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WARRANTIES OF KIND AND QUALITY UNDER THE UNIFORM REVISED SALES ACT

Caveat emptor, as an instrument for allocating loss, was well adapted to a business era when equally knowledgeable parties dealt in homely chattels at arm's length. Solution of today's problems of consumer protection and allocation of loss involves, however, a reappraisal of contemporary social and economic fact. In view of the modern consumer's inequality of technical knowledge, his inability to test highly processed goods except by use, and his dependent bargaining position in a spiderweb distribution system, unmitigated caveat emptor becomes mercantile absurdity.

The long struggle of enlightened courts to readjust the balance in favor of the unprotected consumer is only now reaching fruition. The dramatic evolution of warranty law from its humble origins in tort and the action on the case for deceit, has been characterized and, indeed, made possible by its increasing assimilation of contract principles. As tort concepts of fault and negligence have been further abandoned, seller's obligation to deliver goods of the "warranted" kind and quality has tended to become absolute, and it has become possible to experiment with techniques for adequate consumer protection and the imposition of losses upon those best able to prevent and to absorb them.

The Uniform Sales Act of 1906, codifying the better case law of the nineteenth century, is conceded to have advanced warranty law by the in-

3. 1 Williston, Sales §197 (2d ed. 1924); Prosser, Handbook of the Law of Torts 705 (1941).
5. That these are the relevant social objectives is generally agreed by writers in the warranty field. See, e.g., Llewellyn, op. cit. supra note 2, at 341; Vold, Handbook of the Law of Sales 465-7, 474 (1931); Notes: 37 Col. L. Rev. 77 (1937); 42 Harv. L. Rev. 414, 417-8 (1929); 33 Col. L. Rev. 868, 869 (1933); 18 Cornell L. Q. 128, 133 (1932); 7 Wash. L. Rev. 351, 358 (1932); 31 Mich. L. Rev. 264, 265 (1932). But analyses in terms of "fault" still occur. See Russell, Manufacturer's Liability to Ultimate Consumers, 21 Ky. L. Rev. 388 (1933); Waite, Retail Liability and Judicial Lawmaking, 34 Mich. L. Rev. 494, 514, 520 (1936).
6. Adopted to date in 37 jurisdictions, including Alaska and the District of Columbia. 1 Uniform Laws Annotated, Sales, Cum. Supp. 6 (1948). The Uniform Sales Act (referred to hereafter as USA) has been described as "codification" in the traditional Anglo-American manner, a mere collection of the current concepts as gleaned from the latest expressions of judicial opinion, grouped and arranged with proper respect for tradition and history." Morrow, Warranty of Quality: A Comparative Survey I, 14 Tulane L. Rev. 327, 338 (1940).
fusion of much contract doctrine. But in certain material respects, consumer protection was retarded by the Act and no legal technique was provided for allocating losses among the disparate parties in a complex modern distribution system. The proposed Uniform Revised Sales Act enters the warranty scene with needed revisions and creative additions designed to clear the path to solution of both problems.

The Revisory Sections

The basic principles and policies of the old Act have been carried over for the most part intact into the three revisory sections of the URSA, sections 37, 38 and 39, but a general elimination of conceptual confusion and consumer "booby-traps" has taken place. Seller's obligations stand more sharply and fully defined, and the theoretical basis of these basic obligations is clarified and systematized.

Express Warranties: By Affirmation, Promise, Description, Sample

Although it was of small consequence, since identical legal incidents were attached to both, the old Act preserved a strange conceptual distinction between express and implied warranties. Express warranties were confined to affirmations of fact or promises made in relation to the goods; warranties arising from seller's descriptive language or use of samples were called "implied." From the standpoint of buyer's reasonable expectation, no reason

10. The "revisory" sections include §§ 37, 38, and 39; the "new" sections are §§ 40, 41, 42, 119, 120, 121, and 122. The division is for ease of discussion only and is necessarily somewhat arbitrary as innovations appear in the revisory sections and vestiges of the Uniform Sales Act appear in the so-called "new" sections. Tangential sections, such as §§ 21, 22, 23 and 26, bear importantly on the warranty sections, but their applicability is not confined to warranty.
11. But solution via warranty is necessarily limited to the deterrent effects of civil liability. The financially irresponsible "fly-by-night," to whom civil liability is at best a remote consideration, will be controlled successfully only by penal sanctions. Thus the full realization of adequate consumer protection will also require extension of legislative policing of quality standards in the nature of Pure Food and Drugs Acts and meat inspection laws.
13. USA § 12.
14. USA § 14.
15. USA § 16.
for the distinction is apparent, for in all three cases seller is actually expressing facts to buyer.\textsuperscript{16}

A more valid conceptual distinction is that express warranties are those which arise from the language or actions of the parties, whereas implied warranties are those which the law imports into the bargain without reference either to their language or actions.\textsuperscript{17} Such is the dichotomy adopted by the URSA, and accordingly the express warranty section has been expanded to include both sales by description and by sample.\textsuperscript{18}

The new Act supplies a simple and direct theoretical approach to express warranties. The drive is to give effect to the consensual agreement between the parties. Thus for the language or conduct of the parties to result in an express warranty, it must appear to the trier-of-fact from all the surrounding circumstances that the parties bargained with reference to that particular sample, affirmation or description—made it "a part (or basis) of the bargain."\textsuperscript{19}

Though buyer now may rely upon seller’s express undertaking, he is not to benefit by an inadvertent slip of seller’s tongue—by an affirmation of fact or descriptive word which, though made during the “dicker,” actually does not constitute part of the parties’ understanding. To cite an unlikely example, if the facts show that buyer knew the table was made of oak, seller’s mistaken description of it as mahogany is hardly to be considered a “part of the bargain” and an express warranty.

Important elements in the factual setting to be considered in determining whether an express warranty exists are usage of trade, course of dealing and course of performance—factors which underlie every section in the new Act.\textsuperscript{20} Thus a statement made by one merchant to another merchant may be shown in the light of trade usage to have been merely a statement of opinion and so not binding,\textsuperscript{21} while the same statement made to an uninitiated retail consumer might well become an express warranty.


\textsuperscript{17} \textit{Volt, op. cit. supra} note 5, at 441. Cf. Prosser, \textit{The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev.} 117, 122-3 (1943).

