
THE IDC MONOGRAPH:

Exploration of Warranties under Article 2 of the Uniform Commercial Code

P. Patrick Cella

Kopon Airdo, Chicago

Austin E. Friedrich

Roddy Leahy Guill & Zima, Chicago

Joseph Giambrone

Kopon Airdo, Chicago

R. Sean Hocking

Craig & Craig, LLC, Mattoon

John J. O'Malley

Seyfarth Shaw, LLP, Chicago

Bradley C. Nahrstadt

Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd.

Bruce H. Schoumacher

Querrey & Harrow, Ltd., Chicago

David G. Wix

Tarpey Wix LLC, Chicago

Exploration of Warranties under Article 2 of the Uniform Commercial Code

I. Introduction

In *Moorman Manufacturing Co. v. National Tank Co.*,¹ the Illinois Supreme Court ruled that a plaintiff alleging claims for product liability and seeking damages solely for economic loss may not sue in tort. Undoubtedly, *Moorman* and its progeny require that a product liability claim and the remedy for it lie in contract. As a result, Illinois plaintiffs must look to warranties as the basis for economic-loss claims, thus increasing the importance of understanding warranty law in this state.

In Illinois, warranty law is governed by Article 2 of the Illinois Uniform Commercial Code (UCC).² Article 2 provides for four types of warranties in connection with the sale of goods: (1) warranties of title;³ (2) express warranties;⁴ (3) implied warranties of merchantability;⁵ and (4) implied warranties of fitness for a particular purpose.⁶ This article will explore these four warranties and provide a practical analysis of how they operate. This article will also discuss several other important aspects of warranties under Article 2, including the exclusion and culmination of warranties, notice of breach, revocation, buyer's remedies, and the various defenses to breach of warranty actions.

II. Sections 2-312 and 2-313 – Warranties of Title and Express Warranties

Illinois courts have defined a “warranty” as “a ‘promise that a proposition of fact is true . . . [that] amounts to [a] promise to indemnify promisee for any loss [if] the fact warranted proves to be untrue.’”⁷ As stated by Judge Learned Hand in *Metropolitan Coal Co. v. Howard*,⁸ a warranty may also be understood to be “an assurance

[by] one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee [of] any duty to ascertain the fact for himself; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves [to be] untrue.”⁹ This definition of a warranty was expanded later to include a “promise that a proposition of fact is true [and] that certain facts are truly as they are represented to be and that they will remain so, subject to any specified limitations.”¹⁰

A simpler way to view a warranty is to consider it a contract in its own right.¹¹

A. Sections 2-312(1) and (2) – Warranty of Title

Every contract for the sale of goods in Illinois includes a warranty that:

- (a) the title conveyed shall be good, and its transfer rightful; and
- (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.¹²

A warranty of title may be excluded or modified by specific language giving the buyer reason to know that the seller is only selling the title he possesses.¹³ “Very ‘precise and unambiguous language must be used to exclude a warranty so basic to the sale of goods as is title.’”¹⁴ Language such as, “the seller does not warrant that he has any right to convey the title to the goods,” is necessary.¹⁵ A seller is required to be specific regarding the title he possesses to adequately disclaim the warranty of title. There needs to be a reference to the goods actually purchased

by the buyer.¹⁶ Furthermore, when the language in a purported disclaimer expresses how the seller’s liability will be limited rather than what title (or lack thereof) the seller purports to transfer, the purported disclaimer is ineffective.¹⁷

A warranty of title also could be excluded by circumstances that give the buyer reason to know that the seller does not claim to have title, or that the seller is purporting to sell only the title that he has.¹⁸ Circumstances could be sufficient to exclude the warranty of title, even if it has not been excluded by sufficiently specific language.¹⁹

For example, Section 2-312(2) provides that sales by sheriffs, executors, certain foreclosing lienors, and other similarly situated persons could be so out of the ordinary commercial course of dealing that their peculiar character is immediately apparent to the buyer, and therefore, no personal obligation is imposed on a seller who is purporting to sell only an unknown or limited right.²⁰ This section does not address issues relating to restitution in such circumstances, such as when a unique article is reclaimed after it is sold by a third-party claiming to be the rightful owner.²¹ Foreclosure sales under Article 9 of the UCC²² are not subject to Section 2-312(2).

Finally, the discussion of warranty of title would not be complete without mentioning when the warranty of title passes to the buyer. Although the parties might make the transfer of title part of the agreement, Section 2-401 offers rules for when title passes from the seller to the buyer in the absence of any such agreement.²³ Title passes to the buyer “at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.”²⁴ In other words, title passes

— Continued on page M-4

About the Authors



P. Patrick Cella is a member of *Kopon Airdo, LLC*. He focuses his practice on contested litigated matters in the areas of nursing home negligence and premises liability matters, as well as commercial and contract dis-

putes and property subrogation matters. Mr. Cella also provides risk management services to his clients through contract formation and negotiation strategies. Mr. Cella counsels a wide variety of clients, including religious organizations, universities and high schools, nursing homes, manufacturers, and retail establishments. Mr. Cella is a member of the Young Leaders Committee for the Tooling and Manufacturing Association, and sits on the Board of Directors for the LaSalle Manor Retreat Center in Plano, Illinois. He also sits on the Board of Regents at St. Ignatius College Prep High School, and is a member of the Commercial Litigation Committee for the Illinois Association of Defense Trial Counsel. Mr. Cella received his undergraduate degree from Miami University and his law degree from DePaul University College of Law.



Austin E. Friedrich is an associate with the law firm of *Roddy, Leahy, Guill & Zima, Ltd.*, in Chicago, Illinois. Prior to being admitted to the Illinois Bar in November 2012, Mr. Friedrich served as the Head Varsity Football Coach for

Muchin College Prep, a Noble Network Charter School in Chicago. He also worked for two Congressmen in Washington D.C. as a Legislative Aid. He earned his BA from Ripon College in Wisconsin and his J.D. from The John Marshall Law School, where he was a member of moot court, mediation, and negotiation teams.



Joseph Giambrone has been an associate attorney with *Kopon Airdo, LLC*, since November 2012. Mr. Giambrone represents commercial and not-for-profit organizations, including corporations, religious institutions, schools, and

property owners in the area of civil litigation, which includes premises liability, school law, nursing home litigation, and products liability.



R. Sean Hocking is a partner with *Craig & Craig, LLC's* Mattoon office. Mr. Hocking focuses primarily in the areas of products liability, general civil litigation, intellectual property, and medical malpractice. He trained as an engineer in the

field of aeronautical and astronautical engineering, earning that degree from the University of Illinois, prior to his entry into the practice of law. He received his J.D. from Southern Illinois University. Mr. Hocking is well regarded for his abilities to communicate technical and technological issues to lay persons and to dissect the technical opinions of opposing experts during the oral examination of those experts. He is an active member of the Illinois Defense Counsel.



John J. O'Malley is a partner in the Chicago office of *Seyfarth Shaw LLP* and has over 30 years of experience in the area of product liability, tort, and professional liability defense. Mr. O'Malley has defended numerous personal

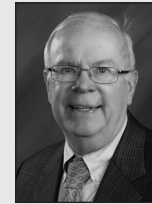
injury actions involving product liability, toxic tort, negligence, the Structural Work Act, and the Federal Employer Liability Act. In the professional liability area, he has represented attorneys successfully in both the trial and appellate courts. He has particular experience in handling malpractice claims involving corporate, bankruptcy, environmental, and probate matters. A former law clerk for Justice John J. Stamos of the Illinois Appellate Court, Mr. O'Malley has served as a lecturer at The John Marshall Law School. He is also a frequent workshop panelist and lecturer on product liability and litigation. Mr. O'Malley earned his B.A. from College of the Holy Cross and earned his J.D., *cum laude*, from DePaul University.



Bradley C. Nahrstadt, a partner at *Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd.* in Chicago, focuses his practice on the defense of high stakes products liability, premises liability, insurance bad faith, and commercial claims. Mr.

Nahrstadt has litigated cases involving a wide variety of products. Mr. Nahrstadt has served as regional counsel for a national testing laboratory

and currently serves as regional counsel for a large consumer of welding rods, a leading optical manufacturer, and a major brake and clutch manufacturer. He is a graduate of Monmouth College *summa cum laude* and the University of Illinois College of Law *cum laude*. He currently serves as a member of the Illinois Association of Defense Trial Counsel Board of Directors.



Bruce H. Schoumacher is a shareholder and Group Co-Chair at *Querrey & Harrow, Ltd.*, where he practices construction, commercial and professional liability law. He is a graduate of Northwestern

University (B.S. degree) and the University of Chicago (M.B.A. and J.D. degrees). Mr. Schoumacher is a fellow of the American College of Construction Lawyers, Past President of the Society of Illinois Construction Attorneys, and Secretary of the Council of ISBA Section on Construction Law. Mr. Schoumacher has authored or co-authored eight books and written numerous articles on construction law. His most recently written chapters are "Mechanics Liens," which appears in *Construction Law* (ABA Publishing, 2009), and "Construction Insurance," published in *Construction Law – Transactional Considerations* (IICLE, 2010). He has spoken at over 100 seminars on construction and insurance law.



David G. Wix is a partner at *Tarpey Wix LLC* and concentrates his trial practice on complex commercial litigation disputes, including breach of contract, breach of warranty, fraud and related business torts, trade

secret misappropriation, fiduciary wrongdoing, partnership and joint venture disputes, and distributor disputes. Many of these litigation matters involve requests for extraordinary equitable remedies, such as injunctive relief. Mr. Wix's trial practice also focuses on defending manufacturers involved in product liability lawsuits, and he routinely advises manufacturers on product recall and product safety-related issues. Mr. Wix obtained his J.D. from Chicago-Kent College of Law and his undergraduate degree from Princeton University.

when the seller has delivered the goods.

Delivery can occur in two ways. First, the contract can authorize the seller to send the goods to the buyer, but not require the seller to deliver them at the buyer's destination.²⁵ In this circumstance, the seller is not actually physically delivering the goods to the buyer.²⁶ Here, title passes at the time and place of shipment—the buyer carries the risk of loss during shipment.²⁷ Second, the contract could require a delivery at a specific destination.²⁸ In this situation, title transfers when the buyer actually receives the goods—the seller carries the risk of loss during the shipment.²⁹ If, as sometimes occurs, the seller is only required to deliver documents of title and not the actual goods, title passes when the seller delivers such documents.³⁰ If no documents of title are to be delivered and the contract identifies the goods, title passes at the time and place of contracting.³¹

B. Section 2-312(3) – Warranty against Infringement

In addition to the warranty of title, a merchant-seller, regularly dealing in the type of goods subject to a purchase agreement, warrants that the goods must be delivered free of any infringement claim by a third-party.³² A buyer, however, who furnishes specifications to the seller, must hold the seller harmless against any claim arising out of compliance with the specifications.³³ A merchant seller's warranty against infringement is subject to the same waiver and disclaimer rules as the warranty of title.³⁴ There are no specific requirements that any disclaimer or modification of the warranty against infringement be contained in a record or be conspicuous.³⁵ Generally, to sustain a breach of warranty claim against infringement, a buyer must demonstrate that the seller was a merchant regularly dealing in the goods purchased,

the goods were subject to a rightful infringement claim of a third party upon delivery, the buyer did not furnish specifications to the seller, and the parties did not form another agreement.³⁶

There is not a wealth of case law in Illinois over the past decade with regard to Section 2-312. As one case put it, Section 2-312 is “an infrequently litigated section of the UCC.”³⁷ Therefore, included within this discussion is an Illinois case, as well as cases from several other states, applying the terms of Section 2-312. These cases have been divided into two sections: (1) Warranty of Title, and (2) Warranty Against Infringement.

1. Warranty of Title

In *Kel-Keef Enterprises, Inc. v. Quality Components*,³⁸ the buyer alleged that the seller breached the warranty of title under Section 2-312 of the UCC, because the seller did not have good title to certain business assets that were sold as part of a purchase agreement.³⁹ The seller argued that a letter sent to the buyer excluded the warranty guaranteed by Section 2-312.⁴⁰ The Illinois Appellate Court First District held that the seller breached the warranty of title provided for in Section 2-312.⁴¹ The court reasoned that the letter, which purportedly excluded the Section 2-312 warranty, was “too vague and general.”⁴² It did not even mention the warranty of title.⁴³ Moreover, the court held that the letter did not focus on title to any of the specific assets the purchaser received in the transaction.⁴⁴

The court also rejected the seller's argument that the circumstances put the buyer on notice that the Section 2-312 warranty was excluded.⁴⁵ The court cited to a case in which the seller notified the buyer in a side conversation that he was only selling the rights of the property that he

possessed.⁴⁶ In *Kel-Keef Enterprises, Inc.*, the court explicitly held that “there [were] no such circumstances.”⁴⁷ The letter sent to the buyer did not alert the buyer to the potential problem with title, and, in fact, the seller had told the buyer that everything was “clean.”⁴⁸ Accordingly, the court found that the seller breached the warranty of title provided for in Section 2-312.⁴⁹

Finally, in addressing an “unarticulated argument” made by the seller, the court, in interpreting the UCC committee comments, noted that the warranty of title within Section 2-312 is “technically not considered an ‘implied’ warranty under the UCC.”⁵⁰ Therefore, the warranty of title is not subject to the disclaimer language within the UCC applicable only to implied warranties.⁵¹

In *Moore v. Pro Team Corvette Sales, Inc.*,⁵² shortly after purchasing a Corvette from the seller, the buyer learned that the car was stolen.⁵³ The buyer sued for breach of the warranty of title under Section 2-312 of the UCC.⁵⁴ The seller argued that the purchase agreement disclaimed the warranty.⁵⁵ The Ohio Court of Appeals for the Third District held that the contract at issue failed to properly disclaim the warranty.⁵⁶ The relevant portion of the sales contract provided, “[a]ll warranties pursuant to O.R.C. 1302.25 (UCC 2–312) (warranty of title and against infringement) are hereby excluded from this transaction.”⁵⁷ The court looked to other jurisdictions and found that “very precise and unambiguous language” is required to exclude a warranty of title.⁵⁸ Moreover, the court held that the language should express clearly, with specificity, what the seller is disclaiming, rather than what the buyer is not receiving.⁵⁹ The court reasoned that the language of the contract at issue failed to articulate sufficiently what the seller was transferring to the buyer.⁶⁰

In another case involving the purchase of a Corvette, *Saber v. Dan Angelone*

In its analysis, the court noted a split authority among jurisdictions concerning the scope of the warranty of title. Some jurisdictions have found a violation of the warranty of title when a “substantial shadow” is cast over the buyer’s title. Others permit a breach only where a third party establishes superior title.

Chevrolet,⁶¹ the Supreme Court of Rhode Island held that impoundment based on a suspicion of theft was a sufficient enough mark upon title to the vehicle to qualify as a breach of the warranty of title.⁶² The buyer had purchased a used Corvette, only to discover soon after that the car possibly had been stolen. The Corvette subsequently was impounded by the state police.⁶³ After further investigation, the police discovered that the car was not stolen; rather, it was destroyed in a fire and rebuilt from various used parts.⁶⁴ The car then was returned to the buyer.⁶⁵ The buyer sued the seller for breach of warranty of title.⁶⁶

The court held that the seller breached the UCC warranty of title.⁶⁷ The court adopted the position in the UCC comments that a buyer can establish a breach of warranty of title claim “by showing a disturbance of quiet possession.”⁶⁸ In its analysis, the court noted a split authority among jurisdictions concerning the scope of the warranty of title.⁶⁹ Some jurisdictions have found a violation of the warranty of title when a “substantial shadow” is cast over the buyer’s title.⁷⁰ Others permit a breach only where a third party establishes superior title.⁷¹ The Rhode Island Supreme Court adopted the former view.⁷² Applying this law, the court found that the impoundment of the vehicle under the suspicion it was stolen cast a significant enough shadow to qualify as a breach of the warranty of title.⁷³

2. Warranty against Infringement

In *Phoenix Solutions, Inc. v. Sony Electronics Inc.*,⁷⁴ a third-party asserted a patent infringement claim against the buyer of certain computer software.⁷⁵ The buyer filed a third-party claim against the seller for breach of warranty of title and against infringement under Section 2-312 of the UCC.⁷⁶ The third party and the buyer settled their patent infringement case.⁷⁷ This case dealt with the dispute between the original software seller and the buyer.

The buyer and the seller filed cross motions for summary judgment concerning the breach of warranty claim.⁷⁸ The federal district court for the Northern District of California outlined the standard in a breach of warranty claim under Section 2-312: “a party must show the seller was a merchant regularly dealing in goods of the kind, the goods were subject to a rightful infringement claim of any third party upon delivery, the buyer did not furnish specifications to the seller, and the parties did not form another agreement.”⁷⁹

The court concluded that the seller was “a merchant regularly dealing in goods of the kind” based upon the seller’s experience with the software at issue.⁸⁰ Next, the court found that the buyer met its burden in asserting a “rightful [infringement] claim.”⁸¹ The court reasoned that the infringement claim had a “significant and adverse effect” on the buyer’s ability

to use the software program it purchased from seller.⁸²

The court, however, held that additional fact discovery was needed to determine if the buyer furnished specifications to the seller.⁸³ The court noted that a seller will not be subject to a breach of warranty claim if the claim “stems from the seller’s compliance with fulfilling the buyer’s specifications.”⁸⁴ If such a claim exists, under Section 2-312 all costs, including attorney fees, are shifted to the buyer who furnished the specifications that led to a “rightful claim” of infringement.⁸⁵

In another California case, *Pacific Sunwear of California, Inc. v. Olaes Enterprises, Inc.*,⁸⁶ a third party filed a trademark infringement suit against the purchaser of t-shirts. The buyer settled with the third party. Then, the buyer sued the seller for breach of warranty under Section 2-312.⁸⁷ The trial court granted the seller’s motion for summary judgment, based upon its finding that the trademark infringement case was not a rightful claim of infringement pursuant to Section 2-312.⁸⁸

After an in-depth examination of official commentary to the UCC, the statutory scheme, and public policy, the California Court of Appeal, Fourth District, concluded that “the warranty against rightful claims applies to all claims of infringement that have any significant and adverse effect on the buyer’s ability to make use of the purchased goods, excepting only frivolous claims that are completely devoid of merit.”⁸⁹ Based upon the rule it set forth, the court of appeal held that the trial court erroneously granted the seller’s motion for summary judgment.⁹⁰ The court reasoned that the filing of the trademark infringement suit, the ensuing litigation, and the eventual settlement created a triable question as to whether the third party’s claim was a rightful claim.⁹¹

— Continued on next page

In its analysis, the court noted that a majority of courts broadly interpret the warranty of title and the warranty against infringement.⁹² According to the court, the majority view concerning Section 2-312 warranties is that “there need not be an actual encumbrance on the purchaser’s title or actual disturbance of possession to permit a purchaser to recover for a breach of warranty of title.”⁹³

The Appellate Division of the Superior Court of New Jersey addressed the issue of an infringement claim in *Sun Coast Merchandise Corp. v. Myron Corp.*⁹⁴ In that case, the buyers purchased Type I calculators from the sellers.⁹⁵ Then, a third party filed a patent for a calculator similar to the seller’s Type I calculator (“Type II calculators”). In response, and to avoid potential patent issues with Type I calculators, the buyer and the seller began negotiating for the purchase of four million Type II calculators.⁹⁶ After failed negotiations concerning what the seller would do should a patent infringement arise, the seller sued the buyer for breach of contract, and the buyer asserted a counter-claim pursuant to Section 2-312(3) of the UCC.⁹⁷ The case was tried to a jury verdict in favor of the seller, but the court vacated or reduced certain damages awarded to the seller. Both parties appealed.⁹⁸

The question on appeal was whether the third party had a “rightful claim” for patent infringement with regard to the Type II calculators.⁹⁹ The court held that the intent of Section 2-312 is to protect buyers against patent and trademark claims that could be asserted against the goods purchased.¹⁰⁰ The court ruled that a claim “must cast a substantial shadow on the buyer’s ability to make use of the goods in question, in order to constitute a breach of the warranty against infringement.”¹⁰¹

The appellate court held that the trial court properly submitted the issue of breach

of warranty under Section 2-312(3) to the jury, and the court rejected the seller’s argument that the buyer had no legal recourse until the goods were delivered.¹⁰² The court reasoned that a jury would decide the extent to which the seller was willing to accommodate the buyer with respect to the possible third-party patent infringement claims to determine if the third party’s claim cast a significant enough shadow to constitute a rightful claim under Section 2-312(3).¹⁰³

The cases noted above indicate that, although not litigated frequently, warranty of title and against infringement claims turn on the specific facts of each case, and the specific language or circumstances offered to support a possible disclaimer. Of course, as noted in *Kel-Keef*, while considered an implied warranty, the warranty of good title under Section 2-312 is not subject to the general disclaimer language in Sections 2-316 and 2-317.

