handling the case. We hold that this testimony was some evidence supporting the trial court's award of attorney's fees. The bank also argued to the court of appeals that there was factually insufficient evidence [**24] to support the trial court's award. That point of error is not within our jurisdiction. Therefore, we must remand the cause to [*568] the court of appeals to consider it. B*iggs v. United States Fire Insurance Co., 611 S. W.2d 624 (Tex. 1981)*.

We affirm the court of appeals in reversing the award of additional damages under the DTPA. We reverse the judgment of the court of appeals and affirm the trial court's judgment for actual damages. We remand the cause to the court of appeals to consider the factual sufficiency of La Sara's evidence on attorney's fees. The court of appeals, after considering that point, is to remand the cause to the trial court to recalculate prejudgment interest in accordance with art. 5069-1.03 as amended.[6]

6 According to the judgment of the trial court, Fidelity is entitled to 20% of La Sara's judgment against the bank.

¿ El banco acá actuó con una actitud de rigor y honestidad en todos los actos y los hechos?

I. ARTÍCULO 2 SOBRE LA COMPRAVENTA

A. SU APLICACIÓN EN NEGOCIOS JURÍDICOS MIXTOS

EL ELEMENTO PREDOMINANTE DEL NEGOCIO

BAUM TEXTILE MILL CO., INC., et al., Appellants, v. MILAU ASSOCIATES, INCORPORATED, et al., Respondents. COURT OF APPEALS OF NEW YORK 42 N. Y.2d 482; 368 N. E.2d 1247 September 8, 1977, ArguedOctober 11, 1977, Decided

OPINION BY: WACHTLER [*484] [**1248] A massive burst in an underground section of pipe,

connecting a sprinkler system to the city water line, caused substantial water damage to bolts of textiles stored in a warehouse. The plaintiffs who were commercial tenants of the building sought recovery against both Milau Associates, the general contractor which built the warehouse, and Higgins Fire Protection, Inc., the subcontractor which designed and installed the sprinkler system. The suit was brought on the alternative theories of negligence and breach of implied warranty of fitness for a particular purpose.

Evidence adduced at the trial indicated that the break followed the occurrence of a phenomenon known as a "water hammer" -- a sudden and unpredictable interruption in the flow from the city water main, followed by a back-surge and build-up of extreme internal pressure when the flow was again released. According to the plaintiffs' experts, this "hoop tension" caused a crack to develop at the root of a V-shaped notch discovered toward the end of the conduit; the fracture traveled along the length of the vulnerable section of pipe with a tearing action and the torrential result.

The "stress-raising" notch was alleged to have been produced by a dull tooth on the hydraulic squeeze cutter used by Higgins to cut sections of the commercially marketed pipe furnished by the subcontractor as specified in the work contract with Milau. Although the 400-foot-long connection had been carefully tested and had functioned properly in conjunction with the remainder of the system inside the building, only a few months in operation had caused enough rusting at the base of the notch, plaintiffs contended, to affect the integrity of the [**1249] entire system. The defendants produced offsetting expert opinion that the pipe itself was neither defective as manufactured nor improperly installed.

[*485] The Trial Judge, having denied plaintiffs' request to charge that the contractors had impliedly warranted the fractured pipe to be fit for its intended purpose, submitted the case to the jury on the sole question of negligent installation. The jury returned a verdict in favor of the defendants, finding neither want of due care by Higgins nor negligent supervision by Milau.

The textile companies contest the trial court's restrictive rulings on the law ofwarranty. They assert that the V-shaped notch found in the ruptured section of pipe is adequate proof that this crucial component of the sprinkler system supplied by Higgins was defective. It is their contention that the jury would have been justified in finding a defect in the "goods" furnished under the hybrid sales-services contract without necessarily finding negligence on the part of either defendant. The plaintiffs argue that this defect made the pipe unfit for its intended purpose and that they were entitled to have the jury decide whether there was a breach of an implied warranty under *section 2-315 of the Uniform Commercial Code* or by application of common-law warranty principles.

The majority at the Appellate Division found the record to be "devoid of any evidence that the pipe installed by Higgins was unfit for its intended purpose" (*56 AD2d 587, 588)*, and concluded that neither the code nor the case law could be invoked to grant the extension of warranty protection sought by the plaintiffs. While we agree with this result, we have some difficulty with that court's caveat that, "in a proper case, the implied warranty provisions of the Uniform Commercial Code might apply to the sale of goods' aspect of a hybrid sales-services contract (see *Schenectady Steel Co. v Trimpoli Gen. Constr. Co., 43 AD2d 234* [concurring opn by Greenblott, J.], affd *34 NY2d 939*)." (56 AD2d 587-588.)

The sales-services dichotomy has been recognized and developed from the days of the law merchant. * In a more contemporary formulation, this court in *Perlmutter v Beth David* [*486] *Hosp. (308 NY 100, 104)* held that, " when service predominates, and transfer of personal property is but an incidental feature of the transaction", the exacting warranty standards for imposing liability without proof of fault will not be imported from the law of sales to cast purveyors of medical services in damages. In that case we held that this prohibition could not be circumvented by conceptually severing the sale of goods aspects of the transaction from the overriding service component so that a hospital's act of supplying and even separately charging for impure blood plasma could not in logic or common sense be separated from a physician's contribution in administering the plasma during the course of treatment. Viewed in its entirety, we held in *Perlmutter* that the transaction could not be characterized in part or in its underlying nature as one for the sale of goods, for Mrs. Perlmutter had checked into the hospital to restore her health, not to purchase blood.

* From its inception, the "English rule" served as a basis for applying the commercial law of sales whenever a transaction resulted in a transfer of chattels. Applying this formulation in *Lee v Griffin* (1 B & S 272; 121 Eng Rep 716 [KB, 1861]), Justice Blackburn held that a contract to manufacture and fit a set of false teeth was subject to sales remedies. Courts in this country, however, generally followed the "labor rule", under which the law of sales would not be applied if the contract required a workman "to put materials together and construct an article for the employer" *(Mixer v Howarth, 38 Mass [21 Pick] 205, 207 [1838])*.

The fact that in *Perlmutter* our "service predominates" analysis led to a conclusion of law which was also

supported by policy considerations peculiar to the impure blood cases does not strip its analytic approach of vitality. The court made no attempt to mask the fact that reallocating the risk of loss by imposing warranty liability on no greater proof than the adverse result itself would place untoward economic and health-care [**1250] burdens on hospitals and patients alike. However, the court's sensitivity to these policy considerations, rather than restrict the scope of its holding, should suggest the need to assess all hybrid transactions along the sales-services continuum both legally and pragmatically.

As suggested in *Perlmutter,* those who hire experts for the predominant purpose of rendering services, relying on their special skills, cannot expect infallibility. Reasonable expectations, not perfect results in the face of any and all contingencies, will be ensured under a traditional negligence standard of conduct. In other words, unless the parties have contractually bound themselves to a higher standard of performance, reasonable care and competence owed generally by practitioners in the particular trade or profession defines the limits of an injured party's justifiable demands (e. G., *Aegis Prods. v Arriflex Corp. of Amer., 25 AD2d 639* [recognizing that in cases where "the service is performed negligently, the cause of action accruing is for that negligence", and "if it constitutes a breach of contract, the action is for that breach"]).

[*487] The parties to the contract underlying this action were perfectly free at the outset, although not after the fact, to adopt a higher standard of care to govern the contractors' performance. Indeed, under a subcontract in which Higgins undertook to design and put together a sprinkler system tailored to the needs of the commercial tenants, the subcontractor was obligated to "Furnish and install [a] wet pipe sprinkler system all in accordance with the requirements of the New York Fire Insurance Rating

Organization, including * * * One (1) 8" City water connection from pit at property line to inside of factory building". Additionally, by affixing its corporate signature to the standard form construction subcontract, the fire protection specialist "expressly warranted" that "all * * * materials and equipment [which it] furnished and incorporated [would] be new" and that "all *Work* under this Subcontract shall be of good quality, free from faults and defects and in conformance with the Contract Documents. All *Work* not conforming to these standards may be considered defective" (emphasis added).

Section 2-313 of the Uniform Commercial Code requires that a "seller's" affirmation of fact to a "buyer" be made as part of the basis of the bargain, that is, the contract for the sale of goods. The express warranty section would therefore be no more applicable to a service contract than the code's implied warranty provisions. Of course, where the party rendering services can be shown to have expressly bound itself to the accomplishment of a particular result, the courts will enforce that promise (e. G., *Robins v Finestone, 308 NY 543*; *Frankel v Wolper, 181 App Div 485*, affd *228 NY 582*).

Here the textile company plaintiffs had the opportunity to plead and test the construction of the written warranty provided in the work subcontract at the trial level. They opted instead to prove fault, and if that failed, to seek enforcement of a warranty imposed by law for the sale of goods unfit for their intended purpose. They were unable to convince a jury that Higgins had performed negligently. And they failed as well to demonstrate that the work subcontract was anything other than precisely what the parties had understood it to be: an agreement outlining the materials to be employed and the performance obligations to be assumed by a construction specialist hired to install a sprinkler system. Both the subcontract and the agreement

between Milau and the owner were on their face and at heart no more than a series of performance [*488] undertakings, plans, schedules and specifications for the incorporation of the specialized system during the erection of a building -- a predominantly labor-intensive endeavor. In the final analysis, the parties contemplated the workmanlike performance of a construction service. The fact that something went wrong less than six months after that service was performed does not change the underlying nature [**1251] of the agreement governing its performance.

Given the predominantly service-oriented character of the transaction, neither the code nor the common law of this Statecan be read to imply an undertaking to guard against economic loss stemming from the nonnegligent performance by a construction firm which has not contractually bound itself to provide perfect results (see *Schenectady Steel Co. v Trimpoli Gen. Constr. Co., 43 AD2d 234, 238-239*; *id., pp 239-240* [Cooke, J., concurring in part] ; *Ben Constr. Corp. v Ventre, 23 AD2d 44*; see, also, *North Amer. Leisure Corp. v A & B Duplicators, Ltd., 468 F2d 695*; 1 Anderson, Uniform Commercial Code [2d ed], §§ 2-102:5, 2-105:10; 1955 Report of NY Law Rev Comm, p 361). In fact,where courts in other jurisdictions have purported to apply an implied warranty of fitness to transactions which in essence contemplated the rendition of services, what was actually imposed was no more than a "warranty" that the performer would not act negligently (e. G., *Bloomsburg Mills v Sordoni Constr. Co.,* 401 Pa 358), or a warranty of workmanlike performance imposing only the degree of care and skill that a reasonably prudent, skilled and qualified person would have exercised under the circumstances (e. G., *Union Mar. & Gen. Ins. Co. v American Export Lines, 274 F Supp 123*; *Pepsi Cola Bottling Co. v Superior Burner Serv. Co., 427 P2d 833*

[Alaska]), or an implied warranty of competence and ability ordinarily possessed by those in the profession *(Wolfe v Virusky, 306 F Supp 519*). (See, generally, Greenfield, Consumer Protection in Service Transactions -- Implied Warranties and Strict Liability in Tort, 1974 Utah L Rev 661, 668-673.) The performance of Higgins and Milau was tested under precisely this standard and found free from any actionable departure.

To be sure, particularly in cases involving personal injury, the absence of an enforceable contractual relationship for the technical sale of goods will not necessarily result in the foreclosure of all remedies, at least where the policies favoring the imposition of strict tort liability for the marketing of [*489] defective products are present (see, e. G., *Victorson v Boch Laundry Mach. Co., 37 NY2d 395*; *Velez v Craine & Clark Lbr. Corp., 33 NY2d 117*) or where manufacturing misjudgments create an unreasonably dangerous condition (see *Micallef v Miehle, Co., 39 NY2d 376*). However, in the products liability cases, " [rather] than arising out of the will or intention of the parties', the liability imposed on the manufacturer * * * is predicated largely on considerations of sound social policy" *(Victorson v Boch Laundry Mach. Co., supra, p 401*, quoting *Codling v Paglia, 32 NY2d 330, 340-341)*, including consumer reliance, marketing responsibility and the reasonableness of imposing loss redistribution. Yet the language and policies of the tort-based cases "should not be understood as in any way referring to the liability of a manufacturer [or tradesman] under familiar but different doctrines of the law of contracts for injuries sustained by a customer or other person with whom or for whose benefit the manufacturer previously has made a warranty or other agreement, express or implied" *(Victorson v Boch Laundry Mach. Co., supra, p 400*).

The appellants here, however, had at no time in the course of litigation sought to invoke these doctrines to redress their no less real but somehow less impelling economic loss. Additionally, to a much greater extent than professionals and tradesmen in the services arena where standards are usually set contractually, sellers of goods typically encourage mass public reliance on their products' fitness and safety through advertising, packaging and other promotional [**1252] devices. This phenomenon is reflected in the fact that the code's warranties attaching to sales of goods are underpinned by an assumption of some form of reasonable reliance by the unleveraged buyer.

No such situation presents itself here and we can find no reasonable basis in policy or in law for reading what would amount to a warranty of perfect results into the contractual relationships defined by the parties to this action.

Accordingly, the order of the Appellate Division should be affirmed.

 ¿ El negocio jurídico en este caso consistió preponderantemente en la provisión de servicios, materia jurídica reglamentada por la lex generalis del common law, o en la venta de mercadería, materia a la que se debe aplicar la lex specialis del Artículo 2 sobre la compraventa de bienes?

 CHRISTOPHER ROTTNER, individually and on behalf of others similarly situated v. AVG TECHNOLOGIES USA, INC.; AVG TECHNOLOGIES CZ, S. R. O.; and AUSLOGICS SOFTWARE PTY LTD. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS 943 F. Supp. 2d 222; 80 U. C. C. Rep. Serv. 2d 730 May 3, 2013, Decided May 3, 2013, Filed

OPINION BY: STEARNS, D. J. In this proposed class action, plaintiff Christopher Rottner, individually and on behalf of others alleged to be similarly situated, seeks to sue the makers and distributors of AVG PC TuneUp software. Rottner claims that defendants AVG Technologies USA Inc. (AVG US), AVG Technologies CZ, S. R. O. (AVG CZ), [**2] and Auslogics Software Pty Ltd., falsely touted the features of PC TuneUp, thereby inducing computer users to purchase software that did not perform as advertised. AVG US and AVG CZ [1] move to dismiss Rottner's Second Amended Complaint (SAC) [2] pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state claims for which relief may be granted.

1 Auslogics has not yet appeared in this action.

2 Rottner was substituted for Dale Theis as the lead plaintiff in the SAC.

BACKGROUND

PC TuneUp is software advertised to optimize a computer's performance by scanning the operating system and removing and fixing harmful errors. Auslogics, an Australian company that designs, creates, sells, and licenses computer software, is responsible for the design and development of the architecture underlying PC TuneUp. The AVG family of companies sells computer security and related software. AVG CZ, located in the Czech Republic, licensed the PC TuneUp technology from Auslogics. AVG CZ markets and sells PC TuneUp within the United States and elsewhere through a website, www. Avg. Com. AVG US, a sister company incorporated in Delaware with its headquarters in the Commonwealth of Massachusetts, is responsible for retail [**3] store and reseller channel sales of PC TuneUp in the United States. AVG US also assists in the maintenance of the www. Avg. Com website and reviews marketing statements posted on the site.

Rottner is a resident of California. In February of 2012, Rottner's computer began malfunctioning -- its speed and performance decreased, and the system sometimes hanged when opening programs. The internet speed also appeared sluggish. Rotter searched for software that would [*225] repair the internal problems and boost the computer's overall performance. His search turned up an advertisement for a free trial of PC TuneUp, which, in turn, led to the www. Avg. Com website. The website claimed that PC TuneUp would boost internet speed, eliminate freezing and crashing, optimize disk space and speeds, extend battery life, protect privacy, monitor hard drive health, and restore the PC to its peak performance.

Rottner downloaded, installed, and ran the trial version of PC TuneUp. The diagnostic scan reported critical errors on Rottner's computer. PC TuneUp then reported that it had repaired these errors, and advised Rottner to perform weekly scans of his computer to maintain and increase its performance. Rottner, relying [**4] on the representations made by PC TuneUp, purchased and installed the full version of the software. [3] However, the weekly scans did not resolve Rottner's computer problems -- his PC continued to suffer from reduced speed and sluggish performance, freezing, and tortoise-like internet access. Rottner also observed that the installation of the full version of PC TuneUp led to no significant improvement in his PC's performance.

3 During the purchase and installation process, Rottner accepted the mandatory End User License Agreement (EULA). Dkt # 50 at 2.

In November of 2012, Rottner contacted AVG and complained about his problems with PC TuneUp. AVG told Rottner to download a recent update of the PC TuneUp software. [4] After downloading, installing, and running the

update, Rottner's computer completely froze. When Rottner attempted to reboot the computer, a Windows message told him that a problem had been detected and that Windows would automatically shut down to prevent further damage to his computer. To restore his PC to working condition, Rottner had to fully reformat his hard drive -- losing various personal files in the process -- and reinstall the Windows operating system.

4 The SAC does [**5] not specify whether Rottner contacted AVG CZ or AVG US. At the hearing, however, counsel stated that Rottner made his initial complaint to AVG US.

Rottner alleges that defendants falsely inflated PC TuneUp's capabilities to induce consumers to purchase the software. Rottner's counsel retained a computer forensics expert who concluded that the trial version of PC TuneUp consistently reported that a tested PC suffered from multiple problems regardless of its actual health, exaggerated the number of errors found on the computer, characterized all listed problems as severe, and always proposed weekly scans with the full to-be-purchased version of PC TuneUp as the only viable cure. Rottner alleges six causes of action against the AVG defendants: breach of express warranty pursuant to *Mass. Gen. Laws ch. 106, § 2-313* (Count I); breach of the implied warranty of merchantability pursuant to *Mass. Gen. Laws ch. 106, § 2-314* (Count II); fraudulent inducement (Count III); breach of contract (Count IV); breach of the implied covenant of good faith and fair dealing (Count V); and unjust enrichment (Count VI). [5] The AVG defendants move to dismiss all counts in which they appear for failure to state [**6] a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*. The court heard oral argument on April 30, 2013.

5 Rottner also alleges a separate count of unjust enrichment against Auslogics.

DISCUSSION

To survive a *Rule 12(b)(6)* motion to dismiss, the factual allegations of the complaint [*226] must "possess enough heft" to set forth "a plausible entitlement to relief." *Bell Atl. Corp. v. Twombly, 550 U. S. 544, 557, 559, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Thomas v. Rhode Island, 542 F.3d 944, 948 (1st Cir. 2008)*. As the Supreme Court has emphasized, this standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion [s] devoid of further factual enhancement." *Ashcroft v. Iqbal, 556 U. S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal citations and quotation marks omitted).

Applicable Law

The threshold dispute is over the substantive law to be applied. Defendants contend that Delaware state law is controlling because the EULA to which Rottner agreed at the time of the purchase of PC TuneUp specifies that " [t] his Agreement will be governed by the laws of the [**7] State of Delaware." EULA § 10f. [6] Rottner does not dispute that he accepted the EULA, *see* Dkt # 52 at 2, but argues that the EULA's choice of law (Delaware) provision is contrary to Massachusetts public policy.

6 The EULA also specifies that " [t] he exclusive jurisdiction for any dispute will be state or federal courts sitting in the State of Delaware." *Id.* However, by agreement the parties have waived this provision of the EULA while reserving the right to dispute the applicability of the remaining provisions. *See* Dkt # 52 at 2-4.

In a diversity action, as is the case here, a federal court applies the choice-of-law rules of the forum state -- in this case, Massachusetts. *Klaxon v. Stentor Electric Mfg. Co., 313 U. S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. "Massachusetts law has recognized, within reason, the right of the parties to a transaction to select the law governing their relationship." *Morris v. Watsco, Inc., 385 Mass 672, 674, 433 N. E.2d 886 (1982)*. However, Massachusetts courts will not honor a choice-of-law provision when its application "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which would [**8] be the state of the applicable law in the absence of an effective choice of law by the parties." *Shipley Co., Inc. v. Clark, 728 F. Supp. 818, 825 (D. Mass. 1990)*, quoting *Restatement (Second) of Conflict of Laws § 187(2)(b)* (1971).

Rottner asserts that Massachusetts law should apply because the EULA, which disclaims all implied warranties, *see* EULA § 5c, is contrary to the Massachusetts public policy of offering the fullest possible legal protections to consumers, including a prohibition against the disclaiming by sellers of the implied warranty of merchantability in consumer contracts. *See Mass. Gen. Laws ch. 106, § 2-316A* ("Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable with respect to injury to the person."). In contrast, as defendants note in their briefs, Delaware law does permit the disclaimer of implied warranties. *See Del. Code tit. 6, § 2-316* (" [T] o exclude or modify the implied warranty of merchantability or any [**9] part of it the language must mention

merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all [*227] implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'"). Thus, according to Rottner, applying Delaware law in this case would be "contrary to a fundamental policy of" Massachusetts, and moreover, that Massachusetts has a "materially greater interest" in the outcome of the case than does Delaware because AVG US is headquartered in Massachusetts.

While the argument is superficially appealing, it is based on a fundamentally mistaken premise. As defendants correctly point out, the public policy exception compares the law of the contractually chosen state, not with the law of the forum state, but with the "state of the applicable law in the absence of an effective choice of law by the parties," *Shipley, 728 F. Supp. at 825* (which state defendants contend is California). In determining the state whose law is to be applied absent a controlling contractual choice, [**10] Massachusetts has adopted the "functional" choice-of-law analysis taught by the Restatement (Second) of Conflict of Laws. *Bushkin Assocs., Inc. v. Raytheon Co., 393 Mass. 622, 631, 473 N. E.2d 662 (1985)*.

[I] n the absence of a choice of law by the parties, their rights "are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in *§ 6*." *[Restatement (Second) of Conflict Laws] at § 188(1)*. " [T] he contacts to be taken into account in applying the principles of *§ 6* to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject

matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties." *Id.* at *§ 188(2)*. Factors under *§ 6* that are said to be relevant to the choice of the applicable rule of law include: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states [**11] in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id. at 632.

This analysis leads inescapably to the conclusion that Massachusetts would apply California law, and not Massachusetts law, in deciding the enforceability of the disclaimer provisions of the EULA. Rottner is a resident of California who purchased a license from AVG to install PC TuneUp in his computer, all of which occurred in California. The EULA states that the contract is between the purchaser and AVG CZ and not AVG US. AVG CZ is a company formed under the laws of the Czech Republic. EULA § 1d. Thus, for choice of law purposes, the contract was formed, negotiated, and performed in California. Although Rottner has named AVG US, which is based in Massachusetts, as a defendant, Rottner has not made any specific allegations linking any action or omission on the part of AVG US to his decision to purchase and install PC TuneUP. Rottner's expectation that he was visiting a web site based in the [**12] United States (based on the website's IP address) does not alter the analysis, as the EULA specifically identifies AVG CZ as Rottner's contractual partner.[7]

7 Rottner also argues that his choice of Massachusetts as a forum for the litigation vitiates California's interest in his claims. However, a litigant's choice of forum is not an appropriate factor in the choice-of-law analysis. Indeed, allowing a litigant's choice of forum to determine the law to be applied would simply encourage impermissible forum shopping.

[*228] Although California may have a greater interest than Delaware in Rottner's personal claims involving his purchase and use of PC TuneUp, there is no conflict between California and Delaware law on the validity of a disclaimer by a seller of implied warranties. California law permits the disclaimer of implied warranties under the same terms and conditions as Delaware law. *See Cal. Com. Code § 2316* (" [T] o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language [**13] to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'"). Thus, under Massachusetts choice-of-law principles, the contractually chosen law -- that of the state of Delaware -- applies in this case because it "would [not] be contrary to a fundamental policy of a state which would be the state of the applicable law in the absence of an effective choice of law by the parties." *Shipley, 728 F. Supp. at 825*.

Claims against AVG US

AVG US moves to dismiss all claims against it because it did not sell PC TuneUp to Rottner and was not a party to the EULA between Rottner and AVG CZ. For ths reason, it argues that Rottner's contract-based claims (express

warranty, implied warranty, breach of contract, and breach of the implied covenant of good faith and fair dealing) against AVG US necessarily fail. Further, because AVG CZ's relationship with Rottner is fully defined and regulated by the terms of the EULA, the claim for unjust enrichment also fails. *See BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp., 2009 Del. Ch. LEXIS 17, 2009 WL 264088, at *7 (Del. Ch. Feb. 3, 2009)* [**14] ("If a contract comprehensively governs the parties' relationship, then it alone must provide the measure of the plaintiff's rights and any claim of unjust enrichment will be denied."). [8] Finally, the claim for fraudulent inducement (like the express warranty claim) also collapses because it was AVG CZ, and not AVG US, that made the allegedly fraudulent statements on which Rottner relied.

8 Rottner also has not identified any benefit AVG US allegedly received from his purchase of PC TuneUp, a critical element of any claim of unjust enrichment.

For his part, Rottner alleges that AVG US reviewed the marketing materials placed on the www. Avg. Com website (including the allegedly fraudulent statements), was a party to the "Privacy Policy" published on the website, [9] and also reviewed the licensing agreements for the AVG brand, such as the one with Auslogics. Additionally, Rottner contends that AVG US and AVG CZ are mere alter egos and should be treated as such for purposes of liability. He notes that AVG CZ and AVG US are owned by the same corporate parent, are "pervasively controlled" by the same corporate officers and employees, and have significantly commingled their efforts to promote [**15] the sale of PC TuneUp in the United States.

9 What this "Privacy Policy" was or why it is relevant to Rottner's claims is not made clear in the SAC.

[*229] Neither of these arguments has persuasive force. While AVG CZ sells PC TuneUp through a website, the content of which AVG US is alleged in some minimal respects to review, Rottner has made no plausible connection between AVG US's review of the material (it is not clear whether any such review is alleged to take place before or after the material is posted) and his decision either to purchase PC TuneUp, or in the process, to agree to the terms of the EULA. The alter ego theory fares no better. "For the alter ego theory, Delaware courts have looked to the law of the entity in determining whether the entity's separate existence is to be disregarded." *EBG Holdings LLC v. Vredezicht's Gravenhage 109 B. V., 2008 Del. Ch. LEXIS 127, 2008 WL 4057745, at *11 (Del. Ch. Sept. 2, 2008)* (citation omitted). Because AVG US is incorporated in Delaware, the court looks to Delaware law in this regard. Under Delaware law (as under Massachusetts law), " [i] t is only the exceptional case where a court will disregard the corporate form." *Sears, Roebuck & Co. v. Sears plc, 744 F. Supp. 1297, 1305 (D. Del. 1990)*.

Some [**16] specific facts a court may consider when being asked to disregard the corporate form include: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the dominant shareholder siphoned company funds; and (5) whether, in general, the company simply functioned as a facade for the dominant shareholder.

*EBG Holdings, 2008 Del. Ch. LEXIS 127, 2008 WL 4057745, at *12*. Rottner has not alleged any facts to support the naked allegation that AVG US was operated as a "facade" for AVG CZ or that it did not adhere to basic corporate formalities in its day-to-day operations. Perhaps of greater significance, Rottner has failed to show "fraud,

injustice, or inequity in the use of the corporate form." *Sears, 744 F. Supp. at 1304*.

[T] he alleged fraud or inequity must be distinct from the tort alleged in the complaint. Any breach of contract and any tort - such as patent infringement - is, in some sense, an injustice. The underlying cause of action does not supply the necessary fraud or injustice. To hold otherwise would render the fraud or injustice element meaningless, and would sanction bootstrapping.

Id. at 1305. [**17] The only inequity Rottner suggests is that if deprived of the domestic defendant (AVG US), he would then have to litigate against two foreign corporations against whom a judgment might prove difficult to collect should he prevail. However, to the extent the argument has any bearing, it simply casts doubt on the wisdom of the underlying transaction, which is not a valid consideration in any piercing of the corporate veil analysis. In sum, because Rottner has not alleged claims against AVG US for which relief may be granted, these claims will be dismissed.

Claims against AVG CZ[10]

10 Having determined that Delaware law applies, the claims made under Massachusetts law will be recast as equivalent claims under Delaware law.

Defendants contend that the claims for breach of express and implied warranties are inapplicable in this case because those claims are pled under Article 2 of the Uniform Commercial Code (UCC), which covers sales of goods, *see Del. Code tit. 6, § 2-102*, whereas software -- the subject of this dispute -- is not, according to AVG CZ, a "good" under Delaware law. AVG relies on two cases -- *Neilson Bus. Equip. Ctr., Inc. v. Italo V. Monteleone., M. D., P. A., 524 A.2d 1172 (Del. 1987)*, [**18] and *Wharton Mgmt. Grp. v. Sigma Consultants, Inc., 1990 Del. Super. LEXIS 54, 1990 WL 18360 (Del. Super. Ct. Jan. 29,* [*230]

1990), aff'd *582 A.2d 936 (Del. 1990)* -- for this proposition.

In *Neilson*, the court held that a lease for computer hardware, software, and support services was predominantly a contract for goods, and thus came under the rubric of Article 2 of the UCC. *Neilson, 524 A.2d at 1174-1175*. However, the court left open the question of whether the sale of software alone would be considered a sale of a good under Article 2. In *Wharton*, the court distinguished *Neilson* and found that the sale of customized software was a contract for services, and not goods, under the UCC. *Wharton, 1990 Del. Super. LEXIS 54, 1990 WL 18360, at *2-3*.

Rottner distinguishes the sale of a software package, as in this case, with cases involving the design of software or the transfer of intellectual property. Although the Delaware courts have not directly addressed this distinction, courts nationally have consistently classified the sale of a software package as the sale of a good for UCC purposes. *See, e. G., ePresence, Inc. v. Evolve Software, Inc., 190 F. Supp. 2d 159, 163 (D. Mass. 2002)* (applying California law); *Micro Data Base Sys. Inc. v. Dharma Sys., Inc., 148 F.3d 649, 654 (7th Cir. 1998)* [**19] (applying New Hampshire law); *Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 675-676 (3d Cir. 1991)* (applying Pennsylvania law, and noting that the majority of academic commentary supports the view that software fits with the definition of a good under the UCC); *Newcourt Fin. USA, Inc. v. FT Mortg. Cos., 161 F. Supp. 2d 894, 897-898 (N. D. Ill. 2001)* (applying Illinois law); *Architectronics, Inc. v. Control Sys., Inc., 935 F. Supp. 425, 432 (S. D. N. Y. 1996)* (applying New York Law); *Olcott Int'l & Co. Inc. v. Micro Data Base Sys., Inc., 793 N. E.2d 1063, 1071 (Ind. App. 2003)*.

Rottner's is the more persuasive view of this dispute. Software is not clearly a good or a service in the abstract, and may qualify as either depending on the particular circumstances of the case. *See RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 546 (9th Cir. 1985)* ("Because software packages vary depending on the needs of the individual consumer, we apply a case-by-case analysis."). Delaware, like other jurisdictions that have adopted the UCC, applies a "predominance" test to determine whether a contract is for goods or services. *See Neilson, 524 A.2d at 1174*.

The holding of *Neilson* turned on the fact that the [**20] contract involved the sale of tangible hardware along with software and services, and thus is readily distinguishable from this case. However, PC TuneUp also bears no resemblance to the custom designed software in *Wharton*. In *Wharton*, the programmer had to "prepar [e] a study of [the customer] 's existing operations, to design, develop, and install computer software which would meet [his] specific needs and objectives." *Wharton, 1990 Del. Super. LEXIS 54, 1990 WL 18360, at * 2*. In essence, "it was [the programmer's] knowledge, skill and ability for which Wharton bargained [and] purchased in the main The means of transmission is not the object of the agreement." *1990 Del. Super. LEXIS 54, [WL] at *3*. In contrast, PC TuneUp is a "generally available standardized software." *Olcott, 793 N. E.2d at 1071* (distinguishing "the development of a software program to meet a customer's specific needs" as a contract for services). Thus, the sale of PC TuneUp is more like the sale of a tangible good -- it is "movable at the time of identification to the contract for sale." *Del. Code. tit. 6, § 2-105*. Indeed, Rottner was able to download and install the full version of PC TuneUp after a one-stop payment over the internet. Because the sale of [**21] PC TuneUp is predominantly like the sale of a good

rather than the provision of services, the UCC warranty [*231] provisions apply. [11]

11 AVG CZ also cites to *Attachmate Corp. v. Health Net, Inc., 2010 U. S. Dist. LEXIS 114445, 2010 WL 4365833, at *2 (W. D. Wash Oct. 26, 2010)*, for the proposition that " [t] he weight of the authority favors application of common law and not the UCC with regard to software licenses."). However, that case involved a claim of copyright infringement, a dispute over intellectual property which is definitively not a "good" under the UCC. *See Lamle v. Mattel, Inc., 394 F.3d 1355, 1359 n.2 (Fed. Cir. 2005)*. There is no suggestion that the purchase of PC TuneUp in this case involved any transfer of intellectual property.

Defendants argue that even if the UCC is applicable, Rottner has failed to make out a claim for breach of express warranties. Section 5a of the EULA warranties for a period of 30-days after purchase (i) that "the medium (if any) on which the [s] oftware is delivered will be free of material defects" and (ii) that "the software will perform substantially in accordance with the applicable specification." [12] Defendants point out that Rottner does not allege a material defect in the delivery [**22] medium, and does not identify any applicable specifications to which PC TuneUp allegedly fails to conform. Moreover, even assuming that Rottner has made out a claim, he failed to provide adequate pre-suit notice of the defects as required by *Del. Code tit. 6, § 2-607(3)(a)* (" [T] he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.").

12 Section 5c of the EULA disclaims all other warranties not expressly provided, and section 10c of the

EULA, an integration clause, disavows any previous representations.

Rottner agrees that he is not claiming a material defect in the software delivery medium, as the software was successfully downloaded from the internet. However, Rottner contends that because the "applicable specification" language of the EULA is vague and undefined, the only rational recourse for the consumer is to turn to the advertising claims and the claims broadcast by PC TuneUp itself as the "applicable specifications." This argument has force in view of Delaware's endorsement of the UCC's liberal approach to express warranty provisions. *See Bell Sports, Inc. v. Yarusso, 759 A.2d 582, 592 (Del. 2000)*. [**23] In particular, "a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming 'all warranties, express or implied' cannot reduce the seller's obligation with respect to such description ." *Id.*, quoting *UCC § 2-313 cmt. 4*.

Moreover, I am confident that the Delaware courts would consider PC TuneUp's claimed functionality as an express warranty separate and apart from the EULA's content-less warranty provisions. In *Bell Sports*, the Court found that a bicycle helmet manual's attempt to disclaim express warranties was invalid where elsewhere in its pages the manual proclaimed the functionality of the helmet. *Bell Sports, 759 A.2d at 591-593*. Here, although the EULA disavowed previous representations, PC TuneUp software trumpets announcements about its functionality (which track the internet advertising claims) each and every time it is run. These claims, therefore, also form an express warranty on which Rottner may properly allege to have relied. [13]

13 Because the express warranties form a basis of the parties' bargain, Rottner has also fairly alleged claims for

breach of contract and the implied covenant of good faith and fair dealing. [**24] In light of the viable contract claims at law, it is unnecessary for the court to consider his alternative equitable claim for unjust enrichment.

With respect to the reasonableness of his notice to AVG as to the alleged [*232] defects in PC TuneUp, Rottner is correct that this is a question of fact that cannot be resolved on a motion to dismiss. *See Speakman Co. v. Harper Buffing Mach. Co., Inc., 583 F. Supp. 273, 278 (D. Del. 1984)* ("The question of timeliness and adequacy of notice is a factual question which can be decided as a matter of law only if the undisputed facts and the inferences that can be drawn therefrom permit only one interpretation."). Here, Rottner contacted AVG in November of 2012 to complain about PC TuneUp's nonfunctionality, that is, nine months after the purchase. Whether this notice was a timely warning to AVG CZ that "it might be answerable to [Rottner] for breach of contract and of warranty" is a question of fact for later adjudication. [14] *Id. at 277*.

14 Rottner also argues that AVG CZ must have had constructive notice of the defects in PC TuneUp because it is a sophisticated business and has sold this software to consumers over a long period of time.

Defendants are [**25] correct, however, that the EULA more successfully disclaimed any implied warranty. As discussed earlier, Delaware law permits the disclaimer of the implied warranty of merchantability if the disclaimer is conspicuous (and mentions merchantability). *Del. Code tit. 6, § 2-316*. Delaware law also permits the disclaimer of the implied warranty of fitness if the disclaimer is in writing and conspicuously displayed. *Id.* Here, the EULA presents the disclaimer in capital letters in section 5c, and specifically identifies both the implied warranties of

merchantability and fitness. Consequently, Rottner's claim for any breach of implied warranty will be dismissed.

Finally, defendants contend that Rottner's claim for fraudulent inducement fails because it is not pled with the requisite particularity required by *Rule 9(b)*'s heightened pleading standard. *See Fed. R. Civ. P. 9(b)* ("In alleging fraud a party must state with particularity the circumstances constituting fraud ."). Specifically, defendants argue that Rottner did not identify with particularity the misrepresentations on which he purportedly relied, did not adequately plead that the statements were false, and did not adequately [**26] plead that the false statements were made with the intent to deceive. On review of the SAC, the court disagrees. Rottner pleads that he relied on the statements from the www. Avg. Com website that PC TuneUp would "boost Internet speeds," "eliminate freezing and crashing," and "optimize disk speeds," in choosing to download the free trial, SAC ¶¶ 45-46, and that he further relied on the software's representation that it would continuously repair his computer's errors if he performed the recommended weekly scans. *Id.* ¶¶ 46-47. Rottner adequately alleges that these statements are false based on the report of his forensics expert that the PC TuneUp software consistently reports numerous and severe errors regardless of the health of the computer, and never recommends anything other than the weekly scans. [15] *Id.* ¶¶ 37-40. Finally, Rottner adequately alleges that AVG CZ knew that its marketing materials regarding PC TuneUp were false and that it set out to induce consumers to purchase the software despite this knowledge. [16] *Id.* ¶ 88. Because [*233] the fraud claim is pled with sufficient particularity, it survives the motion to dismiss.

15 Rottner also alleges that some of these claims are scientifically [**27] impossible. *See id.* ¶ 26.

16 AVG CZ argues that the bulk of Rottner's allegations of fraudulent intent go to the design of the software, which he alleges is attributable to Auslogics, and that the claim therefore does not involve AVG CZ. However, during oral argument AVG CZ agreed that an intermediary seller would also have a duty to consumers to avoid making misrepresentations about its products that it knew or should have known were false.

ORDER

For the foregoing reasons, AVG US's motion to dismiss will be ALLOWED. AVG CZ's motion to dismiss will be ALLOWED as to Count II (breach of implied warranties), and DENIED as to the remaining counts.

 ¿ Los programas de ordenador constituyen una mercadería, y qué de los servicios brindados en apoyo del uso de éstos?

B. EL PERFECCIONAMIENTO DE LOS CONTRATOS

C. LA DOCTRINA DE LA CAUSA EN LOS CONTRATOS TÍPICOS NOMINADOS

LOS REQUISITOS ESTRICTOS DEL *CONSIDERATION* SE AFLOJAN

 WISCONSIN KNIFE WORKS, Plaintiff-Appellant, v. NATIONAL METAL CRAFTERS, Defendant-Appellee UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 781 F.2d 1280; 42 U. C. C. Rep. Serv. 830 December 10, 1985, Argued January 22, 1986, Decided

OPINION BY: POSNER [*1282] This is a diversity breach of contract case; and before getting to the merits we must decide, though neither party contests the point, whether the parties are indeed citizens of different states. The complaint alleges (and the answer admits) that the

plaintiff, Wisconsin Knife Works, is a division of Black & Decker (U. S.), Inc., a corporation incorporated in Maryland and having its "principal offices other than in the State of Wisconsin," and that the defendant, National Metal Crafters, is a division of Keystone Consolidated Industries, Inc., which is incorporated in Delaware and has its principal place of business in Illinois. Although [**2] a division may, if state law permits, sue and be sued in its own name, see *Fed. R. Civ. P. 17(b)*, the state of which it is a citizen for purposes of determining diversity is the state of which the corporation that owns the division is a citizen. The diversity statute deems a corporation a citizen of any state in which it is incorporated and also of the state in which it has its principal place of business. *28 U. S. C. § 1332(c)*. Hence the complaint adequately alleges that the defendant is a citizen of Delaware and Illinois. An allegation of citizenship proper in form and not contested establishes a party's citizenship for purposes of diversity jurisdiction, *Casio, Inc. v. S. M. & R. Co., 755 F.2d 528, 530 (7th Cir. 1985)*, and the jurisdictional allegations were not contested here. So far so good. Regarding the plaintiff, however, also a division rather than a corporation, the complaint alleges that the corporation that owns it is a citizen of Maryland but fails to allege in what state it has its principal place of business. Assuming for the moment that "principal offices" is an inartful attempt to allege principal place of business, still all [**3] the complaint tells us is that Black & Decker is not a citizen of Wisconsin. That leaves open the possibility that it is a citizen of Illinois or Delaware, in which event the parties are not diverse and the suit must be dismissed.

The first thing a federal judge should do when a complaint is filed is check to see that federal jurisdiction is properly alleged. Because federal judges are not subject to direct check by any other branch of government -- because

the only restraint on our exercise of power is self-restraint -- we must make every reasonable effort to confine ourselves to the exercise of those powers that the Constitution and Congress have given us. In this case, however, we are satisfied, despite the deficiency in the pleadings, that there is diversity of citizenship. The record shows and counsel confirmed at argument that Black & Decker's headquarters is in Maryland; and although the state in which a corporation has its headquarters is not always the state of the corporation's principal place of business (hence the complaint should not have used the term "principal offices"), usually it is. [**4] The test in this circuit for principal place of business is "nerve center," *In re Air Crash Disaster Near Chicago, 644 F.2d 594, 620 (7th Cir. 1981)*; *Celanese Corp. of America v. Vandalia Warehouse Corp., 424 F.2d 1176, 1178 (7th Cir. 1970)*; and, to continue the neurological metaphor, we look for the corporation's brain, and ordinarily find it where the corporation has its headquarters. In the absence of any reason to think that Black & Decker's principal place of business might be in Illinois or Delaware, the two states of which the defendant is a citizen, the fact that its headquarters is in Maryland warrants an inference that the parties are of diverse citizenship. Compare *Casio, Inc. v. S. M. & R. Co., supra, at 529-30*.

Some courts use a vaguer standard. They look not just to where the corporation has its headquarters but also to the distribution of the corporation's assets and employees. See 13B Wright, Miller & Cooper, Federal Practice and Procedure § 3625 (2d ed. 1984). We prefer the simpler test. Jurisdiction ought to be readily determinable. There are cases where a corporation's headquarters may be divided between states [**5] and cases where the nominal headquarters isn't really the directing intelligence of the corporation, and those cases could give trouble even under

a simple [*1283] "nerve center" test, but we are satisfied that this is not such a case.

We come, then, to the merits of the appeal. Wisconsin Knife Works, having some unused manufacturing capacity, decided to try to manufacture spade bits for sale to its parent, Black & Decker, a large producer of tools, including drills. A spade bit is made out of a chunk of metal called a spade bit blank; and Wisconsin Knife Works had to find a source of supply for these blanks. National Metal Crafters was eager to be that source. After some negotiating, Wisconsin Knife Works sent National Metal Crafters a series of purchase orders on the back of each of which was printed, "Acceptance of this Order, either by acknowledgement or performance, constitutes an unqualified agreement to the following." A list of "Conditions of Purchase" follows, of which the first is, "No modification of this contract, shall be binding upon Buyer [Wisconsin Knife Works] unless made in writing and signed by Buyer's authorized representative. Buyer shall have the right [**6] to make changes in the Order by a notice, in writing, to Seller." There were six purchase orders in all, each with the identical conditions. National Metal Crafters acknowledged the first two orders (which had been placed on August 21, 1981) by letters that said, "Please accept this as our acknowledgment covering the above subject order," followed by a list of delivery dates. The purchase orders had left those dates blank. Wisconsin Knife Works filled them in, after receiving the acknowledgments, with the dates that National Metal Crafters had supplied in the acknowledgments. There were no written acknowledgments of the last four orders (placed several weeks later, on September 10, 1981). Wisconsin Knife Works wrote in the delivery dates that National Metal Crafters orally supplied after receiving purchase

orders in which the space for the date of delivery had again been left blank.

Delivery was due in October and November 1981. National Metal Crafters missed the deadlines. But Wisconsin Knife Works did not immediately declare a breach, cancel the contract, or seek damages for late delivery. Indeed, on July 1, 1982, it issued a new batch of purchase orders (later rescinded). By December [**7] 1982 National Metal Crafters was producing spade bit blanks for Wisconsin Knife Works under the original set of purchase orders in adequate quantities, though this was more than a year after the delivery dates in the orders. But, in January 13, 1983, Wisconsin Knife Works notified National Metal Crafters that the contract was terminated. By that date only 144,000 of the more than 281,000 spade bit blanks that Wisconsin Knife Works had ordered in the six purchase orders had been delivered.

Wisconsin Knife Works brought this breach of contract suit, charging that National Metal Crafters had violated the terms of delivery in the contract that was formed by the acceptance of the six purchase orders. National Metal Crafters replied that the delivery dates had not been intended as firm dates. It also counterclaimed for damages for (among other things) the breach of an alleged oral agreement by Wisconsin Knife Works to pay the expenses of maintaining machinery used by National Metal Crafters to fulfill the contract. The parties later stipulated that the amount of these damages was $30,000.

The judge ruled that there had been a contract but left to the jury to decide whether the contract [**8] had been modified and, if so, whether the modified contract had been broken. The jury found that the contract had been modified and not broken. Judgment was entered dismissing Wisconsin Knife Works' suit and awarding National Metal

Crafters $30,000 on its counterclaim. Wisconsin Knife Works has appealed from the dismissal of its suit. The appeal papers do not discuss the counterclaim, and the effect on it of our remanding the case for further proceedings on Wisconsin Knife Works' claim will have to be resolved on remand.

The principal issue is the effect of the provision in the purchase orders that forbids the contract to be modified other than by a writing signed by an authorized representative [*1284] of the buyer. The theory on which the judge sent the issue of modification to the jury was that the contract could be modified orally or by conduct as well as by a signed writing. National Metal Crafters had presented evidence that Wisconsin Knife Works had accepted late delivery of the spade bit blanks and had cancelled the contract not because of the delays in delivery but because it could not produce spade bits at a price acceptable to Black & Decker.

Section 2-209(2) of [**9] *the Uniform Commercial Code* provides that "asigned agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party." (As several other subsections of *section 2-209* are relevant to the appeal, we have printed the entire section as an Appendix to this opinion.) The meaning of this provision and its proviso is not crystalline and there is little pertinent case law. One might think that an agreement to exclude modification except by a signed writing must be signed in any event by the party against whom the requirement is sought to be enforced, that is, by National Metal Crafters, rather than by the party imposing the requirement. But if so the force of the proviso ("but except as between merchants..") becomes unclear, for it

contemplates that between merchants no separate signature by the party sought to be bound by the requirement is necessary. A possible reconciliation, though not one we need embrace in order [**10] to decide this case, is to read the statute to require a separate signing or initialling of the clause forbidding oral modifications, as well as of the contract in which the clause appears. There was no such signature here; but it doesn't matter; this was a contract "between merchants."Although in ordinary language a manufacturer is not a merchant, "between merchants" is a term of art in the Uniform Commercial Code. It means between commercially sophisticated parties (see *UCC § 2-104(1)*; White & Summers, Handbook of the Law Under the Uniform Commercial Code 345 (2d ed. 1980)), which these were.

Of course there must still be a "signed agreement" containing the clause forbidding modification other than by a signed writing, but there was that (see definition of "agreement" and of "signed" in *UCC §§ 1-201(3)*, (39)). National Metal Crafters' signed acknowledgments of the first two purchase orders signified its assent to the printed conditions and naturally and reasonably led Wisconsin Knife Works to believe that National Metal Crafters meant also to assent to the same conditions should they [**11] appear in any subsequent purchase orders that it accepted. Those subsequent orders were accepted, forming new contracts on the same conditions as the old, by performance -- that is, by National Metal Crafters' beginning the manufacture of the spade bit blanks called for by the orders. See *UCC § 2-207(3)*. So there was an agreement, signed by National Metal Crafters, covering all the purchase orders. The fact that the delivery dates were not on the purchase orders when received by National Metal Crafters is nothing of which it may complain; it was given *carte blanche* to set those dates.

When National Metal Crafters had difficulty complying with the original specifications for the spade bit blanks, Wisconsin Knife Works modified them; and National Metal Crafters argues that the engineering drawings containing those modifications are the written modification that *section 2-209(2)*, if applicable, calls for. In fact these particular modifications seem to fall within the clause of the contract that allows the buyer (Wisconsin Knife Works) to modify the specifications by notice. The context of this clause makes clear that such notice is not the written modification to which the previous [**12] sentence refers. But in any event there was no modification of the delivery dates. The "pert charts" which National Metal Crafters supplied Wisconsin Knife Works, and which showed new target dates for delivery, do not purport [*1285] to modify the contract and were not signed by Wisconsin Knife Works.

We conclude that the clause forbidding modifications other than in writing was valid and applicable and that the jury should not have been allowed to consider whether the contract had been modified in some other way. This may, however, have been a harmless error. S*ection 2-209(4) of the Uniform Commercial Code* provides that an "attempt at modification" which does not satisfy a contractual requirement that modifications be in writing nevertheless "can operate as a waiver." Although in instructing the jury on modification the judge did not use the word "waiver," maybe he gave the substance of a waiver instruction and maybe therefore the jury found waiver but called it modification. Here is the relevant instruction:

Did the parties modify the contract? The defendant bears the burden [**13] of proof on this one. You shall answer this question yes only if you are convinced to a reasonable certainty that the parties modified the contract.

If you determine that the defendant had performed in a manner different from the strict obligations imposed on it by the contract, and the plaintiff by conduct or other means of expression induced a reasonable belief by the defendant that strict enforcement was not insisted upon, but that the modified performance was satisfactory and acceptable as equivalent, then you may conclude that the parties have assented to a modification of the original terms of the contract and that the parties have agreed that the different mode of performance will satisfy the obligations imposed on the parties by the contract.

To determine whether this was in substance an instruction on waiver we shall have to consider the background of *section 2-209*, the Code provision on modification and waiver.

Because the performance of the parties to a contract is typically not simultaneous, one party may find himself at the mercy of the other unless the law of contracts protects him. Indeed, the most important thing which that law does is to facilitate exchanges [**14] that are not simultaneous by preventing either party from taking advantage of the vulnerabilities to which sequential performance may give rise. If A contracts to build a highly idiosyncratic gazebo for B, payment due on completion, and when A completes the gazebo B refuses to pay, A may be in a bind -- since the resale value of the gazebo may be much less than A's cost -- except for his right to sue B for the price. Even then, a right to sue for breach of contract, being costly to enforce, is not a completely adequate remedy. B might therefore go to A and say, "If you don't reduce your price I'll refuse to pay and put you to the expense of suit"; and A might knuckle under. If such modifications are allowed, people in B's position will find it harder to make such contracts in the future, and everyone will be worse off.

The common law dealt with this problem by refusing to enforce modifications unsupported by fresh consideration. See, e. G., *Alaska Packers' Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902)*, discussed in *Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 927 (7th Cir. 1983)*. Thus in the hypothetical case just put B could not have enforced [**15] A's promise to accept a lower price. But this solution is at once overinclusive and underinclusive -- the former because most modifications are not coercive and should be enforceable whether or not there is fresh consideration, the latter because, since common law courts inquire only into the existence and not the adequacy of consideration, a requirement of fresh consideration has little bite. B might give A a peppercorn, a kitten, or a robe in exchange for A's agreeing to reduce the contract price, and then the modification would be enforceable and A could no longer sue for the original price. See White & Summers, *supra*, at 47; Farnsworth, Contracts 271-78 (1982).

The draftsmen of the Uniform Commercial Code took a fresh approach, by making modifications enforceable even if not supported by consideration (see *section 2-209(1)*) [*1286] and looking to the doctrines of duress and bad faith for the main protection against exploitive or opportunistic attempts at modification, as in our hypothetical case. See *UCC § 2-209*, official comment 2. But they did another thing as well. In *section 2-209(2)* they allowed the parties to exclude oral modifications. National Metal Crafters [**16] argues that two subsections later they took back this grant of power by allowing an unwritten modification to operate as a waiver.

The common law did not enforce agreements such as *section 2-209(2)* authorizes. The "reasoning" was that the parties were always free to agree orally to cancel their contract and the clause forbidding modifications not in

writing would disappear with the rest of the contract when it was cancelled. "The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof." *Wagner v. GrazianoConstruction Co., 390 Pa. 445, 448, 136 A.2d 82, 83-84 (1957)*. This is not reasoning; it is a conclusion disguised as a metaphor. It may have reflected a fear that such clauses, buried in the fine print of form contracts, were traps for the unwary; a sense that they were unnecessary because only modifications supported by consideration were enforceable; and a disinclination to allow parties in effect to extend the reach of the Statute of Frauds, which requires only some types of contract to be in writing. But the framers of the Uniform Commercial Code, as part and parcel of rejecting the [**17] requirement of consideration for modifications, must have rejected the traditional view; must have believed that the protection which the doctrines of duress and bad faith give against extortionate modifications might need reinforcement -- if not from a requirement of consideration, which had proved ineffective, then from a grant of power to include a clause requiring modifications to be in writing and signed. An equally important point is that with consideration no longer required for modification, it was natural to give the parties some means of providing a substitute for the cautionary and evidentiary function that the requirement of consideration provides; and the means chosen was to allow them to exclude oral modifications.

If *section 2-209(4)*, which as we said provides that an attempted modification which does not comply with subsection (2) can nevertheless operate as a "waiver," is interpreted so broadly that *any* oral modification is effective as a waiver notwithstanding *section 2-209(2)*, both provisions become superfluous and we are back in the common law -- only with not even a requirement of

consideration to reduce the likelihood of fabricated or unintended oral modifications. [**18] A conceivable but unsatisfactory way around this result is to distinguish between a modification that substitutes a new term for an old, and a waiver, which merely removes an old term. On this interpretation National Metal Crafters could not enforce an oral term of the allegedly modified contract but could be excused from one of the written terms. This would take care of a case such as *Alaska Packers*, where seamen attempted to enforce a contract modification that raised their wages, but would not take care of the functionally identical case where seamen sought to collect the agreed-on wages without doing the agreed-on work. Whether the party claiming modification is seeking to impose an onerous new term on the other party or to wiggle out of an onerous term that the original contract imposed on it is a distinction without a difference. We can see that in this case. National Metal Crafters, while claiming that Wisconsin Knife Works broke their contract as orally modified to extend the delivery date, is not seeking damages for that breach. But this is small comfort to Wisconsin Knife Works, which thought it had a binding contract with fixed delivery dates. Whether called modification [**19] or waiver, what National Metal Crafters is seeking to do is to nullify a key term other than by a signed writing. If it can get away with this merely by testimony about an oral modification, *section 2-209 (2)* becomes very nearly a dead letter.

The path of reconciliation with subsection (4) is found by attending to its [*1287] precise wording. It does not say that an attempted modification "is" a waiver; it says that "it can operate as a waiver." It does not say in what circumstances it can operate as a waiver; but ifan attempted modification is effective as a waiver only if there is reliance, then both *sections 2-209(2)* and *2-209(4)* can be

given effect. Reliance, if reasonably induced and reasonable in extent, is a common substitute for consideration in making a promise legally enforceable, in part because it adds something in the way of credibility to the mere say-so of one party. The main purpose of forbidding oral modifications is to prevent the promisor from fabricating a modification that will let him escape his obligations under the contract; and the danger of successful fabrication [**20] is less if the promisor has actually incurred a cost, has relied. There is of course a danger of bootstrapping -- of incurring a cost in order to make the case for a modification. But it is a risky course and is therefore less likely to be attempted than merely testifying to a conversation; it makes one put one's money where one's mouth is.

