Basis of the Bargain: Transcending Classical Concepts

John E. Murray Jr.
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I. INTRODUCTION

It has long been unclear whether "basis of the bargain" in Uniform Commercial Code (U.C.C.) section 2-313(1) incorporates a reliance test. Professor John Honnold questioned the assumption that section 2-313 retained the reliance requirement of the Uniform Sales Act as early as 1955. Twenty-five years later, in 1980, Professors White and Summers reported no progress on attempts to penetrate the enigma. The U.C.C.'s enlargement of express warranties to include not only promises or affirmations of fact, but also descriptions and samples or models, was a change from the predecessor statute which caused little disconcertion. To become an express warranty,

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1. U.C.C. § 2-313(1). All references to the U.C.C. will be to the 1978 official text with comments. U.C.C. § 2-313(1) 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. "But this assumption cannot be made with confidence since (i) 'basis of the bargain' does not convey a definite meaning, and (ii) the Code's rejection of the present reliance language might well imply an intent to modify present law." 1 STATE OF NEW YORK LAW REVISION COMMISSION, REPORT OF THE LAW REVISION COMMISSION FOR 1955, STUDY OF THE UNIFORM COMMERCIAL CODE 393 (1955).

3. "The Code omits any explicit mention of reliance and requires only that the promise or affirmation become 'part of the basis of the bargain.' The extent to which the law has so been changed is thoroughly unclear." J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 332 (2d ed. 1980).


5. Under the Uniform Sales Act, sales by description (§ 14) and sales by sample (§ 16) were implied warranties. But even Professor Williston in interpreting the Sales Act § 14 stated: "The warranty might more properly, however,
however, the promise, affirmation, description, sample, or model must be a "part of the basis of the bargain" under section 2-313(1).\textsuperscript{6} The deliberate exclusion of a reliance requirement from this definition of an express warranty\textsuperscript{7} signaled a significant change from the Uniform Sales Act, which expressly required reliance.\textsuperscript{8} Some courts simply ignore the U.C.C.'s deletion of reliance and hold that reliance continues as a requirement.\textsuperscript{9} Others recognize that reliance is unnecessary and that "basis of the bargain" is the test, but find it impossible to explain the test's meaning or application.\textsuperscript{10} In fact, they often unwittingly resort to a reliance test in different garb. When the courts and the commentators\textsuperscript{11} indicate that the phrase "basis of the bargain" continues to mystify them, another attempt to clarify its meaning is worthwhile.

This Article will demonstrate that the underlying difficulty in the existing literature is the failure to recognize the concept of "bargain" as a continuum neither restricted to classical notions of bargained-for-exchange nor requiring express or implied reliance for statements of fact about goods to operate as express warranties. The mysterious phrase "basis of the bargain" cannot be understood without understanding the underlying philosophy of Article 2 of the U.C.C. and related

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\item be called express, since it is based on the language of the parties." 1 S. Williston, The Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act § 223 (rev. ed. 1948).
\item 6. U.C.C. § 2-313(1).
\item 7. The express mention of a reliance requirement in section 2-315 suggests that the drafters purposely omitted the requirement from 2-313. U.C.C. section 2-315 states that an implied warranty is formed if the "seller at the time of contracting has reason to know . . . that the buyer is relying on the seller's skill or judgment." For a discussion of section 2-315, see Valley Iron & Steel Co. v. Thorin, 278 Or. 103, 107, 562 P.2d 1212, 1215 (1977); Roupp v. Gear, 253 Pa. Super. Ct. 46, 49, 384 A.2d 968, 970 (1978).
\item 8. The Uniform Sales Act section 12 provided that "[a]ny affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." (emphasis added).
\item 9. See note 47 infra and accompanying text.
\item 10. See note 74 infra and accompanying text.
\item 11. The commentators have disagreed as to the meaning of "basis of the bargain." Some find that the Code eliminates the concept of reliance altogether. See R. Nordstrom, Law of Sales §§ 66-68 (1970); Note, "Basis of the Bargain"—What Role Reliance?, 34 U. Pitt. L. Rev. 145, 150 (1972). Others have said that the "basis of the bargain" requirement merely shifts the burden of proving non-reliance to the seller. See 1 State Bar of California, Committee on Continuing Education of the Bar, California Commercial Law 210 (1966); J. White & R. Summers, supra note 3, at 332; Boyd, Representing Consumers—The Uniform Commercial Code and Beyond, 9 Ariz. L. Rev. 372, 385 (1968).
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expressions of purpose in Article 1. Thus, this Article will offer a new exploration of both the statutory language of section 2-313 and related Article 2 sections and their comments. It will conduct a survey of the critical case law to demonstrate current judicial confusion, and will review the two leading textual treatments of "basis of the bargain" to provide contrasting perspectives of the conventional wisdom. Only then will it be possible to structure a new analysis of the disconcerting "basis of the bargain" requirement.

II. THE STATUTES

A. THE UNIFORM SALES ACT

Because the U.C.C. does not define "part," "basis," or "bargain," a search for an explanation inevitably proceeds to the most likely source, the predecessor statute. Section 12 of the Uniform Sales Act made affirmations of fact or promises relating to the goods express warranties "if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." A reasonable interpretation of this language is that buyers must prove both that the affirmation or promise induced them to purchase the goods, and that they relied upon the statement in purchasing the goods. The difficulty for buyers in proving reliance was obvious. Therefore, Professor Williston, the author of the Sales Act, suggested a different interpretation. Williston recognized that the Sales Act placed the burden of proof of reliance on buyers, but he suggested that, "as a general rule no evidence of reliance by the buyer is necessary other than the seller's statement were of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods."

Under the Williston analysis, buyers did not have to show that the statement actually induced them to purchase the goods, nor that they actually relied upon the statement in

12. UNIFORM SALES ACT § 12.
13. See, e.g., Beckett v. P.W. Woolworth Co., 376 Ill. 470, 34 N.E.2d 427 (1941). The court held that a printed card attached to a tube of mascara which stated that the make-up was "runproof and harmless," combined with statements by a salesperson made after the sale that the mascara was "supposed to be the best," were insufficient to prove the essential element of reliance. The Supreme Court of Illinois found that the plaintiff did not read the card prior to the sale, and the statement of the salesperson was made after completion of the transaction. Id. at 475, 34 N.E.2d at 430.
14. 1 S. WILLISTON, supra note 5, at § 206.
purchasing. As long as buyers showed that a reasonable buyer would have been induced to purchase by such a statement, they fully met their burden of proof.\textsuperscript{15} It is possible to interpret the new "part of the basis of the bargain" requirement in section 2-313 as a simple adoption of that interpretation of the predecessor statute. Removing any express requirement of reliance upholds the Williston view. By insisting that the affirmation of fact or promise relating to the goods becomes only a part of the basis of the bargain, the drafters of 2-313 relieved buyers from showing that the particular statement of the seller was the only, or even the most important, basis for the deal.\textsuperscript{16} According to the other pre-Code suggestion, the U.C.C. drafters were concentrating on the actual inducement of buyers through the seller's statements of fact about the goods. If buyers must show that the seller's statements actually induced them to purchase, the test is more stringent than the Williston interpretation of the Sales Act test.\textsuperscript{17} This is reminiscent of the classical dictum of Holmes explaining the bargained-for-exchange element of consideration:

No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting.\textsuperscript{18}

If the buyers can prove that they were induced to purchase by the statements of the seller, and if the goods do not conform to those statements of fact, buyers can claim there was no contract for failure of consideration. Section 2-313(1) would then

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  \item \textsuperscript{15} See, e.g., O'Connell v. Kennedy, 328 Mass. 90, 93, 101 N.E.2d 892, 894 (1951). In O'Connell, statements by a seller that a horse was sound, clever, well-trained, and had a great record were sufficient to authorize a finding that the natural tendency of such an affirmation was of the type that would induce a buyer to purchase a horse. \textit{See also} Teter v. Schultz, 110 Ind. App. 541, 547, 39 N.E.2d 802, 804 (1942); Park v. Moorman Mfg. Co., 121 Utah 339, 347, 241 P.2d 914, 918 (1952).
  \item \textsuperscript{16} As the Article demonstrates later, this integration is incorrect. See notes 20-46 infra and accompanying text. In addition to the arguments found in that section, one could note that Karl Llewellyn and his helpers were undoubtedly well aware of the Williston test. If the U.C.C. drafters intended the new basis of the bargain to be the Williston test, they arguably would have included the test in express terms rather than assuming it would judicially evolve.
  \item \textsuperscript{17} The cases cited in note 15 supra indicate that the test for finding an express warranty is not whether the actual buyer relied, but whether the statements possessed the characteristic of an inducement to purchase. For a discussion of the differences between the actual buyer and reasonable buyer approach, see Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 487 (3d Cir. 1965) (Freedman, J., concurring), \textit{cert. denied}, 382 U.S. 987 (1965).
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be nothing more than a restatement of the bargained-for-exchange element of consideration.19

B. THE UNIFORM COMMERCIAL CODE

At first glance, the comments to U.C.C. section 2-313 do not appear to rule out Williston's "natural inducement" test.20 Comment 3 suggests that "no particular reliance on [affirmations of fact] need be shown."21 The implication that some general or assumed reliance must be shown is, however, not implausible. How does a buyer show such general or assumed reliance? The remainder of Comment 3 contains an interesting suggestion. "Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact."22 Under this clause, the buyer must prove that the seller made a statement of fact relating to the goods. It is presumed that such a statement became part of the "agreement" which section 1-201(3) defines as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. . . ."23 To rebut that presumption, the seller must show "clear affirmative proof" that the statement of fact was not part of the agreement.24 The only other language relating to the presumption and the burden on the seller to rebut it is found in Comment 8 to section 2-313: "What statements . . . have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary."25

19. This interpretation, too, is arguably incorrect. See notes 26-46 infra and accompanying text.
20. Comment language is obviously not as persuasive as the enacted language of the Code. Yet, the comments contain a wealth of material which should not be overlooked. The original comments were prepared by those who drafted the Code, and the new comments were prepared by the Permanent Editorial Board. Thus, although the comments are not legislation, they are an excellent source for Code construction. For a discussion of the scope of Code comments, see R. Nordstrom, supra note 11, at 10 ("The Comments often explain why certain statutory language was chosen, what policies were sought to be adopted or rejected, and how the section under consideration harmonizes with other parts of the Code. This material is just too valuable to be ignored.").
22. Id.
23. U.C.C. § 1-201(3).
24. U.C.C. § 2-313 Comment 3.
25. U.C.C. § 2-313 Comment 8.
What is the "clear affirmative proof" or a "good reason to the contrary" that will excuse sellers from the duty to deliver goods which conform to their statements of fact? If the seller made a statement of fact relating to the goods, it would ordinarily not seem possible for the seller to show that a reasonable buyer may not have been induced, at least in part, to purchase the goods because of this statement. Nor would it appear possible for the seller to show that a reasonable buyer may not have relied, at least in part, upon such statements in purchasing the goods. In some cases, the seller can show that, even though a reasonable buyer may have been so induced or may have relied upon the statement, the particular, actual buyer did not. The clearest example is a buyer who was unaware of a seller's statements prior to the purchase of the goods. Absent any knowledge of those statements of fact, the buyer could not have been induced to buy the goods nor could he have relied upon such statements in buying them. If presumed inducement or reliance by a reasonable buyer initially satisfied the "basis of the bargain" requirement, the presumption must be rebutted if the actual buyer was unaware of the statements before purchasing. This analysis appears unassailable. It is also comforting, since it solves the mystery of "basis of the bargain" through familiar concepts of inducement and reliance which are nothing more than elaborations of the Williston interpretation of the Sales Act.

