

1989

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C. Paul Rogers III.
Southern Methodist University, Dedman School of Law

Lee Elizabeth Michaels

Recommended Citation

C. Paul III Rogers & Lee Elizabeth Michaels, Article Two Warranty Disputes in the Seventh Circuit: Advantage Seller or Disadvantage Court, 65 Chi.-Kent L. Rev. 849 (1989)

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ARTICLE TWO WARRANTY DISPUTES IN THE SEVENTH CIRCUIT: ADVANTAGE SELLER OR DISADVANTAGE COURT?

C. PAUL ROGERS III*
AND LEE ELIZABETH MICHAELS**

I. INTRODUCTION

Professor Speidel argues that the Seventh Circuit has failed to emerge as a major commercial law court in the warranty area because of incomplete and unsound reasoning that too often favors the seller. As a result, he concludes, the balance that Article 2 of the Uniform Commercial Code strikes between buyer and seller, which often favors the seller anyway, has shifted, making it very difficult for buyers to prevail on warranty claims.¹

One might suspect that the Seventh Circuit's apparent seller bias is the result of the Chicago School of Economics' influence on the court. Indeed, there is an argument from that school that efficient product risk allocation requires that buyers have the burden of producing evidence of particular purposes or special consequences in establishing a breach.² A perusal of the Seventh Circuit opinions, however, belies such suspicions and reveals a broad cross section of participating judges and panels.³

Beyond questions of economic efficiency, Professor Speidel's conclusions raise interesting issues about how other circuits approach warranty

* Dean and Professor of Law, Southern Methodist University School of Law; B.A., J.D. University of Texas; LL.M. Columbia University.

** Third-year student, Southern Methodist University School of Law; B.A. Vassar College.

The authors would like to thank Roy Ryden Anderson for his helpful comments, not all of which we adopted. Errors remain ours.

1. Professor Speidel notes that the seller advantage under Article 2 is particularly acute where the goods are complex or unique and where particular purposes are involved. Speidel, *Warranty Disputes in the Seventh Circuit under Article Two, Sales: Advantage Seller?*, 65 CHI.-KENT L. REV. 813 (1990) [hereinafter Speidel]. Of course, as Speidel also notes, warranty disputes typically involve "big ticket" items between commercial entities. *Id.* at 1-2. Federal courts of appeals will likely hear only cases involving complex goods or sales of large quantities of goods since the diversity jurisdiction requirement insures that parties to disputes are in different states.

2. See Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 J. LEGAL STUD. 241 (1983). See also Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More Into the Void*, 67 B.U.L. REV. 9, 48-52 (1987); Note, *Imperfect Information, the Pricing Mechanism and Products Liability*, 88 COLUM. L. REV. 1057 (1988).

3. Of course, one could argue that this cross-section simply reveals the attractiveness of the Chicago School approach and that its appeal crosses traditional political lines. The opinions themselves do not, however, overtly reveal large doses of economic analysis.

disputes and whether the Seventh Circuit, certainly one of the most prominent and important federal circuits, is significantly influencing the decisions of other circuits in the warranty area. If the Seventh Circuit is indeed influencing other circuits' warranty decisions, and if Speidel is correct that the Seventh Circuit's analysis often is shoddy and is skewing the balance of Article 2, then the warranty case law of the entire federal judiciary may be out of whack. Thus, this response will take a brief look at the other circuits for the dual purposes of ascertaining whether similar trends exist there and attempting to discern the Seventh's influence elsewhere in the federal judiciary.

Professor Speidel's critique of the Seventh Circuit's warranty decisions also raises, at least indirectly, broader jurisprudential issues about the nature of Article 2 and the role of the judiciary in interpreting and applying the Code. In essence, Speidel accuses the Seventh Circuit of bad Code methodology. This response will briefly consider that charge with reference to both the underlying philosophy of the Code and the practical problems its application presents for courts.

II. CODE APPLICATION

Article 2, as Professor Speidel points out, "is an integral part of a Code which has a definite order and system"⁴ and which strikes certain balances between sellers and buyers with regard to liability and remedy questions.⁵ Courts do not perform satisfactorily if they attempt to alter the balance, are insensitive to relationships between Code sections, or, worse yet, ignore relevant provisions.

Nonetheless, the Code, while not as unbound as the first amendment's "freedom of speech" protection or the Sherman Act's prohibition of "restraints of trade," does require considerable judicial construction and interpretation. For example, in the warranty and remedy sphere, the courts must contend with phrases like "basis of the bargain" and "failure of essential purpose." Terms such as these do not come from the common law and resort to the Official Comments may prove less than helpful for reasons that are well documented.⁶

Article 2 was intended as, and indeed does represent, a drastic

4. Speidel, *supra* note 1, at 815.

5. *Id.* at 817-21.

6. See, e.g., E.A. FARNSWORTH & W. YOUNG, SELECTIONS FOR CONTRACTS 3-6 (1988). In their introduction, the compilers note that one of the primary issues concerning the official comments is the extent to which they can be relied upon in interpreting the U.C.C. Because the comments, although written by the drafters, were not enacted by the legislature, the weight which may be given to the comments remains uncertain. *Id.*

change in our commercial law.⁷ It was designed to insure that the law conform to prevailing commercial practices and to permit the law to adapt as those practices and customs changed. The Code champions uniformity and frequently departs from the common law where commercial practices differ from case law or where the common-law rules impede their exercise. Article 2's heavy emphasis on usage of trade and course of dealing seeks to assure conformity with commercial practice.

Certainly adaptability, uniformity, and conformity with commercial practice are highly desirable aspirations for our commercial law. But, even in the abstract, adaptability comes at some expense to uniformity, particularly in our dual, decentralized judicial system.⁸ The open-endedness of the Code, while laudable and necessary, places considerable pressure on the courts faced with its interpretation. The difficulties are not unlike those that constitutional (or antitrust) adjudication bring to the judiciary, even though the Code is a more thorough, systematic statute. Grant Gilmore described it very well:

The bulk of the Article 2 drafting was done in the early 1940s along lines laid down in the 1930s. In most states Article 2, along with the rest of the Code, came into force during the middle and late 1960s. The courts thus face the problem of dealing with the issues which will be litigated during the 1970s and 1980s in the light of guide-lines laid down before World War II. No doubt the detached professorial observer in his study will enjoy the spectacle of things to come in sales law a good deal more than the harried practitioners and judges on the firing line.⁹

The trouble is exacerbated by the fact that Article 2's decampment from the old Uniform Sales Act and the common law was not entirely satisfactory. Certainly section 2-207 leads the charge in this regard, although its perplexities are not truly representative of all of Article 2.¹⁰ As another example, no one has quite figured out the reason for section 2-510, which allows a breaching party the benefit of an aggrieved party's

7. Article 2 was not free from controversy. No less an authority than Williston argued that some of the changes in the law of Sales under the Code "are not only iconoclastic but open to criticisms that I regard so fundamental as to preclude the desirability of enacting [Article 2] of the proposed Code." Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 561 (1950). Compare Corbin, *The Uniform Commercial Code-Sales: Should it be Enacted?*, 59 YALE L.J. 821 (1950).

8. Of course, as noted above, the adaptability of the Code helps assure that the law continues to mirror and conform to actual commercial practice.

9. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 101-02 (2d ed. 1975).

10. Professor Speidel refers to Section 2-207 as a "mess." Speidel, *supra* note 1, at 836 n.103. See, e.g., Murray, *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307 (1986); Baird & Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982); Duesenberg, *Contract Creation: The Continuing Struggle with Additional and Different Terms under Uniform Commercial Code Section 2-207*, 34 BUS. LAW. 1477 (1979).

insurance coverage.¹¹

The conclusion is inescapable that Article 2, in moving the commercial law forward, has placed a heavy burden on the judiciary. For example, the courts have had to give meaning to commercial impracticability, a concept not found in the common law, by looking to "the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made."¹² Similarly, Article 2 requires courts to make determinations about "unconscionable contracts or clauses," a principle which, according to the Official Comment, is for "the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."¹³ The application of that test has caused considerable judicial consternation, particularly given the confusing illustrations provided by the Comment.¹⁴

Other examples include, as noted, section 2-719's failure of essential purpose standard for attacking exclusive or limited remedies.¹⁵ Here, in support of a provision of great importance and potentially wide application, the Comment gives us one sentence, without example.¹⁶ Section 2-608 provides that a buyer may revoke his acceptance in instances where the nonconformity of the goods "substantially impairs its value to him," again raising a seemingly subjective standard that the courts must objectively apply.

Courts, faced with such substantial construction and interpretation issues, could certainly insert a seller (or buyer) bias into their analyses, whether predicated on principles of economic efficiency or other preexisting concerns. But certainly a seller (or buyer) bias in that context is not inevitable. For example, in *Royal Business Machines, Inc. v. Lorraine*

11. See generally J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 225-29 (3d ed. 1988).

12. U.C.C. § 2-615; *Iowa Elec. Light & Power v. Atlas Corp.*, 467 F. Supp. 129, 133-34 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Tallackson Potato Co. v. MTK Potato Co.*, 278 N.W.2d 417 (N.D. 1979). See also Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under UCC Section 2-615*, 54 N.C.L. REV. 545 (1976); Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 NW. U.L. REV. 1032 (1978).

13. U.C.C. § 2-302 and Comment 1.

14. *Id.* See also Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

15. See generally Anderson, *Failure of Essential Purpose and Essential Failure on Purpose: A Look at Section 2-719 of the Uniform Commercial Code*, 31 SW. L.J. 759 (1977). See also, R. ANDERSON, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE ch.12 (1988).

16. That one sentence simply provides another test for the courts to apply. It states that a limited remedy clause fails of its essential purpose where it "operates to deprive either party of the substantial value of the bargain." U.C.C. § 2-719 Comment 1 (1989).

Corp.,¹⁷ a case criticized by Speidel,¹⁸ the Seventh Circuit arguably was simply attempting to determine the parameters of the "basis of the bargain" test by examining the comparative knowledge of the parties. That case involved the question of whether a seller made and breached, over an eighteen month period, a number of express warranties relating to the qualities of two copying machines.

By focusing on the actual knowledge of the buyer, the court may have been better able to ascertain what affirmations of fact formed his reasonable expectations under the agreement. According to the *Royal Business Machines* court, "[a]n affirmation of fact which the buyer from his experience knows to be untrue cannot form a part of the basis of the bargain."¹⁹ Thus, the Seventh Circuit's approach in determining when an express warranty was made appears to be an attempt to more closely adhere to the intent of the parties in forming the agreement.

Admittedly, this test seems to provide a more equal burden on the parties than Comment section 3 which requires that the seller prove that statements made were *not* part of the basis of the bargain. But a look at the comparative knowledge of the parties arguably is a sensible way of determining what it is that the buyer bargained for. And, although the buyer did not fare well in *Royal Business Machines*, presumably in most cases the weight of knowledge about the goods will rest with the seller and the buyer will be the beneficiary.²⁰ If so, the buyer bias of section 2-313 may not be unreasonably compromised.

Professor Speidel also criticizes the Seventh Circuit for not fully developing the concept of merchantability under section 2-314.²¹ Conceding that the *Royal Business Machines* court probably reached an acceptable result, Speidel nevertheless argues that "[b]ecause the buyer claimed substantial losses, . . . one should expect a more elaborate analysis by the court"²² By focusing solely on the lack of evidence available to prove whether the machines in *Royal Business Machines* were fit for their "ordinary" use, the court, in Speidel's opinion, "failed to develop a sufficiently broad conception of merchantability" which would have "provided enlightenment in future disputes over that implied

17. 633 F.2d 34 (7th Cir. 1980).

18. See Speidel, *supra* note 1, at 822-24.

19. 633 F.2d at 44.

20. The *Royal Business Machines* court was particularly concerned about the 18-month period over which the warranties were allegedly made. "[A]s to each purchase, [buyer's] expanding knowledge of the capacities of the copying machines would have to be considered in determining whether Royal's representations were part of the basis of the bargain." *Id.*

21. Speidel, *supra* note 1, at 823.

22. *Id.* at 823.

warranty.”²³

Arguably, *Royal Business Machines* involved a proof question rather than improper Code methodology. The Seventh Circuit found that the buyer had failed to meet its burden of proof in order to prove breach of the implied warranty of merchantability under section 2-314.²⁴ Because the Seventh Circuit found that the buyer had failed to establish trade standards or uses, there was no basis on which to determine whether the goods in question were “fit for the ordinary purposes for which such goods are used” and thus merchantable under section 2-314.²⁵ The court employed the language of the relevant Code section with its reference to ordinary purposes, and arguably had no choice but to apply that standard to the facts presented in order to determine merchantability. The lack of proof of ordinary purpose left the court with little alternative to its holding.

In his critique of *Royal Business Machines*, Speidel seems to be inviting a more expansionary reading of the Code with respect to the definition of merchantability, encouraging the Seventh Circuit to play a more activist role.²⁶ Speidel further contends that the court’s discussion in *Royal Business Machines* “was limited to a sparse analysis of the essential statutory provisions and the record.”²⁷ But Professor Speidel’s criticism of “sparse Code methodology,” must not be read too broadly. In some areas Speidel argues that the court should expand the scope of the Code and fill gaps left by the language of the Code²⁸ and in other areas Speidel seems critical of the court for expanding doctrine beyond the Code and creating policy.²⁹

The *Royal Business Machines* court was criticized on both accounts. In attempting to give meaning to the “basis of the bargain” language of section 2-313, it established an approach which is widely applicable, although as noted, recasting the seller’s burden somewhat as set forth in the Comments. Facing a similar task with respect to section 2-314’s “merchantability” concept, the court took a narrower approach, focusing on the buyer’s burden of proof. As such, the court does little to reduce “the risk to a buyer purchasing complex goods that have no ‘ordinary purposes’ in the trade to meet particular purposes that are not clearly

23. *Id.* at 823-24.

24. *Royal Business Machines*, 633 F.2d at 46.

25. U.C.C. § 2-314(3) (1989).

26. It is unclear why the fact that the buyer is claiming substantial loss should change the court’s analysis, as Speidel suggests. See Speidel, *supra* note 1, at 823-24.

27. *Id.* at 823.

