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FREEDOM FROM RELIANCE: A CONTRACT APPROACH TO EXPRESS WARRANTY*

Sidney Kwestel**

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INTRODUCTION

"There is no more troublesome word in the law," Professor Williston wrote more than seventy years ago, "than the word 'warranty.'"¹ Whether Professor Williston was correct is not important. Certainly, the law of warranty has its fair share of troublesome issues, not the least of which is whether reliance is required to support a claim of breach of an express warranty. Consider the following hypothetical: A enters into a written contract dated January 15, 1993 to sell her food business to B for \$50 million on March 1. The contract states that "A warrants that: (1) as of January 1, 1993 the outstanding accounts receivable were not less than \$5 million; and that (2) as of the closing date, there will be no material change in the amount of outstanding accounts receivable." Based on confidential information received on January 14 from his accountants, who reviewed A's books and records, B knows when he enters into the contract on January 15 that the accounts receivable were only \$4 million as of January 1 and that they will be no higher on March 1. B says nothing to A until January 20 when B tells A that A has breached her warranty. A refuses to make any adjustment and B says he will sue. The parties consummate the sale on March 1, and on May 1, B commences suit against A, claiming that A breached her express warranty regarding the outstanding accounts receivable. Is B entitled to relief?² The answer

1. 1 SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS* § 181 (1920). Professor Williston is referring to the "different senses" in which the word "warranty" was used in insurance law, charter parties, the Uniform Sales Act, and the English Sales of Goods Act. *Id.*; see also *White Realty & Ins. Agency Co. v. Moreland*, 215 Pa. Super. 423, 428-29, 259 A.2d 461, 464 (1969) (discussing variety of meanings attached to "warranty"). "The word 'warrant' has no positive meaning but varies with the circumstances under which it is used." *White Realty & Ins. Agency Co. v. Moreland*, 215 Pa. Super. 423, 428-29, 259 A.2d 461, 464 (1969).

2. See *infra* notes 185-206 and accompanying text (discussing hypothetical). In comparison to this hypothetical, the court in *CBS Inc. v. Ziff-Davis Publishing Co.*, 75 N.Y.2d 496,

depends for the most part on whether reliance by the buyer on a seller's promise or affirmation of fact in entering into a sales contract is necessary to create or recover on an express warranty. In sale of goods transactions, courts and commentators have hotly debated the issue of whether the buyer's reliance is necessary to create an express warranty under section 2-313(1) of the Uniform Commercial Code (U.C.C. or Code).³ Section 2-313(1)(a) provides that a promise or affirmation of fact relating to the goods sold creates an express warranty if it becomes "part of the basis of the bargain." The statute makes no express reference to "reliance." In contrast, under section 12 of the Uniform Sales Act (U.S.A. or Sales Act),⁴ a seller's affirmation of fact or promise relating to the goods created an express warranty if its natural tendency "induce[d] the buyer to purchase the goods and if the buyer purchase[d] the goods relying thereon."⁵ The question is obvious: in deleting U.S.A. section 12's express reference to reliance, did the drafters of the U.C.C. intend to

553 N.E.2d 997, 554 N.Y.S.2d 449 (1990), was faced with the situation where the buyer, based on an investigation conducted *after* the signing of the purchase agreement but *before* the closing, was led to believe that the information the seller warranted in the agreement was not true. *CBS Inc. v. Ziff-Davis Publishing Co.*, 75 N.Y.2d at 499-502, 553 N.E.2d at 998-99, 554 N.Y.S.2d at 450-51.

3. U.C.C. § 2-313(1) provides:

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

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

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

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

U.C.C. § 2-313(1) (1978) (emphasis added). Note that under subdivision (a) a promise or affirmation that does not relate to the quality of the goods would not create an express warranty since that section requires that "the goods shall conform to the affirmation or promise." *Id.* (emphasis added); see also *Royal Business Mach., Inc. v. Lorraine Corp.*, 633 F.2d 34, 42 (7th Cir. 1980) (discussing whether certain assertions were factual assertions relating to goods). In *Royal Business Machines*, the seller's affirmation of fact that "replacement parts were readily available" was not, the court stated, "a fact that relates to the goods," as required by § 2-313(1)(a), and was "not an express warranty to which the goods were required to conform." *Royal Business Mach., Inc. v. Lorraine Corp.*, 633 F.2d at 42. Unless otherwise indicated, citations to the U.C.C. are to the 1978 Official Text.

4. The U.S.A. was adopted in 1906 and thereafter enacted in 36 states. See 1 U.L.A. 9 (Supp. 1967) (table of states that adopted the U.S.A.).

5. U.S.A. § 12 provides 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.

U.S.A. § 12 (1906).

eliminate the reliance requirement for the creation of an express warranty?

The first text of the Code was published by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, cosponsors of the Code project, as the 1952 Official Text.⁶ The texts of section 2-313 contained in the Code's 1952 and 1978 Official Texts are virtually identical to section 37 of the 1944 proposed final draft of the Uniform Revised Sales Act (U.R.S.A.).⁷ Section 37 of the 1944 draft U.R.S.A. ultimately became section 2-313 in the 1949 draft of Article 2 of the Code.⁸ According to Hiram Thomas, an advisor on Article 2, it was clear that section 37 "wholly eliminated" the tort element of reliance and treated an express warranty as "purely contractual."⁹

Despite Mr. Thomas' view, the issue of whether section 2-313 intended to change prior law surfaced when the New York State Law Revision Commission (Commission) undertook its comprehensive review of the Code's 1952 Official Text. Professor John O. Honnold, a research consultant to the Commission, in analyzing section 2-313, concluded that the extent to which the Code's "basis of the bargain" test would change present law was less than clear.¹⁰ Consistent with Professor Honnold's

6. XIII ELIZABETH SLUSSER KELLY, *UNIFORM COMMERCIAL CODE, Drafts*, 153-54 (1984) [hereinafter KELLY, *Drafts*].

7. See *supra* note 3 (quoting the 1978 Official Text); U.C.C. § 2-313(1) (1952 Official Text). Section 2-313 of the 1952 Official Text read, in pertinent part, as follows:

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

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

U.C.C. § 2-313 (1952) (emphasis added); see also II Kelly, *Drafts, supra* note 6, at 30-31 (§ 37 of 1944 proposed final draft of U.R.S.A.). Professors Karl V. Llewellyn and Soia Mentschikoff were the Reporter and Assistant Reporter, respectively, of the proposed U.R.S.A. See II KELLY, *Drafts, supra* note 6, at 1.

8. Compare UNIF. REVISED SALES ACT § 37 (proposed 1944 final draft) with U.C.C. § 2-313 (tentative draft 1949).

9. See Hiram Thomas, *The Proposed Uniform Revised Sales Act*, 2 BUS. LAW. 16, 18 (1947) (explaining contractual nature of express warranty). Mr. Thomas explained:

The ancient element of tort in express warranties, the natural tendency of the warranty to induce a purchase and the buyer's reliance on the warranty in making the purchase (perpetuated in Sec. 12 of the existing Act), *has been wholly eliminated and an express warranty is treated as purely contractual, a part of the bargain.*

Id. (emphasis added).

10. 1 NEW YORK STATE LAW REVISION COMMISSION REPORT, STUDY OF THE UNIFORM COMMERCIAL CODE 392-93 (1955) [hereinafter NEW YORK COMMISSION] (analyzing 1952 Official Text). Professor Honnold of the University of Pennsylvania Law School explained that "one ground for confusion is that the word 'basis' has no generally understood legal or psychological meaning." *Id.* at 392. He rejected the idea that the draftsmen intended "[t]o limit the buyer's legal protection to seller's representations and promises which are basic,

conclusion, the Commission's 1956 Report also noted that it was unclear whether section 2-313's "basis of the bargain" language was intended "to change the law."¹¹ The Report, however, made no recommendation as to whether the language of section 2-313 should be changed.¹² Similarly,

in the sense employed in [U.C.C.] section 2-615." *Id.* He commented that a "[b]uyer is entitled to legal protection for compliance of the goods with *all* of seller's promises and representations on which the buyer relies, even though some may be of relatively small import." *Id.* (emphasis added). Professor Honnold also stated: "[p]ossibly for lack of any other meaningful standard, courts must employ the test of whether [the] buyer relied on the affirmation or promise, the test presently employed in section 12 of the Uniform Sales Act." *Id.* In concluding his analysis, however, Professor Honnold asserted that one could not assume that the basis of the bargain test includes a reliance requirement since "(i) [the] 'basis of the bargain' does not convey a definite meaning, and (ii) the Code's rejection of the present reliance language might well imply an intent to modify present law." *Id.* at 392-93. Professor Honnold's analysis failed to give appropriate weight to the express language of § 2-313, to the Code's definition of "agreement" as "the bargain of the parties in fact," and to the official comments to the 1952 Official Text, which are essentially the same as the present comments. *See infra* notes 107-26 and accompanying text (discussing meaning of § 2-313's "basis of the bargain language" and showing that reliance is not necessary to create an express warranty under that section); Andrew M. Baker et al., Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 50-51 (1978) [hereinafter *Special Project*] (discussing Professor Honnold's query of meaning of "basis of the bargain"). The *Special Project* asserted that "[t]he language and comments of section 2-313 indicate . . . that Professor Honnold was closer to the mark when he . . . noted that 'the Code's rejection of the present reliance language might well imply an intent to modify present law.'" *Special Project, supra*, at 51. It does not appear that Professor Honnold was aware of Mr. Thomas' published view.

11. *See* NEW YORK STATE LAW REVISION COMMISSION REPORT FOR 1956, REPORT RELATING TO THE UNIFORM COMMERCIAL CODE 30. Under the heading "Novel Terminology," the 1956 Commission Report stated that in some cases "it is not clear whether the new phraseology [of the U.C.C.] is intended to express more accurately the content of present language or to change the law (e.g., the phrase 'basis of the bargain' in § 2-313 stating how implied [sic] should be "express"] warranties are created)." *Id.* The 1956 Commission Report further stated that "[t]he Commission questions whether the phrase 'basis of the bargain' succeeds in conveying the intent of section 2-313." *Id.*

The published excerpts from the Commission's proceedings of its study of § 2-313 (in the 1952 Official Text) stated in pertinent part:

1. It was suggested that the meaning of the phrase "basis of the bargain" is not clear, and the phrase may be taken to mean "basic" to the bargain (*cf.* Restatement of Contracts, § 502) so as to restrict the scope of express warranties. The view was expressed that the present tests under section 12 of the Sales Act (N.Y. Pers. Prop. L., § 93) should be preserved, but that a provision would be desirable that would mitigate the buyer's burden of proof of reliance 4. Subject to items 1, 2, and 3, section 2-313 was approved.

Id. at 376 (Appendix 4). The Commission's suggestion in the first sentence of subparagraph 1 was implemented and the phrase "part of the basis of the bargain" was substituted for the phrase "basis of the bargain." N.Y. U.C.C. LAW § 2-313 annot. (McKinney 1964) (Historical Note). With respect, however, to the expressed view in the second sentence of subparagraph 1, stating that the tests under U.S.A. § 12 "should be preserved, but that a provision would be desirable that would mitigate the buyer's burden of proof of reliance," the Commission made no recommendation in the text of the 1956 Report. *Id.*

12. In early 1960, Professors William Hogan and Norman Penney prepared annotations for New York's Commission on Uniform Laws, which the Commission submitted in 1961 to the New York State Legislature. N.Y. ANN. TO UNIFORM COMMERCIAL CODE ix (1961).

to the extent that annotations or comments were prepared for state legislative bodies before passage of the particular state's Code, none suggested that the language be changed. Some conclusorily indicated that the "basis of the bargain" language was in substance the same as the U.S.A.'s reliance requirement,¹³ while others indicated that it was unclear to what extent section 2-313 changed the law on the reliance issue.¹⁴

Ignoring both Professor Honnold's analysis and the 1956 New York Commission Report, which suggested that the "basis of the bargain" language was unclear, the annotations state: "[t]he requirement that affirmations, etc., become a part of the basis of the bargain in order to establish a warranty is much the same as the 'reliance' requirement of Personal Property Law, § 93 [U.S.A. § 12]. See Comment 3." See N.Y. ANN. TO UNIFORM COMMERCIAL CODE cmt. 3 (1958 Official Text), *accompanying* NEW YORK COMMISSION, *supra* note 10, at 42; *see also* N.Y. U.C.C. LAW § 2-313 (McKinney 1964) (New York Annotations).

13. See RESEARCH STAFF OF THE ARKANSAS LEGISLATIVE COUNSEL, ARK. ANN. TO UNIFORM COMMERCIAL CODE 62 (1955). "[T]he U.C.C. section [2-313] is in accord with sections 68-1412 [U.S.A. § 12] and 68-1414 [U.S.A. § 14] and with case law." LEGISLATIVE RESEARCH COMMISSION, UNIFORM COMMERCIAL CODE: ANALYSIS OF EFFECTS ON EXISTING KENTUCKY LAW 53 (1957). The "basis of the bargain" qualification "appears to be substantially the same as the 'reliance' qualification in [s]ection 12 of the Uniform Sales Act." COMMISSION ON UNIFORMITY OF LEGISLATION IN THE UNITED STATES, ILL. ANN. TO UNIFORM COMMERCIAL CODE 52-3 (Burdette, Smith Co. 1960). After stating that § 2-313(1)(a) is in accord with U.S.A. § 12, these annotations note that the Code requirement that a statement becomes part of the basis of the bargain to create an express warranty is analogous to § 12's reliance requirement. The annotations, however, point out that "the comment to this section [2-313(1)(a)] states that the Code creates a presumption of reliance which can be rebutted only by clear affirmative evidence." N.C. ANN. AND COMMENTS PREPARED FOR USE OF THE NORTH CAROLINA GENERAL ASSEMBLY 42 (1964). Subsection (1)(a) of § 2-313 accords with North Carolina law. *Id.*; *see also* N.Y. ANN. TO UNIFORM COMMERCIAL CODE [1958 Official Text], *accompanying* NEW YORK STATE LAW REVISION COMMISSION REPORT, STUDY OF THE UNIFORM COMMERCIAL CODE 42 (1961) (requirement that affirmation becomes part of basis of bargain to create warranty is "much the same as" U.S.A. § 12 reliance requirement).

14. See KAN. U.C.C. ANN. § 84-2-313 (Vernon 1964). The Kansas Annotation states: "[w]hile this subsection does not materially change the law which has developed under the Uniform Sales Act and the decisional law, the definition is simplified by elimination of the element of reliance Since the Code concept of express warranty is contractual, particular reliance need not be shown." *Id.* (emphasis added). The Kansas Annotation is unclear. It says that § 2-313 "does not materially change the law," yet in the same breath it also says that the "definition of express warranty eliminates the element of reliance." *Id.*; LEGISLATIVE COUNCIL OF WISCONSIN, ANNOTATIONS TO THE UNIFORM COMMERCIAL CODE, Vol. III, Part II, at 91 (1961). The Code "[s]ubstitutes 'basis of the bargain' for 'reliance on the affirmation or promise' as the test of an express warranty based on the seller's affirmation or promise relating to the goods. Apparently no substantive change was intended to follow from such change in language though this is not entirely clear." TEXAS LEGISLATIVE COUNCIL, STAFF MONOGRAPH, ANALYSES OF ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE, SALES 84 (Jan. 1953). The Texas Legislative Council stated:

[T]he Code Comment gives life to [the basis of the bargain] concept by indicating that the crucial inquiry in determining whether there is an express warranty is to ascertain what it is that the seller has agreed to sell. This should focus the attention of the court and the triers of fact on the problem of what is the precise undertaking of the seller and should reduce the effort to find specific acts of reliance on the part of the buyer. In short, the problem is one of fixing the terms of the agreement, and this is a question of fact. *It is difficult to estimate the extent of change in the course of decisions that would*

Despite Professor Honnold's observations and the questions raised in the 1956 Commission Report, neither the drafters of the U.C.C. nor any state legislatures changed the language of section 2-313 to state expressly whether or not reliance was required to create an express warranty. Diverse opinions have been expressed on the issue of reliance, a lack of uniformity that is reflected in various state comments to section 2-313,¹⁵

be produced by this subsection [2-313(1)(a)], although it is clear that the drafters of this subsection intended to expand the scope of the express warranty.

Id. (emphasis added).

15. Many state comments indicate some form of reliance is required under § 2-313. *See* DEL. CODE ANN. tit. 6, § 2-313 Study cmt. 1 (1974) (§ 2-313 substantially reenacts U.S.A. § 12; seller's factual affirmation is warranty if buyer relies thereon); IOWA CODE ANN. § 554.2-313 cmt. 1 (1967) ("basis of the bargain" requirement appears to be similar to U.S.A. § 12's reliance requirement); 1992 Ky. Rev. Stat. & R. Serv. 355.2-313(1)(a) cmt. 1(c) (Baldwin) ("basis of the bargain" requirement appears substantially same as U.S.A. § 12's "reliance" requirement); ME. REV. STAT. ANN. tit. 11, § 2-313 Code cmt. (West 1964) ("part of the basis of the bargain" requirement apparently same as U.S.A. § 12's "reliance" requirement); MICH. COMP. LAWS ANN. § 440.2313 Practice Commentary (West 1967) (no significant change should result from Code restating reliance factor as warranty being part of basis of bargain); N.H. REV. STAT. ANN. § 382-A:2-313 cmt. (1961) ("part of the basis of the bargain" requirement apparently same as U.S.A. § 12's reliance requirement); N.J. STAT. ANN. § 12A:2-313 cmt. 1 (West 1962) (New Jersey Code § comparable to U.S.A. § 12). The New Jersey Comment states that "this section of the Code is comparable to section 12 of the Uniform Sales Act (N.J.S.A. 46:30-18)." N.J. STAT. ANN. § 12A:2-313 cmt. 1 (West 1962). In *Cipollone v. Liggett Group, Inc.*, however, discussing New Jersey law, the court quotes this portion of the New Jersey Comment and states "there is no reference to the reliance issue." *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 565 (3d Cir. 1990), *aff'd in part, rev'd in part*, 112 S. Ct. 2608 (1992). This statement is questionable. By stating that § 2-313 is "comparable" to U.S.A. § 12, which expressly requires reliance, the Comment is, in effect, making a reference to the reliance issue. *Compare* N.J. STAT. ANN. § 12A:2-313 cmt. 1 (West 1962) (implied reliance requirement) *with* N.J. STAT. ANN. § 12A Introductory Commentary (West 1962) ("The Code departs from the Sales Act by omitting any requirement that a buyer must prove his reliance upon an express warranty in any action for its breach."). In some states, the comments are unclear or indicate a diminished or possibly no role for reliance. *See* CAL. COM. CODE § 2313 Code cmt. 2 (West 1964) (citing Official Comment 3) (no particular reliance on affirmations of fact necessary to weave them into fabric of agreement); FLA. STAT. ANN. § 672.2-313 cmt. § (3) (West 1966) (reliance element eliminated from definition of express warranty); ILL. ANN. STAT. ch. 26, para. 2-313 cmt. § (1) (Smith-Hurd 1963) (Official Comment 3 indicates reliance element subordinated by change in language); IND. CODE ANN. § 26-1-2-313 cmt. 3 (Burns 1974) (ambiguous on reliance issue). The Indiana Comment states: "[f]or 'reliance' the instant section seems to substitute the term 'part of the basis of the bargain.' However, official comment 3 states that reliance need not be shown. If 'basis of the bargain' does not mean 'reliance,' what does it mean? . . . Perhaps this is something less than strict reliance." IND. CODE ANN. § 26-1-2-313 cmt. (1)(a) (Burns 1974). The Kansas statute "does not require specific reliance" by the buyer; however in making a determination as to whether a promise has become part of the basis of the bargain "reliance may be of importance; but its absence should not negate an express warranty." KAN. U.C.C. ANN. § 84-2-313 Code cmt. § (1) (Vernon 1968); MASS. GEN. LAWS ANN. ch. 106, § 2-313 cmt. (Materiality of Affirmation, Promise, Description, Sample) (West 1990) ("part of the basis of the bargain" similar but not equivalent to concept of reliance in U.S.A. § 12); MINN. STAT. ANN. § 336.2-313 cmt. § 2-313(1)(a) (West 1966) (discussing difference in terminology between U.C.C. § 2-313(1)(a) and U.S.A. § 12). After noting that § 2-313(1)(a) is "substantially identical" to U.S.A. § 12, the Minnesota Code Comment states that "[t]here is one minor difference in terminology[.]

court decisions,¹⁶ and approaches taken by commentators.¹⁷ Strangely,

. . . . [t]he buyer does not have to rely upon [the affirmation or promise]. Instead, the affirmation or promise must . . . become a part of the basis of the bargain. *This difference in terminology probably brings about no great change in the results of cases.*" MINN. STAT. ANN. § 336.2-313 cmt. 2-313(1)(a) (West 1966) (emphasis added); see also WASH. REV. CODE ANN. § 62A.2-313 cmt. 1 (West 1966) (removing emphasis on reliance factor for creation of express warranty).

16. See *Hendricks v. Callahan*, 972 F.2d 190, 193 (8th Cir. 1992) (stating that even if court applied U.C.C. provisions by analogy, it was "not convinced Minnesota has completely abandoned the requirement of reliance"); *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 567 (3d Cir. 1990), *aff'd in part, rev'd in part*, 112 S. Ct. 2608 (1992) (noting possibility of interpreting "basis of bargain" language "as requiring some subjective inducement, without requiring a reliance finding"); *Overstreet v. Norden Lab., Inc.*, 669 F.2d 1286, 1291 (6th Cir. 1982) (warranty is basis of bargain if relied upon as one inducement for purchasing product); *Royal Business Machs., Inc. v. Lorraine Corp.*, 633 F.2d 34, 44 n.7 (7th Cir. 1980) ("basis of the bargain" requirement essentially reliance requirement); *Dilenno v. Libbey Glass Div., Owens-Illinois, Inc.*, 668 F. Supp. 373, 376 (D. Del. 1987) (claim for breach of express warranty "may not be maintained in Delaware absent some reliance by the buyer on the warranty"); *Global Truck Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641, 652 (N.D. Miss. 1986) (buyer must know of and rely on seller's affirmation of fact before express warranty created); *Glacier Gen. Assurance Co. v. Casualty Indem. Exch.*, 435 F. Supp. 855, 860 (D.C. Mont. 1977) (court recognized issues of reliance and right to rely does not arise in express warranty action); *Indust-Ri-Chem Lab., Inc. v. Par-Pak Co., Inc.*, 602 S.W.2d 282, 293-94 (Tex. 1980) (although it stated that reliance is not test under § 2-313, seller may nevertheless introduce evidence of buyer's lack of reliance and is entitled to jury instruction reliance); see also *infra* note 135 (citing cases supporting view that buyer's reliance required to create express warranty under § 2-313(1)(a)). The *Glacier* court stated that "[t]he [express] warranty is as much a part of the contract as any other part, and the right to damages on the breach depends on nothing more than the breach of warranty." See also *Gillette Dairy, Inc. v. Hydrotex Indus., Inc.*, 440 F.2d 969, 974 (8th Cir. 1971) (stating that factual question presented as to whether written affirmations of fact became part of basis of bargain when buyer apparently did not rely on those affirmations). In affirming the judgment for the seller, the *Gillette Dairy* court said it was a question of fact for the jury as to whether "warranties on the sales invoices were affirmations of fact which became part of the basis of the bargain," where the buyer testified he relied solely on other statements in purchasing the product. *Gillette Dairy, Inc. v. Hydrotex Indus., Inc.*, 440 F.2d 969, 974 (8th Cir. 1971); see *Winston Indus., Inc. v. Stuyvesant Ins. Co.*, 55 Ala. App. 525, 529, 317 So. 2d 493, 497 (determining factor not purchaser's reliance but whether warranty part of contract's "basis of the bargain"), *cert. denied*, 294 Ala. 775, 317 So. 2d 500 (1975); *Jensen v. Seigel Mobile Homes Group*, 105 Idaho 189, 195, 668 P.2d 65, 71 (1983) (stating that buyer need not rely on an affirmation of fact for the affirmation to become "part of the basis of the bargain").