We find support for our proposed reconciliation of subsections (2) and (4) in the secondary literature. See Eisler, *Oral Modification of Sales Contracts Under the Uniform Commercial Code: The Statute of Frauds Problem*, 58 Wash. U. L. Q. 277, 298-302 (1980); Farnsworth, *supra*, at 476-77; 6 Corbin on Contracts 211 (1962). It is true that 2 Anderson on the *Uniform Commercial Code § 2-209*:42 (3d ed. 1982), opines that reliance is not necessary for an attempted modification to operate as a waiver, but he does not explain his conclusion or provide any reason or authority to support it. This provision was quoted along with other material from Anderson in *Double-E Sportswear Corp. v. Girard Trust Bank, 488 F.2d 292, 295 (3d Cir. 1973)*, but there was no issue of reliance in that case. 2 Hawkland, Uniform Commercial [**21] Code Series § 2-209:05, at p. 138 (1985), remarks, "if clear factual evidence other than mere parol points to that conclusion [that an oral agreement was made altering a term of the contract], a waiver may be found. In the normal case, however, courts should be

careful not to allow the protective features of *sections 2-209(2)* and *(3)* to be nullified by contested parol evidence." (Footnote omitted.) The instruction given by the judge in this case did not comply with the test, but in any event we think a requirement of reliance is clearer than a requirement of "clear factual evidence other than mere parol."

Our approach is not inconsistent with *section 2-209(5)*, which allows a waiver to be withdrawn while the contract is executory, provided there is no "material change of position in reliance on the waiver." Granted, in (5) there can be no tincture of reliance; the whole point of the section is that a waiver may be withdrawn unless there is reliance. But the section has a different domain from *section 2-209(4)*. It is not limited to attempted modifications invalid under subsections (2) or (3); it applies, for example, to an express written and signed waiver, provided only that the [**22] contract is still executory. Suppose that while the contract is still executory the buyer writes the seller a signed letter waiving some term in the contract and then, the next day, before the seller has relied, retracts it in writing; we have no reason to think that such a retraction would not satisfy *section 2-209(5)*, though this is not an issue we need definitively resolve today. In any event we are not suggesting that "waiver" means different things in (4) and (5); it means the same thing; but the *effect* of an attempted modification as a waiver under (4) depends in part on (2), which (4) (but not (5)) qualifies. Waiver and estoppel (which requires reliance to be effective) are frequently bracketed. See, e. G., *Chemetron Corp. v. McLouth Steel Corp., 522 F.2d 469, 472-73 (7th Cir. 1975)*; *Hirsch Rolling Mill Co. v. Milwaukee & Fox River Valley Ry., 165 Wis. 220, 161 N. W. 741 (1917)*.

The statute could be clearer; but the draftsmen were making a big break with the common law in subsections (1)

and (2), and naturally failed to foresee all the ramifications of the break. The innovations [*1288] made in Article 9 of the UCC were so novel [**23] that the article had to be comprehensively revised only ten years after its promulgation. See Appendix II to the 1978 Official Text of the Uniform Commercial Code. Article 2 was less innovative, but of course its draftsmanship was not flawless -- what human product is? Just a few months ago we wrestled with the mysterious and apparently inadvertent omission of key words in the middle subsection of another section of Article 2. See *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc., 774 F.2d 214 (7th Cir. 1985)* (section 2-509(2)). Another case of gap-filling in Article 2 is discussed in White & Summers, supra, at 450 (section 2-316(3)(a)). But as a matter of fact we need go no further than *section 2-209(5)* to illustrate the need for filling gaps in Article 2. In holding that that section allows the retraction of a waiver of the Statute of Frauds, the Third Circuit said in *Double-E Sportswear Corp. V. Girard Trust Bank, supra, 488 F.2d at 297 n.7*, "We have found it necessary to fill the interstices of the code," because of "a drafting oversight."

We know that the draftsmen of *section 2-209* wanted to make it possible for parties to exclude oral modifications. [**24] They did not just want to give "modification" another name -- "waiver." Our interpretation gives effect to this purpose. It is also consistent with though not compelled by the case law. There are no Wisconsin cases on point. Cases from other jurisdictions are diverse in outlook. Some take a very hard line against allowing an oral waiver to undo a clause forbidding oral modification. See, e. G., *South Hampton Co. v. Stinnes Corp., 733 F.2d 1108, 1117-18 (5th Cir. 1984)* (Texas law); *U. S. Fibres, Inc. v. Proctor & Schwartz, Inc., 358 F. Supp. 449, 460 (E. D. Mich. 1972)*, aff'd, *509 F.2d 1043 (6th Cir. 1975)* (Pennsylvania

law). Others allow oral waivers to override such clauses, but in most of these cases it is clear that the party claiming waiver had relied to his detriment. See, e. G., *Gold Kist, Inc. v. Pillow, 582 S. W.2d 77, 79-80 (Tenn. App. 1979)* (where this feature of the case is emphasized); *Linear Corp. v. Standard Hardware Co., 423 So. 2d 966 (Fla. App. 1982)*; cf. R*ose v. Spa Realty Associates, 42 N. Y.2d 338, 343-44, 366 N. E.2d 1279, 1282-83, 397 N. Y. S.2d 922 (1977)*. In cases [**25] not governed by the Uniform Commercial Code, Wisconsin follows the common law rule that allows a contract to be waived orally (unless within the Statute of Frauds) even though the contract provides that it can be modified only in writing. See, e. G., *S & M Rotogravure Service, Inc. v. Baer, 77 Wis. 2d 454, 468-69, 252 N. W.2d 913, 920 (1977)*. But of course the Code, which is in force in Wisconsin as in every other state (with the partial exception of Louisiana), was intended to change this rule for contracts subject to it.

Missing from the jury instruction on "modification" in this case is any reference to reliance, that is, to the incurring of costs by National Metal Crafters in reasonable reliance on assurances by Wisconsin Knife Works that late delivery would be acceptable. And although there is evidence of such reliance, it naturally was not a focus of the case, since the issue was cast as one of completed (not attempted) modification, which does not require reliance to be enforceable. National Metal Crafters must have incurred expenses in producing spade bit blanks after the original delivery dates, but whether these were *reliance* expenses is a separate question. [**26] Maybe National Metal Crafters would have continued to manufacture spade bit blanks anyway, in the hope of selling them to someone else. It may be significant that the stipulated counterclaim damages seem limited to the damages from the breach of a separate oral agreement regarding the maintenance of equipment

used by National Metal Crafters in fulfilling the contract. The question of reliance cannot be considered so open and shut as to justify our concluding that the judge would have had to direct a verdict for National Metal Crafters, the party with the burden of proof on the issue. Nor, indeed, does National Metal Crafters argue that reliance was shown as a matter of law.

[*1289] There is no need to discuss most of the other alleged errors in the conduct of the trial; they are unlikely to recur in a new trial. We do however point out that Wisconsin Knife Works' objections to the introduction of parol evidence has no merit once the issue is recast as one of waiver. The purpose of the parol evidence rule is to defeat efforts to vary by oral evidence the terms of a written instrument that the parties intended to be the fully integrated expression of their contract; it has no [**27] application when the issue is whether one of the parties later waived strict compliance with those terms.

The only other issue that merits discussion is Wisconsin Knife Works' contention that the judge should not have let in evidence about its high costs of manufacturing spade bits, which it says is irrelevant to whether National Metal Crafters broke the contract. But it is relevant, though to a different issue. National Metal Crafters argues that it did Wisconsin Knife Works a favor by its slow delivery of the spade bit blanks because Wisconsin Knife Works was unable to manufacture spade bits at anywhere near the cost at which Black & Decker could buy them from its existing supplier. If the argument is correct, it shows either that Wisconsin Knife Works sustained no damage from the alleged breach of contract, or, what amounts to the same thing, that the alleged breach was not causally related to that damage. As in tort law, so in contract law, causation is an essential element of liability. See, e. G.,*Lincoln Nat'l Life Ins. Co. v. NCR Corp., 772 F.2d 315, 320 (7th Cir.*

1985); [**28] *S. J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 527 (3d Cir. 1978)*. If the damage of which the promisee complains would not have been avoided by the promisor's not breaking his promise, the breach cannot give rise to damages. If Wisconsin Knife Works couldn't have made any money from manufacturing spade bits no matter how promptly National Metal Crafters delivered the blanks for them, the failure to make prompt delivery caused no legal injury and cannot provide the foundation for a successful damage suit even if the late delivery was a breach of the contract.

When a jury instruction is erroneous there must be a new trial unless the error is harmless. On the basis of the record before us we cannot say that the error in allowing the jury to find that the contract had been modified was harmless; but we do not want to exclude the possibility that it might be found to be so, on motion for summary judgment or or otherwise, without the need for a new trial. Obviously National Metal Crafters has a strong case both that it relied on the waiver of the delivery deadlines and that [**29] there was no causal relationship between its late deliveries and the cancellation of the contract. We just are not prepared to say on the record before us that it is such a strong case as not to require submission to a jury.

Circuit Rule 18 shall not apply on remand.

REVERSED and REMANDED.

¿ Por qué los juristas estadounidenses son incapaces de rescatar la doctrina de que un contrato típico nominado de su propia causa?

D. EL REQUISITO FORMAL DE UNA ESCRITURA EN EL NEGOCIO COMERCIAL

EL *STATUTE OF FRAUDS* EN EL DERECHO COMERCIAL

ST. ANSGAR MILLS, INC., Appellant, vs. DUANE J. STREIT, Appellee. SUPREME COURT OF IOWA 613 N. W.2d 289; 42 U. C. C. Rep. Serv. 2d 58 July 6, 2000, Filed

OPINION BY: CADY [*290] Considered en banc. A grain dealer appeals from an order by the district court granting summary judgment in an action to enforce an oral contract for the sale of corn based on a written confirmation. The district court held the oral contract was unenforceable because the written confirmation was not [*291] delivered within a reasonable time after the oral contract as a matter of law. We reverse the decision of the district court and remand for further proceedings.

I. Background Facts and Proceedings.

St. Ansgar Mills, Inc. is a family-owned agricultural business located in Mitchell County. As a part of its business, St. Ansgar Mills [**2] buys corn from local grain farmers and sells corn to livestock farmers for feed. The price of the corn sold to farmers is established by trades made on the Chicago Board of Trade for delivery with reference to five contract months. The sale of corn for future delivery is hedged by St. Ansgar Mills through an offsetting futures position on the Chicago Board of Trade.

A sale is typically made when a farmer calls St. Ansgar Mills and requests a quote for a cash price of grain for future delivery based on the Chicago Board of Trade price for the delivery. [1] The farmer then accepts or rejects the price. If the price is accepted, St. Ansgar Mills protects the price through a licensed brokerage house by acquiring a hedge position on the Chicago Board of Trade. This hedge

position, however, obligates St. Ansgar Mills to purchase the corn at the stated price at the time of delivery. Thus, St. Ansgar Mills relies on the farmer who purchased the grain to accept delivery at the agreed price.

1 This is not the exclusive method of sale. Another type of sale is based on an order contingent upon the cash price of the corn reaching a specific level. This type of sale, however, was not involved in this case.

[**3] Duane Streit formerly resided in Mitchell County and currently practices veterinarian medicine in Carroll County. He also raises hogs. He owns a large hog farrowing operation in Carroll County and a hog finishing operation in Mitchell County near Osage. Streit purchased the Osage farm from his father in 1993. Duane's father, John Streit, resides in Mitchell County and helps Duane operate the Osage finishing facility.

Duane and his father have been long-time customers of St. Ansgar Mills. Since 1989, Duane entered into numerous contracts with St. Ansgar Mills for the purchase of large quantities of corn and other grain products. Duane would generally initiate the purchase agreement by calling St. Ansgar Mills on the telephone to obtain a price quote. If an oral contract was made, an employee of St. Ansgar Mills would prepare a written confirmation of the sale and either mail it to Duane to sign and return, or wait for Duane or John to sign the confirmation when they would stop into the business.

John would regularly stop by St. Ansgar Mills sometime during the first ten days of each month and pay the amount of the open account Duane maintained at St. Ansgar Mills for [**4] the purchase of supplies and other materials. On those occasions when St. Ansgar Mills sent the written confirmation to Duane, it was not unusual for Duane to fail to sign the confirmation for a long period of

time. He also failed to return contracts sent to him. Nevertheless, Duane had never refused delivery of grain he purchased by telephone prior to the incident which gave rise to this case.

On July 1, 1996, John telephoned St. Ansgar Mills to place two orders for the purchase of 60,000 bushels of corn for delivery in December 1996 and May 1997. This order followed an earlier conversation between Duane and St. Ansgar Mills. After the order was placed, St. Ansgar Mills completed the written confirmation but set it aside for John to sign when he was expected to stop by the business to pay the open account. The agreed price of the December corn was $3.53 per bushel. The [*292] price of the May corn was $3.73 per bushel.

John failed to follow his monthly routine of stopping by the business during the month of July. St. Ansgar Mills then asked a local banker who was expected to see John to have John stop into the business.

John did not stop by St. Ansgar Mills until August 10, 1996. On [**5] that date, St. Ansgar Mills delivered the written confirmation to him.

Duane later refused delivery of the corn orally purchased on July 1, 1996. The price of corn had started to decline shortly after July 1, and eventually plummeted well below the quoted price on July 1. After Duane refused delivery of the corn, he purchased corn for his hog operations on the open market at prices well below the contract prices of July 1. St. Ansgar Mills later told Duane it should have followed up earlier with the written confirmation and had no excuse for not doing so.

St. Ansgar Mills then brought this action for breach of contract. It sought damages of $152,100, which was the difference between the contract price of the corn and the market price at the time Duane refused delivery.

Duane filed a motion for summary judgment. He claimed the oral contract alleged by St. Ansgar Mills was governed by the provisions of the Uniform Commercial Code, and was unenforceable as a matter of law under the statute of frauds. He claimed the written confirmation delivered to John on August 10, 1996 did not satisfy the statute of frauds for two reasons. First, he was not a merchant. Second, the confirmation [**6] was not received within a reasonable time after the alleged oral agreement.

The district court determined a jury question was presented on whether Duane was a merchant under the Uniform Commercial Code. However, the district court found the written confirmation did not satisfy the writing requirements of the statute of frauds because the delivery of the confirmation to John, as Duane's agent, did not occur within a reasonable time after the oral contract as a matter of law. The district court found the size of the order, the volatility of the grain market, and the lack of an explanation by St. Ansgar Mills for failing to send the confirmation to Duane after John failed to stop by the business as expected made the delay between July 1 and August 10 unreasonable as a matter of law.

St. Ansgar Mills appeals. It claims a jury question was presented on the issue of whether a written confirmation was received within a reasonable time. [2]

2Duane did not cross-appeal from the determination by the district court that his status as a merchant was a question for the fact finder. Therefore, the issue is not before us. We limit our review to the issue whether a forty-day delay between the claimed oral contract and receipt of a written confirmation was unreasonable as a matter of law.

[**7]

II. Scope of Review.

We review a ruling for summary judgment for errors at law. Iowa R. App. P. 4; *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp.*, 606 N. W.2d 359, 362 (Iowa 2000). Summary judgment is appropriate where the record indicates no genuine issue of material fact exists, therefore the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). When the facts are not in dispute, we decide whether the district court correctly applied the law to the facts. K*ennedy v. Zimmermann*, 601 N. W.2d 61, 64 (Iowa 1999). In doing so, we view the facts in the light most favorable to the party opposing the motion. *See Mobil*, 606 N. W.2d at 362.

III. Statute of Frauds.

The statute of frauds is one of the most well-known and venerable rules applicable to contract law. Generally, it establishes an exception to the proposition that oral contracts are enforceable in a lawsuit if [*293] sufficiently proven by requiring certain types of contracts to be in writing and signed by the party against whom enforcement is sought. *See* Iowa Code § 554.2201(1).

The statute [**8] of frauds originated in 17th century England to combat the use of fraud and perjury by litigants in court proceedings to establish oral contracts. *See* 2 E. Allan Farnsworth, *Contracts* § 6.1, at 82-83 (2d ed. 1990). At the time, court rules prohibited parties to a lawsuit from testifying as witnesses in their case, and, consequently, an oral contract could only be established with testimony of third parties. *See Azevedo v. Minister,* 86 Nev. 576, 471 P.2d 661, 663 (Nev. 1970). This prohibition allowed witnesses to be persuaded to give false testimony on behalf of a party in an effort to establish an oral contract, leaving the other party at a distinct disadvantage. *See* James J. O'Connell, Jr., *Boats Against a Current: The Courts and*

the Statute of Frauds, 47 Emory L. J. 253, 257 (1998) [hereinafter O'Connell] [3]

3 Other factors also helped place defendants at a distinct disadvantage. Rules of evidence were undeveloped at the time and courts had little authority to overturn jury verdicts not supported by the evidence. *See* O'Connell, 47 Emory L. J. at 257.

[**9] In 1677, in response to this unsavory practice of using perjury to establish oral contracts, Parliament enacted the statute of frauds to require certain contracts to be supported by written evidence to be enforceable. [4] 29 Car. 2, ch. 3 (1677) (Eng.); *see* Hugh E. Willis, *Statute of Frauds--A Legal Anachronism,* 3 Ind. L. J. 427, 427 (1928). The statute included contracts which were not only particularly susceptible to fraud, but those which posed serious consequences of fraud, including contracts for the sale of goods or property. *See* O'Connell, 47 Emory L. J. at 258.

4 There is some debate as to the date of passage with royal assent for the new bill. Some records indicate the date of passage as April 16, 1676, whereas the actual date was in 1677. *Compare* Marc P. Bouret, *Oral Will Contracts and the Statute of Frauds in California, 1896-1980: A Summary and Evaluation*, 8 Pepp. L. Rev. 41, 43 (1980) (arguing the statute of frauds was originally enacted in 1676), *with* George P. Costigan, Jr., *The Date and Authorship of the Statute of Frauds*, 26 Harv. L. Rev. 329, 331 (1913) [hereinafter Costigan] (arguing the statute was enacted in 1677). The confusion stems from Pope Gregory XIII's abolition of the "old" calendar in 1582, which was adopted in England in 1751. Costigan, 26 Harv. L. Rev. at 331. The "old" calendar was eleven days ahead of the "new" due to the vernal equinox in March, resulting in confusion in the months of January, February and March. *Id.*

[**10] Despite a difference in the court rules which gave rise to this statute of frauds, our American legal culture quickly adopted the principle. James J. White & Robert S. Summers, *Uniform Commercial Code*§ 2--1, at 50 (2d ed. 1980) [hereinafter White & Summers] Iowa adopted the statute of frauds in 1851. *See* Iowa Code §§ 2409-10 (1851). The statute of frauds also became a part of the Uniform Sales Act in 1906, which Iowa subsequently adopted in 1924. *See* 1919 Iowa Acts ch. 396 (initially codified at Iowa Code §§ 9930-10007 (1924)). This statute required all contracts for the sale of goods to be in writing. Over time, the Uniform Sales Act was replaced by the Uniform Commercial Code. [5] The Uniform Commercial Code continued to adhere to the statute [*294] of frauds, but was limited in its provisions to the sale of goods in excess of $500. Iowa enacted its version of the Uniform Commercial Code in 1966 including the statute of frauds. *See* 1965 Iowa Acts ch. 413. Iowa's statute of frauds for the sale of goods now provides:

Except as otherwise provided in this section, a contract for the sale of goods for the price of $500 or more is not enforced by way of action [**11] or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by that party's authorized agent or broker.

Iowa Code § 554.2201(1) (1995).

5 After six years of deliberating, the National Conference of Commissioners on Uniform State Laws produced the 1952 Official Text of the Uniform Commercial Code. *See* William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code,* 22 U. Miami L. Rev. 1, 1-2 (1967). In 1954, Pennsylvania was the first state to formally adopt the

text. *See* 13 Pa. Const. Stat. §§ 1101 to 9507 (1953). By 1968, the Uniform Commercial Code was effective in forty-nine states, the District of Columbia, and the Virgin Islands. *See* Uniform Commercial Code Table, 1 U. L. A. 1-2 (Master ed. 1989). There have been three official revisions, the 1972, the 1978, and the 1987 Official Texts, offered by the Permanent Editorial Board, a board established in 1961 to keep the Code up to date. *See* William A. Schnader, *The Permanent Editorial Board for the Uniform Commercial Code: Can it Accomplish its Object?,*3 Am. Bus. L. J. 137, 138 (1965).

[**12] Although the statute of frauds has been deeply engrained into our law, many of the forces which originally gave rise to the rule are no longer prevalent. White & Summers § 2--1, at 51. This, in turn, has caused some of the rigid requirements of the rule to be modified.

One statutory exception or modification to the statute of frauds which has surfaced applies to merchants. [6] *Id.* § 554.2201(2). Under section 554.2201(2), the writing requirements of section 554.2201(1) are considered to be satisfied if, within a reasonable time, a writing in confirmation of the contract which is sufficient against the sender is received and the merchant receiving it has reason to know of its contents, unless written notice of objection of its contents is given within ten days after receipt. *Id.* Thus, a writing is still required, but it does not need to be signed by the party against whom the contract is sought to be enforced. The purpose of this exception was to put professional buyers and sellers on equal footing by changing the former law under which a party who received a written confirmation of an oral agreement of sale, but who had not signed anything, could hold the other party [**13] to a contract without being bound. *See* White & Summers § 2--3, at 55; *Kimball County Grain Coop. v. Yung,* 200 Neb. 233, 263 N. W.2d 818, 820 (Neb. 1978). It

also encourages the common, prudent business practice of sending memoranda to confirm oral agreements. White & Summers § 2--3, at 55.

6 The Uniform Commercial Code establishes three general exceptions to the writing requirement: (1) goods made specially for the buyer and not suitable for resale to others towards which the seller has made a substantial beginning of their manufacture or commitments for their procurement; (2) where the party against whom enforcement is sought admits the existence of the contract in pleadings, testimony, or before the court; and (3) goods for which payment has been received and goods accepted. *See* Iowa Code § 554.2201(3)(a)-(c). Additionally, a contract "may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of the contract." *Id.* § 554.2204(1). The agreement which creates the contract qualifies even though the exact moment of its making is undetermined or terms are left open, so long as the parties intended to make a contract. *Id.* § 554.2204(2), (3).

[**14] While the written confirmation exception imposes a specific ten-day requirement for a merchant to object to a written confirmation, it employs a flexible standard of reasonableness to establish the time in which the confirmation must be received. Iowa Code § 554.2201(2). The Uniform Commercial Code specifically defines a reasonable time for taking action in relationship to "the nature, purpose and circumstances" of the action. *Id.* § 554.1204(2). Additionally, the declared purpose of the Uniform Commercial Code is to permit the expansion of commercial practices through the custom and practice of the parties. *See*Iowa Code Ann. § 554.1102 cmt. 2 (course of dealings, usage of trade or course of performance are material in determining a reasonable time). Furthermore, the Uniform Commercial Code relies upon course of

dealings between the parties to help interpret their conduct. Iowa Code § 554.1205(1). Thus, all relevant circumstances, including custom and practice of the parties, must be considered in determining [*295] what constitutes a reasonable time under section 554.2201(2).

Generally, the determination of the reasonableness of particular conduct is a jury question. *See Pirelli-Armstrong Tire Co. v. Reynolds,* 562 N. W.2d 433, 436 (Iowa 1997); [**15] s*ee also Harvey v. Great Atl. & Pac. Tea Co.,* 388 F.2d 123, 125 (5th Cir. 1968) (passing judgment on the reasonableness of conduct of the parties must be accomplished in light of all the circumstances of the case and should rarely be disposed of by summary judgment). Thus, the reasonableness of time between an oral contract and a subsequent written confirmation is ordinarily a question of fact for the jury. M*ortgageAmerica Corp. v. American Nat'l Bank,* 651 S. W.2d 851, 856 (Tex. Ct. App. 1983); *Schiavi Mobile Homes, Inc. v. Gagne,* 510 A.2d 236, 238 (Me. 1996) (reasonableness of parties' time for action is a question of fact). It is only in rare cases that a determination of the reasonableness of conduct should be decided by summary adjudication. *Harvey,* 388 F.2d at 125. Summary judgment is appropriate only when the evidence is so one-sided that a party must prevail at trial as a matter of law. *Ridgeway v. Union County Comm'rs,* 775 F. Supp. 1105, 1109 (S. D. Ohio 1991).

There are a host of cases from other jurisdictions which have considered the question of what constitutes a reasonable time under [**16] the written confirmation exception of the Uniform Commercial Code. *See Gestetner Corp. v. Case Equip. Co.*, 815 F.2d 806, 810 (1st Cir. 1987) (roughly five month delay reasonable in light of merchants' relationship and parties' immediate action under contract following oral agreement); *Serna, Inc. v. Harman*, 742 F.2d 186, 189 (5th Cir. 1984) (three and one-half month delay

reasonable in light of the parties' interaction in the interim, and non-fluctuating prices, thus no prejudice); *Cargill, Inc. v. Stafford,* 553 F.2d 1222, 1224 (10th Cir. 1977) (less than one month delay unreasonable despite misdirection of confirmation due to mistaken addressing); *Starry Constr. Co. v. Murphy Oil USA, Inc.*, 785 F. Supp. 1356, 1362-63 (D. Minn. 1992) (six month delay for confirmation of modification order for additional oil unreasonable as a matter of law in light of Persian Gulf War, thus increased prices and demand); *Rockland Indus., Inc. v. Frank Kasmir Assoc.*, 470 F. Supp. 1176, 1179 (N. D. Tex. 1979) (letter sent eight months after alleged oral agreement for two-year continuity agreement unreasonable in light [**17] of lack of evidence supporting reasonableness of delay); *Yung*, 263 N. W.2d at 820 (six month delay in confirming oral agreement delivered one day prior to last possible day of delivery unreasonable); *Azevedo*, 471 P.2d at 666 (ten week delay reasonable in light of immediate performance by both parties following oral agreement)*; Lish v. Compton*, 547 P.2d 223, 226-27 (Utah 1976) (twelve day delay "outside the ambit which fair-minded persons could conclude to be reasonable" in light of volatile price market and lack of excuse for delay other than casual delay). Most of these cases, however, were decided after a trial on the merits and cannot be used to establish a standard or time period as a matter of law. Only a few courts have decided the question as a matter of law under the facts of the case. *Compare Starry,* 785 F. Supp. at 1362-63 (granting summary judgment), and *Lish,* 547 P.2d at 226-27 (removing claim from jury's consideration), *with Barron v. Edwards,* 45 Mich. App. 210, 206 N. W.2d 508, 511 (Mich. Ct. App. 1973) (remanding for further development of facts, summary judgment improper). [**18] However, these cases do not establish a strict principle to apply in this case. The resolution of each case depends upon the particular facts and circumstances.

In this case, the district court relied upon the large amount of the sale, volatile market conditions, and lack of an explanation by St. Ansgar Mills for failing to send the written confirmation to Duane in determining St. Ansgar Mills acted unreasonably as a matter of law in delaying delivery of the written confirmation until [*296] August 10, 1996. Volatile market conditions, combined with a large sale price, would normally narrow the window of reasonable time under section 554.2201(2). However, they are not the only factors to consider. Other relevant factors which must also be considered in this case reveal the parties had developed a custom or practice to delay delivery of the confirmation. The parties also maintained a long-time amicable business relationship and had engaged in many other similar business transactions without incident. There is also evidence to infer St. Ansgar Mills did not suspect John's failure to follow his customary practice in July of stopping by the business was a concern at the time. These factors [**19] reveal a genuine dispute over the reasonableness of the delay in delivering the written confirmation, and make the resolution of the issue appropriate for the jury. Moreover, conduct is not rendered unreasonable solely because the acting party had no particular explanation for not pursuing different conduct, or regretted not pursuing different conduct in retrospect. The reasonableness of conduct is determined by the facts and circumstances existing at the time.

Considering our principles governing summary adjudication and the need to resolve the legal issue by considering the particular facts and circumstances of each case, we conclude the trial court erred by granting summary judgment. We reverse and remand the case for further proceedings.

REVERSED AND REMANDED.

¿ Es más flexible el requisito formal de la escritura en el contexto del derecho comercial estadounidense?

BVS, Inc., Plaintiff - Appellant v. CDW DIRECT, LLC, Defendant - Appellee UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT 759 F.3d 869 December 17, 2013, Submitted July 17, 2014, Filed

OPINION BY**:** BYE [*870] BVS, Inc. (BVS) sued CDW Direct, LLC (CDW) alleging breach of contract, unjust enrichment, and fraud. The dispute arose from BVS's contract with CDW for a computer storage area network (SAN). The district court granted summary judgment in favor of CDW, finding no genuine dispute of material fact regarding the contract's integration, performance, or how course of dealing affected the contract. BVS appeals arguing the district court erred in granting summary judgment. We reverse and remand.

I

BVS provides online training to banks and credit unions. To do so, it uses a main computer system located in Cedar Rapids, Iowa, and keeps a disaster recovery system at a separate location. As a BVS representative testified, if the system "goes down or is unavailable, we're out of business." In late [**2] 2010, BVS sought to update several components of its system, including its SAN. Updating the SAN would involve an entire solution: hardware, software, implementation, testing and support.

Prior to this, BVS had an ongoing business relationship with CDW. CDW resells technology products and services through its internet-based retail business. BVS purchased products and services from CDW on numerous occasions. BVS would either place an order online, or request a quote from Amer Harb, the CDW account manager assigned to BVS. After Harb provided a quote, BVS would either

purchase that item online, or a CDW employee would access the BVS account and place the order.

These transactions numbered in the hundreds. Through them, Harb developed a relationship with BVS. When he learned that BVS was looking for a new SAN solution, he saw an opportunity to further that relationship. However, Roy Karon, BVS's owner, expressed doubt that CDW could deliver on such a complicated project.

It soon became clear just how complicated the project would be. Harb brought in a third party, Net App, Inc. (Net App), for assistance in developing the SAN solution. Net App then arranged for another third party, Arrow [**3] Electronics, Inc. (Arrow), to [*871] install and implement the SAN solution. During frequent and extensive discussions, BVS told Harb of their need for a total SAN solution and that BVS was not looking to simply purchase software and hardware. Rather, BVS told Harb it required a complete solution, fully installed and tested to ensure it met BVS's needs. However, Harb's expertise was other than technical. For example, he had another CDW employee ghost-write an email of technical questions. BVS did not know the email was ghost-written at the time, and Karon testified that, had he known Harb had sent a ghost-written email, he would have insisted on dealing with someone from CDW with more technical competence.

On December 3, 2010, CDW sent BVS a quote for hardware, software, and services for the SAN solution. After receiving this quote and still doubtful CDW could deliver, Karon called Harb directly to express his concerns. Harb explained CDW had data center expertise; Karon took this to mean that CDW had the expertise to deliver a SAN solution.

BVS sent CDW a purchase order, which incorporated the quote, and listed hardware, software, training, support

services, and six "Arrow Provisioned Services." [**4] The next day, CDW sent a purchase order to Arrow to fulfill BVS's purchase order. Harb testified that, at this point, CDW had reached an agreement with BVS; indeed, he testified CDW would not have sent a purchase order to Arrow without such an agreement. One month after BVS sent its purchase order, and after the agreement was made that Harb testified to, CDW sent BVS an invoice (Invoice).

In addition to the items detailed in BVS's purchase order, on its back the Invoice listed Terms and Conditions, including warranty disclaimers, statements that the customer's "sole and exclusive remedy [is] at the sole option of the Seller" to either have CDW reperform or to seek a refund, and further statements limiting CDW's liability. These terms were included on documents generated by BVS's previous, unrelated transactions with CDW. Further, the CDW web site contained disclaimers and liability limitations and were accessible when BVS purchased through CDW's web site. The instant agreement, however, was not reached in the same manner as the previous transactions.

In early February 2011, the parties held a kickoff phone call to discuss and schedule the project. Hardware and software were delivered. [**5] Installation was ultimately scheduled to be complete by March 3, 2011. The project, however, failed. BVS was unable to use its new SAN system. Attempts to fix problems plaguing the system either failed or were refused, until finally, on May 19, 2011 -- more than two months after the expected completion of the project -- BVS decided the system would not be able to function properly. BVS attempted to send the hardware and software back to CDW. CDW refused to take back the system.

BVS brought suit against CDW, alleging breach of contract, unjust enrichment, and fraud. In granting CDW's motion for summary judgment on these claims, the district court found BVS's purchase order in early December constituted an offer, and CDW accepted that offer when it sent a purchase order to Arrow. By this offer and acceptance, the district court found a contract existed before CDW's Invoice. The district court, however, found the parties' course of dealing supplemented the terms of the agreement and the Invoice integrated the agreement. This finding incorporated the Invoice's warranty disclaimers and meant CDW performed its obligations to deliver hardware and software. BVS appealed.

[*872] II

We review a district [**6] court's interpretation of Iowa law and its decision on summary judgment *de novo*, viewing the evidence in the light most favorable to BVS, the non-moving party. *Cagin v. McFarland Clinic, P. C., 456 F.3d 903, 906 (8th Cir. 2006)*. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to relief as a matter of law." *Fed. R. Civ. P. 56(a)*. "A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party; a fact is material if its resolution affects the outcome of the case." *Amini v. City of Minneapolis, 643 F.3d 1068, 1074 (8th Cir. 2011)* (citing *Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 248, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*.

We agree with the district court's finding that BVS's original purchase order constituted an offer and that CDW accepted that offer when it sent a purchase order to Arrow. We must then determine whether, under Iowa law, the agreement between CDW and BVS was integrated by CDW's Invoice. We conclude the district court erred when

it ruled, as a matter of law, that the Invoice -- sent after offer and acceptance had already created a contract -- integrated [**7] the contract with respect to terms not included in either BVS's offer or CDW's acceptance.

Under Iowa law, " [a] n agreement is fully integrated when the parties involved adopt a writing or writings as the final and complete expression of the agreement." *Cagin, 456 F.3d at 907* (quoting *Whalen v. Connelly, 545 N. W.2d 284, 290 (Iowa 1996))*. If a contract is fully integrated, "extrinsic evidence [may not] contradict (or even supplement) the terms of the written agreement." *Id. at 907-08* (quoting *Whalen, 545 N. W.2d at 290*). The determination of " [w] hether or not a written agreement is integrated is a question of fact to be determined by the totality of the evidence." *Id. at 908* (quoting *Whalen, 545 N. W.2d at 290*).

In Cagin, because the plaintiff could not produce evidence "to suggest the [contract] did not constitute the final expression of the parties' agreement [,] " the court found "no facts in dispute which could lead a reasonable person to find the [contract] was not fully integrated." *456 F.3d at 908*. Here, however, the parties dispute the particular facts of the oral agreement stemming from Harb and Koran's conversation. Karon allegedly asked for reassurances CDW was capable of the project; [**8] Harb allegedly assured him CDW was. Those alleged promises -- part of the "totality of the evidence" -- suggest the Invoice was not the "final and complete expression of the agreement." A reasonable jury, weighing this evidence, could return a verdict for either party.

The district court -- considering the parties' prior course of dealing as part of the "totality of evidence" - held the parties' course of dealing supplemented the terms of the contract. Because the Invoice came after the agreement, its

terms are "proposals for addition to the contract." *Iowa Code § 554.2207*. As to merchants, such additional terms become part of the contract unless they materially alter it, i. E., come as a surprise to the party opposing enforcement. Id.; see also *All-Iowa Contracting Co. v. Linear Dynamics, Inc., 296 F. Supp. 2d 969, 979 (N. D. Iowa 2003)* (concluding terms negating standard warranties are normally considered material alterations unless there is no surprise to the party opposing enforcement of the terms negating the warranties). If the course of dealing supplemented the contract, then, BVS would not be surprised by the late inclusion of the warranty disclaimers.

BVS argues the course of dealing [**9] between the parties was inapplicable to the [*873] instant contract. Such consideration is properly a question of fact. See *Grace Label, Inc. v. Kliff, Inc., 355 F. Supp. 2d 965, 972 (S. D. Iowa 2005)* (concluding summary judgment was inappropriate on an issue which involved the parties' course of dealing); see also *St. Ansgar Mills, Inc. v. Streit, 613 N. W.2d 289, 295-96 (Iowa 2000)* (reversing a grant of summary judgment in case involving question whether a delay in sending written confirmation of an oral contract was reasonable under the parties' course of dealing).

BVS and CDW did have extensive dealings with one another. The three ways BVS normally purchased from CDW were to either (1) place an order online, (2) request a quote from Harb for a discounted price and then purchase the item online, or (3) request a quote from Harb and notify Harb via telephone or email of an intention to purchase the item at that discounted price, at which point a CDW employee would access BVS's account and place the order.[1] The transaction at issue here, however, did not have any of the earmarks associated with the parties' prior course of dealing. Their absence is strong evidence this particular transaction [**10] was unique, and there was no intention

to incorporate the warranty disclaimers included with the Invoice. Without the course of dealing, BVS would be surprised to find warranty disclaimers added after the agreement was reached. A finder of fact, then, should determine whether the parties' course of dealing supplemented the instant agreement.

1 BVS moved to exclude Harb's affidavit, which detailed these previous dealings, from the record for summary judgment, on the grounds that it was in violation of *Federal Rule of Civil Procedure 26*. The district court denied that motion, and BVS appeals that denial. Because we are ruling in BVS's favor in reversing the grant of summary judgment, its motion to exclude the affidavit is moot.

For these reasons, we find genuine issues of material fact remain as to whether the qualitatively different nature of this particular transaction overrides any previous course of dealing, whether the Invoice integrated the agreement, and whether Harb's alleged assurances to Koran provided warranties to the contract. Such questions should be addressed to the finder of fact.[2]

2 Having decided a finder of fact should determine whether the parties' agreement was incorporated [**11] by the Invoice, we recognize the finder of fact should be asked to determine which terms were incorporated into the agreement. This fact-finding will determine dispositive elements regarding BVS's breach of contract claim."Under Iowa law, ' [i] n a breach-of-contract claim, the complaining party must prove: (1) the existence of a contract; *(2) the terms and conditions of the contract*; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach.'" *Cagin, 456*

F.3d 903 at 906 (quoting *Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N. W.2d 222, 224 (Iowa 1998))* (emphasis added). Since, under Iowa law, " [g] enerally, questions of performance or breach are for the jury [,] " *Iowa-Ill. Gas & Elec. Co. v. Black Veatch, 497 N. W.2d 821, 825 (Iowa 1993)*, the jury needs to decide the ultimate issue of breach or performance.

III

The district court improperly decided questions of fact which should be left to a jury. We reverse the district court's grant of summary judgment[3] and remand the case for further proceedings consistent with this [**12] opinion.

3 In granting CDW's motion for summary judgment, the district court dismissed BVS's fraud claim. In reversing the summary judgment, we reinstate the fraud claim.

¿ Puede una comunicación escrita posterior acaso integrar un contrato ya perfeccionado?

E. LA OFERTA Y LA ACCEPTACIÓN

LA DENOMINADA 'BATALLA DE LOS FORMULARIOS' ENTRE COMERCIANTES

DIAMOND FRUIT GROWERS, INC., an Oregon corporation, Plaintiff, v. KRACK CORPORATION, an Illinois corporation, Defendant/Third-Party Plaintiff-Appellee, v. METAL-MATIC, INC., a Minnesota corporation, Third-Party Defendant-Appellant UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 794 F.2d 1440; 1 U. C. C. Rep. Serv. 2d 1073 March 5, 1986, Argued and Submitted July 22, 1986, Filed

OPINION BY: WIGGINS [*1441] Metal-Matic, Inc. (Metal-Matic) appeals from judgment entered after a jury verdict in favor of Krack Corporation (Krack) on Krack's third-party complaint against Metal-Matic. Metal-Matic

also appeals from the district court's denial of its motion for judgment n. O. V. We have jurisdiction under *28 U. S. C. § 1291 (1982)* and affirm.

FACTS AND PROCEEDINGS BELOW

Krack is a manufacturer of cooling units that contain steel tubing it purchases from outside suppliers. Metal-Matic is one of Krack's tubing suppliers. At the time this dispute arose, Metal-Matic had been supplying tubing to Krack for about ten years. The parties followed the same course of dealing during the entire ten years. At the beginning [**2] of each year, Krack sent a blanket purchase order to Metal-Matic stating how much tubing Krack would need for the year. Then, throughout the year as Krack needed tubing, it sent release purchase orders to Metal-Matic requesting that tubing be shipped. Metal-Matic responded to Krack's release purchase orders by sending Krack an acknowledgment form and then shipping the tubing. [1]

1 The blanket purchase order apparently did no more than establish Krack's willingness to purchase an amount of tubing during the year. The parties' conduct indicates that they intended to establish their contract based on Krack's release purchase orders and Metal-Matic's acknowledgments sent in response to those purchase orders.

Metal-Matic's acknowledgment form disclaimed all liability for consequential damages and limited Metal-Matic's liability for defects in the tubing to refund of the purchase price or replacement or repair of the tubing. As one would expect, these terms were not contained in Krack's purchase order. The following [**3] statement was printed on Metal-Matic's form: "Metal-Matic, Inc.'s acceptance of purchaser's offer or its offer to purchaser is hereby expressly made conditional to purchaser's

acceptance of the terms and provisions of the acknowledgment form." This statement and the disclaimer of liability were on the back of the acknowledgment form. However, printed at the bottom of the front of the form in bold-face capitals was the following statement: "SEE REVERSE SIDE FOR TERMS AND CONDITIONS OF SALE."

On at least one occasion during the ten-year relationship between Metal-Matic and Krack, Allen Zver, Krack's purchasing manager, discussed the limitation of warranty and disclaimer of liability terms contained in Metal-Matic's acknowledgment form with Robert Van Krevelen, Executive Vice President of Metal-Matic. Zver told Van Krevelen that Krack objected to the terms and tried to convince him to change them, but Van Krevelen refused to do so. After the discussions, Krack continued to accept and pay for tubing from Metal-Matic. [2]

2 Krack contends that there is no evidence of when these discussions took place. That is not the case. Van Krevelen testified that at least some discussions were held before this incident arose. That testimony is not contradicted.

[**4] In February 1981, Krack sold one of its cooling units to Diamond Fruit Growers, Inc. (Diamond) in Oregon, and in September 1981, Diamond installed the unit in a controlled-atmosphere warehouse. In January 1982, the unit began leaking ammonia from a cooling coil made of steel tubing.

After Diamond discovered that ammonia was leaking into the warehouse, Joseph Smith, the engineer who had been responsible for building Diamond's controlled-atmosphere warehouses, was called in to find the source of the leak. Smith testified that he found a pinhole leak in the cooling coil of the Krack cooling unit. Smith inspected the

coil while it was still inside the unit. He last inspected the coil on April 23, 1982. The coil then sat in a hall at Diamond's warehouse until May, 1984, when John Myers inspected the coil for Metal-Matic.

Myers cut the defective tubing out of the unit and took it to his office. At his office, [*1442] he did more cutting on the tubing. After Myers inspected the tubing, it was also inspected by Bruce Wong for Diamond and Paul Irish for Krack.

Diamond sued Krack to recover the loss in value of fruit that it was forced to remove from the storage room as a result [**5] of the leak. Krack in turn brought a third-party complaint against Metal-Matic and Van Huffel Tube Corporation (Van Huffel), another of its tubing suppliers, seeking contribution or indemnity in the event it was held liable to Diamond. At the close of the evidence, both Metal-Matic and Van Huffel moved for a directed verdict on the third party complaint. The court granted Van Huffel's motion based on evidence that the failed tubing was not manufactured by Van Huffel. The court denied Metal-Matic's motion.

The jury returned a verdict in favor of Diamond against Krack. It then found that Krack was entitled to contribution from Metal-Matic for thirty percent of Diamond's damages. Metal-Matic moved for judgment n. O. V. The court denied that motion and entered judgment on the jury verdict.

Metal-Matic raises two grounds for reversal. First, Metal-Matic contends that as part of its contract with Krack, it disclaimed all liability for consequential damages and specifically limited its liability for defects in the tubing to refund of the purchase price or replacement or repair of the tubing. Second, Metal-Matic asserts that the evidence does not support a finding that it manufactured the [**6]

tubing in which the leak developed or that it caused the leak. We address each of these contentions in turn.

STANDARD OF REVIEW

Metal-Matic's contention that its disclaimers are part of its contract with Krack presents questions of statutory and contract interpretation, which are questions of law reviewed *de novo. United States v. Binder, 769 F.2d 595, 600 (9th Cir. 1985)*; *Marchese v. Shearson Hayden Stone, Inc., 734 F.2d 414, 417 (9th Cir. 1984)*; *see United States v. McConney, 728 F.2d 1195, 1202* (9th Cir.) (en banc), *cert. denied*, *469 U. S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984)*. The jury verdict and the district court's denial of Metal-Matic's motion for judgment n. O. V. will not be reversed by this court if there is substantial evidence to support a finding for Krack. *See Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 877* (9th Cir.), *cert. denied*, *469 U. S. 932, 105 S. Ct. 329, 83 L. Ed. 2d 265 (1984)*.

DISCUSSION

A. M*etal-Matic's Disclaimer of Liability for Consequential Damages*

If the contract between Metal-Matic and Krack contains Metal-Matic's [**7] disclaimer of liability, Metal-Matic is not liable to indemnify Krack for part of Diamond's damages. Therefore, the principal issue before us on this appeal is whether Metal-Matic's disclaimer of liability became part of the contract between these parties.

Relying on *Uniform Commercial Code (U. C. C.) § 2-207*, *Or. Rev. Stat. § 72.2070* (1985), [3] Krack argues that Metal-Matic's disclaimer did not become part of the contract. Metal-Matic, on the other hand, argues that *section 2-207* is inapplicable to this case because the parties discussed the disclaimer, and Krack assented to it.

3 Metal-Matic's acknowledgment form specified that Minnesota law would apply to the contract, but the parties tried this case based on Oregon law and have relied on Oregon law in this court. We will therefore apply Oregon law to this appeal.

Krack is correct in its assertion that *section 2-207* applies to this case. One intended application of *section 2-207* is to commercial transactions in which the parties exchange printed purchase [**8] order and acknowledgment forms. *See U. C. C. § 2-207* comment 1. [4] The drafters of the [*1443] U. C. C. recognized that "because the [purchase order and acknowledgment] forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond." *Id. Section 2-207* is an attempt to provide rules of contract formation in such cases. In this case, Krack and Metal-Matic exchanged purchase order and acknowledgment forms that contained different or additional terms. This, then, is a typical *section 2-207* situation. The fact that the parties discussed the terms of their contract after they exchanged their forms does not put this case outside *section 2-207*. *See* 3 R. Duesenburg & L. King, *Sales and Bulk Transfers under the Uniform Commercial Code* (Bender's U. C. C. Service) § 3.05 [2] (1986). *Section 2-207* provides rules of contract formation in cases such as this one in which the parties exchange forms but do not agree on all the terms of their contract.

4 Although the official comments to the U. C. C. are not included in Oregon Revised Statutes, the Oregon courts rely on them. *See, e. G., Willamette-Western Corp. v. Lowry, 279 Ore. 525, 532, 568 P.2d 1339, 1342 (1977)*.

[**9] A brief summary of *section 2-207* is necessary to an understanding of its application to this case. [5] *Section 2-207* changes the common law's mirror-image rule for

transactions that fall within article 2 of the U. C. C. At common law, an acceptance that varies the terms of the offer is a counteroffer and operates as a rejection of the original offer. *See Idaho Power Co. v. Westinghouse Electric Corp., 596 F.2d 924, 926 (9th Cir. 1979)*. If the offeror goes ahead with the contract after receiving the counteroffer, his performance is an acceptance of the terms of the counteroffer. *See C. Itoh & Co. v. Jordan International Co., 552 F.2d 1228, 1236 (7th Cir. 1977)*; J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code*, § 1-2 at 34 (2d ed. 1980).

5 *U. C. C. § 2-207*, *Or. Rev. Stat. § 72.2070*, provides:

Additional terms in acceptance or confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;

(b) They materially alter it; or

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not

otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of the Uniform Commercial Code.

[**10] Generally, *section 2-207(1)* "converts a common law counteroffer into an acceptance even though it states additional or different terms." *Idaho Power, 596 F.2d at 926*; *see U. C. C. § 2-207(1)*. The only requirement under *section 2-207(1)* is that the responding form contain a definite and seasonable expression of acceptance. The terms of the responding form that correspond to the offer constitute the contract. Under *section 2-207(2)*, the additional terms of the responding form become proposals for additions to the contract. Between merchants the additional terms become part of the contract unless the offer is specifically limited to its terms, the offeror objects to the additional terms, or the additional terms materially alter the terms of the offer. *U. C. C. § 2-207(2)*; *see* J. White & R. Summers, § 1-2 at 32.

However, *section 2-207(1)* is subject to a proviso. If a definite and seasonable expression of acceptance expressly conditions acceptance on the offeror's assent to additional or different terms contained therein, the parties' differing forms do not result in a contract unless the offeror assents to the additional terms. *See* J. White & R. Summers, [**11] § 1-2 at 32-33. If the offeror assents, the parties have a contract and the additional terms are a part of that contract. [*1444] If, however, the offeror does not assent, but the parties proceed with the transaction as if they have a contract, their performance results in formation of a contract. *U. C. C. § 2-207(3)*. In that case, the terms of the contract are those on which the parties' forms agree plus any terms supplied by the U. C. C. *Id.; see Boise Cascade Corp. v. Etsco, Ltd., 39 U. C. C. Rep. Serv. (Callaghan)*

410, 414 (D. Or. 1984); J. White & R. Summers, § 1-2 at 34.

In this case, Metal-Matic expressly conditioned its acceptance on Krack's assent to the additional terms contained in Metal-Matic's acknowledgment form. That form tracks the language of the *section 2-207(1)* proviso, stating that "Metal-Matic, Inc.'s acceptance is hereby *expressly made conditional* to purchaser's acceptance of the terms and provisions of the acknowledgment form." (emphasis added). *See* C. I*toh & Co., 552 F.2d at 1235*. Therefore, we must determine whether Krack assented to Metal-Matic's limitation of liability term.

Metal-Matic argues that [**12] Krack did assent to the limitation of liability term. This argument is based on the discussions between Zver for Krack and Van Krevelen for Metal-Matic. Some time during the ten-year relationship between the companies, these two men discussed Krack's objections to the warranty and liability limitation terms in Metal-Matic's acknowledgment form. Krack attempted to persuade Metal-Matic to change its form, but Metal-Matic refused to do so. After the discussions, the companies continued to do business as in the past. Metal-Matic contends that Krack assented to the limitation of liability term when it continued to accept and pay for tubing after Metal-Matic insisted that the contract contain its terms.

To address Metal-Matic's argument, we must determine what constitutes assent to additional or different terms for purposes of *section 2-207(1)*. The parties have not directed us to any cases that analyze this question and our research has revealed none. [6] We therefore look to the language and structure of *section 2-207* and to the purposes behind that section to determine the correct standard.

6 The United States District Court for the District of Columbia has decided a case on this issue. However, the

case is of little precedential value because the court provided no analysis to support its decision. In *McKenzie v. Alla-Ohio Coals, Inc., 29 U. C. C. Rep. Serv. (Callaghan) 852, 855 (D. D. C. 1979)*, the offeror objected to a term in the offeree's form. The offeree reaffirmed that term, and the offeror made no further objection. The court held that the term was part of the contract because the parties continued to behave as if they had a contract after the offeree reaffirmed the term.

[**13] One of the principles underlying *section 2-207* is neutrality. If possible, the section should be interpreted so as to give neither party to a contract an advantage simply because it happened to send the first or in some cases the last form. *See* J. White & R. Summers, § 1-2 at 26-27. *Section 2-207* accomplishes this result in part by doing away with the common law's "last shot" rule. *See* 3 R. Duesenberg & L. King, § 3.05 [1] [a] [iii] at 3-73. At common law, the offeree/counter-offeror gets all of its terms simply because it fired the last shot in the exchange of forms. *Section 2-207(3)* does away with this result by giving neither party the terms it attempted to impose unilaterally on the other. *See id.* at 3-71. Instead, all of the terms on which the parties' forms do not agree drop out, and the U. C. C. supplies the missing terms.

Generally, this result is fair because both parties are responsible for the ambiguity in their contract. The parties could have negotiated a contract and agreed on its terms, but for whatever reason, they failed to do so. Therefore, neither party should get its terms. *See* 3 R. Duesenberg & L. King, § 3.05 [2] at 3-88. However, as [**14] White and Summers point out, resort to *section 2-207(3)* will often work to the disadvantage of the seller because he will "wish to undertake less responsibility for the quality of his goods than the Code imposes or else wish to limit his damages liability more narrowly than would the Code." J. White &

R. Summers, § 1-2 at 34. Nevertheless, White and Summers recommend [*1445] that *section 2-207(3)* be applied in such cases. *Id.* We agree. Application of *section 2-207(3)* is more equitable than giving one party its terms simply because it sent the last form. Further, the terms imposed by the code are presumably equitable and consistent with public policy because they are statutorily imposed. *See* 3 R. Duesenberg & L. King, § 3.05 [2] at 3-88.

With these general principles in mind, we turn now to Metal-Matic's argument that Krack assented to the disclaimer when it continued to accept and pay for tubing once Metal-Matic indicated that it was willing to sell tubing only if its warranty and liability terms were part of the contract. Metal-Matic's argument is appealing. Sound policy supports permitting a seller to control the terms on which it will sell its products, especially [**15] in a case in which the seller has indicated both in writing and orally that those are the only terms on which it is willing to sell the product. Nevertheless, we reject Metal-Matic's argument because we find that these considerations are outweighed by the public policy reflected by Oregon's enactment of the U. C. C.

If we were to accept Metal-Matic's argument, we would reinstate to some extent the common law's last shot rule. To illustrate, assume that the parties in this case had sent the same forms but in the reverse order and that Krack's form contained terms stating that Metal-Matic is liable for all consequential damages and conditioning acceptance on Metal-Matic's assent to Krack's terms. Assume also that Metal-Matic objected to Krack's terms but Krack refused to change them and that the parties continued with their transaction anyway. If we applied Metal-Matic's argument in that case, we would find that Krack's term was part of the contract because Metal-Matic continued to ship tubing

to Krack after Krack reaffirmed that it would purchase tubing only if Metal-Matic were fully liable for consequential damages. Thus, the result would turn on which party sent the last form, and [**16] would therefore be inconsistent with *section 2-207*'s purpose of doing away with the last shot rule.

That result is avoided by requiring a specific and unequivocal expression of assent on the part of the offeror when the offeree conditions its acceptance on assent to additional or different terms. If the offeror does not give specific and unequivocal assent but the parties act as if they have a contract, the provisions of *section 2-207(3)* apply to fill in the terms of the contract. Application of *section 2-207(3)* is appropriate in that situation because by going ahead with the transaction without resolving their dispute, both parties are responsible for introducing ambiguity into the contract. Further, in a case such as this one, requiring the seller to assume more liability than it intends is not altogether inappropriate. The seller is most responsible for the ambiguity because it inserts a term in its form that requires assent to additional terms and then does not enforce that requirement. If the seller truly does not want to be bound unless the buyer assents to its terms, it can protect itself by not shipping until it obtains that assent. *See C. Itoh & Co., 552 F.2d at 1238*. [**17]

We hold that because Krack's conduct did not indicate unequivocally that Krack intended to assent to Metal-Matic's terms, that conduct did not amount to the assent contemplated by *section 2-207(1)*. *See* 3 R. Duesenberg & L. King, § 3.05 [1] [a] [iii] at 3-74. [7]

7 Metal-Matic also argues that testimony of Krack's own employee shows that both parties understood that Metal-Matic's disclaimers were part of the contract. However, the testimony upon which Metal-Matic bases this

argument shows only that Krack was aware of Metal-Matic's position, not that Metal-Matic had adopted or agreed to it.

B. S*ufficiency of the Evidence*

Metal-Matic next argues that there is insufficient evidence to support the jury verdict against it. First, Metal-Matic argues that the evidence does not support a [*1446] finding that it manufactured the tubing in which the leak developed. Second, Metal-Matic argues that even if it manufactured the failed tubing, the evidence establishes that it could not have caused [**18] the defect in the tubing. Although the evidence is contradictory on these issues, there is substantial evidence to support a jury verdict in favor of Krack.

