The Unconscionably Short Warranty

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Abstract

A typical consumer product warranty covers products for defects that appear before the warranty period expires. If the manufacturer warrants a vehicle for five years or 60,000 miles, whichever occurs first, problems that require repairs after the warranty period expires are outside the warranty and, therefore, the buyer's problem. Advocates for consumers have developed a theory to escape the claim-barring consequence of expiration of the warranty period. They have argued with some success that the warranty period that would otherwise bar their claim is unconscionable and thus unenforceable under Uniform Commercial Code ("UCC") section 2-302. The warranty period term, they contend, is both procedurally and substantively unconscionable because the manufacturer knew and failed to disclose the risk that the defect would appear only after the warranty period expired. In effect, the manufacturer has exploited its superior knowledge of the product and market power to impose a warranty period term that unconscionably shifted the risk of product failure to the consumer.

This Article considers this theory of the unconscionably short warranty period. It explains how UCC Article 2 and the Magnuson-Moss Warranty Act recognize and regulate the use of warranty period terms to limit the duration of express and implied warranties on consumer products. It explains the development of the unconscionably short warranty theory and critiques the Fourth Circuit's key decision that recognized it in Carlson v. General Motors. *It argues that the unconscionably short warranty theory is an inappropriate use of section 2-302 to circumvent the pleading and proof requirements necessary for a tort or statutory cause of action against a consumer product manufacturer for fraudulent misrepresentation by nondisclosure in bargaining.*

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INTRODUCTION

A typical written consumer product warranty covers defects that appear during a stated period after the buyer takes delivery of the goods: the warranty period.[1] For example, new vehicle warranties state that the manufacturer will repair or replace defective parts covered by the warranty if the buyer demands warranty service before a stated time elapses or a stated number of miles are driven, whichever occurs first.[2] A warranty period limits the manufacturer's warranty liability to problems with the product that the buyer brings to its attention before the period expires. Defects that arise afterwards that require costly

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1 *See generally* W.R. Blischke & D.N.P. Murthy, *Product Warranty Management—I: A Taxonomy for Warranty Policies*, 62 EUR. J. OPERATIONAL RSCH. 127, 130–31 (1992) (describing a promise to repair or replace defective products within a warranty period as "the most common of all consumer warranties and probably of commercial warranties as well").

2 *See, e.g.*, Alban v. BMW of N. Am., LLC (*Alban II*), No. 09-5398 (DRD), 2011 WL 900114, at *2 (D.N.J. Mar. 15, 2011) (noting that the plaintiff's warranty, "like most motor vehicle warranties," provides a repair or replace warranty during a time or mileage warranty period and quoting BMW's vehicle warranty). Manufacturers who give a "lifetime" warranty on consumer goods set the warranty period via the definition of "lifetime." *See* Anisur Rahman & Gopinath Chattopadhyay, *Lifetime Warranty Policies: Complexities in Modelling and Potential for Industrial Application*, 2004 PROC. FIFTH ASIA PAC. INDUS. ENG'G & MGMT. SYS. CONF. 3.3, https://www.researchgate.net/publication/27482747_Lifetime_Warranty_Policies_Complexities_in_Modelling_and_Potential_for_Industrial_Application [https://perma.cc/V643-HMWL].

repairs or otherwise devalue the product, creating an economic loss, are the uncovered responsibility of the owner.[3]

Suppose a consumer discovers that his truck is leaking oil. Because of the design of the engine, the oil leak can be repaired, but the cost of repair is alarmingly high because the manufacturer designed the engine such that the leaking part is accessible only by a labor-intensive disassembly of the engine block. The consumer demands repair under the manufacturer's warranty, but the manufacturer refuses because the warranty period had expired before the consumer reported the problem, thus the product is "out of warranty." The buyer's injury is solely economic—the cost of the repair—as no physical injury occurred. A buyer in this situation may concede that the truck is out of warranty but nonetheless feel wronged by the manufacturer's refusal to make the repair because of the unexpectedly high repair cost for an oil leak.

The sale of the truck is a sale of goods within the scope of state enactments of Uniform Commercial Code ("UCC") Article 2.[4] Moreover, the manufacturer's written warranty is subject to the federal Magnuson-Moss Warranty Act ("MMWA")[5] because the truck is a "consumer product."[6] Further suppose that a group of consumer buyers of the same truck who encountered the same oil leak problem sues the manufacturer for breach of warranty.[7] Although the warranty period has expired when they sue, they argue that expiration of the warranty period should not shield the manufacturer from liability because, at the time they bought their trucks, the manufacturer knew but did not disclose both that the engine design would dramatically increase the cost to repair an oil leak and that oil leaks like the consumers experienced would likely only happen *after* the warranty period expired. UCC

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3 *E.g.*, Abraham v. Volkswagen of Am., Inc., 795 F.2d 238, 250 (2d Cir. 1986) (holding that an express warranty subject to a warranty period "does not cover repairs made after the applicable time or mileage periods have elapsed"); Daugherty v. Am. Honda Motor Co., 51 Cal. Rptr. 3d 118, 123 (Cal. Ct. App. 2006) ("[I]n giving its promise to repair or replace any part that was defective in material or workmanship and stating the car was covered for three years or 36,000 miles, [the defendant] 'did not agree, and plaintiffs did not understand it to agree, to repair latent defects that lead to a malfunction after the term of the warranty.'" (quoting trial order)).

4 UCC Article 2 governs transactions in goods. U.C.C. §§ 2-102, 2-302 (Am. L. Inst. & Unif. L. Comm'n 2022).

5 15 U.S.C. §§ 2301–2312. The MMWA regulates warranties on "consumer products." *Id.* § 2302(a).

6 *See id.* § 2301(1) ("'[C]onsumer product'" means "tangible personal property . . . which is normally used for personal, family, or household purposes . . . ."). The MMWA sets minimum standards for and otherwise regulates "full" and "limited" written warranties on "consumer products." *Id.* §§ 2303–2308.

7 The MMWA provides for federal district court jurisdiction for civil actions by consumers who are damaged by the failure of the supplier of a written warranty to comply with any obligation imposed by the MMWA. *Id.* § 2310(d)(1)(B). It also provides for consumer class actions, *id.* § 2310(e), and recovery of attorneys' fees by a prevailing consumer, *id.* § 2310(d)(2).

section 2-302 provides that a court may refuse to enforce an unconscionable term in a contract within the scope of Article 2.[8] The consumers argue that the manufacturer's concealment of its exclusive knowledge regarding the engine design and the likelihood and timing of oil leaks at the time of sale, together with the manufacturer's exploitation of its superior bargaining power, makes the warranty period unconscionably short under UCC section 2-302. Because the warranty period term is unenforceable, the consumers' claims can survive the manufacturer's motion to dismiss based on expiration of the warranty period.[9]

Federal district courts applying states' versions of section 2-302 and the MMWA in consumer class action litigation have reached different conclusions regarding whether a warranty period can be unconscionably short based on the manufacturer's knowledge and nondisclosure of a postwarranty period defect. Those that recognize the theory disagree as to the facts the plaintiff must allege to sufficiently show unconscionability of the warranty period term to escape the claim-barring effect of expiration of the warranty period.[10]

The stakes of this seemingly esoteric issue are high. When the unconscionability theory works to overcome the manufacturer's warranty expiration defense on motion to dismiss, consumer buyers win the chance to take discovery and significant settlement leverage.[11] Manufacturers must account for this incremental risk of warranty liability.[12] Because the validity of the unconscionably short warranty theory and the circumstances in which it might apply are unclear, manufacturers risk over or underestimating warranty accruals, resulting in unnecessary capital costs that increase prices for all consumers.[13]

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8 U.C.C. § 2-302(1) (Am. L. Inst. & Unif. L. Comm'n 2022) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.").

9 *See infra* text accompanying notes 123–28.

10 *See infra* text accompanying notes 87–89.

11 A recent report shows a dramatic increase in the value of settlements in consumer class action litigation for product liability and mass tort (267% increase between 2021 and 2022) and consumer fraud class actions (640% increase over the same period). *See* Class Action Review—2023, at 13 (Gerald L. Maatman Jr. & Jennifer A. Riley eds., 2023); Edward Segal, *Class Action Lawsuits Set New Billion Dollar Settlement Records in 2022: Report*, Forbes (Jan. 4, 2023, 7:39 AM), https://www.forbes.com/sites/edwardsegal/2023/01/04/class-action-lawsuits-set-new-billion-dollar-settlement-records-in-2022-report/ [https://perma.cc/88T3-7W6G].

12 Fin. Acct. Standards Bd., Accounting Standards Codification (ASC) 460-10-25-5, https://asc.fasb.org/460/ [https://perma.cc/6SA3-3Q3H] (specifying accounting for warranty obligations as a contingent liability). Warranty costs typically range between 2 and 10% of net sales revenue. Blischke & Murthy, *supra* note 1, at 128.

13 *See* Greg Spraker, *Warranty Financial Management: Part 2: Optimizing Warranty Reserves. Rightsizing a $100 Billion Dollar Worldwide Warranty Reserve by Turning Lazy Capital into Working Capital*, Warranty Wk. (Jan. 23, 2007), https://www.warrantyweek.com/archive/ww20070123.

This Article considers the legal and factual premises underlying the unconscionably short warranty period theory. Part I explains how UCC Article 2 and the MMWA regulate the use of a warranty period to define the manufacturer's liability for breach of its express postdelivery warranty and the implied warranty of merchantability. Part II explains the development of the unconscionably short warranty period theory. Part III surveys the disparate outcomes among courts who have considered the theory. Part IV argues that a clearly stated warranty period term which provides meaningful, albeit nonperpetual, postdelivery warranty coverage cannot be unconscionably short under section 2-302. It argues that the unconscionably short warranty theory depends on an erroneous understanding of the *substantive* effect of a warranty period term on the value of a manufacturer's warranty package. Moreover, absent allegations sufficient to show the manufacturer's tortious fraud, the manufacturer's superior and exclusive knowledge of the risk of a postwarranty period defect at the time of sale does not plausibly establish that the time-limited warranty package the manufacturer provided is the product of malign exploitation of market power. Instead, the appropriate theory under which to challenge the manufacturer's communicative behavior at the time of sale is a tort or statutory action for fraudulent concealment in the inducement of contract. The Article concludes that the unconscionably short warranty theory is an inappropriate attempt to fit the square peg of a tort claim for fraudulent misrepresentation into the round hole of unconscionability.

I. Warranties and the Warranty Period Under Article 2 and the Magnuson-Moss Warranty Act

To understand whether and when a warranty period term can be unconscionably short under section 2-302, it is necessary to first understand the provisions in UCC Article 2 and the MMWA that apply to warranty period terms and how a warranty period term defines the scope of the manufacturer's liability under express and implied warranties.

A. Express and Implied Warranties Under UCC Article 2

Article 2 does not require a seller to give any express warranty at all other than the minimal warranty that the goods are as described

html [https://perma.cc/2CCA-PM5X] (describing techniques for management of warranty reserves and noting the potential for reducing capital costs by improving the accuracy of warranty reserve forecasting); Cigdem Z. Gurgur, *Dynamic Cash Management of Warranty Reserves*, 56 Eng'g Econ. 1, 4 (2011) (noting that warrantors that under accrue for warranty costs risk increased capital costs due to emergency borrowing).

on delivery.[14] Section 2-313(1) states that an express warranty assures the buyer that the goods "shall conform" to the seller's "affirmation of fact or promise."[15] A manufacturer's express promise to provide *a remedy* (repair or replace) for defects that the buyer brings to its attention during the warranty period technically is not an express warranty "that the goods shall conform" as the drafters described in section 2-313.[16] Rather, it is a promise *regarding the manufacturer's performance* if the goods turn out to be defective after delivery under the specific circumstances.[17] The first type of promise is a "warranty" under section 2-313(1), whereas the second type of promise is a manufacturer's performance obligation. The distinction between these two types of promises—promises about the goods and promises about the manufacturer's performance—is relevant for purposes to be considered later.[18] For now, it is sufficient to note that both types are express promises and that a seller has no obligation to give either type.

An affirmation of fact or promise becomes an express warranty only if it "becomes part of the basis of the bargain."[19] This phrase leaves room for courts to interpret, based on the context, whether, or to what extent, the buyer must establish reliance on an express warranty in the decision to buy the goods.[20] In a comment to section 2-313, the drafters

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14 U.C.C. § 2-313(1) (Am. L. Inst. & Unif. L. Comm'n 2022). Express warranties "rest on 'dickered' aspects of the individual bargain." *Id.* § 2-313 cmt. 1; *see also id.* § 1-302(a) (providing that unless prohibited "the effect of provisions [of the Uniform Commercial Code] may be varied by agreement"); *id.* § 1-302 cmt. 1 (noting that subsection (a) "states affirmatively . . . that freedom of contract is a principle" of the UCC); Arkwright-Bos. Mfrs. Mut. Ins. Co. v. Westinghouse Elec. Corp., 844 F.2d 1174, 1180 (5th Cir. 1988) (noting that Article 2 does not require the seller to give any express warranty). A seller inescapably gives a minimal express warranty by describing the goods that they are as described. U.C.C. § 2-313(1) cmt. 4 (noting that "a contract is normally a contract for a sale of something describable and described" and a term that purports to disclaim "'all warranties, express or implied' cannot reduce the seller's obligation with respect to such description"); *see also* Tacoma Boatbuilding Co. v. Delta Fishing Co., No. 165-72C3, 1980 WL 98403, at *32 (W.D. Wash. Jan. 4, 1980) (noting that the contract identified the goods to be sold as an "engine" created an express warranty that the seller "would deliver something of that general nature and function").

15 U.C.C. § 2-313(1); *see id.* § 2-106(2) (goods "conform to the contract when they are in accordance with the obligations under the contract," including warranty obligations).

16 *Id.* § 2-313(1).

17 *See* Herbstman v. Eastman Kodak Co., 342 A.2d 181, 187 (N.J. 1975) (noting the distinction between a manufacturer's warranty against defects and the manufacturer's promise to repair or replace any defects); Tuttle v. Kelly-Springfield Tire Co., 585 P.2d 1116, 1120 (Okla. 1978) (discussing the same).

18 *See infra* notes 39–45 and accompanying text.

19 U.C.C. § 2-313(1)(a).

20 *See* John E. Murray Jr., *"Basis of the Bargain": Transcending Classical Concepts*, 66 Minn. L. Rev. 283, 304 (1982) (discussing the possible meanings of "basis of the bargain" in section 2-313(1)). The Uniform Sales Act expressly required buyer reliance on an express warranty. Unif. Sales Act § 12 (1922) (superseded by U.C.C. (1952)) (defining express warranty as "[a]ny affirmation of fact or any promise by the seller relating to the goods . . . if the natural tendency

explain that any affirmation or promise becomes "part of the basis of the bargain" presumptively.[21] To exclude an affirmation or promise from becoming part of the basis of the bargain, therefore, "requires clear affirmative proof."[22]

A manufacturer of consumer goods typically controls the set of express warranties the buyer may enforce against it by use of a written warranty with a merger term.[23] The merger term provides that the written warranty contains the "entire agreement" of the parties and that the written terms are the only express warranties given and supersede any other affirmations or promises that are not expressed in the writing.[24] The merger term is evidence that the parties intended the writing to be the final, complete, and exclusive statement of their agreement. Thus, the parol evidence rule codified in UCC section 2-202 bars the buyer from introducing evidence of any express warranty other than those expressed in the writing.[25]

Article 2 *implies* two warranties regarding the quality of the goods: (1) the warranty of merchantability,[26] and (2) the warranty of

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of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon").

21 U.C.C. § 2-313 cmt. 3.

22 *Id.*; *see, e.g.*, Yates v. Pitman Mfg., Inc., 514 S.E.2d 605, 607 (Va. 1999) (finding that because the seller had not introduced evidence that its promise regarding the goods did not become part of the agreement, it was an express warranty without regard to whether the buyer relied on it); Fleisher v. Fiber Composites, LLC, No. 1326, 2012 WL 5381381, at *6 (E.D. Pa. Nov. 2, 2012) (finding that statements in manufacturer's warranty document could create express warranties but dismissing complaint for breach of express warranty because plaintiff did not allege they were aware of the statements at the time of sale).

23 *See, e.g.*, Ford Motor Co., 2024 Model Year Ford Warranty Guide 5 (June 2023), https://www.fordservicecontent.com/Ford_Content/Catalog/owner_information/US_Ford_Car_LTtruck_Warranty_Guide_v2_6.20.23.pdf [https://perma.cc/43FR-VUUA] ("The warranties in this booklet are the only express warranties applicable to your vehicle.").

24 *E.g.*, Hoffman v. Daimler Trucks N. Am., LLC, 940 F. Supp. 2d 347, 355 (W.D. Va. 2013) (recognizing that the parol evidence rule in UCC section 2-202 precludes introduction of evidence of express warranties that supplement or contradict those expressed in a writing intended by the parties as the final and complete statement of their agreement).

25 U.C.C. §§ 2-202, 2-316(1). When the buyer is a consumer who may not understand the effect of a merger term, some courts have treated the merger term as evidence of the parties' intention as to the effect of the written warranty, which the buyer can overcome by evidence to the contrary. *See, e.g.*, Sierra Diesel Injection Serv., Inc. v. Burroughs Corp., Inc., 890 F.2d 108, 112–13 (9th Cir. 1989) (affirming trial court's ruling that merger term was not dispositive but was only evidence of the parties' intention regarding the written warranty); Latham & Assocs., Inc., v. William Raveis Real Estate, Inc., 589 A.2d 337, 343 (Conn. 1991) (holding that seller's misrepresentation about its expertise at the time of sale negated the effect of a merger term in the written contract).

26 U.C.C. § 2-314(1) ("Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.").

fitness for a particular purpose.[27] These warranties arise from statute and do not require the seller's promise or the buyer's reliance.[28] They are, however, optional in the sense that the seller can disclaim either or both—Article 2 provides in section 2-316 methods by which a seller, who would otherwise give either implied warranty, may limit or completely disclaim them.[29]

Courts have interpreted the implied warranty of merchantability as an *on-delivery* warranty, meaning the seller either performs or breaches it based on the quality of the goods at the moment the seller delivers them to the buyer.[30] In contrast, with respect to express warranties, section 2-313 does not expressly address the moment, or over what period, the goods "shall conform."[31] This makes sense because the parties by agreement control the duration, like all other aspects, of an express warranty.[32] A manufacturer can expressly warrant the quality of the goods *on delivery* only, or it can make an express postdelivery warranty regarding the quality of the goods on delivery and throughout a designated period after delivery: the warranty period.

Although section 2-313 is agnostic as to the express warranty a manufacturer gives, the drafters recognized the possibility of an express postdelivery warranty in section 2-725.[33] This section provides the limitations period for claims within the scope of Article 2: four years after accrual of a cause of action.[34] Section 2-725 provides that a cause of

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27 *Id.* § 2-315 (implying a warranty that the goods shall be fit for the buyer's particular purpose when the seller "at the time of contracting has reason to know" of any particular purpose and that the buyer is relying on the seller's judgment to select suitable goods).

