

Warranties in the Box

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Thousands of times each day, a buyer opens a box that contains a new computer or other electronic device. There he finds written material including an express “Limited Warranty.” Sometimes the box has come by FedEx directly from the manufacturer; other times the buyer has carried it home from a retail merchant. Despite the fact that it is standard practice for the manufacturer to include a limited written express warranty on the sale of such products,¹ and despite the fact that both the manufacturer and the buyer believe that warranty to be legally enforceable, the law on its enforceability is unclear.

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1. The practices vary with time and type of product. Invariably there is a limited express warranty with the sale of packaged goods such as computers and small appliances. That practice would also be followed with the sale of large appliances such as washing machines, but it would not be true of the purchase of ten nuts and bolts from a hardware store, nor, of course, with the sale of used goods.

There are two doctrinal barriers to the enforceability of this warranty. Because the critical section in Article 2 of the Uniform Commercial Code, section 2-313, requires that any express warranty be “part of the basis of the bargain,”² there is a question whether a warranty, seen for the first time by the buyer after the purchase has been concluded, can be part of the “basis of the bargain.”

An additional doctrinal barrier is present when the buyer purchases from a retail seller. In that case the buyer’s contract is with the retailer, not with the manufacturer, but the manufacturer, not the retailer, gives a warranty. Section 2-313 contemplates warranties by the “seller.”³ Because the buyer’s “seller” is the retailer, not the manufacturer who gives a warranty, the warranty is given by a third party, not, as section 2-313 seems to demand, by the “seller.” Courts finding no claim sometimes invoke terminology familiar from many tort cases, that there is no “privity” between a manufacturer and a buyer once removed.⁴

Finding the statement—“we warrant to you, the end user, that the enclosed product is fit for ordinary purposes,” and uninformed of the legal niceties, what would a lay buyer believe? He would believe that he had received a legally enforceable warranty. His belief would be justified not only by the plain meaning of the words, but also by the uniform practice; sellers of new, packaged electronic equipment always give express warranties and usually honor them.

And, notwithstanding his lawyer’s clever explanation of the legal barriers that might be imposed against a buyer’s claim, every seller

2. U.C.C. § 2-313(2) (2007).

3. *Id.*

4. Comment 1 to section 2-313A states the drafters’ conception of the doctrinal difficulties facing warranties to remote purchasers:

Section 2-313A deals with what are commonly called “pass-through warranties.”

The usual transaction in which this obligation arises is when a manufacturer sells goods in a package to a retailer and include[s] in the package a record that sets forth the obligations that the manufacturer is willing to undertake in favor of the final party in the distributive chain, who is the person that buys or leases the goods from the retailer. If the manufacturer had sold the goods directly to the final party in the distributive chain, whether the manufacturer would incur liability is determined by Section 2-313 and this section is inapplicable.

No direct contract exists between the seller and the remote purchaser, and thus the seller’s obligation under [section 2-313A] is not referred to as an “express warranty.” Use of “obligation” rather than “express warranty” avoids any inference that the obligation arises as part of the basis of the bargain as would be required to create an express warranty under section 2-313. The test for whether an obligation other than a remedial promise arises is similar in some respects to the basis of the bargain requirement in section 2-313, but the test set forth in this section is exclusive.

Id. § 2-313A cmt. 1.

would expect that he was incurring legal liability.⁵ No obscure term in the contract has risen up to bite the seller. The seller knew what he was doing, was likely forced by the market practice to do it, and may even have been looking at the Magnuson-Moss Act when he chose his words.⁶

Writers and judges have long recognized both issues. Statutory provisions that would impose warranty liability on a remote seller were proposed as early as 1944 when Article 2's predecessor, the Revised Uniform Sales Act, was being drafted.⁷ Dick Speidel and a number of other scholars have written extensively on the issue.⁸ Neither section 120 of the Revised Uniform Sales Act, nor Dick's proposal, section 2-313A of the 2001 Revision to Article 2, ever became law. Even today, and despite scholars' agreement on the enforceability of warranties in the box, a determined defendant can find cases to support an argument that neither a remote nor a direct seller has liability for warranties in the box that are first seen by the buyer after the sale has been concluded.

Below I discuss judicial and legislative attempts to deal with the two problems and I suggest how they might be handled in a case today. The proper result is indisputable, only the method is in question; to conclude otherwise would truly make the law an ass.

5. Given the certainty of a buyer's belief and the seller's appreciation of that belief, a seller that intended to use the standard warranty and then to deny its legal power would be dancing on the edge of fraud.

6. The "limited warranty" language that is in common use comes from the Magnuson-Moss Act and is there blessed as language that limits the warranty that would otherwise arise under the Act. 15 U.S.C. § 2303 (2006). So, one who uses that language has thereby acknowledged that he is giving a warranty to his buyer. To enlarge warranty liability for consumer buyers was the whole point of the Act.

7. UNIF. REVISED SALES ACT § 121 (Proposed Final Draft 1944) ("Direct Action Against Prior Seller. Damages from breach of a warranty sustained by the buyer or by any beneficiary to whom the warranty extends under Section 43 may be recovered in a direct action against the seller or any person subject to impleader under Section 120.").

8. E.g., Donald F. Clifford, *Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 WASH. U. L.Q. 413 (1997); Harry M. Flechtner, *Enforcing Manufacturers' Warranties, "Pass Through" Warranties, and the Like: Can the Buyer Get a Refund?*, 50 RUTGERS L. REV. 397 (1998); Thomas J. Holdych, *A Seller's Responsibilities to Remote Purchasers for Breach of Warranty in the Sales of Goods Under Washington Law*, 28 SEATTLE U. L. REV. 239 (2005); Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void*, 67 B.U. L. REV. 9 (1987).