This solution unfortunately is superficial. One must confront Comment 7 to section 2-313. That comment notes that the precise time when statements of fact about the goods are made "is not material." Rather, the sole question is whether such affirmations of fact "are fairly to be regarded as part of the contract." Comment 7 is most clearly inconsistent with the Williston interpretation in its endorsement of postformation warranties: "If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209)." One cannot reconcile the inducement or reliance analysis with postformation warranty. The seller's statement did not induce the purchase.

27. Id.
28. If it is inconsistent with the Williston test, it is a fortiori inconsistent with the much stricter test that requires proof of actual reliance.
29. U.C.C. § 2-313 Comment 7.
of the goods, nor did the buyer rely upon a statement that the seller made only after the contract was formed. The Comment 7 test is amorphous, asking whether the statement is to be fairly regarded as part of the contract. Yet, it does conclude that the buyer may fairly regard the seller's statement made after the closing of the deal as part of the contract, thus suggesting a novel concept of bargain, a concept well beyond and different from a bargained-for-exchange idea involving inducement or reliance.

One can illuminate this novel concept by examining not only section 2-313 and its comments, but also related sections of Article 1 and other sections of Article 2. As noted, Comment 7 requires a determination of what one may fairly regard as part of the "contract." Section 1-201(11) of Article 1 defines contract as the legal effect of "the parties' agreement."30 Section 1-201(3), in turn, defines agreement as "the bargain of the parties in fact."31

This section, the only Code reference to bargain-in-fact, suggests that bargain-in-fact means more than bargained-for-exchange. Section 1-201(3) suggests that it means the total agreement of the parties. According to this section, the bargain-in-fact is found by examining both the parties' language and the implication from other circumstances. These other circumstances include course of dealing,32 usage of trade,33 and course of performance.34 In particular, section 2-208(3), the section governing course of performance,35 affords priority of course of performance evidence, even over the contract's express terms. This is analogous to the postformation warranty concept in Comment 7 to section 2-313. Therefore, under both Comment 7 and section 2-208(3), superior evidence of the bargain-in-fact will replace even the express written terms of the deal.

The essence of Article 2 is a more precise and fair identification of the true bargain-in-fact of the parties, unhampered by technical notions of classical contract law. Other manifesta-

30. U.C.C. § 1-201(11).
31. U.C.C. § 1-201(3).
32. See U.C.C. § 1-205(1).
33. See U.C.C. § 1-205(2).
34. See U.C.C. § 2-208.
35. U.C.C. § 2-208(3) provides, "[s]ubject to the provisions of the next section on modification and waiver such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance." Note that as in Comment 7, section 2-208(3) uses the subsequent modification device to support its priority.
tions of this Article 2 phenomenon abound. Section 2-209, allowing subsequent modifications of agreements without consideration,\textsuperscript{36} certainly constitutes a clear example, albeit one which may have seemed less radical because of the traditional criticism of the pre-existing duty rule. The significant modifications of the parol evidence rule in section 2-202, allowing course of dealing, usage of trade, or course of performance to explain or supplement a written agreement, is another clear illustration of this principle.\textsuperscript{37} The Code's greater flexibility in determining contract formation and operative terms is apparent in section 2-204(2), which states that "[a]n agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."\textsuperscript{38}

Another example of the rejection of classical, technical contract law by Article 2 is the repudiation of disclaimers of express warranties in section 2-316(1).\textsuperscript{39} This section is simply another expression of the critical comment in section 2-313, which also rejects language disclaiming express warranties, that the focus of that section—and all warranty law under the U.C.C.—"is to determine what it is that the seller has in essence agreed to sell . . . ."\textsuperscript{40} While this language is directed principally at the refusal "except in unusual circumstances to recognize a material deletion of the seller's obligation,"\textsuperscript{41} it is interesting that the comment emphasizes the search for what "the seller has in essence agreed to sell," and not what the buyer has agreed to buy. It is possible that the last phrase was inadvertently omitted from the comment. It is more likely, however, that it was deliberately omitted, because its inclusion would have misled interpreters of the section to arrive at the more familiar and narrow concept of bargained-for-exchange.

The most compelling illustrations of the principle that Article 2 rejects traditional contract law, to search for the expanded concept of bargain-in-fact, are the "battle of the forms" analysis

\textsuperscript{36} U.C.C. § 2-209(1) provides that "[a]n agreement modifying a contract within this Article needs no consideration to be binding."

\textsuperscript{37} U.C.C. § 2-202 provides that a written agreement "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)."

\textsuperscript{38} U.C.C. § 2-204(2).

\textsuperscript{39} U.C.C. § 2-316(1) states, in part, that "subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable."

\textsuperscript{40} U.C.C. § 2-313 Comment 4.

\textsuperscript{41} Id.
of section 2-207 and the unconscionability restrictions of section 2-302. Under section 2-207, clauses in the written evidence of the contract are inoperative if they do not represent the bargain-in-fact. Under section 2-302, courts will similarly not enforce certain clauses if they would unfairly surprise or oppress one of the parties, because such a surprising or oppressive term is not part of their bargain-in-fact. Rather, it was dictated by the superior party, and it is, therefore, unconscionable.

The courts have encountered difficulty to a greater or lesser extent with all of the sections mentioned above, and the difficulty in each case is traceable to the same source: a failure to appreciate the essence of Article 2. It is impossible to comprehend the expanded notion of bargain from one comment to section 2-313. The expanded concept of bargain can only be gleaned from an understanding of many sections of Article 2. It is impossible to deal effectively with isolated sections and expect holdings and rationales that are consistent with the underlying philosophy of Article 2.

III. THE CASE LAW

When confronted with the task of adumbrating the "basis of the bargain" in myriad fact situations, courts could have sought guidance in familiar constructs which sound like "basis of the bargain," constructs such as bargained-for-exchange, reliance, and offer and acceptance. In the alternative, courts could have recognized that the concept of "bargain," and the phrase "basis of the bargain," suggest a continuum, a process which they ought not to confuse with or limit to the older, familiar concepts. The former approach is more comfortable, while the latter requires imagination as well as an emphatic concern for the particular facts surrounding the transaction.

There are a number of cases which do not recognize any change in section 2-313 from the Uniform Sales Act require-

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44. Comment 4 to U.C.C. section 2-207 states that terms that would "result in surprise or hardship if incorporated without express awareness" will not be given operative effect.
45. See U.C.C. § 2-302 Comment 1. "The principle is one of the prevention of oppression and unfair surprise . . . ."
46. See Murray, supra note 43, at 41-43.
ment of reliance. These cases blithely assume that the standard remains the same. When they consciously consider the "part of the basis of the bargain" requirement in 2-313, there is a remarkable confusion of thought. Thus, in Sessa v. Riegle, the court confronted the question of whether the seller's statement, "the horse is sound," was an affirmation of fact and a potential express warranty. The court decided that the statement, under the circumstances, was mere opinion. Nonetheless, it proceeded to discuss the "basis of the bargain" element of 2-313(1)(a):

This is essentially a reliance requirement and is inextricably intertwined with the initial determination as to whether given language may constitute an express warranty since affirmations, promises and descriptions tend to become part of the basis of the bargain. It was the intention of the drafters of the U.C.C. not to require a strong showing of reliance. In fact, they envisioned that all statements of the seller became part of the basis of the bargain unless clear affirmative proof is shown to the contrary.

Ostensibly applying this test, the court decided that the seller's (Riegle's) statement that the horse was sound was not part of the basis of the bargain because the buyer had relied upon his own agent (Maloney) in evaluating the horse. The court attempted to clarify its decision: "The court believes that Maloney's opinion was the principal, if not the only factor which motivated Sessa to purchase the horse. The conversation with Riegle played a negligible role in his decision."

The court apparently concluded that an affirmation of fact that motivates or induces the purchase of goods, if it is not the principal factor, or perhaps if it is merely a negligible factor, cannot be an express warranty. Despite requiring a reliance element, the court was willing to presume its existence because of language in Comments 3 and 8. But it then insisted that the buyer must be induced or motivated to purchase the goods

49. 427 F. Supp. at 765.
50. Id. at 766.
51. "The evidence shows, however, that Sessa was relying primarily on Maloney to advise him in connection with the sale." Id.
52. Id. at 767.
53. See id. at 766.
principally as a result of the statement of the seller.\textsuperscript{54} If the court meant that the buyer must prove actual inducement, the test is more difficult for the buyer than the Williston test under the Uniform Sales Act, which only requires that the seller's statements naturally induce the buyer to purchase the goods.\textsuperscript{55} If the court meant that not only an actual buyer, but a reasonable buyer, would not have been motivated or induced to purchase by the seller's statements, it applied a test indistinguishable from the Williston test. Moreover, since the Williston "natural inducement" test was designed to meet the reliance requirement of the Sales Act, the court in its confusion applied, in essence, a reliance test.

In \textit{Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co.},\textsuperscript{56} the court cited \textit{Sessa} with approval,\textsuperscript{57} although it began its discussion of the seller's argument that the samples involved were not express warranties with the unambiguous statement, 

\begin{quote}
[\textbf{R}eliance is not the test under the Uniform Commercial Code.} 
\end{quote}

\ldots Although this question has not been passed on in Texas, the weight of authority does not require reliance as an element to recover on an express warranty. \ldots A finding that the sample is part of the basis of the bargain \ldots incorporates the reliance requirement to some extent \ldots We conclude, therefore, that a separate issue on reliance is improper to establish an express warranty by sample or model.\textsuperscript{58}

Acquiescing in the "weight of authority,"\textsuperscript{59} the court decided that reliance is not an element in establishing an express warranty.

The court, however, retreated from this clear stand. Despite ostensibly eschewing a reliance requirement, it simply in-

\textsuperscript{54} \textit{Id.}
\textsuperscript{55} See notes 14-18 \textit{supra} and accompanying text. The Williston test for express warranties is reminiscent of the Williston test for parol evidence. The latter test directs courts to determine if they will admit parol evidence by comparing the extrinsic oral agreement with the written agreement and determining "whether parties, situated as were the ones to the contract, would naturally and normally include the one in the other if it were made." 4 S. \textbf{WILLISTON, A TREATISE ON THE LAW OF CONTRACTS} § 638 (3d ed. 1961). In both tests, the trier of fact is more concerned that the statements naturally tend to induce a reasonable buyer-party rather than the actual buyer-party.
\textsuperscript{56} 602 S.W.2d 282 (Tex. Civ. App. 1980).
\textsuperscript{57} \textit{Id.} at 293.
\textsuperscript{58} \textit{Id.} (emphasis added).
\textsuperscript{59} The only authority that the \textit{Indust-Ri-Chem Laboratory} court cited for the proposition that the weight of authority does not require a reliance requirement to recover on an express warranty was section 2-313:18 of R. Anderson's book, \textit{Uniform Commercial Code}. While it is true that Anderson does state that reliance is unnecessary, his analysis of express warranty is not internally consistent. Anderson's analysis as a whole suggests that reliance is still an express warranty requirement. See R. \textbf{ANDERSON, UNIFORM COMMERCIAL CODE} §§ 2-313:10, 2-313:11, 2-313:26, 2-313:37, 2-313:42 (2d ed. 1970).
verted the requirement of the element by making "lack of reliance" the test. Lack of reliance became an "inferential rebuttal" to the basis of the bargain requirement. If the seller proved a lack of reliance, the seller was entitled to a jury instruction. The court clearly intended to make reliance an element in determining the existence of an express warranty, although it incorporated it in the form of a presumption of reliance that the seller could rebut by proving that the buyer neither heard the seller's statement nor saw the seller's samples.

