



CSU  
College of Law Library

1993

# Diminishing Returns: Doing without a Separate Provision for Implied Warranty Disclaimers through Dealing, Performance, and Usage

Aremona G. Bennett

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>

Part of the [Commercial Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

---

### Recommended Citation

Aremona G. Bennett, *Diminishing Returns: Doing without a Separate Provision for Implied Warranty Disclaimers through Dealing, Performance, and Usage*, 41 Clev. St. L. Rev. 1 (1993)  
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol41/iss1/3>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

# DIMINISHING RETURNS: DOING WITHOUT A SEPARATE PROVISION FOR IMPLIED WARRANTY DISCLAIMERS THROUGH DEALING, PERFORMANCE, AND USAGE

AREMONA G. BENNETT<sup>1</sup>

I.	INTRODUCTION	1
II.	SCOPE OF U.C.C. § 2-316	3
III.	FEATURES OF U.C.C. § 2-316(3)(C)	6
IV.	JUDICIAL INTERPRETATION OF U.C.C. § 2-316(3)(C)	7
	A. <i>Effective Disclaimers</i>	7
	B. <i>Ineffective Disclaimers</i>	12
	C. <i>Course of Dealing, Course of Performance, and Usage of Trade as Parol Evidence</i>	14
V.	SCOPE OF U.C.C. §§ 1-205 AND 2-208	17
VI.	POLICY ARGUMENTS	19
	A. <i>The Experience Factor</i>	19
	B. <i>Merchants and Unconscionability</i>	23
VII.	REFRAMING DEALING, PERFORMANCE, AND USAGE	
	DISCLAIMERS OF IMPLIED WARRANTY	27
	A. <i>The Power of Perception</i>	27
	B. <i>The Weight of Comments</i>	27
VIII.	CONCLUSION	29

The buyer needs a hundred eyes, the seller not one.<sup>2</sup>

## I. INTRODUCTION

Warranties and disclaimers of warranties may be regarded as elements of risk allocation between buyers and sellers. Sometimes used as bargaining chips, disclaimers enable a seller to curtail liability for goods sold and a buyer to acquire goods at a favorable price. Article 2 of the Uniform Commercial Code

---

<sup>1</sup>Associate Professor of Law, Widener University School of Law. J.D., 1973, New York University School of Law.

<sup>2</sup>GEORGE HERBERT, *THE WORKS OF GEORGE HERBERT* 334 (F.E. Hutchinson ed., 1972).

(UCC) regulates disclaimers of express warranties<sup>3</sup> and implied warranties<sup>4</sup> in sale-of-goods contracts. Of the implied warranty disclaimer subsections, the one allowing disclaimers by course of dealing or performance, and by usage of trade is the least definitive.<sup>5</sup>

This article calls for the rethinking of subsection 2-316(3)(c), the course of dealing, course of performance, and trade usage disclaimer provision. The statutory formation of Article 2 requires elsewhere that, if applicable, any or all of these three factors must be considered when interpreting an agreement.<sup>6</sup> Enactment of this second, separate provision should have directed courts to a more equable construction of implied warranty disclaimers of dealing, performance, and usage. This provision should have guided practitioners to a more reliable understanding of the requirements of such disclaimers. Not only did this provision do neither, but it also blurred the distinction between disclaimers by this method and more concrete disclaimer techniques. The many judicial opinions in which the courts have failed or refused to effectuate 2-316(3)(c) as written demonstrate that this provision is superfluous. Consequently, removal of this statutory provision is quite justifiable.

---

3U.C.C. § 2-316(1) (1992). The section provides:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

*Id.*

4U.C.C. §§ 2-316(2) and (3) (1992). Those sections provide:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

U.C.C. § 2-316(2).

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and  
(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and  
(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

U.C.C. § 2-316(3).

<sup>5</sup>See *infra* notes 16-21 and accompanying text.

<sup>6</sup>See *infra* part V.

A reconsideration of this subsection is timely. In 1988 the Permanent Editorial Board of the Uniform Commercial Code and the American Law Institute together with the National Conference of Commissioners on Uniform State Laws authorized a study to determine if Article 2 should be revised.<sup>7</sup> On March 1, 1990, these bodies issued a Preliminary Report calling for significant revisions.<sup>8</sup> The Study Group which authored the Report suggested no changes for subsection 2-316(3)(c) and no other authorities or scholars have recommended modifying the provision.<sup>9</sup>

In its call for improvement with regard to implied warranty disclaimers through course of dealing, course of performance, and trade usage, this article suggests a change in form, not substance. This article proposes the deletion of 2-316(3)(c) and, as in other Article 2 sections, posits the use of Code Comments to emphasize the importance of what this subsection comprises.<sup>10</sup> Such a change would comport with the goal of Code drafters "to simplify . . . and modernize the law [of] commercial transactions."<sup>11</sup>

## II. SCOPE OF U.C.C. § 2-316

Section 2-316 of the Code, titled "Exclusion or Modification of Warranties," consists of four subsections.<sup>12</sup> Only the first three describe instances in which exclusions or modifications of warranties are given statutory recognition. Express warranty disclaimers are treated in subsection 2-316(1),<sup>13</sup> while paragraphs (2) and (3) control implied warranty disclaimers.<sup>14</sup> These last two subsections overlap because they authorize exclusions or modifications of both implied warranties of merchantability and fitness for a particular purpose.<sup>15</sup> Paragraph (3), however, uses the terms "implied warranties" and "implied

---

<sup>7</sup>PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2 PRELIMINARY REPORT (1990).

<sup>8</sup>*Id.*

<sup>9</sup>See A.B.A. Task Force, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981 (1991). But cf. Cheryl R. Eisen, *Don't Confuse Us With the Facts?: The Relevance of the Buyer's Knowledge of a Written Exclusion of an Implied Warranty Which Is Inconspicuous As a Matter of Law* (U.C.C. § 2-316(2)), 15 SETON HALL LEGIS. J. 297, 312 (1991) (suggesting that dealing, performance, and usage implied warranties not be permitted to apply to written sales contracts).

<sup>10</sup>See *infra* part VII.

<sup>11</sup>U.C.C. § 1-102(2)(a) (1992).

<sup>12</sup>U.C.C. § 2-316 (1992).

<sup>13</sup>See, U.C.C. § 2-316(1) (1992).

<sup>14</sup>See, U.C.C. § 2-316(2) and (3) (1992).

<sup>15</sup>Although the statute itself specifies only "fitness" rather than fitness for a particular purpose, Comment 4 of U.C.C. § 2-316 indicates that the latter was intended.

warranty," more expansively since neither phrase restricts the kinds of implied warranties to which it applies.

Paragraph (3) of subsection 2-316 is also more tenuous than paragraph (2). While 2-316(2) imposes a conspicuousness requirement for disclaimers of implied warranties of merchantability, and a writing and conspicuousness requirement for disclaimers of implied warranties of fitness, subsection (3) has no such standards. Its introductory language, however, has persuaded some authorities that it is independent of or superior to subsection (2).<sup>16</sup> Nevertheless, a greater number of cases, involving either claims or defenses based on disclaimer issues raised by subsections (2) and (3), do not observe this arguable superiority.<sup>17</sup> More significantly, those decisions fail to accord 2-316(3)(c) the stature it merits within the disclaimer *structure* of the section.<sup>18</sup>

There is scant legislative history to aid in the interpretation of course of dealing, course of performance, and trade usage. The only policy consideration disclosed in the history of what eventually became section 2-316(3) is buyer protection.<sup>19</sup> As the section evolved, evidence of the significance, if not superiority, of the future subsection (3)(c) emerged.<sup>20</sup> What did not emerge, however, was an explanation of the grammatical change from its original language. While the precursor to section 2-316(3) placed usage of trade first in the usage, dealing, performance sequence, the order later changed to reflect

---

<sup>16</sup>See, e.g., *Gindy Mfg. Corp. v. Cardinale Trucking Corp.* 268 A.2d 345, 351 (N.J. Super. Ct. 1970); see also *Stream v. Sportscar Salon, Ltd.*, 397 N.Y.S.2d 677, 682 (N.Y. Civ. Ct. 1977) ("[T]he implied warranty of merchantability remained in effect by virtue of subsection (2) unless subsection (3) came into effect."); cf. Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1276 (1987) ("By its terms, section 2-316(3)(a) seems to undermine entirely 2-316(2)'s disclaimer requirements."). But see, e.g., *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 169 (Del. Super. Ct. 1986) (rejecting the position that paragraph (3) outweighs paragraph (2)).

<sup>17</sup>See *infra* part IV. A-B.

<sup>18</sup>See *infra* part III.

<sup>19</sup>See, e.g., National Conference of Commissioners on Uniform State Laws, REVISED UNIFORM SALES ACT § 41 INFORMAL APPENDIX, THIRD DRAFT 1943, (Tentative Sketch of Material for Comment). The language in the APPENDIX states that the "desired limitation or exclusion be so called to the buyer's attention as to make the resulting understanding unambiguous." *Id.* This language is reflected in the last sentence of Comment 1 to U.C.C. § 2-316. That sentence reads: "[This section] seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise." *Id.*

<sup>20</sup>See ALI PROC. 147 (July 1, 1943 - June 30, 1944). Miss Soia Mentschikoff stated: "[W]e also recognize the prevailing power of the custom in the individual trade, or the usage of the trade which is involved." *Id.*

2-316(3)(c)'s form.<sup>21</sup> Usage of trade now follows course of dealing and course of performance.

