

TEXT AND CIRCUMSTANCE: WARRANTY DISCLAIMERS IN A WORLD OF ROLLING CONTRACTS

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INTRODUCTION

The law of warranty disclaimers has failed to keep pace with the proliferation and growing acceptance of “rolling” or “layered” contracts. This failure has resulted in great uncertainty. Courts have struggled, unsuccessfully, to reconcile a restrictive view of disclaimers of the implied warranty of merchantability¹ with a permissive and evolving conception of contract formation that permits sellers to fully disclose some contract terms after the purchase.² I resolve this uncertainty by proposing a flexible test for assessing the circumstances under which a disclaimer is presented. This test would enable a trier of fact to find a disclaimer ineffective if the nature of the transaction is such that it puts the buyer off guard as to the existence or effect of a disclaimer. To illustrate the value of this test, I apply it to the critical issue of disclaimers in rolling contracts involving consumer purchases.

The need for a new approach to warranty disclaimers in rolling or layered contracts is demonstrated by *Rinaldi v. Iomega Corp.*, in which purchasers of a computer disk drive sued the manufacturer for breach of the implied warranty of merchantability.³ The implied warranty of merchantability, which is imposed by

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1. This restrictive view is reflected by the many obstacles sellers face in disclaiming such warranties. See discussion *infra* Part I.B.

2. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (approving of terms included inside box in which computer was delivered); see generally Robert A. Hillman, Symposium, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 744 (2002) (discussing general structure and theory of rolling contracts). For a discussion of judicial acceptance of rolling or layered contracts, see *infra* Part I.A.

3. No. 98C-09-064-RRC, 1999 WL 1442014, at *1 (Del. Super. Ct. Sept. 3, 1999). This case is discussed in more detail *infra* Part II.A.1.b.

law under Article 2 of the Uniform Commercial Code (“U.C.C.”),⁴ assures a purchaser that goods being purchased are fit for their ordinary purpose—that computers will compute, CD players will play music, lamps will give off light, and so on—and that if they do not, the seller will bear responsibility.⁵ The purchasers in *Rinaldi* claimed that not only did the disk drive fail to function properly for its intended purpose of storing information to storage disks, it also frequently destroyed information on the storage disks and “infected” those disks, spreading the defect to other drives and other disks.⁶ The manufacturer based its defense in part on a disclaimer that had been included inside the box in which the drive was sold.⁷

The purchasers argued that although the disclaimer was printed in sufficiently large and clear type, it should still not be considered “conspicuous,” as required by one of the tests for warranty disclaimers,⁸ since the disclaimer was not visible until the package was opened after purchase.⁹ The court rejected the purchasers’ arguments and found that the disclaimer was conspicuous even though it was not visible until after purchase.¹⁰ Accordingly, the court granted the manufacturer’s motion to dismiss the breach of implied warranty claim.¹¹

The purchasers in *Rinaldi* framed their challenge to the effectiveness of the warranty disclaimer solely in terms of whether or not the disclaimer was “conspicuous.” Their reliance on the conspicuousness requirement was understandable. Although conspicuousness had primarily been used to assess the physical attributes of a disclaimer (for example, the size and typeface of the text), it had also been pressed into service to assess the timing of disclaimers in simple transactions. In such cases, courts typically approve of an otherwise conspicuous disclaimer if the disclaimer was presented before the contract was consummated and reject such a disclaimer if it was presented after the contract was consummated.¹² However, such a test is not well-suited to analysis of disclaimers in rolling or layered contracts because it is based on a traditional conception of contract formation that predates the proliferation of rolling contracts. This test, or any other test based solely on technical consummation of the contract, fails to reflect the complexities of contracts formed over time. A test better suited to analyzing disclaimers in rolling contracts is needed.

In Part I of this Article, I provide background information, including a brief discussion of the concept of the rolling or layered contract and an overview of the implied warranty of merchantability (including some of the ways in which it can be disclaimed). In Part II, I discuss why conspicuousness should be used

4. Article 2 of the Uniform Commercial Code has recently been revised. *See infra* note 13 and accompanying text. Article 2 applies to “transactions in goods,” unless the context requires otherwise. U.C.C. § 2-102 (2004).

5. *See* discussion *infra* Part I.B.1.

6. 1999 WL 1442014, at *1.

7. *Id.* at *2.

8. U.C.C. § 2-316(2) (2004).

9. 1999 WL 1442014, at *3.

10. *Id.* at *3–5.

11. *Id.* at *8.

12. *See infra* notes 89–93 and accompanying text.

primarily as a limited tool to assess the physical attributes and appearance of a disclaimer, but not its context. I also evaluate and reject some other possible tests that could be used to assess a disclaimer's context. In Part III, I present the argument that the "unless the circumstances indicate otherwise" language from Section 2-316(3)(a) provides the basis for the most appropriate test to assess the context and timing of a disclaimer. Finally, in Part IV, I apply the test to consumer purchases in rolling contracts, concluding that a disclaimer in such a transaction should not be effective unless it is presented when the purchaser is actively considering other key terms of the purchase, which is typically at the time the good is purchased or ordered.

NOTE ON VERSIONS OF ARTICLE 2

I note at the outset that a number of revisions to Article 2 have recently been approved by the authors of the Uniform Commercial Code (the American Law Institute and the National Conference of Commissioners on Uniform State Laws),¹³ although no jurisdictions have adopted the revisions as of the date of this writing.¹⁴ All references to Article 2 of the U.C.C. or to sections within Article 2 are to this newly revised version unless I indicate otherwise. I will use "Prior Article 2," "Prior Section ___", or "Prior subsection ___" to indicate a reference to the previous version of Article 2.

Many of the revisions directly affect issues discussed in this Article (and, in fact, lend support to the argument I advance). In some instances, the revisions provide guidance and clarification. In other instances, they reflect a lost opportunity to provide just such guidance.

I. BACKGROUND

A. *Rolling or Layered Contracts*

Although the propriety of rolling or layered contracts as a general matter is not the subject of this Article, a brief overview may provide some helpful context in understanding these contracts and how they impact the law of warranty disclaimers. Rolling or layered contracts are contracts in which terms follow or are developed over time and after performance begins.¹⁵ In such contracts, a buyer often orders and purchases goods before seeing all of the contract's terms (which may, for example, be contained within the product packaging).¹⁶ The buyer is typically given a right to return the goods within a specified period if such terms

13. Press Release, National Conference of Commissioners on Uniform State Laws, Work Concludes on Revision of Uniform Commercial Code Articles 2 and 2A (May 14, 2003), available at <http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=51> (last visited Oct. 28, 2004).

14. Information on the status of legislative activity of Article 2 is available on the National Conference of Commissioners on Uniform State Law website at <http://www.nccusl.org/nccusl/LegByAct.pdf> (last visited Oct. 28, 2004).

15. UNIF. COMPUTER INFO. TRANSACTIONS ACT ("UCITA") § 208 cmt. 3, 7 U.L.A. pt. II, at 287 (2002).

16. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (purported terms included inside box in which computer was delivered).

are unacceptable to the buyer.¹⁷ A rolling or layered contract is not consummated at the time of purchase or order, but only after the return period has elapsed.¹⁸ Such contracts are of huge benefit to sellers since terms provided within product packaging need not be analyzed as additional terms to or modifications of an already completed contract, as they ordinarily would.¹⁹ Instead, since the contract is not technically formed until some time after receipt of the terms, the terms are simply part of the contract.

For example, in *ProCD, Inc. v. Zeidenberg*,²⁰ the Court of Appeals for the Seventh Circuit held that a purchaser of a computer program and related database information was bound by a term that limited use of the program and information to non-commercial purposes. The court reached this conclusion even though the term was located on the inside of the package and therefore was not visible at the time of purchase (though the outside of the box did include language stating that the software came with restrictions in a license contained within the box).²¹

The court rejected the conclusion of the district court that the U.C.C. did not countenance a sequence of “money now, terms later,”²² observing that “[n]otice on the outside, terms on the inside, and a right to return . . . for a refund if the terms are unacceptable” may be a valuable and efficient way of doing business.²³ The court achieved its result—enforcement of the license provision—in large part by pushing the time of contract formation later than one might expect. The court noted that although a vendor could certainly structure a transaction such that a contract is formed when the purchaser buys a product and leaves the store with it,²⁴ the U.C.C. permits contracts to be formed “in any manner sufficient to show agreement.”²⁵ The court conceived of the vendor as an offeror who had simply structured a transaction in which the purchaser’s use of the software, which occurred after the purchaser had “an opportunity to read the license at [his] leisure,” constituted the acceptance.²⁶ According to the court, the buyer could have prevented contract formation by simply returning the software instead of keeping and using it.²⁷

Similarly, in *Hill v. Gateway 2000, Inc.*,²⁸ the Court of Appeals for the Seventh Circuit again permitted a seller to push the time of contract formation beyond the point of purchase. *Hill* involved a telephone order for a computer.²⁹ A

17. See Hillman, *supra* note 2, at 744.

18. See, e.g., *Hill*, 105 F.3d at 1148–49; M.A. Mortenson Co., Inc., v. Timberline Software Corp., 998 P.2d 305, 312–14 (Wash. 2000).

19. See Debra L. Goetz et al., *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1272–73 (1987).

20. 86 F.3d 1447 (7th Cir. 1996).

21. *Id.* at 1450.

22. *Id.* at 1452.

23. *Id.* at 1451.

24. *Id.* at 1452.

25. *Id.* (quoting U.C.C. § 2-204(1)) (internal quotations omitted).

26. *Id.*

27. *Id.* at 1452–53.

28. 105 F.3d 1147 (7th Cir. 1997).

29. *Id.* at 1148.

sales representative took the order and credit card information from the purchasers.³⁰ After taking the order, the seller shipped the computer in a box that contained, in addition to the computer itself, a list of contract terms.³¹ Among these contract terms was an arbitration clause that the seller did not mention at the time the order was taken.³² The terms purported to be effective unless the purchaser returned the computer within thirty days.³³ The Seventh Circuit held that the clause should be enforced.³⁴ The terms inside the box were, according to the court, simply part of the contract since no contract was formed at the time the purchasers ordered the computers, but only later, after the “accept or return” period had lapsed.³⁵

Although there has been much academic criticism of rolling contracts,³⁶ and although not all courts have embraced them,³⁷ a large number of courts have accepted the concept of the rolling contract by giving the seller the power to structure a transaction in such a way as to prevent contract formation at the time of the purchase or order and to forestall that formation until the detailed terms are provided and accepted.³⁸ This growing body of case law, coupled with the

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 1150–51.

35. *Id.* at 1150.

36. *See, e.g.,* John E. Murray, Jr. & Harry M. Flechtner, *The Summer, 1999 Draft of Revised Article 2 of the Uniform Commercial Code: What Hath NCCUSL Rejected?*, 19 J.L. & COM. 1, 34–37 (1999) (criticizing *ProCD* as a “swashbuckling opinion” unsupported by authority and *Hill* as improperly equating post-formation warranties with post-formation disclaimers); Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 616–17 (2001) (describing *Hill* as a misinterpretation of the U.C.C.); John D. Wladis, *The Contract Formation Sections of the Proposed Revisions to U.C.C. Article 2*, 54 SMU L. REV. 997, 1025–26 (2001) (describing *Hill* as failing to adequately explain why a contract was not formed at the time of the telephone order or why shipment of the product ordered did not constitute acceptance); Sajida A. Mahdi, Comment, *Gateway to Arbitration: Issues of Contract Formation Under the U.C.C. and the Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods*, 96 NW. U. L. REV. 403, 422 n.173 (2001) (collecting commentary critical of *ProCD* and *Hill*); Robert J. Morrill, Comment, *Contract Formation and the Shrinkwrap License: A Case Comment on ProCD v. Zeidenberg*, 32 NEW ENG. L. REV. 513, 538–51 (1998) (criticizing the reasoning of *ProCD* but noting that it was probably correctly decided on its facts).

37. *See, e.g.,* *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000); *United States Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d 1201 (D. Kan. 1998).

38. *See, e.g.,* *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1074 (C.D. Cal. 2002) (holding arbitration clause not unenforceable “merely by its absence from the original [cellular telephone] service contract”); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097 (C.D. Cal. 2002) (enforcing customer agreements mailed to customers with first bill after signing up for television programming service); *Westendorf v. Gateway 2000, Inc.*, No. 16913, 2000 WL 307369 (Del. Ch. Mar. 16, 2000) (adopting reasoning of *ProCD* and *Hill* in a context similar to that in *Hill*); *Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627 (Fla. Dist. Ct. App. 1999) (enforcing choice of forum provision in a license agreement which was found inside product packaging but which was incorporated by reference on an order form); *Scott v. Bell Atl. Corp.*, 726 N.Y.S.2d 60 (App. Div. 2001)

importance and distinct purpose of warranty disclaimers,³⁹ makes it essential to identify an appropriate means for assessing disclaimers in rolling or layered contracts, particularly in consumer transactions.

For those courts that reject the validity of rolling or layered contracts, a “battle of the forms” analysis is crucial, and I would be remiss not to discuss this analysis, at least briefly. This analysis is important because, while courts accepting the validity of the rolling or layered contract typically push the time of contract formation past the time of purchase or order, courts rejecting these types of contracts typically find that the contract was formed earlier (at the time of the purchase or order, for example). For these courts, whether terms added after consummation of the contract should be considered part of the deal is resolved through a “battle of the forms” analysis⁴⁰ (or, alternatively, by applying Section 2-209, which deals with proposed modifications to a contract⁴¹).

The “battle of the forms” provision⁴² in Prior Article 2 addresses, among other things, the terms of a contract when an acceptance or a written confirmation contains terms different from or additional to those that were in the offer or when conduct by the parties evidences a contract that was not established by the parties’ writings. In contracts between merchants, the additional terms become part of the agreement except under specified circumstances, one of which is that a term does not become part of the agreement if it materially alters the agreement.⁴³ Since a disclaimer of the implied warranty of merchantability normally constitutes a

(enforcing terms and conditions included on installation CD-ROM for Digital Subscriber Line); *Bower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998) (adopting reasoning of *ProCD* and *Hill* in a context similar to that in *Hill*); *Levy v. Gateway 2000, Inc.*, 1997 WL 823611 (N.Y. Sup. Ct. Aug. 12, 1997) (same); *M.A. Mortenson Co., Inc., v. Timberline Software Corp.*, 998 P.2d 305, 313 n.10 (Wash. 2000) (enforcing term limiting consequential damages which was enclosed in a shrinkwrap license, noting the approach to contract formation articulated in *ProCD* and *Hill* represent the “overwhelming majority view”); *cf. O’Quin v. Verizon Wireless*, No. CIV.A.01-855-D, 2003 WL 1889293, at *3-4 (M.D. La. Feb. 7, 2003) (observing that several federal and state courts have countenanced an approach of “money now, terms later” to sales of goods to consumers).

39. See discussion *infra* Part I.B.

40. See *Klocek*, 104 F. Supp. 2d at 1339 (assuming contract formed at time of order or upon seller’s shipment of computer); *United States Surgical Corp.*, 5 F. Supp. 2d at 1205-06 (holding contract formed when manufacturer received orders); *cf. i.Lan Sys. Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (observing distinction between cases enforcing post-purchase terms and cases rejecting the validity of such terms).

41. U.C.C. § 2-209 (2004).

42. Prior U.C.C. § 2-207.

43. See U.C.C. § 2-207(1)-(2). The other two circumstances under which such terms do not become part of the agreement are when “the offer expressly limits acceptance to the terms of the offer,” *id.* § 2-207(2)(a), and when “notification or objection to them” has been given or is given in a reasonable amount of time, *id.* § 2-207(2)(c). When the purchaser is not a merchant, a later added term does not become part of the agreement. See *id.* § 2-207(2).

material alteration,⁴⁴ such a disclaimer is unlikely to be given effect under Prior Section 2-207.⁴⁵

Section 2-207 has been significantly revised, and I discuss the potential effect (if any) of these revisions on warranty disclaimers in rolling contracts later in this Article.⁴⁶

B. The Implied Warranty of Merchantability

1. When the Warranty Arises and What it Requires

Article 2 provides a number of implied warranties of quality that arise automatically in a sale of goods unless the warranties are excluded or modified. The implied warranties of quality include the warranty of merchantability⁴⁷ (which is the warranty most relevant to this Article), the warranty of fitness for a particular purpose (which arises when the seller has reason to know a particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment in selecting goods),⁴⁸ and other implied warranties that "may arise from course of dealing or usage of trade."⁴⁹ No "particular language or action is necessary to evidence" these implied warranties, which arise in appropriate circumstances unless they are "unmistakably negated."⁵⁰

The implied warranty of merchantability arises when the seller is a merchant⁵¹ with respect to the type of goods sold.⁵² Article 2 provides that to be merchantable goods must, at a minimum, be fit for the purposes for which goods of that description are used,⁵³ pass without objection in the trade,⁵⁴ and satisfy a number of other requirements.⁵⁵ The implied warranty of merchantability has been

44. Prior U.C.C. § 2-207 cmt. 4.

45. *See, e.g.,* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 105–06 (3d Cir. 1991).

46. *See* discussion *infra* Part II.B.3.

47. U.C.C § 2-314.

48. *Id.* § 2-315.

49. *Id.* § 2-314(3).

50. *Id.* § 2-313 cmt. 3.

51. A merchant is defined in part as a person that "deals in goods of the kind [involved in the transaction] or otherwise holds itself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction." *Id.* § 2-104(1).

52. *Id.* § 2-314(1).

53. *Id.* § 2-314(2)(c).

54. *Id.* § 2-314(2)(a).

55. The section provides that to be merchantable, goods must be at least such as:

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

described as a “cornerstone of commercial law in dealings between merchants as well as with consumers”⁵⁶ and is designed to “promote the highest possible standards of business conduct and discourage the sharp dealer.”⁵⁷ The warranty arises by operation of law, and, since its purpose is to protect the buyer, courts generally construe it liberally in the buyer’s favor.⁵⁸

*2. Balancing Freedom to Disclaim with Protection Against Disclaimers—
Conspicuousness and Other Protections of Section 2-316*

Although some provisions in the U.C.C. are immutable,⁵⁹ the implied warranty of merchantability is a “default provision”—a provision imposed as a default but one that the parties may vary by agreement.⁶⁰ However, the implied warranty of merchantability is not just a default provision. Rather, it is what Ian Ayres has described as an example of a “very sticky” default provision⁶¹—a default that can only be avoided by compliance with the requirements imposed by Section 2-316.

The requirements of Section 2-316 provide the buyer with some protection against disclaimers. Purchasers need this protection since the “warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.”⁶² Section 2-316 is thus designed to “protect a buyer from unexpected and unbargained for language of disclaimer by . . . permitting the exclusion of implied warranties only by language or other circumstances which protect the buyer from surprise.”⁶³ Section 2-316 provides two main tests for

(f) conform to the promises or affirmations of fact made on the container or label, if any.

