

DEATH OF A (USED CAR) SALESMAN: A DISCUSSION ON THE INTERPLAY BETWEEN WARRANTY EXCLUSION AND FRAUD

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INTRODUCTION

By age four, 90% of children know how to lie.¹ Upon entering adulthood, whether an individual uses that ability to lie varies greatly depending on the circumstances and the personal views of the individual making the choice.² That uncertainty, however, as to whether a person will lie can make for some tricky situations in the realm of commerce. One profession with a particularly bad reputation for dishonest dealings is that of the car salesman.³ But whether the reputation is actually deserved, it is undeniable that botched car sales frequently end up in court.⁴

Litigation in this arena is typically governed by the Uniform Commercial Code. The Uniform Commercial Code (UCC) is a labyrinth of laws set up to regulate sales of personal property, like vehicles.⁵ Generally, the framework

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¹Dominika Osmolska Psy.D., *When Children Lie They are Simply Reaching a Developmental Milestone*, EMAXHEALTH (Aug. 9, 2011), <https://www.emaxhealth.com/6705/when-children-lie-they-are-simply-reaching-developmental-milestone>.

²David J Ley Ph.D., *6 Reasons People Lie When They Don't Need To*, PSYCHOLOGY TODAY (Jan. 23, 2017), <https://www.psychologytoday.com/blog/women-who-stray/201701/6-reasons-people-lie-when-they-don-t-need> (listing circumstances when people lie, and listing personal views on lying).

³Jessica Hullinger, *10 Confessions of Car Salesmen*, MENTAL FLOSS (Oct. 29, 2017), <http://mentalfloss.com/article/510371/10-confessions-car-salesmen> (car salespeople ranked as some of the least honest, least ethical professionals in America, just above members of Congress and below lawyers).

⁴*See generally* United States v. Bob Stofer Oldsmobile-Cadillac, Inc., 853 F.2d 1392 (7th Cir. 1988); Woodard v. Gen. Motors Corp., 298 F.2d 121 (5th Cir. 1962); Daluz v. Acme Auto Body & Sales, Inc., 814 F. Supp. 242 (D. Conn. 1992).

⁵Jean Murray, *What is the Uniform Commercial Code?*, THE BALANCE SMALL BUSINESS (Feb. 3, 2019), <https://www.thebalancesmb.com/what-is-the-uniform-commercial-code-398505>.

is straightforward—to protect purchasers, the UCC provides that certain sales will be covered by implied warranties.⁶ If a seller wants to eliminate those warranties, he or she must follow the rules laid out in UCC § 2-316, aptly titled “Exclusion or Modification of Warranties.”⁷ What is less straightforward is what a court should do when a seller defrauds a buyer into purchasing a car, and the buyer, ignorant of the fraud, agrees to exclude warranties.

The interplay between fraud and the exclusion of implied warranties is a complex matter with no uniform procedure for case resolution. As such, this article will begin with a brief history of how warranty law developed and the methods available for excluding warranties. This article will then discuss the different ways in which courts handle cases involving UCC § 2-316 and fraud, starting with *Sorchaga v. Ride Auto, LLC*.⁸ *Sorchaga* is a Minnesota case that illustrates the issues courts grapple with when attempting to enforce warranty exclusions without reaching an inequitable result.⁹ The rest of the article is dedicated to an explanation and critique of three other methods courts use to resolve cases involving UCC § 2-316 and fraud.

Finally, though this article addresses the UCC § 2-316-fraud dichotomy in terms of vehicle sales, its rationale likely has a broader application. Notably, neither UCC § 2-316 nor common law fraud principles are circumscribed to vehicle sales. Thus, it seems likely that courts may use the following principles for any case involving the sale of goods, a UCC § 2-316 warranty exclusion, and fraud.

I. BACKGROUND

At common law, the doctrine of caveat emptor governed the transactions between buyer and seller.¹⁰ Literally meaning “Let the buyer beware,” caveat emptor worked to bar claims against defects that the buyer could have discovered with reasonable inspection, absent fraud.¹¹ The doctrine took root in the idea that in all business transactions a buyer would take care of his or her own interests and negotiate for a warranty where the buyer distrusted the

⁶*See infra* Section 0.

⁷*Id.*

⁸*See generally* 893 N.W.2d 360 (Minn. Ct. App. 2017).

⁹*Id.*

¹⁰*Cendant Mobility Fin. Corp. v. Asuamah*, 684 S.E.2d 617, 619 (Ga. 2009).

¹¹*Id.*; *Barnard v. Kellogg*, 77 U.S. 383, 388 (1870).

seller's judgment.¹² Courts assumed that a buyer, when dealing with a seller, did so at arm's length and had the means to gain important information concerning the sale.¹³ Ultimately, the buyer bore a large brunt of the risk in trade: the buyer, using whatever knowledge of the goods she had, could inspect them for defects and demand a warranty from the seller, or she could decline inspection and assume the merchantability of the goods.¹⁴

A. *UCC and Warranties and Parol, Oh My!*

While sellers found ways to protect themselves in questionable transactions, buyers were frequently left at the hands of more knowledgeable sellers and subject to problems of fraud under caveat emptor. The UCC significantly modified the buyer-seller relationship created under caveat emptor and shifted the risk of commerce when it incorporated two types of warranties into Article 2, which governs the sales of goods.¹⁵ A seller can create the first type of warranty—an express warranty—when the seller affirms a fact or promise about the goods to the buyer.¹⁶ As for the second type of warranty—the implied warranty—any contract the seller enters into with a buyer will include implied warranties when (1) the goods involved in the sale constitute the seller's usual business; or (2) the seller knows the buyer needs the goods for a particular purpose and relied on the seller's skill to select the goods.¹⁷ This article will focus on implied warranties, warranty disclaimers, and the effects of fraud on both.

1. Implied Warranty Creation, Modification, and Exclusion

The implied warranty breaks down into two categories: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.¹⁸ A contract includes a warranty of merchantability when the seller is a merchant with respect to the goods the buyer seeks to purchase from the seller.¹⁹ The UCC § 2-314 defines goods as merchantable when they

¹²*Barnard*, 77 U.S. at 388.

¹³*Humber v. Morton*, 426 S.W.2d 554, 557 (Tex. 1968).

¹⁴*Barnard*, 77 U.S. at 388.

¹⁵Diane L. Schmauder, *Liability on Implied Warranties in Sale of Used Motor Vehicle*, 47 A.L.R. 5th 677 § 2[a] (1997); U.C.C. § 2-102 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

¹⁶U.C.C. § 2-313.

¹⁷*Id.* §§ 2-314–2-315.

¹⁸*Id.* §§ 2-314–2-315.

¹⁹*Id.* § 2-314.

“pass without objection in the trade under the contract description” or “are fit for the ordinary purposes for which such goods are used.”²⁰ The implied warranty of fitness for a particular purpose attaches when the seller, at the time of contracting, has reason to know the buyer requires the goods for a particular purpose and that the buyer relied on the seller’s skill or judgment to select suitable goods.²¹

However, the parties can limit or negate these implied warranties by following the UCC’s requirements for an effective disclaimer.²² To protect buyers from giving up implied warranties through unexpected and unbargained for contractual language, the UCC § 2-316 provides guidelines that require conspicuous disclaimers.²³ Thus, a seller who seeks to negate the implied warranty of fitness needs a writing that conspicuously disclaims that warranty.²⁴ A seller may also disclaim the warranty of merchantability using a writing, but the language of the disclaimer must mention “merchantability” specifically.²⁵

Additionally, UCC § 2-316 provides three other methods for excluding or modifying implied warranties.²⁶ First, when the buyer examines or refuses to examine the goods, no implied warranty exists with respect to defects that an examination should have revealed.²⁷ Second, a course of dealing or usage of trade might exclude or modify the implied warranties.²⁸ Lastly, and most importantly, UCC § 2-316(3)(a) states that “unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is’, ‘with all faults’ or other language” that makes plain to the buyer no implied warranties exist.²⁹ These three exceptions to the general rule focus on common factual situations which should call the buyer’s attention to the fact that the seller intends to exclude implied warranties from the sale.³⁰

²⁰*Id.*

²¹*Id.* § 2-315.

