A contract for the sale of goods may contain many different types of express or implied terms. Some of those terms were discussed in Chapter 3. This chapter discusses express and implied warranty terms that may become part of a contract for sale. In a contract for sale, the parties have expectations about the quality of the goods. Those expectations form the basis of the idea of “warranty.” As stated in Official Comment 6 to Rev. § 2-313, “[t]he whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell.” Those warranties—expectations based upon what the seller has agreed to sell—may arise from what is said (express warranty), from the conduct of the parties during the sales transaction (implied warranty of fitness for a particular purpose), or from notice of the type of transaction (implied warranty of merchantability). When discussing warranty terms, just as with other terms discussed in Chapter 3, the same two questions must be answered: (1) What is the warranty term and what does it mean? and (2) Did the warranty term become part of the parties’ agreement? The answer to this second question will often depend upon the validity of a disclaimer term in the parties’ agreement.

Sections 2-312 through 2-315 set out Article 2’s warranty provisions and establish two broad categories of warranties, express and implied. Revised § 2-313 governs express warranties. Two new sections, 2-313A and 2-313B, govern express warranty type obligations to remote purchasers. The remaining sections set forth and govern implied warranties, which are imposed by law on sellers without regard to the representations made during or after contract formation. These implied warranties become part of the parties’ “total legal obligation”—the contract. Rev. § 1-201(b)(12).

A. EXPRESS WARRANTIES
Revised § 2-313 addresses express warranties which arise from the seller's affirmative actions. An “express warranty” is any of the following which become part of the “basis of the bargain”: (1) an affirmation of fact or promise made by the seller that relates to the goods, (2) descriptions of the goods, or (3) samples and models. Rev. § 2-313(2). No formal terms of guarantee need be employed, and the seller's subjective intent to warrant the goods is not relevant. Rev. § 2-313(3). Express warranties under Rev. § 2-313 are limited to privity relationships between buyers and sellers, and to emphasize that point Rev. § 2-313 now provides a definition of “immediate buyer.” Rev. § 2-313(1). Nonprivity express warranty type obligations are provided for by the new §§ 2-313A and 2-313B.

**Basis of the Bargain and Reliance.** Under pre-Code commercial law, to prove an enforceable express warranty, buyers bore the burden of proving that they actually relied on the seller's representations. The Code requires only that a seller's representations become “part of the basis of the bargain” but provides no specific definition of this requirement. One of the most rigorous debates in warranty law concerns whether Article 2 “basis of the bargain” analysis supplants, or conversely, incorporates the pre-Code requirement of reliance. Some authorities argue that Article 2 eliminates reliance as a factor of an express warranty. Others contend that Article 2's silence on the issue reflects a lack of intent to change the pre-Code law. Official Comment 5 to former and Rev. § 2-313 provides:

> In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of the goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take these affirmations, once made, out of the agreement requires clear affirmative proof.

The predominating view is to interpret this Official Comment as establishing a rebuttable presumption of reliance that sellers must disprove. In practice, most courts still find the reliance by the buyer on
the seller’s express warranty of some significance, although courts vary on which party has the burden to prove the reliance or lack of it.

Example 1: A seller advertised hair dye that is guaranteed to last three times longer than a competing brand (which lasts one month). A buyer saw the advertisement but bought the dye because he liked the color. When the hair dye washed out within one week after using it, the buyer sought to get his money back. Even though the buyer did not rely on the representation about how long the hair dye would last, that representation became part of the basis of the bargain and what the seller agreed to sell.

1. **Promises Relating to the Goods and Affirmations of Fact**

Promises and affirmations of facts that are made by sellers and that relate to the characteristics and utility of goods may be binding as warranties. Rev. § 2-313(2)(a). These representations must be made to the buyer. Revised § 2-313(3) provides for broad application of this principle by dispensing with the need for formal language.

Revised § 2-313 also provides that a seller’s statement of commendation or opinion does not create a warranty. Courts uniformly adopted this principle in theory, but the standards employed to distinguish promises and affirmations of fact from opinions are not uniform. Courts will often consider the following to determine whether a statement constitutes an opinion:

- the specificity of the statement;
- the context in which the statement was made;
- the nature of the defect;
- the parties’ relative knowledge and sophistication;
- the language employed by the seller; and
- whether the statement was written or oral.
As with all warranty claims, these cases are fact sensitive. Indistinguishable fact patterns often produce dissimilar results in different courts. The weight accorded each factor varies among courts, and no one factor normally will be dispositive.

