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Used Goods and Merchantability

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USED GOODS AND MERCHANTABILITY

The application of the Uniform Commercial Code's (U.C.C.) implied warranty of merchantability¹ has been less than uniform in cases involving the sale of secondhand goods. Although it has been stated that excepting Texas² there is unanimous agreement that such a warranty does apply to used goods,³ this statement is in apparent conflict with decisions and dicta in Alabama⁴ and Georgia.⁵ Even where it is agreed that such a warranty is implied in the sale of secondhand merchandise, the controversy continues, because some courts have indicated that the warranty may be disclaimed more easily in the sale of used goods than in the sale of new goods.⁶ Finally, when the warranty is found applicable and not disclaimed, the courts are faced with the difficult task of determining which used goods are merchantable and which are not.⁷

The purpose of this article is to focus on what, if any, difference there should be in the case of used or secondhand goods when determining the application of U.C.C. section 2-314 to their sale. "Used

1. U.C.C. § 2-314 (1972). (hereinafter all citations are to 1972 version, unless otherwise indicated).

2. *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W. 2d 877 (Tex. Ct. App. 1973).

3. *Moore v. Burt Chevrolet, Inc.*, 563 P.2d 369 (Colo. Ct. App. 1977); Comment, U.C.C. Implied Warranty of Merchantability and Used Goods, 26 BAYLOR L. REV., 630, 637 (1974).

4. *Trax, Inc. v. Tidmore*, 331 So. 2d 275, 277 (Ala. 1976). Although the court limited its holding to the facts of the particular case, the court found that there was no implied warranty in the sale of a used tractor by a tractor merchant, in spite of the fact that no attempt had been made to disclaim the warranty.

5. *General Motors Corp. v. Halco Instruments, Inc.*, 124 Ga. App. 630; 185 S.E. 2d 619, 622 (1971). In a suit by a second user/owner against the manufacturer, the court said that even against the seller of used goods there is no implied warranty of quality, absent special circumstances.

6. *Robinson v. Branch Moving & Storage Co., Inc.* 28 N.C. App. 244; 221 S.E.2d 81 (1976). Although the buyer believed the truck he was buying was still under the manufacturer's warranty, and in spite of the fact that the truck was in the shop being repaired at the time of the sale, the court held that the warranty of merchantability would not be implied into a written sales contract that was silent on the subject of warranties, because the buyer believed he was buying it "as it was." *Id.* at 83.

7. The range is from *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (N.Y. Civ. Ct. 1972), where a used ice maker that did not work at all was found to be merchantable, to *Mack Trucks, Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), where a used commercial asphalt truck that was working and was being used regularly by the second user/owner was found to be unmerchantable because of "excessive oil consumption" and "clutch trouble." *Id.* at 460.

goods" will be defined as goods which have been used long enough,⁸ or damaged⁹ and repaired,¹⁰ to such an extent as to affect their value,¹¹ and which are then resold as serviceable, though not new,¹² goods and not as junk or spare parts.¹³

The language of the Code provision on the implied warranty of merchantability makes no distinction between new and used goods. U.C.C. section 2-314 states:

(1) 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.

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

8. Just being old does not make goods "used goods". In *Rudolph v. Huckman*, 267 A.2d 896 (Del. Super. 1970), a 1965 model boat was held to be "new" in spite of the fact that the dealer had had it for 20 months and both the 1966 and 1967 models had been released prior to the sale of the 1965 model boat. In *Luther v. Bud-Jack Corp.*, 72 Misc.2d 924, 339 N.Y.S.2d 865 (Sup. Ct. 1972), it was held that a car that had been dented and repaired was not a "new" car. The opposite conclusion was reached in *Cocco v. Degnan Chevrolet, Inc.*, 64 Pa. D. & C.2d 6 (Ct. of Common Pleas 1974).

9. *Farmer v. Norm "Fair Trade" Stamp, Inc.*, 164 Colo. 156, 433 P.2d 490 (1967). A hay baler was held to be a "used" hay baler because it had been damaged in transit.

10. *Luther v. Bud-Jack Corp.*, 72 Misc. 2d 924, 339 N.Y.S. 2d 865 (Sup. Ct. 1972); *contra*, *Cocco v. Degnan Chevrolet, Inc.*, 64 Pa. D. & C.2d 6 (Ct. of Common Pleas 1974).

11. *Stamm v. Wilder Travel Trailers*, 44 Ill. App. 530, 358 N.E.2d 382 (1976). Here it was held that a mobile home was still "new," even though it had been used by a salesman on a weekend trip.

12. Selling goods as new which are in fact used has alternately been held to be a breach of warranty (*Paragould v. International Power Mach.*, 233 Ark. 872, 349 S.W.2d 322 (1961), and fraud (*Havas v. Alger*, 461 P.2d 857 (Nev. 1969)). See generally *Annot.*, 36 A.L.R. 237 (1925).

13. *Dato v. Vatland*, 36 Misc.2d 636, 231 N.Y.S.2d 895 (Dist. Ct. Nassau Cty. 1962). A sale of a defective car was held to breach implied warranty even though the contract was marked "sold as junk" where the seller knew that the buyer was not a junk dealer and intended to use the vehicle as a serviceable car.

