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Seller's Responsibility for His Goods - Under the Uniform Commercial Code

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SELLER'S RESPONSIBILITY FOR HIS GOODS

UNDER THE UNIFORM COMMERCIAL CODE*

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Under the Uniform Commercial Code the term "contract for sale" includes both present sales and contracts to sell in the future. A sale, the hoped for result of it all, consists in passing title from the seller to the buyer for a price.[1] The parties, it will be noticed, are seller and buyer. In using the Code it is helpful to keep the Code's distinction between buyer and purchaser in mind. A buyer is one who buys or contracts to buy goods.[2] A purchaser, on the other hand, may take by sale,[3] discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.[4]

The general obligations resting on the parties to a sale transaction are simply stated.[5] The obligation of the seller is to transfer and deliver the goods. The obligation of the buyer is to accept and pay for them. What it is that the seller has an obligation to transfer and deliver is essentially a question of the bargain between the parties. What goods were the subject matter of the sale? Was any burden assumed with reference to their usefulness by the seller? These are the questions of warranty. The warranty provisions of the Code are in a small block of sections covering warranty of title and against infringement,[6] express warranty,[7] implied warranty of merchantability[8] and implied warranty of fitness for a particular purpose.[9] These sections are followed by rules regulating disclaimers of warranty liability,[10] limitations upon remedies in the event of breach,[11] rules for interpretation of warranty terms in sale contracts,[12] and a limitation on the operation of the general rule requiring privity of contract when recovery is based on warranty.[13]

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*Much of the material in this article is drawn from KOCK, GEORGIA COMMERCIAL PRACTICE. It is hoped that it will ultimately become part of a chapter in a brief manual of commercial law.

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1. UNIFORM COMMERCIAL CODE § 2-106(1); All footnotes herein refer to sections of the UNIFORM COMMERCIAL CODE unless otherwise indicated.
2. § 2-103(1)(a).
3. *I.e.*, a buyer.
4. §§ 1-201(33), 1-201(32).
5. § 2-301.
6. § 2-312.
7. § 2-313.
8. § 2-314.
9. § 2-315.
10. § 2-316.
11. §§ 2-316(4), 2-319.
12. § 2-317.
13. § 2-318.

If the words and conduct of the parties in the course of concluding their deal were such as would create warranties under several sections of the Code, it will sometimes be necessary to sort them out in order to determine what the deal was from the point of view of warranty protection. Clearly, if the resulting warranties are entirely consistent with each other they should all be effective and enforced.[14] It is entirely possible, however, that warranties that are created on one analysis of the facts may be inconsistent with warranties resulting from another analysis of the same transaction. In analyzing any transaction close attention must be paid to the language used by the parties. In a number of cases that can easily be identified the particularity with which some characteristic of the goods is prescribed will foreclose other claimed characteristics. A junk dealer, for example, is probably selling goods that in another context are likely to be unmerchantable. To help in dealing with these situations the Code gives us three common sense rules for interpreting warranties. Technical language displaces general language.[15] A sample, a detailed form of description, displaces general language.[16] And express warranties displace inconsistent implied warranties.[17] A *caveat* must be noted here. An implied warranty of fitness for a particular purpose, since it is not in fact a warranty of quality, is never displaced by a warranty of quality. Also, since the foundations on which that warranty rests do not relate to the goods at all—reliance being the test, and usefulness being the warranty—no warranty respecting the goods goes to negative or disclaim the particular purpose warranty. As we will see below, express warranty may be a factor, however, since there is always a question of whether or not there was reliance.

EXPRESS WARRANTY

The creation, exclusion and modification of warranties are all the product of the language, conduct and circumstances involved in the bargaining and conclusion of the sale. In any case of claimed warranty one must check the statute for two steps in the dealings of the parties. The first step is to see if warranty could have been created on the facts one has. Then attention must be directed to the question whether any potential warranties have been excluded or limited in their operation. If the problem is one involving express warranty and there are writings evidencing all or part of the deal arrived at by the parties, the parol evidence rule will be a factor limiting provable words and conduct.[18] Subject to that limitation

14. § 2-317.
15. § 2-317(a).
16. § 2-317(b).
17. § 2-317(c).
18. See § 2-202.

