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## THE MEANING OF "PART OF THE BASIS OF THE BARGAIN"

*Let us use with care those living messengers called words.\**

### INTRODUCTION

Section 2-313 of the Uniform Commercial Code (U.C.C.) outlines the law of express warranty for the sale of goods.<sup>1</sup> An express warranty is created under this section when a seller's (or manufacturer's)<sup>2</sup> representation in the form of an affirmation of fact, a promise, a description, a sample, or a model becomes "part of the basis of the bargain."<sup>3</sup> The intention of the seller to warrant the goods is not necessary to impose an express warranty,<sup>4</sup> only a representation that becomes "part of the basis of the bargain."<sup>5</sup>

The phrase, "part of the basis of the bargain," is unique to section 2-313 and new to the law of warranty. Before the

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<sup>1</sup> 1979 by Kevin McIvers.

\* William Q. Judge, 19th Century lawyer and philosopher.

1. "Goods" are defined as:

all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . . "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty.

U.C.C. § 2-105(1).

2. U.C.C. § 2-318 defines the liability of a seller to a remote user who is not in privity of contract with that seller. California has not adopted this provision, however, and relies wholly upon case law. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 331 n.16 (1972).

3. The following is the full text of U.C.C. § 2-313:

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

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

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

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

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

4. U.C.C. § 2-313(2).

5. *Id.* § 2-313, Official Comment 3.

U.C.C. was adopted, section 12 of the Uniform Sales Act (hereafter Sales Act) governed the law of express warranty for the sale of goods. That section stated that an express warranty was created if the affirmation of fact or promise had a "natural tendency . . . to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."<sup>6</sup> When the Sales Act was rewritten in the form of the U.C.C.,<sup>7</sup> the reference to reliance in express warranty was omitted, indicating the intention of the drafters to alter the old standard. Reliance has been replaced with the concept "part of the basis of the bargain."

The exact meaning of the phrase "part of the basis of the bargain" has not been agreed upon. This confusion is not surprising since neither the text of section 2-313 nor the Official Code Comments (hereafter Comments), which accompany the text, offer a clear definition.<sup>8</sup>

The author's purpose in this comment is to define the phrase "part of the basis of the bargain." Initially, the three general interpretations of section 2-313 most frequently suggested by commentators are considered. Second, U.C.C. section 2-313 is applied to four factual settings. These four settings are: (1) the buyer is unaware, at the moment of purchase, of an existing representation; (2) the representation is made to a buyer after the sale; (3) the buyer knows, at the moment of sale, of an existing representation; and (4) the buyer knows that an existing representation is false. Third, a comparison is made between section 2-313 and other theories of product liability. Finally, a definition of "part of the basis of the bargain" is offered.

#### SUGGESTED INTERPRETATIONS OF SECTION 2-313

In *Hauter v. Zogarts*,<sup>9</sup> the California Supreme Court ad-

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6. UNIFORM SALES ACT § 12 (1906 version).

7. See U.C.C. § 2-313, Official Comments, *Changes*.

The Comments were written to aid in the interpretation of the text. This purpose was explained by the drafters in the 1954 version of the U.C.C., but was omitted from later drafts:

The Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted in the construction and application of this Act, but if text and comment conflict, text controls.

U.C.C. § 1-102(3)(f) (1954 version).

8. The Comments to section 2-313 discuss application of the section to some specific factual settings but leave many questions unanswered. A comprehensive definition of "part of the basis of the bargain" is not attempted.

9. 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975).

dressed the interpretation of section 2-313 for the first time. The court recognized the three interpretations that are usually offered: (1) the plaintiff must affirmatively prove reliance, as under the Sales Act;<sup>10</sup> (2) reliance is presumed, and the defendant has the burden of proving that the plaintiff did not rely; (3) no reliance need be shown or presumed to establish the existence of an express warranty.<sup>11</sup> Although the facts of this case did not require the court to state its position,<sup>12</sup> the court rejected the first interpretation requiring proof of reliance.<sup>13</sup> No opinion as to the other two positions was given. A careful reading of the Comments supports the court's rejection of strict reliance and sheds some light on the other two interpretations.