Subsection (3)(c) has a counterpart in U.C.C. § 2-314(3).<sup>22</sup> By authorizing the creation of implied warranties by course of dealing and trade usage, the subsection parallels the buyer protection concept of 2-316(3). Unaccountably, 2-314(3) omits course of performance as a basis for the creation of an implied warranty. This is particularly curious if one considers that through course of performance the parties' intentions unfold as the phases of a single sales transaction progress, typically in an installment contract, and continued performance can reveal the nature of implied warranties existing at the time of agreement. By the same logic, course of performance can reveal that no implied warranties were included in the bargain or, more deliberately, that implied warranties were excluded. The drafters' reasons for permitting disclaimers of implied warranties but not their creation by course of performance is a mystery.<sup>23</sup>

Exclusions and modifications of warranties under section 2-316 must be distinguished from limitations of remedies for breach of warranty.<sup>24</sup> Although subsection 2-316(4) authorizes such limitations, it references other controlling sections in Article 2.<sup>25</sup> Some courts have combined the two concepts, equating limitation of remedy with disclaimer of warranty.<sup>26</sup> While superimposing the remedies limitation provisions on the disclaimer of warranties provisions may not always be harmful, they were not intended to be equivalents.<sup>27</sup> It can be

---

<sup>21</sup>See *supra* note 19; Elizabeth S. Kelly, 2 *UNIFORM COMMERCIAL CODE DRAFTS* 32 (1984).

<sup>22</sup>Section 2-314(3) states: "Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade." U.C.C. § 2-314(3)(1992).

<sup>23</sup>Cf. Richard A. Lord, *Some Thoughts About Warranty Law: Express and Implied Warranties*, 56 N.D. L. REV. 509, 583-84 (1980) (suggesting that course of performance may not provide a "clearly shown" creation of warranties or that it may be subsumed within course of dealing).

<sup>24</sup>WILLIAM D. HAWKLAND, *UNIFORM COMMERCIAL CODE* § 2-316 (1992).

<sup>25</sup>The section provides in pertinent part: "Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719)." U.C.C. § 2-316(4)(1992).

<sup>26</sup>See *J. D. Pavlak, Ltd. v. William Davis Co., Inc.*, 351 N.E.2d 243, 246 (Ill. App. Ct. 1976). ("This remedy [of recovering damages for breach of contract] may be excluded or modified under section 2-718 and 2-719. Section 2-316(4)."). The court then concluded that in itself the contract language limiting what damages plaintiff could recover excluded an implied warranty. *Id.*

<sup>27</sup>Comment 3 to 2-719 explains the excluding of consequential damages by implying that the issue can be avoided altogether if the seller chooses to disclaim warranties according to 2-316. Nowhere else in the Comments, either to 2-316 or 2-719, does the juxtaposition of these two sections appear. Comment 3 therefore gives some guidance on this point by indicating that a disclaimer has to comply with the standards of 2-316.

argued that just as 2-316(3)(c) has been misapplied or deemphasized despite the statute's clear language, failure to regard the limitation of remedies provisions as separate from the disclaimer section contravenes the policy of following the parties' intentions at the time of the contract, especially in those instances in which warranties were intended. If warranties are found to be excluded by course of dealing, course of performance, or trade usage, it must be clear that the parties agreed to the disclaimer at the time of the contract.<sup>28</sup>

### III. FEATURES OF U.C.C. § 2-316(3)(C)

At first glance the use of "and" as a connector between (a), (b), and (c) of 2-316(3) might signify an inclusive or cumulative application of the subsection. A closer reading of the statute and its Comments indicates the error of that conclusion. Comment 6 characterizes (a), (b), and (c) as "exceptions to the general rule" which "are common factual situations" giving notice to the buyer of warranty disclaimers.<sup>29</sup> It does not preclude circumstances in which only one of the subsections might apply. There is a basis of comparison elsewhere in Article 2 which clarifies the structure of this subsection. Implied warranties may be created in any manner consistent with U.C.C. § 2-314. Subsection (2) lists six ways in which goods may be found to be merchantable<sup>30</sup> and, like 2-316, connects each category with the conjunction "and." Comment 7 to 2-314 specifically directs that paragraphs (a) and (b) "are to be read together." Lacking a similar instruction, 2-316(3) may be regarded as excluding warranties through any one or more of its paragraphs. Although Comment 7 to 2-316 does

---

<sup>28</sup>See *infra* notes 80-85 and accompanying text.

<sup>29</sup>In its entirety Comment 6 to U.C.C. § 2-316 provides:

The exceptions to the general rule set forth in paragraphs (a), (b) and (c) of subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.

U.C.C. § 2-316 cmt. 6 (1992).

<sup>30</sup>Subsection 2 states:

(2) Goods to be merchantable must be at least as  
 (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 container or label if any.

U.C.C. § 2-314(2)(1992).

link (a) and (c) by describing the terms in (a) as a "particularization of paragraph (c)," <sup>31</sup> it does not make them interdependent.

Courts have recognized the efficacy of a seller's conduct in disclaiming implied warranties pursuant to paragraph (a) or (b) <sup>32</sup> despite the indefiniteness of situations to which they might apply. <sup>33</sup> While debate surrounds the construction of 2-316(3)(a), <sup>34</sup> and recommendations have been made for its revision, <sup>35</sup> judicial decisions demonstrate that (3)(c) suffers from as much, if not greater, confusion. <sup>36</sup>

#### IV. JUDICIAL INTERPRETATION OF U.C.C. § 2-316(3)(c)

##### A. *Effective Disclaimers*

In approximately half of the cases examined for this article in which the seller's claim or defense rested on paragraph (c), the courts found an effective disclaimer. <sup>37</sup> Judicial validation of implied warranty disclaimers by the application of this provision, however, suggests an unfounded persuasiveness.

---

<sup>31</sup>In its entirety Comment 7 to U.C.C. § 2-316 provides:

Paragraph (a) of subsection (3) deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.

U.C.C. § 2-316 cmt. 7.

<sup>32</sup>See *K & M Joint Venture v. Smith Intern, Inc.*, 669 F.2d 1106 (6th Cir. 1982) (showing defendant might have prevailed in disclaiming implied warranties by the use of "as is" but for circumstances negating that conclusion); *Tarulli v. Birds in Paradise*, 417 N.Y.S.2d 854 (N.Y. Civ. Ct. 1979) (satisfying all the requirements of 2-316(3)(b) effectively excluded the implied warranty of merchantability). *But see* *Nettles v. Imperial Distributors, Inc.*, 159 S.E.2d 206 (W.V. Sup. Ct. 1968) (holding an opportunity to inspect did not preclude implied warranty since defect could not have been revealed by reasonable inspection).

<sup>33</sup>JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 12-6 (1988).

<sup>34</sup>See Eisen, *supra* note 9 at 302. Janet L. Richards, "As Is" Provisions—What Do They Really Mean? 41 ALA. L. REV. 435 (1990).

<sup>35</sup>See A.B.A. Task Force, *supra* note 9.

<sup>36</sup>See *infra* part IV. A-B.

<sup>37</sup>E.g., *Country Clubs, Inc. v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1394 (6th Cir. 1970) (holding course of dealing or course of performance was the basis of implied warranties disclaimer in purchase of golf carts); *Earl Brace & Sons v. Ciba-Geigy Corp.*, 708 F. Supp. 708 (W.D. Pa. 1989) (holding course of performance in a contract for the purchase of herbicide established a disclaimer arising from a conspicuous limitation of consequential damages clause); *Hummel v. Skyline Dodge, Inc.*, 589 P.2d 73 (Colo. Ct. App. 1978) (purchasing of cars wholesale was on an "as is" basis supporting trade usage implied warranty disclaimer); *Torstenson v. Melcher*, 241 N.W.2d 103 (Neb. 1976) (holding usage of trade proved that sale of bull was made without implied warranty of fitness for a particular purpose); *Kincheloe v. Geldmeier*, 619 S.W.2d 272 (Tex. Civ. App.



In certain decisions, use of 2-316(3)(c) to disclaim an implied warranty was supportive of or an alternative to another basis for exclusion or modification of warranty. For example, the court in *Earl Brace & Sons v. Ciba-Geigy Corp.*<sup>38</sup> determined that a limitation of consequential damages clause which satisfied section 2-719 of the Pennsylvania Uniform Commercial Code, and about which the buyer should have known through previous use of the herbicide, constituted a disclaimer arising through course of performance.<sup>39</sup> The court does not cite a specific paragraph of 2-316. It finds instead the limitation's conspicuousness along with course of performance as sufficient reasoning. It is a general, almost indiscriminate, approach to the issue of warranty disclaimer. Quoting from the Comments pertaining to express warranties and holding the disclaimer valid because of the absence of an express warranty likewise does little to particularize the basis of the disclaimer.<sup>40</sup> Additionally, the court's choice of course of performance rather than course of dealing to describe the plaintiff-buyer's previous use of the herbicide adds to the overall imprecision.