28. See, e.g., *id.* at 825.

29. See, e.g., *id.* at 827-28.

communicated to the seller or expressed in a written agreement.”³⁰ But such an expansion of section 2-314 seems to us at least as susceptible to criticism for diverting Code policy as is the court’s attempt to focus on actual knowledge in the section 2-313 “basis of the bargain” context. It is far from axiomatic that the implied warranty of merchantability was intended to provide substantial protection to complex goods for which the seller has little experience.³¹

Another example in which the Seventh Circuit’s methodology arguably is not as poor as Speidel asserts is *Twin Disc, Inc. v. Big Bud Tractor*.³² In *Twin Disc* the court upheld a disclaimer made by the seller which was clearly not conspicuous in spite of the dictate of section 2-316(2) that a disclaimer in writing must be conspicuous.³³ In reaching its decision, the court in *Twin Disc* noted that “[b]ecause the district court found that [the buyer] had actual knowledge of Twin Disc’s [disclaimer] the question of conspicuousness need not be reached.”³⁴

Rather than ignoring the objective requirement of section 2-316(2) as Speidel argues, the court arguably was applying an underlying Code principle. According to Comment 1 to section 2-316, the purpose of the conspicuousness requirement is to protect the buyer from surprise.³⁵ The *Twin Disc* court asserted that “[t]here is therefore no need to determine whether a disclaimer is conspicuous, such that the buyer’s knowledge of disclaimer can be inferred, when the buyer has actual knowledge of the disclaimer.”³⁶

As Speidel notes, White and Summers argue that in ignoring the objective requirement of 2-316, the court may run the risk of rewarding the “convincing liar.”³⁷ We would argue, however, that the problem largely can be avoided by requiring “clear and convincing,” rather than a mere “preponderance” of evidence regarding the buyer’s actual awareness. In any event, Speidel seems to be arguing for a technical application of the Code, in contradistinction to his chiding of the Seventh Circuit for “fail[ing] to develop a sufficiently broad conception of merchantability” in *Royal Business Machines*.³⁸ The *Twin Disc* court

30. *Id.* at 825.

31. Of course, express warranties are likewise made more difficult to establish by the *Royal Business Machines* court, a fact that supports Speidel’s assertion that the Seventh Circuit tends to zig and zag as necessary to restrict warranty coverage.

32. 772 F.2d 1329 (7th Cir. 1985).

33. Wis. STAT. § 402.316(2) (1988).

34. 772 F.2d at 1335 n.3.

35. U.C.C. § 2-316(2) Comment 1 (1989).

36. 772 F.2d at 1335 n.3.

37. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 502 (3d ed. 1988).

38. Speidel, *supra* note 1, at 823.

adopted what many would argue is a common sense approach to disclaimers, in keeping with the Code's general mandate to adapt to commercial realities.³⁹

The above quibbles with Professor Speidel should not detract from his considerable findings. It appears that in the Seventh Circuit sellers prevail an inordinate amount of the time in warranty disputes involving "big ticket" goods between large commercial entities. Certainly some of the decisions in that circuit are open to question, as Speidel notes. For example, the court's application of the Code's parol evidence rule in *Binks Manufacturing Co. v. National Presto Industries, Inc.*,⁴⁰ is at odds with the Code and modern case law.⁴¹ Further, it is hard to defend the court's methodology when it totally ignores relevant Code sections and Comments, as the court did when rejecting a buyer's "equal opportunity" to mitigate damages argument,⁴² and when it permitted evidence of custom to negate consequential damages without looking to the limitations on the use of usage of trade evidence in section 1-205.⁴³

But perhaps, given the burden the Code places on the courts to apply, interpret, define, construct, and gap-fill, all according to prevailing commercial practices and standards, an uneven judicial performance is inevitable. However, as noted, that same broad judicial latitude does permit, even unintentionally, a shifting to sellers (or buyers). If the Seventh Circuit has perceptibly favored sellers, have other circuits followed suit, whether independent of the Seventh or not?

III. OTHER CIRCUITS

Review of warranty disputes in the other circuits reveals a mixed bag.⁴⁴ While one circuit appears to follow the Seventh Circuit in favoring the seller, the other circuits tend to find for the buyer or split between buyer and seller. Although most circuits have decided a number of war-

39. The court was applying Wisconsin law and, while apparently finding no applicable Wisconsin decisions, did cite an Illinois case and a federal decision in support of its conclusion. 772 F.2d at 1335 n.3 (citing *Imperial Stamp & Engraving Co. v. Bailey*, 82 Ill. App. 3d 835, 837, 403 N.E.2d 294, 296 (1980) and *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 372 (E.D. Mich. 1977)).

40. 709 F.2d 1109, 1115-17 (7th Cir. 1983).

41. *Id.* at 1115-17; Speidel, *supra* note 1, at 827-828.

42. *Cates v. Morgan Portable Bldg. Corp.*, 780 F.2d 683, 689-90 (7th Cir. 1985); Speidel, *supra* note 1, at 831-832.

43. *Western Indus., Inc. v. Newcor Canada, Ltd.*, 739 F.2d 1198, 1204 (7th Cir. 1984); Speidel, *supra* note 1, at 46-48. See also *Continental Sand & Gravel, Inc. v. K & K Sand & Gravel, Inc.*, 755 F.2d 87, 91-92 (7th Cir. 1985) (criticized by Speidel, *supra* note 1, at 829-30).

44. In our look at other circuits we surveyed cases dating back to 1980 in which a warranty dispute governed by Article 2 was a primary issue. We did not consider cases in which warranty claims were brought under a tort theory.

ranty cases in the time period analyzed, two circuits have too few decided cases to discern any meaningful trends.⁴⁵ The remaining circuits will be categorized and reviewed under the headings "Seller" Circuits, "Buyer" Circuits, and "Mixed" Circuits.

A. "Seller" Circuits

The First Circuit is the only circuit, other than the Seventh, which can be described as a "Seller" Circuit. Although the sample from the First Circuit provides only three cases,⁴⁶ the decisions unanimously favor the seller. One of the cases, however, contains an exceptional fact situation which does not lend itself to a well-reasoned analysis based on Article 2.⁴⁷ The other First Circuit cases involve the issues of disclaimer of warranties under the Massachusetts version of section 2-316,⁴⁸ and notification of breach of warranty under section 2-318.⁴⁹

Transurface Carriers, Inc. v. Ford Motor Co.,⁵⁰ involved a suit brought by a truck buyer against a truck manufacturer, dealer, and engine manufacturer, claiming breach of express and implied warranties. The court held that the relevant warranties were those contained in the order form and the warranty booklet.⁵¹ The order form stated that all warranties given were those of the manufacturer and that the truck dealer made no warranties.⁵² The court held such a disclaimer was effective under section 2-316; thus, summary judgment for the dealer was proper.⁵³

45. A search of the Third Circuit revealed only two warranty cases: *Henry Heide, Inc. v. WRH Products Co.*, 766 F.2d 105 (3d Cir. 1985) and *Chatlos Sys., Inc. v. National Cash Register Corp.*, 635 F.2d 1081 (3d Cir. 1980). In the D.C. Circuit, only one case was found in which the primary issue was a warranty dispute: *Mariner Water Renaturalizer of Wash., Inc. v. Aqua Purification Sys., Inc.*, 665 F.2d 1066 (D.C. Cir. 1981).

