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Can You Ever Disclaim an Express Warranty?

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CAN YOU EVER DISCLAIM AN EXPRESS WARRANTY?

KURT M. SAUNDERS*

Abstract.....	59
I. Creation of Express Warranties.....	61
II. Disclaimers of Express Warranties.....	62
III. Effectiveness of Express Warranty Disclaimers.....	65
A. Fraud and Misrepresentation.....	66
B. Unconscionability.....	67
C. Unfair Trade Practices and Consumer Protection Statutes.....	69
IV. Conclusion.....	71

“[W]arranties are favored in law, being a part of a man’s assurance.”¹

ABSTRACT

Article 2 of the Uniform Commercial Code (UCC) recognizes both express warranties and implied warranties of quality in the sale of goods. Within specific limits, the UCC permits sellers to exclude or modify implied warranties. When it comes to disclaiming express warranties, however, the UCC is not so explicit. However, sellers of goods sometimes inquire about the possibility of doing so and whether such disclaimers are enforceable. This essay attempts to answer these questions.

The principle of freedom of contract posits that parties are free to reach

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¹ EDWARD COKE & JOHN HENRY THOMAS, A SYSTEMATIC ARRANGEMENT OF LORD COKE’S FIRST INSTITUTE OF THE LAWS OF ENGLAND, ON THE PLAN OF SIR MATTHEW HALE’S ANALYSIS; WITH THE ANNOTATIONS OF MR. HARGRAVE, LORD CHIEF JUSTICE HALE, AND LORD CHANCELLOR NOTTINGHAM; AND A NEW SERIES OF NOTES AND REFERENCES TO THE PRESENT TIME – PRIMARY SOURCE EDITIONS 219–20 (Nabu Press 2013) (1818).

contracts on mutually agreed terms.² Most contracts for the sale of goods include various warranties of quality. A warranty is a guarantee or promise by the seller to the buyer that specific facts about the goods are true.³ Warranties tend to become an issue of contention when the buyer becomes dissatisfied with the goods after purchase. Article 2 of the Uniform Commercial Code⁴ (UCC) recognizes both express warranties and implied warranties. Within limits, the UCC permits sellers to exclude or modify implied warranties on the goods they sell. Although the implied warranties of merchantability⁵ and fitness for a particular purpose⁶ are imposed by operation of law, the UCC provides specific requirements by which the seller can disclaim either of these warranties.⁷

On occasion, a seller of goods will inquire about the possibility of disclaiming an express warranty. Unlike implied warranties, an express warranty is the result of a negotiated exchange between the buyer and seller.⁸ When it comes to disclaiming express warranties, however, the UCC is not so explicit.⁹ Can a seller ever disclaim an express warranty? This essay attempts to answer this question. In doing so, I first review how an express warranty arises under Article 2 of the UCC. Next, I consider whether the UCC allows for exclusions of express warranties and, if so, how this might be accomplished. Finally, I assess the extent to which an express warranty disclaimer would be enforceable.

² Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598 (1969).

³ See JOHN E. MURRAY, MURRAY ON CONTRACTS § 101(A) (5th ed. 2011).

⁴ U.C.C. §§ 2-313–2-315 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

⁵ *Id.* § 2-314. In its most commonly understood form, an implied warranty of merchantability requires that goods be “fit for the ordinary purposes for which such goods are used.” *Id.* § 2-314(2)(c).

⁶ *Id.* § 2-315. An implied warranty of fitness arises where the seller has reason to know of the consumer’s specific purpose for which the goods are required and the consumer is relying on the seller’s skill or judgment in selecting or furnishing goods for that purpose. *Id.* § 2-315.

⁷ *Id.* § 2-316. Any written warranty disclaimer must be conspicuous. *Id.* § 2-316(2). The implied warranty of fitness for a particular purpose must be disclaimed in writing, while a disclaimer of the implied warranty of merchantability must mention the term “merchantability.” *Id.* Similarly, warranties may be disclaimed by “language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.” *Id.* § 2-316(3)(a). Additionally, warranties will be effectively disclaimed when the consumer examines, or is provided with an opportunity to examine the goods, or “by course of dealing or course of performance or usage of trade.” *Id.* §§ 2-316(3)(b)–2-316(3)(c).

