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Freeing the Tortious Soul of Express Warranty Law

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I. INTRODUCTION

I suspect that most American lawyers and law students regard express warranty as neither more nor less than a term in a contract, a term that is subject to conventional contract rules on formation, interpretation, and remedy. Assume, for example, that a buyer sends a purchase order to a seller and the purchase order specifies the delivery of 300 tons of “prime Thomas cold rolled steel.” The acknowledgment also describes the goods to be sold as “prime Thomas cold rolled steel.” Every American lawyer would agree that there is a contract to deliver such steel and furthermore would conclude that the seller makes an express warranty that the steel delivered would conform to that description and that the seller would be liable for breach of its contract if it failed to deliver steel that conformed to that description. So we would say that the description is an express warranty and that the express warranty is neither more nor less than a term in a contract.

But section 2-313 of the Uniform Commercial Code on express warranty has language that fits only uncomfortably with that “contract term” analysis. Section 2-313(1)(b) reads: “Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.” If this term “prime Thomas cold rolled steel” is merely a term in a contract, then

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why is there an additional requirement that the term be "part of the basis of the bargain," and why does similar language appear with respect to "promises" in 2-313(1)(a), and with respect to "samples and models" in 2-313(1)(c)? Normal rules of contract interpretation provide that one is bound by terms of the contract—at least where he has acknowledged his assent by signing—whether or not he has read the contract, whether or not he knows what it says, and whether or not he has relied. Assume that you promise to pay me in a fixed number of deutschmarks instead of dollars. Assume that at the time of contracting I was indifferent to the mode of payment and failed to notice the deutschmark determination. I could still require you to pay in deutschmarks, and I could enjoy the benefits of an appreciation of deutschmarks against dollars that occurred since the signing even though I had not relied on that term. Even if I would have preferred a contract to buy in dollars, I could still insist on deutschmarks.

The basis of the bargain language that now appears in 2-313 is a vestige of "warranty law." Warranty law started as tort but progressively, from sometime in the nineteenth century, has moved step-by-step from tort to contract. Those steps were hastened by the adoption of the Uniform Sales Act in many states in the twentieth century and accelerated by the post-war adoption of section 2-313 of the UCC by each state except for Louisiana. The promulgation and adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG) may be regarded as the last step in the move to contract, for it abandons the last vestige of tort and self-consciously makes express warranty into contract and nothing more. Whether and to what extent the revised Article 2 of the Uniform Commercial Code should follow the CISG is the subject of current debate.

II. A SHORT REVIEW OF TWENTIETH CENTURY EXPRESS WARRANTY LAW IN THE UNITED STATES

At the request of the Commissioners for Uniform State Laws, Professor Samuel Williston drafted an "Act to Make Uniform the Law

2. At its high point, the Uniform Sales Act (1906) was adopted in more than thirty states. See LAWRENCE VOLD, HANDBOOK OF THE LAW OF SALES 6 n.33 (2d ed. 1959).
of Sales" in 1902 and 1903. In 1909, he published a one-volume treatise on the law of sales that dealt not only with the English and American case law of the day but also with the new act that he had drafted—an act that was ultimately adopted as the Uniform Sales Act in more than thirty states. Professor Williston commenced his discussion of warranty with an ominous warning: "[T]here is no more troublesome word in the law than the word warranty." He noted the irony that, under English and some American cases, warranties were traditionally regarded as "collateral," namely that even an express warranty was to be distinguished from and was different from other promises in a contract for the sale of goods. He then described the status of express warranty in 1909:

Section 197. Nature of the obligation of warranty. Much of the intrinsic difficulty and still more of the divergence of authority which characterize the law of warranty are due to an imperfect recognition of the nature of the obligation imposed by a warranty. As has been seen, the action upon a warranty was in its origin a pure action of tort. There is no doubt that today the obligation of a warrantor is generally conceived of as contractual, and there can be no doubt also that a seller may expressly promise to be answerable for some alleged quality of the articles sold, or that if he makes such a promise for good consideration he enters into a contract. This, however, does not either upon authority or reason exhaust the possibilities of express warranties. It should not be the law, and by the weight of modern authority, it is not the law that a seller who by positive affirmation induces a buyer to enter into a bargain can escape from liability by denying that his affirmation was an offer to contract. A positive representation of fact is enough to render him liable. The distinction between warranty and representation which is important in some branches of the law is not appropriate here. The representation of fact which induces a bargain is a warranty. As an actual agreement to contract is not essential the obligation of the seller in such a case is one imposed by law as distinguished from one voluntarily assumed. It may be called an obligation either on a quasi-contract or a quasi-tort, because remedies appropriate to contract and also to tort are applicable. That this is the character of the seller's obligation was recognized by Blackstone, and that this point of view has been lost sight of by some courts is no doubt due to the fact that assumpsit became so generally the remedy for the enforcement of a warranty. But even at the present time an action of tort for warranty still lies irrespective of any fraud on the part of the seller or knowledge

4. See WILLISTON, supra note 1, at iii.
5. Id. at 222.
6. Id. at 223.
on his part that the representations constituting the warranty were untrue.\(^7\)

Consider the various attributes of warranty which in 1909 were in one way or another associated with tort. First is the question of whether the seller’s intent is important. Intent might be important if the cause of action were thought to be an intentional tort. Presumably in that case one who made an inaccurate or erroneous statement by mistake or through negligence might not be liable. Traditional warranty reached beyond conventional contract. The need to distinguish between actionable statements and a seller’s “mere opinion” tells that we are talking about something different from contract, for who expresses an “opinion” in a contract?

