UCC rejection/revocation and warranty issues

By Roger T. Manwaring

"Some assembly required." These dreaded words, especially in combination with "sold as is" or other warranty disclaimers, sometimes warn of trouble to come. For example, a piece of machinery may arrive lacking an essential part or may not work as promised. If the machine is complex, requires a lengthy assembly or testing period, the buyer may not conclude that the machine is defective until months or years after the sale. What are the buyer's rights after so much time has elapsed, and how are those rights affected if the purchase order, other sale documents, or even the seller's website state that the sale is "as is" and disclaim any warranties? The Uniform Commercial Code provides answers to these questions.

Suppose that a small company agrees to purchase a complex piece of used equipment. The buyer and seller agree that the equipment will be delivered as a kit, consisting of parts which can be assembled into a working machine. The seller agrees to provide the buyer with a list of qualified installers in the buyer's area who can put the machine together. Unbeknownst to the buyer, the seller's purchase order, which the buyer signs, includes in its fine print a statement indicating that the sale is made "as is" and another indicating that all sales are made subject to the terms and conditions listed on the seller's website. That website disclaims all express and implied warranties.

The "as is" clause appears in very small print at the bottom of the purchase order and far below the signature line, and in the same tiny text as non-disclaimers appearing before and after it. It is not in capitals, a different color, underlined, bolded or emphasized in any way, nor is there any title or heading which would advise a buyer that a disclaimer was being made.

The machine arrives as a pile of parts but without the promised list of installers which is not supplied until a few weeks later. The installers are difficult to reach and further weeks pass. The few installers who respond advise the buyer that the parts delivered are insufficient to assemble the machine. When the buyer informs the seller of the problem, the seller tells the buyer that it will fix the problem, but it never does so.

An additional month passes. Ultimately, the buyer concludes that the problem will not be resolved, and demands that the seller take back the parts and refund the purchase price; however, the seller refuses to do so, citing the three months elapsed since the sale, the "as is" clause and disclaimer of warranties.

Using the remedies provided by the UCC, the buyer should be able to get its money back by rejecting the goods or, if the buyer is deemed to have accepted them, by revoking that acceptance. Further, the "as is" clause and any disclaimers on the seller's website are unlikely to be effective.

Rejection

Under the Massachusetts UCC, when goods contracted for:

fail in any respect to conform to the contract, the buyer may: (a) reject the whole; (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.

G.L. c. 106, §2-601. The rejection must be made within a reasonable time and the buyer must seasonably notify the seller. §2-602(1). "The buyer has no further obligations with regard to goods rightfully rejected." §2-602(2)(c). Under §2-606(b) a buyer accepts goods by failing to effectively reject them, *"but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them ..."* (emphasis added).

In the scenario described above, the buyer was entitled to reject the equipment because it failed to conform to the contract specifications that the seller would deliver a functional machine. While §2-601 speaks of failing "in any respect to conform," the failure in this case would justify rejection even if the UCC required a substantial non-conformity. The parts delivered were not a functional machine and could not be assembled into one. The failure was total. The definition of "substantial impairment" is discussed below in the section on revocation.

In addition to proving a non-conformity, a buyer must reject within a reasonable time after delivery. Whether the buyer timely rejected is an issue fact. *Colonial Pacific Leasing Corp. v. J.W.C.J.R. Corp.*, 977 P.2d 541, 547 n.3 (Utah App. 1999), citing *SPS Indus., Inc. v. Atlantic Steel Co.*, 186 Ga. App. 94, 366 S.E.2d 410, 414 (1988). As noted above, §2-606 provides that acceptance cannot occur until the buyer has had a reasonable opportunity to inspect the items delivered. See also *In re Rafter Seven Ranches L.P.*, 546 F.3d 1194, 1201-02 (10th Cir. 2008); *In re: S. M. Acquisition Co.*, 319 B.R. 553, 567 (Bkrtcy. N.D. Ill. 2005), *aff'd* 2005 WL 6292653 (N.D. Ill. 9/12/05); *Colonial Pacific*, 977 P.2d at 545. Thus, the buyer here retained the right to reject until a reasonable period for inspection had elapsed.