28 MATTHEW CROCKETT, THE LAW OF SALES UNDER THE UCC § 11:19 (2023).

29 U.C.C. § 2-316.

30 *See, e.g.*, Mexia v. Rinker Boat Co., Inc., 95 Cal. Rptr. 3d 285, 290 (2009) (to show breach of the implied warranty of merchantability, the buyer must show the goods were defective at the time the product was sold or delivered); Jones v. Marcus, 457 S.E.2d 271, 272 (Ga. Ct. App. 1995) (to breach the implied warranty of merchantability, the defect or condition of the goods must have existed at the time of sale); 2 MATTHEW CROCKETT, THE LAW OF PRODUCT WARRANTIES § 11:5 (Feb. 2024 update) (noting that courts have consistently held that implied warranties of merchantability and fitness do not extend to the postdelivery performance of the goods); Max E. Klinger, *The Concept of Warranty Duration: A Tangled Web*, 89 DICK. L. REV. 935, 939 (1985) (noting that section 2-725(2) "presumes that all warranties, express or implied, relate only to the condition of the goods at the time of sale"); Larry Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U. L. REV. 345, 379 (2003) ("Article Two defines a range of express and implied warranties" which "[a]ll go to the quality of the goods at tender.").

31 U.C.C. § 2-313(1).

32 *See supra* text accompanying note 25.

33 U.C.C. § 2-725.

34 *Id.* § 2-725(1). The parties may agree on a shorter limitations period not less than one year after the cause of action accrues but not to extend beyond four years. *Id.* The MMWA does not include a limitations period on MMWA claims, and courts apply section 2-725 as the limitations period for a claim under the MMWA for breach of a written or implied warranty. *See, e.g.*, Snyder v. Bos. Whaler, Inc., 892 F. Supp. 955 (W.D. Mich. 1994).

action accrues "when the breach occurs,"[35] and "[a] breach of warranty occurs when tender of delivery is made" without regard to whether the buyer has discovered the breach on delivery—an occurrence accrual rule.[36] For purposes of the accrual of a cause of action for breach of a manufacturer's *on-delivery* express or implied warranty on consumer goods, a cause of action accrues and the statute of limitations clock begins to run on delivery of the goods by a retailer to the consumer.[37]

Section 2-725(2) treats the accrual of a cause of action for breach of a manufacturer's express *postdelivery* warranty differently. When the claim is for breach of a warranty that "explicitly extends to future performance of the goods" where "discovery of the breach must await the time of such performance," a discovery accrual rule applies.[38] A cause of action accrues when the buyer discovers or reasonably should have discovered the nonconformity, requests a remedy, and the seller unjustifiably refuses to provide it.[39] A warranty that "explicitly extends to future performance *of the goods*" can only be an express warranty because the implied warranties are implied by statute and not explicit.[40] Thus, a cause of action for breach of the implied warranty of merchantability accrues *only* on delivery of the goods, and, in general, the limitations period ends four years after delivery, without regard to whether the buyer could have discovered the defect that rendered the goods nonmerchantable on delivery.[41] The four-year limitations period

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35 U.C.C. § 2-725(2).

36 *Id.*

37 *See, e.g.*, Patterson v. Her Majesty Indus., Inc., 450 F. Supp. 425, 433 (E.D. Pa. 1978) (holding that tender of delivery to a consumer buyer is the accrual date rather than tender by the manufacturer to an intermediate seller because public policy favored the consumer's warranty rights over the manufacturer's entitlement to repose under section 2-725).

38 U.C.C. § 2-725(2); *see also Patterson*, 450 F. Supp. at 427 n.4.

39 *See, e.g.*, Brown v. Gen. Motors Corp., 14 So. 3d 104, 111 (Ala. 2009) (holding that a cause of action for breach of General Motor's ("GM") warranty purporting to cover defects in material and workmanship under an extended warranty for five years or fifty thousand miles, whichever occurs first, accrued when GM failed to repair the defects within the warranty period); Poli v. DaimlerChrysler Corp., 793 A.2d 104, 111 (N.J. Super. Ct. App. Div. 2002) (cause of action for breach of a seven-year, seventy-thousand-mile warranty accrued when the defects appeared or when the manufacturer was unable to repair the defects); Monticello v. Winnebago Indus., Inc., 369 F. Supp. 2d 1350, 1356–57 (N.D. Ga. 2005) (under Georgia law, holding that a postdelivery warranty is breached when the dealer cannot repair the goods); Long Island Lighting Co. v. Imo Indus. Inc., 6 F.3d 876, 889–90 (2d Cir. 1993) (under New York law, seller breached a postdelivery express warranty when it refused to make demanded repairs).

40 U.C.C. § 2-725(2); *see* Crockett, *supra* note 30, § 11:5; *see also* Clark v. DeLaval Separator Corp., 639 F.2d 1320, 1325 (5th Cir. 1981); Marks v. Andersen Windows, Inc., No. 1:14-CV-10171, 2015 WL 13313489, at *10 (D. Mass. Jan. 16, 2015).

41 U.C.C. § 2-725(2). Section 2-725 also makes it clear that the four-year limitations period on the implied warranty of merchantability cannot be extended by agreement. *Id.* § 2-725(1).

for breach of implied warranty of merchantability claims is subject to tolling on grounds recognized under non-Code law.[42]

Section 2-725(2) provides that the discovery accrual rule applies to an express warranty of the "future performance *of the goods*."[43] The technical distinction between types of express warranties—regarding the quality of the goods or regarding the manufacturer's performance to remedy a defect—returns here. Suppose a manufacturer expressly promises it will repair or replace defects the buyer brings to its attention within the warranty period. Reading the discovery accrual exception in section 2-725(2) literally, a claim for breach of this type of promise does not fall within the exception because the manufacturer's promise does not assure the future performance "of the goods."[44] Courts have held, however, that the discovery accrual rule applies to this type of postdelivery remedial promise because, although technically not a warranty that explicitly extends to future performance *of the goods*,[45] the manufacturer can breach it (and the buyer can accrue a cause of action) only *after delivery* and *during the warranty period* when the buyer discovers the defect, demands the remedy, and the manufacturer unjustifiably fails to provide it, thereby breaching its obligation to perform.[46]

Now consider the function of a warranty period term in an express postdelivery warranty. It sets the postdelivery period during which a cause of action for breach of that express warranty can accrue. As explained above, under section 2-725(2), the four-year statute of limitations for breach of an express postdelivery warranty begins to run only when the "breach is or should have been discovered."[47] Without a

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42 *See* U.C.C. § 2-725(4) (providing that § 2-725 "does not alter the law on tolling of the statute of limitations"). Some states have recognized equitable tolling of the limitations period for breach of the implied warranty of merchantability based on the buyer's reliance on the defendant's "fraudulent concealment" of the defect by representation that the product was not defective or that its repairs corrected the defect. *See, e.g.*, Amodeo v. Ryan Homes, Inc., 595 A.2d 1232, 1237 (Pa. Super. Ct. 1991) (holding that Pennsylvania law recognizes equitable tolling of the limitations period for breach of the implied warranty of merchantability based on the defendant's fraudulent concealment of the breach); Simpson v. Widger, 709 A.2d 1366, 1373 (N.J. Super. Ct. App. Div. 1998) (noting New Jersey law recognizes equitable tolling of the limitations period in section 2-725 on a breach of express warranty claim for the warrantor's fraudulent misrepresentation until plaintiff had reason to know of the alleged fraud).

43 U.C.C. § 2-725(2) (emphasis added).

44 *See* 2 Matthew Crockett, The Law of Product Warranties § 11:4 (noting the distinction and opining that it "seems to elevate form over substance").

45 *See, e.g.*, *Marks*, 2015 WL 13313489, at *6–10; Brown v. Gen. Motors Corp., 14 So. 3d 104, 113 (Ala. 2009); Mydlach v. DaimlerChrysler Corp., 875 N.E.2d 1047, 1059–60 (Ill. 2007). *But see* New Eng. Power Co. v. Riley Stoker Corp., 477 N.E.2d 1054, 1058–59 (Mass. App. Ct. 1985) (holding that breach of a promise of a remedy is not a warranty explicitly extending to the future performance of the goods so the exception to the occurrence accrual rule does not apply).

46 4B Larry Lawrence, Lawrence's Anderson on the Uniform Commercial Code § 2-725:101 (3rd ed. 2010).

47 U.C.C. § 2-725(2).

warranty period term, the manufacturer's potential liability for breach persists until four years after forever because the buyer could discover a defect and accrue a cause of action for breach at any time following delivery.[48] A warranty period term alters this default of perpetual liability. A cause of action for breach of an express postdelivery warranty can accrue only upon discovery of the defect and breach during the warranty period.[49] The limitations period in section 2-725(2) begins to run when the plaintiff reasonably should have discovered the manufacturer's *breach* of its postdelivery express warranty, which can only occur during the warranty period.[50]

The warranty period thus defines the time during which the warrantor may be liable for breach of express postdelivery warranty. It is distinct from an express *notice condition* on the manufacturer's liability for breach, which can be excused, for example, if the buyer's delay in providing notice does not cause prejudice to the manufacturer.[51] Note also that Article 2 imposes a *statutory* notice condition for all claims for breach of any type of warranty—express on delivery, express postdelivery, or implied; per section 2-607(3), the buyer must give the warrantor notice of a claim for breach of warranty "within a reasonable time after he discovers or should have discovered any breach . . . *or be barred from any remedy*."[52]

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48 *See, e.g.*, Oestreicher v. Alienware Corp., 544 F. Supp. 2d 964, 972 (N.D. Cal. 2008) (noting that eliminating the warranty period condition on an express postdelivery warranty would render such a warranty "perpetual or at least [extending] for the 'useful life' of the product").

49 *See, e.g.*, ACH Enters. 1 LLC v. Viking Yacht Co., 817 F. Supp. 2d 465, 471 (D.N.J. 2011) (holding that New Jersey's version of section 2-725 delays accrual of a cause of action for breach of a postdelivery warranty but only if the plaintiff discovers the defect during the warranty period); S. Jersey Gas Co., v. Mueller Co., No. 09-4194 (RBK-JS), 2010 WL 1742542, at *7 (D.N.J. Apr. 27, 2010) ("[W]here a seller warrants a product for a specified period of time, it makes sense to delay running the statute until the defect is discovered, *provided* the defect is discovered during the period for which the product is actually warranted as anything less could potentially dilute or extinguish the value of the warranty purchased.").

50 *See, e.g.*, Trans-Spec Truck Serv. v. Caterpillar Inc., 524 F.3d 315, 323 (1st Cir. 2008) (applying Massachusetts's version of section 2-725(2)); Landsman Packing Co. v. Cont'l Can Co., 864 F.2d 721, 729 (11th Cir. 1989) (holding that a twelve-month warranty period limits the duration of the warranty and does not alter the limitations period applicable to claims for breach of warranty); Ponzio v. Mercedes-Benz USA, LLC, 447 F. Supp. 3d 194, 254 (D.N.J. 2020) (noting that "the discovery rule concerns when a cause of action for a breach of warranty accrues, it does not control the time period in which a breach may occur"); Philips v. Ford Motor Co., No. 14-CV-02989, 2015 WL 4111448, at *7 (N.D. Cal. July 7, 2015) (same).

51 Courts have held that the notice-prejudice rule does not apply to excuse the coverage requirement in a "claims-made" contract that the third party's claim against the insured be "first made" within the policy period. *See* 20-130 Appleman on Insurance Law & Practice Archive § 130.3; *infra* text accompanying notes 87–96 (discussing cases).

52 U.C.C. § 2-607(3)(a) (emphasis added); *see also* Crockett, *supra* note 30, § 9:3 (discussing the policy reasons for the statutory notice of claim condition in section 2-607(3)). Some courts have held that section 2-607(3) requires timely notice of a claim for breach of implied warranty of merchantability even for a claim for damages for *personal injury* by a consumer buyer.

B. *The Duration of a Warranty Under the Magnuson-Moss Warranty Act*

The MMWA[53] provides a federal private right of action for buyers of "consumer product[s]"[54] who are "damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation . . . under a written warranty, [or] implied warranty."[55] The MMWA defines "written warranty" as (A) a "written promise" by a manufacturer "made in connection with the sale of a consumer product . . . which relates to the nature of the material or workmanship" and "promises that such material or workmanship is defect free . . . over a specified period of time," or (B) "any undertaking in writing . . . to refund, repair, replace, or take other remedial action . . . in the event that such product fails to meet the specifications set forth in the undertaking."[56] Note that, under the MMWA's definition of "written warranty," both a warranty of the future performance *of the goods* and the manufacturer's promise regarding its own postdelivery performance are "written warrant[ies]."[57]

The MMWA defines "implied warranty" by reference to state law: "an implied warranty arising under State law . . . in connection with the sale by a supplier of a consumer product."[58] Courts have interpreted the MMWA definition of "implied warranty"[59] to mean the implied warranties that arise under state enactments of Article 2.[60] Courts have held that a manufacturer may assert a lack of privity defense to a breach of implied warranty claim under the MMWA when the state law that governs the contract recognizes it.[61] In contrast, when a consumer makes a

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See, e.g., Hebron v. Am. Isuzu Motors, 60 F. 3d 1095, 1098 (4th Cir. 1995) (applying Virginia's UCC section 2-607(3)). *But see* Hill v. Ryerson & Son, Inc. 268 S.E.2d 296, 302 (W. Va. 1980) (lack of notice defense under section 2-607(3) does not apply in breach of implied warranty of merchantability actions for personal injury damages).

53 15 U.S.C. §§ 2301–2312.

54 *Id.* § 2301(1).

55 *Id.* § 2310(d)(1); *see also* Skelton v. Gen. Motors Corp., 660 F.2d 311, 313–14 (7th Cir. 1981) (observing that MMWA is a remedial statute that protects consumers from "deceptive warranty practices" by "imposing extensive disclosure requirements and minimum content standards on particular types of written consumer product warranties").

56 15 U.S.C. § 2301(6).

57 *Id.*

58 *Id.* § 2301(7) ("The term 'implied warranty' means an implied warranty arising under State law . . . ."); *id.* § 2310(d)(1) (providing the applicable right of action).

59 *Id.* § 2301(7).

60 *See, e.g.*, Voelker v. Porsche Cars N. Am., Inc., 353 F.3d 516, 525 (7th Cir. 2003). The relevant state's enactment of UCC section 2-725 provides the limitations period for any claim for breach of warranty under the MMWA. *See* Murungi v. Mercedes Benz Credit Corp., 192 F. Supp. 2d 71, 79 (W.D.N.Y. 2001).

61 *See, e.g.*, Walsh v. Ford Motor Co., 588 F. Supp. 1513, 1525 (D.D.C. 1984); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 605 n.13 (S.D.N.Y. 1982); *see also* CURTIS R. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT 63–64 (1978) (consumer

claim under the MMWA for breach of a "written warranty," courts have held that the MMWA definition of "written warranty" preempts state law on express warranty and deprives the manufacturer of any privity defense.[62]

Although the MMWA regulates various aspects of manufacturers' written warranties, it does not require a manufacturer to give a written warranty.[63] If a manufacturer gives a written warranty on a consumer product, it must "fully and conspicuously" disclose the terms of the written warranty[64] and "clearly and conspicuously" designate it as "full" or "limited."[65] A written warranty must provide specified coverage and remedies to be designated a full warranty.[66] Written warranties that do not conform to these statutory requirements must be designated as "limited warranties."[67]

The MMWA prohibits a manufacturer who gives a written warranty from disclaiming the implied warranty of merchantability.[68] It thereby preempts UCC section 2-316, which permits sellers to disclaim implied warranties.[69] By entirely prohibiting disclaimer of the implied

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protection from implied warranties under the MMWA is coextensive with that recognized under applicable state law).

62 15 U.S.C. § 2301(6); *see, e.g.*, Abraham v. Volkswagen of Am., Inc., 795 F.2d 238, 248–49 (2d Cir. 1986) (noting that under the MMWA for breach of written warranty claims, 15 U.S.C. § 2310(d), neither horizontal nor vertical privity is required based on enforcement provisions authorizing action by consumers for breach of a written warranty); Milicevic v. Fletcher Jones Imps., Ltd., 402 F.3d 912, 917 (9th Cir. 2005).

63 *See* 15 U.S.C. § 2302(b)(2); Skelton v. General Motors, 660 F.2d 311, 314 (7th Cir. 1981) (clarifying that the MMWA does not authorize the Federal Trade Commission, the agency responsible for rulemaking under the MMWA, to require any supplier to provide a written warranty).

64 15 U.S.C. § 2302(a); 16 C.F.R. § 701.3(a).

65 15 U.S.C. § 2303(a).

66 *See id.* (to be designated as a "full (statement of duration) or limited warranty" the terms and expression of the written warranty must comply with 15 U.S.C. § 2304); *id.* § 2304(a)(1) (providing a minimum remedy "without charge"); *id.* § 2304(a)(4) (if the manufacturer cannot repair the defect after "a reasonable number of attempts" the warranty must permit the consumer to choose a refund or replacement without charge).

67 *See id.* § 2303(a)(2). Note that § 2304 does not regulate or even mention the "specified period of time" of the manufacturer's "written promise." *Id.* § 2304.

68 *See id.* § 2308(a).

69 *Compare id.* § 2308(a) (disallowing disclaimer of the implied warranty where a written warranty is provided), *with* U.C.C. § 2-316(2) (Am. L. Inst. & Unif. L. Comm'n 2022) (providing for "exclu[sion] or modif[ication]" of the implied warranty of merchantability by "language [which] must mention merchantability and in case of a writing must be conspicuous"); *see also id.* § 2-316(3)(a) ("[U]nless 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 . . . ."). Some states have enacted legislation that similarly prohibits disclaimer of the implied warranty of merchantability in certain consumer contracts. *Comprehensive Guide to Warranty Laws by State*, UpCounsel (Nov. 18, 2024), https://www.upcounsel.com/warranty-laws-by-state [https://perma.cc/2N87-3UMH] (listing states).

warranty of merchantability on consumer products when the manufacturer gives a written warranty, the MMWA ensures that buyers who receive a written warranty are entitled at minimum to goods that are merchantable on delivery even if the written warranty provides weaker protection.[70] The buyer's baseline entitlement to merchantability under the MMWA is derivative of state law: because the MMWA recognizes that the nondisclaimable implied warranty of merchantability is a creature of state law, the manufacturer can assert any defense to liability for breach, such as lack of notice or privity, valid under state law.[71]

Moreover, although the MMWA makes the implied warranty of merchantability nondisclaimable, it permits the manufacturer to limit the "duration" of its liability under that warranty. 15 U.S.C. § 2308(b) states: "[I]mplied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty."[72] Manufacturers of consumer products commonly take advantage of this and expressly limit the duration of the implied warranty to that of the written warranty.[73]

The reference in § 2308(b) to the "duration" of the implied warranty of merchantability is confusing.[74] As explained above, the implied warranty of merchantability imposed in UCC section 2-314(1) is an *on-delivery* warranty.[75] It has no "duration" in the sense that a postdelivery express warranty does. At the same time, the durability of goods after delivery is an element of their merchantability on delivery. To have been merchantable on delivery, goods must operate *after delivery*

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70 *See* Abraham v. Volkswagen of Am., Inc., 795 F.2d 238, 248 (2d Cir. 1986) (describing this prohibition in the MMWA as "a major change in the law of warranties"). *See generally* Kathleen F. Brickey, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool*, 18 SANTA CLARA L. REV. 73, 76–80 (1978) (discussing the political history that may have prompted Congress to enact federal consumer warranty legislation).