### *Strict Reliance*

The reasons for rejecting the interpretation requiring affirmative proof of reliance are clear. The word "reliance" does not appear in the text in section 2-313. This absence is conspicuous, given the requirement of reliance in the Sales Act<sup>14</sup> and in the two other product liability theories based upon a seller's representation, strict liability for innocent misrepresentation,<sup>15</sup> and negligent misrepresentation.<sup>16</sup> This time-honored concept would not have been replaced with new and difficult language unless some change had been intended. The U.C.C. drafters included a requirement of reliance in section 2-315, implied warranty of fitness for a particular purpose,<sup>17</sup> making it clear that they realized a distinction between the traditional reliance test and the words "part of the basis of the bargain." Furthermore, Comment 3 explicitly states: "[N]o particular reliance on such statements [affirmations of fact] need be shown in order to weave them into the fabric of the agreement."<sup>18</sup> No other reference to reliance is made in the comments.

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10. UNIFORM SALES ACT § 12 (1906 version).

11. 14 Cal. 3d at 115-16, 534 P.2d at 383-84, 120 Cal. Rptr. at 687-88.

12. The plaintiff, Fred Hauter, clearly relied upon the seller's representation and therefore could meet his burden of proof regardless of which test was applied. *Id.* at 116-17, 534 P.2d at 384, 120 Cal. Rptr. at 688.

13. *Id.* at 115, 534 P.2d at 383-84, 120 Cal. Rptr. at 687-88.

14. UNIFORM SALES ACT § 12 (1906 version).

15. RESTATEMENT (SECOND) OF TORTS § 402-B (1965).

16. *Id.* § 311.

17. U.C.C. § 2-315.

18. *Id.* § 2-313, Official Comment 3.

### *Presumption of Reliance*

The position that the defendant must rebut a presumption of reliance is based upon two statements in the Comments. Comment 3 states: "[A]ny fact which is to take . . . affirmations, once made, out of the agreement requires clear affirmative proof."<sup>19</sup> Comment 6 states: "[T]he presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain."<sup>20</sup> These statements have been interpreted to mean that a presumption of *reliance* is created which may be overcome by affirmative proof of non-reliance.<sup>21</sup>

The Comments do not support this position, however, and nowhere in the text of section 2-313 is it stated that a presumption of reliance is created. The presumption created is not that reliance existed, but rather that a representation became part of the basis of the bargain—a different concept.<sup>22</sup> If the drafters had intended that a presumption of reliance be created by section 2-313, it would have been a simple matter to explain the presumption in the text and Comments using the word "reliance." The fact that the word was avoided is strong evidence that affirmative proof of reliance by a plaintiff is not necessary. It is equally strong evidence that a presumption of reliance has not been created.

### *No Reliance*

Although the Comments do not unequivocally state that the Sales Act standard of reliance was purposefully abandoned, it must be assumed from the lack of support in the text and Comments for any theory under section 2-313 utilizing reliance that "part of the basis of the bargain" does not express the same concept as reliance.

If it does not include reliance, "part of the basis of the bargain" must be defined in other terms. Considering the application of section 2-313 to particular factual situations will be helpful in such a definition.

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19. *Id.*

20. *Id.* § 2-313, Official Comment 6.

21. Ezer, *The Impact of the U.C.C. on the California Law of Sales Warranties*, 8 U.C.L.A. L. Rev. 281, 285 n.30: "The Code's implicit premise is that the buyer's reliance is prima facie established from the fact that he made the purchase." See also J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 279 (1972).

22. Notice the choice of words in Comment 6. "Reliance" is not used. U.C.C. § 2-313, Official Comment 6.

## APPLICATION OF SECTION 2-313

In spite of the absence of any reference to reliance in section 2-313, courts and writers have usually insisted upon some requirement of reliance.<sup>23</sup> In *General Supply & Equipment Co., Inc. v. Phillips*,<sup>24</sup> the Texas Court of Civil Appeals outlined that state's requirements under section 2-313: a plaintiff must show (1) the existence of an affirmation or promise relating to goods, (2) the affirmation or promise became part of the basis of the bargain, and (3) the injured party relied upon the seller's representation in purchasing the goods.<sup>25</sup> In *Eddington v. Dick*,<sup>26</sup> the interpretation of a New York court was virtually identical in form to the Sales Act standard. It required (1) an affirmation of fact or promise by the seller, (2) the natural tendency of which is to induce the buyer to purchase the goods, and (3) that the buyer purchases the goods in reliance thereon.<sup>27</sup>

These and other cases show that courts have fallen back on the familiar standard of reliance for lack of a clear definition of "part of the basis of the bargain." However, since reliance is not called for in the text or Comments of section 2-313, its application should not include reliance. Instead, a new standard must be developed. By applying section 2-313, with the guidance of the Comments, to several factual settings, the nature of such a new standard can be demonstrated.

