

1963

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Richard D. Cudahy, *Limitation of Warranty Under the Uniform Commercial Code*, 47 Marq. L. Rev. 127 (1963).

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## LIMITATION OF WARRANTY UNDER THE UNIFORM COMMERCIAL CODE

RICHARD D. CUDAHY\*

That the law of warranty is, and probably always will be, in a state of flux is hardly news.<sup>1</sup> Part of this instability, or dynamic quality if you will, is represented by the attempt on one hand to increase the burden of warranty liability—to find implied warranties more easily, to restrict the requirement of privity—and, on the other hand, to devise means, through disclaimers, limitations of remedy and other like devices, to restrict the burden of warranty liability. The efforts to restrict liability through contractual disclaimer may reasonably be expected to grow as traditional limitations, such as that of privity, are broken down.

For this reason, although there is no reason to expect that enactment of the Uniform Commercial Code in Wisconsin will effect far-reaching or radical changes in the law governing liability for breach of sales warranties, lawyers will be well advised to acquaint themselves with the rather detailed provisions of the Code governing warranties and, in particular those sections pertaining to disclaimer, exclusion or modification of warranties and limitation of remedy for breach of warranty. These sections (some details aside) are without specific precedent in the Uniform Sales Act except for the general provisions of the Uniform Sales Act, section 71,<sup>2</sup> which allows modification of rights and duties under sales contracts by agreement of the parties. The purpose of this article is to analyze disclaimer, exclusion or modification of warranty and limitation of remedy for breach of warranty of quality under the Code and to summarize in what respects changes in current law seem to have been effected. Warranties of *title* and their disclaimer, governed by Uniform Commercial Code Section 2-312, will not be covered here.

Apart from changes which may be more or less clearly deduced from the new statute, we may assume that the break with the prior statutory framework will provide an opportunity of a sort for courts

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<sup>1</sup>Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U. C. L. A. L. REV. 281 (1961).

<sup>2</sup>Wis. STAT. §121.71 (1961).

to pursue their inclinations in departing from precedents which they already regard as undesirable. Thus in *Hall v. Everett Motors Inc.*,<sup>3</sup> wherein an automobile sold under a standard manufacturer's warranty of replacement and repair of defective parts coupled with disclaimer of implied warranties, was damaged by fire, possibly attributable to a defective part, the court upheld the disclaimer and denied recovery of consequential damages but said:

This is not the kind of an agreement which commends itself to the sense of justice of the court. It really means that the automobile is sold 'as is' subject to the honest satisfaction of the non-resident manufacturer that the defect was something for which it is liable. We do not need to decide whether, to obtain the benefit of this narrow warranty, the buyer was under the obligation first to return the ruined automobile to the factory, wherever that is. We hope should a similar case arise under the Uniform Commercial Code we shall not be so bound by precedent.<sup>4</sup>

The questions presented in sales warranty cases involving disclaimer, exclusion, modification and limitation of remedies are governed primarily by Uniform Commercial Code section 2-202 (pertaining to parol evidence), section 2-302 (pertaining to unconscionability), section 2-316 (pertaining to exclusion or modification of warranties), section 2-317 (pertaining to cumulation and conflict of warranties), section 2-718 (pertaining to liquidation or limitation of damages) and section 2-719 (pertaining to contractual modification and limitation of remedy).<sup>5</sup> Of these, sections 2-718 and 2-719 apply generally to remedies for breach of sales contracts, but, of course, this subject matter includes remedies for breach of warranty.<sup>6</sup>

Section 2-302 (which provides courts with express power to measure the "bargain" of the parties against their own informed standard of justice<sup>7</sup> and eliminates the necessity of recourse to circuitous techniques to void transactions which are not true bargains at all) is generally applicable to all sales contracts and portions thereof. Section

<sup>3</sup> 340 Mass. 430, 165 N.E. 2d 107 (1960).

<sup>4</sup> *Id.* at 434, 165 N.E. 2d 109.

<sup>5</sup> As enacted in Wisconsin, the Code sections pertinent herein differ only in some formal details from the 1962 Official Draft as proposed by The American Law Institute and the National Conference of Commissioners on Uniform State Laws, referred to throughout this article. The corresponding Wisconsin statute numbers are as follows:

<i>Uniform Commercial Code 1962 Draft</i>	<i>Wisconsin Statute</i>
2-202	402.202
2-302	402.302
2-316	402.316
2-317	402.317
2-718	402.718
2-719	402.719

<sup>6</sup> Section 316(4) expressly refers to §§2-718 and 2-719.

<sup>7</sup> But §2-302(2) contemplates that the courts shall, in determining an issue of unconscionability, hear *evidence* of commercial practice and commercial experience bearing on the question.

2-302 itself may be operative over and above, and independently of, any more specific Code provision seeking to promote fairness in a particular situation. Thus, one commentator has stated with respect to the effect of the section on automobile warranties:

In an action for breach of warranty in a state without the Code, a court would probably have no recourse except to recognize Dealer's defense based on the disclaimer, for the contract's language leaves little room for interpretation. Nor would an argument based on lack of mutual assent be available. But under section 2-302 relief from this oppressive contract is more easily obtained. Even assuming that the disclaiming warranty meets the standards imposed by Section 2-316, Buyer would still have an argument based on conscionability. If he can prove that free choice was precluded because of a uniformity among leading car manufacturers in the type of warranty offered, the otherwise valid disclaimer should be stricken under Section 2-302.<sup>8</sup>

The Official Comment to section 2-302 casts some doubt on this hopeful interpretation stating that, "The principle is one of the prevention of oppression and unfair surprise . . . and *not of disturbance of allocation of risks because of superior bargaining power.*"<sup>9</sup> [Emphasis added] Uniformity of automobile warranties would presumably involve the "allocation of risks because of superior bargaining power" rather than "oppression," although the latter might merely be a moral characterization of the former (which sounds in economics). "Unfair surprise," of course, does not necessarily relate to disparity of bargaining power, and "oppression" probably refers to the injustice worked by ambiguous or concealed provisions and has no direct relation to the balance of bargaining power.<sup>10</sup>

Moreover, the concept of unconscionability is incorporated in express terms in section 2-719(3) governing consequential damages. Since the whole problem of unconscionability through inadequate notice to the buyer, through disparity in bargaining power of the parties or otherwise is basic to the specific questions raised by disclaimer, exclusion or modification of warranties and by limitation of remedies for breach of warranties, the mandate provided by section 2-302 to refuse to enforce unconscionable contracts, even though broad and necessarily ill-defined, must permeate the analysis of all such questions.

