Express and Implied Warranties of the Uniform Commercial Code in Seed Sales: Agricultural Services Association, Inc. v. Ferry-Morse Seed Co.

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EXPRESS AND IMPLIED WARRANTIES OF THE UNIFORM COMMERCIAL CODE IN SEED SALES: AGRICULTURAL SERVICES ASSOCIATION, INC. V. FERRY-MORSE SEED CO.

This casenote analyzes the implied warranty of merchantability, the implied warranty of fitness for a particular purpose, and the express warranty as explained in a recent Sixth Circuit decision involving seed sales. The case reflects a modern attitude in favor of seed buyers for damages proximately caused by the mislabeling of seed packages. This casenote will discuss how the court reached its decision and how similar cases might be decided on other grounds.

INTRODUCTION

Agriculture to a Midwesterner means rolling wheatfields and waving stalks of corn. To a Southerner it means tobacco, cotton, and, of course, peanut fields. Nearly all agriculture is dependent on the planting, cultivating and harvesting of crops.

The sale of seed to farmers, dealers and cooperatives[1] plays a major role in the agricultural economy of America. As in other commercial sales, litigation occasionally arises concerning breach of the seller's express and implied warranties. Such warranties in seed sales often cover quality,[2] type,[3] absence of fungus,[4] purity,[5] and germination.[6] State and federal legislation requires some of this information to be printed on seed package labels.[7]

Pre-Code Law: The Background

Under the Uniform Sales Act,[8] recovery of damages was allowed when there was breach of an express or implied warranty that had

1. *See* Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057 (6th Cir. 1977).
2. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975); Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).
3. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057 (6th Cir. 1977); Klein v. Asgrow Seed Co., 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966).
4. Zicari v. Joseph Harris Co., 33 App. Div. 2d 17, 304 N.Y.S.2d 918 (1969).
5. Mallery v. Northfield Seed Co., 196 Minn. 129, 264 N.W. 573 (1936).
6. *Id.*; Walcott & Steele, Inc. v. Carpenter, 246 Ark. 95, 436 S.W.2d 820 (1969).
7. 7 U.S.C. § 1571 (1970); S.D.C.L. § 38-12-12 (1977).
8. In South Dakota the Uniform Sales Act was in effect from July 1, 1921, 1921 S.D. Sess. L. ch. 355, §§ 1-75, to July 1, 1967, 1966 S.D. Sess. L. ch. 150, § 10-102.

not been disclaimed. If the seller expressly or impliedly warranted the seed to be of a certain type or variety, when in fact the seed was a different type or variety, the measure of damages was the difference between the market value of the crop raised and the crop that would have been raised from the seed ordered.[9] It was a different matter if the buyer bought or planted the seed with the knowledge that it was not of the particular quality or variety as warranted. In such a case, damages were limited to the purchase price of the seed.[10]

Under general trade customs and usage, however, seeds were sold subject to a general nonwarranty and damages were typically not recoverable.[11] This was true even when the seed did not conform to the contract description.[12] "Pre-Code law frequently recognized a trade usage of seed sellers that excluded implied warranties and bound the purchaser even if he did not know about the usage."[13] For example, if spring rye had been ordered but fall rye was shipped and planted, and if at the time of sale the seed has been sold subject to a general nonwarranty, damages were not recoverable.[14] This was true even if the crop was a total failure.[15]

In some instances implied warranties were eliminated by express warranties. The South Dakota Supreme Court has held that an express warranty covering the germinating quality of seed excluded any implied warranty covering this seed quality.[16] This rule eliminated any chance of recovery by the buyer under a breach of implied warranty theory if there had been an express warranty given.[17]

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9. Paul v. Williams, 64 Cal. App. 2d 696, 149 P.2d 284 (1944); West Coast Lumber Co. v. Wernicke, 137 Fla. 363, 188 So. 357 (1939); Stegmen v. Offerle Co-op Grain & Supply Co., 151 Kan. 655, 100 P.2d 635 (1940); Iuliucci v. Rice, 130 N.J.L. 271, 32 A.2d 459 (1943); Valley Star Seed & Grain Products Co. v. Bell, 117 S.W.2d 162 (Tex. Civ. App. 1938).

The measure of damages was somewhat different for nursery stock and trees. With orange trees, vines, or other plants and trees which became a permanent part of the land, damages were measured by the difference in the reasonable land value as planted and the value of the land had it been planted as warranted. Posz v. Burchell, 209 Cal. App. 2d 324, 25 Cal. Rptr. 896 (1962); Sweet v. Watson's Nursery, 33 Cal. App. 2d 699, 92 P.2d 812 (1939).

10. Turner v. Bruner, 263 P.2d 191 (Okla. 1953).

11. Smith v. Oscar H. Will & Co., 51 N.D. 357, 199 N.W. 861, 863 (1924) (dictum); Hoover v. Utah Nursery Co., 79 Utah 12, 7 P.2d 270 (1932).