Moreover, many of these warranty statements are made in a different medium, at a different time, or a different place than the medium, time, and place of the contract itself. This removal, temporal and otherwise, from the events or the data that we normally characterize as the “agreement” or the “contract,” also shows the tort ancestry.

Presumably, tort also brings the reliance requirement—the precursor to the “basis of the bargain.” If one regards express warranty as a first cousin of the tort of deceit (being the same but without the requirement of mens rea), then reliance may be regarded as a fitting condition to liability where there is no contract liability. Indeed, the Uniform Sales Act drafted by Williston made reliance a condition to express warranty recovery.\(^8\)

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7. Id. at 250-52 (footnotes omitted).
8. Professor Williston wrote:

Section 206. Reliance of the buyer. As it is essential to maintain the action of deceit that the plaintiff should have relied, to his injury, on the false statements complained of, and as it is necessary in assumpsit that the plaintiff should have done some act in reliance upon the offer, so it was an early requirement of the law of warranty that the buyer should have relied on the warranty. The cases in which the principle was first brought out relate to statements in regard to goods which were obviously defective, especially horses with defective eyes. In an early case, Brian, C.J., said: “If a man sells me a horse and warrants that he has two eyes, if he has not, I shall not have an action of deceit, as I could know this at the beginning.” This was repeated in later cases and the point of the remark was brought out by a later discrimination, “and the distinction is taken where I sell a horse that has no eye, there no action lies; otherwise where he has a counterfeit, false, and bright eye.” It is evident, however, that a buyer might rely on a seller’s statement and be deceived even though he could have found out the truth by careful inspection and this was recognized before long. There is danger of giving greater effect to the requirement of reliance than it is entitled to. It is, of course, true that the warranty need not be the sole inducement to the buyer to purchase the goods. And as in assumpsit, as a general rule no evidence of reliance by the buyer is necessary other than that the seller’s statements were of a kind which naturally
The defenses to liability—such as no liability for obvious or known defects, no liability for faults shown by inspection—may also survive from tort.\(^9\) Consider how awkward such a defense would be in a true contract case: If I promise that \(X\) is so and you contract with me believing that \(X\) is not so, conceivably damages for breach of the contract are reduced because of your knowledge or suspicion, but it seems inappropriate for me to say “I promised that \(X\) is so, but I have no liability for breach of contract because you, my contracting party, knew or suspected that \(X\) was not so.”

Some forms of liability were also eliminated by the tort theory. It is common for someone to promise a future event by executory contract, but it would be uncommon to assign tortious liability to a seller for a defect that did not exist at the time of the sale. Typically, warranty speaks to the status of the goods at the time the statement is made or at the time the sale occurs. It is not a promise about the behavior of the goods thereafter—except insofar as deficiency in performance shows that the warranty was breached.\(^{10}\)

What does the parol evidence rule tell? If express warranty were merely contract, the rule would apply with all its force to express warranties. Professor Williston dealt with this question in 1909:

Another principle which has not yet been very clearly brought out by the cases should be clear wherever it is recognized that an affirmation or representation may form the basis of liability in warranty even though there is no intent to warrant, and the representations cannot fairly be construed as an offer to contract. The basis of the parol evidence rule is that it must be assumed that when parties contracted in regard to a certain matter and reduced their agreement to writing, the writing expressed their whole agreement in regard to that matter. This reason is obviously inapplicable to a situation where an obligation is imposed by law irrespective of any intention to contract. Therefore, if a buyer is induced by positive statements of fact to enter into a written contract for the purchase of goods, there seems no reason why these statements should not be admitted in evidence. False and fraudulent statements inducing the formation of a written contract may, of course,

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10. See WILLISTON, supra note 1, at 227.
be proved and if a false but honest statement, inducing the buyer to enter into the bargain, renders the seller liable though he does not intend to contract, there seems every reason for admitting evidence of such statements in spite of the fact that the bargain was reduced to writing.\textsuperscript{11}

To understand how a lawyer from the eighteenth or nineteenth century might think of warranty, consider an early English case cited by Williston.\textsuperscript{12} The seller gave a receipt which stated: "Received . . . ten £ for a gray, four-year-old colt, warranted sound in every respect."\textsuperscript{13} The court found that the colt had been warranted as sound, but there was no warranty of its age. The reference to "four-year-old" was merely a "description."\textsuperscript{14} In the sales act, Williston rejected that distinction, and that rejection has come forward to us now as a statement in UCC 2-313 whose purpose has been long forgotten.

In 1903, Williston defined express warranty in section 12 of the Sales Act as follows:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller’s opinion only shall be construed as a warranty.\textsuperscript{15}

Williston was well-aware of warranty’s tort roots and was plainly respectful of them. The word "contract" does not appear in section 12. Indeed, Williston might not have claimed that an express warranty was a contract or that a suit in warranty was a claim in contract. Note that section 12 requires not only a "natural tendency" that the statement or promise induced the buyer to buy the goods, but also that the buyer purchase "relying thereon." Williston would have quickly acknowledged that neither of those conditions was necessary to enforce a conventional promise in an executory contract.

