Revocation of Acceptance Under U.C.C. Section 2-608 as a Remedy in a Consumer Sales Transaction Involving Conflicting Oral Quality Representations and Standardized Quality Warranty Disclaimer Language

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REVOCATION OF ACCEPTANCE UNDER UCC SECTION 2-608 AS A REMEDY IN A CONSUMER SALES TRANSACTION INVOLVING CONFLICTING ORAL QUALITY REPRESENTATIONS AND STANDARDIZED QUALITY WARRANTY DISCLAIMER LANGUAGE

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This Article uses the case of Murray v. D & J Motor Co. as a vehicle for exploring issues relating to the appropriateness of granting the remedy of revocation of acceptance under Uniform Commercial Code section 2-608 in the situation where the written sales documents apparently disclaims all express and implied

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warranties of quality and the buyer discovers, after the sale and acceptance of the vehicle in dispute, that it does not conform to certain oral representations of quality made by the seller prior to the signing of such documents. Courts are split as to whether or not the buyer is entitled to UCC section 2-608 relief under these circumstances. Those courts, such as the Oklahoma Court of Civil Appeals in Murray, that are disposed to grant such relief have struggled to identify a proper UCC Article 2 theory justifying their circumvention of the written warranty disclaimer. This Article critically evaluates the theory chosen by the Murray court and discusses several alternative approaches which your authors believe offer sounder bases for achieving that court's decisional outcome.

I. INTRODUCTION

On May 12, 1998 the Court of Civil Appeals of Oklahoma, Division No. 4, decided Murray v. D & J Motor Co., holding that revocation of acceptance under Uniform Commercial Code (UCC) section 2-608 is a remedy not dependent on an Article 2 nonconformity which constitutes a breach of warranty, and is available to a buyer even when all Article 2 warranties have been disclaimed.\(^1\) This decision raises several issues that commonly arise in the context of consumer sales transactions, and are fundamental to the Article 2 remedy structure. This Article analyzes these issues.\(^2\)

II. SUMMARY OF THE FACTS OF MURRAY AND OF THE TRIAL AND APPELLATE COURTS' DECISION-MAKING

June Murray, the plaintiff, went to D & J Motor Co., the defendant, looking for reliable transportation for herself and her disabled daughter. She owned a reliable car, but sought a van-type vehicle which offered more

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2. The reader should bear in mind that the appellate opinion is directed by the procedural fact that the plaintiff's appeal was contesting the trial court decision to grant the defendant's demurrer.
3. The Murray appellate opinion also addressed claims sounding alternatively in the tort of fraud and under the Oklahoma Consumer Protection Act (OKLA. STAT. tit. 15, §§ 751-755 (1999)). The scope of this Article is confined to that portion of the opinion dealing with UCC Article 2 issues.
space to transport her ailing and disabled daughter. The daughter was present during the negotiations and the D & J salesman (Charlie) was advised of her particular needs.

During the negotiations Murray and Charlie took the van for a test drive. Noticing a rattling noise, Murray questioned Charlie about it. He responded that the engine had been replaced and "there was nothing wrong with it." He told her the van would provide reliable transportation. Charlie also told Murray that the van had been inspected by a mechanic and that it ran well. In light of these statements, Murray decided to purchase the vehicle and trade in her existing car. Simultaneously, she signed a set of standardized sales documents which had been prepared by D & J stating that the vehicle was being sold "as is" and "with all faults" as well as that all express and implied quality warranties were disclaimed. At trial Murray testified that she understood that this language meant that no warranty of quality accompanied the sale of the vehicle.

The day following its purchase and while Murray was driving it, the van completely ceased to function. Thereafter, Murray had the van examined by three separate mechanics who found major defects in the heating system and engine. Repair costs were estimated at approximately $2000. The total purchase price paid by Murray was $3995. When Murray requested D & J to repair the van or alternatively refund the purchase price, the dealer refused to do either.

Murray sued D & J requesting relief on several alternative grounds, including UCC Article 2. After a jury trial, D & J entered a demurrer to the evidence put on by Murray during that trial. The trial court sustained the demurrer and dismissed Murray's lawsuit. On appeal, the Oklahoma Court of Appeals reversed and remanded the case for further proceedings relative to all of Murray's claims.

In regard to plaintiff Murray's claim under UCC Article 2, the Court of Appeals focused on the remedy of revocation of acceptance in UCC section 2-608. It ultimately concluded that the plaintiff could be entitled to this remedy notwithstanding the warranty disclaimer language in the sales documents and notwithstanding that the plaintiff had not alleged breach of a UCC warranty of quality in her complaint.

4. See Murray, 958 P.2d at 827.
5. See id. at 832.
6. See id. at 828.
The Court of Appeals rejected the defendant’s counter-argument that without a breach there is no nonconformity,7 and without a nonconformity there can be no revocation.8 In what must be considered the salient holding in the Murray case, the Court of Appeals held that the buyer may have a right to revoke acceptance even in the absence of a breach of warranty: “The right to revoke does not depend upon the existence or breach of any warranty. The buyer may revoke under [section] 2-608 even though all warranties are excluded.”9 “The absence or existence of any warranty is immaterial when considering revocation under section 2-608.”10

This interpretation has generated some controversy in light of not only the text of section 2-608 but also the facts in Murray. If the foregoing decisional passages mean that the buyer in Murray had a right to revoke under section 2-608 even though no warranty of quality was found to exist and to have been breached, then such a holding represents a significant expansion of a buyer’s remedies under UCC Article 2 as they have been commonly understood. Therefore, a considered evaluation of the Murray appellate court’s analysis is in order.

