

5-1992

## U.C.C. Article Two Warranty Disclaimers and the "Conspicuousness" Requirement of Section 2-316

Bernard F. Kistler Jr.

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/jour\\_mlr](https://digitalcommons.law.mercer.edu/jour_mlr)



Part of the [Commercial Law Commons](#)

---

### Recommended Citation

Kistler, Bernard F. Jr. (1992) "U.C.C. Article Two Warranty Disclaimers and the "Conspicuousness" Requirement of Section 2-316," *Mercer Law Review*: Vol. 43 : No. 3 , Article 9.  
Available at: [https://digitalcommons.law.mercer.edu/jour\\_mlr/vol43/iss3/9](https://digitalcommons.law.mercer.edu/jour_mlr/vol43/iss3/9)

This Comment is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

## U.C.C. Article Two Warranty Disclaimers and the "Conspicuousness" Requirement of Section 2-316

Under Uniform Commercial Code ("U.C.C.") section 2-314,<sup>1</sup> a warranty that goods are "merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."<sup>2</sup> Among other definitions, this means that the goods will be "fit for the ordinary purposes for which such goods are used."<sup>3</sup> A warranty of merchantability is implied in every contract for sale, "[u]nless excluded or modified,"<sup>4</sup> because the expectation that goods will be fit for their ordinary purpose "is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution."<sup>5</sup> The special precaution referred to comes in the form of section 2-316.<sup>6</sup>

According to section 2-316(2), any attempt to "exclude or modify the implied warranty of merchantability or any part of it" must: (1) mention the term "merchantability" and (2) be "conspicuous" if made in writing.<sup>7</sup> Alternatively, one may achieve a disclaimer of all implied warranties by compliance with section 2-316(3),<sup>8</sup> which contains three methods of excluding or modifying the implied warranties. The first method of exclusion is the use of phrases such as "with all faults" and "as is."<sup>9</sup> The test of whether a phrase is sufficient is if "in common understanding [it] calls the buyer's attention to the exclusion of warranties and makes plain that

---

1. U.C.C. § 2-314 (1962).

2. *Id.* § 2-314(1).

3. *Id.* § 2-314(2)(c).

4. *Id.* § 2-314(1).

5. *Id.* § 2-314 cmt. 11.

6. *Id.* § 2-316.

7. *Id.* § 2-316(2). Note that the conspicuous requirement applies only where there is a writing. The language of the code permits the possibility of an oral disclaimer. It must also meet, however, the first requirement of mentioning the word "merchantability." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, PRACTITIONER'S EDITION § 12-5 (3d ed. 1988 & Supp. 1991).

8. Note that this second method of disclaiming warranties would exclude not only the implied warranty of merchantability of § 2-314, but also the implied warranty of fitness for particular purpose created by § 2-315 if such warranty arose from the circumstances of the transaction.

9. U.C.C. § 2-316(3)(a) (1962).

there is no implied warranty."<sup>10</sup> The second method of disclaiming a warranty under section 2-316(3) is by an inspection.<sup>11</sup> If, before entering into the contract, the buyer examines the goods "as fully as he desire[s]," or if the buyer has "refused to examine the goods," then no implied warranty exists as to defects that "an examination ought in the circumstances to have revealed to him."<sup>12</sup> The third method of excluding or modifying an implied warranty under section 2-316(3) is by course of dealing<sup>13</sup> and usage of trade.<sup>14</sup>

Though not explicitly required by the current text of Article 2, a majority of courts have taken the position that a written disclaimer that falls under section 2-316(3)(a) must be "conspicuous."<sup>15</sup> Georgia follows this approach and requires a disclaimer under Official Code of Georgia Annotated ("O.C.G.A.") section 11-2-316(3)(a)<sup>16</sup> to be "conspicuous."<sup>17</sup> In *Leland Industries v. Suntek Industries*,<sup>18</sup> the language of an attempted disclaimer failed because it was not "conspicuous."<sup>19</sup> "Although, by its terms, O.C.G.A. § 11-2-316(3)(a) does not explicitly require that the 'other language' be conspicuous, it has been interpreted as implicitly imposing such a requirement."<sup>20</sup> White and Summers argue that this result can be achieved by reading "conspicuous" into the phrase "calls the buyer's attention to the exclusion . . . and makes plain that there is no implied warranty."<sup>21</sup> The rationale behind requiring "conspicuous" disclaimers despite the Code's failure to explicitly require it is that other-

10. *Id.*

11. *Id.* § 2-316(3)(b).

12. *Id.*

13. *Id.* § 1-205(1). Course of dealing is defined as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Id.*

14. *Id.* § 1-205(2).

15. WHITE & SUMMERS, *supra* note 7, § 12-5; *see also* Gindy Mfg. Corp. v. Cardinale Trucking Corp., 268 A.2d 345 (Sup. Ct. N.J. 1970). The court in *Cardinale Trucking* noted:

It does not make sense to require conspicuous language when a warranty is disclaimed by use of the words "merchantability" or "fitness" and not when a term like "as is" is used to accomplish the same result. It serves no intelligible design to protect buyers by conspicuous language when the term "merchantability" is used, but to allow an effective disclaimer when the term "as is" is buried in fine print.