A warranty of title may be disclaimed pursuant to the terms of Section 2-312 only, including by express language in the written agreement or circumstances that provide sufficient notice to the buyer that the seller lacks sufficient title.¹⁰⁴ Therefore, it is essential to specifically disclaim the warranty of title if the seller does not have adequate title in the goods being sold. Furthermore, because circumstances might arise in which a court could determine that the buyer was “on notice” that the seller did not have adequate title, a buyer should clarify, prior to acceptance, any suspicion regarding title, to ensure that the buyer takes the goods with good title.

The factual circumstances to disclaim a warranty against infringement are articulated in Part 3 of Article 2 of the UCC. A party asserting a claim for infringement must establish the necessary elements.¹⁰⁵ To defeat a claim, a seller need only eliminate one of the elements, or provide clear and specific evidence that the warranty was dis-

claimed by the language of the agreement, or the circumstances of the transaction.¹⁰⁶

C. Section 2-313 – Express Warranties

While normally not very instructive regarding appropriate business and sales techniques, Tommy Callahan from the movie *Tommy Boy* illustrates the importance many buyers place on the representations and promises made by sellers: “I can get a good look at a T-bone by sticking my head up a bull’s [rear end], but I’d rather take a butcher’s word for it.”¹⁰⁷

As with many purchases made, including those from a butcher, a buyer routinely relies on the expertise and knowledge a seller has regarding its product. In most situations, a buyer relies on those promises and “affirmations” made by the seller, expecting that the particular product will meet or exceed those representations.

1. Elements of an Express Warranty

In practice, sellers sometimes overzealously represent the virtues of their product, or the buyer places too much reliance on the opinions of the person. In either situation, if the product does not meet the buyer’s expectations, a breach of an express warranty claim may arise. Section 2-313 of the UCC codifies the requirements of an express warranty. Section 2-313 provides that an express warranty is created by:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.¹⁰⁸

**a) Section 2-313(1)(a) –
Affirmations or Promises**

An affirmation of fact or promise amounting to an express warranty must have been made at the time of the sale with the intention of warranting quality and not as a mere expression of opinion.¹⁰⁹ A seller might try later to disclaim a warranty, but a disclaimer is ineffectual if it is made after a contract is concluded and the buyer did not assent to the change.¹¹⁰ Under an express warranty, the language of the warranty itself dictates the obligations of the parties.¹¹¹

When an express warranty has been made, the goods shall conform to the affirmation or promise, description, sample, or model.¹¹² It sounds simple enough, but there are differing opinions regarding when an affirmation, description, or sample constitutes an express warranty and when the express warranty forms a “part of the basis of the bargain.” Illinois courts have not been consistent in interpreting the “basis of the bargain” language in Section 2-313 to require proof that a plaintiff actually relied on the warranty.¹¹³

The matter of timing may become relevant in a discussion of reliance. For example, the Illinois Appellate Court Third District, has held that a sales brochure for a water well drilling rig did not create an express warranty in the sale of the rig to the buyer when the buyer testified that he

did not rely on the sales brochure and could not even recall whether he initially saw the brochure before or after the sale.¹¹⁴

**b) Section 2-313(1)(b) –
Description of Goods**

Section 2-313(1)(b) gives express warranty effect to a seller’s description of goods if they are a “part of the basis of the bargain.”¹¹⁵ Generally, disclaimers of descriptions of goods found to be express warranties are invalid if the disclaimer is inconsistent with the terms of the parties’ agreement.¹¹⁶ Significant reliance by the buyer on his or her examination of the goods before a deal is closed indicates the buyer’s lack of reliance on the seller’s affirmations or descriptions and precludes the creation of an express warranty.¹¹⁷ Some courts, however, have held that a buyer is not barred from relying on an express warranty of quality simply because the buyer inspected the goods when the defects were such that they would only become apparent through time and use.¹¹⁸

Documents, brochures, and advertisements could constitute express warranties under the UCC, and when these affirmations are made during the bargaining process, they are presumed to be part of the bargain unless clear, affirmative proof shows otherwise.¹¹⁹ The following might also give rise to express warranties: contract documents, catalogues, specifications, plans and blueprints, product manuals, correspondence, inspection reports, packaging, labels, and package inserts.¹²⁰

No formal words are necessary to establish an express warranty. In Illinois, however, a statement representing the seller’s opinion or commendation is not actionable.¹²¹ Mere “puffery” will not open a seller to a claim for a breach of an express warranty.¹²² To be an express warranty, the representation must be (1) regarding a

fact (that is, something that can be proven false); (2) of which the buyer is ignorant; and (3) that becomes part of the parties’ bargain.¹²³ If the seller can show that the claimed statements were mere puffery and did not become part of the benefit of the bargain, then the seller can show that no express warranty existed. Whether statements made by the seller constitute puffery or an express warranty is generally a question of fact.¹²⁴

No bright-line distinction between express warranties and “puffing” exists, but sales talk that “relates only to the value of the goods or the seller’s personal opinion and commendation of the goods is considered puffing and is not binding on the seller.”¹²⁵ Numerous Illinois courts have used the following language to differentiate between the creation of an express warranty and mere “puffery”:

To determine whether or not there is a warranty, the decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment on a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty and in the latter there is not.¹²⁶

It is important to remember that the mere use of descriptive terms in a sales contract is not operative to bring into existence an express warranty when the subject matter of the sale can be determined by independent means not connected with the description.¹²⁷

— Continued on next page

**c) Section 2-313(1)(c) –
Conformance of the Goods**

An express warranty creates an obligation on the seller to deliver goods that conform to the promise, description, or model offered by the seller.¹²⁸ The warranty is breached if the goods do not conform.¹²⁹ Whether a sample is made part of the basis of the bargain is essentially a question of fact.¹³⁰

The terms “sample” and “model” are not synonymous. Section 2-313(1)(c) applies to both a sample actually drawn from the goods that are the subject of the sale and to a model that is offered for inspection when the subject matter is not at hand and has not been drawn from the bulk of the goods.¹³¹ The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction.¹³²

A straight sample might be more persuasive than an illustrative model. In general, the presumption is that any sample or model, just like any affirmation of fact, is intended to become a basis of the bargain.¹³³ When the seller exhibits a sample purported to be drawn from a lot of goods, good faith requires that the sample be fairly drawn.¹³⁴ The mere exhibition of a sample does not by itself show whether it is merely intended to “suggest” or to “be” the character of the subject matter of the contract.¹³⁵ The question is whether the seller has so acted with reference to the sample as to become responsible that the whole shall have at least the values shown by it.¹³⁶ If the sample has been drawn from the lot, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of responsibility.¹³⁷ If, on the other hand, a sample of merchandise not on hand is offered for inspection, the presumption that it has become a literal description

of the subject matter of the sale is not so strong, particularly if modification on the buyer’s initiative impairs any feature of the model.¹³⁸

The precise time when words of description are made or samples shown is not material.¹³⁹ The sole question is whether the language, samples, or models should be regarded as part of the contract.¹⁴⁰ If language that otherwise would create an obligation under Section 2-313 is used after the closing of the deal, such as when the buyer at the time of delivery asks for and receives an additional assurance, an obligation will arise if the requirements for a modification are satisfied.¹⁴¹

**2. Breach of an
Express Warranty Claim**

To establish breach of an express warranty, the plaintiff must show by a preponderance of the evidence the terms of the warranty, the failure of some warranted part, a demand on the defendant to perform under the terms of the warranty, a failure of the defendant to do so, a compliance with the terms of the warranty by the plaintiff, and damages measured by the terms of the warranty.¹⁴² Regarding the burden of proof, a reviewing court may not reverse a trial court’s judgment regarding the existence of an express warranty merely because different conclusions might have been drawn. The findings of the trial court will not be disturbed on appeal unless they are against the manifest weight of the evidence.¹⁴³

The following several cases are illustrative regarding how courts in Illinois have evaluated a claim pursuant to Section 2-313. In *MacNeil Automotive Products v. Cannon Automotive, Ltd.*,¹⁴⁴ the buyer contracted with the seller to purchase automobile floor mats.¹⁴⁵ The buyer alleged the seller breached express warranties when it supplied defective floor mats.¹⁴⁶ Specifi-

cally, the plaintiff alleged the seller assured it “could manufacture a quality mat with carpet that properly adhered to the mat, that Cannon’s mats would meet MacNeil’s and Hyundai’s expectations of quality, and that Cannon’s mats would be suitable for their purpose.”¹⁴⁷ The District Court for the Northern District of Illinois held the seller had made express warranties regarding the adhesive qualities of the mats.¹⁴⁸

Relying on Illinois case law and Section 2-313, the court established a three-step analysis to determine if a representation constitutes an express warranty: “a representation must be (1) regarding a fact (that is, something that can be proven false); (2) of which the buyer is ignorant; and (3) that becomes part of the parties’ bargain.”¹⁴⁹ The district court held that the seller’s representation regarding “quality” mats that would “meet expectations of quality,” and would “be suitable for their purposes” were not express warranties.¹⁵⁰ The court found these representations to be too vague and lacking any specific facts necessary to constitute an express warranty.¹⁵¹ But, the seller’s promise that the mats would have “carpet that properly adhered to the mat” was a more specific representation.¹⁵² The facts alleged demonstrated that the seller was aware of how the carpet would adhere to the mat, and the buyer was ignorant regarding this fact.¹⁵³ Moreover, the buyer expressed specific concerns regarding the adhesiveness of the mats, and the seller, in turn, made specific representations in response to alleviate the concerns.¹⁵⁴ Therefore, the court held that the adhesiveness of the mat became part of the bargain between the parties.¹⁵⁵

In *Oggi Trattoria & Caffè, Ltd. v. Isuzu Motors America, Inc.*,¹⁵⁶ the Illinois Appellate Court First District addressed the nature of written warranties within a sales contract. In that case, the buyer purchased a vehicle from the seller.¹⁵⁷ Shortly after

purchase, the buyer brought the vehicle into the seller's dealership on several occasions to address a plethora of concerns.¹⁵⁸ For several years, the repairs were made pursuant to the warranty.¹⁵⁹ Eventually, the seller noted the buyer had failed to maintain its own vehicle properly, including the failure to change the oil in the engine, voiding the warranty.¹⁶⁰ Then, the buyer filed suit alleging, among other claims, that the seller had breached its express written warranty to service all parts and components, including the vehicle's transmission.¹⁶¹ The trial court granted the buyer's motion for summary judgment.¹⁶² On appeal, the First District affirmed.¹⁶³

The appellate court held that the express warranties were contractual, and thus, the specific language of the written warranties was operative.¹⁶⁴ Moreover, in a breach of express warranty action brought pursuant to Section 2-313, the court held that a plaintiff has the burden to prove, by a preponderance of the evidence:

the terms of the warranty, the failure of some warranted part, a demand upon the defendant to perform under the terms of the warranty, a failure of the defendant to do so, a compliance with the terms of the warranty by the plaintiff, and damages measured by the terms of the warranty.¹⁶⁵

In *Oggi Trattoria & Caffè, Ltd.*, the court found that the buyer failed to prove the repairs to its automobile were caused by defective workmanship.¹⁶⁶ The court noted that the buyer's claim rested solely on the fact that the number of times the car required service indicated that the car was defective.¹⁶⁷ Yet, the evidence demonstrated that the seller had performed the repairs, free of charge, in accordance with the warranty terms.¹⁶⁸ Moreover, the repairs

[T]he court held that even if the seller had stated the videotapes would last a lifetime, such a statement is a mere expression of opinion or "puffery." Statements that relate only to the value of the goods or to the seller's personal opinion or commendation of the good is considered "puffing" and is not actionable.

must have been completed satisfactorily, because the vehicle was never serviced for the same issue twice.¹⁶⁹ Therefore, the written express warranty was not violated.¹⁷⁰

Even Walt Disney has been called to respond to its promises regarding the quality of its products. In *Schreib v. Walt Disney Co.*,¹⁷¹ a purported class action, the buyers purchased videotapes sold by Walt Disney.¹⁷² The buyers sued the sellers for breach of an express warranty after the videotapes began to deteriorate and became unplayable.¹⁷³ The trial court dismissed the plaintiffs' complaint.¹⁷⁴ The plaintiffs appealed.¹⁷⁵ The First District affirmed the trial court's dismissal.

To prove breach of an express warranty under Section 2-313, the plaintiff must show "a breach of an affirmation of fact or promise that was made a part of the basis of the bargain."¹⁷⁶ When interpreting express warranties, courts will "give the words used their common meaning and ordinary commercial usage."¹⁷⁷ In *Schreib*, the buyers claimed that the seller had created express warranties by labeling its products, "Gold Collection" and "Masterpiece Collection."¹⁷⁸ The plaintiffs claimed that these terms indicated that the videotapes were of a higher quality, and would last longer than ordinary videotapes. The court, however, held that this language did not constitute an affirmation of fact that the videotapes would last for generations or that they would have an extraordinary

life span.¹⁷⁹

Moreover, the court held that even if the seller had stated the videotapes would last a lifetime, such a statement is a mere expression of opinion or "puffery."¹⁸⁰ Statements that relate only to the value of the goods or to the seller's personal opinion or commendation of the good is considered "puffing" and is not actionable.¹⁸¹

In another "puffery" case, *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*,¹⁸² the District Court for the Northern District of Illinois held the alleged express warranties regarding a machine designed to cut and stack sheets of steel were sufficiently specific to constitute an express warranty. In *Loeffel Steel Products, Inc.*, the buyer sued for breach of express warranty after the machine allegedly failed to perform according to specifications.¹⁸³ In analyzing whether the subject contract contained an express warranty, the court distinguished warranties from "puffery."¹⁸⁴

According to the court, "puffery" includes "generalized statements on which no reasonable person could rely."¹⁸⁵ In this case, the express language offered by the seller was as follows: "DBI guarantees this equipment to operate mechanically within the specifications and capacities as mentioned in this quotation on a production basis."¹⁸⁶ The defendant claimed that the language noted above was mere "puffery." The court noted several "clas-

— Continued on next page

sic” examples of “puffing,” including “the product is of the highest quality” or “the product is the best money can buy.”¹⁸⁷ Inapposite to these “classic” examples, the court held that the clarity of the guarantee noted above fits perfectly within the UCC’s definition of what constitutes a warranty: “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.”¹⁸⁸

Therefore, the court found that, because the agreement contained “only factual, detailed, precise specifications relating to the particular piece of machinery” purchased by the buyer, the seller had made an actionable express warranty.¹⁸⁹ In concluding that the contract at issue contained express warranties, the court noted that Illinois courts have found warranties in cases involving “infinitely less specific promises.”¹⁹⁰

As noted above, the key analysis in a case subject to Section 2-313 is the specific language used; the knowledge possessed by the buyer regarding the product; and whether the “warranty” formed a basis of the bargain for the buyer. Of course, simple opinions or “puffery” will not be actionable as express warranties. Although Illinois courts have established rules and tests to examine such statements, each case will be decided on its own merits and the specific facts of every transaction.

D. UCC Sections 2-313A and B – Obligations to Remote Purchasers – Not Adopted in Illinois

In 2004, after a lengthy process, multiple amendments to Article 2 of the Uniform Commercial Code were adopted by its drafters, the National Conference of Commissioners on Uniform State Laws,

and the American Law Institute. Two new sections that were added to the Uniform Commercial Code, Sections 2-313A and 2-313B, address the rights of buyers against remote sellers. Although neither section has been adopted in Illinois, practitioners should know of their existence.¹⁹¹

III. Sections 2-314 to 2-318 – Implied Warranties

Unlike an express warranty, an implied warranty is unwritten and unspoken. An implied warranty is created by law, and not by the seller.¹⁹² There are two types of implied warranties: merchantability and fitness for a particular purpose.

