first brings up the attribute of the good that constitutes the warranty. And the effectiveness of a disclaimer depends on that as well. You tell your lawyer such distinctions are ridiculous, and the law is an ass if the outcome of your case really turns on who mentions first “the attribute of the good that constitutes the warranty.” You are right.

The premise of this Article is that implied warranty of fitness for a particular purpose, formed in the English common law and now codified in U.C.C. § 2-315,⁶ should be eliminated from Article 2 and American common law.⁷ Not because the

⁴ There would be a warranty of fitness for a particular purpose in this situation because the seller had “reason to know [of the] particular purpose for which the goods [were] required,” and knew that the “buyer [was] relying on the seller’s skill or judgment to . . . furnish suitable goods.” See *infra* note 6 for the text of U.C.C. § 2-315, which codifies the requirements to establish a warranty of fitness.

⁵ This is the dictate of U.C.C. § 2-316(2) and (3), see *infra* text accompanying notes 105–108.

⁶ The current version of U.C.C. § 2-315 provides:

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

U.C.C. § 2-315 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017). The provision has been adopted in the commercial codes of all jurisdictions that have fully adopted the U.C.C. See *infra* note 77.

⁷ For clarification, this article is not discussing the property law version of the warranty of fitness for a particular purpose. In property law, the “warranty of fitness for a particular purpose” derives from *Ingalls v. Hobbs*, 156 Mass. 348 (1892), and applies solely to short-term rentals of furnished residential space. The modern implied warranty of habitability developed out of the warranty of fitness for a particular purpose, but the latter has survived alongside the warranty of habitability. The requirements of the doctrine of constructive eviction are not generally a prerequisite for termination of the lease if there is a breach of the warranty of fitness for a particular purpose, even in states in which such requirements must be met to permit termination as a remedy for breach of the warranty of habitability. On the other hand, this Article focuses on the warranty of fitness quality warranty that is generated upon a sale of goods. This Article also does not deal with the warranty provisions of the United Nations Convention for the International Sales of Goods (1980) (“CISG”), which are principally contained in Article 35 of the CISG. However, the if the premise of the Article were adopted by the CISG drafters, Article 35(2)(b), dealing with goods “fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract” would be deleted. In its stead, cases that would have previously been decided under Article 35(2)(b) would instead

warranty fails to protect important interests—it does. And not because the plaintiffs who recover under it are not worthy—they are. Rather, the implied warranty of fitness should be eliminated from the Code because the factual situations which give rise to it are more properly analyzed as express warranty claims, thus making the warranty unnecessary.

In addition to the benefits of aligning the legal issue with its proper theory, eliminating the warranty and analyzing fitness cases as express warranty problems will also solve various practical and theoretical problems that have dogged the implied warranty of fitness for decades. These include: (1) eliminating the differential treatment as to warranty disclaimers between express and implied fitness warranties, as discussed above, and installing a more equitable and pro-consumer doctrine in its stead;⁸ (2) abolishing the conundrum that has bedeviled courts and practitioners for almost a century, regarding the proper implied warranty to be alleged and proven where the “ordinary purpose” of a good is claimed to be the buyer’s “particular purpose”;⁹ and (3) installing a proper parol evidence rule analysis when what is currently a fitness warranty is involved.¹⁰

This Article has three major substantive parts. Part II explains why the proper theory for fitness problems is through an express warranty theory. Part III traces a brief history of the fitness warranty in the King’s courts, demonstrating that even from its inception, express warranty was the proper theory to resolve fitness issues. In fact, the judges who decided the inaugural case ushering in the implied warranty of fitness held that the express warranty was the proper theory to decide the case. Part IV explains some beneficial collateral consequences of subjecting fitness problems to the express warranty analysis, including resolving some persistent failings of the Code that have long plagued courts and practitioners dealing with the fitness warranty. Finally, an appendix is attached, with suggested edits to the U.C.C. to bring about the changes suggested by this Article.

be adjudicated under Article 35(1), which requires a seller to deliver “goods which are of the quantity, quality, and description required by the contract”

⁸ For a further explanation and discussion of the disclaimer issue, see *infra* Part IV(B).

⁹ For a further explanation and discussion of the confusion about the proper warranty when the ordinary purpose and particular purposes are coincident, see *infra* Part IV(A).

¹⁰ For a further explanation and discussion of the parol evidence rule issue, see *infra* Part IV(C).

II. WHY A "FITNESS" WARRANTY IS REALLY AN EXPRESS WARRANTY

Perhaps the best way to explain why the express warranty provision is the correct analytical framework for what would currently be a warranty of fitness case, is by illustration:

Situation I: A buyer walks into a dive shop. She walks over to the section of the store that sells watches and says to the storeowner, "My dive watch broke and I'm looking for a replacement." The owner replies, "I like the Acme 200. It's what I use. It stays watertight down to 200 feet." He then selects a new Acme 200 from the display case and hands it to her. The buyer says, "I've been doing some deeper diving lately, so a watch that will be watertight down to 200 feet is just what I need. I'll take your recommendation." She then purchases the watch and takes it on her next dive.

Situation II: The same buyer walks into the same store, and tells the same owner, "My dive watch broke and I am looking for a replacement. I've been doing some deeper diving lately, so I need a watch that will stay watertight down to 200 feet. What do you recommend?" The owner says, "I like the Acme 200. It's what I use," and selects a new Acme 200 from the display case and hands it to the buyer. She responds, "I'll take your recommendation." She then buys the watch and takes it on her next dive.

Traditional warranty law would say that an express warranty is created in Situation I, because there is an "affirmation of fact" by the seller which "relates to the goods" and which "becomes part of the basis of the [sales] bargain."¹¹ On the

¹¹ U.C.C. § 2-313 provides:

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

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

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

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

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

U.C.C. § 2-313.

other hand, warranty law would say that an implied warranty of fitness for a particular purpose is created in Situation II, because “the seller at the time of contracting ha[d] reason to know” of the “particular purpose for which the [watch was] required” and because “the buyer . . . rel[ied] on the seller’s skill or judgment to select or furnish suitable goods.”¹² This analytical distinction is nonsense.

Legally, the two situations produce the same contract. In both situations, the law should (and does) protect the buyer’s legitimate expectation of acquiring a watch that will stay watertight down to 200 feet and has a claim against the seller if it does not. As such, the two situations should be analyzed identically, and, as explained below, the express warranty theory is the proper framework for such analysis.

The only *factual* difference between the two situations is that the seller in Situation I initially mentions the warranted attribute of the good, whereas the buyer mentions the warranted attribute of the good in Situation II. However, in both situations, at the time of sale, it can be fairly said that: (1) the seller has promised the buyer that the watch will be watertight down to 200 feet; and (2) the buyer was relying on that promise in deciding to purchase the watch.¹³ As such, both situations should be analyzed and interpreted the same way, namely by protecting

¹² *Id.* § 2-315.

¹³ Of course, there is some disagreement whether the buyer must show reliance in order to recover for an express warranty due to a disagreement over the meaning of the term “basis of the bargain” in the statute. While many courts view the term as a synonym for reliance, see, for example, *Royal Bus. Machs., Inc. v. Lorraine Corp.*, 633 F.2d 34, 44 n.7 (7th Cir. 1980) (“The requirement that a statement be part of the basis of the bargain in order to constitute an express warranty ‘is essentially a reliance requirement’” (quoting *Sessa v. Riegle*, 427 F. Supp. 760, 766 (E.D. Pa. 1977), *aff’d*, 568 F.2d 770 (3d Cir. 1978))), others believe it means only that the affirmation regarding the attribute of the good need only be said during the bargaining process. See, e.g., *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1261 (Ala. 1983) (stating that a showing of reliance is not necessary to give rise to express warranties); see also *Daughtrey v. Ashe*, 413 S.E.2d 336, 338 (Va. 1992) (“In our opinion, the ‘part of the basis of the bargain’ language of Code § 8.2–313(1)(b) does not establish a buyer’s reliance requirement. Instead, this language makes a seller’s description of the goods that is not his mere opinion a representation that defines his obligation.”). There are even some who believe it shifts the burden to the seller to prove there was no reliance. See, e.g., *Hauter v. Zogarts*, 534 P.2d 377, 383–84 (Cal. 1975). See generally Steven Z. Hodaszy, *Express Warranties Under the Uniform Commercial Code: Is There a Reliance Requirement?*, 66 N.Y.U. L. REV. 468, 475–84 (1991); J. David Prince, *Defective Products and Product Warranty Claims in Minnesota*, 31 WM. MITCHELL L. REV. 1677, 1687–90 (2005). The point here, however, is not to argue for the correctness of any one of these views, but rather to establish that the analysis of the contracts arising from Situation I and Situation II should be the same in this regard. At most, a buyer in any jurisdiction would have to establish reliance, which is shown in both Situations I and II. In addition, if a jurisdiction would not require reliance on the part of the buyer to form an express warranty in Situation I, it should not require a greater showing to find an enforceable promise of water tightness in Situation II.

in the same manner the expressed attribute of the good that is an important part of the parties' bargain.

One of the problems in how the law currently approaches fitness cases is that it labels the warranty involved as an "implied" warranty. Analytically, it makes sense to call the implied warranty of *merchantability*, set forth in U.C.C. § 2-314, an "implied" warranty,¹⁴ for what is implied in establishing the merchantability warranty is the warranty itself. That is, no party has to promise or request during the bargaining process that the good will be "fit for the ordinary purposes for which such goods are used,"¹⁵ or be "of fair [and] average quality within the description,"¹⁶ or "pass without objection in the trade under the contract description"¹⁷—which are some of the statutory definitions of merchantability. The parties do not need to utter such terms because, unless disclaimed, those terms are implied-in-law and become part of the contract with a merchant seller *sub silentio*.

On the other hand, with a fitness warranty, the warranted attribute of the good—that the watch is waterproof down to 200 feet in Situation II above—is expressly stated, albeit initially by the buyer. What is implied is the seller's adoption or ratification of the attribute specified by the buyer, i.e., that the seller willingly "stands behind" or vouches for the attribute. However, under any view of normative bargaining, such adoption is fairly attributed to the seller by his or her actions and words. Indeed, the entire warranty of fitness is dependent upon the act of the

¹⁴ U.C.C. § 2-314 provides:

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

(2) Goods to be merchantable must be at least such as

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

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

U.C.C. § 2-314.

¹⁵ *Id.* § 2-314(2)(c).

¹⁶ *Id.* § 2-314(2)(b).