71 *See, e.g.*, *Abraham*, 795 F.2d at 247–49 (describing implied warranties as creations of state law); CROCKETT, *supra* note 28, § 11:51 n.8 (listing cases); Rothe v. Maloney Cadillac, Inc., 492 N.E.2d 497, 502 (Ill. App. Ct. 1986), *aff'd in part*, 518 N.E.2d 1028 (Ill. 1988) (collecting cases).

72 15 U.S.C. § 2308(b); *see, e.g.*, Larsen v. Nissan N. Am., Inc., No. A121838, 2009 WL 1766797, at *5 (Cal. Ct. App. June 23, 2009) (quoting the express warranty in the warranty booklet accompanying the Nissan vehicle: "Any implied warranty of merchantability and fitness for a particular purpose shall be limited to the duration of this written warranty.").

73 *See, e.g.*, Amato v. Subaru of Am., Inc., No. 18-16118, 2019 WL 6607148, at *6–7 (D.N.J. Dec. 5, 2019) (implied warranty of merchantability expressly limited to the same duration as the express warranty which was subject to a 5-year or 60,000-mile warranty period); *Abraham*, 795 F.2d at 248 n.9; FORD MOTOR CO., *supra* note 23 ("These implied warranties are limited, to the extent allowed by law, to the time period covered by the written warranties, or to the applicable time period provided by state law, whichever period is shorter.").

74 15 U.S.C. § 2308(b).

75 *See supra* note 30.

at least for a time and in a manner that makes them, as of delivery, "fit for the ordinary purposes for which such goods are used."[76]

To show a breach of the implied warranty of merchantability by insufficient durability, the buyer must plead and prove both the general standard for durability of the product under ordinary use, and the failure of the product to meet this standard.[77] Goods do not have to operate without problems forever to meet the durability standard for merchantability.[78] To illustrate, a court held that although some toilets leaked after delivery due to a design defect, they were nonetheless fit for their ordinary purpose: "to discard waste into the sewer or septic system."[79] Another court held that allegations that a defect in a computer may, sometime in the postdelivery future, cause the computer to "fail to boot, freeze, randomly restart, and generally underperform" were insufficient to show that the defect made the computer nonmerchantable on delivery.[80] "[T]hese consequences are regular occurrences when troubleshooting computers."[81] In contrast, *safe* operation of a product after delivery is an aspect of merchantability. For example, to be merchantable on delivery, a car must operate safely to provide transportation after delivery.[82]

A consumer buyer who contends that a product was insufficiently durable to have been merchantable faces a significant challenge: the plaintiff must plead and prove the average consumer expectation regarding the durability of the product and show that the product fell short of that average expected durability.[83] Average consumer expectations regarding product durability are notoriously hard to prove;

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76 U.C.C. § 2-314(2)(c) (Am. L. Inst. & Unif. L. Comm'n 2022).

77 *Id.*; *see, e.g.*, Hurry v. Gen. Motors LLC, 622 F. Supp. 3d 1132, 1149 (M.D. Ala. 2022).

78 *See* U.C.C. § 2-314(1)(c) (providing the standard of ordinary purpose); *see, e.g.*, *Hurry*, 622 F. Supp. 3d at 1149 (plaintiff's allegation that the piston rings in the class vehicles should withstand over 100,000 miles of driving and that the vehicles consumed oil "beyond what GM expects and beyond industry standards" among other facts were sufficient to plausibly allege breach of the implied warranty of merchantability even though plaintiffs drove the cars without problems for thousands of miles).

79 Laney v. Am. Standard Cos., No. 07-3991 (PGS), 2010 WL 3810637, at *11 (D.N.J. Sept. 23, 2010).

80 Elias v. Hewlett-Packard Co., 903 F. Supp. 2d 843, 853 (N.D. Cal. 2012) (quoting complaint).

81 *Id.*

82 *See, e.g.*, Miller v. Ford Motor Co., 620 F. Supp. 3d 1045, 1061 (E.D. Cal. 2022) (finding a question of fact as to whether an alleged engine defect posed a sufficient safety risk to make the vehicles unmerchantable); Sheris v. Nissan N. Am., Inc., No. 07-2516, 2008 WL 2354908, at *5 (D.N.J. June 3, 2008) (holding vehicle was merchantable at the time of sale because a vehicle's ordinary purpose is to provide safe transportation, which it did, notwithstanding plaintiff's allegation that the brake pads were insufficiently durable).

83 *See* Withrow v. FCA US LLC, No. 19-13214, 2021 WL 2529847, at *22 (E.D. Mich. June 21, 2021) ("But trucks are also durable goods—they are supposed to last a while. They not only need to get people and things from A to B safely; trucks need to go from A to B safely a fair number

the nature of the product matters.[84] Consumer expectations regarding product durability change over time as technology changes.[85] Research shows that factors like price and the country of manufacture affect consumers' expectations regarding durability.[86] Perhaps the biggest problem is that a consumer buyer's testimony about her expectation of durability is idiosyncratic and may not reflect average consumer expectations. In any event, evidence of consumer expectations of product durability after the product has failed are intrinsically unreliable due to hindsight bias.[87]

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of times to be fit for their general purpose."), *amended by* No. 19-13214, 2021 WL 9629458 (E.D. Mich. July 21, 2021).

84 *See, e.g.*, *In re* Sony Grand Wega KDF-E A10/A-20 Series Rear Projection HDTV Television Litig., 758 F. Supp. 2d 1077, 1099 (S.D. Cal. 2010) (holding that plaintiff could not recover on breach of warranty claim for repair costs incurred after the warranty period expired by allegation that the latent defect in a television was "substantially certain to result in malfunction during the useful life of the product" because consumer expectations regarding useful life are highly variable (quoting Hicks v. Kaufman & Broad Home Corp., 107 Cal. Rptr. 2d 761, 768 (Cal Ct. App. 2001))); Golden v. Den-Mat Corp., 276 P.3d 773, 798 (Kan. Ct. App. 2012) (noting that a jury could rationally conclude that a buyer would reasonably expect dental veneers to remain affixed and maintain their appearance "for some period of time after the sale"); *In re* Lumber Liquidators Chinese-Mfd. Flooring Durability Mktg. & Sales Prac. Litig., No. 1:16md2743 (AJT/TRJ), 2017 WL 2911681, at *17 (E.D. Va. July 7, 2017) (plaintiffs' allegation that laminate flooring did not meet the industry standard for durability was sufficient to plead the nonmerchantability of the flooring); Roe v. Ford Motor Co., No. 2:19-cv-12528, 2019 WL 3564589, at *12 (E.D. Mich. Aug. 6, 2019) (denying Ford's motion to dismiss at the pleadings stage and noting that "discovery on consumer expectations and industry standards" will establish ordinary consumer expectations for durability).

85 *See generally* Dexter Ford, *As Cars Are Kept Longer, 200,000 Is the New 100,000*, N.Y. Times (Mar. 16, 2012), https://www.nytimes.com/2012/03/18/automobiles/as-cars-are-kept-longer-200000-is-new-100000.html [https://perma.cc/H2FY-V6DC]; Ken Budd, *How Today's Cars Are Built to Last*, AARP (Nov. 1, 2018), https://www.aarp.org/auto/trends-technology/how-long-do-cars-last/ [https://perma.cc/7GKG-TG36] (reporting that cars are increasingly lasting longer due to improvements in design, manufacturing, replacement of mechanical systems with electronic systems, and technological advances that increase durability). Experts estimate that the useful life of a laptop computer is 3–5 years, largely because its components will become incapable of running advanced applications over time. *See* Derek Walter, *How Long Do Computers Last? 10 Signs You Need a New One*, Bus. News Daily (June 25, 2024), https://www.businessnewsdaily.com/65-when-to-replace-the-company-computers.html [https://perma.cc/V9V2-5P77].

86 *See, e.g.*, Roberta Veale & Pascale Quester, *Do Consumer Expectations Match Experience? Predicting the Influence of Price and Country of Origin on Perceptions of Product Quality*, 18 Int'l Bus. Rev. 134, 140 (2009) (evaluating influence of price and consumer evaluations of wine quality and concluding that price and country of origin were more important contributors to consumer's perception of wine quality than taste).

87 *See, e.g.*, Oestreicher v. Alienware Corp., 544 F. Supp. 2d 964, 972 (N.D. Cal. 2008) (noting that consumer expectations regarding the useful life of component parts of laptop computers are, compared to expectations about vehicle component parts, "even more subjective and likely unreliable"); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 Yale L.J. 1297, 1298 (1981) (noting that consumer perceptions about durability and reliability of goods are "highly speculative and essentially nonfalsifiable"). When faced with an expensive repair after the warranty period expires, a consumer is likely to conclude that, at the time of sale, he expected the product to operate without needing the repair. *See* Jeffrey J. Rachlinski, *A Positive Psychological*

Courts have reached a variety of conclusions on the question of how consumer expectations of product durability factor into whether the product was merchantable on delivery. One court held, based on the pleadings, that vehicles that operated for more than five years and tens of thousands of miles before any problem with an alleged defect were merchantable on delivery.[88] Another court held that whether a car with a transmission that failed after forty thousand miles of driving was merchantable on delivery presented a fact question that precluded summary judgment.[89]

II. Buyers' Strategies to Overcome the Expiration of the Warranty Period

Suppose that a manufacturer of a consumer product gave a written postdelivery warranty subject to a warranty period and expressly limited the duration of the implied warranty of merchantability to the same warranty period. The product broke down, resulting in economic loss to the consumer buyer—repair costs or diminished value of the product. Further suppose that a class of the product's buyers sues the manufacturer for breach of express and implied warranty in federal court under the MMWA.[90] If the buyers failed to demand warranty service before the warranty period applicable to both the express and implied

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Theory of Judging in Hindsight, 65 U. Chi. L. Rev. 571, 571–75 (1998) (describing hindsight bias and citing to psychological research).

88 *See* Szymczak v. Nissan N. Am., Inc., No. 10 CV 7493(VB), 2011 WL 7095432, at *11 (S.D.N.Y. Dec. 16, 2011); *see also* Chiarelli v. Nissan N. Am., Inc., No. 14-CV-4327 (NGG)(VVP), 2015 WL 5686507, at *8 (E.D.N.Y. Sept. 25, 2015); Sheris v. Nissan N. Am., Inc., Civ. No. 07-2516, 2008 WL 2354908, at *5 (D.N.J. June 3, 2008) (holding that the vehicle that the buyer drove for more than two years without problem with the brake assembly was merchantable, notwithstanding an allegation that Nissan knew at the time of sale "of the detective [sic] nature" of its brake assembly); Yost v. Gen. Motors Corp., 651 F. Supp. 656, 658 (D.N.J. 1986); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 602 (S.D.N.Y. 1982); Ford Motor Co. v. Fairley, 398 So. 2d 216, 219 (Miss. 1981).

89 Hornberger v. Gen. Motors Corp., 929 F. Supp. 884, 888 (E.D. Pa. 1996) (applying Pennsylvania's version of section 2-314 to a consumer vehicle lease); Withrow v. FCA US LLC, No. 19-13214, 2021 WL 2529847, at *22–23 (E.D. Mich. June 21, 2021) (finding plaintiff plausibly alleged vehicle was not merchantable because it stopped running several years and tens of thousands of miles before a reasonable consumer would expect it to fail, noting that plaintiff was entitled to discovery on consumer expectations and industry standards for the durability of a diesel engine in a Dodge truck).

90 The MMWA provides federal court jurisdiction under the circumstances outlined. *See* 15 U.S.C. § 2310(d)(3)(A)–(B). It also grants jurisdiction in class actions if the number of "named plaintiffs" is at least one hundred. *Id.* § 2310(d)(3)(C). Courts construe federal court jurisdiction under the MMWA narrowly. *See, e.g.*, Saval v. BL Ltd., 710 F.2d 1027, 1029–30 (4th Cir. 1983); Skelton v. Gen. Motors Corp., 660 F.2d 311, 319 n.15 (7th Cir. 1981). To determine whether the 100 named plaintiff jurisdictional requirement is satisfied, courts determine whether individual plaintiffs have stated a claim on which relief may be granted and aggregate the amount in controversy. *See, e.g.*, *In re* Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1114 n.2 (7th Cir. 1979).

warranty of merchantability expired, the manufacturer would appear to have a formidable defense to the buyers' claims for breach of these warranties. To survive a manufacturer's motion to dismiss in cases like this, consumer buyers developed several theories supporting an argument that the warranty period is unconscionably short and, therefore, unenforceable as a defense to their breach of warranty claims.

A. Defects That Are "Latent" Within the Warranty Period

In the late 1970s and early 1980s, consumer buyers argued that, because the defect that caused the product to fail after the warranty period expired was "latent" during the warranty period, the warranty covered the problem even though they did not demand warranty service within the warranty period.[91] This argument deploys the rationale that underlies the delayed discovery doctrine, by which courts toll the accrual of a tort cause of action for "latent" injuries, like asbestos-related diseases, until the plaintiff reasonably could have discovered the injury.[92] Consumers argued that the warranty period that limits the time in which a cause of action for breach of express or implied warranty can accrue should not bar their claim because they could not reasonably have discovered the product defect during the warranty period.[93]

For example, in *Walsh v. Ford Motor Co.*,[94] a class of consumer buyers sued Ford under the MMWA for breach of its one-year or twelve-thousand-mile written warranty.[95] They alleged that the transmissions in their Ford vehicles were defective.[96] Ford moved to dismiss for lack of subject matter jurisdiction under the MMWA because the class did not contain at least 100 named plaintiffs with valid breach of warranty claims—as the MMWA requires—after subtracting buyers who did not request repairs within the warranty period.[97]

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91 *See infra* notes 94–101 and accompanying text.

92 *See, e.g.*, Urie v. Thompson, 337 U.S. 163, 169 (1949) (recognizing equitable tolling of limitations period for latent injuries due to exposure to silica dust under the Federal Employers' Liability Act); Stoleson v. United States, 629 F.2d 1265, 1271 (7th Cir. 1980) (recognizing tolling of limitations period until discovery of injury due to exposure to nitroglycerin under Federal Tort Claims Act); McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 667 (3d Cir. 1980) (tolling limitations period until the plaintiff experienced a stroke due to prior ingestion of oral contraceptive under Ohio law); Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 161 (8th Cir. 1975) (tolling limitations period until manifestation of asbestosis due to asbestos exposure under Minnesota law); AMERICAN LAW OF PRODUCTS LIABILITY 3D § 47:34 (2024) (describing the rationale behind and application of the delayed discovery doctrine).

93 *See infra* notes 94–101 and accompanying text.

94 588 F. Supp. 1513 (D.D.C. 1984).

95 *Id.* at 1535–36.

96 *Id.* at 1535.

97 *Id.* Ford's warranty stated: "Ford warrants for its . . . cars and light trucks operated under normal use . . . that the selling dealer will repair, replace, or adjust free any parts, except tires, found

Plaintiffs argued that class members who missed the warranty period should not be excluded because their claims for breach of warranty were latent during the warranty period.[98] The court rejected the buyers' argument and granted Ford's motion to dismiss based on a plain reading of the written warranty.[99] It reasoned that all problems with a product ultimately are the result of a defect that, in some sense, was "latent" in the product during the warranty period. To hold that undiscovered defects are not subject to the warranty period because they are present though "latent" during the warranty period would inappropriately transform Ford's time-limited warranty liability into perpetual warranty liability.[100]

B. Latency Plus the Manufacturer's Knowledge of the Defect

Buyers responded to the holding in *Walsh* one year later in *Alberti v. General Motors Corp.*[101] Plaintiffs distinguished *Walsh* by alleging that, although the buyers did not report the defect during the warranty period, General Motors ("GM") knew of the defect in their automobiles and failed to disclose it to consumer buyers at the time of sale.[102] The court held in favor of the buyers and denied GM's motion to dismiss.[103] Because the buyers had alleged that GM knew of the defect at the time of sale, the defect was not latent but rather "patent" to the manufacturer. Therefore, the reasoning in *Walsh* should not apply and the expiration of the warranty period should not bar the buyers' claims for breach of express warranty.[104] The court offered an incoherent

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to be defective in factory materials or workmanship within the earlier of 12 months or 12,000 miles from either first use or retail delivery." *Id.* at 1535–36, 1536 n.7.

98 *Id.* at 1536. Plaintiffs argued that the express warranty did not limit coverage to defects that appeared during the warranty period but included in coverage defects that were "present during the warranty period," but which "did not manifest . . . until long after the terms of the warranty expired." *Id.*

99 *Id.* at 1536 (citing Taterka v. Ford Motor Co., 271 N.W.2d 653, 657 (Wis. 1978)) (holding that under Ford's 12-month or 12,000-mile warranty, the buyer bears the risk of repairs of defects after the warranty period expires); Broe v. Oneonta Sales Co., 420 N.Y.S.2d 436, 437 (N.Y. Sup. Ct. 1978) (rejecting argument that Ford's warranty covered latent defects not reported to Ford during the warranty period); *see also* Moulton v. Ford Motor Co., 13 U.C.C. Rep. Serv. 55, 59 (Tenn. Ct. App. 1973) (holding that Ford's warranty "provides for repair or replacement of certain parts 'found to be defective' within the limited period [only]"); Abraham v. Volkswagen of Am., Inc., 103 F.R.D. 358, 362 (W.D.N.Y. 1984), *aff'd in part, rev'd in part*, 795 F.2d 238 (2d Cir. 1986) (expressly adopting the reasoning of *Walsh*).

100 *Walsh,* 588 F. Supp. at 1536 ("Ford would, in effect, be obliged to insure that a vehicle it manufactures is defect-free for its entire life.").

101 600 F. Supp. 1026 (D.D.C. 1985).

102 *Id.* at 1028.

103 *Id.*

104 *Id.* (citing Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1050 (D.C. Cir. 1981) (holding that each insurer on all policies insuring the asbestos product manufacturer between the first date of exposure and the manifestation of asbestos disease was liable)).

explanation of why GM's alleged *knowledge* of the defect at the time of sale was relevant on the legal issue before it—whether the warranty period applied to bar the buyers' warranty claims:

> It was at the time of the sales, therefore, that plaintiffs maintain the loss for which they make claim here—the diminished value of the cars they purchased—was incurred, for it was then that GM broke its warranty that the brakes would function safely, and that the automobiles were merchantable and fit for the purpose of providing the ordinary transportation plaintiffs expected of them.[105]

The buyers' argument that persuaded the court in *Alberti* regarding the relevance of GM's *knowledge and nondisclosure* of the defect at the time of sale is best understood as a misapplication of the equitable exception to limitations laws known as the fraudulent concealment doctrine.[106] Courts recognize an equitable exception to the bar of a limitations period where the defendant fraudulently concealed information from the plaintiff that caused the plaintiff to remain unaware of the accrual of the cause of action until after the limitations period expired.[107] The scope of the fraudulent concealment doctrine to toll the running of a limitations period is narrow, and its contours vary across jurisdictions.[108] In general, the plaintiff must show that the defendant knew and intentionally concealed facts *necessary for determining the existence of the plaintiff's cause of action*, which the plaintiff did not know and could not have known despite the exercise of due diligence.[109]

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105 *Id.* at 1028.

