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The Uniform Commercial Code and Greater Consumer Protection Under Warranty Law

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Notes

THE UNIFORM COMMERCIAL CODE AND GREATER CONSUMER PROTECTION UNDER WARRANTY LAW*

On March 28, 1958, the Kentucky Legislature adopted the 1957 Official Draft of the Uniform Commercial Code (hereafter referred to as the Code), which became effective July 1, 1960.[1] Kentucky thus became the third jurisdiction[2] to enact the comprehensive plan designed to regulate all commercial transactions in a manner consistent with modern trends and standards.[3] The Code replaced, among other statutes, the now outmoded Uniform Sales Act[4] (hereafter referred to as the Sales Act). Though the substance of most of the Sales Act has been incorporated in Article 2 of the Code, it has been completely rewritten with numerous revisions and many entirely new provisions. The law of warranty received its share of Code changes, displaying its growth and development during recent period of rapid industralization and specialization.[5] The reclassification as "express," of warranties arising in sales by description and by sample, the broad definition of merchantability, the codification of rules of disclaimer and the partial settlement of the privity problem are but a few of the changes reflecting a trend toward greater consumer protection.

The following comparison between the Sales Act and the Code, with respect to warranty law, is divided into three main categories: (1) the classification of warranties which may arise, (2) the manner

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* Attention is directed to Note, "A Comparison of Rights and Remedies of Buyers and Sellers under the Uniform Commercial Code and the Uniform Sales Act", 49 Ky. L.J. (1960), which includes a discussion of the remedies for breach of warranty and the damages which are recoverable.

[1] Kentucky Acts 1958, Ch. 77.

[2] Pennsylvania became the first state to adopt the Code by enacting the 1952 Official Draft, Pa. Stat. Ann. tit 12A §§ 1-101 to 10-104 (1954). Massachusetts became the second jurisdiction by adopting the 1957 Official Draft in 1957. Mass. Gen. Laws Ch. 106: 1-101 to 9-507 (1957). In 1959, Connecticut and New Hampshire became the fourth and fifth jurisdictions to adopt the Code. Conn. Gen. State. Rev. § 42a (Supp. 1959); N. H. Rev. Stat. Ann. Ch. 382a (Supp. 1959).

[3] UCC § 1-102(2). Note that sections of the 1957 Official Draft of the Uniform Commercial Code will be cited as UCC. Citations to the Official Comments of the 1957 Official Draft will be cited by the Code section and the official comment. The citations to the Uniform Sales Act and to the Kentucky Revised Statutes will be given as USA and KRS respectively.

[4] USA §§ 1-79, KRS Ch. 361 (1928).

[5] Llewellen, Cases and Materials on Sales 340-343 (1930).

in which warranties may be disclaimed, and (3) the application of warranties to third parties.[6]

Classification of Warranties

Warranties in general may be classified into three major categories: Express, Implied and Statutory.

A. *Express Warranties:*

The express warranty has continued to gain in prominence and the Code reflects this trend by broadening its coverage to transactions which formerly were only within the bounds of implied warranties. This extended coverage affords the buyer additional protection against the disclaiming seller who seeks without the purchaser's consent to limit his obligation under the sale or contract to sell.

The express warranty was narrowly defined under the Sales Act as:

> Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.[7]

Where the Sales Act limited the express warranty only to affirmations of fact or promises of the seller which have a natural tendency to duce the buyer to purchase the goods in reliance thereon, the Code has extended the application of the express warranty to sales by description and to sales by sample or model.[8] The Code also substitutes the phrase "part of the basis of the bargain",[9] in place of the words "natural tendency" and "purchasers . . . relying thereon" used in the Sales Act provision set out above. This is apparently in line with the interpretation of the warranty by the courts under the Sales

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[6] For a similar comparison under Pennsylvania law, see Note, "Legislation," 15 U. Pitt. L. Rev. 331 (1953-54).

[7] USA § 12, KRS § 361.120 (1928).

[8] UCC § 2-313 (1) provides:
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 basic 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. [Emphasis added.]

[9] *Ibid.*

Act where the seller's intention to warrant was not required.[10] No specific intention to warrant the goods is necessary under the Code, if an affirmation of fact, promise, description, sample, or model are made part of the basis of the bargain.[11] "Basis of the bargain" is more inclusive since it is an objective standard, looking at the dickered aspects and the individual terms, while the "natural tendency" test under earlier cases provided an escape to the seller by showing that the affirmations made were not normally considered to induce the reliance of the buyer in purchasing the goods.

Warranties arising from sales by description and by sample are classified as implied warranties under the Sales Act, obligating the seller only to the extent of supplying goods which reasonably conform to the description,[12] or in the case of sale by sample suppling bulk in reasonable conformity with the sample.[13] The failure of the of the Sales Act to allow for an express warranty in sales by description met with the criticism of Professor Williston,[14] the principal drafter Sales Act to allow for an express warranty in sales by description affirmation of fact and descriptive language used in identifying the goods in the sales contract. He expressed the belief that such descriptive language may be enforced as an express warranty arising by affirmation of fact. The drafters of the Code were cognizant of the problem, and left no room for ambiguity by creating an express warranty under section 2-313 in all sales involving a description or descriptive language.

The Code provision concerning the wararnty arising out of a sale by sample is more stringent from the seller's standpoint than its predecessor under the Sales Act. Instead of reasonable conformity of the bulk.[15] the whole must conform to the sample under the Code.[16] In creating an express warranty where the sale is by sample, the Code follows the reasoning that the sample is the equivalent of a description of the existing bulk.[17]

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[10] 1 Williston, Sales § 201 (rev. ed. 1948). See also McClintock v. Emich, Stoner & Co., 87 Ky. 160, 7 S.W. 903 (1888), a pre-Sales Act determination that specific intent to warrant was not necessary.

[11] UCC § 2-313 (2) provides in part:

> 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. . . . See UCC § 2-313, official comment 3.

[12] USA § 14, KRS 361.140 (1928).

[13] USA § 16(a), KRS 361.160(a) (1928).

[14] 1 Williston Sales § 223 (rev. ed. 1948).

[15] USA § 16(a), KRS 361.160(a) (1928). See also Sachs Shoe Co. v. Maysville S. & D. Goods Co. 201 Ky. 239, 256 S.W. 401 (1923).

[16] UCC § 2-313(1)(c); UCC § 2-313, official comment 6.

[17] Vold, Sales § 88 (2d ed. 1959).

In conjunction with the warranty by sample, the Code creates a new warranty arising out of sales by model.[18] Though a model is similar to a sample, it is distinguishable in that a sample is a unit of an existing mass, while the model is merely representative of either existing goods or goods to be produced in the future.[19]

An express warranty does not depend upon express language such as "I warrant or guarantee" for its existence.[20] This principle was well settled in Kentuckfiy prior to the adoption of the Sales Act[21] and the Code has followed in the same tradition. The Code also contains the proposition that no warranty arises where the seller is merely making a value judgment or stating an opinion.[22] This rule has forced the courts to distinguish between a seller's affirmation of fact which induces the buyer and becomes part of the basis of the bargain, and a statement which is merely an opinion of the seller. The Kentucky Court of Appeals adopted the generally followed test in *Wedding* v. *Duncan*,[23] *i.e.*:

> [W]hether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion.[24]

This test will have continued application under the Code in aiding the courts in determining whether the statement of the seller became part of the basis of the bargain or whether it was merely an opinion upon which the buyer could not have relied. However, the test above would not be conclusive; though the buyer has the skill and judgment necessary to make an opinion of his own, there may still be reliance upon the seller's opinion which induced or, at least, was one of the inducements leading to the sale. Williston urges that if the statement was made to induce the sale and does so in fact, the seller should be held to have expressly warranted the goods.[25]

B. *Implied Warranties*:

Professor Vold defines implied warranties as warranties imposed by law because of tacit representations or broader considerations of policy.[26] There are three classifications of implied warranties under

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[18] UCC § 2-313(1)(c).
[19] UCC § 2-313, official comment 6.
[20] UCC § 2-313(2).
[21] McClintock v. Emich, 87 Ky. 160, 7 S.W. 903 (1888).
[22] UCC § 2-313(2).
[23] 310 Ky. 374, 220 S.W. 2d 564 (1949).
[24] *Id.* at 378, 220 S.W. 2d at 567. See 1 Williston, Sales § 202 (rev. ed. 1948).
[25] 1 Williston, Sales § 202 (rev. ed. 1948).
[26] Vold, Sales § 84 (2d ed. 1959).

the Code; the warranty of merchantability, the warranty of fitness for a particular purpose, and warranties which arise by usage of trade or course of dealing. In the case of implied warranties, the Code is more inclusive than the Sales Act, granting broader, more complete protection in a greater number of transactions, enabling the buyer to rely with greater assurance upon the representations, selections and reputation of the seller.