*Buyer is Unaware of an Existing Representation*

In this situation, the buyer, at the moment of purchase, is unaware of an existing express warranty created by a seller for the benefit of the class of persons of which the buyer is a member (prospective buyers). Here, the ability of section 2-313 to

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23. See generally W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE U.C.C. 58 (1964); Kock, *Seller's Responsibility for His Goods Under the U.C.C.*, 41 N.D. L. REV. 24, 26 (1964); Lauer, *Sales Warranties Under the U.C.C.*, 30 Mo. L. REV. 259, 265-66 (1965); Shanker & Abel, *Consumer Protection Under Article 2 of the U.C.C.*, 29 OHIO L.J. 689, 690 (1968); *Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967); *Hrosik v. J. Keina Builders*, 37 Ill. App. 3d 352, 345 N.E.2d 514 (1976); *Stamm v. Wilder Travel Trailers*, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976); Ill. General Supply & Equipment Co. v. Phillips, 490 S.W.2d 913 (Tex. Ct. App. 1972); *Eddington v. Dick*, 87 Misc. 2d 793, 386 N.Y.S.2d 180 (1976).

24. 490 S.W.2d 913 (Tex. Ct. App. 1972).

25. It is interesting to note that this court required both that the buyer rely and that the representation become part of the basis of the bargain, indicating an implicit recognition that the two are different concepts. No attempt was made to define the nature of this difference, however. *Id.* at 917.

26. 87 Misc. 2d 793, 386 N.Y.S.2d 180 (1976).

27. *Id.* at 795, 386 N.Y.S.2d at 181.

reach beyond the scope of the Sales Act can be clearly seen.

An express warranty could not have existed under the Sales Act when a buyer was unaware of the representation, because a person cannot rely upon something completely outside of his or her knowledge and experience.<sup>28</sup> Likewise, if affirmative proof of reliance is required by U.C.C. section 2-313, an express warranty cannot exist under the U.C.C. without the buyer's knowledge of the representation before purchase.<sup>29</sup> Even creating a presumption of reliance would not change the outcome of a case in which the buyer is unaware of the representation, because such a presumption could easily be overcome by pointing to the plaintiff's lack of awareness of the representation.<sup>30</sup> An express warranty could not exist without the buyer's advance knowledge of the representation. However, a careful look at section 2-313 reveals the intention of the drafters to permit the plaintiff the possibility of recovery under an express warranty without prior knowledge of the representation.

In section 2-313(1)(a), which refers to representations made in the form of affirmations of fact or promises, the U.C.C. explicitly requires that the representation which relates to the goods be made "by the seller to the buyer."<sup>31</sup> In subsections (1)(b) and (1)(c), which refer to representations made in the form of descriptions, samples, or models, the requirement that a representation be made "to the buyer" is conspicuously missing.<sup>32</sup>

Since the language is so obviously different, the drafters must have intended to leave open the possibility that an express warranty of description, sample, or model could inure to the benefit of a particular buyer to whom it had not been personally communicated. This is very significant because there are few situations in which a seller's words, containing an affirmation of fact or promise relating to a product, do not also describe the product to some degree.<sup>33</sup> For example, to state

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28. See generally UNIFORM SALES ACT § 12 (1906 version).

29. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 277 (1972). "At minimum a plaintiff . . . should have to testify that he (or his agent) knew of and relied upon the advertisement in making the purchase." *Id.* at 280.

30. Under § 2-313, affirmative proof may overcome a presumption that a warranty is "part of the basis of the bargain." Whether the presumption is overcome is normally a question of fact. U.C.C. § 2-313, Official Comment 3.