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

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

The threshold question of whether or not a warranty of merchantability is implied in a particular sale would appear to be answered by subsection one of section 2-314. According to that subsection, whenever there is a *sale of goods* by a seller who is a *merchant with respect to goods of that kind* and the contract neither excludes nor modifies the warranty, it is to be implied as a term of the contract. Each of the "trigger" words are defined elsewhere in the Code. A "sale" is "the passing of title from the seller to the buyer for a price."¹⁴ A "merchant" is "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed."¹⁵ "Goods" means "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action."¹⁶

When the three requirements of subsection one of section 2-314 are met, ((1) a sale, (2) of goods, (3) by a merchant in those goods), the warranty of merchantability must be effectively disclaimed according to the requirements of section 2-316 or it will be implied as a term in the contract.¹⁷ When this term becomes a part of the contract, the seller's basic duty is to deliver goods which "are fit for the ordinary purposes for which such goods are used."¹⁸ U.C.C. section 2-714(2) states that the measure of damages for breach is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. This is not the exclusive remedy,¹⁹ however, as breach of the implied warranty of merchantability may also give the buyer the right to reject the goods,²⁰ revoke his acceptance,²¹ and/or receive incidental and conse-

14. U.C.C. § 2-106(1).

15. U.C.C. § 2-104(1).

16. U.C.C. § 2-105(1).

17. U.C.C. § 2-314(1).

18. U.C.C. § 2-314(2)(c), and U.C.C. § 2-314, Comment 8.

19. U.C.C. § 2-714, Comment 3.

20. U.C.C. § 2-601.

21. U.C.C. § 2-608.

quential damages.²²

As outlined in Official Comment 13 to U.C.C. section 2-314, the buyer's prima facie case for a breach of the warranty of merchantability consists of three elements: (1) a showing that the warranty of merchantability is a part of the contract (this is done by showing that there was a sale of goods by a merchant with respect to those goods and that the warranty was not disclaimed.); (2) a showing that there was a breach of the warranty by proving that the goods did not meet the standards set out in subsection two of U.C.C. section 2-314; and (3) proof that the breach of warranty was the proximate cause of the loss sustained. A requirement of privity of contract between the plaintiff and the seller may also be a problem. Where there is direct privity between an injured buyer and a defendant seller, any requirement of privity is met. However, where the injured party is someone other than the purchaser, or where the merchant who may be liable is not the seller, or where both of those situations exist, there is the additional problem of privity facing the plaintiff bringing suit for breach of warranty.

There is no uniformity in the very confused law of privity. The drafters of the Code offered three alternative sections dealing with horizontal privity²³ (where someone other than the purchaser is injured), and they were totally silent on the subject of vertical privity (where the buyer is suing a remote seller). The Editorial Board for the National Conference of Commissioners on Uniform State Laws concluded that "there appears to be no national consensus as to the scope of warranty protection which is proper,"²⁴ and they were right. Even with three "uniform" sections offered, twenty-one states either wrote their own section on privity or omitted it all together.²⁵ Further discussion of the problem of privity is beyond the scope of this article, and the reader should ascertain the position of his own jurisdiction on this question.

I. APPLICATION TO SALES OF USED GOODS

Generally, there has been little appellate dissension from the position that a warranty of merchantability is implied in the sale of used goods. This has been clearly held in fifteen states²⁶ and is supported by

22. U.C.C. § 2-715.

23. U.C.C. § 2-318, Alternatives A., B., and C.

24. 1 A UNIFORM LAWS ANNOTATED, 53 (1976).

25. *Id.* at 55-56 & 129-30.

26. Arkansas, *Mack Trucks Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969); Colorado, *Moore v. Burt Chevrolet, Inc.* 563 P.2d 369, (Colo. Ct. App. 1977); Georgia,

dicta in three others.²⁷ The courts which disagree say that section 2-314 does not apply to the sale of secondhand goods either because their state's prior law had not implied a warranty of quality in used goods sales or because of the special facts in a particular case.

In *Chaq Oil Co. v. Gardner Machinery Corp.*²⁸, the Texas Court of Civil Appeals held that because pre-Code Texas law had not implied a warranty of merchantability in the sales of used goods, such a warranty was not appropriate subsequent to the Code's adoption.²⁹ The court used a two-step approach in arriving at this conclusion. First, it cited Official Comment 3 to section 2-314, which states: "[A] contract for the sale of second-hand goods . . . involves only such obligation as is appropriate to such goods for that is their contract description." Second, it cited U.C.C. section 1-103 for the principle that prior law should supplement the Code. Thus, because there had been no warranty under pre-Code law, the obligation appropriate for the sale of used goods was no warranty at all.

Courts in other jurisdictions have been faced with long lists of pre-Code precedents holding that there was no warranty of quality implied in the sales of used goods. These courts have held that although those cases should be given some weight, they are not determinative and that the language of the Code should prevail.³⁰ There are two reasons why pre-Code law should not be used to "supplement" section 2-314 and

Georgia Timberlands, Inc. v. Southern Airways Co., 125 Ga. App. 404, 188 S.E.2d 108 (1972); Illinois, Stamm v. Wilder Travel Trailers, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976); Overland Bond & Inv. Corp. v. Howard, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972); Ohio, Centennial Ins. Co. v. Vic Tanny Int'l, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975); North Carolina, Rose v. Epley Motor Sales, 215 S.E.2d 573 (N.C. 1975); New Jersey, Turner v. International Harvester Co., 133 N.J. Super. 277, 336 A.2d 62 (1975); Buff v. Giglio, 124 N.J. Super. 94, 304 A.2d 771, (1973); New York, Stream v. Sportscar Salon, Ltd., 91 Misc.2d 99, 397 N.Y.S.2d 677 (Civ. Ct. 1977); Regan Purchase & Sales Corp. v. Primavera, 68 Misc. 2d 858, 328 N.Y.S.2d 490, (Civ. Ct. 1972); Maryland, Houck v. DeBonis, 38 Md. App. 85, 379 A.2d 765 (1977). Mangieri v. Admiral Pontiac, Inc., 14 U.C.C. Rep. 82 (Md. Cir. Ct. 1974); Massachusetts, Entrialgo v. Twin City Dodge, Inc., 333 N.E.2d 202 (Mass. 1975); Johnson v. Fore River Motors, Inc., 26 Mass. App. Dec. 184, (1967); Michigan, Hensley v. Colonial Dodge, Inc., 69 Mich. App. 597, 245 N.W.2d 142 (1976); Pennsylvania, Basta v. Riviello, 66 Lack. Jur. 77, (1965); Vermont, Tracy v. Vinton Motors, Inc., 130 Vt. 512, 296 A.2d 269 (1952); Washington, Testo v. Russ Dunmire Oldsmobile, Inc., 554 P.2d 349 (Wash. 1976); Baker v. City of Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971).

