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WHAT'S IN A NAME?: THE IMPLIED CONTENT OF EXPRESS WARRANTIES

*Michael J. Herbert**

I. INTRODUCTION

Article 2 of the Uniform Commercial Code[1] recognizes three[2] putatively different warranties (or types of warranties) regarding the quality of goods.[3] These are the express warranty,[4] the implied warranty of merchantability,[5] and the implied warranty of fitness for particular purpose.[6] Although the Code itself acknowledges that the warranties can overlap and attempts to set priorities when they conflict,[7] the Code also draws a number of important distinctions between them.

In addition to the various provisions that deal with warranties, the Code contains other provisions that can act to create or limit obligations with regard to the quality of goods. For example, a usage of

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1. All references to the "Code," the "Uniform Commercial Code," or the "U.C.C." are to the current official edition of the Uniform Commercial Code, which is variously referred to as the "1977" version and the "1978" version.

2. Article 2 may recognize a fourth type of warranty. The Code states that "other" implied warranties can arise from a course of dealing or usage of trade. U.C.C. § 2-314(3) (1977). *See infra* note 12 and accompanying text.

3. A further Code-designated warranty, that of title and against infringement, relates to the buyer's property interest in the goods rather than their quality. U.C.C. § 2-312 (1977).

4. *Id.* § 2-313.

5. *Id.* § 2-314.

6. *Id.* § 2-315.

7. Section 2-317 deals with cumulative and conflicting warranties. In general, it favors "specific" warranties over "unspecific" warranties and "express warranties" over "implied warranties." It reads in full:

> Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:
>
> (a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
>
> (b) A sample from an existing bulk displaces inconsistent general language of description.
>
> (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

trade,[8] a course of dealing,[9] or a course of performance[10] can expand or restrict the meaning of a descriptive term and thereby increase or decrease the required quality of the goods under the contract.[11] A trade usage or a course of dealing can even create an implied warranty;[12] either of these or a course of performance can limit or eliminate implied warranties.[13] For convenience and to distinguish such provisions from express warranties, contractual terms deriving from implied warranties, a usage of trade, a course of dealing, a course of performance, or other enforceable expectations of the buyer regarding the contract are referred to collectively in this article as "implied quality terms."[14]

The distinctions drawn by the Code between express warranties and implied quality terms have substantial significance. Although the

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8. Section 1-205(2) states that "[a] usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." *Id.* § 1-205(2).

9. Section 1-205(1) states that "[a] course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Id.* § 1-205(1).

10. Section 2-208(1) states:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Id. § 2-208(1).

11. It should also be noted that these three provisions are partially exempt from the parol evidence rule; even if the parties intend a particular writing to be a final expression of their agreement, the words of that agreement can be "explained or supplemented" by a course of dealing, usage of trade, or course of performance. *Id.* § 2-202.

12. *Id.* § 2-314(3). At least one aspect of merchantability is directly tied to trade usage—the requirement that the goods "pass without objection *in the trade under the contract description.*" *Id.* § 2-314(2)(a) (emphasis added). More vaguely, section 2-314(3) states that "other implied warranties may arise from course of dealing or usage of trade." *Id.* § 2- 314(3). The nature and content of these "other" warranties are not explained in the Code.

13. Section 2-316(3)(c) states that "an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade." *Id.* § 2-316(3)(c).

14. This phrase is not entirely descriptive of these provisions because the provisions encompass expectations other than expectations of quality. For example, there may be a trade usage regarding delivery terms. However, the phrase "implied quality terms" is used because this article is solely concerned with the seller's obligations regarding the quality of goods.

Use of this phrase also ignores a distinction occasionally drawn between implications created by law and those created by the actions of the parties. In context of the concerns of this article, such a distinction is irrelevant for two reasons. First, the question addressed by this article is the degree to which the buyer's expectations should become obligations of the seller. The Code's conclusion is that the route by which those expectations become obligations should be unimportant. Second, in the context of article 2 quality terms, the distinction between the implications drawn by the parties and those imposed by the Code is evanescent. Virtually every Code-created implication is rooted in an expectation of the buyer created either by some action of the seller, past actions of similarly situated sellers of which the buyer has notice, or the overall present and past relationship of the buyer and the seller. *See id.* §§ 1-205(1)–(2), 2-208(1), 2-314(2).

Code provisions regarding both types of terms are designed to protect the normal expectations of the buyer in purchasing the goods, the expectations created by implication are generally viewed by the Code as less significant than those created by explicit actions of the seller. Implied warranties of quality can be easily and unilaterally disclaimed by the seller.[15] Similarly, expectations of quality created by a trade usage, a course of dealing, or a course of performance can, in theory, be excluded by the express terms of the contract.[16]

Strictly speaking, an express warranty cannot be unilaterally disclaimed by the seller except in the unlikely and ill-defined circumstance that the disclaimer is "consistent" with the warranty.[17] Proof that the

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15. Under sections 2-316(2)–(3), the implied warranties of merchantability and fitness for particular purpose can be disclaimed in either of two ways: First, by express language. *Id.* § 2-316(2). Second, by expressions such as "as is" or "with all faults" that are believed to convey to the buyer an understanding that the sale is without warranty. *Id.* § 2-316(3)(a).

It should be noted that the Magnuson-Moss Act significantly limits the ability of sellers to limit implied warranties in certain consumer transactions. *See* Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, 2187 (1975) (codified at 15 U.S.C. §§ 2304(a)(2), 2308 (1982)). In those covered transactions, the difference between an implied warranty and an express warranty is correspondingly reduced.

16. Section 2-202 states in part:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade . . . or by course of performance . . . .

U.C.C. § 2-202 (1977).

On its face, section 2-202 permits elimination of a warranty based on a usage of trade, a course of dealing, or a course of performance if the terms of the express agreement are directly contradictory to it. *Cf.* Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971) (presence of express price and quantity terms did not bar parol evidence of trade usage that price and quantity terms were not binding).

It should also be noted that those express warranties made prior to the integration of a contract may actually be more vulnerable to the parol evidence rule than a course of dealing, usage of trade, or course of performance because such express warranties can only be put into evidence if (1) the parties intended the writing to be "final" but not "complete and exclusive," and (2) the warranties are consistent with the writing. U.C.C. § 2-202(b) (1977). Conversely, express warranties that are included in the integration are protected in a way that the implied terms are not because such express warranties can *contradict* the rest of the writing. If they do, the warranties control over the disclaimer. *Id.* § 2-316(1).

17. The relevant provision of section 3-316(1) states:

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

Id. § 2-316(1). Comment one to this section has been generally interpreted virtually to preclude unilateral disclaimers of express warranties by the seller. *Id.* § 2-316 comment 1. For a random selection from a mass of cases, see Fundin v. Chicago Pneumatic Tool Co., 152 Cal. App. 3d 951, 199 Cal. Rptr. 789 (1984) (general warranty disclaimer cannot negate express warranty); Jensen

express warranty was ever made may be barred by the parol evidence rule,[18] and the buyer's belief in the seller's representations—and thus the ability to enforce them as express warranties—may be eliminated in the course of bargaining.[19] Of course, a party may waive[20] or bargain away the benefit of an express warranty,[21] but the seller cannot eliminate it by a few *pro forma* words in the sale contract for the simple reason that a blanket exclusion of express warranties would make the contract meaningless.

