BASIS OF THE BARGAIN IN E-COMMERCE: A NEW BATTLEFIELD WHERE RELIANCE FALLS AGAIN

Although variations exist, all fifty states and the District of Columbia have adopted at least part of the Uniform Commercial Code ("U.C.C."). Article 2 of the U.C.C. governs the sale of moveable goods. Section 2-313 of the U.C.C. sets forth the requirements for an express warranty, including that an affirmation of fact or promise from the seller to the buyer must constitute "part of the basis of the bargain" to create an express warranty. Courts and commentators have reached differing interpretations of "basis of the bargain," with some suggesting that a buyer must rely on a seller's representation—reminiscent of the requirement imposed on buyers before the adoption of the U.C.C. Like many articles before it, this Comment argues that reliance ought to be removed as a requirement but makes the case by focusing on the realities of modern commercial practices and consumer behavior.

TABLE OF CONTENTS

INTRODUCTION

Warranties serve a twofold purpose of protecting consumers and incentivizing them to enter into transactions.[1] When a seller gives assurances that its product is guaranteed for a period of time after purchase, the buyer can feel more comfortable purchasing an item even though it may need future repairs. But what if a buyer was completely unaware of a seller's warranty at the time of their agreement? What if the buyer relied solely on his or her own expertise, and not on the seller's statements, in deciding to make the purchase? What if the seller offered assurances to the general public

1. Donald F. Clifford, *Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 WASH. U. L.Q. 413, 414 (1997).

about the quality of its goods well after the conclusion of the transaction? Under Article 2 of the U.C.C., which governs the sale of goods, such a buyer may find relief under the contractual remedy of an express warranty only if the seller's affirmation or promise became part of the basis of their bargain.[2] Since the inception of the basis of the bargain language, courts and commentators have struggled to find any common footing in applying this inherently unclear test.[3]

This Comment will begin in Part I with an overview of the origins of the basis of the bargain test. Part II will explain why vestiges of the older reliance-based requirement for express warranties persist by showcasing the variety of judicial treatment of the test. Part III will discuss the most prominent academic theories for the application of the test. Part IV will demonstrate the pitfalls of a reliance requirement by using the lens of the most dominant medium for modern buyer-seller interactions—e-commerce platforms—and will craft a general blueprint for reliance-free express warranty creation under the basis of the bargain test.

I. BACKGROUND

Creation of express warranties under the U.C.C. is governed by § 2-313.[4] The predecessor to U.C.C. § 2-313 was § 12 of the Uniform Sales Act ("U.S.A."), which included explicit requirements that an express warranty could only arise if a buyer showed inducement to enter into the contract based on the seller's affirmation or promise *and* that the buyer relied on the seller's statement when deciding to purchase the goods.[5] Recognizing that the language of § 12 created a heavy burden for a buyer to satisfy to establish an express warranty, academics who had helped craft the language, such as Professor Samuel Williston, attempted to soften its hard edges by postulating that a buyer only needed to show that the seller made statements which could have induced a reasonable buyer to make the purchase.[6]

Karl Llewelyn, the principal drafter of the U.C.C., expressed frustration with the feckless nature of express warranties under the U.S.A. and sought to create a less impotent version of § 12 in the

2. U.C.C. § 2-313 (AM. L. INST. & UNIF. L. COMM'N 2022).

3. *See* Robert S. Adler, *The Last Best Argument for Eliminating Reliance from Express Warranties: "Real-World" Consumers Don't Read Warranties*, 45 S.C. L. REV. 429, 430 (1994).

4. U.C.C. § 2-313.

5. UNIF. SALES ACT § 12, 1 U.L.A. 173 (1950); *see also* Matthew A. Victor, *Express Warranties Under the UCC—Reliance Revisited*, 25 NEW ENG. L. REV. 477, 478 (1990).

6. 1 SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 206 (1924).

U.C.C.[7] Some academics have attributed key elements of the development of warranty creation standards under the U.C.C. to the experience of Llewelyn and his wife, Soia Mentschikoff, in representing the losing party in *Alaska Pacific Salmon Co. v. Reynolds Metals Co.*[8] The court in that case relied on a highly formalistic bargaining process that included only a single moment of contract formation in order to avoid finding the creation of any warranties, either express or implied, for the plaintiff.[9] Though most modern attempts to interpret the language of U.C.C. § 2-313, including this Comment, chiefly consider the implications of consumer behavior, theorists have noted deliberate efforts by Llewelyn in drafting the U.C.C. to liberalize the bargaining process between merchants; those efforts were designed to reflect a higher goal of demanding honesty of speech in commercial transactions.[10]

The emergence of § 2-313(1)(a) under the first full draft of the U.C.C. in 1951 substituted the problematic, but clear, reliance language of the U.S.A. for the much more nebulous "basis of the bargain" language.[11] In outlining the requirements for creation of an express warranty, the U.S.A. stated that "[a]ny affirmation of fact or any promise by the seller relating to the goods is an express warranty *if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon*."[12] By contrast, the language of the U.C.C. stated that, "[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* creates an express warranty that the goods shall conform to the affirmation or promise."[13] This deliberate, yet relatively unexplained, step forward immediately created uncertainty in the courts as to what extent the new language modified the need for a finding of reliance.[14]

II. JUDICIAL INTERPRETATIONS

The shift in language proved especially vexing for courts which, although far from consistent in their reasoning, have largely chosen

7. Charles A. Heckman, *"Reliance" or "Common Honesty of Speech": The History and Interpretation of Section 2-313 of the Uniform Commercial Code*, 38 CASE W. RSRV. L. REV. 1, 6–7 (1987).

8. 163 F.2d 643 (2d Cir. 1947). *See* Heckman, *supra* note 7, at 24–25.

9. Heckman, *supra* note 7, at 21.

10. *Id.* at 25 & n.96.

11. *Id.* at 1–2.

12. UNIF. SALES ACT § 12, 1 U.L.A. 173 (1950) (emphasis added); *see also* John L. Hutzler, Note, *"Basis of the Bargain" –What Role Reliance?*, 34 U. PITT. L. REV. 145, 145 (1972).

13. U.C.C. § 213-(a)(1) (AM. L. INST. & UNIF. L. COMM'N 2022) (emphasis added); *see also* Hutzler, *supra* note 12, at 145.

