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Note

Balancing the Buyer's Right to Recover for Precontractual Misstatements and the Seller's Ability to Disclaim Express Warranties

Elizabeth Cumming

Tom and Carol Petersen needed a silo in which to store feed for their dairy herd. A sales representative from Feedstore, Inc. visited them and described the advantages of Feedstore's "oxygen exclusion" system. The sales representative showed the Petersens how specially designed "breather bags" capture the air that enters the silo, keeping oxygen from the grain. The salesperson's description impressed the Petersens and they decided to purchase a "Feedstore" silo.¹

The Petersens signed a contract containing the following clauses:²

This order form is the entire and only agreement between the Seller and the Buyer and no oral statements or agreements not confirmed herein, or by a subsequent written agreement, shall be binding on either the Seller or Buyer.

... Buyer understands that the sole warranty, express or implied, which is provided by Feedstore, Inc., is as follows ... .

... I [BUYER] HAVE READ AND UNDERSTOOD THE TERMS AND CONDITIONS OF THIS PURCHASE ORDER, INCLUDING THE WARRANTIES AND DISCLAIMERS, HEREIN GIVEN TO ME. I RELY ON NO OTHER PROMISES OR CONDITIONS AND REGARD THAT AS REASONABLE BECAUSE THESE ARE FULLY ACCEPTABLE TO ME.

The representative failed to explain that air could enter a dome of empty space under the feed when the silo is unloaded. Neither the warranty clause nor the remainder of the contract said anything about the "oxygen exclusion" system or the "breather bags." After the Petersens began to use the Feed-

¹. This hypothetical is based on the facts in D'Huyvetter v. A.O. Smith Harvestore Prods., 475 N.W.2d 587, 591-92 (Wis. Ct. App. 1991).
². The hypothetical contract language was adopted from Keller v. A.O. Smith Harvestore Prods., Inc., 819 P.2d 69, 71 (Colo. 1991) (en banc).
store system, their herd's milk production dropped, and a large number of the herd lost weight. The Petersens sued Feedstore, Inc., alleging, in the alternative, a contract claim for breach of express warranty and a tort claim for negligent misrepresentation.

If the court, examining the contract claim, finds that the disclaimer clauses in the purchase order were valid, the parol evidence rule\(^3\) will prevent the Petersens from introducing the representative's precontractual oral statements. A court ruling on the tort claim could allow the Petersens to recover, if the jurisdiction recognizes a tort action for negligent misrepresentation.\(^4\) The court in this instance may find that the sales representative negligently communicated the precontractual statements and that the Petersens justifiably relied on them. Thus, the tort claim could succeed where the contract claim would fail.

This resolution of the Petersen's suit raises two issues. The first involves whether a plaintiff should be able to avoid contract law barriers to recovery for precontractual misstatements by bringing an action in tort.\(^5\) Plaintiffs often choose tort law, with its procedural advantages,\(^6\) in situations involving a defective product,\(^7\) the defective performance of a service contract,\(^8\) or a flaw in the contract formation process. This Note consid-

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3. See infra notes 30-32 and accompanying text.
4. See infra note 43 and accompanying text.
5. This question focuses on one aspect of what scholars have called a struggle between tort and contract. A number of commentators have predicted the "death" of contract and its reabsorption into tort law. See, e.g., GRANT GILMORE, THE DEATH OF CONTRACT 55-103 (1974) (discussing a number of common-law developments that illustrate a basic coming together of tort and contract, e.g., quasi-contract and promissory estoppel).
7. Such suits fall under the general rubric of "products liability." See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 95-104A, at 677-724 (5th ed. 1984) [hereinafter PROSSER & KEETON]. The authors define five categories of losses related to products liability: personal injury, physical damage to property other than the product, damage to the product purchased by the first purchaser, damage to a product made or repaired with the defendant's components, and intangible economic loss. Id. § 95, at 678. Tort liability for physical harm to persons and tangible things other than the defective product may lie either in negligence or strict liability. Id. §§ 96, 98, at 683-89, 692-94.
8. American courts have extended tort liability for "misfeasance," as this situation has historically been called, to contracts in which defective performance may injure the promisee and there would be liability for gratuitous performance without the contract. Id. § 92, at 660-61.
ers the last situation, specifically the relationship between the law of misrepresentation and the law of warranty in the setting of misrepresentations that do not rise to the level of "fraud." 9 In the last decade, courts have taken a number of approaches to determining whether to maintain a tort action in nonfraudulent misrepresentation. The case law on this issue is growing and is becoming increasingly unsettled.

A second question concerns whether, in light of a clause disclaiming all warranties except those embodied in the contract, a buyer should ever be able to recover for damages caused by precontractual misstatements. Suits such as the Petersen's illustrate a growing tension between the perceived need for extra-contractual, extraordinary policing of contract formation 10 and the desire to preserve the principle of freedom of contract. 11

This Note attempts to balance these competing interests and suggest a uniform approach. Part I sets forth the basic concepts of warranty and misrepresentation. Part II categorizes the approaches taken by state and federal courts in reconciling a nonfraudulent misrepresentation claim and a contractual disclaimer of warranties. In Part III, this Note argues that parties to a sale of goods transaction should not be able to circumvent contract law by recasting the cause of action in tort. This Note further contends that those courts maintaining a tort action, notwithstanding a contract containing a disclaimer clause, have contradicted the express intent of both the drafters of the Uniform Commercial Code (UCC) and the legislatures that adopted the UCC. Part IV proposes a modification of the law of sales that would allow courts to police precontractual negotiations without rendering freedom of contract a nullity.

9. This Note does not address the case of fraudulent misrepresentation in great detail because the relationship between tort and contract with respect to intentional misstatements is well-settled. See infra note 54. "Fraud," it should be noted, is an elastic concept that courts have stretched to encompass many acts of miscommunication. See infra note 42. This Note uses the term "fraudulent" in its narrowest, most technical sense: intentionally deceptive statements that the speaker either knew were false or made with reckless disregard of whether they were true.

10. Courts have developed a number of doctrines that regulate the behavior of contracting parties. Among these are fraud, duress, unconscionability, mistake, and misrepresentation. JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 4-1, at 147 (2d ed. 1980).

I. THE LAW OF EXPRESS WARRANTY AND THE
DOCTRINE OF MISREPRESENTATION

A. EXPRESS WARRANTY

Article Two of the Uniform Commercial Code contains the modern statement of warranty law. A warranty is a statement of fact, either articulated or implied by law, respecting the quality or character of the goods to be sold. The UCC distinguishes between express warranties, and implied warranties.

12. The Uniform Commercial Code (UCC) was the product of a massive reform effort that began in the late 1930s, originally sponsored by the National Conference of Commissioners on Uniform State Laws. For an overview of the genesis of the UCC, see William A. Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U. MIAMI L. REV. 1 (1967). Currently, 49 states, the District of Columbia, and the Virgin Islands have adopted one of three different official texts of the UCC. WHITE & SUMMERS, supra note 10, § 1-1, at 5. Louisiana has adopted some articles from the UCC, but has not yet adopted Article Two. Id.; see also Banque de Depots v. Ferroligas, 569 So. 2d 40, 43 (La. Ct. App. 1990). However, as part of the state-by-state enactment process, various jurisdictions have amended the UCC. Thus, the UCC is not exactly what it claims to be—namely, uniform. Nevertheless, the basic principles embodied in the UCC offer a common foundation for analyzing transactions that fall within its scope. See WHITE & SUMMERS, supra note 10, §§ 1-11, 1-3, at 1-6, 8.