17. *Special Project*, *supra* note 10, at 51. This Special Project interprets § 2-313 as modifying, but not wholly eliminating, U.S.A. § 12's reliance requirement. *Special Project*, *supra* note 10, at 51. "[The] seller's affirmation, whenever made, should become part of the basis of the bargain unless [the] seller can show that a reasonable buyer aware of the affirmation would not expect the promised quality." *Special Project*, *supra* note 10, at 51. Compare RICHARD W. DUESENBERG & LAWRENCE P. KING, SALES AND BULK TRANSFERS § 6.01 n.2 (Matthew Bender & Co. 1991), in 3 BENDER'S U.C.C. SERVICE [hereinafter DUESENBERG & KING]:

[F]or all practical purposes it is suggested that no great change was wrought by the Code. *Whether one speaks of reliance or basis of the bargain, little difference exists between the two.* In neither case should the statement be required to have been the sole factor leading the buyer to purchase. In either case, the statement should, at least, be one of such factors. What is really crucial is whether the statement was made as an affirmation of fact, the goods did not live up to the statement, and the defect was not so

no one has referred to either the Illinois Annotations to Article 2 that Professors Llewellyn and Mentschikoff had a hand in drafting or to Mr. Thomas' published view for guidance as to section 2-313's meaning.¹⁸

Unexplained statements that reliance is or is not required are not very helpful. A statement that reliance is not a requirement under section 2-313 *may* not necessarily mean that reliance has been wholly eliminated. At a minimum, it should mean that the buyer need not prove that it relied on the seller's promise or affirmation in purchasing the goods. The seller, however, might still be permitted to prove nonreliance by the buyer. For example, in *Indust-Ri-Laboratory, Inc. v. Par-Pak Co., Inc.*,¹⁹ the court rejected the seller's contention that it was necessary for the trier of fact to find that the buyer relied on a sample in order for the sample to become a part of the basis of the bargain: "[R]eliance is not the test under the Uniform Commercial Code."²⁰ Yet it held that the seller can introduce proof of the buyer's lack of reliance on the sample and that "upon presentation of [such] proof . . . the seller is entitled to an instruction on reliance, which should be phrased in the negative."²¹

apparent that the buyer could not be held to have discovered it for himself. (emphasis added)

with DUESENBERG & KING, *supra*, § 4.04[2], at 4-60:

This latter defense of no reliance [that the buyer could not rely on a postcontract assurance] is effectively taken away from the seller by section 2-313, which defines an express warranty as an affirmation or promise of the seller relating to the goods which "becomes a part of the basis of the bargain"

See generally WILLIAM D. HAWKLAND, SALES AND BULK SALES 81 (A.L.I. 3d ed. 1976) (discussing interpretation of § 2-313). Hawkland states:

To rise to the level of an express warranty, the statement must be one upon which a buyer not only could reasonably rely but one on which he did actually rely in making the purchase. Section 2-313(1)(a) expresses this concept by stating that the affirmation must become "part of the basis of the bargain." However, as Comment 3 indicates, the burden of showing reliance is met in the absence of nonreliance by the seller [sic], primarily by the buyer showing that he made the purchase after the seller made the representation.

Hawkland, *supra*, at 81; see also 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9-5 (3d ed. 1988 & 1992 Supp.); John E. Murray, Jr., "Basis of the Bargain: Transcending Classical Concepts, 66 MINN. L. REV. 283 (1982) [hereinafter Murray, *Transcending*]; John L. Hutzler, Note, "Basis of the Bargain"—What Role Reliance?, 34 U. PITT. L. REV. 145 (1972).

18. See *infra* note 134 (discussing the Illinois U.C.C. annotations); *supra* note 9 (quoting Thomas' published view).

19. 602 S.W.2d 282 (Tex. 1980).

20. *Id.* at 293. The court further stated: "[r]eliance was an element of an express warranty recovery under the Uniform Sales Act as originally drafted." *Id.* Additionally, the court noted that the drafters of the Uniform Commercial Code deleted the reliance requirement, substituting the "'part of the basis of the bargain' test." *Id.* (citing TEX. BUS. & COM. CODE ANN. § 2-313 (Vernon 1968)).

21. *Id.* at 294. The court's position may be summarized in its own words that "[a] finding that the sample is a part of the basis of the bargain . . . incorporates the reliance requirement to some extent" *Id.* at 293.

Similarly, a statement that section 2-313 requires reliance may mean that the buyer must allege and prove that it relied on the seller's representation or promise in making the purchase, or it may mean to incorporate the less stringent pre-Code reliance requirement as explained by Professor Williston:

There is a danger of giving greater effect to the requirement of reliance than it is entitled to. Doubtless the burden of proof is on the buyer to establish this as one of the elements of his case. But the warranty need not be the sole inducement to the buyer to purchase the goods; and *as a general rule no evidence or reliance by the buyer is necessary other than the seller's statements were of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods.*

It has been said: "If it is true that if an express warranty had been given in express terms as part of the contract of sale, no proof of reliance thereon would have been necessary. But where a mere representation of fact is proved, as in the case before us, it must be shown to have been relied upon by the vendee in order to constitute a warranty." It seems undesirable, however, to make the latter part of the statement a matter of law. *If a representation was evidently made for the purpose of inducing a sale, and was of a kind appropriate for that purpose and a sale followed, this should be enough.*²²

If Professor Williston's view of the reliance requirement is intended, there should be no difference in results if a court says reliance is required or if it says reliance is not required as part of the buyer's *prima facie* case, but would permit the seller to prove its absence.²³

The reliance issue arises in cases other than those involving sales of goods. For example, is the buyer's reliance essential to create an express warranty in contracts for the sale of businesses, real estate, securities, or services, issues not governed by statute?²⁴ Recently, whether a buyer's reliance is necessary to create an express warranty in these transactions has been seriously debated.²⁵ There seems, however, to be no reason why the requirements for creating an express warranty should not be the same

22. WILLISTON, *supra* note 1, § 206.

23. This assumes that under Professor Williston's approach the buyer's complaint states a claim if it alleges a statement by the seller which was, to use Professor Williston's words, "of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods," even though it does not expressly allege that the buyer relied on the statement. WILLISTON, *supra* note 1, § 206.

24. Depending on the circumstances, however, U.C.C. Article 2 may apply to some or all aspects of the sale of a business that includes goods. DUESENBERG & KING, *supra* note 17, § 1.03(4)[d][ii] (discussing applicability of Article 2 in sale of business context).

25. See *Hendricks v. Callahan*, 972 F.2d 190, 192-94 (8th Cir. 1992) (discussing whether reliance is necessary in breach of warranty claim); *CBS Inc. v. Ziff-Davis Publishing Co.*, 75 N.Y.2d 496, 502-05, 553 N.E.2d 997, 1000-01, 554 N.Y.S.2d 449, 452-54 (1990) (discussing whether tort-form of reliance is element of breach of warranty).

for these transactions as for the sale of goods.²⁶ The only question is what those requirements should be or, to put it more concretely, whether the buyer's reliance, to any extent, on the seller's promise or affirmation of fact is required in order to impose liability on the seller if the fact promised or affirmed is untrue?

This paper demonstrates that reliance should not play, and should never have played, any role in determining a seller's liability for a *promise* relating to the subject matter of a contract.²⁷ There is no reason to treat such a promise differently from any other promise by the seller. For the consideration—the purchase price the buyer's paying the seller—is the price the buyer is paying for *all*, not some, of the seller's promises. No legal concern supports the superimposition of a requirement that the buyer must rely on the seller's promise in order to create an express warranty. Even without reliance, the buyer should have a claim for breach of the seller's promise based solely on general contract principles—and contract law does not require reliance. To put it somewhat differently, absent a statute to the contrary, a seller should be liable purely on contract grounds for breach of a promise relating to the subject matter of the contract.

Should the same be true in determining a seller's liability for an *affirmation of fact* as distinguished from a promise? Professor Williston did not think so. Although he recognized that a seller's liability for a promise should be "binding on ordinary principles of contract," Williston asserted that a seller's liability for an affirmation of fact was imposed by law, "not by virtue of his agreement to assume it."²⁸ Based on Williston's approach, it is understandable that the seller's liability for an affirmation of fact should require the tort element of reliance—that the buyer actually be induced by the seller's affirmation to make the purchase. The Commissioners' note to section 12 of the U.S.A. put it this way: "[i]n theory the fundamental basis for liability on warranty is the justifiable reliance on the seller's assertion."²⁹ As I explain below, however, as a

26. In resolving issues concerning express warranties in nonsale of goods transactions, some courts have looked to the law applicable to express warranties in the sale of goods. See *Land v. Roper Corp.*, 531 F.2d 445, 448 (10th Cir. 1976) (reasonable to infer reliance requirement applicable to sale of goods extends to transfer or sale of securities); *Phillips v. Ripley & Fletcher Co.*, 541 A.2d 946, 949-50 (Me. 1988) (court looked to U.C.C. for guidance in concluding that representation in sale of stock agreement constituted express warranty); *Dittman v. Nagel*, 168 N.W.2d 190, 193 (Wis. 1969) (express warranty common law principles governing sale of goods equally applicable to sale of realty). The *Dittman* court also noted that there is "very little case law" discussing express warranties in realty transactions. *Dittman v. Nagel*, 168 N.W.2d 190, 193 (Wis. 1969).

27. See *infra* notes 72-94 and accompanying text (analysis of seller's liability for promises).

28. See *infra* notes 44, 47 and accompanying text (quoting Professor Williston).

29. 1 U.S.A. § 12 Commissioner's Note (1950). Neither this note, nor U.S.A. § 12, distinguishes between a promise and an affirmation. Nonetheless, Professor Williston, who drafted

matter of analysis a seller's affirmation of fact should be treated the same as a promise, thereby making the tort element of reliance irrelevant in determining the seller's liability if the fact affirmed was not true.³⁰

At the outset, I focus on the basis of a seller's liability (in the absence of a statute) for a promise or affirmation of fact relating to the subject matter of the sales contract.³¹ I analyze contract formation and the role of reliance, with particular emphasis on the view expressed by Professor Williston that a seller's promise relating to goods, as distinguished from an affirmation of fact, was enforceable on ordinary contract principles.³² I will consider such fundamental questions as: what does the promisor mean when he promises, for example, that the machinery has no defects; how should an affirmation of fact relating to the subject matter of the contract be treated—as a promise, a condition, or as a noncontractual representation; and, is reliance necessary to the formation of a contract?³³ Next, I discuss whether the “basis of the bargain” language in section 2-313(1) requires reliance for the creation of an express warranty. Finally, I address the issues raised by a seller's postcontract promise or affirmation of fact.³⁴

My conclusions are these: (i) absent a statute, the tort element of reliance has no role in determining a seller's liability for a promise or affirmation of fact relating to the subject matter of the contract; (ii) if any fact promised or affirmed is untrue, a seller's liability should be governed solely by contract principles; (iii) the most reasonable construction of the “basis of the bargain” language of section 2-313(1) that comports with the relevant Code provisions and comments should result in applying a contract approach to determine whether an express warranty has been created; and, (iv) a question of contract modification is raised as to whether a seller's postcontract promise or affirmation creates an express warranty.

Although I conclude that a contracting party's promise or affirmation of fact relating to a contract's subject matter should be enforceable on contract principles alone, this does not mean that as a matter of policy a contract approach should be applied indiscriminately. One may ask, for example, whether a seller who publicly promotes an item for sale should

§ 12, recognized and expressed in his writings an analytical difference between a promise, which he viewed as enforceable on ordinary contract principles, and an affirmation of fact, which he explained was enforceable because of a rule of law. *See infra* notes 44-48 and accompanying text (discussing Williston's views).

30. *See infra* notes 35-71 and accompanying text (analyzing seller's affirmation of fact and promise).

31. *Infra* notes 35-53 and accompanying text.

32. *Infra* notes 35-53 & 72-94 and accompanying text.

33. *Infra* notes 35-106 and accompanying text.

34. *Infra* notes 107-251 and accompanying text.

escape liability to a purchaser for economic damages resulting from misstatements as to the item's quality in advertisements, sales brochures, or circulars, where the purchaser did not see the seller's statement before buying the item. From a contract viewpoint, the answer should be no. But is there any public policy that would make it appropriate in such a case to impose liability independent of a contract theory? This and other questions should be grappled with, particularly in the retail consumer field. But before that can be done intelligently, we must understand the bases on which the law enforces—or should enforce—a seller's promise or affirmation of fact relating to the subject matter of a transaction.

I. CREATION OF AN EXPRESS WARRANTY ABSENT A STATUTE:
CONTRACT APPROACH

A. *Promise or Affirmation as to an Existing or Past Fact or Condition—A Question of Interpretation*

1. *Promise*

For purposes of analysis, my initial focus is on a contract for the future sale of goods in which there is an exchange of promises—the seller promising to sell machinery and the buyer promising to purchase it for a specified price. Assume that in the formation of this contract the seller tells the buyer: “I promise the machinery has no defect.” What does this promise mean? Is it enforceable under contract law?

A promise has been defined as relating to future action on the part of the promisor. The Restatement (Second) of Contracts (Restatement Second), for example, defines a promise as a “manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”³⁵ Can a seller's promise that the machinery has no defect—which relates to an already existing fact and not to future action—fit within this definition? Or, to cull from the Restatement Second, is a buyer justified in inferring from the seller's words “I promise the machinery has no defect” that the seller is making a commitment “to act or refrain from acting in a specified way?” In the context of a contract of sale, the buyer may reasonably

35. RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981) [hereinafter RESTATEMENT (2D)]; see also 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 13 (1952). Professor Corbin defines a promise as “an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such a manner to a promisee that he may justly expect performance and may reasonably rely thereon.” CORBIN, *supra*, § 13; see also OLIVER WENDELL HOLMES, THE COMMON LAW 299 (1881) (promise simply accepted assurance that certain event or state of things shall occur); Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 171 (1917) [hereinafter Corbin, *Offer and Acceptance*] (promise an expression of intention that promisor will act in specified way inviting promisee reliance).

interpret such a promise to mean that the seller has committed himself to act in the future in a specified way—to pay the buyer for any damage caused by a defect in the machinery.³⁶ As the Restatement Second puts it:

Words which in terms promise that an event not within human control will occur, may be interpreted to include a promise to answer for harm caused by the failure of the event to occur.³⁷ An example is a warranty of an existing or past fact, such as a warranty that a horse is sound or that a ship arrived in a foreign port some days previously. Such promises are often made when the parties are ignorant of the actual facts regarding which they bargained, and may be dealt with as if the warrantor could cause the fact to be as he asserted. It is then immaterial that the actual condition of affairs may be irrevocably fixed before the promise is made.³⁸

36. See 1 CORBIN, *supra* note 35, § 14 (discussing promise “expressed in the form of a warranty” that relates to “something over which the promisor has absolutely no power or control”). A promise that a horse is sound does not mean, as Professor Corbin explains, that the promisor will instantly make the horse gentle if it is vicious. Rather, the promisee can expect the promisor to indemnify him against loss if the facts are not as represented. CORBIN, *supra* note 35, § 14.

37. RESTATEMENT (2D), *supra* note 35, § 2 cmt. d. Justice Holmes did not believe that it was necessary to interpret the promise as such. HOLMES, *supra* note 35, at 298-99. A promise relating to a future event over which the promisor has no control, such as a promise that it will rain tomorrow, Justice Holmes said, could be treated the same as a promise to pay the promisee 100 dollars. HOLMES, *supra* note 35, at 298. Justice Holmes pointed out that the only difference between the two promises is “the degree of power possessed by the promisor over the event,” stressing that “the law does not inquire, as a general thing, how far the accomplishment of an assurance touching the future is within the power of the promisor.” HOLMES, *supra* note 35, at 298-99. It is, therefore, unnecessary to interpret a promise that “it shall rain tomorrow,” as the short form of “I will pay if it does not rain.” HOLMES, *supra* note 35, at 299. In stating that the words “may be interpreted to include a promise . . .,” the Restatement Second apparently treats the interpretation issue as a question of fact, not a matter of law. RESTATEMENT (2D), *supra* note 35, § 2 cmt. d. Support for this proposition is implicit from the additional text of comment d, which provides in pertinent part:

Words of warranty, like other conduct, must be interpreted in the light of the circumstances and the reasonable expectations of the parties. In an insurance contract, a ‘warranty’ by the insured is usually not a promise at all; it may be merely a representation of fact, or, more commonly, the fact warranted is a condition of the insurer’s duty to pay (see § 225(3)). In the sale of goods, on the other hand, a similar warranty *normally* also includes a promise to answer for damages (see Uniform Commercial Code § 2-715).

RESTATEMENT (2D), *supra* note 35, § 2 cmt. d (emphasis added). The Restatement’s citation to U.C.C. § 2-715 does not support the interpretation that the word warranty is implicitly the equivalent of a promise to indemnify. Rather, it underscores the fact that the U.C.C. does not define the word warranty to include “a promise to answer for damages.” Thus, § 2-313, quoted *supra* note 3, merely explains how an express warranty is created. The U.C.C. separately provides in § 2-715 for indemnification in the event a warranty created under § 2-313 is breached.

38. RESTATEMENT (2D), *supra* note 35, § 2 cmt. d. Professor Beale apparently disregarded or overlooked this interpretation when he criticized Williston’s position that a promise cannot be consideration for another promise unless the underlying act would also be consideration. See Joseph H. Beale, Jr., *Notes on Consideration*, 17 HARV. L. REV. 71, 81 (1903) (ana-

A seller's promise as to the existence or nonexistence of a present or past fact, therefore, falls squarely within the definition of a promise because, reasonably interpreted, it would include a promise to indemnify the buyer in the future if the facts were not as represented.³⁹ Indeed, based on general usage and the parties' principal purpose, it probably would be unreasonable not to interpret a seller's promise concerning the existence or nonexistence of a past or existing fact as including a promise to indemnify the buyer. In other words, such a promise should in effect be treated as having a fixed or plain meaning.⁴⁰

lyzing whether "a promise to act cannot be a greater or better consideration than the act itself"). According to Beale, a promise alone would be consideration. As proof that he was right and Williston wrong, Professor Beale noted that a person's promise regarding a future event over which he has no control, such as that the horse he sells will be sound or win a race, is valid consideration for a counter-promise, even though "[t]he soundness or speed of the horse . . . could not be a valid consideration for a promise made to me." Beale, *supra*, at 82. What Professor Beale missed is the fact that a promise concerning an event over which the promisor has no control could be interpreted as a promise to pay if the event did not occur and that that payment, the underlying act, would be consideration for a return promise.

39. Whether the seller uses the word "warrant" or "promise" should make no difference. See *Oscar Chess, Ltd. v. Williams*, 1 All E.R. 325, 328-29 (1957) (discussing under English law whether seller's words that car was a 1948 model were a representation or a warranty). Justice Denning stated, "I use the word 'warranty' in its ordinary English meaning to denote a binding promise. Everyone knows what a man means when he says, 'I guarantee it,' or 'I warrant it,' or 'I give you my word on it.' He means that he binds himself to it." *Id.* at 327 (Denning, J.).

Black's defines "warrant" in contracts as, "to engage or promise that a certain fact or state of facts, in relation to the subject matter, is, or shall be, as it is represented to be." BLACK'S LAW DICTIONARY 1585 (6th ed. 1990). In *Webster's Third New International Dictionary* 1815 (1981), "promise" is defined, in pertinent part as follows: "... *archaic*: to affirm to someone the truth or certainty of (something stated): warrant, assure . . ."

40. This is apparently the approach taken in the famous case of *Chandelor v. Lopus*, 79 Eng. Rep. 3 (1603), where the court held that "the bare affirmation [by the seller] that it was a bezar stone, without warranting it to be so, is no cause of action . . ." *Id.* at 4. Implicit in the court's holding is that if the word "warrant" were used, the buyer would have had a claim against the seller. See F. B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 10 (1888) (discussing *Chandelor v. Lopus* and creation of a warranty). Professor Ames rejected the view that *Chandelor* was decided on a pleading rule: "[t]o their minds [the judges in the time of James I] the word 'warrant', or, at least, a word equally importing an express undertaking, was as essential in a warranty as the words of promise were in the Roman *stipulation*." *Id.* at 9-10; see also *Metropolitan Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946) (Hand, J.) (defining warranty). Judge Learned Hand stated: "[a] warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely . . . it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past." *Metropolitan Coal Co. v. Howard*, 155 F.2d at 784; see also *Switzer v. Henking*, 158 F. 784, 786 (6th Cir. 1908) (discussing meaning of term "warranty"). In sales of real or personal property and in insurance contracts, the term warrant has, the *Switzer* court remarked, "a settled and technical meaning. As applied to these . . . transactions, an agreement on the part of the warrantor to indemnify the warrantee against damages on account of a breach of the warranty is implied in the term 'warrant,' the definition of which thus includes such promise to indemnify." *Switzer v. Henking*, 158 F. at 786; see also *Oscar Chess, Ltd. v. Williams*, 1 All E.R. at 327 (discussing whether seller's words that car was a 1948 model were a representation or a warranty under

A much simpler and more accurate approach would view a promise relating to the quality of the goods as a term of the seller's offer or promise to sell. In the usual case of a negotiated exchange to which the parties manifest mutual assent, one party makes an offer specifying what he will do and what he wants in exchange, followed by the other party's acceptance.⁴¹ The offer itself would constitute a promise where the offeror sought an exchange of promises or an exchange of his promise for an act by the other party.⁴² The terms of the offer would be derived from the offeror's words and acts as communicated to the offeree, here, the buyer. More specifically, the terms of the offer (the promises) would be those reasonably inferred from the offeror's language and conduct as manifested to the offeree.⁴³ Thus, in the situation where a seller offers to sell a machine and also promises the buyer that the machine has no defects, the seller's additional promise that the machine has no defects simply defines what the seller is promising to sell—a machine with no defects. It does not constitute an independent promise.

In short, whether a seller's promise relating to the quality of the goods is interpreted as including a promise to pay damages if the goods are of lesser quality or as a term of the promise to sell, the promise should be treated no differently from any other promise in a contract of sale. Consequently, it should be enforceable on the same basis as any other promise in the contract. This seems to be the view Professor Williston expressed over eighty years ago when he wrote:

It is apparent that a seller may, if he chooses, make promises in regard to the character of the goods which will be binding *on ordinary principles of contract* . . . though even where there is a clear promise, if it relates to the existence of a supposed fact, the promise will be a representation or affirmation of the fact *as well as a promise*.⁴⁴

English law); RESTATEMENT OF CONTRACTS § 2(2) (1932) [hereinafter RESTATEMENT (1ST)]. According to the Restatement, "[w]ords which in terms promise . . . the existence or non-existence of a present or past state of facts, are to be interpreted as a promise or undertaking to be answerable for such proximate damages as may be caused" RESTATEMENT (1ST), *supra*, § 2(2) (emphasis added).

41. See RESTATEMENT (2D), *supra* note 35, § 22(1) & cmt. a (explaining usual practice that manifestation of mutual assent ordinarily takes the form of offer and acceptance). Because a bargain occurs primarily through the process of offer and acceptance, that model is used in this article for purposes of discussion. See RESTATEMENT (2D), *supra* note 35, § 3 cmt. d (bargain ordinarily made through offer and acceptance).

42. See RESTATEMENT (2D), *supra* note 35, § 24 cmt. a (discussing offer process).

43. See RESTATEMENT (2D), *supra* note 35, §§ 2, cmt. b, 5 and cmt. a & 24 and cmt. a (indicating that terms of promise are those reasonably inferred from promisor's words and conduct; defining offer which, in normal case of exchange of promises, is a promise).

44. Samuel Williston, *What Constitutes an Express Warranty in the Law of Sales*, 21 HARV. L. REV. 556, 559 (1908) [hereinafter Williston, *Express Warranty*]. Williston expressed the same thought a few years later using the following language:

There can be no doubt now, of course, that a seller may promise, in consideration of the

To sum up, a seller should be contractually liable for any promise relating to the quality of the goods even absent statutory creation of an express warranty. If a seller *promises* the buyer that the machinery has no defect, and it does, he should be liable in contract for damages the buyer suffers from the defect, just as he would be liable for damages if he failed to deliver the promised goods. For the seller's promise or affirmation as to quality is as much a part of the contract of sale as is his promise to deliver. Stated somewhat differently, the seller's liability for breach of such a promise should be independent of liability under any "warranty law."

2. Affirmation of Fact

Let us now assume that the seller tells the buyer that "the machinery has no defect" instead of, "I promise the machinery has no defect." Should that make a difference with respect to the seller's liability in contract if the machinery in fact has a defect?

Professor Williston would answer the question in the negative. In his view, the basis of the seller's liability for any affirmation of fact he makes to the buyer to induce the sale could not "without straining the facts be properly regarded as contractual."⁴⁵ "[T]o hold that such an affirmation

purchase of goods from him, that he will be answerable for their *present*, or, indeed, for their future condition. Nor is it open to doubt that a seller who in terms warrants the goods [I warrant the goods are . . .] which he sells, thereby enters into such a contract. Samuel Williston, *Liability for Honest Misrepresentation*, 24 HARV L. REV. 415, 420 (1911) (emphasis added) [hereinafter Williston, *Honest Misrepresentation*].

Professor Lawrence Vold apparently was expressing the same thought when he labeled a seller's "collateral promise or undertaking to be answerable for certain indicated matters relating to the goods" as a "promissory warranty" and concluded in dealing with promissory warranties that "[t]heir application occasions relatively little difficulty that is different from what is encountered in the enforcement of other contractual promises." LAWRENCE VOLD, *THE LAW OF SALES* 427-28 (2d ed. 1959) [hereinafter VOLD, *SALES 2D*]. Professor Vold distinguished between express warranties "derived from express promises"—which he called "promissory warranties" (and were "strictly contractual")—and "warranties imposed by law because of express representations [affirmations of fact]." *Id.* at 427.

Surprisingly, although Williston drafted the U.S.A., he did not differentiate in § 12 between a promise and an affirmation of fact. U.S.A. § 12 (1907). From a plain reading of § 12, each creates an express warranty only if "the buyer purchases the goods relying thereon." Section 12 does not indicate that the reliance requirement for a promise is different from the reliance requirement for an affirmation of fact. *Id.* If, however, Williston's position in his 1908 article that a promise is enforceable "on ordinary principles of contract" reflects his actual views, and there is no reason to doubt it, § 12 should have permitted the buyer to enforce the seller's *promise* even if the buyer did not purchase the goods "relying thereon." Williston, *Express Warranty*, *supra*, at 559 (emphasis added).