I. LLEWELLYN'S COMMENT 7

From the very first, Llewellyn recognized the possibility that a seller might give express warranties after the contract had been concluded. Comment 7 to section 2-313 specifically addresses this question: "If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209)."⁹

Llewellyn is making a halfhearted attempt to deal with the problem that he perceives but rightly concludes is of limited significance. In 1950, or earlier, when the comment was written, the current practice of boxing small electronic appliances—if there were such things—and then selling them in the box either directly or through a retailer was not widely practiced. So Llewellyn probably thought it sufficient to offer a small patch to fix this small problem.

Llewellyn's assumption that any added terms would have to be a "modification" because the deal was "closed" contradicts the current assumptions underlying rolling contracts. The very idea of rolling contracts is that the contract formation process rolls on long beyond the initial exchange of oral offers and acceptances and beyond even a buyer's payment.

Omitted from the quoted comment is any consideration about how the seller who offers the belated warranty can qualify the warranty or limit the remedies that might be available to the buyer. Also omitted is any consideration of the possibility that the warranty will be given by the manufacturer, a remote seller, not by the actual seller to the ultimate purchaser.

Those omissions from the comment leave it no more than a suggestion about how courts might add postdeal terms to a contract. Because Llewellyn contemplated a face-to-face transaction, the comment fails to take any account of problems that might arise because the original contract was between the buyer and a retailer, while the warranty is offered by another, the manufacturer.

Consider sales of cars. Consumers buy from a dealer, not from the manufacturer. The car comes with an owner's manual from the manufacturer, which contains language that sounds like, and is often labeled as, a warranty. But is it a warranty? The buyer first sees the language in the owner's manual after the sale is concluded; comment 7 tells us that postsale language is a modification and becomes part of the deal only if

9. U.C.C. § 2-313 cmt. 7 (2000).

it is reasonable.¹⁰ That is a nice start, but it hardly answers all of our questions, and courts have been left to figure out the rest.

Because the buyer has no contract with the manufacturer, comment 7 does not address whether the manufacturer is liable to the consumer under the warranty. It appears only to contemplate a second interaction between a buyer and a retail seller, who already have a contract. Furthermore, comment 7 gives no guidance on whether the manufacturer can use postsale language to take away rights the buyer had at the time of the sale—either by limiting available remedies or qualifying the extent of the warranty.¹¹

Comment 7 to section 2-313 does not reach these questions; it can be regarded as no more than a smart lawyer's ruminations about a way to deal with the problem.

II. THE ROLLING CONTRACT

Several courts have enforced terms in the box by finding a “rolling contract.”¹² Strictly speaking, it is not the contract, but rather the contract formation that rolls. Here the formation process does not conclude with one party's acceptance of the other's contemporaneous offer; the formation process continues at least until the buyer receives the box and sees the terms within. By so making the terms in the box part of the bargain, this approach solves one problem, but it does not

10. *Id.*

11. Courts have often held postsale disclaimers in the auto industry ineffective because they are not part of the basis of the bargain. *E.g.*, *Terrell v. R & A Mfg. Partners, Ltd.*, 835 So. 2d 216, 224 (Ala. Civ. App. 2002) (holding postsale warranty disclaimers ineffective because they are not part of the basis of the bargain); *Duffin v. Idaho Crop Improvement Ass'n*, 895 P.2d 1195, 1205 (Idaho 1995) (“It is fundamental that to be effective, disclaimers of warranties and remedy limitations must be part of the bargain struck by the parties.”); *Hahn v. Ford Motor Co.*, 434 N.E.2d 943, 948 (Ind. Ct. App. 1982) (“A modification of warranty or limitation of remedy contained in a manufacturers manual received by purchaser subsequent to sale has not been bargained for and thus does not limit recovery for implied or express warranties which arose prior to sale.”). *Contra* *Murphy v. Mallard Coach Co.*, 582 N.Y.S.2d 528, 531 (App. Div. 1992) (“[W]hile the warranty was technically handed over *after* plaintiffs paid the purchase price, the fact that it was given to plaintiffs at the time they took delivery of the motor home renders it sufficiently proximate in time so as to fairly be said to be part of the basis of the bargain.”).

12. Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 744 (2002) (“In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods. Upon receipt, the buyer enjoys the right to return the goods for a limited period of time.”).

address the fact that there is no contract between the manufacturer and the end user.

The story of the rolling contract begins with Judge Easterbrook's opinion in *ProCD, Inc. v. Zeidenberg*.¹³ In *ProCD*, the buyer ordered and paid for software. When he opened the package, Zeidenberg found a license agreement.¹⁴ He knew that a license would be included, but Zeidenberg did not see the terms of the license until after the purchase. These terms gave the buyer the option to return the software.¹⁵ The buyer argued that because the contract was formed at the time of purchase, the objectionable license terms should not be considered part of the contract. Applying section 2-207 to the terms in the box, the lower court agreed with the buyer. The appellate court reversed and, having first found section 2-207 inapplicable, held that the contract was not fully formed until the buyer kept the goods past the accept-or-reject date set forth in the license.¹⁶

Two factors were important to Judge Easterbrook's decision in *ProCD*. First, the buyer had notice of the terms at the time of purchase—a sticker on the outside of the software packaging indicated that additional terms were included inside the package. Second, the buyer had the option to reject the terms by returning the goods. According to Judge Easterbrook, disclosing terms in this manner is not only tolerable, but also efficient.¹⁷ It gives the buyer time to read the terms carefully before deciding whether to accept or reject the terms.¹⁸ Judge Easterbrook reaffirmed the holding of *ProCD* in *Hill v. Gateway 2000, Inc.*¹⁹

13. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (stating that U.C.C. section 2-207 is irrelevant in cases involving only one form and holding, with support from other sections of the U.C.C., that terms included with software and not seen by purchaser until after purchase are part of the contract and should be enforced).