When we jump to 1960 and Article 2 of the Uniform Commercial Code, some of the messages of tort have disappeared, but many of the issues that bothered Williston are still lurking. There is no longer any requirement of inducement, nor a straightforward requirement of reliance—the verb "relying" is now replaced by the obscure "part of the basis of the bargain." However, even in 1960 Llewellyn found it necessary explicitly to deny the need to use formal

\begin{itemize}
  \item \textsuperscript{11} Id. at 285-86.
  \item \textsuperscript{12} See Budd v. Faimaner, 8 Bing. 48, in id. at 267.
  \item \textsuperscript{13} Id. at 267.
  \item \textsuperscript{14} See id. at 267.
  \item \textsuperscript{15} Uniform Sales Act § 12 (1906).
\end{itemize}
words like “warrant” or to have a “specific intention.” As with section 12 of the Sales Act, there is no statutory identification of express warranty as “contract,” but the comments show that Llewellyn regarded both the reliance requirement as less significant than Williston had and that—at least outside the black letter of the statute—he did classify express warranty as contract. For example, in Comment 3, he asserts that the section deals with affirmations of fact “exactly as any other part of a negotiation which ends as a contract,” and in Comment 7, speaking of the timing, he says: “The sole question is whether the language or samples or models are fairly to be regarded as part of the contract.” Perhaps these comments are an admission that if he had his own way and was free of the restraint of the drafting committee (which controls the statute but not his comments)—he might abandon all the trappings of tort, and make express warranty simply a matter of contract.

That did not happen. Whether out of indecision or out of deference to the drafting committee, Llewellyn kept “basis of the bargain.” And that language is controversial. Writing for the New York Law Revision Commission, Professor Honnold commented on the uncertainty of its meaning. With the adoption of the Code many

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17. Id. § 2-313 cmt. 3.
18. Id. § 2-313 cmt. 7.
19. A 1944 draft of Llewellyn’s revised Uniform Sales Act used the phrases “part of the bargain” and “basis of the bargain” in different subsections of article 37, the express warranty article. See Uniform Revised Sales Act, Proposed Final Draft No. 1, 1944 in 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE: DRAFTS art. 37 (1984). By 1950, in the Proposed Final Draft of the UCC, only “basis of the bargain” was used. See id. at 140. This 1950 text was adopted in 1952 by the NCCUSL and the ALI. See 1956 Recommendations in 18 id. at 4. The New York Law Revision Commission did not adopt this text, but examined it thoroughly and made its own recommendations to the Editorial Board, including recommendations for section 2-313. The Commission wanted “basis of the bargain” changed. A change to the current language was approved by the Editorial Board and adopted in the 1957 official text. The Editorial Board stated:

The New York Commission criticized the limitation of subsection (1) to language, a sample, or a model which becomes or is made “a basis of the bargain” on the ground that “basis” might have been the same connotation as “basic” and thus might drastically restrict the scope of express warranties. To avoid this unintended connotation, the phrase “part of the basis of the bargain” was substituted.

See 1956 Recommendations in 18 id. at 61.

20. In 1995, Professor Honnold wrote:

A change less conducive to clarity is the Code’s requirement that affirmations or promises be “a basis of the bargain.” This language is novel, and is a substitute for the “reliance” test of Section 12 of the Uniform Sales Act. . . . The extent to which the Code’s “basis of the bargain” test would change present law is less than clear . . . . There remains the central question: What is the meaning of “basis of the bargain”? Possibly for lack of any other meaningful standard, courts must employ
writers offered interpretations about what it meant and how it should be construed. Since the adoption of the Code, dozens of courts have also passed on the phrase. I discuss those cases below.

The next statutory pronunciation on the issue of express warranty is section 35 of the CISG. There Professor Honnold, our early reviewer of Article 2 for the New York Law Revision Commission, seems to take the final step; he emphatically stuffs express warranty into the contract. Article 35, subsection 1, reads as follows: "The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract."

Professor Honnold's International Sale of Goods law is not concerned with manly "reliance" or even with less manly "basis of the bargain." At its promulgation in 1980, he did not feel the need to use words such as warranty or guarantee or even to use the word express warranty, much less to require "reliance" or basis of the bargain. To Honnold and the CISG, warranty is a term in a contract, period. As a term in the contract, express warranty has the same weight as any other term, can be broken, and gives rise to suit and recovery in the same way as well. Also missing from the CISG is any suggestion that the test of whether buyer relied on the affirmation or promise, the test presently employed in Section 12 of the Uniform Sales Act.


a statement made in advertising or generally to the public would give rise to liability.  

III. REVISED ARTICLE 2

Finally, we come to the March 1998 revision of UCC 2-313, revised 2-403. This revision abandons the basis of the bargain language and appears to adopt the position of the CISG, namely, that an express warranty is a term in an agreement, no more. Section 2-403(b) reads in full as follows:

A representation that becomes part of the agreement creates an express warranty. The seller has an obligation to the immediate buyer that the goods will conform to the representation or, if a sample is involved, that the whole of the goods will conform to the sample, or that any promises that become part of the agreement will be performed. The obligation is breached if the goods do not conform to any representation at the time when the tender of delivery was completed or if the promise was not performed when due.

The Reporter's comment makes explicit his abandoning of tort:

[T]he phrase 'becomes part of the agreement' is substituted for 'becomes part of the basis of the bargain.' This change clarifies that an express warranty is treated like any other term of the agreement and that the buyer need not initially prove reliance to include it in the agreement.

