"PASS THROUGH" AND ADVERTISING WARRANTIES IN THE CURRENT AND IN THE PROPOSED REVISION OF UCC ARTICLE 2

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"PASS THROUGH" AND ADVERTISING WARRANTIES
IN THE CURRENT AND IN THE PROPOSED REVISION OF UCC ARTICLE 2

by

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LL.B. Dokuz Eylul University Law School, Turkey 1997

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"PASS THROUGH" AND ADVERTISING WARRANTIES
IN THE CURRENT AND IN THE PROPOSED REVISION
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by

NAZMI ORKUN AKSELI

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August 1, 2000
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For my dear father Mech.Eng. Erbil Akseli, my dear mother and my partner Attorney at Law Sevil Akseli and my dear brother, a would be mechanical engineer, Ilgaz Akseli all of whose existence, which I feel next to me every minute of my life, give me the joy of living...
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CHAPTER I

INTRODUCTION

In contemporary markets the mass distribution of goods most often occurs through intermediate sellers. Moving from the manufacturer to the ultimate buyers, products will pass through the hands of one or more intermediaries variously called whole sellers, distributors, dealers or retailers. For convenience we will refer to these various intermediaries by the general term "dealers". This distribution process will require a chain of sales contracts. A sale is by nature "the passing of title from the seller to the buyer for a price."\(^1\) The chain of distribution is the chain of title of goods. To take the simplest, two-step case, a car manufacturer may sell a new vehicle to the retail car dealer that, in turn, may sell the vehicle to the ultimate buyer. The two separate contracts of sale are between the manufacturer and the dealer and the dealer and the ultimate buyer. In this, and in more complicated distributional schemes involving multiple intermediaries, the manufacturers and the ultimate buyers are not as a matter of form parties to the same contract. Their names do not appear together on the same contract document as parties assenting to the bargain. They do not sign the same written sales agreement. Thus, it is customary to say that the manufacturer and the ultimate buyer are contractually remote that the somewhat strange thing we call "privity of contract" does not exist between them.

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\(^1\) U.C.C. § 2-106 (1) (1999).
Despite the absence of conventional privity, there will frequently be communications, which pass from the manufacturer (or related corporate entity acting on behalf of the manufacturer) to the ultimate buyer. The manufacturer may actively assume the role of warrantor by sending a communication along with the goods or the manufacturer may be found to have made a warranty independently of the distribution process by advertising addressed to the public.

It has recently become common to refer to warranties that accompany the goods as “pass through” warranties. They accompany the goods down the chain of title. They run with goods much as a traditional warranty of good title runs with the land in real estate transactions. The warranty booklet that comes with the new car, the warranty certificate in the box in which the computer is delivered, the manufacturer’s label attached to the herbicide container are all examples of “pass through” warranties.

“Pass through” warranties tend to provide a comprehensive statement of the manufacturer’s legal responsibility for the quality of the goods. They provide limited warranties in the sense of stating both an affirmative warranty commitment and restrictions or limitations on the commitment. Disclaimers, remedy limitations, time restrictions accompany assurances.

The package of commitment and restriction is presented as part of the contract. The warranty package is a precisely defined statement of the warrantor’s legal responsibility. The manufacturer intends this warranty package to run to the benefit of the ultimate buyer and also to restrict the rights of that ultimate buyer. Particularly with respect to new vehicles, equipment and other complex products some type of limited “pass through” warranty is necessary to induce the purchaser of the product. The dealer
is authorized to deliver the “pass through” on behalf of the remote warrantor. Without too much strain, one could even say that the warranting manufacturer joins the ultimate sale transaction for the limited purpose of giving a limited warranty.

In contrast with “pass through” warranties, warranties made in advertising addressed to the public are separated in time and space from the ultimate sale transaction. The manufacturer may describe the goods or announce their capabilities in newspapers or magazines or on TV or radio or other media address to the public. In these situations, the communications are separated from the immediate distributional process. But at times statements in media advertising are held to be express warranties under the present article 2 of the UCC. Advertising warranties are an “end-run” direct from the manufacturer to the targeted audience of prospective buyers. Advertising warranties have an impact on the human psychology. Advertising companies in order to engage the attention of the consumer create impressive advertisements. Mostly, consumers buy the goods because they are impressed by the words used on the advertisement. Actually many of those create an express warranty. Sometimes wording on the advertising materials may mislead the consumer or the words used on the advertising material are false. Even in those cases the consumer is impressed with the advertising mostly without knowing that they create an express warranty or are false. Most consumers have little knowledge regarding the accuracy of the information given in those advertisements. According to the manufacturers “advertising is not supposed to inform, but to persuade.” The more the consumers are persuaded, induced to buy the goods and impressed with the

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advertising, the more they buy the goods of the manufacturers. Therefore, the language used in the advertising materials is always attractive and impressive. "Advertising contributes to economic growth by complementing the efforts to create new and improved products through expenditures for research and development." Advertising and its effects on human beings have been described in these terms:

"[A]dvertising, by acquainting the consumer with the values of new products, widens the market for these products, pushes forward their acceptance by the consumer and encourages the investment and entrepreneurship necessary for innovation. Advertising, in short, holds out the promise of a greater and speedier return than would occur without such methods, thus stimulating investment, growth, and diversity.""

In contrast to "pass through" warranties, advertising warranties do not provide a comprehensive statement of the manufacturer's legal responsibilities. Normally, the advertising states the positive. Whatever the restrictions are on warranty liability, they will normally be found apart from the advertising in contract documents of the distributional process including "pass through" warranties accompanying the advertised product. One of the critical issues with respect to advertising warranties is their relationship to the formal documents in the chain of title. Does the warranty affirmation create liability distinct from those documents or the warrantor's liability restricted by the limitations of the formal contracts?

Both "pass through" and advertising warranties carry the characteristic of adhesion contracts. In adhesion contracts, the stronger party can dictate the terms of the contract to the weaker party, who has no chance to negotiate on the terms of the contract.5

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1 See Jules Backman, Advertising and Competition 22 (1967).
2 See Id. at 22.
The three elements must be satisfied before an adhesion contract may be found. Those are:

“(1) the agreement must occur in the form of a standardized contract prepared or adopted by one party for the acceptance of the other, and (2) the party proffering the standardized contract must enjoy a superior bargaining position because the weaker party virtually cannot avoid doing business under the particular contract terms, and (3) the contract must be offered to the weaker party on a take-it-or-leave-it basis, without the opportunity for bargaining.”

The sales law in the United States was initially formed under the influence of the English Sales Act. The English Sales Act derived from the principles of the Common Law. In the early half of the 20th century, Professor Samuel Williston drafted the Uniform Sales Act based on the model of the English legislation. One can say that when the UCC was drafted, the drafters were still influenced by the Uniform Sales Act and its English model. In this connection, during the drafting process of the UCC the drafters focused on the express warranties, which are directly negotiated between the merchants. In some ways this statutory treatment of express warranties in the original article 2 of the UCC is puzzling. Professor Karl Llewelyn believed that the UCC should be adapted to recurring business situations. Moreover, Llewelyn was certainly aware of both “pass through” and advertising patterns. However, the warranty rules of article 2 did not address these recurring patterns of warranty. These patterns may have been avoided because of the controversy concerning privity of contract. The “pass through” and

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7 The comment to section 37 of the Uniform Revised Sales Act, which was prepared by Karl Llewelyn reads as follows “This section consolidates and systematizes the material of Original Act, sections 12, 14 and 16 and the better case-law thereunder.
Direct Scope: The section is limited is limited in its scope and direct purpose to dealing with warranties made by the seller to the buyer as a part of a contract for sale; but the section does not thereby constitute any approval of the view still sometimes judicially expressed that warranties or equivalent obligations are in their nature confined to contracts for sale or to the direct parties to such a contract. Quite apart from the fact that warranties arise in a bailment of hire whether such bailment is itself the main contract, or is merely
advertising warranties were not the drafting focus of the present article 2. The courts have been forced to try to extend the statutory provisions of the present article 2 to "pass through" and advertising warranties. The proposed revision of article 2 attempts to address the needs of the new age and expressly address the "pass through" and advertising warranties in separate sections of the new article. For the first time, article 2 will be drafted for this warranty area to follow Llewelyn's drafting philosophy.

In this thesis, after examining the express warranties under the present article 2, "pass through" and advertising warranties will be examined under the present and under the proposed revision of article 2, respectively. In this context, the advantages and the disadvantages of the revision and the gaps of the present article 2 will be examined.

lines of case law growth, and section 43 on beneficiaries, expressly recognizes the development within a particular area which the cases have demonstrated to be sound. Beyond that this act leaves the matter to the case law, with the suggestion from section 1 (3), that the policies laid down in this act may offer useful guidance in dealing with further cases as they arise.
CHAPTER II

EXPRESS WARRANTIES UNDER THE PRESENT ARTICLE 2

A. IMPORTANCE OF WARRANTY LAW IN ECONOMIC LOSS CASES

In commercial life, products often do not perform as expected. Both business and consumer buyers encounter disappointed expectations. When the result of expectations is economic, the disappointed buyer must normally look to the law of warranty for a remedy. Warranty law becomes the critical source of the buyer's rights, because tort law claims in negligence and strict liability are not available when the loss is economic. Economic loss has been defined by the Illinois Supreme Court as:

"[D]amages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of any personal injury or damage to other property, as well as the diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold."°

In other words, economic loss is "the damage flowing directly from insufficient product quality."°° Under the economic loss doctrine "once loss is defined as economic it cannot be recovered at least in negligence or strict tort and perhaps not in fraud or misrepresentation."°°° It can be said that economic loss doctrine is the separation line between "what is tort and what is not."°°° When an action is brought "to recover damages

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°° See JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE § 11-5, at 405 (5th ed. 2000).
°°° WHITE & SUMMERS, supra note 10, § 10-5, at 395.
°°°° WHITE & SUMMERS, supra note 10, § 11-5, at 405.
for inadequate value, costs of repair and replacement of defective goods this one is for economic loss." Economic loss has two types. Direct economic loss "includes ordinary loss of bargain damages: the difference between the actual value of the goods accepted and the value they would have had if they had been as warranted." Another type of economic loss, namely, consequential economic loss, "encompasses all economic harm a purchaser suffers beyond direct economic loss." Losses like lost profits and loss of good will are typically consequential economic losses. The normal remedy to recover for any of these losses is in warranty, which is considered to be a contractual rather than tort remedy.

B. INTRODUCTION TO EXPRESS WARRANTIES

In general terms, warranty is "an assurance or guaranty, either express in the form of a statement by a seller of goods, or implied by law, having reference to and ensuring the character, quality or fitness of purpose of the goods." UCC article 2 governs the sale of goods and the creation of express warranties with respect to the sale of goods. In this connection "the law of warranty has borrowed its concepts from the legal coffers of tort, contract, and property." Implied warranties may closely resemble tort claims. But express warranties are customarily thought of as contractual.

The words and the actions of the seller are critical to the establishment of express warranties. Section 2-313 of the UCC sets out the elements of express warranty. Under

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13 WHITE & SUMMERS, supra note 10, § 11-4, at 404.
14 See § 2-714(2); see also WHITE & SUMMERS, supra note 10, § 11-5, at 405.
15 WHITE & SUMMERS, supra note 10, § 11-5, at 405.
18 DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON COMMERCIAL LAW 69 (2nd ed. 1990).
section 2-313, an express warranty can arise either from a seller’s promises or statements relating to the goods\textsuperscript{20} or descriptions of goods\textsuperscript{21} or from models or samples of goods that the seller presents to the buyer.\textsuperscript{22} The key requirement which all of these communications must satisfy is to be “part of the basis of the bargain.”\textsuperscript{23} This requirement is vague in meaning and does not answer the question of whether the affirmations made after or before the bargain also create express warranties. Section 2-313 distinguishes between the seller’s opinion and an affirmation of fact that becomes a part of the basis of the bargain, an express warranty is created; but an opinion or commendation of the goods does not create a warranty. Accordingly, only the affirmations of the seller are deemed to create an express warranty. In other words, if the seller expresses his opinion regarding the product, this does not create an express warranty. Section 2-313(2) declares “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.” In deciding whether a statement of a seller is mere puffing or an affirmation of fact, the background of the events, the parties to the transaction and the ultimate aim of the parties must be taken into consideration.

Once validity has been established, section 2-313 has “universal application in that it applies both in present sales and in contracts to sell and without regard to whether the seller is a manufacturer, grower, or merchant, or whether he regularly or casually sells goods of the kind in question.”\textsuperscript{24} Hence, “an express warranty arises when the seller does

\textsuperscript{20} See U.C.C. § 2-313(1) (a).
\textsuperscript{21} See U.C.C. § 2-313(1) (b).
\textsuperscript{22} See U.C.C. § 2-313(1) (c).
\textsuperscript{24} See AMERICAN LAW OF WARRANTIES, § 2.3, at 98 (Clark, Boardman, Callaghan eds. 1991).
something affirmative to create buyer expectations about the characteristic or performance of the goods.” ^25 To this end, a seller can make oral or written representation regarding his product through advertising, brochures or written contract, which may qualify as part of the basis of the bargain, rather than puffing. ^26 Section 2-313(1)(a) points out that “any affirmation of fact or promise made by the seller to the buyer, which relates to the goods” ^27 may qualify. The drafters of article 2 seem to have visualized express warranties as emerging from the negotiations of the parties.

Comment 1 of 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." ^28

As will be explained below, if the statements of the seller relate to the essential aspects of the bargain then they are said to create an express warranty. Furthermore, these statements are hard to disclaim since they are related to the essential terms of the bargain and they are explicit.

According to Comment 3 of section 2-313

"The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to wave 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 is normally one of fact." ^29

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^25 See WHALEY supra note 18, at 71.
^26 Cf. WHALEY supra note 18, at 72; see also U.C.C. § 2-313(1)(a) (noting that "any affirmation .......").
^29 U.C.C. § 2-313 cmt. 3 (1999).
Under section 2-313(2) it is not necessary that the seller use formal words such as warranty or guarantee. To this end "the Code does not limit express warranties to specific declarations about the products and sometimes vague and general communication will suffice."\(^{30}\) In applying the law of express warranties the courts have two crucial duties: first, in deciding if statements are part of the basis of the bargain or that jury could so regard them, and second in determining whether warranties apply to third parties.

