ORAL EXPRESS WARRANTIES: HOW TO CONVINCE A COURT TO UPHOLD THE WARRANTY

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ABSTRACT

Sellers of goods frequently make oral warranties to buyers during negotiations for the purchase of the goods. The formal agreement for the sale is, in most cases, a standardized form. It is highly unlikely that the form agreement will include the oral warranty. What it will include, however, is a boilerplate disclaimer of warranties and an integration clause. If the warranty is breached, sellers typically defend against the warranty with the disclaimer clause, the integration clause, or both. Courts have been too willing to allow these defenses to block the warranty.

This Article contends that courts are not giving proper respect to law that upholds the warranty. The Uniform Commercial Code Article 2, Restatement (Second) of Contracts § 211(3), and common law "reasonable expectations" doctrine protect the oral warranty. When examined critically, the Uniform Commercial Code Article 2 sections on express warranties and warranty disclaimers and the Article 2 parol evidence rule fairly support the warranty over the disclaimer and integration clauses. Restatement (Second) of Contracts § 211(3) authorizes removing a term in a standardized form agreement when the drafting party has "reason to believe" that the assenting party would not agree to the term. The reasonable expectations doctrine allows the reasonable expectations of a party to prevail over the written contract terms although the written terms of the parties' agreement are contrary to their expectations. This Article analyzes these statutes and principles and provides the framework for using them to uphold oral warranties.

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I. INTRODUCTION

The consumer buyer of a product who thinks that the contract of sale includes the oral warranties made by the seller might be mistaken.[1] Examining the writing the buyer signed will likely disclose a disclaimer of warranties[2] and an integration clause.[3] Those clauses can have an adverse effect on whether a warranty exists.[4] If the product performs as the seller warranted, there is no issue. If the product does not perform as warranted and the buyer commences litigation alleging breach of warranty, the court will decide whether a warranty accompanies the product. It is no exaggeration that courts typically hold that the warranty does not survive the disclaimer or, especially, the integration clause.[5]

1. *See* U.C.C. § 2-313 (AM. LAW INST. & UNIF. LAW COMM'N 2014). "Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." *Id.* § 2-313(a); *see also id.* § 2-316(1) (words or conduct of express warranty subject to U.C.C. Article on parol or extrinsic evidence negation or limitation).

2. A typical disclaimer of warranties clause typically provides: Seller makes no warranties, express or implied, including the warranty of merchantability, except as may be expressed in this writing.

3. A typical integration clause provides: This writing is the final expression of the agreement of the parties, and the complete and exclusive statement of the terms agreed upon, all prior agreements and understandings being merged herein.

4. *See, e.g.*, Lincoln Sav. Bank v. Open Sols., Inc., No. C12-2070, 2013 WL 997894, at *3 (N.D. Iowa Mar. 13, 2013); Hoffman v. Daimler Trucks N. Am., LLC, 940 F. Supp. 2d 347, 355 (W.D. Va. 2013); Pitts v. Monaco Coach Corp., 330 F. Supp. 2d 918, 923 (W.D. Mich. 2004); Williams v. Gen. Motors Acceptance Corp., No. 229345, 2011 WL 5071365, at *3 (Mich. Ct. App. Oct. 25, 2011); St. Croix Printing Equip., Inc. v. Rockwell Int'l Corp., 428 N.W.2d 877, 880 (Minn. Ct. App. 1988); Ace, Inc. v. Maynard, 423 S.E.2d 504, 508 (N.C. Ct. App. 1992); Shook v. Counterman, No. L-00-1084, 2000 WL 1791801, at *2 (Ohio Ct. App. Dec. 8, 2000); Boud v. SDNCO, Inc., 54 P.3d 1131, 1136 (Utah 2002).

5. *See, e.g.*, *Lincoln Sav. Bank*, 2013 WL 997894, at *3; *Hoffman*, 940 F. Supp. 2d at 355; *Pitts*, 330 F. Supp. 2d at 923; *Williams*, 2011 WL 5071365, at *3; *St. Croix Printing Equip., Inc.*, 428 N.W.2d at 881; *Ace, Inc.*, 423 S.E.2d at 508; *Shook*, 2000 WL 1791801, at *2; *Boud*, 54 P.3d at 1136–37.

Consider this scenario: A consumer consults a dealer of home air conditioning equipment to determine which size of air conditioner will cool her home completely. The consumer provides the dealer with the square footage and configuration of her home and seeks the dealer's advice as to the appropriate equipment. The dealer states that the "XC704 model" air conditioner will "sufficiently cool her entire home to a temperature of no less than 65 degrees." The consumer replies, "Perfect. That is exactly what I need. I will purchase the XC704." The dealer furnishes the consumer a two-page printed form that includes blank spaces for only the product, the price, and the delivery and installation date.[6] The consumer and dealer sign the writing after completing the blank spaces. They do not discuss the other terms in the form. When the cooling season commences, the lowest temperature the air conditioner achieves is 72 degrees. The dealer's attempts to service the air conditioner so that it cools the consumer's house to a lower temperature are not successful. Consumer asks the dealer to refund the purchase price and take back the air conditioner. Dealer refuses and shows consumer the terms the parties agreed to in the writing, which includes a disclaimer of all warranties and an integration clause. Litigation ensues and the court must decide whether the warranty exists.

The issue presented in scenarios like this is whether an oral express warranty is part of the parties' agreement or whether the disclaimer and integration clauses prevent the existence of the warranty. Statutes that help decide the issue reside in Article 2 of the Uniform Commercial Code (U.C.C.).[7] Supporting the warranty are section 2-313,[8] creating express warranties, and section 2-316(1),[9] limiting disclaimer of express warranties. Against the warranty are section 2-202,[10] the Article 2 parol evidence rule, and section 2-316(1),[11] subjecting the express warranty to the parol evidence rule. Yes, section 2-316(1) can work both sides of the issue. Legal doctrines

6. This is likely an adhesion contract. *See* W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 31 (1984).

7. *See* U.C.C. art. 2 (AM. LAW INST. & UNIF. LAW COMM'N 2014).

8. *Id.* § 2-313.

9. *Id.* § 2-316(1).

10. *Id.* § 2-202.

11. U.C.C. § 2-316(1) makes a limitation of an express warranty inoperative when the court cannot construe reasonably the express warranty and the limitation consistent with each other. But that rule is "subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) . . . ." *Id.* § 2-316(1).

the buyer can utilize are the "reasonable expectations" doctrine[12] and Restatement (Second) of Contracts § 211(3),[13] excluding terms contained in standardized agreements. Inserting warranty disclaimers and integration clauses into a standardized form has made it difficult for consumers to prevail on this issue.[14]

I contend courts should use statutory and doctrinal tools to uphold the oral express warranty against disclaimer and integration clauses. Although I ground my contention in law, it is critical to be mindful that equity reinforces it: "The buyer who has heard the seller make statements about the goods . . . expects the seller to live up to these representations."[15] As I will develop in this Article, U.C.C. Article 2 favors warranties over disclaimers.[16] Its parol evidence rule, section 2-202, does not automatically prevent an oral express warranty simply because the writing that evidences the agreement includes an integration clause.[17] Restatement (Second) of Contracts § 211(3) provides an additional path to sustaining the oral express warranty when the writing containing the disclaimer and integration clauses is a form agreement.[18] And finally, the reasonable expectations doctrine, while typically used in construing insurance contracts, nicely fits analysis of the warranty or no warranty question.[19] Courts can use these tools to uphold the oral express warranty.[20]

There are several questions surrounding this issue that are not

12. The reasonable expectations of a party are honored although close reading of the writing would contradict those expectations. Charles L. Knapp, *Is There a "Duty to Read"?*, 66 HASTINGS L.J. 1083, 1092 (2015); *see* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

13. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981).

14. *See* cases cited *supra* note 4.

15. DOUGLAS J. WHALEY, WARRANTIES AND THE PRACTITIONER 79 (1981).

16. *See* U.C.C. art. 2.

17. *See id.* § 2-202.

18. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3). The Unidroit Principles include a section closely related to Restatement (Second) of Contracts § 211(3). "No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party." UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS § 2.1.20(1), at 68 (INT'L INST. FOR THE UNIFICATION OF PRIVATE LAWS 2010).

19. *See* Knapp, *supra* note 12.

20. There is another theory that the courts in Tennessee have used to protect the expectations of the non-drafting party who assents to a standard form contract. *See* Robert M. Lloyd, *The "Circle of Assent" Doctrine: An Important Innovation in Contract Law*, 7 TRANSACTIONS: TENN. J. BUS. LAW 237, 238 (2006).

discussed in this Article. First, this Article pertains to contracts between consumer buyers and merchant sellers. The consumer buyer is the most vulnerable buyer in these situations, so I limit my analysis to that situation.[21] Second, this Article assumes the seller has made an oral express warranty. Uncertainty as to whether a seller has made a warranty can surround this issue,[22] but this Article examines situations where the oral representations and statements the seller makes are warranties.

There are situations where the consumer buyer will prevail: the court finds the disclaimer or integration clause unconscionable;[23] the seller delivers the writing containing the disclaimer after the sale contract is formed;[24] the express warranty is a written express warranty;[25] or the agreement does not include a warranty disclaimer or an integration clause.[26] This Article will not discuss those situations because courts generally uphold the warranty under those conditions.

Part II of this Article explains how a court should uphold the oral

21. This conflict also can arise between merchant parties, who are less vulnerable adversaries. *See, e.g.*, Nat'l Mulch & Seed, Inc. v. Rexius Forest By-Prods. Inc., No. 2:02-cv-1288, 2007 WL 894833, *1 (S.D. Ohio 2007); St. Croix Printing Equip., Inc. v. Rockwell Int'l Corp., 428 N.W.2d 877, 878, 880 (Minn. Ct. App. 1988).

22. "[T]he seller's opinion or commendation of the goods does not create a warranty." U.C.C. § 2-313(2).

23. *See, e.g.*, Dall. Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 786–88 (2d Cir. 2003) (citations omitted) (discussing whether the disclaimer provisions in the contract at issue were unconscionable); Mullis v. Speight Seed Farms, Inc., 505 S.E.2d 818, 819 (Ga. Ct. App. 1998) (citations omitted); Antz v. GAF Materials Corp., 719 A.2d 758, 759 (Pa. Super. Ct. 1998).

24. *See, e.g.*, Terrell v. R & A Mfg. Partners, Ltd., 835 So. 2d 216, 223–24 (Ala. Civ. App. 2002) (first citing Tiger Motor Co. v. McMurtry, 224 So. 2d 638, 644 (Ala. 1969); and then quoting Bowdoin v. Showell Growers, Inc., 817 F.2d 1543, 1545–46 (11th Cir. 1987)); Duffin v. Idaho Crop Improvement Ass'n, 895 P.2d 1195, 1205 (Idaho 1995) (footnote omitted); Laidlaw Transp., Inc. v. Helena Chem. Co., 680 N.Y.S.2d 365, 367 (N.Y. App. Div. 1998); Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc., 262 S.W.3d 813, 829 (Tex. App. 2008).

25. *See, e.g.*, DJ Coleman, Inc. v. Nufarm Ams., Inc., 693 F. Supp. 2d 1055, 1067 (D.N.D. 2010) (citations omitted); Liimatta v. V & H Truck, Inc., No. Civ. 03-5112JNERLE, 2005 WL 2105497, at *7 (D. Minn. Aug. 30, 2005) (quoting Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 917 (Minn. 1990)); Hauter v. Zogarts, 534 P.2d 377, 384–85 (Cal. 1975) (in bank) (footnote omitted); Bell Sports, Inc. v. Yarusso, 759 A.2d 582, 592–93 (Del. 2000); Jensen v. Seigel Mobile Homes Grp., 668 P.2d 65, 71–72 (Idaho 1983) (citations omitted).