As the current Official Comments to the Uniform Commercial Code now make clear, the scheme of the Code is to provide in sections 2-316 and 2-317 for the exclusion or modification of *warranties* (and under

<sup>8</sup> Comment, *Unconscionable Contracts Under the Uniform Commercial Code*, 109 U. P. A. L. REV. 401, 420 (1961); See Note, 46 CORNELL L. Q. 607 (1961).

<sup>9</sup> UNIFORM COMMERCIAL CODE §2-302, comment 1 (Official Text 1962). But this comment also sets forth a conceivably inconsistent standard in that the "*basic test* is whether . . . the clauses involved are so *one-sided* as to be unconscionable. . . ." (Emphasis added.)

<sup>10</sup> See Note, 74 HARV. L. REV. 630, 632 (1961).

those sections it may be found that a warranty has not in fact been created); and in section 2-719 (or section 2-718) to provide for the limitation of remedies for breaches of warranties which *have, in fact, been created*.<sup>11</sup> In the analysis of a disclaimer problem, therefore, the analyst must first consult sections 2-312 through 2-317 to determine whether liability under a warranty exists and, if so, whether the remedy for its breach has been validly limited under section 2-719 (or section 2-718). In practice, the two problems will usually be found to be intimately related.

### I. *Disclaimer of Express Warranties*

#### A. ANALYSIS

In the 1952 Draft of the Commercial Code, it was, in effect, impossible to disclaim express warranties. In that Draft, section 2-316(1) read: "If the agreement creates an express warranty, words disclaiming it are inoperative."<sup>12</sup> The intent of this language presumably was to preclude entirely the disclaimer of express warranties and to leave the seller to the protection provided by limitation of remedy under sections 2-718 or 2-719 only. Professor Honnold, in his commentary provided for the Report of the New York Law Revision Commission in 1955, discussed the alleged difficulties of construction of the then language of section 2-316(1) at some length and concluded with the following comment which included a suggestion for a revised version of subsection (1).

It must be granted, however, that the foregoing reading of the Code is not free from doubt. The difficulty is posed by the peculiar language of Section 2-316(1) that 'if the agreement *creates* an express warranty, words disclaiming *it* are inoperative.' The difficulty is enhanced since this language suggests that the agreement is to be broken apart and the express warranty construed without reference to the disclaimer clause, whereas the basic theory which would preserve the express agreement must be the diametrically opposite view that each part of the agreement must be given some effect. If the thought underlying this provision is that suggested in this memorandum, it probably could be more readily communicated by language like the following:

(1) To the extent possible, an agreement shall be so construed as to give effect to each part, and words or conduct which otherwise would create an express warranty shall not be denied effect by words of disclaimer.<sup>13</sup>

<sup>11</sup> UNIFORM COMMERCIAL CODE §2-316, comment 2, and §2-719, comment 3 (Official Text 1962).

<sup>12</sup> UNIFORM COMMERCIAL CODE §2-316(1) (Official Text 1952).

<sup>13</sup> 1 Honnold, *Study of the Uniform Commercial Code*, REPORT OF N. Y. LAW REVISION COMM. 406 (1955), referring also, by way of footnote, to *Alaska Pacific Salmon Co. v. Reynolds Metals Co.*, 163 F. 2d 643 (2d Cir. 1947) wherein Judge Frank recorded his opinion that the then current version of §2-316(1) was inconsistent with existing law and Judge Clark's view to the contrary.

After much pulling and hauling, the section finally emerged in the 1958 Draft in the heavily clouded, if not meaningless, form which is now enshrined in the statutes as follows:

Section 2-316. Exclusion or Modification of Warranties.

(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.<sup>14</sup>

The section thus seems to say that, if there is no parol evidence problem, an express warranty will be given as much effect against a disclaimer as reasonable interpretation will permit and that, in any event, the warranty will not be limited or negated if that result is "unreasonable." Courts are thus instructed to use their best efforts to salvage an express warranty, or at least some significant aspect of it, by reconciling it in some "reasonable" manner with language of negation or limitation. If the language of negation or limitation is not "reasonably" reconcilable with the warranty, then the disclaiming language must give way. If only because of the verbal miasma created in the latter Drafts the current version represents a considerable stride (backward) from Professor Llewelyn's straightforward 1952 Draft.<sup>15</sup>

In the event that the express warranty is subject to attack on the grounds that it is excluded by the parol evidence rule, a new set of considerations, incorporated in section 2-202 of the Code, become relevant. Parol warranties may be excluded as under the prior law, especially where a merger clause is present.<sup>16</sup> The Code, however, attempts to make clear that the court in the ordinary case is to consider all relevant extrinsic evidence (including evidence of promises, representations, prior dealings, trade usage, reliance of the buyer and other matters going to the entire commercial setting) before deciding whether a written contract is an integration not to be varied by parol evidence.<sup>17</sup> With respect to *consistent* additional terms, the "intent" of the parties as it appears in the total business context is the controlling consideration, and the written agreement may be explained or supplemented by

<sup>14</sup> UNIFORM COMMERCIAL CODE §2-316(1).

<sup>15</sup> The late Karl Llewelyn, whose force of character matched his intellect, was the principal draftsman of the Sales Article (article 2) of the Uniform Commercial Code.

<sup>16</sup> See *Ady v. Barnett*, 142 Wis. 18, 124 N.W. 1061 (1910); *Valley Refrigeration Co. v. Lange Co.*, 242 Wis. 466, 8 N.W. 2d 294 (1943).

<sup>17</sup> UNIFORM COMMERCIAL CODE §2-202, official comment (Official Text 1962); Note, *Warranties, Disclaimers and the Parol Evidence Rule*, 53 COLUM. L. REV. 858 (1953); Patterson, *1 Study of the Uniform Commercial Code*, REPORT OF N. Y. LAW REVISION COMM. 597, 598 (1955), states that the chief purpose of §2-202 is to "loosen up" the presumption that a writing (apparently complete) is a total integration . . . ."

such terms unless the parties *intended* the writing to be complete and exclusive. In addition section 2-202 departs from Wisconsin law in that evidence of course of dealing,<sup>18</sup> usage of the trade or course of performance<sup>19</sup> may be accorded weight without a showing of "ambiguity" in the written contract.<sup>20</sup>

In the leading Wisconsin disclaimer case, *Valley Refrigeration Co. v. Lange Co.*,<sup>21</sup> an alleged warranty of fitness for a particular purpose was excluded by a merger clause (invoking the parol evidence rule) to the effect that the sales contract contained the entire proposed agreement between the parties and that no agreements, promises or understandings not contained in the written agreement were to have effect. Under the particular facts of the case, there seems to be nothing in section 2-202 which would produce a different result under the Uniform Commercial Code. As will be shown later, however, a different result based on the application of the Code to *implied* warranties might now be reached (assuming the transaction, in fact, created a warranty of fitness under section 2-315).