C. DISTINCT ELEMENTS OF EXPRESS WARRANTIES

In order for an express warranty to be valid, the UCC has provided explicit elements, which must be met.

1. SELLER'S REPRESENTATION OF THE GOODS

Section 2-313 "describes the various forms of an express warranty, since an affirmation of fact or promise relating to the product represents the most common way to create an express warranty."\(^{31}\) Warranties can be found in the advertising materials, in owners' manuals, in the brochures, or as a clause in the sales contracts or as a separate contract.\(^{32}\) A seller can even make an express warranty with an oral representation. A seller can create a warranty in the form of an affirmation of fact, or promise relating the goods, a description of the goods, or a sample or model of the goods.

\(^{30}\) See JULIAN B. MC DON NELL & ELIZABETH J. COLEMAN, COMMERCIAL AND CONSUMER WARRANTIES § 5.02[2][b], at 5-15 (1998).


\(^{32}\) Cf. Special Project, supra note 31, at 1170.
It may seem that the UCC is explicit regarding the formulation of express warranties: however, the UCC “does not require a warranty to be stated with any degree of preciseness.”\textsuperscript{33} The code merely says that where a seller’s statements are an affirmation and such statements constitute the basis of the bargain and hence, an express warranty is formed.\textsuperscript{34} However, the specificity of the statement can be important since specificity supports the conclusion that the affirmation is part of the basis of the bargain.

A seller’s statements about the goods does not always create a warranty. Section 2-313(2) provides that 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. For instance, “statements of the seller that his product is of good quality and that the buyer will be pleased with the results are merely opinions and not express warranties.”\textsuperscript{35}

When examining alleged opinions, a separation must be made, “if the statements of opinion become basis of the bargain, opinions can become warranties.”\textsuperscript{36} American courts have further qualified the use of opinions as the basis for express warranties. For example where “the seller has superior knowledge of the matter to which a statement relates, it is more likely that his statements with respect thereto will be deemed an express warranty rather than a mere opinion.”\textsuperscript{37} In that circumstances, the buyer will have less

\textsuperscript{36} \textit{See Castelaz et al., supra note 33}, § 684.
\textsuperscript{37} \textit{See Castelaz et al., supra note 33}, § 684.
knowledge regarding the performance, quality or the value of the good in the market than the seller will have. For instance in *Diepeveen v. Larry Vogt, Inc.* the New Jersey Superior Court indicated that where a seller or manufacturer of a product states that the product is superior for the buyer’s needs to the product that the buyer had requested, it is likely that such statement will be held to be an express warranty.

On the other hand, “in the statement where the seller assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the seller has no special knowledge then the seller’s statement is not an express warranty.” In this situation, if the buyer knows that the good is defective or has a less value than the seller is representing, then the statements of the seller do not constitute an express warranty.

The limit of the seller’s opinion is also important in differentiating whether a statement constitutes a warranty. Although it is often difficult to draw the line between seller’s talk and warranty, “the more specific the statement, the more likely it is to constitute a warranty.”

Statements as to quality, condition or purpose of product may also constitute express warranties. In *Valley Datsun v. Martinez* the Texas Court of Civil Appeals noted that when the seller of a new car states to the buyer that the car is in ‘excellent condition’, such statement is an express warranty. On the other hand, in *Royal Business*

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39 Cf. generally Diepeveen v. Larry Vogt, Inc., Id.
40 See Castelaz et.al., supra note 33, § 684.
41 Downie v. Abex Corp., 741 F.2d 1235 (10th Cir. 1984).
42 Valley Datsun v. Martinez, 578 S.W.2d 485 (1979).
Machines, Inc., v. Lorraine Corp. the court stated that a seller who states that the goods are of ‘high quality’ is merely making an opinion and not a warranty.

Hence, a good rule in determining warranties based on sale by description is that an express warranty is valid only when the description of goods is the basis of the bargain. In another decision by the United States Court of Appeals 5th Circuit in S--C Industries v. American Hydroponics System, Inc. the court decided that technical specifications may constitute an express warranty. To this end, the court deemed the technical specification a description and in this regard, it constituted an express warranty. The seller’s statements must establish the basis of the bargain and a basis for the purposes of creation of a warranty.

A description of the goods can also create an express warranty. This is set out in the subsection 1(b) of section 2-313. In one case the Georgia Court of Appeals found that the description of an aircraft as “Aero Commander, N-2677 B, Number 135, FAA, Flyable” was an express warranty that the aircraft complied with the Federal Aviation Regulation Part 135, concerning instrument and visual flight.

2. THE BASIS OF THE BARGAIN

What constitutes the basis of the bargain? That is the key question in litigation under section 2-313. But section 2-313 does not define the term “basis of the bargain.” The drafting history may show why this vague phrase was chosen.

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46 See Id. at 526-27, 177 S.E.2d at 805.
Prior to the adoption of the UCC, Uniform Sales Act (USA) was in force in most states. The USA was drafted by Professor Samuel Williston. According to section 12 of the USA:

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller’s opinion only shall be construed as a warranty."

This language seems to require the plaintiff to prove reliance on the affirmation. In this connection, "it might be suggested that the pre-code law required change because it was too burdensome to require buyers to prove that they relied on seller’s representation or promise." It was also stated that " according to Williston, the warranty need not be the sole inducement to the buyer to purchase the goods and as a general rule no evidence of reliance by the buyer is necessary other than the seller’s statements were of a kind which naturally would induce the buyer to purchase the goods."

As can easily be seen “Williston considered reliance to be essential to the creation of an express warranty.” Williston suggested a two-part reliance test:

“If a seller’s affirmation had the ‘natural tendency’ to induce reliance—that is, if it would induce a reasonable person in the situation of the purchaser to buy the goods—then no proof of actual reliance was required. If, however, such a

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47 U.S.A. § 12 (1950)
48 See generally 2-3 SAMUEL WILLISTON, WILLISTON ON SALES §§ 15-17 (Mary Anne Foran ed., 5th ed. Clark, Boardman, Callaghan eds 1996)
49 WHITE & SUMMERS, supra note 10, § 9-5, at 351.
50 WHITE & SUMMERS, supra note 10, § 9-5, at 351.
'natural tendency' could not be shown, plaintiff bore the burden of proving actual reliance."

In the Uniform Revised Sales Act (URSA), which was an expansion and development of the Original Uniform Sales Act, the warranties section moved closer to section on express warranties that later appeared in UCC article 2. Reliance was also not required for the purposes of the creation of express warranty.

Unlike the USA, the UCC does not contain an explicit requirement of reliance. However, instead, it requires that the promise or affirmation become part of the basis of the bargain. In this context, "the reason why the law has been changed is unclear." White and Summers have said that "it is possible that the drafters did not intend to change the law, or that they intended to remove the reliance requirement in all but the most unusual case, or that they intended simply to give the plaintiff the benefit of a rebuttable presumption of reliance."

The UCC defines the agreement as "the bargain of the parties in fact." One step further, it has been suggested that the term basis of the bargain means "the sum of all the reasons why the parties are willing to perform some exchange or the aggregate of terms upon which the parties agree to that exchange." The legal reasoning is indicated in the comment 1, which states that "express warranties rest on dickered aspects of the individual bargain." It has been thought that Code implies with that the substantial

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53 WHITE & SUMMERS, supra note 10, § 9-5, at 350.
54 WHITE & SUMMERS, supra note 10, § 9-5, at 350.
55 THE RESTATEMENT OF CONTRACTS (FIRST RESTATEMENT) which defines the bargain as "an agreement of two or more persons to exchange promises or to exchange promises or to exchange a promise for a performance."; see also for the definition of the "agreement" U.C.C. which defines as "the bargain of the parties in fact." U.C.C. § 1-201(3).
points of the bargain, which may affect the existence of the contract. In the comment 1 of section 2-313 the term “dickered” is not explained. However, from the reading of the comment, it can be said that the “dickered aspects” are the essential terms of the contract, including the quality of the goods. Therefore, when the seller makes a statement regarding the dickered aspects of the goods then those statements constitute an express warranty. This view is also supported by the words “go so clearly to the essence of that bargain,” which can be construed as that the statements of the seller are related to the essential terms of the bargain. In this regard, in the last sentence it is clearly mentioned that the statements of the seller are hard to disclaim, since they are obviously related to the essential terms of the contract and explicit.

The language of the Code “does not explicitly require that the statement induce the purchase or that the buyer rely on the statement, however, the opinions are divided as to whether reliance is demanded.”58 Comment 3 of section 2-313 explicitly states that any affirmation is presumed to be part of the basis of the bargain and “that the plaintiff need put in no evidence unless the defendant offers evidence of the buyer’s non-reliance on a seller’s affirmation during a bargain need be shown.”59

Although reliance is not an articulated requirement some courts require the reliance of the buyer.60 On the other hand some courts do not require the reliance of the buyer on the affirmations of the seller.61 It has been thought that reliance should not be applied or required to express warranty cases since the UCC does not require reliance explicitly.

58 1 McDonnell & Coleman, supra note 30, § 5.02[1], at 5-12.
One of the most important points of the basis of the bargain issue is that the buyers or consumers have in general less knowledge than the seller has. Particularly in these circumstances, it can be said that seller’s statements made during the bargain become express warranty. However, once again, the real life facts such as the buyer’s knowledge of the false representation must be taken into consideration in the decision process.

Statements of the seller after the time of the contract formation may be express warranties if they become a part of the basis of the bargain. If the consumer relies on those statements after the time of the formation of the contract, they can become an express warranty only if they constitute a part of the basis of the bargain. Section 2-313 of the Code “raise a presumption that the statements relating to the goods made by the seller at any time during the commercial relationship are warranties.” Comment 3 of the section 2-313 of the Code states that

“in actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods, hence no particular reliance on such statements need be shown in order to weave them in to 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 policy explanation for the presumption” as it was precisely mentioned “is in an economy characterized by mass production and distribution of technical products, the drafters of the Code concluded that the seller would regularly know more about the product from its greater experience with the product, either as manufacturer, merchant or

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62 Cf. 1 McDONNELL & COLEMAN, supra note 30, § 5.02[2][c][ii], at 5-16.
63 1 McDONNELL & COLEMAN, supra note 30, § 5.02[2][e], at 5-18.
64 U.C.C. § 2-313 cmt.3 (1999); proceeding on the path of the language of the code and the accompanying comment, some courts have held that a buyer need not show reliance in order to recover for a breach of an express warranty see e.g. Lutz Farms v. Asgrow Seed Co. 948 F.2d 638 (10th Cir. 1991); Winston Industries, Inc., v. Stuyvesant Ins. Co. 55 Ala. App 525, 317 So. 2d 493, cert. den. 294 Ala. 775, 317 So.
consumer." In this regard, it has been thought that it would be more convenient to presume that a warranty is created when the seller makes statements about the goods to the buyer during the bargain period.

The specific statements as to capabilities or age of a product are the main pillars to be found as part of the basis of the bargain and held to be an express warranty. However, under the section 2-313 the affirmations of fact as to merely of the value of the goods are not express warranties. On this point, the seller has to have a superior knowledge in order to be found as part of the basis of the bargain.

3. WHAT IS THE ACTUAL ROLE OF RELIANCE?

When the buyer is purchasing a good from the seller, generally the buyer relies on the statements of the seller regarding the goods. It can be said that for the purposes of the creation of an express warranty, reliance of the buyer during the bargaining process on the statements of the seller regarding the goods is the condition of being a part of the basis of the bargain. At this point also the statements of the seller prior, during and after the bargaining process carry great importance.

As a beginning, "section 2-313 of the UCC never mentions reliance, requires only that a seller's affirmations, descriptions, or samples be a part of the basis of the bargain for a buyer to bring an express warranty claim." At this point scholars are divided

2d 500 (1975); Interco. Inc. v. Randustrial Corp. (Mo. App) 533 S.W.2d 257 (1976), see also Special Project, supra note 31, at 1174-75.
65 1 McDonnell & Coleman, supra note 30, § 5.02 [2] [e], at 5-19.
66 Cf. 1 McDonnell & Coleman, supra note 30, § 5.03 [1] [a], at 5-22.
67 See Adler, supra note 51, at 433.
between two views.\textsuperscript{68} One view represents that reliance is necessary. White and Summers states on that issue that:

“[I]t is clear that an advertisement can be a part of the basis of the bargain. The language of Comment 3 is limited to affirmations of fact made by the seller about the goods during a bargain. One would not regard an advertisement as being made during a bargain and therefore no statement in an advertisement would normally qualify for the presumption that may be authorized in Comment 3.”\textsuperscript{69}

In this context, it can be said that White and Summers states that reliance is required for a provision to form part of the contract. To this end, their application of the reliance is only for inter praesentes dealings which occur at the time of the bargain.\textsuperscript{70} On the other hand, some other scholars support the opposite view.\textsuperscript{71} Their view is, generally, no particular reliance need be shown for the affirmations of fact made during the bargain, since they are regarded as part of the description of goods. It has been thought that the reliance requirement must be determined according to the characteristic of each case and the real life experiences. Since it is not always the case that the buyer’s knowledge is less than the seller or sometimes buyer may realize the false or misleading statements of the seller. In these situations, reliance must not be sought.

As for the statements made by the seller prior to the bargaining process it was stated by a scholar that “it is unreasonable to presume that the buyer relied on those affirmations and the buyer has to prove the actual reliance.”\textsuperscript{72} If the seller made the statements regarding the goods in the course of the bargaining process, under section 2-313 of the UCC, it would be highly reasonable to presume the buyer’s reliance on those

\textsuperscript{68} See for the discussion of different views Adler, supra note 51, at 439-42.
\textsuperscript{69} See Adler, supra note 51, at 439-40; see also WHITE & SUMMERS, supra note 10, § 9-5, at 352-53.
\textsuperscript{70} Cf. WHITE & SUMMERS, supra note 10, at 353-54.
\textsuperscript{71} See e.g. Charles A. Heckman, Reliance or Common Honesty of Speech: The History and Interpretation of Section 2-313 of the Uniform Commercial Code, 38, CASE W. RES. L. REV.1, 39 (1987).
\textsuperscript{72} See Hodaszy, supra note 52, at 470.
statements and buyer has no burden of proving the reliance on those statements of the seller. If the seller made the statements after the bargaining process those statements could bind the seller since buyer has reliance on the goods. On this prong, although the seller’s statements regarding the goods have no effect on the buyer’s decision on purchasing the goods and those statements can create an express warranty.