Perhaps the court was confounded by its own illustration: a buyer who knows that a representation by the seller is untrue may not treat that representation as part of the basis of the bargain. The court assumed that the only rationale for this conclusion was a lack of reliance. There is, however, an alternate rationale. Consider two examples. First, suppose a seller has made a unilateral mistake in his representation and the buyer knows or should know that the seller is making that mistake. The representation should not amount to an express warranty any more than an offeree should be able to "snap up" an offer if the offeree knows or should know the offeror has made a mistake. An offeree should know that the offeror does not intend to create a power of acceptance with respect to the mistake in the purported offer. Therefore, the offeree has no expectation that the goods will reflect the seller's representation. Second, suppose that statements otherwise manifesting express warranties are made to an expert buyer about equipment which the buyer examines and, through such examina-

60. "Obviously, if the buyer knows that a representation of the seller is untrue, that representation cannot be a part of the basis of the bargain. Thus, a lack of reliance precludes a sample or model from creating an express warranty." 602 S.W.2d at 293 (citing Sessa and other authorities).

61. Id. at 293-94. The court stated that

[j]n some instances a jury instruction on lack of reliance may be germane to the 'basis of the bargain' issue. If it is, it must take the form of an instruction rather than a defensive issue on lack of reliance because lack of reliance is an inferential rebuttal to the 'basis of the bargain' element of the plaintiff's recovery.

62. Id. The court stated that

[t]he burden on the seller to prove that affirmations of fact or samples or models are not a part of the basis of the bargain. Thus, only after the seller has introduced proof of the lack of the buyer's reliance on the sample is the seller entitled to a reliance instruction.

63. See note 60 supra.


65. For a more detailed analysis of the expectation aspect of express warranties, see notes 205-31 infra and accompanying text.
tion, knows or should know that the statements of the seller are untrue. The buyer has no expectation that the statements reflect the quality of the goods. In both examples, the statements are not part of the contract. It is as if the seller withdrew the statements prior to the closing of the deal. To suggest that there is no reasonable reliance by the buyers is a truism. The argument that the agreement of the parties—their bargain-in-fact—does not include such statements because the buyer's knowledge forecloses any such expectation is a more persuasive rationale.

Other recent cases concerned with structuring an effective test under section 2-313 also avoid the central questions. In *Ewers v. Eisenzopf*, the Supreme Court of Wisconsin began its analysis of the "part of the basis of the bargain" puzzle by holding that the seller's affirmation need only be a factor in the purchase and not the sole basis for the sale. Then, relying on *Pritchard v. Ligget & Myers Tobacco Co.*, which the Wisconsin court read as concluding that the seller's intent and buyer's reliance are irrelevant in creating an express warranty, the court adopted *Pritchard*'s "workable test." "The true test is not whether the seller actually intended to be bound by his statement but rather whether he made an affirmation of fact the natural tendency of which was to induce the sale and which did in fact induce it."70

This test is clearly indistinguishable from the Williston test of reliance under the Uniform Sales Act.71 The *Ewers* court apparently believed, however, that it was adopting a new test, one that eschewed a reliance test and met the new standard of "basis of the bargain" in section 2-313. By adopting a "natural inducement" standard, the court not only unwittingly adopted a pre-Code test, but failed to consider the expansive scope of bargain-in-fact which section 2-313 demands. The failure of the adopted test to meet the requirements of 2-313 is not immediately visible in this case since, as in many cases, one can say

66. 88 Wis. 2d 482, 276 N.W.2d 802 (1979).
67. Id. at 488, 276 N.W.2d at 805.
68. 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1965).
69. Interestingly, *Pritchard* dealt with the provisions of Pennsylvania's adaptation of the Uniform Sales Act § 12, not the U.C.C.
70. *Ewers v. Eisenzopf*, 88 Wis. at 489, 276 N.W.2d at 805.
71. *See* notes 14-18 *supra* and accompanying text.
73. *See* notes 32-46 *supra* and accompanying text.
that the particular statement of the seller induced the buyer to buy just as one can say that the buyer relied, or could have reasonably relied, upon the seller's statement. It is much easier to recognize the inadequacy of such a test where there is no reliance and no inducement, if, for example, a court is confronted with a seller's postformation statement relating to the goods.

In *Autzen v. John C. Taylor Lumber Sales, Inc.*, the buyer and seller met on September 8, 1975, to discuss the purchase and sale of a used boat. At this meeting they agreed to a total purchase price of $100,000, with a down payment of $20,000 that would be paid at the time of transfer of possession. The seller's representative, Mr. Love, volunteered to have a survey made of the boat, that is, have an expert examine the boat to determine its condition. The buyer had not requested any survey and told Love that it would be unnecessary. Love replied that he would like to have one made anyway, at his own expense. The survey was made on September 10, and the purchaser first saw the results on September 12. The survey concluded that the boat was excellently constructed, and that the vessel was clean, dry, and well ventilated. The buyer gave Love the $20,000 down payment and took possession of the boat the same day. The buyer later discovered "an enormous amount of dry rot and insect infestation." In his suit, the buyer claimed breach of an express warranty by description, based upon the September 10 survey.

The Supreme Court of Oregon rejected the seller's argument that the survey was not part of the basis of the bargain because the contract for the sale of the boat had occurred on September 8 and the survey did not occur until after formation of the contract. Although it ruled that a contract had been formed on September 8, the court, relying upon the analysis of Professor Robert Nordstrom, distinguished a "bargain" and a "contract." Under that analysis a "bargain" does not occur at a particular moment in time, but is a process which describes the overall commercial relationship between the parties in regard to the product. While the parties had agreed upon the purchase price of the boat on September 8, other details remained to be settled such as time of payment and transfer of possession. Thus, "[t]he bargain was still in process." This

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75. Id. at 788, 572 P.2d at 1325.
76. Id. at 787, 572 P.2d at 1324.
77. See R. NORDSTROM, supra note 11, at § 67. For a detailed discussion of Nordstrom's analysis, see notes 183-204 infra and accompanying text.
78. 280 Or. at 787, 572 P.2d at 1325.
analysis seems to correspond with this Article’s interpretation of “basis of the bargain,” but the court intimated that it might deviate from this line of thought.

While this description [the survey] did not induce the actual formation of the contract, the jury might have found that it did induce and was intended by the Seller to induce Buyer’s satisfaction with the agreement just made, as well as to lessen Buyer’s degree of vigilance in inspecting the boat prior to acceptance.79

If this were the extent of the court’s analysis, it would be consistent with statements of inducement or even reliance found in other section 2-313 cases. Though the survey did not induce the buyer to purchase the boat, it may have induced the buyer to forgo normal inspection of the boat. Forebearing normal inspection could affect a buyer’s right of rejection under section 2-601.80 Since the court held that the survey was an express warranty81 it did not consider whether the buyer would have had the right to reject absent the survey,82 nor did it consider the existence of other alleged express warranties.83 The court, however, suggested a test which it believed eliminated any reliance or inducement test:

Seller additionally argues that the Huhta survey cannot be a part of the basis of the bargain because when Love volunteered to have the survey made, Buyer indicated it would not be necessary. What was once a matter of indifference to the Buyer, Seller argues, cannot retrospectively be transformed into an essential part of the bargain. Seller emphasizes that nothing in the evidence suggests that Buyer bargained for the survey. The basis of the bargain requirement, however, does not mean that a description by the Seller must have been bargained for. Instead, the description must go to the essence of the contract.84

Since the buyer was both unaware of and indifferent to the survey prior to the contract formation, the buyer clearly did not rely upon the survey in agreeing to purchase the boat. Moreover, although the court earlier suggested a possible inducement of the buyer with respect to buyer’s right to reject, its test clearly did not equate “bargain” as used in section 2-313 with

79. Id. at 790, 572 P.2d at 1326.
80. The buyer has a reasonable opportunity to inspect the goods under section 2-513 (absent a contrary agreement) to permit the exercise of the right of rejection under section 2-601. If the buyer forebears inspection and the reasonable time for such inspection expires, the buyer has accepted the goods under section 2-606(1)(b).
81. 280 Or. at 788, 572 P.2d at 1326.
82. Presumably, under U.C.C. § 2-608(1)(b) the buyer could have revoked his acceptance.
83. The buyer alleged that the original manufacturer’s booklet describing the boat when new, an earlier survey, and Love’s statement that the boat was in “A-I” condition were all express warranties. 280 Or. at 786, 572 P.2d at 1324.
84. Id. at 790, 572 P.2d at 1326.
the classical concept of inducement found in the bargained-for-exchange element of consideration.

Rather, the court's new test requires the statement to go to the essence of the contract. The court concluded that the existence of an express warranty is a question for the jury. The jury presumably should, therefore, be instructed pursuant to the "essence" test. In light of the perplexity that courts manifest in attempting to decipher "basis of the bargain" it may have been inevitable that a court would resort to metaphysics to describe this requirement. The court does not attempt any further description of the "essence" test. This is not surprising since the term suggests an ineffable quality. One can probably do no better than suggest a common dictionary definition of "true substance." Although this definition is compatible with certain Article 2 sections which direct the search toward the "true agreement" of the parties, it is not very helpful.