⁸ See *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 63 (Tex. 2008).

⁹ Before the enactment of the UCC, the courts routinely allowed for the disclaimer of express warranties on the basis of freedom of contract. See Note, *Implied and Express Warranties and Disclaimers Under the Uniform Commercial Code*, 38 IND. L.J. 648, 664 (1963).

I. CREATION OF EXPRESS WARRANTIES

A seller may create an express warranty by an affirmative statement of fact or promise regarding the goods being sold,¹⁰ through a description of the goods,¹¹ or by providing to the buyer a sample or model of the goods.¹² An express warranty will arise from any of these, provided it becomes part of the basis of the bargain of the contract, and the goods must conform to the description, promise, or model or sample.¹³ By making a promise or statement of fact about the goods, or providing a description of the goods that are part of the basis of the bargain of the contract, the seller creates an express warranty that the goods will conform to the description.¹⁴ Similarly, the seller is providing the buyer with a sample or model that becomes part of the basis of the bargain between the parties. This creates an express warranty that “the whole of the goods” will conform to the sample or model.¹⁵

Any of these become part of the basis of the bargain when the buyer relies on the description, promise, or model or sample in making his or her decision to purchase the goods. However, a consumer need not prove reliance since all representations of quality by the seller become part of the basis of the bargain unless “good reason is shown to the contrary.”¹⁶ Thus, the buyer’s awareness of the seller’s representations at the time of their agreement is sufficient to meet this requirement.¹⁷ In addition, the seller need not have a specific intent to make a warranty or use words like “warrant” or “guarantee” to create a warranty.¹⁸ However, statements by the seller relating to the value or opinion of the goods will not create an express warranty.¹⁹ It is important to differentiate statements of fact from statements of value or opinion. A statement like “these are the best microprocessors around” or “these tires are a great deal” are considered puffery or sales talk and do not create express

¹⁰ U.C.C. § 2-313(1)(a).

¹¹ *Id.* § 2-313(1)(b).

¹² *Id.* § 2-313(1)(c).

¹³ *Id.* § 2-313(1)(a).

¹⁴ *Id.* § 2-313(1)(b).

¹⁵ *Id.* § 2-313(1)(c).

¹⁶ *Id.* § 2-313 cmt. 8. In essence, there is a rebuttable presumption that the description, promise, or sample or model is part of the basis of the bargain between the parties.

¹⁷ *Id.* cmt. 3; *see, e.g.*, *Cipollone v. Liggett Grp., Inc.*, 893 F.2d 541 (3d Cir. 1990), *aff’d in part, rev’d in part*, 505 U.S. 504 (1992); *Daughtrey v. Ashe*, 413 S.E.2d 336 (Va. 1992); *England v. Leithoff*, 323 N.W.2d 98 (Neb. 1982).

¹⁸ U.C.C. § 2-313(2). Likewise, it is not necessary for the seller to have any particular experience in selling the goods at issue. *See Ewers v. Eisenzopf*, 276 N.W.2d 802 (Wis. 1979).

¹⁹ U.C.C. § 2-313(2).

warranties.²⁰

As can be seen, an express warranty goes to the essence of what the seller has agreed to sell.²¹ An express warranty may be oral or written.²² Unlike implied warranties, which arise automatically and require no particular statement or action by the seller,²³ express warranties result from any affirmative statement or action on the part of the seller relating to the quality or characteristics of the goods.

II. DISCLAIMERS OF EXPRESS WARRANTIES

In broad terms, the UCC provides that endeavors to disclaim warranties should be construed reasonably and enforced unless doing so would be unreasonable under the circumstances.²⁴ To allow a seller to disclaim an express warranty that the seller freely promised would appear to be illogical. As the comment to section 2-313 states: “‘Express warranties rest on ‘dickered’ aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms.’”²⁵ The conclusion that an express warranty, once made, cannot be disclaimed would appear to be indisputable.²⁶

Nevertheless, the UCC permits a seller to disclaim an express warranty through a confusing provision. Section 2-316 provides that wherever reasonable, an express warranty and a disclaimer of any express warranty are to be construed as consistent with each other.²⁷ However, subject to the provisions of the UCC on parol or extrinsic evidence,²⁸ a disclaimer of an express warranty “is *inoperative* to the extent that such construction is

²⁰ See, e.g., *Web Press Serv. Corp. v. New London Motors, Inc.*, 525 A.2d 57 (Conn. 1987); *Guess v. Lorenz*, 612 S.W.2d 831 (Mo. Ct. App. 1981).