Id. § 2-314(2). The setting forth of these standards is meant neither to “exhaust the meaning of ‘merchantable’ nor to negate any . . . attributes not specifically mentioned . . . that arise by usage of trade or through case law. The language used is ‘must be at least such as . . .,’ and the intention is to leave open other possible attributes of merchantability.” *Id.* § 2-314 cmt 8.

56. *Pay Tel. Sys., Inc. v. Seiscor Techs., Inc.*, 850 F. Supp. 276, 281 (S.D.N.Y. 1994).

57. 3 MARY ANNE FORAN, *WILLISTON ON SALES* § 18-5 (5th ed. 1996) [hereinafter *WILLISTON*].

58. *See Richards v. Goerg Boat & Motors, Inc.*, 384 N.E.2d 1084, 1091 (Ind. Ct. App. 1979); *WILLISTON*, *supra* note 57, at § 18-5.

59. Examples of immutable provisions include the obligations of “good faith, diligence, reasonableness, and care.” U.C.C. § 1-302(b) (2004).

60. *See, e.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 87 (1989) (comparing immutable rules with default rules).

61. Ian Ayres & Stewart Schwab, *The Employment Contract*, 8 *KAN. J.L. & PUB. POL’Y* 71, 85 (1999).

62. U.C.C. § 2-314 cmt. 13 (2004).

63. *Id.* § 2-316 cmt. 1. This comment contains an apparent grammatical error involving the word “it.” The comment states that “[s]ubsection (1) is designed . . . to deal with those frequent contracts . . . which seek to exclude ‘all warranties, express or implied.’” The comment then goes on to note that “[i]t seeks to protect a buyer by . . . permitting the exclusion of implied warranties only by language or other circumstances

warranty disclaimers. The first test is found in Section 2-316(2) (“subsection 2”), which provides:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it in a consumer contract the language must be in a record, be conspicuous, and state “The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract,” and in any other contract the language must mention merchantability and in case of a record must be conspicuous Language that satisfies the requirements of this subsection for the exclusion or modification of a warranty in a consumer contract also satisfies the requirements for any other contract.⁶⁴

Subsection 2 thus provides that disclaimers in consumer contracts must be in a record, be conspicuous, and include language specified in subsection 2. Disclaimers in other contracts must mention merchantability (or use the language specified for consumer contracts) and may be either oral or written. If disclaimers are written, they must be conspicuous. Whether a purchaser’s actual awareness of a disclaimer that does not meet the test of conspicuousness is sufficient to exclude an implied warranty is an unsettled question.⁶⁵

The second test for disclaimers is provided in Section 2-316(3)(a) (“subsection 3(a)”). Subsection 3(a) provides in relevant part that, notwithstanding subsection 2:

[U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as-is,” “with all faults” or other language that in common understanding calls the buyer’s attention to the exclusion of warranties, makes plain that there is no implied warranty, and, in a consumer contract evidenced by a record, is set forth conspicuously in the record⁶⁶

Subsection 3(a) thus provides a way to disclaim all implied warranties with expressions like “as-is” or other similar expressions commonly understood to call the buyer’s attention to the exclusion and make plain no implied warranty exists. In a consumer contract evidenced in a “record” (the definition of which includes, among other things, information in writings and other tangible media⁶⁷), the disclaimer must be set forth conspicuously in the record. All of these requirements are subject to the important qualifier “unless the circumstances

which protect the buyer from surprise.” Grammatically, “it” refers only to subsection (1), but since that subsection contains no reference to language or circumstances protecting the buyer, “it” presumably refers to the entirety of Section 2-316. Such a reading is consistent with Prior Section 2-316 cmt. 1.

64. U.C.C. § 2-316(2).

65. See, e.g., 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*, 15 SETON HALL LEGIS. J. 297 (1991); Bernard F. Kistler, Jr., *U.C.C. Article Two Warranty Disclaimers and the Conspicuousness Requirement of Section 2-316*, 43 MERCER L. REV. 943, 949 (1992).

66. U.C.C. § 2-316(3)(a).

67. U.C.C. § 1-201(b)(31) (2004).

indicate otherwise.” In Part III of this Article, I will discuss that qualifying language in much greater detail and will argue that the language should apply to subsection 2 as well as to subsection 3(a). I will further argue that it should serve as the basis for a most appropriate test to assess the context of disclaimers of the implied warranty of merchantability in rolling or layered contracts.

The relationship between subsection 2 and subsection 3(a) is clarified somewhat by the official comment,⁶⁸ which describes subsection 3 as setting forth the “general test” for disclaiming warranties,⁶⁹ and subsection 2 as setting forth “more specific tests.”⁷⁰ A disclaimer that satisfies the requirements of the more general test under subsection 3(a) need not also satisfy the specific tests under subsection 2.⁷¹

One somewhat controversial and previously unsettled issue—the scope of the application of the conspicuousness requirement—has arguably been resolved by recent revisions to Article 2. While subsection 2 includes a conspicuousness requirement, no such requirement existed in Prior subsection 3(a). This state of affairs created uncertainty as to whether an “as-is” disclaimer under Prior subsection 3(a) was required to be conspicuous. The trend has been to require conspicuousness even though there was no such requirement set forth in Prior subsection 3(a).⁷² The question has apparently been resolved: “as-is” and similar disclaimers must be conspicuous when they are in consumer contracts evidenced by a record but need not be conspicuous in other circumstances. I will more fully discuss how I reach this conclusion later.⁷³

Perhaps not surprisingly, disclaimers of warranties under Section 2-316 are among the terms that sellers include in rolling or layered contracts. The treatment of disclaimers provided after the purchase or order has not been consistent. Some courts have simply applied the reasoning of *ProCD* and *Hill* to such disclaimers, permitting them to be rolled or layered in like other terms.⁷⁴

68. Official comments provide an “official source of guidance in the interpretation of the [Uniform Commercial] Code.” *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913, 918 (Me. 1973); *see also Unicom, Inc. v. Elementis Pigments, Inc.*, No. CIV97-55-P-H, 1999 WL 1995400, at *16 (D. Me. Feb. 10, 1999) (noting that although not given as much weight as legislative history, official comments have been used to explain the intended meaning of and understand the reasoning behind the U.C.C.).

69. U.C.C. § 2-316 cmt. 2.

70. *Id.*

71. *Id.*

72. *See infra* notes 185–86 and accompanying text.

73. *See* discussion *infra* Part II.A.3.

74. *See Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014, at *3–5 (Del. Super. Ct. Sept. 3, 1999) (utilizing conspicuousness test to determine that a disclaimer included in product packaging was valid); *Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91, 92 (App. Div. 2002) (approving of disclaimer and other terms which were visible for the first time when already purchased software was loaded onto the buyer’s computer); *cf. i.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 334–35 (D. Mass. 2002) (indicating that seller had “properly . . . tried to avail itself” of Section 2-316 by disclosing a disclaimer after purchase through a “clickwrap” license which appeared on the screen when software was located onto the buyer’s computer); *Peerless Wall & Window Coverings v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000)

Other courts have been more hesitant about permitting such disclaimers to simply be rolled into a contract after the purchase or order.⁷⁵ Such uncertainty as to the proper way to assess disclaimers in complex transactions is hardly conducive to effectuating the U.C.C.'s purposes of clarifying⁷⁶ and making uniform the law of commercial transactions.⁷⁷

3. Other Protections Against Disclaimers

In addition to the limitations provided by Section 2-316, many jurisdictions have modified Article 2 to eliminate or restrict the seller's ability to disclaim the warranty of merchantability in sales involving consumer products.⁷⁸ Federal law also provides some limitations. For example, the Magnuson-Moss Warranty Act,⁷⁹ which governs written warranties on consumer products, restricts the ability to disclaim the implied warranty of merchantability in certain circumstances.⁸⁰

Article 2 includes other provisions relevant to the exclusion of the implied warranty of merchantability. First, the existence of an express warranty may affect the seller's ability to disclaim a warranty. Although words or conduct relevant to the creation of an express warranty and words or conduct tending to negate a warranty are to be construed, where reasonable, as consistent with each other, negation is "inoperative to the extent that such construction is unreasonable."⁸¹ Further, an examination of the goods before entering into the

(observing that "recent weight of authority" supported the enforceability of terms provided in shrinkwrap licenses).

75. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991) (holding ineffective a disclaimer on boxes of computer software which had not been disclosed at the time of the telephone order and which did not appear on the invoice); *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 765-66 (D. Ariz. 1993) (holding that contract was formed at the time seller agreed to ship computer programs or, at the latest, when the seller actually shipped them and that subsequent disclaimers were ineffective).

76. U.C.C. § 1-103(a)(1) (2004).

77. *Id.* § 1-103(a)(3).

78. See, e.g., ALA. CODE § 7-2-316(5) (2002) (restricting ability to exclude liability for damages for injuries to the person in the case of consumer goods); CONN. GEN. STAT. ANN. § 42a-2-316(5) (West 2002) (making disclaimers unenforceable in sales of consumer goods, except if the goods are clearly marked "irregular," "factory seconds," or "damaged"); D.C. CODE ANN. § 28:2-316 (2001) (making disclaimer provisions inapplicable to sales of consumer goods); MISS. CODE ANN. § 75-2-315.1(2) (1999) (same); VT. STAT. ANN. tit. 9A, § 2-316(3)(a) (1994) (same); see generally Donald F. Clifford, Jr., *Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sales of Goods*, 71 N.C. L. REV. 1011, 1056-96 (1993) (surveying approaches of states to limiting ability to disclaim warranties in the case of consumer goods).

79. 15 U.S.C. §§ 2301-2312 (2004).

80. The Magnuson-Moss Warranty Act restricts the ability to disclaim the implied warranty of merchantability when a supplier of consumer products either makes a written warranty to the consumer or enters into a service contract with the consumer within ninety days after a sale. 15 U.S.C. § 2308(a).

81. U.C.C. § 2-316(1). Similarly, the official comment to Section 2-313 provides that a contract is "normally a contract for a sale of something describable and described" and that, therefore, except in unusual circumstances, a clause generally disclaiming all

contract may prevent the implied warranty from arising with respect to certain matters.⁸² Also, when a buyer provides a seller with detailed specifications, an implied warranty of merchantability will generally not apply unless such an implied warranty is consistent with the specifications.⁸³ Finally, the implied warranty of merchantability “may also be excluded or modified by course of dealing or course of performance or usage of trade.”⁸⁴

II. ASSESSMENT AND REJECTION OF CONSPICUOUSNESS AND OTHER TESTS

A. *Conspicuousness*

In this section, I assess the appropriateness of conspicuousness as a tool to assess the context, including the timing, of warranty disclaimers. First, I describe how judicial use of the conspicuousness requirement has been a failure, resulting in a misplaced focus on when a contract is formally consummated. Second, I describe how the definition of conspicuousness demonstrates that the concept should be utilized only narrowly to assess how text looks on a page or computer screen. Third, I argue that the limited scope of the conspicuousness requirement also makes that requirement a poor test for assessing the context of disclaimers. Finally, I argue that the assignment of the question of conspicuousness to a court as a question of law, instead of to a jury, further makes conspicuousness a poor tool to assess anything beyond the appearance of text.

1. *Judicial Use of Conspicuousness to Assess the Context of Disclaimers*

In this subsection, I discuss how courts have used conspicuousness to assess the timing of disclaimers. I begin by briefly describing how courts have traditionally assessed whether an otherwise conspicuous disclaimer was presented before formal consummation (in which case it is typically deemed conspicuous) or after (in which case it is typically deemed inconspicuous). I then argue that, although a focus on time of consummation may be fine for disclaimers in relatively simple transactions in which consummation and purchase occur together, such an approach is simply not sufficient for disclaimers in rolling contracts. To demonstrate why such an approach is insufficient, I then discuss several cases that have applied the traditional focus on consummation to rolling contracts.

a. *Judicial Focus on Formal Consummation*

Courts assessing the conspicuousness of disclaimers typically limit themselves to questions of how text appears within a document. Courts consider, for instance, the color and style of the print, the size of the disclaiming language

express and implied warranties “cannot reduce the seller’s obligation for the description and therefore cannot be given literal effect under Section 2-316(1).” *Id.* § 2-313 cmt. 6.

82. *Id.* § 2-316(3)(b).

83. *Id.* § 2-316 cmt. 7. The specifications give rise to an express warranty that the goods will comply with the specifications. Thus, under Section 2-317(c), the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications if there is any inconsistency. *Id.*

84. *Id.* § 2-316(3)(c).

(with particular emphasis on the size relative to other print in the document), and the location of the disclaimer in the contract.⁸⁵ Given the text-centric definition of conspicuousness,⁸⁶ and the drafters' goal of avoiding inquiry into such contextual matters as the parties' negotiations,⁸⁷ it is quite appropriate for courts to focus on the disclaimer's appearance on the page or computer screen.⁸⁸

To a limited degree, courts have also considered the timing of disclaimers. This approach, however, focuses only on the time of consummation. For instance, in *Bowdoin v. Showell Growers, Inc.*,⁸⁹ the Eleventh Circuit Court of Appeals, in assessing a disclaimer presented after a sale, noted that "[b]y definition, a post-sale disclaimer is not conspicuous in the full sense of that term because the reasonable person against whom it is intended to operate could not have noticed it before consummation of the transaction."⁹⁰ Courts have routinely denied effectiveness to

85. See generally 3A LARY LAWRENCE, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE [hereinafter LAWRENCE], § 2-316:121 (3d ed. 2002) (citing *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1038 (D.S.C. 1993), *aff'd*, 46 F.3d 1125 (4th Cir. 1995)); see also *Hornberger v. Gen. Motors Corp.*, 929 F. Supp. 884, 889 (E.D. Pa. 1996) (noting that some of the characteristics considered by courts under Pennsylvania law include: "(1) the placement of the clause in the document; (2) the size of the disclaimer's print; and (3) whether the disclaimer was highlighted or called to the reader's attention by being in all caps or a different type style or color"); *Brown v. Range Rover of N. Am., Inc.*, 33 Va. Cir. 104 (1993) (noting that among the factors courts have considered in determining conspicuousness are the presence or absence of methods used to organize the text that either highlight or obscure the presence of the disclaimer, including its location in the text, the relative size of the type and its color and style); see generally William H. Danne, Jr., Annotation, *Construction and Effect of U.C.C. § 2-316(2) Providing That Implied Warranty Disclaimer Must Be "Conspicuous"*, 73 A.L.R.3d 248 (1976) (collecting cases assessing conspicuousness of disclaimers); cf. *Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014, at *2 (Del. Super. Ct. Sept. 3, 1999) (noting that the "usual arguments concerning the conspicuousness requirement . . . have been based on issues such as the size of the type set and the location of the disclaimer").

86. See discussion *infra* Part II.A.2.

87. See Goetz et al., *supra* note 19, at 1271–72 (discussing intent of drafters of original section on conspicuousness).

88. Some courts have looked to the sophistication of the parties in assessing conspicuousness. See, e.g., *Myrtle Beach Pipeline*, 843 F. Supp. at 1038; *Logan Equip. Corp. v. Simon Aerials, Inc.*, 736 F. Supp. 1188, 1197 (D. Mass. 1990); *Sosik v. Albin Marine, Inc.*, No. 020539B, 2003 WL 21500516 (Mass. Super. Ct. May 28, 2003); see generally Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and "Merchant/Consumers" Through Default Provisions*, 30 J. MARSHALL L. REV. 39, 64–65 (1996) (observing that courts use status as a significant factor in assessing conspicuousness). This practice is arguably invited by the definition of a conspicuous term as one being written such that "a reasonable person *against which it is intended to operate* ought to have noticed it." U.C.C. § 1-201(b)(10) (emphasis added). A contrary position is that the reference to a "reasonable person" limits the analysis to an objective test. See *Cate v. Dover Corp.*, 790 S.W.2d 559 (Tex. 1990). For a general discussion of these two approaches and a third—a "modified objective" test—see Kistler, *supra* note 65, at 945–53.

89. 817 F.2d 1543 (11th Cir. 1987).

90. *Id.* at 1547 (citations omitted); accord *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 424, 427 (Ariz. Ct. App. 1980) (holding that a purported disclaimer presented several

disclaimers presented after a contract was consummated (with the disclaimers typically arriving at or after delivery of the purchased goods)⁹¹ while approving of disclaimers if they were presented (or at least made available) before purchase.⁹² This treatment of disclaimers has given rise to what one court described as the “well-established distinction between conspicuous disclaimers made available before the contract is formed and disclaimers made available only after the contract is formed.”⁹³

That a disclaimer presented after a contract’s formation should be deemed ineffective is unremarkable. A disclaimer presented after formal consummation should not be deemed effective, not so much because it is not conspicuous but because under any theory of contract formation the disclaimer is simply too late (unless the disclaimer satisfies the requirements for a modification or for an addition under a “battle of the forms” analysis). If courts wish to use the language of the conspicuousness requirement to reach this conclusion⁹⁴ instead of simply asserting, as other courts have, that disclaimers presented after consummation are ineffective without reference to conspicuousness,⁹⁵ such a practice is unobjectionable.⁹⁶

months after the transaction was ineffective because it could not have been conspicuous “at the time” the contract was entered into).

91. See, e.g., *Bowdoin*, 817 F.2d at 1547; *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575, 582 (8th Cir. 1980); *Metro Nat Corp. v. Dunham-Bush, Inc.*, 984 F. Supp. 538, 559–60 (S.D. Tex. 1997); *Terrell v. R & A Mfg. Partners, Ltd.*, 835 So. 2d 216, 223–24 (Ala. Civ. App. 2002); *Mack Trucks of Ark. v. Jet Asphalt & Rock Co.*, 437 S.W.2d 459, 463 (Ark. 1969); *Pennington Grain & Seed, Inc. v. Tuten*, 422 So. 2d 948, 951 (Fla. Dist. Ct. App. 1982); *Vidalia Ranch, Inc. v. Farmers Union Oil & Supply Co.*, 718 P.2d 647, 649 (Mont. 1986); *Pfizer Genetics, Inc. v. Williams Mgmt. Co.*, 281 N.W.2d 536, 538–39 (Neb. 1979); *Ford Motor Co. v. Taylor*, 446 S.W.2d 521, 532 (Tenn. Ct. App. 1969). *But see* *Monsanto Agric. Prods. Co. v. Edenfield*, 426 So. 2d 574 (Fla. Dist. Ct. App. 1982).

92. See, e.g., *Swanson Bros. Lumber Co. v. Van Waters & Rogers, Inc.*, No. 91-35190, 1992 WL 167968 (9th Cir. July 17, 1992); *McCrimmon v. Tandy Corp.*, 414 S.E.2d 15 (Ga. Ct. App. 1991).

93. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 104–05 (3d Cir. 1991).

94. *Bowdoin*, 817 F.2d at 1547 (“A disclaimer must be conspicuous before the sale, for only then will the law presume that the disclaimer was part of the bargain.”); *Terrell*, 835 So. 2d at 223–24 (concluding, based on conspicuousness requirement, that disclaimers presented after delivery of the purchased good were not effective because they were not part of the basis of the parties’ bargain).

95. See, e.g., *BarclaysAmerican/Business Credit, Inc. v. Cargill, Inc.*, 380 N.W.2d 590, 591–92 (Minn. Ct. App. 1986) (holding, without providing rationale, a disclaimer presented after sale ineffective); *Vidalia Ranch*, 718 P.2d at 649 (finding a disclaimer in a manual received after purchase after sale not effective); *Eichenberger v. Wilhelm*, 244 N.W.2d 691, 697 (N.D. 1976) (noting that where a buyer is not given an opportunity to see and read the disclaimer, courts “will not elevate the disclaimer to status as a part of the bargain”); *Gold Kist, Inc. v. Citizens & S. Nat’l Bank of S.C.*, 333 S.E.2d 67, 70–71 (S.C. Ct. App. 1985) (indicating that under the “prevailing interpretation” of the U.C.C., a disclaimer given after a bargain has already arisen is not effective); *Cooper Paintings & Coatings, Inc. v. SCM Corp.*, 457 S.W.2d 864, 867 (Tenn. Ct. App. 1970) (holding a disclaimer presented after sale ineffective to modify the contract); *cf. LWT, Inc.*

However, this practice of making timing at all relevant to determinations of conspicuousness has also been criticized, with one commentary arguing that timing should have no place in assessing conspicuousness.⁹⁷ Further, the proposition that an otherwise conspicuous disclaimer presented after consummation is not effective does not invariably lead to a conclusion that such a disclaimer presented before consummation is automatically effective.

Indeed, a focus on the moment of technical consummation is insufficient to effectuate the purposes of Section 2-316, which is designed to “protect a buyer from unexpected and unbargained for language of disclaimer” by permitting exclusion “only by language or other circumstances which protect the buyer from surprise.”⁹⁸ Nor does merely focusing on whether a disclaimer came before technical consummation ensure that the purchaser will perceive the warranty as having been “unmistakably negated.”⁹⁹ And although the focus on time of consummation may be perfectly fine for contracts in which purchase (or order) and consummation are at the same time, such a focus is not an apt fit for rolling contracts. The next two subsections illustrate this point.

b. *Rinaldi v. Iomega Corp.*

A recent case in which conspicuousness was applied to assess the effectiveness of a disclaimer in a rolling contract demonstrates how that application fails to take into account the special purposes of warranties and the restrictions on disclaimers. The Delaware Superior Court in *Rinaldi v. Iomega Corp.*,¹⁰⁰ a case described earlier,¹⁰¹ utilized the conspicuousness requirement in assessing a disclaimer. *Rinaldi* was a proposed class action in which plaintiffs alleged that a computer storage drive called a “Zip” drive was defective, and that the defect caused considerable damage. One of the counts in the Complaint was for breach of the implied warranty of merchantability.¹⁰²

The manufacturer of the Zip drive filed a motion to dismiss the breach of the implied warranty of merchantability claim because a disclaimer of the implied warranty of merchantability had been included within the packaging of the Zip drive.¹⁰³ The purchasers did not contend that the wording of the disclaimer was insufficient or that the disclaimer was too small or located in an inconspicuous

v. Childers, 19 F.3d 539, 541 (10th Cir. 1994) (noting that the buyer must be given an opportunity to review a limited warranty at or before the sale for the limited warranty to be effective); *Mack Truck of Ark.*, 437 S.W.2d at 463 (finding a disclaimer ineffective for two reasons: it was not conspicuous and it was presented for the first time at delivery).

96. One caveat is that whether the issue is resolved under the rubric of conspicuousness or not impacts on whether the matter will be determined by a court or by a jury. Compare U.C.C. § 1-201(b)(10) (2004) (conspicuousness a question for the court), with *LWT*, 19 F.3d at 541 (noting that the terms of the contract is a question for the jury).

97. Goetz et al., *supra* note 19, at 1273 n.666.

98. U.C.C. § 2-316 cmt. 1 (2004).

99. *Id.* § 2-313 cmt. 3.

100. No. 98C-09-064-RRC, 1999 WL 1442014 (Del. Super. Ct. Sept. 3, 1999).

101. See *supra* Introduction.

102. *Rinaldi*, 1999 WL 1442014 at *1.

103. *Id.* at *2.

place on the warranty document itself. Instead, they claimed that because the disclaimer was located in the packaging of the product (and hence would not be seen until after purchase), it “could not realistically be called to the attention of the consumer until after the sale had been consummated, thus rendering the disclaimer not ‘conspicuous’ as a matter of law.”¹⁰⁴

The Delaware Superior Court noted that although previous courts had approved the validity of various types of terms located within product packaging, no court had squarely addressed the validity of a disclaimer under Section 2-316(2).¹⁰⁵ The court proceeded to determine whether the warranty disclaimer was conspicuous or not, stating that the purpose of Section 2-316, which the court identified as protecting a buyer from “unexpected and unbargained for language of disclaimer,”¹⁰⁶ should be the “real backbone in determining if a disclaimer is conspicuous when looking at factors beyond the mentioning of merchantability and type set.”¹⁰⁷

Ultimately, however, the court treated warranty disclaimers no differently from any other type of contract term. The court focused on the moment of technical consummation, stating that the disclaimer was simply a term of the contract and no contract was “consummated” until after the period to return the Zip drives for a refund passed.¹⁰⁸ According to the court, a buyer of a Zip drive could read the disclaimer after purchase and reject the Zip drive if the term was not satisfactory.¹⁰⁹ The court dismissed the breach of implied warranty claim, concluding that the “physical location of the disclaimer of the implied warranty of merchantability inside the Zip drive packaging does not make the disclaimer inconspicuous.”¹¹⁰

The *Rinaldi* court’s reasoning on conspicuousness was far from unassailable and demonstrates some of the weaknesses of using conspicuousness to assess the timing of disclaimers. That the *Rinaldi* court was satisfied that a buyer could see the disclaimer before the return period expired represents a misapplication of the underlying test of conspicuousness. The test is not simply whether a reasonable purchaser *could* read a disclaimer, but rather whether such a purchaser likely *would* read it.¹¹¹

Additionally, in reaching its conclusion, the *Rinaldi* court relied on the reasoning of *ProCD, Inc. v. Zeidenberg*¹¹² for support.¹¹³ That reliance is particularly inappropriate given dicta in *ProCD* that actually cautions *against* application of the *ProCD* rationale to disclaimers of the implied warranty of

104. *Id.* at *3.

105. *Id.* at *2.

106. *Id.* at *3 (quoting U.C.C. § 2-316 cmt. 1 (1962)).

107. *Id.*

108. *Id.* at *5.

109. *Id.*

110. *Id.* at *3.

111. The test is that “to be conspicuous a term ought to be noticed by a reasonable person.” U.C.C. § 1-201 cmt. 10 (2004).

112. 86 F.3d 1447 (7th Cir. 1996).

113. *Rinaldi*, 1999 WL 1442014, at *3.

merchantability.¹¹⁴ That dicta indicates that even if “money now, terms later” may be fine for certain types of contract terms (such as the *ProCD* license term which limited the use of the purchased application program and data to non-commercial purposes), it may not be appropriate for warranty disclaimers.¹¹⁵ The court in *ProCD* concluded that the “UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review” of terms provided after purchase.¹¹⁶ However, the court then immediately noted that “[s]ome portions of the UCC impose additional requirements on the way parties agree on terms” such as the requirement that a “disclaimer of the implied warranty of merchantability must be ‘conspicuous.’”¹¹⁷ The court noted that, in contrast to warranty disclaimers, “ordinary terms,” such as the type at issue in *ProCD*, do not require “any special prominence”¹¹⁸ and hence are amenable to being presented after purchase. The *Rinaldi* opinion seemingly disregarded this strong indication from *ProCD* that a warranty disclaimer, unlike other types of contract terms, may not be valid if presented after purchase.

Similarly, *Hill v. Gateway 2000, Inc.*,¹¹⁹ on which the *Rinaldi* court also relied,¹²⁰ provides a strong implicit distinction between arbitration clauses (the type of clause at issue in *Hill*) and warranty disclaimers. The *Hill* court observed that federal law favoring the enforcement of arbitration provisions was “inconsistent with any requirement that an arbitration clause be prominent.”¹²¹ No special requirements could be imposed on the arbitration clause beyond those imposed on any ordinary term, which left the court only to decide whether all the terms inside the box in which the computer was delivered—terms which would “stand or fall together”—were part of the contract.¹²²

But while the law presumably takes a neutral position with respect to “ordinary” provisions, like the license limitation in *ProCD* and, in fact, a favorable view of the type of arbitration clause at issue in *Hill*,¹²³ disclaimers are disfavored in the law¹²⁴ and are construed strictly against the seller.¹²⁵ Thus, a theory

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

115. *Id.*

116. *Id.*

117. *Id.* (quoting U.C.C. § 2-316(2)).

118. *Id.*

119. 105 F.3d 1147 (7th Cir. 1997).

120. *Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014, at *4 (Del. Super. Ct. Sept. 3, 1999).

121. 105 F.3d at 1148.

122. *Id.*; see also *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 198–99 (Tex. App. 2003) (holding that the lack of conspicuousness cannot be used as a defense against enforcement of an arbitration provision).

123. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 81 (2000) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). This favorable view of arbitration under federal law means, for instance, that courts should interpret the scope of arbitrable issues broadly. See, e.g., *Doctor's Assocs., Inc., v. Quinn*, 42 F. Supp. 2d 184, 186 (D. Conn. 1999).

124. See *Sierra Diesel Injection Serv., Inc., v. Burroughs, Corp.*, 890 F.2d 108, 113 (9th Cir. 1989); *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1084 (Ind. 1993); *Miller v. Badgley*, 753 P.2d 530, 535 (Wash. Ct. App. 1988).

permitting post-purchase disclosures may be appropriate for some types of terms, yet inappropriate for disclaimers of the implied warranty of merchantability.¹²⁶

Additionally, the practical considerations that often lead courts to accept terms presented after purchase or order are not fully applicable to disclaimers of the implied warranty of merchantability. The court in *ProCD* pointed out, for instance, that the option of placing all terms on the outside of a box of software might require the displacement of other information a buyer might find more useful in making the purchase decision (such as a description of the product), or might require the use of microscopic text.¹²⁷ Similarly, the court in *Hill* noted that a cashier cannot reasonably be expected to read legal documents to a consumer before ringing up a sale, and that requiring a telephone sales representative to read a four-page statement of terms would likely “anesthetize rather than enlighten.”¹²⁸ Thus, a deferred point of decision-making may be necessary to enable a purchaser to consider some additional terms that simply cannot be provided (or processed) when more significant terms, such as those relating to product description and information, are being considered.

Such concerns are certainly valid, but they simply do not apply to disclaimers of the implied warranty of merchantability. The concern articulated in *ProCD* that product description might be displaced by requiring pre-purchase disclosure is instructive. A term indicating that the good at issue is not warranted to serve its ordinary purposes *is* product description just as much as is any explanation of the good’s features, functions, price, and quality, and is information which a reasonable purchaser would presumably want in order to meaningfully assess the decision whether or not to buy.¹²⁹

And although it is surely true that in many transactions not every term can realistically or meaningfully be provided before purchase or sale,¹³⁰ *some* can.

125. See *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 419 (5th Cir. 1980); *Dorman v. Int’l Harvester Co.*, 120 Cal. Rptr. 516 (Ct. App. 1975); *Martin Rispens*, 621 N.E.2d at 1084; *Agrarian Grain Co., Inc. v. Meeker*, 526 N.E.2d 1189, 1192 (Ind. Ct. App. 1988); *Stauffer Chem. Co. v. Curry*, 778 P.2d 1083, 1091 (Wyo. 1989).

126. Cf. *Adams v. Am. Cyanamid Co.*, 498 N.W.2d 577, 587 (Neb. Ct. App. 1992) (indicating that despite the general rule that an agent can ordinarily bind a party, a warranty disclaimer must be presented directly to the purchaser). Somewhat analogously, in a recent article which addresses standard terms presented in various types of contracts formed over and with the internet, the authors note that there is a need for “judicial sensitivity to the purpose and nature” of a term presented in various types of internet transactions and that a term forbidding the purchaser from making unauthorized copies of purchased information is probably not an example of consumer exploitation, while a term imposing warranty disclaimers may be. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 493 (2002).

127. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450–51 (7th Cir. 1996).

128. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997).

129. I present this point more fully later. See *infra* Part IV.A.2.

130. *But cf. Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 n.14 (D. Kan. 2000) (recognizing practical considerations inherent in commercial transactions but noting that “it is not unreasonable for a vendor to clearly communicate to a buyer—at the time of sale—either the complete terms of the sale” or that additional terms will be proposed as a condition of the sale).

Sellers have no problem displaying or disclosing the price of a product or its features. In adopting a provision that requires that disclaimers of warranties be subject to specific requirements, state legislatures have indicated that these provisions are to be treated differently from what the *ProCD* court referred to as “ordinary terms.”¹³¹ Additionally, disclosure of warranty disclaimers is facilitated by the U.C.C.’s provision for disclaiming warranties, which approves of succinct expressions like “as is,” “with all faults,”¹³² or the simple statement that “[t]he seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract.”¹³³

Rinaldi thus demonstrates the danger of (mis)applying a test that has been used to assess disclaimers in simple transactions to also assess disclaimers in rolling contracts.

c. Right Result for the Wrong Reason

Even those courts that have rejected disclaimers presented after purchase or order have done so only because they concluded that the disclaimer came after consummation. For instance, in the transactions at issue in *Step-Saver Data Systems, Inc. v. Wyse Technology*, which involved telephone orders for computer software programs, the seller would typically accept the telephone order and promise, during the conversation, to ship the goods promptly.¹³⁴ After the order, the buyer would send a purchase order detailing the key terms of the deal.¹³⁵ The vendor would then ship the order along with an invoice.¹³⁶ No reference to any disclaimer of warranties was made during the telephone call, on the purchase order, or on the invoice.¹³⁷ Instead, a license was printed on the box in which the programs were packaged.¹³⁸ Among the terms printed on the box was a disclaimer of warranties and a statement that opening the package constituted acceptance.¹³⁹ The buyer was given the opportunity to return the package, unopened, for a refund.¹⁴⁰

The vendor argued that the contract did not come into existence until the buyer received the program, saw the terms, and then opened the package.¹⁴¹ According to the vendor, the disclaimer was thus simply a term of the contract, not some later addition to an already completed deal.¹⁴² In contrast, the buyer argued that a contract was formed before the conclusion of the telephone call, when the seller agreed to ship the copies of the program.¹⁴³ The buyer further argued that the

131. *ProCD*, 86 F.3d at 1453.
132. U.C.C. § 2-316(3)(a) (2004).
133. *Id.* § 2-316(2).
134. 939 F.2d 91, 96 (3d Cir. 1991).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 96–97.
140. *Id.* at 97.
141. *Id.*
142. *Id.* at 97–98.
143. *Id.* at 97.

box-top license was a material alteration of the contract and hence did not become part of the contract under Prior Section 2-207, the “battle of the forms” provision.¹⁴⁴

The court stated that it saw no need to “parse” the various actions the parties had taken in the course of their dealings to determine the exact moment when the parties formed a contract,¹⁴⁵ although the court did implicitly accept the buyer’s position that a contract was formed before the disclaimer was received.¹⁴⁶ Instead, the court concluded that the parties’ conduct indicated the existence of a contract, and, since the parties did not adopt a particular writing and the writings exchanged did not agree, Prior Section 2-207 governed the matter.¹⁴⁷ The court applied Prior Section 2-207, concluding that the warranty terms were not a part of the contract.¹⁴⁸

The court noted that its ruling was based on the “well-established distinction between conspicuous disclaimers made available before the contract is formed and disclaimers made available only after the contract is formed.”¹⁴⁹ Thus, the *Step-Saver* court referred to the conspicuousness requirement but cast the test as a simple determination as to whether or not a contract had been formed at the time the disclaimer was presented.¹⁵⁰

Since transactions formed over time invariably have a rhythm in which a buyer’s attention waxes and wanes, the timing of a disclaimer is directly relevant to whether the disclaimer provides sufficient protection from surprise (particularly if that surprise is in part created by the seller’s making no mention of a disclaimer at the time of purchase or order and hence putting the buyer off guard). An appropriate test for analyzing disclaimers will, unlike conspicuousness, take these considerations and the distinct nature and purposes of warranties and warranty disclaimers into account instead of merely focusing on the time of formal consummation.

2. *The Text-Focused Definition of Conspicuousness*

The text-focused definition of conspicuousness and the absence of any mention of matters of context or timing in that definition make conspicuousness an inappropriate tool for assessing disclaimers. The definition of conspicuousness indicates that the conspicuousness requirement is not meant to be used as anything but a test to evaluate how a disclaimer appears on a page or computer screen.

144. *Id.*

145. *Id.* at 98.

146. *See id.* at 105 n.50.

147. *Id.* at 98.

148. Earlier in the opinion, the court determined that the terms discussed during the telephone conversation created a sufficiently definite contract, even though not every term was fully spelled out. *Id.* at 100.

149. *Id.* at 104–05.

150. *See also* *Ariz. Retail Sys. Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 766 (D. Ariz. 1993) (holding that contract was formed at the time seller agreed to ship computer programs or, at the latest, when the seller actually shipped them and disclaimers presented afterwards were ineffective).

Before discussing the definition of conspicuous, I note that the U.C.C. includes two slightly different versions of that definition. Article 1 of the U.C.C. was significantly revised in 2001,¹⁵¹ including revisions to the definition of “conspicuousness.”¹⁵² The recent revisions to Article 2 also include a definition of conspicuousness.¹⁵³ The Article 2 version is nearly identical to the Article 1 version, except that the Article 2 version includes special language to address situations “where the sender of an electronic record intends to evoke a response from an electronic agent.”¹⁵⁴ The Article 1 definition has been adopted by seven states¹⁵⁵ and the U.S. Virgin Islands,¹⁵⁶ and it has been introduced, at the time of the writing of this Article, into the legislatures of two other jurisdictions.¹⁵⁷ Since the trend at the moment seems to be to adopt the Article 1 definition, and the Article 2 definition has not yet been introduced into the legislature of any jurisdiction,¹⁵⁸ I will use the Article 1 definition.

