Disclosures As Warranties

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The federal securities laws are conventionally understood as a disclosure regime: They compel issuers to provide information to the market, and they back that mandate with strict liability under provisions such as Section 11 of the Securities Act. Yet this account is incomplete. This Article reconceptualizes Securities Act liability through the lens of express warranty law. It makes two critical observations. First, certain issuer disclosures—registration statements, prospectuses, and analogous offering materials—constitute express warranties under contract law principles. Second, the Securities Act's liability provisions function as a parallel express warranty regime, mirroring warranty law's virtually strict liability. Seen in this light, the Act was not a sui generis New Deal innovation but part of a broader legal convergence: Across both goods and securities, the law evolved to assure reliability in impersonal, mass-market transactions where negotiated terms are impractical. Ironically, the Securities Act's liability provisions predominate precisely in the public markets where warranty liability would be most difficult to avoid, because in these markets, investors buy without individualized contracts. Recasting the statute in this way reveals a previously unappreciated function: not to create new liability, but to entrench a market structure in which issuer disclosures operate as inescapable, enforceable promises that define the modern securities market.

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TABLE OF CONTENTS

INTRODUCTION 1279
I. EXPRESS WARRANTIES 1283
II. WARRANTIES AND THE EXISTING REGIME FOR PUBLIC SECURITIES 1285
A. ARE SECURITIES DISCLOSURES WARRANTIES? 1285
B. SECURITIES ACT LIABILITY AS A FUNCTIONAL WARRANTY REGIME 1287
1. Core Warranty Principles: The Bones of the Securities Act 1288
a. Affirmations of Fact Made by the Seller at the Time of Sale 1289
b. Rescissory Damages as a Fallback 1290
2. Alignment at the Margin: Evolving Parallels in Response to Market Pressures 1291
a. The Privity Requirement (Or Not): Tracing Repackaged 1291
b. The Unlikely Reliance Morass 1294
3. Modern Markets: A Shared Engineering Problem 1295
C. PUBLIC DISCLOSURES AND THE ABSENCE OF WARRANTY CLAIMS 1299
III. CONTRACTUAL SECURITIES SALES AND THE ROLE OF DISCLOSURES 1300
A. REPRESENTATIONS AND WARRANTIES IN THE SECURITIES CONTEXT 1301
B. THE ROLE OF DISCLOSURES IN PRIVATE SECURITIES LITIGATION 1301
1. Excluding Disclosure Liability: Confused, But Easy 1302
2. Including Disclosure Liability: Straightforward, But Difficult 1305
IV. THE ARCHITECTURE OF ENFORCEMENT: DISCLOSURES THAT BIND 1306
A. CONTRACT BY CONDUCT: WHY WARRANTY LOGIC WORKS IN THE PUBLIC MARKETS 1307
B. SECURITIES ACT AND EXPRESS WARRANTIES IN SALES OF PUBLIC SECURITIES: DUPLICATIVE REGIMES AS A HELPFUL EXPERIMENT 1310
CONCLUSION 1312

INTRODUCTION

Since its inception, the federal securities regime has been understood primarily as a disclosure regime, designed to force information into the market to protect investors and promote efficiency.[1] Less frequently, but no less critically, scholars have emphasized its liability function: disclosures are meaningless if they can be false with impunity, and liability provisions such as section 11 of the Securities Act of 1933 give the regime its teeth by ensuring that the information issuers are required to provide is accurate.[2] Yet the structure and function of Securities Act liability remain largely undertheorized.[3]

The familiar narrative of the Securities Act contributes to this gap. The Act did not emerge from a long, deliberative process but from a moment of political crisis. Responding to urgent pressure in early 1933, Felix Frankfurter summoned a small group to Washington, where a law professor and two practitioners drafted the bill's core provisions over a single weekend.[4] This origin story encourages us to view the Act as a statutory creation of the New Deal: purpose-built, crisis-driven, and distinct from the evolutionary logic of the common law. Over time, the Act also became institutionally siloed, treated by practitioners, agencies, and academics as "securities law," a domain unto itself.

That combination of crisis-driven drafting and conceptual isolation has obscured how much of the Act fits within a broader legal toolkit. Indeed, the Securities Act's core liability provisions track a set of concerns and design choices that areas of the common law were already struggling to solve. This Article reconceptualizes the Securities Act through the lens of express warranty

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1. *See*, *e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 669 (1984); Merritt B. Fox, *Civil Liability and Mandatory Disclosure*, 109 COLUM. L. REV. 237, 239 (2009); Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 713 (2006); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2361-62 (1998); John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 235–36 (2007); Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81, 82 (2007).

2. Fox, *supra* note 1, at 273 ("[T]he system of civil liability should be structured in such a way that corporate decisionmakers have equally strong incentives for disclosure regulation compliance . . . "); Easterbrook & Fischel, *supra* note 1, at 670; Henry G. Manne, *Economic Aspects of Required Disclosure Under Federal Securities Law*, *in* WALL STREET IN TRANSITION: THE EMERGING SYSTEM AND ITS IMPACT ON THE ECONOMY 23 (Henry G. Manne & Ezra Solomon eds., 1974) (discussed and summarized in Houman B. Shadab, *Henry Manne and Nonpublic Company Disclosure*, 12 J.L., ECON. & POL'Y 361, 369 (2016)).

3. Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 339 (2013) ("[T]he public-private divide has long been an entirely undertheorized aspect of securities regulation."); George S. Georgiev, *The Breakdown of the Public–Private Divide in Securities Law: Causes, Consequences, and Reforms*, 18 N.Y.U. J.L. & BUS. 221, 224 (2021) ("The [public–private] divide has always been imperfect and, its foundational role notwithstanding, somewhat undertheorized."); J. Richard Zecher, *An Economic Perspective of SEC Corporate Disclosure*, 6 J. CORP. L. 307, 307 (1981) ("[F]ew economists have made any serious effort to analyze the corporate disclosure system . . . [because they] lacked a theoretical framework of the corporation, the capital markets, and the role of economic information that was adequate to the task of studying a government program generating detailed facts about individual corporations.").

4. James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 33–34 (1959).

law, showing that its liability scheme mirrors the mechanisms that warranty law was in the process of developing to make impersonal markets trustworthy. The point is not that the Securities Act proponents understood themselves to be adopting an express warranty regime—they did not. Rather, both bodies of law share key features that evolved as responses to the same structural problem of modern commerce: how to make mass transactions trustworthy when negotiated terms are impracticable and fraud as a remedy is underinclusive. As markets shifted from face-to-face exchange to mass advertising, dispersed buyers, and deep informational asymmetry, multiple areas of law converged on the same solution: strict liability for factual assurances backed by rescissory remedies.[5] By placing the risk of inaccuracy squarely on the seller, strict liability makes sellers' factual assurances credible. Buyers can transact without assuming that informational disadvantages will be exploited, and markets can function without the drag of pervasive mistrust. The similarities between express warranty doctrine and the Securities Act are therefore not curiosities: They reflect parallel adaptations to a shared engineering challenge. Seeing Securities Act liability through this lens reveals its deeper logic and clarifies why several of its most distinctive features take the form they do.

To support this argument, this Article makes three related claims. First, certain issuer disclosures, such as registration statements, prospectuses, and analogous offering materials create liability independent of the Securities Act because they operate as express warranties. Second, the Securities Act's famously rigid liability provisions—principally, Section 11—function as a duplicative warranty regime, mirroring warranty law's virtually strict liability and remedial structure. Third, by channeling public investors into transactions that lack negotiated contracts, the Act created the very conditions in which such warranties can bind without exclusion. Ironically, express warranty-style liability can be effective in public markets precisely because those markets are least contractual: investors buy through impersonal exchanges where there is no written agreement to exclude it.

The balance of this Article elaborates these claims. It begins by showing why disclosures are properly treated as express warranties: Affirmations of fact made by the seller at the time of sale that become the "basis of the bargain."[6] Such affirmations of fact are routinely found in the registration statements and prospectuses of public companies,[7] and in the offering memoranda and

5. See *infra* Subpart.II.B.

6. 18 WILLISTON ON CONTRACTS § 52:49, Westlaw (4th ed. 2024).

7. *See* 15 U.S.C. § 77g (2024) (requiring that registration statements "contain the information, and be accompanied by the documents, specified in Schedule A" and "such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors"); 15 U.S.C. § 77j (2024) (requiring that prospectuses "contain the information contained in the registration statement" and otherwise comply with SEC rules prescribing the content and form of prospectuses); 17 C.F.R. § 229 (2026) (establishing "standard instructions

marketing material of private placements.[8] In the private context, it is virtually uncontested that the liability attaching to these materials is contractual; for public securities, accuracy is generally enforced by the liability provisions of the Securities Act.

This Article then demonstrates that key components of the Securities Act replicate the structure of warranty liability. Most saliently, Section 11 imposes near-strict liability for false statements in a registration statement,[9] just as a seller is bound by an express warranty regardless of intent.[10] Even the Act's remedial scheme—typically rescissory damages, which restore injured parties to their original position[11]—mirrors the traditional remedy for breach of warranty where expectation or "benefit-of-the-bargain" damages are speculative or impracticable.[12] Both regimes have evolved mechanisms to tether the item sold to the relevant affirmation, preventing the transformation of strict liability into an insurance regime[13]

Next, the Article explains why express warranty liability is particularly fragile in modern markets. Express warranties outside the four corners of the agreement—such as those in marketing materials—can be excluded almost effortlessly with boilerplate integration clauses.[14] Though sophisticated buyers sometimes succeed in contractually incorporating such warranties in private securities sales,[15] doing so requires effort and bargaining power.[16] This asymmetry means that claims brought for breach of express warranties based on disclosures and marketing materials in private securities transactions are rarely

for filing forms" under the Securities Act, including detailed requirements for disclosure of affirmative facts about the registrant's business, properties, management, financial statements, risk factors, and more, in both registration statements and prospectuses).

8. *See*, *e.g.*, THOMAS P. LEMKE, GERALD T. LINS, KATHRYN L. HOENIG & PATRICIA S. RUBE, HEDGE FUNDS AND OTHER PRIVATE FUNDS: REGULATION AND COMPLIANCE § 5:4, Westlaw (4th ed. 2024) (Nov. 2025 update) (citing the private placement memorandum as the "key disclosure document").

9. Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983) ("If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his prima facie case.").

10. Gustafson v. Alloyd Co., 513 U.S. 561, 582 (1995) (finding Section 12(a)(2) is "not limited to 'fraudulent' or 'reckless' conduct").

11. 15 U.S.C. §§ 77k(e), 77l(a)(2) (setting forth statutory rescissory damages formulas).

12. E. ALLAN FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS § 12.01 (4th ed. 2004) (Mar. 2026 update) ("Measuring damages by the reliance interest is often supposed to pose fewer problems of causation than measuring by the expectation interest.").

13. This role has been performed at various times in express warranty law by privity, reliance, and identification doctrines; the Securities Act links affirmations to securities sold using the tracing requirement. *See infra* Subpart.II.B.2.a.

14. *See infra* Subpart.II.B.1.

15. *See infra* Subpart.II.B.2.

16. *See* Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1666–67, 1692–93 (2012).

successful.[17] And in the context of public securities, such claims are virtually nonexistent because plaintiffs rely on Securities Act claims instead.[18]

But ironically, the very statute that displaced warranty claims in public deals also created a transactional setting where express warranties could actually hold: a market in which securities are largely sold without negotiated contracts and the integration clauses that go with them. Exchange-traded and widely held securities are required to be registered under the Act,[19] and these securities are rarely purchased through negotiated contracts.[20] Thus, public investors generally only buy securities in a transactional setting where express warranties in disclosures "stick," precisely because there is no written contract containing language that could neutralize them. Thus, although the Act's liability scheme is duplicative of warranty law, it also establishes the environment in which warranty law on its own can succeed.

From this perspective, the Securities Act's significance is not only that it compels disclosure, but also that it stabilizes the architecture of a market where disclosures could function as enforceable promises. Although drafted in a weekend rather than evolved over centuries, the Act solved the same problem express warranty law was struggling to address elsewhere: how to sustain trust in mass, unnegotiated exchange. Recasting the Securities Act in this light complicates the familiar view of it as a New Deal innovation. Its mechanism is older than its origin story suggests. The Act did not invent a new kind of liability so much as transpose an existing one—strict responsibility for factual assurances—into the public securities marketplace. In this sense, the Securities Act is not an outlier to the evolutionary story of private law but part of it: a statutory branch of warranty law adapted to the distinctive problems of mass, anonymous capital markets.

