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The Merchant of Section 2-314: Who Needs Him?

By INGRID MICHELSEN HILLINGER*

Inertia rather than malice was the moving force behind the method practiced by Judge Bridlegoose. . . who carried mechanical tests to the summit of achievement.

B. Cardozo, *The Growth of the Law* 139 (1924).

Assume that Buyer purchases a used car from Seller. Three minutes after Buyer takes possession, the engine explodes. Seller was not guilty of any fraud with respect to the sale nor did he make any express promises about the quality of the car. Does Buyer have any recourse against Seller?

The possibility of legal recourse under the Uniform Commercial Code¹ depends on the seller's status. Section 2-314 of the Code provides 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 if the seller is a merchant with respect to goods of that kind."² Under this section, merchant sellers are deemed to give an implied warranty of merchantability; non-merchant sellers are not.³ Therefore,

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The author dedicates whatever is good in this Article to her parents, Dr. and Mrs. Jost J. Michelsen. She thanks F. Acie Allen and David S. Rudiger, research assistants supreme; Leigh Fulwood, bluebook queen; Professors Frederick Schauer and Timothy Sullivan, mentors; Professors John Levy, Margit Livingston, and Elizabeth Schmidt, support matrix; Della Howard, patient typist; and Michael, Daniel, David and Abigail, family who were still there when the last footnote was done.

1. Unless otherwise indicated, all references to the Uniform Commercial Code ("the Code") are to the 1972 Official Text and Comments. For purposes of this Article, "he," "him," and "his" refer to both the masculine and feminine gender.

2. U.C.C. § 2-314(1).

3. Courts interpret § 2-314(1) to mean that non-merchant sellers do not give an implied warranty of merchantability. A determination that the seller is not a merchant immediately disposes of any § 2-314 claim. *See, e.g.,* Rock Creek Ginger Ale Co. v. Thermice Corp., 352 F. Supp. 522 (D.C. Cir. 1971); McGregor v. Dimou, 101 Misc. 2d 756, 422 N.Y.S.2d 806 (1979); Samson v. Riesing, 62 Wisc. 2d 698, 215 N.W.2d 662 (1974). A non-merchant seller may be liable to a buyer on other theories. *See infra* notes 6-10 & accompanying text.

buyers who receive unmerchantable goods from a merchant seller have section 2-314 recourse while buyers who receive unmerchantable goods from a non-merchant seller do not. Section 2-314(1) requires the buyer from a non-merchant seller to pay his promised purchase price even when the goods received are suitable only for placement on Lord Ellenborough's dunghill.⁴

Section 2-314 determines whether the buyer or the seller must suffer the loss occasioned by unmerchantable goods: if the seller is a merchant, he assumes the loss; if the seller is not a merchant, the buyer assumes the loss. Section 2-314 suggests that a critical connection exists between seller status and the rational allocation of loss for defective goods. It does not, however, suggest what that critical connection might be.

There seems to be no logical reason for the Code to absolve an entire class of sellers from all legal responsibility to deliver merchantable goods. Other legal doctrines that allocate loss for defective quality do not depend upon seller status. A seller, regardless of his status, must bear the loss in the event of breach of an express warranty,⁵ fraud,⁶ innocent misrepresentation,⁷ or constructive fraud.⁸ In addition, other countries, which in many instances do differentiate between merchant and non-merchant sellers, do not differentiate between sellers in terms of their basic legal obligation to deliver merchantable goods.⁹ Section 2-314(1)'s method of allocating loss based upon seller status is both puzzling and unusual.¹⁰

4. *Gardiner v. Gray*, 171 Eng. Rep. 46, 47 (K.B. 1815).

5. *See, e.g., Rock Ginger Ale Co. v. Thermice Co.*, 352 F. Supp. 522 (D.D.C. 1971); *Downs v. Shouse*, 18 Ariz. App. 225, 501 P.2d 401 (1972).

6. *See, e.g., McGregor v. Dimou*, 101 Misc. 2d 756, 422 N.Y.S.2d 806 (1979).

7. *See Fields v. Haupt*, 213 Or. 179, 323 P.2d 332 (1958); *Dahl v. Crain*, 193 Or. 207, 237 P.2d 939 (1951). Courts allow a buyer to rescind the sale where the seller has made an innocent misrepresentation.

8. The doctrine of constructive fraud requires a special relationship between the parties but otherwise does not focus on the defendant's status. *See, e.g., Jackson v. Seymour*, 193 Va. 735, 71 S.E.2d 181 (1952).

9. In both France and Germany it is the civil code rather than the commercial code that imposes a basic duty on all sellers to deliver merchantable goods. For a more detailed discussion of the French and German approaches to a seller's responsibility for quality, see *infra* notes 309-20 & accompanying text.

10. Allocation of loss on the basis of seller status appears to be peculiar to the Anglo-American legal system. The English recently amended their Sale of Goods Act to impose a warranty on any seller who sells goods "in the course of a business." 34 HALSBURY'S LAWS OF ENGLAND 78 (3d ed. 1960 & Supp. 1982). Previously, the English Sale of Goods Act limited the implied warranty of merchantability to sellers dealing in goods of that description. *Id.* at 78 (3d ed. 1960). In reviewing the warranty provisions in their own Sale of Goods Act, the Ontario Law Reform commission objected to the English revision and rec-

The Code fails to provide any policy statement justifying its section 2-314 merchant distinction. Rather, a buyer's section 2-314 fate hinges on the Code's difficult and confusing definition of "merchant."¹¹ The practical difficulties in determining who qualifies as a merchant for purposes of section 2-314 compound the theoretical difficulties created by the section's merchant distinction itself. Both difficulties grow more acute as courts, by analogy, extend section 2-314's "reasoning" to non-sales transactions.¹²

This Article seeks to understand and evaluate section 2-314's merchant distinction, examining it from a number of perspectives, including the Code's warranty provisions, its overall warranty philosophy, and its merchant definition. The Article explores the historical connection linking seller status to seller responsibility for quality and analyzes the merchant restriction in terms of the public policies underlying the creation of an implied warranty of merchantability. The Article concludes that section 2-314's merchant distinction is inconsistent

ommended retention of the former English approach, noting its similarity to the Code's approach. *ONT. LAW REFORM COMM'N, 1 REPORT ON SALE OF GOODS* 209 (1979).

11. U.C.C. § 2-104(1). The threshold question in a § 2-314 claim is whether the seller qualifies as a merchant. *See, e.g., Donald v. City Nat'l Bank of Dothan*, 295 Ala. 320, 329 So. 2d 92 (1976); *Samson v. Riesing*, 62 Wis. 2d 698, 215 N.W.2d 662 (1974). For a discussion of the Code's merchant definition, see *infra* notes 146-200 & accompanying text.

12. Technically, § 2-314 limits itself to sales. Some courts have been willing, however, to imply a warranty of merchantability in non-sales transactions such as leases, bailments, or goods provided in connection with services. *See, e.g., Quality Acceptance Corp. v. Million & Albers, Inc.*, 367 F. Supp. 771 (D. Wyo. 1973) (implied warranty applicable to a lease of business machines with option to purchase); *Bachner v. Pearson*, 479 P.2d 319 (Alaska 1970) (commenting that bailment arrangements do not preclude an implied warranty of merchantability); *Sawyer v. Pioneer Leasing Corp.*, 244 Ark. 943, 428 S.W.2d 46 (1968) (implied warranty applicable to ice machine lease having characteristics of a sale); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965) (implied warranty exists in bailor-bailee relationship).

Courts have refused, however, to extend § 2-314 to lease transactions in which the lessor has acted merely to finance the transaction. *See, e.g., All-States Leasing Co. v. Bass*, 96 Idaho 873, 538 P.2d 1177 (1975); *All-States Leasing Co. v. Ochs*, 42 Or. App. 319, 600 P.2d 899 (1979). Section 2-314's express reference to sales also has caused some courts to refuse to recognize an implied warranty of merchantability in a service transaction even though goods were also provided to the recipient of the services. *See, e.g., Gunter v. Cascio*, 335 Ill. App. 287, 81 N.E.2d 766 (1948) (dental services); *O'Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826 (Minn. 1977) (sale involved not only transfer of goods but also installation); *Preston v. Thompson*, 53 N.C. App. 290, 280 S.E.2d 780 (1981) (dentist not a merchant); *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954) (blood transfusion by a hospital is a service not a sale). Professor Farnsworth, among others, argues that an implied warranty of merchantability should not hinge on a sale/service distinction. Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 666 (1957). *See also* R. NORDSTROM, *LAW OF SALES* § 80 (1970); J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 9-6, at 398 (2d ed. 1980).

with the Code's overall warranty scheme and philosophy as well as with modern notions of unjust enrichment.¹³ It is not a product of considered reasoning, but an atavistic remnant of our caveat emptor past and should be eliminated.

Section 2-314's Merchant Distinction From The Perspective Of The Code's Three Warranty Provisions

Section 2-314 is one of three Code provisions dealing with a seller's responsibility for the quality of the goods he sells.¹⁴ Of the three, only section 2-314 statutorily links seller status to seller responsibility for quality. A consideration of the three warranty provisions may explain why only merchant sellers assume section 2-314 implied warranty responsibility.

Section 2-313

Section 2-313 deals with express warranties, which can be created by a variety of means.¹⁵ Any affirmation of fact or promise made by the seller, any description of the goods, or any model or sample creates an express warranty of quality with respect to the goods *if* the affirmation, promise, description, model, or sample is made "part of the basis of the bargain."¹⁶ Although the phrase "part of the basis of the bargain" is vague,¹⁷ comment 1 to section 2-313 explains that "express

13. "The principle . . . is to deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits quite honestly in the first instance, and even though the plaintiff may have suffered no demonstrable losses." D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 224 (1973). In a non-merchant sale involving defective goods assumed to be non-defective, the seller gains while the buyer, by having to pay the purchase price, suffers a demonstrable loss.

14. Section 2-314 deals with the implied warranty of merchantability, § 2-313 with express warranties, and § 2-315 with the implied warranty of fitness for a particular purpose.

15. U.C.C. § 2-313, captioned "Express Warranties by Affirmation, Promise, Description, Sample," provides: "(1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model. (2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

16. *Id.*

17. The phrase and its possible significance in the overall scheme of § 2-313 have received considerable scholarly attention. See, e.g., R. NORDSTROM, *supra* note 12, §§ 66-68;

warranties rest on 'dickered aspects' of the individual bargain and go . . . clearly to the essence of that bargain,"¹⁸ thus focusing on the articulated quality terms of a bargain.¹⁹ Section 2-313 gives legal effect to the responsibilities for quality which a seller expressly undertakes, thereby protecting the buyer's reasonable expectations of quality created by overt seller conduct.

The text of section 2-313 makes no distinction as to seller status. Any seller can give an express warranty. Seller status, however, is not wholly irrelevant to section 2-313, and may play a role in determining whether an express warranty was given. Section 2-313(2) recognizes that some seller statements may represent the seller's opinion of quality as opposed to an express promise of quality.²⁰ Comment 8 to section 2-313, which gives courts guidance in determining whether a particular statement constitutes mere opinion or an express warranty, provides the standard governing all section 2-313 claims: "the basic question remains the same: what statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain?"²¹

A seller's status may influence the court's interpretation of the parties' objectively reasonable understanding. One court held that the statement "[t]he car is in good shape" did not constitute an express warranty when spoken by a private individual with no special knowledge or expertise regarding cars, and that a reasonable buyer could not understand the statement to be an express warranty.²² A comparable statement, when made by a used car dealer, has been held to constitute an express warranty.²³ Under section 2-313, then, seller status may be

J. WHITE & R. SUMMERS, *supra* note 12, § 9-4; E. FARNSWORTH & J. HONNOLD, *COMMERCIAL LAW CASES AND MATERIALS* 523-25 (3d ed. 1976); Comment, "Basis of the Bargain"—*What Role Reliance?*, 34 U. PITT. L. REV. 145 (1972).

18. U.C.C. § 2-313 comment 1.

19. Lyrically put, "[e]xpress warranties are chisels in the hands of buyers and sellers. With these tools, the parties to a sale sculpt a monument representing the goods. Having selected a stone, the buyer and seller may leave it almost bare, allowing considerable play in the qualities that fit its contours. Or the parties may chisel away inexactitudes until a well-defined shape emerges." Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 43 (1978).

20. "[A]n affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a[n] [express] warranty." U.C.C. § 2-313(2).

21. *Id.* comment 8.

22. *Guess v. Lorenz*, 612 S.W.2d 831, 833 (Mo. Ct. App. 1981).

23. *Wat Henry Pontiac Co. v. Bradley*, 202 Okla. 82, 210 P.2d 348 (1949) (used car salesman's statement that the car was in "A-1 shape" and "mechanically perfect" held to constitute an express warranty). Professors White and Summers believe that this case is

a factor in determining whether an express warranty has been given, but it is not dispositive.

Section 2-315

Section 2-315 deals with the seller's implied undertaking to provide goods fit for the buyer's particular purpose.²⁴ According to section 2-315, if the seller has reason to know of the buyer's particular purpose and of the buyer's reliance on the seller's expertise in furnishing goods for that particular purpose, the sale alone obligates the seller to provide goods fit for the buyer's purpose.²⁵ Comment 1 to section 2-315 states that "[w]hether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting."²⁶ This suggests that section 2-315 protects the buyer's reasonable, albeit unarticulated, expectations of quality which are created by the circumstances of the transaction rather than the kind of overt seller conduct described in section 2-313. The seller's mere act of sale creates a reasonable expectation in the buyer that the goods will meet his particular purpose.²⁷

distinguishable from other "puffing" cases because it involved a woman with a seven-month-old child buying a car in 1944 to make a trip to visit her husband who was in the Army. J. WHITE & R. SUMMERS, *supra* note 12, § 9-3. See also D. WHALEY, *WARRANTIES AND THE PRACTITIONER* 33 (1981).

24. U.C.C. § 2-315, captioned "Implied Warranty: Fitness for Particular Purpose," provides in full: "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

25. The seller's sale under the circumstances described in § 2-315 impliedly establishes the seller's assumption of responsibility to provide goods suitable for the buyer's known purpose.

26. *Id.* comment 1.

27. The case law involving § 2-315 suggests that it protects the buyer's reasonable expectations arising from the circumstances of the sale. For instance, the seller who was told that the exterior walls of buyer's stucco home were "chalky" and was asked to recommend a paint to cover the walls was liable for breach of warranty when the paint he sold did not adhere to the stucco walls. *Catania v. Brown*, 4 Conn. Cir. Ct. 344, 231 A.2d 668 (1967). See also *J. Landau & Co. v. L-Co Cabinet Corp.*, 46 NORTHUMBERLAND LEG. J. 31, 14 U.C.C. Rep. Serv. (Callaghan) 1132 (1974); *Caldwell v. Brown Funeral Serv. Home*, 345 So. 2d 1341 (Ala. 1977). On the other hand, if the seller does not know of the buyer's particular purpose, then the buyer cannot reasonably expect the seller to provide goods suitable for that purpose. Thus, the seller who supplied laminated sheetrock in response to the buyer's order for one-inch sheetrock was not liable to the buyer under § 2-315 because he did not know of the buyer's particular purpose which required homogeneous sheetrock. *Tracor, Inc. v. Austin Supply & Drywall Co., Inc.*, 484 S.W.2d 446 (Tex. Civ. App. 1972). See also *Standard Packaging Corp. v. Continental Distilling Corp.*, 259 F. Supp. 919, 921-22 (E.D. Pa. 1966).

Section 2-315 does not limit itself to merchant sellers. Although the comments to section 2-315 note that normally only merchant sellers would give this warranty because only they would possess the requisite skill and expertise, the comments recognize that under the appropriate circumstances a non-merchant seller could give a section 2-315 warranty as well.²⁸

Failure to restrict the class of sellers capable of giving either an express or an implied warranty of fitness for a particular purpose suggests that the drafters did not want to create arbitrary classifications that might deny effect to a buyer's reasonable quality expectations in a given transaction. Both section 2-313 and section 2-315 protect a buyer's reasonable expectations of quality. A seller, merchant or not, who disappoints the buyer's section 2-313 or section 2-315 expectations of quality is liable to the buyer for breach of warranty.

Section 2-314

Section 2-314 discusses the implied warranty of merchantability, which involves the seller's legal obligation to deliver goods fit for the ordinary purposes for which such goods are used.²⁹ Section 2-314(1) limits section 2-314 to merchant sellers only.³⁰ Thus, only merchant

28. U.C.C. § 2-315 comment 4. Skill and expertise with respect to goods can exist in those who do not sell such goods regularly. For instance, consider the fellow who builds boats for pleasure. His close friend who lives nearby on the ocean asks him to build a boat. The seller's agreement to build him a boat would create a reasonable expectation in the buyer that he would receive a boat suitable for ocean sailing.

29. Section 2-314 provides in full: "(1) Unless excluded or modified (sections 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any. (3) Unless excluded or modified (section 2-316) other implied warranties may arise from course of dealing or usage of trade."

"Fitness for the ordinary purpose for which goods of the type are used is a fundamental concept of the present section. . . ." U.C.C. § 2-314 comment 8. Courts frequently rely on § 2-314(2)(c) as the basic § 2-314 quality standard. *See, e.g.*, *Koellmer v. Chrysler Motors Corp.*, 6 Conn. Cir. Ct. 478, 276 A.2d 807 (1970); *Dennin v. General Motors Corp.*, 78 Misc. 2d 451, 357 N.Y.S.2d 668 (1974); *S.F.C. Acceptance Corp. v. Ferree*, 39 Pa. D. & C.2d 225, 3 U.C.C. Rep. Serv. (Callaghan) 808 (1966).

30. U.C.C. Section 2-314(1) provides that "a warranty that the goods shall be merchantable is implied . . . if the seller is a merchant with respect to goods of that kind."

sellers are obligated to deliver goods of merchantable quality. Section 2-314 makes the obligation to deliver merchantable goods an implied term in all merchant seller contracts unless excluded or modified.³¹

Subsection (2) of section 2-314 attempts to give substantive meaning to the implied obligation established in subsection (1) by setting forth six conjunctive standards for determining merchantability.³² The standards, intentionally broad and vague, enable section 2-314 to apply to the infinite variety of goods and sales circumstances governed by article 2.³³

These broad standards require the courts to determine any individual seller's section 2-314 quality undertaking. In doing so, courts will consider the nature of the particular goods,³⁴ the contract price,³⁵ the circumstances surrounding the sale,³⁶ common expectations and ex-

31. U.C.C. § 2-314(2).

32. See *supra* note 29 for the text of U.C.C. § 2-314(2). The concept of "merchantable" or "merchantability" pre-dates the Code. See *infra* notes 176-81 & accompanying text.

33. Article 2 applies to all transactions in goods unless the context indicates otherwise, the transaction in reality is a security transaction, or a separate statute exists regulating sales to consumers, farmers or other special classes of buyers. U.C.C. § 2-102. Article 2 governs transactions in goods as diverse as widgets, *Blockhead, Inc. v. Plastic Forming Co., Inc.*, 402 F. Supp. 1017 (D. Conn. 1975); electricity, *Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 38 Mich. App. 325, 196 N.W.2d 316 (1972); day old chickens, *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. 1967); and race horses, *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. 1978). It also covers used goods. *Georgia Timberlands, Inc. v. Southern Airways Co.*, 125 Ga. App. 404, 188 S.E.2d 108 (1972) (used airplane); *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (1972) (auction of restaurant equipment); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 554 P.2d 349 (1976) (used car). But see *Chag Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877 (Tex. 1973) (§ 2-314 not applicable to used goods). For a discussion of this case and its unique interpretation of § 2-314's non-applicability to used goods, see Comment, *UCC Implied Warranty of Merchantability and Used Goods*, 26 BAYLOR L. REV. 630 (1974). For a more general discussion of the warranty as it applies to used goods, see Comment, *Used Goods and Merchantability*, 13 TULSA L.J. 627 (1978). "Goods" includes "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." U.C.C. § 2-105.

34. See, e.g., *Price Bros. Co. v. Philadelphia Gear Corp.*, 649 F.2d 416, 424 (6th Cir.), *cert. denied*, 454 U.S. 1099 (1981) (product's experimental and "new" nature was found to preclude imposition of an implied warranty of merchantability). *Sessa v. Riegle*, 427 F. Supp. 760, 770 (E.D. Pa. 1977), *aff'd*, 568 F.2d 770 (3d Cir. 1978); *Coffer v. Standard Brands*, 30 N.C. App. 134, 139, 226 S.E.2d 534, 537 (1976); *Tracy v. Vinton Motors, Inc.*, 130 Vt. 512, 516, 296 A.2d 269, 272 (1972).

35. See, e.g., *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (1972); *Sylvia Coal Co. v. Mercury Coal & Coke Co.*, 151 W. Va. 818, 156 S.E.2d 1 (1967).

36. See, e.g., *Eichenberger v. Wilhelm*, 244 N.W.2d 691, 696-97 (N.D. 1976); *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458, 463 (Okla. 1980).

perience,³⁷ trade usage,³⁸ and the nature of the defect.³⁹ The courts, and not the Code, ultimately determine what responsibilities for quality are engendered by the implied warranty of merchantability.⁴⁰ The courts decide what is and what is not merchantable.