The last glimmer of hope is found in the court's citation of *Alan Wood Steel Co. v. Capital Equipment Enterprises, Inc.* as authority for the "essence" test. In *Alan Wood*, the defendant seller sold a crane to the plaintiff buyer that did not meet the seller's specifications. The seller, however, in its representations to the buyer, stated that its descriptions were only approximate and clearly sold the crane "as inspected by the buyer." The trial court found for the seller. On appeal,

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85. *Id.*
86. WEBSTER'S INTERNATIONAL DICTIONARY (UNABRIDGED) 777 (3d ed. 1961).
87. See notes 36-46 supra and accompanying text.
89. See *Autzen v. John C. Taylor Lumber Sales, Inc.*, 280 Or. at 790, 572 P.2d at 1326.
90. The seller described the crane as a 75 ton locomotive crane with a 40 foot boom. Several months after receipt of the crane, Wood discovered that the maximum lifting capacity was only 50 tons rather than 75 tons. Blueprints indicated that when originally manufactured, the crane was equipped with a curved boom which allowed it to lift 75 tons. That boom, however, had been inexplicably replaced with a straight boom which lowered the lifting capacity to 50 tons. 39 Ill. App. 3d at 52, 349 N.E.2d at 631-32.
91. The seller's "format quotation" contained printed terms captioned "Conditions" which read, in pertinent part: "All equipment is subject to inspection and the descriptions are approximate and intended to serve as a guide." *Id.* at 50, 349 N.E.2d at 630. After receipt of the quotation, a crane operator from Wood inspected the crane in Chicago. Wood then sent its purchase order and acknowledgment form to Capital. Capital's representative signed the Wood acknowledgment form, but added the following typewritten statement: "Accepted subject to modifications contained in our letter dated 2/23/66 attached." *Id.* at 51, 349 N.E.2d at 631. The Capital letter contained four modifications of the terms in the Wood acknowledgment, the fourth of which read as follows: "The crane is offered and sold without warranties either express or implied, and in effect sold as inspected before shipment." *Id.*
92. *Id.* at 49, 349 N.E.2d at 629.
the court attempted to describe the "basis of the bargain" test in section 2-313 by relying upon Comments 1 and 4. It defined express warranties as "contractual in nature," since Comment 1 stated that "'[e]xpress' warranties rest upon 'dickered' terms of the individual bargain . . . ." Continuing with Comment 1 language, the court concluded, "[t]he 'basis of the bargain' test focuses upon the descriptions or affirmations which clearly go to the essence, or the basic assumption, of the bargain between the parties."94

While Comments 1 and 4 mention the "essence" of the bargain, or what the seller has "in essence agreed to sell," neither section 2-313 nor the comments mention "basic assumption." That phrase is found in the commercial impracticability section.95 It is not only absent from the critical U.C.C. section, it is also a test which Professor Honnold had rejected for determining the "basis of the bargain," since it would be even narrower than the Uniform Sales Act test.96

Comment 1 does speak of "dickered terms." In another context, Karl Llewellyn suggested "dickered terms" were terms to which the parties have consciously adverted.97 If express warranties must comply with this meaning of "dickered terms," the Code would recognize significantly fewer express warranties than its predecessor had recognized. Three arguments dispute this interpretation. First, Comment 1 is designed to compare express warranties with implied warranties. The

93. Id. at 53, 349 N.E.2d at 632.
94. Id.
95. See U.C.C. § 2-615. That section provides:
   Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
   (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
phrase "dickered terms" is arguably an imprecise communication of "express terms," which may have been rejected on the basis that one should avoid circular definitions. Second, in his well-known exegesis on "dickered terms," Llewellyn recognized not only "specific assent" to such terms, but also "blanket assent" to any reasonable or decent undickered terms. Finally, the language of section 2-313 and all of the comments suggest an expansion of the express warranty concept over the Uniform Sales Act. Almost no court or commentator has urged a construction that would diminish express warranty protection under the Code to a narrower scope than the Sales Act. Thus, the essence test, adopted by the Oregon court in Autzen, and defined by the Illinois court in Alan Wood, does not adequately explain the meaning of "basis of the bargain," although the Illinois court was justified in resorting to comment language in its attempt.

Of even greater importance was the Alan Wood court's determination that although reliance may be of some significance in determining the bargain or agreement of the parties, it is not the sole criterion. Considering all of the evidence, the court found no express warranty since the buyer assumed all of the risk in the purchase of the crane. The court recognized that Comment 3 does not require particular reliance to create an express warranty. It also recognized, however, the "prevailing

98. Id.
99. See notes 4-8 supra and accompanying text.
100. The only commentator who has argued that the U.C.C. warranty section is more narrow than the Sales Act is Mitchell Ezer. See Ezer, Impact of the Uniform Commercial Code on the California Law of Sales in Warranties, 8 U.C.L.A. L. Rev. 281, 287-88 (1961). Ezer argued that under section 2-313(1) the seller must make a promise or affirmation to the buyer to create an express warranty. The Sales Act required only reliance by the buyer. Therefore, according to this analysis, the fact that the affirmation was not made to the buyer in a face to face situation created no express warranty under the U.C.C. Ezer urged that the words "whether directly or indirectly" be inserted. Id. at 288 n. 46.
101. The Wood court made a valid attempt to elaborate the meaning of "essence of the bargain." It found the sole reference to "bargain" in the Article 1 definition of "agreement" and justified its effort as follows:
This definitional framework is important to our inquiry as to whether the terms of the parties' contract give rise to an express warranty. In accord is pre-code [sic] case law which holds that the existence of an express warranty is to be determined by examining the intent of the parties as expressed by the language of their contract, when read in light of surrounding circumstances.
39 Ill. App. 3d at 54, 349 N.E.2d at 633.
102. Id. at 57, 349 N.E.2d at 635.
103. Id. at 58, 349 N.E.2d at 636.
104. Id. at 57, 349 N.E.2d at 635.
case law” view that significant reliance by the purchaser on his or her own examination of the product before the formation of the contract indicates the buyer's lack of reliance on the seller's statements. At this point, the court could have reduced the basis of its holding to the narrow rationale that the seller showed the buyer's “lack of reliance.” The court, however, expressly rejected that test and concluded that the circumstances surrounding the arrangement of both inspections and Alan Wood's subsequent reliance on its experts' opinions further illustrates that Capital's description of the used crane was not included as part of the “basis of the bargain.” Moreover, the court’s final statement suggested a different test: “In sum, we must give effect to the terms of the contract as formed by the parties . . . . Alan Wood's expectations cannot be extended beyond the terms and nature of the parties' agreement.” The willingness of the court to consider an expansive meaning of “basis of the bargain” premised on the concept of “agreement” or “bargain-in-fact” of the parties is a promising start toward a meaningful understanding of the mysterious phrase.

Having decided that the seller's description was not part of the basis of the bargain, the court unfortunately held that the seller's disclaimer of express warranty was valid thus ensuring that the seller would not be liable. Disclaimer clauses are anathema to the express warranty section. A holding that the disclaimer clause was effective was unnecessary since there was no express warranty to be disclaimed. The parties simply never agreed that the goods would meet the quality standard in the seller's statement of fact. These cases may involve factual determinations which can be difficult. In some cases it may be impossible for the seller to prove either that he or she withdrew the statement or that the buyer knew or should have known that the statement was untrue. Courts should not shrink, however, from recognizing that the problem is to determine whether the statement of fact relating to the goods is part of the agreement rather than whether a disclaimer of warranty is effective.

In United States Fibres, Inc. v. Proctor & Schwartz, Inc.,
the court similarly based its opinion on a disclaimer clause. The seller in Fibres stated in its contract that it would furnish equipment that would produce resinated cotton pads with a thickness tolerance of 1/32 inch.\textsuperscript{111} The contract, however, also included a disclaimer of warranty\textsuperscript{112} in light of the seller's inexperience in making such equipment.\textsuperscript{113} The court concluded that "this descriptive language was not 'part of the basis of the bargain.'"\textsuperscript{114} It unfortunately proceeded to give effect to the disclaimer of warranty.\textsuperscript{115}

The court correctly determined that the language describing the 1/32 inch tolerance did not become part of the basis of the bargain. The machinery had not been sold by specification alone. There was compelling evidence that the parties were attempting to put together a combination of machinery to fabricate a product by an "unproven process." The general manager of the buyer was fully aware of the variables involved, so the buyer never expected the seller to produce a perfectly conforming machine.\textsuperscript{116} Thus, a factual statement in the description of the goods, which on its face appears to be an express warranty, is not an express warranty because the bargain-in-fact of the parties is not limited to that description. Under the U.C.C., a bargain-in-fact includes all the circumstances surrounding an agreement. These circumstances clearly indicate that the parties did not intend the description to be literal. It was merely a target or goal which the parties hoped to achieve.

\textsuperscript{111} Id. at 1045. Another provision stated that "the Company's standard warranty outlined later in this contract does apply." \textit{Id}. The standard warranty clause printed in the contract forms read in part: "The Company warrants the machine against defects in materials and workmanship, but makes no other warranties, express or implied ... unless the word 'guarantee' is used." \textit{Id}.\textsuperscript{112}

112. The contract consisted of two documents. Both writings, prior to the description of the goods, contained typewritten portions captioned "PERFORMANCE" that stated: "[I]n view of the variables present effecting (sic) the capacity of the machine, no guarantee can be extended." \textit{Id}. Moreover, the seller argued that since the clause that described the ability of the equipment to meet the 1/32 inch limit did not use the term "guarantee," the clause could not be a warranty. \textit{See} note 111 \textit{supra}.\textsuperscript{113}

113. The defendant seller had never made equipment to produce these cotton pads. Additionally, the buyer was buying machinery to be used as an integral part of a process never before commercially operated. \textit{See} United States Fibres, Inc. v. Proctor & Schwartz, Inc., 358 F. Supp. 449 (E.D. Mich. 1972).\textsuperscript{114}

114. 509 F.2d at 1046.\textsuperscript{115}

115. It approved the trial court's reliance on the disclaimer of warranty. \textit{Id}.\textsuperscript{116}

116. The appellate court pointed out that "there is substantial evidence that the executives of Fibres [the buyer] ... never expected [the seller] to produce finished pads having a thickness tolerance of '1/32 inch across their width.'" \textit{Id}.\textsuperscript{117}
The trial court reached this conclusion through a factual determination, and the appellate review of that factual determination proceeded unhampered by narrow notions of "reliance," "inducement," or other classical notions which have impeded courts in determining whether an express warranty exists. Unfortunately, the court did not limit its holding to the simple, but precise, determination that the "descriptive language was not 'part of the basis of the bargain.'" 117

The affirmation of the lower court holding that the disclaimer was effective has several unfortunate ramifications. The holding was clearly superfluous since the court had already concluded that the descriptive language was not an express warranty. The only possible operative effect of the disclaimer was to disclaim express warranties. Since descriptive language was held not to constitute an express warranty, the disclaimer had nothing on which to operate. The descriptive language giving the 1/32 inch tolerance specification was not effective because it was not part of the basis of the bargain. It did not become ineffective because it was disclaimed. Some commentators unfortunately view the case as an illustration of an effective disclaimer of an express warranty.118

Moreover, the appellate court's conclusion that the disclaimer of express warranties was consistent with the descriptive language and that, therefore, the disclaimer was effective under U.C.C. section 2-316(1) is patently wrong.119 Once a court determines that a seller's statement becomes part of the basis of the bargain, it is not possible to disclaim that express warranty. The original (1952) draft of section 2-316(1) explicitly made any attempt to disclaim express warranties inoperative.120 This apparently appeared to be too radical. Therefore, the current familiar version of section 2-316(1) was substituted.121 This version permits express warranties and disclaimers of express warranties to co-exist. When, however, it would

117. Id.
119. According to the appellate court, "the district court correctly determined that the language which excluded an express warranty was not inconsistent with the language of description, UCC § 2-316(1), and gave it effect." 509 F.2d at 1046.
120. "If the agreement creates an express warranty, words disclaiming it are inoperative." U.C.C. § 2-316(1) (1952 version).
121. U.C.C. § 2-316(1) provides:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other, but subject to the provisions of this Article on parol or extrinsic evidence (Section
be unreasonable to construe these terms as consistent, the disclaimer is inoperative. The compelling conclusion is that express warranties cannot also be disclaimed under the current version. It will be necessary for a court to determine whether an express warranty exists, as did the court in *Fibres*. If the court concludes that it does exist, any clause limiting or negating the effect of express warranties will not apply to the statement of fact that the buyer claims is an express warranty because it is superfluous.122

A summary of the case law adumbration of "basis of the bargain" reveals mass confusion and little assistance. It would be less than accurate to characterize the case law as manifesting a split of authority between those cases which insist upon a showing of reliance and those which reject that requirement. The confusion is much deeper. As illustrated in this review of the cases, some courts initially state that reliance is required, only to later suggest that in fact it is not or may not be required.123 Other courts initially state that reliance is not required, but proceed to suggest that it is required, either expressly or through some kind of inducement.124 Moreover, these cases may very well cite each other as authority.125 There is little or no understanding of the overlap between reliance and inducement. There is virtually no understanding of the Sales Act test of Williston and some courts mistakenly employ it as a "new" test for determining the basis of the bargain. Finally, the few courts which see the need for a genuinely new

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122. To complete the analysis, the parol evidence limitation of the recognition of express warranties in section 2-316(1) does not operate as a disclaimer of express warranties. The Code parol evidence rule is designed to effectuate the true understanding of the parties of their agreement. See Murray, *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. Pa. L. Rev. 1342, 1385-1387 (1975). The rule is totally consistent with the quintessential search for the bargain-in-fact of the parties. If the parties intended their written expression of agreement to be the sole and exclusive repository of their bargain, it will be given that effect. Therefore, no statement of fact relating to the goods prior to that writing will be part of that bargain. It will not be considered an express warranty.