\textsuperscript{18} URSA §37(1) (b) (c).

\textsuperscript{19} URSA §37. The Draftsmen’s Comments on §37 describe express warranties as resting on the “dickered aspects” of the bargain.

\textsuperscript{20} URSA §§21 and 22. “Agreement,” as defined in §9(2) of the URSA, “means the bargain in fact as found in the language of the parties or in course of dealing or usage of trade or course of performance or by implication from other circumstances.” For definitions of “course of dealing” and “usage of trade” see particularly URSA §§21(1), (2). When course of dealing or usage of trade are inconsistent with express terms, the latter prevail. URSA §21(4) (b).

\textsuperscript{21} The URSA carries over from §12 of the USA specific exclusion of seller’s statements of opinion or commendation of his goods, statements which under the old Act would not have induced reliance by an ordinary reasonable buyer and under the new
But resolution of conceptual confusion is only a secondary objective of this reshuffling of warranties, for the real significance of the change, as is true of all other changes in the "revisory" sections, lies in the increment of consumer protection thereby attained. Under the URSA, once the seller has assumed obligations of express warranty, he may not free himself therefrom; on the other hand, the new Act largely preserves seller's privilege to modify implied warranties. With different legal incidents attached to express and implied warranties, confusion could no longer be tolerated as to what warranties are express and as to the theoretical basis for so distinguishing them.

As buyer protection is furthered by expanding the scope and effect of the express warranty category, so, also, his burden is lightened by deletion of the vestigial tort elements found in the express warranty section of the old Act. No longer need he prove that the seller's affirmation or promise was inductive to buyer's reliance and that in fact he did rely. Though buyer usually was not forced to prove reliance under the old Act, the thoroughly objective approach of the URSA eliminates this potential stumbling block, and remedies another former conceptual inadequacy.

Nor will court and buyer be forced under the URSA to use artificial arguments to find additional consideration to support a warranty made subsequent to the passage of title but still essentially part of the agreement. Vexatious questions as to the exact moment at which the warranty was made or as to whether buyer relied on the warranty at the exact moment of title passage Act would not be from an objective viewpoint a basis of the bargain. "Puffing" statements or "dealer's talk" are the clearest examples, such as, "good," "high class," "valuable." See Vold, op. cit. supra note 5, at 447. For collection of representative cases of "opinion" statements see Bogert, supra note 16, at 33-4. Under the USA where buyer knows that his actual information is equal or superior to seller's his reliance on seller's statements is not justified, and such statements are mere "opinions." Vold, supra at 446-7. Such circumstances under the URSA will operate similarly to show that seller's statements are not an essential "part of the bargain."

22. URSA § 40(1). For discussion of the concept of "iron sections," see Llewellyn, supra note 8, at 384-7, wherein is presented a technical argument that even under the USA the "implied" warranty in sale by description was an "iron" section both in sense and in law. For detailed discussion on disclaimer of warranties, see note 62 infra and text pp. 1400-04 infra.

23. Morrow, supra note 8, at 564-5. Thus, despite the fact that the USA purport to be a "codification of contract, not of tort," included were the requirements of inducement and reliance which were part of warranty when it was a 16th century action in tort for deceit. Ibid.

24. See, e.g., Bowen v. Zaccanti, 203 Mo. App. 208, 208 S.W. 277 (1919) (statement made by seller after contract, but before buyer had paid full price, and which induced buyer to pay, is a warranty); International Harvester Co. v. Haueisen, 66 Ind. App. 355, 118 N.E. 320 (1918) (additional consideration found in payment of price before due); Barton Bros. v. Chicago Fire Proof Covering Co., 113 Mo. App. 462, 87 S.W. 599 (1905) (warranty made subsequent to sale in compliance with understanding reached at time of contract relates back to date of contract and is supported by the consideration of the main contract). Cases collected, Williston, op. cit. supra note 3, § 211; Bogert, supra note 16, at 17, 18.
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become merged in the single inquiry of whether the warranty is "a part of the bargain."

Still another step is taken to secure to buyer the full fruits of seller's express undertaking, by a modification of the flat statement in the old Act that no affirmations of value are to be considered warranties. The draftsmen's comments set forth a remedial distinction between seller's affirmations as to the "value" and other warranties. Thus buyer is given an action for rescission or actual damages suffered if the goods are not of the "warranted" value, but he is not allowed the benefit of the unique warranty measure of damages which would give him the difference between the "warranted" and actual value of the goods. This seems a valid compromise, for, though it is reasonable that seller should not normally be made an insurer of buyer's profit on resale, there seems to be no good reason otherwise to differentiate between affirmations of value and other affirmations of fact which become "part of the bargain."

Implied Warranty of Fitness for Particular Purpose

Whereas under the URSA express warranties represent the bargained aspects of the sale, implied warranties enter the bargain as rebuttable presumptions to which the law will hold seller until a contrary understanding is clearly shown. The theory is simply that all sellers dealing in a given factual situation should be held to assume the obligations which good faith sellers normally assume under those circumstances. Under the new Act, as in the past, consumer protection will depend to a large degree upon judicial conception of what obligations are normally assumed by good faith sellers.

Among the more important implied warranties, the warranty of fitness for

25. In declaring that affirmations of value were not warranties, § 12 of the USA was out of accord with the common law rule that statements regarding value of the goods sold might be warranties and that it was for the trier of facts to determine whether the buyer justifiably relied on the statement as one of fact. Bogert, supra note 16, at 32.

26. Thus the URSA approves a holding like that in Foote v. Wilson, 104 Kan. 191, 178 P. 430 (1919) (seller's statement that goods would invoice from $9,000 to $11,000 were for purposes of rescinding the sale an obligatory statement of fact where the goods later inventoried at $2,500; but the statement would not be binding if the buyer sued to recover lost profit, i.e., the difference between the warranted and the actual value of the of the goods.) The Comments on the URSA extend this dualistic treatment to all opinion or commendatory statements. In a case like Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co., 61 Utah 503, 215 P. 995 (1923), where seller's declaration that stoves would "sell like hot cakes" was held merely an opinion, the URSA for purposes of rescission would treat this statement as an express warranty that the goods would sell and as an opinion only where buyer sues for lost profit.