Whether the buyer had a reasonable opportunity to inspect and thus acceptance occurred, thereby barring rejection, is also a question of fact. Colonial Pacific, 977 P.2d at 544. A reasonable time for inspection must allow the buyer an opportunity to put the product to its intended use or to conduct tests to verify its capability to perform as intended. *Capitol Dodge Sales, Inc. v. Northern Concrete Pipe Inc.*, 131 Mich. App. 149, 158, 346 N.W.2d 535, 539 (1983); *Eggl v. Letvin Equipment Co.*, 632 N.W.2d 435, 441 (N.D. 2001).

What constitutes a reasonable time for rejection also depends in part on the difficulty of discovering the defect at issue. *Rafter Seven*, 546 F.3d at 1202; *Capitol Dodge*, 131 Mich. App. at 159 n. 13, 346 N.W.2d at 540 n.13 ("in determining whether there has been an acceptance in a given case, what constitutes a reasonable opportunity to inspect will depend upon the nature of the defect.").

In this case, rejection within three months arguably was reasonable because it took the buyer that long to determine that the items delivered were defective. Even if the machine had been delivered fully assembled, the buyer would have been entitled to a reasonable time to inspect it and put it to use in order to verify that it performed properly. However, inspection and verification was made much more difficult by the fact that the equipment came unassembled.

As the buyer's employees were not experts in the mechanics of the machine, they could not adequately determine whether the parts delivered conformed to the contract. The buyer could not reasonably discover the non-conformity until it attempted to have the parts assembled by the installers on the list provided by the seller. Those installers were difficult to reach, however, and ultimately told the buyer that the equipment could not be assembled into a safely functioning machine. Immediately upon receiving this news, the buyer contacted the seller and any additional delay in rejection was caused by the seller's representations that it would fix the problem.

Revocation

Even if the buyer were deemed to have accepted the equipment, it was entitled to revoke that acceptance, and therefore stands in the

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same position as if there had been no acceptance. UCC §2-608 states,

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it:

(a) On the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) *Without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.*

(2) *Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it* and before any substantial change in condition of the goods which is not caused by their own defects. *It is not effective until the buyer notifies the seller of it.*

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them (emphasis added).

Thus, a buyer seeking to revoke, who was unaware at the time of acceptance that the goods were defective, must establish:

(1) a nonconformity which substantially impairs the value of the "lot or commercial unit"; (2) acceptance ... reasonably induced by the difficulty of the discovery or by seller's assurances; (3) revocation within a reasonable time after the nonconformity was discovered or should have been discovered; (4) revocation before a substantial change occurs in the condition of the goods not caused by their own defects; and (5) due notice of the revocation to the seller.

James J. White & Robert S. Summers, *Uniform Commercial Code* § 8-4, at 564 (5th ed. 1996) ("White & Summers"). See also *Novacore Tech. Inc. v. GST Communications Corp.*, 20 F.Supp.2d 169, 184 (D. Mass. 1998) ("If the buyer has accepted the good without discovery of the non-conformity, he may still revoke if the acceptance 'was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.'")

The critical issues relating to revocation (substantial impairment, timeliness, etc.) all are questions of fact for the jury.

a. Substantial impairment of value

Whether a non-conformity substantially impairs the value of the item to the buyer is a question of fact. *Fortin v. Ox-Bow Marina*, 408 Mass. 310, 316 (1990); *Pulicelli v. Blackstone Surru Inc.*, 713 A.2d 797, 798 (R.I. 1998); *East Side Prescription Center, Inc. v. E.P. Fournier Co. Inc.*, 585 A.2d 1176, 1179 (R.I. 1991). Clearly, where an item entirely fails to function for its intended purpose, its value is substantially impaired. *East Side*, 585 A.2d at 1179 ("[buyer] was not able to utilize the vehicle for the purpose for which it was purchased because of the incessant mechanical malfunctions. It is apparent that the value of the car to [buyer] ... was substantially impaired."). In this case, the parts delivered could not be used at all. They were without value.