1. Implied Warranty of Merchantability:

The warranty of merchantability represents perhaps one of the most significant changes made by the Code. The Code warranty of merchantability replaces the undefined and restricted warranty which the Sales Act imposed on the seller only in sales by description[27] or sample.[28] Section 2-314 (1) of the Code provides:

> Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

The Code warranty is broad and comprehensive arising out of every sale where the seller is a merchant unless excluded or modified in a manner to be discussed hereinafter.[29] A merchant is defined as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having the knowledge or skill peculiar to the practices. . . ."[30] Though section 2-314 is restricted to sales by merchants, the comments suggest that it will have further influence upon the courts in treatment of the occasional non-merchant sellers who expressly state that the goods are warranted or guaranteed. Such language on the part of the non-merchant would imply that he is warranting the goods to be of merchantable quality.[31]

The long disputed issue of whether the sale of food to be consumed on the premises constituted a *sale* under which the seller could be liable for breach of warranty was conclusively settled by the Code.

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[27] USA § 15(2); KRS 361.150(2) (1928).
[28] USA § 16(c); KRS 361.160 (3) (1928).
[29] UCC § 2-314, official comment 2 states:

> The responsibility imposed rests on any merchant-seller, and the absence of the words "grower or manufacturer or not" which appeared in section 15(2) of the Uniform Sales Act does not restrict the applicability of this section.

[30] UCC § 2-104.
[31] UCC § 2-314, official comment 4. The words "I warrant" would create an express warranty that the goods are merchantable and as the comment suggests; § 2-314 of the Code will furnish the courts with a guide to measure the warranty given.

Whether the food be consumed on the premises or taken elsewhere, it will be for the purposes of the warranty of merchantability a *sale* of goods and not a furnishing of services with the sale of food being only incidental.[32] In a Kentucky decision, *Snead* v. *Waite*,[33] where food prepared for immediate consumption had been taken to the purchaser's home and consumed by the members of his family, all of whom became violently ill, the court permitted recovery under the warranty of fitness for a particular purpose, signifying that the sale of food constitutes a sale of goods fit for the particular purpose of human consumption. The Kentucky rule is that the seller of food, whether the food is open for inspection,[34] or in a sealed container,[35] warrants the goods fit for the particular purpose of human consumption. Refusing to construe the sale of food products as a sale by description, the courts resorted to a legal fiction. It was found that the buyer had made known his purpose and he purchased in reliance upon the skill and judgment of the seller, thus qualifying under the warranty of fitness for a particular purpose.[36] This fiction need no longer be resorted to under the Code since the warranty of merchantability is applicable in all sales of food.[37]

The term "merchantability" has long been troublesome to the courts.[38] The Code in meeting this problem sets out what is thought by many authorities to be the best existing definition,[39]

> (2) Goods to be merchantable must be at least such as
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> (a) pass without objection in the trade under the contract description; and
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> (b) In the case of fungible goods, are of fair average quality within the description; and
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> (c) are fit for the ordinary purposes for which such goods are used; and
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> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

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[32] UCC § 2-314, official comment 5; Vold, Sales § 94 (2d ed. 1959).

[33] 306 Ky. 587, 208 S.W. 2d 749 (1948).

[34] Great A. & P. Tea Co. v. Eiseman, 259 Ky. 103, 81 S.W. 2d 900 (1935).

[35] Martin v. Great A. & P. Tea Co., 301 Ky. 429, 192 S.W. 2d 201 (1946).

[36] When a buyer purchases food, the seller has reason to know that it is for human consumption. The buyer relies on the skill and judgment of the seller in furnishing products from which the purchaser might choose.

[37] Non-food cases in which both goods and services are furnished have plagued the courts. In Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E. 2d 792 (1954), the New York Court of Appeals ruled that the furnishing of diseased blood for which the plaintiff, patient, was charged did not constitute a sale, but was only incidental to the main function of the hospital.

[38] Llewellen, "On Warranty of Quality, and Society; II; 37 Colum. L. Rev. 341, 383 (1937).

[39] Vold, Sales § 89 (2d. ed. 1959).

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.[40]

Subsection (a) pertains to the particular standards of the trade or business of the seller, suggesting that the goods pass without objection under the contract of description. Like the standard of fair average quality under subsection (b) which is particulary appropriate in fungibles and agricultural bulk, each unit need not individually meet the particular standard, but the goods as a bulk should conform to a fair average quality around the mid-point of the class.[41] Subsection (c) is the fundamental concept behind the warranty of merchantability in regard to recovery by the purchaser in personal injury suits.[42] The seller warrants that the goods be fit for the ordinary purposes for which they were produced. However, this definition is not limited to the personal injury suit, it is applicable to all classes of purchasers, whether for resale or for final consumption, whether for recovery of the value of the goods, or consequential damages due to personal injuries sustained. Subsection (d) refers to the permissive variations of quality within certain accepted limits as established by the terms of the agreement or usage of trade.[43] Subsection (e) is applicable where special requirements demand that the goods be adequately packaged and due to their nature they require certain types of packaging, containers or labels. Subsection (f) is applicable wherever the package or label contains an affirmation of fact.[44]

Under the Sales Act, in order that it be understood that the warranty of merchantability arises in every sale by description, the words "whether the seller be grower, manufacturer or not" are employed. The omission of these words from the Code in no way restricts or limits the application of the Warranty,[45] for growers, manufacturers and the like are clearly within the broad definition of merchant set out above in Section 2-104 (1). From producer to distributor, to wholesaler, to retailer and to the final consumer, all are within the scope of the warranty. Unless it is excluded or modified the purchaser has recourse against his immediate seller if the goods

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[40] UCC § 2-314(2). As is indicated by the use of the words "Must be at least such as" and as expressed in official comment 6, the list is not meant to be exhaustive, thus permitting the court to add to the list other attributes not specifically set out in the Code.

[41] UCC § 2-314, official comment 7.

[42] UCC § 2-314, official comment 8.

[43] UCC § 2-314, official comment 9.

[44] UCC § 2-314, official comment 10.

[45] UCC § 2-314, official comment 2.

in question have fallen below the standards of merchantable quality for which he has bargained.

2. Warranty of Fitness for a Particular Purpose;

Under the Sales Act the warranty of fitness for a particular purpose,[46] perhaps more than any other warranty, has been relied on by the injured purchaser in litigations against the seller. The warranty arises in sales where the buyer makes known to the seller the particular use to which he will put the goods and relies upon the seller's skill in selecting suitable goods for the desired purpose.[47] The seller's selection of particular goods for that purpose amounts to a tacit representation that the goods selected are suitable for the particular need of the buyer.[48] Thus, as in the case of the warranty of merchantability and other implied warranties, this warranty arises by implication of law.

