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## LIMITATION OF LIABILITY UNDER THE SALES PROVISIONS OF THE UNIFORM COMMERCIAL CODE

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FROM the inception of trade, a constant and recurring problem between sellers and buyers of goods has been the sellers' attempts to limit their liability. The cases decided under the common law and under the Uniform Sales Act record sellers' contracts which limit or eliminate liability, the buyers' ingenuous arguments of construction and the courts' soul-searching, agonizing attempts to reconcile the principle of freedom of contract with the elemental concept of fairness.<sup>1</sup>

Common methods used by sellers in limiting their liability were warranty disclaimers, provisions for liquidated damages and miscellaneous procedures such as the replacement or repair of defective parts.

The purpose of this article is to examine two interrelated questions under the sales provisions of the Uniform Commercial Code.<sup>2</sup> First, how far can a seller go in negating his responsibilities for the goods he sells. For example, can a seller negate all warranties concerning the goods sold? Secondly, what methods are available to a seller of commercial goods to limit his liability for breaches of his sales contract, and in particular, breach of warranty.<sup>3</sup> Problems dealing with the formation of the contract and the potential conflict of terms of the

<sup>1</sup> Note, 73 YALE L. REV. 723, 726-35 (1963).

<sup>2</sup> All references to the Uniform Commercial Code are to the 1962 Official Draft, with comments, hereinafter referred to as U.C.C.

<sup>3</sup> See generally Cudahy, *Limitation of Warranty under the Uniform Commercial Code*, 47 MARQ. L. REV. 127 (1963); Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods under the Uniform Commercial Code: A Roadmap for Article Two*, 63 YALE L.J. 199, 277-84 (1963); Note, 43 B.U.L. REV. 396 (1963); Note, 38 IND. L.J. 648 (1963).

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seller's and buyer's contracts,<sup>4</sup> or of warranty of title,<sup>5</sup> will not be considered. It will be assumed that the parties under consideration are merchants<sup>6</sup> selling nonconsumer goods.<sup>7</sup>

#### BREACH OF WARRANTY

One of the greatest areas of potential liability for a seller is that of breach of warranty. The Code takes a two step approach in considering a breach of warranty. Initially, it treats the creation, or lack thereof, of a warranty; secondarily, the limitation of damages flowing from a breach of warranty.<sup>8</sup> This analysis will be followed in considering both express and implied warranties.

#### EXPRESS WARRANTIES

Section 2-313 of the Code provides:

- (1) Express warranties by the seller are created as follows:
  - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
  - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
  - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

The comments to section 2-313 indicate that an express warranty can arise at various stages of a business transaction and even from the past acts of the parties. A course of dealings involving past deliveries of goods may establish a warranty of description of quality.<sup>9</sup> At the

<sup>4</sup> U.C.C. § 2-207; *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*, 297 F.2d 497 (C.A.2, 1962); Note, 57 Nw. U.L. REV. 477 (1962); Note, 76 HARV. L. REV. 1481 (1963).

<sup>5</sup> U.C.C. § 2-312.

<sup>6</sup> U.C.C. § 2-104(1). Cf., Note, 39 GEO. L.J. 130 (1950).

<sup>7</sup> U.C.C. § 2-103(3); § 9-109.

<sup>8</sup> U.C.C. § 2-316(4), and comment 2.

<sup>9</sup> U.C.C. § 2-313, comment 5; also § 1-205(1) and (4).

time of the consummation of the sales contract, a seller could make express warranties. However, of greater interest to a seller is the fact that he could be obligated by a warranty made after the contract of sale has been concluded.<sup>10</sup> The later warranty is regarded as a modification of the contract needing no consideration.<sup>11</sup> Thus, the solicitous salesman who reassures the customer after the transaction is closed might destroy all of the protection the carefully drafted sales contract granted his employer.