14. Because it said on the outside of the box that the software was subject to a license, the court stated that the purchaser had sufficient notice of additional terms included inside the packaging. *Id.* at 1450.

15. The license in the packaging expressly extended to the purchaser the right to return the goods for a refund if the purchaser did not accept the terms of the license. *Id.* at 1451.

16. *Id.* at 1451–53.

17. *Id.* at 1453.

18. See Stephen E. Friedman, *Improving the Rolling Contract*, 56 AM. U. L. REV. 1, 25, 37 (2006) (noting that the opinion in *ProCD* enthusiastically endorsed “money now, terms later” contracts with a return option because they allow the purchaser to review terms carefully before making a final decision).

19. 105 F.3d 1147 (7th Cir. 1997). The Hills agreed to purchase a computer over the phone and the computer arrived with a set of terms in the box. *Id.* at 1148. As in *ProCD*, the Hills had the option of accepting the terms or returning the computer for a refund. *Id.* The Hills kept the computer past the accept-or-reject period. *Id.* Later, when they tried to bring a claim against Gateway, the court upheld an arbitration provision that was one of the terms in the box. *Id.* at 1150–51. The court held that the

*Schafer v. AT&T Wireless Services, Inc.*²⁰ weakens the notice requirement.²¹ In *Schafer*, the court upheld an arbitration provision in which the buyer had no notice of additional terms until after the time of purchase. Schafer ordered a cellular phone, and when the phone arrived, there was writing on the outside of the box that said that additional terms were included inside the box²² and that “[t]he use of the service indicates your acceptance of the Terms and Conditions.”²³ The court held that the writing on the outside of the box sufficed for notice,²⁴ even though the buyer claimed she never received the terms mentioned on the outside of the box.²⁵ The court said that regardless of whether or not she received the terms, she had notice of the terms and could have obtained them if she had wanted them.²⁶ Thus, the contract was formed and the terms were accepted when Schafer chose to activate the phone.²⁷

In *Schafer*, *Hill*, and *ProCD*, the contract is not formed until after the buyer fails to reject the terms.²⁸ Under this approach, the terms in the box become part of the basis of the bargain because the contract is not formed until after the buyer has had a chance to look over all of the terms. This logic is strained somewhat in *Schafer* when the court suggests that it does not matter whether or not the plaintiff actually received the terms because she had notice of them and could have received them if she had tried.²⁹ Nonetheless, in a typical deferred terms

Hills accepted the terms by keeping the computer past the accept-or-reject date and that they had sufficient notice of the terms because they “knew before they ordered the computer that the carton would include *some* important terms.” *Id.* at 1150. The court reasoned that because “Gateway’s ads state that their products come with limited warranties and lifetime support,” the Hills had notice that additional terms were coming in the box, and this notice was sufficient for the court to enforce the deferred terms. *Id.*

20. *Schafer v. AT&T Wireless Servs., Inc.*, No. Civ. 04-4149-JLF, 2005 WL 850459 (S.D. Ill. Apr. 1, 2005).

21. See Friedman, *supra* note 18, at 10 (discussing the erosion of the notice requirement in rolling contracts cases).

22. *Schafer*, 2005 WL 850459, at *5.

23. *Id.* at *1.

24. See Friedman, *supra* note 18, at 10 (discussing a problem with postpurchase notice, “While that notice was received before contract formation (at least as formation was viewed by the *Schafer* court), pre-formation notice, as opposed to pre-purchase notice, does not serve the concerns outlined in *ProCD* and *Hill*” (footnote omitted)).

25. *Schafer*, 2005 WL 850459, at *3.

26. *Id.* at *5.

27. *Id.*

28. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996); *Schafer*, 2005 WL 850459, at *4.

29. *Schafer*, 2005 WL 850459, at *5.

case, applying the rolling contracts approach ensures that the deferred terms become part of the basis of the bargain.

The rolling contracts approach solves the basis of the bargain problem by pushing the time of contract formation back to the end of the accept-or-reject period. But it creates other problems. First, it exposes the buyer to the risk that he will be bound by terms that are unilaterally unfavorable. If one analyzed these cases under section 2-207—as *ProCD* expressly declines to do—a nonmerchant buyer, who is not subject to 2-207(2)’s rules, would not be bound by the terms in the box and even a merchant buyer would escape new terms that materially alter the deal.³⁰ Faced with facts nearly identical to those in *Hill v. Gateway*, the United States District Court for the District of Kansas disagreed with *Hill* in its holding in *Klocek v. Gateway, Inc.*³¹ In *Klocek*, the purchaser was not bound by the arbitration clause included with the terms in the box.

The *Klocek* court found that the terms were proposals for additions to the contract and could only become part of the contract by the buyer’s express assent.³² Because the buyer did not assent, he was not bound.

As the *Klocek* court points out, the rolling contract disregards or contradicts generally accepted rules about the time of contract formation.³³ For example, consider a buyer who has ordered and paid for goods from a seller who has agreed to ship the goods. Before the goods are shipped, the buyer changes his mind and asks for his money back. May the seller keep the payment? Not if this is a rolling contract.

