April 1986

Unconscionability and Article 2 Implied Warranty Disclaimers

Michael J. Phillips

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol62/iss2/4

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
UNCONSCIONABILITY AND ARTICLE 2 IMPLIED WARRANTY DISCLAIMERS

MICHAEL J. PHILLIPS*

For some time, the body of scholarly commentary1 on the unconscionability doctrine established by U.C.C. section 2-3022 has been quite substantial. Within that body of commentary, section 2-302's effect on disclaimers3 of the U.C.C.'s implied warranties of merchantability and fitness for a particular purpose is a frequently discussed issue.4 These discussions, however, are usually rather brief.5 Thus, the unconscionability of implied warranty disclaimers seems to have eluded extended treatment until now.6

* Associate Professor of Business Law, School of Business, Indiana University. B.A., Johns Hopkins University, 1968; J.D., Columbia University School of Law, 1973; LL.M., National Law Center, George Washington University, 1975; S.J.D., National Law Center, George Washington University, 1981.


2. For a general description of § 2-302, see infra notes 115-58 and accompanying text.

3. U.C.C. §§ 2-316(2), (3) deal with implied warranty disclaimers. For a general discussion of these sections and their operation, see infra notes 58-81 and accompanying text. Except as it bears on the application of § 2-302 to implied warranty disclaimers, this article is not concerned with the unconscionability of remedy limitations under U.C.C. § 2-719(3). On the distinction between disclaimers of liability and limitations on the buyer's remedies, see, e.g., J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 12-11, at 471-72 (2d ed. 1980). On the possible application of U.C.C. § 2-719(3) in the implied warranty disclaimer context, see infra notes 172-79 and accompanying text.

4. The implied warranties of merchantability and fitness are established by U.C.C. §§ 2-314 and 2-315, respectively. For a general discussion of these sections, see infra notes 7-57 and accompanying text.


6. So far as I can discern, the only sources treating the unconscionability of implied warranty disclaimers at any length are Fahlgren, Unconscionability: Warranty Disclaimers and Consequential Damage Limitations, 20 ST. LOUIS U.L.J. 435, 437-45 (1976); Comment, Unconscionability and the
This article attempts to remedy the deficiency just identified by exhaustively discussing section 2-302's application to disclaimers of the implied warranties of merchantability and fitness. It opens with an overview of the two implied warranties, the methods for disclaiming them, and the doctrine of unconscionability. It then examines in detail the sizeable body of cases considering section 2-302's application in the implied warranty disclaimer context, and the issues presented by these decisions. The final section of the article is a wide-ranging policy discussion that attempts to establish section 2-302's proper role in the implied warranty disclaimer context. As a result of this discussion, the article concludes by urging that section 2-302 should be aggressively applied to invalidate disclaimers of the implied warranties of merchantability and fitness.

I. BACKGROUND

The cases discussing the unconscionability of implied warranty disclaimers result from the convergence of three distinct sets of rules created by Article 2 of the Uniform Commercial Code: its implied warranties of merchantability and fitness, the provisions governing disclaimers of these warranties, and the unconscionability doctrine created by section 2-302. This section briefly reviews each of these matters in turn.

A. The Implied Warranties of Merchantability and Fitness

1. The Implied Warranty of Merchantability

No discussion of the major theories of product liability recovery is
complete without the Uniform Commercial Code's implied warranty of merchantability. This warranty is created by U.C.C. section 2-314(1), which states in relevant part that: "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." This warranty arises by operation of law, and does not depend on the seller's actual assent to its terms. It is an obvious example of a tendency that pervades twentieth century American contract law: government dictation of the terms of private contracts, usually with the aim of protecting the weaker party.

To recover under section 2-314, a plaintiff who has dealt directly with the defendant seller must show that: 1) a merchant sold goods; 2) these goods were not merchantable at the time of sale; 3) the plaintiff suffered injury or economic loss; 4) this injury or loss was caused proximately and in fact by the goods’ failure to meet the merchantability stan-

---

8. Also, U.C.C. § 2-314(3) states that "other implied warranties may arise from course of dealing or usage of trade."


10. On this general tendency, see, e.g., W. FRIEDMANN, LAW IN A CHANGING SOCIETY 129-57 (2d Penguin ed. 1972).

11. On the problems still created by the traditional no-liability-outside-privity rule in the implied warranty context, see infra note 35.

12. See U.C.C. § 2-104(1). The most important kind of merchant defined by this section is a party "who deals in goods of the kind [sold]." This includes business professionals such as jewelers, hardware stores, and used car dealers who regularly deal in particular products. Section 2-104(1) also defines a merchant as one who "by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." This language seems principally directed toward those who use or install goods in the performance of some service. See J. WHITE & R. SUMMERS, supra note 3, § 9-6, at 345. In such cases, of course, it is possible that Article 2 will be inapplicable because the transaction will be characterized as one predominantly involving a service, not the sale of goods. See infra note 13 and R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 22, at 46-47 (1970) (which discusses the mixed goods-services problem).

13. Goods are basically movable things. U.C.C. § 2-105(1). For Article 2's definition of the term "sale," see id. § 2-106(1). For general discussions of the transactions that may or may not qualify as sales of goods subject to Article 2, see R. NORDSTROM, supra note 12, §§ 20-22; T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST paras. 2-105, 2-106 (1978 & 1985 Cumulative Supplement). Also, U.C.C. § 2-314(1) specifically includes within its coverage "the serving for value of food or drink to be consumed either on the premises or elsewhere."

14. On the various kinds of damages obtainable in a successful implied warranty suit under Article 2, see infra notes 52-56 and accompanying text.
The defendant received notice\(^5\) of the injury or economic loss.\(^6\) Perhaps the most important question presented by suits proceeding under section 2-314 is the definition and application of the term "merchantability." U.C.C. section 2-314(2) presents an elaborate list of traits that goods must possess if they are to conform with this standard.\(^8\) The most important\(^9\) such trait is section 2-314(2)(c)'s statement that the goods must be "fit for the ordinary purposes for which such goods are used." This portion of the merchantability test is plainly a broad, discretionary standard designed to encompass the wide range of goods marketed in the United States today and the even wider range of defects they can present.\(^10\) Obviously, the goods do not have to be perfect to satisfy section 2-314(2)(c).\(^2\) Most of the cases presenting a failure to satisfy the merchantability standard have involved situations where the goods simply failed to work properly, or were unexpectedly harmful.\(^22\)

2. The Implied Warranty of Fitness

The implied warranty of fitness for a particular purpose created by U.C.C. section 2-315 covers a much narrower range of situations than the implied warranty of merchantability.\(^23\) Section 2-315 states that: "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 . . . an implied warranty that the goods shall be fit for such purpose."\(^24\) This warranty most commonly arises in situations where a business purchases goods that must be selected, manufactured, and/or

15. This causation requirement is discussed in J. White & R. Summers, supra note 3, § 9-8.
16. See U.C.C. § 2-607(3)(a) (which states that the buyer must give notice within a reasonable time after he discovers or should have discovered any breach of the sale contract).
17. See J. White & R. Summers, supra note 3, § 9-6, at 343 (listing a similar set of elements).
18. U.C.C. § 2-314(2) provides that:

   Goods to be merchantable must be at least such as
   (a) pass without objection in the trade under the contract description; and
   (b) in the case of fungible goods, are of fair average quality within the description; and
   (c) are fit for the ordinary purposes for which such goods are used; and
   (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
   (e) are adequately contained, packaged, and labeled as the agreement may require; and
   (f) conform to the promises or affirmations of fact made on the container or label if any.

   For a general discussion of these requirements, see R. Nordstrom, supra note 12, § 76.
20. Cf. T. Quinn, supra note 13, para. 2-314; J. White & R. Summers, supra note 3, § 9-7 (both indicating the range of situations the merchantability standard covers).
22. Id. § 9-7, at 351.
23. Id. § 9-9, at 358 (fitness warranty narrower, more specific, and more precise).
24. The forerunner of § 2-315 is Uniform Sales Act § 15(1). For a discussion of the pre-Code analogues of the 2-315 fitness warranty, see L. Vold, supra note 9, § 90.
assembled to meet its special needs. In addition to such standard requirements as a sale of goods, notice, causation, and injury or economic loss, a plaintiff seeking recovery under section 2-315 must meet certain additional requirements directly imposed by the section and its comments. Specifically: 1) the seller must have reason to know the particular purpose for which the buyer seeks the goods; 2) the seller must also have reason to know that the buyer is relying on the seller's skill or judgment to select suitable goods; and 3) the buyer must in fact rely on the seller's skill or judgment. If these tests are met and the goods fail to satisfy the particular purpose for which they were purchased, there is a breach of the implied warranty of fitness. In order to establish the first two requirements just stated, the buyer need only show the seller's reason to know of the buyer's particular purpose and of his reliance on the seller's skill or judgment; actual knowledge is not required. The third requirement (the buyer's actual reliance) is not set forth in the text of section 2-315, but appears in Comment 1 to that section.

The implied warranty of fitness for a particular purpose differs from the implied warranty of merchantability in several significant respects. First, section 2-315 imposes different tests for recovery. While the seller need not be a merchant for section 2-315 to apply, that section's other requirements tend to limit the contexts in which the implied warranty of fitness will arise. The implied warranty of merchantability, on the other hand, has a fairly wide sweep. Perhaps the most important distinction between the two warranties, however, concerns the different quality standards they create. Under section 2-314, the goods must be fit for the ordinary purposes for which they are used, while under section 2-315 the goods must satisfy the buyer's particular purpose.

26. See supra notes 13-17 and accompanying text. It is probably reasonable to assume that the privity problem mentioned in supra note 11 and accompanying text will arise less frequently in the fitness warranty context than in the § 2-314 context. On the whole, buyers purchasing goods selected, manufactured, or assembled for their special purposes should most often deal directly with the firm doing the selecting, manufacturing, or assembling; and such buyers are relatively unlikely to transfer such goods to another party.
27. J. WHITE & R. SUMMERS, supra note 3, § 9-9, at 358.
28. As U.C.C. § 2-315, Comment 1 declares:
Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill or judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists.
29. "The buyer, of course, must actually be relying on the seller." Id.
30. As id., Comment 2 states:
A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business
though, both implied warranties may be breached. Goods so defective as not to be fit for any purpose, for example, may subject the seller to liability under each theory.

3. The Continuing Importance of the U.C.C.'s Implied Warranties

Despite the increased emphasis on tort-based theories that has accompanied the "product liability explosion" of recent decades, the U.C.C.'s implied warranties remain significant bases of product liability recovery. This is admittedly more true of the implied warranty of merchantability than of the implied warranty of fitness, since the latter tends to have a localized application. At first glance, though, even the implied warranty of merchantability seems less useful to product liability plaintiffs than tort theories such as negligence and section 402A of the Restatement (Second) of Torts. The traditional "no liability outside privity of contract" rule, for instance, now has little vitality in negligence and section 402A cases. But it is still a significant obstacle to recovery in some implied warranty suits. Moreover, seller waivers or

whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

1. Also, the express warranty recovery allowed by U.C.C. § 2-313, see supra note 7, remains important. Plainly, however, it can only be utilized where the defendant has acted in one of the ways stated by § 2-313(1).

2. On those theories, see supra note 7.

3. On the demise of the no-liability-outside-privity defense in negligence cases, see W. PROSSER & W. KEETON, supra note 7, § 96, at 681-83. "The rule that has finally emerged is that the seller is liable for negligence in the manufacture or sale of any product which may reasonably be expected to be capable of inflicting substantial harm if it is defective." Id. at 683.

4. RESTATEMENT (SECOND) OF TORTS § 402A(2)(b) states that: "The rule stated in Subsection (1) applies although ... the user or consumer has not bought the product from or entered into any contractual relation with the seller." After giving some examples, id., Comment I declares that: "The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant." However, Caveats (1) and (3) to § 402A express no opinion about the application of its rule to plaintiffs other than users or consumers of the product, or to defendants who are sellers of a component part of a product to be assembled. Comments o and q to § 402A seem vaguely sympathetic to 402A's application in such situations, but, due to the absence of relevant case law at the time they were written, likewise decline to express an opinion on the matter. However, the courts applying § 402A have often allowed it to be used by remote parties not specifically falling within the categories of "user" or "consumer." For a general discussion listing the wide range of remote parties capable of using § 402A, see 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY §§ 4:23-4:25 (1974). In particular, the section has frequently been utilized by bystanders. Id. § 4:25.

5. As Professors James White and Robert Summers have declared: "It may be impossible to write briefly but not superficially about privity [under Article 2 of the Code]." J. WHITE & R. SUMMERS, supra note 3, § 11-2, at 399. This article makes no attempt at a full treatment of this immensely complex subject. For a fairly complete discussion, see id. §§ 11-2 to 11-6. This problem is formally governed by the three versions of U.C.C. § 2-318, but the courts often have not felt themselves constrained by the section's language. In general, the main factors affecting the plaintiff's
disclaimers of negligence\textsuperscript{36} and 402A\textsuperscript{37} liability are quite unlikely to succeed in cases involving ordinary consumers. As the next section demonstrates, however, disclaimers are much more likely to block liability in the implied warranty context.\textsuperscript{38} Further, the typical tort statute of limitations is sometimes more advantageous to plaintiffs than Article 2’s statute of limitations.\textsuperscript{39} Finally, unlike suits proceeding under the U.C.C.,\textsuperscript{40} chances of implied warranty recovery outside privity are: 1) whether the loss suffered was a foreseeable consequence of the product defect (a factor suggested by the “reasonable to expect” and “reasonably to be expected” language of various versions of § 2-318); 2) the status of the plaintiff (consumers being in the best position to recover); and 3) the type of damages sought (see infra note 56 and accompanying text).

36. The courts are not in complete unanimity regarding the tests for a valid waiver of negligence liability in the defective goods context. Almost invariably, they require relatively equal bargaining power or a relatively equal bargaining position between the parties. \textit{E.g.}, Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709 (10th Cir. 1974); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 150 (3d Cir. 1974); Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp., 143 Ariz. 368, 383, 694 P.2d 198, 213 (1984). Often, they require that these parties be business or commercial entities. \textit{E.g.}, Keystone, 499 F.2d at 150; Salt River, 143 Ariz. at 383-84, 694 P.2d at 213-14. In addition, it is often necessary that the waiver be clear and unambiguous, or that it specifically mention negligence liability. \textit{See, e.g.}, Keystone, 499 F.2d at 150. Some courts further require actual, knowing negotiation and bargaining regarding the waiver. \textit{E.g.}, Salt River, 143 Ariz. at 384-85, 694 P.2d at 214-15. Finally, it is often said that such waivers are to be strictly construed. \textit{E.g.}, Keystone, 499 F.2d at 150. See generally D. NOEL & J. PHILLIPS, \textsc{Products Liability in a Nutshell} 105-07 (2d ed. 1981). Thus, it is quite unlikely that a waiver of negligence liability will be effective where a consumer buys a product manufactured by a large corporation.

37. “The consumer’s cause of action . . . is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer’s hands.” \textit{Restatement (Second) of Torts} § 402A, Comment m (1965). However, in Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146 (3d Cir. 1974), the court, while finding a disclaimer invalid in a 402A suit because the disclaimer was insufficienctly clear and unequivocal, \textit{id.} at 150, still stated that Pennsylvania law permits a freely negotiated and clearly expressed waiver of 402A liability between business entities of relatively equal bargaining strength, \textit{id.} at 149. Other courts, though, have followed Comment m in business or commercial cases. See, \textit{e.g.}, Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709 (10th Cir. 1974). On this subject, see D. NOEL & J. PHILLIPS, \textit{supra} note 36, at 102-05.

38. This is mainly due to the basic provisions of U.C.C. § 2-316. \textit{See infra} notes 58-81 and accompanying text. However, restrictions on the seller’s ability to disclaim implied warranty liability are increasing. \textit{See, e.g.}, \textit{infra} notes 82-93 and accompanying text. In particular, as the second section of this article demonstrates at length, the unconscionability doctrine created by U.C.C. § 2-302 is an increasingly important check on the ability to disclaim implied warranties.

39. U.C.C. § 2-725(1) provides that: “An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.” \textit{Id.} § 2-725(2) states that: “A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach.” \textit{Id.} It also states the general rule that: “A breach of warranty occurs when tender of delivery is made.” \textit{Id.} Thus, the implied warranty plaintiff may be denied recovery in cases where the defect becomes manifest more than four years after the sale. The typical tort statute of limitations, on the other hand, is for a period of two years or less. But it usually begins to run at the time of the injury, or the time the plaintiff discovered or should have discovered the injury. J. WHITE & R. SUMMERS, \textit{supra} note 3, § 11-9, at 416. Despite their shorter time period, tort statutes of limitations are clearly more advantageous to the plaintiff in cases where the injury occurs well after the sale. In response to this situation, some courts have employed the tort statute of limitations in implied warranty suits (especially those involving personal injury or property damage). \textit{See id.} § 11-9, at 416-18 and accompanying notes. On the whole problem, see \textit{id.} § 11-9.

40. \textit{See supra} note 16 and accompanying text.
there is no notice requirement in tort cases.41

These difficulties notwithstanding, the Code's implied warranties possess significant advantages over negligence and section 402A in certain situations. First, the plaintiff in an implied warranty suit is only required to show that the product is not merchantable or that it failed to satisfy the buyer's particular purpose. The negligence plaintiff, on the other hand, must prove that the seller failed to act as a reasonable person would have acted under the circumstances.42 Of course, the strict liability rule announced by section 402A eliminates this need to prove a breach of duty.43 When compared with the implied warranty of merchantability, however, section 402A presents its own special obstacle to recovery.44 Under section 402A, the plaintiff must not only show that the product was defective, but that this defective condition made it "unreasonably dangerous."45 This latter requirement means that the product must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."46 Under the implied warranty of merchantability, on the other hand, only simple defectiveness (the product's failure to be fit for the ordinary purposes for which it is used) is needed for recovery.

Also, the damages sought by the plaintiff are a significant variable in determining the theory or theories under which to sue. Generally, a plaintiff who mounts a successful 402A suit can only recover for property damage47 and personal injury.48 The situation is a bit more uncertain

42. "[Where] the liability is to be based on negligence, the defendant is required to exercise the care of a reasonable person under the circumstances." W. PROSSER & W. KEETON, supra note 7, at 684. See generally id. at 684-89.
43. "The rule stated in Subsection (1) applies although . . . the seller has exercised all possible care in the preparation and sale of his product." RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).
44. Also, some states still have not adopted § 402A. See supra note 7.
46. Id., Comment i. it is generally held that the product's "unreasonably dangerous" nature is an indispensable element of a 402A case. R. HURSH & H. BAILEY, supra note 34, § 4:14, at 678. But, as this source notes, some courts have eliminated the "unreasonably dangerous" element. E.g., Azzarello v. Black Bros., 480 Pa. 547, 391 A.2d 1020, 1025-27 (1978). Also, some 402A cases employ a form of risk-benefit analysis that effectively blurs the distinction between "defective condition" and "unreasonably dangerous." See, e.g., Hagans v. Oliver Mach. Co., 576 F.2d 97 (5th Cir. 1978).
47. This is damage to property of the plaintiff other than the defective product.
48. The language of § 402A suggests such a limitation. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) ("physical harm thereby caused to the ultimate user or consumer, or to his property"). Also, "[p]erhaps a majority of jurisdictions have denied recovery for economic loss in strict tort cases." D. NOEL & J. PHILLIPS, supra note 36, at 116. By "economic loss," the authors are referring to the basis of the bargain damages and indirect economic loss defined in infra notes 49-50.
when the plaintiff sues in negligence, but there is still a distinct tendency
to deny recovery for basis of the bargain damages\textsuperscript{49} and indirect eco-
nomic loss\textsuperscript{50} in negligence cases.\textsuperscript{51} In implied warranty suits, where the
plaintiff has dealt directly with the defendant, however, all four types of recovery\textsuperscript{52} are possible.\textsuperscript{53} Admittedly, outside privity, the implied war-
ranty plaintiff is less likely to succeed and may not be able to recover at all.\textsuperscript{54} And, even where recovery is not blocked on other grounds,\textsuperscript{55} cer-
tain kinds of damages are very difficult to obtain outside privity of con-
tract. In general, the implied warranty plaintiff who lacks privity of
contract with the defendant, but is otherwise entitled to recover, has a
reasonably good chance of obtaining personal injury or property damage
and relatively little chance of obtaining basis of the bargain damages or
indirect economic loss.\textsuperscript{56}

What all of this suggests is that one or both of the Code's implied
warranties is likely to be the theory of choice where the plaintiff is seek-
ing a basis of the bargain or indirect economic loss recovery from a de-
fendant with whom he dealt directly. This is especially so where a
breach of duty is difficult to prove and the product is merely defective
(not dangerously defective). In general, these factors are most likely to

\textsuperscript{49} Basis of the bargain damages (or "direct economic loss") represent the loss of the value of
the bargain. The typical measure of such damages is the value of the goods as warranted minus the
value of the goods as actually received. As this formulation suggests, basis of the bargain damages
typically are obtainable only in contract cases.

\textsuperscript{50} Indirect economic loss (or "consequential economic loss") is a catchall category including
forms of consequential damages other than personal injury or property damage. Typical examples
include lost profits and loss of business goodwill.