The Comments to section 2-316 recognize a connection between (3)(a) and (c).<sup>41</sup> Applying subsection (3)(a) to neutralize the effect of (3)(c) altogether, however, as the court did in *Hummel v. Skyline Dodge, Inc.*,<sup>42</sup> is an extension of paragraph (3) beyond what the drafters may have intended. The court in *Hummel* found further support for permitting the warranty exclusion in (3)(b).<sup>43</sup> defendant-buyer had examined the vehicle before its purchase and could have availed himself of sophisticated equipment for the examination.<sup>44</sup>

Three cases in which 2-316(3)(c) arguably served as the sole basis of a disclaimer are illustrative of both the courts' unease and, to a lesser extent, their lack of confidence in relying on the provision. *Country Clubs, Inc. v. Allis-Chalmers Mfg. Co.*<sup>45</sup> involved the purchase of motorized golf carts by plaintiff whose president was an attorney, experienced in business. The plaintiff made two purchases from defendant in six months. Before the initial purchase, plaintiff's president had considered operating a dealership for defendants' carts and had received a dealership agreement containing a warranty disclaimer. Although plaintiff chose not to become a dealer, the order

---

1981) (holding purchase of livestock "as is" excluded implied warranty of merchantability through trade usage).

<sup>38</sup>708 F. Supp. 708 (W.D. Pa. 1989).

<sup>39</sup>*Id.* at 710.

<sup>40</sup>*Id.*

<sup>41</sup>See U.C.C. § 2-316 cmts.

<sup>42</sup>589 P.2d 73, 75 (Colo. Ct. App. 1978).

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>430 F.2d 1394 (6th Cir. 1970).

forms which plaintiff subsequently used incorporated by reference the warranty disclaimer in the dealership agreement.<sup>46</sup> Holding that course of performance or course of dealing "could be the basis for a limitation of implied warranties,"<sup>47</sup> the Sixth Circuit agreed with the district court. Communications between the parties, the buyer's experience, and a lawyer's acceptance of the limited warranty provisions contained on the order forms were factors which justified a disclaimer based on 2-316(3)(c).

The noteworthy aspect of this court's decision is the tacit validity it accorded the written disclaimer in the dealership agreement.<sup>48</sup> At the center of the "factual situation"<sup>49</sup> forming the basis of a disclaimer under paragraph (3) was the written limitation communicated by the dealership agreement.<sup>50</sup> Despite the court's determination that it was unnecessary to examine the language in the agreement, the facts adduced by the district court, and with which the circuit court agreed, *formed* the "factual situation" which the latter court held to be "within the meaning of course of performance . . . or course of dealing."<sup>51</sup> A crucial finding of fact was the "notice or chargeable knowledge" of the disclaimer in the dealership agreement.<sup>52</sup> Thus, a seemingly ineffectual written disclaimer which could not survive alone became capable of giving notice to a buyer and thereby giving life to a poorly-developed disclaimer by course of performance. By failing to comment on its conformity with any standard of 2-316 while relying on the writing's existence, the court minimized (3)(c).<sup>53</sup>

---

<sup>46</sup>*Id.* at 1395-97.

<sup>47</sup>*Id.* at 1394.

<sup>48</sup>WHITE and SUMMERS characterize the court's action as "judicial willingness to uphold an imperfectly drafted disclaimer clause." WHITE & SUMMERS *supra* note 33, at 512.

<sup>49</sup>430 F.2d at 1397.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>The court's omission appears to be an implication of uncertainty about the subsection. Addressing this point, the Texas Supreme Court reversed a grant of summary judgment on the ground that a written disclaimer, although failing to satisfy 2-316(2), could form a course of dealing. Actual knowledge of a disclaimer arising from the parties' dealings would render the writing's inconspicuousness irrelevant. *See Cate v. Dover Corp.*, 790 S.W.2d 559, 561-62 (Tex. 1990); *see also Velez v. Craine & Clarke Lumber Corp.*, 341 N.Y.S.2d 248 (N.Y. App. Div. 1973), *rev'd on other grounds*, 305 N.E.2d 750 (N.Y. 1973) (holding actual knowledge of disclaimer on invoices in the trade rendered it "sufficiently conspicuous."). *But see Hartwig Farms, Inc. v. Pacific Gamble Robinson, Co.*, 625 P.2d 171, 175 (Wash. Ct. App. 1981) (holding actual knowledge of a disclaimer pursuant to 2-316(3)(a) "is insufficient to give it effect."). In its preliminary Report the U.C.C. Article 2 Study Group recommends that actual knowledge operate to validate implied warranty disclaimers irrespective of their conspicuousness. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, *supra* note 7, at 106 (Part 3, Rec. A2.3(13)(B)); Eisen, *supra* note, 9 at 307. *But see* A.B.A. Task Force, *supra* note

The written disclaimer does not comply with 2-316(2). There is no mention of the word "merchantability" and, despite bold lettering, the question of conspicuousness remains. Notice to the buyer, therefore, must turn on the mere fact of the limiting language itself. If the court had said as much, it would have explicitly acknowledged (3)(c)'s authority in this instance through the mechanism of a writing sufficiently capable of imparting notice to a buyer. Instead, course of performance or dealing pursuant to (3)(c) and the written limitation emerge as coequals. The failure to distinguish between course of performance and course of dealing by finding "elements of both" is additional evidence that the court was indecisive in its interpretation of (3)(c).<sup>54</sup>

A more precise interpretation came from the district court in *Standard Structural Steel Co. v. Bethlehem Steel Corp.*<sup>55</sup> Plaintiff purchased cable from defendant for use in erecting bridge spans. When the cable broke during removal of the old spans, plaintiff initiated suit against the manufacturer alleging, among other things, breach of implied warranties of merchantability and fitness for a particular purpose. In finding for defendant, the court concluded that a sixty-two year business relationship between the parties showed a course of dealing in which plaintiff, through its prior purchases, became fully aware that defendant excluded such warranties.<sup>56</sup> That awareness resulted, in part, from defendant's practice of sending confirmatory letters and acknowledgements in which unequivocal language, in bold letters, specifically excluded both implied warranties.<sup>57</sup> Unlike *Country Clubs*, the court in *Standard Structural* placed no emphasis on the written disclaimer despite its apparent compliance with 2-316(2) and 1-201(10).<sup>58</sup> Although the

---

9, at 1110-11 (defending the view that the conspicuousness requirement should not be replaced by an actual knowledge standard).

<sup>54</sup>Comment 2 § 1-205 gives these terms "equivalent meaning[s]" after it has been established that the parties' conduct precedes or succeeds the agreement in question. On this point *Country Clubs* was silent.

<sup>55</sup>597 F. Supp. 164 (D. Conn. 1984).

<sup>56</sup>*Id.* at 185-86.

<sup>57</sup>*Id.* at 173-74.

<sup>58</sup>U.C.C. § 1-201(10) (1992) provides:

"Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

*Id.*

It is of course noteworthy that sixty-two years of business dealings in which the parties' actions repeatedly demonstrate their intentions is a more substantial indicator than six months and two purchases. In the former case course of dealing assumes a regularity that either side would find difficult to contradict.

court recognized alternative grounds of no implied warranty of fitness absent the satisfaction of criteria required by U.C.C. § 2-315<sup>59</sup> and no breach of the implied warranty of merchantability,<sup>60</sup> its decision rested squarely on 2-316(3)(c).

While the three ways of excluding or modifying an implied warranty pursuant to 2-316(3)(c) are distinct,<sup>61</sup> only usage of trade requires that its existence and scope be proved as facts.<sup>62</sup> Trade usage, once determined by the trier of fact, should, depending on the circumstances, automatically give rise to or disallow a disclaimer. The occasional failure of this formula in the context of implied warranty disclaimers<sup>63</sup> supports this article's proposal for a reconsideration of the matter.

One case in which the formula worked was *Torstenson v. Melcher*.<sup>64</sup> Plaintiff's suit to recover the purchase price and damages for breach of warranties resulting from the sale of a nonperforming bull failed, despite its reliance on a catalogue warranty stating, among other things, that the animal was a breeding animal.<sup>65</sup> Plaintiffs objected to defendants' pleading a trade usage exclusion of the implied warranty of fitness and the trial court's instruction to the jury on that issue. In upholding the trial court's judgment for defendants, the Nebraska Supreme Court found that defendants' answer had satisfied the requirement of 1-205(6) in placing plaintiffs on notice of their intent to offer evidence of a trade usage.<sup>66</sup> Further, the court declined to overturn the judgment below in view of the jury's authority to render the verdict.<sup>67</sup>

---

<sup>59</sup>597 F. Supp. at 186. Section 2-315 states:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315 (1992).

<sup>60</sup>597 F. Supp. at 187.

<sup>61</sup>See *supra* part III.

<sup>62</sup>See *infra* notes 64-67 and accompanying text.

<sup>63</sup>See *infra* part IV.B.

<sup>64</sup>241 N.W.2d 103 (Neb. 1976).

<sup>65</sup>*Id.* at 104.

<sup>66</sup>*Id.* at 106.

<sup>67</sup>*Id.* at 107. The court did not equivocate on the *formula* despite its own doubts. It held, "[w]hile we may have some question on the result herein, the trial was held in a farm and ranch community. It was a question of fact for the jury. We are bound by its determination."

### B. Ineffective Disclaimers

Courts have given effect to implied warranty exclusions because of 2-316(3)(c), often equivocating on the subsection's precise meaning. They have likewise held exclusions under this subsection to be ineffective.<sup>68</sup> Two cases in which the courts refused to recognize implied warranty disclaimers present straightforward rules for examining (3)(c).

In *Latimer v. William Mueller & Son*,<sup>69</sup> defendant sold kidney bean seed to plaintiffs for planting. Affixed to the bags in which the seed was packaged were three tags, one of which contained a disclaimer of warranties of merchantability and fitness for a particular purpose. When the seed plants developed a bacterial disease reducing crop yield, plaintiffs sued the retailer who in turn sued the supplier.