14. *See* Heckman, *supra* note 7, at 1.

three generalized camps to approach the task of defining the requirements for a seller's statement to serve as the basis of the bargain.[15] First, many courts have simply maintained the reliance requirement exactly as it existed under the U.S.A.[16] Whether it be out of fealty to the reliance test or uncertainty regarding its successor, many courts continue to require that a buyer prove actual reliance on a warranty under the U.C.C.[17] For example, in *Wojcik v. Empire Forklift Inc.*,[18] the court prohibited recovery under express warranty where both the plaintiff and his supervisor failed to read the promotional literature which was alleged to have created the warranty.[19] Thus, courts maintaining the reliance requirement have construed the U.C.C. language to mean that a seller's assertions that the buyer was unaware are categorically prohibited from constituting part of the basis of the bargain.[20]

Notably, actual reliance is an even higher obligation than the objective requirement that Professor Williston claimed to have envisioned for the U.S.A., and one that will nearly always defeat a buyer's warranty claim.[21] Thus, the traditional reliance requirement tilts strongly in favor of a seller and has been criticized for, among other reasons, being ignorant of the buying behaviors of modern consumers.[22] To make matters worse, in the confusion resulting from the basis of the bargain test, even courts claiming to use a modified reliance test or no reliance requirement at all have often conducted some form of reliance-based analysis in reaching their decisions.[23]

A second group of courts operates under a presumption of reliance by the buyer that shifts the burden of proof to the seller to present evidence that the buyer did not rely on the seller's affirmation

15. JAMES J. WHITE & ROBERT S. SUMMERS, PRINCIPLES OF SALES LAW 534–36 (2009).

16. *See, e.g.*, Rogers v. Zielinski, 209 A.2d 706 (R.I. 1965); Thomas v. Amway Corp., 488 A.2d 716 (R.I. 1985); Monte v. Toyota Motor Corp., No. 220671, 220983, 2001 WL 1152901 (Mich. Ct. App. Sept. 28, 2001); Bobholz v. Banaszak, No. 02-1232, 2002 WL 31521364 (Wis. Ct. App. Nov. 14, 2002); Gale v. Int'l Bus. Machs. Corp., 781 N.Y.S.2d 45 (N.Y. App. Div. 2004).

17. *See* sources cited *supra* note 16.

18. 783 N.Y.S.2d 698 (N.Y. App. Div. 2004).

19. *Id.* at 700.

20. *See id.*

21. Overstreet v. Norden Lab'ys, Inc., 669 F.2d 1286, 1291 (6th Cir. 1982); Stamm v. Wilder Travel Trailers, 358 N.E.2d 382, 385 (Ill. App. Ct. 1976); Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1101 (11th Cir. 1983).

22. Adler, *supra* note 3, at 448–49.

23. *Id.* at 448.

or promise.[24] For example, in *Keith v. Buchanan*,[25] the court allowed recovery for a buyer of a sailboat under the theory of express warranty even though the buyer's expert had inspected the boat for defects.[26] The *Keith* court explained that a buyer's inspection may defeat an express warranty claim if the buyer actually discovered the defect later complained of, but the burden of proof to show actual knowledge of the defect is placed on the seller.[27] The court indicated substantial deference towards a buyer who has undergone any inspection that is less than completely comprehensive.[28] Other courts engaging in jurisdictional surveys have found the presumption to be a relevant minority rule, adopted by a smaller number of courts compared to those that have completely eliminated the reliance requirement.[29]

This burden shifting framework strongly favors buyers, and courts have varied in the types of proof sufficient to show non-reliance, with some going so far as to say that the phrase "basis of the bargain" can never be uniformly defined.[30] Courts adopting the burden shift often employ textualist reasoning based on Comments 3 and 8 to U.C.C. § 2-313.[31] Official Comment 3 provides that: "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."[32] Burden-shifting courts have taken this language as instructive that under the U.C.C. a buyer need only show that the seller made a representation at some point during the bargaining process.[33] Official Comment 8 applies to descriptions of goods, which tend to create a stronger basis for an express warranty than other affirmations, and offers a rhetorical question: "What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? . . . [A]ll of the statements of the seller do so unless good reason is shown to the contrary."[34] Though the language of Comment 8 applies specifically to descriptions of goods,[35] burden-shifting courts

24. WILLIAM H. HENNING & WILLIAM H. LAWRENCE, UNDERSTANDING SALES AND LEASES OF GOODS § 5.02 (2d ed. 2009) (citing Yates v. Pitman Mfg., 514 S.E.2d 605 (Va. 1999)).

25. Keith v. Buchanan, 220 Cal. Rptr. 392 (Cal. Ct. App. 1985).

26. *Id.* at 398.

27. *Id.*

28. *Id.*

29. *E.g.*, *In re* Gen. Motors Corp. Dex-Cool Prods. Liab. Litig., 241 F.R.D. 305, 319–21 (S.D. Ill. 2007).

30. *Id.* (citing Torres v. Nw. Eng'g Co., 949 P.2d 1004 (Haw. Ct. App. 1997)).

31. *See* CAROL L. CHOMSKY ET AL., LEARNING SALES LAW 287 (2016).

32. U.C.C. § 2-313 cmt. 3 (AM. L. INST. & UNIF. L. COMM'N 2022) (emphasis added).

33. CHOMSKY ET AL., *supra* note 31, at 287.

34. U.C.C. § 2-313 cmt. 8.

35. *Id.*

allow its guidance to apply as a matter of principle to other representations as well.[36]

The third group of courts eliminate the reliance requirement completely.[37] Generally, courts limit application of this framework to representations made directly to the buyer, contained in the packaging of the goods, or made as part of a public advertisement circulated before contract formation.[38] Speaking specifically on written statements made to the buyer, the Ohio Court of Appeals in *Norcold, Inc. v. Gateway Supply Co.*[39] stressed that where written warranties are "clear and express," the basis of the bargain test is rendered inapplicable.[40] Instead, the warranty should be treated as any other term of the contract—enforced if the buyer can demonstrate mutual assent and consideration.[41] Other courts have endorsed this reading of U.C.C. § 2-313 regarding direct written statements, and, as discussed below, some commentators favor employing such a classical contract test for express warranties in any context.[42]

Norcold's holding boldly sidesteps the basis of the bargain test entirely in the context of direct written statements.[43] However, many other courts, speaking on assertions of the seller made to the public more broadly, have removed the reliance requirement while still framing the analysis in terms of the basis of the bargain.[44] The emerging majority rule today is to eliminate the reliance requirement entirely.[45] These courts adopt the reasoning that two buyers who pay the same for a product should receive the same warranty regardless of why they were motivated to pursue the transaction.[46] As discussed in more detail below, this reasoning becomes especially persuasive in the context of e-commerce transactions.

