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OUT OF SIGHT, OUT OF MIND: HIDDEN DISCLAIMERS AND UCC § 2-316'S CONSPICUOUSNESS REQUIREMENT

Gavin Thole*

INTRODUCTION

“Money now, terms later” agreements, or rolling contracts, are commonplace in consumer transactions. Courts frequently allow these agreements to stand. But problems arise when product manufacturers disclaim a warranty that protects consumers, such as the implied warranty of merchantability, without disclosing the disclaimer upfront—effectively rendering the warranty useless. Suppose, for example, a consumer purchases a refrigerator or computer where the implied warranty of merchantability disclaimer is printed on the last page of a thick instruction booklet. The booklet is hidden deep inside the box, buried in a morass of cords and paperwork. The consumer has no way of knowing about the disclaimer until after she purchases and opens the product. Even then, the disclaimer is quite difficult to find. These “hidden disclaimers” appear to conflict with § 2-316 of the Uniform Commercial Code (UCC), which requires that disclaimers be conspicuous. Nevertheless, some courts have upheld hidden disclaimers under a narrow reading of § 2-316.

Part I of this Comment reviews the history, purpose, and operation of the implied warranty of merchantability. Part II explains the conflict between rolling contract theory and UCC § 2-316. Part III identifies problems with hidden disclaimers. In Part IV, I argue that courts should interpret § 2-316's conspicuousness requirement to render implied warranty of merchantability disclaimers ineffective unless a reasonable consumer would have noticed the disclaimer before making the purchase. This interpretation conforms with § 2-316's purpose, compelling policy considerations, and common sense.

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I. THE IMPLIED WARRANTY OF MERCHANTABILITY

A. *History*

Today's implied warranty of merchantability traces its roots to § 15(2) of the original Uniform Sales Act (the Act), promulgated in 1909 and adopted by thirty-six states.¹ The Act provided that “[w]here the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.”² This warranty of merchantable quality was a default provision,³ meaning that it attached at the time of sale unless disclaimed by the seller.⁴ Courts commonly interpreted the Act's warranty of merchantable quality to require that products be safe, fit for use, and reasonably free from defects.⁵ Sellers had the option to disclaim the warranty of merchantable quality only by express agreement.⁶ Courts typically upheld sellers' express disclaimer of the warranty of merchantable quality under § 71 of the Act, which provided that “any right, duty or liability . . . may be negated or varied by express agreement.”⁷

The UCC is the modern successor to the Uniform Sales Act.⁸ Today's implied warranty of merchantability, found in Article 2 of the UCC, is the default rule for the sale of goods.⁹ It holds merchants responsible for goods that fail to meet reasonable commercial standards of quality. Nearly all states have adopted the UCC's implied warranty of merchantability.¹⁰

1. R.J. Robertson, Jr., *A Modest Proposal Regarding the Enforceability of “As Is” Disclaimers of Implied Warranties: What the Buyer Doesn't Know Shouldn't Hurt Him*, 99 *COM. L.J.* 1, 15–16 (1994).

2. Uniform Sales Act § 15 (2).

3. *See, e.g.*, *Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co.*, 165 N.E. 793, 797 (Ill. 1929).

4. Stephen E. Friedman, *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 *ARIZ. L. REV.* 677, 724–25 (2004).

5. *See, e.g.*, *Appleman v. Fabert Motors, Inc.*, 174 N.E.2d 892, 895–96 (Ill. App. Ct. 1961).

6. *See* Robertson, *supra* note 1, at 16.

7. Uniform Sales Act § 71.

8. *Id.*; *see also* Friedman, *supra* note 4, at 724.