31. U.C.C. § 2-313(1).

32. *Id.*

33. Comment 3 indicates that the drafters intended this broad interpretation of warranties of description: "In actual practice affirmations of fact made by the seller

that tests taken of a product "show no deterioration in five years of normal use" is to affirm a fact, but it is also to describe the quality of the product.<sup>34</sup> Thus, a buyer may often be protected by an express warranty of description, sample, or model of which that person was unaware of at the time of purchase because section 2-313 does not require communication from the seller "to the buyer" in such cases.<sup>35</sup>

The inclusion of the word "basis" in the text of section 2-313 is further evidence that reliance is not required and that an express warranty is not limited to the representations communicated to the buyer at or before the moment of sale. The key phrase could have been more concisely worded, "part of the bargain," "part of the sales agreement," or "part of the contract of sale." The words "bargain," "agreement," or "contract" by themselves convey clearly and simply the idea that communication of the representation between the seller and the buyer must occur, if the representation is to be a binding part of the sales contract. Without modification, these words imply mutual knowledge, understanding, and consent. The word "basis" adds nothing to such an interpretation. To one who is thinking in terms of standard contract law or in terms of an express warranty based upon the concept of reliance, the word is unnecessary and confusing. "Basis" must be intended to create a different meaning.

"Basis" is defined as "foundation" and as "something upon which something else is constructed or established."<sup>36</sup> A sales agreement or bargain is established upon the basis of a collection of laws and accepted practices within a particular marketplace, as well as upon agreements between parties. These rules and practices within the marketplace make up the general commercial setting, which is the "foundation" of each sales agreement—the "basis" of each bargain. Of course, reliance by one party on an agreement or on a promise of another may be a part of the total setting in which a particular sale is made, but it does not constitute the entire "basis." Other fac-

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about the goods during a bargain are regarded as part of the description of these goods. . . ." U.C.C. § 2-313, Official Comment 3.

34. General Supply & Equipment Co. v. Phillips, 490 S.W.2d at 917-18.

35. This distinction within section 2-313 may indicate an intent to distinguish between personal communications and generally communicated representations. It is fair that a *personal* communication between one seller and one buyer (affirmation of fact or promise) would not be a sufficient basis to create an express warranty for the benefit of future buyers who happen to become aware of the content of that personal communication.

36. WEBSTER'S NEW COLLEGIATE DICTIONARY 93 (8th ed. 1974).

tors, such as the relevant laws, customs of the trade, market conditions, and advertising, are always involved. However, the language of the statute requires only that the representation form a "part of the basis of the bargain."<sup>37</sup>

To be "part of the basis of the bargain," a representation must constitute some portion ("part") of the particular commercial environment ("basis") in which the sale ("bargain") is made. Therefore, a representation can either be generally communicated in the marketplace of the product, or be communicated to a particular buyer.<sup>38</sup>

Such a reading of section 2-313 is supported by Comment 2: "[T]he warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to *sales contracts* or to the direct parties to such a contract (italics added)."<sup>39</sup>

Thus it would be consistent with section 2-313 for a court to find an express warranty even though the representation was not actually an element of the sales negotiation or agreement. The nature of the interaction between a seller and a buyer in establishing a contract of sale is immaterial to the question of whether an express warranty has been created by that seller. Courts are invited to step creatively beyond the limitations imposed by the old law of express warranty.

Once the seller's representation has been found to be a part of the commercial setting in which a particular product is marketed, the final question to be considered is that of fairness.<sup>40</sup> If the circumstances are such that it would be fair to bind a seller to the representation, an express warranty exists. Fairness is not explicitly defined in the Comments. We know, however, that buyer reliance is not a factor.

The above analysis is well illustrated in three recent cases. In *Jackson v. Muhlenburg Hospital*,<sup>41</sup> the defendant hospital was sued when a patient contracted hepatitis following blood transfusions. A label on the container of blood, which neither

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37. U.C.C. § 2-313.

38. Examples of representations communicated generally in the marketplace are: (1) advertisements; (2) information on labels and containers; (3) notices of warranty or guarantee intended to pass with the product at sale.

39. U.C.C. § 2-313, Official Comment 2.

40. "The sole question is whether the language or samples or models are *fairly* to be regarded as part of the contract." U.C.C. § 2-313, Official Comment 7 (italics added).