The definition of conspicuousness is focused largely on textual matters and not contextual ones, reflecting, presumably, the goal of the drafters of the original provision on conspicuousness to avoid inquiry into matters outside the “four corners” of the document itself.¹⁵⁹ Even though the basic test of conspicuousness is described, according to an official comment, as “whether attention can reasonably be expected to be called” to the term in question,¹⁶⁰ the manner in which the definition is framed and the examples used in the definition

151. See 77A C.J.S. *Sales* § 5 (Supp. 2004) (noting that Article 1 was “extensively revised in 2001”).

152. See U.C.C. § 1-201(b)(10) (2004).

153. U.C.C. § 2-103(1)(b) (2004).

154. *Id.* § 2-103 cmt. 1. Unlike the Article 1 definition of conspicuousness, the Article 2 version includes a statement that “[a] term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review . . . by an individual.” *Id.* § 2-103(1)(b). The Article 2 definition also includes, in Section 2-103(1)(b)(ii), an example of a conspicuous term which relates to the “special standard for electronic records that are intended to evoke a response from an electronic agent.” *Id.* § 2-103 cmt. 1. The Article 1 and Article 2 definitions are otherwise essentially the same.

155. The states which have adopted the Article 1 definition are: Alabama, *see* 2004 Ala. Acts 315; Delaware, *see* 74 Del. Laws 332 (2004); Hawaii, *see* 2004 Haw. Sess. Laws 162; Idaho, *see* 2004 Idaho Sess. Laws 42; Minnesota, *see* 2004 Minn. Sess. Law Serv. 162 (West); Texas, *see* TEX. BUS. & COM. CODE ANN. § 1.201(b)(10) (Vernon Supp. 2004); and Virginia, *see* VA. CODE ANN. § 8.1A-201(b)(10) (Michie Supp. 2003).

156. 11A V.I. CODE ANN. § 1-201(b)(10) (2003).

157. Information on the status of legislative activity of both Article 1 and Article 2 is available on the National Conference of Commissioners on Uniform State Law website at <http://www.nccusl.org/nccusl/LegByAct.pdf> (last visited Oct. 28, 2004).

158. *See supra* note 157.

159. Goetz et al., *supra* note 19, at 1266 (citing Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 182 (1978)) (discussing intent of drafters of the pre-2003 definition of conspicuousness). The current definition of conspicuousness is derived from the previous one. *See* U.C.C. § 1-201 cmt. 10 (2004).

160. U.C.C. § 1-201 cmt. 10.

demonstrate that conspicuousness is primarily focused on the simple issue of how text looks. The definition in its entirety is as follows:

“Conspicuous,” with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is conspicuous or not is a decision for the court. Conspicuous terms include the following:

- (A) [A] heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- (B) [L]anguage in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.¹⁶¹

The examples of conspicuous terms are described with reference to the appearance of the text. The definition refers, for instance, to the “type, font, or color” of a heading or other language in comparison to surrounding text, whether a heading is in capital letters the same size or larger than surrounding text, and whether language is set off from other text by symbols or marks.¹⁶² That this definition of conspicuousness is largely to be determined by comparing the text in question to the “surrounding text”¹⁶³ indicates an analysis firmly centered on the four corners of the document containing the disclaimer itself. In short, despite a reference to a basic test of whether attention is likely to be called to a term,¹⁶⁴ the definition’s emphasis is not on any contextual matters but rather on the physical attributes of the language and its appearance relative to other text on the page or computer screen.

Further, the definition of conspicuous was intended in part to give “guidance to the party relying on the term” about how to achieve the intended result.¹⁶⁵ The only examples given in the definition, however, deal with the way text appears on a page or computer screen. The lack of any specific guidance as to context gives rise to an inference that the drafters did not intend conspicuousness to be used to assess context, especially since by the time the revisions to Article 1 were promulgated in 2001, rolling contracts had been proliferating (as the drafters were surely aware¹⁶⁶). Additionally, the drafters clearly know how to invite consideration of negotiation and sophistication of the parties, as they do in Section

161. *Id.* § 1-201(b)(10).

162. *Id.* § 1-201(b)(10)(A)–(B).

163. *Id.*

164. *Id.* § 1-201(b)(10); *id.* § 1-201 cmt. 10.

165. *Id.* § 1-201 cmt. 10.

166. For instance, there are numerous references to rolling or layered contracts in UCITA, promulgated by the National Conference of Commissioners on Uniform State Laws in 1999. *See, e.g.*, UCITA § 202 cmt. 4, 7 U.L.A. pt. II, at 276 (2002); *id.* § 208 cmt. 3, 7 U.L.A. pt. II, at 287; *id.* § 305 cmt. 2, 7 U.L.A. pt. II, at 315–16.

2-316.¹⁶⁷ The very lack of any mention of context or timing in the definition of conspicuous provides support for the proposition that such matters ought not be considered in assessing conspicuousness.¹⁶⁸

The manner in which the definition of conspicuousness is framed provides further support for the proposition that conspicuousness should function as a tool limited to assessing the way text appears on a page or computer screen. The definition is structured by reference to how a term is “written, displayed, or presented.”¹⁶⁹ That language warrants some discussion. In the prior version, the reference was to how a term was “written,”¹⁷⁰ and so the expansion to consideration of matters of display and presentation arguably reflects a broader vision of the conspicuousness requirement. A closer examination, however, reveals that no such interpretation was intended.

If the drafters had genuinely intended to broaden the concept of conspicuousness beyond an assessment of the appearance of text, they would have presumably used a conjunctive before the word “presented.” That is, had the revised text referred to how a term is “written, displayed, *and* presented” (instead of “written, displayed, *or* presented”¹⁷¹), there would be a strong signal—indeed, a mandatory requirement—to consider both how the disclaimer “looks” and how it is introduced into the transaction. The use of the disjunctive “or,” in contrast, leads to an inference that the drafters were simply indicating that sometimes a disclaimer will not be “written” but may be displayed (on a computer screen, for example).

Thus, the change is best seen as a simple accompaniment to the inclusion in Article 1 of a definition of “record.” That definition indicates that, given modern communication techniques such as computers and e-mail, a mere reference to a term being “written” does not properly reflect commercial practices.¹⁷² Additionally, the official comment notes that the new version is derived from the former definition (which used only the term “written”) and makes no reference to an expanded scope of conspicuousness.¹⁷³ Moreover, if the drafters had intended for conspicuousness to have a meaning broader than the physical appearance of text, there would be no reason to limit the requirement to written disclaimers only, as Section 2-316 does.¹⁷⁴

Further, the definition indicates a narrow role for conspicuousness by frequently referring to a “term.” The definition of conspicuousness is framed “in

167. U.C.C. § 2-316 cmt. 5 (2004).

168. Cf. Goetz et al., *supra* note 19, at 1270 (arguing that because the definition of conspicuousness contains no “reference to ease of comprehension,” understandability of the disclaimer should not be part of the conspicuousness determination).

169. U.C.C. § 1-201(b)(10).

170. Prior U.C.C. § 1-201(10).

171. U.C.C. § 1-201(b)(10) (emphasis added).

172. U.C.C. § 9-102 cmt. 9 (2004). Reference to the Article 9 comment on the definition of “record” is appropriate because the comment to the definition of “record” in Article 1 refers to the Article 9 definition and states that the Article 1 definition is derived from the Article 9 definition. U.C.C. § 1-201 cmt. 31.

173. See *id.* § 1-201 cmt. 10.

174. See U.C.C. § 2-316(2)–(3) (2004).

reference to a term,”¹⁷⁵ examples are given of “conspicuous terms,”¹⁷⁶ and an official comment describes the basic test of conspicuousness as whether attention can reasonably be expected to be called to a term.¹⁷⁷ This use of the word “term,” which represents a change from the previous version (which referred to a “term or clause”),¹⁷⁸ suggests that the conspicuousness requirement should operate narrowly because of how the U.C.C. defines “term.” “Term” is defined under the U.C.C. as meaning a “portion of an agreement that relates to a particular matter.”¹⁷⁹ In turn, “agreement” is defined as “the bargain of the parties in fact.”¹⁸⁰ For language to be a “term” it must already have been determined to be “in” the agreement and part of the bargain. Conspicuousness becomes relevant only after that determination has already been made, and is thus properly seen as a relatively narrow tool.

That the role for conspicuousness is relatively narrow is also demonstrated by the recent revisions to Section 2-316, a section that provides a useful contrast with the definition of conspicuousness. Section 2-316 now dictates the specific language to be used in disclaimers¹⁸¹ and provides for additional protection of consumers by requiring that disclaimers in consumer contracts be in a record.¹⁸² Additionally, at least in the context of assessing the effectiveness of certain disclaimers, the section invites examination of the parties’ sophistication and the nature of the negotiations.¹⁸³ These changes strongly indicate that it is Section 2-316, and not the definition of conspicuousness, which is intended to be used to assess matters other than a disclaimer’s physical appearance, such as the context of the transaction or the understandability of the disclaimer’s language.¹⁸⁴ In short, as Section 2-316 does more and more, it becomes clearer that the definition of conspicuousness is designed to do, and should do, very little.

3. *The Conspicuousness Requirement’s Limited Applicability*

A somewhat controversial issue—the scope of application of the conspicuousness requirement—has apparently been resolved by recent revisions to Article 2. The resolution of that issue adds further support to the proposition that

175. U.C.C. § 1-201(b)(10).

176. *Id.*

177. *Id.* § 1-201 cmt. 10.

178. Prior U.C.C. § 1-201(10).

179. U.C.C. § 1-201(b)(40).

180. *Id.* § 1-201(b)(3).

181. *See* U.C.C. § 2-316(2), (3)(a) (2004).

182. *See id.*

183. *See id.* § 2-316 cmt. 5.

184. These changes at least arguably answer the previously unsettled question of whether the understandability of a disclaimer was part of conspicuousness. *See* Kistler, *supra* note 65, at 953–54. One trial court has explicitly examined the understandability of a disclaimer as part of its determination of conspicuousness. *Wagaman v. Don Warner Chevrolet-Buick, Inc.*, 17 Pa. D. & C.3d 572 (Ct. C.P. 1981). However, even before the changes to Section 2-316, this approach had been criticized. *See* Goetz et al., *supra* note 19, at 1270 (arguing that because the definition of conspicuousness contains no “reference to ease of comprehension,” understandability of the disclaimer should not be part of the conspicuousness determination). Now that specific language is set forth in Section 2-316, whether conspicuousness includes understandability of the language is a moot point.

conspicuousness is not an appropriate test for assessing the context of warranty disclaimers because the revisions now make clear that the conspicuousness requirement does not even apply to all written warranties.

Both Prior Section 2-316(2) and the newly revised version of Section 2-316(2) require that a written disclaimer be conspicuous. However, Prior Section 2-316(3), which provides for the enforceability of “as-is” and other similar provisions, did not include a requirement of conspicuousness. That omission led to some disagreement as to whether the conspicuousness requirement should apply to “as-is” and similar disclaimers. The trend has been to apply the conspicuousness requirement¹⁸⁵ in order to effectuate the underlying purpose of protecting against unexpected disclaimers even though, as one commentator noted, imposing such a requirement “flatly ignore[d] the statutory language of Section 2-316.”¹⁸⁶

The drafters have made clear in the newest revision that the conspicuousness requirement applies only to some, and not all, written disclaimers. The recent revisions to Article 2 specifically provide that “as-is” and similar disclaimers in consumer contracts evidenced by a record must be set forth conspicuously in the record while imposing no such requirements on “as-is” disclaimers in other contracts.¹⁸⁷ An official comment appears to preclude any argument that the conspicuousness requirements of Section 2-316(2) be imposed generally on Section 2-316(3)(a). The comment clarifies that subsection 3(a) is the general test for disclaimers and that subsection 2 is a more specific test.¹⁸⁸ The comment specifically states that a disclaimer satisfying subsection 3 need not also satisfy “any” of the requirements of subsection 2,¹⁸⁹ one of which is, of course, conspicuousness. A third indication that the drafters intended to clarify that the conspicuous requirement is not a requirement for all written disclaimers is found in another change made to an official comment. Prior Article 2 provided that disclaimers were to be permitted only by “conspicuous language or other

185. See, e.g., *Bailey v. Tucker Equip. Sales, Inc.*, 510 S.E.2d 904, 905–06 (Ga. Ct. App. 1999); *Fernandez v. Western R.R. Builders, Inc.*, 736 P.2d 1361, 1364 (Idaho Ct. App. 1987); *Lumber Mut. Ins. Co. v. Clarkliff of Detroit*, 569 N.W.2d 681, 682–84 (Mich. Ct. App. 1997); *Patton v. McHone*, 822 S.W.2d 608, 616 (Tenn. Ct. App. 1991); LAWRENCE, *supra* note 85, at § 2-316:172 (3d ed. 2002) (noting that most courts have required conspicuousness); 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 12-6, at 644 (4th ed. 1995) (noting that despite the fact that the U.C.C. did not mention conspicuousness as a requirement for “as-is” disclaimers, many courts have imposed such a requirement because otherwise “that requirement’s presence in subsection (2) would be useless”); *Kistler*, *supra* note 65, at 944–45 (noting the application by the majority of courts of the conspicuousness requirement to “as-is” disclaimers). *But see DeKalb Agresearch, Inc. v. Abbott*, 391 F. Supp. 152, 154–55 (N.D. Ala. 1974) (indicating “as-is” disclaimers do not need to be conspicuous), *aff’d*, 511 F.2d 1162 (5th Cir. 1975).

186. See R. J. Robertson, Jr., *A Modest Proposal Regarding The Enforceability of “As-Is” Disclaimers of Implied Warranties: What the Buyer Doesn’t Know Shouldn’t Hurt Him*, 99 COM. L.J. 1, 30–31 (1994).

187. U.C.C. § 2-316(3)(a).

188. *Id.* § 2-316 cmt. 2.

189. *Id.*

circumstances which protect the buyer from surprise.”¹⁹⁰ In the revised version, the word “conspicuous” was dropped.¹⁹¹

Thus, reliance on conspicuousness as a means of policing the timing and context of disclaimers is problematic even with respect to written disclaimers since the conspicuousness requirement does not cover all such disclaimers (and, of course, the conspicuousness requirement does not apply at all to oral disclaimers).

4. *The Assignment of Conspicuousness Determinations to a Court*

That the court, and not the jury, is assigned the task of determining whether a term is conspicuous¹⁹² further demonstrates that conspicuousness should primarily be construed as a function of the text’s physical appearance. First, an analysis of text is something well within a court’s competence, and is an analysis which courts have been comfortable making without outside assistance. One court, for example, barred expert testimony on the conspicuousness of a typeface,¹⁹³ while another made a determination of conspicuousness by comparing the text of a disclaimer to footnotes in a judicial opinion.¹⁹⁴ In contrast, determination of the terms of an agreement is typically for the jury,¹⁹⁵ as are questions of contract formation.¹⁹⁶

Second, courts would face a number of practical difficulties in assessing a disclaimer’s context, as opposed to just its appearance. Article 2 provides no process for the consideration of contextual matters in assessing conspicuousness. The lack of such a process contrasts sharply with Section 2-302.¹⁹⁷ Section 2-302 makes the determination of unconscionability a question for the court and not the trier of fact,¹⁹⁸ just as conspicuousness is also a question for the court. However, the breadth of the unconscionability requirement is reflected by the procedure outlined for making such a determination: the parties are “afforded a reasonable opportunity to present evidence as to [a potentially unconscionable contract’s or contract clause’s] commercial setting, purpose, and effect to aid the court in making the determination.”¹⁹⁹ The definition of conspicuousness has no such

190. Prior U.C.C. § 2-316 cmt. 1.

191. U.C.C. § 2-316 cmt. 1.

192. U.C.C. § 1-201(b)(10) (2004).

193. *Todd Heller, Inc. v. United Parcel Serv.*, 754 A.2d 689, 698 (Pa. Super. Ct. 2000).

194. *Seibel v. Layne & Bowler, Inc.*, 641 P.2d 668, 670 (Or. Ct. App. 1982).

195. *See, e.g., LWT, Inc. v. Childers*, 19 F.3d 539, 541 (10th Cir. 1994) (noting that the terms of the contract is a question for the jury).

196. *See, e.g., Draxis U.S., Inc. v. Walgreen Co.*, No. 00 C 3070, 2001 WL 881340, at *2 (N.D. Ill. Aug. 6, 2001) (“Questions of contract formation are typically the province of the jury.”) (citing *Liu v. T & H Mach., Inc.*, 191 F.3d 790, 795 (7th Cir. 1999)); *Media Sport & Arts v. Kinney Shoe Corp.*, No. 95 Civ. 3901, 1999 WL 946354, at *3 (S.D.N.Y. Oct. 19, 1999) (“Issues of contract formation involve quintessential common law jury question[s] . . .”) (alteration in original) (internal citation and quotations omitted).

197. I discuss unconscionability further *infra* in Part II.B.2.

198. U.C.C. § 2-302(2) (2004); *id.* § 2-302 cmt. 3.

199. *Id.* § 2-302(2).

procedure,²⁰⁰ presumably indicating that it is intended to operate significantly more narrowly since it does not provide for any sort of hearing at which evidence of context could be presented.

Third, the apparent reason for assigning the question of conspicuousness to the court and not the jury also demonstrates that the concept of conspicuousness deals with textual matters. As the court noted in *In re Bassett*²⁰¹ (a case involving bankruptcy law which “borrowed” the U.C.C. definition and case law on conspicuousness), the rationale for assigning the question to the court is that leaving the question to the jury would create too much uncertainty in the “drafting process,” since a jury could always find that, to it, a particular combination of typefaces, colors, and other elements of graphic display did not satisfy the requirement of conspicuousness.²⁰² The court’s references to “graphic design,” to typeface, and to the process of drafting²⁰³ indicate that it is in regard to these sorts of matters that uniformity is being sought and not in regard to matters of context and formation.

Fourth, as a practical matter, it is difficult for a court to make determinations of conspicuousness as a matter of law when such determinations go beyond the simple question of the text’s physical characteristics. For instance, in *In re Eagle-Picher Industries, Inc.*,²⁰⁴ the court construed the concept of conspicuousness fairly broadly. *Eagle-Picher Industries* involved disclaimers contained in the packages of batteries shipped to a purchasing company.²⁰⁵ The seller sought summary judgment on the breach of warranty claim, asserting that the disclaimers barred such an action.²⁰⁶ According to the court, the key to determining if the disclaimers met the requirement of conspicuousness was whether, given the context of the transaction, the transmission of the disclaimers was “reasonably calculated to make [the buyer] aware” of the disclaimers.²⁰⁷ The court could not conclude on summary judgment that the communication had been so calculated, noting that both parties knew that the buyer was purchasing the batteries to use as a component in a system that it manufactured for use in computer systems.²⁰⁸ Under such circumstances, it might be that the disclaimers never came to the attention of the appropriate individuals on the buyer’s side of the transaction. Because a question of fact existed, the court held that summary judgment was inappropriate.²⁰⁹ *Eagle-Picher Industries* thus demonstrates that conceiving of conspicuousness in terms beyond textual matters may create a conflict with the allocation of the question of conspicuousness to a court as a matter of law.