\textsuperscript{51} See D. Noel & J. Phillips, supra note 36, at 113-14 (generally no recovery in negligence
for economic loss). But see id. at 112-13 (economic loss recovery possible where this conjoined with
personal injury or property damage). The example given by the authors, however, involves indirect
economic loss; and it is unlikely that basis of the bargain damages are recoverable in a negligence
suit.

\textsuperscript{52} However, punitive damages are usually not obtainable under the UCC. See, e.g., E. Farns-
worth, supra note 5, § 12.8, at 842 & n.16. Cf. U.C.C. § 1-106 (penal damages not available except
as provided by UCC or other rule of law); J. White & R. Summers, supra note 3, § 4-8, at 168-69
(discussing the availability of punitive damages in the unconscionability context).

\textsuperscript{53} See U.C.C. § 2-714(2) (basis of the bargain damages); id. § 2-715(2)(a) (indirect economic
loss); id. § 2-715(2)(b) (personal injury and property damage). For recovery of indirect economic
loss, the loss must have resulted from general or particular requirements and needs of the buyer
of which the seller had reason to know at the time of contracting. For recovery of personal injury or
property damage, the injury or damage must have "proximately" resulted from the breach of
warranty.

\textsuperscript{54} See supra note 35 and accompanying text.

\textsuperscript{55} These "other grounds" include factors such as the status of the plaintiff and whether it was
foreseeable that the injury or other loss would result from a particular defect in the goods. See supra
note 35.

\textsuperscript{56} See J. White & R. Summers, supra note 3, § 11-3, at 403 (personal injury); id. § 11-4, at
405-06 (property damage); id. § 11-5, at 407 ("direct economic loss"—i.e., basis of the bargain
damages); id. § 11-6, at 409 ("consequential economic loss"—i.e., indirect economic loss). See generally
id. §§ 11-3 to 11-6.
be present where the plaintiff is a business person or entity buying for business purposes in a commercial setting. Negligence and section 402A, on the other hand, are usually better suited for personal injury and property damage cases, especially those where privity of contract is absent. Such cases, of course, tend to be consumer suits.57

B. Implied Warranty Disclaimers

1. The Basic Tests of U.C.C. Section 2-316(2)

U.C.C. sections 2-314 and 2-315 both contemplate the possibility that the implied warranties they establish may be disclaimed,58 and specifically refer to U.C.C. section 2-316 while doing so.59 For our purposes,60 the most important portion of section 2-316 is its subsection (2), which provides in relevant part that: "[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in the 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." Through these requirements, the Code "seeks to protect a buyer from unexpected and unbargained language of disclaimer by . . . permitting the exclusion of implied warranties only by conspicuous language . . . which protect[s] the buyer from surprise."61

Although they do impose interpretative problems,62 section 2-316(2)'s tests are fairly mechanical. To disclaim63 the implied warranty of merchantability, the seller must use the word "merchantability," and, if the disclaimer is in writing,64 must make it conspicuous. To disclaim the implied warranty of fitness for a particular purpose, the seller must

57. Indeed, it has been held that § 402A has no application where parties of relatively equal bargaining power who are dealing in a commercial setting bargain the specifications of the product and negotiate concerning the risk of loss from defects in that product. E.g., Scandinavian Airline Sys. v. United Aircraft Corp., 601 F.2d 425, 428-29 (9th Cir. 1979).
58. Section 2-316 deals only with exclusions and modifications of liability, not remedy limitations. See the discussion at infra notes 172-79 and accompanying text, which discusses remedy limitations under Article 2 and distinguishes them from disclaimers.
59. Before stating the rule in supra text accompanying note 9, U.C.C. § 2-314 conditions it by including the words "Unless excluded or modified (Section 2-316(2))." Id. § 2-315 conditions the rule stated in supra text accompanying note 24 by including the words "unless excluded or modified under the next section" between the terms "there is" and "an implied warranty."
60. Id. § 2-316(1) deals with attempted disclaimers of express warranty liability. For a discussion of this provision, see J. WHITE & R. SUMMERS, supra note 3, §§ 12-2 to 12-4.
61. U.C.C. § 2-316, Comment 1.
62. See generally T. QUINN, supra note 13, para. 2-316; J. WHITE & R. SUMMERS, supra note 3, § 12-5.
63. U.C.C. § 2-316(2) also controls attempts to modify implied warranties (as for instance by limiting their duration). J. WHITE & R. SUMMERS, supra note 3, § 12-5, at 437-38.
64. Thus, U.C.C. § 2-316(2) seems to contemplate oral disclaimers of the implied warranty of merchantability.
use a writing and must make the disclaimer conspicuous. No particular form of words is needed to disclaim an implied warranty of fitness.\textsuperscript{65}

Perhaps the most significant interpretative problem\textsuperscript{66} posed by section 2-316(2) is its "conspicuousness" requirement. U.C.C. section 1-201(10) defines the term "conspicuous" as follows:

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 the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

Although courts construing its language in the 2-316(2) context may have to consider such technical matters as the location of the disclaimer\textsuperscript{67} and the degree to which it contrasts with the rest of the contract,\textsuperscript{68} section 1-201(10) seems to resolve the conspicuousness question in a fairly definite fashion. But since the basic test of a term's conspicuousness "is whether attention can reasonably be expected to be called to it,"\textsuperscript{69} the courts sometimes consider the overall bargaining context while applying the section, and sometimes depart from its literal language when doing so. Although disclaimers are often strictly construed against sellers,\textsuperscript{70} for example, they are more likely to be enforced where the buyer is a party of some business sophistication and bargaining power.\textsuperscript{71} In fact, even an inconspicuous disclaimer may be enforced if the seller actually points out the disclaimer to such a business buyer,\textsuperscript{72} or if a buyer of this sort actually reads the disclaimer.\textsuperscript{73} On the other hand, there is ordinarily no requirement that the buyer be aware of a conspicuous disclaimer before it will be enforceable.\textsuperscript{74}

\textsuperscript{65} The last sentence of U.C.C. § 2-316(2) provides an illustrative form of language that (if conspicuous) will disclaim the implied warranty of fitness for a particular purpose. It provides: "Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'"

\textsuperscript{66} Another such problem involves disclaimers made subsequent to the time of the contract. On this subject, see J. White & R. Summers, supra note 3, § 12-5, at 445-46.

\textsuperscript{67} T. Quinn, supra note 13, para. 2-316(A)(10)(c), at 2-176; J. White & R. Summers, supra note 3, § 12-5, at 442.

\textsuperscript{68} T. Quinn, supra note 13, para. 2-316(A)(10)(g), at § 2-172-73 (1985 Cum. Supp.).

\textsuperscript{69} U.C.C. § 1-201, Comment 10.

\textsuperscript{70} E.g., FMC Fin. Corp. v. Murphree, 632 F.2d 413, 418-19 (5th Cir. 1980). See also J. White & R. Summers, supra note 3, § 12-5, at 440 & n.57.

\textsuperscript{71} See J. White & R. Summers, supra note 3, § 12-5, at 441 & n.59.

\textsuperscript{72} Id. at 444 & n.77.

\textsuperscript{73} See Office Supply Co. v. Basic/Four Corp., 538 F. Supp. 776, 783-85 (E.D. Wis. 1982).

\textsuperscript{74} See J. White & R. Summers, supra note 3, § 12-5, at 443-44 (generally agreeing with proposition in text but noting a case to the contrary). Nothing in U.C.C. § 2-316(2) imposes a requirement that the buyer be actually aware of the disclaimer. In addition, the general test of
2. Other Ways to Disclaim

U.C.C. section 2-316(3) creates a number of exceptions to section 2-316(2)'s basic requirements by listing various alternative ways to disclaim.75 These alternatives involve "common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded."76

U.C.C. section 2-316(3)(c), a catchall provision, allows implied warranties to be disclaimed by course of dealing, course of performance, or usage of trade.77 Section 2-316(3)(a) states a particularized application of this rule78 by providing that "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."79 Even though section 2-316(3)(a) does not directly authorize this, many courts have held that such expressions must be conspicuous if they are to disclaim implied warranty liability.80 Also, section 2-316(3)(a)'s clause "unless the circumstances indicate otherwise" has provided an avenue for occasional rulings that the section should not apply to consumer transactions and to sales of new goods.81

Comment 10 to id. § 1-201(10), see supra text accompanying note 69, is phrased as an objective standard ("reasonably to be expected"). However, the buyer's knowledge of the disclaimer may be relevant in the unconscionability context. See, e.g., infra notes 225, 223, 255 and accompanying text. And, as section III of this article maintains at many points, knowledge of the disclaimer is an important policy consideration that should affect its enforceability.

75. One of these alternatives is only peripherally relevant here because it does not involve a "disclaimer" in the usual sense of the term. U.C.C. § 2-316(3)(b) and Comment 8 to § 2-316 prevent the buyer from mounting an implied warranty suit with respect to a reasonably apparent product defect where: 1) the buyer examines the goods before the sale and either fails to discover such a defect or disregards it and purchases the goods anyway; or 2) the seller demands that the buyer inspect the goods and the buyer fails to do so.

76. U.C.C. § 2-316, Comment 6.

77. For definitions of the terms "course of dealing," "course of performance," and "usage of trade," see U.C.C. §§ 1-205(1), (2); 2-208(1). For a discussion of § 2-316(3)(c), see J. WHITE & R. SUMMERS, supra note 3, § 12-6, at 454-57.

78. "The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade." U.C.C. § 2-316, Comment 7.

79. A comment to § 2-316 adds the term "as they stand." Id.

80. T. QUINN, supra note 13, para. 2-316(A)(10)(c), at 2-177 to 2-178; J. WHITE & R. SUMMERS, supra note 3, § 12-6, at 450.

81. J. WHITE & R. SUMMERS, supra note 3, § 12-6, at 448-49. The reason for denying effect to such terms in consumer cases is that some consumers may be unaware of their meaning and consequences. Also, such terms may be regarded as inapplicable to new goods in certain commercial contexts.
3. Statutory Limitations on the Ability to Disclaim Implied Warranties

Except for the unconscionability problems discussed below, sellers who utilize the basic format authorized by U.C.C. section 2-316(2) would seem to have little difficulty disclaiming implied warranty liability. However, there are various statutory limitations on the ability to disclaim implied warranties. Several states, for instance, have forbidden implied warranty disclaimers in various contexts. Perhaps the most common of these measures is a ban on the enforceability of such disclaimers in sales of consumer goods.

Also, the federal Magnuson-Moss Warranty Act puts severe limits on the seller's ability to disclaim implied warranties in sales of consumer goods to consumers. The Act is basically a disclosure provision, and it also establishes certain consumer remedies. For present purposes, however, its most important feature is a provision stating that a seller who gives a written warranty in connection with the sale of consumer goods costing more than $10 per item must designate the warranty as "full" or "limited." Sellers thereby compelled to give a full or limited warranty cannot disclaim or modify any state-created implied warranty in a sale of a consumer product to a consumer. A seller who gives a full warranty also cannot limit the duration of any implied warranty. However, a seller who gives a limited warranty may limit the duration of any applicable implied warranty "to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty."

Nothing in the Magnuson-Moss Act compels a seller to give a writ-
ten warranty, and sellers who decline to do so can escape the provisions just described. Such sellers presumably could still disclaim the implied warranties of merchantability and fitness by including a writing to that effect along with the goods sold. Competitive realities, however, may often dictate that a written warranty be given. In such cases, the seller's ability to disclaim implied warranty liability obviously is quite limited where consumer goods are sold to a consumer.

C. The Doctrine of Unconscionability

1. Outside Article 2 of the U.C.C.

Prior to the promulgation and adoption of the Uniform Commercial Code, unconscionability was mainly an equitable doctrine. It seems to have been used most often as an argument for denying specific performance of contracts for the sale of land. In such contexts, formulations of the applicable unconscionability standard were usually quite vague. Perhaps the most familiar is the statement that a court should refuse to enforce contracts "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."

Equity courts attempting to inject some content into such nebulous standards ordinarily considered a wide range of factors. In most of the cases, both an unfair bargaining process and unfair substantive terms were present. Included under the former heading were all kinds of trickery, unscrupulous behavior, and abuse of a superior bargaining position that did not rise to the level of fraud, duress, or undue influence. Also relevant were the relative abilities of the parties. As for the sub-

93. Also, the seller might orally disclaim the implied warranty of merchantability where no written warranty has been given.
94. For general discussions of unconscionability's role in equity, see J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 9.38, at 318-19 (2d ed. 1977); E. FARNSWORTH, supra note 5, § 4.27, at 302-05; Leff, supra note 1, at 528-41.
95. See, e.g., Leff, supra note 1, at 531. However, courts occasionally would cancel or rescind the contract as well. E. FARNSWORTH, supra note 5, § 4.27, at 305-06.
96. "Almost without exception, actions for specific performance were (and are) brought with respect to transactions involving real property." Leff, supra note 1, at 534.
97. See, e.g., the examples quoted in E. FARNSWORTH, supra note 5, § 4.27, at 302, 304.
99. E. FARNSWORTH, supra note 5, § 4.27, at 304 (bargain usually infected with something more than substantive unfairness).
100. Id.
101. Within the ambit of those factors of contract-procuring behavior which would result in a denial of specific performance, a bewildering number of permutations work to inform the chancellor's discretion. In these cases one runs continually into the old, the young, the
stantive terms of the contract, it seemed to be agreed that a gross disproportion between the obligations assumed by each party (and not mere inadequacy of consideration) was necessary before the unconscionability doctrine would be invoked.  

It is unclear whether both kinds of unconscionability—an unfair bargaining process and unfair substantive contract terms—were necessary for an equity court to refuse specific performance. Where the substantive terms were fair, it is extremely doubtful whether the courts concerned themselves with unfairness in the bargaining process. Where the substantive terms were unfair, on the other hand, there was considerable disagreement about the need for "bargaining process" unfairness. The question, that is, was whether substantive unfairness was a sufficient (and not just a necessary) condition for denying specific performance.

In actions at law, by contrast, the principles just stated generally did not apply. In theory, at least, a party arguing that he be allowed to avoid an unjust or oppressive bargain was limited to such traditional "escape doctrines" as fraud, duress, and undue influence. In cases not cov-
ered by such doctrines, however, common law courts often manipulated standard contract rules to achieve results paralleling the results that unconscionability made possible in equity.107 As Karl Llewellyn once stated, though, such “[c]overt tools are never reliable tools,”108 and the courts in fact did not employ them in a consistent, predictable fashion.109 The dissatisfaction created by such covert manipulation, coupled with the perceived need to continue policing unjust bargains, encouraged the promulgation and enactment of U.C.C. section 2-302.110

Section 2-302 is discussed immediately below, but our present concern is with its influence outside the sale of goods context controlled by Article 2 of the U.C.C.111 Since the adoption of section 2-302, some courts have chosen to apply its rule in cases not involving the sale of goods.112 Also, the Restatement (Second) of Contracts includes an unconscionability rule quite similar to section 2-302.113 Finally, provisions resembling section 2-302 have been included in a number of other uniform acts.114

2. Under the Uniform Commercial Code

The Section and its Mechanics. U.C.C. section 2-302, Article 2’s unconscionability provision,115 states that:

(1) If the court as a matter of law finds the contract or any

107. In general, . . . courts of law have not directly condemned a contract as unconscionable but have resorted to imaginative flanking devices to defeat the offending contract. The law courts searched for and found (even though not present under ordinary rules) failure of consideration, lack of consideration, lack of mutual assent, duress or fraud, inadequacy of pleading, lack of integration in a written contract or a strained interpretation after finding ambiguity where little or no ambiguity existed.


110. See id. at 321.

111. U.C.C. § 2-102. Although this article is not concerned with the precise coverage of Article 2, it should be noted that some of the cases discussed in section II of this article involve leases of goods.

112. See Restatement (Second) of Contracts § 208, Reporter’s Note, Comment a (1981); E. Farnsworth, supra note 5, § 4.28, at 308 & n.7; and cases cited by each source.

113. Restatement (Second) of Contracts § 208 (1981), which provides:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

For the text of U.C.C. § 2-302, see infra text following note 115.

114. E. Farnsworth, supra note 5, § 4.28, at 308 n.10.

115. On the drafting history of 2-302, see Leff, supra note 1, at 489-501, 509-16; Spanogle, supra note 1, at 938-42.
UNCONSCIONABILITY AND ARTICLE 2

clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purposes and effect to aid the court in making the determination.

As the section expressly declares, the unconscionability determination is to be made by the court. To aid the court in making this determination, subsection (2) requires that the parties be given a reasonable opportunity to present evidence regarding the contract's commercial setting, purpose, and effect. The party alleging unconscionability has the burden of proof on that issue, and must show that the contract was unconscionable at the time of its formation (and not some later time). Once the court decides that the contract or one of its clauses is unconscionable, it has at its disposal the wide range of remedial alternatives described in subsection (1).

The Meaning and Application of Section 2-302. The key inquiries in almost all unconscionability cases, of course, are the term's meaning and its application in the relevant factual context. For better or worse, there is no precise answer to the first question. Neither the Code nor its comments give a specific definition of the word "unconscionable." Also, the indeterminate, self-contradictory language of Comment 1 to section 2-302 also provides little definite guidance. Thus, section 2-

116. "The present section is addressed to the court, and the decision is to be made by it." U.C.C. § 2-302, Comment 3.
117. The trial court's failure to provide such an opportunity may be grounds for reversal of an unconscionability finding. J. WHITE & R. SUMMERS, supra note 3, § 4-3, at 150. See also id. at 150-51 n.17 (providing further detail on § 2-302(2)'s hearing requirement).
118. Id. at 150.
119. Usually, the unconscionability doctrine is used defensively and is not the basis for recovery of damages. Id. For an elaboration of this proposition and some qualifiers to it, see id. § 4-8.
120. See infra notes 360-65 and accompanying text (suggesting that open-endedness of § 2-302(1) inevitable if genuine policing of bargains to occur, and that this indefiniteness therefore qualifies as desirable).
121. E.g., J. WHITE & R. SUMMERS, supra note 3, § 4-3, at 151 ("[i]t is not possible to define unconscionability") (emphasis in original); Braucher, supra note 1, at 337 (unconscionability "unruly horse"); Hillman, supra note 1, at 1-2 (§ 2-302 gives judges great power to police agreements but provides "little coherent guidance" on how to do so); Spanogle, supra note 1, at 931 (concept of unconscionability "vague").
122. In relevant part, U.C.C. § 2-302, Comment 1 provides that: "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." Later, the comment declares that: "The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks
302(1) is often regarded less as a rule of law\textsuperscript{123} than as an occasion for the exercise of case-by-case judicial discretion. As Professors White and Summers have stated unconscionability "is not a concept, but a determination to be made in light of a variety of factors not unifiable into a formula."\textsuperscript{124}

As this last remark suggests, courts deciding unconscionability claims typically consider a range of factors whose application will vary with the factual context. In structuring these factors, the sometimes-criticized\textsuperscript{125} but widely recognized\textsuperscript{126} distinction between "substantive" unconscionability and "procedural" unconscionability is fairly useful.\textsuperscript{127} As its name suggests, substantive unconscionability involves the substantive terms of the contract and the relative benefits and burdens they create for the parties. Courts making this kind of inquiry, of course, are concerned about substantive terms that impose excessive burdens on one party, or unfairly benefit the other.\textsuperscript{128} Procedural unconscionability, on the other hand, concerns various sorts of unfairness in the process of contracting.\textsuperscript{129} Inquiries of this type generally focus on various kinds of "bargaining naughtiness"\textsuperscript{130} giving one party an unfair advantage over because of superior bargaining power." This much-quoted language plainly is very imprecise. "Experimentation with even a single case shows this litmus to be useless; in no sense is the comment an objective definition of the word [unconscionable]. It is simply a string of hopelessly subjective synonyms laden with a heavy ‘value’ burden: ‘oppression,’ ‘unfair,’ or ‘one-sided.’” J. WHITE & R. SUMMERS, supra note 3, § 4-3, at 151. Indeed, since many unconscionability cases involve situations where superior bargaining power has produced a one-sided allocation of risks, the quoted comment language is self-contradictory in many of the common contexts where the doctrine is applied. "The dilemma is: If courts are now supposed to explicitly police against contracts or clauses which are unconscionable, . . . how can a court help but disturb the allocation of risks?" Murray, supra note 1, at 40. See also J. WHITE & R. SUMMERS, supra note 3, § 4-3, at 151 (making the same point).

\textsuperscript{123} Ellinghaus, supra note 1, at 759 (unconscionability not a “rule” but a “standard”).

\textsuperscript{124} J. WHITE & R. SUMMERS, supra note 3, § 4-3, at 151.

\textsuperscript{125} E.g., Hillman, supra note 1, at 3-4, 21 (distinction raises more questions than it solves because it offers no guidance on how to employ the factual elements labeled “substantive” and “procedural”); Murray, supra note 1, at 21 (these factors need not be rejected, but do little to advance analysis).

\textsuperscript{126} E.g., J. WHITE & R. SUMMERS, supra note 3, § 4-3, at 151 (accepting the distinction as framework for discussion); Braucher, supra note 1, at 338 (distinction superior to other analytical frameworks); Ellinghaus, supra note 1, at 762 n.20 (accepting distinction with apparent misgivings); Leff, supra note 1, at 487 (seeming origin of the distinction).