36. *See, e.g.*, Ewers v. Eisenzopf, 88 Wis. 2d 482, 490 (1979) (applying comment 8 broadly even though the statement in question contained both a description of the goods and a more general promise).

37. Hawkins Constr. Co. v. Matthews Co., 209 N.W.2d 643, 655 (Neb. 1973); Martin v. Am. Med. Sys., 116 F.3d 102, 105 (4th Cir. 1997).

38. *See* CHOMSKY ET AL., *supra* note 31, at 287.

39. 798 N.E.2d 618 (Ohio Ct. App. 2003).

40. *Id.* at 623.

41. *Id.* at 624.

42. *See id.* at 624 nn.12–13 (collecting cases); *see infra* note 48 and accompanying text.

43. *Norcold*, 798 N.E.2d at 624.

44. Lennar Homes, Inc. v. Masonite Corp., 32 F. Supp. 2d 396, 399 (E.D. La. 1998); Daughtrey v. Ashe, 413 S.E.2d 336, 339 (Va. 1992).

45. *In re* Gen. Motors Corp. Dex-Cool Prods. Liab. Litig., 241 F.R.D. 305, 319 (S.D. Ill. 2007) (collecting cases).

46. *See* Winston Indus., Inc. v. Stuyvesant Ins. Co., 317 So. 2d 493, 496–97 (Ala. Civ. App. 1975); Keith v. Buchanan, 220 Cal. Rptr. 392, 397 (Cal. Ct. App. 1985).

III. ACADEMIC RESPONSE

The variety of judicial approaches to the basis of the bargain language is easily exceeded by the variety of novel approaches suggested by commentators which form a spectrum between deploying unchanged classical contract law at one extreme and a complete redesign of the meaning of the term "bargain" under the U.C.C. on the other extreme.[47]

First, the most conservative academic theorists have suggested that the ambiguity of the U.C.C.'s basis of the bargain test can be resolved under existing principles of contract law, though this approach has not led to any meaningful consensus regarding proper application of the test.[48] Professor Sidney Kwestel provides the clearest argument that traditional contract principles can supplant any use of a reliance test and maintains that commentators who resort to outside aids are unnecessarily complicating the basis of the bargain test.[49] He reasons that because the drafters of the U.C.C. failed to define "basis of the bargain," a seller's affirmations or promises as described in § 2-313(1) should be treated in exactly the same way as any other term of the sales contract, such as a seller's promise to perform or deliver the goods.[50] He believes that the merits of this approach are further evidenced by reading the comments to § 2-313 in their totality as one single thread of reasoning, paying particular attention to Comment 3's proclamation that affirmations of fact or descriptions of goods should be treated in exactly the same way as any other part of the negotiation that results in a contract.[51] In the absence of a reliance requirement, the traditional contract law requirements of offer, acceptance, and consideration will control whether a seller's affirmation can become part of the basis of the bargain and create an express warranty.[52]

Professor Kwestel, an advocate of the traditionalist approach, is highly critical of courts and commentators that adopt a more creative reading of U.C.C. § 2-313.[53] For example, the Third Circuit has sought to impose a requirement that a buyer have awareness of the seller's representation in order to prevent fraudulent claims of express warranty where the buyer arguably could not have seen the representation, and thus it could not be part of the basis of the

47. *See* Michael J. Herbert, *Toward a Unified Theory of Warranty Creation Under Articles 2 and 2A of the Uniform Commercial Code*, 1990 COLUM. BUS. L. REV. 265, 270–76.

48. Sidney Kwestel, *Freedom from Reliance: A Contract Approach to Express Warranty*, 26 SUFFOLK U. L. REV. 959, 995 (1992).

49. *Id.* at 992.

50. *Id.* at 992–95.

51. *Id.* at 995.

52. *Id.* at 993–95.

53. *Id.* at 1000–06.

bargain.[54] To the contrary, Professor Kwestel found that the Third Circuit misunderstood the purposes of § 2-313 and that the doctrine of consideration already sufficiently requires inducement of action from the buyer without imposing a reliance requirement.[55]

Historically, express warranties were a cause of action in tort, labeled as suits for either misrepresentation or deceit.[56] Moving in the direction suggested by Professor Kwestel, the modern trend is to separate warranties from tort law and move to a purely contractual approach, though not all courts joining the trend have correctly understood the reasoning for treating warranties as primarily creatures of contract.[57] The justification behind the trend is that tortfeasors need not enter into any kind of relationship with a person who later seeks to hold them liable, so requiring reliance or a demonstration of injury resulting from the seller's statements is a well-placed hurdle to avoid injustice.[58]

To the contrary, agreements made between parties which are given effect by contract law exist only when the seller has received bargained-for compensation from the buyer, resulting from their voluntary association.[59] Express warranties under the U.C.C. are created only as the result of such bargained-for exchanges.[60] Given the distinct nature of facts creating tort claims compared to those creating contract claims, and the consensual nature of warranty creation, it should similarly follow that a buyer's burden of proof to impose liability under warranty should be that of ordinary contract standards.[61] To effectuate the purposes of contract law, a buyer who is party to a bargained-for exchange should receive more benefit than one merely wronged in tort, and the seller who voluntarily made statements to induce formation of a contractual relationship should be accountable for the truthfulness of such statements.[62]

Examining the application of classical principles from a different angle, some commentators have found that a traditional contract analysis facilitates the need to distinguish representations or promises from the seller based upon which stage of the bargaining process the seller's statements were made.[63] This fact-based

54. Cipollone v. Ligget Grp., Inc., 893 F.2d 541, 567–68 (3d Cir. 1990).

55. Kwestel, *supra* note 48, at 1001–04.

56. Morris G. Shanker, *The Seller's Contractual Obligation Under U.C.C. 2-313 to Tell the Truth*, 38 CASE W. RSRV. L. REV. 40, 42 (1987) (providing further commentary on Heckman, *supra* note 7).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 41–42.