12. Miller v. Germain Seed & Plant Co., 193 Cal. 62, 222 P. 817 (1924); Lumbrazo v. Woodruff, 256 N.Y. 92, 175 N.E. 525 (1931); Eastern Seed Co. v. Pyle, 191 S.W.2d 708 (Tex. Civ. App. 1945), *aff'd*, 145 Tex. 385, 198 S.W.2d 562 (1946); 67 AM. JUR. 2d *Sales* § 504 (1973).

13. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 371 (1972) [hereinafter cited as WHITE & SUMMERS]; *see* Kennedy v. Cornhusker Hybrid Co., 146 Neb. 230, 19 N.W.2d 51 (1945); Nakanishi v. Foster, 64 Wash. 2d 647, 393 P.2d 635 (1964); S. WILLISTON, WILLISTON ON CONTRACTS § 993A at 610 (3d ed. 1964).

14. Larson v. Inland Seed Co., 143 Wash. 657, 255 P. 919 (1927).

15. *Id.*

16. Slinger v. Totten, 38 S.D. 249, 160 N.W. 1008 (1917) (express warranty in seed catalogue eliminated any implied warranty of suitability for a particular purpose).

17. *Id.*; Lee v. Cohrt, 57 S.D. 387, 395, 232 N.W. 900, 903 (1930). Today this rule has been rejected by the adoption of U.C.C. § 2-317 which states, "Warran-

The disclaimer of express warranties was much more difficult. The South Dakota Supreme Court has held that when an express warranty was disclaimed and the buyer had no knowledge of the disclaimer, the disclaimer was inoperative.[18] The court, however, did not decide whether the disclaimer would have been operative had the buyer read it[19] Some states completely disallowed disclaimer of express warranties and seed buyers were awarded damages for breach of express warranty even if the seller had disclaimed the warranty.[20] One court held that damages were recoverable on a theory of breach of contract rather than breach of warranty when the buyer ordered Turkestan alfalfa seed but the crop turned out to be sweet clover.[21] It was of no consequence to this court that the seed was sold subject to a nonwarranty clause.[22]

Seed sellers circumvented these decisions with contract provisions that limited breach of warranty damages to the purchase price of the seed. In at least one case, the court upheld such a limitation of damages, in absence of bad faith, even though the seed was sold in violation of federal seed laws.[23] The court also held that the limitation did not violate public policy.[24]

Seed sellers have always been in a precarious position. The value of the seed has generally been insignificant compared to the value of the crop to be raised from the seed. Since seed sellers have many bins of seeds, it has always been very easy to mix or confuse one brand of seed with another. Crops can be destroyed or impaired by the weather, insects, blights and rusts, soil deficiency, and improper husbandry. Seed sellers have attempted to limit their liability to the purchase price of the seed or to disclaim liability altogether. Historically, the attitudes of many courts towards the seed sellers' plight could best be summarized by this statement: "If the seed merchant could not protect himself by custom not to warrant or by a disclaimer of warranty, he would find it hard to survive the litigation that would come to his door."[25]

Today, however, there are cases that award consequential damages to seed buyers despite nonwarranty, disclaimer and exclusionary clauses when the damages stem from the mislabeling of the seed

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ties whether express or implied shall be construed as consistent with each other and as cumulative . . . ." S.D.C.L. § 57-4-40 (1967); *see* note, *The Case of the Sick Pigs: Ruskamp v. Hog Builders, Inc. and the Implied Warranty of Fitness Under the UCC*, 20 S.D.L. REV. 659, 663 (1975) [hereinafter cited as *Sick Pigs*].

18. Gray v. Gurney Seed & Nursery Co., 62 S.D. 97, 252 N.W. 3 (1933).

19. *Id.* at 103, 252 N.W. at 6.

20. Phillips v. Sharp, 44 Ohio App. 311, 185 N.E. 562 (1932); Wood v. Quillan, 167 Va. 255, 188 S.E. 216 (1936).

21. Smith v. Oscar H. Will & Co., 51 N.D. 357, 199 N.W. 861 (1924).

22. *Id.* at 361, 199 N.W. at 863.

23. McCauley v. Planters Seed Co., 85 So. 2d 334 (La. App. 1956); *see* Gilbert v. Reuter Seed Co., 80 So. 2d 567 (La. App. 1955).

24. McCauley v. Planters Seed Co., 85 So. 2d 334 (La. App. 1956).

25. Hoover v. Utah Nursery Co., 79 Utah 12, —, 7 P.2d 270, 273 (1932).

packages.[26] This casenote will analyze a recent seed case, *Agricultural Services Association v. Ferry-Morse Seed Co.*,[27] and examine the requirements of express and implied warranties and warranty disclaimers, under the Uniform Commercial Code (hereinafter referred to as UCC).[28] This casenote will detail how the *Ag. Services* court applied these requirements to the facts of this case, and will also examine other relevant Code interpretations and Code sections not discussed by the court.