The Code roughly approximates the Sales Act warranty by providing,

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.[49]

Under the Sales Act it was clear that there were two essential requirements: (1) that the buyer either expressly or by implication made known the particular purpose to the seller and (2) that there were apparent reliance on the seller's skill and judgment. The test was said to be whether the buyer justifiably relied upon the seller's skill and judgment that the goods furnished would fulfill the particular need, or whether the buyer relied on his own judgment.[50] However, under the Code there is some ambiguity as to what actually is required. There are at least three possible interpretations. First the Code section may be read to require that the seller have reason to know both the particular purpose and that the buyer is relying upon the seller's skill and judgment with no actual reliance on the part of the buyer being necessary. It may also be interpreted to mean that the seller must have reason to know of the particular purpose and that the buyer is actually relying on the seller's skill and judgment. This interpretation is more consistent with that of the Sales Act. The

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[46] USA § 15(1), KRS 361.150(1) (1928).
[47] Great A. & P. Tea Co. v. Eiseman, 259 Ky. 103, 81 S.W. 2d 900 (1935).
[48] Vold, Sales § 90 (2d ed. 1959).
[49] UCC § 2-315.
[50] 1 Williston, Sales § 235 (rev. ed. 1948).

official comments suggest still a third possibility: that the seller must have reason to know the particular purpose, and must also have reason to know of the buyer's reliance, in addition to the requirement that the buyer must actually be relying on the seller.[51] Since reliance is of paramount concern to the courts, either the second or third interpretation will most likely prevail.

The Code makes use of the phrase "seller has reason to know" while the Sales Act imposed the burden on the buyer to make his particular purpose known.[52] While under the Sales Act it would seem that some positive action on the part of the buyer is required, the Code, engulfed in objectivity, requires only that the seller have reason to know the particular purpose. It is also noted that the scope of the warranty is extended by the Code and made applicable to the buyer who relies on the seller's skill or judgment in either *furnishing* or *selecting* goods suitable for the special needs of the buyer. The word "furnish" covers the situations in which the goods are actually supplied by the seller even though they may have been selected by the buyer; while the word "select" implies that the goods are chosen by the seller. Generally, the Sales Act warranty protected the buyer only where the seller selected the goods, leaving in doubt situations where the goods were furnished by the seller but chosen by the buyer out of several choices made available.[53]

The trade name exception in section 15 (4) of the Sales Act has been abandoned by the Code.[54] The official comments state that purchases by trade name may still serve as evidence that there has been no actual reliance on the part of the buyer;[55] but where there is knowledge of the particular purpose of the buyer and the seller selects or recommends a product which he conveniently refers to by its trade name, the warranty will arise even though sold by trade name, if there has been the necessary reliance by the buyer.[56] This is in line with the existing Kentucky rule of refusing to apply the trade name exception where the goods were purchased upon the recommendation of the seller.[57]

A particular purpose is distinguishable from an ordinary purpose in that the former envisages a specific use by the buyer peculiar to his needs which may or may not be an ordinary use of the product

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[51] UCC § 2-315, official comment 1.
[52] *Ibid.*
[53] Great A. & P. Tea Co. v. Eiseman, *supra* note 47; Louisville Grinding and Mac. Co. v. Southern Oil & Tar Co., 230 Ky. 39, 18 S.W. 2d 377 (1929).
[54] UCC § 2-315, official comment 5; Vold, Sales § 90 at 441 (2d ed. 1959).
[55] UCC § 2-315, official comment 5.
[56] *Ibid.*
[57] Halterman v. Louisville Bridge & Iron Co., 254 S.W. 2d 493 (1953).

selected or furnished.[58] Since the warranty of merchantability arises in every sale where the seller is a merchant there will often be two warranties upon which to base the seller's liability.[59] This results wherever the seller selects goods which were designed for the buyer's "special needs".

3. Warranties by Course of Dealing and Usage of Trade:

The Code provides for a third classification of implied warranties, those which arise by course of dealings and usage of trade.[60] The Code reaffirms the position of Sales Act under which an implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by usage of trade.[61] The warranty imposes an obligation on the seller to comply with certain standards of quality, fitness and procedure which are by custom and usage employed in sales generally or in that particular locality. The Kentucky Court of Appeals interpreted the Sales Act warranty by usage as a warranty of fitness for some special use which is established by general habit or custom of the using public in that particular locality.[62] However, the court has restricted its application by refusing to incorporate the warranty into the contract unless it is clear that the seller against whom it is to be used was aware of its existence.[63] No apparent change has been made with respect to the warranty by usage, and the courts will continue to apply the same standards as were applicable under the Sales Act.

A warranty may also arise by course of dealing. A course of dealing relates to prior contractual relations between the two parties.[64] Where the parties have engaged in a course of business over a period of time, certain formalities are often abandoned and certain obligations are mutually understood by both parties. Though such obligations have not been expressly included in the contract, the Code will give effect to the terms under the theory of an implied warrantly by course of dealing.

C. *Statutory Warranty of Title and Against Infringements:*

Warranties of title, against incumbrances, and of quiet enjoyment were provided as implied obligations of the seller under the Sales Act.[65]

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[58] UCC § 2-315, official comment 2.
[59] *Ibid.*
[60] UCC § 2-314(3) provides:
> Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

[61] USA 15(5), KRS 361.150(5) (1928).
[62] North Am. Fertilizer Co. v. Combs, 307 Ky. 869, 212 S.W. 2d 526 (1948).
[63] Caldwell Hunter & Co. v. Dawson, 61 Ky. (4 Metc.) 121 (1862).
[64] UCC § 1-205 (1).
[65] USA § 13, KRS 361.130 (1928).

The warranty assures the good faith purchaser that the title he receives is good and free from all incumbrances except those of which he may have actual knowledge, and that he will not be exposed to a lawsuit.[66] Even prior to the adoption of the Sales Act, the courts recognized the implied warranty of title arising out of the seller's tacit representation that the goods in his possession which he offered for sale were his own.[67]

In the pre-Sales Act era, there was some question as to when a cause of action accrued and when the statute of limitation would begin to run. Some jurisdictions held that the statute ran from the time of the sale, at which time the warranty was breached, while others have found that there had been no breach until there was a disturbance of quiet possession by one holding a superior claim to the goods.[68] The Sales Act codified both positions by providing that the warranty of title and the warranty against incumbrances were breached at the time of the sale, while the warranty of quiet enjoyment was not breached until the disturbance of the peaceful possession.[69]

Several material changes are made by the comparable Code provision.[70] The Code makes allowance only for the warranties of title and against incumbrances, indicating the modern view that the warranty is breached at the time of delivery and that the seller's obligation should only extend for the normal period of limitations, four years.[71] Though the warranty of quiet possession is abolished by the Code, the comments provide that a disturbance of peaceful possession is one of many ways in which a breach of the warranty of title may be established.[72] Again a Code section has met with the ardent criticism of Professor Williston, who feels it grossly unjust for an innocent purchaser to lose his property after holding it for longer than the four year period. After the running of the statute of limitations the purchaser

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[66] 1 Williston, Sales § 218. (rev. ed. 1948).
[67] *Ibid.*; Vold, Sales § 87 (2d ed. 1959).
[68] 1 Williston, Sales § 221 (rev. ed. 1948); Vold, Sales § 87 (2d ed. 1959).
[69] *Ibid.*
[70] UCC § 2-312(1) provides:
> Subject to subsection (2) there is in a contract for sale a warranty by the seller that
> (a) the title conveyed shall be good, and its transfer rightful: and
> (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

[71] UCC § 2-725. Note the change in the statute of limitations from five to four years.
[72] UCC § 2-312, official comment 1.

in good faith is barred from any recovery against the seller.[73] The rareness of such suits offsets the damaging effects of the omission.[74]
of the goods which they sell are expressly excluded from the bounds of the warranty obligation.[75] The Code follows the tradition of the Sales Act in limiting the application of the section where the person professes to sell, by virtue of authority in fact or law, goods in which a third person has a legal or equitable interest.[76]

The Sales Act made no provision for a warranty against infringement of patent rights, trade-marks or copyrights. However there is some authority for bringing an action for breach of such warranty.[77] Since the right to convey is incidental to ownership, where a sale of the goods would infringe upon the rights of third persons, the seller does not have sufficient ownership to meet the demands of the warranty of title. The Code specifically provides that:

> Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.[78]

Classed neither as an express warranty nor as one imposed by implication of law, the warranty of title and against infringements is deemed to be a statutory warranty and arises in all sales (unless otherwise agreed) where the seller is a merchant dealing in such goods.[79] It places on the seller the burden on the seller of furnishing goods which do not infringe upon the rights of third persons.[80] The seller will, how-

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[73] Williston, "The Law of Sales in the Proposed Uniform Commercial Code," 63 Harv. L. Rev. 561, 578 (1950).