The terms shipped with Gateway’s computers state, “This document contains Gateway 2000’s Standard Terms and Conditions. By keeping your Gateway 2000 computer system beyond five (5) days after the date of delivery, you accept these Terms and Conditions.”³⁴ A purchaser who has paid for and received goods reasonably believes he owns the goods. In a rolling contract, when the purchaser acts like he owns the goods, this is taken as acceptance of new terms. To transform a nonverbal act

30. See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 105 (3d Cir. 1991). In *Step-Saver*, Judge Wisdom freed the buyer from the reach of the terms on the box because they would have materially altered the deal. Had Judge Easterbrook been more true to the letter and spirit of section 2-207, he might have reached the same result.

31. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000). The *Klocek* court concluded that the court in *Hill* was incorrect in asserting that the vendor was the master of the offer and overruled Gateway’s motion to dismiss because Gateway had not shown that the plaintiff had agreed to the arbitration provision. *Id.* at 1340–41.

32. *Id.* at 1340.

33. *Id.*; see also Hillman, *supra* note 12, at 754 (stating that Judge Easterbrook likely misapplied U.C.C. 2-206(b) in *Hill v. Gateway* because “[i]f the parties did not denominate a clear time of formation, section 2-206(b) appears to control so that the offer and acceptance (order and shipment) took place before the Hills received the terms”).

34. *Klocek*, 104 F. Supp. 2d at 1335.

of the buyer into an acceptance of new terms may contradict reasonable expectations.³⁵ And as Professor Bern points out, “[t]he buyer’s continued use, far from signaling agreement to the adverse terms, is more consistent with an understanding, in accord with the objective theory of contracts, that the buyer fully owns the goods and the seller is crazy to think he can force adverse terms on the buyer.”³⁶

So adoption of the rolling contract fiction removes the basis of the bargain barrier to the enforceability of a warranty in the box, but it does so by exposing sellers to the possibility that they will have to return payments for deals they thought were concluded. It also opens buyers to the risk that they will be bound by disagreeable terms in the box that never would have been imposed by section 2-207(2).

III. AMENDMENTS TO SECTION 2-207

During the Article 2 revision process, the drafting committee considered an addition to section 2-207 that would have dealt with some of the problems of terms in the box. It read in full as follows:

- (b) Terms to which the buyer has not otherwise agreed that are delivered to the buyer with the goods become part of the contract, subject to 2-202, only if:
- (1) the buyer does not within [twenty] [thirty] days of their receipt object to the terms and offer to return the goods at the seller’s expense,
 - (2) the terms do not contradict the terms of the parties’ agreement, and
 - (3) taken as a whole, the terms do not materially alter the contract to the detriment of the buyer.³⁷

Because the documents in the box invariably contain an express warranty, the terms are seldom “unilaterally favorable to the seller.” The quoted language would make terms in the box part of the contract

35. See, e.g., Roger C. Bern, “Terms Later” *Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641, 744–45 (2004). Professor Bern writes:

Use of goods that a buyer has purchased and paid for signals that the buyer reasonably believes he has ownership rights and is exercising them. The seller’s belated insistence that the buyer does not own the goods, that he can have no ownership rights in those very goods except on less favorable terms, and that his continued use of them signifies his agreement to those terms seems preposterous. . . . Under those circumstances, the seller can have no reasonable expectation that the buyer’s use is signaling his agreement to the adverse terms.

Id.

36. *Id.*

37. U.C.C. § 2-207(b) (Members Consultative Group Draft 2000) (bracketed text in original).

except, of course, for terms that were found to be unconscionable and except in the unusual cases when the buyer returns the goods or when the terms in the box were found to be unilaterally favorable to the seller.

By making the warranty part of the contract without any reference to “basis of the bargain,” the provision would have made warranties in the box part of the contract between the seller and the buyer. However, the addition to section 2-207 did not deal with the difficulty arising from the fact that the initial contract might have been with the retail seller yet the terms in the box came from the manufacturer.

Most readers of section 2-207 would assume that it dealt only with exchanges between the retail seller and the buyer. That assumption would follow from the battle of forms, commonly between a retail seller and the buyer, to which section 2-207 is directed. Of course the language to section 2-207 could have been changed explicitly to make the language in the box a contract between either the manufacturer or the retail seller and the buyer. That would have made section 2-207 awkward—dealing in certain places with the manufacturer as seller and in others with the retail party as seller—but with careful drafting it could have been done. So the proposal for section 2-207 offered the possibility of a comprehensive solution, but because neither the consumer-buyer representatives nor the manufacturer-seller representatives liked the proposed language, it was never added to the revision to section 2-207.

IV. SECTION 2-313A OF THE 2003 REVISION

Section 2-313A, drafted by Dick Speidel, is titled “Obligation to Remote Purchaser Created by Record Packaged with or Accompanying Goods.”³⁸ This section was a comprehensive statement of the liability of a seller to a person identified as a “remote purchaser.”³⁹ The section precisely specified the obligation of the manufacturer to a buyer who had purchased the manufacturer’s product at a retail outlet. When the buyer had purchased directly from the manufacturer who had given the warranty in the box, section 2-313A did not apply; those cases were left to section 2-313. So section 2-313A dealt with only one of the problems that I consider here.