²¹ See UCC § 2-313 cmt. 4 (“[T]he whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell.”).

²² See *id.* § 2-202. If the express warranty is oral, it is possible that parol evidence rule issues may arise. If the parties intend the written purchase agreement to be a final expression of their agreement (i.e., intend the agreement to be fully integrated), then the parol evidence rule would prohibit the introduction of evidence of an oral express agreement. See *Betaco, Inc. v. Cessna Aircraft Co.*, 103 F.3d 1281, 1286 (7th Cir. 1996).

²³ See U.C.C. § 2-313 cmt. 1 (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”).

²⁴ See U.C.C. § 2-316(1).

²⁵ *Id.* § 2-313 cmt. 1.

²⁶ See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 425 (5th ed. 2000); MURRAY, *supra* note 3, at § 101(E)(1).

²⁷ See U.C.C. § 2-316.

²⁸ *Id.* § 2-202.

unreasonable.”²⁹ Section 2-316 is designed to protect both the buyer and the seller.³⁰ To better understand how both the buyer and the seller are protected, an analysis of four specific fact situations will be helpful.

The first situation involves an express warranty stated in the written agreement that also contains a general disclaimer, such as “seller disclaims all warranties” or “seller makes no warranties, either express or implied, with respect to these goods.” In this instance, the general disclaimer is inoperative. This result relies on a general rule of contract construction that when there is a conflict between specific and general provisions in the written contract, the specific provisions prevail.³¹ Giving effect to the general written disclaimer provision over the specific express written warranty is unreasonable and therefore the general disclaimer is inoperative.³²

The second situation involves an express warranty stated in the written agreement that also contains a specific disclaimer.³³ In this instance, the general rule of contract construction whereby a specific provision of the agreement prevails over a general provision does not apply because there is a head-to-head meeting of two specific provisions. However, the inclusion in the written agreement of an express warranty and a specific disclaimer cannot be construed as reasonably consistent with one another. In this case, section 2-316(1) explicitly states “negation or limitation is inoperative to the extent that such construction is unreasonable.”³⁴ The result in both the first and second

²⁹ *Id.* § 2-316(1) (emphasis added).

³⁰ *See id.* § 2-316 cmts. 1–2.

³¹ *See id.* § 2-316(1); *see also id.* § 2-316 cmt. 1. Comment 4 to section 2-313 further provides: “[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.” *Id.* § 2-313 cmt. 4; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (AM. LAW INST. 1981). The provisions of section 2-202 of the Uniform Commercial Code relating to parol or extrinsic evidence do not apply given that both the express warranty and the disclaimer of the express warranty are included in the contract in writing. *See* U.C.C. § 2-202 (2014).

³² *See* U.C.C. § 2-316(1); *see also* *Hayes v. Bering Sea Reindeer Prods.*, 983 P.2d 1280, 1286 (Alaska 1999) (“A seller cannot negate express warranties through generalized disclaimers.”); *Murray v. Holiday Rambler, Inc.*, 265 N.W.2d 513, 516 (Wis. 1978). *But see* *Broomfield v. Parker*, No. 12-06-00208-CV, 2007 WL 677819, at *1, *3 (Tex. Ct. App. Mar. 7, 2007) (“as is” clause in written contract served to disclaim implied and express warranties).

³³ For instance, the contract represents that “this fabric is made of 100% cotton” or “seller warrants that all components are new,” but includes a disclaimer stating “seller disclaims any warranty that the fabric contains or is made of cotton” or “seller does not warrant that any component is new.”

