



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Digital Commons @ Touro Law
Center

Scholarly Works

Faculty Scholarship

2002

Express Warranty as Contractual - The Need for a Clear Approach

Sidney Kwestel

Touro Law Center, skwestel@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Contracts Commons](#)

Recommended Citation

53 Mercer L. Rev. 557 (2002)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

Express Warranty as Contractual—The Need for a Clear Approach

Sidney Kwestel*

I. INTRODUCTION

In jettisoning section 12 of the Uniform Sales Act ("U.S.A."), which required reliance to create an express warranty¹ and replacing it with the "basis of the bargain" language of section 313(1) of the Uniform Commercial Code ("U.C.C."),² Karl L. Llewellyn touched off what appears to be an eternal debate as to whether reliance is still a

* Professor of Law, Touro College, Jacob D. Fuchsberg Law Center. Yeshiva University (B.A., 1958); New York University School of Law (J.D., 1961). The author gratefully acknowledges the valuable comments of his former law partner Michael Malina, Esq. and the assistance of Jill B. Selden and Terence Doherty.

1. U.S.A. § 12 (1906). Section 12 provided that:

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.

Id.

2. U.C.C. section 2-313(1) provides:

Express warranties by the seller are created as follows:

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

U.C.C. § 2-313(1) (1988).

prerequisite to the creation of an express warranty in a sale of goods.³ A recent attempt to put the debate to rest through a revision of section 2-313(1) failed,⁴ and it appears that the basis of the bargain language is here to stay. What clearly emerges from the ongoing debate, however, is that there is significant support for the view (i) that the U.C.C.'s basis of the bargain language requires some form of actual reliance for the creation of an express warranty⁵ or (ii) that such language is synonymous with a contract approach.⁶ But no one who is advocating that some form of actual reliance is necessary to create an express warranty has advanced a cogent reason why the immediate buyer in a commercial transaction should not be permitted to treat an express warranty the same as any other term of a sales contract. Stated otherwise, no one has explained why a seller's promise as to the quality of the goods should be treated differently from any of the seller's other promises to the buyer including, for example, her promise as to the quantity of the goods to be delivered.⁷

As explicated at length elsewhere,⁸ I favor a contract approach in all contexts to determine whether an express warranty has been created, and have shown that reliance should play no role in the formation of a contract that contemplates an exchange between the parties—such as a contract for the sale of a building or goods or a business. A contract may be formed even though the contracting parties do not subjectively rely on each other's promises in entering into the contract. If from an objective point of view each party sought the other party's promise in exchange for his own, the contract is enforceable even though neither may, in fact, have been motivated to make his promise in return for the other party's.⁹ Because reliance is irrelevant to contract formation, it should follow that a seller's promise as to a building's structural

3. See Sidney Kwestel, *Freedom from Reliance: A Contract Approach to Express Warranty*, 26 SUFFOLK U. L. REV. 959, 962-67 (1992); also also JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9-5 (5th ed. 2000).

4. Proposed Revisions of U.C.C., Article 2, § 2-403 (1999) (Express Warranty to Immediate Buyer). There is no reason to believe the revision would have produced a uniform approach to express warranties in sales of goods.

5. Keith v. Buchanan, 220 Cal. Rptr. 392 (Cal. Ct. App. 1985); see also WHITE & SUMMERS, *supra* note 3; Kwestel, *supra* note 3, at 962-68.

6. Lennar Homes, Inc. v. Masonite Corp., 32 F. Supp. 2d 396, 404 (E.D. La. 1998) (discussing sale of goods); Allegheny & W. Energy Corp. v. Colum. Gas Sys., Inc., No. 2:85-0652, 1986 WL 13360, at *5 (S.D. W. Va. June 30, 1986) (discussing sale of business); CBS Inc. v. Ziff-Davis Publ'g Co., 553 N.E.2d 997, 1001 (N.Y. 1990) (discussing sale of business).

7. As I have explained elsewhere, a seller's affirmation of fact should be treated the same as a promise. See Kwestel, *supra* note 3, at 971-82.

8. See generally Kwestel, *supra* note 3.

9. See Kwestel, *supra* note 3, at 982-88.

soundness, a business's financial condition, or the quality of goods becomes a term of the contract even though the party to whom the promise was made did not in fact rely on it. The promise becomes part of the contract unless the promisor shows that the parties did not mutually assent, that the promise was not supported by consideration, or that some other contract principle negates that conclusion.¹⁰

Recently the Second Circuit, in *Galli v. Metz*¹¹ and *Rogath v. Siebenmann*,¹² injected confusion into the contract approach when it considered the question of whether a seller's promise as to existing circumstances is enforceable if the buyer had knowledge that the circumstances were not as promised. The answer, it said, depends on the source of the buyer's knowledge.¹³ If the buyer "closes on a contract"¹⁴ after the seller has disclosed facts that would constitute a breach of warranty under the contract, the Second Circuit holds that the buyer has waived the breach.¹⁵ Under these circumstances, the court says, "[I]t cannot be said that the buyer . . . believed he was purchasing the seller's promise as to the truth of the warranties."¹⁶ But, the court notes, if the buyer's source of knowledge is anyone other than the seller, the buyer may maintain a breach of warranty action because "it is not unrealistic to assume that the buyer purchased the seller's warranty 'as insurance against any future claims'" and that is why the buyer insisted on the inclusion of the warranty in the sales agreement.¹⁷ In short, the Second Circuit gives us a black letter rule: If the source of the buyer's knowledge is the seller, the buyer has waived any breach of warranty; if the source of the buyer's knowledge is other than the seller, the seller's warranty is enforceable.¹⁸

In taking this cut-and-dried approach, the Second Circuit did not identify the fundamental contract issues involved. Nor are its opinions very clear. For example, in stating that the buyer waived the breach when the seller made the disclosure, the Second Circuit appears to assume that an express warranty was created and breached but that the buyer cannot recover because it waived the breach as a matter of law.¹⁹

10. *Id.*

11. 973 F.2d 145 (2d Cir. 1992) (discussing the sale of a business).

12. 129 F.3d 261 (2d Cir. 1997) (discussing the sale of a painting).

13. *Galli*, 973 F.2d at 151; *Rogath*, 129 F.3d at 265.

14. *Galli*, 973 F.2d at 151.

15. *Id.* at 154-55.

16. *Rogath*, 129 F.3d at 265; see also *Galli*, 973 F.2d at 150; see also *Siemens Solar Indus. v. Atl. Richfield Co.*, 673 N.Y.S.2d 674 (N.Y. App. Div. 1998).

17. *Rogath*, 129 F.3d at 265 (quoting *Galli*, 973 F.2d at 151).

18. *Id.*

19. *Id.* at 264-65.

Yet, when the court explains the reason for this sort of waiver, it uses terminology more appropriate to warranty creation ("purchasing the seller's promise") than to waiver of a breach of a warranty that had in fact been created.²⁰ In addition, when the Second Circuit in *Galli* uses the phrase "closes on a contract,"²¹ is it referring to the time of contract formation or to the time of contract performance? Put differently, does it make a difference, according to the Second Circuit, whether the seller's disclosure to the buyer occurs before contract formation—or after contract formation but prior to contract performance? Further, if the concept of waiver of breach is applicable, why does it not apply regardless of the source of the buyer's knowledge?