²²*Id.* § 2-316.

²³*Id.* § 2-316 cmt. 1.

²⁴*Id.* § 2-316(2).

²⁵*Id.*

²⁶*Id.* § 2-316(3).

²⁷*Id.* § 2-316(3)(b).

²⁸*Id.* § 2-316(3)(c).

²⁹*Id.* § 2-316(3)(a).

³⁰*Id.* § 2-316 cmt. 6.

2. The Parol Evidence Rule and As Is Clauses

Accordingly, contracts for the sale of goods frequently include “as is” clauses within warranty disclaimers to limit seller liability to buyers in case of product defects.³¹ While beneficial for the seller, such clauses can create pitfalls for the unwary buyer, particularly when the parol evidence rule comes into play.³² The parol evidence rule states that when parties set forth their final agreement within a writing the terms within the writing “may not be contradicted by evidence of a prior agreement or contemporaneous oral agreement.”³³ In other words, where two parties have reached a final agreement under a contract, neither party may use oral evidence to contradict the terms of the completed contract.³⁴ Thus, when a buyer signs a final contract of sale that contains a disclaimer, the buyer may not use parol evidence to show that a warranty still exists if the terms conspicuously negated the warranty.³⁵ The buyer cannot show that the seller made some other oral promise at the time the parties signed the contract or use extrinsic evidence to demonstrate the seller’s creation of an oral warranty.³⁶ The contract—and any disclaimer of implied warranties—is binding.

³¹*Id.* § 2-316 cmt. 7 (explaining that an “as is” clause, in ordinary commercial usage, is understood to mean that the buyer takes the entire risk as to the quality of the goods involved); *Raze Int’l, Inc. v. Se. Equip. Co.*, 69 N.E.3d 1274, 1283 (Ohio Ct. App. 2016) (noting expressions like “as is” exclude all implied warranties and shift the risk as to the quality of the goods sold from the seller to the buyer).

³²*Schneider v. Miller*, 597 N.E.2d 175, 178–79 (Ohio Ct. App. 1991) (rejecting appellant’s attempt to revoke a contract containing an ‘as is’ clause, noting “Appellant is a practicing attorney who claims that he should not be held to the provisions of the documents which he signed. Such a claim is untenable”); *Raze Int’l, Inc.*, 69 N.E.3d at 1283–84 (noting that where a writing embodies the parties’ final agreement, the parol evidence rule prevents either party from using parol evidence to vary the terms or to prove the existence of other oral agreements).

³³U.C.C. § 2-202. In certain circumstances, however, the parties may explain or supplement the terms of an integrated (final) agreement by evidence of (a) a course of dealing or trade usage or (b) consistent additional terms, unless the court finds the writing expresses the complete and exclusive statement of the parties’ agreement. *Id.*

³⁴*Id.*; *Raze Int’l, Inc.*, 69 N.E.3d at 1283.

³⁵U.C.C. §§ 2-316(2), (3), cmt. 2.

³⁶*Id.* §§ 2-316(2), (3), cmt. 1, 2 (“The seller is protected under this Article against false allegations of oral warranties by its provisions on parol If no warranty exists, there is of course no problem of limiting remedies for breach of warranty.”).

B. Sorchaga and the Terrible, Horrible, No Good, Very Bad Auto Seller

Sorchaga v. Ride Auto, LLC dealt with a disclaimer of the implied warranty of merchantability in the used car context.³⁷ In that case, Esmeralda Sorchaga visited Ride Auto, a used-car dealership, to purchase a 2008 Ford F-350 pickup truck for her husband's business.³⁸ Unbeknownst to her, a Ford dealer previously diagnosed the truck as having a "blown" motor that caused the truck to lack power and smoke from the tailpipe.³⁹ Despite the dealer's diagnosis of engine issues, Ride Auto purchased the truck from a salvage company for \$6,770 with the intent to sell it after doing some repairs.⁴⁰ Ride Auto made a few cosmetic fixes and ensured the truck would start and drive short distances, then made the truck available for sale.⁴¹ On her test drive of the truck, Sorchaga noticed tailpipe smoke and saw the check-engine light illuminated, so she asked the salesman, Perez, about the check-engine light.⁴² Perez told her the truck's oxygen sensor was faulty but easily repaired, and that "the truck would last a long time after it was fixed."⁴³ Additionally, he told her "the smoke was a result of the truck being a diesel that smokes when it warms up."⁴⁴ Sorchaga asked for an inspection of the vehicle, but Perez informed her that Ride Auto's mechanic could not perform such an inspection because he lacked certification.⁴⁵ However, he assured her that if she purchased the truck, Ride Auto would inspect and repair the vehicle for free.⁴⁶

Sorchaga agreed to buy the truck for \$12,950.68.⁴⁷ In the process of her purchase, Sorchaga signed a purchase agreement, a buyer's guide, and two other separate documents, all of which contained disclaimers stating that

³⁷893 N.W.2d 360, 364 (Minn. Ct. App. 2017). The Supreme Court of Minnesota granted the petition for review in part and denied the petition in part, then issued a decision without a published opinion. *Sorchaga v. Ride Auto, LLC*, No. A16-0855, 2017 LEXIS 353, *1 (Minn. Jun. 20, 2017).

³⁸*Sorchaga*, 893 N.W.2d at 365.

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

Sorchaga bought the truck “AS IS, NO WARRANTY.”⁴⁸ Within days of purchase, the truck stopped working and Ride Auto refused to repair it.⁴⁹ Sorchaga ultimately had the truck towed and inspected.⁵⁰ The inspector concluded the Sorchagas should not drive the truck and recommended a full engine replacement, a fix that would cost approximately \$20,000.⁵¹

Sorchaga filed a complaint against Ride Auto, alleging it had breached the implied warranty of merchantability and committed fraud.⁵² The district court concluded that Ride Auto committed fraud because it had misrepresented the condition of the truck to Sorchaga.⁵³ The court also found that, because of these misrepresentations, the warranty disclaimer included in the purchase agreement was ineffective.⁵⁴ Consequently, Ride Auto had breached the implied warranty of merchantability.⁵⁵ Ride Auto appealed, and the Court of Appeals of Minnesota took the case to decide whether the district court erred in concluding that Ride Auto’s disclaimer of the implied warranty of merchantability was ineffective.⁵⁶

II. IF IT IS TOO GOOD TO BE TRUE. . . IT HAS PROBABLY BEEN DISCLAIMED⁵⁷

Numerous states have adopted Article 2 of the UCC or have chosen to codify their own versions of it.⁵⁸ Thus, all states have laws on implied warranties, and most states have methods by which a seller may disclaim

⁴⁸*Id.* at 365–66.

⁴⁹*Id.* at 366.

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*; Because the U.C.C. does not distinguish between new and used goods, a majority of courts agree the implied warranty of merchantability applies to the sale of used vehicles. *Id.*

⁵³*Id.*

⁵⁴*Id.*; *Sorchaga v. Ride Auto, LLC*, No. 19HA-CV-14-3536, 2015 WL 11232597, at *4 (Minn. D. Ct. Oct. 30, 2015).

⁵⁵*Sorchaga*, 2015 WL 11232597, at *4.

⁵⁶*Sorchaga*, 893 N.W.2d at 366–67.

⁵⁷Ron Weber, *Ron Weber Quotes*, AZQUOTES, http://www.azquotes.com/author/66393-Ron_Weber (last visited Feb. 28, 2018) (“If it is too good to be true . . . it is probably a fraud.”).

⁵⁸*Sorchaga*, 893 N.W.2d at 373 (reviewing Minnesota’s codification of the U.C.C.); *States Adopting The UCC*, USLEGAL, <https://uniformcommercialcode.uslegal.com/states-adopting-the-ucc/> (last visited Feb. 3, 2018).

those warranties.⁵⁹ As previously noted, UCC § 2-316—the provision on warranty disclaimers—aims to protect buyers from unexpected disclaimer language so that they do not unintentionally waive implied warranties when signing a contract for goods.⁶⁰ On the other hand, UCC § 2-316(3)(a) states that “unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is,’” like those in the *Sorchaga* contracts.⁶¹ Thus, where a contract contains such disclaimer language, the buyer takes on the entire risk of the quality of the goods involved in the transaction.⁶²

While the UCC § 2-316 addresses the consequences of both intentional and unintentional waivers of implied warranties, it does not address the consequences of waiver when a seller fraudulently induces a buyer to enter into a contract.⁶³ To further complicate the matter, the precise elements of fraud vary from state-to-state.⁶⁴ As a result, UCC § 2-316 provides courts with no guidance on how to deal with fraud in the context of implied warranties; and courts have no unified method to solve the problem, given the different proof requirements for fraud among the states.⁶⁵ So what happens when a buyer, after an inspection of the goods, signs a contract containing a written, conspicuous warranty disclaimer in reliance on the seller’s fraudulent misrepresentation?