³⁴ U.C.C. § 2-316(1). This approach focuses on the buyer’s expectations. If a reasonable buyer would not expect or be surprised by the disclaimer, then it should not be enforceable. *See* Robert A. Hillman, *U.C.C. Article 2 Express Warranties and Disclaimers in the Twenty-First Century*, 11 DUQ. BUS. L.J. 167, 171 (2009).

situations is the same in that the disclaimer is inoperative.³⁵

The third situation involves an express warranty not appearing in a written agreement that contains a specific disclaimer of all oral express warranties.³⁶ Generally, in a situation such as this, the express warranty is oral.³⁷ In this instance, the seller's specific disclaimer will prevail. The seller will be able to rely upon the parol evidence rule contained in section 2-202 of the Uniform Commercial Code, which reads, in pertinent part:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement³⁸

The parol evidence rule would prevent the buyer from proving and relying on the alleged oral express warranty.³⁹ Thus, the oral express warranty would be inconsistent with the disclaimer in a written agreement intended by the parties as the final expression of their written agreement. Finally, the last situation involves an express warranty not appearing in a written agreement that contains a general disclaimer of all oral express warranties. As in the third situation, the seller's specific disclaimer will prevail. Again, the seller will be able to rely upon the UCC's parol evidence rule to prevent the buyer from

³⁵ See *Husky Spray Serv., Inc. v. Patzer*, 471 N.W.2d 146, 152 (S.D. 1991) (holding that a disclaimer of which buyer was unaware cannot exclude explicitly bargained-for express warranty). But see *Hayes*, 983 P.2d at 1286, where the court gave effect to a specific disclaimer of an express warranty because it was conspicuous in a contract between parties with equal bargaining power and the buyer had ample opportunity to inspect the goods before purchase. See *St. Croix Printing Equip., Inc. v. Rockwell Int'l Corp.*, 428 N.W.2d 877 (Minn. Ct. App. 1988).

³⁶ For example, the seller orally states or promises: "the glass is shatterproof" or "this product contains no artificial ingredients," and the written agreement includes a disclaimer such as: "seller makes no warranties, either express or implied" or "seller disclaims any oral representations about the ingredients used in this product."

³⁷ See U.C.C. § 2-313 cmt. 5. Comment 5 states that

[a] description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform to them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing.

Id.

³⁸ However, in order to rely on the rule the seller must establish that the terms of the agreement between the parties are "set forth in a writing intended by the parties as a final expression of their agreement . . ." *Id.* § 2-202.

³⁹ See *id.* § 2-316 cmt. 2 ("The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence . . .").

introducing parol or extrinsic evidence of any oral express warranties.⁴⁰

This rationale served as the basis of the court's holding in *Boud v. SDNCO, Inc.*,⁴¹ which involved a contract to purchase a luxury yacht. The contract included a disclaimer of any express warranty that might have been created during the negotiation process.⁴² When the buyer discovered numerous mechanical problems with the yacht, he sued to rescind the sale and argued that the disclaimer was not binding.⁴³ The court, however, ruled that he could not avoid the effect of the parol evidence rule or claim that the parties agreed to any terms other than those in the written contract.⁴⁴ As such, any express warranties were disclaimed.

Although the language in section 2-316(1) is cumbersome and on initial reading appears illogical, a careful analysis of the section provides some insight into the attempt on the part of the drafters to provide some protection to both the buyer and the seller. If an express warranty is contained in the written agreement, the buyer is provided with maximum protection from the effect of a disclaimer. However, if the express warranty is not contained in the written agreement, the seller is able to obtain maximum protection by complying with the parol evidence provision of the Uniform Commercial Code.⁴⁵ Even so, it is probable that a disclaimer of an express warranty that is not conspicuous would be regarded as unenforceable.⁴⁶

III. EFFECTIVENESS OF EXPRESS WARRANTY DISCLAIMERS

Although it is possible in limited circumstances to disclaim an express warranty, the effect of such disclaimers may be circumscribed. In *Mobile Housing, Inc. v. Stone*,⁴⁷ for instance, the buyers sought to rescind a contract for the sale to them of a mobile home that did not conform to the purchase agreement or the model shown and demonstrated to them.⁴⁸ The seller relied on a disclaimer in the contract and the parol evidence rule. However, the court

⁴⁰ *See id.*

⁴¹ *Boud v. SDNCO, Inc.*, 54 P.3d 1131 (Utah 2002).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1135; *see also* *Miller v. Hubbard-Wray Co.*, 630 P.2d 880 (Or. Ct. App. 1981).