Example 2: A buyer, with no knowledge about cars, contracted to buy a new car from a dealer who was aware of the buyer's lack of knowledge about cars. Upon the advice of her friends, the buyer asked the dealer whether the engine was the largest available for that model of car. The dealer replied that the engine “is an eight cylinder, the best engine available.” Three months later, when the buyer had the oil in the car changed, she discovered that the engine was in fact only a six-cylinder engine. The dealer’s statement that the car had eight cylinders was an express warranty. The representation about whether it was the best engine available could be merely a commendation or opinion of the seller.

2. **Descriptions of the Goods**

Descriptions of the goods by either the buyer or seller may create express warranties. Rev. § 2-313(2)(b). Though descriptions often appear indistinguishable from affirmations of fact, descriptions may be broader than affirmations of fact to the extent that descriptive terms include symbols that have special meaning within the context of particular transactions.

Example 3: A buyer bought a pesticide from a seller. The product's packaging bore the emblem “EPA.” The buyer believed that the product, which later damaged his yard, had received EPA approval. If a court agreed that the letters “EPA” could symbolize compliance with EPA requirements, the descriptive letters would be the basis for an express warranty even though the seller never affirmatively stated that the product met EPA standards. The packaging also contained a list of all of the chemicals
enclosed. That list is a description of the product and also an affirmation of fact about what the package contained.

The buyer may also make a description. For example, a buyer may request a product of a certain description and the seller may furnish that product. For example, assume the buyer requested forty-weight oil and the oil the seller furnishes is twenty-weight oil. The buyer’s request is a description that the seller adopted by purporting to supply goods meeting that description.

Often, parties concede that a term is descriptive but contest the meaning of the description. Courts rely on many of the same factors used to distinguish affirmation from opinion to make this determination of meaning. Generic terms that appear in descriptions often prove troubling because they may be construed very narrowly or broadly. One court may decide, for example, that “car” means “a combination of plastic and metal that is mobile” while another court may decide that it means “a product that provides the amenities and performs the functions that a buyer could expect reasonably from a product designed to provide transportation.”

3. **SAMPLES OR MODELS**

Samples or models used by sellers during the course of bargaining may also create express warranties. Rev. § 2-313(2)(c). An often-litigated issue under this section is whether the sample or model established a standard of quality that the seller guaranteed to meet. Courts look first at whether the parties acted as if the sample or model connoted such a standard and then look to trade usage and custom to make this determination. Although Official Comment 8 to Rev. § 2-313 suggests that courts should presume that anything illustrative of goods is a standard-creating sample or model unless the seller states expressly that the delivered goods will be of a grade inferior to that of the proffered sample, not all courts have elected to follow this suggestion.

Example 4: A buyer went to a warehouse operated by a grain processor to purchase five tons of grain. The processor sent the buyer into a storage area where a five-ton pile of grain was located. The processor made no oral or written representations about the nature of the grain. The buyer
contracted to buy five tons of grain to be delivered a week later. The processor delivered five tons of grain that had greater moisture content than the grain the buyer observed. The issue would be whether the five-ton pile was a sample or model resulting in an express warranty that the grain contracted for would conform to the sample or model.

A “sample” is a unit “drawn from the bulk of goods which is the subject matter of the sale.” Rev. § 2-313, Official Comment 8. Conversely, a “model” is “offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods” that is the subject of the sale. Id. Samples are considered more representative of quality standards than are models because samples have an obviously closer nexus to the goods that ultimately change hands.

4. **Remedial Promise**

Revised § 2-313 introduces the concept of a remedial promise to distinguish between promises made by the seller about how the goods will perform, which are express warranties under Rev. § 2-313, and promises made by the seller about the seller’s performance. Rev. § 2-313(4). A “remedial promise” is “a promise by the seller to repair or replace the goods or to refund all or part of the price upon the happening of a specified event.” Rev. § 2-103(1)(n). Remedial promises have been separated from promises about the goods themselves in order to fix a statute of limitations problem that occurred when courts erroneously considered a remedial promise to be a warranty and thus allowed the statute of limitations to begin running from the time the goods were tendered and not from the time the seller failed to perform the duty to take the remedial action. Thus, under Rev. § 2-313(4), a remedial promise “creates an obligation that the promise will be performed upon the happening of the specified event,” and under Rev. § 2-725, a cause of action for a breach of this obligation arises when the remedial promise is not performed when the performance is due. Rev. § 2-725(2)(c).

**B. Express Warranty Type Obligation to Remote Purchaser**
Revised Article 2 has two new sections that address express warranty type obligations of sellers to remote purchasers. See Rev. §§ 2-313A and 2-313B. Although these sections are similar to Rev. § 2-313 on express warranties, the obligations codified in these sections are referred to not as “warranties” but as “obligations” because, unlike a true warranty, these obligations are not between a direct buyer and seller in a contractual relationship.