This Article proceeds as follows: Part I defines express warranties and explains why securities disclosures fit squarely within that framework. Part II examines the existing regime for public securities, showing how the Securities Act operates as a functional express warranty regime, and explaining why express warranty claims based on disclosures themselves are virtually nonexistent. Part III turns to private, contractual securities sales, demonstrating why liability for disclosures is so easily excluded by default and why including it requires uncommon sophistication and leverage. Part IV then develops the claim that the Securities Act did more than mandate disclosure: it created the

17. *See infra* Subpart.III.B.1.

18. *See infra* Subpart.II.C (noting that this situation persists even though express warranty claims may, in some situations, provide practical advantages to plaintiffs over Securities Act claims).

19. To trade on national securities exchanges, securities must be registered. 15 U.S.C. § 78l(a).

20. *See Public Companies*, SEC (Aug. 8, 2025), https://www.sec.gov/resources-small-businesses/capital-raising-building-blocks/public-companies ("Companies can choose to 'list' their securities for trading on a national securities exchange. . . . Listing securities may provide increased liquidity for a company's shareholders by making it easier for shareholders to sell their securities to other investors in the public market, sometimes called secondary trading.").

architecture in which warranties can bind in the public markets, displacing the contractual failures of the private sphere. It further considers the broader implications of this reframing, suggesting that seeing the Act as a warranty regime reshapes how we understand both the structure of securities liability and the market it was designed to govern. This Article then concludes.

I. EXPRESS WARRANTIES

Commentators have noted that "[f]ew areas of the law have historical origins more complex than the law of warranty."[21] Warranty cases were initially brought as a species of tort, and migrated to contract more recently, which accounts for features of warranty law (such as the vestigial reliance requirement) that courts have struggled to harmonize over decades of interpretation.[22] However, although the doctrinal path has been winding, the underlying function of express warranties has been remarkably stable from the origin of warranty law in England: Sellers who breached their express warranties were held strictly liable.[23]

Modern contract law typically defines an express warranty as an affirmation of fact by the seller at the time of sale of some quality or condition of the thing being sold.[24] The statement must be verifiable fact, rather than puffery or opinion.[25]

To qualify as an express warranty, the "natural tendency" of the statement must be to induce purchase.[26] The statement must be the "basis of the bargain."[27] This requirement reflects the historical origins of warranty law as a branch of tort. Over time, jurisprudence has migrated to viewing warranties simply as contract terms, and accordingly, the "basis of the bargain" requirement (somewhat akin to reliance) has weakened or collapsed in most jurisdictions.[28] Accordingly, many courts have held that any affirmation of fact is "presumed to

21. Timothy J. Sullivan, *Innovation in the Law of Warranty: The Burden of Reform*, 32 HASTINGS L.J. 341, 342 (1980).

22. *Id.* at 351–52.

23. *Id.* at 346–47.

24. WILLISTON ON CONTRACTS, *supra* note 6.

25. *Id.* §§ 51:64–51:71. There is a general trend, regarding securities specifically, to constrain puffery in the application of express warranties. *Id.* Express warranties may be made regarding a variety of features to particular securities; in particular, sellers may warrant the financial condition of a company. *See id.* (noting that a seller may expressly warrant the value of the stock, the income to be derived from the shares, guarantee a certain dividend, agree to pay the purchaser a certain percentage per year on the par value of the stock, guarantee that the stock will be worth a stated amount within a given time, agree for a specified period not to engage in a business similar to that of the company whose shares are being sold, warrant that no new leases will be made by the company, represent that the plant is in good repair, guarantee that there will be no assessments on the stock, warrant that certain other outstanding stock is common stock, or guarantee that preferred stock will be redeemed at a specified future time).

26. *Id.* § 52:49.

27. *Id.*; CORPORATE COUNSEL'S GUIDE TO WARRANTIES § 7:9, Westlaw (Nov. 2025).

28. James J. White, *Freeing the Tortious Soul of Express Warranty Law*, 72 TUL. L. REV. 2089, 2089–90, 2098–99 (1998).

become a basis of the bargain" for the purpose of establishing an express warranty.[29]

While there is substantial variation among jurisdictions, today contractual privity is generally not required to prevail on a claim for breach of express warranty.[30] This is because "it is deemed fair to impose responsibility on one who makes affirmative claims as to the merits of the product, upon which the remote consumer presumably relies."[31] More specifically, privity is not required to prevail on a claim for breach of express warranty in many mass marketing contexts, such as where "where the representations are made by labels, advertisements, or sales brochures or literature."[32] Critically, a claim for the breach of an express warranty must demonstrate that the breach caused actual loss to the plaintiff;[33] breach alone is insufficient.

Additionally, a written contract is not necessary for an express warranty to apply to a sale. Contract formation does not require a signed agreement; it can arise through conduct, including the offer and acceptance inherent in placing and fulfilling a market order.[34] The buyer pays money, the seller transfers the item, and both parties receive consideration. Courts have long recognized that such transactions create enforceable contractual relationships.[35] That the terms are standardized or the parties unknown is unimportant: The contract exists, and doctrines like warranty can, in principle, apply to it. Indeed, express warranties can attach to standardized, mass-market transactions formed without negotiation or formal writings.[36]

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29. *See* Tolmie Farms, Inc. v. J.R. Simplot Co., 862 P.2d 305, 310 (Idaho Ct. App. 1992), *aff'd in part*, *rev'd in part*, 862 P.2d 299 (Idaho 1993); *see, e.g.*, Sweco, Inc. v. Cont'l Sulfur & Chem., 808 S.W.2d 112, 115–16 (Tex. App.–El Paso 1991) (holding that no reliance is required to create an express warranty); *see also* CBS Inc. v. Ziff-Davis Publ'g Co., 553 N.E.2d 997, 1000–001 (N.Y. 1990) (detailing circumstances where a buyer did not actually believe information received).

30. 77A C.J.S. SALES § 417, Westlaw (Dec. 2025) (citing Cardinal Health 301, Inc. v. Tyco Elec. Corp., 87 Cal. Rptr. 3d 5 (Cal. Ct. App. 2008)).

31. *Id.*

32. *Id.* (internal citations omitted).

33. *See* WILLISTON ON CONTRACTS, *supra* note 6, § 52:46 (explaining that the plaintiff must prove "that the breach of warranty caused the plaintiff's injury").

34. *See* RESTATEMENT (SECOND) OF CONTRACTS § 22(2) (A.L.I. 1981) ("A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.").

35. *See*, *e.g.*, Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923) ("[A]n agreement 'implied in fact' [is] founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 28 (2d Cir. 2002) (Sotomayor, J.) ("Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.").

36. *See* Randy Knitwear, Inc. v. Am. Cyanamid Co., 181 N.E.2d 399, 402 (N.Y. 1962) ("It may once have been true that the warranty which really induced the sale was normally an actual term of the contract of sale. Today, however, the significant warranty, the one which effectively induces the purchase, is frequently that given by the manufacturer through mass advertising and labeling to ultimate business users or to consumers with whom he has no direct contractual relationship."); U.C.C. § 2-313 cmt. 3 (A.L.I. & UNIF. L. COMM'N 2022) ("In actual practice, affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown . . . .").

Taken together, these elements reflect a body of law that treats factual assurances made in connection with a sale as binding without proof of intent to deceive and generally without negotiated agreement or direct privity. Express warranty doctrine thus supplies a mechanism for holding sellers strictly accountable for the accuracy of their representations in standardized, impersonal market transactions. Scholarly commentary has emphasized that warranties do more than simply restate facts about a product: They operate as social instruments that build trust in impersonal markets.[37] Warranties have also been theorized as risk-allocation devices[38] and as credible signals of quality,[39] drawing on economic accounts of asymmetric information. Understood this way, express warranties operate as fundamental tools of market ordering.

II. WARRANTIES AND THE EXISTING REGIME FOR PUBLIC SECURITIES

Securities disclosures can be understood through the framework of express warranty law. Like warranties in ordinary sales, securities disclosures are seller affirmations of fact made at the time of sale and offered to induce purchase. The Securities Act's core liability provisions, particularly sections 11, mirror warranty liability's strict, non-fraud-based structure. They impose near-strict liability, treat qualifying statements as automatically incorporated into the transaction, and provide rescissory remedies without requiring proof of reliance or scienter. Despite this functional overlap, no one brings breach-of-warranty claims for false or misleading securities disclosures.[40] This absence in part reflects doctrinal path dependence: Lawyers and courts reach reflexively for the Securities Act, even though its liability regime largely replicates the work that warranty law would otherwise do. The following Parts develop this argument in three parts: (A) why disclosures are properly treated as warranties; (B) how the Act's liability regime mirrors express warranty law and how these bodies of law share features adapted in response to the same market pressures, and (C) why warranty claims are nonetheless absent from public securities litigation.

A. ARE SECURITIES DISCLOSURES WARRANTIES?

Despite the dearth of cases addressing whether statements in securities disclosures are express warranties, the argument that at least some such statements qualify is straightforward. If an express warranty is an "affirmation of fact" made by the seller at the time of sale,[41] the range of statements potentially covered is very broad.

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37. *See*, *e.g.*, Karl Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 712–23 (1936).

38. *See* George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1298 (1981).

39. *See id.* at 1303 (discussing the "signaling" theory of warranties as formulated by contemporaries such as Spence and Akerlof).

40. *See infra* Subpart.II.C.

41. WILLISTON ON CONTRACTS, *supra* note 6,. § 52:49.

In the public context, most obviously, registration statements consist of statements made by the seller of securities at the time of their sale and include a wide array of information. Perhaps most important among them are financial statements, such as income statements and balance sheets.[42] In addition to being highly material to investors, these statements are also unlikely to pass as inactionable opinions or sales puffery. More generally, registration statements usually include positive affirmations as to the use of the proceeds of the issuance,[43] the issuer's business,[44] operating results,[45] property,[46] and executive compensation.[47]

Relatedly, many issuances, particularly shelf issuances, incorporate by reference the firm's periodic disclosures—most importantly its annual report, which is incorporated in its 10-K filing. These filings also include audited financial statements, and must contain information regarding the firm's business,[48] properties,[49] legal proceedings,[50] and controls and procedures.[51] To the extent that such statements are affirmations of fact made by the seller at the time of sale, they also may constitute express warranties.

To be sure, many significant elements of issuers' public disclosures may not qualify as express warranties because they are not explicit affirmations of fact. This may be true even if such statements are of great importance to investors. For instance, projections regarding the company's prospects, which may be key to a decision to invest, are unlikely to qualify as affirmations of fact. The same goes for opinions of the management and anything that might be characterized as sales puffery.[52]

Construing certain statements in securities disclosures as warranties also leaves out some significant categories that may constitute substantial sources of

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42. *What Is A Registration Statement?*, SEC, https://www.sec.gov/resources-small-businesses/going-public/what-registration-statement.

43. PRAC. L. CORP. & SEC., REGISTRATION STATEMENT: FORM S-1, PRACTICE NOTE 0-381-0950, Westlaw (2026).

44. *Id.* (describing required disclosures of the issuer's business under Item 101 of Regulation S-K).

45. *Id.* (describing disclosure of issuer's operating results, liquidity position, capital resources and other relevant financial information under Item 303 of Regulation S-K).

46. *Id.*

47. *Id.*

48. *Investor Bulletin*, *How to Read a 10-K*, SEC: OFF. OF INV. EDUC. & ADVOC., https://www.sec.gov/files/reada10k.pdf (last visited Apr. 10, 2026) ("[M]ain products and services, what subsidiaries it owns, and what markets it operates in. This section may also include information about recent events, competition the company faces, regulations that apply to it, labor issues, special operating costs, or seasonal factors.").

49. *Id.* (including "plants, mines, and other physically important properties").

50. *Id.* (including significant lawsuits or legal proceedings, "other than ordinary litigation").

51. *Id.* (discussing firm's controls and procedures for financial reporting).