III. UCC ARTICLE 2 WARRANTY LAW ISSUES

A. Introduction

As noted above, plaintiff Murray’s complaint did not plead the breach of one or more of the UCC Article 2 warranties of quality. Initially, your authors assumed that the decision to omit this cause of action was a deliberate reaction to the presence of the warranty disclaimer language in the sales documents. Murray’s testimony about her understanding of this language seemed to confirm this assumption. We have since been informed by Murray’s trial attorney that the decision was made in part for a different

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7. The court noted that UCC subsection 2-106(2) defines “conforming” as goods that are in accordance with the seller’s obligations under the contract. See id. at 828.

8. UCC subsection 2-608(1) allows revocation only when a “nonconformity substantially impairs” the value of the goods.


10. Id.
tactical reason, to wit: "[A]s a practical matter, it is far easier to explain revocation of acceptance to a jury than a breach of warranty."\textsuperscript{11}

Nonetheless, the absence of a breach of warranty claim posed a fundamental dilemma for both the trial and appellate courts as they sought to resolve the UCC Article 2 issues presented by the Murray facts. In order to grant any remedy under Article 2, a court and/or jury must first determine that some performance obligation arising under the sales contract has been breached by one of the contracting parties.\textsuperscript{12} This generic requisite applies equally to the specific remedy of revocation of acceptance as the language in subsection 2-608(1) requiring a non-conformity makes clear.\textsuperscript{13} On the facts stated in Murray, the contract obligation(s) which conceivably could be considered to have been breached by D & J related to the quality of the vehicle; in other words, an implied warranty under section 2-314 (merchantability) and/or section 2-315 (particular purpose) and/or an express warranty under section 2-313. But since the existence and breach of one or more of these warranties were neither pleaded nor determined to have occurred, the Murray trial court considered itself compelled to declare that the plaintiff had no right to revoke acceptance of the van under section 2-608. On the other hand, the appellate court became convinced that the plaintiff should be entitled to a remedy (the egregious facts no doubt contributing to this conclusion), and accordingly searched for a theory to overturn the trial decision denying such relief. While the Murray appellate court might have been more articulate in its description of some of the more subtle distinctions involved, the case is nonetheless useful for raising and demonstrating issues of legal analysis that are sometimes overlooked or forgotten in run-of-the-mill breach of UCC warranty of quality cases. We turn now to examine that opinion in light of certain key Article 2 provisions, some of which were discussed by the appellate court and others of which were not.

\textsuperscript{11} Letter from Tomme J. Fent, Attorney for plaintiff June Murray (October 5, 1998) (on file with authors). This is understandable, as a matter of litigation strategy, and is probably one of the reasons that revocation of acceptance is such a popular remedy in cases like Murray.

\textsuperscript{12} See U.C.C. §§ 2-703 (seller’s remedies in general), 2-711(1) (buyer’s remedies in general).

\textsuperscript{13} See id. § 2-608(1). For the definition of “conformity,” see subsection 2-106(2).
B. UCC Article 2 Implied Warranties of Quality and Disclaimer Provisions Explained

Under UCC subsection 2-314(1), any contract for the sale of goods involving a seller who is a merchant with respect to such goods includes, as a matter of law (as opposed to the parties’ agreement), an implied warranty of merchantability, unless properly disclaimed under subsection 2-316(2) or (3).

Moreover, under section 2-315, a contract for the sale of goods may also include, again as a matter of law, an implied warranty of fitness for a particular purpose. This second type of implied warranty arises only if three statutory requisites are met: at the time of contracting the seller must have at least reason to know of: (1) the buyer’s particular purpose for the goods as well as (2) the buyer’s reliance on the seller’s skill or judgment in selecting or furnishing the goods, and (3) at that same point in time the buyer must have in fact relied on the seller’s skill or judgment. Under section 2-315, the seller need not be a “merchant.” This second type of implied warranty may also be disclaimed under subsection 2-316(2) or (3).

Subsection 2-316(2) delineates rules governing the formally expressed disclaimer of both types of implied warranties of quality. In particular, it requires that an effective disclaimer of a section 2-314 warranty, whether oral or written, use the word “merchantability,” and, if written, also be “conspicuous.” Moreover, the subsection requires that an effective disclaimer of the distinct section 2-315 warranty always be written and “conspicuous,” but need not refer to this second warranty by name. But, as its introductory clause as well as the introductory clause of subsection 2-316(3) indicate, subsection 2-316(2) does not provide the exclusive methods for disclaiming these two warranties.

14. See id. § 2-104.
15. Comment 2 to section 2-315 discusses the essential conceptual differences between the section 2-314 and section 2-315 warranties. See also J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 9-10 (5th ed. 2000) where, inter alia, the authors note: “Many goods that are perfectly merchantable will not meet the implied warranty of fitness for a particular purpose . . . . The most common circumstance in which one meets the [section 2-315 fitness] warranty . . . . is where a business buys goods that have to be specially selected or particularly manufactured and assembled for [it] . . . .” Id. at 370.
16. See subsection 1-201(10) which adopts an objective test in defining the latter adjective.
Subsection 2-316(3) delineates several alternative, informal, circumstantial methods for disclaiming both types of implied warranties. Subsection 2-316(3)(a) is the only one of these alternative methods relevant on the facts of this case. It contains a general rule allowing terms like “as is” and “with all faults” to function as effective disclaimers of the implied warranties, and an exception which would contrarily defeat the normal effect of such language.