Considering only section 2-403(b) and the accompanying comment, one might conclude that the revisers of Article 2 have followed Honnold's example in the CISG. I think that is wrong. True enough, section 2-403(b) recognizes only express warranties that are "part of the agreement," and the reporter affirms his intention in the comment to treat express warranties like any other term in the contract. But all of that is changed by section 2-403(a), a section without parallel in the CISG. Subsection (a) opens the jaws of contract wide enough to take in not only statements made long before and far away from the traditional "contract" but also to capture post-sale, post-

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22. This omission may have been influenced by the fact that the CISG does not apply to the sale of consumer goods. Article 2 of the CISG states: "This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use. . . ." C.I.S.G. art. 2.
24. Id. § 2-403(b).
contract assurances, statements, and the like. Under that subsection, any “representation or promise relating to the goods to an immediate buyer . . . becomes part of the agreement”—wherever and however made. Section 2-403 restricts the breadth of this contract in only two ways. First, these representations or promises do not become part of the agreement if “a reasonable person in the position of the immediate buyer would not believe that the representation or promise became part of the agreement.” Second, if the representation or promise is made in a “medium for communication to the public,” the buyer has to have knowledge of it at the time of the agreement.

The drafters of the revision have followed Llewellyn’s guidance, but they have done so only by opening the mouth of contract so wide that everything will fall in. The base line is inclusion; the reasonable person standard only excludes. How courts and juries might apply this new definition of contract is impossible to know, but their task under 2-403(a) will be quite different from their task under the CISG, that’s for sure.

As I explain more fully in Part V below, I think it is unwise to solve statutory problems by giving new meanings to words (such as “agreement” or “contract”) whose meanings are already well established. I argue that the revisers have followed Llewellyn’s invitation to make all express warranties into contract an unreasonable step too far. It is time to recognize that Llewellyn was wrong in trying to stuff every bit of express warranty into contract; below I suggest an alternative.

IV. THE CASES

To see what is at stake among the current UCC, the CISG, and the proposed revisions to Article 2 of the UCC, I examined every case

27. Section 2-403(a) of the Draft of March 1, 1998 states in full:
   
   If a seller makes a representation or promise relating to the goods to an immediate buyer, the representation or the promise becomes part of the agreement unless a reasonable person in the position of the immediate buyer would not believe that the representation or promise became part of the agreement or would believe that the representation was merely of the value of the goods or purported merely to be the seller’s opinion or commendation of the goods.
   
   It is not necessary to create an obligation under this section that the seller use formal words such as “warranty” or “guarantee” or to have a specific intention to make a warranty.

   Section 2-403(c) of the Draft of March 1, 1998 states in full: “A seller’s obligation under this section may be created by representations and promises made in a medium for communication to the public, including advertising, if the immediate buyer had knowledge of [and believed] them at the time of the agreement.” (modification in original).
between 1965 and January 1998 that Westlaw produced under a search “basis of the bargain” and “2-313.” Done on January 23, 1998, the search produced 263 cases that referred both to “basis of the bargain” and “2-313.” After I added a few cases and eliminated 112 (because the basis of the bargain issue was not relevant to their outcomes), the sample was approximately 150 cases. Only a small number of the cases had elaborate discussions of basis of the bargain and of its relationship to ideas of reliance. Among the cases that had a separate and explicit consideration of the meaning of basis of the bargain, more than half identified it as a “reliance” requirement. A smaller number stated that the basis of the bargain was not the same as reliance, and a few explicitly stated that “reliance” is “not required.” The great majority of the cases had no explicit statement on whether basis of the bargain did or did not require reliance, but one might draw inferences about the courts’ views based upon what was said and what was left unsaid in the opinions. For example, many decisions that did not explicitly state that “basis of the bargain” was the same as reliance


nevertheless were careful to point out that the buyer had "relied." Such a statement is a weak reed for proving that reliance is a condition to recovery in express warranty, but these courts were sufficiently uneasy about the meaning of basis of the bargain that they specifically stated that the buyer had relied.

Reliance plays a large enough role in my 150 cases that excising basis of the bargain from 2-403 would make a measurable change in the law. While I have not made an attempt to run the doctrine into the ground in any jurisdiction, I have cases from at least ten jurisdictions—including prominent ones such as Illinois and New York—from which one could argue that the basis of the bargain language in section 2-313 requires that a buyer show reliance as a condition to recovery in express warranty.31