[74] Note, "Legislation," 15 U. Pitt. L. Rev. 330 (1953-54).

Certain sellers who by their nature do not profess to be the owners

[75] USA § 13(4), KRS 361.130(4) (1928).

[76] UCC § 2-312(2) provides:

> A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

[77] Robertson, "Implied Warranties of Non-Infringement," 44 Mich. L. Rev. 933 (1946). He urges Adoption of the Uniform Revised Sales Act which expressly provides for the warranty against infringement.

[78] UCC § 2-312(3).

[79] Kentucky Legislative Research Commission Bulletin No. 49 § 2-312, comment 1 (1957); Collins, "Warranties of Sale Under Uniform Commercial Code," 42 Iowa L. Rev. 63, 66 (1956).

[80] Collins, "Warranties of Sale under Uniform Commercial Code," *supra* note 79. Rev. 63, 66 (1956).

ever, be absolved from liability where he is furnished exact specifications, the following of which necessarily infringes the rights of others. The buyer is held to indemnify the seller and assumes all liability.[81]

Exclusion and Modification of Warranties:

Having examined the various warranties under the Code, and the circumstances under which they will be incorporated into the contract of sale, we must realize that other terms of the contract may provide for the exclusion or modification of these various warranties which otherwise may have arisen.

A. *Express Warranties:*

The express warranty has maintained a preferred position in warranty law due to the general ineffectiveness of words of disclaimer.[82] However, even an express warranty may be excluded or modified, in certain instances. Where the Sales Act had failed to codify the rules of disclaimer, the Code devotes an entire section to this purpose. Section 2-316 (1) states:

> Words of 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 the Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

The parol or extrinsic evidence rule recognizes that terms of the agreement which are set forth in a sales memorandum or writing, which is intended to represent a final expression of the agreement of the parties, may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement.[83] The Code further relates that in the absence of language indicating that the written contract is the complete agreement containing all the terms, the writing may be supplemented or explained by evidence of additional *consistent* terms, and by usage of trade, course of dealing and course of performance.[84] Thus, although the "disclaimer" is ineffective as against express warranties contained in the agreement, an "entirety" clause stating that the contract contains all the terms agreed upon will effectively prevent claims of other express warranties made orally prior to the writing.

The parol evidence rule contained in the Code is consistent with

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[81] UCC § 2-312, official comment 3; Vold, Sales § 87 (2d ed. 1959).
[82] Vold, Sales § 91 (2d ed. 1959).
[83] UCC § 2-202; Vold, Sales § 92 (2d ed. 1959). Parol evidence of promissory warranties in connection with the terms of an integrated written contract to sell is inadmissible.
[84] UCC § 2-202.

Kentucky decisions. In *Grayson Motor Sales, Inc.* v. *Shannon*,[85] the court ruled in effect that a written disclaimer in a contract of sale providing that the only warranty expressed or implied was to be the manufacturer's warranty, effectively excluded the oral representation of the used car dealer as to the condition of the car.

The Kentucky Court of Appeals reached a similar conclusion in *Hopkinsville Motor Co.* v. *Massie*,[86] where the seller of a tractor made oral representations concerning the quality of his product, but in the contract of sale expressly stated that "there was no warranty either express or implied". The court upheld the disclaimer stating that ". . . parties competent to contract may contract as they please just so their agreement is not forbidden. . . ."[87] However the court made the distinction between affirmations of fact made in negotiating the sale and those made in the actual contract. Professor Williston has supported this view. He states that parties may limit the effectiveness of language which would otherwise bring about the existence of an express warranty. He adds that the Sales Act provides that rights, duties and liabilities may be negated by express agreement.[88]

The 1952 draft of the Uniform Commercial Code, adopted by Pennsylvania, expressly provides that there can be no exclusion or modification of express warranties.[89] This old orthodox view has enabled the express warranty to maintain its preferred position. However, it is unrealistic and contrary to the parol evidence rule as well as to general contract principles. The 1957 version of the Code adopted in Kentucky is in agreement with the Kentucky rule and Professor Williston and is consonant with the fundamental maxim that parties are free to contract as they please. It is also consistent with modern contract law which examines the contract or transaction as a whole giving the terms a reasonable construction consistent with each other wherever possible.[90] But where such a construction is not reasonable, the specific terms must prevail over the general; the express warranty must prevail over the inconsistent words of disclaimer where both are contained in the same instrument.

B. *Exclusion or Modification of Implied Warranties:*

In the absence of specific statute, the courts have permitted modification or exclusion of implied warranties where the seller has used

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[85] 322 S.W. 2d 465 (Ky. 1959).
[86] 228 Ky. 569, 15 S.W. 2d 423 (1929).
[87] *Id.* at 571, 15 S.W. 2d at 424.
[88] 1 Williston, Sales § 213 (1948); see USA § 71, KRS 361.710 (1928).
[89] UCC § 2-316 (1952 Official Draft); Penn. Stat. Ann. tit. 12 A § 2-316 (1954).
[90] Restatement, Contracts § 236 (1932).

specific language of modification or exclusion, which language has been brought to the attention of the buyer.[91] The Kentucky Court of Appeals made its position clear in *Whayne Supply Co.* v. *Gregory*[92] by stating that under the Sales Act a warranty will not be implied where the contract has expressly stipulated against it or has declared that no warranty other than those set forth in the contract exists. However, in light of the fact that implied warranties are imposed by law to permit the parties to bargain at arms length, and further to impose the burden on the seller of improving the marketability of goods, the courts have given words of disclaimer a rather strict interpretation,[93] even when the words relate only to implied warranties. The problem most often arises in relation to words tending to exclude the warranty of merchantability.[94] *i.e.*, where the seller wishes to absolve himself of liability which may result from the sale of goods of inferior quality. The courts have been aware of the fine print disclaimer which is known to the buyer, and have made it ineffectual. On the other hand, there is admittedly a need for a merchant to be able to dispose of such goods without liability. The problem of drafting a suitable phrase, which clearly makes the seller's position understood and would be given effect by the courts, has represented an intriguing challenge to the commercial lawyer.[95] Cognizant of the lack of uniformity in handling phrases of disclaimer, the Code expressly sets out the manner by which the warranty of merchantability may be disclaimed. Section 2-316(2) provides:

> Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, . . .[96]

By virtue of these requirements, the Code protects the buyer from the surprise disclaimer[97] and strives to limit the use of the disclaimer to cases where the clear intent of the parties demonstrates that the warranty does not exist.

The warranty of fitness for a particular purpose poses a lesser problem, because it arises only where the seller has reason to know of a particular purpose, and that the buyer is relying on his skill and judgment, and where the buyer actually relies upon the selection of the seller.[98] Section 2-316(2) continues:

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[91] Broucher & Sutherland, Commercial Transactions 16 (2d ed. 1958).
[92] 291 S.W. 2d 835 (Ky. 1956); see also Myers v. Land, 314 Ky. 514, 235 S.W. 2d 988 (1951).
[93] Vold, Sales § 91 (2d ed. 1959).
[94] 1 Williston, Sales § 239 (rev. ed. 1948).
[95] *Ibid;* Vold, Sales § 91 (2d ed. 1959).
[96] UCC § 2-316(2).
[97] UCC § 2-316, official comment 1.
[98] UCC § 2-315.

> . . . to exclude or modify any implied warranty of fitness the exclusion *must* be by a *writing* and *conspicuous.* Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof. [Emphasis added.]

Here we find that the disclaimer *must* be a conspicuous writing. Unlike the warranty of merchantability which may be orally disclaimed, the Code requires a written disclaimer with regard to the warranty of fitness whether or not other terms of the contract are in writing.

Several inconsistencies appear in the above section of the Code. The use of the words "all implied warranties of fitness" may indicate both fitness for a particular purpose and fitness for the ordinary purposes for which the goods were produced, the latter being the principle definition of the warranty of merchantability.[99] It would appear that the approach which should be taken by the courts is to read into the section the additional words "for a particular purpose", requiring the seller to exclude both warranties individually where such is his clear intention.