C. The Murray Appellate Court’s Discussion of
UCC Article 2 Implied Warranties of Quality
and Disclaimer Provisions

The Murray opinion pays little or no attention to sections 2-314, 2-315, and subsection 2-316(2), electing merely to cite the first and third of these sections in passing while ignoring section 2-315 altogether. This approach would seem cavalier since all are potentially applicable on the Murray facts. For example, those facts support the conclusion that an implied warranty of merchantability arose under subsection 2-314 since all of its elements are fulfilled. The applicability of section 2-315 is a bit more problematic. Since the court did not address this section at all, the court’s recitation of the facts does not provide sufficient data for determining if section 2-315’s three requisites could have been satisfied. Nevertheless, some of the stated facts suggest that such was the case, and thus that section 2-315 was apposite and arguably should have been taken into account. Finally, subsection 2-316(2) also was not, but should have been, analyzed to determine if the formally expressed disclaimer language in the sales documents was legally effective to disclaim the aforesaid two types of implied warranties. Again, because the court’s attention was elsewhere, the opinion contains scant information in this regard, merely stating: “These [sales contract] documents, in toto, advised Murray . . . that . . . implied warranties were disclaimed.”17 Failing to examine further the facts in light of these three provisions is regrettable since it left unresolved the significant matters of whether either or both types of implied warranties existed and were breached. If subsection 2-316(2) was not complied with, then a major barrier blocking the enforcement of these two types of implied warranties would be removed.

But, of course, subsection 2-316(2) is not the only barrier to the creation of such warranties since, as noted, the introductory clauses to both it and subsection 2-316(3) indicate that disclaimer language which fails under subsection (2) may still be effective if it satisfies one of the alternative rules in subsection (3). Because the same sales documents included the informal disclaiming words “as is” and “with all faults,” subsection 2-316(3)(a) was clearly apposite, and potentially dispositive. This point was not lost on the Murray appellate court, which discussed subsection 2-316(3)(a) in some detail.

Initially, it should be observed that this part of the Murray opinion is doctrinally flawed in that it relies significantly on section 2-313, comment 4 thereto, and subsection 2-316(1). None of these provisions have anything to do with implied warranties, being exclusively concerned with express warranties, as will be explained later in Parts III.D. and E.

In any event, the Murray court’s subsection 2-316(3)(a) discussion was marked by an effort to avoid the provision’s general rule under which the trial court had deemed the “as is” and “with all faults” wording in the sales documents to be a legally enforceable disclaimer. The appellate opinion overcame the operation of that general rule and thereby nullified the normal effect of such disclaimer language partly by engaging in a creative statutory interpretation. The appellate court determined that instead the provision’s exceptional “unless” clause controlled, having been triggered by evidence of fraud on the part of the defendant seller.  

While creative, the appellate court’s interpretation is suspect. Apposite decisional law has confined subsection 2-316(3)(a)’s “unless” clause to cases where the buyer has reason to understand, by virtue of an explicit agreement or otherwise, that the “as is” or “with all faults” language was not mutually intended by both contracting parties to have its usual effect of disclaiming the UCC implied warranties. Accordingly, the Murray court’s application of subsection 2-316(3)(a)’s “unless” clause may be subject to challenge since facts involving the fraudulent, and hence unilateral intentions of a seller are not of the sort which the UCC drafters of this exception had in mind. The distinction being made here is between a communicated bilateral understanding of the seller and buyer which adopts an unorthodox meaning of such language and the undisclosed mindset of

18. See id. at 830.
just one of the two parties as the basis for an invalidating theory opposing the adoption of the normal meaning of the contractual language. Extending the "unless" clause in subsection 2-316(3)(a) to cover the second case, as well as the first, inappropriately confuses the intended scope of this exception.

Moreover, a second ground for challenging the court's application of the subsection 2-316(3)(a) "unless" clause is that it defies well-established fraud law doctrine. The effect of the court's decision-making in this regard was to invalidate a small portion of the agreement, i.e., the informal implied warranty disclaimer, but not the whole sales agreement between the parties. As a general contract law proposition (subject to one exception relating to "divisible contracts," which is not relevant here), where fraud is indicated, the sole proper remedial response is to avoid the entire contract. Nothing in the text of or the comments to section 2-316 justifies employing subsection 2-316(3)(a)'s "unless" clause in a selective way which undercuts this long-standing rule of fraud law.

The point here is not that the defendant should be allowed to profit from its misrepresentations, but that the appellate court should not have misinterpreted and misapplied subsection 2-316(3)(a)'s exception to avoid that unhappy result. Other UCC provisions provide doctrinally sounder means for policing such misbehavior. These alternate provisions will be explored infra in connection with the topic of express warranties and other issues. Hence, the correct decisional approach for dealing with the "as is" and "with all faults" contract language would have been to find that subsection 2-316(3)(a)'s general rule was apposite and that thereunder such language appeared to disclaim all UCC implied warranties of quality.

D. UCC Article 2 Express Warranty of Quality and Disclaimer Provisions Explained

Section 2-313 generally addresses the matter of the creation of express warranties. Subsection 2-313(1) delineates not only the five subcategories of such warranties, but also related requisites for the creation thereof. Subsection 2-313(2) then lays out a series of added guidelines in this respect, including the important point that not everything a seller states may be reasonably understood by the buyer to create an express warranty. For example, "affirmations merely of the value of the goods" or "seller's mere

opinion of the goods” are not legally sufficient to impose liability. Comments 3 and 8 to section 2-313, however, indicate that most things that a seller states to a buyer about the quality of the goods will be rebuttably presumed to be express warranties.\textsuperscript{21} It appears that some of the seller’s statements in Murray would rise to the level of an express warranty, thereby shifting the focus of the inquiry to whether such warranty was disclaimed under subsection 2-316(1).

