North Dakota Law Review

Volume 30 | Number 3 Article 8

1954

The Treatment of Warranty Problems Arising from the Sale of Goods under the Uniform Commercial Code

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would seem to offer very little consolation, since makers of worthless checks are traditionally insolvent.

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THE TREATMENT OF WARRANTY PROBLEMS ARISING FROM THE SALE OF GOODS UNDER THE UNIFORM COMMERCIAL CODE. — Among the many areas of the law in which the Uniform Commercial Code will work substantial changes must be listed those sections of it which deal with the problems arising from warranties. It has long been recognized that the provisions of the Uniform Sales Act regulating these questions are in need of adjustment and overhaul.[1] In general, the Uniform Commercial Code undertakes this difficult task with effectiveness and insight, and a comparison of its provisions with the present law of North Dakota will indicate at once how much improvement has been made.

I.

The first major provision of the Uniform Commercial Code dealing with warranties is §2-313, which undertakes to prescribe the situations in which express warranties of quality or otherwise will be read into a contract of sale. Section 2-313 introduces two significant changes in existing law. Under this section, for instance, "any description of the goods which is made a basis of the bargain creates an express warranty that goods shall conform. . ." This broadens the Uniform Sales Act, which provides that an express warranty is created only if the "natural tendency . . . is to induce the buyer to purchase."[2] Another change would be effected in regard to a sale by sample and description; the UCC provides that such a sale creates an express warranty that the whole of the goods shall conform thereto, while the North Dakota Code provides that an implied warranty is thereby created.[3] The purpose of the latter change could well be to make the warranty effective despite a possible disclaimer clause elsewhere in the contract.

Two significant modifications of existing law would also be

1. See Note, 26 N.D. Bar Briefs 173 (1950).
2. N.D. Rev. Code § 51-0113 (1943). See also Nielson v. Hermanson, 109 Utah 180, 166 P.2d 536 (1946); Teter v. Schultz, 110 Ind. App. 541, 39 N.E.2d 802 (1942); Letnz v. Omar Baking Co., 125 Neb. 861, 252 N.W. 410 (1934); Glaspey v. Wool Grower's Service Corp., 151 Wash. 683, 277 Pac. 70 (1929).
3. N.D. Rev. Code § 51-0115 (7) (1943).

occasioned by the adoption of §2-314 of the Commercial Code. These are the creation of a minimum standard of merchantability and the final determination that food served for value represents a sale[4] rather than an "uttering of service." As represented by case law, the courts have been far from uniform in their decisions on both these problems.[5] A special rule that a sale by a merchant implies a warranty of merchantability will serve to make applicable the minimum standard as provided for. The section also provides that a merchant not usually handling goods of the type sold would not be held to give a warranty of merchantability except where he specifically states that the goods are guaranteed.

Section 2-318 of the Uniform Commercial Code provides:

> "A seller's warranty . . . extends to any natural person who is in the family or household of his buyer or who is a guest in his home . . . and who is injured . . . by breach of the warranty. A seller may not exclude or limit the operation of this section."

The elimination by this section of the requirement of privity of contract in the maintenance of an action for personal injuries caused by the sale of defective goods is one of the more important changes which the adoption of the Uniform Commercial Code would make in existing law.[6] The great majority of courts, including North Dakota, adhere to the common law rule that in order to recover for breach of warranty privity of contract must be shown between the warrantor and the person seeking recovery.[7] However, criticism of the rule has been widespread and there has been a rcent tendency to allow recovery in cases involving injuries caused by food[8] and beverages,[9] although privity in the strict sense was lacking. Even more indicative of the harshness of the privity requirement is the fact that many courts have resorted to the use

4. That it is not a sale: Child's Dining Hall Co. v. Swingler, 173 Md. 490, 197 Atl. 105 (1938); McCarley v. Wood Drugs, Inc., 228 Ala. 226, 153 So. 446 (1934). *Contra*: Jensen v. Berris, 31 Cal.App.2d 537, 88 P.2d 220 (1939); Ford v. Waldorf System, 57 R.I. 131, 188 Atl. 633 (1937); Mix v. Ingersoll Candy Co., 6 Cal.2d 674, 59 P.2d 144 (1936); Goetten v. Owl Drug Co., 6 Cal.2d 683, 59 P.2d 142 (1936).

5. In addition to the cases cited in note 4,*supra*, see Agoos Kid. Co. v. Blumenthal Import Corp., 281 Mass. 1, 184 N.E. 279 (1933); Kelvinator Sales Corp. v. Quabbin Improvement Co., 234 App. Div. 96, 254 N.Y. Supp. 123 (1931); Empire Cream Separator Co. v. Quinn, 184 App. Div. 302, 171 N.Y. Supp. 413 (1918).