Aside from the general rules of disclaimer set out above in section 2-316 (2) there are certain well known exceptions to the rules which by custom and usage have been common practice in commercial circles. The Code sets out these exceptions in section 2-316 (3) as follows:

> Notwithstanding subsection (2)
> (a) 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; and
> (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances have revealed to him; and
> (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

As is indicated by the official comments, the general terms with which subsection (3a) is concerned, are by ordinary usage "understood to mean that the buyer takes the entire risk as to the quality of the goods involved."[100] Subsection (3a) is in fact a particularization of subsection (3c).[101]

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[99] UCC § 2-314(2)(c).
[100] UCC § 2-316, official comment 7.
[101] *Ibid.*

The limitation of the seller's warranty liability is not restricted to the use of disclaimers or words and phrases indicating that a particular warranty or all warranties are excluded. The law has long provided that an inspection of goods by the buyer will relieve the seller of liability for any defects which should have been discovered by such inspection.[102] The Code codifies the existing law by the inclusion of subsection (3b) set out above. Like its counterpart in the Sales Act, this provision modifies any warranties otherwise applicable only to the extent to which any defects or imperfections in the goods are detectable by examination.[103] The extent of the exclusion or modification is determined by the facts surrounding the examination, the means available, the manner in which it is taken, and the person making the examination. Latent defects which could not be discovered by such an examination are not within the provision.[104] Since examination by the buyer indicates that he is relying on his own skill and judgment and not that of the seller, the inspection rule of exclusion is in accord with the warranty requirement that there must be reliance.

The buyer is not required to examine all the goods; the provision is satisfied where he examines a sample or model provided by the seller for such purpose.[105] If, however, the buyer refuses to make the examination after the seller's *demand,* no implied warranty will arise as to defects which would have been discovered on the examination.[106] The official comments indicate that there must be an *actual demand* on the part of the seller that the buyer examine the goods. The commentators point out that the availability of the goods for inspection is not sufficient.[107] It would appear that the view taken by the commentators with respect to the word "refuse" is too stringent. Certainly, it should suffice for the seller to clearly request that the goods be examined and offer the goods at the buyer's convenience for such purpose. A refusal after such a request would indicate the buyer's intention to waive any implied warranty concerning defects which would be discoverable upon the examination.

The warranty will not arise after examination where although a defect is discovered, the buyer continues to use the goods himself or holds them for resale. The seller is not liable for any injuries caused

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102 USA § 15(3), KRS 361.150(3) (1928).

103 Professor Vold explains the diminishing importance of inspection due to increased specialization and manufacture of highly technical products which often make examination impractical. Where the sale is of unidentified goods by description, there can of course be no inspection. Vold, Sales § 89 (2d. ed. 1959).

104 1 Williston, Sales § 234 (rev. ed. 1948); UCC § 2-316, official comment 8.

105 UCC § 2-316, official comment 8.

106 1 Williston, Sales § 234 (rev. ed. 1948); UCC § 2-316(b).

107 UCC § 2-316, official comment 8.

by such defects; the buyer's own negligence would be the proximate cause of any injury caused by use of the defective product.[108]

Also of special interest is the Code's use of the word "examine" in place of the word "inspect" used by the Sales Act. The former refers to the nature of the responsibility assumed by the seller at the time of contracting, since the examination is merely part of the negotiation made *prior* to the final transaction.[109] The word "inspect" referred to an inspection of goods before acceptance or any other time *after* the contract was made.

After the transaction is complete, the warranty is binding and the seller may not exclude or modify an implied warranty by subsequent language such as a disclaimer on a sales slip or receipt.[110] Professor Williston indicates that where the buyer has not had an opportunity to inspect the goods prior to delivery, and then discovers them to be defective, unmerchantable or unfit for the purpose for which they were warranted, his acceptance of the goods precludes recovery.[111] Where the circumstances do not permit an examination prior to the acceptance, the buyer, on discovering the defects after acceptance, must give reasonable notice to the seller or be deprived of a remedy.[112]

C. *Exclusion of the Warranty of Title:*

The warranty of title, not being classified as an implied warranty under the Code, is not subject to the rules of disclaimer under section 2-316,[113] but is specifically provided for in the section dealing exclusively with the warranty of title and against infringements. Section 2-312 (2) provides as follows:

> A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

Two limitations are recognized, either by specific language or by circumstances.[114] Both are generally recognized under the Sales Act.[115] By specific language, the Code refers to where the seller merely purports to quitclaim his rights and interest in property, or where he

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[108] *Ibid.*
[109] *Ibid.*
[110] 1 Williston, Sales § 239(c) (rev. ed. 1948).
[111] 1 Williston, Sales § 239C (rev. ed. 1948).
[112] USA § 49. Essentially the same provision is rewritten but without substantive change in UCC § 2-607(3)(a).
[113] UCC § 2-312, official comment 6.
[114] *Ibid.*
[115] See USA § 13(3)(4), KRS 361.130(3)(4) (1928); 1 Williston, Sales § 219 (rev. ed. 1948).

states that he does not warrant the title, or where the seller professes to sell only a limited interest in the goods. The exclusion or modification by circumstances which give the buyer reason to know that title is not warranted has broad application. Neither a sheriff, pawnbroker, executor or persons of that nature are held to warrant title of goods sold by them.[116] The warranty will not arise where the person making the purchase knows that the person purporting to sell does not have title in himself, nor is representing the owner. The Kentucky Court of Appeals held in *Sego* v. *Lynch*[117] that the purchaser of a car known to have been stolen is denied the benefit of the warranty of title. It also stands to reason that purchases from one known to be a dealer in stolen goods should not give rise to a warranty of title.

The Code fails, as do most authorities, to mention the exclusion or modification of the warranty against infringement. The only limitation stated is that where the buyer furnishes exact specifications which must be followed the seller is indemnified from liability.[118] But the Code does provide for exclusion or modification of the warranty by the use of the words "unless otherwise agreed".[119] Express terms in the contract that the seller does not warrant that the goods will not infringe upon the patents or copyrights of third parties should certainly be given effect under Code.

D. *Cumulation and Conflict of Warranties:*

Numerous pre-Sales Act cases in Kentucky held that the presence of an express warranty excludes the existence of all implied warranties.[120] This fundamental misconception was, however, severely restricted in *J. B. Colt Co. v. Asher,*[121] which held that the presence of an express warranty excludes only implied warranties which are necessarily inconsistent. This is the position taken by the Sales Act[122] and affirmed by the Code.[123] After adoption of the Sales Act, the Kentucky Court of Appeals held that an implied warranty was

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116 Vold, Sales § 87 (2d. ed. 1959); USA § 13(4), KRS 361.130(4) (1928).
117 233 Ky. 176, 25 S.W. 2d 353 (1930).
118 UCC § 2-312(3).
119 *Ibid.*
120 Guhy v. Nichols & Shepard Co., 33 Ky. L. Rep. 237, 109 S.W. 1190 (1908).
121 239 Ky. 235, 39 S.W. (2d) 263 (1931). See also Vandiver v. Wilson, 244 Ky. 601, 51 S.W. 2d 899 (1932), where the court ruled under the Sales Act that where an express warranty covers the same matter which is ordinarily implied by law, the implied warranty is deemed to be inconsistent.
122 USA § 15(6), KRS 361.150(6) (1928) provides:

> An express warranty or condition does not negate a warranty or condition implied under this act unless inconsistant therewith.

123 UCC § 2-317(c). Note that the code only provides for displacement of implied warranties other than the warranty of fitness for a particular purpose which may be excluded only in writing.

excludable only where inconsistent with an express warranty or negated by express language or by implication.[124]

The Code also provides guides by which the court may determine the intent of the contracting parties where such inconsistencies arise. Section 2-317 provides:

> Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:
> (a) Exact or technical specifications displace an inconsistent sample or model or general language or description.
> (b) A sample from an existing bulk displaces inconsistent general language of description.
> (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

As suggested by the official comments, the theory of cumulative warranties is that whether express or implied, a warranty represents the intentions of the parties determined by some conduct on the part of the *seller*.[125] Normally, there will be no inconsistency and the warranties will be held to be cumulative. The comments specifically point out that the above rules are to be applied only where factors making for an equitable estoppel of the seller do not exist and the seller has in good faith obligated himself, not knowing that the warranties are inconsistent.[126] Where the intent of the parties is clear from the circumstances surrounding the transaction, the court need not resort to the above rules.[127]

Abandonment of Privity—Third Party Beneficiary:

Having covered the means by which a warranty obligation arises, and when and how it may be excluded or modified when so desired, the next step is to define the extent of the non-disclaimed warranty's application to whom does the warranty extend? Except in a minority of jurisdictions which have deviated from the norm,[128] the general

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[124] Frick Co. v. Wiley, 290 Ky. 665, 162 S.W. 2d 190 (1942).