*Id.* at 352.

16. O.C.G.A. § 11-2-316(3)(a) (1982).

17. *Leland Indus. v. Suntek Indus.*, 184 Ga. App. 635, 638, 362 S.E.2d 441, 444 (1987); *see also* *White v. First Fed. Sav. & Loan*, 158 Ga. App. 373, 280 S.E.2d 398 (1981).

18. 184 Ga. App. at 635, 362 S.E.2d at 441.

19. *Id.* at 638, 362 S.E.2d at 444.

20. *Id.*

21. U.C.C. § 2-316(3)(a) (1962). *See* WHITE & SUMMERS, *supra* note 7, § 12-6.

wise, the conspicuousness requirement of section 2-316(2) is useless.<sup>22</sup> If a disclaimer were to fail under section 2-316(2) for lack of conspicuousness, then the same language could then be brought under section 2-316(3)(a), where it would not be required to be "conspicuous" and where the drafters' intent of "protect[ing] the buyer from surprise"<sup>23</sup> would be frustrated.

### I. PURPOSES OF THE "CONSPICUOUSNESS" REQUIREMENT

According to the comments accompanying section 2-316, the drafters sought to "protect a buyer from unexpected and unbargained for language of disclaimer."<sup>24</sup> This is accomplished by two means. First, when there is language that tends to give rise to the existence of an express warranty and other language that is inconsistent with the creation of an express warranty, the two "shall be construed wherever reasonable as consistent with each other."<sup>25</sup> Wherever such a construction of the inconsistent phrases is unreasonable, however, the words that create the warranty win out over the words that negate or limit the express warranty.<sup>26</sup> Second, the U.C.C. attempts to protect a buyer from "unbargained language of disclaimer" by "permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise."<sup>27</sup>

According to Anderson in his treatise on the U.C.C., the goal of section 2-316 is "initially to preserve the freedom of the contracting parties by permitting them to allocate risk as they choose . . . . Beyond this initial objective, the objective . . . is to avoid the surprise or fine print waiver of

---

22. See WHITE & SUMMERS, *supra* note 7, § 12-6; see also *White v. First Fed. Sav. & Loan*, 158 Ga. App. 373, 280 S.E.2d 398 (1981). "To hold that the 'as is' language need not be conspicuous would allow the implied warranties of fitness and merchantability to be annulled by implication by language less conspicuous than if they were directly eliminated, in which case the effort to eliminate them would have failed [for inconspicuousness]." *Id.* at 373-74, 280 S.E.2d at 399-400.

23. U.C.C. § 2-316 cmt. 1 (1962).

24. *Id.*

25. *Id.* § 2-316(1).

26. *Id.*

27. *Id.* § 2-316 cmt. 1. Some courts rely upon the phrase "other circumstances which protect the buyer from surprise" to justify giving effect to a warranty disclaimer despite a lack of conspicuousness. See *infra* notes 53-61 and accompanying text.

rights by the buyer."<sup>28</sup> Additional goals include certainty of proof, "long-run buyer protection, and avoidance of difficult questions of fact."<sup>29</sup>

## II. THREE APPROACHES TO "CONSPICUOUSNESS"

Currently there are three different approaches to the "conspicuousness" requirement of section 2-316(2): the objective test, the subjective test, and the "modified objective test."<sup>30</sup> It is this author's opinion that because courts use these different approaches, the drafters of the U.C.C. should redraft the current Code and expressly adopt one approach. The individual state legislatures would then be free to either adopt this approach or to modify the Code in their states. The Permanent Editorial Board has proposed revisions of Article 2, but the 1990 proposed draft does not address the multiple interpretations of the Code's test for conspicuousness.<sup>31</sup>

The differing approaches stems from the language of section 1-201(10)<sup>32</sup> and an apparent inconsistency with comment 10. According to section 1-201(10), "conspicuous" is defined as follows:

"Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person *against whom it is to operate* ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.<sup>33</sup>

The phrase "against whom it is to operate" implies that the test should be subjective rather than objective. At a minimum, it contemplates the consideration of at least some subjective criteria.<sup>34</sup> However, comment 10,

---

28. 3 RONALD A. ANDERSON, *ANDERSON ON THE UNIFORM COMMERCIAL CODE* (1983). Compare this with the goal of the Code's provision on "unconscionability" in § 2-302. "The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." U.C.C. § 2-302 cmt. 1 (1989) (citation omitted).

29. Andrew M. Baker et al., *Special Project: Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 182 (1978).

30. The name for the "modified objective test" in this regard is attributed to Cornell University. See Debra L. Getz et al., *Special Project: Article Two Warranties in Commercial Transactions, An Update*, 72 CORNELL L. REV. 1159, 1271 (1987).