6. Note that § 2-318, *supra*, purports to make no change in cases where property damage, as distinguished from personal injury, is involved.

7. Duncan v. Juman, 25 N.J. Super. 330, 96 A.2d 415 (1953); Wood v. General Electric Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953); Timpson v. Marshall, Meadows & Stewart, Inc., 198 Misc. 1034, 101 N.Y.S.2d 583 (1950); Wood v. Advance Rumely Thresher Co., 60 N.D. 384, 234 N.W. 517 (1931).

8. Martin v. Great Atlantic & Pacific Tea Co., 301 Ky. 429, 192 S.W.2d 201 (1946); Blarjeske v. Thompson's Restaurant Co., 325 Ill. App. 189, 59 N.E.2d 320 (1945); Haute v. Kleene, 320 Ill. App. 189, 59 N.E.2d 855 (1943); Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943).

9. Patargias v. Coca Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947); Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E.2d 739 (1943).

of legal fictions to supply privity. Thus, it has been held in such cases that:

1. The manufacturer represents to the public at large that his goods are fit for consumption and the consumer may rely thereon.[10]

2. The plaintiff, although not a purchaser, may sue as the assignee of the purchaser's right.[11]

3. The consumer is a third party beneficiary.[12]

4. The warranty runs with the goods.[13]

Other courts have bluntly stated that privity is simply not a condition precedent to recovery.[14] And there has been a sharp expansion of the concept of tort liability,[15] particularly in the case of food served and eaten on the premises of the seller.[16]

To summarize: while the right of the seller to modify or disclaim the effect of an implied warranty is retained in the proposed code,[17] he is powerless to limit the class of persons who will benefit thereunder.[18] In short, if a warranty is made by the seller, the seller's liability will extend to those designated by the Uniform Commercial Code, contractual provisions to the contrary notwithstanding.

The Uniform Commercial Code further confers wide discretionary powers upon the courts in some types of contract cases. They may, if they see fit, refuse to enforce "unconscionable" contracts or strike out "unconscionable" clauses therein.[19] Any ex-

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10. Roberts v. Anheuser-Busch Brewing Ass'n, 211 Mass. 449, 98 N.E. 95 (1912).

11. Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920).

12. Dryden v. Continental Baking Co., 11 Cal.2d 33, 77 P.2d 833 (1938); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

13. Patargias v. Coca Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947); Coca Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1907).

14. Vaccarezza v. Sanguinetti, 71 Cal.2d 687, 163 P.2d 470 (1945); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942); Klein v. Duchess Sandwich Co., 14 Cal.2d 272, 93 P.2d 799 (1939).

15. Duncan v. Juman, 25 N.J. Super, 330, 96 A.2d 415 (1953); Dumbrow v. Ettinger, 44 F. Supp. 763 (S.D.N.Y. 1942); Smith v. Salem Coca Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942); Borucki v. McKenzie Bros. Co., 125 Conn. 92, 3 A.2d 224 (1939); Hazelton v. First National Stores, 88 N.H. 409, 190 Atl. 280 (1937).

16. Albrecht v. Rubinstein, 135 Conn. 243, 63 A.2d 158 (1948); Child's Dining Hall Co. v. Swingler, 173 Md. 490, 197 Atl. 105 (1938).

17. Section 2-318, Comment 1: "The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by section 2-316." See Jesperson v. Advance-Rumely Thresher Co., 61 N.D. 494, 240 N.W. 876 (1932); Holden v. Advance Rumely Thresher Co., 61 N.D. 584, 239 N.W. 479 (1931); Palaniuk v. Allis Chalmers Mfg. Co., 57 N.D. 199, 220 N.W. 638 (1928); Minneapolis Threshing Machine Co. v. Hocking, 54 N.D. 559, 209 N.W. 996 (1926).

18. Section 2-318, Comment 1: "What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section."

19. U.C.C. § 2-302 (1): "If the court finds the contract or any clause of the contract to be unconscionable it may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the striken clause had never existed."

clusive or limited remedy which the parties have seen fit to adopt may, if in the court's considered opinion it "might fail of its essential purpose," be disregarded.[20] Needless to say, "unconscionable" limitations or exclusions of consequential damages could be refused enforcement.[21]

These latter provisions have drawn some criticism. It has been suggested[22] that the proposed grant of power to the courts to police contracts is undesirable on two grounds at least: "(1) Demonstration by experience that judicial process is incapable of handling difficulties inherent in policing contracts; and (2) the absence of a fixed standard for the exercise of such power."[23] The comments in the Uniform Commercial Code itself, however, seem to provide the best answer: "In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determination that the clause is contrary to public policy or to the dominant purpose of the contract . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.[24]

II.

