Express Warranties and Greater Consumer Protection from Sales Talk

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COMMENTS
EXPRESS WARRANTIES AND
GREATER CONSUMER PROTECTION
FROM SALES TALK

I. INTRODUCTION

The law of express warranties is in a constant state of flux. Changing ideas on the amount of protection that should be afforded consumers have precipitated and perpetuated the dynamic nature of the area. Before the adoption of the Uniform Sales Act\(^\text{1}\) (hereafter referred to as the Sales Act), the courts were reluctant to impose liability on a vendor for the breach of an express warranty in the absence of a showing of a specific intent by the vendor to warrant or guarantee the fact asserted.\(^\text{2}\)

Reflecting the contemporary trend of thinking, in the early 1900's, section 12 of the Sales Act made no mention of the seller's intent to warrant.\(^\text{3}\) In place of the intent element the Sales Act substituted a more easily satisfied requirement that the affirmation of fact or promise would constitute an express warranty if "the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods."\(^\text{4}\) With the adoption of the Uniform Commercial Code\(^\text{5}\) (hereafter referred to as the Code), an even more encompassing definition of express warranty is acquired. The Code states that:

Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.\(^\text{6}\) (Emphasis added.)

The question of what the parties actually agreed to, and what describable defined thing the parties bargained about is left to the construction of the courts. The Code Comments to section 2-313 emphasize the invitation to interpretation by the courts. Comment 57\(^\text{7}\) makes it clear that

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\(^{1}\)The Uniform Sales Act was adopted in Wisconsin in 1911, Wis. Laws 1911, ch. 549.

\(^{2}\)Baker v. Henderson, 24 Wis. 509 (1869). In this case the court absolved the seller from liability by stating that he (the seller) did not intend his statement to operate as a warranty. See also, Croninger v. Paige, 48 Wis. 229, 4 N.W. 106 (1879) where the court held that the required intent to warrant could be inferred from the language used by the seller. Compare, Bel v. Alder, 63 Ga. App. 473, 11 S.E. 2d 495 (1940) where the supreme court of Georgia held that the required specific intent could be shown by the circumstances surrounding the transaction.

\(^{3}\)"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." (Emphasis added.) Uniform Sales Act §12.

\(^{4}\)Ibid.

\(^{5}\)The Uniform Sales Act was repealed, and the Wisconsin Uniform Commercial Code was enacted, by Wis. Laws 1963, ch. 158.

\(^{6}\)Uniform Commercial Code §2-313(1)(a).

\(^{7}\)"Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must
the course of dealing and usage of the trade should influence what will be considered as the basis of the bargain. The courts are therefore clearly not confined to the words of the contract for their interpretation of what the bargain includes. Comment 8 indicates the intended all-inclusive nature of the "basis of the bargain" concept in declaring that virtually all statements of the seller become part of the "basis of the bargain" unless good reason is shown to the contrary.8

Thus these legislative innovations clearly delineate trend toward increased consumer protection against exaggerated or negligent statements by the seller.9 The concern of the practicing bar should be to ascertain the dividing line between permissible praise or commendation of the product and the affirmation of fact or promise which becomes the "basis of the bargain" rendering the seller strictly liable if the statement is false. This article is devoted to pinpointing the position of that dividing line.

II. PUFFING OR DEALER'S TALK

... [T]here are some matters which even though asserted positively, are in their nature so dependent on individual opinion that, no matter how positive the seller's assertion, it is not held to create a warranty. Such assertions as that things are fine or valuable, or better than productions of rival makers, are of this sort.10

The vendor has long been allowed to praise and recommend his goods to the buyer.11 Such patent and obvious seller's talk has consistently been held to have no legal significance.12 The Sales Act13 and the Code14 have expressly excluded such puffing statements from their definitions of express warranties. The basis of this long and uniformly followed rule is

be read against the applicable trade usages with the general rules as to merchantability resolving any doubts." (Emphasis added.) UNIFORM COMMERCIAL CODE §2-313, Comment 5.

8 "[A]ll of the statements of the seller do so [become part of the basis of the bargain] unless good reason is shown to the contrary." UNIFORM COMMERCIAL CODE §2-313, Comment 8.