THE FACTS

Agricultural Services Association (hereinafter referred to as Ag. Services), a Tennessee farm cooperative, bought 25,000 pounds of Clemson Spineless Okra Seed[29] (hereinafter referred to as Clemson Spineless) from Ferry-Morse Seed Co., Inc. (hereinafter referred to as Ferry-Morse), a California corporation. The seed was distributed to Ag. Services' members, who planted the seed and harvested the crop. Ferry-Morse purchased this seed from the Waldo Rohnert Company (hereinafter referred to as Waldo Rohnert), a California corporation. Waldo Rohnert had incorrectly labeled the seed packages as Clemson Spineless when in fact the seed was an off brand variety of okra. As a result, the crops raised from this seed netted lower yields for the farmers. This caused Ag. Services' members to breach contracts that they had entered into to sell their expected yields.

The mislabeling by Waldo Rohnert was in violation of California and Federal Seed Acts.[30] Since Ferry-Morse relied upon this label, the seed sold to the next buyer in the distributive chain, Ag. Services, bore the same label information as that from Waldo Rohnert and was in violation of Tennessee and Federal Seed Acts.[31] Ferry-Morse relied on Waldo Rohnert's label because visual examination of the seed would not have revealed the type of okra seed it was, adequate testing of the seed would have taken three months, and the seed had to be used within one month from the time of sale.

Ag. Services sued its seller, Ferry-Morse, and the seller's seller, Waldo Rohnert, for damages proximately caused by breach of contract, breach of warranty, and negligence. Ferry-Morse counterclaimed[32] for indemnity from its seller, Waldo Rohnert.

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26. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057 (6th Cir. 1977); Walcott & Steele, Inc. v. Carpenter, 246 Ark. 95, 436 S.W.2d 820 (1969); Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

27. 551 F.2d 1057 (6th Cir. 1977).

28. S.D.C.L. §§ 57-4-25 to -39 (1967); U.C.C. §§ 2-313 to -316.

29. "Okra" is defined in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1569 (1976) as "a tall annual (*Hibiscus esculentus*) widely cultivated in the southern United States and the West Indies for its mucilaginous green pods that are pickled or used as the basis of soups and stews; also the pods of the okra."

30. 7 U.S.C. § 1571 (1970); CAL. AGRIC. CODE § 52453 (West 1968).

31. 7 U.S.C. § 1571 (1970); TENN. CODE ANN. § 43-924 (Supp. 1977).

32. The court and the remainder of this article refer to Ferry-Morse's action as a counterclaim, however, it is technically a cross-claim. *See* FED. R. CIV. P. 13(g).

HOLDING

The District Court of Tennessee "entered final judgment in favor of Ag. Services against both Ferry-Morse and Waldo Rohnert in the amount of $75,985.56," plus interest.[33] Ferry-Morse's counterclaim against Waldo Rohnert was limited to the purchase price of the seed. The court gave two reasons. First, Waldo Rohnert had attached to each seed bag a tag that disclaimed all other warranties[34] and limited its liability to the purchase price of the seed.[35] Secondly, Ferry-Morse had bought seed from Waldo Rohnert on three prior occasions under very similar conditions. On each sale Waldo Rohnert had used the same disclaimer tag, and Ferry-Morse had actual knowledge of its use. Both sellers appealed the decision to the Sixth Circuit Court of Appeals.

The Sixth Circuit decision was based upon Ferry-Morse's indemnity counterclaim against Waldo Rohnert. Since Ferry-Morse had repackaged and labeled the seed as true to type Clemson Spineless without disclaiming or limiting any implied warranties, Ferry-Morse conceded that it had violated the implied warranties of merchantability and fitness for a particular purpose.[36] Ag. Services also conceded that because of a lack of privity, no implied warranties extended to it from Waldo Rohnert.[37] The rights between the two sellers were determined primarily on the issues of express and implied warranties and the ability to disclaim such warranties. Ferry-Morse recovered from Waldo Rohnert the total amount of its liability to Ag. Services. The Sixth Circuit, however, reduced the damage award of the lower court by $25,000. This amount had been allocated for the loss of Ag. Services' goodwill, but was disallowed due to insufficient evidence.[38]

Although the determination of Ferry-Morse's right to indemnification was fair, the court failed to fully consider certain sections of the Code. For example, the court was most willing to apply section 2-316(3)(c), which allowed for consideration of the past business prac-

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33. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1061 (6th Cir. 1977).