\textsuperscript{127} Although it obviously had antecedents in pre-Code law, see supra notes 99-102 and accompanying text, the procedural-substantive distinction seems to have formally originated with Leff, supra note 1, at 487. Of course, this framework is merely a way to organize the factors relevant to unconscionability determinations. It does not tell us what weight to give each substantive or procedural factor; nor does it state whether both procedural and substantive unconscionability are needed for an overall determination that a contract or contract term is unconscionable. Hillman, supra note 1, at 3-4. On the latter question, see infra notes 153-58 and accompanying text.

\textsuperscript{128} Cf. J. WHITE & R. SUMMERS, supra note 3, § 4-3, at 151 (“overly harsh terms”); Leff, supra note 1, at 487 (“evils in the resulting contract”).

\textsuperscript{129} Leff, supra note 1, at 487.

\textsuperscript{130} Id.
the other.

Of the substantive contract provisions that might trouble courts applying section 2-302, perhaps the most frequent offender is the price term.131 Most other instances of substantive unconscionability involve "remedy meddling"132 in its various forms. Examples include contract clauses that: impose liquidated damages for the buyer's non-acceptance,133 limit the seller's liability for consequential damages,134 give the seller excessive repossession rights,135 waive defenses136 or the right to a jury trial,137 or submit disputes to the courts of a particular jurisdiction.138 (And, as we will see, implied warranty disclaimers may be substantively unconscionable as well.) It seems likely that substantive unconscionability can result both from the effect of a single such clause, and from an overall imbalance in the terms of the contract.139 In the latter case, however, it is not evident just how onerous a single term must be before it will be deemed substantively unconscionable.140

The many factors relevant to determinations of procedural unconscionability can be grouped under three general headings: 1) the parties and their characteristics; 2) the way the contract states and packages the substantively offensive terms; and 3) the seller's sales tactics.141 Under the first heading, a disparity in bargaining power between the parties is widely regarded as a significant factor,142 though not a decisive one.143 The absence of such a disparity, on the other hand, may often suggest that the contract is conscionable. Commercial deals between business professionals, for instance, are quite likely to survive allegations of un-
conscionability. In consumer cases, however, the consumer's ignorance, lack of education, inability to understand English, and inability to comprehend contract terms are often significant reasons for determining that unconscionability exists. It has even been suggested that one's general status as "poor" or "disadvantaged" may merit consideration. Turning to the second group of factors, it is commonly claimed that unfavorable contract terms that are stated in fine print, well-buried amidst other clauses, or expressed in incomprehensible legalese may be categorized as procedurally unconscionable. Finally, sales induced by seller trickery, guile, and high-pressure tactics are also procedurally suspect.

Usually, contracts containing substantively unconscionable terms exhibit procedural failings as well. Assent to such terms is unlikely absent some unfairness in the bargaining process. Moreover, it is often asserted that both procedural unconscionability and substantive unconscionability are necessary for an overall finding of unconscionability under U.C.C. section 2-302. If neither the contract as a whole nor any of its terms are particularly onerous, that is, why worry about one-sidedness in the bargaining process? Also, why should courts concern themselves with substantively unconscionable terms where the absence of procedural defects suggests that each party freely and knowingly assented to those terms? In fact, it has been suggested that "superconscionable" bargaining practices may insulate substantively unconscionable terms from judicial attack. Despite all this, however,

144. "[C]ourts have not been solicitous of businessmen in the name of unconscionability." J. WHITE & R. SUMMERS, supra note 3, § 4-9, at 170. However, there are situations where contracts made by business parties in a commercial context will be deemed unconscionable. See id. at 170-73; Hillman, supra note 1, at 43-44. For more on this subject, see infra notes 250-62 and accompanying text.

146. Id. at 153.
147. E.g., id.; Ellinghaus, supra note 1, at 770.
148. E.g., Braucher, supra note 1, at 342; Spanogle, supra note 1, at 963.
149. Also, the seller's knowledge of the buyer's weakness may be a factor. Braucher, supra note 1, at 342; Ellinghaus, supra note 1, at 770.
150. J. WHITE & R. SUMMERS, supra note 3, § 4-3, at 154; Ellinghaus, supra note 1, at 771.
151. E.g., Spanogle, supra note 1, at 943, 954, 963.
152. E.g., J. WHITE & R. SUMMERS, supra note 3, § 4-3, at 154. Also, behavior resembling fraud, duress, and undue influence would no doubt qualify for consideration as well.
153. See id. § 4-7, at 163-64.
154. E.g., id. at 164 (most courts seem to require a certain quantum of procedural unconscionability and a certain quantum of substantive unconscionability); Spanogle, supra note 1, at 932 (both forms of unconscionability usually needed).
155. Ellinghaus, supra note 1, at 775 (occasions when bargain arrived at by full and free assent ought to be struck down extremely rare).
156. Noting this possibility are J. WHITE & R. SUMMERS, supra note 3, § 4-7, at 164-65; Ellinghaus, supra note 1, at 762-63, 773-75; Hillman, supra note 1, at 42-43; Leff II, supra note 1, at
some observers have argued that certain substantive contract terms may be sufficiently egregious to provoke a finding of unconscionability in the absence of procedural unfairness.\textsuperscript{157} And even where both procedural and substantive unconscionability are required, overwhelming evidence of one form of unconscionability may mean that only a token amount of the other will be necessary.\textsuperscript{158}

II. UNCONSCIONABILITY AND IMPLIED WARRANTY DISCLAIMERS—THE LAW

The preceding section has set the stage for the main focus of this article by reviewing the U.C.C.'s implied warranties of merchantability and fitness, the permissible methods for disclaiming them, and the unconscionability doctrine established by U.C.C. section 2-302. This section of the article examines situations in which these three bodies of law are conjoined. Specifically, the section addresses the occasions when a seller of goods subject to one of Article 2's implied warranties validly disclaims that warranty and then is confronted by a claim that the disclaimer is unconscionable. As will become apparent below, such a claim will be successful only if the court gives an affirmative answer to each of two questions: 1) whether section 2-302 can ever apply to implied warranty disclaimers satisfying the tests of U.C.C. section 2-316; and, if so, 2) whether the disclaimer is unconscionable under section 2-302. This section begins by discussing a series of statutory interpretation arguments directed to the first of these questions. Then it considers how the existing case law on the interaction of sections 2-316 and 2-302 deals with each issue just noted.

A. The Statutory Interpretation Arguments

Most of the arguments for the proposition that U.C.C. section 2-302 should never apply to an implied warranty disclaimer satisfying section 2-316 come from Professor Arthur Allan Left's well-known 1967 article

\textsuperscript{349-50}. The usual examples of procedural superconscionability involve "superdisclosure": for example, stating disadvantageous form contract clauses in extremely large or quite contrasting print, calling such clauses to the consumer's attention, requiring that the consumer read the offending clause, and/or requiring that the consumer sign separately near the offending clause.

\textsuperscript{157}. \textit{E.g.}, J. White & R. Summers, \textit{supra} note 3, § 4-7, at 165 (excessive price alone sufficient basis for finding contract unconscionable); Braucher, \textit{supra} note 1, at 339-40 (generally noting the possibility that substantive unfairness may sometimes be sufficient).

\textsuperscript{158}. "[I]t appears that a contract that is one hundred pounds substantively unconscionable may require only two pounds of procedural unconscionability to render it unconscionable and vice versa." J. White & R. Summers, \textit{supra} note 3, § 4-7, at 165. This may lead some courts to manipulate the facts to find procedural unconscionability where the contract is substantively unfair. Hillman, \textit{supra} note 1, at 22.
on the unconscionability doctrine. \textsuperscript{159} The central theme animating many of Professor Left's arguments was that the specificity of section 2-316's disclaimer provisions evidences the Code drafters' intent to make it the sole provision governing implied warranty disclaimers. Although "it would not have been inconceivable for the draftsmen simply to have declared that some or all of the traditional implied warranties surrounding sales would be nondisclaimable," he began, "[t]hey did not do so." \textsuperscript{160} Instead, he continued, they enacted section 2-316, which "not only says that warranties may be disclaimed, but . . . says how one should go about doing so, in rather impressive detail and with surprising particularity." \textsuperscript{161} Moreover, the comments to section 2-316 \textsuperscript{162} "disclose full awareness of the problem at hand." \textsuperscript{163} In particular, Comment 1 to section 2-316 states that the section "seeks to protect a buyer from unexpected and unbargained language of disclaimer by . . . permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise." Obviously, Leff went on, "the vice is surprise" \textsuperscript{164} and section 2-316(2)'s conspicuousness requirement was included to prevent surprise from occurring. \textsuperscript{165}

The contrary reading of sections 2-316 and 2-302, of course, is that section 2-316 only states minimum criteria for the enforceability of an implied warranty disclaimer, and that disclaimers satisfying these criteria still must be conscionable under section 2-302. By its express terms, section 2-302 applies to "any clause of the contract." Nothing in that section or its comments specifically denies its application to contract clauses that are regulated by other U.C.C. provisions. \textsuperscript{166} In fact, one of section 2-302's comments arguably authorizes the section's application to implied warranty disclaimers. Comment 1 lists and describes ten pre-Code cases that presumably were included to illustrate the basis and scope of the section, and in seven of these cases the court refused to give full effect to a warranty disclaimer. \textsuperscript{167} Moreover, even Comment 1 to

\begin{itemize}
  \item \textsuperscript{159} See Leff, supra note 1, at 516-28, especially id. at 520-24. A useful summary of most of the arguments discussed in this section appears in J. White & R. Summers, supra note 3, § 12-11, at 475-77.
  \item \textsuperscript{160} Leff, supra note 1, at 520. See also id. at 524.
  \item \textsuperscript{161} Id. at 521. See also id. at 523.
  \item \textsuperscript{162} See id. at 521 for Leff's statement of the relevant comments.
  \item \textsuperscript{163} Id. at 523.
  \item \textsuperscript{164} Id. at 522.
  \item \textsuperscript{165} See id. (discussing U.C.C. § 1-201(10)'s definition of the term "conspicuous").
  \item \textsuperscript{166} J. White & R. Summers, supra note 3, § 12-11, at 476.
  \item \textsuperscript{167} Id. There is little need to cite or describe these cases, since the comment provides a capsule summary of each case, and since it is the drafters' reading of the cases that presumably is determinative here. As Professors White and Summers note, "[i]t is difficult to reconcile an intent on the part of the draftsmen to immunize disclaimers from the effect of 2-302 with the fact that they used cases
\end{itemize}
section 2-316 can be given an interpretation quite contrary to Professor Leff's. Section 2-316's purpose, the comment declares, is "to protect a buyer from unexpected and unbargained language of disclaimer." Leff's "plain meaning" reading of the comment suggests that requiring the disclaimer to be conspicuous is section 2-316's only permissible means of advancing this purpose. But inconspicuousness is not the only procedural abuse capable of generating "unbargained" contract terms. In particular, a disclaimer might be unbargained because a seller with superior power offers it on a "take it or leave it" basis. Moreover, due to the infrequency with which implied warranty disclaimers are read and understood, section 2-316(2)'s conspicuousness requirement is unlikely to protect buyers from "unexpected" disclaimer language either. Thus, reading section 2-316 in the light of Comment 1's statement of its purpose seems to open the door for further scrutiny of implied warranty disclaimers under section 2-302.

There are other arguments, however, supporting the Leff position. As he notes, nine sections of Article 2 contain specific cross-references to section 2-302, but section 2-316 does not. Still, nothing in section 2-316 or its comments specifically prohibits section 2-302's application to implied warranty disclaimers, and section 2-302 has been applied to contract terms regulated by Code provisions that also lack a cross-reference to section 2-302. Despite this, one Article 2 provision containing a specific textual reference to the possibility of unconscionability—U.C.C. section 2-719(3)—seems to reinforce Leff's general point. Section 2-719(3), which deals with remedy limitations involving consequential damages, states that such damages "may be limited or excluded unless in which courts struck down disclaimers to illustrate the concept of unconscionability." Id. For Professor Leff's probably-unsuccesful attempt to avoid the force of this argument, see Leff, supra note 1, at 516, 525-27.

168. See J. White & R. Summers, supra note 3, § 12-11, at 476-77; Metzger, supra note 5, at 686; Murray, supra note 1, at 48-49; Spanogle, supra note 1, at 956-58.

169. See infra notes 284, 294-99 and accompanying text. Professor Leff, by the way, agreed that disclaimers are seldom read or understood. E.g., Leff II, supra note 1, at 349.

170. Leff, supra note 1, at 523. The provisions in question are U.C.C. §§ 2-202, 2-204, 2-205, 2-207, 2-303, 2-508, 2-615, 2-718, and 2-719. The references to which Leff refers are the "Cross References" at the end of each Code section.


172. While discussing U.C.C. § 2-719 at length, however, Leff de-emphasized § 2-719(3) and in fact seemed critical of it. See Leff, supra note 1, at 517-19, especially id. at 519-20 n.130.

173. Remedy limitations, while resembling disclaimers by contractually limiting the buyer's recovery, differ in their method of attack. Disclaimers attack particular theories of recovery and, if successful, prevent the recovery of any damages under the theory in question. Remedy limitations block the recovery of certain kinds of damages (e.g., consequential damages), but not the theory of recovery under which they are obtainable. Thus, other kinds of damages may be recoverable under a
the limitation or exclusion is unconscionable. Limitation of consequen-
tial 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." \(^1\)

Here, in a somewhat similar contractual context, we have the sort of specific reference section 2-316, its comments, or its
cross-references presumably should contain if implied warranty disclaim-
ers are to be subject to section 2-302's unconscionability standards. Comment 3 to section 2-719 seems to reinforce this point by providing:
"Subsection (3) recognizes the validity of clauses limiting or excluding
consequential damages but makes it clear that they may not operate in an
unconscionable manner . . . . The seller in all cases is free to disclaim
warranties in the manner provided in Section 2-316." \(^1\)

This argument against section 2-302's application to implied war-
 ranty disclaimers, however, loses force when its implications are laid bare. A liability disclaimer attacks a particular theory of recovery and, if
valid, eliminates all damage recoveries under that theory. A valid rem-
edy limitation, on the other hand, only blocks the recovery of certain kinds of damages, leaving the theory of recovery intact and permitting
the recovery of other damages under that theory. Since valid disclaimers
usually would seem more damaging to buyers than valid remedy limita-
tions, one would suppose that the former are better candidates for scrut-
tiny under section 2-302. On the reading of section 2-316 advanced in
the preceding paragraph, however, just the reverse is true. Since section
2-719(3) makes the limitation of consequential damages prima facie uncon-
scionable in sales of consumer goods, for instance, "a seller who is
barred under subsection 2-719(3) from excluding a buyer's right to re-
cover consequential damages for personal injuries could effectively avoid
the same liability by completely excluding implied warranties via subsec-
tion 2-316(2) or (3)." \(^1\)

Considerations of this sort, perhaps, explain the cases adopting the technically-incorrect approach of invalidating

\(^{174}\) On the operation of this section, see id. at 472-75.

\(^{175}\) U.C.C. § 2-316(4) also seems to reinforce the argument that §§ 2-316 and 2-719(3) are
distinct provisions treating different kinds of contract clauses under different standards. It provides:
"Remedies for breach of warranty can be limited in accordance with the provisions of this Article on
liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and
2-719)." In addition, id. § 2-316, Comment 2 states that: "This Article treats the limitation or
avoidance of consequential damages as a matter of limiting remedies for breach, separate from the
matter of creation of liability under a warranty. . . . Under subsection (4) the question of limitation
of remedy is governed by the sections referred to rather than by this section."

\(^{176}\) Metzger, supra note 5, at 685. See also Franklin, When Worlds Collide: Liability Theories

\(^{177}\) E.g., Ford Motor Co. v. Tritt, 244 Ark. 883, 889-90, 430 S.W.2d 778, 781-82 (1968).
implied warranty disclaimers under section 2-719(3) where a consumer has suffered personal injury.\(^{179}\)

**B. The Cases**

All things considered, the statutory construction arguments discussed above tend to support U.C.C. section 2-302's application to implied warranty disclaimers. But they are not the last word on the subject. Since prior judicial interpretations of statutes are often said to bind subsequent courts deciding like issues,\(^{180}\) it is necessary to examine the extant case law discussing the unconscionability doctrine's application in implied warranty cases. As will become apparent, the thirty-five-odd decisions dealing more or less directly with this issue\(^{181}\) are a heterogeneous

\(^{178}\) See J. WHITE & R. SUMMERS, supra note 3, § 12-12, at 484-85.

\(^{179}\) "Undoubtedly the main reason why courts refuse to follow the literal scheme of the Code is its harshness. If neither 2-302 nor 2-719(3) operate as restrictions on disclaimers drafted pursuant to 2-316, then the seller may have the power to thrust on the consumer all risks of personal injury resulting from defects in its products." Id. at 485. Of course, this would not be true where a negligence or § 402A claim can be mounted, but we are not presently concerned with these possibilities.

\(^{180}\) See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 32 (paperback ed. 1949) (stating apparently unqualified rule that prior interpretations should be followed); 2A D. SANDS, SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 49.03-49.10 (1972) (stating the many factors relevant to determining the binding effect of prior interpretations).

lot. This section will begin with an attempt at classifying these cases. Then it will consider their position on the question discussed above: whether section 2-302 can ever be used to invalidate an implied warranty disclaimer satisfying the tests set by U.C.C. section 2-316. After concluding that the vast majority of courts have answered this question in the affirmative, the section will conclude by examining the various factors that are relevant for determining the conscionability or unconscionability of particular disclaimers.

1. Classifying the Cases

Before examining their treatment of legal questions, it might be useful to attempt a rough classification of the cases discussing the unconscionability of implied warranty disclaimers. Quite apart from the legal significance of such a categorization, one issue is what kinds of cases do we have here? Obviously, all the relevant decisions involve implied warranty disclaimers, and these disclaimers invariably are in writing. In addition, most such disclaimers seem to be contained in contracts or other writings that were used with sufficient frequency and consistency to qualify as standard forms. A few, however, may have been tailored to the requirements of a particular sale, or have been the product of explicit bargaining. Also, some of the disclaimers found in the cases were read by the buyer before the sale. In the typical case,


182. Of course, as will become apparent in the pages ahead, the classifications used here do have considerable legal significance.

183. However, Oddo, 22 U.C.C. REP. SERV. 1147, may be an exception. There, the Court held that it was unconscionable to limit the plaintiff to the recovery obtainable under the manufacturer's express warranty. Id. at 1148-49. But it is not clear from the case whether or not a disclaimer existed.

184. However, cf. Salcetti, 27 U.C.C. REP. SERV. at 683 (disclaimer on sales receipt signed by plaintiff).

185. See, e.g., Feeders, 33 U.C.C. REP. SERV. at 542-43 (disclaimer on cans of Lasso herbicide); Salt River, 143 Ariz. at 373, 694 P.2d at 203 (disclaimer in document described as "standardized acceptance form"); Seekings, 130 Ariz. at 601-02, 638 P.2d at 215-16 (disclaimer appearing on purchase order and purchase money security agreement in sale of mobile home to consumers); Dillman, 110 Ill. App. 3d at 336, 442 N.E.2d at 313 (lease on which disclaimer appears called "form contract").

186. Possible examples include Murphree, 632 F.2d at 420 (contract that was product of extensive negotiation); U.S. Fibres, 358 F. Supp. at 460 (both parties realized that purpose of contract to allocate risks associated with transaction in question). Of course, neither factor is likely to be present in the typical consumer case.

187. E.g., Badger, 444 F. Supp. at 921. Cf. Hahn, 434 N.E.2d at 949-50 (buyer generally aware of 12,000 mile/12 month warranty limitation in sale of car); Macarr, 70 Misc. 2d at 500, 333
however, it is doubtful whether the disclaimer was read or specifically bargained for.188

Slightly over half of the relevant decisions involve business buyers operating in a more or less commercial context. Some of these parties, however, are difficult to distinguish from ordinary consumers.189 Within this general business/commercial classification, the fact patterns vary considerably. A few of these cases involve large, sophisticated corporate entities dealing with each other on a relatively equal footing.190 Rather more common, however, is the purchase of a large corporation’s products by a small-to-medium-sized firm.191 Also fairly common is the situation where two businesses of small-to-medium-size confront one another.192 Although the courts are often quite imprecise in describing the damages claimed by the plaintiff, most of the commercial cases involve business buyers that are seeking to recover economic losses193 of various sorts.194 In a few of these cases, however, the validity of the

N.Y.S.2d at 823-24 (disclaimers long used in similar past transactions between seller and buyer are common in industry).

188. Sometimes, courts make specific statements on the point. E.g., Murphree, 632 F.2d at 419 (buyer did not actually read lease); A & M Produce, 135 Cal. App. 3d at 490, 186 Cal. Rptr. at 124 (buyer testified that he never read reverse side of form where disclaimer appeared); Rottinghaus, 35 Wash. App. at 104, 666 P.2d at 903 (no discussions, bargaining, negotiations, or actual agreement regarding disclaimer clause). More often, however, the absence of knowledge or negotiations can be fairly easily inferred even though the court says nothing specific on the subject. See, e.g., Feeders, 33 U.C.C. REP. SERV. 541 (sale of Lasso herbicide to farmer; standard disclaimer on can); Seekings, 130 Ariz. 596, 638 P.2d 210 (sale of mobile home to consumers; disclaimer on purchase order and purchase money security agreement; disclaimer obviously not negotiated and perhaps not read).