⁴⁵ However, in order to rely on the rule the seller must establish that the terms of the agreement between the parties are "set forth in a writing intended by the parties as a final expression of their agreement . . ." *Id.* (quoting Or. Rev. Stat. Ann. § 72.2020 (West)).

⁴⁶ *See* *Gladden v. Cadillac Motor Car Div.*, 416 A.2d 394 (N.J. 1980). It is also probable that such a provision will be strictly construed against the seller. *See* *Fundin v. Chicago Pneumatic Tool Co.*, 199 Cal. Rptr. 789 (Cal. Ct. App. 1984).

⁴⁷ *Mobile Hous., Inc. v. Stone*, 490 S.W.2d 611 (Tex. Ct. App. 1973).

⁴⁸ *Id.* at 611-13.

examined the language of the parol evidence rule and concluded that *both* parties must intend for the writing to be a “final expression of their agreement.”⁴⁹ According to the court, since the buyers intended that the mobile home would conform to the model and the description given by the seller, it could not be seriously contended that the written contract was intended to be the final expression of the parties’ agreement.⁵⁰

In addition, there are further avenues that may afford defenses to the enforcement of express warranty disclaimers. This section explores whether a party against whom a disclaimer would be enforced can assert arguments based on fraud and misrepresentation, unconscionability, or state unfair trade practices and consumer protection statutes to negate the enforceability of the disclaimer.

A. *Fraud and Misrepresentation*

Where a seller has made oral statements or promises of fact about the goods sufficient to create an express warranty and later disclaimed them in the written contract, the buyer may be able to void the contract on the basis of fraud and misrepresentation if he relied on those statements or promises. A misrepresentation is an untrue statement of fact rather than an opinion.⁵¹ The party seeking to avoid the contract must also prove that he actually and justifiably relied on the misrepresentation of fact in deciding to enter into the contract.⁵² Reliance is not justifiable if the assertion is obviously false.⁵³ The contract will be voidable regardless of whether the misrepresentation was fraudulent because it was intentionally deceptive, or innocent and not made with knowledge of its falsity or intent to deceive.⁵⁴ In addition to the remedy of avoidance, the party may have a claim for damages caused by the misrepresentation.⁵⁵

A seller who has made representations creating an express warranty and

⁴⁹ U.C.C. § 2-202.

⁵⁰ *Stone*, 490 S.W.2d at 615; *accord Miller*, 630 P.2d 880.

⁵¹ See RESTATEMENT (SECOND) OF CONTRACTS § 159 (AM. LAW INST. 1981). The nondisclosure or concealment of a material fact is considered to be the equivalent of an affirmative misrepresentation. *Id.* § 161. The distinction between statements of fact versus opinion is not always clear, but should be based on whether the seller has sufficient knowledge to make an assertion rather than express a mere belief. See MURRAY, *supra* note 3, at § 96[2].

⁵² RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (AM. LAW INST. 1981) (alterations in original).

⁵³ *Id.* § 164 cmt. d.

⁵⁴ See *id.*

⁵⁵ *Id.* § 376. No election of remedies is required in contracts for the sale of goods. See U.C.C. § 2-271.

who seeks to disclaim the warranty is likely to rely on the parol evidence rule to exclude such representations as contradicting the language of the written contract.⁵⁶ However, many courts have recognized a fraud exception to the parol evidence rule.⁵⁷ If the buyer can establish that the seller did not intend to abide by an oral express warranty when it was made, then parol evidence of prior oral promises or representations will be admissible to prove fraud.⁵⁸ For example, in *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*,⁵⁹ the seller of an airplane represented that it was in perfect condition and capable of transporting cargo of 40,000 pounds a distance of 2,700 miles. The written contract contained a disclaimer. When these statements proved to be false, the buyer sued for damages and argued that the seller had made fraudulent representations of material facts.⁶⁰ The court held that parol evidence was admissible to prove fraud in the inducement of the contract “even though the written contract contains covenants waiving warranties or disclaiming or limiting liabilities.”⁶¹

B. Unconscionability

The doctrine of unconscionability enables courts to refuse to enforce

⁵⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 213 (AM. LAW INST. 1981); see also U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM'N, amended 2001).

