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RELIANCE AS AN ELEMENT IN PRODUCT MISREPRESENTATION SUITS: A RECONSIDERATION

by

Douglas Whitman*

We grew up founding our dreams on the infinite promises of American advertising. I still believe that one can learn to play the piano by mail and that mud will give you a perfect complexion.

Zelda Fitzgerald

Over the last several decades, consumer marketing theory has acquired a sophistication previously absent in the marketplace. Marketers now recognize many factors beyond advertising that motivate consumer sales. For example, the purchase of major consumer products such as automobiles and durable goods is greatly influenced by the activities of a salesman in the store. While advertising and other marketing devices get the consumer to the shop, something more often is necessary to motivate the consumer to part with his money. In major transactions it is the salesman who often pushes a vacillating consumer into a purchase. Without this extra push, an important sale might be lost.

The role of a salesman often is nonexistent, however, in the purchase of an inexpensive product such as soap or tissue paper; but even here human behavior is so complex that marketers often have difficulty pinpointing the precise consumer motivation for a purchase decision. Consider the following statement:

Motivation is always multiple and complex. There is seldom just one reason for doing anything. When a person buys an automobile he may do so because he needs transportation and wants to extend his horizons and wants to keep up with the Joneses and surpass the Smiths and proclaim his solvency and status to the world and experience the mastery of controlling a powerful new engine, etc. While these motives are apt to have different degrees of importance to different people, they are all likely to be involved to some extent in a purchase of a new car.1

Merely advertising the specific attributes of a product is no longer suffi-
sufficient; sellers must scrutinize everything from the placement of a product in a store, to the catalogues furnished to potential purchasers, to the slightest detail in a television advertisement. Consumer preferences as to color and style of packaging, the person who appears in television advertising, and the effect of advertising and other marketing devices are studied carefully. Even so, every year many new and established products fail to inspire mass consumer purchases. Exactly what causes these changes in consumer behavior eludes even the most thoughtful marketer. John Wanamaker, a New York department store tycoon, recognized the complexity of consumer behavior generations ago, as reflected in his remark to the effect that “I know I waste half the money I spend on advertising. I just don’t know which half.”

This Article focuses on the popular assumption that consumers rely upon one or more statements by a seller in deciding to purchase a product. One consequence of this assumption is that the law requires plaintiffs in many products liability cases to prove they relied upon a particular statement in deciding to purchase a product. A much more realistic view is that embodied in modern marketing theory: a complex combination of marketing factors interplay with one another and result in a buying decision. Even if a plaintiff sincerely believes a given statement caused a purchase, no one can be certain the statement actually resulted in the sale. Because many of the influences on consumer purchasing operate at a subconscious level, asking plaintiffs to prove that a label or a catalogue or an advertisement or the like caused them to purchase a product is an unjustifiable legal burden in light of current marketing techniques.

The time has come, therefore, for the statutory and case law to be revised to eliminate the element of reliance when a cause of action is brought on a theory of product misrepresentation or breach of warranty when a product causes personal injury. In lieu of the reliance element, the courts should permit a rebuttable presumption that reliance on a representation exists unless proven otherwise by the defendant. This Article develops the rationale for this conclusion by exploring some of the changes that have occurred in marketing behavior and theory in recent decades and by applying this knowledge to present-day legal requirements for establishing a claim based on a seller's misrepresentation of a product.

I. Changes in Consumer Marketing: Impact on the Growth of Products Liability Litigation

One factor of great significance to the whole problem of misrepresentation is the change in the marketing environment itself. Gradually, over a period of years, the retail business in the United States changed from a number of small, locally owned shops, which very often produced the goods they sold, to large impersonal chains such as K-Mart, Safeway, and

Sears. The owner of a store may no longer be available to dissatisfied customers; instead such customers often must deal with salespersons hired frequently with inadequate backgrounds about the products they are selling and who are provided scant training. The effect of this radical change from small stores, where purchases were often made on the advice of a local store owner familiar with the product, to purchases made at a self-service store, is profound. With no one to consult, consumers have been forced to place increasing reliance on the marketing of a product and, in particular, on the advertising of a product.

Consumers began to receive information from new sources as they lost contact with individual store owners. Information increasingly comes not from salespersons, newspapers, and magazines, but from television or radio advertising. The amount of information transmitted in a thirty-second television spot is far less than can be conveyed in a magazine or newspaper where the reader has time to examine the material carefully. On television, the advertiser must get its message across to the public quickly through a series of verbal and visual images. One result of this transformation has been an explosion of product liability claims.\(^3\)

Does this suggest anything about the law of misrepresentation? If nothing else, because mass media product promotion and advertising, as opposed to direct contact with the seller, is responsible for most consumer information, this type of information should be carefully scrutinized. To the extent mass media advertising provides misleading information to the public, we should bear in mind that such information might have a subconscious effect on consumer behavior even though an injured plaintiff cannot recall seeing or hearing the advertisement in question.

II. THEORIES OF RECOVERY

A number of different theories of recovery are available to plaintiffs who desire to base a claim on a false statement appearing in an advertisement: fraud, negligent misrepresentation, breach of warranty, and innocent misrepresentation.\(^4\) In the earliest products liability suits, plaintiffs sought recovery based on fraud.\(^5\) The difficulties of proving a case based

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3. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1978). The Task Force estimated that between 60,000 and 70,000 product liability claims were filed in 1976 and concluded that the number of pending claims increased substantially between 1971 and 1976. For a discussion of the number of injuries caused by products used around the home, see U.S. CONSUMER PRODUCT SAFETY COMMISSION, 1980 ANNUAL REPORT (Part Two). The Consumer Product Safety Commission estimates every year nearly 36 million product-related injuries occur that require medical treatment or some limitation in normal activity. The magnitude of injuries suggests special attention is merited in this area as it likely will continue to be a fertile field for litigation.

4. Arguably, two prerequisites must be established in every products liability case based on an advertisement: (1) does the advertisement contain a commitment; and (2) has the commitment been breached? G. ROSDEN & P. ROSDEN, THE LAW OF ADVERTISING § 14.03 (1978). For an outstanding article on the problem of representations appearing in advertisements, see Shapo, A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment, 60 VA. L. REV. 1113 (1974).

on fraud led to the development of the tort of negligent misrepresentation; unfortunately, this tort also presented difficult problems of proof. Breach of warranty next gained popularity as a theory of recovery, and more recently, the courts have adopted the concept of innocent misrepresentation. Finally, federal consumer regulation of deceptive advertising cannot be overlooked as an emerging response to the inadequacies of common law and state statutory law on misrepresentation.

A. Fraudulent Misrepresentation

A seller's intentional falsehoods regarding a product or the attributes thereof for the purpose of deceiving a purchaser may give rise to a common law cause of action. The action is based on fraudulent or deceitful misrepresentation and accrues when the purchaser is injured by the product. Although establishing a case of fraud or deceit is difficult, the necessary elements include the following: (1) a material misrepresentation that is false and ordinarily one of fact; (2) knowledge or belief on the part of the defendant that the representation is false or that he does not have a sufficient basis of information for the misrepresentation; (3) intent to induce the plaintiff to act or refrain from acting in reliance upon the
misrepresentation; (4) justifiable reliance upon the representation by the plaintiff in acting or refraining from acting;\(^{12}\) and (5) damage to the plaintiff as a direct result of his reliance.

Difficulty most often is encountered in attempting to distinguish fact from opinion, and in proving reliance. For example, in *Toole v. Richardson-Merrell, Inc.*\(^ {13}\) the plaintiff developed cataracts after using defendant's drug MER/29. In attempting to convince the appellate court to overturn the jury's verdict for the plaintiff on the issue of fraud, the defendant argued, among other things, that the statements it made concerning MER/29 were mere expressions of scientific opinion made to physicians and that there was no evidence of reliance upon any of the statements by the plaintiff.\(^ {14}\) While the court agreed that in an action for fraud and deceit the misrepresentations must be of fact and not opinion, the court relied on an exception to this rule to uphold the verdict. If "the party making the representation has superior knowledge or special information, the representations may be construed as fact and not opinion."\(^ {15}\) On the issue of reliance, the court decided that there was evidence indicating the plaintiff's physician relied upon the advertisements and the plaintiff relied upon the physician. The court thought the jury could make a reasonable inference that the statements came to his doctor's attention and the doctor relied upon them. Thus, there was sufficient evidence as to fraud to warrant submitting the case to the jury.\(^ {16}\)

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14. 60 Cal. Rptr. at 410. The company had represented:
   (a) MER/29 is virtually non-toxic, (b) it is remarkably free from side effects;
   (c) it is a proven drug; (d) it has been administered under controlled conditions to more than 2,000 patients for periods up to three years; (e) there is no longer any valid question as to its safety or lack of significant side effects;
   (f) MER/29 has a unique, specific and completely safe action.

15. *Id.* at 411.