61. *Id.* at 42.

62. *Id.*

63. Steven Z. Hodaszy, *Express Warranties Under the Uniform Commercial Code: Is There a Reliance Requirement?*, 66 N.Y.U. L. REV. 468, 470 (1991).

framework still finds vitality in the reliance requirement in appropriate circumstances.[64] For example, Professor Steven Hodazy's recommended framework divides a seller's affirmations into three temporal categories.[65]

First, the buyer must prove actual reliance if the express warranty was created by the seller's statements to the general public prior to the parties entering into any kind of bargaining process.[66] The basis of this requirement is U.C.C. § 2-313's Comment 3, which indicates elimination of the reliance requirement for affirmations made *during* the bargaining process.[67] In policy terms, such a reading is justified by the notion that pre-bargain statements made to the public at large could not have been considered and agreed upon by the parties.[68] Second, the buyer's reliance is presumed if the seller made statements to the buyer during bargaining between the two parties because contract law generally supports the assumption that a party is aware of statements made during the bargaining process.[69] Finally, if the seller made statements to the buyer following the transaction, no reliance should be required (because none is possible).[70] Instead, the modification process endorsed by § 2-209, in contrast to the preexisting duty rule, should apply.[71] This view is expressly endorsed by Comment 7 to U.C.C. § 2-313, though not all courts have chosen to follow it.[72]

Next, another group of respected scholars has adopted a third approach which asserts that despite the U.C.C.'s departure from the U.S.A.'s clear reliance requirement, the need for reliance has essentially survived, and that applying the basis of the bargain test will rarely, if ever, yield differing results.[73] Professors James White and Robert Summers argue that a buyer who has not relied on the seller's statement is seeking greater protection via express warranty than under the warranty of merchantability and thus should be denied protection via express warranty.[74] Significantly, they also suggest that without reliance, a plaintiff is seeking a greater protection than he bargained for, and thus can only seek recovery via implied warranties or tort claims.[75] This argument has been subject to extensive criticism by other commentators, who note that the

64. *Id.*
65. *Id.*
66. *Id.* at 492.
67. *Id.* at 493.
68. *See id.* at 497.
69. *Id.* at 496.
70. *Id.* at 491.
71. *Id.* at 491 n.170, 492 n.176.
72. *Id.* at 491–92, 491 n.170.
73. White & Summers, *supra* note 15, at 536–38.
74. *Id.*
75. *Id.* at 539.

warranty of merchantability is a protection imposed by law, not one agreed to by the parties. Therefore, enforcement of a seller's statement that passes the requirements of contract formation will yield exactly what a buyer bargained for and nothing more.[76]

While White and Summers reference the official comments in their reasoning, they essentially argue that a similar outcome is reached even without utilizing textualist interpretations of U.C.C. § 2-313.[77] They find reliance to be an intuitive component of warranty recovery and assume that juries will lean on the theory of reliance to distinguish between actionable representations and mere puffery.[78] White and Summers return to legislative history to observe that the U.C.C. drafters seriously considered removing the basis of the bargain language in a revised Article 2 to remove any "vestigial reliance requirement"; however, they ultimately refused to make the exclusion, suggesting some attachment to retaining the reliance requirement.[79]

Lastly, on the more controversial side of the discussion, some thinkers have advocated for the removal of reliance on the basis that the U.C.C. presents a new and revolutionary understanding of what constitutes a bargain.[80] Instead of the traditional bargained-for exchange, these authors argue that the U.C.C. has redefined the term "bargain" to represent a continuum of interactions between buyer and seller.[81] Leading this charge, Professor John Murray argues that Article 2 of the U.C.C. "transcends the classical concept of bargain," as evidenced by his novel interpretation of U.C.C. definitional sections, as well as by some operative provisions such as § 2-207, which allows for the removal of contractual language from a contract in order to more accurately reflect the intent of the parties.[82] More directly on point, Professor Murray cites Comment 4 to § 2-313 and § 2-316 generally, which both hinder the operability of disclaimers of express warranty, to assert that the focus of "all warranty law under the UCC 'is to determine what it is that the seller has in essence agreed to sell.' "[83]

Murray explains that the practical import of the U.C.C.'s overarching emphasis on enforcing the seller's promises combined with its liberalized notion of what constitutes a "bargain-in-fact" between parties expands the bargaining timeline to allow statements

76. Kwestel, *supra* note 48, at 1004–05.

77. White & Summers, *supra* note 15, at 539.

78. *Id.*; *accord* Janssen v. Hook, 272 N.E.2d 385, 387–88 (Ill. App. Ct. 1971).

79. White & Summers, *supra* note 15, at 540–42.

80. John E. Murray, Jr., *"Basis of the Bargain": Transcending Classical Concepts*, 66 MINN. L. REV. 283, 284–85 (1982).

81. *Id.*

82. *Id.* at 290–91, 318.

83. *Id.* at 290–91.

made over a broad continuum to form the basis of the bargain.[84] Such a continuum allows affirmations and promises of the seller made both well before and well after contract formation to constitute part of the basis of the bargain.[85] This deviation from classical notions of contract has received highly skeptical treatment from other commentators.[86] Professor Murray argues that the true test for an express warranty is based on the buyer's reasonable expectations arising out of all affirmations of fact made by the seller about the goods during a bargain.[87] This solution has also been viewed with some skepticism[88] and in practice still requires an analysis eerily similar to that of the reliance inquiry which Murray claims is unnecessary.

IV. MOVING FORWARD: USING E-COMMERCE TO FIND A BETTER INTERPRETATION OF THE BASIS OF THE BARGAIN TEST

As discussed above, courts and commentators have taken on the issue of reliance from a myriad of perspectives. Guided by either doctrinal theory or quasi-legislative history, they have failed to reach a strong consensus on interpreting the basis of the bargain test.[89] Moreover, U.C.C. drafters have made serious attempts to revise the language to provide a clearer resolution, but remain unable to gather consensus for a replacement test.[90] A far less often explored, yet arguably more significant, lens through which to view the reliance problem is a pragmatic one.[91] Markets and means of forming express warranties have evolved significantly since the inception of the basis of the bargain language. The importance that warranties play in recovery for victims of significant injury from products justifies revisiting the impacts of differing interpretations. Few authors have endeavored to consider the policy implications of adopting one of the differing judicial reliance frameworks. Without the emergence of a clear interpretation of U.C.C. § 2-313 or new action by the drafters, policy considerations may provide the best way forward out of the reliance conundrum.