31. In many states there are cases taking irreconcilable positions as to whether reliance by the buyer is required for express warranty liability. While some cases from each of the following jurisdictions require reliance, there are others in most of these jurisdictions that grant recovery without explicitly mentioning reliance. See, for example, in Maryland: Worm v. American Cyanamid Co., Civ. A. No. HAR 90-1424, 1992 WL 368062 at *5 (D. Md. Nov. 30, 1992) ("[T]he court would have to find that such representations induced the Worms to purchase Scepter. . . . [B]ecause the literature upon which the [p]laintiffs rely did not exist in 1987 and [p]laintiffs therefore could not have relied on it . . . it did not become part of the basis of the bargain."); Illinois: Stamm v. Wilder Travel Trailers, 358 N.E.2d 382, 385 (Ill. App. Ct. 1976) ("[C]ases under the present day Commercial Code . . . require a reliance by the buyer upon the promise, affirmation or description."); cf. Adolphson v. Gardner-Denver Co., 553 N.E.2d 793, 798 (Ill. Ct. App. 1990) ("[T]he trial court was not obligated to accept the plaintiff's argument that the sales brochure created an express warranty . . . given the fact that Adolphson testified that he did not rely on the sales brochure. . . ."); but see Weng v. Allison, 678 N.E.2d 1254, 1256 (Ill. App. 1997) (citation omitted) ("[T]he trial court's ruling that the statements of the seller could not have been part of the basis of the bargain simply because no reasonable persons could have relied upon those statements was erroneous. The trial court misconstrued the role of reliance in determining whether an affirmation of fact or description is part of the basis of the bargain. Affirmations of fact made during the bargain are presumed to be part of the basis of the bargain unless clear, affirmative proof otherwise is shown . . . . It is not necessary, therefore, for the buyer to show reasonable reliance upon the seller's affirmations . . . ."); New York: Scaringe v. Holstein, 477 N.Y.S.2d 903, 904 (N.Y. App. Div. 1984) (citation omitted) ("A necessary element in the creation of an express warranty is the buyer's reliance upon the seller's affirmations or promises."); Pilch, Inc. v. L & L Started Pullets, Inc., No. 84 Civ. 6513 (CSH), 1987 WL 9430, at *4 (S.D.N.Y. Apr. 9, 1987) (citation omitted) ("[I]n order to succeed on an express warranty theory under [2-313], it is necessary for the purchaser to plead and prove that the written promotional literature in question was furnished to buyer prior to the purchase, and relied upon him [sic] in making the purchase."); Shapiro Budrow & Assocs., Inc. v. Microdata Corp., No. 84 Civ. 3589 (CBM), 1986 WL 2756, at *7 (S.D.N.Y. Feb. 24, 1986) (quoting Eddington v. Dick, 386 N.Y.S.2d 180, 181 (City Court, Geneva County, 1976)) ("In order to make out a cause of action for breach of express warranty, the buyer must demonstrate by a preponderance of the evidence, 1) an affirmation of fact or promise by the seller; 2) the natural tendency of the said affirmation or promise was to induce the buyer to purchase goods; 3) [t]hat the buyer purchased goods in reliance thereon. . . ."); cf. Tecnoclima, S.p.A. v. PIC Group of New York, Inc., No. 89 Civ. 4437 (CSH), 1993 WL 404109, at *7 (S.D.N.Y. Oct. 1, 1993) ("[T]he finder of fact could determine that Circle relied
on the specifications in assessing the marketability of the boiler/burner combination. Such a finding would support a claim for breach of express warranty."); but see CBS Inc. v. Ziff-Davis Publ’g Co., 553 N.E.2d 997, 1001 (N.Y. 1990) (citation omitted) ("[T]his view of ‘reliance’—i.e., as requiring no more than reliance on the express warranty as being a part of the bargain between the parties—reflects the prevailing perception of an action for breach of express warranty as one that is no longer grounded in tort, but essentially in contract. The express warranty is as much a part of the contract as any other term. Once the express warranty is shown to have been relied on as part of the contract, the right to damages for its breach does not depend on proof that the buyer thereafter believed that the assurances of fact made in the warranty would be fulfilled."); Rogath v. Siebenmann, 129 F.3d 261, 264 (2d Cir. 1997) (quoting Galli v. Metz, 973 F.2d 145, 151 (2d Cir. 1992) (emphasis in original) ("Where a buyer closes on a contract in the full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty under the terms of the contract, the buyer should be foreclosed from later asserting the breach ... unless the buyer expressly preserves his rights under the warranties ... On the other hand, if the seller is not the source of the buyer’s knowledge, e.g., if it is merely “common knowledge” that the facts warranted are false ... the buyer may prevail in his claim for breach of warranty"); Massachusetts: Sprague v. Upjohn Co., Civ. A. No. 91-40035-NMG, 1995 WL 376934, at *3 (D. Mass. July 10, 1994) (citation omitted) ("[I]n an express warranty claim, plaintiff must show reliance on such warranty."); Stuto v. Coming Glass Works, Civ. A. No. 88-1150-WF, 1990 WL 105615, at *5 (D. Mass. July 23, 1990) ("[T]his court believes that some minimum of reliance is a required element of a breach of express warranty claim ... "); cf. Roth v. Bay-Stel’s Hair Stylists, Inc., 470 N.E.2d 137, 138 (Mass. App. 1984) (noting that ")the hairdresser testified that he had read the information printed on the box, and, relying on it, he recommended its use to Judith Roth"); Hannon v. Original Gunite Aquatech Pools, Inc., 434 N.E.2d 611, 617 (Mass. 1982) (noting that ")the trial judge found that Hannon relied on Aquatech’s brochure"); Jacquot v. Wm. Filene’s Sons Co., 149 N.E.2d 635, 637 (Mass. 1958) (noting that “Mrs. Jacquot ... relied upon these express warranties"); but see Wechsler v. Long Island Rehabilitation Ctr. of Nassau, Inc., No. Civ. A. 93-6946-13, 1996 WL 590679, at *22 (Mass. Super. Ct. Sept. 4, 1996) ("The trustee is not required to establish that in connection with a specific account receivable it purchased, Towers relied on the factual truth of each of the representations and warranties; what must be shown is that Towers relied on the fact of the warranties, that is, the promise itself that the representations and warranties were true ... "); Kentucky: Overstreet v. Norden Lab., Inc., 669 F.2d 1286, 1291 (6th Cir. 1982) (citation omitted) ("A warranty is the basis of the bargain if it has been relied upon as one of the inducements for purchasing the product."); Nebraska: Vlasin v. Shuey, No. A-91-324, 1993 WL 61875, *1 (Neb. Ct. App. Mar. 9, 1994) ("Nebraska case law has long held that the assertion of a fact or promise by a seller concerning goods, which is relied upon by the buyer and which tends to induce the buyer to purchase the goods, is an express warranty."); Hillcrest Country Club v. N.D. Judds Co., 461 N.W.2d 55, 61 (Neb. 1990) (citation omitted) ("This court has held that "[s]ince an express warranty must have been “made part of the basis of the bargain,” it is essential that the plaintiffs prove reliance upon the warranty."); Wendt v. Beardsmore Suburban Chevrolet, Inc., 366 N.W.2d 424, 428 (Neb. 1985) (citation omitted) ("Since an express warranty must have been ‘made part of the basis of the bargain,’ it is essential that the plaintiffs prove reliance upon the warranty."); Indiana: Royal Bus. Machs., Inc. v. Lorraine Corp., 633 F.2d 34, 44 n.7 (7th Cir. 1980) (citation omitted) ("The requirement that a statement be part of the basis of the bargain in order to constitute an express warranty ‘is essentially a reliance requirement ...’"); Kansas: Ray Martin Painting, Inc. v. Ameron, Inc., 638 F. Supp. 768, 772 (D. Kan. 1986) (citation omitted) ("Whether the statements about the coating ability of the Amerlock created an express warranty depends on whether they were ‘part of the basis of the bargain’ which, under Kansas law, requires some type of reliance on the part of the buyer."); Mississippi: Global Truck & Equip. Co., Inc. v. Palmer Mach. Works, Inc., 628 F. Supp. 641, 652 (N.D. Miss. 1986) ("Given the express language used in UCC section 2-313 and the majority of the cases holding that the buyer
Consider the case of Mr. Stamm who sued his seller for breach of express warranty with respect to a “travel trailer.” Stamm claimed that the seller had given an express warranty that the trailer was an “unused, like new, 1970 model travel trailer.” Noting that the plaintiff never testified that he relied upon “the belief that the trailer was a 1970 model,” and stating that the Uniform Commercial Code requires “a reliance by the buyer upon the promise, affirmation, or description . . .” the court found that the plaintiff had not established his cause of action in express warranty.