Similarly, Vold, who takes the position that the obligation under a promissory warranty "is strictly contractual," does not explain why the U.S.A. did not differentiate between a promise and an affirmation of fact. VOLD, *SALES 2D*, *supra*, at 427-33.

45. Williston, *Express Warranty*, *supra* note 44, at 559. Williston notes, parenthetically,

is a contract," he wrote, "is to speak the language of pure fiction."⁴⁶ "[T]he obligation imposed upon the seller in such a case," Professor Williston explains, "is imposed upon him not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement."⁴⁷

In support of his view that a seller's liability for honest misrepresentation is not contractual, Professor Williston frames the following argument:

If it creates a contract for A to say of his horse when he sells it in order to induce the purchase, "the horse is sound," why is it not equally a contract if B should say precisely the same thing in order to induce a sale of A's horse? If A's words to a buyer really mean "if you will buy my horse I undertake to be responsible for the truth of my assertion that the horse is sound," why does it not equally follow that if B should make similar statements to the buyer to induce the sale of A's horse that the same construction of an offer should be put upon them?⁴⁸

To paraphrase the argument, if the seller's words to the buyer that "the horse is sound" are construed to be an offer to contract, then the same words uttered to the buyer by a third party should also be construed as an offer to contract. Professor Williston apparently believed that the only inference that may be drawn from these words uttered by either the seller or a third party is that it is nothing more than a represen-

that "the remedy of *assumpsit* and its equivalents may[,] for convenience[,] be permitted." Williston, *Express Warranty*, *supra* note 44, at 559.

46. Williston, *Honest Misrepresentation*, *supra* note 44, at 420.

47. Williston, *Honest Misrepresentation*, *supra* note 44, at 420; *see also* VOLD, SALES 2D, *supra* note 44, at 427-31 (discussing promissory warranties and express representations). Professor Vold pointed out that a seller's warranty liability for express representations as distinguished from express promises is "independently imposed by law" and "is in its nature analogous to quasi contractual or to tort obligations." VOLD, SALES 2D, *supra* note 44, at 427.

48. Williston, *Honest Misrepresentation*, *supra* note 44, at 421. The argument continues in pertinent part as follows:

A recent decision of the Supreme Court of South Carolina furnishes an interesting comparison in this connection with the well-known case of *Derry v. Peek*. In the latter case the plaintiff was induced to take shares in the company by a misrepresentation of the directors in regard to a right which they stated had been given by special act of Parliament to use steam or other mechanical motive power. In the South Carolina case the plaintiff was induced to buy shares of stock by representations of the seller as to the corporate assets and liabilities. It can hardly be thought that the representations in these two cases are to be distinguished on any other ground than that one was made by a seller, and the other by persons interested in the taking of shares by the plaintiff but not interested as sellers. As a pure question of construction of language, surely if the words in one case amount to an offer to contract, they do so in the other case. In truth, it is submitted they are not words of offer. The only reasonable inference that can be drawn in either case is that representations of fact were made for the purpose of inducing the plaintiff to purchase shares.

Williston, *Honest Misrepresentation*, *supra* note 44, at 421 (footnotes omitted).

tation of fact made to induce the buyer to purchase, and that it cannot be construed as an offer to contract.

Williston does not give any explanation why he would not consider the seller's statement that "the horse is sound" to be an offer to contract. He fails to take into consideration the different contexts in which the seller and the third party in his hypothetical case made their statements.

In Professor Williston's hypothetical, the seller's statement that "the horse is sound" is made in the context of negotiating an exchange with the prospective buyer. In this bargain context, the buyer could reasonably infer from the seller's statement that he was offering or promising to sell a sound horse, not simply any horse. The seller's statement that "the horse is sound," therefore, should not be viewed merely as an inducement to purchase—as Williston would have it—but as an essential element in defining precisely what is being sold, namely, a sound horse. In other words, the seller's statement that "the horse is sound" may reasonably be viewed as an integral part of the seller's offer or promise to sell and not as an independent statement.

This approach avoids Professor Williston's dilemma. The representation of fact itself is *not* considered an offer—consistent with Williston's view that it would be "pure fiction" to do so. Rather it is considered as one term of the offer to sell.⁴⁹ In contrast, the third party in Williston's hypothetical was not offering to sell the horse to the buyer. Hence, there seems to be no rational basis to treat his statement to the buyer as part of an offer to contract.⁵⁰

49. The same thought is conveyed in (i) the following passage from the draft comment to the 1944 Proposed Final Draft of the U.R.S.A.,

Unified contract basis of warranty: Under this Act warranties are an essential part of the contract for sale. Fundamentally, all warranties are summed up in 'description' under the present section; it requires the whole net effect of the bargain to effectively describe what kind and quality of thing the seller has assumed obligation to sell and deliver. It does serve convenience to particularize rules on warranty which deal with some familiar and recurrent sets of fact, but the object remains single; it is to arrive at the net description which defines the seller's obligation. The present section therefore deals with affirmations of fact by the seller exactly as it deals with any other part of a negotiation which ends in a contract.

II KELLY, *Drafts*, *supra* note 6, at 143-44 (emphasis added), and (ii) the Official Comments to § 2-313. See *infra* notes 120-21 and accompanying text (discussing U.C.C. § 2-313 cmt. 3).

50. This assumes that the third party has no interest in the transaction. If, however, the third party has an interest in the transaction, the buyer may reasonably believe that the third party was impliedly promising to indemnify the buyer if the representation is untrue. In that event, there are three parties to the sales contract: the seller, the third party, and the purchaser. The third party's implied promise to indemnify is supported by consideration, *i.e.*, the purchaser's promise to purchase or the purchase itself. See RESTATEMENT (2D), *supra* note 35, § 71(4) (party other than promisee may provide consideration); see also Alfred Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679, 699-700 (1973) (discussing Williston's views on warranty). Commenting on Williston's hypothetical, Professor Hill states:

To the extent that there is authority in this area, it suggests that an innocent B [the

Apart from the interpretation already suggested, it may be possible, under the circumstances, to interpret a seller's affirmation of fact as including a promise to answer in damages if the horse is not sound—that is, to interpret it the same way the words “I promise the horse is sound” may be interpreted.⁵¹ The relevant focus would be on ascertaining the meaning that a reasonable person would attach to the words “the horse is sound” in light of the circumstances and the parties' reasonable expectations and understandings.⁵² Are these words susceptible to being understood by the reasonable buyer as including the seller's promise to answer for the truthfulness of the statement? Or would such an inference be unreasonable as Williston indicates? Here, again, the context in which the statement is made appears critical. If the statement is made by the seller of the horse, why is it not reasonable for a buyer to attach that meaning? It is not difficult, from practical experience, to imagine that such an inference may be drawn by a reasonable buyer. Perhaps the strong preference today for buyer protection makes this inference reasonable, if not compelling, although it may not have been reasonable when the caveat emptor approach prevailed.⁵³

Before turning to the question of reliance, let us examine a seller's promise or affirmation of fact in the context of written and oral contracts.

third party] will be liable, if at all, only when he has a substantial stake in the transaction himself; but in that event the buyer can reasonably assume that B will “make good” his representation, and B may be charged with knowledge that his role in the affair is so understood. In short, it is not only possible to find a contract in this situation but it is also difficult to conceive of warranty liability cases by “third persons” that may not be rationalized on a contract basis.

Hill, *Damages for Innocent Misrepresentation*, *supra*, at 699-700.

51. Illustration 2 to § 2 of the Restatement Second seems to treat a statement of fact as implicitly including a promise to pay:

A, by a charter party, undertakes that the ‘good ship Dove,’ having sailed from Marseilles a week ago for New York, shall take on a cargo for B on her arrival in New York. The statement of the quality of the ship and the statement of her time of sailing from Marseilles include promises to pay for harm if the statement is untrue.

RESTATEMENT (2D), *supra* note 35, § 2, illus. 2. It is questionable whether a promise *must*, or indeed can, be inferred from the statement concerning the ship's sailing date. The parties apparently included the statement of when the ship sailed in order to fix the ship's expected New York arrival date to take on cargo. The words “A . . . undertakes” appear to refer to A's undertaking to have the ship Dove take on cargo—not to the statement concerning the ship's sailing date from Marseilles. RESTATEMENT (2D), *supra* note 35, § 2. It would be different if the illustration said—and maybe this was the intention—“A, by a charter party, undertakes that the good ship Dove has sailed from Marseilles a week ago for New York and that the good ship Dove shall take on cargo for B on arrival in New York.”

52. See RESTATEMENT (2D), *supra* note 35, §§ 200, cmts. a-b, 201 (discussing interpretation and meaning of promise and which meaning prevails).

53. See U.C.C. § 2-313(1) (affirmation of fact and promise treated equally to create express warranties by seller); see also U.S.A. § 12 (treating promises and affirmations of fact equally); Hill, *Damages for Innocent Misrepresentation*, *supra* note 50, at 696-97 (discussing promissory effect of affirmation).

3. *Written Contract*

A written contract of sale that contains express promissory language (S promises or S warrants) relating to the quality of the subject matter should pose no special problem. Assuming a completely integrated contract, there is no issue as to whether a promise was made and what its terms are. Such express promissory language should be treated the same as any other promise in the sales contract. As a practical matter, contracts for the sale of a business or real estate usually contain a "representation and warranty" section in which the seller "represents and warrants" certain facts. Most corporate and real estate lawyers give no thought to whether there is any difference between the word "warrants" and "represents" and they almost automatically include both words. An interpretation issue is presented, however, if the contract contains only an affirmation of fact ("S represents that the machine has X capacity") rather than an express promise ("S warrants"). Should the representation be treated as an integral part of the description of the item being sold, that is, should it be viewed as defining what the seller is offering to sell—a machine having x capacity;⁵⁴ should it be interpreted the same as the word "warranty,"—the equivalent of a promise to indemnify if the fact is not as represented;⁵⁵ should it be considered as creating an express condition that must occur before the buyer is obligated to perform;⁵⁶ or, should it be treated as a noncontractual representation of fact?

We have already discussed the possibility of treating an affirmation of fact as part of the description or as the equivalent of a promise to indemnify.⁵⁷ Let us address the third possibility—treating a representation in the contract as creating an express condition to the buyer's duty of performance.⁵⁸ Suppose, for example, A entered into a written contract to sell a building to B in which A expressly represented that the building was in good repair when in fact it was not. If A's representation that the building was in good repair was treated as creating an express condition to B's duty to purchase, B's duty of performance would never become

54. See *supra* notes 49-50 and accompanying text (discussing that seller's affirmation of fact should be treated as integral part of offer to sell).

55. See *supra* notes 51-53 and accompanying text (discussing interpreting seller's affirmation of fact to implicitly include promise to indemnify).

56. See RESTATEMENT (2D), *supra* note 35, § 226 (discussing how an event may be made a condition).

57. See *supra* notes 49-53 and accompanying text (discussing alternative interpretations of a representation).

58. The Restatement Second defines a condition as "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." RESTATEMENT (2D), *supra* note 35, § 224. The event need not be in the future but "may relate to the present or even to the past." RESTATEMENT (2D), *supra* note 35, § 224 cmt. b.

due, and ultimately it would be discharged.⁵⁹ B, however, would have no claim for damages against A because a condition imposes no duty on the promisor.⁶⁰ This may be unfair to B. If B were unlikely to learn of the condition's nonoccurrence—that the building was in disrepair—until after he had prepared for performance of the contract in reliance on the condition's expected occurrence, it would be preferable to interpret the representation clause as imposing a duty on A that the event occur. In that way B would be able to seek damages against A for any loss resulting from A's failure to perform his duty.⁶¹

The final possibility is to treat the representation in the written contract the same as any noncontractual representation. If the representation was untrue, material, and made by the seller without knowledge of its falsity, a relying buyer would be entitled to rescind the contract.⁶² At first blush, the results of treating the representation (i) as creating an express condition or (ii) as a noncontractual representation are the same. There may be, however, two significant differences. First, the nonoccurrence of an express condition generally discharges the duty whether or not the nonoccurrence is material.⁶³ In contrast, a party can rescind a contract for innocent misrepresentation only if the representation was material.⁶⁴ Second, the nonoccurrence of a condition does not constitute a breach of contract while an innocent misrepresentation, at least in *some* jurisdictions, may be the basis for recovery of damages.⁶⁵

59. See RESTATEMENT (2D), *supra* note 35, § 225(1)-(2) (stating performance subject to condition not due unless condition occurs; nonoccurrence of condition discharges duty when condition can no longer occur). The buyer, of course, could waive the nonoccurrence of the condition and require the seller to perform.

60. See RESTATEMENT (2D), *supra* note 35, § 225(3) & cmt. d (stating condition itself does not impose duty).

61. See RESTATEMENT (2D), *supra* note 35, § 227 & cmt. b (discussing standards of preference in determining whether event has been made a condition). The Restatement expresses an interpretation preference "that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk." See RESTATEMENT (2D), *supra* note 35, § 227 cmt. d.

62. RESTATEMENT (2D), *supra* note 35, § 164.

63. See JOSEPH M. CALAMARI & JOHN D. PERILLO, *THE LAW OF CONTRACTS* § 11-8 (3d ed. 1987) (discussing conditions); E. ALLEN FARNSWORTH, *CONTRACTS* §§ 8.2, 8.3 (2d ed. 1990) (discussing conditions); RESTATEMENT (2D), *supra* note 35, §§ 225, 226 cmt. c, 227 cmt. b (discussing nonoccurrence of conditions as discharging duty and strict application of express conditions). *But see* Robert Childres, *Conditions in the Law of Contracts*, 45 N.Y.U. L. REV. 33, 35-36 (1970) (discussing conditions).

64. See RESTATEMENT (2D), *supra* note 35, § 164 cmt. b (distinguishing fraudulent from nonfraudulent misrepresentations).

65. See *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 181 (8th Cir. 1971) (holding that under Minnesota law, scienter not necessary for fraud action); Hill, *supra* note 50, at 680, 688-89 (noting some jurisdictions allow tort recovery for innocent misrepresentations).

4. Oral Contract

In contrast to a completely integrated written sales contract, an oral sales transaction requires the trier of fact to answer the following fundamental question: based on the seller's oral and written manifestations to the buyer, and vice versa, what are the terms to which both parties mutually agreed? More particularly, did the seller make any promise or affirmation of fact relating to the subject matter of the transaction?⁶⁶

In sale of goods transactions under the Code there is no need to distinguish between a promise and an affirmation. They are treated the same under U.C.C. section 2-313(1)(a).⁶⁷ Similarly, outside the sale of goods area, it is unnecessary to distinguish between promises and affirmations of fact if an affirmation of fact is considered a part of the description of the contract's subject matter, as previously suggested.⁶⁸ If, however, we were to treat an affirmation of fact (a representation) differently from a promise—applying contract principles only to a promise as Williston explained in the sale of goods context—it would be necessary for the trier of fact to determine whether the seller's words and conduct under the circumstances constituted a promise or an affirmation of fact.⁶⁹

As a practical matter, it is very difficult, if not impossible, to determine whether a seller's language and conduct amount to a promise or simply

66. In making this determination, the trier of fact must consider all of the negotiations leading to the parties' manifestations of mutual assent, and not just to that point in time when they manifest mutual assent. See *Distillers Distrib. Corp. v. Sherwood Distilling Co.*, 180 F.2d 800, 803 (4th Cir. 1950) (buyer alleges during sales transaction seller used language constituting warranty). The Fourth Circuit states that:

[w]here a contract is not reduced to a formal instrument, in which prior negotiations are deemed merged, its terms must be determined by consideration of all that was said leading up to the agreement; and a description of goods sold, made by the seller and relied upon by the buyer, may not be ignored because made in connection with an offer which was not accepted but which was part of the negotiations leading up to what was accepted.

Id. The Restatement Second explains that "[e]ven though a communication is not an offer, it may contain promises or representations which are incorporated in a subsequent offer and hence become part of the contract made when the offer is accepted." RESTATEMENT (2D), *supra* note 35, § 26 cmt. f.

67. See U.C.C. § 2-313 (affirmation and promise used interchangeably). This section provides, in pertinent part, "Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer . . ." *Id.* Similarly, § 12 of the U.S.A. treated promises and affirmations of fact the same. See *supra* note 5 (quoting U.S.A. § 12).

68. See *supra* notes 49-50 and accompanying text (discussing that affirmation of fact should be treated as an integral part of the description).

69. See *supra* notes 46-48 and accompanying text (Williston explains promise enforceable on contract principles but liability for representation is imposed by law, not by agreement). The ramifications of treating an affirmation of fact differently from a promise in any sale context have already been discussed. See *supra* notes 58-65 and accompanying text (discussing possibility that affirmation of fact may be interpreted as creating express condition or treated as basis for innocent misrepresentation tort cause of action).

constitute an affirmation of fact. What may initially appear to be only an affirmation of fact, may, in the context of a sales discussion, lead the buyer to believe that the seller is making a promise.⁷⁰ Because a promise can be inferred from words and conduct, the distinction between an affirmation of fact and a promise in an oral transaction may be more theoretical than real.⁷¹ For it is rare that a seller would actually use the word "promise" in assuring the buyer that a certain fact exists or that a particular result will occur. More often than not, the trier of fact will determine from the parties' language and the surrounding circumstances that the seller made a promise, even though the word "promise" was never used and even though the seller only made a statement of fact. Perhaps, because it is difficult to make this determination, there is good reason to follow the U.C.C. approach and treat an affirmation of fact the same as a promise.

B. Contract Formation: No Reliance Required

1. Introduction

If, as suggested, a promise or an affirmation of fact relating to the quality of the subject matter of a sales contract should be enforceable to the same extent as any other contractual promise, the relevant question becomes whether reliance by a promisee is necessary to enforce a contractual promise. The clear answer is no, regardless of whether the contract involves the exchange of promises, or a promise for a performance.

For over 400 years the common law has enforced bilateral contracts without requiring the party seeking performance to show actual reliance.⁷² This means that immediately following the parties mutual assent

70. RESTATEMENT (2D), *supra* note 35, § 2 and cmt. a.

71. RESTATEMENT (2D), *supra* note 35, § 4.

72. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 816 (1941); *see also* FARNSWORTH, *supra* note 63, § 1.6. One reason suggested for enforcing an unrelieved-upon promise, that is, a party's mere expectancy, is that requiring reliance "would in practice tend to discourage reliance." Lon Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 62 (1937). Fuller and Perdue wrote:

The difficulties in proving reliance [such as foregoing of other opportunities] and subjecting it to pecuniary measurement are such that the business man knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise in any case where the legal sanction was of significance to him. To encourage reliance we must therefore dispense with its proof. For this reason it has been found wise to make recovery on a promise independent of reliance, both in the sense that in some cases the promise is enforced though not relied on (as in the bilateral business agreement) and in the sense that recovery is not limited to the detriment incurred in reliance.

The juristic explanation in its final form is then twofold. It rests the protection accorded the expectancy on (1) the need for curing and preventing the harms occasioned by reliance, and (2) on the need for facilitating reliance on business agreements.

Id.

to a bargain, either party could enforce the contract without having performed or without showing that in entering into the contract he passed up other profitable opportunities. For example, if at 11:00 A.M. on May 1 A agrees to sell an oil painting to B to be delivered on May 5, and B agrees to buy it, A may sue B for breach and recover the benefit of the bargain if on May 1 at 11:01 A.M. B says he will not perform, regardless of whether A can show that he passed up the chance to sell the painting to someone else.

Reliance, in the sense that the promise actually induced the promisee into making the return promise or rendering the requested performance, is also unnecessary to the formation of a contract. To create a contract involving the exchange of promises or a promise for a performance, there need only be (a) a manifestation of mutual assent and (b) consideration.⁷³ As discussed below, neither of these requires reliance.⁷⁴

2. *Manifestations of Mutual Assent: No Reliance Required*

Although a promisee's conduct (promise or performance) manifesting assent must be done with "a conscious will," it "is not material what induces the will."⁷⁵ In fact, the promisee's acceptance is effective where he accepts an offer that proposes an exchange of promises without knowing its terms or that the promisor even made an offer.⁷⁶ For example, if

73. RESTATEMENT (2D), *supra* note 35, § 17(1).

74. Reliance may be the basis for enforcement of a promise not involving an exchange between the parties. RESTATEMENT (2D), *supra* note 35, §§ 17(2) cmt. e, 90. Because, however, sales transactions always involve an exchange, this article focuses on that model.

75. RESTATEMENT (1ST), *supra* note 40, § 20 cmt. a; RESTATEMENT (2D), *supra* note 35, § 19 cmt. c. The following illustration is given:

A offers a reward to any one who will deliver to him a certain book or who will promise to do so. B, who owns the book requested, learns of the offer, but is not induced thereby to part with the book. C, learning the facts, threatens B with such personal violence unless he delivers or promises to deliver the book to A that, rather than fail to comply with C's demand, B would have given A the book for nothing; but knowing of the offer he determines to accept it, and he either gives A the book or promises A to do so. On the first supposition there is a unilateral contract; on the second a bilateral contract.

RESTATEMENT (1ST), *supra* note 40, § 20 cmt. a, illus. 3; *cf.* *Klockner v. Green*, 54 N.J. 230, 234-37, 254 A.2d 782, 784-85 (1969) (ordering specific performance of contract to bequeath property). The New Jersey court held that a decedent's agreement to bequeath her estate to the plaintiffs in return for their services during her lifetime was enforceable notwithstanding the plaintiffs' testimony to the effect that they would have served the deceased even if she had not promised to compensate them. *Klockner v. Green*, 54 N.J. at 237-38, 254 A.2d at 785-86; *see also* *Fitch v. Snedaker*, 38 N.Y. 248, 252 (1868) ("The motive inducing consent may be immaterial, but the consent is vital"); RESTATEMENT (2D), *supra* note 35, § 19 cmt. c (other party must manifest assent, but no further change of position necessary to formation of bargain); RESTATEMENT (1ST), *supra* note 40, § 55 illus. 3 (state of mind unimportant as long as consent exists).

76. RESTATEMENT (2D), *supra* note 35, § 23 cmt. b. "[W]here an offer is contained in a writing either the offeror or the offeree may, without reading the writing, manifest assent to it

A receives a letter from B containing an offer, and without reading the letter or even knowing that it contains an offer sends a letter to B stating, "I accept your offer," A's acceptance is effective.⁷⁷ This is because it is a party's *manifestation* of assent, not subjective intent, that is relevant. Thus, an offeree is accountable for the appearance of assent that he created and the offeror can enforce the contract.⁷⁸ Likewise, once the offeror can enforce the contract, regardless of the reason, the offeree can also enforce it.⁷⁹ In sum, this means that an offeree may effectively accept an offer that proposes an exchange of promises without relying on the offer by simply manifesting assent to the offer.

In a proposed exchange of a promise for a performance, assuming that the offeree knows of the offer, the offeree's performance constitutes an acceptance of the offer⁸⁰ even though the offeree does not intend to accept it.⁸¹ "[A] unilateral contract may arise," the Delaware Supreme Court has held, "even though at the time of performance the offeree did not 'rely' subjectively upon, *i.e.*, was not primarily motivated by the of-

and bind himself without knowing its terms." RESTATEMENT (2D), *supra* note 35, § 23 cmt. a. "An offeree, knowing that an offer has been made to him, need not know all its terms." RESTATEMENT (2D), *supra* note 35, § 23 cmt. e; *see also* CALAMARI & PERILLO, *supra* note 63, at 73-74 (discussing promisee's acceptance without knowledge of offer). Although generally the offeree must know of the offer, a contract will be made under the objective theory, where the offeree who has received an offer proposing an exchange of promises accepts it, even though the offeree has no knowledge of its contents or that it was received. CALAMARI & PERILLO, *supra* note 63, at 74.

77. *See* CALAMARI & PERILLO, *supra* note 63, at 73-74 (discussing promisee's acceptance without knowledge of offer).

78. *See* RESTATEMENT (2D), *supra* note 35, §§ 2 cmt. b, 3, & 18 cmt. a (phrase "manifestation of intention" adopts objective standard of interpreting conduct; defining agreement as "manifestation of mutual assent" by parties; assent "operative only to the extent it is manifested"); CALAMARI & PERILLO, *supra* note 63, at 26-27; Robert Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302, 304-05 (1964) (discussing objective theory as focusing on deed rather than thought); *see also* RESTATEMENT (2D), *supra* note 35, § 23 cmt. b (discussing "unintended appearance of mutual assent").

79. *See* RESTATEMENT (1ST), *supra* note 40, § 55 cmt. c (discussing ability of party, once bound, to take advantage of contract).

80. *See* RESTATEMENT (2D), *supra* note 35, § 53(1) cmt. c (discussing performance as acceptance). The performance also constitutes the consideration. RESTATEMENT (2D), *supra* note 35, § 53(1) cmt. c.

81. *See* *Industrial Am., Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 415 (Del. 1971) ("motive in the manifestation of assent is immaterial"); RESTATEMENT (2D), *supra* note 35, § 53 cmt. c ("rendering of the invited performance with knowledge of the offer is a sufficient manifestation of assent").