The Uniform Commercial Code provides for an implied warranty that the goods will be fit for the particular purpose intended where the seller had reason to know of the purpose and the buyer relies on his skill or judgement.[25] It should be noted that the provision requires only that the seller have "reason to know" the particular purpose for which the goods are required in order that a warranty of fitness for that particular purpose may be implied.[26]

The corresponding provision in the Uniform Sales Act requires that the buyer "expressly or by implication *make known* to the seller" the particular purpose for which the goods are sought.[27] Under the present law, therefore, in order for a warranty of fitness

20. U.C.C. § 2-719 (2): "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided by law."

21. U.C.C. § 2-719 (3): "Consequential damages may be limited or excluded unless the limitation is unconscionable. Limitation of conequential damages for injury to person is prima facie unconscionable, but limitation of damage where loss is commercial is not."

22. 18 U. Chi. L. Rev. 146 (1950).

23. 28 N.Y.S. Bar Bulletin (1951).

24. U.C.C. § 2-302, Comment 1.

25. U.C.C. § 2-315.

26. See 1 Williston, Sales § 235 (Rev. ed. 1948).

27. N.D. Rev. Code § 51-0116 (1) (1943): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for that purpose."

to be implied it has been ruled that actual knowledge by the seller of the buyer's particular purpose is essential.[28] In one case, however, the North Dakota Supreme Court has used language indicating that the "reason to know" test is already in force in this jurisdiction.[29]

It is significant that §2-315 makes no reference to the implication of the warranty of fitness in sales of goods under patent or trade names, contrary to the present law. The Uniform Sales Act provides: "In case of a contract to sell or a sale of a specified article under its patent or trade name, there is no implied warranty as to its fitness for any particular purpose."[30] This provision apparently was intended as a restatement of the common law rule that where a known, described and definite article was purchased, there was no implied warranty of fitness,[31] because by selecting a particular object the buyer was not relying on the seller's judgement.[32] Although there are no North Dakota cases on the point, most courts have refused to construe the patent or trade name exception literally and generally tend to ignore it.[33] The UCC apparently endorses this position and omits the rule. As a result, the buyer's request for a patent or trade name article would not *per se* preclude an implied warranty of fitness for a particular purpose, but would merely be an evidentiary fact to be considered along with other circumstances in determining whether or not the buyer actually relied on the seller.[34]

It should be noted that in the event of an inconsistency between the implied warranty of fitness provided for by this section and an express warranty, the implied warranty will be given precedence.[35]

There is presently, with one exception,[36] no provision in the

28. Cretors v. Troyer, 63 N.D. 231, 247 N.W. 558 (1933); Northwest Engineering Co. v. Gjellefald-Chapman Construction Co., 57 N.D. 500, 222 N.W. 621 (1928); Minneapolis Steel & Machinery Co. v. Casey Land Agency, 51 N.D. 832, 201 N.W. 172 (1924).

29. Allis-Chalmers Manufacturing Co. v. Frank, 57 N.D. 295, 221 N.W. 75 (1928): "Where the evidence shows the seller had reason to know the purpose for which goods were purchased and required, there is an implied warranty on the part of the seller that the tractor was reasonably fit for that purpose."

30. N.D. Rev. Code § 51-0116 (4) (1943).

31. Vold, Sales 462 (1931).

32. Seitz v. Brewer's Refrigerating Machine Co., 141 U. S. 510 (1891).

33. Ralston Purina Co. v. Novak, 111 F.2d 631 (8th Cir. 1940); Bagley v. International Harvester Co., 91 Cal.App.2d 922, 206 P.2d 43 (1949); Miller v. Economy Hog and Cattle Powder Co., 288 Iowa 626, 293 N.W. 4 (1940); Ross v. Porteous, Mitchell & Braun Co., 136 Me. 512, 3 A.2d 650 (1939); Rowe Manufacturing Co. v. Curtis Straub Co., 223 Iowa 858, 273 N.W. 895 (1917).

34. See Note, 57 Yale L. J. 1389 (1953).

35. U.C.C. § 2-317.

36. N.D. Rev. Code § 51-0116 (3) (1943): "If the buyer has examined the goods, there is no implied warranty as regards the defects which such examination ought to have revealed."