on the words and conduct on which one may rely in building or defending a case, attention must be given to words and conduct of the parties and any appropriate course of dealing or trade usage. If words and conduct are found that tend both to create and to negative express warranty, the first inquiry is whether there is any reasonable interpretation that would leave it all operative as consistent. Language and conduct tending to limit or exclude express warranty is operative only if it cannot be read as consistent with any express warranties that might be created by the same or other words or conduct of the parties in concluding their deal.[19] Words and conduct creating express warranty are generally a matter of specifying the goods that are the subject matter of the contract.[20] It is not limited to that, of course. A number of modern contract forms are drafted to contain an express warranty of merchantability. Such terms are affirmations of fact or promises relating to the goods and, like any other such affirmations and promises, to the extent they are part of the basis of the bargain they create express warranty.[21] Modern printed forms do often use the word "warranty" or "warrant," but that is not necessary to the creation of express warranty. It is not necessary either that there be any particular intent to make a warranty, so long as the language forms a part of the basis of the bargain.[22] The Code's "basis of the bargain" is essentially the same as "if the natural tendency . . . is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."[23] It is neater, and it should be easier to work with.

Whether the seller's praise of his goods is warranty or not depends on the same question. Was it a part of the basis of the bargain or was it properly only "puffing," taken only to be an opinion as to value or mere commendation of the goods? The answer to this question may very well depend as much on the status and understanding of the buyer as on the subjective intent of the seller.

A description of the goods certainly creates an express warranty. The goods sold must be the goods dealt for.[24] Though the description of the goods has to be an express term of the contract if the parties expect to consummate a sale, the Sales Act characterized this as an implied warranty.[25] This is consistent with the wide-open treatment of warranty one finds elsewhere in that act,[26] but it complicates matters when the seller's contract is under consideration. The single

19. § 2-316(1).
20. § 2-313.
21. § 2-313(1)(a).
22. § 2-313(2).
23. N.D. CENT. CODE § 51-01-13 (1960).
24. § 2-313(1)(b).
25. N.D. CENT. CODE § 51-01-15 (1960).
26. *E.g.*, N.D. CENT. CODE § 51-01-12(1) (1960).

question, "Does the seller have to deliver exactly what he sold?" requires taking account of promises and affirmations,[27] warranty of description,[28] and warranty of bulk,[29] and there is a section of the statute dealing with other matters standing between each of the three. They have been combined under the Uniform Commercial Code.[30]

A sample or model, if it is the basis of the bargain, is description. It is sometimes the only description there is; sometimes it is accompanied by descriptive words. But, whether a sample or model is in fact a basis of the bargain or not raises a problem. When a sample or model is used it is sometimes troublesome to determine whether it was merely to suggest some characteristics, to give an idea, as it were, of structure or quality or whether it was to be the description. Ordinarily if there is no limiting factor a sample or model will probably, in a commercial situation, be the description, with such things as sizes and colors specified in addition, in some cases. The question is the same as in other express warranty problems: was it part of the basis of the bargain?[31]

The most satisfactory way for a seller to be sure he does not make express warranties he does not want is to take care not to say or demonstrate things he is not willing to live up to. Though it is true that disclaimers and limitations are possible, the problem here is that it is the basis of the bargain that is involved. It is not at all unlikely that the anticipated disclaimer or limitation was an important factor in pricing. The trouble comes from the fact that since description goes to the essence of the contract, proof that the description was not warranted tends to show that the parties did not conclude a contract at all. When one argues "I sold a '59 Chevy, but I did not sell an automotive vehicle," he gets awfully close to saying "I didn't sell anything." The neatest solution to this problem does not really help when the warranty goes to description; but take for example new automobile contracts. The approach there is to make an express warranty of merchantability and then to limit liability for breach.[32] A contract provision for liquidated damages is workable, so long as it does not become penal in its operation,[33] but the most useful device in warranty cases is to maintain control over remedies generally. The replacement parts "warranty" is within this category. It is not warranty; it is limitation of liability for breach of warranty—serving also to fix a standard of merchantability when it runs in terms of a period of time or