Some courts have interpreted and decided to eliminate the reliance requirement for express warranties. Briefly in those decisions the views of the courts were “if there was an affirmation of fact which was the part of the basis of the bargain, there was no independent reliance requirement as to that affirmation of fact.” While some cases were relying on the comment 3 of the section 2-313, some cases were denying the existence of the reliance requirement. On the other hand, some other cases insist that reliance is still required. Their ground for the denial was the expanded notion of bargain. In Autzen v. John C. Taylor Lumber Sales the decision was based on the expanded notion of bargain, which means,

“a bargain is not something that occurs at a particular moment in time, and is forever fixed as to its content and it is a continuing commercial relationship between the parties with regard to the product in question, the bargain between plaintiff and defendant was still in process at the time of the survey, even though the sales agreement already had been reached.”

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74 See Hodaszy, supra note 52, at 477.
75 See e.g. Royal Typewriter Co. v. Xerographic Supplies, 719 F.2d 1092, 1101 (11th Cir. 1983); Royal Business Machines v. Lorraine Corp., 633 F.2de 34, 44 (7th Cir. 1980); Stuto v. Corning Glass Works, 1990 WL 105615, 5 (D. Mass. 1990).
76 Cf. Hodaszy, supra note 52, at 477.
78 See Id., at 789,(bargain was described as an ongoing commercial relationship between parties, not discrete event.)
In this regard, according to that view, the buyer can rely on the statements after the conclusion of the agreement, because the relationship is a continuous one.

In *Cipollone v. Liggett Group, Inc.*, it was indicated that "a buyer must have been aware of a seller’s advertisement at the time of purchase and actually must have believed those affirmations at that time to create an express warranty." However, as a counter argument “the defendant could rebut such a presumption through clear affirmative proof that the buyer knew that the affirmation of fact or promise was untrue.” Therefore, no reliance exists and no express warranty is created. For the purposes of the creation of an express warranty the purchaser’s knowledge that a statement is false precludes the statement from being held a warranty. When the purchaser and the seller know that a statement is false it cannot be regarded as an express warranty, because there is no reliance.

In order to create an express warranty, “a seller’s statement must be one which is reasonably understood by the buyer as an affirmation of fact regarding the product to be purchased.” In *Royal Business Machines v. Lorraine Corp.*, it was stated that “to become express warranty, seller’s statement should be one factor leading buyer to purchase good.” This is a kind of presumption that the buyer relied on the statements of the buyer during the course of the bargain. In this regard, the buyer has no burden to prove the reliance, since it is a reasonable presumption that the buyer relied on the affirmations of fact of the seller. Comment 3 to section 2-313 indicates precisely that

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81 Generally see *Cipollone v. Liggett Group, Inc.*
82 See Hodaszy *supra* note 52, at 481.
83 See e.g. Royal Business Machines, Inc., v. Lorraine Corp. 633 F.2d 34 (1980).
84 See Hodaszy *supra* note 52, at 486.
86 See *Lorraine Corp.*, 633 F.2d. at 44.
“seller's affirmations made during the bargaining process are regarded as part of the description of those goods, hence no particular reliance on such statements need be shown.” As stated in the comment that the affirmations made during the bargain are regarded as part of the description of the goods and there is a presumption that buyer have relied on those statements and therefore, a burden of prove regarding the reliance was eliminated.

According to comment 7 of the section 2-313 states that post-bargaining or post-formation statements by the seller can become express warranties. Nevertheless, some courts have ignored the explicit language of the comment 7 and they have held that “those statements after the deal cannot become express warranties since the buyer could have relied on them.” Some other courts have held that post-formation affirmations can become express warranties. Since comment 7 of the section 2-313 supports the expansive interpretation namely the expanded notion of bargain through ratifying the existence of post-sale warranties. In comment 7 it was stated that the precise time regarding the seller’s representation of the products is irrelevant and the post-bargaining representations may create the express warranties. Comment 7 of the section, besides indicating those mentioned above, points out that "if the statement is made after the closing of the deal, it may operate as a modification of the contract under Section 2-209 of the Code."
The other aspect of the reliance of the buyer on the seller’s statements is the prior knowledge of the buyer that the statements of the sellers are false at the time he made his purchase decision. In this case the affirmation of fact of the seller cannot create an express warranty, since the buyer does not rely on the statements of the seller. In other words, the affirmation of fact of the seller is not a part of the basis of the bargain. In this case, “the buyer has to prove the reliance on the affirmation of fact made by the seller to the general public at any time prior to the period during a bargain for that affirmation to become an express warranty.”

The reason why the affirmations of fact made prior and the during the bargaining process are treated differently with respect to burden of proving and becoming an express warranties is “a buyer who was aware of an affirmation about a product prior to the bargain would not buy the product if he believed that the affirmation was false and the product would not perform as promised.” Briefly, a buyer can only rely on the affirmations of the seller when he is deciding to purchase the product. This is the presumption that reliance exists during the bargaining process and there is no need to prove the reliance.

As a consequence, the best reading of section 2-313 that reliance need not be shown for the affirmations of fact made during the bargain. Since a buyer at the time of the purchase naturally will rely on the description and the affirmation of the seller. Finally, the Code itself does not require the reliance.

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92 See White & Summers, supra note 10, § 9-5, at 353.
93 See Hodaszy, supra note 52, at 495.
D. WARRANTY DISCLAIMERS

Subsection 2-316(1) of the UCC states:

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

The purpose of this subsection is to protect buyers. Since an express warranty is created with affirmative affirmations, it is generally hard to disclaim an express warranty. Hence, a seller who explicitly warrants or guarantees that a good is without defects may not successfully defend a lawsuit based on a later disclaimer of express warranties.

According to Comment 1 of the subsection 2-316(1), "subsection 1 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. Thus, subsection 2-316(1) seeks to protect the buyer from the unexpected and unbargained effects of the disclaimer. If the affirmation creates an express warranty then according to subsection 2-316(1) buyer cannot be affected from the disclaimer in the event of conflict. In other words, in the event that there is an express warranty the disclaimer is inoperative. The disclaimer and the warranty must be consistent with each other. Courts have the duty to interpret the consistency between the disclaimer and the warranty.

For the negotiated deals, "where the parties have consciously chosen terms as express warranties and have specifically limited those warranties, it is sensible to interpret the terms as a whole and to recognize what otherwise might be described as an

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\[^{94}\text{U.C.C. } \S\text{ 2-316(1) (1999).}\]

\[^{95}\text{Cf. WHITE & SUMMERS, supra note 10, } \S\text{ 12-2, at 425.}\]

\[^{96}\text{U.C.C. 2-316 (1) cmt. 1 (1999).}\]
invalid disclaimer as an enforceable qualification of the express warranty. When the deal is not negotiated as with “pass through” warranties, “product descriptions and other affirmations that lay persons may not regard as express warranties are express warranties under section 2-313.” Hence, the affirmations on the label or on the warranty package create an express warranty. However, the affirmations on the labels are harder to disclaim since the precise affirmation creates the express warranty and there is little possibility to disclaim it.

One of the crucial parts of subsection 2-316(1) is the cross-reference to the parol evidence rule. Comment 2 of the section 2-316 sets out that “reference to the parol evidence rule is intended to protect the seller against false allegations of the oral warranties.” At this point the finality of the written agreement gains importance, because the protection of the seller has two restrictions. If the written agreement is not the final form, then the disclaimer on this form cannot negate the oral warranty made by the seller previously. As the second step, if the written agreement is the final agreement of the parties, then even here an oral warranty may supplement it. For example in Carpetland, USA v. Payne, the seller’s salesman orally informed the buyer that new carpet would be installed if anything went wrong with the purchased carpet for one year. However, the written sales agreement contained a disclaimer of all express and implied warranties unrelated to the description of the goods. The court held that Carpetland’s warranty disclaimer did not bar recovery under the express warranty. The

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97 See WHITE & SUMMERS, supra note 10, § 12-3, at 427; see also Corey v. Furgat Tractor & Equip., Inc., 147 Vt. 477, 520 A.2d 600 (1986).
98 WHITE & SUMMERS, supra note 10, § 12-3, at 427.
99 WHITE & SUMMERS, supra note 10, § 12-4, at 428.
100 Cf. WHITE & SUMMERS, supra note 10, § 12-4, 428.
court noted that Indiana law provided that when the language of an express warranty and a disclaimer are inconsistent, the disclaimer is inoperative to prevent the seller from liability. Subsection 2-316(1) "does not say that language of negation or limitation is always inoperative, and it is inoperative only when it cannot reasonably be construed to be inconsistent with the language of affirmation." In this connection if the language of the oral warranty and the written disclaimer is inconsistent with each other then the oral warranty prevails and the buyer is protected.

A disclaimer can be made by persons different from the warrantor and is common with "pass through" warranties where the affirmation is made by the manufacturer and the negation or disclaimer is made by the dealer. In this case, "a total disclaimer of express warranty by a dealer can be upheld under subsection 2-316(1) even though the manufacturer is simultaneously giving an express warranty." In that situation, the disclaimer of the dealer has been upheld by some courts.

After all those arguments, it does not appear that 2-316(1) compels the invalidation of a general express warranty disclaimer when it is obvious that the buyer has agreed to the disclaimer provision merely because there have been earlier statements apart from the formal written contract by the seller that

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102 1 McDonnell & Coleman, supra note 30, § 5.08[1], at 5-78.
103 1 McDonnell & Coleman, supra note 30, § 5.08[3], at 5-82.
105 See 1 McDonnell & Coleman, supra note 30, § 5.08[5], at 5-93.
106 See 1 McDonnell & Coleman, supra note 30, § 5.08[5], at 5-93.
E. WARRANTY LIMITATIONS

The purpose of the section 2-719 is to grant the buyer a remedy which can be in the form of repair or replacement, when the goods do not conform to the bargain without subjecting the seller to an unknown risk. The unknown risk can be the consequential damages. Section 2-719 of the UCC governs the warranty limitations of express warranties. As a general rule “contract terms are negotiated between the parties.”107 In other words, the parties may agree to remedies and control damages as they see fit. Every sales contract has two places for the remedies to be looked for. One of them is the provisions of the contract and the other is the provisions of UCC article 2. Furthermore, “it is the essence of a sales contract that at least minimum adequate remedies be available.”108 According to subsection 2-719(1)(a) a buyer’s remedy may be limited to repair and replacement of non-conforming goods or parts or return of the price. In the event the contract between the seller and the buyer declares that buyer has those rights, then buyer must give the opportunity to the seller to repair the non-conforming part of the good. In this context, “there will be no breach if the warrantor makes or pays for the repairs.”109 According to Comment 1 of section 2-719, parties have the freedom to choose and draft the type of their remedies on the contract. This is consistent with the concept of freedom of contract. However, contract terms related to the limitation or exclusion of the consequential damages are subject to judicial scrutiny under the unconscionability standard.110 In this context “a buyer who wants to overcome the

107 1 McDonnell & Coleman, supra note 30, § 7.02[2], at 7-4.
108 U.C.C. § 2-719, cmt. 1 (1999); see also e.g. Polycon Indus., Inc. v. Hercules, Inc., 471 F.Supp. 1316, 1324 (E.D. Wis. 1979).
109 1 McDonnell & Coleman, supra note 30, § 7.02[2], at 7-4.
limitation of the remedy clause may prove that the clause was not expressly agreed to be exclusive." 111 Subsection 2-719(1)(b) requires that the stipulated remedy be regarded as optional, because there is also a remedy option in the article 2 itself. "Comment 2 of the subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive, but the seller can rebut that presumption." 112 In Ford Motor Company v. Reid 113 the court concluded that the clause in the contract did not expressly state that the remedy of repair or replacement was exclusive. In this regard, the clauses regarding the remedies must be clear, in order not to leave any unanswered question.

According to subsection 2-719(2) "even if a contract contains a perfectly drafted clause that explicitly states the exclusive remedy, the buyer can still resort to subsection (2) to avoid the effect of that clause." 114 In order to do that the buyer has to establish that the exclusive remedy provided in the contract fails of its essential purpose and therefore he can disregard that contract term and can return to the other possibilities for recourse. Shortly, subsection 2-719(2) should apply when the remedy fails it essential purpose. Subsection 2-719(2) generally applies when under the limited repair and replacement remedy, seller is reluctant or unable to repair the defective good within a reasonable time. In that case, the remedy fails of its essential purpose. In all of these circumstances the buyer must allow a reasonable opportunity and time to the seller to repair and replace the defective goods. Before that, a buyer cannot argue that the remedy fails of its essential purpose.

111 White & Summers, supra note 10. § 12-9, at 447.
112 White & Summers, supra note 10. § 12-9, at 447.
114 White & Summers, supra note 10. § 12-10, at 449.
Generally, a buyer of equipment, vehicle or other kind of good expects from the seller that her new product be repaired or replaced. However, in the contract the seller may have limited its liability. In this context, “even if a seller interprets the promise to be merely a promise to use its best efforts to make the product like new, that is not a reasonable interpretation of the promise to a consumer.”\(^{115}\) Exclusive remedies are the repair and replacement or promises of refunds of the purchase price. In practice, “in the contracts, they are accompanied by the clauses that deny liability for consequential damages.”\(^{116}\)

Section 2-719(3) reads:

“Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.”

Many courts treat the exclusion of consequential damages as separate and independent from an exclusive remedy of repair or replacement. In their view, the exclusion of consequential damages stands so long as it is not unconscionable even where there has been a failure of repair. Most of the rulings, which have invalidated the exclusion of consequential damages concern cases where farmers have suffered large crop cases.\(^{117}\)

\(^{115}\) See White & Summers, supra note 10, § 12-10 [b], at 453.

\(^{116}\) See White & Summers, supra note 10, § 12-10 [c], at 454.