¹⁷ *Id.* § 2-314(2)(a).

seller in providing a good that meets the buyer's "particular [expressed] purpose." Therefore, in contractual terms, the "implied" part of the implied warranty of fitness arises from an implied-in-fact contract, or one which "arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words."¹⁸ Although it may initially seem that identifying a fitness warranty as an implied-in-fact contract may argue against analyzing it as an express warranty, just the opposite is true. This is because, analytically, the law treats implied-in-fact contracts identically with express contracts.¹⁹ Further, the notion that an act can have a communicative quality is well established in the law; for example, in waiver and hearsay cases.²⁰ Thus, no "analytical stretch" is necessary to look at fitness situations through the express warranty lens. In fact, the law, and the history of the warranty itself, command it. It is to the latter we turn next.

III. HOW DID WE GET HERE? A BRIEF HISTORY OF THE FITNESS WARRANTY

An appropriate place to start tracing the history of the fitness warranty is the beginning of the nineteenth century, during the time of the Industrial Revolution.²¹ English common law of contract had incorporated the concept of consideration for about a century,²² and contract claims were being brought in

¹⁸ 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:5 (4th ed. 2007).

¹⁹ *Weitzenkorn v. Lesser*, 256 P.2d 947, 959 (Cal. 1953) ("The only distinction between an implied-in-fact contract and an express contract is that, in the former, the promise is not expressed in words but is implied from the promisor's conduct. . . . Under the theory of a contract implied in fact, the required proof is essentially the same as under the first count upon express contract, with the exception that conduct from which the promise may be implied must be proved.").

²⁰ See e.g., *United States v. Abou-Saada*, 785 F.2d 1, 8 (1st Cir. 1986) ("We agree . . . that [Defendants'] pointing amounts to hearsay, for it is conduct intended as an assertion."); *People v. Zollbrecht*, 548 N.Y.S.2d 380, 384 (N.Y. Cty. Ct. 1989) ("The Court . . . finds that Mr. Sannicandro's statements made by way of a deliberate blinking of his eyes at a time when he was incapable of verbally communicating are admissible."); *Marles v. State*, 919 S.W.2d 669, 671 (Tex. App. 1996) ("Many nonverbal actions of a defendant at the time of arrest are relevant and admissible."); 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:28 (4th ed. 1990) (stating that intention to waive nonperformance of a condition under the Restatement Second of Contracts § 84 may be inferred from the waiving party's actions).

²¹ BRUCE MAZLISH, *THE FOURTH DISCONTINUITY: THE CO-EVOLUTION OF HUMANS AND MACHINES* 64 (1993) ("All of these developments were rooted, if one can use that organic term, in the swelling movement toward mechanization characteristic of the Industrial Revolution. Of course, that revolution drew upon earlier developments, both technical and conceptual. Only the degree and sweep of what happened in the Western world in the period from around 1760 to 1850 justifies the use of the term *revolution*.").

²² 8 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 7 (1925) ("[T]he leading characteristics of consideration . . . emerged in the sixteenth and seventeenth centuries . . .").

assumpsit.²³ Express warranties were well recognized,²⁴ and mostly in the form we have today.²⁵

At the turn of the nineteenth century, *caveat emptor* was still a guiding mercantile principle,²⁶ and because of it, the courts held there was no need for *any* implied warranty—whether merchantability or fitness.²⁷ That is, if the bread was moldy or the cloth too sheer for making a coat, the law assumed buyers would have noticed these defects during the bargaining process, and if they did not, well, that was their “tough luck.” However, as commercial opportunities increased during the Industrial Revolution, English sellers progressively stopped being peripatetic, for they did not have to travel to foreign countries to purchase goods and bring them back to England, a la Marco Polo.²⁸ Instead, they ordered goods from foreign suppliers without first seeing them, or having seen only a sample.²⁹ Rather than telling the English buyers that it was their “tough luck” for dealing with a sharp-practicing foreign seller who shipped inferior goods, the English courts instead instituted an implied warranty of merchantability in 1815, establishing a minimum

²³ *Id.* at 6 (“[I]t was during the latter half of the sixteenth century that *assumpsit* became alternative to debt. . . . By the end of the century, therefore, it had become definitely the chief contractual action of the common law.”).

²⁴ See, e.g., James B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888) (referencing a 1383 case held to be “perhaps, the earliest reported case upon a warranty”); *Denison v. Ralphson* (1682) 86 Eng. Rep. 235, 235; 1 Ventris, 365, 365 (stating that the Defendant was “to deliver to him ten pots of good and merchandizable [sic] pot-ashes, and that not regarding his promise, and to defraud him, he delivered him ten pots of ashes not merchandizable [sic], but mixed with dirt”).

²⁵ See, e.g., *Walker v. Milner* (1866) 176 Eng. Rep. 773, 775 n.a.; 4 F. & F. (“The best definition that can be given of a warranty—that it is a representation made part of the contract—appears to imply that it is a representation of some certain and existing—past or present—matter of fact; known or capable of being known; as that the article is the work of a certain maker or manufacturer . . .”).

²⁶ See, e.g., Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1186 (1931) (“Not until the nineteenth century, did judges discover that *caveat emptor* sharpened wits, taught self-reliance, made a man—an economic man—out of the buyer, and served well its two masters, business and justice.”)

²⁷ See, e.g., *Parkinson v. Lee* (1802) 102 Eng. Rep. 389, 391; 2 East 314, 320–21 (“No implied warranty can be raised from a fair price in the sale of hops any more than in the sale of a horse, where it is admitted that it does not exist. . . . If then an implied warranty be to be raised in this, it must in all other cases of sale; and then the maxim of *caveat emptor* will become an exception instead of a general rule.”).

²⁸ See KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 204 (E.M. Morgan ed., 1930) (In “a community whose trade is only one step removed from barter . . . [t]wo vital presuppositions reign: first, that the goods in question are there to be seen; second, either that everybody knows everybody’s goods, individually, in a face-to-face, closed, stable group . . .”).

²⁹ *Id.* at 204 (“Overseas trade in seaports introduces . . . dealing in goods at a distance, before they can be seen. Markets widen with improved transportation . . . [and] [t]his means reliance on distant sellers.”).

quality for commercially traded goods.³⁰ An example of this is shown in *Gardiner v. Gray*, a case dealing with the sale of twelve bags of “waste silk,” where Lord Ellenborough opined:

Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a[n] [express] warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the demonination [sic] mentioned in the contract between them.³¹

Another example is in *Laing v. Fidgeon*, a case dealing with a horse’s saddle, where Chief Justice Gibbs stated, “[T]he [seller] . . . ought to furnish a merchantable article.”³²

The first mention of a fitness warranty in the King’s Courts came ten years later in an opinion by Chief Justice Charles Abbott (Lord Tenterden), who was both the trial judge and one of the appellate judges in *Gray v. Cox*. In his capacity as appellate judge, Chief Justice Abbott said:

At the trial it occurred to me, that [when] a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. I am still strongly inclined to adhere to that opinion, but some of my learned brothers think differently.³³

His reasoning did not attract the concurrence of the other judges, but the term a buyer’s “particular purpose,” and the suggestion that a warranty arises when a seller affirms that the goods sold are “fit” for that purpose under it, had made their appearances in the common law.³⁴ However, even taking Chief Justice Abbott’s words at face value, a new implied warranty of fitness was neither needed, nor called for. It would be equally plausible to say that if a seller communicated, directly or

³⁰ Calvin W. Corman, *Implied Sales Warranty of Fitness for Particular Purpose*, 1958 WIS. L. REV. 219, 219–21 (1958).

³¹ (1815) 171 Eng. Rep. 46, 47; 4 Camp. 144, 145.

³² (1815) 128 Eng. Rep. 974, 974; 6 Taunt. 109, 109.

³³ (1825) 107 Eng. Rep. 999, 1002; 4 B. & C. 107, 115.

³⁴ The short summary of the influence of the Industrial Revolution on the gestation and birth of the two implied warranties given above is certainly the traditional view, and is an accurate one if only the decisions in the King’s Courts are examined. *See generally* Ames, *supra* note 24, at 8–10. I am working on an article tracing warranty’s history in greater detail, and the full story is a bit more nuanced. There are references to cases decided on what we would now call “warranty of merchantability” and “warranty of fitness” theories hundreds of years earlier in alternative, arbitral fora applying the principles of the Law Merchant. *See, e.g.*, 1 SELECT CASES CONCERNING THE LAW MERCHANT, A.D. 1270–1638 91 (Charles Gross ed. & trans., Selden Soc’y No. 23, 1908); 2 SELECT CASES ON THE LAW MERCHANT, A.D. 1239–1633 28–30 (Hubert Hall ed. & trans., Selden Soc’y No. 46, 1930); 2 BOROUGH CUSTOMS 182 (Mary Bateson ed. & trans., Selden Soc’y No. 21, 1906). These fora included the courts of piepowder and staple, as well as other arbitral “courts.” *See generally* Charles Gross, *The Court of Piepowder*, 20 Q.J. ECON. 231 (1906); Hamilton, *supra* note 26, at 1133.

indirectly, through words or actions, that a good she³⁵ sold would satisfy a “particular purpose” of the buyer, a warranty based on the express promise arising from those words and actions would be established upon the conclusion of the bargain.

The first case ushering in the warranty of fitness as part of the common law’s permanent consumer protection arsenal was decided four years later in *Jones v. Bright*.³⁶ *Jones* serves as an example of hard cases make bad law.³⁷ The case is hard because of its unusual facts, which are unlikely to be repeated. Regardless, as will be shown below, the common interpretation of the case—that it ushered in a new implied warranty³⁸—was incorrect from its inception. In fact, the judges who decided *Jones* thought it was an express warranty case, and the facts certainly fit an express warranty theory.

In *Jones*, the Plaintiff-buyer, Jones, owned a ship called the *Isabella*.³⁹ The Defendant-seller, Bright, owned a business that manufactured and sold copper plates.⁴⁰ The Plaintiff wanted to purchase the Defendant’s copper plates to sheath the underside of the *Isabella*.⁴¹ Copper under-cladding for a ship usually lasted four to five years.⁴²

If the facts of the case were “typical” for a fitness case, the Plaintiff would have gone to Defendant’s shop and had some conversation with the seller about the attributes and suitability of the copper plates for the *Isabella*. The analysis would then be whether the discussion of those attributes constituted a warranty. However, that did not happen. Instead, the following is what we are told:

Fisher, a mutual acquaintance of the parties, introduced them to each other, saying to the Defendants, “Mr. Jones is in want of copper for

³⁵ Single women were traders in England from at least the fourteenth century. 1 BOROUGH CUSTOMS 227 (Mary Bateson ed. & trans., Selden Soc’y No. 18, 1904).

³⁶ *Jones v. Bright* (1829) 130 Eng. Rep. 1167. There can be little doubt that *Jones* was decided as part of the emerging English consumer protection law. Lord Chief Justice Best, one of the judges who decided *Jones*, said:

It is the duty of the Court, in administering the law, to lay down rules calculated to prevent fraud; to protect persons who are necessarily ignorant of the qualities of a commodity they purchase; and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied.

Id. at 1171.