34. The text of the warranty was as follows:

> Notice to buyer: We warrant that seeds sold have been labeled as required under state and federal seed laws and that they conform to label description. We make no other or further warranty expressed or implied.
>
> No liability hereunder shall be asserted unless the buyer or user reports to warrantor within a reasonable period after discovery (not to exceed 30 days) any conditions that might lead to a complaint. Our liability on this warranty is limited in amount to the purchase price of the seed. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1062-63 (6th Cir. 1977).

35. *Id.*

36. *Id.* at 1064.

37. "The privity issue focused on Tennessee law at the time of the wrong, which law has since been changed." *Id.* at 1065.

38. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1072 (6th Cir. 1977).

tices between Ferry-Morse and Waldo Rohnert. As a result, the court decided the implied warranties could be disclaimed. The court did not discuss, however, section 2-719,[39] which would have allowed for the contractual modification or limitation of remedies. This section takes into consideration the commercial setting between the parties to determine whether the limitation of consequential damages is unconscionable. The court could have considered the past business dealings between Ferry-Morse and Waldo Rohnert and found that it was not unconscionable for Waldo Rohnert to limit its damages to the purchase price of the seed. Instead, the court held that the express warranty could not be limited because it violated public policy.[40]

IMPLIED WARRANTIES

There are two implied warranties in the UCC: the implied warranty of merchantability[41] and the implied warranty of fitness for a particular purpose.[42] Each is wholly distinct from the other. The implied warranty of merchantability applies to goods used for their *ordinary* purpose whereas the implied warranty of fitness for a *particular* purpose applies when the buyer uses goods for purposes to which they are not ordinarily put.[43] The *Ag. Services* court did not distinguish between the ordinary and particular purposes of Clemson Spineless okra seed. Okra seed is ordinarily used for commercial purposes. Even though a particular seed was ordered, no extraordinary or particular *purpose* for the seed was indicated by the court. It is not uncommon for many courts to confuse the two implied warranties.[44]

Implied Warranty of Merchantability

An implied warranty of merchantability requires 1.) a contract for the sale of goods and 2.) a merchant seller.[45] " 'Goods' means all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid."[46] Seeds are goods since they "are movable at the time of identification to the contract for sale."[47] A "merchant" is "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or

39. *See* text accompanying notes 114-128 *infra*.
40. *See* text accompanying notes 109-112 *infra*.
41. S.D.C.L. §§ 57-4-30 to -32 (1967); U.C.C. § 2-314.
42. S.D.C.L. § 57-4-33 (1967); U.C.C. § 2-315.
43. U.C.C. § 2-315, Comment 2: R. ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-315:14 (2d ed. 1970); Comment, *Sales Warranties Under the Pennsylvania Uniform Commercial Code*, 15 U. PITT. L. REV. 331, 343 (1954); *Sick Pigs*, *supra* note 17, at 667.
44. WHITE & SUMMERS, *supra* note 13, at 297.
45. S.D.C.L. § 57-4-30 (1967); U.C.C. § 2-314(1).
46. S.D.C.L. § 57-2-10 (1967); U.C.C. § 2-105(1).
47. *Id.*

goods involved in the transaction."[48] Since a seed seller has particular knowledge and skill in dealing with seed and holds himself out as having such knowledge and skill, seed sellers are merchants.

The warranty implies that the goods are merchantable. The UCC does not define merchantability but provides six examples of when goods are merchantable.[49] This list, however, is not exhaustive.[50] Merchantable seed will grow if it is planted, and merchantable corn seed will sprout corn and not soybeans.[51] Merchantable Clemson Spineless okra seed will develop Clemson Spineless okra plants and not another variety of okra. Labeling the seed indicates that the seed meets the label description and that the seed will "pass without objection in the trade."[52] The UCC section 2-314(2)(e)[53] requires that this implied warranty will always arise in seed sales, because state and federal seed statutes require specific information to be printed on the labels of seed packages.[54] South Dakota law, for example, requires the type of seed, its purity, and its percentage of germination to be printed on each seed package.[55]

Recovery of damages may be premised on a breach of this warranty. The plaintiff must prove: (1) The goods were not merchantable at the time of sale; (2) a breach of the warranty proximately caused damages to the plaintiff or his property; and (3) notice was given to the seller of injury or damages.[56] These three tests were apparently satisfied in *Ag. Services*. The court found that the okra seed was not Clemson Spineless as labeled, and therefore the goods were not merchantable at the time of sale; and that the farmers that planted the seed suffered damages because the reduced productivity of the seed caused them to breach contracts made to sell their expected crops. The court did not specifically state whether notice of the breach had been given to Ferry-Morse and in turn to Waldo Rohnert.

Waldo Rohnert claimed this implied warranty of merchantability was disclaimed in two ways. First, the language on the label of the seed packages disclaimed and limited Waldo Rohnert's liability by stating:

> [W]e make no other or further warranty expressed or implied.