\(^{117}\) See generally McDonnell & Coleman, supra note 30, §§ 7-8.
F. NOTICE OF BREACH

In order to be entitled to a remedy, a buyer, who accepts the non-conforming goods, must notify the seller that the goods are non-conforming. Otherwise, the buyer will be barred from any remedy.

Subsection 2-607(3)(a) provides that:

"Where a tender has been accepted
(a) [T]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."

The remedy mentioned in the subsection includes right to revoke acceptance and the right to damages. The reasonable time requirement has great importance. Although the reasonable time within which the buyer should have discovered the breach and have notified the seller differs from authority to authority and case to case there are four policies behind 2-607.

"According to first policy, the notice requirement is required to enable the seller to make adjustments or replacements or to suggest opportunities for cure to the end of minimizing the buyer's loss and reducing the seller's own liability to the buyer....Second policy is to afford sellers an opportunity to arm themselves for negotiation and litigation...Third policy is to cut off a claimant who does not promptly give notice of a defect....Final policy behind the notice requirement is to give defendants that same kind of mind balm they get from the statute of limitations."\(^{118}\)

According to comment 4 of section 2-607, the notice requirement defeats the commercial bad faith of the buyer. Pursuant to that comment "in cases resting mostly on the first policy, the courts are not at all hesitant to find that commercial buyers failed to live up to the notice requirements and thus forfeited their Code remedies."\(^{119}\)

\(^{118}\) White & Summers, supra note 10, § 11-10, at 418.
\(^{119}\) White & Summers, supra note 10, § 11-10, at 418; see also where notices were untimely Hapag Lloyd A.G. v. Marine Indem. Ins. Co., 576 So.2d, 1330 (Fla. App. 1991); P & F Constr. Corp., v. Friend Lumber
One step further, whether anyone other than the buyer has to give notice of breach and whether a buyer must give notice to any seller other than the one from whom he actually purchased the goods are the crucial points. The requirement of the UCC section 2-607 (3)(a) that a buyer give timely notice to a seller of any breach in accepted goods that prove defective is different in the non-privity context. On this issue courts have different views. In this context on one hand, "the courts have nearly unanimously agreed that notice is not required from third party beneficiaries." On the other hand, however, "in recent cases courts indicate that a non-privity consumer buyer must timely notify a remote manufacturer of alleged defects, at least when the buyer seeks recovery under the Code for economic loss."

In short, one can say that the language of section 2-607(3)(a) indicates that the term "buyer" means the person who buys the goods directly from the manufacturer. Therefore, the remote purchaser should not be held liable for the notification of the defect to the manufacturer.

G. PRIVITY ISSUES

Privity is "the name of a legal relation arising from right and obligation." From that statement it can be deduced that if the right and obligation exist, the party is in

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120 Since in the privity context the timely notice of breach is compulsory for the buyer of the good, which serves for the legitimate purposes, see Harry G. Prince, Overprotecting The Consumer? Section 2-607(3)(a) Notice of Breach In Non-Privity Contexts, 66 N. C. L. Rev. 107, at 135 (1987); see also WHITE & SUMMERS, supra note 10, § 11-10, at 421.

121 See WHITE & SUMMERS, supra note 10, § 11-10, at 421.

122 This was the statement of Justice Stone in La Mourea v. Rhude, 295 N.W. 304, 307 (Minn. 1940). "Privity, in the law of contracts, is merely the name for a legal relation arising from right and obligation."
In the past, formal privity was given strong consideration in express warranties. In other words "traditionally manufacturers owe no duty of care to people not in privity." The traditional doctrine stems from Winterbottom v. Wright whose philosophy is that only those buyers in privity with the manufacturer can recover from manufacturer for defective products which cause harm. However, one can say that the philosophy of this doctrine is declining.

Present article 2 says little about privity. In other words, within the scope of the article privity was not covered thoroughly. At the time of the drafting of section 2-318 "there was no national consensus on the proper scope of warranty protection." In this connection, "Karl Llewellyn initially drafted the section to restrict severely the effect of both horizontal and vertical privity rules." Section 2-318 gives the states three alternatives for the extension of warranties to persons other than the immediate buyer. Alternatives A and B were adopted by most states, limited the extension to non-contracting individuals who were injured in person by breach of the warranty; Alternative C was adopted in few states, and extended the warranty vertically. "In all cases, the theory of extension was analogous to a third party beneficiary contract under which the beneficiary's rights were determined by the contract between the seller and the immediate buyer."

Alternative A provides:

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124 See Special Project supra note 31, at 1310.
127 See HAWKLAND, supra note 126, at 423.
“A seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.”\textsuperscript{129}

According to commentators, authorizing a “legislative choice of limits furthers common law erosion of the horizontal privity doctrine while allowing courts to develop their own rules on vertical privity.”\textsuperscript{130} According to the comment 2 of section 2-318 Alternative A “is neutral and is not intended to enlarge or restrict the developing case law on whether the seller’s warranties, given to his buyer who resells, extend to other persons in the distributive chain.”\textsuperscript{131} Therefore one can say that 2-318 is neutral on the issue and the privity issue is left to legislature and the courts. To this end, the courts may develop their own horizontal and vertical privity doctrines without being bound to any section. As one commentator states “the drafters intended the initial version of section 2-318 to codify contemporary case law on horizontal privity while remaining neutral regarding further limitations on the privity doctrines.”\textsuperscript{132}

Alternative B provides:

“A seller’s warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and


\textsuperscript{130} See Special Project, supra note 31, at 1314.

\textsuperscript{131} U.C.C. § 2-318 cmt. 2 (1999). Comment 2 reads “The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to privity. It seeks to accomplish this purpose without any derogation of any primarily upon the merchant seller’s warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods sold are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.”

\textsuperscript{132} See 2 HAWKLAND, supra note 126, § 2-318:01, at 424.
who is injured by breach of warranty. A seller may not exclude or limit the operation of this section.”

Alternative C provides:

“A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.”

The neutrality of the comments and the courts intervening and shaping the scope of the section is well explained in Spring Motors, which states “the drafters of the U.C.C. have left it to the courts to determine whether vertical privity should be required in a warranty action between a seller and a remote buyer.”

H. CONTRACTUAL CHARACTERISTIC OF EXPRESS WARRANTIES

Express warranties have a contractual characteristic. “Although warranty’s beginnings were in tort, emerging from causes sounding in fraud or deceit, warranty shifted to become a part of the basic contract law on the idea that the parties could bargain for the express warranties as a part of the price of the product.” In this connection, “a fundamental principle of contract law is that warranty and other contract terms may be negotiated between the parties.” In this context, “express warranties consist of those statements (oral or written) and actions that seller manifests in relation to the goods and are enforced for the buyer by the law and they depend on the voluntary

133 U.C.C. § 2-318 Alternative B (1999) Alabama, Delaware, Kansas, South Carolina, South Dakota, Vermont, and the Virgin Islands have adopted this alternative.
136 See Id. Spring Motors, 98 N.J. at 587, 489 A.2d, at 676.
138 1 McDonnell & Coleman, supra note 30, § 7.02[1], at 7-3.
conduct of the seller.\textsuperscript{139} Furthermore, “express warranties depend upon the parties' deliberate actions and are sound in contract in origin; also express warranties are fixed to the individual transaction because they are personal to the bargain."\textsuperscript{140} As mentioned in the \textit{Dravo v. German}\textsuperscript{141} case “express warranties are created by the express representations of the seller.”\textsuperscript{142} In other words the seller is determining the scope of his warranty. The seller may make a warranty as broad or as narrow within the scope of the law. In \textit{Cippollone v. Ligget Group}\textsuperscript{143} case the court stated that “a manufacturer’s liability for breach of express warranties derives from, and is measured by, the terms of the warranty and the requirements imposed by an express warranty claim are not imposed under State law, but rather imposed by the warrantor.”\textsuperscript{144}

As a consequence, express warranties have a contractual characteristic. It is consistent with the face-to-face characteristic of the UCC article 2. Each party has the opportunity to express its view and concerns and within the scope of the concept of freedom of contract they negotiate over the terms of the warranty protection. Therefore, the mutual consent of the parties is established.

I. QUESTION OF REMEDIES

For the measurement of the damages four general principles have been foreseen in the Uniform Commercial Code. Those are:

\begin{itemize}
  \item \textsuperscript{139} \textit{See} \textsc{Douglas J. Whaley}, \textsc{Warranties and the Practitioner} 21 (1981).
  \item \textsuperscript{140} \textit{See} \textsc{Whaley}, \textit{Id.}, at 21-2; \textit{see also} \textsc{Collins Co. v. Carboline Co.}, 125 Ill.2d 498, 532 N.E.2d 834, 838 (1988) which also states that express warranties have a contractual character.
  \item \textsuperscript{141} \textit{Dravo v. German}, 73 Or. App. 165, (1985).
  \item \textsuperscript{142} \textit{See German}, 73 Or. App., at 169.
  \item \textsuperscript{143} \textit{Cippollone v. Ligget Group, Inc.}, 505 U.S. 504 (1992).
  \item \textsuperscript{144} \textit{See Ligget Group, Inc.}, 505 U.S., at 506.
\end{itemize}
(a) “The court should attempt to place the aggrieved party in the same position as performance would have placed him.”\(^{145}\)

(b) “The court should require the parties to mitigate damages where possible.”\(^{146}\)

(c) “The court, where consistent with public and statutory policies, should respect the intentions of the parties.”\(^{147}\)

(d) “Common sense, commercial practicality and Code policies should guide the court.”\(^{148}\)

Under the Uniform Commercial Code, the buyer has two choices to pursue against the seller or sometimes the manufacturer. Those are:

(a) To reject the goods or to revoke the acceptance of them (2-608), or

(b) To keep the goods and to sue the seller for damages for breach of warranties (2-711(3)).

In the first choice of the buyer the contract is canceled and the purchase price is recovered mostly through a lawsuit, and in the second choice of the buyer, buyer accepts

\(^{145}\) U.C.C. 1-106 (1) the remedies provided by this act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law; see also Special Project, supra note 31, at 1220; see Whaley, supra note 139, at 149.

\(^{146}\) The Act makes it clear that damages must be minimized § 1-106 comment 1; § 1-203 obligation of good faith in performance and enforcement; § 2-706 (1) seller’s remedy of resale when buyer breaches; § 2-712 (2) formula for damages when buyer covers after seller’s breach; see also Special Project, supra note 31, at 1220.

\(^{147}\) U.C.C. § 1-102 (2) ‘underlying purposes and policies of this Act are to permit the continued expansion of commercial practices through custom, usage and agreement of the parties’; see also Special Project, supra note 31, at 1220.

\(^{148}\) ‘This Act shall be liberally construed and applied to promote its underlying purposes and policies. Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions’ § 1-102 “It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. This Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the Act as a whole and should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.”’ § 1-102 cmt. 1; see also Special Project, supra note 31, at 1220.
the goods however, sues the seller. In his both choices the buyer is entitled to incidental and the consequential damages through section 2-715 of the UCC.

At this point it is crucial to give information regarding the economic loss, which comprises both direct economic loss and consequential economic loss. According to that:

“Direct economic loss may be said to encompass damage on insufficient product value; thus, the direct economic loss may be out of pocket -- the difference in value of what is given and received -- or loss of bargain -- the difference between the value of what is received and its value as represented. Direct economic loss may also be measured by costs of replacement and repair. Consequential economic loss includes all indirect loss, such as loss of profits resulting from inability to make use of the defective product.”

In general terms, “where the buyer retains the goods, damages are to be measured in terms of the difference at acceptance between the value of the goods accepted and their value as warranted unless special circumstances exist.” After the rejection or revocation of acceptance the buyer can cancel the contract and he is “entitled to so much of the price as has been paid.” Furthermore under sections 2-712 and 2-713, “the revoking or rejecting buyer may be entitled to receive damages based on a cover transaction or market price from the seller.” Therefore, it can be said that the measure of the damages is different for the revocation or the rejection of the goods than retaining the goods. Section 2-714 applies in the case of acceptance of the goods. Therefore it is inappropriate to apply section 2-714 when there is revocation or rejection.

If the goods are returned to the seller after the rejection or the revocation, damages can be demanded through sections 2-711, 2-712, and 2-713. If the buyer

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keeps the goods, the damages can be demanded through section 2-714. However, "at the same time the buyer has the ability for the purchase price of the accepted good under section 2-709." As was mentioned, the buyer will be entitled to incidental and consequential damages under the section 2-715 of the UCC regardless of whether he chooses either of the choices.

According to another explanation "buyer's damages can be gathered under two categories as primary and resultant damages." However, they are different from the common law concepts of direct and special damages, which the Code rejects. Primary damages are the damages which "a buyer suffers to the extent that the goods he receives are not as promised." The resultant damages are "any other damages that the buyer suffers including property damages, personal injuries, lost profits, etc. and section 2-714(3) allows recovery for resultant damages in a proper case as determined under section 2-715." The measurement of the primary damages is provided in section 2-714 (2). In the event the buyer accepts and retains the non-conforming goods this section applies. According to the section 2-714(2):

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

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156 3 McDonnell & Coleman supra note 30, § 25-03[1], at 25-8.
159 See Special Project. supra note 31. at 1220.
From this definition "courts often use either the cost of repair or independent indicia of value to determine the difference between the value of the goods as warranted and as delivered."\textsuperscript{162}

Cost of repair is a type of way to measure the difference between the value of the goods as warranted and as received. "Courts use the cost of repair as the measure of primary damages in cases in which the goods can be brought into conformity with their warranties at a reasonable cost,"\textsuperscript{163} In the section 2-714(2) it is provided that recovery should be the amount of the difference between the value of the defective goods as accepted and the value of the goods as warranted. Thus, "if the cost of repair exceeds the value of the goods as warranted repair costs could not represent the proper recovery amount."\textsuperscript{164}

Some courts have allowed the plaintiff to recover repair damages even though the cost of repair exceeds the purchase price.\textsuperscript{165} On the other hand, some courts apply the theory that limits the buyer's recovery to purchase price.\textsuperscript{166} It has been thought that in the cost of repairs type of recovery allowing the plaintiff to recover the damages even though the cost of the repair exceeds the purchase price is better and it protects the buyer who bought the defective goods. Since "the contract price and value as warranted are not always equivalent and a difference between the contract price and the value as warranted

\textsuperscript{162}See Special Project, supra note 31, at 1221.
\textsuperscript{163}See Special Project, supra note 31, at 1221.
\textsuperscript{164}See Special Project, supra note 31, at 1222.
\textsuperscript{165}See \textit{e.g.}, Continental Sand \& Gravel, Inc., v. K \& K Sand \& Gravel, Inc., 755 F.2d 87 (7th Cir. 1985). "The court found this result logical because capping damages at the purchase price would clearly deprive the purchaser of the benefit of its bargain in cases in which the value of the goods as warranted exceeds that price."; \textit{see also} Special Project, supra note 31, at 1222.
\textsuperscript{166}See \textit{e.g.}, Richardson v. Car Lot Co., 462 N.E.2d 459,462 (1983).
is often attributable to section 2-714(2)'s requirement that courts measure the value as warranted on the date of acceptance of the goods rather than on the contract date.\textsuperscript{167}

Another view regarding the repair was mentioned in \textit{Cundy v. International Trencher Service}\textsuperscript{168} case. In the said case the main thesis was "repairs to bring the goods into conformity with the contract also might improve or extend the life of the goods beyond what was originally warranted."\textsuperscript{169} However, contrary to that case a Texas court in \textit{Neuman v. Spector Wrecking & Salvage Co.}\textsuperscript{170} case decided to "allocate the cost of improvement in value to the buyer."\textsuperscript{171}

When the defective goods cannot be repaired or the cost of repair is an inappropriate measure of the buyer's primary damages, independent indicia of value is the appropriate way to determine the damages.\textsuperscript{172} In the independent indicia of value "buyer must independently prove the value of the goods accepted and the value they would have had if they had been as warranted."\textsuperscript{173} There are two types of value. One of them is 'value as warranted' and the other is 'value as accepted'.