52. It is worth noting here the analog to the rich universe of case law governing these important statements that nonetheless fall short of material misrepresentations for the purpose of establishing a standard securities fraud claim. Forward-looking statements, for instance, are in many instances protected by a safe harbor under the PSLRA. *See* 15 U.S.C. § 78u-5. Whether an opinion is actionable has been carefully circumscribed. *See* Omnicare Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 188–89 (2015). Some classic opinions defining puffery have been broadly interpreted. *See* Eisenstadt v. Centel Corp., 113 F.3d 738, 746 (7th Cir. 1997).

liability under the standard securities fraud regime. First, because the disclosure must be made by the seller at the time of sale, not all disclosures would qualify. For instance, periodic disclosures not made in connection with an issuance or incorporated by reference into the registration documents for an issuance would not give rise to liability as express warranties. Relatedly, other statements made by an issuer or controller not in connection with an issuance, which may give rise to substantial liability under Rule 10b-5, are unlikely to qualify as express warranties because they are not made by the seller at the time of sale.[53]

B. SECURITIES ACT LIABILITY AS A FUNCTIONAL WARRANTY REGIME

The Securities Act governs primary issuances by companies. The most common claims are brought under Section 11 and Section 12(a)(2), often together.[54] This Article primarily addresses Section 11, which I argue is the cleanest analogy to modern express warranty law, although I occasionally address issues that relate to both kinds of claims. Both claims require a material misstatement or omission that causes damages. Section 11 requires such a material misstatement or omission to be in a registration statement and imposes virtually strict liability on the issuer,[55] while Section 12(a)(2) punishes misstatements in a prospectus (which loosely applies to most marketing material).[56] Registration statements and prospectuses are formalized marketing documents, designed to inform and persuade investors. They closely resemble the kinds of representations that, in other settings, would be treated as express warranties.

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53. I note that express warranty liability generally does not encompass pure omissions. *See* Sidco Prods. Mktg., Inc. v. Gulf Oil Corp., 858 F.2d 1095, 1099 (5th Cir. 1988) ("Omissions, however, are not affirmative representations of any sort and thus cannot support a warranty claim, because express warranties must be explicit."). In the most general sense, neither do the securities laws. *See* Gallagher v. Abbott Labs., 269 F.3d 806, 808 (7th Cir. 2001) ("We do not have a system of continuous disclosure. Instead firms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose."). However, because the Securities Act mandates certain disclosures, it does impose liability for pure omissions where mandated disclosures are absent. *See* Macquarie Infrastructure Corp. v. Moab Partners, L. P., 601 U.S. 257, 264–65 (2024) ("By its terms, in addition to proscribing lies and half-truths, this section also creates liability for failure to speak on a subject at all."); *Omnicare*, 575 U.S. at 186 n.3 ("Section 11's omissions clause also applies when an issuer fails to make mandated disclosures—those 'required to be stated'—in a registration statement."). An express warranty claim, like a securities claim, might be brought, however, where an omission renders an express affirmation false or misleading.

54. *See*, *e.g.*, WINSTON & STRAWN LLP, *Circuit Split Brews Over Who's a Securities Seller Under Act*, (Apr. 29, 2024), https://www.winston.com/en/insights-news/circuit-split-brews-over-whos-a-securities-seller-under-act (noting that Section 12 has "long [been] thought of as a mere tagalong to Section 11").

55. 15 U.S.C. § 77k(a) ("In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . may . . . sue.").

56. 15 U.S.C. § 77l(a)(2) ("Any person who . . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading . . . shall be liable.").

The Securities Act of 1933 effectively imposes express warranty-style liability for these public disclosures: it holds issuers and potentially other participants strictly liable for material misstatements—without requiring proof of intent—and imposes rescissory damages. To be clear, there appears to be absolutely no legislative history suggesting that this gloss was considered when the 1933 Act was being drafted or passed. The drafters understood themselves to be basing their work on the English Companies Act, but this statute lacks a strict liability cause of action for misstatements.[57] Nonetheless, the Securities Act's parallel to the core structure of express warranty liability—affirmations of fact binding sellers without regard to intent, enforced primarily through rescission—has remained constant across time. Although doctrinal wrinkles at first glance appear to differentiate express warranty law from core Securities Act liability—questions of privity, reliance, and the like—those differences have largely dissolved as both bodies of law evolved under the same market pressures. The Securities Act translated privity into a tracing requirement, ensuring that liability attached only where a purchase could be linked to the challenged disclosure. Express warranty doctrine, facing analogous problems in consumer markets, gradually relaxed privity in cases involving mass-marketed goods. Similarly, although reliance once played an uneven role in warranty law, courts have softened or abandoned it in contexts where warranties function as market-wide assurances. This mirrors the Securities Act's strict liability framework, which never imposed reliance in the first place. In both domains, the evolution reflects the same underlying dynamic: once sellers distribute standardized statements to dispersed buyers, liability must attach without individualized negotiation or reliance if the object is to promote market-wide trust. Ultimately, both bodies of law adapted to the same policy concerns raised by mass-market sales of fungible, widely advertised products.

1. Core Warranty Principles: The Bones of the Securities Act

The basic framework of the Securities Act parallels the foundational structure of express warranty law. Both fundamentally enforce affirmations of fact made by the seller at the time of sale, with no scienter requirement. The Securities Act also awards rescissory damages, a standard fallback option in warranty law where the benefit of the bargain is speculative.

57. *See* PRAC. L. CORP., STATUTORY LIABILITY FOR FALSE OR MISLEADING STATEMENTS, OMISSIONS AND DISHONEST DELAY: COMPANY REPORTS AND PUBLISHED INFORMATION RELATING TO SECURITIES, Westlaw (2026) ("[T]here was no statutory liability regime for inaccurate statements . . . where liability was imposed on the basis of negligence . . . [and l]iability for misstatements in periodic financial statements could be established through the tort of deceit."); J. WILLIAM HICKS, CIVIL LIABILITIES: ENFORCEMENT & LITIGATION UNDER THE 1933 ACT § 4:83 (2024) ("Although the drafters of the Securities Act drew heavily upon the English Companies Act of 1929 for the registration and prospectus delivery provision, they deviated from the standards in that statute in formulating the civil liability sections.").

a. Affirmations of Fact Made by the Seller at the Time of Sale

Both Securities Act claims and breach of express warranty claims encompass a misstatement of affirmative fact made by the seller or issuer at the time of sale. Crucially, neither type of claim requires scienter[58]—meaning no intention is necessary to have sold something other than what was promised.

One facial difference between Securities Act claims and claims for breach of express warranty is that for a viable Securities Act claim, the misstatement in the registration statement or prospectus must be material.[59] A misstatement is "material" if it would be important to the reasonable investor in the "total mix" of information considered in the investment decision.[60] Although breach of express warranty claims contain no formal materiality requirement, this distinction collapses under scrutiny. Warranty law polices immaterial statements through threshold doctrines that parallel the way securities law treats materiality. Statements too vague or promissory to constitute "affirmations of fact" are excluded as puffery,[61] just as they are in Securities Act cases. Even if a trivial misstatement technically breaches a warranty, it will not constitute a viable breach-of-warranty claim if the breach did not directly cause a loss to the plaintiff.[62] This mirrors how immaterial misstatements may fail under the Securities Act's loss causation framework.[63] Similarly, knowledge of falsity[64]

58. Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983) ("If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his prima facie case."). Reliance, scienter, and loss causation are not required elements of a Section 11 claim. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 34, § 3:1 (stating breach of express warranty does not require proof of intent or knowledge of falsity).

59. 15 U.S.C. § 77k(a) (2024).

60. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote . . . What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.").

61. *See, e.g.*, Vitt v. Apple Comput., Inc., No. 10–55941, 2012 WL 627702, at *1 (9th Cir. Feb. 28, 2012) (affirming dismissal of express warranty claim where statements describing laptops as "mobile," "durable," "reliable," "high performance," and "high value" were "inherently vague and generalized terms" constituting non-actionable puffery); *In re* Gen. Motors Corp. Anti-Lock Brake Prods. Liab. Litig., 966 F. Supp. 1525, 1531 (E.D. Mo. 1997), *aff'd*, 172 F.3d 623 (8th Cir. 1999) (dismissing breach of express warranty claims where statements relied upon by plaintiff constituted puffery, explaining that "claims that a product is 'the best' or 'superior' are non-actionable puffery").

62. *See, e.g.*, E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 957 (5th Cir. 1976) (holding that the breach of warranty must be shown to have been the proximate cause of the loss claimed in order for there to be recovery therefor).

63. *See, e.g.*, Miller v. Thane Int'l, Inc., 615 F.3d 1095, 1102 (9th Cir. 2010) (finding "[s]ection 12 liability may be avoided by way of an affirmative defense of lack of loss causation," also known as negative causation).

64. *See, e.g.*, *In re* Initial Pub. Offering Sec. Litig., 483 F.3d 70, 73 n.1 (2d Cir. 2007) (clarifying a defense can be brought under Section 11 if the defense proves that the plaintiff knew about an untruth or omission at the time it purchased the security); DeMaria v. Andersen, 318 F.3d 170, 175 (2d Cir. 2003) (recovery only if the purchaser had actual knowledge of the falsity).

and truth on the market[65] defenses, which vitiate Securities Act claims on materiality grounds, also operate pragmatically in the warranty context because they demonstrate that the breach caused no damages. A buyer who knew an affirmation was false would suffer no loss because the truth would be priced into the bargain.[66] Likewise, the functional role of the "truth on the market" defense in securities class action context is simply to show that the misstatement caused no loss because the market had already priced it—a limit that would operate the same way in warranty. In this sense, the Securities Act does not depart from warranty liability; it is best understood as channeling warranty's filters through the vocabulary of the securities regime.

b. Rescissory Damages as a Fallback

The Securities Act's remedial structure closely parallels the damages framework courts apply in express warranty law. Sections 11 and 12(a)(2) provide rescissory remedies: plaintiffs may recover the purchase price minus resale value, or seek rescission and restitution.[67] Although warranty law nominally defaults to benefit-of-the-bargain damages—measuring the difference between the value as promised and the value as delivered—courts routinely abandon that approach when the warranted value is too subjective or difficult to prove. In such cases, especially in mass-market settings, courts fall back on reliance-based or rescissory measures.[68] The logic is pragmatic: Where individualized valuation is not feasible, the most reliable indicator of loss is often simply the price paid.[69] This approach appears in warranty cases involving defective services, software, or mass-marketed goods, where courts treat refund-like awards as a natural fit for warranty breaches that undermine the core value

65. Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 516 (7th Cir. 1989) ("Prompt incorporation of news into stock price is the foundation for the fraud-on-the-market doctrine and therefore supports a truth-on-the-market doctrine as well . . . . Knowledge abroad in the market . . . cannot be the basis of liability.").

66. Like all contract claims, the default remedial scheme for breach of express warranty is expectation damages. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 34, § 347 cmt. a. A buyer who knew a warranty was false would, from the outset of the transaction, calculate the "benefit of the bargain" in light of that knowledge. *Id.* Thus, all else being equal, the actual value of the transaction would equal the buyer's expected value, meaning that damages would be zero.

67. *See, e.g.*, 15 U.S.C. § 77k(e) (stating Section 11 damages equal the purchase price minus value at suit or sale); 15 U.S.C. § 77l(a)(2) (communicating Section 12(a)(2) provides for rescission or rescissory damages); Randall v. Loftsgaarden, 478 U.S. 647, 655–56 (1986) (explaining that rescissory damages are the baseline remedy under the Securities Act and rejecting offset for tax benefits).

68. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 34, § 349.

69. *See, e.g.*, La Nasa v. Russell Packing Co., 198 F.2d 992, 992 (7th Cir. 1952) (Bakers seeking damages for breach of warranty correctly demanded full refund of purchase price); Bagwell v. Susman, 165 F.2d 412 (6th Cir. 1947) (bringing an example where a breach of warranty claim is remedied by recission of the contract and return of insufficient goods). *Cf.* Am. Sugar Ref. Co. v. J.E. Jones & Co., 293 F. 560, 562 (5th Cir. 1923) (explaining that due to complications after the sale of some of syrup, the defendant was not entitled to a rescission for breach of implied warranty).

of the product.[70] In this sense, both regimes seek to compensate the buyer for not receiving what was promised, and both resort to rescission-like remedies when the value of the promised thing is inherently hard to pin down.