A. Section 2-314 – Implied Warranty of Merchantability

Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.¹⁹³ To succeed on a claim for breach of the implied warranty of merchantability, a plaintiff must establish (1) a sale of goods, (2) that the seller of the goods is a merchant with respect to those goods, and (3) that the goods were not of merchantability quality.¹⁹⁴

The implied warranty of merchantability can arise with regard to a used product.¹⁹⁵ But, any such warranty is limited “as appropriate to such goods.”¹⁹⁶

The most common description of merchantability is that “the goods must be fit for the ordinary purposes for which they are used,” but there are actually six attributes of merchantability listed in Section 2-314. Goods are “merchantable” if they:

- (a) pass without objection in the trade under the contract description; and

- (b) in the case of fungible goods, are of fair average quality within the description; and

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

- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

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

- (f) conform to the promises or affirmations of fact made on the container or label if any.¹⁹⁷

This list does not purport to exhaust the meaning of “merchantable” or to negate any of its attributes not specifically mentioned in the statute, but arising by usage of trade or through case law.¹⁹⁸

An implied warranty of merchantability applies only to a *merchant with respect to goods of the kind* involved in the contract.¹⁹⁹ This language in Section 2-314 requires a merchant to have professional status as to a particular kind of goods, which is narrower than the general definition of merchant found in Section 2-104.²⁰⁰ A person making an isolated sale of goods is not a “merchant” within the meaning of Section 2-314 and, thus, no warranty of merchantability would apply.²⁰¹

Bottle cap liner sellers were “merchants” within the meaning Section 2-314, because they were persons who, within professional status, sold a particular kind of goods.²⁰² In contrast, a university’s athletic director, football coach, and athletic trainer who allegedly furnished a defective football helmet to the plaintiff did not qualify as merchants and could not be

liable for a breach of the implied warranty of merchantability.²⁰³

In *Siemen v. Alden*,²⁰⁴ a sawmill operator sold a used automated multi-rip saw to the plaintiff. It was the only time the sawmill operator had ever sold a saw or sawmill equipment.²⁰⁵ After noting that “the definition of merchant within 2-324 is a narrow one,” the court concluded that the sawmill operator was not engaged in the business of selling such equipment, that the sale of the saw was an “isolated sale,” and thus, no warranty of merchantability applied.²⁰⁶

Whether the implied warranty of merchantability has been breached is a question of fact.²⁰⁷ A *prima facie* case of breach of the implied warranty of merchantability is established by proof that, in the absence of abnormal use or reasonable secondary causes, the product failed to perform in the manner reasonably to be expected in light of its nature and intended function.²⁰⁸

Many breaches of the implied warranty of merchantability are obvious. For example, stainless steel that has a hardness range varying from 58 to 67 on the Rockwell B scale is not merchantable where the industry custom for that type of steel is to have a hardness range of 70 to 80.²⁰⁹ An herbicide that killed a farmer’s cabbage breached the implied warranty of merchantability.²¹⁰ Boilers for a heating system that leaked breached the implied warranty of merchantability.²¹¹

Nor does the condition have to affect the operation of the product. An inferior paint job can render a car not merchantable.²¹²

A breach of implied warranty can be found even when a plaintiff extensively uses the product. In *Shoop v. DaimlerChrysler Corp.*,²¹³ the plaintiff drove his vehicle daily for three years, logged more than 39,000 miles, and traded it in for its fair market value.²¹⁴ Yet, despite this heavy

use, the court held that the jury was not prevented from finding a breach of the implied warranty of merchantability.²¹⁵

Conversely, in *Alvarez v. American Isuzu Motors*,²¹⁶ evidence of 14 car repairs in 20 months was not sufficient, by itself, to establish a *prima facie* case of breach of the implied warranty of merchantability.²¹⁷ Absent expert testimony regarding the alleged defects, to pursue an implied warranty of merchantability claim, the plaintiff must present evidence of the absence of her abnormal use of the car and exclude any possible secondary causes of the alleged defects.²¹⁸ The car never stalled or died, and the plaintiff was able to use the car to go to work and to run her errands.²¹⁹ Under these circumstances, the appellate court affirmed the directed verdict in the defendant’s favor.²²⁰

Privity of contract is another factor to consider when determining whether implied warranties apply. Although privity no longer is required in Illinois when a buyer who has sustained personal injury predicates recovery against a remote manufacturer on the theory of implied warranty,²²¹ privity still is required when a buyer seeks to recover economic loss.²²² Privity exists between buyers and immediate sellers only.²²³ The “UCC article II implied warranties give a buyer of goods a potential cause of action only against his immediate seller.”²²⁴

There is an exception to the privity requirement for claims brought under the Magnuson-Moss Act,²²⁵ which is the federal statute that governs warranties on consumer products. In Illinois, when a consumer brings an action under the Magnuson-Moss Act and the manufacturer has given an express warranty to the consumer, the manufacturer will be deemed to be in privity with the consumer such that the consumer may bring a cause of action for breach of implied warranty.²²⁶ The Illinois

Supreme Court has held that a manufacturer’s extension of a written warranty to the consumer “establishes privity which, although limited in nature, is sufficient to support a claim for breach of implied warranty under Section 2310(d) of the [Magnuson-Moss] Act.”²²⁷ Thus, where the plaintiff was given a written warranty by a car manufacturer, the plaintiff was deemed to be in privity with the car manufacturer, and the plaintiff could maintain a cause of action against the manufacturer for breach of implied warranty under the Magnuson-Moss Act.²²⁸

But the U. S. Circuit Court of Appeals for the Seventh Circuit does not recognize the exception articulated by the Illinois Supreme Court. In the Seventh Circuit’s view, the Magnuson-Moss Act does not broaden the UCC’s requirements by allowing non-privity parties to bring implied warranty claims.²²⁹ The courts in the Northern District of Illinois have rejected repeatedly the argument that privity is not required to bring a Magnuson-Moss claim for breach of implied warranty.²³⁰

Under Section 2-314, “the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.”²³¹ Like all of the UCC, Section 2-314 applies to “transactions in goods.”²³² It does not apply to the sale of services.²³³ When there is a mixed contract for goods and services, there is a “transaction in goods” only if the contract is predominantly for goods and incidentally for services.²³⁴ If the transaction was primarily for services, then the UCC does not apply, even if the sale of goods was part of the transaction.

In *Brandt v. Boston Scientific Corp.*,²³⁵ the plaintiff sued a hospital for breach of implied warranty of merchantability in connection with a medical device that the hospital sold to the plaintiff and surgically implanted in her. The Illinois Supreme

— Continued on next page

Court applied the “predominant purpose test” to the facts of the case.²³⁶ The court first noted that 51% of the plaintiff’s hospital bill was for services rather than goods.²³⁷ Stating that there was “more to the predominant purpose test than making a simple comparison of money paid for goods and services,” the court went on to consider the predominate nature of the transaction as a whole.²³⁸ The court noted that the plaintiff went to the hospital for medical treatment, rather than merely to buy the medical device; that the medical device was only potentially useful after its surgical implantation; and that the hospital provided services before, during, and after surgery to facilitate implantation of the device.²³⁹ Based on those facts, the court concluded that the medical services were the primary purpose of the transaction, the purchase of the medical device was incidental to the treatment, and the UCC did not apply to the transaction.²⁴⁰

B. Section 2-315 – Implied Warranty of Fitness for a Particular Purpose

The “other” implied warranty is the warranty of fitness for a particular purpose. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods will be fit for such purpose.²⁴¹ Section 2-315 “imposes two requirements: (1) that the seller know of the particular purpose for which the goods are required; and (2) that the buyer rely on seller’s skill or judgment in selecting the product.”²⁴²

A “particular purpose” differs from the ordinary purpose for which the goods are used. “Particular purpose” envisages a specific use by the buyer, which is peculiar

to the nature of his business. The ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses that customarily are made of the goods in question. For example, shoes generally are used for walking upon ordinary ground, but a seller might know that a particular pair was selected to be used for mountain climbing.²⁴³

the buyer relied on the seller’s skill in the manufacture of thermoforming machines to provide such a machine, and that the seller had reason to know of the buyer’s reliance was sufficient to establish a breach of the implied warranty of fitness for a particular purpose.²⁴⁷

On the other hand, in *Zaffiri v. Pontiac RV, Inc.*,²⁴⁸ the plaintiffs brought a claim

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

To establish the implied warranty, the use must be a particular use. Illinois has long recognized that, even where a seller has reason to know of a buyer’s particular purpose, no warranty for a particular purpose is created if the intended use is no different from the ordinary use of the product.²⁴⁴ The existence of such a warranty is a question of fact.²⁴⁵

For instance, a claim that a machine that makes steel rods would be able to process steel rods “with a single pass through the [machine], that the [machine] could consistently operate at speeds of 80 feet per minute [and] that steel rods ranging in diameter from 1” to 6” could be processed through the [machine]” was sufficient to adequately plead an implied warranty of fitness for a particular purpose.²⁴⁶ Likewise, evidence that the seller knew of the buyer’s need for a thermoforming machine that would operate at 120 cycles per hour, that

for breach of implied warranty of fitness for a particular purpose regarding a motor home. The plaintiffs alleged that they intended to use the motor home for “traveling, camping, entertaining clients, and as a mobile office.”²⁴⁹ The court found that the plaintiffs’ uses were “ordinary” and insufficient to support a claim for breach of the implied warranty of fitness for a particular purpose.²⁵⁰

To recover for breach of an implied warranty of fitness for a particular purpose, a buyer must show (1) a sale of goods, (2) that the seller had reason to know of any particular purpose for which the goods are required, (3) that the buyer of goods was relying on the seller’s skill or judgment in selecting the goods, and (4) that the goods did not fit the particular purpose for which they were used.²⁵¹ Although a buyer must prove that the goods were not fit for the alleged particular purpose, the buyer need

not prove that the product was defective.²⁵²

For example, the sellers of bottle cap liners breached the implied warranty of fitness for a particular purpose when they knew the specific intended use of the materials, the plaintiffs relied on the seller's representations that the material would be suitable for liquor closures, and the liners had staining and leakage problems rendering them unusable.²⁵³ Similarly, a seller breached the implied warranty of fitness for a particular purpose where a satellite receiving system that the seller had selected for a buyer, knowing that the buyer was relying on the seller's skill and judgment in selecting a suitable system, worked for only 44 days during a 340-day period.²⁵⁴

In contrast, in *Turnbough v. Schien*,²⁵⁵ the plaintiff was an experienced truck driver. The plaintiff first contracted with the defendant to install a 14-foot dump body on a truck chassis that the plaintiff had not yet purchased. After purchasing the truck chassis, the defendant told the plaintiff that the length of the dump body was too short for the chassis and gave the plaintiff several remedies.²⁵⁶ The plaintiff chose one of the remedies that eventually did not work.²⁵⁷ Although one of the defendants stated that owners of trucks must rely on the defendant for proper installation of the dump body, the court found insufficient evidence that the plaintiff was relying on the defendant's skill or judgment for the implied warranty of fitness to arise.²⁵⁸

In *In re McDonald's French Fries Litigation*,²⁵⁹ the plaintiffs alleged a breach of the implied warranty of fitness for a particular purpose regarding the milk, wheat, and gluten content of McDonald's French fries. In dismissing that count, the court stated:

In this case, plaintiffs do not allege that the consumption of the potato products is not the

ordinary use of such products or that defendant had reason to know what the particular, non-ordinary use of the product would be. The complaint itself provides that the potato products were promoted and sold "for the use of consumers with dietary issues and sensitivities to such ingredients." . . . To the extent the language in the complaint does not foreclose plaintiffs' argument that the products were for a purpose other than their ordinary use, plaintiffs still fail to identify what the non-ordinary use of a French fry or hash brown is. Accordingly, the [*sic*] count II fails to state a claim for breach of implied warranty of fitness for a particular purpose and is dismissed.²⁶⁰

In *Rubin v. Marshall Field & Company*,²⁶¹ the plaintiff purchased eye make-up remover.²⁶² Before purchasing the product, the plaintiff asked the defendant's representative whether the product would be safe for her.²⁶³ The defendant's representative pointed to a statement on the product's box, which stated "recommended for all skin types," and said "if it wouldn't be safe for you, it wouldn't say this on the box."²⁶⁴ That statement by the representative was found sufficient to create an implied warranty of fitness for a particular purpose.²⁶⁵

Unlike Section 2-314, Section 2-315 does not require the seller to be a merchant with respect to the goods. For the implied warranty of fitness to arise, however, the seller must have some "skill or judgment" with respect to the goods.²⁶⁶ In *Sass v. Spradlin*,²⁶⁷ the plaintiff bought a used dump truck. The three individuals involved in selling the truck were an employee of a cement manufacturing concern, a housewife who served as a bookkeeper, and someone

in the construction business. The court had no difficulty finding the lack of the skill or knowledge required for the implied warranty of fitness to arise.²⁶⁸

Like Section 2-314, Section 2-315 applies to a "transaction in goods."²⁶⁹ It does not apply to the sale of services.²⁷⁰ For example, the implied warranty of fitness for a particular purpose does not apply to dentures provided by a dentist.²⁷¹ When there is a mixed contract for goods and services, there is a "transaction in goods" only if the contract is predominantly for goods and incidentally for services.²⁷²

A construction contract where the plaintiff is denominated "owner" not buyer, and the defendant is denominated "contractor" not seller, and which called upon the defendant to do all process, design, and engineering work, but not for the defendant to sell anything to the plaintiff, was a contract for the provision of services, not a contract for the sale of goods.²⁷³ The court concluded that the implied warranty of fitness for a particular purpose was not applicable.²⁷⁴

Also like Section 2-314, privity is required when a buyer seeks to recover economic loss pursuant to Section 2-315.²⁷⁵ A fitness for a particular purpose claim can be brought against the buyer's immediate seller only.²⁷⁶ Prior to 1986, there were several cases holding that privity is not required where a manufacturer knows the identity, purpose, and requirements of its distributor's customers and manufactures goods specifically to meet those requirements.²⁷⁷ But, in 1986, in *Szajna v. General Motors Corp.*,²⁷⁸ the Illinois Supreme Court held that privity still is required when a buyer seeks to recover economic loss under an implied warranty theory.²⁷⁹ That holding was reaffirmed in 1998 in *Rothe v. Maloney Cadillac, Inc.*,²⁸⁰ where the court stated the implied warranties "give a buyer of goods

— Continued on next page

a potential cause of action only against his immediate seller.²⁸¹ The continued authority of the pre-1986 cases has been called into question because they were decided before *Szajna* and *Rothe*.²⁸²

C. Section 2-316 – Exclusion or Modification of Warranties

The UCC permits sellers to disclaim or exclude implied warranties.²⁸³ To disclaim the implied warranty of merchantability, the disclaimer must mention “merchantability” specifically and, if in writing, must be conspicuous.²⁸⁴ A disclaimer of the implied warranty of fitness for a particular purpose does not need to mention fitness for a particular purpose but must be conspicuous and in writing.²⁸⁵

The requirement that the disclaimer be conspicuous is to protect the buyer from surprise.²⁸⁶ The disclaimer language must be part of the sale and cannot be provided to the buyer for the first time when the product is delivered.²⁸⁷

Pursuant to the UCC, 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.²⁸⁸

Whether a particular contract term is conspicuous is a question of law to be decided by the court.²⁸⁹ The court should make that determination by asking if attention reasonably can be expected to be called to the term or clause, which is a fact-specific inquiry.²⁹⁰

The following language has been found to be conspicuous and to properly disclaim all implied warranties:

Warranties Seller Disclaims. You understand that the Seller is not offering any warranties and that there are no implied warranties of merchantability, or fitness for a particular purpose, or any other warranties, express or implied by the Seller²⁹¹

and

“BANK MAKES NO WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, CONCERNING ANY EQUIPMENT, OR OTHER SERVICE PROVIDED BY OTHERS AND, IN PARTICULAR, MAKES NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE.”²⁹²

Print size alone is not dispositive of whether language is conspicuous.²⁹³ Language underlined in its entirety in a paragraph entitled, “Disclaimer of Warranties,” in bold capital letters, and which appeared directly above the plaintiff’s signature effectively disclaimed the implied warranty of merchantability.²⁹⁴

One common question is the location of the disclaimer. In *Anderson v. Farmers Hybrid Companies, Inc.*,²⁹⁵ the disclaimer was in capital letters under a paragraph heading, “Warranties and Limit of Liability,” also in capital letters.²⁹⁶ The disclaimer, however, was on the back of the order confirmation slip.²⁹⁷ On the front of the order confirmation slip was the following sentence: “This order subject to conditions on reverse side hereof and subject to acceptance by the company.”²⁹⁸ That language was not conspicuous in any manner and, in fact, was in smaller print than the other language on the front side of the order slip. The court found:

[W]hile the type used for disclaiming the warranties was conspicuous, in the sense of being larger than other type in the paragraph, the presence of that paragraph on the reverse side of the order slip was not at all conspicuous, either from the general appearance of the slip or from any conspicuous language on the front side of the slip.²⁹⁹

The disclaimer was found to be invalid under the UCC.³⁰⁰

A similar issue was decided the opposite way in *Carpenter v. Mobile World, Inc.*³⁰¹ In *Carpenter*, the plaintiff bought a mobile home from the defendant. In response to the plaintiff’s claim that the implied warranty of merchantability had been breached, the defendant argued that it had been disclaimed by the following language in enlarged print on the back of the contract:

“. . . Exclusion of warranties. I understand that the implied warranties on [*sic*] merchantability and fitness for a particular purpose and all other warranties express or implied are excluded by you from this transaction and shall not apply to the goods sold. I understand that you make no warranties whatsoever regarding the unit or any appliances or component contained therein, except as may be required under applicable State law.”³⁰²

Above the line on the front of the contract for signature by the plaintiff, in enlarged print, as large as any on the front, there was a statement that the plaintiff had read the back of the agreement.³⁰³ Although acknowledging that the statement on the

front did not notify the buyer that there was a disclaimer on the back, the court reasoned that a reasonable buyer likely would have read the back of the document and would have seen the disclaimer in bold face.³⁰⁴ The court concluded that the implied warranty of merchantability had been disclaimed properly.³⁰⁵

There are several accepted shortcuts to exclude all implied warranties. All implied warranties are excluded by expressions like “as is,” “with all faults,” or other language, which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.³⁰⁶ The following disclaimer, however, did not effectively disclaim the implied warranty of merchantability: “WE CAN ONLY GUARANTEE PERFORMANCE OF OUR EQUIPMENT. OVERALL PRODUCTION IS NOT GUARANTEED.”³⁰⁷ Another exception exists when the buyer has examined the goods or refused to examine the goods. When the buyer has examined the goods or has refused to examine the goods, there is no implied warranty with regard to defects that an examination would have revealed to the buyer.³⁰⁸

The particular buyer’s skill and the normal method of examining goods under the circumstances determine what defects are excluded by examination. A failure to notice defects that are obvious cannot excuse the buyer. Yet, an examination under circumstances that do not permit chemical or other testing of the goods would not exclude defects that could be ascertained by such testing only. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects that a professional in the field ought to observe.³⁰⁹

In *Trans-Aire International, Inc. v. Northern Adhesive Co., Inc.*,³¹⁰ the plaintiff

purchased adhesive from the defendant to use in the plaintiff’s manufacturing of recreational vehicles. The plaintiff had experienced difficulty with the adhesive provided by its current supplier and the defendant sent samples of its adhesive to the plaintiff for testing. The plaintiff tested the samples as fully as it desired and refused to conduct further tests, which could have confirmed a problem with the adhesive in warmer temperatures. Under those circumstances, there was no implied warranty with respect to the adhesive.³¹¹

In *Budnick Converting, Inc. v. Nebula Glass International, Inc.*,³¹² the buyer purchased adhesive tape for a new product in development.³¹³ After fully testing a red version of adhesive tape and finding it met all needed requirements, the buyer asked for a white version with a different liner.³¹⁴ The buyer was told that the white version was the same as the red version.³¹⁵ Based on that representation, the buyer did not test the white version.³¹⁶ Nevertheless, the buyer signed a form indicating that it had tested the white tape on a trial run, the tape met the buyer’s requirements, and it was suitable for the buyer’s application.³¹⁷ The white tape was not the same, and it failed. In rejecting the buyer’s claim for breach of the implied warranty of fitness for a particular purpose, the court stated:

This assumption [that the red and white versions of tape were the same] turned out to be incorrect but it does not negate the fact that before entering into the contract [the buyer] examined the goods as fully as it desired or refused to examine the goods. . . . The fact of the matter is that the red and white tape were different products and [the buyer] knew that it was its responsibility to test the tape for its application. [The buyer] relied

on its own business judgment in deciding not to test the white tape and as a result there is no implied warranty.³¹⁸

An implied warranty also can be excluded or modified by course of dealing or by course of performance or by usage of trade.³¹⁹ A course of dealing is a sequence of previous conduct between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.³²⁰

In *R.O.W. Window Co. v. Allmetal, Inc.*,³²¹ a seller was able to use the course of dealing provision of the UCC to overcome a buyer’s argument that it was not bound by a disclaimer of warranties because the disclaimer was not part of the sales contract. The buyer and seller, however, had business dealings for the past 15 years.³²² During that period, all of the invoices that the seller sent to the buyer had a conspicuous disclaimer of implied warranties.³²³ In addition, the product catalog that the seller sent to the buyer each year contained a conspicuous disclaimer of implied warranties. The court found that course of dealing supplements the terms of the parties’ agreement and established that the exclusion of implied warranties was part of the bargain.³²⁴

D. Section 2-317 – Cumulation of Warranties

Warranties, whether express or implied, are construed as consistent with each other and as cumulative, unless such a construction is unreasonable.³²⁵ A cause of action asserted for breach of an express warranty does not extinguish a concurrent cause of action for breach of implied warranty arising from the express warranty.³²⁶

— *Continued on next page*

If a construction of warranties as consistent with each other and cumulative is unreasonable, the intention of the parties will determine which warranty is dominant.³²⁷

In ascertaining the intention of the parties the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.³²⁸

These rules are designed to aid in determining the intention of the parties as to which of inconsistent warranties shall prevail.