Under § 55 of the First Restatement the requested performance must be done "with the intent of accepting the offer." RESTATEMENT (1ST), *supra* note 40, § 55. The First Restatement does not state that the offeree must rely on the offer in accepting it. Rather, it explains that because of the inherent ambiguous meaning attributed to the offeree's performance, it is not possible to objectively determine whether in performing the offeree was manifesting assent to the offer or only engaging in conduct independent of the offer. RESTATEMENT (1ST), *supra* note 40, § 55. Thus, "the only way to determine what [the offeree's] conduct actually means, even objectively, is to ascertain his intent." RESTATEMENT (1ST), *supra* note 40, § 55 cmt. a.

fer.”⁸² As with an exchange of promises, the offeree’s manifestation of assent—the performance—is sufficient alone to constitute an acceptance and the offeree need not show that the promise actually induced the performance.

3. *Communication of Offer*

One more aspect of contract formation is important to the discussion of the reliance issue, and that is the requirement that the offer be communicated to the offeree. If an offer has not been communicated to the offeree, no contract can come into existence. This is not because the offeree in purporting to accept has not relied on the offer, but because generally no power of acceptance is created until the offer is communicated to the offeree; stated otherwise, generally no offer exists until it is communicated.⁸³ For example, suppose A, a car dealer, publishes a sales brochure containing a promise that the X car is capable of going 200 miles per hour. A offers to sell the X car to B, who has neither received nor seen the brochure. Because the brochure’s contents were never communicated to B, the terms of A’s offer, its manifestation of assent, would be only to sell the X car and not to sell the X car with the capability of going 200 miles per hour. In short, the description in the offer of the car being sold would not include the uncommunicated statement in A’s sales brochure relating to the car’s speed capability.⁸⁴

82. *Industrial Am., Inc. v. Fulton Indus., Inc.*, 285 A.2d at 415.

83. See *Tobias v. Montgomery Ward & Co. Inc.*, 362 N.W.2d 380 (Minn. Ct. App. 1985) (personnel manual provision concerning overtime meals allowance not part of employment contract because never communicated to employees); *T.M. James & Sons v. Marion Fruit Jar & Bottle Co.*, 69 Mo. App. 207, 217-18 (1897) (finding no case holding offeree may accept before also communicated); *Mayor of Jersey City v. Town of Harrison*, 72 N.J.L. 185, 189, 62 A. 765, 766 (1905) (“until communication there is no efficacious proposal which could be accepted”); *Farrell v. Neilson*, 43 Wash. 2d 647, 648, 263 P.2d 264, 265 (1953) (bid-offer not heard by auctioneer could not be accepted); *Caldwell v. Cline*, 109 W. Va. 553, 554, 156 S.E. 55, 56 (1930) (words, written or spoken, must reach offeree before mutual assent reached); see also RESTATEMENT (2D), *supra* note 35, §§ 23, 35(1) cmt. b, 53 cmt. c. The Second Restatement states that: “the offeree’s power [of acceptance] arises when the manifestation of assent is complete. Since the acceptance must have reference to the offer it is ordinarily necessary that the offeree have knowledge of the offer.” RESTATEMENT (2D), *supra* note 35, § 35(1) cmt. b; see also RESTATEMENT (1ST), *supra* note 40, § 23 (offeree must have knowledge that offer or made proposal to him). But see *supra* note 76 (concerning proposed exchange of promises).

84. The requirement that an offer be communicated assumes that the offeror did not provide that the offer is effective without communication. The offeror is the master of his offer. RESTATEMENT (2D), *supra* note 35, §§ 29 cmt. a, 52 cmt. a. The offeror, therefore, may make an offer effective even before it is communicated to the offeree. Absent express language in the offer or circumstances which indicate that the offer was to be effective before communication to the offeree, the law provides that the offer must be communicated. Apparently, the law assumes that this is the offeror’s intent absent an indication to the contrary. It may be noted, however, that there is no legal impediment to adopting a different rule, namely, that absent an indication to the contrary, an offer may be effective before it is communicated to the offeree. As Professor Corbin explains:

4. *Consideration: No Reliance Required*

At first blush, the bare definition of consideration might imply that an element of reliance is necessary. The Restatement Second defines consideration as a return promise or performance that is "bargained for."⁸⁵ This means that to constitute consideration, the promisee's return promise or performance must be "sought by the promisor in exchange for his promise and given by the promisee in exchange for that promise."⁸⁶ Put somewhat differently, the promisee's return promise or performance (the consideration) and the promisor's promise must "bear a reciprocal relation of motive or inducement"—the promisor's promise must induce the promisee's promise or performance and the return promise or performance must induce the making of the promisor's promise.⁸⁷ Based on this definition of consideration, one may initially conclude that reliance is required. In determining whether an exchange is the result of mutual inducement, however, the law looks at the parties' external manifestations without considering their subjective intentions or purpose.⁸⁸ In other words, the promisor's promise is supported by consideration even though it did not *in fact* induce the promisee to make the return promise, or to render the requested performance, as long as it can be inferred from the *external* manifestations that the promisor's promise *purports* to be the inducement for the promisee's return promise or performance and the promisee's return promise or performance *purports* to be the inducement for the promisor's promise.⁸⁹ This point is illustrated in the Restatement

There is, however, no inevitable necessity in our adoption of the machinery of offer and acceptance. The rules of contract, like all other rules of law, are based upon mere matters of policy, or belief as to policy. In the process of our evolution we find that some or all of us are following a customary rule. When we become conscious of this fact, we try to express the rule in words and to compel others to obey it by legislative command. We may fail in our attempt, either because the custom supposed is not the custom of the powerful, or because we have failed to express it with accuracy, or because new life conditions require new customs. So, therefore, we may decree that two acts expressing consent, as in the case of crossed offers, shall create contractual relations; or that where an offer has been published, that act empowers others to create contractual relations by doing the acts requested, even though without knowledge of the request. It seems not improbable to the writer that this latter rule will prevail in the future. In the vast majority of cases, however, contracts will be made by offer and acceptance as analyzed above.

Corbin, *Offer and Acceptance*, *supra* note 35, at 183.

85. RESTATEMENT (2D), *supra* note 35, § 71(1).

86. RESTATEMENT (2D), *supra* note 35, § 71(2).

87. RESTATEMENT (2D), *supra* note 35, § 71 cmt. b.

88. RESTATEMENT (2D), *supra* note 35, § 71 cmt. b. "Here, as in the matter of mutual assent, the law is concerned with the external manifestations rather than the undisclosed mental state." RESTATEMENT (2D), *supra* note 35, § 71 cmt. b; *see also* Wisconsin & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386 (1903) (consideration and promise "must purport" to be motive for each other).

89. *See* Panto v. Moore Business Forms Inc., 547 A.2d 260, 268 (N.H. 1988) (promise

Second as follows:

A offers to buy a book owned by B and to pay B \$10 in exchange therefor. B accepts the offer and delivers the book to A. The transfer and delivery of the book constitute a performance and are consideration for A's promise. . . . This is so even though A at the time he makes his offer secretly intends to pay B \$10 whether or not he gets the book, or even though B at the time he accepts secretly intends not to collect the \$10.⁹⁰

In a sales context, this means that a buyer's purchase or promise to purchase would be consideration for the seller's promise or affirmation of fact relating to the subject matter of the contract even if the buyer would have made the purchase or promise to purchase without the seller's promise or affirmation—that is, the seller's promise or affirmation did

enforceable even though promise did not in fact induce promisee's performance); RESTATEMENT (2D), *supra* note 35, § 81 (party may enforce promise even though promise not "subjective inducement" for party's performance). Section 84(a) of the First Restatement states: "[c]onsideration is not insufficient because of the fact . . . that obtaining it was not the motive or a material cause inducing the promisor to make the promise." RESTATEMENT (1ST), *supra* note 40, § 84(a). Section 84 comment b likewise states: "[a]s it is the intent of the parties as manifested to one another which determines whether consideration is given in exchange for a promise, it follows that if such an intent is manifested, the motive or the cause is immaterial." RESTATEMENT (1ST), *supra* note 40, § 84 cmt. b; *see also* *Martin v. Meles*, 179 Mass. 114, 115, 60 N.E. 397, 398 (1901) (discussing whether defendants' promise was supported by consideration). In rejecting the defendants' argument that their promise to pay the plaintiffs was not supported by consideration because it did not in fact induce the plaintiffs to perform, Judge Holmes said:

What we have said justifies, in our opinion, the finding of a consideration either in the promise or in the subsequent act of the committee [plaintiffs], and it may be questioned whether a nicer interpretation of the contract for the purpose of deciding which of the two was the true one is necessary. *It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have been done in reliance upon the promise.* But that is a speculation upon which courts do not enter. When an act has been done, to the knowledge of another party, which *purports* expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct, whether in case of consideration . . . or of fraud.

Martin v. Meles, 179 Mass. at 117, 60 N.E. at 398 (emphasis added). Judge Holmes' comment, that only in "exceptional and peculiar circumstances" will the court inquire into the extent to which one party's act was the motive for the other party's conduct, is surprising because he was the supreme advocate of the objective theory. *See Whitehead & Atherton Mach. Co. v. Ryder*, 139 Mass. 366, 370, 31 N.E. 736, 737 (1885) (Justice Holmes stating irrelevant whether terms actually induced contract once reduced to writing). Justice Holmes said whether expressions in a written contract are warranties is:

[a] matter of construction, and does not depend upon whether the representation or promise which they embody having afforded a preliminary inducement to entering into the contract. Every expression which by construction is a term of one party's undertaking is presumed to be relied on by the other when he makes the contract.

Id. at 370, 31 N.E. at 737.

90. RESTATEMENT (2D), *supra* note 35, § 71 cmt. b, illus. 1.

not induce the buyer's purchase or promise to purchase. This makes sense, because by accepting the seller's offer the buyer has paid the seller's requested price—the consideration—and in return receives all of the seller's promises and affirmations, including those relating to the quality of the goods.⁹¹

What emerges from this analysis is that reliance by a contracting party is not an ingredient in contract formation; accordingly, a promisee may enforce any promise in the contract even though the promise did not actually induce the promisee's return promise or performance.⁹² With respect to a sales contract, this means that a buyer is entitled to the benefit of her bargain without inquiry into the reasons that motivated her to make the promise or render the performance in exchange for the seller's promises.⁹³ Absent a statute to the contrary, therefore, a nonrelying buyer should be able to recover solely on a contract theory for breach of a seller's promise or affirmation of fact relating to the subject matter of the sales contract. Put simply, the buyer's lack of reliance is no bar to a recovery under contract law.⁹⁴

C. Case Law

The common law provides some support for a contract approach to the creation of an express warranty. None of the cases, however, paint a clear or complete picture. In *CBS Inc. v. Ziff-Davis Publishing Co.*,⁹⁵ the purchase agreement contained an express warranty by the seller concerning certain financial information about the business being sold to the plaintiff.⁹⁶ After signing the purchase agreement, the buyer learned that the warranted information was untrue.⁹⁷ Nevertheless, the buyer closed

91. See 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 100 (3d ed. 1957) [hereinafter WILLISTON, CONTRACTS]; RESTATEMENT (2D), *supra* note 35, § 80.

92. *But see* Hebron Pub. Sch. No. 13 v. U.S. Gypsum, 953 F.2d 398, 402 (8th Cir. 1992) (stating that plaintiffs' action for breach of implied warranty of fitness for a particular purpose was grounded in "the doctrine of strict liability in tort, and not in contract" and that plaintiff did not have to show reliance on manufacturer's skill or judgement). In an action by a school district against a manufacturer for breach of an implied warranty of fitness for a particular purpose, the court stated that "[b]ecause the warranty was implied in fact or in law and not by contract, the law of contract warranties, including the contract defense of nonreliance, did not apply." *Id.* The court, however, cited no authority to support this proposition.

93. See *supra* notes 72-94 and accompanying text (discussing that reliance is not a requirement in contract formation).

94. When dealing with express warranties, therefore, it is incorrect to speak of a separate law of warranty as Professor Williston did. Of course, courts or legislatures can continue to impose a reliance requirement if they choose to do so. Ultimately, however, no reason exists to single out express warranties from other contract terms and interfere with the parties' bargain.

95. *CBS Inc. v. Ziff-Davis Pub. Co.*, 75 N.Y.2d 496, 501, 553 N.E.2d 997, 999, 554 N.Y.S.2d 449, 451 (1990).

96. *Id.* at 500, 553 N.E.2d at 998-99, 554 N.Y.S.2d at 450-51.

97. *Id.*

after the seller agreed that the closing “would not constitute a waiver of any rights or defenses either party may have.”⁹⁸ When the buyer brought suit for breach of warranty, the seller asserted as a defense the buyer’s failure to plead reliance, claiming that “the reliance which is a necessary element for a claim of breach of express warranty is essentially that required for a tort action based on fraud or misrepresentation—i.e., a belief in the truth of the representations made in the express warranty and a change of position in reliance on that belief.”⁹⁹ In rejecting the seller’s assertion, the New York Court of Appeals stressed the contractual nature of an express warranty:

We believe that the analysis of the reliance requirement in actions for breach of express warranties adopted in *Ainger v. Michigan Gen. Corp.* . . . is correct. The critical question is not whether the buyer believed in the truth of the warranted information, as Ziff-Davis [the seller] would have it, but “whether [it] believed [it] was purchasing the [seller’s] promise [as to its truth]” This view of “reliance”—i.e., as requiring no more than reliance on the express warranty as being a part of the bargain between the parties—reflects the prevailing perception of an action for breach of express warranty as one that is no longer grounded in tort, but essentially in contract. . . . The express warranty is as much a part of the contract as any other term.¹⁰⁰

Ziff-Davis quite clearly enunciated a contract approach to express warranties.¹⁰¹ Although *Ziff-Davis* does not expressly say so, we would ex-

98. *Id.*

99. *Id.* at 502, 553 N.E.2d at 1000, 554 N.Y.S.2d at 452.

100. *CBS Inc. v. Ziff-Davis Pub. Co.*, 75 N.Y.2d 496, 503, 553 N.E.2d 997, 1000-01, 554 N.Y.S.2d 449, 452-53 (1990) (citations omitted). The court noted that: “[w]e do not hold that no reliance is required, but that the required reliance is established if, as here, the express warranties are bargained—for terms of the seller.” *Id.* at 506 n.5, 553 N.E.2d at 1002 n.5, 554 N.Y.S.2d at 454 n.5. The reliance issue in *Ziff-Davis* did *not*, as the court emphasized, relate to whether the buyer relied on the seller’s express warranty when it signed the purchase agreement and committed itself to buy the business. *Id.* at 501, 553 N.E.2d at 999, 554 N.Y.S.2d at 451. Rather, the determining question was whether the seller “[s]hould . . . be relieved from any contractual obligation under these warranties . . . because, prior to the closing, CBS [the buyer] 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.” *Id.* at 505, 553 N.E.2d at 1002, 554 N.Y.S.2d at 454.

101. *Id.* at 503-06, 553 N.E.2d at 1000-02, 554 N.Y.S.2d at 452-54. *Ziff-Davis*’ supporting citation of *Overstreet v. Norden Labs., Inc.*, 669 F.2d 1286 (6th Cir. 1982), leaves open the question of the extent to which *Ziff-Davis* adopted a purely contract approach to express warranties. The critical question in *Overstreet* was whether the buyer believed in the truth of the seller’s representation, the very approach *Ziff-Davis* expressly rejected.

Ziff-Davis also quoted Judge Learned Hand’s definition of a warranty. *CBS Inc. v. Ziff-Davis*, 75 N.Y.2d at 503, 553 N.E.2d at 1000-01, 554 N.Y.S.2d at 452-53; *see supra* note 40 (quoting Judge Learned Hand’s definition of warranty). In part, Judge Hand stated that the warranty is “intended precisely to relieve the promisee of any duty to ascertain the fact for himself.” *Metropolitan Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946) (Hand, J.) (defining warranty).

pect that an objective test would be applied to determine whether a buyer believed it was purchasing the seller's promise as to the truth of any warranty. As stated in *Ainger v. Michigan General Corp.*:

The question of whether the promisee "relied" on the warranty, then, is whether he believed he was purchasing the promise. As to the promisor's mental state in contract formation, it is judged "by the objective test of what his promise would be understood to mean by a reasonable man in the situation of the promisee" . . . as opposed to a subjective test of guilty knowledge or scienter, as in the intentional tort of fraud.¹⁰²

One hundred years ago the Indiana Supreme Court also applied a contract theory approach to express warranties in a sale of goods transaction in *Shorden v. Kyler*.¹⁰³ The *Shorden* court rejected the seller's contention that the buyer must allege that he was induced by the warranty to make the purchase, that he would not have purchased the goods but for the warranty, and that he relied on the warranty. In disposing of the assertion that the warranty must be a but-for cause of the purchase, the court said:

It is not necessary that it should be true that the buyer would not have purchased but for the warranty. *If, in addition to the simple transfer of the property, he can, for the same price or for a greater price, obtain the seller's engagement to insure the quality of the goods, such engagement goes with the goods as a part of the consideration, and the buyer is entitled to the benefit of his bargain in this regard, whether he would or would not have bought the goods without this additional consideration.*¹⁰⁴

The court then rejected the seller's other assertions concerning inducement and reliance, treating the warranty action the same as any other contract action:

Nor is it necessary that the warranty should constitute an inducement

102. *Ainger v. Michigan Gen. Corp.*, 476 F. Supp. 1209, 1225 (S.D.N.Y. 1979) (citations omitted) (cited and quoted by *Ziff-Davis* for the "reliance" definition), *aff'd on other grounds*, 632 F.2d 1025 (2d Cir. 1980).

103. *Shordan v. Kyler*, 87 Ind. 38 (1882).

104. *Id.* at 41 (emphasis added). The court also explained the contract nature of a warranty as follows:

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 based upon the breach of an express contract, 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 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 engagements

Id.

to the buyer, or that he should rely upon it, otherwise than in contracts, generally, one party is induced by, and relies upon the engagements of the other contracting party. In a pleading based upon a breach of such a warranty, if the warranty be sufficiently shown to have entered into the contract as an intended element thereof, and as a part of the consideration for the purchase, it is not necessary, any more than in other suits on contracts, to allege reliance of the buyer upon the warranty.¹⁰⁵

Although *Ziff-Davis*, *Ainger*, and *Shorden* adopted a contract approach, none of them involved a buyer that did not rely on the seller's warranty in entering into the sales contract. The lingering question is: How far are the courts willing to go in applying the contract theory to express warranty cases? What seems clear from the language of these cases is that they would apply the contract theory in a case involving a buyer who had no subjective interest in the seller's promise or affirmation. What is unclear is whether they would apply it, as I would, to a case involving a buyer who disbelieved or actually knew the untruth of the seller's statement before entering the contract.¹⁰⁶

105. *Id.* at 41-42.

106. See *infra* notes 186-204 and accompanying text (discussing application of contract theory when buyer has precontract knowledge that seller's statement untrue); cf. *Galli v. Metz*, 973 F.2d 145 (2d Cir. 1992) (discussing consequences under New York law of a buyer's knowledge that express warranty is inaccurate). In *Galli*, the sellers expressly warranted that they knew of no fact that might result in litigation adverse to the business the buyers were purchasing. The business, in fact, had owned a contaminated site. Two years after the closing, the buyers were made parties to environmental litigation involving the site. In discussing the consequences if the buyers' closed after they learned from the sellers that the site was contaminated, the Second Circuit stated:

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 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.

Galli v. Metz, 973 F.2d at 151 (emphasis added). Thus, according to *Galli*, if a buyer performs after the seller has disclosed that a warranty in the contract is not accurate, the buyer has "waived the breach." It would appear to follow that the buyer has no remedy for that breach.

Assuming that the sellers made a postcontract disclosure to the buyers, why should that disclosure be relevant at all? Why should the buyers' choice seemingly be, according to *Galli*, either to refuse to close and sue for damages or to close and waive their right to damages? Why shouldn't the buyers have the right to close *and* sue for damages for the breach? The only relevant fact should be that the warranty is inaccurate. The buyers purchased insurance—the sellers' warranty—precisely to insure themselves against such an inaccuracy. Stated otherwise, by entering into the contract, the buyers paid for and secured the sellers' warranty. They bought protection against the very contingency that occurred. Once that breach occurred, the buyers, even if they closed with knowledge of the breach, should be entitled to benefit of the bargain damages for the sellers' failure to fully perform. Cf. U.C.C. § 2-607(2) (1989) (acceptance of goods with knowledge of nonconformity does not impair remedy for nonconformity).

II. CREATION OF AN EXPRESS WARRANTY: U.C.C. SECTION 2-313'S "BASIS OF THE BARGAIN"

A. *Contract Approach*

For more than thirty years, courts and commentators have debated whether the "basis of the bargain" language of section 2-313 requires reliance by the buyer on the seller's promise or affirmation of fact relating to the goods in order to create an express warranty.¹⁰⁷ They have focused heavily on selected excerpts from the U.C.C. comments in an effort to determine the meaning of this language. Virtually no one seems content either to interpret the statutory language without first consulting the comments or to consider the comments as a whole. Why there has been such a serious debate over the fundamental construction of the "basis of the bargain" language escapes me. Of course the statutory language and the comments are not models of perfection, as is true of virtually any legislation, and questions of interpretation may be raised by considering a word, phrase, or sentence on its own. Yet from the statute alone or in conjunction with the comments, the most reasonable interpretation is that the U.C.C. intended to treat the seller's promise or affirmation of fact relating to the goods the same way as any other term of the sales contract.

The "basis of the bargain" language, which the U.C.C. does not define, can be interpreted reasonably from the text of the U.C.C. itself without resorting to extrinsic aid. Section 2-313(1) provides that "[e]xpress warranties by the seller are created" if the affirmation of fact, promise, description of the goods, sample or model is made a "part of the basis of the bargain." Neither section 2-313 nor any other provision of the U.C.C. defines the word "bargain." The word "agreement," however, is defined to mean the "bargain of the parties in fact as found in their language or by implication from other circumstances"¹⁰⁸ There is no reason to believe that the word "bargain" in section 2-313 and in the U.C.C. definition of the word "agreement" were used in different senses. In fact, comment 3 to section 2-313 uses the phrase "fabric of the agreement" or "out of the agreement" in place of the statutory "basis of the bargain" language.¹⁰⁹ Thus, if it is found from the parties' "language or by implication from other circumstances" that the affirmation, promise,

107. See *supra* notes 10, 16-17 and accompanying text.

108. U.C.C. § 1-201(3).

109. U.C.C. § 2-313 cmt. 3 (1979). For example, comment 3 reads, in pertinent part: No specific intention to make a warranty is necessary if any of these factors [seller's affirmations, samples, or description] 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 weave them into the fabric of the *agreement*.

description, sample, or model is part of the parties' factual bargain, it should also be "part of the basis of the bargain" under section 2-313.¹¹⁰ In using the "basis of the bargain" language, therefore, section 2-313 is treating an affirmation of fact or promise relating to the goods the same as price, quantity, or any other part of the parties' bargain.

What about reliance? Must the buyer rely on the seller's affirmation of fact or promise in order to create an express warranty under section 2-313? Analysis of contract formation under the U.C.C. indicates that reliance should be irrelevant, just as it is under general contract law. Agreement is defined in the U.C.C. as "the bargain of the parties in fact."¹¹¹ Because the U.C.C. does not define the word bargain, we must search for a definition in general contract usage.¹¹² The Restatement of Contracts (First Restatement), which predated the U.C.C., defined bargain as "an agreement of two or more persons to exchange promises or to exchange a promise for a performance."¹¹³ In turn, the First Restatement defines agreement to mean a manifestation of mutual assent.¹¹⁴ Piecing this to-

Rather, any fact which is to take such affirmations, once made, out of the *agreement* requires clear affirmative proof.

Id. (emphasis added). Note that the comment does not say, "weave them into the fabric of the basis of the bargain" or "take such affirmations . . . out of the basis of the bargain." Rather the comment uses the phrase "fabric of the agreement" in place of § 2-313's "part of the basis of the bargain" language. *Id.*

110. U.C.C. § 1-201(3).

111. *Id.*

112. See U.C.C. § 1-103 (principles of law and equity apply unless displaced by particular U.C.C. provisions). "The definition [in U.C.C. § 1-201(3)] of agreement as a 'bargain' without defining the word 'bargain' . . . suggests that the ordinary usages of that term may be employed." EDWARD MURPHY & RICHARD SPIEDEL, *STUDIES IN CONTRACT LAW* 2 n.5 (4th ed. 1991). The authors then quote the Restatement Second's definition of "bargain." The Restatement Second defines a "bargain" as "an agreement to exchange promises or to exchange a promise for a performance or to exchange performances." RESTATEMENT (2D), *supra* note 35, § 3; see also John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 5 (1981) [hereinafter Murray, *Underlying Philosophy*] (finding that because bargain not defined in U.C.C., must use classical background).

113. RESTATEMENT (1ST), *supra* note 40, § 4. This definition is generally accepted. See RESTATEMENT (2D), *supra* note 35, § 3 (Second Restatement's definition also includes exchange of performances); 1 WILLISTON, *CONTRACTS*, *supra* note 91, § 2A. In his treatise, Professor Corbin defined the word "bargain" as follows:

Without doubt, the word "bargain" is often used as substantially synonymous with agreement and contract. In this work, however, it is used with the connotation of a definite exchange of equivalents, of a quid pro quo. This is believed to be in accord with prevailing usage. As so used, a bargain is one kind of agreement. There are many agreements that are not bargains; and there are many contracts that involve no bargain. But a bargain is always an agreement for an exchange—[quoting, in a footnote, the Restatement of Contracts, § 4 and stating that in addition, a bargain may also be an exchange of performances.]