The Theory of Section 2-314

Contrasting express with implied warranties, comment 1 to section 2-313 states: "[i]mplied warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated."⁴¹ This suggests that sections 2-314 and

37. See, e.g., *Webster v. Blue Ship Tea Room, Inc.*, 347 Mass. 421, 198 N.E.2d 309 (1964); *Kelly v. Hanscom Bros. Inc.*, 231 Pa. Super. 357, 361, 331 A.2d 737, 739 (1974) (the court considered children's "universal" penchant for putting things in their mouths in determining whether toys were merchantable).

38. See, e.g., *T.J. Stevenson & Co. v.* 81,193 Bags of Flour, 629 F.2d 338, 351-53 (5th Cir. 1980); *Brickman-Joy Corp. v. National Annealing Box Co.*, 459 F.2d 133 (2d Cir. 1972); *Spurgeon v. Jamieson Motors*, 164 Mont. 296, 301-02, 521 P.2d 924, 927 (1974) (the court considered trade usage in determining whether the § 2-314 implied warranty had been modified by the parties and was therefore inapplicable).

39. See, e.g., *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977); *Musil v. Hendrick*, 6 Kan. App. 2d 196, 627 P.2d 367 (1981); *Anderson v. Associated Grocers, Inc.*, 11 Wash. App. 774, 525 P.2d 284 (1974).

40. A seller's § 2-314 responsibility will vary considerably depending upon the circumstances. With respect to a new motor coach, for instance, the court in *Massingale v. Northwest Cortez, Inc.*, 27 Wash. App. 749, 620 P.2d 1009 (1980), held that § 2-314 obligated the seller to deliver an object "fit to transport the driver and his passengers reasonably safely, efficiently and comfortably." *Id.* at 752, 620 P.2d at 1011. With respect to a used car, "merchantable" required a car that would not burn itself into oblivion three hours after its purchase. *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975). With regard to polio vaccine, "merchantable" entailed a product that would not actively cause the very disease it was designed to protect. *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 620, 6 Cal. Rptr. 320, 44 P.2d 447 (1960). In determining that agricultural fertilizer must cause "something to happen" in order to be merchantable, the judge in *American Fertilizer Specialists, Inc. v. Wood*, 635 P.2d 592 (Okla. 1981) relied on common sense and his own personal experience: "I think when you hire someone to do something and it is not done or the results do not come about as forecast, be it breach of implied warranty or be it no fertilizer was put down, that you have violated the person's right. . . . I grew up on a farm and we applied fertilizer and got results every time, one way or the other." *Id.* at 597. Certainly this court's handling of the implied warranty issue confirms that: "Experience has been not only the life of the law, but the progenitor of implied warranties. The idea of imposing warranties of quality by law was probably conceived in the experience of the unfortunate who bought the unfit from the unscrupulous." Special Project, *supra* note 19, at 67. In contrast, a "merchantable" used ice making machine was held to include one that did not make ice. *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (1972). Also, with respect to a \$25,000 race horse, "merchantable" included a horse which won only a little over \$1300 and incurred medical expenses in excess of \$9000. *Sessa v. Riegle*, 427 F. Supp. 760 (E.D. Pa. 1977).

41. U.C.C. § 2-313 comment 1.

2-315 give legal effect to the parties' unarticulated contractual understandings with respect to quality.⁴² Both provisions infer what the parties failed to articulate because it was so basic to their understanding as not to require expression.⁴³

Analyzing the implied warranty of merchantability cases up to 1943, Dean Prosser argued that a theory of "implied agreement in fact" explained most of the decisions.⁴⁴ Under this theory,

[t]he warranty has in fact been agreed upon by the parties as an unexpressed term of the contract of sale. . . . The court, by interpreting the language used, the conduct of the parties and the circumstances of the case, finds that it is there. Such a contract term "implied in fact" differs from an express agreement only in that it is circumstantially proved.⁴⁵

Comment 7 to section 2-314 suggests that the Code's implied warranty of merchantability provision also relates to the parties' actual, reasonable contractual understandings and intentions: "[i]n cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section."⁴⁶ Section 2-314 seems to embody Dean Prosser's "implied in fact" contract theory.⁴⁷ Interpreted this way, section 2-314 deals with the impliedly understood quality terms of a bargain, protecting the buyer's reasonably entertained quality expectations. The view that the implied warranty of merchantability

42. Section 1-201(3) defines "agreement" as "the bargain of the parties in fact as found in their language or by implication from other circumstances. . . ." U.C.C. § 1-201. Sections 2-314 and § 2-315 dealing with implied warranties establish certain circumstances which relate to the parties' bargain in fact.

43. One court held with respect to the sale of a new car "the presumption is that the dealer intended to deliver and the buyer intended to receive a reasonably safe, efficient and comfortable car." *Berg v. Stromme*, 79 Wash. 2d 184, 187, 484 P.2d 380, 383 (1971).

44. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 125 (1943).

45. *Id.* at 123.

46. U.C.C. § 2-314 comment 7.

47. Dean Prosser suggested another theory to explain the implied warranty of merchantability that it is imposed by law. Prosser, *supra* note 42, at 124. Some courts agreed, noting that implied warranties represent an obligation imposed by law as a matter of public policy. *See, e.g.*, *B.F. Goodrich Co. v. Hammond*, 269 F.2d 501, 504 (10th Cir. 1959). Professor Whaley suggests an intermediary interpretation: "implied warranties depend on legislative policy. . . they reflect society's judgments about the basic understandings of the foundation of most deals: implied warranties are contractual only in the sense that they mirror common expectations. . . ." D. WHALEY, *supra* note 23, at 21-22. To the extent that the parties' actual expectations reflect common expectations, § 2-314 enforces both an obligation implied-in-fact and imposed by law. The implied warranty has been described as "a contractual term promising quality but imposed by law rather than agreement." Special Project, *supra* note 22, at 68.

protects the buyer's reasonable, unarticulated quality expectations finds support in the comments to section 2-314,⁴⁸ judicial interpretations of that section,⁴⁹ and Dean Prosser's comments.⁵⁰ The warranty protects these expectations by giving the buyer legal recourse against his seller for breach of the implied warranty of merchantability.⁵¹

If the purpose of section 2-314 is the protection of the buyer's reasonable unarticulated expectations under the circumstances, one wonders what purpose section 2-314's merchant distinction serves. If the idea is that those who buy from non-merchant sellers cannot have reasonable quality expectations, section 2-314's merchant restriction is superfluous. Section 2-314 does not need a merchant restriction to deny effect to unreasonable quality expectations. Suppose, for example, that a person sells a neighbor a used washing machine. Three days after the purchase the motor dies, necessitating the purchase of a new motor. Even without a merchant restriction, the buyer could not sue the seller successfully under section 2-314. The buyer, as a reasonable person buying a used washing machine, reasonably would assume and expect that the subject matter of the sale might require repair, even extensive repair, to be serviceable. The fact that it needed repair would not make it unmerchantable. Delivery of a machine which required repair would still conform to the parties' impliedly understood bargain and the seller's section 2-314 quality responsibility would be met. Similarly, the manufacturer who buys a used machine from another manufacturing concern can reasonably expect that the machine might experience the typical infirmities of old age that a new machine would not.⁵² Section 2-314's merchant distinction is not necessary to block enforcement of unreasonable quality expectations.

In addition to being superfluous to the goal of protecting a buyer's reasonable expectations, section 2-314's merchant distinction totally obstructs that objective with respect to non-merchant sales by categorically precluding the court from inquiring into the buyer's implied quality expectations in a non-merchant sale. If the policy behind section 2-314 is to give effect to a buyer's reasonable quality expectations, we

48. See *supra* notes 41, 46 & accompanying text.

49. See *supra* notes 34-40 & accompanying text.

50. See *supra* notes 44-45 & accompanying text.

51. A seller's breach of warranty authorizes the buyer to reject the goods. U.C.C. § 2-601. In the event of acceptance, the buyer may revoke his acceptance if the non-conformity substantially impairs the value of the goods to him. U.C.C. § 2-608. In the event that revocation is not authorized, the buyer may sue the seller for damages. U.C.C. § 2-714.

52. *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. 1972) (used ice-making machine that did not make ice was merchantable).

must look elsewhere to explain why those expectations should not be protected when the seller is not a merchant.

Section 2-314's Merchant Distinction From The Perspective Of The Code's Overall Warranty Philosophy

Although a reasonable expectations theory of section 2-314 does not explain the merchant distinction, an examination of the Code's overall warranty philosophy may. Buried in a comment to section 2-313 is the statement that "the whole purpose of warranty law is to determine what it is that the seller has in essence agreed to sell. . . ."⁵³ That statement suggests that the warranty provisions⁵⁴ all seek a common goal: determination of the seller's essential contractual undertaking.⁵⁵ That undertaking can have implied as well as express components.

If the whole purpose of warranty law is determining the seller's essential agreement, and all the warranty provisions are just ways to determine that agreement, section 2-314's merchant distinction oper-

53. U.C.C. § 2-313 comment 4.

54. U.C.C. §§ 2-313, 2-314, 2-315, and 2-316 (Exclusion and Modification of Warranties). See *supra* notes 15, 31, 37 and *infra* notes 125-40 & accompanying text.

55. Section 2-316 recognizes the exclusion or modification of warranties if it reflects the parties' bargain. Its requirements seek to protect a buyer from surprise. U.C.C. § 2-316 comment 1. Obviously exclusions and modifications relate to the seller's essential contractual undertaking and therefore are an essential part of the Code's overall warranty scheme. Some courts, especially in the area of consumer transactions, have been both willing and adept at invalidating disclaimer clauses. See, e.g., *Duckworm v. Ford Motor Co.*, 211 F. Supp. 888 (E.D. Pa. 1966); *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 337, 120 Cal. Rptr. 681 (1975). Other courts have been less willing to do so. See, e.g., *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 454 F. Supp. 537 (D.C. Mass. 1977); *Hahn v. Ford Motor Co.*, 434 N.E.2d 943 (Ind. App. 1982).

For a discussion of the various, artful means courts have used to avoid disclaimer clauses, see Sullivan, *Innovation in the Law of Warranty: The Burden of Reform*, 32 HASTINGS L.J. 341, 377-89 (1980). Senator Warren Magnuson argued that consumers needed protection from sellers who gave a limited express warranty and disclaimed all implied warranties. Magnuson, *Fair Disclosure In the Marketplace of Warranty Promises—Truth in Warranties for Consumers*, 8 U.C.C. L.J. 117, 124 (1975). This typical seller conduct, in part, justified enactment of the Magnuson-Moss Warranty Act. *Id.* Professor Sullivan questioned the overwhelming need for federal legislation in the face of common law developments. Sullivan, *supra*, at 401.

Scholars have noted the artificiality of the Code's warranty treatment. See, e.g., Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58, 61 (1952); D. WHALEY, *supra* note 23, at 21. The proposed warranty provision for the International Sales Law provided simply that "the seller is obliged to deliver goods which possess the qualities and characteristics expressly or impliedly contemplated by the contract." Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299, 314-15 (1959). Professor Honnold said that "these few words provide a basis for a unified, powerful and realistic approach to a solution to the most pervasive problem of sales law." *Id.*

ates as the erring black sheep in the Code's warranty family. Rather than advancing the Code's purpose of determining the seller's essential undertaking, the merchant distinction does just the opposite. In the area of non-merchant sales, the court cannot use section 2-314 to determine what the seller has in essence agreed to sell, thereby eliminating a valuable tool otherwise available to the court. The distinction seems at odds with the Code's overall warranty philosophy.

In this regard, section 2-314's merchant distinction becomes even more puzzling when considered in conjunction with section 2-315. As previously mentioned,⁵⁶ the section 2-315 implied warranty is not restricted to any particular class of sellers. Section 2-315 establishes that non-merchant sellers can undertake some implied contractual responsibilities. The juxtaposition of sections 2-314 and 2-315 produces a most curious denouement. A non-merchant seller *can* agree impliedly to furnish goods suitable for the buyer's particular purpose, but *cannot* agree impliedly to furnish goods suitable for their ordinary purpose. In addition to the general question of why non-merchant sellers can impliedly assume some responsibilities but not others, there is the narrower question of whether the ordinary purpose for which goods are used is subsumed under the buyer's particular purpose. One comment to section 2-315 discusses shoes: "shoes are generally used for the purpose of walking upon ordinary ground. . . ."⁵⁷ If the seller knows that the buyer wants mountain climbing shoes and the buyer relies on the seller's expertise to select shoes suitable for that purpose, the seller in selling a particular pair of shoes to the buyer has impliedly undertaken to provide shoes that will be adequate for mountain climbing.⁵⁸ It would seem that the implied undertaking to provide shoes capable of withstanding the rocky hazards of mountain climbing would include the lesser obligation of providing shoes capable of withstanding normal street wear. Although a buyer's particular purpose may not involve the ordinary purpose for which such goods are used, certainly there is some degree of overlap.⁵⁹ This overlap of section 2-314 and 2-315 undertakings produces an incongruous situation with respect to non-merchant sales. What the non-merchant seller cannot undertake impliedly in section 2-314, he can undertake in section 2-315—and more.

56. See *supra* note 34 & accompanying text.

57. U.C.C. § 2-315 comment 2.

58. *Id.*

59. Some courts have found both implied warranties to have been breached by a seller. See, e.g., *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961); *Thomas v. Ford Motor Credit Co.*, 48 Md. App. 617, 429 A.2d 277 (1981); *Shaffer v. Victoria Station Inc.*, 91 Wash. 2d 295, 588 P.2d 233 (1978). This can occur only if the seller is a merchant.

This incongruity becomes odder still in light of case law suggesting that the ordinary purpose for goods can constitute a buyer's particular purpose.⁶⁰ Food and clothing best exemplify the occasionally interchangeable nature of ordinary and particular purpose. Normally one buys food to eat and clothing to wear. The ordinary purpose for food is consumption; for clothing, bodily decor. In addition, sellers of food and clothing can know, with little outside help, that their buyers are buying food and clothing for the particular purpose of eating and wearing.⁶¹ Assume the buyer buys contaminated sausage. In a non-merchant sales transaction, he cannot use section 2-314 to argue that the goods are not merchantable, i.e., not fit for their ordinary purpose—eating—but he can argue, under section 2-315, that they are not fit for his particular purpose—eating. In this instance, the buyer's pur-

60. Professor Williston noted that "[f]itness for a particular purpose may be merely the equivalent of merchantability. Thus the particular purpose for which a reaping machine is generally designed is reaping The particular purpose, however, may be narrower; a reaping machine may be desired for operation on rough ground and, though it may be a good reaping machine, it may yet be impossible to make it work satisfactorily in the place where the buyer wishes to use it." S. WILLISTON, WILLISTON ON SALES § 235 (1st ed. 1909).

The text of § 2-315 itself does not restrict the particular purpose to one different from the ordinary purpose. U.C.C. § 2-315. Comment 2, however, suggests that the particular purpose differs from the ordinary purpose "in that it envisages a specific use by the buyer which is peculiar to the nature of his business. . . ." U.C.C. § 2-315 comment 2. The commentary seems questionable. It probably arose because the drafters assumed that § 2-314 would insure fitness for the ordinary purpose while § 2-315 would impose a greater degree of quality responsibility if the requisite circumstances existed. *See supra* notes 24-27 & accompanying text. This will not always be the case. Section 2-315 could apply when § 2-314 would not. For a general discussion of the interrelationship between §§ 2-314 and 2-315, see J. WHITE & R. SUMMERS, *supra* note 12, § 9-9. For pre-Code cases blurring the purposes involved in the two warranties see, e.g., *Grant Mfg. Co. v. Yates-American Mach. Co.*, 111 F.2d 360 (8th Cir. 1940); *Country Club Soda Co., Inc. v. Arbuckle*, 279 Mass. 121, 181 N.E. 256 (1932). For post-Code cases see, e.g., *Wilson v. Marquette Elec., Inc.*, 630 F.2d 575 (8th Cir. 1980); *Thomas v. Ford Motor Credit Co.*, 48 Md. App. 617, 429 A.2d 277; *Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977). Of course, § 2-315 requires buyer reliance on the seller's skill and judgment and courts frequently dismiss a § 2-315 claim because the requisite reliance is absent. *See, e.g., Garner v. S & S Livestock Dealers, Inc.*, 248 So. 2d 783 (Miss. 1971); *Jones Store Co. v. Shain*, 352 Mo. 630, 179 S.W.2d 19 (1944). Some courts interpret § 2-315 to require a special purpose different from the ordinary purpose. *See, e.g., McHugh v. Carlton*, 369 F. Supp. 1271 (D.S.C. 1974); *Bickett v. W.R. Grace & Co.*, 12 U.C.C. Rep. Serv. (Callaghan) 629 (W.D. Ky. 1972).

61. In *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961), for instance, the plaintiff, a non-buyer consumer of a hula skirt, sued the owners of the gift shop from which the skirt had been bought after it caught fire, burning more than 75% of her body. The court said that both implied warranties were identical: they related to fitness for use as an article of clothing. *Id.* at 94. If an individual buys a car which does not run, both warranties also are breached because it is not of fair average quality or fit for the purpose as impliedly made known to the seller. *Thomas v. Ford Motor Credit Co.*, 48 Md. App. 617, 429 A.2d 277 (1981).

pose and the seller's essential undertaking remain constant but the Code authorizes recourse only under section 2-315.

Interpreted in light of section 2-315, section 2-314 appears to suggest that non-merchant sellers cannot impliedly agree to deliver merchantable goods. The Code does not explain why they cannot, nor does it explain why they can agree impliedly to deliver goods fit for a buyer's particular purpose. Furthermore, it does not explain why, in the context of a non-merchant sale, the nature of the goods, their contract price, the circumstances surrounding the sale, the common expectations and common experience and the nature of the defect, are not significant indicia of the nature and scope of the seller's undertaking.⁶² Considerations perfectly valid when made in the context of a merchant sale suddenly become invalid. Evidently, when the seller is not a merchant, the price at which a deal is closed does not operate as "an excellent index of the nature and scope of [the seller's] obligation. . . ."⁶³

The drafters' own words indicate that the aim of all warranty law is to determine what, in essence, the seller has agreed to sell.⁶⁴ The warranties capture the parties' actual objective contractual understanding from the words and circumstances of the transaction.⁶⁵ But section 2-314 seems to suggest that, as a matter of law, a non-merchant seller and buyer cannot impliedly agree, contemplate or intend that the goods will be merchantable or fit for their ordinary purpose. It is highly unlikely that the drafters of the Code subscribed to such a blanket assumption about actual contractual understandings. The drafters, led by Professor Karl Llewellyn,⁶⁶ were hard-core realists⁶⁷ who believed

62. See *supra* notes 34-39 & accompanying text (indicating the relevance of these considerations to a seller's quality undertaking if a merchant seller is involved).

63. U.C.C. § 2-314 comment 7.

64. *Id.* § 2-313 comment 4.

65. Professor Whaley argues that the true test behind § 2-314 is "the reasonable expectation of the buyer, holding the seller to a quality level sufficient to protect the average buyer." D. WHALEY, *supra* note 23, at 55. In another section, he argues that "the Code protects the reasonable expectations of the buyer measured objectively from the point of view of a reasonable person." *Id.* at 24. Professor Nordstrom argues that in interpreting the parties' agreement, the courts should be guided by "the purpose of contract law—the enforcement of the justified expectations of the parties." R. NORDSTROM, *supra* note 12, § 46 n.24. Others agree that § 2-314 seeks to protect a buyer's objectively reasonable expectations. See, e.g., Dolan, *The Merchant Class of Article 2: Farmers, Doctors, and Others*, 1977 WASH. U.L.Q. 1, 1-2, 25; Farnsworth, *supra* note 12, at 669-70; Newell, *The Merchant of Article 2*, 7 VAL. U.L. REV. 307, 323 (1973).

66. Professor Karl Llewellyn was the chief reporter for the Code project. According to one report, "there was no difficulty in finding a 'Chief Reporter.' The outstanding man in the United States to undertake this task was Professor Karl N. Llewellyn of the Columbia

that the operative facts, and nothing else, counted.⁶⁸ Surely they could conceive of a set of operative facts which would establish an implied understanding between the parties that the goods were to be fit for their ordinary purpose. Suppose Joseph Seller wants to sell his one-year-old car because he is going to the Left Bank to write the great American novel. He has driven it only 5,000 miles and has experienced no problems. Louise Buyer is interested and test drives it. Everything seems to be fine. Buyer and Seller negotiate a fair price for the car which factors in its bluebook value and the savings afforded to both by the private sale. The seller makes no express warranties. It is at least arguable that both parties to the sale assumed, intended, and contemplated, albeit impliedly, that the car would have the capacity for self-

University Law School." Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 4 (1967). One scholar went so far as to describe the Code as *lex Llewellyn*. Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 333 (1951). Professor Llewellyn's influence was all-pervasive. Professor Soia Mentschikoff (Associate Reporter for the Code project and Karl Llewellyn's wife) observed that "[d]espite the numbers of persons involved in the drafting of the Code, the extent to which it reflects Llewellyn's philosophy of law and sense of commercial wisdom and need is startling." S. MENTSCHIKOFF, *COMMERCIAL TRANSACTIONS CASES AND MATERIALS* 4 (1970).