2. Alignment at the Margin: Evolving Parallels in Response to Market Pressures

To be sure, Securities Act law and express warranty law have not always been identical at the margin. Warranty law in particular, as a common law doctrine subject to evolution by different jurisdictions over hundreds of years, has involved wrinkles that lack obvious parallel in the Securities Act. Two notable examples are the privity and reliance requirements. Yet, as the market has evolved toward mass-marketed, unnegotiated transactions for virtually or completely fungible items, these wrinkles have relaxed, and Securities Act and express warranty law have come increasingly into alignment, even at the margin.

a. The Privity Requirement (Or Not): Tracing Repackaged

One largely historical distinction between Securities Act and breach of express warranty claims is who is eligible to bring them. Securities Act plaintiffs must be able to trace their securities to the registration statement or prospectus at issue—a rigorous standing requirement known as "tracing."[71] This requirement is the main constraint on Securities Act claims.[72] Courts have interpreted tracing to require actual tracing of the security to the registration statement or prospectus at issue; a high probability that the security was part of that issuance is insufficient.[73]

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70. *See, e.g.*, Hubbard v. General Motors Corp., No. 95 Civ. 4362, 1996 WL 274018, at *5–6 (S.D.N.Y. May 22, 1996) (awarding refund where diminished value was hard to calculate); *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 155 F. Supp. 2d 1069, 1088 (S.D. Ind. 2001) (finding a refund of the purchase price is an appropriate remedy in warranty actions where other damages are too speculative); *see also* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 34, § 349 (allowing recovery of reliance damages as fallback when expectation measure fails).

71. *See* Slack Techs., LLC v. Pirani, 598 U.S. 759, 768 (2023). Section 11 only covers securities that are registered under the specific registration statement on which the plaintiff has sued. Thus, to bring a claim under Section 11, the securities held by the plaintiff must be traceable to the particular registration statement alleged to be false or misleading.

72. I note that unlike Section 11, Section 12(a)(2) requires purchase from a "statutory seller" on top of the tracing requirement. *See* 15 U.S.C. § 77l(a)(2); Pirani v. Slack Techs., Inc., 127 F.4th 1183, 1191 (9th Cir. 2025). This is more akin to a true privity requirement.

73. *See* Krim v. pcOrder.com, Inc., 402 F.3d 489, 493, 496–97 (5th Cir. 2005) ("[T]he 'Lead Plaintiffs must demonstrate *all* stock for which they claim damages was actually issued pursuant to a defective statement, not just that it might have been, probably was, or most likely was, issued pursuant to a defective statement.' . . . We are persuaded that accepting such 'statistical tracing' would impermissibly expand the statute's standing requirement. Because any share of pcOrder.com stock chosen at random in the aftermarket has at least a 90% chance of being tainted, its holder, according to Appellants' view, would have Section 11 standing. In other words, *every* aftermarket purchaser would have standing for every share, despite the language of Section 11, limiting suit to 'any person acquiring *such* security.' . . . This cannot be squared with the statutory language — that is, with what Congress intended. We decline the invitation to reach further than the statute. . . . To allow Appellants to satisfy the tracing requirement for aftermarket standing in this case with the

Most jurisdictions, at least historically, have required privity with the seller to state a claim for breach of an express warranty.[74] In some jurisdictions, this has persisted longer,[75] although many jurisdictions have relaxed it, particularly in consumer contexts.[76] In the majority of jurisdictions where privity is not required, it is tempting to think that a claim for breach of express warranty based on a misstatement in a registration statement or prospectus might be applicable irrespective of how the investor purchased the security. If there is no requirement that the purchase be from the issuer who made the disclosure/warranty, this in theory could have the effect of opening up the realm of Securities Act-like claims—with no scienter, a longer limitations period, and no PSLRA strictures—to the secondary market.

Such an effect might be celebrated in some quarters as a means to fully effect the purpose of the Securities Act,[77] the other features of which make it highly deterrent. Other perspectives,[78] including those of practitioners defending issuers from securities class actions,[79] might argue that relaxing the tracing requirement would open the floodgates to a tsunami of vexatious claims. Irrespective of the side on which one falls, however, a wave of express warranty

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proffered statistical methodology would contravene the language and intent of Section 11."); *see also Pirani*, 598 U.S. at 765 (holding that the better reading of §11 is that the securities held by the plaintiff must be traceable to the particular registration statement alleged to be false or misleading); *Pirani*, 127 F.4th at 1190 (agreeing with the Fifth Circuit, which has likewise rejected the concept of 'statistical tracing' in the context of a Section 11 claim).

74. *See, e.g.*, Burr v. Sherwin Williams Co., 268 P.2d. 1041, 1048 (1954) ("The general rule is that privity of contract [between the plaintiff and defendant] is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is [not] a party to the original sale.").

75. T.W.M. v. Am. Med. Sys., Inc., 886 F. Supp. 842, 844 (N.D. Fla. 1995) ("The law of Florida is that to recover for the breach of a warranty, either express or implied, the plaintiff must be in privity of contract with the defendant.").

76. Gary E. Sullivan & Braxton Thrash, *Purchasers Lacking Privity Overcoming "The Rule" for Express Warranty Claims: Expanding Judicial Application of Common Law Theories and Liberal Interpretation of U.C.C. Section 2-318*, 5 DREXEL L. REV. 49, 49–61 (2012) (broadly discussing the application of the privity requirement in express warranty claims, and concluding that though the requirement remains present and inconsistent enough to be confusing, there is a clear trend toward abolishing it, especially under broader consumer protection statutes and the UCC).

77. *See, e.g.*, Hillary A. Sale, *Disappearing Without a Trace: Sections 11 and 12(a)(2) of the 1933 Securities Act*, 75 WASH. L. REV. 429, 429–30, 482–83 (2000); John C. Browne & Lauren A. Ormsbee, *Section 11's Tracing Doctrine Goes Up to the Supreme Court*, 56 REV. SEC. & COMMODITIES REGUL. 67, 72 (2023). The authors caution that a strict application of the tracing requirement in direct listings may render Section 11 claims virtually impossible, frustrating the remedial goals of the Securities Act.

78. John C. Coffee, Jr. & Joshua Mitts, *Can Section 11 Be Saved?: Tracing a Path to Its Survival*, CLS BLUE SKY BLOG (Dec. 6, 2023), https://clsbluesky.law.columbia.edu/2023/12/06/john-c-coffee-jr-and-joshua-mitts-can-section-11-be-saved-tracing-a-path-to-its-survival ("Tracing should be required in order to keep the potential liability proportionate to the size of the offering. . . . [T]he real issue is not whether tracing should be required, but how it should (and can) be done.").

79. Ken Cunningham, Grant Thornton, Bruce R. Braun & Neil H. Conrad, *Litigating Section 11's Tracing Requirement: A Practitioner's View of a Powerful Defense*, BLOOMBERG L. (June 2019) ("This tracing requirement is integral to Congress's decision to relax the liability requirements for a Section 11 claim, and plaintiffs who choose to proceed under Section 11 rather than Section 10(b) should be required to prove the traceability of their shares as the statute demands.").

claims from the secondary market is unlikely. This is not because of the occasional requirement that the buyer be in privity with the seller for an express warranty to apply, but rather because of the universal requirement that the item or service alleged to be in breach of the warranty be identified as having been covered by the warranty in the first place.[80] This is typically the case even with respect to warranties on services or software, where physical identification of an item is difficult or impossible (as opposed to a sale of goods where serial numbers and the like are more easily available).[81] Where items covered by the warranty are completely fungible with those that are not—as would be the case for, for example, a company's common stock issued in the initial public offering (IPO) as opposed to in a shelf offering—the same tracing mechanism necessary for a Securities Act claim is the only surefire way to accomplish such identification. Accordingly, tracing, or something similar, is likely to be necessary in the context of a breach of express warranty based on a public securities disclosure, irrespective of whether the jurisdiction at issue requires privity with the seller.[82]

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80. *See, e.g.*, *In re* Sony Grand., 758 F. Supp. 2d 1077, 1099–1100 (S.D. Cal. 2010) (dismissing express warranty claim where statement at issue was part of a general advertisement and there was no link to specific TV units sold to plaintiffs). *See generally* Atkinson v. Elk Corp. of Tex., 48 Cal. Rptr.3d 247, 232 (2006) (affirming summary judgment because plaintiffs could not prove that warranted roofing tiles had actually been used on their homes).

81. *See, e.g.*, BK Trucking Co. v. Paccar, Inc., No. 15-2282, 2016 WL 3566723, at *6 (D.N.J. June 30, 2021) (dismissing claims for breach of express warranty in software-controlled emissions systems, because there was no evidence that the warranty applied to the specific at-issue version of the software); *In re* Mazon, 387 B.R. 641, 647 (M.D. Fla. 2008) (dismissing an express warranty claim for tax services where, among other issues, it was not clear that the warranty applied to that precise service).

82. To be sure, items covered by express warranties that are as completely fungible as securities are rare, and courts have had little inclination to articulate how the identification requirement functions in such contexts. In mass-market commercial settings, where warranties are disseminated broadly through labeling, advertising, or promotional materials, it is not impossible that courts might infer warranty coverage without requiring individualized proof. Courts have roundly rejected probabilistic tracing under the Securities Act, even where it might address the same problem of fungibility. *See* Krim v. pcOrder.com, Inc., 402 F.3d 489, 493, 496–97 (5th Cir. 2005). The Supreme Court's opinion in *Slack Techs., LLC v. Pirani* rested on a textualist interpretation of the Securities Act. 598 U.S. 759, 765 (2023). Warranty law, by contrast, has no such statutory anchor. It arises from the common law and the UCC, both of which may invite a more contextual and pragmatic inquiry. *See, e.g.*, N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange over Legal Realism*, 1989 DUKE L.J. 1302, 1311 (1989) (citing Karl Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665 (1925)); Curtis E.A. Karnow, *Litigating California Contracts*, 17 HASTINGS BUS. L.J. 165, 177 (2021) ("The 1940s saw an increasing shift toward contextualism . . . ."). Accordingly, the doctrinal resistance to probabilistic tracing in securities law does not necessarily foreclose all analogical reasoning in adjacent areas. Of course, the applicability of probabilistic tracing, even in a potentially more flexible context, such as warranty law, is purely speculative. Because warranty liability traditionally requires a link between the seller's affirmation and the specific item sold, the most likely outcome is that satisfaction of the identification requirement in warranty law will require the same rigorous tracing necessary in the Securities Act context. This could be established by the same means that recent scholarship has discussed in the context of the Securities Act, through purchase in the IPO, purchase on the aftermarket within a lockup period, or tracing the chain of title through broker-dealer records. John C. Coffee Jr. & Joshua Mitts, *Can Section 11 Be Saved?: "Tracing" a Path to Its Survival*, 15 HARV. BUS. L. REV. 1, 16–25 (2015).

b. The Unlikely Reliance Morass

A claim for breach of express warranty, unlike a Securities Act claim, has historically required a showing of reliance in some jurisdictions. As in other areas of the law, a true reliance requirement would likely defeat the possibility of class certification in most contexts,[83] as the individual inquiries as to whether particular plaintiffs relied on the warranty would predominate over class-wide inquiries.[84] However, many jurisdictions have more recently held that reliance is not an element of a claim for breach of an express warranty.[85] Although the caselaw in this area once away from the realm of the UCC (which does not require reliance) has been somewhat confused, the reliance requirement is softened or irrelevant in many jurisdictions,[86] particularly where the warranty is included in promotional material or widely disseminated.[87]

Securities law has already grappled with this problem, albeit in a different context. In the well-known "fraud-on-the-market" theory, plaintiffs bringing Rule 10b-5 claims based on securities traded in an efficient market benefit from a rebuttable presumption of reliance on the statements at issue. This is because all public information is assumed to be incorporated into the market price of the

83. *See, e.g.*, Tershakovec v. Ford Motor Co., Inc., 79 F.4th 1299, 1312 (11th Cir. 2023) ("Plaintiffs' claims brought under these causes of action can't be certified for class treatment because proving an individual's reliance will necessarily require individualized evidence."); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation."); Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 141 S. Ct. 1951, 1957–58 (2021) ("The [fraud-on-the-market] presumption allows class-action plaintiffs to prove reliance through evidence common to the class. That in turn makes it easier for plaintiffs to establish the predominance requirement of Federal Rule of Civil Procedure 23, which requires that 'questions of law or fact common to class members predominate' over individualized issues. . . . Indeed, without the *Basic* presumption, individualized issues of reliance ordinarily would defeat predominance and 'preclude certification' of a securities-fraud class action.").

