concluded that, despite any gaps, further development of consumer protection within Article 2 was not justified.27

3. Relationship to Tort.

Personal injuries and property damage. When a buyer is injured in person or suffers property damage resulting from nonconformities or defects in goods, a claim in tort (usually strict liability) may be available against the seller. In most states, the buyer is free to pursue the advantages of tort without the limitations of contract found in Article 2. In tort, lack of privity is no defense, there are no notice requirements, it is more difficult to exculpate oneself from liability and the statute of limitations runs from the time the defect was or should have been discovered rather than from the time of tender.28

Rec. A2.3 (7).

Subject to the terms of any Product Liability Legislation, the Study Group recommends that the freedom of a buyer to sue in tort even though the claim could be pursued under Article 2 be preserved.

What if the buyer decides to pursue the personal injury or property damage claim in warranty as well as tort? Article 2 contemplates this possibility, see §§ 2-715(2)(b) & 2-719(3), but does not elaborate the standards to be applied.

Rec. A2.3 (8).

The Study Group recommends that this option be preserved. But the buyer who pursues a warranty claim involving personal injury or property damage should be subject to the same limitations under Article 2 as a buyer who has suffered only economic loss. We recommend, therefore, that this parity be achieved by eliminating any special rules, such as § 2-719(3) and § 2-318, based upon personal injury and property damage.

4. Economic loss. In recent years, buyers of nonconforming goods which caused only economic loss29 have brought suit in tort to escape limitations

extent to which a buyer can obtain a full refund or replacement of defective goods upon the seller's failure to repair; (5) The extent to which lack of privity is a defense in suits between a consumer buyer and the manufacturer; and (6) The extent to which remedies for breach of warranty include attorney's fees or punitive damages. See C. Reitz, Consumer Product Warranties Under Federal and State Laws (2d ed. 1987).

27. The National Conference of State Legislatures has under development a model "Lemon Law" that, if it replaces the non-uniform acts passed in some 46 states, may well fill one such gap.

28. See Revision at §16-19; Wade, Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C., 48 Mo. L. Rev. 1 (1983).

29. "Economic loss" is a shorthand for contract interests, whether they be expectation, reliance or restitution. In most cases, the losses will involve the buyer's direct and consequential loss from the agreed bargain.
in Article 2, such as the privity requirement and the statute of limitations. Frequently, either the nonconformity or the nature of the accident created a risk to person or property, although the actual loss was solely economic. Sometimes the defect will cause damage to the goods sold beyond the difference in value between the goods as warranted and the goods delivered.30

In commercial cases, most courts have rejected the great tort escape where the damage is solely economic. Although the reasons vary, a recurring concern is that tort would undercut Article 2 and its contractual scheme of risk allocation.31 The courts, however, have disagreed on the result when the defect causes damage to the goods sold and some decisions have permitted an action in tort.32

Rec. A2.3 (9).

The Study Group endorses the limitation upon access to tort in cases of pure economic loss, but believes it is beyond our scope to place a limitation in Article 2. In these cases where everyone has a contract with someone in the distributive chain and the losses involve contract interests, Article 2 is the appropriate source of law. The Study Group makes no recommendation where the loss also includes damage to the goods sold. Rather, this problem is left to the courts for decision on a case by case basis.

ARTICLE 2 - PART 3

[TASK FORCE - WARRANTIES - GENERAL]

Relationship of Warranty Transactions to Tort

Several Study Group recommendations address concerns regarding the overlap between sales warranty and tort law. This

30. E.g., S sells a generator to B for $1,000,000 containing a defective rotator blade which can be replaced for $10,000. The blade breaks in operation, causing $250,000 consequential damage to the generator but no damage to the person or other property of B.

31. A leading case is Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985) which, after discussing the relevant cases, held that a buyer who had suffered only economic loss from an unmerchantable product could not sue in tort to avoid the statute of limitations in Article 2. The point is not emphasized, however, in cases involving personal injury and property damages, which Article 2 also covers. The issues are well analyzed in Schwartz, Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability, 23 San Diego L. Rev. 37, 51-78 (1986).

32. See, e.g., American Home Assurance Co. v. Major Tool & Mach., 767 F.2d 445 (8th Cir. 1985); Mid Continent Aircraft Corp. v. Curry County Spraying Service, 572 S.W.2d 308, 312-13 (Tex. 1978)(defect which harms only the product is not part of the larger accident problem which tort law addresses).
overlap is evidenced by cases in which tort recoveries are awarded for solely economic loss while circumventing traditional warranty law limitations such as privity, notice and statute of limitations.

Rec. A2.3(7) unexceptionally recommends that, in cases of personal injury and property damage resulting from nonconformities or defects in the goods, the buyer should retain the freedom to sue either in tort or under Article 2. However, the Study Group also recommends that a personally injured-property damaged buyer who proceeds under Article 2 should be subject to the same Article 2 limitations as a buyer who is asserting a claim only for economic loss. The Study Group would achieve such "parity" by eliminating special rules "such as § 2-719(3) and § 2-318, based upon personal injury and property damage." 161

The two referenced sections, of course, provide respectively that "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable" and that warranties made to a buyer also extend to certain third party beneficiaries. 162

The Study Group discussion of these recommendations discloses little more than an objective of parity between warranty law and tort law. The later discussion of section 2-318 is more illuminating:


162 U.C.C. §§ 2-719(3), 2-318 (1990). Section 2-318 presently offers three alternatives defining who falls within the protected class. What is now denominated "Alternative A" was originally the sole Official provision in the 1962 text. However, as states began to adopt the Code, the provision came under attack. For example, by 1964, it had been criticized in California as "a step backward" and omitted. It was extended in Wyoming in the language now subsumed as official Alternative B, and extended in Virginia to wholly dispense with both horizontal and vertical privity and any requirement of personal injury. At that time, the Permanent Editorial Board continued to maintain that "beyond the limits of the present section the subject is still highly controversial, and there appears to be no national consensus as to the scope of warranty protection which is proper. Accordingly, no amendment should be made to the Official Text." Report No. 2, Permanent Editorial Board for the Uniform Commercial Code 39-40.

In 1966, the Permanent Editorial Board acknowledged the futility of its position and recommended the addition of the increasingly liberal Alternatives B and C to reflect evolving case law and § 402A of the Restatement (Second) of Torts. Report No. 3, Permanent Editorial Board for the Uniform Commercial Code 14 (1967).

Debates about the interpretation of § 2-318 often overlook the fact that a number of states adopted the Code before the alternatives were officially promulgated.
The current § 2-318, with its three alternatives, is an anachronism. It was drafted before strict tort liability developed in addition to warranty theory where damage to person or property resulted. Furthermore, the stated basis for extension, "third party beneficiaries," is a fiction.163

Although it is clearly the case that the Article 2 provisions were drafted before strict liability in tort matured, it is not clear that the basis for extension was "third party beneficiaries." Presumably, the Study Group plucked that reason from the title of the section. However, it would have been more appropriate to look to Comment 2 in which it is stated that the section "rests primarily upon the merchant-seller's warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used."164

Although it is certainly true that safety as a characteristic of merchantability does not necessarily encompass breaching classic barriers of privity, the case law at the time of the drafting of the Code was clearly developing along those lines. Thus, it may have been the case that the Code draftsmen chose language designed to expand liability in "conservative" privity jurisdictions while not interfering with rapidly evolving developments in the more "progressive" jurisdictions. Perhaps they also intended to obviate the need to resort to clumsy analyses, like agency, to achieve justice.165 More to the point is consideration of the possible impact of the Study Group recommendations. First of all, the recommendation speaks to doing away with the "special rules, such as § 2-719 and § 2-318."166 Are there others than those cited? Presumably, Official Comment 5 to section 2-607 (suggesting notice requirements are different for non-buyer plaintiffs) would have to go since it refers in substance to section 2-318.

At the very least, if such a course were taken, comments should emphasize that any change was not intended to affect tort law. Indeed, it may be that a study should be conducted to determine the extent to which current case law has been affected by the existence of the section. Any jurisdiction in which lines have

165 See, e.g., 1 NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 412-15 (1955) (Professor Honnold commenting).
been drawn in relation to those in section 2-318 would be put in a very peculiar position by such a change.

It is tempting, even comforting, to simply say that tort law is designed to deal with the special problems of personal injury and is more properly shaped by considerations of public policy. But that overlooks the whole history of sales law,167 as one significant prong of sales warranty law is public policy. That was the basis of the development of the implied warranty of merchantability; it was also the basis of that part of sales warranty law dealing with personal injury problems that eventually became Strict Liability in Tort. It does not follow that because there has been an explosion in tort theory, there should be a withdrawal in sales law. Moreover, the Study Group recommendations would remove from Article 2 the only provisions which make specific reference to consumers. Such a retraction should be made for more than aesthetic reasons.

It is also the case that the federal Magnuson-Moss Act, applicable to cases involving consumer goods, provides standing for a number of plaintiffs other than technical buyers.168 This broader standing is not confined to cases of personal injury and sometimes may not even be available in cases of personal injury.169 However, the broader standing in the act again gives rise to the issue of whether a revised Article 2 can ignore law controlling consumer goods transactions.170

The Study Group’s recommendation assumes that it is always easier to assert a strict liability claim in tort than a warranty claim (there is reference to the “great tort escape”).171 Although that is often true, it sometimes may be easier to show that there was a breach of warranty which caused injury than to show that the injury was caused by a defect which made the product “unrea-

167 See infra notes 181-204 and accompanying text (discussing brief history of sales law).
169 In fact, the cases have been unusually antagonistic to attempts to use the Magnuson-Moss Act in cases involving personal injury claims unless the case also involves a violation of one of the provisions of the Act. See NATIONAL CONSUMER LAW CENTER, SALES OF GOODS AND SERVICES § 33.7.7.2 n.289 (2d ed. 1989). Although Professor Reitz is uneasy with many of the arguments made in the cases, he finds solace in the availability of strict liability in tort which should be easier to prove anyway. C. REITZ, CONSUMER PRODUCT WARRANTIES UNDER FEDERAL AND STATE LAWS 146-47 (2d ed. 1987).
170 See supra pp. 1000-09 accompanying notes 15-47.
sonably dangerous.'" Should a plaintiff be deprived of that opportunity?