⁵⁹Warranties, FEDERAL TRADE COMMISSION, (Oct. 2001), <https://www.consumer.ftc.gov/articles/0252-warranties>.

⁶⁰See U.C.C. § 2-316 cmt. 1 (Am. Law Inst. & Unif. Law Comm’n 2002); see also *id.* § 2-314 cmt. 11 (“The warranty of merchantability . . . is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.”).

⁶¹*Id.* § 2-316(3)(a); *Sorchaga*, 893 N.W.2d at 365–66.

⁶²U.C.C. § 2-316 cmt. 7.

⁶³*Id.* § 2-316(3) (noting situations in which a buyer can waive implied warranties); *id.* § 2-316 cmt. 1 (explaining that surprising, inconspicuous language will not exclude implied warranties).

⁶⁴*Lewis Tree Serv., Inc. v. Lucent Techs., Inc.*, 211 F.R.D. 228, 236 (S.D.N.Y. 2002) (“The elements of fraud vary greatly from state to state . . .”). In *Sorchaga*, the court stated that a plaintiff must prove five elements to succeed on a fraud claim in Minnesota:

- (1) A false representation [by the defendant] of a past or existing material fact susceptible of knowledge;
- (2) Made with knowledge of the falsity of the representation or made without knowing whether it was true or false;
- (3) With the intention to induce [the other party] to act in reliance thereon;
- (4) That the representation caused [the other party] to act in reliance thereon; and
- (5) That [the other party] suffered pecuniary damages as a result of the reliance.

893 N.W.2d at 369.

⁶⁵See U.C.C. § 2-316; *Lewis Tree Serv., Inc.*, 211 F.R.D. at 236.

A. *Fraud Is a “Circumstance”* . . .

The *Sorchaga* court faced the exact situation above: Sorchaga signed several pieces of paperwork that included warranty disclaimers, but only did so because Ride Auto made a misrepresentation about the truck to induce Sorchaga to purchase the vehicle.⁶⁶ In its analysis, the appellate court sought to address two main issues regarding the implied warranty of merchantability: (1) whether the “as-is” warranty disclaimer was rendered ineffective by Ride Auto’s fraud and (2) whether the implied warranty was excluded by Sorchaga’s inspection of the truck.⁶⁷

The court took a unique approach to resolving the dispute in favor of the buyer, Sorchaga, without resorting to equity.⁶⁸ The court first discussed Minnesota’s codification of UCC § 2-316 under Minn. Stat. § 336.2-316 (2016), emphasizing the “unless circumstances indicate otherwise” language.⁶⁹ But because Minn. Stat. § 336.2-316, like UCC § 2-316, does not explicitly invalidate disclaimers due to fraud, the court stated that the determinative question was “whether fraud is a ‘circumstance’ that prevents exclusion of the implied warranty of merchantability.”⁷⁰ To determine whether fraud is a circumstance, the court turned to the plain language of the statute.⁷¹ The court concluded the statute was ambiguous because caselaw presented different reasonable interpretations of whether fraudulent representations could constitute a circumstance.⁷² In resolving the ambiguity, the court looked to extrinsic evidence—comment 4 of UCC § 2-313 and

⁶⁶893 N.W.2d at 365–66, 371.

⁶⁷*Id.* at 374–75.

⁶⁸*Id.* at 373–75, 380 (affirming the district court’s findings using statutory construction).

⁶⁹MINN. STAT. § 336.2-316 (2016); *Sorchaga*, 893 N.W.2d at 373 (“[U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is’ . . .” (emphasis original)).

⁷⁰U.C.C. § 2-316; MINN. STAT. § 336.2-316; *Sorchaga*, 893 N.W.2d at 373.

⁷¹*Sorchaga*, 893 N.W.2d at 373–74.

⁷²*Id.*; *Murray v. D & J Motor Co.*, 958 P.2d 823, 830 (Okla. Civ. App. 1998) (concluding “circumstances that render an as-is disclaimer ineffective include a seller making a fraudulent representation or misrepresentation concerning the condition, value, quality, characteristics or fitness of the goods sold that are relied upon by the Buyer to the Buyer’s detriment”); *Nick Mikalacki Constr. Co. v. M.J.L. Truck Sales, Inc.*, 515 N.E.2d 24, 26 (Ohio Ct. App. 1986) (discussing three specific circumstances under which a disclaimer of a warranty is ineffective, but not including fraud in the assessment).

Minn. Stat. § 336.1-201(b)(20)—to ascertain the legislative intent behind the ambiguous statute.⁷³

Comment 4 of UCC § 2-313, the provision for *express warranties*, notes that “a contract is normally a contract for a sale of something describable and described,” and further states:

A clause generally disclaiming 'all warranties, express or implied' cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316.

. . . [I]n determining what they have agreed upon[,] good faith is a factor [C]onsideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.⁷⁴

The court interpreted this comment as evidence of the UCC's distaste for merchant misrepresentations of goods because the UCC restricts merchants' ability to shield themselves from liability through a warranty disclaimer.⁷⁵ Furthermore, comment 4 states that the purpose of the UCC's warranty provisions “is to determine what it is that the seller has in essence agreed to sell.”⁷⁶ The court noted that such a purpose, when combined with the intent to discourage misrepresentations, was consistent with the UCC's general obligation of good faith.⁷⁷ Minn. Stat. § 336.1-201(b)(20), a codification of UCC § 1-201, defines good faith as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”⁷⁸ Fraud, on the other hand, “is neither honest nor a reasonable commercial standard of fair dealing.”⁷⁹ The court concluded it would be incongruous to give a warranty disclaimer literal effect when the seller misrepresents the condition of the goods, and consequently, held that fraudulent misrepresentation constitutes a “‘circumstance’ . . . that may invalidate a warranty disclaimer.”⁸⁰

⁷³*Sorchaga*, 893 N.W.2d at 374–75.

⁷⁴*Id.* at 374; U.C.C. § 2-313 cmt. 4.

⁷⁵*Sorchaga*, 893 N.W.2d at 374–75.

⁷⁶*Id.* at 374; U.C.C. § 2-313 cmt. 4.

⁷⁷*Sorchaga*, 893 N.W.2d at 375.

⁷⁸*Id.*; MINN. STAT. § 336.1-201(b)(20) (2016).

⁷⁹*Sorchaga*, 893 N.W.2d at 375.

⁸⁰*Id.* (“We therefore hold that a merchant’s fraudulent misrepresentation about the condition, value, quality, or fitness of the goods for any purpose is a ‘circumstance’ under Minn. Stat. § 336.2-316(3)(a) that may invalidate a warranty disclaimer such as an ‘as is’ disclaimer.”).

The court then turned to the issue of whether Sorchaga's inspection of the truck excluded the implied warranty.⁸¹ Minn. Stat. § 336.2-316(3)(b) states that "there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed."⁸² However, the court noted that nonprofessional buyers do not assume the risk of defects that only an examination might reveal.⁸³ Further, courts in other jurisdictions have held that the failure of a buyer's test drive to reveal hidden engine defects would not exclude the implied warranty of merchantability.⁸⁴ Based on this reasoning, the court held that Sorchaga's test drive of the truck did not exclude the implied warranty of merchantability because a reasonable inspection would not have revealed the truck's engine defects.⁸⁵ Ultimately, the court concluded that "[b]ecause fraud is a 'circumstance' that may render a warranty disclaimer ineffective, and because the implied warranty of merchantability was not excluded by Sorchaga's test drive of the truck, the district court did not err in finding that Ride Auto breached the implied warranty of merchantability."⁸⁶

B. . . Or Maybe Fraud Isn't A Circumstance

While facially sound, the *Sorchaga* court's reasoning in concluding fraud is a circumstance becomes problematic upon deeper review.