106 *See, e.g.*, Lukovsky v. City & Cnty. of San Francisco, 535 F.3d 1044, 1052 (9th Cir. 2008) (referring to fraudulent concealment as equitably estopping a defendant from asserting a limitations defense because its conduct prevented a plaintiff from suing within the limitations period). The four-year limitations period on claims for breach of contracts within the scope of Article 2 is subject to tolling on grounds, like fraudulent concealment, recognized under non-Code law. U.C.C. § 2-725(4); *see supra* note 92.

107 *See, e.g.*, White v. Gen. Motors, No. 21-cv-0410, 2022 WL 3597161, at *6 (D. Colo. July 7, 2022) (buyers sufficiently alleged fraudulent concealment as grounds to toll the three-year limitations period under Colorado's version of section 2-725 on the buyers' breach of implied warranty claim).

108 *See, e.g.*, Torch v. Windsor Surry Co., No. 3:17-cv-00918, 2019 WL 6709379, at *5 (D. Or. Dec. 9, 2019) (noting that the doctrine is not uniform across all states).

109 *See, e.g.*, Philpott v. A.H. Robins Co., 710 F.2d 1422, 1425–26 (9th Cir. 1983) (a nonfiduciary's nondisclosure of facts underlying a cause of action is insufficient to toll the limitations period); *Lukovsky*, 535 F.3d at 1052 (plaintiff must allege active fraudulent conduct other than the wrongdoing upon which the claim is based to toll the limitations period); S.D. Wheat Growers Ass'n v. Chief Indus., 337 F. Supp. 3d 891, 907–08 (D. S.D. 2018) (plaintiff must show (1) defendant knowingly concealed material facts that constitute the cause of action, (2) plaintiffs exercised reasonable diligence in attempting to discover their causes of action, and (3) defendant's concealment prevented plaintiffs from discovering their causes of action); *Torch*, 2019 WL 6709379, at *5 (plaintiffs failed to allege affirmative actions the defendant took with the intention to delay the

The doctrine makes sense as an equitable response to the claim-barring effect of expiration of a limitations period. It is inapt, however, as a means to escape the claim-barring consequence of expiration of a warranty period.

To illustrate the distinction between the two situations, suppose a buyer discovers a problem with his car and demands repair during the warranty period. The manufacturer's authorized warranty service provider observes the defect but fraudulently conceals it, telling the buyer that the car is operating normally when in fact it is defective. The manufacturer's fraudulent denial of a defect it knows to be the cause of the plaintiff's loss is fraudulent concealment of its own breach and justification for tolling the limitations period on the plaintiff's cause of action for breach until the plaintiff can reasonably discover the facts the defendant concealed.[110] Contrast the breach of warranty case in which the buyers sought to extend the fraudulent concealment doctrine by analogy to excuse their failure to demand warranty service during the warranty period. Their cars worked normally during the warranty period and broke down only after the warranty period expired. The manufacturer's nondisclosure of its exclusive knowledge of the risk of a postwarranty period defect has no effect on the buyer's ability to assert its rights under the warranty because the car did not break down during the warranty period and the manufacturer did not breach the warranty it gave.[111]

The Second Circuit considered the relevance of the manufacturer's knowledge of a latent defect on the enforceability of a warranty period term in *Abraham v. Volkswagen of America, Inc.*[112] A class of buyers sued Volkswagen under the MMWA seeking damages for costs to repair a defect in the valve stem seal in their Volkswagen Rabbits'

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filing of the lawsuit, and pleading fraudulent actions does not establish fraudulent concealment to toll the limitations period).

110 *See, e.g.*, Heater v. Gen. Motors, LLC, 568 F. Supp. 3d 626, 639 (N.D. W. Va. 2021) (finding that buyer sufficiently alleged fraudulent concealment to toll the limitations period on an implied warranty of merchantability claim because plaintiff alleged GM knew that the vehicle engine's design was defective and instructed its dealers to offer repairs that would not cure the defect); S.L. Anderson & Sons, Inc. v. PACCAR, Inc., No. C18-0742, 2018 WL 5921096, at *7–8 (W.D. Wash. Nov. 13, 2018) (plaintiffs sufficiently pled fraudulent concealment to toll the limitations period on their breach of warranty claim by alleging that they brought their vehicle to the dealer during the warranty period for an engine defect and defendant told plaintiff the engine's oil consumption was normal when it knew the engine's oil system was defective).

111 *See, e.g.*, Xu v. Porsche Cars N. Am., Inc., 655 F. Supp. 3d 1214, 1242–43 (N.D. Ga. 2023) (plaintiffs failed to show Porsche fraudulently concealed a defect to toll the limitations period on his claim based on undisputed evidence that Porsche did not know of the defect at the time of sale and did not fraudulently conceal information about the defect from federal investigators, its authorized dealers, or plaintiff after the vehicle broke down).

112 795 F.2d 238 (2d Cir. 1986).

oil systems that appeared after the warranty period expired.[113] Volkswagen moved to dismiss several buyers from the lawsuit after discovery showed their warranty periods had expired, leaving too few plaintiffs for the class action to continue.[114] Citing *Alberti*, the buyers responded that Volkswagen's warranty expiration defense did not bar their claims because the defect in the oil system was latent and Volkswagen knew of it at the time of sale and throughout the warranty period.[115]

The Second Circuit noted the "general rule" that a warranty period term in an express warranty protects the manufacturer from liability for defects that arise after the warranty period expires.[116] It acknowledged, as had the D.C. District Court in *Walsh*, the logical absurdity of the buyers' contention that latent defects are not subject to the warranty period because they are latent and not discoverable by the buyer during the warranty period as "virtually all product failures discovered in automobiles after expiration of the warranty can be attributed to a 'latent defect' that existed at the time of sale or during the term of the warranty."[117] The Second Circuit concluded further that Volkswagen's knowledge of risk that the oil system would fail after the warranty period expired was also irrelevant because "such knowledge is easily demonstrated by the fact that manufacturers must predict rates of failure of particular parts in order to price warranties and thus can always be said to 'know' that many parts will fail after the warranty period has expired."[118] The court reasoned that a contrary holding would essentially invalidate the use of a warranty period term to cap the manufacturer's liability on a post-delivery warranty.[119] Courts have cited the Second Circuit's holding in *Abraham* for the "general rule" that an express warranty does not cover repairs after the warranty period has expired even if the manufacturer

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113 *Id.* at 241. The express warranty period was 24 months or 24,000 miles for 1975 Rabbits and 12 months or 20,000 miles for 1976–1979 Rabbits. *Id.* at 242.

114 *Id.* at 241.

115 *Id.* at 250.

116 *Id.*

117 *Id.*; *see also* Daugherty v. Am. Honda Motor Co., 51 Cal. Rptr. 3d 118, 122 (Cal. Ct. App. 2006) ("Failure of a product to last forever would become a 'defect,' a manufacturer would no longer be able to issue limited warranties, and product defect litigation would become as widespread as manufacturing itself." (quoting Daughterty v. Honda Motor Co., No. BC-308-570, 2004 WL 5477109 (Cal. Super. June 23, 2004) (order sustaining the defendant's demurrer))).

118 *Abraham*, 795 F.2d at 250. The court criticized the court's reasoning in *Alberti*, mercifully noting that approach "suggests that the court confused concepts of implied and express warranty." *Id.*; *see also* Alban v. BMW of N. Am., LLC, No. 09-5938, 2010 WL 3636253, at *7 (D.N.J. Sept. 8, 2010) (adopting the criticism of the holding in *Alberti* expressed by the Second Circuit in *Abraham*); Divis v. Gen. Motors LLC, No. 18-13025, 2019 WL 4735405, at *4 (E.D. Mich. Sept. 27, 2019) (finding *Alberti* unpersuasive and holding that a manufacturer's knowledge of the alleged defect at the time of sale has no effect on the warranty period); *Daugherty*, 51 Cal. Rptr. 3d at 123 (rejecting the holding in *Alberti* as nonpersuasive).

119 *Abraham*, 795 F.2d at 250.

knew of a "latent" defect that might cause a breakdown after the warranty period expires.[120]

III. The Unconscionability Theory

Advocates for consumer buyers responded to the Second Circuit's decision in *Abraham* by attacking the warranty period directly as an unconscionable term under UCC section 2-302.[121] Section 2-302 permits a court to invalidate a contract or term if it finds that the contract or term was "unconscionable."[122] The official comments provide a tautological definition of "unconscionable": "[W]hether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[123] The comments explain that "[t]he principle" that courts should apply to determine whether a term or an entire contract is unconscionable is "the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."[124]

Judge Skelly Wright observed in *Williams v. Walker-Thomas Furniture Company*[125] that "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[126] Professor Arthur Leff coined the terms "procedural unconscionability" and "substantive unconscionability" to differentiate two aspects of contractual unfairness.[127] Leff noted that one aspect tends to implicate the other: procedural considerations,

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120 *See, e.g.*, Chiarelli v. Nissan N. Am., Inc., No. 14-CV-4327, 2015 WL 5686507, at *6–7 (E.D.N.Y. Sept. 25, 2015); Dewey v. Volkswagen AG, 558 F. Supp. 2d 505, 519–20 (D.N.J. 2008) (rejecting the reasoning in *Alberti*); Bussian v. DaimlerChrysler Corp., 411 F. Supp. 2d 614, 621 (M.D.N.C. 2006) (noting that "*Abraham* stands for the broad, nearly universally accepted proposition that a latent vehicle defect known to the manufacturer at the time of sale that does not manifest itself until after expiration of the express warranty does not, in and of itself, give rise to a breach of express warranty claim" and collecting cases).

121 *See infra* notes 122–30.

122 U.C.C. § 2-302(1) (Am. L. Inst. & Unif. L. Comm'n 2022); *see also id.* cmt. 1 ("This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable."). Whether a term is unconscionable is an issue for the court and not the jury. *See id.* § 2-302(1). ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable . . . ."). The time to test for whether a clause is unconscionable is "at the time [when] it was made." *Id.*

123 *Id.* cmt. 1.

124 *Id.* (citation omitted).

125 350 F.2d 445, 449 (D.C. Cir. 1965).

126 *Id.* at 449.

127 Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 Pa. L. Rev. 485, 487, 552–53 (1967).

such as high pressure tactics or abstruse language designed to induce assent, tend to yield a one-sided contract in favor of the dominant party, whereas substantively one-sided contracts or terms are those that are so disproportionately favorable as to raise suspicions about whether negotiations were truly bilateral.[128] Most courts require the party asserting unconscionability to allege facts that plausibly support an inference of both substantive and procedural unconscionability.[129] Some courts only require proof of *either* substantive or procedural unconscionability, but not both elements.[130]

A. Carlson v. General Motors

In 1989, three years after the Second Circuit's decision in *Abraham*, the Fourth Circuit considered an unconscionability challenge to a warranty period by a class of consumers suing GM under the MMWA. In *Carlson v. General Motors Corp.*,[131] a putative class of plaintiffs sued GM alleging that the diesel engines in their 1981–1985 GM vehicles were defective and resulted in frequent breakdowns.[132] GM warranted the vehicles for 24-months or 24,000-miles, or 36-months or 50,000-miles, depending on the model year.[133] As the MMWA permits, the warranty period in GM's express warranty also limited the duration of the implied warranty of merchantability.[134] GM moved to dismiss the express and implied warranty claims of named plaintiffs who alleged that they reported problems with their diesel engines only after the warranty period expired.[135]

The unconscionability of the warranty period in *Carlson* arose as an issue of statutory interpretation under the MMWA. As explained

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128 *Id.* at 495, 513–14. One court noted that although conceivably a contract might be procedurally unconscionable even though the terms were not substantively unconscionable, that outcome would be "rare." Res. Mgmt. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1043 (Utah 1985).

129 *See, e.g.*, Lynn v. McKinley Ground Transp., 923 N.E.2d 638, 640 (Ohio Ct. App. 2009); Clark v. DaimlerChrysler Corp., 706 N.W.2d 471, 477 (Mich. Ct. App. 2005); *see also* JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS § 97[B][2][c] (5th ed. 2011) (noting that many courts require proof of both procedural and substantive unconscionability).

130 *See, e.g.*, Kelly v. Whitehaven Settlement Funding, No. 09-0541, 2010 WL 746983, at *3 (S.D. Ill. Feb. 26, 2010); Fryar v. Sav-Amil, LLC, No. 3:08CV63-SA-SAA, 2009 WL 4841041, at *2 (N.D. Miss. Dec. 10, 2009); L.A. Fitness Int'l LLC v. Harding, No. C09-5537, 2009 WL 4545079, at *3 (W.D. Wash. Nov. 25, 2009). The Supreme Court of Arizona has held that unconscionability can be shown solely by evidence of substantive unconscionability. Maxwell v. Fid. Fin. Servs., 907 P.2d 51, 59 (Ariz. 1995) (en banc).

131 883 F.2d 287 (4th Cir. 1989).

132 *Id.* at 289.

133 *Id.* at 290.

134 *Id.* GM's written warranty provided a 24-month or 24,000-mile warranty on some of the allegedly defective vehicles and a 36-month or 50,000-mile warranty on others. *Id.*

135 *Id.*

above, the MMWA at 15 U.S.C. § 2308(b) permits a manufacturer who gives a written warranty to apply the express warranty period to limit the duration of an implied warranty if the express warranty period is "of reasonable duration" and if the application is "conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty."[136] The consumer buyers in *Carlson* argued that GM's express warranty periods were not of reasonable duration because they were shorter than their expectations regarding the defect-free durability of the diesel engines.[137] They also argued that application of the express warranty period term to the implied warranty of merchantability was not "conscionable" and, therefore, not permitted under § 2308(b). They alleged that GM knew about the risk of a postwarranty breakdown of the diesel engines and failed to disclose it at the time of sale. GM's knowledge and nondisclosure, together with "unequal bargaining power and lack of effective warranty competition among dominant firms in the automobile manufacturing industry," deprived the buyers of any meaningful alternative to GM's written warranty that limited the duration of the implied warranty.[138]

GM responded by arguing that the buyers had not alleged facts that plausibly implicated the conscionability of the application of the express warranty period to the implied warranty.[139] The district court held in favor of GM.[140] That GM may have known of and failed to disclose a defect in the diesel engines that might manifest only after the warranty period expired was irrelevant under § 2308(b) as to both the "reasonableness" of the duration of the express warranty period and the "conscionability" of the application of that warranty period to limit the duration of the implied warranty of merchantability.[141]

The Fourth Circuit held that South Carolina's version of UCC section 2-302 governed whether the application of the warranty period to limit the duration of the implied warranty of merchantability was "conscionable" under MMWA.[142] In 1989, when the Fourth Circuit decided *Carlson*, there were no South Carolina court opinions

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136 15 U.S.C. § 2308(b).

137 *Carlson*, 883 F.2d at 294. The Fourth Circuit apparently adopted plaintiff's assertion that a warranty period shorter than the period the buyer reasonably expected the product to operate defect-free is, for that reason, unreasonable. *Id.* ("[P]laintiffs' allegation that 'diesel engines[ ] are designed to and ordinarily do function for . . . period[s] substantially in excess of th[ose] specified in GM's . . . warranties' obviously implicates the 'reasonableness' of the durational limitation . . . ."). *Id.* (alterations in original) (quoting amended complaint).

138 *Id.* at 294.

139 *Id.* at 291.

140 *Id.*

141 *Id.* at 294–95.

142 *Id.* at 292.

interpreting UCC section 2-302.[143] Citing *Williams v. Walker-Thomas Furniture Company*,[144] the court observed that, in general, whether application of a warranty period to limit the duration of the implied warranty of merchantability is "conscionable" requires an assessment of the fairness of the bargaining process and evidence that the transaction was "tainted by 'overreaching'" and "the presence or absence in a given setting of certain oft-encountered 'indicia' of unfair bargaining."[145] It noted that section 2-302(2) expressly requires courts to afford the parties an opportunity to present evidence on the "commercial setting, purpose, and effect" of the term or contract in issue,[146] concluding that "unconscionability claims should but rarely be determined on the bare-bones pleadings."[147] The court held that the plaintiffs' allegation regarding GM's knowledge and nondisclosure of the defect at the time of sale was sufficient to implicate the "conscionability" under § 2308(b) of the warranty period term and to invalidate GM's defense to breach of warranty based on its expiration.[148]

As to whether the express warranty period GM applied to limit the duration of the implied warranty of merchantability was "of 'reasonable duration'" under § 2308(b), the Fourth Circuit treated that question as one of *substantive* fairness of the warranty period.[149] On this question, the Fourth Circuit adopted the Second Circuit's reasoning in *Abraham*.[150] GM's knowledge and nondisclosure of the problem with the diesel engines at the time of sale was not relevant.[151]

The court held that the conscionability requirement in § 2308(b) required consideration beyond the substantive "reasonableness" of the warranty period and, on this further inquiry, GM's knowledge and

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143 A search of the LEXIS database for then-extant South Carolina cases referring to UCC section 2-302 yields no cases that discuss the standards required to plead unconscionability.

144 350 F.2d 445, 449 (D.C. Cir. 1965) (applying District of Columbia common law on unconscionability); *see also Carlson*, 883 F.2d at 293 (listing as factors relevant to unconscionability of a term: the nature of the plaintiff's injury, whether the plaintiff is sophisticated, disparity in bargaining power, whether the term is surprising to the plaintiff or the product of the defendant's deception, and whether the term is conspicuous).

145 *Carlson*, 883 F.2d at 292 (quoting *Williams*, 350 F.2d at 449).

146 U.C.C. § 2-302(2) (Am. L. Inst. & Unif. L. Comm'n 2022).

147 *Carlson*, 883 F.2d at 292 & n.5. This part of the decision may not have survived the Supreme Court's subsequent clarification of the standard federal courts must apply to ascertain the sufficiency of pleadings to state a claim for relief. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that for a claim to achieve "facial plausibility" the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007))).

148 *Carlson*, 883 F.2d at 295–96.

149 *Id.* at 295 (quoting 15 U.S.C. § 2308(b)).

150 *Id.* at 295–96.