More generally, the determination whether a non-conformity constitutes a substantial impairment must be made with reference to all of the circumstances. Fortin, 408 Mass. at 316. Given the focus on value to the revoking buyer, a defect need not be incurable to constitute a substantial impairment of value:

In determining whether defects in a product substantially impair its value to the revoking buyer, "[m]ost courts read this test as an objective, or common sense, determination that the impaired value of the goods to the buyer was substantial as opposed to trivial, or easily fixed, given his subjective needs."... Such a determination is made in light of the "totality of the circumstances" of each case, including factors such as the "time and inconvenience spent in downtime and attempts at repair" of the product and whether defects "circumscribe ... use or warrant unusual or excessive maintenance actions in order to use" the product...."Experiencing in a major investment a series of defects, even if some have been cured and others are curable, can shake a buyer's faith in the goods, at which point the item not only loses its real value in the buyer's eyes, but also becomes an article whose integrity has been substantially impaired and whose operation is fraught with apprehension."

Novacore, 20 F.Supp.2d at 184, quoting *Fortin*, 408 Mass. at 316-17 (emphasis added). Here, even if the seller could eventually supply the missing parts and otherwise cobble together a functioning machine, the value of the machine to the buyer would still be impaired, and its use would be "fraught with apprehension."

b. Acceptance without knowledge of defect induced by seller's assurances or by difficulty of discovery

If the buyer accepted the equipment at all, it did so without knowledge of its non-conformity to the specifications of the contract. The acceptance was induced both by the seller's assurances and by the difficulty of discovering the non-conformity. The seller assured the buyer that the machine the buyer was purchasing would be complete and, once assembled and installed, would function properly. Those assurances were sufficient to induce the buyer to accept the equipment without knowledge of the non-conformity.

In *Pulicelli*, the Rhode Island Supreme Court noted that there was sufficient evidence for the jury to have determined that "the plaintiffs were reasonably induced into accepting the vehicle by Blackstone's salesperson's assurances that the vehicle had never been in an accident." 713 A.2d at 798. See also *Kesner v. Lancaster*, 180 W.Va. 607, 613 n.15, 378 S.E.2d 649, 655 n.15 (1989) ("The buyer might also have had the right to rely on the seller's assurance, made prior to the acceptance, that the machine was in "fine shape." Under [UCC §2-608(1)(b)] ..., a seller's assurances have the effect of absolving the buyer from a duty to make a discovery of the nonconformity."); White & Summers, §8-4, p. 568 ("The buyer's failure to discover nonconformities may be attributable to assurances of the seller. Thus the seller may say things that throw the buyer off guard or otherwise induce the buyer not to discover the nonconformity.")

Setting aside any assurances made by the seller, the buyer's failure to discover the nonconformities prior to acceptance was caused by the complexity of the machine, and the resulting difficulty of discovering the nonconformities. The scenario described above was not one in which a complete machine was delivered and the buyer had only to switch it on to discover whether it worked. Instead, the seller delivered what amounted to a kit from which the machine supposedly could be constructed. Not being an expert in the mechanics of such lifts, the buyer could not itself determine whether the correct parts had been supplied.

A buyer is not required to go to extraordinary lengths to discover a defect before acceptance. In *H.P. Tool Mfg. Corp. v. Zimmerman*, 37 B.R. 885 (Bkrtcy. E.D. Pa. 1984), the court held that the buyer could revoke based on a finding that it had accepted tool kits without knowledge of their defects due to the difficulty of discovering such defects. The court noted that the only way in which the buyer could have discovered the defects was to have opened each carton and unfolded each of the kits, which were individually wrapped in vinyl-like pouches. Id. at 887.

The difficulty of discovery of defects in complex machinery is further discussed in the following section concerning the timeliness of revocation.

c. Revocation within a reasonable time after defect discovered or should have been discovered

Whether a buyer revoked within a reasonable time is a question of fact for the jury. *In re: G.S.F. Corp.*, 6 B.R. 894, 897 (Bkrtcy. D. Mass. 1980); *Fortin v. Ox-Bow Marina*, 408 Mass. at 315; *Harrington Mfg. Co., Inc. v. Logan Tontz Co.*, 40 N.C. App. 496, 504, 253 S.E.2d 282, 286 (1979); *Eggl*, 632 N.W.2d at 442; *East Side*, 585 A.2d at 1179.