The limitations period applicable to an express warranty can be different from the limitations period applicable to an implied warranty or other implied quality term. Section 2-725 states:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . .
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action

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v. Seigel Mobile Homes Group, 105 Idaho 189, 668 P.2d 65 (1983) (general warranty disclaimer cannot negate express warranty); Deaton, Inc. v. Aeroglide Corp., 99 N.M. 253, 657 P.2d 109 (1982) (purpose of section 2-316(1) is to protect buyer from unexpected and unbargained-for disclaimers of express warranties). For a recent, general discussion of the relationship between trade usages and express terms (in a somewhat different context) and the relationship between the parol evidence rule and the provision on disclaimer of express warranties, see Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, "Express Terms," and Consistency Under Section 1-205 of the Uniform Commercial Code,"* 64 N.C.L. REV. 777 (1986).

18. U.C.C. §§ 2-316(1), 2-202 (1977); *see also* Jordan v. Doonan Truck & Equip. Inc., 220 Kan. 431, 552 P.2d 881 (1976) (parol evidence rule bars admissibility of evidence of express warranty made prior to integration of contract).

19. For example, it may become obvious to the buyer during the negotiations that an earlier statement made by the seller about the goods was incorrect; such as when, the car that the seller said "ran great" does not even start when the buyer tries to test-drive it. In such circumstances, of course, the statement never becomes part of the "basis of the bargain" and thus never even becomes an express warranty under U.C.C. § 2-313 (1977).

20. *See id.* §§ 2-209, 1-107.

21. Comment 4 to section 2-313 states in pertinent part:

> Thus, a contract is normally a contract for sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316.
>
> This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

Id. § 2-313 comment 4; *see also id.* § 2-316 comment 1 ("[This section] seeks to protect a buyer from unexpected and *unbargained* language of disclaimer by denying effect to such language when inconsistent with language of express warranty . . . .") (emphasis added); Universal Drilling Co. v. Camay Drilling Co., 737 F.2d 869 (10th Cir. 1984).

accrues when the breach is or should have been discovered.[22]

In other words, for statute of limitations purposes, it is always true that the cause of action for breach of an implied warranty, and it may be true that the cause of action for a breach of any other implied quality term,[23] arises at the time of tender of delivery, not at the time the defect is discovered. By definition, there cannot be an express promise of future performance in an implied quality term.[24] Conversely, the cause of action on *some* express warranties arises after, sometimes years after, the sale because (1) the seller warranted future performance, and (2) the buyer did not have notice of the defect until the goods failed to perform as warranted.[25]

These differences make it important to distinguish between express warranties and implied quality terms. By and large, the cases have drawn the relevant distinctions intuitively on the unstated assumption that the categorization of a warranty as express or implied or a quality term as a warranty or a usage of trade is virtually self-evident. A small but growing number of cases, however, is deliberately blurring the lines. This article discusses those cases and suggests a theory for distinguishing appropriately between express warranties and implied quality terms.

II. THE CONTENT OF AN EXPRESS WARRANTY

A. In General

An express warranty can be created in any one of several ways: by the seller's affirmation of fact about the goods, by the seller's promise concerning the goods, by a description of the goods, or by a sample or model of the goods.[26] This expansive definition of an express warranty

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22. U.C.C. § 2-725(1)–(2) (1977).

23. It is conceivable that this rule regarding the statute of limitations does not apply to other implied quality terms because section 2-725(2) refers only to breaches of warranty and not to breaches of non-warranty terms. However, the relationship between implied warranties, express warranties, and the other implied quality terms is such that if the non-warranty implied quality terms were subject to the discovery rule, the distinction drawn by section 2-725(2) would be rendered almost meaningless because the non-warranty implied quality terms would virtually duplicate the content of the implied warranties.

24. *See, e.g.*, City of Carlisle v. Fetzer, 381 N.W.2d 627 (Iowa 1986); Allan v. Massey-Ferguson, Inc., 221 Neb. 528, 378 N.W.2d 664 (1985); Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544 (Tex. 1986).

25. The difficult and perhaps unnecessary problems created by the different statute of limitations rules, and the background of the distinctions drawn, are extensively discussed, albeit from a somewhat different perspective, in Williams, *The Statute of Limitations, Prospective Warranties, and Problems of Interpretation in Article Two of the UCC*, 52 GEO. WASH. L. REV. 67 (1983).

26. Section 2-313 states:

(1) Express warranties by the seller are created as follows:

differs somewhat from the common usage of the word warranty, which is limited to descriptions and affirmations of fact about the current state of the goods—"This car is new"—and promises concerning the future performance of the goods—"This car is guaranteed free from all defects in materials and workmanship for a period of twelve months from the date of purchase."

On the surface, at least, express warranties created by description, affirmation, or promise are precise and unambiguous; yet, it should be obvious that the inevitable inexactitude of everyday communication means that much of the content of the warranty is implicitly understood or misunderstood by the parties. Does "new" mean only that the car has not previously been titled or does it also mean that it has never been used as a demonstrator? Does a twelve-month warranty cover all defects that come into existence within that period or only those defects that manifest themselves within twelve months?

The warranties created by sample or model are even more obviously warranties based on implication. For example, a buyer *infers* the look and style of the car she is purchasing from the five-inch scale model of the vehicle she is shown; she *infers* the texture of a carpet from a two-foot square swatch.[27] Obviously, if the seller is Reliable Motors, rather than the North Pole Toy Company, the seller is not promising, and the buyer is not expecting, that the car will be only five inches long. It is thus inevitable that the line between express warranties and implied quality terms is to some degree tenuous and uncertain.

The Code itself is not entirely helpful in making the distinction that it insists must be drawn. For example, much of the article 2 warranty of merchantability is explicitly linked to express warranties:

> 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

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(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.

U.C.C. § 2-313(1) (1977).

27. A related issue is that of the implications of quality, often idealized, drawn by the buyer from pictures of the goods in use. A clutch of cases exploring this issue is collected in Grady, *Inadvertent Creation of Express Warranties: Caveats for Pictorial Product Representations*, 15 U.C.C.L.J. 268 (1983).

. . . .

(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.[28]

The contract description upon which the first two aspects of the merchantability warranty are based is, of course, an express warranty by description. The agreements upon which the aspects set out in subsections (d) and (e) are based can be express warranties by promise. The promises or affirmations of fact on the container or label are express warranties by promise or affirmation. Only one aspect of merchantability is not expressly tied to express warranties—the requirement that the goods be "fit for the ordinary purposes for which such goods are used."[29] Even that requirement has an indirect tie to express warranties. "Such goods" are the goods set out in a contract description, and that description is an express warranty. Thus, the problem of distinguishing between the descriptive content of an express warranty—a "new" car—and the implied warranty of merchantability that arises from that description inevitably arises.