9 "It should be noticed, however, that the continual tendency of the law is to restrict the seller in regard to untruthful puffing of his wares." 1 WILLISTON, SALES §202 (rev. ed. 1948). See Ezer, The Impact of the Uniform Commercial Code on the California Law of Sales Warranties, 8 U.C.L.A. Rev. 281 (1956); Sales Warranties Under the Pennsylvania Uniform Commercial Code, 15 U. Pitt. L. Rev. 331 (1954).

10 1 WILLISTON, SALES §202 (rev. ed. 1948).


12 Statements to the effect that a product is "wonderful" and will "enhance" the appearance of the buyer have no legal significance. Jacquot v. Wm. Filene's Sons Co., 337 Mass. 312, 149 N.E. 2d 635 (1948). Representations that a product is "perfect for you" and that "you couldn't buy a better one" are also held to be insignificant because they are directed at the buyer and do not describe the product. Adams v. Peter Tramontin Motor Sales, 42 N.J. Super. 313, 126 A. 2d 358 (1956); Regal Motor Products, Inc. v. Bender, 102 Ohio App. 447, 139 N.E. 2d 463 (1956).

13 "No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." UNIFORM SALES ACT §12.

14 "[A]n affirmation merely of the value of the goods or a statement purporting
the ancient maxim of the civil law, "simplex commendatio non obligat"—mere recommendation does not bind. This favored status which was previously afforded to virtually all opinions of the seller has been severely restricted by modern cases to statements which are easily recognized as mere dealer's chatter. Comments such as "it will last a lifetime," or "you couldn't buy a better car" fall into this category. Such representations must relate to a matter which is in its nature a matter of opinion or fancy.

The most difficult problem arises in the area of statements of opinion by the seller which do not relate to a matter which is by its nature a matter of opinion or fancy.

III. AFFIRMATION OF FACT V. EXPRESSION OF OPINION, JUDGMENT OR ESTIMATE.

Generally speaking a positive unequivocal affirmation of a fact will give rise to an express warranty. Under pre-Sales Act case law there were two additional requirements: (1) the seller must have intended to make a warranty when he made the statement and (2) the buyer must have relied on the warranty in purchasing the goods. All three of the elements were held to be essential. If one or more were missing recovery was defeated. The apparent difficulty of proving the innermost thoughts of the seller, caused the Supreme Court of Wisconsin to mellow its view on the specific intent element as early as 1887. In dealing with the case of Tenney v. Cowles, the court stated that:

Any representation of fact made to induce the sale, and to be relied upon, and is relied upon, by the buyer, is a warranty.

15 77 C.J.S. Sales §310 (c) (rev. ed. 1952).
16 When considering statements to the effect that "my product will consume less gas and oil than the one you are now using," the supreme court of Arkansas stated the following rule which aptly reflects the thinking which molded the old rule on options:

[T]he representations were general in character and cannot be regarded in law as more than appellee's (seller's) opinion. They did not assume the dignity of warranties.

Pate v. J. S. McWilliams Auto Co., 193 Ark. 620, 10 S.W. 2d 794, 795 (1937).
17 Lambert v. Sistrunk, 38 So. 2d 434 (Fla. 1952).
18 Ibid.
20 77 C. J. S. Sales §310 (c) (rev. ed. 1952).
22 "[I]t is a well settled principle of law, that an affirmation made by the vendor at the time of sale amounts to an express warranty, if it appears, on the facts stated or proven, to have been so intended and received." Giffert v. West, 33 Wis. 617, 621 (1873).
23 67 Wis. 594, 31 N.W. 221 (1887).
24 Id. at 597, 31 N.W. at 223.
In the same case the court also made it clear that even a statement of opinion could constitute a warranty if "any word of affirmation is used in such a manner as to show that the party expects or desires the other party to rely upon the assertion as a matter of fact, instead of taking it as an *expression of the judgment or opinion* of the vendor, it amounts to a warranty." The progressive nature of the Wisconsin court's viewpoint can be readily seen when one inspects the views of other courts and finds many of them clinging to the hard and fast rule that affirmations or representations which merely express the seller's opinion, belief, judgment, or estimate do not constitute warranties.