16. *Id.* at 412. *See also* Wechsler v. Hoffman-LaRoche, Inc., 198 Misc. 540, 99 N.Y.S.2d 588 (Sup. Ct. 1950). In this case arising out of the death of a man as a result of administration of a drug manufactured by the defendant, the court found sufficient facts for fraud. The defendant knew of the drug's fatal propensities, but concealed this fact in its communications with the medical profession. The court stated that even though the representations were made to physicians, as opposed to the general public, reliance could be supplied "by the circumstance that the physician who prescribed the drug was acting on behalf of the intestate and the fraud committed on the doctor, was, therefore, a fraud upon the intestate." 99 N.Y.S.2d at 590. *See also* Wennerholm v. Stanford Univ. School of Medicine, 20 Cal. 2d 713, 128 P.2d 522 (1942). In *Wennerholm* the plaintiff took a drug falsely represented by defendants to be harmless. With respect to the issue of reliance in an action for fraud, the court found evidence of reliance by both the patient and the physician. 128 P.2d at 524.
B. Negligent Misrepresentation

While few people would differ as to the obligation of the law to impose sanctions on sellers who intentionally misrepresent the characteristics of their wares, other theories of recovery involve less culpable behavior. The conduct of the seller in such a situation may be quite innocent, but the law imposes liability because the buyer has been in some manner misled. In other words, the law imposes liability on the seller not because the seller has acted wrongfully, but because the consumer was misled by something the seller did.

An example is the common law theory of negligent misrepresentation. Negligent misrepresentation is defined as a false representation made by a person who has no reasonable grounds for believing it to be true, though he does not know the representation is untrue or perhaps even believes it to be true. The courts do not punish the negligent seller for morally reprehensible behavior. Instead the law says that the seller must exercise greater care with respect to his representation. To the extent a seller carelessly misleads a buyer to the buyer’s detriment, the seller must pay for any personal injuries the buyer sustains.

To hold a seller liable for negligent misrepresentation, the plaintiff must establish justifiable reliance on a statement negligently made. The inability to prove reliance, however, often forecloses the plaintiff’s cause of action. For example, in Kapp v. Bob Sullivan Chevrolet Co. the Arkansas Supreme Court found that although an automobile dealer’s advertising praised the dealer’s cars, the plaintiff could not recover for injuries sustained due to defective seat belts because the dealer made no representation as to the quality or performance of the seat belts. Even assuming a specific statement has been made with respect to a particular product, the possibility always exists that a court will regard it as puffing. For example, in Evans v. Sears Roebuck & Co. a Georgia court found that a Sears

17. BLACK’S LAW DICTIONARY 1152 (4th ed. 1951). Pursuing a case under negligent misrepresentation as opposed to fraud probably will be of little benefit to the plaintiff. Kimble and Lesher observe: “Although liability for negligent misrepresentation causing injury is now well established, a claim of negligence is often hard to prove even when the representation on which it is based is patently false and the resulting injury clear.” W. KIMBLE & R. LESHER, supra note 5, § 111, at 148. Negligence has been found in Pearlman v. Garrod Shoe Co., 276 N.Y. 172, 11 N.E.2d 718 (1937) (child died of infected blister caused by shoes that had been represented orally and in advertising as embodying every proven principle of health); International Prods. Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 662, cert. denied, 275 U.S. 527 (1927) (negligent representations with regard to stored goods); Crist v. Art Metal Works, 230 App. Div. 114, 243 N.Y.S. 496 (1930), aff’d, 255 N.Y. 624, 175 N.E. 341 (1931) (toy revolver that was advertised as harmless set fire to whiskers on Santa Claus suit).


20. 353 S.W.2d at 9-10. In another automobile case, the court found that the plaintiff failed to state a cause of action that the defendant’s advertising encouraged people to drive too fast. The plaintiff was hit by a car going 115 mph. Schemel v. General Motors Corp., 261 F. Supp. 134 (S.D. Ind. 1966), aff’d, 384 F.2d 802 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968). See also Neider v. Chrysler Corp., 361 F. Supp. 320 (E.D. Pa. 1973), aff’d, 491 F.2d 748 (3d Cir. 1974) (advertising for Plymouth GTX emphasized speed).

catalogue was evidence properly excluded as mere sales talk.

C. Breach of Warranty Under the Uniform Commercial Code

A plaintiff may also find a cause of action when a seller breaches a product warranty. Liability is imposed on a seller for reasons similar to the imposition of liability for negligent misrepresentation because the seller is not acting immorally. Nonetheless, a guarantee is given to the buyer that the courts insist the seller must honor. Three warranties are created by the Uniform Commercial Code (UCC), including the express warranty, the implied warranty of merchantability, and the implied warranty of fitness for a particular purpose. Note that in contrast to fraudulent, negligent, and innocent misrepresentation, a cause of action for breach of warranty is based on state statutory law; however, many pre-Code cases upheld common law warranty actions.

Before an injured person can recover for a breach of warranty, the existence of at least one of the three Code warranties must be established.

I. Express Warranty Under Section 2-313. No particular formal words need be used in order to create an express warranty. The use of words such as "warranty" or "guarantee," for example, is not necessary. The words need not indicate a specific intention on the part of the seller to make an express warranty and they may be oral or written.

22. U.C.C. § 2-313 provides:
   (1) Express warranties by the seller are created as follows:
      (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
      (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.
   (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.


24. Id. § 2-315.
25. The court must look at all of the facts and circumstances, along with the language in the advertisement in question, to determine if a warranty has been created. In a number of cases the court has found an advertisement to constitute an express warranty. See, e.g., Drayton v. Jiffee Chem. Corp., 395 F. Supp. 1081 (N.D. Ohio 1975), modified & aff'd, 591
An express warranty comes into existence under Uniform Commercial Code section 2-313 in one of several ways: by an affirmation of fact or promise,\(^\text{27}\) by a description of the goods,\(^\text{28}\) or by a sample or model.\(^\text{29}\) Each of these methods results in the creation of an express warranty only if a second condition occurs: that it becomes part of the “basis of the bargain.”\(^\text{30}\) The Code specifically provides that “an affirmation 
\textit{merely} of the value of the goods or a statement purporting to be 
\textit{merely} the seller’s opinion or commendation of the goods does not create a warranty.”\(^\text{31}\) In some cases, it may be important to determine whether an express warranty, implied warranty of merchantability, or implied warranty of fitness for a particular purpose was created because the Code provides different rules for the exclusion or modification of different types of warranties.\(^\text{32}\) Thus, a

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28. This point is important in bringing a case based on a radio or television advertisement, as such advertisements are oral in content.\(^\text{28}\) \textit{See, e.g.,} Klages v. General Ordnance Equip. Corp., 240 Pa. Super. Ct. 356, 367 A.2d 304 (1976) (man injured by robber while using mace gun that allegedly would stop people in their tracks).


29. The sample or model need not be displayed physically in the plaintiff’s presence. A number of cases have found an advertisement to constitute an express warranty. In an early case, Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939), the court held that the statement in an advertisement that the automobile in question was “A Rugged Fortress of Safety" amounted to an express warranty of quality and construction. 288 N.W. at 310, 312-13. Two leading cases that found advertisements to be express warranties were Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 143 N.E.2d 612 (1958), and Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958). Rogers and Markovich had substantial impact on the drafting of Restatement (Second) of Torts § 402B (1965) [hereinafter cited as Restatement (Second)].

30. U.C.C. § 2-313.


32. U.C.C. § 2-316 provides:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it
manufacturer or retailer wishing to exclude a warranty must do so with care to be certain the exclusion is effective. Moreover, to recover for personal injuries sustained as a result of a breach of warranty, the plaintiff must establish that he is in privity of contract with the seller or a third-party beneficiary of warranty. The persons who may recover vary from state to state, depending on which alternative of Code section 2-318 a particular state has adopted. The New Jersey Supreme Court in *Henningsen v. Bloomfield Motors, Inc.* abrogated the requirement of establishing privity altogether to recover from the manufacturer or the retail dealer. A state following this case should permit a plaintiff to recover from a seller with whom the buyer is not in privity of contract even though the state may have adopted Alternative A of section 2-318.

The Uniform Commercial Code does not explicitly require reliance in express warranty cases, and the official comments to section 2-313 indicate reliance need not be established. Nonetheless, some confusion has occurred in the courts over this issue because of the "basis of the bargain"
terminology. Regrettably, the Code does not define this phrase; however, the comments do give us some insight into what the phrase means. Under the Uniform Sales Act, which preceded the Uniform Commercial Code, reliance by the buyer was required in order to establish an express warranty.\textsuperscript{37} It appears that the Code does not require proof of reliance in order to establish an express warranty. Comment 3 to section 2-313 states that “no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.”\textsuperscript{38} Although the Code uses the terminology “basis of the bargain” rather than reliance, arguably there is no great difference between the terms.\textsuperscript{39} Even so, the analysis of an express warranty case should be in terms of the “basis of the bargain” rather than reliance. This is particularly true when we are concerned with statements made in advertising that were never heard or read by the purchaser prior to purchase. If there was an affirmation of quality in the statements, although the buyer did not rely upon this affirmation in making the purchase, he still arguably has a cause of action under breach of express warranty.\textsuperscript{40} The basic test is: Did the affirmations of fact or promises made by the seller, did any descriptions, or any samples or model exhibited become a part of the basis of the bargain? If so, an express warranty has been created. If not, no express warranty exists.\textsuperscript{41}

\textsuperscript{37} Uniform Sales Act § 12.

\textsuperscript{38} U.C.C. § 2-313, Comment 3. However, the same comment continues: “[A]ny fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.” Id. This seems to suggest that a statement is presumed to be part of the basis of the bargain and that the burden of disproof is on the seller. In any event, such proof may be unnecessary because liability need not be grounded on express warranty. The plaintiff might instead pursue the case under an implied warranty of merchantability.

\textsuperscript{39} 3 R. Duesenber & L. King, Bender's Uniform Commercial Code Service § 6.01 (1980).