67. The term "realist" is used to describe the jurisprudential approach which focuses on the particular facts of a transaction and rejects the "Langdellian way of achieving doctrinal unity on the level of case law or restatement as absurd." G. GILMORE, *THE AGES OF AMERICAN LAW* 79 (1977). According to Professor Gilmore, "Llewellyn . . . insisted throughout his life that there had never been a Realist 'school' or a Realist 'movement.'" *Id.* at 78. Professor Gilmore interprets Professor Llewellyn's denial as referring to the law review controversy and not to Professor Llewellyn's rejection of the Langdellian approach. *Id.* at 78-79. In commenting upon Professor Llewellyn, Professor Gilmore stated: "It was, I believe, Karl's non-systematic, particularizing cast of mind and his case-law orientation which gave to the statutes he drafted, and particularly the Code, their profound originality. He was a remarkable draftsman and took a never-failing interest in even the minutiae of the trade. His instinct appeared to be to draft in a loose, open-ended style; his preferred solutions turned on questions of fact (reasonableness, good faith, usage of trade) rather than on rules of law." Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962).

Professor Corbin's description of Professor Llewellyn's drafting approach reflects this author's sense of the term "realist". Many argue that Professor Llewellyn's approach is best exemplified by his drafting of sales rules unencumbered by the unitary title concept which pervaded pre-Code sales law. *See, e.g.*, R. BRAUCHER & R. RIEGERT, *INTRODUCTION TO COMMERCIAL TRANSACTIONS* 279-80 (2d ed. 1977); E. FARNSWORTH & J. HONNOLD, *supra* note 17, at 478; Corbin, *The Uniform Commercial Code-Sales: Should It Be Enacted*, 59 YALE L.J. 821, 824-27 (1950); King, *The New Conceptualism of the UCC*, 10 ST. LOUIS U.L.J. 30, 81 (1965).

68. In an exhortation to her students, Professor Mentschikoff stated that "each section . . . contains a statement of the factual conditions which are the operative conditions on which the result stated in the rule rests. This means that in terms of applying or using the rule, the very first inquiry will be what are the factual conditions which will put it into operation?" S. MENTSCHIKOFF, *supra* note 66, at 7-8. *See also* R. BRAUCHER & R. RIEGERT, *supra* note 67, at 5-6; King, *supra* note 67, at 50.

propulsion. Typically, a car buyer is interested in acquiring something that is driveable. It would not be unreasonable to expect that a one-year-old car with only 5,000 miles on it would run properly. The seller could understand the buyer's implied assumptions and intentions with respect to the sale. Moreover, the seller also may be assuming that he is selling a car that will drive because he has been driving it.

Contrary to section 2-314's implication, these parties could understand, intend, and contract impliedly that the car would run. The operative facts of the transaction, the contract price (bluebook value minus savings to both) and the subject matter of the sale (one-year-old car with 5,000 miles on it), certainly suggest that Seller assumed he was selling and Buyer assumed she was buying a car that would be driveable. As comment 1 to section 2-313 suggests, "no particular language or action is necessary to evidence" implied warranties.⁶⁹ Here, the circumstances of the sale suggest that the parties had an implied understanding with respect to quality. Section 2-314's merchant restriction, however, precludes the possibility of recognizing that implied understanding and thereby precludes the buyer from section 2-314 recourse in the event the implied understanding is not fulfilled.

The drafters' "realist" predilections make it unlikely that they exempted non-merchant sellers from section 2-314 coverage because they believed that non-merchant sellers and buyers could not contract impliedly for goods fit for their ordinary purpose. In fact, they may have excluded non-merchant sellers from section 2-314 coverage because they *did* believe that non-merchant sellers impliedly could undertake some responsibility for quality. Sellers giving a section 2-314 implied warranty of merchantability are responsible not only for a reduction in, or return of, the purchase price, but also for consequential damages.⁷⁰ Perhaps the spectre of consequential liability for non-merchant sellers who impliedly undertake to provide merchantable goods produced section 2-314's merchant restriction.⁷¹ It seems unlikely, however, that the

69. U.C.C. § 2-313 comment 1.

70. U.C.C. § 2-714(3). For a more detailed discussion of the seller's liability for breach of warranty, see *infra* text accompanying 111-45.

71. Non-merchant sellers might not insure against liability for defective goods. The drafters may have been reluctant to impose substantial liability on those unlikely to insure. This would be consonant with the Code's risk-of-loss rule which, in a non-breach situation, imposes the risk of loss on the merchant seller until the buyer's receipt of goods. U.C.C. § 2-509(3). "The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them." U.C.C. § 2-509 comment 3. Imposition of the loss on the party more likely to insure provides no help in allocating the loss between two parties, neither of whom is likely to insure. See *infra* notes 302-06 & accompanying text.

drafters intended the merchant restriction to mean that non-merchant sellers and buyers are incapable of impliedly agreeing to the sale of merchantable goods. That conclusion follows neither from the drafters' overall jurisprudential approach nor from a consideration of the real world in which people can and do make all kinds of contracts.

Comment 4 to section 2-313 emphasizes that "consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation."⁷² Despite this acknowledged low probability, section 2-314 may enforce just such an exchange. Rather than enforcing the parties' actual agreement, section 2-314 has the potential to do quite the opposite in a non-merchant sale. It can enforce "agreements" to which the parties never agreed.

The contract doctrine of fundamental mistake further highlights section 2-314's anomalous stance with respect to non-merchant sales. If an individual contracts on the basis of a fundamental assumption which turns out to be mistaken, he may rescind the contract.⁷³ The law authorizes rescission because the contract-in-fact is fundamentally different from the contract supposed.⁷⁴ It would fly in the face of orthodox contract doctrine⁷⁵ to give effect to a transaction that the parties did not understand or consensually undertake. There is the additional concern that enforcement of the "bargain in fact" would produce an un contemplated and unbargained for enrichment and/or impoverish-

72. U.C.C. § 2-313 comment 4.

73. "The disadvantaged party's remedy for mutual mistake is avoidance." E. FARNSWORTH, *CONTRACTS* § 9.3 (1982). *See, e.g.*, *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887); *Edwards v. Trinity & Brazos Valley Ry. Co.*, 54 Tex. Civ. App. 334, 118 S.W. 572 (1909). Even in situations of unilateral mistake, rescission is available if the non-mistaken party has not relied to his detriment. *See, e.g.*, *Elsinore Union Elementary School District v. Kastorff*, 54 Cal. 2d 380, 353 P.2d 713, 6 Cal. Rptr. 1 (1960); *Boise Junior College Dist. v. Mattefs Constr. Co.*, 92 Idaho 757, 450 P.2d 604 (1969). If the mistake is not caused by gross negligence, a mistaken party is not barred from relief merely because he could have avoided the mistake by the exercise of reasonable care. If the law were otherwise, the availability of relief for mistake would be greatly limited." E. FARNSWORTH, *supra*, § 9.3. *See also* *Elsinore Union Elementary School Dist. v. Kastorff*, 54 Cal. 2d 380, 353 P.2d 713, 6 Cal. Rptr. 1 (1960); *Geremia v. Boyarsky*, 107 Conn. 387, 140 A. 749 (1928); *Edwards v. Trinity & Brazos Valley Ry. Co.*, 54 Tex. Civ. App. 334, 341-43, 118 S.W. 572, 576 (1909).

74. "Certainly, but for the appellee's belief as to this [sufficient mineable quantity of gravel, sand, and clay], it would not have made the contract. . . ." *Edwards v. Trinity & Brazos Valley Ry. Co.*, 54 Tex. Civ. App. 334, 344, 118 S.W. 572, 577 (1909).

75. "An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances." *RESTATEMENT (SECOND) OF CONTRACTS* § 3 (1979). Whether the agreement between the parties is judged from a subjective or objective theory, the existence of an agreement between the parties is necessary to create a contract.

ment.⁷⁶ Although section 1-103 allows the law of mistake to supplement the Code unless the Code displaces the common law,⁷⁷ section 2-314 displaces the common law, leaving no room for the doctrine of fundamental mistake to operate.⁷⁸

If warranties determine what in essence the seller has agreed to sell, and section 2-314 seeks to uphold the buyer's reasonable quality expectations, it may be possible to rationalize section 2-314's merchant distinction as follows:⁷⁹ the non-merchant seller impliedly agrees only to deliver the physical subject matter of the sale, with the buyer impliedly assuming all risks of quality. The purchase price reflects either the buyer's assumption of those risks or his innate stupidity. In either case, the buyer does not require section 2-314 protection. If the buyer pays less for the goods than the going rate for merchantable goods, section 2-314 should not operate to give him more than that for which he bargained and paid. He paid for physical possession of the goods plus the hope that they would be merchantable minus the doubt that they would not. In that instance, the contract would represent a conscious gamble on the part of both the buyer and the seller, with the buyer hoping to buy merchantable goods for less than he would have to pay otherwise. The seller would in turn hope to receive more for the goods than they were actually worth. Whether the goods turn out to be merchantable or unmerchantable, the buyer will have received his bargain and has no need of section 2-314 recourse. On the other hand, if the buyer pays a non-merchant seller a price commensurate with merchantable goods, without obtaining the guarantees given by a merchant, the buyer is stupid. The law and its prophet, section 2-314(1), should not reward or encourage such stupidity by affording avenues of relief from its consequences.

Although this argument has some logical charm, it fails to explain

76. *See, e.g.*, *Elsinore Union Elementary School Dist. v. Kastorff*, 54 Cal. 2d 380, 389, 353 P.2d 713, 719, 6 Cal. Rptr. 1, 7 (1960) ("bargain" appears too sharp for law and equity to sustain); *Kenneth E. Curran, Inc. v. State*, 106 N.H. 558, 560, 215 A.2d 702, 704 (1965) (enforcement of the apparently resulting agreement unconscionable); *Edwards v. Trinity & Brazos Valley Ry. Co.*, 54 Tex. Civ. App. 334, 344, 118 S.W. 572, 577 (1909) (enforcement would amount to a gift).

77. U.C.C. § 1-103.

78. In order for mistake to operate, the parties must have an understanding which is mistaken. According to § 2-314(1), the legal possibility of an understanding that the seller will deliver merchantable goods does not exist. If it does not exist, it cannot be mistaken. For similar reasoning, see *Watkins & Son Inc. v. Carrig*, 91 N.H. 459, 21 A.2d 591 (1941).

79. The author wishes to thank Professor Schauer whose insistence that § 2-314(1) made sense caused her to rethink and better articulate why § 2-314's merchant distinction makes no sense at all. Professor Schauer has subsequently recanted.

section 2-314's merchant distinction. Section 2-314 only protects a buyer's reasonable quality expectations, and the buyer who assumes all risks of quality has no such expectations. Even without a merchant distinction, section 2-314 would not protect that buyer, nor would it give effect to a buyer's foolish expectations.⁸⁰ By definition, foolish expectations are unreasonable and are unprotected by section 2-314. Thus, a non-merchant seller exemption is not necessary to avoid section 2-314 enforcement of unreasonable quality expectations.

It can be argued, however, that even if unnecessary, section 2-314's merchant restriction is a handy judicial time-saver. If all non-merchant sales involve either a foolish buyer or one who has assumed all risks, section 2-314's merchant distinction serves to increase judicial efficiency by precluding litigation involving a preordained result. From a practical standpoint, however, the existence of the restriction will not eliminate "needless" litigation or litigation with a preordained result. With or without a merchant restriction, buyers will continue to sue or refuse to pay if they believe that they have not gotten what they thought they were getting.⁸¹ Nevertheless, a legislative attempt to discourage such litigation may justify section 2-314's merchant restriction, but only if one accepts the unrealistic initial assumption that all buyers from non-merchant sellers are either stupid or risk-takers.

Philosophically the drafters opposed blanket assumptions.⁸² The Code expressly and repeatedly directs the court to determine what is

80. Courts have the ability to distinguish foolish from reasonable expectations. In *Whitmer v. Schneble v. House of Hoyt, Inc.*, 29 Ill. App. 3d 659, 331 N.E.2d 115 (1975), a doberman pinscher bit the child of a friend of the buyers. The friend sued the buyers and they, in turn, sued their seller arguing that the seller had expressly warranted that the dog was docile. The court suggested that the statement of docility was not an express warranty. *Id.* at 661, 331 N.E.2d at 117. It went on to say that even if an express warranty had been given, "[e]ven a docile dog is known and expected to bite under certain circumstances." *Id.* at 662, 331 N.E.2d at 118. The court further stated: "the law will not lend itself to the creation of an implied warranty which patently runs counter to the experience of mankind or known forces of nature." *Id.* In another case, involving the sale of a race horse, the court found the horse to be merchantable saying that "he did not live up to the buyer's hopes for a preferred racer but such disappointments are an age-old story in the horse racing business." *Sessa v. Reigle*, 427 F. Supp. 760, 770 (E.D. Pa. 1977).

81. In *Guess v. Lorenz*, the buyer of a used car with 90,000 miles on it sued the seller for breach of express and implied warranties seeking to collect \$500 for rear-end work, new car tires, a tune-up, and carburetor adjustment. 612 S.W.2d 831 (Mo. App. 1981). The court held for the seller observing that the buyer could not expect new car performance, especially when the seller had informed the buyer that she had replaced only the carburetor. *Id.* at 833-34. See also *Donald v. City Nat'l Bank of Dothan*, 295 Ala. 320, 329 So. 2d 92 (1976); *Siemen v. Alden*, 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975); *Allen v. Nicole, Inc.*, 172 N.J. Super. 442, 412 A.2d 824 (1980).

82. See *supra* notes 66-68 & accompanying text.

and what is not reasonable.⁸³ A doctrinaire position in section 2-314 would be quite out of character with the Code as well as with the drafters' basic jurisprudential philosophy. The Code's legislative history provides concrete evidence to support this intuition.

The seeds of article 2 began with a revision of the Uniform Sales Act (USA).⁸⁴ The revision's implied warranty of merchantability provision, like its modern counterpart, section 2-314, implied a warranty that "the goods shall be merchantable in a contract for their sale if the seller is a merchant with respect to such goods. . . ."⁸⁵ The revision also contained an introductory provision authorizing judicial flexibility

83. See, e.g., U.C.C. §§ 2-706 (seller's right to resale); 2-712 (buyer's right to cover); 2-305 (open price term); 2-306 (output, requirement contracts); 2-309 (time of delivery); and 2-311 (options and cooperation regarding performance). In fact, the Code's repeated references to a reasonableness standard prompted Professor Mellinkoff to state that "[t]he word 'reasonable', effective in small doses, has been administered by the bucket, leaving the corpus of the Code reeling in dizzy confusion." Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 185-86 (1967). Professor Danzig viewed the drafters' reliance on such open-ended terms as a "renunciation of legislative responsibility and power," for him an unacceptable delegation of power to the courts. Danzig, *A Comment on Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 634-35 (1975).

84. The USA had been drafted by Samuel Williston. S. WILLISTON, *supra* note 60, at iii. The Joint Conference of the American Law Institute and Commissioners for Uniform State Laws approved and recommended its adoption in 1906. *Id.* In 1940, the Conference asked Professor Llewellyn to draft a revision. R. BRAUCHER & R. RIEGERT, *supra* note 67, at 5. Professor Llewellyn's role as revisor of Professor Williston's work must have created some tension between them. This is borne out by a remark made in testimony before the New York Law Revision Commission Hearings. One speaker said: "Unfortunately, and you might just as well face it, a clash of personalities between Professor Williston and his concept of title as being the important thing, and Professor Llewellyn, has arisen." *Stenographic Report of Hearing on Article 2 of the Uniform Commercial Code*, 1 STATE OF NEW YORK LAW REVISION COMMISSION REPORT: STUDY OF THE UNIFORM COMMERCIAL CODE 155 (1954) (Statement of Mr. J. Francis Ireton, Baltimore, Maryland) [hereinafter cited as N.Y. LAW REVISION REPORT 1954]. Professor Williston, in 1950, emerged staunchly opposed to adoption of the 1949 draft of article 2 because it was iconoclastic. Williston, *The Law of Sales in the Proposed Uniform Code*, 63 HARV. L. REV. 561, 561 (1950). Mr. Schnader proposed preparation of a Uniform Commercial Code to the Commissioners as early as 1940. Schnader, *supra* note 66, at 1. The Commissioners believed that such an expansive undertaking would require the cooperation of the American Law Institute. *Id.* The final agreement between the Institute and Commissioners was executed on December 1, 1944. *Id.* at 5. The revision was then completed. FINAL DRAFT #1 OF UNIFORM REVISED SALES ACT (1944) [hereinafter cited as FINAL DRAFT #1].

85. Section 7 of the 1944 draft, entitled "'Merchant', 'Between Merchants', 'Financing Agency,'" provided: "(1) 'Merchant' means a person who by his occupation holds himself out as having the knowledge or skill peculiar to the practices or goods involved in the transaction or in any particular phase of it, or to whom such knowledge or skill may be attributed by his employment of an agent, broker or any other intermediary having such knowledge or skill. With respect to transactions of financing, payment, collection, and the like, a financing agency is a 'merchant.'" *Id.* § 7.

with respect to its special merchant rules.⁸⁶ Section 1, subsection 3, provided: "a provision of this Act which is stated to be applicable 'between merchants' or otherwise to be of limited application need not be so limited when the circumstances and underlying reasons justify expanding its application."⁸⁷ Professor Llewellyn transposed much of his USA revision work into article 2. The 1949 draft of the Code repeated verbatim this flexibility directive.⁸⁸

A battle ensued over retention of this directive because the drafters viewed the issue as one involving fundamental drafting philosophy.⁸⁹ The provision codified the drafters' belief that Code provisions were to be interpreted and applied in accordance with their reason, purpose, and substance.⁹⁰ Any other kind of interpretation would represent a victory of form over substance. The drafters' position on this issue, in the face of criticism that the provision would encourage litigation,⁹¹ suggests that they were not concerned with reducing litigation at the expense of reason and policy. This particular section reflected the drafters' assumption that the special merchant provisions, including the implied warranty of merchantability provision, represented, at most, judicial guidelines.⁹² An individual could fall within or without a provision's guidelines depending upon the circumstances and the policy encompassed by the provision. Undoubtedly, the drafters deleted the provision because that was the politically expedient course of action,⁹³ but deletion did not reflect their jurisprudential beliefs. On the basis of this evidence alone, it is unreasonable to assume that the drafters be-

86. *Id.* § 1(3).

87. *Id.*

88. Compare FINAL DRAFT #1, *supra* note 84, § 1(3) with UNIFORM COMMERCIAL CODE MAY 1949 DRAFT § 1-201(3) [hereinafter cited as MAY 1949 DRAFT].

89. Malcolm, *The Proposed Commercial Code, A Report on Developments from May 1950 Through February 1951*, 6 BUS. LAW. 113, 181 (1951).

90. Professor Williston vehemently objected to this provision on the grounds that it would encourage litigation. Williston, *supra* note 84, at 562.

91. *Id.*

92. Malcolm, *supra* note 89.

93. William Schnader remarked that "I can . . . state that what Professor Llewellyn believed should be the articles of an ideal commercial code were not the articles as they emerged from the crucible of debate when the Code was promulgated." Schnader, *supra* note 66, at 5. Professor Llewellyn himself said: "I am ashamed of it [the Code] in some ways; . . . there are so many beautiful ideas I tried to get in that would have been good for the law, but I was voted down. A wide body of opinion has worked the law into some sort of compromise after debate and after exhaustive work. However, when you compare it with anything that there is, it is an infinite improvement." Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 784 (1953) (address delivered at the 1952 Convention of the Tennessee Bar Association).

lieved that buyers from non-merchant sellers could never entertain "2-314 type" quality expectations.

Other article 2 provisions also suggest that the merchant distinction did not arise because the drafters believed that buyers from non-merchant sellers could not entertain reasonable minimum quality expectations. The functional overlap between sections 2-314 and 2-315 causes section 2-315 to protect some of the very same expectations normally protected by section 2-314.⁹⁴ In addition, a comment to section 2-314 states that "a person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section 2-314 and, thus, no warranty of merchantability would apply."⁹⁵ Thus, a car mechanic selling a car from his repair shop, a watch repairman selling a watch, or a Maytag repairman selling a used Maytag washing machine would not be merchants for purposes of section 2-314. In the absence of an express disclaimer or other circumstances indicating that these sellers were not assuming any quality responsibility, however, a reasonable buyer would expect a car that would run, a watch that would tell time and a washing machine that would wash clothes. Section 2-314's merchant restriction does deny legal effect to those quality expectations, but surely it does not do so because the expectations are unreasonable. Such a conclusion makes even less sense in light of section 2-315. Each of the above-mentioned sellers has expertise with respect to the goods involved. The circumstances of the sales transactions could create an implied obligation on the part of the seller to deliver goods fit for the buyer's particular purpose that might be their ordinary purpose as well. The same expectations that would be unreasonable under section 2-314 would be reasonable and, what is more, enforceable under section 2-315. When viewed together, the drafters' jurisprudential commitment to flexibility, the Code's legislative history, and the ramifications of sections 2-314 and 2-315 establish that the drafters did not draft the merchant restriction because buyers from non-merchant sellers could not have reasonable quality expectations.