In an attempt to answer these questions and clarify the contract approach to express warranties between the immediate contracting parties, this Article will identify and address, in a commercial context, the relevant issues that arise when a party learns (either precontract or postcontract but preperformance) that the other party's warranties are untrue. Whether or not one agrees with a contract approach to express warranties, the debate over its applicability should at least take place in an arena in which all disputants speak the same language and use clearly defined terms. Thus, the relevant contractual issues should be placed on the table and analyzed together with case precedents that have addressed the issues but apparently have been overlooked in the ongoing debate. More specifically, after a brief discussion of the contract approach to warranty creation, this Article considers whether a promisor may introduce parol evidence of the promisee's precontract knowledge that warranted information is not true for the purpose of establishing that the promisor's promise warranting the information did not become part of the written contract or for the purpose of interpreting the warranty term.²² In this connection, assuming the parol evidence rule precludes the promisor from introducing this sort of evidence, I consider whether the promisor can obtain relief in an action for reformation.²³ Finally, I discuss how cases such as *Galli* and *Rogath* should be decided using a contract approach, and in so doing, I analyze the Second Circuit's interpretation of *CBS Inc. v. Ziff-Davis Publishing Co.* ("*Ziff-Davis*").²⁴

20. *Id.* at 265.

21. 973 F.2d at 151.

22. See *infra* notes 36-62 and accompanying text.

23. See *infra* notes 63-64 and accompanying text.

24. 553 N.E.2d 997 (N.Y. 1990) (concerning the purchase of a business; buyer learned from its own investigation conducted *after* parties entered into the written agreement that warranted information was untrue). See *infra* notes 65-83 and accompanying text.

II. WARRANTY CREATION

A. *Mutual Assent and Consideration*

In *Ziff-Davis* the New York Court of Appeals, adopting a contract approach to express warranties, unequivocally tells us that an “express warranty is as much a part of the contract as any other term.”²⁵ Under this view, in determining whether a seller’s promise relating to the condition of the subject matter became part of the contract, the critical question is whether the buyer “believed [it] was purchasing the [seller’s] promise . . .”²⁶ as to the truth of the warranted information.

Similarly, the Indiana Supreme Court in *Shordan v. Kyler*²⁷ made clear that an express warranty is contractual in nature.²⁸ It explains that a seller’s warranty “is a part of the contract.”²⁹

It enters into the contract of sale as an element upon which the minds of the contracting parties unite and as a part of the consideration for the purchase. The action or defence [sic] based upon the breach of an express warranty is founded upon an express contract, and not upon deceit; and the question of the intent of the parties is involved as in actions on contracts generally. Defects known to the buyer may sometimes be excluded from a warranty, which are covered by its general terms, because they can not [sic] be presumed to have been intended by the parties to be insured against. But whatever, under the circumstances, the parties can be said to have intended by their contract, to that will the seller be held, as to other lawful engagements³⁰

Although both *Ziff-Davis* and *Shordan* are silent as to the standard by which the buyer’s belief or parties’ intent will be determined, we would expect, consistent with contract law, that an objective—not a subjective—test would be applied to determine whether a buyer believed it was purchasing the seller’s promise as to the truth of the warranted information.³¹ Thus, in deciding whether the seller’s promise as to the

25. 553 N.E.2d at 1001.

26. *Id.* (citations omitted).

27. 87 Ind. 38 (1882).

28. *Id.* at 41.

29. *Id.*

30. *Id.*

31. *Brown Bros. Elec. Contractors, Inc. v. Bean Constr. Corp.*, 361 N.E.2d 999, 1001 (N.Y. 1977) (“in determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds.”); *Empro Mfg. Co. v. Ball-*

truth of certain information is part of the sales contract, a court must first ask and answer the same questions it would ask and answer to determine whether any other promise is part of a contract. Those questions are whether, to paraphrase the *Second Restatement of Contracts*' ("Second Restatement") definition of an offer,³² the seller has manifested such a willingness to enter into a bargain on terms that include the seller's promise as to the truth of the information, so as to justify the buyer in understanding that her assent to that bargain is invited and will conclude it, and if so, whether the buyer has manifested assent to the seller's offer.³³ In short, the first questions that must be answered are whether, objectively viewed, the seller has made an offer that includes the warranty promise and, of course, whether the buyer has accepted the offer, that is, whether the parties mutually assented to terms that include this sort of promise. Similarly, in determining whether the seller's promise is supported by consideration, the court must ask whether, objectively viewed, it can be inferred from the parties' manifestations that the seller's promises, including the warranty promise, purport to be the inducement for the buyer's return promises and vice versa.³⁴

When a contract is in writing and contains the parties' promises—including an express promise by the seller warranting certain information or the quality of the subject matter—it should be clear that the seller's warranty is part of the parties' bargain. Objectively viewed, it is evident that there is both mutual assent to the language in the written contract and consideration for the promises. Absent any other relevant consideration, the buyer should be able to enforce the warranty promise.³⁵

B. Parol Evidence Rule: Contract Terms and Interpretation

Suppose the parties sign a sales contract in which the seller warrants certain information or the quality of the subject matter being sold. At trial the seller seeks to testify that before signing the contract he disclosed information to the buyer demonstrating that the warranted

Co. Mfg., Inc., 870 F.2d 423, 425 (7th Cir. 1989) (stating "'intent' in contract law is objective rather than subjective") (citing *Interway, Inc. v. Alagna*, 407 N.E.2d 615 (Ill. App. 1980)).

32. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).

33. *Id.*

34. See Kwestel, *supra* note 3, at 986-88.

35. See *supra* note 3. Unless U.C.C. section 2-313 provides an exclusive method of warranty creation, a buyer should be permitted to sue a seller under general contract principles for breach of contract when a seller's express warranty in the sales contract proves to be false. See U.C.C. § 1-103.

information was false. Based on this testimony, the seller intends to argue that even from an objective viewpoint the buyer, when signing the contract, could not have believed that it was purchasing the seller's promise as to the information's truth. May the seller so testify and make the argument that his promise did not become a term of the written contract, or is he precluded from doing so by the parol evidence rule?³⁶ This is a pivotal question that the Second Circuit in *Galli and Rogath* did not ask and the parties apparently never raised.³⁷

The parol evidence rule has hardly been discussed in this context. A few older cases did deal with the issue to some degree. In *Watson v. Roode*,³⁸ defendant sold plaintiff a horse and gave him a written guarantee that the horse was registered in the Stud Book of England. At trial the seller sought to testify that at the time he gave the written guarantee he informed plaintiff-buyer that the horse was not registered. The purpose of the proposed testimony was to show that the buyer could not have relied upon the seller's written guarantee that the horse was registered and, therefore, that the buyer could not predicate a claim for damages on the fact that the horse was unregistered.³⁹ The Nebraska court held the seller's testimony was inadmissible because:

[i]t is too well established to require the citation of authorities that parol testimony cannot be received to contradict or vary a written contract.