27. The Draftsmen's Comments on URSA § 37 explain that implied warranties rest so clearly upon a common factual situation or set of conditions that no particular language or action is necessary to evidence them. That the URSA injects a strong measure of public policy into the "common factual situation," however, is apparent from the high standards of merchantable quality established in sales by merchants. See, notes 45, 46, and 47 infra and text thereto.
a particular purpose, carried over largely intact into the URSA, rests on the buyer's justifiable reliance on seller's skill and judgment to select goods suitable for some special purpose which buyer has made known either expressly or by implication. Since a buyer who picks out his own goods or orders a specific article obviously does not rely on seller's judgment, a well-established common law exception developed where a "known, described and definite" article was purchased. The Uniform Sales Act codified this exception under the unfortunate terminology "patent or other trade name." Though courts generally have attributed the common law meaning to this phraseology, confusion as to the logical basis for the exception has led to a widespread tendency to apply it mechanically without the essential inquiry as to whether in fact buyer is relying on seller's judgment despite use of a patent or trade name in the course of sale. Thus where a purchaser orders "XX pipe," further stipulating that it must be "tough", or a seller sells "XX pipe" knowing that buyer is relying on him for "tough" pipe, the mere fact that a trade name is used should not automatically deprive purchaser of the warranty of fitness for his particular purpose. True, the trade name or definite description may be so

28. URSA § 39. This warranty is found in § 15(1) of the USA. It is to be noted that while under the old Act it was incumbent on buyer to make known his particular purpose expressly or impliedly to seller, the URSA provides that the warranty arises where seller has "reason to know" of buyer's purpose. This alteration coincides with the more liberal case law interpretation. Compagnia Italiana Transporto Olii Mineralli v. Sun Oil Co., 43 F.2d 683 (2d Cir. 1930) (seller must know buyer is relying on seller's judgment or facts must charge seller with knowledge).

29. WILLISTON, op. cit. supra note 3, § 235.

30. VOLD, op. cit. supra note 5, at 462-4. For illustrative cases, see, BOGERT, CASES ON THE LAW OF SALES 487-93 (2d ed. 1947).


32. Llewellyn, supra note 8, at 364. Thus the "language confusions" has turned out to be an unessential accident either through the inertia of the courts or the influence of the draftsman's book. WILLISTON, op. cit. supra note 3, § 236a.

33. Llewellyn, supra note 8, at 352 et seq. See, e.g., Century Electric Co. v. Detroit Copper and Brass Rolling Mills, 264 Fed. 49 (8th Cir. 1920); and see references in Llewellyn, op. cit. supra note 2, at 334-5. Mechem, IMPLIED WARRANTIES IN THE SALE OF GOODS BY TRADE NAME, 11 MINN. L. REV. 485 (1927).

34. The example is developed from the early case of Dounce v. Dow, 64 N.Y. 411 (1876) (iron) in which the patent or trade name exception was applied. See Llewellyn, supra note 8, at 362.

35. A sharp controversy has arisen frequently where buyer makes his special purpose known to seller, who thereupon recommends goods identified by a patent or trade name. Many courts have held that where buyer buys under such circumstances there is no warranty of fitness for particular purpose. See cases collected in VOLD, op. cit. supra note 5, at 462-3 n. 71 (cases contra, id. n. 72).
used as to negative buyer's reliance, but both courts and text writers have failed to see that there may be no inconsistency between the two lines of description, "XX pipe and tough," and that in such a case in order to safeguard the purchaser both lines of description should cumulate against seller.29

The URSA's omission of the "patent or other trade name" exception should remove a hitherto serious source of confusion and a treacherous pitfall for buyer. Judicial inquiry will be forced back into proper focus. Use of a patent or trade name or request for a "known, described and definite" article will be only evidentiary facts to be considered along with other circumstances in determining whether buyer actually relied on seller's judgment.

Implied Warranty of Merchantability

The most potent weapon given the consumer under both the old and new Acts is the implied warranty of merchantability: the implication of the law that all goods sold by a merchant are warranted fit for the purposes which such goods ordinarily serve.37 In contradistinction to the implied warranty of fitness for particular purpose, reliance by buyer has never been part of merchantability, for it has always been purely a matter of contract—a question of what the good faith merchant-seller normally undertakes to deliver.38

Many courts under the Uniform Sales Act have manifested a predilection to forsake the broad warranty of merchantability for the narrower warranty of fitness for particular purpose,39 and there has been a confused tendency, especially in regard to packaged goods, to inject the alien requirement of buyer reliance.40 In part this confusion may have arisen from the grouping

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36. Llewellyn, supra note 8, at 363. See, also, Brown, Implied Warranties of Quality in Sales of Articles under Patent or Trade Names, 2 Wis. L. Rev. 335 (1924); Mechem, supra note 33. The apparent severity of the patent or trade name provision has resulted in reluctance on the part of the courts to find that a transaction is governed by the section. Note, 10 CORN. L. Q. 521, 522-3 (1925).

37. USA § 15(2); URSA § 38. For complete discussion of merchantability, see, Prosser, Implied Warranty of Merchantable Quality, 27 MINn. L. Rev. 117 (1943).

38. At least since the famous case of Jones v. Just, L.R. 3 Q.B. 197, 9 B. & S. 141 (1868), in which the whole matter of merchantability was summed up and stated in terms which substantially shaped § 15(2) of the USA. The fundamental principle of merchantability had been stated as early as 1815, however, in Gardiner v. Gray, 4 Camp. 144, 171 Eng. Rep. 46 ("The purchaser cannot be supposed to buy goods to lay them on a dunghill.")

39. Prosser, supra note 37, at 134-5.

40. Stemming from an early confusion of the warranty of merchantability with the warranty of fitness for particular purpose, the latter requiring reliance on seller's skill and judgment. Thus, since buyer must know his retailer had no such knowledge of the goods as did the manufacturer, he could not have relied on the retailer. Even after passage of the USA, which specifically applied the warranty to all dealers, some few jurisdictions refused to hold the retailer liable, especially in regard to sales of food in sealed containers. For argument in support of this minority position, see Waite, supra note 5. The overwhelming majority of the courts now hold that the dealer warrants his goods to be saleable and fit for ordinary use, even when they are sold in sealed containers. Prosser, supra note 37, at 150, 151 n. 195.
together of the implied warranties of fitness for particular purpose and merchantability as companion subsections in the old Act. Despite such handicaps, it had become the "warranty of quality presumptively to be implied in every sale of goods made by a dealer." The new Act separates the two implied warranties, making each an individual section, and not only greatly elaborates merchantability but places it in a position of accentuated importance. These changes, together with the requirement that a merchant must clearly warn his buyer if he wishes to escape the obligation to provide merchantable goods, should forestall any latent judicial reluctance to recognize merchantability as the basic instrument of consumer protection.