31. PERMANENT EDITORIAL BOARD STUDY GROUP, *UNIFORM COMMERCIAL CODE ARTICLE 2, PRELIMINARY REPORT 26-29* (1990). The Board discussed recommendations for changes in the general definitions of § 1-201. No amendment is mentioned to address § 1-201(10).

32. U.C.C. § 1-201(10) (1987).

33. *Id.* (emphasis added).

34. See *infra* notes 74-79 and accompanying text.

which accompanies section 1-201(10), suggests an objective approach. "[The text of section 1-201(10)] is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it."<sup>35</sup>

#### A. *The Objective Test of "Conspicuousness"*

Georgia currently uses the purely objective test of "conspicuousness."<sup>36</sup> The objective test generally relies upon the text of section 1-201(10) and focuses on the phrase "larger or other contrasting type or color."<sup>37</sup> Courts using this approach most often consider factors such as capitalization,<sup>38</sup> the existence of a border around the disclaiming language,<sup>39</sup> use of a large type size for the disclaimer,<sup>40</sup> the use of a heading above the disclaimer,<sup>41</sup> and the contents of the disclaimer.<sup>42</sup> There is no ranking of the importance of any of these factors such that the existence of one would make up for the absence of any other. However, it is apparent that the content of a disclaimer is one factor that receives a large amount of weight, for example, when the heading is misleading because it appears to create a warranty rather than to exclude it.<sup>43</sup> In *Leland Industries v. Suntek Industries*,<sup>44</sup> the court indicated that "[a] printed heading in [all] capitals . . . is conspicuous."<sup>45</sup> The sales slips contained a conspicuous heading

---

35. U.C.C. § 1-201(10) cmt. 10 (1987).

36. See *Bennett v. Matt Gay Chevrolet-Oldsmobile*, 200 Ga. App. 348, 350-51, 408 S.E.2d 111, 114 (1991) (where the heading of the disclaimer was in large capital letters and the entire disclaimer was blocked off with a border, "the printed language effectively precludes a claim for breach of implied warranty"); *Webster v. Sensormatic Elec. Corp.*, 193 Ga. App. 654, 654, 389 S.E.2d 15, 16 (1989) (disclaimer "printed in type which is bolder and larger than that generally used in the document, and [which] is further emphasized by the capitalization and by being within a dark bordered rectangle . . . is sufficiently conspicuous to satisfy the requirements of OCGA § 11-2-316(2)"); *Steele v. Gold Kist, Inc.*, 186 Ga. App. 569, 570, 368 S.E.2d 196, 197 (1988) ("The combination of the capitalization of the disclaimer and its contents was sufficient to preclude an action against appellee for breach of the implied warranties of merchantability and fitness.").

37. U.C.C. § 1-201(10) (1987).

38. *Bennett v. Matt Gay Chevrolet-Oldsmobile*, 200 Ga. App. 348, 350-51, 408 S.E.2d 111, 114 (1991).

39. *Id.* at 350-51, 408 S.E.2d at 114.

40. *Webster v. Sensormatic Elec. Corp.*, 193 Ga. App. 654, 654, 389 S.E.2d 15, 16 (1989).

41. *Leland Indus. v. Suntek Indus.*, 184 Ga. App. 635, 362 S.E.2d 441 (1987).

42. *Steele v. Gold Kist, Inc.*, 186 Ga. App. 569, 570, 368 S.E.2d 196, 197 (1988) ("The combination of the capitalization of the disclaimer and its contents was sufficient to preclude an action against appellee for breach of implied warranties . . .").

43. See *Leland Indus. v. Suntek Indus.*, 184 Ga. App. 635, 637, 362 S.E.2d 441, 443 (1987).

44. 184 Ga. App. 635, 362 S.E.2d 441 (1987).

45. *Id.* at 637, 362 S.E.2d at 443.

written in all capitals.<sup>46</sup> "The conspicuous introductory language" stated that the transaction was subject to "[A]LL OF THE TERMS AND CONDITIONS ON THE FACE AND REVERSE SIDES HEREOF . . ."<sup>47</sup> The heading "Warranties" was on the reverse side of the document.<sup>48</sup> Although the disclaimer was marked by a heading written in all capitals and therefore would ordinarily be conspicuous, the court concluded that it was not conspicuous, in part because the effect of the language used was unclear in terms of its effect as an exclusion of a warranty.<sup>49</sup> "Several sellers have attempted to satisfy the conspicuousness requirement by printing only the heading of the combined express warranty and disclaimer clause in capital letters. When these headings have usually failed to disclose the true nature of the clause, the Courts have denied effect to the disclaimer."<sup>50</sup>

### B. *The Subjective Test of "Conspicuousness"*

The subjective test relies upon the language "reasonable person against whom it is to operate"<sup>51</sup> for its legitimacy. Courts have differed on the effect of the subjective awareness of a disclaimer. Some courts have taken the position that where the disclaimer is written inconspicuously and would ordinarily be ineffective pursuant to section 2-316(2) or section 2-316(3)(a), proof of the buyer's knowledge of the disclaimer makes the disclaimer effective despite the literal language of the Code.<sup>52</sup> This position

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* (quoting WHITE & SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 12-5, p. 443 (1980)).