* * *

While it is true that in a suit on a breach of warranty against defects in the article sold the seller may prove that the defects were of such a character that the purchaser must have known of their existence, or that the buyer knew of them prior to the sale, for the purpose of showing that the plaintiff did not rely upon the warranty, yet it does not follow that it is competent to prove that the seller, during the negotiations leading up to the sale, made representations to the

36. RESTATEMENT (SECOND) OF CONTRACTS §§ 213, 215, 216; U.C.C. § 2-202.

37. 973 F.2d at 145; 129 F.3d at 261.

38. 46 N.W. 491 (Neb. 1890); *see also* Downey v. Levenson, 142 N.E. 85 (Mass. 1924) (applying parol evidence rule to preclude the seller from showing that the buyer knew, before he signed the written agreement to purchase certain real estate free from encumbrances, that the land was encumbered by a lease that the seller had shown the buyer).

39. 46 N.W. at 491-93. In an analogous but different context, courts have excluded parol evidence to establish that crops sold were to be grown on identified acreage when the seller offered the evidence in support of a defense of commercial impracticability. *See* Ralston Purina Co. v. Rooker, 346 So. 2d 901 (Miss. 1977); Wickliffe Farms, Inc. v. Owensboro Grain Co., 684 S.W.2d 17 (Ky. Ct. App. 1984). *But see* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 9.6 (2d ed. 1998).

purchaser directly contradictory of his written warranty subsequently made. No case has been cited by counsel for plaintiff in error holding the doctrine contended for by him in this case, nor have we been able to find such a case reported in the books. To permit such testimony to be received would violate the familiar rule of evidence above referred to.⁴⁰

The Supreme Court of the United States, in *Lumber Underwriters v. Rife*,⁴¹ similarly applied the parol evidence rule in a different but analogous context, holding that parol evidence of prior negotiations was inadmissible to show that an insurer knew of facts that would constitute a breach of the warranties in the insurance policy.⁴² Plaintiff sought to recover on a policy after a fire destroyed its lumber. Plaintiff had warranted in the policy that a hundred feet of continuous space would be maintained between plaintiff's mill and the lumber. When defendants issued the policy, they knew from an inspection report that a permanent structure existed between the mill and the lumber and thus knew that the warranty was not true.⁴³ In reversing the Sixth Circuit, which would have allowed the jury to find that defendants' knowledge of the permanent structure at the time of policy issuance had waived the warranty, Justice Holmes said:

When a policy of insurance is issued, the import of the transaction, as everyone understands, is that the document embodies the contract. It is the dominant, as it purports to be the only and entire expression of the parties' intent. In the present case this fact was put in words by the proviso for the endorsement of any change [waivers] of terms [to be written on or attached to the policy]. Therefore when by its written stipulation the document gave notice that a certain term was insisted upon, it would be contrary to the fundamental theory of the legal relations established to allow parol proof that at the very moment when the policy was delivered that term was waived. It is the established doctrine of this court that such proof cannot be received.⁴⁴

The New York Court of Appeals in *Bennett v. Buchan*⁴⁵ took a different position. In *Bennett*, in a written assignment of a judgment, defendant-seller warranted that the judgment it sold plaintiff was due and that he would not release it. At the time he purchased the judgment, plaintiff's agent knew from third sources that one of the

40. *Watson*, 46 N.W. at 493.

41. 237 U.S. 605 (1915).

42. *Id.* at 610.

43. *Id.* at 608.

44. *Id.* at 608-09.

45. 76 N.Y. 386 (1879).

judgment debtors had already been released. Plaintiff argued that the seller should not be permitted to introduce evidence that plaintiff had knowledge the warranty was less than absolute because that evidence would vary the seller's written warranty, which was absolute in its terms.⁴⁶ Relying mainly on cases dealing with insurance contracts, the court rejected plaintiff's argument stating: "The principle is well settled, we think, that parol proof is competent to establish that, at the time of entering upon a contract, the party claiming a breach of warranty received information or had knowledge of the real facts, and hence, that a warranty does not extend to known defects."⁴⁷

Other than stating that the "principle is well settled" to allow parol evidence to show the promisee had precontract knowledge that certain warranted information was not true, and hence that the warranty does not extend to that information, the New York court does not explain why this principle should prevail. Unfortunately, the court in *Bennett* did not discuss the parol evidence rule. Unless a court would consider that the parol evidence offered did not contradict the written warranty or that the written warranty was not part of an integrated agreement, why should the parol evidence rule not exclude parol evidence concerning a party's precontract knowledge if such evidence would alter or vary the other party's unqualified written warranty such as the written warranty in *Bennett*.⁴⁸ Put simply, in a jurisdiction that follows a contract

46. *Id.* at 391.

47. *Id.*

48. See *supra* note 36. *Jennings v. The Chenango Mut. Ins. Co.*, 2 Denio 75 (1846), among the cases cited by the court in *Bennett*, is a mixed blessing. There the court held that parol evidence was inadmissible to show that, prior to entering into the insurance contract, the insurer knew the insured's warranty contained in the contract was not true. *Jennings*, 2 Denio at 79-80. The court recognized that the same approach was not used with respect to a warranty against defects in a sale of property. *Id.* at 78-79. The court noted, without explanation, that "[t]he proposition that a general warranty on the sale of property, does not extend to defects which are obvious to the senses, is undoubtedly correct, even when the contract is in writing" and acknowledged that it "may be difficult to assign a satisfactory reason for a distinction in this respect between a warranty in a policy of insurance and one upon a sale of property." *Id.*

The court in *Jennings* seems to have it backwards. No one has explained why the parol evidence rule should not govern sales contracts. If a written contract is integrated with respect to the warranties it contains, there is no sound reason to distinguish between sales and insurance contracts. The parol evidence rule should apply to both. Although the law in New York in the insurance area was also in disarray for a while, it appears that the parol evidence rule applies to warranties in insurance contracts. See *Satz v. Mass. Bonding & Ins. Co.*, 153 N.E. 844 (N.Y. 1926). In *Satz*, the court rejected the application of estoppel to preclude an insurance company from claiming a breach of the insured's warranty contained in the insurance contract when the company knew at the time of contracting that the warranty was not true. *Id.* at 846. It held that "[i]f the warranties are written into

approach to warranty creation, there is no reason why the parol evidence rule should not apply to warranty terms to the same extent it applies to any other terms of a contract. If *Bennett* had applied the rule, the evidence of plaintiff's agent's precontract knowledge should have been excluded because it contradicted the terms of the warranty.⁴⁹

Applying the parol evidence rule in a warranty context certainly does not impose any hardship on the seller. It simply means that the rule that applies to all the terms of a contract that the parties have reduced to a writing will also apply to an express warranty. Further, the seller can easily avoid any difficulty the parol evidence rule may create by simply changing the written warranty language before signing the contract. As Justice Holmes aptly observed in *Lumber Underwriters*:

No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party. The assured also knows better than the insurers the condition of his premises, even if the insurers have been notified of the facts. If he brings to the making of his contract the modest intelligence of the prudent man he will perceive the incompatibility between the requirement of 100 feet clear space and the possibilities of his yard, in a case like this, and will make a different contract, either by striking out the clause or shortening the distance or otherwise as may be agreed. The distance of 100 feet that was written into this policy was not a fixed conventional formula that there would be trouble in changing, if the insured would pay what more, if anything, it might cost. Of course if the insured can prove that he made a different contract from that expressed in the writing he may have it reformed in equity. What he cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its

the policy the company has the right, in spite of any [precontract] knowledge or information it may have, to rely thereon." *Id.*

New York law as to whether parol evidence is admissible to show that the insurer had precontract knowledge that the insured's warranty in the insurance contract was not true has had a confusing history. *Id.* at 845-46; see also *N. Assurance Co. v. Grand View Bldg. Ass'n*, 183 U.S. 308, 329-35 (1902).