North Dakota Code dealing with the subject matter of §2-316 of the Uniform Commercial Code. This section provides for the exclusion and modification of express and implied warranties. Under current case law it is possible to disclaim all warranties, both express and implied,[37] but some unique reasoning has been employed to vitiate the effect of these disclaimer clauses as applied to implied warranties. It has been said, for example, that since the implied warranties are imposed by law, they are not as such governed by an agreement between the parties.[38] The UCC apparently approves this tendency of strict construction against the seller by saying that the disclaimer must be in specific language and any ambiguity shall be resolved against the seller.[39]

The principle alteration of present law entailed by adoption of the UCC concerns a UCC subsection which prohibits disclaimer of any express warranty once it is assumed.[40] This should be considered in the light of another section declaring warranties by sample and by description as well as by affirmation to be express warranties.[41] Consequently, as already indicated, a number of warranties which are implied under present law would become express warranties, free from disclaimer under the Uniform Commercial Code.

The further requirement that the exclusion or modification of the implied warranty of fitness for a particular purpose or of merchantability must be in specific language is evidence of the attempt by the UCC to better the position of the relatively inexperienced buyer in his dealings with the seller. This provision is not inconsistent with the case law in this state[42] but a statutory clarification would be useful.

Although this particular section of the UCC in general greatly improves the status of the buyer, in one respect it falls short of the privileges already granted under North Dakota's present law. North Dakota's statutes provide that a person buying a tractor, engine or harvesting machine shall have a reasonable time to test it and if not satisfactory can rescind and return it.[43] The statute

37. Sayeg v. Gloria Light Co., 236 App. Div. 761, 259 N.Y. Supp. 492 (1932); Minneapolis Threshing Machine Co. v. Hocking, 54 N.D. 559, 209 N.W. 996 (1926).
38. Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927); Hardy v. General Motors Acceptance Corporation, 38 Ga. App. 463, 144 S.E. 327 (1928).
39. U.C.C. § 2-316 (2).
40. U.C.C. § 2-316 (1)
41. U.C.C. § 2-313.
42. See Deere and Webber Company v. Moch, 71 N.D. 649, 3 N.W.2d 471 (1942); Minneapolis Threshing Machine Co. v. Hocking, 54 N.D. 559, 209 N.W. 996 (1926).
43. N.D. Rev. Code § 51-0707 (1943).

further provides that any provision between the parties contrary to the intent of the section shall be ineffecive. North Dakota is said to be the only state which has so expressly limited the waiver of any of the implied warranties provided for in the Uniform Sales Act.[44]

The Uniform Commercial Code, in dealing with the cumulation and conflict of warranties, provides that they shall be construed to be consistent with each other and as cumulative.[45] In case of conflict the intent of the parties is dominant. The general rule at present is that both express and implied warranties can exist side by side if they are not inconsistent,[46] but if they are found to be inconsistent the express warranty will prevail.[47] This result is based on the premise that the expressed intent of the parties should prevail over a warranty which is created by operation of law.

This section of the UCC is essentially the same as the present provisions regarding conflict of warranties found in the Uniform Sales Act,[48] with the exception that the proposed provision would hold an implied warranty of fitness for a particular purpose to supreme in the event of an inconsistency with an express warranty.

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BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE. — Though statutes regulating the sale of goods in bulk are relatively new to the law, they have spread rapidly, with the result that some confusion has been occasioned through their rather disorganized incorporation into the statute books of the various jurisdictions. The purpose of such statutes is concisely summed up in the introduction to the Bulk Transfers Article in the UCC. They are intended to deal with two common forms of commercial fraud: (1) "The merchant, owing debts, who sells out his stock in trade to a friend for less than it is worth, pays his ceditors less than he owes them, and hopes to come back into the business through the back door some time in the future," and (2) "the merchant, owing debts, who sells

44. See Note, 57 Yale L. J. 1389, 1401, n. 70 (1953).
45. U.C.C. § 2-317.
46. Rowe Manufacturing Co. v. Curtis-Straub Co., 223 Iowa 858, 273 N.W. 895 (1937); Peterson v. Dreher, 196 Iowa 178, 194 N.W. 53 (1923); Northwest Engineering Co. v. Gjellefald-Chapman Construction Co., 57 N.D. 500, 222 N.W. 621 (1928).
47. N.D. Rev. Code § 51-0116 (6) (1943) provides: "An express warranty or condition does not negative a warranty or condition implied under this chapter unless inconsistent therewith."
48. See note 47, *supra*.