26. If an agreement does not contain a disclaimer or an integration clause, the buyer should prevail by proving that the seller made an express warranty. U.C.C. § 2-313(1)(a).

express warranty when the written form contract includes a disclaimer of warranties and an integration clause. To achieve that result I use U.C.C. §§ 2-313, express warranties, and 2-202, the parol evidence rule.[27] Although many courts use section 2-202 to hold that an integration clause prevents the buyer from introducing evidence of an oral warranty, I argue that courts can uphold the warranty while following the rule of section 2-202.[28] Part III applies Restatement (Second) of Contracts § 211(3) to uphold an oral express warranty. Section 211(3) operates to prevent a term in a form writing from becoming part of the parties' agreement when the drafter of the writing has reason to believe that the other party would not have assented to the writing that contains the offending term. Part IV advocates for using the reasonable expectations doctrine to uphold the oral warranty. Although the reasonable expectations doctrine has similarities to Restatement section 211(3), it differs in that it addresses the question of determining what terms are part of the parties' agreement based on the expectations of the non-drafting party rather than from what the drafting party has "reason to believe."[29] Initially a doctrine used to construe insurance contracts,[30] courts have applied it to other form contracts.[31] Courts can use this legal theory to sustain an oral warranty.[32]

II. ORAL EXPRESS WARRANTIES AND THE PAROL EVIDENCE RULE

Determining whether an oral warranty is part of the parties' agreement starts with the U.C.C. definition of agreement. The U.C.C. Article 1 definition of agreement is "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of

27. *See infra* Part II.B.

28. *See infra* Part II.B.

29. *See* Keeton, *supra* note 12, at 967.

30. *See, e.g.*, Smith v. Auto-Owners Ins. Co., 500 So. 2d 1042, 1044 (Ala. 1986) (per curiam) (interpreting policy limits in underinsured motorist coverage); Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 283–84 (Ariz. 1987) (construing "resident of same household" clause in uninsured motorist coverage); Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 112 (Iowa 1981) (en banc) (construing "ways immediately adjoining" the insured's premises provision in farm liability policy); *see generally* Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 (1990).

31. *See, e.g.*, Broemmer v. Otto, 821 P.2d 204, 208 (Ariz. Ct. App. 1991), *approved in part & vacated in part*, Broemmer v. Abortion Servs. of Phx., Ltd., 840 P.2d 1013 (Ariz. 1992) (en banc); Zigrang v. U.S. Bancorp Piper Jaffray, Inc., 123 P.3d 237, 241 (Mont. 2005); Swain v. Auto Servs., Inc., 128 S.W.3d 103, 107–08 (Mo. Ct. App. 2003).

32. *See infra* Part II.

performance, course of dealing, or usage of trade as provided in section 1-303."[33] The official comment to the section declares agreement "is intended to include full recognition of . . . the surrounding circumstances as effective parts thereof."[34] Courts that decide which terms are part of the parties' agreement must consider language, oral and written, and the circumstances surrounding formation of the contract.[35]

Recall that the elements of the situation this Article examines are: consumer buyer; oral representation by merchant seller establishes express warranty; buyer signs standardized (form) writing drafted by seller; writing includes disclaimer or limitation of warranty and integration clause; and no explanation or review of printed terms in writing. The warranty, from the example in the Introduction, is the seller's representation that the air conditioner it sells will cool the buyer's home to a temperature no less than 65 degrees. The issue is whether the warranty is part of the agreement.

A. *Warranty Disclaimer*

When a consumer buyer sues the seller alleging a breach of oral express warranty, the seller's initial defense is typically a term in the writing that disclaims all warranties, express and implied, or a term limiting warranties.[36] The disclaimer can be as straightforward as "seller makes no express or implied warranties about the product sold, including the warranty of merchantability."[37] Alternatively, a seller might furnish an express warranty but limit it to "repair or replace defective parts."[38] Either clause provides an argument for the seller that the oral warranty does not prevail against the disclaimer or limitation term[39] included in the printed and signed form

33. U.C.C. § 1-201(3) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

34. *Id.* § 1-201 cmt. 3.

35. *See* Barrett v. Gilbertson, 827 N.W.2d 831, 836 (N.D. 2013).

36. *See* Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 265 (2007). With standardized contracts and boilerplate language, a form drafted by the seller's attorney would very likely include a disclaimer or limitation of warranties, or both.

37. U.C.C. § 2-316(2) requires that an effective disclaimer of the implied warranty of merchantability must "mention merchantability and in case of a writing must be conspicuous."

38. *See id.* § 2-316(1).

39. Because the issues are essentially the same whether the writing includes a warranty disclaimer or a warranty limitation, the discussion in the rest of this Article will be limited to the warranty disclaimer rather than disclaimer and limitation.

agreement.[40] The seller can assert that the buyer has signed a writing that not only does not include the oral warranty but expressly disclaims it.[41] The parties' agreement, says the seller, is limited to the terms of the writing regardless whether the buyer read or understood the printed terms in the form writing.[42]

The buyer is not without a rebuttal. U.C.C. § 2-316(1) shows the Article 2 drafters' preference for warranty over disclaimer.[43] In a clash between words that create an express warranty and words that negate the warranty, section 2-316(1) first requires courts to construe conflicting words "as consistent with each other," if that construction is reasonable.[44] But when such construction is "unreasonable," the words negating the warranty are "inoperative."[45] The warranty survives while the disclaimer drops out.[46] The Indiana Court of Appeals explained section 2-316(1) in this way:

> If an expressed warranty and a disclaimer of an expressed warranty exist in the same sale, an irreconcilable conflict emerges. The statute solves the problem by emphasizing that any negation or limitation of an expressed warranty is inoperative if it is "unreasonable."[47]

The drafters disclose the design and purpose of section 2-316(1) in the official comment to the section:

> This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained

40. *See* Barnes, *supra* note 36.

41. *See id.*

42. This is the familiar and long-approved principle of contract law that a party is bound by the terms of the writing regardless whether the buyer has read or understood those terms. *See id.*; Knapp, *supra*, note 12; James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315, 324 (1997).

43. *See* U.C.C. § 2-316(1).

44. *Id.*

45. *Id.* See *infra* notes 238–50 and accompanying text for a discussion of the parol evidence rule condition to this section.

46. *See* U.C.C. § 2-316(1).

47. Woodruff v. Clark Cty. Farm Bureau Coop. Ass'n, 286 N.E.2d 188, 200 (Ind. Ct. App. 1972). The judge commented that the seller who attempts to "warrant and refuse to warrant at the same time . . . runs both with the hares and hounds" and creates a conflict the statute resolves against the buyer. *Id.* Subsequent Indiana cases follow this reasoning. *See* Carpetland U.S.A. v. Payne, 536 N.E.2d 306, 309 (Ind. Ct. App. 1989); Art Hill, Inc. v. Heckler, 457 N.E.2d 242, 244 (Ind. Ct. App. 1983).

> language of disclaimer by denying effect to such language when inconsistent with language of express warranty . . . .[48]

The correct result of applying section 2-316(1) to the conflict between an oral express warranty and a written disclaimer is clear—the disclaimer is inoperative.[49]

The Indiana Court of Appeals declared a written warranty inoperative against an oral warranty where the facts exactly fit the premise of this Article.[50] Bezzel Payne visited Carpetland USA to purchase carpet for her home.[51] Brad Lewis, a Carpetland sales representative, told Payne that the carpeting came with a one-year warranty.[52] The purchase agreement Payne signed did not include that warranty, but the reverse side of the purchase agreement included a provision in all capital letters stating that: "BUYER ACKNOWLEDGES THAT NO EXPRESS OR IMPLIED WARRANTIES (INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS) HAVE BEEN MADE BY SELLER AND SELLER HEREBY DISCLAIMS ALL SUCH WARRANTIES. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE FACE HEREOF."[53] The court applied U.C.C. § 2-316(1) and held that the warranty and disclaimer were "clearly inconsistent," and it held the disclaimer "inoperative."[54]

In its opinion, the court recognized that their opinion "seemingly ignores the parol evidence provision" of the Indiana Uniform Commercial Code.[55] The court noted the argument that the parol evidence rule could bar admission of an oral express warranty if the agreement was the parties' final expression of their agreement or the complete and exclusive statement of their terms.[56] However, the court found the rebuttal to that argument in the words of the first official comment to U.C.C. § 2-316 that section 2-316(1) "protect[s] a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with

48. U.C.C. § 2-316 cmt. 1.
49. *See id.* § 2-316(1).
50. *Carpetland U.S.A.*, 536 N.E.2d at 309.
51. *Id.* at 307.
52. *Id.*
53. *Id.* at 309.
54. *Id.*
55. *Id.* at 309 n.1.
56. *Id.*

language of express warranty."[57] That being the case, the court determined that the writing was not the parties' final expression and that the parol evidence rule did not bar admission of the oral express warranty.[58] There was no evidence that the parties' agreement included an integration clause.[59]

The Supreme Court of South Dakota addressed the warranty–disclaimer issue in a sale of an aircraft.[60] In this case the seller orally represented to the buyer that "the plane is 'ready to go,' 'You can get in it and go to work. If anything is wrong we will fix it,' and 'if it quits, I will make it right.'"[61] The buyer signed the front of the purchase agreement without reading the reverse side.[62] The reverse side included an exclusion of warranties provision.[63] The court stated that U.C.C. § 2-316(1) "protects buyers from disclaimers inserted into written contracts or similar forms which are inconsistent with express warranties."[64] "[W]here an express warranty and a disclaimer of an express warranty exist in the same sale, there is an irreconcilable conflict and the disclaimer is ineffective."[65]

Other courts have reached the same result.[66] The seller's oral representation that tomato seeds it sold were resistant to disease was upheld against a disclaimer included in an invoice signed by buyer.[67] Citing the state's adopted version of U.C.C. § 2-316 and comment 1, the court stated that the section protects a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty.[68] The seller of sawmill equipment made oral

57. *Id.* (quoting U.C.C. § 2-316 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 1988)).

58. *Id.*

59. *See id.* at 309.

60. Husky Spray Serv., Inc. v. Patzer, 471 N.W.2d 146, 147, 150–52 (S.D. 1991).

61. *Id.* at 150.

62. *Id.* at 148.

63. *Id.*

64. *Id.* at 151.

65. *Id.*

66. *See, e.g.*, Scovil v. Medtronic Inc., No. 2:14-CV-00213-APG-VCF, 2015 WL 880614, at *11, *12 (D. Nev. Mar. 2, 2015); Avram v. Samsung Elecs. Am., Inc., Nos. 2:11-6973(KM), 2:12-976(KM), 2013 WL 3654090, at *10 (D.N.J. July 11, 2013); Marvin Lumber & Cedar Co. v. Sapa Extrusions, Inc., 964 F. Supp. 2d 993, 1001 (D. Minn. 2013); Gable v. Boles, 718 So. 2d 68, 71 (Ala. Civ. App. 1998).

67. Nomo Agroindustrial, S.A. de C.V. v. Enza Zaden N. Am., Inc., 492 F. Supp. 2d 1175, 1177, 1181 (D. Ariz. 2007).

68. *Id.* at 1177 (citing ARIZ. REV. STAT. ANN. § 47-2316 (2007)).

warranties to the buyer concerning the capabilities of the equipment.[69] The written "Conditions of Sale" included in the seller's sale quotation included a warranty against defects in materials and workmanship but expressly made that warranty "exclusive and in lieu of all other express and implied warranties . . . ."[70] The court found that the warranty and the disclaimer cannot be read consistently and held that when such statements cannot be reconciled, the language of the express warranty prevails.[71]

Not all courts uphold the warranty over the disclaimer.[72] But the facts of those cases show not only a written disclaimer but also an integration clause.[73] That clause engages the parol evidence rule and provides the seller with a strong opportunity to invalidate the warranty.[74]

The warranty prevails, however, when the facts of the conflict are an oral express warranty against a disclaimer of the warranty.[75] That is the correct holding: Section 2-316(1) commands that result.[76] One cannot reasonably construe the creation of an oral warranty and a total disclaimer of oral warranties as consistent with each other.[77] When that construction is unreasonable, the negation is inoperative and the warranty stands.[78] Returning to this Article's example of an oral express warranty that the air conditioner will cool the buyer's home to at least 65 degrees, the buyer will

69. Minn. Forest Prods., Inc. v. Ligna Mach., Inc., 17 F. Supp. 2d 892, 898 (D. Minn. 1998).

70. *Id.* at 918 (internal quotation marks omitted).

71. *Id.* at 919.

72. *See, e.g.*, Pitts v. Monaco Coach Corp., 330 F. Supp. 2d 918, 923 (W.D. Mich. 2004) (finding written disclaimer on back of agreement effectively disclaimed oral warranty); Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 7 F. Supp. 2d 954, 965–66 (N.D. Ohio 1998) (finding it reasonable that a company disclaim in writing any reliance on all representations made outside the writing); Rawson v. Conover, 20 P.3d 876, 887 (Utah 2001) (finding sales agreement disclaimer prevails over oral statements not incorporated into the writing).