From the language of the section 2-714 (2) value as warranted cannot be defined. According to the section 2-714 the courts must determine the value. "The difference in value must be the value at the time of the acceptance."\textsuperscript{174} As for the value as accepted, "fair market value as accepted provides the best measure of the value of defective goods as accepted."\textsuperscript{175} However, due to the difficulty in the measurement of the fair value of

\textsuperscript{167} See Special Project. supra note 31, at 1222.
\textsuperscript{169} See Special Project. supra note 31, at 1223.
\textsuperscript{171} For the argument see Special Project. supra note 31, at 1223.
\textsuperscript{172} Cf. Special Project. supra note 31, at 1223.
\textsuperscript{173} See Special Project. supra note 31, at 1223.
\textsuperscript{174} See Special Project. supra note 31, at 1224.
\textsuperscript{175} See Special Project. supra note 31, at 1225.
defective goods at the time of the acceptance some courts in their decisions\textsuperscript{176} use the resale price as the approximation.\textsuperscript{177}

In addition to the recovery of the proximate damages through the primary damages, a buyer can receive resultant damages, which is set forth in section 2-715 via the reference of section 2-714(3). Resultant damages are the incidental and the consequential damages. According to the section 2-715:

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

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

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

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

The incidental damages are appropriate when the buyer revokes the acceptance or rejects the goods. “A buyer who justifiably rejects the non-conforming goods may recover, as incidental damages, the costs of inspecting the goods in addition to storage and transportation expenses.”\textsuperscript{178} In order to be entitled to a recovery of incidental damages, the damages must be incident to breach and they must be reasonable.

\textsuperscript{176} See e.g. Lackawanna Leather Co. v. Martin & Stewart, Ltd., 730 F.2d 1197, 1203 (8\textsuperscript{th} Cir.1984).
\textsuperscript{177} Cf. Special Project. \textit{supra} note 31, at 1225.
\textsuperscript{178} See Special Project. \textit{supra} note 31, at 1232.
According to section 2-715 (2) consequential damages are available to a buyer who experienced a breach of warranty. "A buyer who receives non-conforming goods often sustains losses peculiar to his situation that are not solely attributable to the non-conformity, and therefore the UCC recognizes the consequential damages when appropriate."\(^{170}\)

The suffered loss, the seller's breach which causes the suffered loss, and the situation that the seller could have foreseen the consequence of such breach should be proven by the buyer in order to recover the consequential damages.

\(^{170}\) See Special Project, *supra* note 31, at 1236.
CHAPTER III

"PASS THROUGH" WARRANTIES

A. REGULATION UNDER CURRENT ARTICLE 2

The present article 2 does not expressly address "pass through" warranties. As noted in the introduction part the focus of the drafters of the express warranty provisions seems to have been on direct negotiated contracts. Some scholars have expressed the view that article 2 does not apply to "pass through" warranties, due to the reason that "the legal relationship between the manufacturers and the remote manufacturers and the remote buyers has not been brought under the article 2."\(^{180}\) Furthermore, they state that "current Article 2 does not literally apply to the ubiquitous manufacturers' warranty even in cases involving only economic loss."\(^{181}\)

However, if one examines the cases, he will find that the courts uniformly treat "pass through" warranties as express warranties allowing buyer's to bring their claim for breach of the standby commitment under section 2-313.\(^{182}\) Whatever the jurisdiction's position may be on the issue of privity of contract in general, no decision refuses enforcement to "pass through" warranties on grounds of lack of privity. The decisions


\(^{182}\) See e.g. Mainline Tractor v. Nutrite Corp., 937 F.Supp. 1095 (1996), in which the court held that representations on label and label packets had been express warranties and "the statement on the label clearly falls within the purview of section 2-313(a) as an affirmation of fact made by the seller to the buyer relating to the quality of the goods." 937 F.Supp. at 1106.
employ one of two analytical approaches to allow the ultimate buyer to issue the contractually remote warranty.

Some courts conclude that by intentionally directing the "pass through" warranty to the ultimate buyer, the warranty joins the ultimate sales contract for purposes of providing the warranty for the transaction. Under their analysis, a type of privity is said to exist between the warrantor sending the "pass through" and ultimate buyer. Opinions from Georgia and Vermont illustrate this analysis.

In Chrysler v. Wilson Plumbing Co.,\textsuperscript{183} the Georgia Court has held that "where an automobile manufacturer, through its dealer issues to a purchaser of one of its automobiles from such dealer admittedly as a part of the sale a warranty by the manufacturer running to the purchaser, privity exists."\textsuperscript{184} In Jones v. Cranman's Sporting Goods\textsuperscript{185}, the Georgia Court found this principle applicable to the situation where "the weapon was fully guaranteed by the distributor to the ultimate consumer."\textsuperscript{186} In Ford Motor Co., v. Lee\textsuperscript{187} the Georgia court has held that "a manufacturer who sells or releases a vehicle into the stream of commerce, knowing that it is likely to be resold or used by others than the buyer, will be held liable for an injury caused by a defect which might be discovered by reasonable inspection by the manufacturer."\textsuperscript{188} In Gochey v.

Bombardier\textsuperscript{189}, the Vermont Supreme Court held that "when a manufacturer expressly warrants its goods, it, in effect, creates a direct contract with the ultimate buyer."\textsuperscript{190}

The second analytical approach to allowing ultimate buyers to sue on "pass through" warranties is to conclude simply that privity is not required in this context. To allow a warrantor to defend on this ground would be to allow the warrantor to mislead. In Whitman v. Consolidated Aluminum Corp.,\textsuperscript{191} the court held that, where the plaintiff relied on a label when purchasing the good, "privity of contract was not required to recover for injuries caused by breach of an express warranty and the label was obviously directed toward the prospective purchasers and users of the ladder and defendant should have known that they might rely on."\textsuperscript{192} In this connection, a remote purchaser relies on the statements of the manufacturer, which are printed on the label of the product or are written in the warranty booklet, or owner's manual. Reliance takes place at the time of the purchase of the product. The remote purchaser becomes aware of the warranty at the time when she buys the good and opens the box of the good. In the case of the "pass through" warranties printed on the label remote purchasers become aware of the warranty at the time of the purchase. In any case, there is a clear reliance on the representations of the manufacturer. Therefore, they all create express warranty. The statements of the manufacturer become part of the basis of the bargain. Since the statements are related to the quality of the goods, the statements induce the buyers.

During the drafting process of the UCC Karl Llewellyn was aware of the "pass through" warranties and their effect in the market. In the Uniform Revised Sales Act

\textsuperscript{190} Bombardier, Inc., 153 Vt. 613.
\textsuperscript{191} See Whitman v. Consolidated Aluminum Corp., 637 S.W.2d 405 (Mo. Ct. App. 1982).
\textsuperscript{192} See Consolidated Aluminum Corp., 637 S.W.2d at 407.
(URSA), which was drafted during the first half of the 1940s, this situation was indicated by him in the comments. In the comment to section 37 of the URSA, the importance and the effect of the “pass through” warranties were presented with the sample cases.\footnote{See e.g., Timberland Lumber Co., Ltd. v. Climax Mfg. Co., C.C.A. 3d, 1932, 61 F.(2d) 391 where it was stated that “a manufacturer has been held obligated to a purchaser from an independent intermediary where the manufacturer makes a special guaranty to induce the purchase.”; see also Baxter v. Ford Motor Co., 1932, 168 Wash. 456, 12 P. (2d) 409 where it was stated that “a manufacturer has been obligated on representations made in sales literature supplied to intermediary and relied on by the purchaser.”} Furthermore, the same comment mentioned that the section did not constitute any approval of the view judicially expressed that warranties are in their nature confined to the direct parties to such a contract. Therefore, before the drafting of the UCC the importance of the “pass through” warranties was brought into consideration in the comment to section 37 of URSA. Despite that fact “pass through” warranties were not expressly covered in the present article 2, in this connection, leaves us with contract limitation.

The issue of the effectiveness of a remote seller’s disclaimer of or limitation on express warranties made under sections 2-316 and 2-719 of the UCC against an ultimate purchaser who did not have the opportunity to negotiate over the terms of the agreement was raised by the New Jersey Supreme Court in the Spring Motors v. Ford.\footnote{See Spring Motors Distributors, Inc., v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985).} According to one view “those provisions should be enforced in the non-privity context to the same extent that they would be enforced between the parties in privity for the equity and fairness to remote sellers.”\footnote{See Arlie R. Nogay, Enforcing the Rights of Remote Sellers Under the UCC: Warranty Disclaimers, the Implied Warranty of Fitness for a Particular Purpose and the Notice Requirement in the Non-privity Context, 47 U. Pitt. L. Rev. 873, at 891 (1986).} On this reasoning, “when a remote seller avails itself of the remedy limitations and risk allocation principles of the UCC, it has a statutory right to
expect that those terms will be enforced by the courts." Another view argues that “the manufacturers’ disclaimers and limitations prima facie unenforceable when applied against remote commercial purchasers.” One scholar states on this issue that “standard form documents, indeed, should be seen as things, not as contracts; the choice is between having the manufacturer pass a given risk onto the consumer, and having the manufacturer absorb the risk and raise the price as compensation.” Courts have been divided between enforcing and avoiding manufacturers’ exclusions in non-privity cases. Courts, which extend manufacturers’ warranties to non-privity commercial purchasers under the UCC, face the issue of whether to extend the manufacturers’ disclaimers and limitations. If these exclusions are given affect, this will nullify the advantages granted to remote purchasers through abolishing vertical privity requirements, on the other hand, to deny effect might prevent a manufacturer from limiting its liability. The courts gave theories in favor of the avoidance of the exclusions of warranties as follows. Some courts based their decisions on the lack of conspicuousness theory. The terms of the contract must be conspicuous to the buyer otherwise there is a lack of conspicuousness. Some courts are willing under the present article 2 to deny effectiveness to contract limitation based on lack of conspicuousness or lack of negotiation. Other courts give effect to the restriction in the “pass through” warranties on the ground that they are permitted by article 2 and that a claimant who relies on the affirmations of the “pass through” must also be bound by its limitation.

199 Cf. Russell, supra note 197, at 496.
On the other hand, in the "pass through" warranties the provisions of the contract are drafted without negotiation as was discussed above, and therefore, the terms are not known thoroughly by the remote purchaser. Some other courts based their decisions\(^{201}\) on the material alteration theory. According to that theory "where an informal agreement is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed."\(^{202}\) In the event that those provisions do not materially alter the agreement, they will become part of the agreement according to UCC section 2-207. However, for the material alteration or vice versa, an express outcome of the intention of the other party is needed. This is absent in the "pass through" warranties. Since the manufacturer and the remote purchaser do not directly deal with each other. Some other courts based their decisions\(^{203}\) on the theory of lack of negotiation. According to that theory, parties, especially "the remote purchaser lacked an opportunity to negotiate directly over the terms of the exclusions, and furthermore their decision based on the freedom of contract."\(^{204}\) This also shows one of the main characteristics of the "pass through" warranties that they are not negotiated warranties.

On the other hand, theories in favor of the enforcement of the exclusions of warranties were given as follows. Some courts based their decisions\(^{205}\) on the third party beneficiary theory, which is stemming from the section 2-318 of the UCC. According to that theory and the decisions of the courts the exclusions of warranties are extended to the vertical non-privity plaintiffs, even though they did not take part in the negotiation

\(^{202}\) See Russell, supra note 197, at 472.
\(^{204}\) See Russell, supra note 197, at 475.
process. Some other courts based their decisions on the legislative mandate theory, which denotes that "section 2-316 of the UCC provides for the exclusion or modification of warranties in certain circumstances." In this connection, "by adopting the section 2-316, a state legislature has specifically granted sellers the privilege of excluding warranties in their contracts with buyers." To this end, once a remote purchaser buys the good, the exclusions of the warranties fall automatically within the scope of the enforcement. In other words, those exclusions are applicable and enforceable to the remote purchasers.