⁵⁷ See *Associated Hardware Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 119 (3d Cir. 1965) (explaining that the parol evidence rule does not apply to evidence of prior oral agreements when fraud or mistake is averred); *Alling v. Universal Mfg. Corp.*, 7 Cal. Rptr. 2d 718, 733–34 (Cal. Ct. App. 1992) (explaining that parol evidence is admissible to show promissory fraud, only if “the false promise is either independent of or consistent with the written instrument”). Indeed, “UCC § 1-103 states that “[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to . . . fraud [or] misrepresentation . . . shall supplement its provisions.” *Big Wheel Distrib. Co.*, 355 F.2d at 119 (alteration in original) (quoting U.C.C. § 1-103 (AM. LAW INST. & UNIF. LAW COMM'N 1952), amended by U.C.C. § 1-103(b) (AM. LAW INST. & UNIF. LAW COMM'N 2001)).

⁵⁸ See *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 255 S.E.2d 682, 683 (Va. 1979) (explaining that an express warranty can be admissible to prove a contract was induced by fraud); see also *Associated Hardware Supply Co.*, 355 F.2d at 119 (explaining that oral agreements can be admissible to prove fraud).

⁵⁹ *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 255 S.E.2d 682 (Va. 1979).

⁶⁰ *Id.*

⁶¹ *Id.* at 683; accord *Fecik v. Capindale*, 54 Pa. D. & C.2d 701 (C.P. 1971); *Renaissance Acres, LLC v. Schmidy's Mach. Co.*, No. 217-2010-CV-220, 2011 N.H. Super. LEXIS 42, at 10–11 (July 18, 2011); cf. *Universal Drilling Co. v. Camay Drilling Co.*, 737 F.2d 869, 873 (10th Cir. 1984) (recognizes the parol evidence fraud exception, but finds that it does not apply here since the buyer did not rely on the fraudulent representations). For a further discussion of relationship between the law of misrepresentation and express warranty disclaimers, see Elizabeth Cumming, *Balancing the Buyer's Right to Recover for Precontractual Misstatements and the Seller's Ability to Disclaim Express Warranties*, 76 MINN. L. REV. 1189 (1992).

contracts or contract clauses that they find to be unconscionable and to prevent oppression and unfair surprise.⁶² Section 2-302(1) of the Uniform Commercial Code, which incorporates the doctrine of unconscionability, provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.⁶³

The analysis of unconscionability is frequently distinguished by form: procedural versus substantive unconscionability. Procedural unconscionability is concerned with the process of contract formation and focuses on such factors as unequal bargaining power, lack of meaningful choice, pressured situations, conspicuousness of contract terms, and the consumer's level of education, experience, or economic status.⁶⁴ Substantive unconscionability arises when the contract is found to contain overly harsh or one-sided terms such as excessive price terms, or remedy exclusions or limitations.⁶⁵ Most courts will not void a contract or contract clause unless they find both substantive and procedural unconscionability.⁶⁶

Unconscionability may be an effective countermeasure against the application of express warranty disclaimers because such "disclaimer[s] . . . significantly reduce a warranty protection available under the Uniform Commercial Code with the potentially harsh consequence[s]" to the consumer.⁶⁷ Moreover, consumers rarely understand the effect of disclaimers and are often in no position to bargain to have such provisions removed from the purchase agreement.⁶⁸ As a consequence, express warranty disclaimers may be characterized by both substantive and procedural unconscionability.

For example, the buyers in *Eckstein v. Cummins*⁶⁹ sued for damages and to rescind a contract for the purchase of an automobile plagued by defects

⁶² U.C.C. § 2-302 cmt. 1 (2014). The issue of unconscionability presents a question of law for the court rather than an issue of fact for the jury. *Schroeder v. Fageol Motors, Inc.*, 528 P.2d 992, 995 (Wash. Ct. App. 1975).

⁶³ U.C.C. § 2-302(1). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

⁶⁴ *See* MURRAY, *supra* note 3, at § 97(2)(b).

⁶⁵ *See id.*

⁶⁶ *E.g.*, *Clark v. DaimlerChrysler Corp.*, 706 N.W.2d 471, 474 (Mich. Ct. App. 2005); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999).