These two new sections are limited to “new goods and goods sold or leased as new goods in a transaction of purchase in the normal chain of distribution.” Rev. §§ 2-313A(2) & 2-313B(2). These sections only cover representations that are made to a remote purchaser, defined as “a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.” Rev. §§ 2-313A(1)(b) & 2-313B(1)(b).

1. **Revised Section 2-313A**

The seller’s obligation under Rev. § 2-313A arises if (1) the seller “makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise,” (2) the affirmation, promise, description, or remedial promise is “in a record packaged with or accompanying the goods,” and (3) the seller “reasonably expects the record to be, and the record is, furnished to the remote purchaser.” Rev. § 2-313A(3).

The seller’s obligation to the remote purchaser is that (1) “the goods will conform to the affirmation of fact, promise or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation” and (2) the seller “will perform the remedial promise.” The distinction between affirmations of fact and an opinion is preserved so that statements that are merely “opinion or commendation of the goods” will not create the obligation. Rev. § 2-313A(4). The seller breaches the obligation created by the affirmation of fact, description, or promise (other than a remedial promise) if the goods did not conform to the affirmation, description, or promise at the time that the goods left the seller’s control. Rev. § 2-313A(6). No similar specific rule is provided for when a seller
breaches a remedial promise, but a reasonable inference is that a remedial promise is breached at the
time that the seller fails to perform the promise.

This section provides several rules that relate to the remedies for a breach of the obligation.
First, the seller may modify or limit remedies as long as the modification or limitation is given to the
remote purchaser at least by the time of purchase. Rev. § 2-313A(5)(a). The modification or limitation
may be included in the same record that provided for the affirmation of fact, promise, or description.
Id. If the remedy is not modified or limited, the seller is liable for the remote purchaser's incidental
and consequential damages under the same tests provided in § 2-715 on buyer's remedies, except that
the seller is not liable for a remote purchaser's lost profits. Rev. § 2-313A(5)(b). The measurement of
the loss incurred by the remote purchaser may be "determined in any manner that is reasonable." 
Rev. § 2-313A(5)(c). Official Comment 9 suggests that Rev. § 2-714 provides the appropriate guide
for the measurement of the remote purchaser's damages for breach of an obligation, other than a
remedial promise, through a comparison of the value of the goods if the seller's obligation had been
met and the actual value of the goods.

2. **Revised Section 2-313B**

Revised § 2-313B follows the same structure as Rev. § 2-313A. However, it differs in that it sets forth
the seller's obligation to the remote purchaser for representations made to the public, as opposed to
Rev. § 2-313A, which is concerned with representations in records that accompany the goods.

Under Rev. § 2-313B, the seller's obligation arises if (1) the seller "makes an affirmation of
fact or promise that relates to the goods, provides a description that relates to the goods, or makes a
remedial promise," (2) the affirmation of fact, promise, description, or remedial promise is made "in
advertising or a similar communication to the public," and (3) the remote purchaser purchases the
goods "with knowledge of and with the expectation that the goods will conform to the affirmation
of fact, promise or description, or that the seller will perform the remedial promise." Rev. § 2-
313B(3). The seller's obligation to the remote purchaser is that (1) "the goods will conform to the
affirmation of fact, promise or description unless a reasonable person in the position of the remote
purchaser would not believe that the affirmation of fact, promise or description created an obligation” and (2) that the seller “will perform the remedial promise.” *Id.*

Revised § 2-313B also contains the same principles regarding the distinction between affirmations and opinion and regarding remedies as discussed in connection with Rev. § 2-313A. Rev. § 2-313B(4) through (6).

**C. IMPLIED WARRANTY OF MERCHANTABILITY**

Revised § 2-314 sets out the standards for the creation of the implied warranty of merchantability. This warranty, unless modified or disclaimed, is imposed as a matter of law. The warranty of merchantability is based upon unstated reasonable expectations of the buyer about the quality of the type of goods sold. The merchantability concept is designed to change the common law rule of “caveat emptor.” A buyer in a sale of goods transaction has a right to expect that goods from a merchant will meet a certain minimum level of quality. This warranty attaches to all goods sold by merchants with respect to goods of that kind but not to goods sold by nonmerchant sellers or sellers who are merchants due to their skill and knowledge in their occupation. For Rev. § 2-314 purposes, the sale of consumable food products for consumption is expressly deemed to be a sale of goods.