\textsuperscript{40} See R. Nordstrom, Law of Sales § 68 (1970). Courts differ as to whether an unread advertisement constitutes a warranty. See Annot., supra note 8, at 128-33. A minority view holds that an unread ad may form the basis of an express warranty. See 1 G. Rosden & P. Rosden, supra note 4, §§ 14.03(2), 14.06. The Rosdens disagree: “[W]e believe that [such a view] cannot stand scrutiny. For if an advertisement is to amount to a promise, knowledge of such promise would seem to be one of the minimal requirements for success.” Id. § 14.06. See also W. Kimble & R. Lesher, supra note 5, § 92 (“[A]n express warranty can be created by advertisements leading to the purchase, provided that the buyer can demonstrate his justified reliance on the statements in the advertisements.”) (Emphasis added.). One could argue, however, that the value of the warranty is included in the cost of the product and the seller should be estopped from denying his warranty on public policy grounds. D. Noel & J. Phillips, Products Liability in a Nutshell 31 (1974). Of course, if a plaintiff realizes he must establish a particular statement as part of the basis of the bargain, he may falsely state he was aware of the statement.

\textsuperscript{41} R. Nordstrom, supra note 40, § 68. Nordstrom lists two principles to aid in deciding these cases, although each case must turn on its facts: (1) the promise or description must be interpreted before it can be determined whether there has been a warranty covering the particular defect; and (2) the Code requires that the statements of the seller (or the description, sample, or model) become a part of the basis of the bargain. “If the resulting bargain does not rest at all on the representations of the seller, those representations cannot be considered as becoming any part of the ‘basis of the bargain’ within the meaning of section 2-313.” Id.
Although there is disagreement whether an advertisement must be seen prior to purchase, the Code does not require that an express warranty be created prior to the time the parties enter into a contract. Moreover, language used after the contract was entered into may create an express warranty, and the Code does not require consideration for a modification of a contract.\textsuperscript{42} One could at least make the argument, therefore, that if a person views an advertisement after a purchase, then the advertisement becomes part of the basis of the bargain between the parties. The plaintiff, however, still has the problem of establishing that he read or saw the advertisement.\textsuperscript{43}

Assuming the seller advertised its product, must the person who is bringing suit establish that the express warranty was part of the basis of the bargain between him and the defendant? Code section 2-318\textsuperscript{44} permits someone other than the original purchaser to recover for breach of warranty; thus, one may reasonably argue that the injured party need only

\textsuperscript{42} The drafters of the U.C.C. noted:

\[[T]he precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If the language is used after the closing of the deal . . . the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable in order.\]

U.C.C. § 2-313, Comment 7.

\textsuperscript{43} The injured party should not have to establish that something stated in the advertisement became part of the basis of the bargain between the injured party and the defendant. The fact that the purchaser regarded a statement as part of the basis of the bargain should be sufficient. This position is that adopted by the Restatement (Second) of Torts. Restatement (Second), supra note 29, § 402B, Comments j, i; see Mannsz v. MacWhyte Co., 155 F.2d 445 (3d Cir. 1946). In MacWhyte the injured party had not purchased the wire tape that resulted in his death. Nonetheless, the court stated that the plaintiff "endeavored to prove that the contents of MacWhyte's manual came to King's knowledge and he bought the wire tape because of the representations contained in it. [The plaintiff] failed in this proof but in our opinion it was unnecessary to make it." \textit{Id.} at 451. Because the manual was widely distributed to purchasers and prospective purchasers, the court thought this to be sufficient proof of reliance. However, the plaintiff lost in this case because he used the product wire for a purpose not intended by MacWhyte. \textit{Id.}

The court in MacWhyte seems to be saying that if a company distributed a manual, the purchaser can be assumed to have relied upon the manual. The user in turn may avail himself of the purchaser's reliance. While this approach with respect to reliance is unusual, it represents a more realistic view towards proving reliance than the typical court's analysis. The possibility exists that a purchaser could come into contact with an advertisement and be influenced, at least subconsciously, by it. One could extend this analysis even further and argue that although a purchaser never read an advertisement, a friend of his may have done so. This friend, without even mentioning the advertisement, may have influenced the injured party in making his or her selection. Philip Kotler made the following observation:

Groups that have the most immediate influence on a person's tastes and opinions are face-to-face groups. . . .

The powerful influence of small groups on individual attitudes has been demonstrated in a number of social-psychological experiments. . . .

For the marketer, this means that brand choice may increasingly be influenced by peer groups.


\textsuperscript{44} U.C.C. § 2-318, Alternative A. Section 2-318 therefore does not require that an injured plaintiff prove his or her own reliance on or even awareness of the seller's warranty. This is in accord with the Restatement (Second), supra note 29, § 402B, Comment j, which states that the reliance in question \textit{need not} be that of the injured party.
point out that the express warranty was part of the basis of the bargain between the original purchaser and the defendant. In *Randy Knitwear, Inc. v. American Cyanamid Co.* the manufacturer of a resin asserted in trade papers and on labels the effectiveness of its chemical in preventing shrinkage. A garment manufacturer brought suit to recover damages based on a breach of express warranty. Although no direct contractual relationship existed between the resin manufacturer and the garment manufacturer, the court found the case raised substantial fact issues that precluded summary judgment for defendant.

The problem of determining when a given statement constitutes an express warranty and when it merely is puffing or sales talk certainly adds a degree of unpredictability in relying upon an express warranty in a products liability case. The official comments to section 2-313 shed some light on whether a seller's statement is an affirmation of value, opinion, or commendation. While section 2-313(2) seems to state in unequivocal language that an affirmation as to value or a statement purporting to be the seller's opinion or commendation of goods does not create a warranty, the official comments indicate the test is: "What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain?" This again raises the question of what is the basis of the


46. See R. DUESENBERG & L. KING, supra note 39, § 6.05.

47. U.C.C. § 2-313, Comment 8. The comment also notes that the provisions of subsection (2) were added to clarify the fact that while statements of the seller do ordinarily become part of the basis of the bargain "common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain." Id.

In applying the test suggested by comment 8, Duesenberg and King suggest the courts employ an objective rather than a subjective standard; in other words, what was the buyer led to believe and what could he justifiably rely upon? Thus the authors would inject the use of the term reliance into a court's analysis. They also suggest that perhaps the seller should be given no leeway in advertising—that it must be absolutely truthful. 3 R. DUESENBERG & L. KING, supra note 39, § 6.05.

In numerous cases the courts have found that statements made by the seller to the buyer constitute puffing. Many courts feel those types of statements are to be expected in a sales situation. See, e.g., Ginnell v. Charles Pfizer & Co., 274 Cal. App. 2d 424, 79 Cal. Rptr. 369 (1969); Rogola v. Silva, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1973); Young & Cooper, Inc. v. Vestring, 214 Kan. 311, 521 P.2d 281 (1974); Jacquot v. Wm. Filene's Sons, 337 Mass. 312, 149 N.E.2d 635 (1958); Carpenter v. Albert Culver Co., 28 Mich. App. 483, 184 N.W.2d 547.
bargain and whether an opinion or commendation can become part of the bargain. Moreover, if the official comment liberalizes what can create an express warranty, the question arises as to what weight the courts should place upon the official comments in interpreting the statutory language.

2. Implied Warranty of Merchantability Under Section 2-314. The implied warranty of merchantability arises by operation of law and not as a result of any language in the contract between the buyer and seller. The fundamental concept for purposes of merchantability under Uniform Commercial Code section 2-314 is that the goods “are fit for the ordinary purposes for which such goods are used.” Consequently, some determination of the ordinary purposes of a particular product is required to establish the existence of this warranty. For example, shoes that are fit for ordinary walking are not unmerchantable if they are unfit for mountain climbing, because mountain climbing would not be an ordinary use of walking shoes. Where a manufacturer inadvertently uses an ingredient causing sterility in its feed, and fails to label the feed properly, the manufacturer has breached the implied warranty of merchantability. Likewise, where the manufacturer of a golf training device advertises its ball as “Completely Safe Ball Will Not Hit Player,” and the golfball hits a buyer on the head while he uses the device, the product is unfit for its ordinary purpose.

Goods not only must do the job for which they were made, but

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48. (1) Unless excluded or modified (Section 2-316), 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. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(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.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

U.C.C. § 2-314.

49. U.C.C. § 2-314(2)(c) & Comment 8. Comment 8 also indicates that this warranty protects a person buying for resale. To be merchantable, goods must be honestly resalable in the normal course of business.


also must do the job safely.\textsuperscript{52}

Additional elements needed to establish an implied warranty of merchantability include (1) proof that the goods are not merchantable and (2) that a merchant made the statement.\textsuperscript{53} One of the chief advantages in pursuing a case based on the implied warranty of merchantability is that the injured party need not demonstrate the product was defective; however, the plaintiff's burden to establish that the goods are not merchantable arguably eliminates this advantage.

A positive feature about pursuing a case under the implied warranty of merchantability, as opposed to breach of express warranty, is the absence of a need to establish that the statement became part of the basis of the bargain.\textsuperscript{54} For this reason, the injured party may be able to prevail under the implied warranty of merchantability whereas he could not do so under an express warranty. The plaintiff does not have to establish an awareness of an inadequate representation when an injury arises from the failure of the product to meet ordinary expectations. These expectations are presumed.\textsuperscript{55} For this reason a plaintiff might be better off bringing a case under an implied warranty of merchantability theory.\textsuperscript{56}

3. Implied Warranty of Fitness Under Section 2-315. Another warranty that arises in a sale of goods is the implied warranty of fitness for a particular purpose.\textsuperscript{57} This warranty under Uniform Commercial Code section 2-315 has two facets: (1) the seller must at the time of contracting have "reason to know any particular purpose for which the goods are required" and (2) "the buyer is relying on the seller's skill or judgment to select or furnish suitable goods."\textsuperscript{58} In contrast to the implied warranty of mer-

\textsuperscript{52} R. Nordstrom, supra note 40, § 76.