The assumption that buyers buying from non-merchant sellers cannot entertain reasonable quality expectations embodies a normative approach to contractual expectations. Such an approach ignores actual expectations and contractual understandings and prescribes the expectations a buyer is entitled to have. This approach is inconsistent with

94. See *supra* notes 56-61 & accompanying text.

95. U.C.C. § 2-314 comment 3.

the general legal impulse to protect actual contractual understandings⁹⁶ as well as with the Code's fundamental premise of freedom of contract.⁹⁷ If the circumstances suggest that the buyer has not assumed all risks with respect to quality, and the purchase price reflects that, section 2-314 should not preclude enforcement of the parties' actual contractual understanding just because the buyer ought to have paid a lesser purchase price and assumed all the risks. If he pays a "greater" price and contemplates merchantable goods, why should section 2-314 deny effect to the actual bargain?

A normative interpretation of section 2-314's merchant restriction is simply a modern restatement of caveat emptor.⁹⁸ Implicit in caveat emptor is the belief that a buyer purchasing goods from a seller does not have to assume any quality risks because he always has the option to elicit an express warranty. The buyer who fails to take such a precaution is imprudent and therefore undeserving of legal protection.

This normative reasoning is incomplete because it fails to consider other and more important legal norms such as the desire to effect fairness in individual exchanges and the avoidance of unjust enrichment.⁹⁹

96. A good example of the judicial desire to enforce the parties' actual contractual understanding is *Zell v. American Seating Co.*, 138 F.2d 641 (2d Cir. 1943), *rev'd*, 322 U.S. 709 (1944), wherein the court admitted evidence of an oral agreement despite the fact that it contradicted the parties' written agreement and hence could be excluded by the parol evidence rule. Seven Justices voted to reverse *Zell*. Four Justices reversed on the grounds that parol evidence had been erroneously allowed. The other three Justices reversed on the grounds that the contract violated public policy. 322 U.S. 709 (1944). *See also* *Anderson v. Tri-State Home Improvement Co.*, 268 Wis. 455, 67 N.W.2d 445 (1955).

As early as 1860, the English courts expelled "the normative element from the question of reliance. It was now, not merely a question of whether the buyer had reasonably relied on the seller, or whether he ought not to have relied on his own judgment, but also if whether he had, in fact, done so." P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 475 (1979).

97. "The effects of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed. . . ." U.C.C. § 1-102(3). "Subsection (3) states affirmatively at the outset that freedom of contract is a principle of the Code. . . ." U.C.C. § 1-102(3) comment 2.

98. *See, e.g.*, *Parkinson v. Lee*, 102 Eng. Rep. 389, 392 (K.B. 1802).

99. In writing about the history of caveat emptor, Professor Hamilton summarized the position of Thomas Aquinas on the issue of whether a sale was rendered unlawful because of a defect in the thing sold: "[Aquinas] answers that a defect in kind, in quantity, or in quality, if known to the vendor and unrevealed, is sin and fraud, and the sale is void. If the defect be unknown it is no sin. Yet the seller must make good to the buyer his loss, and likewise the buyer must recompense the seller if he discovers that he has received more than he paid for." Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1138 (1931). For Aquinas, morality and a sense of fair play required the seller to take back goods whose quality did not meet the parties' contractual expectations. The civilian approach codified Aquinas' moral sense.

During the hey-day of caveat emptor, some judges were distinctly uncomfortable with the doctrine's unfairness.¹⁰⁰ Other courts tacitly acknowledged the doctrine's unfairness by attempting to justify it on other grounds. The United States Supreme Court justified caveat emptor by noting that nothing was more universal in the common law.¹⁰¹ The Illinois Supreme Court felt that the need for an established, certain rule precluded inquiry into whether the civil law or the common law was best adapted to promote the ends of justice and the good order of society.¹⁰² Another court reasoned that the needs of commerce, especially the need to protect sellers from constant reclamation suits, justified the common law rule of caveat emptor.¹⁰³ Any other approach would upset the operations of trade.¹⁰⁴ Yet another court suggested that the doctrine of caveat emptor was not harmonious with accepted moral precepts by stating that moral fraud and legal fraud were not necessarily synonymous.¹⁰⁵ Considerations of fairness and justice clearly loomed in the minds of at least some courts when the question of caveat emptor arose.¹⁰⁶ These considerations of justice, fairness, and morality argue against a section 2-314 merchant restriction. They suggest that all sellers should be responsible for their con-

100. Chancellor Kent admitted that "if the question was 'res integra' in our law, I confess I should be overcome by the reasoning of the civilians." *Seixas v. Woods*, 2 Cai. R. 48, 55 (N.Y. 1804). Chancellor Kent remained troubled by the disparity between the rule of caveat emptor and moral precepts. J. KENT, COMMENTARIES ON AMERICAN LAW 477-79 (4th ed. 1840).

101. *Barnard v. Kellogg*, 77 U.S. (10 Wall.) 383, 388 (1870).

102. This was an argument made by the seller's attorney. *Id.* at 386. The Court echoed this argument in stating that "[w]hatever tends to unsettle the law and make it different in different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy." *Id.* at 391. The court in *Misner v. Granger*, 9 Ill. (4 Gilm.) 69, 75 (1847), had expressed an identical sentiment.

103. *McFarland v. Newman*, 9 Watts 55, 56 (Pa. 1939) (Gibson, C.J.).

104. *Hargous v. Stone*, 5 N.Y. 73, 89 (1851).

105. *Kohl v. Lindley*, 39 Ill. 195 (1866). The court noted that morality and the civil law would require the seller to inform the buyer of defects, but the common law had not adopted that position. *Id.* at 201.

106. See *Waddill v. Chamberlayne*, 2 Barradsall 45 (Va. 1735); *Barnard v. Yates*, 4 S.C.L. (1 Nott & McC.) 142, 150 (1818). ("The basis upon which our decisions are founded, is that of honesty and correct dealing between man and man. One sanctioned by able jurists, and not the less to be regarded, from its correspondence with the divine precept, 'that we should do unto others, what we would have them do unto us.'") The South Carolina Supreme Court was so bothered by caveat emptor that it rejected it, believing that law and morality should be in harmony. *Id.* A New York court also favored common honesty in dealings. *Gallagher & Mason v. H & H.P. Waring*, 9 Wend. 20, 28 (N.Y. 1832). The Ohio Supreme Court did not reject the doctrine but did explain that "the requirements of manifest justice" compelled some exceptions to it. *Rodgers & Co. v. Niles & Co.*, 11 Ohio St. 48, 53 (1860).

tractual undertakings and that all buyers should have some recourse for disappointed contractual expectations.

Concern for decency and morality pervaded Professor Llewellyn's thoughts as well.¹⁰⁷ He continually used the words "decent" and "decency" in describing the source of article 2 rules.¹⁰⁸ Businessmen and business lawyers objected to article 2's imposition of a special good faith standard for merchants,¹⁰⁹ believing that it represented the drafters' attempt to legislate morality in the marketplace.¹¹⁰ In the face of all this evidence, it would be difficult to conclude that article 2 was drafted in a moral vacuum. The reasons motivating section 2-314's merchant distinction must lie elsewhere because decency, fairness, morality and justice urge a rule of universal seller responsibility. The Code's disclaimer and remedy provisions must be examined to determine if they justify section 2-314's position.

Section 2-314's Merchant Distinction From The Perspective Of The Code's Remedy And Disclaimer Provisions

The Code does not distinguish between its warranties in terms of remedies available upon breach. The same provisions apply whether the seller breaches a section 2-313, section 2-314, or section 2-315 warranty. Upon breach, if the buyer has accepted the goods¹¹¹ and cannot

107. See, e.g., Llewellyn, *supra* note 93, at 780-82; N.Y. LAW REVISION REPORT 1954, *supra* note 84, at 166 (Professor Llewellyn's remarks referring to "traps and trickeries in vogue among the low-life of business under the present law"); K. LLEWELLYN, *THE BRAMBLE BUSH* 158 (1930) (7th printing 1977); FINAL DRAFT #1, *supra* note 84, § 7 comment. In a 1952 speech, Llewellyn talked about certain legal peculiarities in American sales law which operated as "traps which any decent system of law must not put into the hands of a sharpie so that he may take advantage of the man who is trying in good faith but without legal skill to accomplish decent results." Llewellyn, *supra* note 93, at 780. He described the effects of one such trap: "the sale is in default, the seller has no rights under his contract of sale; a contract that was profitable has become a loss because of a trap in the law which penalizes good faith and makes bad faith profitable." *Id.* at 781.

108. "There is a certain decency between businessmen and there ought to be. . . ." N.Y. LAW REVISION REPORT 1954, *supra* note 84, at 166 (Professor Llewellyn's testimony). See also Llewellyn, *supra* note 93, at 779, 781-82.

109. At issue was the definition of good faith which was defined in article 1 to include "observance by a person of the reasonable commercial standards of any business or trade in which he engaged." MAY 1949 DRAFT, *supra* note 88, § 1-201(18). Article 1's definition of good faith ultimately did not mention the observance of reasonable commercial standards. U.C.C. § 1-201(19). The concept was resurrected in article 2, which imposes a special standard of good faith on merchants. U.C.C. § 2-103(1)(b).

110. *Report of Committee on the Proposed Commercial Code*, 6 BUS. LAW 119, 127-28 (1952) [hereinafter cited as *Report of Committee*].

111. Acceptance of goods includes actual acceptance and failure to make an effective rejection. U.C.C. § 2-606.

revoke his acceptance,¹¹² his damages are governed by section 2-714(2) which provides that the buyer may recover "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."¹¹³ Section 2-714 also authorizes the recovery of consequential damages for breach of warranty "in a proper case."¹¹⁴ Section 2-715(2) dealing with consequential damages provides that

consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know about and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.¹¹⁵

The seller who gives a warranty potentially incurs substantial liability.¹¹⁶ Liability for consequential loss makes him an insurer of the goods' quality. Comment 3 to section 2-715 states that "[i]t is not necessary that there be a conscious acceptance of an insurer's liability on the seller's part, nor is his obligation for consequential damages limited to cases in which he fails to use due effort in good faith."¹¹⁷

The possibility of such substantial liability may explain section 2-314's merchant distinction. Arguably, it would be unfair to impose such onerous responsibility on non-merchant sellers. Section 2-314 avoids that undesirable result by restricting itself to merchant sellers. But non-merchants can give a section 2-315 warranty. If breached, the non-merchant seller will incur the very same liability. Thus, the desire to shield non-merchant sellers from consequential liability does not rationalize section 2-314's merchant restriction.

According to section 2-719(1), all sellers, by agreement with their

112. To revoke his acceptance, a buyer must establish that the non-conformity substantially impairs the value of the goods to him. U.C.C. § 2-608(1). In addition, he must revoke within a reasonable time and before substantial change in the goods not caused by the defects. U.C.C. § 2-608(2). For a discussion of the complicated web which the Code weaves in this area, see Whaley, *Tender, Acceptance, Rejection and Revocation—The UCC's "TARR"-Baby*, 24 DRAKE L. REV. 52 (1974).

113. U.C.C. § 2-714(2).

114. *Id.* § 2-714(3).

115. *Id.* § 2-715(2).

116. The warranty-giving seller need not incur consequential liability. The Code authorizes the exclusion of consequential liability if such exclusion is not unconscionable. *Id.* § 2-719(3). For a more detailed discussion, see *infra* notes 118-24 & accompanying text.

117. U.C.C. § 2-715 comment 3.

buyers, can limit the buyer's remedy for breach of warranty.¹¹⁸ They can agree to an exclusive remedy¹¹⁹ which will be enforceable unless it fails in its essential purpose.¹²⁰ In addition, the parties can agree to limit or exclude consequential damages, unless to do so would be unconscionable.¹²¹ Comment 3 to section 2-719 also states that clauses excluding or limiting consequential damages "are merely an allocation of unknown or undeterminable risks."¹²² By authorizing the exclusion or limitation of consequential damages, the Code permits parties to allocate such risks subject to an outer limit of unconscionability.

Comment 1 to section 2-719 describes the drafters' over-all remedial approach:

[I]t is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.¹²³

In the absence of a section 2-313 or section 2-315 warranty, the buyer from a non-merchant seller has no "fair quantum of remedy" for disappointed expectations of quality. The absence of a buyer remedy is consistent with the comment, however, because the Code does not recognize a section 2-314 non-merchant seller contractual obligation. In the absence of such an obligation, there is no need to provide a minimum adequate remedy. Although the conclusion of no remedy follows from the premise of no obligation, the underlying premise remains unexplained.

Within certain limits, the Code authorizes a seller to provide for an exclusive remedy or to exclude consequential liability. In doing so, the Code permits all sellers to avoid most of the hazards entailed by giving a warranty. Of course, the non-merchant seller who does not give a section 2-313 or section 2-315 warranty does not care. He is wholly unconcerned with ways of limiting the contractual remedy or excluding consequential liability. In a non-merchant sale, section 2-

118. *Id.* § 2-719(1). Typically, such an agreement will limit the buyer to a refund of his purchase price or to a replacement of non-conforming goods or parts. *Id.* § 2-719(1)(a).

119. *Id.* § 2-719(1)(b).

120. *Id.* § 2-719(2). An exclusive remedy will fail in its essential purpose if, under the circumstance, it fails to provide any remedy at all. *See, e.g.*, *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968).

121. U.C.C. 2-719(3). This section states that "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." *Id.*

122. *Id.* § 2-719 comment 3.

123. *Id.* § 2-719 comment 1.

314 allocates all unknown or undeterminable risks to the buyer including even risks of personal injury.¹²⁴ Whether the purchase price reflects a different understanding is irrelevant for purposes of section 2-314.

The Code also gives sellers the power to disclaim the implied warranties.¹²⁵ In this way, sellers can avoid all possibility of liability. In addition, the Code describes certain circumstances which exclude the implied warranties.¹²⁶ If excluded or disclaimed, the buyer will have no recourse even against the merchant seller for quality.

Although the Code makes it difficult to disclaim express warranties,¹²⁷ and most sales are accompanied by some kind of express warranty, *e.g.*, a description of the goods,¹²⁸ this kind of express warranty may not result in any seller responsibility for quality. If a seller expressly agrees to sell a car, it is the section 2-314 warranty of merchantability which establishes that the seller must deliver an object which is driveable.¹²⁹ If the implied warranties are excluded or dis-

124. See, *e.g.*, *Brescia v. Great Road Realty Trust*, 117 N.H. 154, 373 A.2d 1310 (1977); *Allen v. Nicole, Inc.*, 172 N.J. Super. 442, 412 A.2d 824 (1980); *Samson v. Riesing*, 62 Wis. 2d 698, 215 N.W.2d 662 (1974).

125. U.C.C. § 2-316(2). A seller can disclaim an implied warranty of merchantability orally if he mentions "merchantability." If he chooses to disclaim in writing (a course most prudent sellers would pursue for evidentiary purposes), the seller must mention merchantability and disclaim in a conspicuous fashion. *Id.* The seller can disclaim the implied warranty of fitness for a particular purpose only by a writing which is conspicuous although no particular language is required. *Id.* Section 2-316(2) posits formalities to insure that the buyer understands the terms of the bargain. *Id.* § 2-316 comment 1. It is not clear that requiring mention of "merchantability" advances that purpose. Professor Whaley stated: "The Code drafters lived in a fictive world in which all babes are born with instinctive knowledge of the meaning of the word 'merchantability.' . . . [T]he problem is that no such world exists. It is the rarest buyer today who understands the concept of merchantability—indeed, many lawyers do not." D. WHALEY, *supra* note 23, at 92. It is unclear whether the seller's right to disclaim all implied warranties is subject to an outer limit of unconscionability. Neither the text nor the comments to § 2-316 suggest that a valid disclaimer under § 2-316(2) can be held invalid under the unconscionability provision. A comment to § 2-719(3) states that "[t]he seller in all cases is free to disclaim all warranties in the manner provided in Section 2-316." U.C.C. § 2-719 comment 3. This seems to indicate that the unconscionability limitation in § 2-719 does not apply to § 2-316. Section 2-302, however, authorizes the court to find a contract or any clause unconscionable at the time it was made. *Id.* § 2-302(1). This would suggest that § 2-302 applies to seller attempts to disclaim under § 2-316. The drafters created some degree of confusion by specifically mentioning unconscionability in § 2-719(3). Arguably any contract or clause is subject to a charge of unconscionability.

126. U.C.C. § 2-316(3). See *infra* notes 138-44 & accompanying text.

127. If language or conduct suggesting an express warranty conflicts with that tending to negate the warranty, the negation is inoperative. U.C.C. § 2-316(1).

128. Express warranties include "[a]ny description of the goods which is made part of the basis of the bargain. . . ." *Id.* § 2-313(1)(b).

129. Professors Summers and White argue that a buyer "can reasonably believe that the word automobile is an express warranty that the machine purchased will behave in a certain

claimed, arguably the seller's delivery of an object resembling a car would satisfy his express undertaking. Of course, receipt of an object that looks like a car but does not function like a car would not fulfill the buyer's presumed reasonable expectations in buying something described as "a car." Section 2-316, governing the exclusion or disclaimer of implied warranties, intends to avoid such buyer surprise,¹³⁰ insuring that the buyer who buys without the seller's implied warranties understands that that is what he is doing.¹³¹

Section 2-316 describes several circumstances that preclude implied warranties.¹³² These circumstances suggest that section 2-316 seeks simply to enforce the parties' actual contractual understanding. Trade usage, course of dealing, and the parties' course of performance of their contract can preclude the finding of implied warranties.¹³³ Logically, parties transacting a deal in a trade which by usage establishes that buyers assume the risks for certain defects,¹³⁴ understand that the buyer, rather than the seller, assumes the risks for those de-

way, namely, that it will carry him around town for at least a few thousand miles. Finding the meaning of such one-word descriptions is much like defining the meaning of the implied warranty of merchantability in various contexts." J. SUMMERS & R. WHITE, *supra* note 12, § 9-3. Arguably, the function of an implied warranty of merchantability is just that, to define the quality responsibility of a seller entailed by such an express warranty. The Code artificially and needlessly segregates the seller's essential undertaking. In *Randall v. Newson*, 46 L.J.Q.B. 259 (1877), Judge Brett stated: "[t]he governing principle . . . is that the thing offered and delivered . . . must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out." *Id.* at 263 (quoted in E. FARNSWORTH & J. HONNOLD, *supra* note 17, at 511 n.13). These authors ask whether despite complexity and diversity of the Code's statutory provisions, they are inspired by a common principle. E. FARNSWORTH & J. HONNOLD, *supra* note 17, at 511. Professor Whaley argues that the word "car" is an express warranty. D. WHALEY, *supra* note 23, at 25. If the seller delivers a car without an engine, the warranty is breached because "a car body without a working engine is not what most people think of as a car." *Id.* The whole concept of merchantability protected by § 2-314, however, appears to attempt to capture what reasonable people think about a particular bargain. See *supra* notes 29-51 & accompanying text.

130. See U.C.C. § 2-316 comment 1.

131. *Id.*

132. *Id.* § 2-316(2)-(3).

133. *Id.* § 2-316(3)(c).

134. For instance, in the New Mexico cattle industry, trade usage establishes that a knowledgeable buyer, buying from a seller who makes no express representations, buys with no implied warranties. *Fear Ranches, Inc. v. H.C. Berry*, 503 F.2d 953 (10th Cir. 1974). To remove all doubt on the question of allocation of risk with respect to diseased livestock, the Kansas Legislature enacted legislation to provide that no implied warranties accompany the sale of livestock other than sales for immediate slaughter unless the seller knowingly sells diseased livestock. KAN. STAT. ANN. § 84-2-316(3)(d) (1983). See also Rasor, *The History of Warranties of Quality in the Sale of Goods: Contract or Tort?—A Case Study in Full Circles*, 21 WASHBURN L.J. 175, 185 n.85 (1982).

fects. The same holds true with respect to course of dealing and course of performance. The parties' own prior understanding establishes their present understanding as to quality risks.¹³⁵ So, too, if the seller demands that the buyer examine the goods before entering into a contract for them, the parties understand that the buyer rather than the seller is assuming the risk with respect to defects which the buyer ought to have observed.¹³⁶ For instance, if a seller is offering a car with a broken antenna and demands that the buyer examine the car, a buyer, in agreeing to buy the car, understands full well that he is buying a car with a broken antenna.¹³⁷

In addition, section 2-316(3) establishes that language such as "as is" or "with all faults" or other expressions which call the buyer's attention to the fact that the seller is not assuming any quality responsibility with respect to the goods will preclude the implied warranties.¹³⁸ Once again, this suggests that section 2-316 seeks to capture the parties' actual contractual understanding. The buyer understands that the seller is not making any promises as to quality and hence, the buyer understands that he is assuming all risks with respect to quality.¹³⁹

Section 2-316 establishes that a buyer purchasing from a merchant seller may be in the same position as a buyer purchasing from a non-merchant seller: he may have no recourse at all for defective goods if the warranties have been disclaimed or excluded. On the other hand, the buyer buying from a non-merchant seller who extracts an express warranty that the goods are merchantable or guaranteed is in the same effective position as the buyer from the non-disclaiming merchant seller: both kinds of buyers will have recourse against their sellers for unmerchantable goods although under different Code sections.¹⁴⁰

The parties, whatever the seller's status, are free to agree to the bargain of their choosing. Absent such a contract, however, the Code establishes presumptions about contractual understanding predicated on seller status. Section 2-314(1) presumes that the merchant seller

135. If, in prior dealings, the parties understood that the seller was not assuming responsibility for certain defects, logically that understanding would govern their present contractual understanding absent explicit change.