123. See note 47 supra.


125. See, e.g., Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., 602 S.W.2d at 293 (citing Sessa v. Riegle, 427 F. Supp. 760 (E.D. Pa. 1977), aff'd, 568 F.2d 770 (3rd Cir. 1978)).
IV. THE COMMENTATORS

A. THE WHITE AND SUMMERS ANALYSIS

The most recent text on the Code is the second edition of White and Summers's *Uniform Commercial Code*. The section dealing with "basis of the bargain" is unchanged from the first edition except for some additional cases and authority. It is important to consider this volume's explanation of the cryptic phrase since the White and Summers work is justifiably regarded as generally sound and reliable. In keeping with their exploration of other difficult sections of the Code, the authors warn the reader that the phrase remains unclear. They do not pretend to suggest a solution to the mystery. Instead, they suggest that the drafters may have intended to leave the existing law and its reliance requirement intact, or they may have intended to remove a reliance requirement except in the most unusual case, or, finally, they may have merely intended to provide the plaintiff with the benefit of a rebuttable presumption. The authors choose the last alternative. Even that choice is made with some reluctance, however, since they essentially find themselves in the position of Professor Honnold, who expressed his views on the new Code for the New York State Law Revision Commission. Honnold did not believe that one could assume, with confidence, that the "basis of the bargain" test simply incorporated a pre-Code reliance test, since the Code phrase does not convey any definite meaning and the apparent express rejection of the reliance language could signal an intent to modify the pre-Code standard. Although Comment 3, which states that "no particular reliance on such statements need be shown," drives White and Summers to suggest that a plaintiff could "likely" meet the basis of the bargain test without any proof of buyer's reliance, they caution that a careful lawyer will allege some reliance and offer...
White and Summers then attack some of the difficult comment language. Since Comment 3 refers to affirmations of fact made "during a bargain,"\textsuperscript{136} they wonder whether any advertisement would qualify for the presumption that the seller's statement constituted an express warranty.\textsuperscript{137} The authors conclude that notwithstanding the phrase "during a bargain" in Comment 3, advertisements containing such affirmations of fact can be a "part of the basis of the bargain, and it is only fair that it be so."\textsuperscript{138} They feel compelled, however, to add the requirement that a plaintiff or his agent must have known of, and relied upon, the advertisement in making the purchase.\textsuperscript{139} In this circumstance, that is the "minimum" proof necessary to support a finding for the plaintiff.\textsuperscript{140}

The authors apparently distinguish this burden from a lighter burden they would suggest for a plaintiff alleging an express warranty based upon a seller's statement made "during a bargain."\textsuperscript{141} This is a difficult distinction, having no support in Comment 3 or in any other comment or section language. Moreover, it suggests one of the classical contract approaches to the meaning of "bargain." By insisting upon knowledge on the part of the buyer or his agent, it suggests that a buyer somehow must know of and "accept" a seller's statement relating to the goods just as an offeree must know of and accept an offer. White and Summers appear to base their insistence of a showing of reliance on the notion that reliance is similar to the bargained-for-exchange idea, which requires at least inducement reliance.

This view is difficult to reconcile with express warranties made after the sale has been concluded. Although the authors believe that "[o]ne may argue most persuasively that once a le-

\textsuperscript{135} J. White & R. Summers, supra note 3, at 335.
\textsuperscript{136} U.C.C. § 2-313 Comment 3.
\textsuperscript{137} J. White & R. Summers, supra note 3, at 335.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 335-36. They expressly approve a Missouri case cautioning that any such affirmation must have at least been read since "the UCC requires the proposed express warranty be part of the basis of the bargain." Interc0 Inc. v. Randustrial Corp., 533 S.W.2d 257, 262 (Mo. App. 1976). Although the court, in the portion of the opinion quoted by the authors, does not expressly require reliance as well as knowledge of the advertisement by the purchaser, the authors require both knowledge and reliance. J. White & R. Summers, supra note 3, at 336.
\textsuperscript{140} Id.
\textsuperscript{141} Id. The authors make this distinction because "[i]n the usual case one would not regard an advertisement as being made 'during a bargain.'" Id.
gally binding contract of sale exists, no additional statements of the seller can be made part of the basis of that bargain," they recognize that they must come to grips with Comment 7. They seek to justify postformation warranties when logically reliance is impossible after the deal is closed. "To that argument one may respond that in the merchandising world a buyer, even one already legally obligated to buy, has greater rights while he is still standing at the seller's counter than he does two weeks later." In an explanatory footnote supporting this statement, the authors remind the reader that once goods are accepted, the buyer's right to reject no longer exists. Since rejection must occur within a reasonable time after the delivery or tender of goods, a failure to reject within that time constitutes acceptance. While the buyer may, under certain conditions, revoke acceptance of the goods, there is a reasonable time limitation upon such a revocation.

There is a strong temptation to demur to this explanation. If the authors mean that a buyer has a right to reject the goods immediately after the sale, and that right continues until the reasonable time for rejection expires, one cannot argue with that truism. Yet this explanation still does not seem to answer how a postformation warranty can adversely affect the right of rejection, thus justifying the recognition of these postformation warranties. To satisfy this question, the authors suggest an example of a camper who purchases a sleeping bag advertised as suitable for winter use. Immediately after paying the purchase price, the seller tells the buyer that the bag can be used in sub-zero temperatures. Relying upon that statement, the camper uses the bag in sub-zero temperatures and suffers frostbite. The denouement is fascinating:

[A]fter the camper has used the bag in reliance on the seller's statement, the bag will have acquired some holes and a great deal of mud, and the seller will be far less willing to rescind. In these circumstances it would seem reasonable to make the seller's post-sale statement an express warranty.

Apparently, the authors are attempting to illustrate that

142. Id. at 336-37.
143. Id. See U.C.C. 2-313 Comment 7. For a discussion of Comment 7, see notes 26-35 supra and accompanying text.
144. J. WHITE & R. SUMMERS, supra note 3, at 337.
145. Id. at 337 n.43.
146. Id.
147. U.C.C. § 2-608.
148. See text accompanying note 146 supra.
149. J. WHITE & R. SUMMERS, supra note 3, at 337.
the buyer relied on the seller’s postformation statement, thus affecting the buyer’s right of rejection. This analysis is faulty. If the inability of the sleeping bag to withstand sub-zero temperatures causes it not to conform to the original contract as found in the advertisement,150 the buyer has a right to reject the sleeping bag.151 This right of rejection lasts at least until the buyer first uses the bag, enabling the buyer to discover its defect.152 Although this use may make the bag dirty and full of holes, causing the seller to be unwilling to rescind, the buyer has an incontestable right to reject. On the other hand, if the inability of the sleeping bag to withstand sub-zero temperatures does not make it nonconforming, the buyer has no right to reject it regardless of the seller’s postformation warranty statement. Either way, the seller’s postformation warranty statement does not adversely affect the buyer’s right of rejection. Admittedly, there are particular cases where the seller’s postformation statements can affect a right of rejection.153 Yet, even in these few cases, a buyer might be able to revoke acceptance under U.C.C. section 2-608.154

The White and Summers example is unfortunate in one last respect. If the seller made a statement of fact about the use of the bag in sub-zero temperatures and the buyer relied

150. “Goods or conduct including any part of a performance are ‘con- forming’ or conform to the contract when they are in accordance with the oblig- ations under the contract.” U.C.C. §2-106(2). A sleeping bag advertised as “suitable for winter use” which was not effective in sub-zero temperatures could arguably not be in accordance with the terms of this contract.

151. U.C.C. § 2-601.

152. White and Summers would clearly permit the typical purchaser of such an item to reject it after the first opportunity to use it, since the reason- able time to reject incorporates the time necessary for inspection. “Although 2-602 [Manner and Effect of Rightful Rejection] does not make explicit reference to the difficulty of discovery, the comments, the statutory history, and the cases suggest that that factor is equally relevant there.” J. WHrrE & R. SUMMERS, supra note 3, at 310. White and Summers also cite Comment 1 to U.C.C. § 2-602. “The sections of this article dealing with inspection of goods must be read in connection with the buyer’s reasonable time for action under this subsection.” Id. at 310 n.46. This view is certainly correct. Absent unusual expertise, the typical buyer of a sleeping bag would discover the defect only after awakening with frostbite. Even if the sale had occurred months before, the right to reject would exist. Clearly this rejection would be within a reasonable time. U.C.C. section 2-602(1) would be the authority for the rejection.

153. For example, in Autzen the seller’s statement could have induced the buyer not to conduct a normal inspection and, therefore, foreclosed the buyer’s possible right to reject. See text accompanying notes 74-86 supra. Under U.C.C. section 2-606(1)(b), if the buyer fails to inspect the goods after he has had a reasonable opportunity to do so, he has accepted the goods.

154. Under U.C.C. section 2-608 the elements of revocation of acceptance are (1) the subjective test of substantial impairment to the buyer and (2) that acceptance was induced by the “difficulty of discovery” of the defects.
upon that statement and suffered frostbite, the postformation warranty concept of Comment 7 is unnecessary to permit recovery. The actual reliance by the purchaser upon such a statement and the seller's liability would be recognized outside the Code under tort law as the authors subsequently suggest.155

Hence, the authors' explanation of Comment 7, that postformation warranties should be express warranties because of the buyer's reliance on the seller's statement and the resulting adverse effect on the buyer's right of rejection, is not convincing. To properly understand Comment 7, one must realize that the U.C.C. describes an expanded notion of basis of the bargain. The basis of the bargain is not limited to the traditional law of contracts, nor is it restricted to situations involving inducement or reliance. White and Summers further reveal their misunderstanding of these precepts in the particularly narrow scope they give to postformation warranties.