B. THE REVISION OF ARTICLE 2

1. THE REVISION PROJECT

The UCC has been developed and continued to be revised by the two organizations namely the National Conference of Commissioners for Uniform State Laws (NCCUSL) and the American Law Institute (ALI). The ALI and the NCCUSL have been working on the revision of the Article 2 since the early 1990s. In this context, "in 1990 a study group appointed by the permanent editorial board of UCC and issued a preliminary report and a drafting committee, appointed by the NCCUSL, has begun circulating preliminary drafts since technological and other changes in the nature and

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206 See e.g. Western Equipment Co. v. Sheridan Iron Works, Inc., 605 P.2d 806 (Wyo. 1980).
207 See Russell, supra note 197, at 479-80.
208 See e.g. Russell, supra note 197, at 479.
209 UCC is the main source of commercial law in the United States. The UCC and the revisions to it are presented to the state legislatures for adoption, and the Code only becomes the law of a respective state when it is adopted by that state's legislature. The UCC has been adopted in some form in all fifty states. The only exception is the state of Louisiana, which has not adopted the sales and leases article of the UCC." See Henry D. Gabriel, The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code, 72 TUL.L.REV. 1995 (1998).
210 For detailed information regarding the NCCUSL, See Gabriel, Id.
211 For detailed information regarding the ALI, See Gabriel, supra note 209.
performance of sales agreements confirm the need to revise article 2." In other words, the intent and the reason of the revision are “based on the ideas that the current Code is not reflective of current business practices, particularly in areas such as consumer protection, warranty, products liability and third party rights in sales contracts, as well as emerging electronic modes of contracting.” Those views supplement and justify the revision because “the pace of economic, technical and legal change is very rapid in American society.” “The current Article 2 was drafted and operates within a context of established principles of the common law of contracts.” After a decade of efforts the final form of the proposed revision of the Article 2 was brought on the agenda of the NCCUSL in July 1999. However, due to the industry opposition to some sections, it was thought that there would be a difficulty in the uniform adoption by the states. In this context, the July draft for the proposed revision of the Article 2 was withdrawn. After that meeting three modifications were made on the final July draft. Those were November 1999, December 1999, March 2000 drafts. The recent draft is the April 2000 draft, which will be discussed in 2000 ALI Annual Meeting. The hope is that the project will be approved by ALI in 2001.

2. **NEW WARRANTY SECTIONS**

During the revision process most important and controversial changes have been made in the warranties section. In the proposed revision of the article 2 the express

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215 “The sale of goods provisions of the UCC has been in its present form since 1958. In this regard, in its present form it does not respond to modern electronic and computer based business transactions.” See Gabriel, *supra* note 209, at 2003.
warranties, "pass through" and advertising were drafted in separate sections. Express warranties, which are governing the direct relations, are placed in section 2-313. This section is limited in its scope and direct purpose to express warranties and remedial promises made by the seller to the immediate buyer as part of a contract for sale. The present section deals with affirmations of fact or promises made by the seller, to the immediate buyer, descriptions of the goods, or exhibitions of samples or models, exactly as any other part of a negotiation which ends in a contract is dealt with. Section 2-313 A is new and follows the case law and practice of extending a seller’s obligations regarding new goods to remote purchasers. It governs what are commonly called the "pass through" warranties. Section 2-313 B is also new and follows the case law and the practice in extending a seller’s obligations regarding new goods to remote purchasers. This section deals with obligations to a remote purchaser created through a medium for communication with the public, primarily through advertising. In place to be current 2-313, the revision will include these sections, which bring significant differences and precise regulation to the privity issues, the concept of the basis of the bargain and the remedial rights with regard to "pass through" and advertising warranties which have effects on the third parties.

3. SECTION 2-313 A

The explicit treatment of "pass through" warranties is in section 2-313 A which reads as follows:

Section 2-313 A  Obligation To Remote Purchaser Created By Record Packaged With or Accompanying Goods.

(a)  In this section:

(1)  "Goods" means new goods and goods sold or leased as new goods unless the transaction of purchase does not occur normal chain of distribution.
(2) "Immediate Buyer" means a buyer that enters into a contract with the seller.

(3) "Remote purchaser" means a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.

(b) If a seller makes an affirmation of fact or promise that relates to the goods, or provides a description that relates to the goods, or makes a remedial promise, in a record packaged with or accompanying the goods, and the seller reasonably expects the record to be, and the record is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that the goods will conform to the affirmation of fact, promise or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation, and an obligation to the remote purchaser will perform the remedial promise.

(c) It is not necessary to the creation of an obligation under this section that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to undertake an obligation, 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 an obligation.

(d) The following rules apply to the remedies for breach of an obligation created under this section:

(1) The seller may modify or limit the remedies available to the remote purchaser if the modification or limitation is furnished to the remote purchaser no later that the time of purchase or if the modification or limitation is contained in the record that contains the affirmation of fact, promise or description.

(2) Subject to a modification or limitation of remedy, a seller in breach is liable for incidental or consequential damages under section 2-715 but the seller is not liable for lost profits.

(3) The remote purchaser may recover as damages for breach of as seller’s obligation arising under subsection (b) the loss resulting in the ordinary course of events as determined in any manner, which is reasonable.

(e) An obligation that is not a remedial promise is breached if the goods did not conform to the affirmation of fact, promise or description creating the obligation when the goods left the seller’s control.

a) "OBLIGATION" RATHER THAN "WARRANTY"

To begin with, in the proposed revision of article 2 the so-called "pass through" warranty is named an "obligation" rather than an "express warranty". The crucial task is to identify the change that 2-313 A will make in comparison with the treatment of "pass through" under the current article 2.

"The recognition of the remote warranty obligation is an acknowledgment of the modern marketing and distribution system in which the manufacturers give warranties to
persons not in privity."\textsuperscript{216} Furthermore, "the recognition of these remote warranties also comes with a recognition of the remote seller's ability to limit remedies and to curtail the extension of the warranty to non-buyers, as well as providing a clear accrual rule for bringing actions based upon the remote warranty."\textsuperscript{217} Furthermore, as the "pass through" warranties were deemed express warranties they were also subject to the elements of express warranties. For example, one of the elements that they were subject to was the basis of the bargain test. In the proposed revision of article 2 they were named as "obligation." In this context, in the proposed revision of article 2, the test of basis of the bargain was eliminated. The elements that trigger the obligation under section 2-313 A are placed in the subsection (b). Those elements are an affirmation of fact or promise that relates to the goods or a description that relates to the goods or a remedial promise. Those elements must be in a record packaged with or accompanying the goods and they must be furnished to the remote purchaser.

b) CONFIRMATION: PRIVITY IS NOT REQUIRED

Another implication of drafting the "pass through" warranties in a separate and independent section is the express recognition and confirmation that lack of privity is not a defense. This is recognized in section 2-313 A (a) (3) through defining "the seller" and "the remote purchaser". This confirmation also eliminates the risk of remote purchaser's recovery of damages when the intermediate seller becomes insolvent or out of business. In this context, a remote purchaser, when the intermediate seller becomes insolvent or is out of business, can bring an action against the seller based on section 2-313 A without

\textsuperscript{217} See Rusch. supra note 216, at 1700.
the requirement of privity. However, section 2-313 A does not allow an extension beyond a remote purchaser to the donee or any voluntary transferee who is not a buyer or lessee. Unlike the practice under the present article 2 the third party other than the remote purchaser cannot bring an action against a remote seller. According to the preliminary comment 2 of section 2-313 A:

"The party to whom the obligation runs under this section may either buy or lease the goods, and thus the term 'remote purchaser' is used. The term is more limited than 'purchaser' in article 1, however, and does not include a donee or any voluntary transferee who is not a buyer or lessee. Moreover, the remote purchaser must be part of the normal chain of distribution for the particular product. That chain will by definition include at least three parties and may well include more-for example, the manufacturer might sell first to a wholesaler, who would the resell the goods to a retailer for sale or lease to the public. A buyer or lessee from the retailer would qualify as a remote purchaser and could invoke this section against either the manufacturer or the wholesaler (if the wholesaler provided a record to the retailer to be furnished to the ultimate party), but no subsequent transferee, such as used-goods buyer or sublessee, could qualify. The law governing assignment and third-party beneficiary, including section 2-318, must be consulted to determine whether a party other than the remote purchaser can enforce an obligation created under this section." 218

Therefore, one can say that for the persons other than the remote purchaser, sections other than 2-313 A is applicable. In other words, only the persons who buys the product in the normal distribution chain are entitled under this section to qualify as a remote purchaser and sue the remote seller under this section. People other than the remote purchaser can sue according to section 2-318 or other regulations.

The change from "express warranty" to "obligation" creates tension with the rationale of the economic loss doctrine. The revision embraces the second analytical approach of the current case law. It can be said that the drafters drafted the section as if there was no bargain between the remote purchaser and the seller. Therefore, with this,

218 American Law Institute, Uniform Commercial Code [New] Revised Article 2, Sales, Discussion Draft (April 14, 2000), § 2-313 A. cmt. 2, at 64
all statements about the good, which are written on a label or in a booklet and are received with the good, create an obligation. The obligation exists even if the remote purchaser is totally unaware of the "pass through" warranties at the time of the purchase. Therefore, there is no need to establish reliance or to prove that the statements are part of the basis of the bargain. This can be realized through the preliminary comment 1 to section 2-313 A, which reads:

"No direct contract exists between the seller and the remote purchaser, and thus the seller's obligation under this section is not referred to as an 'express warranty.' Use of "obligation" rather than 'express warranty' avoids any inference that the basis of the bargain test is applicable here. The test for whether an obligation other than a remedial promise arises is similar in some respects to the basis of the bargain test, but the test herein is exclusive. Because 'remedial promise' in Section 2-313 is not subject to the basis of the bargain test that term is used in this section."^219

However, with the application of reasonable person standard a seller can rebut this presumption that the remote purchaser would not believe that affirmation of fact, promise or description did not create an obligation. In this context, one can say that the seller escapes responsibility for puffing under 2-313A(c). According to this, subsection 2-313 A (b) provides:

"if a seller makes an affirmation of fact or promise that relates to the goods, or provides a description that relates to the goods, or makes a remedial promise, in a record packaged with or accompanying the goods, and the seller reasonably expects the record to be, and the record is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that the goods will conform to the affirmation of fact, promise or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation, and an obligation to the remote purchaser that the seller will perform the remedial promise."

This situation is also mentioned in the preliminary comment 5 of section 2-313A:

"[T]he seller is entitled to shape the scope of the obligation, and the seller's language must be considered in context. If a reasonable person in the position of the remote purchaser, reading the seller's language as a whole, would not believe that an affirmation of fact, promise or description created an obligation, there is no liability under this section."\textsuperscript{220}

c) **RESTRICTION OF THE "PASS THROUGH" WARRANTY PACKAGE**

In the subsection 2-313 (A) (d) (1) limitations on the "pass through" warranties are confirmed. According to this a seller can limit the remedies available to the remote purchaser if the limitation is furnished to the remote purchaser no later than the time of purchase. The statutory language requires the furnishing of the restriction. It does not demand demonstrated agreement to them by the buyer. Thus, the revision adopts the view of these cases that bind the buyer by "pass through" restriction. Bearing in mind that the "pass through" warranties are comprehensive, obviously the remote purchaser will receive the limitation with the good. The limitation is written in the warranty package and until she opens the box of the good, she will not be aware of the limitation. Therefore, it can be said that there is a possibility of unconscionable terms to be imposed over the remote purchaser, since there is an inequality of bargaining power between the seller and the remote purchaser.

d) **ELIMINATION OF LOST PROFIT CLAIMS**

In the subsection 2-313 A (d) (2) it is stated that the seller is not liable for the lost profits. Regarding the recovery of the damages, a remote purchaser to whom the obligation is extended cannot recover consequential damages for loss of profits. The

\textsuperscript{220} American Law Institute, Uniform Commercial Code [New] Revised Article 2, Sales, Discussion Draft (April 14, 2000), § 2-313 A. cmt. 5. at 64
drafters kept the consequential damages in the scope of recovery, however, they provide a total insulation for loss profit claims. This seems to be a major change in existing law. The buyer has no loss profits claim even though the buyer has not agreed to give up this right. Under the present law “if there is a failure of the essential purpose, the limitation of the express warranty to a warranty of repair or replacement will fail and the buyer has available the array of Code remedies.” Section 2-715 is one of the available remedies under the revision, which governs the consequential damages resulting from the breach. They are available in addition to the incidental and difference in value damages. One may ask why the loss of profits -- only one particular form of economic loss -- cannot be recovered. It can be argued that section 2-313 A balances the imposition of liability on sellers against the unlimited scope of the loss of profits of the remote purchaser. In other words, a remote seller cannot predict the scope of the usage of the product he sells or its benefit to the remote purchaser. Therefore, one can say that the drafters tried to balance the unexpected and unrestricted amounts of lost profits through not allowing the remote purchaser to recover the lost profits in the form of consequential damages. However, on the other hand, lost profit damages are vitally crucial when the remote purchaser is a commercial consumer. For instance, Lewis v. Mobil Oil Corp., provides a powerful defense against the exclusion of lost profits. In this case, the United States Court of Appeals for the Eighth Circuit has held that:

“where a seller provides goods to a manufacturing enterprise with knowledge that they are to be used in the manufacturing process, it is reasonable to assume that he should know the defective goods will cause a disruption of production, and loss of profits is a natural consequence of such disruption. Hence, loss of profits should be recoverable under those circumstances.”

\[1\] McDonnell & Coleman, supra note 30, § 7.04 [1], at 7-54.

\[2\] See Lewis v. Mobil Oil Corp., 438 F.2d 500 (8th Cir. 1971).

\[3\] See Mobil Oil Corp., 438 F.2d, at 510-11.
Therefore, one can say that subsection (d) (2) of section 2-313 A sees the problem from one aspect, *i.e.* from the consumer aspect. Therefore, at least a balance should have been built between the consumer and the commercial consumers regarding lost profits.
CHAPTER IV

ADVERTISING WARRANTIES

A. REGULATION UNDER CURRENT ARTICLE 2

1. CASE LAW RECOGNIZING ADVERTISING AFFIRMATIONS AS EXPRESS WARRANTIES

In the modern era "for markets to operate effectively, buyers must have accurate information about the quality and other characteristics of the products offered for sale."\(^{224}\)

In this connection, "with mass marketing, the manufacturer is removed from the purchaser, sales are accomplished through intermediaries and the demand for products is created primarily by advertising media."\(^{225}\)

Statements in advertising which are found to be part of the basis of the bargain are held by the courts to be express warranties under the present article 2 even though there is no privity of contract between the advertiser and the buyer and no negotiation between these actors.\(^{226}\)