Article Two, concerning contracts for the sale of goods, was drafted principally by Karl N. Llewellyn and replaced the Uniform Sales Act of 1906. Charles A. Heckman, "Reliance" or "Common Honesty of Speech": The History and Interpretation of Section 2-313 of the Uniform Commercial Code, 38 CASE W. RES. L. REV. 1, 2 (1987). For the first time since its initial publication, Article Two will undergo a major revision. In 1987, the Permanent Editorial Board of the Uniform Commercial Code approved the creation of a Study Group charged with identifying major problems in the operation of Article Two. Amelia H. Boss, PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary to Permanent Editorial Board of the Uniform Commercial Code, 1991 A.L.I.-A.B.A. COURSE OF STUDY, ch. 664, at 475. The Study Group has unanimously recommended that a Drafting Committee be appointed to revise Article Two. Id.

13. The law of warranty shares a common ancestry with the law of misrepresentation. Both bodies of law derive from the action on the case, the only appropriate form of action during the late middle ages for redressing harms such as the Petersens’. Fitz. Ab. Monst. de Faits, Y.B. 7 Rich. 2, pl. 160 (1383) (cited in PROSSER, supra note 6, at 384 & n.22). The action of assumpsit later branched off from the action on the case and became increasingly contractual in nature, while the action on the case became increasingly tort-like. See 1 FARNSWORTH, supra note 11, § 1.6. Breaches of warranty first became actionable through a claim in assumpsit in the late eighteenth century, Stuart v. Wilkins, 1 Douglas’ Rep. 18 (K.B. 1778), and were completely divorced from connotations of “tort” in the early 19th century. PROSSER & KEETON, supra note 7, § 105, at 729.


15. UCC § 2-313 states:

(1) Express warranties by the seller are created as follows:
ties of merchantability\textsuperscript{16} and fitness for a particular purpose.\textsuperscript{17} Regarding express warranties, the declarant need not \textit{intend} to make a warranty in order for one to arise.\textsuperscript{18} Courts and commentators are divided, however, on whether the buyer must

(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 the goods or a statement purporting to be merely the seller’s opinion does not create a warranty.


16. \textit{UCC} § 2-314 provides:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. 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.


17. \textit{UCC} § 2-315 states:

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


18. “It is not necessary to the creation of an express warranty that the seller . . . have a specific intention to make a warranty . . . .” \textit{U.C.C.} § 2-315(2) (1990).
rely on the express warranty for it to be actionable.\(^\text{19}\)

A suit for a breach of warranty lies whenever the goods do not conform to the warranty,\(^\text{20}\) the seller need not be guilty of "blameworthy" conduct.\(^\text{21}\) The UCC defines damages for the seller's breach of any of these warranties as the difference between the value of the goods as received and their value if they

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\(^{19}\) Courts and commentators have struggled with the meaning of "basis of the bargain." See WHITE & SUMMERS, supra note 10, § 9-4, at 333 (noting that although "basis of the bargain" is an issue that the buyer must plead and prove, the UCC does not articulate any standard); John E. Murray, Jr., "Basis of the Bargain": Transcending Classical Concepts, 65 MINN. L. REV. 283, 304 (1982) (characterizing the situation as "mass confusion"). One commentator, however, has argued compellingly that, based on Llewellyn's academic writings and his redrafts of the Uniform Sales Act, he clearly intended, by use of "basis of the bargain" language, to divorce warranty law from a requirement of reliance. Heckman, supra note 12, at 10-16.

The predecessor of the UCC, the Uniform Sales Act, required a showing of reliance with respect to affirmations of fact and promises which related to the goods. UNIF. SALES ACT § 12 (1906). Description, however, was treated as an implied warranty and therefore did not need a showing of knowledge or reliance on the part of the buyer. Id. § 14. Karl Llewellyn, key architect of Article Two of the UCC, approved whole-heartedly of the status of description under the Uniform Sales Act. Karl N. Llewellyn, On Warranty of Quality and Society: II, 37 COLUM. L. REV. 341, 384-85 (1937) ("As to description . . . it was genius or prophecy that informed the accident by which that main root of the growth of representation into 'express' warranty was excised and transplanted into the orchard of the 'implied.'"). Comment 3 to § 2-313 itself bears witness to Llewellyn's position:

In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.

U.C.C. § 2-313 cmt. 3 (1990); see, e.g., Lutz Farms v. Asgrow Seed Co., 948 F.2d 638, 645 (10th Cir. 1991) (citing cases). In practice, however, a number of courts still read reliance into a breach of warranty action. Murray, supra, at 283-84.

This Note adopts Llewellyn's conception of the phrase "basis of the bargain" and, when referring to UCC § 2-714, assumes that a showing of reliance is not required.

\(^{20}\) Contract law also allows one party to rescind or reform the contract if the other party has misrepresented a material fact, even if that other party honestly believed that the statement made was true. RESTATEMENT (SECOND) OF CONTRACTS §§ 164, 166 (1977) (rescission and reformation).

\(^{21}\) See WHITE & SUMMERS, supra note 10, § 9-1, at 327. White and Summers distinguish between the requisite mental states for actions in warranty and fraud. Id. Fraud addresses "blameworthy conduct"—an intentional or reckless statement of a mistruth. The seller must want to mislead buyer, or at least must not care. On the other hand, a seller can sincerely believe that the representations he made were accurate (he "can be Simon pure," in White and Summers's words) and still be liable for a breach of an express warranty. Id.
would have been as warranted, plus incidental and consequential damages where appropriate.

The UCC recognizes that descriptions and affirmations of fact relating to the goods to be sold often go to the core of the "dickered" aspects of the bargain. Thus, the law of warranty determines the scope of the seller's obligation to the buyer: What has the seller agreed to sell? The UCC, however, allows the parties to disclaim warranties, express and implied. In such a case, the buyer agrees to purchase the goods as they are described, if they are described, in the sales contract. The warranty disclaimer is a voluntary reallocation of obligations; it exemplifies the principle of freedom of contract that underlies the entire UCC.

When a disclaimer of express warranties is part of a final written contract, it falls within the scope of Article Two's pa-
The parol evidence rule is a rule of substantive contract law that prevents a factfinder from considering extrinsic evidence that would create or alter obligations under the contract. If the parties intend the disclaimer clause to be the final word with respect to warranties, it cannot be contradicted. Thus, the parol evidence rule prevents the buyer from introducing precontractual oral statements when the contract contains a disclaimer of express warranties.

The ability to disclaim warranties, as with all exercises of freedom of contract, is not absolute. Section 2-316(2) sets forth requirements of form for disclaimers of implied warranties. Furthermore, courts can void all or part of a contract that is

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(Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.


30. In the context of sale of goods transactions, the parol evidence rule is stated in § 2-202 of the UCC:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.


If the parties intended the contract to be the complete and exclusive statement of their agreement, the contract cannot be contradicted, supplemented or otherwise varied by evidence of a prior or contemporaneous oral agreement or a prior written agreement. Id.

31. See 2 FARNsworth, supra note 11, § 7.2.


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

substantively or procedurally "unconscionable."\textsuperscript{34} Courts, however, rarely invalidate disclaimer clauses on procedural or substantive grounds.\textsuperscript{35} Thus, unable to attack the disclaimer clause in contract, the buyer turns to tort concepts.