136. U.C.C. § 2-316(3)(b) & comment 8.

137. *Guess v. Lorenz*, 612 S.W.2d 831 (Mo. App. 1981).

138. U.C.C. § 2-316(3)(a).

139. Section 2-316(2) describes the formal Code methods for disclaiming implied warranties. See *supra* note 125.

140. The non-merchant seller who guarantees his goods gives an express warranty. U.C.C. § 2-313(1)(a). Section 2-314 furnishes "a guide to the content of the resulting express warranty." *Id.* § 2-314 comment 4. Thus, the buyer would sue the seller under § 2-313 but the court would refer to § 2-314 to flesh out the substantive content of the warranty.

promises to provide merchantable goods and that the non-merchant seller does not.¹⁴¹

The Code does not explain the source of these very different presumptions. Perhaps section 2-314 is qualitatively different from its brothers, sections 2-313 and 2-315. It can be argued that the latter sections recognize and enforce the parties' actual contractual intentions and understandings. In section 2-313, the actual contractual understanding arises by words, either spoken or written, or by visual aids, such as models or samples. In section 2-315, the actual understanding and intentions arise from the parties' conduct and the circumstances surrounding the sale. Some argue that in contrast, section 2-314 represents a legal obligation which exists irrespective of the parties' actual contractual understanding.¹⁴² Section 2-314 is a legal fiction imposed as a matter of public policy.¹⁴³ This theory of section 2-314 indirectly explains why sections 2-313 and 2-315 are not restricted in their application to a particular class of sellers. Any seller has the freedom to contract as he wishes.¹⁴⁴ If he elects to assume quality responsibility, the Code enforces that freely undertaken responsibility. If, however, the quality responsibility is imposed by law, the class of sellers "imposed upon" should be determined and limited by the policy considerations giving rise to the implied-in-law obligation.

Whether section 2-314 merely gives legal effect to a buyer's actual reasonable contractual expectations or imposes quality obligations irrespective of the parties' actual understanding is a matter of some debate.¹⁴⁵ If, in fact, section 2-314 protects a buyer's actual, reasonable quality expectations, section 2-314's merchant mystery remains unsolved. On the other hand, if section 2-314 imposes its quality obligations as a matter of public policy, an explanation for its merchant distinction may be at hand. There is only one problem—nowhere does

141. The Code presumptions do not operate if the merchant seller disclaims the § 2-314 warranty or the non-merchant seller guarantees his goods.

142. In other words, the warranty is "implied in law" and therefore is a legal fiction devised to accomplish some public policy goal. *See, e.g.*, D. WHALEY, *supra* note 23, at 21, 42; Farnsworth, *supra* note 12, at 670.

143. D. WHALEY, *supra* note 23, at 43.

144. U.C.C. § 1-102(3). *See supra* note 96 & accompanying text.

145. At some point, the implied-in-fact and implied-in-law theories of warranty merge. The buyer's actual reasonable expectations may be identical to the common expectations aroused by such a sale. "Implied warranties reflect society's judgments about the basic understandings of the foundation of most deals. . . ." D. WHALEY, *supra* note 23, at 21. These societal judgments arise from common understandings, *i.e.*, the buyer's actual and reasonable understanding in the transaction. In this sense, the debate over the nature of the § 2-314 warranty is somewhat artificial as well as misleading.

section 2-314 state a public policy. Obviously, the absence of an expressed policy impedes evaluation of the section's merchant distinction. One code provision remains as a source of possible enlightenment: section 2-104, the Code's definition of "merchant."

Section 2-314's Merchant Distinction From The Perspective Of The Code's Merchant Definition

To determine who qualifies as a merchant for purposes of section 2-314, one must refer to section 2-104, which defines the term "merchant" as

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.¹⁴⁶

Section 2-104 actually includes thirteen different merchant definitions.¹⁴⁷ Although the text of section 2-104 suggests that anyone who qualifies under the definition will be a merchant for all article 2 purposes, the comments correct that impression.¹⁴⁸ Merchant status under section 2-104 depends upon the particular code section involved, which, in turn, depends upon the legal issue involved.¹⁴⁹ The comments indicate that the merchant concept is grounded in the idea of professionalism.¹⁵⁰ Professional status can take one of two forms: pro-

146. U.C.C. § 2-104(1).

147. Newell, *supra* note 65, at 315-16. Professor Mellinkoff wrote that "[e]very reader of the U.C.C. will find his own candidate for first place in the cross-country sentence derby." Mellinkoff, *supra* note 83, at 220. Section 2-104(1) is this author's winner.

148. U.C.C. § 2-104 comment 2. Professor Homer Kripke is probably the one to be thanked for the comments' elucidation on who qualifies as a merchant. In a 1951 meeting of the editorial board, Professor Kripke (through notes exchanged across the table) pointed out to Professor Mentschikoff that § 2-104 was ambiguous. *Hearing Before Enlarged Editorial Board, January 27-29, 1951*, 6 BUS. LAW. 164, 183 (1951) (Professor Kripke's remarks) [hereinafter cited as *Hearing Before Board*]. Professor Mentschikoff told him that that was the drafters' intention. *Id.* Section 2-104's ambiguity continued to be a focal point of discussion. See, e.g., *Study of the Uniform Commercial Code Article 2—Sales*, 1 N.Y. LAW REVISION REPORT 347, 359 (1955) [hereinafter cited as N.Y. LAW REVISION REPORT 1955]. Professor Llewellyn, appearing before the 1954 Law Review Commission, stated: "The only thing that has been done, after considerable discussion, has been to so modify the comment, not the text, as to show that knowledge or skill with regard to practices or goods involved means knowledge as to practices when the question is one of practices, and knowledge as to goods when the problem is one of goods." N.Y. LAW REVISION REPORT 1954, *supra* note 84, at 168.

149. U.C.C. § 2-104 comment 2.

150. *Id.* § 2-104 comment 1.

fessionalism with respect to goods or professionalism with respect to business practices.¹⁵¹ The nature of the professionalism required for merchant status depends upon the pertinent Code provision.¹⁵² The comments establish that the section 2-314 merchant requires a professional status with respect to goods.¹⁵³ Professional status with respect to business practices is irrelevant.¹⁵⁴ For purposes of section 2-314, then, section 2-104 defines "merchant" as one who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the goods involved in the transaction.¹⁵⁵

Having determined the class of sellers who by law give the implied warranty of merchantability, it would appear that the public policy forwarded by section 2-314 is none other than to give effect to the reasonable expectations of the parties. After all, what can be more reasonable than to expect a merchantable product from one who is in the business of selling that product? A buyer who buys ping pong balls from someone in the business of selling them reasonably expects and relies on the seller to provide balls that will bounce adequately on a ping pong table. A buyer who buys a new car from a car dealer reasonably expects a car that will require minor adjustments at most. A seller who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill with respect to those goods impliedly communicates to the world that expectations of quality are reasonable with respect to his sales. Buyers can rely on him.

Viewed from a section 2-104 perspective, section 2-314(1) appears to codify a policy that sellers should be responsible for the reasonable quality expectations generated by their status. That policy, however, does not justify section 2-314's merchant restriction. There are too many sellers who do not qualify as section 2-314 merchants whose status with respect to goods would create reasonable expectations. The

151. *Id.* § 2-104 comment 2.

152. *Id.* For instance, if the issue involves § 2-201, the Code's Statute of Frauds provision, the merchant would be anyone with specialized knowledge of business practices. U.C.C. § 2-104 comment 2. If the issue involves a good faith purchaser's interest in property vis-à-vis the true owner of the property, the entrusting provision of § 2-403, only sellers who deal in goods of the kind would be considered merchants. *Id.* Under certain Code provisions, for instance, § 2-509 (risk of loss) and § 2-103(1)(b) (good faith standard for merchants), the merchant could be either a businessman or one who sold goods of the kind. *Id.*

153. U.C.C. § 2-104 comment 2.

154. The § 2-314 warranty is restricted "to a much smaller group than everyone who is engaged in business . . ." *Id.*

155. U.C.C. § 2-104(1). Elimination of all references to "practices" in the § 2-104(1) definition produces the relevant wording for § 2-314 purposes.

comments to section 2-314 establish, and the courts routinely hold, that sellers making isolated sales are not merchants for purposes of section 2-314 and thus do not give an implied warranty of merchantability.¹⁵⁶ Those who otherwise might seem to qualify as section 2-314 merchants do not. A professional sailor who sells his boat, a car mechanic who sells a car, a professional golfer who sells his clubs, all these people by their occupation hold themselves out as having knowledge or skill with respect to their goods. Surely their buyers can entertain *some* unarticulated reasonable expectations of quality and yet, for purposes of section 2-314, these sellers are not merchants. In drafting section 2-314 and its merchant distinction, the drafters seemingly were not seeking to hold all sellers responsible for the quality expectations raised by their status.

The comment excluding isolated sales from section 2-314 coverage¹⁵⁷ cannot be dismissed as an "old" comment inconsistent with the present text. The drafting history of section 2-314 establishes that the drafters intended to exclude isolated sales. Originally, the isolated sale exception only applied to sales of used goods.¹⁵⁸ In successive drafts, however, the exception was uniformly discussed in more general terms.¹⁵⁹ In light of the extended drafting and review period¹⁶⁰ and the relatively few changes made in section 2-314 and its comments, we can assume that the drafters intended what they said. Section 2-314 does

156. "A person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section, and, thus, no warranty of merchantability would apply." U.C.C. § 2-314 comment 3. *See, e.g.,* *Jatco, Inc. v. Charter Air Center, Inc.*, 527 F. Supp. 314 (S.D. Ohio 1981); *Bevard v. Ajax Mfg. Co.*, 473 F. Supp. 35 (E.D. Mich. 1979); *Siemen v. Alden*, 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975).

157. U.C.C. § 2-314 comment 3.

158. The comments to the 1949 draft read: "In contrast, a contract for the sale of second-hand goods can involve only such obligation as is appropriate to such goods. A person making an isolated sale of *such* goods would not be a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply." MAY 1949 DRAFT, *supra* note 88, § 2-314 comment 3. Presumably, at that time, the drafters wanted to exempt an individual private sale of a used television, for example. Professor Llewellyn once remarked that separate rules to govern mercantile transactions "rest on a vital need for distinguishing merchants from housewives and from farmers and from mere lawyers." N.Y. LAW REVISION REPORT 1954, *supra* note 84, at 108.

159. Subsequent drafts omitted the "such" after "isolated sale of," thus changing the meaning substantially. The comment to the May 1950 draft read: "A contract for the sale of secondhand goods, however, involves only such obligation as is appropriate to such goods. A person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply." MAY 1950 PROPOSED FINAL DRAFTS § 2-314 comment 3. *See also* UNIFORM COMMERCIAL CODE OFFICIAL TEXT § 2-314 comment 3 (1972); UNIFORM COMMERCIAL CODE FINAL DRAFT § 2-314 comment 3 (1952).

160. *See supra* note 84.

not apply to an isolated sale even if the seller by his occupation holds himself out as having knowledge or skill peculiar to the goods.

Consideration of section 2-104 thus brings us back to square one, if not further back. Not only does the public policy underlying section 2-314 still elude us, but the merchant definition as applied to section 2-314 makes little sense. Who, other than dealers, will qualify as section 2-314 merchants? Is there anyone in the real world who (1) will not be a dealer, (2) will by his occupation hold himself out as having knowledge or skill with respect to the goods, and (3) will not be involved in an isolated sale? The class of section 2-314 merchants defined by the second half of section 2-104 appears to be empty.¹⁶¹

The likelihood that this represents a drafting blunder is remote. Professor Llewellyn was too attached to the legal concept of merchant and too ardent in his desire to introduce the merchant concept into American sales law to have drafted a merchant definition, half of which was bereft of substance. Section 2-104's legislative history reveals Professor Llewellyn's thinking and also provides the first real clue to the origins and reasoning behind section 2-314's merchant distinction.

Section 2-104 made its public debut in 1949.¹⁶² In substance and wording, it was identical to the merchant definition Professor Llewellyn drafted in his revision of the *USA*.¹⁶³ Professor Llewellyn defined "merchant" solely in terms of the "by his occupation holds himself out" language.¹⁶⁴ The definition did not include any reference to "those who deal in goods of the kind."¹⁶⁵ The 1949 draft provided thir-

161. Professors Summers and White argue that the second half of the § 2-314 merchant definition applies to "electricians, plumbers, carpenters, boat builders and the like." J. WHITE & R. SUMMERS, *supra* note 12, § 9-6. This interpretation does not make sense. Plumbers deal in plumbing fixtures, electricians deal in electrical supplies, boat builders in boats. The "deals in" language encompasses them. Professor Nordstrom does not address the § 2-104(1) language in a § 2-314 context but argues that the second half of the merchant definition limits the class of merchant sellers of used goods. R. NORDSTROM, *supra* note 12, § 134, at 408 n.25. "The Code did not intend to make every seller of used goods a 'merchant' simply because the seller had knowledge concerning those goods. All owners of goods have knowledge of their goods. . . . The Code accomplishes this distinction by limiting the goods and practices portion of the definition of merchant to a person who *by his occupation* holds himself out as having the requisite knowledge or skill." *Id.* (emphasis in original). This explanation does not explain § 2-104(1)'s meaning in a § 2-314 context.

162. The May 1949 draft of the Uniform Commercial Code was submitted to "a joint meeting of the sponsoring organizations held in St. Louis, Missouri, in September of 1949." R. BRAUCHER & R. RIEGERT, *supra* note 67, at 24-25.

163. Compare § 7 of FINAL DRAFT #1, *supra* note 84, with § 2-104(1) of the MAY 1949 DRAFT, *supra* note 88.

164. See *supra* notes 85, 163.

165. This language, which ultimately became a part of the present definition of § 2-

teen special rules for merchants.¹⁶⁶

From the moment of article 2's official introduction, scholars as well as lawyers voiced serious reservations about Professor Llewellyn's merchant.¹⁶⁷ They questioned the need for two sets of rules, one for merchants, another for non-merchants.¹⁶⁸ In addition, even if the need existed, many found section 2-104's definition unmanageable.¹⁶⁹ It was ambiguous,¹⁷⁰ odd,¹⁷¹ and difficult to construe.¹⁷²

In response to the "doubting Thomases" who questioned the need for a bifurcation of American sales law into one set of rules governing merchants and another governing non-merchants, Professor Llewellyn retorted that not only did American sales law need this concept, it already existed.¹⁷³ According to Professor Llewellyn, wise courts already distinguished between mercantile and non-mercantile transactions in reaching their decisions.¹⁷⁴ In addition, the USA even codified the merchant bifurcation in one of its provisions.¹⁷⁵ Interestingly enough,

104(1), appeared in the September 1950 proposed final draft of the Uniform Commercial Code. *See infra* notes 186-98 & accompanying text.

166. These special merchant provisions remained constant throughout the drafting and review process. The Code's special merchant provisions are: § 2-103(1)(b) (Good Faith); § 2-201(2) (Statute of Frauds); § 2-205 (Firm Offers); § 2-207(2) (Additional Terms in Acceptance); § 2-209(2) (Modification, Rescission and Waiver); § 2-312(3) (Warranty of Title); § 2-314 (Implied Warranty of Merchantability); § 2-327(1)(c) (Sale on Approval); § 2-402(2) (Rights of Seller's Creditors); § 2-403(2) (Entrusting); § 2-509(3) (Risk of Loss); § 2-603(1) (Rightful Rejection); § 2-605(1)(b) (Waiver of Buyer's Objections by Failure to Particularize); and § 2-609(2) (Adequate Assurance of Performance).

167. *See, e.g.*, Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification*, 16 LAW & CONTEMP. PROBS. 141 (1951); Kripke, *The Principles Underlying the Drafting of the U.C.C.*, 1962 U. ILL. L. F. 321, 325-26; Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427, 431-33 (1950); Waite, *The Proposed New Uniform Sales Act*, 48 MICH. L. REV. 603, 607, 618-19 (1950); Williston, *supra* note 84, at 571-73, 584; *see also Report of Committee on the Proposed Commercial Code, Developments Since September 1949 Report*, 6 BUS. LAW 119, 126-29 (1951) [hereinafter cited as *Report of Committee*]; *Hearing Before Board*, *supra* note 148, at 181-83.

168. *See, e.g.*, *Report of Committee*, *supra* note 167, at 126; N.Y. LAW REVISION REPORT 1955, *supra* note 148, at 107-08, 164-65, 351 (Honnold's statement); N.Y. LAW REVISION REPORT 1954, *supra* note 84, at 137 (Fifield's testimony); Waite, *supra* note 167, at 607; Williston, *supra* note 84, at 572-73.

169. *See, e.g.*, Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291; *Hearing Before Board*, *supra* note 148, at 181-83; Rabel, *supra* note 167, at 432; Waite, *supra* note 167, at 618-19; Williston, *supra* note 84, at 571-73.

170. *Hearing Before Board*, *supra* note 148, at 183 (Professor Kripke's remarks).

171. Waite, *supra* note 167, at 618.

172. Comment, *Merchant Provisions in the Uniform Commercial Code—Sales*, 39 GEO. L.J. 130, 131 (1950).

173. N.Y. LAW REVISION REPORT 1954, *supra* note 84, at 165 (Professor Llewellyn's remarks).

174. *Id.*

175. *Id.* at 165-66.

the codification to which he was referring, section 15(2) of the USA, dealt with the Act's implied warranty of merchantability.¹⁷⁶

Professor Llewellyn apparently equated the section 15(2) seller with the section 2-314 merchant. In a 1937 article, he discussed the USA and its implied warranty of merchantability.¹⁷⁷ He criticized the Act's failure to define the concept of "merchantability,"¹⁷⁸ objected to its election of remedies doctrine which gave the buyer the unpalatable choice between rescission and damages,¹⁷⁹ and did not like its requirement of a sale by description.¹⁸⁰ His own version of the implied warranty of merchantability reflected these criticisms by defining the concept of merchantable¹⁸¹ and eliminating the requirement of a sale by description.¹⁸² Article 2 abolished the election of remedies doctrine.¹⁸³ In criticizing section 15(2), Professor Llewellyn never once criticized the class of sellers subject to it. Not one to mince words when words were due,¹⁸⁴ his failure to criticize alone could be construed as

176. USA § 15(2). In hearings before the New York Law Revision Commission, Professor Llewellyn stated: "Now, may I turn to the matter of the introduction of the concept of 'merchant' into the Code? Let me begin by pointing out that this is not something new in the law. What this is, instead, is a bringing into clarity and explicit focus of a thing which is really there and which has been in the law of sales for something more than a hundred years. There are a few places in the present statute in which that becomes explicit. In Section 15₂ [New York's version of § 15(2) of the USA] of the present statute is a provision that there is a warranty of merchantability when the goods are sold by a dealer who deals in goods of that description . . . and if he is not a merchant with respect to those goods, I am sure I don't know who is. . . ." N.Y. LAW REVISION REPORT 1954, *supra* note 84, at 165 (Professor Llewellyn's remarks).

Later, he commented: "One of the things that reads in this memorandum again and again is the notion that there should not be different rules for merchants or for people in one trade or occupation from those which are had for people in another. I refer again for the moment to Section 15(2) of the old Act which provides a rule that we still have in the Code, that sales of goods by a merchant who deals in goods of that description ought to carry a warranty of merchantability. This makes good sense. We all know it. We all feel it." *Id.* at 165-66.

177. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 381-84 (1937).

178. *Id.* at 383.

179. *Id.* at 390. He poses the situation of a horse warranted "gentle" which, in fact, is vicious and kicks the buyer's son. *Id.* Under the USA, the buyer could choose between the following alternatives: keep the horse, and risk another kick; shoot him and pay the price; or rescind the sale and forego damages. "This is not sense," concluded Professor Llewellyn. *Id.*

180. *Id.* at 384-87.

181. U.C.C. § 2-314(2).

182. *Id.* § 2-314(1).

183. "[T]he buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. . . . The remedy under this section . . . involves no suggestion of 'election' of any sort." *Id.* § 2-608 comment 1.

184. In his second warranty article, correcting some observations made in his first, Pro-

approval. But he did more than remain silent. He was positively effusive. He praised the USA's "yeoman work" in regard to the creation of responsibility in a seller, in light of modern social and technical conditions.¹⁸⁵ All of the evidence suggests that Professor Llewellyn intended the section 2-314 merchant to be none other than the section 15(2) seller.