The basic legal rule of section 2-313A is stated as follows in subsection (3):

If in a record packaged with or accompanying the goods the seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, and the seller reasonably

38. U.C.C. § 2-313A (2007).

39. *Id.* § 2-313A(3).

expects the record to be, and the record is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that:

- (a) the goods will conform to the affirmation of fact, promise, or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise, or description created an obligation; and
- (b) the seller will perform the remedial promise.⁴⁰

The section nicely anticipates claims that a remote promise might not be a warranty because it will not be part of the “basis of the bargain.” The requirement that the seller can “reasonably expect” an obligation to be offered is a reliance requirement even more pale than the basis of the bargain rule. Presumably every American purchaser of new goods that arrive in a package would reasonably expect that the package contain a warranty as well as other terms.

The section contains several limitations to protect against inappropriate application. By limiting the obligation to the transfer of “new goods . . . in the normal chain of distribution,” it protects against claims of secondhand buyers.⁴¹ Subsection 5 authorizes modification or limitation of the remedies but only if those modifications or limitations are furnished to the remote purchaser at the time of purchase or with the record that contains the manufacturer’s obligation.⁴² The section also makes the seller liable for consequential damages but not for “lost profits.”⁴³ Presumably the omission of lost profits is to protect the manufacturer from the large and unanticipated damages that might be claimed by a business purchaser. Although the section is not limited to consumer purchasers, the consumer purchase transaction is clearly its focus.

How can one explain the failure of revised section 2-313 to deal with the basis of the bargain problem when that rule remained a part of section 2-313 in the revision? Note that the second paragraph of comment 1 to section 2-313A draws attention to the basis of the bargain inference, so the drafters were aware of the issue.⁴⁴ While section 2-313A and section 2-313B were being drafted and considered, the drafting committee was also considering the modification or removal of the basis of the bargain test from section 2-313. The efforts to alter or remove the

40. *Id.*
41. *Id.* § 2-313A(2).
42. *Id.* § 2-313A(5).
43. *Id.*
44. *Id.* § 2-313A cmt. 1.

test came to naught, but the abandonment of that effort may have occurred after Dick resigned as the Reporter. As I recall, being one of the Philistines who was added to the committee after Dick's departure, we never came back to the warranty provisions after he was gone.

In the end, section 2-313A does an admirable job with the manufacturer's warranty when it is made to a remote and not a direct purchaser from the manufacturer. However, to a court in 2009, the section is little help. First, no part of the Article 2 revision has yet been enacted by any state, so the section lives merely as an intelligent suggestion but it is not the law anywhere. Second, the section does not solve the basis of the bargain issue when the buyer is a direct purchaser, not a remote purchaser. Third, by its worry over both the basis of the bargain issue and of the fact that there is no contract between a remote purchaser and a manufacturer, the section gives recognition and perhaps newfound standing to the arguments that a remote seller is likely to make.

V. MAGNUSON-MOSS

Designed to remedy certain shady practices by suppliers who manufactured or sold goods to consumers, the Magnuson-Moss Act specifies certain forms and terms that express warranties must take. The Act does not require that a supplier make an express warranty; it requires only that any express warranty that the supplier makes conform to the Act's requirements.⁴⁵ Congress was concerned with express warranties that appeared to give more than they delivered, such as a broad express warranty that expired one day after purchase or a warranty that required the buyer to deliver the product to a rural outpost in west Texas within a month of purchase as a condition to recovery. The Federal Trade Commission understood that the market would demand express warranties of most manufacturers, so it could safely concern itself with the form and content.

With trivial exceptions, the manufacturer, not the retail seller, gives these written express warranties.⁴⁶ Under section 102 of the Act, any covered warranty must fully and conspicuously disclose its terms in words that will not mislead an average consumer and it must describe "the legal remedies" available.⁴⁷ Under the Act, a written warranty is a statement that "affirms or promises that [the product's] material or

45. 15 U.S.C. § 2302 (2006).

46. I include in "manufacturer" both those who manufacture in-house and those who contract out manufacturing to others. Even if Hewlett-Packard computers are made under contract in Taiwan, Hewlett-Packard is still the "manufacturer."

47. § 2302.

workmanship is defect free or will meet a specified level of performance.”⁴⁸ And this warranty must become “part of the basis of the bargain.”⁴⁹ One wishing to comply with the Act must label his warranty either a “full warranty” or a “limited warranty.”⁵⁰

Looking at Magnuson-Moss, one is tempted to say that the game is over, that Congress has transformed all of these warranties in the box into binding legal obligations. That may be true, but the route to that conclusion is not easy. First, Congress surely had the power to make warranties in the box legally binding, but if that were Congress’s intent, it did not do the best job. Although the Act defines “written warranty,” it appears merely to be riding on the coattails of Article 2; only obliquely does the Act say that certain contractual expressions have particular legal consequences.⁵¹ And, of course, the language repeats the fatal phrase, “basis of the bargain.”⁵²

Hoping to avoid the contractual restrictions that are built into a manufacturer’s express warranties, plaintiffs argue that Magnuson-Moss somehow mandates implied warranty liability against remote sellers. That argument has been successful only in the Illinois state courts.⁵³ The court in *Walsh v. Ford*⁵⁴ speaks for all of the other jurisdictions:

If, in this action, there are to be any implied warranty claims at all under Magnuson-Moss, they must “originate” from or “come into being” from state law. Therefore, if a State does not provide for a cause of action for breach of implied warranty where vertical privity is lacking, there cannot be a Federal cause of action for such a breach.⁵⁵

Paying more respect to the statute, can one read the Act to say that any supplier of consumer goods in a covered transaction who labels his statement a limited or full warranty has the same liability, as a matter of federal law, that he would have under state law if only the basis of the bargain language were narrowed? Put differently, can we read the Act

48. 15 U.S.C. § 2301 (2006).

