Commercial Warranties and Agricultural Products
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Cooperative Extension Service
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March 1977
12 pages

Extension Bulletin E-1053

March 1977

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I: The Uniform Commercial Code
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"The Grower Warranty Constitutes All Of The Warranties With Respect To The Sale Of This Item/ Items. The Seller Hereby Expressly Disclaims All Warranties, Either Express Or Implied, Including Any Implied Warranty Or Merchantability Or Fitness For A Particular Purpose, And The Seller Neither Assumes Nor Authorizes Any Other Person To Assume For It Any Liability In Connection With The Sale Of This Item/Items."

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Commercial Warranties & agricultural products

Why be Concerned about Warranties?

A WARRANTY DETERMINES who bears the loss when a buyer is disappointed with a purchased product. If the seller has guaranteed the buyer or, has warranted to the buyer that the product will perform in a certain manner, then the buyer can shift his loss to the seller if the product does not meet the promised level of performance. For example, if a sod grower sells sod to a buyer and the sod dies on installation, whether the buyer can sue the seller for the buyer's loss turns on whether the sod grower has warranted that the sod will survive transplant.

Growers, wholesalers and retailers of agricultural products, whether they sell hogs, wheat, sod or flowers, cannot afford not to understand the law of warranties. Warranty law is, unfortunately, complicated. Some warranties can be created only by express agreement. Other warranties will be implied by the courts if the parties have not expressly disclaimed them. Disclaimers of warranties must sometimes use special language and be in a particular form before the courts will recognize them as valid. While the law allows the parties to agree to limit the measure of damages upon breach of a warranty, there are also limits.

This bulletin will survey the law of warranty touching on the above and other issues. This writing, however, cannot be a complete expression of the law on commercial warranties. In drawing up a contract that involves much money, you should consult an attorney. This bulletin should, however, help you in the preliminary stages of contract negotiation and will alert you to potential trouble spots in the form contracts you may use.

This bulletin is divided into two parts corresponding to the relevant sources of law. The first part deals with provisions of the **Uniform Commercial Code** (UCC) on warranties. The UCC is a uniform set of laws governing commercial transactions that has been adopted by 49 states, including Michigan. The second part deals with the new federal law, the **Magnuson Moss — Federal Trade Commission Improvement Act,** which places certain additional restrictions on warranties.

I: The Uniform Commercial Code (UCC)*

Offering a Warranty

Sellers can provide buyers with two categories of warranties — express warranties and implied warranties.

An express warranty is an actual promise by the seller that the product will meet a certain level of quality. An example is a farm implement dealer's promise that the tractors he sells will be defect-free for one year and that the dealer will replace all defective parts during this one-year period.

An implied warranty is a warranty the seller gives even if he says nothing about warranties in the sales agreement. Implied warranties are simply assumed to be given. The seller, however, can avoid giving an implied warranty by actually stating, in a manner discussed later, that he is giving no implied warranties.

Express Warranties

Just as there are many ways to communicate, there are a number of ways a seller can expressly warrant what he sells. He can actually promise that the product will meet a certain quality level[1]; for example:

> *Tom Tomato says to George Grower, "95 percent of the tomato seedlings I am selling you will survive transplant."*

The seller can simply affirm the buyer's statement relating to the goods sold[2], as when

> *George Grower says to Tom Tomato, "95 percent of the seedlings will survive transplant, won't they?" Tom says, "yes."*

A description of the goods creates a warranty;[3] for example:

> *Fred Fertilizer sells Greg Grower sacks of chemical fertilizer on which it is printed that the bag contains 40% nitrogen, 15% phosphorous, and 10% potassium.*

Simply handing the buyer a sample or model of the product being sold can create a warranty that the product actually will be of the same quality,[4] as when

> *Sam Sod shows Larry Landscaper a yard of sod to indicate the quality of sod he will sell Larry.*

Express warranties can be oral or written. However, oral warranties may be invalidated if a written agreement is later made which states that there are no other terms apart from those set forth in writing (a matter discussed later). A written warranty is also better evidence that a warranty was actually made.

Not every statement a seller makes about the quality of his product is a warranty. A seller's opinion or commendation of the product is called puffing and is not a warranty.[5] A sodgrower's statement to a broker that "my customers have been happy with the sod I sold them" is puffing. So too is a tractor salesman's

*See page 12 for footnote references.

claim that the FMC tractors he sells are more reliable than the John Deere tractors.