9. U.C.C. § 2-314 (2013).

10. *Uniform Commercial Code Locator*, CORNELL LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/uniform/ucc#a2> (last visited May 31, 2015); *see also* § 2-314. IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE, UCC LOCAL CODE VARIATIONS § 2-314, <https://a.next.westlaw.com/Document/Ib41b61034f6411ddaeca904b3dfad5a0/View/FullText.html?o>

B. Purpose

The implied warranty of merchantability is “by far the most important” of the UCC’s warranties.¹¹ The decision to make a default rule holding sellers responsible for goods that fall below reasonable standards of quality is a normative one; it reflects a value judgment that sellers, rather than consumers, should be liable for substandard goods.¹² Merchants, simply by virtue of selling products, make an implicit representation that their products are of merchantable quality.¹³ Holding sellers to minimum standards of quality incentivizes manufacturers to produce safer and more reliable products.¹⁴ This seller-manufacturer incentive scheme promotes consumer confidence that products will conform to reasonable expectations of adequacy.¹⁵

The implied warranty of merchantability also improves efficiency in consumer transactions. When the default rule requires products to meet minimum standards of quality, it reduces the cost of seeking out information regarding a product’s reliability and decreases the likelihood of market failure due to limited information.¹⁶ The ability to disclaim the implied warranty of merchantability allows sellers to limit their liability and avoid the default rule. This flexibility can reduce the cost of goods for consumers¹⁷ and ease the costs of market entry for sellers.

The implied warranty of merchantability also assists in the efficient allocation of the risk of product failure. Sellers, rather than consumers, can better bear the cost of defective products that cause harm or fall below reasonable standards of quality; sellers can raise the price of a good to cover the cost of compensating consumers for breaches of the implied warranty of merchantability, thereby distributing the cost among

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11. JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6 at 343 (2d ed. 1980).

12. 3 LARY LAWRENCE, LAWRENCE ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-314:5 (3d ed. 2004).

13. See Debra L. Goetz, et al., *Article Two Warranties In Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1191 (1987).

14. LAWRENCE, *supra* note 12, at § 2-314:5.

15. See Goetz, *supra* note 13, at 1191.

16. See Robert A. Hillman & Jeffery J. Rachlinksi, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 445, 450–53 (2002).

17. See Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and “Merchant/Consumers” Through Default Provisions*, 30 J. MARSHALL L. REV. 39, 88 (1996); Bernard F. Kistler, *U.C.C. Article Two Warranty Disclaimers and the “Conspicuousness” Requirement of Section 2-316*, 43 MERCER L. REV. 943, 95–57 (1992).

all consumers of the product.¹⁸ This is akin to the creation of an insurance fund for the consumers' protection.¹⁹

C. Operation of the Warranty and Disclaimers

The UCC's implied warranty of merchantability bears close resemblance, at least functionally, to the original version found in the Uniform Sales Act. Merchants are generally responsible for goods that fail to meet reasonable commercial standards of quality.²⁰ In order to be "merchantable" under the UCC, goods must meet all of the following requirements:

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promise or affirmations of fact made on the

18. See LAWRENCE, *supra* note 12, at § 2-314:5.

19. See, e.g., *Cornette v. Searjeant Metal Prods., Inc.*, 258 N.E.2d 652, 656 (Ind. App. 1970) ("In theory at least . . . if the price of the product accurately reflects the cost of the product [including the costs associated with violations of the implied warranty of merchantability], then the consumer is contributing to a fund for his own protection.").

20. See *Goetz*, *supra* note 13, at 1191; see also LAWRENCE, *supra* note 12, at § 2-314:5.

container or label if any.²¹

In short, the implied warranty of merchantability, if not disclaimed, means that the seller is responsible for ensuring that the product will work.²²

§ 2-314(1) of the UCC provides that “[u]nless [disclaimed], a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”²³ Thus, like under the Uniform Sales Act, the UCC’s implied warranty of merchantability attaches by default whenever a merchant sells goods.²⁴ A “merchant” is one who regularly deals in the type of goods involved in the transaction or holds himself out as having knowledge or skill regarding such goods.²⁵ Litigation surrounding the implied warranty of merchantability generally centers around three points of contention: whether the seller is a merchant with respect to the type of goods in question, whether a product is of “merchantable quality,” and whether disclaimers of the implied warranty of merchantability are effective.²⁶