Subsection 2-316(1) provides a package of three mutually exclusive judicial guidelines for interpreting contract language or conduct in the form of disclaimers of express warranties. In the first instance, the court is instructed to read contractual manifestations creating an express warranty and those tending to disclaim such warranties “whenever reasonable as consistent with each other.”\textsuperscript{22} While this subsection does not explicitly say so, by reasonable implication it authorizes the use of express warranty disclaimers, at least to some extent, but discourages their use to contradict specific express warranties. If a reasonably consistent reading of these two potentially conflicting types of contractual terms is not possible, subsection 2-316(1)’s second guideline instructs the court to prefer the language of the express warranty over that of disclaimer, deeming the latter “inoperative to the extent” that the two conflict. However, the second guideline is qualified by a third one, which makes the former subject to the Parol Evidence Rule provision in section 2-202. Comment 1 to section 2-316 provides a policy rationale which explains not only the just-described relation between the second and third guidelines but also the content of and relations among all three of the provision’s guidelines.\textsuperscript{23}

\textsuperscript{21} The phrase “part of the basis of the bargain” in subsection 2-313(1) has generated a great deal of judicial controversy. For an effective, in-depth discussion of that controversy and a suggested proper interpretation of the phrase, see J. Murray, “Basis of the Bargain:” Transcending Classical Concepts, 66 MINN. L. REV. 283 (1982). We have touched on this subject only in passing since it was not raised in the Murray appeal.

\textsuperscript{22} U.C.C. § 2-316(1).

\textsuperscript{23} Comment 1 to section 2-316 states:

This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude “all warranties, express or implied.” It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.
Interestingly, the preceding commentary also provides the first of several compelling policy arguments for the view that the scope of the third guideline (regarding the Parol Evidence Rule) is relatively narrow notwithstanding that the letter of subsection 2-316(1) does not specifically so state. The first sentence of comment 2 to section 2-316 tends to confirm such an interpretation: "The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary ‘lack of authority’ clauses." Accordingly, the third guideline may be read as limited to barring parol evidence only in the two situations of false or unauthorized warranty allegations. Furthermore, if the contrary view is taken, then in the commonly occurring fact pattern exemplified by Murray, the third guideline would almost always trump the second one. In other words, the Parol Evidence Rule alone would govern the issue and bar recovery, without regard to the preferential ranking expressly stated in the second guideline and implicit in the first.

The second interpretation is suspect for at least two reasons. First, a robust view of the operation of the Parol Evidence Rule would routinely deny a buyer like the plaintiff in Murray the right to base a claim on oral misrepresentations such as those uttered by the defendant’s salesman even though those misrepresentations actually and reasonably induced the sale of the vehicle. Second, this robust view would render the second guideline a virtual nullity, at least in circumstances such as those in Murray. A cardinal premise of statutory interpretation is that the presence of a provision in a statute indicates the drafters’ intent that it be given a reasonable field of operation. An interpretation that gives total primacy to the Parol Evidence Rule in these circumstances would violate this premise. Alternatively, under a narrower interpretation of the third guideline in subsection 2-316(1), as suggested in Comment 2, the second guideline (preferring the language of an express oral warranty over unreasonably inconsistent language in a warranty disclaimer) would be accorded an adequate field of operation. Thus, the limits on extrinsic evidence in subsection 2-316(1) (referencing the Parol Evidence Rule) should be interpreted narrowly to cover primarily unauthorized representations and false allegations of oral warranties. Thus viewed, subsection 2-316(1) would impose a test of reasonableness on the seller’s use of disclaimers to override the seller’s express representations, oral or written.
E. The Murray Appellate Court's Discussion of
   UCC Article 2 Express Warranty and
   Disclaimer Provisions

The Murray appellate court's examination of section 2-313 and
subsection 2-316(1) also suffers from some confusion. The court states that
the former provision "discusses disclaimers generally." This is not the
purpose of section 2-313. Rather, as the section's title and text clearly
indicate, its purpose is the exact opposite, to wit: to elaborate guidelines
relative to the creation of express warranties.\textsuperscript{24} On the other hand,
subsection 2-316(1) is the principal repository of the Article 2 rules
addressing disclaimers of express warranties, as described below.
Unhappily, the Murray court appears unsure of the purpose of the latter
provision, since its discussion thereof comprises only two passing
references in the form of elliptical sentences and a footnote, which are
illogically found in the midst of the court's separate discussion of implied
warranties.

Nevertheless, the appellate court's analysis of express warranties does
include two crucial, doctrinally sound propositions. The court's opinion
rightly indicates that the disclaimer language "as is" and "with all faults,"
which can operate under subsection 2-316(3)(a) to exclude implied
warranties,\textsuperscript{25} has no effect whatsoever on any express warranty arising
under section 2-313.\textsuperscript{26} The division of labor of the disclaimer provisions in
section 2-316 is clear: subsection (1) pertains exclusively to express
warranties whereas subsection (3) (along with subsection (2)) pertains
exclusively to implied warranties, and "never the twain shall meet."\textsuperscript{27}
Secondly and accordingly, the court correctly surmised that the facts in

\textsuperscript{24} Apparently the court's reference to section 2-313 is not a "typo," since footnote 5
in the Murray opinion faithfully recites portions of the text of section 2-313 and since at the
same point in the opinion the court discusses portions of Comment 4 to this section. That
examination is also incomplete since it barely touches on subsection (1) and ignores
altogether subsection (2) of section 2-313.

\textsuperscript{25} See discussion supra at Part III.D.