The line between puffing and warranty is unfortunately unclear. It may help buyers and sellers to know the factors a court may consider in a close case:

1. The more specific the statement the more likely it is a warranty.
2. A written statement is less likely to pass as puff than an oral statement.
3. A written statement in a contract is better evidence of a warranty than if it is in an advertisement.
4. The nature and reasonableness of the buyer's reliance is important to the finding of a warranty.
5. The more the seller hedges, the less likely there is a warranty. To avoid this troublesome area the best advice to sellers is simply to be quite clear in making warranties.[6]

Implied Warranties

Complete silence on the subject of warranties is one way the seller can avoid giving an express warranty but it will not eliminate implied warranties. Implied warranties are warranties the law presumes the parties have implicitly agreed on or would have agreed on if the buyer and seller had thought about them. The presumption can only be defeated by an express disclaimer (a matter discussed later). The implied warranties of particular importance are the warranties of merchantability and fitness for a particular purpose.

MERCHANTABILITY

A warranty of merchantability is essentially a warranty that the product sold meets the reasonable expectations in terms of quality of one who deals in the product. Some factors courts may consider in determining a particular product's merchantability are:

1. usage in the trade;
2. price, or an index of the nature and extent of the product;
3. characteristics exhibited by goods of the same class produced by persons other than the seller in question; and
4. government standards and regulations.[7]

Examples of breaches of the warranty of merchantability illustrate this warranty:

- sod is probably unmerchantable if it dies two days after it is laid, assuming due care was used in laying and maintaining the sod;
- hens sold for egg laying are unmerchantable if they won't lay regularly;
- a steer sold for slaughter is unmerchantable if it has an undetectable disease that makes the meat unfit for consumption.

Merchantability, however, does not require perfection. For example, if farmers usually expect 90 percent of the tomato seedlings they transplant to survive transplant, a 99% survival rate is not necessary for the seedlings to be merchantable.

Not all sellers, only "merchants," by their silence warrant the goods they sell to be merchantable. For purposes of law, a "merchant" is a person who deals in goods of the kind or otherwise holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.[8] Wholesalers and retailers of agricultural products, such as wholesale grocers, sod brokers, nurserymen and grain elevator operators, would all be merchants of the goods they sell. A nonfarmer who occasionally sells the surplus from his backyard garden, a farmer who sells a tractor to a neighbor and the farmer who sells extra fertilizer to his neighbor are not merchants with regard to the products they are selling.

There is some dispute over whether a farmer is a merchant when he sells the crops or animals he has grown or raised. The court cases outside Michigan are split. Two state supreme courts have held farmers are merchants while two others have reached the opposite conclusion. The Michigan courts have not ruled on this matter; however, to play it safe, Michigan farmers should assume they are merchants of the agricultural products they raise and sell.

FITNESS FOR A PARTICULAR PURPOSE

Buyers sometimes have unusual uses in mind for the products they buy, uses that require the product be more than "merchantable." Under certain limited circumstances, the law will imply a warranty that the goods are suitable for the buyer's particular purpose. The circumstances are limited because in most instances the buyer should demand an express warranty. The factors which must exist for a warranty of suitability for a particular purpose to be implied are:

1. The buyer must have a particular purpose for which the goods are required;
2. The seller at the time of contracting must have reason to know the buyer's particular purpose;
3. The seller at the time of contracting must have reason to know that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods; and
4. The buyer must, in fact, rely on the seller's skill or judgment.[9]

An example will illustrate the element necessary for creation of a warranty of fitness for a particular purpose. A potato chip manufacturer contracts to buy 10 carloads of potatoes from a farmer who historically has grown potatoes for chipping. Nothing is said about the quality of the potatoes but the grower knows the buyer is not sending a representative to inspect the potatoes in the field and the grower knows the seller intends to chip the potatoes upon delivery. Under

these circumstances a court would probably find the grower to have **impliedly** warranted the potatoes to be fit for chipping on delivery to the buyer's plant.

It is not necessary that the seller be a "merchant" to imply a warranty of fitness for a particular purpose, although in most instances the sellers will be merchants. Note that if a seller is a "merchant" he can be held to **impliedly** warrant the goods to be both merchantable and fit for the buyer's particular purpose. It is also quite possible for a merchant to sell a product which does not breach the warranty of merchantability but which is not suitable for the buyer's particular purpose.

Breaching the Warranty

Once you have determined that the seller has expressly and/or impliedly warranted the goods he sold, the critical question is whether the seller breached the warranty. There are two elements to finding a breach of warranty: (1) the goods must not measure up to the seller's express or implied promises; and (2) the seller must be responsible for the defect.