The Michigan trial court ruled in plaintiffs' favor, denying defendant-seller's motion for a directed verdict on the issue of breach of an express warranty.<sup>70</sup> The court also denied the third party defendant-supplier's directed verdict motion based on the disclaimer tags attached to the seed bags.<sup>71</sup> On appeal the appellate court found no express warranty and reversed the judgment in favor of defendant-seller on the issue of express warranty.<sup>72</sup>

The court, however, rejected the third party defendant supplier's argument that no breach of warranty of merchantability occurred because the seeds were not warranted against disease. Instead, the court agreed with the trial court, holding that an implied warranty arose from course of dealing and usage of trade.<sup>73</sup> Neither 2-316(2) nor (3)(c) effectively disclaimed the warranty. The language on the tags was "insufficiently conspicuous"<sup>74</sup> and, while similar tags

---

<sup>68</sup>See, e.g., *Bodine Sewer v. Eastern Illinois Precast*, 493 N.E.2d 705, 710 (Ill. App. Ct. 1986) (holding the express warranty in the sale of concrete pipe was not affected by any disclaimer of implied warranty based on trade usage); *Christopher & Son, Inc. v. Kansas Paint & Color Co., Inc.*, 523 P.2d 709, 716 (Kan. 1974) (finding an implied warranty disclaimer based on course of dealing would have no effect unless known to the buyer at the time of the contract for steel primer paint); *Latimer v. William Mueller & Son, Inc.*, 386 N.W.2d 618, 625 (Mich. Ct. App. 1986) (finding evidence insufficient to establish trade usage as a disclaimer of warranty in the sale of seed); see also *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638 (10th Cir. 1991) (holding a disclaimer contained in invoice sent after purchase of onion seed was ineffective to exclude an implied warranty of merchantability).

<sup>69</sup>386 N.W.2d 618 (Mich. Ct. App. 1986).

<sup>70</sup>*Id.* at 621.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* at 622.

<sup>73</sup>*Id.* at 623.

<sup>74</sup>386 N.W.2d at 624.

were used in the seed trade, that fact did not establish a trade usage disclaimer.<sup>75</sup>

The court accepted plaintiffs' arguments that they had not read or noticed the tags.<sup>76</sup> Consequently, no "mutual understanding" as to the disclaimer had come about.<sup>77</sup> Although the court did not state that an undisputed trade usage would have made the lack of understanding immaterial and the disclaimer effective, U.C.C. § 1-205(5) makes this inference clear.<sup>78</sup>

The *Latimer* court, however, did not address the issue concerning when the disclaimers reached plaintiffs. The third party defendant-supplier shipped the seed to defendant-seller more than a year after plaintiffs had placed their orders. By implication, the understanding would have had to arise at the time of the contract, but the court found no such understanding.<sup>79</sup>

In *Christopher and Son, Inc. v. Kansas Paint & Color Co.*,<sup>80</sup> the Kansas Supreme Court affirmed the lower court, expressly observing that a written disclaimer was inadmissible if made after the date of the contract.<sup>81</sup> Defendant, the lowest bidder on a contract to provide steel primer paint to plaintiff, sent invoices containing disclaimers of all warranties after plaintiff had placed orders. Because the parties had done business for years, and because the contract in question entailed sixteen orders, defendant asserted an exclusion of warranties through course of dealing and course of performance.<sup>82</sup>

The court rejected a finding of exclusion based on course of dealing because of the buyer's ignorance of the limitation at the time of the contract.<sup>83</sup> Likewise, no disclaimer resulted from course of performance because the writing which

---

<sup>75</sup>*Id.* at 625.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.* at 625.

<sup>78</sup>Compare *Latimer* with *Torstenson v. Melcher*, 241 N.W.2d 103, 107 (Neb. 1976) ("In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence." (quoting *Ridenour v. Kuker*, 175 N.W.2d 287, 288 (Neb. 1970))).

<sup>79</sup>Other courts ruling on seed cases have explicitly denied a summary judgment motion or rejected a disclaimer under paragraph (3) on the grounds that it is not part of the bargain when the writing containing it is sent after the contract of sale. See, e.g., *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 625 P.2d 171, 175 (Wash. Ct. App. 1981) ("Without negotiation and agreement, no disclaimer . . . can be effective."); see also *Lecates v. Pontiac Buick Co.*, 515 A.2d 163, 170 (Del. Super. Ct. 1986) ("[T]he more immediate problem with the invoice disclaimer is whether it was delivered to plaintiffs after the contract for sale had been made.").

<sup>80</sup>523 P.2d 709 (Kan. 1974).

<sup>81</sup>*Id.* at 716.

<sup>82</sup>*Id.* at 715.

<sup>83</sup>*Id.* at 716.

would form its basis was not conspicuous.<sup>84</sup> Thus, with regard to (3)(c) the court examined the issue of disclaimer from two separate perspectives: (1) failure to apprise plaintiff of the disclaimer at the time of the contract rendered a course of dealing exclusion inoperative, and (2) failure to satisfy 2-316(2)'s conspicuousness requirement negated a course of performance exclusion.<sup>85</sup> On the latter point the court, in regard to course of performance as dependent upon paragraph (2), implied that performance was an inferior criterion.

Course of performance remains the weakest link in the disclaimer chain for implied warranties. It has no meaning until events have unfolded after the contract of sale, and then it is used to reconstruct the moment of contract. Course of dealing and trade usage operate in a proactive direction to determine if an implied warranty disclaimer should be given effect, while course of performance operates retroactively. Few courts have been precise in construing the application of a course of performance disclaimer and this vagueness undermines the clear language of both 2-316(3)(c) and 2-208.<sup>86</sup>

### *C. Course of Dealing, Course of Performance, and Usage of Trade as Parol Evidence*

When the contract is in writing but does not include a written disclaimer, or an effective written disclaimer, a seller's assertion of warranty exclusion under 2-316(3)(c) may conflict with the Code's parol evidence rule.<sup>87</sup> Section 2-316(3)(c) is two steps removed from section 2-202. Paragraph (a) of section 2-202 permits a written contract to be explained or supplemented by course of dealing or performance or usage of trade. Implied warranty disclaimers arising out of those factors will in turn be allowed to clarify a written contract.

---

<sup>84</sup>*Id.* at 717.

<sup>85</sup>The court said as much: "This rule [requiring disclaimers to be made at the time of the contract] would not apply in a situation where the seller was attempting to use the disclaimers subsequently made known to the buyer to create a defense of 'course of performance.'" 523 P.2d at 716.

<sup>86</sup>*See Country Clubs, Inc., v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1394, 1397 (6th Cir. 1971); *see also Earl Brace & Sons v. Ciba-Greip Corp.*, 708 F. Supp. 708, 710 (W.D. Pa. 1989), (arguing "course of performance" while describing course of dealing); *Robinson v. Branch Moving and Storage Co., Inc.*, 221 S.E.2d 81, 84 (N.C. Ct. App. 1976) (finding buyer who refused to inspect a used truck sold "as it was," and the only subject of the sale, could not recover costs because of an effective implied warranty disclaimer based on course of performance).

<sup>87</sup>*See* U.C.C. § 2-202 (1992). That section states:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

*Id.*

Courts view the admissibility of supplemental evidence from course of dealing, course of performance, and trade usage in the light of three criteria. First, if a written contract is ambiguous, there will be no bar to the introduction of extrinsic evidence such as usage of trade.<sup>88</sup> Second, if a writing is unambiguous by virtue of its language, or by the inclusion of a merger clause which does not constitute a complete expression of the parties' agreement (contrary to the intention of the party who prepared it), parol evidence which is consistent with the writing may be introduced.<sup>89</sup> Third, a contract which shows a purported final expression of the parties' agreement will be effective to exclude the introduction of parol evidence if it is clear from the language that the court should not consider extrinsic evidence.<sup>90</sup>

The criteria are not absolute and debate centers on two fronts. When does evidence contradict the agreement? And, when will trade usage, course of dealing, and course of performance be admissible despite the possible appearance of total integration?

Case decisions disagree on the meaning of contradictory evidence.<sup>91</sup> Of greater significance, however, is the question of whether the parol evidence rule can ever exclude course of dealing, course of performance, and trade usage evidence. Courts have observed that course of dealing and trade usage are not terms of the contract but are assumed to be a part of it.<sup>92</sup> Thus, they can never be inconsistent with the contract in contravention of the statutory language which calls for the consideration of consistent additional terms.<sup>93</sup> A merger clause which purports to exclude all extrinsic evidence and is meticulous in its language may yet fail carefully to negate course of dealing, usage of trade, and

---

<sup>88</sup> See *Ashland Oil Inc. v. Donahue*, 223 S.E.2d 433 (W. Va. 1976).

<sup>89</sup> See *Nanakuli Paving and Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981); *Morgan v. Stokely-Van Camp, Inc.*, 663 P.2d 1384 (Wash. Ct. App. 1983).

<sup>90</sup> See, e.g., *Nanakuli*, 664 F.2d at 782 n.14 (commenting that a boilerplate clause in defendant-appellee's contract "should not have operated to exclude all dealings evidence for any purpose, unless the parties had evidenced a clear intent to contract with no reference whatsoever to such evidence.").