46. *Castro v. Stanley Works*, 864 F.2d 961 (1st Cir. 1989); *Transurface Carriers, Inc. v. Ford Motor Co.*, 738 F.2d 42 (1st Cir. 1984); *Venezia v. Miller Brewing Co.*, 626 F.2d 188 (1st Cir. 1980).

47. See *Venezia*, 626 F.2d at 188. The case involved a breach of warranty claim brought on behalf of a child who was injured when he threw a bottle against a telephone pole and the bottle shattered. Plaintiff alleged a breach of warranty based upon the implied warranty that goods are fit for the ordinary purpose for which such goods are used. The court declined to hold that ordinary purpose includes "the deliberate misuse of an otherwise reasonably safe container in a manner totally unrelated to any normal or intended use of that item." *Id.* at 190.

48. *Transurface Carriers*, 738 F.2d at 46, 47 (where the court held that the truck dealer's disclaimer of warranties was effective because the manufacturer's warranty expressly disclaimed any warranties given on behalf of the dealer and the language of such disclaimer was conspicuous).

49. *Castro*, 864 F.2d at 964 (where the court found that the manufacturer was prejudiced by delay in notification of a breach of warranty claim, and thus, would not allow recovery under breach of warranty).

50. 738 F.2d at 42.

51. *Id.* at 45.

52. *Id.* at 46.

53. *Id.*

In *Castro v. Stanley Works*,⁵⁴ the plaintiff was injured when a spiral ratchet screwdriver manufactured by the defendant malfunctioned. Castro brought suit claiming, among other things, breach of implied warranty of merchantability.⁵⁵ The jury found for the buyer, Castro, on the warranty claim, but also found that the defendant had been prejudiced by delay in notification of the breach.⁵⁶ The trial judge thus found that the delay in notification precluded Castro's warranty claim.⁵⁷ The Court of Appeals affirmed, holding that prejudice may result not only from loss of substance but may occur when evidence that may have been revealed from prompt investigation is lost.⁵⁸

The issues in these two cases are fairly straightforward. The sampling of cases contains none of the situations referred to by Professor Speidel which are prone to an analysis favoring the seller. Rather, these cases involve the basic issues of whether a disclaimer was effectively made within the standards of the statute and whether the buyer, by not expediently notifying the seller of breach, prejudiced the seller's ability to satisfactorily correct the breach. The disclaimer in *Transsurface Carriers* did not involve a "battle of the forms" under section 2-207, an area noted by Professor Speidel in which the analysis tends to favor the seller. In addition, the court found that the language of the disclaimer was conspicuous and thus met the requirements of the statute.⁵⁹

Based on these two decisions, the First Circuit appears to avoid the problems identified in Professor Speidel's review of the Seventh Circuit. It is thus difficult to conclude that the First Circuit unduly favors the seller.⁶⁰

B. "Buyer" Circuits

1. Eighth Circuit

Of the twelve cases included in our survey of the Eighth Circuit, only two were decided in favor of the seller.⁶¹ The remaining cases,

54. 864 F.2d 961 (1st Cir. 1989).

55. *Id.* at 963.

56. *Id.*

57. *Id.*

58. *Id.* at 964. The court, noting that formal proof of prejudice is not required, stated that "[i]t is sufficient that the 20-month delay in notification prevented Stanley Works from investigating fully the circumstances of the accident and ascertaining facts which later could not be determined"

Id.

59. 738 F.2d at 46.

60. In addition, there is no evidence that the First Circuit has been influenced by the Seventh Circuit since no Seventh Circuit opinions were cited by the First Circuit in the cases reviewed.

61. *Hunter v. Texas Instruments, Inc.*, 798 F.2d 299 (8th Cir. 1986) and *Golden Plump Poultry, Inc. v. Simmons Eng'g Co.*, 805 F.2d 1312 (8th Cir. 1986) were both decided in favor of the

favoring the buyer in their outcomes, covered a variety of issues. The creation of an express warranty was an issue in many of the cases.⁶² In analyzing this issue, the majority of the opinions relied on section 2-316. The analysis of several of the cases is confusing, however, either because the opinion's reliance on the U.C.C. was sparse⁶³ or because the corresponding state statute was not numbered consistently with the U.C.C., thus making it difficult to discern exactly what provision of the Code was being cited.⁶⁴

Warranty disclaimer was another prevalent issue in the Eighth Circuit. In each case reviewed, the Eighth Circuit declined to uphold disclaimers, albeit for a variety of reasons. For example, in *Northern States Power Co. v. ITT Meyer Industries*,⁶⁵ the court declined to uphold a disclaimer because of its conflict with an express warranty.⁶⁶ In *Limited Flying Club, Inc. v. Wood*,⁶⁷ the court held that the disclaimer was effective only with respect to the implied warranties, but not with respect to express warranties.⁶⁸ The court in *Wilson v. Marquette Electronics, Inc.*⁶⁹ refused to extend the disclaimer from the parties' course of dealing.⁷⁰

Another issue present in several of the Eighth Circuit cases involved a limitation of remedies clause in the warranty package. In those cases, where the limited remedy under U.C.C. section 2-719 failed of its essential purpose, limitations on consequential damages were held to be void,

seller. The issues involved in these two cases included disclaimer of warranties under the Arkansas statute that corresponds to U.C.C. § 2-316, and lack of privity, respectively.

62. See, e.g., *Northern States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 412 (8th Cir. 1985) (where the court found that a separate express warranty was created by technical specifications proposed by the buyer); *Neville Constr. Co. v. Cook Paint & Varnish Co.*, 671 F.2d 1107, 1110 (8th Cir. 1982) (where the court held that representations in a brochure can create an express warranty); *Select Pork, Inc. v. Babcock Swine, Inc.*, 640 F.2d 147, 149 (8th Cir. 1981) (where the court held that an agreement for the sale of two specific breeds of pigs created a warranty of description); *Limited Flying Club, Inc. v. Wood*, 632 F.2d 51, 56 (8th Cir. 1980) (where the court held that a logbook given to the purchaser of an airplane providing repair and inspection history as well as certifications of the airplane as airworthy was sufficient to create an express warranty); *Wilson v. Marquette Elec., Inc.*, 630 F.2d 575, 580 (8th Cir. 1980) (where the court found that oral statements made by the seller created express warranties).

63. See *Hutchinson Utilities Comm'n v. Curtiss-Wright Corp.*, 775 F.2d 231 (8th Cir. 1985) (court placed little emphasis on the U.C.C. in its analysis of the warranty issues).

64. See *Matco Mach. & Tool Co. v. Cincinnati Milacron Co.*, 727 F.2d 777 (8th Cir. 1984).

65. 777 F.2d 405 (8th Cir. 1985).

66. *Id.* at 412.

67. 632 F.2d 51 (8th Cir. 1980).

68. *Id.* at 56-57.

69. 630 F.2d 575 (8th Cir. 1980).

70. *Id.* at 582. The court refused to hold that a standard warranty containing a disclaimer became part of the basis of the bargain based on the parties' previous course of dealing. In the court's words, "[t]he relatively few sales of differing equipment . . . accompanied by the standard warranty do not in our view establish a course of dealing that would extend the disclaimer provisions to the agreement to purchase the [equipment under consideration in this transaction]." *Id.* at 581.

in spite of specific disclaimers of consequential damages within the warranty.⁷¹ These decisions support Comment 1 to section 2-719 which provides that agreements limiting remedies must permit "at least minimum adequate remedies" or a "fair quantum of remedy."⁷² Although the Eighth Circuit did not specifically refer to the Comment when analyzing this issue, it appears to be following the intent of the U.C.C.