The **nonconformity** of the goods to the warranty (or not measuring up) is a matter of evidence. The buyer must prove the goods are not as warranted. Buyers will have an easier time proving breach if they immediately notify the seller of the defect and have others witness the defect.

The second element to prove breach, **causation** (or the seller's responsibility), is sometimes difficult to prove. Causation means that the seller must have in fact sold the buyer a defective or nonconforming product. Agricultural products after sale to a buyer may rot, die, fail to germinate or otherwise fail to meet the buyer's expectations. But death, rotting or failure to germinate may result from the buyer's handling of the goods, and not be a case of the seller delivering defective goods. If someone other than the seller is responsible for the failure of the product, then the seller is not liable.

An example illustrates the importance of causation. Sam Sodbroker sells 500 yards of sod to Larry Landscaper. Larry installs the sod along with 300 yards he bought elsewhere around an office building. One week after the sod is installed, most of it dies. Larry establishes that Sam gave a warranty of merchantability and that the sod is unmerchantable if it dies in a week. Larry, however, can't claim breach of warranty unless Sam actually sold him defective sod. Sam will argue that the sod was OK but that Larry did not install it properly. Or Sam might argue that the other 300 yards of sod contained a fungus that spread to and killed the 500 yards Sam sold Larry. Or Sam might argue that Larry mixed up the sod and can't prove that the sod that died was actually Sam's sod.

The susceptibility of agricultural products to disease or mishandling after sale should make causation an important element in a breach of warranty suit. It is therefore in the interest of the sellers and buyers of agricultural products to keep careful records on the quality of the goods sold or purchased in the event breach of warranty is alleged.

The fact that an earlier seller actually caused the defect is no defense for the immediate seller. The seller's warranty liability turns on simply selling the defective product, not creating the defect. Therefore, even though the sod grower actually caused the defect, a sod broker is liable to anyone to whom he sells the defective sod. Note that the immediate seller can in turn sue the person who sold him the goods if he can establish that the earlier seller warranted the goods and that the goods did not meet the warranty at the earlier time of sale. In some instances the buyer may be able to sue the remote seller for breach of warranty; however, this sort of suit is limited by the defense of **privity** (a matter discussed later).

Damages for Breach

Once the buyer has established that the seller has breached a warranty, the important question is how much can the buyer recover from the seller. Buyers can suffer many types of losses due to breach: the cost of repair, the cost to replace, lost profits, injury to property, injury to people, etc. Merely proving any or all of these types of losses or injuries does not guarantee that the buyer will receive compensation for them.

The law provides that the seller and buyer can agree in their contract on the measure of damages if the contract is later breached. Often you will find that the seller promises only to replace or repair defective goods. A farmer whose harvester breaks down in the middle of harvesting can see that a repair or replacement clause is little comfort if half his crops rot waiting for the repair of his harvester. Sellers and buyers should carefully scrutinize any limitation of damages clause. The existence or nonexistence of a damage limit clause should affect the agreed-on price for the product.

Kinds of Loss

Many times there is no damage limitation clause, particularly where there is only an oral agreement. If the seller and buyer did not agree on the measure of damages, the law provides a remedy for these cases. A distinction is drawn initially between direct and indirect losses, the latter being more difficult to recover. A direct loss is simply the cost to repair or replace the defective goods. Indirect losses are those that are a consequence of the breach such as physical injury or loss of profits. For example, if a tractor engine blows up in violation of the warranty, the farmer first suffers the direct loss of repairing the tractor. This is loss that inheres in the breach. The farmer can also suffer losses as a consequence of the

breach; that is, indirect damages such as the rotting of crops that could not be harvested due to the tractor down time or the added cost of hiring a custom harvesting outfit. The recovery of direct and indirect losses will be discussed in turn.

DIRECT LOSSES

The measure of damages for direct losses turns on whether the buyer discovered the breach of warranty before or after he accepted the product or goods. If the breach is discovered before acceptance, the buyer can cancel the contract and recover the difference between the market price of nondefective goods or the actual substitute contract for nondefective goods and the original contract price.[10] If the buyer accepts the defective goods and only later discovers the breach, he must pay the contract price but he can recover the difference between the value of the goods if they were not defective and their actual value.[11]

No doubt the reader at this point is saying, "so what!" The distinction between rejection **before** and rejection **after** is critical if the market price of the goods has declined between the time the contract was entered and the time of breach.