What is a reasonable time depends, among other things, on the nature of the item delivered, the complexity of the item, the difficulty of discovery and the sophistication of the buyer. *Roy Burt Enterprises, Inc. v. Marsh*, 328 N.C. 262, 264, 400 S.E.2d 425, 427 (1991) (defects in fertilizer could not reasonably be discovered until it was applied to the ground); *Cato Equipment Co., Inc. v. Matthews*, 91 N.C. App. 546, 550, 372 S.E.2d 872, 875 (1988) ("In determining what is a reasonable time, it is proper to consider all the surrounding circumstances, including the nature of the defect, the complexity of the goods involved, the sophistication of the buyer, and the difficulty of the discovery"); *Harrington*, 253 S.E.2d at 503 (same); *EPN-Delaval, S.A. v. Inter-Equip Inc.*, 542 F.Supp. 238, 247 (S.D. Tex. 1982) (same).

A longer time for discovery of nonconformities is reasonable when the item in question is a complex piece of machinery. "Where complicated machinery which has [a] long period of ironing out is involved, notification of buyer's revocation of acceptance will necessarily take a longer time than where a relatively simple, easily inspected item such as foam is involved." *In re G.S.F.*, 6 B.R. at 897. See also *Travel Services Intern., Inc. v. Incentive Systems Inc.*, 2002 WL 1058892, *3 n.3 (D. Mass. 5/23/02).

It also is well established that the time for revocation is tolled for the period during which a buyer, having discovered a non-conformity, is working together with the seller to cure the defect. *Novacore*, 20 F.Supp.2d at 185 ("Indeed, [m]any courts have held that any delay on the part of the buyer in notification of revocation of acceptance is justified where the buyer is in constant communication with the seller regarding nonconformity of the goods, and the seller makes repeated assurances that the defect or nonconformity will be cured and attempts to do so." (internal quotation marks omitted)); *Fortin v. Ox-Bow Marina*, 408 Mass. at 318-19; East Side, 585 A.2d at 1180. "It would be anomalous, given the U.C.C.'s purpose to encourage buyers and sellers to reach reasonable accommodations to minimize losses, ... to penalize buyers ... for their patience in giving sellers ... the opportunity to rectify nonconformities before revoking acceptance of the goods." Fortin, 408 Mass. at 318-19, 557 N.E.2d at 1163. See also Travel Services, 2002 WL 1058892, *3 n.3.

In our hypothetical scenario, the equipment delivered to the buyer was extremely complex not just because such a machine is by its nature complex, but because this machine was delivered unassembled. The buyer made prompt and reasonable efforts to have it assembled, but encountered delays. The time period between delivery and revocation also is reasonable because, during that period, the buyer was working with the seller to make the product functional and to discover any non-conformities. Having delivered nothing more than a box of parts, and having agreed to provide a list of installers, the seller clearly contemplated that the buyer would require a reasonable amount of time after delivery to have the lift assembled and to discover any non-conformities.

In any event, revocation three months after delivery is well within the bounds of reasonable time for revocation. In *East Side*, revocation was allowed after the buyer had held the vehicle for 30 months and driven it 38,000 miles. *East Side*, 585 A.2d at 1179. In *Pulicelli*, revocation was allowed after one year. 713 A.2d at 797-798. In *Fortin*, the Supreme Judicial