The version of a reliance test that a court chooses to impose for express warranties has broad impacts on consumer protection, especially within the realm of e-commerce.[92] E-commerce is a blanket

84. *See id.* at 291.
85. *See id.* at 290.
86. Hodaszy, *supra* note 63, at 508.
87. Murray, *supra* note 80, at 318.
88. Heckman, *supra* note 7, at 35–36; Hodaszy, *supra* note 63, at 506–08.
89. *See supra* notes 15–88.
90. White & Summers, *supra* note 15, at 540–42.
91. Katie McLaughlin, Comment, *Another Argument "Pops Up" Against Reliance in Express Warranty Law*, 28 J.L. & COM. 95, 109–10 (2009).
92. *Cf.* Maureen A. O'Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing towards Nonuniformity?*, 14 BERKELEY

term that encompasses everything a business does online to sell to consumers and to other businesses.[93] The term includes the sale of goods through a website, online marketing that induces transactions, and general online brand building.[94] Already an instrumental part of the modern shopping landscape, the COVID-19 pandemic showcased the value of e-commerce's versatility.[95] Brands built either largely or entirely online are in a unique position to quickly shuffle inventory to meet the needs of a global supply chain that is changing faster than ever.[96] In 2019, approximately 1.92 billion people purchased goods or services online.[97] In the United States, e-commerce sales tripled between 2011 and 2020, with online platforms accounting for an estimated 14 percent of all retail sales.[98] Globally, e-commerce facilitated 22 percent of all retail sales in 2022, and that number is expected to increase to 27 percent by 2026.[99]

In addition to the unique benefits and opportunities created by e-commerce, the growing popularity of online electronic transactions poses new challenges to creating uniformity for the industry.[100] The adaptability of the e-commerce space means that an adequate uniform law must address contracts for goods, services, and information, while also anticipating the way parties increasingly rely on complex, standard form language in conjunction with only the briefest representations to consumers.[101] In other words, the diversity of online transactions serves consumer interests by delivering more personalized services, but that potential for customization also makes consumer protection far more challenging. Further, online transactions require revisiting fundamental elements of contract formation, such as mutual assent, since many transactions only require the most minimal consumer awareness of an agreement's

TECH. L.J. 635, 647 (1999) (noting the "workable" if "imprecise" nature of applying U.C.C. Article 2 rules to e-commerce transactions).

93. *eCommerce Resources*, INT'L TRADE ADMIN., https://www.trade.gov/ecommerce (lasted visited Mar. 6, 2023).

94. *Id.*

95. *See* Austin Caldwell, *67 Ecommerce Stats and Facts to Know in 2021*, ORACLE NETSUITE (Apr. 15, 2021), https://www.netsuite.com/portal/resource/articles/ecommerce/ecommerce-statistics.shtml.

96. *See* Sara Silver, *How Kellogg's, Nike, and HP Handled 2020 Supply Chain Disruptions*, FIN. MGMT. (Jan. 25, 2021), https://www.fm-magazine.com/news/2021/jan/coronavirus-supply-chain-disruptions-kelloggs-nike-hp.html (discussing Nike's experiences with brick-and-mortar and online presence).

97. Caldwell, *supra* note 95.

98. *Id.*

99. *See Here's Why E-Commerce Growth Can Stay Stronger for Longer*, MORGAN STANLEY (June 14, 2022), https://www.morganstanley.com/ideas/global-ecommerce-growth-forecast-2022.

100. *See* O'Rourke, *supra* note 92, at 641.

101. *Id.* at 643.

terms. [102] Online contracting practices such as "clickwrap" agreements, where a buyer consummates a transaction subject to unilaterally imposed terms without a true signature,[103] necessarily challenge the viability of defining the basis of the bargain entirely on the basis of classical contract principles as advocated by Professors Kwestel and Hodaszy.

To better understand the policy implications of moving the reliance goalposts, it is important to evaluate how real consumers make decisions. As first recognized by Professor Robert Adler in 1994, consumer behavior in practice is far different from that envisioned by the U.C.C. drafters. [104] This misconception could potentially be explained, at least in part, by the desires of U.C.C. drafters such as Llewelyn to shape the section to offer protection for certain types of transactions between merchants, with less emphasis than modern law on the consumer transactions that the basis of the bargain language has come to govern.[105]

Consumers care deeply about warranties and often perceive them as being more valuable than they really are.[106] The economics of *extended* warranties are especially unfavorable for consumers. [107] Consumer interest in warranties is in part the result of a consumer tendency to overestimate the probability of product failure. [108] However, even more so than misunderstanding the probability of product failure, consumers neglect to consider probability at all and are drawn to warranties as an emotional safety net. [109] This phenomenon is to some extent true across demographics, but its strongest impacts are seen in lower income groups who possess less understanding of the market.[110] The fact that consumer interest in warranties is primarily driven by emotions and most heavily preys upon lower income buyers amplifies the need for warranties to be less ambiguous and more accessible.

Consistent with the irrational basis for consumer interest in warranties, consumers whose products are accompanied by warranties rarely take steps to understand the protections afforded to them. For example, Professor Adler utilized quantitative data from the Federal Trade Commission in the late 1970s and early 1980s to

102. *Id.* at 652.

103. Heather Daiza, *Wrap Contracts: How They Can Work Better for Businesses and Consumers*, 54 CAL. W. L. REV. 201, 214–15 (2018).

104. Adler, *supra* note 3, at 455–56.

105. *See* Heckman, *supra* note 7, at 24–25.

106. Marieke Huysentruyt & Daniel Read, *How Do People Value Extended Warranties? Evidence from Two Field Surveys*, 40 J. RISK & UNCERTAINTY 197, 198–99 (2010).

107. *Id.* at 215–16.

108. *Id.* at 215.