49. *Id.*

50. 15 U.S.C. § 2303 (2006).

51. § 2301.

52. *Id.*

53. *Cohen v. AM Gen. Corp.*, 264 F. Supp. 2d 616, 621 (N.D. Ill. 2003); *Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028, 1031 (Ill. 1988); *Szajna v. Gen. Motors Corp.*, 503 N.E.2d 760, 769 (Ill. 1986).

54. *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513 (D.D.C. 1984).

55. *Id.* at 1525 (footnote omitted).

as modifying the basis of the bargain language to allow the additional materials in the box to bind the direct and the remote seller?

Surely the Act does not contemplate a remote seller's defeating the warranty claim merely because a retailer intervened between the warrantor and the buyer. Recall first that remote sellers make almost all of these warranties in the box the very target of the Act. That being so, it is inconceivable that Congress would have excluded remote sellers from the reach of the Act.

But what about the Act's basis of the bargain language that is obviously drawn from section 2-313? The only way to square this language with Congress's intention is to say Congress intended its own definition of basis of the bargain and that its definition does not insulate either the remote seller or an immediate seller who shows his warranty only after the deal has been concluded. The congressional intention to capture manufacturers as well as direct sellers is demonstrated by the use of "supplier" in lieu of "seller." A supplier is one who is "engaged in the business of making a consumer product directly or indirectly available to consumers."⁵⁶

The FTC regulations make remote parties explicit targets of the law. Section 700.3 gives the following example: "The supplier of the refrigerator [to be installed in a boat or RV] relies on the boat or vehicle assembler to convey the written agreement to the consumer. In this case, the supplier's written warranty is to a consumer, and is covered by the Act."⁵⁷

The point is elaborated in 700.4:

A supplier who does no more than distribute or sell a consumer product covered by a written warranty offered by another person or business and which identifies that person or business as the warrantor is not liable for the failure of the written warranty to comply with the Act or rules thereunder.⁵⁸

What to do? Can a warranty arise because of Magnuson-Moss even when there would be none under applicable state law? It is a stretch to find that express liability was created by a statute whose only purpose was to channel warranty language and limit disclaimers, but that shows no purpose to enact freestanding warranty liability. To say that Congress understood the baggage carried by the basis of the bargain language and intended to unload that baggage ascribes both subtlety and incompetence to Congress—subtlety to do the least possible damage to state law and incompetence for using words from the U.C.C. without a signal that the words were to have a different meaning in the federal law.

56. 15 U.S.C. § 2301(4).

57. 16 C.F.R. § 700.3(c) (2009).

58. *Id.* § 700.4.

An alternative analysis that does not require quite the same gymnastics is to say that Magnuson-Moss's requirement that suppliers characterize their statements as "warranties, limited or full" causes suppliers to do the things that will cause warranty liability under state law. But even with that interpretation, one must conclude that Congress intended to modify the basis of the bargain definition so that it only applies to puffing and to statements unrelated to the goods.

I suppose that a court, determined to do what Congress plainly would have intended, if Congress had understood all of the issues, could find that Magnuson-Moss creates warranty liability or forces suppliers to use language that creates liability at least for the typical manufacturer (supplier) of electronic goods in the box who now routinely makes a "limited warranty."

VI. LAW AND PRACTICE IN 2009

So what is a court to do with a warranty in the box in 2009 and beyond? Section 2-313A was never enacted anywhere. The proposal for change to section 2-207 did not even make the final draft. The rolling contract is a solution disfigured with ugly warts. But perhaps the solution is in plain sight. It is just possible that a massaging of current law in a way well-known to common law courts can solve both problems.

VII. BASIS OF THE BARGAIN

I believe that the retail market for many products, such as computers and other electronic goods, has already answered the basis of the bargain issue. The market now demands that manufacturers of a wide range of products include an express warranty. Virtually all sellers of those products have responded with limited express warranties in the box. If it is widely known and expected by retail buyers that there will be express warranties in the box, I believe that makes the expected warranty a part of the basis of the bargain.

Modern practice with respect to new goods makes this case much easier than Llewellyn's 1940s hypothetical affirmation at the time of delivery. In Llewellyn's example, the seller might be garrulous or close-lipped; at the time of sale in his example, there could be no certain expectation of a warranty from the lips of the seller. In modern practice, we know the seller will be speaking from the box. Because the warranties by manufacturers in the same industries are similar to one another,

always “limited” and usually for one year in electronic products, it is likely that a moderately sophisticated buyer could paraphrase the contents of the warranty before he saw it.⁵⁹

Nor do I think that elevation of warranties in the box to part of the basis of the bargain does any violence to this remnant of the Uniform Sales Act’s reliance requirement.⁶⁰ With the adoption of section 2-313 and with fifty years of cases that interpret section 2-313, the reliance remnant has been progressively weakened.⁶¹ We need not abandon it to say that in its current pale state, it is met by warranties in the box when both buyers and sellers expect them and widespread practice demands them.

Any argument that the express warranty is not part of the basis of the bargain is belied by the fact that the sellers march in rank here. Why does every laptop manufacturer include an express warranty? They do it because they realize that their product will be shunned as a pariah if they do not. That is an admission that the warranty is an expected part of the deal, for the sellers’ conformity tells us that they are afraid of losing sales, perhaps many sales, if they deviate from the practice.

