University of Dayton Law Review

Volume 2 | Number 2 Article 5

1977

The Magnuson-Moss Warranty Act and the Uniform Commercial Code: A Survey of Warranty Protection in Consumer Sales Transactions

Keith J. Hey
University of Dayton

THE MAGNUSON-MOSS WARRANTY ACT AND THE UNIFORM COMMERCIAL CODE: A SURVEY OF WARRANTY PROTECTION IN CONSUMER SALES TRANSACTIONS

*Keith J. Hey**

> For many years warranties have confused and misled the American consumers. A warranty is a complicated legal document whose full essence lies buried in myriads of reported legal discussions and in complicated State codes of commercial law. The consumers' understanding of what a warranty on a particular product means to him frequently does not coincide with the legal meaning. . . . Today, most consumers have little understanding of the frequently complex legal implications of warranties on consumer products.[1]

These comments, included in the report submitted by the Committee on Commerce accompanying the bill that was to become the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,[2] accurately describe the disorderly melangé encountered by the modern American consumer in the field of warranties. In particular, provisions for disclaimer of warranties and limitation of remedies or damages in transactions involving the sale of goods have been the source of confusion and extensive litigation during recent years. Unless state legislation provided special treatment for consumer transactions, the respective states' adoption of Article 2 of the Uniform Commercial Code[3] has provided the primary source for resolving disputes involving warranty provisions. Partly for this reason, and because decisions varied substantially from one jurisdiction to another, the state of the law in the warranty field has, in the past, been difficult to assess.

---

* Professor of Law, University of Dayton. B.S.C., Creighton University, 1955; J.D., Creighton University, 1963; LL.M., Georgetown University, 1969.

1. S. REP. No. 151, 93d Cong., 1st Sess. 6 (1973).

2. Full title of this legislation is the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-11 (Supp. V 1975) [hereinafter referred to as the Warranty Act]. Only Title I of the Warranty Act is discussed in this article; Title II covers changes in the Federal Trade Commission Act.

3. The UNIFORM COMMERCIAL CODE [hereinafter cited as UCC or the Code] was promulgated in 1951 by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. It was first adopted in 1953 in the state of Pennsylvania, effective July 1, 1954. All states, with the exception of Louisiana, have adopted the U.C.C. The District of Columbia and the Virgin Islands have also adopted the Code. All references are to the 1962 Official Text and Comments.

The Code, particularly sections 2-316[4] and 2-719,[5] while approving the modification of warranties and remedies (including damages) in sale of goods transactions, calls for application of essentially the same regulatory provisions to both commercial and consumer contracts.[6] Recently, however, both state legislatures and judicial decisions have recognized the need for separate treatment of commercial and consumer sales transactions.

Of greater significance, however, is the recently enacted

---

4. U.C.C. § 2-316:

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

(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, and 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."

(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 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 to 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.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

5. U.C.C. § 2-719:

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

6. A distinction was made, however, in the handling of limitations on consequential damages under U.C.C. § 2-719(3). *See* note 5 *supra*.

Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, wherein warranties on consumer products have been singled out for exclusive regulation. Intended to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products,"[7] the Warranty Act has opened a new chapter in the struggle to enlarge the protection afforded the consumer in a merchandise sales contract. A contract covering "consumer goods" and containing an express warranty, now requires compliance with the provisions of this new federal legislation, thus carving out a substantial degree of preemption in a field of commercial activity previously regulated by the states. The changes in disclaimer of warranties brought about by the Warranty Act will no doubt have a substantial impact on the sales practices currently followed by manufacturers and sellers of "consumer products." The repercussions of the Warranty Act cannot be fully appreciated, however, without examining the earlier stages through which contract provisions involving disclaimer of warranties and limitation of remedies and damages have passed. Therefore, Part I of this article will review the state of the law prior to enactment of the Uniform Commercial Code. Part II will undertake a discussion of the pertinent Uniform Commercial Code sections relating to warranties, disclaimer of warranties and limitation of remedies or damages. In Part III, this article will describe the more significant provisions of the Magnuson-Moss Warranty Act, particularly those which relate to disclaimer of warranties and limitation of remedies or damages. In Part IV, the projected impact of the Warranty Act upon the relevant Uniform Commercial Code provisions will be discussed.

I. Common Law and Other Pre-UCC Recognition of Warranty Disclaimers and Limitation of Remedies or Damages

In order to determine the validity of any warranty disclaimer provision, it is necessary to presume the existence of *some* warranty. There was little in the common law approach to the sale of goods which might have given rise to such a presumption. "Caveat emptor" aptly described the perspective from which the law viewed the sales transaction.[8] Absent fraud or the inclusion of an express war-

7. 15 U.S.C. § 2302(a) (Supp. V. 1975).

8. Hargous v. Stone, 5 N.Y. 73, 80 (1851): "*Caveat emptor* is an ancient rule of common law, and stands in contradistinction to the rule of caveat venditor . . . ." It means that where a sale of goods is not accompanied by an express warranty by the seller, and there is no fraud on his part, the buyer must stand all losses arising from latent defect.

ranty within the agreement, the buyer assumed the risk of any losses from defects. Even payment of the purchase price did not give rise to an implied warranty that the goods were sound.[9]

As the law of contracts began to recognize the public policy argument favoring the attachment of implied warranties to sale of goods transactions, the implied warranties of merchantability and fitness for a particular purpose gradually emerged.[10]

The Uniform Sales Act[11] allowed the contracting parties to vary or negate rights or duties by agreement or course of dealing,[12] but the form used in the avoidance or variance was not detailed in the statute. As disclaimer of warranties and damage limitation clauses became fairly common terms in sales contracts, the general language of the Uniform Sales Act necessitated extensive judicial interpretation and construction. The result was often an avoidance of the disclaimer or limitation as the court strictly construed the clause against the seller or other party asserting its validity. For example, a seller's duty to faithfully perform basic contract obligations could not be avoided by a disclaimer clause.[13] Several courts negated disclaimers by drawing a distinction between warranties implied in fact as part of the contract and those warranties imposed by law.[14] Therefore, the statement that "no warranties have been made" was construed to mean that the seller was excluding only contractual warranties and not those imposed by law.[15]

---

9. Miller v. Tiffany, 68 U.S. (1 Wall.) 298, 309 (1863): *Caveat emptor* means that "[w]here there is neither fraud nor warranty, the buyer receives and retains the goods, without objection, he waives the right to object afterwards, and is finally concluded." The fact that he paid full price for the goods does not raise an implied warranty that the goods are sound. *See also* Barnard v. Kellog, 77 U.S. (10 Wall.) 383 (1870) for a similar declaration of *caveat emptor.*

10. *See* the cases on "merchantability" collected and discussed in Annot., 21 A.L.R. 367 (1922). The issue of "fitness for a particular use" in cases decided prior to the Uniform Sales Act is thoroughly examined and documented in Dushame v. Benedict, 120 U.S. 630 (1886); and Kellog Bridge Co. v. Hamilton, 110 U.S. 108 (1884).

11. The Uniform Sales Act was promulgated in 1906 and subsequently adopted by 37 states. *See* Malcom, *Uniform Commercial Code* in ABA UNIFORM COMMERCIAL CODE HANDBOOK 1, 3 (1964).

12. Section 71 of the Uniform Sales Act stated: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by custom . . . ." UNIFORM LAWS ANNOTATED, 3 U.C.C. 401 (Master ed. West 1968).