CORBIN, *supra* note 35, § 10.

114. RESTATEMENT (1ST), *supra* note 40, § 4; see also RESTATEMENT (2D), *supra* note 35, § 3 (defining agreement and bargain); 1 WILLISTON, *CONTRACTS*, *supra* note 91, § 2 (discuss-

gether, the parties' factual "bargain,"—their agreement—is nothing more than their manifestations of mutual assent to an exchange of promises or a promise for a performance.¹¹⁵ Their agreement or factual bargain, however, does not necessarily have legal consequences under the Code. Whether an agreement has legal consequences is determined by the U.C.C. provisions, if applicable, otherwise by contract law.¹¹⁶ If the agreement (the parties' factual bargain) has legal significance, the total obligation resulting from it is the parties' "contract."¹¹⁷ The formation of a sales contract under the U.C.C., therefore, requires not only mutual assent but also, as required under contract law, consideration.¹¹⁸ Since neither mutual assent nor consideration requires reliance, reliance should not be necessary to create an express warranty under section 2-313 which treats a promise or affirmation of fact relating to the goods the same as

ing agreement). Williston states that "[a]n agreement, as the courts have said, 'is nothing more than a manifestation of mutual assent by two or more legally competent persons to one another.'" 1 WILLISTON, CONTRACTS, *supra* note 91, § 2.

115. As noted previously, the Restatement Second also includes an exchange of performances within its definition of the word "bargain." RESTATEMENT (2D), *supra* note 35, § 3.

The textual conclusion can be reached perhaps more simply by recognizing that contract principles are applicable to sales transactions "unless displaced by the particular [U.C.C.] provision," U.C.C. § 1-103, and that no provision has eliminated the requirement of mutual assent for an agreement. See 3 DUESENBERG & KING, *supra* note 17, § 4.02. The authors state:

[I]t cannot be overemphasized that nothing in the Code is intended to displace the basic premise of contract law, namely that *for an agreement to come into being, there must be mutual assent to its terms*. Sales are, after all, contracts, and common-law contract principles will continue to be applicable except as modified by certain Code provisions. For a contract to exist, there must be an offer and an acceptance, and these must relate to terms to which the parties mutually assent. Assent is shown by the objective manifestation of the words or conduct of the respective parties.

Id. § 4.02 (emphasis added).

116. U.C.C. § 1-201(3).

117. *Id.* § 1-201(11). "The distinction between 'agreement' and 'contract' [under the U.C.C.], Professor Llewellyn said, 'is made sharp and clear and unmistakable. The first is a term of fact; the other is a term of law. This has been standard legal theory for at least thirty years. The value of such a distinction appears throughout *Corbin on Contracts*.'" 1 1954 REPORT OF THE NEW YORK STATE LAW REVISION COMMISSION AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 114; see also *Lee Fed. Credit Union v. Gussie*, 542 F.2d 887, 890 (4th Cir. 1976) (discussing effect of creditor's agreement to extend debtor's time for payment of note). The *Gussie* court quoted the Virginia comment to then § 3-606, which notes the U.C.C.'s distinction between "an agreement as being a bargain in fact" and "a contract which is the effect given by law to agreement." *Gussie v. Lee Fed. Credit Union*, 542 F.2d at 890; see also SAMUEL WILLISTON, LAW OF CONTRACTS § 13 (Lord 4th ed. 1990) (U.C.C., as did common law, separated definition of agreement from test of whether it has legal consequences); RESTATEMENT (2D), *supra* note 35, § 3 cmt. a (discussing various aspects of word "agreement"). Comment a states: "The word 'agreement' contains no implication that legal consequences are or are not produced." RESTATEMENT (2D), *supra* note 35, § 3 cmt. a; see also *infra* note 168 and accompanying text (quoting Williston that the word bargain "neither asserts nor denies operative effect of a transaction as creating a contractual or other legal duty").

118. See RESTATEMENT (2D), *supra* note 35, § 17(1) (formation of contract requires bargain in which there are manifestation of mutual assent to an exchange and consideration).

any other term of the parties' contract.¹¹⁹

Interpreting the "basis of the bargain" language to mean that the seller's promise or affirmation of fact relating to the goods will be treated the same as any other part of the parties' bargain comports with the comments to section 2-313. Comment 3, which has been cited in support of some form of a reliance requirement, actually underscores the purely contractual nature of an express warranty under 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 the negotiation which ends in a contract is dealt with*. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear, affirmative proof. The issue, normally, is one of fact.¹²⁰

In clear terms, this comment tells us that affirmations and descriptions are to be treated the same as any other part of the negotiation that results in a contract. This means that an affirmation is to be treated the same, for example, as the seller's promise to sell, or any other promise by the seller that is part of the contract. Comment 3 next explains that any affirmation relating to the goods that the seller makes during the "bargain" is automatically "part of the description of those goods."¹²¹ It is in this context that the comment goes on to note that "hence no particular reliance" on the affirmation is necessary to weave the affirmation into the fabric of the agreement. In other words, affirmations are woven into the fabric of the agreement through the parties' negotiations, not through reliance. Thus, any court or commentator that points to the sentence "hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement," as support for some form of a reliance requirement, takes the sentence out of context and ignores the overriding concept that express warranties are contractual.

Finally, comment 3 concludes by stating that "any fact"—not any nonreliance—which is to take a seller's affirmation relating to the goods

119. See *supra* notes 75-82 and accompanying text (discussing mutual assent); *supra* notes 85-91 and accompanying text (discussing consideration).

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

121. *Id.* As I have suggested in discussing how to treat affirmations under contract law, if a seller tells the buyer that the X car has the capability of going 200 miles an hour, that statement becomes a part of the car's description so that the car being offered for sale is not simply the X car, but the X car that can go 200 miles per hour. See *supra* notes 45-49 and accompanying text.

out of the agreement requires clear affirmative proof.¹²² This tells us the obvious—that the language and circumstances as a whole may show that the parties' bargain does not include the seller's affirmation as part of the description of the item being sold.¹²³

Comment 7 also emphasizes a contractual test to determine whether an affirmation of fact by the seller to the buyer creates an express warranty. It provides: "The precise time when words of description or affirmation are made or samples are shown is not material. *The sole question is whether the language or samples or models are fairly to be regarded as part of the contract.*"¹²⁴

122. U.C.C. § 2-313 cmt. 3. This important difference is overlooked by courts and commentators that cite comment 3 to support the position that § 2-313 imposes a reliance requirement. According to *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 566 (3d Cir. 1990), *aff'd in part and rev'd in part*, 112 S. Ct. 2608 (1992), in the earlier case of *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987, *opinion amended*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967) (applying Pennsylvania law), the *Pritchard* court interpreted "the last sentence in comment 3 ('[A]ny fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof') as qualifying the sentence that precedes it ('[N]o particular reliance need be shown.') [sic]." *Cipollone v. Liggett Group, Inc.*, 893 F.2d at 566. "In other words, even though no particular reliance need be shown, the seller can take [an] affirmation . . . out of the agreement by showing that the buyer did not rely." *Id.* This reading of comment 3 ignores the actual language of the comment. The last sentence of comment 3, which starts out "[r]ather, any fact which is to take such affirmations . . .," clearly qualifies the sentence that precedes it, which reads: "[i]n actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement." U.C.C. § 2-313 cmt. 3. A fair reading of the sentence "[r]ather any fact which is to take *such* affirmations . . ." shows that it refers back to the *first half* of the preceding sentence, which reads: "[i]n 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" and not, as the Third Circuit says, to the second half of the preceding sentence, which reads: "Hence no particular reliance on such statements need be shown . . ."

123. For example, suppose a seller tells a potential car buyer that the car he is offering for sale has an FM radio. When the seller and the buyer check the car together before they finalize their bargain, however, they see that the car has only an AM radio. Apparently, the "bargain" does not include an FM radio as part of the description of the goods, but rather an AM radio. This conclusion is not based on the fact that the buyer did not rely on the FM description but rather on the fact that the circumstances fairly interpreted show that the seller's offer to sell did not include an FM radio. On the other hand, if the seller was unaware that the car did not have an FM radio, the trier of fact may find that his offer was to sell a car with an FM radio even though the buyer knows that the radio is an AM radio.

124. U.C.C. § 2-313 cmt. 7. There is a danger in placing too much emphasis on the comments. Language very similar to that in comment 7 can be found in a pre-Sales Act treatise on the law of warranty, yet at common law reliance was required to create an express warranty. For example, in Arthur Biddle's work on the law of warranties, he states: "[i]t is true that it is not necessary that the statement or representation should be simultaneous with the close of the bargain. If it be *part of the contract* it matters not at what period of the negotiation it is made." ARTHUR BIDDLE, A TREATISE ON THE LAW OF WARRANTIES IN SALES OF CHATTELS 39 (Philadelphia, Kay & Brother 1884) (emphasis added). In his earlier discussion of what constitutes a warranty, however, Biddle makes it clear that a buyer's reliance on the affirmation is necessary to create a warranty. *Id.* at 37.

To answer this "sole question" of whether the seller's affirmation of fact is "fairly to be regarded as part of the contract,"¹²⁵ we must ascertain whether the requirements for contract formation, manifestations of mutual assent and consideration, are present. Or to put it in U.C.C. terms, we must first ascertain from the totality of the parties' language and other circumstances whether the seller's affirmation is part of the parties' bargain-in-fact—their agreement—and then determine the legal effect of the factual bargain—whether it has ripened into a contract. As I have explained, reliance plays no role in this connection.¹²⁶

Extrinsic factors suggest this conclusion. First, section 2-313 mentions nothing about reliance. In sharp contrast, section 12 of the U.S.A. explicitly required reliance to create a warranty.¹²⁷ This change in the language cannot be regarded as merely stylistic. The traditional tort element of reliance in express warranties, as perpetuated in U.S.A. section 12, "has been wholly eliminated," Hiram Thomas wrote, "*and an express warranty is treated as purely contractual, a part of the bargain.*"¹²⁸

125. U.C.C. § 2-313 cmt. 7. Parenthetically, it may be noted that in asking "whether the language . . . [is] fairly to be regarded as part of the contract" instead of asking "whether the language . . . [is] fairly to be regarded as part of the basis of the bargain," comment 7 uses the language, "part of the contract" in place of the statutory language "part of the basis of the bargain." *Id.*

126. See *supra* notes 111-19 and accompanying text (showing that reliance is irrelevant to contract formation). There are those who argue that a reliance requirement would be inconsistent with comment 7, which provides that postclosing language can become a warranty. See *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 567 (3d Cir. 1990), *aff'd in part and rev'd in part*, 112 S. Ct. 2608 (1992); Russell J. Weintraub, *Disclaimers of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEX. L. REV. 60 (1974) (discussing "basis of the bargain" test and whether reliance required by buyer); Hutzler, Note, *supra* note 17, at 152 (discussing reliance and basis of bargain test). The Third Circuit stated the argument as follows: "[i]f a post-closing promise—on which, by definition, a seller cannot rely in deciding to make a purchase—can create a warranty, then it is difficult to see why a pre-closing promise can create a warranty only if relied upon." *Cipollone v. Liggett Group, Inc.*, 893 F.2d at 567. This argument mistakenly assumes, however, that precontract and postcontract statements must be treated the same. If reliance were required, there is no reason why the type of reliance could not be different—precontract reliance could require reliance on the seller's statement in purchasing the product whereas postcontract reliance could require reliance on the seller's statement in furnishing new consideration. The legislature may have decided to treat precontract and postcontract statements differently, just as they treated contract formation and modification differently with respect to the consideration requirement. See U.C.C. § 2-209(1) (agreement modifying sales contract binding without consideration).

The Third Circuit's argument also ignores the fact that precontract and postcontract affirmations or promises *may* not have been treated the same under the U.S.A. Under § 12 of the U.S.A., a precontract promise or affirmation created an express warranty only if the buyer "purchase[d] the goods relying thereon." U.S.A. § 12. It is arguable that a postclosing promise or affirmation, however, may have been enforceable as a modification if it was supported by new consideration, even though by definition the buyer could not have relied upon it in deciding to make the purchase, because the purchase had already been made. See *infra* note 221 and accompanying text.

127. See *supra* note 5 (quoting U.S.A. § 12).

128. Thomas, *supra* note 9, at 18 (emphasis added). Ms. Soia Mentschikoff made the

Mr. Thomas considered this revision to be among the "outstanding"

Thomas article a part of the record of the Commission's U.C.C. hearings so that it would be distributed with the official transcripts. She suggested that it be copied in its entirety, stating: "I don't want any accusations that it has been distorted in any fashion whatsoever. I stand on the Hiram Thomas Report." 2 1954 REPORT OF THE LAW REVISION COMMISSION AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 1399-1406.

In stating that the "express warranty is treated as purely contractual, a part of the bargain," Mr. Thomas was referring to § 37 of the 1944 proposed final draft no. 1 of the U.R.S.A., which is virtually identical to § 2-313 and reads, in pertinent part:

- (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise which relates to the goods and is made by the seller to the buyer as a part of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made a basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made a basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

II KELLY, *Drafts*, *supra* note 6, at 30-31.

Note that subsection (a) uses the phrase "part of the bargain" not "part of the basis of the bargain" whereas subsections (b) and (c) use the phrase "a basis of the bargain." Significantly, neither the Report nor Ms. Mentschikoff made note of this difference nor did Professor Llewellyn address this difference in the lengthy draft comment to this section. II KELLY, *Drafts*, *supra* note 6, at 154-63. There is certainly no indication that the variation in language was substantive and not merely stylistic. In fact, in his article Mr. Thomas said that the proposed U.R.S.A. "has, in all matters of substance and policy, been approved by the Commissioners and by the Institute. The Reporters and the Joint Committee are left with the task of making some stylistic changes in the text . . ." Thomas, *supra* note 9, at 16.

The provision in § 37(1)(b) of the 1944 draft, that the description be made "a basis of the bargain," was changed in the 1948 draft of § 37 to read "a part of the bargain"; in 1949, § 37 of the draft U.R.S.A. became § 2-313 of the proposed Code and it reinstated the "a basis of the bargain" language in subsection 1(b); in 1950, the drafters changed the language in subsection 1(a) from "part of the bargain" to "a basis of the bargain." II KELLY, *Drafts*, *supra* note 6, at 30 (containing § 37 of 1944 proposed final draft of U.R.S.A.); V KELLY, *Drafts*, *supra* note 6, at 221, 247 (containing 1948 draft of § 37 of proposed U.R.S.A.); VI KELLY, *Drafts*, *supra* note 6, at 103 (containing 1949 draft of § 2-313 of proposed Code); VII KELLY, *Drafts*, *supra* note 6, at 115; IX KELLY, *Drafts*, *supra* note 6, at 243 (1950 proposed final draft of Code-Text edition); X KELLY, *Drafts*, *supra* note 6, at 1, 5, 140 (1950 proposed final draft of Code-Text and comments edition). In response to the New York Commission hearings, the drafters changed the "basis of the bargain" language in § 2-313 of the 1952 Official Text to "part of the basis of the bargain." N.Y. ANN. TO UNIFORM COMMERCIAL CODE AND REPORT OF COMMISSION ON UNIFORM STATE LAWS TO LEGISLATURE OF NEW YORK STATE 42 (1961). In an article commenting on the language changes to § 37, Professor Heckman states: "Obviously, a good deal of soul-searching was going on in an attempt to discover the proper formulation. The comments do not reveal the reasons for these changes, but it seems clear that the standard finally adopted was more restrictive of warranties created by affirmation than the earlier drafts." See Charles 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, 25 (1987) (commenting on 1948, 1949, and 1950 language changes in drafts of express warranty section). The difference between "a part of the bargain" and "a basis of the bargain," Heckman says, was "surely intentional, and must have been for the purpose of setting up a more restrictive standard on words that might be uttered without promissory intent." *Id.* at 26. All this, however, is pure speculation on Professor Heckman's part. And it is contrary to Hiram Thomas' statement that when the 1944 U.R.S.A. final draft was promulgated, "all matters of substance and policy" had been agreed upon. The 1944 text, therefore, was com-

"new features" of the U.R.S.A.¹²⁹ Indeed, it is difficult to imagine that such a dramatic difference in the language was not intended to effectuate a substantive change. If the drafters intended to retain a reliance requirement, why change the language of U.S.A. section 12, particularly when there were forty years of case law behind it?¹³⁰ Why change the language when the uninitiated reading section 2-313(1) would have no reason to believe that the language was intended to impose some form of a reliance requirement?

Second, section 2-315, as its predecessor U.S.A. section 15(1), expressly requires reliance by the buyer to create an implied warranty of fitness for a particular purpose.¹³¹ The continuation in section 2-315 of an express reliance requirement, as contrasted with its omission from section 2-313, indicates that the reliance requirement for an express warranty was intentionally deleted.¹³²

plete except for "the task of making some stylistic changes in the text." Thomas, *supra* note 9, at 17-18. Professor Heckman does not mention the Hiram Thomas Report in his article.

129. Thomas, *supra* note 9, at 18.

130. Compare Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 565 (1950) [hereinafter Williston, *Proposed Code*] (discussing difference between code and noncode statutes) with Grant Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285-86 (1966) (discussing Code's reliance on precode and noncode law). Williston states that:

Under a statute as long as the proposed Code in which many of the rules and most of the language differ from those in existing statutes, the determination of countless cases will be necessary to give reasonable certainty to the law. Precedents cease to have certain application when words are wholly changed from those in existing statutes. The question of whether principles are also changed is always present, even though no change in them was intended.

Williston, *Proposed Code, supra*, at 565. Gilmore, however, states that the Code

assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support, which it displaces to the least possible extent, and without which it could not survive. The solid stuff of pre-Code law will furnish the rationale of decision quite as often as the Code's own gossamer substance.

Gilmore, *supra*, at 286.

131. U.C.C. § 2-315 (1989) provides:

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

Id. (emphasis added); see also U.S.A. § 15(7). The Sales Act provided:

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

U.S.A. § 15(7) (emphasis added).

132. Without citing any supporting authority, Professor Heckman states that a warranty by description under § 15(1) of the Sales Act, which was an implied warranty, required no reliance. Heckman, *supra* note 128, at 14. Based on this premise, Heckman argues that § 2-313(1)(b), which treats a description warranty as an express warranty, does not embody a reliance requirement because there is no indication that the U.C.C. drafters intended to intro-

Having concluded that contract principles govern the determination of whether a promise or affirmation is part of the "basis of the bargain," the obvious question is why does the Code have a separate section for the creation of express warranties? Even without section 2-313, the seller's affirmation or promise relating to the goods should be treated the same as any other aspect of the parties' agreement. Perhaps the section was needed to avoid the conceptual problem that some people might have with treating affirmations of fact as contractual.¹³³ Alternatively, the separate treatment of express warranties in the U.S.A. may have been carried over to the U.C.C. without consideration of whether it was necessary to do so. Or perhaps the drafters did intend section 2-313 to continue some form of a reliance requirement in the creation of an express warranty.¹³⁴

B. Reliance Approach

There is significant case support for the view that the buyer's reliance on the seller's promise or affirmation of fact relating to the goods is required to create an express warranty under section 2-313(1)(a).¹³⁵ Virtu-

duce a reliance requirement for a description warranty. Heckman, *supra* note 128, at 14. Authority exists, however, to the effect that reliance was required under U.S.A. § 15(1), thereby undermining the basis of Professor Heckman's argument. See 1 SAMUEL WILLISTON, THE LAW GOVERNING THE SALES OF GOODS § 223a (rev. ed. 1948) [hereinafter WILLISTON, SALES OF GOODS, REVISED] (relied upon description statement constitutes warranty under U.S.A. §§ 12 and 14); VOLD, SALES 2D, *supra* note 44, at 434 (suggesting reliance requirement under U.S.A.).

133. See *supra* notes 45-48 and accompanying text.

134. The final draft of the Illinois U.C.C. annotations, which were prepared for the Illinois Legislature prior to passage of the Code, were reportedly drafted by Professors Llewellyn and Mentschikoff of the University of Chicago Law School and Professor William M. Trumbull of Northwest University School of Law. These Illinois annotations to § 2-313 read in pertinent part as follows:

(1)(a) *Is in accord with Ill. Rev. Stat. 1959, ch 121-1/2 § 12 [U.S.A.] and with the Illinois cases, e.g. Beckett v. F.W. Woolworth, 376 Ill. 470, 34 N.E.2d 427 (1941) Under the Code a statement becomes an express warranty when it becomes part of the basis of the bargain. This is analogous to the requirement of reliance in Ill. Rev. Stat. 1959, ch. 121-1/2 § 12. This was also the law prior to the passage of the Sales Act, Ender v. Scott, 11 Ill. 35 (1849) (assertion that horse was sound does not constitute a warranty unless the buyer showed that he relied on it) . . . [t]he [official] comment to this section states that the Code creates a presumption of reliance which can be rebutted only by clear affirmative evidence. Accord Hicks v. Steves, 121 Ill. 186, 11 N.E. 241 (1887) (held that there is a presumption of reliance when an ordinary individual is dealing with an expert).*

COMMISSION FOR THE UNIFORMITY OF LEGISLATION IN THE UNITED STATES, ILL. ANN. TO THE UNIFORM COMMERCIAL CODE 53 (Burdette Smith Co. 1960) (emphasis added).

135. See *Royal Typewriter Co., Inc. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983) (stating buyer's knowledge or lack of reliance precludes existence of express warranty); *Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395, 397 (10th Cir. 1967) (finding that proof fails to establish express warranty where no reliance shown); *Alpert v. Thomas*, 643 F. Supp. 1406, 1414-15 (D. Vt. 1986) (buyer's signing purchase agreement in reliance on seller's

ally none of the cases, however, has a meaningful analysis of the pertinent Code provisions and comments. For the most part, they simply state or imply that reliance is required.¹³⁶ Nor do they have a meaningful discussion of whether reliance requires the buyer to allege and prove that she relied on the seller's statement as an inducement to entering into the sales contract or of whether the seller's statement is rebuttably presumed to create an express warranty, with the seller being permitted to prove the buyer's lack of reliance.¹³⁷ Of course, in either case, the buyer should not prevail if the facts show that the seller's promise or affirmation of fact was not subjectively one of the inducements for the buyer's entering into the sales transaction. For example, if the facts show that the buyer had no interest in the seller's promise or affirmation of fact relating to the goods, no express warranty should be created under section 2-313, regardless of which party has the burden of proof regarding reliance.

In *Cipollone v. Liggett Group, Inc.*,¹³⁸ however, the Third Circuit extensively analyzed the question of reliance under section 2-313. It took a unique view of the reliance issue in rejecting an approach which requires either that the buyer prove reliance or the seller prove nonreliance.¹³⁹ The court noted that such a reliance requirement was not compatible with comments 4 and 7 to section 2-313.¹⁴⁰ Nevertheless, the court

assurance makes seller's statement part of basis of agreement); *Fargo Machine & Tool Co. v. Kearney & Trecher Corp.*, 428 F. Supp. 364, 370 (E.D. Mich. 1977) (seller's advertisements and promotional literature part of basis of bargain where buyer relies on representations); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 680 (D.N.H. 1972) (stating that under § 2-313 plaintiff has burden of showing he acted on representations); *Thomas v. Amway Corp.*, 488 A.2d 716, 720 (R.I. 1985) (stating that plaintiff alleging breach of express warranty has burden of proving reliance on statements).

136. See, e.g., *Royal Typewriter Co., Inc. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983); *Overstreet v. Norden Labs., Inc.*, 669 F.2d 1286, 1291 (6th Cir. 1982); *Alpert v. Thomas*, 643 F. Supp. 1406, 1415 (D. Vt. 1986).

137. See *supra* notes 135-36.

138. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part and rev'd in part*, 112 S. Ct. 2608 (1992).

139. *Id.* at 564-67. The *Cipollone* court also rejected the approach that a seller's statements to the general public would create an express warranty if they would naturally induce a reasonable purchase, regardless of whether the actual buyer was aware of the statements. *Id.* at 568.

140. *Id.* at 567; see also U.C.C. § 2-313 cmt. 4 (discussing extent to which seller's obligation with respect to the description of the item being sold can be reduced by warranty disclaimers); *supra* note 126 (discussing *Cipollone* court's view that a reliance requirement would be inconsistent with comment 7). Comment 4 provides:

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

thought it possible to interpret section 2-313's "basis of the bargain" language "as requiring some subjective inducement of the buyer, without requiring a reliance finding."¹⁴¹ Stating that it was reconciling the U.C.C. comments, case law, and traditional contract principles, the Third Circuit held that "once the buyer has become aware of the affirmation of fact or promise, the [seller's] statements are presumed to be part of the 'basis of the bargain' unless the [seller], by 'clear affirmative proof' shows that the buyer knew that the affirmation of fact or promise was untrue."¹⁴² The court explained its approach somewhat differently in a footnote:

Although we have emphasized the relevance of a buyer's *belief*, our construction of section 2-313 can be read as simply fleshing out the more commonly discussed *reliance* requirement with a framework of shifting presumptions and burdens of proof. Thus, in the context of advertisements claimed to be warranties, a plaintiff buyer must first prove that she saw the advertisements. This raises a (rebuttable) presumption of belief, which in turn raises an irrebuttable presumption of reliance. Next, a defendant seller may rebut the presumption of reliance, but only by proving that the plaintiff disbelieved the advertisement Successfully proving disbelief creates a new rebuttable presumption of nonreliance. Finally, the plaintiff may rebut this presumption by proving reliance directly Whether our holding is read as imposing a "belief" requirement or a "reliance" requirement thus is

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

U.C.C. § 2-313 cmt. 4.