200. See U.C.C. § 1-201(b)(10) (2004).

201. 285 F.3d 882 (9th Cir. 2002).

202. *Id.* at 885 (citing *Smith v. Check-n-Go of Ill., Inc.*, 200 F.3d 511, 515 (7th Cir. 1999)).

203. *Id.*

204. 181 B.R. 51 (Bankr. S.D. Ohio 1995).

205. *Id.* at 53.

206. *Id.* at 55.

207. *Id.*

208. *Id.*

209. *Id.*

There are also a number of theoretical objections to permitting courts to treat conspicuousness as a broad concept in light of the assignment of questions of conspicuousness to the court. One commentator has described as “wrongheaded” those decisions in which courts have assessed conspicuousness as a matter of law, noting that: “Most warranties confer benefits. Benefits are property rights held by an individual and that individual ought not to be divested of a property right without a jury trial.”²¹⁰ This commentary also notes that, although it may be appropriate for a judge to determine conspicuousness as a matter of law in cases in which there is no doubt as to whether the definition is satisfied, any other interpretation of Section 2-316 “smacks of property deprivation without a trial.”²¹¹ Leaving a simple analysis of text to a court is presumably less objectionable than leaving it in the hands of the judge to make a broad-based determination of conspicuousness.

Similarly, as Professor Margaret Moses notes, an allocation of the question of conspicuousness to a court instead of to a jury is not problematic so long as the function is essentially the interpretation of written documents—a function “the court has performed since the eighteenth century.”²¹² Professor Moses argues that a determination of conspicuousness is actually not an act of interpreting the meaning of language but rather an effort to determine whether a reasonable person ought to have noticed the language and, “[i]f reasonable persons could differ, the matter is [ordinarily] for the jury.”²¹³ Concern has also been expressed about permitting a court, as opposed to a trier of fact, to consider evidence of the buyer’s sophistication in making assessments of conspicuousness.²¹⁴ Limiting the role of conspicuousness to a simple focus on text and its placement alleviates some of these concerns since it leaves the larger contextual issues to a jury while leaving only a relatively narrow task to the court.²¹⁵

5. Conclusion on Conspicuousness

Conspicuousness is ill-suited for the task of assessing the timing and context of disclaimers. Judicial use of conspicuousness to make such assessments has essentially resulted in making the effectiveness of disclaimers hinge on the moment of technical contract consummation and in disclaimers being treated no differently from other terms. Further, the definition and scope of application of conspicuousness as well as the treatment of conspicuousness as a question of law

210. WILLISTON, *supra* note 57, at § 20–18 n.29.

211. *Id.* The constitutionality of depriving a plaintiff of a jury trial on the fact of whether provisions in the disclaimer were conspicuous was raised, but not addressed by the court, in *Bailey v. Ford Motor Co.*, 440 S.W.2d 238 (Ark. 1969).

212. Margaret L. Moses, *The Jury-Trial Right in the U.C.C.: On a Slippery Slope*, 54 SMU L. REV. 561, 576 (2001).

213. *Id.*

214. Eisen, *supra* note 65, at 314–15.

215. Interestingly, at one point in the revision process of Article 2, the drafters indicated that in some instances conspicuousness is better left to the jury than the judge. That language was removed. For a general discussion, see Moses, *supra* note 212, at 576–78.

for the court indicate that the tool is a narrow one. A more appropriate test is needed.

B. Assessment and Rejection of Other Possible Tests

The basis used by some courts to assess the timing of disclaimers is not always clear, with courts variously averting to several possible approaches: many courts look to the conspicuousness requirement,²¹⁶ others look to a requirement of an opportunity to review or a “basis of the bargain” approach,²¹⁷ while others give little explanation for their determinations.²¹⁸ Before turning to what I argue is the most appropriate basis for assessing the timing of disclaimers, I discuss and critique three other possible approaches: first, I address the test imposed by the courts of Washington State; second, I address unconscionability under Section 2-302; and third, I address the newly revised version of Section 2-207.

1. The Washington Approach

Courts in the State of Washington impose a unique test—a disclaimer is not effective unless it was “explicitly negotiated.”²¹⁹ Washington courts impose this requirement even though neither the official text of Section 2-316 nor the version as adopted in Washington²²⁰ imposes such a requirement. This requirement appears to apply even in commercial contexts.²²¹ Under this test, disclaimers presented after sale are routinely deemed ineffective for the simple reason that they could not have been explicitly negotiated.²²²

This test is not without its benefits. It provides an explicit basis for the consideration of the context of a transaction and the manner in which a disclaimer was presented. Additionally, it effectively prevents surprise in that a party would invariably be aware of a term that was explicitly negotiated (especially because

216. See, e.g., *Bowdoin v. Showell Growers, Inc.*, 817 F.2d 1543, 1547 (11th Cir. 1987); *Terrell v. R & A Mfg. Partners, Ltd.*, 835 So. 2d 216, 223–24 (Ala. Civ. App. 2002); *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 424, 427 (Ariz. Ct. App. 1980).

217. See, e.g., *Eichenberger v. Wilhelm*, 244 N.W.2d 691, 697 (N.D. 1976) (noting that where the buyer is not given an opportunity to see and read the disclaimer, courts “will not elevate the disclaimer to status as a part of the bargain”); cf. *LWT, Inc. v. Childers*, 19 F.3d 539, 541 (10th Cir. 1994) (noting that the buyer must be given an opportunity to review limited warranty at or before the sale for limited warranty to be effective).

218. See, e.g., *BarclaysAmerican/Business Credit, Inc. v. Cargill, Inc.*, 380 N.W.2d 590, 591–92 (Minn. Ct. App. 1986) (disclaimer presented after sale ineffective; court does not provide rationale); *Vidalia Ranch, Inc. v. Farmers Union Oil & Supply Co.*, 718 P.2d 647, 649 (Mont. 1986) (disclaimer received after purchase not effective but additional reasoning not given); *Cooper Paintings & Coatings, Inc. v. SCM Corp.*, 457 S.W.2d 864, 867 (Tenn. Ct. App. 1970) (same).

219. See *W. Recreational Vehicles v. Swift Adhesives, Inc.*, 23 F.3d 1547, 1554 (9th Cir. 1994); *Miller v. Badgley*, 753 P.2d 530, 535 (Wash. Ct. App. 1988).

220. See WASH. REV. CODE ANN. § 62A.2-316 (West 2003).

221. See *W. Recreational Vehicles*, 23 F.3d 1554.

222. See, e.g., *id.*; *Riverview Sch. Dist. No. 407 v. Loadmaster Sys. Inc.*, No. 47855-9-I, 2002 WL 1974106 (Wash. Ct. App. Aug. 26, 2002); *Hartwig Farms, Inc. v. Pac. Gamble Robinson Co.*, 625 P.2d 171 (Wash. Ct. App. 1981).

“explicit negotiation” has been interpreted to require knowledge and discussion of the provision²²³).

However, the rule also has a number of difficulties. First, in adopting such a rule, Washington courts have imposed a super-requirement of explicit negotiations (something not required by the Code itself²²⁴) based only on the assertion that disclaimers are disfavored under the law, without even referencing what language of Section 2-316 is being applied.²²⁵

Second, not only does Article 2 not require negotiations, the requirement of explicit negotiation is arguably in conflict with an official comment indicating that Section 2-316 is designed to “protect a buyer from . . . unbargained language of disclaimer by denying effect to this language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by language or other circumstances which protect the buyer from surprise.”²²⁶ In other words, Section 2-316 does not prohibit unbargained for disclaimers—instead, it contemplates that there will be such disclaimers and deals with them by providing various safeguards to protect against surprise. Thus, an outright requirement that a disclaimer must be explicitly negotiated arguably contradicts the official comment. At the very least, the drafters seemed to think that Section 2-316 provides sufficient protections against unbargained for language.²²⁷

Third, since the negotiation requirement necessitates actual discussion of the disclaimer clause by the buyer and seller,²²⁸ the burdens imposed by such a requirement effectively make it impossible to actually disclaim warranties in a mass-market transaction.²²⁹ Such a result may ultimately be appropriate, but in other jurisdictions this decision has been made by state legislatures, and not the courts.²³⁰

The Washington approach ultimately falls short of serving as a valid, workable rule. It imposes an onerous requirement that is not clearly spelled out and which is arguably inconsistent with, or at the very least not supported by, the statutory scheme of Section 2-316. Additionally, the lack of a clear statutory basis for the Washington approach is troubling, to say the least.

223. See, e.g., *Badgley*, 753 P.2d at 535.

224. See Goetz et al., *supra* note 19, at 1275 (noting that the U.C.C. does not require negotiations for an effective disclaimer).

225. See, e.g., *Badgley*, 753 P.2d at 535.

226. U.C.C. § 2-316 cmt. 1 (2004). For a discussion of an apparent grammatical error in this comment, see *supra* note 63.

227. See Goetz et al., *supra* note 19, at 1275 (citing Prior U.C.C. § 2-316 cmt. 1).

228. See *Badgley*, 753 P.2d at 535.

229. Washington courts have shown some flexibility in this regard, holding, for example, that the rule does not apply to an auction, since in that context a negotiation requirement simply does not make sense. *Travis v. Wash. Horse Breeders Ass'n., Inc.*, 759 P.2d 418, 421–22 (Wash. 1988).

230. See *supra* note 78 and accompanying text.

2. Unconscionability

Another possible test that could be used to police the context of disclaimers is unconscionability. Section 2-302 provides as follows:

If the court as a matter of law finds the contract or any term 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 term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.²³¹

Despite its broad language, Section 2-302 is not an appropriate test for assessing the context of disclaimers of the implied warranty of merchantability.

It is doubtful that Section 2-302 is even intended to apply to disclaimers of the implied warranty of merchantability. Section 2-314, which deals with the creation of the implied warranty of merchantability, begins with a statement that “[u]nless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale,”²³² thus referencing only Section 2-316 as the source for exclusion of the implied warranty of merchantability.

An official comment provides further indication that Section 2-316 is the section intended to protect purchasers from the surprise of an excluded warranty. The comment states that exclusion of the implied warranty of merchantability is “dealt with in Section 2-316,” noting that the warranty of merchantability, “wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.”²³³ Since the general purpose of the unconscionability doctrine is also to prevent “oppression and unfair surprise,”²³⁴ Section 2-316 seems designed to carry out that task in the particular context of a disclaimer.²³⁵

As Professor Arthur Leff observed, Section 2-316 provides a detailed “blueprint” for disclaiming the implied warranty of merchantability²³⁶ in rather “impressive detail and with surprising particularity.”²³⁷ Section 2-316 sets forth “clear, specific, and anything but easy to meet standards for disclaiming warranties.”²³⁸ According to Professor Leff, it simply makes no sense for the “generally protective and loosely defined section [on unconscionability] devoted to general naughtiness” to be applied to a disclaimer meeting the clear requirements of the section devoted specifically to disclaimers.²³⁹ As Professor Leff further

231. U.C.C. § 2-302(1).

232. *Id.* § 2-314(1).

233. *Id.* § 2-314 cmt. 13.

234. *Id.* § 2-302 cmt. 1.

235. See Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 521–22 (1967) (noting that surprise is the “vice” with which Section 2-316 is designed to deal).

236. *Id.* at 520.

237. *Id.* at 521.

238. *Id.* at 523.

239. *Id.*

noted, while several provisions of Article 2 make reference to the section on unconscionability, Section 2-316 does not,²⁴⁰ thus undermining any claim that unconscionability can function as an overlay to the requirements of Section 2-316.

Of course, not all commentary has accepted Professor Leff's position on this point.²⁴¹ Section 2-302 does apply to "any term"²⁴² of the contract. In addition, Section 2-316 does not explicitly bar applicability of Section 2-302. Finally, many of the examples used in the comment to the section on unconscionability (or, more accurately, in the comment to Prior Section 2-302) involve disclaimers. In response to this final point, Professor Leff argued that the examples illustrate "the responses of judges in the throes of one of the dilemmas of the judicial process"²⁴³ and are likely intended to illustrate the "skewing of legal doctrine that may be caused by an emotional pressure to get a more heartwarming particular result."²⁴⁴ Interestingly, these examples have been dropped from the official comments to the recently revised version of Section 2-302.²⁴⁵

The elimination of disclaimers as examples of unconscionable terms is not the only change in the recent revisions to Article 2 that strengthens Professor Leff's arguments. A number of revisions have been made to Section 2-316 to provide additional protection to consumers. For example, Section 2-316 has been revised to require that in a consumer contract evidenced by a record, the disclaimer must appear in the record.²⁴⁶ In addition, while under Prior subsection 2 all that was required was that the language of the disclaimer mention merchantability, the language required in the current version is much more explicit and must, in a consumer contract, state that "[t]he seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract."²⁴⁷ If anything, the detailed blueprint to which Professor Leff referred has become even more detailed and stringent in its protections, especially those for consumers.

The drafters of the most recent revisions apparently could not reach consensus on the issue of whether or not a disclaimer complying with Section 2-316 could be deemed unconscionable. During the drafting process of Article 2, language clarifying the applicability of Section 2-302 to Section 2-316 was added. A comment to the 2000 Annual Meeting draft provided that although in some instances a term could be deemed unconscionable based on substantive (as opposed to procedural) unconscionability, a court "ought not, on the basis of substantive unconscionability alone, refuse to enforce a term disclaiming an

240. *Id.*; see U.C.C. § 2-316 (2004).

241. See, e.g., M.P. Ellinghuas, *In Defense of Unconscionability*, 78 YALE L.J. 757, 793-803 (1969); Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT L. REV. 199, 223-24 (1985).

242. U.C.C. § 2-302(1).

243. Leff, *supra* note 235, at 525.

244. *Id.* at 527.

245. See U.C.C. § 2-302 cmts. 1-3.

246. *Id.* § 2-316(3)(a); see also *id.* § 2-316(2) ("[T]o exclude or modify the implied warranty of merchantability . . . in a consumer contract the language must be in a record [and must] be conspicuous . . ."). In the previous version, disclaimers in consumer contracts could be oral. See Prior U.C.C. § 2-316.

247. *Id.* § 2-316(2).

implied warranty that complies with the requirements of Section 2-316.”²⁴⁸ However, this language was omitted in the May 2001 draft,²⁴⁹ apparently due to lack of consensus,²⁵⁰ and ultimately was not included in the final draft.²⁵¹ Such lack of consensus, along with the deletion of the disclaimer examples from the official comment, is sufficient to create hesitancy in using unconscionability as a tool for policing disclaimers.

Additionally, Article 2 contemplates that disclaimers of warranties may be governed, at least in some instances, exclusively by the relevant section describing the requirements for such disclaimers and not by any other section of Article 2. This is the situation alluded to in an official comment to Section 2-312, which provides for the creation of warranties of title or against infringement. Section 2-312 provides that such a warranty is disclaimed or modified “only by specific language or by circumstances that give the buyer reason to know” that such warranties are disclaimed or modified.²⁵² The section is described in an official comment as a “self-contained provision that governs the modification or disclaimer of warranties” of title or against infringement.²⁵³ The comment then immediately references Section 2-316, noting that “the warranties in this section [Section 2-312] . . . are not subject to the . . . disclaimer provisions of Section 2-316(2) and (3).”²⁵⁴ Although Section 2-316 is not itself described as a self-contained provision,²⁵⁵ a fair inference from the official comment is that just as Section 2-312 is intended as the exclusive provision on disclaiming warranties of title, Section 2-316 is intended as the exclusive provision on disclaiming

248. See U.C.C. § 2-302 cmt. 1, 2000 Annual Meeting Draft, *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited Oct. 28, 2004). An explanation in the Prefatory Note provided that the language recognized that disclaimers meeting the requirements of Section 2-316 could still be held unconscionable “under the traditional test (this has not been recognized by all courts).” See Prefatory Note, at III.4, 2000 Annual Meeting Draft, *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited Oct. 28, 2004).

249. U.C.C. § 2-302, American Law Institute Tentative Draft, May 2001, *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited Oct. 28, 2004).

250. An explanatory comment indicates that at “its final meeting, the Drafting Committee . . . decided not to amend the original Official Comment if consensus could not be reached.” Prefatory Note: Unconscionability, American Law Institute Tentative Draft, May 2001, *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited Oct. 28, 2004).

251. See U.C.C. § 2-302.

252. *Id.* § 2-312(3).

253. *Id.* § 2-312 cmt. 6.

254. *Id.*

255. See *id.* § 2-316. That the drafters would make clear that Section 2-312 is self-contained but make no such reference in Section 2-316 does not in any way undermine the claim that Section 2-316 is also self-contained. The language in Section 2-312 is intended to indicate that reference need not be made to Section 2-316, which deals with disclaimers of warranties. See *id.* § 2-312 cmt. 6. There would be, of course, no logic in Section 2-316 containing such a statement.

warranties of merchantability.²⁵⁶ Additionally, there is no logical reason to insulate disclaimers of warranties of title from the provisions on unconscionability without doing the same for disclaimers of the implied warranty of merchantability.

Finally, the drafters made clear that a limitation of remedies for breach of warranty (as opposed to a disclaimer or exclusion) is subject to other provisions, including the provision on unconscionability.²⁵⁷ Had they intended the same to be true of disclaimers, they presumably would have indicated as much.

I do not go so far as to say that disclaimers complying with Section 2-316 are completely exempt from any consideration of unconscionability. The language of Section 2-302 permits a court to find a contract, as opposed to just a term of it, to be unconscionable. In making a determination that a contract is, in its entirety, unconscionable, a court may of course consider a term disclaiming the implied warranty of merchantability in combination with the other terms as well, even if that term complies with Section 2-316.

I note as well that the inapplicability of Section 2-302 to disclaimers that comply with Section 2-316 eliminates another related approach to assessing warranty disclaimers. That approach, advocated in general by Professor Robert Hillman (though not directly with respect to warranty disclaimers), is that terms in a rolling contract should be assessed no differently from terms in any type of standard form contract—thus, effect should be given to bargained for terms and to boilerplate terms which are conscionable.²⁵⁸ That test may indeed be appropriate for most types of boilerplate, but the test's reliance on unconscionability makes its application to warranty disclaimers problematic for the reasons discussed in this subsection of the Article. As Section 2-316 demonstrates, there is something different about warranty disclaimers and that section should be used to analyze and assess them.