In *Ady v. Barnett*,<sup>22</sup> the buyer, as a defense to an action for the purchase price of certain goods, claimed that the goods were bought with the understanding that they were not to be paid for unless sold. The court held that, in the absence of fraud or mutual mistake, proof of such antecedent or contemporaneous agreements between the parties could not be received. Under the Code, evidence as to these matters ought to be received to show whether or not the written agreement was in fact what the parties intended to constitute their entire deal. Again under the facts of the case there is nothing to indicate that a different *result* would have been reached under the Code, but there would have been greater freedom to prove or disprove the fact of integration by written contract.

Even though the express warranty is shown to have survived the exclusionary efforts of the seller under section 2-316, the parties are able to limit remedies under section 2-719. Several lower-court decisions in Pennsylvania indicate how this result has been reached under

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<sup>18</sup> Course of dealing (conduct of parties in prior transactions) is defined in UNIFORM COMMERCIAL CODE §1-205(1).

<sup>19</sup> Course of performance (conduct with respect to prior deliveries under the instant contract) is defined in UNIFORM COMMERCIAL CODE §2-208(1). Course of performance controls both course of dealing and usage of trade, UNIFORM COMMERCIAL CODE §2-208(2). As between the latter, course of dealing controls, UNIFORM COMMERCIAL CODE §1-205(4).

<sup>20</sup> Cf. *Engeldinger v. Stevens*, 132 Wis. 423, 112 N.W. 507 (1907) (absent ambiguity in the order, evidence of custom of dealer not admissible); *Chicago, I. & L. Ry. v. Peterson*, 168 Wis. 193, 169 N.W. 558 (1918) (proof of alleged custom negating primary liability of shipper for freight charges not admissible).

<sup>21</sup> Note 16 *supra*.

<sup>22</sup> *Ibid.*

the Code in effect in that state. In *Magar v. Life-Time, Inc.*,<sup>23</sup> an action for breach of contract, *not involving personal injury*, in which defendant (who undertook to plaster the four exterior walls of plaintiff's house) allegedly failed to provide material up to sample and to apply the material properly, language limiting the home-owner's remedy was held enforceable. Since this was not a sales case, the court did not directly apply the Uniform Commercial Code but indicated that the provisions of sections 2-719 were relevant by analogy. The language of warranty and limitation of remedy, which was upheld, was as follows:

Contractor guarantees that all materials furnished by it will be of standard quality free from defects and will be installed or applied in a good and workmanlike manner for a period of one year from date of installation. The liability of the Contractor for defective material or installation under this guarantee is hereby limited to the replacement or correction of said defective material and/or installation, and no other claims or demands whatsoever shall be made upon, or required to be allowed by the Contractor.<sup>24</sup>

Section 2-719(3) pertaining to the limitation or exclusion of consequential damages permits such limitation or exclusion so long as the result is not "unconscionable." The unconscionability concept is given more specific application through the provision that limitations upon consequential damages for *personal injury* inflicted by consumer goods are to be deemed *prima facie* unconscionable. The distinction made by the Code between limitation of damages for personal injury and those for commercial loss has no specific or express precedent in Wisconsin, but would seem to follow the trend of judicial decisions, particularly in the food cases (where disclaimers or limitations of remedy are seldom resorted to)<sup>25</sup> and the automobile cases (where such restrictions have been under attack).

The Wisconsin leading precedent in the field of modification of remedy is middle-aged but appears consistent with section 2-719. Thus, in *Renne v. Volk*<sup>26</sup> the sales contract provided that, in the event buyer instructed seller not to ship, the seller had an option to ignore the instruction and deliver the goods to a common carrier for shipment. Based on a repudiation by the buyer and shipment under this provision by the seller, seller brought suit for the purchase price of an acetylene

<sup>23</sup> 187 Pa. Super. 143, 144 A. 2d 747 (1958).

<sup>24</sup> *Id.* at 146, 144 A. 2d at 748; cf. *Willman v. American Motor Sales Co.*, 44 Erie Leg. J. 51 (Pa. 1961), 3 B. C. IND. & COM. L. REV. 602, 611 (1963) (parts' replacement warranty and disclaimer of all other warranties insufficiently specific under Uniform Commercial Code 1952 Draft to avoid consequential damages). *Denkin v. Sterner*, 10 Pa. D. & C. 2d 203, 70 York Leg. Rec. 105 (1956) (reading the unconscionability provisions of §2-719 in connection with §2-718); *Eimco Corp. v. Joseph Lombardi and Sons*, 193 Pa. Super. 1, 162 A. 2d 263 (1960) (parts' replacement warranty and exclusion of consequential damages upheld under Uniform Sales Act).

<sup>25</sup> Note, 109 U. PA. L. REV. 453, 458 (1961).

<sup>26</sup> 188 Wis. 508, 205 N.W. 385 (1926).



farm lighting plant. The court, in upholding seller's claim for the purchase price, held that the buyer might validly waive his right to cancel the contract (and thereby also waive his right to limit seller to a remedy in damages). Although the case does not, strictly speaking, concern itself with a breach of warranty and, in effect, results in a liberalization rather than in a limitation of remedies, it is clearly consistent with the principle incorporated in section 2-719 that the parties may, within reason, modify the remedies provided them by statute.

In the area of *warranties of description*, the Code, as to disclaimer, does seem to provide the basis for some changes in existing Wisconsin law. This conclusion is based on the classification by section 2-313(6) of such warranties as *express* warranties coupled with the barriers raised by section 2-316(1) against limitation or negation of express warranties.<sup>27</sup> Since, as indicated above, the meaning of section 2-316(1) is murky, its effect on warranties of description partakes of its general obscurity. Perhaps, however, the scheme of these sections would result in the overruling of the Wisconsin "seed" cases (which have their counterparts in other states as well).