84. Comcast Corp. v. Behrend, 569 U.S. 27, 30 (2013).

85. *See, e.g.*, Weinstat v. Dentsply Int'l, Inc., 103 Cal. Rptr. 3d 614, 625 (Cal. Ct. App. 2010) (finding "[r]eliance plays no role" in express warranty claims); Bobb Forest Prods., Inc. v. Morbark Indus., Inc., 783 N.E.2d 560, 576 (Ohio Ct. App. 2002) (holding the buyer need not show reliance on the warranty, only that the warranty was part of the basis of the bargain); CBS Inc. v. Ziff-Davis Publ'g Co., 553 N.E.2d 997, 1001 (N.Y. 1990) ("The critical question is not whether the buyer believed in the truth of the warranted information . . . but 'whether [it] believed [it] was purchasing the [seller's] promise [as to its truth].'").

86. *See, e.g.*, Hauter v. Zogarts, 534 P.2d 377, 383 (Cal. 1975) ("The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller . . . 'no particular reliance . . . need be shown in order to weave [the seller's affirmations of fact] into the fabric of the agreement.'."). Keith v. Buchanan, 220 Cal. Rptr. 392, 387 (Ct. App. 1985) ("The representation need only be part of the basis of the bargain, or merely a factor or consideration inducing the buyer to enter into the bargain. A warranty statement made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest at all on the representation.."); Weinstat v. Dentsply Int'l, Inc., 103 Cal.Rptr.3d 614, 626 (Ct. App. 2010) ("The lower court ruling rests on the incorrect legal assumption that a breach of express warranty claim requires proof of prior reliance. While the tort of fraud turns on inducement, as we explain, breach of express warranty arises in the context of contract formation in which reliance plays no role..").

87. *See, e.g.*, Kraft v. Dr. Leonard's Healthcare Corp., No. 04-72769, 2009 WL 981687 (E.D. Mich. Apr. 13, 2009); Fed. Signal Corp. v. Safety Factors, Inc., 886 P.2d 172, 178 (Wash. 1994).

security.[88] The logic of this presumption is also applicable to express warranty claims for mass-marketed and largely fungible goods when the key statements are public, uniform, and integrated into price. The mechanism is the same: a widely disseminated affirmation shapes expectations in the market, not because each buyer reads it, but because its existence and presumed accuracy affect demand. In both settings, the statements at issue often come from the same source (a company) and relate to the same subject (the value or condition of a security or product). And in both cases, the harm arises when those statements are false. That warranty law has increasingly softened its reliance requirement, particularly for widely distributed claims made in advertising or promotional materials, suggests that it is quietly responding to the same intuition: the value of a thing is shaped by the assurances made about it, and buyers rely, not individually, but collectively, on the integrity of those assurances. Loosely, the idea is that the market expects that someone has vetted the seller's claims, and that the quality and credibility of those claims help determine the value of what's being bought.

3. Modern Markets: A Shared Engineering Problem

The Securities Act began with the same core commitments as express warranty law—strict liability for affirmations of fact and rescissory remedies—and over time, the two bodies of law have converged even further. They have evolved in parallel under the same market pressures of mass, unnegotiated sales of fungible goods and securities. At their core, the Securities Act and express warranty law both confront the same engineering problem of modern markets: how to sustain reliable trade in a world of mass advertising, impersonal transactions, and asymmetric information.

Some theorists have noted that consumer warranties respond to one facet of this problem by providing signals of quality to buyers; where information is asymmetric and personal assurances are unavailable, trade might otherwise stall.[89] Securities disclosures themselves might be construed as performing this signaling role. Other commentators have argued that warranties allocate the risk of product failure between seller and buyer in a way that reflects both parties' capacity to manage that risk.[90] They function not only as signals of quality but as sorting devices, allowing sellers to segment consumers by their willingness

88. Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988).

89. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970); *see also* ERIC TALLEY, EXPECTATIONS AND LEGAL DOCTRINE, *in* PARADOXES AND INCONSISTENCIES IN THE LAW 184 (Oren Perez & Gunther Teubner eds., 2006) ("In [a] warranty example, for instance, a buyer's genuine belief that she can recover on a warranty claim is likely to increase her willingness to pay for the item. If—as is likely—this enhanced willingness to pay is reflected in an increased price, then that premium will constitute the pivotal evidence required by a court to grant protection. But by granting protection, the court renders true the buyer's initial belief that the warranty was enforceable to begin with.").

90. *See* Priest, *supra* note 38, at 1306–12.

to assume risk and by the mitigation efforts they are prepared to undertake.[91] In a sense, Securities Act liability is the cleanest application of this theory. While consumers might take post-purchase efforts to mitigate the risk of product failure, this is not possible in a securities context. Any risk mitigation efforts taken by the buyer, such as diligence, must be done ex ante. Accordingly, the risk allocated to sellers under the Securities Act is narrow but crucial, and consists solely of the risk that disclosures were inaccurate. Buyers bear all other risks, and sort themselves according to their various tolerances.

Yet, a seller's affirmations do not promote trust—either by signaling quality or allocating risk—if they lack bite. Fraud, with its requirement of bad intent, is an underinclusive guarantor of commercial stability, even when understood as a low-cost substitute for more formal assurance mechanisms.[92] Not only is scienter difficult to prove, but in mass markets with asymmetric information, buyers cannot distinguish honest sellers from dishonest ones. Such an asymmetry sows mistrust against even high-quality sellers and chills commerce.[93] This is the foundational reason that liability for express warranties and under the Securities Act is virtually strict: It makes all seller signals credible by allocating the risk of defects to the seller. But pragmatically, this approach transforms the seller into an insurer, and is thus not commercially viable.[94] Accordingly, in both warranty law and securities law, the central challenge is tethering liability to the seller's own representations without imposing open-ended insurer status on the seller. Different doctrinal devices have done this work at different times.

In warranty law, privity historically performed this tethering function. But in mass markets, a strict privity requirement makes little sense. Consumers acquire goods through intermediaries, distributors, or retailers, and it would

91. *Id.* at 1313.

92. Some economic accounts identify warranties as a credibility device and describe antifraud liability as supplying a low-cost "informational warranty": by attaching a penalty to false disclosure, the law can deter low-quality firms from mimicking high-quality ones, reducing the need for costly private certification and verification. *See* Easterbrook & Fischel, *supra* note 1. That account, however, treats antifraud liability as a functional substitute for warranty assurance, without recognizing the disclosures themselves as warranties. Moreover, although enforcement against false disclosures can promote market trust by increasing the cost of misrepresentation and mitigating verification costs, modern antifraud liability does not fully substitute for express warranty liability because it generally does not attach to inaccuracy as such; it is filtered through scienter and related elements that make it an uneven guarantor of informational accuracy.

93. Akerlof, *supra* note 89, at 495.

94. This concern may be more acute in the securities context because disclosures under the Securities Act are mandatory, 15 U.S.C. § 77g, distinguishing them from express warranties in other contexts, which are voluntary. The fact that such disclosures are compelled might be an additional reason to hesitate before imposing a strict liability regime. The general justification for this, however, is that information asymmetries for new issuers are unusually severe, and that investors at the moment of issuance are largely dependent on issuer-provided disclosures for valuation. For this reason, Congress paired mandatory disclosure with a non-scienter-based liability regime, effectively allocating the risk of inaccuracy to issuers rather than purchasers for statements the issuers are required to make. Whether this allocation is optimal might be debated, but it is consistent with treating Securities Act liability as performing a warranty-like function despite the compulsory nature of the underlying disclosures.

defeat the assurance function of a warranty if the manufacturer could escape liability simply because the buyer did not purchase directly.[95] Scholarly commentary recognized since relatively early days that the privity requirement of warranty law in the mass market context was untenable.[96] Market pressure therefore eroded privity, extending warranties "downstream."[97] But once privity fell away, the law still needed some mechanism to tie liability to the right transactions. Identification continues to perform this role: the buyer must show that the particular good she received was the one covered by the warranty at issue. Otherwise, the seller would become the insurer of all similar goods in circulation, including those it never warranted.

The reliance requirement—as it has intermittently existed in express warranty law—can be understood as performing a similar function. Reliance in express warranty law never required proof of belief in the strict fraud sense.[98] Rather, it has been based on the idea that the statement must be part of the "basis of the bargain."[99] This is best viewed as another form of tethering device: a way of linking the seller's affirmation to the buyer's purchase, so that liability attached only where the representation was part of a specific transaction. As mass marketing expanded, even this minimal reliance requirement eroded; the law came to presume that affirmations of fact were part of the deal, recognizing that individualized reliance was unnecessary in markets built on standardized representations.[100]

Under the Securities Act, particularly Section 11, tracing performs this tethering function. Though it looks like a privity requirement, it is in fact an identification device. Securities are fungible and indistinguishable once they are in the market. The only way to ensure that liability attaches to the securities actually sold under a particular registration statement is to require investors to trace their holdings back to that offering. Without tracing, issuers would effectively guarantee all securities of the same class in circulation, regardless of whether those securities were ever sold under the disclosure at issue.

The throughline is that all three doctrines—privity, reliance, and tracing—are not ends in themselves but mechanisms for keeping liability tethered to the seller's own representations. Under pressure from mass markets in fungible goods and securities, the law adjusted each doctrine to preserve and update that

95. *See* Sullivan, *supra* note 21, at 359-60.

96. *See, e.g.*, Llewellyn, *supra* note 37, at 712.

97. *See supra* Subpart II.B.2.a. (discussing the privity requirement).

98. *See generally* Llewellyn, *supra* note 37.

99. See *supra* notes 86; *see also* Sullivan, *supra* note 21, at 389–90.

100. The Supreme Court's embrace of the fraud-on-the-market presumption in *Basic v. Levinson* mirrors warranty law's retreat from individualized reliance: where securities are traded in liquid, informationally efficient markets, reliance can be presumed because the market itself incorporates the representation into price. 485 U.S. 224, 242 (1988).

tether.[101] The result is structural convergence: Warranty law and the Securities Act both evolved toward strict liability for affirmations of fact, with tethering devices pared back to their minimal function of matching a representation to a sale.

The convergence—both functional and mechanic—of express warranty law with the Securities Act undercuts the familiar view that the Act is a sui generis product of the New Deal. In fact, it fits within a broader body of law that has long grappled with how to make impersonal markets reliable. Commentators have suggested that the common law, unlike much legislation, tends over time to promote economic efficiency.[102] The argument is that judge-made law evolves incrementally, with inefficient rules generating continued litigation and pressure for change, while doctrines that approximate efficient outcomes are more stable. The result is a "convergence, frequently subtle and unexpected, between common-law rules and the implications of economic theory" over long periods of time.[103] This dynamic has been traced across diverse fields where doctrines that might appear arbitrary at first glance can be rationalized as minimizing the costs of accidents, enforcing only those promises that maximize joint gains, or internalizing externalities.[104]

On this theory, legislation does not display the same evolutionary tendency. Statutory and administrative rulemaking often reflect redistributive pressures rather than efficiency considerations and may even "reduce efficiency" by serving compact interest groups at the expense of diffuse publics.[105] Scholars drawing on the economic theory of regulation have emphasized that government action is frequently a commodity allocated by political markets. Accordingly, statutory outcomes are stochastic—products of bargaining among shifting coalitions—rather than the result of any long-run selection for efficiency.[106] In this light, major regulatory enactments of the twentieth century, particularly the New Deal statutes, appear to be adopted in crisis, shaped by political

101. Section 12(a)(2) layers on top of the tracing requirement with additional tethering devices: the "statutory seller" requirement, functionally akin to a privity requirement, and the "by means of a prospectus" requirement, which has been interpreted to restrict its application to publicly sold securities sold by means of a statutory prospectus. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 571 (1995). In this respect, it looks like an earlier iteration of express warranty law, with a privity requirement and an ambiguous gesture toward reliance. This reinforces the idea that both bodies of law experimented with parallel mechanisms to solve the same market problems.

102. *See, e.g.*, Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43, 61 (2007).

103. Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 289 (1979).

104. *Id.* at 289–90 (collecting examples from torts, contracts, admiralty, remedies, privacy, and property).

105. *Id.* at 289 (noting that government "is frequently involved in redistributive activities that actually reduce efficiency").