151 *Id.*

nondisclosure was relevant.[152] The "conscionability" condition required the court to determine whether GM's knowledge and nondisclosure of the problem with the diesel engines so tainted the bargaining process as to make the limitation of the duration of the implied warranty procedurally unconscionable.[153] Although the court did not use the term, it concluded that the manufacturer's alleged knowledge and nondisclosure showed an informational asymmetry that could call the fairness of the bargaining process and the voluntariness of the buyer's consent to the limitation into question: "When a manufacturer is aware that its product is inherently defective, but the buyer has 'no notice of [or] ability to detect' the problem, there is perforce a substantial disparity in the parties' relative bargaining power."[154]

The Fourth Circuit concluded that the consumers' allegations that GM knew and failed to disclose "major, inherent product defects" at the time of sale supported the inference that application of the warranty period to limit the duration of the implied warranty of merchantability "constituted 'overreaching.'"[155] The plaintiffs pled sufficient facts to implicate the *procedural* "conscionability" of the application of an express warranty period to the implied warranty of merchantability, which, if proven, would invalidate GM's purported limitation of the duration of the implied warranty of merchantability under § 2308(b).[156] Thus, GM was not entitled to dismissal on grounds that the warranty period had expired before plaintiffs demanded warranty coverage for their vehicles.[157]

B. Critique of Carlson

The Fourth Circuit did not interpret the text of 15 U.S.C. § 2308(b) regarding the "reasonable duration" of an express warranty and the "conscionable" application of such a warranty period to limit the duration of the implied warranty in its statutory context.[158] First, the court interpreted the "of reasonable duration" constraint in § 2308 as calling for an evaluation of whether the warranty period approximated the consumers' reasonable expectations regarding the repair-free operation of the diesel engines.[159] It stated that the test for objective reasonableness of the warranty period under § 2308 "requires the court to determine

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152 *Id.*

153 *Id.* at 295 ("'Objective reasonableness' [of the warranty period] is certainly relevant; but so also is the fundamental fairness of the bargaining process." (footnote omitted)).

154 *Id.* at 296 (quoting Martin v. Joseph Harris Co., 767 F.2d 296, 302 (6th Cir. 1985)).

155 *Id.*

156 *Id.*

157 *Id.* at 290.

158 15 U.S.C. § 2308(b).

159 *Carlson*, 883 F.2d at 295.

nothing more than for how long, given past experience, consumers legitimately can expect to enjoy the use of a product 'worry-free.'"[160] This test reveals the court's misunderstanding of the function of an express warranty period. If a manufacturer gives a postdelivery express warranty, for example, that it shall repair or replace defects that appear within one-year after delivery, *the warranty period term* communicates to the buyer the postdelivery period that is backed by the warranty liability of the manufacturer. A consumer may expect that a product will operate "worry-free" after the warranty period expires. Whether the buyer's idiosyncratic expectation about the product's postwarranty period durability is *reasonable* is distinct from whether the *express warranty period* is reasonable.[161] In the context of § 2308(b), however, the question is whether the warranty period is "of reasonable duration" solely for the purpose of the application of it to limit the duration of the implied warranty of merchantability.

How a court should assess the "reasonableness" of the duration of an express warranty period term *for purposes of § 2308(b)* is not immediately obvious. The MMWA does not require a manufacturer of consumer goods to give any written warranty at all.[162] If a manufacturer gives a written warranty, it must provide "full and conspicuous disclosure" of all warranty terms.[163] The warrantor must ensure availability of all warranty terms to a consumer "prior to the sale of the product to him."[164] Moreover, any written warranty must be designated "clearly and conspicuously" as either "full" or "limited."[165] To be designated as a "full" written warranty, terms must comply with the "minimum standards" in 15 U.S.C. § 2304(a) and (b).[166] A manufacturer who gives a written warranty that does not meet these minimum standards must "conspicuously" designate the written warranty as a "limited" warranty.[167] Notably, the "full" warranty minimum standards do not include a requirement as to the "reasonableness" of the duration of an express warranty period.[168] They do, however, prohibit in a written

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160 *Id.* The plaintiffs had alleged that GM's 24-month or 24,000-mile warranty period was substantively unreasonable because it expired before they reasonably expected that the diesel engines would operate without requiring repairs.

161 The manufacturer's express warranty period arguably should affect the objective reasonableness of a buyer's expectation as to how long the product will operate "worry-free" beyond the warranty period.

162 *See supra* note 63 and accompanying text.

163 15 U.S.C. § 2302(a).

164 *Id.* § 2302(b).

165 *Id.* § 2303(a).

166 *Id.* § 2303(a)(1).

167 *Id.* § 2303(a)(2).

168 *Id.* § 2304(a)–(b). The minimum standards for designation as a "full warranty" require the manufacturer to remedy any defect within a reasonable time without charge, § 2304(a)(1), prohibit any disclaimer or limitation of liability for consequential damages unless the disclaimer

warranty designated as "full" "any limitation on the duration of any implied warranty on the product."[169]

The MMWA does not impose the substantive minimum standards for warranties designated as "full" in § 2304 on warranties designated as "limited" with one exception. The lone exception to the general non-regulation of the substance of terms of "limited" warranties appears in § 2308(a), which extends to "limited" warranties the prohibition on disclaimer or modification of the implied warranty of merchantability that applies to "full" warranties per § 2304(a)(2).[170] This exception is itself subject to the exception in § 2308(b): a "limited" warranty may limit the duration of the implied warranty of merchantability "to the duration of a written warranty of reasonable duration."[171]

To understand what Congress might have had in mind by the term "reasonable duration," consider California's Song-Beverly Act,[172] which similarly regulates manufacturers' use of an express warranty period to limit the duration of the implied warranty of merchantability:

> The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer.[173]

Neither the Song-Beverly Act nor the MMWA at 15 U.S.C. § 2308 provide guidance as to how long an express warranty period must be to be "reasonable." The Song-Beverly Act, however, provides a minimum duration for purposes of application to the implied warranty of merchantability: if a manufacturer wants to apply an express warranty period to limit the duration of the implied warranty of merchantability, the express warranty period must be at least sixty days.[174]

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or limitation appears "conspicuously" on "the face of the warranty," § 2304(a)(3), and allow a consumer to elect either full refund or replacement of a product that the manufacturer cannot repair "after a reasonable number of attempts," § 2304(a)(4).

169 *Id.* § 2304(a)(2) (stating that the prohibition on limiting the duration of the implied warranty of merchantability applies "notwithstanding section 2308(b) of this title," which permits a manufacturer who gives a "limited" written warranty to apply the express warranty period to limit the duration of the implied warranty of merchantability under certain circumstances).

170 *Id.* § 2308(a).

171 *Id.* § 2308(b).

172 California Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790–1795 (West 2019).

173 *Id.* § 1791.1(c). Where the manufacturer states no warranty period on an express warranty, the statute limits the duration of the implied warranty of merchantability to one year maximum. *Id.*

174 *See id.*

Whether a warranty period is "of reasonable duration" for purposes of § 2308(b) should consider the regulatory structure of the MMWA in general and the Congressional purpose for the exception to the exception of *nonsubstantive regulation* of terms in a "limited" warranty in § 2308(b) in particular. The MMWA prohibits both "full" and "limited" written warranties from disclaiming the implied warranty of merchantability to ensure that consumers who receive written warranties get at least the assurance that the goods shall be merchantable.[175] By locating the requirement regarding "reasonable duration" of a warranty period in § 2308(b) as an exception to the general prohibition on disclaimer of the implied warranty of merchantability but only in warranties designated as "limited," Congress likely meant "of reasonable duration" to ensure that cases within this exception nonetheless protect this immutable assurance of basic merchantability. Applying this understanding, a warranty period is "of reasonable duration" if, when applied to limit the duration of the implied warranty of merchantability, the consumer has a realistic opportunity to make a claim for breach of the implied warranty of merchantability. For example, an express one-minute warranty period applied to limit the duration of the implied warranty of merchantability would yield a period to make a demand for warranty coverage that is so short that the nondisclaimable implied warranty has *no* practical value to the consumer. For that reason, a one-minute express warranty period term is not "of reasonable duration."

The court in *Carlson* rested its decision on the part of § 2308(b) that requires that the resulting limitation of the duration of the implied warranty of merchantability be "conscionable."[176] Like the "reasonable duration" requirement, how to determine whether a limitation on the duration of the implied warranty of merchantability is "conscionable" is not immediately apparent. As to whether the limitation is procedurally fair, the MMWA, at 15 U.S.C. § 2302(a) and (b), requires all warranty terms to be "fully and conspicuously" disclosed "in simple and readily understood language[,]" which must be "made available" to the consumer before the sale.[177] 15 U.S.C. § 2308(b) adds another specific requirement to these generally applicable disclosure requirements. To effectively limit the duration of the implied warranty of merchantability, a term that purports to do so must be "[o]n the face of the warranty."[178]

The requirement that the application of the express warranty term to limit the duration of the implied warranty of merchantability must be "conscionable" *in addition to* the other stated conditions to enforceability stated in § 2308(b) is puzzling. The requirement that

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175 *See supra* note 170.

176 15 U.S.C. § 2308(b); *see* Carlson v. Gen. Motors Corp., 883 F.2d 287, 290 (4th Cir. 1989).

177 15 U.S.C. § 2302(a)–(b) (outlining requirements for all written warranties).

178 *Id.* § 2308(b); *see* 16 C.F.R. § 701.1(i) (defining "[o]n the face of the warranty").

the warranty period be "of reasonable duration" requires assessment of the *substantive impact* of the limitation on the baseline utility of the implied warranty of merchantability that the MMWA protects.[179] The requirements of conspicuity, clarity, and prominent location of the limitation "on the face of the warranty"[180] address the *procedural risk* that a consumer might not perceive or understand a term that purports to limit the duration of the implied warranty of merchantability, thus undermining the reliability of his manifested consent.[181] These safeguards expressly incorporated into § 2308(b) appear to do the work of assessing the "conscionability" of the duration-limiting term. It is not clear what *other* factors a court should consider to determine whether a reasonably long and clearly and prominently disclosed limitation is nonetheless not conscionable.[182]

The Fourth Circuit concluded that GM's alleged undisclosed knowledge of the risk of a postwarranty period defect coupled with its superior bargaining power, if proven, could make the warranty period unconscionably short even if it was "of reasonable duration" and prominently disclosed on the face of the written warranty because the nondisclosure of this defect, if known to the manufacturer but not the consumer at the time of sale, would implicate procedural fairness under section 2-302.[183]

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179 15 U.S.C. § 2308(b).

180 *Id.* § 2308(b).

181 UCC Article 2 similarly identifies and deals with the risk that a consumer may not in fact perceive or understand a term that purports to disclaim an implied warranty. Section 2-316(2) permits a seller to disclaim the implied warranty of merchantability by "language" that "mention[s] merchantability" and, if the disclaimer is by written term, it must be "conspicuous." U.C.C. § 2-316(2) (Am. L. Inst. & Unif. L. Comm'n 2022); *see id.* § 1-201(a)(10) (defining "conspicuous"). Section 2-316 (3)(a) provides for an alternative to the disclaimer technique approved in section 2-316(2). *Id.* § 2-316(3)(a). It permits disclaimer of a warranty by use of "as is" or "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." *Id.*

182 The "conscionable" requirement in 15 U.S.C. § 2308(b) does not appear in § 2304(a)(3), which restricts the ability of manufacturers who give a "full" warranty to exclude liability for consequential damages "unless such exclusion or limitation conspicuously appears on the face of the warranty." 15 U.S.C. § 2304(a)(3). It does not mention the conscionability of the exclusion or limitation. *Id.* The omission of a separate conscionability requirement in § 2304(a)(3) apparently takes into account that state law via Article 2 expressly screens consequential damage disclaimers for "conscionability" in UCC section 2-719(3). *Cf.* U.C.C. § 2-719(3) (permitting exclusion of consequential damages "unless the . . . exclusion is unconscionable," a term that limits the seller's liability for consequential damages for "injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not"). Article 2 similarly addresses the conscionability of limitations on implied warranties in section 2-316(2) and (3). But it does so indirectly by requiring conspicuous disclosure of any exclusion or limitation of the implied warranty of merchantability or other means which call the buyer's attention to the existence and effect of the limitation. U.C.C. § 2-316(2)–(3).

183 Carlson v. Gen. Motors Corp., 883 F.2d 287, 296 (4th Cir. 1989).

In 2016, the Fourth Circuit revisited its holding in *Carlson* regarding the *substantive* component of an evaluation of the conscionability of a warranty period in *Hart v. Louisiana-Pacific Corp*.[184] Applying North Carolina's version of section 2-302, it held that although the manufacturer's undisclosed knowledge of a defect at the time of sale may be relevant to the *procedural* unconscionability of a warranty term, a warranty term is not necessarily *substantively* unconscionable solely because the manufacturer failed to disclose that knowledge before the sale.[185] The court held that the test for substantive unconscionability of warranty terms requires "some link between the defect and the objective unfairness of the warranty terms."[186]

C. The Unconscionability Theory Expands

This Section describes the evolution of the unconscionability theory after *Carlson*. Courts have reached different conclusions about the persuasive value of *Carlson* and the validity of the theory of the unconscionably short warranty at the pleadings stage. Courts have struggled to reconcile disparate holdings in similar factual situations: those that recognize the possibility of an unconscionably short warranty period disagree about the facts necessary to show the requisite procedural and substantive unconscionability.

1. Expansion of the Unconscionability Theory Beyond the Magnuson-Moss Act

Recall that *Carlson* interpreted the requirement that a limitation on the duration of the implied warranty of merchantability must be "conscionable" to be enforceable under the MMWA at 15 U.S.C. § 2308.[187] In *Bussian v. DaimlerChrysler Corp.*,[188] a North Carolina district court considered whether an express warranty period term could be unconscionably short under section 2-302.[189] Buyers alleged a defect in the design of their vehicle suspension systems and sought damages for breach of express warranty.[190] DaimlerChrysler moved to dismiss the

184 641 F. App'x 222 (4th Cir. 2016).

185 *Id.* at 228.

186 *Id.* at 229. The court noted that *Carlson* was not binding because the court in that case applied South Carolina's version of section 2-302, whereas North Carolina's version applied in the case before it. *Id.* at 230.

187 *See supra* notes 149–54 and accompanying text.

188 411 F. Supp. 2d 614 (M.D.N.C. 2006).

189 *Id.* at 621.

190 *Id.* at 617. The ball joints in the system contained lubrication that was "prone to deteriorate" and were designed so they could not be relubricated, but rather had to be replaced for "$600 to $1,200." *Id.* at 617–18.

breach of express warranty count on grounds that the warranty period expired before the plaintiffs requested warranty service.[191]

Citing *Carlson*, buyers claimed that DaimlerChrysler's "superior knowledge" of the latent defect at the time of sale, plus its "colossal unequal bargaining power" made the warranty period unconscionable.[192] DaimlerChrysler argued that *Carlson* was inapposite because the issue there was the "conscionab[ility]" of the durational limit on the implied warranty of merchantability under § 2308.[193] The court held that although *Carlson* did not consider the precise question before it, *Carlson*'s reasoning about the unconscionability of a warranty period based on the manufacturer's undisclosed knowledge of a defect was persuasive.[194]

The court noted that the Second Circuit's decision in *Abraham* "stands for the broad, nearly universally accepted proposition that a latent vehicle defect known to the manufacturer at the time of sale that does not manifest itself until after expiration of the express warranty does not, in and of itself, give rise to a breach of express warranty claim,"[195] but it dismissed the precedent as inapposite. The difference was in the facts alleged. The buyers in *Abraham* argued only that the defect they encountered after the warranty period expired was "latent" within the warranty period. In contrast, the buyers in *Bussian* alleged not only that their vehicles contained a "latent defect" but also that the defendants knew of and failed to disclose the defect *and* that the "purchasers lacked a meaningful choice with respect to the terms of the warranty due to unequal bargaining power and a lack of warranty competition."[196] Citing *Carlson*, the court held that the buyers had sufficiently alleged the unconscionability of the express warranty period term to survive motion to dismiss.[197]

More recently, in *Singh v. Lenovo (United States) Inc.*,[198] a Maryland district court affirmed that undisclosed prior knowledge of a latent defect

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191 *Id.* at 619. The court dismissed plaintiffs' claim for breach of the implied warranty of merchantability, finding that plaintiffs failed to allege that the vehicles were not merchantable. *Id.* at 623. The plaintiff alleged that he bought a 1998 Durango used in 2001 and learned in 2003 that the ball joints needed to be replaced. *Id.* at 617–18. "Thus with the exception of a single repair five years after original manufacture, Plaintiff's complaint makes out no allegations that his Durango was not fit for the purposes for which it was intended, i.e., to provide safe and reliable transportation." *Id.* at 624.

192 *Id.* at 621–22. The plaintiff relied on *Carlson* for the assertion that the warranty period was unconscionable and as authority for his argument that having raised unconscionability, he was entitled to a hearing under section 2-302. *Id.*

193 *Id.* at 622.

194 *Id.*

195 *Id.* at 621 (citing Abraham v. Volkswagen of Am., Inc., 795 F.2d 238, 240 (2d Cir. 1986)).

196 *Id.* at 622.

197 *Id.* at 623 (quoting Carlson v. Gen. Motors Corp., 883 F.2d 287, 296 (4th Cir. 1989)).

198 510 F. Supp. 3d 310 (D. Md. 2021).

can render an express warranty unconscionable under section 2-302.[199] Buyers of Lenovo's laptop-tablet computer called the "Yoga" alleged that the hinge that enabled the transition between laptop and tablet was defective and that Lenovo knew the hinge was likely to wear out after one year, concealed that knowledge, and set the one-year warranty period to exclude coverage for hinge failure, "leaving [the plaintiffs] unable to receive the substantial benefit of the contract."[200] The court held in favor of the buyers.[201] Lenovo's failure to disclose its knowledge of the defect in the hinge deprived the plaintiffs of "a meaningful choice . . . thereby abusing its bargaining power, sophistication, knowledge, and expertise."[202] As to substantive unconscionability, the plaintiffs pled that the warranty period would leave buyers with "no remedy" and that Lenovo used its knowledge together with the warranty period term to make sure the one-year warranty would "fail[] . . . of its essential purpose."[203]

In addition to the manufacturer's alleged knowledge of the defect and the disparity of bargaining power inherent in a mass market consumer warranty, the court noted the magnitude of the impact of the defect on the consumer's expectations and its significance to the product's value for the buyer's unconscionability theory.[204] The buyers had alleged that the hinge was the "defining feature" of the Yoga and its failure after the warranty period deprived the plaintiff of that feature.[205] Similarly, in *Duncan v. Nissan North America, Inc.*,[206] the buyers had alleged a defect that caused extensive engine damage.[207] As to whether the buyers had sufficiently alleged that the express warranty period was unconscionably short to survive the manufacturer's motion to dismiss, the court noted that "the complaint draws a distinction between components [that] must be routinely replaced in an automobile, and thus are designed to be relatively inexpensive to identify and replace, and components [such as the defective engine] that are expected to last the lifetime of the car."[208] The court reasoned that the nature of the defect and the magnitude of the cost to repair it are part of the "commercial

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199 *Id.* at 324.

200 *Id.* at 322–23. As proof tending to show that Lenovo knew the hinge would fail shortly after one year of normal use, the plaintiffs alleged that Lenovo changed to a more durable hinge in subsequent versions of the Yoga. *Id.* at 318.

201 *Id.* at 324.

202 *See id.* at 322 (quoting complaint).

203 *Id.* at 323 (alteration in original) (quoting complaint).