In the leading case of *Leonard Seed Co. v. Crary Canning Co.*<sup>28</sup> the seller contracted to furnish seed for "Advancer" peas, and, upon the crop's being planted and the peas sufficiently matured, it was found that they did not conform to the contract description. The contract of sale contained a provision that the seller gave no warranty, express or implied, that the seed peas furnished would conform to the contract description. The court, in holding for the seller on a counterclaim by defendant-buyer for consequential damages for loss of the crop contracted to the defendant canning company by its sub-vendee farmers, gave full effect to the disclaimer. In so holding, the court said:

Plaintiff plainly undertook to relieve itself from liability in case of intermixture, and defendant agreed that it should be relieved. \* \* \* If it be conceded that the contract is one-sided, it must also be conceded that the parties had a right to make a one-sided contract if they saw fit.<sup>29</sup>

This is a forthright statement, if ever there was one, of the principles of freedom of contract. Unfortunately, however, the court makes little attempt to analyze how much freedom, if any, the buyer had to purchase "Advancer" seeds without such a disclaimer. There is evidence that it was the custom of seed suppliers to disclaim warranties of description.<sup>30</sup> This being the case, we are probably not talking about a

<sup>27</sup> Section 2-313(b) provides: "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the description."

<sup>28</sup> 147 Wis. 166, 132 N.W. 902 (1911).

<sup>29</sup> *Id.* at 169, 132 N.W. at 903.

<sup>30</sup> See *Hoover v. Utah Nursery Co.*, 79 Utah 12, 7 P. 2d 270 (1932); *Ross v. Northrup, King & Co.*, 156 Wis. 327, 144 N.W. 1124 (1914).

dickered deal at all but about the right of the seed industry to impose the risk of misdescription upon individual buyers rather than distributing it to the agricultural community through absorption of this risk into its own costs and a consequent upward price adjustment to all buyers. Under modern conditions, at least, this risk could presumably be equalized through recourse to liability insurance.

*Ross v. Northrup, King and Co.*<sup>31</sup> reaches the same result as the *Leonard Seed*<sup>32</sup> case and turns both upon express disclaimer and upon general custom of the trade not to warrant. These cases are strongly influenced by the idea of liability through fault since the essential characteristics of seeds are latent and incapable of verification until the seeds are planted, germinate and sprout. Therefore, it is argued that the seller should be permitted to avoid warranty responsibility for the description of the seeds, which he could not reasonably be expected to assure even with the highest degree of care. As noted above, risk-distribution theory would ignore this rationale (which, in any event, departs from the concept of warranty as imposing strict liability) and would spread the risk to the entire agricultural community through liability insurance. Presumably, section 2-316 could be used to implement this latter theory and overrule the Wisconsin cases since limitation or negation of a warranty of description of seeds would seem to be "unreasonable" within the meaning of section 2-316(1) unless buyer and seller were professionals of roughly equivalent bargaining power.<sup>33</sup> On the other hand, equivalence of bargaining power might be shown to exist in varying degrees in either of the Wisconsin cases cited since neither case involved farmers as buyers bargaining for themselves.

Under section 2-719 (or section 2-718) a seed supplier might perhaps conscionably limit consequential damages resulting from misdescription since one of the arguments for exculpating sellers in this situation is the need for protecting them against large losses resulting from relatively small purchases. Again, seemingly, the availability of liability insurance should be a governing consideration.

#### B. SUMMARY (EXPRESS WARRANTIES)

Thus, in considering the application of the Uniform Commercial Code to a problem of disclaimer of express warranty, unless a parol evidence

<sup>31</sup> 156 Wis. 327, 144 N.W. 1124 (1914).

<sup>32</sup> Note 28 *supra*.

<sup>33</sup> See Ezer, *supra* note 1, at 313-314. The door is still slightly ajar for disclaimers of warranties of description under the Code since the Official Comments state: "This [limitation on general disclaimer of warranties of description] is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation." UNIFORM COMMERCIAL CODE §2-313, comment 4 (Official Text 1962).

problem exists, the strong bias of the statute is to give as strong effect as possible to the warranty in the face of language of attempted disclaimer. No doubt this bias is not expressed as unequivocally as the rule incorporated in the 1952 Draft, but even with the prolix and opaque language now enacted into law, the courts will be more than likely to observe the bias by so construing an express warranty and disclaimer together as to give maximum effect to the warranty and none, if possible, to the disclaimer. Certainly, and particularly to the extent that the parol evidence rule is not involved, the policy of the Code to preclude the disclaimer of express warranties furthers the rational distribution of risks, as well as, in the usual case, being in the interest of fair play between the parties. The seller should not, as a general principle, be permitted to take away with one hand under the table what he proffers with the other hand above the table, although there are still cases where it may be both rational and equitable to disclaim the effect of language which might otherwise be construed as an "express warranty."<sup>34</sup> The Code language is flexible (or obscure) enough to allow for the latter situations.

Insofar as the parol evidence rule may alone, or in conjunction with a disclaimer, limit the effect of an express warranty, the Code, in section 2-202, has sought to reduce the chances of nullification of the warranty by over-technical application of the rule. The intent of the parties in the context of the entire commercial setting is to be considered in determining whether *consistent* parol warranties should bind the seller. Thus, the Code contemplates that, in the ordinary case, relevant evidence of promises, representations, prior dealings, trade usages, and reliance of the buyer will be considered by the court before deciding whether the written agreement constitutes a full, complete and exclusive statement of the terms of the agreement such as to exclude consistent additional terms.<sup>35</sup> Section 2-202 allows the explanation or supplementing of the written contract by course of dealing or usage of trade or by course of performance without a showing that the document is ambiguous on its face. All these are aspects of the Code which further the widely accepted policy of strict construction of disclaimers and which seem to make significantly more difficult the path of the disclaimer of express warranties, whether such warranties are written or parol or imposed by usage.

## II. *Disclaimer of Implied Warranties: The Code*

In the area of disclaimer of implied warranties the Code spells out in a fashion unknown to the Sales Act (but not necessarily foreign in result to the case law decided under it) certain rules primarily designed

<sup>34</sup> The more real is the freedom to contract the more available should be the option to disclaim.

<sup>35</sup> Note, *supra* note 17, at 871.

to invalidate the "surprise" or "fine print" disclaimer. These rules do not, and, generalized as they are, cannot, directly confront the problem of disclaimers resulting from gross disparity of bargaining power of the parties; however, the provisions of the Code which would require all disclaimers (whether or not unilaterally imposed) to be more conspicuous and specific than under the requirements of the prior law may serve to embarrass a seller into refraining from exerting the full weight of his economic power.<sup>36</sup>

Section 2-316(2) requires a disclaimer of the implied warranty of merchantability to mention merchantability and, in case of a written disclaimer, to be conspicuous.<sup>37</sup> To exclude or modify any implied warranty of fitness (meaning presumably, and more precisely, any implied warranty of fitness *for a particular purpose* under section 2-315) the exclusion must be by a writing and conspicuous. The language of the section represents a watering down of the requirements set forth in the 1952 Draft of the Code for a valid disclaimer of implied warranties of fitness. Under that Draft any such disclaimer was required to be "in specific language."<sup>38</sup> Under the current version of the Code, enacted in Wisconsin, all implied warranties of fitness may be excluded by language, for example, to the effect that, "There are no warranties which extend beyond the description on the face hereof."<sup>39</sup> The term "conspicuous" is defined in section 1-201(10) of the Code which states as follows: "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." This definition would seem adequate to dispose of small print; in fact, the definitional section goes on to cite large type, or other type or color contrasting with the surrounding material, as being "conspicuous."