\textsuperscript{53} U.C.C. § 2-314.


\textsuperscript{55} U.C.C. § 2-314(2)(c). That reliance is assumed in an action brought under § 402A of the Restatement (Second) of Torts also seems clear. Restatement (Second), supra note 29, § 402A, Comment c; Phillips, Product Misrepresentation and the Doctrine of Causation, 2 Hofstra L. Rev. 561, 561 (1974).

\textsuperscript{56} See 2 L. Frumer & M. Friedman, supra note 8, § 16.04[4][b] (1981).

\textsuperscript{57} 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 under the next section an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315.

\textsuperscript{58} Id. The seller is not required to have actual knowledge. Section 15 of the Uniform Sales Act required that the buyer make known to the seller the particular purpose for which the goods were required. This requirement was deleted from § 2-315. Now, the seller has reason to know if the circumstances "are such that the seller has reason to realize the pur-
chantability, the implied warranty of fitness does not require a statement from a merchant.59 A “particular purpose” differs from the “ordinary purpose for which such goods are used.”60 The concept of merchantability covers uses that are customarily made of goods;61 on the other hand, a “particular purpose” envisages some specific use that is “peculiar to the nature of his [the buyer’s] business.”62 An example of a particular purpose is found in Filler v. Rayex Corp.,63 where a high school student sued the manufacturer of baseball sunglasses for the loss of his right eye. During a game, a fly ball hit the right side of his sunglasses, shattering the right lens into sharp splinters that pierced his right eye. The injured plaintiff’s coach had purchased the sunglasses after reading an advertisement indicating that they were designed for baseball players and would provide instant eye protection.64 The court noted that the glasses were not fit for baseball players, the particular purpose for which they were sold, thus the implied warranty of fitness had been breached.65

To recover under the implied warranty of fitness for a particular purpose, one must establish reliance.66 The statement in question must still be established as having been a factor in deciding to enter into a transaction. The plaintiff must establish reliance on the seller’s skill or judgment to select or furnish suitable goods. This requirement of reliance poses serious factual problems for the injured party but while the seller need not have actual knowledge of the buyer’s particular purpose or of the buyer’s reliance on the seller’s skill and judgment, the buyer actually must rely on the seller.67 In examining the question of the plaintiff’s reliance, the court will need to examine the degree of the seller’s knowledge of the buyer’s re-

59. A merchant is defined as:
[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

60. Id. § 2-104(1).
61. If a buyer merely has used the goods in an ordinary manner, the implied warranty of merchantability is sufficient. A number of cases have used the implied warranty of fitness when it was unnecessary. R. Nordstrom, supra note 40, § 78.
63. 435 F.2d 336 (7th Cir. 1970).
64. Id. at 337. The advertisement read: “Play Ball and Flip for Instant Eye Protection with Rayex Baseball Sunglasses Professional Flip Specs.” A cardboard box was labeled: “Baseball Sunglasses—Professional Flip-Specs” and stated “Simply flip . . . for instant eye protection.” A guarantee inside each box provided “Rayex lenses are guaranteed for life against breakage.”
65. Id. at 338.
66. See note 39 supra and accompanying text; for implied warranty of fitness for a particular purpose, see footnote 136 infra and accompanying text.
quirements and the degree of the buyer's reliance on the seller's skill and judgment.  

D. Innocent Misrepresentation

The final step away from liability based on blameworthy conduct to liability based purely on a seller's misrepresentation of some product characteristic is innocent misrepresentation. The seller's conduct in this situation is assumed to be free of any intent to injure or mislead the buyer. Nonetheless, the seller's actions have misled the purchaser in such a fashion as to cause direct physical injury to the plaintiff. We are generally dealing here with a completely honest and fair seller who, through no intentional or negligent act, and without any express or implied guarantee, misled the party using the product. This common law theory of innocent misrepresentation is found in section 402B of the Restatement (Second) of Torts.

The rule in section 402B applies to:

any misrepresentation of a material fact concerning the character or quality of the chattel sold which is made to the public by one so engaged in the business of selling such chattels. This fact must be a material one, upon which the consumer must be expected to rely in making his purchase, and he must justifiably rely upon it.

Arguably, the statement in question was too general to be relied upon by the plaintiff. Thus, in Ford Motor Co. v. Taylor, 60 Tenn. App. 271, 446 S.W.2d 521 (1969), the plaintiff was not permitted to recover based on defendant's reputation and advertisements because the court felt these statements were general rather than particular. An interesting case involving reliance and § 2-315 is Addis v. Bernardin, Inc., 226 Kan. 241, 597 P.2d 250 (1979). The buyer placed an order for jar lids, but the seller informed the buyer it would not recommend the lids in question for the buyer's product, salad oil. The buyer purchased them anyway. When the lids failed to meet his needs, he brought suit based on § 2-315. The Kansas Supreme Court ruled that the seller had superior knowledge of why his product was unsuitable for buyer and, by failing to caution the buyer properly, had breached the implied warranty of fitness for a particular purpose.

The authors argue that whether the seller possessed any particular skill or judgment is immaterial. The mere fact of being a seller is sufficient indication to the buyer that the seller has the requisite skill and judgment. Id. at 7-28. The better view would seem to be that the buyer's selecting of the goods does not preclude reliance by the buyer on the seller. Peters v. Lyons, 168 N.W.2d 759 (Iowa 1969) (purchaser's inspection of dog chain did not preclude reliance on seller's clerk); Kurriss v. Conrad & Co., 312 Mass. 670, 46 N.E.2d 12 (1942) (plaintiff's selection of dress did not preclude reliance).

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

Comment f (emphasis added). Special note should be taken of the requirements
For section 402B to apply, a misrepresentation as to the character or quality of the chattels must be made, and the person or company making this representation must be in the business of selling any type of chattel. Official comment b excludes from the application of section 402B a casual seller, such as a person who sells his lawn mower at a garage sale. Even if a seller made a misrepresentation at a garage sale, section 402B could not be used.

Section 402B does not apply to mere statements of opinion, puffing, sales talk, or commendatory trade statements. While an action based upon reliance on a mere opinion may not be possible, if the statement of opinion is material a plaintiff might argue that it reasonably may be interpreted to include an implied assertion of the existence or nonexistence of reliance and materiality. These requirements in many ways make the problems of proof similar to those encountered under deceit. Much of the analysis in this Article could also arguably be applied to deceit. See L. Frumer et al., supra note 9, § 1.03[1].

As an illustration of the problem of reliance, comment f contains a factual situation involving an automobile represented as having a shatterproof windshield. Illustration 1 is based on Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932), adhered to on rehearing, 168 Wash. 465, 15 P.2d 1118, second appeal, 179 Wash. 123, 35 P.2d 1090 (1934).

Interestingly, the court in Baxter recognizes the changes that have taken place in the American marketplace. The court makes the following observations as a justification for the abandonment of privity:

Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.

12 P.2d at 412. While the court thus recognized the changes in the methods of doing business as a justification for abandoning privity, one might also argue that these changes merit a departure from the requirement of reliance. If radio, television, etc., creates a demand for a product, why is it necessary to point to a specific statement in the advertisement which created the demand? The mere realization that advertising creates a demand seems sufficient to justify imposing liability if there has been a misstatement of fact. See notes 114-35 infra and accompanying text.


73. Restatement (Second), supra note 29, Comment b.

74. On the other hand, the buyer could rely on the theory of express warranty to recover. U.C.C. § 2-313.

75. In interpreting the extent to which a purchaser may rely upon the statement of the seller, § 542 of the Restatement (Second) is helpful, particularly comment d:

If the subject matter of the transaction is one which both parties have an approximately equal competence to form a reliable opinion, each must trust his own judgment and neither is justified in relying upon the opinion of the other. . . . The fact that one of the two parties to a bargain is less astute than the other does not justify him in relying upon the judgment of the other. This is true even though the transaction in question is one in which the one party knows that the other is somewhat more conversant with the value and quality of the things about which they are bargaining. . . .

Restatement (Second), supra note 29, § 542, Comment d.
facts. In this case, the person or company making the statement might be liable on the basis of an implied representation of fact. Alternatively, the plaintiff might argue that the statement was material and the maker had special knowledge of the matter the recipient did not have or that the maker had successfully endeavored to secure the confidence of the recipient. In addition, the allegedly wrongful statement also must be a material one of importance to the normal purchaser "by which the ultimate buyer may justifiably be expected to be influenced in buying the chattel." The rule stated in section 402B applies only to misrepresentations made to the public at large that are intended to induce the purchase of a product or to reach the public. The rule applies whether the representation was made by television, radio, newspaper, or other form of communication. A caveat to section 402B leaves open the question whether the section also should apply to a representation made by an individual.

To recover damages under section 402B, the plaintiff must establish that reliance was justifiable and physical harm resulted because of the fact misrepresented. If a purchaser either does not know or is indifferent to a misrepresentation, and the misrepresentation does not influence the purchase or subsequent conduct, the plaintiff may not base a cause of action on section 402B.