³⁷ See *Doggett v. United States*, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting) (“Just as ‘bad facts make bad law,’ so too odd facts make odd law.”); *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402, 406 (“Hard cases, it has been frequently observed, are apt to introduce bad law.”).

³⁸ See, e.g., Corman, *supra* note 30, at 220; Emlin McClain, *Implied Warranties in Sales*, 7 HARV. L. REV. 213, 218 (1893–1894); *Jones*, 130 Eng. Rep. at 1168.

³⁹ *Jones*, 130 Eng. Rep. at 1168.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

sheathing a vessel, and I have pleasure in recommending him to you, knowing you will sell him a good article;" one of the Defendants answered, "Your friend may depend on it, we will supply him well."⁴³

It is unclear whether this exchange moderated by Fisher was by letter or in person. On the one hand, it reads as if the introduction and response was by letter, as it is unlikely a defendant would say, "Your *friend* may depend on it," if Jones was standing right there.⁴⁴ However, one judge later suggested that this was "a loose *conversation* at the time of the sale."⁴⁵ In any event, this communication constituted the entire reported pre-sale discussion between the parties, and it is thus possible no promise whatsoever was directly communicated between the parties, and was only exchanged through Fisher.⁴⁶

However, either because Jones was part of the "we will supply him well" conversation, or was told about it later, he must have relied on that promise because he thereafter sent his shipwright⁴⁷ to the Defendant's warehouse. The shipwright rummaged through "sheets of various size, thickness, and weight"⁴⁸ at the facility, and selected several sheets of copper that were purchased by the Plaintiff at "market price as for copper of the best quality."⁴⁹ While it is unlikely there was no

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.* at 1171 (opinion of Best, C.J.) (emphasis added).

⁴⁶ *Id.* at 1172 (opinion of Best, C.J.). Sometime after the sale, Defendant sent Plaintiff an invoice which read simply, "Copper for the ship 'Isabella,'" along with the price for the sheathing. *Id.* at 1168. By today's commercial standards, we would expect the invoice to be generated at the time of sale, and thus be a potential source of warranty, but apparently that was not the tradition between merchants in England in the late 1800's. As stated by Chief Justice Best, "An invoice, however, is frequently not sent till long after the contract is completed . . ." *Id.* at 1171 (opinion of Best, C.J.). Only Chief Justice Best dealt with the issue of the invoice stating a warranty, and even he concluded that the promise, "We will supply him well," was ultimately the warranty on which the verdict should be upheld:

[I]f we look at the invoice alone, we see in the present case that the copper was expressly for the ship "Isabella." However, I do not narrow my judgment to that, but think on the authority of a case not cited at the bar, *Kain v. Old* (2 B. & C. 634), that "where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination." . . . Here, when Fisher, a mutual acquaintance of the parties, introduced them to each other, he said, "Mr. Jones is in want of copper for sheathing a vessel;" and one of the Defendants answered, "We will supply him well." As there was no subsequent communication, that . . . amounted to a warranty.

Id. at 1171-72.

⁴⁷ A shipwright is a "[m]an skilled in the building and repairing of ships." C.W.T. LAYTON, *DICTIONARY OF NAUTICAL WORDS AND TERMS* 341 (Brown, Son & Ferguson LTD, 2d ed. 1967).

⁴⁸ *Jones*, 130 Eng. Rep. at 1168.

⁴⁹ *Id.*

conversation while the shipwright was rummaging through the various plates at Defendant's factory, there is, again, no record of it.

The plates selected by the shipwright were put on the *Isabella*, and the vessel set sail for Sierra Leone. The copper failed on this first voyage, lasting but four months instead of the expected four to five years.⁵⁰ There was a dispute between the parties as to what caused the premature breakdown of the copper. Plaintiff's expert testified the reason was that the copper "might have imbibed more oxygen than it ought to contain" during its manufacture.⁵¹ On the other hand, Defendant claimed the failure was caused "from the singular inveteracy of the barnacles in the river at Sierra Leone, where the ship lay for some time."⁵²

The trial judge left it to the jury "to determine whether the decay in the copper was occasioned by intrinsic defect or external accident; and if it arose from intrinsic defect, whether such defect were [sic] occasioned in the process of manufacture."⁵³

The jury found that "the decay [in the copper] was occasioned by some intrinsic defect in the quality of the copper; but that there was no satisfactory evidence to shew [sic] what was the cause of that defect."⁵⁴ Verdict was therefore entered for the Plaintiff, with damages to be ascertained later by a specially appointed arbitrator.⁵⁵ Hence, while the jury found that the copper was not up to snuff, it did not specifically find a breach of any warranty. As a result, the jury obviously did not identify what that warranty was—that was left to be sorted out by the four appellate judges who heard the case.

The judges were unanimous in holding the Defendant liable because he did not provide copper suitable for sheathing ships regardless of defect or accident.⁵⁶ There were statements by each judge that *could* be read as resting the decision on a new implied fitness warranty. For example, Chief Justice Best explained that the fitness warranty was a natural extension of the implied warranty of merchantability:

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* In addition, the Defendant also asserted a caveat emptor/contributory negligence defense, claiming that, "the quality of copper might always be known by its appearance and malleability;" so that "if there had been any defect in [the copper] sold to the Plaintiff, his shipwright must have discovered it while in the act of sheathing the vessel." *Id.* The jury apparently rejected this argument, as it found for the Plaintiff. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1173–74.

If a man sells an article, he thereby warrants that it is merchantable,—that it is fit for some purpose. This was established in *Laing v. Fidgeon*. If he sells it for a particular purpose, he thereby warrants it fit for that purpose; and no case has decided otherwise. . . . Whether or not an article has been sold for a particular purpose, is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit.⁵⁷

A second judge, Sir James Park, opined that the fitness warranty had already been established in Chief Justice Abbott's (Lord Tenterden's) opinion mentioned above, *Gray v. Cox*, and that *Jones* was controlled by it:

[I]s there not, where the purchaser cannot judge of the interior of the article, and buys for a particular purpose, an implied warranty, that the article is fit and proper for the purpose for which it is purchased? . . . The principal object of attack has been the case of *Gray v. Cox*, where Lord Tenterden said, "that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." And this is not to be esteemed an obiter dictum, because the other judges differ from him. It is his judgment formally given, and goes to support the argument for the Plaintiff⁵⁸

Lord Burrough, a third judge in the case, explained his reasoning for upholding the verdict as follows:

The Defendants knew what the copper was wanted for, and made it; . . . The copper, instead of lasting four or five years, lasted only one voyage, and this was proved to have been occasioned by a defect in the manufacture. I cannot comprehend why the action should not lie.⁵⁹

And finally, the fourth appellate judge who heard the case, Judge Gaselee, wrote:

The case has been so fully gone into, that I shall make only one or two observations. . . . [I]t is clear that where goods are ordered for a particular purpose, the law implies a warranty that they are fit for that purpose. . . . How far the case might have been altered if the Defendants has not manufactured the copper, I do not say; but as to the warranty, the declaration could scarcely have been, other than it is.⁶⁰

The premise of this Article is that any implied fitness case is really an express warranty case, and such is true here, despite the language above suggesting an implied fitness warranty. None of the quoted language above is inconsistent with there being an express warranty *implied* from the acts and words of the seller. That is, if the focus was on a warranty arising from an expression

⁵⁷ *Id.* at 1172 (opinion of Best, C.J.).

⁵⁸ *Id.* at 1173 (opinion of Park, J.).

⁵⁹ *Id.* at 1174 (opinion of Burrough, J.).

⁶⁰ *Id.* at 1174 (opinion of Gaselee, J.).

of Defendant's needs as communicated by *Fisher*: "Mr. Jones is in want of copper for sheathing a vessel,"⁶¹ then the case could be read as imposing on the Defendant an implied warranty that the copper would meet Jones's needs when he thereafter sold Plaintiff the copper. However, if the focus is instead on the Defendant's promise, "We will supply him well,"⁶² and the act of selling Jones the copper, then the case is more properly understood as a breach of warranty to supply suitable copper for cladding a ship expressly undertaken by the Defendant, since the copper did not "supply" Jones "well." Hence, looking at it from the point of view of the Defendant creating the express warranty, what is "implied" is an express suitability warranty stemming from the words and actions of the Defendant in providing the copper after hearing of its intended use. It is the express promise (or rather the express warranty) of the Defendant under this view that serves as the basis of the claim. As noted above, analysis under such a theory is entirely consistent with the language from the judges quoted above.

If we were to leave the case there, an argument could be made for interpreting it as either resting on an implied fitness warranty basis or an express warranty basis. However, three of the four judges themselves held that the theory on which the case was affirmed was breach of *express* warranty, derived from the "we will supply him well" promise, and the fourth said it did not matter whether the warranty was viewed as an express or an implied one. Chief Justice Best opined:

Here, when Fisher, a mutual acquaintance of the parties, introduced them to each other, he said, "Mr. Jones is in want of copper for sheathing a vessel;" and one of the Defendants answered, "We will supply him well." As there was no subsequent communication, that constituted a contract, and amounted to a warranty. . . . *Here there has been, in my opinion, an express warranty.*⁶³

Judge Burrough similarly stated:

[A]fter Fisher had introduced the parties, and stated the purpose for which the Plaintiff wanted the copper, the Defendants warranted the article by undertaking to serve the Plaintiff well. . . . *I put it on the ground of an express warranty* and the finding of the jury that the copper was insufficient, and am of opinion that the verdict for the Plaintiff must stand.⁶⁴

⁶¹ *Id.* at 1172 (opinion of Best, C.J.).

⁶² *Id.*

⁶³ *Id.* (emphasis added).

⁶⁴ *Id.* at 1173–74 (opinion of Burrough, J.) (emphasis added).

Sir James Park stated, “the evidence of Fisher . . . goes to *shew* [sic] *an express warranty . . .*”⁶⁵ Finally, Judge Gaselee stated, “*Without enquiring whether the warranty here be express or implied, it is clear that where goods are ordered for a particular purpose, the law implies a warranty that they are fit for that purpose.*”⁶⁶

As such, read in its entirety, *Jones* should not be understood as, or used as precedent for, establishing a new implied warranty of fitness. Rather, the case should more properly be read to hold that when a defendant undertakes to supply a good that meets the specifications asked for by the buyer, by words and actions, those words and actions, by implication, constitute an affirmative promise that the goods will meet the specification. Thus, the case is more properly understood as an express warranty case, where the suitability of the copper for cladding the ship flowed from, and was, an implied-in-fact promise of the Defendant based on his sale of the copper to Jones after hearing of its intended use, and based on his promise to serve Jones “well.” As such, *Jones* is fundamentally the same case, and presents the same issues, as Situation II above.