In defining an express warranty, the drafters of the Sales Act clearly omitted an intention to warrant from the elements constituting an express warranty. Section 12 of the Act defines an express warranty as:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

Thus the Sales Act required only two elements: (1) an affirmation of fact or a promise which has a natural tendency to induce a purchase, and (2) reliance by the buyer. An affirmation of the seller's opinion only was still specifically excepted from the definition of express warranty. Not requiring a showing of specific intent to prove a warranty makes good sense. If the buyer is saddled with a requirement of demonstrating that his adversary specifically intended to make a warranty, in the face of what will certainly be his adversary's vehement denials, the obstacle would often be impossible to overcome.

Wisconsin adopted the Sales Act in 1911. In accordance therewith, the Wisconsin Supreme Court has repeatedly imposed liability on the basis of express warranty without reference to the intention of the vendor. The United States Court of Appeals for the Sixth Circuit succinctly stated the new rule when it said:

25 *Id.* at 596, 31 N.W. at 223.

26 "Matters of opinion, judgment, estimate or 'dealer's talk' are permissible and whether a given statement made by the seller to the buyer, at the time of the sale, constitutes a warranty or not appears to be a question of the intention of the parties and the circumstances under which the statements were made." *Canon v. Chapman*, 161 F. Supp. 104, 110 (1958). *See also, King v. Ohio Valley Terminix Co.*, 309 Ky. 35, 214 S.W. 2d 993 (1948).

27 *Uniform Sales Act* §12.

28 Wis. Laws 1911, ch. 549.

29 *Hellenbrand v. Bowar*, 16 Wis. 2d 264, 114 N.W. 2d 418 (1962); *Valley Refrigeration Co. v. Lange Co.*, 242 Wis. 466, 8 N.W. 2d 294 (1943).
No specific intent to warrant need be shown, if the statements made would lead a reasonable buyer to believe that such statements had been made to induce the bargain.30

Some of the other courts have apparently been reluctant to impose the strict liability31 of a breach of express warranty upon the unintending seller.32 Despite the express language of section 12 of the Sales Act, the supreme court of Kansas has held that "whether an affirmation or representation constitutes a warranty is a question of the intention of the seller and the reliance placed thereon by the buyer."33 (Emphasis added.) Such an abortive construction of section 12 could only be prompted by sympathy and reluctance to impose the harsh remedy of strict liability on the apparently well-meaning or simply inadvertent vendor.

Fortunately, the more perceptive majority has realized that the obvious absence of any reference to the seller's intention in section 12 was not the result of inadvertence, but rather reflective of the trend of public opinion toward increased consumer protection.34

The drafters of section 12 of the Sales Act saw fit to retain and require the element of reliance by the buyer upon the affirmation or promise. This element, however, has served as a convenient vehicle used by the courts to deny recovery to a meritorious litigant.35 Cognizant of such a possibility, the drafters of the Code have eliminated the express requirement of reliance in favor of the more flexible "basis of the bargain" concept.36 Hence, the Code has gone one step farther than the Sales Act in the attempt to provide more protection for the consumer.

B. The "Basis of the Bargain" Concept.

The Sales Act limited the express warranty only to affirmations of fact or promises of the seller which have a natural tendency to induce the buyer to purchase the goods in reliance thereon. The Code substitutes the phrase "part of the basis of the bargain" in place of the Sales Act language of "natural tendency" and "purchasers . . . relying there-
on." Hence, under the Code, reliance by the buyer—a prime requisite under the Sales Act—will no longer be of any particular significance. Comment 3 of section 2-313 leaves no doubt as to this proposition when it states that "no particular reliance on such statements [affirmations of fact or promises] need be shown in order to weave them into the fabric of the agreement." 39

The next logical question is what affirmation of fact or promise will become part of the "basis of the bargain"? This question is only apparently answered in the comments to section 2-313. In answer to this inquiry, Comment 7 states that "all of the statements of the seller do so [become part of the basis of the bargain] unless good reason is shown to the contrary." 40 Looking to the section itself it is clear that only one of the two following factors will suffice as "good reason to the contrary": (1) the affirmation or promise does not relate to the goods, as required 41 or (2) the affirmation is merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods. 42 If the affirmation of fact or promise does not relate to the goods there is no express warranty question. The crux of the problem lies in determining whether a statement is merely one of opinion (commendation) or an affirmation of fact which will give rise to an express warranty. In regard to this question neither the comments nor the section itself give any real enlightenment, but rather leave the matter of defining the scope of opinion where it always has been—with the courts. However, section 2-313(1)(a) does clearly contemplate a very narrow area in which the seller can praise or "puff" his goods. The question of the section is "what is the basis of the bargain" and not necessarily "what is opinion"? Therefore it seems clear that opinion can give rise to an express warranty if it becomes part of the basis of the bargain. The question to be answered is when does an opinion become an express warranty.