Thus, the revisions of the 1952 Draft have resulted in a turning away from a firm commitment to *specificity* of disclaimer. The requirement of specificity has been retained as to warranties of merchantability under Uniform Commercial Code section 2-314, but, as to warranties for a particular purpose under Uniform Commercial Code section 2-315,

<sup>36</sup> Cf. *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A. 2d 568 (1959) (consequential property damages from truck accident allowed under Uniform Sales Act where parts' replacement warranty did not expressly disclaim implied warranties); *Duckworth v. Ford Motor Company*, 211 F. Supp. 888, 891 (E. D. Pa. 1962) wherein the court said, "There was in this case a written contract which purported to embody the entire agreement between the parties, but it did not specifically exclude the warranty of merchantability hence that warranty was in effect." (Case decided under Uniform Commercial Code 1952 Draft and involved, *inter alia*, damages for personal injury, but manufacturer apparently did not rely on disclaimer).

<sup>37</sup> An oral disclaimer of the warranty of merchantability is hard to conceive.

<sup>38</sup> UNIFORM COMMERCIAL CODE §2-316(2) (1952 Draft):

"Exclusion or modification of the implied warranty of merchantability or of fitness for a particular purpose must be in specific language and if the inclusion of such language creates an ambiguity in the contract as a whole it shall be resolved against the seller . . ."

<sup>39</sup> UNIFORM COMMERCIAL CODE §2-316(2).

the principle has been greatly diluted if not entirely washed out.<sup>40</sup> However, the rule that merchantability must be mentioned, that disclaimers of fitness must be in writing and that written disclaimers must be conspicuous all have their effect in increasing consumer protection.

These new Code provisions seem to require at least formal modifications of existing disclaimer law in Wisconsin. In *Hyland v. GCA Tractor & Equipment Co.*,<sup>41</sup> involving the sale of equipment under lease and conditional sales contract, the seller allegedly provided a 90-day parts repair and replacement warranty. The warranty, in addition to other language of disclaimer, contained a statement emphasized by the court to the effect that, "*This warranty is in lieu of all other warranties expressed or implied. . .*"<sup>42</sup> The court held that the warranty of fitness for a particular purpose was thereby effectively disclaimed and that no liability going beyond the express terms of the agreement attached.

Under the Code, the issue in the *Hyland* case might be whether these words of disclaimer were "conspicuous" within the meaning of section 1-201(10). The generality of the language of disclaimer would not clearly be insufficient but would invite comparison with the sample disclaimer in section 2-316(2) that, "There are no warranties which extend beyond the description on the face hereof."

What effect the Code might have on such a case as *Valley Refrigeration Co. v. Lange*,<sup>43</sup> is more doubtful. In that case refrigeration equipment was sold to fill a particular purpose, refrigerating a specified large quantity of fish, and was so expressly warranted. The disclaimer clause in the contract of sale provided that the writing contained all of the agreements between the parties and that there were no other understandings or promises. The court held that the express warranty was barred by the parol evidence rule and that in effect there was no implied warranty (assuming that there could be one as to capacity) because "nothing was left to implication."<sup>44</sup> But the court also indicated in passing that the disclaimer clause in the contract effectively barred implied warranties.<sup>45</sup> A close reading of the case, therefore, indicates that the *implied* warranty was excluded primarily by reason of the existence of the express warranty and that the disclaimer clause operated

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<sup>40</sup> See *L. & N. Sales Co. v. Little Brown Jug, Inc.*, 12 Pa. D. & C. 2d 469 (1959), wherein the court held *under the 1952 Draft* that a disclaimer to the effect that the goods were sold "without warranty, guarantee or representations of any kind or nature" and "without any express or implied warranties unless written [on the contract] at the date of purchase" was not specific enough to bar implied warranties (including both an alleged warranty of merchantability and one of fitness); Del Duca, *Commercial Code Litigation*, 65 *DICK. L. REV.* 287, 304-5 (1960).

<sup>41</sup> 274 Wis. 586, 80 N.W. 2d 771 (1957).

<sup>42</sup> *Id.* at 592, 80 N.W. 2d at 775.

<sup>43</sup> Note 16 *supra*.

<sup>44</sup> *Id.* at 471, 8 N.W. 2d at 297.

<sup>45</sup> *Id.* at 473, 8 N.W. 2d at 298.

predominantly to invoke the parol evidence rule against the warranty of fitness for a particular purpose, as an *express warranty*.

The question whether an express warranty relating to the same subject matter as an implied warranty should be permitted to exclude the latter has been variously decided in Wisconsin, but the more recent cases, decided under the Uniform Sales Act, seem to indicate at least that clear inconsistency between an express warranty and an implied warranty would be required in order to exclude the latter.<sup>46</sup> Section 2-317 of the Code does not alter this principle but provides, as a governing rule, that warranties shall be construed as consistent and cumulative unless such a construction is "unreasonable," in which event the *intention* of the parties is to determine which warranty is "dominant."<sup>47</sup> If the intention is not clear, the Code provides rules for its ascertainment.<sup>48</sup>

The directive of section 2-317 that all warranties are to be preserved, if possible, by a construction of consistency and cumulation and, if that construction is unreasonable, by a determination of dominance of war-

<sup>46</sup> UNIFORM SALES ACT §15(6), WIS. STAT. §121.15(6), first adopted in Wisconsin in 1912 provides that, "An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith." See *Hellendbrand v. Bowar*, 16 Wis. 2d 264, 114 N.W. 2d 418 (1962) (representation that mix was recommended but did not produce 100 percent results held not inconsistent with the implied warranty of fitness for particular purpose of feeding sows); *Boothby v. Scales*, 27 Wis. 626, 633 (1871), *overruled on another point*, 94 Wis. 251, 68 N.W. 1003 (1896) (alleged express warranties on some points did not exclude implied warranty of fitness). Cf. *J. I. Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590, 63, N.W. 1013 (1895) (express warranties excluded implied warranty of fitness); *Dwight Bros. Paper Co. v. Western Paper Co.*, 114 Wis. 414, 90 N.W. 444 (1902) (express warranty excluded implied warranty of fitness); *LaCrosse Plow Co. v. Helgeson*, 127 Wis. 622, 106 N.W. 1094 (1906) (express warranty excluded implied warranty of fitness). See also *L. & N. Sales Co. v. Stuski*, 188 Pa. Super. 117, 146 A. 2d 154 (1958) (invoking the Uniform Commercial Code to save the warranty of fitness for a particular purpose in the face of a purportedly exclusive warranty of merchantability); Corman, *Implied Sales Warranty of Fitness for Particular Purpose*, 1958 WIS. L. REV. 219; *The Uniform Commercial Code and Greater Consumer Protection Under Warranty Law*, 49 KY. L. J. 240, 258-259 (1960).