73. *See, e.g.*, *Pitts*, 330 F. Supp. 2d at 923; *Goodyear Tire & Rubber Co.*, 7 F. Supp. 2d at 962; *Rawson*, 20 P.3d at 879–80. A typical "no unauthorized representations" clause provides: "No representative has authority to make any representation, promise or agreement except as stated herein." *Goodyear Tire & Rubber Co.*, 7 F. Supp. 2d at 958.

74. *See infra* notes 238–50 and accompanying text (discussing the effect of the parole evidence rule).

75. *See* U.C.C. § 2-316(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

76. *See id.*

77. *See id.* § 2-316 cmt. 1.

78. *Id.* § 2-316(1).

have the opportunity to obtain damages for the seller's breach of warranty.[79]

B. *Disclaimer Plus Integration Clause*

The buyer encounters the most difficult obstacle to upholding the oral express warranty when the form sales contract includes an integration clause[80] in addition to a warranty disclaimer clause or an integration clause regardless of a disclaimer.[81] The integration clause, also known as a merger clause, and familiar to all law students and attorneys, is boilerplate; it is included in most standardized form writings.[82] When the integration clause enters the warranty conflict, the court's deliberation will involve U.C.C. § 2-202, the U.C.C.'s parol evidence rule, in addition to U.C.C. § 2-316(1), the U.C.C.'s disclaimer of express warranties.[83] This is because section 2-316(1)'s negation-of-warranty-is-inoperative rule is "subject to the provisions of this Article on parol or extrinsic evidence . . . ."[84] The U.C.C. Article 2 parol evidence rule becomes relevant because the buyer must prove that the oral warranty is part of the parties' agreement.[85] Although the buyer has that burden regardless of an integration clause, when the writing includes an integration clause, the seller argues the writing is the complete agreement of the parties and the parol evidence rule precludes introduction of any

79. *See id.*

80. The integration clause typically provides:

> This Agreement constitutes the sole entire agreement among the Parties with respect to the subject matter hereof, and no representations, warranties, inducements, promises or agreements, oral or otherwise, not embodied or incorporated herein have been made concerning or in connection with this Agreement. Any prior discussions or negotiations, agreements, commitments and understandings relating hereto are superceded hereby and merged herein.

SPECIAL STUDY FOR CORPORATE COUNSEL ON SEVERANCE AGREEMENTS § 3:32, cl. 32.1 (2015), Westlaw Spec. Study for Corp. Couns. on Severance Agreements § 3:32.

81. For representative cases in which the buyer loses the oral express warranty because of the integration clause, see, e.g., Lincoln Sav. Bank v. Open Sols., Inc., No. C12-2070, 2013 WL 997894, at *3 (N.D. Iowa Mar. 13, 2013); Hoffman v. Daimler Trucks N. Am., LLC, 940 F. Supp. 2d 347, 355 (W.D. Va. 2013); Ace, Inc. v. Maynard, 423 S.E.2d 504, 509 (N.C. Ct. App. 1992); Boud v. SDNCO, Inc., 54 P.3d 1131, 1136 (Utah 2002).

82. *See* Richard F. Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 DUKE L.J. 881, 881–82, 905–06.

83. *See* U.C.C. § 2-316(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014); *id.* § 2-202.

84. *Id.* § 2-316(1).

85. *See id.* § 2-202.

agreement not included in the writing.[86] A superficial look at the U.C.C. § 2-202 parol evidence rule indicates the seller makes a persuasive argument.[87]

The U.C.C. Article 2 parol evidence rule operates when the parties have set the terms of their agreement "in a writing intended by the parties as a final expression of their agreement with respect to such terms" included in the writing.[88] The initial question the section asks is whether the parties intend the writing to be their final expression of the terms of their agreement included in the writing.[89] If they have, section 2-202 provides that those terms "may not be contradicted by evidence of a prior agreement . . . ."[90] However, section 2-202 allows even a "final expression" to be supplemented by "consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."[91]

The seller involved in a warranty conflict against the buyer, where the parties' written agreement includes an integration clause, looks at section 2-202 as the path to summary judgment.[92] The integration clause is evidence, arguably conclusive, that the parties intended the writing to be the final, complete, and exclusive expression of their agreement.[93] That is precisely what the integration clause says, and that is why the seller included it in the writing.[94] The writing says it includes all terms of the parties' agreement, yet the buyer seeks to introduce evidence of the oral warranty.[95] If the court agrees that the parties intended the writing as their final expression, then it will exclude the buyer's evidence of the oral warranty as contradictory to the terms of the writing.[96]

86. *See id.*
87. *See id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* § 2-202(b).
92. *See id.*
93. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 3.4(b), at 115 (6th ed. 2009).
94. *See id.*
95. *See id.*
96. *See, e.g.*, Betaco, Inc. v. Cessna Aircraft Co., 103 F.3d 1281, 1288 (7th Cir. 1996); Ray Martin Painting, Inc. v. Ameron, Inc., 638 F. Supp. 768, 773 (D. Kan. 1986); Shore Line Props., Inc. v. Deer-O-Paints & Chems., Ltd., 538 P.2d 760, 762 (Ariz. Ct. App. 1975); Redfern Meats, Inc. v. Hertz Corp., 215 S.E.2d 10, 18 (Ga. Ct. App. 1975); Boud v. SDNCO, Inc., 54 P.3d 1131, 1137 (Utah 2002).

The buyer must direct the court's focus to the significance section 2-313 places on an express warranty and to the section 2-202 requirement that the parol evidence rule operates when the parties—both parties—intend the writing to be their final expression.[97] Those sections provide the buyer with the tools to counter the seller's contention.[98] This Article first examines section 2-313, then section 2-202.

Section 2-313 establishes the requirements for creating an express warranty, but more importantly, the official comment stresses the strength of an express warranty.[99] "'Express' warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms."[100] Another statement in the comment indicates the difficulty of ridding the parties' agreement of an express warranty:[101] "[A]ny fact which is to take such affirmations [of fact], once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact."[102]

The drafters express several relevant thoughts in these comments. First, express warranties are "dickered" terms—terms important to the parties or one of the parties and made to induce the buyer's purchase.[103] Second, words of a disclaimer in a form are repugnant to the dickered terms.[104] "Repugnant" is a strong word, signifying the drafters' firm belief of the unacceptability of a disclaimer after the seller has made a warranty.[105]

97. *See* U.C.C. §§ 2-313, -202.

98. *See id.*

99. *Id.* § 2-313 cmt. 1. "Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." *Id.* § 2-313(2)(a).

100. *Id.* § 2-313 cmt. 1.

101. *Id.* § 2-313 cmt. 4.

102. *Id.* § 2-313 cmt. 3.

103. *Id.* Although "dicker" can mean to bargain for goods because a warranty is created by a seller's affirmation of fact or promise, there is no requirement that the parties haggle over the warranty. They could do that, but the seller creates a warranty regardless of whether the parties engage in bargaining. "Dickered" seems more likely to communicate the idea of the importance to the buyer of the affirmation of fact or promise and the idea that the seller makes the statement to induce the buyer to purchase the good.

104. *Id.* § 2-313 cmt. 1.

105. *See* WHALEY, *supra* note 15 (noting that express warranties are practicably impossible to disclaim).

Third, repugnancy results from a disclaimer included in a form.[106] The drafters' use of form implies their awareness of the use of standardized agreements in sales of goods transactions and the unlikelihood that the buyer will read or, if the buyer has read, understand the disclaimer term.[107] Look at it from the buyer's perspective: the buyer just heard the seller make a warranty and would not expect the seller to take it away in the printed agreement.[108] Finally, removing the warranty from the parties' agreement requires "clear affirmative proof."[109] "Affirmative" suggests that the parties have assented to eliminating the warranty.[110] And the buyer's assent must be clear.[111] There is no clear assent to relinquishing the express warranty when the facts show only that the buyer, after receiving an express warranty, signs a form agreement that includes a warranty disclaimer without explanation.[112] Code readers know the official comment is not law, but it provides insight into the intent behind the law and shows the commitment of the U.C.C. drafters to upholding an express warranty against a disclaimer.[113] Courts should consider these comments when they inquire into whether the parol evidence rule operates to bar evidence of the oral warranty.

A court might well agree with U.C.C. Article 2's preference for preserving an express warranty but must still navigate the parol evidence issue that arises when the writing includes an integration clause.[114] A court cannot uphold the express warranty by disregarding the parol evidence rule.[115] Unfortunately, the parol evidence rule is the insurmountable barrier for many courts in oral warranty and integration clause cases.[116] The question, however, is whether there is a valid course around the barrier.

Academics have advocated that the parol evidence rule does not

106. U.C.C. § 2-313 cmt. 1 ("Words of disclaimer in a form are repugnant to the basic dickered terms.").

107. *See* WHALEY, *supra* note 15, at 79–80 (noting the difficulty a buyer will have understanding the technicalities of warranty law).

108. *Id.*

109. U.C.C. § 2-313 cmt. 3.

110. *See Affirmative*, BLACK'S LAW DICTIONARY (9th ed. 2009).

111. *See* U.C.C. § 2-313 cmt. 3.

112. *Id.* § 2-313 cmt. 5.

113. *See* WHALEY, *supra* note 15 ("[T]he Code drafters did not want a seller to be able to disclaim express warranties.").

114. *See* U.C.C. § 2-202 cmt. 1.

115. *See id.*

116. *See id.* § 2-316(1).

destroy automatically an oral express warranty made to a consumer.[117] Chancellor and Professor John Murray discussed the parol evidence rule in the context of section 2-316(1) in his article discussing the revision of U.C.C. Article 2:

> Why the reference to the parol evidence rule? At best, it is a reminder that one could lose an express warranty that was made prior to the execution of an integrated writing that did not mention it. But the parol evidence rule has nothing to do with written disclaimers or exclusions. It precludes the admissibility of *any* prior agreement that "would certainly" have been included in a given type of writing by reasonable parties. Suggesting that the exclusion of disclaimer of warranties is "subject to" the parol evidence rule simply adds another confusing element to this convoluted section. It is time to remove the "covert tools" from section 2-316(1) and simply announce that it is impossible to disclaim express warranties.[118]

Professor Richard Broude, in his article examining the consumer and the U.C.C. parol evidence rule, noted how the section 2-313 comments favored infrequent use of the parol evidence rule against an oral express warranty:

> The comments to this section indicate beyond peradventure that the draftsmen intended that the parol evidence rule should be used infrequently to exclude parol evidence of express warranties made by the seller during the negotiations leading up to the sale.[119]

Professor Perillo discussed the effect of a merger clause in a contract dispute:

> The suggestion gaining currency is that the merger clause should not have any effect unless the clause was actually agreed upon. . . . This is a sensible approach since it is logical to make a distinction between a "dickered" merger clause and one that is merely "boiler plate."[120]

117. *See* 6 PETER LINZER, CORBIN ON CONTRACTS: PAROLE EVIDENCE AND IMPLIED TERMS § 25.8[G], at 98 (Joseph M. Perillo ed., rev. ed. 2010); PERILLO, *supra* note 93, § 3.16, at 142–43; Broude, *supra* note 82, at 918; John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447, 1489–90 (1994).

118. Murray, *supra* note 117. The American Law Institute officially withdrew the Revised Article 2 from consideration for adoption by the states in 2011. James R. Maxeiner, *Costs of No Codes*, 31 MISS. C. L. REV. 363, 373 (2013).

119. Broude, *supra* note 82, at 913.

120. PERILLO, *supra* note 93, § 3.6, at 122–23.

Keeping to Professor Perillo's "sensible approach," the place to attack the parol evidence rule is the condition U.C.C. § 2-202 places on the operation of the rule that the parties intend the writing as final.[121] The terms of the writing may not be contradicted by prior agreements when those terms are in a writing "intended by the parties as a final expression of their agreement" as to those terms.[122] The writing that evidences the parties' agreement is a standardized writing—a form.[123] The buyer signed the writing without reading the printed terms.[124] But, says the seller, contract interpretation is based on the principle that a party is bound by the terms of what she signs, regardless of whether she reads or understands it.[125] By signing the writing that includes a disclaimer of warranties and an integration clause, the buyer intends, and the seller asserts, for it to be the final expression of the terms in the writing.[126] The buyer intends that the agreement include no warranties.[127]

It is not reasonable, in this situation, to believe that the buyer intends the parties' agreement not to include the oral express warranty—the warranty that the seller created in their negotiations.[128] Determining intent is an objective question, based on the circumstances of making the agreement as well as manifestations of the parties.[129] The terms of the signed writing are evidence of intent, and it is an easier task for the court to base its decision on those terms.[130] But the circumstances of the making of the contract are highly relevant to intent.[131] Those circumstances show that the

121. *See id.* § 3.6, at 123.