Thus we have a scale to consider. At one end of the scale lies the protected area of "puffing" or "dealer's talk" where the vendor can praise and recommend his goods, even in a misleading manner, and still be protected from the heavy burden of express warranty liability. On the other end of the scale lies the affirmation of fact which renders the dealer liable if said affirmation of fact relates to the goods. Between these two poles lies the vast, judicially uncharted area of opinion. Social policy and legislative pressure have succeeded in moving the liability frontier from the dividing line between fact and opinion. These same

38 “[I]f the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.” (Emphasis added.) Uniform Sales Act §12.
39 Uniform Commercial Code §2-313, Comment 3.
40 Uniform Commercial Code §2-313, Comment 8.
41 Uniform Commercial Code §2-313(1)(a).
42 Uniform Commercial Code §2-313(2).
pressures persist in forcing the liability frontier closer and closer to
the protected area of "dealer's talk" or "puffing" at the other end of
the scale. Consequently, the question is no longer "what is fact and what
is opinion," but "which opinions enter into and became a basis of the
bargain and which do not?"

IV. WHERE PUFFING TERMINATES AND WARRANTY BEGINS

The pre-Sales Act cases were very strict in clinging to the rule that
an expression of opinion did not constitute a warranty. This position
wrought many difficult problems, not the least of which was trying to
determine what was a statement of fact and what was an expression
of opinion. After all, any assertion of fact can be given an air of opinion
by merely preceding it with an "I believe" or any similar phrase. It
didn't take unscrupulous sellers long to realize that all express warranty
liability could be avoided if their statements were couched in terms of
opinion or were somewhere labeled as estimates. When faced with such
a case, the courts were constrained to apply their "opinion or fact" test
and reap the inequitable results. Just such a case was Snow's Laundry
and Dry Cleaning Co., Inc. v. Georgia Power Co. In the Snow case the
vendor's engineer wrote a detailed letter to the prospective buyer con-
taining the numerical results of a study conducted by the engineer on
the subject of installing gas firing equipment on the prospective buyer's
premises. The letter contained the figures and a statement that the new
equipment, if installed, would effect heating cost savings for the buyer
to the extent of $800 per annum. The letter was quite wisely labeled as
an estimate. The Georgia court held that the statements did not consti-
tute a warranty because "they were denominated by him (the seller)
as estimates. . ." In a somewhat feeble attempt to justify the outcome
of the case the court added that "its terms are not such positive state-
ments as would make the same an express warranty." Such decisions
were unfortunately not uncommon.

The Wisconsin consumer has been favored with a much more per-
ceptive and progressive supreme court. Realizing the trend toward in-
creased protection of the consumer and obviously dissatisfied with the
sometimes inequitable results of the "opinion or fact" test, the Wiscon-
sin court hinted as early as 1869 that a statement of opinion could con-
stitute the basis of express warranty liability. In 1887 the Wisconsin

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43 J. C. Penney Co., Inc. v. Scarborough, 184 Miss. 310, 186 So. 316 (1939) ; 46
AM. JUR. Sales §323 (rev. ed. 1943).
44 I WILLISTON, SALES §202 (rev. ed. 1948). See also Welch Veterinary Supply
Co. v. Martin, 313 S.W. 2d 111 (Tex. 1958) where the court refused to find
a warranty because the seller said "I don't think you will ever be bothered
with any cholera."
46 Id. at 162.
47 Ibid.
48 After holding the statement in question to be opinion, the court said it could
court pierced the wall between opinion and fact, and made it clear that liability would be extended into the field of opinion if the facts warranted. Speaking of statements made during the negotiations for a sale, the court stated that:

_If any word of affirmation_ is used in such a manner as to show that the party expects or desires the other party to rely upon the assertion _as a matter of fact_, instead of taking it as an expression of judgment or opinions of the vendor, it amounts to a warranty._

(Emphasis added.)