\textsuperscript{27} This division of labor is not universally appreciated in the case law. See 3A
Anderson, supra note 19, §§ 2-316:203, 204, 212 (citing cases which hold that an "as is"
disclaimer will also oust all express warranties). This view strikes us as spurious given the
pointed use of the words "express warranty" in subsection 2-316(1) and "implied warranty"
in subsections 2-316(2) and (3).
Murray could conceivably give rise to an express warranty of description notwithstanding the presence of disclaimer language which satisfies subsection 2-316(3)(a) (and affects only implied warranties).

However, the court did not pursue this line of analysis to its logical conclusion; and the soundness of these two propositions may tend to become lost in some other aspects of the Murray court’s handling of section 2-313 and subsection 2-316(1). The facts of this case literally cry out for a full-blown analysis under subsections 2-313(1)(a) and (b) and 2-316(1). The plaintiff’s decision to buy the vehicle was plainly induced by the oral representations made by the defendant’s salesman prior to the plaintiff’s signing the sales documents. Those statements were not just a “description” under subsection 2-313(1)(b), as the court concluded, but also “affirmations of fact” under subsection 2-313(1)(a). They, as well, plainly “related to the goods” and were “part of the basis of the bargain” between the two parties. Moreover, the nature of the statements (that the engine had been replaced; the van had been inspected by a mechanic; that “there was nothing wrong with it”; and it would provide reliable transportation for driving the plaintiff’s disabled daughter) was such that, when evaluated in light of the parties’ total transactional context, the representations cannot fairly be deemed mere sales talk, hype, or puffing in the sense of subsection 2-313(2). These facts readily support the conclusion, at least as an initial proposition, that the above-mentioned representations constituted express warranties under both subsection 2-313(1)(a) and (b).

F. Important Aspects of Applying Subsection 2-316(1) to the Murray Facts Not Addressed by the Murray Appellate Opinion.

A complete express warranty law analysis of this case must not stop with section 2-313. Subsection 2-316(1) and its three interpretive guidelines also have to be taken into account.

1. Our Initial Comments Regarding the Applicability of Subsection 2-316(1) to the Murray Facts

While the Murray appellate court did not undertake a full examination of the case under subsection 2-316(1), we believe it essential to do so. Our examination, which will focus on not only the provision’s three guidelines but also certain other related ideas, will be conducted in the next several sub-segments of the Article. Such further analytic undertaking calls for
consulting each of the guidelines seriatim to determine which one would control the *Murray* facts. Recall that the three are mutually exclusive. The first guideline might well be inapplicable, but only if there was a written disclaimer of express warranties with which the oral representations of warranty actually conflicted. We must speak tentatively because the opinion does not recite verbatim the express warranty disclaimer wording and also contains contradictory passages which leave in doubt what the exact content of that wording was.\(^{28}\) Absent appropriate disclaimer language there would be no conflict, and hence the first guideline would apply. Under it, the result announced by the appellate court would be entirely appropriate, albeit pursuant to a theory explicitly dismissed by the appellate court, i.e., breach of an express warranty.

Assuming a conflict between an express warranty and an effective disclaimer, however, the choice then would be between the second and third guidelines in subsection 2-316(1). If the third one (incorporating the Parol Evidence Rule in section 2-202), is narrowly interpreted pursuant to Comments 1 and 2 to section 2-316,\(^{29}\) then the Parol Evidence Rule would not apply to the *Murray* case, which involved neither a falsely alleged oral warranty nor unauthorized sales personnel representations. Instead, the second guideline of subsection 2-316(1) would control. Under the latter, the result announced by the appellate court would be, once again, quite sound (although for reasons not mentioned by the court). Contrarily, if the narrower interpretation of the third guideline is rejected and as a result the third guideline of subsection 2-316(1) is deemed apposite here, then section 2-202’s Parol Evidence Rule would have to be addressed.

2. Focusing More Closely on the Parol Evidence Rule Analysis Under UCC Section 2-202

Under section 2-202 a result favorable to the *Murray* plaintiff is harder, but not impossible, to reach. The Parol Evidence Rule has two separate legal consequences depending upon whether the writing in question is a “total” integration (the final, complete, and exclusive expression of the terms of the parties’ agreement) or merely a “partial” integration (final as to those terms stated in the writing, but not purporting to cover all of the terms of the parties’ agreement). In the former event, evidence of a parol

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29. Proposed *supra* in this text at Part III.D.
side agreement generally is not admissible, and hence such a side agreement cannot be enforced. In the latter event, evidence of such an agreement is admissible only to the extent that it does not "contradict" the writing.

At this point the reader may be wondering, regardless of what type of integration the writing in Murray is deemed to be, how can the plaintiff be saved from the exclusionary thrust of the Parol Evidence Rule? But it is important to recognize that the UCC drafters deliberately designed the Parol Evidence Rule in section 2-202 to be more liberal and flexible than other pre-code versions of the rule. Thus, under section 2-202 a trial judge who wants to hear evidence deemed relevant and reliable has several means to do so. For one, subsection 2-202(a) generally allows the admission of such evidence as it relates to course of dealing, usage of trade, or course of performance that may tend to explain or supplement the written terms of the agreement. Such evidence can hence be used either to resolve ambiguities in the written language or even to add terms thereto.\(^\text{30}\) And pursuant to well-established law, parol evidence can be admitted to show that a contract was obtained by fraud, misrepresentation, or mistake.\(^\text{31}\) Consequently, using parol evidence for any of the preceding purposes in no way violates the Parol Evidence Rule in section 2-202 or the third guideline in subsection 2-316(1) which incorporates that rule.\(^\text{32}\) While the point is not addressed in the Murray appellate opinion, the facts of the case lend themselves to the argument that evidence of defendant's parol quality representations was admissible to show that defendant fraudulently obtained its contract with plaintiff.\(^\text{33}\)

3. The Possible Use of the Doctrines of Good Faith and Unconscionability in Conjunction with Subsection 2-316(1)

An alternative strategy for avoiding the effect of the third guideline of subsection 2-316(1) and/or the printed warranty disclaimer language would be to contend that the Murray seller's conduct (relating to both of the respective phases of the performance and enforcement of its contractual

\(^{30}\) See U.C.C. § 2-202 cmt. 1; see, e.g., Leveridge v. Notaras, 433 P.2d 935 (Okla. 1967).