The final Study Group recommendation relating to tort law, Rec. A2.3(9), is an expression of belief as to what tort law should be regarding cases involving pure economic loss. Although the language of discussion is not entirely clear, it appears the Study Group favors the line of tort cases which holds that sales warranty law, and not tort law, should apply to cases in which there is only pure economic loss (and in which the defect does not cause damage to the goods or other property). The Group expressly "makes no recommendation where the loss also includes damage to the goods sold." 172 Appropriately, the Group concedes that it is beyond their scope to place such a limitation in Article 2.

[PRELIMINARY REPORT - 2-313]

O. EXPRESS WARRANTIES BY AFFIRMATION, PROMISE, DESCRIPTION, SAMPLE: § 2-313.

Section 2-313 distinguishes between affirmations, promises, samples and descriptions which can create express warranties, § 2-313(1), and affirmations, statements, or commendations which cannot, § 2-313(2). Section 2-313(1) then states that promises and representations which can become express warranties must also become or be made "part of the basis of the bargain." Neither § 2-313(1) nor § 2-313(2) provide a test for the distinctions that must be made. Comments 3 and 8, however, suggest a common strategic approach: All statements made, whether ultimately classified as those governed by § 2-313(1) or (2), are presumed to be part of the basis of the bargain unless taken out by "clear affirmative proof" or for "good reason. . .shown to the contrary." The implication is that once the buyer proves that the statements were made, the seller must prove a negative, i.e., that they were not part of the basis of the bargain. The best evidence of the negative might be that the buyer did not in fact believe or was unreasonable in believing that the statement was part of the bargain. 33

The Study Committee disagreed on what the test should be. The disagreement ranged between a suggestion that the buyer must prove reasonable

reliance on the affirmation (a return to the USA test) to a proposal that "basis of the bargain" be replaced by a "reasonable expectations" test that applied both before and after the contract was made. In the middle, some supported the "presumption" test stated in the comments and, with clarifications, were content to leave the matter for the courts. This disagreement mirrors to some extent the range of views found among the courts and commentators.

Rec. A2.3 (10).

The Study Group urges the Drafting Committee to resolve the debate over this important issue without returning to an explicit reliance test. More particularly, the solution should (1) Incorporate the "presumption" test, now stated in the comments, into the text of § 2-313; (2) Clarify whether the affirmations governed by § 2-313(2) are part of the "presumption" test; and (3) Elaborate when a promise or representation made after contract formation becomes part of the bargain.

[TASK FORCE - 2-313]

SECTION 2-313

1. Basis of the Bargain.

The focus of the Study Group's two page discussion of express warranty was "part of the basis of the bargain." We are told that:

The Study Committee disagreed on what the test should be. The disagreement ranged between a suggestion that the buyer must prove reasonable reliance on the affirmation (a return to the USA test) to a proposal that "basis of the bargain" be replaced by a "reasonable expectations" test that applied both before and after the

34. For a case approaching this position, see Royal Business Machines, Inc. v. Lorraine Corp., 633 F.2d 34, 41-45 (7th Cir. 1980)("basis of the bargain" is, in essence, a reliance test). Cf. Restatement, Second, Torts § 402(b)(requiring reliance).

35. This is, in essence, Professor Murray's test. See Murray, "Basis of the Bargain: Transcending Classical Concepts, 66 Minn. L. Rev. 283 (1982).

173 Prelim. Rpt., Part 3, supra p. 1088. This focus is set out in the introduction to Rec. A2.3(10).
contract was made.\textsuperscript{174} In the middle, some supported the "presumption" test stated in the comments and, with clarifications, were content to leave the matter for the courts.\textsuperscript{175}

The recommendation of the Group took the form of urging the Drafting Committee:

to resolve the debate over this important issue without returning to an explicit reliance test. More particularly, the solution should (1) Incorporate the "presumption" test, now stated in the comments, into the text of section 2-313; (2) Clarify whether the affirmations governed by section 2-313(2) are part of the "presumption" test; and (3) Elaborate when a promise or representation made after contract formation becomes part of the bargain.\textsuperscript{176}

In view of the widespread disagreement between members of the Study Group over what test should apply to "basis of the bargain," it is unfortunate that the recommendation calls for incorporating the "presumption" test into the statutory text. Given the disagreement, it seems unlikely that the Study Group intended to adopt the comprehensive "presumption" test approach urged by White and Summers or any other specific presumption jurisprudence pressed by other commentators.\textsuperscript{177} Rather, it must mean simply moving to the statute language from (or similar to) current Official Comments 3 and 8 which declares that statements are

\textsuperscript{174} "This is, in essence, Professor Murray's test. \textit{See} Murray, 'Basis of the Bargain:' Transcending Classical Concepts, 66 MINN. L. REV. 283 (1982)."

\textsuperscript{175} Prelim. Rpt., Part 3, \textit{supra} p. 1088-89. The disagreement among Committee members is evidenced in the introduction to Rec. A2.3(10).

\textsuperscript{176} Prelim. Rpt., Part 3, Rec. A2.3(10), \textit{supra} p. 1089. The Study Group's concern about the possibility that proof of representations might be foreclosed by the parol evidence rule when made prior to a writing which contains a merger clause is discussed \textit{supra} under U.C.C. \textsection{} 2-202.

\textsuperscript{177} One sentence of the Study Group's commentary regarding \textsection{} 2-318 could be read to embrace a White and Summer's type presumption approach. It reads:

All agree that if the remote seller has made an express warranty through advertising or otherwise to the buyer that became part of the basis of the buyer's bargain with its seller, a suit against the remote seller should be allowed. Consistent with our recommendations regarding \textsection{} 2-313, the remote seller should be permitted to show that the representations did not in fact become part of the buyer's bargain.


On closer reading, however, it does not purport to resolve the question. It simply says the issue is basis of the bargain without indicating how that issue is to be resolved.
presumed to be part by the basis of the bargain unless taken out by "clear affirmative proof" or for "good reason . . . shown to the contrary." That much can be regarded as a beginning point for most views of "basis of the bargain." Although such a step would be helpful, it does not purport to resolve much of the disagreement that exists in both the Study Group and the commentators.

The second recommendation, seeking clarification on whether those affirmations governed by section 2-313(2) are part of the "presumption" test, could contemplate simply a rewrite of current Comment 8. Surely the clear import of that language is that if something is an affirmation which survives a puffing challenge, it is to be treated the same as any other affirmation. Perhaps the Study Group finds confusion in the separate statement of that notion. Thus, it may be useful for the Drafting Committee to attempt to deal comprehensively with "basis of the bargain" in such a way as to encompass what is now separately stated in two sub-sections.

The third recommendation, proposing elaboration on when a promise or representation made after contract formation becomes a part of the bargain, raises issues both for section 2-313 and for section 2-209. However, this part of the Study Group Report considers only the section 2-313 issues. Implicit in the recommendation is the conclusion that Comment 7 is no longer adequate to the task. In view of the difficulties in some of the cases and the diverse views of commentators, some clarification is desirable.

a. A Brief History of Warranty Shaping "Basis of the Bargain."

Re-evaluation of standards for "basis of the bargain" necessitates a comprehensive review of the nature of warranty obligation. Some history is essential since the current language of section 2-313 refers directly or indirectly to several distinctly different bases of obligation.

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179 Promises or representations made after the contract, which have not become part of the basis of the bargain, are by definition not warranties. They may, however, constitute a modification of the contract or operate as a waiver under U.C.C. § 2-209. See, e.g., B. CLARK & C. SMITH, LAW OF PRODUCT WARRANTIES ¶¶ 4.03[4], 4.04[3][f] (1984) (citing discussion and cases).
180 The § 2-209 issues are considered in recommendations of the Report.
Most law students in recent decades have been exposed to Prosser's inimitable description of the "curious hybrid" of warranty, "born of the illicit intercourse of tort and contact, unique in the law."181 This serves as fair warning of some complexity. Professor Vold used "a convenient figure of speech" to describe the "triple nature" of the warranty obligation:

prong no.1, the promissory warranty, is strictly contractual; prong no.2, the warranty obligation based on the seller's representations inducing the deal, is independently imposed by law, comparable to tort obligations; prong no.3, also is independently imposed by law, apart from seller's representations, for strictly public policy reasons.182

Moreover, each of these bases of warranty developed separately with some overlap over a period of time to reflect strikingly different underlying philosophies.

(1) Separate Contract. Early on, warranty was not considered part of the sales contract. Originally, a buyer of goods was obligated to pay for and receive goods regardless of any defects in them. The only ground for objection was that the object delivered was not that which was contracted for. Thus, if a buyer wanted quality protection, he was obliged to find it in a separate contract of warranty.183 That separate obligation in turn was rooted in rigorous requirements, as special words of warranty184—what Rabel has called "solemn assumption of liability"185—were necessary.

(2) Express Assumption and Representations With "Intent." The initial insistence on solemn assumption gradually gave way to express assumption and then representations made with intent to assume liability. Gradually, "though the requirement of intent was generally stated, the natural meaning of the word was explained

182 Id. at 427. Prosser's trilogy is similar. See Prosser, The Implied Warranty of Merchantable Quality, 27 MINN. L. REV. 117, 119-25 (1943).
away”

away”186 so that Benjamin, in his treatise on sales, could correctly summarize English law regarding intent to warrant as follows:

In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment.187

Many American cases generally developed along the lines of the Benjamin articulation, construing intent not to mean “intent to contract or to agree to be bound, but rather an intent to make a statement as matter of fact rather than as matter of opinion.”188 Williston applauded those American decisions which avoided the use of the word “intent” altogether and followed a similar course in his drafting of the Uniform Sales Act.189

(3) Fact v. Opinion, Exaggerations; Influence of Tort Misrepresentations Cases. These developments regarding representations also appeared in the tort law of misrepresentation, with sales warranty and misrepresentation cases cited interchangeably for a number of propositions. Illustrative are those cases in which efforts were made to distinguish “fact” from “opinion,” the effect of statements of value, and whether liability could attach to representations tinged by exaggeration, extravagant language, flattery and the like.