In *Heat Exchangers, Inc. v. Aaron Friedman, Inc.*,³²⁹ the court was required to resolve the inconsistency between two similar warranties with different remedies.³³⁰ The plaintiff manufacturer had extended two first-year warranties in the sale of heat pumps. Both covered all defects, but one warranty stated that the manufacturer's obligation was to repair the defects at its own expense. The second warranty stated that the manufacturer's obligation was to furnish replacement parts.³³¹ The court stated that it must determine which warranty was intended to dominate.³³² To do that, the court referred to the language of Section 2-316(1), which provides:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other;

but . . . negation or limitation is inoperative to the extent that such construction is unreasonable.³³³

The court stated that if one gives a warranty with an expanded obligation and in the same agreement attempts to give a similar warranty with a limited obligation, then the attempt to limit the warranty is rendered inoperative.³³⁴ The court concluded that the plaintiff's obligation was the more extensive obligation, to repair all defects at its own expense.³³⁵

These rules of intention are to be applied only where factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties that later turn out to be inconsistent. To the extent that the seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.³³⁶

E. Section 2-318 – Third-Party Beneficiaries of Warranties

Under the Illinois version of Section 2-318, a seller's warranty, whether express or implied, extends to any natural person who is in the family or household of his buyer, or who is a guest in his home, if it is reasonable to expect that such person may use, consume, or be affected by the goods, and who is injured in person by breach of the warranty.³³⁷ The purpose of the section is to give the buyer's family, household, and guests the benefit of the same warranty that the buyer received, freeing any such beneficiaries from any technical rules as to privity.³³⁸ Implicit in the section is that any listed beneficiary may bring a direct action for breach of warranty against the seller whose warranty extends to him.³³⁹

Section 2-318 states: "A seller may not exclude or limit the operation of this Sec-

tion."³⁴⁰ But this sentence does not limit a seller's ability to exclude or modify a warranty consistent with Section 2-316. Nor does the sentence preclude the seller from limiting remedies in any manner provided by Sections 2-718 or 2-719, discussed in Section V of this article.³⁴¹ What the sentence forbids is exclusion of liability by the seller to the persons to whom the warranties, which he has made to his buyer, would extend under this section.³⁴²

There are three versions of UCC Section 2-318 concerning the need for privity under warranty claims. Illinois has adopted the first and most restrictive. Illinois has rejected more expansive versions that would have extended the benefits of Section 2-318.³⁴³

The first occurrence of a judicial extension of Section 2-318 was in *Whitaker v. Lian Feng Machine Co.*³⁴⁴ In *Whitaker*, the plaintiff was injured while using a band saw that had been purchased by his employer.³⁴⁵ The court determined that Section 2-318 does not state any limitation on the rights of persons to recover for breach of warranty. The court concluded that the employee was essentially a third party beneficiary to the sale in that the employee's safety while using the band saw was "either explicitly or implicitly part of the basis of the bargain when the employer purchased the goods."³⁴⁶

The holding in *Whitaker*—that the benefits of Section 2-318 are extended to an employee where the safety of the employee and the use of the goods were either implicitly or explicitly part of the basis of the bargain when the employer purchased the goods—has been followed by a number of courts.³⁴⁷ It also has been recognized as the controlling law in Illinois.³⁴⁸

An attempt to further extend the benefits of Section 2-318 to an employee of a non-purchasing user of the product was rejected in *Lukwinski v. Stone Container*

*Corp.*³⁴⁹ In *Lukwinski*, an employee of a delivery company was injured when a pressurized strap securing cardboard boxes that he was delivering broke.³⁵⁰ Lukwinski's employer had not purchased the pressurized strap. Noting that Illinois had not adopted more expansive versions of Section 2-318, the court concluded that Lukwinski could not assert a warranty claim against the manufacturer of the pressurized strap because of lack of privity.³⁵¹

Several federal cases have extended Section 2-318. In *Reed v. City of Chicago*,³⁵² a detainee was able to hang himself in his jail cell using a paper isolation gown. The estate of a detainee brought suit against the manufacturer of the gown, alleging breaches of implied warranties when the gown failed to tear away. After reviewing the case authority and noting that no Illinois court has "expanded the plaintiff class for breach of warranty claims beyond employees," the District Court for the Northern Illinois of Illinois concluded that the "law requires us to do so here."³⁵³ The court stated:

If protection is not provided to plaintiffs like Reed, any warranty as to the safety of the gown would have little, if any, effect. In designing and manufacturing the gown, defendants contemplated that the users of the gown would be detainees. Moreover, the safety of these detainees was necessarily a part of the bargain, whether explicitly or implicitly, between the seller and buyer. For these reasons, a detainee of the City like Reed must be able to enforce the protections of any warranties made by the manufacturer and designer of the gown.³⁵⁴

In *Canadian Pacific Railway Co. v. Williams-Hayward Protective Coatings*,

Inc.,³⁵⁵ the railroad brought breach of implied warranty claims against the supplier of paint purchased by another entity and used on the railroad cars.³⁵⁶ The district court recognized an exception to the privity rule "when the remote manufacturer knows the identity, purpose and requirements of the dealer's customer and manufactured or delivered the goods specifically to meet those requirements."³⁵⁷

IV. Sections 2-601 to 2-610 – Notice of Breach, Rejection, Revocation, Adequate Assurances and Anticipatory Repudiation

A. Section 2-607 – Notice of Breach

Section 2-607 states in pertinent part that "[w]here a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . ."³⁵⁸ This section imposes a duty upon every buyer who has accepted goods to give notice of an alleged breach of warranty to the seller within a reasonable time after the buyer discovers, or should have discovered, the breach.³⁵⁹ Failure to do so bars any remedy for the buyer.³⁶⁰ Further, this section applies to all the various beneficiaries of an implied or express warranty, in addition to the purchaser of goods.³⁶¹

Notice is an essential element, and failure to allege sufficient notice could be fatal for a complaint alleging breach of warranty.³⁶² The notice requirement provides the seller with (1) an opportunity to cure a defect and minimize damages, and (2) an opportunity to investigate and gather evidence of a potential breach, with hope to encourage settlement.³⁶³

1. Requirements for Adequate Notice

In general, buyers must notify the seller directly of any problems that have occurred with the goods or transaction, or both.³⁶⁴ Often, this requirement is referred to as direct notice. But, there are two exceptions where direct notice is not required: (1) the seller has actual notice of the defect, or (2) the seller is found to have been reasonably notified by the complaint alleging the breach.³⁶⁵ Whether notice is sufficient is a question of fact that is determined on a case-by-case basis.³⁶⁶ If no other inference can be drawn from the evidence but for notice being unreasonable, it can be determined by the court as a matter of law.³⁶⁷

First, to determine whether notice was adequate, the court classifies the plaintiff as one of the following: (1) merchant buyer; (2) consumer buyer who did not suffer personal injury; or (3) consumer buyer who did suffer personal injury.³⁶⁸ In a strictly consumer transaction where the plaintiff suffers no personal injury, the notice requirement is not fulfilled by filing a complaint.³⁶⁹ Thus, the action of filing the complaint will satisfy the notice requirement only when the plaintiff has suffered a personal injury. The purpose of the narrow interpretation is that the UCC prefers that the breach be cured without a lawsuit.³⁷⁰

The decision in *Maldonado v. Creative Woodworking Concepts, Inc.*³⁷¹ highlights both exceptions of direct notice. In *Maldonado*, the plaintiff, a waitress who worked on the Empress Riverboat Casino, was injured when she was struck by a defective door built into a bar counter. The waitress filed suit against several defendants, but the supplier of the door was not named in the complaint. In fact, the supplier was not added until after one of the original defendants filed for summary judgment, claiming that the supplier was responsible for

— Continued on next page

the injury to the waitress. She then named the supplier as a respondent in discovery.³⁷²

After almost a year of discovery, the waitress amended her complaint, naming the supplier as a defendant, and argued that the two exceptions to direct notice applied.³⁷³ The waitress stated the supplier had sufficient notice of her claims when it was named as a respondent in discovery.³⁷⁴ The court disagreed and reasoned that merely being named as a respondent in discovery did not provide adequate actual notice.³⁷⁵ As the claim was for personal injury, however, the supplier had sufficient actual notice once the amended complaint was filed, because the amended complaint clearly outlined step-by-step why the door was defective and why the supplier had breached the warranty.³⁷⁶

Thus, merely being named as a respondent in discovery is not enough to establish notice. Further, if a claim is for a personal injury, the complaint can be sufficient notice of the breach if it clearly describes the transaction. But, because the complaint in *Maldonado* was very specific and precisely laid out the transaction, the appellate court did not decide that the level of specificity must be pleaded the same as an exception to the direct notice requirement.³⁷⁷

2. Particular Notice Trumps Generalized Notice

Another frequently litigated topic is whether notice can be general or must be particular to the transaction. Although it is unnecessary to list specific claims of breach of warranty to notify the seller, it is essential that the seller be notified of the particular transaction alleged by the buyer.³⁷⁸

In *Connick v. Suzuki Motor Co.*,³⁷⁹ the plaintiff filed a class action complaint alleging that the Samurai's (a sport utility vehicle) risk of rolling over was due to a

defect in the vehicle's design or production. The buyers did not allege that they had ever suffered a rollover accident; rather they sought compensation for the diminution in the Samurai's resale value due to the alleged risk.³⁸⁰ The suit was filed in response to a "not acceptable" rating given to the Samurai by a consumer agency.³⁸¹

The plaintiffs argued that Suzuki had generalized knowledge about the alleged safety concerns of the vehicle because the company (1) was aware of the report, and (2) attempted to counter the report by issuing publicity contrary to the report.³⁸² The Illinois Supreme Court disagreed with the plaintiffs, stating it is essential that the seller be notified of the particular transaction in question even if Suzuki was aware of the alleged safety risk.³⁸³ The court, therefore, held that the plaintiffs failed to allege that Suzuki had actual knowledge of the alleged breach of that particular transaction.³⁸⁴

As a practice point, when debating whether proper notice was given, always err on the side of providing notice that is particular and specific to the consumer transaction at issue. Following this principle will ensure that proper notice has been provided.

B. Section 2-601 – Rejection of Non-Conforming Goods

Section 2-601 states in pertinent part: "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may . . . reject the whole . . ." ³⁸⁵ Thus, when the goods delivered to the buyer do not conform to the terms of the contract, the buyer is allowed to reject them.³⁸⁶ To be a valid rejection, the buyer must reject within a reasonable time and seasonably notify the seller of his intention to reject the delivered goods.³⁸⁷ If the buyer does not validly reject the goods, the goods

are deemed to have been accepted.³⁸⁸

In *Presto Manufacturing Co., Inc. v. Formetal Engineering Co.*,³⁸⁹ the buyer purchased pads to be used in making air conditioner units.³⁹⁰ When those pads were delivered, the buyer told the seller that they did not conform with the sample, because they were incomplete cuts, had color variances, and had faulty backings.³⁹¹ In response to the notification of the alleged defect, the seller stated that it had corrected the defects.³⁹² The buyer paid for the pads when they were delivered.³⁹³ Almost a year later, the buyer purchased additional pads from the seller.³⁹⁴ When the buyer made the order, he provided the seller with defective pads from the earlier order to remind the seller of the prior defects so they would not be repeated.³⁹⁵ When the pads were delivered, they contained the same defects.³⁹⁶ The buyer immediately informed the seller of the defects, provided notice of rejection, and returned the pads.³⁹⁷ The court held the buyer's rejection to be proper, as it met the requirements of Section 2-601. The court further noted that the buyer properly notified the seller of the rejection immediately and returned the non-conforming pads.

Presto Manufacturing Co. highlights the right to reject non-conforming goods and the importance of adequately notifying the seller of the defect. A buyer does not need to immediately reject non-conforming goods, but the sooner notice of the rejection is provided the more likely the buyer will be found to be in compliance with Section 2-601. Additionally, to further ensure the validity of the rejection of non-conforming goods, the buyer should provide detailed reasons for the rejection.

C. Section 2-608 – Revocation of Acceptance of Goods

Section 2-608 states in pertinent part: "The buyer may revoke his acceptance of a

lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it.”³⁹⁸ Revocation of acceptance is a remedy that is available to the buyer in an action for breach of warranty.³⁹⁹ Not every breach or non-conformity will entitle the buyer to revoke acceptance, but a substantial impairment of value will allow revocation.⁴⁰⁰ Further, a breach of warranty that substantially impairs value gives rise to a buyer’s right to revoke acceptance.⁴⁰¹ The validity of revocation of acceptance hinges upon material questions of fact. Therefore, the trier of fact will determine whether the alleged nonconformity caused a substantial impairment.⁴⁰²

The right of revocation arises when a buyer accepts goods either: (1) on the reasonable assumption that the non-conformity will be cured and it has not been seasonably cured; or (2) without discovery of such non-conformity if the acceptance was reasonably induced by either the difficulty of discovery before acceptance or by the seller’s assurances.⁴⁰³ In either circumstance, revocation must be made within a reasonable time after the non-conformity is, or should have been, discovered.⁴⁰⁴ Revocation, however, is not effective until the buyer notifies the seller.⁴⁰⁵ No particular form or specific language is required for the buyer to notify the seller of the revocation.⁴⁰⁶

When a buyer wishes to revoke acceptance of non-conforming goods, the buyer has the same duties as a buyer who has rejected non-conforming goods,⁴⁰⁷ addressed in Section IV.B of this article.⁴⁰⁸ Notice of revocation by the buyer must be given within a reasonable time after either the buyer discovers or should have discovered the breach, or the buyer will be barred from recovery as to the breach.⁴⁰⁹ Timeliness of the revocation is a question of fact.⁴¹⁰ Further, the buyer’s attempted revocation can be delayed if it is induced

by the seller’s continued assurances that repairs would be successful.⁴¹¹ The reasonable time for revocation may be extended if the seller continues to give assurances that it will cure the non-conformity.⁴¹²

In *Sorce v. Naperville Jeep Eagle, Inc.*,⁴¹³ the buyer purchased a Hummer and approximately two years later filed suit to revoke acceptance of the vehicle.⁴¹⁴ The dealership rejected revocation.⁴¹⁵ The purchase included a three-year or 36,000 mile manufacturer’s limited warranty.⁴¹⁶ The Hummer was serviced by the dealership over 30 times during the two-year period.⁴¹⁷ The dealership continued to assure the buyer that the problems would be fixed, but a vast majority of the repairs were completely or partially unsuccessful.⁴¹⁸ Prior to the expiration of the warranty, the buyer told the dealership that he no longer wanted the Hummer because of all the problems and wished to trade it in for a new one.⁴¹⁹ But, each time he took it in for repairs, the salesman continued to assure him that the problems would be adequately fixed.⁴²⁰ After the repeated repair attempts, the buyer attempted to revoke acceptance of the vehicle.⁴²¹ When he did, the Hummer was 7,000 miles over the warranty.⁴²² The court found that whether the delay in revocation of acceptance was the result of the dealership’s continued assurances as to the repairs was a question of fact.⁴²³ Accordingly, summary judgment should have been denied.⁴²⁴

The appellate court might have ruled differently had the Hummer still been under warranty. But, the appellate court emphasized that each case depends on the circumstances, and the validity of an attempted revocation of acceptance in most instances hinges upon a question of fact.⁴²⁵ This position allows the court to address the circumstances of each case individually rather than state a generalized rule. The court favors analyzing each particular

consumer transaction on its own versus viewing transactions as a whole. Each case is determined based on the particular transaction in question.

D. Section 2-609 – Adequate Assurances

Adequate assurances of performance come into play when a party suspects that the other party might breach the contract when the other party’s performance comes due.⁴²⁶ The right of adequate assurances arises when some event occurs after entering into the contract, but prior to performance, which causes insecurity as to a party’s ability to perform under the contract.⁴²⁷ Section 2-609 allows the party suspecting that a breach will occur to suspend performance until that party receives assurance the other will perform. This section states in pertinent part:

When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.⁴²⁸

Whether a buyer has reasonable grounds for insecurity, and thus the right to demand adequate assurance, is a question of fact.⁴²⁹

In *Shields Pork Plus, Inc. v. Swiss Valley AG Service*,⁴³⁰ the seller and the defendant contracted for the sale of feeder pigs. The plaintiff seller supplied the buyer each month with pigs and the buyer would resell them.⁴³¹ The contract began in March 1998 and lasted until August 1998 when the

— *Continued on next page*

buyer notified the seller that it would no longer accept any pigs because it received non-conforming pigs it could not re-sell.⁴³² In December 1998, the seller filed suit against the buyer, and the buyer filed a counter claim.⁴³³ The trial court ruled that both parties had repudiated the contract, and both parties appealed.⁴³⁴

The appellate court's ruling thoroughly analyzes the law of adequate assurances. In the case, there was no clear, unequivocal intention not to perform the contract. The buyer heard, through non-parties to the contract, that the seller could no longer breed that type of pig.⁴³⁵ The court reasoned that, if the buyer believed this circumstance to be true and that the seller was not going to perform, it could have demanded an adequate assurance from the seller.⁴³⁶ The buyer, however, accepted two more shipments and never demanded assurance of the seller's ability to provide the proper pigs, causing the court to find the evidence of repudiation of the contract inconclusive.⁴³⁷ The scenario described in *Shields Pork Plus* highlights an ideal situation to demand adequate assurance of performance. All the buyer had to do was to write to the plaintiff, inquiring as to his intention to perform under the contract.

When reasonable grounds arise as to a party's ability to perform under a contract, the other party to the contract should make a demand. One should put pen to paper or fingers to keys and inquire as to the other party's ability to perform. If adequate assurance of performance is not received, Section 2-609 allows the party to suspend any performance for which he has not already received the agreed return.