The most significant change, however, is the addition of a definition of "merchantability." The blank check which the old Act drew upon the future by leaving the meaning of merchantability completely open has been filled in by judicial hand. The more advanced developments are codified in the new Act. The resulting definition recognizes that merchantability involves both use (consumption) and exchange (resale) aspects within its general scope of fitness for the ordinary purpose. Emphasis upon resaleability in the URSA is seen in requirements that goods must "pass without objection in the trade under the contract description," be of "medium or fair average quality," within trade tolerances of kind, quality and quantity, and be adequately packaged and labelled. These are minimal standards which the courts are free to revise upwards as the economic scene changes. Other aspects of mer-

41. Prosser, supra note 37, at 117, 167-8.
42. URSA § 40(2).
43. One of the most serious deficiencies of the USA was its failure to define what "merchantability" meant. Llewellyn, supra note 8, at 383. For collection of cases illustrating the varied approach of the courts in regard to the meaning of "merchantability," see, BOGER, op. cit. supra note 30, at 506-7 n. 26.
44. Prosser, supra note 37, at 131-2.
45. URSA § 38(2) (a). Thus in Jones v. Just, L.R. 3 Q.B. 197, 9 B. & S. 141 (1868), the fact that the Manila hemp wetted by sea water was in fact resold at auction as "Manila hemp with all faults" at about 75 per cent of the original price, did not prevent the goods from being unmerchantable. Accord, Niblett v. Confectioners' Materials Co., 3 K.B. 387 (1921) (resold with brand removed).
46. URSA § 38(2) (b). The URSA indorses such a case as Howard v. Hocy, 23 Wend. 350, 351, 352 (N.Y. 1840) ("at least of medium quality or goodness . . . such as would bring the average price at least.")
47. URSA §§ 38(2) (d), (e), and (f). Prosser, supra note 37, at 129.
48. Thus the introductory phrase in § 38(2) of the URSA says, "Goods to be merchantable must at least be such as . . ." The Draftsmen's Comments on URSA § 38 point to such further attributes of merchantability as fitness of the goods to withstand shipment where the goods are to be shipped by the seller or are bought for reshipment. Philip Olim & Co. v. C. A. Watson & Sons, 204 Ala. 179, 85 So. 460 (1920) (apples shipped to buyer for resale must be in condition to keep them sound and saleable for a reasonable time). And in sale of blooded animals where attestation of breeding is one material element of their value, appropriate documents must accompany the animals to satisfy the requirements of merchantability. Weeks v. Lee, 42 S.D. 355, 175 N.W. 355 (1919) (re-
chantability are brought out in the warranty of title section, under which seller impliedly warrants freedom in the domestic market from patent infringement, statutory violations and title complications.\textsuperscript{40} Though consistent with the consumer-minded approach of the new Act and the not unreasonable assumption that a buyer in dealing with a merchant normally expects to receive medium-grade goods, objection may be taken to the “medium or fair average” standard of merchantable quality. In a market where goods of a certain description vary considerably in quality, the new medium-grade requirement will mean that a greatly increased number of sellers will be guilty of breach of the implied warranty of merchantability, despite the fact that their goods are both readily saleable and usable. Though buyer should not be forced to accept goods that are unfit for the market or for use, it is questionable whether he should be the beneficiary of an implied warranty which assures him not only passable but medium-grade goods.\textsuperscript{50} It would not seem to be an undue burden on him to contract for any desired grade above “passable”—the standard generally approved by the cases.\textsuperscript{51} Moreover, the main purpose of consumer protection is assured by fitness for use. “Medium or fair average quality” appertains principally to fitness for resale. Although it may be argued that the small retailer often needs implied warranty protection almost as much as the consumer, the great majority of purchasers for resale are professionals, who need at most a modicum of protection.\textsuperscript{52} Thus

49. URSA § 36. It is to be noted that these aspects of merchantability do not apply to foreign markets. Buyer must expressly contract for such protection or look to the implied warranty of fitness for particular purpose. Sumner, Permain & Co. v. Webb & Co., 1 K.B. 55 (1922) (marketable in London where sold, prohibited by statute in Argentina where destined for resale; held to be of merchantable quality); Wilford Hall Laboratories v. Shoenfeld, 182 App. Div. 504, 169 N.Y.Supp. 912 (1st Dep't 1918) (buyer must make purpose of sale in foreign country known and receive seller's express warranty); Bencoe Exporting and Importing Co. v. Erie City Iron Works, 280 Fed. 690 (2d Cir. 1922) (boiler plates “for export” must be exportable).

50. “The ‘fair average’ quality recommended by the . . . Revised Uniform Sales Act seems to set too lofty a standard, if ‘fair average’ is construed, as it might conceivably be, to mean the average of all the goods that are made or sold.” Prosser, supra note 37, at 138. See Judge Learned Hand in McNeil & Higgins Co. v. Czarnikow-Rienda Co., 274 Fed. 397, 399 (S.D.N.Y. 1921) (merchantability “means a good enough delivery to pass generally under that description after full examination. ’Medium quality or goodness’ . . . seems to me perhaps too high a standard.”). The Draftsmen's Comments on URSA § 38 interpret “medium” as synonymous with “fair average.”


the medium quality required by the new Act would seem to give excessive protection where least needed.

Particularly does this criticism seem justified by the fact that the same remedies on breach of warranty are made available indiscriminately to all purchasers, whether for consumption or for resale, whether professional or amateur. When the excessive protection given the professional purchaser by the medium quality requirement is coupled with the extension to him of all the remedies available to the unprotected consumer, it would seem that the professional buyer's hand has been unduly strengthened. It is arguable that the purchaser for resale would be adequately protected if assured merely a passable grade of goods and only the right to rescind the sale if the goods are non-conforming, save where he is sued himself for consequential damages by an injured consumer. As it is, however, the URSA's undifferentiated approach to remedies for the professional purchaser accentuates the doubtful advisability of the blanket requirement of medium quality.