Similar language appears in Overstreet v. Norden Laboratories, where Judge Keith, speaking for the United States Court of Appeals for the Sixth Circuit, interpreted Kentucky law to mean that “[a] warranty is the basis of the bargain if it has been relied upon as one of the inducements for purchasing the product.”

It is easy to underestimate the importance of reliance in cases under 2-313. But in truth, only a small minority of my 150 cases are at all articulate about the meaning of basis of the bargain. Many of the cases that do not explicitly mention basis of the bargain as a reliance requirement nevertheless are careful to point out that the plaintiff in that case did rely. Others merely reiterate the basis of the bargain language. So I do not claim that a majority of the courts would find the basis of the bargain to be a reliance requirement, but I believe that a far larger number of courts find reliance to be a condition to express warranty liability than the academic literature would suggest. At least until the rise of the law and economics movement, the post-war academic literature has been much more sympathetic to the expansion of liability than to its restriction.

must both be knowledgeable of and rely on the affirmation of fact before an express warranty is created, the court concludes that the plaintiff failed to prove by a preponderance of the evidence that the statements contained in the Palmer brochure were relied upon by Randall prior to or contemporaneously with the making of the contract between Global and Palmer. Therefore, recovery under the theory of breach of express warranty is also precluded.

Washington: Casper v. E.I. Du Pont de Nemours & Co., 806 F. Supp. 903, 909 (E.D. Wash. 1992) (citation omitted) (“If, in fact, Mr. Warr assured Brad Casper that Velpar could be applied safely during November or December of 1990, and Mr. Casper relied upon that affirmation of fact in deciding to have PureGro treat his fields, an express warranty was created.”).

33. 669 F.2d 1286 (6th Cir. 1982).
34. Id. at 1291.
36. See, e.g., Kwestel, supra note 21, at 991 & n.106; Adler, supra note 21, at 448-49; Goetz et al., supra note 21, at 1183; Murray, supra note 21, at 1486-88.
The most interesting findings from my 150 cases are set out in the accompanying chart. Nearly half of all the basis of the bargain cases arise from oral statements made before or simultaneously with the sale. About one-third of the cases arise from presale advertising or brochures that are given to the buyer or seen by the buyer. The remaining cases are scattered among the remaining six categories.

### Basis of the Bargain Cases

| Oral (and a few written) statements made by seller before or simultaneous with sale | 74 |

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Advertising or brochure given or seen before sale


What lessons does one draw from these cases? First, the problem is manageable. Basically, the drafters need consider only oral statements made before or simultaneously with the sale and statements in brochures or other forms of advertising seen by the buyer prior to the sale. It should be simple to design law that would deal adequately

with these limited issues. This is not a complex or large universe, and it calls for fairly simple rules.

The second lesson from the cases is that reliance lives. A minority of the courts explicitly require reliance as a condition to buyer’s recovery. But even in courts that do not insist upon reliance, there is often a recognition of its significance by a finding that the buyer did rely.

In short, the cases tell us that any revision can and somehow should take account of reliance.

