Does "Puff" Create an Express Warranty of Merchantability? Where the Hornbooks Go Wrong

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I. INTRODUCTION

In discussing the law of sales, hornbooks distinguish "puff" from express warranties. Thus, according to White and Summers, "The law recognizes that some seller's statements are only puffing, not express warranties." To support this statement, White and Summers offer the following illustration: "'This is a top-notch car' [puff] versus 'This truck will give not less than 15.1 miles to the gallon when it is driven at a steady 60 miles per hour [express warranty].'" A divergence may exist, however, between the hornbook definition of an express warranty and the definition set forth in judicial opinions. This comment examines the difference between this legal theory and legal practice and seeks to correct the hornbook notion that statements traditionally called "puff" are never express warranties.

Three reasons exist why many statements traditionally dismissed by hornbooks as "puff" should be classified as express warranties:

(1) A body of decisional authority holds that statements like "This is an A-1 automobile" or "This motorcycle is in good condition" are express warranties. These decisions cannot be dismissed as "bad law" merely by protesting that their holdings contradict the hornbooks. Courts, not hornbooks, make law.

2. Id.
3. The author is indebted to R.H. Helmholz for pointing out the distinction between "hornbook law" and "case law." R.H. Helmholz, Wrongful Possession of Chattels: Hornbook Law and Case Law, 80 NW. U. L. Rev. 1221 (1986). Professor Helmholz made this distinction in the context of the common law property law rule of prior possessors.

The "Prior Possessor" rule provides that a possessor of property has rights in the property superior to all the world except a prior possessor. So far, a noncontroversial statement. However, the hornbook version of the rule continues that the prior possessor rule is valid even if the prior possessor's possession of the property is wrongful. Thus, if Thief 1 steals a chattel from Owner, and then Thief 2 steals the chattel from Thief 1, the hornbook rule is that Thief 1 (as a prior possessor) may replevy from Thief 2. Helmholz' point is that the true rule as it appears in cases is: "What a man has acquired illegally he cannot replevy." Id. at 1225-26.
Hornbooks must follow the logic of courts, not the other way around.  

(2) Concepts from the philosophy of science provide a convincing rationale for these holdings by enumerating criteria for ascertaining what a fact is, demonstrating that such seemingly “puff”-like statements do indeed make the “affirmations of fact” required for the creation of an express warranty. Moreover, such statements must be considered express warranties to safeguard the purchaser's reasonable expectations.

(3) Strong public policy favoring consumer protection compels a finding that “puff” may constitute an express warranty. Frequently, puff expressly warrants a product's merchantability. Unlike an implied warranty, sellers cannot disclaim an express warranty. Thus, a finding that puff constitutes an express warranty of merchantability is crucial to the protection of consumers. Article 2 inadequately serves consumers because it allows disclaimer of the implied warranty of merchantability.

4. Of course, one can argue that the holdings in these cases are bad law, not because they disagree with the hornbooks, but because they disagree with the weight of other judicial authority. Indeed, in any area of the law, a few quirky and isolated decisions may contradict the weight of other authority. Grant Gilmore is believed to have said that it is possible to find a district court decision standing for any proposition.

The decisions examined here ought to be regarded as more than curiosities for two reasons: (1) because a stronger rationale supports these cases than the rationale underlying the majority position cases; and (2) these minority cases fulfill a compelling public policy interest — i.e., consumer protection — that the majority cases do not.

5. See infra note 13 and accompanying text, discussing U.C.C. § 2-313(1)(a).

6. See infra note 19.


8. U.C.C. § 2-316. Disclaimer of the implied warranty of merchantability may be effected by: (1) an "as is" sale under U.C.C. § 2-316(3)(a); (2) an oral or written reference to "merchantability" (if in writing, "merchantability" must be mentioned "conspicuous[ly]") under U.C.C. § 2-316(2); (3) the buyer's reasonable inspection of the goods or refusal to inspect the goods when such inspection would have revealed the defects later complained of under U.C.C. § 2-316(3)(b); (4) course of dealing, course of performance, or usage of trade under U.C.C. § 2-316(3)(c). Id.
II. THE NATURE OF WARRANTIES. HORNBOOK DEFINITIONS OF PUFF AND DISTINGUISHING PUFF FROM AN EXPRESS WARRANTY

The Uniform Commercial Code\(^9\) sets out three warranties relating to the quality of goods:\(^{10}\) express warranties,\(^{11}\) the implied warranty of merchantability,\(^{12}\) and the implied warranty of fitness for a particular purpose.\(^{13}\) Controversy exists about whether a warranty is a promise or a condition,\(^{14}\) but resolving this question is not necessary to understand how warranties operate. Perhaps, understanding a warranty as *sui generis* is more helpful,\(^{15}\) so that, whatever a warranty is, if goods fail to conform to the warranty, a breach of contract occurs, entitling the buyer to the remedies provided by U.C.C. Article 2.\(^{16}\)

Unlike an express warranty, implied warranties are created, not by the seller's words, but by the commercial nature of the transaction. Ordinarily, because it is less specific than an express warranty, the implied warranty recognized by § 2-314 merely guarantees that the goods in question are "merchantable, i.e., that they need not be the best goods of that sort, but must be of "fair average quality . . . [and] fit for the ordinary purposes for which such goods are used."\(^{17}\) Although any type of seller may make an


\(^{10}\) "Warranty" is "an assurance or guaranty, either express in the form of a statement by a seller of goods, or implied by law, having reference to and ensuring the character, quality, or fitness of purpose of the goods." BLACK'S LAW DICTIONARY 1586 (6th ed. 1990). For warranties generally, see JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 100 (3d ed. 1990).

\(^{11}\) U.C.C. § 2-313.

\(^{12}\) U.C.C. § 2-314.

\(^{13}\) U.C.C. § 2-315.

\(^{14}\) See U.C.C. § 2-313(1)(a), providing that an express warranty may be created by "[a]ny 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.'" *Id.* (emphasis added).

\(^{15}\) See MURRAY, supra note 10, at § 100(A): "The characterization of warranties as promises or conditions, however, is no longer significant. They have taken on a life of their own." *Id.*

\(^{16}\) See U.C.C. § 2-711 (buyer's remedies in general); § 2-601 (buyer's rights on improper delivery); § 2-602 (rejection of goods); § 2-608 (revocation of acceptance); § 2-714 (damages for breach of warranty).

\(^{17}\) U.C.C. § 2-314(2), entitled "Implied Warranty: Merchantability; Usage of Trade," provides:

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

(a) pass without objection in the trade under the contract description; and
express warranty, the implied warranty of merchantability only arises when the seller is a "merchant," *i.e.*, a seller who customarily deals in goods of that kind.\(^{18}\) Finally, unlike an express warranty, a seller may disclaim the implied warranty of merchantability.\(^{19}\)

Under U.C.C. § 2-313, sellers can create express warranties in three ways: by an "affirmation of fact or promise"; by a "description of the goods"; or by a "sample or model." The affirmation, description, or sample must form part of the "basis of the bargain." Specific intent is not necessary to create an express warranty,\(^ {20}\) nor are special words (such as "warrant" or "guarantee").\(^ {21}\) A warranty relates to the past or present performance or condition of goods, not to the goods' future performance or condition.

Controversy exists about whether the words "basis of the bargain" in § 2-313 require the buyer's reliance to create a warranty.\(^ {22}\) An express warranty may attach to used goods. Sellers may create an express warranty after formation of the contract.\(^ {23}\)

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18. U.C.C. § 2-314(1) provides: "Unless excluded or modified ([by] § 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." *Id.*

"Merchant" for purposes of the implied warranty of merchantability is defined in U.C.C. § 2-104 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." U.C.C. § 2-104.

19. *See* U.C.C. § 2-316 and *supra* note 6. The opaque U.C.C. § 2-316(1) takes many words to say what Karl Llewellyn had originally said transparently in a few words: "[i]f the agreement creates an express warranty, words disclaiming it are inoperative." John E. Murray, Jr., *The Emerging Article 2: The Latest Iteration*, 35 Duq. L. Rev. 533, 582, 582 n.289 (1997).

20. U.C.C. § 2-313(2) and cmt. 3.


22. U.C.C. § 2-313 cmts. 3 and 8. This question is discussed in detail at *infra* notes 125-39 and accompanying text.

23. U.C.C. § 2-313 cmt. 7. In such case, the warranty constitutes a modification to the
Unlike an implied warranty, sellers may not disclaim an express warranty.\(^2\)

Having said what an express warranty is, it is necessary to say what an express warranty is not. U.C.C. § 2-313(2) provides that "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."\(^{25}\) Hornbooks have traditionally called these statements of opinion and/or commendation "puff" or "seller's talk." Whether a statement constitutes an express warranty rather than "puff" is a question of fact.\(^{26}\)

III. CASE REVIEW: CASES FINDING EXPRESS WARRANTIES IN WHAT HORNBOOKS WOULD CALL PUFF

Numerous decisions have found that statements that hornbooks would label "puff" create express warranties. Thus, a pre-Code decision held that a description of an automobile as in "A-1 condition" created an express warranty.\(^{27}\) Another pre-Code court found that whether an advertisement that described a tractor as in "A-1 condition" was a question of fact for the jury to decide.\(^{28}\) No error was found in a trial court holding that a newspaper ad that

contract that, under U.C.C. § 2-313 comment 7, requires no consideration. Id.