The authors require that postformation warranties be bilateral.156 They may have thought that Comment 7 supported this view in three respects. First, the test set forth in Comment 7 is "whether the language or samples or models are fairly to be regarded as part of the contract."157 Although this may suggest a "bilateral" connotation absent the Code, the definition of "contract" is merely the legal effect given to the "agreement" of the parties.158 The agreement of the parties, in turn, is the parties' bargain-in-fact, which extends beyond the bounds of a traditional "contract."159 Second, Comment 7 suggests that postformation warranties must comply with section 2-209 on subsequent modifications. White and Summers may have regarded the reference to agreement in 2-209160 as describing a bilateral contract instead of the more expansive definition of "agreement" in section 1-201(3).161 Finally, Comment 7 contains a parenthetical illustration: "(as when the buyer when

156. J. White & R. Summers, supra note 3, at 338.
157. U.C.C § 2-313 Comment 7 (emphasis added).
158. U.C.C § 1-201(3) states: "'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance . . . ."
159. See notes 26-46 supra and accompanying text.
160. U.C.C. § 2-209(1) provides: "An agreement modifying a contract within this article needs no consideration to be binding." White and Summers believed that an agreement of modification had a "bilateral connotation." J. White & R. Summers, supra note 3, at 338.
161. See text accompanying note 31 supra.
taking delivery asks and receives an additional assurance.”
Certainly, this illustration suggests a bilateral connotation. Yet, there is no suggestion that the expression is anything more than illustrative.

The same illustration is apparently the basis for additional restrictions which the authors place upon such a warranty. They say that the comment seems to contemplate only “face-to-face dealings that occur while the deal is still warm.” It taxes credulity to suggest that the parties could not enter into a subsequent modification amounting to an express warranty by mail or telephone. In fact, such suggestion is clearly contrary to other Code policies.

The restriction requiring express warranties to be made “while the deal is still warm” is severe. Apparently, the authors are only comfortable with postformation warranties that literally comply with the parenthetical illustration in Comment 7. They would recognize as warranties only those statements made prior to the time “the buyer had passed the seller’s threshold . . . or until some other necessarily arbitrary limit.” Since White and Summers believe that even allowing these statements to be warranties “does some violence to normal contract doctrine,” they “would urge a different rule for seller’s statements made more than a short period beyond the conclusion of the agreement.” This pronouncement is of particular significance because it concludes that “agreement” is a “contract” in the classical sense of that term and assumes that the precise moment when an agreement is concluded can be determined under classical contract law. Yet Article 2 makes it clear that such a precise determination is not only unnecessary but, in the language of Comment 7, is also “not material.” It is material to White and Summers only because they have rejected the possibility that the concept of “bargain” in “basis of

162. U.C.C. § 2-313 Comment 7.
164. See, e.g., U.C.C. § 2-204(1) (“A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”); U.C.C. § 2-206(1)(a) (“Unless otherwise unambiguously indicated by the language or circumstances (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.”).
166. Id.
167. See U.C.C. § 2-313 Comment 7. Moreover, the parenthetical expression in Comment 7 is merely illustrative. Cf. U.C.C. § 2-204(2) (An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.).
the bargain" is not the classical concept.168

The authors restrict the recognition of postformation warranties even further. They argue that since Comment 7 requires all such warranties to meet the requirements of section 2-209, these warranties must also comply with the statute of frauds.169 They suggest that this provision is ambiguous and can be read as prohibiting postformation warranties.170 This argument is unpersuasive for two reasons. First, the reference in Comment 7 to section 2-209 does not necessarily mean that all postformation warranties must adhere to that section. It is not the only basis for recognizing these warranties. The U.C.C. drafters probably include 2-209 in Comment 7 so that the legal world would feel comfortable with the new provision. An expanded concept of bargain which is not burdened by pre-Code, classical contracts notions is a radical departure from the understanding and vested interest learning of lawyers prior to enactment of the Code.171 To argue that a warranty action transcends classical contracts notions may suggest something akin to a legal space odyssey for the lawyer or judge who is comfortable only within the ambit of the logical structure of

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168. An illustration will demonstrate the extremely restricted nature of postformation warranties under the White and Summers view. A buyer of one of the new Chrysler K automobiles contracts to purchase one even before all of the literature and advertising is published. The car is delivered and only after delivery does the buyer read subsequent advertising or literature containing affirmations of fact about the car. One or more affirmations is not true with respect to this car, though it is true in relation to other exact models of the K car. The manufacturer simply did not include one or more pieces of standard equipment which the advertisement or literature indicates the buyer should have received with his car and which, in fact, all other new K car owners have received. It would be grossly unfair to deprive the buyer of a remedy merely because they were not "bilateral." In the same vein, if this buyer contracted at such an early time that the literature and advertising were not available until a month or more after he signed the contract document, the court should not accept the White and Summers view that the "short period" for postformation warranties had expired before the buyer read the statements. Similarly, it would violate the spirit of the Code if statements that were contained in literature or advertisements were not express warranties merely because the statements were not "face-to-face."

169. See U.C.C. § 2-209(3). ("The requirements of the statute of frauds of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.")


171. As Nordstrom suggests, warranty protection was always viewed as available under a contracts rubric. R. NORDEROM, supra note 11, at 225. The classification of warranty protection as contractual was based upon the felt necessity to characterize the cause of action as sounding either in contract or tort. Therefore, if a breach of warranty action was brought, all of the baggage of contract law seemed indispensable to that cause of action.
classical contract law. Absent extensive commentary to 2-313 describing the expanded concept of bargain, the suggestion that postformation affirmations may be express warranties required a device to uphold the symmetry of the classical contracts structure—the subsequent modification device. Although the ardent followers of classical contract doctrine could view even this as radical, there were many criticisms of the pre-existing duty rule by lawyers and judges who appeared otherwise committed to classical contract theory. Therefore, it was, itself, an acceptable change, and it could also satisfy the longing for symmetry with respect to postformation warranties. To suggest, however, that the subsequent modification concept is the only basis for recognizing postformation warranties reveals a total misunderstanding not only of the "basis of the bargain" concept as used in 2-313, but of the whole thrust of the expanded concept of the "bargain-in-fact" of the parties which Article 2 emphasizes.

Second, White and Summers, in their separate discussion of 2-209(3) and related sections, argue for an interpretation which, at least in the typical case, would not create a statute of frauds bar to the recognition of postformation express warranties. Yet, they append to it a discussion of postformation warranties in a foreboding fashion. They contend that a modification must be in writing if it brings the deal within the Statute of Frauds section for the first time, as when the price is

172. These people are comfortable even though that structure may have been largely the ingenious creation of a few well-known legal scholars and judges. The clearest example of this creation of classical contract law is the theory of consideration that Holmes enunciated in his lectures. O. HOLMES, THE COMMON LAW 227-46 [1881] (M. Howe ed. 1963). Differing perspectives exist as to the source of Holmes's theory. Compare G. GILMORE, DEATH OF CONTRACT 20 (1974) ("Holmes was, quite consciously, proposing revolutionary doctrine and was not in the least interested in stating or restating the common law as it was.").

173. See, e.g., Rye v. Phillips, 203 Minn. 567, 569, 282 N.W. 459, 460 (1938). Mr. Justice Stone's opinion contained the following dicta in describing the pre-existing duty rule: "[I]t is one of the relics of antique law which should have been discarded long ago. It is evidence of the former capacity of lawyers and judges to make the requirement of consideration an overworked shibboleth rather than a logical and just standard of actionability." Id. See also Person, The Rule in Foakes v. Beer, 31 Yale L.J. 15 (1921).

174. See notes 26-46 supra and accompanying text.

175. See J. WHITE & R. SUMMERS, supra note 3, at 42-44.

176. Id. at 44.
raised above $500, if the modification falls in 2-201 on its own, or if it changes the quantity term.\textsuperscript{177} It is clear that the authors are not comfortable with postformation warranties, and are eager to identify, and even exacerbate, all of the conceivable obstacles to the recognition of such warranties.

The refusal of a court to recognize postformation warranties on any of these bases manifests adherence to an outworn notion of bargain not contemplated by the Code. Moreover, it ignores the critical test set forth in Comment 7—the only Code language to guide a court in this area—that such language or samples or models may fairly be regarded as part of the contract.\textsuperscript{178} A buyer expects to receive not only that which the seller agrees to provide in statements made before or immediately after the deal, but also that which all other buyers, similarly situated, receive as part of their deals for the identical product. It would be quite difficult to convince buyers that they are not entitled to the features they learn about some time, even a relatively long time, after the contract is formed. It would be virtually impossible to convince buyers that a seller who refuses to provide the features that the seller promised to provide, albeit after the time of contract formation, is operating in good faith and is not simply using technical arguments to avoid delivering "what it is that the seller has in essence agreed to sell."\textsuperscript{179} If good faith is a requirement which all commentators, including White and Summers, insist is omnipresent in the Code,\textsuperscript{180} it is impossible to regard a seller's refusal to perform such postformation warranties as honest, commercially reasonable, and ultimately fair conduct.

The inevitable conclusion of White and Summers is that the "basis of the bargain" test does not and should not change the outcome in any case.\textsuperscript{181} After all, "[w]hy should one who has not relied on the seller's statement have the right to sue?"\textsuperscript{182} Their prediction that the reliance requirement is and always will be a part of the express warranty analysis may un-

\textsuperscript{177} Id. However, postformation warranties do not typically refer to quantity or price changes, but rather relate to the quality or performance of the product.

\textsuperscript{178} U.C.C. § 2-313 Comment 7 provides: "The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract."

\textsuperscript{179} U.C.C. § 2-313 Comment 4.

\textsuperscript{180} See notes 218-23 infra and accompanying text.

\textsuperscript{181} J. White & R. Summers, supra note 3, at 338-39.

\textsuperscript{182} Id.
fortunately be correct. Since courts tend to rely heavily upon their important work, their prediction may be a self-fulfilling prophecy.

B. THE NORDSTROM ANALYSIS

The other reliable and sound presentation of sales law is the significant contribution of Professor Robert Nordstrom. The Nordstrom analysis of "basis of the bargain" is diametrically opposed to the White and Summers analysis. Nordstrom recognizes that section 2-313(1) is a dramatic change from section 12 of the Uniform Sales Act. He asserts that the Code simply "dropped the reliance test" regarding express warranties and substituted a "basis of the bargain" test. Nordstrom clearly rejects any allegiance to pre-Code contract principles in his attempt to unravel the mystery of "basis of the bargain."

The word 'bargain' is not encrusted with pre-Code concepts which had attached themselves to contract formation—notions that a contract came into existence at some specific point in time, some split second when offer and acceptance coincided, thereafter to be binding unless a new contract complete with the trappings of agreement and consideration superseded the old one. The Code's word is 'bargain'—a process which can extend beyond the moment in time that the offeree utters the magic words, 'I accept.'

This is the essence of the Nordstrom analysis. He rejects the limitations on postformation warranties that White and Summers suggest. For example, if a seller makes a statement about the goods after the formation of a classically defined "contract," Nordstrom suggests that a court could enforce the express warranty as a subsequent modification. The lack of any bilateral understanding between the parties does not trouble him.