13. Swift & Co. v. Aydlett, 192 N.C. 330, 135 S.E. 141 (1926); Smith v. Oscar H. Will & Co., 51 N.D. 357, 199 N.W. 861 (1924).

14. Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 799 (1927). *See also* Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. 240, 189 A. 580 (1937); National Equipment Corp. v. Moore, 189 Minn. 632, 250 N.W. 677 (1933); Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S.E. 327 (1928); Main v. Dearing, 73 Ark. 470, 84 S.W. 640 (1905); *contra,* Larson v. Inland Seed Co., 143 Wash. 557, 255 P. 919 (1927).

15. *See* cases cited note 14 *supra.*

Disclaimer clauses were held to be an unenforceable part of the contract where the disclaimers were placed on cards which were packaged with the merchandise,[16] on invoices accompanying the goods,[17] or in fine print on the back of the contract.[18] Special statutes were adopted in some jurisdictions to negate attempts to disclaim warranties on certain types of goods.[19] For example, a North Dakota statute voided warranty disclaimers in retail machinery sales contracts for public policy reasons, allowing rescission by the purchaser within a reasonable time after delivery if the machinery was unfit for its specified purpose.[20]

The pre-UCC courts did, however, recognize use of the term "as is" or a similar statement to operate as a disavowal of all warranties.[21] Moreover, a contract term limiting the remedies available for breach of warranty (now covered by UCC section 2-719) was held effective and one court treated the stated remedy as exclusive.[22] An exclusive remedy must, however, be a truly effective remedy. In *Ford Motor Co. v. Cullum,*[23] an automobile purchaser successfully avoided an exclusive remedy clause where the remedy given (replacement of parts) did not remove the defective condition in the vehicle.

One of the major pre-UCC decisions which limited the effect of warranty disclaimers in a consumer contract was *Henningsen v. Bloomfield Motors, Inc.,*[24] in which the New Jersey Supreme Court invalidated, as contrary to public policy, a provision for the disclaimer of warranties in a standard form automobile sales contract. In recognizing that the economic strength of the automobile industry enabled it to dictate the contract terms, the court found a total lack of equal bargaining power between the parties. The court stated:

16. Black v. B.B. Kirkland Seed Co., 158 S.C. 112, 155 S.E. 268 (1930).

17. Edgar v. Breck & Sons Corp., 172 Mass. 581, 52 N.E. 1083 (1899).

18. Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N.W. 484 (1917).

19. *E.g.,* N.C. GEN. STAT. § 106-277.11 (1975) (seed).

20. N.D. CENT. CODE § 51-07-07 (1960).

21. Industrial Rayon Corp. v. Clifton Mills, 310 Pa. 322, 165 A. 385 (1933); R.E. Brooks Co. v. Storr, 111 N.J.L. 316, 168 A. 382 (Ct. Err. & App. 1933); Union Trust Co. v. Detroit River Transit Co., 162 Mich. 670, 127 N.W. 780 (1910). *See* the text accompanying notes 68-77 *infra* for a discussion of disclaimer through use of the term "as is" or similar statement.

22. Wallich Ice Mach. Co. v. Hanewald, 275 Mich. 607, 267 N.W. 748 (1936).

23. 96 F.2d 1 (5th Cir. 1938). *See also* Detwiler v. Downes, 119 Minn. 44, 137 N.W. 422 (1912).

24. 32 N.J. 358, 161 A.2d 69 (1960). *See also* Walsh v. Ford Motor Co., 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969) and Zabrinski Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (Sup. Ct. 1968). For a rejection of the public policy arguments presented in the *Henningsen* case, *see* Marshall v. Murray Oldsmobile Co., 207 Va. 972, 154 S.E.2d 140 (1967).

> The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a studied effort to frustrate that protection. True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously, the legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such dangerous instrumentality as a defectively made automobile. In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.[25]

The inherent power of individuals and associations to freely bargain for the terms of their contract is a concept underlying all contract law and was a cornerstone in the enactment of the Uniform Commercial Code.[26] The adoption of the Code did not, however, resolve the problem posed by the disparity in bargaining power which was at issue in the *Henningsen* case. Rarely does the Code create a special rule for consumer goods or exclude retail sales from the impact of its provisions.[27] Rather, commercial and non-commercial transactions are essentially governed by the same terms. Nevertheless, the concern articulated in the pre-UCC, non-commercial cases, such as *Henningsen,* continued to find expression in cases decided under the Code.

II. Disclaimer or Modification of Warranties, Exclusion of Remedies and Limitation of Damages Under the Uniform Commercial Code

Section 2-316 contains the terms on disclaimer or modification

25. 32 N.J. 358, 385, 161 A.2d 69, 95 (1960).

26. *See* Kansas City Structural Steel Co. v. L.G. Barcus & Sons, Inc., 217 Kan. 88, 535 P.2d 419, 424 (1975) in which the court stated: "The policy of the law in general is to permit mentally competent parties to arrange their own contracts and fashion their own remedies where no fraud or overreaching is practiced. Contracts freely arrived at and fairly made are favorites of the law."

27. For purposes of this article, the special language involving consumer goods is that of U.C.C. § 2-719(3) declaring the limitation of consequential damages for injury to the person in the case of consumer goods to be prima facie unconscionable.

of warranties under Article 2 transactions.[28] Although the primary emphasis of the section is upon the disclaimer of implied warranties of merchantiability and fitness for a particular purpose, the problems inherent in disavowing express warranties are likewise substantial.[29] The separate consideration of express and implied warranties in this discussion is, to a certain extent, artificial since most disclaimer provisions attempt to negate both express and implied warranties. Certain problems, however, are exclusive to disclaimers of express warranties, and these will be dealt with separately below.

A. *Express Warranties*

Any affirmation of fact, promise, description or sample which becomes or is made a part of the "basis of the bargain" creates an express warranty under UCC section 2-313.[30] Attempts to limit or exclude an express warranty will be given effect only if such construction is reasonably consistent with the warranty itself. One method commonly employed to achieve this purpose is to set out an express warranty in the contract, usually for a specified time period or with other limitations, and make that warranty in lieu of all other warranties, express or implied.[31]

Although words of description in a contract will normally create an express warranty, the courts do not always give such effect to the language. For example, the language used to describe the machinery

---

28. U.C.C. § 2-102 states that Article 2 applies to "transactions" in goods.

29. Many of the problems on express warranties will be dealt with by U.C.C. § 2-317, which states the rules on cumulation and conflict of warranties. *See* note 34 *infra* for the text of § 2-317.

30. U.C.C. § 2-313:

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

31. "The warranty described in this paragraph shall be IN LIEU of any other warranty, express or implied, including but not limited to, any implied warranty of MERCHANTABILITY or fitness for a particular purpose." J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 358 (1972), making reference to Koellmer v. Chrysler Motors Corp., 6 Conn. 478, 276 A.2d 807 (Cir. Ct. 1970).

sold under one contract was held to be merely "an expectation" where the machinery was to be used in connection with a still unproven manufacturing process. Hence, such language could not be considered "part of the basis of the bargain."[32] In light of such findings the court was able to construe the disclaimer of all warranties as consistent with the descriptive language of the instrument.[33] Furthermore, the UCC provides that express and implied warranties are to be construed as consistent with each other and as cumulative.[34] The intention of the parties is used to resolve any conflict where such a construction of consistency is unreasonable.[35]

A conflict or ambiguity between an express warranty and an attempted exclusion of warranties will be resolved in favor of the express warranty.[36] One illustration of this principle involved a contract for the conversion of a heating system and replacement of parts. Although the printed contract contained a disclaimer of liability for personal injury or property damage, a provision had been typed-in, stating that the installation was to be done in a workmanlike manner; in addition, a one year guarantee was issued. The court held the typed-in warranty effective against the printed disclaimer.[37] Likewise, the inclusion of a specific statement (express warranty) on the face of the agreement is sufficient to render inoperative a provision on the back of the agreement stating that there are no warranties, express or implied.[38]

---

32. United States Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043, 1046 (6th Cir. 1975) [hereinafter cited as *U.S. Fibres*].