The Code, in its general provisions, indicates that freedom of contract is still a respected principle.<sup>12</sup> Thus the parties are given some freedom in modifying the provisions of the Code. However, the modification of express warranties is treated specifically in section 2-316(1) which provides:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

Most of the writers agree that section 2-316(1) is confusing at best.<sup>13</sup>

The seller's obvious solution to the ambiguous language of section 2-316 is to make as few express warranties as possible. Once an express warranty is made, it is difficult to later negate it no matter what language may be used.<sup>14</sup>

Although the problem of oral contracts of sale can and will present itself, any competent seller's attorney will counsel his client to have a written contract of sale which will limit his liability. The old standby clause "excluding all warranties, express or implied," will not suffice under the Code to exclude all express warranties.<sup>15</sup> What clause can

<sup>10</sup> U.C.C. § 2-313, comment 7.

<sup>11</sup> U.C.C. § 2-209(1); *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

<sup>12</sup> U.C.C. § 1-102(3); Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 CORNELL L.Q. 1, 40 (1962).

<sup>13</sup> Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. REV. 281, 310 (1961); Cudahy, *supra* note 3, at 131; Note, 38 IND. L.J. 648, 666 (1963).

<sup>14</sup> Cf. U.C.C. § 2-313, comment 3.

<sup>15</sup> U.C.C. § 2-313, comment 4, § 2-316, comment 1.

be used depends upon what the Code will allow as a minimum standard of responsibility for the seller.

The popular requirement that any modification of the contract must be in writing before it shall be valid is still maintained in the Code.<sup>16</sup> In addition, the customary clause providing that an agent lacks authority to do certain things is also available under the Code.<sup>17</sup> However, a real problem which can occur is that of parol warranties given before or at the consummation of the sales contract. The parol evidence rule is contained in the Code.<sup>18</sup> In addition, the parties' written agreement may be modified by a course of dealing or usage,<sup>19</sup> but these modifications can be negated in the written agreement.<sup>20</sup>

Having considered some of the problems in negating express warranties under the Code, now let us consider how far a seller can go in negating all express warranties. The Code makes it quite clear that a seller cannot sell goods and have no responsibilities. Comment 4 to section 2-313 states,

In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described . . . .

Comment 1 to section 2-313 states,

'Express' warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms . . . .

Assuming that no affirmation of fact or promise relating to the goods is made,<sup>21</sup> nor are any samples or models presented to form a basis of the bargain,<sup>22</sup> then the only warranty left that a seller must make is that of the description of the goods.<sup>23</sup> A reading of the previously quoted comments also indicates that this is the seller's minimum responsibility in the express warranty area. However, the Code

<sup>16</sup> U.C.C. § 2-209(2).

<sup>17</sup> U.C.C. § 2-316, comment 2.

<sup>18</sup> U.C.C. § 2-202; see Note, 53 COLUM. L. REV. 858 (1953).

<sup>19</sup> U.C.C. § 2-202(a).

<sup>20</sup> U.C.C. § 2-202, comment 2; see also § 1-205(4).

<sup>21</sup> U.C.C. § 2-313(1)(a).

<sup>22</sup> U.C.C. § 2-313(1)(c).

<sup>23</sup> U.C.C. § 2-313(1)(b).

sheds no light on the most difficult issue concerning the express warranty of description. What exactly is meant by the statement "that the goods shall conform to the description?" Assuming all implied warranties are properly disclaimed, if a car is sold, it is inherent in a description of a car that it have wheels, a motor, upholstery, windshield and those other features of a car. Does the concept of a warranty of description encompass the essence of the item sold? If so, then the courts have a difficult task of distilling the essence of each item sold. Moreover, if a warranty of description includes the essence of a product, then an implied warranty of merchantability might be coming in the back door although having been properly excluded pursuant to the provisions of the Code.<sup>24</sup> The answer to this question is difficult. If a warranty description covers no more than the product sold in its most general terms without reference to its attributes, then sellers will be able to limit their liability substantially.