204 *Id.* at 324.

205 *Id.* (quoting complaint).

206 305 F. Supp. 3d 311 (D. Mass. 2018).

207 *Id.* at 314.

208 *Id.* at 320.

setting, purpose, and effect" on which section 2-302 requires that the parties shall have a "reasonable opportunity to present evidence."[209]

2. Rejecting the Unconscionability Theory

Several courts have considered and rejected the unconscionability theory. In *Santos v. Sanyo Manufacturing Corp.*,[210] a plaintiff on behalf of a putative class sued Sanyo claiming that Sanyo breached its express one-year warranty on a plasma television for refusing to repair it four years after he bought it.[211] The plaintiff alleged that Sanyo "tailored" the warranty period so that televisions would fail after the warranty period expired to avoid the cost of warranty repairs.[212]

The court granted Sanyo's motion to dismiss, finding the plaintiff failed to allege facts sufficient to show procedural unconscionability.[213] The court rejected the buyers' argument that the manufacturer's undisclosed knowledge of a defect alone supports an inference of procedural unconscionability, noting that it was "not convinced the rule propounded by the Fourth Circuit [in *Carlson*] has any practicable application in a real-world market economy."[214] The complaint did not allege facts to support the conclusion that the plaintiff lacked "meaningful choice" because the plaintiff could have purchased a television from any of Sanyo's competitors "who compete fiercely in the consumer electronics market."[215]

Similarly, in *Chiarelli v. Nissan North America, Inc.*,[216] the court held that, to show *procedural* unconscionability, the plaintiff must plead facts in addition to the manufacturer's knowledge and nondisclosure of the defect at the time of sale and use of a standard form warranty document that invalidates the buyer's assent.[217] The court granted Nissan's motion to dismiss claims for breach of express and implied warranty,

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209 *Id.* (quoting U.C.C. § 2-302 (Am. L. Inst. & Unif. L. Comm'n 2002)).

210 No. 12-11452, 2013 WL 1868268 (D. Mass. May 3, 2013).

211 *Id.* at *1.

212 *Id.*

213 *Id.* at *3–4.

214 *Id.* at *4 (citing Abraham v. Volkswagen of Am., Inc., 795 F.2d 238, 240 (2d Cir. 1986)); *see also* Henderson v. Volvo Cars of N. Am., LLC, Civ. No. 09–4146, 2010 WL 2925913, at *9 (D.N.J. July 21, 2010) (manufacturer's knowledge that a part will fail after the expiration of the warranty period does not by itself make a warranty period unconscionable).

215 *Santos*, 2013 WL 1868268, at *3; *see also* Berenblat v. Apple, Inc., Nos. 08-4969, 09-1649, 2010 WL 1460297, at *5 (N.D. Cal. Apr. 9, 2010) (a warranty term that limits the manufacturer's express warranty liability is not procedurally unconscionable, even if the manufacturer knew of the defect at the time of sale, where the warranty period is prominent in the warranty document and where consumers may choose to purchase similar products from competitors).

216 No. 14-CV-4327, 2015 WL 5686507 (E.D.N.Y. Sept. 25, 2015).

217 *Id.* at *1, *6–7; *see also* Dean Witter Reynolds, Inc. v. Super. Ct. of Alameda Cnty., 259 Cal. Rptr. 789, 795 (Cal. Ct. App. 1989) (explaining a term is not oppressive even if it appears in a standard form warranty document in which warranty terms are nonnegotiable if buyers

holding that the buyers' unconscionability theory failed as a matter of law.[218] The court noted that *Carlson* is not binding on federal district courts in the Second Circuit, and it is of questionable persuasive value after the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[219] and *Ashcroft v. Iqbal*[220] regarding the sufficiency of pleading to state a claim in federal courts.[221]

The district court in *Chiarelli* distinguished its decision from *Szymczak v. Nissan North America, Inc.*,[222] a case decided by a sister New York district court four years earlier.[223] In *Syzmczak*, the court, relying at least in part on *Carlson*, held that the buyers' allegations that Nissan knew their vehicles would fail only after the warranty period expired, plus the absence of meaningful choice about the warranty terms, were sufficient to survive a motion to dismiss.[224] In *Chiarelli*, the district court characterized *Szymczak* as "an outlier," and it held to the contrary that "bare-bone" allegations of the manufacturer's knowledge of the defect at the time of sale, plus disparity in bargaining power or lack of meaningful choice, do not plausibly allege unconscionability of a warranty period term sufficiently to survive motion to dismiss.[225] Under New York law, allegations sufficient to challenge a contract term on unconscionability grounds required more than just an allegation a party lacked "meaningful choice"—plaintiffs must show that the defendant engaged in high-pressure or deceptive tactics in exploiting its superior bargaining power.[226]

Even where the buyers sufficiently alleged procedural unconscionability, some courts have rejected the unconscionability theory because of insufficient allegations regarding the *substantive* impact of the warranty period. In *Seifi v. Mercedes-Benz USA, LLC*,[227] the plaintiff sued for breach of warranty due to a defect that appeared after he had driven 70,000 miles, a full 20,000 miles after his warranty expired,

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"had reasonably available alternative sources of supply from which to obtain the desired goods . . . free of the terms claimed to be unconscionable").

218 *Chiarelli*, 2015 WL 5686507, at *7.

219 550 U.S. 544 (2000).

220 556 U.S. 662 (2009).

221 *Chiarelli*, 2015 WL 5686507, at *7 n.5; *accord Alban II*, Civ. No. 09–5398, 2011 WL 900114, at *9 n.8 (D.N.J. Mar. 15, 2011) (noting that "in light of [*Twombly*] and *Iqbal*, the Fourth Circuit's logic is no longer persuasive, as conclusory allegations are insufficient to survive a motion to dismiss").

222 No. 10 CV 7493, 2011 WL 7095432 (S.D.N.Y. Dec. 16, 2011).

223 *See Chiarelli*, 2015 WL 5686507, at *7 & n.5, *13.

224 *Szymczak*, 2011 WL 7095432, at *9–10.

225 *See Chiarelli*, 2015 WL 5686507, at *7 n.5.

226 Passelaigue v. Getty Images (US), Inc., No. 16-CV-1362, 2018 WL 1156011, at *5 (S.D.N.Y. Mar. 1, 2018).

227 No. C12-5493, 2013 WL 2285339 (N.D. Cal. May 23, 2013).

requiring $6,000 to repair.[228] The plaintiff argued that the warranty period was procedurally unconscionable because Mercedes-Benz concealed its knowledge of the defect and thereby prevented him from negotiating for a warranty period that would cover the defect.[229] The court held that the plaintiff had sufficiently alleged *procedural* unconscionability under California law because the defect posed a safety concern and nondisclosure deprived plaintiff of information necessary to make a meaningful choice among vehicles available on the market.[230] Nonetheless, it granted the motion to dismiss because the plaintiff failed to allege facts showing *substantive* unconscionability—that the warranty Mercedes-Benz provided, as limited by the warranty period, was "overly harsh or one-sided."[231]

Different courts within the federal district of New Jersey have reached different conclusions about the unconscionability theory. In *Gelis v. BMW AG*,[232] the court denied BMW's motion to dismiss buyers' breach of express and implied warranty counts based on expiration of the warranty period that applied to both. It did so, not solely because of BMW's alleged undisclosed knowledge of a defect, but because buyers alleged that BMW set the warranty period *intentionally* to exclude coverage for the defect.[233] It held that allegations that BMW had a bargaining advantage over individual consumers were sufficient to plead *procedural* unconscionability.[234] The litigation in *Gelis* eventually settled for an amount estimated to be at least $27 million, and class counsel sought attorneys' fees of $3.7 million.[235] Another court in the same district noted the discord within the district on the facts buyers must plausibly plead to allege the unconscionability of a warranty period

228 *See id.* at *1–2. The warranty provided was for 48-months or 50,000 miles. *Id.* at *3.

229 *Id.* at *4.

230 *Id.*

231 *Id.* at *5; *see also* White v. Volkswagen Grp of Am., Inc., No. 2:11-CV-02243, 2013 WL 685298, at *5 (W.D. Ark. Feb. 25, 2013) (noting that "there is nothing facially unconscionable about a five-year or 60,000-mile warranty in the auto industry" (citing Nelson v. Nissan N. Am., Inc., 894 F. Supp. 2d 558, 565 (D.N.J. 2012))).

232 No. 17-cv-07386, 2018 WL 6804506 (D.N.J. Oct. 30, 2018).

233 *Id.* at *6–7 ("While a 40/5 warranty provision is not facially unconscionable, the terms do 'shock the conscience' if, as is sufficiently alleged, BMW set them with specific knowledge that class engines would fail after the end of the warranty period but before the vehicle's expected useful life."); *see also* Skeen v. BMW of N. Am., LLC, No. 13-cv-1531, 2014 WL 283628, at *14–15 (D.N.J. Jan. 24, 2014) (finding that plaintiffs adequately alleged substantive unconscionability of the warranty period by alleging that BMW knew a part "would fail and manipulated the warranty terms to avoid paying for it"); DeFrank v. Samsung Elecs. Am., Inc., No. 19-21401, 2020 WL 6269277, at *3, *17–19 (D.N.J. Oct. 26, 2020) (similar for defective clothes dryers' warranty).

234 *Gelis*, 2018 WL 6804506, at *6.

235 Gelis v. BMW of N. Am., LLC, 49 F.4th 371, 375, 377 (3d Cir. 2022) (appeal of fee award).

to survive a manufacturer's motion to dismiss.[236] It held that the line of cases decided after the Supreme Court's decisions on sufficiency of pleadings in *Twombly*, which reject conclusory allegations of unconscionability as insufficient, reflect the "trend" in that federal district and elsewhere.[237] Based on the standards, the buyers' allegations that the manufacturer knew of and failed to disclose the defect in the product at the time of sale and used its superior bargaining power to impose the warranty period term were "entirely conclusory" and insufficient to plausibly raise an issue regarding the unconscionability of the warranty period.[238] In particular, the plaintiffs did not specifically allege the particular bargaining characteristics of the plaintiff or "the details of the transaction at issue which would support a disparity in sophistication or bargaining power."[239] It found the allegations of disparate bargaining power "dubious" in the absence of any allegation that the plaintiffs could not buy comparable vehicles from other manufacturers.[240]

Similarly, a court in another federal district held that buyers' allegation in support of procedural unconscionability of the warranty period term when the manufacturer knew of the defect at the time of sale was insufficiently specific to plead the type of informational asymmetry that could render an express warranty period procedurally unconscionable.[241] The court held that allegations that Ford had knowledge of at least fourteen complaints at the time of sale to the plaintiff did not support an inference that Ford knew that water pumps in its vehicles were defective.[242] It noted that Ford sells more than two million vehicles in North America alone each year, and allegations of complaints made to Ford dealers, to the National Highway Traffic Safety Administration,

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236 *In re* Caterpillar, Inc., C13 & C15 Engine Prods. Liab. Litig., No. 14-cv-3722, 2015 WL 4591236, at *20–22 (D.N.J. July 29, 2015).

237 *Id.* at *21; *see also* Gotthelf v. Toyota Motor Sales, U.S.A., Inc., No. 11-4429, 2012 WL 1574301, at *20 (D.N.J. May 3, 2012) (noting that after *Twombly*, the district court "has been much less willing to deny motions to dismiss breach of warranty claims once a warranty has expired").

238 *In re Caterpillar*, 2015 WL 4591236, at *22.

239 *Id.* The plaintiffs asserted that "[d]isparity of bargaining power is inherent whenever a manufacturer acts with superior knowledge of a defect but refuses to inform the consumer." *Id.* at *22 n.34 (alteration in original) (citation omitted). The court rejected the proposed inference. *Id.*

240 *Id.* at *22 (citing Werwinski v. Ford Motor Co., 286 F.3d 661, 673 (3d Cir. 2002), *overruled in part*, Earl v. NVR, Inc., 990 F.3d 310, 314 (3d Cir. 2021)) (noting that purchasers of vehicles whether consumers or commercial entities "may be unable to negotiate the specific details of their automobile warranties, or may be able to select only limited options" but "do not lack bargaining power" because they "often have the option of buying an extended warranty" and "may select among cars of various manufacturers and consider the differences in warranties in making their choice"). In *Werwinski*, the Third Circuit held that the economic loss rule bars claims for economic loss damages under Pennsylvania's consumer fraud act. *Werwinski*, 286 F.3d at 681. It overruled this holding in *Earl* because Pennsylvania courts considering the issue after *Werwinski* disagreed. *Earl*, 990 F.3d at 311.

241 Roe v. Ford Motor Co, 2:18-cv-12528, 2019 WL 3564589, at *10 (E.D. Mich. Aug. 6, 2019).

242 *Id.* at *7.

on an internet forum, or to Ford directly did not suffice to show Ford's knowledge of the defect unless the complaints were "frequent enough that they were not lost in a sea of complaints and repairs amassing by the dozens each day."[243] Moreover, allegations that Ford had notice of complaints from buyers was not sufficient to support the inference that Ford knew the water pumps failed because of a *defect* and not some other cause.[244] The court noted that the buyers alleged twenty-six failures out of millions of Ford vehicles.[245] The complaint did not allege how the failure rate compared to the failure rate of a part that under products liability law, a court would treat as "defective."[246] While the court imposed a fairly clear standard for pleading facts sufficient to plausibly allege the manufacturer's undisclosed knowledge of a product defect as a basis for procedural unconscionability of a warranty period, other courts are less demanding.[247]

The disarray surrounding the "unconscionably short warranty" has not escaped the attention of jurists. In *Haft v. Haier U.S. Appliance Solutions, Inc.*,[248] a federal district court in New York noted that courts that consider the possibility of an unconscionably short warranty generally agree that an allegation that the manufacturer knew of and failed to disclose a latent defect to the buyer at the time of sale is not alone sufficient to render a warranty period unconscionable,[249] but they disagree as to the type and level of detail of allegations regarding the manufacturer's knowledge that plausibly allege a warranty period is unconscionable.[250] The court in *Haft* concluded that a manufacturer's exclusive knowledge of a defect likely to arise only after the warranty period expires cannot alone establish the unconscionability of a warranty period.[251] On the other hand, "[c]ircumstances could arise where

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243 *Id.*

244 *Id.*

245 *Id.*

246 *Id.*; Snodgrass v. Ford Motor Co., Civ. No. 96-1814, 2001 WL 37118915, at *13 (D.N.J. Aug. 31, 2001) (concluding that approximately four ignition failures per million vehicles did not support an inference that Ford knew ignitions were defective).

247 *E.g.*, *In re* Volkswagen Timing Chain Prod. Liab. Litig., No. 16-2765, 2017 WL 1902160, at *4 (complaint alleged that Volkswagen issued several technical service bulletins about the defect); Sater v. Chrysler Grp. LLC, No. EDCV 14–00700, 2015 WL 736273, at *2 (C.D. Cal. Feb. 20, 2015) (buyers alleged Chrysler had received "hundreds" of complaints and had issued seven recalls regarding the defect).

248 578 F. Supp. 3d 436 (S.D.N.Y. 2022).

249 *Id.* at 453; *see also* Vullings v. Bryant Heating & Cooling Sys., No. 18-3317, 2019 WL 687881, at *3 (E.D. Pa. Feb. 19, 2019) (assertion that manufacturer knew of the defect "cannot, without more, suffice to establish substantive unconscionability"); Henderson v. Volvo Cars of N. Am., LLC, No. 09-4146, 2010 WL 2925913, at *9 (D.N.J. July 21, 2010) (same).

250 *Haft*, 578 F. Supp. 3d at 453.

251 *Id.* at 454 (the court explaining that to rule otherwise would allow an "end-run" around the Second Circuit's holding in *Abraham v. Volkswagen of America., Inc.*, 795 F.2d 238 (2d Cir. 1986)).

a defendant so abused their knowledge of a latent defect to entirely rob a customer of the of the [sic] benefit of the warranty."[252] The court reasoned that a bare allegation that the customer lacked "meaningful choice" is not enough to show that a warranty period term is *procedurally* unconscionable.[253] Nor is an allegation that the manufacturer knew that customers would bear the cost of repair due to expiration of the warranty period sufficient to show that a warranty period is *substantively* unconscionable.[254]

The court identified a seemingly intractable question: What, besides the manufacturer's knowledge of a defect at the time of sale, must the plaintiff plead to sufficiently allege the unconscionability of a warranty period?

> Is it the case that Plaintiffs must allege that Defendants knew that the product would fail after the warranty expired, but before the product life, in 80% of cases? What about in 50% of cases? What percentage of the products must fail and at what point in time? How soon after the warranty period must the failure occur in order to be unconscionable? Is it unconscionable is [sic] the product typically fails ten years after the warranty period? A day? And given that procedural and substantive unconscionability are evaluated on a sliding scale, are there some factual allegations that would suggest such significant enough degree of substantive unconscionability so as to survive a motion to dismiss, even if allegations of procedural unconscionability were more conclusory?[255]

The court did not arrive at answers to these questions. It held that the plaintiffs' allegations were "highly conclusory" and failed to raise a plausible inference of either procedural or substantive unconscionability.[256]

IV. Not Unconscionable but Possibly Fraudulent

The survey of cases above show that application of section 2-302 to warranty period terms based on the assertion that a manufacturer's undisclosed knowledge of the risk of a defect has left courts struggling to apply section 2-302 coherently and consistently. One obvious problem, identified by the Second Circuit in *Abraham*, is that the manufacturer's exclusive knowledge of risks of product defects, and the timing and cost

252 *Id.* at 455.

253 *Id.*

254 *Id.*

255 *Id.* (citation omitted).

256 *Id.*

of those defects if they occur, is not *per se* an abuse of bargaining power that could render an otherwise clear, conspicuous, and substantively reasonable warranty period unconscionably short.

When the Fourth Circuit decided *Carlson*, a leading view of consumer product warranties posited that manufacturers offer the lowest value express warranty that the law will allow and deliver it via a standard warranty document that deprives consumers of alternatives other than to take the warranty terms the manufacturer offers.[257] According to this "exploitation theory" of consumer product warranties, a manufacturer who uses a standard warranty document in transactions with consumers has "unfettered discretion" to impose terms favorable to it because of the manufacturer's superior bargaining power.[258] Under the exploitation theory, because all manufacturers use consumer product warranties to exploit consumers even in competitive markets, their use of similar warranty terms deprives consumer buyers of meaningful choice.[259]

Since section 2-302 was first approved as part of the original UCC in 1951, the exploitation theory of consumer product warranties has powerfully influenced scholarly and judicial thinking about the role of courts in policing terms in mass market consumer contract documents.[260] The Fourth Circuit in *Carlson* likely had the exploitation theory in mind when it held that GM's alleged knowledge and nondisclosure of the risk of a significant defect, together with its use of a standard form warranty document "is perforce a substantial disparity in the parties' relative bargaining power."[261] Another possibility, one that appeared to persuade the Second Circuit in *Abraham*, is that manufacturers' superior and undisclosed knowledge about the risk that the products they manufacture will fail after the warranty period expires is ubiquitous and benign.