41. 53 N.J. 138, 249 A.2d 65 (1969).

the plaintiff nor her husband saw, guaranteed the "utmost care in the selection of donors. . . ."42 In sending the case back for retrial on the issue of the care used in selecting donors, the court held: "The fact that the patient and her husband probably never saw the label on the container of blood has not been overlooked. They are nevertheless entitled to the benefit of the express warranty."<sup>43</sup>

*Marston v. E.I. DuPont de Nemours & Company, Inc.*<sup>44</sup> involved the sale and use of an insecticide. The product label stated that it was recommended for use as a transplant water treatment for tobacco growing. The plaintiff used the product for the prescribed purpose with the result that his crop was badly damaged. Although the plaintiff testified that he did not read the label until after delivery, the court held that an express warranty was created for his benefit, reliance not being an element of a section 2-313 cause of action.<sup>45</sup>

In *Winston Industries, Inc. v. Stuyvestant Ins. Co.*,<sup>46</sup> the buyer purchased a new mobile home to be used as a personal residence. Shortly after purchase, the mobile home was badly flooded as the result of a disconnected waterline. The flooding caused extensive and permanent damage to the mobile home. While it was a business practice of the seller to place a written warranty in every mobile home sold, no warranty ever reached the purchaser in this case. In affirming a judgment for the plaintiff, the court said: "[D]espite the fact that the purchaser did not physically receive a copy of the written expressed warranty an express warranty was, in fact, in existence and does inure to the benefit of appellee."<sup>47</sup>

The interpretation of section 2-313 employed by the courts in the *Jackson*, *Marston*, and *Winston Industries* cases is consistent with the public policy considerations which underlie the U.C.C.<sup>48</sup> A seller is encouraged to make only careful and accurate representations and to continue to produce a product which meets the minimum standard of quality established by the representation. Comment 4 states that "the whole purpose of the law of warranty is to determine what it is that the seller

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42. *Id.* at 66.

43. *Id.*

44. 23 U.C.C. Rptr. 1140 (W.D. Va. 1978).

45. The district court cited Comment 4 as authority: "[N]o particular reliance need be shown. . . ." *Id.* at 1142.

46. 55 Ala. App. 525, 317 So. 2d 493 (Civ. App. 1975).

47. *Id.* at 529, 317 So. 2d 496.

48. See R. NORDSTROM, HANDBOOK OF THE LAW OF SALES 209 (1970).

has in essence agreed to sell."<sup>49</sup> It is the seller, by the representation made, who sets the standard of quality to which the goods must conform, thereby agreeing to sell to the potential buyer goods of the quality described. By focusing on the content of the representation rather than on the buyer's reliance, the policy of encouraging the responsible marketing of high quality goods is best realized. It is not reasonable to deny a buyer the protection of an express warranty because the buyer happened not to read the representation. The California Supreme Court noted this view in *Hauter*, stating: "[I]f a seller agrees to sell a certain quality of product, he cannot avoid liability for selling lower grade goods. No longer can he find solace in the fact that the injured consumer never saw his warranty."<sup>50</sup>

### *Representation Is Made to the Buyer After the Sale*

It is not uncommon for a purchaser to receive additional assurances from a seller after the moment of purchase. Since the purchase has already been completed, it is not possible that the buyer purchased in reliance upon the representation. Under the Sales Act, therefore, no express warranty would exist.<sup>51</sup>

However, an express warranty may be created in this way because reliance is not an element under the U.C.C. Comment 7 states:

The precise time when the 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. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (§2-209).<sup>52</sup>

*Jones v. Abriani*<sup>53</sup> illustrates the proper application of this principle. In that case, promises made by a seller to a buyer after the purchase of a mobile home were designed to induce

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49. U.C.C. § 2-313, Official Comment 4.

50. *Hauter v. Zogarts*, 14 Cal. 3d 104, 116 n.12, 534 P.2d 377, 384 n.12, 120 Cal. Rptr. 681, 688 n.12 (1975). The court here merely took note of this view without expressing its position.