#### IMPLIED WARRANTIES

In addition to express warranties, the Code also provides for an implied warranties of merchantability,<sup>25</sup> of fitness for a particular purpose<sup>26</sup> and for implied warranties that may arise from a course of dealing or usage of trade.<sup>27</sup> In contrast to the policy of the Code preventing the exclusion of all express warranties, the Code allows the complete exclusion of all implied warranties.<sup>28</sup> Implied warranties are assumed to exist, if the circumstances so permit, until excluded.<sup>29</sup>

The exclusion of implied warranties resolves itself into following the proper guidelines contained in the Code. In the case of a writing,<sup>30</sup> to exclude an implied warranty of merchantability the language must be conspicuous<sup>31</sup> and mention the term "merchantability."<sup>32</sup> The drafters of the Code thought that an implied warranty of merchantability, wherever it was normal, was so taken for granted that special precautions were necessary to prevent surprise.<sup>33</sup> To exclude any

<sup>24</sup> U.C.C. § 2-314; § 2-316.

<sup>26</sup> U.C.C. § 2-315.

<sup>25</sup> U.C.C. § 2-314.

<sup>27</sup> U.C.C. § 2-314(3).

<sup>28</sup> U.C.C. § 2-314(1) and (3); § 2-315; § 2-316(2) and (3).

<sup>29</sup> U.C.C. § 2-316, comment 5.

<sup>30</sup> U.C.C. § 1-201(46).

<sup>31</sup> U.C.C. § 1-201(10).

<sup>32</sup> U.C.C. § 2-316(2); *Duckworth v. Ford Motor Co.*, 211 F.Supp. 888 (E.D. Pa. 1962), modified 320 F.2d 130 (C.A. 3, 1963).

<sup>33</sup> U.C.C. § 2-314, comment 11.

implied warranty of fitness, the exclusion must be in writing and conspicuous but need not mention fitness.<sup>34</sup> The Code even provides the draftsman with a clause to exclude implied warranties of fitness, that is, "There are no warranties which extend beyond the description on the face hereof."<sup>35</sup>

In addition to the above-mentioned methods of preventing implied warranties from arising, there are other means and circumstances which can negate implied warranties. It would seem that an implied warranty of merchantability could be excluded by an oral statement to that effect whereas the exclusion of an implied warranty of fitness "must be by a writing and conspicuous."<sup>36</sup> Implied warranties can also be excluded by a course of dealing or performance, or usage of trade.<sup>37</sup> Oral expressions or inconspicuous written statements like "as is" or "with all faults" can exclude implied warranties.<sup>38</sup> However, if the expressions "as is" or "with all faults" are used to exclude all implied warranties and there is no course of dealing or performance or usage of trade to give them real meaning, then they will undoubtedly fail in their purpose.<sup>39</sup> Finally, implied warranties may be excluded by an express warranty under certain circumstances.<sup>40</sup>

For purposes of analysis, express and implied warranties have been treated as creating readily ascertainable rights. Unfortunately, it is difficult at times to tell whether a warranty is express or implied, or whether one replaces or is in conflict with another.<sup>41</sup> As a result, a draftsman desiring to protect a seller would be wise to exclude all warranties except those which his client is willing to give.

#### LIMITATION OF REMEDIES

Remedies for breaches of warranty can be limited.<sup>42</sup> In addition to breaches of warranty, there are other breaches of a sales contract for

<sup>34</sup> U.C.C. § 2-316(2). Cf., *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (C.A. 8, 1964).

<sup>35</sup> U.C.C. § 2-316(2).

<sup>36</sup> *Ibid.*

<sup>37</sup> U.C.C. § 2-316(3)(c); see also § 1-205(1) and (2); § 2-208.

<sup>38</sup> U.C.C. § 2-310(3)(a), and comment 7.

<sup>39</sup> Cf., Note, 38 *IND. L.J.* 648, 673 (1963), where the author mistakenly thinks that an "as is" clause is sufficient to exclude all implied warranties without proof of a course of dealing or usage of trade.