Even though the provenance for ushering in an entirely new warranty was thin in *Jones*, the case was cited throughout the remainder of the nineteenth century as establishing the fitness warranty.⁶⁷ The warranty was thus reasonably well-entrenched in the common law when Sir Mackenzie Chalmers followed the codification urgings of Jeremy Bentham⁶⁸ and

⁶⁵ *Id.* at 1173 (opinion of Park, J.) (emphasis added).

⁶⁶ *Id.* at 1174 (opinion of Gaselee, J.) (emphasis added).

⁶⁷ See, e.g., *Brown v. Edgington* (1841) 133 Eng. Rep. 751, 756 (opinion of Bosanquet, J.); 2 Man. & G. 279, 291 (“In *Jones v. Bright*, . . . the court was of opinion, that the defendants being informed of the purpose for which the sheathing was wanted, an implied warranty arose.”); *Chanter v. Hopkins* (1838) 150 Eng. Rep. 1484, 1487 (opinion of Parke, B.); 4 M. & W. 399, 406 (“Now I agree with the authority which Mr. Byles has referred to, of *Jones v. Bright*, that if an order is given for an undescribed and unascertained thing, stated to be for a particular purpose, which the manufacturer supplies, he cannot sue for the price, unless it does answer the purpose for which it was supplied.”); *Jones v. Just* (1868) 3 QB 197 at 202–03 (Eng.) (“[W]here a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.”) (citations omitted).

⁶⁸ Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 957, 989–90 (1992) (noting that Jeremy Bentham, a nineteenth century English utilitarian philosopher, wrote a treatise, which was “arguably the most influential among scholars,” in which he attempted to structure and codify English law and urged others to do so).

authored the British Sales Act of 1893.⁶⁹ Section 14(1) of that Act provided:

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.⁷⁰

It is interesting that the British Sales Act expanded upon, and changed, the holding of *Jones* a bit. Under the Act: (1) the fitness warranty was limited to merchant sellers; (2) a specific reliance requirement was added before a plaintiff could be successful; and (3) the warranty was described as a condition, and not a term.⁷¹

The implied warranty of fitness set forth in section fourteen of the British Sales of Goods Act was itself rewritten some by Professor Williston when he presented his "Draft of An Act Relating to the Sale of Goods" in 1903,⁷² as he eliminated the merchant limitation and described the effect of meeting the criteria as establishing a warranty term, not a condition, in section fifteen of the Act:

⁶⁹ Chalmers first drafted the bill in 1888 and the draft was submitted to Parliament for comment; a revised draft was submitted in 1889 and referred to the Standing Committee on Law. M.D. Chalmers, *The Codification of the Law of Sale*, 12 J. INST. BANKERS 11, 14 (1891).

Between Chalmers' initial draft and the final form of the UK *Sale of Goods Act 1893*, there were changes in the language of the section concerned with fitness for purpose and merchantable quality that subtly altered meaning. One of these shifts concerns communication of a particular purpose. The initial draft required the buyer, relying on the seller's skill and judgment, to order goods for a particular purpose known to the seller. The April 1893 Bill required the buyer expressly or impliedly to make known to the seller the particular purpose so as to show the buyer relies on the seller. . . . It should also be noted that the side note that said caveat emptor was dropped.

Gail Pearson, *Reading Suitability against Fitness for Purpose—The Evolution of a Rule*, 32 SYDNEY L. REV. 311, 321–22 (2010). See also Corman, *supra* note 30, at 224. (identifying Chalmers as the drafter of section fourteen).

⁷⁰ Sale of Goods Act 1893, c. 71, § 14(1) (Eng.).

⁷¹ Other parts of section fourteen of the British Act, such as the "patent or trade name" exception, were put in different subsections in the American Sales of Goods Act. The idea behind this exception was that, if a buyer asked for a product with a particular trade name, e.g., a Ford F-150 Truck, a buyer could not bring a fitness claim if the truck lacked the towing capacity the buyer also mentioned he or she was looking for, since the buyer had, in essence, selected the product. See Corman, *supra* note 30, at 224–26.

⁷² SAMUEL WILLISTON, DRAFT OF AN ACT RELATING TO THE SALE OF GOODS § 15(1) (1903) (codified as amended at U.C.C. § 2-315 (1951)); see Corman, *supra* note 30, at 224 (identifying Professor Williston as the author of the Uniform Sales Act section fifteen).

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), *there is an implied warranty* that the goods shall be reasonably fit for such purpose.⁷³

The next major statutory adaptation of the warranty in the United States was in the original 1952 draft of the U.C.C., and that version remained unchanged in the 1972 version of the U.C.C.⁷⁴ The U.C.C. drafters kept the Willistonian ideas of having the section be applied as a warranty term (as opposed to a condition), and rejecting the idea that the warranty be limited to only merchant-sellers. In addition, the U.C.C. changed two requirements of section fifteen. First, the requirement of the buyer having to make "known to the seller the particular purpose for which the goods are required," was eliminated and replaced with a requirement that the seller "has reason to know any particular purpose for which the goods are required" from any source, not just from the buyer.⁷⁵ The second change eliminated the requirement that, "it *appear*[] that the buyer relies on the seller's skill or judgment," and replaced it with a requirement that the buyer actually "rely[] on the seller's skill or judgment to select or furnish suitable goods."⁷⁶ The statutory warranty of fitness has largely been

⁷³ WILLISTON, *supra* note 72, § 15(1) (emphasis added).

⁷⁴ The 1952 version of § 2-315 Implied Warranty: Fitness for Particular Purpose states the following:

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

U.C.C. § 2-315 (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1952). For comparison, see the 1972 version of § 2-315 Implied Warranty: Fitness for Particular Purpose, which states the following:

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

U.C.C. § 2-315 (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1972).

⁷⁵ *Id.*

⁷⁶ *Id.* The U.C.C. also modified the "patent or trade name" exception rule. See Corman, *supra* note 30, at 241. It removed it from the text, and added the following Comment:

The elimination of the "patent or other trade name" exception constitutes the major extension of the warranty of fitness which has been made by the cases and continued in this Article. Under the present section the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not of itself decisive of the issue. If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or

left unchanged since then, and has been adopted without change by every jurisdiction that has fully adopted the U.C.C.⁷⁷

IV. CONSEQUENCES OF ANALYZING “FITNESS” PROBLEMS UNDER AN EXPRESS WARRANTY THEORY

In addition to the jurisprudential benefit of using the proper theory to evaluate a “fitness” case, eliminating the implied warranty of fitness provision and analyzing fitness cases under the express warranty theory would create three other collateral benefits: (A) it would eliminate the problem of trying to decide the proper implied warranty claim where the plaintiff’s particular purpose is the good’s general purpose; (B) the fitness warranty would appropriately be harder to disclaim; and (C) a more accurate application of the parol evidence rule to fitness situations would result.

trade name is not sufficient to indicate non-reliance if the article has been recommended by the seller as adequate for the buyer’s purposes.

U.C.C. § 2-315, cmt. n.5 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1952).

⁷⁷ Alabama: ALA. CODE § 7-2-315 (LexisNexis 2019); Alaska: ALASKA STAT. § 45.02.315 (2019); Arizona: ARIZ. REV. STAT. ANN. § 47-2315 (2019); Arkansas: ARK. CODE ANN. § 4-2-315 (West 2019); California: CAL. COM. CODE § 2315 (Deering 2019); Colorado: COLO. REV. STAT. § 4-2-315 (2019); Connecticut: CONN. GEN. STAT. § 42a-2-315 (2019); Delaware: DEL. CODE ANN. tit. 6, § 2-315 (2019); Florida: FLA. STAT. ANN. § 672.315 (LexisNexis 2019); Georgia: GA. CODE ANN. § 11-2-315 (2019); Guam: 13, GUAM CODE ANN. § 2315 (2019); Hawaii: HAW. REV. STAT. ANN. § 490:2-315 (LexisNexis 2019); Idaho: IDAHO CODE ANN. § 28-2-315 (West 2019); Illinois: 810 ILL. COMP. STAT. ANN. 5/2-315 (West 2019); Indiana: IND. CODE ANN. § 26-1-2-315 (West 2019); Iowa: IOWA CODE ANN. § 554.2315 (West 2019); Kansas: KAN. STAT. ANN. § 84-2-315 (West 2019); Kentucky: KY. REV. STAT. ANN. § 355.2-315 (West 2019); Louisiana: LA. CIV. CODE ANN. art. 2524 (2019); Maine: ME. STAT. tit. 11, § 2-315 (2019); Maryland: MD. CODE ANN., COM. LAW § 2-315 (West 2019); Massachusetts: MASS. GEN. LAWS ch. 106, § 2-315 (2019); Michigan: MICH. COMP. LAWS ANN. § 440.2315 (West 2019); Minnesota: MINN. STAT. ANN. § 336.2-315 (West 2019); Mississippi: MISS. CODE ANN. § 75-2-315 (West 2019); Missouri: MO. ANN. STAT. § 400.2-315 (West 2019); Montana: MONT. CODE ANN. § 30-2-315 (West 2019); Nebraska: NEB. REV. STAT. ANN. § 2-315 (West 2019); Nevada: NEV. REV. STAT. ANN. § 104.2315 (LexisNexis 2019); New Hampshire: N.H. REV. STAT. ANN. § 382-A:2-315 (LexisNexis 2019); New Jersey: N.J. STAT. ANN. § 12A:2-315 (West 2019); New Mexico: N.M. STAT. ANN. § 55-2-315 (LexisNexis 2019); New York: N.Y. U.C.C. LAW § 2-315 (Consol. 2019); North Carolina: N.C. GEN. STAT. ANN. § 25-2-315 (West 2019); North Dakota: N.D. CENT. CODE ANN. § 41-02-32 (West 2019); Ohio: OHIO REV. CODE ANN. § 1302.28 (LexisNexis 2019); Oklahoma: OKLA. STAT. ANN. tit. 12A, § 2-315 (West 2019); Oregon: OR. REV. STAT. ANN. § 72.3150 (West 2019); Pennsylvania: 13 PA. STAT. AND CONS. STAT. ANN. § 2315 (West 2019); Rhode Island: 6A R.I. GEN. LAWS § 6A-2-315 (2019); South Carolina: S.C. CODE ANN. § 36-2-315 (2019); South Dakota: S.D. CODIFIED LAWS § 57A-2-315 (2019); Tennessee: TENN. CODE ANN. § 47-2-315 (2019); Texas: TEX. BUS. & COM. CODE ANN. § 2.315 (West 2019); Utah: UTAH CODE ANN. § 70A-2-315 (LexisNexis 2019); Vermont: VT. STAT. ANN. tit. 9A, § 2-315 (West 2019); Virginia: VA. CODE ANN. § 8.2-315 (2019); Virgin Islands: V.I. CODE ANN. tit. 11A, § 2-315 (2019); Washington: WASH. REV. CODE ANN. § 62A.2.315 (LexisNexis 2019); West Virginia: W. VA. CODE ANN. § 46-2-315 (LexisNexis 2019); Wisconsin: WIS. STAT. ANN. § 402.315 (West 2019); Wyoming: WYO. STAT. ANN. § 34.1-2-315 (2019).