As the meaning of merchantability has been codified, its scope has been expanded, in the interest of consumer protection and in accordance with the better case law, to include food merchants. Specific inclusion of restaurant keepers ends a quaint anti-consumer notion derived from "innkeeper days" that food served in a restaurant is not the subject of a sale contract at all, but merely of a "service" and is thus not a source of warranty obligations on the part of the restaurant dealer. The real question, as the new Act recognizes, is not "sale" or "no sale," but rather what the good faith restaurant keeper

53. Though remedies on breach of warranty are beyond the scope of this comment, it may be noted that valuable steps have been taken in the URSA to protect the buyer by expanding the remedies available to him. Thus, the barbarous doctrine of "election" of remedies written into USA §69(2) has been eliminated, and buyer is in all cases under the URSA assured his action for consequential damages. URSA §§112-116. In addition he is given the right to "cover" by purchasing substitute goods and to recover from seller the difference between the cost of cover and the contract price together with incidental or consequential damages, but less any expense saved in consequence of seller's breach. URSA §113. Under URSA §77, on the other hand, seller is given valuable protection against surprise rejection by buyer for minor defects. Thus, "where buyer rejects a non-conforming tender which seller had reason to believe would be acceptable with or without money allowance the seller may if he gives seasonable notice have further reasonable time to substitute a conforming tender," and where the contract time of delivery has not expired, seller may give seasonable notice of his intention to cure and make conforming delivery within the contract time. For a complete discussion of remedies, see Comment, Remedies For Total Breach of Contract, p. 1360 supra.

54. URSA §38(1).

normally undertakes to deliver: clearly, food fit for consumption.\footnote{58}

The reference to service of food in restaurants is intended to indicate indirectly that any sort of sale of food by a merchant, whether in sealed container or otherwise, is within the warranty of merchantability. Thus will be deterred a short-sighted judicial penchant for confining the retail food dealer’s liability to fitness for buyer’s particular purpose.\footnote{57} This misconception has led frequently to denial of recovery to the consumer on the grounds that he could not reasonably have relied on the retailer’s knowledge of the fitness of the food.\footnote{58} Indeed, there has been a general tendency in warranty literature to treat food and drink as a separate category.\footnote{59} The new Act should serve to reintegrate food and drink as merely one “peculiarly poignant” aspect of the general consumer problem.\footnote{60}

Though the warranty of merchantability, unlike the warranty of fitness for particular purpose, does not apply to a casual non-merchant seller because he is not expected to stand behind his goods as would a professional, the new Act soundly extends the scope of merchantability to include sales by a non-merchant where a general guarantee is proclaimed.\footnote{61}

\footnotesize{56. A clear majority of the courts now find a sale and apply the warranties of the USA. See Prosser, supra note 37, at 152 n. 201.}

\footnotesize{57. The argument between Prof. Waite and Prof. Brown deals at length with the precedent and policy questions involved in holding the retail food dealer liable. Waite, supra note 5; Brown, The Liability of Retail Dealers for Defective Food Products, 23 MINN. L. REV. 585 (1939); Waite, Retail Responsibility—A Reply, 23 MINN. L. REV. 612 (1939).}

\footnotesize{58. The number of courts denying the retailer’s liability for the fitness for use of his goods is rapidly declining. For examples of cases denying liability even under the USA, see, e.g., Kirkland v. Great A. & P. Tea Co., 233 Ala. 404, 171 So. 735 (1936); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); Harrington v. Montgomery Drug Co., 111 P.2d 808 (Mont. 1941); Merriman v. Coca Cola Bottling Co., 17 Tenn. App. 433, 68 S.W. 2d 149 (1934). The overwhelming majority of the cases now hold the retailer liable, even where the goods are sold in sealed containers and all the more so when they are open to his examination. For collected cases, see Prosser, supra note 37, at 150 n.195, 151 n.196.}

\footnotesize{59. Llewellyn, supra note 8, at 404-8.}

\footnotesize{60. Llewellyn, supra note 7, at 704 n. 14.}

\footnotesize{61. “The use of the word ‘warrant’ without reference to any particular qualities, is equivalent to an assertion of general soundness. Sometimes the word ‘guaranty’ is used in the sense of ‘warranty’....” Bogert, supra note 16, at 17. The URSA in applying the warranty of merchantability to a “seller [who] is a merchant with respect to such goods” departs from the terminology of the USA where merchantability was implied if “the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not).” The change is not significant in view of the liberal interpretation generally given the phrase “by description” under the USA. See, e.g., Brandenberg v. Samuel Stores, 211 Iowa 1321, 3% N.W. 741 (1931) (“an A-No. 1 fur coat”); Inter-State Grocer Co. v. George W. Bentley Co., 214 Mass. 227, 101 N.E. 147 (1913) (order for “500 cases ½ oil sardines and 200 cases of ½ mustard sardines”); Ryan v. Progressive Grocery Stores, 255 N.Y. 358, 175 N.E. 105 (1931) (“Ward’s Bread”). URSA §7(1) defines “merchant” as a “person who by his occupation holds}
THE "NEW" SECTIONS

Remedial revision of the warranty sections of the old Act, however, is of only limited efficacy in augmenting consumer protection. And as a means of making possible the proper allocation of the burden of consumer's injury, mere revision of the USA is completely inadequate. To move further on both fronts the "new" warranty sections of the URSA lay fresh foundations of doctrine and policy.

Contractual Modification of Warranties and Remedies: the Disclaimer Problem

Nowhere has the need for doctrinal improvement become more apparent than in the matter of disclaimer clauses used to limit seller's warranty liabilities and to curtail buyer's remedies. The origins of the disclaimer problem are plainly discernible. Warranty being a matter of contract, the parties have been free, at least on the doctrinal level, to contract away warranty obligations as they please, and sellers have used their superior bargaining position to extricate themselves from their growing burden of warranty obligations. The disorganized and dependent consumer has had little alternative but to acquiesce, in this one-sided legal disarmament.