1. D*id Metal-Matic Manufacture the Tubing that Failed*?

From 1978 through 1981, when the unit involved in this case was manufactured, Krack purchased tubing only from Metal-Matic and Van Huffel. Metal-Matic leaves the bead on welds in the tubing it manufactures, and Van Huffel removes the bead from welds in its tubing. The bead was left on the welds in the tubing that developed the leak. Nevertheless, Metal-Matic argues that there is no proof that it manufactured this tubing. Metal-Matic's argument is based on testimony that before 1978, Krack also purchased tubing from several smaller suppliers, some of which left the bead on their welds and that Krack puts all of its tubing in common bins.

The evidence on this issue is contradictory. That being the case, it was the jury's responsibility to weigh the evidence and reach a decision. The jury reached a result that is supported by substantial evidence, and we will not disturb it. *See Mosesian, 727 F.2d at 877*.

2. D*id Metal-Matic Cause the Defect* [**19] ?

Three experts, Wong for Diamond, Myers for Metal-Matic, and Irish for Krack, testified that the hole they observed in the tubing was caused by a hacksaw. One expert, Smith for Diamond, testified that the hole he saw was a pinhole and that there were no saw grooves on the tubing when he inspected it. Smith was the first expert to inspect the cooling unit after the leak was discovered. The next expert to inspect the unit, Myers, did not do so until almost two years after Smith's last inspection. During that time the unit was left in a hall at Diamond's warehouse. When Myers did inspect the unit, he cut the leaky section of tubing out of the unit. He then did more cutting on that section of tubing at his office. The other two experts, Wong and Irish, saw the tubing after Myers inspected it.

Relying on the testimony that the hole in the tubing was caused by a hacksaw, Metal-Matic attempts to show that such a hole could only have been made by Krack. The testimony at trial established that both Krack and Metal-Matic have hacksaws on their premises, but Krack is more likely to use a hacksaw around the tubing than is Metal-Matic.

Again there is evidence that would support a finding [**20] on either side of this issue. The jury weighed the evidence and reached a verdict supported by substantial evidence. That verdict will not be disturbed on appeal. *See Mosesian, 727 F.2d at 877*.

The jury verdict is supported by the evidence and consistent with the U. C. C. Therefore, the district court did not err in denying Metal-Matic's motion for a directed verdict. AFFIRMED.

 ¿ Cuál es la consecuencia consecuencia de abrogar la estricta *mirror image rule* del *common law* entre los comerciantes?

 BAYWAY REFINING COMPANY, Plaintiff-Appellee, TOSCO CORPORATION, Plaintiff-Counter-Defendant-Appellee, -v.- OXYGENATED MARKETING AND TRADING A. G., Defendant-Counter-Claimant-Appellant. UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 215 F.3d 219; 41 U. C. C. Rep. Serv. 2d 713 January 11, 2000, Argued June 8, 2000, Decided

OPINION BY: JACOBS [*220] Plaintiff-appellee Bayway Refining Company ("Bayway") paid federal excise tax on a petroleum transaction, as the Internal Revenue Code requires a petroleum dealer to do in a sale to a buyer who has not procured an exemption under the applicable tax provision. In this diversity suit against the buyer, Oxygenated Marketing and Trading A. G. ("OMT"), Bayway seeks to recover the amount of the tax it paid. One question in this "battle of the forms" contract case is whether, under N. Y. *U. C. C. § 2-207(2)(b)* (McKinney 1993), a contract term allocating liability to [**2] the [*221] buyer for an excise tax is an additional term presumed to have been accepted (as the seller contends) or (as the buyer contends) a material alteration presumed to have been rejected. The United States District Court for the Southern District of New York (McKenna, *J.*) granted summary judgment in favor of the seller, Bayway.

We conclude that, in the circumstances presented: (i) the party opposing the inclusion of an additional term under *§ 2-207(2)(b)* bears the burden of proving that the term amounts to a material alteration; (ii) the district court properly granted summary judgment in favor of the seller,

because the additional term here did not materially alter the contract; and (iii) the district court properly admitted evidence of custom and practice in the industry despite the fact that it was first proffered in the moving party's reply papers. Accordingly, we affirm.

Background

Bayway and OMT are in the business of buying and selling petroleum products. Bayway contracted to sell to OMT 60,000 barrels of a gasoline blendstock called Methyl Tertiary Butyl Ether ("MTBE"). On February 12, 1998, OMT faxed Bayway a confirmation letter, which operated as the offer, and [**3] which stated in pertinent part:

We are pleased to confirm the details of our purchase from you of MTBE as agreed between Mr. Ben Basil and Roger Ertle on [February 12, 1998.]

This confirmation constitutes the entire contract and represents our understanding of the terms and conditions of our agreement. Any apparent discrepancies or omissions should be brought to our notice within the next two working days.

Bayway faxed its confirmation to OMT the next day. That document, which operated as the acceptance, stated in pertinent part: "We are pleased to confirm the following verbal agreement concluded on February 12, 1998 with your company. This document cancels and supersedes any correspondence in relation to this transaction." Bayway's acceptance then set forth the parties, price, amount and delivery terms, and undertook to incorporate the company's standard terms:

Notwithstanding any other provision of this agreement, where not in conflict with the foregoing, the terms and conditions as set forth in Bayway Refining Company's General Terms and Conditions dated March 01, 1994 along

with Bayway's Marine Provisions are hereby incorporated in full by [**4] reference in this contract.

The Bayway General Terms and Conditions were not transmitted with Bayway's fax, but Paragraph 10 of its General Terms and Conditions states:

Buyer shall pay seller the amount of any federal, state and local excise, gross receipts, import, motor fuel, superfund and spill taxes and all other federal, state and local taxes however designated, other than taxes on income, paid or incurred by seller directly or indirectly with respect to the oil or product sold hereunder and/or on the value thereof.

This term is referenced as the "Tax Clause."

OMT did not object to Bayway's acceptance or to the incorporation of its General Terms and Conditions (which included the Tax Clause). OMT accepted delivery of the MTBE barrels on March 22, 1998.

The Internal Revenue Code imposes an excise tax, payable by the seller, on the sale of gasoline blendstocks such as MTBE "to any person who is not registered under [*26 U. S. C. § 4101*] " for a tax exemption.*26 U. S. C. A. § 4081(a)(1)(A)(iv) (West Supp. 1999)*. After delivery, Bayway learned that OMT was not registered with the Internal Revenue Service for the tax [**5] exemption. The transaction therefore created a tax liability of $464,035.12, which Bayway paid.

[*222] Invoking the Tax Clause, Bayway demanded payment of the $464,035.12 in taxes in addition to the purchase price of the MTBE. OMT denied that it had agreed to assume the tax liability and refused to pay that invoice item. In response, Bayway filed this diversity suit alleging breach of contract by OMT.

Upon Bayway's motion for summary judgment, the district court held that the Tax Clause was properly incorporated into the contract. *See Tosco Corp. v. Oxygenated Mktg. & Trading A. G., 1999 U. S. Dist. LEXIS 7903*, No. 98 Civ. 4695, 1999 WL 328342, at *3-*6 (S. D. N. Y. May 24, 1999). The fact that Bayway had failed to attach a copy of the General Terms and Conditions was irrelevant because OMT could have obtained a copy if it had asked for one. *See id.* at *3. The court then analyzed the contract-forming documents, applied the "battle of the forms" framework set forth in N. Y. *U. C. C. § 2-207(2)*, and concluded that OMT failed to carry its burden of proving that the Tax Clause materially altered the contract. *See id.* at *3-*6. The court therefore granted summary judgment in favor of Bayway. [1]

1 The underlying litigation also involved a second MTBE transaction. In June 1998, OMT contracted to sell 35,000 barrels of MTBE to Tosco Refining Company ("Tosco"), Bayway's parent company. Tosco offset the money claimed by Bayway under the Bayway/OMT contract at issue in this appeal. Tosco joined Bayway in its suit against OMT, seeking as alternative relief a declaration that Tosco was entitled to the offset; and OMT counterclaimed. The district court granted summary judgment in favor of OMT, concluding that Tosco had no right of offset under the June 1998 contract. *See Tosco Corp.*, 1999 WL 328342, at *7. Tosco did not appeal that decision, and it is therefore not before this Court.

[**6] Discussion

On appeal, OMT argues (i) that it succeeded in raising genuine issues of fact as to whether the Tax Clause materially altered the Bayway/OMT contract and (ii) that the evidence of custom and practice in the industry, upon

which the grant of summary judgment turns, was improperly admitted.

We review the district court's grant of summary judgment *de novo*. *See Young v. County of Fulton, 160 F.3d 899, 902 (2d Cir. 1998)*. In so doing, this Court construes the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in its favor. *See Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; *Maguire v. Citicorp Retail Servs., Inc., 147 F.3d 232, 235 (2d Cir. 1998)*. Summary judgment is appropriate only where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*.

We affirm for substantially the reasons stated by the district court. We hold--on an issue of first impression in this Court--that in a "battle of the forms" case governed by N. Y. *U. C. C. §* [**7] *2-207(2)(b)*, the party opposing the inclusion of an additional term bears the burden of proving that the term works a material alteration. Viewing the evidence in the light most favorable to OMT, we conclude that OMT failed to shoulder that burden. Finally, we hold that the district court properly admitted the evidence concerning industry custom and practice. [2]

2 OMT raises two arguments for the first time on appeal. First, OMT argues that Bayway's acceptance was effected by a different confirmation fax, sent by a broker, which did not list or reference additional terms, and that the Tax Clause therefore never became a part of the contract. Second, OMT contends that the third "battle of the forms" exception also applies, because a supposed integration clause contained in OMT's offer constitutes a "notification of objection" to any additional terms contained in the Acceptance. N. Y. *U. C. C. § 2-207(2)(c)*. "It is a well-

established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994)*. We decline to reach these untimely arguments. [**8]

[*223] **A. Battle of the Forms.**

Bayway argued its motion for summary judgment on the basis of New York law, presumably because one of the additional terms incorporated by its acceptance is a New York choice-of-law provision. OMT has accepted New York law as controlling for purposes of Bayway's summary judgment motion.

Under New York law, the rules of engagement for the "battle of the forms" are set out in the Uniform Commercial Code ("U. C. C."), *§ 2-207*:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them [**9] is received. N. Y. *U. C. C. § 2-207*.

It was undisputed in the district court that Bayway's confirmation fax is effective to form a contract as an acceptance--even though it stated or referenced additional terms (including the Tax Clause)--because it was not made expressly conditional on OMT's assent to the additional terms. *See id. § 2-207(1)*. Therefore, under *§ 2-207(2)*, the Tax Clause is a proposal for an addition to the contract. *See id. § 2-207(2)*. The parties are both merchants within the meaning of the U. C. C. *See id.* § 2-104(1), (3). The Tax Clause therefore is presumed to become part of the contract unless one of the three enumerated exceptions applies. *See id. § 2-207(2)*. In its defense, OMT invokes the "material alteration" exception of *§ 2-207(2)(b)*.

1. *Burden of Proof.*

The allocation of the burden of proof under this exception to *§ 2-207(2)* is a question of New York law, *see United States v. McCombs, 30 F.3d 310, 323-24 (2d Cir. 1994)* (holding that, under the *Erie* doctrine, federal courts sitting in diversity apply the forum state's law concerning burdens of proof), and is answered in the text of New York's U. C. [**10] C. *§ 2-207(2)*. *Section 2-207(2)(b)* is an exception to the general rule of *§ 2-207(2)* that additional terms become part of a contract between merchants. That general rule is in the nature of a presumption concerning the intent of the contracting parties. Thus if neither party introduced any evidence, the Tax Clause would, by the plain language of *§ 2-207(2)*, become part of the contract. To implement that presumption, the burden of proving the materiality of the alteration must fall on the party that opposes inclusion. Accordingly, we hold that under *§ 2-207(2)(b)* the party opposing the inclusion of additional terms shoulders the burden of proof. In so doing, we join almost every court to have considered this issue. *See Avedon Eng'g, Inc. v. Seatex, 126 F.3d 1279, 1284 (10th Cir. 1997)* (describing a

"conventional UCC analysis" as placing "the burden of showing that [an additional term] is a material alteration on the party opposing its inclusion because *section 2-207* presumes inclusion of additional terms between merchants"); *see also, e. G., Jom, Inc. v. Adell Plastics, Inc., 193 F.3d 47, 59 (1st Cir. 1999)*; *Comark Merchandising, Inc. v. Highland Group, Inc., 932 F.2d 1196, 1201 (7th Cir. 1991)*; [**11] *K I C Chems., Inc. v. ADCO Chem. Co., 1996 U. S. Dist. LEXIS 3244*, No. 95 CIV. 6321, 1996 WL 122420, at *4 (S. D. N. Y. Mar. 20, 1996); *Bergquist Co. v. Sunroc Corp., 777 F. Supp. 1236, 1245 n.11 (E. D. Pa. 1991)*; *LTV Energy Prods. Co. v. Northern States Contracting Co. (In re* [*224] *Chateaugay Corp.), 162 B. R. 949, 956 (Bankr. S. D. N. Y. 1994)*; *Palmer G. Lewis Co. v. ARCO Chem. Co., 904 P.2d 1221, 1229 (Alaska 1995)*; *Wilson Fertilizer & Grain, Inc. v. ADM Milling Co., 654 N. E.2d 848, 850 (Ind. Ct. App. 1995)*; *Eskay Plastics, Ltd. v. Chappell, 34 Wn. App. 210, 660 P.2d 764, 767 (Wash. Ct. App. 1983)*. *But see Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S. W.2d 190, 199 n.3 (Tex. App. 1992)*.

2. *Materiality and Per Se Materiality.*

A material alteration is one that would "result in *surprise* or *hardship* if incorporated without express awareness by the other party." N. Y. *U. C. C. § 2-207* cmt. 4 (emphasis added).

Certain additional terms are deemed material as a matter of law. For example, an arbitration clause is *per se* a material alteration in New York because New York law [**12] requires an express agreement to commit disputes to arbitration. *See Marlene Indus. v. Carnac Textiles, Inc., 45 N. Y.2d 327, 408 N. Y. S.2d 410, 413, 380 N. E.2d 239 (1978)*; *see also* N. Y. *U. C. C. § 2-207* cmt. 4 (listing as examples of *per se* material alterations, *inter alia*, waivers

of warranties of merchantability or fitness for a particular purpose and clauses granting the seller the power to cancel upon the buyer's failure to meet any invoice). OMT characterizes the Tax Clause as a broad-ranging indemnity clause, and analogizes it to these *per se* material alterations. We reject the analogy. The Tax Clause allocates responsibility for the tax payable on a specific sale of goods. *See Union Carbide Corp. v. Oscar Mayer Foods Corp., 947 F.2d 1333, 1335, 1337 (7th Cir. 1991)* (distinguishing between "open-ended" tax liability, which is a material alteration, from "responsibility for taxes shown on an individual invoice," which is not). And unlike an arbitration clause, which waives a range of rights that are solicitously protected, the Tax Clause is limited, discrete and the subject of no special protection. Unable to show that the Tax Clause [**13] is a material alteration *per se*, OMT must prove that in this case the Tax Clause resulted in surprise or hardship. [3]

3 Even if an additional term that places the tax liability on the opposing party was a material alteration *per se*, New York law allows a party to rebut this conclusion in some limited circumstances with a sufficient showing that the additional term reflects the custom and practice in the particular industry. *See Avedon Eng'g, 126 F.3d at 1285* & n.15 (discussing New York law); *Schubtex, Inc. v. Allen Snyder, Inc., 49 N. Y.2d 1, 424 N. Y. S.2d 133, 135, 399 N. E.2d 1154 (1979)*. As discussed below, Bayway's evidence that the Tax Clause reflects the custom and practice in the petroleum industry is compelling and unrebutted.

3. *Surprise.*

Surprise, within the meaning of the material alteration exception of *§ 2-207(2)(b)*, has both the subjective element of what a party actually knew and the objective element of what a party should have known. *See American Ins. Co. v.*

El Paso Pipe & Supply Co., 978 F.2d 1185, 1191 (10th Cir. 1992); [**14] *In re Chateaugay, 162 B. R. at 956-57*. A profession of surprise and raised eyebrows are not enough: "Conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment." *Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996)*. To carry the burden of showing surprise, a party must establish that, under the circumstances, it cannot be presumed that a reasonable merchant would have consented to the additional term. *See Union Carbide, 947 F.2d at 1336*.

OMT has adduced evidence that the Tax Clause came as an amazement to OMT's executives, who described the term's incorporation as "contract by ambush" and a "sleight-of-hand proposal." Thus OMT has sufficiently exhibited its subjective surprise. As to objective surprise, however, OMT has alleged no facts and introduced no evidence to show that a reasonable petroleum merchant would be surprised by the Tax Clause. *See In re* [*225] *Chateaugay, 162 B. R. at 957* (including as types of evidence proving objective surprise "the parties' prior course of dealing and the number of written confirmations that they exchanged, industry custom [**15] and the conspicuousness of the term"). OMT had no prior contrary course of dealing with Bayway, and offered nothing concerning trade custom or practice.

Ordinarily, our inquiry into surprise would end here. However, in response to OMT's claim of surprise, Bayway introduced evidence that the Tax Clause reflects custom and practice in the petroleum industry, and on appeal OMT argues that Bayway's own evidence raises a genuine issue of material fact as to whether such a trade practice exists. Although the evidence was introduced by Bayway, [4] we are "obligated to search the record and independently determine whether or not a genuine issue of fact exists."

Jiminez v. Dreis & Krump Mfg. Co., 736 F.2d 51, 53 (2d Cir. 1984) (quoting *Higgins v. Baker, 309 F. Supp. 635, 639 (S. D. N. Y. 1970))* (internal quotation marks omitted).

4 Bayway introduced the trade practice evidence to rebut OMT's claim of surprise. Typically, Bayway would bear the burden of establishing the custom and practice in the industry. *See Putnam Rolling Ladder Co. v. Manufacturers Hanover Trust Co., 74 N. Y.2d 340, 547 N. Y. S.2d 611, 615, 546 N. E.2d 904 (1989)* ("The burden of proving a trade usage has generally been placed on the party benefiting from its existence."). *See generally* 1 James J. White & Robert S. Summers, *Uniform Commercial Code* § 3-3, at 124 n.52 (4th ed. 1995) (collecting cases). This allocation of burden avoids forcing the party claiming objective surprise to prove a negative.

[**16] Upon our review of the evidence, we conclude that Bayway has adduced compelling proof that shifting tax liability to a buyer is the custom and practice in the petroleum industry. Two industry experts offered unchallenged testimony that it is customary for the buyer to pay all the taxes resulting from a petroleum transaction. One expert stated that "this practice is so universally understood among traders in the industry, that I cannot recall an instance, in all my years of trading and overseeing trades, when the buyer refused to pay the seller for excise or sales taxes."

OMT cites the standard contracts of five major petroleum companies that Bayway introduced to illustrate contract terms similar to the Tax Clause. OMT argues that only three of the five place the tax liability on the buyer, and that there is therefore an issue of fact as to whether the Tax Clause would objectively surprise a merchant in this industry.

OMT misconstrues the evidence. Three of the contracts--those of CITGO Petroleum, Conoco, and Enron--mirror the Tax Clause. A fourth, Chevron's, differs from the others only in that the cost of the taxes is added into the contract price rather than separately itemized. [**17] Thus Chevron's standard contract affords OMT no support.

The fifth example, the Texaco contract, is silent as to the tax allocation issue in this case. But on this unrebutted record of universal trade custom and practice, silence supports no contrary inference.

Moreover, common sense supports Bayway's evidence of custom and practice. The federal excise tax is imposed when taxable fuels are sold "to any person who is not registered under [*26 U. S. C. § 4101*] ." *26 U. S. C. § 4081(a)(1)(A)(iv)*. The buyer thereby controls whether any tax liability is incurred in a transaction. A trade practice that reflects a rational allocation of incentives (as trade practices usually do) would place the burden of the tax on the party that is in the position to obviate it--here, on OMT as the buyer.

Viewing Bayway's evidence in the light most favorable to OMT, we conclude that allocating the tax liability to the buyer is the custom and practice in the petroleum industry. OMT could not be objectively surprised by the incorporation of an additional term in the contract that reflects such a practice.

[*226] 4. *Hardship.*

To recapitulate: A material alteration [**18] is one that would "result in surprise *or* hardship if incorporated without express awareness by the other party." N. Y. *U. C. C. § 2-207* cmt. 4 (emphasis added). Although this Official Comment to the U. C. C. seemingly treats hardship as an independent ground for finding that an alteration is material, courts have expressed doubt: "You cannot walk

away from a contract that you can fairly be deemed to have agreed to, merely because performance turns out to be a hardship for you, unless you can squeeze yourself into the impossibility defense or some related doctrine of excuse." *Union Carbide, 947 F.2d at 1336* ("Hardship is a consequence [of material alteration], not a criterion. (Surprise can be either.)"); *see also, e. G.*, *Suzy Phillips Originals, Inc. v. Coville, Inc., 939 F. Supp. 1012, 1017-18 (E. D. N. Y. 1996)* (citing *Union Carbide* with approval and limiting the test for material alteration to surprise); *In re Chateaugay, 162 B. R. at 957* (same).

We need not decide whether hardship is an independent ground of material alteration, because even if it were, OMT failed to raise a genuine issue of material fact as to hardship. [**19] OMT's only evidence of hardship is (generally) that it is a small business dependent on precarious profit margins, and it would suffer a loss it cannot afford. That does not amount to hardship in the present circumstances.

Typically, courts that have relied on hardship to find that an additional term materially alters a contract have done so when the term is one that creates or allocates an open-ended and prolonged liability. *See, e. G.*, *St. Charles Cable TV, Inc. v. Eagle Comtronics, Inc., 687 F. Supp. 820, 827 (S. D. N. Y. 1988)* (finding a hardship in "shifting all risks for any dispute to the buyers"), *aff'd*, *895 F.2d 1410 (2d Cir. 1989)* (unpublished table disposition); *Charles J. King, Inc. v. Barge "LM-10"*, *518 F. Supp. 1117, 1120 (S. D. N. Y. 1981)*.

The Tax Clause places on a buyer a contractual responsibility that bears on a specific sale of goods, that is (at least) not uncommon in the industry, and that the buyer could avoid by registration. The cry of hardship rings

hollow, because any loss that the Tax Clause imposed on OMT is limited, routine and self-inflicted.

OMT failed to raise a factual issue as to hardship or surprise. [**20] Summary judgment was therefore appropriately granted in favor of Bayway.

B. Admissibility of the Common Trade Practice Evidence.

OMT argues that the district court erred in considering Bayway's evidence of industry custom and practice because it was submitted with Bayway's reply submission rather than with its moving papers. We review for abuse of discretion the district court's decision to rely upon this evidence. *Cf. Cifarelli v. Village of Babylon, 93 F.3d 47, 53 (2d Cir. 1996)* (reviewing for abuse of discretion the denial of a motion to amend the judgment, in which the non-moving party objected to the court's reliance on an affidavit submitted with the moving party's reply papers).

Bayway brought this suit alleging that the Tax Clause had been validly incorporated and that OMT had breached the contract by refusing to pay the tax. OMT's answer denied generally that the Tax Clause was ever incorporated, without alleging specifically that it was a material alteration under *§ 2-207(2)(b)*. When Bayway moved for summary judgment, its papers tracked the allegations of its complaint. The material alteration argument was raised for the first time in OMT's [**21] opposing papers. Bayway's reply submission was thus its first opportunity to rebut OMT's argument with custom and practice evidence.

We affirm the district court's decision because "reply papers may properly address new material issues raised in the opposition papers so as to avoid giving [*227] unfair advantage to the answering party." *Litton Indus. v. Lehman Bros. Kuhn Loeb Inc., 767 F. Supp. 1220, 1235 (S. D. N. Y. 1991)*, *rev'd on other grounds*, *967 F.2d 742 (2d Cir.*

1992); *see Bonnie & Co. Fashions, Inc. v. Bankers Trust Co., 945 F. Supp. 693, 708 (S. D. N. Y. 1996)*; *Travelers Ins. Co. v. Buffalo Reinsurance Co., 735 F. Supp. 492, 495* (S. D. N. Y.), *vacated in part on other grounds*, *739 F. Supp. 209 (S. D. N. Y. 1990)*; *United States v. International Bus. Machs. Corp., 66 F. R. D. 383, 384 (S. D. N. Y. 1975)*.

In addition to the timing of OMT's material alteration argument, three other reasons support the district court's acceptance of Bayway's evidence:

(i) OMT was not surprised by the affidavits in question. OMT knew that evidence of custom and practice in the industry could refute its material [**22] alteration argument, but chose not to introduce any evidence demonstrating that the Tax Clause was objectively surprising. Instead, OMT simply noted in its opposition papers that "Bayway has presented no evidence whatsoever of any custom in the industry to have such a tax indemnity term in such a contract." This statement undermines OMT's claim that it was treated unfairly by the court's acceptance of Bayway's evidence. *See Cifarelli, 93 F.3d at 53*.

(ii) OMT did not move the district court for leave to file a sur-reply to respond to Bayway's evidence. OMT thus failed to seek a timely remedy for any injustice. *See, e. G.*, *Litton Indus., 767 F. Supp. at 1235* ("Where new evidence is presented in a party's reply brief or affidavit in further support of its summary judgment motion, the district court should permit the nonmoving party to respond to the new matters prior to disposition of the motion.").

(iii) OMT makes no claim that it has any contrary evidence to introduce even if it were given an opportunity to proffer it. OMT's real complaint seems to be that its attempt to surprise Bayway with its material alteration argument was thwarted [**23] by the district court's

exercise of its discretion to receive evidence on the other side.

Under these circumstances, we conclude that the district court acted within its discretion in accepting and relying upon the affidavits submitted with Bayway's reply papers.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

 ¿ Dónde los términos de la oferta integran el contrato celebrado entre los comerciantes?

 RICH HILL and ENZA HILL, on behalf of a class of persons similarly situated, Plaintiffs-Appellees, v. GATEWAY 2000, INC., and DAVID PRAIS, Defendants-Appellants. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 105 F.3d 1147; 31 U. C. C. Rep. Serv. 2d 303 December 10, 1996, argued January 6, 1997, decided

OPINION BY: EASTERBROOK [*1148] A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?

One of the terms in the box containing a Gateway 2000 system was an arbitration clause. Rich and Enza Hill, the customers, kept the computer [**2] more than 30 days before complaining about its components and performance. They filed suit in federal court arguing, among other things, that the product's shortcomings make Gateway a racketeer (mail and wire fraud are said to be the predicate offenses),

leading to treble damages under RICO for the Hills and a class of all other purchasers. Gateway asked the district court to enforce the arbitration clause; the judge refused, writing that "the present record is insufficient to support a finding of a valid arbitration agreement between the parties or that the plaintiffs were given adequate notice of the arbitration clause." Gateway took an immediate appeal, as is its right.*9 U. S. C. § 16(a)(1)(A)*.

The Hills say that the arbitration clause did not stand out: they concede noticing the statement of terms but deny reading it closely enough to discover the agreement to arbitrate, and they ask us to conclude that they therefore may go to court. Yet an agreement to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U. S. C. § 2*. *Doctor's Associates, Inc. v. Casarotto, 134 L. Ed. 2d 902, 116 S. Ct. 1652 (1996)*, holds that this provision [**3] of the Federal Arbitration Act is inconsistent with any requirement that an arbitration clause be prominent. A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome. C*arr v. CIGNA Securities, Inc., 95 F.3d 544, 547 (7th Cir. 1996)*; *Chicago Pacific Corp. v. Canada Life Assurance Co., 850 F.2d 334 (7th Cir. 1988)*. Terms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced.

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product. Likewise, *Carnival Cruise Lines, Inc. v. Shute, 499 U. S. 585, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991)*, enforces a forum-selection clause that was included among three

pages of terms attached to a cruise ship ticket. *ProCD* and *Carnival Cruise Lines* exemplify the many commercial transactions in which people pay for products with terms to follow; *ProCD* discusses others.*86 F.3d at 1451-52*. The district [**4] court concluded in *ProCD* that the contract is formed when the consumer pays for the software; as a result, the court held, only terms known to the consumer at that moment are part of the contract, and provisos inside the box do not count. Although this is one way a contract [*1149] could be formed, it is not the only way: "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance." *Id. at 1452*. Gateway shipped computers with the same sort of accept-or-return offer ProCD made to users of its software. *ProCD* relied on the Uniform Commercial Code rather than any peculiarities of Wisconsin law; both Illinois and South Dakota, the two states whose law might govern relations between Gateway and the Hills, have adopted the UCC; neither side has pointed us to any atypical doctrines in those states that might be pertinent; *ProCD* therefore applies to this dispute.

Plaintiffs ask us to limit *ProCD* to software, but where's the sense in that? *ProCD* is about the law of contract, not the law of software. Payment [**5] preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize

rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread. For what little it is worth, we add that the box from Gateway was crammed with software. The computer came [**6] with an operating system, without which it was useful only as a boat anchor. See *Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756, 761 (7th Cir. 1996)*. Gateway also included many application programs. So the Hills' effort to limit *ProCD* to software would not avail them factually, even if it were sound legally--which it is not.

For their second sally, the Hills contend that *ProCD* should be limited to executory contracts (to licenses in particular), and therefore does not apply because both parties' performance of this contract was complete when the box arrived at their home. This is legally and factually wrong: legally because the question at hand concerns the *formation* of the contract rather than its *performance*, and factually because both contracts were incompletely performed. *ProCD* did not depend on the fact that the seller characterized the transaction as a license rather than as a contract; we treated it as a contract for the sale of goods and reserved the question whether for other purposes a "license" characterization might be preferable.*86 F.3d at 1450*. All debates about characterization to one side, the transaction in *ProCD* [**7] was no more executory than the one here: Zeidenberg paid for the software and walked out

of the store with a box under his arm, so if arrival of the box with the product ends the time for revelation of contractual terms, then the time ended in *ProCD* before Zeidenberg opened the box. But of course ProCD had not completed performance with delivery of the box, and neither had Gateway. One element of the transaction was the warranty, which obliges sellers to fix defects in their products. The Hills have invoked Gateway's warranty and are not satisfied with its response, so they are not well positioned to say that Gateway's obligations were fulfilled when the motor carrier unloaded the box. What is more, both ProCD and Gateway promised to help customers to use their products. Long-term service and information obligations are common in the computer business, on both hardware and software sides. Gateway offers "lifetime service" and has a round-the-clock telephone hotline to fulfil this promise. Some vendors spend more money helping customers use their products than on developing and manufacturing them. The document in Gateway's box includes promises of [*1150] future performance that some consumers [**8] value highly; these promises bind Gateway just as the arbitration clause binds the Hills.

Next the Hills insist that *ProCD* is irrelevant because Zeidenberg was a "merchant" and they are not. *Section 2-207(2) of the UCC*, the infamous battle-of-the-forms section, states that "additional terms [following acceptance of an offer] are to be construed as proposals for addition to a contract. Between merchants such terms become part of the contract unless. .". Plaintiffs tell us that *ProCD* came out as it did only because Zeidenberg was a "merchant" and the terms inside ProCD's box were not excluded by the "unless" clause. This argument pays scant attention to the opinion in *ProCD*, which concluded that, when there is only one form, " *§ 2-207* is irrelevant." *86 F.3d at 1452*. The question in *ProCD* was not whether terms were added

to a contract after its formation, but how and when the contract was formed--in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general "send me the product," but after the customer has had a chance to inspect both the item and the terms. *ProCD* answers [**9] "yes," for merchants and consumers alike. Yet again, for what little it is worth we observe that the Hills misunderstand the setting of *ProCD*. A "merchant" under the UCC "means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction", *§ 2-104(1)*. Zeidenberg bought the product at a retail store, an uncommon place for merchants to acquire inventory. His corporation put ProCD's database on the Internet for anyone to browse, which led to the litigation but did not make Zeidenberg a software merchant.

At oral argument the Hills propounded still another distinction: the box containing ProCD's software displayed a notice that additional terms were within, while the box containing Gateway's computer did not. The difference is functional, not legal. Consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone, avoiding the transactions costs of returning the package after reviewing its contents. Gateway's box, by contrast, is just a shipping carton; it is not on display [**10] anywhere. Its function is to protect the product during transit, and the information on its sides is for the use of handlers ("Fragile!" "This Side Up!") rather than would-be purchasers.

Perhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the

computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping. What the remedy would be in such a case--could it exceed the shipping charges?--is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include *some* important terms, and they did not seek to discover these in advance. Gateway's ads state that their products come with limited warranties and lifetime support. How limited was the warranty--30 days, with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson-Moss Warranty Act requires firms [**11] to distribute their warranty terms on request, *15 U. S. C. § 2302(b)(1)(A)*; the Hills do not contend that Gateway would have refused to enclose the remaining terms too. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product's delivery. Like Zeidenberg, the Hills took the third option. By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.

The Hills' remaining arguments, including a contention that the arbitration [*1151] clause is unenforceable as part of a scheme to defraud, do not require more than a citation to *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U. S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967)*. Whatever may be said pro and con about the cost and efficacy of arbitration (which the Hills disparage) is for Congress and the contracting parties to consider. Claims based on RICO

are no less arbitrable than those founded on the contract or the law of torts. S*hearson/ American Express, Inc. v. McMahon, 482 U. S. 220,* [**12] *238-42, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987)*. The decision of the district court is vacated, and this case is remanded with instructions to compel the Hills to submit their dispute to arbitration.

¿ Un formulario escondido dentro del paquete puede integrar el contrato con un consumidor?

F. LA INTERPRETACIÓN CONTRACTUAL

G. LOS USOS COMERCIALES

H. EL *PAROLE EVIDENCE RULE* SE AFLOJA

COLUMBIA NITROGEN CORPORATION, Appellant, v. ROYSTER COMPANY, Appellee UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT 451 F.2d 3; 9 U. C. C. Rep. Serv. 977 April 6, 1971, Argued October 26, 1971, Decided

OPINION BY: BUTZNER [*6] Columbia Nitrogen Corp. appeals a judgment in the amount of $750,000 in favor of F. S. Royster Guano Co. for breach of a contract for the sale of phosphate to Columbia by Royster. Columbia defended on the grounds that the contract, construed in light of the usage of the trade and course of dealing, imposed no duty to accept at the quoted prices the minimum quantities stated in the contract. It also asserted an antitrust defense and counterclaim based on Royster's alleged reciprocal trade practices. [1] The district court excluded the evidence about course of dealing and usage of the trade. It submitted the antitrust issues based on coercive reciprocity to the jury, but refused to submit the alternative theory of non-coercive reciprocity. The jury found for Royster on both the contract claim and the antitrust counterclaim. We hold that Columbia's proffered evidence was improperly excluded and Columbia is entitled to a new

trial on the contractual issues. With respect to the antitrust issues, we affirm.

1 Royster alleged diversity jurisdiction.*28 U. S. C. § 1332 (1964)*. Columbia's defense and counterclaim were based on *15 U. S. C. §§ 1* and *15 (1964)*.

[**2] I.

Royster manufactures and markets mixed fertilizers, the principal components of which are nitrogen, phosphate and potash. Columbia is primarily a producer of nitrogen, although it manufactures some mixed fertilizer. For several years Royster had been a major purchaser of Columbia's products, but Columbia had never been a significant customer of Royster. In the fall of 1966, Royster constructed a facility which enabled it to produce more phosphate than it needed in its own operations. After extensive negotiations, the companies executed a contract for Royster's sale of a minimum of 31,000 tons of phosphate each year for three years to Columbia, with an option to extend the term. The contract stated the price per ton, subject to an escalation clause dependent on production costs. [2]

2 In pertinent part, the contract provides:

"Contract made as of this 8th day of May between COLUMBIA NITROGEN CORPORATION, a Delaware corporation, (hereinafter called the Buyer) hereby agrees to purchase and accept from F. S. ROYSTER GUANO COMPANY, a Virginia corporation, (hereinafter called the Seller) agrees to furnish quantities of Diammonium Phosphate 18-46-0, Granular Triple Superphosphate 0-46-0, and Run-of-Pile Triple Superphosphate 0-46-0 on the following terms and conditions.

"*Period Covered by Contract* -- This contract to begin July 1, 1967, and continue through June 30, 1970, with

renewal privileges for an additional three year period based upon notification by Buyer and acceptance by Seller on or before June 30, 1969. Failure of notification by either party on or before June 30, 1969, constitutes an automatic renewal for an additional one-year period beyond June 30, 1970, and on a year-to-year basis thereafter unless notification of cancellation is given by either party 90 days prior to June 30 of each year.

"Products Supplied Under Contract

"Seller agrees to provide additional quantities beyond the minimum specified tonnage for products listed above provided Seller has the capacity and ability to provide such additional quantities. * * *

"*Price* -- In Bulk F. O. B. Cars, Royster, Florida. * * *

"*Default* -- If Buyer fails to pay for any delivery under this contract within 30 days after Seller's invoice to Buyer and then if such invoice is not paid within an additional 30 days after the Seller notifies the Buyer of such default, then after that time the Seller may at his option defer further deliveries hereunder or take such action as in their judgment they may decide including cancellation of this contract. Any balances carried beyond 30 days will carry a service fee of 3/4 of 1% per month. * * *

"*Escalation* -- The escalation factor up or down shall be based upon the effects of changing raw material cost of sulphur, rock phosphate, and labor as follows. These escalations up or down to become effective against shipments of products covered by this contract 30 days after notification by Seller to Buyer. * * *

"No verbal understanding will be recognized by either party hereto; this contract expresses all the terms and conditions of the agreement, shall be signed in duplicate

and shall not become operative until approved in writing by the Seller."

[**3] [*7] Phosphate prices soon plunged precipitously. Unable to resell the phosphate at a competitive price, Columbia ordered only part of the scheduled tonnage. At Columbia's request, Royster lowered its price for diammonium phosphate on shipments for three months in 1967, but specified that subsequent shipments would be at the original contract price. Even with this concession, Royster's price was still substantially above the market. As a result, Columbia ordered less than a tenth of the phosphate Royster was to ship in the first contract year. When pressed by Royster, Columbia offered to take the phosphate at the current market price and resell it without brokerage fee. Royster, however, insisted on the contract price. When Columbia refused delivery, Royster sold the unaccepted phosphate for Columbia's account at a price substantially below the contract price.

II.

Columbia assigns error to the pretrial ruling of the district court excluding all evidence on usage of the trade and course of dealing between the parties. It offered the testimony of witnesses with long experience in the trade that because of uncertain crop and weather conditions, farming practices, and [**4] government agricultural programs, express price and quantity terms in contracts for materials in the mixed fertilizer industry are mere projections to be adjusted according to market forces. [3]

3 Typical of the proffered testimony are the following excerpts:

para. "The contracts generally entered into between buyer and seller of materials has always been, in my opinion, construed to be the buyer's best estimate of his anticipated requirements for a given period of time. It is

well known in our industry that weather conditions, farming practices, government farm control programs, change requirements from time to time. And therefore allowances were always made to meet these circumstances as they arose."

para. "Tonnage requirements fluctuate greatly, and that is one reason that the contracts are not considered as binding as most contracts are, because the buyer normally would buy on historical basis, but his normal average use would be per annum of any given material. Now that can be affected very decidedly by adverse weather conditions such as a drought, or a flood, or maybe governmental programs which we have been faced with for many, many years, seed grain programs. They pay the farmer not to plant. If he doesn't plant, he doesn't use the fertilizer. When the contracts are made, we do not know of all these contingencies and what they are going to be. So the contract is made for what is considered a fair estimate of his requirements. And, the contract is considered binding to the extent, on him morally, that if he uses the tonnage that he will execute the contract in good faith as the buyer. * * *"

para. "I have never heard of a contract of this type being enforced legally. * * Well, it undoubtedly sounds ridiculous to people from other industries, but there is a very definite, several very definite reasons why the fertilizer business is always operated under what we call gentlemen's agreements. * * *"

para. "The custom in the fertilizer industry is that the seller either meets the competitive situation or releases the buyer from it upon proof that he can buy it at that price. * * * They will either have the option of meeting it or releasing him from taking additional tonnage or holding him to that price. * * *"

para. And this custom exists "regardless of the contractual provisions."

para. "The custom was that [these contracts] were not worth the cost of the paper they were printed on."

[**5] [*8] Columbia also offered proof of its business dealings with Royster over the six-year period preceding the phosphate contract. Since Columbia had not been a significant purchaser of Royster's products, these dealings were almost exclusively nitrogen sales to Royster or exchanges of stock carried in inventory. The pattern which emerges, Columbia claimed, is one of repeated and substantial deviation from the stated amount or price, including four instances where Royster took none of the goods for which it had contracted. Columbia offered proof that the total variance amounted to more than $500,000 in reduced sales. This experience, a Columbia officer offered to testify, formed the basis of an understanding on which he depended in conducting negotiations with Royster.

The district court held that the evidence should be excluded. It ruled that "custom and usage or course of dealing are not admissible to contradict the express, plain, unambiguous language of a valid written contract, which by virtue of its detail negates the proposition that the contract is open to variances in its terms. * * *"

A number of Virginia cases have held that extrinsic evidence may not be received [**6] to explain or supplement a written contract unless the court finds the writing is ambiguous. E. *g.*, *Mathieson Alkali Works v. Virginia Banner Coal Corp., 147 Va. 125, 136 S. E. 673 (1927)*. This rule, however, has been changed bythe Uniform Commercial Code which Virginia has adopted. The Code expressly states that it "shall be liberally construed and applied to promote its underlying purposes and policies," which include "the continued expansion of

commercial practices through custom, usage and agreement of the parties * * *." *Va. Code Ann. § 8.1-102* (1965). The importance of usage of trade and course of dealing between the parties is shown by *§ 8.2-202*, [4] which [*9] authorizes their use to explain or supplement a contract. The official comment states this section rejects the old rule that evidence of course of dealing or usage of trade can be introduced only when the contract is ambiguous. [5] And the Virginia commentators, noting that "this section reflects a more liberal [**7] approach to the introduction of parol evidence * * * than has been followed in Virginia," express the opinion that *Mathieson, supra*, and similar Virginia cases no longer should be followed. V*a. Code Ann. § 8.2-202*, Va. Comment. S*ee also Portsmouth Gas Co. v. Shebar, 209 Va. 250, 253 n.1, 163 S. E.2d 205, 208 n.1 (1968)* (dictum). We hold, therefore, that a finding of ambiguity is not necessary for the admission of extrinsic evidence about the usage of the trade and the parties' course of dealing.

4 *Va. Code Ann. § 8.2-202* provides:

"Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade (*§ 8.1-205*) or by course of performance (§ 8.2-208); and

(b) by evidence of consistent additional terms unless the court find the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." [**8]

5 *Va. Code Ann. § 8.2-202*, Comment 1 states:

"This section definitely rejects:

* * *

"(c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous."

We turn next to Royster's claim that Columbia's evidence was properly excluded because it was inconsistent with the express terms of their agreement. There can be no doubt that the Uniform Commercial Code restates the well established rule thatevidence of usage of trade and course of dealing should be excluded whenever it cannot be reasonably construed as consistent with the terms of the contract. D*ivision of Triple T Service, Inc. v. Mobil Oil Corp., 60 Misc. 2d 720, 304 N. Y. S.2d 191, 203 (1969)*, *aff'd mem.*, *34 A. D.2d 618, 311 N. Y. S.2d 961 (1970)*. Royster argues that the evidence [**9] should be excluded as inconsistent because the contract contains detailed provisions regarding the base price, escalation, minimum tonnage, and delivery schedules. The argument is based on the premise that because a contract appears on its face to be complete, evidence of course of dealing and usage of trade should be excluded. We believe, however, that neither the language nor the policy of the Code supports such a broad exclusionary rule. S*ection 8.2-202* expressly allows evidence of course of dealing or usage of trade to explain or supplement terms intended by the parties as a final expression of their agreement. [6] When this section is read in light of *Va. Code Ann. § 8.1-205(4)*, [7] it is clear that the test of admissibility is not whether the contract appears on its face to be complete in every detail, but whether the proffered evidence of course of dealing and trade usage reasonably can be construed as consistent with the express terms of the agreement.

6 This section is set forth in full at note 4, *supra*.

7 *Va. Code Ann. § 8.1-205(4)* states:

"The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade."

[**10] The proffered testimony sought to establish that because of changing weather conditions, farming practices, and government agricultural programs, dealers adjusted prices, quantities, and delivery schedules to reflect declining market conditions. For the following reasons it is reasonable to construe this evidence as consistent with the express terms of the contract:

The contract does not expressly state that course of dealing and usage of trade cannot be used to explain or supplement the written contract.

The contract is silent about adjusting prices and quantities to reflect a declining market. It neither permits nor prohibits [*10] adjustment, and this neutrality provides a fitting occasion for recourse to usage of trade and prior dealing to supplement the contract and explain its terms.

Minimum tonnages and additional quantities are expressed in terms of "Products Supplied Under Contract." Significantly, they are not expressed as just "Products" or as "Products Purchased Under Contract." The description used by the parties is consistent with the proffered testimony.

Finally, the default clause of the contract refers only to the failure of the buyer to pay for delivered [**11] phosphate. [8] During the contract negotiations, Columbia rejected a Royster proposal for liquidated damages of $10

for each ton Columbia declined to accept. On the other hand, Royster rejected a Columbia proposal for a clause that tied the price to the market by obligating Royster to conform its price to offers Columbia received from other phosphate producers. The parties, having rejected both proposals, failed to state any consequences of Columbia's refusal to take delivery -- the kind of default Royster alleges in this case. Royster insists that we span this hiatus by applying the general law of contracts permitting recovery of damages upon the buyer's refusal to take delivery according to the written provisions of the contract. This solution is not what the Uniform Commercial Code prescribes. Before allowing damages, a court must first determine whether the buyer has in fact defaulted. It must do this by supplementing and explaining the agreement with evidence of trade usage and course of dealing that is consistent with the contract's express terms. *Va. Code Ann. §§ 8.1-205(4)*, *8.2-202*. Faithful adherence to this mandate reflects the reality of the marketplace and avoids the [**12] overly legalistic interpretations which the Code seeks to abolish.

8 The default clause is set forth at note 2, *supra*.

Royster also contends that Columbia's proffered testimony was properly rejected because it dealt with mutual willingness of buyer and seller to adjust contract terms to the market. Columbia, Royster protests, seeks unilateral adjustment. This argument misses the point. What Columbia seeks to show is a practice of mutual adjustments so prevalent in the industry and in prior dealings between the parties that it formed a part of the agreement governing this transaction. It is not insisting on a unilateral right to modify the contract.

Nor can we accept Royster's contention that the testimony should be excluded under the contract clause:

"No verbal understanding will be recognized by either party hereto; this contract expresses all the terms and conditions of the agreement, shall be signed in duplicate, and shall not become operative until approved in writing by the Seller."

[**13] Course of dealing and trade usage are not synonymous with verbal understandings, terms and conditions. S*ection 8.2-202*draws a distinction between supplementing a written contract by consistent additional terms and supplementing it by course of dealing or usage of trade. [9] Evidence of additional terms must be excluded when "the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." Significantly, no similar limitation is placed on the introduction of evidence of course of dealing or usage of trade. Indeed the official comment notes that course of dealing and usage of trade, unless carefully negated, are admissible to supplement the terms of any writing, and that contracts are to be read on the assumption that these elements were taken for granted when the document was [*11] phrased. [10] Since the Code assigns course of dealing and trade usage unique and important roles, they should not be conclusively rejected by reading them into stereotyped language that makes no specific reference to them. C*f. Provident Tradesmens Bank & Trust Co. v. Pemberton, 196 Pa. Super. 180, 173 A.2d 780 (1961)*. [**14] Indeed, the Code's official commentators urge that overly simplistic and overly legalistic interpretation of a contract should be shunned. [11]

9 This section is set forth in full at note 4, *supra*.

10 *Va. Code Ann. § 8.2-202*, Comment 2 states:

"Paragraph (a) [of § 8.202] makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any

writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean."

See also Levie, Trade Usage and Custom under the Common Law and the Uniform Commercial Code, 40 N. Y. U. L. Rev. 1101, 1111 (1965).

[**15]

11 Referring to the general provisions about course of dealing and trade usage, *Va. Code Ann. § 8.1-205*, Comment 1 states:

"This Act rejects both the 'lay dictionary' and the 'conveyancer's' reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing."

We conclude, therefore, that Columbia's evidence about course of dealing and usage of trade should have been admitted. Its exclusion requires that the judgment against Columbia must be set aside and the case retried.

III.

We find no error in the district court's refusal to enter judgment for Columbia on the basis of a purchase order

Columbia issued and Royster acknowledged ten days after the contract was signed. On its face, the order included shipping and invoicing instructions, [**16] and the printed statement: "Seller's acknowledgment required, see reverse side for terms and conditions which are a part of this order and have the same force and effect as if set out on its face." On the reverse of the form were the following printed provisions:

"8. Purchaser reserves the right at any time to change this order in any particular with respect to goods not theretofore shipped thereunder. If any such change shall increase Seller's cost of performance, Seller shall immediately notify Purchaser thereof and an equitable adjustment in the price shall be made by written amendment to this order."

* * *

"10. In case of conflict of any of the Purchaser's terms with those of Seller, Purchaser's terms will govern unless specific exception is agreed to in writing by Purchaser."

Royster acknowledged the receipt of the purchase order in writing.

Both parties agree that the contract and the purchase order must be read together. Relying on *Va. Code Ann. § 8.2-207*, Columbia argues that the purchase order amended the contract because Royster's signed acknowledgment was an express agreement to the additional terms printed on the back.

The flaw in Columbia's [**17] argument is that *§ 8.2-207* applies only to the formation of contracts. It states, with certain exceptions not in issue here, that " [a] definite and seasonable expression of acceptance * * * operates as an acceptance even though it states terms additional [*12] to or different from those offered or agreed upon * * *."

Here the bargain became effective upon the execution of the contract several days before Columbia issued the purchase order. Indeed, the order itself acknowledges the contract for it expressly states that it was issued "to cover concentrated phosphate per contract dated May 8, 1967." [12]

12 On this basis, cases under *§ 2-207 of the Uniform Commercial Code* cited by Columbia are distinguishable; *e. G. Southeastern Enameling Corp. v. General Bronze Corp., 434 F.2d 330 (5th Cir. 1970)*, where the additional terms were included in a written confirmation, and *Roto-Lith, Ltd. v. F. P. Bartlett & Co., Inc., 297 F.2d 497 (1st Cir. 1962)*, where the additional terms were printed on the acknowledgment form denoting acceptance.

[**18] As an alternative theory for summary judgment, Columbia argues that the purchase order was a modification of the contract under § 8.2-209. Noting that under this section "an agreement modifying a contract within this title needs no consideration to be binding," Columbia claimed that Royster's acknowledgment of the purchase order effected a modification reflecting the additional terms printed on the reverse side.

The purchase order, however, does not purport to modify the terms of the contract. Columbia reserved the right to change only the order. The district judge held that this reservation referred to the order's shipping and invoicing instructions and not to the terms and conditions of the contract. The reference to the equitable adjustment in price in the second sentence of the reservation supports his interpretation. His ruling, we believe, is unimpeachable.

For the same reason there was no occasion to admit the purchase order in evidence. There is no dispute about shipping or invoicing, and the order, therefore, was not pertinent to the issues before the jury. Furthermore, it cannot be said that the purchase order corroborates the

usage of trade or course of dealing [**19] on which Columbia relies. Neither trade usage nor prior dealing sanction unilateral modification of the contract regardless of market conditions. Accompanied by proper instructions describing its role in the transaction, the order could have been admitted into evidence along with the contract. It has, however, no direct bearing on the controversy, and we find no abuse of discretion in its exclusion.

IV.

Contrary to Columbia's contention, we find no reversible error in the district judge's charge to the jury on damages. However, the charge should be amplified on retrial.

Royster sold all the phosphate Columbia had rejected to the Mobil Oil Company for a sum considerably below the contract price. To recover the difference between the contract price and the resale price, Royster's sale to Mobil must have been "made in good faith and in a commercially reasonable manner." *Va. Code Ann. § 8.2-706(1)*. Borrowing from the official comment, the court instructed the jury that "what is a commercially reasonable manner depends on the nature of the goods, the condition of the market and other [**20] circumstances in the case, and cannot be measured by any legal yardstick or divided into degrees. In determining whether the sale of the goods was done * * * in a commercially reasonable manner, you must inquire into all aspects of the sale and not just its manner." This is an accurate statement as far as it goes, but the comment further states that the statute is drawn to enable the seller "to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances," and "to dispose of the goods to the best advantage." *Va. Code Ann. § 8.2-706*, Comments 4 and 6.

The record discloses conflicting testimony about the market price, problems [*13] of storage, and difficulties in making a sale of a large quantity of phosphate. In view of this evidence, it is important for the jury to be fully informed about a seller's obligation to dispose of the goods in a commercially reasonable manner. On retrial, therefore, the instruction explaining this section of the code should mention Royster's duty to realize as high a price as possible under all the circumstances. We find no merit in the other assignments of error to the court's charge [**21] on damages.

V.

As an affirmative defense to Royster's action on the contract and as the basis for a counterclaim, Columbia pleaded that Royster had violated *§ 1* of the Sherman Antitrust Act, *15 U. S. C. § 1 (1964)*, [13] by engaging in reciprocal dealing. [14] Columbia introduced proof, denied by Royster, that Royster had exerted economic leverage through its purchases of nitrogen from Columbia to coerce Columbia to sign the phosphate contract. The court submitted the issue of coercive reciprocity to the jury, which found against Columbia on both its defense and counterclaim. [15]

13 *15 U. S. C. § 1* provides in part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * *."

14 "The phrase 'reciprocal dealing' refers to the use of buying power to secure an advantage in the sale of one's products. While reciprocal dealing arrangements may take varied forms, the central core is the use of purchasing power to promote sales." ABA Antitrust Developments 1955-1968 at 11 (1968).

[**22]

15 Since Royster prevailed, the propriety of the submission of the claim of coercive reciprocity to the jury is not directly in issue on appeal.

Relying on the oft noted analogy to tying arrangements, [16] the district court instructed the jury to the effect that Columbia had to prove, among other facts, that a "not insubstantial" amount of interstate commerce was affected. S*ee Northern Pacific Ry. v. United States, 356 U. S. 1, 6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. Columbia, citing *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U. S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*, now protests that proof of a "not insubstantial" amount of interstate commerce is an essential element only of a per se violation of the Sherman Act. It complains that this portion of the charge erroneously restricted the antitrust issues to a per se violation and foreclosed the claim sanctioned by *Fortner* "that the general standards of the Sherman Act have been violated." *394 U. S. at 500, 89 S. Ct. at 1257*.

16 *See, e. G.*, *United States v. General Dynamics Corp., 258 F. Supp. 36, 65 (S. D. N. Y.1966)*; Handler, Emerging Antitrust Issues: Reciprocity, Diversity and Joint Ventures, 49 Va. L. Rev. 433, 437 (1963); Hausman, Reciprocal Dealing and the Antitrust Laws, 77 Harv. L. Rev. 873, 883 (1964).

[**23] Columbia, however, did not comply with *Rule 51 of the Federal Rules of Civil Procedure* by stating distinctly that it objected to the "not insubstantial" test. Instead it countered by requesting an instruction that it met the test on the basis of *International Salt Co. v. United States, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947)*, if the jury found the amount of affected business exceeded $500,000. The court first refused this request, but later it gave a supplemental charge to this effect. Having willingly

embraced the advantages of going to the jury on a per se theory, Columbia cannot now shift to a theory based on the general standards of the Sherman Act. Moreover, since the jury's verdict discloses that it recognized that more than $500,000 of trade was affected, Columbia could not have been prejudiced by the charge. We also find no reversible error in the timing of the supplemental charge or in the court's modification of the language of Columbia's request. S*ee Wiles v. Nationwide* [*14] *Life Insurance Co., 334 F.2d 296, 300 (4th Cir. 1964)*.

VI.

Columbia now emphasizes an alternative antitrust theory. It contends that non-coercive [**24] reciprocity affords both a valid affirmative defense to Royster's action on the phosphate contract and a basis for recovery of treble damages on its counterclaim. The district court declined to submit these issues to the jury.