[125] UCC § 2-317, official comment 1.

[126] UCC § 2-317, official comment 2.

[127] UCC § 2-317, official comment 3. Note the similarity of UCC § 2-317 and paragraphs (c) and (e) of the Restatement of Contracts § 236. Paragraph (c) of § 236 considers the situation where the contract contains a general provision and an inconsistent specific provision. The specific provision is ordinarily held to qualify the general. And by paragraph (c) the restatement expresses the traditional view of preferring the hand written or type written term over the inconsistent printed term of the contract. Restatement, Contracts § 236 (c) and (e) (1932).

[128] Prosser, Torts § 84, 507 (2d ed. 1955). Prosser relates that about one-third of the jurisdictions have indicated their willingness to part from the bounds of privity in cases involving food products.

proposition is that the warranty extends only to parties to the contract, to those persons said to be in privity.[129]

The privity doctrine, a contractual theory, developed in an era when the buyer was held to deal at arms length in commercial dealings, and social policy reflected the need for protection of sellers and manufacturers.[130] Due to the sociological and economic developments which have resulted in our present specialized and urbanized economy, the buyer no longer has an equal advantage of bargaining power, and manufacturers and sellers no longer depend upon such protection. Thus, social policy has likewise taken a marked reverse in support of greater consumer protection. The pressures of public policy, recognizing the seller's greater ability of bearing the risk of loss and his ability to distribute it to the benefited public, weigh heavily upon the courts in promoting a change which will afford protection to the ultimate user while at the same time foster improved marketing on the part of the seller.[131]

Two problems confront the courts by virtue of the privity doctrine. The first, which has been designated as the "horizontal" problem, is concerned with claims by persons other than the buyer against the buyer's vendor.[132] For example, in a recent Kentucky case suit was brought against the seller-dealer of an outboard motor boat by a guest of the purchaser for personal injuries sustained when the motor exploded.[133] While the owner of the boat was in privity with the dealer, his guest was not, and in the absence of proving negligence on the part of the dealer the guest could not recover. The second problem, referred to as the "vertical" problem, involves claims of a subvendee against the manufacturer. This problem would be exemplified in the factual setting used above[134] if the owner suffered personal injuries

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129 Rochlin v. Libby-Owens Ford Glass Co., 96 F. 2d 597 (2d Cir. 1938) (shattered shatter proof windshield); Burr v. Sherwin Williams Co., 42 Cal 2d 682, 268 P. 2d 1041 (1954) (crop damage caused by "harmless" insecticide); Hieronymous Motor Co. v. Smith, 241 Ky. 209, 43 S.W. 2d 668 (1931) (performance of new car warranted by manufacturer); Prater v. Campbell, 110 Ky. 23, 60 S.W. 918 (1901) (warranty as to size of standing timber); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923) (nail baked in cake).

130 Prosser, Torts § 84 (2d ed. 1955).

131 Llewellen, Cases and Materials on Sales 340 (1930). See also Traynor, J., concurring in Escola v. Coca-Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 150 P. 2d 436, 440 (1944); Edwards, "Privity; Property Damage; and Personal Injuries . . . A Reappraisal," 32 Wash. L. Rev. 153 (1937).

132 For further discussion on the Horizontal and Vertical problems, see Note, "Legislation," 15 U. Pitt. L. Rev. 331, 352 (1953).

133 Coplinger v. Werner, 311 S.W. 2d 201 (Ky. 1958). Guest of buyers denied recovery against seller-dealer because of no privity; and was denied recovery against the manufacturer due to inability to sustain burden of proof in negligence charge, and court refused to apply the doctrine of *res ipsa loquitur.*

134 *Ibid.*

from the explosion and sought damages for breach of warranty of merchantability in a direct suit against the manufacturer. Here again, unless negligence can be proved on the part of the manufacturer constituting the proximate cause of the accident, the owner will not recover.

A. *Horizontal Problem:*

The courts have become particularly aware of the harshness of privity in warranty cases where the person injured is one who might reasonably be expected to use the product and suffer injuries if it is defective.[135] Some courts, under the pressure of public policy, will temporarily ignore the privity doctrine and allow recovery to the injured consumer. This has been especially true in food cases.[136] While many courts have elected not to abandon the privity doctrine, they have instead employed various legal fictions to bring the cases within the rules of privity.[137] One such fiction is based on principles of agency, as where the wife-agent purchases groceries for the husband-principal who consumes the deleterious food and suffers personal injuries. The courts have held that the warranty is actually given to the principal through his agent.[138] But the rule is limited to cases where the court can reasonably construe the purchaser as the agent of the person injured. In view of the limited application of this theory, some courts rely instead upon a theory that once a warranty has been given it runs with the goods and the consumer has the benefit of the original warranty.[139] Still other jurisdictions have resorted to a third

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[135] James, "Products Liability II," 34 Tex. L. Rev. 193 (1955).

[136] Prosser states that many courts have permitted recovery by the consumer injured by unwholesome food against the manufacturer upon a theory not based upon the intricacies of the law of Sales, but upon public policy. Prosser, Torts § 84 (2d ed. 1955); see Klien v. Duches Sandwich Co., Ltd., 14 Cal. 2d 272, 93 P. 2d 799 (1939) (maggots in cellophane wrapped sandwich); Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 213 (1944) (canned meat); Kniess v. Armour & Co., 134 Ohio St. 432, 17 N.E. 2d 734 (1938) (sausages infected with trichinosis); Catani v. Swift Co., 251 Pa. 52, 95 Atl. (1915) (deleterious dressed meat in original package); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942) (poisonous sausages); but see Greenberg v. Lorenz, 7 App. Div. 2d 968, 183 N.Y.S. 2d 46 (1959) (metal fish tag imbedded in canned salmon).

[137] James, "Products Liability II", *supra* note 135 at 193; 1 Williston, Sales § 244, (rev. ed. 1948).

[138] Young v. Great A. & P. Tea Co., 15 Supp. 1018 (Pa. W. D. 1936) (wife acting as husband's agent in purchase of preserves containing a mouse); Singer v. Zabelin, 24 N.Y.S. 962 (1941) (wife purchased diseased canned salmon held to be agent of husband and not of her daughter). But *cf.* Russell v. First Nat. Stores Inc., 79 A. 2d 573 (N.H.1951) (court permitted wife to recover for injuries she received under warranty of fitness on lamb patties, and held that evidence was insufficient to show that she was acting as agent for spouse.)

[139] Williams v. Paducah Coca-Cola Bottling Co., 343 Ill. App. 1, 98 N.E. 2d 164 (1951) (warranty runs with goods, but buyer must maintain burden that

(footnote continued on next page)

party beneficiary theory of extending the warranty obligation to others than the purchaser when they reasonably expect to use the goods purchased.[140]

Apparently this latter theory impressed the drafters of the Code. Section 2-318 provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

As a step in the right direction, the Code has extended the warranty to members of the family or household and to guests in the home. As further indicated by the last sentence of the section, the seller can not limit the operation of this section where any warranty exists.