189. See, e.g., Martin, 41 U.C.C. REP. SERV. at 320 n.4 (court uncertain whether plaintiff farmers U.C.C. “merchants,” but deciding to operate on assumption that case “commercial” in nature); Wilson Plumbing, 132 Ga. App. 435, 208 S.E.2d 686 (plumbing company with one stockholder purchasing car from local dealer); Sarfati, 35 A.D.2d at 1005, 318 N.Y.S.2d at 354 (lessee whose business not identified in case “in no better commercial position than the consumer” regarding lease of car).

190. E.g., Salt River, 143 Ariz. 356, 694 P.2d 198 (large electric utility company and Westinghouse Electric Corporation).

191. E.g., Murphree, 632 F.2d 413 (closely held corporation running shuttle service and leasing subsidiary of FMC Finance Corporation); Feeders, 33 U.C.C. REP. SERV. 541 (corporation engaged in farming and cattle feeding versus Monsanto Company); Badger, 444 F. Supp. 919 (corporation engaged in distributing bearings and power transmission components versus Burroughs Corporation); A & M Produce, 135 Cal. App. 3d, 186 Cal. Rptr. 114 (solely owned farming corporation and FMC Corporation); Edenfield, 35 U.C.C. REP. SERV. 781 (knowledgeable and experienced farmer versus Monsanto).

192. E.g., Dillman, 110 Ill. App. 3d 355, 142 N.E.2d 311 (firm in business of preparing tax returns and lessor of copier); Bill Stremmel, 89 Nev. 414, 514 P.2d 654 (auto dealer and lessor of communications system); Butcher, 20 Wash. App. 2d 361, 581 P.2d 1352 (sawmill operator and firm about to go into mass production of portable small log sawmill).

193. By “economic losses,” I mean basis of the bargain damages, property damage, and indirect economic loss. See supra notes 47, 49-50 and accompanying text.

194. E.g., Feeders, 33 U.C.C. REP. SERV. at 542 (crop loss); Badger, 444 F. Supp. at 922 (losses resulting from defective computer system); Salt River, 143 Ariz. at 374, 694 P.2d at 204 (damage to gas turbine unit and any resulting losses; personal injury not mentioned); A & M Produce, 135 Cal. App. 3d at 479-80, 186 Cal. Rptr. at 117-18 (damage to tomato crop and any resulting losses).
disclaimer is at issue because the buyer has employed the seller’s alleged breach of warranty as a defense to the seller’s suit for the purchase price.  

The remaining cases involve purchases by consumers. Here, the decisions are more homogeneous, being fairly evenly divided between contests against small-to-medium-sized sellers and clashes with corporate “giants.” With a few exceptions, there do not appear to be substantial variations within the generally low range of business sophistication possessed by the consumers in question. One significant basis for classifying the consumer cases, however, is the damages at issue in these decisions. Some of the consumer cases are suits for personal injury, while others only involve some kind of economic loss. In addition, as with the commercial cases, a few of the consumer decisions present situations where the seller sues for the price and the buyer employs the seller’s alleged breach of warranty as a defense.

2. The Applicability of Section 2-302 to Otherwise Valid Implied Warranty Disclaimers

The taxonomy contained in the preceding section ignored one salient feature of the cases considering the issues whether and when implied warranty disclaimers can be judged unconscionable. The feature com-

195. E.g., Murphree, 632 F.2d at 417 (party sued as guarantor on lease alleged breach of warranty as defense and also asserted unconscionability of warranty disclaimer); Avery, 128 Ga. App. 266, 196 S.E.2d 357 (seller’s suit for purchase price).
196. Many of these cases involve automobiles. See Tritt, 244 Ark. 883, 430 S.W.2d 778; Jacobs, 125 Ga. App. 462, 188 S.E.2d 250; Hahn, 434 N.E.2d 943; Zabriskie, 99 N.J. Super. 441, 240 A.2d 195; Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390; Walsh, 59 Misc. 2d 241, 298 N.Y.S.2d 538; Evans, 2 Ohio App. 3d 435, 442 N.E.2d 777; Eckstein, 41 Ohio App. 2d 1, 321 N.E.2d 897; Moulton, 511 S.W.2d 690; Marshall, 207 Va. 972, 154 S.E.2d 172.
197. See, e.g., Seekings, 130 Ariz. 596, 638 P.2d 210 (Tuscon dealer in motor homes); Salcetti, 27 U.C.C. REP. SERV. 679 (pet shop); Zabriskie, 99 N.J. Super. 441, 240 A.2d 195 (auto dealer); Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (used car dealer and finance company).
198. See, e.g., Tritt, 244 Ark. 883, 430 S.W.2d 778 (Ford); Walsh, 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Ford); Moulton, 511 S.W.2d 690 (Ford). Cf. Jacobs, 125 Ga. App. 462, 188 S.E.2d 250 (auto dealer and Chrysler).
199. Possible exceptions, however, include Salcetti, 27 U.C.C. REP. SERV. at 683 (plaintiffs not unsophisticated consumers, since they negotiated 30-day extension of right to return dog to pet shop for cash credit if dog became seriously ill); and, at the other extreme, Marcano, 60 Misc. 2d at 141, 302 N.Y.S.2d at 393-94 (plaintiff virtually unable to understand English).
200. The presence of personal injury is probably a significant (if unavowed) basis for decision in cases where a disclaimer is challenged on grounds of unconscionability. See infra note 239 and accompanying text.
201. E.g., Tritt, 244 Ark. 883, 430 S.W.2d 778; Walsh, 59 Misc. 2d 241, 298 N.Y.S.2d 538; Moulton, 511 S.W.2d 690.
202. See, e.g., Salcetti, 27 U.C.C. REP. SERV. at 681 (cost of puppy and medical and transportation expenses for treatment of puppy); Evans, 2 Ohio App. 3d 435, 442 N.E.2d 777 (truck’s unsuitability for intended purposes).
mon to all these cases is the generally low quality of their technical legal argumentation. The exceptions to this generalization include *Martin*, 41 U.C.C. REP. SERV. at 318-23; *Murphree*, 632 F.2d at 420; *Tacoma Boatbuilding*, 28 U.C.C. REP. SERV. at 30-45; and *A & M Produce*, 135 Cal. App. 3d at 483-93, 186 Cal. Rptr. at 119-28.

205. The fact that these questions are distinguishable is obvious when we consider cases that clearly apply § 2-302 to apply to disclaimers that satisfy § 2-316, but then refuse to find the disclaimer unconscionable under the circumstances. To take just one example, the court in *Murphree*, 632 F.2d at 420, concluded that “section 2-302 could apply to a warranty disclaimer meeting the requirements of section 2-316,” but then proceeded to hold that the disclaimer was valid nonetheless. Of course, if a court decides that § 2-302 can have no application to a disclaimer satisfying § 2-316, it need not consider the second question. As we have seen, this question involves significant issues of statutory construction. And it is plainly distinguishable from a further question that arises once it has been decided that section 2-302 can apply: whether the disclaimer will survive the resulting scrutiny under section 2-302.

Despite the inadequate way they deal with the issue, the relevant decisions overwhelmingly support the proposition that implied warranty disclaimers satisfying section 2-316 may still be examined under section 2-302. Only a few of these cases, however, analyze the question in any depth. By far the more common tendency is for the court to simply assume that section 2-302 applies, and then to discuss the various factors relevant to unconscionability determinations. Also, the few cases rele-
jecting section 2-302’s application to otherwise valid implied warranty disclaimers are equally casual in their discussion of the issue.209 Only one of them,210 in fact, cites the primary source of arguments supporting their position: Professor Leff’s well-known 1967 article.211

3. The Unconscionability Determination

In General. In slightly over half of the cases applying U.C.C. section 2-302 to implied warranty disclaimers, the court ultimately found the disclaimer conscionable and enforced it. The reasons for these courts’ determinations are rooted in the facts before them and thus vary from case to case. The same is true for the decisions finding the disclaimer unconscionable. Regardless of their final position on the unconscionability question, moreover, many of the cases employ a rather perfunctory legal analysis to reach it.

Few of the courts, for instance, make any reference to the procedural/substantive analysis discussed earlier,212 or, indeed, to any other discernible mode of unconscionability analysis. Instead, the typical decision merely states section 2-302 and then gives a few reasons why the disclaimer in question is or is not unconscionable. For example, in Feeders, Inc. v. Monsanto Co.,213 where a farmer sued for crop losses caused by a defective 900-gallon purchase of Lasso herbicide, the court managed to compress its reasons for denying the plaintiff’s unconscionability claim and enforcing the manufacturer’s disclaimer into one paragraph. This paragraph contained the following arguments: 1) that the disclaimer was under U.C.C. § 2-719(3). Cf. Macarr, 70 Misc. 2d at 499, 333 N.Y.S.2d at 823; Walsh, 59 Misc. 2d at 242-43, 298 N.Y.S.2d at 539-40 (unclear whether disclaimer’s unconscionability based on § 2-302 or § 2-719(3)). On the technical incorrectness of using § 2-719(3) to invalidate implied warranty disclaimers, see supra notes 177-79 and accompanying text.

209. In Avery, 128 Ga. App. at 267, 196 S.E.2d at 358, the court concluded that the disclaimer satisfied U.C.C. § 2-316(3)(a), and that § 2-302 was inapplicable because “[t]he provisions of the contract contended . . . to be unconscionable under [§ 2-302] are provisions which the law itself specifically permits.” Chapman, 129 Ga. App. at 831, 201 S.E.2d at 687-88, simply followed Avery. The court in R.D. Lowrance, 185 Neb. at 682-83, 178 N.W.2d at 279, apparently employed similar reasoning, simply stating that the implied warranty was excluded by usage of trade under § 2-316(3)(c). The court in Moulton, 511 S.W.2d at 694, merely declared that “[m]ost commentators answer this question in the negative.” However, the analysis in Marshall, 207 Va. at 976-79, 154 S.E.2d at 143-45, was more extensive, but Marshall was decided before enactment of the UCC. For a discussion of this case, see J. White & R. Summers, supra note 3, § 12-11, at 478-79.

210. Moulton, 511 S.W.2d at 694.

211. Leff, supra note 1.

212. The only cases employing this kind of analysis are Tacoma Boatbuilding, 28 U.C.C. REP. SERV. at 34-45; A & M Produce, 135 Cal. App. 3d at 485-93, 186 Cal. Rptr. at 122-26; Hahn, 434 N.E.2d at 951-52. Cf. Martin, 41 U.C.C. REP. SERV. at 321 (mentioning procedural unconscionability); Industrolease, 58 A.D.2d at 489, 396 N.Y.S.2d at 431 (recognizing the distinction but not applying it).

213. 33 U.C.C. REP. SERV. 541, 544.
conspicuous; 2) that it would be read by a reasonable farmer; 3) that the plaintiff was a large farming corporation, not a consumer; and 4) that the disclaimer did not exclude all liability because an express warranty was present.

Just as they tend to ignore the procedural/substantive distinction, the courts generally do not explicitly consider when or whether either form of unconscionability might itself be sufficient for an overall determination of unconscionability. On the whole, the cases emphasize procedural concerns. The reasons for this emphasis are not difficult to understand. Ordinarily, the only substantive factor present in these decisions is the implied warranty disclaimer itself. The substantive effect of such a clause is obvious: it blocks recovery under the excluded implied warranty. Admittedly, there may be problems determining how much or what kind of harm the denial of recovery must cause before the disclaimer will be a serious substantive concern. Generally, though, the courts are dealing with a discrete contract clause with more or less identifiable effects. Thus, there are inherent limits on the scope of any substantive inquiry they might desire to make.

Another reason why the courts tend to emphasize procedural factors is the unlikelihood that the mere presence of a disclaimer is enough to produce an overall finding of unconscionability. Presumptively, a disclaimer is a legitimate device for allocating the risks associated with a sale of goods. Thus, it is difficult to argue that disclaimers should be invalidated where no procedural defects impair a party's free and knowing assent to their terms. Further weighing against the position that implied warranty disclaimers are so substantively objectionable that they should be struck down in the absence of procedural unfairness is the obvious fact that U.C.C. section 2-316 sanctions their use. For these

214. The only specific statement on this subject is found in Tacoma Boatbuilding, 28 U.C.C. REP. SERV. at 34 (risk allocation devices not unconscionable unless procedurally unfair, at least in commercial cases).

215. Implied warranty disclaimers are routinely put under the “substantive unconscionability” heading. E.g., J. WHITE & R. SUMMERS, supra note 3, § 4-6 at 160.

216. Ellinghaus, supra note 1, at 796 suggests that an implied warranty disclaimer should be deemed unconscionable if it is: 1) at odds with the “iron essence” of a transaction for the sale of goods; or 2) an alteration or evisceration of the bargained terms in a contract for the sale of goods. The first category seems to involve goods that differ drastically from the contract description or are radically defective. Id. at 798-99. The second seems mainly to apply to breaches of the implied warranty of fitness. See id. at 801. Also, it has been suggested that the presence of personal injury may be a covert factor in some unconscionability cases. See Leff II, supra note 1, at 354 n.20. See also infra note 239 and accompanying text.

217. Ellinghaus, supra note 1, at 793 (implied warranty disclaimers not unconscionable in themselves because § 2-316 explicitly legitimizes them).
reasons, procedural concerns are usually decisive in determining the unconscionability of a particular disclaimer.

The few implied warranty disclaimer cases raising substantive concerns, however, depart from this suggested pattern. In one of them, the substantive effect of the implied warranty disclaimer appeared to be the sole factor leading the court to declare a disclaimer unconscionable. *Eckstein v. Cummins*\(^{218}\) involved a consumer’s purchase of an automobile that, despite the dealer’s extensive efforts at repair, continued to hum and vibrate when it reached speeds of 35 to 40 miles per hour. Even though the car was covered by an express warranty for the repair or replacement of defective parts, the court found an accompanying implied warranty disclaimer unconscionable. However, it only did so because the express warranty did not adequately protect the buyer’s contractual expectations in the unusual fact situation it confronted. The court stated:

> To place the purchaser of a defective vehicle incapable of repair in the anomalous position of having no actionable claim for relief pursuant to the strict language of the express warranty and disclaimer therein, because the precise nature of the defect cannot be determined and the plaintiff cannot identify any defective part the replacement of which could remedy the defect, would be to defeat the very purpose of the warranty which had been given to the purchaser. Such a result would substantially deprive the buyer of the benefit of his bargain and is unconscionable. Although the warranty and disclaimer, which is strictly limited to parts, is not unconscionable on its face, it cannot be applied to the facts of this case in a conscionable manner.\(^{219}\)

In the remaining cases considering substantive factors, the substantive element was only one component in a decision-making process that involved procedural elements as well. In these cases, the substantive concern troubling the court was that enforcing the disclaimer either left the buyer without an effective remedy\(^ {220}\) or made the deal extremely one-sided.\(^ {221}\)

As noted, most of the implied warranty disclaimer/unconscionability cases only discuss procedural concerns. In general, they appear to take the view that the presence of an implied warranty disclaimer is a

\(^{218}\) 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

\(^{219}\) *Id.* at 10-11, 321 N.E.2d at 904.

\(^{220}\) *See A & M Produce*, 135 Cal. App. 3d at 491, 186 Cal. Rptr. at 125; *Durham*, 315 N.W.2d at 700. *Cf. Feeders*, 33 U.C.C. REP. SERV. at 544 (fact that implied warranty disclaimer does not exclude all liability a factor in conclusion that it is not unconscionable).

\(^{221}\) *Industralease*, 58 A.D.2d at 490, 396 N.Y.S.2d at 432 (fact that purchased equipment did not work at all and that deal thus one-sided one factor in finding of unconscionability). *Cf. Martin*, 41 U.C.C. REP. SERV. at 322-23 (balancing impact of disclaimer on buyers against burden on seller to correct defect); *Marcano*, 302 N.Y.S.2d at 393 (dollar analysis of relative benefits obtained by each party to consumer transaction one factor in unconscionability finding).
matter of some substantive significance, but that its unconscionability depends on the existence of sufficient procedural defects. The most common procedural factors considered by these courts are such familiar matters as relative bargaining power,\textsuperscript{222} the characteristics of the parties,\textsuperscript{223} the presence or absence of negotiations,\textsuperscript{224} and the buyer's knowledge of the disclaimer's existence.\textsuperscript{225} Even though U.C.C. section 2-316 hardly neglects the subject, some courts consider the disclaimer's conspicuousness as well.\textsuperscript{226} Less frequently considered are factors such as the existence of seller competition on warranties,\textsuperscript{227} the complexity of the disclaimer's language,\textsuperscript{228} the parties' past dealings and customs in the trade,\textsuperscript{229} and the presence of "sales hype."\textsuperscript{230} Occasionally, the courts seem to disagree about the weight to be given individual factors. For example, apparent differences of opinion on the importance of bargaining power,\textsuperscript{231} negotiations,\textsuperscript{232} and actual buyer knowledge\textsuperscript{233} are not infrequent.

Of the procedural factors just noted, the most important is the na-

\textsuperscript{222} E.g., Martin, 41 U.C.C. REP. SERV. at 321 (bargaining power one factor considered); A & M Produce, 135 Cal. App. 3d at 491, 186 Cal. Rptr. at 125 (same); Cottrell, 688 F.2d at 1257 (same).

\textsuperscript{223} E.g., Feeders, 33 U.C.C. REP. SERV. at 544 (fact that plaintiff a large farming corporation, not a consumer, a factor in rejecting unconscionability claim); Salcetti, 27 U.C.C. REP. SERV. at 683 (consumer plaintiffs not unsophisticated consumers).

\textsuperscript{224} E.g., Murphree, 632 F.2d at 420 (extensive negotiations a factor in finding disclaimer conscientable); Sarfati, 35 A.D.2d at 1005, 318 N.Y.S.2d at 354 (inability to negotiate terms crucial to unconscionability of disclaimer).

\textsuperscript{225} E.g., Martin, 41 U.C.C. REP. SERV. at 322 (salesman's failure to inform buyers about effect of disclaimer a factor in finding of unconscionability); U.S. Fibres, 358 F. Supp. at 460 (knowledge that purpose of contract to allocate risks seemingly crucial in upholding disclaimer); Marcano, 60 Misc. 2d at 141, 302 N.Y.S.2d at 393-94 (buyer's inability to understand English a major factor making disclaimer unconscionable).

\textsuperscript{226} E.g., Feeders, 33 U.C.C. REP. SERV. at 544; Dillman, 110 Ill. App. 3d at 343, 442 N.E.2d at 317.

\textsuperscript{227} Martin, 41 U.C.C. REP. SERV. at 321; Murphree, 632 F.2d at 420.

\textsuperscript{228} A & M Produce, 135 Cal. App. 3d at 490, 186 Cal. Rptr. at 124.

\textsuperscript{229} Macarr, 70 Misc. 2d at 500, 333 N.Y.S.2d at 823-24.

\textsuperscript{230} Salcetti, 27 U.C.C. REP. SERV. at 683 (absence of "forceful sales talk" a factor in rejection of unconscionability claim).

\textsuperscript{231} Compare, e.g., Murphree, 632 F.2d at 420 (absence of grossly disproportionate bargaining power a significant factor behind finding of conscionability in commercial context) with U.S. Fibres, 358 F. Supp. at 460 (superior bargaining power irrelevant in similar context if both parties realize that purpose of contract to allocate risks). \textit{Cf.} Martin, 41 U.C.C. REP. SERV. at 321 (noting the disagreement and concluding that bargaining power is relevant).

\textsuperscript{232} Compare, e.g., Murphree, 632 F.2d at 420 (extensive negotiations a significant factor behind finding of conscionability in commercial transaction) with Tacoma Boatbuilding, 27 U.C.C. REP. SERV. at 38 (specific negotiations not essential to conscionability where sophisticated parties contract in commercial context).

\textsuperscript{233} Compare, e.g., A & M Produce, 135 Cal. App. 3d at 490, 186 Cal. Rptr. at 124-25 (business buyer's lack of actual knowledge seemingly an important element in finding of unconscionability) with Tacoma Boatbuilding, 28 U.C.C. REP. SERV. at 37-38 (crucial issue in determining procedural unconscionability whether actual or constructive knowledge present; no requirement that buyer actually read contract).
ture of the parties: specifically, the distinction between sales to consumers and commercial sales to business actors. This distinction is often important for unconscionability determinations generally, and it figures prominently in the next section of this article. In order to flesh out the present discussion, therefore, I will now consider each of these situations in relative detail.

The Consumer Cases. Despite the influence of well-known cases like *Henningsen v. Bloomfield Motors, Inc.*, courts do not invariably find disclaimers unconscionable in consumer cases. Of the twelve-odd consumer cases applying U.C.C. section 2-302 to an implied warranty disclaimer, about half have found the disclaimer unconscionable and half have not. These cases diverge widely in their handling of the unconscionability question, and sometimes their reasoning appears muddled or confusing. Although their consumer context injects a sizeable dose of procedural unconscionability into the determination, the cases generally emphasize substantive factors to a greater extent than the "commercial" cases. Although this is usually not discussed openly, the substantive factor with the most predictive value in consumer cases is the presence of personal injury. In such cases, the courts invariably find the disclaimer unconscionable.