Although the Eighth Circuit has sometimes strayed from "hard" Code analysis and made statements without apparent Code authority, overall it has taken a fairly well-reasoned approach to warranty issues, with due regard for the statute. For example, in *Northern States Power* the court, before addressing the disclaimer issue discussed above, considered whether notification of breach was sufficient. Notification is important from the buyer's point of view because it can limit or preclude remedy for breach.⁷³ The *Northern States Power* court performed an in-depth analysis of notification, focusing first on the language of the statute, and then looking to the relevant comment.⁷⁴ It then considered the policy underlying the provision, the precedent within the state, and decisions which had addressed similar issues in other jurisdictions.⁷⁵

In *Select Pork, Inc. v. Babcock Swine, Inc.*,⁷⁶ the court analyzed Iowa's U.C.C. in order to determine the implications of a limited remedy which failed of its essential purpose. The seller breached an express description warranty by delivering the wrong breed of pigs. The court ruled that a remedy limiting the buyer to return of the pigs failed of its essential purpose because the promised pigs were "highly-touted special pigs."⁷⁷ The court then held that the clause excluding consequential damages was unconscionable and thus void.⁷⁸ Although the court relied in part on the lower court's finding without questioning its analysis, the court also looked to the language of the U.C.C. and cited a relevant comment.⁷⁹ Its analysis appears to parallel the methodology applied by the Seventh Circuit, *i.e.*, which holds that, in deciding an issue of limited remedy, every case must be analyzed on its own facts. Because the facts

71. See, e.g., *R.W. Murray, Co. v. Shatterproof Glass Corp.*, 758 F.2d 266 (8th Cir. 1985); *Matco Mach. & Tool Co. v. Cincinnati Milacron Co.*, 727 F.2d 777 (8th Cir. 1984); *Hartzell v. Justus Co., Inc.*, 693 F.2d 770 (8th Cir. 1982); *Select Pork, Inc. v. Babcock Swine, Inc.*, 640 F.2d 147 (8th Cir. 1981).

72. U.C.C. § 2-719 Comment 1 (1989).

73. See U.C.C. § 2-607.

74. 777 F.2d at 408.

75. *Id.* at 409-10.

76. 640 F.2d 147 (8th Cir. 1981).

77. *Id.* at 150.

78. *Id.* at 149-50.

79. *Id.* See U.C.C. § 2-313 Comment 4.

of this case pointed so strongly towards the buyer due to the seller's behavior, this case did not, in Professor Speidel's words, "leave the buyer to fight an uphill battle."⁸⁰

Finally, in *Wilson v. Marquette Electronics, Inc.*,⁸¹ the court upheld the trial court's finding of oral express warranties. Relying on the language of the U.C.C., the court allowed consistent and additional terms to become part of the basis of the bargain within the parol evidence rule of section 2-202, which created an express warranty.⁸² The court applied an even more thorough analysis in its finding of implied warranties, relying both on the language of the statute and the relevant comments.⁸³

Generally, the Eighth Circuit decisions were the result of fairly consistent analysis of the applicable U.C.C. provisions. As demonstrated above, in many instances the court also looked to the comments for further support. Thus, the argument may be made that favoring the buyer simply means staying true to the presumptions built into Article 2 for the protection of the buyer. Under the warranty provisions, the buyer appears to have an advantage both in proving that a warranty was created and breached, and in seeking damages for the breach. As Professor Speidel notes, there is a good chance that the subjective expectations of the buyer will be consistent with the contractual obligations of the seller, either through express or implied warranties.⁸⁴ Although damages may be limited by agreement between the buyer and the seller, the Code sets forth provisions addressing how far the seller may go in limiting damages.⁸⁵ Therefore, the Eighth Circuit's slant toward the buyer may be the result of that court performing its job well.

2. Ninth Circuit

The sample from the Ninth Circuit contains three warranty cases, all favoring the buyer. In one case, *Consolidated Data Terminals v. Applied Digital Data Systems, Inc.*,⁸⁶ the court upheld the creation of an express warranty.⁸⁷ The court also ruled that the express warranty survived even a general disclaimer, in support of the Code's explicit policy

80. Speidel, *supra* note 1, at 841.

81. 630 F.2d 575 (8th Cir. 1980).

82. *Id.* at 579-80.

83. *Id.* at 580-81 (citing ARK. STAT. ANN. § 85-2-315 Official Comment 2 (1987)).

84. Speidel, *supra* note 1, at 817.

85. See, e.g., U.C.C. §§ 2-719(3), 2-316(2) (1989).

86. 708 F.2d 385 (9th Cir. 1983).

87. *Id.* at 391-92. The court held that a statement made in the written specifications for computer terminals concerning the speed at which the computers would operate created an express warranty. *Id.* at 391.

prohibiting disclaimers of express warranties.⁸⁸

These decisions also considered the implications of a limited remedy failing of its essential purpose.⁸⁹ Adopting reasoning similar to that of the Eighth Circuit, the Ninth Circuit consistently held that if a limited remedy fails of its essential purpose, the buyer may be awarded consequential damages, even where the warranty contains a clause disclaiming the payment of consequential damages. For example, the court in *Fiorito Bros., Inc. v. Fruehauf Corp.*,⁹⁰ applied a thorough analysis of the applicable Code provisions, placing weight not only on the rules themselves but the way in which the rules interrelated. The *Fiorito* court first determined that the limited remedy contained in the contract had failed of its essential purpose.⁹¹ The court next focused on the interrelationship of sections 2-719(2) and 2-719(3).⁹² The court then looked to other jurisdictions and finally to the Official Comments to section 2-719 before deciding that exclusion of consequential damages is unconscionable and thus void where a limited remedy fails of its essential purpose.⁹³ The Ninth Circuit, in favoring the buyer in these cases, appears to be placing great weight on the underlying policy of the Code, which is that although the parties should be free to create their own agreements and remedies, the contract may not be oppressive and must afford some "fair quantum of remedy."⁹⁴ In addition to relying on the specific provisions of the U.C.C., the Ninth Circuit also relied on the holdings of other circuits.⁹⁵ The Seventh Circuit, however, was not cited.

3. Tenth Circuit

Our survey of warranty dispute cases uncovered four Tenth Circuit cases, three of which favor the buyer. The case holding for the seller involved the issue of whether an express warranty was created.⁹⁶ The

88. *Id.* See U.C.C. § 2-316(1).

89. See *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 761 F.2d 553 (9th Cir. 1985); *Fiorito Bros., Inc. v. Fruehauf Corp.*, 747 F.2d 1309 (9th Cir. 1984); *Consolidated Data Terminals v. Applied Digital Data Sys., Inc.*, 708 F.2d 385 (9th Cir. 1983).

90. *Fiorito Bros.*, 747 F.2d at 1309.

91. *Id.* at 1312-13.