<sup>47</sup> Section 2-317, of course, provides principles of construction as among all warranties, whether express or implied. Thus, it may cover the case of the construction of two express warranties as well as the case of an express warranty and an implied warranty.

<sup>48</sup> (a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from 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*." [Emphasis added] UNIFORM COMMERCIAL CODE §2-317(a). But "The [official] comments specifically point out that the above rules [as to inconsistency and cumulation of warranties] are to be applied only where factors making for an equitable estoppel of the seller do not exist and the seller has in good faith obligated himself, not knowing that the warranties are inconsistent. Where the intent of the parties is clear from the circumstances surrounding the transaction, the court need not resort to the above rules." Note 37 *supra*; 49 KY. L. J. 240, 259 (1960).

warranties in accordance with the intention of the parties, as fortified by rules of construction, would serve to affect the result in certain Wisconsin cases where the warranty of fitness for a particular purpose failed because of the operation of an express warranty. The rule of section 2-317(c) provides that an express warranty displaces an inconsistent implied warranty *other than an implied warranty of fitness for a particular purpose*. The policy underlying this provision is apparently contrary, for example, to *Dwight Bros. Paper Co. v. Western Paper Co.*<sup>49</sup> which held that the express warranty that certain paper was equal in quality and strength to the paper which the buyer was then using excluded an implied warranty of fitness for use in a particular process of making lace paper. Likewise, the policy of section 2-317 would be contrary to the rationale of *J. I. Case Plow Works v. Niles & Scott Co.*<sup>50</sup> wherein the court said:

The fact that the limited warranties going to the question of suitability of the wheels were expressed in the contract, by the strongest implication, excludes and negatives the idea that it was intended that other or more comprehensive warranties [such as the implied warranty of fitness for a particular purpose] should exist, and repels any implication of law to that effect.<sup>51</sup>

The facts of the *J. I. Case Plow Works* case, where the buyer allegedly furnished specifications, would, however, also require reference to comment 9 of section 2-316 which states in part:

The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer.

Reference ought also to be made to comment 2 of section 2-315 which states in part:

The provisions of this Article on the cumulation and conflict of express and implied warranties must be considered on the question of inconsistency between or among warranties. In such a case any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the warranty of fitness for particular purpose as against all other warranties *except where the buyer has taken upon himself* the responsibility of furnishing the technical specifications. [Emphasis added]

*Valley Refrigeration Co. v. Lange Co.*<sup>52</sup> presents a somewhat different problem since there the court held in effect that the warranty of fitness for a particular purpose cannot be implied in law (and given the

<sup>49</sup> Note 46 *supra*.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Id.* at 604, 63 N.W. at 1016.

<sup>52</sup> Note 16 *supra*.

legal effect of such implication) if it is given specific oral expression by the seller so as to assume the status of an express warranty. If it is given such specific oral expression it becomes subject to exclusion under the parol evidence rule. Thus the court reached the highly questionable result that a seller helps his own case by giving oral expression to warranties by which he might be bound if he remained silent. The policies of sections 2-315, 2-316 and 2-317 of the Code would seem to militate against this analysis, for in the *Valley Refrigeration Co.* case the implied warranty of fitness was not only *consistent* with, it was *identical* to, the parol warranty. In defense of the result, if not the analysis, it might be pointed out that the opinion preliminarily indicates grave doubt whether there could be an implied warranty of fitness with respect to *capacity* of the refrigerating machinery.

Section 2-317(a) (another of the intention-ascertaining rules) provides that exact or technical specifications displace an inconsistent sample or model or general language of description. This provision is without counterpart in the Uniform Sales Act or other prior Wisconsin legislation but is consistent with the rule of section 236(c) of the Restatement of Contracts that, "where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions."<sup>53</sup>

Section 2-317(b) provides that a sample from an existing bulk displaces inconsistent language of description. This provision may change the rule of Uniform Sales Act, section 14,<sup>54</sup> to the extent that the prior statutory provision, in certain cases, required conformity to both the sample and the description.<sup>55</sup> Before drawing too many such mechanical conclusions, however, one must bear in mind that subsections 2-317(a), (b) and (c) are subject to the guiding principle of the section that warranties are to be construed, wherever possible, as consistent and cumulative and, if this result is not reasonable, dominance of the warranties is to be determined according to the intention of the parties.<sup>56</sup>

Wisconsin law apparently is not changed by section 2-316(3)(a) of the Code pertaining to traditional commercial language of general disclaimer of implied warranties such as "as is" or "with all faults." In

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<sup>53</sup> See Honnold, *supra* note 13, at 411; *cf.* *Spencer v. Holman*, 113 Wis. 340, 89 N.W. 132 (1902); *Thomsen-Abbott Construction Co. v. Wausau*, 9 Wis. 2d 225, 100 N.W. 2d 921 (1960).

<sup>54</sup> Wis. Stat. §121.14 (1961).

<sup>55</sup> *Cf.* *Rappaport v. Boyer & Gilfillan Motor Co.*, 239 Minn. 477, 59 N.W. 2d 302 (1953); Honnold, *supra* note 13, at 411.