E. Section 2-610 – Anticipatory Repudiation of a Contract for Goods

Anticipatory repudiation (also referred to as anticipatory breach) consists of a

The proper measure of damages available to a party who establishes repudiation by another party is the amount of money that will place the non-repudiating party in as satisfactory a position as it would have been if the contract had been fully performed.

manifestation by one party to a contract of an intention not to perform its contractual duty despite the other party rendering full and complete performance.⁴³⁸ The intention must be a definite and unequivocal manifestation that the party will not render the agreed upon performance when the time arises.⁴³⁹ Repudiation can be by words or conduct.⁴⁴⁰ Specifically, anticipatory repudiation focuses on two types of conduct: (1) when the promisor, without justification, states he cannot or will not perform; or (2) voluntarily putting out of his power to perform as agreed under the contract.⁴⁴¹ The UCC and common law recognize that for the promisor's language to rise to the level of repudiation, it must be clear and distinct to be reasonably interpreted to mean that the promisor cannot or will not perform.⁴⁴² The failure of the breaching party must be a total breach that defeats or renders unattainable the object of the contract.⁴⁴³ Repudiation, however, can result from an action that reasonably indicates that a party will not fulfill its contractual obligations.⁴⁴⁴ Doubtful and indefinite statements that performance might or might not occur are not enough to constitute anticipatory repudiation.⁴⁴⁵

When one party anticipatorily breaches the contract, the non-breaching party has three options: (1) rescind the contract and pursue rescission remedies; (2) treat the repudiation as a breach and file suit or change position; or (3) wait for the time of performance to pass and file suit.⁴⁴⁶

When one party repudiates a contract, the non-repudiating party is excused from performing or may continue to perform and seek damages for the breach.⁴⁴⁷ The proper measure of damages available to a party who establishes repudiation by another party is the amount of money that will place the non-repudiating party in as satisfactory a position as it would have been if the contract had been fully performed.⁴⁴⁸

*Hessler v. Crystal Lake Chrysler-Plymouth, Inc.*⁴⁴⁹ is a textbook example of anticipatory repudiation. In *Hessler*, the buyer and the seller contracted for the purchase of a Plymouth Prowler, a vehicle that was soon to be released.⁴⁵⁰ The parties entered into a contract for the Prowler.⁴⁵¹ The buyer put down a refundable \$5,000 deposit and the seller agreed to deliver the car to him as soon as possible.⁴⁵² Months went by and the car had yet to arrive at the dealership.⁴⁵³ The buyer continually checked and was assured that it would be forthcoming.⁴⁵⁴ After attending a Plymouth (car manufacturer) event, the buyer was able to obtain a list of the dealerships that would be receiving a Prowler.⁴⁵⁵ The dealership with whom he had entered into a contract with earlier was on the list.⁴⁵⁶ The next day, the buyer contacted the dealership to confirm their contract; the dealership, however, stated that it no longer wanted to do business with him and would never sell him the Prowler.⁴⁵⁷ Later that same day, the buyer purchased a Prowler at another dealership.⁴⁵⁸ The buyer filed suit against

the seller for breach of contract, seeking damages in excess of the amount he had to pay over the contract price he had originally agreed to with the seller.⁴⁵⁹ The trial court agreed with the buyer's argument and awarded damages.⁴⁶⁰

In affirming the trial court's ruling, the appellate court held that the dealership unequivocally repudiated the contract with the buyer by saying it did not want to do business with him.⁴⁶¹ It also sold the Prowler that it was contractually obligated to sell to the buyer to someone else.⁴⁶² As a result of the dealership's anticipatory breach, the buyer had the option of buying the Prowler from another dealership and then filing suit against the dealership for the difference in price.⁴⁶³ The appellate court affirmed the damages calculation of the difference between actual price the buyer paid and the contract price the plaintiff entered into with the dealership.⁴⁶⁴

When issues arise pertaining to Sections 2-601 through 2-610, here are a few practice points. First, when confronted with the rejection and revocation of non-conforming goods, always ensure that notice of any such breach is particular and specific to the transaction at issue. Further, the more timely and specific the notice, the more favorably it will be viewed by the court. Second, when the performance of a party to the contract is in doubt or the party states that it will not perform, demand assurance promptly (including being specific to the transaction) or seek performance elsewhere and seek damages. Timeliness and particularity to the transaction at issue are the keys to these sections.

V. Sections 2-711 to 2-719 – Remedies

When a seller breaches a warranty regarding the sale of goods under Article 2 of the UCC, the buyer might have several

remedies, depending upon the circumstances of the breach. Sometimes, a buyer must elect between various remedies.

Section 2-711 of the UCC states four circumstances that determine the remedies available to a buyer when a seller has breached its warranty: (1) when the seller fails to make delivery; (2) when the seller repudiates; (3) when the buyer rightfully rejects the goods; and (4) when the buyer justifiably revokes acceptance of the goods.⁴⁶⁵ There is also a fifth potential circumstance not described in Section 2-711. When already accepted goods (that eschew rightful rejection or justifiable revocation) are non-conforming, Section 2-714, rather than Section 2-711, specifies the available recovery.⁴⁶⁶

In addition to (or instead of) the remedies provided under Section 2-711, there might be contractual remedies. These remedies depend upon the terms of the agreement between the buyer and the seller and could take the form of liquidated damages under Section 2-718(1) or might modify or limit, consistent with Section 2-719, the remedies provided under Article 2. Understanding of the circumstances of breach is paramount to identifying the appropriate remedies.

A. Section 2-712 – The Remedy of “Cover”

“Cover” is the most prolific remedy for breach of warranty available under Article 2.⁴⁶⁷ If the buyer has not accepted the goods, the buyer may elect to “cover” and then recover its “cover” damages.⁴⁶⁸ To properly “cover,” the buyer must, in good faith and without unreasonable delay, make a reasonable purchase of goods or a contract to purchase goods to substitute for the goods that were due from the seller.⁴⁶⁹ The buyer then can recover the difference between its “cover” price and the contract

price, along with incidental or consequential damages.⁴⁷⁰ Expenses that are saved by the buyer as a consequence of the seller's breach must be subtracted from the recoverable damages.⁴⁷¹ A buyer who fails to cover is not barred from recovering any other available remedy.⁴⁷²

Where a buyer has accepted goods, Section 2-714, discussed in Section D below,⁴⁷³ provides remedies. Cover is not an available remedy for a buyer who accepts non-conforming goods.⁴⁷⁴

When the buyer elects to cover, the buyer still has the burden of proving the market or current price.⁴⁷⁵ Although Section 2-712 helps a buyer meet this burden with its provision that cover made in good faith and without unreasonable delay is proper,⁴⁷⁶ a good way to preempt any complaint from the seller about the cover price is to give the seller the opportunity to match any cover offer the buyer obtains.⁴⁷⁷

B. Section 2-711(3) – Liens on Prepayment of Contract Price

A buyer who has received goods and then rightfully rejects them or justifiably revokes acceptance of those goods may retain possession or even sell the goods to offset pre-payment and certain reasonable expenses.⁴⁷⁸ Section 2-711(3) creates a security interest in goods the buyer possesses or controls for any payments that have been made on the contract price and expenses reasonably incurred in the inspection, receipt, transportation, care, and custody of the goods.⁴⁷⁹ The buyer is permitted to resell those goods to offset those damages, as provided under Section 2-706. The buyer, however, is not permitted to keep the benefit of the bargain and might have to pay the seller for the reasonable use of the goods as an offset.⁴⁸⁰

Exercising the lien rights afforded

— *Continued on next page*

by Section 2-711(3) does not prohibit the buyer from claiming cover damages or specific performance.⁴⁸¹ The buyer likewise is not required to physically return rightfully rejected goods, and where they have been rightfully rejected, holding the goods does not constitute acceptance or waiver.⁴⁸²

C. Section 2-713 – Damages for Non-Delivery or Repudiation

Rather than cover, the buyer may elect to recover damages for non-delivery.⁴⁸³ When a buyer seeks damages for non-delivery or repudiation, the measure of damages is the difference between the market price at the time the buyer learns of the breach and the contract price, minus expenses saved because of the seller's breach.⁴⁸⁴ Incidental and consequential damages are also properly recoverable in this circumstance.⁴⁸⁵ Market price is determined at the place of tender, except in cases of rejection after arrival or revocation of acceptance, in which case it is determined at the place of arrival.⁴⁸⁶

The remedy available under Section 2-713 is completely in the alternative to the cover remedy, so it applies only when and to the extent the buyer has not covered. Under Section 2-713, the buyer will have the burden of proving the market price, so when cover is possible, it is usually the preferable remedy.⁴⁸⁷ Firmly establishing an increased market price in this situation is crucial, because there are no damages if the difference between the contract price and market price is zero (or less).⁴⁸⁸

D. Section 2-714 – Damages when Goods Have Been Accepted but Are Non-Conforming

In the circumstance where a buyer accepts goods and is unable to rightfully reject or revoke acceptance, damages may

still be recovered for the non-conforming breach,⁴⁸⁹ provided the buyer has given proper notification.⁴⁹⁰ When covering under Section 2-712 or obtaining damages for non-delivery or repudiation under Section 2-713, the buyer ultimately will not retain the goods, but Section 2-714 provides for damages when the buyer already has accepted and, for that reason, the buyer does keep the goods on recoveries under this section.⁴⁹¹

The measure of damages is the difference between the value of the goods that were accepted (at the time and place of acceptance) and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.⁴⁹² In situations where revocation of acceptance would be justified, but is not used, the time and place for measuring damages is advanced to the time when the buyer decides not to revoke.⁴⁹³

Acceptance of non-conforming goods does not bar the ability to recover incidental and consequential damages.⁴⁹⁴ Thus, as discussed in the following Section E, incidental and consequential damages are available under Section 2-714 “in a proper case.”⁴⁹⁵

E. Section 2-715 – The Meaning of Incidental and Consequential Damages

Incidental damages cover a wide range of expenses that a buyer could incur when a breach of warranty occurs. These expenses include inspection, receipt, transportation, care, and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the delay or other breach.⁴⁹⁶

Consequential damages include injury

to a person or property proximately resulting from any breach of warranty, as well as any loss resulting from general or particular requirements and needs that the seller knew or had reason to know at the time of the contracting and could not reasonably be prevented by cover or otherwise.⁴⁹⁷

Though the distinction between incidental and consequential damages is sometimes difficult to encapsulate, one view of the difference between the two is given in *Petroleo Brasileiro S.A. Petrobras v. Ameropan Oil Co.*,⁴⁹⁸ as follows:

While the distinction between the two is not an obvious one, the Code makes plain that incidental damages are normally incurred when a buyer . . . repudiates the contract or wrongfully rejects the goods, causing the other to incur such expenses as transporting, storing, or reselling the goods. On the other hand, consequential damages do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of the contracting.⁴⁹⁹

F. Section 2-716 – When Specific Performance or Replevin Is Available

In cases where the seller fails to deliver or repudiates the contract, the buyer, in addition to its other remedies, may obtain specific performance if the goods have been identified to the contract, or replevy the goods in a proper case.⁵⁰⁰ Ostensibly, these remedies are not available in situations where fungible goods that have not

been identified to the contract are involved.

In general, specific performance is available where the goods are unique “or in other proper circumstances.”⁵⁰¹ When specific performance is allowed, the decree or judgment providing for it may include “terms and conditions as to payment of the price, damages, or other relief as the court may deem just.”⁵⁰²

Although it is perhaps obvious that one-of-a-kind goods are a proper subject of specific performance,⁵⁰³ items having special sentimental value, items that are custom made,⁵⁰⁴ and goods that have special market significance, such as goods covered by an output contract,⁵⁰⁵ also are properly claimed with this remedy. The meaning of “in other proper circumstances” under Section 2-716(1) generally has been regarded to apply when the buyer cannot cover on the open market.⁵⁰⁶ This circumstance results only in the rare availability of the replevin remedy where goods previously have not been identified to the contract.⁵⁰⁷ When replevin is available, however, it can be a useful remedy because it enables possession of the goods to be obtained before judgment.

The buyer has a right to replevin of the goods only where they are identified to the contract and where the buyer is unable to effect cover after reasonable effort or circumstances reasonably indicate that the buyer will be unable to cover.⁵⁰⁸

G. Section 2-717 – The Self-Help Remedy of Deducting Damages from the Contract Price

A buyer may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract, upon notifying the seller of his intention to do so.⁵⁰⁹ As a result, damages may be deducted from amounts still owed on a contract where

goods, which are in breach of a warranty, are accepted.⁵¹⁰ Under these circumstances, the buyer will have the burden of proving the breach because he has accepted the goods.⁵¹¹ Notice must be given to the seller of the buyer’s intention to deduct, but care should be taken to insure that notice of the breach is also given under Section 2-607(3).⁵¹²

H. Sections 2-718 and 2-719 – Liquidated Damages and Modification or Limitation of Remedies

The remedies for breach of warranty claims may be modified or limited.⁵¹³ Such modification includes the possibility for liquidated damages under Section 2-718.⁵¹⁴

Liquidated damages provisions are valid only when they are “at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.”⁵¹⁵ Unreasonably large liquidated damages provisions are void because they are considered a penalty.⁵¹⁶

Where the actual damages can be determined, that inquiry usually will be relevant to determine the reasonableness of a liquidated damages clause.⁵¹⁷ Liquidated damages clauses have been invalidated where the measure of damages is uncertain, and the majority rule is that a buyer cannot recover liquidated damages for a breach to which the buyer has contributed.⁵¹⁸ When a liquidated damages provision is voided, a buyer still may have other remedies available under Article 2.

Even though any of the remedies available under Article 2 may be limited or excluded by contract, the contract language must expressly state that the remedy is the exclusive or sole remedy, or it will be deemed to be an “optional” remedy.⁵¹⁹ Such

modifications could provide additional remedies or substitute remedies for those provided under Article 2 or could limit or change the damages recoverable, such as by limiting the buyer’s remedies to return of the goods and repayment of the contract price or to repair and replacement of non-conforming goods.⁵²⁰

Likewise, consequential damages may be limited or excluded as long as the limitation or exclusion is not unconscionable.⁵²¹ In the case of injury to a person or in the case of consumer goods, a limitation of consequential damages is *prima facie* unconscionable.⁵²² In a case involving commercial goods, there is no *prima facie* proof of unconscionability.⁵²³

Although modification or limitation of Article 2 remedies is permitted, it is clear that the modification or limitation by contract cannot result in the complete failure to provide a proper remedy for a foreseeable breach. Section 2-719(2) provides: “Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.”⁵²⁴ As a result, even in situations where the contract purports to limit or exclude remedies, the Article 2 remedies may continue to be available if there is proof the contract remedy failed of its “essential purpose.”⁵²⁵ Thus, even though the Article 2 remedies may be limited or modified, some remedy must be provided that arguably compensates the buyer for its loss.⁵²⁶

Early and proper assessment of the factual circumstances of a breach of warranty is paramount to the determination of appropriate remedies under Article 2. Careful attention to, and analysis of the facts surrounding a breach of warranty, are likely to have a significant impact on the propriety and viability of the potential remedies and, thus, recoverable damages.

— Continued on next page

VI. Sections 2-720 to 2-725

In a breach of a sales contract, claims for damages are not easily overcome.⁵²⁷ As discussed below, the mere existence of cancellations, market price delays, or statutes of limitations will not prevent parties from seeking damages. Illinois, however, has placed significant limitations on the provision regulating future performance.

Section 2-720 protects both the buyer and the seller from unintentional waivers of their claims for damages for breach of a sales contract.⁵²⁸ The use of the terms “cancellation” or “rescission” of a contract shall not act as waiver of any claim for damages for breach of contract.⁵²⁹ “Unless the contrary intention clearly appears,” when either party cancels a contract, it will not waive its claim for damages for breach of contract.⁵³⁰ In *National Register Cash Co. v. UNARCO Industries, Inc.*,⁵³¹ a contractor wrote to a subcontractor to inform the subcontractor that the contractor was canceling a subcontract and that it would procure the items covered by the contract from another supplier.⁵³² The court held that canceling the contract by the contractor was not a waiver of its right to claim damages from the subcontractor for the subcontractor’s breach of the contract.⁵³³ All the remedies afforded a party by Article 2 also apply to claims for “material misrepresentation or fraud.”⁵³⁴ Rescission, rejection of the goods, or return of the goods does not waive any claim for damages or any other remedy that the buyer might have under Article 2.

Once goods are identified to be furnished under the contract of sale, both the buyer and the seller then have the right to file suit for damage or conversion of the goods.⁵³⁵ This provision adopts a “real party in interest” law to goods that have been identified as subject of the sale. The Comment to Section 2-722 notes:

Prior to [identification of the goods] only the seller has a right of action. During the period between identification and final acceptance (except in the case of verification of acceptance) it is possible for both parties to have the right of action. Even after final acceptance both parties may have the right of action if the seller retains possession or otherwise retains an interest.⁵³⁶

In *Draper v. Minneapolis-Moline, Inc.*,⁵³⁷ the buyer purchased a tractor from a dealer. The tractor manufacturer financed the dealer’s inventory.⁵³⁸ After the purchase, the manufacturer delivered a tractor to the dealer, which the dealer identified to the buyer was the tractor that he had purchased.⁵³⁹ The dealer did not deliver the tractor to the buyer, because the buyer had ordered a cab with the tractor, which had not yet been delivered to the dealer.⁵⁴⁰ The manufacturer then audited the dealer’s inventory, found the dealer in arrears on payments due the manufacturer, and repossessed all of the manufacturer’s products in the dealer’s store, including the tractor that had been identified to the buyer as the tractor he had purchased.⁵⁴¹ The manufacturer did not deliver the tractor to the buyer, and the buyer sued for extra expenses incurred using his old tractor for spring plowing.⁵⁴² The court noted that the financing agreement between the dealer and the manufacturer granted the dealer authority to sell the tractor free of the security interest after which the security interest would then attach to the sale proceeds.⁵⁴³ Relying upon Section 2-722, the court concluded that the buyer could sue the manufacturer for damages arising from conversion.⁵⁴⁴

Sections 2-723 and 2-724 provide parties with leeway in obtaining market

price evidence. Specifically, Section 2-723 provides the parties with additional time to prove market price when it is not readily available.⁵⁴⁵ “[T]he court is . . . granted reasonable leeway in receiving evidence of prices current in other comparable markets or at other times comparable to the one in question.”⁵⁴⁶

Similarly, Section 2-724 establishes the methods one may use to introduce market price evidence. It states that where the price or value of goods regularly bought and sold in any established market is in issue, reports in official publications, trade journals, newspapers, and periodicals of general circulation are admissible into evidence.⁵⁴⁷ Illinois did not enact the 2003 Amendment to Section 2-724, which allows for other forms of communication to be used to show the market price, presumably information available electronically.

Section 2-725 provides the statute of limitations period for sale contracts. The Illinois version of Section 2-725 provides that an “action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued.”⁵⁴⁸ The cause accrues “when the breach occurs.”⁵⁴⁹ Knowledge of the breach does not determine when the cause of action accrues.⁵⁵⁰ If an action started within the four-year statute of limitation is later terminated, but there is another remedy available for the breach, a subsequent action may be commenced within the four years or within six months after termination of the first suit.⁵⁵¹

A “breach of warranty occurs when delivery is made.”⁵⁵² But, “where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.”⁵⁵³ The Illinois courts, however, have severely limited the impact of the provision pertaining

to future performance of the goods.

The provision regarding future performance has been litigated in several Illinois cases. First, the implied warranties of merchantability and fitness pertain to the condition of the goods at the time of delivery and cannot be used as a basis for a breach of warranty claim based upon future performance.⁵⁵⁴ To invoke the provision on future performance to extend the warranty, the warranty must “explicitly guaranty future performance of the product.”⁵⁵⁵ The warranty must be concise and plain.⁵⁵⁶

The provision regarding future performance has been litigated in several Illinois cases. First, the implied warranties of merchantability and fitness pertain to the condition of the goods at the time of delivery and cannot be used as a basis for a breach of warranty claim based upon future performance. To invoke the provision on future performance to extend the warranty, the warranty must “explicitly guaranty future performance of the product.”

Expectations cannot be used to extend the four-year period.⁵⁵⁷ For instance, in *Moorman Manufacturing Co. v. National Tank Co.*,⁵⁵⁸ the court held that the statement “Tank designed to withstand 60 lbs. per bushel of grain and 100 m.p.h. winds” did not apply to future performance.⁵⁵⁹ The court reasoned that the warranty’s language did not guarantee future performance explicitly nor were the party’s expectations sufficient to toll the statute of limitations.⁵⁶⁰

By agreement, the parties to a sales contract may reduce the four-year period. The warranty period, however, has to be at least one year. Further, the parties cannot extend the time period beyond four years.⁵⁶¹

Not only does Section 2-725 apply to commercial contracts, but it also applies to personal injury actions based on breach of warranty.⁵⁶² Accordingly, Section 2-725 is beneficial to a plaintiff seeking to recover personal injury due to a product defect.⁵⁶³ Although a breach of warranty claim might be barred by the four-year limitation period, property damage claims are governed by the five-year limitation.⁵⁶⁴ A suit for misrepresentation arising from a sales transaction is subject to the general five-year statute of limitations.⁵⁶⁵

Sections 2-720 to 2-725 protect damages to which parties are entitled when a sales contract or warranty is breached. Pursuant to these sections, neither canceling a contract nor a delay in obtaining evidence of market price information will automatically prevent one from obtaining damages. Accordingly, one cannot easily avoid damages in breach of warranty or sales contract cases.