27. Delaware, Ed Fine Oldsmobile, Inc. v. Knisley, 319 A.2d 33 (Del. Super. 1974); Connecticut, Chamberlain v. Bob Matick Chevrolet, Inc., 4 Conn. Cir. 685, 239 A.2d 42, (1967); Texas, Mid-Continent Aircraft Corp. v. Curry County Spraying, Inc., 553 S.W.2d 935 (Tex. Ct. App. 1977). See also Keystone Aero. Corp. v. R.J. Enstrom Corp., 449 F.2d 146 (3d Cir. 1974) (Pennsylvania law applied); Simmons v. American Mut. Liab. Ins. Co., 433 F. Supp. 747 (S.D. Ala. 1976).

28. 500 S.W.2d 877 (Tex. Ct. App. 1973).

29. *Id.* at 879.

30. Moore v. Burt Chevrolet, Inc., 563 P.2d 369, 370 (Colo. 1977); Testo v. Russ Dunmire Oldsmobile, Inc., 554 P.2d 349, 356 (Wash. 1976).

exclude secondhand goods. First, such a reading would not supplement that section, but instead would contradict it. Second, the policies behind the Code's warranty of merchantability are different from the policies underlying pre-Code warranties. That shift in policy favors including used goods sales in the coverage of Code warranties.

The exclusion of warranties from used goods sales actually contradicts the Code because the language of section 2-314(1) covers *all* sales of goods by a merchant who deals in similar goods, unless the parties specifically agree to exclude or modify the warranty of merchantability. Although it has been suggested that section 2-314 is silent as to warranties for used goods,³¹ such goods are specifically mentioned twice in the Official Comments to that section,³² so it can hardly be argued that the framers simply forgot about used goods and used overly broad language.

As pointed out above, subsection one of section 2-314 says "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." It has long been a canon of statutory construction that "the case must be a strong one indeed that would justify a court in departing from plain meaning of words in search of an intention which the words themselves did not suggest."³³ Case law or previous legislation should be used only to clarify ambiguity and uncertainty,³⁴ not to create it.³⁵

A decision that used goods are not within the coverage of section 2-314 would require that a court find some ambiguity in the words "goods," "sales," or "merchant" that would justify excluding secondhand merchandise. Defining "goods" or "sales" to exclude used goods is not authorized by the Code's definitions of those words,³⁶ and excluding the sale of used goods from the definitions of either "goods" or "sales" would remove those sales from the coverage of Article Two of the Code altogether.³⁷ Also, such an interpretation is clearly refuted by the repeated references to used goods in the comments.³⁸ And if used

31. Oklahoma Code Comment, OKLA. STAT. ANN. tit. 12A, § 2-314 (West 1963). See also 77 C.J.S. Sales § 330(e)(1)(1965).

32. U.C.C. § 2-314, Comments 3 & 4.

33. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820); *Cf.* Bouie v. City of Columbia, 378 U.S. 347, 363 (1964).

34. Northridge v. Grenier, 278 Mass. 438, 180 N.E. 226 (1932).

35. Voorhies v. Faust, 220 Mich. 155, 189 N.W. 1006, 1007 (1922); Thornton v. Williams, 215 Or. 639, 336 P.2d 68, 72 (1959).

36. U.C.C. § 2-105 (goods defined); U.C.C. § 2-106(1) (sale defined).

37. U.C.C. § 2-102.

38. U.C.C. § 2-314, Comments 3 & 4.

goods are "goods," then one who by his occupation deals in used goods is a merchant with respect to goods of that kind.³⁹ If anything, courts have been overzealous in defining "merchant" with respect to used goods.⁴⁰

Since there is no way to read the actual language of section 2-314 as excluding used goods, it must be assumed that the legislature knew what the earlier law was and that they appreciated the effect of the new language on the old law.⁴¹ Thus, since the exclusion of used goods from the coverage of section 2-314 would contradict the Code language and the apparent intent of the authors of the Code, prior case law should not be used to "supplement" the Code in this way.

The second reason modern courts should not be bound by pre-Code determinations that a warranty of merchantability is not implied in the sale of secondhand goods is that the language of the Code evidences a shift in the fundamental policies underlying the implied warranty of merchantability.

Implied warranties of quality began at common law as exceptions to the doctrine of caveat emptor.⁴² In the 1867 case of *Jones v. Just*,⁴³ the court explained what the common law implied warranties were and when they were applicable. The court cited cases where goods were sold and were to be delivered from abroad with no opportunity to be inspected prior to delivery,⁴⁴ cases of goods sold for future manufacture,⁴⁵ cases where only a sample of the goods was offered for inspection.

39. U.C.C. § 2-104(1).

40. In *Centennial Ins. Co. v. Vic Tanny Int'l, Inc.*, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975), an Ohio court reversed a summary judgment in favor of the seller of a defective used sauna heater on the issue of whether or not the seller was a merchant within the scope of U.C.C. § 2-314. In that case, the seller was the owner of a health spa who was selling all of the assets of his spa to a buyer who had opened a new spa with those assets in the same location. There was nothing in the opinion to indicate that there was any evidence that the defendant had ever sold another sauna or other health club or that he had any special knowledge about sauna heaters other than as a user of that sauna, albeit professionally. A determination that he was a merchant of saunas just because he used sauna heaters in his profession would mean that, by the same reasoning, postmen are merchants with respect to shoes and judges are merchants with respect to gavels.