An example illustrates how damages are measured under the above two formulas. William Wheat contracts in February to sell Warren Warehouse 100 tons of wheat at $50 a ton, delivery due on August 1. On August 1 William delivers the 100 tons but it is unmerchantable because it is too wet. High-moisture wheat on August 1 is worth only $40 a ton. Also, because wheat farmers overplanted, the market price of dry wheat of the sort William is delivering on August 1 is only $45 a ton.

Let's first assume Warren notices the wheat is too wet and rejects it. Warren has then two options. He can enter a contract for wheat on August 1 at a price around $45 a ton or he can simply do nothing. In either case Warren can recover from William the difference between the February contract price and either the price of the August 1 substitute contract or the August 1 market price:

Market price or substitute Contract price on August 1	$45/ton
(—)	(—)
Original contract price (February)	$50/ton
Recoverable damages	$ 0/ton

As we can see, Warren recovers nothing from William. But we should not be sad for Warren. Warren was able to get out of his $50 a ton purchase contract and into a $45 a ton contract. Warren saved himself $5 a ton **by spotting** William's wet wheat.

Now let us assume Warren did not check William's wheat carefully and accepted it. Only two days later, while blending the wheat, did Warren discover the wheat was too wet. In this instance, Warren can only recover the difference between the market value of merchantable wheat and the actual value of the wet wheat.

Market value of merchantable wheat on August 1	$45/ton
(—)	(—)
Actual value of the wet wheat on August 1	$40/ton
Recoverable damages	$ 5/ton

At first, one might think Warren is better off accepting the goods. After all he gets $5 a ton back in damages. But Warren is really worse off. He has, in fact, actually lost $5 a ton. First—Warren has had to pay William $50 a ton for wheat that, if merchantable, is worth only $45 a ton. Now of course Warren gets $5 a ton back from William, but Warren is stuck not with dry wheat worth $45 a ton but wet wheat worth $40 a ton. So let's put it all together. Warren buys wheat at $50 a ton which he can only sell at $40 a ton because it is wet. Warren's $10/ton loss is only partly offset by a $5/ton recovery from William, leaving Warren with a net $5 loss.

The lesson to buyers is that they should carefully inspect the goods before acceptance to insure that the goods are as warranted, particularly if the market price has dropped below the contract. Buyers in times of declining market price should reject all goods if they are not exactly as warranted. When market prices are falling, the buyer is best off if he can cancel his higher-priced contracts.

INDIRECT OR CONSEQUENTIAL DAMAGES

Indirect or consequential damages are losses other than simply the loss of the benefit of the bargain. These losses can be physical, such as personal injury or injury to property, as well as financial. Our focus will only be on financial losses. Agricultural product cases rarely involve personal injury or injury to property. Further, the law regarding personal injury is in a state of change.

Examples of consequential financial damages are lost profits and injury to business reputation. Sometimes consequential damages are more important to the buyer than direct damages. An extreme example is where a small defective part keeps a tomato harvester out of the field during two days at the height of harvesting. It is more important to the farmer that he recover the value of the tomatoes that rotted during these two days than the difference in value between the part as warranted and its actual defective condition.

Not all consequential damages are recoverable. The law limits the buyer's recovery to only those losses that the seller at the time of contracting had reason to foresee as resulting from his breach.[12] It is not necessary that the seller actually foresee the potential extent of damages; rather it is sufficient that, based on the information he had, he should have known the possible extent of damages upon breach. There

is variation in the extent to which courts will hold that a particular seller has or should have foreseen the actual damages that resulted from the seller's breach of warranty. Some courts are quite restrictive, while others are not. The buyer certainly enhances his position by making very clear (**at the time of contracting**) his expected use of the product.

Note that a "limitation of remedy" clause in the agreement can be used to limit or completely avoid consequential damage recovery.

Apart from the requirement of foreseeability, another limit to recovering consequential damages is the buyer's duty to minimize damages that flow from the breach of warranty. The buyer cannot simply sit idly by and let consequential damages mount and then recover them in a breach of warranty action if the losses could have been avoided by the buyer. For example, if a defective part disables a tomato harvester during harvesting for two days, the farmer could not recover the entire value of the tomatoes lost to rot during those two days if a tomato harvester could have been rented for those two days.