92. *Id.* at 1314. Subsection (2) states that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Title." WASH. REV. CODE § 62A.2-719(2) (1989). Subsection (3) states that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." *Id.* at § 62A.2-719(3).

93. 747 F.2d at 1314-15.

94. U.C.C. § 2-719 Comment 1.

95. To cite several examples, the court in *Consolidated Data Terminals*, 708 F.2d at 397, referred to the Sixth Circuit. Similarly, the court in *Fiorito Bros.*, 747 F.2d at 1313, 1315, cited the Eighth Circuit, and the court in *Milgard Tempering, Inc. v. Selas Corp. of Am.* 761 F.2d 553, 556 (9th Cir. 1985) cited the Sixth Circuit.

96. *Universal Drilling Co. v. Camay Drilling Co.*, 737 F.2d 869 (10th Cir. 1984).

court held that a description of drilling rigs contained in a contract did not create an express warranty that the rigs would conform to that description.⁹⁷ The court, in reaching its decision, undertook a thorough analysis of Colorado's U.C.C., relying on the language of the relevant provisions and the Comments.⁹⁸ Thus, although the court found for the seller, it did so while focusing on the statute.

In *Ponderosa System, Inc. v. Brandt*,⁹⁹ the court found for the buyer on a breach of an implied warranty of merchantability. Although referring to provisions within the Wyoming statute, the court in *Ponderosa* did not rely on the statute to the same extent it did in the other Tenth Circuit cases. In addition, the court's quoted language from the Wyoming statute is somewhat confusing because the numbering of the Wyoming statute does not correspond to the numbering of the U.C.C.

The decisions in the remaining two cases demonstrate well-reasoned analysis of warranty issues. One case involved the creation of an express warranty¹⁰⁰ while the other involved the creation of an implied warranty.¹⁰¹ Both decisions relied on the applicable statutory language. One of the decisions, *Downie v. Abex Corp.*, also relied on the Comments to the U.C.C. in determining that the seller's affirmations of fact had become part of the basis of the bargain, thus creating an express warranty.¹⁰²

Overall, from the small sample of Tenth Circuit cases reviewed, the court appears to more thoroughly rely upon Article 2 language than does the Seventh Circuit. In addition, in *Downie* the court avoided the more complex test applied by the Seventh Circuit in express warranty cases which required a showing of reliance. The Tenth Circuit relied on the language of Official Comment 3 to U.C.C. section 2-313 which states, "in actual practice affirmations of fact made by the seller . . . are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement" ¹⁰³ The court then hedged, however, stating that the issue need not be decided because there was sufficient evidence for a rational jury to find that the buyer did rely on the seller's express

97. *Id.* at 874.

98. *See id.* at 873-74.

99. 767 F.2d 668 (10th Cir. 1985).

100. *Downie v. Abex Corp.*, 741 F.2d 1235 (10th Cir. 1984).

101. *Patty Precision Products Co. v. Brown & Sharpe Mfg., Co.*, 846 F.2d 1247 (10th Cir. 1988).

102. 741 F.2d at 1240. The court relied on the language of Official Comment 7 to § 2-313 which stated in part that "[t]he sole question is whether the language . . . [is] fairly to be regarded as part of the contract." U.C.C. § 2-313 Comment 7.

103. 741 F.2d at 1240.

warranty.¹⁰⁴

The Tenth Circuit relied almost solely on its own understanding of the U.C.C. and corresponding Comments when resolving warranty disputes, citing only one other circuit. Because the Tenth Circuit sample is small, it is difficult to discern an overall trend. With the possible exception of *Ponderosa*, the Tenth Circuit appears to have performed well in its application of Article 2.

C. "Mixed" Circuits

1. Second Circuit

The Second Circuit has decided only three warranty dispute cases since 1980 but the cases are noteworthy because of their reference to other circuits. Although the results in these decisions do not favor buyers or sellers, the court relies on decisions from the Third, Sixth, Eighth and Ninth Circuits. More importantly, for our purposes, two cases cite Seventh Circuit opinions: *Tokio Marine & Fire Insurance Co. v. McDonnell Douglas Corp.*¹⁰⁵ and *Sobiech v. International Staple & Machine Co.*¹⁰⁶

In *Tokio Marine*, the court's reference to the Seventh Circuit favors the buyer, stating that a seller's liability may be altered as long as the buyer is left with a "fair quantum of remedy."¹⁰⁷ In *Sobiech*, the court cites the Seventh Circuit for the proposition that "a purchaser cannot recover damages for breach of implied or express warranties that an examination of the goods should have revealed to him."¹⁰⁸ Although the court in these cases relied in part on the Seventh Circuit for its holding, the Seventh Circuit's influence in these particular situations is not controversial and does not evidence seller bias.

2. Fourth Circuit

The sample from the Fourth Circuit contains eleven cases, with the decisions appearing to favor the buyer only slightly more than the seller.¹⁰⁹ The court does appear to favor the buyer with respect to some

104. *Id.*

105. 617 F.2d 936 (2d Cir. 1980).

106. 867 F.2d 778 (2d Cir. 1989).

107. 617 F.2d at 940-41. The court was citing *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933, 939 (7th Cir. 1978), in which the Seventh Circuit quoted language from U.C.C. § 2-719 Comment 1. *Id.*

108. 867 F.2d at 783 (citing *Royal Bus. Mach., Inc. v. Lorraine Corp.*, 633 F.2d 34, 44 (7th Cir. 1980)).

109. The decisions holding for the buyer include: *Fullerton Aircraft Sales & Rentals, Inc. v. Beech Aircraft Corp.*, 842 F.2d 717 (4th Cir. 1988); *Massey-Ferguson Credit Corp. v. Webber*, 841

issues. For example, the Fourth Circuit does not require privity of contract in order for the buyer to bring a breach of warranty claim.¹¹⁰ In addition, the decisions generally uphold breach of express and implied warranties unless there is a disclaimer which limits warranties,¹¹¹ or unless the buyer has reason to know that he could not rely on the warranty.¹¹² The court also requires, where a limited remedy fails of its essential purpose, that the buyer be given some remedy for a breach of warranty. Thus, in *Waters v. Massey-Ferguson, Inc.*,¹¹³ the buyer was allowed to recover consequential damages even though the warranty contained an express exclusion of consequential.¹¹⁴

In the majority of the Fourth Circuit cases reviewed, the court referred to the relevant provisions of the U.C.C. and often referred to other circuit court cases, including the Seventh Circuit. References to the Seventh Circuit include holdings favoring both the buyer and the seller. For example, in *Coastal Modular Corp. v. Laminators, Inc.*,¹¹⁵ the court, citing the Seventh Circuit's decision *V-M Corp. v. Bernard Distributing Co.*,¹¹⁶ focused on the parties' expectations and held that each "intended to receive something from their bargain."¹¹⁷ Because the parties had not expressly agreed to limit consequential damages, the court allowed the buyer to recover them.¹¹⁸ In contrast, the court in *Kaplan v. RCA Corp.*,¹¹⁹ relied on a Seventh Circuit case as support for upholding the seller's exclusion of consequential damages.¹²⁰ Citing *AES Technology*

F.2d 1245 (4th Cir. 1988); *Spartanburg County School Dist. Seven v. National Gypsum Co.*, 805 F.2d 1148 (4th Cir. 1986); *Roy Stone Transfer Corp. v. Budd Co.*, 796 F.2d 720 (4th Cir. 1986); *Waters v. Massey-Ferguson, Inc.*, 775 F.2d 587 (4th Cir. 1985); *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421 (4th Cir. 1985); *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980). The following Fourth Circuit cases favored the seller: *Kaplan v. RCA Corp.*, 783 F.2d 463 (4th Cir. 1986); *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 778 F.2d 196 (4th Cir.), *cert. denied*, 475 U.S. 1121 (1985); *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287 (4th Cir. 1982); *Fischbach & Moore Int'l Corp. v. Crane Barge R-14*, 632 F.2d 1123 (4th Cir. 1980).