51. U.C.C. § 1-201(10) (1987).

52. See *Stauffer Chem. Co. v. Curry*, 778 P.2d 1083, 1092 (Wyo. 1989) ("[E]ven if [the disclaimer] is inconspicuous, a disclaimer will become a part of the bargain if it is read or acknowledged by the customer prior to purchase."); *Twin Disc v. Big Bud Tractor*, 772 F.2d 1329, 1335 (7th Cir. 1985) ("Because the district court found that [defendant] had actual knowledge of [plaintiff's] warranty, the question of conspicuousness need not be reached."); *South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 322 S.E.2d 453, 457 (S.C. Ct. App. 1984) (disclaimer given effect despite a lack of conspicuousness because it "came as no surprise"); *Office Supply Co. v. Basic/Four Corp.*, 538 F. Supp. 776, 784-85 (E.D. Wis. 1982) (disclaimer not conspicuous because there was "only slightly contrasting print and [was] without a heading adequate to call the buyer's attention to the disclaimer clause," but given effect because "[plaintiff's] testimony establishes that the warranty disclaimers were neither unexpected nor unbargained for, and that, consequently . . . they should be enforced."); *Imperial Stamp & Engraving Co. v. Bailey*, 403 N.E.2d 294, 296 (Ill. App. Ct. 1980) ("The conspicuousness requirement is not controlling here since defendant admits that he read and was aware of the provision."); *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 375 (E.D. Mich. 1977) ("[c]ommercial buyer's actual awareness and apparent

is supported by reference to section 2-316 comment 1. The Code protects a buyer from surprise of a disclaimer by "permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise."<sup>53</sup> The South Carolina Court of Appeals took this approach in *South Carolina Electric & Gas Co. v. Combustion Engineering, Inc.*<sup>54</sup> Although the disclaimer did not mention the word "merchantability" and was not "conspicuous,"<sup>55</sup> the court found that the warranty was effectively disclaimed.<sup>56</sup> "[T]he language of the disclaimer included in the warranty item came as no surprise to [plaintiff] and [plaintiff] in fact bargained with [defendant] over a period of seven months concerning it."<sup>57</sup> The theory is that when the buyer has actual knowledge of the disclaimer, he or she is not surprised.<sup>58</sup> Since the goal of the "conspicuousness" requirement has been met, there is no need to require a technical following of the Code.<sup>59</sup> The court in *Twin Disc v. Big Bud Tractor*<sup>60</sup> used the same theory:

Because the district court found that [defendant] had actual knowledge of [plaintiff's] warranty, the question of conspicuousness need not be reached. The purpose of the conspicuousness requirement is to protect the buyer from unfair surprise. There is therefore no need to determine

---

endorsement of the [disclaimer] obviates any need for conspicuousness in order to prevent surprise.").

53. U.C.C. § 2-316 cmt. 1 (1962) (emphasis added).

54. 322 S.E.2d 453 (S.C. Ct. App. 1984).

55. *Id.* at 457-58.

The disclaimer itself appears on page 17 of the agreement in the last sentence of a two-paragraph item. It is indistinctive both as to color and as to type . . . Moreover, the item containing the disclaimer is misleading in that it is suggestive of "a grant of warranty rather than a disclaimer" because the heading of the item, printed in underlined capital letters, simply reads "WARRANTY."

*Id.* at 456 (citing *Hartman v. Jensen's Inc.*, 289 S.E.2d 648, 649 (S.C. Ct. App. 1982)).

56. *Id.* at 457-58.

57. *Id.* at 457.

58. *Id.*

59. See *Imperial Stamp & Engraving Co. v. Bailey*, 403 N.E.2d 294 (Ill. App. Ct. 1980), in which the Illinois Appellate Court stated:

The conspicuousness requirement is not controlling here since defendant admits that he read and was aware of the provision. The purpose of the conspicuousness requirement is to "protect the buyer from surprise" and "unexpected and unbar-gained [for] language of disclaimer[s]." This purpose is accomplished when the buyer is actually aware of the seller's disclaimer.

*Id.* at 296 (citations omitted).

60. 772 F.2d 1329 (7th Cir. 1985).



whether a disclaimer is conspicuous, such that the buyer's knowledge can be inferred, when the buyer has actual knowledge of the disclaimer.<sup>61</sup>

Other courts and commentators have taken the position that knowledge of the disclaimer does not make an inconspicuous disclaimer effective.<sup>62</sup> In *Rehurek v. Chrysler Credit Corp.*,<sup>63</sup> defendant-seller attempted to argue that plaintiff-buyer was not "surprised" by the disclaimer "because [plaintiff] stated on deposition that he had read the contract, including the disclaimer clause."<sup>64</sup> Even though the policy behind requiring disclaimers to be conspicuous had been satisfied, the court refused to give effect to the disclaimer since it was not conspicuous.<sup>65</sup> The court adopted the view that the code seeks not only to prevent "surprise," but also to avoid the:

"'unconscionable' destruction of rights of buyers, it being stated that any attempt to exclude or modify an implied warranty of merchantability must use such terms, and, if in writing, must be conspicuous to the buyer, because it is unconscionable to permit general statements to destroy the buyer's right that the thing he purchases perform properly."<sup>66</sup>

The court in *Rehurek* takes the position that the minimum requirements to satisfy the "conscionability" requirement<sup>67</sup> of the Code are those contained in section 2-316.<sup>68</sup> Any variation from these would apparently be unconscionable per se.