76. Id. § 539:
(1) A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement
(a) that the facts known to the maker are not incompatible with his opinion; or
(b) that he knows facts sufficient to justify him in forming it.
(2) in determining whether a statement of opinion may reasonably be so interpreted, the recipient's belief as to whether the maker has an adverse interest is important.

For example, could this section be applied today if Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939), were litigated today? (In that case Hudson advertised its car as "A Rugged Fortress of Safety.") What does the buyer know about how a car is constructed? Wouldn't the buyer be justified in concluding the seller knows facts sufficient to justify its assertion the car is a rugged fortress of safety?

77. Is not one purpose of advertising, in any event, to secure the recipient's confidence in the content of the advertised message? Otto Kleppner makes the following comment with respect to a change in attitude of a consumer as a goal of advertising:
In the case of a company, advertising can generate a favorable attitude toward it—the basis of most institutional advertising. Although there is no definite proof that a person's favorable attitude toward a product is an assurance that he will buy it, nevertheless, measurements of changes in attitude are widely sought by advertisers as an index of how effective their advertising is in predisposing a person more favorably to the product or company. These studies are of particular interest to heavy advertisers, and to corporations concerned with their public image.


78. Restatement (Second), supra note 29, § 402B, Comment g.
79. Id., Comment h.
80. The caveat states: "The institute expresses no opinion as to whether the rule stated in this Section may apply (1) where the representation is not made to the public, but to an individual . . . . " Id. § 402B.
81. Id., Comment j. A point explored later in this Article deals with the question of whether a purchaser ever is influenced to purchase by an advertisement. Furthermore, if the
ment to purchase or use the chattel, it need only be a substantial factor in inducing the purchase or use of the chattel. In determining what constitutes justifiable reliance, sections 537-545A of the *Restatement (Second) of Torts* are applicable, as far as they are pertinent. If such a false statement is made to a person, no obligation arises to investigate to determine if the statement is true or false, but a person cannot rely upon a statement that he knows to be false.

The plaintiff need not establish direct reliance; the cause of action is sufficient if only the purchaser of the chattel relied upon a particular statement, provided that the injured plaintiff is a consumer. The mere fact the injured party was unaware of the misrepresentation will not bar recovery as long as he can point to reliance by the original purchaser. For example, if a man buys an automobile in justifiable reliance upon statements concerning its brakes, and he permits his wife to drive the car, the wife may bring suit based on misrepresentation if the brakes fail and she is injured, even though the wife never learns of the statements.

purchaser is so influenced, some question might arise whether the purchaser could state that a specific representation caused him or her to make a purchase. *But see* Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958). In this case the plaintiff claimed to have heard an advertisement on the radio for Prom Home Permanent and, as a result of that advertisement, asked her nurse to purchase the product. Thereafter, she suffered injury to her scalp. The court stated:

The plaintiff was induced to purchase "Prom Home Permanent" by defendant’s radio broadcast, urging its use with the statement that a neutralizer other than water was unnecessary, making the application or use of its product more convenient than those of other manufacturers. The product was purchased because of the warranties published by the defendant. The defendant induced the sale and is liable if the product thus bought does not comply with the representations made and the health of the user is endangered when the product is used as directed by the manufacturer.

149 N.E.2d at 186. Requiring a plaintiff to make such a statement is unreasonable because in very few instances does advertising have such a direct cause and effect. The sale requiring reliance very likely could encourage perjury. *See* the discussion in the text on advertising theory and the accompanying notes 114-37 infra.

Of course, advertising probably never is the sole reason for a purchase. For example, for a person to purchase an automobile solely because of an advertisement is highly unlikely. The purchaser must be in the market for an automobile in the first place. The requirement that the advertisement be a "substantial factor in inducing the purchase or use of the chattel" is also unreasonable in that advertising theory questions whether an advertisement is ever a substantial factor in making a purchase. *See* notes 114-37 infra and accompanying text.

Compare the issue of causation for pecuniary losses. *Restatement (Second), supra* note 29, § 546 states: "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss."

32. *Restatement (Second), supra* note 29, § 540.

83. *Id.* § 541.

84. *Id.* § 402B, Comment i. Consumer is to be interpreted liberally to include any person who uses a chattel in a manner a purchaser might be expected to use it.

85. *Id.* § 402B, Comment j. The illustration was based on the case of Mannsz v. MacWhyte, 155 F.2d 445 (3d Cir. 1946).
A number of courts have discussed the question of reliance. For example, in *Klages v. General Ordnance Equipment Corp.* the Pennsylvania Superior Court found reliance by a motel clerk on a manufacturer's brochure that indicated the defendant's mace would cause "instantaneous incapacitation" when sprayed on an assailant. The manufacturer attempted to raise the defense of voluntary assumption of the risk, but the court found that no such defense exists under section 402B.

In *Bristol-Myers Co. v. Gonzales* the plaintiff obtained an $800,000 judgment for deafness allegedly resulting from claimed inadequacies in the warnings given by Bristol-Myers concerning its prescription drug "Kantrex." Plaintiff's physician, an orthopedist, administered Kantrex to the plaintiff after an operation. Physicians Desk Reference (a compilation of prescription drug package inserts required by the Food and Drug Administration) stated that Kantrex "has been used satisfactorily as an irrigating solution." Testimony by physicians indicated that the statement was a positive assertion and that a prescribing physician could use Kantrex as a continuous irrigant although the statement had been criticized in 1969 by the National Academy of Sciences and National Research Council because it failed to indicate toxicity from absorption and because the concentration suggested for irrigation was excessive. The criticism notwithstanding, Bristol-Myers continued to represent that Kantrex could be used as an irrigant when it in fact was meant for a one time post-surgical wash. The intermediate court of civil appeals concluded the jury had sufficient evidence to support its findings against Bristol-Myers. On further appeal the Texas Supreme Court noted that the plaintiff did not claim that Kantrex was an adulterated drug or defective, but that it was "ototonic" (having the potential to cause deafness) and that the warnings given by Bristol-Myers for its use were inadequate and improper. The court approved the jury verdict based on section 402B, but reversed the case for other reasons.

The Colorado Court of Appeals recently adopted section 402B in *Winkler v. American Safety Equipment Corp.* In this case a police officer acquired for his personal use a discarded police helmet originally purchased by the Denver Police Department for riot control. On the carton the manufacturer depicted a motorcyclist wearing the helmet. The plaintiff was familiar with the carton and believed the helmet was intended for motor-

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88. 367 A.2d at 312.
90. 548 S.W.2d at 423. The Physicians Desk Reference also stated "Kantrex injection [Kanamycin sulfact injection] in concentrations of 0.25 per cent (2.5 mg./ml.) has been used satisfactorily as an irrigating solution in abscess cavities." *Id.* This is the statement that had to be a misrepresentation justifiably relied on. See *Crocker v. Winthrop Laboratories*, 514 S.W.2d 429 (Tex. 1974); Technical Chem. Co. v. Jacobs, 480 S.W.2d 602 (Tex. 1972).
91. 548 S.W.2d at 426.
92. 561 S.W.2d at 803.
93. *Id.* at 804.
cycle use. Unfortunately, while riding his motorcycle, the plaintiff collided with a pickup truck and suffered head injuries. The helmet performed as designed, but the plaintiff claimed it did not perform as represented on the packaging carton, that is, as a motorcycle helmet. The court of appeals found that the trial court should have instructed the jury based on section 402B, in light of the evidence of justifiable reliance by the plaintiff on the misrepresentation on the carton.95

Not every plaintiff prevails on the issue of reliance. In Franks v. National Dairy Products Corp.96 the plaintiff purchased some shortening for his store from a meat company. The shortening was manufactured by defendant National Dairy Products Corporation. While draining a pan of the shortening, the plaintiff was sprayed with hot grease. The West Texas federal district court found liability based upon section 402A. As to section 402B, the court found the chief hurdles to be the identification of the misrepresentation as to quality and the issue of reliance. The evidence of a representation was a brochure furnished to users and a handbook for the salesmen;97 however, the plaintiff testified unequivocally that he did not rely upon the brochures or any other writing.98 As an alternative theory of reliance (on a representation of quality) plaintiff argued that whenever a product is placed on the market a section 402B representation should be implied that the product would perform safely within the scope of its intended use.99 The court, however, rejected this liberal reading of section 402B because of comment h to section 402B. This comment and its illustrations indicated to the court that section 402B was meant to cover only express representations.100 The court also recognized that comment b requires an affirmative misrepresentation as to quality or character. The court stated that a contrary interpretation would make manufacturers ab-

95. Id. at 696-97.
97. While the trial court noted that the brochure and the handbook suggested how to use the shortening, neither stated that it could be used safely. The court continued:
   Of course, it could be contended that a term implied in the language is that the shortening could be used safely; in other words, if a manufacturer expressly states that a product can be used for certain periods of time in a certain manner, then a user is justified in interpreting that express language to mean that it can be used safely and without explosion for that period in that manner.

282 F. Supp. at 533.
98. Id.
99. Id. This reasoning was suggested by the following dictum by California Chief Justice Traynor in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962):
   In the present case, for example, plaintiff was able to plead and prove an express warranty only because he read and relied on the representations of the Shopsmith's ruggedness contained in the manufacturer's brochure. Implicit in the machines presence on the market, however, was a representation that it would safely do the job for which it was built. Under these circumstances, it should not be controlling whether the plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do.