A merchantable product is one that falls within that quality range normally associated by the trade with goods of its type. Though a product of “fair average quality” need not be the best available of its type, it should be better than the worst available. Merchantable goods must be fit for the ordinary purposes for which goods of their description are used, adequately packaged and labeled, and able to pass in the trade without objection. Rev. § 2-314. This list of qualities is not exhaustive. Rev. § 2-314, Official Comment 8. Common sense suggests that the list is susceptible to varying interpretations. Courts often look to the following factors when determining the merchantability of goods:

- the parties’ course of performance and dealings;
- trade usage and custom;
- the goods’ new or used status;
• the goods’ price relative to the market price of similar goods;
• the characteristics and utility of similar brands; and
• relevant government regulations and standards.

The malleable nature of these factors leads to shifting interpretations of “merchantability” over time.

Example 5: A buyer purchased a lawn mower from a seller, a lawn and garden supply store. To be merchantable, the lawn mower must “pass without objection in the trade” and be fit for its ordinary purposes. If the lawn mower was unable to cut normal lawn grass, it would be unmerchantable.

Example 6: A buyer purchased a lawn mower from his next-door neighbor, a college professor. The neighbor, who is not a merchant, does not make any implied warranty of merchantability. Thus, even if the mower does not cut the grass, the buyer is unable to sue the neighbor for breach of the implied warranty of merchantability.

Official Comment 7 to Rev. § 2-314 states that the test for product defect in tort and merchantability in contract should be the same when recovery is sought for injury to persons and property in both contract and tort. Thus, for example, this comment suggests the following:

[S]uppose that the seller makes a representation about the safety of a lawn mower that becomes part of the basis of the buyer’s bargain. The buyer is injured when the gas tank cracks and a fire breaks out. If the lawnmower without the representation is not defective under applicable tort law, it is not unmerchantable under this section. On the other hand, if the lawnmower did not conform to the representation about safety, the seller made and breached an express warranty and the buyer may sue under Article 2.
D. IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

Section 2-315 recognizes the creation of an implied warranty when a buyer can prove that the seller had reason to know that the buyer relied on the seller’s judgment or skill when buying goods for a “particular purpose.” This section, which was not changed by the amendments, acknowledges that goods, though merchantable, may not be fit for particular purposes contemplated by the parties. This implied warranty is based upon the idea that a seller who knows a buyer’s needs and knows the buyer is relying on the seller to furnish suitable goods has a responsibility to furnish suitable goods.

Example 7: A sawmill operator contracted to purchase hydraulic fluid from a dealer. The buyer told the dealer that the buyer wanted to use the fluid in a certain type of saw at the mill. The dealer selected one type of fluid and delivered it to the buyer. Although the fluid would work in most types of industrial saws, it caused frequent breakdowns in the buyer’s mill equipment. Though the fluid was merchantable for purposes of Rev. § 2-314, the fluid was not fit for the particular purpose of protecting the buyer’s mill equipment. The dealer, knowing the buyer’s requirements and knowing that the buyer was relying on the dealer’s skill and judgment, has made and breached a warranty of fitness for a particular purpose. If the dealer were a merchant with respect to goods of the kind, the dealer also would have made an implied warranty of merchantability.

The elements of an implied warranty of fitness for a particular purpose differ from an implied warranty of merchantability in three significant ways. First, the seller need not be a merchant. Section 2-315 applies to all sellers whether merchants or nonmerchants. Second, the buyer must prove that the seller had reason to know of the use for which the buyer purchased the goods and that the buyer was relying on the seller’s judgment or skill when purchasing the goods. Third, the buyer must prove actual reliance on the seller’s assurances or acts.
Example 8: Suppose that in Example 7, the buyer walked into the dealer's store and purchased hydraulic fluid with no advice from the dealer and without consulting any person. Because the buyer did not rely on the dealer's skill or knowledge to select suitable fluid, the dealer did not make a warranty of fitness for a particular purpose. If the dealer were a merchant with respect to goods of that kind, however, the dealer would have made an implied warranty of merchantability.

Courts first look to the parties’ relative knowledge and sophistication to determine whether § 2-315 claims have merit, but they also will consider whether the buyer insisted on a particular brand, made written or oral expressions of reliance, or initiated the transaction.