Under the above rule a statement of opinion could be the basis of warranty liability even if it were couched in terms of opinion or labeled as an estimate. Such a rule is sound. It recognizes the realities of bargaining in the business world and produces results which are more equitable than those reached under the strict "opinion or fact" rule.

Considering the case of _White v. Stelloh_ in 1889, the Wisconsin court added another figure to the formula outlined above. The court declared that "a mere statement by the seller, of his own opinion and belief, not amounting to a positive affirmation or statement of fact, and upon a matter concerning which the purchaser is to exercise his own judgment, does not amount to a warranty._

By this statement the court clearly outlined which statements of opinion would not be the basis of warranty, namely, those opinions upon matters which the purchaser is to exercise his own judgment. Before the _White_ case the opportunity of the buyer to form his own opinion was not a factor to be considered in determining whether a seller's opinion would constitute a warranty. Wisconsin was apparently the first state to make this inroad into the previously protected area of statements of opinion.

The test outlined in _White_ is a simple and a logical one. It declares that a seller will not be held to have made a warranty by a statement of opinion if the buyer has an "equal opportunity" to form his own opinion on the subject. Conversely stated, the seller will be held to have made a warranty if the seller expresses an opinion in an area in which he has special knowledge. This "equal opportunity test" has been widely adopted by the various states.

While still considering "intention to warrant" as an element, the supreme court of Texas recognized that even opinion could constitute a warranty. In _United States Pipe and Foundry Co. v. City of Waco_,

have constituted a warranty if it was so intended and relied upon. _Baker v. Henderson_, 24 Wis. 509, 511 (1869).

_Tenn v. Cowles_, 67 Wis. 594, 31 N.W. 221 (1887).

_Id._ at 596, 31 N.W. at 223.

_74 Wis. 435, 43 N.W. 99 (1889)._ The subject of the sale was a three month old bull calf which was later found to be sterile. The court stressed the fact that, at the time of sale, the buyer was in an equally favorable position to judge whether or not the calf would be productive when fully grown.

_Id._ at 435, 43 N.W. at 99.

_130 Tex. 136, 103 S.W. 2d 432 (1937)._
the supreme court of Texas stated that one key factor would determine whether a statement of opinion would be a warranty or not. That key factor was designated by the court as "whether or not its [the statement of opinion's] correctness is a matter of which either of the parties can judge as well as the other, upon which the buyer can, and may, reasonably be expected, in the exercise of ordinary diligence, to have formed his own opinion." The holding of this case was particularly significant in the field of warranty because of the unique nature of the fact situation. The vendor in the *U.S. Pipe* case was attempting to market a newly invented type of underground pipe. This new type of pipe was not fully tested and its properties were largely unknown. In a letter to the prospective buyer, the vendor stated that the new type of pipe was amply strong for use under deep fills. Many courts still harboring the old school of thought would have declared such a statement to be merely an expression of opinion which was not binding regardless of the vendor's special knowledge on the subject. The Texas court in *U.S. Pipe*, however, seized upon this ideal fact situation to voice its view on the question of when the vendor should be bound by a statement of his opinion or judgment. The view of the court was strictly reflective of the trend toward increased protection of the consumer. The local retailers' association was given additional cause to worry when, the court further stated that the seller's superior knowledge "in conjunction with the buyer's relative ignorance operates to make the slightest divergence from mere praise into representations of fact effective as a warranty." Such language could be an indication that even the favored category of "dealer's praise" or "puffing" may not be exempt from warranty liability for very long.

Following suit, the Kentucky court placed a strict construction upon remarks made by the vendor in the case of *Wedding v. Duncan*. During negotiations for the sale of a new type of hybrid seed, the vendor referred to the product as being "outstanding" and having the properties of producing an "exceptional yield." Had he terminated his remarks at this point the court would have undoubtedly dismissed them as mere puffing. However, he went on to cite various figures of how many bushels per acre the seed had produced in the past. The often

54 Id. at 436. But compare, J. C. Penney Co., Inc. v. Scarborough, 148 Mass. 310, 186 So. 316 (1939) where the supreme court of Mississippi held that a sales clerk was in no better position than a buyer to judge whether or not the ingredients of the product were harmful.