122. U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM'N 2014).

123. *See* WHALEY, *supra* note 15, at 79–80.

124. This reaction to printed form agreements is typical of buyers.

> For many years it has been an open secret that the innumerable prefabricated forms used to evidence a contract go unread and would not have been understood by decent and reasonable parties, including merchants, if they had been read. No one reads the boilerplate on these forms before or after their use unless trouble occurs.

Murray, *supra* note 117, at 1453–54.

125. Pitts v. Monaco Coach Corp., 330 F. Supp. 2d 918, 923 (W.D. Mich. 2004); Barnes, *supra* note 36; Knapp, *supra* note 12, at 1086; White, *supra* note 42.

126. *See* Knapp, *supra* note 12, at 1097.

127. *See id.*

128. *See id.*

129. Barnes, *supra* note 36, at 243.

130. WHALEY, *supra* note 15, at 80.

131. Broude, *supra* note 82, at 904 ("[I]ntent is a factual question and cannot be

sales agreement is a form agreement.[132] Before the buyer can intend that the form writing is final, the buyer has to know what terms the writing includes.[133] Not only is it extremely unlikely that the buyer will know what printed terms are in the form, but it is likely that the seller never ascertained whether the buyer wanted to read the form or gave the buyer time to read the form.[134] In most sales of goods to consumers, the form is given to the buyer and the buyer is asked to sign.[135] The economy of sales of goods transactions depends on speed: negotiate the deal, sign the agreement, pay for the goods, and take the goods.[136] That is why Karl Llewellyn, addressing the buyer's assent to boilerplate terms over 50 years ago, stated that the buyer assents specifically to "the few dickered terms" and then makes "a blanket assent . . . to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms."[137] A buyer who is not made aware that the form includes a warranty disclaimer and an integration clause, when those clauses have the effect of negating an oral warranty the seller gave, does not intend the writing as the final expression of the parties agreement.

This question of determining the buyer's intent must recognize the fact that the written agreement is a standardized writing and the effect that has on the buyer's intent that the writing is final on all terms.[138] "The fact that consumers do not read standard form contracts is so well accepted and documented as to be virtually enshrined as dogma within the contracts literature."[139] That does not make form contracts unconscionable; they have value.[140] But it is a fact that courts must consider as they decide whether both parties intend the form writing as final with respect to the terms included.[141]

determined solely by reference to any writing . . . .").

132. *See id.* at 906 (describing the procedure under which a form agreement is made).

133. Professor Broude asserts that, in addition to knowing the terms, the parties must understand the terms before they can intend that the writing is the final expression. *Id.*

134. *See id.* at 905–06.

135. *Id.* at 906.

136. *See id.*

137. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

138. Barnes, *supra* note 36, at 237.

139. *Id.*

140. RANDY E. BARNETT, THE OXFORD INTRODUCTIONS TO U.S. LAW: CONTRACTS § 3.5.1, at 104–05 (Dennis Patterson series ed., 2010).

141. *See* Knapp, *supra* note 12, at 1098.

Since the seller (or more likely the seller's attorney) drafted the form, one can assume the seller intends it to be final as to its terms.[142] But the buyer does not know what terms are included in the form.[143] That is why it is unreasonable to assume that a buyer would intend the writing as the final statement if the buyer knew that the form included a clause that disclaimed the warranty that the seller just made. To determine objectively the buyer's intent, courts must consider the effect of the standardized form on the buyer's intent.[144]

As the following cases show, there are courts willing to allow an oral warranty to stand against an integration clause.[145] In *Seibel v. Layne & Bowler Inc.*, the plaintiff, a farmer, purchased a pump from the defendant to use in irrigating his crops.[146] Plaintiff alleged the seller made various oral warranties in agreeing to install the pump.[147] The seller countered with the merger clause that allegedly proved the parties intended the writing to be a complete and exclusive expression of their agreement, making inadmissible any evidence to supplement the writing.[148] The court rejected that argument.[149] It stated that U.C.C. § 2-202 requires that "the parties intend

142. *See* Broude, *supra* note 82, at 905–06.

143. *See id.* at 906. If the seller has pointed out the terms to the buyer, or asked the buyer to review them (and given time to do so), or even pointed out that the writing includes a disclaimer of warranty term that affects any oral statement or promise about the goods the seller made previously, those facts are part of the surrounding circumstances that a court must also consider in determining intent.

144. *See id.*

145. The majority of courts, however, routinely find that a merger clause conclusively shows the parties intended for the writing to be their final agreement. *See* cases cited *supra* note 96 and accompanying text.

146. Seibel v. Layne & Bowler, Inc., 641 P.2d 668, 669–70 (Or. Ct. App. 1982).

147. *Id.* at 670–71.

148. *Id.* at 671. The "complete and exclusive" rule arises from section 2-202(b), which precludes evidence of consistent additional terms when the parties intend the writing to be a complete and exclusive statement of their terms. U.C.C. § 2-202(b) (AM. LAW INST. & UNIF. LAW COMM'N 2014). Although the court never labels the writing as a form, its description of a disclaimer clause included in the terms and conditions of the writing makes that a valid assumption. *See Seibel*, 641 P.2d at 670. "Here, the terms and conditions are printed on standard-size paper (8.5" x 11") and fill approximately three-quarters of the page. These terms cover numerous aspects of the contractual relationship in addition to the disclaimers. The type is smaller than that used for footnotes in this court's permanent reports and the lines are longer and more closely spaced than in our footnotes. There is neither indentation nor extra spacing between paragraphs. The print is generally difficult to read." *Id.*

149. *Seibel*, 641 P.2d at 671.

for the agreement to be their complete expression. Because the merger clause is as inconspicuous as the disclaimers, it provides little or no evidence of the parties' intentions, regardless of the defendant's intentions."[150] Here, the court is cognizant that the parol evidence rule is not applicable unless both parties intend the writing to be final, and it was not persuaded that an inconspicuous merger clause is conclusive evidence of the parties' intent.[151]

In *Sierra Diesel Injection Service, Inc. v. Burroughs Corp.*, the seller argued that a merger clause included in a signed writing made the agreement integrated and prevented the buyer's evidence of an express warranty not included in the writing.[152] The court disagreed: "[O]ther courts and commentators have rejected this view, especially when the contract is a pre-printed form drawn by a sophisticated seller and presented to the buyer without any real negotiation."[153] Although the court did not address the question of whether the buyer intended the writing to be final, they were willing to consider circumstances surrounding the making of the contract and not let a merger clause alone control the issue.[154]

The buyer of a steel building argued that the seller breached an express warranty in *Morgan Buildings and Spas, Inc. v. Humane Society of Southeast Texas*.[155] However, the purchase agreement included a merger clause, and the seller argued the writing was a completely integrated agreement.[156] The court stated that a merger clause "does not conclusively establish the written contract is fully integrated."[157] The facts showed other documents were relevant to the transaction.[158] The court considered all these documents in holding that the writing was not completely integrated.[159] "Considering the surrounding circumstances, we conclude the written purchase agreement was not intended to embody the complete and exclusive terms of the

150. *Id.*

151. The court also recognizes that a buyer would suffer "greater surprise" from denying effect to an express warranty on the basis of an inconspicuous merger clause. *Id.*

152. Sierra Diesel Injection Serv., Inc. v. Burroughs Corp., 890 F.2d 108, 111, 112 (9th Cir. 1989).

153. *Id.* at 112.

154. *See id.* at 112–13.

155. *See* Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Se. Tex., 249 S.W.3d 480, 486 (Tex. App. 2008).

156. *Id.*

157. *Id.*

158. *Id.* at 488.

159. *Id.*

agreement of the parties, and is only partially integrated."[160]

It is not a great burden for courts to consider all the facts in deciding whether the signed writing is the parties' final expression.[161] A court should not apply the parol evidence rule to the warranty issue until it determines that the parties intended the writing as the final expression of their terms.[162] Both parties must have the requisite intent.[163] If a court gives an integration clause conclusive effect, it ignores the realities of the circumstances surrounding the making of most sales agreements between a consumer buyer and the seller.[164] Those realities include: the seller has made an oral express warranty;[165] the form writing does not include the warranty but does include a merger clause;[166] and the buyer does not read the printed form nor does the seller ask the buyer to read it or state that it has terms that might contradict oral statements.[167] A buyer would not intend that writing as the final expression of their agreement.[168] Courts need to hear evidence on the buyer's intent before deciding that the writing is the final expression.[169] Then they must factor in the clear intent of the U.C.C. drafters that when the seller makes an express warranty, it should not be discarded easily.[170]

If the writing signed by our buyer of the air conditioner includes an integration clause, she will have to persuade the court that the writing is not her final expression of the agreement. A court that considers all the facts of the sale and applies the U.C.C. parol evidence rule and section 2-316(1) as the drafters intended will allow her that opportunity.[171] The integration clause alone should not bar evidence of the oral warranty.[172] If the court holds that the agreement is not final, she will prove the oral warranty and recover damages for its breach.[173]

160. *Id.*
161. *See id.*
162. *See id.* at 487.
163. *See id.* at 486.
164. *See id.* at 488.
165. *See, e.g.*, Ace, Inc. v. Maynard, 423 S.E.2d 504, 507 (N.C. Ct. App. 1992).
166. *See, e.g.*, Seibel v. Layne & Bowler, Inc., 641 P.2d 668, 671 (Or. Ct. App. 1982).
167. *See* Murray, *supra* note 117, at 1453.
168. *See* Broude, *supra* note 82, at 905–06.
169. *See* U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM'N 2014).
170. *See id.* § 2-313(1)(a) & cmt. 1.
171. *Id.* § 2-316(1).
172. *Id.* § 2-316(1) cmt. 1.
173. *See id.*

III. RESTATEMENT (SECOND) OF CONTRACTS § 211(3)

Section 211(3) of the Restatement (Second) of Contracts provides courts with another means of upholding an express warranty against disclaimer and integration clauses.[174] Section 211 is in chapter 9, topic 3. Topic 3's title is "Effect of Adoption of a Writing."[175] Section 211's heading is "Standardized Agreements."[176] The first subsection provides that the standardized writing is an integrated agreement when the transaction satisfies specific conditions.[177] The second subsection involves interpretation of the writing.[178] The third subsection excludes unexpected terms.[179] "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."[180] To exclude a term in the agreement using the principle of section 211(3), the court must find that the "other party" has reason to believe the assenting party would not have assented had that party known of the offensive term.[181]

In the situation this Article studies, the buyer assented to the writing that includes the warranty disclaimer. But now the buyer wants to exclude the warranty disclaimer. To accomplish that, the buyer must prove the seller, the other party, has reason to believe the buyer would not have assented to the writing had the buyer known of the disclaimer term. Section 211(3) makes the court inquire into the state of mind of the seller to determine whether the seller has the requisite reason to believe.[182] Reason to believe is an objective standard.[183] Would a person with knowledge of all facts

174. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981).

175. *Id.* § 211. Most sections in chapter 9, topic 3 pertain to the Restatement's parol evidence rule.

176. *Id.*

177. The party must sign or otherwise manifest assent and must have reason to believe that the same writing is regularly used for the same type of agreements. *Id.* § 211(1).

178. *Id.* § 211(2).

179. *Id.* § 211(3).

180. *Id.*

181. *Id.*

182. *See id.*

183. Henderson, *supra* note 30, at 847. Professor Henderson supports his conclusion with a quote from the Reporter for Restatement (Second) of Contracts, "Well, 'reason to believe' is an objective standard requiring the exercise of judgment by the reasonable man, but it is a judgment exercised in the light of the facts available to the party whose reason to believe is in question . . . ." *Id.* at 847 n.122 (quoting 47 A.L.I. PROC. 535

surrounding the transaction have reason to believe the assenting party would not have assented had it known of the offending term?