109. *Id.*

110. *Id.* at 215–16.

demonstrate that even in a time when pop-up boilerplate agreements were far less common, most consumers rarely looked at express warranties before a purchase or even knew of their existence.[111] Though not specific to express warranties, recent empirical data clearly reflect a notion that consumer contracts are written in a way that requires comprehension levels and education far greater than that possessed by the public at large.[112] Even shrewd consumers who attempt to read warranty disclosures included in the packaging with their products are unlikely to fully understand the protective documents they have purchased unless they are trained in commercial law.[113] Available research indicates that federal reforms such as the Magnuson-Moss Act of 1975 have not succeeded in their aims to make warranties more comprehensible for consumers.[114] Thus, while no comprehensive follow-up government studies have been conducted to reproduce the data analyzed by Professor Adler, the trends he observed should ring true today in light of the added complexity in modern warranty agreements.

Recognizing patterns of actual consumers also points towards another potential shortcoming of the strict classical contract theory advanced by Professor Kwestel. Many contractual obligations would fall apart if courts were not given default rules to serve as backstops to enforce the intent of the parties because real life parties often fail to act in a way consistent with the theoretical notions of mutual assent.[115] Thus, strict adherence to classical contract requirements of mutual assent and consideration would, in practice, eliminate many warranties from transactions as a result of imprecise contracting practices and leave buyers in a worse position than under the reliance test.[116] However, this potential critique does not undermine the ability of the U.C.C. to fairly regulate modern transactions. As noted by Professor Murray, the U.C.C. can be a flexible tool for adjudicating warranty disputes, since key U.C.C. provisions allow for a liberal interpretation that avoids these harsh outcomes.[117]

In addition to consumer behavior being significantly different from what the U.C.C. drafters envisioned, behaviors of modern businesses have also evolved significantly since the inception of the basis of the bargain language, especially with regard to advertising

111. Adler, *supra* note 3, at 457.

112. Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2277–80 (2019).

113. *See id.*

114. F. Kelly Shuptrine & Ellen M. Moore, *Even After the Magnuson-Moss Act of 1975, Warranties Are Not Easy to Understand*, 14 J. CONSUMER AFFS. 394, 396 (1980).

115. Adler, *supra* note 3, at 456.

116. *Id.*

117. Murray, *supra* note 80, at 290–91.

practices.[118] New mediums of electronic communication have allowed businesses to launch a virtual barrage of advertisements at consumers, with the average American exposed to an estimated 5,000 advertisements per day—ten times the number seen by Americans in the 1970s.[119] Digital advertisements are also being made progressively shorter, with researchers finding six-second advertisements on smartphones just as effective—or even more so—than their longer predecessors.[120] Shorter advertisements call for more brazen, yet generalized, claims, exacerbating the difficulty for consumers to prove reliance, just as commentators have been observing for years.[121] As face-to-face transactions continue to decline and consumers are inundated with digital advertisements that briefly pop up and then just as quickly disappear, the relationship between businesses and consumers has become more one-sided and less consensual.[122] Businesses have tremendous access to consumers, but it becomes more difficult for a consumer to recall, let alone demonstrate reliance on, any particular statement.[123]

The importance of a viable standard for creation of express warranties is heightened because without express warranties, consumers are very limited in terms of alternative remedies for injuries caused by products. Businesses generally choose not to contest warranty claims in most low dollar cases, but sellers are likely to oppose large claims based on serious injury or death where consumer litigants are most in need of recovery.[124] If an express warranty claim fails specifically for a lack of reliance, a consumer is essentially limited to a few highly inaccessible means of recovery.[125]

First, a buyer can seek redress under consumer protection laws, but most jurisdictions' consumer protection laws contain parallel requirements to those of express warranties—meaning a buyer unable to prove an express warranty for lack of reliance will also be unable to recover under the consumer protection laws in most

118. *Cf.* Ryan Holmes, *We Now See 5,000 Ads a Day . . . And It's Getting Worse*, LINKEDIN (Feb. 19, 2019), https://www.linkedin.com/pulse/have-we-reached-peak-ad-social-media-ryan-holmes/ (discussing the rise and perseverance of free services that are monetized with ads).

119. *Id.*

120. Mike Vorhaus, *Shorter May Be Better. The Micro-Ad Works on Smartphones*, FORBES (Dec. 21, 2021, 9:03 PM), https://www.forbes.com/sites/mikevorhaus/2020/12/21/shorter-may-be-better--the-micro-ad-works-on-smartphones/?sh=25848a9b4fc4.

121. *Cf. id.*

122. McLaughlin, *supra* note 91, at 109–10.

123. *Id.*

124. Adler, *supra* note 3, at 456.

125. McLaughlin, *supra* note 91, at 110; *see also* Douglas Whitman, *Reliance as an Element in Product Misrepresentation Suits: A Reconsideration*, 35 SW. L.J. 741, 743–765 (1981) (further describing causes of action available to those injured by products).

states.[126] Second, a buyer can seek recovery through a tort claim, which was historically the root of all express warranty claims as explained above in Part II.[127] However, tort claims based on product-caused injuries are similarly unlikely to succeed because uniform law for such claims has significant hurdles to recovery for would-be plaintiffs. For example, Restatement (Second) of Torts § 402A strict liability offers no recourse to a buyer unless the product was "unreasonably dangerous."[128] While the Restatement (Second) of Torts § 402B offers additional leniency when injury results from a misrepresentation, the section also contains a reliance requirement, which denies relief to buyers seeking a work-around from the express warranty burden of proof.[129] Lastly, class action suits have proven ineffective as express warranty substitutes because otherwise viable class action claims have historically been defeated at the stage of class certification because of inconsistencies in the reliance requirement among jurisdictions.[130]

The detrimental effect on class action recoveries is perhaps the clearest manifestation of how the absence of uniformity in the reliance standard penalizes consumers, proving especially harmful to those seeking recovery for the kinds of smaller monetary claims class actions were designed to provide.[131] These dead on arrival class action cases present a clear reason for simply selecting one standard, regardless of which one it may be. In *Chapman v. Tristar Products*,[132] a Northern District of Ohio judge refused to certify a putative nationwide class of 1.6 million buyers of a pressure cooker that was rendered worthless and dangerous by a defect that allowed its lid to open before pressure was fully released.[133] Holding that variations in the reliance requirement "swamp common issues and defeat predominance," the court noted that owners in California are subject to a different standard than owners in Kansas who are subject to a different standard than owners in Illinois.[134] Ultimately, the lack of uniformity between state law had the practical impact of limiting recovery for owners in three states that had elected to remove the reliance requirement, as well as for those that had already suffered personal injury from the cooker, denying a remedy to over one million