55 After making minor repairs on the automobile to be sold, the seller stated that it was in a "safe running condition." Disregarding the special knowledge of the vendor, the Georgia court held that "the assurance given by the employee of the defendant [the seller] did not amount to an express warranty, but was merely an expression of their opinion or belief." *Terrell v. Florence*, 53 Ga. App. 360, 185 S.E. 839, 840 (1936).


57 310 Ky. 374, 220 S.W. 2d 564 (1949).
cited test laid down in the *Wedding* case is not one designed to differ-
entiate opinion from fact, but rather one to differentiate opinion
from warranty. The latter category was obviously designed to include
assertions of fact and opinion. The *Wedding* test of whether a given
representation is a warranty, or a mere expression of opinion or judg-
ment is:

> [W]hether the seller assumes to assert a fact of which the buyer
is ignorant, or whether he merely states an opinion or expresses
a judgment about a thing as to which they may each be expected
to have an opinion and exercise a judgment.\(^{58}\)

This variation of the Wisconsin "equal opportunity" test is noteworthy
because it does not require that the vendor have any special knowledge
in the area of the opinion statement. The only fact required to make
the statement of opinion binding is that the buyer be ignorant in that
area. The burden of such a test upon the seller is heavy indeed. It
prevents him from making indiscriminate statements concerning mat-
ters which are beyond the knowledge of both buyer and seller. Such a
rule has long been needed to protect the average buyer from unscrupu-
lous selling techniques. Although the rule is harsh with the seller who
tends to exaggerate when pushing his wares, it has an aspect of in-
creased fairness with respect to the square-dealing vendor. This is true
because the rule places an increased responsibility on the buyer in areas
where he is capable of forming his own opinion or judgments.

Indicative of this favorable aspect of the rule are cases dealing with
an object of sale which is simple enough in nature that the buyer can
form his own opinion of its quality by merely observing it. The supreme
court of Florida was faced with such a case in 1952.\(^{59}\) In attempting
to sell a stepladder, the vendor noted that the product was "strong,"
would "last a lifetime" and that the prospective buyer would "never
break it." After dismissing the latter two remarks as obvious "puff-
ing" and in fact "no representations at all," the court moved on to con-
sider the question of whether the representation that the ladder was
"strong" constituted a warranty or mere opinion on a subject upon
which the seller and the buyer could form an opinion or judgment. In
applying the rule the court concluded the representation of strength
did not constitute a warranty for the simple reason that a buyer "can
know as much as a salesman of a stepladder by simply looking at it."\(^{60}\)

Such an interpretation of this rule on opinion statements is most de-
sirable. It requires honesty on the part of the seller and also requires
the buyer to use his head and enter negotiations with his eyes open.

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\(^{58}\) *Id.* at 567. *Cf.* Wat Henry Pontiac Co. v. Bradley, 202 Okla. 82, 210 P. 2d 348 (1949).

\(^{59}\) Lambert v. Sistrunk, 58 So. 2d 434 (Fla. 1952). *Cf.* Carney v. Sears and Roe-

\(^{60}\) Lambert v. Sistrunk, 58 So. 2d 434, 435 (Fla. 1952).
Such a delicate balance between the responsibility required of each party was not easily achieved. Praise should be given to those courts which have developed it with such admirable aplomb.

At least one learned writer in the field of warranty is not satisfied with the development and progress of the law in the area of opinion statements. In referring to the "equal opportunity" test currently being applied to opinion statements Professor Williston observes that the test does not seem conclusive. He states his position as follows:

Though a buyer has the opportunity and the skill to pass judgment upon goods, he may be induced not to do so, by positive statements of the seller. If such statements are made for the purpose of inducing a sale and do induce it, there seems no reasons why the seller should not be liable.\(^1\)

With all due respect to Professor Williston's experience and judgment, there seems to be a very plausible argument to the contrary. First of all, the realities of any business transaction demand that both parties have some responsibility to exercise their own judgment. Secondly, there is no apparent reason why the law should step out of its way to protect one who makes no effort to protect himself. Any buyer who would not take the trouble to form his own opinion on a subject when the facts are before his eyes would appear to be in a rather difficult position to appeal for sympathy from the courts. To follow Professor Williston's suggestion would be to destroy the present balance of responsibility and thrust the entire burden upon the shoulders of the vendor. Such a harsh rule would not further the cause of justice in the business relationship between buyer and seller.