UCC § 2-316 allows sellers to disclaim the implied warranty of merchantability. It provides that in order “to exclude or modify the implied warranty of merchantability or any part of it the language [of the disclaimer] must mention merchantability and in case of a writing must be conspicuous”²⁷ The disclaimer must be conspicuous²⁸ to prevent sellers from disclaiming the implied warranty of merchantability without fair notice to the consumer.²⁹ Judges must decide whether a disclaimer is conspicuous on a case-by-case basis as a matter of law.³⁰ Written

21. U.C.C. § 2-314(2) (2013).

22. See Warkentine, *supra* note 17, at 88.

23. U.C.C. § 2-314(1).

24. *See id.*

25. *Id.* § 2-104(1).

26. See JEFFREY T. FERRIELL, UNDERSTANDING CONTRACTS 371 (3d ed. 2014).

27. U.C.C. § 2-316(2) (2013).

28. *Id.*

29. The conspicuousness requirement serves an important consumer protection function – when consumers know whether a product is covered by the warranty, they can make better decisions, such as whether express warranties provided by the seller offer sufficient protection or whether competing products offering fuller warranties have a better value. *See id.* § 1-201(b)(10) (“‘Conspicuous,’ with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.”); *id.* § 2-316 cmt. 1 (the purpose of the conspicuousness standard is “to protect a buyer from unexpected and unbargained language of disclaimer . . . [and] surprise.”). *See also* Logan Equip. Corp. v. Simon Aerials, Inc., 736 F. Supp. 1188, 1197 (D. Mass. 1990) (holding that a conspicuous disclaimer puts a consumer on notice).

30. *See* U.C.C. § 1-201(b)(10) (“Whether a term is ‘conspicuous’ or not is a decision for the court.”); *see, e.g.*, Adams v. American Cyanamid Co., 498 N.W.2d 577, 585, 587 (Neb. App. 1992); Clark v. LG Elecs. U.S.A., Inc., No. 13–CV–485, 2013 WL 5816410, at *11 (S.D. Cal. 2013);

disclaimers are standard;³¹ practical obstacles would almost certainly prevent consistent enforcement of oral disclaimers.³²

In defining conspicuous, the UCC provides judges with both a standard and a rule.³³ The UCC's conspicuousness standard is a familiar "reasonable person" standard: "'Conspicuous,' with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it."³⁴ Such a standard delegates significant discretion to the judge to weigh the issue of conspicuousness and rule accordingly. The UCC's physical characteristics rule supplements the conspicuousness standard. It specifies physical attributes that can make a disclaimer conspicuous:

Conspicuous terms include the following: . . .

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.³⁵

The UCC's inclusion of both the conspicuousness standard and the physical attributes rule makes the warranty disclaimer provision difficult to apply. What result is appropriate where a disclaimer minimally complies with the physical attribute rule, but no reasonable consumer would have noticed it? This problem is most apparent where the conspicuousness requirement operates in apparent contradiction to the rolling contract theory of contract formation.

Cooper Paintings and Coatings, Inc. v. SCM Corp., 457 S.W.2d 864, 867 (Tenn. App. 1970); Gindy Mfg. Corp. v. Cardinale Trucking Corp., 268 A.2d 345, 350 (N.J. Super. Ct. 1970); *Logan*, 736 F. Supp. at 1197; Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1038-39 (D.S.C. 1993); *Omni USA, Inc. v. Parker-Hannifin Corp.*, 798 F. Supp. 2d 831, 850 (S.D. Tex. 2011); *Rinaldi v. Iomega Corp.*, No. 98C-09-064, 1999 WL 1442014 at *2-3 (Del. Super. 1999).

31. *Id.*

32. *Id.*; see also Robertson, *supra* note 1, at n. 27.