<sup>91</sup> See, e.g., *State ex rel. Conley Lott Nichols Machine Co. v. Safeco Ins. Co. of Am.*, 671 P.2d 1151, 1155 (N.M. Ct. App. 1983) (reasoning trade usage evidence is contradictory to the agreement if it would change its basic meaning). But see *American Research Bureau, Inc. v. E-Systems, Inc.*, 663 F.2d 189, 199 (D.C. Cir. 1980) (stating the test for contradiction is a "stricter standard requiring a substantially greater agreement between the contract and the proffered additional terms.").

<sup>92</sup> See, e.g., *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 10-11 (4th Cir. 1971).

<sup>93</sup> See generally Roger W. Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. ILL. L. F. 811, 833 ("[S]ubsection 2-202(a) is primarily an internal cross-reference to emphasize that section 1-205 provides the rule governing usage of trade and course of dealing. The 'may not be contradicted' phrase and subsection (b) are not applicable to evidence of usage of trade and course of dealing at all.").



course of performance.<sup>94</sup> The statute does not offer examples of what would constitute a careful negation, although use of explicit language covering these three factors would seem to suffice.<sup>95</sup>

In the context of the Code's parol evidence rule, no landmark case appears to address the introduction of implied warranty disclaimers based on course of dealing, course of performance, and trade usage. A conundrum exists. If a disclaimer of warranty is a contract term while evidence of a trade usage, course of dealing, or course of performance is not, which concept prevails? If 2-202(b) governs all disclaimers, those arising from 2-316(3)(c) could be in conflict with the written contract, and the application of the parol evidence rule would conform to judicial interpretation similar to the above. The statutory definition for "term" would seem to apply<sup>96</sup> in that a disclaimer is a part of an agreement which must be bargained for.<sup>97</sup> If subsection 2-316(3)(c) did not exist, disclaimers of implied warranties by trade usage, course of dealing, and course of performance would continue to be effective because of 1-205 and 2-208.<sup>98</sup> Because those sections are capable of producing disclaimers, the potential for conflict between 2-202 and the subject matter of 2-316(3)(c) would not be eradicated.<sup>99</sup> However, an absence of case law on this issue raises the possibility that the trade usage *itself*, or the course of dealing or performance controls. If what the trade usage comprises, such as a disclaimer, is secondary, exclusion under the parol evidence rule may be inapplicable. A judicial resolution, if not a statutory comment on this point, is in order.

---

<sup>94</sup>Comment 2 to U.C.C. § 2-202 provides:

Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

*Id.*

<sup>95</sup>*But see* Kirst, *supra* note 93, at 864-68 (arguing that forms which mention explicitly course of dealing and usage of trade may be inadequate if they do not reflect the "intent of the parties and their agreement in fact.").

<sup>96</sup>U.C.C. § 1-201(42) (1992) provides: "'Term' means that portion of an agreement which relates to a particular matter." *Id.*

<sup>97</sup>U.C.C. § 2-316(1) (1992) makes a disclaimer of an express warranty inoperative if it conflicts with 2-202. The negating or limiting of a warranty, a *disclaimer*, is, by this section, recognized as a term.

<sup>98</sup>*See infra* part V.

<sup>99</sup>*But cf.* Eisen, *supra* note 9, at 312-13 (arguing course of dealing, course of performance, and trade usage should not be permitted to act as disclaimers but should be limited to an "interpretive function" so as not to violate the parol evidence rule).

## V. SCOPE OF U.C.C. §§ 1-205 AND 2-208

By declaring that "a course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware *give particular meaning to and supplement or qualify terms of an agreement*,"<sup>100</sup> paragraph (3) of section 1-205 can be a controlling device in any sale-of-goods contract.<sup>101</sup> Similarly, course of performance "*shall be relevant to determine the meaning of the agreement*."<sup>102</sup> The statutory language, therefore, clearly mandates the consideration of course of dealing, usage of trade, and course of performance when interpreting a contract of sale. Because 1-205 and 2-208 are instruments for detecting parties' intentions and expectations after a dispute has arisen, disclaimers of implied warranties are thereby subject to discovery. In accordance with this reasoning, Comment 1 to 1-205 supports the argument that the Code's parol evidence rule did not contemplate the exclusion of course of dealing and trade usage.<sup>103</sup>

Courts have examined the effectiveness of trade usage and course of dealing in disclaiming implied warranties without reference to 2-316(3)(c). In *Velez v. Craine & Clarke Lumber Corp.*,<sup>104</sup> plaintiffs sued a lumber supply company for personal injuries sustained when a plank on which they were standing collapsed.<sup>105</sup> Judgment in their favor was reversed on appeal. The appellate court held that actual knowledge of invoice disclaimers of an implied warranty of fitness gained over fifteen years of dealings with the defendant, combined with the conspicuousness of the written disclaimer in question, made the disclaimer operable.<sup>106</sup> This case may be compared with *Brace*,<sup>107</sup> in which the court likewise ruled that the written disclaimer was conspicuous and that course of performance strengthened the disclaimer's effectiveness. The court

---

<sup>100</sup>U.C.C. § 1-205(3) (1992) (emphasis added).

<sup>101</sup>The Code distinguishes between "agreement" and "contract" in section 1-201; however, the sale contract is predicated on the existence of an agreement. See U.C.C. §§ 2-204(1) and (2) (1992).

<sup>102</sup>U.C.C. § 2-208(1) (1992) (emphasis added).

<sup>103</sup>Comment 1 to U.C.C. § 1-205 provides:

This Act rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

U.C.C. § 1-205 cmt. 1 (1992).

<sup>104</sup>341 N.Y.S.2d 248 (N.Y. App. Div. 1973).

<sup>105</sup>*Id.* at 249.

<sup>106</sup>*Id.* at 252.

<sup>107</sup>*Earl Brace & Sons v. Ciba-Geigy Corp.*, 708 F. Supp. 708 (W.D. Pa. 1989).

in *Brace* cited 2-316 generally in its opinion, quoting from Comment 1.<sup>108</sup> By implication alone, 2-316(3)(c) was made applicable. Neither the majority nor the dissenting opinion in *Velez* cited 2-316(3)(c); the former, by citing 2-316(2) only, narrowed its statutory focus to that subsection. It may be argued that a similar omission of any reference to 1-205 does not weaken its role. Course of dealing and trade usage are fundamental to an agreement.

*Lutz Farms v. Asgrow Seed Co.*<sup>109</sup> reached a decision contrary to that in *Velez*. Plaintiffs, commercial onion growers, had purchased seed from defendant-seed company following a business relationship between the parties covering more than a decade. During that time plaintiffs had experienced no serious difficulty with seller's seed. When the crop in question yielded deformed onions attributed to genetic defects in the seed, plaintiffs sued, claiming negligence, breach of express warranty, and breach of implied warranties of merchantability and fitness for a particular purpose.<sup>110</sup> Following judgment for plaintiffs, defendant appealed to the Tenth Circuit. With respect to the warranty issues, defendant asserted that the district court had erred in submitting evidence of warranties to the jury when it should have granted defendant's motion for a directed verdict.<sup>111</sup> Leaving unchanged the trial court's finding that the written disclaimer was inconsistent with express warranties contained in defendant's publication,<sup>112</sup> the court affirmed for plaintiffs. The court cited both subsections 2-316(1)<sup>113</sup> and (2).<sup>114</sup> In dicta, the court examined the prior dealings between the parties, finding no disclaimer on that basis.<sup>115</sup> As in *Velez*, the court cited neither 2-316(3)(c) nor 1-205.

The courts in both *Velez* and *Lutz Farms* considered the buyers' knowledge in reaching their decisions.<sup>116</sup> Therefore, removal of 2-316(3)(c) need not undermine courts' appreciation of the need for great care in assessing the parties' understanding with regard to their sales contract.<sup>117</sup>

More generally, courts have incorporated and applied 1-205 and 2-208 into their decisions without recourse to other provisions specifically recognizing course of dealing, performance, or trade usage. Decisions have supported a

---

<sup>108</sup>*Id.* at 710.

<sup>109</sup>948 F.2d 638 (10th Cir. 1991).

<sup>110</sup>*Id.* at 640.

<sup>111</sup>*Id.* at 644.

<sup>112</sup>*Id.*

<sup>113</sup>*Id.*

<sup>114</sup>948 F.2d at 646.

<sup>115</sup>*Id.*

<sup>116</sup>See *id.*; *Velez v. Craine & Clarke Lumber*, 341 N.Y.S.2d 248, 252 (N.Y. App. Div. 1973).

<sup>117</sup>See Special Project, *supra* note 16, at 1283.

buyer's rejection of goods,<sup>118</sup> determined a seller's entitlement to a price increase,<sup>119</sup> approved interest charges on overdue invoices,<sup>120</sup> and found a breach of an implied warranty of merchantability.<sup>121</sup> All of these actions, along with exclusions, modifications, or limitations of implied warranties, were within the formulation of 1-205 and 2-208. In addition to the clear language of these sections, policy reasons exist which call for the refinement of implied warranty disclaimers through course of dealing, course of performance, and trade usage.

## VI. POLICY ARGUMENTS

### A. *The Experience Factor*

If sellers and buyers were generally knowledgeable about their rights and liabilities at the time a contract is made, a provision like 2-316(3)(c) could be beneficial to a seller and harmless to a buyer. Many contracting parties, however, including merchants, do not possess the level of knowledge or experience to justify subsection 2-316(3)(c).