27. N.D. CENT. CODE § 51-01-13 (1960).
28. N.D. CENT. CODE § 51-01-15 (1960).
29. N.D. CENT. CODE § 51-01-17 (1960).
30. § 2-313.
31. § 2-313(1)(c).
32. § 2-316(4).
33. § 2-718(1).

stated mileage.[34] If one is using such a limitation provision, care must be taken to make it expressly understood that the substitute remedy is exclusive. If that is not done the effect is to give the buyer an optional added remedy, and the advantage of the term as a limiting factor disappears.[35]

Such a limitation clause is not always effective, however. If the circumstances are such as to cause the limitation to fail of its purpose, the normal remedies are reverted to.[36] Take, for example, the replacement parts provision. This is clearly a provision for the orderly handling of claims arising from mechanical breakdown and is directed to the kinds of damages that might grow out of the buyer's scrounging around for parts and installation service. Should the mechanical failure occur under such circumstances that substantial property damage is caused, the limitation provision fails of its purpose. Such a clause cannot be used to limit liability for injuries to the person by consumer goods.[37]

WARRANTIES IMPLIED FROM THE NATURE OF THE TRANSACTION

The two basic implied warranties that arise from a sale simply because there has been a sale have been among the most troublesome areas of sales law. The difficulty involved in making them function satisfactorily led the Code drafters to separate them so that their separate functions might better be served. The unnecessary limitation of the warranty of merchantable quality to sales by description[38] has led courts to treat as problems of fitness for a particular purpose fact situations that called only for a warranty of merchantability. The consumer goods cases are the most obvious example of this. Because it is usually impossible to find a sale by description, as is required by the Sales Act,[39] there can be no regular warranty of merchantability. In order to arrive at a proper result on the facts courts have simply ignored the well established distinction between fitness for a particular purpose[40] and fitness for ordinary purposes (merchantability) and have granted relief on the basis of what should have been an expert's warranty, more-or-less.[41]

Under the Code the question is, as it ought always to have been, merchantability, not fitness for any particular purpose. Every sale of goods by a merchant gives rise to an implied warranty that the goods are fit to sell, that is, that they are merchantable. This

34. § 2-719(1)(a).
35. § 2-719(1)(b).
36. § 2-719(2).
37. § 2-719(3).
38. N.D. CENT. CODE § 51-01-16 (1960). The statement in the statute of the warranty obligation as a mere exception to a general rule of no liability has not helped much either.
39. N.D. CENT. CODE § 51-01-16(2) (1960).
40. N.D. CENT. CODE § 51-01-16(1) (1960).
41. See the discussion at page 31 and following.

includes every sale, including the serving of food and drink for value.[42]

Express warranties can displace implied warranties,[43] but the usual function of the express warranties is other than that. In order to know the measure of merchantability one must know what was sold; that depends on the express warranties. As a result, express warranty is usually the place from which we must work when we undertake to determine the scope of the warranty of merchantability. The Code drafters have given us some help in working with questions of merchantability by giving us a list of standards against which the goods are to be measured.[44] The list is not exclusive,[45] but it is quite comprehensive, including minimal standards for many different kinds of goods. The goods supplied must be such as pass without objection in the trade under the contract description.[46] This test clearly demonstrates the close relation of express and implied warranties. The goods must conform to any description that has been the basis of the bargain.[47] If there is a breach of that express warranty, the goods will surely not be such as would pass in the trade under that description.

If the goods are fungible, they must be of fair, average quality within the description.[48] Goods must be fit for the ordinary purposes for which such goods are used.[49] Here it must be emphasized that it is fitness of the goods that is involved. The cases involving buyers who become ill because of some special sensitivity are another matter altogether. The law regulates defective goods, not defective buyers. The goods must conform to affirmations made on the container or label, if any.[51] If the agreement required them to be packaged or labeled that must be adequately done.[52] and they must be of even quality within each unit and among all units, within variations allowed by the agreement.[53]

The close connection between the warranty of merchantability and express warranties is especially important when we look at sales made by sellers who are not "merchants."[54] The statutory