126. McLaughlin, *supra* note 91, at 111.
127. Shanker, *supra* note 54, at 42.
128. McLaughlin, *supra* note 91, at 112.
129. *Id.* at 113.
130. Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1640 & n.19 (2000).
131. *Id.* at 1634 & n.3, 1648.
132. No. 1:16-CV-1114, 2017 U.S. Dist. LEXIS 61767 (N.D. Ohio Apr. 24, 2017).
133. *Id.* at *1–2, *7, *14–15.
134. *Id.* at *14–15.

buyers who paid for a piece of equipment that was unusable.[135] This is precisely the sort of problem that the adoption of the U.C.C. in all fifty states should prevent.

As discussed by Professor Samuel Issacharoff, inaccessible nationwide class action recovery removes from consumers their ability to enforce their reasonable expectations for how marketplace sellers ought to conduct themselves.[136] A reasonable retail buyer expects a product that she or he purchases to perform its baseline function without causing injury. This expectation is a desirable market norm because it facilitates commerce. Imagine an alternate reality where buyers must be highly suspicious that any item they encounter in a store or online may not actually work and must investigate each product before making a purchase. Fortunately, this alternate reality need not come to pass; however, courts and commentators must realize that leaning on subjective measures of the basis of the bargain, like reliance, adds an unnecessary degree of difficulty to the process of aggregating the proof needed for a viable class action.[137]

Innovation in the space of e-commerce has changed advertising, altered modern consumer behavior, modified interactions between buyers and sellers, and created cracks in the outmoded reliance standard that leave consumers unnecessarily vulnerable.[138] So, what can be done to better protect consumers while still honoring the market principle of contractual freedom for businesses? Unfortunately, even uniform law drafters who are well aware of the way innovation has changed modern consumer transactions have left courts as helpless as the original U.C.C. drafters did more than half a century ago.[139] The Uniform Computer Information Transactions Act ("UCITA"), implemented as uniform law for software-based transactions, has retained the basis of the bargain test for computer information, and it has been as confusing to courts and commentators as the original U.C.C. test.[140] The only additional explanation offered by UCITA is that to be a part of the basis of the bargain, a promise or representation must create an "enforceable commitment."[141] This language requires further definition that is not provided in the UCITA and sounds remarkably like the basic requirement that a contract must exist for a warranty to be actionable.[142] This has left

135. *Id.* at *15, *30; *see id.* at *8–9.

136. *See* Issacharoff, *supra* note 130, at 1634–35.

137. *See id.* at 1653; *Chapman*, 2017 U.S. Dist. LEXIS 61767, at *15.

138. *See supra* notes 89–123 and accompanying text.

139. Robert A. Hillman, *U.C.C. Article 2 Express Warranties and Disclaimers in the Twenty-First Century*, 11 DUQ. BUS. L.J. 167, 169 (2009).

140. *Id.*

141. *Id.*

142. Though "enforceable commitment" is not defined by the statute, some clarity may be found by employing the *ejusdem generis* canon of construction,

electronic commercial law commentators advocating for the complete removal of the basis of the bargain language from the U.C.C.[143] While simple in description, this proposal ignores the legislative history of § 2-313 where the Uniform Law Commission deliberated about doing exactly that in 1995, but could not muster the will to dispel the last vestige of the old reliance requirement.[144] Finding no evidence that the Commission's interest in amending § 2-313 has increased, more immediate reform can and should be carried out by the courts.

The best solution is to eliminate the reliance requirement by way of judicial interpretation as a slim majority of courts throughout the nation have already done.[145] Under a uniform "no reliance" reading of the basis of the bargain test, any statement made by a seller prior to the sale, whether to the public at large or directly to the buyer at issue, would become part of the basis of the bargain.[146] Sellers should be held accountable for their statements and should be liable for what they have "in essence agreed to sell," which the comments to § 2-313 explain is the overarching purpose of warranty law.[147] This approach finds justification in the U.C.C. and would operate under the notion of expanding the time which could be considered *during the bargaining process*—at which point affirmations of fact made by a seller are included in the description of the goods at issue.[148] For representations made after the close of a liberally defined bargaining period, the normal standards for contract modification under the U.C.C. as set forth in § 2-209 should determine whether an express warranty is created.[149] Such sweeping change will certainly invite contest from retailers arguing that complete removal of the reliance requirement will increase their liability to unjustifiable levels, but

which provides that where a general word or phrase follows more specific examples, the general term is constrained in meaning by the specific instances. Wayne B. Wheeler, *Which Definition of Concurrent Power Will the Supreme Court Choose*, 90 CENT. L.J. 283, 285 (1920). Here, the UCITA indicates that the seller's representations during bargaining are part of the basis of the bargain unless they are puffing, predictions, or otherwise unenforceable commitments. UCITA § 402 cmt. 2 (2002). Per *esjudem generis*, because puffing and predictions are sales talk statements that are vague in nature and should be understood as opinions, "unenforceable commitments" would mean statements during bargaining that express opinion, subjective future belief, or are so immeasurable that a buyer could only interpret them as marketing and not as a serious claim about the qualitative features of the goods.

143. *E.g.*, Hillman, *supra* note 139, at 170.

144. White & Summers, *supra* note 15, at 540–42.

145. *See In re* Gen. Motors Corp. Dex-Cool Prods. Liab. Litig., 241 F.R.D. 305, 319 (S.D. Ill. 2007) (collecting state and *Erie* cases).

146. McLaughlin, *supra* note 91, at 110.

147. U.C.C. § 2-313 cmt. 4 (AM. L. INST. & UNIF. L. COMM'N 2022).

148. *Id.* § 2-313 cmt. 3.

149. *See id.* § 2-209.

there are plenty of common-sense solutions which could prevent the proverbial flood of litigation from meritless warranty claims.