But what of a guest in a car, or boat, or elsewhere, or of other third persons who may by the nature of the sale be reasonably expected to be in frequent use or to be affected by the use of the product sold? The comments explain that the section is neutral in regard to other situations not specifically mentioned and is dependent upon the developing case law for further extension.[141] This shortcoming has met with notable criticism from Professor James who indicates his regret that the more inclusive 1949 draft of the Code had been modified with respect to the privity question.[142] It provided that the warranty extends to "[one] whose relationship to him [the buyer] is such as to make it reasonable to expect that such a person may use, consume or be affected by the goods. . ."[143] The 1957 draft adopted by the Kentucky legislature, however, is couched in the language set forth above in section 2-318. Perhaps one reason for this limitation is to avoid the difficult question of determining whether the person claiming the benefit of the warranty was within the scope of the seller's foreseeability.

B. *Vertical Problem:*

While the Code is criticised for being incomplete in handling the horizontal problem, it has entirely neglected the vertical problem.

(footnote continued from preceding page)

goods have not been tampered with); Patargias v. Coca-Cola Bottling Co. of Chicago, 332 Ill. App. 117, 74 N.E. 2d 162 (1943); (dead mouse in Coca-Cola); Le Blanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952) (beverage containing house fly.)

[140] Mouren v. Great A. & P. Tea Co., 139 N.Y.S. 2d 375 (App. Div. 1955); (warranty to husband purchaser of contaminated beef extends to third party, wife).

[141] UCC § 2-318, official comment 3.

[142] James, "Products Liability II, *supra* note 135, 194, n. 9.

[143] UCC § 2-318 (1949 Official Draft).

The Code has simply taken no position as to whether an injured subvendee should be allowed recourse against one other than his immediate vendor. This identical problem faced the courts in products liability cases based on negligence, where for over three quarters of a century they blindly followed the misconceived case of *Winterbotton* v. *Wright*.[144] However, with the eventual adoption of the *MacPherson*[145] rule, an injured party became entitled to bring a direct suit against the manufacturer for breach of duty to exercise such care.[146] Absence of privity no longer precludes recovery.

But recovery based on negligence has not proved a sufficient remedy as specific acts of negligence are often impossible to prove[147] and the courts have shown a reluctance to apply the doctrine of *res ipsa loquitur* unless the instrumentality was under the control of the defendant and the circumstances create a clear inference that the accident would not have happened if the defendant had not been negligent.[148] Modern authorities are therefore urging a form of strict liability, where only the existence of the warranty and the fact that the defective quality of the goods was the proximate cause of the injury need be proven.[149]

Strict adherence to the privity doctrine in breach of warranty suits brings about a multiplicity of law suits causing unnecessary expense and delay in the administration of justice.[150] For example, an injured consumer must bring suit against his immediate vendor who in turn must sue his vendor. Thereafter suit may be brought by the manufacturer against his suppliers with liability eventually falling on the party at actual fault. This leaves the consumer, or any intermediary, bearing the risk of insolvency of his immediate vendor and being denied recovery at all.

As pressure from public opinion mounts, forward looking courts have seized upon other means by which the manufacturer may be held in a direct suit. Many courts have held the non-negligent manufacturer liable on a warranty of wholesomeness imposed by

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[144] 10 N. & W. 109, 111 J. Ex. 415 (1842) (a user not contracting directly with repairman denied the right to bring suit for personal injuries.)

[145] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). Kentucky finally adopted the MacPherson rule in C. D. Herme, Inc. v. R. C. Tway Co., 294 S.W. 2d 534 (Ky. 1956).

[146] C. D. Herme, Inc. v. R. C. Tway Co., *supra* note 145.

[147] Redlich, *Commercial Law*, 1959 Ann. Survey of Am. L. 353, 360 (1960).

[148] Worsham v. Duke, 220 F. 2d 506 (6th Cir. 1955); J. C. Penney Co. v. Livingston, 271 S.W. 2d 906 (Ky. 1954).

[149] Prosser, Torts §§ 83, 84 (2d ed. 1955), Vold, Sales § 93 (2d ed. 1959); James, "Products Liability II", *supra* note 135 at 195.

[150] Escola v. Coca-Cola Bottling Co. of Fresno, *supra* note 131 at 440; see other authorities cited in note 131.

operation of law as a matter of public policy.[151] And in cases where the manufacturer advertises his product, some courts have found a direct contractual relation existing between the manufacturer and the consumer who relied upon the affirmations so made.[152] Some courts have applied the theory of the warranty running with the goods so that the ultimate consumer is protected by the warranty of the manufacturer.[153] Professor James is an advocate of this theory, stating that, ". . . the interest in consumer protection calls for warranties by the maker that (do) run with the goods, to reach all who are likely to be hurt by the use of the unfit commodity for a purpose ordinarily to be expected."[154] While acknowledging some support for the theory of the warranty running with the goods, Dean Prosser suggests what he considers a more sound theory of warranty being a form of strict liability in tort which does not depend upon a contract theory.[155] He points out that this theory is grounded in the historical development of the law of warranty in the field of tort liability to which the courts could justifiably return. Professor Vold, like Prosser, supports a theory which does not attempt to come within the bounds of privity, but seeks to limit the rule of privity itself. He takes the position that the privity doctrine should only apply to promissory warranties, but not to warranties imposed by law.[156]

However, many courts would not consider a theory which would allow recovery to one not in privity.[157] Professor Williston, an advocate of the privity doctrine suggests an "assignment" theory. He explains that the right which a purchaser acquires under a warranty amounts

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[151] Foley v. Coca-Cola Bottling Co. of St. Louis, 215 S.W. 2d 314 (Mo. Ct. App. 1948) (tack swallowed while drinking beverage); Oklahoma Coca-Cola Bottling Co. v. Dillard, 208 Okl. 126, 253 P. 2d 847 (1953); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942); (poisonous sausages). Swift & Co. v. Wells, 201 Va. 213, 710 S.E. 2d 203 (1959) (diseased meat). See cases cited *supra* note 136.

[152] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612 (1958); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409 (1932).

[153] Patorgias v. Coca-Cola Bottling Co. of Chicago, *supra* note 139; LeBlanc v. Louisiana Coca-Cola Bottling Co., supra note 139; Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927) (bottle containing broken glass); Coca-Cola Bottling Co. of Ft. Worth v. Smith, 97 S.W. 2d 761 (Tex. Civ. App. 1936) (cockroach in bottle). But see J. I. Case Threshing Machine Co. v. Dulworth, 216 Ky. 637, 287 S.W. 994 (1925), where the Kentucky court emphatically rejects any notion of the manufacturer's warranty running with the product.

[154] James, "Products Liability II", *supra* note 135 at 194.

[155] Prosser, Torts § 84, 508 (2d ed. 1955), states that the seller's liability rests upon the responsibility assumed toward the members of the consuming public who may be injured as a result of marketing the goods.

[156] Vold, Sales § 93 (2d ed. 1959).

[157] Greenberg v. Lorenz, 7 App. Div. 2d 968, 183 N.Y.S. 2d 46 (1959). The court ruled that (where the father purchased and daughter consumed a can of salmon which contained metal tag, daughter could not recover because of lack of privity.)

to a chose in action. A chose in action, unless forbidden by law, is always assignable. He asserts that the choice secured by the warranty should be assignable as other choses under general contract law, thus permitting the warranty of the manufacturer through assignment to enure the warranty protection to the sub-assignee.[158]

As indicated above the Code takes no position in this regard. The Comments state that ". . . it is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."[159] It is thought that the drafters intentionally remained neutral on the question, fearing that to take a definite position might mean the refusal of many jurisdictions to adopt the Code.