⁶⁷ Kurt M. Saunders, *Unconscionability as "Lemon Aid,"* 6 PACE L. REV. 195, 202 (1986) (discussing warranty disclaimers in the context of defective "lemon" automobiles).

⁶⁸ *See id.*

⁶⁹ 321 N.E.2d 897 (Ohio Ct. App. 1974).

incapable of repair. The contract contained a disclaimer of express and implied warranties.⁷⁰ On appeal, the court upheld the trial court's conclusion that the disclaimer was unconscionable.⁷¹ As the court explained:

To place the purchaser of a defective vehicle incapable of repair in the anomalous position of having no actionable claim for relief pursuant to the strict language of the express warranty and disclaimer therein, because the precise nature of the defect cannot be determined and the plaintiff cannot identify any defective part, the replacement of which could remedy in defect, would be to defeat the very purpose of the warranty which had been given to the purchaser.⁷²

As a caveat, it must be noted that the holding in *Eckstein* may be an exception. Most courts have been hesitant to apply unconscionability to invalidate disclaimers of implied warranties with the exception of cases involving personal injuries to consumers.⁷³ It is likely that a number of courts would be similarly reluctant to exclude express warranty disclaimers on the basis of unconscionability unless the case involved personal injury.⁷⁴

C. *Unfair Trade Practices and Consumer Protection Statutes*

As to consumers, another potential impediment to the enforcement of express warranty disclaimers is state deceptive trade practices and consumer protection statutes. Many such statutes are based on the Uniform Trade Practices and Consumer Protection Law,⁷⁵ which proscribes unfairness and deception in commercial sales transactions.⁷⁶ Most of these laws authorize private enforcement actions and remedies, and empower the state attorney general to adopt rules and regulations and to seek civil penalties for violations.⁷⁷

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 904.

⁷³ *See, e.g.,* Wilke v. Woodhouse Ford, Inc., 774 N.W.2d 370 (Neb. 2009).

⁷⁴ For further discussion of unconscionability and disclaimers of warranties, *see* Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT L. REV. 199 (1985); Richard A. Lord, *Some Further Thoughts About Warranty Law: Express and Implied Warranties*, 56 N.D. L. REV. 510, 545–46 (1980).

⁷⁵ The Unfair Trade Practices and Consumer Protection Law was jointly drafted by the Federal Trade Commission and the Committee on Suggested State Legislation of the Council of State Governments. *See* COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION 1967 A71–A78 (1967) (text of the statute).

⁷⁶ Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163 (2011).

⁷⁷ *Id.*

Other states have adopted the Uniform Consumer Sales Practices Act,⁷⁸ the purpose of which is to protect “consumers from suppliers who commit deceptive and unconscionable sales practices.”⁷⁹ Section 3(10) of the Act defines a deceptive act or practice to arise when a seller indicates “that a consumer transaction involves or does not involve a warranty, [or] a disclaimer of warranties ... if the indication is false[.]”⁸⁰ This section prohibits misrepresentations to a consumer “that a warranty is unconditional . . .”⁸¹ If a seller has made representations about the goods, which are not true, or has misrepresented the rights, remedies, or obligations of either the consumer or the seller, the consumer can rescind the sale or sue for treble damages, plus attorney’s fees, regardless of any disclaimers of warranties or parol evidence.⁸²

Some courts have applied such statutes to hold that warranty disclaimers and remedy limitations are unfair or unconscionable practices. The case of *Ford Motor Co. v. Mayes*⁸³ involved a defective and unmerchantable truck that had been sold under an express warranty which limited the consumer’s remedy to repair or replacement. The truck could not be adequately repaired within a reasonable period of time and the buyers sued.⁸⁴ On appeal, the court affirmed a jury verdict finding that the manufacturer’s refusal to recognize the consumer’s right to revoke acceptance and receive a refund was, under such circumstances, unlawful under the Kentucky Consumer Protection Act.⁸⁵ According to the court, “[b]y insisting that its only liability was to repair or replace defective parts even when the defects could not be corrected within a reasonable time, Ford would use the strict language of the express warranty to deprive [the buyers] of the benefits of their purchase.”⁸⁶

⁷⁸ See KAN. STAT. ANN. §§ 50-623–50-679a (1983); OHIO REV. CODE ANN. §§ 1345.01–1345.13 (LexisNexis 1979); 1953 UTAH CODE ANN. §§ 13-11-1 to 13-11-23 (LexisNexis 1985). See generally UNIF. CONSUMER SALES PRACTICES ACT, § 7A (UNIF. LAW COMM’N 1970), <http://www.uniformlaws.org/shared/docs/consumer%20sales%20practices/MCSA71.pdf>.