A. Eliminating the Implied Warranty of Fitness Would Eliminate the Problems Associated with Deciding Which Implied Warranty Should Control When the “Ordinary Purpose” of the Good is Coincident with the Buyer’s “Particular Purpose” for the Good

Having fitness cases resolved under an express warranty theory will provide the benefit of eliminating a persistent implied warranty issue, namely, which implied warranty is violated when a buyer’s “particular” purpose is the “ordinary” purpose for which the good is used.⁷⁸ This is an issue because the implied warranty of merchantability is violated when goods are not “fit for the *ordinary purposes* for which such goods are used,”⁷⁹ while, of course, the implied fitness warranty is violated when the goods are not fit for the “particular purpose” of the buyer. To illustrate, suppose a buyer goes into a Home Depot and asks for a barbecue that will allow her “to safely and deliciously barbecue steaks.” Assume the Home Depot representative recommends a particular model, and the customer buys it based on that recommendation. However, the purchased barbecue never gets hot enough to cook a steak properly because of some hard-to-discover manufacturing defect that put a clog in the gas line, which eventually causes the unit to explode. The unit did not fulfill the buyer’s particular purpose—it did not allow the buyer to “safely and deliciously cook steak”—but surely the ordinary purpose of any barbecue sold at Home Depot is to cook meats, like steaks, both safely and deliciously. So which warranty was violated by the defective grill—the warranty of fitness for a particular purpose, the warranty of merchantability, or both?

Many courts have answered that when the buyer’s particular purpose and the good’s ordinary purpose coincide, they merge together to form some sort of “fitability” warranty, and a plaintiff can recover under either theory. For example, in *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, the buyer purchased “pulpwood trailers” in order to transport pulpwood,

⁷⁸ See generally U.C.C. § 2-315 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1972). To be clear, the situation I am describing is different from the situation in which a buyer conveys a non-ordinary, particular purpose to the seller, the seller furnishes what purports to be a suitable good, but the good turns out to be so shoddy that not only does it fail to serve the buyer’s particular purpose, but it is also unmerchantable. In that case, both implied warranties are violated, as contemplated by the U.C.C.’s drafters, “[a] contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.” Rather, the situation I am speaking about above is that recurring subset of cases where the “particular purpose” of the buyer is the “ordinary purpose” of the goods. See U.C.C. § 2-315, cmt. n.2 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

⁷⁹ U.C.C. § 2-314(2)(c) (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1972) (emphasis added).

which was also the ordinary purpose of the trailers.⁸⁰ The trailers did not work very well and the buyer brought suit, claiming a breach of both the warranty of merchantability and of fitness.⁸¹ At trial, however, the buyer only pursued the fitness claim, and the only jury instructions provided were on a fitness theory.⁸² The seller claimed merchantability was the proper theory because it was not aware of any “particular purpose” for the trailers, and since no verdict was entered on that theory, the verdict in Plaintiff’s favor should be reversed.⁸³ The court stated:

Great Dane contends that it was aware only of the ordinary purpose to which the pulpwood trailers would be used—hauling pulpwood—and was unaware of any other purpose. Great Dane . . . states that before it can be liable for a breach of the warranty of fitness for a particular purpose, it must be shown it, as a supplier, knew that a particular purpose was intended by the consumer, Malvern Pulpwood. Instead, Great Dane asserts only the ordinary purpose for which the trailers would be used was shown, giving rise to a warranty of merchantability—a warranty which was not incorporated in the instructions given the jury. Great Dane’s argument overlooks the fact that, under the circumstances of the case, the particular purpose involved was pulpwood hauling. If the particular purpose for which goods are to be used coincides with their general functional use, *the implied warranty of fitness for a particular purpose merges with the implied warranty of merchantability.*⁸⁴

The idea of a merger of the two warranties is clever and has been used frequently by courts for nearly a century in these types of cases.⁸⁵ However, the U.C.C. drafters instructed that

⁸⁰ 785 S.W.2d 13, 14, 17 (Ark. 1990).

⁸¹ *Id.* at 14.

⁸² *Id.* at 17.

⁸³ *Id.*

⁸⁴ *Id.* (emphasis added) (citation omitted). For lists of other cases where courts have merged fitness and merchantability concepts, see 1 JAMES J. WHITE, ROBERT S. SUMMERS & ROBERT A. HILLMAN, UNIFORM COMMERCIAL CODE § 10.36 929 n.1 (6th ed. 2012), 1 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 4:22 272 n.7 (4th ed. 2014), and 3 DAVID FRISCH, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-314:139 376 nn.10–11 (3d ed. 2013).

⁸⁵ Professor Corman, in his article on the implied warranty of fitness, observed that appellate courts have upheld “ordinary purpose” claims on fitness grounds since the 1920s:

The parallel growth of this implied warranty and of industry is typified by the automobile. At the beginning of the twentieth century the motor vehicle had scarcely left the inventor’s workshops; by 1929, there were almost thirty-two million cars and trucks in use throughout the world. During the period of initial growth of the automobile industry, courts in England and the United States were liberal in finding both particular purpose and reliance in the purchaser’s favor. Purchases for the purpose of use as a “pleasure car” or “for touring purposes,” or “to convey the purchaser from place to place,” are little more than application of the common or general purpose, and yet were found to justify reliance as purchases for a *particular* purpose. Similar decisions are to be noted in the related areas of trucks and farm tractors.

merchantability and fitness are separate and distinct theories. They have stated in the infamous Comment 2 to 2-315:

A “particular purpose” differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.⁸⁶

Comment 2 may provide more shade than light when trying to adapt it to any particular case; nevertheless, it is fairly read as stating that the two implied warranties are separate because they have different purposes.⁸⁷ That, also, is the prevailing view of leading commercial law commentators. For example, White, Summers, and Hillman say:

Those unfamiliar with the differences between the warranty of merchantability (fitness for the *ordinary* purposes for which such goods are used) and the warranty of fitness for a *particular* purpose often confuse the two; one can find many opinions in which the judges used the terms “merchantability” and “fitness for a particular purpose” interchangeably. Such confusion under the Code is inexcusable. Sections 2-314 and 2-315 make plain that the warranty of fitness for a particular purpose is narrower, more specific, and more precise. . . . [However], [a]n increasing number of courts have held that the 2-315 warranty as to fitness for a particular purpose may arise when the buyer’s “specific use” is the same as the “general use” to which the goods under contract are usually put. We are wary of such cases. They apparently enlarge the scope of the 2-315 warranty beyond the intent of the drafters.⁸⁸

Corman, *supra* note 30, at 222–23 (footnotes omitted). The “fitability” merger theory is also present in cases like *Minneapolis Steel & Mach. Co. v. Casey Land Agency*, 201 N.W. 172 (N.D. 1924). There, the buyer purchased a tractor for use on his farm, saying he needed it, among other things, for plowing. *Id.* at 173. The tractor did not meet the Plaintiff’s needs, and the court had the following to say with regard to situations in which the particular purpose and ordinary purposes are coincident:

The “particular purpose” for which the tractor was purchased was for use in connection with general farm work, discing, plowing, etc. A “particular purpose” is not some purpose necessarily distinct from a general purpose. A particular purpose is, in fact, the purpose expressly or impliedly communicated to the seller, for which the buyer buys the goods; and it may appear from the very description of the article, as, for example, “coatings,” or a “hot water bottle.”

Id. at 175.

⁸⁶ U.C.C. § 2-315 cmt. n.2 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1952).

⁸⁷ *Id.*

⁸⁸ WHITE, SUMMERS & HILLMAN, *supra* note 84, at 928–30 n.1 (citations omitted).

The authors of a leading products liability treatise agree:

More fundamentally . . . the fitness warranty is entirely distinct and independent from the implied warranty of merchantability. As lucidly explained in comment 2 to § 2-315, above, this distinction is so perfectly clear that one might reasonably conclude that an “ordinary” use by definition must be separate and distinct from a purpose that is “particular” to a buyer. . . . Notwithstanding the logic of this view, some courts remain confused. Perhaps led astray by comment 2 to § 2-315, a few courts have ruled that an ordinary use under § 2-314 can also amount to a particular purpose under § 2-315.⁸⁹

Another commercial treatise echoes this idea:

The warranties of merchantability and of fitness for a particular purpose are distinct. . . . A court must not confuse the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. However, courts have done so. The fitness of goods for their ordinary use is covered by the implied warranty of merchantability as contrasted with the non-normal use that constitutes a particular purpose.⁹⁰

If fitness and merchantability are thus left as is, courts are left with two unappealing choices in these types of cases: (1) they can fashion a merged “fitability” warranty to ensure deserving plaintiffs will recover, but in doing so, ignore the dictates of the U.C.C.’s drafters; or (2) put the plaintiff (and his or her lawyer) to the task of selecting the “correct” (or at least “correct” in the court’s view) theory, with the possibility that recovery will be denied if the wrong choice is made. Choosing the “correct” theory is not just a matter of pleading—it is also a matter of proof. Going to trial under a fitness theory requires putting on evidence that the seller “ha[d] reason to know” of the buyer’s requirements, and actual reliance by the buyer “on the seller’s skill or judgment to select or furnish suitable goods.”⁹¹ On the other hand, successfully trying a merchantability case requires proof of what the “fair average quality” is of the good delivered, or what are the “ordinary purposes for which such goods are used,” or what characteristics of the good would allow it to “pass without objection in the trade” in order to prevail.⁹²

⁸⁹ OWEN & DAVIS, *supra* note 84, at 271–72 (footnotes omitted).

⁹⁰ FRISCH, *supra* note 84, at 376 (footnotes omitted). See also BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* § 6:4 (2017) (“[T]he courts in many cases treat the two implied warranties as tweedledum and tweedledee, so that the same set of facts can lead to a breach of both.”).