VII. Conclusion

Article 2 of the UCC provides an extensive and detailed framework for warranty law in Illinois. Depending on

the circumstances, these warranties, which apply to the sale of goods, can be imposed automatically, implied, or created by the words or conduct of the parties. They can be excluded, disclaimed, or modified if the contract is drafted properly. Specific requirements also exist for providing notice to invoke the protections afforded by these warranties, and the remedies and defenses available for a breach of warranty claim are numerous and varied. Whether drafting or reviewing a sales contract for a client, prosecuting or defending a commercial breach of contract claim or defending against a breach of warranty product liability claim, knowledge of the provisions of Article 2 of the UCC is a must.

(Endnotes)

¹ *Moorman Mfg. Co. v. Nat’l Tank Co.*, 91 Ill. 2d 69 (1982).

² 810 ILCS 5/2-101–725 (2013).

³ *Id.* § 2-312.

⁴ *Id.* § 2-313.

⁵ *Id.* § 2-314.

⁶ *Id.* § 2-315.

⁷ *Siler v. N. Trust Co.*, 80 F. Supp. 2d 906, 910 (N.D. Ill. 2000), quoting Black’s Law Dictionary 1586 (6th ed. 1990); see also *Indeck N. Am. Power Fund, L.P. v. Norweb PLC*, 316 Ill. App. 3d 416 (1st Dist. 2000).

⁸ *Metro. Coal Co. v. Howard*, 155 F.2d 780 (2d Cir. 1946).

⁹ *Metro. Coal*, 155 F.2d at 784; see also *Capitol Bankers Life Ins. Co. v. Amalgamated Trust & Sav. Bank*, No. 92 C 4480, 1993 U.S. Dist. LEXIS 6032, at *10 (N.D. Ill. May 6, 1993), quoting *Vasco Trucking, Inc. v. Parkhill Truck Co.*, 6 Ill. App. 3d 572 (4th Dist. 1972).

¹⁰ *Consol. Freightways Corp. v. Niedert Terminals, Inc.*, 612 F. Supp. 1391, 1396 (N.D. Ill. 1985).

¹¹ See *Bormann v. Simpson*, 45 Ill. App. 3d 176 (5th Dist. 1977).

¹² 810 ILCS 5/2-312(1).

— Continued on next page

- ¹³ *Kel-Keef Enters., Inc. v. Quality Components Corp.*, 316 Ill. App. 3d 998, 1014 (1st Dist. 2000).
- ¹⁴ *Kel-Keef Enters., Inc.*, 316 Ill. App. 3d at 1014, quoting *Jones v. Linebaugh*, 34 Mich. App. 305, 309-10, 191 N.W.2d 142, 144-45 (1971).
- ¹⁵ *Id.*
- ¹⁶ *Id.* at 1015.
- ¹⁷ *Id.* at 1014.
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ 810 ILCS 5/2-312 cmt. 5.
- ²¹ *Id.*
- ²² *Id.* §§ 9-101–108.
- ²³ *Id.* § 2-401(2).
- ²⁴ *Id.*
- ²⁵ *Id.* § 2-401(2)(a).
- ²⁶ This circumstance involves what is commonly referred to as a shipment contract. In a shipment contract, the seller is required or authorized to ship goods by carrier, such as a trucking company. Under a shipment contract, the seller is required only to deliver the goods into the hands of a carrier, and title passes to the buyer at the time and place of shipment.
- ²⁷ 810 ILCS 5/2-509(1)(a).
- ²⁸ *Id.*; see also *id.* § 2-401(2)(b).
- ²⁹ *Id.* §§ 2-401(2)(b); 2-509(1)(b).
- ³⁰ *Id.* § 2-401(3)(a).
- ³¹ *Id.* § 2-401(3)(b).
- ³² 810 ILCS 5/2-312(3).
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ *Id.*
- ³⁶ *Phoenix Solutions, Inc. v. Sony Elecs. Inc.*, 637 F. Supp. 2d 683, 693 (N.D. Cal. 2009).
- ³⁷ *Sun Coast Merch. Corp. v. Myron Corp.*, 393 N.J. Super. 55, 76 (App. Div. 2007).
- ³⁸ *Kel-Keef Enters., Inc. v. Quality Components Corp.*, 316 Ill. App. 3d 998 (1st Dist. 2000).
- ³⁹ *Kel-Keef Enters., Inc.*, 316 Ill. App. 3d at 1013-14.
- ⁴⁰ *Id.* at 1014.
- ⁴¹ *Id.*
- ⁴² *Id.* at 1015.
- ⁴³ *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ *Kel-Keef Enters., Inc.*, 316 Ill. App. 3d at 1015.
- ⁴⁶ *Id.*, citing *Rockdale Cable T.V. Co. v. Spadora*, 97 Ill. App. 3d 754, 757 (3d Dist. 1981).
- ⁴⁷ *Id.*
- ⁴⁸ *Id.*
- ⁴⁹ *Id.*
- ⁵⁰ *Kel-Keef Enters., Inc.*, 316 Ill. App. 3d at 1016.
- ⁵¹ *Id.*
- ⁵² *Moore v. Pro Team Corvette Sales, Inc.*, 152 Ohio App. 3d 71 (3d Dist. 2002).
- ⁵³ *Moore*, 152 Ohio App. 3d at 72.
- ⁵⁴ *Id.*
- ⁵⁵ *Id.*
- ⁵⁶ *Id.* at 75.
- ⁵⁷ *Id.*
- ⁵⁸ *Id.* at 74. For example, the Section 2-312 warranty of title, 810 ILCS 5/2-312(1), effectively could be disclaimed by language stating that “the seller does not warrant that he has any right to convey the title to the goods.” *Sunseri v. RKO-Stanley Warner Theatres, Inc.*, 248 Pa. Super. 111, 374 A.2d 1342, 1345 (1977).
- ⁵⁹ *Moore*, 152 Ohio App. 3d at 74.
- ⁶⁰ *Id.* at 75.
- ⁶¹ *Saber v. Dan Angelone Chevrolet, Inc.*, 811 A.2d 644 (R.I. 2002).
- ⁶² *Saber*, 811 A.2d at 651.
- ⁶³ *Id.* at 647.
- ⁶⁴ *Id.*
- ⁶⁵ *Id.*
- ⁶⁶ *Id.* at 648.
- ⁶⁷ *Id.* at 652.
- ⁶⁸ *Saber*, 811 A.2d at 651.
- ⁶⁹ *Id.*
- ⁷⁰ *Id.*
- ⁷¹ *Id.*
- ⁷² *Id.*
- ⁷³ *Id.*
- ⁷⁴ *Phoenix Solutions, Inc. v. Sony Elecs. Inc.*, 637 F. Supp. 2d 683 (N.D. Cal. 2009).
- ⁷⁵ *Phoenix Solutions, Inc.*, 637 F. Supp. 2d at 688.
- ⁷⁶ *Id.*
- ⁷⁷ *Id.* at 689.
- ⁷⁸ *Id.* at 692-93.
- ⁷⁹ *Id.* at 693.
- ⁸⁰ *Id.* at 694.
- ⁸¹ *Phoenix Solutions, Inc.*, 637 F. Supp. 2d at 697.
- ⁸² *Id.*
- ⁸³ *Id.* at 698.
- ⁸⁴ *Id.*
- ⁸⁵ *Id.*, quoting *Cover v. Hydramatic Packing Co.*, 83 F.3d 1390, 1394 (Fed. Cir. 1996).
- ⁸⁶ *Pacific Sunwear of Cal., Inc. v. Olaes Enters., Inc.*, 167 Cal. App. 4th 466 (2008).
- ⁸⁷ *Pacific Sunwear of Cal., Inc.*, 167 Cal. App. 4th at 470.
- ⁸⁸ *Id.* at 473.
- ⁸⁹ *Id.* at 481.
- ⁹⁰ *Id.* at 482.
- ⁹¹ *Id.* at 483.
- ⁹² *Id.* at 476-77.
- ⁹³ *Pacific Sunwear of Cal., Inc.*, 167 Cal. App. 4th at 476.
- ⁹⁴ *Sun Coast Merch. Corp. v. Myron Corp.*, 393 N.J. Super. 55 (App. Div. 2007).
- ⁹⁵ *Sun Coast Merch. Corp.*, 393 N.J. Super at 61.
- ⁹⁶ *Id.* at 63.
- ⁹⁷ *Id.* at 76.
- ⁹⁸ *Id.* at 55.
- ⁹⁹ *Id.* at 76-77.
- ¹⁰⁰ *Id.*
- ¹⁰¹ *Sun Coast Merch. Corp.*, 393 N.J. Super at 79 (internal quotations omitted).
- ¹⁰² *Id.* at 81.
- ¹⁰³ *Id.*
- ¹⁰⁴ 810 ILCS 5/2-312(2).
- ¹⁰⁵ *Id.* § 2-312(3).
- ¹⁰⁶ *Id.*
- ¹⁰⁷ *Tommy Boy* (Paramount Pictures 1995).
- ¹⁰⁸ 810 ILCS 5/2-313(1).
- ¹⁰⁹ *Felley v. Singleton*, 302 Ill. App. 3d 248 (2d Dist. 1999).
- ¹¹⁰ *Keller v. Flynn*, 346 Ill. App. 499 (2d Dist. 1952) (finding that the defendants warranted that hogs had not been treated for cholera and were safe, and that the plaintiff relied on this warranty).
- ¹¹¹ *Oggi Trattoria & Caffè, Ltd. v. Isuzu Motors Am., Inc.*, 372 Ill. App. 3d 354 (1st Dist. 2007); *Hasek v. DaimlerChrysler Corp.*, 319 Ill. App. 3d 780 (1st Dist. 2001).

¹¹² *Oggi Trattoria & Caffè, Ltd.*, 372 Ill. App. 3d at 354; *Hasek*, 319 Ill. App. 3d at 780.

¹¹³ Compare *Weng v. Allison*, 287 Ill. App. 3d 535, 538 (3d Dist. 1997) (“The burden is upon the seller to establish . . . that the affirmations did not become part of the basis of the bargain.”), and *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068 (5th Dist. 1982), with *Regopoulos v. Waukegan P’ship*, 240 Ill. App. 3d 668, 674 (1st Dist. 1992) (requiring a purchaser to prove that he “actually relied upon the warranty”), and *Spectramed Inc. v. Gould Inc.*, 304 Ill. App. 3d 762, 775 (1st Dist. 1998) (“The law . . . requires that parties prove they actually relied on the warranty provisions.”).

¹¹⁴ *Adolphson v. Gardner-Denver Co.*, 196 Ill. App. 3d 396 (3d Dist. 1990).

¹¹⁵ 810 ILCS 5/2-313(1)(b).

¹¹⁶ *Alan Wood Steel Co. v. Capital Equip. Enters., Inc.*, 39 Ill. App. 3d 48 (1st Dist. 1976).

¹¹⁷ *Alan Wood Steel Co.*, 39 Ill. App. 3d at 48 (holding that when a buyer’s decision to buy was primarily based on opinions and observations of its skilled inspectors who examined a crane on two different occasions and when evidence indicated that the parties intended that crane be sold as inspected without warranties, no express warranty was included in the terms of the contract); *Jansen v. Hook*, 1 Ill. App. 3d 318 (2d Dist. 1971).

¹¹⁸ *E.g., Hodgman v. State Line & Sullivan R.R.*, 45 Ill. App. 395 (2d Dist. 1892).

¹¹⁹ *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068 (5th Dist. 1982) (noting that it is clear that documents and brochures may constitute express warranties); *Wheeler v. Sunbelt Tool Co.*, 181 Ill. App. 3d 1088 (4th Dist. 1989).

¹²⁰ *Adolphson*, 196 Ill. App. 3d at 396; *Crest Container Corp.*, 111 Ill. App. 3d at 1068.

¹²¹ *MacNeil Auto. Prods., Ltd. v. Cannon Auto., Ltd.*, 715 F. Supp. 2d 786, 794 (N.D. Ill. 2010).

¹²² *Schreib v. Walt Disney Co.*, No. 1-05-0094, 2006 WL 573008 (1st Dist. Feb. 1, 2006).

¹²³ *MacNeil Auto. Prods., Ltd.*, 715 F. Supp. 2d at 794-95.

¹²⁴ *Redmac, Inc. v. Computerland of Peoria*, 140 Ill. App. 3d 741 (3d Dist. 1986).

¹²⁵ *Redmac*, 140 Ill. App. 3d at 382 (finding that a salesman’s statements that a computer system would be “free of defects” upon delivery and would “work for a reasonable period of time” created express warranty); see also

Weng v. Allison, 287 Ill. App. 3d 535 (3d Dist. 1997) (seller’s statements that the car at issue was “mechanically sound,” “in good condition,” and had “no problems” were affirmations of fact and descriptions of the car that created an express warranty). But see *Olin Mathieson Chem. Corp. v. Moushon*, 93 Ill. App. 2d 280 (4th Dist. 1968) (holding that no express warranty was formed when a seller characterized a product as being of good quality and would produce results with which a buyer would be pleased); and *Royal Bus. Machs. v. Lorraine Corp.*, 633 F.2d 34 (7th Cir. 1980) (holding that no express warranty was created when a seller described goods as being of high quality, requiring few repairs, and from which a buyer could expect substantial profits).

¹²⁶ *Weiss v. Rockwell Mfg. Co.*, 9 Ill. App. 3d 906, 915 (1st Dist. 1973); see also *Keller v. Flynn*, 346 Ill. App. 499, 508 (2d Dist. 1952); *Felley v. Singleton*, 302 Ill. App. 3d 248, 255 (2d Dist. 1999).

¹²⁷ *Grass v. Steinberg*, 331 Ill. App. 378 (1st Dist. 1947) (finding that a sale was not a sale by description but of specific article in existence and thoroughly and repeatedly inspected by the plaintiff and his experts, who were all well qualified to make such inspection, and that the plaintiff did not rely on any warranty but rather only on his examination of the property purchased, and holding that there could be no warranty, either express or implied, as to justify rescission).

¹²⁸ *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307 (2007); *Heisner v. Genzyme Corp.*, No. 08-C-593, 2008 WL 2940811 (N.D. Ill. July 25, 2008).

¹²⁹ *Mydlach*, 226 Ill. 2d at 321.

¹³⁰ *Eaton Corp. v. Minerals Techs., Inc.*, No. 96CV162, 1999 WL 33485557, at *9 (W.D. Mich. Mar. 19, 1999).

¹³¹ 810 ILCS 5/2-313 cmt. 6.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 810 ILCS 5/2-313 cmt. 6.

¹³⁸ *Id.*

¹³⁹ *Id.* § 2-313 cmt. 7.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Oggi Trattoria & Caffè, Ltd. v. Isuzu Motors Am., Inc.*, 372 Ill. App. 3d 354 (1st Dist. 2007); *Hasek v. DaimlerChrysler Corp.*, 319 Ill. App. 3d 780 (1st Dist. 2001); *Collum v. Fred Tuch Buick*, 6 Ill. App. 3d 317, 322 (1st Dist. 1972) (“[T]he plaintiff must prove that the alleged malfunctioning . . . was caused by a defect in the parts and workmanship, and that the manufacturer failed to repair or replace the parts in accordance with the warranty.”).

¹⁴³ *Felley v. Singleton*, 302 Ill. App. 3d 248 (2d Dist. 1999) (emphasizing that whether an express warranty exists is usually a factual issue to be determined by the trier of fact).

¹⁴⁴ *MacNeil Auto. Prods., Ltd. v. Cannon Auto., Ltd.*, 715 F. Supp. 2d 786 (N.D. Ill. 2010).

¹⁴⁵ *MacNeil Auto. Prods., Ltd.*, 715 F. Supp. 2d at 794.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 794-95.

¹⁴⁸ *Id.* at 795.

¹⁴⁹ *Id.* at 794-95.

¹⁵⁰ *Id.*

¹⁵¹ *MacNeil Auto. Prods., Ltd.*, 715 F. Supp. 2d at 795.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Oggi Trattoria & Caffè, Ltd. v. Isuzu Motors Am., Inc.*, 372 Ill. App. 3d 354 (1st Dist. 2007).

¹⁵⁷ *Oggi Trattoria & Caffè, Ltd.*, 372 Ill. App. 3d at 356.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 356-57.

¹⁶⁰ *Id.* at 357.

¹⁶¹ *Id.*

¹⁶² *Id.* at 358.

¹⁶³ *Oggi Trattoria & Caffè, Ltd.*, 372 Ill. App. 3d at 361.

¹⁶⁴ *Id.* at 360.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 361.

¹⁶⁹ *Oggi Trattoria & Caffè, Ltd.*, 372 Ill. App. 3d at 361.

¹⁷⁰ *Id.* at 360-61.