\section*{B. Misrepresentation}

The \textit{Restatement (Second) of Torts} recognizes three types of misrepresentation: fraudulent, negligent and innocent.\textsuperscript{36} All three torts apply to misrepresentations of material fact,\textsuperscript{37} and all three require that the plaintiff justifiably relied on the misstatement.\textsuperscript{38} The \textit{Restatement} contemplates the recovery of pecuniary losses that are proximately caused by the misrepresentation.\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{34} UCC \textsection 2-302 states the law of unconscionability:
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\item If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
\item When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.
\end{enumerate}

\item \textsuperscript{35} See, e.g., Avery v. Aladdin Prods. Div., Nat'l Serv. Indus., Inc., 196 S.E.2d 357 (Ga. Ct. App. 1973). As one commentator has noted, courts "have been reluctant to declare unconscionable under the general provisions of section 2-302 that which the [UCC] specifically permits." Richard A. Lord, \textit{Some Thoughts About Warranty Law: Express and Implied Warranties}, 56 N.D. L. REV. 509, 546 (1980). But see Schmaltz v. Nissen, 431 N.W.2d 657, 662 (S.D. 1988) (holding that the disclaimer of warranties and limitation of damages clauses in a seed manufacturer's sales contract were unconscionable because plaintiffs, "like most farmers, were not in a position to bargain for more favorable contract terms, nor were they able to test the seed before their purchase").
\item \textsuperscript{36} \textit{Compare} \textit{Restatement (Second) of Torts} \textsection{s} 525-549 (1977) (fraudulent misrepresentation) \textit{with} id. \textsection 552 (negligent misrepresentation) \textit{and} id. \textsection 552C (innocent misrepresentation).
\item \textsuperscript{37} A plaintiff may not recover for a fraudulent misrepresentation of opinion, intention or law, except as they imply misrepresentations of fact. \textit{Id.} \textsection{s} 542-545. Negligent misrepresentation also may lie for a negligently given opinion that is based "upon facts equally well known to both the supplier and the recipient" of the opinion. \textit{Id.} \textsection 552 cmt. h.
\item \textsuperscript{38} \textit{Id.} \textsection{s} 537-545A (fraudulent misrepresentation); \textsection{s} 552 (negligent misrepresentation), 552A (limiting justifiable reliance with doctrine of contributory negligence); \textsection 552C (innocent misrepresentation).
\item \textsuperscript{39} \textit{Id.} \textsection 549 (allowing the plaintiff to recover the benefit of the bargain for fraudulent misrepresentation under certain circumstances); \textsection 552B (limiting plaintiff's recovery to out-of-pocket losses, including consequential dam-
\end{itemize}
Fraudulent misrepresentation, also called an action in deceit, requires scienter, or the intent to induce a buyer to act or refrain from acting in reliance on the intentional misstatement.\textsuperscript{40} Additionally, the defendant must either have known that the statement was false or have acted with reckless disregard for the truth of the statement.\textsuperscript{41} Sciency implies that the defendant acted in bad faith.

The development of the scienter requirement excluded negligently or innocently made misstatements from the action in deceit.\textsuperscript{42} Accordingly, in the last seventy-five years, many jurisdictions have developed separate actions for negligent and innocent misrepresentation. The tort of negligent misrepresentation\textsuperscript{43} imposes on the speaker a duty to exercise the care or

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\item Id. § 526; Prosser & Keeton, supra note 7, § 107, at 741-42.
\item Restatement (Second) of Torts §§ 526-530 (1977). The current formulation of the action for fraudulent misrepresentation originated with the holding of the House of Lords in Derry v. Peek, 1889 App. Cas. 337 (appeal taken from Eng.). That decision limited the action in deceit to intentional misrepresentations, leaving negligence and strict liability to other actions. Id. at 339. The draftsmen of the first Restatement of Torts noted that the language they employed "adopts the effect of the opinion of Lord Herschell" in Derry v. Peek. Restatement of Torts § 87 (Tentative Draft No. 13, 1936).
\item Id. § 107, at 740-42; Leon Green, Deceit, 16 Va. L. Rev. 749, 752-57 (1930). For example, courts have imputed knowledge to the defendant, thereby arriving at the conclusion that the defendant "knew" of the falsity of the statement. Prosser & Keeton, supra note 7, § 107, at 742. Courts have also given a broad interpretation to "recklessness" in order to remedy situations that might not, strictly speaking, fall within the scope of scienter. See, e.g., Flamme v. Wolf Ins. Agency, 476 N.W.2d 802, 809 (Neb. 1991) (Shanahan, J., concurring). Commentators in the 1920s and 1930s frequently bemoaned these legal fictions. See, e.g., Francis H. Bohlen, Misrepresentation as Deceit, Negligence, or Warranty, 42 Harv. L. Rev. 733 (1929).
\end{enumerate}
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competence of a reasonable person communicating information. The defenses available in negligence actions apply equally here; for example, a court may scrutinize the plaintiff’s conduct under the doctrine of contributory negligence. A successful plaintiff will recover out-of-pocket damages plus any consequential damages caused by the misstatement.


Nebraska recognizes negligent misrepresentation in the context of an insurance agent’s misstatements to an insured. Flamme v. Wolf Ins. Agency, 476 N.W.2d 802, 807 (Neb. 1991). One member of the Flamme court viewed the opinion as an “innovation” reaching beyond the facts of the case, stating that it introduces a cause of action that “has never inhabited Nebraska law before [this] decision.” Id. at 808-09 (Shanahan, J., concurring).

44. Section 552 of the Restatement (Second) of Torts embodies the doctrine of negligent misrepresentation. Negligent misrepresentation began as a remedy for third parties harmed by the erroneous statements of defendants who supplied information for the guidance of others in their business transactions. RESTATEMENT OF TORTS §§ 70-71, 107 (Tentative Draft No. 13, 1936) (codifying the rule in Glanzer v. Shepard, 135 N.E. 275 (N.Y. 1922)). The action remained limited for a number of years, reflecting the courts’ concern that a defendant could be subjected to “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931) (Cardozo, C.J.).

Section 552 expanded in the second Restatement to include “any other transaction in which [the defendant] has a pecuniary interest.” RESTATEMENT (SECOND) OF TORTS § 552 (1977). This change in language can be read to include contractual negotiations between a potential buyer and seller. But see Alfred Hill, Damages for Innocent Misrepresentation, 73 COLUM. L. REV. 679, 685-88 (1973) (questioning whether § 552 applies to “antagonistic” transactions such as sales contracts). The comments state that “[t]he defendant’s pecuniary interest in supplying the information will normally lie in a consideration . . . paid in a transaction in the course of and as a part of which it is supplied.” RESTATEMENT (SECOND) OF TORTS § 552 cmt. d (1977). This language appears to encompass contracts for the sale of goods.


46. The action for negligent misrepresentation allows the plaintiff to recover the difference between the value of the goods as received and the purchase price (or the value of whatever was offered in exchange for the goods), plus any consequential damages. RESTATEMENT (SECOND) OF TORTS
A handful of jurisdictions recognize an action for innocent misrepresentation. 47 This tort operates on the principle of strict liability; if the defendant misspoke and harm resulted from the plaintiff's justifiable reliance on the misstatement, an action lies. 48 As in a breach of warranty suit, the defendant's "blameworthiness," (i.e., negligence or bad faith) is not relevant to the plaintiff's right to recover. 49 The measure of damages in an action for innocent misrepresentation, however, is less than that recoverable in a breach of warranty suit. 50

§ 552B (1977). The tort does not consider whether the underlying bargain was "good" or "bad"; its only concern is the restoration of out-of-pocket losses.

An action to recover for breach of warranty, on the other hand, does take into account the nature of the bargain. The buyer cannot escape a bad bargain by claiming breach of warranty. For example, suppose a buyer pays $5000 for widgets and, at the time of their delivery, they were worth only $1000 because they did not conform. Had they conformed, however, their fair market value would have been only $4000. Under UCC § 2-714, the buyer can recover only the difference between the value of the goods at the time of delivery as accepted ($1000) and the value at the time of delivery that they would have had if they were as warranted ($4000). See U.C.C. § 2-714 (1990).