Coercive reciprocity has long been recognized as an anti-competitive practice that violates the antitrust laws. [17] Recent dictum of the Supreme Court, however, citing a description of the anti-competitive harm flowing from voluntary reciprocal dealing, evenhandedly condemned reciprocal trading that ensued either from coercion or "from more subtle arrangements." *FTC v. Consolidated Foods Corp., 380 U. S. 592, 594* & n. 2, *85 S. Ct. 1220, 14 L. Ed. 2d 95 (1965)*. Influenced in part by this opinion, one court has stated that non-coercive contracts for reciprocal dealing may violate *§ 1* of the Sherman Act. In reaching this conclusion, it reasoned that the antitrust laws are not designed merely to protect the individual merchant from coercion and other predatory practices."The legislation," said the court, "is intended to preserve free competition. Reciprocity, whether mutual or coercive, serves to exclude competitors by the exercise of large scale [**25]

purchasing power." *United States v. General Dynamics Corp., 258 F. Supp. 36, 66 (S. D. N. Y.1966)*.

17 *FTC v. Consolidated Foods Corp., 380 U. S. 592, 85 S. Ct. 1220, 14 L. Ed. 2d 95 (1965)*; California Packing Corp., 25 F. T. C. 379 (1937); Mechanical Mfg. Co., 16 F. T. C. 67 (1932); Waugh Equip. Co., 15 F. T. C. 232 (1931). Recently, the Government has obtained a series of consent decrees based on *§§ 1* and *2* of the Sherman Act barring reciprocal dealing. E. *g.*, United States v. Bethlehem Steel Corp., 1970 Trade Cas. para. 73,376 (E. D. Pa., Dec. 11, 1970); United States v. General Tire & Rubber Co., 1970 Trade Cas. para. 73,303 (N. D. Ohio, Oct. 21, 1970). S*ee also* ABA Antitrust Developments 1955-1968 at 11-14, 87-89 (1968, Supp. 1971).

In view of our disposition of this aspect of the case, we may assume, without deciding, that the reciprocal dealing disclosed by this record violated *§ 1* of the Sherman Act. [18] It [**26] does not follow, however, that Columbia is entitled to assert non-coercive reciprocity as an affirmative defense or as the basis for recovering treble damages on its counterclaim. [19]

18 Viewing, as we must, the evidence on this issue in the light most favorable to Columbia, the record discloses a long term written contract for Columbia's purchase from Royster of approximately $4,750,000 worth of phosphate conditioned on anticipated purchases of approximately $4,000,000 worth of nitrates by Royster from Columbia. This agreement was reached voluntarily by both parties who enjoyed sufficient economic strength to appreciably restrain free competition in the market.

19 We, of course, express no opinion on whether the Government, or a person not a party to the reciprocal dealing, could maintain an action under *§ 1* of the Sherman

Act based on the agreement between Royster and Columbia.

Even in diversity actions, [**27] the effect of an act made illegal by a federal statute is to be decided by federal, not state, law. S*ola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176, 63 S. Ct. 172, 87 L. Ed. 165 (1942)*. Assuming as we have that the reciprocal dealing violated *§ 1* of the *Sherman Act, Kelly v. Kosuga, 358 U. S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959)*, precludes one of the participants from interposing the violation as an affirmative defense to an action on the contract. In *Kelly*, the buyer of 50 carloads of onions, withdrew from storage only 13 cars, and the seller was forced to sell the remaining 37 on a declining market for the buyer's account. The seller then brought an action for the unpaid balance of the purchase price of the 13 cars and damages for the 37 cars. The buyer pleaded as an affirmative defense that the sale was part of an indivisible agreement, to which both the buyer and the seller were parties, that violated *§ 1* of the Sherman [*15] Act. The district court struck the defense and entered summary judgment for the unpaid purchase price and storage charges less the amount obtained by the sale of the 37 cars. The Supreme Court [**28] affirmed, restating the settled principle that"the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction." *358 U. S. at 519, 79 S. Ct. at 431*. The Court further concluded that only where "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act" may the defense of illegality be interposed.*358 U. S. at 520, 79 S. Ct. at 432*. With reference to the argument that the sale and the agreement to fix prices were indivisible, it said:

"Where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the

parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question." *358 U. S. at 521, 79 S. Ct. at 432*.

Here, as in *Kelly*, the sale was "an intelligible economic transaction in itself," the price was fair, and the terms were voluntarily accepted. By the time [**29] Royster brought this action, the parties had terminated their reciprocal dealing, and the award of damages to Royster can not exclude competitors. We conclude, therefore, that the district court did not err in refusing to charge the jury on Columbia's affirmative defense of non-coercive reciprocity.[20]

20 Because the jury's verdict settled the issue of coercive reciprocity, we find no occasion to express an opinion about the application of Kelly v. Kosuga to the defense of coercive reciprocal dealing. C*f. Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 768 (6th Cir. 1965)* (tying arrangement).

VII.

Although we have assumed for the purposes of this case that the non-coercive reciprocal agreement disclosed by the record violated *§ 1* of the Sherman Act, Columbia cannot recover on its counterclaim. Voluntary participation in an agreement, uninfluenced by economic domination of one party [**30] over the other, is inherent in the concept of non-coercive reciprocal dealing. Since the jury's verdict disposed of the issue of coercive reciprocity, Columbia is limited in pressing its non-coercive theory of recovery to evidence disclosing the voluntary, joint participation and equal fault of the parties.

The most recent authority touching this aspect of the case is *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U. S. 134, 140, 88 S. Ct. 1981, 1985, 20 L. Ed. 2d 982 (1968)*, where the Court broadly stated "that the

doctrine of in pari delicto * * * is not to be recognized as a defense to an antitrust action." That case, however, involved opponents of decidedly unequal strength enmeshed in an illegal scheme. The plaintiffs, the Court noted, "participated to the extent of utilizing illegal arrangements formulated and carried out by others * * * [but] their participation was not voluntary in any meaningful sense." *392 U. S. at 139, 88 S. Ct. at 1985*. Recognizing that the scheme had been thrust upon the plaintiffs, offering them no choice but to cooperate, Mr. Justice Black speaking for the Court said:

"We need not decide * * * whether [**31] * * * truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of pari delicto, for barring a plaintiff's cause of action * * *." *392 U. S. at 140, 88 S. Ct. at 1985*.

Columbia's counterclaim is the type of case the Court expressly excluded from the scope of its opinion. Separate opinions in *Perma Life* representing the views of five of the members of the Court, however, provide guidance for the resolution of this issue. These opinions teach thatwhen parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear equal responsibility [*16] for the consequent restraint of trade, each is barred from seeking treble damages from the other. [21]

21 *See 392 U. S. at 146, 147, 149*, and *156, 88 S. Ct. 1981*.

We think it plain, therefore, thata party, [**32] who voluntarily formulates and equally participates in a non-coercive agreement for reciprocal dealing until a declining market makes its purchases unprofitable, cannot maintain an action under *§ 1* of the Sherman Act against its trading partner. S*ee Premier Electrical Construction Co. v. Miller-*

Davis Co., 422 F.2d 1132, 1138 (7th Cir. 1970) (dictum). Accordingly, we conclude the district court committed no error by declining to instruct the jury that Columbia could recover on its counterclaim if it proved a non-coercive agreement for reciprocal dealing.

With respect to all the antitrust issues, the judgment of the district court is affirmed. The judgment for Royster on the contract is vacated, and the case is remanded for further proceedings consistent with this opinion. Each party shall bear its own costs.

¿ Los tribunales revisan acaso los usos comerciales, la conducta previa de las partes y el transcurso de la ejecución del contrato para interpretar la escritura?

I. LAS ESTIPULACIONES CONTRACTUALES

EL REQUISITO TAXATIVO DE LA ESTIPULACIÓN DE TODOS LOS TÉRMINOS DEL CONTRATO SE AFLOJA

CASSERLIE ET AL., APPELLANTS, v. SHELL OIL COMPANY ET AL., AP-PELLEES. SUPREME COURT OF OHIO 121 Ohio St. 3d 55; 902 N. E.2d 1; 68 U. C. C. Rep. Serv. 2d 310 May 20, 2008, Submitted January 6, 2009, Decided

OPINION BY**:** MOYER

I

[**P1] Appellants' proposition of law proposes that " [t] he definition of Good Faith under the [Uniform Commercial Code] incorporating an 'honesty in fact' component requires a subjective inquiry." We disagree and affirm the judgment of the court of appeals.

II

[**P2] Appellants, Donald Casserlie and others, are a group of independent Shell lessee-dealers in the greater

Cleveland area (collectively, "the dealers"). The appellees in this case are Shell Oil Company, its partners, and its successors (collectively, "Shell"), who at various times between 1995 and the time the complaint was filed sold Shell-branded gasoline to the dealers in the greater Cleveland area. The dealers leased gas stations, including equipment and land, from Shell and operated them as franchisees. The parties' contracts obligated the dealers to buy gasoline only from Shell at a wholesale price set by Shell at [*56] the time of delivery. This type of term in a contract is known as an open-price term.

[**P3] The price paid by the dealers is referred to as the dealer-tank-wagon ("DTW") price because it includes the cost of delivery to the stations. Shell charged the dealers a DTW price that was based on market factors including the prices offered by its major competitor, British Petroleum ("BP"), and the street price within areas of Cleveland. In each area of the city, called a price administration district ("PAD"), Shell charged all dealers the same DTW price.

[**P4] In 1998, Shell, Texaco, and Saudi Aramco formed Equilon Enterprises L. L. C.; Shell's agreements with service stations in Cleveland were assigned to Equilon. In November 1999, Equilon and appellee Lyden Company entered into a joint venture called True North Energy, L. L. C. True North became the distributor of Shell-branded gasoline in the Cleveland area, including to the stations operated by the dealers. True North set the DTW price as the wholesale price it had paid Equilon for gasoline plus six or seven cents per gallon.

[**P5] Shell also sold gasoline to "jobbers," which were independent companies operating non-Shell-owned gas stations. Jobbers purchased gasoline directly at the oil company's terminal and paid the "rack" price, which was

the cost of purchasing gasoline at the oil company's terminal and thus did not include delivery costs.

[**P6] In 1999, the dealers filed suit against Shell, alleging, among other claims, that Shell had engaged in bad faith when it set the DTW price. The dealers alleged that the rack price was often substantially lower than the DTW price. This allowed jobbers, including Lyden Company, to offer wholesale DTW prices that were substantially lower than the DTW price charged to the dealers. The dealers contend that this pricing is unreasonable and is part of a marketing plan proposed by Shell that was designed to drive them out of business. The dealers assert that Shell's goal was to eliminate them so that Shell could take over operation of the gas stations, thus profiting from all of the sales, including nonfuel sales, at the stations, and not just from wholesale gasoline sales to and rental income from the dealers.

[**P7] The parties agreed to bifurcate the proceedings and move forward only on the bad-faith claim. On April 13, 2005, the trial court granted summary judgment for Shell. The court found that Shell did not violate *R. C. 1302.18*, which codifies Uniform Commercial Code ("UCC") *section 2-305* and requires a price to be fixed in good faith, when it set the DTW price and that the dealers had not proven that the price had been set in a commercially unreasonable manner.

[**P8] The dealers appealed, arguing that bad faith may be shown either by evidence of a party's intent, a subjective standard, or by evidence of its commercial [*57] unreasonableness, which is an objective standard. The court of appeals affirmed the trial court's ruling and adopted an objective standard based on *Tom-Lin Ents. v. Sunoco, Inc. (R&M) (C. A.6, 2003), 349 F.3d 277*. The court determined that the dealers failed to show that Shell's prices were not

commercially reasonable. The cause is before this court upon our acceptance of a discretionary appeal.

III

[**P9] As a preliminary matter, we review de novo the granting of summary judgment. *Comer v. Risko, 106 Ohio St.3d 185, 2005 Ohio 4559, 833 N. E.2d 712, P 8*.

[**P10] The parties agree that Shell has authority pursuant to the dealer agreements to set the price of gasoline at the time of delivery. They agree that the price must be set subject to *R. C. 1302.18*, which requires the price to be "reasonable." *R. C. 1302.18(A)*. Pursuant to *R. C. 1302.18(B)* (*UCC section 2-305*(2)), the price must be set "in good faith." "Good faith" is defined generally as "honesty in fact in the conduct or transaction concerned," *R. C. 1301.01(S)*, but in the case of a merchant, "'good faith' * * * means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *R. C. 1302.01(A)(2)*. It is undisputed that Shell is a "merchant," as defined in *R. C. 1302.01(A)(5)*.

[**P11] Shell argues that good faith requires an objective inquiry and is demonstrated when a seller's price is within the range of its competitors and the seller has not discriminated between similarly situated buyers. Shell also contends that "an inquiry into the seller's subjective intent is neither permitted nor required." The dealers argue that good faith requires a subjective inquiry and ask, " [H] ow can an open price, specifically calculated to drive a contractual partner out of business, be a 'good faith' price."

[**P12] The trial court and court of appeals agreed with Shell, relying on *Tom-Lin Enters., 349 F.3d 277*. In *Tom-Lin*, the court confronted an agreement nearly identical to the one between the dealers and Shell and concluded, applying Ohio law, that an inquiry into good faith required "an *objective* analysis of the merchant-seller's conduct."

(Emphasis sic and footnote omitted.) *Id. at 281-282*. Thus, neither the trial court nor the court of appeals considered whether an examination into "good faith" required a subjective inquiry, and neither court engaged in a subjective inquiry.

[**P13] It is not disputed that the latter half of the definition of good faith, "the observance of reasonable commercial standards of fair dealing in the trade," requires only an objective analysis. The issue before us is whether there is room for a subjective inquiry within the honesty-in-fact analysis in these circumstances.

[**P14] [*58] The UCC does not define the term "honesty in fact." It should also be noted that " [c] ourts and commentators have recognized that the meaning of 'good faith' is not uniform throughout the [UCC] ." *Mathis v. Exxon Corp. (C. A.5, 2002), 302 F.3d 448, 456*. See also *Martin Marietta Corp. v. New Jersey Nat'l Bank (C. A.3, 1979), 612 F.2d 745, 751* (noting that good faith is considered subjective in Article 1 but objective in Article 2). Thus, case law defining good faith in other areas of the UCC, such as the Article 1 covenant of good faith and fair dealing, is of somewhat limited value here. Non-UCC cases defining good faith are of even less relevance.

[**P15] Official Comment 3 to *UCC section 2-305* does provide some guidance. That comment provides, in full:

[**P16] " [*UCC section 2-305(2)*], dealing with the situation where the price is to be fixed by one party rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish by the express qualification that the price so fixed must be fixed in good faith. Good faith includes observance of reasonable commercial standards of fair dealing in the trade if the party is a merchant. (*Section 2-103* [*R. C.*

1302.01]). But in the normal case a 'posted price' or a future seller's or buyer's 'given price,' 'price in effect,' 'market price,' or the like satisfies the good faith requirement."

[**P17] Comment 3 explains that the purpose of *R. C. 1302.18(B)* is to restrict the price a seller or buyer may set when the contract price has been left open, by requiring the price to be fixed in good faith. The second sentence of the comment does not remove honesty in fact from the definition of good faith in this context, because it uses the nonexclusive term "includes." The last sentence, however, is not limited to part of the good-faith definition but rather provides a safe harbor where a "posted price" satisfies good faith in its entirety.

[**P18] A number of cases from other jurisdictions considering openprice terms have relied on the posted-price comment. [1] This court has noted in the past that "it is desirable to conform our interpretations of the Uniform Commercial Code to those of our sister states." *Edward A. Kemmler Mem. Found. v. 691/733 E. Dublin-Granville Rd. Co. (1992), 62 Ohio St.3d 494, 499, 584 N. E.2d 695*. Relying on the Official Comments to the UCC helps to achieve this uniformity, as does reviewing case law that has previously interpreted particular provisions.

1 See *Havird Oil Co., Inc. v. Marathon Oil Co., Inc. (C. A.4, 1998), 149 F.3d 283, 290-291*; *Richard Short Oil Co., Inc. v. Texaco, Inc. (C. A.8, 1986), 799 F.2d 415, 422*; *United Food Mart, Inc. v. Motiva Ents., L. L. C. (S. D. Fla.2005), 457 F. Supp.2d 1329, 1334-1338*; *Wayman v. Amoco Oil Co. (D. Kan.1996), 923 F. Supp. 1322, 1349*; *Shell Oil Co. v. HRN, Inc. (Tex.2004), 144 S. W.3d 429, 433-438*.

[**P19] The Supreme Court of Texas addressed the very issue before us here in an essentially identical fact

pattern in *Shell Oil Co. v. HRN, Inc.* [*59] *(Tex.2004), 144 S. W.3d 429*. Independent gasoline dealers brought suit against Shell, alleging that the prices were not set in good faith under *UCC section 2-305(2)* because Shell had set the prices intending to put them out of business. *144 S. W.3d 429, 431-432*. The court held that Shell did not violate its duty of good faith, because the posted price was both commercially reasonable and nondiscriminatory. *Id. at 435-436*. It noted that "' [i] t is abundantly clear * * * that the chief concern of the UCC Drafting Committee in adopting *§ 2-305(2)* was to prevent discriminatory pricing.'" *Id. at 434*, quoting *Wayman, 923 F. Supp. at 1346-1347*. A subjective good-faith inquiry "injects uncertainty into the law of contracts and undermines one of the UCC's primary goals-to 'promot [e] certainty and predictability in commercial transactions.'" *Id. at 435*, quoting *Am. Airlines Emps. Fed. Credit Union v. Martin (Tex. 2000), 29 S. W.3d 86, 92*, quoting *Putnam Rolling Ladder Co., Inc. v. Mfrs. Hanover Trust Co. (1989), 74 N. Y.2d 340, 349, 547 N. Y. S.2d 611, 546 N. E.2d 904*. The drafters of the UCC, therefore, incorporated the posted-price safe harbor to prevent extensive litigation involving any open-price term, "while seeking 'to avoid discriminatory prices.' " Id., quoting Malcolm, The Proposed Commercial Code: A Report on Developments from May 1950 through February 1951 (1951), 6 Bus. Law. 113, 186. The court concluded that subjective intent was not intended to stand alone as a basis for liability: " [A] llegations of dishonesty under this section must also have some basis in objective fact which at a minimum requires some connection to the commercial realities of the case." *Id. at 435-436*.

[**P20] A few cases note the posted-price comment but conclude that it does not provide a safe harbor where there is subjective bad faith. See *Marcoux v. Shell Oil Prods. Co. L. L. C. (C. A.1, 2008), 524 F.3d 33, 50*; *Mathis, 302 F.3d*

at 455-456; *Bob's Shell, Inc. v. O'Connell Oil Assoc., Inc. (Aug. 31, 2005), D. Mass. No. 03-30169, 2005 U. S. Dist. LEXIS 21318, 2005 WL 2365324*; see also *Allapattah Servs., Inc. v. Exxon Corp. (S. D. Fla.1999), 61 F. Supp.2d 1308, 1322* (finding that when the seller double charged for credit-card processing, the action was not a "normal case," because the dispute was not over the actual price charged but over the manner in which the price was calculated; thus, the safe-harbor provision did not apply). Those cases contend that the comment is limited to the "normal case," which does not include a situation where the seller is purposefully trying to drive the buyer out of business.

[**P21] This interpretation would eviscerate the safe harbor in any action in which the plaintiff alleges circumstantial evidence of an improper motive, leading to drawn-out litigation "even if the prices ultimately charged were undisputedly within the range of those charged throughout the industry." *HRN, 144 S. W.3d at 435*. See Berry, Byers, & Oates, Open Price Agreements: Good Faith Pricing in the Franchise Relationship (2007), *27 Franchise L. J. 45, 49*. If a subjective inquiry could determine bad faith, a seller charging a fair price, even exactly the [*60] same price as another, good-faith seller, could be deemed to be acting in bad faith.

[**P22] There appear to be five other cases, besides *HRN*, that directly address the issue of subjectivity. Two, each holding in favor of a subjective inquiry, were decided under Massachusetts law. See *Marcoux, 524 F.3d 33*; *Bob's Shell, 2005 U. S. Dist. LEXIS 21318, 2005 WL 2365324*. *Mathis, 302 F.3d 448*, the only other case proposing subjectivity, is no longer good law, as it was decided by the Fifth Circuit Court of Appeals under Texas law before the Texas Supreme Court issued its ruling in *HRN*. The final two cases, including one from the Sixth Circuit applying Ohio law, conclude that *UCC section 2-305* requires only

an objective inquiry. See *Tom-Lin Ents., 349 F.3d 277*; *United Food Mart, Inc. v. Motiva Ents., L. L. C. (S. D. Fla. 2005), 457 F. Supp.2d 1329* There are a number of other cases discussing similar open-price-term contracts under *UCC section 2-305* that conduct only an objective analysis, although those cases do not directly state that a subjective inquiry is inappropriate. See, e. G., *Schwartz v. Sun Co., Inc. (R & M) (C. A.6, 2002), 276 F.3d 900, 905*; *Mikeron, Inc. v. Exxon Co., U. S. A. (D. Md.2003), 264 F. Supp.2d 268, 276*; *T. A. M., Inc. v. Gulf Oil Corp. (E. D. Pa.1982), 553 F. Supp. 499, 509*. In total, prior to this court's opinion today, at least three jurisdictions found that the test could be met only with objective evidence of bad faith, while only one concluded that evidence of intent was sufficient.

[**P23] All of this is not to say that intent is necessarily irrelevant to an analysis of good faith under *UCC section 2-305(2)*, but only that a subjective inquiry is not permitted when the posted-price safe harbor applies. By its language, the safe harbor does not apply when it is not the "normal case" or when the price setter is not imposing a "posted price," "given price," "price in effect," "market price," or the like. As long as a price is commercially reasonable, it qualifies as the "normal case." The touchstone of prices set through open-priceterm contracts under *UCC section 2-305* is reasonableness. A price that is nondiscriminatory among similarly situated buyers correspondingly qualifies as a "posted price" or the like. A discriminatory price could not be considered a "posted" or "market" price, because, in effect, the seller is not being "honest in fact" about the price that it is charging as a posted price, since it is charging a different price to other buyers.

[**P24] Therefore, a price that is both commercially reasonable and nondiscriminatory fits within the limits of the safe harbor and complies with the statute's good-faith requirement. Given our conclusion below that the safe

harbor applies to the facts of this case, we are not required to precisely define good faith as it is used in *section 2-305(2)*. We offer no opinion, in particular, on the role of subjective intent within the good-faith analysis beyond the safe harbor.

[*61] IV

[**P25] The facts of this case demonstrate that the prices set by Shell were both commercially reasonable and nondiscriminatory. Aside from claiming that Shell's goal in setting prices was to drive the dealers out of business, the only evidence of bad faith was that the prices set were too high for dealers to remain profitable and compete with jobbers in the Cleveland area. However, Shell is not required to sell gasoline at a price that is profitable for buyers. "A good-faith price under *section [2-305]* is not synonymous with a fair market price or the lowest price available." *HRN, 144 S. W.3d at 437*. As noted by the court of appeals: "The trial court * * * found that Shell submitted expert testimony which established that the DTW prices set by the company were within the range set by its competitors." *Casserlie v. Shell Oil Co., 2007 Ohio 2633, at P 31*. The dealers failed to rebut this evidence. Id.

[**P26] The dealers also point out that Shell's prices varied throughout the area because of PAD pricing. But the fact that Shell's DTW prices varied by PADs does not itself demonstrate unreasonable or discriminatory pricing. It is reasonable for Shell to adjust according to competition, and there is no evidence that Shell discriminated among similarly situated buyers, such as dealers within a given PAD or dealers in similar PADs.

[**P27] Finally, the only other argument of discrimination put forth by the dealers is that jobbers were charged significantly less, specifically, the rack price rather than the DTW price. Jobbers and dealers are not, however,

similarly situated buyers. The price difference is partially explained by the fact that the DTW price includes a delivery charge, while the rack price does not. We further find the Sixth Circuit Court of Appeals analysis comparing jobbers and dealers in *Tom-Lin instructive*, just as the lower courts did. See *Tom-Lin Ents., 349 F.3d at 285-286*. *Tom-Lin* noted that jobbers perform additional functions compared to dealers, such as maintaining the properties they own and bearing the risk of environmental liability. *Id. at 285*. Because jobbers relieve Shell of these obligations, they are charged a lower price. The dealers have not challenged these differences. The disparate pricing between jobbers and dealers is not evidence of discrimination.

V

[**P28] When a price that has been left open in a contract is fixed at a price posted by a seller or buyer, and the posted price is both commercially reasonable and nondiscriminatory, the price setter has acted in good faith as required by *R. C. 1302.18(B)*, and a subjective inquiry into the motives of the price setter is not permitted. In this case, the dealers have not provided any evidence that the prices set by Shell were commercially unreasonable or discriminatory. The [*62] posted-price safe harbor therefore applies, and we affirm the judgment of the court of appeals.

Judgment affirmed.

DISSENT BY: PFEIFER

[**P29] The majority opinion's reliance on the safe-harbor presumption is misplaced, as shown by one simple fact: Official Comment 3 to Uniform Commercial Code ("UCC") *section 2-305*, which introduced the concept of a safe-harbor presumption, has never been adopted by the General Assembly. See Am. S. B. No. 5, 129 Ohio Laws 13, 28. The safe-harbor presumption is not part of the law

of Ohio, despite the majority opinion's insouciant belief to the contrary.

[**P30] "Good faith" is generally treated as incorporating both subjective and objective standards. Although *R. C. 1302.18* deals exclusively with open-price terms, it does not define "good faith" differently from its customary meaning. Many different jurisdictions in many different contexts, including in the context of an open-price term, define "good faith" as requiring both subjective and objective analysis. I am more persuaded by the bulk of these cases than by the fact that three out of four jurisdictions (one of which, in my view, mistakenly applied Ohio law) have decided that an open-price term is susceptible only of objective analysis. See *Bhatia v. Debek (2008), 287 Conn. 397, 412, 948 A.2d 1009*, quoting *Kendzierski v. Goodson (1990), 21 Conn. App. 424, 429-430, 574 A.2d 249* ("In common usage, the term good faith has a well-defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. * * * Whether good faith exists is a question of fact to be determined from all the circumstances"); *Tonka Tours, Inc. v. Chadima (Minn.1985), 372 N. W.2d 723, 728* (determining good faith "necessarily involves factual findings. * * * It is for the trier of fact to evaluate the credibility of a claim of 'honesty in fact' and, in doing so, to take account of the reasonableness or unreasonableness of the claim"); *Smalygo v. Green (Okla.2008), 2008 OK 34, 184 P.3d 554, 559* ("By requiring good faith, the Legislature did not create an ambiguity nor did it render the provision vague. Rather, it employed a well-known legal concept that applies to a variety of situations and transactions. For example, the Uniform Commercial Code defines 'good

faith' as 'honesty in fact and the observance of reasonable commercial standards of fair [*63] dealing.' * * * Similarly, the concept of subjective honesty combined with objective reasonableness is found in an insurer's 'implied-in-law duty to act in good faith and deal fairly with the insured to ensure that the policy benefits are received.' *Christian v. Am. Home Assurance Co., 1977 OK 141, P 8, 577 P.2d 899, 901*"); *Simmons v. Jenkins (1988), 230 Mont. 429, 435, 750 P.2d 1067* ("the *breach* of a duty of good faith is a question of fact not susceptible to summary judgment" [emphasis sic]); *Miller Brewing Co. v. Ed Roleson, Jr., Inc. (2006), 365 Ark. 38, 45, 223 S. W.3d 806* (in determining whether the Miller Brewing Company violated the Arkansas Franchise Practices Act, *Ark. Code Ann. 4-72-201 et seq.*, the Supreme Court of Arkansas stated that " [w] hether Miller dealt with the franchise in a commercially reasonable manner and in good faith is a fact question for the jury"); *Garrett v. BankWest, Inc. (S. D.1990), 459 N. W.2d 833, 841* ("Good faith is derived from the transaction and conduct of the parties. Its meaning varies with the context and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party"); and *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs. (2005), 182 N. J. 210, 224-225, 864 A.2d 387*, quoting 4 Williston on Contracts (3d Ed.1961), Section 610B ("The covenant of good faith and fair dealing calls for parties to a contract to refrain from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive' the benefits of the contract").

[**P31] The majority opinion dismisses these cases as being of "limited value" because they do not specifically address open-price terms. But "good faith" does not have a different meaning in Ohio, which has not adopted the UCC comments, when used with open-price terms than when

used in any other context. Although the cases mentioned above discussed "good faith" in a variety of contexts, the courts agree that it is not possible to determine whether a party acted in "good faith" without a subjective inquiry. See *Allapattah Servs., Inc. v. Exxon Corp. (S. D. Fla.1999), 61 F. Supp.2d 1308, 1322, fn. 24* (The UCC "imposes a duty on merchants to meet good faith requirements that are measured both subjectively and objectively").

[**P32] We have had little occasion to discuss "good faith" in Ohio other than to parrot the Revised Code. See *Master Chem. Corp. v. Inkrott (1990), 55 Ohio St.3d 23, 28, 563 N. E.2d 26* ("'Good faith' is defined in UCC 1-201(19), *R. C. 1301.01(S)*, as 'honesty in fact in the conduct or transaction concerned'"); *Arcanum Natl. Bank v. Hessler (1982), 69 Ohio St. 2d 549, 554, 23 O. O.3d 468, 433 N. E.2d 204* (same). But we have defined "bad faith" as " 'that which imports a dishonest purpose and implies wrongdoing or some motive of self-interest.' " *Master Chem., 55 Ohio St.3d at 28*, quoting *Smith v. Halverson (S. D.1978), 273 N. W.2d 146, 151* (Wollman, C. J., dissenting). See Black's Law Dictionary (8th Ed.2004) 713 ("good faith" is defined as the "absence of intent to [*64] defraud or to seek unconscionable advantage"). *Tom-Lin Ents., Inc. v. Sunoco, Inc. (R&M) (C. A.6, 2003), 349 F.3d 277*, on which the majority opinion relies, clearly misinterpreted *Master Chem*. in concluding that "good faith" requires only objective inquiry. The definition of "bad faith" in *Master Chem*. is the closest that opinion came to addressing the issue before us, and it does not support the conclusion reached by the court in *Tom-Lin* or the conclusion reached by the majority in this case. *Master Chem., 55 Ohio St.3d at 28*.

[**P33] Although Shell cited several cases from federal courts to support its contention that prices set pursuant to an open-price term are subject to only objective inquiry,

none of them are persuasive. *Ajir v. Exxon Corp. (May 26, 1999), C. A. 9 Nos. 97-17032 and 97-17134, 1999 U. S. App. LEXIS 11046, 1999 WL 393666*, did not address "good faith" but only whether the price charged was "commercially reasonable." *1999 U. S. App. LEXIS 11046, [WL] at *7. Schwartz v. Sun Co., Inc. (C. A.6, 2002), 276 F.3d 900, 905*, does not support Shell's contention, because the court addressed only the "commercially reasonable" aspect of "good faith." *USX Corp. v. Internatl. Minerals & Chems. Corp. (Feb.8, 1989), N. D. Ill. No. 86 C 2254, 1989 U. S. Dist. LEXIS 1277, 1989 WL 10851, *1*, does not support Shell's contention, because the court emphasized only that the obligation to fix a price in good faith does not "impose a requirement for a seller to match the lowest price available," an issue that is not before us. *Adams v. G. J. Creel & Sons, Inc. (1995), 320 S. C. 274, 279, 465 S. E.2d 84*, does not support Shell's contention, because the court stated only that the plaintiff did not produce evidence that the price fixed by the defendant was unreasonable. *Richard Short Oil Co., Inc. v. Texaco, Inc. (C. A.8, 1986), 799 F.2d 415, 422-423*, also does not speak directly to subjective or objective inquiry; the court concluded that Short had not presented sufficient evidence to support a claim that Texaco did not act in good faith when it set a cap on rebates, in part because Short did not show that Texaco was dishonest or had a bad motive to injure Short. *Wayman v. Amoco Oil Co. (D. Kan.1996), 923 F. Supp. 1322, 1349*, does not support Shell's contention. In *Wayman*, the court concluded that the plaintiffs could not establish that Amoco had set its price in bad faith. That court stated, however, that " [i] f there was evidence that Amoco had, for example, engaged in discriminatory pricing or tried to run plaintiffs out of business, then the court's decision might be different." *T. A. M., Inc. v. Gulf Oil Corp. (D. C. Pa.1982), 553 F. Supp. 499, 509*, does not support Shell's contention. The court stated, with respect to "good faith," that " [t] he

plaintiffs have not alleged that the prices they were asked to pay differed from those demanded of other Gulf dealers." In short, none of these cases provide a reason to conclude that the analysis of whether a defendant acted in good faith in setting a price under an open-price term is amenable only to objective inquiry.

[**P34] [*65] The majority opinion also relies on *Shell Oil Co. v. HRN, Inc. (Tex.2004), 144 S. W.3d 429*, in which the Supreme Court of Texas considered the issue that is before us and concluded that open-price terms are subject only to objective inquiry. Because the court in *HRN* relied on the readily distinguishable federal cases discussed above and on the safe-harbor presumption, which Ohio has not adopted, this court should not rely on *HRN*. See *Bob's Shell, Inc. v. O'Connell Oil Assoc., Inc. (Aug. 31, 2005), D. Mass. No. 03-30169, 2005 U. S. Dist. LEXIS 21318, 2005 WL 2365324* (the court rejected the logic and conclusion of *HRN* and stated that it agreed "with Plaintiffs' assertion that [*UCC] section 2-305*'s purpose of preventing price discrimination should bar a supplier from trying to drive its dealers out of business").

[**P35] "Good faith" in the context of open-price terms should be subject to both objective and subjective inquiry. Even courts and commentators who have written in favor of the safe-harbor presumption have concluded that an intent to drive a contractual partner out of business might overcome the presumption. *Wayman, 923 F. Supp. at 1349*; Berry, Byers, and Oates, Open Price Agreements: Good Faith Pricing in the Franchise Relationship (2007), *27 Franchise L. J. 45, 51*. See *Wilson v. Amerada Hess Corp. (2001), 168 N. J. 236, 247, 773 A.2d 1121* ("various courts have stated that a party must exercise discretion reasonably *and with proper motive* when that party is vested with the exercise of discretion under a contract" [emphasis added]). I can conceive of situations in which nondiscriminatory

pricing could violate "good faith." For instance, in this case, it is alleged that Shell charged all of its similarly situated franchisees the same price, and it is alleged that that price was set too high for them to profitably operate a gas station. In that situation, even though the pricing was nondiscriminatory, it was designed to drive a contractual partner out of business. So much for the concept of a partnership.

[**P36] I believe that "good faith" as defined in *R. C. 1302.01* requires parties to act both honestly in fact and according to reasonable commercial standards. A court's analysis of a merchant's good faith, then, should be both subjective and objective. Furthermore, the safe-harbor presumption, even though not part of the law of Ohio, only applies in the normal case; at a minimum, the appellants should be allowed to attempt to establish that this is not a normal case. I would reverse the judgment of the court of appeals and remand the cause for further consideration consistent with this opinion. After this opinion becomes public, all franchisees in Ohio should watch their wallets very carefully because their franchisors will no longer be held to subjective good-faith standards. Instead, the law of the ocean applies: the big fish are free to consume smaller fish at will. Apparently, not until the waters are exclusively inhabited by a few great white sharks will the majority decide they need a bigger boat or a more robust interpretation of the UCC.

 ¿ Son para nosotros un misterio los gap fillers del Código Comercial Uniforme, tratándose de los contratos típicos nominados?

J. EL RIESGO DE PÉRDIDA

 COOK SPECIALTY COMPANY v. RANDOLPH SCHRLOCK, a/k/a RANDOLPH SCURLOCK, R. T. L.

LINES, INC., MACHINERY SYSTEMS INTERNATIONAL, LTD. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA 772 F. Supp. 1532;16 U. C. C. Rep. Serv. 2d 360 September 25, 1991, Decided September 25, 1991, Filed

OPINION BY: WALDMAN [*1532] Defendant Machinery Systems, Inc. ("MSI") contracted to sell plaintiff a machine known as a Dries & Krump Hydraulic Press Brake. When the machine was lost in transit, plaintiff sued defendants to recover for the loss. Presently before the court is plaintiff's Motion for Summary Judgment and defendant MSI's Cross-Motion for Summary Judgment.

I. LEGAL STANDARD

In considering a motion for summary judgment, the court must consider whether the pleadings, depositions, answers to interrogatories and admissions on file, together [*1533] with the affidavits, show there is no genuine issue as to any material fact, and whether the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. A*nderson v. Liberty Lobby, Inc., 477 U. S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; *Arnold Pontiac-GMC, Inc. v. General Motors Corporation,* [**2] *786 F.2d 564, 568 (3d Cir. 1986)*; only facts that may affect the outcome of a case under applicable law are "material." *Anderson, supra at 248*. All reasonable inferences from the record must be drawn in favor of the non-movant. *Anderson, supra at 255*. Although the movant has the initial burden of demonstrating an absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. *J. F. Feeser, Inc. v. Serv-A-Portion, 909 F.2d 1524, 1531 (3d Cir. 1990)*, cert. denied *113 L. Ed. 2d 246, 111 S. Ct. 1313 (1991)*, (citing *Celotex Corp. v. Catrett,*

477 U. S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

II. FACTS

The pertinent facts are not contested and are as follow.

Plaintiff entered into a sales contract with defendant MSI for the purchase of a Dries & Krump Press Brake in August of 1989 for $28,000. The terms of the contract were F. O. B. MSI's warehouse in Schaumburg, Illinois. Defendant R. T. L., also known as Randy's Truck Lines, ("the carrier") was used to deliver the press brake from the defendant's warehouse to the plaintiff in Pennsylvania. MSI obtained a certificate of insurance from the carrier with a face amount of $100,000 [**3] and showing a $2,500 deductible (See dfdt. ex. D.)

On October 20, 1989, the carrier took possession of the press brake at MSI's warehouse. While still in transit, the press brake fell from the carrier's truck. The carrier was cited by the Illinois State Police for not properly securing the load. Plaintiff has recovered damages of $5,000 from the carrier's insurer, the applicable policy limit for this particular incident. The machine was worth $28,000. [1]

1 Plaintiff, who also sued for certain consequential damages, asserts a claim for a total of $81,000.

III. DISCUSSION

This dispute is governed by the Uniform Commercial Code ("UCC") provisions regarding risk of loss. The parties agree that there is no meaningful distinction between the pertinent law of Pennsylvania and Illinois, both of which have adopted the UCC.

The term "F. O. B., place of shipment," means that "the seller must at that place ship the goods in the manner provided in this Article (section 2-504) and bear the expense and risk of putting them [**4] into the possession

of the carrier." *13 Pa. C. S. A. § 2319*. Thus, MSI bore the expense and risk of putting the machine into the carrier's possession for delivery. At the time the carrier takes possession, the risk of loss shifts to the buyer. The UCC provides:

> Where the contract requires or authorizes the seller to ship the goods by carrier
>
> a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier .*13 Pa. C. S. A. § 2509*.

Goods are not "duly delivered" under § 2-509, however, unless a contract is entered which satisfies the provisions of Section 2-504. See *13 Pa. C. S. A. § 2509*, Official Comment 2. Section 2-504, entitled "Shipment by Seller" provides that:

> Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must
>
> a) put the goods in the possession of such a carrier and make such a contract [*1534] for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case. *13 Pa. C. S. A. § 2504* (emphasis [**5] added).

Plaintiff argues that the contract MSI made for the delivery of the press brake was not reasonable because defendant failed to ensure that the carrier had sufficient insurance coverage to compensate plaintiff for a loss in transit. Plaintiff thus argues that the press brake was never duly delivered to a carrier within the meaning of section 2-

509 and accordingly the risk of loss never passed to plaintiff.

Plaintiff relies on two cases. In the first, *La Casse v. Blaustein, 93 Misc. 2d 572, 403 N. Y. S.2d 440 (Civ. Ct. 1978)*, the defendant seller shipped calculators to the plaintiff buyer, a college student, in two cartons by fourth class mail. The buyer authorized the seller to spend up to $50 for shipping and insurance. The seller spent only $9.98 and insured each carton, valued at $1663, for $200. The seller wrongly addressed one of the cartons, and inscribed a theft-tempting notation on it. The New York County Civil Court held that the defendant had improperly arranged for transportation of the calculators.

La Casse is the only reported case which suggests that a seller's failure to obtain adequate insurance may breach his duty to make a reasonable contract for shipment under § [**6] 2-504. The dearth of support for plaintiff's position is instructive. A leading UCC authority has remarked: "Under this subsection [§ 2-504], what constitutes an 'unreasonable' contract of transportation? Egregious cases do arise." See J. White and R. Summers, Uniform Commercial Code § 5-2 (1988). The only such "egregious case" identified by White and Summers is La Casse, where "the package was underinsured, misaddressed, shipped by fourth class mail, and bore a 'theft-tempting' inscription." White and Summers, supra, at § 5-2.

The actions taken by the defendant in La Casse were utterly reckless. Moreover, unlike the defendant in that case, MSI did not undertake the responsibility to insure the shipment, and did not ship the press brake at a lower cost than the plaintiff expressly authorized it to pay.

Plaintiff also relies on *Miller v. Harvey, 221 N. Y. 57 (1917)*. This pre-Code case is inapplicable. In Miller, by failing to declare the actual value of goods shipped on a

form provided for that purpose, the seller effectively contracted away the buyer's rights against the carrier. Official Comment 3 to section 2-504 states:

> it is an improper contract [**7] under paragraph (a) for the seller to agree with the carrier to a limited valuation below the true value and thus cut off the buyer's opportunity to recover from the carrier in the event of loss, when the risk of shipment is placed on the buyer.

Thus, a contract is improper if the seller agrees to an inadequate valuation of the shipment and thereby extinguishes the buyer's opportunity to recover from the carrier. That is quite different from a seller's failure to ensure that a carrier has sufficient insurance to cover a particular potential loss, in which case the carrier is still liable to the buyer.

Plaintiff's focus on a single sentence of Official Comment 3 ignores the explicit language of the statute which defines reasonable in the context of "having regard to the nature of the goods," *13 Pa. C. S. A. § 2504*, and the portion of the Comment which states:

> Whether or not the shipment is at the buyer's expense the seller must see to any arrangements, reasonable in the circumstances, such as refrigeration, watering of live stock, protection against cold and the like Id., Official Comment 3.

The clear implication is that the reasonableness of a shipper's conduct [**8] under § 2-504 is determined with regard to the mode of transport selected. It would be unreasonable, for example, to send perishables without refrigeration. See *Larsen v. A. C. Carpenter, Inc., 620 F. Supp. 1084, 1119 (E. D. N. Y. 1985)*. No inference fairly

can be drawn from the section that a seller [*1535] has an obligation to investigate the amount and terms of insurance held by the carrier.

The court finds as a matter of law that MSI's conduct was not unreasonable under section 2-504. MSI obtained from the carrier a certificate of insurance and did nothing to impair plaintiff's right to recover for any loss from the carrier. [2] Accidents occur in transit. For this reason, the UCC has specifically established mercantile symbols which delineate the risk of loss in a transaction so that the appropriate party might obtain insurance on the shipment. The contract in this case was "F. O. B." seller's warehouse. Plaintiff clearly bears the risk of loss in transit.

> 2 Plaintiff's argument that because the carrier used an allegedly unprofessional sounding name, Randy's Truck Line, and inelegant stationary, MSI was on notice that the carrier was unreliable is untenable. The Philadelphia telephone directory alone lists dozens of moving companies bearing the name, often just the first name, of an individual. Moreover, plaintiff has made no showing that the carrier, which is a party defendant, does not in fact have the means to satisfy a judgment in the amount sought.

[**9] There are no material facts in dispute and MSI is entitled to judgment as a matter of law. An appropriate order will be entered.

ORDER

AND NOW, this 25th day of September, 1991, upon consideration of the Cross-Motions for Summary Judgment of plaintiff, Cook Specialty Company, and defendant, Machinery Systems International Ltd., and the respective responses thereto, *IT IS HEREBY ORDERED* that plaintiff's Motion is *DENIED* and defendant's Motion is *GRANTED,* and *JUDGMENT* is entered in the above case

for defendant Machinery Systems International, Ltd. and against plaintiff Cook Specialty Company.

¿ Quién asume el riesgo de pérdida o daño en este negcio jurídico, y por qué?

K. LAS GARANTÍAS EN EL NEGOCIO COMERCIAL

LAS GARANTÍAS EXPLÍCITAS

LA BASE DE LA NEGOCIACIÓN

KEY v. BAGEN et al. Court of Appeals of Georgia 136 Ga. App. 373; 18 U. C. C. Rep. Serv. 882 September 29, 1975, Submitted October 29, 1975, Decided

OPINION BY: EVANS [*373] [**235] This case involves the sale of a horse. The horse, "Lilting Heart," owned by Dr. John Hartley, Jr., was sold through Dr. Hartley's agents, Leonard and Sarah Bagen by their employees, a Mr. Ward and Mrs. Brown. The horse was purchased by Ernest D. Key, Jr., for his daughter, who purchased same in reliance on the representations and selection of Ward and Mrs. Brown, who knew the horse was not suitable for Key's daughter. The horse threw the daughter when she rode it and was unsuitable for her. Upon learning the horse was unsuitable, Key demanded that Dr. Hartley and the Bagens return his money or replace the horse. The demand not being met, Key sued Dr. Hartley, the owner, and Leonard Bagen and Sarah Bagen, his agents, for damages as a consequence of the breach of warranty. Plaintiff contended there had been a breach of warranty and misrepresentation.

As a part of their separate answers, these defendants moved to dismiss the complaint. After a hearing thereon, the motion to dismiss was granted and the complaint was dismissed as to all defendants. Plaintiff appeals. H*eld:*

1. This transaction for the purchase of a horse, apparently for recreational use, while possibly a casual sale, nevertheless, is provided for in the Uniform Commercial Code which applies to transactions in goods. See Code Ann. §§ 109A-2 -- 102, 109A-2 -- 105.

2. Any affirmation of fact or promise made by the seller to the buyer relating to the goods becomes a part of the basis of the bargain; and "creates an express warranty that the goods shall conform to the affirmation or promise." Code Ann. §§ 109A-2 -- 313, 109A-2 -- 315; *Hill Aircraft &c. Corp. v. Simon, 122 Ga. App. 524, 527 (2) (177 SE2d 803)*.

3. Under the Civil Practice Act, § 9 (Code Ann. § 81A-109 (b)), "the circumstance constituting fraud or mistake shall be stated with particularity." Here the allegations of fact that the agent represented the horse to be safe and suitable to learn equitation; that the horse [*374] was well behaved, and even a novice might ride without problem; that defendants knew the horse was being purchased for a young girl to ride and learn equitation; and that the horse was not suitable for the daughter in learning equitation; and that said representations were made within the scope of their authority, are sufficient affirmance of fact stating the circumstances which constituted fraud and misrepresentation in this case. On motion to dismiss, the allegations of [**236] petitioner shall be construed most strongly against the movant and in favor of the pleader. See *Robinson v. A. Const. Co., 130 Ga. App. 56, 59 (202 SE2d 248)*; *Hunter v. A-1 Bonding Service, Inc., 118 Ga. App. 498, 499 (164 SE2d 246)*. The defendants had sufficient notice to enable them to know they were being charged with fraud and misrepresentation to prepare a proper defense. H*ayes v. Hallmark Apts., 232 Ga. 307, 309 (207 SE2d 197)*.

4. This case differs on its facts from *Goldman v. Hart, 134 Ga. App. 422 (214 SE2d 670)*, and in addition, here the essentials of fraud and deceit, where false representations have been made and relied upon, have been met. In the *Goldman* case, *supra, at page 424* in Division 5,the petitioner plead himself out of court by pleading facts showing that there was no fraud practiced by that defendant.

5. Generally, where two parties contract and a suit is filed for the breach thereof, the agent of the contracting party is not liable for his principal's default. See *Hill v. Daniel, 52 Ga. App. 427* (2), 428 (*183 SE 662*). But here it appears that this complaint proceeds under the new Civil Practice Act which allows suits for torts and contract in one and the same action, and that Dr. Hartley is sued for breach of contract, while his agents, Mr. and Mrs. Bagen are being sued for tort. This is allowable under the present law. See *Bacon v. Winter, 118 Ga. App. 358 (3) (163 SE2d 890)*; *Cohen v. Garland, 119 Ga. App. 333* (3), 337 (*167 SE2d 599*).

6. The petition should not have been dismissed unless it appeared beyond doubt from the pleadings therein that the plaintiff could not prove any set of facts in support of his claims which would entitle him to relief. See *American Southern Ins. Co. v. Kirkland, 118 Ga. App. 170* [*375] *(162 SE2d 862)*. The court erred in dismissing the petition.

JUDGMENT REVERSED.

¿ En Estados Unidos acaso toda representación fáctica sobre la mercadería constituye una garantía expresa?

LAS GARANTÍAS LEGALES

LA *WARRANTY OF TITLE*

 BRYON MOORE, plaintiff-appellant, v. PRO-TEAM CORVETTE SALES, INC., defendant-appellee COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, HENRY COUNTY 786 N. E.2d 903; 48 U. C. C. Rep. Serv. 2d 528 August 20, 2002, Date of Judgment Entry

OPINION BY: Walters %%03] [*72] [**P1] Plaintiff-Appellant, Bryon Moore, brings this appeal from a Henry County Common Pleas Court decision which dismissed his action against Defendant-Appellee, Pro Team Corvette Sales, Inc., regarding a contract for the sale of a 1974 Chevrolet Corvette, which was subsequently discovered to be stolen. On appeal, Moore argues that terms within the agreement did not effectively disclaim the implied warranty of title under *R. C. 1302.25* (U. C. C. 2-312). Because *R. C. 1302.25* provides for a buyer's basic needs with respect to the type of title he in good faith expects to acquire by his purchase, namely, a good, clean title transferred to him in a rightful manner, we find that the provision lacks sufficient specificity to disclaim the implied warranty of title. Accordingly, we reverse the judgment of the trial court.

[**P2] Facts and procedural history relevant to issues raised on appeal are as follows: In October 1994, Moore drove from his Gross Isle, Michigan residence to Pro Team Corvette Sales, Inc. ("Pro Team"), located in Napoleon, Ohio, in order to purchase a Chevrolet Corvette. On October 17, 1994, he signed as agreement to purchase a 1974 Corvette, as well as a%%04] separate agreement to trade in his 1975 Corvette. When Moore attempted to register the car with the Michigan Bureau of Motor Vehicles, he learned that the car had been reported stolen in Texas, and therefore could not be registered. The Michigan

State Police subsequently confiscated the car and returned it to Texas.

[**P3] On October 15, 1996, Moore filed suit against Pro Team, arguing that its failure to provide good title to the vehicle was negligent. He also claimed unjust enrichment, breach of statutory warranties, and violations of Ohio's Consumer Sales Practices Act. Pro Team denied all liability, claiming that it had excluded all warranties, including the warranty of title, in the purchase agreement. Pro Team also filed a third-party complaint against the dealership that sold the car to Pro Team, as well as the person who sold the car to that dealer, the Michigan State Police, and the sheriff of San Patricio County, Texas.

[**P4] In defending the suit, Pro Team relied upon language in its contract indicating that the Corvette was being sold "as is" and that the all warranties, including the warranty of title, were excluded from the agreement. Moore sought summary judgment, arguing that the language contained in the agreement was not sufficient to constitute a valid disclaimer of statutorily implied warranties of title. This motion was denied. Moore subsequently dismissed all counts [*73] unrelated to the warranty provisions. In February 2002, the trial court dismissed his remaining claims, concluding that the language contained in the agreement was sufficiently specific to permit exclusion of the warranty of title under *R. C. 1302.25(B)*.

[**P5] Moore appeals the trial court's judgment, presenting the following single assignment of error for our review: "The Trial Court erred when it concluded that the dealer's contract properly excluded the warranty of title."

[**P6] In Ohio, "a seller warrants that he will convey good title free from any security interest or other lien or encumbrance of which the buyer is without knowledge when the contract is made." [1] This implied warranty of title

is codified in *R. C. 1302.25*, which is identical to and modeled after U. C. C. section 2-312, providing as follows:

1 *Levin v. Nielsen (1973), 37 Ohio App.2d 29, 34, 66 Ohio Op. 2d 52, 306 N. E.2d 173*; *R. C. 1302.25(A)*.

[**P7] "(A) Subject to division (B) of this section there is in a contract for sale a warranty by the seller that:

[**P8] "(1) The title conveyed shall be good, and its transfer rightful; and

[**P9] "(2) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

[**P10] "(B) A warranty under division (A) of this section will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

[**P11] "(C) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications."

[**P12] %%05] Accordingly, "unless excluded or modified, *R. C. 1302.25(A)* adds to a sales contract a warranty by the seller that the title conveyed shall be good and its transfer rightful." [2] As provided by *R. C. 1302.25(B)*, a warranty of title may be excluded or modified by specific language giving the purchaser reasons to know that the vendor is only selling what title he possesses. "This code section provides for a buyer's basic needs in respect to the type of title he in good faith [*74]

expects to acquire by his purchase, namely, a good, clean title transferred to him in a rightful manner so that he will not be exposed to a lawsuit in order to protect it." [3] "In the usual case,the buyer expects to get a good title, and regards disclaimers as affecting only risks with regard to quality." [4]

2 *Gonder v. Ada Community Improvement Corp*. (March 11, 1996), Hardin App. No. 6-95-18, *1996 Ohio App. LEXIS 1001* .

3 *Gonder*, supra, citing to the Official Code Comment 1 to U. C. C. 2-312 (*R. C. 1302.25(A)*).

4 1 Hawkland UCC Series (2001) § 2-312:5, Disclaimer of Warranty of Title--Contractual Terms .

[**P13] The Michigan Court of Appeals, in *Jones v. Linebaugh*, [5] held that "very precise and unambiguous language must be used to exclude a warranty so basic to the sale of goods as is title." [6] Specific language is necessary to relieve the buyer of the idea that any disclaimer of warranty relates only to quality. [7] In *Sunseri v. RKO-Stanley Warner Theaters, Inc*., [8] the court found language stating that the seller "shall in nowise be * * * liable * * * upon or under guaranties [sic] or warranties * * * including, but not limited to, the implied warranty of title" lacked sufficient specificity to disclaim the warranty of title. The court reasoned that the language used was ineffective because it was "couched in negative terminology, expressing what the seller will not be liable for rather than what the buyer is or is not receiving. The inadequacy of such a caveat is best illustrated by juxtaposing it with title disclaimer provisions suggested by authorities in the subject area. For example, 18 Am. Jur. Legal Forms 2d s 253:825 (1974), provides: 'Seller makes no warranty as to the title to the goods, and buyer assumes all risks of nonownership of the goods by seller.'" [9] "Where the language in a purported disclaimer expresses how the seller's [*75] liability will be limited

rather than what title (or lack thereof) the seller purports to transfer, the purported disclaimer is ineffective." [10]

5 *Jones v. Linebaugh (1971), 34 Mich. App. 305, 191 N. W.2d 142*.

6 *Id., 191 N. W.2d at 144-145*; cited with approval in 1 White & Summers, Uniform Commercial Code (4th ed.) § 9-13, The Warranties of Title and Against Infringement, Section 2-312-- Disclaimer. See also *Kel-Keef Enterprises, Inc. v. Quality Components Corp. (2000), 316 Ill. App. 3d 998, 1014, 738 N. E.2d 524, 535-536, 250 Ill. Dec. 308*, appeal denied by *193 Ill. 2d 599, 744 N. E.2d 289*; *Lawson v. Turner (Fla. App. 1981), 404 So. 2d 424, 425, 32 U. C. C. Rep. Serv. 744*.

7 1 Hawkland UCC Series (2001) § 2-312:5, Disclaimer of Warranty of Title--Contractual Terms.

8 *Sunseri v. RKO-Stanley Warner Theatres, Inc. (1977), 248 Pa. Super. 111, 374 A.2d 1342, 1344*.

9 *374 A.2d at 1345*; cited with approval in *67 American Jurisprudence 2d Sales § 840*, Exclusions of Warranties of Title and Against Encumbrances and Infringement. See also *Rockdale Cable T. V. Co. v. Spadora (1981), 97 Ill. App. 3d 754, 757, 423 N. E.2d 555, 558, 53 Ill. Dec. 171* (finding language stating that the seller purports to transfer only such "right, title and interest" as he may possess insufficient to disclaim the implied warranty of title).