\(^{225}\) See Note, 36 So. Cal. L. Rev. 291, 294.
\(^{226}\) See e.g. 1 McDonnell & Coleman, supra note 30, § 5.01[2] at 5-4; Castelaz et al., supra note 33, at § 696, see e.g. General Supply & Equip. Co. v. Phillips, 490 S.W.2d 913 (Tex. Ct. App. 1972); Community T.V. Serv. Inc., v. Dressor Indus. Inc., 586 F.2d 637 (8th Cir.), reh'g denied, 586 F.2d 637 (8th Cir. 1978) (advertising catalog describing T.V. tower); Taylor v. Alfama 481 A.2d 1059 (Vt. 1984)(car advertised as in mint condition with rebuilt engine).
Express warranties have been held to be created by the use of particular statements in advertising with respect to automobiles and automobile accessories, batteries, cosmetics and hair preparations, equipment and machinery, insulation, preparations for agricultural use or for livestock, and sporting goods. A remote purchaser in order to recover under an express warranty stemming from the advertising warranties must establish that the manufacturer's advertisement contains an affirmation of fact or description of goods, which becomes part of the basis of the bargain. However, "where advertising is involved, especially in national media like television or magazines, the argument can thus be made that there is such a high degree of skepticism among consumers that no reasonable person accepts the representation made as accurate product information on which they may rely." "In some instances, the language of an advertisement might be regarded merely as an affirmation of the value of the advertised

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227 See e.g. Hansen v. Firestone Tire & Rubber Co. (CA 6 Mich.) 276 F.2d 254 (6th Cir. 1960) (advertisement that certain tires would fit any rim and had certain safety features); Ghema v. Ford Motor Co. (1st Dist.) 246 Cal. App.2d 639, 55 Cal. Rptr. 94 (1966) (advertisement that a certain kind of car was designed and built to give road performance required by the most exacting motoring enthusiasts); Scheuler v. Aamco Transmissions, Inc., 1 Kan. App.2d 525, 571 P.2d 48 (1977) (advertising as to automatic transmission); Funk v. Kaiser-Frazer Sales Corp. (2d Dept.) 23 App. Div.2d 771, 258 N.Y.S.2d 553 (1965) (advertisement of safety windshield on car). An automobile manufacturer's radio, television, magazine, and newspaper advertisements extolling the virtues of its products are made for the ultimate purchasers who use and drive the products, and form part of the warranty that the manufacturer gives the ultimate consumer. General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960) (disapproved on other grounds by Kyker v. General Motor Corp., 214 Tenn. 521, 381 S.W.2d 884)(action for injury caused by defective brakes). See also Castelaz et al. supra note 33, at § 697.


233 Hauer v. Zogarts, 14 Cal.3d 104, 120 Cal. Rptr. 353, 534 P 2d 377 (1975) (golf training device was 'completely safe ball will not hit player.'); See also Castelaz et al., supra note 33, at 697.

234 Wayne K. Lewis, Toward A Theory of Strict 'Claim' Liability: Warrants Relief For Advertising Representations, 47 Ohio St. L.J. 671, 679 (1986); in the same article it was also stated that "according to Newspaper Advertising Bureau, only 39% of viewers regard TV ads as believable." n. 62.
goods or a statement purporting to be merely the advertiser’s opinion or commendation concerning the goods, and thus does not create a warranty.”

In this context, a court held that “advertisements and promotional literature can be a part of the basis of the bargain where they are prepared and furnished by a seller to induce the purchase of its product and the buyer relies on the representations.”

An advertisement, catalog, or brochure can contain representations that constitute an express warranty even when a warranty is not intended. In order to determine, and so as to provide a breach of warranty action to recover for injury caused by the product, whether a statement in an advertisement amounts to a warranty of the advertised product “depends on the circumstances, and the alleged warranty language of the advertisement in question and the context in which such language is used.”

2. LACK OF PRIVITY DOES NOT BAR ACTION

Typically the advertiser of the product is the manufacturer or some related company that does not have a contract with the ultimate buyer. In this context, advertising warranties can be described as “non-privity warranties” at least in the sense that the advertiser and the ultimate buyer do not manifest consent to the same contract. Although the remote purchaser and the manufacturer whose good is advertised, have no

235 See Castelaz et al., supra note 33, at § 692.
238 See Castelaz et al., supra note 33, at § 692.
direct contractual relation, the remote purchaser may well rely on the express warranties in the advertisement. In the well-known Randy Knitwear Inc., v. American Cyanamid Co., the Court of Appeals of New York declared that:

"[T]he world of merchandising is, in brief, no longer a world of direct contract; it is, rather, a world of advertising and when representations expressed and disseminated in the mass communications media and on labels attached to the goods themselves, prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity. Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products and this advertising is directed at the ultimate consumer or at some manufacturer or supplier who is not in privity with them. It is highly unrealistic to limit a purchaser's protection to warranties made directly to him by his immediate seller. The protection he really needs is against the manufacturer whose published representations caused him to make the purchase."

Express warranties created through mass media advertisements addressed to the public are also captured perfectly in Terry v. Double Cola Bottling Company as

"[I]t is the consumer whom the bottling companies are trying to persuade when they proclaim in neon lights from atop tall buildings, and by every other known advertising medium, that this cola and that crush are refreshing, delicious, delightfully nonfattening, and just the drink for you. The consumer is their mark even though the manufacturers have no direct contract with him. It is to shut one's eyes and ears in today's world of advertising to say that, because no reassuring words appear on the product's container, the manufacturer of nationally advertised product has made no representation to the purchaser. He makes one every day -- sometimes every hour on hour. Any food entitled to status as a famous name brand has been warranted by the manufacturer to the consumer -- very probably in color -- in magazines, on billboards, and by glamorous stars of stage and screen over radio and television."

Since "the rationale is that the advertiser has, by its actions, created the market for the products by making claims about their quality and performance that induce

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consumers to purchase them. 243 A remote purchaser, who is not in privity with the manufacturer, who advertises his product through mass media, can bring an action on the non-privity basis for breach of warranty. The manufacturer's aim in placing his goods upon the market and warranting through advertising is to induce the consumer to rely upon his representations and purchase the goods. Therefore, it cannot be said that a manufacturer had no intention of warranting in the advertisement made to public through mass media and consequently he cannot avoid his responsibilities, "when the expected use leads to injury and loss, by claiming that he made no contract directly with the user." 244 In Henningsen v. Bloomfield Motors Co., 245 the Supreme Court of New Jersey indicated that "with the advent of large scale advertising by the manufacturers to promote the purchase of their goods from the dealers by members of the public, provided a basis upon which the existence of express warranties was predicated, even though the manufacturer was not a party to the contract of sale." 246

Furthermore, in Semowich v. R.J. Reynolds Tobacco Co., 247 the court decided that advertisements concerning Vantage cigarettes, which were published in the various issues of "Parade", "Penthouse", "Playboy", "Life", and "Look" magazines, and which commented on the Vantage's "great taste" and low tar and contained the Surgeon General's warning about the effects of smoking, created an express warranty. In Rogers v. Toni Home Permanent Co., 248 the Supreme Court of Ohio held that "a consumer could sue the manufacturer of a product for breach of express warranties arising from published

243 See Lewis, supra note 234, at 678 (1986).
244 See Randy Knitwear Inc., 11 N.Y.2d at 13, 181 N.E.2d at 403, 226 N.Y.S.2d at 368.
246 See Bloomfield Motor Co., 32 N.J. at 372-73, 161 A.2d at 77.
advertisements, although no privity of contract existed between the consumer and the manufacturer.\textsuperscript{249} Furthermore, the Supreme Court of Ohio added that "the warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious."\textsuperscript{250} Therefore, one can say that according to this decision an injured consumer who relies upon the express warranty to his detriment can recover even though there is no direct privity of contract between him and the manufacturer. One step further, in Drayton v. Jiffee Chemical Corp.,\textsuperscript{251} it was held that "television advertisements that product was "safe" and capable of "fast action", which representations the purchaser allegedly relied on, were properly considered express warranties as to safety of the product for human contact."\textsuperscript{252} According to this case warranties made in the advertisement to public through mass media can create an express warranty. Furthermore, a consumer who relies on the advertisement can bring an action against the manufacturer on a non-privity basis for the breach of express warranty.\textsuperscript{253} In all of these decisions one can say that courts recognized the right of the remote purchaser who relied on the advertising warranty of the manufacturer to sue on the non-privity basis. In brief, a buyer may bring an action directly on a non-privity basis to a manufacturer who advertised his products through mass media and make an express warranty.

\textsuperscript{249} See Toni Home Permanent Co., 167 Ohio St. at 249, 147 N.E.2d at 615.
\textsuperscript{250} See Toni Home Permanent Co., 167 Ohio St. at 249, 147 N.E.2d at 615.
\textsuperscript{251} See Drayton v. Jifsee Chemical Corporation, 591 F.2d 352 (6th Cir. 1978).
\textsuperscript{252} See Jifsee Chemical Corp., 591 F.2d at 352.
\textsuperscript{253} As a supplement to those decisions in Omaha Pollution Control Corp., v. Curver-Greenfield Corp., (413 F. Supp. 1069 (1976)) it was referred to Hawkins Construction Co., v. Matthews Co., (190 Neb. 546, 209
3. IMPORTANCE OF BUYER RELIANCE ON MEDIA ADVERTISING

Although the courts debate whether demonstrated reliance on the warranty affirmation by the claimant buyer is generally required for an express warranty action, decisions dealing with public advertising seem to place particular emphasis on the reliance requirement. A typical judicial statement is: "assuming that an advertisement's statement regarding a product may be regarded as an express warranty, a person injured by the product cannot recover from the advertiser on the ground of breach of express warranty without showing reliance on the statement in question." Furthermore, according to American Tobacco Co. Inc., v. Grinnell an express warranty claim under section 2-313 is available where the seller makes an affirmation of fact or promise relating the goods sold which becomes the basis of the bargain, thereby inducing reliance on the part of the buyer. The defendant, a tobacco company, won summary judgment as against the plaintiff's claims for breach of express warranty as well as fraud, fraudulent concealment and negligent misrepresentation by proving conclusively that plaintiff did not rely upon the advertisements in question in choosing to smoke defendant's cigarettes and the plaintiff admitted that he did not see the advertisement. Torres v. Northwest

N.W.2d 643 (1973)) and it was decided that a manufacturer or seller may be held liable under such an advertising warranty even though he is not in privity of contract with the purchaser.

254 See e.g., Ball v. Mallinkrodt Chemical Works, 53 Tenn. App. 218, 381 S.W.2d 563 (1964); Connolly v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (1963); Jones v. Kellner, 451 N.E.2d 548 (Ohio App. 1982); see e.g. Kinlaw v. Long Mfg. N.C., Inc., 298 N.C. 494, 259 S.E.2d 552 (1979), in which it was stated that "the element of reliance need not always be expressly alleged, it can often be inferred from allegations of mere purchase or use if the natural tendency of the representations made is such as to induce such purchase or use." 298 N.C. at 501 n. 7, 259 S.E.2d at 557 n.7; Hawkins Construction Co., v. Matthews Co., 190 Neb. 546, 564-66, 209 N.W.2d 643, 654-55 (1973), holding that distribution of an advertising brochure with express representations about the product sufficed for a finding of express warranty.


Engineering[^a] joins those opinions in holding that a buyer need not show reliance in order to create an express warranty. However, the court does not conclude that where a buyer claims an express warranty based on advertising, the evidence must show that the buyer read the advertisement.

The presumption of warranty recognized in comment 3 to section 2-313 is limited to statements made by the seller “during a bargain”. Thus, it is possible to argue that media advertising does not quality as being made “during a bargain” and is not entitled to a presumption of warranty, therefore, requiring the buyer to demonstrate reliance, which is distant in time and place. White and Summers support this view stating that:

“one would not regard an advertisement as being made during a bargain and therefore no statement in an advertisement would normally qualify for the presumption that may be authorized in comment 3. At a minimum a plaintiff in such a case should have to testify that he or his agent knew of and relied upon the advertisement in making the purchase.”[^b]

In this regard, White and Summers “interpret the comment as being applicable only to face-to-face dealings that occur while the deal is still warm.”[^c] Briefly one can say that their view supports a reliance approach for the creation of an express warranty. Actually, this interpretation is correct when the philosophy of the drafting of the UCC is taken into consideration. However, if a remote buyer does not see the advertisement addressed to the public, one can say that she will also be subject the express warranty represented on the advertising material, since a manufacturer advertises his product in the mass media with the knowledge and the intention that they will be read by the public. In other words, one can say that the manufacturer assumes the responsibility to be sued by

[^b]: See WHITE & SUMMERS supra note 10, § 9-5, at 353.
the remote purchaser, who has not read the advertisement addressed to the public in the mass media but affected by the defective product. Therefore, a non-privity action can be brought against the manufacturer who makes warranties in the advertising addressed to the public in the mass media and privity will not be a bar when dealing with the express warranties arising out of advertising. Furthermore, one can say that lack of privity will not be a bar for recovery where only economic loss is involved.

4. RELATIONSHIP OF ADVERTISING TO FORMAL WARRANTY DOCUMENTS

Another aspect of the advertising warranties addressed to the public through mass media is that they are non-negotiated. Instead, “they arise from affirmations or promises contained in advertising pitched broadly to numerous potential customers.” Therefore, the consumer has no chance to negotiate over the terms of the warranty made in advertisement addressed to the public in mass media. Furthermore, advertising warranties are non-comprehensive since in the advertisement the manufacturer does not set out the limitations on the warranty such as exclusion of consequential damages. An attempt to state those limitations may be made as part of the ultimate sale either through use of a negotiated contract or a “pass through” warranty document. Issues arise as to the relationship between the advertising and the formal warranty document. At this point, it is crucial to determine whether the statements in the advertising -- which are seen before the sales brochure, the catalog or the warranty package received with the product -- are binding and constitute a basis of the bargain independent of the formal warranty, and whether there is a difference between the advertising warranty and the written warranty.