The opposite conclusion was reached in *Downs v. Shouse*, 18 Ariz. App. 225, 501 P.2d 401 (1972) where a court faced the same question with regard to a professional pilot selling his airplane.

41. *Thompson v. Thompson*, 218 U.S. 611 (1910).

42. Williston, *Representations and Warranties in Sales*, 27 HARV. L. REV. 1, 13 (1913).

43. L.R. III, Q.B. 197, 200-03 (1868).

44. *Jones v. Bright*, 5 Bing. 533, 130 L.R. 1167 (Eng. 1829); *Bigge v. Parinson*, 158 Eng. Rep. 758 (Exch. 1862).

45. *Laing v. Fidgron*, 171 Eng. Rep. 55 (Nisi Privs 1815); *Shepherd v. Pybus*, 133 Eng. Rep. 1390 (Eng. 1842).

tion,⁴⁶ and cases where the goods were sold by description.⁴⁷ The court explained that in each of those situations the buyer is required to substitute the seller's judgment and good faith for his own full inspection of the goods. Because of the buyer's forced reliance on the seller's description of the goods in these cases, the courts were willing to imply a term in the contract that the goods would be of at least average, or merchantable, quality.

These same warranties were adopted in the United States as part of the common law by the late 1800's⁴⁸ for largely the same reasons,⁴⁹ and were later codified in the Uniform Sales Act.⁵⁰ By the time the Sales Act was written, the warranties of quality had been divided into the express warranties,⁵¹ the implied warranty of fitness for a particular purpose,⁵² and the implied warranty of merchantability.⁵³ Before either of the implied warranties of quality arose, the seller had to make a representation either verbally or by his actions. If the buyer made his particular purpose known to the seller and then received goods implicitly suited for that purpose, the Sales Act implied a warranty of fitness for that purpose. If the buyer justifiably relied on the seller's non-contractual representations,⁵⁴ or if the seller described the goods and sold them by that description,⁵⁵ the law would imply a warranty of merchantability. However, if the buyer selected his own goods,⁵⁶ or if he specified a trade name, no warranty was implied.⁵⁷ This was because the policy underlying the pre-Code warranties was honesty,⁵⁸ and if the buyer relied on his own judgment, or if the seller made no representations, there was no dishonesty.⁵⁹

46. *Nichol v. Godts*, 10 Exch. 19; 23 L.J. (Exch.) 314; 156 Eng. Rep. 410 (Exch. 1854).

47. *Gardiner v. Gray*, 171 Eng. Rep. 46, 47 (K.B. 1815).

48. *Dushane v. Benedict*, 120 U.S. 630 (1887); *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108 (1884).

49. Williston, *Representations and Warranties in Sales*, 27 HARV. L. REV. 1, 11 (1913).

50. Uniform Sales Act (hereinafter U.S.A.) § 15.

51. U.S.A. § 13.

52. U.S.A. § 15.

53. U.S.A. § 15(2).

54. *Bouchet v. Oregon Motor Car Co.*, 78 Or. 230, 152 P. 888 (1915); *Walker, Evans & Cogswell Co. v. Ayer*, 80 S.C. 292, 61 S.E. 557 (1908); *Guayandotte Coal Co. v. Virginia Elec. & Mach. Works*, 94 W. Va. 300, 118 S.E. 512 (1923).

55. *Majestic Coal Co. v. W.J. Bush & Co.*, 171 N.Y.S. 662 (City Ct. of N.Y.C. 1918); *Main & Co. v. Dearing*, 74 Ark. 280, 84 S.W. 640 (1905).

56. *National Cotton Oil v. Young*, 74 Ark. 144, 84 S.W. 92, 93 (1905).

57. U.S.A. § 15(5).

58. *E.g.*, *Ward v. Great Atl. & Pac. Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918); *Bekkevold v. Potts*, 173 Minn. 87, 89, 216 N.W. 790, 791 (1927); *J.I. Case Plow Works v. Niles & S. Co.*, 90 Wis. 590, 63 N.W. 1013 (1895).

59. Prosser, *Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 141 (1943).

Dean Prosser has characterized all of the pre-Code implied warranties as founded on three distinct theories: (1) warranties which arose because the seller knew the buyer was relying on the seller's judgment (thus creating a duty to insure the goods were fit for the intended purpose),⁶⁰ (2) warranties which were neither verbalized nor written into the contract, but which formed the basis of the bargain (i.e. warranty that if the goods were sold by description, the goods delivered would be of average quality for things fitting that description),⁶¹ and (3) warranties which arose by operation of law for policy reasons whenever a seller offered goods for sale, regardless of the circumstances of the sale (i.e., warranty of title).⁶² To Prosser, only the second theory explains the common law cases of implied warranties of merchantability.⁶³

Today, it is the third theory, that of duties imposed on merchants by operation of law, that best explains the Code's implied warranty of merchantability. Much like the common law warranty of title, a merchant offers an implied warranty of merchantability by the very act of putting goods up for sale. Both warranties may be disclaimed,⁶⁴ but they are both imposed as a matter of public policy rather than being drawn from the contract or inferred from the words and acts of the parties.

This shift in operational theories evidences the fact that the Code's warranty of merchantability is designed to serve a wider range of policy goals than the pre-Code warranty served. To be sure, section 2-314 is designed to further the pre-Code goals of preventing sharp dealing and promoting honesty,⁶⁵ but it is intended to serve other goals as well. The Code's warranty is also based on policies aimed at eliminating dangerous products,⁶⁶ putting the burden of keeping inferior products off the market on the one best able to do so,⁶⁷ and spreading the costs of those defective products which do reach the market as widely as possible among those who benefit from the enterprise.⁶⁸

60. *Id.* at 122.

61. *Id.* at 123.

62. *Id.* at 124.

63. *Id.* at 124.

64. There were not many cases of the common law warranty of title being disclaimed, but it was possible, as in the case of the sale of a claim to a disputed chattel. *See Cleveland Wrecking Co. v. Federal Deposit Ins. Corp.*, 66 F. Supp. 921 (E.D. Pa. 1946).