Seller's Defenses

Privity

The Seller's Defense Against a Remote Buyer

Privity is an important seller defense when the seller is sued for breach of warranty by a person who bought the product not from the seller but from someone who bought the goods or product from the seller. A common example is when Sam Sodgrower sells diseased sod to Bob Broker who in turn sells the sod to Larry Landscaper who finds the sod to have died two days after installation. If Larry can prove that Sam impliedly warranted the sod to be merchantable when Sam sold the sod to Bob, he may try to sue Sam for breach of warranty. Buyers often want to sue remote sellers (or in actuality, remote buyers want to sue sellers) when they fear their immediate sellers (in this case Bob) are broke or cannot pay the entire expected damage recovery.

In effect, the traditional rule of privity prevents Larry from suing Sam; that is, it prevents buyers from suing remote sellers. The law of privity is changing. For the most part, privity is not a defense when the buyer is seeking recovery for personal injury or injury to property. However, when the buyer is seeking only financial losses, privity may still be a valid defense; the Michigan Supreme Court has not ruled definitely on this question.

Although there are no Michigan cases, privity will not usually stand as a defense when a seller makes an express warranty directly to a remote buyer such as through advertising. Therefore, our landscaper might recover against the grower if the grower advertised that his sod is disease free. A statement on a label or in literature put out by the buyer could also constitute an express warranty to the ultimate buyer.

Notice of Breach

Upon discovering a breach, a buyer has a duty to notify the seller within a reasonable time after the breach.[13] An unreasonable delay in so notifying the seller in some instances will bar the buyer's suit. In personal and property injury cases, the courts are more willing to ignore the notice requirement.

When only economic losses are sought, the courts will enforce the notice requirement. Of course the issue in notice cases is what is a reasonable period of time in which to give notice. There are no set rules on this point. It rests in the judge's discretion.

Disclaimers and Modification

Sellers as well as buyers are protected by the law. The seller who wants to avoid giving express or implied warranties may do so. Also, the seller can give a warranty but provide a restricted remedy. There are, however, some restrictions on the manner in which, and the extent to which, warranties can be disclaimed and remedies limited.

Express Warranties

Generally, a disclaimer of all express warranties is ineffective if the seller actually gave a buyer an express warranty.[14] In other words, if a seller gives an express warranty he cannot disclaim it. However, if there is uncertainty over whether the seller actually warranted the goods, a disclaimer clause may be considered to prove that no express warranty was given in the first place.

There is one situation where a disclaimer of an express warranty may be allowed — that is the situation where an oral warranty was made prior to a written contract which disclaims all express oral warranties. An example that often arises is where a car salesman orally warrants a used car to be defect-free for 120 days but the dealer's sales contract provides that all warranties are disclaimed that are not within the contract.

Courts will enforce written contracts that disclaim all prior oral warranties only when the written contract constitutes the "complete and exclusive statement of the terms of the agreement."[15] Determining whether a contract is "complete and exclusive" is a bit uncertain. However, sellers are advised to state clearly in the written contract that it is the entire agreement. A possible clause might be the following:

> **MERGER CLAUSE:** *The seller's salesman may have made oral statements about the merchandise described in this contract. Such statements do not constitute warranties, shall not be relied upon by the buyer, and are not part of the contract for sale. The entire contract is embodied in this writing. This writing constitutes the final expression of the parties' agreement, and it is a complete and exclusive statement of the terms of that agreement.*[16]

Merchantability

The implied warranty of merchantability is the warranty that sellers most often want to disclaim or modify. The law allows sellers either to eliminate their merchantability liability or to modify it. A common modification is to place a time limit on the warranty, such as warranting the goods to be merchantable for 30 days.

The law places some limitations on the manner in which the warranty of merchantability can be disclaimed. First, all disclaimers or modifications must use the word "merchantability."[17] Thus a simple disclaimer clause such as "all implied warranties are excluded" would not exclude the warranty of merchantability.

Second, the exclusion or modification of the warranty of merchantability can be oral or written; but, if written, it must be conspicuous. The law defines conspicuous in the following manner: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of the form is 'conspicuous' if it is in larger or contrasting type."[18]

Fitness for a Particular Purpose

The exclusion or modification of the warranty of fitness must be in writing, it cannot be oral, and it must be conspicuous.[19] No particular language is required although the relevant provision of the law states that the following language is sufficient:

> *"There are no warranties which extend beyond the description on the face thereon."*

Sample Disclaimer Clauses

White, in his treatise on the Uniform Commercial Code, suggests language similar to the following to disclaim the warranties of merchantability and fitness.