To understand the meaning of section 2-104's definition of merchant as applied to section 2-314, section 15(2) of the USA must be considered. It provided that "[w]here the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality."¹⁸⁶

The parenthetical "whether he be the grower or manufacturer or not" possessed tremendous legal significance. Prior to the USA, courts generally agreed that manufacturers and growers of goods gave an implied warranty of merchantability,¹⁸⁷ but disagreed over whether dealers or retailers gave it.¹⁸⁸ Professor Williston intended to settle the

fessor Llewellyn referred to one judge as "a commercial moron." Llewellyn, *supra* note 177, at 341 (errata in part I). In a 1952 speech to the Tennessee Bar Association, Professor Llewellyn stated: "[Y]ou don't know the present law, and if you are practicing on the assumption that you do, all I can say to you is 'God pity your clients.' The amount of abysmal, unbelievable, utterly un-understandable, base ignorance on the part of the bar giving commercial advice which I have found in the highest quarters of the land, is a thing which has turned my hair—not white,—but taken it out—during the process of discussion of the problems of this Commercial Code." Llewellyn, *supra* note 93, at 781. By 1952, Professor Llewellyn had become impatient with those who opposed adoption of the Code because it would change the allegedly existing, certain law. Professor George W. Bacon's remarks are illustrative of this camp of thought: "I have taught Sales for 28 years. . . . I have asked myself ever since the Code has been in the process of drafting, 'why is it needed'. . . . One reason that I have read as to why it is needed, and almost the only specific reason that has been given . . . is that an airplane can fly from San Francisco to New York in four hours whereas it used to take a horse and covered wagon six months, or whatever it was. Just what that has to do with where the risk of loss should fall or whether a warranty should run to guests of the family or what the seller's duties are on a f.o.b. point of shipment contract is more than I can make out. Now, just because we have more speed in the transaction of business and the delivery of goods does not seem to me to lead to the idea that we should change all the principles of the law that we now have and which are pretty well settled." N.Y. LAW REVISION REPORT 1954, *supra* note 84, at 129, 144.

185. Llewellyn, *supra* note 177, at 382.

186. USA § 15(2).

187. See, e.g., Kellogg Bridge Co. v. Hamilton, 110 U.S. 108, 116 (1884); Archdale v. Moore, 19 Ill. 565 (1858); Hoe v. Sanborn, 21 N.Y. 552 (1860); Rodgers & Co. v. Niles & Co., 11 Ohio St. 48 (1960).

188. For cases holding that a dealer did not give an implied warranty of merchantability, see, e.g., Barnard v. Kellogg, 77 U.S. (10 Wall.) 383 (1871); Reynolds v. General Elec. Co., 141 F. 551 (8th Cir. 1905); Seixas v. Wood, 2 Cai. R. 48 (N.Y. Sup. Ct. 1804). For cases

controversy with section 15(2),¹⁸⁹ believing that the more sensible position was that retailers should give an implied warranty of merchantability.¹⁹⁰ It was this aspect of section 15(2) which Professor Llewellyn praised.¹⁹¹

Professor Llewellyn clearly wanted his section 2-314 merchant to include retailers, manufacturers, and growers of goods. He must have believed that his original definition, expressed solely in terms of the "by his occupation" language, would do so. Others did not interpret section 2-104 that way. Professor Waite expressed total confusion about the meaning of the definition.¹⁹² He thought its emphasis on knowledge "odd."¹⁹³ Musing about section 2-104 in connection with section 2-314, he discussed a hypothetical storekeeper who sold toilet paper, eggs, and pat  .¹⁹⁴ Relying on a common sense understanding of the word "merchant," he would assume obviously that the country storekeeper was a merchant.¹⁹⁵ Relying on section 2-104's definition, he would conclude "emphatically 'no.'"¹⁹⁶ Professor Waite then asked, "Does he, merely because he sells such things, hold himself out as having knowledge or skill peculiar to them?" He concluded that, "Now I have serious doubt as to what section 2-314 means."¹⁹⁷

The possibility that section 2-104 could be *mis*construed to exclude retailers must have horrified Professor Llewellyn. Professor Waite's article appeared in March 1950. The next revision of the Code, dated September 1950, contained the following: "Section 2-104, Line 1: in-

holding that a dealer did give a warranty, see, *e.g.*, *Murchie v. Cornell*, 155 Mass. 60, 29 N.E. 207 (1891); *Campion v. Marston*, 99 Me. 410, 59 A. 548 (1904).

189. "According to the English law (and also under the American Sales Act) the seller impliedly warrants the merchantable character of the goods he sells as fully when he is merely a dealer in goods of that description as when he is a manufacturer." S. WILLISTON, *supra* note 60, § 233. According to Professor Gilmore: "Statutes like the Uniform Sales Act were not statutes at all. That is, they were not designed to provide rules for decision. Drafted in terms of loose and vague generality, they were designed to provide access to the prevailing academic wisdom. The rules for decision in sales cases were to be found, not in the Uniform Sales Act which had been drafted by Samuel Williston . . . but in Professor Williston's treatise on the law of sales." Gilmore, *supra* note 67, at 71. Morrow analogized the Sales Act to "[t]he Restatements of today, with the sole advantage that they did possess legislative sanction." Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 327, 338 (1940).

190. S. WILLISTON, *supra* note 60, § 233.

191. See *supra* note 185 & accompanying text.

192. Waite, *supra* note 167, at 618-19.

193. *Id.* at 618.

194. *Id.* at 619.

195. *Id.*

196. *Id.*

197. *Id.*

sert 'who deals in goods of the kind or otherwise'.¹⁹⁸ The drafters hastily added the "deals in" language to avert a possible section 2-104 interpretative disaster.

The intended meaning of section 2-104's definition, viewed in light of these historical considerations, becomes clear. The "deals in" language takes on its ordinary meaning of buying and selling, referring to retailers and dealers. The "by his occupation" language refers to manufacturers and growers. Section 2-104 thereby encompasses the class of sellers covered by section 15(2). Originally, Professor Llewellyn assumed that his "occupation" language would include everybody he wanted to include. The "deals in" language was an afterthought, added after the drafters thought about Professor Waite's article. But, section 2-104's meaning as it applies to section 2-314 is not intuitively obvious to those who must interpret it. One court referred to the practices aspect of the definition in holding that a manufacturer qualified as a merchant for purposes of section 2-314.¹⁹⁹ Maryland just gave up. In enacting the Code, Maryland added a sentence to section 2-314 defining the seller subject to sections 2-314 and 2-318 as "the manufacturer, distributor, dealer, wholesaler or other middleman or the retailer."²⁰⁰

Having identified the class of sellers subject to section 2-314 as all those involved in the distribution network with respect to particular goods, the fundamental question now becomes: why limit the implied warranty of merchantability just to that class? The drafters' wisdom in doing so clearly was an inherited wisdom. In fact, section 2-314 merely carried on a venerable English tradition older than the USA. Professor Williston had modeled the USA on Chalmers' English Sale of Goods Act which had been enacted in 1893.²⁰¹ The English Sale of Goods Act, in turn, codified English case law.²⁰² To evaluate section 2-314's

198. U.C.C. arts. 2, 4, 9 (Sept. 1950 Revision).

199. "The term 'practices' indicates that any one may be a merchant of goods by virtue of his involvement in the process by which those goods are produced as well as by sale of the finished goods from inventory." *Blockhead, Inc. v. The Plastic Forming Co., Inc.*, 402 F. Supp. 1017, 1025 (D. Conn. 1975).

200. MD. COM. LAW CODE ANN. § 2-314 (1975 & Supp. 1982).

201. Professor Williston acknowledged that he based his sales act on the English Sale of Goods Act. Williston, *supra* note 84, at 563. He argued that the similarity between English and American law was a strength, especially in light of international trade, and the Code's different treatment and phraseology undermined that. *Id.* at 564-65. In the area of seller responsibility for quality, Professor Williston did not adopt the English distinction between conditions and warranties. S. WILLISTON, *supra* note 60, § 249. Under the English Act, breach of warranty only gave rise to a right to damages whereas breach of condition gave rise to a right of rescission. Morrow, *supra* note 189, at 340. The USA's elimination of the warranty/condition distinction therefore afforded the buyer greater relief. *Id.*

202. "The English statute was intended to express the common law of England as it

merchant distinction, we must consider the historical connection between seller status and seller responsibility. More than one court has observed that it is impossible to reconcile all the cases.²⁰³ Despite this, the policies that justified imposing quality responsibility on some sellers and not others do emerge. It is with these policy considerations and not the complicated history and evolution of the law of warranty itself²⁰⁴ that we must be concerned in judging the present validity of section 2-314's merchant restriction.

The Historical Antecedents Connecting Seller Status To Seller Responsibility For Quality

In the beginning, there was caveat emptor—or so eighteenth and nineteenth century English and American courts thought.²⁰⁵ Professor Hamilton established that, in reality, just the opposite was true,²⁰⁶ but that historical reality is ultimately irrelevant. English and American courts believed caveat emptor to be the basic rule governing allocation of loss between buyer and seller for defective goods. Modern seller responsibility for quality evolved from an initial predicate of caveat emptor. The law recognized only two exceptions to caveat emptor:

existed at the time the act was passed." S. WILLISTON, *supra* note 60, § 248. For a general discussion of what the drafters of the English Sale of Goods Act failed to perceive about prior English warranty caselaw, see Stoljar, *Conditions and Warranties on Sale*, 15 MOD. L. REV. 425 (1952). The treatment of warranties under both acts largely adopted the classifications enunciated in *Jones v. Just*, 3 L.R.Q.B. 197 (1868). See S. WILLISTON, *supra* note 60, § 229.

203. See, e.g., *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108, 115-16 (1883); *Hoe v. Sanborn*, 21 N.Y. 552, 555 (1860).

204. Many scholars have dealt with this difficult topic. See, e.g., S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 271-78, 317-20 (1969); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 637-50 (1956); A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT*, 164-67, 242-47, 535-36, 556-57 (1975); Ames, *History of Assumpsit*, 2 HARV. L. REV. 53 (1889); Ames, *History of Assumpsit*, 2 HARV. L. REV. 1 (1888). Professor Rasor's brief description aptly captures the complexity of the topic: "[T]his article will trace the law of warranty from its origin as a tort out of the primordial ooze of action on the case, through its capture by assumpsit, its transportation as a hybrid to the United States . . . its emergence as a contract, and finally its illumination and reappearance as a tort." Rasor, *supra* note 134, at 176.

Dean Prosser in his own inimitable style characterized the implied warranty as "a freak hybrid born of the illicit intercourse of tort and contract." Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960).

205. See, e.g., *Barnard v. Kellogg*, 77 U.S. (10 Wall.) 383 (1870); *Seixas v. Woods*, 2 Cai. R. 48 (N.Y. 1804); *La Neuville v. Norse*, 170 Eng. Rep. 1407 (Nisi Prius 1813); *Parkinson v. Lee*, 102 Eng. Rep. 389 (K.B. 1802).

206. Hamilton, *supra* note 99, at 1136-74.

seller fraud and/or the seller's giving of an express warranty.²⁰⁷ If the seller was guilty of fraud or gave an express, formal warranty of quality with respect to the goods, he assumed the loss for their defects.²⁰⁸ Otherwise, the buyer did. These rules did not discriminate upon the basis of a seller's status. Caveat emptor and its exceptions uniformly governed all sales transactions.

Scholars have argued that the doctrine embodied the individualistic spirit of the times,²⁰⁹ a belief "that individuals should make their own decisions, exercise their own prudence and judgment and ask for a warranty if they wanted one."²¹⁰ Of course, if all courts had embraced the doctrine and its underlying premises wholeheartedly, there would be no implied warranty today. The United States Supreme Court, probably unmindful of the deeper implications, recognized this in *Kellogg Bridge Co. v. Hamilton*.²¹¹ In *Kellogg*, the seller's attorney had argued that the buyer, not the seller, should assume the loss because it was always in the buyer's power to exact an express warranty and he had failed to do so.²¹² The Court rejected the argument out of hand: "Such an argument impeaches the whole doctrine of implied warranty, for there can be no case of a sale . . . in which the buyer may not, if he

207. See, e.g., *Parkinson v. Lee*, 102 Eng. Rep. 389, 392 (K.B. 1802); *Stuart v. Wilkins*, 99 Eng. Rep. 15 (K.B. 1778).

208. See, e.g., *Parkinson v. Lee*, 102 Eng. Rep. 389, 392 (K.B. 1802). Courts assumed that *Chandelor v. Lopus*, 79 Eng. Rep. 3 (K.B. 1603), first enunciated the doctrine of caveat emptor. See, e.g., *Siexas v. Woods*, 2 Cai. R. 48, 55 (N.Y. 1804) (Kent, J.). Scholars have questioned the true significance of the *Chandelor* case, which dealt with the buyer's right of recourse against the seller of a bezoar stone (a stone from a goat's intestine) claimed to have medicinal qualities. Professor Hamilton argued that the case involved a pleading matter. Hamilton, *supra* note 99, at 1167. Professor Atiyah remarked that "[i]t seems extraordinary that this case should have been regarded as laying the foundation of the later law of caveat emptor." P. ATIYAH, *supra* note 96, at 179. He surmised that the court probably was reluctant to value such a strange object or to determine if it was a bezoar stone. *Id.* He also noted that the buyer probably was suing because it did not have the medicinal qualities he expected. *Id.* With respect to that kind of subject matter, arguably it was reasonable to hold "that one's unconsidered bargain was his own tough luck." Hamilton, *supra* note 99, at 1163. Professor Hamilton describes the origins of caveat emptor as deriving from the non-organized unregulated trade of "the wayfaring palmer with his relics and trinkets, the peripatetic peddler with gew-gaws and ornaments, strangers here today and there tomorrow, wayfaring men of no place and without the law. In such wares one had to trade at his peril; there was no authentic test for holy water and bones of the saints, for venetian glass and spices of Araby." *Id.* at 1162-63. A bezoar stone certainly would seem to fall into the same class of things as holy water and bones of saints.

209. See, e.g., P. ATIYAH, *supra* note 96, at 180; Hamilton, *supra* note 99, at 1176; Kessler, *The Protection of the Consumer Under Modern Sales Law, Part I*, 74 YALE L.J. 262, 266 (1964).

210. P. ATIYAH, *supra* note 96, at 180.

211. 110 U.S. 108 (1883).

212. *Id.* at 118.

chooses, insist on an express warranty against latent defects.”²¹³ The simple fact that some courts did resort to an implied warranty suggests that at least some courts were uncomfortable with caveat emptor and its allocation of loss to the buyer.

Courts ill-disposed toward caveat emptor could circumvent the doctrine by focusing on its emphasis on the buyer’s reliance on his own judgment. In 1815, Lord Ellenborough stated that “[w]here there is no opportunity to inspect the commodity, the maxim caveat emptor does not apply.”²¹⁴ In referring to the buyer’s inability to inspect, Lord Ellenborough managed to acknowledge and dispose of caveat emptor in one fell swoop.²¹⁵ A contractual reasonable expectations approach to the question of allocation of loss characterized the rest of his opinion. He noted that under the circumstances, “the purchaser has a right to expect a salable article answering the description in the contract . . . the purchaser cannot be supposed to buy goods to lay them on a dung-hill.”²¹⁶ Although the transaction appeared to be between two merchants,²¹⁷ seller status was not an issue.

A buyer’s inability to inspect provided one way to circumvent the doctrine of caveat emptor. The buyer’s reasonable reliance on the skill and judgment of his seller provided another. If the buyer did not exercise his own skill and judgment, but relied on the seller’s skill and judgment, caveat emptor would not apply.²¹⁸ In this context, the question of seller status assumed a pivotal role with respect to seller responsibility for quality. A finding of buyer reliance on the skill and judgment of the seller was a thinly disguised way to reject caveat emptor. New policy considerations were at work. In *Jones v. Bright*,²¹⁹ a manufacturer of copper sheathing sold some to the plaintiff for his ship. The defendant manufacturer knew the buyer’s particular purpose. He said to the buyer, “I will supply you well.”²²⁰ The attorney for the plaintiff-buyer

213. *Id.*

214. *Gardiner v. Gray*, 171 Eng. Rep. 46, 47 (K.B. 1815).

215. Clearly if the buyer has no opportunity to inspect, he cannot be said to have relied on his own judgment. If that is impossible, caveat emptor does not apply.

216. *Gardiner v. Gray*, 171 Eng. Rep. 46, 47 (K.B. 1815).

217. The subject matter of the sale was 12 bags of waste silk. At the time of contracting, the defendant had shown the plaintiff’s agent samples of it which he had received in a letter from his seller. The waste silk was to be imported from the continent. Upon receipt of the silk, the plaintiff found it unfit for sale. All of these facts suggest that the two parties were traders. *Id.*

218. See, e.g., *Jones v. Just*, 3 L.R. - Q.B. 187 (1868); *Bigge v. Parkinson*, 158 Eng. Rep. 758 (Ex. 1862); *Brown v. Edgington*, 133 Eng. Rep. 751 (C.P. 1841).

219. 130 Eng. Rep. 1167 (C.P. 1829).

220. *Id.*

argued that the buyer would not have had any means of knowing whether the article to be sold would be fit for his particular purpose and therefore could not rely on his own judgment, "but the seller has generally the means of knowing this, and of preparing his article accordingly, more especially where, as in the present case, he is the manufacturer."²²¹ The buyer, he argued, was relying reasonably on the seller's skill. Chief Justice Best, in ruling for the buyer, suggested two reasons for his decision, one which disposed of caveat emptor and another which justified the application of a different rule. He began his opinion: "[I]t is the duty of the court, in administering the law to lay down rules calculated to . . . protect persons who are necessarily ignorant of the qualities of a commodity they purchase; and to make it in the interest of manufacturers and those who sell, to furnish the best article that can be supplied."²²² He imposed the loss on the manufacturer seller because "it will teach manufacturers that they must not aim at underselling each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold."²²³ For Chief Justice Best, the seller's status as a manufacturer had a dual significance. A manufacturer knew more about the goods offered for sale than the purchaser. Therefore, the buyer from a manufacturer had reason to rely on the manufacturer's skill and expertise rather than on his own judgement and caveat emptor would not apply. Second, manufacturers who could control the quality of their goods should do so or be responsible for their failure to do so.²²⁴

The notion of buyer reliance on the seller's skill and expertise extended to include sellers who were dealers rather than manufacturers. In *Brown v. Edgington*,²²⁵ the buyer, a wine merchant, needed a crane rope to lift wine from his cellar. The seller, a dealer in ropes, undertook to supply him with a suitable rope. The rope broke while one of the plaintiff's servants was hauling a "pipe" of wine to the street.²²⁶

221. *Id.* at 1169.

222. *Id.* at 1171.

223. *Id.* at 1173.

224. Manufactured goods were unlike goods such as horses whose "erratic properties . . . could not be reduced to a standard model. . . ." Hamilton, *supra* note 99, at 1163: Professor Llewellyn repeatedly argued for the need to distinguish sales of horses and haystacks from sales of wares in commerce. See, e.g., Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 874, 877, 879 (1939) [hereinafter cited as Llewellyn, *First Struggle*]; Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 728, 732, 741 (1939) [hereinafter cited as Llewellyn, *Across Sales*].

225. 133 Eng. Rep. 751 (C.P. 1841).

226. *Id.* at 752. The plaintiff's description of his loss proves, beyond a doubt, that legal

The seller's attorney argued that the seller was not a manufacturer and, therefore, did not give an implied warranty.²²⁷ Chief Justice Tindall observed that if the buyer had relied on the seller's judgment and informed the seller of his purpose, "it seems to me, the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purpose for which it was designed."²²⁸ All three justices indicated that the seller's status as a manufacturer was not crucial to the finding of an implied warranty.²²⁹ Justice Bosanquet went furthest in this regard, viewing the situation from a contractual perspective: "[w]here a contract is, expressly or impliedly, to furnish goods of a particular description, a warranty is created that they shall be of that description."²³⁰

The notion of reasonable buyer reliance on the seller was a flexible judicial device. It could be used to impose the loss on the buyer. If the transaction involved two dealers, it was possible to hold that the buyer was not relying on the seller's skill and judgment because he had his own on which to rely.²³¹ So, too, if the seller was not a dealer or manufacturer, he would not have any particular knowledge or skill upon which the buyer could be said to have relied.²³² Under both those factual situations some courts held that it was every man for himself.²³³ Not too far from the surface of such cases, however, was the desire to avoid imposing the loss on an innocent seller.²³⁴ Of course, the court's direct act of refusing to impose the loss on an innocent seller had the indirect consequence of imposing it on the innocent buyer, but caveat emptor saved the day. The buyer was less innocent or "more deserving" of the loss, having created his own demise by failing to demand an

prolixity began well before the twentieth century: "[T]he said last-mentioned rope, by reason of its being so bad, unfit and improper for that purpose as aforesaid . . . then gave way and broke, and thereby the said pipe of wine fell to the ground, and the said pipe was broken, shattered, staved in, and spoilt, and the wine in the said pipe was spilt, scattered, spoiled and poured out upon the ground, and thereby became and was wholly lost to the plaintiff . . ." *Id.* at 753.

227. *Id.* at 753.

228. *Id.* at 756.

229. *Id.* at 756 (Tindall, C.J., and Bosanquet, J.), 757 (Erskine, J., and Moule, J.).

230. *Id.* at 756.

231. *See, e.g.*, *Emmerton v. Matthews*, 158 Eng. Rep. 604 (Ex. 1862); *Gray v. Cox*, 107 Eng. Rep. 999 (K.B. 1825); *Parkinson v. Lee*, 102 Eng. Rep. 389 (K.B. 1802).

232. *See, e.g.*, *Burnby v. Bollett*, 153 Eng. Rep. 1348 (Ex. 1847).