Of course, the classic tort of deceit included the independent


187 Id. (noting the statement appeared in the first six editions of Benjamin and was adopted by the English Court of Appeal in 1901). The seventh edition substituted for “a decisive test,” “a valuable, though not decisive, test” to take into account a 1913 House of Lords case which (in Williston’s view) mistakenly reverted to the older view. The current successor edition of Benjamin’s Sale of Goods indicates that the older view emphasizing “that liability is only to be imposed where the person giving the warranty can fairly be regarded as having made a contractual promise,” id. ¶ 744, at 352, continues, although mitigated by “the general tendency over the whole law of contract in the twentieth century to treat statements and acts objectively and to place emphasis on the impression they reasonably create” producing “a movement towards the readier imposition of liability.” Id. ¶ 746, at 353. Some of the deficiencies of English law pertaining to misrepresentations in sale of goods cases were addressed in the Misrepresentation Act 1967. See Benjamin’s Sale of Goods ¶ 738 (A. Guest 2d ed. 1991).

188 WILLISTON, supra note 186, § 200, at 512.

189 Id. § 201, at 514. Uniform Sales Act § 12, defining express warranty, contains no reference to the concept of intent.
element of reliance. Thus, it is not surprising that even in the sales warranty cases discussing liability for representations involving opinion or puffing, language of reliance appeared. Indeed, such language became an element of that stream of sales warranty law founding liability on representations and was written into the Uniform Sales Act definition of express warranty. But, it no longer bore the old tort of deceit meaning. More importantly, it was neither a part of those streams of warranty law predicking liability on promises or solemn affirmations or intention—nor a part of those, to be discussed below, rooted in public policy.

(4) Liability Imposed by Law. Warranty liability imposed by law is reflected in two very significant lines of cases. The first is that which began as the warranty of description and ended as the implied warranty of merchantability. The second is that line of cases involving personal injury in which the courts found it convenient to use some of the terminology, if not all the trappings, of sales warranty law. The latter, of course, has in the last several decades virtually splintered off and evolved independently into strict liability in tort.

(a) The Warranty of Description and the Evolution of Merchantability. At root, the common law cases dealing with description concern basic notions of fairness and fair play. Even in the heyday of caveat emptor, the law required sellers to deliver what they had contracted to deliver. "Nothing is more elementary in all the law of contract than that an agreement to deliver a horse is not satisfied by delivery of a cow." Gradually the cases began to use language that called for quality, as courts began to acknowledge the shortcomings of the old caveat emptor doctrine in transactions which did not involve face to face haggling over goods physically within the view of the parties. The sale of goods unseen by the buyer was characterized

190 See, e.g., Williston, supra note 186. Even in tort, reliance has become another way of inquiring whether a statement is important enough to induce action or whether is is reasonable for someone to act on it. See W. Prosser & P. Keeton, Torts § 109, at 755 (4th ed. 1971). Whether, for example, something is to be labeled as "fact" or "opinion" is no longer the issue.
One who contracts to sell to another a Jersey cow is liable for damages for breach of contract if he delivers a mule, or even an Angus cow, notwithstanding his statement, in the contract of sale, that he made no warranty as to the qualities of the cow he contracted to seller [sic] and deliver.
as a sale “by description.” 192 Conformity to description required determination of “the real mercantile or business description” of the goods which, in order to “answer that description” had to be “salable or merchantable.” 193 This reasoning led to the much quoted expression of Lord Ellenborough in Gardiner v. Gray: 194

[T]he purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. 195

It is clear that this “implied” obligation was imposed by law, i.e., it arose irrespective of the agreement of the parties. The foundation for the implied warranty of merchantability was clearly laid.

It was also clear that, prior to the acknowledgement of the warranty of merchantability as such, the description cases dealt not only with identification of the goods but also with enough of the characteristics of the goods to be sure that what was described was delivered. To borrow an apt phrase, the concern was not simply “which goods are being sold, but what the goods actually are.” 196

This quality content of the warranty of description surfaced in several contexts. One of these was disclaimer. Thus, a “copper fastened vessel, to be taken with all faults” was construed to mean only such faults consistent with a copper fastened vessel as the term was understood in the trade. 197 “From this it is a short step

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192 Over time, the concept of sale “by description” was not confined to circumstances where the goods were unseen at the time of contract. See P. Atiyah, The Sale of Goods 110-11 (7th ed. 1985).
194 4 Campbell 143, 16 Rev. Rpts. 764 (1815).
195 Id. at 144, 16 Rev. Rpts. at 765.
196 See Atiyah, supra note 192, at 108.
197 Prosser, supra note 182, at 160 (quoting language from Shepherd v. Kain, 5 B. & Ald. 240, 106 Eng. Rep. 1180 (1821)).
to construe the description as calling for goods of the kind sold on the market, merchantable under the description, and to hold that a disclaimer in general terms does not exclude the minimum warranty of merchantable quality." The ground was thus laid for an overlap between the obligations of description and merchantability, although each performed separate—and continuing—functions.

The obligations of description and merchantability were carried over into the English Sale of Goods Act 1893 and from there to the Uniform Sales Act. Section 14 of the Uniform Sales Act provided that, where goods were bought "by description," there was an implied warranty that the goods "shall correspond with the description." Section 15(2) provided for the implied warranty of merchantability where the goods were bought by description from a seller who dealt in goods of that description. The Uniform Commercial Code drafters reassigned the description obligation to the status of express, rather than implied obligation, and removed the requirement that the sale be one "of description" to qualify for the warranty of merchantability.

The Code transformed the warranty of description from implied to express status for two reasons: (1) to overcome difficulties that had arisen under the Sales Act in determining whether a particular warranty was an express warranty or an implied warranty of description, and (2) to circumvent problems encountered in some cases involving disclaimer of implied warranties. Thereafter, a disclaimer of implied warranties would have no effect on warranties arising out of a description of the goods. The Uniform Sales Act requirement that a sale be "by description" before the implied warranty of merchantability would attach was regarded as an "anachronism" which resulted from copying some, but less than all, the language of several sections of the English Sales of

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198 Id.
199 The Uniform Sales Act, however, classified both obligations as "warranties," abandoning the confusing difference drawn in the English Act between "conditions" and "warranties."
200 Uniform Sales Act § 14 (1906).
201 W. Hawkland, Sales and Bulk Sales 36 (1958).
202 See id. at 36-38 (discussing Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 94 F. Supp. 311 (D.C. Del. 1950), rev'd, 190 F.2d 817 (3d Cir. 1951)). The same change was made with respect to warranties applicable to samples for the same reasons.
Goods Act. It was, therefore, omitted to "remove a source of possible confusion."204 The changes made also clearly preserved the separate identities of the warranties of description and merchantability.

(b) Influence of Sales Warranty Cases Involving Personal Injuries. Seller and manufacturer liability for personal injuries caused by defective goods is presently thought of as a matter of course in terms of strict liability in tort. However, the bridge to that current doctrine was borrowed or adapted from sales law to circumvent some of the tactical disadvantages of suits in negligence. For some time, the sales trappings were retained, even while some traditional sales doctrines—in particular, privity of contract—were breached on grounds of public policy until, finally, strict liability in tort was declared to be separate and apart from sales law.

Despite the current separation of strict liability in tort from sales law, the years of developments on the sales side remain as strong evidence of obligations imposed as a matter of law. These obligations were not only in the form of an expansive concept of "implied warranty," but also in strong public policy underpinnings for permitting suits against non-privy sellers—sometimes reasoned on a finding of express assurances made to the ultimate buyer or the courting of the public through advertising and promotions. Some of the reasoning of those cases has continued to influence such issues as privity of contract.

(c) "Basis of the Bargain" as a Unifying Concept for Disparate Foundations. In light of this history, it is not surprising that the Code draftsmen chose language which was broad enough to encompass the various strands of warranty law evolution, including representation (with overtones of reliance), promise, language of solemn assumption, and obligation rooted in public policy. In addition, it may be suggested that "basis of the bargain" represents a level of abstraction that encompasses the somewhat more definitive concepts of puffing, opinion, affirmation, description and model. It is a generic statement that helps give content to the others. For example, puffing is regarded as language which one is not entitled to rely on. Therefore, language that one is not entitled to rely on will not become a part of the basis of a bargain.

204 1 J. HONNOLD, NEW YORK LAW REVISION COMMISSION, STUDY OF UNIFORM COMMERCIAL CODE, ANALYSES OF SECTIONS OF ARTICLE 2, at 335, 396 (1955).
This approach, of course, can become almost tautological in nature: whether the representation, affirmation, description, sample or model should be considered a part of the seller’s obligation because it is either implicit in the bargain of the parties or is imposed for reasons of public policy.

Such a view of “basis of the bargain” should color the Official Comments. It also has strong implications for resolving privity issues, the “generic description” debate and whether there should be liability for statements made both before and after the sale.

(d) Basis of the Bargain and Affirmations Removed in Time and Space. Although the cases have touched on a number of aspects of the role of reliance, they have not yet provided a framework for a unified approach to the variety of fact situations ranging from affirmations made long before the closing (as in advertising) through affirmations made shortly after closing to those made considerably after closing. Also unresolved are those cases in which reliance on express affirmations is not affirmatively shown and those in which reliance cannot be shown. Some commentators have attempted to articulate such a unified approach. A look at two such attempts is illuminating.

i) White and Summers: The Comment 3 Presumption.

White and Summers begin by contrasting the reliance requirement of the Uniform Sales Act with the murky Code language. They canvass some of the possibilities: “It is possible that the drafters did not intend to change the law, or that they intended to remove the reliance requirement in all but the most unusual case, or that they intended simply to give the plaintiff the benefit of a rebuttable presumption of reliance.”