Just as there is little demarcation between implied and express warranties, there is little indication in the Code of the standard by which other implied quality terms are to be distinguished from express warranties. For example, the comments to the Code provisions on express warranties state: "Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course all descriptions [of goods] by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts."[30]

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28. U.C.C. § 2-314(2) (1977) (emphasis added).

29. *Id.* § 2-314(2)(c).

30. *Id.* § 2-313 comment 5. For a discussion of this distinction, see comments to the article 2 parol evidence rule section 2-202 which read:

> Paragraph (a) [of section 2-202] makes admissible evidence of course of dealing, usage of trade and course of performance *to explain or supplement* the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealing between the parties and the usage of trade were taken for granted when the document was phrased. Unless carefully negated *they have become an element of the meaning of the words used.* Similarly, the course of actual performance by the parties is considered *the best indication of what they intended the writing to mean.*

Id. § 2-202 comment 2 (emphasis added). The phrase "explain or supplement" suggests that these implied terms operate independently; the phrases "have become an element of the meaning" and

What on earth is this supposed to mean? Indeed, does it have any significance beyond illustrating the occasional lack of coordination between the Code's text and its comments? Is a course of dealing or a trade usage supposed to be read into the express warranty as part of the warranty? Or does the comment simply indicate that, in addition to express warranty obligations, a merchant seller has other obligations, e.g., those created by a course of dealing, a trade usage, or the implied warranty of merchantability? A significant number of cases indicte, without any real explanation, that, at least with regard to trade usages, the former reading is the correct interpretation.[31] If so, it is difficult to see much reason to distinguish between express warranties and usages of trade, since virtually all trade usages are in some way connected to a description or other express warranty concerning the goods.[32]

B. Implications from Express Warranties

But for the greater fragility of implied quality terms and the potentially shorter statute of limitations applicable to them, the potential risk of confusion between express warranties and implied quality terms would be of purely academic interest. The advantages given by the Code to express warranties, however, have led some commentators and litigants to assert, and some courts to find, penumbral rights hovering around express warranties, especially those warranties that were created by description. To illustrate:

> [A]ssume that the sales contract describes machinery to be sold as a "haybaler" and then attempts to disclaim all express warranties. If the machine failed to bale hay and buyer sued, we would argue that the disclaimer is ineffective. In our judgment, the description of the machine as a "haybaler" is a warranty that the machine will bale hay and, in the words of 2-316, a negation or limitation ought to be "inoperative" since it is inconsistent with the warranty.[33]

"best indication of what they intended the writing to mean" suggest that they fuse with the words themselves.

31. *See, e.g.*, McKnelly v. Sperry Corp., 642 F.2d 1101 (8th Cir. 1981) (trade usage becomes part of express warranty); Wullschleger & Co. v. Jenny Fashions, Inc., 618 F. Supp. 373 (S.D.N.Y. 1985) (trade usage becomes part of express warranty); Fargo Machine & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364 (E.D. Mich. 1977) (express warranties must be read in light of trade usages and the general obligations of an article 2 merchant); Moore v. Puget Sound Plywood, Inc., 214 Neb. 14, 332 N.W.2d 212 (1983) (trade usage apparently read into express warranty); Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544 (Tex. 1986) (trade usage could be read by a jury into an express warranty). *See also* Kastely, *supra* note 17.

32. Of course, not all express warranties are related to usages of trade. For example, an express warranty that a car is or will be defect-free is not related to a usage of trade; but it is difficult to imagine a trade usage that could arise in the absence of some express description, promise, affirmation of fact, sample, or model.

33. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL

The basic principle is not controversial; its application to less clear-cut cases may be. For example, is a machine a haybaler if it bales hay but only very slowly and with an abnormally large number of breakdowns?

In a Nebraska Supreme Court case, *Moore v. Puget Sound Plywood, Inc.*,[34] the plaintiffs, Dennis and Lois Moore, purchased house siding for the construction of their home. The purchase was made sometime during 1970 or 1971. The siding began to deteriorate noticeably by October, 1977. In April, 1981, the Moores sued Puget Sound for breach of warranty.[35]

The claimed breach was of an implied warranty. Puget Sound defended on the basis that the statute of limitations had long since expired.[36] The court rejected both the plaintiffs' theory and Puget Sound's defense: "According to the parties, the description of the goods as 'siding' carried with it the representation that it would last the life of the house. Therefore, the requisite elements of [an express warranty under section 2-313] are present . . . ."[37] Because the warranty was reclassified "express" and because the court viewed it as "expressly" extending to future performance (the life of the house), the cause of action accrued when the breach was or could have been discovered, not when the siding was sold.[38] Given the inferred content of the express warranty, "discovery could occur at any time between installation and the 'life' of the house."[39] The Moores' suit was thus held to be timely.[40]

The holding in *Moore* has led a fairly vigorous life in the Nebraska state courts, as well as in the federal courts. The Eighth Circuit Court of Appeals reviewed a substantially similar problem in *Economy*

CODE 433 (2d ed. 1980). The "haybaler" example appears to be derived from the classic pre-Code case of Moss v. Gardner, 228 Ark. 828, 310 S.W.2d 491 (1958).

34. 214 Neb. 14, 332 N.W.2d 212 (1983).

35. *Id.* at 15–16, 332 N.W.2d at 214.

36. *Id.* at 16, 332 N.W.2d at 214.

37. *Id.* at 17, 332 N.W.2d at 214–15.

38. *Id.* at 17, 332 N.W.2d at 215.

39. *Id.*

40. *Id.* at 17–18, 332 N.W.2d at 215. The *Moore* court was more than a little confused about the timeliness issue. It actually held that the Moores' suit was timely because it was filed within a "reasonable period of time after they discovered the latent defect." *Id.* at 18, 332 N.W.2d at 215. This is not the proper standard. If one accepts the court's view that the warranty expressly extended to future performance, the provisions of U.C.C. § 2-725(1) and (2) required the Moores to commence their action within four years after they discovered or should have discovered the breach, not within a "reasonable period of time" after discovery. *See* U.C.C. § 2-725(1)–(2) (1977). Perhaps the court muddled the requirements of section 2-725 with the requirements of section 2-607(3)(a). The latter imposes an additional prerequisite for suit if the goods at issue have been accepted by the buyer. The buyer must give notice of breach to the seller within a reasonable time after the buyer discovers or should have discovered the breach. *See Moore*, 214 Neb. at 18, 332 N.W.2d at 215.