⁹¹ See U.C.C. § 2-315 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

⁹² See *Id.* § 2-314(2). Of course, a successful plaintiff on a merchantability theory could also prevail upon establishing one of the other listed tests for merchantability in U.C.C. § 314(2), such as the good not being “adequately contained, packaged, and

The potential pitfalls in the difference in proof between the two implied warranties was illustrated in *Schenck v. Pelkey*.⁹³ There, the Plaintiff used the swimming pool slide manufactured by Defendants and suffered quadriplegic injuries after sliding down headfirst.⁹⁴

The trial court held for the Defendants.⁹⁵ On appeal, the Supreme Court of Connecticut noted the following confusion by the trial court:

The [trial] court construed the plaintiffs' complaint, which alleged an implied warranty "that said slide would be reasonably fit for the purpose for which it was purchased," to be a complaint invoking . . . the section of the Uniform Commercial Code that describes an implied warranty of fitness for a particular purpose.⁹⁶

In other words, although the Plaintiff alleged a breach of the warranty of merchantability (claiming the slide was not "fit for the ordinary purpose for which" such goods are used under U.C.C. § 2-314), the trial court interpreted the complaint as suing for breach of a warranty of fitness.⁹⁷ The court, therefore, instructed the jury that the Plaintiff had to show that the manufacturer knew of the particular purpose for which the Plaintiff wanted the slide, and relied on some sort of advertised purpose by the Defendants promising to fulfill that purpose to prevail.⁹⁸ Since the Plaintiff's lawyer made no such showing, the jury was left with "virtually no choice other than to find for the defendants on implied warranty."⁹⁹ However, "[t]he plaintiffs claim[ed] that they were entitled to a charge based on the implied warranty of merchantability . . . proof of which requires neither specific representations nor reliance."¹⁰⁰

The Supreme Court of Connecticut reversed, pointing out the confusion of the trial court, and holding that the Plaintiff was entitled to a merchantability instruction, since "[t]he purpose for which this slide was purchased was obviously the ordinary purpose."¹⁰¹ Hence, while the reviewing court eventually set things right, the trial court and the parties were needlessly put to the task of determining which warranty was violated,

labeled." *Id.* But the point still remains that the proof required to establish a merchantability claim is different from that needed to prevail under a fitness theory.

⁹³ 405 A.2d 665 (Conn. 1978).

⁹⁴ *Id.* at 667-68.

⁹⁵ *Id.* at 668.

⁹⁶ *Id.* at 670 (footnote omitted).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 670-71 (footnote omitted).

¹⁰¹ *Id.* at 671.

resulting in a mistaken, outcome-determinative choice by the court, all due to the confusing analysis when a particular and ordinary purpose become conflated. There are other such cases in which the deserving plaintiff was not so fortunate.¹⁰²

If U.C.C. § 2-315 were eliminated, this confusion would go away. If, by words and actions, an express warranty that a good has certain attributes is created, then suit can, and should, be brought on an express warranty theory, regardless of whether the attribute is the ordinary purpose for which the good was sold. There would be no penalty to the plaintiff for also bringing an implied merchantability claim in addition to an express warranty one, since, where reasonable, “[w]arranties whether express or implied shall be construed as consistent with each other and as cumulative” under U.C.C. § 2-317.¹⁰³ More importantly, however, there would also be no penalty to the plaintiff for *not* bringing a merchantability claim in that situation, since the two warranties would act independently, even if they might sometimes cover the same transaction.¹⁰⁴

¹⁰² See *Beth Schiffer Fine Photographic Arts, Inc. v. Colex Imaging Inc.*, No. 10-cv-5321 (WHW), 2014 U.S. Dist. LEXIS 65338 *1, *31–35 (D.N.J. May 13, 2014), as another example of the perils facing a plaintiff trying to choose the correct implied warranty theory because of the differences in proof between fitness and merchantability. There, the Plaintiff-buyer provided a variety of services to commercial and professional photographers, including making photographic prints. *Id.* at *1, *34. The Plaintiff purchased a printer, seeking a “professional grade machine.” *Id.* at *2. However, the printer did not work, and the Plaintiff brought suit claiming a breach of both fitness and merchantability warranties. *Id.* at *3–5. The court noted that “[i]f there is only one purpose asserted, a plaintiff may not assert claims under both implied warranties,” and that “[t]he particular purpose warranty ‘is not triggered when the buyer communicates to the seller that the buyer intends to use the goods for their ordinary purpose.’” *Id.* at *31–32 (quoting *Ferrari v. Am. Honda Motor Co.*, No. A-1532-07T2, 2009 N.J. Super. LEXIS 346 (Jan. 30, 2009)). Determining that “processing and printing photographic prints for professional operators is ‘the general purpose for which [the machines are] manufactured and sold,’” the court found that there was not a breach of an implied warranty of fitness. *Id.* at *34–35 (citation omitted). The court acknowledged, however, had the Plaintiff “shown that [the] Defendant knew it intended to use its machine in a setting so susceptible to vibrations,” it may have prevailed on a fitness theory; but since that had not been made clear to the seller, a fitness claim could not be sustained. *Id.* at *35. The court also held that the Plaintiff had not proven a breach of the merchantability warranty as “Plaintiff ha[d] failed to create a genuine issue of material fact that the [machine] was not reasonably fit for its ordinary purpose,” since “[t]he record supports only a finding that the machine did not function in the circumstances in which Plaintiff attempted to use it.” *Id.* As such, the verdict for the Defendant was upheld, due to the Plaintiff’s confusion on what had to be proven. *Id.* at *31–36.

¹⁰³ See U.C.C. § 2-317 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017); see also *id.* § 2-315, cmt. n.2 (“A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.”).

¹⁰⁴ See Corman, *supra* note 30, for a situation in which the two implied warranties might justifiably coexist in the same transaction.

B. Eliminating the Implied Fitness Warranty Would Change the Rule as to Disclaiming What are Now Fitness Warranties (and Rightly So)

Another beneficial consequence of eliminating U.C.C. § 2-315 is that warranty disclaimers for what is now the fitness warranty would be more appropriately analyzed and applied.

Under the U.C.C. as it currently stands, two subsections govern the disclaimer of a fitness warranty. The first is U.C.C. § 2-316(2), which provides that to disclaim an implied warranty of fitness, “the exclusion must be by a writing and conspicuous.”¹⁰⁵ The Code does not require the use of any particular word to disclaim the warranty—not even the words “warranty” or “fitness.”¹⁰⁶ However, the Code provides exemplar disclaimer language in § 2-316(2), stating that “[l]anguage to exclude all implied warranties of fitness is sufficient if it states, for example, that ‘There are no warranties which extend beyond the description on the face hereof.’”¹⁰⁷

The following subsection, U.C.C. § 2-316(3), provides instruction for how to disclaim both implied warranties—merchantability and fitness—at the same time. It provides that, “all implied warranties are excluded by expressions like ‘as is,’ ‘with all faults,’ or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.”¹⁰⁸

The case on which the opening to this Article was loosely based, *Thorman v. Polytemp, Inc.*, illustrates the relative ease with which a fitness warranty can be disclaimed.¹⁰⁹ There, the buyer, a dry cleaner, purchased a steam heating unit for its premises.¹¹⁰ It discussed its needs and desires with the Defendant, telling the Defendant that it wanted to get the steam to run the new heating unit from its existing dry-cleaning equipment.¹¹¹ As the court explained:

¹⁰⁵ U.C.C. § 2-316(2).

¹⁰⁶ See generally U.C.C. This is in contrast to a disclaimer of the implied warranty of merchantability, where the drafters have mandated use of the word “merchantability” for any valid disclaimer. *Id.* § 2-316(2).

¹⁰⁷ *Id.* One cannot be faulted for doubting that if the “average Joe” who reads “[t]here are no warranties which extend beyond the description on the face hereof” on a purchase and sale document would immediately come to the conclusion that no warranty of fitness for a particular purpose would apply to the transaction. *Id.* If nothing else changes as a result of this Article, hopefully a U.C.C. drafter will agree that some editing of the exemplar fitness disclaimer is warranted.

¹⁰⁸ *Id.* § 2-316(3)(a).

¹⁰⁹ 1965 WL 8338, 2 U.C.C. Rep. Serv. 772, 774 (N.Y. Cty. Ct. May 11, 1965).

¹¹⁰ *Id.* at 773.

¹¹¹ *Id.* at 773–74.

Plaintiff contends that the contract was for the installation of the space heating unit for operation in the existing steam system in conjunction with the dry cleaning and pressing equipment which was being and was to be supplied from the same boiler; that, having surveyed the existing steam system and having ascertained the boiler's rated BTU per hour output capacity and the requirements of the equipment it was then serving, defendant impliedly warranted that the heater unit it recommended was fit for plaintiff's particular purposes as disclosed to defendant's engineer; [and] that it knew that plaintiff relied on defendant's skill and judgment in the selection and furnishing of a suitable space heating unit to be operable within the existing steam generating system.¹¹²

However, the written contract between the parties had the following disclaimer: "The warranties and guarantees herein set forth are made by us and accepted by you in lieu of all statutory or implied warranties or guaranties [sic], other than title."¹¹³ There was no promise in the written contract concerning the steam from the dry cleaning equipment being sufficient to power the heating unit.¹¹⁴

In finding for the Defendant, the court determined that:

But for the disclaimer provisions of the contract, the facts here established would have sustained a finding that such an implied warranty rose in this case, and that the warranty had been breached. . . . These provisions negate plaintiff's claim of an implied warranty of fitness for a particular or intended use or purpose, and bar his recovery, for he cannot be given the benefit of a warranty which he has expressly waived.¹¹⁵

While a seller can thus relatively easily disclaim fitness warranties, express warranties are much harder to disclaim under the Code. The U.C.C. drafters made it clear that when a seller tries to negate or limit an *express* warranty, any such incompatible words of "negation or limitation [of the express warranty] [are] inoperative."¹¹⁶

Express warranties are difficult to disclaim because a consumer is more likely to be aware of the warranty as opposed to the disclaimer.¹¹⁷ By definition, an express warranty term

¹¹² *Id.* at 773.

¹¹³ *Id.* at 774.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ U.C.C. § 2-316(1) (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017).

¹¹⁷ See Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI. KENT L. REV. 199, 242-43 (1985) ("It seems safe to assume that sellers are not in the habit of pointing out implied warranty disclaimers to consumers. And it is difficult to believe that consumers actually read such disclaimers at or before the time of the sale. In fact, the realities of much consumer merchandising suggest that, as

must be a “basis of the bargain” for the warranty to apply, and any attempt to dangle an enticing term in front of a buyer, causing him or her to buy the product, and then whisking it away by some sort of written disclaimer on the receipt or in the contract, is abhorrent and not tolerated.¹¹⁸ Indeed, a seller who knows he or she is not going to stand behind a material, “dickered” attribute promised during contract negotiation may have committed fraud, and has demolished an important pillar on which the foundation of the bargain rests.¹¹⁹

*Carpetland U.S.A. v. Payne*¹²⁰ is an example of how the Code deals with disclaimers in an express warranty context. There, Payne was shopping for carpet at the Defendant’s store, and was assisted by a sales representative named Lewis.¹²¹ As the court recounted, Payne testified, “I just asked [Lewis], uh, how long—was there a warranty with it, and he said a year. If anything went wrong, they would replace it”¹²² The carpet unraveled a few weeks after it was installed but Carpetland refused to replace it, relying on the warranty disclaimer found on the reverse side of the sales contract: “EXCEPT FOR DESCRIPTION ON REVERSE SIDE HEREOF, BUYER ACKNOWLEDGES THAT NO EXPRESS OR IMPLIED WARRANTIES (INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS) HAVE BEEN MADE BY SELLER AND SELLER HEREBY DISCLAIMS ALL SUCH WARRANTIES. THERE ARE NO WARRANTIES

compared with other form terms, disclaimers have *less* chance of being read.” (footnotes omitted)); *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 330 (1963) (“Some jurisdictions go so far as to require that a seller ‘fairly procure’ his *disclaimer* by bringing it to the actual notice of the buyer.” (emphasis added)).