106. *See id.* at 288 (contrasting efficiency-oriented common law with redistributive statutory and administrative rulemaking); *see also* Ponzetto & Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 382 (2008).

compromise, and not subject to the same case-by-case corrective mechanisms that operate in the common law.[107]

All of this makes the distinction between an efficiency-evolving common law and a stochastic statutory regime sound very tidy, but the picture is complicated when one views the Securities Act as a kind of express warranty regime. It would be inaccurate to suggest that the Act was modeled directly on common-law warranties, yet its central liability mechanism performs a virtually identical function. At the same time, the common law of warranties was itself evolving in ways that parallel the challenges the Act sought to address in mass securities offerings, and doctrines under the Act, such as tracing, developed in ways that resemble common-law adaptations to the problems of scale and proof in modern markets. From this angle, the Act looks less like an idiosyncratic product of the New Deal and more like a particular instantiation of warranty law adapted to a new transactional setting. The more illuminating comparison, then, may not be between "common law" and "statute" at all. Rather, it is between two branches of warranty doctrine responding in parallel to the demands of impersonal, high-volume exchange.

C. PUBLIC DISCLOSURES AND THE ABSENCE OF WARRANTY CLAIMS

Although registration statements and prospectuses can be conceived as express warranties, there appear to be no instances in which public investors—and their lawyers—assert claims that a misrepresentation in a registration statement or prospectus breached an express warranty.[108]

One reason for this is probably that class actions for express warranty claims in several key jurisdictions would likely be interpreted to be preempted by the Securities Litigation Uniform Standards Act (SLUSA).[109] SLUSA prevents class actions alleging misrepresentations or omissions "in connection with the purchase or sale of a covered security" from being brought in state court.[110] The language of the statute mirrors the elements of much-more-common Rule 10b-5 claims, which require showings of scienter and reliance. However, some courts have held that no pleading of scienter or reliance is required to bring claims within the ambit of SLUSA preemption.[111] Although

107. *See, e.g.*, Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 BYU L. REV. 147, 160 (2021).

108. A single lawsuit pleaded a theory of implied warranty, which was dismissed on the ground that it was based on a Louisiana statute which applied specifically to sales of goods. *See In re* Merrill Lynch Auction Rate Sec. Litig., 758 F. Supp. 2d 264, 286 (S.D.N.Y. 2010).

109. 15 U.S.C. § 78bb(f)(1). I note, however, that federal preemption is unlikely to be a meaningful obstacle to warranty claims based on misstatements in registration statements or other public disclosures. The Securities Act contains no express preemption provision for state-law remedies.

110. 15 U.S.C. §§ 77p(b), 78bb(f)(1).

111. *See, e.g.*, Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc., 521 F.3d 1278, 1285 (10th Cir. 2008); Winne v. Equitable Life Assurance Soc'y of the U.S., 315 F. Supp. 2d 404, 413–15, 415 n.5 (S.D.N.Y. 2003); Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1346 (11th Cir. 2002); Feitelberg v. Merrill Lynch & Co., 234 F. Supp. 2d 1043, 1051 (N.D. Cal. 2002).

other courts have held the opposite,[112] the variation in the judicial interpretations of SLUSA preemption likely discourages plaintiffs from bringing class actions under a warranty theory.

But such lawsuits were virtually unknown even prior to the passage of SLUSA in 1998. This may be because of the incentives of the plaintiffs' bar. Although plaintiffs' lawyers are not categorically averse to novel claims, warranty claims specifically may offer little added value in most cases. Their elements closely mirror those of Section 11 claims,[113] and courts rarely see them in the securities context, creating uncertainty about how such claims would be analyzed. More fundamentally, unless the statutory clock has run on a Securities Act claim,[114] a breach of warranty theory is not a substantive fallback. This is because the elements required to prove a breach of express warranty are virtually identical to those required for a Securities Act claim; If the Section 11 claim fails on the merits, the warranty claim likely fails as well. In this light, most plaintiffs' firms see little reason to spend limited litigation resources developing a risky parallel theory that will probably rise or fall with the familiar one. It is accordingly likely that the Securities Act has simply become the default doctrinal tool for litigating false issuer disclosures. Plaintiffs' lawyers reach for it not because it is the only available option, but because it is the obvious one. The familiarity and institutionalization of securities law crowd out other frameworks, even when those frameworks might be conceptually appropriate.

III. CONTRACTUAL SECURITIES SALES AND THE ROLE OF DISCLOSURES

Securities, like other items sold in commerce, can be warranted. Transactional lawyers and the architects of structured finance have long operated on this premise: representations and warranties are standard features of stock purchase agreements, asset purchase agreements, servicing agreements, and other deal documents. A small but telling number of cases have involved investors asserting breach of express warranty or other claims based on

112. *See, e.g.*, Green v. Ameritrade, Inc., 120 F. Supp. 2d 795, 798 (D. Neb. 2000); Burns v. Prudential Sec., Inc., 116 F. Supp. 2d 917, 923–24 (N.D.Ohio 2000). Notably, Securities Act claims themselves may now indisputably be brought in state court. Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 582 U.S. 951, 951 (2018). In this light, it is perhaps worth considering whether interpreting SLUSA to preempt virtually identical claims from state courts makes sense.

113. *See supra* Part.II discussion on doctrinal overlap.

114. The statute of limitations on Securities Act claims is only one year, and claims are barred entirely after three years. 15 U.S.C. § 77m ("No action shall be maintained to enforce any liability created under section 77k or 77l(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. . . . In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public . . . "). Conversely, statutes of limitations for express warranty claims usually track state contract law, and generally range between three and six years. *See, e.g.*, Gregorio v. Ford Motor Co., 522 F. Supp. 3d 264, 287 (E.D. Mich. 2021) ("The limitations period for express and implied warranty claims, as well as Magnuson-Moss Warranty Act claims, is four years in California."); Weiss v. Polymer Plastics Corp., 802 N.Y.S.2d 174, 176–77 (2005) (applying four-year statute of limitations for contract to express and implied warranties).

statements in private placement memoranda, offering circulars, or marketing materials—direct analogues to a public registration statement or prospectus. These claims, however, almost always fail, not because the statements fall outside warranty law, but because written contracts make it far easier to evade warranties than to enforce them. This Part examines how that contractual structure erodes express warranty liability in private securities sales and helps explain why a statutory regime like the Securities Act was required to supply the warranty-like assurance that private ordering systematically undermines.

A. REPRESENTATIONS AND WARRANTIES IN THE SECURITIES CONTEXT

Express warranties are commonplace in private securities transactions, particularly in mergers, acquisitions, and venture financings.[115] Stock purchase agreements routinely include detailed representations about the issuer's financial condition, capitalization, compliance status, and ongoing litigation.[116] These warranties attach to the securities being sold, and breach gives rise to contractual remedies, generally without any need to prove reliance or scienter.[117] That parties can warrant a security, and courts can enforce those warranties, underscores that warranty doctrine is not foreign to the sale of corporate securities.[118]

B. THE ROLE OF DISCLOSURES IN PRIVATE SECURITIES LITIGATION

Sales of private securities typically rely on offering documents such as private placement memoranda (PPMs), offering circulars, and investor slide decks to induce investor interest and consummate the transaction. These materials describe the issuer's business, financial condition, risk factors, and offering terms, and they serve as the primary—often only—source of

115. I note that representations and warranties in stock purchase and other complex purchase or finance agreements are technically distinct and relate to different areas of the law. Representations are assertions as to the truth of a fact that if inaccurate may give rise to tort liability, while warranties are contractual promises. *See* PRAC. L. COM. TRANSACTIONS, GENERAL CONTRACT CLAUSES: REPRESENTATIONS AND WARRANTIES, Westlaw (last visited Apr. 10, 2026). However, this distinction is generally "irrelevant because the consequences of an inaccurate representation or breach of warranty are provided for contractually." *Id.* I further discuss the collapse of fraud and tort liability in the private securities purchase context below in this Part.

116. *See, e.g.*, Prairie Cap. III, L.P. v. Double E Holding Corp., 132 A.3d 35, 47–49 (Del. Ch. 2015) (discussing representations and warranties in private equity sale including financial statements and absence of undisclosed liabilities). *See generally* A.B.A., MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY (2d ed. 2010) (providing standardized representations including corporate authority, financial statements, compliance with laws, and litigation).

117. *See infra* Part.IV. While representations and warranties are technically different, they are generally used interchangeably in the deal document context and constitute express warranties for my purposes.

118. *See* WILLISTON ON CONTRACTS, *supra* note 6, § 51:85 (recognizing express warranties in sales of securities, including warranties of income, value, or guaranteed return); *see also* Eric Talley, *Disclosure Norms*, 149 U. PENN. L. REV. 1955, 1956 (2001) ("Examples abound in which legal doctrines have been devised in an attempt, active or passive, to encourage accurate information disclosure, particularly within corporate settings, with the ostensible goal of ameliorating the dangers posed by adverse selection. The law of express and implied warranties, for example, has general and far-reaching implications for both ordinary market transactions and for 'due-diligence' disputes within the mergers and acquisitions context.").

information available to prospective buyers. In that sense, they may often also constitute express warranties, in that they are representations by sellers made to induce purchase that form "part of the basis of the bargain."[119] There is little question that buyers of private securities typically rely on them—indeed, they have little choice but to do so.[120] These materials underpin a substantial and growing market: private placements and other exempt offerings accounted for over $4.2 trillion in capital raised in 2023 alone.[121] This Part describes the functionality of disclosures and marketing materials in the sale of private securities. Although these documents likely constitute express warranties under contract law, they are easy to exclude and difficult to include in contracts to purchase private securities. Moreover, fraud liability, which should act as a backstop for false disclosures, may often be unavailable in the private securities context.

1. Excluding Disclosure Liability: Confused, But Easy

Though uncommon, it is not unknown for plaintiffs to allege that disclosures or offering documents constitute warranties in sales of private securities. But while courts rarely recognize (and litigants don't often plead) disclosure documents as standalone warranties in private securities sales, the question of whether misstatements in such disclosures are actionable arises frequently, though indirectly, in contract and fraud litigation. Investors often point to statements in private placement memoranda, slide decks, or other marketing materials as part of the factual narrative supporting their claims. And although these materials are seldom pled or enforced as express warranties, they frequently become entwined with disputes over contractual obligations, reliance, and the effect of integration or no-reliance clauses.

Courts have nonetheless acknowledged that the theory that such disclosures are warranties is valid. In *Independent Order of Foresters v. Donaldson, Lufkin & Jenrette*,[122] institutional investors alleged that misstatements in a "Derivative Portfolio" and related marketing materials constituted express warranties about the expected performance of mortgage-

119. *See, e.g.*, CBS Inc. v. Ziff-Davis Publ'g Co., 75 N.Y.2d 496, 503–04 (1990) (holding that a contractual representation need not be believed by the buyer to be relied on, so long as it formed part of the deal); *see also supra* notes 85–86.

120. *See* Assured Guar. Mun. Corp. v. DLJ Mortg. Cap., Inc., 44 Misc. 3d 1206(A), 2014 WL 3288335, at *7–8 (N.Y. Sup. Ct. 2014) (noting that disclosure documents play a critical role in inducing sophisticated investors to commit capital).

121. *See* Carlos E. Juarez, *Private Capital and Exempt Offering Trends in SEC OASB Report*, MAYER BROWN: FREE WRITINGS & PERSPECTIVES (Dec. 18, 2023), https://www.freewritings.law/2023/12/private-capital-and-exempt-offering-trends-in-sec-oasb-report ("Based on data provided by the SEC's Division of Economic and Risk Analysis, between July 1, 2022 and June 30, 2023, companies raised approximately $4.2 trillion in private and exempt offerings.").

122. 157 F.3d 933, 937–39 (2d Cir. 1998) (dismissing express warranty claim where marketing materials were not incorporated into the final contract and defendants "expressly disclaimed any intention that earlier representations should have any legal effect").

backed securities. The district court acknowledged,[123] and the Second Circuit confirmed,[124] that the statements in the marketing materials could constitute express warranties, citing classic treatises in contract.[125] On appeal, however, the Second Circuit dismissed the claim based on specific disclaimers regarding risks and a strong "no-reliance" clause in the offering circular.[126] In this respect, the opinion is part of a large family of cases where misstatements in offering documents and marketing materials are disposed of on the basis of a no-reliance clause.[127]

But in general, express warranties may not be freely disclaimed,[128] and no-reliance clauses speak to elements of fraud, rather than breach of warranty, which generally does not require a showing of reliance.[129] The exclusion of express warranties in disclosures and marketing materials, under basic contract theory, is in fact far easier. The reason is that where the warranty is in a disclosure or marketing material outside the four corners of the stock purchase

123. Indep. Ord. Foresters v. Donaldson, Lufkin & Jenrette Inc., 919 F. Supp. 149, 152–53 (S.D.N.Y. 1996) ("Plaintiff alleges that certain statements made in the sales brochures were warranties . . . Whether the statements alleged were actionable warranties or promotional puffery remains to be seen. Further, what effect the contracts had on these statements, if any, cannot be determined at this stage. Accordingly, Plaintiff's First Cause of Action cannot be dismissed at this time.").