49. *Bennett* is problematic for another reason. A party's precontract knowledge stemming from its own investigation—as was the case in *Bennett*—or a third party source should not prevent the other party's promise from being a term of the written contract. Mutual assent in contract formation is determined from the external manifestations of the parties to each other. Thus, whatever a party may have learned from a third party or from its own investigation should be irrelevant in determining mutual assent and should not prevent the other contracting party's promise from being *part* of the written contract.

terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause.⁵⁰

Thus, if express warranties are contractual in nature, there is every reason to apply the parol evidence rule to precontract negotiations and agreements relating to warranties to the same extent it would be applied to all other precontract negotiations or agreements between the parties relating to any other term.⁵¹

On the other hand, in a jurisdiction that requires a buyer's reliance to create an express warranty, that is, requires that the buyer should in fact be induced by the seller's express warranty to enter into the contract, it is understandable that the parol evidence rule should not be applied to exclude proof that the buyer knew the seller's warranty was false. For in that sort of case the reliance requirement is superimposed as a matter of law—not by the parties' mutual assent. Stated differently, because actual reliance is not required as a matter of contract but rather is imposed by law, it may be argued that the parol evidence rule should have no application to a determination of whether the buyer in fact was induced by the seller's promise or affirmation of fact to enter into the deal. In a reliance jurisdiction, therefore, it would make sense to permit the seller to show by parol evidence that the buyer, regardless of the source, had precontract knowledge of a defect and to argue that, because of this knowledge, he cannot satisfy the noncontractual requirement of reliance.⁵²

50. 237 U.S. at 609-10.

51. The parol evidence rule is applicable to exclude evidence of precontract negotiations and agreements to protect the seller against claims by the buyer that the seller made certain precontract oral promises concerning the subject matter of the contract. See, e.g., *Hoover Universal v. Brockway Imco, Inc.*, 809 F.2d 1039 (4th Cir. 1987); *Jordan v. Doonan Truck & Equip., Inc.*, 552 P.2d 881 (Kan. 1976); *Nettles v. Imperial Distribs., Inc.*, 159 S.E.2d 206 (W. Va. 1968). If the seller is protected by the parol evidence rule to exclude precontract oral warranties not included in the written contract, why should the buyer not be entitled to equal treatment?

52. The same argument is true if a subjective approach to contract formation is taken. See *McCormick v. Kelly*, 9 N.W. 675 (Minn. 1881) in which the court said:

It has always been held that a general warranty should not be considered as applying to or giving a cause of action for defects known to the parties at the time of making the warranty, and both the weight of authority and reason authorize this proposition, viz.: that for representations in the terms or form of a warranty of personal property no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain A warranty, for the breach of the conditions of which an action *ex contractu* for damages can be maintained, must be a legal contract, and not a mere naked agreement. It must be a representation of something as a fact, upon which the purchaser relies and by which he is induced, to some extent, to make the purchase, or is influenced in

Assume, however, that the seller offers evidence of the buyer's precontract knowledge for the purpose of *interpreting* the terms of the express warranty contained in the written contract. Should the court admit the evidence for the purpose of determining the meaning of the warranty term, or should the evidence be excluded by the parol evidence rule? Here, too, the written contract containing the express warranty term should be treated no differently from any other written contract. Suppose that in an integrated written contract for the sale of a business the seller, S, generally warrants that "there are no outstanding claims against S." At some time prior to the contract, however, S told the buyer, B, that C had asserted a \$50,000 products liability claim against S. In an action for breach of the warranty, may S testify to the conversation with B, not for the purpose of changing the terms of the warranty, but for the purpose of "interpreting" it? Stated otherwise, may the court consider the fact that S had disclosed C's claim to B for the purpose of determining that the warranty term, "there are no outstanding claims against S," means there are no outstanding claims against S other than claims previously disclosed to the buyer? The answer may vary depending on the approach taken by a court to ascertain the meaning of contract terms. At one end of the spectrum, a court may take a very narrow approach to contract interpretation. It may rigorously apply the plain meaning rule⁵³ and determine that the words "there are no outstanding claims against S" are clear and unambiguous. In such a case, extrinsic evidence would be excluded by the parol evidence rule because such evidence would contradict the unqualified warranty term of the contract.⁵⁴ If, however, the court determined that the warranty term was unclear, it would admit extrinsic evidence in order to resolve the ambiguity.⁵⁵ At the other end of the spectrum, a court may take the approach of the *Second Restatement*

respect to the price or consideration In the nature of things one cannot rely upon the truth of that which he *knows* to be untrue; and to a purchaser fully *knowing* the facts in respect to the property, misrepresentation cannot have been an inducement or consideration to the making of the purchase, and hence could have been no part of the contract.

Id. at 676. Of course, today, an objective approach is taken to determine whether a contract has been formed; reliance is therefore irrelevant in determining whether mutual assent or consideration exists. See Kwestel, *supra* note 3, at 982-88.

53. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 3.10 (4th ed. 1998). "The Plain Meaning Rule states that if a writing, or the term in question, appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any kind." *Id.*

54. *Id.* §§ 3.9, 3.16. See McAbee Constr. Inc. v. United States, 97 F.3d 1431 (Fed. Cir. 1996).

55. See CALAMARI & PERILLO, *supra* note 53.

which provides that "[T]he interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in light of the circumstances"⁵⁶ In this connection, *whether or not the agreement is unclear or ambiguous*, the *Second Restatement* would permit "reference to the negotiations of the parties, including statements of intention and even positive promises, so long as they are used to show the meaning of the writing"⁵⁷ and to all other relevant extrinsic evidence. But after considering all extrinsic evidence, the meaning attributed to the contract language "must be one to which the language of the writing, read in context, is reasonably susceptible."⁵⁸ If it is not, then even under the *Second Restatement* approach parol evidence is inadmissible.