While acknowledging a variety of judicial responses, their choice is a form of presumption which is predicated, in part, on Official Comment 3 which provides: “no particular reliance on [a seller’s affirmations during a bargain] need be shown . . . . Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.” This means, they

206 White & Summers, supra note 205, § 9-5, at 449.
207 Id. at 400 n.3.
say, that the plaintiff “need put in no evidence unless the defendant offers evidence of the buyer’s nonreliance . . . .”209 Where suit is on a statement made orally during the negotiation or in the written contract, seller’s motion for a directed verdict should be denied “even though plaintiff has not put on proof of reliance.”210 But, where the statement at issue is removed in time and place, the plot thickens.

White and Summers assert that “[i]t is clear that an advertisement can be a part of the basis of the bargain, and it is only fair that it be so.”211 However, they insist, in approving a decision of the Missouri Court of Appeals, they insist “[a]t minimum a plaintiff in such a case should have to testify that he (or his agent)212 knew of and relied upon the advertisement in making the purchase.”213 As to statements made after the sale is concluded, they distinguish between those made while the deal is still warm and those made some time later. Where the statement is made before the buyer has “passed the seller’s threshold,” the buyer, as a matter of empirical fact, will have the power to get the seller to take the goods back and undo the sale.”214 Thus, calling such statements “express warranties recognizes the practical realities even though it does some violence to normal contract doctrine.”215 On the other hand, later statements should not be effective as warranties unless they qualify as modifications under section 2-209.216

ii) Clark and Smith: The Objective View.

Clark and Smith also catalogue the possibilities, citing case law support for: (1) requiring a strict showing of reliance, (2) dispensing with any showing of reliance, and (3) the middle ground

210 Id.
211 Id. at 401.
212 They cite and approve several cases in which a representation was made to the plaintiff’s employer or her doctor or her seller. Id. at 402.
213 Id. at 401.
214 Id. at 403.
215 Id.
216 Id. White and Summers suggest that some post-deal statements that could not qualify as warranties might be the basis for a tort action under § 402B of the Restatement (Second) of Torts. However, recovery under that rule is limited to a “consumer who suffers physical harm caused by justifiable reliance on the misrepresentation” made in the course of advertising.
of a rebuttable presumption of reliance grounded in Comment 3. In their view, the first line is wrong because it is clear the drafters intended to do away with a strict requirement of reliance; the word was used in section 2-315, and Official Comment 3 to section 2-313 says “no particular reliance need be shown.” On the other hand, the second line goes too far because it ignores that mysterious “basis of the bargain” language which must mean something. The middle ground espoused by White and Summers is also not satisfactory because it leaves unclear the kind of evidence and the standard of evaluation which are necessary to rebut the presumption and, in turn, the amount of evidence the buyer must produce to establish reliance. The better solution, in their view, is an objective test under which a seller’s representations are deemed to be a part of the basis of the bargain unless the seller can show that a reasonable buyer would not have relied on the representations if they were brought to his attention before the sale was consummated. This objective approach shifts the focus from the buyer’s state of mind to the expected impact of affirmations made by the seller once he launches a product on the market. If these affirmations are precise enough, the seller should be required to stand behind the goods.

They find support for this objective approach in the much cited quotation of Williston, in the writings of other commentators, and in the “thrust of some of the better reasoned decisions.”

They perceive several advantages in this view. It recognizes the large overlap between “basis of the bargain” and “puffing.” It eliminates the need for indulging in such fictions as treating

217 Clark & Smith, supra note 179, ¶ 4.03[3], at 4-32.
218 Id.
219 Id. ¶ 4.03[2][c], at 4-31.
220 Id. ¶ 4.03[3], at 4-33.
221 There is danger in 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 of reliance by the buyer is necessary other than the seller’s statements were of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods. S. Williston, Williston on Sales § 206, at 534-35 (rev. ed. 1948).
222 Clark & Smith, supra note 179, ¶ 4.03[3], at 4-33.
third parties as agents for reliance, and it "does away with the need for tenuous allegations of reliance by a particular buyer, a recurrent theme in decided cases." They also point out that the objective test overcomes the problem of the post-agreement warranty.

iii) An Evaluation.

The Clark-Smith view represents a unified approach that seems quite workable. It is sufficiently pervasive to encompass the different strands that have evolved into modern warranty law while being far better suited than the Comment 3 presumption approach to cope rationally with the ubiquitous modern warranty and its accompanying pre- and post-sale advertising and marketing blitzes. Surely one should not be surprised that the law regarding the role of reliance in express warranties is in the process of change. It is part of that same laborious evolution that, in response to changing circumstances ranging from the industrial revolution to modern marketing methodology, in turn: (1) de-formalized warranty (2) gradually imposed it as a matter of law in transactions where the goods were not present at the time of the sale because buyers could not, in such circumstances, rely on their own inspection, and (3) enlarged that implied warranty obligation to reach even the classic face to face transaction.

In light of the fact that one strand of the law of warranty once required a showing of "intent to warrant," it is ironic that the presumption approach to advertising and even unread warranties would deny liability even for statements which on their face show evidence of intent on the part of the seller to affirm product quality or stand behind its products. It is even more ironic that White and Summers concede that "[t]he next twenty years may see the reliance requirement go the way of the Nineteenth Century requirement that a seller intend to warrant; that is, it may disappear altogether."
Why should a buyer who has not read an advertisement or an owner's manual not have the advantage of a warranty when he is paying the same price as one who has read the advertisement or owner's manual and will have warranty protection? A warrantor who publishes affirmations which pass beyond the line of puffing must contemplate the possibility that every potential purchaser will read and rely on them. Presumably, that warrantor, engaging in such activity to induce reliance and promote sales, will price its product to include the cost of the warranty. Why should it not be required to stand behind its affirmations even if an individual buyer has not demonstrated direct reliance?

Enforcing warranty liability in these situations does not pose the spectre, contemplated in the famous phrase of Cardozo with respect to accountant liability, of "'liability in an indeterminate amount for an indeterminate time to an indeterminate class.'"226 A recent North Carolina decision,227 updating the law of accountant liability, suggests several grounds for distinction. Those persons supplying goods have control over the processes by which products enter commerce (including, it should be added, the publication of affirmations which constitute warranties), they can limit potential liability by controlling the number of products released and they "fully expect that their products will be used by a wide variety of unknown members of the public. Indeed, this is their hope . . . ."228 Why should they be permitted to escape warranty liability when that hope is fulfilled?

(e) Comment Reference to Factual Underpinnings. One matter that should be amplified in the Comments is an emphasis that "'basis of the bargain' is both highly factual and contextual, especially in the puffing cases. This appears to be common wisdom among the commentators who stress the importance of identifying relevant factors in reading cases.229 Such catalogue might include such factors as the specificity of the seller's statement, the relative expertise and commercial status of the parties, the other terms of the contract,

228 Id. at 213, 367 S.E.2d at 616.
229 See, e.g., CLARK & SMITH, supra note 179, ¶ 4.02[4]; WHITE & SUMMERS, supra note 205, § 9-4.
the nature (if any) of the buyer’s reliance, the gravity of the defect in the goods, the extent of damage attributable to the defect and even the strength of the evidence apparently available to establish breach and damages. One problem in an effort of this sort is that some of the matters suitable for inclusion in the catalogue—such as the last three enumerated here—do not pertain to the theoretical question of whether a warranty exists, even though they may be helpful in trying to reconcile the cases.

2. Are Warranties Made by Remote Sellers Covered by the Language of Section 2-313?

The present section 2-313 does not directly address the issue of warranties made by remote sellers, and Comment 2 shows that the drafters finessed the issue.\(^{230}\) Thus, despite the fact that many such warranties are regularly enforced by courts, the language of the provision does not really fit the situation. For example, the language speaks of an affirmation of fact or promise “made by the seller.” Is the remote seller a “seller” in relation to the ultimate buyer? Likewise, how can an affirmation or promise made by the remote seller become part of the basis of the buyer’s bargain with the retailer? Isn’t the bargain, after all, between the buyer and the retailer?\(^{231}\)

The problem, of course, not only implicates warranties, but remedies as well, as the Study Group acknowledges in a list of issues that a Drafting Committee must examine if privity is not required.\(^ {232}\)

Such remote seller warranties are pervasive. Where they relate to consumer goods and are in writing, the federal Magnuson-Moss

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230 U.C.C. § 2-313 (1990). Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the 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. The provisions of §2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

231 Of course, the retailer may adopt the remote seller’s warranty. However, that would serve only to bind the retailer to the remote seller’s promises, not necessarily to bind the remote seller directly to the buyer unless it could somehow be said that part of the deal between the retailer and the remote seller was the latter’s authorization for the former to bind it directly to the buyer.

Act, in effect, overcomes the Article 2 privity problem by granting standing to the ultimate buyer and certain others\textsuperscript{233} but does not deal with the remedy issues. Lemon laws in most states, albeit in non-uniform fashion, deal with both privity and remedy problems when new automobiles are involved.\textsuperscript{234} In addition, case law generally imposes liability on the remote seller for violations of warranty promises addressed in form to an ultimate buyer.\textsuperscript{235}

Thus, we have a situation in which remote seller warranties are both common and enforced. But, are they warranties within section 2-313? In view of the language of "seller" and "bargain," they appear not to be, although most cases do not confront this inconvenience. What then are they?