233. When it was every man for himself, *i.e.*, caveat emptor, the buyer assumed the loss.

234. With respect to *Parkinson v. Lee*, Professor Hamilton argued that "[i]t is impossible for the reader . . . to escape the conclusion that the innocence of the dealer, who was a party distinct from the fraudulent grower, was the dominant consideration with the bench." Hamilton, *supra* note 99, at 1176.

express warranty.²³⁵

The 1869 case of *Jones v. Just* summarized English thinking with regard to the connection between seller status and seller responsibility for quality.²³⁶ The court laced its basic theory of contractual expectations with noddings to caveat emptor. The subject matter of the sale, manilla hemp, was to be delivered to an English buyer from Singapore. Clearly the buyer had no opportunity to inspect it, but neither had the seller. It arrived in Liverpool damaged by "the perils of the seas and navigation,"²³⁷ namely, salt-water. At auction, it realized only 75 percent of the price for merchantable hemp.²³⁸ In holding for the buyer the court said:

The maxim of caveat emptor cannot apply, and . . . it must be assumed that the buyer and seller both contemplated dealing in an article which was merchantable. The buyer bought for the purpose of sale, and the seller could not on any other supposition than that the article was merchantable have found a customer for his goods, and the buyer must be taken to have trusted to the judgment, knowledge and information of the seller, as it is clear to us that he could *exercise no judgment of his own*; and this appears to us to be at the root of the doctrine of implied warranty.²³⁹

The court's emphasis on the buyer's reliance on the seller's judgment and knowledge must be seen for what it is—a judicial device to break from the strictures of caveat emptor. The seller had no more knowledge and could exercise no greater judgment with respect to the damaged condition of the manilla hemp than the buyer. The buyer's lack of opportunity to inspect offered the court a convenient route of escape from caveat emptor. The court grounded its decision in contract. The buyer and seller were buying and selling on the supposition that the manilla hemp was merchantable. But for that assumption, there would have been no contract.

In England, the concept of implied warranty arose from the desire

235. The court in *Parkinson v. Lee* stated: "I must suppose that each party was equally well acquainted with the commodity bargained for. There was no representation made by the plaintiff as to the goodness of the hops, to induce him to make the purchase. But here was a commodity offered for sale, which might or might not have a latent defect: this was well known in the trade; and the plaintiff might if he pleased, have provided against the risk, by requiring a special warranty. Instead of which, a sample was fairly taken from the bulk, and he exercised his own judgment upon it; and knowing, as he must have known, as a dealer in the commodity, that it was subject to a latent defect which afterwards appeared, he bought it at his own risk." 102 Eng. Rep. 389, 392 (K.B. 1802).

236. 3 L.R.-Q.B. 197 (1868). The English Sale of Goods Act codified the holding of *Jones v. Just*.

237. *Id.*

238. *Id.*

239. *Id.* at 207 (emphasis in original).

to give legal effect to reasonable contractual expectations and to regulate manufacturers. It evolved from a framework of caveat emptor. Chief Justice Best's interpretation²⁴⁰ of an old English case, *Chandelor v. Lopus*,²⁴¹ considered to be the cornerstone of caveat emptor, exemplifies the transparency of the judicial reasoning used to break away from caveat emptor.²⁴² Choosing to overlook an earlier holding that an express warranty was required,²⁴³ Chief Justice Best said that *Chandelor* only established "that to render the defendants liable, there must be a warranty or a false representation. But the case does not decide there must be an express warranty; an implied warranty would satisfy the terms of the decision."²⁴⁴ The concept of implied warranty was a judicial construct which allowed the court to impose the loss on the seller. The seller's status was helpful in avoiding caveat emptor.

English courts used a seller's status as dealer or manufacturer to justify departing from caveat emptor. The doctrine remained to allocate loss between the non-manufacturer/non-dealer seller and buyer. The desire to regulate manufacturers and to give effect to contractual expectations justified and continue to justify rejection of the doctrine. They do not justify retaining it in the area of private sales.

Most American courts took caveat emptor more seriously than their brethren across the Atlantic,²⁴⁵ and as a consequence, the American situation was quite confused.²⁴⁶ Courts held for the seller if the

240. *Jones v. Bright*, 130 Eng. Rep. 1167 (C.P. 1829).

241. 79 Eng. Rep. 3 (K.B. 1603).

242. See *supra* notes 214-30 & accompanying text.

243. *Stuart v. Wilkins*, 99 Eng. Rep. 15 (K.B. 1778).

244. *Jones v. Bright*, 130 Eng. Rep. 1167, 1172 (C.P. 1829).

245. Professor Hamilton argued that the real triumph of caveat emptor occurred in America. Hamilton, *supra* note 99, at 1178. Professor Atiyah stated that "the doctrine . . . never seems to have been nearly as rigorously applied in England as is popularly believed and certainly not as it was later applied in America." P. ATIYAH, *supra* note 96, at 180. There was a certain irony in all this. In *Jones v. Just*, Justice Mellor noted that the seller's attorney directed the court to consider the authority of Chancellor Kent. 3 L.R.-Q.B. 197, 206 (1868). In *Seixas v. Woods*, 2 Cai. R. 48 (N.Y. Sup. Ct. 1804), Chancellor Kent expressed reservations about caveat emptor but reluctantly applied the doctrine because it represented what he thought to be the well-established rule. *Id.* at 54-55. See *supra* note 100 & accompanying text. Justice Mellor rejected the attorney's appeal to the authority of Chancellor Kent saying that "as the American cases which [Kent] cites are generally adverse to his opinion, it can at most be said that the opinion of an eminent writer is opposed to the authority of the cases he cites. *Jones v. Just*, 3 L.R.-Q.B. at 206. It is not surprising that the area of warranty law is confused and confusing.

246. Several American courts noted that it was impossible to reconcile all the cases. See, e.g., *Barnard v. Kellogg*, 77 U.S. (10 Wall.) 383, 390 (1870); *Hoe v. Sanborn*, 21 N.Y. 552 (1860). Some courts followed strictly the dictates of caveat emptor. See, e.g., *Tomlinson v. Armour & Co.*, 74 N.J.L. 274, 675 A. 883 (1907); *Dounce v. Dow*, 64 N.Y. 411 (1876). Other courts were more sensitive to mercantile needs, political realities and principles of fairness.

buyer could have inspected the goods, regardless of the impracticability involved in an inspection.²⁴⁷ In addition, the existence of the right to inspect caused the buyer to assume the loss even for latent defects undiscoverable by inspection.²⁴⁸ This reasoning was consistent with a literal application of caveat emptor because the buyer had the right to demand an express warranty if he did not want to assume the risk for latent quality defects.²⁴⁹ Slothfulness was not to be rewarded and, more importantly, the needs of trade required caveat emptor.²⁵⁰

American courts generally agreed that manufacturers impliedly warranted the merchantability of their goods,²⁵¹ but courts offered varying explanations. Some courts simply cited English or American precedent.²⁵² Other courts felt the need for a rationale more satisfactory than stare decisis. An 1860 New York court, casting about for an explanation that would be doctrinally consistent with caveat emptor, provided a logically impeccable theory.²⁵³ It began with the uncontroverted exception to caveat emptor that a seller is liable for all defects about which he had knowledge,²⁵⁴ and reasoned that a manufacturer has intimate knowledge about its goods.²⁵⁵ Because manufacturers had such knowledge, there was a great probability that they had knowledge of defects in their goods.²⁵⁶ Thus for the court, holding manufacturers to give an implied warranty was nothing more than a presumption of knowledge about defects.²⁵⁷ The law presumed scienter with respect to manufacturers whereas it required proof of scienter

See, e.g., Bradford v. Manly, 13 Mass. 138 (1816); Bierman v. City Mills Co. 151 N.Y. 482, 45 N.E. 856 (1897); Carleton v. Lombard, Ayers & Co., 149 N.Y. 137, 43 N.E. 422 (1896); Howard v. Hoey, 23 Wend. 350 (N.Y. 1840). Yet other courts rejected the doctrine out of hand. *See, e.g.,* Missroon v. Waldo, 11 S.C.L. (2 Nott & McC.) 76 (1819); Barnard v. Yates, 4 S.C.L. (1 Nott & McC.) 142 (1818).

247. *See, e.g.,* Barnard v. Kellogg, 77 U.S. (10 Wall.) 383 (1870). *But see* Boorman & Johnston v. Jenkins, 12 Wend. 566 (N.Y. 1834).

248. Hargous v. Stone, 5 N.Y. 73, 89 (1851) ("where the goods are equally accessible to both and their quality equally unknown there can be neither justice or propriety in implying a warranty on the part of the seller against a latent defect").

249. *Id.* at 90.

250. Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 391 (1870); Hargous v. Stone, 5 N.Y. 73, 89 (1851).

251. *See, e.g.,* Bierman v. City Mills Co., 151 N.Y. 482, 45 N.E. 856 (1897); Hoe v. Sanborn, 21 N.Y. 552 (1860); Archdale v. Moore, 19 Ill. 565 (1858).

252. *See, e.g.,* Strauss v. Salzer, 109 N.Y.S. 734, 58 Misc. 573 (1908); Pascal v. Goldstein, 100 N.Y.S. 1025, 51 Misc. 629 (1906).

253. Hoe v. Sanborn, 21 N.Y. 552 (1860).

254. *Id.* at 555.

255. *Id.* at 562.

256. *Id.*

257. *Id.* at 562, 566.

with respect to all other sellers.²⁵⁸ If the manufacturer could rebut the presumption that he should have known of the defect, he would not be responsible.²⁵⁹ The court concluded that manufacturers impliedly warranted the quality of their goods because their status indicated special knowledge of the goods.²⁶⁰ This explanation fit neatly into the logical contours of caveat emptor.

The United States Supreme Court in 1883 offered a somewhat different explanation for imposing warranty liability on manufacturers. Its reasoning had a significant impact on subsequent American thinking with respect to seller status and responsibility²⁶¹ and thus merits special attention:

According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. . . . But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed.²⁶²

According to the Court, seller status was important because it indicated the seller's degree of knowledge or skill with respect to the goods. The degree of seller knowledge or expertise went to the more fundamental question of whether the buyer justifiably relied on the seller's judgment rather than his own. If it could be established that the buyer had a right to rely on the seller's judgment, his rights would not be governed by caveat emptor. This reasoning entailed two logical consequences. If the parties had equal skill or knowledge with respect to the goods, caveat emptor would apply, causing the loss to fall on the buyer.²⁶³ So too, if the parties were equally ignorant, caveat emptor

258. *Id.* at 555.

259. *Id.* at 566.

260. *Id.* at 562-63.

261. See *infra* notes 263-76 & accompanying text.

262. *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108, 116 (1883).

263. See, e.g., *Reed v. Rea-Patterson Milling Co.*, 186 Ark. 595, 54 S.W.2d 695 (1932); *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S.W. 288 (1905); *National Cotton Oil Co. v. Young*, 74 Ark. 144, 85 S.W. 92 (1905).

would govern and once again, the loss would fall on the buyer.²⁶⁴

Emphasis on the seller's skill and knowledge led some courts to conclude that dealers and retailers were not responsible for the merchantable quality of their goods.²⁶⁵ Justice Learned Hand reasoned that a general dealer would have no special acquaintance with particular types of goods and therefore, the common law, i.e., caveat emptor, would control.²⁶⁶ Another court held that a seller who was not the manufacturer would not impliedly warrant the merchantable quality of his goods because in that situation, both parties would have equal knowledge and, therefore, stand on an equal footing.²⁶⁷ Consequently, it could not be said that the buyer was relying on the seller's skill and expertise.²⁶⁸ A contract between merchants, *a fortiori*, would not involve an implied warranty of merchantability.²⁶⁹

Emphasis on the seller's skill and knowledge led some courts to conclude that dealers and retailers were not responsible for the merchantable quality of their goods. Professor Llewellyn intended his section 2-104 merchant to include retailers for purposes of section 2-314.²⁷⁰ His choice of words defining the article 2 merchant, borrowed from the text of an 1883 Supreme Court opinion,²⁷¹ seems most peculiar. He employed words to accomplish a result that the words themselves had not produced. Professor Waite's criticism, that section 2-104's definition would exclude general retailers from its scope,²⁷² was a

264. See, e.g., *Reynolds v. General Elec. Co.*, 141 F. 551 (8th Cir. 1905); *Dishman v. Griffiths*, 16 Ala. App. 381, 77 So. 961 (1918); *Bigelow v. Maine Cent. R.R. Co.*, 110 Me. 105, 85 A. 396 (1912).

265. See, e.g., *Cole v. Branch & O'Neil*, 171 Ark. 611, 285 S.W. 353 (1926); *P.D. Bellville Supply Co. v. Dacey*, 141 Miss. 569, 106 So. 818 (1926); *Hoyt v. Hainsworth Motor Co.*, 112 Wash. 440, 192 P. 918 (1920).

266. *McNeil & Higgins Co. v. Czarnikow-Rienda Co.*, 274 F. 397 (S.D.N.Y. 1921).

267. *Reynolds v. General Elec. Co.*, 141 F. 551 (8th Cir. 1905).

268. See, e.g., *Scruggins v. Jones*, 207 Ky. 636, 269 S.W. 743 (1925); *Bellville Supply Co. v. Dacey*, 141 Miss. 569, 106 So. 818 (1926); *Aronowitz v. F.W. Woolworth Co.*, 134 Misc. 272, 236 N.Y.S. 133 (1929).

269. See, e.g., *Reed v. Rea-Patterson Milling Co.*, 186 Ark. 595, 54 S.W.2d 695 (1932); *Cole v. Branch & O'Neil*, 171 Ark. 611, 285 S.W. 353 (1926). The Mississippi Supreme Court recognized an implied warranty only if the seller knew of the buyer's reliance on him. *P.D. Bellville Supply Co. v. Dacey*, 141 Miss. 569, 573, 106 So. 818, 819 (1926). It therefore limited the implied warranty to manufacturers because only manufacturers would know of buyer reliance on their expertise. See *id.* A 1920 Washington court refused to find that a car dealer had given an implied warranty because both the car dealer and buyer were relying on the skill and expertise of the car manufacturer. *Hoyt v. Hainsworth Motor Co.*, 112 Wash. 440, 192 P. 918 (1920).

270. See *supra* notes 167-91 & accompanying text.

271. *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108, 116 (1883).

272. Waite, *supra* note 167, at 619. See *supra* notes 192-98 & accompanying text.

case law reality!²⁷³ Why Professor Llewellyn, conversant with the case law,²⁷⁴ chose the words he did is extremely puzzling. Perhaps he believed that subsequent decisions, grounding the implied warranty of merchantability on a broader theory of reasonable public expectations,²⁷⁵ negated prior decisions. However, at least some courts deciding cases under the Code have taken section 2-104 literally, refusing to accord merchant status to one not manufacturing goods or holding himself out as having special knowledge or expertise with respect to the goods.²⁷⁶

Section 15(2) of the USA attempted to resolve the controversy surrounding whether a dealer gave an implied warranty of merchantability by imposing warranty liability on all sellers dealing in goods of the kind.²⁷⁷ Courts interpreted this to mean that retailers as well as manufacturers gave implied warranties,²⁷⁸ although they offered different explanations to justify this imposition. Sometimes the rationale was articulated in terms of a reasonable reliance theory. For instance, a customer selecting canned goods on a store shelf "is ordinarily bound to rely upon the skill and experience of the seller in determining the kind of canned goods which he will purchase."²⁷⁹ Arguing against such liability for retailers, Professor Waite pointed out the fictional nature of this kind of reasoning.²⁸⁰ Professor Waite believed that buyers could not reasonably rely on the seller's skill and judgment with respect to canned goods.²⁸¹ He maintained that retailers should be liable only if they were at fault.²⁸² The seller of canned or packaged goods has no more knowledge or skill with respect to the goods than the buyer because neither party has actual access to the goods inside the packaging. At most, the buyer can assume that the seller's sale intimates the seller's

273. See *supra* notes 265-69 & accompanying text.

274. Professor Llewellyn's articles parsed decisions and scrutinized judges. See generally, Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936); Llewellyn, *supra* note 177.

275. See, e.g., *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P.2d 930 (1938); *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942).

276. See, e.g., *All-States Leasing Co. v. Bass*, 96 Idaho 873, 538 P.2d 1177 (1975) (lease transaction); *All-States Leasing v. Ochs*, 42 Or. App. 319, 600 P.2d 899 (1979) (security transaction).

277. See *supra* notes 265-69 & accompanying text.

278. See, e.g., *Smith v. Great Atl. & Pac. Tea Co.*, 170 F.2d 474 (8th Cir. 1948); *Young v. Great Atl. & Pac. Tea Co.*, 15 F. Supp. 1018 (W.D. Pa. 1936); *Dubin v. Denham*, 106 Or. 34, 210 P. 165 (1922).

279. *Ward v. Great Atl. & Pac. Tea Co.*, 231 Mass. 90, 91, 120 N.E. 225, 226 (1918).

280. Waite, *Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494 (1936).

281. *Id.* at 501-03.

282. *Id.* at 520.

belief that the goods are wholesome.²⁸³

Professor Waite's arguments exposed the transparency of a reasonable reliance theory to impose warranty liability on retailers. Some courts talked about the public's general confidence and reliance on retailers,²⁸⁴ but the link between seller status and seller responsibility more and more resembled a link forged from public policy. One court noted that if the buyer's damages award was to be upheld, it had to be on some basis other than reliance.²⁸⁵ It justified the retailer's liability because such liability was "one of the hazards of business."²⁸⁶ Another court observed, "practically he must know if it is fit or take the consequences, if it proves destructive."²⁸⁷ In the area of food, courts justified dealer warranty liability on the basis of public safety.²⁸⁸ One court expressed impatience with judicial emphasis on the buyer's reasonable reliance.²⁸⁹ In holding a manufacturer of contaminated sausage liable for the death of a child and illness in the rest of the family, the court stated that "[t]his implied warranty was not based on any reliance by the buyer upon the representations of the seller, or upon his skill and judgment, but was grounded squarely upon the public policy of protecting the public health."²⁹⁰

Another court explained how retailer warranty responsibility ultimately protected the public.²⁹¹ The retailer was in a better position to know and ascertain the reliability and responsibility of a manufacturer.²⁹² He should be motivated to exercise prudence and caution with respect to his suppliers.²⁹³ Furthermore, the retailer was better able to protect himself as well as better equipped to recoup any loss from the person (his supplier) who actually caused the loss.²⁹⁴ Considerations of who was better able to avoid the loss, to assume the loss, to spread the

283. *Id.* at 501-03. Professor Waite objected to "an obvious imposition of liability without fault, without assumption, and without justification in public good." *Id.*

284. *See, e.g.,* Higbee v. Giant Food Shopping Center, Inc., 106 F. Supp. 586 (E.D. Va. 1952); Cliett v. Lauderdale Biltmore Corp., 39 So. 2d 476 (Fla. 1949); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W. 2d 835 (1942).

285. Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 391, 175 N.E. 105, 106 (1931) (Cardozo, J.).

286. *Id.* at 392, 175 N.E. at 106.

287. Parks v. G.C. Yost Pie Co., 93 Kan. 334, 337, 144 P. 202, 203 (1914).

288. *See, e.g.,* Wiedeman v. Keller, 171 Ill. 93, 49 N.E. 210 (1887); Hoover v. Peters, 18 Mich. 51 (1869); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942).

289. Jacob E. Kecker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

290. *Id.* at 616, 164 S.W.2d at 831.

291. Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942).

292. *Id.* at 630, 164 S.W.2d at 838.

293. *Id.* at 633, 164 S.W.2d at 840.

294. *Id.* For similar arguments, see Ward v. Great Atl. & Pac. Tea Co., 231 Mass. 90,

loss or to pass it back to its source became part of the judicial consciousness with respect to implying the warranty of merchantability. Factored into all of this was a desire to police the marketplace.²⁹⁵

By the time Professor Llewellyn began drafting his version of the implied warranty of merchantability, many courts understood that the implied warranty was a tool of public policy.²⁹⁶ Presumably the public policy considerations which gave rise to the warranty also gave rise to section 2-314's merchant restriction. Those considerations must be considered in evaluating the validity of section 2-314's merchant distinction.

Section 2-314's Merchant Distinction From The Perspective Of Public Policy And Civil Law

Professor Llewellyn observed that "[w]arranty is a civil obligation. Its purpose, like that of any civil obligation, is at once to police, to prevent and to remedy."²⁹⁷ Presumably then, Professor Llewellyn drafted section 2-314 to police, prevent and remedy the sale of unmerchantable goods. Section 2-314 polices the merchant seller by making him liable for unmerchantable goods. It prevents the merchant seller from selling unmerchantable goods by threatening section 2-314 liability and it provides a remedy by authorizing buyer recourse against the seller in the event the goods are unmerchantable. Section 2-314's merchant restriction, however, prevents section 2-314 from policing, preventing, or remedying the non-merchant seller's sale of unmerchantable goods. In fact, it does quite the opposite. By limiting section 2-314's applicability to merchant sellers, it impliedly sanctions the non-merchant seller's sale of unmerchantable goods. Such sellers have no quality responsibility and their buyers are left with no alternative but to pay the purchase price even when the goods turn out to be

120 N.E. 225 (1918); *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942).

295. Some courts viewed the implied warranty as a policing device. Imposition of liability on the retailer would cause the retailer to sue the manufacturer or supplier, thereby placing the loss on the party responsible for it. *See, e.g.*, *Ward v. Great Atl. & Pac. Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918); *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105 (1931); *Swift v. Wells*, 201 Va. 213, 110 S.E.2d 203 (1959).