33. See U.C.C. § 1-201(b)(10).

34. *Id.*

35. *Id.*

II. ROLLING CONTRACT THEORY AND THE CONSPICUOUSNESS REQUIREMENT

The bargain landscape has changed drastically with the advent of rolling contracts, where the full terms of a contract are not disclosed to the purchaser until after the sale of a product is complete.³⁶ In such cases, the seller typically gives the buyer an option to return the product for a limited time after seeing the full terms of the sale.³⁷ The difficulty with rolling contracts lies in determining whether or not terms presented to the consumer after payment become part of the basis of the bargain and enter the contract.³⁸

Courts frequently allow rolling contracts to stand. For example, in *ProCD, Inc. v. Zeidenberg*,³⁹ the defendant purchased a telephone database and associated software stored on a CD-ROM.⁴⁰ The outside of the package indicated that additional terms were enclosed inside.⁴¹ When the defendant installed the software, he clicked through a screen containing the additional terms, which included a term stating that the software would not be used for commercial purposes.⁴² Plaintiff manufacturer brought suit alleging that the defendant violated this additional term after the defendant resold information from the database.⁴³ The court held that the additional term was enforceable against the defendant although it was hidden inside the software package.⁴⁴ The court reasoned that the defendant accepted the additional term by clicking through the screen rather than rejecting and returning the software.⁴⁵

*Hill v. Gateway, Inc.*⁴⁶ is another oft-cited example of courts' willingness to enforce rolling contracts. Plaintiff purchaser ordered a computer over the phone and received it in the mail.⁴⁷ The manufacturer sent additional contract terms, including an arbitration clause, in the

36. See Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 743–44 (2002).

37. *Id.* See also *Hill v. Gateway, Inc.* 105 F.3d 1147, 1148–49 (7th Cir. 1997).

38. Hillman, *supra* note 36, at 744.

39. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

40. *Id.* at 1450.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1455.

45. *Id.* at 1452–53.

46. 105 F.3d 1147 (7th Cir. 1997).

47. *Id.* at 1148.

box.⁴⁸ The computer had a thirty-day return policy.⁴⁹ When the purchaser brought suit against the manufacturer claiming that the computer was defective, the court held that the arbitration clause was enforceable even though the consumer could not read it before making the purchase.⁵⁰ The court reasoned that the purchaser assented to all additional terms in the box by failing to return the computer within thirty days.⁵¹

When sellers present a disclaimer of the implied warranty of merchantability after the sale of a product, however, courts must reconcile rolling contract principles with the UCC's conspicuousness requirement. Recall the earlier example: a consumer purchases a product (such as a refrigerator or a computer) where the implied warranty of merchantability disclaimer is printed on the last page of a thick instruction booklet. The booklet is hidden deep inside the box, buried in a morass of cords and paperwork. The consumer has no way of knowing about the disclaimer until after she purchases and opens the product. Even then, the disclaimer is quite difficult to find. Courts applying a strict rolling contract analysis would likely interpret the UCC's conspicuousness requirement to find that the hidden disclaimer is effective: the defining feature of rolling contract reasoning is to allow "money now, terms later" agreements to stand where a consumer has "assented" to the hidden term by keeping the product instead of returning it.⁵²

*Rinaldi v. Iomega Corp.*⁵³ exemplifies the tension between the UCC's conspicuousness requirement and rolling contract principles. In *Rinaldi*, a proposed class of computer zip drive owners brought suit against defendant manufacturer.⁵⁴ Defendant's product allegedly suffered from a serious defect known as the "click of death," which caused data loss and irreparable damage to the zip drives.⁵⁵ Plaintiffs claimed that this defect violated the implied warranty of merchantability.⁵⁶ Defendant argued that it had effectively disclaimed the warranty.⁵⁷ The disclaimer was packaged inside the box with the zip

48. *Id.*

49. *Id.*

50. *Id.* at 1149, 1150.

51. *Id.* at 1148.

52. *See, e.g.,* O'Quin v. Verizon Wireless, 256 F. Supp. 2d 512, 516 (M.D. La. 2003).