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257 *See* Priest, *supra* note 87, at 1299–1302.

258 *Id.* at 1299–1300 (quoting William C. Whitford, *Law & the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 Wis. L. Rev. 1006, 1039) (citing Freidrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 640 (1943)).

259 *See, e.g.*, Arthur Allen Leff, *Contract as a Thing*, 19 Am. U. L. Rev. 131, 140–44 (1970); Kessler, *supra* note 258, at 632; *see also* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960). Academic observers have posited that consumer product manufacturers conspire to capture the legislative process to enact laws that only symbolically protect consumers from exploitation. *See, e.g.*, Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 Law & Soc'y Rev. 507, 520–21 (1977). *See generally* Murray Edelman, The Symbolic Uses of Politics (1964) (symbolic legislation is designed to appear to benefit consumers but does not change the power and economic relations between manufacturers and consumers).

260 *See* M. P. Ellinghaus, *In Defense of Unconscionability*, 78 Yale L.J. 757, 761–72 (1969) (describing scholarly thought on the meaning of "unconscionability" in section 2-302); *Uniform Commercial Code*, Unif. L. Comm'n, https://www.uniformlaws.org/acts/ucc [https://perma.cc/RDF8-9R3X] (describing the origins of the modern Article 2 of the UCC).

261 Carlson v. Gen. Motors Corp., 883 F.2d 287, 296 (4th Cir. 1989).

It is simply not relevant to the substantive or procedural fairness of a warranty period term.[262]

As an alternative to the exploitation theory, consumer product warranties can be understood as a form of manufacturer-supplied insurance against the risk of economic loss from defects that appear after delivery of the goods.[263] The optimal allocation of risk between manufacturer and consumer is complicated because both parties can affect the risk that a product defect will occur and the magnitude of loss that may result from a defect.[264] The manufacturer controls decisions about the design and manufacturing of the goods before delivery, while the buyer controls decisions about the use and maintenance of the goods after delivery.[265] The buyer has exclusive physical control of the goods after delivery and controls the postdelivery use and maintenance of the goods. The buyer's decisions about how to use and maintain the product after deliver affect both the risk of postdelivery defects and the magnitude of loss if they occur.[266] An express postdelivery warranty that allocates risk of certain postdelivery defects to the manufacturer creates an incentive for the manufacturer to invest in research, design, and quality control to reduce expected cost of those product defects during the warranty period.[267]

In contrast to the assumptions underlying the exploitation theory of consumer product warranty, manufacturers of consumer goods have an incentive to offer a warranty package that optimizes the productive value of their goods.[268] Because both buyers and manufacturers can affect the probability and magnitude of loss from defects, both are better off if warranty terms allocate the cost of measures to mitigate or insure against risk of loss to the cheaper bearer.[269] The use of a warranty period as a durational boundary of the manufacturer's warranty liability risk allocates to the buyer loss from product failure after the warranty period expires. The longer the goods are in the buyer's control, the more likely it is that the buyer's decisions regarding use, maintenance, and storage of the goods drive the risk of a problem relative

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262 Abraham v. Volkswagen of Am., Inc., 795 F.2d 238, 250 (2d Cir. 1986).

263 George Priest noted that the insurance function of consumer product warranties was "well-known" but that this understanding cannot be readily seen in industry practice and "has had little influence" on courts and legislatures. *See* Priest, *supra* note 87, at 1298 & n.5.

264 *See id.* at 1310, 1312–13.

265 *See id.* at 1311–13.

266 *See id.* at 1312; *see also* Isaac Erlich & Gary S. Becker, *Market Insurance, Self-Insurance, and Self-Protection*, 80 J. POL. ECON. 623, 624, 637–43 (1972).

267 Priest, *supra* note 87, at 1309–10.

268 *See id.* at 1298 (noting manufacturer's incentive to provide warranty coverage that "optimizes the productive services of goods").

269 *Id.*; *see also* Erlich & Becker, *supra* note 266, at 633–43 (providing a model of optimal market insurance taking into account the insured's opportunities for self-insurance and self-protection).

to the manufacturer's decisions as to product design or manufacture, and the more likely that the buyer can manage that risk more cheaply than the manufacturer. Put simply, risk-averse buyers prefer that the manufacturer insure against postdelivery defects only during the postdelivery period when the manufacturer's price for providing that insurance is lower than the cost of buyers' alternatives for managing the risk of economic loss from product failures themselves.[270]

Allocation of risk achieved by use of a warranty limited by a warranty period may be frustrating to the party who in the end bears the risk,[271] but it is not *per se* substantively unfair.[272] How manufacturers select the duration of the warranty period of the base product warranty on their products is beyond the scope of this Article.[273] Understanding the legitimate reasons why manufacturers limit the duration of express and implied warranties by use of a warranty period term is relatively easy. An express postdelivery warranty bounded by a warranty period is analogous to a "claims-made" insurance contract, which limits the insurer's coverage obligation to claims made within the coverage period, in contrast to an "occurrence" insurance policy, which covers loss resulting from events that occur within the policy period without regard to when the claim is made.[274] Warranty coverage only for claims made within

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270 V. Padmanabhan, *Marketing and Warranty*, *in* The Product Warranty Handbook 393, 396 (Wallace R. Blischke & D.N. Prabhakar Murthy eds., 1995) ("A simple economic argument for product warranty is that with risk-averse consumers it is optimal for the manufacturer to offer warranty as a form of insurance.").

271 *Cf.* Robert E. Keeton & Alan I. Widiss, Insurance Law § 5.10(d)(1)–(3), at 598–99 (1988) (noting that one of the principal disadvantages of a claims-made policy is that the insured bears the uncertainty of the costs of claims made against it after the policy period ends).

272 Insureds have challenged claims-made insurance policies on unconscionability and public policy grounds, but courts have generally found the claims period limitation on coverage to be enforceable. *See* Lehr v. Pro. Underwriters, 296 N.W. 843, 844 (Mich. 1941) (holding a claims-made policy did not violate public policy and noting that an insurance company may limit the risks it assumes and charge premiums accordingly); Zuckerman v. Nat'l Union Fire Ins. Co., 495 A.2d 395, 399–400 (N.J. 1985) (explaining the underwriting advantages of claims-made coverage for both the insurer and the insured); Neil A. Doherty, *The Design of Insurance Contracts When Liability Rules Are Unstable*, 58 J. Risk & Ins. 227, 243 (1991) (asserting that claims-made policies are an innovative response to underwriting risk and tend to benefit both insurers and insured).

273 *See generally* Mohsen Afsahi & Mahmood Shafiee, *A Stochastic Simulation-Optimization Model for Base-Warranty & Extended-Warranty Decision-Making of Under-& Out-of-Warranty Products*, 197 Reliability Eng'g & Sys. Safety, 2020, at 1 (proposing a stochastic simulation-based optimization model to determine the optimal lengths of base and extended warranty terms given factors including sale price and expected cost of warranty repairs).

274 For example, under a claims-made professional malpractice policy, the insurer agrees to cover the insured professional for loss from any "claim" alleging professional malpractice that a third party makes against the insured during the policy period. *See* 20-130 Appleman on Insurance Law & Practice Archive § 130.3 (Jeffrey E. Thomas ed., 2024) (discussing the definition of "claim" in a claims-made policy and noting that under a "claims-made" insurance contract, if the third party does not make the claim and the insured does not report it to the insurer during the policy period, no liability attaches). Contrast an "occurrence" policy that covers loss resulting from

the warranty period, like a "claims-made" insurance contract, bounds a manufacturer's otherwise perpetual liability for breach of a postdelivery express warranty by cutting off "long-tail" liability for economic loss resulting from occurrences which do not materialize as claims during the claims period.[275] Increased certainty regarding the expected cost of warranty liability lowers the cost of calculating expected loss for claims-made coverage compared to open-ended occurrence coverage.[276] Warranty coverage bounded by a warranty period tends to be optimal for both the manufacturer and the buyer compared to no warranty, or perpetual, long-tail warranty coverage.[277]

Thinking about a warranty period as a tool to allocate efficiently the risk of postdelivery failure of goods illuminates the relevance of the manufacturer's knowledge of risks of product failure at the time of sale on the conscionability of a warranty period term that allocates some of those known risks to the buyer. Buyers who assert the unconscionability theory do not contend that the warranty period renders the manufacturer's warranty substantively *valueless*, nor do they contend that the warranty period term is procedurally unconscionable for all consumer buyers of the product because the standard warranty document deceptively states or obscures the warranty period term, *e.g.*, buries it in incomprehensible terms in the fine print of the warranty document. Rather, they contend that the warranty period is unconscionable, and therefore unenforceable, *as applied to bar their recovery for the defect they experienced* because the manufacturer knew of and failed to disclose its knowledge that this particular risk would occur,

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events that occur during the policy period, which may not materialize as third-party claims against the insured until long after the policy period ends and without regard to whether the insurer or the insured knows about the loss during the policy period. *See* Gerald Kroll, Comment, *The Claims Made Dilemma in Professional Liability Insurance*, 22 UCLA L. Rev. 925, 928 (1975) (describing the unlimited liability tail an insurer undertakes under a policy that defines coverage based on the occurrence of the loss producing event during the policy period, an "occurrence policy"); Stine v. Cont'l Cas. Co., 349 N.W.2d 127, 134 (Mich. 1984) (explaining the distinction between an "occurrence" policy and a "claims-made" policy and noting that satisfaction of the condition of notice to the insurer within the claims period "stands in equal importance" with the occurrence of the insured event).

275 *See* 20-130 Appleman on Insurance Law & Practice Archive § 130.3(C) ("The insurance company that issues an 'occurrence' policy is exposed to a 'tail,' which is the lapse of time between the occurrence and the date on which the claim is made.").

276 John K. Parker, *The Untimely Demise of the "Claims Made" Insurance Form: A Critique of* Stine v. Continental Casualty Co., 1983 Det. Coll. L. Rev. 25, 73 (claims-made policy terms enable insurers to offer lower premiums relative to "occurrence" policy terms). In *National Union Fire Insurance Co. v. Baker & McKenzie*, 997 F.2d 305, 306 (7th Cir. 1993), Judge Posner explained that insurers offer claims-made policies to confine the otherwise indefinite future liability under an occurrence policy: "The coverage is less, but so, therefore, is the cost." *Id.* at 306.

277 *Nat'l Union*, 997 F.2d at 306.

causing economic loss, under circumstances which make that conduct fraudulent.[278]

The unconscionably short warranty theory focuses the court on the manufacturer's alleged misconduct at the time of the sale but indirectly as an indicator of an imbalance in bargaining power that makes the warranty period term in the contract procedurally unfair.[279] Unconscionability under section 2-302 permits courts to invalidate "*the contract or any clause of the contract*" that a court "finds . . . to have been unconscionable at the time [the contract] was made."[280] When the term challenged as unconscionable is a warranty period, the court's focus should hold steady on the procedural and substantive unfairness *of the warranty period term* at the time of the sale as part of the warranty package that the manufacturer provided. A clear, conspicuous, and easily understood warranty period term does not present an "unfair surprise," and it is not "oppressive" in the sense of deceiving the buyer *as to the effect of the term*—the only theory that might reasonably characterize such a term as "oppressive" is precisely the type of judicial intrusion into contractual risk allocation the drafters rejected.[281]

Unconscionability under section 2-302 clearly provides courts with discretion to police warranty period terms. It is, however, a clumsy tool when used to evaluate whether *a manufacturer's conduct at the time of sale*, including nondisclosure of information regarding the risk of postwarranty period problems, yields a fair and reasonable allocation of risk of a postwarranty period defect. Tort law governing fraudulent misrepresentation or nondisclosure provides an alternative to evaluate the manufacturer's culpability for a buyer's economic loss when a product fails after the warranty period expires. This approach considers directly facts that the unconscionability theory obscures.

A. Manufacturer's Knowledge of the Defect and Intention to Deceive the Buyer

As a preliminary matter, under tort law, it matters whether the defendant intentionally misrepresented or withheld information or was merely negligent. The economic loss rule generally bars an action in tort against a contract counterpart for *unintentional* infliction of economic loss caused by that party's negligent misrepresentation in bargaining.[282]

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278 *See supra* Part III.

279 *See infra* Section IV.B.

280 U.C.C § 2-302(1) (Am. L. Inst. & Unif. L. Comm'n 2022) (emphasis added).

281 *See id.* cmt. 1.

282 Restatement (Third) of Torts: Liability for Economic Harm § 1(1) (Am. L. Inst. 2020) ("An actor has no general duty to avoid the unintentional infliction of economic loss on another."); *id.* § 3 (unless an exception applies a contract party is not liable in tort for economic loss "caused by negligence in the performance or negotiation of a contract"); *see also* Seely v. White Motor Co.,

The Restatement (Third) of Torts clarifies that a seller of goods is not liable in tort for negligent misrepresentations that induce buyers to contract because "[a] seller's negligent misrepresentations are addressed sufficiently by the law of contract and restitution."[283] Some states recognize liability for a negligent misrepresentation in bargaining if the plaintiff can show an injury other than the lost value of the bargain caused by the misrepresentation.[284] Negligent *nondisclosure* of material information in bargaining generally does not support a tort claim for damages.[285]

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403 P.2d 145, 151 (Cal. 1965) (superseded by statute on other grounds). The Restatement defines "economic loss" as "pecuniary damage not arising from injury to the plaintiff's person or from physical harm to the plaintiff's property." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 2. *See generally* Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 525–26 (2009) (noting that states vary as to how they apply the rule); Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMPAR. L. 111, 125 (1998) (noting that the rule is "much less well settled and less uniform than one might wish it to be"). A party has a tort duty not to provide false information, even negligently, only when "in the course of his or her business . . . or in any [other] transaction in which [he] has a pecuniary interest, [he] supplies false information for the guidance of others" and "fails to use reasonable care in obtaining or communicating [the information]." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 5(1) (AM. L. INST. 2020).

283 RESTATEMENT (THIRD) OF TORTS § 3 cmt. d.

284 *See* RDA Pro. Beauty Supply Inc. v. Clay, No. 12-23-00050, 2023 WL 8658711, at *3 (Tex. App. Dec. 14, 2023) (plaintiff cannot bring a claim for negligent misrepresentation unless she "can establish that she suffered injury that is 'distinct, separate, and independent' from the economic loss recoverable under a breach of contract claim" (quoting Guerrero-McDonald v. Nassour, 516 S.W.3d 198, 210 (Tex. App. 2017))); Skyco Res., LLP v. Fam. Tree Corp., 512 P.3d 11, 27 (Wyo. 2022) (economic loss rule permits tort claims for economic loss based on breach of a duty independent of contract duties).

285 *See, e.g.*, Santos v. Sanyo Mfg. Corp., No. 12-11452, 2013 WL 1868268, at *6 (D. Mass. May 3, 2013) (bare nondisclosure does not support negligent misrepresentation under Massachusetts law). Whether a manufacturer has affirmatively misrepresented nondefect or merely failed to disclose its knowledge of a defect can be controversial. Sonneveldt v. Mazda Motor of Am., Inc., No. 8:19-cv-01298, 2021 WL 62502, at *5 (C.D. Cal. Jan. 4, 2021) (finding that a maintenance schedule indicating water pumps would not require maintenance for 120,000 miles was not a representation to that effect because the express warranty covering the water pump was limited to 5 years or 60,000 miles); Roe v. Ford Motor Co., No. 2:18-cv-12528, 2019 WL 2564589, at *3, *9 (E.D. Mich. Aug. 6, 2019) (holding the same regarding Ford's maintenance schedule that water pumps would not require service or replacement for 150,000 miles because Ford's express 5-year or 60,000-mile warranty made it clear that after that warranty period expired "all bets were off on the water pump; it might last quite a while longer, it might not"); *see also In re* Volkswagen Timing Chain Prod. Liab. Litig., No. 16-2765, 2017 WL 1902160, at *18 (D.N.J. May 8, 2017) (finding that for vehicles containing a timing chain system, as opposed to a timing belt, the inclusion of a replacement requirement for timing belts but not timing chain systems in Volkswagen's maintenance schedules plausibly alleged an affirmative misrepresentation that the timing chain systems would last without maintenance longer than the belt); *In re* Saturn L-Series Timing Chain Prods. Liab. Litig., MDL No. 1920, 2008 WL 4866604, at *2–5 (D. Neb. Nov. 7, 2008) (discussing buyers allegations that, in addition to omitting the timing chain from the maintenance schedule, Saturn's marketing material extolled the durability of its timing chain system over competitors' timing belts); Nelson v. Nissan N. Am., Inc., 894 F. Supp. 2d 558, 567 (D.N.J. 2012) (discussing that

In contrast, a tort claim for *fraudulent* misrepresentation in contract negotiation falls outside the scope of the economic loss rule on the supposition that contract terms do not allocate the risk of economic loss due to *deliberate fraud*.[286] To plead fraudulent misrepresentation in the inducement of a contract, the plaintiff generally must plead and prove that the defendant misrepresented a material fact *with intention to deceive* its contract counterpart.[287] The plaintiff must allege that the defendant knew or believed the representation to be false, knew or implied a false level of confidence in its accuracy, or knowingly stated or implied a basis for the representation that does not exist.[288]

To show fraudulent misrepresentation by *nondisclosure* in the course of bargaining, the plaintiff must plead and prove additionally that the defendant deliberately failed to disclose material facts while under a *duty* to disclose.[289] When a defect does not implicate product safety, a manufacturer generally has no duty to disclose a defect in the goods it sells.[290] An exception arises when the manufacturer has a "special" relationship with the buyer.[291] For example, New Jersey courts have recognized three types of special relationships that give rise to a duty to disclose: (1) where there is a fiduciary relationship, (2) where the

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Nissan's maintenance schedules only required changing transmission fluids if the vehicle was used for towing or driving through muddy roads which implied a representation that the transmission system would not require maintenance under other driving conditions).

286 *See* Restatement (Third) Torts: Liability for Economic Harm § 9 cmt. a (Am. L. Inst. 2020) ("As discussed in § 2, the economic-loss rule generally forecloses tort liability for negligence in the negotiation or performance of a contract, but it does not impair the claims of fraud discussed in this Chapter."). *See generally* Ralph C. Anzivino, *The Fraud in the Inducement Exception to the Economic Loss Doctrine*, 90 Marq. L. Rev. 921, 940–41 (2007) (discussing that the fraud exception allows contract parties to use the economic loss rule to accomplish the disclaimer of the implied obligation of good faith and fair dealing that is not waivable by contract).

287 Restatement (Third) of Torts § 10, cmt. a (noting that the requirement of scienter is the "most important difference between cases of fraud and cases of negligent misrepresentation or breach of contract").

288 *Id.* § 10.

289 *Id.* § 13 (failure to disclose material information may result in liability "if the actor has a duty to speak"). This duty arises in certain contexts where one actor has asymmetric information that another contracting party would reasonably expect to be disclosed, such as fiduciary relationships. *See id.*

290 *See, e.g.*, Urman v. S. Bos. Sav. Bank, 674 N.E.2d 1078, 1081 (Mass. 1997) (finding silence is not sufficient to show fraudulent misrepresentation even where a seller may "have knowledge of some weakness in the subject of the sale").