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48. S.D.C.L. § 57-2-7 (1967); U.C.C. § 2-104(1).
49. S.D.C.L. § 57-4-31 (1967); U.C.C. § 2-314(2).
50. U.C.C. § 2-314, Comment 6.
51. Merchantable goods "are fit for the ordinary purposes for which such goods are used." S.D.C.L. § 57-4-31(3) (1967); U.C.C. § 2-314(2)(c).
52. S.D.C.L. § 57-4-31(1) (1967); U.C.C. § 2-314(2)(a).
53. Goods to be merchantable must be at least such as
(5) are adequately contained, packaged, and labeled as the agreement may require. S.D.C.L. § 57-4-31(5) (1967).
(2) Goods to be merchantable must be at least such as
(e) are adequately contained, packaged, and labeled as the arrangement may require. U.C.C. § 2-314(2)(e).
54. 7 U.S.C. § 1571 (1970); S.D.C.L. § 38-12-12 (1977).
55. S.D.C.L. § 38-12-12 (1977).
56. WHITE & SUMMERS, *supra* note 13, at 286.

> No liability hereunder shall be asserted unless the buyer or user reports to warrantor within a reasonable period after discovery (not to exceed 30 days) any conditions that might lead to a complaint. Our liability on this warranty is limited in amount to the purchase price of the seed.[57]

Ferry-Morse argued, however, that this disclaimer was invalid for failure to specifically mention the term "merchantability" within the disclaimer clause.[58] Secondly, Waldo Rohnert claimed that Ferry-Morse had inspected the seed, which should have revealed any defects. If a buyer does inspect the goods, this *may* negate implied warranties "with regard to defects which an examination ought in the circumstances to have revealed."[59] In this case, visual examination of the seed would not have revealed any defects; even the best trained eyes could not have determined that the seed was not Clemson Spineless okra. Since the seed had to be shipped to Ag. Services within one month and adequate testing of the seed required three months, the court held that Ferry-Morse had not been able to adequately inspect the seed. Rather, Ferry-Morse had relied on the good faith and expertise of Waldo Rohnert.[60]

The court, however, agreed with Waldo Rohnert's defense that the implied warranty of merchantability had been disclaimed by the seed tag language. The existence of this warranty was summarily dismissed by relying upon UCC section 2-316(3)(c). Notwithstanding the absence of the term "merchantability" in the disclaimer clause, as required by section 2-316(2), section 2-316(3)(c) provides for the exclusion or modification of implied warranties "by course of dealing *or* course of performance *or* usage of trade."[61] Ferry-Morse had, on three separate occasions, bought okra seed from Waldo Rohnert and was aware of the disclaimer clause in each transaction. These facts were held sufficient to allow the disclaimer of the implied warranty of merchantability.[62]

To evaluate this holding, the UCC definitions of these three concepts must be considered. A "course of dealing" is "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other

57. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1062-63 (6th Cir. 1977).

58. *Id.* at 1066; *see* S.D.C.L. § 57-4-35 (1967); U.C.C. § 2-316(2).

59. S.D.C.L. § 57-4-37 (1967); U.C.C. § 2-316(3)(b); *see* Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEX. L. REV. 60, 66 (1974).

60. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1065 (6th Cir. 1977).

61. Emphasis added.

62. The court stated, "Thus, the District Court did not err in finding that prior course of dealings and the usage of the trade modified Waldo Rohnert's implied warranties to Ferry-Morse by the tags." *Id.* at 1066. The facts indicate, however, that there existed a "course of performance" rather than a "usage of trade." *See* text accompanying notes 77-79 *infra*.

conduct."[63] "Course of performance," in sales contracts, "involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other."[64] A "usage of trade" is "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."[65]

Since section 2-316(3)(c) uses these concepts in the disjunctive, the existence of any one of them would have been sufficient to disclaim an implied warranty. The *Ag. Services* court did not specifically indicate how the facts fit the definitions of these concepts. The court apparently felt that the three previous sales transactions dealing with okra seed were enough to find a "sequence of previous conduct . . . establishing a common basis of understanding."[66] This established a "course of dealing."[67] Although the court did not hold that there was a "course of performance" between Ferry-Morse and Waldo Rohnert, the facts indicate that such a finding was feasible. Since Ferry-Morse had actual knowledge of the disclaimer clause and repeatedly failed to object to it during the three previous transactions, this may have been sufficient to establish a "course of performance."[68] Furthermore, although the court held there was a "usage of trade," there were no facts presented to support such a holding. "A usage of trade . . . develops out of a history of transactions within a particular business community of which the parties are members."[69]