> "EXCLUSIONS OF WARRANTIES: *The parties agree that the implied warranties of MERCHANTABILITY and fitness for a particular purpose and all other warranties, express or implied, are EXCLUDED from this transaction and shall not apply to the goods sold."*[20]

If a seller wants to provide the buyer with limited protection he should spell out the nature of the express warranty in specific terms. Following the express warranty, White suggests language to the effect:

> *"The warranty described in this paragraph shall be IN LIEU of any other warranty, express or implied, including, but not limited to, any implied warranty of MERCHANTABILITY or fitness for a particular purpose."*[21]

Disclaimer Subsequent to Contracting

The following situation may arise in the sale of agricultural products: upon delivering the goods, the seller gives a disclaimer on a label attached to the goods or on an invoice. This is essentially an attempt to disclaim a warranty after a sales agreement has been reached. The general rule is that such a disclaimer will have no effect unless it qualifies within the narrow confines of a contract modification.[22]

An existing contract can only be modified if the parties, the buyer and seller, agree to the modification. One might imagine that the seller is usually quite reluctant to agree to a subsequent warranty disclaimer or modification. Further, if the existing contract involves a price of greater than $500, the modification must be in writing.

Other Disclaimers

"AS IS" CLAUSE

The law prescribes alternative methods to exclude, but not modify, implied warranties. The law provides that "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all faults,' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."[23]

One should note initially that an **express** warranty such as a description of the goods by the seller cannot be disclaimed with an "as is" clause.

There is some dispute over whether an "as is" clause must be conspicuous. The safe way to handle this is to make the clause conspicuous in order to assure that the "buyer's attention" has been called to the exclusion.

EXAMINATION OR OPPORTUNITY TO EXAMINE

The law provides "when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired, no implied warranty with regard to defects which on examination ought in the circumstances to have been revealed to him."[24] Only implied, not express, warranties can be disclaimed by examination.

A strategy a seller might follow, therefore, is to demand that the buyer actually examine the goods in order to assure that apparent defects cannot later be sued upon for breach of implied warranty. But by this strategy, the seller does make an express warranty that the goods delivered will match the sample or model.

The skill of the buyer is relevant to determining what defects are excluded by examination. The defects apparent to a professional buyer may not be seen by a nonprofessional buyer. The more skilled the buyer, the more likely the court will find the defects to be ones "which ought in the circumstances" to have been revealed to him.

COURSE OF DEALING OR COURSE OF PERFORMANCE OR USAGE

The law provides that "an implied warranty can also be excluded or modified by course of dealing, or course of performance or usage of trade."[25]

A "course of dealing" is a "sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their experiences and other conduct."[26]

A "course of performance" is established "where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other. . . ."[27]

A "usage of trade" is "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."[28]

Of these three methods of disclaimer, usage of trade will arise most often in agricultural transaction. For example, in the sale of cattle when a cattle buyer inspects animals and cuts out those that do not suit him there is a usage of trade, at least in Nebraska, that his acceptance of others excludes all implied warranties as to those accepted, even though there was no proper express disclaimer.[29]

A limit on trade usage as a disclaimer is that it is binding on members of the trade involved or persons who know or should know of the particular usage. Thus, in the Nebraska cattle sale example, the trade usage may not apply to an out-of-state buyer who was not aware of the trade practice.

Modification or Limitation

The damage remedies for breach of warranty outlined earlier are not absolute. The UCC allows the parties to agree to a different or limited remedy.[30] For example, the agreement might limit the buyer's remedy to simple replacement of the defective products and disclaim liability for consequential damages such as lost profit.

There is some overlap between a modification of warranty and a modification of remedy. For example, a sodgrower may achieve the same effect by disclaiming all warranties except the replacement of defective sod or by limiting the buyer's damages to replacement of the sod.

A modification of remedy does not have to meet the conspicuousness requirement that a warranty modification must. However, if the remedy is intended to be the sole and exclusive remedy, this should be clearly stated. Also the word "remedy" should be used to make clear that the warranty itself is not being modified.

The remedy provided should not be so minimal as to appear to provide no real remedy. However, the agreed-upon remedy can provide a damage recovery substantially smaller than the law would otherwise provide if there were no such clause limiting the remedy.

II: The Magnuson Moss – Federal Trade Commission Improvement Act

The Magnuson Moss Act[31] is a new federal consumer protection law that places restrictions on sellers in addition to those of the Uniform Commercial Code discussed in Part I. Magnuson Moss, however, only applies to a small group of sellers of agricultural products. The bulk of agricultural product sales are not affected by Magnuson Moss. Because of its limited impact the discussion of the Act is briefer than the discussion in Part I.

Its Application

Magnuson Moss applies only to the sale of a "consumer product" to a "consumer."