In short, unconscionability either does not apply to, or is an ill fit with, Section 2-316. Thus, the task of policing the timing of the presentation of a disclaimer should not be left to unconscionability.

3. Revised Section 2-207

Revised Section 2-207 provides a possible, but less than optimal, means for assessing disclaimers in rolling or layered contracts. Professor Linda Rusch, who was involved with the drafting of the Article 2 revisions, described the changes to Section 2-207 as “[p]erhaps the most dramatic revision” made to

256. Additionally, it would not be logical to insulate disclaimers of the implied warranty of title or against infringement from the provisions on unconscionability without also doing the same for disclaimers of the implied warranty of merchantability, either.

257. Section 2-316(4) provides that remedies can be limited in accordance with other provisions in Article 2 on liquidation of damages and limitation of damages. The provision on limitation of damages expressly references unconscionability. U.C.C. § 2-719(3).

258. See Hillman, *supra* note 2, at 755–58.

Article 2.²⁵⁹ Unlike Prior Section 2-207 (the “battle of the forms” provision), the revised version governs the terms of a contract regardless of how it is formed.²⁶⁰ The revised version provides that the terms of a contract are as follows:

- (a) terms that appear in the records of both parties;
- (b) terms, whether in a record or not, to which both parties agree; and
- (c) terms supplied or incorporated under any provision of [the U.C.C.].²⁶¹

Section 2-207 thus purports to provide a straightforward test for determining a contract’s terms. Unfortunately, the drafters explicitly refused to give any guidance as to how to apply these provisions to rolling or layered contracts. For instance, the official comments indicate that the section “omits any specific treatment of terms attached to the goods, or in or on the container in which the goods are delivered.”²⁶² Further, the drafters purport to take no position on whether courts should follow the reasoning of cases rejecting rolling contracts or the reasoning of cases approving of such contracts.²⁶³

Additionally, revised Section 2-207 may give less protection to consumers, who will rarely send a record as a part of a transaction, than it does to commercial parties, who are much more likely to each use a record in a transaction. An official comment indicates that when only the offeror makes use of a form, such as a purchase order, performance by the offeree “should normally” be construed as acceptance of all terms contained in the offeror’s form.²⁶⁴ The performance of keeping the good past the return period in a typical consumer rolling contract could thus well be construed as acceptance of all terms in a seller’s record, since the buyer is unlikely to have sent a record. In contrast, performance by an offeree is not normally construed as acceptance of all the offeror’s terms when the offeree sends its own record with terms that conflict or are inconsistent with terms in the offeror’s record.²⁶⁵ Of course, a consumer could gain this protection by sending a record of his or her own, and may be well advised to do so,²⁶⁶ but it is unlikely many consumers will. Thus, applying Section 2-207 to assess warranty disclaimers in rolling contracts would result in the anomalous situation of under protection of unwary consumer purchasers—a result at odds with the purposes of warranty disclaimers.²⁶⁷

259. Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 DEL. L. REV. 41, 56 (2003).

260. *See* U.C.C. § 2-207.

261. *Id.*

262. *Id.* § 2-207 cmt. 5.

263. *Id.*

264. *Id.* § 2-207 cmt. 3.

265. *Id.*

266. *See* Wladis, *supra* note 36, at 1017.

267. *See, e.g.,* Pay Tel Sys., Inc. v. Seiscor Techs., Inc., 850 F. Supp. 276, 281 (S.D.N.Y. 1994) (noting warranty of merchantability is “cornerstone of commercial law in dealings between merchants as well as with consumers”).

Further, revised Section 2-207 apparently provides no basis for distinguishing among different types of terms. That is, under Prior Section 2-207, terms additional to those in the offer or agreement become part of an agreement between merchants unless, among other things, they materially alter the agreement.²⁶⁸ An official comment to Prior Section 2-207 listed examples of clauses that would normally “materially alter” the agreement,²⁶⁹ and those that ordinarily would not.²⁷⁰ This guidance enables a court to treat different types of terms differently (and, indeed, warranty disclaimers are the first type of term listed as one that would ordinarily materially alter the agreement).²⁷¹ The revised version fails to make a distinction among different types of terms,²⁷² a failure that does not fully reflect the purposes of the restrictions on warranty disclaimers.

And, finally, use of revised Section 2-207 to assess warranty disclaimers in rolling contracts must await widespread acceptance and adoption of the Article 2 revisions. The test I propose does not have this problem, since it is based on language found in both the newly revised and the prior versions of Article 2.

III. “UNLESS THE CIRCUMSTANCES INDICATE OTHERWISE”²⁷³

The test I propose for assessing the context of a disclaimer is based on the “unless the circumstances indicate otherwise” language which begins Section 2-316(3)(a) and which qualifies the effectiveness of disclaiming language.²⁷⁴ This test has thus far only been used to assess the effectiveness of “as-is” disclaimers and has not been used to assess the timing of a disclaimer. In this Part of the Article, I argue that all disclaimers should be subject to that language and that it provides the most appropriate test to assess disclaimers of the implied warranty of merchantability in rolling contracts. I focus on two major issues. First, I address the scope of the applicability of this language, arguing that it applies to all disclaimers of implied warranties of merchantability and not just a narrow class of them. Second, I present arguments based on Article 2 and case law interpreting this language to support the proposition that the test is well suited to the task of assessing the validity of disclaimers of the implied warranty of merchantability in rolling or layered contracts.

A. *Scope of Applicability*

One of the impediments to the use of conspicuousness to assess disclaimers is, as discussed, that the conspicuousness requirement does not apply to all written disclaimers.²⁷⁵ In this subsection of the Article, I address whether the “unless the circumstances indicate otherwise” qualification applies to all disclaimers. I conclude that it does.

268. Prior U.C.C. § 2-207(2)(b).

269. *Id.* § 2-207 cmt. 4.

270. *Id.* § 2-207 cmt. 5.

271. *Id.* § 2-207 cmt. 4.

272. *See* U.C.C. § 2-207 (2004).

273. For an excellent overview of the drafting history of this language, see Robertson, *supra* note 186, at 15–21.

274. U.C.C. § 2-316(3)(a).

275. *See* discussion *supra* Part II.A.3.

The “unless the circumstances indicate otherwise” language appears in subsection 3(a), which deals with “as-is” and other similar disclaimers. Its placement in subsection 3(a) gives rise to the question whether this language also applies to disclaimers described in subsection 2. Subsection 2, as described earlier, contains its own guidance and tests as to how to disclaim the implied warranty of merchantability (requiring in some instances, for example, that a disclaimer be conspicuous), but subsection 2 does not include any language about “unless the circumstances indicate otherwise.”²⁷⁶ This omission creates an immediate potential impediment to examining what the “circumstances indicate” to assess disclaimers since a requirement to examine such circumstances may only be implicated in a narrow category of disclaimers.

However, the “unless the circumstances indicate otherwise” qualification, does apply to disclaimers under subsection 2, and not just to “as-is” disclaimers under subsection 3(a). An official comment added during the recent revisions of Article 2 indicates that subsection 3(a) sets forth the “general test” for disclaimers of the implied warranty of merchantability, while subsection (2) provides “more specific tests.”²⁷⁷ The official comment thus conceives of subsection 3 as an overarching test. Indeed, although some subsections are described as exceptions to the general rule of subsection 3(a), subsection 2 is not so described.²⁷⁸

Further, subsection 2 begins by stating that it is “[s]ubject to subsection (3)”²⁷⁹ before setting forth its specific tests. Similarly, subsection 3 begins with a statement indicating that its provisions apply “[n]otwithstanding subsection (2).”²⁸⁰ As one court has noted, this language highlights that subsection 3(a) is intended to limit the application of subsection 2.²⁸¹ Further, an official comment provides that a “disclaimer that satisfies the requirements of subsection (3)(a) need not also satisfy any of the requirements of subsection (2).”²⁸² There is no corresponding statement that a disclaimer satisfying subsection (2) need not also satisfy the requirements of subsection 3(a). This silence makes it reasonable to assume that a disclaimer satisfying subsection 2 is not exempt from the requirements of subsection 3(a), including the qualifying language “unless the circumstances indicate otherwise.”²⁸³

276. See U.C.C. § 2-316(2).

277. *Id.* § 2-316 cmt. 2.

278. *Id.* § 2-316 cmt. 6.

279. *Id.* § 2-316(2).

280. *Id.* § 2-316(3).

281. *Lefebvre Intergraphics, Inc. v. Sanden Mach. Ltd.*, 946 F. Supp. 1358, 1363 (N.D. Ill. 1996).

282. U.C.C. § 2-316 cmt. 2.

283. *But see generally* Robertson, *supra* note 186, at 137 (concluding that subsection 2 provides a safe harbor for disclaimers where compliance with the requirements makes a disclaimer effective regardless of other circumstances). An argument that the language “[u]nless the circumstances indicate otherwise” also modifies subsection 2 was made but not ruled upon in *Mid Continent Cabinetry, Inc. v. George Koch Sons, Inc.*, No. 87-1248-C, 1991 WL 151074 (D. Kan. July 11, 1991).

In sum, the “unless the circumstances indicate otherwise” language is, and should be, a required part of the analysis in assessing all disclaimers, and not just “as-is” disclaimers.

B. Meaning of “Circumstances”

In this section, I argue that “circumstances” include anything about the context of a transaction that puts a buyer off guard as to the existence or full effect of a warranty disclaimer. A disclaimer is not effective when the “circumstances are such that the clause does not give the buyer reason to know that he or she was surrendering a warranty.”²⁸⁴ The official comments to Section 2-316 and to other sections support this proposition, as does case law addressing what the term “circumstances” means in this context.

1. Official Comments

Neither the official comments to nor the text of Article 2 specify exactly what the term “circumstances” means in the context of subsection 3(a). The comments, however, provide some guidance. For instance, the exceptions to the general rule set forth in subsection 3(b) (which deals with exclusion of warranties when a buyer performs an examination)²⁸⁵ and subsection 3(c) (which provides for disclaimer by course of dealing or usage of trade)²⁸⁶ are described as 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.”²⁸⁷ Conversely, then, the circumstances referenced in subsection 3(a) should include any which might distract a buyer or put a buyer off guard as to the existence or effect of a disclaimer.

Protecting against circumstances that put a buyer off guard as to the existence or effect of a disclaimer is also consistent with the purpose of Section 2-316. That purpose is to safeguard buyers against unexpected disclaimers and permit exclusions only by language “or other circumstances” that protect the buyer from surprise.²⁸⁸ Further, where the circumstances of a disclaimer do not adequately inform a purchaser about a warranty disclaimer, that negation can hardly be said to be “unmistakabl[e],” as such negations are required to be.²⁸⁹

That “circumstances” should be construed broadly is also suggested by an official comment inviting examination of the status of the parties and the nature of the negotiations. According to the comment, nothing in subsection 3(a) is meant to deny effectiveness to disclaiming language other than that specified in the

284. LAWRENCE, *supra* note 85, at § 2-316:171.

285. U.C.C. § 2-316(3)(b).

286. *Id.* § 2-316(3)(c).

287. *Id.* § 2-316 cmt. 6.

288. *Id.* § 2-316 cmt. 1; *accord id.* § 2-314 cmt. 13 (“[T]he warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.”).

289. *Id.* § 2-313 cmt. 3.

subsection “in appropriate circumstances, as when the term is a negotiated term between commercial parties.”²⁹⁰ Although this comment is not directly relevant (since it merely clarifies the type of language acceptable in an “as-is” disclaimer), it at least suggests a possible conclusion that where a disclaimer is not only unbargained for but rather “slipped in” by a post-purchase disclaimer in a transaction, circumstances making the imposition of a warranty disclaimer appropriate are not present. This invitation to consider negotiations contrasts starkly with the lack of such an invitation in the section defining conspicuousness.²⁹¹

2. Case Law Interpreting “Circumstances”

Case law interpreting “circumstances” also supports the argument that the key inquiry is whether a purchaser was put off guard as to the existence or effect of a warranty. As one court noted, an “as-is” disclaimer is ineffective “when the circumstances are such that the clause would not give the buyer reason to know that he was surrendering a warranty.”²⁹² Disclaimers are permitted only if the transaction and its context are such that the buyer “reasonably understands” that warranties are being disclaimed.²⁹³ Where there is no such reasonable understanding, circumstances indicate that the disclaimer should not be given effect.

For instance, in *Knipp v. Weinbaum*, the court reversed the decision of the trial court that had granted summary judgment in favor of a seller of a used motorcycle.²⁹⁴ The seller had argued that the warranty of merchantability was excluded by language that the motorcycle was sold “as-is.”²⁹⁵ In reversing the trial court’s grant of summary judgment for the seller, the court noted that the language “unless the circumstances indicate otherwise” precluded a finding that “automatic absolution can be achieved in the sale of used consumer goods merely by the inclusion in a bill of sale of the magic words ‘as-is.’”²⁹⁶ Since there was conflicting evidence as to the intended meaning of the disclaimer, including evidence that the buyer thought that the disclaimer only applied to minor defects, summary judgment was inappropriate.²⁹⁷ The purchaser’s reasonable understanding of the transaction thus becomes a crucial aspect of the circumstances to be assessed.

When something about the context of a transaction puts a buyer off guard as to the effect or existence of a warranty, circumstances indicate that a disclaimer

290. *Id.* § 2-316 cmt. 5.

291. *See* U.C.C. § 1-201(b)(10) (2004).

292. *Nick Mikalacki Constr. Co. v. M.J.L. Truck Sales, Inc.*, 515 N.E.2d 24, 26 (Ohio Ct. App. 1986) (citation omitted).

293. *Knipp v. Weinbaum*, 351 So. 2d 1081, 1084–85 (Fla. Dist. Ct. App. 1977).

294. *Id.* at 1086.

295. *Id.* at 1085.

296. *Id.* at 1084.

297. *Id.* at 1085; *accord* *Maritime Mfrs. Inc. v. Hi-Skipper Marina*, 483 N.E.2d 144, 146 (Ohio 1985); *cf.* *Masker v. Smith*, 405 So. 2d 432, 434 (Fla. Dist. Ct. App. 1981) (holding that summary judgment for seller who had used disclaiming language was proper in the absence of any evidence of a conflict about the intended meaning).

should not be given effect. For instance, in *Murray v. D & J Motor Co.*,²⁹⁸ an Oklahoma appellate court included among the circumstances to be considered under subsection 3(a) “fraudulent representations or misrepresentations concerning condition, value, quality, characteristics or fitness of the goods” relied upon by the buyer.²⁹⁹ In *Murray*, the buyer of an allegedly defective automobile presented evidence that the salesperson had told her that it would provide reliable transportation and that there was “nothing wrong” with the car or the engine.³⁰⁰ Even though there was a disclaimer, the court held that the evidence at trial, including the salesperson’s comments, was sufficient to withstand defendant’s demurrer.³⁰¹

Circumstances short of fraud or misrepresentation may also put a buyer off guard as to the existence of a warranty. If the parties intended the language to mean something other than a warranty waiver, circumstances indicate that the disclaimer should not be given effect.³⁰² Additionally, the manner in which the disclaimer is presented by the seller can also give rise to a circumstance indicating that a disclaimer should not be given effect. For instance, in *K & M Joint Venture v. Smith International, Inc.*, the Court of Appeals for the Sixth Circuit affirmed a finding that circumstances indicated that a disclaimer should not be given effect.³⁰³ Among the evidence supporting the trial court’s finding was the seller’s failure to use its usual sales contract (which spelled out the warranties and limitations in detail).³⁰⁴ And in *Gindy Manufacturing Corp. v. Cardinale Trucking Corp.*, in which the court referred both to the “unless the circumstances indicate” language and the requirement that disclaiming language make plain that there is no warranty, an “as-is” disclaimer was deemed ineffective based on a number of aspects of the transaction.³⁰⁵ At the beginning of the form contract, even before the disclaimer or the description of the new vehicle being purchased, was a statement that the buyer accepted “delivery in good condition,”³⁰⁶ and this arrangement of information presumably put the buyer off guard as to the existence of the disclaimer.³⁰⁷ Further ambiguity was created by the seller’s decision to use a form which applied to both new and used vehicles since a buyer could “reasonably expect” that the “as-is” disclaimer applied only to the purchase of a used vehicle and not to the purchase of a new one.³⁰⁸

298. 958 P.2d 823 (Okla. Civ. App. 1998).

299. *Id.* at 830.

300. *Id.* at 827.

301. *Id.* at 830.

302. *Maritime Mfrs.*, 483 N.E.2d at 145.

303. 669 F.2d 1106, 1111 (6th Cir. 1982).

304. *Id.*

305. 268 A.2d 345, 350, 354 (N.J. Super. Ct. Law Div. 1970), *overruled on other grounds*, *Ramirez v. Autosport*, 440 A.2d 1345 (N.J. 1982).

306. *Id.* at 353.

307. *See id.* at 354.

308. *Id.* Courts have been hesitant to apply U.C.C. § 2-316(3)(a) to the purchase of new, as opposed to used, goods. *See* Richard C. Ausness, *Replacing Strict Liability With a Contract-Based Products Liability Regime*, 71 TEMP. L. REV. 171, 203 (1998).

The general context and nature of a transaction, too, may give rise to a circumstance indicating that a disclaimer should not be given full effect. For instance, in *Alpert v. Thomas*, the court held that a disclaimer in a contract for the sale of a horse was not effective because the “circumstances indicate[d] otherwise.”³⁰⁹ The court looked to the nature of the transaction and the course of negotiations in determining that it was the custom in the type of transaction at issue that when a seller knows of a buyer’s intent to use the horse for breeding, an implied warranty exists that the horse will fulfill that purpose, notwithstanding any disclaiming language.³¹⁰ The key point of these cases is that the buyer’s understanding of a transaction, as long as it is reasonable, as well as the structure and nature of the transaction, should be considered a “circumstance” in assessing whether a disclaimer should not be given effect.

Furthermore, unlike conspicuousness, which is a question of law for the court,³¹¹ the determination of what the circumstances indicate is one for the trier of fact.³¹² Thus, the assessment of what is a reasonable understanding of a given transaction is properly left to the jury. The many practical and policy concerns inherent in permitting the court to make broad contextual determinations under the conspicuousness rubric³¹³ are thus avoided.

IV. APPLICATION OF THE TEST TO A TYPICAL CONSUMER PURCHASE

The test I propose will not always result in a post-purchase or post-order disclaimer being deemed ineffective. In some transactions, such as those involving sophisticated entities or those in which it is clear that consideration of major terms of the deal will continue after purchase or order, it may be perfectly appropriate for terms to be provided in “batches.” In this Part, I discuss how the test might apply in a typical consumer transaction. I conclude that, ordinarily, a disclaimer presented after purchase or order should not be effective under the “unless the circumstances indicate otherwise” test.