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42. § 2-314(1).
43. § 2-317(c).
44. § 2-314(2).
45. "Goods to be merchantable must be at least such as . . . ," § 2-314(2); "Unless excluded or modified . . . other implied warranties may arise from course of dealing or usage of trade." § 2-314(3).
46. § 2-314(2)(a).
47. § 2-313(1)(b).
48. § 2-314(2)(b).
49. § 2-314(2)(c).
50. Reference omitted intentionally, Editor.
51. § 2-314(2)(f).
52. § 2-314(2)(e).
53. § 2-314(2)(d).
54. A merchant is one who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or who deals through another who has such knowledge or skill. See § 2-104(1).

warranty of merchantability is a merchant's warranty. It has an impact on non-merchant sellers, however, because its function is largely to supply a measure of conformance to description. When a non-merchant sells, he is bound by his express warranties. The question whether the goods he has supplies conform to the standard will be a question whether they are salable under that description; this is a form of merchantability, though the question remains one of express warranty.

MERCHANTABILITY—LIMITATION AND EXCLUSION

The circumstances of commercial dealing may very well be such that no warranty of merchantability arises. It can be excluded by prior dealings between the parties or performance under the agreement in issue or by trade usage.[55] Another form of what amounts to the same rule is found in the use of certain words of art that serve to call to the buyer's attention that no warranties are being made by the seller.[56] The efficacy of any particular words depends entirely upon the circumstances. In some trades one form of words will be sufficient to convey that message while in other lines of business different language may be called for. The examples given in the Code are "as is" and "with all faults." These are probably the most commonly used expressions for this purpose, but even they cannot be expected to convey the intended message under all circumstances. What is operating here is a shorthand form of expression, not magic.

Merchantability always depends upon the underlying contract. If before concluding the sale the buyer has in fact examined the goods as fully as he desired, there is no warranty as to any defects that his examination ought under the circumstances to have revealed. It must be noted here that normally the implied warranties do protect against patent defects. If the buyer does examine the goods before entering into the contract that protection is not available; he has chosen to rely on his own examination. This reliance upon the buyer's examination may be taken advantage of by the seller also. He may include in his part of the deal a requirement that the buyer examine the goods. If he does that and the buyer nonethe-less refuses to examine them, there is no implied warranty with regard to defects that the buyer would have discovered if he had examined them.[57] Whether buyer must examine the goods or not depends on what seller was bargaining for. The defects that examination ought to disclose will depend on the buyer's capacity. An expert will be bound by what an expert would have noticed;

55. § 2-316(3)(c).
56. § 2-316(3)(a).
57. § 2-316(3)(b).

an unskilled layman is held only to what one not a specialist in such goods would notice.

The result in a particular case can still depend on whether the defect was a patent one. In case of breach of warranty the buyer must notify his seller of the claim of breach or lose his remedy. This notice must be given within a reasonable time after the buyer discovers *or should have discovered* the breach.[58] It is at this point that the fact that it was a patent defect is important.

When the parties bargain with respect to goods they can, of course, bargain with regard to exclusion of the warranty of merchantability. If that is done, and words of art as discussed above[59] are not used, there must be explicit mention of merchantability.[60] This is simply a matter of preventing surprise—the disclaimer that slips in on an unwary buyer. For the same reason, the Code recognizes the dangers inherent in the printed forms that we see get longer every year. Too often have we seen disclaimers in small print somewhere down in the middle of a page. The Code rule cannot hurt honest merchants and can protect at least some buyers. If the exclusionary clause is in writing, the required mention of merchantability must be so written that a reasonable person ought to have noticed it, it must be *conspicuous*.[61] The safest way to insure that this standard is met is to print it substantially larger than the surrounding provisions or to print it in a contrasting color.[62]

FITNESS AND PARTICULAR PURPOSE

This, too, is a warranty arising from the nature of the transaction but it is different from merchantability[63] just as it is different from express warranty. Fitness for a particular purpose goes beyond the goods themselves; it relates to an undertaking by the seller in terms of the usefulness of the goods. Whether the goods are as described or not is one question; whether they are merchantable under the contract description is another; whether they will be useful to accomplish the buyer's needs is another matter altogether. This third warranty is not a product of every sale. As things go it is quite rare, but when the facts of the bargaining meet the criteria established for it, it is a very important matter. The facts from which this warranty builds run in terms of the buyer who comes into the store and says "I want a widget that will do thus and so." Seller picks out one that he believes will serve the purpose and sells it. Seller when he does this had better be right about its