65. *Asbestos Prod., Inc. v. Ryan Landscape Co.*, 282 Minn. 178, 163 N.W.2d 767 (1968).

66. *Booth S.S. Co. v. Meier & Oelhaf Co.*, 262 F.2d 310 (2d Cir. 1958) (Pennsylvania law applied).

67. *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 449, 212 A.2d 769, 773 (1965); *Vlases v. Montgomery Ward Co.*, 377 F.2d 846 (3d Cir. 1967).

68. *Wood v. Hub Motor Co.*, 110 Ga. App. 101, —, 139 S.E.2d 674, 678 (1964).

Accordingly, if a customer goes into a store, selects what she wants and lays her money on the counter, absent any other facts, the Code will imply a warranty of merchantability where the pre-Code law would not have done so. The supporting policies of the Code come close to imposing a duty on the merchant to insure that the product is merchantable, while the pre-Code policies required only that the merchant refrain from dishonesty and sharp dealing. Since the customer in this hypothetical initiated the purchase and used her own judgment about the purchase, neither the common law nor the Uniform Sales Act would have implied any warranty.⁶⁹

This shift in policy has particular significance in the application of the implied warranty of merchantability to the sales of used goods. It was generally thought that the buyer who knew that he was buying used or secondhand goods also knew that he should be on his guard. That knowledge alone almost served as a disclaimer of any representations made by the seller, so that it was unreasonable for the buyer to rely on the seller's representations rather than on his own judgment.⁷⁰ But the Code policies encouraging sellers to examine their goods for safety and quality have particular relevance to the used goods market. The shift in underlying policies between the Code's warranty of merchantability and its predecessors adds more weight to the conclusion that used goods were included in the coverage of section 2-314 by design rather than by oversight.

Thus, there are two independent reasons for distinguishing pre-Code cases when dealing with implied warranties in the sale of used goods. First, the natural language of the Code does not authorize the exception of used goods from its coverage. Second, the policies supporting the Code's warranty of merchantability are different from the pre-Code policy and the Code's policies favor the inclusion of the sales of used goods.

Most of the other judicial statements negating the warranty of merchantability for used goods have been dicta in cases where the courts did not have to reach the question, but included their opinion with little explanation. In one such case, the plaintiff had bought a used car from an individual and then sued the manufacturer when it broke down. After disposing of the case due to lack of privity between the plaintiff and the defendant, the court went on to say that the general

69. *Cf. Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874 (1974) (retail food store, however, has duty to insure that all goods are of merchantable quality, even though purchaser may have selected the specific item herself).

70. *See Durbin v. Denham*, 106 Ore. 34, 210 P. 165 (1922).

rule was that a second seller gives no implied warranties.⁷¹ Another appellate court reversed a finding that the defendant-seller had breached an implied warranty of merchantability on a car sold after the effective date of the Code. That North Carolina court so ruled because the common law did not imply such a warranty and because the trial was had without reference to the Uniform Commercial Code.⁷²

There is, however, one other situation in which inclusion of the implied warranty of merchantability in the sale of some secondhand items poses a serious analytical problem. That situation is as follows: the buyer takes possession of the goods under a lease, holds the goods for a considerable length of time, and then buys the goods without ever returning possession to the seller. In this situation, there may be no reason to imply a warranty of merchantability at the time of the sale. The facts of the case where that situation arose are most compelling. In that case the defendant owned a caterpillar tractor subject to a security interest. He fell behind in his payments and sold the tractor to the plaintiff, who was a merchant in such tractors. A short time later the defendant leased the same tractor back and almost immediately fell behind in the rent payments. Fifteen months later he offered to buy the tractor from the plaintiff who sold it to him without ever seeing the tractor again. The defendant never paid the sale price, and the plaintiff sued. At trial, the defendant successfully defended on the theory that the tractor was not merchantable at the time the plaintiff sold it to him. The Supreme Court of Alabama reversed the lower court, saying: "We make no attempt to set out any broad principles to govern implied warranties in the ordinary sales of used motor vehicles in the future. We hold that there was no implied warranty connected with the transaction in this particular case. The facts here are unique."⁷³

Although the facts of that particular case are admittedly unusual, leases followed by sales are not. When the sale provision is part of the original lease, some courts have said the entire contract was really a sale and have implied the warranty as of the original date of delivery.⁷⁴ A more serious problem arises when the lease contains no such provision, and the sale is a separate contract. One possible solution would be

71. *General Motors Corp. v. Halco Instruments Co.*, 124 Ga. App. 630, —, 185 S.E.2d 619, 622 (1971).

72. *Christenson v. Friendly Ford Sales, Inc.*, 6 N.C. App. 137, —, 169 S.E.2d 542, 546 (1969).

73. *Trax, Inc. v. Tidmore*, 331 So. 2d 275, 277 (Ala. 1976).

74. *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975). See also Comment, *The Extension of Article 2 of The Uniform Commercial Code to Leases of Goods*, 12 TULSA L. J. 556 (1977).

to call the sale a modification of the original contract and require that the goods be merchantable at the time the seller-lessor put the buyer-lessee in possession of the goods. Such a solution would make the condition of the goods at the time of the modification irrelevant for purposes of section 2-314. That solution would further the policies of the Code because at the time of the sale it is the buyer who has superior knowledge of the goods and is therefore the only one in a position to ascertain their quality.

II. DISCLAIMING WARRANTIES IN USED GOODS SALES.

The law governing the exclusion of the implied warranty of merchantability in a sale of goods is contained in section 2-316 of the Code.⁷⁵ Section 2-316 sets out three methods of disclaiming the implied warranty of merchantability: First, conspicuous contractual language can effectively disclaim merchantability.⁷⁶ Second, the buyer's inspection can limit the implied warranties as to defects he does or should gain knowledge of.⁷⁷ Third, knowledge the parties have or should have gained from their past dealings with each other or in the trade can limit implied warranties.⁷⁸ The policy of section 2-316 is "to protect a buyer

75. The pertinent portions of U.C.C. § 2-316 states:

(2) 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. . . .