Section 211(3) creates an exception to the principle, noted in the section's comment, that customers assent to standardized agreements without knowing the terms in detail and are bound by the terms included therein regardless of lack of knowledge.[184] Notwithstanding that principle, a term included in the writing is excluded from the agreement "if the other party [the seller using the standardized agreement form] has reason to believe that the adhering party [the buyer] would not have accepted the agreement if he had known that the agreement contained the particular term."[185] That is the consequence a party bears when it chooses to use a standard form writing to evidence the parties' agreement but takes no steps to determine whether the other party would assent to a term that cancels a dickered term.[186]

Assume a seller makes an oral warranty regarding the goods sold. The form writing used by the seller does not include the warranty but does include a disclaimer of all express warranties. If the seller has reason to believe that the buyer would not have agreed to the standard form writing if the buyer had known that the form included a disclaimer of all express warranties, the disclaimer term is excluded from the agreement.[187] Because the seller previously made the oral express warranty to the buyer, it is practically beyond question that the seller has reason to believe the buyer would not have agreed to the purchase had the buyer known of the disclaimer.[188] For the seller to prevail and retain the disclaimer term, the seller must establish that the buyer would have been willing to enter the agreement had the buyer known of the warranty disclaimer.[189] In the example, the seller would not have reason to know that the buyer would not assent. Perhaps the buyer would be willing to forego the warranty had the

(1970)) (internal quotation marks omitted).

184. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f.

185. *Id.* One statement in comment f to section 211 goes even further than the words of the subsection in excluding terms. "[T]hey [the customers] are not bound to unknown terms which are beyond the range of reasonable explanation." *Id.* This statement is more accurately the reasonable expectations doctrine, discussed *infra* Part IV.

186. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f.

187. *See id.* § 211(3).

188. *See id.* § 211 cmt. f.

189. *See id.*

seller discussed the effect of the disclaimer.[190] But unless the seller provides the buyer with an explanation of the terms in the writing and an opportunity to review the terms, the buyer does not know of the disclaimer term, making it very difficult for the seller to prove that the buyer would have assented to the writing.[191] If the seller cannot prove the buyer would have assented to the writing, then the seller has reason to know and the disclaimer term is excluded.[192] That paves the way for the warranty to prevail, although the seller likely will assert other defenses that are discussed *infra*.[193]

Comment f to section 211 provides guidance as to the circumstances that give the drafter of the form reason to believe that the assenting party would not have assented had it known of the term.[194]

> 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.[195]

The scenario of this Article fits two of the comment's reasons that give the drafting party reason to believe that the buyer would not agree to the writing. First, the warranty disclaimer is bizarre. What buyer would expect a writing to take away a warranty that the seller made previously? Second, the disclaimer eviscerates the oral term. A term disclaiming all warranties eviscerates the oral warranty that the seller made. The seller who makes an oral warranty to the buyer has reason to believe that a buyer would not agree to the writing if the buyer knew of the disclaimer of all warranties.

The transaction where a seller makes an oral express warranty and then evidences the parties' agreement with a form writing that includes a warranty disclaimer easily fulfills the conditions of section 211(3) for excluding the disclaimer term.[196] The buyer agrees to purchase the goods after seller makes an oral warranty and manifests her assent in a form writing

190. *See id.*
191. *See id.*
192. *See id.*
193. *See infra* notes 200–46 and accompanying text.
194. *Id.*
195. *Id.*
196. *See id.*

that includes a disclaimer of all warranties but does not include the oral warranty.[197] Had the seller requested that the buyer read the form and given her the opportunity to do so, a knowledgeable buyer would have objected to the disclaimer since it cancels the oral warranty the seller just created.[198] The seller has reason to believe, if not actual knowledge, that the buyer would not agree to the writing that disclaims the warranty.[199]

The seller has several defenses to the buyer's attempt to exclude the warranty disclaimer. First, restatements are not law so a court is free to reject the principle of section 211(3).[200] Restatements are "considered opinions of the members of the American Law Institute" and entitled "to our careful attention" but not "to the respect we owe to a statute or a decision in a case."[201] Courts have unfettered discretion to ignore or adopt section 211(3).[202] And because the principle is counter to the familiar rule that a party is bound by the unknown and unread terms of an agreement she signs,[203] it is likely some courts will disregard it.[204]

The drafting committee for revising U.C.C. Article 2 ultimately rejected a proposal similar to Restatement (Second) of Contracts § 211(3).[205] During the process of revising Article 2, the American Law Institute (ALI) drafting committee proposed a new section:

> In a consumer contract, if a consumer agrees to a record by

197. *See id.*

198. This assumes the buyer would understand the meaning of the disclaimer, would think the seller was actually cancelling a warranty just made by the seller, and be assertive in objecting to the term. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995).

199. Although the seller might not even know all the terms of the form because the seller's attorney likely drafted it, that should not prevent the seller's reason to believe. *See* Knapp, *supra* note 12, at 1109. If there is a "duty to read," surely the seller cannot express ignorance of its own terms. *See id.* at 1109–10.

200. Wallace v. Balint, 761 N.E.2d 598, 606 (Ohio 2002).

201. Slawson, *supra* note 6, at 63.

202. *See id.*

203. *See, e.g.*, Nunn v. C.C. Midwest, 151 S.W.3d 388, 402 (Mo. Ct. App. 2004), *superseded by statute on other grounds*, 2005 Mo. Laws 1 (codified at MO. REV. STAT. § 287.043 (2005)); *see also* 66 VMD Assocs., LLC v. Melick-Tully & Assocs., P.C., 2011 WL 3503160, at *5 (N.J. Super. Ct. App. Div. Aug. 11, 2011) (per curiam).

204. *See Wallace*, 761 N.E.2d at 606.

205. *See* Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1684–85 (1999); White, *supra* note 42, at 315.

> authentication or affirmative conduct, any non negotiated term that a reasonable consumer in a transaction of this type would not expect to be in the record is excluded from the contract, unless the consumer had knowledge of the term before the contract was authenticated.[206]

The section was withdrawn,[207] however, and no similar provision was included in Revised Article 2, which the ALI subsequently withdrew from consideration.[208]

Second, assuming that a court is amenable to using the Restatement's section 211(3), the buyer seeking to exclude the warranty disclaimer must prove that the disclaimer term alone provides the seller with reason to believe that the buyer would not have assented to the writing had the buyer known of the disclaimer.[209] If the buyer can prove that the seller had reason to believe this, section 211(3) will exclude the term from the form document.[210] The seller can assert that to satisfy this requirement the seller must know that the warranty has such vital importance to the buyer that including the disclaimer would result in the buyer's rejection of the writing.[211] Essentially, the oral express warranty must have crucial importance to the buyer.[212]

Is it likely that the warranty term alone is the indispensable factor in the buyer's decision? Professor Slawson thinks it is not:

> But when people buy things, they almost never make their choices among competing products on the basis of just one particular factor or term. Rather, people typically make such choices on the basis of a rough, necessarily highly subjective evaluation of *all* the factors or terms.[213]

On the other hand, the warranty a seller makes about the product might be

206. White, *supra* note 42, at 315. "The quoted version won approval by the Drafting Committee in its March 21-23, 1997 meeting." *Id.* at 315 n.3 (citing U.C.C. § 2-206 note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Draft 1995)).

207. The committee likely withdrew the amendment because of strong objection from industry representatives. Rusch, *supra* note 205.

208. Maxeiner, *supra* note 118. The American Law Institute officially withdrew Revised Article 2 from consideration for adoption by the states in 2011. *Id.*

209. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) & cmt. f (AM. LAW INST. 1981).

210. *See id.* § 211(3).

211. *See id.* § 211 cmt. f.

212. *See id.*

213. Slawson, *supra* note 6, at 63 (emphasis in original).

the factor that persuades the buyer to purchase.[214] The facts of the particular case will answer this question.[215] The buyer must prove the facts of the buyer's case, but courts should give the buyer the opportunity to do so.[216]

It is more concerning, initially, that courts utilize section 211(3) in deciding whether the warranty disclaimer is a term of the parties' agreement than whether the buyer ultimately proves the buyer's case.[217] A buyer's difficulties with proof should not prevent the court from allowing a buyer to use section 211(3) to attempt to exclude the warranty disclaimer.[218]

Third, courts have utilized section 211(3) most frequently in cases involving insurance contracts or arbitration clauses.[219] Is that the limit of section 211(3)? Not by the words of the subsection. Further, there are cases and commentators who find no such restriction.[220] The scope of section 211 is standardized agreements.[221] In the commercial world of the twenty-first century, most contracts for goods and services are standardized agreements.[222] Regardless of the subject matter of the agreement, both parties recognize that neither party will read the printed terms of the standardized form.[223]

214. *See id.* ("The [buyer] should consider whether he could honestly testify that he would not have purchased some item . . . if just one particular factor or term in the forms accompanying the product had not been as he had thought.").

215. *See id.*

216. *See id.* (discussing a buyer's ability to access the factors and terms upon which they relied when deciding whether or not to make a purchase).

217. Intuitively, the court must decide whether a buyer even has to prove an issue before going on to prove such an issue. *See id.* at 62. I will admit I am rooting for the buyer.

218. *See id.* at 63 ("It is precisely because consumers do *not* focus on the possible significance of particular terms that sellers are able to get away with drafting their forms so unfavorably to consumers' interests.").

219. *See, e.g.*, Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 396 (Ariz. 1984) (en banc). Arizona has adopted the principal of section 211(3) in many subsequent cases. *See, e.g.*, Broemmer v. Abortion Servs. of Phx, Ltd., 840 P.2d 1013, 1017 (Ariz. 1992) (en banc); *see also* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975) (en banc); White, *supra* note 42, at 325–45.

220. *See* Lauvetz v. Alaska Sales & Serv., 828 P.2d 162, 164 (Alaska 1991) (rental car contract); Angus Med. Co. v. Dig. Equip. Corp., 840 P.2d 1024, 1030 (Ariz. Ct. App. 1992) (software service contract); Barnes, *supra* note 36, at 249.

221. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. LAW INST. 1981).

222. John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000).

223. WHALEY, *supra* note 15, at 80.

A representative case is *Angus Medical Co. v. Digital Equipment Corp*.[224] Angus Medical signed an agreement with Digital Equipment wherein Digital Equipment agreed to convert software to make it function on Angus Medical's computers.[225] The terms and conditions of the writing provided an 18-month statute of limitation to bring any claims for breach of contract.[226] When Angus Medical sued for breach of contract, the trial court granted summary judgment to Digital Equipment, finding that Angus Medical commenced the action more than 18 months after the cause of action accrued—in violation of the term-imposed statute of limitation.[227] On appeal, Angus Medical argued that section 211(3) governs analysis of the agreement and operates to exclude the 18-month statute of limitations from the agreement.[228] The Arizona Court of Appeals agreed that the court should apply section 211(3).[229] The court recognized that "the Arizona Supreme Court adopted [Restatement section 211] as a guide to analyzing 'contracts containing boiler-plate provisions which are not negotiated, and often not even read by the parties.'"[230] The court also cited to a previous Arizona Supreme Court opinion that held the "Restatement rule applies to unambiguous boilerplate terms. The rule may relieve a party from application of non-negotiated, standardized terms."[231] In the court's opinion, the section applied because "the insured did not receive full and adequate notice of the term in question, and the provision is either unusual or unexpected, or one that emasculates apparent coverage."[232] The court pointed to Digital Equipment's correspondence as evidence that Angus Medical did not have an opportunity to read the agreement's terms and conditions and to support Angus Medical's argument that the 18-month limitation term was not standard industry practice.[233] Reversing the trial court decision, the court remanded the case for the trial court to apply

224. *Angus Med. Co.*, 840 P.2d at 1024.
225. *Id.* at 1025.
226. *Id.* at 1026.
227. *Id.* at 1025.
228. *Id.* at 1029.
229. *See id.* at 1031.
230. *Id.* at 1029–30 (quoting Darner Motor Sales, Inc. v. Universal Underwriters, 682 P.2d 388, 396 (Ariz. 1984)).
231. *Id.* at 1030 (quoting Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 283 (Ariz. 1987)).
232. *Id.* (emphasis in original).
233. *Id.* at 1030–31.

section 211(3) to the case.[234] Note that the Arizona Court of Appeals held that section 211(3) should apply regardless of the fact that there was no representation made by Digital Equipment regarding the 18-month period.[235] The case for applying section 211(3) is even more compelling when the facts show an oral warranty made by the other party, coupled with a disclaimer term included in the standardized form.[236] If section 211(3) can exclude a term because it is unread and unexpected, as it did in *Angus Medical*, then it must apply to exclude a form term that cancels a term created by the express statement of a party.[237]

Fourth, assuming a court uses section 211(3) to exclude a term, the question remains whether the parol evidence rule will allow the introduction of evidence of the oral warranty.[238] After a court decides to exclude the warranty disclaimer, the remaining agreement includes the oral express warranty and, most likely, an integration clause that is part of the form writing.[239] When the buyer attempts to introduce evidence of the oral warranty, the seller trots out the integration clause and asserts that it is conclusive evidence that the parties intended the writing to be the complete and exclusive agreement.[240] If the court agrees, the parol evidence rule in U.C.C. § 2-202 bars evidence of consistent additional terms.[241] Section 2-202 provides that a writing may be supplemented by evidence of consistent additional terms "unless the court finds the record to have been intended also as a complete and exclusive statement of the terms of the agreement."[242] Official comment 3 states that the court must find that both parties intend the writing as the complete and exclusive statement of all terms.[243] That is consistent with the first paragraph of section 2-202, which applies the parol evidence rule to the terms in a writing "intended by the *parties* as a final

234. *Id.* at 1033.