Implicit in § 2-315 is the idea that “particular” means something other than that which is normal. Were this otherwise, buyers would regularly assert that they purchased goods for the particular purpose of deriving all ordinary uses and benefits one might normally expect from the goods. To recognize this assertion as a valid § 2-315 claim would undermine the section’s narrow scope and frustrate the clear intent of the section. Official Comment 2 to § 2-315 recognizes the difference between an ordinary and a particular purpose:

A “particular purpose” differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

**E. WARRANTIES OF TITLE AND AGAINST INFRINGEMENT**
Revised § 2-312 provides for the creation of warranties of title and against infringement. The essence of a sales transaction is the “passing of title from the seller to the buyer for a price.” § 2-106(1). Sellers warrant, as a matter of law, that title to the goods they convey shall be good and that the conveyance is rightful. Rev. § 2-312(1)(a). This warranty also assures that title to the goods shall be free of all possessory or security interests, liens, and encumbrances, except for those of which the buyer is aware at the time of sale. Rev. § 2-312(1)(b). The 2003 amendments to Article 2 broaden the scope of the warranty of title by providing that not only must the title be good and the transfer rightful, but also that the transfer must not “unreasonably expose the buyer to litigation because of any colorable claim to or interest in the goods.” Rev. § 2-312(1)(a). This concept was taken from the comments to former Article 2, and it is in accord with the cases that have addressed this issue.

Revised § 2-312(2) provides that a merchant regularly dealing in goods of the kind sold warrants that the goods will be free of a third party’s claim of infringement. A claim of infringement may arise, for example, if the seller sells goods that are subject to a patent or a trademark and the seller does not have a patent or trademark license to sell such goods. If a seller provides goods in compliance with specifications drawn by the buyer, however, the seller makes no implied warranty against infringement and the buyer must indemnify the seller against loss in the event that the buyer’s specifications cause the seller to violate the trademark or patent rights of third parties. Rev. § 2-312(2).

Unlike the prior law, revised Article 2 allows the seller to disclaim not only the warranty of title but also the warranty against infringement. Rev. § 2-312(3). The seller can disclaim the warranty of title or the warranty of noninfringement under this section by express language or by circumstances that give the buyer reason to know that the seller is not making the warranty. Rev. § 2-312(3).

F. WARRANTY MODIFICATIONS AND DISCLAIMERS

The warranty provisions are based on the presumption that in a contract for sale the risk of product defectiveness is and should be on the seller. This presumption is tempered, however, by the policy of
freedom of contract that underlies Article 2. Thus, Rev. § 2-316 acknowledges that the parties may modify or disclaim express and implied warranties made under Rev. §§ 2-313, 2-314, and 2-315 during the bargaining process. This section establishes guidelines to be used to determine whether a warranty modification or disclaimer will be effective. Revised § 2-312 contains its own provision on disclaiming the implied warranty of title and noninfringement.

Effective warranty disclaimers do more than limit the remedies available to buyers. They may remove all basis for a remedy. Because of this, many courts have shown a disfavor for disclaimers and have developed a tendency to resolve doubts in favor of buyers.

1. **Disclaimer of Express Warranties**

When reviewing the validity of a disclaimer of an express warranty, all statements and conduct of the parties that relate to both the creation and the negation of the express warranty must be considered. Rev. § 2-316(1). These terms and acts are to be construed as consistent with each other whenever it is reasonable to do so. *Id.* Where unreasonable, the disclaimer will not be given effect. *Id.* The evidence that one can use to establish both the creation and negation of the express warranty is subject to the parol evidence rule discussed in Chapter 3. If the seller’s assurances or descriptions created an express warranty under the test of Rev. § 2-313 discussed previously, the next issue is whether those representations are part of the contract given the operation of the parol evidence rule. If the representations are part of the contract, no effect will be given to disclaimers inconsistent with the express warranty. If the representations are not part of the contract, then the disclaimer of the express warranty will be effective as it is not inconsistent with any other term of the contract.

Example 9: A buyer purchased a washing machine from a dealer. The dealer expressly warranted the machine was merchantable. The dealer’s express warranty of merchantability might not be inconsistent with a disclaimer that refutes any guarantee that the machine tub will spin at 100 revolutions per minute (rpm). This disclaimer will remain effective. But the same express warranty would be inconsistent with a disclaimer that refutes a guarantee
that the machine will clean clothes. The latter disclaimer will not be
effective.

Example 10: Assume, in Example 9, that the dealer orally represented that
the washing machine tub would spin at 100 rpm. The buyer and the dealer
then signed a document purporting to be totally integrated. The document
contained a disclaimer of all express warranties. If the oral representation is
excluded from evidence because of the parol evidence rule, then the
disclaimer is not inconsistent with the express warranty because the
warranty is not part of the contract. Therefore the disclaimer would be
effective.