After quoting from a portion of the first sentence of comment 4, that "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell," the *Cipollone* court tersely notes that, "reliance is irrelevant to what a seller agrees to sell." *Cipollone v. Liggett Group, Inc.*, 893 F.2d at 567. Because of this, the Third Circuit concludes that a reliance requirement is inconsistent with comment 4. *Id.*

This conclusion is far from persuasive. First, comment 4 does not focus on the reliance issue. It simply explains why the Code adopted a policy that a seller should not be permitted to reduce his express warranty obligation by general disclaimer language. Second, although reliance may be irrelevant to what a seller has agreed to sell, it does not automatically follow, as the Third Circuit erroneously assumes, that it would be inconsistent to require reliance by a buyer in order to take advantage of seller's promise or affirmation relating to the goods he agreed to sell. For the principle stated in comment 4, that the purpose of warranty law is to "determine what it is that the seller has in essence agreed to sell," is perfectly consistent with the additional requirement that the buyer must rely on the seller's promise or affirmation in order to take advantage of it. Third, if that principle were inconsistent with requiring reliance, as the Third Circuit indicates, one wonders why Professor Williston included a reliance requirement in § 12 of the U.S.A. and why it was required at common law.

141. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 567 (3d Cir. 1990), *aff'd in part and rev'd in part*, 112 S. Ct. 2608 (1992).

142. *Id.* at 568.

probably just a question of semantics, not substance.¹⁴³

This passage is far from clear. After the seller proves that the buyer disbelieved the statement and thereby “creates a new rebuttable presumption of non-reliance,” how is it possible for the buyer to “rebut this presumption by proving reliance directly?” The court purports to answer this question in a footnote as follows:

It is possible to disbelieve, but still rely on, the existence of a warranty. In this sense, the buyer can “buy” a lawsuit. Thus, if the buyer disbelieved the warranty, but could prove she was relying on it when she bought the product, she could return the product for stipulated damages—for example, a refund—or economic damages¹⁴⁴

Here, too, it is difficult to decipher the court’s precise meaning. In saying that a buyer who disbelieves the warranty—that is, disbelieves the truth of the fact promised or affirmed—may still prove she was relying on the warranty, the court probably means reliance on the warranty’s implicit promise to indemnify—not reliance on the truth of the warranty. In other words, the court is probably saying that a buyer is entitled to the benefit of a seller’s promise or affirmation if she proves that when she purchased the product, her state of mind was: “I do not believe the seller’s statement about the product but I will take the chance and buy it, because I can sue the seller for damages.”¹⁴⁵ If this analysis of the court’s view is correct, the court is using a very convoluted approach to reach precisely the same result that would be reached under the contract approach outlined above.¹⁴⁶ In a nutshell, the Third Circuit’s approach

143. *Id.* at 569 n.34 (emphasis added). The court does not appear to advocate either a tort or contract theory to determine whether an express warranty was created. Consider the hypothetical case of a buyer who is wholly disinterested in, but nonetheless believes, the seller’s promise or affirmation of fact relating to the goods which the buyer has seen in an advertisement. Under *Cipollone*, such a buyer would be entitled to enforce the seller’s statement because the seller cannot, based on the hypothetical facts, rebut the presumption of reliance that would arise from the buyer’s having read the advertisement. The same outcome would follow under a contract approach but would not ensue if the traditional tort reliance requirement were imposed. Suppose, however, that the buyer receives an advertising flier from the seller but does not read it. Under *Cipollone*, there is no presumption of reliance and the buyer cannot recover for breach of an express warranty. The same result would follow if a traditional tort reliance requirement were imposed, but should not result from a contract approach. In sum, the court in *Cipollone* has interpreted § 2-313 in a manner that does not comport with either contract or tort law.

144. *Cipollone v. Liggett Group, Inc.*, 893 F.2d at 568 n.31. Consequential damages, the court said, would not be recoverable under either U.C.C. § 2-715 or “traditional contract principles which requires the buyer to mitigate.” *Id.*

145. The chance of a layperson proving this type of “reliance” is minimal. If virtually no lawyer would believe she were purchasing a lawsuit unless she were familiar with the *Cipollone* decision, we cannot expect a layperson to entertain such a belief.

146. See *supra* notes 107-26 and accompanying text (detailing contract approach under U.C.C.). The *Cipollone* court did not consider a contract approach. Such an approach reconciles *all* of the comments including comments 2 and 8, both of which, in the court’s words,

in *Cipollone* leaves us somewhat bewildered.

Finally, notwithstanding the *Cipollone* court's lengthy discussion of the comments, its analysis is seriously flawed as explained earlier.¹⁴⁷ Perhaps most important, however, is its failure to consider the first sentence of comment 3, which tells us that section 2-313 "deals with affirmations of fact by the seller . . . exactly as any other part of a negotiation which ends in a contract is dealt with." Nor does the Third Circuit attempt to interpret section 2-313's "basis of the bargain" language without first resorting to the comments. Simply put, the *Cipollone* approach, confusing as it may be, is not based on a complete and flawless consideration of the relevant Code sections and comments.

C. Commentators

1. Reliance Approach

Professors White and Summers, two leading commentators on the Code, believe that section 2-313's "basis of the bargain" language requires reliance.¹⁴⁸ They ask, "why should one who has not relied on the seller's statement have the right to sue?" "Such a plaintiff," they say, "is asking for greater protection than he would get under the warranty of merchantability, far more than he bargained for."¹⁴⁹ But that is not so. To begin with, a contracting party is entitled to the benefit of the bargain even if he obtains more protection than he would get under the implied warranty of merchantability—a warranty imposed by law, not by the parties' bargain. Second, a buyer who has not relied on the seller's promise or affirmation is *not* asking "for more than he bargained for." Although Professors White and Summers speak in contract terms in using the phrase "more than he bargained for," they do not apply contract

"envision some mechanism for overcoming the presumption that the seller's statements, even if heard by the actual buyer, are a basis of the bargain." *Cipollone v. Liggett Group, Inc.*, 893 F.2d at 869. The contract approach reconciles the comments by applying an objective interpretation to the totality of the parties' external manifestations to each other in reaching an agreement. Several situations can be imagined where the totality of the parties' language and other circumstances *may* demonstrate that part or all of a seller's affirmations of fact did not become part of the parties' bargain, and, therefore, did not become part of the contract. Examples of these situations may include: the buyer's examination of the goods in response to the seller's demand that the buyer do so; a sale of used goods at a low price; and where the seller and buyer together become aware of a specific defect after the seller has made a general affirmation that there are no defects.

147. See *supra* note 122 (discussing *Cipollone* court's analysis of comment 3); *supra* note 126 (discussing the *Cipollone* court's view that a reliance requirement would be inconsistent with comment 7); *supra* note 140 (discussing *Cipollone* court's position that a reliance requirement is inconsistent with comment 4).

148. See WHITE & SUMMERS, *supra* note 17, at 403 (discussing extent to which Code may have changed pre-Code reliance requirement); see also *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 546 n.23 (3d Cir. 1990), *aff'd in part and rev'd in part*, 112 S. Ct. 2608 (1992).

149. WHITE & SUMMERS, *supra* note 17, at 403.

principles. As I already have discussed, under contract principles a nonrelying buyer would have a right to sue for breach of the seller's statement because reliance is irrelevant to the formation of a contract.¹⁵⁰ In seeking to enforce the seller's statement, therefore, the buyer is asking only for the benefit of her bargain, no more and no less. In fact, by definition, every time a contract is enforced, a party receives no more than she bargained for. For the party receives her expectation damages as a substitute for the seller's failure to perform as agreed. The answer to Professors White and Summers' question "why should one who has not relied have the right to sue" is: because under fundamental contract principles, every party to a contract has the right to sue the other contracting party to recover the benefit of her bargain without regard to reliance.

2. Reasonable Expectation Approach

Professor Murray takes the position that the "proper analysis" of section 2-313 "concentrates on and protects a buyer's reasonable expectations. This is the *only* test that conforms to the statutory language, the comments, and the underlying philosophy of Article 2."¹⁵¹ The buyer's "reasonable expectations," he says, are those "created by all of the 'affirmations of fact made by the seller about the goods during the bargain.'"¹⁵² Professor Murray contends that the duration of the bargain under Article 2 transcends the classical concept of bargain and "does not end until a considerable time after the contract for sale has been made"¹⁵³ Thus, he says, "this test will protect those reasonable expectations that a seller's statements create regardless of when those statements were made or when the buyer learned of them."¹⁵⁴ Or as Professor Murray phrases it in a footnote, "any statement of the seller about the goods to which the buyer reasonably expects his purchased goods to conform is part of the basis of the bargain."¹⁵⁵ In short, Professor Murray argues that Article 2 "dictates" the enforcement of an uncommunicated, pre-contract formation statement "that the buyer does not learn of until after formation."¹⁵⁶

Professor Murray's conclusion is fundamentally unsound. How can a seller's precontract affirmation or promise, of which the buyer is unaware

150. See *supra* notes 72-94 and accompanying text (discussing irrelevance of reliance for contract formation).

151. Murray, *Transcending*, *supra* note 17, at 325 (emphasis added).

152. See Murray, *Transcending*, *supra* note 17, at 318 (quoting, in part, § 2-313 comment 3).

153. Murray, *Underlying Philosophy*, *supra* note 112, at 17.

154. Murray, *Transcending*, *supra* note 17, at 318.

155. Murray, *Transcending*, *supra* note 17, at 325 n.237.

156. Murray, *Transcending*, *supra* note 17, at 325 n.237.

at the time of the contract, create "reasonable expectations" in the buyer?¹⁵⁷ A buyer can reasonably expect that a product will conform to the seller's affirmations and promises that have been communicated to him before reaching an agreement. This is true even of affirmations and promises contained in written communications received from the seller but not read by the buyer. For only such communicated affirmations and promises, as I have explained, can become part of the terms of the sales contract,¹⁵⁸ and the buyer is entitled to expect that the seller will perform these contractual terms.¹⁵⁹ Of course, a buyer may have subjective expectations that a product will conform to any precontract affirmation or promise that the seller made to the public, or to any other customer, even though it was not communicated to the buyer and did not become part of the terms the seller offered. These subjective expectations may even be "reasonable" under the circumstances. A seller, however, should be responsible on an express warranty theory only for those reasonable expectations of the buyer that were created by the parties' agreement.¹⁶⁰ In other words, protection of a buyer's subjective expectations—expecta-

157. See *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 567 (3d Cir. 1990) (noting court's difficulty in construing seller's promise as basis of bargain where buyer unaware), *aff'd in part and rev'd in part*, 112 S. Ct. 2608 (1992). "It strains the language to say that a statement is part of the 'basis' of the buyer's 'bargain,' when the buyer had no knowledge of the statement's existence." *Id.*

158. See *supra* notes 83-84 and accompanying text (discussing requirement that offer be communicated to offeree in order to create power of acceptance).

159. See RESTATEMENT (2D), *supra* note 35, § 344 cmt. a (defining buyer's interest in benefit of bargain as "expectation interest"). The law protects this expectation interest in the event of a contract breach. *Id.* Comment a of the Restatement provides in pertinent part:

Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. It does this by attempting to put him in as good a position as he would have been in had the contract been performed, that is, had there been no breach. The interest protected in this way is called the 'expectation interest.' It is sometimes said to give the injured party the 'benefit of the bargain.'

RESTATEMENT (2D), *supra* note 35, § 344 cmt. a; see also *Fuller & Perdue*, *supra* note 72, at 54 (defining expectation interest as putting buyer in position comparable to that where seller performed).

160. See *Alan Wood Steel Co. v. Capital Equip. Enter., Inc.*, 39 Ill. App. 3d 48, 58, 349 N.E.2d 627, 636 (1976) (buyer's expectations cannot be extended beyond terms and nature of parties' agreement); cf. UNIF. LAND TRANSACTIONS ACT § 2-308 cmt. 1, 13 U.L.A. 532 (1986) (buyer's expectations in express warranty context created by seller's conduct "in connection with inducement of the sale"). As the comment explains:

The purpose of the law of warranty is to determine the quality which a buyer is reasonably entitled to expect in the sale of real estate. Express warranties deal with expectations of the buyer created by particular conduct of the seller in connection with inducement of the sale. Therefore, once it is established that the seller has acted so as to create particular expectations in the buyer, warranty should be found unless it is clear that, prior to the time of final agreement, the seller has clearly negated the conduct which created the expectation.

UNIF. LAND TRANSACTIONS ACT § 2-308 cmt. 1, 13 U.L.A. 531 (1986).

tions that are not based on the seller's communications to the buyer—should be imposed by law, not as a matter of express warranty. Indeed, this is precisely the role played by the implied warranties of merchantability and of fitness for a particular purpose as distinguished from express warranties, which are created by the parties' agreement.¹⁶¹

Furthermore, Professor Murray's reasonable expectation theory is based on his assertion that the word "bargain" in the U.C.C. is a novel concept involving a continuum "that does not end until a considerable time after" the parties have entered into the sales contract.¹⁶² His position is nothing more than a repackaging of Professor Nordstrom's idea of an expanded concept of bargain.¹⁶³ The Code, however, does not indicate that the word "bargain" in the Code has a meaning different from its pre-Code meaning.¹⁶⁴ To the contrary, the most reasonable analysis of the relevant Code sections shows that the word "bargain" does not have a novel meaning and that the parties' initial bargain ceases the moment it ripens into a sales contract.¹⁶⁵ If the drafters intended a novel meaning, they would certainly have indicated this in the comments.

Professor Murray's position that U.C.C. section 1-201(3) "suggests that bargain-in-fact means more than bargained-for-exchange" is built on a strawperson—that there has been a failure to recognize that the U.C.C.'s concept of "bargain" in section 1-201(3) is not restricted to the concept of "bargained-for-exchange."¹⁶⁶ Professor Murray mixes apples

161. See U.C.C. § 2-314 (implied warranty of merchantability). This implied warranty protects the buyer's expectation that the goods, for example, will be "fit for the ordinary purposes for which such goods are used." U.C.C. § 2-314(2)(c); see also U.C.C. § 2-315 (implied warranty of fitness for particular purpose). The implied warranty of fitness for a particular purpose protects a buyer "where the seller at the time of contracting has reason to know any particular purpose" for which the buyer needs the goods and where "the buyer is relying upon the seller's skill or judgment to select or furnish suitable goods." U.C.C. § 2-315.

162. See Murray, *Underlying Philosophy*, *supra* note 112, at 5 (noting "bargain" includes course of dealing, usage of trade, and course of performance); Murray, *Transcending*, *supra* note 17, at 284 ("bargain" not restricted to classical notions of bargained-for-exchange). Interestingly, Professor Murray does not give us a standard to determine when the bargain ends other than to say it is a "considerable time" after the making of the sales contract. Murray, *Transcending*, *supra* note 17, at 284.

163. ROBERT J. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 67, at 206-07 (1970); see *infra* note 227 and accompanying text (quoting Nordstrom's view that the Code's concept of bargain can extend beyond moment offeree says "I accept").

164. See *supra* notes 108-15 and accompanying text (discussing meaning of bargain).

165. *Supra* notes 108-15; see also *infra* notes 230-35 and accompanying text (discussing Code's meaning of bargain).

166. Murray, *Transcending*, *supra* note 17, at 284. In another article, Professor Murray reiterated this point stating that "the bargain with which we are familiar is not the factual bargain of the parties. We yearn for the days of bargained-for-exchange as one of the classical elements of the sacred doctrine of consideration." Murray, *Underlying Philosophy*, *supra* note 112, at 5. Murray does not tell us the basis for his conclusion that "the bargain with which we are familiar is not the factual bargain of the parties." Murray, *Transcending*, *supra* note 17, at 289.

and oranges. The word "agreement," as Professor Karl Llewellyn put it, is a "term of fact."¹⁶⁷ It necessarily follows that the phrase "the bargain of the parties in fact" is also a "term of fact." "[T]he term 'bargain,' " as Professor Williston emphasizes, "neither asserts nor denies the operative effect of a transaction as creating a contractual or other legal duty."¹⁶⁸ The phrase "bargained-for-exchange," on the other hand, relates to the legal requirement of consideration.¹⁶⁹ The words "bargain" and "bargained-for-exchange" are therefore used in two different contexts, with the word "bargain" having a meaning independent of the "bargained-for" concept of consideration.¹⁷⁰

Significantly, Professor Murray fails to address the critical opening sentence of comment 3, which specifically states that the U.C.C. treats express warranties "exactly as any other part of a negotiation which ends in a contract is dealt with."¹⁷¹ This alone should put Professor Murray's reasonable expectation theory to rest. Nor does his reasonable expectation theory square with comment 1, which states that "[e]xpress' warranties rest on 'dickered' aspects of the individual bargain," thus also suggesting a contract approach to express warranties.¹⁷² Under a contract approach, the seller's statements would create express warranties

167. See *supra* note 117 (differentiating between agreement and contract).

168. 1 WILLISTON, CONTRACTS, *supra* note 91, § 2A.

169. See RESTATEMENT (1ST), *supra* note 40, §§ 4, 75 (consideration for promise must be bargained for and given in exchange for promise); 1 WILLISTON, CONTRACTS, *supra* note 91, § 111 ("consideration is a present exchange bargained for in return for a promise"). Section 71(1) of the Restatement Second states that "to constitute consideration, a performance or return promise must be bargained for." RESTATEMENT (2D), *supra* note 35, § 71(1). Section 71(2) states that "a performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." RESTATEMENT (2D), *supra* note 35, § 71(2).

170. Compare RESTATEMENT (2D), *supra* note 35, § 3 (defining "bargain") with RESTATEMENT (2D), *supra* note 35, § 71(1) cmt. b (defining "bargained for"). But see RESTATEMENT (2D), *supra* note 35, § 17(1) (noting that formation of contract involving an exchange requires "a bargain in which there is a manifestation of mutual assent to the exchange and consideration"); RESTATEMENT (2D), *supra* note 35, § 17(1) cmt. b (stating requirements of contract formation for a bargain transaction). Comment b states that "[t]his chapter [mutual assent] and the next [consideration] deal with two essential elements of a bargain: agreement and exchange." RESTATEMENT (2D), *supra* note 35, § 17(1) cmt. b. Even if "consideration" were an element of a bargain, however, § 17(1) and comment b make it clear that the "consideration" is a separate requirement from the mutual assent or agreement aspect. RESTATEMENT (2D), *supra* note 35, § 17(1) cmt. b.

171. U.C.C. 2-313 cmt. 3.

172. See U.C.C. § 2-313 cmt. 1 (distinguishing between express and implied warranties). U.C.C. § 2-313 comment 1 reads in pertinent part:

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

Id.

under section 2-313 if they are part of the negotiated terms. It would follow that a seller's precontract affirmation or promise that the seller did not communicate to the buyer would not be part of the negotiated terms, and thus would not create an express warranty under section 2-313, as Professor Murray suggests.¹⁷³

Professor Murray recognizes that the "'dickered' terms of the deal" include "any statement of the seller when that statement has been communicated to the buyer before the sale."¹⁷⁴ However, relying on Professor Llewellyn in a completely different context, Professor Murray argues that the buyer not only "gives his specific assent to any dickered warranty" but "he also gives his blanket assent to any undickered statements about the goods."¹⁷⁵ But of what relevance is the buyer's blanket assent to statements that the seller has not communicated to the buyer? If the seller has not communicated the statements to the buyer, the buyer would have no power to accept them.

Further, Professor Murray's reliance on Professor Llewellyn is way off the mark. Professor Llewellyn was discussing the extent to which Party A, who had signed a written "form or Boiler-Plate agreement"—that is, a party to whom the terms obviously were communicated—should be held to the boiler-plate provisions, a completely different issue than Professor Murray focuses on.¹⁷⁶ Certainly Professor Llewellyn was not ad-

173. Murray, *Transcending*, *supra* note 17, at 325 n.237.

174. Murray, *Transcending*, *supra* note 17, at 320.

175. Murray, *Transcending*, *supra* note 17, at 321 (citing KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960)).

176. Party A may not have read all of the boiler-plate provisions. The provisions, however, were communicated to him. In determining the extent to which Party A should be held to the boiler-plate provisions, Llewellyn suggested that:

Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in There has been an arm's-length deal, with dickered terms. There has been accompanying that basic deal another which, if not on any fiduciary basis, at least involves a plain expression of confidence, asked and accepted, with a corresponding limit on the powers granted: the boiler-plate is assented to *en bloc*, 'un-sight, unseen,' on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair. Such is the reality, and I see nothing in the way of a court's operating on that basis, to truly effectuate the only intention which can in reason be worked out as common to the two parties, granted good faith. And if the boiler-plate party is not playing in good faith, there is law enough to bar that fact from benefitting it. We had a hundred years of sales law in which any sales transaction with explicit words resulted in two several contracts

vocating, as is Professor Murray, that we hold Party A to a statement or promise that Party B never communicated to Party A. If anything, Professor Llewellyn's discussion of boiler-plate clauses confirms that parties should be held only to those communicated terms to which they manifested assent, precisely the opposite of what Professor Murray concludes.

Additionally, Professor Murray's interpretation of section 2-313 to include a seller's precontract, uncommunicated statements, does not fit well with the language of section 2-313(1)(a), which speaks of "any affirmation of fact or promise made by the seller *to the buyer*" ¹⁷⁷ This language implies that the seller has communicated his statements to the buyer with whom a contract of sale is being made. ¹⁷⁸

Professor Murray further claims that Article 2's underlying philosophy, which seeks to reject "technical notions of classical contract laws," impliedly includes seller's precontract or postcontract uncommunicated statements within section 2-313's meaning. ¹⁷⁹ Article 2's general philosophy, however, cannot justify an interpretation that the statutory language itself and the comments do not reflect. Despite its overall philosophy, the U.C.C. still requires compliance with the technicalities of its own provisions and with applicable contract law; thus, many of the "technical notions of classical contract law," such as mutual assent and consideration, are still applicable to sales transactions. ¹⁸⁰

Finally, Professor Murray argues that comment 7 to section 2-313 concludes that a buyer may fairly regard a seller's postcontract statements as part of the contract, "thus suggesting a novel concept of bargain, a concept well beyond and different from a bargained-for exchange idea involving inducement or reliance." ¹⁸¹ Comment 7, however, speaks of postcontract warranties as becoming "a modification . . . if it is otherwise reasonable and in order (section 2-209)." ¹⁸² It does not say that the seller's postcontract statements are part of the original bargain—which by definition has ripened into a contract—but rather treats them, as it should, under the modification heading.

for the one consideration: that of sale, and the collateral one of warranty. The idea is applicable here, for better reason: any contract with boiler-plate results in *two* several contracts: the *dickered* deal, and the collateral one of *supplementary* boiler-plate.

LLEWELLYN, *supra* note 175, at 370-71.

177. U.C.C. § 2-313(1)(a) (emphasis added).

178. *See* U.C.C. § 2-313 cmt. 2 (stating that § 2-313 is limited in "scope and direct purpose" to seller's warranties made to buyer as part of contract).

179. *See* Murray, *Transcending*, *supra* note 17, at 289-91, 317-18 (analyzing Article 2 drafters' philosophy as rejecting technical contract law).

180. *See* U.C.C. § 1-103 (principles of law and equity apply unless displaced by particular U.C.C. provisions); 3 DUESENBERG & KING, *supra* note 17, § 4.02 (nothing in Code intended to displace basic premise of contract law that mutual assent essential for agreement).

181. Murray, *Transcending*, *supra* note 17, at 289.

182. U.C.C. § 2-313 cmt. 7.

III. EXPRESS WARRANTIES: CONTRACT V. RELIANCE APPROACH— PRACTICAL DIFFERENCES

I have concluded in this article that an affirmation of fact or promise relating to the contract's subject matter should be enforced in accordance with contract principles. The next logical question is the extent to which a contract approach would change the results in the cases that require reliance. More specifically, would a party who knew that the fact affirmed or promised was untrue, as in the hypothetical at the outset of this article, be entitled to any relief? Would a party who was either disinterested in the promise or affirmation or relied on his own examination or experts be entitled to recover? To answer these questions and succinctly compare the results using both approaches, I focus on a few hypotheticals.

A. *Hypothetical 1*

S, a crane manufacturing company, prepares a sales brochure in which it states that its crane has the capacity to lift 125 tons. All of S's sales offices and many potential customers have obtained copies of the brochure. A signs a purchase contract after having seen only the previous brochure, which says that the crane has a 90 ton lifting capacity. B, who previously read the old brochure, receives the new one from S's salesperson, but does not read it before signing the purchase contract. The crane in fact can lift no more than 100 tons. A and B sue seeking to recover expectation damages.