First, the express warranty comment the court cites to in reaching its conclusion that fraud is a circumstance does not necessarily support the court's rationale when read in light of UCC § 2-316, the implied warranty provision.⁸⁷ Comment 4 provides that "[a] clause generally disclaiming 'all warranties, express or implied' cannot reduce the seller's obligation with respect to [the goods described in the contract] and therefore cannot be given literal effect under Section 2-316."⁸⁸ The court read comment 4 as a limitation on merchants' abilities to shield themselves from liability by using a warranty

⁸¹*Id.*

⁸²*Id.*; MINN. STAT. § 336.2-316(3)(b).

⁸³*Sorchaga*, 893 N.W.2d at 376; U.C.C. § 2-316 cmt. 8 (Am. Law Inst. & Unif. Law Comm'n 2002).

⁸⁴*Sorchaga*, 893 N.W.2d at 376 (citing *Rose v. Epley Motor Sales*, 215 S.E.2d 573, 578 (N.C. 1975) as an example).

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.*; U.C.C. §§ 2-313 cmt. 4, 2-316.

⁸⁸U.C.C. § 2-313 cmt. 4.

disclaimer.⁸⁹ Section 2-316, however, does not necessarily limit a seller's ability to disclaim warranties generally—instead, UCC § 2-316 protects buyers from waiving implied warranties due to broad, “unexpected and unbargained language of disclaimer.”⁹⁰ Section 2-316 principally deals with “those frequent clauses in sales contracts which seek to exclude ‘all warranties, express or implied.’”⁹¹ Thus, UCC § 2-316 limits a seller's ability to use broad, generic language to create a disclaimer in favor of conspicuous language that calls the warranty exclusion to the buyer's attention.⁹² Thus, while the *Sorchaga* court characterizes UCC § 2-316 as an attempt to limit sellers' abilities to use warranties, UCC § 2-316 actually just requires sellers to disclaim warranties in specific ways so as to protect buyers from otherwise hidden disclaimers.⁹³

Indeed, comment 4 of UCC § 2-313 acknowledges that the parties to a sale, if they consciously desire, can conduct their bargain as they wish.⁹⁴ In other words, the parties *can* agree to limit a seller's liability through an implied warranty disclaimer—UCC § 2-316 just requires the language to meet certain minimum requirements to be operative.⁹⁵ Clearly, a buyer does not pay the seller a substantial price with the intention of receiving close to nothing of value in return.⁹⁶ But this intention may guide the court only as a consideration in its determination of what the parties really agreed to under their contract.⁹⁷ The UCC's focus on freedom of contract allows the parties to structure their agreement as they please; and ultimately, the parties' contract will control the terms of the agreement—even to the detriment of

⁸⁹*Sorchaga*, 893 N.W.2d at 374–75.

⁹⁰U.C.C. § 2-316 cmt. 1.

⁹¹*Id.* § 2-316 cmt. 1.

⁹²*Id.* § 2-316(3)(a), cmt. 1.

⁹³*Sorchaga*, 893 N.W.2d at 374–75; U.C.C. § 2-316 cmt. 1.

⁹⁴U.C.C. § 2-313 cmt. 4.

⁹⁵*Id.* § 2-316(2), (3)(a); For example, Section 2-316(2) requires a writing disclaiming the warranty of merchantability, the same clause at issue in *Sorchaga*, to use the word “merchantability” specifically. *Sorchaga*, 893 N.W.2d at 373.

⁹⁶U.C.C. § 2-313 cmt. 4 (“[T]he probability is small that a real price is intended to be exchanged for a pseudo obligation.”); *Frank Griffin Volkswagen v. Smith*, 610 So. 2d 597, 613 (Fla. Dist. Ct. App. 1992) (Ervin, J., concurring and dissenting) (“Mr. Smith's reasonable expectations were frustrated following his payment of and future obligation to pay a substantial sum of money for an automobile that the dealer had represented to him as new. Clearly, he did not intend to pay a substantial price in exchange for a pseudo-obligation . . .”).

⁹⁷U.C.C. § 2-313 cmt. 4.

one party or the other.⁹⁸ In the *Sorchaga* case, Sorchaga signed several documents containing “as is” clauses, which negated all implied warranties.⁹⁹ Thus, though unfortunate for Sorchaga, those disclaimers governed the terms of the contract above all else, including the UCC and the court’s tangled interpretation of its provisions.¹⁰⁰

Furthermore, even if the UCC’s commentary on express warranties and good faith could alter an express disclaimer of implied warranties, it is unlikely that the UCC contemplates including fraud as a circumstance.¹⁰¹ UCC § 2-721 Remedies for Fraud serves as one indication that under the UCC, “circumstance” does not include fraud.¹⁰² The official comment to UCC § 2-721 states that the purpose of the section aims:

[t]o correct the situation by which remedies for fraud have been more circumscribed than the more modern and mercantile remedies for breach of warranty This section thus makes it clear that neither rescission of the contract for *fraud* nor rejection of the goods bars other remedies unless the *circumstances* of the case make the remedies incompatible.¹⁰³

⁹⁸Sorchaga signed paperwork that excluded all warranties via “as is” clauses. *Sorchaga*, 893 N.W.2d at 365–66. Under the UCC’s freedom of contract focus, then, the disclaimers should govern the agreement:

The freedom of contract norm under the UCC provides both a reasonable opportunity for the parties to structure their licensing agreements and the flexibility needed to inject regulatory interventions where needed. The broad themes of the UCC include: . . . an emphasis on the intent of the parties. Although the UCC provides a lot of gap fillers or default provisions, where the intent of the parties can be determined it usually overrides the UCC default provisions.

Main Themes of UCC, USLEGAL, <https://uniformcommercialcode.uslegal.com/main-themes-of-ucc/> (last visited Feb. 3, 2018).

⁹⁹893 N.W.2d at 365–66; U.C.C. § 2-316(3)(a).

¹⁰⁰*See, e.g.,* *Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1416 (5th Cir. 1983) (holding that UCC provisions do not control over contractual provisions).

¹⁰¹Again, the Sorchaga court’s interpretation of Section 2-316(3)(a)’s reference to “unless the circumstances indicate otherwise” stems from the UCC’s commentary on express warranties, Section 2-313, and its provision on good faith, Section 1-201(b)(20). *Sorchaga*, 893 N.W.2d at 373–75; U.C.C. §§ 2-316(3)(a), 2-313 cmt. 4, 1-201(b)(20).

¹⁰²U.C.C. § 2-721.

¹⁰³*Id.* § 2-721 Official Comment (emphasis added).

The comment's use of the terms "fraud" and "circumstance" as distinct concepts implicitly demonstrates the meaning of "circumstance" does not encompass fraud.¹⁰⁴ Here, the UCC's use of fraud (as a wrong that occurred) and circumstance (as a set of facts surrounding the particular transaction) aligns with the Bouvier Law Dictionary's definitions of the two.¹⁰⁵ The dictionary defines a circumstance as "any fact or condition that in any way describes or influences a fact."¹⁰⁶ And unless "circumstance" refers to a social or economic position, the term carries no legal meaning; rather, a circumstance gives courts contexts by which they may reach a legal conclusion.¹⁰⁷ Contrastingly, fraud refers to a "trick to induce another to act to the other's harm for one's own benefit."¹⁰⁸ Fraud constitutes a legal conclusion "which may be presumed from the circumstances and conditions of the parties contracting."¹⁰⁹ Given the disparate definitions and separate uses of the two terms in the UCC's Article 2 provisions, the UCC authors likely did not include fraud in their understanding of "circumstances" under UCC § 2-316(3)(a).¹¹⁰ And because Minnesota adopted all of the above-

¹⁰⁴*See, e.g.,* *Mirpad, LLC v. Cal. Ins. Guarantee Ass'n*, 132 Cal. App. 4th 1058, 1070 (2005) (concluding the separate and distinct uses of the words "person" and "organization" in an insurance policy meant the words had separate and distinct meanings); *Personalized Media Commc'ns., L.L.C. v. Sci.-Atlanta, Inc.*, No. 1:02-CV-824-CAP, 2005 U.S. Dist. LEXIS 50116, at *494–95 (N.D. Ga. Mar. 1, 2005) ("[The defendant] understood a cable transmission to be different from a wireless transmission, and distinguished the two by using the word 'cablecast' with one, and 'broadcast' with another, and [this] further suggests that [the defendant] at least implicitly defined those terms separately.").