33. *Id.*

34. U.C.C. § 2-317:

> 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 of 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.

35. *Id.*

36. *Id.*; S-C Industries v. American Hydroponics System, Inc., 468 F.2d 852 (5th Cir. 1972); Mobile Housing, Inc. v. Stone, 490 S.W.2d 611 (Tex. Civ. App. 1973); Walsh v. Ford Motor Co., 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969); Tiger Motor Co. v. McMurtry, 284 Ala. 283, 224 So. 2d 638 (1969).

37. Henry v. W.S. Reichenbach & Son, Inc., 45 Pa. D. & C.2d 171 (Lehigh County 1968).

38. Realmuto v. Straub Motors, Inc., 65 N.J. 336, 322 A.2d 440 (1974). *See also* Chisholm v. J. R. Simplot Co., 94 Idaho 628, 495 P.2d 1113, 1116 n.4 (1972) (disclaimer of all warranties in sale of weed killer not effective to disclaim express warranty on the package that "this product kills weeds").

Although section 2-316(2) imposes specific requirements for the valid disclaimer of implied warranties, the section is noticeably silent on the form necessary to effectively disclaim *express* warranties. It is therefore possible to postulate a situation wherein the disclaimer may be sufficient to exclude or limit an express warranty but lacks the details sufficient to disclaim an implied warranty.[39] Thus, in *Transcontinental Gas Pipeline Corp. v. Ingersoll Rand Co.*,[40] the court held that an express warranty limiting the effective period of the warranty to fifteen months from date of shipment of goods was ineffective to negate an implied warranty of fitness for a particular purpose. The contract was for the purchase of goods which were manufactured by the seller with the knowledge that the goods would be stored until needed by the purchaser.

A problem exclusive to the category of express warranties concerns statements relating to the goods which the seller or his agent allegedly made but which are not found in the written contract. Such representations or declarations, if not made a part of the writing, may be unenforceable due to the Parol Evidence Rule.[41] Section 2-316(1) states that its provisions are subject to section 2-202 dealing with parol evidence.

Nevertheless, the court may determine in some circumstances that the written agreement was not intended as the final expression of the parties and, thus, allow contradiction of the written terms by parol evidence.[42] If the court finds a partial integration of the agreement, introduction of consistent additional terms is admissible.[43] A determination that the contract is totally integrated precludes the introduction of contradictory terms, but explanation or supplemen-

---

39. *See generally* Forte Towers South, Inc. v. Hill York Sales Corp., 312 So. 2d 512 (Fla. Dist. Ct. App. 1975).

40. 9 UCC REP. SERV. 234 (N.Y. Sup. Ct. 1971).

41. U.C.C. § 2-202:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

42. If other language in the contract is conflicting, the court can hold the writing to be incomplete and look to parol evidence for explanation and clarification: 3 A. CORBIN, CORBIN ON CONTRACTS § 578, at 411 (1960); 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 643, at 1082-83 (3d ed. 1961).

43. U.C.C. § 2-202(a).

tation by reference to the parties' course of dealing, performance or trade usage is allowed.[44] Evidence of oral representations excluded under the Parol Evidence Rule does not become admissible by characterizing the representation as an express warranty.[45] The cross-reference in section 2-316 to section 2-202 is intended to protect the seller against allegations that warranties and unauthorized representations made orally are part of the contract.[46] This protection is subject to significant restrictions since the court must first determine the written contract between the parties to be the final, complete, and exclusive expression of their intent. A carefully worded and appropriately placed paragraph identifying the contract as completely integrated should be sufficient to exclude any alleged express warranty not within the terms of the contract.[47] The integration clause may be combined with a disclaimer provision, so long as the appropriate language for disclaiming implied warranties is used.[48]

If the disclaimer of express warranties is repugnant to the negotiated terms of the bargain in fact, the court may refuse to enforce the disclaimer even though its terms comply with the statute.[49]

---

44. *See* note 41 *supra* for the text of U.C.C. § 2-202.

45. Shore Line Properties, Inc. v. Deer-O-Paints & Chemicals, Ltd., 24 Ariz. App. 331, 538 P.2d 760 (1975).

46. U.C.C. § 2-316, Comment 2 provides:

> The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

47. In Economy Forms Corp. v. Kandy, Inc., 391 F. Supp. 944, 949 (N.D. Ga. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1974) the following language was held effective to exclude any express warranties not included in the contract:

> This agreement, together with the supplements, if any, attached hereto, incorporates all agreements and understandings of every kind and nature concerned on the subject matter hereof, and NO REPRESENTATION, WARRANTY (EXPRESS OR IMPLIED) OR ESTIMATE OF ANY KIND OR NATURE NOT INCORPORATED HEREIN IS AUTHORIZED BY, NOR SHALL THE SAME BE BINDING ON ANY OF THE PARTIES HERETO (Emphasis in original).

48. Investors Premium Corp. v. Burroughs Corp., 389 F. Supp. 39, 45 (D.S.C. 1974), found the merger-disclaimer clause to be effective:

> THERE ARE NO UNDERSTANDINGS, AGREEMENTS, REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED (INCLUDING ANY REGARDING MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE) NOT SPECIFIED HEREIN, RESPECTING THIS CONTRACT OR THE EQUIPMENT HEREUNDER. THIS CONTRACT STATES THE ENTIRE OBLIGATION OF SELLER IN CONNECTION WITH THIS TRANSACTION (Emphasis in original).

49. Bowen v. Young, 507 S.W.2d 600 (Tex. Civ. App. 1974). *See also* Eckstein v. Cum-

Furthermore, if the express warranty is represented as exclusive of other warranties and the terms impose too onerous a burden on the consumer in terms of his compliance therewith, then it may be nullified.[50]

B. *Implied Warranties*

Section 2-316(2) permits a seller to disclaim the implied warranties of merchantability[51] and fitness for a particular purpose.[52] Under the more common method of disclaiming the implied warranty of merchantability, the seller must use the term "merchantability" and the disclaimer, if in writing, must be "conspicuous."[53] Disclaimer of a warranty for a particular purpose must also be conspicuous, and in writing, but may be expressed in general terms. A term or clause is conspicuous when so written "that a reasonable person against whom it is to operate ought to have noticed it."[54] Furthermore, language will be conspicuous if it is a

---

mins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

50. *E.g.*, Foremost Mobile Homes Mfg. Corp. v. Steele, 506 S.W.2d 646 (Tex. Civ. App. 1974).

51. U.C.C. § 2-314:

(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

(f) conform to the promises or affirmations of face 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.

52. U.C.C. § 2-315:

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.

53. *See* U.C.C. § 2-316(2) note 4 *supra*.