234. See supra note 144 and accompanying text.


236. In making this tally, I am including *Tritt*, 244 Ark. 883, 430 S.W.2d 778 (which used U.C.C. § 2-719(3) to invalidate an implied warranty disclaimer) and *Walsh*, 59 Misc. 2d at 242-43, 298 N.Y.S.2d at 539-40 (which may have done the same).

237. In *Hahn*, 434 N.E.2d at 950-52, the court undertook a fairly lengthy discussion of unconscionability doctrine, and then concluded, without any explanation, that the manufacturer's disclaimer was not so one-sided as to be unconscionable as a matter of law. See id. at 952. In a later portion of its opinion dealing with the dealer's disclaimer, however, the court considered such routine factors as the absence of fraud, the disclaimer's conspicuousness, and the understanding reasonably to be attributed to a buyer of ordinary sophistication before finding the disclaimer conscionable. Id. at 953. In *Walsh*, 59 Misc. 2d at 242-43, 298 N.Y.S.2d at 539-40, the court may have been directly employing § 2-302 to find the disclaimer unconscionable, may have been using § 2-719(3) to do so, or may have utilized the two in tandem. See also *Zabriskie*, 99 N.J. Super. at 446-50, 240 A.2d at 198-200 (blurring together unconscionability, § 2-316(2)'s conspicuousness tests, the *Henningsen* rationale, and perhaps failure of essential purpose under U.C.C. § 2-719(2)); *Evans*, 2 Ohio App. 3d at 438, 442 N.E.2d at 781 (considering a variety of factors not ordinarily employed in unconscionability cases). See also infra notes 242-44 and accompanying text.

238. However, see infra text accompanying note 240.

239. See *Tritt*, 244 Ark. 883, 430 S.W.2d 778 (using U.C.C. § 2-719(3)); *Walsh*, 59 Misc. 2d 241, 298 N.Y.S.2d 538. *Cf. Sarfati*, 35 A.D.2d 1004, 318 N.Y.S.2d 352 (technically a "commercial" case involving personal injury, but a case where the business plaintiff resembled a consumer). In *Moulton*, 511 S.W.2d 690, the court upheld a disclaimer in the consumer/personal injury context, but did so on the basis that §§ 2-302 and 2-719(3) have no application to implied warranty disclaimers. See id. at 692-94. The overall results in these cases, of course, correspond to those that would occur under *RESTATEMENT (SECOND) OF TORTS* § 402A (1965), where disclaimers are virtually never effective in consumer cases. See supra note 37 and accompanying text.
The substantive factors openly considered by the courts in consumer cases are generally similar to those noted above: the disclaimer's capacity to leave the buyer without an effective remedy or to make the deal extremely one-sided. To illustrate how these factors might affect a court's decision, consider the following statement by a Georgia intermediate appellate court:

There is obviously a point at which the warranty limitation must be considered unconscionable—for example if, due to defective manufacture or failure to repair by failing to place a 25 cent nut on the proper bolt, the brakes fail and a collision occurs resulting in heavy property damage and personal injury, courts might well be loathe to limit the manufacturer's or seller's liability to the sum of twenty-five cents.\textsuperscript{240}

Also, as mentioned previously,\textsuperscript{241} one court seemingly has held a disclaimer unconscionable without the presence of procedural defects because it would have deprived the buyer of any effective remedy under the special facts of the case. Sometimes, however, a substantive analysis leads the court to the conclusion that the disclaimer is conscionable. In \textit{Seekings v. Jimmy GMC},\textsuperscript{242} the Arizona Supreme Court upheld a disclaimer despite the buyers' inferior bargaining position because "[t]here is no evidence that the disclaimer Jimmy GMC used in [the buyers'] contract was different than the disclaimer Jimmy GMC used in all its sales contracts."\textsuperscript{243}

In the \textit{Seekings} case, the court blended its substantive conclusion with some procedural analysis. From the disclaimer's similarity to previous disclaimers, it reasoned that the seller did not use its superior bargaining position to oppress or unfairly surprise the buyers, concluding that "this allocation of risks should not be disturbed in the absence of overreaching by the party with superior bargaining power."\textsuperscript{244} The other consumer cases considering procedural factors tend to focus on matters other than bargaining power as such. In one decision involving the sale of a diseased puppy, the court emphasized the disclaimer's supposed conspicuousness, the buyer's asserted business sophistication, and the absence of sales talk in finding the disclaimer conscionable.\textsuperscript{245} In another

\textsuperscript{240.} Jacobs, 125 Ga. App. at 466, 188 S.E.2d at 253 (dictum).
\textsuperscript{241.} See supra notes 218-19 and accompanying text.
\textsuperscript{243.} \textit{Id.} at 602, 638 P.2d at 216. Of course this begs an obvious question: whether the earlier disclaimers were unconscionable.
\textsuperscript{244.} \textit{Id.}
\textsuperscript{245.} Salcetti, 27 U.C.C. REP. SERV. at 683-84. In that case, the "conspicuous" disclaimer was printed in dark type on the front of a sales receipt. The court emphasized that it was not in fine print and was not buried amidst other boilerplate clauses. Also, the court concluded that the plaintiffs were not unschooled, unsophisticated consumers because they negotiated a 30-day extension of their right to return the puppy for a cash credit if it turned out to be seriously ill.
case yielding the same result, the relevant factors were the absence of fraud, the disclaimer's conspicuousness, and the court's judgment regarding the knowledge and sophistication attributable to an ordinary consumer. However, in the much-cited case of Zabriskie Chevrolet, Inc. v. Smith, where the court struck down a disclaimer accompanying the sale of a sadly defective new car, the court seemingly based its unconscionability finding on the dealer's failure to bring the disclaimer to the buyer's attention and explain it, the disclaimer's inconspicuousness, and the fact that the buyer only received the disclaimer after the sale. Finally, in the equally well-known case of Jefferson Credit Corp. v. Marcano, a major reason for the court's unconscionability finding was the buyer's inability to understand English.

The Commercial Cases. As Professors White and Summers declare, "courts have not been solicitous of businessmen in the name of unconscionability." This generalization seems at least somewhat accurate in the present context, where roughly two-thirds of the courts applying section 2-302 to an implied warranty disclaimer find the disclaimer unconscionable. Some of these courts expressly make the general "business/commercial" label a factor in their decisions. Since business actors generally possess the size, sophistication, expertise, and bargaining power lacking in consumers, this reliance would seem justified at first blush. Thus, it appears that procedural concerns of this sort are often the deter-

246. See the discussion of the Hahn case in supra note 237.
248. Id. at 447-50, 240 A.2d at 198-200. Most of these factors, however, seem capable of being subsumed under § 2-316, thus removing the need to consider unconscionability at all. For the wide range of doctrines apparently apparently justifying the court's decision, see supra note 237.
249. 60 Misc. 2d at 141, 302 N.Y.S.2d at 393-94. The court treated the plaintiff's language deficiency as a factor giving the seller superior bargaining power. Id. at 140, 302 N.Y.S.2d at 393. Also, its opinion considered a substantive matter; each party's financial position after the deal. See: id. at 140, 302 N.Y.S.2d at 393.
250. J. White & R. Summers, supra note 3, § 4-9 at 170.
251. Murphree, 632 F.2d at 420 ("Illinois courts will readily apply the unconscionability doctrine to contracts between consumers and skilled corporate sellers, [but] they are reluctant to rewrite the terms of a negotiated contract between businessmen"); Salt River, 143 Ariz. at 374, 694 P.2d at 204 (although commercial purchaser not doomed to failure in pressing an unconscionability claim, "findings of unconscionability in a commercial settings are rare"); Dillman, 110 III. App. 3d at 343, 442 N.E.2d at 317 (case involved "businessmen of equal sophistication" and not "an experienced businessman taking unfair advantage of a poorly educated consumer"). But see A & M Produce, 135 Cal. App. 3d at 489-90, 186 Cal. Rptr. at 124 ("courts have begun to recognize that experienced but legally sophisticated businessmen may be unfairly surprised by unconscionable contract terms . . . and that even large business entities may have relatively little bargaining power, depending on the identity of the other contracting party and the commercial circumstances surrounding the agreement") (emphasis in original).
252. E.g., Feeders, 33 U.C.C. REP. SERV. at 544 (plaintiff a large farming corporation, not an unwitting and uneducated purchaser of a household necessity); Dillman, 110 III. App. 3d at 343, 442 N.E.2d at 317 (quoted in the preceding note).
minative factors in commercial cases.\textsuperscript{253}

As noted above,\textsuperscript{254} though, the courts sometimes differ on the importance of matters such as bargaining power, negotiations, and knowledge of the disclaimer,\textsuperscript{255} and these disagreements usually occur in the commercial context. In addition, since roughly one-third of the courts deciding in this context found the disclaimer unconscionable, a significant minority apparently is unimpressed with the basic assumption that business parties can protect themselves from unknown and unwanted implied warranty disclaimers. Obviously, such broad terms as "business parties" and "commercial context" encompass a congeries of actors who differ greatly in size, power, and sophistication. When we take these differences into account by classifying the business/commercial cases according to the relative size\textsuperscript{256} of the parties, we go some way toward explaining the differences noted above. In the relatively few cases where both parties are large corporations, for instance, the courts invariably reject any claim that the disclaimer is unconscionable.\textsuperscript{257} With a few exceptions,\textsuperscript{258} the same result obtains when each party is a business actor of small to medium size.\textsuperscript{259} However, the courts do deviate in cases where such a small-to-medium-sized party attacks a large corporation's

\textsuperscript{253} For an exception to this generalization, see \textit{A & M Produce}, 135 Cal. App. 3d at 343, 186 Cal. Rptr. at 125-26 (disclaimer unconscionable, and substantive unconscionability given separate discussion and seemingly treated as important aspect of case). Also, \textit{cf. Martin}, 41 U.C.C. REP. SERV. at 322-23 (considering harm disclaimer would cause buyer and burden on seller to correct defect).

\textsuperscript{254} \textit{See supra} notes 231-33 and accompanying text.

\textsuperscript{255} In some cases, it should be noted, courts come close to adopting the rule that a commercial purchaser will be presumed to have read the contract and understood the disclaimer included within it. \textit{E.g., Feeders}, 33 U.C.C. REP. SERV. at 544 (reasonable farmer would read disclaimer carefully before deciding to purchase Lasso herbicide); \textit{Tacoma Boatbuilding}, 28 U.C.C. REP. SERV. at 37-38 (commercial parties generally held to their contracts whether they read them or not; test whether purchaser knew or should have known of challenged terms; question is one of actual or constructive notice). \textit{Cf. Badger}, 444 F. Supp. at 923 (businessman must be deemed to possess some commercial sophistication and familiarity with disclaimers).

\textsuperscript{256} In doing so, I am of course assuming that there is some correlation between size, on the one hand, and bargaining power, business sophistication, etc., on the other.

\textsuperscript{257} \textit{See Salt River}, 143 Ariz. 368, 694 P.2d 198 (large electric utility and Westinghouse Electric Corporation); \textit{Jorgensen}, 56 Hawaii 466, 540 P.2d at 978 (buyer construction contractor with multimillion dollar business and number of large projects; characteristics of seller unclear, but statement that there is no great disparity in power of parties) (unclear whether case involves disclaimer, remedy limitation, or both). \textit{See also Tacoma Boatbuilding}, 28 U.C.C. REP. SERV. 26 (where all relevant parties probably possessed significant size and power, but where, in finding disclaimer conscionable, court focused on relations between parties \textit{other than} those claiming unconscionability).

\textsuperscript{258} \textit{See, e.g., Butcher}, 20 Wash. App. 361, 581 P.2d 1352 (sawmill operator versus newly-established business marketing portable small log sawmill).

\textsuperscript{259} \textit{See Dillman}, 110 Ill. App. 3d 335, 442 N.E.2d 311 (preparer of tax returns versus lessor of copier); \textit{R.D. Lowrance}, 185 Neb. 679, 178 N.W.2d 277 (pharmacist operating commercial feedlot versus corporation selling cattle); \textit{Bill Stremmel}, 89 Nev. 414, 514 P.2d 654 (auto dealer versus lessor of communications system). \textit{Cf. U.S. Fibres}, 358 F. Supp. 449 (size of parties difficult to ascertain, but apparently neither a corporate "giant").
disclaimer on unconscionability grounds.\textsuperscript{260} This is most apparent in a fact pattern common to three of the cases in this last category: the situation where a farmer purchases a herbicide from a large corporate manufacturer.\textsuperscript{261} It is within this final class of cases that many of the courts’ disagreements about the importance of bargaining power, negotiations, and knowledge occur.\textsuperscript{262}

III. UNCONSCIONABILITY AND IMPLIED WARRANTY DISCLAIMERS—POLICY CONSIDERATIONS AND DESIRED EVOLUTION

A. Introduction

As the previous section demonstrated, the courts have largely mooted Professor Left’s arguments against the application of U.C.C. section 2-302 to implied warranty disclaimers by overwhelmingly concluding that such disclaimers may be unconscionable even though they satisfy section 2-316. As we have also seen, however, the courts tend to go their separate ways when actually applying section 2-302 in the implied warranty disclaimer context. Assuming that such disclaimers may be attacked under section 2-302, what approach should courts take when determining whether or not they are unconscionable? As will soon become apparent, any attempt to answer this question forces one to consider a wide range of somewhat incommensurable policy factors.

To structure the fairly complicated inquiry that follows, this section will consider what appear to be the three main policy arguments for the

\textsuperscript{260} Finding the disclaimer conscionable in this context are: Murphree, 632 F.2d 413 (closely held corporation running shuttle service versus leasing subsidiary of FMC Finance Corporation); Feeders, 33 U.C.C. REP. SERV. 541 (cattle feeding and farming corporation versus Monsanto Corporation); Badger, 444 F. Supp. 919 (corporation in business of distributing bearings and power transmission components versus Burroughs Corporation); Edenfield, 35 U.C.C. REP. SERV. 781 (experienced and knowledgeable farmer versus Monsanto Corporation; possible confusion of implied warranty disclaimer and remedy limitation); Macarr, 70 Misc. 2d 495, 333 N.Y.S.2d 818 (corporation selling rectifiers versus Westinghouse). Finding the disclaimer unconscionable are: Martin, 41 U.C.C. REP. SERV. at 319-23 (farmers versus large national producer and distributor of seed); A & M Produce, 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (farming company solely owned by experienced farmer versus FMC Corporation); Industralease, 58 A.D.2d 482, 396 N.Y.S.2d 427 (corporation owning 40-acre picnic grove versus manufacturer and seller of incinerator); Durham, 315 N.W.2d 696 (farmer versus Ciba-Geigy Corporation; reference to implied warranty disclaimer probably dictum, because express warranty breached).

\textsuperscript{261} Compare Feeders, 33 U.C.C. REP. SERV. at 544, and Edenfield, 35 U.C.C. REP. SERV. at 784-87 (the latter possibly confusing disclaimer and remedy limitation) with Durham, 315 N.W.2d at 700-01 (where reference to disclaimer likely dictum due to breach of express warranty). Cf. Martin, 41 U.C.C. REP. SERV. at 319-23 (finding disclaimer unconscionable where farmers purchased defective cabbage seed).

\textsuperscript{262} Compare, e.g., Murphree, 632 F.2d at 420, and Feeders, 33 U.C.C. REP. SERV. at 544, with A & M Produce, 135 Cal. App. 3d at 490-91, 186 Cal. Rptr. at 124-25. The A & M Produce case is discussed in detail at infra notes 308-22 and accompanying text.
enforcement of implied warranty disclaimers and against the idea that section 2-302 should be used to police them. These arguments, each of which is treated in a separate subsection, are based on: 1) traditional "freedom of contract" values; 2) the economic benefits that presumably flow from enforcing disclaimers; and 3) a syndrome of arguments whose central theme is the idea that employing unconscionability to scrutinize disclaimers offends rule of law values. Each subsection below concludes with a statement of that subsection's implications for the legal treatment of implied warranty disclaimers. These concluding statements are cumulative in the sense that each is based on the considerations raised in the subsection where they appear and those raised in preceding subsections (if any). Thus, the first subsection's conclusions about the enforceability of implied warranty disclaimers only reflect that subsection's position on the freedom of contract issues raised there. The next subsection's conclusions reflect both the economic arguments considered there and the matters discussed in the first subsection. The third subsection concludes with the article's overall position on the unconscionability doctrine's application to implied warranty disclaimers.

This section's policy discussion might seem better directed to the legislatures than to courts utilizing section 2-302, but the unconscionability doctrine is surely flexible enough to accommodate and reflect the concerns discussed below. And the conclusions the section reaches, while significantly restricting the effectiveness of implied warranty disclaimers, are not especially radical. The first such conclusion is that implied warranty disclaimers should always be unconscionable in consumer cases. Although the 2-302 cases just discussed do little to suggest such a rule, it merely replicates the results already obtained under other product liability theories and reinforces the severe restrictions imposed by the Magnuson-Moss Act and some state statutes. Given all these

263. Indeed, as noted immediately below, Congress and the state legislatures do seem to have responded to considerations of the sort raised in this section.


265. However, Walsh v. Ford Motor Co., 59 Misc. 2d 241, 242, 298 N.Y.S.2d 538, 539-40 (1969) may have announced a qualified per se ban on implied warranty disclaimers when it stated that: "In the absence of factual evidence indicating [that] the limitation or exclusion is commercially reasonable and fair rather than oppressive and surprising to a purchaser of a new vehicle, it must be stricken as a matter of law." In making this statement, the court cited Henningsen v. Bloomfield Motors, Inc., see supra note 235. Also, cf. Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 447-50, 240 A.2d 195, 198-200 (1968) (also relying on Henningsen and overall quite hostile to implied warranty disclaimers in the consumer context).

266. Disclaimers will rarely, if ever, be effective in consumer suits proceeding under negligence or Restatement (Second) of Torts § 402A (1965). See supra notes 36-37.

267. See supra notes 84-93 and accompanying text.

268. See supra notes 82-83 and accompanying text.
limitations on the enforceability of implied warranty disclaimers in the consumer context, it might appear redundant to attack them on unconscionability grounds as well. However, the limitations are not of universal application.\footnote{269}{Usually, plaintiffs using negligence or § 402A can only recover for personal injury or property damage. See supra notes 47-48. Also, there are still a few states that have not adopted § 402A. See supra note 7. The relevant portions of the Magnuson-Moss Act do not apply to goods costing less than $10 per item, and a seller can avoid the Act's strictures simply by refusing to give a written warranty. See supra notes 87-88, 92 and accompanying text. Finally, only a few states have directly invalidated implied warranty disclaimers in consumer cases. See supra notes 82-83 and accompanying text.}

Perhaps for this reason, consumer unconscionability challenges to implied warranty disclaimers continue to be litigated\footnote{270}{For some 1980's examples, see Seekings v. Jimmy GMC, 130 Ariz. 596, 638 P.2d 210 (1981); Hahn v. Ford Motor Co., 434 N.E.2d 943 (Ind. App. 1982); Evans v. Graham Ford, Inc., 2 Ohio App. 3d 435, 442 N.E.2d 777 (1981).} and presumably remain important. Also, this section's final position on the enforceability of implied warranty disclaimers in the commercial context depends to a large degree on policy considerations first developed in the consumer situation and most sharply focused in that area. In business or commercial situations, the section concludes, standards similar to those governing waivers of negligence liability\footnote{271}{See supra note 36.} should be controlling in the implied warranty context. This conclusion plainly flies in the face of much of the case law discussed above, but cases with a similar general orientation do appear within that body of law.\footnote{272}{The most conspicuous example is A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (1982), discussed at infra notes 308-22 and accompanying text.}

B. The Freedom of Contract Rationale

1. The Argument and Its Twentieth Century Demise

The first argument for enforcing implied warranty disclaimers and limiting the courts' ability to police them under U.C.C. section 2-302 is almost too familiar for discussion. Freedom of contract, all would presumably agree, is an extremely important public policy. One aspect of this freedom is the idea that, to the maximum extent possible, the parties should be able to set the terms of their agreement. This ensures that they will be legally bound only on terms to which they have given voluntary and knowing consent. Thus, since sales of goods are voluntary contractual agreements, and since disclaimers are terms of those contracts, disclaimers should be enforced. To deny them enforcement would be to contravene the parties' objectively expressed\footnote{273}{Under the objective theory of contract, actual knowledge of standard form contract terms is not necessary for such terms to be binding. Rather, it has been presumed that the parties know and} mutual intent.