A "consumer product" is "any tangible personal property which is to be distributed in commerce and which is normally used for personal, family, or household purposes."[32] While there are no cases interpreting the term "consumer product," it seems unlikely that many agricultural commodities would qualify as consumer products. Until there are cases to the contrary, a rule of thumb is that if the product has to be processed before it is consumed by consumers it is not a consumer product. Therefore, five tons of wheat would not qualify as a consumer product, but the one ton of flour made from it would qualify if sold to consumers. Nursery products, sod, dairy products and vegetables are all probably "consumer products."

The impact of Magnuson Moss on members of the agriculture industry is narrowed further because the Act applies only to sales to "consumers."

A "consumer" for purposes of the Act is "a buyer (other than for purposes of resale or use in the ordinary course of the buyer's business) of any consumer product. . . ."[33] Therefore, a sodgrower's wholesale sale of sod to a nurseryman would not be covered by Magnuson Moss but the nurseryman's retail sale of the sod to a homeowner would be covered.

Warranty Requirement

There must be a written warranty given before Magnuson Moss applies to the sale of a consumer product.

If the seller does not give a written warranty he can forget Magnuson Moss; but woe to him who gives a written warranty and does not understand the Act.

The Act defines warranty as "any written affirmation of fact or written promise made in connection with the sale of consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking."[34] Essentially the Act's definition of a warranty conforms to the UCC definition of a written express warranty.

Requirements at Sale Price Minimum

If a seller warrants in writing a consumer product to a consumer and the product costs the consumer more than $15.00 he must "fully and conspicuously disclose in simple and readily understood language" the following terms and conditions of such warranty:

1. The identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty.
2. A clear description and identification of products, or parts, or characteristics, or components or properties covered by and where necessary for clarification, excluded from the warranty.
3. A statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide.
4. The point in time or event at which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration.
5. A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligation(s). This includes the name(s) of the warrantor(s), together with the mailing address(es) of the warrantor(s) and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warrantor obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance.
6. Information on the availability of any informal dispute settlement mechanism elected by the warrantor.
7. Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in the Act, accompanied by the following statement: "Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation may not apply to you."
8. Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement, which may be combined with the statement required in subparagraph (7) above: "Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation may not apply to you."
9. A statement in the following language: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state."[35]

Availability of Terms

Where the consumer product actually costs the consumer more than $15.00 and a written warranty is provided, the seller must make available for the prospective buyer's review, prior to sale, the text of such written warranty by use of one or more of the following means:

1. Clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product.
2. Maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each department in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each such department, or in a location which provides the prospective buyer with ready access to such binder(s), and shall be prominently entitled "Warranties" or other similar title which clearly identifies the binder(s). Such binder(s) shall be indexed according to product or warrantor and shall be maintained up-to-date when new warranted products or models or new warranties for existing products are introduced into the store or department by substituting superseding warranties and by adding new warranties as appropriate. The seller shall either:
   a. display such binder(s) in a manner reasonably calculated to elicit the prospective buyer's attention; or
   b. make the binders available to prospective buyers on request, and place signs reasonably calculated to inform the prospective buyers of the availability of the binders, including instructions for obtaining access.
3. Displaying the package of any consumer product on which the text of the written warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale.
4. Placing in close proximity to the warranted consumer product a notice which discloses the text of the

written warranty, in a manner which clearly identifies to the prospective buyers the product to which the notice applies.[36]

Exceptions to the above alternatives are provided for catalog and mail order sales and door-to-door sales (matters not discussed in this bulletin).

Labeling of Warranties

The section of the Magnuson Moss Act that is probably of most concern to sellers is the requirement that written warranties must be conspicuously labeled as either "full" or "limited," for the consumer products costing the consumer over $10.00.[37]

A "full" warranty is one that meets certain minimum standards outlined in the Act.

A "limited" warranty is one that does not comply with the minimum standards.

The intention behind this provision is to encourage sellers to give more complete "full" warranties out of a reluctance to conspicuously designate their written warranties as "limited."

The minimum federal requirements for a "full" warranty are as follows:

1. The warrantor must, as a minimum, remedy the consumer product within a reasonable time, in case of the breach of an implied or written warranty. "Remedy" refers to whichever of the following actions the warrantor elects:

   — repair

   — replacement, or

   — refund;

   except that the warrantor may not elect refund unless (1) the warrantor is unable to provide replacement, and repair is not commercially practicable or cannot be timely made, or (2) the consumer is willing to accept such refund.