54. U.C.C. § 1-201(10):

"Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color.

heading printed in capitals, if it is in larger or contrasting type or color in the body of a printed form, or if it is embodied in a telegram.[55]

The requirement for conspicuousness is one of the most difficult for the courts to resolve due, in major part, to the extensive use of standard form contracts in commercial and consumer transactions. Disclaimers written in the same size and color as other paragraphs of the sales contract and placed on the reverse side of the contract have been held not conspicuous.[56] The courts have also rejected disclaimer provisions which appear in smaller print,[57] in slightly larger print than that of the preceding paragraph,[58] or in slightly contrasting print.[59] Disclaimer language appearing in italics was found to provide insufficient contrast in a recent California decision.[60] Conversely, the Sixth Circuit, in *United States Fibres, Inc. v. Proctor & Schwartz,* rejected an argument that a disclaimer printed in the same size and color of print as the remainder of the contract would be *per se* invalid.[62]

A study of cases wherein conspicuousness is at issue discloses two noteworthy facts. First, a number of the decisions which found a disclaimer clause not conspicuous also found the clause misleading or ambiguous.[63] The conclusion might be drawn that an ambigu-

---

But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

55. *Id.*

56. *E.g.,* Chrysler Corp. v. Wilson Plumbing Co., 132 Ga. App. 435, 208 S.E.2d 321 (1974); Jerry Alderman Ford Sales, Inc. v. Bailey, 154 Ind. App. 632, 294 N.E.2d 617 (1973). The following cases give examples of disclaimers held not "conspicuous." National Cash Register Co. v. Adell Indus., Inc., 57 Mich. App. 413, 225 N.W.2d 785 (1975); Sellman Auto, Inc. v. McCowan, 513 P.2d 1228 (Nev. 1973); Rehurek v. Chrysler Credit Corp., 262 So.2d 452 (Fla. App.), *cert. denied,* 267 So.2d 833 (Fla. 1972); Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc., 258 So. 2d 319 (Fla. App. 1972); Hunt v. Perkings Mach. Co., 352 Mass. 535, 226 N.E.2d 228 (1967). The "conspicuous" requirement was used by analogy in a lease transaction to negate a disclaimer. Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975).

57. Atlas Industries, Inc. v. National Cash Register Co., 216 Kan. 213, 531 P.2d 41 (1975).

58. Dorman v. International Harvester Co., 46 Cal. App. 3d 11, 120 Cal. Rptr. 516 (1975).

59. Sarnecki v. Al Johns Pontiac, 56 Luz. Reg. 293 (Pa. C.P. 1966).

60. Dorman v. International Harvester Co., 46 Cal. App. 3d 11, 120 Cal. Rptr. 576 (1975).

61. 509 F.2d 1043 (6th Cir. 1975).

62. *Id.* at 1046-47.

63. Dorman v. International Harvester Co., 46 Cal. App. 3d 11, 120 Cal. Rptr. 516 (1975), and cases cited in notes 25-26 *supra. See also* Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co., 246 Ark. 101, 437 S.W.2d 459 (1969) (court held the disclaimer to be ineffective for lack of conspiciousness and timeliness—attempt to disclaim made at time of delivery of trucks which was several months after the contract had been signed).

ous clause will no doubt also lack conspicuousness, although this would not necessarily follow in every case. Second, courts have used the existence of an inequality in bargaining power, such as in a consumer sale, as a critical factor in resolving the issue of conspicuousness.[64]

An interesting question in this area is posed where the buyer admits to reading what is apparently a non-conspicuous disclaimer. In such a case does a non-conspicuous clause thereby become conspicuous? In *Rehurek v. Chrysler Credit Corp.*,[65] the buyer admitted reading a non-conspicuous disclaimer, to which the court nonetheless declined to give effect. A contrary result was reached in an Oklahoma case where, on similar facts, it was held that the requirement of conspicuousness was inapplicable to the case at bar due to the admission that the purchaser had read the disclaimer.[66]

Section 2-316(3) provides, *inter alia*, alternative methods of disclaiming the implied warranties of merchantability or fitness for a particular purpose.[67] Use of the terms "as is" and "with all faults" permits the seller to disclaim all implied warranties without use of the term "merchantability" as required under 2-316(2).[68]

Although section 2-316(3) requires the use of language "which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty," it does not require the language to be conspicuous.[69] Yet, in *Fairchild Industries v. Maritime Air Service, Ltd.*,[70] the Maryland Court required a disclaimer containing the words "as is" to be conspicuous, concluding that "to allow the exclusion of implied warranties through inconspicuous use of the simple words 'as is' obscured in the middle of a contract would be contrary to the spirit of the UCC and to the policy disfavoring exclusion of warranties and

64. Sellman Auto, Inc. v. McCowan, 89 Nev. 353, 513 P.2d 1228 (1973) (in determining whether the disclaimer of warranties is effective consideration, must be given to the circumstances that the market sophistication of the seller exceeds that of the buyer).

65. 262 So. 2d 452 (Fla. App. 1972).

66. Smith v. Sharpensteen, 521 P.2d 394 (Okla. 1974).

67. For the text of U.C.C. § 2-316, *see* note 4 *supra*.

68. *Id.*

69. Several jurisdictions require conspicuousness for "as is" clauses. *E.g.*, Fairchild Industries v. Maritime Air Service, Ltd., 274 Md. 181, 333 A.2d 313 (1975); Osborne v. Genevie, 289 So. 2d 21 (Fla. App. 1974); Woodruff v. Clark County Farm Bureau Coop. Ass'n., Inc., 153 Ind. App. 31, 286 N.E.2d 188 (1972); Gindy Mfg. Corp. v. Cardinale Trucking Corp., 111 N.J. Super. 383, 268 A.2d 345 (Sup. Ct. 1970). *Contra*, Dekalb Agresearch, Inc. v. Abbott, 391 F. Supp. 152 (N.D. Ala. 1974), *aff'd*, 511 F.2d 1162 (5th Cir. 1975) (Code provisions not controlling on lease disclaimer). *See also* 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE U.C.C. 76-77 (A.L.I. 1964); Note, 41 TENN. L. REV. 958 (1974).

70. 274 Md. 181, 333 A.2d 313 (1975).

construing such disclaimer against the seller."[71]

The buyer's examination of the goods or his refusal to do so following a demand by the seller will operate as a disclaimer of any implied warranties as to defects which the examination ought to have revealed to the buyer.[72] Certainly, the skill and expertise of the buyer would be important in determining whether or not a particular defect ought to have been discovered. Thus, the purchaser of a used car, who was not a mechanic but who had test driven the automobile, was not precluded from recovering under an implied warranty of merchantability.[73] Furthermore, the examination provisions of 2-316(3)(b) do not extend to latent defects. The implied warranty would likewise not be excluded where the seller was obligated to perform specific services with respect to the goods after delivery and the defect was not apparent until the services had been provided.[74]

Section 2-316(3)(c) permits the seller to exclude an implied warranty by course of performance,[75] course of dealing, and usage

---

71. *Id.* at 190, 333 A.2d at 318.

72. U.C.C. § 2-316(3)(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 to have revealed to him . . .

73. Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975); Overland Bond & Investment Corp. v. Howard, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972). *See also* Alan Wood Steel Co. v. Capital Equip. Enterprises Inc., 39 Ill App. 3d 48, 349 N.E.2d 627 (1976) (significant reliance by the buyer on his examination of the product before the deal is completed discounts reliance on seller's affirmations and precludes the creation of an express warranty).

74. Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972); David v. Vintage Enter., Inc., 23 N.C. App. 581, 209 S.E.2d 824 (1974). For the effect of buyer's failure to make a full examination where the seller's conduct or assurance caused the buyer to refrain from making a thorough examination which would have revealed the defect, *see* Annot., 168 A.L.R. 389, 402-04 (1947).

75. U.C.C. § 2-208:

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

See Spurgeon v. Jamieson Motors, 164 Mont. 296, 521 P.2d 924 (1974); R.D. Lowrance, Inc. v. Peterson, 185 Neb. 679, 178 N.W.2d 277 (1970).

of trade.[76] Official Comment 7 to section 2-316 states, in part, that terms like "as is," "as they stand," and "with all faults,"

> in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (a) ["as is," etc.] are in fact merely a particularization of paragraph (3) which provides for exclusion or modification of implied warranties by usage of trade.

A disclaimer of implied warranties by trade usage would be effective only by proof that a party against whom the disclaimer is asserted was or should have been aware of the particular trade usage.[77]

C. Limitation of Remedies and Exclusion of Consequential Damages - In General

Article 2 of the Code contains an extensive array of cumulative remedies for breach of the sales contract.[78] Under section 2-719,[79] the parties are left free to bargain for additional or substitutional remedies as well as to alter the measure of damages consistent with section 2-718.[80] The limitation of remedy clause in a contract routinely limits the remedies available to the buyer, either by imposing upon the seller a duty to repair or replace defective goods or component parts, or to return the purchase price. This type of clause, if valid, would also exclude other claims of a remedial nature, the most common of which would be a claim for damages to protect the expectation interest of the purchaser.

Any attempt to exclude certain remedies or limit damages for breach of warranty must be tested upon the basis of the language used in the limitation. Unless the language used is clear and unmistakable the provision may fail of its intended purpose. In *Gramling*

---

76. U.C.C. § 1-205:

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

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

77. *See* Zicari v. Joseph Harris Co., 33 App. Div. 2d 7, 304 N.Y.S.2d 918 (1969).

78. U.C.C. § 1-106 (Remedies to Be Liberally Administered). *See* U.C.C. § 2-703 (Seller's Remedies in General) and § 2-711 (Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods) for an index of remedies under Article 2 of the UCC.

79. For the text of U.C.C. § 2-719, *see* note 5 *supra.*

80. U.C.C. § 2-718:

(1) Damages for breach of either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

v. Baltz,[81] the plaintiff's claim for consequential damages for breach of implied warranty was not excluded by a contract provision stating that an express warranty was "in lieu of all other warranties, express or implied . . . and all other obligations or liabilities, including liability for incidental and consequential damages."[82] In an earlier case decided in the same jurisdiction, *Ford Motor Co. v. Reid*,[83] the court emphasized the distinction between "obligations" and "remedies" in finding that the disclaimer clause under consideration failed in its intended exclusion of all remedies other than repair or replacement.

Section 2-719 does not specifically authorize the limitation of remedies or exclusion of consequential damages through course of dealing, usage of trade, or course of performance, whereas section 2-316(3)(c) permits the exclusion or modification of implied warranties in such a fashion.[84] Yet, a limitation on damages may become part of the "agreement" of the parties without being subject to express negotiations. Course of dealing or usage of trade may include the limitation or exclusion of damages term as part of the "bargain of the parties in fact."[85] Where a commercial buyer of film had made at least ten purchases of film from the defendant company in the past, and a limitation of liability notice was both printed on the film container and repeated in the instruction booklet, it was held that the buyer was limited to the remedy stated in the notice and could not claim damages for consequential losses.[86] The impact of usage of trade or course of performance in limiting remedies or damages would, however, be less significant in a noncommercial situation. Trade usage can be asserted only against a

81. 253 Ark. 352, 485 S.W.2d 183 (1972).

82. *Id.* at 358, 485 S.W.2d at 189.

83. 250 Ark. 176, 465 S.W.2d 80 (1971).

84. *See* note 40 *supra* for the text of U.C.C. § 2-316.

85. *See* Posttape Associates v. Eastman Kodak Co., 19 UCC REP. SERV. 832 (3rd Cir. 1976). U.C.C. § 1-201(3) defines the term "agreement" as: "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in the act (Sections 1-205 and 2-208). . . ."

86. D.O.V. Graphics v. Eastman Kodak Co., 46 Ohio Misc. 37, 347 N.E.2d 561, 562-63 (1976) in which the court stated:

> While it is true here that there is no evidence that the limitation of liability was "negotiated," it is equally clear that plaintiff ordered defendant's photographic paper knowing that defendant had stated in its instructions for the use of the paper and on each package delivered to plaintiff that its liability was limited to replacing any defective paper. The contract therefore for the alleged defective paper consisted of plaintiff's order for paper knowing that defendant was limiting his liability for any commercial damages flowing therefrom and its acceptance of the package of paper on which such limitation of liability was set forth.

party who is "in the trade" or otherwise chargeable with knowledge of the usage of that trade.[87]

The remedies provided in the contract will be considered merely optional unless the agreement expressly provides they are to be exclusive.[88] A declaration that the remedy given is exclusive is sufficient; however, the inclusion of a specific remedy in the contract, without more, is not enough to have the remedy declared exclusive.[89]

Subsections (2) and (3) of section 2-719 place several restrictions upon the ability to limit remedies. If the remedy is exclusive and fails of its essential purpose, then the limitation is ineffective and the buyer may resort to the cumulative remedies given elsewhere in the Code.[90] A contract term on the limitation or exclusion of consequential damages may also be avoided if it is found to be "unconscionable."[91]

Subsection (3) of 2-719 allows for the exclusion of consequential damages, provided that the exclusionary clause is not unconscionable. Limitations pursuant to this provision have been held valid in a number of cases involving complex contracts between large and experienced corporations.[92] The exclusion or limitation of damages

87. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 371 (1972).

88. U.C.C. § 2-719(1)(b).

89. *See* the text of U.C.C. § 2-719(1)(b) note 5 *supra.*

90. U.C.C. § 2-719(2).

91. U.C.C. § 2-719(3). With respect to unconscionability, § 2-302 of the Code states:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Although § 2-302 sets no guidelines for judging what is or may be unconscionable, the Official Comments cite a number of pre-UCC cases which provide appropriate standards: *see, e.g.,* Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S.E. 327 (1928); Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922).

Although the language of § 2-302 speaks generally of "any term" in "a contract," unconscionability has been traditionally viewed as a consumer-orientated concept. *See, e.g.,* Potomac Elec. Power Co. v. Westinghouse Elec. Corp., 385 F. Supp. 572, 579 (D.D.C. 1974). It is probable that unconscionability will continue to be argued primarily in warranty cases where the consumer has suffered personal injury caused by a defective product.

Section 2-302 must be read in conjunction with the UCC sections concerning disclaimer of warranties (§ 2-316) and limitation of remedies (§ 2-719). In fact, the term "unconscionable" appears in § 2-719(3). That section allows the limitation or exclusion of consequential damages "unless the limitation or exclusion is unconscionable." The Official Comments to § 2-719(3) recognize, however, that the seller "in all cases is free to disclaim warranties in the manner provided in Section 2-316."