Between these two ends of the spectrum, a court may take the *First Restatement* approach. Under the *First Restatement*, when an integrated agreement is not ambiguous, the terms are given a meaning that a "reasonably intelligent person . . . knowing all of the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended to mean," would attribute to those terms.⁵⁹ But if a term were ambiguous such statements would be admissible as well as statements of "what they understood."⁶⁰

Under the *Second Restatement* approach, S's testimony regarding his precontract disclosure to B may well be admitted for the purpose of giving the warranty term a meaning not apparent on its face unless a court would conclude that the term is not reasonably susceptible to the meaning S is urging, namely, that the warranty only covers claims not disclosed to B. Even under the *First Restatement* it may be argued that S's evidence of his disclosure of C's claim to B before the contract of sale was executed is not evidence of a statement as to the meaning of the warranty term and thus inadmissible, but rather evidence of the context—that B had precontract knowledge of C's existing claim and that S was the source of B's knowledge—in which the warranty was made.⁶¹

56. RESTATEMENT (SECOND) OF CONTRACTS § 212(1).

57. *Id.* § 212 cmt. c. Interestingly, the *Second Restatement* cautions: "But even after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention." *Id.* § 212 cmt. b.

58. *Id.* § 215 cmt. b.

59. RESTATEMENT OF CONTRACTS § 230 & 238(a) (1932).

60. *Id.* § 238(a) cmt. a.

61. *See id.* § 235, cmts. e and f. This assumes that the meaning S urges is not "at variance with any meaning that can be attached to the words" in light of the surrounding circumstances. As Comment f explains:

If S's disclosure to B were so viewed, then both the *First* and *Second Restatement* approaches would lead to the same result—the admission of S's testimony—unless the court determined that it was offered to give the warranty term a meaning to which it was not reasonably susceptible.⁶² Regardless of how a court would ultimately resolve the admissi-

In an integrated contract, however, if accompanying circumstances indicate an intent at variance with any meaning that can be attached to the words of the contract, even where the words are looked at in the setting in which they were used, that intent can be given no effect unless the facts justify reformation of the contract. Yet, as all language will bear some different meanings, evidence of surroundings is always admissible. Its operative effect depends on how far the words will stretch, and how alien from the ordinary meaning of the words is the intent they are asked to include.

Id. § 255, cmt. f.

62. See *supra* note 58 and accompanying text and *supra* note 61. Professor Williston states that a warranty in general terms is held not to cover defects which the buyer must have observed, and explains that,

This is a rule of construction, and is based on an endeavor by the court to give effect to the intention of the parties. If the seller of a horse which is obviously blind, and which both parties know to be blind, says he is sound, the meaning of sound as used in that connection must be sound except as to his eyes. The same rule is applicable to a defect which is not obvious, but of which the seller tells the buyer, or of which the buyer knows.

1 WILLISTON, THE LAW GOVERNING THE SALES OF GOODS § 207 (rev. ed. 1948). See also *Watson v. Roode*, 46 N.W. 491, 492 (Neb. 1890) ("general warranty does not extend to imperfections known to both parties").

Professor Williston's statement may be explained in a few ways. First, Professor Williston may be speaking of situations that do not involve integrated contracts and thus, in that context, he is giving effect to the parties subjective understanding. See *Campbell v. Rockefeller*, 59 A.2d 524, 526 (Conn. 1948); RESTATEMENT OF CONTRACTS §§ 233 cmt. a, 242 cmt. a. Second, assuming that Professor Williston is addressing all situations including those where the warranty is contained in an integrated written contract, then Professor Williston may be saying that based on the surrounding circumstances the word "sound," reasonably interpreted, means sound other than obvious defects and that such meaning does not contradict a seller's general warranty that the thing being sold is "sound." Third, Professor Williston may consider the word sound to be ambiguous in light of the surrounding circumstances. In this context, the "rule of construction" would be consistent with the view that courts will give effect "to a common meaning shared by both parties in preference to an objective meaning." FARNSWORTH, CONTRACTS § 7.9 (2d ed. 1998). See *Berke Moore Co. v. Phoenix Bridge Co.*, 98 A.2d 150, 165 (N.H. 1953). Finally, Professor Williston also notes that the buyer is required to prove reliance as part of its cause of action for breach of warranty. See WILLISTON, THE LAW COVERING THE SALE OF GOODS § 206 (rev. ed. 1948). Because Professor Williston says that the "same rule" (of construction) applies to "a defect which is not obvious, but, of which . . . the buyer knows" it would appear that the "rule" is based on the fact that such a buyer is not in fact relying on the warranty in making the purchase. See *Harwood v. Breese*, 103 N.W. 55 (Neb. 1905); *McCormick v. Kelly*, 9 N.W. 675 (Minn. 1881); *Moore v. Day Rubber Co.*, 119 S.W. 454 (Kan. Ct. App. 1909); *Norris v. Parker*, 38 S.W. 259 (Tex. Civ. App. 1896).

bility of S's testimony, the point is that a court should consider the role, if any, of the parol evidence rule in this area and the extent to which extrinsic evidence of the buyer's precontract knowledge is admissible to interpret the warranty term of an integrated contract.

C. *Reformation*

Assuming the parol evidence rule is applicable to exclude the seller's testimony as to the buyer's precontract knowledge, can the seller nonetheless prevail by obtaining reformation of the written contract that contains the seller's warranty? Asked in another way, can the seller establish that the parties' oral agreement did not contain the seller's warranty and that, through a mutual mistake, the written contract that contains the seller's warranty did not reflect the parties' oral agreement? This burden will be difficult, if not impossible, to satisfy when the seller's warranty is specific.

Take the following hypothetical. On January 10, S and B enter into a written contract in which S agrees to sell his electronics business to B for \$100 million and warrants "that as of January 3, 2000, the outstanding accounts receivable were not less than \$5 million" and that "there will be no material adverse change in the amount of outstanding accounts receivable as of January 15, the closing date." Prior to signing the contract, S informs B that the accounts receivable schedule as of January 3, which S gave B on January 7, is inaccurate and that the accounts receivable were only \$4 million as of January 3. The parties nevertheless sign the contract without modifying S's warranties. At the time of the closing, the outstanding accounts receivable are only \$4.5 million. Can S obtain reformation of the contract? To do so, S must first establish that the parties orally agreed that S was only warranting that the outstanding accounts receivable as of January 3 were not less than \$4 million. If S could do so, S would then have to show that the written contract did not reflect the oral agreement because of a mutual mistake.⁶³ Given the hypothetical facts, it seems unlikely the seller can prove there was a mutual mistake in reducing the oral agreement to a writing. Because the written warranty is specific—S warrants "that as of January 3, 2000, the outstanding accounts receivable were not less than \$5 million"—and S told B before signing the contract that they were actually only \$4 million, it is difficult to see how S can show that, because of a mutual mistake, the writing did not reflect the alleged oral agreement. The language of the written warranty is clear and leaves no

63. See, e.g., *Downey v. Levenson*, 142 N.E. 85, 86 (Mass. 1924); see also *Slobodsky v. Phenix Ins. Co.*, 72 N.W. 483, 484-85 (Neb. 1897).

room for S to argue that when he signed the contract he believed, mistakenly, that the written language reflected the parties' oral agreement—that is, he believed the language stated that the outstanding accounts receivable “were not less than \$4 million.” Even more difficult is for S to establish that B mistakenly thought the writing reflected their oral agreement. No doubt B would testify that he intended to make a contract exactly as written and that the \$5 million figure in the warranty was not supposed to be \$4 million. Thus, when the claimed warranty is specific, the seller will probably not succeed in a reformation action.⁶⁴