53. No. 98C-09-064, slip op. at *1 (Del. Super. Ct. 2001).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at *2.

drive; it was not visible to plaintiffs before the purchase.⁵⁸ Plaintiffs responded that the disclaimer was not conspicuous as required by UCC § 2-316.⁵⁹ How should the judge rule?

Courts are divided. Some find the disclaimer conspicuous despite the fact that it is effectively invisible to the consumer until the purchase is complete.⁶⁰ These courts focus on the UCC's physical characteristics rule, which considers the way in which the disclaimer is printed on the page—its color, size, and location.⁶¹ Favoring rolling contracts principles, these courts do not consider whether the disclaimer is disclosed to the consumer, or even discoverable by the consumer, before the purchase.⁶² Applied to *Rinaldi*, this reasoning results in a victory for the seller; the customer is bound by the disclaimer of the implied warranty of merchantability despite not knowing about it until after purchasing and opening the product's packaging. Other courts hold that a disclaimer that is buried in the box, and thus presented after the sale of a product, is inconspicuous as a matter of law.⁶³ These courts invalidate the warranty disclaimer because it fails to meet the UCC's conspicuousness standard.⁶⁴ Applied to *Rinaldi*, this view results in a victory for the buyer; the seller's failure to provide reasonable notice of the disclaimer renders it inoperative.

Absent a revision to Article 2, courts confronted with this problem must decide which of these approaches to follow. The *Rinaldi* court ultimately adopted the former view, holding that the seller's disclaimer was conspicuous despite its placement inside the box.⁶⁵ The court reasoned that if the disclaimer surprised the plaintiff, the plaintiff's sole remedy was to return the product upon discovering it.⁶⁶ Other courts have followed a similar approach.⁶⁷

58. *Id.*

59. *Id.* at *2–3.

60. *See, e.g., id.* at *2–4, *5, *9.

61. *See* Friedman, *supra* note 4, at 688–89 (citations omitted); U.C.C. § 1-201(b)(10).

62. *See, e.g., id.*

63. *See, e.g., Clark v. LG Electronics U.S.A., Inc.*, 81 U.C.C. Rep. Serv. 2d 1114 (S.D. Cal. 2013).

64. *See id.*

65. *Rinaldi*, at *5 (holding that “[d]efendant’s disclaimer of the implied warranty of merchantability was effective despite its physical placement inside the packaging of the Zip drive and has satisfied the conspicuousness requirement . . .”).

66. *See id.* (“The buyer can read the disclaimer after payment for the Zip drive and then later have the opportunity to reject the contract terms (i.e., the disclaimer) if the buyer so chooses.”).

67. *See* Friedman, *supra* note 4, at 688–89 (citations omitted). For examples of courts looking only to a disclaimer’s physical characteristics, see *Transurface Carriers, Inc. v. Ford Motor Co.*, 738 F.2d 42, 46 (1st Cir. 1984); *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537, 547 (D. Mass. 1977); *Bennett v. Matt Gay Chevrolet Oldsmobile, Inc.*, 408 S.E.2d 111, 114–15

III. PROBLEMS WITH THE *RINALDI* COURT'S APPROACH

The *Rinaldi* approach is fundamentally flawed; the reasoning that justifies the application of “money now, terms later” rolling contracts principles (as in *ProCD* and *Hill*) simply does not hold up when the hidden term is a disclaimer of the implied warranty of merchantability.

First, while the *Rinaldi* court purported to rely upon *ProCD* and *Hill*, that reliance was misplaced. *ProCD* and *Hill* are easily distinguishable from *Rinaldi*.⁶⁸ The term at issue in *ProCD* was a limited-use license.⁶⁹ *Hill* involved an arbitration clause.⁷⁰ Under the UCC, neither of these terms is subject to the same statutory conspicuousness requirements as an implied warranty of merchantability disclaimer.⁷¹