92. Council Bros., Inc. v. Ray Burner Co., 473 F.2d 400 (5th Cir. 1973); U-M Corp. v. Bernard Distrib. Corp., 447 F.2d 864 (7th Cir. 1971); Southwest Forest Indus. Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013 (9th Cir. 1970); Ebasco Serv., Inc. v. Pennsylvania Power

for personal injury where the contract involves consumer goods is declared *prima facie* unconscionable under this section. One court has, on the basis of unconscionability, avoided *in toto* a limitation clause dealing with *both* personal injury and property damage.[93] A seller's refusal to correct defects under a limitation of remedy clause has also been the basis for a court's avoidance of the limitation term on unconscionability grounds.[94]

The identification of a prima facie case of "unconscionability," wherein the claim is one for personal injury in a consumer goods contract, represents one of the few instances in which the language of the Code draws a distinction between commercial and consumer contracts. This dichotomy has resulted in the shifting of "unconscionability" arguments away from the general scope of section 2-302[95] and into the coverage of section 2-719(3).[96]

Although the difference between disclaimer or modification of *warranties* and the limitation of *remedies* or *damages* can be crucial, it is often ignored or inadequately discussed by the courts. The reader will recall that a disclaimer must meet the specific requirements of section 2-316, including conspicuousness and the mention of the term "merchantability."[97] However, if a clause is construed to be merely a limitation of the remedies available for breach of warranty, conspicuousness and use of the term "merchantability" are not statutory requisites for a valid limitation. In *Orrox Corp. v. Rexmond, Inc.*,[98] the court made the necessary distinction in finding the clause to be governed by section 2-719 on limitation of damages,

---

and Light Co. 17 UCC REP. SERV. 645 (E.D. Pa. 1975); Cyclops Corp. v. Home Ins. Co., 389 F. Supp. 476 (W.D. Pa. 1975); Potomac Elec. Power Co. v. Westinghouse Elec. Corp., 385 F. Supp. 572 (D.D.C. 1974); Royal Indemnity Co. v. Westinghouse Elec. Corp., 385 F. Supp. 520 (S.D.N.Y. 1974); Raybond Electronics, Inc. v. Glen-Mar Door Mfg. Co., 22 Ariz. App. 409, 528 P.2d 160 (1974). *See also* Bakal v. Burroughs Corp., 74 Misc. 2d 202, 343 N.Y.S.2d 541 (Sup. Ct. 1972).

93. McCarty v. E.J. Korvette, Inc., 28 Md. App. 421, 347 A.2d 253 (1975). For an interesting discussion in the extent to which the "unconscionable" concept of § 2-719(3) can work to avoid a limitation of damages provision, *see* Collins v. Uniroyal, Inc., 64 N.Y. 260, 315 A.2d 16 (1974). Comment, *Uniform Commercial Code: Limitations on Personal Injury Damages for Breach of Warranty - Toward Per Se Unconscionability?*, 14 WASHBURN L.J. 708 (1975).

94. Koehring Co. v. A.P.I., Inc., 369 F. Supp. 882 (E.D. Mich. 1974); Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972).

95. U.C.C. § 2-302, *supra* note 91.

96. U.C.C. § 2-719, *supra* note 4.

97. *See* the discussion in the text accompanying notes 51-54 *supra*.

98. 389 F. Supp. 441 (M.D. Ala. 1975). *But see* Zicari v. Joseph Harris Co., 33 App. Div. 2d 17, 304 N.Y.S.2d 918 (1969) and Wilson Trading Co. v. David Ferguson, Ltd., 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1969) wherein the requirements of § 2-316 were brought into a limitation of remedy problem.

not section 2-316 on disclaimer of warranties, thus avoiding the issue of conspicuousness.[99] Section 2-719 does not impose a requirement that the limitation or exclusion be conspicuous. However, the conspicuous requirement under section 2-316 on disclaimer of warranties may provide the basis for imposing such a requirement on limitation clauses governed by section 2-719.[100] The decisions have generally denied such a requirement as a part of an attempt to clearly differentiate the disclaimer of warranty requirements under section 2-316 from the exclusion of remedies and the limitation of damages provisions of section 2-719.[101] Some courts, however, as in *Avenell v. Westinghouse Electric Corp.*,[102] have required a clause limiting remedies under section 2-719 in a commercial contract to be "in writing and conspicuous." Since the typical limitation clause will attempt to modify or exclude both warranties and remedies, the terminology used and its conspicuousness will almost always be in issue.

D. *Failure of Essential Purpose*

Official Comment 1 to section 2-719 clearly mandates that "minimum adequate remedies" be available as an essential part of a sales contract.[103] Even a clause apparently reasonable at the contract's inception may later operate to deprive either party of its respective benefits of the bargain. Several decisions, in both consumer and commercial settings, have provided insight into this provision. In *Wilson Trading Corp. v. David Ferguson, Ltd.*,[104] a clause in a yarn contract stated that no claims would be allowed if made

99. Orrox v. Rexnord, Inc., 389 F. Supp. 441, 445 (M.D. Ala. 1975).

100. *See* Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

101. *See* Cryogenic Equip., Inc. v. Southern Nitrogen, Inc., 490 F.2d 696 (8th Cir. 1974); Boone Valley Coop. Proc. Ass'n v. French Oil Mill Mach. Co., 383 F. Supp. 606 (N.D. Iowa 1974); Gramling v. Baltz, 253 Ark. 352, 485 S.W.2d 183 (1972).

102. 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

103. U.C.C. § 2-719, Official Comment 1:

> [I]t is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. . . .

104. 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (Ct. App. 1969); *accord*, Neville Chemical Co., v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968), *modified*, 422 F.2d 1205 (1970). *See also* Earl M. Jorgensen Co. v. Mark Construction, Inc., 540 P.2d 978 (Hawaii 1975) and National Cash Register Co. v. Adell Indus., Inc., 57 Mich. App. 413, 225 N.W.2d 785 (1975).

"after weaving, knitting, or processing, or more than ten (10) days after receipt of shipment." The court found that latent defects rendered the yarn unmerchantable but reasoned the defects might not have been discoverable within the stated period of time. The buyer would have been left without a remedy for the defect and, therefore, the remedy's purpose had failed. Furthermore, at least one court has stated that the refusal of the seller to correct defects after proper notice by the purchaser could result in a failure of essential purpose.[105] A similar argument might be based on seller's inability to cure the defect.[106]

Alternatively, the court may view the alleged "failure" of the remedy from the perspective of the person *against whom* the limitation was to operate. In *Reynolds v. Preferred Mutual Insurance Co.*,[107] the claimant's home furnishings had been damaged by water leaking into the house due to faulty installation under a home improvement contract. If the court upheld the exclusive remedy of repair given under the contract, the homeowner could not recover for the damages to furnishings. The court found the remedy would not make the consumer whole, therefore failing of its essential purpose, and denied effect to the exclusive remedy provided in the contract.[108]

Unless the exclusion of remedies fails of its essential purpose or the limitation of damages term is found to be unconscionable, the modification would be effective in both commercial and consumer settings, provided the remedy identified is expressly agreed to be exclusive.

Section 2-719 may also be used to effectively limit damages based upon tort liability. In *Posttape Associates v. Eastman Kodak Co.*,[109] the court determined that the legislative mandate of the Code, particularly sections 2-719(3) and 1-210(3),[110] was sufficiently

105. Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972) (decision actually based on § 2-719(3)'s unconscionable provisions). *Contra*, Lankford v. Rogers Ford Sales, 478 S.W.2d 248 (Tex. Civ. App. 1972). For a discussion critical of the *Langford* decision, *see* Comment, *Uniform Commercial Code—A Limited Remedy Fails of Its Essential Purpose Only in the Case of a Negligent or Willful Repudiation of the Remedy*, 51 TEX. L. REV. 383 (1972).