10 *Kel-Keef, 738 N. E.2d at 536*.

[**P14] %%06] The relevant portion of the sale contract states: "All warranties pursuant to *O. R. C. 1302.25* (U. C. C. 2-312) (warranty of title and against infringement) are hereby excluded from this transaction." In light of the foregoing discussion, we find this language to be akin to that which expresses how the seller's liability will be limited, rather than what title the seller purports to

transfer, and conclude that the provision lacks sufficient specificity to disclaim the implied warranty of title. Accordingly, Moore's assignment of error is sustained.

[**P15] Having found error prejudicial to the appellant herein, in the particulars assigned and argued, the judgment of the trial court is hereby reversed and the matter is remanded for further proceedings in accordance with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

¿ Por qué en nuestra tradición jurídica más bien tenemos una garantía de pacífica posesión?

LAS GARANTÍAS IMPLÍCITAS

COMERCIALIZACIÓN E IDONEIDAD PARA FINES ORDINARIOS

DANIEL R. SHAFFER, Petitioner, v. VICTORIA STATION, INC., et al, Respondents SUPREME COURT OF WASHINGTON 588 P.2d 233; 25 U. C. C. Rep. Serv. 427 December 28, 1978

OPINION BY: DOLLIVER [*296] [**234] On March 26, 1974, plaintiff Shaffer ordered a glass of wine at the Victoria Station, a restaurant operated by defendant. In the course of taking his first or second sip, the wine glass broke in Mr. Shaffer's hand, resulting in alleged permanent injury.

Plaintiff brought this action based upon three theories: negligence, breach of implied warranty under the Uniform Commercial Code, and strict liability under the theory of *Restatement (Second) of Torts § 402A* (1965). The manufacturer of the glass was named as a defendant, but was never served. Prior to trial, as counsel and the trial judge were discussing proposed instructions, plaintiff's attorney indicated that he could not prove negligence, and wished to submit the case to the jury on the grounds of

breach of warranty and strict liability. Plaintiff then took a voluntary nonsuit on the negligence issue. At the same time, the court ruled the case sounded in negligence alone, and granted the defendant's motion for dismissal. The Court of Appeals affirmed. S*haffer v. Victoria Station, Inc., 18 Wn. App. 816, 572 P.2d 737 (1977)*. We reverse the Court of Appeals.

I

Defendant argues the Uniform Commercial Code (RCW 62A) does not apply since the restaurant was not a merchant with respect to wine glasses as defined in *RCW 62A.2-104* and, since the glass itself was not sold, there was no passing of title as required under *RCW 62A.2-106*. Plaintiff, however, points to *RCW 62A.2-314* as being decisive. We agree. R*CW 62A.2-314* reads, *inter alia*:

[*297] (1)Unless excluded or modified (RCW 62A.2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as. .

(c) are fit for the ordinary purposes for which such goods are used; and

. .

(e) are adequately contained, packaged, and labeled as the agreement may require;

[1] It is our opinion that, when the Uniform Commercial Code states "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale" and that such food and drink must be "adequately contained, packaged, and labeled as the agreement may

require", it covers entirely the situation before us. Plaintiff ordered a drink (a glass of wine) from defendant. Defendant sold and served the glass of wine to plaintiff to be consumed by plaintiff on the premises. The wine could not be served as a drink nor could it be [**235] consumed without an adequate container. The drink sold includes the wine and the container both of which must be fit for the ordinary purpose for which used. Plaintiff alleges the drink sold -- wine in a glass -- was unfit and has, therefore, stated a cause of action.

In addition to the language of *RCW 62A.2-314*, we believe the language of *RCW 62A.1-103* is applicable. It states:

Unless displaced by the particular provisions of this Title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Plaintiff urges that cases which apply the Uniform Commercial Code where the goods are leased rather than sold (*see, e. G., Baker v. Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971)), or are under a bailment for mutual benefit (*see,* [*298] *e. G., Fulbright v. Klamath Gas Co.*, 271 Ore. 449, 533 P.2d 316 (1975)), be extended to the facts before us. We believe this is unnecessary. A more straightforward and less tortuous approach is that adopted in *Hadley v. Hillcrest Dairy, Inc.*, 341 Mass. 624, 171 N. E.2d 293 (1961). In that case, a bottle of milk delivered to the plaintiff's home shattered and cut the plaintiff's hand. The Massachusetts Supreme Judicial Court, relying on the Massachusetts sales act (which was not, as argued by defendant, significantly different in its applicable part from the Uniform Commercial Code), held at page 627, "In our

view it is immaterial whether or not the property in the jug passed to the plaintiff." The court goes on to cite *Geddling v. Marsh*, (1920) 1 K. B. 668. In that case, a retailer received bottled mineral water from the manufacturer and was injured by an exploding bottle. The court found the bottles were not sold to the retailer but held the retailer could recover under a breach of an implied warranty of fitness. The court said at pages 671-72:

In this case there was only one contract -- namely, a contract between the plaintiff and the defendant that the plaintiff should be supplied with mineral waters. Mineral waters could not be supplied except in bottles, and therefore the plaintiff was asking to be supplied with mineral waters in bottles. That undoubtedly is a contract of sale, and I will assume that in that contract there might be a condition that the bottles should not be bought by the plaintiff but should be hired; but the question the county court judge had to consider was whether the bottles were not "supplied under a contract of sale." This was a contract of sale none the less because there was a special provision with regard to the bottles. The section, in my opinion, extends not only to the goods actually bought under the contract but to goods "supplied under the contract of sale." This particular bottle was thus "supplied under a contract of sale," and it follows that it should be reasonably fit for the purpose for which it was supplied. In fact it was not reasonably fit and in consequence of that unfitness the plaintiff was injured.

[*299] *See also Sartin v. Blackwell*, 200 Miss. 579, 28 So. 2d 222 (1946). Plaintiff has a cause of action both on the face of the statute and under the principles of case law elucidated above.

II

We also hold an action lies under the strict liability theory of Restatement (Second) of Torts § 402A (1965). The policy questions of strict liability and their application to retailers have been previously determined. S*ee Seattle-First Nat'l Bank v. Tabert Volkswagen of America, Inc.*, 86 Wn.2d 145, 542 P.2d 774 (1975); *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969). The only question remaining is whether section 402A applies to the transaction here. In addressing this issue, the Court of Appeals expressed concern over an uncontrollable broadening of the doctrine of strict liability:

Were the wine glass in question held to be a mere facet of the sale of the "glass of wine" and thus a "product" for the [**236] purposes of section 402A, the theory of strict liability would be greatly and unnecessarily expanded. The reasonably clear standard of engagement "in the business of selling a product" would be abandoned in deference to a less predictable question -- whether the injury-producing aspect of the sale was necessary to the sale. If a wine glass renders a restaurateur strictly liable because he could not sell wine without it, what of other tablewear, the waiters and the bus boys, the furnishings to effect an attractive atmosphere, or the building housing the establishment? The argument could be made that numerous aspects of a restaurant's operation, or that of any other retailer, are integral to each sale. To ignore the fact that this allegedly defective glass was never sold would create great uncertainty as to the limits of strict liability. *Shaffer*, at 820-21.

[2] We do not agree with the gloomy view of the Court of Appeals of the consequences of allowing the plaintiff to proceed with this action. We hold the sale of a glass of wine is subject to the strict liability provisions of *section 402A*. If their predictions as to future lawsuits come to pass, we will [*300] deal with the litigation at that time.

Confirmation of the applicability of *section 402A* to this case is given in comment *h*, which says:

> The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed. No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container is itself dangerous, the product is sold in a defective condition. Thus a carbonated beverage in a bottle which is so weak, or cracked, or jagged at the edges, or bottled under such excessive pressure that it may explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition. The container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this Section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle while he is handling it preparatory to consumption.

Restatement (Second) of Torts § 402A, comment h at 352 (1965).

Plaintiff has stated a cause of action under theories of implied warranty of fitness and strict liability. The Court of Appeals is reversed.

¿ Si el Código de Comercio Uniforme considera la comida y la bebida que sirven los restaurantes como una mercadería, que queda del *common law*?

ADECUACIÓN PARA UN FIN PARTICULAR

 FERDINAND LEAL, ET AL., Plaintiffs-Appellees v. JOSEPH D. HOLTVOGT, ET AL., Defendants-Appellants COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MIAMI COUNTY 702 N. E.2d 1246; 37 U. C. C. Rep. Serv. 2d 953 August 7, 1998, Rendered

OPINION BY: FAIN [*59] [**1251] Defendants-appellants and cross-appellees Joseph and Claudia Holtvogt appeal from a judgment awarding compensatory damages to plaintiffs-appellees and cross-appellants Mary and Ferdinand Leal. The Leals cross-appeal from that part of the judgment awarding compensatory damages, punitive damages, and attorney fees to the Holtvogts.

This appeal involves a sale by the Holtvogts to the Leals of a one-half interest in an Arabian stallion named Mc Que Jabask. The Holtvogts contend that they neither negligently misrepresented the condition of the stallion nor gave the Leals an express warranty regarding the stallion. Further, they argue that the damage award against them is against the manifest weight of the evidence. The Holtvogts also argue that under the agreement the Leals should be required to pay for half of all the costs expended for Mc Que Jabask before his death. Finally, they argue that the trial court did not award them adequate attorney fees.

The Leals contend that the Holtvogts fraudulently misrepresented the condition of the stallion and that, because of this fraud, they should receive punitive damages and attorney fees. They also argue that Mrs. Leal did not defame Mr. Holtvogt.

We conclude that the record supports the trial court's award of compensatory damages to the Leals. Further, we conclude that there is evidence in the record to support the

trial court's award of punitive damages and attorney fees to the Holtvogts. We also conclude that the amount of compensatory damages awarded to the Holtvogts by the trial court was supported by the record. Finally, we conclude that both the Holtvogts and the Leals may be entitled to further compensatory damages.

Accordingly, the judgment of the trial court is *Affirmed in part* and *Reversed in part,* and this cause is *Remanded* for further proceedings.

I

Joseph and Claudia Holtvogt owned and operated Shady Glen Arabians, a horse barn in Miami County, Ohio. They were experienced in Arabian horse training, breeding, boarding, selling, and showing. In 1992, the Leals, novices in the equine industry, decided to begin raising horses. In April, 1993, Ferdinand [*60] Leal began visiting Shady Glen Arabians regularly to learn how to ride and handle horses. Before long, a friendship developed between the Holtvogts and Leals, and Ferdinand Leal began spending three to four days each week at the Holtvogts' barn helping Joseph Holtvogt with the horses.

In late 1993, the Leals decided they wanted to start a breeding program by purchasing a stallion to breed with a mare they owned. At first, they were interested in purchasing Procale, a stallion owned by John Bowman. After talking to Mr. Holtvogt about Procale, the Leals decided not to buy [**1252] him. The Holtvogts then offered the Leals a one-half interest in Mc Que Jabask, an Arabian stallion that the Holtvogts owned. At trial, the Leals testified that before they agreed to invest in Mc Que Jabask, Mr. Holtvogt made a number of statements regarding the stallion, such as: Mc Que Jabask was a national top ten champion in three categories; he was an all-around winning stallion; he earns $20,000.00 per year in

stud fees; he is capable of attaining national show titles again; and his foals were selling for $6,000 to $10,000 each [these statements will be referred to hereinafter as "the five contested statements"]

In January, 1994, the Leals and Holtvogts entered into a contract of sale for a one-half interest in Mc Que Jabask for $16,000. The contract also established a partnership agreement, which called for the parties to share equally in the expenses and profits arising from their joint ownership of Mc Que Jabask.

There was expert testimony that prior to January, 1994, Mc Que Jabask had been treated for lameness and was suffering a chronic lameness condition in his right rear and fore fetlocks. Mr. Holtvogt testified that he had taken the stallion for lameness treatments numerous times. He also stated that he did not disclose this information to the Leals.

By July, 1994, the Leals were dissatisfied with the partnership and indicated to the Holtvogts that they wanted either a refund of their money or a remedy for their concerns. In March, 1995, the mortality insurance on Mc Que Jabask lapsed when neither the Leals nor the Holtvogts paid the insurance premium.

Mary Leal, a former Dayton police officer, was unhappy with the partnership. She began making disparaging remarks about Joseph Holtvogt's honesty and integrity to the past and present customers of Shady Glen Arabians. As a result of these remarks, Joseph Holtvogt testified that he suffered from depression, had visited some medical doctors, and was on medication. The Holtvogts did stipulate, however, that they could not prove any business or economic damages due to Mary Leal's remarks.

On January 17, 1996, Mc Que Jabask died from stomach ulcer complications. Since neither party had

renewed the stallion's mortality insurance, Mc Que Jabask was uninsured.

[*61] In February, 1995, the Leals filed suit against the Holtvogts, who then brought counterclaims against the Leals. The Miami Country Common Pleas Court found that the Holtvogts had negligently misrepresented the stallion's condition and that they had breached an "express warranty on the condition of the horse for the purposes intended" and awarded the Leals $16,000 in compensatory damages. The court further found that the Leals had four of their own horses boarded at the Holtvogts' barn and that the Leals had failed to pay for their care and upkeep. Thus, the trial court awarded the Holtvogts $800.23 in compensatory damages for the services they had provided for these four horses. The court also found that Mary Leal slandered Joseph Holtvogt and, after concluding that Mr. Holtvogt's damages were minimal to nominal, awarded him $1,000 in compensatory damages. Finding Mary Leal's statements to have been made with malice, the court also awarded the Holtvogts punitive damages and attorney fees of $1,000. The $1,000 award for punitive damages and attorney fees was vacated by the trial court after the parties reminded the court that it had been stipulated that there would be an additional hearing to present evidence for attorney fees if the court found punitive damages were appropriate. After this additional hearing, the trial court awarded the Holtvogts $3,000 for punitive damages and attorney fees. Both the Holtvogts and the Leals appeal from the judgment of the trial court.

II

The Holtvogts' Second Assignment of Error is as follows:

The trial court committed reversible error when it held that defendants' actions constituted negligent

misrepresentation because plaintiffs failed to present any factual evidence whatsoever which would lead a reasonable person to believe that Mc Que Jabask was lame at the time the parties entered into [**1253] the partnership agreement or that Mc Que Jabask was not fit to be shown.

The Holtvogts contend that the Leals failed to establish the requisite elements for a claim of negligent misrepresentation and that the trial court's conclusion is against the manifest weight of the evidence and contrary to law for two reasons. First, they argue that the expert testimony in the record does not establish that Mc Que Jabask was lame at the time the parties entered into the agreement. Second, they argue that the trial court's conclusion that the stallion was not fit to be shown is against the manifest weight of the evidence because there is no proof that the stallion could not be shown and that, even if he was not able to be shown, this inability would not have affected his ability to earn stud fees.

We begin by addressing the issue of whether the Holtvogts negligently misrepresented the condition of Mc Que Jabask when they failed to disclose his lameness. Whether Mc Que Jabask was lame at the time of the agreement was [*62] hotly contested at trial,with both sides presenting expert testimony from veterinarians and introducing numerous exhibits ranging from x-rays to a video tape. The trial court concluded that the Holtvogts had negligently misrepresented the stallion's condition by failing to inform the Leals that he suffered from chronic lameness. We conclude that, regardless of the evidence presented, the Holtvogts could not have made a negligent misrepresentation by failing to disclose to the Leals that Mc Que Jabask suffered from lameness.

Negligent misrepresentation is defined as follows:

one who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, *supplies false information* for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in communicating the information.

Textron Financial Corp. v. Nationwide Mut. Ins. Co. (1996), 115 Ohio App. 3d 137, 149, 684 N. E.2d 1261, *cert. denied*, *78 Ohio St. 3d 1425, 1425, 676 N. E.2d 531*. (Emphasis in original.)

A negligent misrepresentation occurs when one "*supplies false information* for the guidance of others." *115 Ohio App. 3d at 149*. In other words, a "negligent misrepresentation does not lie for omissions; there must be some affirmative false statement." ***Id***. (citation omitted); *see Zuber v. Ohio Dept. of Insurance (1986), 34 Ohio App. 3d 42, 45-46, 516 N. E.2d 244*. The Holtvogts' concealment of Mc Que Jabask's lameness cannot support a claim of negligent misrepresentation, since it was not an affirmative false statement. Thus, the trial court erred when it found that the Holtvogts negligently misrepresented the condition of the stallion to the Leals when they failed to disclose his lameness.

We next address the trial court's finding that the Holtvogts negligently misrepresented Mc Que Jabask by holding the stallion out as being fit to be shown. A judgment that is "supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Seasons Coal Co. v.*

Cleveland (1984), 10 Ohio St. 3d 77, 80, 461 N. E.2d 1273 (citation omitted).

The trial court, in its findings of fact,concluded that the Holtvogts were experienced equine breeders and trainers and that the Leals were novices in the equine industry. Further, the court found that the Holtvogts falsely represented to the Leals that the stallion was fit to be shown and that the Holtvogts failed to exercise reasonable care in communicating this information. Finally, the trial [*63] court concluded that the Leals justifiably relied on the Holtvogts' representations and consequently suffered a $16,000 loss.

These findings of fact and conclusions of law are not against the manifest weight of the evidence. The record reflects that the Holtvogts were quite experienced with training, breeding, showing, and boarding Arabian [**1254] horses. There is evidence that the Leals were novices in the horse industry. Further, the record shows that in late 1993, the Leals decided to buy an investment stallion to start a breeding program and that they were particularly interested in Procale, a stallion owned by John Bowman. The record demonstrates that Mr. Holtvogt, after persuading the Leals that Procale was not a suitable horse for their purposes, offered them one-half interest in Mc Que Jabask. Further, there is evidence that Mr. Holtvogt represented to the Leals that with the help of the Leals' money, Mc Que Jabask could be promoted, advertised, and shown to increase his national recognition, thus enabling him to bring in higher stud fees.

The record further supports a finding that the stallion was not fit to be shown. Dr. Patterson, a veterinarian who performed an independent examination as directed by the trial court, testified at trial and concluded to a reasonable veterinary certainty that Mc Que Jabask was suffering from

chronic lameness in his right fore fetlock and right rear fetlock. He stated that while walking, the stallion tended to fall over his right rear limb fairly consistently and that this lameness was also visible while the stallion was running, as there was definite short striding on the stallion's right rear fetlock and a lack of good suspension on the right fore fetlock. Dr. Patterson testified that the stallion "comes off lame." Further, Dr. Patterson testified that Mc Que Jabask's general muscle tone was consistent with that of a horse not in active athletic training. Thus, the record supports the trial court's finding that Mc Que Jabask was not fit to be shown due to his lameness.

While testifying, Dr. Patterson also stated that the conditions that he saw in the stallion's fetlocks take years to develop and thus concluded that the chronic lameness did exist in January, 1994, when the agreement between the parties was entered into. Thus, competent and credible evidence was presented at trial to demonstrate that the Holtvogts supplied false information to lead the Leals to invest in Mc Que Jabask.

The record also indicates that the Holtvogts knew that Mc Que Jabask had been treated for lameness prior to January, 1994. Mr. Holtvogt testified that they had taken him for lameness treatments at least half a dozen times. Thus, competent and credible evidence was presented at trial to show that the Holtvogts failed to exercise reasonable care in communicating Mc Que Jabask's lameness to the Leals.

[*64] As for the Leals' reliance on the Holtvogts' representations, the record shows that the parties had become social friends over time and both of the Leals testified that they relied on Mr. Holtvogt's representations. In fact, Mr. Leal, who spent several days a week at the Holtvogts' barn, testified, " * * * Joe and I have a really,

really good relationship, um, I trust him a lot, he, he won my trust. He is my teacher. At that time [before the problems over Mc Que Jabask arose] he, everything he told me that good or it is not good I believed him." Thus, from our review of the record we find competent and credible evidence supports the trial court's finding that the Leals justifiably relied upon the Holtvogts' representations that the horse was fit to be shown.

It is also clear from the record that due to their reliance on the Holtvogts' representations, the Leals had a pecuniary loss that they otherwise would not have suffered. The Leals both testified that if they had known Mc Que Jabask had been treated for lameness prior to the agreement, they would not have invested in him. Thus, our review of the record supports the trial court's finding that the Holtvogts negligently misrepresented to the Leals that Mc Que Jabask was fit to be shown.

The Holtvogts finally contend that even if Mc Que Jabask was not able to be shown, this inability would not have affected his ability to earn stud fees. They argue that there was no need to show Mc Que Jabask because he had already established a show record that would attract breeders. We cannot find support in the record for the Holtvogts' argument. At trial, Dixie Gansmiller, an experienced horse breeder, testified that a person could not successfully advertise a stallion for stud unless it was actively being shown simultaneously.

Thus, the Holtvogts' argument that their failure to disclose Mc Que Jabask's lameness did not make a claim for negligent misrepresentation [**1255] is well-taken. Competent and credible evidence in the record does, however, support the trial court's finding that the Holtvogts did negligently misrepresent to the Leals that Mc Que Jabask was fit to be shown. Therefore, the trial court's

findings of fact and conclusions of law regarding the Holtvogts' negligent misrepresentation that the stallion was fit to be shown are not against the manifest weight of the evidence.

The Holtvogts' Second Assignment of Error is overruled.

III

The Holtvogts' First Assignment of Error is as follows:

The trial court committed reversible error when it found that defendants' actions constituted a breach of an expressed warranty because the transaction between the parties does not meet the definitional requirements under ohio [*65] expressed warranty law; defendants' conduct does not rise to the level of an expressed warranty; and the integration clause in the partnership agreement precludes the court's consideration of any and all prior oral representations.

The Holtvogts' argument that there was no breach of an express warranty is three-fold. First, they argue that Ohio's express warranty law is not applicable to their transaction. Second, they argue that their conduct was not sufficient to constitute an express warranty. Third, they argue that there was a clause in the parties' agreement precluding consideration of any oral representations.

We begin with the Holtvogts' argument that Ohio's express warranty law does not apply to the transaction that occurred between the parties. The Holtvogts contend that an express warranty can arise only if there has been a "sale" between the parties and that their transaction with the Leals created a "partnership agreement," not a "sale."

We first address this argument by noting that Ohio warranty law is governed by the Uniform Commercial Code, Sales, *R. C. Chapter 1302.* The scope of Chapter

1302 is set forth in 1302.02, which provides in part that "*sections 1302.01 to 1302.98*, inclusive, of the Revised Code, apply to transactions in goods." *R. C. 1302.02*. Goods are defined as "all things * * * which are moveable at the time of identification to the contract for sale * * * [and] must be both existing and identified before any interest in them can pass." *R. C. 1302.01(A)(8)*. The Arabian stallion, Mc Que Jabask, was moveable, existing, and could be identified at the time of the contract. Thus, he would qualify as a "good" under *R. C. 1302.02*.

As for the Holtvogts' contention that the transaction was not a "sale," they correctly argue that a "sale" is defined as "the passing of title from the seller to the buyer for a price." *R. C. 1302.01(A)(11)*. There is no statutory requirement, however, that full title to the good must pass from the buyer to the seller. In fact, Chapter 1302.01 explicitly states, in its definition of "goods," "there may be a sale of a part interest in existing identified goods." *R. C. 1302.01(A)(8)*. Thus, although the transaction involved the sale of only a half-interest in Mc Que Jabask, the transaction was within the definitional requirements of R. C. 1302 and thus is governed by Ohio warranty law. Therefore, the first part of the Holtvogts' argument is not well-taken.

We next address the Holtvogts'argument that their conduct did not amount to an express warranty. The trial court found that " * * * the [Holtvogts] engaged in 'puffing' at the time of the sale of the one-half interest in the horse but did not fraudulently misrepresent a material fact." Although the trial court did not enlighten us as to what part of the Holtvogts' conduct it believed to be "puffing," our review of the record leads us to believe that the trial court was talking about [*66] the five contested statements that the Leals claim the Holtvogts made. The Holtvogts contend that the trial court's finding that they engaged in "puffing"

is inconsistent with the trial court's conclusion that they gave the Leals an express warranty.

R. C. Chapter 1302.26 states the following:

(A) Express warranties by the seller are created as follows:

(1) 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 [**1256] the goods shall conform to the affirmation or promise.

(2) 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.

(3) * * *

(B) * * * an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. *R. C. 1302.26*.

"Puffing," or merely stating the seller's opinion, cannot amount to an express warranty. *See Slyman v. Pickwick Farms (1984), 15 Ohio App. 3d 25, 28, 472 N. E.2d 380*; *R. C. 1302.26(B)*. The five contested statements were the subject of extensive testimony during the trial. Mr. Holtvogt denied making any of these statements and the Leals repeatedly testified that Mr. Holtvogt did make these statements. The trial court seems to have found the five contested statements to be "puffing." Our review of the record shows that there is credible and competent evidence that these five contested statements were no more than "puffing." The Holtvogts correctly argue that when

statements are mere "puffing," they cannot constitute an express warranty.

We cannot sustain this Assignment of Error, however, because we find that the Holtvogts breached an implied warranty of fitness for a particular purpose.

In its entry, the trial court found the following:

" * * * the information the [Holtvogts] failed to apprise the [Leals] was the lameness of the horse at the time the contract was executed in January 1994.

The [Leals] suffered damages in the amount of $16,000.00 as a result of this negligent misrepresentation.

The ***same set of facts*** establish a cause of action for breach of express warranty ***on the condition of the horse for the purposes intended*** * * * ." (emphasis added).

[*67] In its entry, the trial court did not just say an express warranty was breached, but rather said that an "express warranty ***on the condition of the horse for the purposes intended***" was breached. We conclude that the trial court intended to say that an implied warranty of fitness for a particular purpose was breached. Our conclusion is supported by the trial court's statement that the same set of facts establishes claims for both a breach of express warranty on the condition of the horse for the purposes intended and negligent misrepresentation. We note that the elements of a claim for negligent misrepresentation and breach of an implied warranty of fitness for a particular purpose are quite similar, while the elements of negligent misrepresentation and breach of an express warranty are not similar. Thus, we conclude that the trial court, in its conclusions of law, intended to say that an implied warranty of fitness for a particular purpose was given and breached by the Holtvogts when they failed to disclose Mc Que Jabask's lameness to the Leals.

An implied warranty of fitness for a particular purpose is covered by the Uniform Commercial Code, Sales, *R. C. Chapter 1302.28*, which provides:

"Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under *section 1302.29 of the Revised Code* an implied warranty that the goods shall be fit for such purpose." *R. C. 1302.28*.

Ohio courts have set forth the following test to determine whether an implied warranty of fitness for a particular purpose has been created: (1) the seller must have reason to know of the buyer's particular purpose; (2) the seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish or select appropriate goods; and (3) the buyer must, in fact, rely upon the seller's skill or judgment. H*ollingsworth v. The Software House, Inc. (1986), 32 Ohio App. 3d 61, 65, 513 N. E.2d 1372*; *Delorise Brown, M. D., Inc. v. Allio (1993), 86 Ohio App. 3d 359, 362, 620 N. E.2d 1020*.

The first element requires that Mr. Holtvogt knew why the Leals decided to buy [**1257] an interest in Mc Que Jabask. From our review of the record, we see that Mr. Holtvogt clearly knew that the Leals wanted to buy an interest in the stallion to start a breeding program. Mr. Holtvogt testified:

" * * * [The Leals] had explained what type of horse they were looking for [and] it seemed to me that [Mc Que] Jabask fit the bill [of] what they were looking for and that's why I mentioned to them, uh, to Ferdinand that there might be a possibility that we would be interested in selling part interest in him.

* * * The things that they were saying, * * * those things were, were present in, in [Mc Que] Jabask * * * .

[*68] * * * It just, it made sense that, you know, in the fact that the Leals could breed to [Mc Que] Jabask * * * * * * Um, we could, uh, with the experience and the reputation that we had we could help market their foals, um, it was, I really felt that it was something that could work."

Thus, evidence of the first element of an implied warranty of fitness for a particular purpose was presented at trial.

The second element requires that Mr. Holtvogt had reason to know that the Leals were relying on his skill and judgment to select or furnish the appropriate goods. Evidence presented at trial shows that Mr. Holtvogt knew, or at least should have known, that the Leals were relying on his judgment when they purchased an interest in the stallion. The relationship between Mr. Holtvogt and Mr. Leal was like that of a teacher and student. Mr. Leal spent a great deal of time at the Holtvogts' barn, helping Mr. Holtvogt with the horses and learning from Mr. Holtvogt. Mr. Holtvogt testified that he was an expert trainer and breeder with Arabian horses, and the evidence shows that he knew Mr. Leal knew very little about horses. Furthermore, the Leals testified that they were interested in purchasing another horse, Procale, but that Mr. Holtvogt steered them away from that horse, saying that horse was not the type of horse that the Leals wanted to buy. Mr. Holtvogt even testified that he mentioned Mc Que Jabask to the Leals because the stallion was the type of horse that they were looking for. Thus, evidence of the second element of an implied warranty of fitness for a particular purpose was presented at trial.

The third element requires that the Leals actually did rely upon Mr. Holtvogt's skill and judgment when they

purchased an interest in the stallion. The trial court found that the Leals justifiably relied upon the Holtvogts' representations regarding the stallion. This finding is not against the manifest weight of the evidence. As stated earlier, there was competent and credible evidence presented at trial to support this finding as both Leals were novices in the horse industry and they testified that they trusted Mr. Holtvogt and considered him to be the expert. Thus, evidence of the third element was presented at trial.

Because all three elements were proven at trial, we conclude that an implied warranty of fitness for a particular purpose was given by the Holtvogts to the Leals at the time of the sale. There must be evidence that the warranty was breached if the Leals are to recover. D***elorise Brown, M. D., Inc***., *86 Ohio App. 3d at 363*. "Whether a warranty has failed to fulfill its essential purpose is ordinarily a determination for the factfinder." *Id.*

The trial court found that a warranty was breached by the Holtvogts because the horse was lame. As stated above, competent and credible evidence was presented to support the trial court's finding that Mc Que Jabask suffered [*69] from chronic lameness at the time of the sale. At trial, Dixie Gansmiller testified that even though a lame stallion could stand for stud, its lameness would affect her decision whether to breed her mares with it. Thus, we conclude that competent and credible evidence in the record does demonstrate that Mc Que Jabask was not fit for the particular purpose intended by the Leals when they invested in him.

Finally, we address the Holtvogts' argument that there was no express warranty because the partnership agreement had an integration clause that nullified any and all prior oral representations that were not specifically mentioned within the document. As we stated above, there was not an express

warranty in this case, so we will consider this [**1258] argument by applying it to the Holtvogt's breach of an implied warranty of fitness for a particular purpose.

The partnership agreement that the parties entered into had the following clause: "This contract contains the entire agreements between the parties and no oral agreements shall be binding nor shall any modification of this agreement be binding unless in writing." As we have already stated, the transaction between the Leals and the Holtvogts is governed by the Uniform Commercial Code, Sales, *R. C. Chapter 1302. R. C. 1302.05*, which discusses final written expressions and the admissibility of parol or extrinsic evidence, states:

"Terms * * * which are * * * set forth in a writing intended by the parties as a final expression of their agreement * * * may not be contradicted by evidence of any *prior agreement* or of a *contemporaneous oral agreement* but may be explained or supplemented * * * ." *R. C. 1302.05* (emphasis added).

We first note that the integration clause in the agreement could preclude consideration of an express warranty, if an express warranty had been given by the Holtvogts. We have already stated, however, that no express warranty was given but rather the Holtvogts breached an implied warranty of fitness for a particular purpose when they failed to disclose Mc Que Jabask's lameness to the Leals. The Holtvogts' failure to disclose this information does not amount to a "prior agreement" or "contemporaneous oral agreement" that the Leals are trying to introduce to change the terms of the agreement. An integration clause does not affect an implied warranty of fitness for a particular purpose because an integration clause essentially says that everything the parties agreed to is within the four corners of the document. An implied

warranty of fitness for a particular purpose is not something that is explicitly agreed to or discussed by the parties. In fact, an implied warranty of fitness for a particular purpose can be given without the parties' knowledge.

We do note that another Ohio appellate court has stated, "it has been held that an integration clause * * * which provides that the entire agreement between the [*70] parties is contained within the four corners of the contract is effective to waive any implied warranty. N***ick Mikalacki Constr. Co. v. M. J. L. Truck Sales, Inc.*** *(1986), 33 Ohio App. 3d 228, 515 N. E.2d 24 * * * .*" ***Schneider v. Miller*** *(1991), 73 Ohio App. 3d 335, 339, 597 N. E.2d 175.* However, we do not believe that this statement accurately summarizes the holding in the Nick Mikalacki Constr. Co**.** case. In both the ***Schneider*** and ***Nick Mikalacki Constr. Co.*** cases, the contracts in question involved integration clauses ***and*** "as is" clauses. In ***Nick Mikalacki Constr. Co.***, the court held that when there is an integration clause in a contract that has an "as is" clause, the "as is" clause will prevent any implied warranties from arising. N***ick Mikalacki Constr. Co. v. M. J. L. Truck Sales, Inc.*** *(1986), 33 Ohio App. 3d 228, 229-30, 515 N. E.2d 24.* Thus, it was the "as is" clause that prevented any implied warranty, not the integration clause, as stated in ***Schneider***. There was no "as is" clause in the agreement between the Holtvogts and the Leals. Thus, reliance on ***Schneider*** or ***Nick Mikalacki Constr. Co.*** would be misplaced.

The argument that the integration clause prevented an implied warranty of fitness for a particular purpose from arising is not well-taken.

The Holtvogts' First Assignment of Error is overruled.

IV

The Holtvogts' Third Assignment of Error is as follows:

The trial court committed reversible error when it only awarded defendants $800.23 out of the $4,167.98 owed to defendants by plaintiffs.

The Holtvogts make two alternative arguments under this Assignment of Error. First, they claim that the trial court erred when it essentially rescinded their agreement with the Leals by awarding the Leals the $16,000 they invested in the stallion. Second, and in the alternative, they contend that the agreement was not rescinded but that the Leals were merely awarded $16,000 in damages. They argue that regardless of which argument is followed, the agreement is still enforceable [**1259] and the Leals should have to pay $3,367.75 for half of the expenses incurred for Mc Que Jabask.

The trial court, in its findings of fact, determined the following:

"As a result of [the] negligent misrepresentation, the [Leals] invested $16,000.00 they would have otherwise not invested and were damaged in this amount.

* * *

The [Holtvogts] also presented evidence the [Leals] owed the [Holtvogts] stable fees for the horses Kalua, Tsequel, Allee and CS Coquette in the amount of [*71] $800.23 * * * *The Court rejects the claim that any such fees are owed by [Leals] for McQue* [sic] *Jabask.*" (emphasis added).

In its conclusions of law, the trial court held:

The [Leals] suffered damages in the amount of $16,000.00 as a result of [the] negligent misrepresentation. * * *

The [Holtvogts] have established they provided services for four of the [Leals'] other horses for which they have not been paid and for which the total amount is $800.93 [sic] ."

In its final judgment entry, the court characterized the $800.23 as "compensatory damages."

Our review of the record shows that the trial court concluded that if the Holtvogts had disclosed the stallion's lameness to the Leals, the Leals would have never entered into the agreement. Thus, we find no error in the trial court's decision to hold the Leals harmless for any expenses incurred under the partnership. The Holtvogts should not be able to collect half of the costs incurred under a partnership which they misled the Leals into entering.

The Holtvogts' Third Assignment of Error is overruled.

V

The Holtvogts' Fourth Assignment of Error is as follows:

EVEN IF THIS COURT FINDS THAT PLAINTIFF'S PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THEIR NEGLIGENT MISREPRESENTATION AND EXPRESSED WARRANTY CLAIMS, THE TRIAL COURT'S AWARD OF $16,000.00 %%0] TO PLAINTIFFS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW.

Although this Assignment of Error raises a manifest weight issue, the Holtvogts do not make an argument regarding the evidence. Instead, they argue that the trial court essentially rescinded the parties' agreement without returning the parties to the positions they occupied before the agreement was signed. In support, they argue that the Leals attempted to breed two of their mares to Mc Que Jabask for free under the agreement, and that as a result,

one of the mares produced a foal. They claim that the normal stud fee is $1,000 per horse and that because the agreement was rescinded, the Leals should have to pay $2,000 for their breedings. We find this argument to be well-taken. Our review of the record indicates, however, that returning the parties to the positions they occupied before the agreement will not be an easy task.

[*72] We begin by noting that the record indicates that the Holtvogts charged varying stud fees for Mc Que Jabask. The record reveals stud fees normally ranging between $900 and $1,000, with one person winning a free breeding with the stallion. The record also indicates that the Holtvogts would deduct stud fee credits from the Leals' bill when the mares being bred with Mc Que Jabask did not "catch," *i. E.*, conceive. We believe this indicates that in at least some instances, the Holtvogts would refund the stud fees to customers whose mares were not in foal as a result of the breeding. If this is true, the Leals would only owe the Holtvogts $1,000, because only one of their mares produced a foal from the breedings.

We also note that the Holtvogts present only half the story when they argue that they were not returned to their original position. The record reveals that in paying for their half of Mc Que Jabask's expenses under the agreement, the Leals made at least three payments totaling $908. Thus, if the parties are to be returned to their original positions, the Holtvogts should return all the money the Leals paid for Mc Que Jabask.

[**1260] The Holtvogts' Fourth Assignment of Error is sustained. The case will be remanded to the trial court for a determination of the amounts owed to each party to return the parties to their original positions before the agreement was entered into.

VI

The Holtvogts' Fifth Assignment of Error is as follows:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ARBITRARILY AND CAPRICIOUSLY AWARDED DEFENDANTS A MEAGER TWO THOUSAND DOLLARS AND NO/CENTS ($2,000.00) IN ATTORNEY FEES SINCE THE PARTIES STIPULATED THAT THE PROFESSIONAL SERVICES OF DEFENDANTS' COUNSEL, WHICH TOTALED TWENTY-THREE THOUSAND SEVEN HUNDRED FORTY-FIVE DOLLARS AND NO/CENTS ($23,745.00), WAS FAIR AND REASONABLE AND SINCE OVER 20% OF DEFENDANTS' ATTORNEY FEES WERE ATTRIBUTABLE TO DEFENDANTS' DEFAMATION CLAIMS.

The Holtvogts argue that the trial court's award of attorney fees was inadequate and contrary to law. In its first entry, the trial court awarded the Holtvogts punitive damages in the amount of $1,000. That amount was later vacated by the trial court when it realized that the parties had stipulated earlier in the case that there would be an additional hearing to present evidence on attorney fees if the court found that punitive damages were appropriate. Following this hearing, the trial court awarded the Holtvogts $3,000 for punitive damages and attorney fees. The Holtvogts argue that because the parties stipulated that the professional services performed by the Holtvogts' counsel were necessary and reasonable, the only issue that the court had to determine [*73] was the total percentage of attorney fees attributable to the Holtvogts' defamation claim. Further, they argue that the award is unreasonably small in light of Mrs. Leal's malicious conduct.

When punitive damages are awarded, a trial court has discretion to award attorney fees. *See Columbus Finance,*

Inc. v. Howard (1975), 42 Ohio St. 2d 178, 183, 327 N. E.2d 654 (stating that "if punitive damages are proper, the aggrieved party ***may*** also recover reasonable attorney fees") (emphasis added). As we note below, in our discussion of the Leals' Third Cross-Assignment of Error, the trial court's award of punitive damages is supported by the record. Thus, an award of attorney fees was permitted in this case.

We begin by addressing the Holtvogts' argument that because the parties stipulated that the professional services performed by the Holtvogts' counsel were necessary and reasonable, the only issue that the court had to determine was the total percentage of attorney fees attributable to the Holtvogts' defamation claim. A trial court must consider the following factors when awarding attorney fees: "(1) the time and labor involved in maintaining the litigation,(2) the novelty, complexity, and difficulty of the questions involved, (3) the professional skill required to perform the necessary services, (4) the experience, reputation, and ability of the attorneys, and (5) the miscellaneous expenses of the litigation." ***Uebelacker v. Cincom Systems, Inc.*** *(1992), 80 Ohio App. 3d 97, 105, 608 N. E.2d 858*. Further, there must be evidence presented regarding the reasonableness of attorney fees before the trial court can make such an award. ***Id.*** In consideration of all of these factors, we cannot agree with the Holtvogts that because the necessity and reasonableness of the attorney fees was stipulated, all the trial court needed to do was pick a percentage of the fees to award. The trial court needed to consider all of the above factors. Thus, this part of the Holtvogts' argument is not well-taken.

We next address the Holtvogts' argument that such a minimal award in the light of Mrs. Leal's malicious conduct is unreasonable. The Holtvogts argue that the $3,000 award for punitive damages and attorney fees breaks down into $1,000 for punitive damages and $2,000 for attorney fees.

Assuming this to be the case, we cannot find error in the trial court's award.

As we just noted, there are numerous factors that a trial court must consider before making an award of attorney fees. From our review of the record, we conclude that there was sufficient evidence presented to the trial court for it to consider each of the above factors before making its determination. In [**1261] fact, we note that on March 10, 1997, a hearing was held solely for the attorneys to present evidence to the trial court regarding punitive damages and attorney fees. [*74] At this hearing, one of the witnesses was the Holtvogts' counsel, who testified regarding the bills for his legal services and the breakdown of his fees. Although the trial court did not state its reasons for awarding attorney fees, there is no evidence in the record to lead us conclude that the trial court did not consider these factors when making its determination. In the absence of evidence to the contrary, we must presume that the trial court did consider these factors when making its award. *See Dayton Women's Health Ctr., Inc. v. Enix (1993), 86 Ohio App. 3d 777, 780, 621 N. E.2d 1262*. As we stated above, an award of attorney fees is discretionary with the trial court. *See**Columbus Finance**, 42 Ohio St. 2d at 183*. From our review of the record, we cannot say that the trial court abused its discretion.

The Holtvogts' Fifth Assignment of Error is overruled.

We now address the Leals' Cross-Assignments of Error.

VI

The Leals' First Cross-Assignment of Error is as follows:

The trial court erred in determining the appellants had engaged in only negligent misrepresentation when

appellees produced evidence sustaining their burden of proof on the claim of fraud.

The Leals contend that at trial they presented evidence of two instances of fraud by the Holtvogts: first, they argue that there was evidence to show that the Holtvogts' statements prior to the sale of the stallion were fraud and not mere "puffing;" second, they argue that the Holtvogts' failure to disclose Mc Que Jabask's lameness constitutes fraud. The Leals also claim that the trial court erred when it found that malice was a necessary element of fraud.

The trial court found the following on the issue of fraud:

"Factually, the Court determines the Defendants engaged in 'puffing' at the time of the sale of the one-half interest in the horse but did not fraudulently misrepresent a material fact."

This sentence is the only reference in the trial court's entry that accounts for the Leals' claim that the Holtvogts' statements prior to the sale of the stallion constituted fraud. The trial court did not specifically address whether the Holtvogts' failure to disclose the stallion's lameness constituted fraud, but rather characterized it as negligent misrepresentation. As discussed above, the Holtvogts' failure to disclose the stallion's lameness cannot establish a claim of negligent misrepresentation.

We begin by addressing the Leals' argument that the Holtvogts committed fraud with the statements that they made prior to the sale of the one-half interest [*75] in Mc Que Jabask. The Leals contend that Mr. Holtvogt committed fraud when he made the five contested statements to induce them to invest in the stallion. At trial, the Holtvogts claimed that they did not make the five contested statements.

In its entries, the trial court did not explain whether it found all of the five contested statements to be "puffing," or only some of the five contested statements to be "puffing," with the rest contributing to the trial court's finding of negligent misrepresentation. The trial court also failed to state which, if any, of the five contested statements it believed were actually made by Mr. Holtvogt. Rather, it simply found that "the Defendants engaged in 'puffing' at the time of the sale."

Because it is not clear to us whether the trial court found that any of the five contested statements were actually made, we will not address this part of the Leals' argument. Furthermore, there is really no need for us to address this argument because we find that the Holtvogts' failure to disclose Mc Que Jabask's lameness does constitute fraud.

The Leal's contend that the second instance of fraud committed by the Holtvogts was their failure to disclose the stallion's lameness. As we found earlier, an action for negligent misrepresentation is only actionable when an affirmative false statement has been made; it is not actionable for omissions. [**1262] A claim of fraud, however, "is maintainable not only as a result of affirmative misrepresentations, but ***also for negative ones, such as the failure of a party * * * to fully disclose facts*** of a material nature where there exists a duty to speak." ***Textron Financial Corp****., 115 Ohio App. 3d at 153* (citation omitted) (emphasis added). Thus, although the Holtvogts' failure to disclose the stallion's lameness could not be negligent misrepresentation, it could constitute fraud.

The elements of fraud are as follows:

"(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the

transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance."

Mussivand v. David (1989), 45 Ohio St. 3d 314, 322, 544 N. E.2d 265; *Cohen v. Lamko, Inc. (1984), 10 Ohio St. 3d 167, 169, 462 N. E.2d 407*.

The first element of fraud requires that the Holtvogts concealed a fact that they had a duty to disclose. "It has generally been held that nondisclosure [*76] of a fact will become the equivalent of fraudulent concealment when it is the duty of the person to speak in order to place the other party on equal footing with him." ***Davis v.*** *Sun Refining%%0] & Marketing Co. (1996), 109 Ohio App. 3d 42, 55, 671 N. E.2d 1049*. A person's duty to speak does not necessarily depend on the existence of a fiduciary relationship; "it may arise in any situation where one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Mancini v. Gorick (1987), 41 Ohio App. 3d 373, 374-75, 536 N. E.2d 8* (citation omitted). A review of the record shows that the Holtvogts failed to disclose Mc Que Jabask's lameness to the Leals. The record also reveals that both of the Leals testified that they considered Mr. Holtvogt to be a professional trainer and that they trusted his expertise. There is evidence in the record that Mr. Holtvogt had knowledge of this confidence, since he knew the Leals were not experienced in the equine industry. The evidence also shows that Mr. Holtvogt informed the Leals of his expertise. Mr. Leal testified:

" * * * [Mr. Holtvogt] told me about his reputation that he's been doing this since he was a kid, he's been around horses when he was a kid and he told me that he's been to a lot of shows, Arabian shows and people know him, his reputation * * * ."

The second element of fraud would be met if the concealed lameness of Mc Que Jabask was material to the transaction. A fact is material if it is likely, "under the circumstances, to affect the conduct of a reasonable person with reference to the transaction." ***Van Camp v. Bradford*** *(1993), 63 Ohio Misc. 2d 245, 255, 623 N. E.2d 731*. Both the Leals testified that if they had known of the stallion's lameness, they would not have bought a one-half interest in him.

The third element of fraud requires that the Holtvogts knew that Mc Que Jabask was chronically lame at the time of the sale. As stated earlier, our review of the record demonstrates that evidence was presented to show that the Holtvogts knew that Mc Que Jabask had been treated for lameness numerous times prior to the sale.

The fourth element of fraud requires that the Holtvogts, in their failure to disclose Mc Que Jabask's lameness, intended to induce the Leals to buy an interest in the stallion. Intent must be inferred from the totality of the circumstances, because it is rarely provable by direct evidence. D*avis, 109 Ohio App. 3d at 56*. At trial, Mr. Holtvogt testified that before the contract, the couples discussed Mc Que Jabask's show records, breedings, and offspring; everything about the stallion except his lameness. [*77] Considering all of the circumstances surrounding the sale, the record supports an inference that the Holtvogts [**1263] avoided telling the Leals of the stallion's lameness in order to induce them to buy.

The fifth element of fraud requires that the Leals justifiably relied on the Holtvogts' description of the stallion and their failure to inform the Leals of its lameness. "The question of justifiable reliance is one of fact and requires an inquiry into the relationship between the parties." *Crown Property Dev., Inc. v. Omega Oil Co. (1996), 113 Ohio App. 3d 647, 657, 681 N. E.2d 1343*. The trial court, in its findings of fact, concluded that the Leals justifiably relied on the Holtvogts' representations of the stallion. From our review of the record, we find that there is competent and credible evidence to support this finding.

The final element of fraud requires that the Leals suffered an injury due to their reliance. The trial court found that the Leals were injured when they invested $16,000 in the stallion due to their belief that he was healthy. From our review of the record, we find competent and credible evidence to support this finding.

Because all six elements of fraud were proven, we agree with the Leals that the Holtvogts committed fraud when they failed to disclose Mc Que Jabask's chronic lameness.

Finally, we address the Leals' argument that the trial court erred when it found that malice is a necessary element of fraud. We find no basis for this argument, since a review of the trial court entry fails to demonstrate to us that the trial court made such a finding. The trial court entry states as follows:

"Factually, the Court determines the Defendants engaged in 'puffing' at the time of the sale of the one-half interest in the horse but did not fraudulently misrepresent a material fact."

* * *

* * *

"Factually, the Court finds no malice on the part of the Defendants in this regard."

From the trial court's entry, it does not seem to us that the trial court required malice as an element of a claim of fraud. The sentence regarding malice merely states one of the trial court's many findings of fact. Thus, this argument is not well-taken.

Although we conclude that the trial court erred when it found against the Leals on their claim of fraud, we further conclude that this error was harmless. For the reasons set forth in Part VIII, below, we conclude that the trial court did not err in failing to award attorney fees or punitive damages against the Holtvogts. The trial court did find, erroneously in our opinion, that the Holtvogts [*78] had negligently misrepresented the condition of Mc Que Jabask by failing to inform the Leals of his chronic lameness. Presumably, the trial court took this into consideration when it fashioned the remedy of rescission, placing the Leals in the condition they were in before the transaction. The trial court's mischaracterization of the Holtvogts' conduct as negligent misrepresentation, rather than fraud, had no adverse consequences to the Leals, since we conclude that they were not entitled to punitive damages or attorney fees, and the remedy of rescission gave them everything to which they would be entitled as a result of the fraud.

The Leals' First Cross-Assignment of Error is overruled.

VIII

The Leals' Second Cross-Assignment of Error is as follows:

The trial court erred in failing to award appellees punitive damages and attorney fees once they had proven each and every element of fraud.

The Leals claim that they should be awarded punitive damages and attorney fees based on the fact that the Holtvogts committed fraud. In particular, they argue that these damages are warranted because Mr. Holtvogt took advantage of the relationship of trust he developed with Mr. Leal. As we concluded above, the Leals did prove that the Holtvogts committed fraud when they failed to disclose Mc Que Jabask's lameness. The trial court did not specifically address punitive damages or attorney fees for the Leals but did find no malice on the part of the Holtvogts.

This court has previously held that punitive damages may be proper in cases involving [**1264] fraud. D*avis, 109 Ohio App. 3d at 58* (citing *Byrley v. Nationwide Life Ins. Co. (1994), 94 Ohio App. 3d 1, 20, 640 N. E.2d 187*). We have also held that where punitive damages are warranted in a case involving fraud, attorney fees may also be awarded. F*armers State Bank & Trust Co. v. Mikesell (1988), 51 Ohio App. 3d 69, 86, 554 N. E.2d 900*; *Roberts v. Mason (1859), 10 Ohio St. 277, 281*.

"To establish a claim for punitive damages in an action for fraud, [a party] must demonstrate, in addition to proving the elements of the tort itself, 'that the fraud is aggravated by the existence of malice or ill will, or must demonstrate that the wrongdoing is particularly gross or egregious.'" ***Davis****, 109 Ohio App. 3d at 58* (quoting *Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co. (1984), 12 Ohio St. 3d 241, 466 N. E.2d 883*, paragraph three of the syllabus). From our review of the record, we cannot agree that the Holtvogts acted with malice toward the Leals. We do not believe that the Holtvogts' conduct had the requisite ill will or such a conscious [*79] disregard for the rights

and safety of others to constitute malice as a matter of law. Thus, the trial court could find, as it did, that there was no malice, and an award of punitive damages and attorney fees for the Leals would be improper in this case.

The Leals' Second Cross-Assignment of Error is overruled.

IX

The Leals' Third Cross-Assignment of Error is as follows:

The trial court erred in determining that appellee defamed the appellant, joe holtvogt, and that he was entitled to damages.

The Leals' arguments in this Cross-Assignment of Error are four-fold. First, the Leals argue that Mrs. Leal's statements regarding Mr. Holtvogt were mere opinion. Second, they argue that Mrs. Leals' statements could have been interpreted as innocent or defamatory and that under Ohio's "innocent construction rule," the innocent interpretation should be taken. Third, the Leals contend that the trial court erred in finding Mrs. Leal's statements to be slander *per se* because they were slander *per quod*. The Leals point out that this distinction is important because slander *per quod* requires the offended party to prove special damages resulting from the statements. Fourth, the Leals argue that the trial court erred when it found that Mrs. Leal's statements were made with malice. As part of this argument, the Leals also contend that the trial court erred when it awarded the Holtvogts' punitive damages.

We begin by addressing the Leals' argument that Mrs. Leal's statements regarding Mr. Holtvogt were mere opinion. The trial court found that Mrs. Leal "made disparaging remarks about the integrity and honesty of [Mr. Holtvogt] * * * which constituted slander." Thus, the trial

court concluded that Mrs. Leal's statements were more than mere opinion.

The Ohio Constitution provides "Every citizen may freely speak, * * *his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech * * * ." Because the Ohio Constitution provides this guarantee for the protection of opinion, we must examine whether Mrs. Leal's statements were opinion or fact. *See Condit v. Clermont Cty. Review (1996), 110 Ohio App. 3d 755, 759, 675 N. E.2d 475*.

Ohio courts use a "totality of the circumstances" test to determine whether a statement is fact or opinion. *Vail v. The Plain Dealer Publishing Co. (1995), 72 Ohio St. 3d 279, 282, 649 N. E.2d 182*, *cert. denied*, *516 U. S. 1043, 116 S. Ct. 700, 700, 133 L. Ed. 2d 657*. Under this test, a court must consider the following four factors: (1) the specific language used, (2) whether the statement is [*80] verifiable, (3) the general context of the statement, and (4) the broader context of the statement. ***Id***. This is not a bright-line test, but is a fluid standard, with the weight given to each of the factors varying depending on the circumstances of the case. ***Id***.

First, we must examine the specific language used. This factor calls for us to determine whether an ordinary person would view Mrs. Leal's words to be of a factual nature, where their meaning is readily ascertainable, or opinion, where their meaning is [**1265] ambiguous. C***ondit, 110 Ohio App. 3d at 759***; ***Vail, 72 Ohio St. 3d at 282***. Our review of the record indicates that Mrs. Leal contacted customers of the Holtvogts' barn and told them that Mr. Holtvogt had lied to the Leals about Mc Que Jabask's value, show records, and stud fees, and that Mr. Holtvogts "was cheating her out of breeding fees for their

partnership." We believe that an ordinary person would view these statements as fact, not mere opinion, because their meaning is clearly ascertainable, not ambiguous.

Second, we consider whether Mrs. Leal's statements were verifiable. "When the statement lacks a plausible method of verification, a reasonable [person] will not believe that the statement has specific factual content." ***Condit****, 110 Ohio App. 3d at 760* (citation omitted). The Ohio Supreme Court has stated that statements regarding a person's honesty are possibly verifiable. V***ail,*** *72 Ohio St. 3d at 283*. The record reveals that Mrs. Leal did say Mr. Holtvogt had lied to her, cheated her out of money, and that she also %%0] called him untrustworthy. Thus, we believe that Mrs. Leal's statements should be viewed as verifiable.

Finally, we consider both the specific and broader contexts of Mrs. Leal's statements. The record shows that three people testified that Mrs. Leal telephoned them asking about their interactions with Mr. Holtvogt. They testified that she asked them whether Mr. Holtvogt had revealed to them that the Leals were part owners in Mc Que Jabask, whether they had bred mares with Mc Que Jabask, and if so, what amount of stud fees they paid. As discussed above, they testified that Mrs. Leal told them that Mr. Holtvogt made various misrepresentations to her and that he was untrustworthy. In fact, one of the witnesses testified that Mrs. Leal told her "that [she] should keep a good eye on [her] mare and should consider the possibility of moving that mare away from [Mr.] Holtvogt's barn because she [(Mrs. Leal)] did not feel that they gave proper care and that [her] mare might be in possible danger being there because she [(Mrs. Leal)] would not put it past Joe Holtvogt to burn down his barn, horses and all, to collect the insurance money."