2. **Disclaimer of Implied Warranties of Merchantability and Fitness for a Particular Purpose**

Subsections (2) and (3) of Rev. § 2-316 regulate modifications and disclaimers of implied warranties
of merchantability and fitness for a particular purpose. These subsections govern warranty
modifications and disclaimers that are part of the contract at formation as well as those that occur
after sale under Rev. § 2-209. The general principles governing warranty modifications and
disclaimers of implied warranties of merchantability and fitness for a particular purpose are in
subsection (2) of Rev. § 2-316. Subsection (3) operates as a specialized exception to subsection (2)
principles.

Under former Article 2, any written disclaimer of implied warranties either of
merchantability or fitness for a particular purpose had to be “conspicuous.” Former § 2-316(2).
“Conspicuous” was defined as language “so written that a reasonable person against whom it is to
operate ought to have noticed it.” Former § 1-201(10). Under this standard, conspicuousness could
be determined by such factors as print size and color in relation to the rest of the document; the use
of italicized, underscored, indented, bold, or capitalized print; the print’s location on the document;
and the parties’ relative sophistication.
Also under former Article 2, a disclaimer of the implied warranty of merchantability need not have been in writing, but if the disclaimer was in writing, the disclaimer must have been conspicuous. Whether the disclaimer was oral or written, it must have mentioned the word “merchantability” so that the buyer knew the seller was disclaiming or modifying the warranty of merchantability. Former § 2-316(2). An example of a disclaimer under these rules would be a written document that provides in all capital letters, in contrast to the rest of the document which is in normal type: “THE SELLER DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY.”

Former § 2-316(2) also governed disclaimers of the implied warranty of fitness for a particular purpose. These disclaimers had to be both written and conspicuous. However, the disclaimer need not have made specific reference to the term “fitness for a particular purpose.” General language of disclaimer generally would effectively negate this warranty. An example of a disclaimer of the implied warranty of fitness was given in the statute with the requirement that the language be conspicuous: “There are no warranties which extend beyond the descriptions on the face hereof.”

The 2003 amendments make one change to the above described rules in relation to warranty disclaimers or modification in nonconsumer contracts and make two changes to former § 2-316(2) for disclaimers of implied warranties in consumer contracts. In a nonconsumer contract, the disclaimer may be in a “record” instead of a “writing.” In consumer contracts, to disclaim the implied warranty of merchantability, the disclaimer must be in a record, be conspicuous, and use the following language: “the seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract.” Rev. § 2-316(2). To disclaim the implied warranty of fitness in a consumer contract, the disclaimer must be in a record, be conspicuous, and use the following language: “the seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract.” Rev. § 2-316(2). The required language sufficient in a consumer contract to disclaim the implied warranty of
merchantability and the implied warranty of fitness for a particular purpose will also be sufficient in a nonconsumer contract. Rev. § 2-316(2).

Exceptions. Revised § 2-316(3) establishes several exceptions to the requirements of Rev. § 2-316(2). First, sellers may disclaim implied warranties by incorporating the conditional terms “as is,” “with all faults,” or other language that “in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.” Rev. § 2-316(3)(a).

Although former § 2-316(3)(a), unlike former § 2-316(2), did not require conspicuousness, some courts have extended the requirement of conspicuousness to language used under former § 2-316(3)(a) to attempt to avoid the problem of unfair surprise to the buyer. Under the 2003 amendments, if the disclaimer of implied warranties in a consumer contract is through an “as is” or “with all faults” provision, that language must be conspicuously set forth in a record if the consumer contract is evidenced by a record. Rev. § 2-316(3).

Implied warranties may also be disclaimed when the buyer voluntarily examines the goods prior to the sale. Rev. § 2-316(3)(b). The section states that no implied warranty will extend to defects that could have reasonably been discovered during this examination. The former Official Comments expanded this protection for sellers by suggesting that the risk of defect should shift to the buyer simply upon the seller's demand that the buyer examine the goods. Under the 2003 amendments, this comment language has now been moved into the statutory text of Rev. § 2-316(3)(b) so that upon such a demand by the seller, the buyer is put on notice that the buyer now bears the burden of finding all discoverable defects in the goods.

Finally, sellers may be able to disclaim implied warranties by relying on course of dealing, course of performance, or usage of trade. Rev. § 2-316(3)(c). This provision allows courts to give effect to disclaimer clauses that do not meet the formal requirements of Rev. § 2-316 when parties to the transaction are at arm’s length, are equipped with equivalent knowledge, and have evidenced an intent to be bound by the disclaimer through the totality of their conduct leading up to the sale.
Courts were most willing to use former § 2-316(3)(c) to resolve disputes involving parties who have used and honored similar disclaimers in prior transactions.