Housing Co. v. Continental Forest Products, Inc.,[41] a case which also involved allegedly defective siding. It held that summary judgment in favor of the seller based on the running of the statute of limitations was improper unless the trial court first determined whether the parties' expectations regarding the siding extended to future performance.[42] A third case, *Allan v. Massey-Ferguson, Inc.*,[43] parallels *Economy Housing* in that it held inappropriate the grant of summary judgment in favor of the manufacturer on a statute of limitations defense prior to the disposition of an express warranty issue.[44]

A few other courts have been equally bold in sketching out the boundaries of an express warranty. For example, a statement in a log-home kit that the logs were treated "to protect the . . . wood against decay, stain, termites and other insects" became an express, continuing warranty that insect infestation would not exist at the time of delivery or "within a relatively short time thereafter."[45] Since the infestation would not become obvious until the insects actually appeared several years later, "the warranty extended to future performance."[46]

In *McKnight v. Bellamy*,[47] a mare was represented by her seller as having been bred to a stallion prior to the sale. This statement was held to raise a reasonable expectation that the mare was in foal. Since the mare was not in foal, the seller was in breach of warranty and the buyer could rescind the contract.[48]

A further case, *McNally v. Sperry Corp.*,[49] involved a lifting device described in the sale contract as a "general purpose winch."[50] There was considerable dispute between the parties about the meaning

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41. 757 F.2d 200 (8th Cir. 1985).

42. *Id.* at 202–03.

43. 221 Neb. 528, 378 N.W.2d 664 (1985).

44. *Id.* at 531–32, 378 N.W.2d at 666–67.

45. Parzek v. New England Log Homes, Inc., 92 A.D.2d 954, 955, 460 N.Y.S.2d 698, 699 (1983). The *Parzek* court was extremely vague about the duration of the supposed warranty, stating only that the seller's argument "that it should not be held to have warranted the logs against infestation some 50 or 60 years after the sale" was merely an attempt "to obscure the issue." *Id.*

46. *Id.*

47. 248 Ark. 27, 449 S.W.2d 706 (1970).

48. *Id.* at 34, 449 S.W.2d at 709. Actually, *McKnight* is a confusing melange which only tangentially stands for the proposition that express warranties have implied contents. It primarily turned upon a finding that the court could find "a flagrant breach of an express warranty bordering on fraud" because the seller knew several days before the sale that the mare had been covered but was still in heat (and thus not in foal). *Id.* Moreover, the buyer's claim related not so much to the original warranty as to the seller's failure to provide adequate medical care for the mare when it was returned to the seller for rebreeding—a negligent failure that resulted in the horse's death. *Id.* Thus, the case is better viewed as a fraud action or a negligence action, rather than a warranty action.

49. 642 F.2d 1101 (8th Cir. 1981) (interpreting Iowa law).

50. *Id.* at 1104.

of that phrase.[51] However, the court held that there was sufficient evidence to permit the jury to find an express warranty that a "general purpose winch" was adequate to lift both goods and people safely.[52]

Safeway Stores, Inc. v. Certainteed Corp.[53] is somewhat parallel to *Moore*. In *Safeway*, the buyer contracted with a builder to construct a warehouse. The builder's roofing subcontractor purchased the roofing material from Certainteed.[54] Certainteed advertised[55] the roofing material to be "bondable up to 20 years."[56]

The building was completed in 1970. In 1977, the roof began to leak, and in 1979, Safeway sued Certainteed for breach of express and implied warranties.[57] The court held that because the express warranty created by the advertisement could be found by the trier of fact to be one that explicitly extended to future performance, it was subject to the discovery rule. The court's holding focused on the "bondable up to 20 years" phrase used in the Certainteed advertisement which, according to an alleged usage of trade, meant that the roofing material would make "a roof which will last at least 20 years before it has to be removed and replaced."[58]

The result in *Safeway* is especially remarkable because the court allowed the jury to incorporate into the express warranty an implica-

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51. *Id.* at 1106 (court's discussion of the parties' factual theories).

52. *Id.* at 1106–07.

53. 710 S.W.2d 544 (Tex. 1986).

54. *Id.* at 544.

55. The case did not discuss one potential issue—whether the advertisement had become part of the "basis of the bargain," which is an integral part of any express warranty. *See* U.C.C. § 2-313(1) (1977).

56. *Id.* at 545. The bond referred to was a surety bond guaranteeing the roof, not the physical bond between the roofing material and the building. *Id.* at 551 (Wallace, J., dissenting).

57. *Id.* at 545.

58. *Id.* at 548. *See also* Little Rock School Dist. v. Celotex Corp., 264 Ark. 757, 574 S.W.2d 669 (1978) (largely identical to *Moore* involving roofing materials); Pack & Process, Inc. v. Celotex Corp., 503 A.2d 646 (Del. Super. Ct. 1985) (fact question whether statements regarding future inspection of roof problems created express warranty of future quality of roof).

The dissenting judge in *Safeway* neatly illustrated an equally credible and yet far more restrictive way of reading the "bondable up to 20 years" clause:

> The contractual provision that a roof is "bondable up to 20 years," by its nature, means *capable* of being bonded for a period of up to 20 years. In other words, the product is made of such quality that a surety is willing to issue a 20 year bond as opposed to a ten year bond for lesser quality materials or a 30 year bond for higher quality materials. . . .
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> . . . [E]ven if this term could be construed as an express warranty, what it expresses is clearly confined to a specific point in time: i.e., the time the roof is completed. To say, as the majority does, that "bondable up to 20 years" may be construed as an explicit reference to future performance is tantamount to saying that the purchaser of the roof could approach a surety at any time and obtain a bond for 20 years into the future.

Safeway, 710 S.W.2d at 551 (Wallace, J., dissenting) (emphasis in original). The views of Judge Wallace are parallel to those adopted by the entire court in a similar pre-*Moore* Nebraska case. Grand Island School Dist. No. 2 v. Celotex Corp., 203 Neb. 559, 279 N.W.2d 603 (1979).

tion that was, perhaps, drawn more from the evaluation of the roof by a third party than the words used by the seller. On its face, the phrase "bondable up to 20 years" indicates only that a surety would be willing to write a bond guaranteeing the quality and performance of the roof for that length of time. The surety would agree to do this only if it believed that the roof would last long enough to make the bond profitable.[59] Based on the surety's evaluation, as evidenced by its willingness to write the bond, the buyer might infer that the roof would last beyond the date that it was delivered.

Since Celotex said that the surety would evaluate the roof as bondable for twenty years, the buyer could infer from this "express warranty" that the surety would believe that the roof would last for some period of time after delivery. The buyer could then adopt for himself the inferred belief that the roof would indeed do so. In short, *Safeway* allowed the buyer to enforce, as an express warranty, the implication that the buyer could draw from what the seller said a third party would think—an inference based upon an inference based upon an asserted but as yet hypothetical opinion.[60]

These cases exist against a background of many others that involve far more routine expansions of the literal scope of an express warranty. For example, the phrase "road ready," when used in the face of the buyer's statements that "I don't want to buy this truck if there is anything wrong with it mechanically" and "I'm buying it to put it on the road," was found to create an express warranty that was breached when the truck broke down because of a cracked engine block two weeks after the sale.[61] It was concluded that a jury could properly find that a statement by the seller that television equipment would be put "in 'first class' condition" created an express warranty that it would produce a "quality television picture."[62] Finally, a car warranted "Mechanically A-1" by its seller was warranted not to break down immediately after the sale.[63] Similarly, an automobile said to be in "mint

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59. The roof subject to the bond may last less than twenty years. If the premium is high enough a bonding company might write a bond for a roof that it expects to disintegrate in a week. This, of course, does not matter insofar as the statute of limitations is concerned. If there is any explicit extension of the warranty to future performance, and the breach will not be discovered until then, the discovery rule applies. *See* U.C.C. § 2-725(1)–(2) (1977).