<sup>40</sup> U.C.C. § 2-316, comment 9; see also § 2-317.

<sup>41</sup> U.C.C. § 2-317. Cf., *L & N Sales Co. v. Stuski*, 188 Pa. Super. 117, 146 A.2d 154 (1958).

<sup>42</sup> U.C.C. § 2-316(4).

which a seller might want to limit his damages, such as the seller's total failure to deliver goods, his failure to deliver the amount ordered and late delivery. The damages for these branches can also be limited.<sup>43</sup>

The problem of the limitation of remedies is functionally divided in the Code into two sections. Section 2-719 deals with non-liquidated damages, remedies and the modification of the measure of damages while section 2-718 deals with liquidated damages.

Consequential damages may also be limited under the Code.<sup>44</sup> However, whether a liquidated damages clause or some other restriction on the buyer's remedy is used, care must be exercised to clearly indicate that the remedy provided is the sole and exclusive remedy.<sup>45</sup>

Turning to section 2-719, we find that the Code has already suggested possible methods of limiting remedies for a seller's breach of warranty. The seller may require a buyer to return the goods and refund the purchase price, or the seller may repair or replace non-conforming<sup>46</sup> goods or parts. It would also seem that the seller could require the buyer to give him notice of a breach of warranty within a fixed time period<sup>47</sup> and require a detailed statement of the alleged defects.<sup>48</sup>

In the case of breach of contract due to a partial non-delivery, or late delivery of goods, the contract could provide the seller with a grace period after the breach in which he could cure the breach without incurring any liability.

However, any suggested remedy varying or substituting the remedies of the Code is potentially subject to being voided under certain circumstances. The Code provides that where circumstances cause an exclusive or limited remedy to fail of its essential purpose, the remedies of the act apply.<sup>49</sup> The comments to the Code make it clear that a tailored remedy can fail either because it is unconscionable *ab initio* or, although appearing reasonable when drawn, it nevertheless operates in such a way under the circumstances to deprive the other party of the

<sup>43</sup> U.C.C. § 2-718; § 2-719.

<sup>44</sup> U.C.C. § 2-719(3).

<sup>45</sup> U.C.C. § 2-719(1)(b), and comment 2. *Cf.*, *Magar v. Lifetime, Inc.*, 187 Pa. Super. 143, 144 A.2d 747 (1958).

<sup>46</sup> U.C.C. § 2-106(2).

<sup>47</sup> U.C.C. § 2-607(3)(a) and (4); § 2-602(1).

<sup>48</sup> *Cf.*, U.C.C. § 2-605.

<sup>49</sup> U.C.C. § 2-719(2).

substantial value of the bargain.<sup>50</sup> At the present time, the draftsman is left with no real precedent to rely upon. In practically any case a defense of an unreasonable remedy could be raised. Whether the courts define any general areas of acceptability or treat each case on an *ad hoc* basis remains to be seen.

A liquidated damage clause can be used as a secondary or primary method of limiting damages.<sup>51</sup> Assume that there is a breach of warranty and that the goods cannot be repaired, as the remedial clause in the contract provides. Obviously, the buyer will be entitled to damages, but these can be limited by the possible use of a liquidated damages clause as a secondary method of limiting damages after the failure of the initial remedy provision. Similarly, in the case of a non-delivery of goods, a liquidated damages clause could be used initially to limit damages where the remedial provision providing for the return or replacement of goods is inapplicable.

The comments state that a liquidated damages clause of an unreasonably small amount might be stricken as unconscionable.<sup>52</sup> However, since the seller is limited, when he withholds delivery of the goods upon the buyer's breach, to retaining 20% of the value of the total performance for which the buyer was obligated under the contract or \$500.00, whichever is smaller,<sup>53</sup> it could be argued that the buyer could be reasonably restricted to damages, for any breach of the seller, of 20% of the purchase price or \$500.00, whichever is smaller.