The *Ag. Services* court similarly applied section 2-316(3)(c) in *Country Clubs, Inc. v. Allis Chalmers Mfg. Co.*[70] This case involved a sale of golf carts between two experienced businessmen. The president of the corporate purchaser was an experienced businessman and attorney. The seller was a merchant that sold golf carts. The president used and read the seller's order forms, which excluded all implied warranties, but did not use the word "merchantability." The president had expressed his dissatisfaction to the seller with the disclaimers but nevertheless acquiesced. When certain damages resulted to the golf carts, which would have been covered by the implied warranty of merchantability but fell outside of the express warranty, the Sixth Circuit denied recovery to the buyer. The court upheld the disclaimer clause on the basis of "course of dealing" and "course of performance."[71] The court, however, made no attempt to

63. S.D.C.L. § 57-1-15 (1967); U.C.C. § 1-205(1).
64. S.D.C.L. § 57-3-16 (1967); U.C.C. § 2-208(1).
65. S.D.C.L. § 57-1-16 (1967); U.C.C. § 1-205(2).
66. S.D.C.L. § 57-1-15 (1967); U.C.C. § 1-205(1).
67. *Id.*
68. S.D.C.L. § 57-3-16 (1967); U.C.C. § 2-208(1).
69. WHITE & SUMMERS, *supra* note 13, at 370. *See also* text accompanying notes 77-79 *infra*.
70. 430 F.2d 1394 (6th Cir. 1970).
71. *Id.* at 1397; *see* text accompanying notes 63 & 64 *supra*.

distinguish one from the other. The holding is similar to *Ag. Services* where, without a detailed analysis, the Sixth Circuit was willing to uphold a disclaimer of the implied warranty of merchantability between experienced businessmen despite omission of the word "merchantability."

The court was probably correct in allowing the disclaimer of the implied warranty of merchantability despite the omission of the word "merchantability."[72] The ease with which the court made this conclusion, however, is frightening to those who believe that this implied warranty is the most important warranty of the Code.[73] The Official Comments to the UCC make cautionary remarks that "the warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution."[74] It is arguable that even though Ferry-Morse knew of the disclaimer of all warranties, express or implied, it did not comprehend the significance of the disclaimer. Ferry-Morse may not have been sufficiently alerted to the fact that Waldo Rohnert would not be liable beyond the cost of the seed in the event the seed was not Clemson Spineless. Ferry-Morse had simply taken for granted that the seed would at least be what the label claimed it was. Whether inclusion of the word "merchantability" in the disclaimer clause in reality puts a buyer on any more notice of the effect of such disclaimer is questionable, but in any event it is a precaution that section 2-316(2) requires. The courts should not allow this warranty to be so easily disclaimed.

In *Ag. Services*, the express warranty appeared on a *tag* attached to the seed bags, whereas the warranty of merchantability was implied from the seed bag *labels*. The court allowed the implied warranty of merchantability to be disclaimed by course of dealing or course of performance. The express warranty, however, could not be disclaimed because such a disclaimer violated public policy as set out in a California statute. For all intents and purposes, however, each warranty was identical. Both warranted that the seed was Clemson Spineless okra. This difference in how, or whether, the seemingly identical warranties can be disclaimed results in considerable confusion and cannot be logically justified. The court could have eliminated this confusion in two ways. First, it could have found that a course of dealing or a course of performance had not been sufficiently established. The definitions of these two terms allow for interpretation. Such an interpretation would have allowed Ferry-Morse to recover from Waldo Rohnert on both the express and implied warranties. Secondly, the court could also have resorted to UCC section 2-719, which limits remedies for breach of an express warranty. This

72. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1066 (6th Cir. 1977); *see* Country Clubs, Inc. v. Allis Chalmers Mfg. Co., 430 F.2d 1394 (6th Cir. 1970); J. D. Pavlak, Ltd. v. William Davies Co., 40 Ill. App. 3d 1, 351 N.E. 2d 243 (1976).

73. WHITE & SUMMERS, *supra* note 13, at 286.

74. U.C.C. § 2-314, Comment 11.

section of the Code also takes into consideration the business practices of the parties.[75] Under this section, the court could have denied recovery to Ferry-Morse on both the express and implied warranties. This section will be discussed further below.[76]

A recent seed case, which is analogous to *Ag. Services*, is *Zicari v. Joseph Harris Co.*[77] Plaintiff Zicari bought cabbage seed from defendant Joseph Harris Co. Zicari claimed an "oral warranty that defendant would stand behind the Australian seed when Zicari inquired whether it might not be infected with Blackleg." Zicari's cabbage crop was diseased with the fungus and became totally worthless. Zicari sued the Joseph Harris Co. for $177,000 damages based upon negligence and the implied warranties of merchantability and fitness for a particular purpose. Joseph Harris moved for summary judgment because it had disclaimed all express and implied warranties and limited its liability to the purchase price of the seed. The word "merchantability" did not appear in the disclaimer clause.