In *Cate v. Dover*,<sup>69</sup> Justice Ray of the Texas Supreme Court addressed in his concurrence in part, dissent in part, the rationale for ignoring the subjective awareness of the disclaimer by the purchaser. He argued that a buyer's knowledge should not be relevant to a decision whether a disclaimer is effective because sellers are then encouraged to make their dis-

---

61. *Id.* at 1335 n.3 (citations omitted). The court apparently takes the position that we require "conspicuousness" in order to infer the buyer's knowledge of, and therefore his or her assent to, the term in the contract.

62. *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. Dist. Ct. App. 1972); see also JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, STUDENT HORNBOOK EDITION § 12-5 (3d ed. 1988) ("We think the drafters intended a rigid adherence to the conspicuousness requirement in order to avoid arguments concerning what the parties said about warranties at the time of the sale. Thus we view with apprehension the growing number of decisions making buyer knowledge relevant to a disclaimer's conspicuousness.").

63. 262 So. 2d 452 (Fla. Dist. Ct. App. 1972).

64. *Id.* at 455.

65. *Id.*

66. *Id.* (quoting 1 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE 677 (1983)).

67. U.C.C. § 2-302 (1962).

68. 262 So. 2d at 455.

69. 790 S.W.2d 559 (Tex. 1990).

claimers conspicuous.<sup>70</sup> Disregarding the buyer's knowledge would enable the court to avoid the difficult fact questions that arise regarding ACTUAL awareness.<sup>71</sup> "An absolute rule that an inconspicuous disclaimer is invalid, despite the buyer's actual knowledge, encourages sellers to make their disclaimers conspicuous, thereby reducing the need for courts to evaluate swearing matches as to actual awareness in particular cases."<sup>72</sup>

C. *The "Modified Objective"<sup>73</sup> Test of "Conspicuousness"*

Relying on the phrase "reasonable person against whom it is to operate,"<sup>74</sup> some courts have chosen to consider a limited amount of subjective criteria in addition to the general factors of the objective test.<sup>75</sup> These additional factors are the buyer's status as a consumer rather than a commercial entity, the buyer's size and relative bargaining strength, and the buyer's experience in the market.<sup>76</sup> The courts stop short of the subjective test, however, by refusing any inquiry as to whether the party against whom the disclaimer is to operate possessed actual knowledge of the disclaimer.<sup>77</sup> The Ninth Circuit Court of Appeals used the modified objective test in *Sierra Diesel Injection Service, Inc. v. Burroughs Co.*<sup>78</sup>

Whether a disclaimer is conspicuous is not simply a matter of measuring the type size or looking at the placement of the disclaimer within the contract. A reviewing court must ascertain that a *reasonable person in the buyer's position* would not have been surprised to find the warranty disclaimer in the contract. A factor to consider is the sophistication of

---

70. *Id.* at 567 (Ray, J., concurring in part, dissenting in part).

71. *Id.* (Ray, J., concurring in part, dissenting in part).

72. *Id.* (Ray, J., concurring in part, dissenting in part).

73. Getz, *supra* note 30, at 1271.

74. These factors are found in the U.C.C. § 1-201(10) definition of "conspicuousness."

75. See *supra* notes 38-42 and accompanying text.

76. See *Logan Equip. Corp. v. Simon Aerials, Inc.*, 736 F. Supp. 1188, 1197 (D. Mass. 1990) ("Whether or not a term is conspicuous is a decision for the court. In making this determination, the court takes into account the location of the clause, the size of the type, any special highlighting, such as boldface, capitalization or underlining, the clarity of the clause, and the sophistication of the contracting parties . . . . The parties to the contract were not commercial innocents."); *Sierra Diesel Injection Serv., Inc. v. Burroughs Co.*, 890 F.2d 108 (9th Cir. 1989); *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 419 (5th Cir. 1980) ("Where the disclaimer is in a commercial transaction involving experienced businesspersons rather than a consumer transaction involving ordinary purchasers, the concept of reasonableness under the circumstances depends on what a reasonable businessperson is expected to notice."); *Avenell v. Westinghouse Elec. Corp.*, 324 N.E.2d 583, 586-87 (Ohio Ct. App. 1974) (among other factors leading to the court's determination that the disclaimer was conspicuous, the court considered that "the 'person' against whom the limiting language is to operate is a prominent, sophisticated entity").

77. *Baker, supra* note 29, at 186.