124. *Indep. Ord. Foresters*, 157 F.3d at 938 ("The district court dismissed this claim on two legal grounds: (1) that the statements alleged to be warranties were only 'puffery and expressions of opinion,' and 'not express warranties,' and (2) that, in any event, the statements were made before and never incorporated into any enforceable contract of sale. We affirm that ruling on the second ground[.]" (citation omitted)).

125. *Indep. Ord. Foresters*, 919 F. Supp. at 152–53.

126. *Indep. Ord. Foresters*, 157 F.3d at 939 ("No dealer, salesperson or other person has been authorized to give any information or to make any representations . . . other than those contained in this Offering Circular . . . and if given or made, such information or representations must not be relied upon as having been authorized . . . .").

127. *See, e.g.*, JJR, LLC v. Turner, 58 N.E.3d 788, 803–04 (Ill. App. Ct. 2016). The plaintiff alleged that various marketing materials, including a private placement memorandum, PowerPoint, and executive summary, contained false representations about a hedge fund's strategy and historical performance. But the subscription agreement included a strong non-reliance clause, which stated that the investor had not relied on any oral or written statements not contained in the agreement itself. The court dismissed the fraud claims, holding that the disclaimer defeated any showing of justifiable reliance. Similar results appear in several other cases. In *Kaufman v. Guest Capital, LLC*, the court dismissed fraud and securities law claims based on alleged misrepresentations in a PPM and emails, finding that the plaintiff had disclaimed reliance in a signed subscription agreement. 386 F. Supp. 2d 256, 273 (S.D.N.Y. 2005). In *Stewart v. Estate of Steiner*, a case involving oral and written promises about investment returns, the court enforced a no-reliance clause and rejected the plaintiff's effort to rely on outside statements. 93 P.3d 919, 920 (Wash. Ct. App. 2004).

128. *See, e.g.*, U.C.C. § 2-316 cmt. 1 (A.L.I. & UNIF. L. COMM'N 2002) (express warranty "so clearly [goes] to the essence of the bargain that words of disclaimer in a form are repugnant to the basic dickered terms"); Brown v. Goodman Mfg. Co., L.P., No. 1:13–CV–03169, 2015 WL 1006319, at *4 (D.S.C. Mar. 5, 2015) ("An express warranty cannot be disclaimed."); Kurt M. Saunders, *Can You Ever Disclaim an Express Warranty?*, 9 J. BUS. ENTREPRENEURSHIP & L. 59, 62 (2016) ("The conclusion that an express warranty, once made, cannot be disclaimed would appear to be indisputable.").

129. *See* Sidney Kwestel, *Express Warranty as Contractual—The Need for a Clear Approach*, 53 MERCER L. REV. 557, 580 (2002) (arguing that express warranties should be treated as purely contractual terms, rendering any reliance requirement unnecessary and conceptually misplaced, with the parol evidence rule, not reliance, governing whether a warranty is part of the contract).

agreement, the parol evidence rule may apply to exclude it.[130] Standard merger clauses, which are generally presumptive or conclusive evidence that a contract is fully integrated,[131] are included in virtually every stock purchase agreement.[132] Accordingly, warranties in external documents, like offering circulars of marketing materials, are likely to be inoperative not because they are specifically disclaimed, but because they are barred as evidence extrinsic to a fully integrated agreement.

In this respect, the Second Circuit's reasoning in *IOF v. DLJ*[133] reflects a broader confusion of fraud and warranty law in the sale of private securities. A handful of cases reveal this explicitly, with claims that gesture toward an express warranty theory but ultimately collapse into a muddle of fraud, misrepresentation, and contract language.[134] These fractured claims hint at a deeper instability in how courts classify false or misleading statements in financial transactions. In particular, they reflect a doctrinal discomfort with allowing certain kinds of representations, particularly those found in disclosure documents, to give rise to liability of any kind where the contract does not contemplate it, even when they appear deliberately crafted to furnish necessary information.[135]

This blurring of doctrinal lines does not arise in a vacuum. In private securities transactions, antifraud liability is not the primary mechanism through which informational risk is allocated; parties either contract around it or replace it with express warranties enforced through negotiated remedies. The doctrinal muddling between fraud and contract, as well as the propensity to address most disclosure-related problems through the blunt-instrument application of fraud claims and no-reliance clauses, may be the result of judicial pragmatism. After all, who cares what the doctrinal lens is when the fundamental question in any case almost certainly redounds to, "What does the contract say?" In this sense, courts enforce no-reliance clauses not only as contract terms barring fraud

130. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 34, § 213(2) ("A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.").

131. *See, e.g.*, WILLISTON ON CONTRACTS *supra* note 6, § 33:23 ("[I]n some jurisdictions, a merger clause is conclusive evidence of the parties' intent to consider the agreement integrated. In many more jurisdictions, however, the presence of an integration or merger clause is merely presumptive evidence of the parties' intentions as to integration."); Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEORETICAL INQUIRIES L. 457, 475 (2019) ("If two firms negotiate a writing that includes an integration clause, courts should at least presumptively treat the writing as integrated.").

132. *See, e.g.*, PRAC. L. CORP. & SEC., STOCK PURCHASE AGREEMENT (PRO-SELLER LONG FORM), Westlaw (2026) ("This is a standard provision (also called a merger or integration clause) used to prevent the parties from being liable for any representations, warranties, understandings, or agreements other than those expressly set out in the stock purchase agreement and any other transaction documents.").

133. 157 F.3d 933, 938 (2d Cir. 1998).

134. For example, in *Bergeron v. Ridgewood Securities Corp.*, the court dismissed a contract claim based on a no-reliance clause, but held that the same no-reliance clause did not preclude a fraud claim based on the same misstatement. 610 F. Supp. 2d 113, 138, 146 (D. Mass. 2009).

135. Eric A. Zacks, *Contract and Fraud*, 26 U. PA. J. BUS. L. 570, 573–75 (2024) (explaining that many courts increasingly permit sophisticated parties to contractually limit, define, or even disclaim fraud liability, often by enforcing no-reliance clauses or disclaimers, despite public policy concerns).

claims,[136] but as broader signals that the parties have allocated responsibility for misstatements to the buyer, leaving little practical room for either fraud or warranty to operate. From an economic perspective, this might make sense: judges assume that sophisticated investors can protect themselves through contract,[137] and if they lack the leverage to do so, courts treat the resulting risks as priced into the bargain.

Yet, the quiet collapse of contract and fraud in the private securities context obscures the fact that disclosures and marketing materials on their own are binding as warranties. From a plaintiff's perspective, this is significant because it means that no scienter is required to prove these claims. And from a drafter's perspective, it means that an integration clause is as thorough and important a prophylactic as a no-reliance clause. That these distinctions are not important in the private context—and judges feel comfortable treating them cavalierly—reflects how fully fraud, contract, and warranty liability collapse into a single, contract-governed inquiry. So long as a merger clause or no-reliance provision is in place, the practical outcome is the same: statements in disclosure documents will not give rise to liability.

2. Including Disclosure Liability: Straightforward, But Difficult

To be sure, some savvy buyers may negotiate for language in the stock purchase agreement (SPA) that expressly warrants the accuracy of disclosure materials.[138] But doing so requires not only the sophistication to make the ask and the lawyers to draft satisfactory language, but also the bargaining power to force consent.[139] This creates a sharp structural asymmetry. Excluding liability for a disclosure document is easy; it happens by default as soon as a standard merger clause is inserted into the stock purchase agreement. But including liability is difficult. If a buyer wants the seller to warrant the truth of the PPM or other disclosures, it must negotiate for a provision to that effect.[140] That provision must typically be written into the contract. Negotiating for such a term requires legal sophistication, which many private securities purchasers are

136. *See* Harsco Corp. v. Segui, 91 F.3d 337, 344–45 (2d Cir. 1996) (rejecting fraud claim where misstatements were arguably disclaimed and risks were foreseeable in the context of a negotiated deal).

137. *See* Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032, 1057–58 (Del. Ch. 2006) (emphasizing respect for contractual risk allocation between sophisticated parties).

138. For instance, in *Waste Management Holdings, Inc. v. Mowbray*, the SPA warranted that the company's financial statements and SEC filings were complete and conformed to GAAP. 208 F.3d 288, 292–94 (1st Cir. 2000). The First Circuit treated these as enforceable contractual warranties and rejected arguments that they were merely statements of opinion. *Id.*; *see also* Metromedia Co. v. Fugazy, 753 F. Supp. 93, 95 (S.D.N.Y. 1990), *aff'd as amended*, 983 F.2d 350 (2d Cir. 1992) (finding breach of warranty where defendant misstated financial information warranted in the SPA).

139. Choi & Triantis, *supra* note 16, at 1672–76, 1687–94 (demonstrating that parties with greater bargaining power can negotiate either for the inclusion of broader warranties or for the effective disclaimer of warranty liability, showing that leverage systematically shapes the risk allocation and nonprice terms).

140. *See supra* notes 52–53.

assumed to have,[141] but also leverage, which some might lack. Sophistication, accordingly, may not allow a purchaser of private securities to negotiate successfully for a term warranting the truth of disclosures and marketing materials, but it will almost certainly cause a court to assume that the lack of such a warranty was priced into the transaction, and that the buyer could fend for itself.

As a result, private ordering in securities transactions systematically favors exclusion over inclusion of liability for disclosures and marketing materials. Sellers can exclude liability with a boilerplate merger clause; buyers must work to include it. The end result is that false or misleading disclosure documents are actionable only if the buyer successfully negotiates to make them so.

IV. THE ARCHITECTURE OF ENFORCEMENT: DISCLOSURES THAT BIND

Registration statements and prospectuses are disclosures, but they are also something more: they are affirmative representations made in connection with a sale. The Securities Act treats them as such. Section 11 imposes liability without scienter or reliance: strict liability, in effect, for material misstatements in public offering documents.[142] That liability regime is, in structure and effect, nearly indistinguishable from the common law of express warranty.[143] Like warranty law, Section 11 holds sellers accountable not for intent to deceive, but for failing to deliver what they represented.

Yet courts and litigants almost never frame the Securities Act this way. The prevailing legal and institutional vocabulary treats Section 11 as part of "disclosure law;" a body of doctrine that views misstatements primarily as a failure of informational compliance rather than a failure of commercial obligation. "Disclosure law," in this sense, refers to a framing that emphasizes transparency, completeness, and informational accuracy as regulatory goals, often backed by specialized pleading rules and policy-driven justifications. While analytically coherent, this view is conceptually narrow. Framed this way, misstatements in a registration statement are a compliance problem, not a broken promise.

But by treating the Securities Act solely as "disclosure law," we have lost the ability to connect it to the broader legal tradition of enforcing affirmations in transactions. That misrecognition has obscured the structure of the regime, misidentified the source of its strength, and distorted how we think about the boundaries of enforceability in both public and private securities markets. Recognizing offering disclosures for what they are—express warranties made in

141. *See* SEC Regulation D, 17 C.F.R. § 230.506(b) (2024) (providing exemption for "accredited investors" to buy unregistered securities subject to specific conditions).

142. *See* 15 U.S.C. § 77k(a); Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983) (noting that Section 11 imposes liability for material misstatements or omissions in a registration statement regardless of intent).

143. *See supra* Part.II.

commerce—is a necessary first step toward understanding how the regime allocates legal protection, and why it does so unevenly.

The Subparts that follow develop this claim in two respects. The first examines the *channeling function* of the Securities Act: how it directs investors into impersonal, non-contractual transactions in which express warranties, unlike in negotiated private sales, cannot be excluded. The second describes how once that channeling work is done, the Act's liability scheme essentially builds a duplicative regime; a statutory warranty regime atop a structure in which common law express warranty would have sufficed. That duplication, while curious, helps demonstrate the substantive and structural scaffolding necessary to make otherwise fragile express warranty liability functional in modern markets. In that sense, the Securities Act can be understood as a successful experiment in making warranties "stick," one that parallels contemporaneous efforts on the consumer side to achieve the same goal.