(3) 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 mode 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 to have revealed to him; and
- (c) an implied warranty can also be excluded by course of dealing or course of performance or usage of trade.

76. Although there is no mention of the word "conspicuous" in § 2-316(3)(a), that section does require that the language call the buyer's attention to the fact that the warranties are being disclaimed. From this courts have reasoned that the phrase "as is" must also be conspicuous in order to effectively disclaim the warranty of merchantability. *Fairchild Indus. v. Maritime Air Service, Ltd.* 333 A.2d 313 (Md. Ct. App. 1975). *See also* *Stream v. Sportscar Salon, Ltd.* 397 N.Y.S. 2d 677, 91 Misc. 2d 99 (Civ. Ct. 1977); *Hensley v. Colonial Dodge, Inc.*, 69 Mich. App. 597, 245 N.W.2d 142 (1976); *Rose v. Epley Motor Sales*, 215 S.E.2d 573 (N.C. 1975); *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975); *Centennial Ins. Co. v. Vic Tanny Int'l, Inc.*, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975). *See generally* *Annot.*, 24 A.L.R. 3d 465 (1975).

77. *E.g.*, *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017, 1025 (D. Conn. 1975); *Donald v. City Nat'l Bank*, 295 Ala. 320, 329 So. 2d 92, 96 (1976); *Alan Wood Steel Co. v. Capital Equip. Enterprises, Inc.*, 39 Ill. App. 3d 48, 349 N.E.2d 627 (1976).

78. For the definitions of Course of Dealing and Usage of Trade, see U.C.C. § 1-205. Cases which have limited the warranty of merchantability because of the operation of this section in-

from unexpected and unbargained language of disclaimer . . . and permit[s] the exclusion of the implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise."⁷⁹

None of this language specifically authorizes a separate and distinct system for disclaiming warranties in used goods sales, and no state has held that it does. However, courts in six states have indicated that if the buyer has actual knowledge that the seller does not warrant the quality of the goods, no warranty will be implied in the sale.⁸⁰ The effect of these holdings is to abrogate the requirement that written disclaimers be conspicuous⁸¹ and to render oral disclaimers effective even when the contract is in writing.⁸²

Although this system of disclaiming a warranty would appear to be consistent with the "no surprise" policy of the Code, it contradicts the Code language requiring a conspicuous disclaimer in written contracts and has also been criticized on policy grounds. Professors White and Summers argue against it on the grounds that section 2-316 is designed to protect the buyer by requiring objective proof of the circumstances that should have alerted the buyer to the fact that the seller was not going to stand behind his goods. They fear that giving effect to any subjective knowledge of disclaimer would reward the seller who is a convincing liar and allow him to escape his duty to provide merchantable goods.⁸³

Such "subjective knowledge disclaimers" are relevant in the used goods marketplace in that used goods buyers would be particularly vulnerable to the "convincing liar." It will be up to the fact finder to determine whether or not the buyer knew (or should have known) of the

clude: *Fear Ranches, Inc. v. Berry*, 503 F.2d 953 (9th Cir. 1974) (New Mexico law applied); *Country Club, Inc., v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1394 (5th Cir. 1970) (Alabama law applied); *Spurgeon v. Jamieson Motors*, 164 Mont. 296, 521 P.2d 924 (1974).

For the definition of Course of Performance or Practical Construction see U.C.C. § 2-208. One case which has applied this section to exclude the implied warranty of merchantability is *Lipschutz v. Gordon Jewelry Corp.*, 367 F. Supp. 1086 (S.D. Tex. 1973).

79. U.C.C. § 2-316, Comment 1.

80. *Massachusetts, Roto-Lith, Ltd. v. Bartlett & Co.* 297 F.2d 497, 500 (1st Cir. 1962) (Massachusetts law applied); *Michigan, Williams v. College Dodge*, 11 U.C.C. Rep. 958, 961 (Mich. Dist. Ct. 1972); *North Carolina, Robinson v. Branch Moving & Storage Co., Inc.*, 28 N.C. App. 244, 221 S.E.2d 81 (1976); *Tennessee Carolina Transp. v. Strick Corp.*, 383 N.C. 423, —, 196 S.E.2d 711, 718 (1973); *New York, Velez v. Crane & Clark Lumber Corp.*, 33 N.Y.2d 117, 350 N.Y.S.2d 617, 622, 305 N.E.2d 750, 756 (1973); *Oklahoma, P.E.A.C.E. Corp. v. Oklahoma Nat. Gas*, 568 P.2d 1273, 1378 (Okla. 1977); *Smith v. Sharpenstien*, 521 P.2d 394, 395 (Okla. 1974); *Texas, Boyd v. Thompson-Hayward Chemical Co.*, 450 S.W.2d 937, 945 (Tex. Ct. App. 1970); *Griffin v. H. L. Peterson Co.*, 427 S.W.2d 140, 141 (Tex. Ct. App. 1968).

81. *Smith v. Sharpenstien*, 521 P.2d 394 (Okla. 1974).

82. *Robinson v. Branch Moving & Storage Co.*, 28 N.C. App. 244, 221 S.E.2d 81 (1976).

83. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE at 371 (1972).

disclaimer. A jury is much more likely to believe that the salesman told the buyer the car was sold "as is" if it was used, than they would be if it was a new car. Hence, although the fact that the goods are secondhand rather than new is not determinative of the question of whether or not there is a warranty of merchantability implied in the sale, it is likely to be very important in jurisdictions which give effect to subjective knowledge of disclaimers.

