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IMPACT OF THE UNIFORM COMMERCIAL CODE ON PRODUCTS LIABILITY LAW

by

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A recent article warns that the adoption of the Uniform Commercial Code ". . . has altered many of the traditional notions of products liability, as it had been delineated under the Uniform Sales Act," 10 PRAC. LAW. 49 (1964). Such undue alarmism is apparently designed to inflate the value of those who have a little bit of Code information by scaring the harried and hurried lawyer who has not yet found the time to study this legislation in depth. The statement is simply not true. It is doubtful whether any provision in the warranty sections of the Code does not find substantial support in cases decided under the Sales Act. It would be surprising indeed if a *commercial* code greatly affected products liability law. The warranty cause of action, and this is the only area in which the Code touches products liability, is not commercial law at all. In its most important modern function, the compensation of buyers personally injured by using a product, it is essentially tort law. This is true even if it is classified as one sounding in contract to determine what statute of limitations period applies, to decide whether contributory negligence should be a bar to recovery, or for some other purpose. In fact, it may be argued that it was only through an historical accident or because of a too strict use of logic that the law allows any recovery for personal injuries in a warranty action. If the imposition of strict liability upon vendors had developed out of traditional negligence principles, it would have been on firmer ground and many of the present-day problems in this area would have been avoided. See, Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L. J. 1099 (1960).

Though the Uniform Commercial Code provisions on warranty do not depart substantially from prior concepts of product liability law, the Code is deserving of careful attention by lawyers interested in this field. There is new language and rearrangement of material and the law in any particular jurisdiction is likely to be somewhat different after its passage. The very fact that there has been a rewriting of the statutory provisions governing warranty actions is itself certain to stimulate litigation as lawyers test out its possible advantages and disadvantages. It is perhaps significant that during the eleven years

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since the Code was first adopted by Pennsylvania, courts have cited the warranty sections far more often than any other. But, in reviewing these sections it is subtleties and nuances that should be sought, not significant trends.

EXPRESS WARRANTIES

The Code continues to subsume warranties under two headings: implied and express. Perhaps the most obvious change is the reclassification of the old implied warranties of description and sample under the express warranty category. The import of this modification is likely to be slight as the effect of making an express warranty is the same as that of giving an implied warranty. Two interrelated questions have endured the codification: (1) to what extent must the buyer rely upon the seller's representations, and (2) where is the dividing line between a warranty and mere puffing or sales talk. Under pre-Code law there is considerable doubt whether reliance is a significant requirement to maintain a warranty action. The more modern cases have tended to follow Williston's opinion that all that is necessary is a showing that the representation or promise be such as to naturally induce the purchase. 1 Williston on Sales § 206 (Rev. Ed. 1948). For recent cases see Frumer and Friedman, Products Liability, § 19.04(4) (1963). The Code follows this lead by requiring that the statement must be part of the "basis of the bargain." *U.C.C. § 2-313*.

Although the Code provides that "any affirmation of fact or promise" may constitute a warranty, it also recognizes that "some statements or predictions cannot fairly be viewed as entering into the bargain." *Official Comment 8 to § 2-313*. Therefore, the Code states that "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." *U.C.C. § (2-313)(2)*. Whether a statement is to be construed as a warranty or as merely seller's talk is still a fact question that defies the formulation of a pat rule. The test that the official Comment suggests is similar to that applied under pre-Code law: "What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain." *Official Comment 8 to § 2-313*. The Official Comment suggests that the burden of proving that a particular statement was not meant to be part of the basis of the bargain may be heavy. The Comment states that:

In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which

is to take such affirmations, once made, out of the agreement requires clear affirmative proof. *Official Comment 3 to § 2-313.*

These brief observations are indicative of the fact that there has been no startling change accomplished by the Code in our former notions of express warranties. Probably, it is a little easier for a plaintiff's attorney to construct an argument that a statement by the seller is a warranty than it was under pre-Code law, but the validity of this conclusion will have to await more litigation.

THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

The Code retains the warranty of fitness for a particular purpose with few changes. Where the Uniform Sales Act required that the buyer make known, expressly or by implication, to the seller a particular purpose for which he wanted the goods, the Code requires only that the seller have reason to know of the particular purpose. *Compare, U. S. A. § 15(1) with U. C. C. § 2-315.* The heart of the warranty for a particular purpose is still reliance by the buyer on the seller's skill or judgment in selecting the goods. In this connection, one troublesome provision of the Sales Act has been eliminated: the exception that there was no warranty of fitness for a particular purpose where the sale was of "a specified article under its patent or trade name." *U. S. A. § 15(4).* Clearly, the fact that the product is patented or sold under a trade name does not necessarily negate the possibility that the buyer has relied upon the skill of the seller to pick an item that would accomplish a specified purpose. See, for an example of a case decided under the Sales Act holding a warranty of fitness for a particular purpose where the goods were patented *Kansas City Bolt Co. v. Rodd*, 220 F. 750 (6th Cir. 1915). Rather, it is simply evidence of whether the buyer has relied upon the seller's skill. Thus, if a person asked a paint dealer for a can of paint suitable for painting the outside of his house, the warranty of fitness for a particular purpose would attach to the sale even though the product ultimately sold was under a trade name or patented. If, however, the buyer entered a self-service market, selected the paint off the shelf himself, and purchased it without discussion, then there could be no warranty of fitness. The Code has also, deleted the words "whether he be a grower or manufacturer or not" in referring to the type of seller who may give the warranty. The Official Comment indicates that the deletion was based upon the belief that the words were unnecessary. *Official Comment 4 to § 2-315.*

WARRANTY OF MERCHANTABILITY

The wording of the Uniform Commercial Code section on the warranty of merchantability is considerably different from that of the former Sales Act, but it is doubtful whether any significant substantive change has been effected. Under the old law, the warranty of merchantability attached only to sales "by description." This was largely ignored by the courts and the limitation has been eliminated by the Code. The Sales Act provided that the warranty of merchantability arose when goods were purchased from a seller "who deals in goods of that description (whether he be the grower or manufacturer or not)." Under the Code, the warranty is imposed when the seller is a merchant—one 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." *U. C. C. § 2-103.*

Unlike the Uniform Sales Act, the Code's statutory language gives some guide as to what is "merchantable," but the enumeration is not exhaustive. Section 2-314(2) states that:

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 fact made on the container or label if any.

Finally, the Code specifically provides that the serving of food or drink is a sale to which the warranty of merchantability may, and generally will, attach.

Compared with the case law developments of the past decade, the Code's position on whether privity of contract is a necessary requirement for maintenance of a warranty action are pretty innocuous. The Code merely extends a seller's warranty, whether express or implied, to all natural persons who are in the family or household

of the buyer or who are guests in the buyer's home if it is reasonable to expect that such persons may use or be affected by the goods. Furthermore, the warranty is extended, by the Code provision, only in the event that there are personal injuries suffered by the non-buyer.

FUTURE DEVELOPMENT OF WARRANTY LAW

From this very brief discussion of the warranty sections of the Uniform Commercial Code it should appear that no lawyer will have much difficulty in recognizing concepts, and problems, with which he has long been familiar. Perhaps the most interesting questions raised by the Code and by the current cases involve the modification or limitation of a seller's warranties by disclaimer clauses. This topic, however, is outside the designated scope of this paper. One area of warranty law is clearly worthy of note even though it has little to do with the enactment of the Uniform Commercial Code. During the next few decades I believe that the attention of litigants, courts and writers in the product liability field will be turned toward limitations on warranty recovery.

Warranty is usually discussed in terms of "strict liability." This is accurate in the sense that the seller's liability is not predicated on any negligence or fault. Even if he has exercised the highest degree of care in performing his function as a manufacturer or distributor, he is still liable if a warranty is breached. But the term "strict liability" seems to have dulled recognition of the primary limiting factor in warranty law: the scope of the warranties given. Just what is promised or guaranteed at the time of a particular sale? For example, is there an implied warranty that pork is free from trichina, or that a drug, cosmetic or hair dye is safe for use by all purchasers irrespective of their particular sensitivities, or, as was asked in a recent Massachusetts case already on its way to everlasting fame: does the presence of a bone in fish chowder constitute a breach of warranty? *Webster v. Blue Ship Tea Room, Inc.*, 198 N. E. 2d 309 (1964).

The question of the scope of the various warranties in a particular case is important for it is the principal means of achieving a degree of flexibility in the warranty cause of action. By this I mean that it gives to the judicial tribunal judging a particular controversy the opportunity to require that the law do justice to the parties, and of expanding the law to meet the changing conditions of our developing economy. The "reasonable man test" and the doctrine of proximate causation have served this function well in negligence cases. With the new emphasis on warranty as the "frontier of products liability law" similar methods of allocating to the courts a substantial degree of discretion and of law making authority are certain to be found.