235. *See id.*

236. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (AM. LAW INST. 1981).

237. *See id.*

238. *See* 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33:33, at 1083–95 (West 4th ed. 2012) (1920); *see also* Broude, *supra* note 82, at 914–15.

239. *See* 11 WILLISTON & LORD, *supra* note 238.

240. *See* Broude, *supra* note 82, at 913.

241. *See* U.C.C. § 2-202(b) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

242. *Id.*

243. *Id*. § 2-202 cmt 3.

expression of their agreement . . . ."[244] The response of the buyer must be that the buyer did not intend the writing to be the complete and exclusive statement of the parties' terms because the writing does not include the warranty regardless of including the integration clause.[245] The court will admit evidence of the oral warranty if it agrees the writing is not the complete and exclusive statement of the agreement.[246]

In Part II.B, I discuss the courts' and academics' opinions on the effect of a form writing integration clause on the issue of whether the parties intend the writing as their final, complete, and exclusive statement.[247] Most academics and some courts are willing to look beyond a merger clause in a form writing to answer the question of whether both parties intended the writing as final, complete, and exclusive.[248] My thoughts on this issue have not changed. To conform to the language of the statute, courts must hear evidence on whether both parties intended the writing as final and, if so, as a complete and exclusive statement.[249] It is unrealistic to assume that the buyer intends that a form agreement, almost beyond question unread by the buyer, that does not include the oral warranty the seller just created, as the complete and exclusive statement of their agreement.[250]

Professor Knapp explained the state of mind of parties to a form agreement in his article "Is There a 'Duty to Read'?":

> Nobody does that, and in fact nobody is expected to. In standardized form contracting, it is not only *not* encouraged, it is essentially *discouraged*. Contract recitations that say, "I have read all of this contract" are patently false, and are known to be false—to the party who presents a written contract for signature as well as to the party who signs it. All those words really convey to the signer is this: "Although we know you haven't read much or any of this contract, and probably wouldn't

244. *Id.* § 2-202 (emphasis added).

245. Broude, *supra* note 82, at 885.

246. *See id.*

247. *See supra* notes 80–127 and accompanying text.

248. *See* Sierra Diesel Injection Serv., Inc. v. Burroughs Corp., 890 F.2d 108, 112 (9th Cir. 1989); Seibel v. Layne & Bowler, Inc., 641 P.2d 668, 671 (Or. Ct. App. 1982); Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Se. Tex., 249 S.W.3d 480, 486 (Tex. App. 2008); 6 LINZER, *supra* note 117; PERILLO, *supra* note 93, § 3.6, at 122–23; Broude, *supra* note 82, at 916–17; Murray, *supra* note 117. It is true that the majority of courts look no further than the merger clause. *See* 11 WILLISTON & LORD, *supra* note 238.

249. *See supra* notes 138–44 and accompanying text.

250. *See supra* notes 138–44 and accompanying text.

> understand its importance if you had, we expect to hold you to it." Like a merger clause, it is essentially a message not to the other party, but to a future court.[251]

Courts must recognize that fact and at least hear evidence from both parties as to their intent regarding exclusivity.[252] The seller that uses a form writing should at least pay the price of having to prove that both parties intended the form as their final expression. An integration clause alone should not be conclusive on that issue.

Restatement section 211(3) can aid the buyer of the air conditioner in proving the warranty. A seller who makes an oral warranty that the air conditioner will cool to a specific level has reason to believe that the buyer would not assent to a writing that excludes the warranty the seller just made.[253] That removes the disclaimer clause and allows the buyer to prove the warranty.[254] If the buyer can persuade the court to follow the intent of the U.C.C. § 2-202 drafters,[255] the court will hear evidence that the buyer did not intend the writing to be the final expression.[256] That opens the door for proof of the warranty.

IV. CONFORMING THE AGREEMENT TO THE PARTIES' "REASONABLE EXPECTATIONS"

The other principle courts can implement to protect an oral warranty is the reasonable expectations doctrine. The reasonable expectations doctrine provides that the reasonable expectations of a party are honored although close reading of the writing would contradict those expectations.[257] When a seller creates an oral warranty, the buyer has a reasonable expectation that the agreement includes the warranty, although, unknown to the buyer, the form writing includes a disclaimer of all warranties.[258] The

251. Knapp, *supra* note 12, at 1108–09.

252. *See* Broude, *supra* note 82, at 889–90; Knapp, *supra* note 12, at 1108–09.

253. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) & cmt. f (AM. LAW INST. 1981); *see* WHALEY, *supra* note 15, at 79–80.

254. *See* U.C.C. § 2-316(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

255. *See supra* note 170 and accompanying text.

256. *See supra* notes 161–73 and accompanying text.

257. Keeton, *supra* note 12; Knapp, *supra* note 12.

258. *See* Henderson, *supra* note 30, at 841 & n.87 (footnote omitted) (citing Harr v. Allstate Ins. Co., 255 A.2d 208 (N.J. 1969), *superseded by* 1992 N.J. Laws 804); *cf.* Keeton, *supra* note 12 (arguing language of insurance contracts should be "construed as laymen would understand it and not according to the interpretation of sophisticated

result of employing this doctrine is that the oral warranty is part of the parties' agreement notwithstanding a clause in the writing that disclaims all warranties.[259] The doctrine is a cousin of Restatement (Second) of Contracts § 211(3),[260] although there are important differences, discussed *infra*, that make it a better tool for the buyer. The reasonable expectations doctrine is not an innovation of the twenty-first century; courts began adopting the doctrine in the 1970s.[261] In most cases, however, courts use this doctrine in interpreting insurance contracts.[262]

However, there is no reason to limit reasonable expectations to insurance contracts; the similarity between contracts of insurance and other standardized agreements makes a strong case for applying reasonable expectations to any form agreement.[263] As Professor Keeton noted in his 1970 article, "Insurance contracts continue to be contracts of adhesion,

underwriters").

259. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 497, 508 (2008).

260. *See* Warkentine, *supra* note 259, at 497.

261. *See, e.g.*, Lambert v. Liberty Mut. Ins. Co., 331 So. 2d 260, 263 (Ala. 1976); Cont'l Ins. Co. v. Bussell, 498 P.2d 706, 710 (Alaska 1972); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 177 (Iowa 1975) (en banc); Prudential Ins. Co. of Am. v. Lamme, 425 P.2d 346, 348 (Nev. 1967) (discussing a party's reasonable expectations regarding the conditional receipt of an insurance policy).

262. *See, e.g.*, Smith v. Auto-Owners Ins. Co., 500 So. 2d 1042, 1044 (Ala. 1986) (per curium) (citations omitted) (interpreting policy limits in underinsured motorist coverage); Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 283–84 (Ariz. 1987) (citations omitted) (construing "resident of same household" clause in uninsured motorist coverage); Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 107, 112 (Iowa 1981) (en banc) (construing "ways immediately adjoining" the insured's premises provision in farm liability policy); Transamerica Ins. Co. v. Royle, 656 P.2d 820, 824 (Mont. 1983) (citations omitted) (construing household exclusion clause in auto liability policy); Nile Valley Coop. Grain & Milling Co. v. Farmers Elevator Mut. Ins. Co., 193 N.W.2d 752, 754 (Neb. 1972) (per curiam) (citations omitted) (construing standard fire policy); Grimes v. Concord Gen. Mut. Ins. Co., 422 A.2d 1312, 1315 (N.H. 1980) (citations omitted) (deciding whether uninsured motorist benefits contained within a single policy that insured two cars may be "stacked"), *abrogated by* Descoteaux v. Liberty Mut. Ins. Co., 480 A.2d 14 (N.H. 1984), *as recognized in* Orleans v. Commercial Union Ins. Co., 578 A.2d 360 (N.H. 1990); Sparks v. St. Paul Ins. Co., 495 A.2d 406, 414 (N.J. 1985) (construing "claims made" professional liability policy). Professor Knapp notes, "Although logically this doctrine might be employed in any case involving a consumer and a standardized form, such cases appear to be rare." Knapp, *supra* note 12.

263. Warkentine, *supra* note 259, at 497; *see* Knapp, *supra* note 12.

under which the insured is left little choice beyond electing among standardized provisions offered to him . . . ."[264] The form agreement a seller routinely uses is of the same variety—a contract of adhesion.[265] The typical standard form adhesion contract has these attributes: (1) printed form containing many terms; (2) drafted by one of the parties; (3) the business party routinely engages in similar transactions; (4) form presented on "take-it-or-leave-it" basis; (5) consumer signs form after negotiation of any dickered terms; (6) the consumer does not engage in similar transactions; and (7) the primary obligation of the consumer is payment of money.[266] Professor Rakoff concluded that form agreements leave no room for choice: "The consumer's experience of modern commercial life is one not of freedom in the full sense posited by traditional contract law, but rather one of submission to organizational domination . . . ."[267] Professor Knapp advocated that a court should not let the "duty to read" principle prevent it from using the reasonable expectations doctrine when interpreting a form agreement:

> Both doctrines contemplate the possibility that in order to achieve justice, a court may have to go beyond the literal wording of a contract in order to enforce the agreement that one party reasonably believed she was making, or to relieve a party from the effects of a contract she should not be held to. Whether the vulnerable party did in fact read and understand the agreement to which she apparently assented can be germane to those issues, perhaps in some cases even determinative, but the application of those other doctrines should not in principle be precluded by the application of a [presumption of knowing assent] rule.[268]

There is no legal obstruction precluding a court from applying the reasonable expectations doctrine to an agreement wherein the seller creates

264. Keeton, *supra* note 12, at 966.

265. "Contracts of adhesion arise when a party possessing superior bargaining power presents a standardized form of agreement to a party whose choice remains either to accept or reject the contract without the opportunity to negotiate its terms." Zigrang v. U.S. Bancorp Piper Jaffray, Inc., 123 P.3d 237, 240 (Mont. 2005) (citing Kloss v. Edward D. Jones & Co., 54 P.3d 1, 7 (Mont. 2002)).

266. Barnes, *supra* note 36, at 234–35 (citing Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983)); Rakoff, *supra*.

267. Rakoff, *supra* note 266, at 1229.

268. Knapp, *supra* note 12, at 1111. Knapp was also discussing the unconscionability doctrine. *Id.*

an oral express warranty followed by the buyer signing a form contract that does not include the warranty but rather includes a printed-term disclaimer of all warranties.[269] Courts are stopped by their reliance on the judge-made rule "you are bound by what you sign."[270]

If a court is willing, it is not a difficult task for it to apply the reasonable expectations doctrine to the parties' agreement.[271] A court simply allows the buyer to introduce evidence to prove the reasonable expectations of the buyer.[272] The buyer will present evidence on the oral warranty created by the seller.[273] What statements did the seller make about the product? Who made the statement? When did seller make the statement? Where did the seller make the statement? Did anyone else overhear the statement? Determining a party's reasonable expectations is an objective question.[274] Discussing the application of the doctrine to insurance contracts, Professor Henderson noted:

> The requirement that the expectation have an objective basis indicates, at the very least, that any expectation that is idiosyncratic would not be reasonable, but it also goes further. It seems to require that there be some evidentiary basis beyond naked belief on the part of the person seeking coverage*, i.e.*, that it be objectively determinable.[275]

That standard of proof helps protect the seller from the buyer's bare assertion that the seller made the warranty.[276] Yet the seller is not left without a defensive reply[277]—the form writing includes a warranty disclaimer

269. *See* Henderson, *supra* note 30, at 840.