110. See *Fullerton Aircraft Sales & Rentals, Inc. v. Beech Aircraft Corp.*, 842 F.2d 717 (4th Cir. 1988).

111. See, e.g., *Spartanburg*, 805 F.2d at 1150 (where court held that state of the art defense is not allowed to excuse breach of an implied warranty); *Klein*, 773 F.2d at 1424-25 (where court found breach of express and implied warranties). But see *Hill*, 696 F.2d at 292 (where court held that buyer was limited to warranties set out in the disclaimer).

112. See, e.g., *Fishbach*, 632 F.2d at 1125 (where the court held that buyer could not recover in warranty if he knew or had reason to know of nonconformity of goods).

113. 775 F.2d 587 (4th Cir. 1985).

114. *Id.* at 593.

115. 635 F.2d 1102 (4th Cir. 1980).

116. 447 F.2d 864 (7th Cir. 1971).

117. 635 F.2d at 1107.

118. *Id.*

119. 783 F.2d 463 (4th Cir. 1986).

120. *Id.* at 467.

Systems, Inc. v. Coherent Radiation,¹²¹ the court held that the failure of a repair and replacement warranty does not necessarily void the seller's exclusion of consequential damages.¹²²

Nonetheless, the Seventh Circuit's influence on the Fourth Circuit is only slight. The Fourth Circuit appears to have heavily relied on the U.C.C. to afford the buyer some measure of remedy. Additionally, the buyer is advantaged by the court's refusal to require privity of contract between the buyer and seller for breach of warranty action. Thus, in the Fourth Circuit, the buyer appears to have an easier battle in breach of warranty cases than Professor Speidel argues is the case in the Seventh Circuit.

3. Fifth Circuit

The Fifth Circuit and the Eleventh Circuit were analyzed together due to the fact that the Eleventh Circuit was created out of the Fifth Circuit in 1981. Of the fourteen warranty dispute cases decided, only three were Eleventh Circuit cases.¹²³

The sampling of cases decided in the Fifth Circuit demonstrated mixed results. Seven of the cases were resolved in favor of the seller and three favored the buyer. Of the remaining decisions, two decisions were split between seller and buyer, and two cases were remanded for further consideration of various issues.

Several of the decisions favoring the seller addressed the validity of disclaimer of warranties and held that the disclaimers were effective as long as they were not unconscionable.¹²⁴ The Fifth Circuit in *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Westinghouse Electric Corp.*,¹²⁵ also upheld the seller's limitation of remedies as not

121. 583 F.2d 933 (7th Cir. 1978).

122. 783 F.2d at 467.

123. *Earman Oil Co., Inc. v. Burroughs Corp.*, 625 F.2d 1291 (5th Cir. 1980) was decided in 1980 and was thus part of the "old" Fifth Circuit. However, the action was originally brought in the United States District Court for the Southern District of Florida which is now part of the Eleventh Circuit. *Bowdoin v. Showell Growers, Inc.*, 817 F.2d 1543 (11th Cir. 1987) and *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092 (11th Cir. 1983) were decided after the creation of the Eleventh Circuit.

124. See *Arkwright-Boston Mfr. Mut. Ins. Co. v. Westinghouse Elec. Corp.*, 844 F.2d 1174, 1183-84 (5th Cir. 1988) (court found that disclaimers of implied warranties of fitness and merchantability for a particular purpose were conspicuous and in compliance with Texas law); *Earman*, 625 F.2d at 1299 (court held that disclaimers of warranty were not unconscionable); *Two Rivers Co. v. Curtiss Breeding Serv.*, 624 F.2d 1242, 1252 (5th Cir. 1980) (court held that disclaimer of warranty of merchantability was effective against buyer), *cert. denied*, 450 U.S. 920 (1981); *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 420 (5th Cir. 1980) (court held that disclaimer language was conspicuous and not unconscionable).

125. 844 F.2d 1174 (5th Cir. 1988).

unconscionable.¹²⁶

A more difficult issue addressed by the Fifth Circuit involves determining when a limited remedy fails of its essential purpose. The Fifth Circuit never clearly defined the standards used to resolve this issue. Even where the court found that the limited remedy had failed of its essential purpose, however, the court upheld the seller's exclusion of consequential damages. For example, in *Reynolds Metals Co. v. Westinghouse Electric Co.*,¹²⁷ even though the seller's disclaimer of warranty was held inapplicable because there was a total failure of performance, the case was remanded on the issue of damages because the lower court had incorrectly awarded consequential damages where the seller had expressly excluded such damages.¹²⁸

The court favored the buyer in two cases on the issue of breach of express warranty.¹²⁹ In one of those cases, *Lindemann v. Eli Lilly & Co.*, the court relied on section 2-313 of the Code in deciding that the buyer had adequately proven the elements necessary to find breach. Based on the U.C.C. and earlier decisions, the court held that in order to bring a successful cause of action for breach of express warranty, the plaintiff does not have to prove a product defect but need only show that the product failed to comply with the terms of the warranty.¹³⁰

In another case favoring the buyer, *Clark v. DeLaval Separator Corp.*,¹³¹ the court refused to extend a disclaimer of warranty to the manufacturer when the disclaimer was not expressly made by the manufacturer but by the retailer.¹³² Thus, the manufacturer in this case was subject to an action for breach of implied warranty of merchantability.¹³³ In addition, the court looked to other jurisdictions, including the Seventh Circuit. One Seventh Circuit case cited contained a fact pattern that was very similar to the facts before the Eleventh Circuit (included as part of

126. *Id.* at 1182. See also *Lindemann v. Eli Lilly & Co.*, 816 F.2d 199, 204 (5th Cir. 1987) (manufacturer's exclusion of consequential damages was not unconscionable); *Reynolds Metals Co. v. Westinghouse Elec. Corp.*, 758 F.2d 1073, 1080 (5th Cir. 1985) (where exclusion of consequential damages clause was upheld).

127. 758 F.2d 1073 (5th Cir. 1985).

128. *Id.* at 1079.

129. *Lindemann*, 816 F.2d at 202 (where the court found that evidence of excessive weeds in fields where warranted herbicide had been properly applied was sufficient to find breach of express warranty); *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983) (where the court held that affirmations made by the seller to the buyer concerning the useful life of a copier and the cost of maintenance gave rise to an express warranty).

130. 816 F.2d at 202.

131. 639 F.2d 1320 (5th Cir. 1981).

132. *Id.* at 1323.