\(^{32}\) The three comments to this section clearly communicate the drafters' intent in this regard. See U.C.C. § 2-202, cmts. 1-3.

\(^{33}\) Subsection 2-316(1) is discussed supra in Part III.D.
duties) constituted a breach of the good faith obligation in UCC section 1-203, and as a remedial consequence the court should decline to enforce, at least in pertinent part, the warranty disclaimer with which the seller sought to defend itself against the buyer’s claims under Article 2. Specifically, the seller’s conduct in question suggests the possibility of duplicitous oral representations about the quality of the vehicle, which representations were intended to, and did, in fact, directly influence the buyer’s decision to purchase it; its failure to perform under the sales agreement (of which such representations were a part) by not supplying a vehicle which conformed thereto; and its subsequent refusal to remedy the numerous major deficiencies in the vehicle when called upon by the buyer to do so. That a court may properly apply section 1-203 in such a remedial manner has been recognized by the Permanent Editorial Board (PEB) for the UCC in its PEB Commentary Number 10.34 This commentary stresses that the essential function of the “doctrine of good faith . . ., as expressed in the Code, . . . [is to serve] as a directive to protect the reasonable expectations of the contracting parties.”35 The Murray appellate court mentioned this section

35. PEB Commentary No. 10 amplifies the fundamental concept of protection of the reasonable expectations of the contracting parties with the following descriptive remarks:

The correct perspective on the meaning of good faith performance and enforcement is the Agreement of the parties. The critical question is, “Has ‘X’ acted in good faith with respect to the performance or enforcement of some right or duty under the terms of the Agreement?” It is therefore wrong to conclude that as long as the agreement allows a party to do something, it is under all terms and conditions permissible. Such a conclusion overlooks completely the distinction between merely performing or enforcing a right or duty under an agreement on the one hand and, on the other hand, doing so in a way that recognizes that the agreement should be interpreted in a manner consistent with the reasonable expectations of the parties in the light of the commercial conditions existing in the context under scrutiny. The latter is the correct approach. . . .

The Official Comment to section 1-203 is amended by adding the following language at the end of the first paragraph:

[T]his section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power.
in the distinct context of discussing the remedy of revocation of acceptance, but apparently did not recognize its possible use as an additional means to overcome the disclaimers of express warranties.  

A third approach for achieving the same end would be to deny the disclaimer wording legal effect under section 2-302’s principle of unconscionability because it is a material risk-altering term which both unfairly surprised the plaintiff in a procedural sense and was grossly one-sided in a substantive sense.  

4. Other Policy Concerns

In applying the doctrine of good faith or the principle of unconscionability or, for that matter, the second guideline in subsection 2-316(1) to the Murray case, the plaintiff’s trial testimony that “she bought the vehicle anyway knowing there was no warranty” poses an obvious impediment. However, this impediment is not in the final analysis as significant as it might initially appear. The way out of this apparent conundrum is a line of reasoning not unlike that which the Murray court employed in the distinct context of its revocation of acceptance discussion. There the court noted that it was possible for the plaintiff to be aware of the

Our assertion that UCC section 1-203 is properly applicable in a case like Murray might be challenged for miscomprehending the limited scope of this provision. The section explicitly confines its good faith obligation to the “performance or enforcement” of “[e]very contract or duty within this Act,” and thus would seemingly preclude, by negative implication, its application to issues of contractual formation. The point of challenge would be that the conflict between the oral quality representations and the standardized warranty disclaimer in Murray involves essentially and exclusively the process of contractual formation. We recognize that questions such as whether or not the representations and disclaimer became part of the sales agreement are formation-related in nature. We also acknowledge that much of this Article addresses UCC Article 2 provisions which are concerned largely with formation process matters. Nevertheless, we believe our theory of good faith does not violate the scope of section 1-203 because the conflict between the oral representations and form disclaimer simultaneously and distinctly raises issues of performance and enforcement. Indeed, that theory assumes that both indicia of manifested intent became part of the parties’ sales agreement, but then urges the court not to enforce the disclaimer in deference to the buyer’s reasonable expectations arising from the seller’s oral quality representations and subsequent failure to perform.


37. See 3A ANDERSON, supra note 19, § 2-316:98-101, 103; WHITE & SUMMERS, supra note 15, §§ 4-2 to 4-7 and 12-11(b); and U.C.C. § 2-302 cmt. 1.
written disclaimer language and still rely on the seller’s oral assurances.\textsuperscript{38} How is this possible? One answer is that the plaintiff \textit{arguendo} never made the conceptual connection that the former somehow impacted the latter.

Interestingly, such a failure to connect the “as is” disclaimer language with the seller’s oral express warranties may be legally correct; as discussed above in Part III.E., the “as is” disclaimer rules in subsection 2-316(3) have no application to an express warranty, which can only be negated under subsection 2-316(1). And, as noted earlier, it is not clear that any such negation should be recognized under subsection 2-316(1) in \textit{Murray}. Certainly, the statute does not require any such connection or negation.