1. *Contract Approach*

A cannot recover because S's promise in the new brochure was never communicated to A. Accordingly, A had no power to accept it.¹⁸³ B can enforce S's promise because, in giving B the new brochure, S communicated its contents to B and accordingly S's promise regarding the crane's lifting capacity was a part of S's offer. Once S's offer was communicated to B, B had the power to accept it regardless of his lack of knowledge of those terms.¹⁸⁴

2. *Reliance Approach*

If reliance were required and S proved the facts in the hypothetical, neither A nor B would be entitled to recover. Obviously, neither of them could have relied on a statement that they never heard or saw.

183. See *supra* note 84 and accompanying text (offer must be communicated to offeree before acceptance may occur).

184. See *supra* note 76 and accompanying text (discussing ability to accept contract without knowing terms of offer).

B. Hypothetical 2

A enters into a written contract dated January 15, 1993 to sell her food business to B for \$50 million on March 1, 1993.¹⁸⁵ The contract states that: "A warrants that (1) as of January 1, 1993 the outstanding accounts receivable are not less than \$5 million; and that (2) as of the closing date, there will be no material change in the amount of outstanding accounts receivable." Based on confidential information received on January 14 from his accountants, who reviewed A's books and records, B knows when he enters into the contract on January 15 that the accounts receivable were only \$4 million as of January 1 and that they will be no higher on March 1. B says nothing to A until January 20 when B tells A that A has breached her warranty. A refuses to make any adjustment and B says he will sue. On March 1, the parties consummate the sale and on May 1, B commences suit against A, claiming breach of A's express warranty regarding the outstanding accounts receivable. Is B entitled to relief?

1. Contract Approach

If the seller's statement were general, *i.e.*, all financial information is accurate, the buyer's precontract knowledge that the statement was untrue in some respect would raise an initial issue of interpretation. Professor Williston explains the interpretation issue as follows:

*[A] warranty in general terms is held not to cover defects which the buyer must have observed. 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.*¹⁸⁶

Hypothetical 2 does not present an interpretation question. The seller's warranty was not general, *i.e.*, all financial information is correct. The only question is whether the buyer's precontract knowledge should preclude enforcement of that warranty. The first possible obstacle is the buyer's lack of reliance. As I have explained, however, reliance has no

185. This is the hypothetical stated at the outset of this article.

186. 1 WILLISTON, SALES OF GOODS, REVISED, *supra* note 132, § 207 (emphasis added). Professor Williston does not state whether each party must be aware of what the other party knows about the defect. This information may be critical to interpreting the scope of the seller's general promise or affirmation, or rather, to determining the parties' intent as to its scope, given the objective theory. See *Empco Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989) (intent "in contract law is objective rather than subjective"); FARNSWORTH, *supra* note 63, § 7.9 (discussing awareness of other party's knowledge).

bearing on contract formation. The buyer's subjective knowledge, therefore, should not preclude the seller's warranty from becoming a part of the contract the same way as every other promise in the contract—through mutual assent and consideration.

The obligation of good faith has been mentioned in the sale of goods context as an impediment to enforcing a seller's statement that the buyer knows is incorrect. In *Price Brothers Co. v. Philadelphia Gear Corp.*,¹⁸⁷ the defendant gave the plaintiff false assurances that the components it was selling would perform in a certain manner when installed in plaintiff's pipe covering machine. The court held that these assurances did not become part of the basis of the bargain under U.C.C. section 2-313(1) because the plaintiff's experts should have recognized that the defendant's representations as to the capability of the components were either "‘puffing’ or falsehood."¹⁸⁸ After noting that the plaintiff's experts' familiarity with their own pipe wrapping machine should have enabled them to make "an independent assessment of the adequacy of the proposed components for the task assigned to them,"¹⁸⁹ the court went on to say that "[t]he obligation of good faith imposed on the parties¹⁹⁰ prevents [the buyer] from remaining silent in the face of known overstatements of performance by [the seller] and then asserting that those falsehoods were a basis of the bargain."¹⁹¹

The court's reliance on a good faith obligation is problematic. First, there is a serious question as to whether the Code imposes any precontract good faith requirement; on its face it imposes a good faith obligation only in the performance or enforcement of a contract.¹⁹² Assuming, however, that the U.C.C. imposes a precontract good faith obligation, the court did not explain why the plaintiff-buyer's conduct in remaining silent is lacking in good faith. The court's unexplained statement has a nice ring to it, but it has no logical force. The buyer's silence did not prejudice the seller. The buyer paid the seller the price—the consideration—the seller requested for all of the seller's promises and affirmations.¹⁹³ The seller, therefore, received the benefit of its bargain.

187. 649 F.2d 416 (6th Cir.), *cert. denied*, 454 U.S. 1099 (1981).

188. *Id.* at 423.

189. *Id.*

190. OHIO REV. CODE ANN. § 1301.09 (Anderson 1979). Section 1301.09, which parallels U.C.C. § 1-203, provides that "[e]very contract or duty within Chapters 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, and 1309 of the Revised Code imposes an obligation of good faith in its performance or enforcement." *Id.*

191. *Price Bros. Co. v. Philadelphia Gear Corp.*, 649 F.2d 416, 423 (6th Cir.), *cert. denied*, 454 U.S. 1099 (1981).

192. U.C.C. § 1-203.

193. See 1 WILLISTON, CONTRACTS, *supra* note 91, § 100 (exchange or price is consideration for seller's performance). Williston states: "the idea that the consideration is the exchange or price requested and received by the promisor for the promise . . . is undoubtedly the

Further, it is fair to assume that the seller fixed the purchase price on the assumption of the truth of its statements to the buyer. If the buyer did not remain silent, the buyer, and not the seller, would have been injured, unless the seller was prepared to reduce the purchase price, a risk the buyer should not have to take. By the buyer's remaining silent, both the buyer and seller realized the benefit of their bargain, no more and no less.

Citing section 20 of the Restatement Second, Professor Murray suggests that if a buyer knows or should know that the seller made a mistake in his representation, the representation should not constitute a warranty "any more than an offeree should be able to 'snap up' an offer if the offeree knows or should know that the offeror has made a mistake."¹⁹⁴ He argues that "[a]n offeree should know that the offeror does not intend to create a power of acceptance with respect to the mistake in the purported offer."¹⁹⁵ Section 20, however, applies to the situation where parties attach different meanings to the same words, just the opposite of the situation under discussion.¹⁹⁶ For in hypothetical two there is no mistake as to the meaning of the seller's representation—both the seller and buyer attach the same meaning to it. Nor is the buyer, as Professor Murray said, "snapping up" the offer; he is paying the seller's price which the seller fixed based on his belief in the truth of the representation.¹⁹⁷

The real issue posed by hypothetical 2, and all other instances where the buyer has precontract knowledge that a fact warranted is untrue, is not whether the promise is part of the purchase and sale contract, because it should be for the reasons explained earlier,¹⁹⁸ but rather the relief to which the buyer is entitled in light of his precontract knowledge, a question which we will now discuss.

In hypothetical 2, the seller's performance of his promise is a constructive condition to the buyer's duty under the contract to purchase. If the seller's tendered performance constitutes a material breach because he failed to tender substantial performance, the buyer is under no duty to

fundamental and as to most cases the generally accepted idea of consideration." 1 WILLISTON, CONTRACTS, *supra* note 91, § 100.

194. Murray, *Transcending*, *supra* note 17, at 294.

195. Murray, *Transcending*, *supra* note 17, at 294.

196. RESTATEMENT (2D), *supra* note 35, § 20.

197. At best, the seller's unilateral mistake should be treated the same as any other unilateral mistake. For the reason given in the text alone, however, the seller should not be entitled to any relief. See RESTATEMENT (2D), *supra* note 35, § 153 (addressing circumstances under which contract voidable for unilateral mistake). Section 153 provides that where a contracting party makes a unilateral mistake as to "a basic assumption on which he made the contract" and it has "a material effect on the agreed exchange of performances *that is adverse to him*," the contract may be voidable "if the other party had reason to know of the mistake." RESTATEMENT (2D), *supra* note 35, § 153 (emphasis added).

198. See *supra* notes 75-94 and accompanying text (discussing that contract formation does not require reliance).

perform and generally has the right to suspend performance and, after a time, terminate the contract if the breach is not cured.¹⁹⁹ The basic question, therefore, that must be answered is whether the seller's breach of warranty can ever be deemed material if the buyer has precontract knowledge of the seller's misrepresentation? Taking into account the factors normally considered in determining whether a breach is material, there appears to be a good argument for a negative answer.²⁰⁰ Turning to hypothetical 2, since the buyer knew the promise (the warranty) was false but still proceeded with the transaction, the truth of the seller's promise could not have been very important to her. Further, not only may the buyer be compensated adequately by damages, but if the buyer were permitted to terminate the contract the seller may well be prejudiced, for example, by having passed up the opportunity to sell to another or because of the time and money spent on negotiating the deal. Thus, while lack of reliance may be irrelevant to contract formation, it may well be relevant to judging the degree of contract performance.²⁰¹

199. See CALAMARI & PERILLO, *supra* note 63, at 11-18 (aggrieved party may cancel contract for material breach; substantial performance antithesis of material breach); FARNSWORTH, *supra* note 63, §§ 8.3, 8.15-8.18 (stating seller's failure to substantially perform entitles injured party to suspend performance and terminate contract if material breach remains uncured). Conversely, substantial performance or the absence of a material breach is generally sufficient to satisfy a constructive condition. See CALAMARI & PERILLO, *supra* note 63, at 11-18(b) (constructive conditions generally satisfied by substantial performance); FARNSWORTH, *supra* note 63, § 8.12 (substantial performance generally satisfies constructive conditions). Note, however, that substantial performance is not complete performance. A party who performs a promise only substantially is in breach and the aggrieved party may recover damages for that breach. See CALAMARI & PERILLO, *supra* note 63, at 11-18(b); FARNSWORTH, *supra* note 63, §§ 8.8, 8.15.

200. See RESTATEMENT (2D), *supra* note 35, § 241 (discussing factors considered in determining whether breach is material); CALAMARI & PERILLO, *supra* note 63, at 11.18(a) (discussing factors indicating material breach); FARNSWORTH, *supra* note 63, §§ 8.12, 8.16 (explaining factors considered in determining materiality of breach). Whether a party has substantially performed, or conversely, whether the party has materially breached, is a factual question. CALAMARI & PERILLO, *supra* note 63, at 11-18(a)-(b); FARNSWORTH, *supra* note 63, § 8.16. The question raised in the text as to whether a seller's breach may be material if the buyer has precontract knowledge of the seller's misrepresentation, might not apply to noninstallment transactions in goods. Generally it is said that the Code utilizes the perfect tender rule in noninstallment sales transactions, which permits a buyer to reject the goods if they "fail in any respect to conform to the contract . . ." See U.C.C. § 2-601 (1989); CALAMARI & PERILLO, *supra* note 63, § 11-20, at 72 (discussing perfect tender rule); FARNSWORTH, *supra* note 63, § 8.12 (discussing perfect tender rule); WHITE & SUMMERS, *supra* note 17, § 8-3 (discussing perfect tender rule). This presents somewhat of a problem for the textual analysis. Perhaps a buyer who knew of the defect before entering into a noninstallment sales contract should be deemed to have waived the right to reject the goods because of that defect. Of course, if Professors White and Summers are correct in their interpretation that § 2-601 permits a buyer to reject the goods only for a material nonconformity, then the question and the discussion in the text would apply equally to noninstallment contracts governed by the Code. WHITE & SUMMERS, *supra* note 17, § 8-3.

201. See FARNSWORTH, *supra* note 63, § 8.16 (discussing material breach). Farnsworth states that: "[m]ost significant is the extent to which the breach will deprive the injured party

Although the buyer may not be entitled to terminate the contract because of her precontract knowledge, she should be able to recover her direct but not consequential damages. For breach of contract, the injured party is generally entitled to recover damages based on her expectation interest. This includes "the loss in the value to him of the other party's performance caused by its . . . deficiency" plus foreseeable consequential loss.²⁰² Because a promise or affirmation relating to the subject matter of the contract is to be treated no differently from any other promise in the contract, an injured party with precontract knowledge that the fact promised or affirmed is untrue should be entitled to recover damages for the loss in value to her caused by the seller's defective performance. This loss in value is equal to the difference between the value of the performance as promised and its value as tendered.²⁰³ Such party, however, should not be entitled to consequential damages from use of the defective product. For it is the injured party's *use* of the defective product knowing that it was defective, and not the other party's breach, that would be the cause of any consequential loss.²⁰⁴

2. Reliance Approach

If reliance were required, it is plain that B would not be entitled to enforce S's warranty. A buyer cannot possibly claim to have relied on a warranty that he knew was untrue.²⁰⁵ "[A] statement known to be incor-

of the benefit that he justifiably expected from the exchange." FARNSWORTH, *supra* note 63, § 8.16.

202. RESTATEMENT (2D), *supra* note 35, §§ 347, 351.

203. See RESTATEMENT (2D), *supra* note 35, § 347(a) cmt. b (discussing "loss of value to the injured party" in determining expectation damages); FARNSWORTH, *supra* note 63, § 12.9.

204. Compare U.C.C. § 2-715(2)(a) (buyer's consequential damages include those that "could not reasonably be prevented by cover or otherwise") with U.C.C. § 2-715(2)(b) cmt. 5 (if buyer "discover[s] the defect prior to his use, the injury would not proximately result from breach of warranty"). See also generally *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 568 n.31 (3d Cir. 1990) (consequential damages barred by U.C.C. § 2-715 and buyer's duty to mitigate under "traditional contract principles"), *aff'd in part and rev'd in part*, 112 S. Ct. 2608 (1992); *Indust-Ri-Chem Lab., Inc. v. Par-Pak Co., Inc.*, 602 S.W.2d 282, 290 (Tex. Civ. App. 1980) (holding that buyer's consequential damages may be reduced to extent buyer's unreasonable conduct caused the damages).

205. *Overstreet v. Norden Labs., Inc.*, 669 F.2d 1286, 1291 (6th Cir. 1982) ("buyer may not rely blindly on a statement or affirmation that he knows is incorrect"). The *Overstreet* court added, however, that the seller's incorrect statement may become part of the basis of the bargain to the extent that the buyer believes and relies on it. The court provided the following illustration:

For example, a seller represents in its advertising that its product is capable of lifting 100 pounds. The buyer is aware that the product cannot lift the weight claimed in its advertising. Nevertheless, he relies on his subjective belief that the product could lift 75 pounds and purchases the product. The product fails to lift 75 pounds. In an action for breach of express warranty against the seller, the buyer will prevail. The seller cannot complain because his product failed to perform at a level of proficiency lower than that originally claimed in its advertising.

rect," as the Sixth Circuit has held, "cannot be an inducement to enter a bargain."²⁰⁶

C. Hypothetical 3

Assume that B received and read the brochure but was not interested in S's promise that the crane had a maximum lifting capacity of 125 tons because B needed a crane that had a maximum lifting capacity of only 90 tons. Would B be entitled to any relief against S if B, after purchasing the crane, subsequently needed the crane to lift 110 tons?

1. Contract Approach

Hypothetical 3 exhibits the basic requirements for contract formation—mutual assent and consideration. Accordingly, inasmuch as contract law does not inquire into a party's subjective intent, a contract was formed and B should recover damages against S for his breach.²⁰⁷ These damages should be measured by his objectively determined expectation interest: loss of value plus foreseeable consequential loss. B, however, may not be entitled to walk away from the contract since B was not interested in the seller's promise concerning the crane's additional lifting capacity. The seller may successfully argue that his misstatement as to the crane's capacity was not a material breach under the circumstances.²⁰⁸

2. Reliance Approach

Whether B is required to prove she relied or S must prove nonreliance, B cannot recover for breach. B did not rely on the warranted capacity in entering into the contract and, therefore, no express warranty was created.

Id. at 1291; *see also* Royal Business Machs., Inc. v. Lorraine Corp., 633 F.2d 34, 44 (7th Cir. 1980) (affirmation of fact buyer knows untrue cannot form part of basis of bargain); Indust-Ri-Chem Lab., Inc. v. Par-Pak Co., Inc., 602 S.W.2d 282, 293 (Tex. Civ. App. 1980) (seller's representation cannot be part of basis of bargain where buyer knows untrue). The *Par-Pak* court concluded: "[t]hus a lack of reliance precludes a sample or model from creating an express warranty." Indust-Ri-Chem Lab., Inc. v. Par-Pak Co., Inc., 602 S.W.2d at 293; *see also* McCormick v. Kelly, 28 Minn. 135, 136-37, 9 N.W. 675, 676 (1881) (person cannot rely on truth of that which person knows is untrue). "[T]o a purchaser fully *knowing* the facts in respect to the property," the *McCormick* court stated the "misrepresentation cannot have been an inducement or consideration to the making of the purchase, and hence could have been no part of the contract." McCormick v. Kelly, 28 Minn. at 136, 9 N.W. at 676. In so stating, the court apparently used a subjective test. *Id.*

206. Overstreet v. Norden Labs., Inc., 669 F.2d 1286, 1291 (6th Cir. 1982).

207. *See supra* notes 75-82, 85-94 and accompanying text (showing that party's subjective intent plays no role in contract formation).

208. *See supra* notes 200-01 and accompanying text (discussing whether seller's breach of warranty can ever be deemed material if buyer has precontract knowledge of seller's misrepresentation).

IV. POST-CONTRACT PROMISE OR AFFIRMATION

A. *Prior to Complete Performance*1. *Absent Statute*a. *Contract Approach*

For years the preexisting duty rule has been a significant impediment to any modification to an ongoing transaction by the parties to a contract, even if the terms of the modification were fair and the parties agreed to them without undue pressure.²⁰⁹ For example, if B agreed to purchase fifty computers a year from S pursuant to a five-year contract, and in the second year the parties agreed to reduce the number to twenty-five because B's financial condition suddenly deteriorated, the modification, to the extent executory, would be unenforceable prior to the Code because there was no consideration for the seller's promise. In agreeing to buy twenty-five computers instead of fifty, B was agreeing to do what he was already legally bound to do, and thus B's promise to buy twenty-five computers would not be consideration for S's consent to the modification.

The questionable wisdom of applying the preexisting duty rule to all modifications led courts to employ theories that would ameliorate the rigors of the rule.²¹⁰ At times, courts seem to have ignored the rule or to have found consideration where none really existed. For example, over 100 years ago in *Webster v. Hodgkins*,²¹¹ the parties' struck a bargain for the exchange of horses without any warranties, but before the actual exchange took place the defendant warranted that his horse was sound. Because there was no consideration for defendant's warranty—the plaintiff had already agreed to purchase the horse without any warranties—

209. The Restatement Second states the rule as follows: "[p]erformance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration." RESTATEMENT (2D), *supra* note 35, § 73; *see also* *Angel v. Murray*, 113 R.I. 482, 489-90, 322 A.2d 630, 634-35 (1974) (discussing contract modification and preexisting duty rule); CORBIN, *supra* note 35, § 171 (discussing preexisting duty rule); FARNSWORTH, *supra* note 63, § 4.21 (discussing modification and preexisting duty rule); WILLISTON, *CONTRACTS*, *supra* note 91, § 130 (discussing promise to perform preexisting obligation). *See generally* Burton F. Brody, *Performance of a Pre-Existing Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation*, 52 DENVER L.J. 433, 440-56 (1975) (discussing various "forms of misdealing" prevented by preexisting duty rule). Jurisdictions have not universally followed the rule. *See* *Production Credit Ass'n v. Farm Credit Bank*, 781 F. Supp. 595, 605 (D. Minn. 1991) (rejecting preexisting duty rule under Minnesota law). In place of the preexisting duty rule, Minnesota has adopted a rule "providing that parties to a contract can alter their contract by mutual consent, and this requires no new consideration, for it is merely the substitution of a new contract for the old one, and this is of itself a sufficient consideration for the new." *Id.* (quoting *Olsen v. Pakert*, 252 Minn. 334, 347, 90 N.W.2d 193, 203 (1958)).

210. *See* FARNSWORTH, *supra* note 63, § 4.22 (discussing reform of preexisting duty rule).

211. *Webster v. Hodgkins*, 25 N.H. 128 (1852).

the defendant should have prevailed. Nevertheless, without any real discussion of the issue of consideration, and without any mention of reliance, the Supreme Court of New Hampshire upheld a jury verdict for the plaintiff, stating:

The evidence tends to show that the warranty was made either when the [defendant's] horse was delivered, or immediately before; that is, where the contract of sale was in the process of being completed. This is all the law requires. The instruction of the court that though the writings [receipts which reflected the purchase price and the subject matter of the exchange] were passed in the counting-room, yet the bargain was not so fully completed until the delivery of the horse at the stable, as to relieve the defendant from a warranty made before the delivery, was correct.²¹²

A strict application of the preexisting duty rule plainly would preclude a buyer from enforcing a seller's postcontract promise or affirmation relating to the subject matter that was not supported by new consideration.²¹³ Even if it were supported by new or fresh consideration, on what theory would a seller's postcontract *affirmation of fact* be enforceable? I have shown that *precontract* affirmations of fact may be treated as part of the seller's manifestation of assent—part of the description of the subject matter that the seller is agreeing to sell. It would be difficult to apply the same analysis to postcontract affirmations because there is no promise by the seller of which they can be considered a part.²¹⁴ But under all the

212. *Id.* at 142-43; *accord* Douglass v. Moses, 89 Iowa 40, 43, 56 N.W. 271, 272 (1893) (binding warranty possible after partial purchase money payment and before delivery); Bowen v. Zaccanti, 203 Mo. App. 208, 209, 208 S.W. 277, 278 (1919) (seller's statement made after contract but before payment and delivery constituted warranty); Butterfield v. Burroughs, 91 Eng. Rep. 189, 189 (1795) (postcontract warranty enforceable since postcontract payment completed bargain). *But see* Jamison v. Niel Nohr Auto., Co., 77 Colo. 85, 88, 234 P. 695, 696 (1925) (seller's postcontract oral warranty made at delivery unenforceable due to lack of consideration); Summers v. Vaughan, 35 Ind. 323, 325 (1871) (seller's postcontract warranty made before payment and delivery unenforceable without new consideration); Richardson v. Landreth, 260 S.W. 128, 129 (Mo. Ct. App. 1924) (seller's postcontract and predelivery representation not enforceable unless supported by new consideration).

213. *See* Olney Seed Co. v. Johnson Farm Equip. Co., 342 Ill. App. 549, 553-54, 97 N.E.2d 480, 482 (1951) (representations made after purchase complete do not constitute warranty without new consideration); White v. Oakes, 88 Me. 367, 374, 34 A. 175, 177 (1896) (any postsale warranty not binding without consideration); Fletcher v. Nelson, 6 N.D. 94, 96-98, 69 N.W. 53, 56-57 (1896) (under preexisting contract, additional oral warranty unenforceable without consideration).

214. What is puzzling is that Professor Williston fails to differentiate between postcontract promises and postcontract affirmations. He implies that each is enforceable if new consideration is given. *See* WILLISTON, *supra* note 1, § 211 (no legal effect to subsequent representation or agreement to warrant without new consideration). Given Professor Williston's view that precontract promises relating to the character of the goods should "be binding on ordinary principles of contract" alone, his position as to a seller's postcontract *promise* is understandable. *See supra* note 44 and accompanying text (quoting Professor Williston). Professor Williston believed, however, that to view a precontract *affirmation* as "a contract is to speak the

circumstances, as with a precontract affirmation of fact, a postcontract affirmation may be reasonably understood by a buyer as including a promise by the seller to answer for the truthfulness of the affirmation. Thus, if the seller's postcontract statement, whether a promise or an affirmation, is supported by consideration, it should be enforceable on ordinary contract principles.

Turning to a seller's postcontract promise or affirmation that is *not* supported by consideration, what possible basis is there to enforce the seller's statement? For purposes of discussion, I will consider only the approach of section 89 of the Restatement Second to modification without consideration.²¹⁵ Section 89 offers two possible theories under which a seller's postcontract promise relating to the subject matter may be enforceable.²¹⁶ First, it may be enforceable as a modification if the modification is fair and equitable in view of unanticipated circumstances at the time of the contract.²¹⁷ Basically, this theory covers factual bargains to modify that are unenforceable for lack of consideration only because of the preexisting duty rule;²¹⁸ it should have no application to a seller's unsolicited postcontract promise or affirmation, which can hardly be characterized as constituting a "bargain," an agreement to exchange promises, or a promise for a performance.²¹⁹ A seller's unsolicited postcontract statement, however, may be enforceable under section 89(c) if the buyer materially changes his position in reliance on the seller's unsolicited statement.²²⁰ The practical difference between the two theories may be in the measure of damages. If the seller's statement qualifies as a

language of pure fiction." WILLISTON, *Honest Misrepresentation*, *supra* note 44, at 420. This should be true *a fortiori* of *postcontract affirmations*. The contract concept of consideration should, therefore, be inapplicable to an affirmation. Yet Professor Williston, without distinguishing between a promise and an affirmation, states that a postsale representation "will be of no legal effect, unless new consideration is given for it." WILLISTON, *supra* note 1, § 211. By contrast, Professor Vold, who viewed a seller's liability for precontract promises as "strictly contractual"—distinguished between postcontract promises and affirmations. VOLD, *SALES 2D*, *supra* note 44, at 431. Professor Vold believed that representations cannot be relied upon as inducements to the sale, while postcontract promises are "nugatory" for lack of consideration. VOLD, *SALES 2D*, *supra* note 44, at 431.