¹⁰⁵U.C.C. § 2-721 Official Comment; *Circumstance*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk Ed. 2012); *Fraud*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk Ed. 2012).

¹⁰⁶*Circumstance*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk Ed. 2012).

¹⁰⁷*Id.* ("Once the fact of some circumstance is established to some degree, the legal significance of the circumstance may be asserted. . . . Circumstance has a non-legal meaning that is sometimes confused with its legal meaning . . .").

¹⁰⁸*Fraud*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk Ed. 2012).

¹⁰⁹*Id.* at note 3; *Chesterfield et al. v. Jansen* (1750) 95 Eng. Rep. 621, 623 (Lord Hardwicke, writing for the majority in an English chancery court in 1750, explained that to determine whether a contract is fraudulent, a court must evaluate the "circumstances, character, and situation" of both parties and that a determination of fraud is a factual determination dependent upon context).

¹¹⁰*Cf. People v. Thompson*, 730 N.W.2d 708, 717 (Mich. 2007) (Corrigan, J., concurring in part and dissenting in part) (arguing that, under fundamental statutory construction rules, every word the legislature employs should be given meaning and no word should be treated as surplusage if possible). Here, to subsume the definition of "fraud" within "circumstance" under § 2-721's official comment would render "fraud" redundant.

mentioned UCC provisions, including UCC § 2-721, the same rationale regarding the meanings of “circumstance” and “fraud” may be similarly attributed to the Minnesota provisions.¹¹¹ Indeed, Minnesota’s own caselaw seems to operate under a tacit understanding that the terms have separate meanings and purposes, a distinction made more explicit by the requirement that parties “plead the circumstances constituting fraud with particularity.”¹¹² Under this phrasing, it seems that a set of circumstances acts as evidence for fraud, rather than fraud itself becoming a circumstance.¹¹³ Ultimately, the *Sorchaga* court’s tangled interpretation of fraud as a circumstance is very likely just an attempt to help a buyer, trapped by her own signature, escape the damage of a seller’s duplicitous activity.

III. DO ALTERNATIVE REMEDIES EXIST?

Whether the *Sorchaga* court’s interpretation of UCC § 2-316 will represent the majority view in the future remains uncertain.¹¹⁴ Although some courts have used a similar rationale to reach suitable conclusions, others have approached the problem in methods that vary based on state laws or remedies available.¹¹⁵

¹¹¹*Sorchaga v. Ride Auto, LLC*, 893 N.W.2d 360, 373 (Minn. Ct. App. 2017) (“Chapter 336 of the Minnesota Statutes houses Minnesota’s codification of the Uniform Commercial Code (UCC).”).

¹¹²*Robert Allen Taylor Co. v. United Credit Recovery, LLC.*, No. A15-1902, 2016 WL 5640670, at *6 (Minn. Ct. App. Oct. 3, 2016) (requiring fraud to be pled with particularity under Fed. R. Civ. P. 9(b) and Minn. R. Civ. P. 9.02); *see, e.g.*, *Hardin Cty. Sav. Bank v. Hous. & Redevelopment Auth.*, 821 N.W.2d 184, 191 (Minn. 2012) (explaining that fraud, a legal claim, requires the support of factual circumstances); *Rucker v. Schmidt*, 794 N.W.2d 114, 122 (Minn. 2011) (Dietzen, J., concurring) (acknowledging that a judgment for a fraud claim is reached based on a set of factual circumstances); *Miller v. Shugart*, 316 N.W.2d 729, 734 (Minn. 1982) (requiring “circumstances constituting fraud” to be stated with particularity).

¹¹³*Cf. Robert Allen Taylor Co.*, 2016 WL 5640670, at *6 (stating that the circumstances required for pleading fraud with particularity include “time, place, and contents of false representations, as well as the identity of the person making the misrepresentation . . .”) (citing *Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 (8th Cir. 1995)).

¹¹⁴Fred Miller, *Notes & Trends—August 2017*, BENCH & BAR OF MINNESOTA (Aug. 3, 2017), <http://mnbenchbar.com/2017/08/notes-trends-august-2017/> (noting that the court’s opinion in *Sorchaga* “seems questionable given the history of the ‘circumstances’ language and its intended meaning”).

¹¹⁵For opinions that align with *Sorchaga*, *see Murray v. D.J. Motor Co.*, 958 P.2d 823, 830 (Okla. Civ. App. 1998) (holding that fraudulent representations or misrepresentations constitute “circumstances” that preclude an effective disclaimer) and *Knipp v. Weinbaum*, 351 So.2d 1081, 1084–85 (Fla. Dist. Ct. App. 1977) (holding summary judgment was improper where buyer and

A. *There Are More Ways than One to Skin a Cat*

As it stands, there are at least three ways in which courts have handled cases of buyer-alleged fraud where the seller claims the buyer waived the implied warranty of merchantability.

1. Vermont—The State of “Freedom and Unity”

First, at least one state has modified the official version of UCC § 2-316 when codifying it into state law.¹¹⁶ Vermont changed UCC § 2-316(3)(a) language from “all implied warranties *are excluded* by expressions like ‘as is’” to “implied warranties of fitness *may be excluded* by expressions like ‘as is’” when it adopted Vt. Stat. 9A § 2-316.¹¹⁷ In Vermont, then, the “as is” clause included in the *Sorchaga* contract would not exclude the implied warranty of merchantability because the Vermont provision is permissive, not compulsory.¹¹⁸ Thus, a Vermont court would have reached the same result as the *Sorchaga* court in establishing the seller’s liability under a breached implied warranty of merchantability.¹¹⁹

2. Pennsylvania Is “the Steel State” for a Reason

Other courts deal with fraud and “as is” clauses with a much steelier approach. In one Pennsylvania case, a buyer signed a purchase agreement containing “as is” provisions.¹²⁰ After discovering vehicle damage, the buyer alleged the dealer had misrepresented the vehicle’s condition and breached express and implied warranties.¹²¹ The court first noted that the words “as is”

seller disagreed on the meaning of the disclaimer, which the court considered a “circumstance” that precluded absolving the seller’s liability).

¹¹⁶Compare U.C.C. § 2-316 (Am. Law Inst. & Unif. Law Comm’n 2002) with VT. STAT. ANN. 9A, § 2-316 (1979).

¹¹⁷*Alpert v. Thomas*, 643 F. Supp. 1406, 1414 (D. Vt. 1986); VT. STAT. ANN. 9A, § 2-316(3)(a) Historical Notes.

¹¹⁸*Alpert*, 643 F. Supp. at 1414 (“Therefore, in Vermont, unlike Arizona, the implied warranty of merchantability may not be excluded under § 2-316(3)(a) by an ‘as is’ clause such as the one present in the contract at issue here.”).

¹¹⁹*Id.* at 1409, 1420 (holding, for various reasons, the defendant prevailed on a breach of implied warranty counterclaim).

¹²⁰*Silver v. Porsche of the Main Line*, No. 1057 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 433, at *2–3 (Mar. 10, 2015).

¹²¹*Id.* at *5.

disclaimed all implied warranties.¹²² Additionally, because the contract represented the entire agreement of the parties, parol evidence could not be used to vary or explain the “as is” clause.¹²³ Consequently, the buyer could not use parol evidence to show that the dealer’s false representation persuaded him to enter into the contract.¹²⁴ The court denied the buyer’s contention that Pennsylvania law permits a cause of action for misrepresentation despite a contractual “as is” clause, instead holding that the “as is” clause shifted the risk of a vehicle defect to the purchaser.¹²⁵ Ultimately, though the buyer alleged the seller fraudulently induced him into entering into a contract, he had no cause of action for a breach of implied warranties due to the “as is” clause.¹²⁶

3. Ohio—The Mother of Modern Good Ideas¹²⁷

Ohio, for its part, shied away from the *Sorchaga* method in favor of a legal path it found more palatable.¹²⁸ There, a buyer tested a car, inspected it, and asked about the transmission.¹²⁹ The seller informed him nothing was wrong with it, and the buyer signed a purchase waiver containing an “as is” clause upon purchase.¹³⁰ Two days later, the car broke down.¹³¹ The court acknowledged that the “as is” clause in the agreement did preclude a claim based on implied warranty.¹³² However, the court then stated that the next issue to address was “whether an express oral warranty was given by

¹²²*Id.* at *12.