Professor Reitz concludes that they are common-law warranties which can be recognized by virtue of section 1-103\textsuperscript{236} and notes that "like warranty theory in the distant past, warranty obligations may be independent of contract." Distant past indeed! As indicated above,\textsuperscript{237} the warranty as separate contract analysis applied at the earliest stages of warranty liability.\textsuperscript{238} Originally, the separate contract was between buyer and seller. However, the concept was also applied to create warranty liability between an ultimate consumer and a manufacturer. Indeed, this was one of the bases of decision in \textit{Henningsen v. Bloomfield Motors, Inc.}\textsuperscript{239} In dealing with the warranty made by the manufacturer, the court said, "The consideration for this warranty is the purchase of the manufacturer's product from the dealer by the ultimate buyer."\textsuperscript{240}

Surely a rewritten statute should be drafted broadly enough to encompass such commonly used warranties. Further, the drafting should be broad enough to encompass representations in advertising which are broadly addressed to the public. In order to avoid

\textsuperscript{234} See supra p. 1003 accompanying notes 27-28.
\textsuperscript{235} See, e.g., \textit{National Consumer Law Center, Sales of Goods and Services} ch.19 (2d ed. 1989).
\textsuperscript{236} Memorandum by Reitz, "Warranties by Remote Manufacturers," prepared for the Study Group, at 5 (1989). He puts Magnuson-Moss written warranties into the same category for Code purposes.
\textsuperscript{237} See supra text accompanying notes 183-85.
\textsuperscript{238} The separate contract was often referred to as a collateral contract, a notion that still persists in England. See \textit{Benjamin}, supra note 187. Because of the confusion engendered, the Uniform Sales Act drafted around the concept.
\textsuperscript{239} 32 N.J. 358, 161 A.2d 69 (1960).
\textsuperscript{240} Id. at 374, 161 A.2d at 78.
problems of reliance, the language might provide that representations (which survive a puffing test) addressed to segments of the public to which the buyer belonged would be part of the basis of the bargain—just as express promises.

[PRELIMINARY REPORT - 2-314]

P. IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE: § 2-314.

Rec. A2.3 (11).

No revisions are recommended in the text of § 2-314. Some revisions in the comments, however, are recommended.

1. Merchant seller. A warranty of merchantability shall be implied when the "seller is a merchant with respect to goods of that kind." § 2-314(1). This is a less expansive definition of merchant than that contained in § 2-104(1). The definition is further narrowed by a sentence in Comment 3, which states that a "person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section. . . ." (A) We recommend that this sentence be deleted. If the seller otherwise qualifies as a merchant, a limited volume of actual sales should be irrelevant.

2. Auctioneer. It is not clear when an auctioneer is a seller who makes an implied warranty of merchantability.

(B) We recommend that when an auctioneer is a seller be clarified in a comment.

3. Merchantability. In general, courts have had little trouble working with the definitions of merchantability in § 2-314(2). The question in most cases is whether the buyer has proved that the goods, whether new or used, were unmerchantable at the time of tender.37 One problem is whether well made goods, i.e., cigarettes, fish, butter, blood or whiskey, whose natural ingredients create risks are unmerchantable. Are they "fit for the ordinary purposes for which such goods are used?" § 2-314(2)(c). The answer is unclear, and may depend upon the circumstances in each case.

(C) We recommend that the Drafting Committee prepare a new comment for guidance on this question. In addition, we recommend that the last sentence in § 2-314(1), which deals with whether the

36. See Revision at 408-410 (recommending that this problem be specifically addressed).
37. In general, the buyer must prove both the ordinary purposes for which such goods are used and that particular characteristics of the goods made them unfit for ordinary purposes. Bethlehem Steel Corp. v. Chicago Eastern Corp., 863 F.2d 508, 513 (7th Cir. 1988).
"serving for value of food or drink to be consumed either on the premises or elsewhere," be reviewed and coordinated with any revision in § 2-102.

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-315]

Q. IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE: § 2-315.

No revisions are recommended in § 2-315.

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-316]

R. EXCLUSION OR MODIFICATION OF WARRANTIES: § 2-316.

We will deal with § 2-316(1) subsection by subsection.

1. Express warranties: § 2-316(1).

§ 2-316(1) renders a disclaimer of an express warranty "inoperative" if the two terms cannot reasonably be construed as consistent. This policy decision is subject to the parol evidence rule, § 2-202, and raises the risk that a standard form "merger" clause may exclude an express warranty made before the contract was signed, even though it is still part of the buyer's actual expectations.

Rec. A2.3 (12).

The Study Group does not recommend that the reference to § 2-202 be deleted from § 2-316(1). Rather, we recommend that § 2-202 be revised to ensure that the buyer is not unfairly surprised by the merger clause. One possible revision is to require that the merger clause be "separately signed" by the other party. See §§ 2-205 & 2-209(2). Another possibility is to draft a new comment requiring proof that the buyer expressly assented to the merger clause.

A new comment in § 2-202 should also clarify when, if ever, a general merger clause excludes an implied warranty of merchantability or fitness.
2. Implied warranties: § 2-316(2).

Rec. A2.3 (13).

The following revisions and clarifications are recommended in the text of § 2-316(2):

(A) A conspicuous disclaimer of the implied warranty of merchantability should not be effective unless it is in writing and mention merchantability.

The addition of the writing requirement achieves parity with the fitness warranty and parallels § 2A-316. The consensus was, however, that § 2-316(2) should not be revised to require the seller to communicate additional information to the buyer. The buyer is expected to understand from a conspicuous, written disclaimer using the word "merchantability" that it assumes the risk that the goods will not be fit for ordinary purposes.

Some members of the Study Group disagreed with that conclusion, especially where consumer buyers are involved. Perhaps some reconsideration of the statutory approved words would help this issue. Compare § 2A-214(2) on "fitness."

(B) The majority of the Study Group concluded that the text should be revised to indicate that a disclaimer of which the buyer has knowledge it should be effective even though the definition of "conspicuous" in § 1-201(10) was not satisfied.

In short, in this case substance (no surprise in fact) should control form (the prevention of unfair surprise). Some members of the Study Group thought that form should be preserved, both to insure the consistent communication of essential information and to avoid evidentiary conflicts over how much the buyer actually knew.

(C) A bare majority of the Study Committee agrees that the courts should be free to apply the general principle of § 2-302 to invalidate disclaimers that comply with the formal requirements of § 2-316(2). This interpretation should be made clear in a comment to § 2-316(2). See Rec. A2 3(B) and accompanying discussion.

In short, § 2-316(2) should not be the exclusive statement of unconscionability where disclaimers of implied warranties are involved. Exactly what the residual principles are should be worked out on a case by case basis.

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38. Accord: Twin Disc, Inc. v. Big Bud Tractor, 772 F.2d 1329, 1635, n. 3 (7th Cir. 1985). Cases to the contrary are discussed in Update at 1270-71, supra at note 32.

3. § 2-316(3).

§ 2-316(3) provides for other circumstances that may exclude or limit an implied warranty.

No revisions are recommended in the text of § 2-316(3)(b) and (c).40

(D) § 2-316(3)(a) should be revised to require that the language of exclusion treated there, if put in writing, must be conspicuous.

As now drafted, § 2-316(3)(a) does not clearly require that language of disclaimer, such as “as is,” which is actually contained in a writing be conspicuous. In this case, we recommend that parity with § 2-316(2) be achieved. On the other hand, we are less clear that such language must be in writing, especially if that language is actually communicated to the buyer. Under those circumstances, the current draft of § 2-316(3)(a) appears to provide sufficient protection.

4. § 2-316(4).

No revisions are recommended in § 2-316(4).

[TASK FORCE - 2-316]

SECTION 2-316

1. 2-316 (1): Merger Clauses and the Parol Evidence Rule. For discussion of this issue see the discussion of Section 2-202.

2. Exclusion of Modification of Implied Warranties: Section 2-316(2).

a) Merchantability in Writing; Conspicuous “As Is”; Oral Disclaimers. The Study Group recommends that the current 2-316 be amended to add a requirement that a conspicuous disclaimer of merchantability be in writing and mention merchantability.41 The change “achieves parity with the fitness warranty and parallels § 2A-316.”42 In addition, the Study Group recommends that the “as is” disclaimer provisions in section 2-316(3)(a) be amended to require that any such language contained in a writing be con-

40. Peters suggested that a literal reading of § 2-316(3)(b) shows that a failure to examine the goods before contracting precludes both the right to reject and to recover damages and she questions whether this is sound. Roadmap at 207, note 30.


spicuous, thus resolving an acknowledged problem.\textsuperscript{243} However, the Study Group does not recommend any change in that part of the current provisions which does not require such language to be in writing.

The net result of these recommendations is positive. Because a writing also containing an express warranty involving consumer products would trigger the anti-disclaimer provisions of the Magnuson-Moss Act, the requirement for a writing to disclaim merchantability would indirectly enhance consumer protection. On the other hand, an oral disclaimer would still be possible under an amended subsection (3)(a). Even the brief explanation of the Study Group on the point is hedged: "[W]e are less clear that such language must be in writing, especially if that language is actually communicated to the buyer."\textsuperscript{244} Even if the full step of banning any disclaimer of merchantability is not taken, there should be added to the Comments some emphasis on the point. For example, where the "as is" disclaimer is not in writing, it should be actually communicated to the buyer to be effective.

b) \textit{Is the Medium the Message?} The provisions also do not confront the question of whether the word "merchantability" carries the message. It is, almost by definition, a merchant concept. Apparently the Study Group considered the issue since the Report indicates that

\begin{quote}
[t]he consensus was . . . that § 2-316(2) should not be revised to require the seller to communicate additional information to the buyer. The buyer is expected to understand from a conspicuous, written disclaimer using the word "merchantability" that it assumes the risk that the goods will not be fit for ordinary purposes.

Some members of the Study Group disagreed with that conclusion, especially where consumer buyers are involved. Perhaps some reconsideration of the statutory approved words would help this issue. Compare § 2A-214(2) on "fitness."\textsuperscript{245}
\end{quote}

\textsuperscript{243} \textit{See} Leary & Frisch, \textit{Is Revision Due for Article 2?}, 31 \textit{Vill. L. Rev.} 399, 414-15 (1986) (noting that a disclaimer of warranty of merchantability or fitness be conspicuous, but a disclaimer of all warranties with the use of words such as "as is" is not explicitly required to be conspicuous).

\textsuperscript{244} Prelim. Rpt., Part 3, \textit{supra} p. 1108.