In a breach of warranty action, however, the buyer can recover the benefit of a good bargain. Suppose the widgets for which buyer paid $5000 were actually worth $1000 at the time of delivery but, had they conformed, they would have been worth $6000 at the time of delivery. The buyer can recover the $1000 benefit, above and beyond the contract price, of which he has been deprived because of the non-conformity.


48. (1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.


49. See supra note 21.

50. "Under this Section, damages are solely restitutory in character. In contrast, the measure of damages for breach of warranty includes compensation for benefit of the bargain and for consequential losses." RESTATEMENT (SECOND) OF TORTS § 552C cmt. b (1977). A restitutory measure of damages seeks to return the buyer to the status quo ante, putting him in as good a position as he would have been in had no contract been made.
These three tort actions for misrepresentation attempt to fulfill the policy underlying all of tort law: the protection of valued interests. In the context of commercial transactions, the interest being protected is freedom from economic harm. Because contract law imposes few duties on the parties during the process of precontractual negotiations, parties often turn to the law of misrepresentation to recover pecuniary losses resulting from precontractual misstatements.

II. THE COURTS' TREATMENT OF NONFRAUDULENT MISREPRESENTATION VIS-A-VIS DISCLAIMERS OF WARRANTY

Courts adopt a variety of approaches when resolving suits in which a nonfraudulent misrepresentation claim conflicts with an aspect of contract law. Courts explain their decisions

51. See id. § 552 cmt. a; id. § 552C cmt. a.
52. Mark P. Gergen, Liability for Mistake in Contract Formation, 64 S. CAL. L. REV. 1, 1-2 (1990). Section 1-203 of the Uniform Commercial Code requires the parties to a commercial transaction to act in "good faith"; that section is limited, however, to the performance and enforcement of a contract, not the process of contract formation. U.C.C. § 1-203 (1990). Currently, the law implies no duty to bargain in good faith, but courts have begun to enforce express agreements to that effect. Gergen, supra, at 31-32. In any event, a duty of "good faith" does not address the problem of negligent misrepresentation because "good faith", in the context of sales transactions, is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103(1)(b) (1990).
53. Statutes sanctioning deceptive trade practices incorporate concepts of common-law misrepresentation. The uniform statute states: "A person engages in deceptive trade practice when [that person] . . . represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have . . . ." UNIF. DECEPTIVE TRADE PRACTICES ACT § 2 (1966).
54. Courts have little difficulty in reconciling a claim for fraudulent misrepresentation with a conflicting term in a contract. When a buyer sues a seller for fraudulent precontractual misrepresentations, courts allow the buyer
to maintain or dismiss tort actions in terms of one or more of three bases: the applicability of the parol evidence rule or an integration clause, the existence of a duty of care, and the significance of freedom of contract.

First, a court might analyze the problem in terms of the parol evidence rule or an integration clause. Some courts, concentrating solely on the contract, have concluded that the alleged misrepresentations are not actionable because either an integration clause or the parol evidence rule bars their consideration. These courts reason that to hold otherwise would open every contract to challenge from parol evidence of potentially dubious merit. Thus, the plaintiff, under this analysis,
cannot introduce the facts required to establish an action for misrepresentation. Other courts, however, have focussed on the fact that the plaintiff has stated a claim in tort. This group of courts refuses to apply a substantive rule of contract law, the parol evidence rule, to a tort action.\(^5\) Similarly, when confronted with an integration clause, they are not willing to allow the seller to escape tort liability with fine print in the boilerplate.\(^6\)

Second, courts have evaluated misrepresentation actions in terms of whether the seller has a duty of care in obtaining or communicating information in an arm's length commercial transaction.\(^6\) Two jurisdictions, Maryland and Illinois, have concluded, albeit on different grounds, that a seller does not owe the buyer a duty of care. Although Maryland courts have rejected the proposition that negligent misrepresentation can

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5. Formento v. Encanto Business Park, 744 P.2d 22, 26 (Ariz. Ct. App. 1987) (holding that plaintiff "is entitled to a trial on the merits of the issue of negligent misrepresentation, and the parol evidence rule cannot be used by [defendant] as a shield against its own representations"); Keller v. A.O. Smith Harvestore Prods., Inc., 819 P.2d 69, 73 (Colo. 1991) (en banc) (holding that the parol evidence rule is a rule of substantive contract law and does not apply to tort actions); Wilburn v. Stewart, 794 P.2d 1197, 1199 (N.M. 1990) (holding that "parol evidence is admissible to show any misrepresentations that induced the parties to contract"); Gilliland v. Elmwood Properties, 391 S.E.2d 577, 580-81 (S.C. 1990) (following the reasoning in Formento); Stamp v. Honest Abe Log Homes, Inc., 804 S.W.2d 455, 457 (Tenn. Ct. App. 1990) (holding that the parol evidence rule is inapplicable to plaintiffs' claim for negligent misrepresentation because the suit did not involve interpretation of the contract).

6. Keller, 819 P.2d at 73; Gilliland, 391 S.E.2d at 581; see Formento, 744 P.2d at 26 (stating as a "well-settled" rule that "a party 'can not free himself from fraud by incorporating [an integration clause] in a contract'") (quoting Lusk Corp. v. Burgess, 333 P.2d 493, 495 (Ariz. 1958)).

61. Illinois courts have interpreted § 552 of the Restatement (Second) of Torts extremely narrowly. They have refused to expand the language "a transaction in which [defendant] has a pecuniary interest" beyond the scope of those who are in the business of supplying information upon which others rely in making business decisions. Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 452 (Ill. 1982); see also Hill, supra note 44, at 685-86 (distinguishing between "antagonistic," or arm's length transactions in which the parties' interest are contrary to one another, and informational transactions in which the contractual relationship between the parties involves the exchange of information for value received).

Courts and legislatures also distinguish between "consumer" transactions and "commercial" transactions. In a consumer transaction, the buyer is an individual who purchases the goods for personal, family, or household purposes. A commercial transaction, on the other hand, involves a sale of goods between two business entities for purposes that relate to a business opportunity. UNIF. CONSUMER SALES PRACTICES ACT § 2(1) (1985).
never lie for statements made in arm's length transactions. Subsequent case law has qualified that position. No duty exists unless there is privity of contract or another sufficiently close nexus between the parties. Illinois, focusing on the origins of the negligent misrepresentation action, does not extend the scope of the action beyond its historical parameters, excluding parties involved in arm's length negotiations. In contrast, Wisconsin courts have taken an expansive view of the speaker's duty of care, holding that a party need not be in privity with the plaintiff to be liable for negligent misrepresentation.

Third, courts have turned to the policy of freedom of contract to resolve the conflict between a disclaimer clause and a

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62. Martens Chevrolet, Inc. v. Seney, 439 A.2d 534, 539 n.7 (Md. 1982). But see Susan F. Martielli, Comment, Martens Chevrolet v. Seney—Extending the Tort of Negligent Misrepresentation, 42 Md. L. Rev. 596, 603 (1983) (criticizing the court for making the tort available to a buyer in a commercial setting because "[i]n an adversarial business deal, the buyer cannot expect that the seller has taken care to state each fact correctly for the buyer's benefit").