58. § 2-607(3)(a).
59. *Supra* note 56.
60. § 2-316(2).
61. *Ibid.*
62. § 1-201(10).
63. Fitness for ordinary purposes for which such goods are used. § 2-314(2)(c).

usefulness. This is not a matter of being helpful to customers. Buyer has indicated his reliance on seller to know his widgets and the seller in order to make the sale has undertaken to ensure that a stated need is met. It is not necessary that seller utter words of promise, and he need not have any intent to warrant. All that is needed to create this additional liability is that seller know of any particular purpose for which buyer wants the goods and that the buyer be relying on him to exercise his skill or judgment.[64] It does not matter that the seller has no particular skill; he is bound if he exercises his judgment and completes the sale.

The skill or judgment factor is an important safeguard for a seller. He cannot be bound by a warranty of fitness for a particular purpose unless he is left free to exercise his own judgment,[65] using whatever skill he may have. If the buyer makes his purpose known and limits the seller's freedom of action by prescribing severely limiting requirements, it can hardly be said that he is relying on the seller's skill or judgment. Even if the goods are sold by description, trade name, or other specifications, there is a warranty of fitness if the seller had reason to know the particular purpose for which the buyer wanted the goods and that the buyer was relying on him to supply appropriate goods.[66] It does not matter that the seller has no particular skill if there is reason to know of the buyer's reliance. In order to make his showing of the seller's reason to know, the buyer can show prior dealings between the same parties. Any course of prior dealings between these parties may be used to explain or supplement the express terms of an agreement,[67] if they can reasonably be construed as consistent with the express terms.[68] Of course, if there have been repeated deliveries of similar goods by the seller and the buyer has been using them, the buyer's failure to complain earlier is relevant to the question of what the contract called for.[69] If the buyer has repeatedly accepted performances inconsistent with his present claim of high quality the course of performance will prevail over course of dealing, as it would prevail over trade usage.[70]

The effect of an express warranty, description, for example, is to fix the basic standard of merchantability. Its effect on the warranty of fitness is different. In that case it depends entirely on who fixes the description and, if the buyer does so, whether there

64. § 2-315.
65. It is on this point that the rule of N.D. CENT. CODE § 51-01-16(4) (1960) is significant, but it is not conclusive under the Code, as it was under the Sales Act.
66. § 2-315.
67. § 1-205(3).
68. § 1-205(4).
69. § 2-208(1).
70. § 2-208(2).

has been any reliance by the buyer on seller's skill or judgment to furnish suitable goods.[71]

FITNESS—LIMITATION AND EXCLUSION

A very common problem that buyers have run into when they have tried to recover on the basis of this warranty in the past has grown out of this kind of situation. Buyer goes to seller and says he wants a widget to do a certain job. Seller picks out one and fills out a sales contract form, filling in the description of the widget he has selected. Buyer signs the form. When the breach of warranty claim arises, seller has two dodges: (1) buyer can't prove his warranty because of the parol evidence rule; (2) even if he could, express warranty displaces implied warranty.[72] Both of these arguments are specious. If the warranty of fitness arises from the facts of the parties' dealing, the signed order form does not constitute the agreement between the parties. The second point is bad because the whole thrust of the warranty is that seller had control over the description that would be used in the writing. In such a case it would be absurd for the express warranty to displace the implied warranty; on the facts it could not be an inconsistent term.[73] If the circumstances of the contracting were such as to create the warranty, no writing that does not include or specifically disclaim it can be a complete statement of the terms, and evidence of all the facts is necessarily evidence of consistent additional terms.[74]

If the seller wants to disclaim this warranty he must do so in writing, and the disclaimer must, for the reasons indicated above, be conspicuous.[75] No particular words need be used, however. The words THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF[76] would be a sufficient disclaimer of the warranty of fitness for a particular purpose, and a full general disclaimer of all implied warranties could be as simple as THERE ARE NO WARRANTIES OF MERCHANTABILITY OR FITNESS EXCEPT AS EXPRESSED HEREIN.