By now, the objections to this traditional argument are almost as
familiar as the argument itself. As Professor Todd Rakoff has recently noted, freedom of contract arguments often presuppose an implicit sociology, "the image of individuals meeting in the marketplace." 274 For much of the nineteenth century, this image often may have corresponded to social reality. As Friedrich Kessler once observed: "The individualism of our rules of contract law, of which freedom of contract is the most powerful symbol, is closely tied up with the ethics of free enterprise capitalism and the ideals of justice of a mobile society of small enterprisers, individual merchants and independent craftsmen." 275 Certainly the "classical" contract law of the nineteenth century—with its mutually reinforcing postulates of freedom, equality between the parties, and the negative, "nightwatchman" state 276—reflected this implicit sociology. 277 It did so mainly because its assumption of equal bargaining power possessed considerable validity in a society where most contracts were made by Kessler's small enterprisers, merchants, and craftsmen. In such an environment, private restrictions on contractual freedom were probably fairly infrequent, since there were relatively few parties with the ability to impose them. And, while the power of government was still a plausible threat to contractual autonomy, courts and legislatures in fact tended to adopt a "hands off" attitude toward private contracts. 278

What undermined the classical nineteenth century synthesis was the demise of the social conditions on which it rested. Specifically, "[t]he foundations of the theory were shattered when corporations increasingly displaced physical persons as legal individuals, and as parties to commercial and industrial contracts." 279 The rise of the corporation (and other private groups) upset the nineteenth century equality postulate by creating innumerable situations where contracting parties dealt on an unequal footing. These disparities in bargaining position manifested themselves in many ways; among the most prominent has been the ubiquitous stan-

understand the contents of the forms they execute. E.g., E. FARNSWORTH, supra note 5, § 4.26, at 295-96.

276. See W. FRIEDMANN, supra note 10, at 119-29.
278. "The idea that the state on behalf of the community should intervene to dictate or alter terms of contracts in the public interest, is, on the whole, alien to the classical theory of common-law contract." W. FRIEDMANN, supra note 10, at 123.
279. Id.
standard form contract commonly used by business firms of all sorts. As Kessler once observed:

With the decline of the free enterprise system due to the innate trend of competitive capitalism toward monopoly, the meaning of contract has changed radically. Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege. Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals. . . . Thus the return back from contract to status which we experience today was greatly facilitated by the fact that the belief in freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture.

In the contemporary social environment, that is, the traditional freedom of contract rationale often allows standard form contracting to become private law-making.

Ordinarily, the power which firms exercise through standard forms does not spring from any duress or other external compulsion directed

280. Implied warranty disclaimers are “packaged” in many different ways, but throughout this article I am assuming either that they qualify as “standard form” terms, or at least deserve the same legal treatment as standard form terms. Indeed, implied warranty disclaimers also might qualify as “adhesive” terms. For one definition of the term “contract of adhesion,” see Rakoff, supra note 274, at 1177. The typical seller’s or manufacturer’s standard form express warranty and implied warranty disclaimer seems to meet six of the seven tests set by Professor Rakoff. And the only missing element—the buyer’s signature—may be present in some cases where implied warranties are disclaimed. However, Rakoff excludes from his definition “secondary issues that might cloud efforts at analysis,” among them “apparently contractual documents that are never signed, such as some ‘warranties.’” Id. But then he states that “the presence of such issues would not improve the case for legal enforcement of the form language.” Id.

281. Kessler, supra note 275, at 632 suggests that “[s]tandard contracts are typically used by enterprises with strong bargaining power.” This power, he then asserts, arises either because “the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.” Id. Rakoff, however, takes issue with Kessler here, arguing that standard forms are used by all sorts of firms in all kinds of industries. Rakoff, supra note 274, at 1218-19. On the reasons for the widespread use of standard forms, see infra text surrounding notes 350-53.

282. Kessler, supra note 275, at 640.

283. The privately made law imposed by standard form has not only engulfed the law of contract; it has become a considerable portion of all the law to which we are subject. If by making law we mean imposing officially enforceable duties or creating or restricting officially enforceable rights, then automobile manufacturers make more warranty law in a day than most legislatures or courts make in a year. Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 HARV. L. REV. 529, 530 (1971).
against the weaker party. Instead, it usually results from disparities in organization, experience, attention, foresight, and general business sophistication between the parties, and from the context in which they contract. It seems to be generally agreed that consumers or other individuals who contract by standard form, while perhaps aware of the few specifically bargained terms, rarely read the forms, would not understand most form terms if they were read, and are not warned about the presence of disadvantageous form terms.\textsuperscript{284} Even if such parties are aware of disadvantageous terms, there may be little they can do to bargain them away.\textsuperscript{285} For reasons discussed below,\textsuperscript{286} the party offering the form may be reluctant to depart from the standard boilerplate. "Shopping around" for better terms is time-consuming, and will be of little avail if (as may often be the case in oligopolistic industries) the firm's competitors offer substantially the same form terms.\textsuperscript{287} Finally, since disadvantageous form clauses often deal with contingencies that may never occur, there is a natural disposition toward discounting their importance and hoping for the best while accepting the standard terms.\textsuperscript{288} All these considerations, however, seem less applicable where the "weaker" party is itself a business organization of some size, power, experience, and sophistication. In such cases, the traditional freedom of contract argument may still possess much force.\textsuperscript{289}

2. The Implied Warranty Disclaimer Context

The points just raised lead to the conclusion that freedom of contract in its traditional sense is often an illusion in the standard form context. Radkoff has reached a similar conclusion:

Refusal to enforce a contract of adhesion, the courts say, trenches on freedom of contract. Implicit in the argument is an equating of the

\begin{itemize}
    \item \textsuperscript{284} 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 of the purposes 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.\textsuperscript{284}
    \item \textsuperscript{285} For a summary of the reasons why this is so, see Rakoff, supra note 274, at 1225-29.
    \item \textsuperscript{286} See infra text surrounding notes 350-53.
    \item \textsuperscript{287} See, e.g., Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 86-87 (noting situation in the automobile industry); Kessler, supra note 275, at 632.
    \item \textsuperscript{288} Cf. Leff II, supra note 1, at 351; Rakoff, supra note 274, at 1226.
    \item \textsuperscript{289} See, e.g., Rakoff, supra note 274, at 1253-54.
\end{itemize}
drafting organization with a live individual. For what gives value to uncoerced choice—the type of freedom that the courts have in mind—is its connection to the human being, to his growth and development, his individuation, his fulfillment by doing. But the enforcement of the organization’s form does not further these fundamental human values; the standard document grows out of and expresses the needs and dynamics of the organization. To see a contract of adhesion as the extension and fulfillment of the will of an individual entrepreneur, entitled to do business as he sees fit, is incongruous. . . . Once it is recognized that contracts of adhesion arise from the matrix of organizational hierarchy, the argument for enforcement of form terms as a recognition of “freedom of contract” in its usual sense is unsupportable.290

In response to this perception, of course, the twentieth century has witnessed innumerable instances of government intervention into private contracts. This intervention has usually proceeded with the avowed aim of protecting weaker contracting parties. In general, it has taken two forms: the dictation or implication of protective terms, and the excision or reformation of offensive terms. Article 2’s implied warranties of merchantability and fitness are obvious examples of the first tactic. One instance of the second is the unconscionability doctrine recognized by U.C.C. section 2-302.291 Section 2-316’s disclaimer rules, on the other hand, are characterizable as a freedom of contract-based counterattack on the Code’s implied warranties.292 But if the preceding analysis applies to implied warranty disclaimers, freedom of contract values seem ill-suited for justifying their enforcement. This, in turn, would appear to allow the courts wide discretion to invalidate implied warranties under section 2-302. What remains to be considered is whether and to what extent the preceding arguments govern the implied warranty disclaimer context.

Consumer Cases. As we have seen, there are numerous reasons for concluding that the enforceability of standard form contracts cannot be based on a freedom of contract rationale. These reasons seem equally, if not more, persuasive in the situation where a consumer purchases a product with an implied warranty disclaimer.293 It seems safe to assume that sellers are not in the habit of pointing out implied warranty disclaimers

290. Id. at 1236-37.
291. Leff II, supra note 1, at 350 (unconscionability one form of governmental regulation in contract cases).
292. J. White & R. Summers, supra note 3, § 12-1, at 427 (ability to disclaim implied warranties means that freedom of contract gives seller some protection against them).
293. In the discussion below, I rely heavily on my personal experience and observations regarding consumer sales. In doing so, I am assuming that the assertions I make are matters of common experience requiring little or no corroboration in the form of authority. The reader, of course, is invited to compare his or her own experience and perceptions with mine.
UNCONSCIONABILITY AND ARTICLE 2

294. "It is common knowledge that salesmen almost never draw the purchaser's attention to the disclaimers prior to the sale of packaged goods." Slawson, supra note 283, at 544.

295. Id. (referring to surveys regarding the behavior of car buyers).

296. In purchases of "big-ticket" items such as automobiles, there is admittedly more time to peruse the seller's and manufacturer's standard forms. But there is considerable reason to doubt that the forms are read even in this context. See supra note 295 and accompanying text.

297. Slawson, supra note 283, at 541.

298. See id. at 548 (noting the warranty competition that has occasionally occurred in the automobile industry).

299. Even some courts have difficulty distinguishing between liability disclaimers and remedy limitations. E.g., J. WHITE & R. SUMMERS, supra note 3, § 12-11, at 471-72.

300. Also, there are many reasons why firms are disinclined to bargain away standard form terms on a situation-by-situation basis. See infra text accompanying notes 351-53.
that may never come to pass—the possibility that the goods will turn out to be defective. Hence, even a consumer who fully understands the import of a known implied warranty disclaimer may be relatively unconcerned about its presence. This is especially likely to be true where, as is not uncommon, the consumer's main concern is the swift acquisition of a highly desired product.\textsuperscript{301}

For all the reasons just stated, the freedom of contract argument provides a tenuous basis for enforcing implied warranty disclaimers in consumer cases. In such situations, it is highly unlikely that the consumer's assent is knowing. Even where knowledge and understanding are present, the assent itself is not especially voluntary.\textsuperscript{302} Typically, that is, the informed consumer acquiesces only because no better choices are available, the cost of discovering them is too high, or the disclaimer is perceived to deal with a relatively insignificant contingency. In consumer cases, therefore, the content of the sales contract is largely dictated by the seller or manufacturer and expresses its desires, not the consumer's. Thus, it can hardly be regarded as a product of the consumer's knowing and voluntary assent.

\textit{Commercial Cases.} At first glance, commercial deals involving business parties seem much different from the consumer transactions just described. Here, we have more or less sophisticated parties who are much more apt to read the seller's form. While, for the reasons stated above, even these parties may have trouble grasping the legal significance of an implied warranty disclaimer, they may have the time and resources to

\textsuperscript{301} Here, I will interject a personal note whose wider relevance is for the reader to decide. I have taught U.C.C. § 2-316's disclaimer rules for eight years and have been able to recall them at will for most of that time. Needless to say, I have also made numerous consumer purchases (including two automobiles) during this period. Never once has the presence or absence of an implied warranty disclaimer been of any concern to me at the time of purchase. In fact, I cannot recall ever reading such a disclaimer before making the purchase, or feeling the slightest inclination to do so. No doubt, one of the reasons for my unconcern with implied warranty disclaimers has been the assumption (correct or not) that all sellers will inevitably disclaim them, but this is an assumption that I have never even considered testing. For most of the purchases in question, my main concern was with price, options, and so forth. In some, my main concern was simply the obtaining of the consumer item and nothing else. My behavior may be aberrational, but I am inclined to doubt it. \textit{Cf.} Rakoff, \textit{supra} note 274, at 1179 n.22 ("I have asked many lawyers and law professors over the past few years whether they ever read various form documents, such as their bank-card agreements; the great majority of even this highly sophisticated sample do not.").

\textsuperscript{302} In this context, it is irrelevant to assert that what counts is the consumer's \textit{manifested} assent to the disclaimer. \textit{Cf.} \textit{Restatement (Second) of Contracts} § 211(1), (2) (1981) (stating a rule of manifested assent probably broad enough to cover the consumer/implied warranty disclaimer situation). In this section of the article, we are concerned with a particular policy basis for enforcing a disclaimer: the buyer's knowing and voluntary assent to it. The objective theory of contract on which the manifested assent rule rests may have other policy justifications, \textit{e.g.}, J. Calamari & J. Perillo, \textit{supra} note 94, § 2-2, at 25 (suggesting that one basis of objective theory need to preserve security of business transactions), but here we are mainly concerned with free subjective assent.
employ an attorney to examine the seller’s form. Needless to say, such parties are also more likely to recognize the disclaimer’s importance as a risk-allocation device, to shop around for better terms, and to attempt to bargain the disclaimer away. Also, their bargaining position may be improved by their tendency to make high-volume purchases, which can represent a significant business opportunity for the seller. Also, some commercial purchases are “one-shot” deals for expensive equipment, and in these situations the seller may have less incentive to use a standard form in the first place.

As discussed earlier, however, the “business/commercial” category is a broad one that encompasses a wide range of possible buyers. In certain contexts, some of these “business” purchasers are not easily distinguishable from ordinary consumers. A farmer purchasing Lasso herbicide, for example, is usually not as well-equipped to protect himself as a large electrical utility purchasing a manual control system for a gas turbine generator. What this suggests is that the desirability of enforcing an implied warranty disclaimer in commercial cases varies with the nature of the parties and the context in which the transaction occurs. This, in turn, means that courts considering the unconscionability of implied warranty disclaimers in the commercial context must make individualized case-by-case determinations. A relatively recent California decision suggests the general sort of inquiry that they should undertake.

In relevant part, A & M Produce Co. v. FMC Corp. was an implied warranty of fitness suit for economic losses caused by a defective weight-sizer which was to sort tomatoes by size. A & M Produce, the plaintiff, was a farming company solely owned by C. Alex Abatti. Abatti had been a farmer all his life, but had never farmed tomatoes and was unfamiliar with weight-sizing equipment. After discussions with FMC salesmen and in reliance on their recommendations, Abatti purchased a weight-sizer device which was defective and caused crop losses.

303. For one thing, such purchasers are more likely to suffer indirect economic loss if the goods are defective, and, because of their familiarity with their own businesses, to anticipate this.

304. The point is that sellers are more likely to need and employ standard forms where they make large numbers of contracts that are essentially similar in most relevant respects.


307. Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp., 143 Ariz. 368, 694 P.2d 198 (1984). However, it is arguable that there was a disparity in bargaining power in this case despite the size of the buyer. See id. at 373, 694 P.2d at 203.


309. The court was unclear on the point, but it seems that A & M was mainly suing to recover crop losses.
weight-sizer from FMC. The sale contract contained an implied warranty disclaimer satisfying U.C.C. section 2-316(2). After the weight-sizer proved unfit for A & M's purposes, Abatti sued, winning a $255,000 judgment (plus $45,000 in attorney's fees) at the trial court level. The trial court had found FMC's implied warranty disclaimer unconscionable, and this holding was the main issue confronting the court after FMC's appeal.

After concluding that U.C.C. section 2-302 could apply to an implied warranty disclaimer satisfying section 2-316, the appellate court undertook a general examination of the unconscionability doctrine, one that emphasized the distinction between procedural and substantive unconscionability. Then it applied this analysis to the disclaimer before it. In considering procedural unconscionability, the court first noted that "this contract arises in a commercial context between an enormous diversified corporation (FMC) and a relatively small but experienced farming company (A & M)." Generally, it continued, unconscionability claims by businessmen do not find favor with the courts. But "[w]ith increasing frequency," it stated, "courts have begun to recognize that experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms . . . and that even large business entities may have relatively little bargaining power, depending on the identity of the other contracting party and the commercial circumstances surrounding the agreement." Turning to the "unfair surprise" aspect of unconscionability, the court strongly suggested that Abatti was unfairly surprised because, among other things, the disclaimer appeared in the middle of the back page of a long preprinted form contract, FMC's salesmen never suggested that Abatti read the back of the form, and Abatti in fact did not read it. Then, however, the court conceded that Abatti did have abundant opportunity to read the contract and to consult a lawyer. Still, it concluded, the length and complexity of the contract and FMC's failure to direct Abatti's attention to it implied that his failures "may not be totally unreasonable."

Even if the unfair surprise argument is ignored, the court went on,

310. The sale contract also contained a consequential damages limitation.
311. 135 Cal. App. 3d at 483-85, 186 Cal. Rptr. at 120-21.
312. See id. at 485-88, 186 Cal. Rptr. at 121-23.
313. The court appeared to consider the unconscionability of the consequential damages limitation along with the unconscionability of the disclaimer. It also raised some additional considerations that seemingly were relevant only to the former. See id. at 492-93, 186 Cal. Rptr. at 126.
314. Id. at 489, 186 Cal. Rptr. at 124.
315. Id. at 489-90, 186 Cal. Rptr. at 124 (emphasis in original).
316. See supra note 122.
317. 135 Cal. App. 3d at 490, 186 Cal. Rptr. at 124.
the disparity in bargaining power between the parties and the lack of any real negotiation over contract terms were by themselves sufficient for procedural unconscionability. On the first point, the court seemed to use the vast difference in size between A & M and FMC as a proxy for unequal bargaining power. On the second, it emphasized that FMC’s sales force was instructed to adhere to the firm’s standard form terms and was given little or no discretion to bargain regarding them.

Although the court could perhaps have made the point more clearly, it seemed to require both procedural and substantive unconscionability for an overall finding of unconscionability. And it had little difficulty concluding that the latter form of unconscionability was present. First, the court noted that this is a case where the implied warranty disclaimer basically left the buyer without a remedy in case the product was defective. Also, after pointing out that A & M’s inexperience with weight-sizing equipment forced it to rely on FMC’s expertise and representations and that FMC was aware of this, it declared that “[a] seller’s attempt, through the use of a disclaimer, to prevent the buyer from reasonably relying on such representations calls into question the commercial reasonableness of the agreement and may well be substantively unconscionable.”

Admittedly, the arguments made by the court in the A & M Produce case are less than impregnable. Its conclusion regarding procedural unconscionability relied heavily on an asserted inequality of bargaining

318. “Although it was conceded that A & M was a large-scale farming enterprise by Imperial Valley standards, employing five persons on a regular basis and up to fifty seasonal employees at harvest time, and that Abatti was farming some 8,000 acres in 1974, FMC Corporation is in an entirely different category. The 1974 gross sales of the Agricultural Machinery Division alone amounted to $40 million.” Id. at 491, 186 Cal. Rptr. at 125. This language was the court’s sole justification for its conclusion that superior bargaining power existed.

319. During its general discussion of unconscionability, the court stated that “commercial practicalities dictate that unbargained for terms only be denied enforcement where they are also substantively unreasonable.” Id. at 487, 186 Cal. Rptr. at 122 (emphasis in original). Later in its opinion, the court stated that: “When non-negotiable terms on preprinted form agreements combine with disparate bargaining power, resulting in the allocation of commercial risks in a socially or economically unreasonable manner, the concept of unconscionability . . . furnishes legal justification for refusing enforcement of the offensive result.” Id. at 493, 186 Cal. Rptr. at 126.

320. The warranty allegedly breached by FMC went to the basic performance characteristics of the product. In attempting to disclaim this and all other warranties, FMC was in essence guaranteeing nothing about what the product would do. Since a product’s performance forms the fundamental basis for a sales contract, it is patently unreasonable to assume that a buyer would purchase a standardized mass-produced product from an industry seller without any enforceable performance standards.

Id. at 491, 186 Cal. Rptr. at 125. However, the plaintiff had also mounted an express warranty suit, and the court had earlier stated that, even if the trial court had erred in holding that the disclaimer was unconscionable, the error was harmless because express warranty liability was available as an alternative basis for the trial court’s judgment. See id. at 485 n.10, 186 Cal. Rptr. at 121 n.10.

321. Id. at 492, 186 Cal. Rptr. at 125.
power, but in reaching this conclusion the court relied solely on the disparity in the size of the parties and ignored the possibility that Abatti may have been able to seek better terms elsewhere. Also, it is arguable that the court should have given more weight to Abatti's failure to read the contract and to seek legal help. Moreover, it seems that the court's discussion of substantive unconscionability was heavily influenced by the fact that *A & M Produce* was an implied warranty of fitness case in which the buyer's reliance on the seller's judgment was crucial. Thus, its reasoning regarding substantive unconscionability may be inapplicable in implied warranty of merchantability cases. Despite all this, the *A & M Produce* decision well illustrates the type of analysis the courts should be employing where an implied warranty disclaimer is attacked as unconscionable in the commercial context. And its approach is infinitely preferable to the prevailing tendency to insulate commercial contracts from unconscionability challenges.

3. Summary

If the considerations discussed in this subsection were the only matters relevant in determining how courts should treat implied warranty disclaimers under section 2-302, it would seem that such disclaimers should always be struck down in the consumer context, and that highly individualized determinations are necessary in commercial situations. In the latter context, disclaimers should generally have the greatest chance of being enforced where both parties are large and sophisticated corporations, because equal bargaining power and knowledge of the contract's terms are most likely to be found here. Due to the likelihood of equal bargaining power, disclaimer clauses in sales between small-to-medium-sized business actors should usually be next most deserving of enforcement. Least entitled to judicial backing, are disclaimers accompanying sales by corporate giants to smaller business entities, and commercial sales in which there is little to distinguish the "business" buyer from an ordinary consumer.