51. UNIFORM SALES ACT § 12 (1906 version).

52. U.C.C. § 2-313, Official Comment 7.

53. 350 N.E.2d 635 (Ind. Ct. App. 1976).

the buyer to accept delivery of the product with certain defects. The court held that an express warranty by modification was created, even though no reliance could have existed on the facts.<sup>54</sup>

One commentator suggests another rationale for post-sale representations becoming express warranties without additional consideration: "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."<sup>55</sup> Under this theory, a post-sale representation could easily be seen as creating an express warranty. Consideration for the warranty is found in a buyer's forbearance to return the product for refund.<sup>56</sup> However convincing this rationale might be, it is unnecessary because the U.C.C. clearly requires no showing of consideration of any kind to create an express warranty by modification.<sup>57</sup>

Some courts refuse to recognize an express warranty when the representation comes after the sale. In *Hrosik v. J. Keim Builders*,<sup>58</sup> the court held that a written warranty on a home delivered after purchase was not an express warranty under U.C.C. section 2-313 because "reliance [at the time of purchase] is missing."<sup>59</sup> Such a ruling is manifestly unfair and fails to take into account the explicit provision for modification under section 2-209,<sup>60</sup> where reliance is not required.

Post-sale express warranties by modification are another example of the U.C.C. explicitly abandoning the concept of reliance in express warranty.

### *Buyer Knows of an Existing Representation*

The most common factual setting in express warranty cases is that in which the representation is communicated to a buyer at or before the moment of purchase. This situation occurs frequently in express warranty cases because it is only with the buyer's advance knowledge of a representation that it is possible to find reliance, which has often been considered

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54. *Id.* at 645.

55. R. NORDSTROM, *supra* note 48, at 206.

56. *Id.* at 207.

57. U.C.C. § 2-209(1).

58. 37 Ill. App. 2d 352, 345 N.E.2d 514 (1976).

59. *Id.* at 354, 345 N.E.2d at 515.

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

necessary to create a section 2-313 express warranty.

When the representation is communicated to the buyer at or before purchase, courts usually have no trouble finding reliance and, therefore, an express warranty. Of course, proving reliance, that is, a dependency existing in a human mind at a particular moment, is a task more metaphysical than legal.<sup>61</sup> It has generally been sufficient to show that "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."<sup>62</sup> A seller's statement communicated to a buyer which reflects positively upon a product, and that buyer's eventual purchase of the product, is all that is needed to establish reliance.

With a buyer's advance knowledge of a representation, there should also be no difficulty in finding that a representation has become "part of the basis of the bargain." Writers have agreed that the test under section 2-313 is satisfied if reliance is found to exist.<sup>63</sup> That a buyer relies upon a representation is ample proof that it has become a part of the commercial environment within which the sales contract is made.

Even with no proof of reliance, a buyer may still be protected by an express warranty if it is "part of the basis of the bargain,"<sup>64</sup> since representations communicated to the general market in which the product will be sold or to a particular buyer form part of the foundation of the sale to that buyer. Nothing else need be shown "to weave them [representations] into the fabric of the agreement."<sup>65</sup> In *Gillette Dairy, Inc. v. Hydrotex Industries*,<sup>66</sup> the court held that the trial court had properly left it for the jury to determine whether a representation made before purchase, concerning oil used in the plaintiff's machinery, had become "part of the basis of the bargain," even though there was apparently no reliance in the purchase. Reli-

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61. See Ezer, *The Impact of the U.C.C. on The California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281 (1961). He stresses the role of § 2-313 in deemphasizing the "metaphysical buyer's reliance" test. *Id.* at 285.

62. J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 278 (1972). The authors quote Professor Williston's analysis of the burden of proof under the Uniform Sales Act, but without reference to reliance. S. WILLISTON, *SALES* 206 (rev. ed. 1948). See also *Steiner v. Jarrett*, 130 Cal. App. 2d 869, 280 P.2d 235 (1954).

63. "If the seller's statements would have met the test of the Uniform Sales Act, the 'basis of the bargain' test of the Code has been satisfied." R. NORDSTROM, *supra* note 48, at 205.