III. ZIFF-DAVIS AND THE SECOND CIRCUIT

Before proceeding to see how the Second Circuit should have analyzed the facts in *Galli* and *Rogath*, we must first clarify that court's somewhat confusing discussion of *Ziff-Davis*. In *Galli* the sellers of a business warranted in the written purchase agreement that they were not aware of any facts that would result in a claim that might adversely affect the business or its property. Prior to signing the agreement, however, the buyer knew of a contamination problem at the business's Catskill property.⁶⁵ In remanding the case for the lower court to determine the source of the buyer's knowledge, the Second Circuit purported to distinguish *Ziff-Davis* as follows:

In *Ziff-Davis*, there was a dispute at the time of closing as to the accuracy of particular warranties. *Ziff-Davis* has far less force where the parties agree at closing that certain warranties are not accurate. Where a buyer closes on a contract in the full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty under the terms of the contract, the buyer should be foreclosed from later asserting the breach. In that situation, unless the buyer expressly preserves his rights under the warranties (as CBS did in *Ziff-Davis*), we think the buyer has waived the breach.⁶⁶

64. See *Slobodsky*, 142 N.E. at 86-87. Assume, however, that a seller warrants that “there are no outstanding claims against S.” Prior to the contract signing, S tells B that C has asserted a \$50,000 products liability claim. Because the seller's warranty is not specific, that is, “C has no claims against S,” the trier of fact may find that the parties, though mistakenly, mutually believed that the general warranty language in the written contract did not cover claims the seller had disclosed to the buyer prior to the parties' signing of the written agreement.

65. 973 F.2d at 151.

66. *Id.* When the court says with “full knowledge and acceptance of facts disclosed by the seller,” what does the court mean by the phrase “acceptance of facts?” Does it mean something more than knowledge of the facts? On remand, the district court found that the seller had made the disclosure. See *Johnston v. Metz*, No. 87-CV-973, 1993 WL 481395

However, the court noted that if the buyer knew of the contamination problem from a third source, it is possible "that . . . [the buyer] purchased the sellers' warranty as insurance against any future claims . . . [and] would have a strong argument" under *Ziff-Davis* that no waiver occurred.⁶⁷

Similarly, in *Rogath* the seller of a painting warranted in the bill of sale that the seller had no knowledge of any challenge to the work's authenticity.⁶⁸ The seller claimed that at the time of purchase the buyer knew Marlborough Gallery had challenged the painting's authenticity. In reversing summary judgment for the buyer, the Second Circuit applied the teaching of *Galli* and said that if the seller had disclosed information to the buyer that constituted a challenge to the painting's authenticity, then the buyer waived any breach of warranty claims because he "did not 'expressly preserve his rights' under the Bill of Sale, as required by *Galli*."⁶⁹

The Second Circuit's analysis of *Ziff-Davis* would be sound if *Ziff-Davis* involved a fact pattern similar to those in *Galli* and *Rogath*, but it did not. In both *Galli* and *Rogath* the buyers had precontract knowledge that the warranted information was not true.⁷⁰ By contrast, in *Ziff-Davis*, the buyer learned of the seller's alleged breach of warranty after the parties had signed the contract of sale but before the date of closing—the date of performance.⁷¹ Although in *Ziff-Davis* the seller denied that any warranty was breached,⁷² and the parties performed after stipulating that the closing "[would] not constitute a waiver of any rights,"⁷³ nowhere does *Ziff-Davis* indicate that a waiver would have occurred if the seller had agreed that it had breached its warranty. Or put differently, nowhere does the court in *Ziff-Davis* indicate, as does the Second Circuit, that if a buyer closes with "full knowledge and accep-

(N.D.N.Y. Nov. 18, 1993).

67. 973 F.2d at 151.

68. The Bill of Sale stated that, "In order to induce David Rogath to make the purchase, Seller and . . . Agent for Seller, do make the following warranties . . . to and with the Buyer. 1. . . that the Seller has no knowledge of any challenge to Seller's title and authenticity of the Painting" *Rogath v. Siebenmann*, 941 F. Supp. 416, 419-20 (S.D.N.Y. 1996).

69. 129 F.3d at 266. Parenthetically, if *Bennett* were good law, then the Second Circuit's conclusion in *Rogath* and *Galli* that a buyer does not waive the breach of warranty if the source of the buyer's knowledge is a third party would be contrary to New York law.

70. 973 F.2d at 151; 129 F.3d at 263.

71. 553 N.E.2d at 999.

72. *Id.*

73. *Id.*

tance of facts disclosed by the seller" that would constitute a breach of the contractual warranty, the buyer waives its right to sue for that breach unless it expressly preserves the right.⁷⁴ Rather, it indicates the opposite. Thus, in *Ziff-Davis* the New York Court of Appeals said,

The determinative question is this: should Ziff-Davis be relieved from any contractual obligation under these warranties, as it contends that it should, because, prior to the closing, CBS and its accountants questioned the accuracy of the financial information and because CBS, when it closed, did so without *believing in or relying on* the truth of the information?⁷⁵

The court then answered this question in the negative because any other holding would, in the words of the court, "have the effect of depriving the express warranties of their only value to CBS—i.e., as continuing promises by Ziff-Davis to indemnify CBS if the facts warranted proved to be untrue."⁷⁶

Furthermore, the court in *Ziff-Davis* notes with approval an analogy to the U.C.C. under which acceptance of nonconforming goods does not itself impair any remedy.⁷⁷ The U.C.C. requires only that the buyer give timely notice to the seller to preserve its remedies for breach. In short, under *Ziff-Davis* a buyer who learns of a breach after the contract signing, regardless of the source of its knowledge, should be able to close under an executory contract without waiving the breach.

74. See *Rogath*, 129 F.3d at 264; *Galli*, 973 F.2d at 151.

75. 553 N.E.2d at 1002. But see *Allegheny & W. Energy Corp.*, No. 2:85-0652, 1986 WL 13360, at 6-7 (stating that buyer's preclosing knowledge that warranty was not correct means buyer did not rely on the warranty and therefore the breach did not cause buyer any damage). The court appears to be saying that if a buyer performs under the contract knowing that the seller's warranty was not true, then the seller's breach has not caused the buyer any damage. This position is not sound. Once a court concludes that a warranty was created—as the court did in *Allegheny & Western Energy Corp.*—a breach of the warranty automatically entitles the buyer to maintain an action for the breach and to recover any damages that naturally flow from the breach. If the law were not so, then in every breach of warranty case in which the buyer accepted merchandise knowing of a defect, the buyer would not be entitled to recover as damages the difference in value between the goods as warranted and as accepted, even if the buyer gave timely notice. But the law permits this sort of buyer to sue for breach. See *infra* note 77. However, the buyer may not be entitled to consequential damages if the buyer could have prevented those damages because it knew that the warranty was not true.

76. 553 N.E.2d at 1002. See *Southern Broadcast Group L.L.C. v. Jem Broadcasting, Inc.*, 145 F. Supp. 2d 1316, 1324 (D.C. Fla. 2001).