The referenced section of the new Article 2A governing leases provides that one way to exclude a fitness warranty is to state that "[t]here is no warranty that the goods will be fit for a particular purpose." 246 Another example is the Arizona statute which requires the phrase "as is—not expressly warranted or guaranteed" to disclaim warranties relating to sale of cars. 247 And in Washington, disclaimers of merchantability or fitness "shall not be effective to limit the liability of merchant sellers except only insofar as they set forth with particularity the qualities and characteristics not being warranted." 248 Further consideration should be given to this issue by the Drafting Committee. 249

c) Does Knowledge of the Disclaimer Make it Conspicuous? A majority of the Study Group recommends an amendment to "indicate that a disclaimer of which the buyer has knowledge should be effective even though the definition of 'conspicuous' in section 1-201(1) was not satisfied." 250 There is some ambiguity in the recommendation since the referenced definition of "conspicuous" requires a writing. Presumably, the suggestion is directed only at the size and location

249 The nature of the problem for consumers is noted in National Consumer Law Center, Sales of Goods and Services § 17.4.5 (2d ed. 1989) with specific reference to the FTC Used Car Rule:

Most consumer buyers would not even know that there is an implied warranty called merchantability, much less that it can be disclaimed and how. Most consumers probably expect that if goods purchased do not function reasonably well, they can be returned to the seller within a reasonable time. This is, in fact the practice in most retail sales of goods to consumers.

... It is unlikely that a consumer buyer knows that [as is] means if the car does not work at all, he must still pay the seller and the seller will have absolutely no obligation. Some consumer buyers may believe that "as is" means "as equipped" or "with scratches and dents." It is also likely that a buyer may believe "as is" simply means the dealer does not promise free repairs for a specific period, that is, that there was no warranty to repair. The "common understanding" of the term "warranty" by consumer buyers generally concerns repairs of an item. 251

Id.

In the view of the publication, the additional language required by the FTC in that circumstance fortifies that understanding. This leads a consumer to conclude that, although the dealer will not pay for repairs, the "car will at least function reasonably well and be free of major defects (warranty of merchantability) or be fit to serve a particular purposes ... ." Id.

of type, not at whether a writing is required. Otherwise, the recommendation would undercut the new recommendation that the disclaimer of merchantability be in writing.

On the merits, the minority has the better case as a rough look at litigation regarding efficacy of disclaimers suggests that merchants have learned how to write them. Also, the minority view is persuasive that "form should be preserved, both to insure the consistent communication of essential information and to avoid evidentiary conflicts over how much the buyer actually knew."  

d) Unconscionable Disclaimers. Because there has been a thorough canvass by commentators of the relationship between section 2-316(2) and section 2-302, there is surely enough evidence to support the "bare majority" recommendation that "courts should be free to apply the general principle of § 2-302 to invalidate disclaimers that comply with the formal requirements of § 2-316(2)." This interpretation is to be "made clear" in a Comment to section 2-316(2). The subject is more fully discussed in the Study Group's consideration of section 2-302 where the same conclusion is recorded.

The conclusion is clearly consistent with two notions: (1) 2-316 is simply an application of 2-302 and does not exhaust the reach of the latter; (2) while 2-316 provides guidelines for true

251 In the early days, much warranty litigation terminated at this level of controversy. It was only after the merchants got their forms right that there was a need to push the frontiers of "failure of essential purpose."


The other side of the case was made in dicta in Tennessee Carolina Transp. v. Strick, 283 N.C. 423, 196 S.E. 2d 711 (1973), where the court suggested further inquiry should be permissible "as to whether the buyer was protected by factors other than the physical conspicuousness of the clause itself."

Certainly actual awareness of the disclaimer is another circumstance which protects the buyer from the surprise of unexpected and unbar-gained language of disclaimer. Perhaps an additional circumstance of this sort arises where, as here, the buyer is a non-consumer with bargaining power substantially equivalent to the seller's.

Where both of these circumstances are shown—the buyer is a non-consumer on substantially equal bargaining terms with the seller and is actually aware of the disclaimer prior to entering the sale contract—possibly the disclaimer should be enforced despite its inconspicuousness, in the absence of a showing of unconscionability, since the purpose of the "conspicuous" requirement has been satisfied.

Id. at 434, 196 S.E.2d at 718. If a change is to be made, it should be at least as hedged.


negotiated bargains, it may at times be inadequate in other circumstances.

[PRELIMINARY REPORT - 2-317]

S. CUMULATION AND CONFLICT OF WARRANTIES EXPRESS OR IMPLIED: § 2-317.

Rec. A2.3 (14)
No revisions are recommended in the text of § 2-317.
Section 2-317 provides principles to resolve conflict when the bargain contains more than one warranty and the intention of the parties as to which dominates is not clear. The approach is to construe the warranties "as consistent" unless this is "unreasonable" and then to fill out intention by certain "rules" of construction. In general, the "rules" give preference to the specific over the more general.

§ 2-317(c) provides that "[e]xpress warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose." Arguably, the inconsistent express warranty, whether giving the buyer more or less protection than the implied warranty, should control in both cases. The Study Group disagreed on this point, however, and recommends no revision in the text of § 2-317.42

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-318]

T. THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS OR IMPLIED: § 2-318.43

1. The Privity Requirement.

Background. The current § 2-318, with its three alternatives, is an anachronism. It was drafted before strict tort liability developed in addition

41. See §§ 1-205(4) and 2-208(2), where a similar approach is taken.
42. Most courts agree that an express warranty of description does not displace an implied warranty of fitness going to the details of performance or function of the goods. See, e.g., Singer Co. v. E.I. du Pont de Nemours & Co., 579 F.2d 433 (8th Cir. 1978).
43. We have benefited from an excellent memorandum entitled "Warranties by Remote Manufacturers," prepared for the Study Group by Professor Curtis R. Reitz of the University of Pennsylvania School of Law. See also, C. Reitz, Consumer Product Warranties Under Federal and State Law (2d ed. 1987).
to warranty theory where damage to person or property resulted. Furthermore, the stated basis for extension, "third party beneficiaries," is a fiction.

Rec. A2.3 (15).

(A) The Study Committee agreed that a major revision of § 2-318 was required and that whatever the revision, a buyer who suffered damage to person or property and claimed breach of warranty under Article 2 should meet the same privity standards as a buyer who suffered only economic loss.

Areas of Agreement and Disagreement. Since the Study Committee was not unanimous on what that revision should be, some background is required. The first question is whether a purchaser from a dealer should be permitted to sue a remote seller, especially a manufacturer, for breach of warranty for nonconformities in the goods at the time they left the seller's possession.

1. All agree that if the remote seller has made an express warranty through advertising or otherwise to the buyer that became part of the basis of the buyer's bargain with its seller, a suit against the remote seller should be allowed. Consistent with our recommendations regarding § 2-313, the remote seller should be permitted to show that the representations did not in fact become part of the buyer's bargain.

2. All agree that if the goods are otherwise merchantable but do not satisfy the buyer's particular purposes, the requirements of § 2-315 must be met. The effect of this is to require privity of contract. Where a buyer has special needs and the goods are complex, one would expect direct bargaining (or a sufficient nexus between the parties) before the seller is required to assume the risk that the goods do not satisfy the buyer's needs.

3. The main area of disagreement arises when the goods are unmerchantable at the time they leave the remote seller's possession and there are no express warranties as such. Yet even here the buyer makes a decision based upon product description, price and the ordinary uses for goods of that type. Should privity be required here?

One point of view was that privity should be a defense in this situation. If this view were accepted by the Drafting Committee, the following revision of § 2-318 might be warranted:

Regardless of the nature of the loss (and subject to the possibility that there may be a true third party beneficiary contract), the general rule is that there shall be no recovery for breach of warranty unless there is privity of contract between the seller and buyer. This rule applies whether the plaintiff is a commercial or consumer buyer.

There are two exceptions:

(1) Where the plaintiff is an assignee of a warranty made by the seller to the plaintiff's assignor; and
(2) Where the seller’s express warranties have become part of the buyer’s bargain with its seller.

In addition, under the revised § 2-318 the court should have power to define what amounts to privity but not to dispense with the requirement where privity is not present. Finally, a remote seller should be able to exclude or limit liability to its dealer through an appropriate clause, regardless of the type of injury suffered by the ultimate purchaser.

Another point of view claims that the privity requirement imposes unrealistic and unfair limitations upon a manufacturer’s responsibility for unmerchantable goods. When these limitations are combined with the judicial refusal to impose tort liability where there is only economic loss, there is less incentive for remote sellers to improve product quality and buyers are left to the vagaries of the contracting process and the risk that their seller will be insolvent or out of business.44 From this point of view, the privity requirement for breach of the implied warranty of merchantability, therefore, should be deleted from § 2-318.

2. Revisions Needed in Article 2 if Privity is Not Required.

Article 2 was not drafted for the case where a buyer is permitted to sue a remote seller for breach of warranty.

(B) The Study Group agrees that revisions are required to accommodate the possibility that privity will not be required and has identified eight problem areas where revisions are required. We recommend that the Drafting Committee produce concrete answers to the following questions.

1. Should a remote buyer be afforded a right of rejection or revocation as against the remote seller?

2. Should a remote buyer be allowed to recover the price it paid for the goods, or should its recovery be limited to the price the remote seller received for the goods?

3. How does the Code’s notice requirement for breach apply? Must the remote buyer notify the remote seller to preserve its remedies for breach, or is notification to the immediate seller sufficient?

4. Is a remote seller afforded a right to cure? Is such a right additional to the immediate seller’s right to cure?

5. May a seller in its contract with its own buyer prevent assignability, thereby limiting any warranties solely to its own buyer?

6. In the absence of an enforceable disclaimer or limitation of consequential damages, may a remote buyer recover consequentials such as lost profit from a remote seller?

7. May a remote buyer sue for breach of an express warranty on which there is no reliance?

8. What is the effect of a disclaimer in the contract between remote seller and its buyer on the suit by remote buyer against remote seller?

(C) The Study Group agreed that persons permitted to assert breach of warranty claims under Article 2 should be limited to buyers. § 2-103(1)(a). A remote seller’s warranties, therefore, do not extend to persons in the household of the buyer or “any person who may reasonably be expected to use, consumer or be affected by the goods.” 45

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-319]


FOB terms perform three important functions. They: (1) Impose an obligation to ship the goods on the seller; (2) Define what the seller must do to tender delivery, §§ 2-503 & 2-504; and (3) Determine when, in the absence of breach, risk of loss passes to the buyer. § 2-509(1). 46 When the term is clearly expressed as either “FOB the place of shipment” or “FOB the place of destination,” the different effects on tender of delivery and risk of loss are carefully spelled out in Article 2. A problem in interpretation may arise, however, if the FOB term is used without a clear designation of “a named place.” If the FOB is equivocal and there is no other agreement to the contrary, the courts have presumed that an “FOB place of shipment” contract was intended. 47

Rec. A2.3 (16).