24. U.C.C. § 2-316(1) provides, inter alia: "[N]egation or limitation [of express warranties] is inoperative to the extent that such construction is unreasonable." Id. See also Murray, supra note 10, at § 100(E)(1) at 550.

However, the buyer to whom an express warranty has been made may also be at risk. First, although an express warranty may not be disclaimed, it may be lost through operation of the parol evidence rule. Id. An unscrupulous seller may believe that his perfect strategy is to make an oral express warranty, but embody the disclaimer in a fully integrated writing. The seller's design would fail, however, due to the Code's general requirement of good faith in all transactions cognizable under the Code. U.C.C. § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). Id.

Second, U.C.C. § 2-719(1) allows the parties to agree to a limitation of remedies. Common limitations restrict a buyer's remedies to: repair-or-replace or return-and-refund and exclude consequential damages (U.C.C. § 2-719(3)). Depending on the circumstances, these remedies may not fully compensate the buyer, particularly if the buyer has incurred consequential damages. Murray, supra note 10, at § 100(E)(2).

Third, if the purchaser knows at time of purchase that the express warranty is false, the express warranty will be negated. Richard W. Duesenberg & Lawrence P. King, 3 Bender's Uniform Commercial Code Service, § 6.05 at 6-16.16 (1998).

25. U.C.C. § 2-313(2), inter alia.
26. U.C.C. § 2-313 cmt. 3.
28. Taylor v. Ward, 393 So.2d 1342 (Miss. 1981). The jury found the advertisement created an express warranty. Id.
described a used car as "mechanically A-1" created an express warranty. A9 Another court held that a description of goods as "first class" created an express warranty that they were fit for their intended use. A0 A description of a computer as "first rate" created "a warranty of merchantability and of fitness for a particular purpose." A1 An ad describing a used car as in "mint condition" with a "rebuilt engine" created an express warranty. A2

Several courts have found that the term "good condition" created an express warranty. Thus, an ad describing a tractor as in "good condition" created an express warranty. A3 A description of an engine in "good running condition" created an express warranty. A4 Another court held that a description of an automobile frame as in "good condition" may create an express warranty. A5 A motorcycle described as in good condition and needing no major repairs created an express warranty. A6 The seller's description of a used car as in "good mechanical condition" also created an express warranty. A7 Assurances made by the seller of a used automobile that its "engine runs good" created an express warranty. A8

In Jones v. Kellner, A9 the sellers placed a newspaper ad, describing a used car as "mechanically A-1." A0 Jones responded to the ad, A1 and after taking the car for a test drive, agreed to purchase it. A2 Later, Jones paid the Kellners the balance of the purchase price and took possession of the car. A3 As Jones was

41. Id. at 549. The ad, which appeared in December 1980 in the Cleveland Plain Dealer, read: "Chevy '74 Malibu, One Owner, Clean, New Tires, Defogger, Mechanically A-1, $700.00 negotiable, 461-7253." Id.
42. Id. The parties agreed to a purchase price of $600; Jones gave a deposit to the Kellners at the time he test-drove the car. The amount of the deposit is not stated in the opinion. Id.
43. Id.
driving the car home, it stalled and had to be towed. Jones sued the sellers. The court of appeals affirmed the holding and reasoning of the trial court that the Kellners' description of the car as "mechanically A-1" created an express warranty when combined with Jones' reliance on the description. The Kellners breached this warranty when the car broke down on Jones' way home. The court discussed neither puff nor opinion in its decision.

Taylor v. Alfama also concerned purchaser reliance and an ad for a used car sold by private parties. The Alfamas advertised their car, describing it as in "mint" condition with a "rebuilt" engine. Taylor purchased the car but had difficulties with the engine. He brought suit in small claims court and won a judgment, but the Alfamas appealed. The Supreme Court of Vermont affirmed the decision of the small claims court. The supreme court held that the Alfamas had created an express warranty by describing the condition of the car. Taylor relied on this description. The court also noted the role of a purchaser's expectations in deciding to purchase a car so described.

44. Id. The Kellners refused Jones' attempt to return the car or Jones' request for a refund of the purchase price. Id. Jones subsequently obtained a mechanical inspection of the car that disclosed that the car was "mechanically inoperable." By the time of trial, the car's salvage value was $35.00. Id.

45. Jones, 451 N.E.2d at 549. The trial court found in favor of Jones. Id. Jones was awarded the purchase price of the car minus its salvage value. Id.

46. Id. By "reliance," the court seems to mean that the description of the car as "mechanically A-1" induced the sale, i.e., that Jones would not have purchased the car had Kellner made this representation. Id. at 549. This reading makes sense, based on the court's citing of Schwartz v. Gross, 114 N.E.2d 103 (Ohio Ct. App. 1952).

Other interpretations are possible—the court may mean that simply purchasing the car demonstrated Jones' reliance. If this is the correct reading, however, it guts the court's reliance requirement of real significance. In any event, under the Uniform Commercial Code, reliance is not required for the creation of an express warranty. See infra at text accompanying notes 125-39.

47. Id. at 550. Although the decision does not explicitly so hold, defendants appear to have been casual sellers; consequently, if this is true, the implied warranty of merchantability did not arise in the sale.


49. Taylor, 481 A.2d at 1059.

50. Id. The car was a 1974 Volkswagen. Id.

51. Id. at 1060. U.C.C. § 2-313(1)(b) (codified in Vermont at 9A V.S.A. § 2-313(1)(b)) provides that a seller's description of goods constitutes an express warranty that the goods will conform to the description. Id.

52. Id. at 1060. The court reasoned: "Because the car failed to function as a car in 'mint condition' with a 'rebuilt engine' might be expected to perform, the [small claims] court decided that the seller had breached his express warranty." Id. (emphasis added). The explanation for the court's holding may be that the court found an express warranty when puff was joined to fact in the description of the goods (i.e. "puff" ("mint" condition) plus fact ("rebuilt" engine)). The court might have reached a different conclusion if the ad had only
In *Pake v. Byrd*, an ad describing a used tractor as in "good condition," combined with the seller's in-person verbal statements, created an express warranty. Pake testified that he purchased the tractor based on the assurances of Byrd and that he told Byrd this. Two days after Pake took delivery of the tractor, when he switched on the tractor's ignition, he heard a knocking sound in the engine. When the Pake telephoned Byrd, Byrd told Pake that this had sometimes happened while he owned the tractor, but that it was not a major problem. Subsequent inspection of the tractor by a mechanic revealed engine damage and that Byrd would have received advance warning that damage was occurring to the engine by the knocking sound when he used the tractor. The Court of Appeals of North Carolina held that Byrd had made an express warranty that “the tractor was in good condition and free of major mechanical defects.” The court based its holding on Pake's reliance, *i.e.*, that a buyer would not have purchased the tractor but for the statements of the seller. Pake was entitled to rely

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54. *Pake*, 286 S.E.2d at 588. The ad read: “‘John Deere, 3020, gas, PWR [power shift], with 4 by 16 bottom plow. Good condition. $5,000.00.’” *Id.* at 589 (brackets in original).
55. *Id.* At trial, witnesses disagreed on whether Byrd had made additional statements when Pake and his father came to look over the tractor. Pake testified that Byrd represented that “‘they had never had any trouble with [the tractor],’” “‘that it was a good tractor,’” “‘that the only thing wrong with the tractor was that it was a used tractor; that it operated as good as when it was new,’” and that both the transmission and the hydraulic were in “‘good condition.’” *Id.* at 589.

It is unclear whether Pake was quoting Byrd verbatim or paraphrasing his statements. The court noted that the Pake's testimony was corroborated by Pake's father, who was present when Byrd made the remarks. *Id.* Byrd testified that he had described the tractor as in good condition but had never warranted that it was without any defects whatsoever. *Id.*

56. *Id.* The court reasoned: “Plaintiff allegedly told defendants that if he bought the tractor he would ‘buy it based on what they said because they had been operating the tractor and he had not.’” *Id.*
57. *Id.* at 590. Byrd denied saying this. *Id.*
58. *Id.* “‘[L]oose motion in the bearing of the shaft,’” caused the knocking sound, according to the mechanic's testimony. *Id.* The mechanic also testified that “the bearing was locked to the shaft, the shaft was ruined, and the damage could have been caused by excessive wear in the motor.” *Id.*
59. *Pake*, 286 A.2d at 590. Apparently, the court equated "good condition" with "free of major mechanical defects." The opinion recites no testimony that defendants had used the phrase "free of major mechanical defects." Byrd defended on the basis that the statements had been puff, not warranties, and that, in any event, "good condition" did not mean free of any defects. *Id.* at 589. The court of appeals did not expressly reject the second part of Byrd's defense: the court did not state that any defects would have constituted breach of warranty, but only that the defects which existed under the facts constituted a breach of warranty.

60. *Id.* at 590. A warranty created by a seller's affirmations of fact which become part
upon Byrd's statements because Byrd had superior knowledge of the tractor as its owner-operator and because Pake could make only a cursory inspection. Finally Pake's inspection of the tractor did not void Byrd's warranty when, under the circumstances, inspection could not have revealed the defects.

In Melotz v. Scheckla, a description of an engine as in "good running condition" was held to create an express warranty. Melotz, a lumber hauler, purchased a used truck engine from Scheckla, a casual seller. Scheckla described the engine as in "good running condition." Subsequently, Melotz experienced repeated problems with the engine, which finally became inoperable. In reviewing the jury's verdict for Melotz, the Supreme Court of Montana applied the "substantial evidence" standard, holding that Scheckla's words and conduct provided substantial evidence to support the finding that Scheckla had made an express warranty to Melotz. Although Scheckla claimed that his statements had been puff, the court did not address how those statements constituted affirmations of fact, rather than puff or opinion. The court did not discuss the characteristics of a "fact" or "an affirmation of fact." Nor did the court explicitly address the question of reliance.

of the basis of the bargain. Id. (citing 1 ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-313:40 (2d ed. 1970)).

61. Id. Witnesses testified that Byrd had prior knowledge of the tractor's knocking. Id.
62. Id.
63. 801 P.2d 593 (Mont. 1990).
64. Melotz, 801 P.2d at 594. The engine was a used 335 Cummins diesel engine. Purchase price was $3,000. Id.
65. Id. at 596. The engine had a cracked block and could not be repaired. Id.
66. Id. at 596. Under the "substantial evidence" standard, a jury verdict will be upheld on review if the appellate court finds substantial evidence to support it. Id. The evidence is viewed in the light most favorable to the prevailing party. Id. (citing Flynn v. Siren, 711 P.2d 1371, 1374 (Mont. 1986)).
67. Id. at 597. In addition to the defendant's description of the engine as in "good running condition" defendant had provided advice — and on one occasion, service — to plaintiff when problems occurred. After installing the engine plaintiff had at once experienced problems with the oil pressure. Defendant advised the plaintiff to replace the bearing; if that did not work, the defendant offered "to pay for the bearings and everything." Problems continued with low oil pressure and overheating. Subsequently the defendant's mechanic replaced a cracked head on the engine. The problems persisted and defendant suggested new head gaskets. Finally, the engine became inoperable, so that the plaintiff was unable to perform a towing contract which he had entered into. Id. at 594-95, 597.
68. Id. at 597. The Supreme Court did not say that the jury could not reasonably have reached the conclusion that an express warranty had not been made. The Court said, however, that even if facts exist which might provide "reasonable grounds" for reaching an opposite conclusion, the existence of a warranty is a question of fact which ought not to be removed from the hands of the jury. Id.
In Bernstein v. Sherman⁶⁹ a description of an automobile frame as in “good condition” was held to create an express warranty. Sherman, a casual seller, sold a used car to Bernstein.⁷⁰ Bernstein spoke to Sherman’s mechanic before the sale. Bernstein knew that the car had previously been involved in an accident, so he specifically asked Sherman’s mechanic about the condition of the frame.⁷¹ The mechanic told Bernstein that the frame was in “good condition.”⁷² In fact, the frame was corroded. This condition, the court found, had been concealed either by Sherman or by a previous owner.⁷³ The court found that the description by Sherman’s agent (the mechanic) of the frame as in “good condition” created an express warranty. The court explicitly grounded its decision on Bernstein’s reliance on Sherman’s statement that, the court said, became part of the basis of the bargain.⁷⁴ The court gave no reasons why “good condition” constituted an affirmation of fact rather than a statement of opinion or puff.⁷⁵

In Cagney v. Cohn,⁷⁶ a description of a motorcycle as in good condition and needing no major repairs was held to create an express warranty.⁷⁷ Cagney responded to a newspaper ad placed by Cohn, the motorcycle’s owner and a casual seller.⁷⁸ Cagney telephoned Cohn and asked if the bike was indeed in excellent condition as the ad had said. Cohn affirmed this.⁷⁹ Cagney then

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⁶⁹. 497 N.Y.S.2d 298 (Justice Court, Town of Ossining, Westchester County, Small Claims Part 1986).
⁷⁰. Bernstein, 497 N.Y.S.2d at 300. The car was a used 1976 Datsun 280 Z. Purchase price was $1,300. Id.
⁷¹. Id. The opinion does not state how the plaintiff knew this.
⁷². Id.
⁷³. Id. Newspapers had been stuffed above the front wheels and coated underneath with tar to conceal the newspapers and the frame’s condition. The mechanic either knew of the concealment at the time of his statement to Plaintiff or, as the court said, should have become aware of this condition during the course of a brake job the mechanic had performed. The court said that under the circumstances the facts fell short of providing clear and convincing evidence of fraud. Id.
⁷⁴. Id. Unstated grounds appear to be desire on the part of the court to give relief for conduct tantamount to fraud which could not be proved as fraud and the youth of the Plaintiff ("a young woman who appeared to be barely 20"). Id.
⁷⁵. Bernstein, 497 N.Y.S.2d at 300. There is no indication in the opinion that the seller defended on the basis that the words “good condition” were puff or a statement of opinion. The seller defended pro se, so may very well have been unaware of the distinction. Id. at 300.
⁷⁷. Cagney, 13 U.C.C.R.S. at 1000. It was a used 1970 BMW motorcycle. Id.
⁷⁸. Id. The ad, which appeared in the July 4, 1973 issue of a publication called “The Want Ad,” described the motorcycle as in “excellent condition.” Id.
⁷⁹. Id. at 1001. At no point in the opinion are the seller’s remarks quoted verbatim. Id.
visited Cohn to look at the motorcycle. The opinion stresses that Cagney knew little about motorcycles. During a test ride, Cagney noticed a “metallic sound” coming from the engine. Cagney again asked Cohn about the motorcycle’s condition. Cohn again told Cagney that the motorcycle was in good condition and that, although it might need some “minor valve adjustments,” the motorcycle needed no major repairs. At no time did Cohn qualify his remarks about the motorcycle’s condition with words such as “in my opinion” or “to the best of my knowledge.” Cagney made a down payment on the motorcycle and, after he had obtained bank financing, returned in a few days to make the purchase. Cagney kept the motorcycle for approximately a month and drove it some 500 miles when problems developed, signaled by a “high metallic whine.” A mechanic inspected the motorcycle and discovered that someone had disconnected the oil pressure indicator light. The mechanic reconnected the light, and it stayed lit, indicating insufficient oil pressure. Cagney’s mechanic estimated that the motorcycle required $471.76 in repairs. In holding that Cohn’s oral statements had created an express warranty, the court first looked to Cohn’s “superior knowledge.” Although Cohn may not in fact have possessed knowledge superior to that of the buyer, Cagney, 80. Id. The opinion states that the buyer “personally inspected” the motorcycle but does not say what this inspection consisted of. Presumably, it was a superficial examination given the court’s emphasis on Purchaser’s lack of knowledge of motorcycles. It is difficult to judge how much the seller knew about motorcycles. The seller was not a dealer in new or used bikes. The court did note, however, that this was the fifth or sixth motorcycle the seller had owned and that The seller assured the buyer that he, the seller, “had personally performed the bulk of major repairs” on the motorcycle during his ownership. Id. In its Fourth Finding of Fact, the court concluded that seller “had substantially more knowledge of motorcycle engines than plaintiff.” Id. 81. Id. The opinion does not state who, if anyone, the court is quoting. Id. 82. Cagney, 13 U.C.C.R.S. at 1001. 83. Id. “Hedging” is discussed, infra at note 120. 84. Id. The deposit was $100.00. Id. 85. Id. Purchaser initially inspected the bike on July 7, 1973 and returned on July 10, 1973 for a second inspection along lines suggested by a friend who owned a BMW bike. The purchased was consummated that day. The balance of the purchase price was $1,100.00. Id. 86. Id. The full range of mechanical problems is set out in the court’s Fifth Finding of Fact: “damaged camshaft bearings, loose timing chain, and ‘totally wipedout’ camshaft lifters.” Id. at 1001-02. The mechanic advised not riding the motorcycle until the repairs were made. Id. 87. Cagney, 13 U.C.C.R.S. at 1002 n.1. The court held that the buyer had failed to establish this figure by clear and convincing evidence. Id.
Cohn held himself out as possessing superior knowledge. The court found it reasonable for Cagney to rely on Cohn's assurance that the motorcycle was in good condition. Nor did Cagney's two inspections of the motorcycle prevent an express warranty from arising out of Cohn's representations. Cohn argued that Cagney relied not on Cohn's representations but on Cagney's own inspections. Cohn's argument, however, confused the exclusion of implied warranties with the exclusion of express warranties.

Under § 2-316(3)(b), an inspection that ought to have uncovered the defects the warranty relates to will act to exclude the implied warranties even if the buyer does not discover the defects. Neither § 2-316 nor any comparable provision applies to express warranties. Since § 2-316(3)(b) explicitly provides that inspections nullify implied warranties (but is silent as to express warranties), the Cagney court drew the negative inference that the Code's omission of any reference to inspections vis-à-vis express warranties was purposeful.

Consequently, the mere fact that an inspection is made does not exclude an express warranty. Contrast this with a pre-sale inspection that actually brings to the buyer's attention the defects warranted against. Under circumstances where the buyer has actual knowledge that the seller's representations are untrue, the express warranty does not arise. In Cagney, however, neither of the buyer's inspections brought the defects to light.

Reliance on the seller's representations is not required under § 2-313 for the creation of an express warranty. Finally, although it is ordinarily true that a warranty applies to the time of sale only (i.e., warrants only that the defects in question do not exist at the time of sale), and although it is possible that the engine defects did not exist at the time of sale, the court held that Cagney had met his burden of proving that the defects existed at the time of sale. The court based its conclusion on two facts: the "metallic noise," which Cagney's mechanic linked to the engine problems, was

88. For example, U.C.C. section 2-314's implied warranty of merchantability and U.C.C. section 2-315's implied warranty of fitness for particular purpose.
89. U.C.C. § 2-316(3)(b) provides: "[W]hen the buyer before entering into the contract has examined the goods . . . as fully as he desired . . . there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; . . ." Id. (emphasis added).
90. U.C.C. § 2-313 cmt. 3 provides: "In actual practice, affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement." Id. (emphasis added).
already audible prior to the sale; secondly, since the engine damage stemmed from insufficient oil pressure, the fact that someone had disconnected the oil pressure light at the time of the sale strongly suggested that this problem existed at the time of sale.\textsuperscript{91}

In \textit{Valley Datsun v. Martinez},\textsuperscript{92} a seller's description of a used camper as in "good mechanical condition" was held to create an express warranty.\textsuperscript{93} Plaintiff Martinez purchased the camper from Valley Datsun ("Datsun"), a car dealership.\textsuperscript{94} Datsun's salesman represented to Martinez that the engine had recently been refitted with new heads, that the engine noises Martinez heard before purchasing the camper were normal for a Volkswagen camper, and that the camper was in "good mechanical condition."\textsuperscript{95} However, two days after the sale, when Martinez had driven the camper 150 miles, the camper's clutch burned out and the engine threw a rod.\textsuperscript{96} The court used the superior knowledge test to determine whether Datsun's statements were "affirmations of fact."\textsuperscript{97} Inasmuch as Datsun's knowledge about the camper's condition was superior to Martinez', Datsun's statements constituted affirmations of fact, and thus, an express warranty.\textsuperscript{98}

In \textit{Ekizian v. Capurro},\textsuperscript{99} an assurance given by a nonmerchant seller of a used van that the car's "engine runs good" was held to create an express warranty.\textsuperscript{100} A friend of the buyer, described by

\begin{itemize}
\item \textsuperscript{91} \textit{Cagney}, 13 U.C.C.R.S. at 1001-02.
\item \textsuperscript{92} 578 S.W.2d 485 (Tex. App. 1979).
\item \textsuperscript{93} \textit{Martinez}, 578 S.W.2d at 487. The vehicle was a 1971 Volkswagen camper. Purchase price was $2,190.00. \textit{Id}.
\item \textsuperscript{94} \textit{Id}. Note the contrast with the cases discussed above which did not involve merchant sellers. Although the defendant was a merchant seller, under Texas case law the implied warranty of merchantability does not attach when used goods are sold to a buyer who had knowledge that they are used. \textit{Id}. at 489 (citing Chaq Oil Company v. Gardner Mach. Corp., 500 S.W.2d 877 (Tex. App. 1973)). Accordingly, Martinez was not able to assert a breach of the implied warranty of merchantability. Note that in this respect, Texas case law departs from Article 2. \textit{Id}.
\item \textsuperscript{95} \textit{Id}.
\item \textsuperscript{96} \textit{Id}.
\item \textsuperscript{97} \textit{Id}. at 490.
\item \textsuperscript{98} \textit{Martinez}, 578 S.W.2d at 490. The court said: "The test of whether a salesman's statement constituted 'affirmations of fact' going to the very 'basis of the bargain' is whether the salesman was asserting a fact of which the buyer was ignorant [\textit{i.e.}, that the camper was in 'excellent condition'], or whether he was merely declaring his belief with reference to a matter of which he had no special knowledge and of which the buyer may also have been expected to have an opinion." \textit{Id}.
\item \textsuperscript{99} 444 N.Y.S.2d 361 (Justice Court, Town of Ossining, Westchester County, Small Claims Part 1981). The same court and the same judge, Town Justice Edwin S. Shapiro, decided \textit{Bernstein v. Sherman}, supra notes 69 -75.
\item \textsuperscript{100} \textit{Ekizian}, 444 N.Y.S.2d at 361. The vehicle was a used 1976 Chevrolet van sold for
the court as a "backyard mechanic," twice inspected the van before purchase.\footnote{101} In addition, the buyer twice requested assurances about the van from the seller.\footnote{102} Each time the seller replied that the "engine runs good."\footnote{103} In fact, at the time of sale, the van's engine's cylinder head was cracked in five places.\footnote{104} The court held that the seller's assurances created an express warranty.\footnote{105} Key in this holding was the buyer's reasonable reliance on the seller's statements.\footnote{106} The buyer did not fully rely on his friend's inspections since he asked the seller for assurances.\footnote{107} The court observed further that there was no "applicable written disclaimer."\footnote{108} Consequently the seller created an express warranty "at least to the extent that the engine was 'not cracked.'"\footnote{109} The opinion does not discuss why the seller's statements were not puff or why the seller's statements would constitute an assertion of fact.

In \textit{Elwell v. Maiko Exploration & Drilling, Inc.},\footnote{110} an express warranty was held to have been created by the seller's description of a used oil drilling rig as, "On a scale of ten, mechanically, the rig is a nine. Cosmetically it's a six."\footnote{111} In a departure from the decisions previously examined, both parties in \textit{Elwell} were businesses (oil companies)\footnote{112} and the goods were commercial equipment, not consumer goods. Maiko contracted with Elwell to

\begin{footnotes}
101. \textit{Id.}
102. \textit{Id.}
103. \textit{Id.}
104. \textit{Id.} The opinion does not state when this fact was discovered.
106. \textit{Id.}
107. \textit{Id.} at 361. The court seems to be reasoning that had the buyer fully relied on his own inspection (conducted through his friend) no express warranty would have been created. The court seems to be confusing disclaimer of implied warranties with disclaimer of express warranties. The mere fact of inspection alone, which does not disclose a flaw will not act to disclaim an express warranty although it will disclaim an implied warranty. See discussion of Cagney, \textit{supra}, at text accompanying notes 76-91.
108. \textit{Id.} at 362. This seems to be further confusion about warranty disclaimers. Neither an oral nor written disclaimer can disclaim an express warranty. See text accompanying note 24.
109. \textit{Id.}
111. \textit{Elwell}, 807 P.2d at 176
112. \textit{Id.} Although the case is styled in the name of "John Mike Elwell" as an individual, rather than Ewell's company, Devonian Oil, the corporation may be taken as identical with Elwell for purposes of suit. Elwell was Devonian's sole shareholder, was personally liable for Devonian Oil's obligations, and was considered the owner for tax purposes of the equipment purchased from Maiko. \textit{Elwell}, 1991 Kan. App. LEXIS 145 at *2.
\end{footnotes}
sell Elwell various used items of equipment Maiko had used in its operations. One David Sears, who worked for a different drilling company and who Maiko had hired to conduct the demonstration, demonstrated the oil rig to Elwell. Sears was the original source of the remark about the rig being a nine on a scale of ten. Maiko employee James Barnett later repeated this remark. Following the purchase, Elwell experienced repeated problems with and breakdowns of the rig. Elwell brought suit for breach of express and implied warranties and for violation of the Kansas Consumer Protection Act. Maiko countersued for the unpaid balance of the contract. The trial court found for Elwell. Maiko appealed to the Court of Appeals of Kansas. In affirming the decision of the trial court, the court of appeals held that the jury could reasonably have found that the seller's statement created an express warranty. The court noted the difficulty in drawing a distinction between an express warranty and a statement of opinion. However, the court of appeals pointed to the purchaser expectations created by the description of the rig as "nine on a scale of ten." It pointed out that Elwell's experts were able to describe what the condition of a rig that is a "nine on a scale of ten" ought to be and that the Maiko rig fell far short. What this seems to equate to is that the seller's words created an ascertainable standard that had been breached.

113. *Elwell*, 1991 Kan. App. LEXIS 145 at *1. In addition to the used oil drilling rig, the other items were "a Dodge school bus, a Peterbilt tractor, and assorted oil drilling tools." *Id.* The contract price for all the items was $75,000. *Id.*

114. Purchaser reliance is not discussed in the opinion.

115. *Elwell*, 1991 Kan. App. LEXIS 145 at *3. Elwell employee Tom Schmidt testified that in his 22 years of experience in the oil business, he had seen as many breakdowns within 3 months with the Maiko rig as he had seen with other rigs over the past 20 years. *Id.*

116. *Id.* at *6. The jury had found that Maiko was a "merchant" capable of making an implied warranty of merchantability. *Id.* While Maiko listed this finding among its assignments of error, the court of appeals said the matter was moot as the trial jury had also found that no implied warranties of merchantability had been made. *Id.* On what basis the trial jury determined that no implied warranties of merchantability had been made is not revealed in the opinion.

117. *Id.* at *8. The court approved the definition of warranty proffered by the Supreme Court of Kansas in *Topeka Hill & Elevator Co. v. Triplett*, 213 P.2d 964 (Kan. 1950) (cited in *Young & Cooper, Inc. v. Vestring*, 521 P.2d 281 (Kan. 1974)) ("'[R]epresentations of fact capable of determination are warranties'.")

118. *Id.* at *10-11. The court reasoned, "In the instant case there was sufficient evidence for the jury to find that the rating amounted to an express warranty. On its face, nine out of a possible ten implies a machine of high mechanical integrity. This interpretation was encouraged by the admonition that cosmetically the machinery was admittedly only a six." *Id.*

119. The opinion gives no indication whether it was industry practice to describe equipment in terms of numerical ratings.
IV. THE NEED FOR A RATIONALE

A. Introduction

What generalizations can be made about these holdings? These courts offer two rationales or tests to account for the holding that what a hornbook might dismiss as puff was instead an express warranty. The tests are: (1) the purchaser's reliance on the supposed warranty; and (2) the seller's superior knowledge (superior to the purchaser's knowledge) concerning the goods. Neither of these tests stands up. The essential inquiry in determining whether a seller's statements constitute an express warranty or puff is to determine whether a seller's statements to a buyer constitute an affirmation of fact. Yet neither of the above tests sets forth criteria for distinguishing "affirmations of fact" (warranties) from non-fact opinions (puff). Many decisions do not even address the distinction between puff and express warranties.

Given such weak rationales, one wonders whether the real grounds for these holdings were unstated: i.e., the courts' desire to give relief to plaintiffs when relief could not be had under any other theory. In the decisions examined, fraud either was not pleaded or was unprovable; and the implied warranty of merchantability did not apply because the seller was not a merchant as required by U.C.C. § 2-314. Under such circumstances, a buyer's only hope for relief is if the court finds that the seller's statements constituted an express warranty inasmuch as an express warranty cannot be disclaimed and can be made by a nonmerchant casual seller.

What is needed is a satisfactory rationale for these holdings.

120. Other considerations sometimes looked at by courts, although not in the decisions examined here, are the specificity of the seller's statement, whether the statement was written or oral, and whether the seller "hedged" his statement. WHITE & SUMMERS, supra note 1, § 9-4 at 335. For an example of specific language creating an express warranty, see the example supra in the text accompanying note 2. For a discussion of "hedging," see the discussion of Cagney v. Cohn, supra, in the text accompanying notes 76 -91. None of these ancillary considerations is any more helpful in determining whether an express warranty was created than the reliance and superior knowledge tests.

121. Under U.C.C. § 2-313(1)(a), an "affirmation of fact" made by the seller about the goods creates an express warranty.

122. Possibly because the seller did not defend on the basis that his statement was puff rather than an express warranty.

123. The author first heard this suggestion made by Justin Daniels, Duquesne University Law School, J.D. 1998.
These decisions reached the right result: express warranties were indeed created. However, the stated rationales cannot stand up. Unless a better rationale can be found, these cases will be regarded as wrongly decided or decided for reasons other than those stated. Consequently, other courts will not follow them. This would be a pity because a strong public policy interest supports the conclusion that what hornbooks have previously dismissed as puff is actually an express warranty: that is, consumer protection that is, at present, inadequately served by a Code that allows the disclaimer of the implied warranty of merchantability. Finally, after providing a new rationale, this comment examines possible objections that might be made to the argument and analysis presented here.

B. Criticism of the Rationales Employed in the Cited Decisions

1. Reliance

One must first examine the concept of reliance. U.C.C § 2-313 requires that an "affirmation of fact," "description," or "sample or model" be part of the "basis of the bargain" in order to create an express warranty. The words "reliance," "rely," or variations thereof, do not appear in § 2-313. However, controversy has existed whether these words, "basis of the bargain," impose a reliance requirement for creating an express warranty. White and Summers say, "yes"; John Murray says, "no." White and Summers believe that the Code retains the reliance requirement, but admit that "What the Code does to the pre-Code..." White & Summers, supra note 1, at § 9-5. One could as
reliance requirement is quite unclear." They suggest two alternatives, both requiring reliance. In the first alternative, "basis of the bargain" possibly refers to a presumption of reliance that a seller may rebut by offering evidence of a purchaser's affirmative nonreliance. In the second, "basis of the bargain" may refer to a presumption that anything communicated by the seller to the buyer becomes part of the agreement absent affirmative proof that the parties did not intend a particular statement of the seller to become part of the agreement.

Murray rejects the notion of a reliance requirement in § 2-313. Murray's analysis begins with the comments to § 2-313. To judge from the comments there is no reliance requirement under § 2-313. First, Comment 3 to § 2-313 explicitly states that reliance is not required. Second, Comment 7 suggests that the parties may create a warranty after formation of the contract. This would not be possible if reliance were required. Third, it has been suggested that a warranty may arise even from statements of the seller that the buyer does not become aware of until sometime after contract formation. Fourth, § 2-315 expressly requires reliance in order to
create the implied warranty of fitness, leading to the negative inference that omission of any reference to reliance under § 2-313 means that reliance is not required for creation of an express warranty.136

For Murray, the uncertainty over reliance and § 2-313 stems from confusing the term "bargain" (as used in "basis of the bargain") with the concept of "bargained-for exchange." "Bargained-for exchange" implies reliance: each party seeks something it values from the other party; each party performs only because it believes the other party will also perform. However, "bargain" in "basis of the bargain" is different from "bargained-for exchange." What "bargain" in "basis of the bargain" refers to is the parties' entire agreement. The parties reasonably expect that all statements of the seller relating to the goods will be incorporated in the agreement. By enforcing the seller's statements as express warranties (whether relied on or not), the law merely protects the parties' reasonable expectations concerning the agreement.137

Nevertheless, many of the decisions examined explored reliance and found a seller created an express warranty when a buyer relied on the statements of the seller.138 Now, it may be that these courts are not ruling that reliance is absolutely required for the creation of an express warranty. Instead, what these courts may be suggesting, is that, although reliance is not required under the Code for the creation of an express warranty, when buyer reliance on the seller's statements exists, an express warranty is created.

In other words, reliance is one route, but not the only route, for creating an express warranty. Of course, if this is what the courts meant it would be helpful if they would say so explicitly rather than leave the reader thinking these courts have misunderstood § 2-313. However, even if this is what these courts mean, such a line of reasoning does not make sense.

The problem with the reliance test is that it skirts the issue of whether relying on a nonfactual assertion would create an express warranty. It begs the question. Section 2-313 requires an assertion

express warranty could not be created without the buyer's awareness of the seller's statements). Murray & Flechtner, supra, at 79.


137. Murray, supra note 10, at § 100(B).

Thus, a court must determine the threshold issue: whether the seller has made an assertion of fact. There are two, and only two, possibilities. Either the seller has made an assertion of fact — in which case, reliance is not needed for an express warranty to arise — or the seller has not made an assertion of fact — i.e., the seller has uttered puff. Nevertheless, if the seller has not made an assertion of fact, will buyer reliance turn a nonfactual assertion into an assertion of fact? Is it even possible (or meaningful) to say that the buyer has "relied" on a nonfactual assertion? If this is possible, would the buyer's reliance be reasonable?

Section 2-313(2) states flatly that "an affirmation of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods [i.e., not an affirmation of fact] does not create a warranty," and significantly this language is not followed by the words, "unless the buyer relies." Thus, reliance is an inadequate test for determining whether the seller's words constitute an express warranty.

2. **Superior Knowledge**

Under what has been called the "superior knowledge" test, courts have found that an express warranty was created when the seller informed the buyer of a fact that the seller was in a position to know, but the buyer was not. Thus, the warranty arises from the seller's superior knowledge. Thus, in *Pake v. Byrd*, the Court of Appeals of North Carolina held that the seller's statement that a used tractor as in "good condition" created an express warranty when the seller was familiar with the tractor that he had owned and operated for years and of which the buyer was able to make only a cursory inspection.