The witnesses also testified that Mrs. Leal sounded upset, irrational, and hostile on the phone. All three testified that Mrs. Leal made statements about [*81] her intentions of doing everything she could to put Mr. Holtvogt out of business. Two of the witnesses also testified that she informed them that she was a former Dayton police officer. We believe that a reasonable person who heard these statements from a woman on the phone would at least be concerned about doing business with Mr. Holtvogt and suspicious of his integrity. While Mrs. Leal's anger and hostility might lead a reasonable person to discount some of her accusations, it is also conceivable that a reasonable person would just assume that he or she would be angry, too, if he or she had been tricked in these ways. Our conclusion is supported by the testimony of one of the witnesses, who stated that after discussing Mrs. Leal's call, he and his wife agreed that maybe it was good that the mare they bred with Mc Que Jabask did not "catch."

We find that the trial court's conclusion that Mrs. Leal's statements regarding Mr. Holtvogt were more than mere opinion is supported by credible and competent evidence in the record. This part of the Leals' argument is not well-taken.

We next address the Leals' argument that Mrs. Leals' statements could have been interpreted as innocent or defamatory, and that under Ohio's "innocent construction rule," the innocent interpretation should be taken. The "innocent construction" rule states that if a statement is "susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted." *Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369, 372, 453 N. E.2d 666*; *see, also, Van Deusen v. Baldwin* (1994), 99 Ohio App. 3d 416, 419, *650 N. E.2d 963*. Unfortunately, the Leals' briefs do not explain how Mrs. Leal's statements could be interpreted

innocently. From our review of the record, we cannot see how Mrs. Leal's statements could have any meaning other than that Mr. Holtvogt is untrustworthy. Thus, we conclude that this part of the Holtvogts' argument is not well-taken.

We next address the Leals' argument that the trial court erred in finding Mrs. Leal's [**1266] statements to be slander *per se* because they were slander *per quod*. The Leals argue that slander *per quod* requires a showing of actual damages and that because the Holtvogts failed to prove that they established any damages, they should not have received a damage award on this claim. The trial court did not mention slander *per se* or slander *per quod*, but generally found Mrs. Leal's statements to be defamatory.

This court has previously held that slander *per se* "means that the slander is accomplished by the very words spoken." *King v. Bogner (1993), 88 Ohio App. 3d 564, 567, 624 N. E.2d 364*; *Rainey v. Shaffer (1983), 8 Ohio App. 3d 262, 264, 456 N. E.2d 1328*. When a claim [*82] of slander *per se* is established, damages will be presumed. K***ing***, *88 Ohio App. 3d at 567*. A statement that "tends to injure one in one's trade or occupation" will be considered slander *per se*. ***Id.*** *at 568*; *McCartney v. Oblates of St. Francis deSales (1992), 80 Ohio App. 3d 345, 353, 609 N. E.2d 216*. From our review of the record, we find there is competent and credible evidence that Mrs. Leal's statements would tend to harm Mr. Holtvogt's business. The witnesses testified that Mrs. Leal expressed to them her intention of putting Mr. Holtvogt out of business. Further, at least one witness stated that Mrs. Leal encouraged her to remove her mares from the Holtvogt's barn. Thus, we find no error in the trial court's award of damages for this defamation because we believe Mrs. Leal's statements constitute slander *per se*. This part of the Leals' argument is not well-taken.

Finally, we address the Leals argument that the trial court erred when it found that Mrs. Leal's statements were made with malice. The trial court found that "by clear and convincing evidence [Mrs. Leal's] statements were made with malice."

To receive punitive damages on a claim for defamation *per se*, one must separately prove either actual damages or show that the other party acted with actual malice. *Bryans v. English Nanny & Governess School, Inc. (1996), 117 Ohio App. 3d 303, 317, 690 N. E.2d 582*. Actual malice has been defined as "anger, hatred, ill will, a spirit of revenge, or a reckless disregard of the consequences or the legal rights of others." *Id.*; *Worrell v. Multipress, Inc. (1989), 45 Ohio St. 3d 241, 248, 543 N. E.2d 1277*.

Our review of the record supports the trial court's finding that Mrs. Leal's statements constituted malice. One of the witnesses testified that during their phone conversation, Mrs. Leal said that she "wanted her money back and that she would do anything in her power to get that money back and that she was going to do everything that she could to see that [Mr. Holtvogt] either went out of business or [gave] her money back." One witness testified that Mrs. Leal told her to consider moving her mare from Mr. Holtvogt's barn. From this testimony, we conclude that there is competent and credible evidence in the record to support the trial court's finding of actual malice in Mrs. Leal's statements. As actual malice was demonstrated, we cannot find error in the trial court's award of punitive damages. This part of the Leals' argument is not well-taken.

The Leals' Third Cross-Assignment of Error is overruled.

X

The Holtvogts' First, Second, Third, and Fifth Assignments of Error having been overruled; all of the Leals' cross-assignments of error having been overruled; and [*83] the Holtvogts' Fourth Assignment of Error having being sustained, the judgment of the trial court is *Affirmed,* in part, and *Reversed,* in part, and this cause is *Remanded* for further proceedings consistent with this opinion, which would include a recomputation of damages to reflect the Leals' obligations to the Holtvogts for stud fees for the mares they bred with Mc Que Jabask, and the Holtvogts' obligation to refund the moneys paid to them by the Leals as and for their share of Mc Que Jabask's expenses.

 ¿Cuántas garantías de idoneidad para un propósito en particular pueden otorgarse en un mismo negocio jurídico?

LA EXCLUSIÓN DE LAS GARANTÍAS EN EL NEGOCIO COMERCIAL

EL *DISCLAIMER* DE LA GARANTÍA EXPLÍCITA

 BELL SPORTS, INC., a foreign corporation, Defendant, Appellant, v. BRIAN J. YARUSSO, Plaintiff, Appellee. SUPREME COURT OF DELAWARE 759 A.2d 582; 42 U. C. C. Rep. Serv. 2d 714 June 6, 2000, Submitted September 7, 2000, Decided

OPINION BY: WALSH [*584] This is an appeal from a Superior Court denial of judgment as a matter of law, or alternatively, for a new trial following an award of damages in a product liability action. The defendant-appellant claims error on the part of the trial judge in ruling on the qualifications of plaintiff's expert witnesses and in permitting the substance of that testimony to establish a jury question on claims for breach of warranty. [**2] The appellant further asserts that the jury verdict was internally inconsistent and that the Superior Court should have

declared a mistrial after discharging a juror for cause during trial. Upon careful review of the record, we conclude that the Superior Court did not abuse its discretion in permitting the testimony of plaintiff's experts nor in submitting the issues of breach of warranty to the jury. We further conclude that the jury's verdict did not lack consistency and that the refusal to grant a mistrial was not error.

I

On October 20, 1991, Brian J. Yarusso ("Yarusso"), then 22 years of age, was riding his off-road motorcycle [1] at a dirt motocross track located off Church Road in Newark, Delaware. Yarusso was wearing a full complement of safety equipment in addition to the helmet that is the subject of this dispute. While traveling over a series of dirt moguls, or bumps, Yarusso hit one of the moguls in such a way that he was catapulted over the handlebars of the motorcycle. He landed on his head, flipped over and came to rest face down in the dirt. As a result of his fall, Yarusso sustained a burst fracture of the C5 vertebral body and was rendered a quadriplegic. [2]

1 "Off-road" motorcycles are equipped with motors, tires, seats and suspension components specifically designed to function effectively under adverse riding conditions typical of motocross tracks, woods and fields. They are generally much lighter in weight than motorcycles designed for street use, have a higher degree of suspension clearance/compliance and are usually not equipped with horns, lights and other features required for legal street operation. [**3]

2 Dr. Joseph Cusick, a neurosurgeon, described Yarusso's specific injuries. He testified that Yarusso's C5 vertebral body sustained major damage due to a "severe axiocompression load, usually .. without much extension or

flexion." The magnitude of the load was sufficient to crack the bone, push the spinal disk into the soft bone, and "explode" the disc into the spinal cord and some of the other disks.

Yarusso filed suit in the Superior Court against Bell Sports, Inc. ("Bell"), the manufacturer of the Bell Moto 5 helmet he was wearing at the time of the accident. Yarusso's suit against Bell was predicated on a claim that the enhanced injuries he suffered were the proximate result of a defect in the helmet's design. The Bell Moto-5 is a full-face motocross helmet that was designed for off-road use. It complies with federal Department of Transportation ("DOT") standards and is also certified by the Snell Foundation, a leading worldwide helmet research and testing laboratory. [3] The helmet is constructed of a fiberglass outer shell, an inner crushable liner, and a retention system consisting [**4] of a chinstrap and D-ring pull-tab. While all three of these components are designed to interact, [*585] the inner liner is considered the most important safety feature of the helmet. The expanded polystyrene material of which this liner is primarily constructed is designed to compress upon contact with a solid object.

3 A motorcycle rider's helmet must have DOT certification in order to participate in any races sanctioned by the American Motorcycle Association ("AMA"). The AMA also recommends the use of a Snell-certified helmet.

Yarusso's complaint contained alternative grounds for recovery. He alleged negligence in the design and construction of the helmet, breach of express warranties and breach of an implied warranty of merchantability. Yarusso's express warranty claim arose from specific textual representations in the helmet's accompanying owner's manual (the "manual"), the relevant portions of

which are as follows (emphasis printed in manual also reproduced below):

Five Year Limited Warranty: Any [**5] Bell helmet found by the factory to be defective in materials or workmanship within five years from the date of purchase will be repaired or replaced at the option of the manufacturer, free of charge, when received at the factory, freight pre-paid.. This warranty is expressly in lieu of all other warranties, and any implied warranties of merchantability or fitness for a particular purpose created hereby, are limited in duration to the same duration as the express warranty herein. Bell shall not be liable for any incidental or consequential damages..

Introduction: Your new Moto-5 helmet is another in the long line of innovative off-road helmets from Bell.. The primary function of a helmet is to reduce the harmful effects of a blow to the head. However, it is important to recognize that the wearing of a helmet is not an assurance of absolute protection. NO HELMET CAN PROTECT THE WEARER AGAINST ALL FORESEEABLE IMPACTS.

Helmet Performance: The Moto-5 is designed to absorb the force of a blow first by spreading it over as wide an area of the outer shell as possible, and second by the crushing of the non-resilient inner liner. Damage to the helmet after an impact [**6] is not a sign of any defect in the helmet design or construction. It is exactly what the helmet is designed to do.

NOTICE: No helmet can protect the user from all foreseeable impacts. To obtain the maximum protection offered by any helmet, it must fit firmly on the head and the chinstrap must be securely fastened.

Yarusso testified at trial that he purchased this particular helmet based on the specific assertions, quoted

above, that "the primary function of a helmet is to reduce the harmful effects of a blow to the head."

Yarusso's implied warranty of merchantability claim arose out of his contention that the helmet was not merchantable because it was sold as an off-road helmet but was designed to function for "on-road" use. Because the helmet met DOT street helmet standards, Yarusso claimed that it was actually designed with a very stiff liner that would effectively function for on-road use but would not protect a rider against foreseeable off-road falls, where the impact surface could conceivably be softer.

A pivotal factual issue at trial was whether the helmet liner properly crushed, as designed, at the time Yarusso's head impacted the ground after his fall. [**7] Yarusso claimed that the injuries to his neck were caused by the stiffness or density of the liner material at the helmet crown. At trial, he offered expert testimony by Maurice Fox ("Fox"), a safety consultant who had been employed by a helmet manufacturer during the 1970's. Fox opined that Yarusso's helmet sustained the majority of the fall's impact at its crown where the liner was too dense to crush sufficiently, thereby transmitting excessive force to Yarusso's neck, resulting in his paralysis. Fox's testimony however, was directed primarily at Yarusso's negligence claim against Bell, which the jury subsequently rejected.

Joseph Cusick, M. D. ("Cusick"), a neurological expert, similarly testified that the [*586] neck injuries sustained by Yarusso were consistent with impact at the top, or crown, of the helmet. Cusick further testified that a 20-30% reduction of force to Yarusso's body would have been sufficient to avoid injury because his body would have been able to withstand this lower level of force.

Richard Stalnaker, Ph. D. ("Stalnaker"), a biomechanical engineer, also testified on behalf of Yarusso

and largely affirmed Fox's opinion. His testimony was crucial in the jury's determination [**8] that Bell had breached express and implied warranties. Stalnaker determined that the force of Yarusso's impact with the ground was equivalent to 60 foot pounds, and that adequate crush of the helmet liner would have reduced it significantly to avert injury. Although Stalnaker modified the analytical process used to reconstruct the accident to coincide with that presented by Bell's expert reconstruction witness at trial, Bell's counsel rejected an opportunity to delay the trial and requested only a mistrial. Because the trial judge determined that the factual foundation for Stalnaker's testimony was unchanged despite his use of an alternative analytical, she denied the motion for mistrial leaving the matter for attack through cross-examination.

Bell offered its own expert testimony at trial disputing the helmet's point of impact from the accident and asserting the inability of any helmet to protect its user from severe neck injuries. The principal designer of the helmet, James Sundahl ("Sundahl"), testified that any helmet must be designed to protect its user from a multitude of accident types. He further opined that in circumstances involving a helmet's impact with a soft surfaces [**9] the surface itself, rather than the helmet, absorbs a greater portion of the energy. When questioned about the representation in the helmet's manual, Sundahl testified that it was "wrong."

James McElhaney, Ph. D. ("McElhaney"), a professor of biomechanics at Duke University, testified for Bell and disputed Yarusso's contention that the helmet was impacted at its crown. McElhaney testified that the front of Yarusso's helmet liner was crushed in a fashion indicating a substantial blow to that area. Both Sundahl and McElhaney presented evidence of industry-wide research to the effect that no helmet can offer "any significant protection of the neck because the mass of the torso is so much more than

the energy levels that a helmet can manage." Bell's experts claimed that this helmet and helmets in general are designed to protect users from head and brain injuries and the helmet in this case did precisely that.

Upon the conclusion of Yarusso's case, he abandoned his failure to warn claim. At the close of all the evidence, Bell moved for judgment as a matter of law as to liability. The trial court granted judgment as a matter of law on Yarusso's breach of implied warranty for a particular [**10] purpose claim, but denied Bell's motion on the remaining counts. The jury was then charged on the remaining claims of negligence, breach of implied warranty of merchantability and breach of express warranty.

On the second day of jury deliberations, one juror notified the trial court that he had reviewed outside information regarding motorcycle helmets in connection with securing a motorcycle licensing examiner's certificate. The jury also notified the court that they were deadlocked. The trial judge subsequently interrogated the juror who had disclosed his outside knowledge out of the presence of the remaining jurors. The trial judge determined that while the juror had not yet shared this extraneous information with other jurors, he had violated the direct instruction to decide the case solely from the evidence presented. The trial judge dismissed the juror prompting a motion from Bell for a mistrial, which was denied. Because both parties had agreed at the outset of the trial to accept a jury of eleven members, the remaining jurors were permitted to deliberate.

[*587] Through specific answers to interrogatories, the jury ultimately found that Bell was not negligent, but had breached an [**11] express or implied warranty, which proximately caused Yarusso's enhanced injury. Yarusso was awarded $1,812,000 in damages. Bell objected that the

verdict was inconsistent and renewed its motions for judgment as a matter of law or alternatively for a new trial on liability only, all of which were denied by the Superior Court. This appeal followed.

II

This Court's standard of review from a ruling on a motion for judgment as a matter of law is whether under any reasonable view of the evidence, the jury could have justifiably found for the non-moving party. *See Mazda Motor Corp. v. Lindahl, Del. Supr., 706 A.2d 526, 530 (1998)*. The Court reviews a trial court's decisions to admit evidence and/or deny a motion for a new trial under an abuse of discretion standard. *See Young v. Frase, Del. Supr., 702 A.2d 1234, 1236 (1997)*.

Bell contends that the critical element in this case, whether the helmet was defective, was based on Yarusso's claim that it failed to protect his neck when thrown from the motorcycle even though he received no head injuries. Bell asserts that Yarusso's ability to prove this claim rested entirely on the expert testimony of Fox and [**12] Stalnaker, and that the trial court abused its discretion in finding Fox and Stalnaker qualified and in further determining that their testimony was not "new science", thereby precluding an analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*. Bell claims that an independent *Daubert* analysis is required, as a matter of law, prior to the admission of any expert testimony. Because Yarusso presented no other testimony that a helmet could protect a neck from injury, the argument goes, the trial court's error cannot be considered harmless and the verdict was improper as a matter of law.

Bell further contends that had the trial court conducted a *Daubert* analysis, allowing the introduction of Fox and

Stalnaker's testimony would have constituted a "gross" abuse of discretion. First, Bell submits that the testimony was not properly based on accepted scientific protocol. Fox's testimony, it claims, did not reflect scientific knowledge because his assertions were made following the use of tests suggested to him by Yarusso's counsel, neither of which was derived by scientific methodology. [4] Stalnaker's use [**13] of football helmet protocol to demonstrate how a helmet could protect its wearer's neck, Bell claims, was methodologically flawed and yielded an opinion not based on facts reasonably relied on by experts in the field.

4 Bell points to two tests performed by Fox. One test confirmed that the denser the helmet's liner, the greater the force necessary to crush it. The other found that the ground absorbs the energy on impact into soft earth regardless of the density of the liner.

Bell argues that Yarusso's expert testimony is also barred based on its alleged origin in theory that has not been generally accepted by the scientific community. Bell contends that neither Fox, who worked in the helmet industry in the 1970's and early 1980's, nor Stalnaker, who has never worked for a helmet company, is aware of current scientific opinion that a helmet cannot offer significant neck protection. Bell further notes that neither expert offered independent proof from the scientific community, in the form of peer review, of [**14] their unpublished theory's acceptance and viability.

Yarusso counters that Fox and Stalnaker were both properly qualified and their testimony was competent and, therefore, admissible. With over 21 years of experience in the helmet industry, much of which involved testing and studying the safety performance of helmets, Yarusso argues that Fox is eminently qualified to offer expert testimony.

He notes that Fox continues [*588] to work with the helmet industry and serves as an expert consultant to several helmet companies. Yarusso claims that Bell's contention that Fox's experience is outdated is unfounded since the principles of physics upon which the helmet's shell and liner were studied have not changed.

Yarusso argues that Stalnaker's general credentials too are impeccable, sufficiently so that Bell chose not to challenge them. Stalnaker's decision to use a football helmet protocol in his testing was mandated, Yarusso contends, by the absence of a testing standard applicable to off-road helmets. Moreover, because his research determined that the helmet's liner was too stiff to properly deform within the protocol standards from this accident, testing under more severe DOT or Snell standards [**15] was rendered unnecessary. Similarly, because the helmet's damage in this case was centralized at its crown and was sustained following impact with a soft surface (dirt), Stalnaker was forced to use alternative testing methods to yield accurate results. Yarusso argues that reliable techniques or methodology that aid the decision making process are admissible, even if they have "certain flaws."

Yarusso also takes issue with Bell's conclusion that the scientific community has rejected the notion that a helmet can provide protection for the neck. Given the specific circumstances from his accident, whereby the weight of his torso did not fully "load" the neck, Yarusso postulates that the scientific community would generally agree that a properly designed helmet could provide an adequate measure of safety. Stalnaker offered testimony that testing and research has been conducted by other scientists in the industry in support of a theory that helmets can, in specific instances, protect users from neck injuries. Thus, Yarusso contends that the specific facts of this case required its experts to use alternative testing methods and make

references to other helmet designs, both of which were [**16] based on accepted scientific principles permitting further consideration by a fact finder at trial.

Delaware Rule of Evidence 702 governs the admission of expert witness testimony. It provides, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."D. R. E. 702 is identical to *Federal Rule of Evidence 702* ("*F. R. E. 702*") and has been interpreted by the United States Supreme Court, in *Daubert, 509 U. S. at 589*, to obligate a trial judge to "ensure that any and all scientific testimony is not only relevant, but reliable." *Daubert* further identifies certain factors for the trial judge to consider in performing a "gatekeeper" function, including testing, peer review, error rates and acceptability in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific theory or technique.*509 U. S. at 597*.

In *Kumho Tire Co., Ltd. v. Carmichael, 526 U. S. 137, 149, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999)*, [**17] the Court extended the gatekeeping obligation of the trial judge to apply to all expert testimony on "scientific, technical or other specialized" matters. The Supreme Court's holding in *Kumho Tire* also reaffirmed *Daubert's* description of the trial judge's *F. R. E. 702* inquiry as "flexible" and not requiring "a definitive checklist or test," but clarifying that it must be "tied to the facts" of a particular case. I*d. at 150*. The Court further concluded that"the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *526 U. S. at 152*.

Daubert and *Kumho Tire* were decided by the U. S. Supreme Court in its federal supervisory role, and its interpretation of [*589] *F. R. E. 702* is binding only on lower federal courts. In *M. G. Bancorporation, Inc. v. LeBeau, Del. Supr., 737 A.2d 513 (1999)*, this Court expressly adopted the holdings of *Daubert* and *Kumho Tire* as correct interpretations of D. R. E. 702. *LeBeau,* however, was not decided until approximately one year after the ruling presently under consideration. Indeed, the U. S. Supreme [**18] Court had not yet decided *Kumho Tire* at the time the Superior Court passed upon the qualification of Fox and Stalnaker.

The issue of Fox and Stalnaker's qualification as experts was the subject of *in limine* hearings and a substantial pretrial record generated by the parties on Bell's claim that they lacked the necessary expertise to give opinions on the relationship between helmet design and injury causation. Before Fox was called to testify at trial, counsel for Bell prefaced his objection to Fox's testimony by noting that counsel's position had already been presented in "our memo that the Court has had." The essential objection to Fox was that while he had experience in helmet testimony his experience with the particular helmet in question was limited and in any event Fox had not offered "any alternative design." Fox's expertise was defended by Yarusso's counsel who noted that Fox had been "associated with a variety of helmet testing laboratories over the years" and is intimately familiar with how helmets are designed for usage on road and off road. The Superior Court questioned Yarusso's counsel about whether the opinion of alternative design was intended to show that there [**19] should have been a "more resilient, more readily compressible material." After this colloquy, the trial judge overruled the objection noting that *Daubert* dealt with new science and, in any event, alleged limits in

Fox's helmet testing could be explored in cross-examination.

With respect to Stalnaker, again there had been an *in limine* effort to exclude his testimony and later at trial an objection was made that Stalnaker had changed the foundation for his testimony. The court specifically rejected that claim. [5]

5 The court stated: "I don't buy because he has demonstrated - now, whether you agree with him or not, he's got sufficient experience and education to understand the physiology of injury, and I'm content that's - that he's met the criteria."

The Superior Court amplified upon Bell's objection to the testimony of Fox and Stalnaker in its post-trial rejection of Bell's motion for a new trial.

Fox's testimony .. was directed primarily at the plaintiff's negligence case. I was satisfied that [**20] his qualifications were sufficient on the basis of his education and experience to permit him to testify. The weight to be given to his testimony was left to the jury. Since the jury did not find in the plaintiff's favor on the negligence charge, Fox's testimony is of little consequence.

Stalnaker's testimony was pivotal. It was he who testified that the force of the accident was 60 foot pounds, and that the crush of the liner would have reduced it sufficiently to avert injury. The deposition testimony of Stalnaker had been taken prior to trial. He apparently had developed his own accident reconstruction analysis, working backward from his assessment of the kind of force needed to produce the injury. He concluded that the force was 60 foot pounds. At the time of trial, he rejected his own reconstruction and relied upon the reconstruction of plaintiff's reconstruction expert, Newbold, who had reached the same conclusion, though through a different analytical

process. When the change in the foundation of the Stalnaker testimony came to light, the defendant was offered the opportunity to suggest a remedy, such as a delay in the trial, so he could react to the change. No remedy was requested, [**21] except a mistrial. Since the foundation fact for Stalnaker's testimony was unchanged although the analysis getting to [*590] that fact was different, I concluded in the exercise of my discretion that a mistrial was not appropriate. Furthermore, the defense vigorously cross examined Stalnaker on that change in his testimony in an attempt to challenge his credibility and competence. [6]

6 *Yarusso v. Bell Sports, Inc., Del. Super., 1999 Del. Super. LEXIS 231*, C. A. No. 93C-10-132, slip. op. at 21-22 (April 1, 1999).

Because this Court's approval of the *Daubert/Kumho Tire* approach for deciding disputed issues under D. R. E. 702 had not been promulgated at the time of trial in this case, the Superior Court's ruling on admissibility cannot be tested by the later-enacted standard. [7] The Superior Court ruling was consistent, however, with the Court's decisional standards then in effect. Since the adoption of the Delaware Rules of Evidence in 1980, this Court has recognized thatopinion evidence may be offered if an expert's education, training [**22] or general experience demonstrates sufficient knowledge of general principles, even if the expert does not have particular experiences with the exact issue under examination. *See e. G. Yankanwich v. Wharton, Del. Supr., 460 A.2d 1326, 1329-30 (1983)* (personal observation and experience may provide basis for expert opinion on accident reconstruction by police officers); *DiSabatino Bros. Inc. v. Wortman, Del. Supr., 453 A.2d 102, 106 (1982)* ("An experienced practicing physician is an expert, and it is not required that he be a specialist in the particular malady at issue in order to make

his testimony as an expert admissible."). If scientific issues are implicated in the expert's conclusion, in-depth experience in the underlying scientific principles is required of the expert. *See State v. Ruthardt, Del. Super., 680 A.2d 349, 361 (1996)* (cited with approval in *Zimmerman v. State, Del. Supr., 693 A.2d 311, 314 (1997))*.

7 Nor can the Superior Court's ruling on admissibility be tested by the stringent standards promulgated by other federal decisions implementing *Daubert* relied upon by Bell. *See e. G. Goebel v. Denver and Rio Grande W. R. R. Co., 10th Cir., 215 F.3d 1083, 1088 (2000)* (holding that *Daubert* findings must be made specific on record).

[**23] Under the standards of admissibility for expert testimony then in effect, we are satisfied that the Superior Court, after full *in limine* hearings, did not abuse its discretion in permitting the expert testimony of both Fox and Stalnaker. Those hearings and the written submission of the parties permitted the trial judge to gauge the competing positions of the parties concerning the expertise of the proposed witnesses, their familiarity with the underlying scientific principles and the relevance of their opinion to the disputed issues.

With extensive experience in the helmet industry, much of which involved testing and studying the safety performance of helmets, Fox is qualified to have offered expert testimony, as the Superior Court determined. At the time of trial, Fox was continuing to serve as an expert consultant to several helmet companies. The underlying principles of physics upon which the helmet's shell and liner were studied in this case have not changed over time. Moreover, as the Superior Court noted in its post-trial ruling, Fox's testimony was directed primarily to the theory of negligent design -- a premise rejected by the jury in fixing liability on the warranty [**24] claims alone.

At trial, Bell did not directly contest Stalnaker's qualifications as an expert but sought to strike his testimony because he allegedly changed his own accident reconstruction theory in favor of that advanced by another of the plaintiff's experts. The sole remedy sought by Bell at trial in this regard was the grant of a mistrial. The Superior Court had discretionary authority to grant Bell a range of remedies from a delay in the trial to a mistrial. Under the circumstances, since Stalnaker's basic scientific analysis did not change and his qualifications were not directly [*591] at issue, the Superior Court did not abuse its discretion in denying Bell's motion for mistrial.

Finally, we conclude that the Superior Court was correct in noting that the underlying scientific dispute over the helmet's ability to withstand impact was not "new science" in the sense that the expert evidence on either side offered scientific theory in a previously unexplored area. As the record indicates, the helmet industry has for years conducted continuous testing of helmets of all types, including off-road helmets. While *Kumho Tire's* teaching, as adopted by this Court in *LeBeau,* obviously [**25] extends *Daubert's* analysis for admissibility to all scientific evidence, the Superior Court's ruling did not depend for its validity on whether it was required to follow a "new scientific" analysis or not. In the final analysis, the correctness of the Superior Court's ruling must be viewed from the appellate standard of whether the trial court abused its discretion. [8]

8 While this Court's adoption of the *Daubert/Kumho Tire* analysis also incorporated an abuse of discretion test for appellate review of a trial court's ruling and D. R. E. 702, prior Delaware decisional law was equally deferential. *See Robelen Piano Co. v. DiFonzo, Del. Supr., 53 Del. 346, 169 A.2d 240, 246 (1961).*

We find no abuse of discretion on the part of the lower court in this case. A substantial pretrial record was generated, most of which contained expert testimony and opinion evidence presented by both parties. A review of those records afforded the trial judge the opportunity to determine the experts' qualifications [**26] and the reliability and relevance of their testimony. The trial judge found both Fox and Stalnaker to be properly qualified to offer expert testimony by their knowledge, skill, experience, training and/or education.

Fox's testimony was allowed based on his years of experience in the helmet industry and knowledge of its products. Stalnaker, a respected physicist, offered opinions predicated on his performance of a variety of tests that appear both sufficiently based on scientific methodology and specifically related to the circumstances of Yarusso's accident. As permitted by D. R. E. 702, their testimony served to assist the jury to understand the evidence and determine facts. Yarusso's experts were subjected to rigorous cross-examination, a safeguard recognized in *Daubert.* [9] The trial judge also permitted Bell's experts to present competent evidence to counter Yarusso's claims. The jury apparently found Yarusso's expert and opinion testimony more convincing, but that result does not require a heightened standard of review by this Court of the criteria governing the admissibility of the expert testimony it favored.

9 As the Supreme Court noted in *Daubert* (addressing concerns that abandonment of *Frye's* general acceptance standard will result in admissibility of "pseudoscientific assertions"), "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *509 U. S. at 596*. See also, to the same effect, *Barriocanal v. Gibbs, Del. Supr., 697*

A.2d 1169, 1173 (1997) (citing *Daubert* and *State v. Cephas, Del. Supr., 637 A.2d 20, 28 (1993))*.

[**27] For these reasons, we conclude that the Superior Court did not abuse its discretion in permitting the expert testimony tendered on behalf of Yarusso after having determined the witnesses to be qualified by education, experience, and their opinions relevant to the issues in dispute.

III

By its verdict, the jury specifically determined that Bell had not negligently designed the Moto-5 helmet but that Bell had breached "an express or implied warranty" when it sold the helmet and that "conduct proximately caused Brian Yarusso to suffer enhanced injuries." Bell argues on appeal that Yarusso failed, as a matter of law, to establish an evidentiary basis for recovery under either express or implied warranty and the trial court should [*592] have granted judgment in its favor as to those claims.

Preliminarily, we note that the jury was permitted to find liability under alternative forms of breach of warranty, express or implied, without differentiating between the two. [10] Bell did not object to the warranty claims being submitted in that format and, thus, the verdict may be sustained if there is record and legal support for recovery under either theory.

10 The Superior Court granted Bell judgment as a matter of law as to Yarusso's claim of breach of implied warranty for a particular purpose but permitted the jury to consider the implied warranty claim based on merchantability.

[**28] A.

The statutory basis for a claim for damages based on breach of an express warranty arising out of a sale of goods

under Delaware law is found in this State's counterpart of the Uniform Commercial Code. Title 6, *section 2-313(1)* provides that express warranties of a seller of goods 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.

Additionally,6 *Del. C.* § 2-313(2) states that:

It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement [**29] purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Title 6, *section 2-313(1)* and *(2)* are identical to *§ 2-313(1)* and *(2)* of the Uniform Commercial Code. The official commentary to that section under the U. C. C. indicates that the drafters intended its warranty provisions to be construed and applied liberally in favor of a buyer of goods. *See* U. C. C. *§ 2-313* cmt. 1 (1977) ("Express warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of a disclaimer in a form are repugnant to the basic dickered terms."); U. C. C. *§ 2-313* cmt. 3 ("In actual

practice affirmations of fact made by a seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement."); U. C. C. *§ 2-313* cmt. 4 (" [A] contract is normally a contract for a sale of something describable and described. A clause generally disclaiming 'all warranties, express or implied' cannot reduce the seller's obligation with respect to such description.."). The [**30] language of the U. C. C.'s official commentary may be applied by analogy to the sale of goods governed by 6 *Del. C.* § 2-313 in the reconciliation of any ensuing express warranty disputes. Thus, Bell's argument in this case that the express warranty terms in the manual are strictly limited to the "Five Year Limited Warranty" section, which also contained a purportedly effective disclaimer of those terms, is unfounded.

Formal wording is not necessary to create a warranty and a seller does not have to express any specific intention to create one. *See Pack & Process, Inc. v. Celotex Corp., Del. Super., 503 A.2d 646, 658-69 (1985)*. Here the additional terms [*593] found in the manual's "Introduction" and "Helmet Performance" sections (stating that "the primary function of a helmet is to reduce the harmful effects of a blow to the head.." and ".. The [helmet] is designed to absorb the force of a blow by spreading it over as wide an area of the outer shell as possible..") are textual representations constituting affirmations of fact upon which a buyer is entitled to rely. While this Court does not appear to have specifically addressed the issue, other courts have held that [**31] express warranties can arise from similar textual representations found in owners' manuals even where not specifically labeled as such. *See e. G., Kinlaw v. Long Mfg. N. C., Inc., N. C. Supr., 298 N. C. 494, 259 S. E.2d 552, 557 (1979)*; *Hawkins Constr. Co. v.*

Matthews Co., Neb. Supr., 190 Neb. 546, 209 N. W.2d 643, 654-55 (1973).

The restrictive provision of 6 *Del. C.* § 2-316(1), renders Bell's effort to disclaim any express warranties in the manual's "Five Year Limited Warranty" ineffective as a matter of law. *See* U. C. C. § 2-316(1) cmt. 1 (stating that "this section.. Seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty.."). While the manual contains disclaimers warning potential users that the helmet cannot prevent all injuries, other representations were made to assure a potential buyer that the helmet's liner was designed to reduce the harmful effects of a blow to the head. Those representations constituted essential elements of a valid express warranty that may not be effectively disclaimed as a matter of law. *See Jensen v. Seigel Mobile Homes Group, Idaho Supr., 105 Idaho 189, 668 P.2d 65 at 71-72 (1983)* [**32] (holding that one principle of the law of warranty is to hold a seller responsible for its representations and assuring that a buyer receives that which he bargained for).

Bell argues that even if an express warranty was created and not effectively disclaimed here, the manual's textual representations promise only to prevent injuries to the head, not to a user's neck. Furthermore, Bell argues, the helmet's liner did crush as designed, thereby precluding a finding that the warranty was breached. Yarusso counters this argument by pointing out that injuries to the neck may logically follow a blow to the head, the helmet's liner did not sufficiently crush to prevent his injury and, as a result, he did not get what he bargained for. Upon review of the evidence, much of which was admittedly supplied by testimony of Yarusso's experts, the jury came to a logical conclusion that an express warranty was made in the helmet's manual. Upon consideration of this representation

in relation to the specific facts of this case, they also concluded that the warranty was breached. In view of the evidence presented by the experts for both parties on the relationship between the helmet's design and the [**33] risk of neck injury, a factual predicate existed for the jury to determine whether there was a basis for recovery under the express warranty claim. The Superior Court did not err in submitting that issue to the jury.

B.

Our holding sustaining the jury's verdict on the claim of breach of express warranty renders an in-depth consideration of Bell's implied warranty arguments unnecessary, since the jury was permitted to find a breach of warranty on alternative grounds. The Superior Court in rejecting Bell's post-trial motions also declined to rule on the merits of Bell's attack on the implied warranty finding in view of the jury's finding of liability on the express warranty claim. We also are not required to address Bell's contention that Yarusso was obligated, as a matter of law, to present evidence of a safer alternative design. *See Mazda Motor Corp. v. Lindahl, Del. Supr., 706 A.2d 526, 530 (1996)*. We note, however, that Yarusso's experts never claimed that a helmet can reduce the probability of a user's neck injury in all circumstances, and they were not required to [*594] present evidence that a helmet could be designed to achieve this. Expert evidence was presented, [**34] however, that a helmet could be designed with a softer liner that would, in theory, limit the amount of force placed on the user's neck, thereby reducing the probability of partial-load direct downward neck injuries, particularly upon impact with harder surfaces. There was, thus, a sufficient factual predicate for submission of the implied warranty claim to the jury.

IV

In a related vein, Bell next argues that the jury's finding for Yarusso on breach of express and implied warranties is inconsistent with its finding that Bell was not negligent. Because the jury found no product defect leading to negligent conduct on Bell's part, it could not have properly found, the argument runs, that a defect existed in the helmet upon which any warranty claims relied. *See Ruffin v. Shaw Indus., Inc., 4th Cir., 149 F.3d 294, 301 (1998)* (holding that the requirements of both actions are nearly alike and that a finding on one claim often "applies equally" to the other); *Prentis v. Yale Mfg. Co., Mich. Supr., 421 Mich. 670, 365 N. W.2d 176, 186 (1984)* (both actions "involve identical evidence and require proof of exactly the same elements"). In essence, Bell contends [**35] that because its product was not defective, a verdict in favor of Yarusso on warranty and negligence claims was precluded. [11]

11 The jury was requested to determine the basis for Bell's liability in the following two-part inquiry.

(1)(a) Do you find by a preponderance of the evidence that Bell Sports negligently designed the Bell Moto-5 Helmet?

__YES X NO

(b) Do you find that Bell Sports breached an express or implied warranty when it sold Mr. Yarusso a Bell Moto-5 Helmet?

X YES __NO

If your answer to parts a or b of Question 1 is "Yes," go on to Question 2.

If, as Bell now asserts, a finding of no negligence in Answer (1)(a) precludes a finding as to breach of warranty, express or implied, it should have objected to the verdict form or requested a modification consistent with its present position, *i. E.,* that answer of "No" as to (1)(a) ends the

liability inquiry. As we read the record, it tendered no objection to the verdict format.

A claim for breach of [**36] warranty, express or implied, is conceptually distinct from a negligence claim because the latter focuses on the manufacturer's conduct, whereas a breach of warranty claim evaluates the product itself. *See Cline v. Prowler Indus. of Md., Inc., Del. Supr., 418 A.2d 968, 978, n.19 (1980)* (the focus of a negligence claim is the manufacturer's conduct and the breach of an accepted standard of conduct); *Borel v. Fibreboard Paper Prod. Corp., 5th Cir., 493 F.2d 1076, 1094 (1973)* (in a products liability case with inconsistent verdicts, it is within the jury's prerogative so long as evidence supports the finding); *Community Television Serv. v. Dresser Indus., Inc., D. S. D., 435 F. Supp. 214, 216 (1977)* (jury could find defendant neither negligent nor strictly liable while finding as a matter of law that representations in a brochure created an express warranty that defendant breached). Based on the foregoing authorities, we find no fatal inconsistency between the jury's verdict negating negligence but finding breach of warranty.

V

Finally, we consider Bell's contention that it was entitled to a mistrial after the discharge of one juror [**37] from the panel during deliberations. This claim is predicated on the fact that prior to the juror's dismissal, the panel indicated it was deadlocked. Because the juror was dismissed without an explanation, Bell claims that the remaining jurors were left with an impression that the juror had done something wrong and whichever side that juror was supporting would have "lost credibility." The jury's verdict was, therefore, conceivably swayed against Bell as a result of that juror's dismissal.

[*595] The granting of a mistrial for juror misconduct is part of the trial judge's case management function and is reviewed under an abuse of discretion standard. *See Temple v. Raymark Indus., Del. Supr., 716 A.2d 975, 1998 WL 138929*, at *2 (1998) (ORDER). We find no merit to this argument. It is undisputed that the trial judge determined that the dismissed juror shared no extraneous information with any other members on the panel prior to his dismissal. *Compare Diaz v. State, Del. Supr, 743 A.2d 1166 (1999)* (ruling juror's comments in open court regarding the interpretation of live testimony prejudicial). The trial judge dealt with the situation upon learning of the juror's misdeed [**38] by swiftly discharging him and subsequently allowed the jury to continue its deliberations. *Id.* Moreover, prior to trial, both parties had agreed that should circumstances warrant it, an eleven-member panel was acceptable. *See* Super Ct. Civ. R. 48. The trial court did not abuse its discretion in dismissing this juror and there was no basis to order a mistrial.

The judgment of the Superior Court is AFFIRMED.

¿ Luego de explícitamente se otorgue una garantía, no es contradictorio descargarse de responsabilidad?

EL *DISCLAIMER* DE LA GARANTÍA ÍMPLICITA

EDWARD CATE, JR., d/b/a CATE'S TRANSMISSION SERVICE, Petitioner, v. DOVER CORPORATION, Respondent SUPREME COURT OF TEXAS 790 S. W.2d 559; 12 U. C. C. Rep. Serv. 2d 47 June 6, 1990, Delivered

OPINION BY: DOGGETT [*560] We consider the enforceability of a disclaimer of implied warranties. The trial court upheld the disclaimer and granted summary judgment in favor of Dover Corporation. The court of appeals affirmed.*776 S. W.2d 680*. We reverse the

judgment of the court of appeals and remand this cause to the trial court for further proceedings consistent with this opinion.

In September 1984, Edward Cate, doing business as Cate's Transmission Service, purchased from Beech Tire Mart three lifts manufactured and designed by Dover Corporation to elevate vehicles for maintenance. Despite repairs made by Beech and Dover, the lifts never functioned properly. Dover contends that Cate's subsequent claim against it for breach of the implied warranty of merchantability is barred by a disclaimer contained within a written, express warranty.

[**2] This warranty is set forth on a separate page headed in blue half inch block print, with the heading: "YOU CAN TAKE ROTARY'S NEW 5-YEAR WARRANTY AND TEAR IT APART." The statement is followed by bold black type stating, "And, when you are through, it'll be just as solid as the No. 1 lift company in America. Rotary." The text of the warranty itself is in black type, contained within double blue lines, and appears under the blue three-eighths inch block print heading "WARRANTY." The disclaimer of implied warranties, although contained in a separate paragraph within the warranty text, is in the same typeface, size, and color as the remainder of the text.

EXHIBIT A

YOU CAN TAKE ROTARY'S NEW 5-YEAR WARRANTY AND TEAR IT APART.

And, when you're through, it'll be just as solid as the No. 1 lift company in America. Rotary.

Not so with some of the other companies. They may offer you a multi-year warranty, too. But you're likely to discover it's limited to parts only.

And, hidden in all the mumbo-jumbo, you may find out -- too late -- that their beautifully worded "warranty" doesn't even cover major components. Like power units. So what you really have is a great warranty that covers [**3] almost nothing.

We at Rotary are proud of the surface lift products we manufacture. And we don't have to "play it safe" when it comes to guaranteeing them. Here's what our new 5-year warranty says:

WARRANTY

All Rotary Surface Mounted Lifts are guaranteed to the original owner for five years from invoice date. Rotary Lift Division here after is known as "The Company". The Company shall replace for the full five years those parts returned to the factory which prove upon inspection by the Company to be defective. The Company shall pay for reasonable costs of transportation and labor for replacement of said parts for the first 12 months only. Purchaser will bear costs of transportation and labor for parts returned after the first year and the remainder of this warranty. This warranty shall not apply unless the product is installed, used and maintained in accordance with the Company's specifications as set forth in the Company's installation, operation and maintenance instructions.

This warranty does not cover normal maintenance or adjustments, damage or malfunction caused by improper handling, installation, abuse, misuse, negligence or carelessness of operation.

This warranty [**4] is exclusive and is in lieu of all other warranties expressed or implied including any implied warranty of merchantability or any implied warranty of fitness for a particular purpose, which implied warranties are hereby expressly excluded.

The remedies described are exclusive and in no event shall the Company be liable for special, consequential or incidental damages for the breach of or delay in performance of the warranty.

This warranty shall be governed by the State of Indiana, and shall be subject to the exclusive jurisdiction of the Court of the State of Indiana in the County of Jefferson.

AMERICAN MADE

An implied warranty of merchantability arises in a contract for the sale of goods unless expressly excluded or modified by conspicuous language. *Tex. Bus. & Com. Code Ann. §§ 2.314(a)*, *2.316(b)* (Vernon 1968). Whether a particular disclaimer is conspicuous is a question of law to be determined by the following definition:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in a body of a form is conspicuous [**5] if it is larger or of other contrasting type or color. But in a telegram, any stated term is conspicuous.

Id. § 1.201(10). Further explanation is provided by comment 10 thereto:

This [section] is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it.

In interpreting this language, Dover argues that a lesser standard of conspicuousness should apply to a disclaimer made to a merchant, such as Cate. Admittedly, an ambiguity is created by the requirement that disclaimer language be conspicuous to "a reasonable person *against whom it is to operate."* Comment 10, however, clearly

contemplated an objective standard, stating the test as "whether attention can reasonably be expected to be called to it."

We then turn to an application of an objective standard of conspicuousness to Dover's warranty. The top forty percent of the written warranty is devoted to extolling its virtues. The warranty itself, contained within double blue lines, is then set out in five paragraphs in normal black type under the heading "WARRANTY." Nothing distinguishes the third paragraph, which [**6] contains the exclusionary language. It is printed in the same typeface, size and color as the rest of the warranty text. Although the warranty in its entirety may be considered conspicuous, the disclaimer is hidden among attention-getting language purporting to grant the best warranty available. [1]

1 Justice Grant's dissent in the court of appeals correctly characterizes the warranty as follows:

Dover has cleverly buried the disclaimer provision within language that strongly suggests a warranty that greatly benefits the consumer. The bold print language suggests that warranties were included rather than excluded. *See Mallory v. Conida Warehouses, Inc., 134 Mich. App. 28, 350 N. W.2d 825 (1984).*

776 S. W.2d at 685.

[*561] Dover cites *Ellmer v. Delaware Mini-Computer Systems, Inc., 665 S. W.2d 158* (Tex. App. -- Dallas 1983, no writ), as authority for imposing a subjective standard of conspicuousness. In finding a disclaimer conspicuous, that court did look to the circumstances surrounding [**7] the transaction. That particular language, however, was in bold print, unlike the language under review here. Nor did that court give consideration to the effect of comment 10. Nevertheless, to the extent that *Ellmer* may be read as imposing a subjective standard, we disapprove it. [2]

2 The other case relied upon by Dover, *W. R. Weaver Co. v. Burroughs Corp., 580 S. W.2d 76, 81* (Tex. Civ. App. -- El Paso 1979, writ ref'd n. R. E.), is distinguishable because it concerned a lease agreement, to which the UCC does not apply.

Although this is a case of first impression in Texas, the facts here parallel those reviewed in other states. In *Massey-Ferguson, Inc. v. Utley, 439 S. W.2d 57, 59 (Ky. Ct. App. 1969)*, a disclaimer hidden under the heading "WARRANTY and AGREEMENT" was found not to be conspicuous:

It is true that the *heading* was in large, bold-face type, but there was nothing to suggest that an exclusion was being made; on the contrary, the words of the headings indicated a *making* of warranties [**8] rather than a *disclaimer.*

(Emphasis in original.) Similarly, in *Hartman v. Jensen's, Inc., 277 S. C. 501, 289 S. E.2d 648 (S. C. 1982)*, the court found that placing a disclaimer under the bold heading "Terms of Warranty" failed to alert the consumer to the fact that an exclusion was intended. [3] Dover's disclaimer similarly fails to attract the attention of a reasonable person and is not conspicuous.

3 *See also Mack Trucks of Arkansas, Inc. v. Jet Asphalt & Rock Co., 246 Ark. 101, 437 S. W.2d 459 (1969)* (disclaimer contained within warranty text under headings "Vehicle Warranty" and "Supplement to Mack Standard Warranty applicable to Mack Diesel Engines" held not conspicuous in part because neither title suggests the exclusion or modification of an implied warranty); *Blankenship v. Northtown Ford, Inc., 95 Ill. App. 3d 303, 50 Ill. Dec. 850, 420 N. E.2d 167 (1981)* (the heading "Factory Warranty" is misleading, and a disclaimer which follows a misleading heading cannot be deemed to comply

with the UCC); *Seibel v. Layne & Bowler, Inc., 56 Or. App. 387, 641 P.2d 668*, *rev. denied, 293 Or. 190, 648 P.2d 852 (1982)* (disclaimer held not conspicuous when only the paragraph heading "Warranty" stood out and suggested the making of the warranties, not their exclusion); *Dorman v. International Harvester, Co., 46 Cal. App. 3d 11, 120 Cal. Rptr. 516 (2d Dist. 1975)* (inconspicuous disclaimer provision lacked a heading such as "DISCLAIMER OF WARRANTIES" which would adequately call the exclusionary language to the attention of the buyer); *Richards v. Goerg Boat & Motors, Inc., 179 Ind. App. 102, 384 N. E.2d 1084 (3d Dist. 1979)* (disclaimer language contained within warranty text held ineffective); B. Clark & C. Smith, The Law of Product Warranties para. 8.03 [2] (1984) ("disclaimer paragraph should be conspicuously captioned as a "DISCLAIMER OF WARRANTIES," or the paragraph should at least capitalize all words relating to the disclaimer").

[**9] Dover argues that *Singleton v. LaCoure, 712 S. W.2d 757* (Tex. App. -- Houston [14th Dist.] 1986, writ ref'd n. R. E.), held that a disclaimer in the same print as the rest of a form contract was conspicuous. While the disclaimer on the *back* of the form in *Singleton* was undistinguished in typeface, size and color from the remainder of the text, the same provision was repeated in a box as the only preprinted paragraph on the front of the contract.712 S. W.2d 758-59. *Singleton* is thus distinguishable from the case at bar.

Dover argues that even an inconspicuous disclaimer should be given effect because Cate had actual knowledge of it at the time of the purchase. Because the object of the conspicuousness requirement is to protect the buyer from surprise and an unknowing waiver of his or her rights, inconspicuous language is immaterial when the buyer has actual knowledge of the disclaimer. This knowledge can

result from the buyer's prior dealings with the seller, or by the seller specifically bringing the inconspicuous waiver to the buyer's attention. The Code appears to recognize that actual knowledge of the disclaimer overrides the question of conspicuousness. For [**10] [*562] example, Section 2.316(b) does not mandate a written disclaimer of the implied warranty of merchantability but clearly provides that an oral disclaimer may be effective. [4] Similarly, Section 2.316(c) (3) allows an implied warranty to be excluded or modified by methods other than a conspicuous writing: course of dealing, course of performance, or usage of trade. When the buyer is not surprised by the disclaimer, insisting on compliance with the conspicuousness requirement serves no purpose. *See* R. Anderson, *Uniform Commercial Code* § 2.316:49-50 (1983). The extent of a buyer's knowledge of a disclaimer of the implied warranty of merchantability is thus clearly relevant to a determination of its enforceability. *See Sinaleton v. LaCoure, 712 S. W.2d 757, 759* (Tex. App. -- Houston [14th Dist.] 1986, writ ref'd n. R. E.) (relying in part on buyer's acknowledgement to enforce disclaimer). The seller has the burden of proving the buyer's actual knowledge of the disclaimer.

4 *Tex. Bus. & Com. Code § 2.316*, comment 1 (section seeks to protect buyer from unexpected and unbargained language of disclaimer by permitting exclusion of implied warranties only by conspicuous language or other circumstances which protect buyer from surprise); *see also* Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC,* 53 Tex. L. Rev. 60, 66 (1974); J. White & R. Summers, *Uniform Commercial Code* § 12-5, n.76 (2d ed. 1980) (seller may effectively disclaim by orally explaining inconspicuous written disclaimer, provided word "merchantability" used).

[**11] As this is a summary judgment case, the issue on appeal is whether Dover met its burden by establishing that there exists no genuine issue of material fact thereby entitling it to judgment as a matter of law. C*ity of Houston v. Clear Creek Basin Authority, 589 S. W.2d 671, 678 (Tex. 1979)*. All doubts as to the existence of a genuine issue of material fact are resolved against the movant, and we must view the evidence in the light most favorable to the Petitioner. G*reat American Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S. W.2d 41, 47 (Tex. 1965)*. In support of its claim that Cate had actual knowledge of the disclaimer, Dover relies on Cate's deposition testimony, as follows:

Q: Do you know, or do you remember what kinds of warranties you received when you bought the lifts?

A: I may be wrong, but I think it was a five year warranty.

Q: What was your understanding of that warranty?

A: Any problems would be taken care of within the five year period.

Q: Do you know if that warranty was from Beech Equipment, or from Dover?

A: I believe it was from Dover.

Q: Did you receive any written documentation in regard to that warranty?

A: [**12] Yes, ma'am.

Although it is clear that Cate understood the warranty to extend for only five years, it is not clear that he understood any other limitations or exclusions. Merely providing a buyer a copy of documents containing an inconspicuous disclaimer does not establish actual

knowledge. Dover has failed to establish that as a matter of law Cate had actual knowledge of the disclaimer.

We hold that,to be enforceable, a written disclaimer of the implied warranty of merchantability made in connection with a sale of goods must be conspicuous to a reasonable person. We further hold that such a disclaimer contained in text undistinguished in typeface, size or color within a form purporting to grant a warranty is not conspicuous, and is unenforceable unless the buyer has actual knowledge of the disclaimer. For the reasons stated herein, we reverse the judgment of the court of appeals and remand to the trial court for further proceedings consistent with this opinion.

CONCURRING OPINION BY: SPEARS; RAY

[*564] Although I concur in the court's opinion, I write separately to declare that the time has come for the [**13] legislature to consider the realities of the marketplace and prohibit all disclaimers of the implied warranties of merchantability and fitness.

These implied warranties, created by common-law courts long before the adoption of the U. C. C., developed to protect purchasers from losses suffered because of "the frustration of their expectations about the worth, efficacy, or desirability" of a product. W. Keeton, *Prosser and Keeton on The Law of Torts* § 95A (5th ed. 1984). Implication of these warranties into every goods contract, without regard to the parties actual assent to their terms, served "to police, to prevent, and to remedy" unfair consumer transactions. Llewellyn, *On warranty of Quality, and Society*, 39 Colum. L. Rev. 699, 699 (1936); *Humber v. Morton, 426 S. W. 2d 554, 557-58 (Tex. 1968)*. These implied warranties also serve other important purposes: they create incentives to produce and market higher quality products; they discourage shoddy workmanship and

unethical trade practices; and they place responsibility on those who profit from the sale of goods, have the greatest control over the products, and are better able to bear the risk of loss. H*umber, 426* [**14] *S. W.2d at 562*; *Decker & Sons v. Capps, 139 Tex. 609, 610, 164 S. W.2d 828, 829 (1942)*. Section 2.316 of the U. C. C., however, subverts all of these purposes by giving sellers almost unlimited license to disclaim implied warranties.

We live in an age when sellers of goods "saturate the marketplace and all of our senses" with the most extraordinary claims about the worth of their products. Anderson, *The Supreme Court of Texas and the Duty to Read the Contracts you Sign,* 15 Tex. Tech L. Rev. 517, 544 (1984); *Henningsen v. BloomField Motors, Inc., 32 N. J. 358, 161 A.2d 69, 84 (N. J. 1960)*. Yet, the same sellers under the *carte blanche* granted them by section 2.316 of the U. C. C. refuse to guarantee and indeed expressly disclaim that their products are merchantable or even fit for their intended purposes. Under section 2.316, not much is actually required for an effective disclaimer. To disclaim the implied warranty of merchantability the seller need only include the word "merchantability" in a conspicuous fashion. *Tex. Bus. & Com. Code Ann. § 2.316(b)*(Vernon 1968). To disclaim the implied warranty of fitness the seller must use a writing and must make the disclaimer conspicuous. [**15] *Id.* at § 2.316(2). No particular form of words is needed to disclaim an implied warranty of fitness, nor does section 2.316 require the buyer to be actually aware of the disclaimer before it will be enforced. All implied warranties can be disclaimed by the mere inclusion of expressions like "as is" or "with all faults". *Id*. at § 2.316, comment 1. Finally, as today's majority makes clear, section 2.316 does not even require the disclaimer to be conspicuous if the buyer's actual knowledge of the disclaimer can be shown.