Example 11: A contractor purchased scaffold planking from a tool supplier. The sales contract contained the same small, inconspicuous disclaimer of the implied warranty of merchantability that had appeared on previous contracts between the contractor and the supplier during a fifteen-year period. On several prior occasions, the supplier had refused to replace defective portions of scaffolding, relying on the disclaimer. The contractor never objected to the supplier’s practice. The planking collapsed and injured one of the contractor’s employees. The course of dealings alone would not result in a disclaimer of the implied warranty because the disclaimer was not conspicuous. However, the course of dealings could validate the written disclaimer because the contractor’s knowledge of the disclaimer may have rendered the writing conspicuous for the contractor.

3. **Disclaimer of Warranties of Title and Against Infringement**

The requirements for modifications or disclaimers of the warranty of title and warranty against infringements are distinct from those related to other warranties. Revised § 2-312(3) provides that the warranty of title can be disclaimed by specific language or by “circumstances that give the buyer reason to know that the seller does not claim title, that the seller is purporting to sell only the right or title as the seller or a third person may have, or that the seller is selling subject to any claims of infringement or the like.” The disclaimer by specific language does not require that the language be in a record or conspicuous. The simple recitation of a statement such as, “seller does not warrant title in the goods,” when made during the bargaining process, will usually disclaim the warranty of title.

Example 12: A sheriff held an auction of goods seized upon executing a judgment. No warranty of title would exist as the circumstances indicated that the sheriff was only purporting to sell whatever right or title the
creditor was entitled to sell under other state law. In contrast, if the auction was part of an Article 9 foreclosure of a security interest, the secured party would make a warranty of title unless the secured party disclaims the warranty. Rev. § 9-610; Rev. § 2-312, Official Comment 6.

G. THIRD-PARTY BENEFICIARIES OF WARRANTIES AND OBLIGATIONS

Historically, only buyers in privity of contract with sellers were allowed to recover under warranty suits. Though the strict requirement of privity generally has been abolished, the scope of the abolition varies by jurisdiction. Thus, privity still plays a role in warranty law, but the degree to which it does so is unresolved. At the time Article 2 originally was drafted, a consensus could not be found for the extension of warranties to third parties, and consequently, the governing provision, former § 2-318, provided the states with a choice of three options.

The 2003 amendments to § 2-318 retain those three alternatives for extension of express and implied warranties and revise them to also allow the seller’s remedial promise under Rev. § 2-313 and the seller’s obligations under Rev. §§ 2-313A and 2-313B to be extended to the class of persons designated in the three alternatives. Thus, if the seller has made a remedial promise under Rev. § 2-313 or has an obligation to a remote purchaser under either Rev. § 2-313A or 2-313B, that obligation is extended.

There are two types of extension of warranty liability to parties not in privity: horizontal and vertical. Extending warranties horizontally refers to giving warranty protection to nonbuyers who consume, use, or are affected by the seller’s goods, including persons in the family or household of the buyer. Extending warranties vertically refers to giving warranty protection to remote buyers who buy from a seller other than the original seller who made the warranty, such as a consumer who purchases goods from a retailer who purchased the goods from a manufacturer who made the warranty. Revised § 2-318 Alternative A only extends warranty protection horizontally. Revised § 2-318 Alternatives B and C extend warranty protection both horizontally and vertically.
Three points are common to all three alternatives. First, under any of the alternatives, the plaintiff must be someone who the seller reasonably could have foreseen would be affected by the goods. Second, Rev. § 2-318 does not impair a seller’s ability to disclaim warranties. Consequently, disclaimers that comply with Article 2’s provisions, and are therefore effective against initial buyers, are usually effective against remote parties. Finally, Rev. § 2-318 extends warranty liability as a matter of law. Any attempt by the seller to exclude or limit the section’s operation will not be given effect. Thus a seller cannot decide to make an express warranty only to its immediate buyer or limit the implied warranties only to its immediate buyer.

1. Revised Section 2-318 Alternative A

Revised § 2-318 Alternative A extends warranty protection, remedial promises, and obligations under Rev. § 2-313A or 2-313B to a relatively narrow class of nonprivity parties who suffer personal injury: natural persons who are family, household members, or guests of the seller’s immediate buyer or, if a seller has an obligation under Rev. § 2-313A or 2-313B to a remote purchaser, natural persons who are family, household members, or guests of the remote purchaser. The warranty, remedial promise, or obligation is extended to people who fall into that category of people who are injured in person by breach of the warranty, remedial promise, or obligation.