2. The warrantor may not impose any limitation on the duration of any implied warranty on the product. Note that the warrantor cannot disclaim or exclude implied warranties, (a matter discussed later).

3. The warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty. "On the face of" means (a) where the warranty is a single sheet with printing on both sides of the sheet or where the warranty is comprised of more than one sheet, the page on which the warranty text begins; or (b) where the warranty is included as part of a larger document, such as a use and care manual, the page in such document on which the warranty begins.

4. If the product (or component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be). If the warrantor replaces a component of a consumer product, such replacement shall include installing the part in the product *without charge*.

   "Without charge" means the warrantor may not assess the consumer for any costs the warrantor or his representative incur in connection with the required remedy of a warranted consumer product. An obligation to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover the reasonable incidental expenses which are so incurred in any action against the warrantor.[38]

The warrantor's duty under a full warranty extends not only to the immediate consumer-buyer but to any person to whom such product is transferred during the duration of an implied or written warranty applicable to the product.[39] This represents a partial repudiation of the rule of privity that prevents persons not party to the sales transaction from suing for breach of warranty.

As part of the "full" warranty the warrantor can require that the consumer gives reasonable notice.[40]

If the warrantor designates a warranty applicable to a consumer product as a "full" warranty, then the warranty on such product is held to incorporate the minimum terms for a "full" warranty even if the terms are not so stated in the contract.[41]

Other Restrictions

If a written warranty is given, whether it is "full" or "limited," the warrantor cannot disclaim any implied warranty to a consumer with respect to a consumer product.[42] Some relief is allowed those who give **"limited"** warranties; they may limit the duration of the implied warranties to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.[43] No such limitation is allowed when a "full" warranty is given.

Informal Settlement

The Act allows the warrantor to provide for an informal dispute settlement procedure that consumers must follow before they can bring a civil suit under the Magnuson Moss Act.[44] The elements of the dispute settlement procedure are beyond the scope of this paper. Though an informal procedure is established, the consumer is not precluded from pursuing alternate state (UCC) or federal remedies.

General References

The Uniform Commercial Code

I highly recommend for those interested in understanding the UCC provisions on warranties as well as the other provisions affecting commercial transactions that they peruse White and Sumner's treatise, *The Uniform Commercial Code*. Much of this paper was drawn from their book. The treatise is well written and quite thorough. Someone unfamiliar with legal terminology, however, may have difficulty.

The Magnuson Moss — FTC Improvement Act

The Act is quite new, consequently there is not much written on it at the time of this writing. No doubt, however, there will soon be a flood of articles on the Act. For now I recommend an article in volume 44 of the *Fordham Law Review* on pages 273 to 300.

Footnotes

[1] UCC 2-313(1)(a)
[2] UCC 2-313(1)(a)
[3] UCC 2-313(1)(b)
[4] UCC 2-313(1)(c)
[5] UCC 2-313(2)
[6] UCC 2-314(1)
[7] White and Sumners, *The Uniform Commercial Code*, West Publg., 1972, pp. 294-295.
[8] UCC 2-104(1)
[9] UCC 2-315
[10] UCC 2-712; 2-713
[11] UCC 2-714
[12] UCC 2-715(2)(a)
[13] UCC 2-607(3)(a)
[14] UCC 2-316(1)
[15] UCC 2-202
[16] White, *supra*, p. 356
[17] UCC 2-316(2)
[18] UCC 1-201(10)
[19] UCC 2-316(2)
[20] White, *supra*, p. 358
[21] Ibid
[22] UCC 2-209
[23] UCC 2-316(a)
[24] UCC 2-316(b)
[25] UCC 2-316(c)
[26] UCC 1-205(1)
[27] UCC 2-208(1)
[28] UCC 1-205(2)
[29] White, *supra*, p. 371
[30] UCC 2-719
[31] P.L. 93-637; 15 U.S. Code Annotated 2301-2312
[32] 15 USCA 2301(1)
[33] FTC Regulation 701.(h)
[34] FTC Regulation 701.1(c)
[35] FTC Regulation 701.3(a)(1)-(9)
[36] FTC Regulation 702.3(a)
[37] 15 USCA 2303(a)(1)-(2)
[38] 15 USCA 2304(a)
[39] 15 USCA 2304(b)(4); 15 USCA 2301(3)
[40] 15 USCA 2304(b)(1)
[41] 15 USCA 2304(d)
[42] 15 USCA 2308(a)
[43] 15 USCA 2308(b)
[44] 15 USCA 2310

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