Article 2 of the Code applies to contracts for the sale of goods irrespective of the status of the parties.<sup>122</sup> While the Magnuson-Moss Warranty Act provides additional protection to consumers in cases of written warranties,<sup>123</sup> and legislation in many states regulates other aspects of consumer sales,<sup>124</sup> Article 2 has broad application for those states which have adopted it as officially written. A number of states have amended 2-316 to prohibit or restrict warranty

---

<sup>118</sup>GNP Commodities, Inc. v. Walsh Heffernan Co., 420 N.E.2d 659 (Ill. App. Ct. 1981); Harper & Assoc. v. Printers, Inc., 730 P.2d 733 (Wash. Ct. App. 1986).

<sup>119</sup>Southwest Indus. Import & Export, Inc. v. Borneo Sumatra Trading Co., 666 S.W.2d 625 (Tex. Ct. App. 1984).

<sup>120</sup>Southwest Concrete Prod. v. Gosh Constr. Corp., 263 Cal.Rptr. 387 (Cal. Ct. App. 1989), *aff'd*, 798 P.2d 1247 (Cal. 1990).

<sup>121</sup>Delano Growers' Coop. Winery v. Supreme Wine Co., Inc., 473 N.E.2d 1066 (Mass. 1985).

<sup>122</sup>See U.C.C. § 2-102 (1992). The section provides:

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

*Id.*

<sup>123</sup>15 U.S.C. § 2301 (1992).

<sup>124</sup>See, e.g., VT. STAT. ANN. tit. 9, §§ 2451 (1991) (prohibiting unfair deceptive trade practices in consumer transactions).

disclaimers in the case of consumers.<sup>125</sup> But merchants are regarded as a general class and are assumed to need no such protection.

Courts have often approached disclaimers with caution, observing explicitly or otherwise that disclaimers are disfavored.<sup>126</sup> They have likewise considered experience and business acumen in deciding the effectiveness of implied warranty disclaimers<sup>127</sup> despite the Code's omission of these factors in its *general* regulation of sales transactions.<sup>128</sup> Since nothing in the *statutory* language of 2-316 indicates that this section was intended to evaluate the parties' relative business experience,<sup>129</sup> unlike sections such as 2-314 in which the warranty of merchantability exists because of the seller's status and by implication the seller's experience,<sup>130</sup> courts have taken this factor into account

---

<sup>125</sup>See, e.g., ALA. CODE § 7-2-316(5) (1975) (providing that seller's liability for damages for personal injury may not be limited in the case of consumer goods); ME. REV. STAT. ANN. tit. 11, § 2-316(5) (1991) (providing that exclusions of implied warranties of merchantability and fitness, and limitations on a consumer's remedies for breach are unenforceable); MASS. GEN. L. ch. 106, § 2-316A (1992) (requiring that section 2-316 is not applicable to sales of consumer goods or services); N.H. REV. STAT. ANN. § 382-A:2-316(4) (1983) (requiring that in a consumer sale disclaimers of warranties of merchantability or fitness are ineffective to limit a merchant's liability unless buyer has signed a conspicuous writing); S.C. CODE ANN. § 36-2-316 (Law. Co-op. 1990) (stating exclusion or modification of implied warranties by usage of trade are applicable to merchants only); VT. STAT. ANN. tit. 9A, § 2-316(5) (1991) (stating exclusions or modifications of implied warranties are not applicable to sales of new consumer goods or services); WASH. REV. CODE ANN. § 62a.2-316(4) (1992) (providing that a limitation on a merchant seller's liability for the sale of consumer goods will be effective only if the disclaimer gives particularity about unwarranted qualities). Mississippi has chosen not to include 2-316 or otherwise limit liability as to implied warranties of merchantability or fitness. See MISS. CODE ANN. § 11-7-18 (1972).

<sup>126</sup>See, e.g., *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 625 P.2d 171, 173 (Wash. Ct. App. 1981). ("Disclaimers . . . are not favored in the law[.]"); *Lecates v. Pontiac Buick Co.*, 515 A.2d 163, 168 (Del. Super. Ct. 1986) ("Since the ordinary presumption is that the risk of nonmerchantability is *never* assumed by the buyer, its exclusion from a contract threatens surprise and reasonably requires that a seller make special mention of the word as a precaution against unfair advantage.").

<sup>127</sup>See, e.g., *Country Clubs, Inc. v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1347, 1397 (6th Cir. 1978) (holding a purchase order entered by experienced business man gave notice of warranty limitation); see also *Hummel v. Skyline Dodge, Inc.*, 589 P.2d 73, 76 (Col. Ct. App. 1978) (holding a professional car dealer's actions amounted to acceptance of vehicle).

<sup>128</sup>See, e.g., *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164, 185 (D. Conn. 1984) (discussing assumption that "merchants" are experienced professionals).

<sup>129</sup>But see Comment 8 addressing paragraph 3, subsection (b) and stating: "The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination." U.C.C. § 2-316 cmt. 8 (1992).

<sup>130</sup>Cf. U.C.C. § 2-316 cmt. 3 (1992) which provides: "Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard

gratuitously.<sup>131</sup> In considering the positions of a commercial buyer and seller, in light of their presumed experience as merchants, those courts have, in effect, broadened the explicit criteria for interpreting and enforcing 2-316(3)(c).

Weighing a merchant's *inexperience* would be more useful than examining experience. Unfamiliarity with trade usage exclusions of implied warranties is relevant to a determination of the parties' bargain-in-fact. Despite a few courts' reflections on a merchant's experience, the overwhelming trend is not to probe this aspect.

Even experience gained in one's trade or profession does not, in itself, endow a commercial buyer or seller with an understanding of warranties and warranty disclaimers. Legal consultation is a prerequisite to that understanding and, for commercial entities, it often makes the difference between a company's survival or its demise. In effect, the utilization of counsel can compensate for inadequate experience. Although there appear to be no empirical studies on the subject, it is a probable misconception that all, or even most, commercial sellers and buyers operate with the benefit of regular legal counsel. Certain facts support this premise: standard forms predominate in commercial transactions;<sup>132</sup> warranties as protective devices remain an essential feature of both consumer and commercial transactions;<sup>133</sup> most businesses are small enterprises;<sup>134</sup> and lastly, the vast numbers of failed

---

that such disclaimers must mention merchantability and in case of a writing must be conspicuous." *Id.*

<sup>131</sup>While it follows that only a merchant may make a disclaimer of an implied warranty of merchantability since the warranty only arises through a sale by a merchant, this is but one type of warranty disclaimer recognized under 2-316. And although Comment 1 to 2-104 equates merchants with experienced professionals, not all courts have adopted that view. *See, e.g., Barco Auto Leasing Corp. v. PSI Cosmetics, Inc.*, 478 N.Y.S.2d 505, 512 (N.Y. Civ. Ct. 1984) ("[I]t is nonetheless apparent that small businessmen can also be victimized by unconscionable practices.").

<sup>132</sup>*See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, (1971) ("Standard form contracts probably account for more than ninety-nine percent of all the contracts now made.").

<sup>133</sup>*See* Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1397 (1983) (discussing whether warranties exist primarily for consumers as a gauge of product quality according to "signalling theory," the authors contend that the frequency of warranties in commercial markets belies the theory).

<sup>134</sup>In 1988 seventy-five percent of business establishments paid wages to nine or fewer employees with sixty-nine percent of all wholesale trade establishments employing nine or fewer workers. These figures do not include self-employed persons whose businesses would increase percentages substantially. *See* U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS X, 48 (1988). And while one company might operate several establishments, thereby constituting a large business entity, other data minimize the significance of this. *See* Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1628 (1983) ("[L]arge corporations represent only a tiny fraction of the total number of all business firms.").

businesses demonstrate undercapitalization as well as neglect in obtaining preventive legal advice.<sup>135</sup>

The use of standard form contracts by merchants, who are also classifiable as businesses or business enterprises, deserves closer scrutiny with regard to disclaimers of warranties and merchants. The sellers in the cases cited in this article satisfied the Code's definition of merchant,<sup>136</sup> as did most of the buyers.<sup>137</sup> And in the majority of cases the disclaimers at issue were contained in standard form contracts, invoices, order forms, or the like.<sup>138</sup>

Criticism has been aimed at the use of standardized forms because they preclude the opportunity for bargaining.<sup>139</sup> A key objective of Article 2 is the promotion of sales contracts resulting from the parties' agreement through a bargaining process. One example of this focus is its less rigorous treatment of

---

<sup>135</sup>See Philip Schuchman, *The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States*, 88 COMM. L. J. 288, 306 (1983) ("The largest of the personal bankruptcies, as measured by the scheduled contractual liabilities and gross assets, are the business-related filings.").

<sup>136</sup>U.C.C. § 2-104(1) (1992) states:

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

*Id.* In addition, U.C.C. § 2-314(1) (1992) states, in part: "Unless excluded or modified (Section 2-316), 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." *Id.*

<sup>137</sup>This article will not explore the debate over whether or when farmers should qualify as merchants. *See, e.g.*, *Fred J. Moore, Inc. v. Schinmann*, 700 P.2d 754, 757 (Wash. Ct. App. 1985) ("Whether a farmer is a merchant under the Uniform Commercial Code is a question of fact unless the facts are undisputed."); *see also* *Loeb & Co., Inc. v. Schreiner*, 321 So.2d 199 (Ala. 1975) (holding a farmer who sold only his own cotton was not a merchant under 2-104).