Several other states have distinguished first sales of consumer goods from subsequent sales when passing statutes which make it impossible to disclaim the warranty of merchantability in the sale of new consumer goods.⁸⁴ Obviously in those states, if the goods are classified as consumer goods, the warranty of merchantability can be disclaimed only if the goods are secondhand.

Massachusetts and Maryland have gone even further in attempting to protect consumers from unmerchantable goods. Those states have amended section 2-316 to make it impossible for merchants to disclaim the warranty of merchantability in the sale of *any* consumer goods.⁸⁵ In both states, the courts have held that used cars are still consumer goods,⁸⁶ so that used goods are definitely covered by the acts. Thus, those states give equal treatment to both new and used goods under section 2-316.

III. WHEN IS THE WARRANTY BREACHED?

Once a court has determined that the seller is bound by an implied warranty of merchantability, it must determine whether or not the seller has breached it. To answer this question the court must begin by looking to the Code's minimum definition of merchantability, which is found in subsection 2 of section 2-314:

- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and

84. See CAL. CIV. CODE § 1791 (West) (Supp. 1978); ME. REV. STAT. tit. 11, § 2-314(5) (Supp. 1977); VT. STAT. ANN. tit. 9A, § 2-314(5) (Supp. 1977).

85. MD. COM. LAW CODE ANN. § 2-316A (1977); MASS. GEN. LAWS. ANN. ch. 106, § 2-316A (West) (Supp. 1976).

86. *Entrialgo v. Twin City Dodge*, 333 N.E. 2d 202 (Mass. 1975); *Slaney v. Westwood Auto Inc.*, 322 N.E.2d 768 (Mass. 1974); *Mangieri v. Admiral Pontiac, Inc.*, 14 U.C.C. Rep. 82 (Md. Dist. Ct. 1974).

- (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.

The official comment to that section adds the following caveat: "A contract for the sale of secondhand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description."⁸⁷ Merchantability depends on the description, and since the generic description of used goods is different from that of new goods, the standard of merchantability is therefore also different. It should also be noted that not only is it important that the goods are used as opposed to new, but the extent of use also makes a difference, because the description may change from being merely "used goods" to "antique goods" or "junk" after enough time or enough use. If the goods have become antiques, it may be wholly irrelevant that they are no longer suited for their original purpose; aesthetics may have assumed paramount importance. If the goods are only slightly used and sold to perform their original function, the opposite may be true.

To determine what the contract description was and whether or not the goods are fit for the ordinary purposes of such goods requires that the court look to a number of factors, no one of which is necessarily determinative. It has been said that the contract price is a good index of the quality which the seller has warranted.⁸⁸ However, other factors may override price. If the circumstances of the sale indicate that the buyer intended to use the item for its originally designed purpose, it may not matter that the seller labeled the contract "sold as junk" and sold it at junk prices.⁸⁹ Because of strong public policies favoring the protection of consumers from dangerous products, those goods rendered hazardous by defects have almost always been found to be unmerchantable.⁹⁰ The Code's policy of protecting the buyer from surprise has caused some courts to focus primarily on the operative qualities of the goods rather than on aesthetics,⁹¹ and it has sometimes

87. Official Comment 3 to U.C.C. § 2-314.

88. Official Comment 7 to U.C.C. § 2-314. *See Testo v. Russ Dunmire Oldsmobile, Inc.*, 554 P.2d 349, 354 (Wash. 1976).

89. *Dato v. Watland*, 36 Misc. 2d 636, 231, N.Y.S. 2d 895 (Dist. Ct., Nassau Cty. 1962).

90. *Testo v. Russ Dunmire Oldsmobile, Inc.*, 554 P.2d 349, 354 (Wash. 1976); *Chamberlain v. Bob Matick Chevrolet, Inc.*, 4 Conn. Cir. 685, —, 239 A.2d 42, 48 (1967).

91. *Stamm v. Wilder Travel Trailers*, 3 Ill. Dec. 215, —, 358 N.E.2d 382, 385 (1976); *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, —, 292 N.E.2d 168, 172 (1972); *Stream v. Sportscar Salon, Ltd.*, 91 Misc. 2d 99, 397 N.Y.S. 2d 677, (Civ. Ct. 1977); *Tracy v. Vinton Motors*, 130 Vt. 512, 296 A.2d 269, 272 (1972); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 554 P.2d 349, 354 (Wash. 1976).

made no difference that the goods were worth more than the contract price if they would not do the job they were apparently meant to do.⁹²

The nature of the seller's business may also have great influence in determining what the reasonable expectations of the parties are. The same car that is unmerchantable if sold by Honest Ed's Reliable Used Cars may be merchantable if sold by Harry's Junk and Salvage. This, however, may come perilously close to reading the warranty out of the contract. In a case where a commercial ice maker was sold at auction, it was held that even though it would not make ice, it was still of merchantable quality because "the possibility that individual components might be defective or worn out . . . was surely implicit in the transaction."⁹³ If it is said that the buyer understands that an item might not work because it is used, the question of whether or not there is a warranty of merchantability becomes very nearly moot, since all that remains is protection from dangerous defects, which falls under tort law.⁹⁴

Thus, the question of merchantability in used goods is at best elusive and at worst invisible. Because the main policy of section 2-314 is protection of the consumer from dishonest dealings and dangerous products, the courts should focus on safety and on the reasonable expectations of the buyer while avoiding a warranty that either remakes the parties' agreement, on the one hand, or leaves the buyer defenseless on the other.

IV. PRIVITY

As pointed out above, there are very few answers as to what the current state of the law of privity is nationally, and it is not within the scope of this comment to attempt a thorough analysis of this subject. But in addition to all of the problems involving privity in the sale of new goods, the used goods market raises even more problems.