— Continued on next page

- ¹⁷¹ *Schreib v. Walt Disney Co.*, No. 1-05-0094, 2006 WL 573008 (1st Dist. Feb. 1, 2006).
- ¹⁷² *Schreib*, 2006 WL 573008, at *1.
- ¹⁷³ *Id.*
- ¹⁷⁴ *Id.*
- ¹⁷⁵ *Id.*
- ¹⁷⁶ *Id.* at *2.
- ¹⁷⁷ *Id.*
- ¹⁷⁸ *Schreib*, 2006 WL 573008, at *2.
- ¹⁷⁹ *Id.* at *2-3.
- ¹⁸⁰ *Id.* at *3.
- ¹⁸¹ *Id.*
- ¹⁸² *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 379 F. Supp. 2d 968 (N.D. Ill. 2005).
- ¹⁸³ *Loeffel Steel Prods., Inc.*, 379 F. Supp. 2d at 970.
- ¹⁸⁴ *Id.* at 982.
- ¹⁸⁵ *Id.*
- ¹⁸⁶ *Id.* at 981.
- ¹⁸⁷ *Id.* at 982.
- ¹⁸⁸ 810 ILCS 5/2-313(1)(a).
- ¹⁸⁹ *Loeffel Steel Prods., Inc.*, 379 F. Supp. 2d at 982.
- ¹⁹⁰ *Id.* at 983.
- ¹⁹¹ New Sections 2-313A and 2-313B of the UCC, U.C.C. §§ 2-313A; 2-313B (2003), create new so-called “pass-through warranties” for transactions within the normal chain of distribution. They pertain to records that are packaged with or accompany goods, and to advertisements made to the general public. These sections create statutory obligations in the nature of express warranties that run directly from a seller to a remote purchaser that is not in privity and excludes liability for statements that are mere opinion, permits the seller to modify or limit remedies as long as the modification or limitation is provided to the remote purchaser at or before the time of purchase, and excludes recovery for consequential damages in the form of lost profits. Illinois has **NOT** enacted any of the proposed revisions to Article 2, including the obligations to remote purchasers as set forth in Sections 2-313A and 2-313B. To date, only three state legislatures (Kansas, Nevada, and Oklahoma) have considered bills proposing to enact the 2003 amendments to Article 2 of the UCC.
- ¹⁹² *Bell Fuels, Inc. v. Lockheed Elecs. Co.*, 130 Ill. App. 3d 940, 943 (1st Dist. 1985).
- ¹⁹³ 810 ILCS 5/2-314(1).
- ¹⁹⁴ *Maldonado v. Creative Woodworking Concepts, Inc.*, 342 Ill. App. 3d 1028, 1034 (3d Dist. 2003).
- ¹⁹⁵ *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 352 (1st Dist. 1972).
- ¹⁹⁶ U.C.C. § 2-314 cmt. 3.
- ¹⁹⁷ 810 ILCS 5/2-314(2).
- ¹⁹⁸ U.C.C. § 2-314 cmt. 6.
- ¹⁹⁹ 810 ILCS 5/2-314(1).
- ²⁰⁰ U.C.C. § 2-104 cmt. 2.
- ²⁰¹ U.C.C. § 2-314 cmt. 3.
- ²⁰² *AEA Corp. v. Phoenix Closures, Inc.*, 501 F. Supp. 224, 229 (N.D. Ill. 1980).
- ²⁰³ *Hemphill v. Sayers*, 552 F. Supp. 685, 689 (S.D. Ill. 1982).
- ²⁰⁴ *Siemen v. Alden*, 34 Ill. App. 3d 961 (2d Dist. 1975).
- ²⁰⁵ *Siemen*, 34 Ill. App. 3d at 963.
- ²⁰⁶ *Id.* at 964.
- ²⁰⁷ *Fed. Ins. Co. v. Vill. of Westmont*, 271 Ill. App. 3d 892, 897 (2d Dist. 1995).
- ²⁰⁸ *Oggi Trattoria & Caffè, Ltd. v. Isuzu Motors Am., Inc.*, 372 Ill. App. 3d 354, 361 (1st Dist. 2007).
- ²⁰⁹ *Toyomenka (Am.) Inc. v. Combined Metals Corp.*, 139 Ill. App. 3d 654, 660 (1st Dist. 1985).
- ²¹⁰ *Ouwenga v. Nu-Way Ag, Inc.*, 239 Ill. App. 3d 518 (3d Dist. 1992).
- ²¹¹ *Midland Supply Co. v. Ehret Plumbing & Heating Co.*, 108 Ill. App. 3d 1120 (5th Dist. 1982).
- ²¹² *Check v. Clifford Chrysler-Plymouth of Buf-falo Grove, Inc.*, 342 Ill. App. 3d 150 (1st Dist. 2003).
- ²¹³ *Shoop v. DaimlerChrysler Corp.*, 371 Ill. App. 3d 1058 (1st Dist. 2007).
- ²¹⁴ *Shoop*, 371 Ill. App. 3d at 1065.
- ²¹⁵ *Id.* at 1066.
- ²¹⁶ *Alvarez v. Am. Isuzu Motors*, 321 Ill. App. 3d 696 (1st Dist. 2001).
- ²¹⁷ *Alvarez*, 321 Ill. App. 3d at 696.
- ²¹⁸ *Id.* at 704.
- ²¹⁹ *Id.* at 705.
- ²²⁰ *Id.* at 706.
- ²²¹ *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 558 (1974).
- ²²² *Szajna v. General Motors Corp.*, 115 Ill. 2d 294, 311 (1986).
- ²²³ *Jensen v. Bayer AG*, 371 Ill. App. 3d 682, 691 (1st Dist. 2007).
- ²²⁴ *Rothe v. Maloney Cadillac, Inc.*, 119 Ill. 2d 288, 292 (1998); see also *Mekertichian v. Mercedes-Benz U.S.A., LLC*, 347 Ill. App. 3d 828, 832 (1st Dist. 2004).
- ²²⁵ 15 U.S.C. § 2301, *et. seq.*
- ²²⁶ *Szajna*, 115 Ill. 2d at 315-16.
- ²²⁷ *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 332 (2007).
- ²²⁸ *Shoop v. DaimlerChrysler Corp.*, 371 Ill. App. 3d 1058, 1066 (1st Dist. 2007).
- ²²⁹ *Voelker v. Porsche Cars N. Am., Inc.*, 353 F. 3d 516, 525 (7th Cir. 2003).
- ²³⁰ *E.g., IWOI, LLC v. Monaco Coach Corp.*, 581 F. Supp. 2d 994, 1000 (N.D. Ill. 2008); *Finch v. Ford Motor Co.*, 327 F. Supp. 942, 945-46 (N.D. Ill. 2004).
- ²³¹ 810 ILCS 5/2-314.
- ²³² *Id.* § 2-102.
- ²³³ *Pitler v. Michael Reese Hosp.*, 92 Ill. App. 3d 739, 742 (1st Dist. 1980).
- ²³⁴ *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 352-53 (2002).
- ²³⁵ *Brandt v. Boston Scientific Corp.*, 204 Ill. 2d 640 (2003).
- ²³⁶ *Brandt*, 204 Ill. 2d at 651.
- ²³⁷ *Id.* at 652.
- ²³⁸ *Id.*
- ²³⁹ *Id.*
- ²⁴⁰ *Id.* at 652-3; see also *Zielinski v. Miller*, 277 Ill. App. 3d 735, 741 (3d Dist. 1995) (finding that a masonry subcontract was primarily for services); *Tivoli Enters., Inc. v. Brunswick Bowling & Billiards Corp.*, 269 Ill. App. 3d 638, 645-47 (2d Dist. 1995) (finding that a bowling lane construction contract was predominately for goods); *Bob Neiner Farms, Inc. v. Hendrix*, 141 Ill. App. 3d 499, 501-03 (3d Dist. 1986) (finding that a building construction contract was primarily for goods); *Nitrin, Inc. v. Bethlehem Steel Corp.*, 35 Ill. App. 3d 577, 594-95 (1st Dist. 1976) (finding that a construction contract was predominantly for services).
- ²⁴¹ 810 ILCS 5/2-315.
- ²⁴² *Siemen v. Alden*, 34 Ill. App. 3d 961, 965 (2d Dist. 1975).
- ²⁴³ U.C.C. § 2-315 cmt. 2.
- ²⁴⁴ *Wilson v. Massey-Ferguson, Inc.*, 21 Ill. App. 3d 867, 869-70 (4th Dist. 1974) (finding

that a tractor sold for ordinary farm work would include heavy duty plowing and thus would not be covered by implied warranty of fitness for a particular purpose).

²⁴⁵ *Janssen v. Hook*, 1 Ill. App. 3d 318, 321 (2d Dist. 1971).

²⁴⁶ *Industrial Hard Chrome, Ltd. v. Hetran, Inc.*, 76 F. Supp. 2d 903, 908 (N.D. Ill. 1999).

²⁴⁷ *Custom Automated Mach. v. Penda Corp.*, 537 F. Supp. 77, 83 (N.D. Ill. 1982).

²⁴⁸ *Zaffiri v. Pontiac RV, Inc.*, 2012 IL App (4th) 120042-U.

²⁴⁹ *Zaffiri*, 2012 IL App (4th) 120042-U, ¶ 73.

²⁵⁰ *Id.* ¶¶ 73-74; see also *Anderson v. Farmers Hybrid Cos.*, 87 Ill. App. 3d 493, 502 (3d Dist. 1980) (holding that the plaintiffs had no fitness for a particular purpose claim that gilts could not be used for breeding where the ordinary use of gilts is for breeding purposes). But see *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 354-55 (1st Dist. 1972) (holding that an allegation that the seller was informed that the buyer was a salesman who needed his car for business purposes was sufficient to allege an implied warranty of fitness for a particular purpose).

²⁵¹ *Fed. Ins. Co. v. Vill. of Westmont*, 271 Ill. App. 3d 892, 897 (2d Dist. 1995).

²⁵² *Rubin v. Marshall Field & Co.*, 232 Ill. App. 3d 522, 529 (1st Dist. 1992).

²⁵³ *AFACorp. v. Phoenix Closures, Inc.*, 501 F. Supp. 224, 230 (N.D. Ill. 1980).

²⁵⁴ *Lathrop v. Tyrrell*, 128 Ill. App. 3d 1067 (3d Dist. 1984).

²⁵⁵ *Turnbough v. Schien*, 26 Ill. App. 3d 88 (4th Dist. 1975).

²⁵⁶ *Turnbough*, 26 Ill. App. 3d at 89-91.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 92.

²⁵⁹ *In re McDonald's French Fries Litigation*, 503 F. Supp. 2d 953 (N.D. Ill. 2007).

²⁶⁰ *Id.* at 957.

²⁶¹ *Rubin v. Marshall Field & Co.*, 232 Ill. App. 3d 522 (1st Dist. 1992).

²⁶² *Rubin*, 232 Ill. App. 3d at 525.

²⁶³ *Id.*

²⁶⁴ *Id.* at 526.

²⁶⁵ *Id.* at 530.

²⁶⁶ 810 ILCS 5/2-314.

²⁶⁷ *Sass v. Spradlin*, 66 Ill. App. 3d 976 (2d Dist. 1978).

²⁶⁸ *Sass*, 66 Ill. App. 3d at 980.

²⁶⁹ 810 ILCS 5/2-102.

²⁷⁰ *Nitrin, Inc. v. Bethlehem Steel Corp.*, 35 Ill. App. 3d 577, 592 (1st Dist. 1976).

²⁷¹ *Carroll v. Grabavoy*, 77 Ill. App. 3d 895, 901 (3d Dist. 1979).

²⁷² *Pitler v. Michael Reese Hosp.*, 92 Ill. App. 3d 739, 742 (1st Dist. 1980).

²⁷³ *Nitrin*, 35 Ill. App. 3d at 594.

²⁷⁴ *Id.* at 595.

²⁷⁵ *Budnick Converting, Inc. v. Nebula Glass Int'l, Inc.*, 866 F. Supp. 2d 976, 996 (S.D. Ill. 2012).

²⁷⁶ *Budnick Converting, Inc.*, 866 F. Supp. 2d at 998; *Hemphill v. Sayers*, 552 F. Supp. 685, 689 (S.D. Ill. 1982).

²⁷⁷ See, e.g., *Abco Metals Corp. v. J.W. Imports Co.*, 560 F. Supp. 125, 128 (N.D. Ill. 1982); *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068 (5th Dist. 1982).

²⁷⁸ *Szajna v. General Motors Corp.*, 115 Ill. 2d 294 (1986).

²⁷⁹ *Szajna*, 115 Ill. 2d at 311.

²⁸⁰ *Rothe v. Maloney Cadillac, Inc.*, 119 Ill. 2d 288 (1998).

²⁸¹ *Rothe*, 119 Ill. 2d at 292.

²⁸² *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 678-79 (N.D. Ill. 2005); see also *Forbes, Inc. v. Reliance Indus. Elec. Co.*, No. 95 C 4891, 1996 WL 650614, at *2 (N.D. Ill. Nov. 7, 1996) (noting the doubtful precedential value of pre-1986 cases regarding exceptions to the privity requirement).

²⁸³ 810 ILCS 5/2-316(2).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Bell Fuels, Inc. v. Lockheed Elecs. Co.*, 130 Ill. App. 3d 940, 944-45 (1st Dist. 1985).

²⁸⁷ *Midland Supply Co. v. Ehret Plumbing & Heating Co.*, 108 Ill. App. 3d 1120, 1125-26 (5th Dist. 1982); see also *Gideon Serv. Div. v. Dunham-Bush, Inc.*, 80 Ill. App. 3d 633 (1st Dist. 1980).

²⁸⁸ 810 ILCS 5/1-201(10).

²⁸⁹ *Tague v. Autobarn Motors, Ltd.*, 394 Ill. App. 3d 268, 278 (1st Dist. 2009).

²⁹⁰ *R.O.W. Window Co. v. Allmetal, Inc.*, 367 Ill. App. 3d 749, 753 (3d Dist. 2006).

²⁹¹ *Hamilton v. O'Connor Chevrolet, Inc.*, 399 F. Supp. 2d 860, 867 (N.D. Ill. 2005) (emphasis in original).

²⁹² *Shurland v. Bacci Café & Pizzeria on Ogden, Inc.*, No. 08 C 2259, 2010 WL 3835874, at *6 (N.D. Ill. Sept. 24, 2010).

²⁹³ *Westfield Ins. Co. v. Birkey's Farm Store, Inc.*, 399 Ill. App. 3d 219, 235 (3d Dist. 2010).

²⁹⁴ *Tague*, 394 Ill. App. 3d at 279.

²⁹⁵ *Anderson v. Farmers Hybrid Cos.*, 87 Ill. App. 3d 493 (3d Dist. 1980).

²⁹⁶ *Anderson*, 87 Ill. App. 3d at 501.

²⁹⁷ *Id.* at 502.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*; see also *Bowers Mfg. Co. v. Chi. Mach. Tool Co.*, 117 Ill. App. 3d 226, 234 (2d Dist. 1983).

³⁰¹ *Carpenter v. Mobile World, Inc.*, 194 Ill. App. 3d 830 (4th Dist. 1990).

³⁰² *Carpenter*, 194 Ill. App. 3d at 836.

³⁰³ *Id.* at 837.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 837-38.

³⁰⁶ 810 ILCS 5/2-316(3)(a).

³⁰⁷ *Imperial Stamp & Engraving Co. v. Bailey*, 82 Ill. App. 3d 835 (2d Dist. 1980).

³⁰⁸ 810 ILCS 5/2-316(3)(b).

³⁰⁹ U.C.C. § 2-316 cmt. 8.

³¹⁰ *Trans-Aire Int'l, Inc. v. N. Adhesive Co.*, 882 F.2d 1254 (7th Cir. 1989).

³¹¹ *Trans-Aire Int'l, Inc.*, 882 F.2d at 1258-59.

³¹² *Budnick Converting, Inc. v. Nebula Glass Int'l, Inc.*, 866 F. Supp. 2d 976 (S.D. Ill. 2012).

³¹³ *Budnick Converting, Inc.*, 866 F. Supp. 2d at 980-81.

³¹⁴ *Id.* at 981-82.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 983.

³¹⁸ *Id.* at 1000.

³¹⁹ 810 ILCS 5/2-316(3)(c).

³²⁰ *Id.* § 1-205(1).

³²¹ *R.O.W. Window Co. v. Allmetal, Inc.*, 367 Ill. App. 3d 749, 755 (3d Dist. 2006).

³²² *R.O.W. Window Co.*, 367 Ill. App. 3d at 755.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ 810 ILCS 5/2-317.

— Continued on next page

- ³²⁶ *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 326 (2d Dist. 1999).
- ³²⁷ 810 ILCS 5/2-317.
- ³²⁸ *Id.*
- ³²⁹ *Heat Exch'rs, Inc. v. Aaron Friedman, Inc.*, 96 Ill. App. 3d 376 (1st Dist. 1981).
- ³³⁰ *Heat Exch'rs, Inc.*, 96 Ill. App. 3d at 377.
- ³³¹ *Id.* at 386.
- ³³² *Id.* at 387; 810 ILCS 5/2-317.
- ³³³ 810 ILCS 5/2-316(1), quoted in *Heat Exch'rs, Inc.*, 96 Ill. App. 3d at 387.
- ³³⁴ *Heat Exch'rs, Inc.*, 96 Ill. App. 3d at 387.
- ³³⁵ *Id.*
- ³³⁶ U.C.C. § 2-317 cmt. 2.
- ³³⁷ 810 ILCS 5/2-318.
- ³³⁸ U.C.C. § 2-318 cmt. 2.
- ³³⁹ *Id.*
- ³⁴⁰ *Id.*
- ³⁴¹ See *infra* Section V (discussing remedies available under Sections 2-711 through 2-719).
- ³⁴² *Id.* § 2-318 cmt. 1.
- ³⁴³ *Hemphill v. Sayers*, 552 F. Supp. 685, 691 (S.D. Ill. 1982).
- ³⁴⁴ *Whitaker v. Lian Feng Mach. Co.*, 156 Ill. App. 316 (1st Dist. 1987).
- ³⁴⁵ *Whitaker*, 156 Ill. App. at 317.
- ³⁴⁶ *Id.* at 321.
- ³⁴⁷ *Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill. App. 3d 935, 938 (3d Dist. 1998); *Wheeler v. Sunbelt Tool Co.*, 181 Ill. App. 3d 1088, 1098-99 (4th Dist. 1989).
- ³⁴⁸ *Thomas v. Bombardier-Rotax Motorenfabrik, GmbH*, 869 F. Supp. 551, 556-57 (N.D. Ill. 1994).
- ³⁴⁹ *Lukwinski v. Stone Container Corp.*, 312 Ill. App. 3d 385 (1st Dist. 2000).
- ³⁵⁰ *Lukwinski*, 312 Ill. App. 3d at 386-87.
- ³⁵¹ *Id.* at 393-94; see also *Hemphill v. Sayers*, 552 F. Supp. 685, 690-93 (S.D. Ill. 1982).
- ³⁵² *Reed v. City of Chicago*, 263 F. Supp. 2d 1123 (N.D. Ill. 2003).
- ³⁵³ *Reed*, 263 F. Supp. 2d at 1126.
- ³⁵⁴ *Id.*
- ³⁵⁵ *Canadian Pac. Ry. v. Williams-Hayward Protective Coatings, Inc.*, No. 02 C 8800, 2005 WL 782698 (N.D. Ill. Apr. 6, 2005).
- ³⁵⁶ *Canadian Pac. Ry.*, 2005 WL 782698, at *12.
- ³⁵⁷ *Id.* But see *Caterpillar, Inc. v. Usinor In-*
- dusteel*, 393 F. Supp. 2d 659, 678-79 (N.D. Ill. 2005) (calling into doubt the exception to the privity rule after *Szajna*).
- ³⁵⁸ 810 ILCS 5/2-607(3)(a).
- ³⁵⁹ *Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill. App. 3d 935, 939 (3d Dist. 1998).
- ³⁶⁰ *Maldonado*, 296 Ill. App. 3d at 940.
- ³⁶¹ *Id.*; see also *Ratkovich v. SmithKline*, 711 F. Supp. 436 (N.D. Ill. 1989).
- ³⁶² *Maldonado*, 296 Ill. App. 3d at 939; see also *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482 (1996); *Branden v. Gerbie*, 62 Ill. App. 3d 138 (1st Dist. 1978).
- ³⁶³ *Maldonado*, 296 Ill. App. 3d at 940; see also *Perona v. Volkswagen of Am., Inc.*, 292 Ill. App. 3d 59 (1st Dist. 1997); J. White & R. Summers, Uniform Commercial Code § 11-10, at 481 (3d ed. 1988).
- ³⁶⁴ *Connick*, 174 Ill. 2d at 492.
- ³⁶⁵ *Id.* at 497.
- ³⁶⁶ *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548 (1974).
- ³⁶⁷ *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 350 (1st Dist. 1978).
- ³⁶⁸ *Connick*, 174 Ill. 2d at 494-95; see also *Bd. of Educ. v. A,C & S, Inc.*, 131 Ill. 2d 428 (1989); *Perona*, 292 Ill. App. 3d at 59; *Goldstein*, 62 Ill. App. 3d at 350.
- ³⁶⁹ *Connick*, 174 Ill. 2d at 495.
- ³⁷⁰ *Goldstein*, 62 Ill. App. 3d at 350.
- ³⁷¹ *Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill. App. 3d 935 (3d Dist. 1998).
- ³⁷² *Maldonado*, 296 Ill. App. 3d at 936-38.
- ³⁷³ *Id.* at 937.
- ³⁷⁴ *Id.* at 940.
- ³⁷⁵ *Id.*
- ³⁷⁶ *Id.* at 941.
- ³⁷⁷ *Id.*
- ³⁷⁸ 810 ILCS 5/2-607 cmt. 4; see also *Malawy v. Richards Mfg. Co.*, 150 Ill. App. 3d 549 (5th Dist. 1986).
- ³⁷⁹ *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 494 (1996).
- ³⁸⁰ *Connick*, 174 Ill. 2d at 490.
- ³⁸¹ *Id.* at 488.
- ³⁸² *Id.* at 494-95.
- ³⁸³ *Id.* at 494.
- ³⁸⁴ *Id.*; see also *Perona v. Volkswagon of Am.*, 292 Ill. App. 3d 59 (1st Dist. 1997) (applying the same logic in a case involving luxury vehicles).
- ³⁸⁵ 810 ILCS 5/2-601.
- ³⁸⁶ *Id.*
- ³⁸⁷ *Presto Mfg. Co. v. Formetal Eng'g Co.*, 46 Ill. App. 3d 7, 14 (1st Dist. 1977).
- ³⁸⁸ 810 ILCS 5/2-606(b).
- ³⁸⁹ *Presto Mfg. Co. v. Formetal Eng'g Co.*, 46 Ill. App. 3d 7 (1st Dist. 1977).
- ³⁹⁰ *Presto Mfg. Co.*, 49 Ill. App. 3d at 9.
- ³⁹¹ *Id.*
- ³⁹² *Id.*
- ³⁹³ *Id.*
- ³⁹⁴ *Id.*
- ³⁹⁵ *Id.*
- ³⁹⁶ *Presto Mfg. Co.*, 49 Ill. App. 3d at 9.
- ³⁹⁷ *Id.* at 10.
- ³⁹⁸ 810 ILCS 5/2-608.
- ³⁹⁹ *Id.* § 2-608 cmt. 1.
- ⁴⁰⁰ *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 359 (1st Dist. 1972).
- ⁴⁰¹ *AFACorp. v. Phoenix Closures, Inc.*, 501 F. Supp. 224 (N.D. Ill. 1980).
- ⁴⁰² *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 321 (2d Dist. 1999).
- ⁴⁰³ 810 ILCS 5/2-608(a)-(b).
- ⁴⁰⁴ *Id.* § 2-608(2).
- ⁴⁰⁵ *Id.*
- ⁴⁰⁶ *Boysen v. Antioch Sheet Metal, Inc.*, 16 Ill. App. 3d 331, 332 (2d Dist. 1974).
- ⁴⁰⁷ 810 ILCS 5/2-608(3).
- ⁴⁰⁸ See *supra* Section IV.B (discussing rejection of non-conforming goods under Section 2-601 of the UCC).
- ⁴⁰⁹ 810 ILCS 5/2-607(3)(a).
- ⁴¹⁰ *Id.* § 1-204(2).
- ⁴¹¹ *GNP Commodities, Inc. v. Walsh Heffernan Co.*, 95 Ill. App. 3d 966, 978 (1st Dist. 1981).
- ⁴¹² *N. Am. Lighting, Inc. v. Hopkins Mfg. Corp.*, 37 F.3d 1253, 1257-58 (7th Cir. 1994).
- ⁴¹³ *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313 (2d Dist. 1999).
- ⁴¹⁴ *Sorce*, 309 Ill. App. 3d at 318.
- ⁴¹⁵ *Id.*
- ⁴¹⁶ *Id.* at 317.
- ⁴¹⁷ *Id.* at 318.
- ⁴¹⁸ *Id.*
- ⁴¹⁹ *Id.*