However, this section has examined only one set of considerations relevant to the enforcement of implied warranty disclaimers, and there are other policy arguments that might produce a different set of conclusions. In fact, this section is not the last word on the freedom of contract

---

322. Before dealing with FMC, Abatti had discussed the purchase of a weight-sizer from another firm, which informed him that a hydrocooler would be needed to supplement the weight-sizer. For this reason, the firm's bid was too high for Abatti's taste, and he then turned to FMC. It appears that the absence of a hydrocooler contributed to A & M's losses. See id. at 478-79, 186 Cal. Rptr. at 117-18.
rationale that is its central theme. First, it is possible that "supercon-
scionability" in the form of "superdisclosure"\textsuperscript{323} may eliminate some of
the mentioned problems with enforcing implied warranty disclaimers. Sec-ond, if we shift our focus away from the buyer's actual knowledge of
the disclaimer by asking whether a fully informed buyer would have
assented to it,\textsuperscript{324} we may be able to avoid the conclusions reached here. Both these possibilities, however, are intertwined with the economic ar-
guments discussed immediately below, and, in the interest of avoiding
repetition, are raised there.

C. The Economic Arguments

Although often embracing laissez-faire themes, the next set of policy
arguments for enforcing implied warranty disclaimers is primarily of an
economic nature. In this subsection, the freedom of contract rationale
for enforcing disclaimers is less an end in itself than a means for maxi-
mizing economic welfare. The first economic consideration relevant to
implied warranty disclaimers, however, is not of a free-market variety. Nor does it directly support the proposition that disclaimers should be
enforced. Instead, it stresses that refusing to enforce implied warranty
disclaimers involves undeniable economic costs.

1. The Economic Costs of Invalidating Implied
Warranty Disclaimers

A major theme throughout this subsection is the assertion that stan-
dard form contracts are an essential component of the modern American
system of mass production and mass consumption, and that the system
would function less efficiently in their absence. As Professor Leff once
remarked, "it is arguable that mass production is the source of a vast
total increase in economic welfare, and that successful mass production
requires mass distribution by documents also inalterably mass-produced,
or briefly, that one can no more efficiently customize contracts than cus-
tomize goods for a mass market without losing all of the economic gains
of non-customized production."\textsuperscript{325} Although Leff was vehemently op-
posed to section 2-302's application in the implied warranty disclaimer
context, his opposition did not rest on the freedom of contract rationale
discussed above.\textsuperscript{326} He recognized that, in consumer transactions at

\textsuperscript{323} See supra note 156 and accompanying text.
\textsuperscript{324} By way of anticipation, the reason why a fully informed buyer might assent to an implied
warranty disclaimer is that he could obtain a lower price by doing so.
\textsuperscript{325} Leff II, supra note 1, at 350-51.
\textsuperscript{326} The real basis of Leff's objections to using § 2-302 to police implied warranty disclaimers is
least, the buyer's assent to standard form terms is hardly ever knowing and voluntary. "[T]o attempt to regulate the consumer contracting process," he asserted, "is frequently to attempt to regulate a process that not only does not take place, but perhaps . . . , as a matter of economic efficiency, ought not to take place." In fact, he went on, "we should stop thinking about these consumer adhesion 'contracts' as contracts altogether, and think about them as products, just like the products sold pursuant to them. Once having established that outlook, one is better able to discuss what governmental regulatory decisions ought to be made about the quality of these 'products.'" In Leff's opinion, this orientation had the advantage of forcing one to consider the costs of policing consumer contracts through doctrines like unconscionability:

When you focus on something as a "contract," it is too easy to assume that what doesn't fall on one party will fall on the other. Thus, if the shift of a risk is held by the court bureaucracy to be "unconscionable," it will somehow come to rest on the party whose attempted shift was frustrated. When, however, one thinks of the situation as involving a directive to a manufacturer not to sell risky or defective "goods" to the public, one is more likely to recognize that the risk has not been bounced permanently to the maker-seller, but has been lobbed back temporarily, so that he can slip it into his price base and allocate it ratably to the whole class of buyers. Thus, the net effect of a series of decisions following Henningsen v. Bloomfield Motors, Inc. . . . would be that all buyers of automobiles would eventually automatically "buy" from the manufacturers an insurance policy covering any personal injuries which might arise from manufacturing defects in the cars they bought. I suppose it is possible to believe that one can buy insurance policies without having to pay premiums; it's just that I can't.

Thus, refusing to enforce implied warranty disclaimers imposes costs that inevitably are passed on to buyers in the form of higher prices for the seller's goods.

Nothing said thus far is necessarily an argument for enforcing implied warranty disclaimers. Indeed, the foregoing remarks are basically just another statement of the familiar "socialization of risk" rationale for the tremendous expansion in product liability that has occurred in recent decades. However, there are some objections to applying this well-established policy in the present context by declaring implied warranty disclaimers unconscionable. One obvious cost of this approach is that

the open-ended, discretionary, case-by-case nature of decision-making under the unconscionability doctrine. See infra note 362 and accompanying text.
327. Leff II, supra note 1, at 352.
328. Id. at 352 n.18 (emphasis in original).
329. E.g., W. PROSSER & W. KEETON, supra note 7, § 98, at 692-93 (discussing RESTATEMENT (SECOND) OF TORTS § 402A (1965)).
the higher prices normally associated with increased liability somewhat limit the public’s ability to purchase goods and (presumably) the overall level of abundance. But the choice to accept such consequences was made some time ago, and, until recently at least, has not been a major source of distress. Over the past several years, however, there has been increasing talk of a “crisis” in product liability law, as increasing liability and increasing dollar recoveries have helped make product liability insurance more expensive and difficult to obtain.\footnote{See, e.g., Leibman, \textit{When the Product Ticks: Products Liability and Statutes of Limitations}, 11 \textit{Ind. L. Rev.} 693, 694-99 (1978) (discussing various formulations of the problem and assessments of its severity).} Even more recently, these problems have been exacerbated by the possibility of mass liability for injuries resulting from asbestos, toxic chemicals, and other substances.\footnote{See, e.g., Lauter, \textit{Footing the Bill for Toxic Torts}, \textit{Nat’l L.J.}, Jan. 31, 1983, at 1, col. 1.} While these problems are real and worrisome, it is doubtful whether the enforcement of implied warranty disclaimers is the preferred method for alleviating them. Of the many actual and suggested responses to the difficulties generated by the socialization of risk strategy,\footnote{See, e.g., Leibman, \textit{supra} note 331, at 700-02.} perhaps the most promising are those that preserve (or even enhance) the plaintiff’s ability to recover, but limit the dollar amount of that recovery.\footnote{One example is the emerging doctrine of comparative fault, which reduces the plaintiff’s recovery in proportion to the plaintiff’s percentage contribution to the injury suffered. \textit{See}, e.g., Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981).} 

2. The Problem of Nonoptimal Results

Another, perhaps more weighty, objection to socializing the risk of defective products by denying enforcement to implied warranty disclaimers concerns the likelihood that courts will frustrate the preferences of some buyers by doing so. All things being equal, products accompanied by an enforceable disclaimer are apt to be cheaper than products accompanied by an “insurance policy” against defects.\footnote{See, e.g., \textit{supra} note 331, at 700-02.} Purchasers who deem the lower price worth the risk of encountering a defect can hardly be dismissed as irrational. A policy of refusing to enforce disclaimers, however, leaves such buyers with no way to exercise this preference. Professor Alan Schwartz has illustrated the point with the following hypothetical example:

Assume . . . that a retailer is offering two contracts that are identical except for one clause: the first contract, which costs $100, includes a warranty against product defects, while the second contract, which costs $90, includes a disclaimer of the warranty. The hypothetical re-

\footnote{Schwartz, \textit{A Reexamination of Nonsubstantive Unconscionability}, 63 \textit{Va. L. Rev.} 1053, 1056 (1977).}
tailer has customers for both contracts, but the state, by statute or judicial opinion, . . . bans the warranty disclaimer. Under these circumstances, the prohibition against warranty disclaimers neither helps nor hurts those customers who would have purchased warranty coverage. The prohibition, however, harms the customers who would have purchased a contract disclaiming all warranties. These customers apparently value the insurance against product defects provided by a warranty less than they value other uses for their $10.336

"Therefore," Schwartz concludes, "the prohibition against disclaimers yields a nonoptimal result: some buyers regard themselves as worse off than [under] the ban, and no buyers regard themselves as better off."337

As is obvious from earlier discussion, this example does not square with the realities of most standard form contracting. In particular, it assumes a degree of information, competence, and rationality338 that most purchasers (especially consumer purchasers) do not possess. Despite its rather unempirical nature, however, the argument can be restated in a more realistic fashion. It may be safe to assume that in many cases the choice in question—whether to sacrifice a degree of legal protection in exchange for a lower price—is a function of personal traits (mainly, attitudes toward risk) that are relatively enduring. If so, it makes some sense to consider what option a particular buyer would have chosen had he been fully informed at the time of the sale.339 Since it has been assumed that this hypothetical informed choice rests on fairly stable personal predilections, it also makes some sense to regard the denial of that choice as frustrating the buyer's preferences. Thus reformulated, the nonoptimality argument could still be a significant objection to a policy of refusing to enforce implied warranty disclaimers.

Even as restated, however, the objection hardly supports the blanket enforcement of implied warranty disclaimers. For all the reasons discussed earlier, it is unlikely that most purchasers (especially consumer purchasers) can bargain away standard-form disclaimers. Thus, the buyers who would have wished to "purchase insurance" would be unable to realize their assumed objective if disclaimers are enforced. What seems to be needed to produce optimal results is some after-the-fact method for determining the choice that a particular buyer would have made had he been fully informed at the time of the sale. While this conclusion may reflect a failure of imagination on my part, I find it difficult to see how

336. Id. at 1057-58.
337. Id. at 1058.
338. Professor Schwartz made just such assumptions for purposes of analysis. See id. at 1056.
339. Cf. Restatement (Second) of Contracts § 211(3) (1981) (standard form term not part of agreement where party offering form has reason to believe that other party would not have assented had he known that the form contained the term).
the courts could make this determination with any degree of accuracy.\(^\text{340}\) The buyer's testimony on the subject would almost certainly be unreliable, since those who have suffered losses from a product defect will invariably claim (and even believe) that they would never have assented to the disclaimer had they been aware of its existence and effect. In consumer cases, at least,\(^\text{341}\) the results produced by such attempted determinations are likely to be no more optimal than those produced by either the blanket enforcement of disclaimers or their blanket non-enforcement. In other words, while the "nonoptimality" argument remains valid, there seems to be no feasible method for correcting the problem it identifies.

3. The "Superdisclosure" Option

In the previous subsection, we saw that freedom of contract was a weak reed on which to base the enforceability of implied warranty disclaimers. And immediately above we saw that, while refusing to enforce disclaimers frustrates the choice some parties would have made if fully informed, there seems to be no practicable after-the-fact method for making this determination. Perhaps, though, both problems could be addressed by legal rules that promote informed choice at the time of the sale.\(^\text{342}\) Specifically, courts might allow the disclaimer to be enforced

\(^{340}\)Id. Comment f contains the following suggestions:

[A] party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view. This rule is closely related to the policy against unconscionable terms and the rule of interpretation against the draftsman.

Implied warranty disclaimers hardly qualify as "bizarre or oppressive," and, since they negate a warranty created by operation of law, can hardly be said to "eviscerate the non-standard terms explicitly agreed to." Occasionally, though, an implied warranty disclaimer might be said to "eliminate the dominant purpose of the transaction." See supra notes 320-21 and accompanying text (discussing the A & M Produce case).

\(^{341}\)In commercial cases, however, the situation may be a bit different. As suggested in note 340, negotiations may be helpful in determining the buyer's assumed intention, and negotiations are certainly more likely in commercial cases. Another factor that may be helpful in commercial cases is the presence of past deals involving disclaimers. Also, a product's ability to produce severe (foreseeable consequential damages if defective might reasonably convince a court that the buyer would not have acquiesced to the disclaimer. This factor may be present in some consumer situations, but is more likely in business contexts involving the possibility of indirect economic loss. Even when factors of the sort just described are present, however, determining what the buyer would have chosen still seems to involve a significant measure of guesswork. Also, note that where negotiations involve implied warranty disclaimers themselves the nonoptimality problem is far less likely to arise because it is likely that the buyer is aware of the disclaimer and its effect.

\(^{342}\)Current law attempts to promote this goal to some degree. See, e.g., 15 U.S.C. § 2302
where standards of "superconscionability" in the form of "superdisclosure" have been observed by the seller and have made it highly probable that the buyer was aware of the risks associated with a disclaimer.

The Possibilities. What kinds of seller disclosure might be effectual? In rough order of ascending effectiveness, the possibilities include: positioning the disclaimer outside the product's package, making it stand in violent contrast to the rest of the sale contract, requiring the buyer to sign separately near the disclaimer, disclosing its existence on conspicuous signs where the product is sold, pointing it out to the buyer, and/or explaining its effect to the buyer. Since such disclosure is unlikely to be meaningful in the absence of genuine choice, sellers should also be required to offer the buyer the option of buying the product with the disclaimer or without it. By insulating disclaimers accepted after such steps have been taken while invalidating most other disclaimers, the courts would seem to be creating substantial incentives for full disclosure. In the process, they would also be overcoming the obstacles to free, knowing choice and optimal buyer satisfaction that have been discussed above. Unfortunately, however, there are a number of problems with this approach. These problems are most evident in the consumer context, and, in order to make these difficulties vivid, that context will be emphasized here.

The Degree of Necessary Disclosure. The first problem with the superdisclosure option concerns the degree of disclosure necessary to produce the required high probability of buyer awareness. In consumer cases, at least, methods such as placing the disclaimer outside the package, using a sale contract with a superconspicuous disclaimer, placing the disclaimer on a sign, or requiring a separate signature do not seem likely to attract the buyer's attention and stimulate his understanding with the needed reliability. Worse yet, even the most effective forms of notice are apt to be poorly understood if phrased in the legalese required by U.C.C. section 2-316(2). Perhaps these objections could be overcome by using more effective methods of communicating the option the seller is presenting (e.g., very conspicuous, detailed signs or a verbal explanation) and stating that option in commonsense terms (e.g., explaining it as a choice between a higher-priced product with an "insurance policy" and a lower-


343. See supra note 156 and accompanying text.

344. See infra text following note 359 for a discussion of how these factors affect the enforceability of implied warranty disclaimers in the commercial content.
priced product without one).\textsuperscript{345} Even this course of behavior, however, does not appear completely satisfactory. For one thing, the colloquial "insurance policy" explanation would be misleading if it fails to convey the message that \textit{implied warranty} liability is the only thing at issue,\textsuperscript{346} and explaining why this is important requires some exegesis of product liability law. Also, it should be evident that the kinds of notice most likely to generate buyer awareness are also the most burdensome for sellers.\textsuperscript{347}

\textit{The Disincentives to Use Superdisclosure.} The burdens imposed on sellers by the more effective forms of superdisclosure have other implications for this tactic's viability. First, such methods will almost certainly raise the costs associated with sales transactions,\textsuperscript{348} and this increased cost presumably will be reflected in the price of the seller's goods.\textsuperscript{349} For this reason and others, secondly, it is unclear whether sellers will be inclined to pursue superdisclosure at all. Explaining why this is so requires that we examine the reasons why sellers employ standard form contracts in the first place.\textsuperscript{350} In part, they do so to tame the external environment by minimizing both the likelihood of legal liability and legal uncertainty generally.\textsuperscript{351} Plainly, enforceable implied warranty disclaimers advance both of these goals.

But the use of standard forms also reflects forces that spring less from the need to tame the external environment than from internal institutional imperatives. As Professor Rakoff explains:

Form documents promote efficiency within a complex organizational structure. First, the standardization of terms . . . facilitates coordination among departments. The costs of communicating special understandings rise rapidly when one department makes the sale, another delivers the goods, a third handles collections, and a fourth fields

\textsuperscript{345} Section 2-316's tests, of course, remain a minimum requirement for the enforceability of implied warranty disclaimers. And technical compliance with U.C.C. § 2-316 will still be necessary.

\textsuperscript{346} For example, disclaimers of negligence and § 402A liability are quite unlikely to be effective in consumer cases. See supra notes 36-37. It might be argued that superdisclosure should validate such disclaimers, but this is rather unlikely, since in both cases equal bargaining power is necessary.

\textsuperscript{347} On the other hand, it is possible that over time consumers will become acquainted with the issues implied warranty disclaimers present, and that the more extreme methods of disclosure will eventually become unnecessary as a result.

\textsuperscript{348} See Rakoff, supra note 274, at 1221; Schwartz, supra note 335, at 1064-65.

\textsuperscript{349} In fact, it has been suggested that "[t]he costs incurred when a seller drafts and administers a particularized agreement often exceed the additional benefit a buyer would derive from such an agreement." Schwartz, supra note 335, at 1065. On the other hand, however, this increased cost must be balanced against the reduction in price attributable to the lower seller liability that superdisclosure could produce.

\textsuperscript{350} The discussion in the following two paragraphs is mainly based on Rakoff, supra note 274, at 1220-25. For other discussions of the reasons firms use standard forms, see RESTATEMENT (SECOND) OF CONTRACTS § 211, Comment a (1981); Slawson, supra note 283, at 530-32, 552.

\textsuperscript{351} Rakoff, supra note 274, at 1221.
complaints. Standard terms make it possible to process transactions as a matter of routine; standard forms, with standard blank spaces, make it possible to locate rapidly whatever deal has been struck on the few customized items. Second, standardization makes possible the efficient use of expensive managerial and legal talent. Standard forms facilitate the diffusion to underlings of management's decisions regarding the risks the organization is prepared to bear, or make it unnecessary to explain these matters to subordinates at all. Third, the use of form contracts serves as an automatic check on the consequences of the acts of wayward sales personnel. The pressure to produce may tempt salesmen to make bargains into which the organization is unwilling to enter; the use of standard form contracts to state the terms of the deal obviates much of the need for, and expense of, internal control and discipline in this regard.352

These factors militate against the use of superdisclosure to avoid the judicial negation of implied warranty disclaimers. For one thing, giving buyers the choice described above would probably make "communicating special understandings" and "coordination among departments" somewhat more difficult for organizations. But the resulting problems of communication and coordination are not likely to be overwhelming, since the buyer has only two alternatives and his choice can easily be indicated on the form. The real problems involve the crucial role that salespeople will play in making any such scheme effective. Since true purchaser understanding of the available options seems to require that the sales force be equipped to explain these options, its training becomes a matter of vital concern. Also, no matter what form of disclosure the firm adopts, the sales force will be required to implement it. This necessitates a greater degree of higher-level supervision as well. All these requirements tend to make the organization's internal functioning less smooth than would otherwise be the case. As noted earlier, they also consume time and resources, thus raising transaction costs. Finally, because they increase the responsibilities and importance of salespeople, these measures tend to alter the corporation's internal power structure in ways uncongenial to top managers.353 For all these reasons, some sellers

352. Id. at 1222-23.
353. [F]orm documents help to solidify the organization's internal power structure. In private organizations, as in public bureaucracies, discretion is power—and this is true of discretion at the bottom of the hierarchy as well as at the top. As subordinates are given wider discretion, they become more difficult to discipline, because standards of performance are less clear. From the point of view of an organization that desires to maintain internal hierarchy, the most desirable salespeople are nearly interchangeable: they sell a standard product at a standard price on standard terms. When price is negotiable, the employee's status increases somewhat. If all terms were negotiable, a much greater degree of training and ability—and consequently of status and reward—would be required. Instead, the routinization of transactions through the use of standard forms reserves discretion for positions further up the organizational hierarchy.

Id. at 1223.
may decide that superdisclosure is simply not worth its intraorganizational costs. This is especially so since, as noted above, the forms of disclosure that most effectively reduce liability are also the most burdensome to the firm.

Another reason why sellers may be disinclined to pursue superdisclosure involves a more obvious corporate imperative: the pursuit of sales. In some situations, at least, superdisclosure could be a poor marketing tactic. It is likely that a substantial number of purchasers (especially consumer purchasers) have little interest in the terms of their sales contracts and that superdisclosure is unlikely to stimulate their interest. In fact, the most effective methods of disclosure may arouse their antipathy, since these methods will inevitably slow the pace at which sales are made. Even buyers who desire to be informed about contract terms may find their interest fading as superdisclosure produces its inevitable delays. And their desire to patronize establishments devoted to enhanced disclosure may fade as well.

Paternalism and Undesirable Risk Allocation. The last set of difficulties with superdisclosure differs considerably from those just discussed. As we have seen, the aim of the superdisclosure requirement is to recreate the conditions of free contractual choice and thus to produce buyer decisions that are optimal from an economic point of view. But why, it might be argued, attach such importance to free choice and optimal economic results? Instead, why not adopt the frankly paternalistic position that certain buyers need protection from some of the choices they make? This argument seems most compelling in cases where consumers suffer personal injury. It is buttressed by the natural tendency of purchasers not to focus on the contingencies with which standard forms deal.

A related consideration is the likelihood that superdisclosure will produce a less-than-ideal allocation of losses in situations where the disclaimer is upheld and the buyer cannot recover from the seller. Here, the loss resulting from the product defect may deplete the buyer's savings or other resources, a result that is not desirable from a socialization of risk perspective. Also, this result may have consequences for the purchaser's dependents, parties who in no way assented to the risk of a de-

354. Actually, these objections apply to the "freedom of contract" and "optimality" arguments discussed earlier as well.
355. For example, it is difficult to imagine that superdisclosure would validate a disclaimer of § 402A liability in a personal injury case. See Restatement (Second) of Torts § 402A, Comment m (1965) and supra note 37.
356. The arguments in this paragraph come from Franklin, supra note 176, at 1010 n.214 (1966).
fect. Of course, the economic consequences of a disclaimable product defect may be “spread around” if the buyer’s losses are covered by insurance or are paid for by charity. Here, however, the loss will not fall on the party (the manufacturer) best situated to avoid the occurrence of the defect.