106. Eckstein v. Cummings, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

107. 11 UCC REP. SERV. 701 (Mass. Ct. App. 1972).

108. *Id.* at 708.

109. 19 UCC REP. SERV. 832 (3d Cir. 1976).

110. For the text of § 2-719(3), *see* note 4 *supra*. Section 1-201(3) provides:

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an

encompassing to govern a limitation of damages provision purporting to cover both tort and contract liability. The agreement limiting such damages, however, must specifically identify the parties' intention to that effect.[111]

The foregoing discussion has demonstrated that the UCC provides the consumer with a minimal degree of protection in sales transactions. It remained for the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act to award him an additional range of safeguards.

III. THE MAGNUSON-MOSS WARRANTY ACT

Title I of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act[112] establishes disclosure standards for written warranties given in the sale of a consumer product with a retail price of over five dollars.[113] Furthermore, the Title prescribes the warranty form and content necessary for compliance with the Act. Initially, one must note there are several limitations within the Act which are quite evident. Notably, a supplier of consumer products is *not* required to give a warranty; no standards are imposed unless and until a written warranty is made to the consumer. Secondly, only written warranties are covered by the Act,[114] whereas UCC section 2-313 defines express warranties to include oral as well as written affirmations.[115] These express but non-written warranties are thus excluded from the Magnuson-Moss Warranty Act.

The basic definitions within the Warranty Act are, for the most part, crucial to an understanding of the extent to which warranties may be excluded. The term "consumer product" under the Warranty Act applies to "any personal property . . . which is normally used for personal, family, or household purposes"[116] including such property intended to be attached to or installed in real property. This latter inclusion of property intended for attachment to realty

---

agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise, by the law of contracts (Section 1-103) (*Compare* "Contract").

111. *See* UCC REP. SERV. *supra* note 109, at 839.

112. 15 U.S.C. § 2301-12 (Supp. V 1975).

113. For other discussions of the Act, *see* Magnuson, *Fair Disclosure in the Marketplace of Warranty Promises—Truth in Warranties for Consumers*, 8 U.C.C.L.J. 117 (1975); Leefe, *A Look at the Consumer Warranty Problem—the Federal Solution*, 6 U. TOL. L. REV. 351 (1975), and, Note, *The Magnuson-Moss Warranty Act: Consumer Information and Warranty Regulation*, 51 IND. L.J. 397 (1975).

114. 15 U.S.C. § 2303(a) (Supp. V 1975).

115. *See* note 30 *supra* for the UCC description of express warranty.

116. 15 U.S.C. § 2301(1) (Supp. V 1975).

(whether actually affixed or not) may expand the range of traditional "consumer products."

A "consumer" is a buyer of any product intended for his own use rather than for resale; any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product; and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligation of the warranty (or service contract).[117] Two notable features are incorporated within the definition of "consumer." First, the warranty protection will not terminate upon subsequent transfer of a consumer product from the original buyer to another person but will remain in force during the full warranty period. Second, the definition includes third persons capable of enforcing a consumer product warranty under state law. UCC section 2-318[118] allows definable third parties not in privity of contract with the warrantor to enforce the warranty. Combining the above categories of persons with the buyer of the consumer product certainly reflects a legislative policy to protect a broad class of parties under the term "consumer."

A "warrantor" within the Warranty Act is "any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty."[119] Included within this definition are persons other than the traditional line-of-distribution parties (manufacturer, distributor, wholesaler, and retailer). Although a "supplier" is clearly covered by the term warran-

117. 15 U.S.C. § 2301(3) (Supp. V 1975).

118. U.C.C. § 2-318:

Alternative A

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 reasonably 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.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to 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.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. As amended 1966.

119. 15 U.S.C. § 2301(5) (Supp. V 1975).

tor, since he is one "engaged in the business of making a consumer product directly or indirectly available to consumers,"[120] persons not involved in the sale transactions, such as product-testing laboratories or product-approval associations, could also fall within the aegis of the term. It should be noted, however, that although a "warrantor" can be other than a "supplier," the only warranties covered by the term "written warranty" are those given by a "supplier."[121]

"Written warranty" under the Magnuson-Moss Act is defined as:

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking.

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.[122]

An "implied warranty" under the Act incorporates such warranties as arise under state law.[123] The portions of the UCC to be consulted are section 2-314 (implied warranty of merchantability) and section 2-315 (implied warranty of fitness for a particular purpose).

A "remedy" denotes repair of the product, replacement by furnishing an identical or "reasonably equivalent" product, or refund of the purchase price (less reasonable depreciation as allowed by Federal Trade Commission rules).[124] The warrantor is allowed to determine which of the remedies shall accompany the warranty, except that a refund may not be selected unless the consumer's consent is obtained, or replacement cannot be provided and repair cannot be effected in a practicable or timely manner.[125]

---

120. 15 U.S.C. § 2301(4) (Supp. V 1975).
121. 15 U.S.C. § 2301(6)(A) & (B) (Supp. V 1975).
122. 15 U.S.C. § 2301(6) (Supp. V 1975).
123. 15 U.S.C. § 2301(7) (Supp. V 1975).
124. 15 U.S.C. § 2301(10), (11) & (12) (Supp. V 1975).
125. 15 U.S.C. § 2301(10) (Supp. V 1975).

A warrantor opting to extend a written warranty on a consumer product must clearly and conspicuously designate that warranty as either a "Full Warranty" or a "Limited Warranty."[126] The Federal minimum standard for designation as a "Full Warranty" requires that:

> 1. The Warrantor will remedy the consumer product without charge to the consumer and within a reasonable time following defect, malfunction or other failure to conform with the written warranty.
> 2. No limitation may be imposed by the Warrantor on the duration of any implied warranty on the product.
> 3. No exclusion or limitation of consequential damages for breach of any written or implied warranty is permitted unless such exclusion or limitation conspicuously appears on the face of the warranty.
> 4. The consumer may elect a refund or replacement of the product or part if the product or part still contains a defect or malfunction after a reasonable number of attempts to remedy the defect have been made.[127]

Any written warranty providing less than the above specifications is a "Limited Warranty" and must be so designated.[128]

A supplier making a written warranty, whether full or limited, *may not* disclaim or modify any implied warranty.[129] However, such supplier *may* limit the duration of an implied warranty running with a "Limited Warranty." The duration may be limited to the term of the written limited warranty, provided the term is of reasonable duration, the limitation is conscionable, set out in clear and unmistakable language, and displayed prominently on the face of the warranty.[130] Action by the Federal Trade Commission may extend the term of a written warranty where the product has failed to meet the terms of the warranty or the warrantor has failed to carry out the warranty terms, thus depriving the consumer of the product's use for a period not less than ten days.[131]

The Warranty Act calls for enforcement of the disclosure provisions either by action of the Attorney General[132] or private action,[133] including a class action if the jurisdictional requirements can be met.[134] The statute also describes the role of the Federal Trade Com-

126. 15 U.S.C. § 2303(a)(1) & (2) (Supp. V 1975).
127. 15 U.S.C. § 2304(a) (Supp. V 1975).
128. 15 U.S.C. § 2303(a)(2) (Supp. V 1975).
129. 15 U.S.C. § 2308(b) (Supp. V 1975).
130. 15 U.S.C. § 2308(b) (Supp. V 1975).
131. 15 U.S.C. § 2302(b)(3) (Supp. V 1975).
132. 15 U.S.C. § 2310(c)(1) (Supp. V 1975).
133. 15 U.S.C. § 2310(d) (Supp. V 1975).
134. 15 U.S.C. § 2310(d)(3) (Supp. V 1975).