270. *See* Bachelder v. Brentwood Lanes, Inc., 119 N.W.2d 630, 634 (Mich. 1963) (en banc) (quoting trial court opinion); RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (AM. LAW INST. 1981); JEFFREY JACKSON & D. JASON CHILDRESS, MISSISSIPPI INSURANCE LAW AND PRACTICE § 2:19 (2015 ed.), Westlaw MS-ILP § 2:19.

271. *See, e.g.*, Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 112 (Iowa 1981 (en banc) (citing RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. f (AM. LAW INST. 1973)).

272. *See, e.g.*, *id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. f).

273. *See, e.g.*, *id.* at 112–13.

274. Professor Keeton explained the doctrine as "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Keeton, *supra* note 12.

275. Henderson, *supra* note 30.

276. *See id.*

277. *See* Warkentine, *supra* note 259, at 526.

clause.[278] The seller can present evidence on whether: the buyer read the form; the seller asked the buyer to take time to read the form; the seller pointed out the clause to the buyer; the seller explained the clause to the buyer; or the buyer understood the clause.[279] That evidence could suggest that the buyer's expectation of the warranty was not reasonable.[280]

The Montana Supreme Court applied the reasonable expectations doctrine to a case involving whether an arbitration clause was part of the parties' agreement.[281] Ms. Zigrang, a 68-year-old woman with a high school education, retained O'Neill, an agent of Piper Jaffray investment firm, to open an individual retirement account (SEP-IRA) for the purpose of investing money for retirement.[282] The court reported the facts of the case:

> The SEP–IRA agreement contained an arbitration provision. Zigrang signed the agreement after a brief discussion with O'Neill regarding the general maintenance of the account. O'Neill did not advise Zigrang that the agreement contained a provision to arbitrate any dispute . . . . O'Neill never informed Zigrang that she could "opt out" of any of the provisions contained within the agreement, including the arbitration provision. Zigrang filed a complaint [against Piper] . . . after learning that O'Neill frequently had traded securities in her account without obtaining her approval.[283]

Then, Piper asserted that the parties must submit any claim to arbitration.[284] The court stated: "Generally applicable contract law states that an adhesion contract will not be enforced against the weaker party if it is (1) not within their reasonable expectations, or (2) within their reasonable expectations, but, when considered in its context, proves unduly oppressive, unconscionable or against public policy."[285] After deciding the contract was an adhesion contract, the court commented that determining: "[A]n investor's reasonable expectations in an adhesion contract consists only of an analysis of the investor's objectively reasonable expectations regarding

278. *See, e.g.*, *id.*

279. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (AM. LAW INST. 1981); Keeton, *supra* note 12, at 967–68.

280. *See* Keeton, *supra* note 12, at 967–68.

281. Zigrang v. U.S. Bancorp Piper Jaffray, Inc., 123 P.3d 237, 238–39 (Mont. 2005).

282. *Id.* at 239.

283. *Id.*

284. *Id.*

285. *Id.* at 240 (citing Iwen v. U.S. W. Direct, 977 P.2d 989, 995 (Mont. 1999)).

the investment agreement."[286] Piper argued that the arbitration clause was within the investor's reasonable expectations because the clause was printed in the agreement.[287] Remanding the case for further fact finding, the court stated because the form agreement was a contract of adhesion "the mere presence of an arbitration provision in an investment agreement, though conspicuous, does not bring the provision within the reasonable expectations of an investor in every instance."[288]

The significance of this case is that the court inquired into the reasonable expectations of the investor although the other party to the agreement had made no statement or representation as to whether the form agreement included the arbitration clause.[289] The court was willing to investigate the investor's reasonable expectations due to the offensive nature of the arbitration term, not the other party's representations.[290] Therefore, courts should be more receptive to the doctrine when a party can base its reasonable expectations on an actual representation made by the other party.

The Missouri Court of Appeals applied the reasonable expectations doctrine in a case involving a service plan contract.[291] Swain purchased a vehicle service plan and brought suit in Missouri after the service plan provider refused to pay for automobile repairs.[292] The contract Swain signed included a term requiring that any dispute be submitted to arbitration in Arkansas, and the seller moved to compel arbitration.[293] Swain attested that the dealership completed the service plan for him, "did not offer him the chance to read it," "did not discuss any terms of the plan with Swain (other than length of coverage)," did not show him the arbitration clause—which he "was not aware of . . . when he signed the plan"—and "never indicated that any terms of the service plan (other than length of coverage) were negotiable."[294] The trial court denied the motion to compel arbitration and the defendant sought appellate review.[295] The Missouri Court of Appeals

286. *Id.* at 240, 241.
287. *Id.*
288. *Id.* at 242.
289. *See id.* at 240.
290. *See id.* at 241 (citing *Iwen*, 977 P.2d at 995).
291. Swain v. Auto Servs., Inc., 128 S.W.3d 103, 107–08 (Mo. Ct. App. 2003).
292. *Id.* at 105.
293. *Id.*
294. *Id.* at 106.
295. *Id.* at 105.

found the agreement to be an adhesion contract but noted that fact alone did not invalidate it.[296] Instead, the court would "enforce the reasonable expectations of the parties. Only those provisions that fail to comport with those reasonable expectations and are unexpected and unconscionably unfair are unenforceable."[297] The court held that "an average person would reasonably expect" arbitration of disputes.[298] It continued, however: "[T]he selection of Arkansas as the venue for arbitration is unexpected and unconscionably unfair. An average consumer purchasing a car in Missouri would not reasonably expect that any disputes arising under the service plan accompanying the car would have to be resolved in another state."[299] Once again, a court was willing to examine the reasonable expectations of a party regardless that the other party made no representation of the term in issue.[300] Reasonable expectations were raised by the inclusion of the arbitration clause in the adhesion contract.[301]

An early case adopting the reasonable expectations doctrine was in Iowa, *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*[302] C & J desired to purchase burglary insurance on its chemicals and equipment.[303] In conversations with the Allied Mutual agent, the parties discussed that burglary insurance would not protect C & J from an "inside job" and that there had to be "visible evidence of burglary" to the premises.[304] C & J purchased the insurance and received the policy afterward.[305] The definition of burglary in the policy required visible marks of entry to the exterior of the premises at the place of entry.[306] This definition "was never read to or by

296. *Id.* at 107, 108.

297. *Id.* at 107 (citing Hartland Comput. Leasing Corp. v. Ins. Man, Inc., 770 S.W.2d 525, 527, 528 (Mo. Ct. App. 1989)). The court stated that "the test for 'reasonable expectations' is objective, addressed to the average member of the public who accepts such a contract, not the subjective expectations of an individual adherent." *Id.* (quoting *Hartland Comput. Leasing Corp.*, 770 S.W.2d at 528).

298. *Id.* at 107–08.

299. *Id.* at 108 (citation omitted).

300. *See id.* at 106.

301. *See id.* at 107–08.

302. C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 177 (Iowa 1975) (en banc).

303. *See id.* at 171.

304. *Id.* at 171, 176–77.

305. *Id.* at 172.

306. *Id.* at 171.

plaintiff's personnel, nor was the [clause] explained by defendant's agent."[307] Later there was a burglary with clear evidence of physical damage to an interior door but "no physical damage to the exterior of the building to [indicate] felonious entry . . . ."[308] Allied Mutual denied coverage and C & J brought suit on its claim.[309]

The Iowa Supreme Court engaged in a detailed discussion of insurance contracts as adhesion contracts and assent to such contracts.[310] The court then stated how it had adopted the doctrine of reasonable expectations when it had previously approved this statement of the doctrine: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[311] To help apply the doctrine, the court quoted approvingly the factors of the Restatement (Second) of Contracts § 211 comment f.[312] The court noted that C & J should have reasonably anticipated an exclusion from coverage for a burglary by an employee or representative of C & J based on the conversations with the agent of Allied Mutual.[313] Going further, the court stated that "the most [C & J] might have reasonably anticipated was a policy requirement of visual evidence . . . [that] the burglary was an 'outside' job."[314] But the court found nothing in the parties' negotiations that would cause C & J reasonably to anticipate the definition buried in the fine print of the contract.[315] The court noted further that the policy definition of burglary did not comport with a lay person's concept of burglary or with a legal interpretation of burglary.[316] The court held that "appropriately applied to this case, the doctrine [of reasonable expectations] demands reversal and judgment for the plaintiff."[317]

307. *Id.* at 177.

308. *Id.* at 171.

309. *See id.*

310. *Id.* at 173–76.

311. *Id.* at 176 (quoting Rodman v. State Farm Auto. Mut. Ins. Co., 208 N.W.2d 903, 906 (Iowa 1973)).

312. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. f). Comment f is discussed *supra* text accompanying notes 194–95.

313. *C & J Fertilizer, Inc.*, 227 N.W.2d at 176–77.

314. *Id.* at 177.

315. *Id.*

316. *Id.*

317. *Id.* Other grounds the court cited for invalidating the policy description were unconscionability and implied warranty. *Id.* at 177–79.

In *C & J Fertilzer, Inc.*, the unusual definition of burglary in the policy, contrasted with the statements made during the negotiation of the policy, led the court to hold that the reasonable expectations overcame the written terms of the contract.[318] In negotiating the policy, the Allied Mutual agent represented that burglary only required proof that a non-insider committed the crime.[319] This created the reasonable expectation.[320] The definition of burglary in the form policy negated that expectation.[321] However, the reasonable expectation prevailed over the written words of the policy so that visible marks of entry to the exterior of the structure were not a condition to a claim under the policy.[322]

Courts in other jurisdictions should adopt the reasoning of these opinions and apply the reasonable expectations doctrine to form contracts drafted by sellers and presented to buyers on a take-it-or-leave-it basis. An oral express warranty furnishes a compelling reason to extend the doctrine beyond the insurance policy terms and arbitration clauses.[323] It involves an actual representation made by the drafting party, followed by a form agreement that contains a warranty disclaimer negating the warranty.[324] If courts allow a reasonable expectation to arise solely from the offensive term without an express representation, an express representation by the other party affords an even stronger basis for applying the doctrine.[325] The buyer should be allowed to prove that the warranty representation created a reasonable expectation. The result may be that the oral express warranty prevails over a disclaimer term.

Although the reasonable expectations doctrine is a cousin of the Restatement (Second) of Contracts § 211(3), there is an important difference between these principles that makes the reasonable expectations doctrine more favorable for consumers.[326] Under the reasonable

318. *See id.* at 177.
319. *See id.* at 176–77.
320. *Id.* at 177.
321. *Id.*
322. *See id.*
323. *See* Knapp, *supra* note 12.
324. *See* Keeton, *supra* note 12, at 967, 973–74.
325. *See id.*; Knapp, *supra* note 12.
326. *See* Henderson, *supra* note 30, at 848.

> In contrast with the Restatement formulation, these formulations would appear to be more faithful to the notion that the drafter of the adhesion agreement must bear the consequences of any reasonable misunderstanding by the adhering

expectations doctrine, the fact finder must evaluate the reasonable expectations from the perspective of the party who asserts that the printed form negates that party's reasonable expectations—the buyer.[327] The inquiry under Restatement § 211(3), however, is whether the drafting party has reason to believe the assenting party would not have done so had she known of the term.[328] That requires evaluating the objective state of mind of the drafting party—the seller.[329] This difference from reasonable expectations can be significant because to prevail under section 211(3), the consumer buyer must prove the drafting party's reason to believe.[330] That is likely a more difficult burden than proving the buyer's reasonable expectations.

The analysis of reasonable expectations is based on the objectively reasonable expectations of the non-drafting party: Could that party reasonably expect the parties' agreement to include a particular term?[331] It does not depend on what the drafting party perceived or believed.[332] In the case of the oral warranty and the written warranty disclaimer clause, the inquiry is whether the buyer could reasonably expect that the parties' agreement would include the oral warranty.[333] If the seller made the oral warranty, it is reasonable that the buyer would expect the warranty to be in the agreement.[334] It is not relevant that the seller, when making the warranty,

> party, even where there is no ambiguity in the language of the contract, so long as the misunderstanding was fostered by the drafter. There is no requirement that the insurer be aware of facts that would cause it to believe the insured's expectations would be defeated.