First, express warranty protection should only be granted in the event that the promise or representation is one that a reasonable buyer could rely on—meaning it was specific, clear, and unconditional.[150] The inquiry for courts would be objective, removing the need for the buyer to prove actual reliance; however, some general considerations for the type of buyer, seller, and trade usage of their respective industries would be appropriate.[151] Once a buyer establishes evidence of a promise or representation on which she or he could reasonably rely, the burden would shift to the seller, who would be given the opportunity to present evidence to the contrary. Sellers would not be unreasonably burdened by this standard of proof because a consistent approach to the basis of the bargain test will restore vitality to class action express warranty claims and allow sellers with strong defenses to have an entire set of claims against them adjudicated in a single action.

Furthermore, sellers would not be rendered helpless in such actions, but rather would retain a strong arsenal of strategic choices available to limit their liability. Defenses such as puffery—showing a statement is merely a non-actionable opinion rooted in sales talk—and buyer knowledge—that no objectively reasonable buyer could understand a statement to constitute a warranty—are very powerful and deeply rooted in sales law.[152] In addition, sellers would be free to implement prominently placed disclosures on their websites and advertisements in order to limit their liability, a measure also useful for increasing transparency in e-commerce purchases.[153] Disclosures, if conspicuous and worded plainly, would be prima facie evidence that the buyer could not have reasonably relied on a representation or promise.

Second, using contract principles from the U.C.C., it would be possible to determine the beginning and end points of the bargaining period so as to exclude statements taking place too early or too late from being considered part of the basis of the bargain.[154] This analysis would essentially consist of a fact-specific inquiry into the expectations of a reasonable buyer under the circumstances.[155] Thus, a court would possess the necessary flexibility to account for differences between commercial and consumer sales, the impact of the course of dealing between the parties, and common trade

150. Hillman, *supra* note 139, at 170.

151. *See* Richard L. Savage III, Comment, *Laying the Ghost of Reliance to Rest in Section 2-313 of the Uniform Commercial Code: An "Endpoints" Analysis*, 28 WAKE FOREST L. REV. 1065, 1096 (1993).

152. *Id.* at 1098 n.306.

153. *See* Hillman, *supra* note 139, at 173.

154. Savage, *supra* note 151, at 1096.

155. *Id.*

practices—all of which inform contract adjudication in other sections of the U.C.C.[156] Any statement made prior to the sale would be presumed to form the basis of the bargain, but a seller in an e-commerce business that could demonstrate sufficient change in market conditions following the statement could easily overcome the presumption.

For statements made following the sale, a grace period should be imposed that would require a similar analysis informed by the same factors to determine how long post-sale a reasonable buyer could believe a seller's statements constitute part of the basis of the bargain. The U.C.C. uses a similar methodology to calculate damages post-delivery, bolstering the reasonableness of the inquiry.[157] Trade usage and course of dealing would prove especially persuasive here. Beyond the window of the bargaining period, a buyer would have to meet the modification requirements of U.C.C. § 2-209 as suggested by Comment 7 to § 2-313.[158] Though the U.C.C. disposes of the pre-existing duty rule, mutual assent is still required, and a seller can further protect itself by including in the agreement a no-oral-modification clause.[159]

Lastly, the U.C.C. concepts of good faith and commercial reasonableness, which are implied elements of every contract, can act as a final backstop against unethical conduct in order to prevent wasteful claims by buyers or duplicitous advertising practices by sellers.[160] While good faith does not provide an independent cause of action, courts are permitted to use the doctrine to protect against a party's bad faith performance or unfair exercise of a valid contractual right.[161]

The doctrine of good faith is most applicable following contract formation to address issues the contract did not specifically contemplate or situations where one party alleges rights or duties under the contract have been exercised in an unfair way.[162] Though good faith is a nebulous and broad doctrine in its own right, there is a general consensus that it can serve as a basis for implying terms into a contract, for finding a breach of contract through bad faith performance of contractual duties, and for permitting inquiry into a party's contractually authorized exercise of discretion.[163] Some have even gone so far as to extend the duty's application to the contract

156. *See id.* at 1096–97.

157. *Id.* at 1097; U.C.C. § 2-714(2) (AM. L. INST. & UNIF. L. COMM'N 2022).

158. *See generally* U.C.C. § 2-313 cmt. 7; *id.* § 2-209.

159. *Id.* § 2-209(2).

160. *See* Hillman, *supra* note 139, at 167; U.C.C. § 1-304.

161. U.C.C. § 1-304 cmt. 1.

162. Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 561 (2006).

163. *See id.* at 587–615.

formation stage.[164] Thus, the U.C.C. has already provided courts with the tools necessary to protect parties from any abuses that could result under this Comment's proposed no reliance standard, including unfair use of warranty disclosures, bad faith performance in filing or fulfilling claims, omission of warranty terms which trade usage and course of dealing deem necessary, or other unjust bargaining practices.

CONCLUSION

Since the adoption of the requirement that a seller's statement must constitute part of the basis of the bargain in order to create an express warranty, courts and commentators have struggled to reach consensus for an articulation of the test.[165] Combinations of textualism and theory have resulted in a treacherous variety between states that limits the effectiveness of the express warranty doctrine and harms consumers. Exacerbating these harms is the technological revolution and the rise of e-commerce, giving sellers more power to reach buyers and, under current law, less accountability.[166] In the absence of revision to the U.C.C. or the successful implementation of an industry-specific counterpart, courts must resolve the conundrum. By eliminating the reliance requirement for the basis of the bargain test, courts can revitalize the express warranty doctrine to better serve its original purpose—to hold sellers accountable for the product they have agreed to sell. This outcome is not revolutionary, but rather it comports with traditional goals of contract law and can be implemented using a pathway already embraced by many courts throughout the nation. The marketplace has evolved significantly since the adoption of U.C.C. § 2-313, and it is time for courts to recognize this transformation or risk compromising the functionality of the express warranty doctrine altogether.

*Christian Schweitzer**

164. *Id.* at 592–93.

165. *See* Hillman, *supra* note 139, at 167.

166. *Id.* at 171–72.

* J.D. Candidate, 2023, Wake Forest University School of Law; B.S., 2019, Weber State University. Special thank you to Professor Tim Davis for his mentorship and guidance on this Comment, and to my family for believing in me throughout my educational journey.