The Study Group recommends that a new § 2-319(1)(d) be drafted to express the presumption favoring “FOB the place of shipment” in the text of the statute.

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45. Thus, if a non-buyer’s claim in tort is barred by the tort statute of limitations but not the “warranty” statute of limitations, § 2-725, that plaintiff would not be able to bring a warranty claim under Article 2.

46. In addition, delivery terms determine when title passes to the buyer. § 2-401(2). See Cracker Nat. Bank v. Idec division of Dresser Industries, 839 F.2d 1104 (5th Cir. 1988) (under FOB place of shipment term, title did not pass until goods delivered to carrier).

47. See Comment 5 to § 2-503 and the cases collected in Par. 2319.1 and par. 2319.10, of Callaghan’s UCC Case Digest.
Although no further revisions are recommended, the use of a "F.A.S." term indicates that an international sale may be involved. Accordingly, the Drafting Committee should review the relevant provisions of the Convention on Contracts for the International Sale of Goods, the INCO Terms and other relevant International Conventions to insure a proper mesh.48

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-320]


No revisions in the text of § 2-320 are recommended.

Section 2-320(1) defines the pricing implications of using the terms C.I.F. and C.&F. and § 2-320(2) states the seller’s delivery obligations when the term “C.I.F. destination or its equivalent” is used. Section 2-320(3) draws an important distinction between the effect of C.I.F and C.&F. terms (the insurance obligation) and § 2-320(4), like § 2-319(4), requires the buyer to make payment against documents. Comments 1 and 14 to § 2-320 state that the C.I.F. term “indicates a contract for proper shipment rather than one for delivery at destination.” Thus, the risk of loss passes at the point where the seller satisfies the obligations under § 2-320 rather than when the goods actually arrive at the destination.

This result may be clear from the comments and in the trade, but it is not so obvious from the text of § 2-320(2). For example, § 2-320(2) uses the term “C.I.F. destination” intending a “place of shipment” result while the term “F.O.B. the point of destination” under § 2-319(1)(b) would defer the risk of loss until the goods actually arrive.

Rec. A2.3 (17).

The Study Group recommends that the Drafting Committee consider whether additional clarity is required in the text of § 2-320(2).

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-321]


Except for ensuring a proper mesh with the law of international sales, no revisions are recommended in § 2-321.

X. **DELIVERY "EX-SHIP"**: § 2-322.

Except for ensuring a proper mesh with the law of international sales, no revisions are recommended in § 2-322.

Y. **FORM OF BILL OF LADING REQUIRED IN OVERSEAS SHIPMENT; "OVERSEAS"**: § 2-323.

Except for ensuring a proper mesh with the law of international sales, no revisions are recommended in § 2-323.

Z. **"NO ARRIVAL, NO SALE" TERM**: § 2-324.

Except for ensuring a proper mesh with the law of international sales, no revisions are recommended in § 2-324.

AA. **"LETTER OF CREDIT" TERM; "CONFIRMED CREDIT"**: § 2-325.

Subject to possible revisions in Article 5 or other sources of letter of credit law, no revisions are recommended in the text of § 2-325.

BB. **SALE ON APPROVAL AND SALE OR RETURN; CONSIGNMENT SALES AND RIGHTS OF CREDITORS**: § 2-326.

A number of revisions are recommended in the text of § 2-326 and § 9-114.
1. Overview.

Section 2-326 deals with one aspect of the larger problem of ostensible ownership. That larger problem, simply stated, is this: If A delivers goods to B and in that transaction reserves power to retrieve the goods from B at some later time, what are the rights of C, a creditor of B, who knows that B has possession of but does not know of A’s interest in the goods? The answer is clear if A and B intended to create a security interest in the goods or A, a seller, retained title to the goods after delivery to B: Article 9 applies and C’s rights are determined, in the main, by Article 9. See §§ 1-201(37) & 9-102.49

But suppose that Article 9 does not apply? Suppose that A, a bailor, entrusts the goods to B for repair or processing and C relies on that possession. Since a financing transaction was not intended, C assumes the risk that B does not own the property despite the apparent ownership. This follows even though B is a merchant who deals in goods of that kind.

A similar problem arises when a seller delivers goods to a buyer “on approval” or on “sale or return” or an owner consigns goods to a consignee with power to resell. Since a secured transaction is not involved, Article 9 does not apply. Section 2-326, however, was drafted with the interests of C, a creditor of the party in possession, in mind.50


After delivery of goods under transactions characterized as a sale on approval or a sale or return or a “true” consignment, what are the rights of creditors of the party in possession against the seller or consignor to whom, under the terms of their contracts, the goods may be returned? Suppose the creditor obtains a judicial lien on or a perfected security interest in the goods? Can the seller or consignor retrieve the goods free of that lien or security interest?

The current answers under § 2-326 are:

(1) Goods held on approval are “not subject to the claims of the buyer’s creditors until acceptance. . . .”, § 2-326(2);

(2) Goods held on sale or return “are subject to such claims while in the buyer’s possession. . . .”, § 2-326(2); and


50. Conceivably, the so-called “ostensible ownership” problem is no longer a serious risk and the burden should be placed upon the creditor to inquire rather than upon the consignor to disclose. See Revision at §57-58.
(3) Goods, whether or not held under a "true" consignment, "are deemed to be on sale or return" if delivered for sale to a person meeting the conditions stated in § 2-326(3), i.e., a person who "maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making the delivery." The consignor, however, can avoid the "deemed" sale or return rule by satisfying one of the three methods of giving public notice spelled out in § 2-326. If the option to comply with the filing provisions of Article 9, § 2-326(3)(e), is selected, § 9-114 states the conditions under which a consignor whose consignment is "not a security interest" has priority.51


A number of problems have been identified in and around the current statutory solutions.

Rec. A2.3 (18).

In order to simplify and clarify, the Study Group recommends the following revisions in the text of or comments to § 2-326.

(A) Assuming that a consignment for security is governed only by Article 9 and that a "true" bailment is not governed by either Article 2 or Article 9, a "true" consignment should be governed by § 2-326 and, to the extent relevant, the priority rules of Article 9. An effort to distinguish a "true" consignment from a consignment for security should be made in the comments.52

(B) § 2-326 should be revised as follows:

(1) The only option for giving public notice should be compliance with the filing provisions of Article 9. Option (a) of § 2-326(3) should be deleted and option (b) should be limited to cases where goods are delivered to an auctioneer for sale.

(2) The phrase "delivered to a person for sale" in § 2-326(3) should be expanded to include all deliveries of goods pursuant to which the parties expect the consignee ultimately to sell to others, even though further processing or prior consent to sale is required.

(3) Clarification of whether the consignee must, as § 2-326(3) now provides, "maintain a place of business at which he deals in goods of the kind involved" should be made. As written, this restricts

51. Under § 2-326(3), if a consignor does not file a financing statement but complies with either of the notice alternatives in (a) or (b), § 9-114 should not apply.
52. The Study Group agreed that a "sale or return" and a "true" consignment should be governed by the same rules where third parties asserted claims to the goods. Both are non-security consignments for sale.
the scope of protection to third parties. Section 2-326(3) should also be broadened to include delivery to and possession by a "merchant who deals in goods of that kind." Compare § 2-403(2).

(4) Consignors who are "consumers" should be excluded from the public notice requirements of § 2-326(3).\(^{53}\)

(5) A Seller (as well as a consignor) who delivers on "sale or return" should not be subject to the claims of the buyer's creditors if the seller gives public notice by filing a financing statement.

(C) The Study Group recommends that the Article 9 Study Committee consider the following revisions to § 9-114 and, where appropriate, to other sections of Article 9.

(1) If a consignor has filed a proper financing statement but has not met the additional conditions in § 9-114(1), the priority provisions of § 9-312(5) rather than § 9-114(2) should control. The consignor should not be automatically subordinated.

(2) It should be made clear that priority between a lien creditor and a consignor who files but does not meet the conditions in § 9-114(1) should track the priority rules in § 9-301(1)(b).

(3) It should be made clear that a consignor's interest in the goods attaches to their proceeds and what the priority of the consignor's interest should be.

The Study Group agreed that the further implications of Article 9 on these transactions should be left to the Article 9 Study Committee.

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-327]

CC. SPECIAL INCIDENTS OF SALE ON APPROVAL AND SALE OR RETURN: § 2-327.

No revisions are recommended in the text of § 2-327.

The terms "sale on approval" and "sale or return" are defined in § 2-326(1) and the special incidents of each between the parties are spelled out in § 2-327. No problems of consequence have arisen in the interpretation of § 2-327.

The risk of loss issues will be discussed under § 2-509, infra.

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-328]

DD. SALE BY AUCTION: § 2-328.

No revisions are recommended in the text of § 2-328.

An auction is a technique employed by an auctioneer, usually the agent of the seller, to generate competitive offers for the goods. Auctions and auctioneers may be regulated by special legislation. Also, the conditions of the auction and the terms of any resulting contract may be determined by the seller, if such conditions and terms are communicated to prospective bidders in advance. Section 2-328 provides a few special rules that apply, primarily, to disputes over when the sale was complete and the effect of putting up the goods "without reserve."

Although a thorough investigation has not been done, no problems of consequence appear to have arisen in the operation or interpretation of § 2-328.54

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-401]

ARTICLE 2, PART 4:
TITLE, CREDITORS AND GOOD FAITH PURCHASERS

A. PASSING OF TITLE; RESERVATION FOR SECURITY; LIMITED APPLICATION OF THIS SECTION: § 2-401.

No revisions are recommended in § 2-401.