Typical of seller's effort is the omnipresent standard manufacturer's warranty clause: warranting against defective materials and workmanship (but not design), for a short period of time, usually 90 days, and providing a limited form of remedy on breach of warranty, e.g., repair or replacement of the defective part on condition that buyer return the part at his expense and abide by seller's decision as to whether or not the part is defective.

62. For general discussion of the disclaimer problem, see Notes, 31 Col. L. Rev. 1325 (1931); 23 Minn. L. Rev. 784 (1939); 1939 Wis. L. Rev. 459.
63. The rule is that a sale may be with or without warranty. Benjamin, Sales 708 (2d ed. 1920); Burdick, Sales 119 (3d ed. 1913); 1 Williston, op. cit. supra note 3, § 239a; Prosser, supra note 37, at 157-8. USA § 71 expressly sanctions the right of the parties to waive warranties.
64. Note, 23 Minn. L. Rev. 784-5 (1939).
66. An extreme case would be: A buys an automobile under standard warranty, and within 3 months of delivery, an axle breaks under normal driving and A is killed; his representative may be limited to return of the broken axle to the factory at his own expense and the obtaining of a new axle. There can be no recovery for the destruction of the remainder of the car or A's death—though the defective axle was the proximate cause of both, and the warranty of sound materials and workmanship has been breached. Despite the fact that such a non-warranty clause was held void as "repugnant to every conception of justice" as far back as 1920 in Mills v. Maxwell Motor Sales Corp., 105 Neb. 465, 181 N.W. 152 (1920), a clause purporting to limit buyer's remedy in exactly the same way is at present being used by General Motors Corp.—perhaps for psychological rather than legal effect.
common is the general disclaimer of “all warranties express or implied save those expressly provided for herein.”

The courts, sensitive to the position of buyers, have tended to construe disclaimer clauses strictly against seller, and by ingenious legal devices have often succeeded in vitiating their effect. Only rarely, however, have they refused to pay lip service to a theory which permits the parties to contract away all liability whatsoever. The result has been a contest of wits between draftsmen and courts with the need for concerted statutory control becoming increasingly apparent.

The new Act fulfills that need. Recognizing that non-warranty clauses or clauses limiting or substituting remedies are not in all circumstances undesirable and that a large measure of freedom of contract should be reserved to the parties, the new Act takes the approach that if the parties in good faith, without coercion or surprise agree to exclude implied warranties, they may do so. Such exclusion, however, must be in specific terms, and any ambiguity will be resolved against seller. The familiar general language of disclaimer may no longer be used successfully.

An understanding between the parties to

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67. See Vold, op. cit. supra note 5, at 468-70; Prosser, supra note 37, at 164; Note, 23 MINN. L. REV. 784, 785 (1939).

68. Upon the theory that implied warranties are imposed by law and not by agreement, certain courts will allow recovery on breach of the warranty implied, despite a provision purporting to limit seller’s obligations to the warranties expressly stated. Beldskevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927) (clause providing that “no warranties have been made” except those noted thereon, but recovery allowed on implied warranty of fitness for buyer’s purpose), and exclusion of warranties has been construed to mean only express warranties. Hardy v. G.M.A.C., 38 Ga. App. 463, 144 S.E. 327 (1928), noted in 42 HARV. L. REV. 710 (1929), 27 MICH. L. REV. 592 (1929); and statement in a contract that it contains the entire agreement does not exclude implied warranties. Hughes v. National Equipment Corp., 216 Iowa 1000, 250 N.W. 154 (1933).

69. Note, 23 MINN. L. REV. 784, 796 (1939). One lower New York court has declared that disclaimer clauses will not be tolerated in retail sale of food because they are against “natural justice and good morals” where the public health is involved. Linn v. Radio Center Delicatessen, 169 Misc. Rep. 879, 9 N.Y.S. 2d 110 (N.Y. City Ct. 1939); cf. American Hoist & Derrick Co. v. Frey, 127 La. 183, 53 So. 486 (1910) (exclusion of warranties regarding latent defects in machinery would be contra bonas moras).

70. Bogert and Fink, supra note 65, at 413; Vold, op. cit. supra note 5, at 470-1. A few states have passed statutes in an attempt to protect both buyer and seller with respect to dealings in certain commodities. See, e.g., OKLA. STAT. §8375 (seeds) (1931); NORTH CAROLINA CODE §4690 (fertilizer) (1931); but only North Dakota has expressly limited the waiver of any of the implied warranties provided for in the USA. NORTH DAKOTA COMP. LAWS §§ 5991a, 5993a (Supp. 1925).

71. URSA §40(2). Just how specific the disclaimer of implied warranties need be under the URSA the Draftsmen’s Comments do not say. A strict construction of “specific,” however, might well force seller to enumerate the various listed aspects of merchantability found in §38(2). The impact of the new Act upon disclaimer drafting of course will be profound, but in all likelihood considerable inertia will appear because of the fact that disclaimer clauses are drafted with an eye towards creating the desired psychological effect upon the layman ignorant of the law.

72. For illustrative cases collected, see Bogert, op. cit. supra note 30, at 553 n. 74.
remove all implied warranties from their agreement will be inferred where they use language such as "with all faults" or "as they stand." And where buyer examines the goods during the bargain or, upon demand by seller, refuses to examine, there are no implied warranties as to patent defects which in the circumstances should have been revealed by examination.

But more important is the provision that the implied warranties may be circumstantially negatived or modified by "course of dealing or course of performance or usage of trade." Though these three factors are made a part of every sale when consistent with the express agreement of the parties, their repetition here is important as a matter of emphasis, for it is by reference to them that the new Act in large measure achieves the flexibility that particularly characterizes its warranty provisions. The URSA aims at creating a level of protection sufficient for the uninformed consumer. From the point of view of giving protection where protection is needed, however, it is obvious that technically expert industrial purchasers or, for that matter, the ordinary consumer who buys at a sheriff’s sale, auction, or from a junk dealer should not benefit from the high level of protection given the inexpert consumer in usual transactions through the implication of warranties. By relating these warranties to trade usage and course of dealing or performance the new Act makes allowances for such aberrational types of buyers and moulds seller’s obligations appropriately. Thus in those special areas of our economy where caveat emptor is still functionally sound and implicit in the situation, the implied warranties need not, and presumably will not be raised.