¹²³*Id.* at *12–13.

¹²⁴*Id.*

¹²⁵*Id.* at *13, *16.

¹²⁶*Id.* at *12, *22.

¹²⁷One Ohio state nickname is “Mother of Presidents.” Vince Guerrieri, *Ohio—the Mother of Presidents*, OHIO: FIND IT HERE BLOG (Feb. 18, 2013), <http://www.ohio.org/blogs/2013/02/ohio-the-mother-of-presidents>.

¹²⁸*Barksdale v. Van’s Auto Sales, Inc.*, 577 N.E.2d 426, 428 (8th Dist. 1989) (discussing a previous case, *Mar. Mfrs, Inc. v. Hi-Skipper Marine*, in which an Ohio court held an ‘as is’ clause did not preclude an implied warranty claim). The *Maritime* court explained “as is” clauses normally precluded such claims unless circumstances indicate otherwise, and there the parties did not understand the “as is” clause to mean the same thing. 483 N.E.2d 144, 146 (8th Dist. 1985). The *Barksdale* court disagreed, characterizing the conclusion as “an unsupported independent determination that the ‘as is’ clause was inapplicable.” 577 N.E.2d at 428.

¹²⁹*Barksdale*, 577 N.E.2d at 427.

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Id.* at 428.

defendant to plaintiff concerning the fitness of the transmission” and if the defendant-seller had disclaimed such an express warranty.¹³³

Under UCC § 2-313(1)(a), when an affirmation of fact or promise relating to the goods become the basis for the parties’ bargain, the seller creates an express warranty.¹³⁴ Because the seller’s representation about the transmission became part of the essence of the bargain, the seller created an express oral warranty.¹³⁵ Lastly, the court looked to whether the “as is” clause effectively disclaimed the express oral warranty.¹³⁶ The court then noted that UCC § 2-316(1) provides that when a seller makes an express warranty during the bargain but disclaims it in the sales contract, “preference is to be given to the express warranties.”¹³⁷ Inconsistent, unreasonable disclaimers would then be rendered inoperative.¹³⁸ The court found that the contract’s “as is” provisions could not be reasonably construed with the seller’s oral express warranty.¹³⁹ As a result, the express warranty prevailed over the disclaimers, and the buyer’s ability to sue on the breach of the warranty survived along with it.¹⁴⁰ Under Ohio law, then, while an “as is” clause would preclude a claim for the breach of an implied warranty, Sorchaga likely could have argued the seller’s engine representations created an express oral warranty he consequently breached.¹⁴¹

¹³³*Id.*

¹³⁴*Id.*; U.C.C. § 2-313(1)(a) (Am. Law Inst. & Unif. Law Comm’n 2002).

¹³⁵*Barksdale*, 577 N.E.2d at 428. This does not violate the parol evidence rule under UCC § 2-202 because the parties may introduce evidence of “consistent additional terms” of the contract unless the court finds the writing “to have been intended a complete and exclusive statement of the terms of the agreement.” The court’s admission of consistent additional terms through parol evidence to establish an express oral warranty is likely an implied judicial holding that the contract was not intended as a complete and exclusive statement of the parties’ agreement. U.C.C. § 2-202.

¹³⁶*Barksdale*, 577 N.E.2d at 428.

¹³⁷*Id.*; U.C.C. § 2-313(1).

¹³⁸*Barksdale*, 577 N.E.2d at 429; U.C.C. § 2-313(1).

¹³⁹*Barksdale*, 577 N.E.2d at 429.

¹⁴⁰*Id.*

¹⁴¹For more examples of Ohio’s method, see *Perkins v. Land Rover of Akron*, 7th Dist. Mahoning No. 03 MA 33, 2003 WL 22939452, at *4 (Dec. 5, 2003) (seller’s promise to fix the car as a part of the sale was an express warranty the “as is” clause did not exclude) and *Willey v. Crow*, 6th Dist. Lucas No. CV80-F-430, 1982 WL 6286, at *2–3 (Feb. 26, 1982) (finding “as is” clause does not disclaim an express warranty or negate fraud, thus the defendant failed to establish a defense).

B. The Texas Two-Step – Invalidation

Texas, like many other states, has codified Article 2 of the Uniform Commercial Code and did so as part of the Texas Business and Commerce Code.¹⁴² However, Texas has not yet squarely faced the issue of whether an “as is” clause can negate an implied-warranty claim by a used-good buyer against a fraudulent seller.¹⁴³ On the other hand, enough caselaw exists to give a speculative look into how Texas courts would handle a case like *Sorchaga*.

1. Contractual Lies, Disclaimer Lies, and Statistics¹⁴⁴

Implied warranties arise by operation of law—in Texas, a consumer may sue for breach of the implied warranty of merchantability under Section 2.314 of the Texas Business & Commerce Code.¹⁴⁵ Once a statutory provision or the common law establishes a warranty, a plaintiff may also bring a claim under the Texas Deceptive Trade Practices Consumer Protection Act (DTPA) to obtain heightened remedies for breach of the warranty.¹⁴⁶ However, the Supreme Court of Texas held in *Prudential* that an “as is” clause (1) excludes implied warranties in a contract covered by the UCC and (2) precludes a buyer from succeeding on a DTPA claim because the clause negates

¹⁴²JCW Elecs., Inc. v. Garza, 257 S.W.3d 701, 702 n.1 (Tex. 2008) (Article 2 of UCC codified under TEX. BUS. & COM. CODE ANN. §§ 2.101-.725(West 2009)).

¹⁴³Man Engines & Components, Inc. v. Shows, 434 S.W.3d 132, 140 (Tex. 2014) (dealing with a case involving a second-hand buyer of a used vehicle attempting to sue a manufacturer for a breach of implied warranty despite an ‘as is’ clause). The Supreme Court of Texas, however, recognized the issue presented in *Sorchaga* poses a relevant commercial question:

And how does section 2.316(c)(1)’s introductory clause—“unless the circumstances indicate otherwise”—inform the statute’s broad “all implied warranties” language? The reach of an “as is” clause is important, but unfortunately, it is procedurally unreachable in this case. MAN did not plead that the “as is” clause barred Shows’s implied-warranty claim . . . in the trial court.

Id. at 141.

¹⁴⁴Dept. of Mathematics, *Lies, Damned Lies and Statistics*, UNIVERSITY OF YORK DEPT. OF MATHEMATICS BLOG (July. 19, 2012), <https://www.york.ac.uk/depts/math/histstat/lies.htm> (“There are three types of lies: lies, damned lies, and statistics.”).

¹⁴⁵Hartford v. Lyndon-DFS Warranty Servs., No. 01-08-00398-CV, 2010 WL 2220443, at *10 (Tex. App.—Houston [1st Dist.] May 28, 2010, no pet.) (citing *Garza*, 257 S.W.3d at 704); TEX. BUS. & COM. CODE ANN. § 2.314.

¹⁴⁶Hartford, 2010 WL 2220443, at *11 (citing Parkway Co. v. Woodruff, 901 S.W.2d 434, 438 (Tex. 1995)); TEX. BUS. & COM. CODE ANN. §§ 17.41–63.

causation, an essential element to recovery under the DTPA.¹⁴⁷ Furthermore, the Court noted an “as is” agreement would negate the causation required for other causes of action, including negligence, a breach of the duty of good faith and fair dealing, and fraud.¹⁴⁸

But the holding did not extend to every situation in which a contract includes an “as is” clause.¹⁴⁹ On one hand, the Court stated that fraud *in the inducement* of an “as is” agreement does not negate causation required for establishing a cause of action for the buyer.¹⁵⁰ This seems to suggest a fraudulent inducement cause of action will stand despite an “as is” clause if (1) a seller makes a misrepresentation about the “as is” clause itself; and (2) that misrepresentation induces the buyer to agree to include the clause in the contract.¹⁵¹ On the other hand, the Court later made a much broader assertion that “[a] buyer is not bound by an agreement to purchase something ‘as is’ that he is induced to make because of a fraudulent representation or concealment of information by the seller.”¹⁵² This phrasing implies that fraudulently inducing a buyer into the contract itself, rather than a specific contractual provision, will preserve a fraudulent inducement cause of action.