78. 890 F.2d 108 (9th Cir. 1989).

the parties . . . . Also relevant as to whether a reasonable person would have noticed a warranty disclaimer are the circumstances of the negotiation and signing.<sup>79</sup>

### III. IS THERE A REQUIREMENT THAT THE BUYER HAVE ACTUAL KNOWLEDGE OF THE DISCLAIMER IN ORDER TO BE EFFECTIVE?

Some courts indicate that a disclaimer is not effective if it is not actually brought to the attention of the buyer.<sup>80</sup> In *Hiigel v. General Motors Corp.*,<sup>81</sup> for example, the Colorado Supreme Court stated that a general policy existed against permitting "general disclaimer language" to negate implied warranties.<sup>82</sup> While the court had previously enforced such clauses in transactions between commercial parties, they did not choose to do so in a consumer sale unless the buyer had actual knowledge of the disclaimer:

[A]lthough a general disclaimer clause may negate implied warranties if there is a negotiated contract between a commercial seller and a commercial buyer, it is not appropriate to a consumer sale. This is so unless it is shown that "the so-called disclaimer was clearly brought to the attention of the buyer and agreed to by him . . . ."<sup>83</sup>

Recently, courts have ignored cases that made actual knowledge an absolute requirement for an effective disclaimer.<sup>84</sup> In *Stauffer Chemical Co.*

79. *Id.* at 114 (citations omitted).

80. *Twin Disc v. Big Bud Tractor*, 772 F.2d 1329 (7th Cir. 1985). The court held a disclaimer effective despite its lack of conspicuousness because the buyer had actual knowledge of the disclaimer and therefore was not surprised. The court noted that "[t]here is therefore no need to determine whether a disclaimer is conspicuous, such that the buyer's knowledge of disclaimer can be inferred, when the buyer has actual knowledge of the disclaimer." *Id.* at 1335. The Seventh Circuit apparently takes the position that the buyer must have actual knowledge of a disclaimer for it to be effective. When actual knowledge is not shown, the code requires "conspicuousness" in order to infer the buyer's knowledge. *See also Zabriskie Chevrolet v. Smith*, 240 A.2d 195 (Sup. Ct. N.J. 1968). In *Zabriskie Chevrolet*, the disclaimer was ineffective due to lack of conspicuousness since it was "in fine print on the back of the [document]." *Id.* at 198. However, the court noted that "[t]he evidence is plain that the terms of these attempted disclaimers and limitations of warranties were not actually brought to defendant's attention nor explained to him in detail." *Id.*; *see also Hiigel v. General Motors Corp.*, 544 P.2d 983 (Colo. 1975).

81. 544 P.2d 983 (Colo. 1975).

82. *Id.* at 989-90.

83. *Id.* at 989-90 (quoting *Cherokee Inv. Co. v. Voiles*, 166 Colo. 270, 274, 443 P.2d 727, 729 (1968) (decided under the Uniform Sales Act rather than the Uniform Commercial Code; the relevant section required a showing of actual knowledge of the disclaimer by the buyer in order for it to be effective)).

84. *See Stauffer Chem. Corp. v. Curry*, 778 P.2d 1083 (Wyo. 1989); *Architectural Aluminum Corp. v. Macarr, Inc.*, 333 N.Y.S.2d 818, 822 (Sup. Ct. 1972) ("[T]here is no requirement in the Uniform Commercial Code that [buyers] have had actual knowledge of seller's

*v. Curry*,<sup>85</sup> the court noted "two distinct requirements for an effective disclaimer of the implied warranty of merchantability."<sup>86</sup> The disclaimer must mention "merchantability," and if written it must be conspicuous.<sup>87</sup> Actual knowledge of the disclaimer is not required.<sup>88</sup> "If the disclaimer is in writing and is conspicuous, there is no requirement that the customer actually read or acknowledge the disclaimer in order for it to become a part of the bargain."<sup>89</sup>

#### IV. IS THERE A REQUIREMENT THAT THE LANGUAGE USED IN THE DISCLAIMER BE "UNDERSTANDABLE"?

The concept of "conspicuousness" may incorporate "understandability" as one of its factors.<sup>90</sup> In *Earl Brace & Sons v. Ciba Geigy*,<sup>91</sup> the court evaluated a disclaimer contained in a booklet attached to each container of an herbicide. The disclaimer was in bold type and appeared on a page immediately after the booklet's table of contents.<sup>92</sup> The court stated the disclaimer was effective because the disclaimer was "clear and conspicuous and one that a reasonable person would have noticed and understood."<sup>93</sup> Also, in *Wagaman v. Don Warner Chevrolet-Buick, Inc.*,<sup>94</sup> the court addressed the issue of understandability. The court noted that "[w]hether or not an exclusion or modification must be understandable, burying the same in a profusion of words may operate to hide and make it inconspicuous."<sup>95</sup> The court, however, gave effect to the disclaimer because once the buyer's attention was directed to the paragraph with large print, "a little time and patience unravels [the] meaning."<sup>96</sup> The court considered the same issue in *Union Exploration Co. v. Dowell Division*,

---

disclaimer of warranties of merchantability and fitness in order to make them effective, so long as the disclaimer is in writing and conspicuous."); *WHITE & SUMMERS, supra* note 62, § 12-5.