V. **Revising Revised 2-403**

Most of the problems in my 150 cases arise from the difficulty in making every conceivable express warranty into part of the contract. Those difficulties are exacerbated by Llewellyn’s choice of words (“basis of the bargain”) and they are not solved by Llewellyn’s exhortations in the comments that express warranty is “merely contract.”

Whatever Llewellyn’s intention and despite the comments, the black letter law that he has left us is not handy at making every express warranty into a contract term. If Llewellyn did not intend basis of the bargain to be a proxy for a diluted form of reliance, he has fooled many courts. Some courts now reject statements claiming to be warranties because the buyer did not rely, and many courts feel the necessity of stating that a particular buyer did rely. In fact, of course, Llewellyn may have appreciated the difficulty of making every assurance into part of the contract and might have intended to reintroduce a reliance requirement in his basis of the bargain language. If so, the “reliance” courts are not misreading him.

Second, the current Code does not adequately explain how statements, such as those in advertising brochures and catalogs that are far removed from the time and place of contracting—and are not in any sense incorporated into the document that the parties recognized as a “contract”—are themselves to be part of that contract.

Third, Llewellyn’s invitation in Comment 7 to 2-313 to treat post-sales statements as “a modification” itself skips over the problem

45. *See supra* note 27.

46. In fact, the knowledge requirements now embodied in the draft of 2-408 and 2-403(c) are themselves crypto reliance requirements. Why must one have knowledge of an advertisement before he can recover, if having knowledge, he does not rely on it? What about the language in revised 2-403 that lets the seller off the hook if the buyer doesn’t believe the warranty, or if the warranty is merely puffing? Are not these also crypto reliance requirements?
of fitting that idea into 2-209, which states that "[a]n agreement modifying a contract within this Article needs no consideration to be binding." Section 2-209 plainly contemplates an "agreement." And, to me, an "agreement" is more than merely an "additional assurance" given at the time of delivery.47

So, if Professor Llewellyn intended to make a complete transition from tort to contract and to leave nothing outside of the contract that could be called an express warranty, he did an imperfect job. He left behind the vestigial appearances of the reliance requirement, and he insufficiently explained how one was to import into the "contract" advertising and other statements made before negotiations were begun or the contract was signed or statements made long after the contract was signed.

Well aware of the difficulties with the basis of the bargain language, and also of the tort history, Professor Honnold made a clean cut in his drafting of section 35: "Seller has to deliver goods of the quality, quantity and description required by the contract." If we wish to make all express warranties into the terms in a contract, and if we do not wish to grant express warranty status to any term that is not part of the contract, Professor Honnold has shown us how to do it with article 35 of the CISG.

The reason that Professor Speidel, the reporter for revised Article 2, does not copy the concise language of Professor Honnold, is that Speidel wants broader liability. Beset by critics, Professor Speidel has characterized the CISG as "nineteenth century law,"48 and it seems obvious that he intends sellers to bear greater liability than they will bear under article 35 of the CISG. In what way is the CISG too narrow? If one uses a conventional definition of "the contract" in article 35, presumably descriptions such as those in advertising brochures, and in other advertising and terms stated orally or in writing after the deal is signed, will not be express warranties because they will not be part of the contract—at least as "contract" is likely to be defined in a conventional setting where there is a record either in writing or in some other medium that sets down the agreement of the

47. See U.C.C. § 1-201(3) (1995) ("'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act.").
48. See Memorandum from Richard E. Speidel & Linda Rusch, The July 1, 1997 Draft of Revised Article 2: A Response to Critics and Proposals for Further Revisions (Sept. 12, 1997) (on file with author). Speidel and Rusch state: "It appears that the 'loyal opposition' would really prefer a sales revision based upon a late 19th and early 20th century model of contract, such as is the Convention on Contracts for the International Sale of Goods." Id. at 19.
parties. Presumably, Professor Speidel wished to leave room for liability arising out of statements made before the negotiation or long after the contract is signed. Put differently, Professor Speidel, a well-known buyer's friend, certainly did not want to propose law that would have restricted the warranty coverage that is available particularly to consumer buyers under the current version of the Uniform Commercial Code. It seems likely that article 35 of the CISG will do exactly that.

Accordingly, Professor Speidel has chosen the contract model quite as fully as Professor Honnold in the CISG, but with the exception described above. To achieve his purpose, he makes a novel definition of agreement—the agreement includes every representation or promise relating to the goods (without regard to its distance in time and place from the conventional "contract") "unless a reasonable person in the position of the immediate buyer would not believe that the representation or promise became part of the agreement." The quoted language opens up the possibility not only for oral statements made prior to the contract, but also for statements in a catalog, an advertising brochure, or in other forms of advertising. By the same token, it might include statements made after the sale, statements in an owner's manual, and statements contained on a label or container. Having opened the jaws of contract far wider than traditional law does, Professor Speidel is able to do away with basis of the bargain or any other reliance requirement because, like Professor Honnold under the CISG, he has transformed all of express warranty into contract.

But, the open-jawed definition of contract in 2-403(a) (every representation or promise unless a person in the position of the buyer would believe that it is not part of the contract), is novel, potentially limitless, and necessarily ill-defined. For a commercial seller, sweeping every datum into a contract—that an unreasonable jury might think a reasonable person in the position of buyer would think was there—is frightening. The seller has no way of knowing what a reasonable buyer would think was part of the contract, nor what a judge or jury would think a reasonable person would think.