64. U.C.C. § 2-313, Official Comment 3.

65. *Id.*

66. 440 F.2d 969 (1970).

ance was not seen as being synonymous with "part of the basis of the bargain."<sup>67</sup>

The only time a representation might not constitute an express warranty at the time of purchase is when it is merely a statement of the value of the goods or of the seller's opinion regarding the goods,<sup>68</sup> or when the particular representation is properly disclaimed by the seller.<sup>69</sup> Even when the representation is one of value or opinion, it is a question of fact whether it has become a "part of the basis of the bargain."<sup>70</sup>

### *Buyer is Aware that a Warranty is False*

When a buyer becomes aware before purchase that a product does not conform to a seller's representation, it is generally held that the buyer cannot later assert a claim based upon that representation.<sup>71</sup> This point of view is based upon the idea that some quantum of reliance is required by U.C.C. section 2-313, and that a buyer would not rely upon information known to be inaccurate.<sup>72</sup> Since reliance is not an element of section 2-313,<sup>73</sup> this reliance analysis is inappropriate. The facts must be analyzed according to the letter and the spirit of section 2-313.

Section 2-313 does not directly address the situation in which a buyer purchases knowing that a representation is false. However, the subject of a buyer's advance knowledge of non-conformity with a warranty is discussed in U.C.C. section 2-316. This section states: "[W]hen the buyer before entering the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no *implied* warranty with regard to defects which an examination ought in the circumstances to have revealed to him."<sup>74</sup>

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67. *Id.*

68. U.C.C. § 2-313(2): "[A]n affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

69. U.C.C. § 2-313, Official Comment 4: "[T]he parties . . . [may] make their own bargain as they wish."

70. U.C.C. § 2-313, Official Comment 8.

71. See 1 R. ANDERSON, *UNIFORM COMMERCIAL CODE* 492 (2d ed. 1970). A representation "cannot be regarded as having formed part of the basis of the bargain when the buyer knew that it was not true." *Id.*

72. See *City Machine & Mfg. Co. v. A. & A. Machine Corp.*, 4 U.C.C. Rptr. 461 (E.D.N.Y. 1967).

73. "[N]o particular reliance on such statements need be shown." U.C.C. § 2-313, Official Comment 3.

74. U.C.C. § 2-316(3)(b) (emphasis added).

A reference to express warranty in section 2-316 would not have been awkward or out of context, yet it is not mentioned. This suggests that the drafters' intention was that express warranties may exist regardless of the buyer's knowledge of a defect.

This is in accordance with the section 2-313 requirement that a representation be a "part of the basis of the bargain."<sup>75</sup> This "part" may be a very significant or a very minor contribution to the commercial environment in which the bargain is made, and the degree to which the buyer believes or is influenced by a representation (reliance) is immaterial. The only question is whether the representation may be fairly considered a part of the commercial setting which is the foundation of the sales contract. The focus is on the seller's representation.

There are many instances in which it would be fair to give a buyer the protection of an express warranty, even though the buyer did not believe at the time of purchase that the product would conform to the seller's representation. For example, words that describe the product may be of such a general nature that a buyer is not certain about what sort of defects are covered. A buyer may not agree at the time of purchase that a product is in "good condition" as warranted.<sup>76</sup> Minor defects may be apparent that, in the buyer's opinion, indicate that the product does not conform to the representation. However, the buyer may purchase the product anyway on the belief that the representation is insurance against the appearance of other defects in the future, and that the product is a good deal in spite of its minor deficiencies. It would be unfair and therefore contrary to section 2-313<sup>77</sup> to deny the buyer the protection of an express warranty when major defects become apparent because of the buyer's subjective belief that the product with certain minor defects is not in "good condition."

A second instance in which it would be proper to find an express warranty is when non-conformity with a representation is not apparent to a buyer while the product is still on the shelf. Although the buyer does not believe at the time of purchase that a product will perform as warranted, the product may be the sort of item which makes it very difficult to know in ad-

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75. U.C.C. § 2-313.

76. See generally *Jansen v. Hook*, 1 Ill. App. 3d 318, 272 N.E.2d 385 (1971), in which a truck represented to be in "good condition" was inspected and test-driven by the buyer before purchase. The court would not allow recovery because the buyer did not initially believe that the truck was in good condition.

77. "The sole question is whether the language or samples or models are fairly to be regarded as part of the contract." U.C.C. § 2-313, Official Comment 7.

vance how well it will perform. An impatient buyer may be persuaded to purchase against better judgment, believing that it will be possible to return the item for exchange or refund if it does not conform to the seller's representations. It would be unfair to penalize the buyer who decides to give the seller the benefit of the doubt.