The Code does provide some small measure of relief to the "vertical" problem by the adoption of the "third party notice" or "vouching in" requirement in cases where the person to be notified is answerable over.[160] The Code has sought to alleviate some of the hardships which necessarily follow from the successive suit in which necessarily follow from the successive suit in which the seller-defendant in the original litigation must bring suit against his vendor to recoup his damages suffered in the initial suit. In the past the courts have not considered the determinations of fact made in the prior litigation *res ajudicata* to the second,[161] thus requiring the plaintiff in the second suit to present substantially the same proof which had been presented against him before, and with no assurance that he will be successful in the subsequent litigation.[162] The Code's provision makes the determinations of fact in the original suit binding on the defendant in the subsequent suit. This occurs, however, only where he has refused to come in and defend after having received a reasonable notice of the pending litigation, an offer to him to come in and defend, and a warning that his refusal to make a defense will render him bound to any determinations made therein.[163] This section of the Code is applicable where the original seller is a non-resident of the state and out of the jurisdiction of the local courts or where prior case law has not recognized third party defenses within the court's jurisdiction. The seller in the original suit will be given the

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158 1 Williston, Sales § 244 (rev. ed. 1948).
159 UCC § 2-318, official comment 3.
160 UCC § 2-607(5).
161 Booth v. Scheer, 105 Kan. 643, 185 Pac. 878 (1919).
162 Note, 40 Mich. L. Rev. 872 (1942). See also 3 Williston, Sales § 614A (rev. ed. 1948). Williston asserts that in a suit for breach of warranty of quality where notice has been given to a dealer, he will be primae facia liable for consequential damages.
163 UCC § 2-607.

additional knowledge and ability of his vendor where the vendor has decided, in protecting his interest, to come in and defend.[164] Where the seller, answerable over, has taken over the defense in the original action he will not later be heard to deny findings made in the original suit.[165] It should be noted that the "vouching in" provision of section 2-607 is applicable only where the seller is answerable over,[166] and, as the comments suggest, the application of the notice provision is limited to the immediate seller who in turn must still bring a successive suit to recoup the damages he sustains if he is not the wrongdoer.[167]

What of the developing case law in Kentucky? There are relatively few decisions which have dealt with the privity rule in warranty cases. The great bulk of product liability cases, a majority of which concern deleterious food products,[168] are brought under a negligence theory, where privity is not required.[169] But in *North America Fertilizer* v. *Combs*[170] there is dicta to the effect that the court will recognize an extension of the privity doctrine in actions based on warranty. The court stated that a manufacturer may expressly warrant his goods to the final consumer by affirmations of fact written on the label or container, and that he may impliedly warrant that the goods are fit for the ordinary purpose for which they were produced. The court apparently was making a distinction between warranties which are of a personal nature, such as the warranty of fitness for a particular purpose, and warranties which may arise by the nature of the inducement and reliance, such as where the consumer relies on the manufacturer's claims in advertising his product.[171]

If the court were to follow the above dicta, it would be well supported by modern thought. The manufacturer's interest in his product by no means ends with its initial sale to the distributor, but he must clear the wholesaler's and retailer's shelves in order to market his product in the future. To accomplish this end he engages in

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[164] Note, 40 Mich. L. Rev. 872, 882 (1942).

[165] Hartford Acc. & Indem. Co. v. First Nat. Bank & T. Co., 281 N.Y. 162, 22 N.E. 2d 324 (1939).

[166] *Ibid.*

[167] UCC § 2-607, official comment 5.

[168] Note, 23 Ky. L.J. 534 (1935).

[169] C. D. Herme, Inc. v. R. C. Tway Co., 294 S.W. 2d 534 (Ky. 1954); and see Note, 42 Ky. L.J. 273 (1954) which accurately traces the history of manufacturers' liability in Kentucky.

[170] 307 Ky. 869, 212 S.W. 2d 526 (1948) the court denied recovery in direct suit by consumer against manufacturer based on warranty of fitness for a particular purpose arising by usage of trade.

[171] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612 (1958).

extensive advertising as to the quality and fitness of his products through the media of radio, television, and the press, extending an invitation to purchase to the consuming public.[172] By so placing his products in the channels of commerce, he warrants them to the consumer to be reasonably safe and fit for the purpose designed. The resulting strict liability would not be without limits. The manufacturer's warranty being defined in terms of the safety of the product when used in the proper manner should not, however, be extended to injuries that arise because of improper use or defects which cannot be traced to the product at the time the article reached the market.[173] to the privity doctrine,[174] and in non-food cases there is very little movement away from the rigid rule. Though most secondary authorities recommend its abandonment, there is still strong authority for its continued application. Professor Williston, in defense of the doctrine, relates that there are two reasons justifying the continued application of the rule. He states that a warranty is a contract of personal indemnity, and like insurance, it covers only the insured and not a subpurchaser or friend. Secondly, the rights of the buyer arising out of the warranty are choses in action, and in the absence of a specific agreement, the seller may not be compelled to assign the chose he possesses from his vendor.[175] Another reason for the privity rule is the local merchants are in a better position to handle frivolous claims which hound them in claim-conscious areas.[176] It is also pointed out by advocates of the doctrine that since the party at fault is eventually brought to justice by the successive suits (though not always the case) there is no cause for change. Even those courts which recognize the adverse public opinion to the doctrine are generally not willing to break from the long standing precedent, seeking refuge in the claim that it is a matter for the legislature.

The modern trend undoubtedly is away from the ancient doctrine, and the reasons in support of this trend appear to be the most sound. Today's consumer generally purchases entirely in reliance on the manufacturer in the case of manufacturer products and on the seller in the case of produce. The Kentucky court pointed out the harshness of holding the seller liable in sealed container food cases, but justified

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[172] Escola v. Coca-Cola Bottling Co. of Fresno, *supra* note 131.

[173] Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828, (1942); Swift & Co. v. Wells, 201 Va. 213, 110 S.E. 2d 213 (1959).

As indicated before, the majority of jurisdictions staunchly adhere

[174] Prosser, Torts § 84 (2d ed. 1955).

[175] 1 Williston, Sales § 244 (rev. ed. 1948).

[176] Llewellen, Cases and Materials on Sales 343 (1930).

it as a lesser of two evils, imposing the loss on the seller instead of the consumer.[177] In such a case the consumer relies on the manufacturer not the seller, who is a mere conduit of the manufacturer.[178] What valid reason prohibits an injured consumer from seeking redress directly from the party at fault? Not only would a direct suit expedite justice, but it would reduce the risk of judgment proof defendants which, under present rules, bars all recovery on warranty theory. As for the manufacturer, he no longer requires the protection and sympathy of the law. Marketing conditions as they are would seemingly impose on the manufacturer the responsibility for his products.[179] The manufacturer is in a better position to bear the burden of injuries of the consuming public, and in turn to pass it on to the entire public by higher prices. A direct suit, based on strict liability would tend to foster greater precautions in the manufacture and design of products.[180]

Conclusion

In seeking recovery for injuries caused by defective products, the consumer continues to stumble through a maze of legal doctrines[181] which continue to be applied by most jurisdictions. But the adoption of the Code has enabled Kentucky to keep abreast with modern trends in providing for its citizens a comprehensive commercial law. As has been so elegantly stated by Mr. James B. Young, Chairman of the Kentucky State Bar Association Committee for the Uniform Commercial Code, ". . . the Code represents the end result of the best legal minds in this country. . . . One of the great advantages of the Code is that it fills in the blank areas of the law where we have had no decisions or statutes."[182] These statements are particularly pertinent to the subject of warranties. The application of the express warranty has been vastly extended and the warranty of merchantability has been clearly defined, making it applicable to all sales by merchants unless specifically excluded. The troublesome status of the disclaimer has at last been codified, and initial strides have been taken to alleviate the hardships of the archaic privity requirement. Though the Code may not provide all the answers to the multitude of intricacies which arise in com-

[177] Martin v. Great A. & P. Tea Co., 301 Ky. 429, 192 S.W. 2d 201 (1946) (dead rat in chile con carne).

[178] Rogers v. Toni Home Permanent Co., *supra* note 171.

[179] Prosser, Torts § 84 (2d ed. 1955).

[180] Escola v. Coca-Cola Bottling Co. of Fresno, *supra* note 131.

[181] Redlich, *Commercial Law*, 1959 Ann. Survey Am. L., *supra* note 147 at 357.

[182] Young, Scope, Purposes, and Functions of the Uniform Commercial Code, 48 Ky. L.J. 191 (1960).

mercial transactions, it will serve as a guide to the court in those cases which are not within its express provisions. The official comments will serve as a valuable aid in solving the many problems of interpretation which will face the court under the new law. Where the case presented demands a policy consideration on matters not specifically covered, it is the duty of the court to meet the challenge in a manner consistent with the new conditions and practices of a changing and prosperous civilization.[183]

K. Sidney Neuman

[183] Rogers v. Toni Home Permanent Co., *supra* note 126.