By establishing specific "requirements" for disclaimers, section 2.316 ostensibly "seeks to protect a buyer from unexpected and unbargained language of disclaimer." *Tex. Bus. & Com. Code § 2.316*, comment 1 (Vernon 1968). In reality, however, section 2.316 completely undermines implied warranties. Implicitly, section 2.316 adopts the position that disclaimers should be enforced because society benefits when parties to a contract are allowed to set *all* the terms of their agreement. The problem with this position, and with section 2.316 generally, is twofold: it ignores the fact that governmental implication of protective terms into private contracts is commonplace [**16] (e. G. the *implied* warranties of merchantability and fitness); and, more importantly, it rests on the faulty premise that contractual disclaimers are generally freely bargained for elements of a contract.

Freedom of contract arguments generally, and section 2.316 specifically, presuppose and are based on "the image of individuals meeting in the marketplace" on equal ground to negotiate the terms of a contract. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1174, 1216 (1983)*. At one time, this image may have accurately reflected marketplace realities. However, the last half [*565] of the twentieth century has witnessed "the rise of the corporation" and, increasingly, the displacement of physical persons as sellers in consumer and commercial contracts. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers, 62 Chi.-Kent L. Rev. 199, 239 (1985)*. This development has led to innumerable situations in which consumers deal from an unequal bargaining position, the most prominent example being the ubiquitous standard form contract which is now used by most sellers of goods and which invariably contains an implied warranty disclaimer. [**17] *See Melody Home Mfg. Co. v. Barnes, 741 S. W.2d 349, 355 (Tex. 1987)*; *Henningsen,*

161 A.2d at 86-89; Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power,* 84 Harv. L. Rev. 529, 529 (1971)("standard form contracts probably account for more than ninety-nine percent of all the contracts now made"); IL. Vold, *Handbook of the Law of Sales* 447 (2d ed. 1959)(dramatic rise in corporate power has yielded the standard form contract whose terms are drafted by the seller and usually contain implied warranty disclaimers).

The great majority of buyers never read an implied warranty disclaimer found in a standard form contract. [1] Even when implied warranty disclaimers are read, their legal significance is not generally understood. Such disclaimers include unfamiliar terminology (e. G. "implied warranty of merchantability"), and comprehending their legal effect requires one not only to understand what substantive rights are involved, but also to grasp that these rights have been lost via the disclaimer. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers, 62 Chi.-Kent L. Rev. 199, 243 (1985)*; *see also* Federal Trade Commission, [**18] *Facts for Consumers* (Mar. 23, 1979)(more than 35% of those surveyed mistakenly believed that an "as is" disclaimer meant the dealer would have to pay some, if not all, costs if a car broke down within 25 days of a sale). Finally, even if a buyer reads and understands an implied warranty disclaimer, chances are he will be without power to either strike these terms or "shop around" for better ones. If the buyer attempts the former, he will likely run into an employee who is unauthorized to alter the form contract; if he attempts the latter, he will likely confront a competitor who offers substantially the same form terms. H*enningsen, 161 A.2d at 87*. In short, the "marketplace reality" suggests that freedom of contract in the sale of goods is actually

nonexistent; a buyer today can either take the contract with the disclaimer attached or leave it and go without the good.

1 *See RESTATEMENT (SECOND) OF CONTRACTS § 211, Comment b* (1981):

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One purpose of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Customers do not in fact ordinarily understand or even read the standard terms.

Id.; *see also* Rakoff, *Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1174, 1179 n.21 (1983)*(citing numerous commentators who declare that standard terms not read or understood, and some empirical studies asserting same proposition); Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers, 62 Chi.-Kent L. Rev. 199, 243 (1985)*(many sales do not involve a written sales contract that is presented before the goods change hands; usually, the disclaimer is inside the package and is not seen until after the sale is completed).

[**19] Increasingly, the courts and legislatures of other states have acted to ameliorate or to avoid entirely the harsh consequences wrought by section 2.316. Several courts have refused to enforce disclaimers, on public policy grounds, unless the disclaimer sets forth the particular qualities and characteristics of fitness being waived, is clearly brought to the buyer's attention and is expressly agreed to by the buyer. *See*, *e. G., Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (Colo. 1975)*; *Jensen v. Siegel Mobile Homes Group, 105 Idaho 189, 668 P.2d 65*

(Idaho 1983); *Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So.2d 92 (La. 1979)*; *Scientific Application, Inc. v. Delkamp, 303 N. W.2d 71 (N. D. 1981)*; *Zabriskie Chevrolet, Inc. v. Smith,* [*566] *99 N. J. Super. 441, 240 A.2d 195 (N. J. 1968)*; *Woods v. Secord, 122 N. H. 323, 444 A.2d 539 (N. H. 1982)*; *Seibel v. Layne & Bowler, Inc., 56 Ore. App. 387, 641 P.2d 668 (Or. 1982)*; *Berg v. Stromme, 79 Wash. 2d 184, 484 P.2d 380 (Wash. 1971)*.

A number of other courts have found even conspicuous disclaimers to be unconscionable under section 2-302 of the U. C. C., despite the disclaimer's [**20] compliance with § 2.316. *See, e. G., FMC Fin. Corp. v. Murphree, 632 F.2d 413 (5th Cir. 1980)*; *A & M Produce Co. V. FMC Corp., 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (1982)*; *Chrysler Corp. v. Wilson Plumbing Co., 132 Ga. App. 435, 208 S. E.2d 321 (1974)*; *Hahn v. Ford Motor Co., 434 N. E.2d 943 (Ind. App. 1982)*; *Sarfati v. M. A. Hittner & Sons, 35 A. D.2d 1004, 318 N. Y. S.2d 352 (1971)*, *aff'd 30 N. Y.2d 613, 331 N. Y. S.2d 40, 282 N. E.2d 126 (1972)*; *Evans v. Graham Ford, Inc., 2 Ohio App. 3d 435, 442 N. E.2d 777, 24 Ohio Op. 3d 140 (1981)*; *Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N. E.2d 897, 70 Ohio Op. 2d 10 (1974)*; *Durham v. Ciba-Geigy Corp., 315 N. W.2d 696 (S. D. 1982)*; *Rottinghaus v. Howell, 35 Wash. App. 99, 666 P.2d 899 (1983)*; *See generally* Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers, 62 Chi.-Kent L. Rev. 199, 262-63 (1985)*(arguing that § 2-302 should be aggressively applied to invalidate disclaimers of implied warranties, and concluding that such disclaimers should be "per se unconscionable" in consumer cases).

Several states have gone even further by enacting protective legislation which [**21] forbids implied warranty disclaimers or by repealing section 2.316 of the Code. *See. e. G., ALA. CODE §§ 2.316(5)*,2-719(4) (1975); *CONN. GEN. STAT. § 42-179* (1984); D. C. CODE ANN.

§ 28:2.316.1(1984); *KAN. STAT. ANN.§ 50-636(a)*(1983); ME. REV. STAT. ANN. tit. 11, § 2.31 (1973); MD. COM. LAW ANN. § 2.316 (1982); *MASS. ANN. LAWS ch. 106, § 2.316A* (1984); *MINN. STAT. ANN. § 325.19* (1982); 1976 Miss. Laws, Ch.385, Preamble; *MISS. CODE ANN. § 11-7-18*; *VT. STAT. ANN. tit. 9A, § 2.316(5)*(1981); WASH. REV. CODE § 62A-2.316(4) (1966); *W. VA. CODE § 46A-6-107* (1980); *see also* Uniform Consumer Credit Code § 2.308 (1974); Model Consumer Credit Act §§ 2.503,8.108 (1973).

Finally, the federal Magnuson-Moss Warranty Act places severe limits on the seller's ability to disclaim implied warranties in the sale of consumer goods.*15 U. S. C. §§ 2301-12 (1982)*. The Act's most important clause essentially provides that *if* a seller gives a written express warranty, he cannot disclaim the implied warranties. *Id*. § 2308(a). The Act effectively prohibits the common practice of a seller boldly announcing an express warranty of limited value and then disclaiming the more valuable [**22] implied warranties, leaving the consumer with a delusive remedy at best.

Our own prior decisions reflect a growing hostility toward attempted disclaimers of important rights. For example, in *Cromwell v. Housing Authority of City ofDallas,* we held that an exculpatory provision exempting a landlord from liability for negligence was void as against public policy because of the disparate bargaining positions of the parties and the "take it or leave it" nature of the contract.*494 S. W.2d 887, 889 (Tex. 1973)*. More recently, in *Melody Home Mfg. Co. v. Barnes,* we created a new common-law implied warranty of good and workmanlike repair and further held that the new warranty could not be waived or disclaimed. *741 S. W.2d 349, 354-55 (Tex. 1987)*. In so holding, we recognized that "(i] t would be incongruous if public policy required the creation of an

implied warranty, yet allowed the warranty to be disclaimed and its protection eliminated merely by a pre-printed standard form disclaimer or an unintelligible merger clause" *Id. at 355*; *see also Crowder v. Vandendeale, 564 S. W.2d 879, 881 (Mo. 1978)*(boilerplate waiver provisions, even if conspicuous, would not be allowed [**23] to extinguish so important a creature of public policy as the implied warranty of habitability and workmanship).

In other contexts, the Texas legislature has refused to allow the rights and remedies it creates to fall victim to skillfully drafted waiver provisions or disclaimers. *See. e. G., Tex. Bus. & Com. Code Ann. § 17.42(a)* (Vernon Supp. 1990)(DTPA waiver [*567] unenforceable and void as against public policy unless defendant proves consumer is not in a significantly disparate bargaining position, the consumer is represented by legal counsel, and the waiver is by express provision in a written contract signed by both consumer and his counsel); Tex. Rev. Civ. Stat. Ann. art. 5221f, § 18 (Vernon Supp. 1987)(waiver of the provisions of the Manufactured Housing Standards Act unenforceable and void); *Tex. Bus. Com. Code Ann. §§ 9.504*, *9.506* (Vernon Supp. 1985)(debtor may not waive, until after default, rights to notice of sale and to redemption of collateral); Tex. Bus. Comm. Code Ann. § 2-719(3)(presumptively invalidating disclaimers of liability for personal injuries in contracts for the sale of consumer goods).

The realities of the modern marketplace demand that the [**24] legislature prohibit implied warranty disclaimers by repealing *section 2.316* of the U. C. C. Without such action, Texas courts will be forced to rely on "covert tools", such as the unconscionability provision in section 2-302 or the "conspicuous" requirement in *section 2.316*, to reach a just and fair result in disclaimer suits. When these tools are

used, guidance, predictability and consistency in the law is sacrificed, while limited judicial resources are spent policing unjust bargains that could have been avoided. Were it up to the judicial branch, the courts could declare such disclaimers void as against public policy. If the legislature has the interests of Texas citizens at heart, it will repeal *section 2.316* because, no matter how conspicuous, such disclaimers are abusive of consumers.

CONCURRING AND DISSENTING OPINION BY: RAY I concur in that portion of the court's opinion requiring that a written disclaimer of the implied warranty of merchantability must be conspicuous to a reasonable person. I write separately, however, to take issue with the court's immediate erosion of that standard by permitting a showing of actual knowledge of the disclaimer to override [**25] a lack of conspicuousness.

The statute, on its face, provides for no actual knowledge exception. There is no room for judicial crafting of those omitted by the legislature. I would hold that the extent of a buyer's knowledge of a disclaimer is irrelevant to a determination of its enforceability under Section 2.316(b) of the UCC. [1]

1 This approach is taken in *Rehurek v. Chrysler Credit Corp., 262 So. 2d 452* (Fla. Dist. Ct. App.), *cert. denied, 267 So. 2d 833 (Fla. 1972)* (inconspicuous disclaimer ineffective even though the buyer admitted having read it before the purchase).

The effect of actual knowledge is subject to debate among leading commentators on commercial law. The purpose of the objective standard of conspicuousness adopted by the court today reflects the view that "the drafters intended a rigid adherence to the conspicuousness requirement in order to avoid arguments concerning what the parties said about the warranties at the time of the sale."

J. White and R. Summers, *Uniform Commercial* [**26] *Code* § 12-5 (2d ed. 1980). An absolute rule that an inconspicuous disclaimer is invalid, despite the buyer's actual knowledge, encourages sellers to make their disclaimers conspicuous, thereby reducing the need for courts to evaluate swearing matches as to actual awareness in particular cases. *See* W. Powers, *Texas Products Liability Law* § 2.0723 (1989). Today's decision condemns our courts to a parade of suchcases.

 ¿ Por qué el tribunal determina que no es visible la escritura por la que se descarga la responsabilidad?

LA LIMITACIÓN DE LAS GARANTÍAS

 WILSON TRADING CORPORATION, Respondent, v. DAVID FERGUSON, LTD., Appellant Court of Appeals of New York 23 N. Y.2d 398; 244 N. E.2d 685 October 17, 1968, Submitted December 12, 1968, Decided

OPINION BY: JASEN [*400] [**686] %%0] The plaintiff, Wilson Trading Corporation, entered into a contract with the defendant, David Ferguson, Ltd., for the sale of a specified quantity of yarn. After the yarn was delivered, cut and knitted into sweaters, the finished [*401] product was washed. It was during this washing that it was discovered that the color of the yarn had "shaded" -- that is, "there was a variation in color from piece to piece and within the pieces." This defect, the defendant claims, rendered the sweaters "unmarketable".

This action for the contract price of the yarn was commenced after the defendant refused payment. As a defense to the action and as a counterclaim for damages, the defendant alleges that " [plaintiff] has failed to perform all of the conditions of the contract on its part required to be performed, and has delivered * * * defective and unworkmanlike goods".

The sales contract provides in pertinent part:

"2. No claims relating to excessive moisture content, short weight, count variations, twist, quality or shade shall be allowed *if made after weaving, knitting, or processing*, or more than 10 days after receipt of shipment.* * * The buyer shall within 10 days of the receipt of the merchandise by himself or agent examine the merchandise for any and all defects." (Emphasis supplied.)

"4. This instrument constitutes the entire agreement between the parties, superseding all previous communications, oral or written, and no changes, amendments or additions hereto will be recognized unless in writing signed by both seller and buyer or buyer's agent. It is expressly agreed that no representations or warranties, express or implied, have been or are made by the seller except as stated herein, and the seller makes no warranty, express or implied, as to the fitness for buyer's purposes of yarn purchased hereunder, seller's obligations, except as expressly stated herein, being limited to the *delivery of good merchantable yarn of the description stated herein*".(Emphasis supplied.)

Special Term granted plaintiff summary judgment for the contract price of the yarn sold on the ground that "notice of the alleged breach of warranty for defect in shading was not given within the time expressly limited and is not now available by way of defense or counterclaim." The Appellate Division affirmed, without opinion.

The defendant on this appeal urges that the time limitation provision on claims in the contract was unreasonable since the defect in the color of the yarn was latent and could not be discovered [*402] until after the yarn was processed and the finished product washed.

Defendant's affidavits allege thatits sweaters were rendered unsaleable because [**687] of latent defects in the yarn which caused "variation in color from piece to piece and within the pieces." This allegation is sufficient to create a question of fact concerning the merchantability of the yarn (*Uniform Commercial Code, § 2-314, subd. [2]*). Indeed, the plaintiff does not seriously dispute the fact that its yarn was unmerchantable, but instead, like Special Term, relies upon the failure of defendant to give notice of the breach of warranty within the time limits prescribed by paragraph 2 of the contract.

Subdivision (3) (par. [a]) of *section 2-607 of the Uniform Commercial Code* expressly provides that a buyer who accepts goods has a reasonable time after he discovers or should have discovered a breach to notify the seller of such breach.(Cf. 5 Williston, Contracts [3d ed.], § 713.) Defendant's affidavits allege that a claim was made immediately upon discovery of the breach of warranty after the yarn was knitted and washed, and that this was the earliest possible moment at which the defects could reasonably be discovered in the normal manufacturing process. Defendant's affidavits are, therefore, sufficient to create a question of fact concerning whether notice of the latent defects alleged was given within a reasonable time. (Cf. Ann., *17 ALR 3d 1010, 1112-1115* [1968] .)

However,the Uniform Commercial Code allows the parties, within limits established by the code, to modify or exclude warranties and to limit remedies for breach of warranty. The courts below have found that the sales contract bars all claims not made before knitting and processing. Concededly, defendant discovered and gave notice of the alleged breach of warranty after knitting and washing.

We are, therefore, confronted with the effect to be given the time limitation provision in paragraph 2 of the contract. Analytically, paragraph 2 presents separate and distinct issues concerning its effect as a valid limitation on remedies for breach of warranty (*Uniform Commercial Code, § 2-316*, *subd. [4]* ; *§ 2-719*) and its effect as a modification of the express warranty of merchantability (*Uniform Commercial Code, § 2-316*, *subd. [1]*) established by paragraph 4 of the contract.

[*403] Parties to a contract are given broad latitude within which to fashion their own remedies for breach of contract (*Uniform Commercial Code, § 2-316*, *subd. [4]* ; *§§ 2-718*, *2-719*). Nevertheless, it is clear from the official comments to *section 2-719 of the Uniform CommercialCode* that it is the very essence of a sales contract that at least minimum adequate remedies be available for its breach."If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an *unconscionable manner* is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed." (*Uniform Commercial Code, § 2-719*, official comment 1; emphasis supplied.)

It follows thatcontractual limitations upon remedies are generally to be enforced unless unconscionable. This analysis is buttressed by the fact that the official comments to *section 2-302 of the Uniform Commercial Code*, the code provision pertaining to unconscionable contracts or clauses, cites *Kansas City Wholesale Grocery Co. v. Weber Packing Corp. (93 Utah 414* [1937]), a case invalidating a time limitation provision as applied to latent defects, as illustrating the underlying basis for *section 2-302*.[1]

1 We recognize that the Superior Court of Pennsylvania in *Vandenberg & Sons, N. V.* v. *Siter* (204 Pa. Super. Ct. 392 [1964]) held that the manifest unreasonableness of a time limitation clause presented a question of fact for trial (citing *Uniform Commercial Code, § 1-204* and two pre-Uniform Commercial Code cases). However, the Pennsylvania Superior Court did not consider the sections of the code pertaining to limitation of remedies for breach of warranty. (*Uniform Commercial Code, § 2-316*, subd. [4*] ; §§ 2-718*, *2-719*.) When these interrelated sections are considered in light of the official comments to *section 2-719 of the Uniform Commercial Code*, it is clear that the issue of the reasonability of limitations upon contractual remedies presents a question of unconscionability for the court. For this reason we decline to follow *Vandenberg & Sons, N. V. V. Siter* (*supra*).

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[**688] Whether a contract or any clause of the contract is unconscionable is a matter for the court to decide against the background of the contract's commercial setting, purpose, and effect, [*404] and the existence of this issue would not therefore bar summary judgment. [2]

2 In construing *section 2-302* (subd. [2]) as a matter of first impression, *Sinkoff Beverage Co. v. Schlitz Brewing Co. (51 Misc 2d 446*) acknowledges that the issue of unconscionability is a matter of law for the court, but holds that a hearing to determine the commercial setting, purpose, and effect of a contract is mandatory rather than discretionary when the court accepts the possibility of unconscionability. Neither party argues that Special Term should have held an evidentiary hearing on the issue of unconscionability, and accordingly we express no opinion on this issue.(Cf. Cohen and Karger, Powers of the New York Court of Appeals [Rev. ed., 1952], §§ 161, 162.)

However, it is unnecessary to decide the issue of whether the time limitation is unconscionable on this appeal for*section 2-719* (subd. [2]) of the Uniform Commercial Code provides that the general remedy provisions of the code apply when "circumstances cause an exclusive or limited remedy to fail of its essential purpose". As explained by the officialcomments to this section: "where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article." (*Uniform Commercial Code, § 2-719*, official comment 1.) Here, paragraph 2 of the contract bars all claims for shade and other specified defects made after knitting and processing. Its effect is to eliminate any remedy for shade defects not reasonably discoverable within the time limitation period. It is true thatparties may set by agreement any time not manifestly unreasonable whenever the code "requires any action to be taken within a reasonable time" (*Uniform Commercial Code, § 1-204*, *subd. [1]*), but here the time provision eliminates all remedy for defects not discoverable before knitting and processing and *section 2-719* (subd. [2]) of the Uniform Commercial Code therefore applies.

Defendant's affidavits allege that sweaters manufactured from the yarn were rendered unmarketable because of latent shading defects not reasonably discoverable before knitting and processing of the yarn into sweaters. If these factual allegations are established at trial, the limited remedy established by paragraph 2 has failed its "essential purpose" and the buyer is, in effect, without remedy. The time limitation clause of the contract, therefore, insofar as it applies to defects not [*405] reasonably discoverable within the time limits established by the contract, must give way tothe general code rule that

a buyer has a reasonable time to notify the seller of breach of contract after he discovers or should have discovered the defect.(*Uniform Commercial Code, § 2-607*, *subd. [3],* par. [a] .) As indicated above, defendant's affidavits are sufficient to create a question of fact concerning whether notice was given within a reasonable time after the shading defect should have been discovered.

It can be argued that paragraph 2 of the contract, insofar as it bars all claims for enumerated defects not reasonably discoverable within the time period established, purports to exclude these defects from the coverage of the express warranty of [**689] merchantability. By this analysis, the contract not only limits remedies for its breach, but also purports to modify the warranty of merchantability. An attempt to both warrant and refuse to warrant goods creates an ambiguity which can only be resolved by making one term yield to the other (cf. Hawkland, Limitation of Warranty under the Uniform Commercial Code, 11 How. L. J. 28 [1965]). S*ection 2-316* (subd. [1]) of the Uniform Commercial Code provides that warranty language prevails over the disclaimer if the two cannot be reasonably reconciled.

Here,the contract expressly creates an unlimited express warranty of merchantability while in a separate clause purports to indirectlymodify the warranty without expressly mentioning the word merchantability. Under these circumstances, the language creating the unlimited express warranty must prevail over the time limitation insofar as the latter modifies the warranty. It follows that the express warranty of merchantability includes latent shading defects and defendant may claim for such defects not reasonably discoverable within the time limits established by the contract if plaintiff was notified of these defects within a reasonable time after they were or should have been discovered.

The result reached under the Uniform Commercial Code is, therefore, similar to the pre-code case law holding unreasonable contractual provisions expressly limiting the time for inspection, trial or testing of goods inapplicable or invalid with respect to latent defects. (*Randy Knitwear v. American Cyanamid Co.,* [*406] *7 N Y 2d 791*; *Jessel v. Lockwood Textile Corp., 276 App. Div. 378*; *Torrance v. Durisol, Inc., 20 Conn. Supp. 62*; *Kansas City Wholesale Grocery Co. V. Weber Packing Corp., supra*; *National Grocery Co. v. Pratt-Low Preserving Co., 170 Wash. 575*; cf. Ann., *52 ALR 2d 953-957* [1957] .) In fact, in *Randy Knitwear (supra)* this court held a contractual provision remarkably similar to the time limitation clause in the instant case to present a factual question for trial concerning the reasonableness of the time limitation.

In sum, there are factual issues for trial concerning whether the shading defects alleged were discoverable before knitting and processing, and, if not, whether notice of the defects was given within a reasonable time after the defects were or should have been discovered. If the shading defects were not reasonably discoverable before knitting and processing and notice was given within a reasonable time after the defects were or should have been discovered, a further factual issue of whether the sweaters were rendered unsaleable because of the defect is presented for trial.

The order of the Appellate Division should be reversed, with costs, and plaintiff's motion for summary judgment should be denied.

CONCUR BY: FULD I agree that there should be a reversal -- but on the sole ground that a substantial question of fact has been raised as to whether the clause limiting the time in which to make a claim is "manifestly unreasonable" (*Uniform Commercial Code, § 1-204*) as applied to the type

of defect here complained of. In this view, it is not necessary to consider the relevancy, if any, of other provisions of the Uniform Commercial Code (e. G., *§§ 2-302*, *2-316*, *2-719*), dealing with "unconscionable" contracts or clauses, exclusion of implied warranties or limitations on damages.

 ¿Cuál habría sido el resultado si la cláusula contracual que descarga la responsabilidad no hubiese fracasado en su propósito esencial?

 ROBERT COOLEY and RITA COOLEY, d/b/a COOLEY DAIRY; DONALD WEED; BEN KONISHI, D. V. M.; PAMELA ANN KONISHI; MARK KONISHI; and JEFFREY KONISHI, Petitioners and Cross-Respondents, v. BIG HORN HARVESTORE SYSTEMS, INC., a Colorado corporation, and A. O. SMITH HARVESTORE PRODUCTS, INC., a Delaware corporation, Respondents and Cross-Petitioners Supreme Court of Colorado 813 P.2d 736; 14 U. C. C. Rep. Serv. 2d 977 June 24, 1991

OPINION BY: KIRSHBAUM [*738] In *Cooley v. Big Horn Harvestore Systems, Inc., 767 P.2d 740 (Colo. App. 1988)*, the Colorado Court of Appeals affirmed in part and reversed in part a judgment entered on a jury verdict in favor of the petitioners and cross-respondents, plaintiffs at trial, and against respondents and cross-petitioners, defendants at trial. Having granted certiorari to consider the propriety of the Court of Appeals decision, [**2] we affirm in part, reverse in part, and remand the case with directions.

I

In July 1980, plaintiffs Robert Cooley and Rita Cooley executed two agreements with defendant Big Horn Harvestore Systems, Inc. (hereinafter Big Horn), in connection with their purchase of a Harvestore automated grain storage and distribution system for use in their dairy

operation. Big Horn is an independent distributor of Harvestore systems pursuant to agreements with defendant A. O. Smith Harvestore Products, Inc. (hereinafter AOSHPI), the manufacturer of the Harvestore system. [1] The Cooleys purchased the Harvestore [*739] system to improve the efficiency and productivity of their dairy. Plaintiffs Donald Weed; Ben Konishi, D. V. M.; Pamela Konishi; Mark Konishi; and Jeffrey Konishi are owners of cows placed in the Cooleys' dairy herd pursuant to an agreement obligating the Cooleys to care for and feed the cows in return for the right to retain the proceeds of sale of milk produced by those cows.

1 The transaction was structured as a lease-purchase. The Cooleys executed two purchase orders with Big Horn. Big Horn purchased the Harvestore equipment from AOSHPI and then nominally sold it to the financing lessor, Agristor Leasing. The Cooleys and Agristor later executed a lease with purchase option. Agristor, a named party defendant, is not a party to this appeal. Unless otherwise indicated, all references to the term "purchase agreement" in this opinion refer to the documents dated July 28, 1980, executed by Big Horn and by the Cooleys, each of which contains identical language respecting applicable warranties, exclusions, disclaimers and remedies.

[**3] The Harvestore system is designed to enhance the nutritional quality of cattle feed by means of an in-silo fermentation process. An essential feature of the system is its asserted ability to limit oxygen contact with the feed, thus facilitating long-term storage of grain. The Harvestore silo itself is composed of glass-fused-to-steel panels. The silo also features breather bags which expand or contract to equalize the pressure inside and outside the silo no matter how frequently outside temperature patterns might vary. Because the oxygen exchange takes place completely within the breather bags, damaging oxygen contact with the

feed is limited. During the two years prior to the sale, Big Horn provided the Cooleys with numerous promotional materials prepared by AOSHPI, including films, videotapes, pamphlets, and a book explaining the Harvestore system.

In early 1981, the Cooleys began to feed their herd with grain stored in the Harvestore system. Shortly thereafter, the health of the herd began to deteriorate and milk production substantially declined. The Cooleys informed Big Horn of these developments, and over the succeeding eighteen months Big Horn representatives made repairs to [**4] the structure, gave advice to the Cooleys concerning feed ratios, and assured the Cooleys that the system was functioning properly.

The health of the cows continued to deteriorate. Some died, and the Cooleys ultimately sold the remainder of the herd in 1983. The plaintiffs then filed this action against Big Horn and AOSHPI seeking damages based on claims of breach of implied warranties of merchantability and fitness for a particular purpose, breach of express warranties, breach of contract because of the failure of essential purpose of a limited remedy of suit for breach of warranty to repair or replace any defective part thereof (hereinafter referred to as the "failure of essential purpose" claim), negligence, deceit, and revocation of acceptance. [2]

2 The Konishis and Weed claimed damages against AOSHPI for the death of and injury to their cows pursuant to *section 4-2-318, 2 C. R. S.* (1973), which provides that warranties extend to any person "who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty."

[**5] Prior to the commencement of trial, the trial court entered summary judgment in favor of the defendants and against the plaintiffs on all claims of breach of implied

warranties and breach of express warranties. The claims alleging revocation of acceptance and deceit were also dismissed by the trial court. The jury was instructed solely on the claim against AOSHPI and Big Horn for failure of essential purpose of the warranty and on a claim against Big Horn for negligence in recommending improper nutritional programs.

The jury returned a verdict in favor of the plaintiffs and against Big Horn on the negligence claim in the total amount of $87,723.77. The jury also returned a verdict in favor of the plaintiffs and against both Big Horn and AOSHPI in the amount of $245,077.26 on the failure of essential purpose claim. In special verdict forms, the jury assigned seventy-five percent liability to Big Horn and twenty-five percent liability to AOSHPI on the failure of essential purpose claim. The jury also found Big Horn ninety percent negligent and the Cooleys ten percent negligent on the negligence claim. The trial court therefore reduced the amount of damages recoverable [*740] on the negligence [**6] claim to the sum of $78,951.40. The trial court also determined that the award of damages returned by the jury on the negligence claim duplicated a portion of the award of damages returned on the failure of essential purpose claim. The trial court ultimately entered judgment for the plaintiffs and against Big Horn and AOSHPI in the amount of $245,077.26.

On appeal, the Court of Appeals affirmed the negligence verdict against Big Horn but reversed the failure of essential purpose verdict against AOSHPI and Big Horn. The court held that the plaintiffs were barred from asserting their failure of essential purpose claim because AOSHPI was entitled to receive timely notice of the claim pursuant to *section 4-2-607(3)(a), 2 C. R. S.* (1973), of the Colorado Commercial Code (hereinafter the Code) and the plaintiffs did not give such notice to AOSHPI. The court reversed the

failure of essential purpose verdict against Big Horn on the ground that the purchase agreement limited Big Horn's responsibility to proper installation of the Harvestore system and the evidence did not establish any failure of installation. [3] Observing that it could not determine what factors were considered by the jury [**7] in its calculations of damages on the negligence claim, and determining that the plaintiffs were entitled to recover damages for economic loss on their negligence claim, the Court of Appeals remanded the case for a new trial on the issue of the amount of damages attributable to Big Horn's negligence.

3 This issue has not been appealed and thus is not before this court.

We granted the plaintiffs' petition for certiorari and the defendants' cross-petitions for certiorari to consider the following issues: whether *section 4-2-607(3)(a), 2 C. R. S.* (1973), requires notice to a remote manufacturer as a condition precedent to the initiation of a breach of contract claim based on the failure of essential purpose doctrine; whether evidence of specific defects in material or workmanship is essential to a failure of essential purpose claim; whether a contractual disclaimer of consequential damages is rendered invalid by the establishment of a failure of essential purpose claim; whether an exculpatory clause was sufficient to disclaim [**8] negligence in providing nutritional advice; whether the record contains sufficient evidence to establish the plaintiffs' claim of negligent nutritional advice; and whether the case should be remanded for retrial on the issue of damages. [4]

4 Because of the grounds upon which the Court of Appeals resolved the case, it did not consider the effect of the lack of evidence of defects in materials or workmanship or the effect of the consequential damages disclaimer.

II

The Court of Appeals held that a commercial buyer seeking recovery from a manufacturer for a breach of contract claim resulting in property damage alone must, pursuant to the provisions of *section 4-2-607(3)(a), 2 C. R. S.* (1973), give the manufacturer timely notice of the claimed breach as a condition precedent to any recovery. The plaintiffs contend that they complied with the notice provisions of the statute by giving timely notice of their failure of essential purpose claim to Big Horn. We agree with the plaintiffs' contention.

Section 4-2-607(3)(a), 2 C. R. S. [**9] (1973), provides that "where a tender has been accepted: (a) the buyer must within a reasonable time after he discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy ." This provision serves as a condition precedent to a buyer's right to recover for breach of contract under the statute. P*almer v. A. H. Robins Co., 684 P.2d 187, 206 (Colo. 1984)*. The question of what constitutes a reasonable time is dependent on the circumstances of each case. W*hite v. Mississippi Order Buyers, Inc., 648 P.2d 682 (Colo. App. 1982)*. The parties agree that the plaintiffs gave timely notice to Big Horn of their claim but did not directly notify AOSHPI of such claim.

The notice provision of *section 4-2-607(3)(a)* serves three primary purposes. It [*741] provides the seller with an opportunity to correct defects, gives the seller time to undertake negotiations and prepare for litigation, and protects the seller from the difficulties of attempting to defend stale claims. Palmer v. A. H. Robins Co.; *Prutch v. Ford Motor Co., 618 P.2d 657 (Colo. 1980)*. See generally White and Summers, Uniform Commercial [**10] Code § 11-10 at 481 (3d ed. 1980). The Code defines 'seller' as "a

person who sells or contracts to sell goods." *§ 4-2-103(1)(d), 2 C. R. S.* (1973). The official comment to the Code states in pertinent part that "the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." *§ 4-2-607, 2 C. R. S.* comment 4 (1973).

In *Palmer v. A. H. Robins Co., 684 P.2d 187*, this court construed the statute's notice provision in the context of a product liability action. In Palmer, a consumer injured through use of a defective intrauterine device sought recovery for damages against the manufacturer of the product, A. H. Robins Co. Although the plaintiff, prior to initiating litigation, notified the immediate seller, her doctor, of the fact that she allegedly sustained injuries as a result of defects in the product, she did not so notify Robins. Robins argued that the plaintiff's claims against it should be dismissed for failure to comply with *section 4-2-607(3)(a)*.

We rejected that argument. We construed the term "seller" as used in *section 4-2-607(3)(a)* to "refer only to the immediate seller who tendered the [**11] goods to the buyer." *Palmer at 206*. We explained that "under this construction, as long as the buyer has given notice of the defect to his or her immediate seller, no further notification to those distributors beyond the immediate seller is required." Id. We also observed that a relaxed notification requirement was especially appropriate in Palmer because the plaintiff was a lay consumer who "would not ordinarily know of the notice requirement." *Id. at 207 n.3*.

The Court of Appeals concluded that the plaintiffs here were commercial purchasers who suffered only economic loss, as distinguished from the lay consumer who sought relief in Palmer. Assuming, arguendo, that the plaintiffs here were commercial purchasers, [5] it must be observed

that our decision in Palmer required construction of a statute adopted by the General Assembly for application in all commercial contexts. The language of *section 4-2-607(3)(a)* is unambiguous: it requires a buyer to give notice of a defective product only to the "seller." See 2 Anderson, Uniform Commercial Code § 2.607:24. The General Assembly has not elected to require advance notice to a manufacturer [**12] of litigation for breach of the manufacturer's warranty of a product, and we find no compelling reason to create such a condition precedent judicially in the context of commercial litigation. The filing of a lawsuit is sufficient notice to encourage settlement of claims, and applicable statutes of limitation protect manufacturers from the difficulties of defending against stale claims. See Palmer; *Owens v. Glendale Optical, 590 F. Supp. 32, 36 (S. D. Ill. 1984)*; *Shooshanian v. Wagner 672 P.2d 455 (Alaska 1983)*; *Mattos, Inc. v. Hash, 279 Md. 371, 368 A.2d 993, 996 (Md. 1977)*.

5 The trial court made no factual determination regarding the status of the plaintiffs. We are not prepared to conclude on the basis of the record that with regard to their purchase of the Harvestore system the Cooleys were sophisticated commercial buyers or that the other plaintiffs were sophisticated commercial users of the system.

Several courts considering whether a purchaser [**13] seeking recovery under a manufacturer's warranty must give notice to the manufacturer as well as to the seller of the product under statutory provisions similar to *section 4-2-607(3)(a)* have reached a similar result. See, e. G., *Firestone Tire and Rubber Co. v. Cannon, 53 Md. App. 106, 452 A.2d 192 (1982)*, aff'd, *295 Md. 528, 456 A.2d 930 (1983)*. Some courts have reached contrary results. See *Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976)*; *Branden v. Gerbie, 62 Ill. App. 3d 138, 379 N. E.2d 7, 19 Ill. Dec. 492 (1978)*; *Western Equip. Co. v. Sheridan*

Iron Works, Inc., 605 P.2d 806 (Wyo. 1980). Many such courts have recognized that in [*742] most nationwide product distribution systems, the seller/representative dealer may be presumed to actually inform the manufacturer of any major product defects. G*oldstein v. G. D. Searle & Co., 62 Ill. App. 3d 344, 347-48, 378 N. E.2d 1083, 1086-87, 19 Ill. Dec. 208 (1978)*; see also Prince, Overprotecting the Consumer? § 2-607(3)(a). Notice of Breach in Non-Privity Contexts, *66 N. C. L. Rev. 107, 151 (1987)*. [**14] Furthermore, as one commentator has noted, "it is perhaps more reasonable to treat notice to an immediate seller as sufficient against a remote seller than vice versa, in view of the immediacy of relation that exists in the one instance but not in the other." Phillips, Notice of Breach in Sales and Strict Tort Liability Law: Should There be a Difference?, 47 Ind. L. J. 457, 473 (1971); see also *Snell v. G. D. Searle & Co., 595 F. Supp. 654, 656 (N. D. Ala. 1984)* (applying Alabama law); *Firestone Tire and Rubber Co. v. Cannon, 53 Md. App. 106, 452 A.2d 192 (1982)*, aff'd, *295 Md. 528, 456 A.2d 930 (1983)*. This presumption forms the basis of the principle that a remote manufacturer may raise as its own defense the buyer's failure to give timely notice to the immediate seller. See, e. G., *Snell v. G. D. Searle & Co., 595 F. Supp. 654, 656 (N. D. Ala. 1984)* (applying Alabama law); *Owens v. Glendale Optical Co., 590 F. Supp. 32, 36 (S. D. Ill. 1984)* (applying Illinois law); *Goldstein v. G. D. Searle & Co., 62 Ill. App. 3d 344, 347-48, 378 N. E.2d 1083, 1086-87, 19 Ill. Dec. 208 (1978)*. [**15] In view of the unambiguous language of *section 4-2-607(3)(a)*, we conclude that a purchaser injured by a product is not required to give notice of such injury to a remote manufacturer prior to initiating litigation against such manufacturer.

AOSHPI urges us to adopt the rationale expressed in *Carson v. Chevron Chemical Co., 6 Kan. App. 2d 776, 635*

P.2d 1248 (1981). In that case three farmers brought suit against a herbicide manufacturer and dealer to recover damages for breach of warranties. Observing that in ordinary buyer-seller relationships the Kansas Commercial Code equivalent of *section 4-2-607(3)(a)* requires that notice of an alleged breach need only be given to the buyer's immediate seller, *Carson at 1256*, the Kansas Court of Appeals concluded that the plaintiffs were required to notify the manufacturer under the particular circumstances of that case. The court explained its holding as follows:

> In those instances, however, where the buyer and the other parties to the manufacture, distribution and sale of the product are closely related, or where the other parties actively participate in the consummation of the actual sale of the product, [**16] the reasons for the exclusion of such other parties from the *K. S. A. 84-2-607(3)(a)* notice provision cease to exist. Id.
>
> In our view, the rationale of Carson supports the result we reach. The Kansas Court of Appeals emphasized that under the circumstances disclosed by the evidence the defendant was in effect a direct seller to the plaintiffs. Here, AOSHPI, the manufacturer, was isolated and insulated from the plaintiffs. The contract specified that Big Horn was the seller. AOSHPI, if a seller, was a seller to Big Horn, not to the plaintiffs. As far as the plaintiffs were concerned, the only direct relationship established by the contract and by the conduct of the parties was their relationship with Big Horn. Under these circumstances, to require the plaintiffs to give statutory notice to AOSHPI when not specifically required to do so by statute would unreasonably promote commercial bad faith and inequitably deprive good faith consumers of a remedy,

contrary to the purpose of the statute. We reject such a construction.

III

AOSHPI contends that to recover on their failure of essential purpose claim, the plaintiffs were required to establish the existence of some specific defect [**17] in materials or workmanship, which they failed to do. AOSHPI alternatively asserts that the purchase contract itself prohibits recovery of consequential damages by the plaintiffs. [*743] We disagree with these arguments. [6]

6 As previously indicated, the Court of Appeals did not address these questions. See n.4, infra.

A

Section 4-2-719, 2 C. R. S. (1973), contains the following pertinent provisions respecting the abilities of contracting parties to limit the remedies which are available to a purchaser in the event a seller breaches an agreement:

Contractual modification or limitation of remedy. (1) Subject to the provisions of subsections (2) and (3) of this section and of *section 4-2-718* on liquidation and limitation of damages:

(a) The agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair [**18] and replacement of nonconforming goods or parts; and

(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case, it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.

§ 4-2-719, 2 C. R. S. (1973). These provisions allow great flexibility in negotiations for the provision of goods. *Section 4-2-719(2)*, however, reflects a legislative determination that in limited circumstances enforcement of an agreement to restrict a buyer's potential remedies would produce unconscionable results. See generally, Eddy, On the Essential Purpose of Limited Remedies: The Metaphysics of UCC Section 2-719(2), 65 Calif. L. Rev. 28 (1977).

The plaintiffs' failure of essential purpose claim is premised on the language of *section 4-2-719(2)*. [7] The plaintiffs acknowledge that the purchase agreement contains an express warranty of repair or replacement and a disclaimer clause limiting their remedy to a suit for breach of that warranty. [8] They argued at trial that because this remedy failed of its essential [*744] purpose, the language [**19] of the agreement purporting to limit their available remedies was not enforceable. The failure of essential purpose claim was tried on this theory, and the jury instructions stated that to return a verdict for the plaintiffs against AOSHPI, the jury must first determine that the plaintiffs had established the necessary factual predicate for application of the failure of essential purpose doctrine. See *Balistreri Greenhouses v. Roper Corp., 767 P.2d 736 (Colo. App. 1988)*; *Leprino v. Intermountain Brick Co., 759 P.2d 835 (Colo. App. 1988)*.

7 To establish their claim of failure of essential purpose of the remedy of suit for breach of a warranty to repair or replace any defective product or parts thereof, the plaintiffs were required to establish that the product was defective in material or workmanship, that the defendants had an

opportunity to repair or replace the defects, that they were unable to do so, that their inability to effectively repair or replace substantially affected the value of the product and that the impairment of the value damaged the plaintiffs. See C. Smith & B. Clark, The Law of Product Warranties, 8.04 [2] (1984). [**20]

8 The purchase agreement contains the following pertinent provisions:

WARRANTY OF MANUFACTURER AND SELLER

If within the time limits specified below, any product sold under this purchase order, or any part thereof, shall prove to be defective in material or workmanship upon examination by the Manufacturer, the Manufacturer will supply an identical or substantially similar replacement part f. O. B. the Manufacturer's factory, or the Manufacturer, at its option, will repair or allow credit for such part. .

SECOND DISCLAIMER

NO OTHER WARRANTY, EITHER EXPRESS OR IMPLIED AND INCLUDING A WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE HAS BEEN OR WILL BE MADE BY OR IN BEHALF OF THE MANUFACTURER OR THE SELLER OR BY OPERATION OF LAW WITH RESPECT TO THE EQUIPMENT AND ACCESSORIES OR THEIR INSTALLATION, USE, OPERATION, REPLACEMENT OR REPAIR. NEITHER THE MANUFACTURER NOR THE SELLER SHALL BE LIABLE BY VIRTUE OF THIS WARRANTY, OR OTHERWISE, FOR ANY SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE (INCLUDING BUT NOT LIMITED TO THOSE RESULTING FROM THE CONDITION OR QUALITY OF ANY CROP OR MATERIAL STORED IN THE STRUCTURE) RESULTING FROM THE USE OR LOSS OF THE USE

OF EQUIPMENT AND ACCESSORIES. THE MANUFACTURER MAKES NO WARRANTY WITH RESPECT TO THE ERECTION OR INSTALLATION OF THE EQUIPMENT, ACCESSORIES, OR RELATED EQUIPMENT BY THE HARVESTORE DEALER, WHO IS AN INDEPENDENT CONTRACTOR, OR ANY OTHER INDEPENDENT CONTRACTOR. IRRESPECTIVE OF ANY STATUTE, THE BUYER RECOGNIZES THAT THE EXPRESS WARRANTY SET FORTH ABOVE, IS THE EXCLUSIVE REMEDY TO WHICH HE IS ENTITLED AND HE WAIVES ALL OTHER REMEDIES, STATUTORY OR OTHERWISE.

[**21] AOSHPI initially asserts that there was insufficient evidence for the jury to find a failure of essential purpose because there was no evidence of any specific defect in material or workmanship [9] and because AOSHPI was not given an opportunity to repair or replace such defect.

9 The record contains evidence of defects in operational components of the Harvestore system, which defects were repaired by Big Horn, as well as evidence of a dent in the system's structure which was not repaired.

The policy behind the statutory provision establishing the failure of essential purpose doctrine is discussed in the official comments to the Code, as follows:

It is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations [**22] or duties outlined in the contract. Under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive

either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

§ 4-2-719, 2 C. R. S. comment 1 (1973). The comment makes clear that determination of the applicability of the failure of essential purpose doctrine requires a two-tiered evaluation: first, identification of the essential purpose of the limited remedy, and second, whether the remedy in fact failed to accomplish such purpose. M*ilgard Tempering, Inc. v. Selas Corp., 902 F.2d 703 (9th Cir. 1990)*; *Chatlos Systems, Inc. v. National Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980)*. From a buyer's standpoint, a promise to repair or replace defective parts supplies assurance that within a reasonable period of time defective goods will be put into the condition they were warranted to be in at the time they were purchased. [10] Milgard; Chatlos; *Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978)*; *Beal v. General Motors Corp., 354 F. Supp. 423 (D. Del. 1973)*. [**23] See C. Smith & B. Clark, The Law of Product Warranties, 8.04 [2] at 8-52 (1984). The plaintiffs introduced sufficient evidence to establish that the Harvestore system was never functional, thus permitting the jury to conclude that the limited remedy of a suit for breach of the warranty to repair or replace failed of its essential purpose.

10 From the seller's standpoint, the purpose of such warranty is to foreclose efforts by the buyer to return goods or to recover damages as a remedy for defective goods.

AOSHPI suggests that its warranty protecting against a defect in material and workmanship is limited solely to protection against flaws resulting from the manufacturing process and did not encompass general product design defects. From this premise, AOSHPI concludes that lack of evidence of some specific defect in some specific manufactured part is fatal to the failure of essential purpose

claim. This view of the transaction is not supported by the evidence.

The product advertised, purchased, and warranted [**24] was a functioning system for storage and distribution of grain. The Cooleys purchased this system. They did not purchase a combination of component parts. See *Polycon Industries, Inc. v. Hercules Inc., 471 F. Supp. 1316, 1323 (E. D. Wis. 1979)*. But see *Lombard Corp. v. Quality Aluminum Prods. Co., 261 F.2d 336 (6th Cir. 1958)*; *Bruffey Contracting Co. v. Burroughs Corp., 522 F. Supp. 769 (D. Md. 1981)*, aff'd *681 F.2d 812 (4th Cir. 1982)*. A remedy fails of its essential purpose [*745] if it operates to deprive a party of the substantial value of the contract. *§ 4-2-719(2), 2 C. R. S.* comment 1 (1973). Fair application of warranty principles require a determination of what the seller has agreed to sell and what the buyer has agreed to pay for. See *§ 4-2-313, 2 C. R. S.* comment 4 (1973). See also *Computerized Radiological Services v. Syntex Corp., 595 F. Supp. 1495 (E. D. N. Y. 1984)* aff'd in part, rev'd in part on other grounds, *786 F.2d 72 (2d Cir. 1986)*. The Cooleys' purchase had value only to the extent the Harvestore system functioned, as advertised, as an entire unit to increase [**25] the productivity of their dairy herd. Additionally, AOSHPI's warranty promised repair or replacement of any defective product or part thereof. The evidence established that the product was defective and was not repaired or replaced with a non-defective product. In these circumstances, the Cooleys were entitled to argue to the jury that the limited remedy of repair or replacement failed to guarantee them the value of the system they purchased. A*gristor Credit Corp. v. Schmidlin, 601 F. Supp. 1307 (D. Or. 1985)*. The record clearly supports the jury's conclusion that the system as a whole was defective.

AOSHPI's argument that it was not given an opportunity to repair or replace the Harvestore system is

not persuasive. The purchase agreement does not specify the means by which the Cooleys were to provide AOSHPI with the opportunity to repair or replace defects. The agreement does provide that "no product or part shall be returned to the Seller without written authorization and shipping instructions first having been obtained from the Seller." This provision in essence directs the Cooleys to address any questions concerning the Harvestore system to Big Horn. The evidence [**26] fully supports the conclusion that, as the Cooleys alleged, the agreement was intended to assure the Cooleys that Big Horn would assume any role assigned by the purchase agreements to AOSHPI to repair defects in the system; to determine what parts, if any, to replace; and to inform the Cooleys how the provisions of the remedy to repair or replace were to be effectuated.

B

AOSHPI also argues that the purchase agreement prohibits the plaintiffs from recovering any consequential damages on their failure of essential purpose claim. We disagree.

The jury returned a verdict in the amount of $245,077.26, against AOSHPI and Big Horn on the plaintiffs' failure of essential purpose claim, which sum included consequential damages for injuries to the plaintiffs' herds and for loss of milk profits. The verdict form did not require the jury to itemize its damage award. However, the evidence with regard to damages was presented in three distinct categories, as follows: the value of the Harvestore system ($88,636.00), damage to the dairy herds ($87,723.77), and loss of milk profits ($68,717.49).

The purchase agreement contains the following pertinent provision:

NEITHER THE MANUFACTURER NOR [**27] THE SELLER SHALL BE LIABLE BY VIRTUE OF THIS WARRANTY, OR OTHERWISE, FOR ANY SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE (INCLUDING BUT NOT LIMITED TO THOSE RESULTING FROM THE CONDITION OR QUALITY OF ANY CROP OR MATERIAL STORED IN THE STRUCTURE) RESULTING FROM THE USE OR LOSS OF THE USE OF EQUIPMENT AND ACCESSORIES.

The trial court concluded that this provision did not bar the plaintiff from recovering consequential damages in view of the language of *section 4-2-719(2), 2 C. R. S.* (1973). AOSHPI argues that *section 4-2-719(3), 2 C. R. S.* (1973), which permits buyers to waive their rights to recover consequential damages, controls. We agree with the trial court.

We have determined that the evidence supports the jury's verdict that the limited remedy of replacement or repair of defective parts failed of its essential purpose. *Section 4-2-719(2)* states that when a seller [*746] is found liable to a buyer on the basis of the failure of essential purpose doctrine, "remedy may be had as provided in this title." *Section 4-2-714(3)* of the Code expressly provides that a purchaser may recover consequential damages resulting from a seller's breach of contract. Thus the Code clearly establishes consequential [**28] damages as a remedy available to buyers of goods.

Section 4-2-719(3) of the Code states as follows:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but limitation of damages where the loss is commercial is not.

§ 4-2-719(3), 2 C. R. S. (1973). AOSHPI argues that *section 4-2-719(3)* establishes the right of contracting parties to limit the general availability of consequential damages established by *section 4-2-714* and that the Cooleys did so limit their rights here. [11]

11 *Section 4-2-714(3), 2 C. R. S.* (1973), provides that where there has been a breach in regard to accepted goods "in a proper case, any incidental and consequential damages under *section 4-2-715* may also be recovered."

Courts that have considered the relationship of these two provisions as they appear in other state commercial codes have reached divergent results. Many courts have [**29] concluded that the broad sweep of the literal language of provisions identical to *section 4-2-719(2)* represents a legislative decision to permit a buyer who suffers loss because of the failure of essential purpose of a limited remedy of repair or replacement to recover all damages resulting from such failure. See, e. G., *Milgard, Tempering Inc. v. Selas Corp., 902 F.2d 703 (9th Cir. 1990)* (applying Washington law); *Fiorito Bros. v. Fruehauf Corp., 747 F.2d 1309 (9th Cir. 1984)*; *Soo Line R. R. v. Fruehauf Corp., 547 F.2d 1365 (8th Cir. 1977)*; *Beal v. General Motors Corp., 354 F. Supp. 423 (D. Del. 1973)*; *Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39*, (N. D. Ill. 1970); *Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978)*. Indeed, our own Court of Appeals has so construed *section 4-2-719(2)* of the Code. J. *A. Balistreri Greenhouses v. Roper Corp., 767 P.2d 736 (Colo. App. 1988)*; *Leprino v. Intermountain Brick Co., 759 P.2d 835, 837 (Colo. App. 1988)*; cf. W*enner Petroleum Corp. v. Mitsui & Co. (U. S. A.), Inc., 748 P.2d 356 (Colo. App. 1987)*. [**30]

It has been observed that the decision of contracting parties to limit potential remedies to the single remedy to

repair or replace defective parts is based on a number of assumptions which, if unfounded, fundamentally change the parties' intended allocation of risk. C*lark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978)*. These include the assumptions that the seller will diligently and in good faith attempt to repair, that the seller will be able to effect repairs within a reasonable time period, and that any consequential loss sustained during the period of repair will be minimal. W*aters v. Massey-Ferguson, Inc., 775 F.2d 587 (4th Cir. 1985)*; *S. M. Wilson & Co. v. Smith International, 587 F.2d 1363 (9th Cir. 1978)*; *AES Technology Sys., Inc. v. Coherent Radiation, 583 F.2d 933 (7th Cir. 1978)*. See generally, Eddy, On the Essential Purpose of Limited Remedies: The Metaphysics of UCC Section 2-719(2), 65 Calif. L. Rev. 28 (1977). Under the rationale of these cases, a loss that is itself caused by the failure of the remedy of suit for breach of a warranty [**31] to repair or replace defective parts could not be within the contemplation of the parties, and therefore should not be prohibited when such bargained-for remedy fails of its essential purpose. A buyer reasonably expecting to avoid significant consequential loss through the effective use of such remedy should not be required to absorb such loss when the remedy fails of its essential purpose. See *Waters v. Massey-Ferguson, Inc., 775 F.2d 587, 591-92 (4th Cir. 1985)*; *Kearney & Trecker v. Master Engraving, 107 N. J. 584, 527 A.2d 429 (1987)*.

A few courts have determined that the adequacy of the buyer's remedy in the absence [*747] of the ability to recover consequential damages should govern the applicability of the two provisions. K*elynack v. Yamaha Motor Corp., U. S. A., 152 Mich. App. 105, 394 N. W.2d 17 (1986)* (where the bulk of the damages were consequential, remedy without consequential damages was no remedy at all); see also *Earl M. Jorgensen Co. v. Mark Constr. Inc.,*

56 Haw. 466, 540 P.2d 978 (1975); *Oldham's Farm Sausage Co. v. Salco, Inc., 633 S. W.2d 177 (Mo. App. 1982)*. [**32] These courts give great weight to language in their statutes that mirrors the language of *section 4-2-719* of the Code. This approach requires determination on a case-by-case basis of whether a particular limitation is conscionable under all applicable circumstances.

Finally, some courts, emphasizing language of commercial code provisions adopted in their jurisdictions that parallel the language of *section 4-2-719(3)*, have concluded that the two sections constitute distinct clauses applicable to different circumstances. Under this view, *section 4-2-719(3)* is a particular provision modifying the availability of consequential damages established generally by *section 4-2-714(3)*. See *Kaplan v. RCA Corp., 783 F.2d 463, 467 (4th Cir. 1986)*; *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable and Cold Storage Co., 709 F.2d 427, 434-35 (6th Cir. 1983)*; *Chatlos Systems, Inc. v. National Cash Register Corp., 635 F.2d 1081, 1086 (3d Cir. 1980)*; *S. M. Wilson & Co. v. Smith Int'l, Inc., 587 F.2d 1363, 1375 (9th Cir. 1978)*; *Johnson v. John Deere Co., 306 N. W.2d 231, 238 (S. D. 1981)*; *Envirotech Corp. v. Halco Eng'r, Inc., 234 Va. 583, 364 S. E.2d 215, 220 (1988)*. [**33] See also J. White & R. Summers, Uniform Commercial Code § 12-10 (3d ed. 1980); B. Clark & C. Smith, The Law of Product Warranties § 8.04 [2] [c] (1984 & 1990 Supp.). This approach suggests that the failure of essential purposes doctrine articulated in *section 4-2-719(2)* requires application of a substantial value of the bargain standard, while the question of the viability of a contractual waiver of the availability of the remedy of consequential damages contained in *section 4-2-719(3)* is measured by a conscionability standard. Thus, a remedy may fail in its essential purpose because it deprives a party of the substantial value of a bargained-for benefit, but a clearly

expressed exclusion of consequential damages as a remedy available to such party in that circumstance is enforceable if not unconscionable.