Nordstrom recognizes postformation warranties either because they are included in the expanded concept of bargain or, if a court is more comfortable with a traditional analysis, because they are subsequent modifications of a bargain already made. If the modification basis is chosen, he assumes the purchaser will invariably consent to extended warranty protection, thus making the statement an effective modification under

183. See R. Nordstrom, supra note 11.
184. Id. at 205.
185. Id. at 206.
186. Id. at 206-07.
187. He notes that "it is reasonable to assume that a buyer would agree to an expansion of his warranty protection." Id. at 207.
188. Id. As noted above, the subsequent modification analysis is superfluous. See notes 171-74 supra and accompanying text.
section 2-209. He uses the same rationale to overcome an obstacle which is very troublesome to White and Summers; if the postformation warranty is effective, postformation disclaimers should arguably be equally effective. Nordstrom effectively disposes of this problem by assuming that the buyer would not consent to a restriction on his existing warranty protection.

In dealing with a seller's preformation statements that the buyer does not read or learn of until after the traditional contract is formed, Nordstrom abandons this subsequent modification rationale, but still concludes that such statements are express warranties. Unfortunately, his rationale is not persuasive.

What is involved are a product and an injury, either to a person or to property. The court's task is to determine whether that injury was caused by a defect in the product, and any statements made by the seller designed to induce the public to buy his product are relevant in making this determination. The 'basis of the bargain' includes theickered terms but is not limited to them. The 'basis of the bargain' is also the item purchased, and a part of that bargain includes the statements which the seller made about what he sold.

The conclusory nature of Nordstrom's analysis is troublesome. He essentially states that all of the statements of fact about the goods made by the seller become part of the basis of the bargain because they become part of the basis of the bargain. One possible interpretation of this rationale suggests a strict liability notion, that is, every factual statement the seller makes about the product will become part of the basis of the bargain because the seller should bear the risk of any such statements; the buyer should not be put to a burden of persuasion or proof which might involve reliance, inducement, or the like. Yet, if this is the correct interpretation, why should the seller assume such absolute liability for any statement of fact relating to the goods? Instead, it would be preferable to rely on the rationale that Nordstrom proposes for postformation warranties—assume the buyer would agree to include the statement in the bargain. The buyer will certainly have become familiar with any statement of the seller before the buyer makes his claim for breach of express warranty. It seems reasonable to assume that the buyer would consent to any extension of his warranty protection, whether the statements were

189. Id. at 207.
190. See J. White & R. Summers, supra note 3, at 446.
191. R. Nordstrom, supra note 11, at 207.
192. Id. at 207-09.
193. Id. at 209.
made after the contract was formed or had been made prior to formation though the buyer was unaware of them.

The major weaknesses in Nordstrom's analysis are his overemphasis on factual differences and his resulting refusal to declare that reliance is not an essential element of the U.C.C.'s novel "basis of the bargain" test. In discussing whether a seller can successfully argue that a statement is not an express warranty because there was no reliance, Nordstrom states only that one must make a careful analysis of the factual pattern. The excessive weight that Nordstrom attaches to myriad factual patterns may be the cause of its lack of success. The three "principles" that Nordstrom finds in the Code, designed to assist courts in deciding whether there is an express warranty, reflect this overemphasis. First, the court must determine, under all surrounding circumstances, whether the seller's statement was a statement that the buyer should have reasonably interpreted as a warranty. Moreover, the Code does not require that the statement be the sole basis for the bargain; it merely has to be "a part of the basis of the bargain." Finally, the statement must be "a part of the basis of the bargain." If the resulting bargain does not rest upon the statement even in part, the statement will not become an express warranty.

An example that illustrates the last "principle" is indicative of the other Nordstrom examples:

The buyer who examines and discovers a defect could conceivably also be purchasing without a warranty that a seller's prior affirmation would

194. In discussing whether reliance is an essential element, Nordstrom declares: "This question is not easily answered, in large part because of the varying factual patterns which can present it." Id. at 205.

195. "As the facts change, so may the result." Id. at 210. Nordstrom later reiterates his belief that different factual situations can engender different results. "[N]o single rule can provide an answer to all of these factual patterns." Id.

196. The typical judicial reaction to the problem of the "basis of the bargain" mystery is to divide courts and authorities into reliance and no-reliance camps. See notes 123-26 supra. The Nordstrom analysis is often simply and incorrectly cited as support for the latter view. Even a court which recognized the Nordstrom concept of the expanded meaning of bargain belied its understanding of that concept in its holding. See Autzen v. John C. Taylor Lumber Sales Inc., 280 Or. at 788, 572 P.2d at 1326. For further discussion of Autzen, see notes 74-87 supra and accompanying text. The confusion attributable to Nordstrom's overemphasis of factual differences illustrates the difficulty in using Nordstrom's approach.

197. R. NORDSTROM, supra note 11, at 210.

198. Id.

199. Id. at 211.

200. Id.
have created. This result (no warranty) ought to be reached only if the
trier of fact is convinced that the representation formed no part of the
basis of the bargain.201

How does the trier of fact decide whether a representation
was or was not a part of the basis of the bargain? The only an-
swer provided by the final Nordstrom analysis is that the ques-
tion is one of fact.202 Thus, even Nordstrom's analysis,
designed to enlighten courts, reverts to an excessive depen-
dence on the facts.

Among all of the writers who have attempted to explain
"part of the basis of the bargain," Nordstrom stands alone in
recognizing that the concept of bargain transcends classical
limitations. It is the most promising analysis because it re-
quires a new and perhaps radical perspective by both courts
and lawyers if a workable description is to be determined. Yet,
it fails because Nordstrom does not supply the kind of guidance
which courts and lawyers can use. The analysis becomes so
mired in factual diversity that it suggests a non-analysis. Since
Nordstrom himself cannot proceed beyond this point, even the
one court which might have recognized the wisdom of his ex-
panded concept of bargain had insufficient guidance to pursue
the analysis.203 Courts have felt compelled to resort to tradi-
tional guides, or to substitute new terms which scarcely hide
their return to orthodox tests.204

V. SOLUTION

The key to understanding the "basis of the bargain" test is
a recognition, pursuant to the initial work of Nordstrom, that
"bargain" transcends earlier connotations. One must, however,
be more specific than Nordstrom. It is important to set forth, as
precisely as possible, a workable test to determine its opera-
tion. The test which courts must use is a familiar test: What
are the reasonable expectations of the buyer? The reasonable
expectations of the buyer are not relegated to those induced by

201. Id. at 212. Cf. B.W. Feed Co. v. General Equip. Co., 44 Or. App. 467, 605
P.2d 1205 (1979) (The seller supplied a truck with 5 to 7 ton capacity which
buyer examined. The truck did not comply with the capacity warranted. The
trier of fact determined that through examination the buyer knew that the
truck did not have 5 to 7 ton capacity; held no express warranty.).
202. R. Nordstrom, supra note 11, at 212.
203. See Autzen v. John C. Taylor Lumber Sales, Inc., 280 Or. 783, 572 P.2d
1322 (1977); notes 74-87 supra and accompanying text. Perhaps the Nordstrom
analysis is not cited more often because, as indicated, it does not give adequate
guidance to courts. See note 196 supra and accompanying text.
770 (3d Cir. 1977); notes 48-55 supra and accompanying text.
the seller's promise. Nor are they relegated to those expectations which the buyer also relied upon in making the purchase. Rather they are those expectations created by all of the "affirmations of fact made by the seller about the goods during a bargain."205 Since the duration of the bargain in Article 2 transcends the classical concept of bargain,206 this test will protect those reasonable expectations that a seller's statements create, regardless of when those statements were made or when the buyer learned of them.207 Up to this point, this Article has merely argued that one should enforce postformation statements, and preformation statements that the buyer does not learn of until after formation, because Article 2 dictates that result. Given this suggested test of reasonable expectations, however, one discovers other rationales.

In their classic analysis of the interests protected by contract remedies, Fuller and Perdue develop reasons to protect a party's expectation interest, despite nonreliance upon the promise.208 They argue that a "psychological" justification,209 a "will theory,"210 and an economic or institutional approach211

205. U.C.C. § 2-313 Comment 3.
206. See notes 32-46 supra and accompanying text.
207. For a detailed analysis of the assertion that a seller's statements made outside the classical bounds of a bargain engender reasonable expectations that should be protected, see notes 223-31 infra and accompanying text.
208. Fuller & Perdue, The Reliance Interest in Contract Damages, 46 YALE L.J. 52 (1936). As noted earlier, White and Summers believe that if there is no reliance, there can be no basis for the buyer to recover: "Why would one who has not relied on the seller's statement have the right to sue?" J. WHITE & R. SUMMERS, supra note 3, at 339. This question is a virtual paraphrase, presumably unintended, of the same question posed by Fuller and Perdue: "[W]hy should a promise which has not been relied on ever be enforced at all . . . ?" Fuller & Perdue, supra, at 57. Unlike White and Summers, Fuller and Perdue do not ask the question rhetorically. They develop the philosophical and economic bases for the protection of the expectation interest. See id. at 57-66.
209. Id. at 56-57. This rationale suggests that one should protect an expectation interest to avoid disappointment or the feeling that the promisee has been deprived or cheated. They conclude this is reasonable, but not the key to the problem.
210. Id. at 57. This rationale suggests that the contracting parties have, in effect, produced legislation that should be enforced. Although they conclude this too is reasonable, it is still an insufficient explanation.
211. Id. at 59. The economic or institutional approach provides a more promising solution. Since a credit economy tends to eliminate the distinction between present and future, "[e]xpectations of future values become, for purposes of trade, present values." Id. See MacNeil, The Many Futures of Contract, 47 S. CAL. L. REV. 691, 800 (1974). For a recent economic analysis of the basis for enforcing promises, see Goetz & Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 YALE L.J. 1261 (1980). Since expectancies in such an economy are regarded as a kind of property, a breach of promise is an actual injury to that property. Yet, promises were enforced before any general system of credit was conceived. Therefore, the economic or institutional justifi-
are insufficient, but find an acceptable basis in their "juristic" explanation. Their juristic approach reveals three distinct reasons to protect the expectation interest.

The first principle is that one should compensate buyers for the opportunities they lose and the gains they are prevented from achieving because of the seller's statements. Fuller and Perdue argue that the cure for these typically immeasurable losses "may justify a categorical rule granting the value of the expectancy as the most effective way of compensating for such losses." Secondly, the protection of the expectation interest may also be "a prophylaxis against the losses resulting from detrimental reliance." The expectation interest is a more easily administered measure of recovery than the reliance interest. Therefore, it offers a more effective sanction against breach. Finally, Fuller and Perdue contend that protecting the expectancy promotes and facilitates reliance on business agreements. If business agreements could be invalidated by asserting a lack of reliance, a "business man knowing, or sensing that [this] stood in the way of judicial relief would hesitate to rely on a promise in [a] case where the legal sanction was of significance to him." Requiring proof of reliance, in effect, decreases reliance.

The U.C.C. suggests one more rationale for protecting the expectation interest, the desire to encourage "good faith" bargaining. The U.C.C. defines "good faith" in two sections. The cation for the protection of the expectation interest may be viewed as a *petitio principii*, that is, the protection of the expectation interest is the result rather than the cause of legal intervention. Fuller & Perdue, *supra* note 208, at 59-60.