The seller contended that trade usuage in the seed business justified the disclaimer of the warranty of merchantability and that the disclaimer fell within the terms of section 2-316(3)(c). Although this case technically could have been decided under an express warranty theory, the court nonetheless used language that explains the prerequisite of using a usage of trade to alter an implied warranty.

> The fact that the other seedsmen use exclusionary language in their conditions of sale on purchase orders, which language does not comply with § 2-316(2) UCC [omission of "merchantability"], would not establish as a matter of law that such is a usage of the trade understood by all persons in the seed business and farming. . . . There should be a full exploration of the facts with respect to the understanding of the trade as to the exclusion of the implied warranty of merchantability.[78]

The mere fact other seedsmen in the area used a similar disclaimer clause and nearly 400 other farmers with damaged crops did not complain was insufficient to establish a "usage of the trade understood by all persons in the seed business and farming."[79] Therefore, the court denied the seller's motion for summary judgment.

There are two basic differences between *Zicari* and *Ag. Services*. First, the warranty given in *Zicari* was breached because the seed was not protected from fungus, while in *Ag. Services* the warranty was breached because the seed was of a type different than the label had indicated. Secondly, there had been no prior business dealings between the buyer and seller in *Zicari*, while the opposite was true in *Ag. Services*. The cases indicate differences in the ease with which

75. *See* text accompanying notes 123-126 *infra*.
76. *See* text accompanying notes 114-128 *infra*.
77. 33 App. Div. 2d 17, 304 N.Y.S.2d 918 (1969).
78. *Id.* at —, 304 N.Y.S.2d at 923-24.
79. *Id.*

courts will allow the implied warranty of merchantability to be disclaimed. The *Zicari* court would allow the disclaimer only after a full investigation of the facts. The *Ag. Services* court allowed the disclaimer after a showing of three prior business transactions between experienced businessmen and a showing that the buyer had knowledge of the disclaimer. There is no indication in *Ag. Services* that the trial court found that the disclaimer was a "usage of the trade." The Sixth Circuit did not discuss the trial court's finding on this issue.

In addition to requiring the word "merchantability" to be included in the disclaimer clause, the Code also requires, in the case of a writing, that the disclaimer be conspicuous.[80] A writing is not required, however, if the buyer is alerted to the disclaimer of merchantability.[81] The *Ag. Services* court properly did not consider the conspicuousness of the disclaimer. Ferry-Morse had actual knowledge of the disclaimer, and was thus precluded from raising the issue of its inconspicuousness.[82]

Implied Warranty of Fitness for a Particular Purpose

The UCC also gives an implied warranty of fitness for a particular purpose.

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required *and* that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.[83]

The rule states at least two requirements. First, at the time of contracting, the seller must have "reason to know of any particular purpose for which the goods are required."[84] Secondly, the buyer must be "relying on the seller's skill or judgment to select or furnish suitable goods."[85] There may be a third requirement, namely, that the "seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods."[86] Comment 1 to UCC section 2-315 states:

> Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which

80. S.D.C.L. § 57-4-35 (1967); U.C.C. § 2-316(2).

81. U.C.C. § 2-316, Comment 3.

82. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1063 (6th Cir. 1977); *see* Tennessee Carolina Transp., Inc. v. Strick Corp., 283 N.C. 423, 196 S.E.2d 711 (1973), *app. aff'd* 286 N.C. 235, 210 S.E.2d 181 (1974); Smith v. Sharpensteen, 521 P.2d 394 (Okla. 1974). *See also* U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043 (6th Cir. 1975).

83. S.D.C.L. § 57-4-33 (1967); U.C.C. § 2-315 (emphasis added).

84. *Id.*

85. *Id.*

86. WHITE & SUMMERS, *supra* note 13, at 297; *Sick Pigs*, *supra* note 17 at 662; Madison Silos, Div. of Martin Marietta Corp. v. Wassom, 215 N.W.2d 494, 500 (Iowa 1974).

> the goods are intended *or* of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended *or* that the reliance exists.[87]

Therefore, the Code recognizes the third requirement but uses it disjunctively.