These two examples are not exhaustive of the cases that arise in which it is just to hold a seller bound by a representation that a buyer believes to be inaccurate. The U.C.C. presumes that a representation becomes part of the basis of a bargain<sup>78</sup> because of its policy to hold a seller to what he has agreed to sell, in all but the most unusual circumstances.<sup>79</sup> This presumption is not overcome by showing that a buyer has not relied. However, a buyer will be denied recovery on the basis of fairness if it appears that the purchase was not made in good faith or that the parties explicitly agreed that the particular representation would not apply to their sales agreement. Comment 4 states that the parties to a sales contract may "make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor. . . ."<sup>80</sup> Thus, a seller will not be bound by an express warranty when it is clear that a buyer, who was aware of the product's inadequacy, fully intended at the time of purchase to return the product for refund after enjoying its use for a period of time.

#### SECTION 2-313 AND OTHER PRODUCT THEORIES

Defining "part of the basis of the bargain" without reading in a requirement of reliance does not create unnecessary overlap with other product and warranty theories. No other theory covers the non-relying buyer who suffers only the economic loss of purchasing a product that does not conform to an express warranty but is not "unmerchantable."<sup>81</sup> Since the purpose of section 2-313 is to determine what the seller agreed to sell, a buyer is not denied the benefit of an express warranty because he did not rely<sup>82</sup> or was not injured,<sup>83</sup> or because the product is

78. U.C.C. § 2-313, Official Comments 3, 7.

79. 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.

U.C.C. § 2-313, Official Comment 4.

80. *Id.*

81. See U.C.C. § 2-314, which defines merchantability.

82. See RESTATEMENT (SECOND) OF TORTS §§ 311, 402-B (1965); U.C.C. § 2-315.

83. See RESTATEMENT (SECOND) OF TORTS §§ 311, 402-A, 402-B (1965).

not fundamentally "unfit."<sup>84</sup> These factors, which are required elements of other theories of products liability, have nothing to do with what a seller has offered for sale.

Even in cases in which other theories could protect the buyer, as when a product is defective<sup>85</sup> or unmerchantable<sup>86</sup> and when personal injury or property damage has resulted from the inadequacy,<sup>87</sup> a non-relying buyer can benefit from the applicability of section 2-313. Establishing the existence of a defect or of unmerchantability at a trial can be very costly and difficult. Non-conformity with an express warranty is generally much easier to show.<sup>88</sup> In such cases, application of section 2-313 would make proof under the other, more difficult theories unnecessary because the inadequacy of the product would be conclusively established by the seller's own standard. Early settlement of cases would be encouraged and lengthy trials avoided.

#### CONCLUSION

The words "part of the basis of the bargain" in U.C.C. section 2-313 are intended to replace the Uniform Sales Act requirement of reliance with a broader test that is not based upon the attitude or conduct of the buyer but upon the representation of the seller.

A seller creates an express warranty in two ways: (1) by communication, directly to a buyer, of an affirmation of fact or a promise regarding the goods; or (2) by communication, to a class of persons of which the buyer is a member or directly to a particular buyer, of a description, sample, or model of the goods. Such representations constitute a part of the commercial setting in which the goods are purchased and are, therefore, a part of the basis of any subsequent sale or bargain. Reliance is strong evidence that a representation is "part of the basis of the bargain," but is not a necessary element.

This formulation is not unfair to a seller. It merely encourages honest dealing with the public. It is very fair to allow a seller to be measured by a standard that he or she created.

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84. See U.C.C. § 2-314.

85. See RESTATEMENT (SECOND) OF TORTS § 402-A (1965).

86. See U.C.C. § 2-314.

87. RESTATEMENT (SECOND) OF TORTS § 402-A (1965) applies only in cases involving personal injury or property damage.

88. See *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975). It would have been easier to show that the golfing gizmo was not "completely safe" as warranted than to show that it was defective under RESTATEMENT (SECOND) OF TORTS § 402-A, since a non-defective product is not necessarily completely safe.

Liability cannot be avoided merely because a particular buyer did not read a warranty.

Because fairness and good faith are built into the definition of express warranty under U.C.C. section 2-313, the seller has no cause to fear that the section will sweep too broadly. The circumstances of each case may be considered by a court to prevent buyer abuse of express warranty benefits. Therefore, the concept of reliance is not necessary to protect a seller from unfair claims.

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