¹¹⁸ U.C.C. § 2-313.

¹¹⁹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 164 (Am. Law Inst. 1981); see also, e.g., Kurt M. Saunders, *Can You Ever Disclaim an Express Warranty?*, 9 J. BUS. ENTREPRENEURSHIP & L. 59, 62 (2015) (citation omitted) (“To allow a seller to disclaim an express warranty that the seller freely promised would appear to be illogical. As the comment to section 2-313 states: ‘Express warranties rest on “dickered” aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms.’”); accord JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 101 (5th ed. 2011) (“It would, for example, be ludicrous to honor a clause generally disclaiming all express warranties. If given literal effect, such a clause would effectively disclaim even the express warranty arising from a description of the goods.”); Vincent A. Wellman, *Essay: The Unfortunate Quest for Magic in Contract Drafting*, 52 WAYNE L. REV. 1101, 1109 (2006) (“A moment’s reflection confirms that the very idea of disclaiming all express warranties is not only self-defeating, but would be ludicrous in effect. . . . If there were truly no warranties, then a contract to sell a car could be fully satisfied by delivery of a skateboard . . . because the complete absence of warranty would mean that there would be no basis on which to assert that delivery of a skateboard . . . did not satisfy the contract’s terms.”).

¹²⁰ 536 N.E.2d 306 (Ind. Ct. App. 1989).

¹²¹ *Id.* at 307.

¹²² *Id.* at 308.

WHICH EXTEND BEYOND THE FACE HEREOF.”¹²³ The court was little impressed with Carpetland’s supposed disclaimer, and relying on the version of U.C.C. § 2-316(1) in the Indiana Commercial Code and prior case law, the court stated:

If an express warranty and a disclaimer of an express warranty exist in the same sale, an irreconcilable conflict emerges. If it is unreasonable or impossible to construe the language of an express warranty and the language of a disclaimer as consistent, the disclaimer becomes inoperative. In the present case Lewis’s assertion that the carpet was guaranteed for one year and the disclaimer which purported to negate all express warranties were clearly inconsistent. . . . Therefore, the disclaimer is deemed inoperative and its existence cannot stand as a bar to Payne’s recovery.¹²⁴

Surely, if Payne could enforce the carpet replacement guarantee even in light of a disclaimer, the buyer in Situation II above should be able to enforce the representation that the watch would stay watertight down to 200 feet in the presence of a disclaimer as well. The law cannot allow the seller of the watch to dangle the down-to-200-feet dickered term in front of the buyer and then take it away by means of a few printed words on a sales receipt, like in *Carpetland U.S.A.*, especially when it would not countenance such a tactic in Situation I. The buyer in both Situations I and II relied on the articulated promise of the watertight attribute of the watch and would be much more conscious of the warranty promise than any disclaimer slipped into the sales contract. The best way to stop the possibility of having a disclaimer trump a fitness warranty is to treat the warranty for what it is—an express warranty—and to use U.C.C. § 2-316(1)’s direction that words of negation and limitation are inoperable to defeat any express warranty.

C. Eliminating the Implied Fitness Warranty Would Allow for a More Equitable Application of the Parol Evidence Rule

As explained above, analyzing disclaimers of what is now a warranty of fitness using the “words-of-negation” approach of U.C.C. § 2-316(1) is both fairer and consistent with normative bargaining.¹²⁵ However, that approach is subject to one potentially significant limitation—the parol evidence rule. U.C.C. § 2-316(1) provides, in its entirety:

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

¹²³ *Id.* at 309.

¹²⁴ *Id.* (citations omitted).

¹²⁵ See U.C.C. § 2-316(1) (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

construed wherever reasonable as consistent with each other; *but subject to the provisions of this Article on parol or extrinsic evidence* (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.¹²⁶

That is, when an express warranty and a disclaimer eliminating that warranty are both in evidence, the inoperative clause of U.C.C. § 2-316(1) directs that the disclaimer be disregarded. However, there is a possibility that an oral warranty made while the deal is being negotiated will never make it into evidence because it will be blocked by the application of the parol evidence rule, leaving only the disclaimer as the controlling term. This is especially more likely when the written contract has an effective integration clause, like in the case of *Silver v. Porsche of the Main Line*,¹²⁷ where the court held that “the fully integrated, written purchase order contract containing an ‘as is’ clause would bar the introduction of parol evidence of pre-contract representations made by the Dealer . . . [because the integration clause] both ‘cancels and supercedes’ any prior agreements”¹²⁸

Because the parol evidence rule might keep an oral warranty from the jury that was crucial to the buyer’s purchase decision, the parol evidence clause should be eliminated from U.C.C. § 2-316(1), as it is a terrible rule. However, its history and the way courts have diminished its impact make for an interesting story.

The original 1951 version of § 2-316(1) had no parol evidence clause, and simply disallowed any express warranty disclaimer or words of limitation.¹²⁹ The only mention of parol evidence was in Comment 2 to the provision, noting that a buyer’s false assertion of express warranty might be kept out of evidence by virtue of the parol evidence rule.¹³⁰ However, in the 1957 version of the Code, the drafters added the parol evidence clause to U.C.C. § 2-316(1), so as to take the idea of protecting a wrongly accused seller with the parol evidence rule from a comment to the text (and it is that version which persists today).¹³¹

The provision has not proven popular with the courts, understandably, because, in most cases, rather than keeping a

¹²⁶ *Id.* (emphasis added).

¹²⁷ No. 1057, 2015 WL 7424848, at *1, *3, *4 (Pa. Super. Ct. Mar. 10, 2015).

¹²⁸ *Id.* at *3–4; *see also*, MURRAY, JR., *supra* note 119, § 101 (“A statement amounting to an express warranty will be inadmissible if the writing of the parties is so final and complete that reasonable parties would certainly include such a statement of fact about the goods in such a writing.”).

¹²⁹ U.C.C. § 2-316 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, Proposed Final Draft Spring 1950).

¹³⁰ *Id.*

¹³¹ U.C.C. § 2-202 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1957).

false assertion of warranty out of evidence, it has, in fact, deprived a deserving plaintiff of recovery. As a leading treatise put it, “[C]ourts are somewhat hostile toward efforts to employ the parol evidence rule in this way, particularly in cases involving consumers.”¹³² As a result, courts have come up with a number of ways to limit the application of the parol evidence rule in express warranty cases. These include:

1) Finding that the written contract is only partially integrated, and thus allowing the express warranty into evidence as a “consistent additional term.” As Professor Richards noted, “If the buyer can persuade the court that the written agreement is only partially integrated, parol evidence of express warranties will be admissible as consistent additional terms”,¹³³

¹³² 3 FREDERICK H. MILLER & WILLIAM H. HENNING, HAWKLAND’S UNIFORM COMMERCIAL CODE SERIES § 2A-214:7 (Carl S. Bjerre, database updated June 2019).

¹³³ Janet L. Richards, *As-Is Provisions—What Do They Really Mean?*, 41 ALA. L. REV. 435, 441 (1990); see e.g., *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575, 580 (8th Cir. 1980) (“There was no evidence that indicated the parties intended the manual or this sentence in the manual to be a final expression of their agreement. Therefore, the parol [express] warranties are not barred.”); *Ltd. Flying Club, Inc. v. Wood*, 632 F.2d 51, 57 (8th Cir. 1980) (“The description of the airplane as set forth in the logbook [the source of the express warranty] is . . . a consistent additional term and may be introduced to explain the actual agreement between the parties.”); *Zutz v. Case Corp.*, No. 02-1776 (PAM/RLE), 2006 WL 463539, at *1, *3 (D. Minn. Feb. 24, 2006) (“The Court finds that the parol evidence is admissible in this case. The purchase order form does not contain a merger or integration clause. . . . Thus, the substance of the alleged express warranties does not contradict the purchase order form.”); *CGBM 100, LLC v. Flowserve US, Inc.*, No. G-15-026, 2016 WL 7475701, at *1, *2 (S.D. Tex. Dec. 29, 2016) (“[T]he merger clause can offer Flowserve no escape since it cannot be seriously contended that Plaintiffs intended the written contract to be a complete and exclusive statement of the terms of the agreement.”); *Potter v. Shields*, 140 N.W. 500, 501-02 (Mich. 1913) (“[T]he contract relied upon consists of a letter written by defendants and its alleged acceptance in an oral conversation. It cannot be claimed that the written instrument is the completed contract; and it has been repeatedly held that in such a case parol evidence may be had to show that a warranty constituted a part of the contract.”); *A & A Discount Ctr., Inc. v. Sawyer*, 219 S.E.2d 532, 535 (N.C. Ct. App. 1975) (“It is our opinion that the printed form contract executed by the parties was not intended to integrate and supersede all of the negotiations, representations and agreements between the parties, and that the evidence of the representation or warranties that the pool would be suitable for commercial use was not excluded by the parol evidence rule”); *Barrientos v. Sulit*, 133 Misc. 2d 1061, 1063 (N.Y. City Ct. 1986) (“The fact that the warranty was oral and the contract of sale was written does not invoke the parole evidence rule to ban proof of the warranty. I find that the written agreement was not intended as a complete and exclusive statement of the terms of the agreement, and thus, evidence of express warranty was admissible.”); *Morgan Bldgs. & Spas, Inc. v. Humane Soc’y of Se. Tex.*, 249 S.W.3d 480, 488 (Tex. App. 2008) (“Considering the surrounding circumstances, we conclude the written purchase agreement was not intended to embody the complete and exclusive terms of the agreement of the parties, and is only partially integrated. Under the parol evidence rule, the trial court could consider evidence of consistent additional terms to explain or supplement the terms of the written agreement.” (citations omitted)); WHITE, SUMMERS & HILLMAN, *supra* note 84, § 13:4 (“A written agreement may be contradicted by parol evidence if it [is] not intended by the parties as a final expression of their agreement.”); CLARK & SMITH, *supra* note 90, § 4:28 (noting that some courts will not only determine that a writing is partially integrated, but also hold

2) Finding that the written agreement is ambiguous, and thus the express warranty should be admitted to explain the vague contract;¹³⁴

3) Finding that the seller who makes an oral express warranty and thereafter attempts to disclaim it, has committed fraud, and the fraud vitiates the disclaimer;¹³⁵

4) Finding that the express warranty was an expression of a course of dealing, course of performance, or usage of trade, and thus admissible to explain the agreement. As one court explained, “the court admitted parol evidence to show that, under the parties’ course of performance, the language contemplated a 30-day warranty against latent mechanical defects that could not be discovered by the buyer’s initial inspection of the car”;¹³⁶ and

5) Finding that the disclaimer is unconscionable.¹³⁷

If the parol evidence provision in § 2-316(1) is not eliminated, these same limitations can be used to allow into evidence the making

that an “oral express warranty is nothing more than an ‘additional consistent term’ for which the writing leaves room”).