63. Weisman v. Connors, 540 A.2d 783, 792-94 (Md. Ct. App. 1988), cert denied, 551 A.2d 868 (Md. 1989). The federal courts, applying Maryland law, have discussed this position further. 21st Century Properties Co. v. Carpenter Insulation and Carpeting Co., 694 F. Supp. 148, 154 (D. Md. 1988) ("While such [precontractual] negotiations may be sufficient to establish an intimate nexus if they invoke considerations of personal trust and reliance, the arm's length negotiations between representatives of business entities concerning a construction project cannot be said to be 'intimate' unless language is to be stripped of all meaning." (citation omitted)). "[A] claim for negligent misrepresentation is improper when . . . the only relationship between the parties is contractual, both parties are equally sophisticated, and the contract does not create an express duty of due care in making representations." Martin Marietta Corp. v. Intelstat, 763 F. Supp. 1327, 1332-33 (D. Md. 1991) (citing Flow Indus., Inc. v. Fields Constr. Co., 683 F. Supp. 527, 530 (D. Md. 1988)).

64. In Moorman Mfg. Co. v. National Tank Co., the Illinois Supreme Court held that, because contract principles are sufficient to govern the relationship between suppliers and purchasers, purely economic loss cannot be recovered in tort. 435 N.E.2d 443, 450 (Ill. 1982). The court did, however, carve out two exceptions to this rule. It allowed recovery of economic losses in fraudulent misrepresentation actions generally and in negligent misrepresentation actions if and only if the defendant is in the business of supplying information to guide others in their business transactions. Id. at 452. Illinois courts have subsequently construed the negligent misrepresentation exception very narrowly, consistent with the spirit of Moorman. See, e.g., Black, Johnson & Simmons Ins. Brokerage, Inc. v. IBM, 440 N.E.2d 282, 284 (Ill. App. Ct. 1982) (holding that IBM, which sold merchandise to plaintiffs, did not owe them a duty of care because it was not "in the business of supplying information").

65. "A defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone." D'Huyvetter v. A.O. Smith Harvestore Prods., 475 N.W.2d 587, 596 (Wis. Ct. App. 1991) (quoting A.E. Investment Corp. v. Link Builders, Inc., 214 N.W.2d 764, 766 (Wis. 1974)).
claim of misrepresentation. In the Tenth Circuit, this line of reasoning developed from the New Mexico Supreme Court's decision in *Rio Grande Jewelers Supply, Inc. v. Data General Corp.*, in which a commercial purchaser of a computer system sued the seller for precontractual misrepresentations regarding the system's capacity to perform specific functions. The court held that the action for negligent misrepresentation directly conflicted with New Mexico's version of section 2-316 of the UCC and the policy favoring freedom of contract. Although the court in *Rio Grande* focussed on the UCC issue, and dealt with the freedom of contract argument only in passing, two months later, the Court of Appeals for the Tenth Circuit fully developed the freedom of contract analysis in *Isler v. Texas Oil & Gas Corp.*

The court in *Isler* held that the contract precluded any extraneous tort duty. The court based its reasoning primarily on two factors: the importance of safeguarding the consensual nature of contract, with its bargained-for duties and liabilities, and the distinction between contractual and tort obligations.

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66. 689 P.2d 1269 (N.M. 1984) (answering a question certified from the United States Court of Appeals for the Tenth Circuit).
67. *Id.* at 1270. The sales contract contained a boldface provision disclaiming all prior representations and all warranties, express or implied, not contained in the contract. *Id.*
68. *Id.*
69. *See id.* at 1271 (citing Smith v. Price's Creameries, 650 P.2d 825 (N.M. 1982)).
70. 749 F.2d 22 (10th Cir. 1984). *Isler* was not a negligent misrepresentation case. It involved a suit against the owner of a lease by a sublessee alleging negligent failure to pay rent. *Id.* at 22. The sublease expressly stated that defendant corporation had no responsibility to plaintiff if it did not make the rental payments, although it promised to use its best efforts to do so. *Id.*
72. "Important to the vitality of contract is the capacity voluntarily to define the consequences of the breach of a duty before assuming the duty." *Isler*, 749 F.2d at 23.
73. Tort law proceeds from a long historical evolution of externally imposed duties and liabilities. Contract law proceeds from an even longer historical evolution of bargained-for duties and liabilities. The careless and unnecessary blanket confusion of tort and contract would undermine the carefully evolved utility of both.
This second factor also underlies the "economic loss doctrine," a judicial policy denying recovery in tort for economic harm (lost profits, cost of replacement or repair, etc.) arising from a contractual transaction.74 Courts have attributed to these three principles varying degrees of significance, creating a variety of analyses for determining whether a frustrated buyer can maintain a tort action for misrepresentation. Thus, the buyer's success depends on the jurisdiction in which she brings suit. The federal courts add a further layer of confusion through their efforts to reconcile and explain the state law they must apply. The cases discussed above demonstrate the need for a unified approach to this conflict.

III. A FLAWED APPROACH: MAINTAINING THE MISREPRESENTATION ACTION

The three approaches discussed in the previous section all hinge upon the court's perception of the importance of the contractual nexus between the parties. Courts holding that no duty exists between commercial parties,75 or that the contract law barriers to a suit cannot be circumvented,76 or that the ability of parties to bargain for their obligations should be paramount,77 have emphasized that the relationship between the parties is contractual.78 Courts willing to maintain the negli-

74. Seeley v. White Motor Co. is the paradigmatic case on the "economic loss doctrine":
A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

75. See supra notes 61-64 and accompanying text.
76. See supra notes 55-58 and accompanying text.
77. See supra notes 66-73 and accompanying text.

The contractual nature of the relationship between the plaintiff and defendant is not at issue when a court addresses a suit for fraudulent misrepresentation. Fraud implies dishonesty in fact, affirmatively representing as true
gent misrepresentation action have downplayed the contractual nature of the relationship. This latter position, however, is misguided. A potential buyer and seller, negotiating to form a contract, are protected by contract law principles such as unconscionability, duress and mistake. The real issue, therefore, is whether tort law should be available as an additional means of policing the contract.

A. A Threat to the Certainty of the Contract

An important function of contract law is the protection of individuals and courts from manufactured evidence and insufficient proof. This concern for evidentiary security underlies the parol evidence rule, the Statute of Frauds, and the "plain meaning" rule of contractual interpretation. A misrepresentation action, however, undermines the evidentiary function of contract by allowing the plaintiff to introduce extrinsic evidence of prior oral representations that contract law has deemed unreliable. When the court admits and considers such evidence, it varies the contract.

An action in tort, by avoiding the evidentiary safeguards of contract law, leaves the terms of the contract open to the threat of fabricated evidence. Contract law has a utilitarian and a libertarian dimension; both are diminished by the conflation of that which is known not to be true. A party acting in bad faith cannot consent to the terms of the contract because there is no "meeting of the minds." See supra notes 42-44 and accompanying text.


81. See U.C.C. § 2-316 cmt. 2 (1990) (stating that by its provisions on parol evidence Article Two protects the seller against false allegations of oral warranties).


83. The "plain meaning" rule allows a court to exclude extrinsic evidence if it has concluded that "the contract language is so clear that extrinsic evidence is not needed to determine the intentions of the parties." Hillman et al., supra note 54, ¶ 3.07[1]. Given the inherent ambiguity of words, however, and the infrequency with which "easy cases" involving clear language appear, this approach is not preferred. Id.
tort and contract theories. Although the law generally views disclaimers of liability with mistrust, it tolerates them when it is unclear whether a rigid rule allocating loss is good. Therefore, parties may opt out of an obligation by choosing an alternative. Yet, the rule of tort liability for misrepresentation threatens to swallow one of the primary functions of contract law by imposing a duty that is not clearly necessary. The common law of nonfraudulent misrepresentation is too blunt an instrument for policing precontractual negotiations.