296. *See, e.g.*, *Williams v. Coca-Cola Bottling Co.*, 285 S.W. 2d 53 (Mo. App. 1955); *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W.2d 835 (1942); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942). Whether it should be used as a public policy tool sparked a lively debate between Professors Waite and Brown. Waite, *supra* note 280; Brown, *The Liability of Retail Dealers for Defective Food Products*, 23 MINN. L. REV. 585 (1939); Waite, *Retail Responsibility—A Reply*, 23 MINN. L. REV. 612 (1939).

297. Llewellyn, *supra* note 274, at 712.

worthless. The public policy considerations underlying the creation of an implied warranty of merchantability do not explain section 2-314's merchant restriction. Holding all sellers responsible for merchantable quality would not undermine in any way the warranty goals of policing, preventing, and remedy. It would promote them.

At this point, one must doubt the rationality of the restriction. The store of potential sources of enlightenment seems exhausted. If section 2-314 seeks to capture and enforce the reasonable expectations of the contracting parties, section 2-314's merchant restriction thwarts that goal in non-merchant sales. If the Code's overall warranty goal is to determine what, in essence, the seller has agreed to sell, section 2-314(1) prevents realization of that goal in non-merchant sales. The Code's merchant definition, suggesting that responsibility for quality is tied to expectations aroused by status, is undercut by section 2-314 and its comments excluding isolated sales. An interpretation of section 2-314 as a public policy tool does not explain its merchant restriction because imposition of responsibility on all sellers would not undermine any of the policies discussed. Finally, the historical connection between seller status and seller responsibility merely establishes that seller status assisted judicial circumvention of the doctrine of caveat emptor. It does not explain why that doctrine continues to govern non-merchant sales.

One possible explanation remains. Occasionally, courts have observed that the implied warranty of merchantability is a hazard of business, a peril to those engaged in selling for profit.²⁹⁸ Of course, most sellers sell to make a profit. Moreover, the mere fact of being in business does not establish merchant status for purposes of section 2-314. A bank is a business, but it does not give a section 2-314 warranty when it sells a repossessed car²⁹⁹ or boat.³⁰⁰ In fact, any businessperson making an isolated sale does not give a section 2-314 warranty.³⁰¹ Only those in the business of selling goods of the kind involved in the transaction give a section 2-314 warranty. Thus, section 2-314 liability creates a limited, rather than a general, business hazard.

The limited scope of the "warranty hazard" provides a clue as to

298. *See, e.g.*, *Young v. Great Atl. & Pac. Tea Co.*, 15 F. Supp. 1018, 1019 (W.D. Pa. 1936); *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 392, 175 N.E. 105, 106 (1931).

299. *Joyce v. Combank/Longwood*, 405 So. 2d 1358 (Fla. Dist. Ct. App. 1981).

300. *Donald v. City Nat'l Bank of Dothan*, 295 Ala. 320, 329 So. 2d 92 (1976).

301. U.C.C. § 2-314 comment 3. *See, e.g.*, *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522 (D.C. 1971); *Siemen v. Alden*, 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975); *Brescia v. Great Road Realty Trust*, 117 N.H. 154, 373 A.2d 1310 (1977); *see also* notes 156-60 & accompanying text.

why only merchant sellers give an implied warranty of merchantability. Those in the business of selling goods of the kind are those most likely to insure against liability in the event they prove defective. The probability of insurance makes them good candidates to assume the loss.³⁰² But even this reasoning does not rationalize fully section 2-314's imposition of liability on merchant sellers. The business buyer is in an equal position to insure against loss, but the merchant seller still assumes the loss under section 2-314. At least in part, this must be because his goods caused the loss.³⁰³ A seller in the business of selling

302. With respect to merchant sellers, the U.C.C. allocates risk of loss or damage on the basis of likelihood of insurance. If the merchant seller is to make delivery at his place of business, the risk of loss for goods remains on him until physical delivery of the goods. U.C.C. § 2-509(3). The comments justify this allocation of the risk of loss explaining that the merchant seller "continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control over the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession." *Id.* comment 3. Section 2-509 governs in a non-breach situation. If the buyer is in breach, he must assume the loss to the extent of any deficiency in the seller's insurance. *Id.* § 2-510(3). For purposes of § 2-509(3), the merchant is defined broadly to include both "practices" merchants and "goods" merchants. *Id.* § 2-104 comment 2. In defining the § 2-509(3) merchant so broadly, the drafters obviously intended to impose the loss on the candidate most reasonably able to assume the loss without real loss, *i.e.*, the party who could and reasonably should insure. Arguably, all sellers in possession of goods, whether they are merchants or not, continue to control the goods and reasonably should be expected to insure the goods. This prompted Professors Farnsworth and Honnold to ask: "Would it be too brutal to simplify this provision to provide that (apart from breach) risk remains with the seller (merchant or otherwise) until the buyer receives the goods?" E. FARNSWORTH & J. HONNOLD, *supra* note 17, at 507.

303. Imposing the loss on the party ultimately responsible for it comports with the policy underlying § 402A of the Second Restatement of Torts which imposes strict liability on any seller who engages in the business of selling a product if the product sold is in a defective condition unreasonably dangerous to any user or consumer. RESTATEMENT (SECOND) OF TORTS § 402A(1)(a). The comments to § 402A indicate that sellers who market products for use assume a special responsibility toward the consuming public, that the public has a right to expect that reputable sellers will stand behind their goods, and that "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed on those who market them, and be treated as a cost of production against which liability insurance can be obtained. . . ." *Id.* comment c. A concern for shifting the loss to the party responsible for it is echoed in some § 2-314 cases. In *Vlases v. Montgomery Ward*, 377 F.2d 846 (3d Cir. 1967), the court said "the entire purpose behind the implied warranty sections of the Code is to hold the seller responsible when inferior goods are passed along to an unsuspecting buyer." *Id.* at 850. See also *Safeway Stores v. L.D. Schreiber Cheese Co.*, 3326 F. Supp. 504 (W.D. Mo. 1971); *Pierce v. Liberty Furniture Co.*, 146 Ga. App. 175, 233 S.E.2d 33 (1977). Section 402A does not apply to the isolated or occasional seller. According to the comments, it adopts a position analogous to § 15(2) of the USA and § 2-314 of the Code: "The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods." RESTATEMENT (SECOND) OF TORTS, § 402A comment f. Section 402A imposes consequential liability on

goods of the kind also has the opportunity to pass on the loss for defective goods through price adjustments.³⁰⁴ In addition to being responsible for the loss, he is the superior loss bearer and as such, section 2-314 imposes the loss on him unless the parties have agreed otherwise.

Section 2-314's allocation of loss to the merchant seller because he is the superior loss bearer of the two makes sense as a modern, enlightened, and reasonable loss allocation.³⁰⁵ It is the non-merchant seller aspect of section 2-314 that is outmoded, unenlightened and unreasonable.³⁰⁶ A principle of loss allocation imposing the loss on the party best able to bear it is singularly unhelpful when both parties to the transaction are equally unprepared or ill-equipped to assume it. The reasoning underlying loss allocation to the merchant seller has little relevance to loss allocation in non-merchant sales. If there is no superior loss bearer, some other principle must be used. Apparently, for want of anything better, the drafters relegated non-merchant sales to the dictates of caveat emptor.

In all fairness, the drafters may have been concerned with imposing onerous liability on sellers unprepared and ill-equipped to assume it. But refusing to impose the loss on such sellers entails the inevitable consequence of imposing it on their buyers, equally unprepared and ill-equipped to suffer it. Furthermore, a reluctance to impose consequential liability on non-merchant sellers does not justify the denial of any legal recourse at all for their buyers. In many breach of warranty cases, consequential liability is not an issue; rather, the buyer simply wants his money back or does not want to pay the purchase price.³⁰⁷ Section

certain sellers for personal injury and property loss caused by their products. Section 2-314 does not relate just to consequential liability. It governs seller responsibility of any kind. Its merchant limitation precludes any § 2-314 recourse at all to the buyer from a non-merchant seller. It is this aspect of § 2-314's merchant restriction which is objectionable and nonsensical.

304. Those who can take into account in the price the cost of liability without fault are superior risk bearers. C. MORRIS & C. MORRIS, *MORRIS ON TORTS* 234 (2d ed. 1980).

305. It is to be distinguished from caveat emptor which indiscriminately imposed the loss on the buyer who failed to elicit an express warranty.

306. Some would argue that § 2-314's limitation to merchant sellers is modern and reasonable because a non-merchant sale does not involve a superior risk-bearing party. The loss should be shifted only from an inferior to a superior risk bearer. C. MORRIS & C. MORRIS, *supra* note 304, at 233. This rule would save the expenses involved in shifting the losses. *Id.* If the buyer's remedy against a non-merchant seller were limited to a refund on the purchase price or an abatement therein, the seller's "loss" would be limited to the purchase price. It is fair and reasonable to shift this loss to the seller. In many instances, the rule itself would cause the seller to refund or abate without the need for a lawsuit and its attendant expenses in much the same way that § 2-314 now undoubtedly precludes many buyers from suing their non-merchant sellers.

307. *See, e.g., Holmes Packaging Mach. Corp. v. Bingham*, 252 Cal. App. 2d 862, 60

2-314 could make sellers uniformly responsible for the merchantable quality of their goods, but limit the non-merchant seller's responsibility to a return of or an abatement in the purchase price. In this way, the reasonable quality expectations of all buyers would receive some degree of legal protection, but non-merchant sellers would not be saddled with consequential liability.

Seller responsibility for quality without regard to status may be novel in American law but it is a concept as old as Roman law.³⁰⁸ Sev-

Cal. Rptr. 769 (1967) (lessee attempted to defend against rental owing by asserting breach of warranty); *Testo v. Russ Dunmire Oldsmobile*, 16 Wash. App. 39, 554 P.2d 349 (1976) (buyer sought rescission of contract).

308. As in other areas of the law, the Roman law of implied warranty for latent defects developed over centuries and from different sources until its final codification under the Emperor Justinian in 529 A.D. See A. SCHILLER, *ROMAN LAW* 210-68 (1978); B. NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 1-41 (1962). The early civil law (*ius civile*) recognized such a warranty only when the buyer's ignorance of the defect could be ascribed to the seller's breach of his obligation to act in good faith, an obligation Roman law imposed on both parties to a contract regardless of their willingness to bargain it away. W. WARMELO, *AN INTRODUCTION TO THE PRINCIPLES OF ROMAN CIVIL LAW* 175, 176-78 (1978). See also B. NICHOLAS, *supra*, at 181. The *ius civile* implied a warranty against latent defects on the seller when buyer's ignorance of the defect resulted from either the seller's willful concealment (*dolus*—generally translated as fraud) of the defect or the seller's negligence (*culpa*) in not knowing of the defect before he sold the goods. B. NICHOLAS, *supra*, at 170, 176; W. WARMELO, *supra*, at 177. If the buyer could establish either *dolus* or *culpa*, he could avail himself of the buyer's general contractual remedy of *actio empti* which entitled him not only to general damages (*damnum emergens*) but also consequential damages (*lucrum cessans*), including lost profits. W. WARMELO, *supra*, at 179-80, 219. Absent *dolus* or *culpa*, the *ius civile* excused the seller from liability unless he gave an express warranty. B. NICHOLAS, *supra*, at 181; W. WARMELO, *supra*, at 179-80.

Faced with the *ius civile*'s relative bias toward sellers, Roman administrative practice developed greater protection for buyers, especially in the sale of slaves and livestock. B. NICHOLAS, *supra*, at 180-81; W. WARMELO, *supra*, at 179-80. In the complex structure of the Roman system of government, the Curile Aediles supervised the open markets of Rome, including the slave markets. A. SCHILLER, *supra*, at 185-86; W. WARMELO, *supra*, at 5. The Aediles required all slave dealers to warrant specifically that their slaves had no physical or mental defects, no tendency to run away, etc. B. NICHOLAS, *supra*, at 23, 181; W. WARMELO, *supra*, at 178. If a dealer sold a slave without disclosing any of the defects, the buyer was entitled to a choice between two remedies: rescission (*actio redhibitoria*) within two months of purchase or diminution in price (*actio quanti minoris*) to the actual value of the slave within six months of purchase. B. NICHOLAS, *supra*, at 181; W. WARMELO, *supra*, at 178. These "aedilician remedies" were soon extended to animals and the statutes of limitation for bringing the actions were raised to six months and a year respectively. W. WARMELO, *supra*, at 178-79. Over the years the remedies were extended to ever-widening classes of goods and finally, in the Code of Justinian, to all sales. B. NICHOLAS, *supra*, at 181-82; W. WARMELO, *supra*, at 179-80. Justinian's Code also kept the remedy of *actio empti* for buyers who could show *dolus* or *culpa* on the part of the seller. B. NICHOLAS, *supra*, at 181-82; W. WARMELO, *supra*, at 180. The combination of these remedies meant that Roman law, in the form received centuries later by most of continental Western Europe, imposed strict liability against latent defects on all sellers, even those innocent of knowledge of the existence of the defects.

eral modern legal systems have retained the basic Roman approach.³⁰⁹ Both the German and French approaches are instructive in this regard and provide concrete proof that universal seller responsibility for quality will not cause the collapse of modern civilization as we know it.³¹⁰

Germany has two separate codes, a commercial code which governs merchant transactions³¹¹ and a civil code³¹² which governs all other transactions and all issues upon which the commercial code is

309. Even cursory examination of the codes of Italy, France, and West Germany reveals the continuing influence of Roman theories of warranty liability. The Italian and German codes best typify the survival of the Roman law of sales. Articles 1490-1497 of the Italian Civil Code (Codice civile - C.c.) set forth the basic law of warranty. A seller warrants the goods he sells to be free of defects which either make the goods unfit for their intended use or materially diminish their value; the seller may disclaim this warranty only if he discloses the existence of these defects to the buyer. C.c. art. 1490. This warranty applies only if the defect is unknown to the buyer or could not reasonably have been discovered by him. *Id.* art. 1491. In case of breach of a seller's article 1490 responsibility, the buyer may choose between rescission or reduction in price. *Id.* art. 1492. Consequential damages also are available to the buyer unless the seller can prove that he neither knew nor should have known of the defect. *Id.* art. 1494.

Sections 459-493 of the West German Civil Code (Bürgerliches Gesetzbuch) deal with warranties. Although the German code is more explicit and detailed than the Italian code, it follows the same pattern. A German seller warrants the goods he sells against defects impairing the value of their fitness for their ordinary or intended use. BGB § 459. Absent an express warranty, the seller is not liable for defects of which the buyer knew or which he failed to discover due to his own gross negligence. *Id.* § 460. The normal remedies for breach of the warranty are rescission (*Wandelung*) or the right to demand a reduction in the price (*Minderung*). *Id.* § 462. Under limited circumstances, an aggrieved buyer may waive his aedilician remedies and sue instead for damages, including consequential damages. *Id.* § 463. The exceptions include the absence of a quality specifically warranted by the seller, as well as fraudulent concealment of a defect. *Id.*

The French Civil Code (Code Civil) deals with a seller's warranty in articles 1641-49. A French seller warrants his goods against hidden defects which make the goods unsuitable for their intended use or which so diminish this use that the buyer either would not have purchased the goods or would have paid less for them had he known of the defects. C. civ. art. 1641. A seller has no liability for obvious defects which the buyer could have discovered. *Id.* art. 1642. As in Italy and Germany, a disappointed buyer may choose between rescission and recovery of part of the purchase price. *Id.* art. 1644. A seller who knew of the defect, but concealed its existence, is liable for both restitution of the price of the goods and for consequential damages. *Id.* art. 1645. A seller is liable for defects of which he was ignorant, even if those defects were undiscoverable, unless he disclaims his liability for hidden defects in good faith. *Id.* art. 1643.

310. In *Hoe v. Sanborn*, 21 N.Y. 552 (1860), Judge Selden intimated that caveat emptor arose to meet commercial needs among a highly commercial people. *Id.* at 558. "No doubt the common law rule [as opposed to the civil law approach] is, upon the whole, wisest and best adapted to an advanced state of society." *Id.* Morrow argues that it was Rome's advanced commercial society that produced its scheme of seller responsibility. Morrow, *supra* note 189, at 348-52.

311. Handelsgesetzbuch.

312. Bürgerliches Gesetzbuch.

silent.³¹³ Interestingly enough, the seller's basic responsibility for quality is governed by the civil code.³¹⁴

The German buyer has two generally available remedies for breach of the seller's warranty: the right to cancel the contract (*Wandelung*) or the right to demand a reduction in the purchase price (*Minderung*) to reflect the deficiency in value.³¹⁵ Under the German system, then, all sellers warrant the quality of their goods, but normally the buyer's remedy is limited to a reduction in or return of the purchase price. The German approach gives all buyers some recourse for disappointed quality expectations.

The French approach also authorizes these so-called "aedilician remedies" derived from Roman law.³¹⁶ Additionally, the French authorize consequential damages when the seller is guilty of fraud, whether it be an active misrepresentation or concealment.³¹⁷ Through case law, the French have established an irrebuttable presumption of fraud if the seller is a merchant.³¹⁸ Thus, the French and American approaches converge with respect to the merchant seller's responsibility for quality. Under both, the merchant seller is liable for consequential losses. The French and American positions are at opposite poles, however, with respect to the non-merchant seller's quality responsibility.

313. The focus of the German Commercial Code is on the additional rights, duties, and obligations of those who have the legal status of merchant (*kaufman*) and who engage in commercial transactions (*handelsgeschafte*). The Handelsgesetzbuch applies special rules to merchants acting in their mercantile capacity, rules which in general hold merchants to higher standards of duty and care than the BGB applies to non-merchants. See, e.g., N. HORN, H. KOTZ & H. LESER, *GERMAN PRIVATE AND COMMERCIAL LAW* 21-39 (1982). Professor Llewellyn's German legal training obviously influenced his drafting of article 2, especially its special merchant rules, which impose greater responsibility on merchants.

In Germany, as in other civil law countries, merchant status also includes certain technical requirements, such as entry into the commercial register, certain bookkeeping formalities, as well as detailed rules concerning the "Commercial Name" (*Firma*). HGB 1-7, §§ 17-30.

314. The commercial code imposes several important obligations on merchant buyers who allege a breach of the civil code warranty. In transactions where both parties are merchants, the buyer forfeits his remedies under the civil code if he fails promptly to inspect the goods and inform the seller of defects. HGB § 377. The buyer's duty to inspect and notify also applies if the goods are non-conforming rather than actually defective. *Id.* § 378. Between merchants, non-conforming goods are deemed accepted in the absence of timely notice to the seller unless the goods differ so substantially from contract specifications that the seller could not reasonably have expected the buyer to accept them. *Id.*

315. BGB § 462. See *supra* note 309.

316. C. CIV. art. 1644.

317. *Id.* art. 1645.

318. Kessler, *supra* note 209, at 277 (citing 10 PLANIOL & RIPERT, *TRAITE PRATIQUE DE DROIT CIVIL FRANCAIS* NO 134 (2d ed. 1956)); MORTOW, *Warranty of Quality: A Comparative Survey, Part II*, 14 TUL. L. REV. 529, 535 (1940).

The French and German approaches codify the basic civil law maxim that "a sound price warrants a sound commodity."³¹⁹ They shield non-merchant sellers from consequential liability if the defect is unknown, but still provide some measure of protection for the buyer's contractual expectations. Their approach is more consonant with American contract principles and considerations of fairness in the exchange. They authorize rescission in the event contractual expectations are not met.

Professor Llewellyn was trained in civil law and taught law in Germany for two brief periods.³²⁰ He must have been familiar with the basic civil law approach to warranty. One wonders why he did not borrow their approach when he drafted section 2-314. Perhaps it was a question of Code politics and political realities. He may have thought that public acceptance of the Code required a fundamentally conservative approach and that the civil law approach to warranty obligations was a radical concept. The controversy generated by article 2's merchant concept, itself borrowed from the civilians, indicates a basic American hostility to things new or different. Perhaps section 2-314's compromise represented a considered political decision. For whatever reasons, section 2-314(1) superimposes new public policy considerations upon an old foundation of caveat emptor. Section 2-314's merchant restriction enshrines caveat emptor as the fundamental principle of loss allocation in American non-merchant sales law.

Conclusion

As a reasoned way to allocate loss between buyer and seller, caveat emptor never had much to recommend it and has less so now in an age in which the spirit of individualism has faded. Eliminating section 2-314's merchant restriction will assure buyers of their basic bargains by allowing rescission of "bargains" they never made. Imposing at least minimal quality responsibility on all sellers will make section 2-314 consistent with itself and with the Code's broader warranty scheme. More importantly, it will make section 2-314 consistent with modern notions of fairness in the individual exchange. There is no reason to retain section 2-314's merchant distinction and every reason to abolish it. Seller status may be relevant to the question of the degree of seller responsibility for quality, but it should be irrelevant to the question of basic seller responsibility for contractual expectations. If merchant

319. See *supra* note 309.

320. B. BRAUCHER & R. RIEGERT, *supra* note 67, at 6.

sellers are to assume greater responsibility for quality than non-merchant sellers in terms of consequential liability, that distinction should be incorporated into the Code's remedial provisions. Section 2-314's merchant restriction perpetuates the ancient doctrine of caveat emptor in non-merchant sales. In doing so, it represents an aberration under an American sales law which has otherwise wholly rejected the doctrine. The merchant of section 2-314, caveat emptor's only remaining protagonist, should perish as well.