A. CONTRACT BY CONDUCT: WHY WARRANTY LOGIC WORKS IN THE PUBLIC MARKETS

Express warranty liability often fails in private securities transactions not because the doctrine is unavailable, but because it is too easily excluded. In private placements, disclosures are typically made through PPMs, pitch decks, or other marketing documents, but those documents are almost always governed by—or folded into—a written contract. That contract routinely contains integration clauses and no-reliance provisions,[144] both of which make liability for false statements extremely difficult to assert.[145] To preserve a warranty claim in that environment requires sophistication and leverage: buyers must negotiate for an express warranty of disclosure accuracy and must prevent it from being neutralized by standard contractual boilerplate.[146]

Public offerings present the opposite scenario. There is no individualized contract between issuer and investor. Shares are sold through broker-dealers or underwriters, often on an exchange, to buyers the issuer never meets.[147] There is no negotiated document that can exclude warranties or allocate informational risk.[148] In that environment, any disclosure made in connection with the offering—particularly the registration statement and prospectus—cannot be

144. *See* Harsco Corp. v. Segui, 91 F.3d 337, 344 (2d Cir. 1996) (distinguishing between integration and no-reliance clauses and describing their legal effect).

145. *Id.*

146. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 579 (1995) (distinguishing private transactions governed by individual contracts from public offerings made via prospectus).

147. *Id.* at 578–79 (explaining that in public offerings, the prospectus is not part of a bilateral contract but a general solicitation to the market).

148. I note that in primary issuances, the relationship between the issuer and the underwriter is governed by an underwriting agreement that generally does warrant the accuracy of the issuer's disclosures. However, this does not affect the analysis of whether the disclosure are warranties in their own right. If privity is not required to bring a warranty claim, these representations in underwriting agreements could also qualify as warranties to purchasing investors.

waived away by contract. The structure of the transaction itself creates an opening for express warranty law because there is no location for language, usually an integration clause, that neutralizes it.

By tying access to the public capital markets to registration,[149] and by limiting exchange trading to registered securities,[150] the Act ensured that public offerings would generally occur through unnegotiated transactions without written contracts. To be sure, firms could and do offer registered securities on a one-off basis pursuant to written agreements. But the primary benefit of registration to firms, managers, and investors is liquidity, and this is best achieved by trading through brokers or on an exchange. In this transactional structure, there are no deal documents, no individualized terms, and crucially, no integration clauses.[151] The Act closed the escape hatch that written contracts provide. This feature might be considered a structural analog for the Act's anti-waiver provision, which prevents waiver of compliance with its own provisions.[152] But rather than issuing a statutory prohibition, it functions by largely directing public investors to market structures—generally exchanges—where they buy securities through anonymous, order-driven transactions rather than written, negotiated contracts, leaving no document which could exclude express warranties made outside it.

This Article takes that market structure as given. But even if there were efforts to introduce contractual waivers, they would face obstacles. A brokerage could likely not accomplish this with a blanket waiver in its customer agreement: even if such a clause purported to disclaim implied warranties, it would probably not reach express warranties.[153] To effectively neutralize the express warranties in issuer disclosures, the order itself would have to be converted into a kind of written contract incorporating an integration clause for each trade. The technology to accomplish this was likely unavailable for much of the history of securities trading, and even now such a change could be cumbersome, potentially economically unattractive, and inconsistent with the immediacy that underpins market liquidity—which is the reason many issuers go public to begin with.[154]

149. 15 U.S.C. § 77e (requiring registration of securities offered to the public).

150. *See* 15 U.S.C. § 78l(a) (securities must be registered to be listed on national exchanges); *see also* SEC v. Ralston Purina Co., 346 U.S. 119, 124–25 (1953) (registration requirements aim to protect unsophisticated public investors).

151. Public issuances are generally made with the assistance of underwriters pursuant to an underwriting agreement, which generally does specifically warrant the accuracy of the firm's disclosures. In the modern regime where mass warranties do not require privity, these statements could also pass to investors. But this is not necessary because the disclosures themselves are warranties.

152. 15 U.S.C. § 77n (2024) (anti-waiver provision of the Securities Act); 15 U.S.C. § 78cc(a) (2024) (anti-waiver provision of the Exchange Act).

153. *See infra* note 163.

154. *Should My Company "Go Public"?*, SEC ("Companies go public for a number of reasons [including] to increase liquidity for a company's stock."), https://www.sec.gov/resources-small-businesses/going-public/should-my-company-go-public

The Securities Act is often celebrated for its disclosure mandate[155]: it requires public companies to make standardized, comprehensive statements about their business, operations, and risks.[156] But disclosure alone is not what makes the Act distinctive. Sophisticated investors in the private market also demand disclosures, generally through private placement memoranda, diligence materials, and management presentations.[157] While these are less standardized, they serve a similar function: conveying information to support a purchasing decision.[158] What sets public offerings apart is not only the presence of disclosures, but the conditions under which those disclosures are delivered. Public securities are funneled into a market system where they are sold without individualized written contracts. Investors purchase through brokers or exchanges, not via negotiated agreements. And where there is no contract, the legal infrastructure that allows sellers to neutralize liability in private offerings does not exist.[159]

Courts and commentators have not always recognized this feature. But an essential feature of the Securities Act is that it effectively segmented the market, funneling public investors into a domain where disclosures are standardized and legally sticky, while leaving private investors to negotiate their own terms—and disclaimers. The very form of public securities transactions—specifically, the reliance on impersonal orders, rather than written contracts—makes the imposition of liability for misstatements not only feasible but hard to avoid.

This market structure ensured the survival not only of warranty, but common law fraud liability. Lack of a written contract means that not only are warranties included in the contract, but reliance cannot be disclaimed. Yet fraud is a weaker framework. Proving fraud requires scienter, and outside of *Basic Inc. v. Levinson*'s fraud-on-the-market presumption, plaintiffs must also prove individual reliance—a showing that generally defeats class treatment. By contrast, warranty liability is better suited to do the heavy lifting in a world where we worry, as we do in the IPO context, about information asymmetry and motive to lie: It imposes a more rigorous, transaction-wide framework that does not turn on scienter or individualized reliance.

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155. *See, e.g.*, Easterbrook & Fischel, *supra* note 1; Fox, *supra* note 1, at 253; Goshen & Parchomovsky, *supra* note 1, at 718; Romano, *supra* note 1, at 2361–62; Coffee, Jr., *supra* note 1, at 238.

156. *See* 15 U.S.C. § 77g(a)(1) ("The registration statement shall contain such information and be accompanied by such documents as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors."); 15 U.S.C. §§ 77e, g.

157. *See, e.g.*, Andrew N. Vollmer, *Evidence on the Use of Disclosure Documents in Private Securities Offerings to Accredited Investors*, 51 SEC. REG. L.J. 91, 92 (2023) (finding based on survey evidence that "issuers nearly always provided some form of disclosures to accredited investors").

158. *Id.* at 91("Businesses want to sell their securities at a good price to raise money, and prospective securities buyers need information about a company, its business, and the securities to decide whether to buy and at what price.").

159. For discussions of instances in which contractual protections are ineffective because parties lack the ability to bargain effectively and therefore must be protected by positive law, see Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 742 (1982) (analyzing how the classic "bargain principle"—that bargains should generally be enforced—breaks down).

In this light, the Securities Act did more than impose obligations; it created the conditions for enforceability. The market structure it codified effectively locked in a space where disclosure functions like express warranty, and warranty liability cannot be bargained away. Even without Section 11, the Act ensures that material misstatements in public disclosures carry binding legal consequences—because there is no mechanism to prevent them from doing so. And in that sense, a profound contribution of the Act was not only to impose a warranty regime, but to preserve the structural conditions in which one could survive.

B. SECURITIES ACT AND EXPRESS WARRANTIES IN SALES OF PUBLIC SECURITIES: DUPLICATIVE REGIMES AS A HELPFUL EXPERIMENT

From a doctrinal perspective, state-law express warranty claims and Section 11 of the Securities Act are functionally similar. Both treat seller disclosures—product labels in one context, registration statements in the other—as binding assertions of fact. Both allow buyers to recover when those assertions are materially inaccurate, without requiring proof of intent to deceive or actual reliance. In short, both impose a form of strict liability for statements made in connection with a sale.

This means that in the public securities context, where offerings are accompanied by disclosures and transactions are not governed by individualized written contracts, express warranty law could plausibly have done much of the same work as the Securities Act. Courts already recognize that offering documents contain affirmations of fact, and because public securities are generally sold to the public without the possibility of contractual exclusion, warranty liability in this setting could be difficult to contract around. In that sense, the structural preconditions for meaningful express warranty enforcement already exist in public offerings. But this doctrinal overlap has not produced functional redundancy. Instead, the existence of the Securities Act has effectively crowded out the use of warranty law in the public arena. Practitioners and courts alike reach for it reflexively. Thus, even though warranty liability could fit neatly in this context, it is rarely recognized or asserted. It is, in effect, rendered invisible by the shadow of the statutory framework.

This is a curious form of legal redundancy. In private securities transactions, warranties are routinely included in written agreements, and their enforceability turns on negotiated terms. In the public sphere, by contrast, warranty law could have taken hold organically, precisely because the public structure lacks the mechanisms to disclaim it. But the presence of a parallel, formal statutory regime has preempted this development, perhaps largely through institutional habit. When everything looks like a disclosure claim, no one sees the warranty.

Yet from a broader perspective, the duplicative nature of the Securities Act is an innovative manifestation of efforts to make warranty liability stick. In this

respect it is not unique, though it might be characterized as more streamlined or successful than similar efforts in other areas. Warranties are inherently fragile. Previous sections described how express warranties in the disclosures issued for private securities are, despite some doctrinal muddling, easy to puncture and difficult to maintain. This is a problem that the law has confronted generally with the advent of impersonal transactions and mass advertising.[160] In the years surrounding the passage of the Securities Act, courts and policymakers also began to grapple in earnest with exploitative, seller-friendly consumer warranties in the mass marketing context.[161] A long period of judicial creativity exercised in solicitude for the smalltime buyer[162] culminated in some protective provisions under the UCC,[163] and ultimately federal protections in the Moss-Magnuson Act.[164] Prompted by concerns about exploitative warranties for cars and household appliances, the Moss-Magnuson Act governs any transaction for a consumer good worth more than twenty-five dollars that comes with a written warranty.[165] Like the Securities Act, the Moss-Magnuson Act brings warranties within the purview of federal law, and imposes substantive and form-related requirements on express warranties (such as that they be in clear, conspicuous language). But unlike the Securities Act, it does not require sellers to make such warranties in the first place.[166]

The key point, however, is that both statutes are part of a larger effort to make common law express warranty liability—and the commercial reliability and trust that it promotes—stick in modern markets. Express warranty liability tends to decay under private ordering, especially in mass-market settings. Sellers can draft around it almost effortlessly, and consumers or investors lack the bargaining power to insist on its inclusion. Sustaining warranty liability in such markets requires substantive or structural scaffolding to keep it from collapsing. The Securities Act provides that scaffolding in two ways: substantively, by creating a duplicate express warranty regime that imposes strict liability for false disclosures; and structurally, by channeling investors into transactions without written contracts, where disclaimers and integration clauses could not erode those warranties. Rather than being a New Deal anomaly, the Act represents a particularly successful iteration of a broader twentieth-century effort to stabilize promises of reliability in impersonal markets. In this sense, the Securities Act's

160. *See* Sullivan, *supra* note 21, at 376 ("More than forty years ago it was presciently suggested that existing legal categories would prove inadequate to analyze the legal complications resulting from modern manufacturing and merchandising methods. It was further suggested that a new legal construct would be needed to deal with the new reality. It probably would have been better if the courts had followed this suggestion. Not surprisingly, however, they did not.").

161. See *id.* at 381.

162. *See id.* at 377–81.

163. *Id.* at 389–92.

164. *Id.* at 395.

165. 15 U.S.C. §§ 2301–2312.

166. *Id.*

apparent duplicative nature is in fact an innovative device to transform a fragile common-law device into a durable public one.

CONCLUSION

The Securities Act is best understood as preserving a liability structure that is very useful but difficult to maintain in modern markets. The disclosures that accompany a securities sale operate as express warranties: factual assurances by the seller that form part of the bargain. By removing contracts from the transaction and providing a duplicative substantive regime, the Act ensures that those warranties will function. In this sense, it is part of a larger movement wherein the key features of express warranty law have evolved and been supplemented to better create trust in modern markets.