The question *Prudential* raises, then, is which situation will create a cause of action despite an “as is” clause: when a seller fraudulently induces the buyer to include an “as is” clause in the contract, or when the seller fraudulently induces the buyer to enter into a contract altogether?¹⁵³ And based on the answer, does fraudulent inducement constitute a “circumstance” under UCC § 2-316(3)(a)? One district court case, *Howard v. Forest River, Inc.*, while it does not definitively answer either question, does give insight into how Texas may address these issues.¹⁵⁴

¹⁴⁷896 S.W.2d 156, 161, 163 (Tex. 1995). Note, however, an “as is” clause does not waive DTPA rights; instead, “it is a statement that no basis exists for the assertion of such rights” because the seller made no warranties. *Id.* at 163–64.

¹⁴⁸*Id.* at 161.

¹⁴⁹*Id.* at 162.

¹⁵⁰*Id.* at 161. Under Texas law, “[f]raudulent inducement . . . is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof.” *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001).

¹⁵¹See *supra* note 141 and accompanying text.

¹⁵²*Prudential*, 896 S.W.2d at 162.

¹⁵³*Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007) (“*Prudential* stands for the proposition that—*absent fraud in the inducement*—an ‘as is’ provision can waive claims based on a condition of the property.”) (emphasis added). The question is—fraud in the inducement of what?

¹⁵⁴No. 9:15-CV-162, 2017 U.S. Dist. LEXIS 200982, at *2 (E.D. Tex. Nov. 14, 2017).

2. *Howard* and the Terrible, Horrible, No Good, Very Bad Auto Seller

Howard involved two plaintiffs, the Howards, who sought to purchase an RV from Myers RV Center, Inc. to live in while Mr. Howard underwent medical treatment.¹⁵⁵ While the Myers RV employees told the Howards the RV they purchased was new, the employees failed to mention that the RV had construction defects.¹⁵⁶ Once the Howards discovered several defects in the operation of the RV, they brought suit against Myers RV for fraudulent inducement, breach of express warranties, and breach of implied warranties.¹⁵⁷

In assessing the Howards' fraudulent inducement claim against Myers RV on a summary judgment standard, the court concluded that some evidence of fraudulent inducement existed.¹⁵⁸ For one, the Howards offered evidence that Myers RV knew about the RV's construction defects but did not relay that fact to the Howards, who thought they bought a new, undefective RV.¹⁵⁹ Additionally, some evidence existed to show the Howards relied on the representation that the RV was new in deciding to purchase the RV.¹⁶⁰ Thus, the Howards had a triable cause of action for fraudulent inducement.¹⁶¹

In light of that finding, the court's second conclusion that no fact issue existed regarding the breach of the implied warranty of merchantability claim seems anomalous.¹⁶² The court began its analysis of the implied warranty issue by noting that under Section 2.316(b), the Texas codification of UCC § 2-316(b), sellers may disclaim implied warranties by a conspicuous writing

¹⁵⁵*Id.* at *27–32.

¹⁵⁶*Id.* at *12–13.

¹⁵⁷*Id.* at *3. While the Howards did bring other claims, they do not relate to the focus of this article and shall not be discussed. Additionally, the court determined Texas law governed the breach of warranty claims, while New Mexico law governed the fraud claims. *Id.* With respect to the fraud claims, the difference between Texas and New Mexico law arose only with regard to the constructive fraud claim, which is not at issue here. Thus, the fraudulent inducement analysis would not differ under Texas law. *Id.* at *5, *8.

¹⁵⁸*Id.* at *18–19.

¹⁵⁹*Id.* at *18.

¹⁶⁰*Id.*

¹⁶¹*Id.* at *18–19.

¹⁶²*Id.* at *42.

that mentions merchantability.¹⁶³ In this case, Myers RV's Purchase Agreement contained such a disclaimer.¹⁶⁴ The Howards argued that Myers RV's "fraud and coercion" voided the disclaimer, but the court remained unpersuaded.¹⁶⁵ In concluding an effective disclaimer existed, the court did not look to Section 2.316(c)(1)'s "unless the circumstances indicate otherwise" language for further context.¹⁶⁶ The court also did not consider any of the evidence that suggested Myers RV had fraudulently induced the Howards into the contract.¹⁶⁷

Instead, the court looked to evidence of whether the contract resulted in unfair surprise or oppression through the seller's use of trickery or overreaching.¹⁶⁸ In doing so, the court observed the Howards' only evidence of fraud, trickery, or coercion was "Mr. Howard's assertion that he did not have to read the paperwork because he was told it would be filled out later, and Myer's alleged withholding of the owner's manual and warranty as part of the process."¹⁶⁹ Consequently, the evidence did not indicate trickery or overreaching "to the extent that it establishes fraud or coercion relieving Mr. Howard from the warranty disclaimer to which he knowingly affixed his signature."¹⁷⁰ Thus, the court held the Howards had signed a conspicuous disclaimer, which waived their claim for a breach of the implied warranty of merchantability.¹⁷¹

3. The Texas Two-Step: Warranty Invalidation

With its holding, the court subtly implied that evidence of fraudulent inducement did not constitute a "circumstance" sufficient to invalidate an

¹⁶³*Id.* at *39–40; *see* TEX. BUS. & COM. CODE ANN. § 2.316. The implied warranty of merchantability may also be disclaimed using an "as is" clause, as the seller did in *Sorchaga*, 893 N.W.2d 360, 373 (Minn. Ct. App. 2017).

¹⁶⁴*Howard*, 2017 U.S. Dist. LEXIS 200982, at *40–41.

¹⁶⁵*Id.* at *42 ("[T]he evidence presented does not indicate "trickery" or overreaching by Myers RV to the extent that it establishes fraud or coercion relieving Mr. Howard from the warranty disclaimer to which he knowingly affixed his signature.")

¹⁶⁶*Id.*; *see* TEX. BUS. & COM. CODE ANN. § 2.316.

¹⁶⁷*Howard*, 2017 U.S. Dist. LEXIS 200982, at *38–42.

¹⁶⁸*Id.* at *42.

¹⁶⁹*Id.* at *41.

¹⁷⁰*Id.* at *42.

¹⁷¹*Id.* at *41–42.

implied warranty disclaimer under Section 2.316.¹⁷² Instead, based on the case the court cited, invalidating an implied warranty disclaimer might require a plaintiff to show either (1) The disclaimer was the product of fraud or coercion or (2) The disclaimer was unconscionable.¹⁷³

In *In re Lyon Fin. Servs.*, the Supreme Court of Texas seemed to indicate that evidence of a contractual clause being the result of fraud requires an explicit misrepresentation about the contested clause specifically, rather than a misrepresentation about underlying subject matter of the contract.¹⁷⁴ Under that rationale, a buyer disputing the enforcement of an implied warranty disclaimer could not argue fraudulent inducement into the contract generally to invalidate the disclaimer; instead, the buyer would have to argue the seller made a fraudulent representation about the application of the implied warranty disclaimer itself.¹⁷⁵ Invalidation on the basis of unconscionability, on the other hand, requires the buyer to show the disputed clause unfairly surprised or oppressed the buyer through small font, misleading titles, obscure placement, or excessive one-sidedness.¹⁷⁶ However, UCC § 2-316

¹⁷²*See id.* at *18–19, *33, *41–42. The court first noted there was some evidence indicating Myers knew the RV had construction defects but did not tell the Howards, which created a genuine issue of material fact regarding the Howards’ fraudulent inducement claim against Myers. *Id.* at *18–19. The court then stated an implied warranty is a representation “about the implied quality” of a product that, based on circumstances surrounding the transaction, the law implies in a contract. *Id.* at *33. Under *Sorchaga* rationale, then, the “circumstances” surrounding the implied warranty’s creation in *Howard* would include fraud—Myer’s representation that the RV was new, when it actually had construction defects. *Id.* at *11, *13. Nevertheless, the court concluded the Howards did not produce sufficient evidence of “fraud or coercion” to create an issue of material fact on the breach of implied warranties claim. *Id.* at *44. In its discussion of the breach of implied warranties, the court did not mention Myer’s misrepresentation of the RV’s quality (new and functional versus new but defective), which arguably constitutes a breach of the implied warranty of merchantability. *Id.* at *32–42. Thus, despite some evidence of fraud in the inducement of the contract, there was no breach of implied warranty because there was not enough evidence of “trickery” to vitiate the disclaimer Mr. Howard knowingly signed. *Id.* at *42.