77. 553 N.E.2d at 1002 n.4; see U.C.C. § 2-607(2). This view was prevalent prior to the U.C.C. See *Franck v. J.J. Sugarman-Rudolph Co.*, 251 P.2d 949, 952-53 (Cal. 1952) (discussing sale of stock); *Atwater & Co. v. Pan. R.R.*, 175 N.E. 189 (1931); *Day v. Pool*, 52 N.Y. 416 (1873).

So how did the Second Circuit go astray? First, in reaching its conclusion, the Second Circuit did not take into account the fact that when Ziff-Davis spoke of the closing it was referring to the date of performance under a contract previously made and not to contract formation.⁷⁸ In *Ziff-Davis*, the buyer first learned after the signing of the contract but before the closing, that is, before performance, that the seller's warranty was not true.⁷⁹ In both Second Circuit cases, however, the sellers claimed that the buyers had precontract knowledge.⁸⁰ Thus, when the Second Circuit used the phrase "closes on a contract,"⁸¹ it apparently was referring to the signing or entering into the contract and not to a closing under a contract entered into at an earlier point in time. In short, other than to state the key point—that the court in *Ziff-Davis* adopted a contract approach to express warranty⁸²—the Second

78. Interestingly, however, in reciting the facts of *Ziff-Davis*, the Second Circuit correctly stated that the buyer conducted its investigation between the time of signing and the closing. See *Galli*, 973 F.2d at 150.

79. 553 N.E.2d at 999.

80. See *Rogath*, 129 F.3d at 263, 265-66 (stating bill of sale constituted contract); *Galli*, 973 F.2d at 147 (stating parties "simultaneously signed a stock purchase agreement and closed the deal" *Id.*).

81. See *Rogath*, 129 F.3d at 264; *Galli*, 973 F.2d at 151.

82. In taking this position, the majority in *Ziff-Davis* rejected the notion that the buyer must rely on the warranty in the tort sense. 553 N.E.2d at 1001-02. Unfortunately, the dissent's discussion of reliance and the majority's response are off the point. The still hotly-debated issue of whether reliance is essential for an express warranty focuses on whether reliance in the tort sense is necessary to create an express warranty. Put differently, the debated issue is whether a buyer must be induced by the seller's promise or affirmation to enter into the transaction. In *Ziff-Davis* everyone agreed that the buyer entered into the deal relying on the truth of the warranted information. The issue of reliance in the creation of a warranty was therefore not presented. Under any view of reliance, an express warranty was created. In short, neither the dissent nor the majority should have discussed the seller's contention that the buyer did not rely on the warranty other than to say that it is irrelevant because, under the facts before the court in *Ziff-Davis*, an express warranty was created no matter what position one took on the reliance issue.

The real issue the seller was apparently raising in *Ziff-Davis* was whether, given the buyer's knowledge of the seller's breach of warranty, the buyer's claim for the breach was discharged or was renounced by the buyer as a result of the buyer's closing under the contract. To be sure, an express warranty was created once the purchase agreement was signed, and it was breached because the information was not true. The only issue left, therefore, was whether the buyer's damage claim for that breach was discharged or renounced. The majority in substance recognized this point quite clearly at the conclusion of its opinion. Although in resolving the issue the court did not speak in terms of discharge or renunciation, the court made it clear that the seller, Ziff-Davis, was not relieved of its contractual obligation under its warranties because the buyer closed under the contract without believing the truth of the information. *Id.*; see also *supra* notes 76 and 77 and accompanying text.

Circuit should have said that *Ziff-Davis* was not relevant because it involved a buyer's postcontract knowledge whereas *Galli* and *Rogath* each involved a buyer's precontract knowledge.⁸³

Second, by speaking in terms of waiver such as "waived the breach,"⁸⁴ the Second Circuit masked the real issue presented by the facts before it which, in contrast to *Ziff-Davis*, was contract formation and not waiver of breach. This point is apparent when one analyzes how a court should handle fact patterns similar to those in *Galli* and *Rogath*. Let us first analyze the case in which the seller made precontract disclosure to the buyer. If the contract is in writing, the court must first decide whether the parol evidence rule is applicable, a step that the Second Circuit did not take. If the court determines that it is, and I think it should be as discussed earlier,⁸⁵ then the seller's warranty will be a part of the contract and enforceable. Stated differently, if the parol evidence rule is applicable, then evidence of the buyer's precontract knowledge is not admissible for the purpose of showing that the seller's warranty did not become part of the sales contract, and the seller's warranty will be a part of the contract to the same extent as all the other terms contained in the written contract. Although no issue of waiver arises unless the seller can show some postcontract conduct by the buyer that amounts to an intentional relinquishment of its right to enforce the warranty that was created, a court should consider whether the evidence of the buyer's precontract knowledge is admissible for the purpose of interpreting the warranty term.

But even if a court determines that the parol evidence rule is not applicable and admits evidence of the seller's disclosure to the buyer for the purpose of showing that the warranty term does not include disclosed claims, a court should not hold, as a matter of law, that the buyer has no claim for breach of warranty. Using an objective standard, a trier of fact should always first ask and answer the questions of whether, under the circumstances, including the seller's disclosure, the

83. See *Rogath*, 129 F.3d at 264; *Galli*, 973 F.2d at 151. The court in *Coastal Power International Ltd. v. Transcontinental Capital Corp.*, 10 F. Supp. 2d 345 (S.D.N.Y. 1998) (discussing sale of stock of business), also missed this distinction. There, before the closing under the purchase agreement but months after the parties had entered into the agreement, the seller disclosed facts to the buyer that showed the seller was in breach of its warranty. *Id.* at 347-48. The court blindly applied the *Rogath* rule and held that the buyer could not recover for that breach. *Id.* at 369-70. However, because the buyer did not have precontract knowledge of any breach—and it could not have had knowledge because the breach first occurred after the parties entered into the purchase agreement—the buyer in *Coastal Power* should have prevailed in accordance with the holding in *Ziff-Davis*.

84. See *Rogath*, 129 F.3d at 264.

85. See *supra* notes 36-55 and accompanying text.

seller has manifested such a willingness to enter into a bargain on terms that include the seller's promise as to the truth of the information so as to justify the buyer in understanding that his assent to that bargain is invited and will conclude it and, if so, whether the buyer in signing the contract assented to all the terms. In other words, using an objective standard, the trier of fact must answer the question of whether the buyer, in spite of the seller's disclosure, purchased the seller's warranty as insurance against any future claims. Although the answer in almost all situations may be in the negative, perhaps there are circumstances when reasonable people can differ as to the answer, and thus, a factual issue is presented. Suppose, for example, the negotiated purchase price that obviously represents the consideration for all of the seller's promises, including the warranties that are in the draft contract, is not adjusted downward after the seller's disclosures. Is it not reasonable to infer that under these circumstances the buyer was purchasing all of the seller's written warranties without qualification,⁸⁶ because the buyer would be paying the purchase price negotiated on the basis of all of the written warranties?⁸⁷ And is not this inference certainly possible when the contract containing the seller's warranty is drafted after the seller's disclosure to the buyer?⁸⁸ Or suppose that the seller can cause the warranty to be true on the date of closing even though it is not true at the time the parties enter into the contract. Is it not reasonable to infer that the buyer is purchasing the seller's warranty as insurance? Or take for example the facts in *Galli*. In *Galli* the business site being sold was contaminated for many years.⁸⁹ During those years no suit was instituted against the sellers.⁹⁰ Given that background, a seller may feel that no suit would ever be brought, or at least that the possibility was so remote that it was not a matter of concern, and thus would be willing to give a guarantee such as the warranty in *Galli*. A buyer, in turn, may be willing to buy at the agreed purchase price because he had the seller's warranty to protect himself if, by chance, suit were brought against him. In this situation a trier of fact may conclude, using an objective standard, that the seller's promise was purchased by the buyer and, thus, the seller's warranty covered a claim based on facts disclosed

86. If the seller intended to modify any express warranty by its disclosure, it could easily protect itself by revising the language of the written warranty before signing the contract.