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Court approved a 4 month period, but cited cases in which revocation had been allowed after up to four *years*. 408 Mass. at 319. The *Fortin* court cited: "*Gramling v. Baltz*, 253 Ark. 361, 485 S.W.2d 183, 187-88 (two-year delay in revoking acceptance of truck not unreasonable where seller was attempting to cure defects); *Conte v. Dwan Lincoln-Mercury Inc.*, 172 Conn. 112, 122, 374 A.2d 144 (Conn. 1976) (fourteen-month delay in notice of revocation not unreasonable); *Jackson v. Rocky Mountain Datsun Inc.*, 693 P.2d 391, 394 (Colo. App. 1984) (six to eight months between acceptance of automobile and revocation deemed not unreasonable); *Bair v. A.E.G.I.S. Corp.*, 523 So.2d 1186, 1189 (Fla. App. 2 Dist. 1988) (buyer's two-year delay in revoking acceptance of boat reasonable); *Ybarra v. Modern Trailer Sales Inc.*, 94 N.M. 249, 250, 609 P.2d 331 (1980) (four-year delay in revoking acceptance of mobile home held not unreasonable); *Welch v. Fitzgerald-Hicks Dodge Inc.*, 121 N.H. 358, 365, 430 A.2d 144 (1981) (five-month delay during which buyer drove automobile 11,000 miles deemed reasonable for revocation); *Warren v. Guttanit Inc.*, 69 N.C. App. 103, 111, 317 S.E.2d 5 (1984) (eight-month delay in revoking acceptance of new roof not unreasonable); *Erling v. Homera Inc.*, 298 N.W.2d 478 (N.D.1980) (one and one-half years between acceptance of mobile home and revocation reasonable); *Vista Chevrolet, Inc. v. Lewis*, 704 S.W.2d 363, 369 (Tex. App. 1985) (fifteen-month delay held reasonable; *Aubrey's R.V. Center v. Tandy Corp.*, 46 Wash. App. 595, 603, 731 P.2d 1124 (1987) (nine-month gap between acceptance of computer and revocation deemed reasonable)." See also *Triad Systems Corp. v. Alsip*, 880 F.2d 247, 249 (10th Cir. 1989) (two plus years reasonable time for revocation).

d. Before a substantial change occurs in the condition of the goods

In the hypothetical scenario, the equipment delivered by the seller did not undergo any change in condition before revocation.

e. Notice to seller

In our hypothetical, once the buyer discovered the non-conformities in the equipment delivered, it promptly gave the seller notice and, when it became clear that the seller could not or would not fix the problem, promptly gave notice of rejection/revocation.

The "as is" clause

The seller's reliance on the "as is" clause included in the fine print of its purchase order should fail. UCC §2-316 states, in relevant part:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty ....

Under §2-316, all disclaimers of implied warranties, including so-called "as is" disclaimers, must be conspicuous. Although subsection (3) of §2-316 does not expressly require that an "as is" disclaimer be conspicuous, UCC commentators and the overwhelming majority of courts hold that a conspicuousness requirement is implied in subsection (3). *Anderson on the Uniform Commercial Code* states: "Under a literal application of UCC § 2-316(3)(a), the requirement of "conspicuousness" does not apply to an "as is" clause. Most courts, however, have read into the Code a requirement that an "as is" clause be conspicuous." 3A Anderson U.C.C. §2-316:172 (3d ed.) (2007). See also e.g. *Scientific Leasing Inc. v. Morris*, 1993 WL 524787, *2 (N.D. Ill. 12/14/93) ("Courts have generally read subsection (2)'s conspicuousness requirement into subsection (3)"); *Leland Industries Inc. v. Suntek Industries, Inc.*, 184 Ga. App. 635, 362 S.E.2d 441, 444 (1987) ("The requirement that disclaimer terms must be conspicuous to be effective follows the main current of interpretation of [OCGA 11-2-316(3)(a)]"); *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 169 n.6 (Del. Super. 1986) ("the trend of cases from other jurisdictions is in favor of requiring conspicuousness even under 2-316(3)(a)). In our hypothetical, however, neither the disclaimer language in the fine print of the seller's purchase order, nor the language of the seller's website referred to at the bottom of the purchase order, are conspicuous.

UCC §1-201(10) notes that the issue of conspicuousness is one of fact and defines conspicuous as follows:

"Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court. See also *Boston Helicopter Charter Inc. v. Agusta Aviation Corp.*, 767 F. Supp. 363, 376 (D. Mass. 1991).