Id.

327. Keeton, *supra* note 12.

328. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981); Henderson, *supra* note 30, at 846–47.

329. *See* Henderson, *supra* note 30, at 847.

330. RESTATEMENT (SECOND) OF CONTRACTS § 211(3); Henderson, *supra* note 30, at 846–47.

331. Keeton, *supra* note 12; *see* Swain v. Auto Servs., Inc., 128 S.W.3d 103, 107 (Mo. Ct. App. 2003) (citing Hartland Comput. Leasing Corp., v. Ins. Man, Inc., 770 S.W.2d 525, 528 (Mo. Ct. App. 1989)); Zigrang v. U.S. Bancorp Piper Jaffery, Inc., 123 P.3d 237, 241 (Mont. 2005).

332. *See Swain*, 128 S.W.3d at 107 (citing *Hartland Comput. Leasing Corp.*, 770 S.W.2d at 528); *Zigrang*, 123 P.3d at 241.

333. Rakoff, *supra* note 266, at 1187 n.52 (citing 4 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS §§ 631–47, at 948–1167 (Baker, Noorhis & Co., Inc. 3d ed. 1957) (1920)).

334. *See id.* at 1269.

did not think the buyer would expect the warranty or that the disclaimer clause would alert the buyer that the contract does not include a warranty.[335] Although the seller can introduce evidence that its representations and the printed form should not cause a reasonable buyer to expect a warranty, the seller's state of mind cannot prevent the buyer's reasonable expectations.[336]

The drafting party's state of mind is critical to the analysis when a court employs section 211(3) to determine whether an oral express warranty survives a printed warranty disclaimer.[337] Section 211(3) provides that the term in question is not part of the parties' agreement when the drafting party has reason to believe the non-drafting party would not assent to the form writing if that party knew the writing included the term.[338] The focus is on whether the drafting party—the seller—has reason to believe the other party—the buyer—would not assent.[339] Although the knowledge of the drafting party (the seller) that it has created an oral express warranty is relevant to the issue, it may not be conclusive.[340] A drafting party could assert that it believed the warranty was relatively immaterial to the buyer's decision to purchase and thus, disclaiming the warranty would not prevent assent.[341] The seller could further assert that the buyer had an opportunity to read the contract so the seller assumed the buyer did not have a problem with disclaiming all warranties.[342] The seller may not understand or believe that he has created an express warranty; so he would not have reason to believe that a warranty disclaimer term would prevent the buyer's assent.[343] Since the seller's attorney is the likely drafter of the agreement, the seller could assert he did not know of the disclaimer and does not have reason to

335. *See id.*

336. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (AM. LAW INST. 1981); Keeton, *supra* note 12, at 967–68; Rakoff, *supra* note 266, at 1269.

337. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3).

338. *Id.* "[T]he other party has reason to believe that the party manifesting assent would not do so . . . ." The party manifesting assent is the party that manifests assent to the form writing. *Id.*

339. *Id.* § 211(3) & cmt. f. The reasonable expectations doctrine is incorporated as a means for determining when the drafting party has reason to believe. "Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectations." *Id.* § 211 cmt. f. Of course neither the comment nor the subsection is law until a court adopts it.

340. *See* Broude, *supra* note 82, at 914 n.127.

341. *See* Keeton, *supra* note 12, at 968.

342. *See* Knapp, *supra* note 12, at 1097.

343. *See* Broude, *supra* note 82, at 905–06.

believe the buyer would not assent had it known of that term.[344] Although section 211(3) supplies an opportunity for the oral express warranty to prevail over the warranty disclaimer,[345] the reasonable expectations doctrine may provide an easier path as compared to a strict application of section 211(3).

Ridding the form agreement of the warranty disclaimer and allowing the oral warranty to prevail nevertheless leaves one final impediment: the parol evidence rule. Although the disclaimer term is removed from the agreement, the seller can still maintain that the agreement does not include the oral representation of a warranty, as the form agreement likely has an integration clause.[346] That clause arguably makes the writing the complete and exclusive statement of the parties' agreement.[347] That is the basis of the seller's objection to the buyer's attempt to introduce evidence of the oral warranty.[348]

As I noted previously, the parol evidence rule is not an insurmountable barrier.[349] The key is that the court follows the words of U.C.C. § 2-202 that *both* parties must intend that the written agreement is the parties' final agreement or their complete and exclusive agreement.[350] Including an integration clause in a form agreement indicates that the drafting party intends the agreement as final and complete and exclusive.[351] It is not conclusive as to the intent of the non-drafting party.[352] The court must be cautious of holding that the buyer intends the writing as final or as complete and exclusive simply because the buyer signed the form agreement.[353] It is not realistic to assume that the buyer intends that a form agreement, almost beyond question unread by the buyer, as the complete and exclusive statement of their agreement when the writing does not include the oral warranty the seller just created.[354]

344. *See id.*

345. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981).

346. *See* U.C.C. § 2-316(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

347. *See id.*

348. *See id.*

349. *See supra* notes 238–46 and accompanying text (discussing the parol evidence rule in connection with section 211(3)).

350. U.C.C. § 2-202; *see supra* notes 121–73 and accompanying text.

351. *See* U.C.C. § 2-202(b); Broude, *supra* note 82, at 882–83.

352. Knapp, *supra* note 12, at 1108–09.

353. *See id.*

354. *Id.*

The reasonable expectations doctrine provides a clear and strong method that helps the buyer of the air conditioner prove the oral express warranty. The seller has made an oral warranty that the air conditioner will cool the home to not less than 65 degrees. That warranty creates a reasonable expectation of the buyer. When the writing disclaims all oral warranties, it completely negates that expectation. The reasonable expectations doctrine does not allow the terms of the writing to negate the reasonable expectations of the other party.[355] If the buyer can prove the oral warranty, the parol evidence rule should not prevent that proof.[356] Because the buyer did not intend for the writing to be her final expression of the warranty term, the parol evidence rule is not a bar to evidence.

V. CONCLUSION

When consumers shop for a product, it is typical for them to seek information about the product from the seller.[357] The seller is knowledgeable about the product and can provide details about it that the consumer might not know.[358] The representations and statements of the seller are typically a significant factor in making a decision.[359] It is reasonable for consumers to seek details about the product from the seller and to rely on these statements.[360] Many of these representations and statements are express warranties under U.C.C. § 2-313(1).[361]

The problem for the consumer buyer is that the parties likely will sign a printed form agreement whose terms do not include the oral warranty but do include a disclaimer of warranties and an integration clause.[362] Such agreements jeopardize the oral warranty.[363]

355. *See, e.g.*, Lloyd, *supra* note 20, at 244.

356. *See supra* note 171 and accompanying text.

357. *See* WHALEY, *supra* note 15, at 25; *Why Customers Seek Advice to Make a Purchase Decision*, GUIDED SELLING (July 29, 2015), http://www.guided-selling.org/why-customers-seek-advice-to-make-a-purchase-decision/ [hereinafter GUIDED SELLING].

358. *See* WHALEY, *supra* note 15, at 25; GUIDED SELLING, *supra* note 357.

359. WHALEY, *supra* note 15, at 25.

360. *See id.*

361. The seller's affirmations of fact, promises, descriptions, samples, and models can be express warranties under section 2-313. The seller's opinion, commendation, or statement merely of the value of the goods does not create an express warranty. U.C.C. § 2-313(2) (AM. LAW. INST. & UNIF. LAW COMM'N 2014).

362. *See supra* note 26 and accompanying text.

363. *See supra* note 26 and accompanying text.

If the product fails to conform to the oral warranty and the buyer pursues her claim against the seller, the seller declares that the parties' agreement does not include the warranty.[364] The seller can call attention to the fact that the printed agreement does not include the oral warranty, disclaims all warranties other than any warranty included in the writing, and includes an integration clause that triggers the parol evidence rule, which bars evidence that contradicts or supplements the writing.[365] Any of these time-honored principals of contract law can thwart the oral warranty.[366] It is not fair to the buyer that the seller may not be obligated to honor the oral warranties. There are, however, accepted rules of contract law that protect the warranty.[367]

U.C.C. Article 2 makes a strong statement of support for oral express warranties and clearly disfavors disclaimers that operate against the warranty.[368] A warranty disclaimer should not undermine an oral warranty.

Article 2 also furnishes a response when the seller attempts to bar evidence of the oral warranty under the parol evidence rule.[369] The rule operates only when both parties intend the writing is the final expression of the terms in the writing or the complete and exclusive statement of their agreement.[370] Courts must examine the actual intent of the buyer, not simply the constructive intent that arises from the buyer's subscribing a form agreement that includes an integration clause.[371]

Restatement (Second) of Contracts § 211(3) provides a structure for eliminating a term disclaiming all express warranties in a standardized agreement when the drafting party has reason to believe that the non-drafting party would not assent to the agreement with such term.[372] Although

364. *See supra* note 37 and accompanying text.

365. *See supra* Part II.B.

366. *See supra* Part II.B.

367. *See supra* Parts II, III.

368. U.C.C. § 2-313 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2014) ("'Express' warranties . . . go so clearly to the essence of the bargain that words of disclaimer in a form are repugnant the basic dickered terms."); *id.* § 2-316(1) & cmt. 1 ("[This section] seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty . . . .").

369. *See id.* § 2-202.

370. *Id.*

371. *See supra* notes 138–44 and accompanying text.

372. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW. INST. 1981).

not a statute, courts have embraced and applied section 211(3) to form agreements.[373] The case where a seller makes an oral warranty but later defends against it using a warranty disclaimer clause matches the conditions for applying section 211(3).[374] The seller has created an oral express warranty to the buyer during negotiations of the purchase. The buyer then signs a form agreement, unread and unexplained, that does not include the warranty but does include a disclaimer of any express warranty not included in the form.[375] These facts satisfy the reason to believe test.[376] A reasonable buyer would not assent to the form writing if she knew the form excluded a warranty the seller just made.[377] The seller, knowing that it made a warranty and disclaimed the very same warranty, has reason to believe the buyer would not assent to the form.[378]

Finally, the reasonable expectations doctrine has the effect of revising an agreement so that it conforms to the reasonable expectations of a party.[379] A court can use the doctrine to honor the objectively reasonable expectations of a party although the terms of the printed agreement negate those expectations.[380] A seller that makes an oral express warranty in favor of the buyer creates a reasonable expectation that the parties' agreement includes the warranty.[381] A disclaimer of warranty clause in the printed form agreement negates that warranty.[382] The buyer typically would not read the form agreement, but even if the buyer read and understood the form, the buyer could reasonably believe that the seller does not intend to disclaim a warranty just made.[383] The buyer has a reasonable expectation that the agreement includes the warranty.[384] Courts should not allow the printed terms to negate that expectation.

373. *See* Lauvetz v. Alaska Sales & Serv., 828 P.2d 162, 164 (Alaska 1991) (rental car contract); Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 397 (Ariz. 1984) (per curiam) (insurance policy); Angus Med. Co. v. Dig. Equip. Corp., 840 P.2d 1024, 1030–31 (Ariz. Ct. App. 1992) (software service contract).

374. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3).

375. *See* WHALEY, *supra* note 15, at 79–80.

376. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(1).

377. *See* WHALEY, *supra* note 15, at 79–80.

378. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(1).

379. Knapp, *supra* note 12.

380. *See supra* Part IV.

381. *See* U.C.C. § 2-313(1)(a) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

382. *See id.*

383. Knapp, *supra* note 12, at 1109.

384. *See* U.C.C. § 2-316.

Ideally, contract law would have a rule where express warranties could not be disclaimed.[385] But that is not the rule, nor is it the rule that express warranties can be disclaimed.[386] It is necessary for courts to use all the available tools to examine whether an oral express warranty prevails over terms in a form agreement that disclaim all warranties and that make the printed form the parties' final, complete, and exclusive agreement. The legal tools discussed in this article are not groundbreaking; they have been accessible for some time.[387] Courts must provide buyers the opportunity to prove their reasonable expectations, that they would not have assented to an agreement that included an integration clause, and that they did not intend the writing as their final agreement. The tools exist. Courts simply have to use them.

385. According to Professor Murray, early versions of Article 2 had that rule. Murray, *supra* note 117, at 1488. Any such rule would still require the buyer to prove that the seller created the oral express warranty. *See id.*

386. *See* U.C.C. § 2-316.

387. *See* Barnes, *supra* note 36, at 241–43.