<sup>56</sup> Official Comment 3 to §2-317 states as follows:

"The rules in subsections (a), (b) and (c) are designed to ascertain the intention of the parties by reference to the factor which probably claimed the attention of the parties in the first instance. These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable."



the *Hyland*<sup>57</sup> case (where warranties were found to have been excluded), in addition to other disclaimer language emphasized by the court, the contract contained a provision that "The lessee . . . takes and accepts the leased property in its present 'as is' condition and state of repair."<sup>58</sup>

Section 2-316(3)(b), pertaining to exclusion of implied warranties through the buyer's inspection, requires either examination by the buyer or a *refusal* to examine. The Official Comment explains that *refusal* requires not only availability of the goods but a demand by the seller that the buyer examine them. This interpretation does not appear to be inconsistent with existing law.<sup>59</sup>

Section 2-316(3)(c) providing for exclusion or modification of warranties by course of dealing, course of performance or usage of trade is also consistent with the Uniform Sales Act, section 71, Wis. Stat. 121.71.<sup>60</sup>

### III. *Disclaimer of Implied Warranties: The Policy*

As previously indicated, the main thrust of the provisions of the Code relating to exclusion and modifications of implied warranties is to make such disclaimers clear and conspicuous. The scheme is based, for the most part, on an assumption of freedom of contract, and the attempt is made to require full and fair disclosure within the context of freedom of contract. In some recent cases, and notably in *Henningsen v. Bloomfield Motors, Inc.*<sup>61</sup> (a pre-Code case), courts have refused to enforce certain disclaimers of implied warranties and in doing so have faced up openly and directly to the problem of gross disparity in bargaining power between buyer and seller as this is reflected in the "form contract" or so-called contract of adhesion.<sup>62</sup> Such cases are to be distinguished from certain leading Wisconsin disclaimer cases such as *Valley Refrigeration Co. v. Lange Co.*<sup>63</sup> where such gross disparity did not appear to exist. In the *Henningsen* case, on the other hand, the court said that (at the time of decision of the case) there was no real competition among automobile manufacturers as to the terms of the warranties offered to buyers (the warranty offered was a standard manufacturer's warranty of parts' repair or replacement, within ninety

<sup>57</sup> Note 41 *supra*.

<sup>58</sup> *Id.* at 591, 80 N.W. 2d at 775. It is arguable whether, under the Code, language under §316(3)(a), such as "as is," must be "conspicuous."

<sup>59</sup> UNIFORM SALES ACT §15(3), WIS. STAT. §121.15(3); *cf.* T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N.W. 513 (1895); Boothby v. Scales, 27 Wis. 626 (1871), *overruled on another point*, 94 Wis. 251, 68 N.W. 1003 (1896); Hennig v. Iron Ridge Canning Co., 186 Wis. 499, 202 N.W. 466 (1925); Prime Mfg. Co. v. Allen-Hough Carryola Co., 210 Wis. 72, 245 N.W. 70 (1933).

<sup>60</sup> WIS. STAT. §121.71 (1961); see *Ross v. Northrup, King & Co.*, *supra* note 31.

<sup>61</sup> 32 N.J. 358, 161 A. 2d 69 (1959).

<sup>62</sup> See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COL. L. REV. 629 (1943).

<sup>63</sup> Note 16 *supra*.

days or 4000 miles, and disclaimer of all other warranties). Hence, buyers having no real choice in the matter were forced to accept unfair warranty bargains to which they should not be held. The court, therefore, allowed recovery for personal injuries attributable to a mechanical defect, in the face of a disclaimer of implied warranties.<sup>64</sup>

The *Henningsen*<sup>65</sup> case seems forthrightly to adopt and turn upon the principle of unconscionability now expressly incorporated in the Commercial Code. The Code, itself, however, makes no provision in section 2-316 for unfairness of disclaimers *resulting from disparity of bargaining power* (unless such disclaimers fail to provide the notice required by the section) and, as previously noted, the Official Comments to section 2-302 disavow an intent to deal directly with the problem of imbalance of bargaining power.<sup>66</sup> To the extent, however, that the *Henningsen* problem was construed as one of exclusion of consequential damages for personal injury, the provisions of section 2-719(3) might be invoked to hold such a limitation *prima facie* unconscionable. But in form at least the disclaimer *as to implied warranties*, strikes at the creation of the warranty rather than at the damages for its breach. *As to the express warranty*, section 2-719(3) would seem to support the *Henningsen* result (although breach of express warranty was not pleaded in that case) since there the manufacturer warranted "each new motor vehicle . . . chassis or parts . . . to be free from defects in material or workmanship . . ." but limited its "obligation" under the warranty. Assuming that a causal connection between a defect in the warranted goods and the consequential damages for *personal injury* can be shown, the warranty restriction may be construed as one of *remedy* rather than as going to the creation of the *express* warranty.<sup>67</sup>

Obviously, any general statutory provision expressly purporting to affect or modify the allocation of risks *because of disparity of bargaining power* would be exceedingly difficult to draft and would necessarily destroy, or seriously impair, freedom of contract where the latter serves a worthwhile purpose. Such legislation having this purpose as does exist, pertains to the sale of specific products. Thus a North Dakota statute provides that the purchasers of certain kinds of farm machinery may rescind their contracts of sale within a reasonable time after delivery if such machinery does not prove reasonably fit for the purpose for which it was purchased, and that any contractual provision to the contrary is against public policy.<sup>68</sup>

<sup>64</sup> See Note, 46 CORNELL L. Q. 607 (1961); Note, 74 HARV. L. REV. 630 (1961); Note, 36 NOTRE DAME LAW 233 (1961); Note, 109 U. PA. L. REV. 453 (1961); Note, 63 HARV. L. REV. 494 (1950).

<sup>65</sup> Note 61 *supra*.

<sup>66</sup> See note 9 *supra*.

<sup>67</sup> Cf. *State Farm Mut. Auto Ins. Co. v. Anderson Weber*, 252 Iowa 1289, 110 N.W. 2d 449 (1961) where the *Henningsen* doctrine was extended to a subrogated *property damage* claim.

<sup>68</sup> 10 N. D. CEN. CODE §51-07-04; Note, 23 MINN. L. REV. 784 (1939).

Public policy also precludes disclaimer of liability for a sale in breach of a penal statute.<sup>69</sup> Presumably the Code would not change this result.

Apart from the question of disparity of bargaining power, the *Henningesen*<sup>70</sup> case lays considerable stress upon the failure of the disclaimer in question to provide adequate notice to the buyer that by accepting the disclaimer he was relinquishing any personal injury claim that might flow from the use of a defective automobile, and to mold the buyer's expectation accordingly.<sup>71</sup> Thus the court said:

*In the context of this warranty, only the abandonment of all sense of justice would permit us to hold that, as a matter of law, the phrase 'its obligation under this warranty being limited to making good at its factory any part or parts thereof' signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile. Such claims are nowhere mentioned. The draftsmanship is reflective of the care and skill of the Automobile Manufacturers Association in undertaking to avoid warranty obligations without drawing too much attention to its effort in that regard. No one can doubt that if the will to do so were present, the ability to inform the buying public of the intention to disclaim liability for injury claims arising from breach of warranty would present no problem.*<sup>72</sup>

To be fair, a disclaimer of implied warranties must adequately inform buyers of the risks to be incurred (i.e. "mold the expectations" of buyers), and the Code has, despite some alteration in language since its original promulgation, effected an improvement upon prior law by its detailed provisions regarding the form and style of disclaimers. In themselves these provisions mount no direct attack upon the problems inherent in disparity of bargaining power in mass marketing but indirectly they have their effect in this broader area.