One of the most interesting issues presented is the interrelationship between section 2-316, dealing with exclusion or modification of warranties, and sections 2-718 and 2-719, dealing with the liquidation or modification of damages. Section 2-718(4) specifically states that remedies for breach of warranty can be limited by section 2-718(2) and section 2-719. Sections 2-718 and 2-719 have no provisions for conspicuous writings or any particular language. Thus, even though there is nothing in a written contract properly negating express and implied warranties, as a practical matter a carefully drafted clause restricting the buyer's remedies upon the seller's breach of

<sup>50</sup> U.C.C. § 2-719, comment 1.

<sup>51</sup> See generally Note, 72 YALE L. REV. 723, 751-55 (1963).

<sup>52</sup> U.C.C. § 2-718; comment 1; *Unit Vending Corp. v. Tobin Enterprises*, 194 Pa. Super. 470, 168 A.2d 750 (1961); see U.C.C. § 2-302.

<sup>53</sup> U.C.C. § 2-718(2)(b).

contract could take away the rights the buyer might have had under the warranty provisions of the Code.

The seller could also curtail the statute of limitations within which a buyer may sue for seller's breach of the contract. If the parties agree, the statute of limitations may be reduced to one year.<sup>54</sup> However it is an open question as to whether the buyer's statute of limitations can be reduced to one year while leaving the seller's remedies subject to a four year period of limitation.<sup>55</sup>

#### FAIRNESS

Throughout the Code, the draftsmen have sought to inject the element of fairness into the dealings between the parties. The specific sections of the Code dealing with express warranties,<sup>56</sup> liquidated damages,<sup>57</sup> and non-liquidated damages remedies<sup>58</sup> forcefully illustrate this proposition. In addition the Code has a general section concerning the unconscionability of any contract or clause thereof<sup>59</sup> and the obligations of good faith.<sup>60</sup>

In view of this tenor of fairness, a seller would do well to adhere to reasonable commercial practices regarding limiting buyer's remedies for breach of warranty or other breaches of contract.<sup>61</sup> This practice would not only be good business in the sense of customer relations but would also probably withstand any attack based upon unfairness.

Any remedy that is too one-sided is subject to attack for unconscionability. Just how far the courts will allow a seller to restrict the buyer's remedies is still an open question.

#### CONCLUSION

The Code provides that all express warranties except that of description can be negated. What is meant by a warranty of description is an open issue which courts will have to wrestle with. All implied

<sup>54</sup> U.C.C. § 2-725(1).

<sup>55</sup> Cf., U.C.C. § 2-302.

<sup>57</sup> U.C.C. § 2-718, comment 1.

<sup>56</sup> U.C.C. § 2-313, comment 4.

<sup>58</sup> U.C.C. § 2-719(3).

<sup>59</sup> U.C.C. § 2-302; Note, 43 B.U.L. REV. 396, 402 (1963); Note, 109 U. PA. L. REV. 401 (1961); Note, 45 Iowa L. Rev. 843 (1960); Note 45 VA. L. REV. 583 (1959); Note, 58 DICK. L. REV. 161 (1954); Note, 18 U. CHI. L. REV. 146 (1950).

<sup>60</sup> U.C.C. § 1-203. Cf., U.C.C. § 2-103(1)(b).

<sup>61</sup> Cf. U.C.C. § 2-302(2); Hall v. Everett Motors, Inc., 340 Mass. 430, 165 N.E.2d 107 (1960),

warranties can be negated if the guidelines set forth in the Code are followed. Remedies for breach of warranty and other breaches of a sales contract such as non-delivery, partial delivery or the delivery of defective goods can be limited. However to the extent that the remedies provided by the seller are unconscionable or unfair, whether initially or in the face of subsequent circumstances, they run the risk of being voided by the courts thereby leaving the buyer free to pursue all of his remedies under the Code. The safest course for a seller to follow is to provide fairly reasonable remedies for the buyer in case of a breach of the sales contract. This approach will not only increase customer goodwill but will also probably withstand any attack by the buyer that the remedy provided is unconscionable.