Another side of the parol evidence rule frequently comes up in warranty cases. These are the cases in which the buyer concludes a contract that contains an adequate disclaimer. Thereafter, he discovers that the machine is not capable of doing the job. He complains to the seller, who makes some adjustments and assures the buyer that the machine will do the job. Assuming the disclaimer to have been effective, what is the buyer's position? Parol evidence

71. § 2-315.
72. Of course, the sound rule is that express warranty displaces only inconsistent implied warranties.
73. § 2-317(c).
74. See § 2-202.
75. *Supra* note 61.
76. § 2-316(2).

may not be used to *contradict* any writing intended by the parties to have been a final expression of the terms it includes.[77] This is true whether or not the writing was intended to have been a complete and exclusive statement of the terms of the agreement. As a result, the buyer will not be able to prove a prior or contemporaneous agreement amounting to a warranty of fitness for a particular purpose, but there remains the question of the subsequent assurances. An agreement may contain a provision that would prevent a parol modification, but if there is no such provision, separately signed by the buyer in the case of a printed form,[78] the subsequent assurance that the equipment would do the job the buyer wanted it for amounts to a promise or affirmation of fact creating express warranty.[79] This cannot be an implied warranty of fitness, because that depends on reliance at the time of the original sale,[80] but it can be an express warranty added to the contract without additional consideration.[81]

THE LIMITS OF WARRANTY—TORT AND PRIVITY

This is not an appropriate place for a survey of either the history of contract law or new developments in the law of torts, but if the relation of the Commercial Code to what it has become fashionable to call "products liability" is to be understood it is necessary to turn briefly to both of these fascinating areas. The confusion that appears in products liability cases may be an aid to the more rapid development of tort law, but there is a danger that our contract law, especially as that is embodied in the Commercial Code, will be burdened with qualifications and limitations not appropriate in the context of sales transactions.

Much of the confusion is attributable to frequent repetition of an historical truth that misleads because it mistakes one element for the whole set. It has been over-emphasized that warranty has its source in tort.[82] Warranty did have its beginnings in tort. The untruth arises from the failure to note that, except for the actions of debt, detinue, covenant and account, all of modern contract law had its origins in tort. All of it is, in fact, development from trespass.[83] The actions upon a special case in *assumpsit* or *indebitatus assumpsit* are our modern contract law. Building from an action upon a special case for deceit, one had to show the undertaking, assumpsit, and a breach to show the deceit. The

77. § 2-202.
78. § 2-209(2).
79. § 2-313(1)(a).
80. § 2-315.
81. § 2-209(1).
82. For a very recent example of such talk in what was a relatively clear sales case, see Hanson v. Firestone Tire & Rubber Company, 276 F.2d 254, 257 (6th Cir. 1960).
83. Modern historians appear to accept that this was a shift of jurisdiction from the local courts to the royal courts rather than a development of new law; but, for all of that, see the discussion in MAITLAND, FORMS OF ACTION AT COMMON LAW, Lecture VI (1962).

assumpsit, being the source of the duty of the defendant toward the plaintiff, became more important an element than the deceit, which disappeared except as a formal averment. The step from nonfeasance to misfeasance involves more history than is needed here, but it is clear that once a defective performance can be found to support a recovery, little further development is needed before it becomes as much of a breach to supply a sick cow as to supply one larger, smaller, or of another breed than contracted for. Subject to varying rules over the years about the buyer's need to trust his own senses, this is essentially warranty as we know it in sales contracts.[84]

The remainder of the development, that sounding in tort even today, can be seen to have much of the same coloration in its early years. The so-called "dangerous instrumentality" cases[85] developed beginning in the early 19th Century. Some of them sounded in negligence, but others of them did not. The courts found representations by a seller upon which to base liability even toward parties with whom they had not dealt. "The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less."[86] There we have roots from which strict liability could grow without regard to privity of contract. Put this with trespass upon a special case in negligence, which dates back to the time of the action on the case in assumpsit, and the basis of modern tort law, as far as "products liability" is concerned, can be developed. Even given these foundations, however, the notion that there must be some direct connection between the parties if there is to be a duty, the breach of which will support damages, has persisted in the law. Over the years there were a number of cases in which liability was found; these were usually turned on some peculiar attribute of the commodity that caused the harm, as a substitute for a direct relation between the parties: privity. On the negligence side it came to be said that "if the nature of the thing is such that it is reasonably certain to place life and limb in peril, when negligently made, it is then a thing of danger."[87] And, if it is a thing of danger, there is liability. On the representation, or warranty, side of this coin we have among the recent cases the statement that "Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to

84. The enforcement of parol contracts, of course, gives rise to problems of finding terms that are not spoken out. Why this examination of circumstances evidencing terms of implied contracts should have given rise to suggestions that *caveat emptor* is by no means clear.