¹³⁴ See, e.g., *Ohio Sav. Bank v. H.L. Vokes Co.*, 560 N.E.2d 1328, 1334 (Ohio Ct. App. 1989) (“The purchase order was incomplete since it did not contain the engineers’ actual specifications. Therefore, evidence regarding the engineers’ specifications and how they were compiled, which would constitute additional terms of the contract, should have been admitted to explain or supplement the contract between the parties.”); *Mobile Hous., Inc. v. Stone*, 490 S.W.2d 611, 615 (Tex. Civ. App. 1973) (“[P]arol testimony [of the express warranty] was properly admitted to remove the said ambiguities with respect to the description of the subject matter of the contract.”).

¹³⁵ See also, e.g., *Pinken v. Frank*, 704 F.2d 1019, 1023–24 (8th Cir. 1983) (“It would be indeed ironic if this court were to blindly apply a fraud preventing doctrine—the parol evidence rule. . . . We simply cannot accept the proposition that the parol evidence rule was designed to foreclose a showing of fraud by preventing the admission of oral misrepresentations contradicting the terms of a written contract.”); *City Dodge, Inc. v. Gardner*, 208 S.E.2d 794, 798 (Ga. 1974) (“In this case, parol evidence of the alleged misrepresentation was admissible on the question of fraud and deceit. As the antecedent fraud was proven to the satisfaction of the jury, it vitiated the contract. We hold, therefore, that the Uniform Commercial Code does not preclude an action in tort based upon fraudulent misrepresentation” (citation omitted)); *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 255 S.E.2d 682, 683 (Va. 1979) (“A buyer can show that a contract of sale was induced by the seller’s fraud, notwithstanding . . . the written contract contains covenants waiving warranties or disclaiming or limiting liabilities. “The express warranty, which purports to be “in lieu of all other warranties” does not render the seller immune from fraud that induced [a] contract. The warranty stands no higher than the contract which is vitiated by the fraud.” (quoting *Packard Norfolk v. Miller*, 198 Va. 557, 565 (1956))).

¹³⁶ *Leveridge v. Notaras*, 433 P.2d 935, 941 (Okla. 1967); see also, e.g., CLARK & SMITH, *supra* note 90, § 4:29 (“§ 2-202(a) provides that a writing may be ‘explained’ or ‘supplemented’ by course of dealing or usage of trade under § 1-205 or by course of performance under § 2-208.”).

¹³⁷ See, e.g., *Seibel v. Layne & Bowler, Inc.*, 641 P.2d 668, 671 (Or. Ct. App. 1982) (“[U]nder the UCC, courts are to limit the application of contract provisions so as to avoid any unconscionable result . . . it would be unconscionable to permit an inconspicuous merger clause to exclude evidence of an express oral warranty”); CLARK & SMITH, *supra* note 90, § 4:31 (2017) (noting that courts will invalidate a disclaimer or merger clause on unconscionability grounds in order to admit oral express warranties).

of an express “fitness” warranty, even in the presence of a merger clause, and even in the face of a parol evidence rule argument. That way, the “words of negation . . . being inoperative” doctrine would allow the warranty to be enforceable. Once again, it does not make sense for the buyer in cases like Situation II to be denied warranty protection through application of the parol evidence rule, as occurred in *Silver*, when there are so many arguments to defeat application of the rule in cases like Situation I.

V. CONCLUSION

When buyers express a purpose for which they want a good, and the seller undertakes to supply them with a good that will meet their needs, the seller has made an express promise that the good will suffice when the sale is consummated. Under normative bargaining expectations, that promise is as express as if the seller had actually said, for example, “the watch is watertight down to 200 feet.” As such, the law should treat these situations as express warranty claims, and eliminate as unnecessary the implied warranty of fitness for a particular purpose. Not only does such an analysis make more analytical sense, it also solves some persistent problems that have plagued those seeking to allege and judge an implied fitness warranty case.

VI. APPENDIX

If any state, or the National Conference of Commissioners on Uniform State Laws, is persuaded that U.C.C. § 2-315 should be eliminated and fitness cases should be analyzed as express warranty cases under U.C.C. § 2-313, what follows is suggested language to effect that change, presented in redlined form.

Suggested Amendments to Article 2:

§ 2-313. Express Warranties by Affirmation, Promise, Description, Sample, and Action.

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

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. Such affirmation of fact can be made by the seller directly, via language conveying such affirmation or promise, or by the seller indirectly, by providing goods purportedly meeting the buyer’s needs after the buyer has made it reasonably apparent that the buyer is looking to the seller to supply goods with particular attributes.

(b) Any description of the goods, whether by language of description provided by the seller, or by the seller's supplying goods in response to a buyer's request to the seller to provide goods with a particular attribute, which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

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

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, or that the seller be the one who initially articulates the affirmation, promise or description, so long as the buyer has made it reasonably apparent that he or she is looking to the seller to supply goods which meet specified criteria and the seller thereafter undertakes to provide goods sufficient to meet buyer's needs, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Official Comment

Prior Uniform Statutory Provision: Sections 12, 14 and 16, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To consolidate and systematize basic principles with the result that:

1. "Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. ~~"Implied" warranties~~ The "implied" warranty of fitness rests so clearly on a common factual situation or set of conditions with a merchant seller that no particular language or action is necessary to evidence them it, and they it will arise in such a situation unless unmistakably negated.

This section reverts to the older case law insofar as the warranties of description and sample are designated "express" rather than "implied." However, by virtue of the 2019 amendment, it also now establishes that what was previously a warranty of fitness, where a buyer describes the desired attribute(s) of the good and the seller furnishes a good that purportedly meet such attribute(s), creates an express warranty and should be analyzed under this section.

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer, whether directly or indirectly, as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, whether made directly to the buyer or by means of supplying goods to the buyer after learning that the buyer expects the seller to deliver goods with certain attributes, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller, directly or indirectly, 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. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316.

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

5. Paragraph (1)(b) makes specific some of the principles set forth above when a description of the goods is first given by the seller or the buyer. A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a "model" which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods. Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject-matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material nor is whether the words of description or affirmation or samples come first from the buyer or the seller. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional

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

8. Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question remains the same: What statements or actions of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller, and the actions of the seller in furnishing the good after reasonable notice that the buyer is relying on the seller to furnish goods with particular attributes, do so unless good reason is shown to the contrary. The provisions of subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

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§ 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but ~~subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202)~~ words of negation or limitation is **are** inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), ~~to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.~~ Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof." can be disclaimed or modified by: (i) use of the word "merchantability" and in case of a writing must be conspicuous; or (ii) use of expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of the warranty and makes plain that there is no implied warranty unless the circumstances indicate otherwise; or (iii) by course of dealing, course of performance or usage of trade.

(3) ~~Notwithstanding subsection (2)~~

~~(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all~~

faults” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and

~~(b)(a)~~ **(a)** When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty of merchantability with regard to defects which an examination ought in the circumstances to have revealed to him; ~~and~~

~~(e)~~ **(b)** An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

Official Comment

Prior Uniform Statutory Provision: None. See sections 15 and 71, Uniform Sales Act.

Purposes:

1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude “all warranties, express or implied.” It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of the implied warranties of merchantability only by conspicuous language or other circumstances which protect the buyer from surprise.

2. ~~The seller is protected under this Article~~ Protections for the seller against false allegations of oral warranties may be provided, when appropriate, by its this Article’s provisions on parol and extrinsic evidence and against unauthorized representations by the customary “lack of authority” clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

~~5~~ 4. Subsection (2) presupposes that the implied warranty ~~in question of merchantability~~ exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. ~~Thus, unless the provisions of this Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had "reason to know" under the section on implied warranty of fitness for a particular purpose.~~

~~6~~ 5. The exceptions to the general rule set forth in ~~paragraphs (a), (b) and (c) of subsection (3)~~ (2) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties of merchantability ~~are~~ is made or that a ~~certain implied warranty~~ it is being excluded.

~~7~~ 6. Paragraph ~~(a) of subsection (3)~~ (ii) of subsection (2) deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. ~~The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.~~

~~8~~ 7. Under ~~paragraph (b) of subsection (3)~~, the implied warranties of merchantability may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. "Examination" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he or she unreasonably fails to examine the goods before he or she uses them, resulting injuries may be found to result from his or her own action rather than proximately from a breach of warranty. See Sections 2-314 and 2-715 and comments thereto.

In order to bring the transaction within the scope of "refused to examine" in ~~paragraph (b) subsection (3)~~, it is not sufficient that the goods are available for inspection. There must in

addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand. Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty. In such cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by subsection (1) of the present section. The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

§ 8. The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the ~~implied warranties may be excluded~~ does not attach. The warranty of fitness for a particular purpose An express warranty would not normally arise since in such a situation ~~there is usually no reliance on the seller by the buyer~~ the specifications are not usually part of the basis of the bargain between the two, since there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. ~~Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.~~

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§ 2-317. Cumulation and Conflict of Warranties Express or Implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace an inconsistent implied warranty other than an implied warranty of fitness for a particular purpose warranty of merchantability.

Official Comment

~~Prior Uniform Statutory Provision:~~ On cumulation of warranties see Sections 14, 15, and 16, Uniform Sales Act.

Changes: Completely rewritten into one section.

Purposes of Changes:

1. The present section rests on the basic policy of this Article that no warranty is created except by some conduct (either affirmative action or failure to disclose) on the part of the seller. Therefore, all warranties are made cumulative unless this construction of the contract is impossible or unreasonable.

This Article thus follows the general policy of the Uniform Sales Act except that in case of the sale of an article by its patent or trade name the elimination of ~~the~~ an express warranty of fitness depends ~~solely~~ on whether the buyer has ~~relied on the seller's~~ asked the seller to use his or her skill and judgment in providing a product that meets any expressed needs of the buyer, or whether the seller has undertaken only to provide the good whose patent or trade name was provided by the buyer. ; ~~the use of the patent or trade name is but one factor in making this determination.~~

2. The rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from the circumstances of their transaction shall prevail. These rules of intention are to be applied only where factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties which later turn out to be inconsistent. To the extent that the

seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.

3. The rules in subsections (a), (b) and (c) are designed to ascertain the intention of the parties by reference to the factor which probably claimed the attention of the parties in the first instance. These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable.