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## Oral Warranties and Written Disclaimers in Consumer Transactions: Indiana's End Run Around the U.C.C. Parol Evidence Rule

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In the course of promoting their products, manufacturers and sellers often engage in extensive advertising campaigns aimed at prospective buyers, whether ordinary consumers or commercial buyers. Later, when the seller and buyer are face to face either in the seller's store or showroom, or when a seller's representative calls on the buyer, sales personnel frequently extol the qualities of the goods and answer the buyer's questions before the parties sign a contract of sale. Both the advertising and the statements of the seller may constitute express warranties of the goods.<sup>1</sup> However, the written contract of sale often contains a provision that disclaims all warranties other than those set forth in the writing, and the writing frequently does not set forth any of the warranties contained in the advertising or made by the seller's representative. The contract may also contain a merger clause which states that the writing sets forth the entire agreement between the parties.

The conflict between the oral warranty and the written disclaimer requires an analysis of two provisions of the Uniform Commercial Code: the section authorizing the disclaimer of express warranties and the Code's version of the parol evidence rule. Section 2-316(1) of the Code states:

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1. See U.C.C. § 2-313(1) (1972) and IND. CODE § 26-1-2-313(1) (1988). The seller makes an express warranty when he makes a statement of fact or promise which relates to the goods, describes the goods, or shows a sample or model, and the statement, promise, description, sample, or model becomes "part of the basis of the bargain" between the parties. *Id.*

In this article all citations to the Code will be to the generic section numbers, e.g., § 2-313(1), rather than to the Indiana Code citation, unless the Indiana Code differs from the Official 1972 Draft.

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other; but *subject to the provisions of* [§ 2-202] on parol or extrinsic evidence, negation or limitation is inoperative to the extent that such construction is unreasonable.<sup>2</sup>

The Code's parol evidence rule, section 2-202, states:

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 [§ 1-205] or by course of performance [§ 1-208]; and
- (b) by evidence of consistent additional terms, unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.<sup>3</sup>

Section 2-316 creates two problems: how to construe an express warranty and a disclaimer of express warranty so they are consistent with each other, and how to apply the parol evidence rule in the event the alleged express warranty is oral and the written contract contains either a disclaimer clause with which the warranty is inconsistent or a merger clause which purports to exclude all parol evidence, including that of an oral warranty.<sup>4</sup>

The Code conflict between oral warranties and written disclaimers has sparked much comment.<sup>5</sup> Indiana's resolution of the conflict, particularly in consumer cases, is troublesome given these provisions of the Code, some recent cases, and Indiana's historical approach to the parol

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2. U.C.C. § 2-316(1) (1972) (emphasis added).

3. *Id.* § 2-202.

4. *See id.* § 2-316.

5. *See, e.g.,* Jordan v. Doonan Truck & Equip., Inc., 220 Kan. 431, 435, 552 P.2d 881, 883 (1976); Duesenberg & King, *Sales and Bulk Transfers under the Uniform Commercial Code*, 3 U.C.C. Serv. (MB) § 6.06 (1988) [hereinafter Duesenberg & King]; J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 12-4 (3d ed. 1988) [hereinafter WHITE & SUMMERS]; Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 DUKE L.J. 881, 914-18 (1970); Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 UCLA L. REV. 281, 310 (1961); Note, *Implied and Express Warranties and Disclaimers under the Uniform Commercial Code*, 38 IND. L.J. 648 (1963).

evidence rule. The most recent cases involving this problem, *Carpetland U.S.A. v. Payne*,<sup>6</sup> and *Travel Craft, Inc. v. Wilhelm Mende GmbH & Co.*,<sup>7</sup> are the focus of this Article.

### I. THE CASES

Before she purchased new carpet for her son's home, Bezzel Payne was assured by the salesman that the carpet was guaranteed for one year and that the seller would replace it if any defects appeared within that time.<sup>8</sup> However, the printed sales contract presented for her signature stated on the reverse side, in light gray, capital letters under the heading "OTHER TERMS AND CONDITIONS":

EXCEPT FOR DESCRIPTION ON REVERSE SIDE HEREOF, BUYER ACKNOWLEDGES THAT NO EXPRESS OR IMPLIED WARRANTIES (INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS) HAVE BEEN MADE BY SELLER AND SELLER HEREBY DISCLAIMS ALL SUCH WARRANTIES. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE FACE HEREOF."<sup>9</sup>

The only descriptions on the face of the contract were "100% nylon pile" and "Mustang Mahogany."<sup>10</sup> Within a few weeks after installation, the pile began to come loose and bald spots appeared. A representative of the seller examined the carpet, trimmed the loose fibers, and gave instructions to trim any additional loose fibers. When the seller refused to replace the carpet, Mrs. Payne sued for breach of warranty. She was permitted by the trial court to introduce evidence of the salesman's oral representations, and ultimately recovered for breach of express warranty. The seller appealed.

The Indiana Court of Appeals, quoting section 2-316(1),<sup>11</sup> concluded that the oral warranty and the written disclaimer of express warranties were inconsistent, and ruled that the disclaimer was inoperative. In so doing, the court noted its awareness "that this holding *seemingly* ignores the parol evidence provision"<sup>12</sup> of the Code, and compared the approaches to the problem as expressed by *White & Summers*<sup>13</sup> and *Duesenberg &*

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6. 536 N.E.2d 306 (Ind. Ct. App. 1989).

7. 534 N.E.2d 238 (Ind. Ct. App. 1989).

8. *Carpetland*, 536 N.E.2d at 307.

9. *Id.* at 309; Defendant's Trial Exhibit A.

10. Defendant's Trial Exhibit A.

11. See *supra* note 2 and accompanying text.

12. 536 N.E.2d at 309 n.1 (emphasis added).

13. *WHITE & SUMMERS*, *supra* note 5, at 493-96. (The page citations in the court's opinion are incorrect.)

King.<sup>14</sup> The former would require a parol evidence analysis and would admit evidence of an oral warranty only if the writing was not intended to be the final agreement of the parties.<sup>15</sup> The latter, in the court's words,

[S]uggest that the very existence of a prior oral express warranty indicates that the writing itself was not intended to be a final expression of the parties . . . [and that] whenever a prior oral express warranty is contradicted by a written disclaimer, the parol evidence rule as codified 26-1-2-202 would have no effect on the analysis, and evidence of the oral warranty should be admitted.<sup>16</sup>

The court concluded that Indiana has adopted the view of Duesenberg & King so that it is "unnecessary to evaluate the written agreement to determine whether or not it was a final expression of the parties' intent [under the parol evidence rule] before abandoning the parol evidence rule and hearing evidence of prior oral express warranties."<sup>17</sup> Thus, the court completely ignored the statutory mandate that negation or limitation of an express warranty is "subject to the provisions of [§ 2-202] on parol evidence."<sup>18</sup> As noted below, the court's characterization of the Duesenberg & King analysis is not quite accurate.<sup>19</sup>

In support of its statement of the Indiana position, the court relied on three decisions: *Woodruff v. Clark County Farm Bureau Coop. Assoc.*,<sup>20</sup> *Jones v. Abriani*,<sup>21</sup> and *Art Hill, Inc. v. Heckler*.<sup>22</sup> Although each case involved a prior express warranty followed by a written disclaimer of warranties in the sales contract, and in each case the disclaimer was ruled inoperative, none of the cases mentioned the possible applicability or effect of the parol evidence rule. In *Woodruff*, on which the other two cases relied,<sup>23</sup> the court quoted section 2-316(1), but emphasized only the negation or limitation language, and declared that if there is both an express warranty and a disclaimer of that warranty, the disclaimer is unreasonable and inoperative.<sup>24</sup> The *Woodruff* court, as well as the

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14. Duesenberg & King, *supra* note 5, § 6.06.

15. See WHITE & SUMMERS, *supra* note 5.

16. *Carpetland*, 536 N.E.2d at 309 n.1 (citations omitted).

17. *Id.*

18. U.C.C. § 2-316(1) (1972).

19. See *infra* notes 46-47 and accompanying text.

20. 153 Ind. App. 31, 286 N.E.2d 188 (1972).

21. 169 Ind. App. 556, 350 N.E.2d 635 (1976).

22. 457 N.E.2d 242 (Ind. Ct. App. 1984).

23. See *Art Hill, Inc.*, 457 N.E.2d at 244; *Jones*, 169 Ind. App. at 571, 350 N.E.2d at 645.

24. *Woodruff*, 153 Ind. App. at 51-52, 286 N.E.2d at 199-200.

courts in *Jones*, *Art Hill*, and *Carpetland*, acted as if the Code language invoking the parol evidence rule did not exist.<sup>25</sup>

Contrasted with *Carpetland* is *Travel Craft, Inc. v. Wilhelm Mende GmbH & Co.*,<sup>26</sup> in which the trial court refused to admit evidence of oral express warranties. After the president of seller Wilhelm Mende GmbH, a producer of aluminum products, solicited business from a number of mobile home manufacturers, including buyer Travel Craft, the parties entered into a sales agreement, the only written component of which was a letter drafted, signed, and sent by the buyer and then signed by the seller. It stated: "The seller agrees for a period of three years from the date of delivery that the product manufactured by it will be free under normal use from substantial defects in materials or workmanship. There are no other warranties, express or implied."<sup>27</sup>

The Indiana Court of Appeals agreed with the trial court's conclusion that the parties intended the letter to be their final agreement with respect to warranties and that the alleged oral warranties made prior to the letter were properly excluded under the parol evidence rule.

The essential difference between the two cases is that *Carpetland* involved a consumer who was given a pre-printed form to sign and had little, if any, bargaining power, and *Travel Craft* involved two commercial entities who specifically negotiated the warranty language. This may support the different results, but only *Travel Craft* directly confronted

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25. The *Art Hill* case, in particular, has been criticized for ignoring the language of the Code, not first examining the parol evidence rule, and then concluding that the written contract was not the full and final expression of the parties' agreement. See B. CLARK & C. SMITH, *THE LAW OF PRODUCT WARRANTIES* § 8.02[3] (Supp. 1987); Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1263 (1987). The Special Project authors noted, however, that had the court considered the issue, it probably would have achieved the same result favoring the buyer because of the exception to the parol evidence rule under which evidence of fraud is admissible. From the recited facts of the case, it appeared that the seller had made repeated assurances to the buyer that the seller had no intention of fulfilling. *Id.* at 1263-64 n.605.

26. 534 N.E.2d 238 (Ind. Ct. App. 1989).

27. *Id.* at 241. See Affidavit of John Koster, President and Owner of Wilhelm Mende GmbH & Co., in Support of Motion for Summary Judgment, Record at 193-94. The principal issue in *Travel Craft* was the interpretation of the term "normal use," as set forth in the warranties letter. The trial court granted defendant-seller's motion for summary judgment based on seller's affidavit that normal use of its product did not include sidewall construction of motor homes. The Indiana Court of Appeals affirmed because the plaintiff-buyer did not respond by affidavit or otherwise. 534 N.E.2d at 240. However, in view of seller's affidavit that its president had visited the plants of several mobile home manufacturers for the purpose of soliciting their business, it appears that seller's own affidavit raised an issue of fact which could not be resolved on summary judgment, namely, what was the normal use of seller's product if not for use in mobile home manufacture. Stated another way, why did seller solicit mobile home manufacturers if its product was not suitable for use in their products?

the applicability of the parol evidence rule. *Carpetland* ignored it. Had the court in *Carpetland* engaged in a parol evidence rule analysis, as it should have, the result, in all likelihood, would have been the same. Had the court in *Travel Craft* utilized the approach taken in *Carpetland*, however, the result probably would have been different.

## II. THE CODE'S POLICIES

The underlying source of the difficulty with *Carpetland's* approach lies in the language of 2-316(1) and in the apparently contradictory policies expressed by the Code drafters. The section itself has been characterized as "puzzling,"<sup>28</sup> a "verbose and confusing mass of language,"<sup>29</sup> a matter of "obscure draftsmanship,"<sup>30</sup> and expressed "in language that would at once both amaze and delight Gilbert and Sullivan" so that it "says nothing; it means nothing."<sup>31</sup> The official comment explains that the provision which gives preference to an express warranty over an inconsistent disclaimer, and upon which the *Carpetland* court based its decision, is "to protect a buyer from unexpected and unbar-gained language of disclaimer. . . ."<sup>32</sup> The comment continues, however, that "the seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence. . . ."<sup>33</sup> The Code does not deal with true allegations of genuine oral warranties which the seller has thereafter attempted to disclaim.<sup>34</sup>

In addition to this preference in favor of express warranties over disclaimers, the drafters have stated that:

"Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms.<sup>35</sup>

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[A]ny fact which is to take such affirmations [i.e., express

28. H. PRATTER & R. TOWNSEND, *INDIANA UNIFORM COMMERCIAL CODE WITH COMMENTS* 44, § 2-316 comment (1963).

29. Note, *Implied and Express Warranties and Disclaimers Under the Uniform Commercial Code*, 38 *IND. L.J.* 648, 666 (1963).

30. Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 *DUKE L.J.* 881, 914.

31. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 *UCLA L. REV.* 281, 310 (1961).

32. U.C.C. § 2-316 comment 1 (1972).

33. U.C.C. § 2-316 comment 2 (1972).

34. See Broude, *supra* note 30, at 918. He concludes that the drafters intended evidence of true warranties to be admissible. *Id.*

35. U.C.C. § 2-313 comment 1 (1972).

warranties] once made, out of the agreement requires clear affirmative proof.<sup>36</sup>

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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[;]

and

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.<sup>37</sup>

The background leading to the adoption of the present language of section 2-316(1) is helpful in determining whether the drafters intended that prior express warranties could be excluded under the parol evidence rule.<sup>38</sup> Between the time it first appeared in drafts of the Uniform Revised Sales Act and the 1956 revision of the Code which ultimately resulted in the present language, the provision on disclaimer of express warranties stated, in its entirety, "If the agreement creates an express warranty, words disclaiming it are inoperative."<sup>39</sup> The comment to this section expressed the very same goals of protecting both the buyer and the seller as does the current comment to section 2-316, described above.<sup>40</sup>

36. U.C.C. § 2-313 comment 3 (1972).

37. U.C.C. § 2-313 comment 4 (1972).

38. *But see* Duesenberg & King, *supra* note 5, at 6-14 to 6-15 (stating that the legislative history is not at all helpful).

39. Unif. Revised Sales Act § 41 (Proposed Final Draft No. 1 1944), in II UNIFORM COMMERCIAL CODE DRAFTS 32 (Kelly 1984); U.C.C. § 2-316(1) (1954 Draft). The origin of this section appears to be in Professor Llewellyn's Notes from SALES ACT § 36 (Prelim. Draft No. 8 1943), in THE KARL LLEWELLYN PAPERS, § J, item V.2.a: "No express warranty can be disclaimed or modified." The classification and indexing of the late Prof. Llewellyn's papers appear in R. ELLINWOOD & W. TWINING, THE KARL LLEWELLYN PAPERS: A GUIDE TO THE COLLECTION (1970). The collection itself is in the library of the University of Chicago Law School and is available in other libraries on microfilm.

40. *See supra* notes 32-33 and accompanying text. The comment to § 2-316 (1949 Draft) states:

1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by prohibiting the disclaimer of express warranties . . . .

2. The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence . . . .

VII UNIFORM COMMERCIAL CODE DRAFTS 126 (Kelly 1984).

In his report to the New York State Law Revision Commission in 1955, Professor John Honnold observed that "the most plausible construction" of the parol evidence rule of section 2-202 and of the disclaimer provision of section 2-316(1) was that the drafters did not intend to protect oral express warranties from the operation of the parol evidence rule and that the prohibition against disclaimers of express warranties did not apply until after the parol evidence rule analysis was completed.<sup>41</sup> Professor Honnold's principal problem with the section was that if an agreement was read as a whole, there could be no express warranty in the presence of a disclaimer. On the other hand, if the agreement was read to give meaning to each part, the express warranty could override a disclaimer. Accordingly, he suggested a modification of the section, but he did not include in his modification any reference to the parol evidence rule because he thought it unnecessary.<sup>42</sup>

In response to Professor Honnold's report, Professor Robert Braucher<sup>43</sup> agreed that there were problems with 2-316(1) but rejected Professor Honnold's proposal because it "would also require that words of disclaimer be disregarded in determining whether the agreement creates an express warranty," and "doubt would be cast on the use of written words of disclaimer to exclude inconsistent oral warranties under Section 2-202."<sup>44</sup> He agreed that the original version of 2-316(1) necessarily involved the parol evidence rule. In place of the Honnold proposal,

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41. See Honnold, *Analyses of Sections of Article 2, Part A*, 1 N.Y.L. REV. COMM'N. REPORT 355, 406 (1955). But see Duesenberg & King, *supra* note 5, at 6-15; Note, *Implied and Express Warranties and Disclaimers Under the Uniform Commercial Code*, 38 IND. L.J. 648, 668-69 (1963). In commenting on the old § 2-316, Duesenberg & King state: "In the 1952 edition, there would be no question that the oral express warranty would prevail. No reference would have to be made to the parol evidence rule, and it would certainly appear that Section 2-316 would override Section 2-202 where a case of conflict arose." Later, however, they also state, after commenting on the history of the revision, "If it was felt that the parol evidence rule would still exclude prior or contemporaneous oral agreements or warranties, the language in the 1952 edition would go along with that if necessary." Duesenberg & King, at 6-16.

The writer of the Note believed that the original language of § 2-316 required the court to admit evidence of any oral warranties despite the parol evidence rule. 38 IND. L.J. at 668-69.

42. See Honnold, *supra* note 41, at 405-06. The language he suggested was: "(1) To the extent possible, an agreement shall be so construed as to give effect to each part, and words or conduct which otherwise would create an express warranty shall not be denied effect by words of disclaimer." *Id.* at 406.

43. Professor Braucher was chairman of the American Law Institute—National Conference of Commissioners on Uniform State Laws Subcommittee on Article 2. The Code was a joint project of the A.L.I. and N.C.C.U.S.L.

44. Braucher, *Comment on Criticisms of Article 2 Uniform Commercial Code* 49 (1955), a typed memorandum for submission to the N.Y.L. Rev. Comm'n., found in THE KARL LLEWELLYN PAPERS, § J, Item XVII.2.a., at 49-50.

Professor Braucher proposed language which is substantially the same as that of the present section, including the cross-reference to section 2-202.<sup>45</sup>

When the revision was presented to the N.Y.L. Rev. Comm'n. for further consideration, Professor Robert Pasley reported:

The reference to parol or extrinsic evidence (§ 2-202) seems misplaced, since Section 2-202 is clearly applicable where the expressions of warranty and of disclaimer are consistent as well as where they cannot reasonably be construed as consistent. (See Comment 2 to the 1952 Draft.) Apart from this point, the proposed redraft appears to adopt in principle the meaning suggested by Professor Honnold.<sup>46</sup>

The problem being addressed by these three scholars was the difficulty with construction of the language relating to warranties and disclaimers in the writing itself, not to oral warranties conflicting with written disclaimers. All three understood that the parol evidence rule was applicable, no matter how the section was re-drafted to resolve the inconsistency.

The substantial majority of courts and writers agree that a parol evidence rule analysis precedes the resolution of any possible inconsistency between the warranty and the disclaimer.<sup>47</sup> Even Duesenberg and King, on whom the *Carpetland* court relied for avoiding any parol evidence rule considerations, indicate that such an analysis is required and that

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45. *Id.* Professor Braucher stated:

This provision has long been troublesome, and this subcommittee believes that the following counterproposal would clarify it. The cross-reference to Section 2-202 is an afterthought of the chairman not yet considered by the subcommittee:

(1) [If the agreement creates] *words or conduct relevant to the creation of an express warranty and words or conduct relevant to disclaimer of warranty* [an express warranty,] *shall be construed wherever reasonable as consistent with each other; but* [words disclaiming it] *subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) disclaimer* [are] *inoperative to the extent that such construction is unreasonable.*

*Id.*

46. Pasley, *Analyses of Sections of Article 2* (Sections Revised in Supplement No. 1), Part D, in 1 N.Y.L. REV. COMM'N. REPORT 723, 743 (1955).

47. See, e.g., *Jordan v. Doonan Truck & Equipment, Inc.*, 220 Kan. 431, 552 P.2d 881 (1976); *Miller v. Hubbard-Wray Co.*, 52 Or. App. 897, 630 P.2d 880, 883-84 (1981); WHITE & SUMMERS, *supra* note 5, at § 12-4; Braude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 DUKE L.J. 881, 917; Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 CORNELL L. REV. 1, 8 (1962); Moye, *Exclusion and Modification of Warranty Under the U.C.C.—How to Succeed in Business Without Being Liable for Not Really Trying*, 46 DENVER L.J. 579, 593-95 (1969).

the court should find that the writing was not the final expression of the parties' agreement before reaching the inconsistency issue.<sup>48</sup> They state that in the apparent conflict between the parol evidence rule of section 2-202 and the present language of 2-316(1), "it seems as though Section 2-202 will prevail at least to the extent that is necessary for the court to determine if the writing is the final expression of the parties' agreement."<sup>49</sup>

What, then, should a court do when this problem arises? The paradox inherent in this problem is that for the court to determine whether or not there was an express warranty with which the disclaimer may be inconsistent under section 2-316, it must consider the buyer's parol evidence of the seller's representations, the very evidence which the seller intended to exclude by the disclaimer and which may be excludable under the parol evidence rule.<sup>50</sup> But if the representations do not create an express warranty, there is nothing with which the disclaimer is inconsistent under section 2-316 and that section, including the reference to the parol evidence rule, is irrelevant. And if the disclaimer is effective, evidence of warranties inconsistent with it is inadmissible under the parol evidence rule.

The same type of paradox is presented when a party alleges that a written contract was procured by fraud, which invokes a traditional exception to the parol evidence rule. More than one hundred years ago, the Indiana Supreme Court stated that if a warranty does not appear in a written contract, it cannot be proved by parol evidence unless it is alleged to have been false or fraudulent, in which event it is admissible

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48. See Duesenberg & King, *supra* note 5, at 6-14. A more complete quotation of their position than that appearing in *Carpetland* is:

The section on parol evidence would seem to say that if the writing is intended to be the final expression of the intent or contract of the parties, then no evidence of prior or contemporaneous terms may be admissible. Of course, it would always be left open for a court to find that the writing itself was not intended as the final expression of the parties. This finding could be based solely on the fact of the existence of the prior oral express warranty. This would seem like circular reasoning by finding that the express oral warranty made the written contract not conclusive, final or complete and, therefore, permitting the express oral warranty to be admissible in evidence. Yet this is the result that seems to be intended by the Code, or at least, if not intended, one that is left open to a court to achieve.

*Id.*

49. *Id.* at 6-15.

50. See G. WALLACH, *THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE* § 11.11[1][a] (1981), in which the author observes that the buyer must overcome the barrier of the parol evidence rule before the seller is faced with the problem of establishing that the disclaimer is valid.

as evidence of the representation.<sup>51</sup> In such cases, the court will hear the evidence of the alleged fraud in order to determine if there was fraud so as to invoke the exception and permit one party to avoid the contract or recover damages.<sup>52</sup> If there was no fraud, the exception does not apply and the evidence is not admitted. The courts have been able to deal with the problem without much difficulty.

The resolution of the section 2-316(1) issue of admissibility of an oral warranty and any inconsistency between the warranty and disclaimer therefore depends on the state's policy with respect to how the parol evidence rule should be applied.

### III. INDIANA AND THE PAROL EVIDENCE RULE

The Indiana policy on the admissibility of parol evidence has been a conservative one. In non-Code cases, the courts have consistently adhered to a "four corners" approach under which there is a conclusive presumption as a matter of substantive law that if a written agreement appears to be complete on its face, it contains the entire agreement of the parties. In the absence of such factors as fraud, mistake, illegality, duress, ambiguity, or undue influence, parol or extrinsic evidence will not be admissible to add to, vary, or explain the writing's terms.<sup>53</sup> Moreover, because the parol evidence rule is a rule of substantive law, the courts may not consider such evidence even if it is admitted at trial without objection.<sup>54</sup> By 1950, it was well settled in Indiana that "[w]here a written contract of warranty is made, oral warranties and implied warranties are all merged in the written contract, and by its terms the parties must be bound, as in other cases of written agreements."<sup>55</sup> Thus, in another pre-Code case involving the sale of a used automobile, the court stated the rule to be that "in the absence of fraud or mistake an express warranty cannot be shown by parole [sic] evidence where the

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51. *McClure v. Jeffrey*, 8 Ind. 79, 83 (1856). See *Vernon Fire & Casualty Ins. Co. v. Thatcher*, 152 Ind. App. 692, 701, 285 N.E.2d 660, 666 (1972).

52. *Vernon Fire & Casualty Ins. Co. v. Thatcher*, 152 Ind. App. 692, 701, 285 N.E.2d 660, 667 (1972).

53. See, e.g., *Lewis v. Burke*, 248 Ind. 297, 305, 226 N.E.2d 332, 337 (1967); *Creech v. LaPorte Prod. Cred. Ass'n*, 419 N.E.2d 1008, 1010 (Ind. Ct. App. 1981); *Hauck v. Second Nat'l Bank*, 153 Ind. App. 245, 260-63, 286 N.E.2d 852, 861 (1972).

54. See *Franklin v. White*, 493 N.E.2d 1161, 1165-66 (Ind. 1986); *Hancock v. Kentucky Central Life Ins. Co.*, 527 N.E.2d 720 (Ind. Ct. App. 1988).

55. Memorandum of F. M. Schultz to Dean Gavit dated June 24, 1950, prepared in connection with the Summer Institute on the U.C.C.—The Indiana Law of Sales, conducted by Karl Llewellyn and Soia Mentschikoff, *THE KARL LLEWELLYN PAPERS*, § J, item XII.1.m (quoting *Sullivan Mach. Co. v. Breeden*, 40 Ind. App. 631, 637, 82 N.E. 107, 109 (1907) (quoting *Shirk v. Mitchell*, 137 Ind. 185, 190, 336 N.E. 850, 851 (1894) (citing a long line of cases))).

written contract is complete in all its parts.”<sup>56</sup> However, parol evidence of alleged fraudulent misrepresentations of the car’s mechanical condition was admissible as an exception to the rule.<sup>57</sup>

The only crack in the strict four-corners approach in non-Code cases appears in *Weaver v. American Oil Co.*,<sup>58</sup> in which the court first recited the traditional parol evidence rule that an apparently complete writing is conclusively presumed to be fully integrated, and then characterized the rule as “an archaic rule from the old common law” whose only merit is its simplicity.<sup>59</sup> But the court did not abrogate the rule or the presumption. The issue in *Weaver* was the enforceability of exculpatory and indemnification clauses which the court concluded were unconscionable and contrary to public policy because of one party’s overwhelmingly stronger bargaining power, the other’s lack of knowledge of the existence or meaning of the clauses, and the substantial hardship imposed by the two clauses.<sup>60</sup> Although *Weaver* is considered a leading case on unconscionability and exculpatory and indemnification clauses,<sup>61</sup> it has also been cited as authority for the conservatively applied parol evidence rule and the presumption of integration,<sup>62</sup> this despite its criticism of the rule. No other case since *Weaver* has criticized the parol evidence rule in the same manner.<sup>63</sup>

The touchstone of section 2-202 is the actual intent of the parties. The official comment states that the section rejects “any assumption that because a writing has been worked out which is final on some

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56. *Clarke Auto Co. v. Reynolds*, 119 Ind. App. 586, 591, 88 N.E.2d 775, 778 (1949).

57. *Id.*

58. 257 Ind. 458, 276 N.E.2d 144, *reh’g denied* (1971).

59. *Id.* at 464, 276 N.E.2d at 147.

60. In *Weaver*, the service station lease between the lessee, Weaver, and the lessor, American Oil Co., contained clauses which exculpated American from the negligence of its employees and required Weaver to indemnify American against any liability arising from such negligence. An employee of American negligently sprayed Weaver and his employee with gasoline, thereby injuring them. At issue was American’s liability to either Weaver or his employee and Weaver’s duty to indemnify American should Weaver’s employee recover from it.

61. See, e.g., *Franklin v. White*, 493 N.E.2d 161, 165 (Ind. 1986).

62. See *Vernon Fire & Casualty Co. v. Thatcher*, 152 Ind. App. 692, 701, 285 N.E.2d 660, 665 (1972). The court quoted *Weaver*’s characterization of the rule as archaic as being “not material here, yet not without significance.” *Id.* n.6. The reason it was not material was because the case involved actionable misrepresentation or fraud, always admissible under any version of or approach to the parol evidence rule.

63. A search of Lexis on October 16, 1989, disclosed 38 cases in which *Weaver* was cited. With the exception of *Vernon Fire & Casualty Ins. Co.*, discussed in the immediately preceding footnote, none made reference to the comment that the presumption of integration was archaic.

matters, it is to be taken as including all the matters agreed upon. . . ."<sup>64</sup> This is a rejection of the four-corners rule in favor of a determination by the court of the actual intent of the parties from evidence outside the writing.<sup>65</sup> Analysis of the rule's effect should involve an examination of all the evidence relating to the parties' actual intent,<sup>66</sup> including the circumstances surrounding the transaction, such as the relative bargaining strengths of the parties and the ability of one party to control the transaction with a pre-printed contract. Unfortunately, it is possible for a court to look to the language of the Code as requiring a determination of the intent of the parties and still apply a conservative approach in determining that intent.<sup>67</sup> Thus, a court could conclude that if the buyer has read and signed a contract containing a disclaimer of warranties or a merger clause, evidence of an oral warranty is inadmissible and there is no conflict to be resolved under section 2-316.<sup>68</sup>

Seven Indiana cases have mentioned or discussed section 2-202.<sup>69</sup> Two, namely, *Carpetland* and *Travel Craft*, are the focus of this Article. In none of the remaining five did the court discuss specifically how to determine if a writing constitutes a total integration. Either there clearly

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64. U.C.C. § 2-202 comment 1(a) (1972).

65. See, e.g., R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 69 (1970); Braude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 DUKE L.J. 881, 916-17; Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35, 49-50 (1985); Note, *Warranties, Disclaimers and the Parol Evidence Rule*, 53 COLUM. L. REV. 858, 861-63 (1953).

66. H. PRATTER & R. TOWNSEND, *supra* note 28, at 23.

67. See Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEX. L. REV. 60, 74 (1975), in which the author notes that the text of § 2-202 takes no stand on whether a four-corners test is appropriate to determine intention, and that the courts are divided on the issue. He adds that official comment 3 assumes that the court will hear evidence of intent. He concludes, therefore, that because of § 2-202 and comment 3, Texas, which was a four-corners state, would be more likely to admit evidence of oral warranty which would have been excluded under prior law. *Id.* at 74-75.

68. See, e.g., *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966); 2 W. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* § 2-316:06 (1984).

69. As of October 15, 1989, a Lexis search indicated that the term "26-1-2-202" was cited in eight cases: *Carpetland U.S.A. v. Payne*, 536 N.E.2d 306 (Ind. Ct. App. 1989); *Travel Craft, Inc. v. Wilhelm Mende GmbH & Co.*, 534 N.E.2d 238 (Ind. Ct. App. 1989); *Bowyer v. Vollmar*, 505 N.E.2d 162 (Ind. Ct. App.), *reh'g denied, transf. denied* (1987); *Perfection Cut, Inc. v. Olsen*, 470 N.E.2d 94 (Ind. Ct. App. 1984); *Art Hill, Inc. v. Heckler*, 457 N.E.2d 242 (Ind. Ct. App.), *reh'g denied, transf. denied* (1983); *Front v. Lane*, 443 N.E.2d 95 (Ind. Ct. App. 1982); *Richards v. Goerg Boat & Motors, Inc.*, 179 Ind. App. 102, 384 N.E.2d 1084, *reh'g denied, transf. denied* (1979); *Warrick Beverage Corp. v. Miller Brewing Co.*, 170 Ind. App. 114, 352 N.E.2d 496 (1976). The citation to § 2-202 in *Art Hill* was nothing more than the cross-reference to § 2-202 found in the quotation of § 2-316(1).

was no integration which would exclude parol evidence,<sup>70</sup> or the extrinsic evidence sought to be introduced consisted of usage of trade, course of dealing, or course of performance which are expressly admissible under section 2-202 even if the writing is integrated.<sup>71</sup>

How far the Indiana courts will move from the traditional, four-corners rule in determining partial or complete integration remains to be seen. The position of the court in *Carpetland* indicates a most liberal approach to the issue of integration in a case involving the rights of a consumer. This, coupled with the general rule that disclaimers will be construed most strictly against the seller,<sup>72</sup> indicates that protection of the buyer is a paramount consideration of the court. However, the courts' continued conservative approach to the resolution of alleged ambiguities in written contracts pulls in the opposite direction. With respect to the admissibility of parol evidence to clarify a latent ambiguity, the courts continue to adhere strictly to a four-corners approach.<sup>73</sup> Unless the term in question is susceptible to more than one interpretation in the mind of the court, the court will not admit parol evidence as to the meaning of the term.<sup>74</sup> The fact that the parties disagree as to a term's meaning is not enough to show that there is in fact an ambiguity,<sup>75</sup> nor will the court admit any extrinsic evidence for purposes of clarification

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70. In *Bowyer*, 505 N.E.2d at 164, the writing was a mere sales receipt. *Perfection Cut*, 470 N.E.2d at 94, involved an oral warranty and an oral disclaimer. There was no evidence of a written agreement in *Front*, 443 N.E.2d at 97, and the writing in *Warrick* was held unenforceable because of lack of mutuality.

71. See *Warrick Beverage*, 170 Ind. App. at 121, 352 N.E.2d at 501 (usage of trade, course of dealing, and course of performance are always admissible); *Richards*, 179 Ind. App. at 104-07, 384 N.E.2d at 1087-90 (course of dealing over several months). *Richards* also involved § 2-316, but the primary focus was on the inconsistency of the written disclaimer with written express warranties and the disclaimer's failure to properly disclaim the implied warranty of merchantability. Some mention was made of the disclaimer of oral warranties, 179 Ind. App. at 123, 384 N.E.2d at 1095, but this issue was not developed by the court.

72. See *Richards v. Goerg Boat & Motors, Inc.*, 179 Ind. App. 102, 384 N.E.2d 1084 (1979); *Woodruff v. Clark County Farm Bureau Coop.*, 153 Ind. App. 31, 286 N.E.2d 188 (1972).

73. See, e.g., *Skrypek v. St. Joseph Valley Bank*, 469 N.E.2d 774 (Ind. Ct. App. 1984); *Hauck v. Second Nat'l Bank*, 153 Ind. App. 245, 286 N.E.2d 852 (1972). The four-corners rule for interpretation of written contracts has been strongly condemned by courts and writers. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 3-10 (3d ed. 1987).

74. See, e.g., *Turnpaugh v. Wolf*, 482 N.E.2d 506 (Ind. Ct. App.), *reh'g denied* (1985); *Indiana-Kentucky Elec. Corp. v. Green*, 476 N.E.2d 141 (Ind. Ct. App. 1985).

75. See *Hauck v. Second Nat'l Bank*, 153 Ind. App. 245, 286 N.E.2d 852, 863 (1972). *But see* Note, *Warranties, Disclaimers and the Parol Evidence Rule*, 53 COLUM. L. REV. 857, 861 (1953), where the writer suggests that the mere fact of litigation indicates that the contract means more than expressed within its four corners.

of the parties' intent. That intent may be determined only from the document itself. In effect, the court's understanding of the document is substituted for the parties' actual understanding or intent.

Indiana courts dealing with the issue of integration under the Code should avoid an overly restrictive approach and determine the intent of the parties from their testimony and from the surrounding circumstances before concluding that a contract is or is not partially or fully integrated. Part of that testimony will include evidence of the representations made by the seller. The court must also determine, at least *prima facie*, whether those representations constitute an express warranty. If they do not, there is no inconsistent disclaimer problem under section 2-316 to be resolved. If they do, the court must then apply both sections 2-202 and 2-316 and determine if both parties intended the disclaimer to be the final and exclusive statement of their agreement. For a court to conclude that the existence of an oral warranty automatically precludes the writing from being the final and complete agreement of the parties, as it did in *Carpetland*, is to engage in reasoning which is circular, at best.<sup>76</sup> Moreover, it completely eliminates the parol evidence rule from every case involving an oral warranty, something which the drafters did not intend.<sup>77</sup> The making of a prior express warranty is but one factor which goes into the determination; it cannot compel the result. Similarly, a disclaimer clause or a merger clause should be treated like any other written term subject to the parol evidence rule.<sup>78</sup>

#### IV. SUGGESTED APPROACHES

The Indiana courts have available to them at least three approaches which will enable them to protect the consumer, as was obviously intended in *Carpetland*, without doing violence to the language or intent of section 2-316. The first is based on a presumption of admissibility, the second and third on the traditional concepts of exceptions to the parol evidence rule. Under any of these approaches, the parties are still able to merge

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76. See Duesenberg & King, *supra* note 5. One writer has taken the opposite approach and has stated that if there is a disclaimer in the written contract, it "indicates that the parties have reduced all express warranties to writing and the alleged warranty conflicts with" it. Consequently, "since the alleged express warranty cannot be introduced into evidence" under the parol evidence rule, there is no inconsistency to resolve under § 2-316(1). Note, *Implied and Express Warranties and Disclaimers Under the Uniform Commercial Code*, 38 IND. L.J. 648, 670 (1963). This approach is a rigid application of the four-corners rule, with no analysis of the parties' intent whatsoever.

77. See Lord, *Some Thoughts about Warranty Law: Express and Implied Warranties*, 56 N.D.L. REV. 509, 558 (1980).

78. See *Franklin v. White*, 493 N.E.2d 161 (Ind. 1986); 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-316:06 (1984).

all prior negotiations and representations into the written contract if they intend to do so, as they are empowered to do by sections 2-202 and 2-316,<sup>79</sup> and as the trial court found they did in *Travel Craft*.

A. *The Presumption of Non-integration in Consumer Transactions*

In a consumer transaction, such as that in *Carpetland*, the court should examine all the facts and circumstances surrounding the execution of the written contract and, specifically, the facts and circumstances leading to the disclaimer clause itself. In *Weaver v. American Oil Co.*,<sup>80</sup> where the facts showed the service station lessee to be at a substantial disadvantage with respect to his power to negotiate and to understand the contract terms, and the exculpatory and indemnification clauses were so burdensome to the lessee as to cause severe hardship in the eyes of the court, the court declared the terms unconscionable and stated: "The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and *came to his knowledge* and there was in fact *a real and voluntary meeting of the minds and not merely an objective meeting.*"<sup>81</sup>

In the context of the parol evidence rule, it is not necessary for the court to declare disclaimer clauses unconscionable.<sup>82</sup> The Code has itself indicated a decided preference in favor of express warranties by providing in section 2-316(1) that as between an express warranty and an inconsistent disclaimer clause, the warranty prevails and the disclaimer is inoperative. While the drafters did not state, in so many words, that a disclaimer inconsistent with a warranty may be substantively unconscionable, as that term is used in section 2-302, the expression of repugnancy for disclaimers<sup>83</sup> comes very close.

In consumer transactions, the courts can follow the *Weaver* lead and establish a rebuttable presumption that the existence of an oral warranty indicates that the writing does not express the full and final agreement of the parties. The burden would then be on the seller to

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79. See U.C.C. § 2-313 comment 4 (1972).

80. 257 Ind. 458, 276 N.E.2d 144 (1971).

81. *Id.* at 464, 276 N.E.2d at 148 (emphasis in original).

82. Prof. Hawkland doubts that a disclaimer which complies with the Code rules in § 2-316 for conspicuousness and understandability, thereby precluding surprise, could be declared unconscionable. See Hawkland, *Limitation of Warranty Under the Uniform Commercial Code*, 11 HOWARD L.J. 28, 36-37 (1935). Although he was speaking primarily about disclaimers of implied warranties pursuant to § 2-316(2), the same policies should apply as well to disclaimers of express warranties under § 2-316(1). Because the latter subsection creates a superior position for the warranty vis-a-vis the inconsistent disclaimer, an analysis dealing with unconscionability would be unnecessary.

83. See *supra* notes 35-37 and accompanying text.

establish that the parties did intend the writing to be their full and final agreement by showing, first, that the buyer was fully aware of the disclaimer, and second, that she understood what the disclaimer meant and that none of the representations made to her in any advertising or by any salesperson before the signing of the contract applied to the sale. In a situation such as that in *Carpetland*, where new goods were sold at a standard new goods price, it is unlikely that the seller would be able to prove that before the buyer signed the contract, she understood that the one year warranty expressed by the salesman was not applicable, that there were no warranties beyond the statement of fabric content and color, as expressed on the face of the writing,<sup>84</sup> and that the risk of any product failure was hers. In effect, the seller would be required to demonstrate that the buyer agreed to a contract under which the seller had a "pseudo-obligation."<sup>85</sup>

In a few consumer transactions, the seller may well be able to sustain its burden by showing that the goods were clearly marked "imperfect" or with some other term suggesting flawed goods, that the price was so low that the any reasonable buyer would understand that the sale did not involve perfect goods, or that events occurring prior to execution of the contract indicated that there was no express warranty.<sup>86</sup> In any transaction, whether consumer or commercial, if the evidence shows that the buyer read the written contract, understood its ramifications with respect to warranties, was not surprised by the disclaimer, and agreed to it, the seller should receive the full protection intended by section 2-316.<sup>87</sup> All of this would be a question of fact.

The presumption would not apply to a purely commercial transaction in which the parties are on a more equal footing and the evidence shows that the there were or could have been actual negotiations before the

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84. See *supra* note 9.

85. See U.C.C. § 2-313 comment 4, quoted in the text accompanying note 37.

86. See, e.g., Herbert, *What's In a Name?: The Implied Content of Express Warranties*, 12 U. DAYTON L. REV. 297, 300 n.19 (1986). The author gives the example of a used car said to "run great" but which fails to start when the buyer attempts to start it. He suggests that, under these circumstances, the statement never becomes "part of the basis of the bargain" and, therefore, does not give rise to an express warranty at all. *Id.*

87. See, e.g., *Jordan v. Doonan Truck & Equipment, Inc.*, 220 Kan. 431, 552 P.2d 881 (1976) (although there was an oral express warranty, buyer of a truck read the contract, saw the handwritten disclaimer, understood it, and signed; warranty evidence held inadmissible); Lord, *Some Thoughts about Warranty Law: Express and Implied Warranties*, 56 N.D.L. REV. 509, 555-57 (1980); Note, *Uniform Commercial Code: Disclaiming the Express Warranty in Computer Contracts—Taking the Byte Out of the UCC*, 40 OKLA. L. REV. 471, 497 (1987).

writing was signed.<sup>88</sup> As one writer noted, it makes good sense to give effect to negotiated disclaimers or merger clauses in commercial transactions; it makes no sense to do so in consumer transactions where the buyer seldom reads and even less seldom understands the implications of such provisions.<sup>89</sup>

*B. A New Exception to the Parol Evidence Rule: Unequal Bargaining Power*

As a consequence of the analysis of *Weaver*, there has been a suggestion that *Weaver* created a new exception to the parol evidence rule: that where there is great disparity in the relative bargaining positions of the parties, prior representations are admissible.<sup>90</sup> The effect of this new exception would be automatic admissibility of the pre-writing representations, a result much closer to the *Carpetland* approach but still consistent with a preliminary consideration of the parol evidence rule. It could apply in both consumer and commercial transactions where the disparity in bargaining power is apparent as in *Weaver*, which involved a major oil company and a service station operator.

The difference between the presumption, discussed earlier, and the exception to the parol evidence rule is that under the presumption, the seller may still be able to exclude the evidence of warranty if it can show that the parties' ultimate intention was that the warranty not apply and that such intention was reflected in the written disclaimer. Under the exception, if the buyer can satisfy the court that she was in a substantially inferior bargaining position in a consumer or commercial transaction, the evidence comes in. The only questions would be whether the evidence demonstrates the existence of an express warranty and whether the warranty and the disclaimer are inconsistent. If the answers to both questions are affirmative, the warranty prevails. In *Carpetland*, the answer to both questions would have been affirmative.

*C. A Traditional Exception to the Parol Evidence Rule: Misrepresentation*

Another approach is for the plaintiff to allege and for the court to determine if the making of the oral warranty was a material misrep-

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88. See, e.g., *Jaskey Fin. & Leasing v. Display Data Corp.*, 36 U.C.C. Rep. Serv. (Callaghan) 26 (E.D. Pa. 1983); *Ray Martin Painting, Inc. v. Ameron, Inc.*, 638 F. Supp. 768 (D. Kan. 1986) (in both cases, parties were merchants of equal bargaining power).

89. See Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 Wis. L. Rev. 1405, 1415-16.

90. See *Grande v. General Motors Corp.*, 444 F.2d 1022, 1027 (7th Cir. 1971); *Vernon Fire & Casualty Ins. Co. v. Thatcher*, 152 Ind. App. 692, 703, 285 N.E.2d 660, 666 n.7 (1972).

resentation, evidence of which is admissible despite the parol evidence rule. In *Franklin v. White*,<sup>91</sup> a non-Code case, the seller stated that the real property being sold was suitable for the installation of a septic system. The subsequent written agreement of sale included a virtually iron-clad integration clause which withdrew or merged into the agreement all prior agreements and negotiations and stated that no representation not contained in the writing had induced either party to sign. The Indiana Supreme Court affirmed the admissibility of the septic tank representation as either a mistake of fact or a misrepresentation. It said:

Absent fraud by the seller, a purchaser may seek rescission [sic] of the contract where he has relied upon misrepresentations as to a material fact by the seller. . . . The parol evidence rule has no application to exclude evidence of mistake. . . . Also the parol evidence rule did not exclude Franklin's oral representation because this evidence was admissible to show Franklin's misrepresentation of material fact, whether intentional or not.<sup>92</sup>

The court characterized the misrepresentation as "constructive or unintentional fraud" and stated: "The fact that the officer or agent of appellant who made the representations did not know of their falsity, does not bar appellant's recovery."<sup>93</sup>

In order for a representation to constitute an express warranty, it must be "part of the basis of the bargain."<sup>94</sup> Although the meaning of this statutory language has, in the past, created problems for courts and scholars alike,<sup>95</sup> the Indiana Court of Appeals has resolved the issue by interpreting the phrase to mean that a buyer is not required to prove actual reliance on the seller's representation but "need only show that the warranty was entered into the contract as an intended element thereof, and as a part of the consideration for the purchase price."<sup>96</sup>

In the context of express warranty, disclaimer, and misrepresentation, the seller should be required to show that once the representation was made, it played no part whatever in the decision of the buyer to purchase the goods. One way of doing this would be to show that the buyer

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91. 493 N.E.2d 161 (Ind. 1986).

92. *Id.* at 164.

93. *Id.* at 165 (quoting *Clarke Auto Co. v. Reynolds*, 119 Ind. App. 586, 592, 88 N.E.2d 775, 778 (1949)).

94. U.C.C. § 2-313(1) (1972).

95. See, e.g., H. GREENBERG, RIGHTS AND REMEDIES UNDER U.C.C. ARTICLE 2, § 14.9 (1987); WHITE & SUMMERS, *supra* note 5, at § 9-5; Coffey, *Creating Express Warranties under the UCC: Basis of the Bargain—Don't Rely on It*, 20 U.C.C. L.J. 115 (1987); Murray, "Basis of the Bargain": *Transcending Classical Concepts*, 66 MINN. L. REV. 283, 304 (1982). Prof. Murray characterizes the situation as one of "mass confusion."

96. *Carpetland*, 536 N.E.2d at 308.

knew and understood that the representation was in fact no longer part of the bargain at the time the contract was signed. In a case such as *Carpetland*, the seller would be required demonstrate that Mrs. Payne would still have purchased the carpet although she was told and understood that there was no warranty of quality despite the earlier statement that the carpet was guaranteed for a year.

It should also be noted that pursuant to section 2-721 of the Code as enacted in Indiana, all Code remedies, including recovery of damages, are available for material misrepresentation or fraud, and a successful plaintiff is entitled to recover reasonable attorney's fees.<sup>97</sup>

Furthermore, although not an issue in *Carpetland* because it apparently was not raised by the buyer, a representation by a seller that the goods are covered by a warranty if that representation is false and the seller knows or should know that it is false, is a violation of the Deceptive Consumer Sales Act,<sup>98</sup> for which a plaintiff may recover damages and attorney's fees.<sup>99</sup> A seller whose representative states that there is a one year warranty on carpet but whose form contract disclaims all warranties except the description of the goods on its face, has, in all likelihood, violated the Act.<sup>100</sup>

Finally, the facts of *Carpetland* indicated that despite the seller's claim of no warranty of quality, a seller's representative did inspect the carpet and trim it on several occasions.<sup>101</sup> A similar situation arose in *O'Neil v. International Harvester Co.*,<sup>102</sup> in which the court found that the seller's conduct after the sale tending to show that oral warranties had been made, when taken together with the written contract containing a disclaimer of warranties and an integration clause, created an ambiguity as to whether the parties had intended the writing to be their final expression of intent so as to preclude summary judgment for the seller. The parol evidence was admissible. Applying the Colorado court's reasoning to *Carpetland*, the fact that the seller sent a representative to inspect and repair the defective carpet indicates that the disclaimer was not intended to control and that there was a warranty which the seller attempted, at least initially, to honor.

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97. IND. CODE § 26-1-2-721 (1988).

98. See IND. CODE ANN. § 24-5-0.5-3(a)(8) (West Supp. 1989).

99. See *id.* § 24-5-0.5-4(a) (West Supp. 1989).

100. White & Summers suggest that a merger clause should include a disclaimer of the authority of any sales person to make any warranties other than those in the written contract. See WHITE & SUMMERS, *supra* note 5, at 496. Even so, while the authors suggest that a court will have some difficulty in giving effect to prior oral warranties in a consumer transaction, the issue remains whether both parties intended the merger clause to take effect and to exclude those warranties. *Id.* The parol evidence rule remains central.

101. See *Carpetland*, 536 N.E.2d at 307.

102. 40 Colo. App. 369, 575 P.2d 862 (1978).

## V. CONCLUSION

Consumer advocates may commend the *Carpetland* decision for its direct approach to giving the buyer what she bargained for and for preventing the seller from inducing a sale by making promises, whether innocently or otherwise, that it did not intend to keep. While the result is probably correct, the decision should be criticized for its failure to follow specific statutory language. The tools are available for achieving the same result if justice and fairness call for that result. They should have been used. With respect to the position of sellers of consumer goods, the best admonition is to train sales people to make only those warranties contained in the written contract of sale or to make no oral warranties whatever,<sup>103</sup> and to do nothing following the sale which would cast doubt on the finality of the disclaimer. Anything else may result in liability for breach of an express warranty.

On the other hand, in a transaction between parties with relatively equal bargaining positions and understanding of the bargaining process, as were the parties in *Travel Craft*, the way remains open for them to design their agreement as they choose, with all prior negotiations merged into the final, written contract and, therefore, inadmissible to contradict a disclaimer of oral warranties.

The seller will thus be protected from allegations of warranty when the parties intended that there be none, but the buyer will also be protected from unbargained for and unexpected disclaimers or integration clauses which effectively deprive her of the bargain which she was led to believe she was making.

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103. See, e.g., 3 A. SQUILLANTE & J. FONSECA, WILLISTON ON SALES § 20-5 (4th ed. 1974); Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 173 (1978).