100. 282 F. Supp. at 533.
In *Harris v. Belton* another plaintiff failed to establish reliance under section 402B. Here the plaintiff sought to recover damages under a number of theories from a retailer and manufacturer of skin tone cream. Plaintiff introduced a magazine advertisement, a standing poster advertisement, the box that contained the skin tone cream, and a statement on the tube itself. A pamphlet referred to on the package and tube repeated the manufacturer's claims and warnings concerning individual sensitivity and also stated: "IMPORTANT: Do not use Artra [skin tone

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101. The court reasoned:
   If one adopts the plaintiff's contention that implicit in the presence of a product in the marketplace is the implied guarantee that it will safely do the jobs for which it was intended, then the section 402A requirement that a product not only be dangerous (i.e., unsafe) but unreasonably so has been redefined in terms solely of a representation of safe use; and the section 402A requirement of proof (by direct or circumstantial evidence) of "defective condition" has been effectively extinguished. At that point, we may well have reached the age in which, at least as to safe use to prevent physical harm to consumers, we have made manufacturers absolute insurers.

102. In *Heaton v. Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967), the plaintiff purchased a truck in 1963. While driving the truck he hit a rock. The truck continued uneventfully for about 35 miles when it left the road and tipped over. After the accident the rim of the wheel was found to be separated from the spider. Section 402B was not presented to the trial court, but plaintiff referred to advertising published by Ford to reinforce the claim that "a consumer would have expected the wheel in question to be engineered and manufactured in such a manner as to withstand the kind of force applied to it in this case." 435 P.2d at 810. Although the plaintiff did not contend that this was a misrepresentation under § 402B, plaintiff asserted: "that advertising in general tends to create expectations of strength and durability, however, does not help a customer to form an expectation about the breaking point of a wheel." *Id.* The court noted that if such expectations existed, the record should contain evidence to support the inference that such was the case.

103. The advertisement contained the following statements:
   LIGHTER, LOVELIER SKIN BEAUTY FOR YOU . . . The ARTRA PROMISE. Artra promises—a complexion fresh and bright as springtime. Soft and glowing as candlelight! Artra, with miracle-magic Hydroquinone, acts a gently [sic], but with deep-down thoroughness—to lighten and brighten your skin. To cream your skin to luxurious softness, too. And without oiliness—because Artra vanishes! Try Artra today. That famous Artra look can belong to you!
   65 Cal. Rptr. at 810.

104. The ad read: "For a skin that is gloriously LIGHTER BRIGHTER SOFTER Clears complexion New ARTRA SKIN TONE CREAM with miracle beauty ingredient Hydroquinone." *Id.*

105. The statement on the box read:
   ARTRA SKIN TONE CREAM contains Hydroquinone lightens brightens, softens skin. Skin Tone Cream is a greaseless vanishing cream for lightening skin, with these additional skin care benefits. Softens skin—Eases removal of blackheads—Protects skin against sunburn. Directions: Place small amount of ARTRA on fingertips, smooth on face, arms, legs, etc. Allow it to soften skin for one or two minutes. Place more ARTRA on fingertips and smooth on skin until it vanishes. Use ARTRA once or twice daily, as desired. NOTE: FOR FULL DIRECTIONS READ ENCLOSED PAMPHLET.

106. The tube had the following directions on it: "NOTE: For full directions read accompanying pamphlet. Some individuals are allergic or sensitive to certain foods, drugs, or cosmetics. If irritation appears discontinue use of this cream." *Id.* at 811.
cream] with other skin bleaches! Mixing Artra with other cosmetic bleaches may lead to dangerous skin irritations. For best results, use only, Artra . . . .”

The plaintiff purchased Artra at a beauty supply store after she saw the poster and read the magazine advertisements. She did not pay particular attention to what it could do but she claimed, based on the labeling and advertising, the manufacturer expressly warranted the cream as suitable for a given purpose, and she purchased it in reliance upon the express warranty. She also alleged a claim under section 402B, but the California Court of Appeals rejected this claim because a warning was given and actually read by the plaintiff.

E. Strict Liability in Tort

In certain instances a plaintiff might be in a position to pursue a products liability case under the theory of strict liability in tort. This theory is contained in section 402A of the Restatement (Second) of Torts and imposes liability on a seller for physical or property injury sustained by a user of a product when the product is in a defective and unreasonably danger-

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107. Id.
108. Id. at 814. The plaintiff also asserted a breach of the implied warranty of fitness for a particular purpose and merchantability. The court rejected all Code claims because they “are for the most part recognizable as generalities promulgated to attract attention and subsequent sales . . . .” Id.

109. Id. at 816; see Restatement (Second), supra note 29, § 402B, Comments f, g, h, and j. Another case in which the plaintiff was unable to establish reliance to the satisfaction of the court and, thus, could not recover under § 402B is Ford Motor Co. v. Russell & Smith Ford Co., 474 S.W.2d 549 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ). Steve La Rocca brought suit against the dealer for personal injuries sustained when he was burned by a split in the radiator hose. The dealer joined Ford as a third-party defendant for indemnity. Following a verdict of $109,224 against the defendant Russell & Smith Ford, and judgment against Ford for full indemnity, the court found that the dealer had not relied on the manufacturer’s representations; thus, no recovery could be sustained upon § 402B. Id. at 559.

In Times Mirror Co. v. Sisk, 122 Ariz. 174, 593 P.2d 924 (1979), plaintiff alleged that a map prepared by Jeppeson & Co. (wholly owned by Times Mirror) and used by a jet in landing at the Manila International Airport was defective and unreasonably dangerous. The jet had crashed. The jury ruled against the plaintiff, but the trial judge granted a judgment n.o.v. This judgment, in turn, was set aside by the Arizona Court of Appeals.

110. Restatement (Second), supra note 29, § 402A states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The rule stated in § 402A does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller (unlike U.C.C. § 2-315), nor any representation by the seller (unlike U.C.C. § 2-313). The seller’s liability is not affected by limitations on the scope and content of the warranties (as in U.C.C. § 2-316). Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurred (as in U.C.C. §§ 2-607(3)(b)).
uous condition. The seller must be in the business of selling the product, and the product must reach the ultimate user in a condition substantially unchanged from the time it left the hands of the seller in order for a plaintiff to recover. Liability is imposed on the seller even though the seller has exercised all possible care in preparing and selling the product and even though no privity of contract exists between the user and seller. Section 402A does not require any reliance on a seller's representation or skill or judgment. Moreover, the seller's liability is unaffected by any limitations on the scope and content of a warranty, and the consumer is not required to give notice to the seller of his injury within a reasonable time after it occurred.

The courts have adopted strict liability in tort to impose the loss resulting from a defective product on the party best able to bear or spread the risk of loss. This party supposedly is in the position to prevent such defective products from being marketed; thus the imposition of liability will tend to force greater care in all facets of the production and marketing process—a company cannot afford to do otherwise.

A seller may choose to create representations in a number of ways: orally, in writing, on television and radio broadcasts, in newspapers, magazines, on labels, in catalogues and brochures. Any one of these sources, if it contains a misrepresentation, may give rise to liability. Retailers, manufacturers, and endorsers may become liable if they misrepre-

112. RESTATEMENT (SECOND), supra note 29, § 402A, Comment c states: On whatever theory, the justification for strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is being forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.


Some authors take issue with the position that the producer is able to pass along the additional costs imposed by products liability claims. This is particularly true of smaller producers. See, e.g., Schwartz, Products Liability and No-Fault Insurance; Can One Live Without the Other?, 12 Forum 130, 130-31 (1976).

113. See, e.g., Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring); Henningssen v. Bloomfield Motors, Inc., 32 N.J. 358, 379, 161 A.2d 69, 81 (1960). Prosser observed that the move to strict liability was a major departure from the established law. Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791, 794 (1966). On the other hand, there is a distinct possibility that through products liability suits we are fostering an environment antithetical to business innovation.
sent the attributes of a product, whether or not they intentionally misrepresent the product. The courts have imposed liability on persons who misrepresent the characteristics of their products even if they do so innocently. The law has moved substantially away from the concept of imposing liability only for intentional misrepresentation of the product attributes. A seller today easily may unintentionally misrepresent a product, and if this misrepresentation causes physical injury to the plaintiff, the seller may incur liability to the injured party.

In the course of this evolution, however, the courts continue to cling to the idea that the plaintiff must establish his reliance on the misrepresentation. In light of what we know today about the impact of advertising on the public, the reliance element is becoming increasingly antiquated.

III. Advertising Theory

The imposition on the plaintiff to establish reliance in all product liability cases except those based on an implied warranty of merchantability or strict liability in tort cannot be justified in light of modern advertising theory. The fact is that people generally do not view an advertisement and in direct response to the advertisement alone, purchase a product. The consumer is influenced by a number of factors besides any particular advertisement, including friends and neighbors, brand loyalty, reputation of seller, labels, marketing display, and distribution. The impact of advertising is delayed and conditional upon interaction with other elements of the marketing mix. The stimulation of demand for a product arises through a combination of promotional methods.

On the other hand, people are influenced by advertising and other marketing devices and in one sense or another eventually may be stimulated to purchase a product because of an advertisement. Although any particular advertisement might not be the source of the stimulus for the product demand, it very well may be a powerful element contributing to the demand for a product. For this reason, continuing to hold sellers responsible for misstatements in their advertising seems logically sound, but insisting that a consumer prove any particular advertisement led to a specific purchase is highly questionable.