85. 778 P.2d 1083 (Wyo. 1989).

86. *Id.* at 1091.

87. *Id.* at 1092.

88. *Id.*

89. *Id.*

90. See *Earl Brace & Sons v. Ciba-Geigy*, 708 F. Supp. 709 (W.D. Pa. 1989); *Union Exploration Co. v. Dowell Div., Dow Chem. Co.*, 41 U.C.C. Rep. Serv. 759 (D. Kan. 1985); *Wagaman v. Don Warner Chevrolet-Buick, Inc.*, 31 U.C.C. Rep. Serv. 1604 (Pa. Ct. C.P. 1981); *Thermo King Corp. v. Strick Corp.*, 467 F. Supp. 75 (W.D. Pa. 1979).

91. 708 F. Supp. 709 (W.D. Pa. 1989).

92. *Id.* at 710.

93. *Id.*

94. 31 U.C.C. Rep. Serv. 1604 (Pa. Ct. C.P. 1981).

95. *Id.* at 1606.

96. *Id.* at 1606-07.

*Dow Chemical Co.*<sup>97</sup> The court concluded that the disclaimers were "clearly conspicuous . . . [in part because] [t]he language is clear and concise."<sup>98</sup>

#### V. U.C.C. DEFINITION OF "CONSPICUOUSNESS" AND THE MAGNUSSON-MOSS WARRANTY ACT

Currently, there is not a definition of the word "conspicuous" as used in the Magnusson-Moss<sup>99</sup> Warranty Act.<sup>100</sup> According to section 2304(a)(3)<sup>101</sup> of the Act, a "warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on [a] product, unless such exclusion or limitation conspicuously appears on the face of the warranty."<sup>102</sup> The federal district court in Virginia in *Callas v. Trane*, faced the lack of a definition for "conspicuous" in Magnusson-Moss.<sup>103</sup> The court chose to apply the U.C.C. definition by analogy.<sup>104</sup> The author considers this approach to be reasonable and, therefore, likely to be followed by other courts faced with the same issue. However, in light of the competing interpretations of the approach to be taken under the U.C.C., different results will be obtained on similar facts based solely on which state's substantive law applies to the case.

#### VI. CONCLUSION

Given the various approaches that have been taken to define "conspicuous," the U.C.C. definition should be redrafted when Article 2 is next revised so that a uniform test will be created. The U.C.C. should correct the internal inconsistency between the text of section 1-201(10) and comment 10 regarding whether an objective or subjective approach should be applied; or the editorial board might consider a "modified objective" test as is recommended by Cornell University.<sup>105</sup>

It is a worthy goal to protect the unsophisticated consumer from the harsh result of boilerplate language of disclaimer while holding the sophisticated consumer or commercial enterprise bound to its agreement. As the Code stands right now, it is uncertain whether or not the courts

---

97. 41 U.C.C. Rep. Serv. 759 (D. Kan. 1985).

98. *Id.* at 762 (emphasis added).

99. 15 U.S.C. §§ 2301-2312 (1988).

100. *Callas v. Trane CAC, Inc.*, 12 U.C.C. Rep. Serv. 2d 72, 73 (W.D. Va. 1990).

101. 15 U.S.C. § 2304(a)(3) (1988).

102. *Id.*

103. 12 U.C.C. Rep. Serv. 2d 72 (W.D. Va. 1990).

104. *Id.* at 73-74.

105. Getz, *supra* note 30. "We continue to advocate a modified objective test to determine the conspicuousness of a disclaimer." *Id.* at 1271-72.

are free to consider the level of buyer sophistication.<sup>106</sup> The inconsistency between the text of section 1-201(10) and its comment 10 have resulted in sometimes strained interpretations to achieve what appears to be a socially desirable result. This can be remedied by merely amending section 1-201(10) to account for these factors. The subjective test may be too lenient if it is held to require actual knowledge of the disclaimer. In the extreme case, both the intentionally blind consumer and the convincing liar are rewarded at the expense of a business that has in good faith indicated to the consumer that its product is disclaiming implied warranties. Likewise, the purely objective test may result in inequities in the exact opposite direction. It would permit boilerplate language that may be extremely confusing and require an unrealistic amount of legal knowledge<sup>107</sup> in order to be understood to disclaim a warranty of merchantability that is "so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution."<sup>108</sup> The only requirement to effectiveness would be assuring that the language is in capitals or dark print.