B. STATUTORY PREEMPTION OF THE TORT CLAIM

The Uniform Commercial Code dictates a resolution to the tension between a tort claim of misrepresentation and the right of the seller to disclaim warranties. Section 1-103 states that the law of misrepresentation shall supplement the provisions of the Code unless displaced by a particular provision of the Code. Most of the courts that have adjudicated a tort claim for the seller's nonfraudulent misrepresentations have not addressed the relationship between the Code and tort law. Those few courts that have, however, have held that the legislature has spoken, by adopting the Uniform Commercial Code, regarding recovery for economic injury in a purely contractual relationship. In Rio Grande Jewelers Supply, Inc. v. Data General Corp., the New Mexico Supreme Court held that an action for negligent misrepresentation conflicted directly with that state's version of section 2-316, governing disclaimers of warranties.

84. Farnsworth, *supra* note 11, at 22. Contract law serves the utilitarian function of providing the most efficient means to allocate loss, allowing the market forces to shape the contours of the individual contract. Contract law is also highly libertarian, allowing the parties to shape their contract to their individual needs.
86. U.C.C. § 1-103 (1989).
88. 689 P.2d 1269 (N.M. 1984).
89. *Id.* at 1270. The plaintiffs here were hoist by their own petard since
New Mexico’s Commercial Code therefore precluded a claim of negligent misrepresentation in suits over the sale of goods under the Code.\textsuperscript{90}

Although courts generally hold that statutes should not be read in derogation of the common law,\textsuperscript{91} when a statutory purpose to the contrary is evident, the presumption favoring retention of long-established common law principles must yield.\textsuperscript{92} In this instance, the legislatures that have adopted section 1-103 of the Uniform Commercial Code have manifested their intent that provisions of the Code displace common law actions, including negligent misrepresentation. Therefore, the UCC provisions relating to warranties should control.

This does not mean, however, that there is no need to police the creation and use of disclaimer clauses. The dissent in \textit{Rio Grande Jewelers} was properly concerned about the problem of unconscionable conduct on the part of the seller.\textsuperscript{93} This Note proposes that that problem should and can be addressed within the law of sales.

\textbf{IV. MODIFYING THE LAW OF SALES TO ADDRESS THE PROBLEM OF NONFRAUDULENT PRECONTRACTUAL MISREPRESENTATION}

If a buyer can no longer maintain a tort action based on the seller’s nonfraudulent misrepresentations, he or she must turn to contract law for a remedy.\textsuperscript{94} Applying the parol evidence they cited UCC § 1-103 as a justification for letting in parol evidence of the prior misrepresentations. \textit{Id.}

\textsuperscript{90} \textit{Id.} at 1271.

\textsuperscript{91} “No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.” Shaw v. R.R., 101 U.S. 557, 565 (1879).

\textsuperscript{92} See Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952).

\textsuperscript{93} The majority opinion condones the unconscionable conduct of allowing statements, promises or inferences to be made that lead the purchaser to believe that a product will do certain things that it cannot without having to be concerned about their inaccuracy as long as the written contract contains the usual “boiler plate” language that “no warranties except those contained in the printed contract are granted.” \textit{Rio Grande Jewelers}, 689 P.2d at 1271 (Riordan, J., dissenting).

\textsuperscript{94} Contract law allows the plaintiff to rescind or reform a contract on the basis of a negligently made misrepresentation of a material fact. See \textit{supra} note 20 and accompanying text. A buyer can also recover monetary damages for misrepresentations by means of a breach of express warranty suit. See \textit{supra} notes 22-24 and accompanying text.
rule, courts will find that a valid disclaimer of warranties clause bars the buyer’s recovery of economic losses in a breach of warranty action. The buyer must therefore attack the disclaimer clause with the only contract law weapon left: the doctrine of unconscionability. Courts are reluctant, however, to find unconscionable that which the UCC explicitly allows. Furthermore, unconscionability is not a very satisfying tool for policing warranty disclaimers. It is a vague doctrine that courts use in a conclusory manner, and thus lacks the necessary predictability to safeguard the finality of contracts.

Under the present law of sales, the buyer has no good remedy if he or she has signed a contract on the basis of precontractual representations that turn out to be wrong. This situation gives the seller tremendous capacity for overreaching. As one commentator observed:

Because of the bargaining position of well-leveraged sellers, it is not unusual to encounter attempts at opportunistic exploitation of the right to contractually modify remedies and.disclaim warranties. If these attempts by a seller are unchecked, the risk of the goods turning out to be completely worthless will be shouldered by the buyer who will be left without effective recourse.

The seller thus would be free in precontractual negotiations to say whatever he or she in good faith believed to be true about

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95. See supra notes 30-32 and accompanying text (discussing the parol evidence rule).
96. See supra note 35 and accompanying text. Furthermore, as Professor Leff has noted, § 2-316 on disclaimers of warranties contains no reference to § 2-302 on unconscionability, although nine other sections of Article Two make reference to it. Arthur A. Leff, Unconscionability and the Code—The Emperor’s New Clause, 115 U. PA. L. REV. 485, 523 n.140 (1967).
97. As Professor Leff observed of UCC § 2-302: “If reading this section makes anything clear it is that reading this section alone makes nothing clear about the meaning of ‘unconscionable’ except perhaps that it is pejorative.” Leff, supra note 96, at 487. Another commentator, discussing the extreme indeterminacy inherent in the unconscionability doctrine, noted:

Nowhere in the Code can a definition of the term unconscionable be found. The only guidance given by the drafters is the statement in comment 1 to section 2-302 that “[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”

David Frisch, Buyer’s Remedies and Warranty Disclaimers: The Case for Mistake and the Indeterminacy of Section 1-103, 43 ARK. L. REV. 291, 317 n.101 (1990) (footnotes omitted); cf. Victoria Elevator Co. v. Meriden Grain Co., 283 N.W.2d 509, 512 (Minn. 1979) (stating that a significant factor in determining whether to “pierce the corporate veil” is whether the corporation is functioning as a “mere facade” for individual dealings).
98. Frisch, supra note 97, at 304-05.
the characteristics or capacity of the subject of the sale, without regard for its accuracy.\textsuperscript{99} If the seller is wrong, the disclaimer of express warranties in the preprinted "boilerplate" of the form contract would allow him or her to escape all liability.

Investing a disclaimer of express warranties with such weight is an unwelcome step backwards toward the philosophy of caveat emptor.\textsuperscript{100} The moral appeal of caveat emptor has lost much of its force,\textsuperscript{101} as both the development of an implied warranty of merchantability\textsuperscript{102} and the Code's position on modification and limitation of remedies illustrate.\textsuperscript{103} Furthermore, the fast pace of modern business and the standardization of transactions make it impractical to require the buyer to meet each statement of the seller with sheer incredulity.\textsuperscript{104} Thus, a

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\textsuperscript{99} If the seller speaks dishonestly (i.e., in bad faith), he or she would be liable under the existing common law for fraud.

\textsuperscript{100} Caveat emptor places on the plaintiff a "duty" to protect oneself through reasonable investigation and to distrust one's "antagonist" in the negotiation process. When parties are dealing at arm's length, neither party is entitled to rely on the other's statements, not even on mere assertions of fact. See \textit{Prosser \& Keeton, supra} note 7, § 108, at 751.

\textsuperscript{101} Caveat emptor embodies the popular sentiment of the time that "[t]he law, like heaven, protects only those who protect themselves." Bohlen, \textit{supra} note 42, at 740. Some scholars view caveat emptor as the relic of a bygone era in commerce that predated the development of "an improved code of commercial ethics." \textit{Id.} at 739; \textit{Prosser \& Keeton, supra} note 7, § 108, at 751-52.