Moreover, the *ProCD* court explicitly recognized that implied warranty disclaimers should be treated differently than other terms in rolling contracts.⁷² Although some terms may be presented to the consumer after purchase, warranty disclaimers may not. The *ProCD* court explicitly stated that implied warranty of merchantability disclaimers should fulfill “additional requirements,” including the conspicuousness requirement.⁷³

The *Rinaldi* court's reasoning also runs contrary to the intent of the UCC's drafters. That the implied warranty of merchantability is difficult to disclaim is no accident; the warranty is considered fundamental in contracts for the sale of goods.⁷⁴ Accordingly, the implied warranty of merchantability was designed to be a “very sticky” default rule that can only be altered by careful compliance with the provisions of UCC § 2-316.⁷⁵ Adequate notice must be provided to the consumer so that she is not surprised after the purchase.⁷⁶

Evidence to this effect is found in the Official Comments to the UCC, wherein the drafters clarified that the purpose of the

(Ga. Ct. App. 1991); *Webster v. Sensormatic Elec. Corp.*, 389 S.E.2d 15, 16 (Ga. Ct. App. 1989).

68. See Friedman, *supra* note 4, at 692–94.

69. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

70. *Hill v. Gateway, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

71. See U.C.C. § 2-316; see also Friedman, *supra* note 4, at 693–94.

72. *ProCD*, 86 F.3d at 1453 (“Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be ‘conspicuous’ . . . [t]hese special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in *Carnival Lines*.”); see also Friedman, *supra* note 4, at 692–93.

73. *ProCD*, 86 F.3d at 1453.

74. See WHITE & SUMMERS, *supra* note 11, at § 9–7.

75. Friedman, *supra* note 4, at 684.

76. See *id.*

conspicuousness standard is “to protect a buyer from unexpected and unbargained language of disclaimer . . . [and] surprise.”⁷⁷ The warranty of merchantability is “so commonly taken for granted [by consumers] that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.”⁷⁸ The UCC’s conspicuousness standard, properly applied, requires more than mere contrasting type, color, or placement—it also requires a disclaimer that “a reasonable person against which it is to operate ought to [notice].”⁷⁹ In other words, a seller must take adequate steps to put the buyer on notice that the seller is rejecting obligations normally imposed by law.⁸⁰

Nevertheless, courts following the *Rinaldi* approach analyze the physical appearance of the disclaimer but fail to consider whether a reasonable person should actually notice the disclaimer as UCC § 2-316 requires.⁸¹ The customer in *Rinaldi* could not have noticed the disclaimer before the purchase because it was buried in the box, yet the disclaimer was upheld.⁸² Consequently, the *Rinaldi* interpretation of UCC § 2-316 guts the important consumer notice function of a conspicuous disclaimer—the very reason for the inclusion of the requirement in the UCC.⁸³

Finally, the *Rinaldi* approach ignores fundamental practical barriers that might prevent customers from returning a product upon discovering an unfavorable term inside the box. Assuming a consumer finds the disclaimer before the return period expires, her options remain quite limited. If she returns the product, she has no way of knowing whether potential replacement products carry a similar disclaimer. On the other hand, if the hidden disclaimer minimally complies with the physical characteristics rule, the consumer is barred from bringing suit under the implied warranty.

77. U.C.C. § 2-316 cmt. 1 (2012).

78. U.C.C. § 2-314 cmt. 11.

79. U.C.C. § 1-201(b)(10).

80. See Robertson, *supra* note 1, at 21–23.

81. See, e.g., *Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014, at *2–5 (Del. Super. Ct. Sep. 3 1999); see also Friedman, *supra* note 4, at 691–95.