The drafters were fully aware that consumers expect some minimum standard of quality when they purchase an item, as evidenced by the enactment of section 2-314. To permit the implied warranty of merchantability to be excluded against a consumer who lacks the sophistication to understand the legal effect of the rights being disclaimed would seem to require consumers to either enroll in law school or consult an attorney every time they make a purchase of goods. Even more unrealistic in light of consumer shopping patterns is to expect that a consumer will take the time to even read a warranty term before making a purchase. The often complex terminology used in a disclaimer, not to mention the difficulty and time involved in procuring the warranties of competing goods and reading these while shopping, is certain to act as a deterrent to reading the terms for all but the most dedicated of purchasers.

These are mere generalizations, however, and do not apply in every case. There are certain to be purchasers who are capable of understanding the legal effect of a disclaimer. This is true not only of an attorney, but also of a commercial entity making a purchase in which the person authorizing the purchase either involves its attorneys or has great knowledge of both the item being purchased and any substitute goods. However, it is not true in all cases that even a large corporation is going to

---

106. Buyer sophistication is permitted under the subjective test as well as the "modified objective" test, but it is not relevant under the pure objective test.

107. It is an unrealistic goal to expect the bulk of society to possess more than a very basic understanding of the law of Sales.

108. U.C.C. § 2-314 cmt. 11 (1962).

give detailed consideration to the warranty terms of an item it purchases. This would be especially true when the item is a relatively inexpensive item that might be purchased infrequently or by a lower-level employee.<sup>109</sup> Additionally, a purely private consumer is more likely to seek legal advice or perform comparison shopping that would include warranty comparisons when the relative value of the good is great. The purchase of an \$11 toaster is not likely to provoke a consumer to study its warranty terms; although a \$15,000 car is likely to provoke such a response.

There are two reasons that justify placing the burden on the seller or manufacturer rather than on the purchaser to establish knowledge, or at least a reasonable inference of knowledge, that a disclaimer formed part of the basis of the bargain. The first reason is that a seller is in the best position to bring the clause to the attention of the purchaser. The ideal situation in contracting is a complete "meeting of the minds" between the buyer and seller. When the seller takes the time to inform the buyer of a warranty disclaimer, their minds are sure to have met absent any reason to expect that the purchaser does not comprehend what has been told to him or her. When a face to face meeting between the buyer and seller does not occur, the seller is in a position to see to it that the warranty terms appear in clear, understandable language in a location that is likely to be seen by the purchaser.<sup>110</sup> This minimizes the likelihood that the purchaser will make an uninformed purchase and thus minimizes the risk of unfair surprise.<sup>111</sup>

The second reason that justifies placing the burden upon the seller or manufacturer to bring a disclaimer to the attention of the purchaser is that it ultimately may result in manufacturers producing higher quality goods. When a manufacturer chooses to voluntarily produce an inferior quality good, placing the disclaimer of any warranty in a place where it is most likely to be noticed by the consumer such as near the price, and requiring the use of language that can be understood by most, or alternatively requiring any salespersons to bring actual attention to the warranty disclaimer when practical, will result in more educated purchasing. If the manufacturer's warranty is not sufficient to satisfy the consumer that a good will perform to his or her liking, then the consumer will not purchase it. This will, theoretically, cause the market value of that good to decrease until it reaches a point at which the purchasers feel that the

---

109. Presumably, a purchase that requires approval by an executive of the company would be of such magnitude that attorneys or experts on the item would be involved and, therefore, an informed decision would be made.

110. The author suggests placing any disclaimer at or very near the price since this is probably the most closely scrutinized portion of the package.

111. U.C.C. § 2-316 cmt. 1 (1962) ("permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise").

risk they take with inferior goods or warranties is justified by the cost savings. If the selling price is too low to be profitable for the manufacturer, then it will be forced to increase its quality or its warranty in order to attract new customers. In any event, the buyer is protected from surprise and presumably higher quality goods are produced. The result is beneficial to both consumers and manufacturers. Consumers benefit by receiving higher quality goods, which is what they generally expect when making a purchase. The manufacturer also benefits from the production of higher quality goods. They are able to offer better warranty terms to the customer, which can be an attractive selling point if the purchasers are aware of this. Yet the cost of this better warranty will be minimal since the higher quality goods are less likely to utilize the warranty.

In light of these considerations, the Permanent Editorial Board should adopt a "modified objective" test for conspicuousness. In addition to the factors relevant to the purely objective test,<sup>112</sup> the Board should consider the commercial sophistication of the buyer, the relative value of the goods purchased, and the understandability of the terms used in the disclaimer. Consumers make purchases with an expectation that the goods are generally going to perform and be of a certain level of quality. It is certainly reasonable to uphold this expectation whenever possible. It would be unreasonable to deny the buyer the benefit of the bargain as he or she reasonably expects it to be when the seller knows, or from the circumstances should have known, that the buyer would not know of or understand the disclaimer. While actual knowledge should certainly suffice to satisfy the "conspicuousness" requirement, this requirement should also be satisfied when the circumstances of the transaction are such that an expectation that the goods are warranted is unreasonable. For example, the expectation of a warranty is unreasonable when the price of the item is appreciably lower than its market value.

BERNARD F. KISTLER, JR.

---

112. See *supra* notes 38-42 and accompanying text.