A. *Consumer Expectations When Purchase or Order Passes Without Disclosure of a Disclaimer*

As discussed in the previous section, a buyer’s reasonable understanding of a transaction and whether the structure of the transaction creates confusion as to whether a warranty is being disclaimed are relevant circumstances in assessing the validity of a disclaimer. Further, a buyer expects all key product description to be

309. 643 F. Supp. 1406, 1417 (D. Vt. 1986).

310. *Id.*

311. U.C.C. § 1-201(b)(10) (2004).

312. *See, e.g., Knipp v. Weinbaum*, 351 So. 2d 1081, 1084–85 (Fla. Dist. Ct. App. 1977) (indicating that, in circumstances of the case, summary judgment was inappropriate given disputed issues of fact on question of “circumstances” making disclaimer potentially ineffective); *Maritime Mfrs., Inc. v. Hi-Skipper Marina*, 483 N.E.2d 144, 145–46 (Ohio 1985) (designating the intended meaning of purported disclaimer as a question of fact); *Murray v. D & J Motor Co.*, 958 P.2d 823, 830 (Okla. Civ. App. 1998) (indicating jury is to resolve issue of whether fraud prevented exclusion of implied warranties).

313. *See discussion supra* Part II.A.4.

presented at the same time, and warranty information *is* key product description. Thus, when the time of purchase or order passes without disclosure of a disclaimer, a purchaser is put off guard as to the existence and effect of a later disclaimer. Circumstances thus indicate that the disclaimer should generally not be given effect.

I. Function over Form in Rolling Contracts

A focus on the moment of formal contract formation quite literally “misses the point.” What should matter is not the point of contract formation, but the point at which a buyer would reasonably think a disclaimer, if any, was going to be a part of the deal. Sometimes those points will be the same, but not always. When they are different, the functional should take precedence over the formal in assessing the effectiveness of disclaimers.

The inherent structure of a rolling or layered contract, in which the time of technical acceptance is deferred until much later than a purchaser might expect, gives rise to a reasonable belief by the purchaser that a disclaimer is not a part of the transaction. As already discussed, in a rolling or layered contract, the terms of the contract do not become effective until sometime after the purchase or order and, indeed, after the time the purchaser takes possession of the good.³¹⁴ While this Article does not directly assess the validity of non-disclaimer contract terms which are rolled or layered into a transaction, I do note that to the extent there has been judicial resistance to rolling or layered contracts, it often focuses on the failure of those cases to realistically reflect the purchaser’s understanding of the transaction.³¹⁵ A purchaser, and especially a consumer, generally presumes that the contract was complete at the time of purchase, order, or taking possession of the good. The technical moment of consummation is not crucial—in fact, it is de-emphasized by Article 2.³¹⁶

The focus on the moment of consummation is particularly inappropriate when it comes to implied warranties of merchantability, since such a warranty has been held to come into existence even before technical consummation and is certainly not dependent on formal consummation of a contract.³¹⁷ A buyer’s reasonable expectations thus do not necessarily hinge on the moment of technical contract consummation.

314. See discussion *supra* Part I.A.

315. See, e.g., *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000) (noting that in a typical consumer transaction the purchaser is the offeror and the seller is the offeree); cf. *Novell, Inc., v. Network Trade Ctr., Inc.*, 25 F. Supp. 2d 1218, 1230 n.17 (D. Utah 1997) (discussing cases rejecting validity of shrink-wrap licenses).

316. See U.C.C. § 2-204(2) (providing that an agreement may be found “even if the moment of its making is undetermined”).

317. See, e.g., *Porter v. Pfizer Hosp. Prods. Group, Inc.*, 783 F. Supp. 1466, 1472 (D. Me. 1992) (accepting, in a claim for breach of the implied warranty of merchantability, plaintiff’s claim that a sale of a medical implant had been completed even though the plaintiff had not yet been billed for or paid for the implant); see generally Annotation, *What Constitutes a Contract for Sale Under Uniform Commercial Code § 2-314*, 78 A.L.R.3d 696 (1977) (collecting cases that demonstrate the broad range of circumstances in which courts have found sales to have occurred).

The timing of the creation of express warranties under Section 2-313 also provides useful guidance in assessing the effectiveness of post-purchase disclaimers and on the relative lack of importance on the time of formal contract consummation on the creation of warranties. Section 2-313 states that the “precise time when words of description or affirmation . . . or samples [which would otherwise create an express warranty] are shown is not material,” and further states that the “sole question is whether the language or samples or models are fairly to be regarded as part of the contract.”³¹⁸ Given that disclaimers are disfavored,³¹⁹ it would make little sense to provide buyers with less protection against disclaimers than sellers receive with respect to statements giving rise to express warranties.

In their treatise, Professors James White and Robert Summers conclude that this official comment³²⁰ contemplates giving effect only to statements presented during “face-to-face dealings while the deal is still warm.”³²¹ According to this commentary, seller’s statements made more than a short while after the agreement is closed should not give rise to express warranties³²²—they are simply too late. Of course, to conclude that this commentary supports the proposition that disclaimers must also be presented when the deal is warm requires an assumption that the deal is completed at or near the time of purchase (and not after a review and return period as articulated in cases adopting the theory of the rolling or layered contract). Again, however, the focus seems to be on the functional, not the formal. The comment references “the closing of the deal” and not the formal consummation of the contract—indeed, the comment indicates that the inquiry is whether or not the language, samples, or models are “fairly to be regarded” as part of the contract, not whether they technically are.³²³

It is unlikely that a disclaimer disclosed after possession is taken of a good is “fairly to be regarded” as part of the contract. The bargain, as the parties understand it, may conclude at a different point than did the contract. For instance, in *Autzen v. John C. Taylor Lumber Sales*, the court noted that “bargain” and “contract” are different concepts and that a bargain could extend beyond the time of contract consummation.³²⁴ In *Autzen*, although a sale had been completed, a description could still be part of the basis of the bargain (and hence give rise to an express warranty) since the “bargain was still in process”³²⁵—the buyer had not yet taken possession of the boat and the time of payment and transfer of possession had still to be determined.³²⁶

But a bargain could also just as easily conclude, at least with respect to what may “fairly be regarded” as part of the deal, *before* the contract is technically completed, and not just after, as in *Autzen*. Where possession has been taken of the

318. U.C.C. § 2-313 cmt. 9.
 319. *See supra* note 124.
 320. Or, more precisely, its nearly identical predecessor, Prior U.C.C. § 2-313 cmt. 7.
 321. WHITE & SUMMERS, *supra* note 185, at § 9-5.
 322. *Id.*
 323. U.C.C. § 2-313 cmt. 9.
 324. 572 P.2d 1322, 1325 (Or. 1977).
 325. *Id.*
 326. *Id.* at 1325–26.

good without a disclaimer and where all major terms have been established, the bargain may be said to be complete even if the contract has yet to be technically consummated. The U.C.C. definitions make clear that the concept of an “agreement,” which is defined as the parties’ bargain in fact,³²⁷ differs from the concept of a “contract,” which refers to the final repository of all legal obligations between the parties.³²⁸ The bargain in fact could thus, consistent with these definitions, be formed before the contract was consummated while some legal obligations (though presumably not any significant terms of the deal) are yet to be determined. To be fairly considered part of the deal, then, a disclaimer would have to be presented when the bargain was still forming (“while the deal is still warm”³²⁹) and not after. Further, the official comment indicates that language presented after the deal is closed, as when “delivery is being taken” (indicating that by delivery it is generally “too late” for something to be fairly considered part of the deal), must also meet the requirements for a modification.³³⁰ Given those requirements, only a “handful of all the possible post-deal warranties” would be validated.³³¹ Analogously, a post-deal disclaimer should also rarely be validated.

In sum, purchasers reasonably expect that key product information will be disclosed at or prior to purchase, and such expectations are quite relevant to determining whether the “circumstances indicate” a disclaimer should not be given effect. In the next section, I develop more fully the argument that warranty disclaimers are key product information and are the exact type of information a buyer expects before or at purchase.

2. Warranty Information and Disclaimers Are Key Product Information

A consumer ordinarily expects that even if some “fine print” regarding matters like arbitration, choice of forum, and so forth, may accompany a purchased item, critical product description regarding the good and its quality will be presented at the time of purchase or order since such information is needed for an informed choice about a purchase. A warranty disclaimer, far from being fine print, *is* key product description that a buyer needs to assess a purchase meaningfully. Warranty disclaimers are not, as the *ProCD* court observed, mere “ordinary” provisions, but require special prominence³³² (making them the opposite of “fine print”). The existence of an implied warranty of merchantability is taken for granted³³³ and disclaimers are disfavored in the law.³³⁴ Thus, if there is to be a disclaimer, it should be made at the time of purchase or order.

327. U.C.C. § 1-201(b)(3) (2004).

328. *Id.* § 1-201(b)(12).

329. WHITE & SUMMERS, *supra* note 185, at § 9-5.

330. U.C.C. § 2-313 cmt. 9 (2004). Professor White and Summers take the position that a disclaimer presented after the deal is closed should also have to satisfy the same requirements for a modification. WHITE & SUMMERS, *supra* note 185, at § 12-5, at 640.

331. WHITE & SUMMERS, *supra* note 185, at § 9-5.

332. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996).

333. U.C.C. § 2-314 cmt. 13.

334. *See Sierra Diesel Injection Serv., Inc., v. Burroughs, Corp.*, 890 F.2d 108, 113 (9th Cir. 1989); *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1084 (Ind. 1993); *Miller v. Badgley*, 753 P.2d 530, 535 (Wash. Ct. App. 1988).

For instance, in *Gideon Service Division v. Dunham-Bush, Inc.*,³³⁵ the court refused to enforce a disclaimer which was not made at the time plaintiff placed an order for the good, a time at which the disclaimer would have been, according to the court, of substantial import to plaintiff's understanding of the rights and the obligations that it incurred when making the order.³³⁶ Similarly, buyers generally expect, unless told to the contrary before purchase, that any goods purchased from a merchant will be usable and "undoubtedly rel[y] on this expectation in agreeing to purchase the goods."³³⁷

Information regarding a warranty disclaimer is crucial product information and description. The implied warranty of merchantability is a representation as to what the goods are—that they are, at a minimum, fit for their ordinary purposes and that they will pass without objection in the trade.³³⁸ Additionally, the implied warranty of merchantability provides that the good will actually conform to any other description of the product on the packaging.³³⁹

That warranty disclaimers are part of the core attributes of product quality whose timely disclosure is of crucial importance to purchasers is also reflected in an official comment to Prior Section 2-207. That comment lists a disclaimer of the warranty of merchantability as the first example of a clause which would normally "'materially alter' the contract and so result in surprise or hardship" if incorporated without express awareness of the provision.³⁴⁰ Further, that reference in the official comment to a warranty disclaimer resulting in surprise and hardship was actually describing a situation when the buyer was a merchant.³⁴¹ The surprise, presumably, would be even greater for an inexperienced non-merchant buyer, such as a consumer. Thus, one of the policy justifications for rolling contracts—that requiring merchants to present all information at the time of purchase or order would displace product information³⁴²—may be relevant to terms like arbitration clauses and choice-of-forum provisions, but it is simply beside the point when it comes to warranty disclaimers since disclaimers are the very type of product information expected to be provided "up front" in the transaction.

That a purchaser should expect any information relating to the disclaiming or exclusion of warranties to be provided before the contract is entered into is also reflected by a provision of Section 2-316 under which a warranty may not arise as a result of a buyer's examination of the goods.³⁴³ Under this provision, "if the buyer before entering into the contract has examined the goods . . . or has refused to examine the goods after a demand by the seller there is no implied warranty with regard to defects that an examination in the circumstances should

335. 400 N.E.2d 89 (Ill. App. Ct. 1980).

336. *Id.* at 91.

337. Michael J. Herbert, *Toward a Unified Theory of Warranty Creation Under Articles 2 and 2A of the Uniform Commercial Code*, 1990 COLUM. BUS. L. REV. 265, 279.

338. *See* U.C.C. § 2-314(2).

339. *Id.* § 2-314(2)(f).

340. Prior U.C.C. § 2-207 cmt. 4.

341. Whether a term materially alters a contract is only relevant to sales between merchants. *See id.* § 2-207(2).

342. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450–51 (7th Cir. 1996).

343. U.C.C. § 2-316(3)(b).

have revealed”³⁴⁴ This provision is only implicated when the information is acquired *before* the buyer enters into the contract. The benefit of an examination before entering into the contract is that a potential buyer has not yet taken possession of the goods and is not committed to the transaction—the buyer can walk away free and clear without any entanglements.³⁴⁵ Such is not the case once a buyer has received or taken possession of the goods in a rolling contract. After delivery, purchasers are psychologically and financially committed to the transaction, having invested a large amount of time and money before making an order and, as a result, are at least somewhat less likely to consider making a change or to attend to additional terms.³⁴⁶ As one court noted in assessing a provision that gave the purchaser a right to return software if the license terms were not acceptable, the vendor may have been:

[R]elying on the purchaser’s investment in time and energy in reaching this point in the transaction to prevent the purchaser from returning the item. Because a purchaser has made a decision to buy a particular product and has actually obtained the product, the purchaser may use it despite the refund offer, regardless of the additional terms specified after the contract formed.³⁴⁷

Further, returning the item and finding a substitute imposes “switching costs” that may make enforcement inefficient.³⁴⁸ The buyer’s various commitments to the purchase may thus serve as a strong deterrent to actually taking advantage of a right to return the good. The review and return period in a rolling contract is thus very different from the examination before entering into a contract. It is conceptually more similar to an “inspection before acceptance,”

344. *Id.*

345. *See* 1 WILLIAM D. HAWKLAND, HAWKLAND UNIFORM COMMERCIAL CODE SERIES § 2-316:4 (2002) (expressing that potential buyer has the ability to “walk away from the deal” and simply not enter into it).

346. *See* *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 766 (D. Ariz. 1993); *cf.* Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1807 (2000) (arguing, among other things, that delaying disclosure of contract terms until after the time of purchase should be considered a deceptive trade practice, akin to “bait and switch” techniques); Jane M. Rolling, *The UCC Under Wraps: Exposing the Need for More Notice to Consumers of Computer Software with Shrinkwrapped Licenses*, 104 COM. L.J. 197, 226–27 (1999) (discussing costs and disincentives inherent in returning purchased items). *But cf.* *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (App. Div. 1998) (stating that although returning goods to avoid contract formation entails affirmative action and expense, this “may be seen as a trade-off for the convenience and savings” of avoiding on-site retail shopping).

347. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 102 (3d Cir. 1991).

348. *Peerless Wall & Window Coverings, Inc., v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 528 (W.D. Pa. 2000) (*dicta*); *cf.* *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (noting that if consumers had no indication of additional terms before opening the box an argument might be possible that consumers would be dissuaded from returning the product due to shipping charges, though the court notes that damages in such a case might not exceed the cost of shipping).

which an official comment specifically notes differs from the examination before entering into the contract and which does not prevent a disclaimer from arising.³⁴⁹

Additionally, when Section 2-316 was revised, language was added making clear that warranties may be excluded by the failure to make an examination, but only if the seller makes a “demand” that the examination be made.³⁵⁰ Such a demand must “place the buyer on notice that the buyer is assuming the risk of defects which the examination ought to reveal.”³⁵¹ This comment provides an interesting indication that a seller claiming that a warranty is excluded by a buyer’s inaction must meet a high burden of ensuring that the buyer understood up front the full consequences of his inaction and its precise implications on warranty disclaimers since otherwise the “circumstances surrounding the transaction” would presumably not be “sufficient to call the buyer’s attention” to the exclusion.³⁵² Requiring that a disclaimer be presented to a consumer before purchase is thus an appropriate “precaution” to prevent surprise at a later exclusion of the warranty of merchantability,³⁵³ which will often purport to take effect based only on a buyer’s inaction in failing to return the purchased item.

That information limiting obligations that arise under Article 2 should be provided at the time of purchase or with the product description is also demonstrated by two new sections in Article 2 that deal with obligations to a remote purchaser in a normal distribution chain. Section 2-313A addresses situations in which a manufacturer sells goods to a retailer and includes within the packaging a record setting forth any obligations owed by the manufacturer to the purchaser who buys the goods from the retailer.³⁵⁴ For instance, an “affirmation of fact or promise that relates to the goods” or “provides a description that relates to the goods” may give rise to an obligation that the goods will conform to that affirmation of fact, promise, or description.³⁵⁵ The remedies available for breach of these obligations may be limited or modified, but only “if the modification or limitation is furnished to the remote purchaser no later than the time of purchase or if the modification or limitation is contained in the record that contains the affirmation of fact, promise, or description.”³⁵⁶ In other words, any limitation must be presented at a point when it would be expected, and in “no event may it be furnished to the remote purchaser any later than the time of purchase.”³⁵⁷ Similarly, Section 2-313B deals with obligations to remote purchasers when such obligations are created by advertising or other communications directed to the public.³⁵⁸ Again, the seller can modify or limit remedies available to the remote purchaser if the

349. U.C.C. § 2-316 cmt. 6.

350. *Id.* § 2-316(3)(b). The previous version did not make clear that there was a demand requirement. Prior U.C.C. § 2-316(3)(b).

351. U.C.C. § 2-316 cmt. 6.

352. *Id.*

353. *See id.* § 2-314 cmt. 13.

354. *Id.* § 2-313A cmt. 1.

355. *Id.* § 2-313A(3).

356. *Id.* § 2-313A(5)(a).

357. *Id.* § 2-313A cmt. 7.

358. *Id.* § 2-313B cmt. 1.

modification or limitation is furnished no later than the time of purchase or “as part of the communication that contains the affirmation of fact, promise, or description.”³⁵⁹

Similarly, the status of warranty information as essential product information that a purchaser should expect at the time of purchase or order is also demonstrated by the design of the Magnuson-Moss Warranty Act³⁶⁰ and its regulations. Although the Magnuson-Moss Warranty Act does not require that consumer products be warranted, if a warranty is offered the Act requires full and conspicuous disclosure of the terms and conditions of any written warranty which is in fact offered³⁶¹ and requires that such information be made available “prior to the sale of the product.”³⁶²

Although “time of sale” is not defined, the regulations demonstrate that the emphasis is on providing warranty information at or before the time of purchase in conjunction with the presentation of other product information. For instance, a seller of a consumer product must either place the warranty “in close proximity to the warranted product”³⁶³ or furnish the warranty upon request “prior to sale.”³⁶⁴ If a seller chooses this latter approach, it must also place signs “in prominent locations” at the store (or in the relevant department of the store) to inform prospective buyers of the availability of the warranty.³⁶⁵

Similarly, the regulations provide that warrantors must provide sellers with copies of the warranties for each product or attach the warranty to the product, print the warranty on the product’s packaging, or provide a notice, sign, or poster, disclosing the text of the warranty.³⁶⁶ The regulations also provide that in a catalog or mail order solicitation, the disclosure of the warranty must be made “in close conjunction to the description of warranted product” or in an information section that is clearly referenced in close conjunction to the product’s description.³⁶⁷ It would be anomalous if information describing warranties being provided under federal law had to be presented before purchase, but information actually disclaiming warranties could be deferred until after purchase under Section 2-316.