<sup>138</sup>*Country Clubs, Inc. v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1347, 1396 (6th Cir. 1970) (order forms); *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 644 (10th Cir. 1991) (invoices and seed pail labels); *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164, 173-74 (D. Conn. 1984) (letter and acknowledgement); *Lecates v. Pontiac Buick Co.*, 515 A.2d 163, 167 (Del. Super. Ct. 1986) ("used vehicle guarantee" and invoice); *Christopher and Son, Inc. v. Kansas Paint & Color Co.*, 523 P.2d 709, 715 (Kan. 1974) (invoices); *Latimer v. William Mueller & Son*, 386 N.W.2d 618, 624 (Mich. Ct. App. 1986) (seed bag tags); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 268 A.2d 345, 347 (N.J. 1970) (contract clause); *Velez v. Craine & Clarke Lumber*, 341 N.Y.S.2d 248, 250 (N.Y. App. Div. 1973) (invoice); *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 625 P.2d 171, 173 (Wash. Ct. App. 1981) (invoices).

<sup>139</sup>*See, e.g.*, K. N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 701 (1939) ("[W]hen contracts are produced by the printing press, with the fountain pen used not for recording thought but for authentication, the adequacy of the general law for filling gaps in the conscious bargain is flatly negated, in the view of the party preparing and ordering the form pads.").

forms than under the common law "mirror image" rule.<sup>140</sup> If the absence of a dispute arising from a seller and buyer's use of unmatched preprinted forms indicates that little, if any, bargaining occurred (no typewritten terms have been added, or confirmatory memoranda exchanged, for example), the model contract envisaged by Article 2 and its drafters has been subverted. Likewise, a seller who provides preprinted contract forms or invoices to a buyer who has used the seller's order forms is in a weak position to argue that the language of the forms was bargained for.<sup>141</sup>

Regarding merchants as persons knowledgeable about the goods they buy or sell<sup>142</sup> overlooks sometimes extreme degrees of skill and ignorance existing in contemporary commercial settings.<sup>143</sup> Subsection 2-316(3)(c) may make some commercial sellers less conscientious in notifying a buyer of an implied warranty disclaimer included on a standard form either drafted by counsel and used repeatedly without review or purchased in tablet form. Likewise, it may make some commercial buyers more vulnerable to the possible foreclosing of a remedy by disclaimer. Both are consequences which will most likely occur to the inexperienced or careless.<sup>144</sup> Furthermore, such merchants may well comprise the greater number of those conducting business.

### *B. Merchants and Unconscionability*

The failure of merchant buyers and sellers to operate with the requisite understanding of all the consequences of a warranty or warranty disclaimer and the reasons therefore, invites a comparison of bargaining power. In the case of a buyer, it is only "bargained language," i.e., agreement to the disclaimer as required by Comment 1 to 2-316 and as interpreted by most courts, which legitimizes the disclaimer. Although agreement alone does not signify equality of bargaining power, and unequal bargaining power is not synonymous with unfairness, Comment 1 to 2-316 implicitly raises the issue of fairness in its attention to buyer protection. When inexperienced merchants bargain

---

<sup>140</sup>See U.C.C. § 2-207 (1992) (allowing for an acceptance to contain terms that differ from the offer).

<sup>141</sup>See, e.g., *Cate v. Dover Corp.*, 790 S.W.2d 559, 565 (Tex. 1991) (citing the RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981) (Spears, J., concurring). The concurring opinion asserts that most buyers do not read standard form contracts. See also W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 34 (1984) (observing that even nonstandard contracts may be as complex and incomprehensible as standard contracts).

<sup>142</sup>See *supra* notes 128 and 136 and accompanying text.

<sup>143</sup>See, e.g., Note, *supra* note 134 at 1629 (stating most small businesses are headed by inexperienced entrepreneurs).

<sup>144</sup>Sellers who neglect to bring a disclaimer to a buyer's attention may be inexperienced themselves or they may represent that class of seller who "respond[s] to [buyers'] ignorance by offering more limited warranty coverage than the buyers want, but charging prices that are commensurate with fuller coverage." ALAN SCHWARTZ & ROBERT E. SCOTT, *SALES LAW AND THE CONTRACTING PROCESS* 183 (1992).



unequally, the resulting agreement may contain an unfair, and therefore, unconscionable disclaimer, notwithstanding a buyer's acceptance of the term.<sup>145</sup>

Section 2-316 does not expressly include fairness as a consideration in determining the validity of a warranty disclaimer.<sup>146</sup> Furthermore, no cases cited herein have examined the unconscionability of a warranty exclusion or modification even though some have examined it with regard to a remedy limitation pursuant to 2-719.<sup>147</sup>

Despite the unlimited applicability of section 2-302 governing unconscionability in contracts,<sup>148</sup> it would seem that few disclaimers in commercial dealings are unconscionable.<sup>149</sup> This makes little sense given that the Code's model of the categorically experienced merchant remains unproved.<sup>150</sup> Perhaps the reluctance to consider unconscionability of implied warranty disclaimers, particularly those arising in the least structured manner, derives from its clearer role under 2-719(3).<sup>151</sup> By including explicit language

<sup>145</sup>See *Barco Auto Leasing Corp. v. PSI Cosmetic, Inc.*, 478 N.Y.S.2d 505, 512 (N.Y. Cir. Ct. 1984) (providing that procedural unconscionability can result from, among other things, a showing of "gross inequality of bargaining power").

<sup>146</sup>See Richard D. Cudahy, *Limitation of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127, 143 (1963) ("The Code, itself, however, makes no provision in section 2-316 for unfairness of disclaimers *resulting from disparity of bargaining power* unless such disclaimers fail to provide the notice required by the section . . .").

<sup>147</sup>See, e.g., *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 646 (10th Cir. 1991) (holding defendant's exclusion of consequential damages was unconscionable); see also *Latimer v. William Mueller & Son*, 386 N.W.2d 618, 625 (Mich. Ct. App. 1986) ("[L]imiting the plaintiff's recovery to the purchase price of the seed would lead to an unconscionable result.").

<sup>148</sup>U.C.C. § 2-302 (1992) provides:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

*Id.*; see also *Barco*, 478 N.Y.S.2d at 511 ("The question remains as to whether or not such disclaimer [under 2-316(2)] is unconscionable, since it is nonetheless subject to judicial scrutiny under UCC § 2-302.").

<sup>149</sup>See Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT L. REV. 199, 217-18 (1985) (citing WHITE & SUMMERS, *supra* note 33, § 4-9 at 170). The author remarks that "Commercial deals between business professionals . . . are quite likely to survive allegations of unconscionability."

<sup>150</sup>See *supra* notes 132-44 and accompanying text.

<sup>151</sup>U.C.C. § 2-719(3) (1992) states: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequen-

allowing a finding of unconscionability in limitations on consequential damages, that subsection, which 2-316 references, appears to limit this consideration to 2-719 alone. When courts have found the remedy limitations to be unconscionable, they have also found the implied warranty disclaimer to be ineffective.<sup>152</sup> The outcome has worked to the buyer's advantage making a dual examination unnecessary.

The idea that buyers need greater protection than sellers in the case of an implied warranty disclaimer may be well-founded if one theorizes that warranties by definition mean goods of better quality and exclusions of warranties mean goods of lesser quality. This theory, however, does not necessarily lead to price adjustment for goods of lesser quality.<sup>153</sup> Yet both of those elements—potentially defective goods and price adjustment—are at the heart of warranty exclusion negotiations. Statutory protection recognizes this in a circuitous way. If the buyer would not be surprised by the disclaimer, the parties will have negotiated price with the understanding of no warranty, or, if price remains open, it can be set according to that understanding. Course of dealing, course of performance, and trade usage disclaimers may present an indistinct term which must be established other than by the parties' express negotiations.

Because the cases overwhelmingly demonstrate that (3)(c)'s effectiveness occurs when other disclaimer indicia exist, one can argue that the drafters may have never intended this subsection to operate independently or even to play a dominant role.<sup>154</sup> Nonetheless, the language appears as a discrete mechanism for excluding implied warranties. A seller's misplaced confidence in its authority may be the result and, for the unwary buyer, it is poised as a sword ready to strike.

Sellers have predictably used the section as support for or an alternative to, the more "tangible" methods of excluding or modifying implied warranties. In effect, sellers and their lawyers have used it as something held in reserve in the event another device failed. While it is common for practitioners to draft pleadings with alternative bases for relief, this provision may have relaxed the ways in which sellers have otherwise attempted to disclaim warranties. In view of continued disagreement over whether 2-316(2) is superior to (3), failure to

---

tial damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." *Id.*

<sup>152</sup>*Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 646 (10th Cir. 1991); *Latimer v. William Mueller & Son*, 386 N.W.2d 618, 625 (Mich. Ct. App. 1986).

<sup>153</sup>*See, e.g., Phillips, supra* note 149, at 251 (holding that buyers willing to accept a disclaimer in exchange for a lower price will only have this option so long as the disclaimers are enforceable).