82. See *Rinaldi*, 1999 WL 1442014, at *5, *9.

83. See U.C.C. § 2-103(b); U.C.C. § 2-316 cmt. 1.

IV. TOWARD A SENSIBLE INTERPRETATION OF UCC § 2-316: THE *CLARK* APPROACH

The court in *Clark v. LG Electronics U.S.A., Inc.*⁸⁴ advances a more sensible interpretation of the UCC's conspicuousness requirement. Plaintiff, a refrigerator buyer, claimed that the defendant refrigerator manufacturer breached the implied warranty of merchantability after her one-month-old refrigerator failed to function.⁸⁵ The refrigerator manufacturer included an implied warranty of merchantability disclaimer in the owner's manual, which was buried inside the box.⁸⁶ The manufacturer moved to dismiss plaintiff's claim on the theory that the disclaimer was sufficiently conspicuous because it was printed in capital letters.⁸⁷ The manufacturer argued that if the plaintiff wanted to return the refrigerator after receiving delivery, opening the box, and finding the warranty, she could have done so.⁸⁸ The court rejected the manufacturer's argument, properly relying on the UCC's definition of conspicuous⁸⁹—as well as the explicit purpose of UCC § 2-316⁹⁰—to support a holding that the disclaimer was invalid.⁹¹ Importantly, the court observed that, because plaintiff was not alerted to the disclaimer before her purchase, she “lacked any ability to negotiate its terms or to make a different choice based on the disclaimer's inclusion.”⁹² Courts in fourteen states and the Fourth, Ninth, and Tenth Circuits have followed similar reasoning.⁹³

The interpretation of UCC § 2-316 advanced in *Clark* has a number of important benefits. First and foremost, the *Clark* approach restores UCC § 2-316's consumer protection function. It allows courts to

84. *Clark v. LG Electronics U.S.A., Inc.*, No. 13-cv-485 JM, 2013 WL 5816410, (S.D. Cal. Oct. 29, 2013).

85. *Id.* at *1–2.

86. *Id.* at *10. The refrigerator manufacturer's disclaimer read as follows: “THIS WARRANTY IS IN LIEU OF ANY OTHER WARRANTY, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.” *Id.* at *10, *12.

87. *Id.* at *13.

88. *Id.*

89. Recall, in addition to suggesting that conspicuous terms might be larger in size, printed in contrasting color or type, and set off from other text, the UCC requires that a conspicuous term is “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.” U.C.C. § 1-201(b)(10).

90. U.C.C. § 2-316 cmt. 1 (2012).

91. *Clark v. LG Electronics U.S.A., Inc.*, No. 13-cv-485 JM, 2013 WL 5816410, at *12–14 (S.D. Cal. Oct. 29, 2013).

92. *Id.* at *15.

93. See RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 52:81 n. 68 (4th ed. 2001).

evaluate whether a reasonable consumer would notice the seller's disclaimer. Courts may consider the disclaimer void if it is hidden from the consumer until after the transaction is completed.

The *Clark* approach also encourages more efficient consumer transactions by reducing the information cost of discovering the warranty disclaimer. At present, the cost to individual consumers of monitoring most terms outweighs the benefit of doing so.⁹⁴ Terms are simply too difficult and time-consuming to locate.⁹⁵ This problem is compounded when disclaimers are hidden inside the box, making them nearly undiscoverable prior to purchase. As a result, buyers usually do not read warranty disclaimers, and the market lacks consumers who are informed about the warranty status of products.⁹⁶ This dearth of information unfairly favors manufacturers and sellers, who can disclaim the implied warranty of merchantability without charging a lower price, while consumers are unable to consider hidden disclaimers and cannot select products accordingly.⁹⁷

Requiring a disclaimer that reasonable consumers would notice may also improve consumer confidence. If buyers are routinely made aware of unfavorable disclaimers, they could, in theory, make more efficient and informed decisions about the allocation of risk when purchasing products.⁹⁸ Buyers may choose to pay more for a product that is warrantied to function properly. In that case, the buyer purchases increased certainty that the product will work as intended. A buyer could also choose to pay less for a riskier product that lacks such a warranty. In either case, the buyer gains confidence because she has more information about the true value of the product she is purchasing.

Increased consumer confidence may incentivize manufacturers and sellers to create more reliable products.⁹⁹ If consumers value products with the implied warranty of merchantability intact, despite a marginally

94. Hillman & Rachlinksi, *supra* note 16, at 447.

95. *Id.* at 446.