\textsuperscript{102} Friedrich Kessler \& Edith Fine, \textit{Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study}, 77 HARV. L. REV. 401, 441-42 (1964). Kessler and Fine set forth the civil law concept of \textit{culpa in contrahendo} as an alternative to the view that parties, when negotiating for a contract, are dealing at arm's length and owe each other nothing. The authors contend that the civil law doctrine illustrates a heightened awareness of the social nature of the institution of contract and of the fact that parties do not contract in a vacuum. \textit{Id.} at 407.

\textsuperscript{103} UCC § 2-719 deals with the contractual modification or limitation of remedy. The comments state that, while parties are left free to shape their remedies to their particular requirements,

\begin{quote}
it is of the very essence of a sales contract that at least minimum adequate remedies be available. . . . where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.
\end{quote}

U.C.C. § 2-719 cmt. 1 (1990). In discussing the validity of clauses limiting or excluding consequential damages, the comments provide, however, that "[t]he seller in all cases is free to disclaim warranties in the manner provided in Section 2-316." \textit{Id.} cmt. 3.

\textsuperscript{104} [W]ith the acceleration of business generally, as well as the standardization of the various types of transactions, the factors which control judgment demand more and more certainty and precision in sales and credit transactions, and therefore . . . the risk of misrepresentation should be borne by those who misrepresent, whether purposely or innocently.
policy that places the risk on the often less-informed buyer conflicts with the realities of modern transactions. The commercial world has outgrown caveat emptor.

Disclaimers of express warranties are problematic because the buyer is often unable to verify the seller’s statements easily and therefore must rely facially on precontractual representations. Given the alternative of the anachronistic revival of caveat emptor, this Note proposes that legislatures modify the law of sales to create a right for the buyer, in certain circumstances, to recover for economic losses from precontractual misstatements concerning the character or capacity of the goods sold. The case law that has developed to construe UCC section 2-714 is readily applicable here.\textsuperscript{105} As with most provisions in Article Two, this right to recover could be waived or modified by the agreement of the parties, consistent with the UCC’s principle of freedom of contract. However, this Note would further require that such a waiver or modification be made knowingly and freely.\textsuperscript{106} A clause to that effect, bargained for specifically and separately, is evidence of its voluntary nature. The deliberative nature of the waiver or modification guarantees that the buyer understands what he or she may be relinquishing. Finally, this Note would expressly displace the law of nonfraudulent misrepresentation in the context of sale of goods transactions.\textsuperscript{107}

\textsuperscript{105} Having returned the issue of precontractual misstatement to the contract fold, the law of warranty (namely UCC § 2-714) supplies the appropriate remedy. Nothing in this Note’s proposal is intended to displace the existing law of buyer’s remedies following a rightful rejection or justifiable revocation of acceptance. See U.C.C. §§ 2-711 to 2-713 (1990).

\textsuperscript{106} The “free and knowing” requirement attempts to ameliorate the danger that any separately bargained-for waiver or modification clause will eventually become part of the preformulated boilerplate. If a party does not freely and knowingly agree to the contents of such a clause, that clause is unenforceable. Cf. U.C.C. § 2-302 (1990) (unconscionability); \textit{Restatement (Second) of Contracts} § 211(3) (1979) ("Where the other party has reason to believe that the party manifesting . . . assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.").

\textsuperscript{107} An alternative remedy suggested to the author is an amendment that would grant the buyer the express right to bring the appropriate action in tort.
This Note proposes the following amendment of Article Two of the Uniform Commercial Code:

(1) Subject to the provisions of subsection (2), a buyer who does not customarily purchase the goods that are the subject of the contract in question may bring a breach of warranty action against the seller, pursuant to Section 2-714, for damages resulting from the seller's erroneous precontractual representations regarding the nature, characteristics, capacity or uses of the goods being sold.

(2) The buyer may waive or modify the right to recover under this section only if such waiver or modification is freely and knowingly made. A separate, signed clause of the contract, allowing the buyer to state those representations (if any) regarding the nature, characteristics, capacity or uses of the goods upon which the buyer is relying, is not conclusive proof that such a waiver or modification was free and knowing, but is merely evidence of its nature. Any party attempting to assert such a clause shall bear the burden of alleging and proving that the party against whom the waiver or modification is invoked has freely and knowingly agreed thereto.

(3) The right of recovery provided by this section expressly displaces the buyer's right to bring the appropriate action in tort for a non-fraudulent misrepresentation.

The proposed statutory cause of action raises two initial concerns. The first involves the scope of the right: Who should be considered a "buyer" for the purposes of this act? The second involves the impact of the new remedy on the parol evidence rule. A discussion of these issues will fit the statutory remedy into the larger context of existing law and demonstrate its harmony.

for nonfraudulent misrepresentation. This Note rejects that alternative for two reasons. First, incorporating common law misrepresentation into the UCC injects an unnecessary degree of variation into the Code. Not all jurisdictions recognize actions in innocent or negligent misrepresentation. The ability of the buyer to recover, and the scope of that recovery, will therefore vary on the basis of preexisting case law. A legislature's decision to adopt such an amendment is thus no decision at all, since the scope of the remedy lies in the hands of the courts. Given the fundamental nature of the problem, uniformity of result is more important than the expedient of turning to an existing body of case law.

Furthermore, the breach of warranty action is more true to the contractual nature of the relationship between buyer and seller. The breach of warranty allows the buyer to recover the benefit of the bargain she made. If she made a bad bargain, however, she cannot escape it by suing on the warranty. The tort remedy, concerned with making the buyer whole, provides exactly the opposite result because it contemplates recovery of out-of-pocket losses. This Note's proposed remedy is intended to modify the seller's bargaining behavior by making inaccurate speech costly, ultimately providing the casual buyer with a degree of security that she currently does not enjoy. In light of that goal, an action in breach of warranty is preferable over an action in tort.
A. The Buyer's Remedy: Who Is a "Buyer?"

This proposed statutory cause of action for precontractual misrepresentation is designed to protect the buyer's ability to rely upon the seller's factual statements. A buyer should not, however, be entitled to rely on the accuracy of the seller's statements in all situations. For example, suppose that a buyer and seller both customarily deal in widgets. The buyer generally will have sufficient access to the information necessary to determine whether the seller's assertions of fact were made with due care. If the buyer brought a suit in tort for negligent misrepresentation, the court might find that the seller did not owe the "sophisticated" buyer a duty of care. Similarly, allowing the widget buyer to recover under the statute upsets the balance in the bargaining relationship with the seller. The buyer could blindly rely on the seller's statements and, if the goods did not conform to the precontractual warranties, invoke the statutory remedy to escape the consequences of sloppy negotiations. The buyer who customarily deals in the goods being sold should not have recourse to the proposed statutory right of recovery.

Courts often find that consumers are "unsophisticated" and lack sufficient bargaining power to participate meaningfully in the process of contract formation. These courts may choose to avoid the rigid application of contract principles in order to work justice. Particularly when dealing with form contracts, courts have looked beyond the letter of contract doctrine to protect important rights of the consumer from the vagaries of manufacturers.

108. Cf. Prosser & Keeton, supra note 7, § 108, at 752-53 (discussing justifiable reliance on assertions of fact: one factor to be considered is the comparative availability of information for determining whether the statement is one of fact or opinion.).
109. See supra notes 61-64 and accompanying text.
110. I believe that this court should forthrightly hold that the proof of conditions in parol between parties, either of which do not customarily trade in the market in which the property exchanged is bought and sold, is governed by the standard of commercial reasonableness, regardless of assertions as to integration.