An interesting recent case of effective disclaimer of implied warranties under the Code is *Roto-Lith, Lt. v. F. P. Bartlett & Co.*<sup>73</sup> an action for damages on account of alleged defects in certain adhesive emulsions used in the production of a cellophane adhesive. The buyer's order was for "N-132-C" emulsion and stated, "End use: wet pack spinach bags" (thereby presumably providing a basis for a warranty of fitness). The acknowledgement of the order and the invoice bore on

<sup>69</sup> In *Metz v. Medford Fur Foods, Inc.*, 4 Wis. 2d 96, 90 N.W. 2d 106 (1958), buyer's agreement to hold seller harmless from liability arising from use of seller's mink food was held void as against public policy established by criminal statute forbidding the sale of adulterated food. Note, 1960 Wis. L. Rev. 337; 6 A CORBIN, CONTRACTS §1471 (1st ed. 1962).

<sup>70</sup> Note 61 *supra*.

<sup>71</sup> See Boshkoff, *Some Thoughts About Physical Harm, Disclaimer and Warranties*, 4 B. C. IND. & COM. L. REV. 285, 306-308 (1963).

<sup>72</sup> Note 61 *supra*, 161 A. 2d at 93.

<sup>73</sup> 297 F. 2d 497 (1st Cir. 1962).

their face in (what the court characterized as) "conspicuous" type the following legend: "All goods sold without warranties, express or implied, and subject to the terms on the reverse side." In somewhat smaller but still "conspicuous" type, certain terms of sale were printed on the back, including a limitation of seller's liability to replacement of non-conforming goods, a merger clause, a disclaimer of warranties and a condition that the buyer give notice if such terms were unacceptable. These provisions were held to be binding on the buyer (though not contained in its order) and to constitute a sufficient disclaimer of all warranties. It may be noted that the *Roto-Lith* case, and many cases like it, including certain Wisconsin cases, such as *Valley Refrigeration Co. v. Lange Co.*,<sup>74</sup> do not involve evident disparity in bargaining power since the buyers in these cases are not individual consumers purchasing in a mass market from sellers of great economic power. Rather the buyers are commercial enterprises possessed of more than nominal economic power and presumably having some business sophistication, even though in some cases they may have bound themselves to printed form contracts. Obviously, where the buyer is thus apparently advantaged, the principle of freedom of contract is more realistically applicable.<sup>75</sup>

#### IV. CONCLUSION

The adoption of the Uniform Commercial Code, has, therefore, modified the prior Wisconsin law of exclusion or modification of warranty and limitation of remedy for breach of warranty in the following principal respects:

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<sup>74</sup> Note 16 *supra*.

<sup>75</sup> Cf. *Norway v. Root*, 58 Wash. 2d 96, 361 P. 2d 162 (1961) (by way of dictum, sympathy expressed for *Henningson* rationale); *Knecht v. Universal Motor Co.*, 113 N.W. 2d 688 (N. D. 1962) (implied automobile warranties may be expressly disclaimed so as to defeat action for rescission); *Boehck Const. Equip. Corp. v. H. Fuller & Sons, Inc.*, 121 N.W. 2d 303 (Wis. 1963) (agreement by lessee to hold lessor harmless from third party claims does not disclaim implied warranty of fitness); *Wade v. Chariot Trailer Co.*, 331 Mich. 576, 50 N.W. 2d 162 (1951) (disclaimer of implied warranties should be strictly construed); *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927) (language of disclaimer strictly construed so as to preserve implied warranties); *Duckworth v. Ford Motor Co.*, *supra* note 31, (warranty of merchantability not specifically excluded); *Frigidinnors, Inc. v. Branchtown Gun Club*, 176 Pa. Super. 643, 109 A. 2d 202 (1955) (general disclaimer which did not expressly disclaim implied warranties held insufficient under the Sales Act to disclaim warranty of fitness for the general purpose); *Moss v. Gardner*, 228 Ark. 828, 310 S.W. 2d 491 (1958) (disclaimer of implied warranties *reluctantly* held valid); *State Farm Mut. Auto Ins. Co. v. Anderson-Weber*, *supra* note 60, (*Henningsen* case followed in situation involving a subrogated property damage claim); *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W. 2d 655 (*cert. den.*, Tenn. Sup. Ct. 1960) (limitation of liability and disclaimer of warranties in sale of automobile held insufficient to protect manufacturer in suit for consequential damages); Hall, *Article 2—Sales—"From Status to Contract?"*, 1952 Wis. L. Rev. 209; Schaffer, *Sales Warranties in Illinois: Commercial Code and Pre-Code Law*, 39 CHI-KENT L. REV. 93 (1962); 2 HARPER & JAMES, TORTS §28.25 (1st ed. 1956).

1. Where the parol evidence rule is not an issue, disclaimer of an express warranty has been made even more difficult than under the prior law (although there are few Wisconsin cases in point beside the "seed" cases).

2. The parol evidence rule has been liberalized and, hence, exclusion and disclaimer of parol warranties and other extrinsic matters made more difficult.

3. Written disclaimers of the implied warranties of merchantability and fitness for the particular purpose are required to be "conspicuous" and hence more clearly notify the buyer and "mold his expectations" as to the risks of the purchase; but, with respect to specificity, the provisions regarding disclaimer of warranty of fitness for a particular purpose are less stringent than those affecting merchantability.

4. Provisions as to multiple warranties covering the same subject matter have been liberalized to the benefit of the buyer and allow consideration of the intention of the parties, thereby discouraging mechanical application of rules.

5. The concept of unconscionability may be expressly applied to any sales problem and is particularly applicable to matters of disclaimer or limitation of warranty and limitation of remedy.

6. To the extent that a contract provision purports not to prevent creation of a warranty but rather to limit damages for its breach, there is a presumption of unconscionability as to such limitation, in the case of consumer goods, insofar as it pertains to damages for personal injury.

Although changes in warranty law have not been revolutionary and in most important respects the new scheme reaches the same results as have been evolving under the case law of the Sales Act, the desire of the Code draftsmen to conform the law to commercial practice and to increase consumer protection has found firm and, for the most part, effective expression.