\(^{260}\) See Adler, *supra* note 51, at 457.
which is received later. In this context, "the presence of a formal warranty document does not in itself preclude separate recognition of informal warranty." But at the same time specific clauses in the formal warranty document may invoke the parol evidence rule and thereby prevent the informal statements that are made before or after execution or delivery of the warranty from being effective. According to one view, "given the capacity of informal and formal warranties to coexist, a critical role of an informal express warranty is to amplify or explain the statements in the formal warranty often to the disadvantage of the seller." In this connection, "informal statements in advertising and sales presentation may amplify the carefully structured language of formal commitments, and provide means by which a frustrated buyer can recover economic losses." In the case law development this situation has been reflected in a variety of cases. For instance, in Community TV Service Inc., v. Dresser Indus. Inc., the formal contract stated precisely that a TV tower could stand pressure of 60 lbs/sq. foot. Advertising indicated that the tower would safely withstand winter wind and ice loads. The tower was judged by whether it performed up to the standard of the advertising and buyer recovered judgment for $1.2 million. In Select Port Inc., v. Babcock Swine Inc., the formal contract described pigs being sold simply as "Midwestern Gilt." Advertising described this strain as the gilt of the future, a product of 3 pureline strains which is SPF like (i.e., specific pathogen free). Buyer obtained an award of $352,700 based on breach of the warranty created by the advertisement. In Ricwil, Inc., v. S.L. Pappas &
Co., a product brochure advertising “Pre-insulated Piping System for Buried Hot and Chilled Water Domestic Hot Water and Condense Lines to 250 °F” expressly warranted that the pipe would withstand water temperatures to 250 degrees; the warranty was not limited to a repair commitment.

Whether the written contract bars proof of an express warranty based on promotional materials under the parol evidence rule is a crucial issue. An important discussion of this issue appears in *In re Lone Star Industries*. This case was brought by railroad entities as a result of the premature cracking and deterioration of concrete railroad ties. The plaintiffs alleged that they were reluctant to buy concrete, rather than the traditional wood ties, and that Lone Star persuaded them to agree to the more expensive ties through promotional material emphasizing long-life and low maintenance. The court replied that the full actual record must be developed before it can be determined whether the written contract was the complete integration of the agreement.

“If after full factual background is developed, the court admits the promotional material, the representations contained therein may well simplify the formal written contract between the railroads and Lone Star. The manner in which the courts either permit or deny amplification depending on the particular facts of the transaction illustrates the search for bargain in fact which article 2 was designed to encourage.”

A second issue concerning the relationship of advertising affirmations to the formal warranty documents is whether the liability limitation features of the formal document will apply when the action is brought based on the separate advertising

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269 The court noted that in *Community T.V. Services Inc., v. Dresser Indus. Inc.*, (586 F.2d 637 (8th Cir.) *reh’d* denied, 586 F.2d 637 (8th Cir. 1978)), it was the jury decided that promotional material amplified the written agreement. see 1 MCDONnell & COLEMAN, supra note 30, § 5.05, at 5-62.
270 1 MCDONnell & COLEMAN, supra note 30, § 5.05, at 5-63.
affirmation. The warranty package included in the formal document will typically have a number of protective provisions for the warrantor including such matters as notice requirements, exclusions of consequential liabilities and time requirements for bringing suit. The present case law seems to say very little about this issue. It is possible to visualize the advertising as an independent warranty. It is also possible to visualize the formal warranty contract as amending or supplementing the earlier warranty affirmation of the advertising. In reality it seems the contractual relationship develops over time. If the formal warranty contract is expressly negotiated, a strong case can be made that it should control. On the other hand, if the formal document is a non-negotiated "pass through" warranty, one is presented with another illustration of the problem of the "rolling contract", the status of which remains unclear in contemporary contract law and has troubled the article 2 revision process.

In an action against the manufacturer of a product used in performing certain medical tests, the court stated "the trial court did not err in directing a verdict for defendant on plaintiff's charge that the defendant, in its sales brochure, warranted the safety of the product, where the physician stated that he used the product in reliance, not upon the brochure, but upon experience."271 However, "the difficulty of the reliance standard is that advertisements, which may create an express warranty, are often difficult to identify due to the vast number of advertisements and the time which may pass before a buyer actually purchases a good."272 Because, advertising warranties are addressed to the general public, remote purchaser sees the advertisement before she buys the product and in a different place than that of the ultimate sale transaction. In this connection, "the

272 See Brown, supra note 259, at 320.
problem with the reliance approach is that if the burden of proving reliance is on the buyer, he may not recover because of the difficulty of tracing his reliance to the advertisement.”273 Comment 3 to the 2-313 leaves open the case where the buyer only reads a brochure or advertisement about a product and does not bargain or negotiate. At this point it is worth mentioning that “the confusion is whether the consumer must have read, understood, and relied on the representations in advertisements and the key is whether the reliance in advertisements is necessary.”274

Finally, the advertised product must have a relation to the statements used on the advertising material. Regarding that issue it was stated that:

“[M]anufacturers’ mass media advertising warranties is admissible in evidence as a warranty if the buyer can link the ads with the automobile purchased. Warranties in advertising have been useful in breaking the privity barrier which manufacturers use in defending themselves against damage suits. For example, if the manufacturer has advertised its automobile to be trouble free, economical in operation, and built with high quality workmanship, the manufacturer may have difficulty arguing that its written warranty is limited to repair of defective parts.”275

The court in Inglis v. American Motors Corp.276 said that just such advertised promises permitted the buyer to recover damages from the manufacturer in the form of diminution in value of the automobile caused by latent defects. In New York, statements made in defendant’s advertising to the effect that a boat was of high quality do not create an express warranty under 2-313 because, as mentioned earlier, statements in the form of seller’s talk and puffing are not deemed as an express warranty.277 In other words, the

273 See Brown, supra note 259, at 320.
274 See Brown, supra note 259, at 322.
277 Cf. Simone v. Genmar Indus. Inc., 1989 A.M.C. 2627, 2629 (S.D.N.Y. 1989) “holding that advertising that boat was of ‘uncompromising quality’ and ‘skillfully crafted and integrated’ did not create express warranty that boat was seaworthy and soundly manufactured.”
"puffing" limitation on the creation of express warranties fully applies to advertising warranties.

In short, advertising warranties are subject to section 2-313 of the Code, and therefore constitute an express warranty. They can be found in the mass media, catalogs and brochures. Therefore, the statements on the advertisement constitute the statements of the manufacturer and create an express warranty directed to the remote purchasers. Technically, there is no bargain between the manufacturer and the remote purchaser. Nonetheless, if the remote purchaser sees the advertisement or does not see the advertisement yet relies on it, she can sue the manufacturer on the basis of the breach of express warranty in the event that there is a defect on the product.

B. THE REVISION OF ARTICLE 2

Section 2-313 B is new and follows the case law and the practice in extending a seller's obligations regarding new goods to remote purchasers. This section deals with obligations to a remote purchaser created through a medium for communication with the public, primarily through advertising. The explicit treatment of advertising warranties is in section 2-313 B which reads as follows:

Section 2-313 B Obligation to Remote Purchaser Created By Communication to Public

(a) In this section:

(1) “Goods” means new goods sold or leased as new goods in a transaction of purchase that occurs in the normal chain of distribution.
(2) “Immediate buyer” means a buyer that enters into a contract with the seller.
(3) “Remote purchaser” means a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.

(b) If a seller makes an affirmation of fact or promise that relates to the goods, or provides a description that relates to the goods, or makes a remedial promise in advertising or a similar communication to the public and the public and the
remote purchaser enters into a transaction of purchase with knowledge of and with the expectation that the goods will conform to the affirmation of fact, promise or description or that the seller will perform the remedial promise, the seller has an obligation to the remote purchaser that the goods will conform to the affirmation of fact, promise or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation, and an obligation to the remote purchaser that the seller will perform the remedial promise.

(c) It is not necessary to the creation of an obligation under this section that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to undertake an obligation, 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 an obligation.

(d) The following rules apply to the remedies for breach of an obligation created under this section:

(1) The seller may modify or limit the remedies available to the remote purchaser if the modification or limitation is furnished to the remote purchaser no later than the time of purchase. The modification or limitation may be furnished as part of the communication that contains the affirmation of fact, promise or description.

(2) Subject to a modification or limitation of remedy, a seller in breach is liable for incidental or consequential damages under section 2-715 but the seller is not liable for lost profits.

(3) The remote purchaser may recover as damages for breach of a seller's obligation arising under subsection (b) the loss resulting in the ordinary course of events as determined in any manner, which is reasonable.

(e) An obligation that is not a remedial promise is breached if the goods did not conform to the affirmation of fact, promise or description creating the obligation when the goods left the seller's control.

In the March draft, in section 2-313B the approach of Randy Knitwear, Inc., v. American Cyanamid Co.,278 was adopted. In that case, the court overruled its prior decisions requiring privity on the ground that it was unrealistic to allow a manufacturer to avoid liability after engaging in a heavy advertising campaign.

Again in section 2-313 B, the term "obligation" was used instead of "express warranty." The elements that trigger the "obligation" arising out of advertising

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warranties made to the public are the affirmation of fact or promise that relates to the goods, or a description provided by the advertiser seller or the remedial promise made in advertising or in a similar communication to the public.

There are two defenses that can be raised by the seller: the reasonable person test of 2-313 B (b) which was drafted as “reasonable person ...would not believe” and the puffing defense of 2-313 B (c).

According to the reasonable person defense, a buyer who wishes to enforce an advertised promise must prove that the buyer had an expectation that the goods would conform to the advertised promise. One can say that the statements in the advertising material are made with the purpose to induce the remote purchaser to buy the advertised product. In this regard, it can be said that it is illogical to allow a seller to decline the responsibility advertised as promises or representations about its product due to the reason or assumption that a remote purchaser cannot prove which advertisement she saw or because the remote purchaser’s sale was induced by a person other than the remote purchaser, who also was influenced by the advertised promise.

A second defense in favor of the seller is the puffing defense drafted in 2-313 B (c). According to the language of this subsection, a “statement purporting to be merely the seller’s opinion or commendation of the goods does not create an obligation.” One can say that advertising materials are carefully drafted; therefore, the chances that the statements in the advertising materials are seller’s talk is logically out of question. On the other hand, it can be argued that this defense is a pro-seller defense, which enables the seller to escape from the liability due to certain statements used in the advertising. In the comment 3 to section 2-313 B it was stated that the purchaser must have a knowledge of
the affirmation of fact, promise, description or remedial promise and must have an expectation that the goods will conform or the seller will comply. This test is entirely subjective, while the reasonable person test in subsection (b) is objective in nature.

In other words, according to comment 3 to section 2-313 B

"the seller will incur no liability to the remote purchaser if: a) the purchaser did not have knowledge of the seller’s statement at the time of purchase; b) the remote purchaser knew of the seller’s statement at the time of purchase but did not expect the goods to conform or the seller to comply; c) a reasonable person in the position of the remote purchaser would not believe that the seller’s statement created an obligation (this test does not apply to remedial promises), or d) the seller’s statement is puffing."\(^{279}\)

In subsection 2-313 (d) (1) the availability of the limitation and the modification remedies are set forth. Under the language of this subsection, it can easily be seen that the possibility of limiting or modifying the remedies were given to the seller if the modification or limitation was furnished to the remote purchaser no later than the time of the purchase. As with “pass throughs” it is not required that the buyer agree to these limitations. However, a “pass through” document presented after the purchase can limit the advertising warranty. Advertising warranties are made in a remote time and place. Therefore, the risk of “pass throughs” limitation of the advertising warranties arises. In other words, when the remote purchaser buys the goods after she sees the advertisement, the limitations in the warranty package or in the label can limit the language used in the advertising material. Section 2-313 B (d) (1) may be the most important subsection of the revision in that it clearly establishes that advertisers may limit advertising commitment by the formal warranty document introduced at or before the time of purchase.

Section 2-313 B does not deal with the extension of the obligation to certain third party beneficiaries. This was left to section 2-318, which deals with the third party beneficiaries of warranties.
CHAPTER V

CONCLUSION

In this thesis, one of the most controversial parts of the proposed revision of the UCC article 2, the “pass through” and advertising warranties, had been examined. In the course of the examination first a general overview regarding the express warranties under the present article 2 was presented. Next, we explored the regulations of the “pass through” and advertising warranties under the present article 2 and their regulation under the proposed revision of article 2.

Under the proposed revision of article 2 the drafters planned to impose new regulations regarding the “pass through” and advertising warranties. Naturally, new implications arose out of those regulations. Those new regulations and their implications can be summarized as follows:

With the proposed revision of article 2 it was confirmed that the privity was not required anymore, since the “pass through” and advertising warranties were recognized separately and expressly in article 2. It was recognized that a remote purchaser can sue a manufacturer based on the ground that the manufacturer has breached its obligation stemming from the section 2-313 A or section 2-313 B.

However, contrary to the basic concept that warranties are contractual, the terminology of the sections are changed. “Obligation” rather than “express warranty” is used. Use of the term “obligation” rather than “warranty” suggests that the underlying nature of the liability is not contractual. Perhaps the liability should be considered to be
in tort or to be statutory, but it does not seem to rest on a traditional agreement process. The liability is imposed automatically based on acts of the seller (e.g., making an affirmation that runs with the goods, providing a description of the goods in the advertising). These acts are not required to be part of the basis of the bargain.

At the same time, the revision allows the warrantor to adhesively limit its liability. The limitation of the remedies is also another controversial provision. In the subsection 2-313 (A) (d) (1) limitations on the remedy for the “pass through” warranties are confirmed. According to this rule, a seller can limit the remedies available to the remote purchaser if the limitation is furnished to the remote purchaser no later than the time of purchase. The agreement of the remote purchaser to the terms of the warranty package is not required. Arguably, this provision allows the warrantor to impose remedial limitations unfairly. Advertising warranties are drafted similarly. Advertising warranties drafted in 2-313 B are made in a remote time and place. However, according to subsection 2-313 B (d) (1), the “pass through” terms or other documents may limit the remedy for the advertising warranty if they are furnished no later than the time of purchase. This provision can also create an unfair result against the remote purchaser.

Another new statutory protection for the warrantor is that advertising and “pass through” warranties can produce a lost profit claim. The end result is that the buyer is made the beneficiary of a statutory obligation despite the lack of a privity but the warrantor can restrict its liability to the remote purchaser for violating that obligation.
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