This, however, is circular reasoning. The heart of the superior knowledge "test" is that the seller informs the buyer of a fact which the buyer does not know. However, this assumes that what

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139. John Murray made this observation during a classroom lecture attended by the author in 1995. U.C.C. § 2-313(2) (emphasis added).
140. 286 S.E.2d 588 (N.C. Ct. App. 1982).
141. *Pake*, 286 S.E.2d at 589. See also *Cagney v. Cohn*, 13 U.C.C.R.S. 998 (D.C. 1973) and *Valley Datsun v. Martinez*, 578 S.W.2d 485 (Tex. App. 1979), which also employ the superior knowledge test.
142. A variant of this test appears in *Cagney v. Cohn*, 13 U.C.C.R.S. 998 (D.C. 1973) (the seller's words created an express warranty when the seller did not possess superior knowledge, but *held himself out* as possessing superior knowledge).
the seller said was a factual assertion when that is precisely what the court is trying to determine. If the content of the seller’s remark is not fact, but opinion, it makes no sense to say the seller has “superior knowledge” of his own opinion.

In any event, the Code does not impose a knowledge requirement for creating an express warranty. Recall the example offered by White and Summers of a statement that is unquestionably not puff but an express warranty: “This truck will give not less than 15.1 miles to the gallon when it is driven at a steady 60 miles per hour.” This statement constitutes an express warranty even when coming from the mouth of an ignorant speaker who is mistaken about the truck’s mpg or who has no idea and is just saying whatever pops into his head. When it comes to express warranties, what the seller knows is irrelevant.

If the assertion is one of fact, it is an express warranty, however carelessly made.”

A possible objection to this might be that, although the Code does not require knowledge, when the seller has knowledge and it is knowledge superior to the buyer’s, an express warranty is created. Again, this leapfrogs the question of whether the seller’s words make a factual assertion.

C. Proposed New Rationales

According to U.C.C. § 2-313(1), an express warranty is “an affirmation of fact.” Hornbook writers say puff cannot be an express warranty because statements like “This is a first-class automobile” do not make an affirmation of fact. But is this true? What is a “fact”? The notion of fact is so familiar that it is hard to appreciate how difficult defining the term “fact” is. Only rarely will judicial opinions attempt to define “fact,” and when they do, they usually end up providing a circular definition. The Code itself never defines “fact.”

143. See supra text accompanying note 2.
144. The only situation in which a party’s knowledge is pertinent is when a buyer has actual knowledge that the seller’s statement is false; in that event, no express warranty arises.
145. Recall, too, that express warranties may be made by casual sellers who may have insufficient experience with the goods to know the quality or characteristics of the goods.
146. The superior knowledge test may derive in part from a confusion of express warranties with the implied warranty of merchantability. The latter is implied in a commercial transaction, at least in part, because a merchant seller is presumed to know the quality of his goods. If the merchant does not, the implied warranty of merchantability creates a strong incentive for the merchant to correct this deficiency.
147. U.C.C. § 2-313(1).
1. Falsification

The conclusion reached by the cases considered here — that some or all puff constitutes an express warranty — is more firmly grounded in ideas that can be applied to law from linguistic analysis and the philosophy of science, than the hornbook notion that puff is never an express warranty. The philosophy of science, particularly Sir Karl Popper's concept of "falsification" provides the answer to "What is a fact?"

According to Popper, a statement is a statement of fact when the statement is susceptible to falsification, i.e., when one can imagine conditions under which observation would reveal that the statement is falsified. Consider an example. Suppose Able, a seller, says, "My car is red." What conditions could reveal that Able's statement is false? If a buyer looks at Able's car and sees that it is some color other than red, Able's statement is false. Thus the statement "My car is red" is a statement of fact. (That a statement happens to be untrue does not mean that it is not a statement of fact, merely that it is an untrue statement of fact.)

Seeing how statements commonly accepted as creating express warranties meet Popper's falsification test is easy. Statements such as, "This car has only 6,000 miles on it" are falsified by showing that the odometer reads more than 6,000 miles. But a statement like "This is a first-class automobile" might be different in kind from a statement like "This car has only 6,000 miles on it." The main reason a statement like "This is a first-class automobile" has traditionally been said to be puff is because it seems to say nothing — to be no more than boasting, a commendation, or an attempt to persuade to buy. A buyer can easily check the odometer on the car the seller is offering. The buyer can tell with the naked eye whether Able's "red" car is blue. A buyer can measure the "100-ft yacht" and put the lie to the seller when it turns out to be 50 feet.

But how can a buyer tell whether the car offered for sale is "first-class" or not? Is this not just a matter of opinion, not fact? For one person, a Chevy may be "first-class"; for another person, nothing less than a Bentley would be. Should the seller of a Chevy that the seller describes as "first-class" be liable for breach of warranty because the Chevy is not a Bentley? That would be a

148. Karl Popper (1902-1994) was an Austrian-born British philosopher of science and of history who was knighted by Queen Elizabeth II in 1965.

149. For an explanation of Popper's doctrine of falsification, see ROBERTA CORVI, AN INTRODUCTION TO THE THOUGHT OF KARL POPPER 22 (1997).
ridiculous conclusion, which is unjustifiably harsh toward sellers.

In fact, given the wide variety of human taste, it is impossible to tell what a “first-class” auto is — in other words, it is impossible to verify the statement. But a buyer does not have to verify the seller’s statement — and neither does the seller. If a buyer brings an action against the seller of a “first-class” automobile for breach of an express warranty, the burden of proof is not on the seller to prove that the car is “first-class”; the burden is on the buyer-plaintiff to prove that the car is not first-class.

What is the difference? The difference is that, owing to the differences in human tastes (Able likes Chevys and Baker likes Bentleys), buyers can never completely verify the statement “This is a first-class automobile.” But a seller can falsify the statement because, whatever “first-class” means, there are some qualities that are definitely not first-class on which even the Chevy-lover and the Bentley-phile can agree. In short, if Baker turns the ignition key and the car does not start, or if, when he opens the door, all the body parts fall off, or if the car explodes in flames a quarter mile from the showroom, is there any person in the world who, in good faith, could describe this car as “first-class?” The “puff” statement, “This is a first-class car” has been falsified. Thus, the seller has breached the express warranty.

Some difference exists between statements such as, “This car has only 6,000 miles on it” and “This car is first-class.” The first statement seems much more specific and particular. There is no question when it’s been breached: if the odometer reads 7,000 miles, 6,900 miles, even 6,001 miles — all constitute a breach of the express warranty. But what about the second statement (“This car is first-class”)? It seems much more general and the examples used to show breach are rather extreme: car falling apart, catching on

150. In fact, one can never verify any statement. Popper’s concept of falsification arose as a response to, and a criticism of, the concept of “verification” as the criterion for factual statements propounded by the Vienna Circle of logical positivism. According to the concept of “verification,” a statement became a statement of fact only when it could be empirically verified. ALFRED JULES AYER, LANGUAGE, TRUTH, AND LOGIC, 35 (2d. ed. 1946).

Popper, however, demonstrated that no statement can ever be verified because there is always the possibility of encountering a counterexample. Thus, the statement “All swans are black,” can never be verified because there is always the possibility that a swan of some other color will be discovered. Isaiah Berlin, My Intellectual Path, 53 N.Y. REV. OF BOOKS (May 14, 1998). This view undermines certainty, which may be psychologically unsatisfying but is unavoidable. No statement can ever be positively asserted as true, but, rather, must be viewed as a tentative hypothesis that may be disproved at any time. Id.

151. See Anderson, supra, note 87, at 66-67 (citing specificity as a factor in the creation of an express warranty).
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What about less extreme scenarios? Is a car “first-class” if the air conditioning does not work? That might be acceptable to the owner of the souped-up Chevy who will be kept cool by the breeze rushing through her hair but not acceptable to the Bentley purchaser. What about if the car gets only ten miles a gallon? The Bentley purchaser could afford that, but perhaps not the Chevy buyer.

Statements that hornbooks traditionally have classified as “puff” do constitute express warranties, but do not warrant particular features (such as air conditioning or specific miles per gallon). What then is being warranted? The “first-class” car has to run and it should not fall apart. To express this sort of warranty in a formula, all that is being warranted is that the car is of “fair, average” quality for goods of its kind: it does not have to have particular features and does not have to be the best one of its kind when measured against competing products from other manufacturers. The warranty is modest, but important: the car should “work.”

What does it mean to say that a product is of “fair, average” quality? It means that the product is merchantable, under the standard set out in U.C.C. § 2-314, which addresses the implied warranty of merchantability. However, a warranty created by the seller’s words (such as the warranties under examination) is not implied but express. Accordingly, the warranty under consideration here is not the implied warranty of merchantability but an express warranty of merchantability. A seller who states that “This is an A-1 car” or “This is a first-class car” is not uttering puff, but is in fact making an express warranty that the car is merchantable. If the car is not merchantable, the seller should be held liable for breach of an express warranty under § 2-313.

2. Reasonable Expectations

In addition to this rationale derived from the philosophy of science, Murray’s “reasonable expectation” test provides a further rationale. The reasonable expectation test “suggest[s] that the test for whether a statement creates an express warranty should be whether the statement creates reasonable expectations in the

152. An objection to this contention is examined in Section V.B, infra, at text accompanying notes 161 -68.
parties. The statement, "This is a first-class automobile" can mean different things to different people, but at the least, it creates a reasonable expectation that the car being sold is not junk. It raises a reasonable expectation that the car is a "fair, average" car of its kind. It raises a reasonable expectation that the car is merchantable.

This expectation coexists with an expectation (at least in purchasers over the age of five) that the seller will engage in some exaggeration. Mentally, the buyer will likely downgrade an assertion such as "first-class" to "average." What the purchaser will not do, however, is interpret the expression "first-class" as meaning "junk" and regard his expectations as satisfied when he receives unmerchantable goods. Concluding that the purchaser is exchanging good money (the most concrete measure of a purchaser's expectations) for junk is unreasonable.5

It is also unreasonable to concede that sellers do not know what they are doing. A seller will defend on the grounds that a statement such as, "This is a first-class automobile," is meaningless puff. Yet, if the seller thought the remark was meaningless, why did he make it? In trying to pass off his statements as puff, the seller is being disingenuous. Anyone who has ever bought anything knows why these statements are made. The reason is salesmanship, the intentional creation of expectations of quality in the buyer's mind aimed at inducing the buyer to buy. The seller must be held to the expectations he intended to create. Therefore, under John Murray's reasonable expectation test, a statement such as, "This is a first-class automobile" or "This is an A-1 car," creates an express warranty of merchantability.

D. Recognizing the Existence of an Express Warranty of Merchantability Is Essential in Order to Protect Consumers

The third reason that the decisions finding an express warranty in what hornbooks would call puff should not be dismissed as aberrations is a strong public policy justification: consumer

153. John E. Murray, Basis of the Bargain, 66 MINN. L. REV. 283, 317-18 (1982). The author has not found any evidence that the "reasonable expectation" test has ever been applied to extent urged here.

154. In some instances, the purchaser is doing precisely that. But in those instances when a purchaser wants a car only for its scrap metal, she will presumably pay no more than the car's salvage value, which will entail a lower price than for a working automobile. In other instances, "the probability is small that a real price is intended to be exchanged for a pseudo-obligation." U.C.C. § 2-313 cmt. 4.
protection. Article 2 of the Uniform Commercial Code does not adequately protect purchasers.\textsuperscript{155} An \textit{express} warranty of merchantability is needed, even though the Code already contains an \textit{implied} warranty of merchantability.

The most serious flaw in Article 2 is that it allows sellers to disclaim the implied warranty of merchantability. It has been said that the best possible consumer protection statute would be a flat statement in Article 2 that "A seller may not disclaim the implied warranty of merchantability."\textsuperscript{156} This approach was considered, but unfortunately rejected, by the drafters of Article 2.\textsuperscript{157}

Allowing disclaimer of the implied warranty of merchantability works the greatest injustice on consumers. It allows sellers to disclaim the four-year warranty to which consumers are entitled at no extra charge under the Code and to sell it back to consumers disguised as an "extended warranty" or "extended protection plan." These "extensions" provide less comprehensive coverage for defects than under the Code and, also, run for shorter periods.\textsuperscript{158} From an ethical standpoint, a swindle permitted by law is still a swindle.\textsuperscript{159}

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155. This is not a new criticism. \textsc{Murray \& Flechtner, supra} note 135, at 138-39. The drafters of Article 2 considered adding consumer protection provisions, but decided this new comprehensive commercial law statute would already be difficult enough to accept. \textit{Id.}

156. John Murray in a classroom lecture. \textit{See also} \textsc{Murray \& Flechtner, supra} note 135, at 139. Whether subsequently enacted consumer protection legislation has been effective is open to debate. For example, the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1996), disallows exclusion of the implied warranty of merchantability in consumer sales. However, a seller may limit the implied warranty's duration to mirror the duration of the express warranty —typically, ninety days. In addition, the seller is not even under an obligation to make an express warranty. When the seller does not make an express warranty, the effect is the same as if disclaimer of the implied warranty of merchantability had been allowed. \textsc{Murray \& Flechtner, supra} note 135, at 139-40.


158. \textsc{Murray \& Flechtner, supra} note 135, at 139. In sales in which the implied warranty of merchantability applies and has not been disclaimed, the implied warranty of merchantability is valid for the term of the Article 2 statute of limitations, usually four years from the date of delivery. U.C.C. § 2-725. By contrast, extended warranty plans sold by merchants usually run for much shorter periods.

159. If parties are forbidden to contract out of the implied warranty of merchantability, will the cost of goods be higher? Will consumers have to bear the extra cost of a nondisclaimable implied warranty of merchantability, just as they now do for an extended protection plan? Not necessarily, because a seller will not be able to pass along an additional cost to consumers in all cases. The extent to which sellers can pass on costs —if at all—is a function of the economic notion of cost incidence. Briefly, the more elastic the demand, the greater a portion of an extra cost will be absorbed by consumers in the form of higher prices. (Demand is said to be "elastic" when an increase in price does not produce a decrease in demand.) When demand is inelastic, it is sellers, not purchasers, who absorb the added cost. \textsc{Jeffrey L. Harrison, Law and Economics in a Nutshell} 17-19 (1995).
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Express warranties, unlike implied warranties, cannot be disclaimed. Thus, the need for an express warranty of merchantability is evident. Further, no reason exists why the express warranty of merchantability, once accepted by courts, should be limited to the sort of fact patterns examined here.

The express warranty of merchantability should also be enforced in large sales of new goods made between merchant sellers and buyers, even large corporations. Drafters may someday revise Article 2 to prohibit disclaimer of the implied warranty of merchantability. Meanwhile, courts can rectify this flaw in Article 2 by recognizing that so-called “puff” creates an express warranty of merchantability: a conclusion justified by case law, by philosophy, and by public policy.

V. OBJECTIONS TO THE ARGUMENT THAT “PUFF” MAY CREATE AN EXPRESS WARRANTY OF MERCHANTABILITY

Possible objections to the foregoing argument fall into two broad classes: (1) that an express warranty of merchantability does not exist; and (2) even if such a warranty does exist, it is ineffective.

A. The Express Warranty of Merchantability Does Not Exist

Some scholars can object that the foregoing argument relies too heavily on a small group of quirky cases. In fact, holdings that found puff was “really” an express warranty seem to be peculiar to cases where all of the following elements are present: (1) a casual seller; (2) used goods; (3) small dollar amounts of damages; (4) no fraud was asserted or, if asserted, was not provable; and (5) manifest injustice to a worthy plaintiff (because no implied warranty is available under the facts the court is “stretching” the law of express warranties in order to do justice).

A further criticism may be that these decisions lack precedential weight and are not very authoritative for two reasons: many are unreviewed trial court decisions and because a finding that an express warranty was created is a factual determination these holdings can be dismissed as merely the result of the vagaries of juries sympathetic to a plaintiff they feel worthy of relief.

Although the argument in this comment purports to be grounded in linguistic analysis, cannot linguistic analysis just as easily be used against it? Suppose there is such a thing as an express warranty of merchantability; would it not be a statement such as, “These goods are merchantable,” rather than “This engine is in
good condition?" Even if the term "merchantable" is unnecessary to create an express warranty of merchantability, a court might hold that words such as "A-l" or "good condition" are insufficient to warrant a product's merchantability and that an express warranty of merchantability requires greater specificity.160

B. An Express Warranty of "Merchantability" Actually Warrants a Lower Level of Quality than Merchantability: The "Description" Cases

The so-called "description" cases lie mainly outside the scope of this comment.161 In the description cases, the threshold issue is not whether supposed "puff" creates an express warranty (in these cases, the sellers made no "puff-like statements) but whether the very description of goods as an "automobile" or a "computer" creates an express warranty.162 If it does, the next issue is: what level of quality is warranted by the description: merchantability or some lesser level of quality?

In one respect, descriptions do incontrovertibly create express warranties. If a seller contracts to sell a buyer a car, the seller must sell the buyer a car. The seller cannot deliver a toaster or anything else but a car.

A different aspect presents the difficulty. This second aspect recalls the children's riddle, "When is a door not a door?" Answer: "When it's ajar." Here, however, the question is: "When is a car not a car?" The answer a buyer might give is: "When it doesn't work." To the buyer, an automobile is something that performs the functions of an automobile. If it does not perform those functions, it is no more an automobile than a cardboard box with

160. See, e.g., Ellmer v. Delaware Mini-Computer Sys., Inc., 665 S.W.2d 158. In Ellmer, the seller described the computer for sale as "a first-rate computer and would perform all the functions necessary to be performed by a commercial computer." Id. at 160. This description was held to create a "warranty of merchantability and of fitness for a particular purpose. . ." Id. Ellmer is discussed infra, at text accompanying notes 173 -78.