While reserving a large degree of control to the parties in altering implied warranties, the new Act makes all disclaimers of express warranties inopera-tive. In so doing it pursues a logical progression dictated by definition, for if express warranties are "a part (or basis) of the agreement between the parties," a stipulation in the same agreement negativing their existence is

73. URSA § 40(2) (a). Hitherto, the courts have not hesitated to construe such language as a complete disclaimer of all warranties. See, e.g., Rogers v. Hale, 205 Iowa 557, 218 N.W. 264 (1928) (sale of second-hand taxicabs); Union Trust Co. v. Detroit River Transit Co., 162 Mich. 127, 127 N.W. 780 (1910); Alexander v. Sola, 185 N.Y. Supp. 869 (Sup. Ct. 1921); Industrial Rayon Corp. v. Clifton Mills, 310 Pa. 322, 165 Atl. 385 (1933) (sale of inferior yarn).

74. URSA § 40(2) (b). For discussion of the effect of inspection upon implied warranties, see, Prosser, supra note 37, at 153-7.

75. URSA § 40(2) (c).

76. See note 20 supra. The USA provided in § 71 that implied warranties might be negatived by "course of dealing between the parties, or by custom, if the custom be such as to bind both the parties to the contract or the sale." But the old Act was gravely deficient in that it failed to define custom or course of dealing or to provide for the manner in which these factors were to be proved. The URSA rectifies the deficiency in §§ 21 and 22. Particularly important is the provision, designed to prevent surprise, for advance notice to the other party where evidence of trade usage is to be introduced. Id. at § 21 (6).

77. Isaacs, supra note 52. The author cogently criticizes the USA for its undifferentiated approach to sales to lay consumers and to manufacturing purchasers.

78. URSA § 40(1).
fundamentally inconsistent. Though this logic would have been equally valid under the old Act, the expression of it in the URSA alters the almost universally recognized doctrine that all warranties both express and implied may be disclaimed.  

A further aspect of the disclaimer problem, the contractual deprivation of buyer's remedies, is covered in the new Act. Buyer is to have a definite baseline of remedy at all events, for the URSA provides that if the "circumstances cause the exclusive or limited remedy to fail of its essential purpose" the regular remedies provided in the Act may be had.  

Moreover, the URSA, taking the forthright position that those who would sell must do so in good faith and conscience, explicitly imposes the obligation of good faith in every sale and empowers the court to refuse to enforce an unconscionable contract or clause and to substitute "such provision as would be implied . . . if the stricken clause had never existed." For seller this means that he must leave buyer a remedy which will insure him the "substantial value of the contract." Consequential damages may be limited only so far as seems conscionable, and liquidated damages must be reasonable in the "light of anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the convenience . . . of otherwise obtaining an adequate remedy." However, within these limits the parties are left wide discretion in arranging additional or substituted remedies appropriate to their particular situation.  

Thus the potent threat to the consumer created by seller's ruthless abuse of
contract doctrine is brought to a two-fold impasse. Disclaimer clauses, effective henceforth only in regard to implied warranties, must strike the court as fair and reasonable, and buyer at all events is to have adequate remedy. Freedom of contract has been necessarily and creatively limited in the public interest.

Protection of Third Party Beneficiaries of Warranties and the Sub-vendee

The generally beneficial importation of contractual concepts into the law of warranty has unfortunately introduced the awkward doctrine of “privity”—a notion which has operated frequently as a cordon sanitaire between seller and injured consumer. Thus members of buyer’s family, his guests, licensees or business invitees, lacking direct contractual relations with seller have been denied warranty protection. Furthermore the sub-vendee has been forced to sue his immediate vendor, and imposition of liability upon the offending party often depended upon a wasteful and cumbersome chain of actions rendered fragile by the possibility of insolvency of any intermediate vendor.

Doctrine has it that by the mere act of resale a middle-man does not manifest an intention to pass his warranty action against his supplier along to the consumer. Further, since warranty, like an insurance contract, is said to be a contract of personal indemnity, it has been urged that the purchaser by gift or resale should not be allowed to enlarge the scope of his indemnitor’s liability.

Privity has forced courts to listen to tortuous agency arguments and has

87. Privity of contract traditionally has been the sine qua non of a contract action for breach of warranty whether express or implied. Notes, 18 Corn. L. Q. 445, 451 (1933), 14 Tulane L. Rev. 470 (1940). See, e.g., Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942). For extensive collection of cases, see, Bogert, op. cit. supra note 30, at 556 n. 75. In recent years there has been an increasing trend to expand warranty liability in favor of subpurchasers and other remote parties injured through defects in the goods. Vol. op. cit. supra note 5, at 474-5.


89. In Kasler & Cohen v. Slavouski, [1928] 1 K.B. 78, B. bought dyed rabbit skins from A., made fur collars therefrom, and resold to C.; C. resold to D., and D. to E., a draper. E. then sold a coat with one of the fur collars attached to F., a customer, for her own wear. F. developed “fur dermatitis,” owing to antimony in the fur, and sued E. for damages for breach of warranty. E. gave notice of the action to D., D. to C., C. to B., and B. to A. E. defended and judgment was given against him for £67 and £248 costs. E. claimed this sum together with his own costs, amounting to £643 in all, from D. D. recovered this amount from C. together with a further sum for his costs. C. claimed from B., and B. having paid £654 for £45 for costs, sued A. for £699 damages for breach of warranty. B. recovered for the damages originally paid to F., the costs of both sides in that action, and for the costs incurred by themselves and C. and D.

Williston, op. cit. supra note 3, at § 244.

90. See, e.g., Wadleigh v. Howson, 88 N.H. 365, 189 Atl. 865 (1937) (warranty of wholesomeness ran to husband because wife acted as his agent in purchasing pork pie which was contaminated).
led to circumventive rationalizations: e.g., the warranty runs with the goods like a running covenant;92 or, more realistically, actual contractual relationship is found between seller and remote parties by virtue of seller's advertising representations and the injured party's action-in-reliance thereon.93 The courts have been most willing to forsake the requirement of privity in regard to potentially dangerous products,94 and the public policy, always at least implicit in such cases, has increasingly become the explicit basis of decision.