But aside from this, the possibility that the \textit{Murray} plaintiff in fact may not have connected the express warranties and more general disclaimer raises an important policy concern: Should the law countenance a lack of mental acuity by relieving one, such as the \textit{Murray} plaintiff, of the risk allocation/obligation imposed by a written disclaimer term of which that person was admittedly aware? Perhaps it should be where a seller with vastly superior knowledge of the product seeks to take advantage of another party by using standardized legal terms of art to defeat the consumer’s reasonable expectations as specifically created by the seller’s prior oral representations. Admittedly, this is a difficult issue, striking as it does at the heart of a consumer’s ability to enter into an enforceable contract as a means to obtain necessary transportation. As a general proposition, your authors believe that contract terms should not be overridden lightly. On the other hand, the \textit{Murray} plaintiff had a legitimate argument, which would justify the court doing so under the stated facts. Thus the plaintiff’s attorney at trial could have stressed the probability that the plaintiff did not understand, actually or reasonably, that the general warranty disclaimer in the sales document might nullify the specific oral sales representations made during the test drive, on which the bargain was based. That is to say, in her view the parties’ “agreement” included \textit{both} sets of terms.\textsuperscript{39}


\textsuperscript{39} See UCC subsection 1-201(3) as discussed \textit{supra} at Part III.D. of this Article. This is also consistent with the mandate of the first guideline of subsection 2-316(1) that contract terms be viewed as consistent whenever possible. On the \textit{Murray} facts it seems a reasonable interpretation.
G. Summary and Conclusions—UCC Article 2
Warranty Law Issues

Thus, either the doctrine of good faith or the principle of unconscionability could have been used to deny broad legal effect to the written warranty disclaimer language, at least as against the seller's express warranties. Such a partial and/or piecemeal remedial approach is expressly authorized by UCC section 1-203 with respect to good faith and subsection 2-302(1) with respect to the principle of unconscionability. Moreover, restricting the disclaimer in this fashion has related, interesting implications for an analysis under subsection 2-316(1). If the disclaimer language were so neutralized, the third guideline (and for that matter, the second one) of subsection 2-316(1) would no longer be apposite since there would be no conflict between the terms of the sales documents and the oral representations, and there would be no Parol Evidence Rule issue to resolve. Instead, the case would fall under the first guideline, pursuant to which both the written and oral manifestations could be interpreted in a reasonably consistent manner. This analysis is sound because, once again, the three guidelines are mutually exclusive and because the third guideline (respecting the Parol Evidence Rule) qualifies only the second one, and hence, not as well the first, according to the text of subsection 2-316(1).

In concluding this segment of the Article, we see the need to remind the reader of a key point of distinction separating the doctrine of good faith on the one hand and the principle of unconscionability and the interpretive guidelines in subsection 2-316(1) on the other. In identifying this distinction it will be helpful initially to emphasize a key attribute shared by the three concepts. As hopefully our discussion thus far has demonstrated, each of the three authorizes a court to "police" a sales transaction where there is evidence of one contracting party taking unfair advantage of the other. Thus in a case like Murray, any of these provisions can be properly employed to overcome the form disclaimer language. But the difference is that in doing so, section 2-302's principle of unconscionability and subsection 2-316(1)'s guidelines operate from a very different theoretical perspective than section 1-203's doctrine of good faith.

As noted earlier in Part III.D. of this Article, subsection 2-316(1) provides a set of interpretive guidelines intended to facilitate and channelize judicial resolution of issues involving a potential conflict between manifestations creating express warranties and other manifestations tending to disclaim such warranties in the sales agreement. The doctrinal focus of
these guidelines is the process of formation: mutual assent. The focus of the principle of unconscionability is identical as indicated by the textual phrase in subsection 2-302(1), “[i]f 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.”\(^40\) This is not to say that subsection 2-316(1)’s guidelines and the principle of unconscionability are the same in all respects. They are not. Unconscionability is classified under contract law not as a rule of interpretation but as an invalidating cause. Accordingly, the principle enables a court to scrutinize for and, if appropriate, to take specific remedial action to correct unfairness occasioned by not only the parties’ formation process but also (according to some cases) the substantive terms which result therefrom. Rather our point is that both subsection 2-316(1) and section 2-302, because they enable (albeit distinctly) judicial policing of contract formation, perform a significantly different function than the doctrine of good faith in the UCC scheme of things.

By contrast, section 1-203, as noted above, confines the scope of the UCC good faith obligation to fact patterns involving questions of “performance or enforcement” of a “contract or duty within this Act.” Its application to issues of contract formation would seem to be precluded. Hence, a judicial policing exercise under this separate section is concerned only with the post-formation conduct of the contracting party charged with bad faith.

Bearing this distinction in mind, were a court to police warranty disclaimer language like that in Murray under section 1-203, the focus of analysis should be exclusively on the seller’s behavior not only in performing his or her contractual obligations, but also later during litigation in seeking enforcement of the contract against the buyer. Alternatively, were a court to police such language under either subsection 2-316(1) or section 2-302, the analytic focus should be exclusively on the seller’s behavior during the distinct earlier time frame of contract formation.

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40. U.C.C. § 2-302(1).
IV. UCC SECTION 2-608’S REMEDY OF REVOCATION OF ACCEPTANCE EXAMINED

A. Section 2-608 Introduced

Even though the Murray court made this its first topic, we have postponed our discussion of section 2-608 until now for reasons of doctrinal logic. Revocation of acceptance is one of numerous remedies available to a buyer (alone—section 2-608 does not apply to sellers) who has been aggrieved by a breach of a sales contract by the seller. As previously observed, a crucial prerequisite for a proper assertion of this remedial option is that the goods must be “non-conforming.” In other words, the first two things which must be established in any analysis under section 2-608 are that (1) the agreement contained a particular term imposing performance obligation which (2) the seller failed to perform. As also previously observed, the only such obligation which could have possibly been present in Murray, given its stated facts, related to a potential warranty of quality, whether implied or express. Thus, it made sense for us to consider whether or not such a warranty existed in the first place before addressing the two logically successive points of whether or not a breach thereof occurred, and then whether or not revocation of acceptance is the proper remedy for such breach.