60. *Safeway*, 710 S.W.2d at 548.

61. Wiseman v. Wolfe's Terre Haute Auto Auction, Inc., 459 N.E.2d 736, 737 (Ind. App. 1984). As is true in many of the implied content cases, *Wiseman* can be viewed to a significant extent as merely an expression of the proper deference an appeals court should display toward a trier of fact; the jury was permitted, but was not required, to find that the more expansive warranty existed. *Id.* at 737.

62. KLPR TV, Inc. v. Visual Elec. Corp., 465 F.2d 1382, 1386 (8th Cir. 1972). Alas, the statement created no warranty concerning the quality of the *programming*.

63. Jones v. Kleiner, 51 Ohio App. 2d 242, 243, 451 N.E.2d 548, 550 (1982). The *Jones*

condition" with a "rebuilt engine" breached those express warranties when its engine broke down within an unspecified "short period of time after the sale."[64]

The fecundity of livestock was at issue in *Glen Peck, Ltd. v. Fritsche*.[65] The buyer purchased a bull under a contract that stated:

> Should any bull Fourteen (14) months of age or over, fail to prove a breeder after being used on cows known to be breeders, the matter shall be reported in writing to the seller within six (6) months following date of purchase. . . . The seller will then have the right and privilege of 6 months to prove the bull a breeder . . . .[66]

The warranty was held to be explicitly prospective, since it "promised the performance of the bulls as breeders, not only at the moment of purchase but at some future date as well, namely, 'after being used on cows known to be breeders.' "[67]

There is nothing remarkable or objectionable about the fact that these cases read into the contract terms provisions that represent the apparent understandings of the parties as derived from prior conduct between them or their understanding of a particular phrase in a particular trade. Indeed, article 2 is replete with provisions that call upon the courts to view each contract as a web of expectations, rather than a mere scrap of paper.

An implied warranty, a "gap-filling" provision,[68] a course of dealing, a usage of trade, and a course of performance all add the understandings or the presumed intentions of the parties to the literal words of their written or oral verbalizations of the contract. The implied warranty of merchantability protects the buyer's assumption that the goods will be of at least average quality.[69] The implied warranty of fitness for particular purpose protects the buyer's reasonable belief that the seller has undertaken to select appropriate goods for the buyer's needs.[70] A usage of trade permits the buyer and seller to assume that the terms of

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court, like the court in *Parzek*, 92 A.D.2d 954, 460 N.Y.S.2d 698 (1983), gave no real standard for determining the length of any such warranty, stating merely "although it was unclear how long this warranty would have lasted, it should have lasted at least long enough for the appellee to get the car home." *Jones*, 5 Ohio App. 3d at 243, 451 N.E.2d at 550.

64. Taylor v. Alfama, 481 A.2d 1059, 1060 (Vt. 1984). *See also* Barb v. Wallace, 45 Md. App. 271, ___, 412 A.2d 1314, 1318 (1980) (issue of whether statement from seller that he had been using engine "around the farm, and . . . [that] it ran real good" created an express warranty of future performance was a question of fact that should not be resolved on summary judgment).

65. 651 P.2d 414 (Colo. Ct. App. 1982).

66. *Id.* at 415.

67. *Id.*

68. *See generally* J. WHITE AND R. SUMMERS *supra* note 33, §§ 3-4 to -10, at 104–39.

69. U.C.C. §§ 2-314(2)(b)–(c) (1977).

70. *Id.* § 2-315.

art that they know from their general business dealings are to be treated as part of their agreement unless they clearly indicate otherwise.[71] Even unconscionability is to some extent an expectation term; it protects the expectation that both parties are engaged in a real exchange of value. The list is by no means exclusive, but it illustrates a fundamental principle of modern contract law—whenever possible, each party should receive at least a fair approximation of what it reasonably anticipates from the bargain.

The problem with the implied-content cases is not that the courts in those cases viewed the seller's statements or actions as creating an enforceable expectation. The problem is that the expectation was elevated to the level of an express warranty and enforced as such. If all of the expectations triggered by a word or a phrase used in the sale contract are express warranties, what is left of the assumed distinction between such warranties and the implied quality terms?[72]

Perhaps for this reason, many cases have been far more restrictive in their interpretation of express warranty terms. *Tacoma Boatbuilding Co. v. Delta Fishing Co.*[73] is a good example. Tacoma built four boats for four different corporations that the court grouped together under the name "the Greek Fishing Companies (GFCs)."[74] Tacoma bought components from General Electric, which in turn bought subcomponents from Western Gear.[75] The boats developed mechanical problems, and the GFCs refused to pay the balance of the price.[76] Tacoma sued the GFCs for the balance owed.[77] The GFCs counterclaimed against Tacoma and cross-claimed against General Electric

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71. *See id.* §§ 1-205, 2-202, 2-317.

72. It is interesting to note that the first edition of their HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (1972), J. White and R. Summers, adopted a broad view of the implied content of express warranties. In a passage deleted from the second edition, the authors stated:

> We believe that the buyer can reasonably believe that the word "automobile" is an express warranty that the machine purchased will behave in a certain way, namely, that it will carry him around town for at least a few thousand miles. . . . Likewise, the court must decide whether the use of the noun "automobile" conveys the meaning that the machine would propel itself about on its four wheels in a certain way or whether that word promises only a machine with the external characteristics of a car.

Id. at 276–77. *See* Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 48–49 (1978) (criticizing the passage for unduly expanding the limits of express warranties).

73. 28 U.C.C. Rep. Serv. (Callaghan) 26 (W.D. Wash. 1980) (interpreting Washington, New York, Pennsylvania, and California law).

74. *Id.* at 28.