133. *Id.* at 1324.

the Fifth Circuit).¹³⁴ The other Seventh Circuit case referenced was cited for its rejection of a claim that a remedy had failed of its essential purpose. In finding for the seller, the court in *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Westinghouse Electric*¹³⁵ relied on the Seventh Circuit's reasoning that where two sophisticated purchasers negotiate a limited remedy, the purchaser cannot claim that the warranty failed of its essential purpose merely because a claim did not arise until after the warranty had expired.¹³⁶

Based on these examples, it appears that the Seventh Circuit may have had some influence on the Fifth Circuit's analysis of warranty disputes. The Fifth Circuit, however, also places great weight on the principles of the controlling state law, which may explain some differing outcomes. Although the Fifth Circuit decisions frequently favored the seller, the analyses were based on a thorough review of the applicable U.C.C. provisions. In general, the court, consistent with the policies of the U.C.C., allowed the parties' bargains to stand as long as they were not unconscionable and as long as the buyer was afforded some relief.¹³⁷

4. Sixth Circuit

The majority of the nine cases in the Sixth Circuit favored the seller although there were several decisions which found for the buyer. The cases favoring the seller primarily considered whether there was an express or implied warranty and whether it was breached. Several of the cases found that the seller had not made any warranties.¹³⁸ In one case, *Dugan & Meyers Construction Co., Inc. v. Worthington Pump Corp.*,¹³⁹ the court found that the limited warranty terms were part of the contract and alternatively held that the seller had not breached an implied warranty of merchantability or fitness for a particular purpose.¹⁴⁰ In

134. *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092 (11th Cir. 1983). In *Royal Typewriter* the court cited *Royal Business Machines, Inc. v. Lorraine Corp.*, 633 F.2d 34, 46 (7th Cir. 1980) as support for its finding that the buyer had not sufficiently demonstrated that the copy machines that the buyer had purchased from the seller failed to conform to existing standards of the trade at the time of sale. 719 F.2d at 1092, 1099.

135. 844 F.2d 1174 (5th Cir. 1988) (citing *Wisconsin Power & Light Co. v. Westinghouse Elec. Corp.*, 830 F.2d 1405, 1412-13 (7th Cir. 1987)).

136. *Id.* at 1179.

137. See, e.g., 844 F.2d at 1174; *FMC Finance Corp. v. Murphree*, 632 F.2d 413 (5th Cir. 1980). But see *Lafayette Stabilizer Repair, Inc. v. Machinery Wholesalers Corp.*, 750 F.2d 1290 (5th Cir. 1985).

138. See *Lancaster Glass Corp. v. Philips ECG, Inc.*, 835 F.2d 652 (6th Cir. 1987); *Beyette v. Ortho Pharmaceutical Corp.*, 823 F.2d 990 (6th Cir. 1987); *Price Bros. Co. v. Philadelphia Gear Corp.*, 649 F.2d 416 (6th Cir. 1981).

139. 746 F.2d 1166 (6th Cir.), cert. denied, 471 U.S. 1135 (1984).

140. *Id.* at 1168.

Overstreet v. Norden Laboratories, Inc.,¹⁴¹ the court found no implied warranty of merchantability but remanded the case on the issue of express warranty.

The cases in which the buyer prevailed concerned the issue of the appropriate remedy in warranty cases. In *Martin v. Joseph Harris Co., Inc.*,¹⁴² the court held that the seller's disclaimer and limitation of remedy clause was unconscionable because of the unequal bargaining power between the buyer and the seller.¹⁴³ The court further upheld the finding below that seller had breached the implied warranty of merchantability.¹⁴⁴ In another case, the court reversed on the issue of damages, instructing the lower court to award consequential damages to the buyer for the seller's breach of warranties.¹⁴⁵ Finally, in *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.*,¹⁴⁶ the court found for the buyer in part, holding that the limited remedy had failed of its essential purpose and that consequential damages are authorized in appropriate cases.¹⁴⁷ The court also held that an exclusion of consequential damages can stand even if a limited remedy fails of its essential purpose, unless it is unconscionable.¹⁴⁸ The court remanded on the issue of unconscionability.¹⁴⁹

Most of the Sixth Circuit's warranty dispute cases demonstrate attention to the applicable Code language. All of the cases except one referred to the relevant state's version of the U.C.C. and several of the cases referred to the Official Comments. The Sixth Circuit commonly cited other circuits as support for its decisions.

One reference to the Seventh Circuit is of particular interest. In *Overstreet v. Norden*, the court relied on the Seventh Circuit on the question of whether mere reliance was sufficient to prove breach of an express warranty.¹⁵⁰ The Sixth Circuit first held that, under the Kentucky version of the U.C.C. in order to show that a warranty is part of the basis of the bargain, the buyer must have relied upon the warranty as "one of the inducements for purchasing the product."¹⁵¹ The court's analysis of this

141. 669 F.2d 1286 (6th Cir. 1982).

142. 767 F.2d 296 (6th Cir. 1985).

143. *Id.* at 299-302.

144. 767 F.2d at 296-97.

145. *Taylor & Gaskin, Inc. v. Chris-Craft Indus.*, 732 F.2d 1273, 1279 (6th Cir. 1984).

146. 709 F.2d 427 (6th Cir. 1983).

147. *Id.* at 432.

148. *Id.* at 434-35.

149. *Id.* at 436.

150. 669 F.2d at 1290, 1292 (citing *Royal Business Machines v. Lorraine Corp.*, 633 F.2d 34 (7th Cir. 1980)).

151. 669 F.2d at 1291.

issue closely follows the Seventh Circuit reasoning criticized by Professor Speidel for requiring proof of actual reliance for breach of an express warranty. The *Overstreet* court noted that although a buyer has no obligation to investigate a seller's representations before relying on them, "a buyer may not rely blindly on a statement or affirmation that he knows is incorrect."¹⁵² It reversed the lower court's judgment for the buyer, ruling that the instructions on express warranty were erroneous for failure to include the requirement that the buyer must have relied on the warranty in order to bring an action.¹⁵³

V. CONCLUSION

The Sixth Circuit in *Overstreet v. Norden*, illustrates the influence that the Seventh Circuit may have as the circuits contend with difficult Code problems, such as the "basis of the bargain" test. But, overall, the Seventh Circuit's influence on other circuits in the warranty area appears slight, with a couple of notable exceptions. Moreover, the Seventh Circuit's pattern of favoring the seller, as demonstrated by Speidel, does not appear to be duplicated elsewhere. We have found, in general, that the other circuits do an adequate job of analyzing warranty issues and do not stray from pure Code methodology as frequently as does the Seventh. However, Speidel may be more critical on this score than we.

While we believe that Professor Speidel may be somewhat overzealous in his criticism of the Seventh Circuit's methodology, he firmly establishes that buyers have not fared well there, in contradistinction to our findings elsewhere. One could make the argument that the flexibility inherent in Article 2 permits a court to become a policymaker in attempting to conform the law to commercial practice. However, it would be going too far to assert that Article 2 gives a court carte blanche to ignore its structure or to redefine its presumptions.

Certainly Article 2 presents a myriad of difficulties for the judiciary faced with its application. Some biases should be expected, given Article 2's interpretation burden and its concomitant adaptability. But Speidel argues that the Seventh Circuit has gone too far, and with the evidence he has compiled, it is hard to disagree.

152. *Id.*

153. *Id.* at 1295.