161. For a discussion of the "description" cases, see WHITE & SUMMERS, supra note 1, at § 9-4.

162. U.C.C. § 2-313, entitled "Express Warranties by Affirmation, Promise, Description, Sample," provides:

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

(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.

U.C.C. § 2-313(1)(b) (emphasis added).

163. "To me [said Ellery Queen], a wheel is not a wheel unless it turns.' [To which Ellery's friend Judge McCue responded:] 'That sounds suspiciously like pragmatism.'" ELLERY QUEEN, THE AMERICAN GUN MYSTERY 3 (1933) (republished 1976).
some wheels painted on it would be.\textsuperscript{164}

Several difficulties accompany this analysis. The first is that, given this understanding, how can a seller ever avoid making an express warranty of quality?\textsuperscript{165} Inherent in the concept of an express warranty is the idea that a seller is free not to make an express warranty if he so chooses. Second, if the express warranty being made is construed as one of merchantability, this express warranty of merchantability by description seems to perform an illegitimate end-run around § 2-316, which gives the seller the right to disclaim the implied warranty of merchantability.\textsuperscript{166}

Can the statutory right in § 2-316 be nullified by a judge-made doctrine? For some courts, the objection is insurmountable and they refuse to recognize an express warranty of merchantability by description. Courts that do recognize the warranty follow two tacks. First, they apply the express warranty of merchantability sparingly only in cases where its recognition is essential for justice to be done and only when all other theories have proved unavailing. Second, they construe this express warranty as warranting not merchantability but a lower level of quality: mere operability.\textsuperscript{167}

The boundaries between operability and merchantability are bound to be fuzzy and should be determined on a case by case basis. When is an “operable” car not a “merchantable” car? When it run, but the heater doesn’t work, the engine is ear-splittingly loud, and oil leaks demand frequent changes? Difficult as it may be to apply the operability standard, this is the compromise position some courts have settled on.

What is the relevance of the description cases to the “puff” cases? Even if “puff” does create an express warranty, it does not

\textsuperscript{164} This illustration and the preceding analysis are taken from Murray, \textit{The Emerging Article 2}, supra note 19, at 582.

\textsuperscript{165} Harry M. Flechtner speaks of “general language of description —language that a direct seller almost unavoidably must use.” Flechtner, supra note 7, at 415.

\textsuperscript{166} Id. at 417.

\textsuperscript{167} Dictum in Blankenship v. Northtown Ford, Inc. found an express warranty of merchantability created by the words “new car.” This warranty was breached when the car needed to be returned to the dealership for repairs eleven times within five months. Blankenship, 420 N.E.2d 167, 168 (Ill. App. Ct. 1981). The court held that this condition did not accord with the reasonable expectations created by the words “new car.” Id. at 171. In discussing Blankenship, one commentator remarked: “Unlike the court in Blankenship, others would not go so far as to infer merchantability from an express warranty created by description.” Manning Gilbert Warren III & Michelle Rowe, \textit{The Effect of Warranty Disclaimers on Revocation of Acceptance under the Uniform Commercial Code}, 37 A.L.A. L. Rev. 307, 333 (1986).
necessarily follow that puff creates an express warranty of merchantability. Instead a court might find that what the seller has created is an express warranty of mere operability.

The counterargument is: look to the reasonable expectations of the buyer. Did the buyer pay for a merchantable car or a merely operable car? Often, it will be difficult to tell. Pricing data for merely operable (as opposed to merchantable) cars of that year, make, and model may be unavailable or may be too difficult or expensive to justify collecting. The buyer will not always win his argument that what he bargained for was a merchantable car. However, even if the court construes the express warranty as one of operability alone, it will still be of value to the buyer in many cases. Is this not preferable to no remedy at all?

C. An Express Warranty of Merchantability Will Be Ineffective

If the so-called "express" warranty of merchantability is in substance identical with the implied warranty of merchantability then will it not be disclaimable, just as the implied warranty is and in the same way? The possibility that an express warranty of merchantability may be disclaimable is suggested by dictum in Ekizian v. Capurro. In Ekizian, the court found the seller's statement "the engine runs good" created an express warranty but also found it relevant to inquire whether an "applicable written disclaimer" existed. The court found none. The implication is that had there been an applicable written disclaimer, this express warranty would have been effectively disclaimed. Although the court did not use the term, the statement "engine runs good" is the sort of statement that creates an express warranty of merchantability. Therefore, a reading of Ekizian suggests that the express warranty of merchantability may be disclaimable.

Going a step further, one can argue that disclaiming the implied warranty of merchantability will also be effective to simultaneously disclaim the express warranty of merchantability. This occurred in Ellmer v. Delaware Mini-Computer Sys., Inc. In Ellmer, the

168. Recall the previous observation that a court could find that an express warranty of merchantability existed, but something more than language such as "good" or "mint condition" is required to create it. See supra text accompanying note 160.
169. 444 N.Y.S.2d 361.
171. Id.
172. Id.
seller described a computer as "a first-rate computer and would perform all the functions necessary to be performed by a commercial computer." The court held that this language created a warranty of merchantability and of fitness. The court did not describe this as an express warranty of merchantability, but neither did it deem the description as an implied warranty. Since it cannot be an implied warranty because it was created by words, it must be an express warranty.

Of all the cases examined here, this case comes closest to calling the express warranty of merchantability by name. However, in Ellmer, what became of this express warranty of merchantability? The seller's contract of sale disclaimed the implied warranties of merchantability and of fitness and limited the buyer's remedies to a sixty-day repair and replace warranty. The court held that the warranty of merchantability created by the seller's words was disclaimed by the warranty disclaimer provisions contained in the contract of sale. Thus Ellmer represents an instance of a disclaimer of the implied warranties being simultaneously effective to disclaim the express warranty of merchantability.

Considered one way, it is not unreasonable for exclusion of the implied warranty of merchantability to simultaneously exclude the express warranty of merchantability. This would follow from the express warranty of merchantability's hybrid nature. On the one hand, the express warranty of merchantability is like an express warranty in that it is created by words; on the other hand, the express warranty of merchantability is like the implied warranty of merchantability in what it warrants: merchantability of goods. What courts will decide on this issue may depend on whether they regard the express warranty of merchantability as more like an express warranty (which will weigh in favor of finding that the express warranty of merchantability is nondisclaimable) or more

174. Ellmer, 665 S.W.2d at 160.
175. Id.
176. Id. at 159.
177. Id. at 160. The court observed that this "warranty of merchantability and of fitness for a particular purpose [was] the identical warranty which is expressly disclaimed in the contract." Id.
178. Could the buyer have argued that what was expressly warranted was mere operability, not merchantability, so that disclaimer of the implied warranty of merchantability would be ineffective to disclaim the express warranty of merchantability? Or is operability, as a lower level of quality than merchantability, subsumed under the concept of merchantability so that disclaimer of merchantability would necessarily also act to disclaim operability?
like the implied warranty of merchantability (which will weigh in favor of finding that the express warranty of merchantability is disclaimable).

VI. RESPONSE TO OBJECTIONS AND CONCLUSION

All of the above are legitimate objections and cannot be refuted. But the argument for an express warranty of merchantability cannot be refuted either. There are no "true" answers to legal questions in the sense of answers existing in some Platonic heaven independent of a court's ruling. This comment began by saying that courts, not hornbooks, make the law. (Note that Law Review comments do not make the law either.)

What has been said here about the express warranty of merchantability is not law — yet. It will become law to the extent that courts adopt it. Some courts have already found express warranties in what hornbooks would call "puff," but they have done so through questionable legal reasoning. Furnishing a plausible and persuasive rationale will encourage other courts to reach this same result without distorting the law.

The purchaser's reasonable expectations, as well as Karl Popper's falsification criterion, demonstrate that seemingly "puff"-like descriptions, such as "good condition," are meaningful and signify that the seller warrants that the goods in question are merchantable. Llewellyn points out that, in any dispute, both sides generally can present a case that is technically sound from a legal standpoint.¹⁷⁹

¹⁷⁹ KARL N. LLEWELLYN, HOW APPELLATE COURTS DECIDE CASES 17-18 (1951) (text of two lectures delivered by Professor Llewellyn on Jan. 10, 1945 and May 10, 1945 to a group of judges and lawyers assembled in Philadelphia, Pa.). As a conservative estimate, Llewellyn suggests that at least four technically sound legal arguments can be developed from any set of facts. Id.
Llewellyn adds that presenting a technically sound legal argument is only the first step. To prevail, a party must present a technically sound legal argument that makes sense to the court. Which argument makes better sense? The express warranty of merchantability’s technical soundness is demonstrated by logic and case law, but what is more, it satisfies the crucial need for purchaser protection, which the “hornbook” view does not. It allows a court to do justice. When two arguments are both technically sound, sense is found where justice lies.

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180. *Id.* at 18.