75. *Id.*

76. *Id.*

and Western Gear.[78]

Among the numerous issues raised[79] by the GFCs was that an express warranty of quality had been made and breached. The warranty in question was the contract's description of the goods sold as "engines." The warranty created by that word, or so the GFCs claimed, was breached because of "a plethora of post-contractual problems plaguing [the] engines."[80] The court acknowledged that the descriptive word created a nondisclaimable express warranty, but rejected the GFCs' claim that the warranty had been breached. In part, this was due to the GFCs' attempt to bootstrap the alleged warranty breach into a claim of unconscionability regarding the underlying contract; in part, it was because the court viewed the real issue in the case to be whether the seller's limited remedy had failed of its essential purpose.[81] However, the court discussed at some length its view of the standard by which the scope of an express warranty should be measured:

> Most likely, the contract's identification of the goods as an "engine" created an express warranty, under § 2-313, that GE would deliver something *of that general nature and function.* . . .
>
> Turning to the terms themselves, the GFCs brand as "arrogance" the attempts of GE to limit its liability. They liken this contract to the sale of a car "without a motor or wheel" and imply that, since no reasonable person would pay top dollar for a lemon, contract terms that guarantee no more must be unreasonable. This blurs the distinction between the performance one expects under a contract and the legal protection one secures against non-performance. The GFCs forget that goods were bought and sold long before courts enforced warranties against sellers. Parties may enter contracts with the reasonable expectation of mutual satisfaction even though they agree that one of them will bear the main risk of non-performance.[82]

The holding in *Tacoma Boat Building* significantly narrowed the content of the express warranty to "something of that general nature and function,"[83] on the theory that the only obligation the seller voluntarily undertook by making that statement was to deliver something that

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78. *Id.*

79. The case is primarily concerned with unconscionability under section 2-302 of the Code and the failure of the "essential purpose" of the seller's limited remedy under section 2-719(2). *Id.* at 30–35. Those issues, although beyond the scope of this article, are obviously related. They too are involved in determining which expectations of the buyer the seller can ignore or avoid. *See* U.C.C. §§ 2-302, 2-719 (2)(1977).

80. *Tacoma*, 28 U.C.C. Rep. Serv. (Callaghan) at 31.

81. *Id.* at 32–33.

82. *Id.* at 32–34 (footnote omitted) (emphasis added).

could credibly be called an engine, rather than a mere "wooden box."[84] Whether that engine worked well or not was a risk allocated by contractual provisions other than the descriptive term.[85]

The case is obviously contrary to *Moore v. Puget Sound Plywood, Inc.*[86] In *Moore*, the material delivered by the seller could credibly be called siding: it covered the side of a house successfully for a number of years; it had the "general nature and function" of siding. It just did not work as well as ordinarily expected.[87] In *Moore*, the expectation of satisfactory performance was an express warranty while in *Tacoma Boatbuilding* it was relegated to the status of an implied quality term.[88]

A number of other cases are similarly grudging. In a North Carolina case, *Davis v. Siloo, Inc.*,[89] a statement on the label of a product warned the user: "[A]void prolonged contact with skin. While Petisol 202 permits the immersion of hands, some dryness of skin may be noticed after prolonged exposure . . . ."[90] The court held that this statement did not create an express warranty and that the product was not harmful to the skin or to users.[91] In *Rutland v. Swift Chemical Co.*,[92] a description of goods as "fertilizer" did not "*explicitly* relate to future performance" in that the goods would in fact fertilize land when they were applied.[93] In *Whilmer v. Schneble*,[94] it was held that a doberman described as a "docile dobe" was not expressly warranted not to bite.[95] In *Szajna v. General Motors Corp.*,[96] the court held that a Pontiac Ventura may still have an "inferior" transmission originally designed for a smaller Chevette, at least if there is no established understanding linking the trade name to the particular transmission type.[97] In a Mich-

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84. *Id.*

85. *Id.* at 33–34 ("[P]arties may enter contracts with the reasonable expectation of mutual satisfaction even though they agree that one of them will bear the main risk of nonperformance.").

86. 214 Neb. 14, 332 N.W.2d 212 (1983). For a discussion of *Moore*, see *supra* notes 34–40 and accompanying text.

87. *Moore*, 214 Neb. at 16–17, 332 N.W.2d at 214–15.

88. *Compare id.* at 17, 332 N.W.2d at 215 *with Tacoma*, 28 U.C.C. Rep. Serv. (Callaghan) at 32.

89. 47 N.C. App. 237, 267 S.E.2d 354, *pet. for review denied*, 301 N.C. 234, 283 S.E.2d 131 (1980).

90. *Id.* at 239, 267 S.E.2d at 356 (the user died of aplastic anemia caused by skin contact with the product).

91. *Id.* at 246, 267 S.E.2d at 360.

92. 351 So. 2d 324 (Miss. 1977).

93. *Id.* at 325.

94. 29 Ill. App. 3d 659, 331 N.E.2d 115 (1975).

95. *Id.* at 661, 331 N.E.2d at 117–18 (holding that the seller's description was a mere opinion and not an express warranty).

96. 130 Ill. App. 173, 474 N.E.2d 397 (1985).

97. *Id.* at 178, 474 N.E.2d at 401–02. However, the court distinguished a pre-Code case in which a description of a car as a "1940 Mercury" was breached because it contained an engine

igan case, *Klanseck v. Anderson Sales & Service, Inc.*,[98] a checklist provided by the seller regarding a motorcycle which said nothing about the motorcycle's tires or wheels, except to note that the air pressure in the tires had been checked, did not create an express warranty that the tires and wheels were free of defects.[99]

In a number of these cases, the warranty was constricted by a usage of trade. For example, *Mohasco Industries, Inc. v. Anderson Halverson Corp.*[100] involved the purchase of carpet for a casino owned by United Resort Hotels. The buyer issued a detailed purchase order that specified all elements of the carpet, including the type of yarn.[101] The carpet proved aesthetically inadequate, in that it "shaded" excessively.[102] In defense to an action brought by the manufacturer for the unpaid balance of the purchase price, the buyer asserted, as a defense, a breach of express warranty,[103] which arose, the purchaser argued, because the seller had provided a sample run of the carpet prior to the submission of the purchase order.[104] The court rejected this claim because the buyer had declined to buy what was known in the trade as "twist yarn." Unlike the yarn ordered, twist yarn was specifically designed to minimize shading.[105]

In a similar case, *Mac Pon Co. v. Vinsant Painting and Decorating Co.*,[106] the New Pilgrim Baptist Church ordered tinted concrete blocks for the construction of a church building. Two express warranties were made. One was made by the description of the goods, "buff colored fluted block ET4."[107] The other was made by a model; the same type of block had been used in the construction of the local K-Mart, and this "building was used as an example prior to the selection of the block by Pilgrim Church."[108]

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built in an earlier year. *Id.* at 178, 474 N.E.2d at 401 (distinguishing Kilbourn v. Henderson, 37 Ala. App. 173, 65 So. 2d 533 (1953)). This suggests that if the name by itself carries an implication concerning the component parts, the court might have implied that content in the express warranty.

98. 136 Mich. App. 75, 356 N.W.2d 275 (1984).

99. *Id.* at 86, 356 N.W.2d at 280.

100. 90 Nev. 114, 520 P.2d 234 (1974).

101. *Id.* at ___, 520 P.2d at 234–35.

102. *Id.* at ___, 520 P.2d at 235.

103. *Id.* at ___, 520 P.2d at 234.