V. EFFECT OF THE "BASIS OF THE BARGAIN" CONCEPT ON WISCONSIN LAW

As previously noted, all statements of the seller will enter into and become part of the "basis of the bargain" if they relate to the goods and are not mere statements of value or commendation. Since the language of the Code in section 2-313(1)(a) clearly indicates that some opinions may enter into the basis of the bargain, the question of where to draw the line rests with the courts of the adopting states. Since the Wisconsin court has been a pioneer in the area of extending warranty liability to opinion statements a sizable body of case law is at hand on the subject of increasing the protection of the consumer against such remarks by the seller. The question of "what statements of opinion will enter into the "basis of the bargain" will be answered by the existing "equal opportunity" role:

\[ A \] mere statement by the seller, of his own opinion and belief, not amounting to a positive affirmation or statement of fact,

\(^{61}\) 1 WILLISTON, SALES §202 (rev. ed. 1948).
and upon a matter concerning which the purchaser is to exercise his own judgment, does not amount to a warranty.63

Clearly then, the only opinion statements which will not enter into the "basis of the bargain" in Wisconsin are those which deal with a subject upon which the buyer had an "equal opportunity" to form his own opinion or judgment. Since Wisconsin has already made inroads into the field of opinion statements, the advent of the "basis of the bargain" concept will not change the trend of the law in this state. If anything, section 2-313(2) will accelerate this trend, as it clearly contemplates a very narrow range in which the seller can "puff."63

Recent Wisconsin cases have faithfully adhered to the element of reliance required by the Sales Act.64 In this respect the Code will change the existing law in Wisconsin in that no particular reliance need be shown for a statement to enter into the "basis of the bargain."65 This aspect of section 2-313 will shift the presumption of reliance in favor of the buyer. Consequently, it will become more difficult for the vendor to defend on the ground that the buyer inspected the goods and therefore did not rely on the representation. The making of this often specious defense more onerous to assert is also a step in the right direction.

VI. CONCLUSION

In response to strong public opinion on the subject the courts and legislatures have taken large strides to increase the protection of the consumer from false or exaggerated statements made by vendors. Before the turn of the century, the courts almost unanimously held that no statement of opinion could be the basis of warranty. The gradual erosion of the opinion defense shows no signs of losing momentum. On the contrary, judicial statements like the following hint that the erosion may limit the seller to mere commendation in the very near future:

"When the limits of the required form of prevarication known as "dealers talk" have been overstepped . . . the law does step in and protect the buyer."66

If the vendor states a fact which relates to the quality, condition, capacity, character, kind, variety, or title of the goods, he will most

63 White v. Stelloh, 74 Wis. 435, 437, 43 N.W. 99, 100 (1889).
65 Hellenbrand v. Bowar, 16 Wis. 2d 264, 114 N.W. 2d 418 (1962).
66 \[N]o particular reliance on such statements [affirmations of fact or promise] need be shown in order to weave them into the fabric of the agreement.\ UNIFORM COMMERCIAL CODE §2-313, Comment 3.
68 McGuire v. Thompson, 152 Neb. 28, 40 N.W. 2d 237 (1949).
69 Witte v. Cook Tractor Co., 261 S.W. 2d 651 (Mo. 1953).
assuredly be held to have made a warranty under section 2-313. The vendor can ease his burden by making it clear to the buyer that the statement is merely his opinion. This technique will presently gain him the advantage of the "equal opportunity" test. No matter what type of legislative formula is applied, it is doubtful that the courts will ever impose liability in the absence of some semblance of reasonable reliance by the buyer. However, assuming no change in the trend of the law, it will behoove the seller of today and tomorrow to watch his tongue very carefully.

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70 Welch Veterinary Supply Co. v. Martin, 313 S.W. 2d 111 (Tex. 1958).