4. Summary

This subsection’s discussion of the economic arguments for enforcing implied warranty disclaimers has tended to emphasize the consumer context more than its commercial counterpart. On the whole, this discussion does little to upset my earlier conclusion that implied warranty disclaimers should not be enforced in consumer cases. Indeed, by introducing the socialization of risk perspective, the preceding discussion has strengthened the case for negating implied warranty disclaimers accompanying consumer sales. However, socialization of risk has its associated costs, most notably the tendency to produce nonoptimal economic results. As we have seen, though, there appear to be no feasible means for rectifying this situation. It is difficult, if not impossible, for the courts to make accurate after-the-fact judgments about the choices consumers would have made had they been fully informed at the time of the sale. Moreover, the attempt to induce genuine choice via superdisclosure is also beset with problems. Whether these problems are sufficient for a definitive rejection of superdisclosure, however, is not completely certain. Thus, it will be preserved as a possible alternative for the time being.

Where the “business” purchaser is in reality indistinguishable from an ordinary consumer, the points just made appreciably weaken the case for enforcing implied warranty disclaimers in commercial cases. This is arguably the case in many situations where a small-to-medium-sized business actor deals with a large corporation. In other business contexts, however, the preceding discussion probably strengthens the case for enforcing implied warranty disclaimers. Since many business parties are relatively well-equipped to bear the costs associated with defective goods, the socialization of risk rationale is less applicable to them. In fact, some large corporate buyers may be able to pass on these costs to their customers, thus eliminating most of the risk-distribution arguments for impos-

357. Cf. Epstein, supra note 1, at 311 (1975) (suggesting that, in remedy limitation context, preferred solution to enforce limitation and let market allocate risks by buyer’s purchase of insurance). Leaving aside the question whether such insurance is generally available to consumers, the objection to this proposal from the present perspective is simply that many consumers will not purchase such insurance and that they should not be left to suffer the consequences of their choice.
ing liability on the seller.\textsuperscript{358} In addition, enforcing disclaimers may produce economically optimal results in certain business transactions. In some deals of this sort, the parties may have explicitly bargained the terms of the disclaimer, or the buyer may have been aware of the disclaimer and its legal consequences. Even where this has not occurred, moreover, after-the-fact judgments on the course the buyer would have taken if fully informed may occasionally be possible in the business context.\textsuperscript{359} Finally, the superdisclosure option is far more viable for business buyers than for consumer buyers. Here, less in the way of notice and explanation will ordinarily be required to generate the desired level of purchaser awareness and understanding. Where the sale is a sizeable "one-shot" deal, the organizational disincentives toward full disclosure would seem less pressing. And paternalistic arguments have relatively little weight where the object of concern is a business entity.

These considerations considerably enhance the case for enforcing implied warranty disclaimers where both parties to the contract are large corporations. However, they strengthen the case only marginally where the contracting parties are two small-to-medium-sized firms. In this case, the buyer is in little position to pass on the costs of a product defect. Also, superdisclosure is somewhat less likely to be effective due to such firms' lower than average organization, business sophistication, and ability to obtain legal help. As already suggested, finally, the same considerations apply with more force where a small-to-medium-sized business actor purchases from a large corporation. Here, the case for enforcing implied warranty disclaimers is often rather weak.

\textbf{D. The "Rule of Law" and Related Concerns}

1. The Problem and Its Genesis

Although formulations of the term "the rule of law" vary,\textsuperscript{360} at the core of its traditional statement are the notions of certainty and predictability. To Friedrich Hayek, the rule of law "means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's indi-

\textsuperscript{358} See, e.g., Scandinavian Airlines Sys. v. United Aircraft Corp., 601 F.2d 425, 428 (9th Cir. 1979) (using this argument as one basis for holding § 402A inapplicable to commercial deals between large corporations).

\textsuperscript{359} See supra note 341.

\textsuperscript{360} See, e.g., W. FRIEDMANN, supra note 10, at 500-05 (rejecting traditional conception of rule of law identifying it with fixity of legal rules and absence of discretionary state power, and attempting formulation relevant to modern conditions).
vidual affairs on the basis of this knowledge." Obviously, the "rule" of unconscionability announced by U.C.C. section 2-302 fails to satisfy this criterion. Indeed, the indeterminacy of the unconscionability doctrine was the major reason for Professor Leff's famous 1967 assault on section 2-302. Needless to say, section 2-302's formlessness is quite apparent in the decisions applying the unconscionability doctrine to implied warranty disclaimers. On rule of law grounds, in other words, this body of law seems quite deficient.

The indeterminacy of which Leff complained, however, is an almost inevitable response to twentieth century social realities. Open-ended, discretionary standards pervade modern law. Many of them reflect the fact that precision is self-defeating where government intervenes in a complex, variegated social environment. In such an environment, the relevant factors of decision vary from case to case, and it is frequently impossible to predict either their incidence or their effects in advance. Thus, legislatures, administrative agencies, and courts announce broad, flexible standards that facilitate the exercise of case-by-case discretion. As Roberto Mangabeira Unger once noted:

As government assumes managerial responsibilities, it must work in areas in which the complexity and variability of relevant factors of decision seem too great to allow for general rules, whence the recourse to vague standards. These standards need to be made concrete and individualized by persons charged with their administrative or judicial execution.

Thus, "the courts may be charged to police unconscionable contracts, to void unjust enrichment, to control economic concentration so as to maintain competitive markets, or to determine whether a government agency has acted in the public interest." Courts utilizing U.C.C. section 2-302 are plainly assuming "managerial responsibilities." The section is but one example of a familiar phenomenon; government intervention into private contracts. As we have
seen, this intervention has been prompted by the demise of the nineteenth century assumption of contractual equality and the "negative state" posture that this assumption made possible. Courts attempting to police unfair bargains under section 2-302 must consider the many kinds and sources of contractual unfairness (e.g., the list of substantive and procedural factors discussed earlier). These factors of decision will be present in different degrees and will have different effects over the wide range of factual contexts the courts confront. In each discrete context of decision, finally, these factors must somehow be weighed against each other. Such a decision-making process seems to necessitate an indeterminate legal standard like section 2-302's unconscionability doctrine.

From the above, it should be evident that cries for a return to "the rule of law" can be covert attacks on government regulation. Since in many instances the regulatory process must be discretionary if it is to be effective, the demand for certainty is in substance a demand that the regulation cease or be ineffectual. However, this was not Leff's position. Instead, as Rakoff notes, "Leff suggested a broad program of legislation coupled with administrative enforcement, directed in part to requiring greater disclosure of terms, but aimed primarily at the outright prohibition of particular clauses and devices in adhesion contracts."365 In fact, Leff had few qualms about the outright legislative prohibition of implied warranty disclaimers in consumer cases.366 In light of the considerations raised in the preceding paragraph, however, it is doubtful whether the Leff program is workable across the full range of fact-patterns where implied warranty disclaimers are attacked as unconscionable. In commercial cases, at least, the relevant variables appear too many and too evenly balanced to permit a clear, tidy legislative or administrative resolution of the question.

2. Implications and Conclusions

Despite everything said so far, legal certainty and predictability surely have some value and thus have some bearing on the approach courts should take when determining whether implied warranty disclaimers are unconscionable. The standards applied in deciding this question, in other words, should be as definite and predictable as possible without unduly compromising other relevant values. In the present context, the main interest promoted by "rule of law" certainty is the assist-

365. Rakoff, supra note 274, at 1207. See Leff II, supra note 1, at 351-58.
366. See Leff, supra note 1, at 254.
ance it gives to private planning. As we have seen, one of the reasons firms use standard-form terms is to tame the external environment by making it more predictable. The terms can hardly accomplish this task if the rules controlling their enforceability are unclear. Specifically, clear rules governing the enforceability of implied warranty disclaimers give sellers, manufacturers, and their insurers some basis on which to predict the economic consequences of product defects and to plan accordingly. While legal certainty plainly is of some value, however, it is difficult to assess its actual importance to affected firms or its significance relative to other values affecting the enforceability of implied warranty disclaimers. But it is possible to suggest the direction in which "rule of law" concerns push the analysis made above.

Consumer Cases. In consumer cases, this article has tentatively reached a conclusion that, while no doubt unsatisfactory to sellers and manufacturers, at least affords them considerable certainty. This conclusion, of course, is that implied warranty disclaimers generally should not be enforced in consumer cases. However, there was one caveat to this conclusion; the possibility that superdisclosure might occasionally validate a disclaimer made to a consumer. But the considerations raised immediately above seem to drive the final nail into the coffin of consumer superdisclosure. As discussed previously, it is extremely difficult to determine the degree of disclosure needed to generate the consumer knowledge and understanding necessary for superdisclosure to achieve its goals. Thus, preserving the superdisclosure option for sellers is hardly likely to enhance certainty in the legal standards governing the enforceability of implied warranty disclaimers. As a result, virtually all of the

367. See supra text accompanying note 361.

368. However, there is another consideration which complicates and qualifies this conclusion a bit. The consumer, presumably, has interests in certainty and the ability to plan that rival the seller's interest. But in order for either interest to be furthered in the implied warranty disclaimer context, the consumer must at least have: 1) knowledge of the disclaimer's existence and effect (something the seller can be assumed to possess); and 2) legal certainty in the sense described in the text. Superdisclosure generally increases the likelihood that the buyer will know of the disclaimer's existence, while decreasing legal certainty. However, if the disclosure is truly exhaustive and effective, both factors would seem to be maximized. Such seller behavior, that is, makes it very likely that the buyer will know about the disclaimer and appreciate its impact, and also creates a minimum of uncertainty about its enforceability. Thus, it could be argued that a seller loophole for "super-superdisclosure" should still be retained. But there are at least two reasons why this seems inadvisable. First, since such extreme disclosure imposes all kinds of burdens on sellers, sellers pursuing this option are under intraorganizational pressure to cut corners in their disclosure programs. See supra notes 352-53 and accompanying text. Second, consumer plaintiffs may often claim that, despite the extreme methods of disclosure used, they truly did not understand the disclaimer and its effect; and courts may give weight to such testimony. Imagine that a consumer buys a product for a lower price after full disclosure of the accompanying disclaimer and its operation. If this buyer later suffers personal injury due to a defect in the goods, he will be sorely tempted to claim that he did not really understand the deal he was making. And courts influenced by socialization of risk arguments may
UNCONSCIONABILITY AND ARTICLE 2

relevant policy considerations\textsuperscript{369} point to the conclusion that implied warranty disclaimers should be \textit{per se} unconscionable in consumer cases.

\textit{Commercial Cases.} In commercial cases, the preceding analysis has indicated that: 1) implied warranty disclaimers have a strong presumption of enforceability where the seller and the buyer are both large corporations; 2) such disclaimers should often be enforced where both parties are small-to-medium-sized business entities; and 3) the desirability of enforcement is questionable where a small-to-medium-sized business actor buys from a large corporation. The reasons for these general conclusions were many. In the first situation, the parties are likely to be in an equal bargaining position, the buyer frequently will have the market power to pass on the costs associated with defective goods, and buyer awareness of the disclaimer and appreciation of its effect are most apt to be present. In the second situation, we have a buyer whose ability to engage in risk-spreading is doubtful, but who will often occupy a position of relative equality with the seller, and who will sometimes possess the sophistication to know of the disclaimer and its impact. While such sophistication and knowledge may also be present in the third situation, equal bargaining power and the buyer's ability to pass on the costs of product defects are fairly unlikely. In all three cases, though, the range of possibilities is so vast that precise legal rules seem impossible. The parties, their size, bargaining power, and business sophistication, and their appreciation of the disclaimer and its impact all will vary to such an extent that open-ended standards appear inevitable if case-by-case justice is to be done.

From a "rule of law" perspective, this situation is unfortunate. Is it possible to systematize the relevant factors of decision and thus achieve a modicum of predictability? The standards commonly used to determine the enforceability of liability waivers in negligence cases\textsuperscript{370} seem able to further this objective. Although formulations of the applicable test differ

be inclined to give weight to testimony of that sort. They also would be disinclined to give preclusive effect to the seller's adoption of a certain unconscionability ritual, since the crucial question is the buyer's actual knowledge and understanding. For both reasons, the certainty seemingly provided by "super-superunconscionability" seems a bit illusory.

\textsuperscript{369} However, this result does compromise the optimality criterion discussed at \textit{supra} notes 335-41 and accompanying text. That is, consumers who would have opted for a lower price and a disclaimer had they been fully informed will not be able to exercise this hypothetical preference.

\textsuperscript{370} One objection to the use of negligence standards is that tort rules should not be employed in a contract context. Here, though, such an objection is the emptiest of empty formalisms. The implied warranty of merchantability is, as Professors White and Summers note, the "first cousin to strict tort liability." J. \textsc{White} \& R. \textsc{Summers}, \textit{supra} note 3, \S\ 9-6, at 343. Moreover, it is probably safe to say that in most cases where the seller is liable under the implied warranty of merchantability, negligence or something quite like it is present (if not always provable). Finally, the unconscionability doctrine seems sufficiently open-ended to accommodate legal standards that technically are not contractual.
somewhat, several factors recur in the cases discussing the enforceability of such waivers. The most important factors supporting enforceability are: 1) a transaction between business entities (not a consumer purchase); 2) relatively equal bargaining power between these parties; 3) genuine bargaining or negotiations regarding the waiver; and 4) considerable explicitness in the terms of the waiver. The first factor is present by definition here. The fourth should be satisfied if the seller adheres to the technical standards of U.C.C. section 2-316. (These standards, of course, remain as minimum criteria for the enforceability of any implied warranty disclaimer.) Remaining to be discussed, therefore, are the two remaining criteria; the existence of relatively equal bargaining power and the presence of genuine negotiations.

Equal bargaining power has not always been considered significant by courts considering the unconscionability of implied warranty disclaimers in commercial cases. In light of the realities discussed in the opening portion of this section, however, such a requirement plainly is necessary to make freedom of contract meaningful by preventing stronger parties from imposing disclaimers. Absent this requirement, genuine buyer assent to the disclaimer would be doubtful in many cases. Moreover, the buyer's ability to bargain for an "insurance policy" (and thus the policy of promoting optimal economic results) would sometimes be frustrated. Under this general test, deals between large corporations and between smaller entities of equal size (the first two situations outlined above) should usually pass muster. Transactions between corporate giants and small-to-medium-sized firms, however, will be highly suspect. But size is not always a reliable proxy for bargaining power. "Much depends on the nature of the transaction, the nature of the product, the relative knowledge of the parties concerning the product, and the

371. See supra note 36.

372. Courts also say that a waiver of negligence liability should be strictly construed. See supra note 36. In the present context, however, this requirement appears to have little meaning, since under U.C.C. § 2-316 we have precise standards governing the enforceability of disclaimer clauses that have a quite precise effect.

373. See supra notes 231, 256, 262 and accompanying text.

374. See supra notes 335-37 and accompanying text.

375. Also, there is another consideration that supports the enforceability of disclaimers in cases where the buyer and the seller are both large corporations. Large corporate buyers are sometimes able to pass on the costs associated with product defects. Where this is true, it is not necessary to impose liability on the seller in order for the risk to be socialized. See supra note 358 and accompanying text.

376. However, there is obviously some connection between size and bargaining power. See, e.g., supra text following note 283 (suggesting that disparities of bargaining power spring less from outright compulsion than from disparities in business experience, business sophistication, etc.). There is plainly some correlation between size and the possession of these attributes.
availability of other products to fill the needs of the purchaser." In all three situations, therefore, individualized consideration of such factors may still be necessary.

Like equal bargaining power, the factor of genuine bargaining has not always been deemed significant by courts deciding unconscionability challenges to implied warranty disclaimers in the commercial context. For a variety of reasons, however, this additional requirement seems desirable. Most importantly, the buyer's knowledge of the disclaimer is virtually guaranteed where that disclaimer is the product of genuine bargaining. Such knowledge is ordinarily crucial if the goals of optimal results and predictable planning are to be achieved. In the absence of a knowing bargain, there is little guarantee that a disclaimer actually reflects the buyer's preference to refuse an "insurance policy" in return for a lower price. Moreover, it is difficult to see how firms can effectively plan if their plans are affected by unknown risk-allocations.

Obviously, buyer knowledge of the disclaimer is possible in the absence of negotiations. Why, then, not make buyer knowledge rather than the presence of negotiations, the criterion? Earlier in the article, for example, I suggested that superdisclosure might sometimes justify the enforcement of an implied warranty disclaimer in commercial cases, and that after-the-fact judgments about what the buyer would have chosen if fully informed may be permissible in such cases. However, there are two general reasons why the presence of genuine negotiations seems to be a better criterion than simple buyer knowledge. First, the buyer knowledge that accompanies genuine bargaining is apt to be of

377. Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp., 143 Ariz. 368, 384, 694 P.2d 198, 214 (1985) (discussing transaction between two large corporations). These considerations, however, apply in other contexts as well. The ready availability of substitute products, for example, might give a small buyer some leverage when it bargains with a larger firm.

378. See supra notes 232, 256, 262 and accompanying text.

379. While relatively equal bargaining power may be necessary for genuine negotiations, it hardly guarantees their presence. Some large corporate buyers, for example, may passively accept their sellers' standard-form disclaimers.

380. Cf. Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 288-89 (3d Cir. 1980) (enforceability of freely bargained waivers of negligence liability reflects idea that such bargaining can achieve more rational allocation of risks than law would otherwise allow, and this rationale, in turn, presupposes that contracting parties have actually considered the negative costs of insuring against negligent design and manufacture).

381. Some business or commercial buyers, for example, may possess the business sophistication and experience to recognize an unbargained disclaimer in the seller's contract, but may passively accept it. The same result may occur even if the disclaimer's existence has been pointed out by the seller.

382. Here, of course, I refer to actual knowledge, and reject the tendency for some courts to impute such knowledge to business or commercial buyers. On this tendency, see supra note 255.

383. See supra text following note 359.

384. See supra notes 340-41, 359 and accompanying text.
a different order than knowledge received in more passive ways (including superdisclosure). Where the disclaimer results from real negotiations, it is more likely that the buyer has fully considered its impact before assenting to it. Since effective planning and the achievement of optimal economic results are somewhat dependent on such deliberation, these goals are best advanced where actual negotiations have occurred.

Secondly, the main concern of this subsection—legal certainty and predictability—tips the scales in favor of making negotiations the standard. Even under the best of circumstances, determining what a hypothetical fully informed buyer would have chosen is beset with difficulties. And determining whether the buyer actually was aware of the disclaimer at the time of the sale also poses problems. Presumably, the buyer's own testimony is entitled to some weight in resolving this question. But even buyers who really knew of the disclaimer at the time of the sale will have a natural inclination to testify to the contrary if the product turns out to be defective and losses result. While seller superdisclosure may sometimes render such claims implausible in the commercial context, the degree of superdisclosure needed for genuine buyer awareness is still somewhat uncertain.\textsuperscript{385} In comparison, the presence or absence of real negotiations appears easier to ascertain. Since negotiations are objective events involving more than one person, establishing their existence is less dependent on the testimony of the buyer or its employees. Such bargaining may also be evidenced by letters and other writings. In some cases, finally, there may be third-party witnesses to the negotiations.

IV. Conclusion

Among the many crosscurrents affecting the drafting of Article 2 of the Uniform Commercial Code was the clash between nineteenth century freedom of contract ideas and the more protective, interventionist spirit that has often prevailed in the twentieth century. In few instances is this more evident than in Article 2's rules governing implied warranties and seller disclaimers of these warranties. Reflecting the interventionist climate produced by the social changes that undermined classic nineteenth century contract law, the drafters followed the lead of the Uniform Sales Act\textsuperscript{386} by including the implied warranties of merchantability and fitness. At the same time, however, they significantly diluted the impact of these warranties by giving sellers broad freedom of contract-based powers to

\textsuperscript{385} See supra notes 344-47 and accompanying text (referring to the consumer context). Also, there are various intraorganizational reasons why sellers may be disinclined to pursue superdisclosure in the first place. See supra notes 352-53 and accompanying text.

\textsuperscript{386} See Uniform Sales Act §§ 15(1), (2).
disclaim them. The resulting tension between nineteenth and twentieth century conceptions of contractual freedom and the government's role in maintaining it made for an unstable admixture. And, while various economic arguments for enforcing implied warranty disclaimers may have helped to reduce this tension, they failed to eliminate it. Eventually, it seems, the incongruity between Article 2's implied warranties and its easy-to-use disclaimer provisions has been resolved in favor of the former. By now, implied warranty disclaimers can be readily attacked under section 2-302's all-purpose ban on unconscionable contract clauses. Still, the courts applying section 2-302 to implied warranty disclaimers have sometimes been tentative in their use of this regulatory tool. The general movement of product liability law, and the policy considerations underlying that movement, however, argue for a more aggressive judicial stance in this area.
NOTES
&
COMMENTS