291 *See* Argabright v. Rheem Mfg. Co., 201 F. Supp. 3d 578, 604 (D.N.J. 2016). The duty to disclose facts pertinent to product safety is broader. The federal Motor Vehicle Safety Act requires vehicle manufacturers to disclose a defect "related to motor vehicle safety." 49 U.S.C. § 30118(c). California recognizes a manufacturer's duty to disclose a design defect at the time of sale when it knows of the defect and that it poses a safety risk. *See* Judicial Council of California Civil Jury Instructions, No. 1222 (2024) (noting a safety risk can create a duty to warn).

transaction requires perfect good faith and full disclosure, or (3) where one party expressly reposes a trust and confidence in the other.[292]

Law regarding the circumstances under which a manufacturer has a duty to disclose information varies. For example, New Jersey federal district courts have found no special relationship between a manufacturer and a consumer and, therefore, no duty to disclose on which to base a claim for fraudulent misrepresentation by omission.[293] Under New York law, however, a defendant has a duty to disclose a material fact to a contract counterpart when the defendant is the plaintiff's fiduciary or when the defendant's "superior knowledge of essential facts renders a transaction without disclosure inherently unfair."[294] Presumably, this last category of special relationship supports a tort duty to disclose information to consumers about certain defects with the effect that nondisclosure could be fraudulent.

In *Catalano v. BMW of North America, LLC*,[295] a New York court considered the sufficiency of pleadings on BMW's knowledge of the defect in their vehicles to state a tort claim for fraud by concealment under New York common law.[296] Catalano alleged that BMW was aware or should have been aware of consumer complaints about the defect filed with the National Highway Traffic Safety Administration and on online car fora.[297] Catalano also alleged that BMW had issued several technical service bulletins to its authorized warranty service providers regarding repairs for the defect.[298] The district court held that Catalano had sufficiently pled facts to show BMW's knowledge of the defect.[299] He failed, however, to plead that BMW withheld information at the

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292 Maertin v. Armstrong World Indus., 241 F. Supp. 2d 434, 461 (D.N.J. 2002); Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1185 (3d Cir. 1993).

293 *See, e.g.*, Schechter v. Hyundai Motor Am., No. 18-13634, 2020 WL 1528038, at *16–17 (D.N.J. Mar. 31, 2020); Coba v. Ford Motor Co., No. 12-1622, 2013 WL 244687, at *12 (D.N.J. Jan. 22, 2013); Green v. Gen. Motors Corp., No. A-2831-01T-5, 2003 WL 21730592, at *8 (N.J. Super. Ct. App. Div. July 10, 2003); *Argabright*, 201 F. Supp. 3d at 603; Alin v. Am. Honda Motor Co., No. 08-4825, 2010 WL 1372308, at *14 (D.N.J. Mar. 31, 2010).

294 Grand Union Supermarkets of the V.I., Inc. v. Lockhart Realty, Inc., 493 F. App'x 248, 252 (3d Cir. 2012) (quoting Swersky v. Dreyer & Traub, 219 A.D.2d 321, 327 (N.Y. App. Div. 1996)); *see also* Beneficial Com. Corp. v. Murray Glick Datsun, Inc., 601 F. Supp. 770, 773–74 (S.D.N.Y. 1985) (recognizing a "growing trend to impose a duty to disclose in many circumstances in which silence used to suffice" but concluding that "New York courts have "recognized the need for a flexible handling of the duty to disclose," yet "restrict[ing] the duty to speak to situations in which plaintiff's reliance on defendant induced it to enter into certain unfair transactions" and declining to find a duty to disclose by a lender in an arms' length financing contract).

295 167 F. Supp. 3d 540 (S.D.N.Y. 2016).

296 *Id.* at 558–61.

297 *Id.* at 547.

298 *Id.*

299 *Id.* at 559; *see also* Guariglia v. Procter & Gamble Co., No. 15-cv-04307, 2018 WL 1335356, at *10 (E.D.N.Y. Mar. 14, 2018) (finding allegations that consumers complained about the defect sufficient to impute knowledge of the defect to the defendant).

time of sale with the requisite fraudulent intent.[300] The allegation that BMW knew of the defect and failed to disclose it was insufficient to support an inference BMW acted intentionally to deceive the plaintiff.[301] The court explained a defendant's nondisclosure must be at least "highly unreasonable" and "an extreme departure from the standards of ordinary care" to support such an inference.[302]

What allegations might show a manufacturer's *intent to deceive* by concealing information regarding a defect from consumers? In *Stearns v. Select Comfort Retail Corp.,*[303] the plaintiffs claimed that Stearns knew of and "purposefully concealed" a defect in their beds by providing refunds of the purchase price to any customer who complained about the bed.[304] The court held that offering a full refund does not indicate a defendant's knowledge of a defect at the time of sale or an intention to deceive its customers by active concealment.[305] Rather, a full refund policy is a standard business practice serving legitimate purposes.[306] The court held that plaintiffs' allegations that defendants implemented a new design or took other remedial action are immaterial to an alleged fraudulent concealment claim.[307] To decide otherwise would create a perverse incentive for manufacturers to withhold refunds or corrective design or manufacturing changes to respond to defects.[308]

Courts have reached different conclusions as to whether an allegation that the manufacturer subsequently redesigned a product to

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300 *Catalano*, 167 F. Supp. 3d at 560. The heightened fraud pleading standards in Federal Rule of Civil Procedure 9(b) applied, requiring allegation of what the omitted or concealed facts were, the person or persons responsible for the failure to disclose, the context of the nondisclosure and the how the nondisclosure misled the plaintiff, and what the defendant obtained through the fraud, given this was a case of fraudulent concealment. *Id.* at 560 (quoting Soroof Trading Dev. Co. v. GE Fuel Cell Sys. LLC, 842 F. Supp. 2d 502, 513 (S.D.N.Y. 2012) (applying New York law)); *see also* Bruno v. Zimmer, Inc., No. CV 15-6129, 2017 WL 8793242, at *8 (E.D.N.Y. Aug. 11, 2017) (tort claim for fraudulent nondisclosure must be plead with particularity under Federal Rule of Civil Procedure 9(b)).

301 *Catalano*, 167 F. Supp. 3d at 560; *see also* Orange Transp. Servs. v. Volvo Grp. N. Am., LLC, No. 19-CV-6289, 2021 WL 2194670, at *9 (W.D.N.Y. Jan. 13, 2021) (holding that allegation of self-interested desire to increase sales does not support an inference of fraudulent intent and the scienter element for fraud by nondisclosure is the same under both federal securities laws and New York common law); *In re* Lyman Good Dietary Supplements Litig., No. 17-CV-8047, 2018 WL 3733949, at *4 (S.D.N.Y. Aug. 6, 2018) (general profit motive does not support an inference of fraudulent intent).

302 *Catalano*, 167 F. Supp. 3d at 560 (quoting *In re* Carter-Wallace Sec. Litig., 220 F.3d 36, 39 (2d Cir. 2000) (applying federal securities fraud law)).

303 No. 08-2746, 2009 WL 1635931 (N.D. Cal. June 5, 2009).

304 *Id.* at *9.

305 *Id.*

306 *Id.*

307 *Id.* (citing FED. R. EVID. 407).

308 *See* FED. R. EVID. 407 advisory committee's note (explaining that Rule 407 exists to encourage people to take steps "in furtherance of added safety" without paying a legal cost).

eliminate a defect is sufficient to establish knowledge and intentional concealment of the defect at the time of a sale before a redesign. The length of time between the sale and the redesign appears to be important. For example, in *Duttweiler v. Triumph Motorcycles (America) Ltd.*,[309] the court held that a nearly two-year gap between the sale and the redesign supported an inference that the manufacturer knew of defects and intentionally concealed that information from the buyer at the time of sale.[310] In *Herremans v. BMW of North America, LLC*,[311] however, the court held that a four-year gap between sale and redesign did not support such an inference.[312]

B. The Buyer's Reliance on the Misrepresentation

In addition to the knowledge of the falsity of a representation and intention to induce reliance on the false representation by the person making it, to state a claim for fraudulent misrepresentation, a plaintiff generally must show that she acted in reasonable reliance on the representation and that reliance was the cause of her damages.[313] If by failing to disclose its knowledge of a post-warranty period defect, the manufacturer misrepresents that there is no risk to the consumer regarding that defect, the warranty itself is an obvious problem in establishing the required reasonable reliance.

A warranty is a communication from the manufacturer about the defects the buyer can expect the warranty to cover and those it will not cover. The effectiveness of warranty terms to communicate to consumers additional information about the risk of defects that might arise after the warranty period expires, the general quality they can expect from a product, or the relative quality of a product compared to substitutes offered by competitors, is the subject of ongoing research.[314]

Some courts have interpreted the warranty period as the *exclusive* representation of the manufacturer's warranty liability that renders all extrinsic expectations of the buyer unreasonable. For example, a court granted Honda's motion to dismiss consumer buyers' claim for

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309 No. 14-cv-04809, 2015 WL 4941780 (N.D. Cal. Aug. 19, 2015).

310 *Id.* at *6.

311 No. 14-02363, 2014 WL 5017843 (C.D. Cal. Oct. 3, 2014).

312 *Id.* at *18.

313 13-91 Appleman on Insurance Law & Practice Archive § 91.1 (Jeffrey E. Thomas ed., 2024).

314 *See* Joshua Lyle Wiener, *Are Warranties Accurate Signals of Product Reliability?*, 12 J. Consumer Rsch. 245, 245 (1985) (showing that warranties are signals of product reliability); Terence A. Shimp & William O. Bearden, *Warranty and Other Extrinsic Cue Effects on Consumers' Risk Perceptions*, 9 J. Consumer Rsch. 38, 44–45 (1982) (observing how changes in warranty terms, price and warrantor reputation affect consumer perceptions of product reliability and concluding that warranty terms are consistently important).

fraudulent nondisclosure of an engine defect under California's consumer fraud act because the defect did not cause problems with the vehicle engines until after the express warranty period expired.[315] The court concluded that consumers could not reasonably have relied on any representation by nondisclosure or otherwise that was inconsistent with the warranty: "The only expectation buyers could have had about the F22 engine was that it would function properly for the length of Honda's express warranty, and it did."[316]

Contracts include terms designed to exclude the possibility of extrinsic warranties or the buyer's reasonable reliance on representation of quality other than the warranties. The written warranty document typically includes an integration term that invokes the parol evidence rule. That rule sets the boundary for admissible evidence of the parties' *contractual* obligations as coextensive with those that appear in the writing.[317] An integration term, however, does not bar evidence of a parol fraudulent misrepresentation by the manufacturer that induced the buyer to buy the product in a tort action for fraudulent misrepresentation.[318]

That is where an express no-reliance term in a contract comes in.[319] Warranty documents typically include a term that expressly precludes the buyer's reasonable reliance on any representation or warranty other than those expressed in the written warranty document.[320] The purpose of such a term is to protect the manufacturer from the risk of *tort liability* based on a buyer's reliance on a misrepresentation or nondisclosure that causes economic loss.[321] It is not clear, however, that a no-reliance term in a contract will be effective to preclude a buyer's reasonable reliance

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315 *See* Daugherty v. Am. Honda Motor Co., 51 Cal. Rptr. 3d 118, 120 (Cal. Ct. App. 2006).

316 *Id.* at 129.

317 *See, e.g.*, Extra Equipamentos E Exportacao, Ltda. v. Case Corp., 541 F.3d 719, 723 (7th Cir. 2008).

318 *See, e.g.*, Betz Laboratories, Inc. v. Hines, 647 F.2d 402, 408 (3d Cir. 1981) (parol evidence rule does not bar evidence of fraud in the inducement of a contract because a contract that is fraudulently induced is void); MacFarlane v. Manly, 264 S.E.2d 838, 840 (S.C. 1980) (an "as is" term in a sales contract is not an absolute defense to a tort claim for fraud in the inducement); *see also* Allen Blair, *A Matter of Trust: Should No-Reliance Clauses Bar Claims for Fraudulent Inducement of Contract?*, 92 MARQ. L. REV. 423, 437 n.46 (2009) (listing cases holding that integration clauses invoking the parol evidence rule do not bar fraud claims).

319 The Seventh Circuit noted that a contract party might use a tort claim for fraudulent inducement as an end run around the parol evidence rule's bar on efforts to vary the terms of a written contract based on representations made during negotiations and that no-reliance terms close this back door. *Extra Equipamentos*, 541 F.3d at 724.

320 *See* Blair, *supra* note 318, at 434–37 (explaining that "not every representation made by a party during negotiations should be relied on"); *Non-Reliance Sample Clauses*, LAW INSIDER, https://www.lawinsider.com/clause/non-reliance [https://perma.cc/V6ZW-TKZ6].

321 *See, e.g.*, *Extra Equipamentos*, 541 F.3d at 724 (noting that in legal jargon, no-reliance terms are "big boy" clauses referring to the incentive and ability for parties to contract in their own interest, including the reasonableness of any reliance on extracontractual representations of the

on a *fraudulent* misrepresentation.[322] The drafters of the Restatement (Third) of Torts note that no-reliance terms "can serve as traps for parties who are content to treat a written contract as final but do not mean to assume the risk that the other side has committed fraud."[323] A no-reliance term is designed to undermine the reasonable reliance element of the plaintiff's tort claim for fraudulent representation. Although the drafters note the tension between freedom of contract and protection from fraud, they provide little insight into how courts should distinguish legitimate use of a no-reliance term from an illegitimate, unenforceable one. They note only that whether a no-reliance term should preclude a tort claim for fraudulent misrepresentation depends on the specificity of the term and the sophistication of the party against whom it is to be enforced.[324] The Restatement (Second) of Contracts is similarly equivocal, appearing to broadly condemn no-reliance terms on public policy grounds but only if they "*unreasonably* exempt[] a party from the legal consequences of a misrepresentation."[325] Courts have reached differing conclusions on whether or under what circumstances a no-reliance term will bar one contract party's fraud claim for economic loss against the other.[326] Some courts decline to enforce no-reliance clauses *per se*, reasoning that a fraudulent representation that induces the formation of a contract invalidates *all* contractual terms, including the no-reliance term.[327] Other courts take a nuanced approach, implicitly recognizing the legitimate allocative function a no-reliance term can serve and the potential for abuse of such terms against unwitting contract parties who reasonably misunderstand their significance.[328]

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other party); Schrager v. Bailey, 973 N.E.2d 932, 937 (Ill. App. Ct. 2012) (noting that "it is hardly justifiable for someone to rely on something that they have agreed not to rely on").

322 And in the case of fraud in the inducement, they clearly cannot. *Betz Labs*, 647 F.2d at 408 (parol evidence rule does not bar evidence of fraud in the inducement of a contract because a contract that is fraudulently induced is void).

323 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 11 cmt. e (AM. L. INST. 2020).

324 *Id.*; *see also* Blair, *supra* note 318, at 448.

325 RESTATEMENT (SECOND) OF CONTRACTS § 196 (AM. L. INST. 1981). In comment a, the drafters contemplate the legitimate use of a no-reliance term to prevent reliance on a representation or that makes reliance unjustified. *Id.* cmt. a.

326 *See* Blair, *supra* note 318, at 439–52 (describing varying decisions).

327 *E.g.*, Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp., 38 Cal. Rptr. 2d 783, 788 n.7 (1995).

328 Blair, *supra* note 318, at 445. For example, applying New York law, the Second Circuit reinstated a fraud claim notwithstanding a no-reliance term because it did not specifically exclude reliance on the particular representations on which the plaintiff's claim for fraudulent inducement rested. Mfrs. Hanover Trust Co. v. Yanakas, 7 F.3d 310, 316–18 (2d Cir. 1993); *see, e.g.*, Fridrikh V. Shrayber & Morgan J. Hanson, *Anti-Reliance Clauses and Other Contractual Limitations Under Delaware Law*, 25 WIDENER L. REV. 23, 27–28 (2019) (summarizing enforcement of no-reliance terms in commercial transactions under Delaware law).

Thinking of the buyer's economic loss from the postwarranty period failure of consumer goods as the possible product of the manufacturer's fraud focuses directly on the space between buyers' unjustified reliance on a perpetual warranty, notwithstanding a warranty period term in the warranty document that specifically limit the duration of the warranty, and buyers' reasonable expectations of a baseline level of product quality after the warranty period expires, notwithstanding the warranty period term. A buyer's expectation that the product will not manifest certain types of defects even after the product is "out of warranty" might be reasonable when (1) the manufacturer has actively cultivated it, or at least knows of that expectation at the time of sale; and (2) the manufacturer knows at the time of sale that the buyer overvalues the product because of that expectation, resulting in a windfall to the manufacturer.

The manufacturer's culpability under these conditions is for intentional and fraudulent exploitation of buyers' expectations of postwarranty-period product quality. The theory of the unconscionably short warranty period focuses inappropriately on the warranty period. This focus is inappropriate because the warranty period term is merely the contractual mechanism that ensures the manufacturer will reap the intended fruits of its fraud. The warranty period may be the contract term that dashes the buyer's expectations. But this is what warranty periods are designed to do. That function is not *intrinsically* unfair or unconscionable absent evidence of the manufacturer's *fraud* in exploiting the buyer's reasonable, albeit extra-contractual expectations of product quality.

Conclusion

UCC section 2-302 permits courts to invalidate unconscionable contract terms. Fraud law provides a more effective instrument for ferreting out those circumstances when a manufacturer's exploitation of a buyer's reasonable extracontractual expectations of product quality beyond the warranty period should relieve a buyer of its ordinarily uncontroversial claim-barring effect. In contrast to the unfocused inquiry into substantive and procedural unconscionability of the warranty period term under section 2-302, fraud law focuses *directly* on the culpability of the manufacturer's intent to exploit the buyer's reasonable extracontractual expectations of product quality beyond the warranty period. This intense focus on the precise behavior and expectations of both the manufacturer and buyers will assist courts in evaluating pleadings and considering evidence consumers offer in support of a tort claim for damages for economic loss.

Replacement of fraud law for the amorphous procedural and substantive unconscionability tests under UCC section 2-302 will likely

increase the success rate for manufacturers on motion to dismiss because the elements of fraudulent misrepresentation are more developed and exacting than the flexible norms of substantive and procedural unconscionability. Certainly, federal pleading standards for fraud are more exacting than those for breach of contract.[329] Recognizing the unconscionability theory as merely a fraud claim in a contract disguise will reduce the uncertainty that is costly for both consumers and manufacturers, assist the courts in evaluating pleadings, and end the inscrutable reasoning and irreconcilable outcomes under UCC Article 2, a law that aspires to uniformity.[330] Courts should identify the unconscionably short warranty theory for what it is—an end run around the pleading and proof challenges inherent in a tort claim for fraudulent misrepresentation by nondisclosure—and do away with its destructive doctrinal trail.

329 FED. R. CIV. P. 9(b) (requiring allegations of fraud must be stated with particularity).

330 U.C.C. § 1-103(a)(3) (AM. L. INST. & UNIF. L. COMM'N 2022) (noting that one of the purposes of the UC is "to make uniform the law among the various jurisdictions").