mission in prescribing minimum requirements for establishment of informal dispute settlement procedures.[135]

Section 2308 of the Act permits the limitation of consequential damages in a written warranty, but under section 2311 state law "regarding consequential damages for injury to the person or other injury" is left unimpaired.[136] This provision directly relates to UCC section 2-719(3) in declaring prima facie unconscionable "any limitation of consequential damages for injury to the persons in the case of consumer goods." Other state or federal laws affording rights or remedies to consumers also remain unaffected.[137]

IV. Impact of the Magnuson-Moss Warranty Act on the Uniform Commercial Code Provisions Relating to Disclaimer of Warranties and Limitation of Remedies and or Damages: Analysis and Conclusions

The total impact of the Magnuson-Moss Warranty Act on consumer product warranties is obviously susceptible to only general assessment at this early stage; nevertheless, certain effects can be stated.

A. The initial movement of the Uniform Commercial Code and recent decisions to characterize sale of goods transactions as either consumer or commercial[138] has received a clear mandate by adoption of the Magnuson-Moss Warranty Act. Although the gap between consumer and commercial transactions has widened, the schism is by no means complete. Only issues relating to consumer warranties have been singled out for coverage under the Act; other phases of the sales transactions will continue to be governed by state law, predominantly each state's version of the Code.

B. In order to invoke the provisions of the Magnuson-Moss Warranty Act, it is required not merely that there be a "consumer product"[139] as the subject of the transaction, but also that a "written warranty"[140] be given. Warranty disputes arising from purely commercial transactions are still governed by UCC sections 2-313 through 2-316. Furthermore, those express warranties under UCC section 2-313 not reduced to written form are not covered by the Warranty Act. Thus, the discussion in Part II of this article will remain viable for commercial transactions.

---

135. 15 U.S.C. § 2310(a) (Supp. V 1975).
136. 15 U.S.C. § 2311(b)(2) (Supp. V 1975).
137. 15 U.S.C. § 2311(b)(1) (Supp. V 1975).
138. *See* note 74 *supra.*
139. Defined in 15 U.S.C. 2301(1) (Supp. V 1975).
140. Defined in 15 U.S.C. 2301(6) (Supp. V 1975).

C. Section 2308(a) of the Warranty Act states that any implied warranty arising out of a consumer product transaction under Magnuson-Moss may not be disclaimed.[141] This vital provision overrides existing state laws under UCC section 2-316 which allows disclaimer of warranties in both consumer and commercial transactions by using the appropriate language in a conspicuous fashion. The retention of implied warranties for the consumer must certainly be viewed as one of the more meaningful developments resulting from the Magnuson-Moss Act.

D. Application of the Warranty Act's provision to a transaction requires that the warranty be identified as either a "Full Warranty" or a "Limited Warranty."[142] This designation has no counterpart under the Code.

As noted in paragraph C above, implied warranties *cannot* be disclaimed by a supplier. Furthermore, extension of a "Full Warranty" precludes any restriction upon the duration of implied warranties.[143] In other words, any applicable implied warranty will necessarily attach for at least a reasonable period of time.[144]

E. The Warranty Act permits the exclusion or limitation of consequential damages for either written or implied warranties provided the restrictive provision is placed conspicuously on the face of the warranty.[145] Viewed separately, this measure would clearly change the restriction on consequential damages found in UCC section 2-719(3). However, section 2311(b)(2) of the Act preserves state law regarding consequential damages for personal or other injury. Any clause excluding personal injury damages in a transaction involving consumer goods will remain prima facie unconscionable as per UCC section 2-719(3). Further, restrictions under state consumer statutes would similarily remain in effect.

The treatment afforded consequential damage restrictions under the Warranty Act reflects a fundamental difference in attitude between *disclaimer of warranties and limitation or modification of damages.* The same distinction is made under the Code but with a far different emphasis. The Code allowed disclaimer of warranties in consumer goods transactions but declared a limitation of damages for personal injury in such transactions prima facie unconscionable.[146] Conversely, the Warranty Act prevents the total

141. 15 U.S.C. § 2301(a) (Supp. V 1975).
142. 15 U.S.C. § 2303(a) (Supp. V 1975).
143. 15 U.S.C. § 2308(a) (Supp. V 1975).
144. 15 U.S.C. § 2308(b) (Supp. V 1975).
145. 15 U.S.C. § 2304(a)(3) (Supp. V 1975).
146. U.C.C. § 2-719(3).

disclaimer of implied warranties but sets out only modest requirements for an effective limitation of damages clause.[147] From a consumer perspective, it is preferable that the Code restrictions on limitation of damages operate in tandem with the Magnuson-Moss prohibitions against disclaimer of implied warranties to achieve the maximum protection.

F. Generally, the warrantor under the Warranty Act may select the remedy (repair, replacement or refund) that he wishes to offer in the warranty.[148] Notwithstanding such selection, any other remedy given by state law or other Federal law remains in effect.[149]

G. Clarity and precision of language of *any* permissible restriction upon the normal flow of warranties, remedies, and damages in sales transactions will remain a main issue in both consumer and commercial litigation. The Warranty Act has adopted key language heretofore litigated under the Code in several key areas. The term "conspicuously" is used in the Act to qualify the manner of designating warranties under section 2303 and in specifying the minimum standards for a "Full Warranty" under section 2304. Section 2308 uses the term "conscionable" in a discussion on limiting the duration of implied warranties. No doubt the construction given the terms "conspicuous" and "unconscionable" under Code decisions will be given due consideration by state and federal courts facing a similar term or concept under the Warranty Act. Future litigation may find the reappearance of old problems wearing the same coat but with a different label.

V. Conclusion

The Magnuson-Moss Warranty Act has created a new level of warranty protection for the consumer. It has not, however, preempted the field of consumer warranties and it should not be viewed as a panacea for the grievances, real or alleged, suffered by consumers in consumer products transactions. A combination of the Magnuson-Moss Warranty Act and the Uniform Commercial Code appears needed to deal adequately with the multiple issues of disclaimer of warranties, exclusion of remedies, and limitation of damages.

In evaluating the Magnuson-Moss Warranty Act, it may be well to ask how expeditiously consumer grievances are resolved, either through the grievance settlement procedures to be developed under

147. 15 U.S.C. § 2304(a)(2) (Supp. V 1975).
148. 15 U.S.C. § 2301(10) (Supp. V 1975).
149. 15 U.S.C. § 2311(b)(1) (Supp. V 1975).

the guidance of the Federal Trade Commission or through the courts. No answer to that question is possible at present. However, the Act does provide the basis for a rational dichotomy in the treatment of warranties between commercial activities and those involving consumer products. The Code may continue as an appropriate guide for regulating transactions among merchants; however, consumer transactions have long needed a regulatory scheme going far beyond that provided by the Code. Perhaps the Uniform Commercial Code's de minimus effort at regulation of transactions of the latter type may be best understood in light of the fact that the Code's adoption preceded the consumer movement by a number of years. One can state unequivocally that the language of Title I of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act contains a number of substantial and beneficial changes for the protection of the buyer of consumer products; it remains to be seen if their promise becomes a reality for the consumer.