Example 13: A seller, a merchant with respect to goods of this kind, sold a lawn mower to a buyer. The implied warranty of merchantability arose in that sale. When the buyer started the mower for the first time, the blade for cutting grass flew loose, ricocheted off of the buyer’s child, vaulted over the fence, bounced off of the neighbor’s house, and speared the neighbor as he sat on his own patio. Assume that the loose blade breached the implied warranty of merchantability, in an Alternative A state. The buyer’s child could sue the seller for breach of the warranty of merchantability as a natural person who was a member of the buyer’s family and personally injured by breach of the warranty. The neighbor could not sue the seller for
breach of the implied warranty of merchantability for either his personal
injury or the property damage to his house as he was not a member of the
buyer's household or the buyer's guest. If the manufacturer of the lawn
mower incurred an obligation under either Rev. § 2-313A or 2-313B to the
buyer, that obligation would be extended to the buyer's child but not the
neighbor.

A few courts have construed former Official Comment 3 (which stated that former § 2-318
Alternative A is “not intended to enlarge or restrict the developing case law”) to allow extension of
former § 2-318 Alternative A to vertical nonprivity buyers. Other courts have taken former Official
Comment 3 as an invitation to extend warranty protection for property damage as well as personal
injury or to extend warranty protection to persons other than the buyer's household members or
guests.

2. Revised Section 2-318 Alternative B

Revised § 2-318 Alternative B extends any express or implied warranty or remedial promise the seller
made to the immediate buyer to any individual whom the seller reasonably could have foreseen
would be harmed by the goods and whom suffers personal injury due to the breach of warranty or
remedial promise. If the seller has an obligation to a remote purchaser under Rev. § 2-313A or 2-
313B, then the obligation extends to any individual whom reasonably may have been expected to use,
consume, or be affected by the goods and suffers personal injury due to a breach of the obligation.
This extends warranty protection both horizontally (beyond just the members of the immediate
buyer's or remote purchaser's family, household, or guests) and vertically (including transferees from
the immediate buyer or remote purchaser if reasonably foreseeable).

Example 14: If Example 13 occurred in an Alternative B state, the buyer's
child would be able to sue the seller. The neighbor, if he reasonably might
be expected to be affected by the breach of warranty, would also be able to
sue the seller for breach of the implied warranty of merchantability for his
personal injury harm but not for the harm to his house. The manufacturer of the lawn mower who incurred an obligation under either Rev. § 2-313A or 2-313B would be liable to the child and the neighbor as well for their personal injuries.

Example 15: The manufacturer sold the lawn mower to the retailer without disclaiming the implied warranty of merchantability. The retailer then sold the lawn mower to the buyer as in Example 13. The buyer used the lawn mower and the same harm resulted as in Example 13; in addition, the buyer’s person and the buyer’s house were harmed by the flying blade. In an Alternative B state, the buyer could sue the manufacturer directly for breach of the implied warranty of merchantability for his personal injury but not for the harm to his house. Both the buyer’s child and the neighbor would be able to sue the manufacturer for their personal injury harm, if both persons reasonably were expected to be affected by the breach, but not for damage to other property such as the neighbor’s house.

3. **Revised Section 2-318 Alternative C**

Revised § 2-318 Alternative C covers both vertical and horizontal nonprivity parties. It differs from Alternative B by extending coverage to entities other than individual and by allowing recovery for all injuries—including economic loss and property damage—not just for personal injuries. Under Alternative C, a seller cannot refuse to extend a warranty, remedial promise, or Rev. § 2-313A or 2-313B obligations for personal injury damages. The negative implication of that provision is that a seller can limit its liability for nonpersonal injury losses by limiting the extension of the warranty, remedial promise, or Rev. § 2-313A or 2-313B obligation to the extent that nonpersonal injury losses occur.¹

¹ There is no consensus on the scope and extent of damages allowed under former Alternative C. Most courts have not allowed the recovery by nonprivity parties, under this provision, for all economic injuries. For direct economic loss (i.e. loss to the goods sold), the result often depends on the
Example 16: In Examples 13 through 15, in an Alternative C state, the
buyer and the buyer's child would be able to sue for all injuries. In addition,
the neighbor could recover for his personal injury as well as for the harm to
his house. The seller who made the implied warranty would be able to
provide in the contract that the warranty is not extended to persons who
suffer nonpersonal injury loss, and such a term would be enforceable. The
manufacturer of the lawn mower would be liable for its Rev. § 2-313A or §
2-313B obligation to the remote purchaser, the remote purchaser's child and
the neighbor for all harm caused by the breach.

— type of warranty under which the claim is based. For breach of an express warranty, most courts allow
recovery for direct economic damages. Most courts have not allowed recovery if the claim arises from the
breach of an implied warranty, though consumers have a better chance for recovery. The courts have rarely
allowed nonprivity parties to recover consequential economic losses (e.g., anticipated profits).