85. The basic core of these cases is interestingly discussed in LEVI, AN INTRODUCTION TO LEGAL REASONING 6-19 (1955).

86. Langridge v. Levy, 2 M. & W. 519 (1837), 150 Eng. Rep. 863, 868.

87. MacPherson v. Buick, 217 N.Y. 382, 111 N.E. 1050, 1053 (1916).

the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious."[88]

The Commercial Code has no direct impact on either of these developments. Article 2 of the Code deals with the law of sales, and it covers the warranty liability that exists between parties to sales contracts—that is, their contract liability. The Code does not deal with negligence, and its warranty sections do not impinge upon the "lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract."[89] The greatest impact of the Code on tort law will probably prove to be in the determination of whether there was any representation—warranty—in the first place. Though there is no necessity to refer this question to the Code, as a body of law that is specially directed to just that question in the context of contract law, it is the logical place to turn for a test when one is needed in a tort case.

There is one point at which the Code does change the privity requirement directly. A seller's warranties, whether express or implied, protect any natural person in the family or household of the buyer, and even guests of the buyer, if it is reasonable to expect that these persons may use, consume or be affected by the goods.[90] This extension of protection cannot be limited by agreement, though, of course, the warranty itself may be excluded or modified. The only effect of this rule is to extend the coverage of any warranties that may exist; it does not create any new warranty.[91] The question of what warranties there may be depends upon the contract of the buyer and seller, not this section of the Code.

REMEDIES—THE DAMAGES PROBLEM

If the goods that are supplied by the seller do not conform to the contract, the buyer may reject them,[92] and in some cases an acceptance may be revoked,[93] with the same result as a rejection.[94] In the normal breach of warranty situation, however, once the goods are accepted an obligation to pay the price arises.[95] If the price has not yet been paid, the buyer may, after giving notice of an

88. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612, 615 (1958).
89. § 2-313, comment 2.
90. § 2-318.
91. Though this section was drafted to deal with the problem caused by family and servant cases in the context of a sale to the head of the household, Wyoming has adopted it in a changed version that reaches far into tort law.
92. § 2-601.
93. § 2-608(1)(b).
94. § 2-608(3).
95. § 2-607(1).

intention to do so, set off against the price his claimed damages.[96] In the normal case, he would have an action for damages.[97]

In a number of jurisdictions complications involving rescission and failure of consideration and an inappropriate application of the foreseeability rule laid down in *Hadley v. Baxendale*[98] have led counsel to advise an action in tort rather than in contract when the buyer suffered substantial consequential damages. The Code rule on consequential damages is more specific than was the prior law, and it should be easier for the courts to work with.

In the normal commercial situation the damage rule is uncomplicated. The measure of damages is the difference between the value of the goods at the time and place of acceptance and the value they would have if they had been as warranted. If different proximate damages can be shown they can be recovered.[99] Incidental damages that result from the seller's breach may be recovered also, of course.[100] In many cases, however, the consequential damages are the most important part of the recovery needed to compensate for the harm caused by the breach. These too can be recovered.[101] The measure of the consequential damages that can be recovered depends on the kind of injury claimed for. If there has been injury to person or property, any damages proximately resulting from the breach may be recovered.[102] If the harm is not to person or property, consequential damages are limited to those arising from facts that the seller had reason to know and that the buyer could not reasonably prevent.[103] The maximum recovery then includes any direct proximate damages, plus incidental damages, plus consequential damages foreseeable by the seller, plus any damage to person or property proximately resulting from the breach.