The new Act knifes through the substantative barricade of privity and extends warranties to those whose "relationship to him [buyer] is such as to make it reasonable to expect that such person may use, consume or be affected by the goods..."95 Nor may seller lessen his warranty obligations to such remote parties except by lessening them to his immediate vendee;96 and even this expedient may be condemned by the court if buyer is deprived of an adequate remedy. It is apparent that the URSA removes the privity requirement only as regards the consumer for use and not as regards the purchaser for resale. The latter may sue the original manufacturer or party ultimately responsible only where his immediate vendor has resold under a warranty similar to that extended by the original vendor.97 Of course, where a purchaser for resale is injured in person by defective goods, he would then be a consumer for use to that extent and would be given recourse against the original vendor regardless of privity of contract or the extension by his immediate vendor of a similar warranty.

95. URSA § 42.
96. Ibid.
97. URSA § 42 provides: "A warranty whether express or implied extends to any natural person who is in the family or household of the buyer or who is his guest or one whose relationship to him is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." (Italics added.) URSA § 120 gives a subvendee a direct action against any person subject to impleader under URSA § 119, and the latter section provides: "(1) Where a buyer resells and is sued for any breach with regard to which he would have an action over against his seller" he may implead his seller. Thus, where no personal injury is involved, and a remote third party seeks to hold the original seller liable for breach of a warranty of resalability, he must show that his immediate vendor resold to him under a warranty similar to that extended by the original seller. A provision in the original sale contract that no warranty of resalability was extended to subvendees should suffice to protect the original seller in such an instance, whereas, a provision negativing fitness for use or consumption, of course, would be ineffective.
Having extended warranty protection to remote parties, the new Act provides procedural machinery whereby larger social objectives may be attained: the expeditious imposition of loss upon the link in the production and distribution chain which is best able to pay, to spread the burden via price and insurance, and to police quality standards; and the safeguarding of the links which are both innocent and unable to bear the shock of litigation.\textsuperscript{98} Depending on the pattern of distribution, the dominant and responsive link may be manufacturer, wholesaler or retailer.\textsuperscript{99}

The need for a cumbersome chain of actions has been eliminated and the remote party may sue his warrantor directly without first seeking satisfaction from his immediate vendor.\textsuperscript{100} In the normal course of events the financially weak retailer, to whom litigation may be ruinous and from whom small satisfaction may be expected, will be by-passed. When he is subjected to suit, the URSA gives him the protection of modern impleader machinery, enabling him to vouch-in his seller in any instance where he is sued on a warranty similar to that undertaken by his seller.\textsuperscript{101} Short of express immunization, which may be objectionable on constitutional grounds,\textsuperscript{102} the weak link is thus protected as fully as possible. Where, however, the remote seller cannot be reached, the burden must fall upon the retailer who, in all likelihood, is better able to bear the loss than the consumer.\textsuperscript{103}

\textit{Cumulation and Conflict of Warranties}

A distinct gain in consumer protection is achieved with the provision in the URSA for a simple means of resolving conflicting warranties.\textsuperscript{104} The old Act offered no rational solution for this problem. The "patent or other trade name" exception, alluded to above, led to mutually exclusive treatment of warranties that in many instances should have been considered consistent and cumulative.\textsuperscript{105} Paradoxically, warranties by description and sample were made automatically cumulative when in actuality they might be completely inconsistent.\textsuperscript{106} The only contribution made by the old Act in this regard was the abolition of the primitive doctrine that express warranties automatically preclude all others.\textsuperscript{107}

The URSA, indorsing the policy that express and implied warranties

\textsuperscript{98.} Llewellyn, supra note 7, at 704 n. 14; Llewellyn, \textit{op. cit. supra} note 2, at 341.
\textsuperscript{100.} URSA § 120.
\textsuperscript{101.} URSA § 119. The URSA adopts by reference the impleader procedure which "is or may be provided in the Federal Rules of Civil Procedure."
\textsuperscript{102.} Llewellyn, supra note 7, at 704 n. 14; Llewellyn, supra note 8, at 407.
\textsuperscript{104.} URSA § 41. 
\textsuperscript{105.} See supra note 31 and text thereto.
\textsuperscript{106.} USA § 14.
\textsuperscript{107.} USA § 15(6).
wherever possible shall cumulate against seller, provides that in cases of conflict the intention of the parties is to determine which warranty is dominant. To aid in ascertaining intention, technical specifications displace conflicting samples or descriptive language, and samples from an existing bulk in turn displace general descriptive language. Express warranties exclude inconsistent implied warranties with the exception of the implied warranty of fitness for particular purpose. The latter exception is well founded. If the intention of the parties is to govern conflicts, this particular warranty, the only one in which intent (i.e. buyer reliance) is a *sine qua non*, naturally should displace all others.

**Conclusion**

The early transition from tort to contract freed the warranty from the trammels of negligence and reasonable care and has enabled courts to mould warranty principles to conform to the changing needs of the economic community. The inevitable result of this transition, however, has been to bring warranty up against certain contract concepts which have inhibited and retarded its development—notably privity and the contract principles which have nurtured the disclaimer problem. One function of the new Act is to free warranty from these conceptual deterrents. Privity is dead. Freedom of contract is whittled down when brought face to face with public interest.

But more important is the spirit of the new Act. Good faith commercial dealing is the criterion, and those who would sell must measure up to it. High standards have been established from which departure may be made only within the bounds of conscionableness and subject always to judicial conceptions of fairness. These high standards are not rigid, however, for the principles of warranty now incorporate trade usage, course of dealing and performance and the particular circumstantial setting of the transaction. Thus, although the Act is pointed towards the waif of our business society, the consumer, it is designed to give judicial latitude in withholding protection from professional buyers when the full protection of the Act appears unjustified. Even that dour gentleman *caveat emptor* finds his proper place within the ambit of the Act. It is this very flexibility, the emphasis upon trade norms, good faith commercial standards, and conscionable dealing, which appears most promising in the Act.

But the job is only begun in the writing of the Act. The legal tools have been sharpened and the doctrinal path cleared. In the last analysis, protection of the consumer and proper allocation of the burden of his injury will, as in the past, depend upon the case-to-case wisdom of the courts.

108. URSA § 41(a)(b)(c).