215. RESTATEMENT (2D), *supra* note 35, § 89.

216. RESTATEMENT (2D), *supra* note 35, § 89. This section provides in pertinent part:

A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or . . . (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

RESTATEMENT (2D), *supra* note 35, § 89.

217. RESTATEMENT (2D), *supra* note 35, § 89(a).

218. RESTATEMENT (2D), *supra* note 35, § 89 cmt. a.

219. See *supra* note 113 and accompanying text (noting definition of "bargain").

220. See *supra* note 216 (quoting portion of Restatement Second's modification approach for executory contracts). Prior to such a change in position, however, the original terms could be reinstated by reasonable notification. RESTATEMENT (2D), *supra* note 35, § 89 cmt. d.

modification under section 89(a), the buyer should be entitled to sue for damages for a breach to the same extent as if the statement were originally in the contract. These damages should include the difference between the value of the product as sold and its value as warranted, as well as any consequential damages. If, however, the seller can sue only under section 89(c), the seller's statement will be enforced only "to the extent that justice requires enforcement."

b. Reliance Approach

Assuming that reliance were required to create an express warranty (and putting to one side the preexisting duty rule), would a seller's post-contract promise or affirmation be unenforceable because of a lack of reliance? The answer to this question should be "no." Let us focus for discussion purposes on a pre-Code sale of goods. Under section 12 of the U.S.A., a seller's promise or affirmation created an express warranty only if the buyer purchased the goods relying on that promise or affirmation. Because it is obvious that a buyer could not have relied on a seller's post-contract statements in making a purchase that had already been made, a reliance requirement would have been an insurmountable obstacle to enforcing a seller's postcontract promise or affirmation. In other words, if section 12 were applied to a seller's postcontract promises or affirmations, no postcontract express warranty, *even if supported by consideration*, could ever have been created because the reliance requirement could never have been satisfied. Such an absurd result could not have been contemplated by its drafter, Professor Williston, and reasonably interpreted, section 12, which speaks of reliance in making the purchase, should have been limited to precontract, but not postcontract, statements.

Furthermore, because no postcontract warranty could be created if section 12's reliance-in-purchasing requirement were applicable, one would expect the cases and treatises to mention the buyer's absolute inability to satisfy the reliance requirement as the ground for not enforcing a postcontract promise or affirmation, without mentioning, much less emphasizing, the issue of consideration, an issue which would have been irrelevant. But this is not what we find. Lack of consideration is mentioned in the cases and treatises as the basic reason for not enforcing a seller's postcontract statement, with only a few mentioning the reliance issue in this context.²²¹

221. See *W & S Job & Co., Inc. v. Heidritter Lumber Co.*, 255 F. 311, 313 (2d Cir. 1918) (postsale representation did not constitute express warranty due to lack of consideration); *Budrow v. Wheatcraft*, 115 Cal. App. 2d 517, 519-21, 252 P.2d 637, 639-40 (1953) (postsale warranty unenforceable because of lack of consideration); *Jamison v. Niehl Nohr Auto. Co.*, 77 Colo. 85, 87, 234 P. 695, 696 (1925) (seller's postcontract oral warranty made at delivery

In short, if reliance on a seller's postcontract statement were required, in addition to new consideration, to create an express warranty, it should, at best, mean that the buyer must furnish the new consideration in reliance on the seller's postcontract statement. For significant authority indicates that a postcontract representation is enforceable if supported by a new or fresh consideration, while there appears to be no authority clearly stating that a postcontract statement will not be enforced because of a lack of reliance even though it is supported by new consideration.

unenforceable due to lack of consideration); *Summers v. Vaughan*, 35 Ind. 323, 325 (1871) (postsale warranty void absent new consideration); *White v. Oakes*, 88 Me. 367, 368, 34 A. 175, 177 (1896) (any postsale warranty not binding without consideration); *Fletcher v. Nelson*, 6 N.D. 94, 96-97, 69 N.W. 53, 56 (1896) (under preexisting contract, additional warranty unenforceable without consideration); *Beckett v. F.W. Woolworth Co.*, 376 Ill. 470, 472, 34 N.E.2d 427, 430 (1941) (seller's postsale statements do not support claim that buyer induced to buy in reliance on statements). In *Farmers' Stock-Breeding Ass'n v. Scott*, 53 Kan. 534, 36 P. 978 (1894), the court noted the impossibility of relying on postcontract representations:

Such representations, made after the sale, could not have been relied upon by the purchasers, or have been any inducement to the sale. Representations made by a seller after a contract of sale has been consummated are not actionable. There is no consideration for the same. They do not offer any inducement to a purchase already made.

Id. at 536, 36 P. at 979. Yet, arguably, the absence of consideration may be the reason why it concluded that the representations "are not actionable." In any event, it is unclear from this passage whether the court would hold unenforceable for lack of reliance a postcontract representation that was supported by new consideration. *Id.*; 1 SAMUEL WILLISTON, *SALES* § 211 (2d ed. 1924) [hereinafter WILLISTON, *SALES*] (subsequent representation has no legal effect without new consideration). Professor Williston also states that: "[t]he chief difficulties which arise in regard to questions of reliance relate to several special cases [such as] . . . statements previous to the bargain [and] statements subsequent to the bargain." WILLISTON, *SALES*, *supra*, § 206 (emphasis added). In the section titled "Statements Subsequent to the Bargain," however, Professor Williston makes no reference to reliance as a ground for not enforcing a postsale statement; the only ground mentioned is consideration. WILLISTON, *SALES*, *supra*, § 211; see also BIDDLE, *supra* note 124, § 37 (to constitute warranty, representations given after sale must have new consideration); 2 FLOYD R. MECHEM, *LAW OF SALES* § 1247 n.2 (1901) (warranty made after sale complete not valid unless new consideration given); 3 DUESENBERG & KING, *supra* note 17, §§ 4.04 [2], 4-60 (noting defenses to enforceability of seller's postcontract promises or representations). Duesenberg and King state:

Buyers claiming that their sellers made post-contractual promises or representations have run up against not only the requirement that consideration be given to make them enforceable, but also that the buyer could not have relied on the post-contractual assurance and therefore one of the elements of a warranty would be wanting.

3 DUESENBERG & KING, *supra* note 17, §§ 4.04 [2], 4-60; see also VOLD, *SALES* 2D, *supra* note 44, at 431 n.28 (discussing when representations must be made). Vold notes that postsale statements "cannot be invoked . . . to assert a warranty obligation. As representations, such subsequent statements were not relied on as inducements to the sale. As promises, such subsequent statements are nugatory for lack of consideration" See VOLD, *SALES* 2D, *supra* note 44, at 431 n.28 (emphasis added) (quoting *Richardson v. Landreth*, 260 S.W. 128 (Mo. Ct. App. 1924)). The *Richardson* court, however, did not discuss lack of reliance; it discussed only the need for new consideration. *Richardson v. Landreth*, 260 S.W. 128, 129 (Mo. Ct. App. 1924) (postsale statements do not constitute warranty unless supported by new consideration).

Therefore, the real obstacle to enforcement of a seller's postcontract statement is not the lack of reliance, but the preexisting duty rule.

2. U.C.C.

a. Generally

In a sale of goods transaction, what are, or should be, the requirements to create an express warranty based on a seller's postcontract promise or affirmation? The U.C.C. rejects the preexisting duty rule for every postcontract modification.²²² Under section 2-209(1), an agreement modifying a sales contract "needs no consideration to be binding."²²³ A seller's postcontract statement, therefore, will be enforceable as a modification under section 2-209(1) if the court finds that the parties made a postcontract agreement, a factual bargain, embodying the seller's postcontract statement.²²⁴

This seemingly straightforward approach is contemplated by comment 7 to section 2-313. As comment 7 puts it: "[t]he precise time when words of . . . affirmation are made . . . is not material. The *sole* question is whether the language . . . [is] fairly to be regarded as part of the contract."²²⁵ To answer this "sole question," a court need only determine whether the parties' postcontract language, including the seller's postcontract statement, and any other circumstances may fairly be regarded as an agreement to modify the original sales contract.²²⁶ Because if the postcontract language constitutes such an agreement, then by virtue of section 2-209(1) it will automatically be a modification contract. In turn, the seller's postcontract statement would fairly be regarded as part of the original sales contract as modified.

Professor Nordstrom approaches postsale statements under the U.C.C. from a different viewpoint. In discussing whether postsale statements

222. U.C.C. § 2-209(1) (1989).

223. *Id.* Some state statutes provide that a written modification of any contract is enforceable without consideration. See N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney 1989) (providing that written promise modifying any contract not invalid because of absence of consideration).

224. The modification must be sought in good faith. *T & S Brass & Bronze Works v. Pic-Air*, 790 F.2d 1098, 1105 (4th Cir. 1986) (stating that the Code imposes good faith obligation on efforts to modify a contract); see also U.C.C. § 2-209 cmt. 2 (noting Code's good faith requirement for modification). See generally Robert A. Hillman, *A Study of Uniform Commercial Code Methodology: Contract Modification Under Article Two*, 59 N.C. L. REV. 335, 349 (1981) (discussing good faith requirement in contract modification). Hillman states that: "[w]hereas the pre-existing duty rule provided some protection to a contracting party from attempts by the other party to coerce modification by threats of non-performance, the Code attempts to police against such overreaching in the negotiation of modifications through the obligation of good faith performance found in section 1-203." Hillman, *supra*, at 336; see also FARNSWORTH, *supra* note 63, § 4.22 (discussing reform of preexisting duty rule).

225. U.C.C. § 2-313 cmt. 7 (emphasis added).

226. See U.C.C. § 1-203(3).

made by a clerk at the checkout counter after payment of the purchase price but before delivery created an express warranty, he explains:

The Code test is whether the . . . [seller's] statement was a "part of the basis of the bargain." A "bargain" is not something that occurs at a particular moment in time, and is forever fixed as to its content; instead, it describes the commercial relationship between the parties in regard to this product. The word "bargain" is not encrusted with pre-Code concepts which had attached themselves to contract formation— notions that a contract came into existence at some specific point in time, some split second when offer and acceptance coincided, thereafter to be binding unless a new contract complete with the trappings of agreement and consideration superseded the old one. The Code's word is "bargain"—a process which can extend beyond the moment in time that the offeree utters the magic words, "I accept." In the [hypothetical] case, the clerk's statements are a part of the entire *bargain* even though they did not induce the *contract*.²²⁷

Professor Nordstrom does not cite any U.C.C. provision or associated comment or any other authority to support his basic proposition that the U.C.C. concept of bargain is radically different from the pre-Code concept, and extends beyond the moment the offeree says "I accept."²²⁸ His position blurs the bright line the U.C.C. draws between "agreement," a factual term, and "contract," the legal consequences of the parties' agreement.²²⁹ If the parties' original agreement gives rise to legal obligations, then, by definition, the parties' factual bargain constitutes a sales contract. At the point that this occurs, the original bargain has been concluded and the parties' relationship is governed by the sales contract.

The U.C.C. does provide that "an agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."²³⁰ However, even though the moment of its making is undetermined, there is necessarily a moment before which there is no

227. NORDSTROM, *supra* note 163, § 67.

228. See *Autzen v. Taylor Lumber Sales, Inc.*, 280 Or. 783, 789, 572 P.2d 1322, 1325 (1977) (discussing basis of bargain requirement). In *Autzen*, the seller claimed that a certain survey description was not part of the basis of the bargain because the sale already had taken place before the seller told the buyer that he was having a survey made. *Id.* Relying only on the passage of Professor Nordstrom set forth in the text, the court stated that the seller was confusing a "bargain" with a "contract." *Id.* The court went on to indicate that the parties agreed on the purchase price but not on other specifics, such as the time of payment and the transfer of possession. *Id.* The court also noted that "[t]he bargain was still in process." *Id.* It is difficult to understand why the court quoted Nordstrom. If, because of the open terms, the factual bargain or agreement was not concluded and thus, there was not yet a contract, there was no need for the court to quote Nordstrom; the seller would have been wrong under general contract principles.

229. U.C.C. § 1-201(3) & (11); see *supra* note 117 (distinguishing between agreement and contract).

230. U.C.C. § 2-204(2).

agreement and, hence, no contract. Likewise, there is a point at which there is "an agreement sufficient to constitute a contract."²³¹ To be sure, we may not be able to determine, and in ninety-nine percent of the cases we need not determine, the moment when mutual assent occurred. There is, however, a moment when it must have occurred. At that moment, even though it is undetermined, an agreement in fact has been reached and, if it is legally enforceable, its terms constitute the parties' sales contract.²³² In discussing modification generally, Professor Nordstrom himself recognized this point when he said:

The basic assumption of this approach to contract formation is that the terms become set as of the time of the contract and, even though the Code relaxes the requirement that the exact moment that the contract was made be determined, nevertheless there is some point in time when the bargain has been struck and the terms have created rights and obligations.²³³

Once the parties' relationship is governed by a sales contract, they may change that contract only by entering into a modification contract.²³⁴ It follows that if the parties wish to change the seller's warranty obligation under the original sales contract, they may do so by modifying it in the same way they would the price or any other term of the contract. For the Code did not change contract law concerning modification of an executory contract except to eliminate the impediment of the preexisting

231. *Id.* The comments to § 2-204 indicate that the facts may "not disclose the exact point at which the deal was closed [even though] the actions of the parties indicate that a binding obligation has been undertaken." U.C.C. § 2-204 cmt. This does not mean that it is necessary to determine that moment. As the Code puts it, "[a]n agreement sufficient to constitute a contract of sale may be found even though the moment of its making is undetermined." U.C.C. § 2-204(2). This does imply, however, "that if a party has become contractually bound by a promise, there must have been some moment 'at which the deal was closed,' before which that party was not bound and after which it was." FARNSWORTH, *supra* note 63, § 3.2.

232. *Van Den Broeke v. Bellanca Aircraft Corp.*, 576 F.2d 582, 584 (5th Cir. 1978) (stating that "both historically and under the Code, the time for determining the terms of the contract is when the bargain is struck").

233. NORDSTROM, *supra* note 163, § 43. Professor Nordstrom adds in a footnote that perhaps § 2-313's basis of the bargain test "also expands the time during which statements . . . become express warranties." NORDSTROM, *supra* note 163, § 43 n.62. He offers no explanation why he treats the word "bargain" in § 2-313 differently from the word "bargain" in § 1-201(3). If a bargain is a process continuing after acceptance for the purpose of § 2-313, why should it not be so for all bargains under the U.C.C.? Yet Professor Nordstrom singles out the seller's postcontract statements for special consideration and defines bargain as a continuing process for purposes of § 2-313. See *supra* note 227 and accompanying text (quoting Nordstrom).

234. See Hillman, *supra* note 224, at 339-40. Hillman explains that "[u]nder the definitions of agreement and contract in the Code and the dictionary definition of 'modify' an 'agreement that modifies a contract' is the bargain of the parties in fact, to change a legal obligation that results from the parties' original agreement. A modification contract is the legal obligation that results from the modification agreement." Hillman, *supra* note 224, at 339-40.

duty rule. Accordingly, a seller's postcontract promise or affirmation should create an express warranty only if it becomes part of the basis of a new bargain that relates to the seller's warranty obligation. In turn, by virtue of section 2-209(1), this promise or affirmation would be an enforceable modification contract even without consideration.

To summarize, nothing in the Code suggests that the word bargain in section 1-201(3) or in section 2-313 is a continuing process. Rather, once the parties strike a legally enforceable bargain, the original bargain process is no longer ongoing,²³⁵ and their relationship is governed by a sales contract which may be changed only if they make a new enforceable bargain.

b. Case Law

Cases addressing a seller's postcontract promise or affirmation relating to the goods are not very helpful in fleshing out the U.C.C. requirements for an enforceable modification based on a seller's postcontract statement. In *Bigelow v. Agway, Inc.*,²³⁶ the plaintiffs, dairy farmers, purchased Hay Savor, a chemical preparation manufactured by one defendant and distributed by the other, that was designed to retard mold growth from the moisture in baled hay.²³⁷ Two months after the purchase, the defendants' representatives visited plaintiff Bigelow in the fields where unbaled hay was drying. Nelson, one of the representatives, stated that the hay could be baled if Hay Savor was used. Plaintiff Bigelow testified that in reliance on Nelson's statement he baled the hay despite his "better judgment that it was still too green."²³⁸ A fire occurred in the barn where the hay was stored, allegedly as a result of the early baling, and plaintiffs sued defendants for negligence and breach of warranty.

In reversing a judgment for defendants, the Second Circuit addressed the argument that because Nelson's representations postdated the sale, they could not be the "basis of the bargain" under section 2-313.²³⁹ It

235. See *Terry v. Moore*, 448 P.2d 601, 602 (Wyo. 1968) (stating that alleged postcontract promise as to well's production capacity did not become part of bargain). After drilling a well pursuant to an oral agreement, the contractor allegedly told the owner that the well would produce 400 gallons per hour, which it did not. Citing § 2-313, the well owner claimed that the contractor had made a warranty. *Id.* The court noted that regardless of any statement the contractor may have made, it was neither "a part of the basis of the bargain" nor "did it induce the bargain." *Id.* The court explained that "the parties had their bargain and contract before the well was started. No new bargain or contract was made when the test was run." *Id.*

236. 506 F.2d 551 (2d Cir. 1974).

237. *Id.* at 553. Farmers would not bale and store hay that had a high moisture content because of the possibility it would mold and create a risk of fire from spontaneous combustion. *Id.*

238. *Id.*

239. *Id.* at 555 n.6.

was undisputed that the defendants' representatives visited the plaintiffs "to promote the sale of the product."²⁴⁰ Accordingly, the court concluded that the representations "might constitute an actionable modification of the warranty."²⁴¹

The problem in *Bigelow* is the apparent absence of an agreement to modify.²⁴² Although consideration is unnecessary to have a binding modifying agreement, under the plain language of section 2-209(1) there must be an agreement, a "bargain of the parties in fact," to modify the sales contract.²⁴³ Stated otherwise, section 2-209(1) merely removes the preexisting duty rule as an impediment to the enforcement of an agreement to modify a contract.²⁴⁴

Comment 7 to U.C.C. 2-313 supports the view that the seller's post-contract promise or affirmation must be more than an unsolicited statement. The only illustration given in comment 7 of postclosing language that becomes a modification is "when the buyer when taking delivery asks and receives an additional assurance."²⁴⁵ In this example, the parties have at least manifested mutual assent to the additional assurance resulting from the buyer's request and the seller's consent to that request.²⁴⁶

It seems difficult to characterize the *Bigelow* facts as a factual bargain. Realistically, they show nothing more than a statement by Nelson that the hay in the field could be baled if defendant's product were used and plaintiff's reliance on that statement. There is no indication that Nelson

240. *Bigelow v. Agway, Inc.*, 506 F.2d 551, 555 n.6 (2d Cir. 1974).

241. *Id.*

242. This problem was not presented to the court. Nor did the defendants raise the question of whether U.C.C. § 2-209(1) can be invoked if the contract has been performed by either or both parties. *Id.*; see also RESTATEMENT (2D), *supra* note 35, § 89 (§ 89 applies only to modifications of wholly executory contracts).

243. U.C.C. § 2-209.

244. *Id.* "This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments." *Id.* cmt. 1; see also FARNSWORTH, *supra* note 63, § 4.22 (preexisting duty rule).

245. U.C.C. § 2-313 cmt. 7 (1989) (emphasis added). In pertinent part, comment 7 states: "[i]f language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (section 2-209)." *Id.*

246. See *Global Truck & Equip. Co., Inc. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 645, 652 (N.D. Miss. 1986) (interpreting *Bigelow* as indicating that "usual prerequisite of mutual assent" required for postsale warranty modification). The court then noted that "[i]f the buyer is not aware of the affirmation of fact and there is no evidence of any reliance on such affirmation, then it would seem that the mutual assent requirement is not met such that a binding modification does not exist." *Id.*

The illustration in comment 7 implies that manifestations of mutual assent to the seller's statement alone may be sufficient for a modification agreement and that mutual assent to an exchange is not required. This is not, however, entirely clear. Although the illustration does not indicate that the buyer would not have taken delivery without the additional assurance, perhaps it can be inferred.

was seeking to enter into a bargain as distinguished from simply promoting the product for the future. Nelson was not seeking anything in return for his statement. Nor is there any indication that plaintiff Bigelow wanted any additional assurance relating to the product. In other words, there was no mutual assent stemming from a request by the buyer.²⁴⁷

Bigelow did not consider enforcing the seller's postcontract statement on common-law principles based on the buyer's reliance on that statement.²⁴⁸ Instead of stretching to conclude that the seller's postcontract statement "might constitute an actionable modification of the warranty," the court should have considered applying the principle of promissory estoppel to the seller's postsale statement.²⁴⁹ For the facts would have justified a finding in *Bigelow* that defendants reasonably would have expected the postsale representations to induce plaintiff Bigelow to use the product, and that it induced such action.

B. After Complete Performance

Turning now to contracts that have been fully performed, may a promise or affirmation of fact relating to the subject matter of the contract made after full performance by both parties be enforceable as a modification to the contract? Under both general contract principles and the U.C.C. the answer should be "no." By definition, a modification to a contract must occur before both sides have fully performed. Once the contract has been fully performed, neither party remains contractually

247. The Tenth Circuit decision in *Downie v. Abex Corp.*, 741 F.2d 1235 (1984), does not add to the teaching of *Bigelow*. In *Downie*, the plaintiffs sued to recover for personal injuries they suffered when an airplane passenger-loading bridge (Jetway) manufactured by the defendant collapsed. In its claim-over against General Motors (GM), the defendant asserted that a component part it purchased from GM and added in the Jetway did not conform to a postsale express warranty that the component part was fail-safe. *Downie v. Abex Corp.*, 741 F.2d at 1236-37. Citing and quoting *Bigelow*, the Tenth Circuit found that GM's representations became part of the basis of the bargain because they "were designed to promote future sales." *Id.* at 1240. The court does not explain, however, how a statement made to promote the future sale of the product can conceivably be the basis of the bargain of a past sale.

GM's contention that "there was no mutual agreement to modify" its original limited warranty was given short shrift. Without any discussion, the court held that from all the evidence a jury could have found that "both parties recognized and assented to" the new absolute warranty. Given that the opinion does not show that the buyer had requested an additional assurance or threatened to return the component part, the court in essence is saying, as did the *Bigelow* court, that a seller's unsolicited statement may be enforceable as an agreement modifying a contract.

248. U.C.C. § 1-103 (principles of law and equity apply unless replaced by particular Code provisions).

249. RESTATEMENT (2D), *supra* note 35, § 90 (promissory estoppel). This assumes that the courts would treat a representation the same as a promise in the postsale context. Because the contract in *Bigelow* appears to have been completely performed by each party, § 89(c) of the Restatement Second would not apply to any postsale promise. See *supra* note 216 (quoting Restatement Second § 89(c)).

obligated to do anything.²⁵⁰ Simply put, there is no existing contract to be modified. Any further agreement, therefore, would not be a modification of the parties' original contract but would constitute a new and separate agreement that would require consideration or a substitute to be enforceable.²⁵¹

CONCLUSION

Freed from their historical shackles, express warranties, more specifically promises or affirmations of fact relating to the subject matter of contracts, should be treated the same as any other terms of the contract. Given the context in which they are made, both a promise and an affirmation of fact should be enforceable under contract principles. Between the promisor and promisee, the requirements for the formation of a contract should apply to the creation of an express warranty just as they apply to price, quantity, or any other contract term. Thus, no reliance should be required to create such a warranty between the contracting parties because only mutual assent and consideration, not reliance, are necessary to contract formation involving a bargain. The extent of the relief available for breach of an express warranty, however, may be affected by the promisee's precontract knowledge as to the truth of the fact affirmed or promised or her lack of interest in or disbelief of that fact.

Postcontract statements relating to the subject matter of the contract similarly should be enforceable solely on a contract theory. Thus, if the statements are untrue, the promisor should be liable for any damage caused if the statements constitute, or are part of, an enforceable modification of the original contract or are otherwise enforceable because of the promisee's reliance.

Unfortunately, neither the U.C.C. nor case law attempts to distinguish between commercial and consumer transactions. While no distinction should be drawn when dealing with express warranties, there appears to be justification for holding the mass-consumer marketer liable for the truth of affirmations or promises relating to the item being sold. This would be true even though the consumer never read or saw the advertisement or other literature containing the affirmation or promise or learned of its contents. Liability of this nature, however, must be imposed by law and should not be imposed by indulging in the fiction that such statements are part of the basis of the parties' bargain.

250. RESTATEMENT (2D), *supra* note 35, § 235(1) ("full performance of a duty under a contract discharges the duty"); *see also* FARNSWORTH, *supra* note 63, § 8.8. "All contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts." 1 WILLISTON, CONTRACTS, *supra* note 91, § 14; *see also* CLARENCE ASHLEY, LAW OF CONTRACTS § 6 (1911).

251. *See* RESTATEMENT (2D), *supra* note 35, § 90 (promissory estoppel).