<sup>154</sup>*Cf. WHITE & SUMMERS, supra* note 33, at 504 ("[E]ach of the alternative routes depends to some extent on the circumstances surrounding the particular sale in question: these are not absolute rules."); *see also Lord, supra* note 23, at 582-83 ("Generally, the role that usage, dealing, and performance play in the exclusion of implied warranties is residual.").

act as if they were both equally essential and to observe meticulously every standard has harmed sellers needlessly.<sup>155</sup>

It is misguided to believe that, in the case of commercial sale-of-goods transactions, all, most, or even a majority of contracting parties customarily discuss in detail terms included on preprinted forms. Beyond quantity, price, and delivery schedules, agreement to other terms is largely by acquiescence. The courts' disinclination to examine the unconscionability of warranty disclaimers in contracts between merchants, however unsophisticated one or both may be, leaves a wide margin for the uneven application of 2-316(3)(c), the most formless of all the implied warranty disclaimers.

Against this background, the removal of 2-316(3)(c)'s *prominence* while retaining its *significance* would more closely harmonize the belief and the reality. The shift would occur first in the way sellers' attorneys draft their disclaimers. Unable to rely on a separate statutory provision declaring the availability of a course of dealing, course of performance, or trade usage disclaimer, sellers' counsel will eventually be more attentive to the requirements of (2) and (3)(a). Improving the enforceability of disclaimer clauses likely to be used repeatedly by their clients is a benefit to the seller,<sup>156</sup> who retains the option of pleading a course of dealing, performance, or trade usage disclaimer through 1-205 and 2-208.<sup>157</sup>

Two potential benefits accrue to the buyer. First, the disclaimers resulting from a changed emphasis to safeguard the seller's interests will, by their clarity and conspicuousness, provide near-undisputed notice to a buyer. In turn, the buyer has the choice of objecting to the disclaimer or obtaining adjustments elsewhere in the contract. Second, those very factors which have caused smaller merchant buyers to fail will diminish as sellers' contracts prevail in the area of disclaimers and buyers begin to consult their attorneys on a regular basis. Currently, subsection 2-316(3)(c) renders course of dealing, course of performance, and trade usage factors undependable for sellers and unexpected for buyers. Sellers and buyers then remain at the mercy of a court's discretion in an area lacking consensus.

---

<sup>155</sup>See, e.g., *Lecates v. Pontiac Buick Co.*, 515 A.2d 163, 168 (Del. Super. Ct. 1986) (holding no method of disclaiming under 2-316(3) will compensate for failure to mention "merchantability" when excluding that warranty); *Zicari v. Joseph Harris Co.*, 304 N.Y.S.2d 918, 924 (N.Y. App. Div. 1969) (failing to mention the word "merchantability" in the written disclaimer and insufficient facts showing a trade usage exclusion precluded summary judgment).

<sup>156</sup>See, e.g., *Slawson*, *supra* note 141, at 24 ("Standard forms also enable a business to make its risks of transacting more manageable by making them uniform for all its transactions of a kind.").

<sup>157</sup>Other commentators have implied that (3)(c) is not the method of first choice for disclaiming implied warranties. See, e.g., *Lord*, *supra* note 23, at 690 (suggesting if implied warranties have not been disclaimed other than by dealing, performance, or usage, these are nonetheless available to the seller's attorney as part of strategy "even where there are better alternative arguments to be made").

## VII. REFRAMING DEALING, PERFORMANCE, AND USAGE DISCLAIMERS OF IMPLIED WARRANTY

### A. *The Power of Perception*

Viewed in the light of other disclaimer techniques, subsection 2-316(3)(c) has been ancillary at best. Two ways to rehabilitate it are readily apparent. First, the Comments could be revised to illustrate the subsection's independence with examples and to clarify the introductory language of 2-316(3) as it relates to 2-316(2). Second, the entire provision could be removed and replaced with a Comment revision to emphasize the continued function of these three elements in disclaiming warranties.

This article advocates the latter alternative. The difficulty with the first method is one of perception. Retaining the subsection while elaborating on it in the Comments will not transform its use in the minds of practitioners and courts. The provision is prominent and, while clarifying language in the Comments would cause some reform, changes in its application would be negligible. As the courts have found remedy limitations unconscionable pursuant to the unmistakable language of 2-719(3), while ignoring the potential unconscionability of warranty disclaimers involving merchants, so will some courts continue to regard 2-316(3)(c) as influential despite the confusion surrounding its utility.

The deletion of 2-316(3)(c) would be immediately noteworthy generating interest in the reasons for its removal. Thorough explanation in the Comments, with emphasis on the continued relevance of these factors pursuant to 1-205 and 2-208, would be required. Achieving the desired effect—unchanged recognition of disclaimer through course of dealing, course of performance, or trade usage while calling for scrupulous attention to other disclaimer methods—would depend upon the authority accorded the Comment.

### B. *The Weight of U.C.C. Comments*

Differences of opinion as to the U.C.C. Comments' purpose abound. Originally, the Comments were to be a substitute for the treatise which followed the Uniform Sales Act and were written "to make clear what changes were made in the law and why[.]"<sup>158</sup> As Chief Reporter for the Code, Professor Karl Llewellyn intended the Comments "to assist the courts in their application of the Code by providing an authoritative guide to the purposes and reasons for each section."<sup>159</sup> Specific references to the Comments initially contained in the Code were later deleted,<sup>160</sup> but their still essential place in the Code has led

---

<sup>158</sup>Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 809 (1958).

<sup>159</sup>A.B.A. Task Force, *supra* note 9, at 996.

<sup>160</sup>Braucher, *supra* note 158, at 809.

to its characterization as a "split level" statute . . . only one level of which has been subjected to the full legislative process."<sup>161</sup>

Despite concern that courts do not invariably account for their reliance on or disregard of a Comment,<sup>162</sup> use of a Comment in this instance is justified. It would not supplement or modify the statute.<sup>163</sup> Its content would not expand upon "textual uncertainties."<sup>164</sup> Its utility would serve as a reminder of the additional grounds for implied warranty disclaimers consonant with sections 1-205 and 2-208.

Additionally, other sections of the Code exist which include course of dealing, course of performance, and trade usage as instructional elements of the Comment while omitting them from the statutory language. Section 2-301 states: "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract."<sup>165</sup> The Comment to that section states: "In order to determine what is 'in accordance with the contract' under this Article usage of trade, course of dealing and performance, and the general background of circumstances must be given due consideration . . . ."<sup>166</sup> Cross references to 1-205 and 2-208 follow. Comment 2 to section 2-106(2) likewise elaborates on the statutory definition of conforming goods by including usage of trade, course of dealing, and course of performance as relevant factors. That statutory section, like 2-301, does not itself contain similar language.<sup>167</sup> At least one court followed the spirit of the Comments to both 2-310 and 2-106(2).<sup>168</sup>

Specific changes in section 2-316 should include the deletion of paragraph (c) from subsection 2-316(3) and from Comment 6. The following sentence should be added to that Comment: "Additional circumstances which will notify the buyer that implied warranties have been excluded or modified are to be found in the parties' course of dealing, course of performance, or in usage of trade." Finally, the last sentence of Comment 7 should be rewritten to read:

---

<sup>161</sup>REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 173 (1975).

<sup>162</sup>A.B.A. Task Force, *supra* note 9, at 996.

<sup>163</sup>*Cf.* Dickerson, *supra* note 161, at 146-47 ("Most of comment 9 to section 2-615 . . . is clearly no part of proper legislative context, because rather than clarify the section it attempts to set forth additional rules of law.").

<sup>164</sup>*Cf.* Dickerson, *supra* note 161, at 159 (noting that Comment 3 to section 2-318 removes the privity requirement in actions against retailers while implying nothing about its applicability to wholesalers or manufacturers).

<sup>165</sup>U.C.C. § 2-301 (1992).

<sup>166</sup>U.C.C. § 2-301, cmt. (1992).

<sup>167</sup>U.C.C. § 2-106(2) (1992) provides: "Goods or conduct including any part of a performance are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract."

<sup>168</sup>*Evco Distributing, Inc. v. Commercial Credit Equip. Corp.*, 627 P.2d 374 (Kan. Ct. App. 1981).

"The terms covered by paragraph (a) merely particularize exclusion or modification of implied warranties by usage of trade."

Because there can be no way of predicting a court's observance of a Comment, a more uniform treatment of implied warranty disclaimers through course of dealing, course of performance, and trade usage in keeping with this article's recommendation remains uncertain. Little is to be gained, however, by abandoning this warranty disclaimer to its current disordered state.

### VIII. CONCLUSION

Judicial discretion has rendered U.C.C. section 2-316(3)(c) a misleading subsection for both buyers and sellers. The provision can stand alone, but it rarely does. When sellers employ it as support for sometimes carelessly prepared written disclaimers, they face only an even chance that it will succeed in reinforcing their claims or defenses. Buyers may find themselves remiss in what they should have known and, consequently, except for certain categories of sales transactions in which trade usage disclaimers are indisputably the norm, may face the not quite unfair surprise of warranty exclusion by course of dealing, performance, or trade usage. The indirect documentation showing widespread inexperience among merchants increases this probability while judicial reluctance to examine such disclaimers for unconscionability ignores trends, if not realities, in the marketplace.

Benefits to both sellers and buyers will result when attention paid to the details of implied warranty disclaimers generally becomes more crucial to a sales transaction. Relegating implied warranty exclusions or modifications under 2-316(3)(c) to a status approximating an afterthought as the cases indicate some parties have done has devitalized the provision and invites reform. A clearer understanding of the interdependence between 2-316(2) and (3), the judicial signalling of stricter standards for a disclaimer under (2) whenever disclaimers from dealing, performance, or usage are asserted, and the reestablishment of 1-205 and 2-208 as the principal references for such disclaimers would add order to what is now an indeterminate body of law.