96. *Id.* One could argue that it is unlikely that consumers would read warranty disclaimers even if they were discoverable before the purchase. But the information cost could be reduced to such an extent that consumers would be likely to comply. An industry-standard logo, for example, might make this possible.

97. See Hillman, *supra* note 36, at 757.

98. See, e.g., Eric A. Zaks, *Contracting Blame*, 15 U. PA. J. BUS. L. 169, 178 n. 27 (2012) (citing Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement*, 56 WASH. & LEE L. REV. 519, 576 (1999)); David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 287-94 (arguing that increased disclosure can lower search costs and improve consumers' decisionmaking); Friedman, *supra* note 4, at 694.

99. See Kistler, *supra* note 17, at 956.

higher cost, sellers will feel pressure to avoid disclaiming the warranty. Manufacturers will have to improve the quality of products or pay for their faults.¹⁰⁰ Any increase in production costs would spread to all customers by a slight price increase, allowing customers to essentially subsidize a fund for their own protection.¹⁰¹

Critics of the *Clark* approach argue that it is impractical to put contract terms on a purchase order or on the outside of a product's box.¹⁰² But compliance would not necessarily require presenting lengthy disclaimers before the purchase. An industry-standard logo alerting the consumer to the disclaimer could easily replace the text of the disclaimer itself. Ratings logos on movies, age logos on toys, and "environmentally friendly" logos on appliances demonstrate that this approach can work.¹⁰³ Critics also argue that disclosing the warranty disclaimer is futile because most purchasers simply will not read it.¹⁰⁴ But the law already presumes that buyers have read a disclaimer so long as it conforms to the requirements of UCC § 2-316.¹⁰⁵ Given this presumption, the law should encourage compliance by making the disclaimer less difficult to find and easier to understand.

Requiring an implied warranty of merchantability disclaimer that reasonable consumers notice will still allow manufacturers and sellers to bargain around the default rule. If buyers and sellers truly value exchanging cheaper goods, they may continue to do so using visible disclaimers.¹⁰⁶ Some sellers would undoubtedly continue to disclaim the warranty. Others may differentiate themselves by honoring the warranty and adjusting their price point accordingly. In either case, requiring a truly conspicuous disclaimer will assist consumers in differentiating products and will improve overall market efficiency.¹⁰⁷

100. *Id.*

101. *Id.*

102. See Friedman, *supra* note 4, at 694.

103. While consumers would have to learn what the logo means, this is unlikely to prevent success. The same was once true of "R" rated movies, electric-shock warnings, and cell phone signal-strength indicators, which have all become generally understood and accepted symbols in their respective industries.

104. See Hillman & Rachlinksi, *supra* note 16, at 448.

105. *Id.* at 455; see also Hillman, *supra* note 36, at 748, 755.

106. See Kistler, *supra* note 17, at 956–57.

107. See, e.g., Zaks, *supra* note 98, at 178 n. 27; Grether et al., *supra* note 98, at 287–94; Friedman, *supra* note 4, at 694.

CONCLUSION

Compelling policy considerations and the purpose of UCC § 2-316 suggest that courts should adopt the interpretation of conspicuousness advanced in *Clark* rather than that in *Rinaldi*. Implied warranty of merchantability disclaimers should be deemed ineffective unless the court determines that a reasonable consumer would have noticed the disclaimer prior to purchase. The *Rinaldi* approach thwarts the ideal operation of the warranty disclaimer in at least three ways: the consumer is not alerted to the inclusion of the unfavorable disclaimer before making the bargain, the consumer cannot make a meaningful choice between similar products that may have different warranty provisions, and the consumer is, in all practicality, left without remedy if the product fails to meet a merchantable standard of quality. The *Clark* approach restores § 2-316's notice function, promotes efficiency, restores consumer confidence, and incentivizes manufacturers to create products that are more reliable—all without sacrificing the parties' flexibility to bargain around the rule.