The rejection in § 2-401 of "title" as a problem solving device was a major innovation in Article 2. Neither risk of loss nor liability for the price now depend upon who has title to the goods. Experience has vindicated Llewelyn's judgment that the elimination of title was a "true contribution and a true opportunity to bring a difficult, useful and troubled body of law within the compass of anybody, anytime, anyhow."

54. But see Revision at 408-10(questioning whether an auctioneer should be treated as a seller for warranty purposes). See also, Kershen, Horse-Tradin': Legal Implications of Livestock Auction Bidding Practices, 37 Ark. L. Rev. 119 (1983).

Although the carefully hedged and neutral "title" principles in § 2-401(1) have frequently been invoked in litigation, no major problems have arisen in their interpretation and application. Section 2-401 has simply been one ingredient in disputes that are frequently resolved under other sections of Article 2, e.g., § 2-403.

The principles of § 2-401 may be preempted by other state or federal legislation dealing with sales, such as the Certificate of Title Acts or farm legislation. A survey of this legislation in the comments may be useful. Also, § 2-401 may be relevant to non-sales disputes, such as the applicability of state and local tax legislation.

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-402]

B. RIGHTS OF SELLER'S CREDITORS AGAINST SOLD GOODS: § 2-402.

Rec. A2.4 (1).

Minor revisions are recommended in § 2-402.

Section 2-402(1), amplified, deals with priority disputes between "unsecured creditors" of the seller and buyers over "identified goods" in the seller's possession. Subject to §§ 2-402(2) & (3), the rights of these unsecured creditors are determined outside of Article 2 but are "subject to" the buyer's possessory rights under §§ 2-502 and 2-716.

(A) If § 2-502 is deleted, as recommended by the Study Group, § 2-402(1) should be revised to reflect this change.²

The balance struck in § 2-402(2) between state fraudulent conveyance law and "good faith" retention by a merchant seller has produced little litigation and no apparent problems.³ The same can be said about § 2-402(3)(b), dealing with the rights of creditors of the seller where retention of delivery "is made not in current course of trade. . . . "

In light of recommendations for the revision of § 2-403, infra, § 2-402(3)(a) may state too broad a proposition. A BIOCB under § 2-403(2) may, under certain circumstances, cut off a security interest created under Article 9, even though § 9-307(1) does not apply.

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² A more general question is whether the buyer's possessory rights under Article 2 are broad enough? As now drafted and interpreted by the courts, § 2-716 does not provide much protection to the buyer.

³ A leading case interpreting § 2-402 is In re Black & White Cattle Co., 783 F.2d 1454 (9th Cir. 1986).
(B) If § 2-403 is so revised, we recommend that § 2-402(1) be revised to state "Except as provided in § 2-403, nothing in this Article..."

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-403]

C. POWER TO TRANSFER; GOOD FAITH PURCHASE OF GOODS; "ENTRUSTING": § 2-403.

Section 2-403 has been the subject of considerable litigation and law review commentary. In light of some history under § 2-403, we recommend the following revisions, as discussed below.

Rec. A2.4 (2)

1. § 2-403(1).

(A) In § 2-403(1), the principle of Nemo Dat Quod Non Habet (One who hath not cannot give) should be made explicit. Also, the word "rights" should be combined with "and title" in the first sentence. The overall revision might read: "A purchaser of goods acquires at least as great but no greater rights and title than his transferor had or had power to transfer. A purchaser of a limited interest acquires rights and title only to the extent of the interest purchased."

§ 2-403(1) also confirms the power of a person with "voidable" title to transfer "good" title, but does not say when there is voidable title. At common law, there was disagreement whether the four transfers identified in § 2-403(1)(a) through (d) were within the voidable title rule. A proper reading is that the four transfers expand rather than limit the common law concept of voidable title.


5. See § 8-301(1), which provides that upon "transfer of a security to a purchaser..., the purchaser acquires the rights in the security which his transferor had or had actual authority to convey...." This revision of § 2-403(1) operates as a limitation on other sections where the power to transfer is defined. See, e.g., §§ 9-301(1) & 9-307(1).
(B) This interpretation should be made clear in a comment.6

There is some support for the view that a buyer who knows or has reason to know of competing third party claims to the goods is per se in bad faith.

(C) The Study Committee rejects a per se test and recommends that the comments be revised to state that whether a buyer is in good faith depends upon the facts and circumstances of each case.

2. § 2-403(2).

Section 2-403(2) gives a merchant to whom goods have been entrusted "power to transfer all rights of the entruster to a buyer in the ordinary course of business." A recurring question is whether the BIOCB (no matter how defined) "takes free" from a security interest held by the entruster if § 9-307(1) is not satisfied, i.e., the security interest was not created by "his seller," the merchant. Some courts have read § 2-402(3)(a) and § 2-403(4) to mean that § 9-307(1) controls and the BIOCB is not protected.7

(D) The Study Committee recommends a revision that insures protection of the BIOCB under § 2-403(2) if the secured party itself has entrusted the goods to a merchant, even though the security interest was created by another party.6 Further, it should be made clear that if the goods are entrusted to Merchant #1, who sells to non-BIOCB Merchant #2, who sells to BIOCB, the BIOCB takes "all rights" or takes "free" of a security interest. Finally, it should be made clear that the "shelter" principle operates where there is a break in the chain of merchants. Thus, a BIOCB takes the rights of a person who entrusted the goods to a merchant who resold them to a non-BIOCB who sold them to the BIOCB.

Any revision of § 2-403 must be coordinated with the revised definition of buyer in the ordinary course of business and other changes in sections dealing with the rights of third parties. See Rec. A1(4).

6. The phrase "transaction of purchase" in § 2-403(1) is broader than the phrase "contract for sale." Yet the phrase "voidable title" suggests that the purchaser who has power to transfer good title is in possession of the goods under a voidable transaction of "sale." If so, the language of § 2-403(1) should be sharpened to reflect this.


8. Entrustment, in general, might occur if the secured party delivered goods in its possession to, or acquiesced in the debtor's delivery to the merchant. See § 2-403(3). Some members of the Study Group disagrees that the broad reading of entrustment should apply here.
ARTICLE 2 - PART 4

SECTION 2-403

Conventional wisdom emphasizes the sanctity of the good faith purchase doctrine, a partial expression of which is found in section 2-403. Notwithstanding the grip that this doctrine presently has on our collective psyche, now may be the time to seriously rethink its future. Recall that it was not too long ago that Grant Gilmore fancifully labelled the Code’s treatment of third party rights as “a mid-twentieth-century codification of a mid-nineteenth-century idea whose time has long since gone.” At a minimum, greater attention to the substance of section 2-403 is necessary.

Section 2-403(1) begins with the statement that a purchaser acquires all of the title that his transferor had or had power to transfer. The Task Force agrees with the Study Group that the concept of “title” should be explicitly expanded to include “rights,” but it believes that the overall revision of the sentence suggested by the Study Group is without consequence and unnecessary.

The remainder of subsection (1) empowers a person with voidable title to transfer a good title to a good faith purchaser for value. One may wonder why such a purchaser is deserving of protection. Notice that no policy statement is provided to explain the subsection as written. If the voidable title provision is premised on the need to protect the interest of third parties who rely on the transferor’s good title, it goes too far, yet, at the same time, not far enough. Because of the broad definition of the terms “purchaser” and “value,” the protected class will include secured parties who were in no way misled by the voidable title

257 See id.
258 See U.C.C. § 1-201(33) (1990) (defining purchaser as anyone who takes “by sale, discount . . . pledge, lien . . . or any other voluntary transaction creating an interest in property”).
259 See U.C.C. § 1-201(44) (1990) (stating a broad definition of value).
holder's possession. On the other hand, many who do rely on possession will find themselves unprotected in situations where their transferor was found to be without voidable title or, as in the case of a judicial lien creditor who does rely on possession, because they do not take by purchase.

Subsections (2) and (3) also lack a single explanatory policy statement. Why is it just the BIOCB who is protected and not other purchasers for value? If the purpose of the entrustment doctrine is to protect reasonable reliance, should not the scope of the protected class be the same as that under subsection (1)? Furthermore, why not go all the way and make goods fully negotiable? As things now stand, a BIOCB is protected despite the fact that the entrustment was the product of larceny. Why is the BIOCB not equally deserving of protection if the true owner was deprived of possession by a thief who then entrusted to a merchant? Certainly the Study Group's recommendation to extend the protection of section 2-403(2) to BIOCBs who do not qualify for protection under section 9-307(1) is a step in the right direction.

It is the opinion of the Task Force that section 2-403 raises a number of issues which require further study. The Task Force believes that there are instances in which the true owner should be estopped to contest the transfer of ownership to another and

260 Due to an after-acquired property clause in the security agreement and prior extensions of credit, a secured party will attain the status of a good faith purchaser for value even if it has knowledge of a third party claim to the goods and it makes no further advances after the debtor receives possession. See In re Samuels & Co., 510 F.2d 139, 155 (5th Cir. 1975); rev'd on rehearing en banc, 526 F.2d 1238 (5th Cir.), cert. denied, 429 U.S. 834 (1976) (stating that Article 2 good faith only requires honesty in fact, reasonable commercial behavior, and fair dealing).

261 Such would be the case if, for example, the transferor was a mere bailee or if it had received its possession from a thief.

262 The possibility that a judicial lien creditor will rely on its debtor's possession is implicitly recognized by those recording acts which protect such creditors against prior unrecorded conveyances. See, e.g., U.C.C. § 9-301 (1990); ILL. ANN. STAT. ch. 30, ¶ 39 (Smith-Hurd 1969); MINN. STAT. ANN. § 507.34 (West 1986); N.J. STAT. ANN. § 46:22-1 (West 1989).


264 The Drafting Committee should also consider ways to ease the tension between U.C.C. § 2-403 and the array of statutes regulating the sale of many types of personality. In particular, motor vehicles have been the source of frequent litigation. See generally Kunz, Motor Vehicle Ownership Disputes Involving Certificate-of-Title Acts and Article Two of the U.C.C., 39 Bus. LAW. 1599 (1984) (detailing the many types of disputes arising due to the clash of the U.C.C. and Title Certificate Acts).