104. *Id.* The court never discussed the fact that, apparently, the sample run was only used to give an indication of the pattern, not of the material used. *Id.* Because it was the material, not the pattern, that caused the problem, it is difficult to see that the warranty of the pattern created by the sample was even relevant to the case in that it did not warrant the quality of the material used.

105. *Id.* at ___, 520 P.2d at 235.

106. 423 So. 2d 216 (Ala. 1982).

107. *Id.* at 217.

108. *Id.*

After the blocks had been incorporated in the building, the church "became convinced" that there were unattractive color variations between the blocks,[109] which was disputed by the manufacturer. [110] Apparently assuming that color variations did exist, the court held that the variations did not constitute a breach of the express warranties[111] because of an understanding in the trade that such variations "will exist within any order of block, even though that order consists of only one type and color of tinted block. . . . [T]he variations in shade were an inherent result of the manufacturing process."[112]

The final example of the constrictive effect of a trade usage on an express warranty is *Zappanti v. Berge Service Center.*[113] The case involved the purchase of a vehicle described as a "1969 Volkswagen Dunebuggy."[114] Despite the description, the vehicle contained component parts from pre-1969 Volkswagens. The court found no breach of express warranty because it found that, according to trade usage with regard to reconstructed vehicles, the stated vehicle model year was the year of reconstruction, not the year the original vehicle (from which the dunebuggy was built) was constructed.[115]

Although these cases are grouped with the "credible resemblance" cases, they could be fit in almost as easily with the implied content cases. If the scope of the express warranty can be narrowed by a trade usage, then logically it can be broadened by a trade usage. If a trade usage is *part* of an express warranty and not a separate term operating *in conjunction with* an express warranty then at least one "implied" quality term is fused into the content of the contract's express warranties.

The net result of all this is a mishmash. Some courts readily find implied content in express warranties; others are more reluctant. Even

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109. *Id.*

110. *Id.* at 219 (The court cited testimony from, among others, the chair of the church's own building committee that there was no variation in shading.).

111. *Id.*

112. *Id.*

113. 549 P.2d 178 (Ariz. App. 1976).

114. *Id.*

115. *Id.* at 179. The court brushed aside earlier cases regarding new car model years as having "no application to specially reconstructed vehicles." *Id.* (citing Lufty v. R.D. Roper & Sons Motor Co., 57 Ariz. 495, 11 P.2d 161 (1941)).

Unfortunately, none of these cases discusses whether the usage of trade should have been binding on the buyer. A usage of trade does not *automatically* become part of the contract. Among other limitations are those set out in section 1-205(3) of the Code, which states that "any usage of trade *in the vocation or trade in which they are engaged or of which they are or should be aware* give[s] particular meaning to and supplement[s] or qualif[ies] terms of an agreement." U.C.C. § 1-205(3) (1977) (emphasis added). If the buyer is not engaged in the relevant trade, is not aware of the trade usage, and has no reason to be aware of the trade usage, the trade usage does not become part of the contract with respect to the buyer.

the reluctant courts, however, rely freely on usages of trade to vary the literal words of the express warranty, without explaining whether the usage of trade changes the meaning of the words by becoming "part of" the express warranty or by operating independently but in conjunction with it. The remainder of this article deals with the difficulties in establishing any coherent and consistent basis for distinguishing express warranties from implied quality terms.

III. Distinguishing Express Warranties from Implied Quality Terms

It must first be said that the effort to distinguish between implied quality terms and express warranties is largely futile. There is no intrinsic meaning to the sound of "car" or "siding;" there are only the meanings that the speaker and listener ascribe to those sounds. Still, the Code requires that some attempt be made to sort out which of those meanings have more legal significance than others.

One method would focus on the requirement that is explicit in the express warranty provision but does not appear in the provisions on implied warranties—basis of the bargain. Under this rule, if the words, description or model become part of the basis of the bargain, they create an express warranty entitled to the benefits provided by section 2-313(1).[116] If they do not and if there is no reliance, then they merely create implied quality terms.

One problem with such an approach is that it creates implied contract terms that are enforceable by the buyer, although neither the seller intended nor the buyer expected such terms to be in the contract. If the buyer lacks even the minimal reliance required by the basis of the bargain requirement, then it is difficult to see why the seller should be bound; yet, under the suggested rule, the seller would be bound if there were no disclaimer of the implied quality terms. In any event, such a rule does not really address the problem presented by the cases. Regardless of the source of the expectation of durability, if the Moores had not expected their siding to last for the life of their house—or at least for a longer time than nine years—it is unlikely that they would have sued.[117] The word "siding" obviously created some type of expectation, as would any other descriptive word. Defining which expectations are "part of the basis of the bargain" rather than "express warranties" or "implied quality terms" changes the label without advancing the analysis.

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116. U.C.C. § 2-313(1) (1977).

117. 214 Neb. 14, 332 N.W.2d 212 (1983). For a discussion of *Moore*, see *supra* text accompanying notes 34–40.

Perhaps the only practical way to distinguish between express warranties and implied quality terms is that suggested by *Tacoma Boatbuilding Co. v. Delta Fishing Co.*:[118] minimal adequacy.[119] If the goods can just barely pass muster under the express warranty, then the warranty is not breached. Only the implied quality terms, which the seller can remove from the contract, will extend the seller's obligation and risk beyond this bare minimum.[120]

This rule should be applied even with regard to a usage of trade, course of dealing, or course of performance. This is not to say that the literal words of the contract should not be read in light of those provisions, but only that they operate *independently* of express warranties. In other words, a usage of trade is not part of an express warranty, but rather a separate provision which must be read in conjunction with the express warranty, unless it is removed by sufficiently clear contrary language.[121]

The most difficult problem created by the suggested rule is with the statute of limitations. The unresolved question is whether any addition made to an express warranty by a trade usage or similar term continues for more than four years beyond the date of tender. In other words, was *Moore* correctly decided? The logic of the minimal adequacy rule leads to the conclusion that *Moore* was wrong. The express warranty was never breached. The breach was of the separate promise of durability that was created by combining the express warranty, "siding," with the usage of trade, "life of the house."[122]

Of course, stating the rule only partially resolves the interpretive problem. Words do not have absolute meanings or meanings in the abstract; they can only derive meaning from the context in which they are used. To say that a minimally adequate haybaler[123] must be delivered

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118. 28 U.C.C. Rep. Serv. (Callaghan) 26 (W.D. Wash. 1980).

119. *Id.* at 32. For a discussion of *Tacoma Boatbuilding*, see *supra* text accompanying notes 71–79.

120. Minimal adequacy, of course, means minimal adequacy under the particular express warranty. An express warranty that a car will be free from defects in materials and workmanship for five years would be viewed as a thoroughly adequate warranty from the buyer's perspective. The point is that the seller has breached the warranty only if the car does not minimally conform with the expansive promise that it will be free from defects in materials and workmanship for five years.