- ⁴²⁰ *Sorce*, 309 Ill. App. 3d at 318.
- ⁴²¹ *Id.*
- ⁴²² *Id.*
- ⁴²³ *Id.* at 321.
- ⁴²⁴ *Id.*
- ⁴²⁵ *Id.*
- ⁴²⁶ *Chronister Oil Co. v. Unocal Ref. & Mktg.*, 34 F.3d 462, 464 (7th Cir. 1994).
- ⁴²⁷ *Nasco, Inc. v. Dahltron Corp.*, 74 Ill. App. 3d 302, 309 (2d Dist. 1979).
- ⁴²⁸ 810 ILCS 5/2-609.
- ⁴²⁹ *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167, 1170 (7th Cir. 1976).
- ⁴³⁰ *Shields Pork Plus, Inc. v. Swiss Valley AG Serv.*, 329 Ill. App. 3d 305, 317 (4th Dist. 2002).
- ⁴³¹ *Shields Pork Plus, Inc.*, 329 Ill. App. 3d at 308.
- ⁴³² *Id.* at 309-10.
- ⁴³³ *Id.*
- ⁴³⁴ *Id.*
- ⁴³⁵ *Id.* at 317.
- ⁴³⁶ *Id.*
- ⁴³⁷ *Shields Pork Plus, Inc.*, 329 Ill. App. 3d at 318-19.
- ⁴³⁸ *In re Marriage of Olsen*, 124 Ill. 2d 19, 24 (1988).
- ⁴³⁹ *B & C Elec., Inc. v. Pullman Bank & Trust Co.*, 96 Ill. App. 3d 321, 328 (1st Dist. 1981).
- ⁴⁴⁰ *Busee v. Paul Revere Life Ins. Co.*, 341 Ill. App. 3d 589, 594 (1st Dist. 2003).
- ⁴⁴¹ *Shields Pork Plus, Inc.*, 329 Ill. App. 3d at 317.
- ⁴⁴² *Id.*; see also *P.R.S. Int'l, Inc. v. Shred Pax Corp.*, 184 Ill. 2d 224 (1998); *In re Marriage of Olsen*, 124 Ill. 2d 19 (1988); *Bituminous Cas. Corp. v. Commercial Union Ins. Co.*, 273 Ill. App. 3d 923 (1st Dist. 1995).
- ⁴⁴³ *In re Marriage of Olsen*, 124 Ill. 2d at 24.
- ⁴⁴⁴ *Hessler v. Crystal Lake Chrysler-Plymouth*, 338 Ill. App. 3d 1010, 1023 (2d Dist. 2003).
- ⁴⁴⁵ *Henderson v. Lemna*, 76 Ill. App. 3d 168, 170 (4th Dist. 1979).
- ⁴⁴⁶ *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1032 (1st Dist. 2007); see also *Builder's Concrete Co. v. Fred Faubel & Sons, Inc.*, 58 Ill. App. 3d 100, 103 (3d Dist. 1978).
- ⁴⁴⁷ *Curtis Casket Co. v. D.A. Brown & Co.*, 259 Ill. App. 3d 800, 806 (1st Dist. 1994); see also *Yale Dev. Co. v. Aurora Pizza Hut, Inc.*, 95 Ill. App. 3d 523 (2d Dist. 1981).
- ⁴⁴⁸ *Equity Ins. Managers of Ill., LLC v. McNichols*, 324 Ill. App. 3d 830, 837 (1st Dist. 2001).
- ⁴⁴⁹ *Hessler v. Crystal Lake Chrysler-Plymouth, Inc.*, 338 Ill. App. 3d 1010 (2d Dist. 2003).
- ⁴⁵⁰ *Hessler*, 338 Ill. App. 3d at 1013.
- ⁴⁵¹ *Id.*
- ⁴⁵² *Id.*
- ⁴⁵³ *Id.* at 1013-16.
- ⁴⁵⁴ *Id.* at 1014-15.
- ⁴⁵⁵ *Id.* at 1015.
- ⁴⁵⁶ *Hessler*, 338 Ill. App. 3d at 1015.
- ⁴⁵⁷ *Id.* at 1015-16.
- ⁴⁵⁸ *Id.* at 1016.
- ⁴⁵⁹ *Id.* at 1017.
- ⁴⁶⁰ *Id.* at 1013.
- ⁴⁶¹ *Id.* at 1017.
- ⁴⁶² *Hessler*, 338 Ill. App. 3d at 1016.
- ⁴⁶³ *Id.* at 1024.
- ⁴⁶⁴ *Id.* at 1025.
- ⁴⁶⁵ 810 ILCS 5/2-711.
- ⁴⁶⁶ It should be noted that the 2003 amendments to Article 2 of the UCC clarify the general overview of available relief detailed in Section 2-711, including the relief available under Section 2-714. See U.C.C. § 2-711. These amendments, however, have not been adopted in Illinois.
- ⁴⁶⁷ 810 ILCS 5/2-712.
- ⁴⁶⁸ *Id.* § 2-712(1).
- ⁴⁶⁹ *Id.*
- ⁴⁷⁰ *Id.* § 2-712(2).
- ⁴⁷¹ *Id.*
- ⁴⁷² *Id.*
- ⁴⁷³ See *infra* Section V.D (discussing available remedies when non-conforming goods are accepted).
- ⁴⁷⁴ *Moore Gen. Contractors, Inc. v. Basepoint, Inc.*, 485 S.E.2d 131, 32 U.C.C. Rep. Serv. 2d 440 (Va. 1997).
- ⁴⁷⁵ *Bockman Printing & Servs., Inc. v. Baldwin Gregg, Inc.*, 213 Ill. App. 3d 516, 15 U.C.C. Rep. Serv. 2d 490 (1991).
- ⁴⁷⁶ See *id.* at 516, 15 U.C.C. Rep. Serv. 2d at 490; *Erie Casein Co. v. Anric Corp.*, 217 Ill. App. 3d 602, 15 U.C.C. Rep. Serv. 2d 1240 (3d Dist. 1991).
- ⁴⁷⁷ 2 Hawklund UCC Series § 2-712:2.
- ⁴⁷⁸ 810 ILCS 5/2-711(3).
- ⁴⁷⁹ *Id.*
- ⁴⁸⁰ See *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878, 10 U.C.C. Rep. Serv. 2d 117 (1989).
- ⁴⁸¹ See *Art Hill, Inc. v. Heckler*, 214 Cal. App. 3d 878, 37 U.C.C. Rep. Serv. 697 (Ind. App. 1983).
- ⁴⁸² *T&S Brass & Bronze Works, Inc. v. Pic-Air, Inc.*, 790 F.2d 1098, 1 U.C.C. Rep. Serv. 2d 433 (4th Cir. 1986).
- ⁴⁸³ 810 ILCS 5/2-713.
- ⁴⁸⁴ *Id.* § 2-713(1).
- ⁴⁸⁵ *Id.*
- ⁴⁸⁶ *Id.* § 2-713(2). Note, however, that the 2003 amendments to Article 2 (not adopted in Illinois) change the time for computing the measure of damages in cases not involving repudiation to the time of tender specified in the contract. See U.C.C. § 2-713(1).
- ⁴⁸⁷ See *Kolmar America's, Inc. v. Koch Supply & Trading, LP*, No. 10 Civ. 7905(JSR), 2012 WL 676354, at *76, U.C.C. Rep. Serv. 2d 902 (S.D.N.Y. Feb. 29, 2012).
- ⁴⁸⁸ *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group, LLC*, No. 08-762(DSD/SRN), 2008 WL 2690287 (D. Minn. July 1, 2008), *rev'd & remanded*, 635 F.3d 1106 (8th Cir. 2011).
- ⁴⁸⁹ 810 ILCS 5/2-714.
- ⁴⁹⁰ *Id.* § 2-607.
- ⁴⁹¹ *Felde v. Chrysler Credit Corp.*, 219 Ill. App. 3d 530, 16 U.C.C. Rep. Serv. 2d 1102 (2d Dist. 1991).
- ⁴⁹² 810 ILCS 5/2-714(2).
- ⁴⁹³ See U.C.C. § 2-714 cmt. 3.
- ⁴⁹⁴ See *Anna Ready Mix v. N.E. Pierson Constr. Co.*, 747 F. Supp. 1299, 13 U.C.C. Rep. Serv. 2d 757 (S.D. Ill. 1990); *Lenox, Inc. v. Triangle Auto Alarm*, 738 F. Supp. 26, 12 U.C.C. Rep. Serv. 2d 646 (N.D. Ill. 1990).
- ⁴⁹⁵ 810 ILCS 5/2-714(3).
- ⁴⁹⁶ *Id.* § 2-715(1).
- ⁴⁹⁷ *Id.* § 2-715(2).
- ⁴⁹⁸ *Petroleo Brasileiro S.A. Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503, 508, 14 U.C.C. Rep. Serv. 661, 667 (E.D.N.Y. 1974).
- ⁴⁹⁹ *Petroleo Brasileiro S.A. Petrobras*, 372 F. Supp. at 508.
- ⁵⁰⁰ 810 ILCS 5/2-716.
- ⁵⁰¹ *Id.* § 2-716(1).

— Continued on next page

- ⁵⁰² *Id.* § 2-716(2).
- ⁵⁰³ See *Robins v. Zwirner*, 713 F. Supp. 2d 367 (S.D.N.Y. 2010) (artwork).
- ⁵⁰⁴ See *Colorado-Ute Elec. Ass'n., Inc. v. Envirotech Corp.*, 524 F. Supp. 1152, 33 U.C.C. Rep. Serv. 965 (D. Colo. 1981).
- ⁵⁰⁵ See *Bander v. Grossman*, 161 Misc. 2d 119, 23 U.C.C. Rep. Serv. 2d 1159 (N.Y. Sup. Ct. 1994).
- ⁵⁰⁶ *Gerwin v. Se. Cal. Ass'n of 7th Day Adventists*, 14 Cal. App. 3d 209, 8 U.C.C. Rep. Serv. 643 (1971).
- ⁵⁰⁷ See *Putnam Ranches, Inc. v. Corkle*, 203 N.W.2d 502, 11 U.C.C. Rep. Serv. 1174 (Neb. 1973).
- ⁵⁰⁸ 801 ILCS 5/2-716(3). The 2003 amendments to Article 2 (not adopted in Illinois) change Section 2-716 to make it clear that parties to an agreement may contract for the remedy of specific performance, but even if they do, specific performance will not be awarded if the breaching party's only remaining obligation under the contract is to pay a sum of money. See U.C.C. § 2-716(1).
- ⁵⁰⁹ 810 ILCS 5/2-717.
- ⁵¹⁰ *Kan. Mun. Gas Agency v. Vesta Energy Co.*, 843 F. Supp. 1401, 23 U.C.C. Rep. Serv. 2d 32 (D. Kan. 1994).
- ⁵¹¹ *Samuel, Son & Co. v. Sierra Stainless, Inc.*, No. 3:09-cv-00291-RAM, 2010 WL 4237993 (D. Nev. Oct. 19, 2010).
- ⁵¹² See *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 686 F. Supp. 1319, 7 U.C.C. Rep. Serv. 2d 429 (N.D. Ill. 1988).
- ⁵¹³ 810 ILCS 5/2-719.
- ⁵¹⁴ *Id.* § 2-718(1).
- ⁵¹⁵ *Id.*
- ⁵¹⁶ *Id.* The 2003 amendments to Article 2 change Section 2-718 to eliminate the expression that unreasonably large liquidated damages clauses are void as a penalty, making such clauses enforceable when the amount specified is reasonable under the factors of subsection (1). "[T]he difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy" are no longer elements used to determine the reasonableness of the amount, except in cases involving consumer contracts. Illinois has not adopted the 2003 amendments to Article 2 of the UCC. U.C.C. § 2-718(1).
- ⁵¹⁷ *Skyline Steel Corp. v. A.J. Dupuis Co.*, 648 F. Supp. 360, 3 U.C.C. Rep. Serv. 2d 475 (E.D. Mich. 1986); see also *Comind, Companhia de Seguros v. Sikorsky Aircraft Div. of United Techs. Corp.*, 116 F.R.D. 397, 5 U.C.C. Rep. Serv. 2d 575 (D. Conn. 1987).
- ⁵¹⁸ See *Baldwin v. Nat'l Safe Depository Corp.*, 697 P.2d 587, 41 U.C.C. Rep. Serv. 471 (Wash. App. 1985).
- ⁵¹⁹ *Parsons v. Motor Homes of Am. Inc.*, 465 So. 2d 1285, 40 U.C.C. Rep. Serv. 1264 (Fla. App. 1985).
- ⁵²⁰ 810 ILCS 5/2-719(1)(a).
- ⁵²¹ *Id.* § 2-719(3).
- ⁵²² *Id.*
- ⁵²³ *Id.*
- ⁵²⁴ *Id.* § 2-719(2).
- ⁵²⁵ *Id.*
- ⁵²⁶ See *Mansfield Heliflight, Inc. v. Bell/Agusta Aerospace Co., LLC*, 507 F. Supp. 2d 638 (N.D. Tex. 2007).
- ⁵²⁷ As stated earlier, Illinois has not enacted the official 2003 amendments to Article 2 of the UCC. Those amendments made minor changes to Sections 2-722 and 2-723. Major changes, however, again not enacted in Illinois, were made to Sections 2-724 and 2-725.
- ⁵²⁸ 810 ILCS 5/2-720.
- ⁵²⁹ *Id.*
- ⁵³⁰ *Id.*
- ⁵³¹ *Nat'l Register Cash Co. v. UNARCO Indus., Inc.*, 490 F.2d 285 (7th Cir. 1974).
- ⁵³² *Nat'l Register Cash Co.*, 490 F.2d at 286.
- ⁵³³ *Id.* at 287.
- ⁵³⁴ 810 ILCS 5/2-721.
- ⁵³⁵ *Id.* § 2-722.
- ⁵³⁶ *Id.* § 2-722 cmt.
- ⁵³⁷ *Draper v. Minneapolis-Moline, Inc.*, 100 Ill. App. 2d 324 (3d Dist. 1968).
- ⁵³⁸ *Draper*, 100 Ill. App. 2d at 325.
- ⁵³⁹ *Id.*
- ⁵⁴⁰ *Id.*
- ⁵⁴¹ *Id.* at 326.
- ⁵⁴² *Id.*
- ⁵⁴³ *Id.* at 327.
- ⁵⁴⁴ *Draper*, 100 Ill. App. 2d at 329.
- ⁵⁴⁵ 810 ILCS 5/2-723.
- ⁵⁴⁶ *Id.* § 2-723 cmt.
- ⁵⁴⁷ *Id.* § 2-724.
- ⁵⁴⁸ *Id.* § 2-725(1).
- ⁵⁴⁹ *Id.* § 2-725(2).
- ⁵⁵⁰ *Id.*
- ⁵⁵¹ 810 ILCS 5/2-725(3).
- ⁵⁵² *Id.* § 2-725(2).
- ⁵⁵³ *Id.*
- ⁵⁵⁴ *Cosman v. Ford Motor Co.*, 285 Ill. App. 3d 250 (1st Dist. 1996); see also *Razor v. Hyundai Motor Am.*, 349 Ill. App. 3d 651 (1st Dist. 2004); *Stoltzner v. Am. Motors-Jeep, Inc.*, 127 Ill. App. 3d 816 (1st Dist. 1984).
- ⁵⁵⁵ *Beckmire v. Ristokrat Clay Prods. Co.*, 36 Ill. App. 3d 411 (2d Dist. 1976).
- ⁵⁵⁶ *Beckmire*, 36 Ill. App. 3d at 411.
- ⁵⁵⁷ *Id.* at 413; see also *Wilson v. Massey-Ferguson, Inc.*, 21 Ill. App. 3d 867 (4th Dist. 1974).
- ⁵⁵⁸ *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill. 2d 69 (1982).
- ⁵⁵⁹ *Moorman Mfg. Co.*, 91 Ill. 2d at 92-94.
- ⁵⁶⁰ *Id.* at 94.
- ⁵⁶¹ 810 ILCS 5/2-725(1).
- ⁵⁶² *Stoltzner v. Am. Motors Jeep, Inc.*, 127 Ill. App. 3d 816, 818 (1st Dist. 1993).
- ⁵⁶³ *Stoltzner*, 127 Ill. App. 3d at 816.
- ⁵⁶⁴ *Chi. & S. Airlines, Inc. v. Volpar, Inc.*, 54 Ill. App. 3d 609 (1st Dist. 1977).
- ⁵⁶⁵ *Best Bearings, Inc. v. Challenger Parts Rebuilders, Inc.*, 10 Ill. App. 3d 404 (2d Dist. 1973).