The parties may, of course, contract for a modification of the statutory remedies. They may provide for liquidated damages[104] or limitation or modification of remedies[105] so long as the limits that are fixed are not unconscionable,[106] but if the limitation fails of its purpose it is not effective.[107] The replacement parts "warranty" that is common in motor vehicle contracts is a common example of such limitation clause,[108] but no limitation provision

96. § 2-717.
97. § 2-714(1).
98. [1954] 3 Ex. 341, 156 Eng. Rep. 145.
99. § 2-714(2).
100. §§ 2-714(3), 2-715(1).
101. § 2-714(3).
102. § 2-715(2)(b).
103. § 2-715(2)(a).
104. § 2-718(1).
105. § 2-719(1).
106. § 2-719(3). The court's power to refuse to enforce contract clauses that were unconscionable when the contract was made is in § 2-302.
107. § 2-719(2).
108. See, *e.g.*, § 2-719(1)(a).

may cut off consequential damages for personal injuries caused by consumer goods.[109]

The seller who is liable in warranty under a sales contract has his action over for breach of the same warranty against his seller. This is so, at least, if he has not purchased under such conditions that a lower standard of goods would be merchantable as to him, and if he has not permitted his seller to exclude or modify his liability. When the retail seller is sued, he may vouch in his seller[110] or wait and sue later. His recovery against his seller would be any loss resulting from the requirements that the goods be fit for resale.[111] The seller who sells to retailers has abundant reason to know of that requirement, and should the goods not be merchantable the dealer/buyer may recover from his seller any damages that may have been recovered from him.

TITLE

A sale is seen technically as consisting in the passing of title from seller to buyer for a price.[112] This being so, it is to be expected that the seller must be held to warrant title. Under the Commercial Code, the warranty of title is not considered either express or implied. It is *sui generis* and has its separate rules for creation, exclusion and modification. Normally, every contract for sale includes a warranty by the seller that he conveys good title[113] and that the goods are subject to no lien or encumbrance of which the buyer has no knowledge.[114] If the seller does not claim title or is known to be selling only such right or interest as he or another has, he can protect himself from warranty liability by language sufficient to give buyers reason to know of his position. The same result will flow from appropriate circumstances. For example, a sheriff conducting a public sale will not warrant title in himself; he is selling only such right as a third person may have.[115]

With respect to certain very important goods an effective warranty of title has to be broad enough to protect buyers against third party claims derived from rights other than straight ownership. In these situations protection against infringement is a proper incident of a warranty of title. But here we have a form of protection so broad that protection of innocent sellers is needed.[116] If use is to be protected by law and available only to licensed buyers,

109. § 2-719(3).
110. See § 2-607(5)(a) for the procedure to be followed.
111. Thus, meeting the requirements of § 2-715(2)(a).
112. § 2-106(1).
113. § 2-312(1)(a).
114. § 2-312(1)(b).
115. § 2-312(2).
116. See 35 U.S.C. § 271(a) (1958).

protection of the buyer who innocently sells is needed. To limit the warranty against infringement appropriately, the Code provides its protection only when the seller is a merchant regularly dealing in goods of the kind.[117]

A very important, yet novel, form of warranty protection is provided sellers when the buyer has control of the facts. If the buyer furnishes specifications to which the seller must conform, the buyer must hold the seller harmless against any claim of infringement or the like that arises out of seller's compliance with the buyer's specifications.[118]

If the buyer is pursued by a claimant who challenges his title or claims infringement, he, of course, has the same privilege to vouch in his seller as he would have for another breach,[119] but he must give timely notice of the suit.[120] If the claim is for infringement or the like, his seller may demand in writing that the buyer give him control of the litigation, including the right to settle. If the seller makes such a demand and agrees to bear the expense and satisfy any judgment that may result against the buyer, the buyer must turn over the control or lose his action over against his seller.[121] In those cases in which seller is entitled to be protected by his buyer, the same rules apply.[122] He must give notice of the litigation within a reasonable time;[123] the burden of establishing breach is his,[124] but he may summon his buyer to defend;[125] and he must be prepared to surrender control of the litigation to a willing buyer.[126]

117. § 2-312(3).
118. *Ibid.*
119. § 2-607(5)(a).
120. § 2-607(3)(b).
121. § 2-607(5)(b).
122. § 2-607(6).
123. § 2-607(3)(b).
124. § 2-607(4).
125. § 2-607(5)(a).
126. § 2-607(5)(b).