¹⁷³*Cf. In re Lyon Fin. Servs.*, 257 S.W.3d 228, 232, 233 (Tex. 2008) (discussion on “product of fraud or coercion” and unconscionability).

¹⁷⁴*Id.* at 232 (“We have held that fraudulent inducement to sign an agreement containing a dispute resolution agreement . . . will not bar enforcement of the clause unless the specific clause was the product of fraud or coercion.”). For example, here the plaintiff argued the defendant fraudulently misrepresented that the disputed clause—the forum selection clause—“only applied to Schedule 1 of the financing, not Schedule 3.” *Id.*

¹⁷⁵*Cf. id.*

¹⁷⁶*E.g., id.* (discussing unfair surprise, oppression, one-sidedness, trickery, and overreaching); *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 679 (Tex. 2006) (court looks for procedural unconscionability based on clause’s length and label); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d

already provides that a seller cannot disclaim the implied warranty of merchantability except through a conspicuous—i.e., not unconscionable—writing.¹⁷⁷ Indeed, the implied warranty disclaimers in both *Sorchaga* and *Howard* met the UCC's conspicuousness requirements,¹⁷⁸ which undercuts any basis for invalidating the disclaimers due to unconscionability.¹⁷⁹

Thus, where a buyer has signed a conspicuous implied warranty of merchantability disclaimer she seeks to avoid, does Texas law require a plaintiff to show the disclaimer came about as a product of fraud or coercion, as it does for arbitration clauses, forum selection clauses, and jury waiver clauses?¹⁸⁰ Under *Howard*, the answer seems to be yes, which means that buyers like *Sorchaga* would likely have no breach of implied warranty cause of action.¹⁸¹ Until the courts face such a precise situation, though, the manner in which Texas will conclusively answer this question remains hazy and uncertain.¹⁸²

4. All's Well that Ends Well

While *Howard* dashes the dreams of buyers who spend their days wishing to bring a breach of implied warranty claim, hope may live on in the form of an alternate cause of action—breach of express warranty. The court's analysis on the Howards' breach of express warranty claim aligns with Ohio's approach of essentially turning a breach of an implied warranty into

124, 134 (Tex. 2004) (without mentioning "unconscionability," discusses jury trial waiver with a bolded caption that was "crystal clear" and unhidden).

¹⁷⁷U.C.C. § 2-316(2) (Am. Law Inst. & Unif. Law Comm'n 2002).

¹⁷⁸*See Sorchaga v. Ride Auto, LLC*, 893 N.W.2d 360, 365–66 (Minn. Ct. App. 2017); *Howard v. Forest River, Inc.*, No. 9:15-CV-162, 2017 U.S. Dist. LEXIS 200982, at *40–41 (E.D. Tex. Nov. 14, 2017).

¹⁷⁹*Howard*, 2017 U.S. Dist. LEXIS 200982, at *41–42 (noting that a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and upholding the disclaimer because no unfair surprise or oppression existed).

¹⁸⁰*E.g.*, *In re Lyon Fin. Serv.*, 257 S.W.3d at 231 (forum selection clause); *In re Palm Harbor Homes, Inc.*, 195 S.W.3d at 674 (arbitration agreement); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 128 (jury trial waiver); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 752 (Tex. 2001) (arbitration agreement).

¹⁸¹2017 U.S. Dist. LEXIS 200982, at *42 (holding the implied warranties, disclaimed as a matter of law, warranted summary judgment in favor of the defendant).

¹⁸²*Man Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 140–41 (Tex. 2014) (listing questions left unanswered due to the defendant's failure to plead an "as is" clause barred plaintiff's implied warranty claim).

a claim for the breach of an express warranty, giving defrauded consumers a viable cause of action.¹⁸³

The *Howard* court first noted an express warranty “is an affirmation of fact or promise made by the seller which relates to the goods and becomes part of the basis of the bargain.”¹⁸⁴ It also recognized that while a seller may disclaim an express warranty, the seller may not do so when the disclaimer is inconsistent with the language of the express warranty.¹⁸⁵ In *Howard*, Myers RV expressly warranted the RV was “new, top of the line, the best, . . . and that the warranty [would] cover problems with the RV.”¹⁸⁶ Despite the fact that Mr. Howard signed an “as is” disclaimer of warranties, the court concluded that “Myers cannot on one hand orally aver that the condition of the RV is new and top of the line and then turn around and disclaim that statement with the ‘as is’ clause.”¹⁸⁷ Thus, the court denied a summary judgment in favor of Myers RV and held that factual issues existed with regard to the disclaimer’s validity.¹⁸⁸

Assuming the *Howard* court analysis applied, Sorchaga would have fared well had she alleged a breach of express warranty instead of a breach of the implied warranty of merchantability.¹⁸⁹ *Sorchaga* presents facts virtually identical to those of *Howard*—the seller represented the condition of the car was better than it was and promised to repair defects.¹⁹⁰ The “as is” disclaimer she signed, however, was “exactly the type of inconsistent disclaimer that courts have held to be invalid,” since courts will uphold express warranties where a seller perpetrates a fraud on the buyer or conceals some defect to induce her into a purchase.¹⁹¹ Ride Auto could not expressly warrant it would give her a functional car with promises of repair and then turn around and disclaim its statements with a simple “as is” clause.¹⁹² While the *Sorchaga* court found a crafty way to rule for Sorchaga on her claim, the simplest route

¹⁸³See *Howard*, 2017 U.S. Dist. LEXIS 200982, at *29–32; see *supra* Part II.

¹⁸⁴*Id.* at *29 (citing TEX. BUS. & COM. CODE ANN. § 2.313(a)).

¹⁸⁵*Id.* at *30 (citing TEX. BUS. & COM. CODE ANN. § 2.316).

¹⁸⁶*Id.* at *29.

¹⁸⁷*Id.* at *32.

¹⁸⁸*Id.*

¹⁸⁹*Sorchaga v. Ride Auto, LLC*, 893 N.W.2d 360, 366 (Minn. Ct. App. 2017) (alleging a breach of the implied warranty of merchantability).

¹⁹⁰*Id.* at 365.

¹⁹¹*Howard*, 2017 U.S. Dist. LEXIS 200982, at *31.

¹⁹²*Cf. id.* at *32.

may have been to follow in the footsteps of Ohio or *Howard* and conclude that a breach of an express warranty existed instead.

IV. CONCLUSION

“The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of law, where there is no law, there is no freedom.”¹⁹³ So to avoid the lawlessness of a seller’s ability to lie with impunity, the United States—as far back as 1795—candidly acknowledged that “fraud vitiates everything.”¹⁹⁴ But in an increasingly complex world where more fine text governs a deal than the parties’ true intent, may a seller use a simple phrase to escape the liability of deceit? While *Sorchaga* court held it could not, and found for the buyer, courts seem to fall on different sides of the matter. But in the end, after all the highways, and the owners, and the sales and the years, maybe a used car ends up worth more dead than alive.¹⁹⁵

¹⁹³JOHN LOCKE, TWO TREATISES OF GOVERNMENT 216 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

¹⁹⁴Talbot v. Janson, 3 U.S. (3 Dall.) 133, 146 (1795).

¹⁹⁵*Cf.* ARTHUR MILLER, DEATH OF A SALESMAN 77 (Taisha Abraham, 3rd ed. 2011); *see generally* Orin S. Kerr, A Theory of Law, 16 GREEN BAG 2D 111 (2012).