I am sympathetic to Professor Speidel's goals, but I disagree with his methods. To understand the cases where there should be express warranty liability, return to my 150 cases that are discussed above. I can identify three subsets where most would think the seller should be liable if his representation is inaccurate or his promise is broken.

First are representations or promises that would be part of the contract under conventional definitions of contract. These would include everything in a record itself as well as all oral promises and assurances made by the seller in negotiations before or contemporaneously with the sale. As long as there is no integration, conventional doctrine would make these data into part of the contract. I see no reason why the law should not recognize and enforce those terms as contract terms without any additional requirement about reliance or basis of the bargain. A person is bound by his contract even to an obligee who has never read the contract, much less relied on its terms.50

Second is a limited subset of post-contract representations or promises. These are the statements in owner’s manuals and promises or descriptions made on labels or in other documents that are attached to or otherwise delivered with the product. Despite Llewellyn’s exhortation to the contrary in Comment 7 to 2-313, I have never understood how an owner’s manual can be the modification of a contract earlier made, perhaps by the parties’ signing a formal document. Even though these do not seem to be part of the contract, everyone—including the seller—would acknowledge that the seller should have liability for their inaccuracy or breach. Because these terms are in writing (or perhaps in some other form of “record” in the electronic medium of the future), because they refer to a specific product that is the subject of a particular sale and are directed to the particular buyer, these terms deserve higher status than other statements in advertising or than oral assurances and the like.

For this second subset I would impose liability for inaccuracy by statute and without any requirement that the buyer rely or that they somehow become part of the contract. Because of their close association with the deal and because both the buyer and the seller anticipate these terms, both parties should anticipate contract-like liability even though these terms will not be part of the contract and even though the buyer is unlikely ever to have taken any action in reliance on them.

The third subset is representations and promises that are made in advertising brochures, catalogs, orally, or in other media but made in such a way or of such a character that they do not fall within the first two categories. My cases show that most of these precede the deal, but some will come after the contract is made. Because these do not

50. See Restatement (Second) Contracts § 211 cmt. b (“Assent to unknown terms”).
enjoy the status of the owner's manual nor that given to "contracts," what is the basis of liability? It is tort, not so? In this subset I would make the seller liable only if the buyer could show that he bought in reliance on the representation or promise or, in the case of post-contract assurances, that he relied to his detriment. My cases show that an articulate minority of courts use reliance in just this way under current law. The cases suggest that there is a much larger group of silent courts who may share the view that reliance is or should be a condition to recovery (these are courts that are at pains to show reliance even where they do not state it to be a requirement for recovery).

My plea is twofold. First, my cases show that not all warranty claims are the same; some are contract plain and simple; some are special and some really are tort or, in the words of Williston, quasi-tort. I believe that the law will be more certain, more predictable, and subject to smaller manipulation if we unbundle these liabilities. Second, I believe that having unbundled the liabilities, we will achieve greater certainty by freeing warranty's tortious soul and, at least in my third subset, by insisting on reliance as a basis for recovery. Consider the following first attempt to modify revised 2-403:

**Express Warranty**

A representation or promise that relates to the goods and is part of the contract is an express warranty and is enforceable as a term in the contract.

A representation or promise that relates to the goods and is contained in a written owner's manual, on a label attached to the goods or otherwise in a record delivered with the goods is an express warranty and is enforceable as though it were part of the contract between the buyer and seller.

A representation or promise that relates to the goods and is neither part of the contract nor delivered in a record with the goods is enforceable as though it were part of the contract between the buyer and seller only if i) the buyer purchased in reliance on it or, ii) in the case of a representation or promise made after the purchase, the buyer changed its position in reliance on the representation or promise.

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51. *See supra* note 27.


53. *See WILLISTON, supra* note 1, at 251.
VI. CONCLUSION

Llewellyn's attempt to repress the tortious soul of express warranty was not successful. And Speidel's plan to stretch contract to cover events remote in time, place, and medium from what we recognize as the "contract" will not be successful either. My cases show that there is an irrepressible minimum of tort buried in express warranty; we should let it out.

Whether Professor Honnold's more determined attempt to turn all of express warranty into contract in article 35 of the CISG will be successful remains to be seen. We have no cases. Because the CISG does not apply to consumer transactions and because it applies exclusively to international business transactions where there will usually be an extensive written contract that is intended to include all of the terms, perhaps that law properly eliminates liability that might arise from advertising brochures or from post-sale communications between the parties.

But what was open to Honnold in an international code written from scratch is not open to Speidel in a carefully watched revision of a domestic law that drags a tail of dozens of cases. I believe that the revisers of Article 2 correctly make the seller liable for the accuracy of certain promises and statements that do not fit comfortably into the definition of contract. I disagree with the current draft revision for two reasons. First, it unnecessarily distorts the idea of contract in its attempt to put liability on sellers for their inaccurate statements and unfulfilled assurances. Second, this distortion of contract may include some cases that should not cause liability and exclude others where there should be warranty liability.

In my opinion, it would make the law more certain and far more felicitous to abandon Llewellyn's belief that all express warranty is and must be contract. Of course the revisers have already done that with express warranties to remote buyers, but they should do the same with certain statements made to immediate buyers too. In my opinion, the universe of appropriate liability is captured by three sets: contract, pre- and post-contract statements on which the buyer relies, and certain post-sale statements that are entitled to special status because of their particular association with the product sold and because of their specific direction to the actual buyer.

54. See Draft of March 1, 1998, § 2-408.