If we are speaking of national advertising, determining whether an advertisement has been successful is difficult. Because sales have gone up or down simultaneously with an advertising campaign does not necessarily mean that the advertising campaign stimulated or failed to stimulate demand. Before any judgment may be made of an advertising campaign,

114. C. SANDAGE & V. FRYBURGER, supra note 1, at 240.
115. C. PATTI & J. MURPHY, ADVERTISING MANAGEMENT 1 (1978). Some of the promotional methods are personal selling, publicity, sales promotion, and advertising. These are used in order to help a firm achieve its communications objectives: “creating brand awareness; encouraging product trial; altering buyers’ opinions, attitudes and beliefs; and generating sales leads—these are all communications tasks which must be performed if the organization is to achieve its marketing goals.” Id.
116. O. KLEPPNER, supra note 77, at 508.
the result which a company seeks must first be defined. Merely increasing dollar sales or market shares is not an advertising goal, but a total marketing goal. In fact, an increase or decrease in volume of sales proves nothing about the effectiveness of an advertisement. Only research can attempt to determine the effectiveness of advertising.

Nonetheless, researchers find it difficult to assess the impact of advertising. John Treasure suggests several reasons why measurement of sales effectiveness of advertisements is a difficult task: (1) advertising is a complex phenomenon; (2) competition may undercut the effectiveness of an advertisement; (3) something else may occur in the market at the time of the introduction of an advertising campaign; and (4) the effect, if any, of advertising on the consumer is likely to be delayed. A person viewing or listening to an advertisement is unlikely to be influenced by exposure to a single advertisement as opposed to an entire campaign of multiple exposures to several related advertisements; consumers respond to campaigns rather than a single advertisement.

A strong argument can be made for the proposition that national advertising seldom if ever causes an immediate purchase. A sale is more likely to result from a delayed response after many exposures to advertisements. The thrust of an advertising campaign, for example, may be to change the frequency of purchasing by people who have purchased a prod-

118. L. Quera, Advertising Campaigns 173 (2d ed. 1977). Even with research, one cannot always determine the merit of a given advertising campaign. Many results may be inconclusive. Charles Patti & John Murphy comment:

Perhaps the most widespread misunderstanding of the research activity is the notion that research results make decisions. Whenever management views research in this way, they are often frustrated because results can be "inconclusive." At best, research can only describe an environment and indicate relationships within that environment. Ultimately, management must interpret the data and then apply the results to the particular problem at hand. Skill and creativity is required in using research as a guide to decision making. C. Patti & J. Murphy, supra note 115, at 210.
120. L. Quera, supra note 118, at 187. Quera observed that while a consumer may remember and react to one particular advertisement of a campaign, he more than likely will be influenced to buy only after seeing or being exposed to several elements of that campaign. Consequently, the tactic of a campaign normally proves to be more valuable for an advertiser rather than a single advertisement. Quera also notes that findings of a survey conducted by the American Association of Advertising Agencies revealed that 85% of all advertisements make virtually no impression on consumers. Id. at 174.
121. C. Sandage & V. Fryburger, supra note 1, at 240, state:

The trite notion that national advertising gets people "to go down to the corner drug store right now and buy brand x" is far from reality. Buying action resulting from such advertising is a delayed response that typically takes place after many exposures to a series of advertisements over a period of weeks and months. This is not to suggest that each advertisement should not invite action. It simply means that it is naive to expect an immediate response.

Some argue that advertising does not create demand. "The theory is that advertising does not create demand for a product but only suggests an outlet for preconceived wants and desires." K.C. Star, Mar. 9, 1980, § E, at 8, col. 1.
uct previously. These people often buy more than one brand of the same product; thus, the seller through advertising may be attempting to increase its share of purchases by current users of this type of product.\textsuperscript{122}

One major function of advertising is to encourage frequent repeat buying.\textsuperscript{123} Advertising frequently works by reinforcing those persons who are already convinced of the usefulness of the advertised product.\textsuperscript{124} Because of this multibrand purchasing pattern, a great deal of money is spent trying to reinforce consumer buying habits.\textsuperscript{125} The object of an advertising campaign may not be to achieve brand growth (increase in sales) but maintenance of an existing brand share.\textsuperscript{126} Some authors have suggested that an advertising campaign should merely be expected to “communicate a message from an advertiser to prospective buyers of his brand of product.”\textsuperscript{127}

With all of this uncertainty as to the results of advertising, when is a company likely to use advertising as a promotional device? There are a variety of factors a company might consider in deciding whether to engage in an advertising campaign. Patti and Murphy list three general categories: (1) product factors; (2) market factors; and (3) financial factors.\textsuperscript{128} Some of these factors are beyond the control of the sellers, factors such as the social or political environment or a competitor’s price. Other factors such as pricing or distribution can be controlled. Oftentimes they converge and making causal inferences becomes impossible.

Products that a consumer cannot judge merely by viewing, feeling, tasting, and smelling present the best opportunity for increasing that product’s demand through advertising, particularly if the basic motives for the

\textsuperscript{122} Treasure, supra note 119, at 162.

The role of advertising in sustaining a purchasing habit is further emphasized when it is recognized that initial trial of a new brand—or, indeed, that of an established brand by a “new” user—may well not be induced directly by advertising at all but, for example, by word-of-mouth recommendations. Given a satisfactory product the distinctive contribution of advertising to the success of the brand is likely to be the reinforcement of the buying habit once it has started.

\textit{Id.}

\textsuperscript{123} Telser, \textit{Advertising and the Consumer}, in \textit{ADVERTISING AND SOCIETY} 31 (Y. Brozen ed. 1974).

A general principle underlies not only the use of advertising but also the pervasiveness of brand names. If a firm makes a product that consumers will like, then it has an interest in encouraging repeat buying. Consequently, it identifies its product in an easily recognized way and advertises. Customers will recall their previous satisfaction with the product and will be inclined to buy it again.

\textit{Id.}

\textsuperscript{124} Treasure, supra note 119, at 162.

\textsuperscript{125} \textit{Id.} at 154.

\textsuperscript{126} “As I have already suggested, the task of advertising in this situation is not primarily one of conversion but rather one of reinforcement and reassurance.” \textit{Id.}

\textsuperscript{127} L. Quera, supra note 118, at 182. However, Sandage and Fryburger reject the notion that the function of advertising is merely to communicate a message. They feel it can do much more. C. Sandage & V. Fryburger, supra note 1, at 204.

\textsuperscript{128} C. Patti & J. Murphy, supra note 115, at 4.
purchase involve strong emotional drives.\textsuperscript{129} If the product is in a market that has been experiencing a long-term decline, advertising is likely to be less successful. For example, a manufacturer who advertises wringer washing machines will find advertising of questionable value.\textsuperscript{130} Likewise, the size and marketing strength of competitors, their brand shares, and loyalty, as well as the state of the economy, will affect the success of an advertising campaign.\textsuperscript{131}

While a great deal of advertising money is spent on consumer products,\textsuperscript{132} industrial marketers have less faith in the ability of advertising to help stimulate demand.\textsuperscript{133} Likewise, consumer durables (cars, refrigerators, deep freezers, etc.) present special problems.\textsuperscript{134} People are less likely to be influenced by advertising as a product becomes more expensive, and the role of a personal salesman becomes more important in closing a sale.\textsuperscript{135} Few people are likely to see an advertisement for an automobile or house, and on an impulse stimulated by that single advertisement alone, make a purchase. Much more likely is that the demand will build up over time, and the consumer still will have to be coaxed into the deal by a personal salesman.

Thus, a consumer is subject to a number of forces in determining whether to purchase a product. Even so, one can argue that a deceptive advertisement might result in some additional sales, assuming all other factors are suitable to a sale. Some writers believe that even if a seller increases his sales through a deceptive advertisement, he will obtain only a temporary gain, particularly if the product is one that the public buys regularly. Arguably, even with infrequently purchased products such as furnaces, funerals, and pianos, a seller will not profit from deceptive advertisements because consumers learn about the product not only from their own experience but from the experience of others.\textsuperscript{136} If a friend expresses displeasure after buying a particular brand of automobile, you may decide not to purchase that brand.

Nonetheless, a case can be made for regulation of deceptive advertising. Robert Pitofsky, a former Director of the Federal Trade Commission's Bureau of Consumer Protection, rejects the argument that free competition will solve all the problems arising from deceptive advertising. He believes the absence of repeat buying in many cases and an absence of advertising that challenges false claims made by competitors makes government regulation of deceptive advertising essential.\textsuperscript{137}

\begin{footnotes}
\item[129.] Id. at 4-5.
\item[130.] Id. at 5.
\item[131.] Id.
\item[132.] Telser, \textit{supra} note 123, at 27.
\item[133.] C. PATTI \& J. MURPHY, \textit{supra} note 115, at 2. The absolute size of U.S. industrial advertising billings, however, is huge.
\item[134.] Id.; Treasure, \textit{supra} note 119, at 160.
\item[135.] O. KLEPPNER, \textit{supra} note 77, at 509.
\item[136.] Telser, \textit{supra} note 123, at 30.
\end{footnotes}
A case also can be made that advertisers who deceive the public should pay persons injured by a product that was not in the condition it was represented to be in. The fact that the injured party did not rely upon the misrepresentation in making a purchase should not preclude a suit based upon a misrepresentation. That anyone relies upon any single advertisement in making a purchase is unlikely, because the entire marketing mix influences a purchase decision. If part of the marketing effort involves a misrepresentation, the company should bear the responsibility for arguably inducing sales through the use of a false advertisement. The fact that the injured party, or the purchaser of the misrepresented product, is not able to state specifically "I bought product X because I heard an advertisement about product X" should not preclude recovery in personal injury suits. A consumer purchasing decision may have resulted, directly or indirectly, from the advertisement.