87. This inference can be stronger or weaker depending on other circumstances.

88. Particularly, for example, when the buyer's attorney inserted the warranty clause to protect the buyer against any possible consequences from the seller's disclosure.

89. 973 F.2d at 150.

90. *Id.* In fact, the buyer was not sued until two years after the deal closed. *See id.* at 147.

by the seller. In sum, if the parol evidence rule were not applicable and if using an objective standard the trier of fact concluded that the seller's warranty covered disclosed information, the buyer should be entitled to assert a claim for breach unless some postcontract conduct of the buyer amounted to an enforceable waiver.

Turning to the case when third parties inform the buyer prior to the contract signing that the seller's warranty is inaccurate, the Second Circuit holds as a matter of law that under these circumstances the buyer does not waive any rights to enforce the contract. The court's approach, however, is problematic. If the parol evidence rule is not applicable and the court admits evidence that the buyer knew from third parties that the warranty was not true, can it not be argued that the question of whether a buyer is waiving any claims to the extent it knows at the time of contracting that the information is not as warranted, is a question of fact and may not be decided as a matter of law?⁹¹ Put differently, if the relevant issue were "waiver," there may be a factual issue whether under the circumstances the buyer is knowingly relinquishing its rights to the extent it knows at the time of contracting that the warranty is not true. As an issue of waiver, therefore, the Second Circuit's unqualified rule is questionable. However, as an issue of contract formation, which it is, the Second Circuit's conclusion that the buyer may enforce the contract seems correct. Based on the seller's manifestations to the buyer,⁹² it seems that the contract formed includes the seller's warranty. Put differently, based on an objective standard the seller offered the buyer an unlimited warranty against claims and the buyer accepted. Thus, if before signing the contract a buyer learns from a third party that the warranty is not true, a warranty is nevertheless created, and a buyer is entitled to sue for its breach. In short, unless the buyer's postcontract conduct amounts to a waiver of any claim, the buyer should be entitled to sue for breach of the warranty. Of course, if the parol evidence rule is applied to exclude parol evidence of the buyer's precontract knowledge, then obviously there is no basis on which to find that the buyer has waived its claims upon entering into the contract.

Even assuming the issue was one of waiver, the Second Circuit's statement of the rule that no waiver occurs when a third party is the source of the buyer's knowledge cannot be taken at face value. Such statement leaves the erroneous impression that a buyer may be entitled to recover on the seller's warranty to the same extent as a buyer who did not know that the warranty was inaccurate. Regardless of the source,

91. *Cf. Wikoff v. Vanderveld*, 897 F.2d 232 (7th Cir. 1990).

92. *See supra* note 31.

however, a buyer's knowledge should make a difference on two issues: consequential damages and rescission. For discussion purposes let us use *Rogath*, in which the buyer resold the painting. When the resale buyer learned of a challenge to the painting's authenticity, the buyer took back the painting and sued his seller for breach of warranty.⁹³ The seller claimed that the buyer should not prevail because the buyer knew of the challenge before purchasing the painting. The Second Circuit said that if the buyer learned of the challenge from a third party, the buyer would prevail because what the buyer learned from a third party "is immaterial."⁹⁴ As mentioned earlier,⁹⁵ in terms of contract formation, what the buyer learned from a third party is irrelevant. But what the buyer learned from a third party is material so far as the issue of consequential damages is concerned. For if the buyer's knowledge, and not the seller's breach, is the cause of any consequential loss to the buyer, that buyer should not be entitled to recover against the seller to the same extent as a buyer who did not know. Thus, if *Rogath*, the buyer, knew from a third party that the painting's authenticity had been challenged and nevertheless resold the painting, it may be said that the buyer's own conduct caused the loss of the resale when he took back the painting from the resale buyer because of the challenge. In this sort of case, the buyer, knowing of the challenge, should have disclaimed all implied warranties when he sold the painting to the resale buyer. If he did not do so or if he gave an express warranty, it seems clear that the buyer himself caused the loss of the resale, and not the original seller.⁹⁶ In other words, when a buyer such as *Rogath* could have prevented any consequential damages because the buyer knew that the seller's warranty was breached, the buyer should not be able to recover those consequential damages.⁹⁷

Regardless of the source, a buyer's precontract knowledge that a warranty in the written contract is not true should also be relevant if the buyer seeks rescission. A buyer who knows that a seller's warranty

93. 129 F.3d at 263.

94. *Id.* at 266.

95. See *supra* note 91 and accompanying text.

96. See *Tomita v. Johnson*, 290 P. 395, 396 (Idaho 1930). The same is true if *Rogath* was not obligated to take back the painting from the resale buyer because of any challenges to authenticity. Thus, if *Rogath* voluntarily took back the painting, it seems self-evident that the buyer's act of voluntarily taking it back, and not any act of the seller, caused the loss of the resale.

97. The Second Circuit in *Rogath* overlooked this point. The court should have indicated that if the buyer had precontract knowledge of any challenge, the buyer would not be entitled to recover consequential damages for the loss of the resale regardless of the source of the buyer's knowledge.

is inaccurate has the option of not signing the contract or renegotiating the deal. If the buyer chooses to sign the contract, there is no reason for a court thereafter to exercise its discretion and let the buyer rescind. In other words, there is no reason to grant the buyer equitable relief that the buyer could have had by not entering into the contract.

IV. CONCLUSION

I believe that all courts should adopt a contract approach to the creation and enforcement of express warranties in every context. There seems to be no rational basis to require for the creation of an express warranty, the additional factor of reliance when the warranty would otherwise be a part of the contract. For whether or not there is reliance, the party making the warranty is receiving from the other party the exchange it bargained for, that is, the price it bargained for in return for all of its promises in the agreement.

When a buyer has precontract knowledge that a seller's warranty is not true, a court should use contract concepts to determine whether the warranty is a part of the contract, its meaning and the extent to which the buyer may recover for breach of the warranty. In so doing, it should apply the parol evidence rule when the agreement is in writing to the same extent that it would apply the rule with respect to any other term in the written agreement. Stated differently, in dealing with the impact of a buyer's precontract knowledge on the creation or meaning of an express warranty, a court should use a contract approach and resolve the issue in the same manner it would resolve any similar issue relating to any other term of the parties' agreement.