In construing statutory provisions, we must give effect to the language and intent of the General Assembly and seek to harmonize apparently contrasting provisions. D*anielson v. Castle Meadows, Inc., 791 P.2d 1106 (Colo. 1990)*; *City of Ouray v. Olin, 761 P.2d 784 (Colo. 1988)*. The Code itself provides some guidance in resolving the [**34] issue here presented. It is designed to enhance freedom of contract and innovation in commercial practices while establishing good faith, diligence and reasonableness as limits upon such freedom of contract. *§ 4-1-102, 2 C. R. S.* (1973). It also provides that the remedies provided thereunder are to be liberally administered to further those ends. *§ 4-1-106, 2 C. R. S.* (1973). In view of these guidelines, we find persuasive those authorities which suggest that the two subsections in question must be construed together to effectuate their purposes.

In adopting *section 4-2-719(2)*, the General Assembly recognized that while contracting parties may generally limit the remedies available in the event of foreseeable and bargained-for contingencies, when a limited remedy fails of its essential purpose any contractual limitation directly related to the assumption that the limited remedy constituted a sufficient remedy must also fail. In effect, this provision protects contracting parties from unforeseen and unbargained-for contingencies. In adopting *section 4-2-719(3)*, the General Assembly recognized that in most situations contracting parties may agree to limit or exclude the availability of [**35] the remedy of consequential damages, subject to a conscionability standard. Neither section grants absolute rights to contracting parties.

It is neither possible nor desirable to suggest absolute guidelines for the reconciliation [*748] of these two provisions in all cases. In this case, however, the applicability of the statutory scheme is not difficult. The purchase agreement purports to exclude all warranties other than the promise to repair or replace defective parts while simultaneously excluding all remedies for the recovery of economic loss sustained as a breach of that limited warranty. The language excluding consequential damages and the language limiting remedies appears in the same sentence of the purchase agreement. That sentence commences with the following phrase: "Neither the manufacturer nor the seller shall be liable by virtue of this warranty, or otherwise, for any special or consequential loss or damage ."

In construing the terms of a contract, courts must give full effect to the intent of the parties as expressed by the language of the agreement. I*n re May v. United States, 756 P.2d 362 (Colo. 1988)*. The above-quoted sentence of the purchase agreement [**36] refers to the exclusion of the remedy of consequential damages resulting from liability "by virtue of this warranty, or otherwise." The remedy of suit for breach of warranty having failed in its essential purpose, the plaintiffs' remedy of consequential damages here does not arise by virtue of that warranty. The phrase "or otherwise" does not, in our view, evidence an intent to render consequential damages unavailable when the only remedy provided by the purchase agreement fails of its essential purpose and therefore is no remedy at all.

While in other circumstances parties may, pursuant to *section 4-2-719(3)*, by clear and unambiguous language, unequivocally state in a separate provision that the remedy of consequential damages shall not be available in the event the remedy of a suit for breach of a limited warranty to repair or replace fails of its essential purpose, no such

intent may be gleaned from the language of this purchase agreement. To the extent the parties here agreed to limit the availability of consequential damages as a remedy, they did so on the assumption that the limited warranty to repair or replace would suffice to protect the plaintiffs from substantial consequential [**37] damage losses. The total inadequacy of that warranty was neither foreseen nor bargained for. See *Fidelity and Deposit Co. v. Krebs Engineers, 859 F.2d 501 (7th Cir. 1988)*; *Waters v. Massey-Ferguson, Inc., 775 F.2d 587 (4th Cir. 1985)*.

When a purchase agreement establishing that the only warranty provided is a warranty to repair or replace defective parts contains no separate provision unambiguously recording the intent of parties to prohibit a buyer's recovery of consequential damages even when such sole remedy fails of its essential purpose, the buyer is entitled by virtue of *section 4-2-719(2)* to the statutory remedy of consequential damages notwithstanding a general contractual disclaimer to the contrary. The purchase agreement here contains no such provision; thus the trial court properly concluded that the plaintiffs were not foreclosed from recovering consequential damages.

IV

Big Horn contends that the Court of Appeals erred in affirming the judgment entered against it on the plaintiffs' negligence claim. Big Horn argues that the purchase agreement contains language that bars the filing of any negligence claim and, alternatively, that [**38] the evidence adduced at trial does not support the jury's verdict with respect to that claim. We reject those arguments.

A

The purchase agreement contains the following sentence:

IRRESPECTIVE OF ANY STATUTE, THE BUYER RECOGNIZES THAT THE EXPRESS WARRANTY SET FORTH ABOVE, IS THE EXCLUSIVE REMEDY TO WHICH HE IS ENTITLED AND HE WAIVES ALL OTHER REMEDIES, STATUTORY OR OTHERWISE.

Insofar as it is applicable to Big Horn, the warranty referred to states as follows: "The Seller warrants only that the foundation will be properly installed and that the [*749] product will be erected in strict conformance with the Manufacturer's specifications." Big Horn argues that this sentence of the purchase agreement bars the plaintiffs from asserting any right to recover damages allegedly resulting from negligent conduct by Big Horn. We do not agree.

The contract provision in question resembles a forfeiture clause. Such clauses are not favored in Colorado. G*rooms v. Rice, 163 Colo. 234, 429 P.2d 298 (1967)*. To be enforceable, contractual provisions seeking to effect a waiver or forfeiture of a party's rights must be couched in clear, unambiguous language. M*ontgomery Ward & Co. v. Reich, 131 Colo. 407, 282 P.2d 1091 (1955)*. [**39]

The sentence in question is at best ambiguous and imprecise. Initially, it must be noted that the statement that the "express warranty" is the buyers' "exclusive remedy" constitutes a non sequitur. While damages for breach of warranty is a remedy, a warranty is a guarantee, not a remedy.

More importantly, as the Court of Appeals observed, the limiting clause, in context, merely constitutes a limitation on the buyers' choice of remedies for the seller's failure to properly assemble the Harvestore system. The sentence does not contain a limitation on the buyers' right to seek remedies for negligent conduct distinct from conduct necessary to install a foundation and erect the superstructure. The plaintiffs' negligence claim against Big

Horn is based on an alleged breach of a separate duty of care arising from Big Horn's conduct in providing advice and recommendations concerning adoption, modification or rejection of nutritional programs.

Big Horn argues alternatively that its provision of nutritional advice to the plaintiffs was a service contemplated by the purchase agreement and therefore subject to the exclusivity language of the contract. The purchase agreement contradicts such [**40] argument. It provides expressly that the document constitutes "the entire and only agreement between the Seller and Buyer; and no oral statements or agreements not confirmed herein, or by subsequent written agreements, shall be binding on either the Seller or Buyer." Big Horn's responsibilities with regard to the communication of information concerning nutritional programs were not governed by the purchase agreement. We therefore agree with the Court of Appeals that the purchase agreement does not bar the plaintiffs' negligence claim against Big Horn.

B

Big Horn also contends that, contrary to the conclusion of the Court of Appeals, the evidence adduced at trial failed to establish any negligent conduct on its part and failed to establish the applicable standard of care by which to measure its conduct. We again disagree.

Factual findings implicit in a jury verdict will be upheld on appeal if supported by the evidence considered in the light most favorable to the prevailing party. D*enver Dry Goods Co. v. Gettman, 167 Colo. 539, 448 P.2d 954 (1969)*. When viewed in the light most favorable to the plaintiffs, the evidence establishes that Big Horn agents [**41] repeatedly gave the plaintiffs advice concerning appropriate ratios of nutrients and feeds, that Big Horn was not qualified to give such advice, that the advice was

incorrect, and that the plaintiffs sustained damages as a result of such incorrect advice. Expert witnesses testified on behalf of Big Horn as well as on behalf of the plaintiffs; their testimony, together with the trial court's instructions, was sufficient to inform the jury of the standard of care applicable to persons purporting to be qualified to give advice concerning nutritional feeding programs for dairy herds. See *Melville v. Southward, 791 P.2d 383 (Colo. 1990)*. We find ample evidentiary support in the record for the jury's conclusion that Big Horn acted negligently in breach of a duty of care it owed to the plaintiffs.

V

The plaintiffs contend that the Court of Appeals erred in remanding the case for a new trial on the issue of the amount of [*750] damages attributable to Big Horn's negligence. Big Horn argues that the Court of Appeals erred in failing to order a new trial on the issue of liability for negligence as well as on the issue of damages. We conclude that a new trial is not warranted.

The [**42] Court of Appeals ordered a new trial on the question of the appropriate amount of damages to be assessed against Big Horn in large part because it reversed the judgment entered for the plaintiffs on their failure of essential purpose claim. We have concluded that the judgment entered on the claim against AOSHPI must be reinstated. The trial court expressly concluded that, in view of the evidence, the instructions, and the parties' theories of the case, the special jury verdict establishing the sum of $245,077.26 as the total damages to which the plaintiffs were entitled on their failure of essential purpose claim included all damages separately assessed against Big Horn on the plaintiffs' negligence claim. This ruling is supported by the record. We therefore agree with the plaintiffs'

argument that no retrial with respect to questions of the jury's award of damages is necessary.

Big Horn asserts that it should have been granted a new trial on the question of its liability for negligence because the jury improperly considered Big Horn's alleged liability on the failure of essential purpose claim. Big Horn contends that in view of the Court of Appeals' conclusion that Big Horn was [**43] not liable to the plaintiffs on the failure of essential purpose claim, the trial court must be deemed to have erred in failing to grant Big Horn's motion for directed verdict on that issue. Accordingly, Big Horn argues, it is entitled to a new trial during which questions of liability based on theories of negligence are not confused with questions of liability based on contract principles.

We do not find this argument persuasive. The jury was properly instructed on the elements of the plaintiffs' separate and distinct claim of negligence by Big Horn, and we have determined that there was sufficient evidence to support the jury's verdict against Big Horn on that claim. Separate special verdict forms permitting the jury to enter a verdict against the plaintiffs on their failure of essential purpose claim against AOSHPI and Big Horn while simultaneously entering a verdict in favor of the plaintiffs on their negligence claim against Big Horn further emphasized the distinct bases of the plaintiffs' two claims for relief. As we view the record, Big Horn has not established that the jury's consideration of the plaintiffs' failure of essential purpose claim against it and AOSHPI created juror [**44] confusion with reference to Big Horn's liability on the negligence claim. See *Moseley v. Lemirato, 149 Colo. 440, 370 P.2d 450 (1962)*.

VI

For the foregoing reasons, we reverse those portions of the judgment of the Court of Appeals vacating the trial

court judgment entered in favor of the plaintiffs on their failure of essential purpose claim against AOSHPI. The judgment of the Court of Appeals is otherwise affirmed, and the case is remanded to that court with directions to reinstate the judgment entered by the trial court in favor of the plaintiffs and against AOSHPI on the failure of essential purpose claim and in favor of the plaintiffs and against Big Horn on the negligence claim.

¿ Qué factores incidieron para que el tribunal determine que el descargo de responsabilidad era *unconscionable*?

L. EL CUMPLIMIENTO DEL CONTRATO COMERCIAL

EL DECLIVE DEL REQUISITO TAXATIVO DE *PERFECT TENDER* EN EL NEGOCIO COMERCIAL

ERNEST RAMIREZ AND ADELE RAMIREZ, plaintiffs-respondents, v. AUTOSPORT, A CORPORATION OF THE STATE OF NEW JERSEY, defendant-appellant SUPREME COURT OF NEW JERSEY 440 A.2d 1345; 33 U. C. C. Rep. Serv. 134 December 14, 1981, Argued February 4, 1982, Decided

OPINION BY: POLLOCK [*281] [**1347] This case raises several issues under the Uniform Commercial Code ("the Code" and "UCC") concerning whether a buyer may reject a tender of goods with minor defects and whether a seller may cure the defects. We consider also the remedies available to the buyer, including cancellation of the contract. The main issue is whether plaintiffs, Mr. and Mrs. Ramirez, could reject the tender by defendant, Autosport, of a camper van with minor defects and cancel the contract for the purchase of the van.

The trial court ruled that Mr. and Mrs. Ramirez rightfully rejected the van and awarded them the fair market value of their trade-in van. The Appellate Division

affirmed in a brief *per curiam* decision which, like the trial court opinion, was unreported. We affirm the judgment of the Appellate Division.

I

Following a mobile home show at the Meadowlands Sports Complex, Mr. and Mrs. Ramirez visited Autosport's showroom in Somerville. On July 20, 1978 the Ramirezes and Donald Graff, a [*282] salesman for Autosport, agreed on the sale of a new camper and the trade-in of the van owned by Mr. and Mrs. Ramirez. Autosport and the Ramirezes signed a simple contract reflecting a $14,100 purchase price for the new van with a $4,700 trade-in allowance for the Ramirez van, which Mr. and Mrs. Ramirez left with Autosport. After further allowance for taxes, title and documentary fees, the net price was $9,902. Because Autosport needed two weeks to prepare the new van, the contract provided for delivery on or about August 3, 1978.

On that date, Mr. and Mrs. Ramirez returned with their checks to Autosport to pick up the new van. Graff was not there so Mr. White, another salesman, met them. Inspection disclosed several defects in the van. The paint was scratched, both the electric and sewer hookups were missing, and the hubcaps were not installed. White advised the Ramirezes not to accept the camper because it was not ready.

Mr. and Mrs. Ramirez wanted the van for a summer vacation and called Graff several times. Each time Graff told them it was not ready for delivery. Finally, Graff called to notify them that the camper was ready. On August 14 Mr. and Mrs. Ramirez went to Autosport to accept delivery, but [**1348] workers were still touching up the outside paint. Also, the camper windows were open, and the dining area cushions were soaking wet. Mr. and Mrs. Ramirez

could not use the camper in that condition, but Mr. Leis, Autosport's manager, suggested that they take the van and that Autosport would replace the cushions later. Mrs. Ramirez counteroffered to accept the van if they could withhold $2,000, but Leis agreed to no more than $250, which she refused. Leis then agreed to replace the cushions and to call them when the van was ready.

On August 15, 1978 Autosport transferred title to the van to Mr. and Mrs. Ramirez, a fact unknown to them until the summer of 1979. Between August 15 and September 1, 1978 Mrs. Ramirez called Graff several times urging him to complete the preparation of the van, but Graff constantly advised her [*283] that the van was not ready. He finally informed her that they could pick it up on September 1.

When Mr. and Mrs. Ramirez went to the showroom on September 1, Graff asked them to wait. And wait they did -- for one and a half hours. No one from Autosport came forward to talk with them, and the Ramirezes left in disgust.

On October 5, 1978 Mr. and Mrs. Ramirez went to Autosport with an attorney friend. Although the parties disagreed on what occurred, the general topic was whether they should proceed with the deal or Autosport should return to the Ramirezes their trade-in van. Mrs. Ramirez claimed they rejected the new van and requested the return of their trade-in. Mr. Lustig, the owner of Autosport, thought, however, that the deal could be salvaged if the parties could agree on the dollar amount of a credit for the Ramirezes. Mr. and Mrs. Ramirez never took possession of the new van and repeated their request for the return of their trade-in. Later in October, however, Autosport sold the trade-in to an innocent third party for $4,995. Autosport claimed that the Ramirez' van had a book value of $3,200 and claimed further that it spent $1,159.62 to repair their

van. By subtracting the total of those two figures, $4,159.62, from the $4,995.00 sale price, Autosport claimed a $600-700 profit on the sale.

On November 20, 1978 the Ramirezes sued Autosport seeking, among other things, rescission of the contract. Autosport counterclaimed for breach of contract.

II

Our initial inquiry is whether a consumer may reject defective goods that do not conform to the contract of sale. The basic issue is whether under the UCC, adopted in New Jersey as *N. J. S. A. 12A:1-101 et seq.*, a seller has the duty to deliver goods that conform precisely to the contract. We conclude that the seller is under such a duty to make a "perfect tender" and that a buyer has the right to reject goods that do not conform to the [*284] contract. That conclusion, however, does not resolve the entire dispute between buyer and seller. A more complete answer requires a brief statement of the history of the mutual obligations of buyers and sellers of commercial goods.

In the nineteenth century, sellers were required to deliver goods that complied exactly with the sales agreement. S*ee Filley v. Pope, 115 U. S. 213, 220, 6 S. Ct. 19, 21, 29 L. Ed. 372,373 (1885)* (buyer not obliged to accept otherwise conforming scrap iron shipped to New Orleans from Leith, rather than Glasgow, Scotland, as required by contract); *Columbian Iron Works & Dry-Dock Co. v. Douglas, 84 Md. 44, 47, 34 A. 1118, 1120-1121 (1896)* (buyer who agreed to purchase steel scrap from United States cruisers not obliged to take any other kind of scrap). That rule, known as the "perfect tender" rule, remained part of the law of sales well into the twentieth century. By the 1920's the doctrine was so entrenched in the law that Judge Learned Hand declared " [t] here is no room in commercial contracts for the doctrine of substantial

performance." *Mitsubishi Goshi Kaisha v. J. Aron & Co., Inc., 16 F.2d 185, 186* (2 Cir. 1926).

[**1349] The harshness of the rule led courts to seek to ameliorate its effect and to bring the law of sales in closer harmony with the law of contracts, which allows rescission only for material breaches. L*eRoy Dyal Co. v. Allen, 161 F.2d 152, 155* (4 Cir.1947). *See* 5 Corbin, *Contracts* § 1104 at 464 (1951); 12 Williston, *Contracts* § 1455 at 14 (3 ed. 1970). Nevertheless, a variation of the perfect tender rule appeared in the Uniform Sales Act. *N. J. S. A.* 46:30-75 (purchasers permitted to reject goods or rescind contracts for any breach of warranty); *N. J. S. A.* 46:30-18 to -21 (warranties extended to include all the seller's obligations to the goods). S*ee* Honnold, "Buyer's Right of Rejection, A Study in the Impact of Codification Upon a Commercial Problem", 97 *U. Pa. L. Rev.* 457, 460 (1949). The chief objection to the continuation of the perfect tender rule was that buyers in a declining market would reject goods for minor nonconformities and force the loss on surprised sellers. *See* Hawkland, *Sales and Bulk Sales Under the Uniform Commercial* [*285] *Code*, 120-122 (1958), cited in *N. J. S. A. 12A:2-508*, New Jersey Study Comment 3.

To the extent that a buyer can reject goods for any nonconformity, the UCC retains the perfect tender rule. Section 2-106 states that goods conform to a contract "when they are in accordance with the obligations under the contract". N. *J. S. A. 12A:2-106*. Section 2-601 authorizes a buyer to reject goods if they "or the tender of delivery fail in any respect to conform to the contract". N. *J. S. A. 12A:2-601*. The Code,however, mitigates the harshness of the perfect tender rule and balances the interests of buyer and seller. *See Restatement (Second), Contracts, § 241 comment (b)* (1981). The Code achieves that result through its provisions for revocation of acceptance and cure. *N. J. S. A. 12A:2-608*, 2-508.

Initially, the rights of the parties vary depending on whether the rejection occurs before or after acceptance of the goods. Before acceptance, the buyer may reject goods for any nonconformity. *N. J. S. A. 12A:2-601*. Because of the seller's right to cure, however, the buyer's rejection does not necessarily discharge the contract. N. *J. S. A. 12A:2-508*. Within the time set for performance in the contract, the seller's right to cure is unconditional. I*d.*, subsec. (1); *see id.*, Official Comment 1. Some authorities recommend granting a breaching party a right to cure in all contracts, not merely those for the sale of goods. R*estatement (Second), Contracts*, ch. 10, especially §§ 237 and 241. Underlying the right to cure in both kinds of contracts is the recognition that parties should be encouraged to communicate with each other and to resolve their own problems. Id.,Introduction p. 193.

The rights of the parties also vary if rejection occurs after the time set for performance. After expiration of that time, the seller has a further reasonable time to cure if he believed reasonably that the goods would be acceptable with or without a money allowance. *N. J. S. A. 12A:2-508(2)*. The determination of what constitutes a further reasonable time depends on the [*286] surrounding circumstances, which include the change of position by and the amount of inconvenience to the buyer. *N. J. S. A. 12A:2-508*, Official Comment 3. Those circumstances also include the length of time needed by the seller to correct the nonconformity and his ability to salvage the goods by resale to others. S*ee Restatement (Second), Contracts, § 241 comment (d)*. Thus, the Code balances the buyer's right to reject nonconforming goods with a "second chance" for the seller to conform the goods to the contract under certain limited circumstances. N. *J. S. A. 12A:2-508*, New Jersey Study Comment 1.

After acceptance, the Code strikes a different balance: the buyer may revoke acceptance only if the nonconformity substantially impairs the value of the goods to him. N. *J. S. A. 12A:2-608*. S*ee Herbstman v. Eastman Kodak Co., 68 N. J. 1, 9 (1975)*. *See generally*, Priest, "Breach [**1350] and Remedy for the Tender of Non-Conforming Goods under the Uniform Commercial Code: An Economic Approach," 91 *Harv. L. Rev.* 960, 971-973 (1978). This provision protects the seller from revocation for trivial defects. H*erbstman, supra, 68 N. J. at 9*. It also prevents the buyer from taking undue advantage of the seller by allowing goods to depreciate and then returning them because of asserted minor defects. S*ee* White & Summers, *Uniform Commercial Code*, § 8-3 at 391 (2 ed. 1980). Because this case involves rejection of goods, we need not decide whether a seller has a right to cure substantial defects that justify revocation of acceptance. S*ee Pavesi v. Ford Motor Co., 155 N. J. Super. 373, 378 (App. Div.1978)* (right to cure after acceptance limited to trivial defects) and White & Summers, *supra*, § 8-4 at 319 n.76 (open question as to the relationship between §§ 2-608 and 2-508).

Other courts agree that the buyer has a right of rejection for any nonconformity, but that the seller has a countervailing right to cure within a reasonable time. *Marine Mart Inc. v. Pearce, 252 Ark. 601, 480 S. W.2d 133, 137 (1972)*. *See Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017, 1024* (2 Cir. 1978); *Moulton Cavity & Mold., Inc. v. Lyn-Flex Industries, 396 A.2d 1024, 1027* [*287] *n.6 (Me.1979)*; *Uchitel v. F. R. Tripler & Co., 107 Misc.2d 310, 316, 434 N. Y. S.2d 77, 81 (App. Term 1980)*; *Rutland Music Services, Inc. v. Ford Motor Co., 422 A.2d 248, 249 (Vt.1980)*. *But see McKenzie v. Alla-Ohio Coals, Inc., 29 U. C. C. Rep. 852, 856-857 (D. D. C.1979)*.

One New Jersey case, *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, suggests that, because some defects can be

cured, they do not justify rejection.*111 N. J. Super. 383, 387 n.1 (Law Div.1970)*. *Accord, Adams v. Tremontin, 42 N. J. Super. 313, 325 (App. Div.1956)* (Uniform Sales Act). B*ut see Sudol v. Rudy Papa Motors, 175 N. J. Super. 238, 240-241 (D. Ct.1980)* (§ 2-601 contains perfect tender rule). Nonetheless, we conclude that the perfect tender rule is preserved to the extent of permitting a buyer to reject goods for any defects. Because of the seller's right to cure, rejection does not terminate the contract. Accordingly, we disapprove the suggestion in *Gindy* that curable defects do not justify rejection.

A further problem, however, is identifying the remedy available to a buyer who rejects goods with insubstantial defects that the seller fails to cure within a reasonable time. The Code provides expressly that when "the buyer rightfully rejects, then with respect to the goods involved, the buyer may cancel." *N. J. S. A. 12A:2-711*."Cancellation" occurs when either party puts an end to the contract for breach by the other. N. *J. S. A. 12A:2-106(4)*. Nonetheless, some confusion exists whether the equitable remedy of rescission survives under the Code. C*ompare Ventura v. Ford Motor Corp., 173 N. J. Super. 501, 503 (Ch. Div.1980)*, *aff'd 180 N. J. Super. 45 (App. Div.1981)* (rescission under UCC) *and Pavesi v. Ford Motor Corp., supra, 155 N. J. Super. at 377* (equitable remedies still available since not specifically superceded, § 1-103) *with Edelstein v. Toyota Motors Dist., 176 N. J. Super. 57, 63-64 (App. Div.1980)* (under UCC rescission is revocation of acceptance) *and Sudol v. Rudy Papa Motors, supra, 175 N. J. Super. at 241-242* (under UCC, rescission no longer exists as such).

[*288] The Code eschews the word "rescission" and substitutes the terms "cancellation", "revocation of acceptance", and "rightful rejection". N. *J. S. A. 12A:2-106(4)*; 2-608; and 2-711 & Official Comment 1. Although

neither "rejection" nor "revocation of acceptance" is defined in the Code, rejection includes both the buyer's refusal to accept or keep delivered goods and his notification to the seller that he will not keep them. White & Summers, *supra*, § 8-1 at 293. Revocation of acceptance is like rejection, but occurs after the buyer [**1351] has accepted the goods. Nonetheless, revocation of acceptance is intended to provide the same relief as rescission of a contract of sale of goods. N. *J. S. A. 12A:2-608* Official Comment 1; N. J. Study Comment 2. In brief, revocation is tantamount to rescission. *See Herbstman v. Eastman Kodak Co., supra, 68 N. J. at 9*; *accord, Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc., 99 Idaho 675, 677, 587 P.2d 816, 818 (1978)* (rescission and revocation of acceptance amount to the same thing). Similarly, subject to the seller's right to cure, a buyer who rightfully rejects goods, like one who revokes his acceptance, may cancel the contract. N. *J. S. A. 12A:2-711* & Official Comment 1. We need not resolve the extent to which rescission for reasons other than rejection or revocation of acceptance, *e. G.* fraud and mistake, survives as a remedy outside the Code. C*ompare N. J. S. A. 12A:1-103 and* White & Summers, *supra*, § 8-1, p. 295, *with N. J. S. A. 12A:2-721*. Accordingly, we approve *Edelstein* and *Sudol*, which recognize that explicit Code remedies replace rescission, and disapprove *Ventura* and *Pavesi* to the extent they suggest the UCC expressly recognizes rescission as a remedy.

Although the complaint requested rescission of the contract, plaintiffs actually sought not only the end of their contractual obligations, but also restoration to their pre-contractual position. That request incorporated the equitable doctrine of restitution, the purpose of which is to restore plaintiff to as good a position as he occupied before the contract. Corbin, *supra*, § 1102 at 455. In UCC

parlance, plaintiffs' request was for the cancellation [*289] of the contract and recovery of the price paid. N. *J. S. A. 12A:2-106(4)*, 2-711.

General contract law permits rescission only for material breaches, and the Code restates "materiality" in terms of "substantial impairment". S*ee Herbstman v. Eastman Kodak Co., supra, 68 N. J. at 9*; *id. at 15* (Conford, J., concurring). The Code permits a buyer who rightfully rejects goods to cancel a contract of sale. N. *J. S. A. 12A:2-711*. Because a buyer may reject goods with insubstantial defects, he also may cancel the contract if those defects remain uncured. Otherwise, a seller's failure to cure minor defects would compel a buyer to accept imperfect goods and collect for any loss caused by the nonconformity. *N. J. S. A. 12A:2-714*.

Although the Code permits cancellation by rejection for minor defects, it permits revocation of acceptance only for substantial impairments. That distinction is consistent with other Code provisions that depend on whether the buyer has accepted the goods. Acceptance creates liability in the buyer for the price, *N. J. S. A. 12A:2-709(1)*, and precludes rejection. N. *J. S. A. 12A:2-607(2)*; *N. J. S. A. 12A:2-606*, New Jersey Study Comment 1. Also, once a buyer accepts goods, he has the burden to prove any defect. N. *J. S. A. 12A:2-607(4)*; White & Summers, *supra*, § 8-2 at 297. By contrast, where goods are rejected for not conforming to the contract, the burden is on the seller to prove that the nonconformity was corrected. *Miron v. Yonkers Raceway, Inc., 400 F.2d 112, 119* (2 Cir. 1968).

Underlying the Code provisions is the recognition of the revolutionary change in business practices in this century. The purchase of goods is no longer a simple transaction in which a buyer purchases individually-made goods from a seller in a face-to-face transaction. Our

economy depends on a complex system for the manufacture, distribution, and sale of goods, a system in which manufacturers and consumers rarely meet. Faceless manufacturers mass-produce goods for unknown consumers who purchase those goods from merchants exercising [*290] little or no control over the quality of their production. In an age of assembly lines, we are accustomed to cars with scratches, television sets without knobs and other products with all kinds of defects. Buyers no longer expect a "perfect tender". If a merchant sells defective goods, the reasonable expectation of the parties is that the buyer will return those goods and that the seller will repair or replace them.

[**1352] Recognizing this commercial reality, the Code permits a seller to cure imperfect tenders. Should the seller fail to cure the defects, whether substantial or not, the balance shifts again in favor of the buyer, who has the right to cancel or seek damages. N. *J. S. A. 12A:2-711*. In general, economic considerations would induce sellers to cure minor defects. S*ee generally* Priest, *supra*, 91 *Harv. L. Rev.* 973-974. Assuming the seller does not cure, however, the buyer should be permitted to exercise his remedies under *N. J. S. A. 12A:2-711*. The Code remedies for consumers are to be liberally construed, and the buyer should have the option of cancelling if the seller does not provide conforming goods. S*ee N. J. S. A. 12A:1-106*.

To summarize, the UCC preserves the perfect tender rule to the extent of permitting a buyer to reject goods for any nonconformity. Nonetheless, that rejection does not automatically terminate the contract. A seller may still effect a cure and preclude unfair rejection and cancellation by the buyer. *N. J. S. A. 12A:2-508*, Official Comment 2; *N. J. S. A. 12A:2-711*, Official Comment 1.

III

The trial court found that Mr. and Mrs. Ramirez had rejected the van within a reasonable time under *N. J. S. A. 12A:2-602*. The court found that on August 3, 1978 Autosport's salesman advised the Ramirezes not to accept the van and that on August 14, they rejected delivery and Autosport agreed to replace the cushions. Those findings are supported by substantial credible evidence, and we sustain them. S*ee Rova Farms* [*291] *Resort v. Investors Ins. Co., 65 N. J. 474, 483-484 (1974)*. Although the trial court did not find whether Autosport cured the defects within a reasonable time, we find that Autosport did not effect a cure. Clearly the van was not ready for delivery during August, 1978 when Mr. and Mrs. Ramirez rejected it, and Autosport had the burden of proving that it had corrected the defects. Although the Ramirezes gave Autosport ample time to correct the defects, Autosport did not demonstrate that the van conformed to the contract on September 1. In fact, on that date, when Mr. and Mrs. Ramirez returned at Autosport's invitation, all they received was discourtesy.

On the assumption that substantial impairment is necessary only when a purchaser seeks to revoke acceptance under *N. J. S. A. 12A:2-608*, the trial court correctly refrained from deciding whether the defects substantially impaired the van. The court properly concluded that plaintiffs were entitled to "rescind" -- *i. E.*, to "cancel" -- the contract.

Because Autosport had sold the trade-in to an innocent third party, the trial court determined that the Ramirezes were entitled not to the return of the trade-in, but to its fair market value, which the court set at the contract price of $4,700. A buyer who rightfully rejects goods and cancels the contract may, among other possible remedies, recover so much of the purchase price as has been paid. N. *J. S. A.*

12A:2-711. The Code, however, does not define "pay" and does not require payment to be made in cash.

A common method of partial payment for vans, cars, boats and other items of personal property is by a "trade-in". When concerned with used vans and the like, the trade-in market is an acceptable, and perhaps the most appropriate, market in which to measure damages. It is the market in which the parties dealt; by their voluntary act they have established the value of the traded-in article. S*ee Frantz Equipment Co. v. Anderson, 37 N. J. 420, 431-432 (1962)* (in computing purchaser's damages for alleged breach of uniform conditional sales law, trade-in value [*292] of tractor was appropriate measure); *accord, California Airmotive Corp. v. Jones, 415 F.2d 554, 556* (6 Cir. 1969). In other circumstances, a measure of damages other than the trade-in value might be appropriate. S*ee Chemical Bank v. Miller Yacht Sales, 173 N. J. Super. 90, 103 (App. Div.1980)* (in determining value of security interest in boat, court rejected both book value and contract trade-in value and adopted resale value as appropriate measure of damages).

[**1353] The ultimate issue is determining the fair market value of the trade-in. This Court has defined fair market value as "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts." *In re Estate of Romnes, 79 N. J. 139, 144 (1978)*. Although the value of the trade-in van as set forth in the sales contract was not the only possible standard, it is an appropriate measure of fair market value.

For the preceding reasons, we affirm the judgment of the Appellate Division.

 ¿Cuándo está facultado el comprador a rechazar la mercadería que el vendedor le ha entregado?

 ARTHUR R. WADDELL AND ROSWITHA M. WADDELL, Appellants, vs. L. V. R. V. INC., D/B/A WHEELER'S LAS VEGAS RV, Respondent. L. V. R. V. INC., D/B/A WHEELER'S LAS VEGAS RV, Appellant, vs. ARTHUR R. WADDELL; ROSWITHA M. WADDELL; AND COACHMEN RECREATIONAL VEHICLE COMPANY, INC., Respondents. SUPREME COURT OF NEVADA 125 P.3d 1160; 58 U. C. C. Rep. Serv. 2d 655 January 19, 2006, Decided

OPINION BY: GIBBONS [*17] [**1161] This is an appeal and cross-appeal from a district court judgment allowing revocation of acceptance of a contract and an order awarding attorney fees and costs. Respondent/cross-appellant L. V. R. V. Inc., D/B/A Wheeler's Las Vegas RV (Wheeler's) sold a 1996 Coachmen Santara motor home (the RV) to appellants/cross-respondents Arthur R. Waddell and Roswitha M. Waddell (the Waddells). The Waddells noticed numerous problems with the RV and "continually"had to return it to Wheeler's service department for repairs. Eventually, the Waddells stopped attempting to have Wheeler's make repairs and filed a complaint seeking to revoke their acceptance of the RV or, in the alternative, money damages. Wheeler's answered the complaint and filed a third-party complaint seeking indemnification from respondent Coachmen Recreational Vehicle Company, Inc. (Coachmen). After a bench trial, the district court granted judgment in favor of the Waddells and Coachmen.

On appeal, Wheeler's argues that (1) the district court erred in allowing the Waddells to revoke their acceptance, (2) the district court abused its discretion by admitting two

[**1162] documents into evidence, (3) the district court erred in denying Wheeler's motion for attorney fees, and (4) the district court erred in denying indemnification from Coachmen. The Waddells argue on cross-appeal that the district court erred in denying them (1) computerized research costs and (2) post-judgment interest on their attorney fees award.

FACTS

In 1996, the Waddells served jointly as president of the Las Vegas area Coachmen Association Camping Club. During the course of that group's meetings, the Waddells spoke with Tom [*18] Pender, Wheeler's sales manager, about upgrading from the motor home they then owned to a "diesel pusher" motor coach. As a result of that conversation, Pender took the Waddells to the Wheeler's lot and showed them a 1996 Coachmen Santara model diesel pusher coach.

The Waddells test-drove and eventually agreed to purchase the RV and an extended warranty. Before they took possession of the RV, the Waddells requested that Wheeler's perform various repairs. The Waddells' request included a service on the RV's engine cooling system, new batteries, and alignment of the door frames. Wheeler's told Arthur Waddell that the repairs had been performed as requested. The Waddells took delivery of the RV on September 1, 1997.

The Waddells first noticed a problem with the RV's engine shortly after they took possession of it. They drove the RV from Las Vegas to Hemet, California. On the return trip, the entry door popped open and the RV's engine overheated while ascending a moderate grade to such a degree that Mr. Waddell had to pull over to the side of the road and wait for the engine to cool down.

When the Waddells returned from California, they took the RV back to Wheeler's for repairs. Despite Wheeler's attempts to repair the RV, the Waddells continually experienced more problems with the RV, including further episodes of engine overheating. Between September 1997 and March 1999, Wheeler's service department spent a total of seven months during different periods of time attempting to repair the RV.

On June 9, 2000, the Waddells filed a complaint in district court seeking both equitable relief and money damages. Wheeler's answered the complaint and ultimately filed a third-party complaint against Coachmen seeking equitable indemnification and contribution.

Following a three-day bench trial, the district court issued its findings of fact, conclusions of law, and judgment. The district court concluded that the RV's nonconformities substantially impaired its value to the Waddells. The district court allowed the Waddells to revoke their acceptance of the RV and ordered Wheeler's to return all of the Waddell's out-of-pocket expenses, but further concluded that Wheeler's was not entitled to indemnification from Coachmen. Following entry of judgment, the district court awarded the Waddells $15,000 in attorney fees, entered supplemental findings of fact and conclusions of law, issued an amended judgment, entered a separate order denying post-judgment interest on the attorney fee award, and denied the Waddells' motion to retax their costs to include computerized research fees. This timely appeal and cross-appeal followed.

[*19] *DISCUSSION*

Wheeler's argues that the district court erred in allowing the Waddells to revoke their acceptance of the RV because the Waddells failed to prove that the RV suffered

nonconformities that substantially impaired its value. We disagree.

The district court found that despite Wheeler's good-faith attempts to repair the RV, the nonconformities persisted and rendered the RV unfit for its intended use. Some of those nonconformities identified by the district court included: the bedroom air conditioning does not cool, the front air conditioning does not cool, the dash heater does not blow hot air, RV batteries do not stay charged, and chronic engine overheating. The district court concluded that these nonconformities and others substantially impaired the RV's value to the Waddells and [**1163] that the Waddells had revoked their acceptance of the RV within a reasonable time.

Substantial impairment

NRS 104.2608(1) provides that a buyer may revoke his acceptance if the item suffers from a "nonconformity [that] substantially impairs its value *to him*" and (a) the buyer accepted the goods on the understanding that the seller would cure the nonconformity or (b) the buyer was unaware of the nonconformity and the nonconformity was concealed by the difficulty of discovery or by the seller's assurances that the good was conforming. (Emphasis added.)

We have never before determined when a nonconformity substantially impairs the value of a good to the buyer. Other jurisdictions treat this determination as an issue of fact, [1] which "is made in light of the 'totality of the circumstances' of each particular case, including the number of deficiencies and type of nonconformity and the time and inconvenience spent in downtime and attempts at repair." [2]

1 *See, e. G., Frontier Mobile Home Sales, Inc. v. Trigleth, 256 Ark. 101, 505 S. W.2d 516, 517 (Ark. 1974)*;

Rester v. Morrow, 491 So. 2d 204, 209 (Miss. 1986); *McCullough v. Bill Swad Chrysler-Plymouth, 5 Ohio St. 3d 181, 5 Ohio B. 398, 449 N. E.2d 1289, 1294 (Ohio 1983)*.

2 *Fortin v. Ox-Bow Marina, Inc., 408 Mass. 310, 557 N. E.2d 1157, 1162 (Mass. 1990)* (quoting *Rester, 491 So. 2d at 210*).

The Supreme Court of Oregon has established a two-part test to determine whether a nonconformity, under the totality of the circumstances, substantially impairs the value of the goods to the buyer. The test has both an objective and a subjective prong:

[*20] Since [the statute] provides that the buyer may revoke acceptance of goods "whose nonconformity substantially impairs its value *to him*," the value of conforming goods *to the plaintiff* must first be determined. This is a subjective question in the sense that it calls for a consideration of the needs and circumstances of the plaintiff who seeks to revoke; not the needs and circumstances of an average buyer. The second inquiry is whether the nonconformity in fact substantially impairs the value of the goods to the buyer, having in mind his particular needs. This is an objective question in the sense that it calls for evidence of something more than plaintiff's assertion that the nonconformity impaired the value to him; it requires evidence from which it can be inferred that plaintiff's needs were not met because of the nonconformity. [3]

Since Nevada, like Oregon, adopted Uniform Commercial Code § 2-608 verbatim, we conclude that this test applies to *NRS 104.2608*. Accordingly, we adopt the Supreme Court of Oregon's two-part test for determining whether a nonconformity substantially affects the good's value to the buyer under *NRS 104.2608(1)*.

3 *Jorgensen v. Pressnall, 274 Ore. 285, 545 P.2d 1382, 1384-85 (Or. 1976)* (footnote omitted), *quoted with approval in McGilbray v. Scholfield Winnebago, Inc., 221 Kan. 605, 561 P.2d 832, 836 (Kan. 1977)*; *see also Milicevic v. Mercedes-Benz USA, LLC, 256 F. Supp. 2d 1168, 1176 (D. Nev. 2003)* (applying a two-part test that addressed both objective and subjective considerations); *Haight v. Dales Used Cars, Inc., 139 Idaho 853, 87 P.3d 962, 966 (Idaho Ct. App. 2003)* (applying a similar two-part test).

Subjective value to the Waddells

Arthur Waddell testified that he purchased the RV to enjoy the RV lifestyle. Before purchasing the RV, the Waddells owned similar vehicles that they used both as a residence and for camping trips. In fact, Mr. Waddell testified that he and his wife intended to sell their house and spend two to three years traveling around the country.

Mr. Waddell further testified that he shopped at Wheeler's based on Wheeler's advertisements. Marlene Wheeler, president and chief operating officer, testified that Wheeler's advertising encouraged the purchase of an RV to find unlimited freedom. When Mr. Waddell spoke with Tom Pender, sales manager at Wheeler's, about upgrading to an RV for those purposes, Pender told him that he had an RV on the lot that would meet his needs.

[*21] Mr. Waddell's testimony demonstrates that the RV's subjective value to the Waddells was based on their ability to spend two [**1164] or three years driving the RV around the country. Thus, we must consider whether the RV's nonconformities substantially impaired the value of the RV based on the Waddells' particular needs. [4]

4 *Jorgensen, 545 P.2d at 1384-85*.

Objective impairment

Mr. Waddell testified that as a result of the RV's defects, he and his wife were unable to enjoy the RV as they had intended. Mr. Waddell further testified that the RV's engine would overheat within ten miles of embarking if the travel included any climbing. As a result of the overheating, the Waddells were forced to park on the side of the road and wait for the engine to cool down before continuing. Consequently, the RV spent a total of 213 days, or seven months and one day, at Wheeler's service department during the eighteen months immediately following the purchase. This testimony is sufficient to demonstrate an objective, substantial impairment of value.

The Supreme Court of Ohio has stated that a nonconformity effects a substantial impairment of value if it "shakes the buyer's faith or undermines his confidence in the reliability and integrity of the purchased item." [5] The Supreme Judicial Court of Massachusetts has recognized that "even cosmetic or minor defects that go unrepaired or defects which do not totally prevent the buyer from using the goods, but circumscribe that use can substantially impair the goods' value to the buyer." [6] The United States District Court for the District of Nevada recently reiterated that "'the [seller's] inability to correct defects in [motor] vehicles creates a major hardship and an unacceptable economic burden on the consumer.'" [7]

5 *McCullough, 449 N. E.2d at 1294*; *see also Rester, 491 So. 2d at 210-11*.

6 *Fortin, 557 N. E.2d at 1162*.

7 *Milicevic, 256 F. Supp. 2d at 1176* (quoting *Berrie v. Toyota Motor Sales, USA, Inc., 267 N. J. Super. 152, 630 A.2d 1180, 1181 (N. J. Super. Ct. App. Div. 1993))*.

In this case, the chronic engine overheating shook the Waddells' faith in the RV and undermined their confidence in the RV's reliability and integrity. [8] Not only did this

problem make travel in the RV unreliable and stressful to the Waddells, the overheating made travel in the vehicle objectively unsafe.

8 *See Rester, 491 So. 2d at 210-11*; *McCullough, 449 N. E.2d at 1294*.

Accordingly, we conclude that substantial evidence exists to support revocation of acceptance under *NRS 104.2608(1)*.

[*22] *Reasonable time for revoking acceptance*

Wheeler's argues that the Waddells should not have been allowed to revoke their acceptance because they did not attempt to revoke within a reasonable time after purchasing the RV. We disagree.

Under *NRS 104.2608(2)*, "revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects." The statute further provides that revocation "is not effective until the buyer notifies the seller of it." [9] We have never before determined a reasonable timeline for revocation of acceptance. However, other jurisdictions have held that the reasonable time determination "depends upon the nature, purpose and circumstances of the transaction." [10] The reasonable time determination is generally considered to be an issue of fact for the trial court. [11]

9 *NRS 104.2608(2)*.

10 *DeVoe Chevrolet-Cadillac v. Cartwright, 526 N. E.2d 1237, 1240 (Ind. Ct. App. 1988)*; *see also Golembieski v. O'Rielly R. V. Center, Inc., 147 Ariz. 134, 708 P.2d 1325, 1328 (Ariz. Ct. App. 1985)* (noting that "reasonableness of the time for revocation is a question of fact unique to the circumstances of each case").

11 *See, e. G., Golembieski, 708 P.2d at 1328*; *Frontier Mobile Home Sales, Inc. v. Trigleth, 256 Ark. 101, 505 S. W.2d 516, 517 (Ark. 1974)*; *Chernick v. Casares, 759 S. W.2d 832, 834 (Ky. Ct. App. 1988)*; *Oda Nursery, Inc. v. Garcia Tree & Lawn, Inc., 103 N. M. 438, 708 P.2d 1039, 1042 (N. M. 1985)*; *Purnell v. Guaranty Bank, 624 S. W.2d 357, 359 (Tex. App. 1981)*.

[**1165] Here, the district court found that the Waddells were entitled to revoke their acceptance since they notified Wheeler's of their intent to revoke within a reasonable time. Mr. Waddell testified that he first noticed the RV's defects immediately after his purchase. Mr. Waddell took the RV to Wheeler's service department whenever he noticed a defect and Wheeler's always attempted, often unsuccessfully, to repair the RV. In September 1998, Mr. Waddell took the RV to Wheeler's after continued engine overheating. As a result of these defects, Wheeler's service department kept the RV for approximately seven months of the eighteen months that the Waddells owned the RV. Roger Beauchemin, a former employee of Wheeler's service department, testified that Wheeler's was unable to repair some of the defects, including the engine's chronic overheating problems. In January 1999, the Waddells again brought the RV to Wheeler's complaining of persistent [*23] engine overheating. The Waddells demanded a full refund of the purchase price in March 1999 and sought legal counsel. Through counsel, the Waddells wrote to Wheeler's during the summer of 1999 to resolve the matter. Wheeler's did not respond to these inquiries until early 2000. Unable to resolve the dispute with Wheeler's, the Waddells revoked their acceptance of the RV in June 2000.

The seller of nonconforming goods must generally receive an opportunity to cure the nonconformity before the buyer may revoke his acceptance. [12] However, as the

Supreme Court of Mississippi has recognized, the seller may not "postpone revocation in perpetuity by fixing everything that goes wrong." [13] Rather, "there comes a time when [the buyer] is entitled to say, 'That's all,' and revoke, notwithstanding the seller's repeated good faith efforts to [cure] ." [14]

12 *See Rester, 491 So. 2d at 210*.

13 *Id.*

14 *Id.*

Furthermore, the seller's attempts to cure do not count against the buyer regarding timely revocation. The United States District Court for the District of Nevada has held that the "time for revocation of acceptance will be tolled while the seller attempts repairs." [15] Tolling the reasonable time for revocation of acceptance is appropriate given "the buyer's obligation to act in good faith, and to afford the seller a reasonable opportunity to cure any defect in the goods." [16]

15 *Sierra Diesel Injection Service v. Burroughs Corp., 651 F. Supp. 1371, 1378 (D. Nev. 1987)*.

16 *Id.*

The Waddells gave Wheeler's several opportunities to repair the defects before revoking their acceptance. Because Wheeler's was unable to repair the defects after a total of seven months, the Waddells were entitled to say "that's all" and revoke their acceptance, notwithstanding Wheeler's good-faith attempts to repair the RV. [17] Also, the reasonable time for revocation was tolled during the seven months that Wheeler's kept the RV and attempted to repair the defects. [18] Accordingly, the district court's determination is supported by substantial evidence and is not clearly erroneous. [19]

17 *Rester, 491 So. 2d at 210*.

18 *Sierra Diesel, 651 F. Supp. at 1378*.

19 *Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996)*.

[*24] *Wheeler's motion for attorney fees*

Wheeler's argues that the district court erred in denying its motion for attorney fees because the Waddells recovered only on equitable grounds and failed to obtain a money judgment in excess of the $25,000 offer of judgment that Wheeler's proffered before trial. We disagree.

Under *NRCP 68(a)*, [20] either party may serve an offer of judgment to settle the matter "at any time more than 10 days before trial." Further, *NRCP 68(f)* provides for penalties if the offeree rejects the offer, proceeds to trial, "and fails to obtain a *more* [**1166] *favorable judgment*." (Emphasis added.) Specifically, *NRCP 68(f)(2)* provides that "the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer."

20 *NRCP 68* was amended effective January 1, 2005, during the pendency of this appeal. The amendments do not change our consideration of the appeal.

The district court must consider four factors in awarding penalties pursuant to *NRCP 68(f)*. [21] The third factor, which is most relevant to this case, requires a consideration of "whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith." [22]

21 *Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)*.

22 *Id.*

The district court properly concluded that the Waddells' decision to proceed to trial was neither unreasonable nor in bad faith. Further, the district court was not entitled to penalize the Waddells under *NRCP 68(f)(2)* because the Waddells failed to obtain a more favorable judgment than the $25,000 offer. Though the Waddells succeeded only on an equitable claim, their revocation of acceptance resulted in the recovery of $113,680.57 that they had spent on the RV. [23] This recovery is clearly more favorable to the [*25] Waddells than the offer of judgment because (a) they recovered more than $25,000 from Wheeler's and (b) they were not required to keep and make payments on the RV, which they could not use for the purposes they intended when they bought it. Accordingly, the district court properly denied Wheeler's motion for attorney fees.

23 This figure represents:

1. The sum of $78,857.22 which constitutes 78 payments made by the [Waddells] from the date of the purchase through April 1, 2004 .

2. The following sums of money:

a. $249.50 constituting the document fee paid at the time of purchase;

b. $5,313.45 constituting the sales tax paid at the time of purchase;

c. $20,080.40 constituting the net trade-in allowance at the time of purchase;

d. $3,576.00 constituting casualty insurance premiums paid on the vehicle;

e. $2,589.00 constituting the Department of Motor Vehicles registrations;

f. $2,995.00 which constitutes the extended service contract; [and]

3. $20.00 which constitutes the title fee. .

Indemnification

Wheeler's argues that the district court erred in denying its claim for indemnification from Coachmen for its liability to the Waddells. We disagree.

We have repeatedly held that "findings of fact supported by substantial evidence, will not be set aside unless clearly erroneous." [24] The district court concluded that the indemnification contract between Coachmen and Wheeler's applied only to manufacture and design defects. The district court further concluded that the only defect relating to manufacture and design was a faulty mud flap that had been repaired without further incident.

24 *Edwards Indus., 112 Nev. at 1031, 923 P.2d at 573*.

Mr. Waddell testified that the front, left mud flap had melted during several trips, but that Wheeler's was eventually able to correct that problem. There is no evidence in the record demonstrating irreparable design or manufacturing defects. Accordingly, we conclude that the district court's decision is supported by substantial evidence and is not clearly erroneous. [25]

25 We have considered Wheeler's other assignments of error and find them without merit.

Computerized legal research costs

On cross-appeal, the Waddells argue that the district court abused its discretion by denying them computerized research costs. We disagree.

"The determination of allowable costs is within the sound discretion of the trial court." [26] Only reasonable costs may be awarded. [27] "'Reasonable costs' must be actual and reasonable, 'rather than a reasonable [**1167] estimate or calculation of such costs.'" [28] The district court did not abuse its discretion in denying costs for [*26] computerized legal research because those costs were not sufficiently itemized.

26 *Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998)*.

27 *NRS 18.005*.

28 *Bobby Berosini, 114 Nev. at 1352, 971 P.2d at 385-86* (quoting *Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994))*.

Post-judgment interest on attorney fees

The Waddells argue that they were entitled to post-judgment interest on their attorney fees award. We agree.

NRS 17.130(1) provides for interest to be granted on "all judgments and decrees, rendered by any court of justice, for any debt, damages or costs." We have never directly addressed the issue of whether the recipient of an attorney fees award is entitled to post-judgment interest on that award. However, we have held that a district court "judgment" includes both damages and costs; thus, prejudgment interest is available for costs incurred by the prevailing party. [29]

29 *Id. at 1355, 971 P.2d at 387-88*; *Gibellini, 110 Nev. at 1209, 885 P.2d at 545*.

The prevailing view among other jurisdictions is that attorney fees awards are entitled to post-judgment interest. [30] The Supreme Court of Ohio recently recognized that "the modern trend favors the awarding of post-judgment interest

on attorney fees as a general rule." [31] That court adopted the "modern trend" because "an award of post-judgment interest on attorney fees properly recognizes the time value of money by making the prevailing party truly whole and preventing the nonprevailing party from enjoying the use of money that no longer rightfully belongs to it." [32]

30 *See, e. G., Isaacson Structural Steel Co. v. Armco Steel, 640 P.2d 812, 818 (Alaska 1982)*; *Fischbach & Moore, Inc. v. McBro, 619 So. 2d 324, 324-25 (Fla. Dist. Ct. App. 1993)*; *Nardone v. Patrick Motor Sales, Inc., 46 Mass. App. Ct. 452, 706 N. E.2d 1151, 1152 (Mass. App. Ct. 1999)*; *Parker v. I&F Insulation Co., 89 Ohio St. 3d 261, 2000 Ohio 151, 730 N. E.2d 972, 979 (Ohio 2000)*; *Aguirre v. AT & T Wireless Services, 118 Wn. App. 236, 75 P.3d 603, 605 (Wash. Ct. App. 2003)*.

31 *Parker, 730 N. E.2d at 977*.

32 *Id. at 978*; *see also Isaacson, 640 P.2d at 818*.

Further, in *Powers v. United Services Automobile Association*, we held that the prevailing party is entitled to post-judgment interest on punitive damages awards. [33] We explained that "the purpose of post-judgment interest is to compensate the plaintiff for loss of the use of the money awarded in the judgment" without regard to the various elements that make up the judgment. [34] For the same reason, we conclude that the prevailing party may recover post-judgment interest on an attorney fees award.

33 *114 Nev. 690, 705-06, 962 P.2d 596, 605-06 (1998)*.

34 *Id. at 705, 962 P.2d at 605*.

[*27] *CONCLUSION*

The district court did not err in allowing the Waddells to revoke their acceptance of the RV within a reasonable time because chronic engine overheating problems

substantially impaired the RV's value to the Waddells. The district court also properly denied Wheeler's motion for attorney fees. Further, substantial evidence supports the district court's determination that Wheeler's was not entitled to indemnification from Coachmen.

Additionally, the district court did not abuse its discretion in denying the Waddells' computerized research costs. Finally, the Waddells are entitled to post-judgment interest on their attorney fees award. Accordingly, we affirm the district court's judgment with the exception of post-judgment interest. We reverse as to that issue only and remand for further proceedings consistent with this opinion.

 ¿Cuándo está facultado el comprador a revocar la aceptación de la mercadería que el vendedor le ha entregado?

II. ARTÍCULO 2A SOBRE EL ARRENDAMIENTO

A. EL CASO INSÓLITO DEL ARRENDAMIENTO FINANCIERO

 In re Bruce A. WALLACE and Eileen T. Wallace, h/w, Debtors UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY 122 B. R. 222 February 1, 1990, Filed

OPINION BY: GAMBARDELLA The matter before this court is a motion filed on September 28, 1989 on behalf of creditor General Motors Acceptance Corporation ("GMAC" or "Creditor") to compel the debtors to assume or reject an unexpired lease. The motion seeks *inter alia* an order compelling debtors to assume or reject a lease for a 1987 Buick Century automobile, vehicle identification number ("VIN") 1 G4AH81W2H6435895, within ten (10) days of the entry of such order. In GMAC's application in support of its motion GMAC also seeks to compel the