⁷⁹ 7A U.L.A. § 1(2) (1997).

⁸⁰ *Id.* § 3(b)(10); e.g., *Brown v. Lyons*, 332 N.E.2d 380 (Ohio Ct. C.P. 1974).

⁸¹ 7A U.L.A. § 3(b)(10) cmt. (1997). Such an act or practice is treated as *per se* deceptive. *Id.* § 3(b) cmt.

⁸² See *id.* § 11.

⁸³ 575 S.W.2d 480 (Ky. Ct. App. 1978).

⁸⁴ *Id.*

⁸⁵ *Id.* at 486; see also *Dale v. King Lincoln-Mercury, Inc.*, 676 P.2d 744 (Kan. 1984); *Evans v. Graham Ford, Inc.*, 442 N.E.2d 777 (Ohio Ct. App. 1981).

⁸⁶ 575 S.W.2d at 485. The court added: “Because the truck could not be repaired within a reasonable time, Ford acted ‘unconscionably’ when it insisted that [the buyers] had no remedy other than to allow Ford and its dealer to continue indefinitely in their efforts to correct the problem.” *Id.* at 486.

IV. CONCLUSION

It is not always the disingenuous seller who desires to disclaim an express warranty. A seller may want to provide a limited written warranty and therefore employ a disclaimer to maintain a standard set of terms for all such warranties.⁸⁷ Alternatively, there is the concern that sales agents will make unauthorized oral statements or promises creating express warranties that will be binding on the seller.⁸⁸ In either situation, the seller might consider including an express warranty disclaimer in the contract as a reasonable business practice.

Although the language of section 2-316(1) is not a model of clarity, it appears to prohibit disclaimers of express warranties by denying effect to such language when inconsistent with the language of an express warranty in a written contract. On the other hand, it may be easier for sellers to exclude oral express warranties by relying on the parol evidence rule and including a merger clause which states that the written contract constitutes the complete and final agreement between the parties. In these instances, it is likely that a conspicuous disclaimer of an oral express warranty would be regarded as enforceable.⁸⁹

Nevertheless, in such cases, a disappointed buyer who wishes to avoid the effect of an express warranty disclaimer is not without recourse. He or she may find support for negating the effect of the disclaimer in such theories as the fraud exception to the parol evidence rule, the doctrine of unconscionability, or by way of remedies available in state deceptive trade practices and consumer protection statutes.

⁸⁷ This could arise in a sale involving the sale of a consumer product pursuant to a written warranty and governed by the Magnuson-Moss Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312.

⁸⁸ In such circumstances, the principal would be bound by the express warranty on the basis of the agent's implied actual authority as inferred from the agent's express actual authority to make representations about the goods to prospective buyers. See RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 2.02(1) (AM. LAW INST. 1958).

⁸⁹ This result stands in contrast with how such a disclaimer would be treated under the U.N. on Contracts for the International Sale of Goods (CISG), U.N. Doc. A/CONF. 97/18 (1980), reprinted in S. TREATY DOC. No. 9, 98th Cong., (1st Sess. 1993). Article 35 of the CISG requires that the goods conform to certain implied representations that are similar to the express and implied warranties of quality recognized by the UCC, "[e]xcept where the parties have agreed otherwise." CISG art. 35(2). This suggests that sellers are easily able to disclaim express warranties as part of the agreement. However, the enforceability of a disclaimer of an express representation depends on whether the buyer was aware of it at the time of contracting, or would have purchased the goods had he or she known of the disclaimer. See Kurt M. Saunders, *Contract Formation and Performance under the UCC and CISG: A Comparative Case Study*, 32 J. LEG. STUD. EDUC. 1, 21, 39 (2015).