Revocation of acceptance is by nature a “self-help” remedy, which a buyer who has already “accepted” goods may pursue without the aid of judicial action. Due to its extraordinary nature the availability of this remedy is sharply restricted, as is evident from the many prerequisites which subsections 2-608(1) and (2) impose. These prerequisites are both procedural and substantive in nature.

41. See U.C.C. § 2-711(1).
42. See subsections 2-608(1) and 2-106(2)’s definition of this term, which is produced in Murray respectively at 958 P.2d at 828 n.3 and id., headnotes 5, 6.
43. See U.C.C. § 2-606.
44. For an effective element-by-element examination of subsections 2-608 (1) and (2), see White & Summers, supra note 15, § 8-4.
B. The Murray Appellate Court’s Discussion of Section 2-608

The Murray appellate court commenced this part of the opinion with an effective summary of the subsection 2-608(1) and (2) prerequisites. However, because the defendant’s appeal only raised an issue concerning the first of these, the court largely confined its analysis to the matter of whether or not “the vehicle failed to conform to the contract.” The Murray court’s analysis borrowed freely from the Arizona Supreme Court decision in Seekings v Jimmy GMC of Tucson, Inc. Based on this reasoning, the Murray court concluded that: (i) “[r]evocation by a buyer under . . . section 2-608 is not the same as a remedy for breach of express or implied warranty”; (ii) “[t]he right to revoke does not depend upon the existence or breach of any warranty”; (iii) “[t]he buyer may revoke under . . . section 2-608 even though all warranties are excluded”; (iv) “[t]he absence or existence of any warranty is immaterial when considering revocation under Section 2-608”; (v) “[t]herefore, the question here is: Was plaintiff’s attempted revocation valid where there is nonconformity and resulting substantial impairment of value undiscovered because of reliance on sellers’ assurances?”; and (vi) “[t]he item furnished was mechanically deficient and not reliable. Further, it did not conform to the sellers’ representations.”

The inherent tension between statements (i) through (iv) on the one hand, and statements (v) and (vi) on the other should be obvious. This tension may suggest that the only conceivable nonconformity present in Murray was a breach of the warranty of quality, express and/or implied. The point here is not that section 2-608 is unavailable where the breach is of a term other than quality. Surely, the negative implication of subsection 2-106(2)’s definition of “conformity” is broad enough to cover any term in a sales contract. Rather, the point is, once again, that given the stated facts in Murray, the only performance obligations which conceivably were breached by defendant were the express warranties arising from its oral representations as to the quality of the van.

Presumably, the Murray court took this approach because it felt stymied by the plaintiff’s testimony that she was aware that the written warranty disclaimer meant that the vehicle was being sold without a warranty. But the court would have been better served by meeting this obstacle head-on, with a proper warranty analysis. The theoretical analyses suggested in this Article, utilizing alternatively subsection 2-316(1)’s first guideline or its second guideline or the doctrine of good faith or the principle of unconscionability, would have provided the court with the necessary, forthright decisional tools. Pursuant to each of these theories the court could have neutralized the written disclaimer of at least the express warranties on the ground that the plaintiff reasonably and actually understood the parties’ sales transaction to include not only the written disclaimer wording but also the express oral representations made by the defendant’s agent during the test drive. Sadly, one can see at several points in the Murray opinion the appellate court struggling with, but not quite grasping, how these issues are legally significant for deciding the UCC Article 2 issues in the case.

V. CONCLUSION

In the final analysis we must give a “mixed review” to that portion of the opinion of the Oklahoma Court of Civil Appeals in Murray v. D & J Motor Co. dealing with UCC Article 2. Its final conclusion that the trial court committed reversible error in denying the plaintiff the remedy of revocation of acceptance under section 2-608 as a matter of law appears justifiable in light of the facts at bar. Particularly compelling are the facts relating to the plaintiff’s reasonable expectations arising from the defendant’s oral representations of quality as well as the defendant’s duplicitous conduct in refusing to honor those representations. On the other hand, the appellate court’s reasoning on which it premised the conclusion seems misguided in a curiously “so near yet so far away” sense. That reasoning flirts with but never fully appreciates the telling proposition that the “as is” disclaimer and the plaintiff’s knowledge of the written disclaimer did not necessarily prevent her from actually and reasonably expecting that the seller’s oral quality representations were an enforceable portion of the parties’ sales contract. This proposition is well and specifically embraced by the interpretive guidelines addressing the disclaimer of express warranties in subsection 2-316(1) and in no way violates the implied warranty disclaimer provision in subsection 2-316(3)(a). Because the Murray court did not realize the true decisional
importance of this proposition, it adopted a rationale which depended on the
dubious idea that “[t]he absence or existence of any warranty is immaterial
when considering revocation under Section 2-608.” 47 While this statement
would be correct in a case involving a nonconformity other than a breach
of warranty of quality, it surely is not so on the Murray facts where the only
possibility of nonconformity was the breach of such a warranty. Overall, the
appellate court either failed to identify or identified but underestimated
various UCC provisions which not only were conveniently at hand and
clearly pertinent, but also would have permitted it to reach the same final
result in a statutorily approved warranty analysis. The provisions in
question, section 1-203, subsection 2-316(1), and section 2-302 are the
focus of the analyses which we have explained in the course of this Article
as alternative methods for protecting the plaintiff’s expectations in a case
like Murray.

47. Id. at 828.