213. Fuller and Perdue argue that a narrow conception of reliance would protect the promisee against out-of-pocket losses, a clearly measurable quantity caused by the breach of promise. But there are other aspects of reliance, "often very numerous and difficult to prove," which add to the "total reliance" of the promisee. *Id.* at 60.

214. *Id.*

215. *Id.* at 61.

216. The authors suggest that enforcing a promise which has not been relied upon has the same justification "as an ordinance which fines a man for driving through a stop-light when no other vehicle is in sight." *Id.*

217. *Id.* at 62.

218. In addition to this rationale, the U.C.C. also indicates that it supports the reasonable expectations of a party in its remedy provisions. The U.C.C. directs courts to place the aggrieved party in as good a position as if the other party had fully performed, U.C.C. § 1-106(1), with the added directive that they should reject any doctrine which requires mathematical certainty: "Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more." U.C.C. § 1-106 Comment 1. Specific U.C.C. remedies, including the remedy for breach of
general definition, applicable to all articles, is in section 1-201(19): "'Good faith' means honesty in fact in the conduct of transaction concerned." The Article 2 definition, pertaining to the sale of goods, is in section 2-103(1) (b): "'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The basic statutory "good faith" requirement for all U.C.C. transactions is in section 1-203: "Every contract or duty within this Act imposes an obligation of good faith in its performance and enforcement." The need for "good faith" is clear. If it was not present, commercial transactions would be seriously impeded by the resulting lack of trust. Breaking a promise, or not intending to honor it when initially setting it forth, frustrates a reasonable expectation and is not in good faith.

Given the test requiring the protection of reasonable expectations, and a justification for that test, one must ask which statements should trigger that protection. Certainly, a buyer reasonably expects to receive goods that conform to any statement of the seller when that statement has been communicated to the buyer before the sale, whether the statement is in the form of oral or written language, description, sample, or model. These are the "dickered" terms of the deal and it is more than likely that such statements have not only induced the purchase, but also that they have probably caused the buyer to rely upon them, at least to some extent, in purchasing. While these statements would have become express warranties under the most traditional pre-Code tests, these traditional tests will not permit other statements of fact by the seller to warranty, do not limit recovery to the value of the detriment incurred. If White and Summers are correct in limiting express warranties to statements of the seller which have been relied upon, the measurement, absent difficulties of measurement, should be coextensive with the reason for enforcing the seller's statement. Eisenberg, Donative Promises, 47 U. CHI. L. REV. 1, 18-31 (1979). See also J. MURRAY, MURRAY ON CONTRACTS § 91 (2d ed. 1974). There is no such limitation in the U.C.C.

219. U.C.C. § 1-201(19).
220. U.C.C. § 2-103(1) (b).
221. U.C.C. § 1-203. The Restatement (Second) of Contracts also has a good faith requirement. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).
become express warranties. Such tests are inadequate to explain the Code concept of "basis of the bargain." The reasonable buyer expects more than goods which simply conform to express warranties in the "dickered" sense. While the buyer gives his specific assent to any dickered warranty, he also gives his blanket assent to any undickered statements about the goods.223

Consider a situation where the seller makes a statement, for the first time, after a sale is concluded. This is the typical postformation statement outlined in Comment 7 to section 2-313. These postformation statements clearly fall within the suggested test. For example, suppose a seller makes a statement relating to the performance capability of a computer after it is purchased and delivered to a buyer. The buyer has a reasonable expectation that the statement is true. Moreover, all the reasons for protecting this reasonable expectation are clearly present. The buyer may forgo other opportunities which he does not even consciously consider as a result of the seller's statement. He may attempt to operate the computer according to the seller's representation and suffer some measurable loss. If the seller's statement is not enforceable, the inevitable result will be an impairment of facilitation of business arrangements. Finally, the seller's defense, in which he asserts an excuse based on the timing of his statement, would manifest obvious bad faith.

Next, consider the situation in which the seller makes a preformation statement that the buyer does not learn of until after the goods are purchased and delivered. One should initially note that this situation is virtually indistinguishable from a postformation warranty. To make it a warranty under Comment 7, the buyer would only have to ask the seller about the matter contained in the pre-existing statement and have the seller restate it. Distinguishing between a statement that the seller merely restates and a statement that the seller does not restate is antagonistic to the express antitechnical nature of Article 2.224 It also smacks of the *Slade's Case*225 rationale that

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224. For examples of the antitechnical nature of Article 2, see U.C.C. § 2-204(3) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); U.C.C. § 2-209(1) ("An agreement modifying a contract within this Article needs no consideration to be binding."); U.C.C. § 2-309(1) ("The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time."); U.C.C. § 2-206 Comment 1 ("Former
should have been overcome by now.226

These preformation statements, later heard by the buyer, are also subject to the same dangers as postformation statements. Suppose the seller has made written statements about the goods contained in a publication—for example, an owner's manual—that the buyer reads only after the goods are purchased and delivered. The manual contains a statement of various features of the goods that the buyer was not aware of prior to the purchase. Although the buyer was not specifically aware of these features prior to the sale, even before purchasing the buyer reasonably expected any statements by the seller in such a publication to be true. The buyer will not expect the product to have only those features that he or she remembers it has from reading the owner's manual. The buyer will feel oppressed227 and unfairly surprised228 if the goods do not contain the features represented in the sales literature. If the product does not meet the standards set forth in the owner's manual, the buyer will not only be disappointed, but may also forbear other opportunities that are immeasurable. Moreover, the buyer may rely upon the seller's statement in attempting to use the goods pursuant to the statement, resulting in personal injury or economic loss. If courts recognized the seller's defense that the statement cannot be a warranty because the buyer read the statement only after purchase, business arrangements would be seriously impaired. If every preformation statement had to be read or heard, if every examination of a sample or model had to be meticulously complete, and if no postformation statement in any form could be trusted, buyers would be

226. Slade's Case held that if a party breached his agreement to pay for a chattel, unless the promise was under seal, the only action was for debt. If, however, the breaching party subsequently promised to pay, the second promise would permit the action to be brought in assumpsit.
228. See U.C.C. § 2-207 Comment 4.
forced to incredible cautionary efforts before concluding the
technical contract of sale.229 Finally, a seller's defense based
on the buyer's lack of awareness230 violates the U.C.C.'s re-
quirement of good faith.231

Does this analysis reduce "part of the basis of the bargain"
to a nullity? Clearly not. One should not read section 2-313
under this analysis as making any statement relating to the
goods an express warranty, regardless of when it is made. The
comments to section 2-313 indicate that the seller may show
that the statements were not express warranties by "clear af-
firmative proof"232 or "good reason."233 The most obvious case
of "clear affirmative proof" or "good reason" is evidence of the
withdrawal of the statement prior to the closing of the deal.
For example, if the seller has made a statement relating to one
model of goods, and the buyer indicates an interest in another
model, the seller's statement that the second model does not
have the feature attributed to the first is an obvious withdrawal
of the express warranty.

A less obvious example is the implied withdrawal of an ex-
press warranty. A seller may have made statements of fact
about goods so long before the purchase that a buyer could not
reasonably expect these statements to attach to the purchased
goods. Express warranties do not last forever. Yet, their dura-
tion is extensive. The duration of the bargain begins with any
statement in advertising made by the seller, even long before
the goods are purchased, so long as the buyer can reasonably
expect that the statement is still true at the time of purchase.
Thus, any statement by the seller relating to a particular model
of automobile would continue as long as that model was sold
absent an express withdrawal of the statement by the seller
prior to the purchase.

Other illustrations of statements which do not meet the
"basis of the bargain" test include a seller's statement that the

229. Posner noted, "It is uneconomical to require people to be too careful." R. Posner, ECONOMIC ANALYSIS OF LAW 70 (2d ed. 1977).
230. Such a response would be "indecent" in Llewellyn's terms. See K. LLEWELLYN, supra note 97, at 364.
231. The dangers detailed above will also appear in other examples of unread or unheard preformation warranties. For instance, a buyer could examine a sample or model of the product before purchase, and fail to observe a particular feature. If after purchase the buyer discovers a feature of that sample, the buyer will expect the the product purchased contains that feature.
232. U.C.C. § 2-313 Comment 3.
233. Id. at Comment 8.
buyer knows is untrue.\textsuperscript{234} If an expert buyer examines the goods and discovers that the seller's statements are untrue, such a buyer cannot reasonably expect the goods to conform to the statements.\textsuperscript{235} Another situation is illustrated by the Fibres case discussed earlier.\textsuperscript{236} A description of the goods or performance specification appears, on its face, to be an obvious statement of fact relating to the goods. Yet, if there is clear, affirmative proof that the parties did not regard that statement as anything more than an aspiration—a hope, target, or goal—the buyer should have no reasonable expectation with respect to that stated specification.

While these illustrations do not exhaust the possible variations of a seller's statements that do not become part of the basis of the bargain, they do emphasize the narrow scope of escape from the broad, reasonable expectations of the buyer. Yet, even under a "rebuttable presumption" test, such as White and Summers suggest, it will be difficult for a seller to prove that his or her statements are not express warranties. Certainly, the comments to section 2-313 strongly suggest that escape from the basis of the bargain will be unusual. Most important, these illustrations of statements that are not within the basis of the bargain, together with the numerous illustrations of statements that are part of the basis of the bargain, indicate that the suggested test is workable.

To determine what is or what is not part of the basis of the bargain by determining the reasonable expectations of the buyer is not a mechanical test. Yet, no test can be mechanical if the essential question is the determination of the bargain-in-fact of the parties. It is a question of fact. But it is not a more difficult question than innumerable other questions of fact which courts decide comfortably and with familiarity. Like all such questions, there will be difficult cases and there will be dissenting views. A reasonable expectation test, however, is no more difficult than either a reliance or inducement test.\textsuperscript{237} In

\begin{itemize}
\item \textsuperscript{236} See notes 110-22 supra and accompanying text.
\item \textsuperscript{237} One could even suggest that the change in the Code over the Uniform Sales Act test under the Williston interpretation is simply whether the statement of the seller would have induced a reasonable buyer to purchase the goods had such buyer known of the statement prior to the purchase. This would be an unfortunate expression of the new test, however, since it uses the
making this determination of fact, a court must consider all of the circumstances surrounding the transaction, not restricting itself to classical concepts of contract or bargain.

VI. CONCLUSION

This Article demonstrates that a reliance or inducement test under section 2-313 is contrary to the terms of the statute and its comments. Under an expanded concept of basis of the bargain, courts should recognize both postformation warranties and preformation warranties that a buyer does not learn of until after the formation of the contract. In their "rebuttable presumption" test, severely limiting postformation warranties, White and Summers fail to discern this expanded concept. Nordstrom perceives it, but then fails to derive an adequate test. The proper analysis concentrates on and protects a buyer's reasonable expectations. This is the only test that conforms to the statutory language, the comments, and the underlying philosophy of Article 2.

term "induce" and would still require justification in terms of the suggested test: any statement of the seller about the goods to which the buyer reasonably expects his purchased goods to conform is part of the basis of the bargain and, therefore, constitutes an express warranty under U.C.C. section 2-313(1).