121. This seems to be the intention of the hierarchy created by U.C.C. § 2-208(2) (1977) and the parol evidence rule, *id.* § 2-202, which only allows a usage of trade to explain or supplement express terms, not to contradict them (*but see* supra note 16). It is also indicated by section 2-314(3), which suggests that the quality obligations created by usages of trade and courses of dealing are implied warranties (*see supra* note 12).

122. *Moore*, 214 Neb. at 16–17, 332 N.W.2d at 214–15. One awkward effect of the minimal adequacy rule is, of course, that the meanings ascribed to the express words of the contract will change at the end of the four-year limitations period.

123. *See* J. WHITE & R. SUMMERS, *supra* note 33.

to fulfill the seller's obligation under a contract for sale of a "haybaler" is not entirely helpful. An important question remains. What is a minimally adequate haybaler?

One way of defining minimal adequacy is to tie it to the most significant indicator of the parties' understanding of their bargain: price.[124] Assuming that there is a significant and reasonably definable market in the type of goods that were sold, it should be possible to get a reasonable estimation of what the parties meant to exchange by determining what was received by the buyer for a comparable price in other, similar transactions. That, in turn, should be the starting point for the court's interpretation of the words that the parties used to describe their bargain.

In less abstract terms, if one buys an "auto" or a "haybaler" for fifty dollars, it may well be a car without an engine or a haybaler that cannot bale hay.[125] In context of the extremely low price, the descriptive words may only relate to the general shape or origin of what are now just a few tons of scrap metal. The context includes not only the dollar amount, of course, but the dollar amount in relation to the type of goods involved. For example, an old Chevrolet for which one pays $500 should run (more or less); a Rolls Royce bought for the same price might very well not.[126] In short, the scope of the express warranty—the minimal adequacy that it promises—varies with the price paid.

Price may be the most important single indicator, but can it be the only one? Obviously, price is relevant only in context of the words that created the warranty. For example, if a Rolls Royce that sold for $500 was said to be "mechanically sound," the court must give some meaning to the "mechanically sound" warranty even if a mechanically sound $500 Rolls Royce is unheard of. What if there is no market, either in the goods described or in the goods described at the price paid? What if the market has so many variables that truly analogous sales are nonexistent?

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124. *See, e.g.*, U.C.C. § 2-313 comment 4 (1977) ("[T]he probability is small that a real price is intended to be exchanged for a pseudo-obligation."). *See also id.* § 2-314 comment 7 ("In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.").

125. *Cf.* Special Project, *supra* note 70, at 48, which states, "True, a buyer who pays good money for what is obviously a haybaler can reasonably expect a machine that bales hay. But his expectation probably does not arise from the magical word "haybaler;" it would arise even if the seller had merely quoted a price and remained otherwise mute." *Id.*

126. This of course raises the possibility that the *Moore* court might reach the same result applying the suggested rule. If the price that the Moores paid for their siding was the price associated with life-of-the-house siding, the suggested rule would treat life-of-the-house as part of the

The tempting answer is that the court should look to all the surrounding circumstances of the sale to determine what the parties meant by the terms they used. That, of course, is not an answer at all. As soon as the court begins to read the express warranty in light of everything else that happened, the line between express warranties and implied quality terms begins to disappear.

The only way to avoid this problem is to couple the price with the "dictionary definition" of the words used. If the warranty is not made by words but by sample or model, then the price should be coupled with whatever were the obvious characteristics of the model or sample. In short, the court should define the express warranty in terms of the immediately evident meaning of the words, sample, or model, in light of the contract price.[127]

This rule is not entirely satisfactory. It is stuffed with vague words that attempt to draw impossible, and perhaps useless, distinctions among the ways meanings are conveyed to the buyer and the expectations that those meanings raise.[128] These distinctions may also be increasingly obsolete because strict liability (when and where applicable) seems not to draw them. Worse still, resort to a dictionary may leave the court in as much confusion as the present, incoherent method of defining the warranty's scope. Each word in the definition leads to other definitions; the definition itself is likely to be so general as to provide only modest assistance in determining any meaning that will be of assistance in the exact matter at issue.[129] Finally, it should be obvious that even the use of the price to interpret the express warranty adds a significant implied content to the warranty, one that, at least to

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127. An alternative would be to find that no warranty was created on the theory that a warranty which was unheard of at the quoted price could not raise the necessary expectations of the parties to become part of the basis of the bargain. While this is a tenable position in cases where the buyer found the warranty incredible, it provides no help in the obviously more likely case where the warranty is unusual but scarcely inconceivable.

128. The Code continuously ties itself in semantic knots trying to express these distinctions. A good example of this is found in comment 6 to section 2-313 which attempts to explain the content of a warranty by sample:

> But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject-matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it.

U.C.C. § 2-313 comment 6 (1977).

129. Webster's Dictionary defines "siding" as "material of any kind used for the covering of the outside of a frame building." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (2d ed. 1983). If "siding" was indeed the only warranty made to the Moores, the use of a pure dictionary definition rule could have permitted the seller to comply with its express warranty by tacking canvas on the house. Presumably, however, the presence of the implied quality terms, and the fact that the warranty is to be read in light of the price paid, sufficiently protect against such absurd results.

some extent, dovetails with the warranty of merchantability.[130]

IV. CONCLUSION

A more careful differentiation by the courts of the minimal adequacy required in express warranties from the broader qualities inferred in implied quality terms would help to clarify the Code's distinctions between them. The ultimate problem, however, is with the Code itself. It incompletely deals with the problems created by its attempt to include within the contract the parties' entire zone of assent. It seeks to permit enforcement of the agreement in fact by stripping away formal barriers to the parties' understanding of their own agreement. This has permitted the creation of what have been called contracts of accretion (rather than adhesion) that are stitched together from many sources other than the parties' express verbalization of the contract.[131]

But the Code has not clearly delineated the distinctions that it purports to draw between these different sources of contract terms. No comprehensive rationale is provided for making some sources less equal than others: more subject to disclaimer, more vulnerable to the parol evidence rule,[132] shorter-lived under the statute of limitations.[133] The implied content problem, while significant in its own right, is only a small portion of the Code's incomplete absorption of its own attempt to recast contract law.

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130. "In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section." U.C.C. § 2-314 comment 7 (1977).

131. *See generally* Herbert, *Contracts of Accretion: A Modest Proposal for U.C.C. Section 2-207*, 14 MEM. ST. U.L. REV. 441 (1984).

132. *See supra* text accompanying notes 16–18. However, it should be noted that the parol evidence rule does not consistently favor express warranties over implied quality terms. Indeed, under some circumstances, it favors implied quality terms over express warranties.

133. One implicit message of the implied content cases may well be that it is impossible to draw any useful distinction between "express" terms and the "implications" derived from them, since each defines the other. To end as we began, "What's in a name: that which we call a rose/ By any other name would smell as sweet." W. Shakespeare, ROMEO AND JULIET, act II, scene ii. But does "a rose" imply the scent or does the scent imply "a rose"?