What should be the rule when the business practice is not consistent? When some give warranties and others do not? Certainly different practices might call for different conclusions. For example, the drafters of section 2-313A did not apply it to used goods, nor to goods outside of the normal channels of commerce—sales as remainder sales or sales at T.J. Maxx. It is dangerous to predict the parties’ actual or legitimate expectations in markets with variable practices. There may be markets, such as those for new cars or large appliances, that deserve the same rule as laptops do, but there are others. For example, sales of used cars, where there is not one market with one practice but many markets and many practices—compare the sale of a ten-year-old clunker for \$1500 with the sale for \$65,000 of last year’s “pre-owned” BMW 750i carrying

59. Of course if the buyer has read the warranty online before his purchase, the issue disappears.

60. The Uniform Sales Act required reliance by a plaintiff in an express warranty case. The U.C.C. replaced the reliance requirement with the “basis of the bargain” language. However, “[w]hat the Code does to the pre-Code reliance requirement is quite unclear.” 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 455 (1988).

61. Following the shift from “reliance” to “basis of the bargain,” the requirement of reliance has faded, but it has not entirely disappeared. Some courts hold that no reliance is required to satisfy basis of the bargain, but some courts continue to treat the two standards as synonymous. James J. White, *Freeing the Tortious Soul of Express Warranty Law*, 72 TUL. L. REV. 2089, 2099 (1998); see also J. David Prince, *Defective Products and Product Warranty Claims in Minnesota*, 31 WM. MITCHELL L. REV. 1677, 1687–88 (2005) (stating that many states no longer require a buyer to show reliance in express warranty cases).

a dealer warranty. Only time will tell how far the courts should or will go beyond the warranty in the box.

VIII. LIABILITY OF REMOTE SELLERS

To reach remote sellers, the drafters of the Article 2 revision did not rely on the manipulation of contract doctrine, or even the warranty doctrine. They simply made a brute force assertion that there was an “obligation” because section 2-313A said so. The drafters, of course, were speaking as quasi-legislators representing the Uniform Law Commission to the real legislators representing the states, a status not enjoyed by the courts. Even the most activist court should be hesitant simply to assert that there is liability.

Traditionally, cases holding against remote buyers justify their conclusions by noting the absence of “privity,” that is, there is no contract between the buyer and the remote seller.⁶² The requirement of privity is justified as necessary to protect a promisor from unexpected and immeasurable liability to unknown persons. After all, this is contract, not tort. But if, as Professor Kessler says, “privity is only a means of protecting a party guilty of breach against losses suffered by remote parties which are unanticipated and therefore not included in the calculation of costs,”⁶³ then privity is not needed here. By hypothesis the warranties in the box are directed to a specific person, namely the “end user” or “customer,” not to the public at large. And the remedies can, and commonly are, limited to repair or replacement or the like—limitations that are enforceable unless they “fail of their essential purpose” under section 2-719. So I see no policy that demands privity when the manufacturer’s warranty is in the box.

More important, it is hard to find a case that would hold no express warranty responsibility for a manufacturer who had enclosed a “limited warranty” to the “end user” in the box. Many cases conclude that the remote seller has no implied warranty liability, but in most of those cases the seller, often a car manufacturer, has conceded liability to the retail buyer under his written limited express warranty, and in others that

62. *E.g.*, *Stepp v. Takeuchi Mfg. Co.* (U.S.), No. C07-5446RJB, 2008 WL 4460268, at *10 (W.D. Wash. Oct. 2, 2008); *Thongchoom v. Graco Children’s Prods., Inc.*, 71 P.3d 214, 219 (Wash. Ct. App. 2003) (“Generally, contractual privity between the buyer and seller must exist before a plaintiff may maintain an action for a breach of warranty.”).

63. Friedrich Kessler, *Products Liability*, 76 *YALE L.J.* 887, 892 (1967).

finding is implicit in the decision.⁶⁴ In some cases the court finds that privity is not required for either express or implied warranty cases.⁶⁵

Paying attention to the language of the express warranty, several cases rest their finding of express warranty liability on a finding that the remote seller has plainly directed a promise to the buyer.⁶⁶ Consider the *Kinlaw* court's rejection of the privity requirement. In *Kinlaw v. Long Manufacturing, N.C., Inc.*,⁶⁷ the court affirmed express warranty liability of a manufacturer who was conceded not to be in privity with the buyer:

Plaintiff here purchased both goods and a promise. He bought a new tractor, the performance of which was expressly guaranteed within the limits and upon the terms specified in the warranty contained in the owner's manual. Plaintiff could reasonably expect the author of the warranty to stand by its promise. . . . We find no "sensible or sound reason" requiring us to hold otherwise.⁶⁸

Every one of the cases demanding privity differs from the prototypical warranty in the box. Most involve implied, not express warranties.⁶⁹ That a manufacturer would regard himself as having implied warranty liability to a remote buyer or that such a buyer would think himself to have an implied warranty claim against a remote seller is far more

64. *E.g.*, *Aggarwal v. Nokia Corp.*, No. MDL-1521, 2005 WL 1564978, at *9-11 (N.D. Ill. June 3, 2005); *Bailey v. Monaco Coach Corp.*, 350 F. Supp. 2d 1036, 1048 (N.D. Ga. 2004); *Finch v. Ford Motor Co.*, 327 F. Supp. 2d 942, 946 (N.D. Ill. 2004); *Smith v. Monaco Coach Corp.*, 334 F. Supp. 2d 1065, 1069 (N.D. Ill. 2004); *Larry J. Soldinger Assocs. Ltd. v. Aston Martin Lagonda of N. Am., Inc.*, No. 97 C 7792, 1999 WL 756174, at *9 (N.D. Ill. Sept. 13, 1999); *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513, 1524-38 (D.D.C. 1984); *Chaurasia v. GMC*, 126 P.3d 165, 168, 175 (Ariz. Ct. App. 2006); *Kahn v. Volkswagen of Am., Inc.*, No. FSTCV075004090S, 2008 WL 590469, at *1, *7-8 (Conn. Super. Ct. Feb. 13, 2008); *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 807 N.E.2d 1165 (Ill. App. Ct. 2004).