Dealing with the more clear-cut problems first, it should be noted that the special problems of the used goods market are not in the area of horizontal privity (i.e., which users are in privity with the seller). That is the question dealt with by all of the alternative's in section 2-

92. In spite of having over \$6,000 worth of racing modifications, a used car, sold for just over \$2,000, was held unmerchantable when sold for normal street use because it wouldn't restart after being driven until given several hours to cool down. *Testo v. Russ Dunmire Oldsmobile, Inc.*, 554 P.2d 349 (Wash. 1976).

93. *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 861, 328 N.Y.S.2d 490, 492, (Civ. Ct. 1972).

94. RESTATEMENT OF TORTS § 402A (1964).

318. Alternative A, extends any warranties given to members of the buyers household that can reasonably be expected to use the goods. Alternative B extends the warranties to any natural person that may be reasonably expected to use the goods, and Alternative C extends the warranties to any person reasonably expected to use the goods whether or not they are natural persons. Alternative A is limited to breaches of the warranties which cause personal injuries, while Alternatives B and C cover any injuries, but allow the seller to effectively disclaim warranties to third parties for non-personal injury or economic losses.

None of the proffered alternatives for section 2-318 distinguish between new and used goods, and there are no policy reasons for having different horizontal privity requirements for new and used goods. To date no case can be found that does distinguish between new and used goods in the law of horizontal privity.

When dealing with vertical privity however, there is a problem. The problem is whether the warranties given by a manufacturer or middleman seller stop with the first consumer or extend beyond him to all subsequent purchasers. An additional problem arises if the manufacturer's warranties are extended to the purchasers of the then used goods: when to start and when to toll the running of the statute of limitations. There has been very little litigation on these questions, and any answers remain largely speculative.

The initial question of whether or not to extend the manufacturer's warranties beyond the first consumer has been faced by three courts and the decisions are split, with two courts saying that only the first purchaser/user has a cause of action. However, even those two courts employed different rationales. The Georgia Court of Appeals applied Alternative A in a case where a used car was sold to a second user within months after its original purchase. The court held that vertical privity was still a requirement in all cases in Georgia.⁹⁵ An Alabama court faced with substantially identical facts applied Alternative B and held that vertical privity was certainly still a requirement in economic injury cases, but the court refused to speculate on cases which involved personal injuries except to say that those cases would more properly be handled under tort law.⁹⁶

The third case arose in Arkansas, a state which has its own version of section 2-318 stating that lack of privity shall not be a de-

95. *General Motors Corp. v. Halco Instruments, Inc.*, 124 Ga. App. 630, —, 185 S.E.2d 619, 622 (1971).

96. *Wear v. Chenault Motor Co.*, 293 So. 2d 298, 299 (Ala. Civ. App. 1974).

fense.⁹⁷ There, the court extended the implied warranty of merchantability to a purchaser who bought an asphalt truck after it had been used for two months, but the court limited its ruling to the facts at bar. The court then indicated that not every remote purchaser would be covered.⁹⁸ Thus, of the three courts that have faced the question of vertical privity in the sale of used goods, two have hedged and limited their rulings to the specific facts before them.

The question of the application of the statute of limitations to the second purchaser has never been answered by a court. Section 2-725 of the Code does not appear to have been written with this situation in mind.⁹⁹ The problem is that subsection 1 of section 2-725 says that the statute begins to run when the cause of action accrues. But the second or third purchaser's cause of action cannot accrue before he owns the goods. Subsection 2 says that the cause of action accrues when the tender of delivery is made, which may be years before the used goods purchaser ever thought of buying the goods if the appropriate tender is the one the manufacturer makes to his first customer. Because that time may allow the statute to run before the consumer ever comes in contact with the goods, at least one court has held in a horizontal privity case that the appropriate time to start the statute was when the consumer received the goods.¹⁰⁰ This result could, however, lead to perpetual liability if the goods are sold and resold and the statute of limitations is started and restarted. The only protection the defendant seller would have is that the plaintiff would still have to show that the goods were defective because of that seller's breach rather than because of an intervening seller's breach of the implied warranty of merchantability.

Policy considerations do not dictate either result. On the one hand, if the injured consumer can prove that the goods were not merchantable when they left the defendant merchant's hands, a strong case can be made that the responsible merchant should pay regardless of how long ago he sold the goods. However, if that were the only consideration,

97. ARK. STAT. ANN. § 85-2-318 (Supp. 1977).

98. *Mack Trucks v. Jet Asphalt & Rock*, 246 Ark. 101, —, 437 S.W.2d 459, 463 (1969).

99. U.C.C. § 2-725, dealing with the statute of limitations applicable in contracts for sale states:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not exceed it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

100. *Simmons v. American Mut. Liab. Ins. Co.*, 433 F. Supp. 747 (S.D. Ala. 1976).

there would be no statute of limitations. The need for the merchant to plan his potential liability and the need to have the trial while the evidence is still available has given rise to statutes that limit the time in which the action can be brought, and those policies would not be served by perpetual liability.

As mentioned earlier, this problem has yet to be faced by an appellate court. A possible reason is that if the defect results in a personal injury, either negligence or strict liability in tort would apply and solve the problem by beginning the running of the statute at the time of injury. Another possible reason is the difficulty in showing that the defect was not caused by any of the intervening user-owners of the goods. Nevertheless, the problem is there and undoubtedly will someday have to be addressed.

CONCLUSION

The fact that the goods sold are used rather than new is properly a major factor in determining whether or not the goods delivered conform to the requirements of the implied warranty of merchantability. It is, however, a false issue when determining whether or not a particular sale is within the scope of section 2-314 of the Uniform Commercial Code. Similarly, it has only limited relevance to the questions of whether or not the warranty has been disclaimed, and even then it has application only in those states that have adopted the position that actual knowledge of the disclaimer is effective. Application of the implied warranty of merchantability may well raise some very sticky problems of privity, but as yet there is insufficient case law on the topic to predict how the courts will resolve the issue when it arises.

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