That a purchaser expects that any disclaimer will be presented at the time of purchase is also reflected by the language used in the predecessor to the U.C.C., the Uniform Sales Act. Of course, the Uniform Sales Act no longer applies, but because Article 2 was intended as a “reenactment, modification and expansion”³⁶⁸ of the Uniform Sales Act, and the U.C.C. was not intended to “curtail . . . liability imposed by . . . [the Uniform Sales Act] upon sellers for breaches of warranty nor

359. *Id.* § 2-313B(5)(a).

360. 15 U.S.C. §§ 2301–2312 (2004).

361. *Id.* § 2302(a).

362. *Id.* § 2302(b)(1)(A).

363. 16 C.F.R. § 702.3(a)(1) (2003).

364. *Id.* § 702.3(a)(2).

365. *Id.*

366. *Id.* § 702.3(b)(1)(i).

367. *Id.* § 702.3(c).

368. *Vitomar Piece Dye Works v. Lawrence of London, Ltd.* 256 N.E.2d 135, 138 (Ill. App. Ct. 1969).

extend their power to disclaim or limit liability for such breaches,”³⁶⁹ language from the Uniform Sales Act may be instructive, especially in the area of warranties and disclaimers. Under the Uniform Sales Act, an implied warranty arose when the goods were “bought”³⁷⁰—an informal term connoting the point at which money is exchanged for the good in question. As one court observed, both historically and under the U.C.C., the time for determining the terms of the contract is when the “bargain is struck”³⁷¹—a point most consumers would likely understand to be the time at which the purchase or order is made.

Where the time of purchase or order passes without a disclaimer, a buyer is put off guard as to the likelihood or effect of a later disclaimer. In such a transaction, the buyer has a reasonable understanding that a disclaimer will not be given effect, an understanding created by the way the seller has structured the transaction and in the transaction’s context.

One final policy consideration also supports a requirement that a disclaimer be presented at a time when a buyer can walk away from the transaction without entanglement. One purpose served by the safeguards surrounding disclaimers of the implied warranty of merchantability is to create a disincentive to sellers to disclaim the warranty of merchantability by generating “embarrassment and hesitancy among disclaiming sellers by requiring them to parade their lack of faith in their own product before prospective buyers’ eyes.”³⁷² But no such broad display takes place in a delayed disclosure—the disclaimer is not exhibited to all potential buyers but instead only to those who have already made an initial decision to proceed with the transaction. Requiring sellers to make their disclosure at an earlier time and to a broader audience (and an audience that has not in any way committed to the transaction) would put additional pressure on sellers to refrain from disclaiming warranties, especially in consumer transactions, which are typically marketed to large numbers of buyers.

B. Implied Warranty Arising Before Contract Consummation

The implied warranty of merchantability may arise at the time of the purchase or order in many contracts (or, to use the language of the Uniform Sales Act, when the good is “bought”), regardless of when the contract is formally consummated.³⁷³ When a seller presents a disclaimer after the warranty has already arisen, circumstances indicate that the disclaimer should not be given effect, both because such a late disclaimer is particularly unexpected and because disclaimers

369. Klein v. Asgrow Seed Co., 54 Cal. Rptr. 609, 619 (Ct. App. 1966).

370. Uniform Sales Act § 15(2), reprinted in WILLISTON, *supra* note 57, at § 18-3.

371. Van Der Broeke v. Bellanca Aircraft Corp., 576 F.2d 582, 584 (5th Cir. 1978).

372. Jerome R. Verlin, Note, *Contract Draftsmanship Under Article Two of the Uniform Commercial Code*, 112 U. PA. L. REV. 564, 584 (1964); cf. Richard Cudahy, *Limitation of Warranties Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127, 137 (1963) (observing that safeguards serve to “embarrass a seller” from using the full weight of its economic power in dealing with purchasers).

373. See *supra* note 317.

presented after a warranty has arisen are generally deemed ineffective.³⁷⁴ In this section of the Article, I discuss three points other than formal consummation at which an implied warranty may arise. First, I discuss the possibility that in a rolling contract the implied warranty of merchantability may arise at the time of purchase or order even if delivery does not occur until later. Second, I argue that even if a disclaimer did not arise when the good was purchased or ordered, it may arise at the time of delivery. And, third, I discuss the possibility that even if an implied warranty of merchantability does not arise in a rolling contract until the time of formal consummation, a separate but related warranty—an implied warranty of quality under Section 2-314(3)—may have arisen earlier.

Of course, the discussion in this subsection is relevant to the discussion in the previous subsection as well since a warranty presumably arises at the time a purchaser would generally expect such protections to be triggered, and a buyer is put off guard by the presentation of a disclaimer after that point. In effect, the points of time discussed in this subsection represent points other than consummation when a buyer would reasonably expect any information relating to the implied warranty of merchantability (or a disclaimer of such warranty) to be provided since it is at these points that the warranty may arise.

1. Warranty Arising upon Purchase or Order

The implied warranty of merchantability may well arise at the time of purchase or order in a rolling or layered contract. The warranty arises in a contract for sale,³⁷⁵ a term that includes not only a present sale but a “contract to sell goods at a future time.”³⁷⁶ A rolling or layered contract includes within the transaction a contract to sell goods at a future time, and this “contract within the contract” arises at the time of purchase or order. That is, even if *the* contract is not formed until after delivery and the return period lapses, *a* contract is formed at the time of purchase or order—a contract in which the seller agrees to sell the good if the purchaser provides some sought-after action (such as keeping the good beyond the return period or breaking open shrinkwrap). At the time of the purchase or order, the seller committed to make a future sale, conditional on some action (or lack of action) by the buyer. Sufficient consideration—the agreement by the buyer to receive the goods—supports the contract.

In a typical rolling or layered transaction, the seller and buyer have thus entered into an option contract. An option contract has two components: first, “the

374. See *Paper Mfrs. Co. v. Rescuers, Inc.*, 60 F. Supp. 2d 869, 880 (N.D. Ind. 1999) (noting that disclaimers presented after consummation are usually ineffective as efforts to “avoid warranty obligations that have already arisen”); *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 170 (Del. Super. Ct. 1986) (noting that once a bargain with an implied warranty has arisen, subsequent efforts to disclaim it are unavailing) (citation omitted); *Ford Motor Co. v. Taylor*, 446 S.W.2d 521, 532 (Tenn. Ct. App. 1969) (noting that materials excluding or modifying the implied warranty of merchantability which were delivered after the warranty arose did not erase the warranty).

375. U.C.C. § 2-314(1) (2004).

376. *Id.* § 2-106(1). An official comment makes clear that the seller’s warranty obligations apply to both present sales and contracts to sell in the future. *Id.* § 2-314 cmt. 2.

underlying contract is not binding until accepted”³⁷⁷ (a description which meshes perfectly with the concept of a rolling contract in which acceptance does not occur until after delivery and the expiration of a return period), and, second, a “covenant to hold open the option to the optionee the opportunity to accept the option.”³⁷⁸ This second component is also inherent in a rolling contract—it is difficult to imagine Gateway (or any other seller) claiming that it had the right to take possession of purchased goods back from a buyer before the expiration of the review and return period. The discretion to proceed is fully in the hands of the buyer. The underlying contract may or may not be accepted, but the option itself is a contract, and an option contract is within the definition of a “sale.”³⁷⁹

Thus, if a warranty has already arisen at the time of the purchase or order, then the presentation of a disclaimer after that point should generally be ineffective since the “circumstances indicate” to a reasonable buyer that no disclaimer will be a part of the deal.

2. Warranty Arising on Buyer Taking Possession of the Goods

Even if the warranty of merchantability does not arise as a result of the purchase or order, it may arise as a result of the buyer taking possession of the good. Such a possibility is reflected in numerous instances in Article 2. For instance, according to an official comment to Section 2-314, goods “delivered” must be of a quality comparable to that generally acceptable in the relevant line of trade,³⁸⁰ indicating that once the buyer takes possession of the goods, the warranty has already arisen.

Additionally, the statute of limitations period for a breach of the implied warranty of merchantability claim generally begins to run when delivery is tendered by the seller.³⁸¹ Further, the guarantee of quality inherent in the implied warranty of merchantability relates to the condition of goods at the time they are delivered.³⁸² Somewhat analogously, the warranties of title and against infringement,³⁸³ which like the warranty of merchantability arise as a matter of law, are also apparently already in existence when the goods are delivered.³⁸⁴

Some courts assessing cases in which a grocery store customer removes an item from a shelf and is injured before reaching the check-out line have held

377. Merritt-Campbell, Inc. v. RxP Prods., Inc., 164 F.3d 957, 963 (5th Cir. 1999).

378. *Id.*

379. *See id.* at 963–64.

380. U.C.C. § 2-314 cmt. 3; *see also* Lee v. Peterson, 716 P.2d 1373, 1376 n.3 (Idaho Ct. App. 1986) (noting that implied warranty of merchantability assures buyer that the goods being purchased are “fit for ordinary use at the time when it is delivered to the purchaser”).

381. U.C.C. § 2-725(3)(a).

382. HAWKLAND, *supra* note 345, at § 2-314:1.

383. *See* U.C.C. § 2-312(2).

384. Section 2-312 provides that goods “shall be delivered free from any security interest or other lien or encumbrance,” and that unless otherwise agreed, goods “shall be delivered free of the rightful claim of any third person by way of infringement or the like,” *Id.* § 2-312.

that the “sale” for purposes of the implied warranty of merchantability was complete when the item was removed from the shelf by the customer with the intent to purchase it. Of those courts reaching this conclusion, some have determined that a contract to sell goods at a future time was formed when a buyer removed the item from the shelf with intent to buy it even before the buyer was able to actually purchase the item.³⁸⁵

Other courts have determined that a present sale, as opposed to a contract to sell goods at a future time, was complete at the time the item was removed from the shelf. This determination proceeds from the U.C.C. definition of a “sale” as consisting in the passing of title from the buyer to the seller for a price³⁸⁶ (even though the U.C.C. de-emphasizes the importance of title³⁸⁷). For example, in *Gillispie v. Great Atlantic and Pacific Tea Co.*, a grocery store shopper removed soda bottles from the store shelves and proceeded to the cashier to purchase them.³⁸⁸ Before the shopper reached the cashier, two bottles exploded.³⁸⁹ The shopper brought a claim based solely on a breach of the implied warranty of merchantability.³⁹⁰

The Court of Appeals for North Carolina reversed the trial court’s grant of directed verdict for the grocery store, concluding that sufficient evidence existed for a jury to find that a sale had occurred and hence a warranty had arisen.³⁹¹ The court determined that time of payment was not determinative and “[i]f there has been a completed delivery by the seller, the sale has been consummated and implied warranties arise.”³⁹² The court concluded that a delivery had occurred and that title had thus been transferred.³⁹³ The buyer had taken possession of the soda with the intention of paying for it—no further act of delivery was necessary on the part of the store.³⁹⁴ The court stated: “All that remained was for plaintiff to pay for the drinks—an act delayed until he reached the cashier’s counter primarily for the convenience of the seller.”³⁹⁵

385. *Fender v. Colonial Stores, Inc.*, 225 S.E.2d 691 (Ga. Ct. App. 1976); *Giant Food, Inc. v. Wash. Coca-Cola Bottling Co.*, 332 A.2d 1 (Md. 1975); *Sheeskin v. Giant Food, Inc.*, 318 A.2d 874 (Md. Ct. Spec. App. 1974); *Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979).

386. U.C.C. § 2-106(1).

387. *See id.* § 2-401 cmt. 1; 67 AM. JUR. 2D *Sales* § 357 (2003).

388. 187 S.E.2d 441, 441 (N.C. Ct. App. 1972).

389. *Id.*

390. *Id.* at 442.

391. *Id.* at 444.

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*; *see also Fisher v. Elmore*, 610 F. Supp. 123, 125 (E.D.N.C. 1985) (approving of the “very clear reasoning” of *Gillispie*). *But see Sheeskin v. Giant Food, Inc.*, 318 A.2d 874, 884–85 (Md. Ct. Spec. App. 1974) (reaching similar result but rejecting reliance on title approach in fact pattern similar to *Gillispie* because title is unimportant and because Section 2-401(2) is not applicable where seller has no duty to deliver beyond his own place of business).

Similar reasoning applies to a typical rolling or layered contract. In such a contract the seller has done all acts necessary to complete delivery (and indeed, has typically even received payment for the goods, creating an even more compelling case for a finding of a completed sale than in situations like the one in *Gillispie*) and all that remains is for the buyer to take a final act—keeping the good beyond the return period, using the product, or tearing through the shrinkwrap, for example, all of which are mechanisms designed by the seller for its own convenience.³⁹⁶

Thus, the point at which the buyer takes possession of the goods (be it in the store or at home upon delivery) is a functionally important one. A purchaser will reasonably conclude that if no disclaimer has been visible at or before that point, no disclaimer is intended and a warranty arises. When a disclaimer is then not visible until after possession is taken (as terms inside a box or which appear on a computer screen when software is loaded, for example), circumstances indicate that the buyer has not been protected against surprise and such disclaimers should generally be deemed ineffective.

3. Implied Warranty Under Section 2-314(3)

Additionally, even if a sale has not occurred by the time a disclaimer is presented after purchase, an implied warranty of quality may still have arisen under Section 2-314(3). Section 2-314(3), which has been described as a “neglect[ed]” subsection,³⁹⁷ provides that in addition to the implied warranty of merchantability, “other implied warranties may arise from course of dealing or usage of trade,” unless these other warranties are disclaimed under Section 2-316.³⁹⁸

That subsection, about which there has been minimal case law,³⁹⁹ differs from Section 2-314(1), which provides for the creation of the implied warranty of merchantability. While the implied warranty of merchantability arises in a contract for the sale of goods by a seller who is a merchant with respect to the type of

396. Of course, the parties may prevent the transfer of title at delivery by otherwise explicitly agreeing. See U.C.C. § 2-401(2) (2004); *S & H Communications, Inc. v. Seiscor Techs., Inc.*, 633 N.Y.S.2d 146 (App. Div. 1995). But that is a considerable burden to overcome. The term “explicit” in this context means that which is so clearly and distinctly set forth that no doubt is possible as to its meaning. *Harney v. Spellman*, 251 N.E.2d 265, 266 (Ill. App. Ct. 1969); *House of Lloyd, Inc. v. Dir. of Revenue*, 824 S.W.2d 914, 923 (Mo. 1992), *overruled on other grounds*, *Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539 (Mo. 1994); *Bowman v. Am. Home Assurance Co.*, 213 N.W.2d 446, 449 (Neb. 1983). This narrow construction indicates that the U.C.C.’s presumption in favor of passage on title is “not easily altered.” *Weber-Stephen Prods. Co., v. Waban Inc.*, No. 92 C 3317, 1993 WL 398725, at *4 (N.D. Ill. Oct. 6, 1993).

397. Charles M. Thatcher, *Implied Warranties Arising From Course of Dealing Or Usage of Trade Under Uniform Commercial Code Section 2-314(3): Why All the Neglect?*, 97 COM. L.J. 332 (1992).

398. U.C.C. § 2-314(3).

399. See generally Thatcher, *supra* note 397, at 333 (describing “dearth” of case law under Section 2-314(3)).

goods at issue,⁴⁰⁰ the text of Section 2-314(3) makes no mention of a sale requirement or of any limitation to situations involving merchants.⁴⁰¹ Such an implied warranty could therefore arise even absent a sale—it could arise as long as there was a “transaction[] in goods”⁴⁰² (as provided by the general scope provision of Article 2). The term “transactions in goods” is broader than the concept of a sale of goods⁴⁰³ and, as one commentator has stated, “adds significantly to the scope that Article 2 would have had” were Article 2 restricted only to the sale of goods.⁴⁰⁴ Thus, even if the purchase or taking of possession of goods by a customer does not constitute a completed sale, it could fall within the broader definition of a transaction in goods.

Of course, that an implied warranty *may* arise as part of the first step of a rolling contract only begins the analysis. Still to be answered is whether such a warranty does arise by usage of trade in a given consumer purchase and, if so, what that warranty would entail. But it is at least possible to argue that the very act of entering into the transaction gives rise to an implied warranty of quality⁴⁰⁵ and that a subsequent disclaimer is, under such circumstances, too late.

CONCLUSION

Like them or not, rolling or layered contracts are a fact of commercial life. Their proliferation provides opportunities and challenges. We are forced to clearly articulate the purposes of the implied warranty of merchantability and warranty disclaimers so that we can be certain that those purposes are fully realized. We can examine as well what impact rolling or layered contracts have on warranty disclaimers and use that impact to measure the appropriateness of rolling contracts in general. And, of course, we can ensure that we utilize the best test to accommodate the purposes of rolling contracts and of the heightened requirements for warranty disclaimers.

In this Article, I have proposed that the qualifying language from subsection 3(a) can balance the efficiency interests served by rolling contracts with the need to protect purchasers from disclaimers. The test I propose provides a clear basis for scrutinizing the context of a warranty disclaimer and is better suited to the task than is the conspicuousness requirement or any other test. This test is flexible in that it can be applied to any type of transaction and provides a focus on the core question of whether there is something in the context or structure of a transaction indicating that a disclaimer should not be given effect. Moreover, it properly leaves the question to the trier of fact and not as a question of law for the court. It is ideally suited to assessing the rhythm and flow of a complex transaction, like a

400. U.C.C. § 2-314(1).

401. *Id.* § 2-314(3).

402. *Id.* § 2-102.

403. RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE, § 2-102:4 (3d ed. 1996).

404. HAWKLAND, *supra* note 345, at § 2-102:4.

405. *Cf.* Christenson v. Milde, 402 N.W.2d 610 (Minn. Ct. App. 1987) (upholding trial court finding of breach of warranty under Section 2-314(3) based on failure of distributor of building materials to check materials for defects).

rolling or layered contract, to determine when a disclaimer may be appropriately introduced into a transaction and when it may not.

I have applied the test to one type of transaction—a consumer purchase—and reached a conclusion that post-purchase or post-order disclaimers should generally not be effective in that context. In other situations, such as those involving sophisticated parties or parties who have engaged in past dealings, or those in which it is clear that active consideration of the transaction will continue after purchase or order, the result might well be different. The test is flexible enough to respond to each of these situations in a way that reconciles the purposes of the restrictions on warranty disclaimers with the reality of rolling or layered contracts.