The "as is" disclaimer relied upon by the seller satisfies none of these requirements. It appears in very small print, at the bottom of the purchase order, well below the line on which the buyer signed. Its tiny text, moreover, is not emphasized in any way to set it off from the non-disclaimers appearing before and after it. It is not in capitals, a different color, underlined, or bolded. Nor is there any title or heading which would advise a buyer that a disclaimer was being made. Because the disclaimer is not conspicuous, it is ineffective.

While the reference at the bottom of the purchase order to terms and conditions on the seller's website suffers from the same lack of conspicuousness, this incorporation by reference would likely be ineffective even if the reference on the purchase order were conspicuous and even if the website conspicuously displayed its disclaimers. A seller cannot make a conspicuous disclaimer in one document simply by incorporating by reference a disclaimer which appears conspicuously on a different document. *Koellmer v. Chrysler Motors Corp.*, 276 A.2d 807, 811 (Conn. Cir. Ct. 1970) ("[I]ncorporation by reference, only, can hardly be regarded as conspicuously setting forth the conditions appearing in the other document."); *Outboard Marine Corp. v. Babcock Industries Inc.*, 1994 WL 468596, *7 (N.D. Ill. 8/26/94) (UCC conspicuousness requirement "counsels against incorporation when the reference to a disclaimer in another document is not explicit"); *Woodward v. Naylor Motor Sales*, 1974 WL 21755 (Mich. Dist. 4/11/74); 63 *Am. Jur.2d Products Liability*, §821 ("The UCC §2-316(2) standard of conspicuousness is not, however, satisfied by the mere incorporation of a disclaimer within one document by reference to another, regardless of whether the disclaimer is conspicuously printed in the document in which it actually appears.")

The seller's attempted disclaimer of express warranties

Even if the "as is" clause and the website disclaimers were deemed conspicuous, they would likely be ineffective to disclaim any express warranties made by the seller that the machine would work and that the item delivered would in fact be the machine purchased. A seller generally cannot disclaim express warranties. *Providence & Worcester Railroad Co. v. Sargent & Greenleaf Inc.*, 802 F.Supp. 680, 688 (D. R. I. 1992). Section 2-316(1) states:

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

The UCC Comment to §2-316(1) explains:

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 denying effect to such language when inconsistent with language of express warranty ...

Thus, where the express warranty is inconsistent with the disclaimer, the disclaimer fails. *USM Corp. v. Arthur D. Little Systems Inc.*, 28 Mass. App. Ct. 108, 546 N.E.2d 888, 896 (1989) ("To the extent that the express warranties are inconsistent with the disclaimer, however, G.L. c. 106, § 2-316(1), requires that the express warranties be given effect"); *Sosik v. Albin Marine* Inc., 16 Mass. L. Rptr. 398, 2003 WL 21500516, *5 (Mass. Super. 5/28/03). Providence, 802 F.Supp. at 688.

The "as is" clause would not effectively disclaim express warranties. UCC §2-316(2-3) make clear that an "as is" clause disclaims implied warranties (of fitness or merchantability) but not express warranties.

Nor would the language on the seller's website effectively disclaim the express warranties that the machine would work and identifying the machine to be delivered. UCC §2-313 provides:

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

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

The buyer in our example can argue that, under §2-313(1)(b), the description of the machine appearing in the purchase order is a basis of the bargain and creates an express warranty that the seller will deliver an item conforming to that description. In addition, under §2-313(1)(a), a statement by the seller that the machine delivered would be complete and, once assembled, would function properly created an express warranty that the item delivered would work as such a machine should. The seller cannot use its disclaimers to avoid these express warranties.

Any merchant who regularly purchases or sells goods should be aware of his or her UCC rights. The UCC attempts to protect the reasonable expectations of both buyers and sellers. Although it attempts to provide clear procedures for resolving disputes arising from non-conforming goods, the UCC's focus on reasonable expectations causes it to rely on general concepts (e.g. reasonable time) and often leaves it to the courts to apply the UCC in a particular situation. It is, therefore, also essential to maintain an understanding of the evolving judicial interpretations of the UCC's provisions.