A realistic method of viewing the impact of deceptive advertising is that employed by the Federal Trade Commission (FTC). The FTC need not prove actual deception or that the advertising actually influenced consumer decisions. Instead, the FTC tries to determine the total impression of the advertisement on consumers.

Arguably, the FTC is following a much more rational approach with respect to deception than the courts follow when reliance on a misrepresentation becomes an element for recovery in a products liability case. The FTC does not require proof that people actually relied upon an advertisement or were in fact misled. Instead, the Commission determines the likely impact created by advertising. If the advertisement has a potential to deceive, the Commission finds an advertisement deceptive.

A recent case illustrating the FTC's approach involves celebrity endorsements. In re Cooga Mooga, Inc. & Charles E. Boone involved entertainer Pat Boone, who agreed to pay damages to compensate purchasers of a product he promoted in advertising. Boone appeared in print and on television advertisements to promote Acne-Statin as an acne preparation. In fact, no evidence existed to support the claim it would cure acne. During his endorsement of the product, Boone failed to reveal that he had a

140. Id. A commentator notes that a mere showing of a misrepresentation is sufficient. "[T]he Commission need not demonstrate that specific consumers have actually believed and acted upon the misrepresentation to their injury. All the Commission needs to conclude is that a challenged advertisement has the 'tendency' or the 'capacity' to deceive consumers by inducing them to rely on the misrepresentation." Reed, Advertising and the Federal Trade Commission, in BUSINESS LAW KEY ISSUES AND CONCEPTS 100 (1978). The question is whether the representation has the capacity or tendency to deceive, not whether it actually deceived anyone. Resort Car Rental Sys. Inc. v. FTC, 518 F.2d 962 (9th Cir.), cert. denied, 423 U.S. 827 (1975).
close connection to the company selling the product. Commenting on the significance of the case, Albert H. Kramer, director of the FTC Consumer Protection Bureau, warned:

The negotiated order, while not a binding legal precedent, stands for the principle that an endorser must verify the claims made about the advertised product before the first commercial goes on the air or appears in print, or else risk FTC action. Unless the endorser is an expert on the subject, the endorser must look to independent reliable sources to validate claims, tests, or studies supplied by the advertisers. Failure to make a reasonable effort at independent evaluation could result in personal liability for the endorser.143

The FTC thereafter promulgated guidelines for authorized endorsements and testimonials.144 These guidelines forbid the use of endorsements that are deceptive or could not be substantiated if made directly by the advertiser.145 In essence, the FTC recognizes that an endorsement with a false representation has a powerful influence over purchasers. If a celebrity misleads the public as to the attributes of a product, the FTC may bring suit directly against the endorser. In effect, the FTC recognizes that product endorsers effect purchasing decisions by the general public and assumes the likelihood of reliance.

If the FTC does not require evidence of reliance on the part of the public in making a determination that an advertisement was in fact deceptive and had an impact upon viewers, does it not seem reasonable to extend this approach to private suits in the products liability field? Is it unreasonable to argue that an advertisement the FTC might find deceptive also may be deceptive to the purchaser of a product, even though the purchaser is unable to say specifically: "I purchased the product based on a statement I saw in an advertisement."? The FTC approach makes sense. If advertising arguably is deceptive, a not unreasonable conclusion is that it might have had an impact on a consumer even though a consumer did not consciously rely upon the advertisement in making a purchase decision.

IV. ELIMINATION OF RELIANCE AS AN ELEMENT IN MISREPRESENTATION CASES

The requirement of reliance ought to be dispensed with in all cases in which a consumer has been injured by a manufactured product. As noted earlier, negligent misrepresentation,146 fraud,147 section 402B of the Restatement (Second) of Torts,148 and the implied warranty of fitness for a

144. 16 C.F.R. § 255 (1980).
145. Id. § 255.1(a). See also In re Leroy Gordon Cooper, Jr., No. C-2993 (F.T.C. Oct. 4, 1979) (consent order to cease and desist). In this case Gordon Cooper aided in promotion of a device to aid fuel economy in automobiles. His pay was dependent upon the number of products sold, a fact the FTC thought should have been disclosed.
146. See notes 17-21 supra and accompanying text.
147. See notes 9-16 supra and accompanying text.
148. See notes 69-109 supra and accompanying text. While the Restatement indicates that the advertisement need not be the sole inducement to purchase, it must be a substantial
PARTICULAR PURPOSE all require reliance. Furthermore, the plaintiff must prove the statement was the basis of the bargain if an express warranty theory is relied upon—something akin to reliance. Only the plaintiff bringing suit under breach of implied warranty of merchantability or strict liability in tort escapes the rigors of proving reliance.

Reliance clearly has been a major stumbling block for litigants who wish to pursue a case based on a misrepresentation by the seller, yet the courts in misrepresentation cases steadfastly have retained the requirement of establishing reliance. Simultaneously, the courts have recognized the impact of modern marketing on consumer decision-making by their willingness to discard the antiquated notion of privity of contract in order to permit plaintiffs to bring suit. For example, the court in Markovich v. McKesson & Robbins, Inc. recognized that the manufacturer attempted to create a retail market for his goods, and the buyer would not have purchased the product had it not been for the representations of the seller. If the courts willingly abandon privity of contract in light of the representations created by the seller, why have they been so unwilling to forego the requirement of reliance in light of the very similar factors?

Through a complex system of marketing, consumers are stimulated to purchase a product, although we may not be absolutely sure why a purchase was made. For this reason, a company that makes misrepresentations about its products should have to indemnify consumers injured by a facet of the product that relates to the misrepresentation. If a company says a windshield is shatterproof, and a person is injured because it is not, he should not be required to establish reliance on any particular advertise-

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149. See notes 57-68 supra and accompanying text.
150. U.C.C. § 2-313, Comment 3.
151. See notes 48-56 supra and accompanying text.
152. In misrepresentation cases, the plaintiff must be someone who relies upon representation. See Prosser, supra note 112, at 837-38.
153. In Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958), the court justified the abandonment of privity based on changes in the marketplace.

Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise . . . make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer . . . . The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements.

147 N.E.2d at 615.
155. Id. at 274, 149 N.E.2d at 188.
ment. All that should be required of the plaintiff is establishing that a statement relating to a characteristic of the product was made and that it was untrue. Reliance should not be part of the plaintiff’s burden of proof. The approach of the FTC with respect to deceptive advertising might have a subconscious impact on consumer decision-making. This seems to be an assumption behind holding celebrities liable for deceptive endorsements of products.¹⁵⁶

A rebuttable presumption should be adopted by the courts on the issue of reliance; reliance should be presumed in personal injury cases based on a false advertisement in the absence of clear-cut evidence presented by the defendant. The burden of disproving reliance should be on the defendant. The defendant should be required to prove that the plaintiff or the purchaser of the product could not possibly have been influenced, directly or indirectly, in deciding to buy. The current rule unjustifiably places the burden of establishing reliance upon the plaintiff. This rule should be eliminated.

V. Conclusion

We have seen that someone injured by a product may recover under a number of theories of recovery. In most cases, the plaintiff need not establish that the product is defective but only that the seller made a statement about the product that later is determined to be untrue, and that the plaintiff relied upon this statement. Reliance should be eliminated in all products liability cases where the element is currently required. The courts instead should adopt a rebuttable presumption of reliance in cases of this nature. Advertising theory does not support the proposition that consumers purchase a product as a result of reliance on a single advertisement.

The notion that advertising leads a consumer to go directly to the store to purchase a product no doubt contributed to the idea that an injured plaintiff must establish reliance on the advertisement to recover damages. The fact is that people are unlikely to purchase any product after an exposure to a single advertisement. A buying response is more likely to arise after viewing a series of advertisements, but even then, one cannot attribute the buying response solely to any advertisement or series of advertisements. A number of factors contribute to a consumer’s willingness to purchase a product: friends, neighbors, brand loyalty, reputation of seller, marketing display, the competition a seller faces, and the economic times all play a part in a purchase decision, along with other factors. Advertising operates in conjunction with marketing in order to stimulate demand; it does not operate in a vacuum as these rules for recovery seem to assume. Furthermore, certain product characteristics determine whether advertising, as opposed to direct contact with the consumer, will be effective. For consumer durables and industrial products, advertising alone quite clearly will not cause a person to purchase a product. While it might be possible

¹⁵⁶. See notes 142-45 supra and accompanying text.
to say an advertisement caused a person to purchase a home permanent, it is highly unlikely that a sale arose solely as a result of an advertisement. Yet for a consumer to recover under most causes of action, the courts require him to establish reliance upon some statement in an advertisement. This requirement cannot be justified in light of the fact that many factors, not just advertising, result in a sale.

With the elimination of the defense of reliance, any one of the current theories of product liability would become a much better and much simpler vehicle for recovery. Modern marketing techniques stimulate demand. If misrepresentations somehow are involved in stimulating that demand, a company should pay for the consequences of its conduct. A company that carefully avoids untrue statements would have nothing to fear from such a change in the law. Only unethical or careless advertisers would be penalized, and injured consumers would be greatly assisted in establishing their cases.