111. The seminal case on this issue is Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960). In Henningsen, the plaintiff sought consequential damages resulting from an accident involving the car he recently purchased from the dealership. The court rejected the defendant's argument that the disclaimer clause excluded the plaintiff's claim for a breach of the implied warranty of merchantability. Id. at 95. Noting the unequal bargaining power...
The application of contract principles can be equally harsh for a buyer who is not a "consumer." A bottling plant that buys a computer system from a major manufacturer is likely in no better position to judge the accuracy of the seller's representations than the individual who buys a personal computer. The current law of warranty does not take into account the factual complexity of modern transactions. An informational imbalance is as problematic as an imbalance in bargaining power; indeed, it can contribute to a disparity in bargaining power. "Customary" parties necessarily have an advantage, in both experience and substantive knowledge, over "casual" parties. Therefore, by incorporating a distinction between "customary" and "casual" buyers and offering protection to the latter, the statutory right of recovery will reflect the realities of the marketplace.

of the parties, the court reasoned that it would be against public policy to allow Chrysler to disclaim an implied warranty of merchantability and the obligations arising from it with a form contract that fails adequately to notify the buyer that he has relinquished the right to recover damages for personal injuries arising from a breach of that warranty. Id. at 92-93.

One final note on Henningsen: the court did not have the benefit of UCC § 2-302, which addresses unconscionability, and therefore was forced to confront and discuss relevant questions of policy. One commentator has noted that policy discussions are conspicuously absent in more recent cases in which the courts have the UCC available to them. Leff, supra note 96, at 558 n.300.

112. Several state legislatures have enacted statutes, sanctioning deceptive trade practices, that make no distinction between "consumers" and "commercial" buyers. E.g., MINN. STAT. § 325F.69, subd. 1 (1990):

The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is enjoindable as provided herein.

The Minnesota statute does not require the plaintiff actually to have been damaged. Nor is it limited to cases involving intentional wrongdoing. Minnesota courts have held that a negligent or unintentional misrepresentation also violates the Act. Church of the Nativity of Our Lord v. Watpro, Inc., 474 N.W.2d 605, 612 (Minn. Ct. App. 1991) (citing Yost v. Millhouse, 373 N.W.2d 826, 831 (Minn. Ct. App. 1986)). All of these factors are designed to encourage buyers to stop the activities covered by the statute by bringing suit. Id. (citing Yost, 373 N.W.2d at 832).


114. Article Two differentiates between "transactions between professionals in a given field" (i.e., "merchants") and transactions involving "a casual or inexperienced seller or buyer." Whereas the former may "require special and clear rules," such rules may not be appropriate for the latter. U.C.C. § 2-104 cmt. 1 (1990); see also Green River Valley Foundation, Inc. v. Foster, 473 P.2d 844, 853 (Wash. 1970) (Finley, J., concurring).
B. KNOWING WAIVER OR MODIFICATION OF THE BUYER'S REMEDY: THE EFFECT ON THE PAROL EVIDENCE RULE

Giving the buyer a statutory right to recover for precontractual misstatements at first appears no different than a tort action for nonfraudulent misrepresentation. Both the statute and the tort give effect to precontractual statements that, under a parol evidence analysis, would be displaced by written language of disclaimer in the contract. Both approaches conceptually broaden the fraud exception to the parol evidence rule to include nonfraudulent misrepresentations. The main advantage of the statute is that, consistent with the principle of freedom of contract, the right to recover may be waived or modified on the agreement of the parties. This fact distinguishes the effect that the statute has on the parol evidence rule.

The proposed statutory remedy is analogous to the approach taken by courts that have finessed contract principles to avoid harsh results for "unsophisticated" consumers. The parol evidence rule is among those principles that courts have bent. The Indiana Court of Appeals, for example, has denied effect to a written disclaimer of warranties that was "inconsistent" with a prior oral express warranty. Reasoning that the existence of the precontractual oral warranty indicates that the parties did not intend the writing to be the final expression of their agreement, the court refused to apply the parol evidence rule and admitted evidence of the oral warranty. The "pro-consumer" approach of the Indiana courts thus protects buyers from unbargained-for language of disclaimer.

The proposed statutory right to recover for precontractual misstatements also addresses the problem of an unbargained-for disclaimer, but its impact on the parol evidence rule is less destabilizing. A specifically bargained-for waiver or modificatio-

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115. See Franklin v. White, 493 N.E.2d 161, 164-65 (Ind. 1986) (labelling the statements "constructive fraud," the court held that, in a suit by purchaser seeking rescission of the contract, evidence of seller's precontractual misstatements was admissible to show that seller misrepresented a material fact, regardless of whether the seller knew of the statements' falsity).


tion of the buyer's statutory right is essentially a disclaimer of express warranties with an enhanced form requirement. The imposition of a form requirement on a disclaimer is not foreign to the UCC; section 2-316 demands that valid waivers of implied warranties be "conspicuous." Furthermore, the form requirement for the waiver also supplies ample evidence for determining whether the waiver or modification is "the final expression of the parties" on the subject of express warranties. The objective standard of satisfying or not satisfying the form requirement supplies a degree of certainty that the judicial finessing of concepts such as "constructive fraud" or "finality" lack.

The requirement that the buyer's waiver or modification be specifically bargained for also furthers the statute's purpose of protecting the purchaser's ability to rely on factual statements made by the seller. By making the process of waiver or modification deliberative, the buyer has an opportunity to acknowledge consciously those representations that induced him to buy from the seller. Therefore, the buyer's right to recovery for precontractual misrepresentations, waivable upon negotiation between the parties, does less violence to the parol evidence rule than does maintaining an action in tort or allowing courts to bend a substantive rule of contract law, while addressing the same issues of public policy.

**CONCLUSION**

This Note contends that parties to a contract for the sale of

118. U.C.C. § 2-316(2) (1990). In addition to being conspicuous, the language disclaiming the implied warranty of merchantability must mention merchantability. U.C.C. § 2-314. To exclude the implied warranty of fitness, U.C.C. § 2-315, the disclaimer must be in writing. U.C.C. § 2-316 cmts. 3, 4.

119. This Note proposes a more flexible position than that taken by Texas, which bars as a matter of course any waiver of a consumer's right to recover under that state's Deceptive Trade Practices—Consumer Protection Act:

(a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if a defendant in an action or claim under this subchapter pleads and proves:

(1) the consumer is not in a significantly disparate bargaining position;

(2) the consumer is represented by legal counsel in seeking or acquiring goods or services . . . by a purchase or a lease for a consideration paid or to be paid that exceeds $500,000; and

(3) the consumer waives all or part of this subchapter . . . by an express provision in a written contract signed by both the consumer and the consumer's legal counsel . . . .

TEX. BUS. & COM. CODE ANN. § 17.41 (West 1991).
goods should not be allowed to bypass contract law by bringing a tort action on the same facts. Allowing a suit for nonfraudulent misrepresentation threatens the certainty of contracts, and violates an explicit provision of the Uniform Commercial Code. This Note balances the need to police the process of contract formation with the principle of freedom of contract through a two-part analysis. Those buyers whom the courts find are "casual" buyers should be allowed to introduce evidence of precontractual misrepresentations. Courts should then examine the contract to determine the content of any waiver or modification clause. The party asserting the clause has the burden of proving that the other party freely and knowingly agreed to its contents. Only if this burden is met should courts apply the parol evidence rule and exclude evidence of the precontractual representation.