65. *Seely v. White Motor Co.*, 403 P.2d 145, 148 (Cal. 1965); *Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028, 1031 (Ill. 1988); *Hiles Co. v. Johnston Pump Co. of Pasadena*, 560 P.2d 154, 157 (Nev. 1977).

66. *E.g.*, *Stepp*, 2008 WL 4460268, at *10 ("The privity requirement is 'relaxed,' however, if the manufacturer makes express representations to the plaintiff and the plaintiff knows of such representation."); *Free v. Sluss*, 197 P.2d 854, 856 (Cal. App. Dep't Super. Ct. 1948) (holding remote purchaser allowed to recover from manufacturer under express warranty created by quality guarantee printed on soap wrappers); *Kinlaw v. Long Mfg. N.C., Inc.*, 259 S.E.2d 552, 553-57 (N.C. 1979) (finding absence of privity not fatal to remote buyer's claim for breach of express warranty against manufacturer when plaintiff purchased new tractor from dealer and tractor came with owner's manual from manufacturer).

67. *Kinlaw*, 259 S.E.2d at 557.

68. *Id.*

69. *See Simonet v. SmithKline Beecham Corp.*, 506 F. Supp. 2d 77, 84-85 (D.P.R. 2007) (discussing state law variations regarding privity requirement for express and implied warranty claims); *Aggarwal*, 2005 WL 1564978, at *10; *Bailey*, 350 F. Supp. 2d at 1048; *Finch*, 327 F. Supp. 2d at 946; *Smith*, 334 F. Supp. 2d at 1069-70; *Larry J. Soldinger Assocs.*, 1999 WL 756174, at *9; *Walsh*, 588 F. Supp. at 1525; *Chaurasia*, 126 P.3d at 171; *Seely*, 403 P.2d at 147-48; *Kahn*, 2008 WL 590469, at *8; *Rothe*, 518 N.E.2d at 1028-29; *Mekertichian*, 807 N.E.2d at 1166; *Hiles Co.*, 560 P.2d at 155.

doubtful than with an express warranty. Other privity cases deal with issues unrelated to warranty.⁷⁰ Yet other cases, such as the owner's manual cases, arise from documents that have few of the contractual attributes that attend warranties in the box. Many of the cases that demand privity for express warranty liability arose before the Magnuson-Moss Act prescribed formal, contractual language. The warranties in the box now have a formality demanded by Magnuson-Moss; they proudly announce "limited warranties," and they are not usually buried in a document such as an automobile owner's manual whose principal purpose is to instruct about the operation of a complicated machine that the buyer must master.⁷¹

Reading this handful of modern express warranty cases tempts one to consider the radical possibility that modern law already enforces warranties in the box from remote sellers. Perhaps the patient has healed spontaneously while the doctors dithered over his cure. The drafters of the Article 2 revision and their advisors may have been too attentive to the fine doctrinal detail of warranty law;⁷² they may have imagined a problem that no longer exists.

We know that tens of thousands of warranties in the box and other express warranties from manufacturers on the sale of new cars and large appliances are made each year. We also know that thousands of claims are made against these warranties each year, but we find no case in which a remote seller of new goods who has made an express warranty packaged with the product has denied the legal effectiveness of that warranty. If these warranties are not enforceable against the remote sellers, one would expect at least an occasional seller/manufacturer to raise that issue in an appellate case. Annually there must be thousands of warranty claims against automobile manufacturers and at least the same number against Dell, Hewlett-Packard, and Sony. Yet the closest we come to a case that invalidates a warranty in the box are a few

70. See, e.g., *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (holding arbitration clause included with terms in box unenforceable).

71. See, e.g., *Haynes v. George Ballas Buick-GMC Truck*, No. L-89-168, 1990 WL 210413, at *4-5, *8 (Ohio Ct. App. Dec. 21, 1990); but cf. *Finch*, 327 F. Supp. 2d at 945-46; *Chaurasia*, 126 P.3d at 168-69.

72. Donald F. Clifford, *Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 WASH. U. L.Q. 413, 464 (1997) ("The statutory recognition of an enforceable relationship between a remote seller and a buyer is an important step in dealing with the realities of the modern marketplace.").

owner's manual cases that disagree with *Kinlaw*.⁷³ That we cannot find a single claim in a modern appellate case dealing with express warranties packed in the box with the product is a strong, if mute, denial of a problem.

73. *Haynes*, 1990 WL 210413, at *1–4, *6–8 (finding no warranty liability for remote manufacturer in an owner's manual case). Other cases rejecting express warranty liability are farther removed from the warranty in the box. *See, e.g.*, *Stepp v. Takeuchi Mfg. Co. (U.S.)*, No. C07-5446RJB, 2008 WL 4460268, at *1 (W.D. Wash. Oct. 2, 2008) (warning labels on a tractor); *Thongchoom v. Graco Children's Prods., Inc.*, 71 P.3d 214, 216 (Wash. Ct. App. 2003) (warning on a secondhand stroller bought at a garage sale and acquired by the plaintiffs as a gift).