The *Ag. Services* court held that the implied warranty of fitness for a particular purpose existed but, as will be noted below, had been disclaimed. The court found that Waldo Rohnert had reason to know of the particular purpose for which Ferry-Morse had purchased the seed. "Waldo Rohnert knew at the time of contracting that Ferry-Morse intended to resell the seed" and that it would be "used to produce commercial crops."[88] The court also found that Ferry-Morse had actually relied upon Waldo Rohnert's skill and judgment. This was true since Ferry-Morse did not have sufficient time to adequately test the seed and because visual examination could not reveal any defects.[89]

Disclaimer of the implied warranty of fitness for a particular purpose requires a conspicuous writing.[90] There is no requirement that the language specifically mention what is being disclaimed, as with the implied warranty of merchantability.[91] In *Ag. Services*, this implied warranty was properly disclaimed in the same way as the warranty of merchantability was disclaimed. There was a writing that used general language to disclaim all implied warranties.[92] Although the court did not mention whether or not the writing was conspicuous, actual knowledge on the part of Ferry-Morse again was sufficient to vitiate any inconspicuousness of the writing.[93]

EXPRESS WARRANTY

Applicability of the Express Warranty

Express warranties by the seller may be created in three ways: (1) by affirmation of fact or promise that becomes part of the basis of the bargain; (2) by a description of the goods that becomes a part of the basis of the bargain; or (3) by a sample or model that is made part of the basis of the bargain.[94] An express warranty does not require the use of any specific words, such as "warrant" or "guarantee," and may arise even when there is no "specific intention to make a warranty."[95]

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87. U.C.C. § 2-315, Comment 1 (emphasis added).
88. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1065 (6th Cir. 1977).
89. *Id.*
90. S.D.C.L. § 57-4-35 (1967); U.C.C. § 2-316(2).
91. *Id.*; U.C.C. § 2-316, Comment 4.
92. *See* text of the disclaimer at note 33 *supra*.
93. *See* Constr. Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505 (7th Cir. 1968), *cert. denied* 395 U.S. 921 (1969); note 82 *supra*.
94. S.D.C.L. §§ 57-4-26 to -28 (1967); U.C.C. § 2-313(1)(a)-(c).
95. S.D.C.L. § 57-4-29 (1967); U.C.C. § 2-313(2).

Waldo Rohnert's warranty to Ferry-Morse, as written on the tag attached to the seed bag, stated: "Notice to Buyer: We warrant that seeds sold have been labeled as required under state and federal seed laws and that they conform to label description."[96] Since Clemson Spineless okra seed was bargained for, the court found that Waldo Rohnert and Ferry-Morse had violated their express warranties to Ag. Services. The issue, however, was whether Ferry-Morse had a right to full indemnity from Waldo Rohnert. The court had already limited any recovery for Ferry-Morse under the implied warranty theories to the purchase price of the seed.

The *Ag. Services* court assumed that the language on the tag was also part of the contract between Ferry-Morse and Waldo Rohnert.[97] Any time an affirmation of fact or promise, a description of the goods, or a sample or model becomes a part of the basis of the bargain, *i.e.* an express warranty, it also becomes part of the contract or agreement. Such terms are " 'dickered' aspects of the individual bargain."[98] Authority for this proposition rests upon Code definitions of "agreement" and "contract." "Agreement" is defined as "the *bargain* of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance."[99] From this definition, express warranties are part of an agreement. "Contract" is defined as "the total legal obligation which results from the parties' *agreement*."[100] The Code also states that "unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods."[101] "Basis of the bargain" is nowhere defined in the Code. It follows from these definitions that express warranties are a part of the contract or agreement.

Exclusion or Modification of the Express Warranty

Waldo Rohnert tried to negate any application of the express warranty in two ways. First, it claimed that seeds, which were taken from Lot No. 3501-P-38 in prior orders from Ferry-Morse, "were in fact samples for the order in question that were made a basis of the bargain."[102] Waldo Rohnert claimed the okra seed in the order conformed to these samples and thereby met the express warranty

96. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1062 (6th Cir. 1977) (This language satisfies the requirements of § 2-313(1)(a) & (b) as it is an affirmation of fact or promise and a description of the goods.)

97. The court had to have made such an assumption, otherwise CAL. CIV. CODE § 1668, which applies to contracts, would not have been applicable. *See* text accompanying notes 109-111 *infra*.

98. U.C.C. § 2-313, Comment 1.

99. S.D.C.L. § 57-1-2(3) (1967); U.C.C. § 1-201(3) (emphasis added).

100. S.D.C.L. § 57-1-2(11) (1967); U.C.C. § 1-201(11) (emphasis added).

101. S.D.C.L. § 57-2-16 (1967); U.C.C. § 2-106(1).

102. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1064 (6th Cir. 1977).

given to Ferry-Morse.[103] The seed from this lot was not Clemson Spineless but an off brand variety of okra that had been ordered by Ferry-Morse on prior occasions. Since Ferry-Morse did not order the same type of okra seed that it had bought on previous sales, but specified Clemson Spineless, the seed from Lot No. 3501-P-38 never became a part of the basis of this bargain. The court noted:

> Sale by description or sample, however, requires that the seed conform to the description or the sample. . . . In order for past descriptions or samples to become part of the bargain, both parties must mutually agree to the arrangement and the description or samples must conform to the understanding. 67 Am. Jur. 2d *Sales* § 456 (1973).[104]

Secondly, Waldo Rohnert claimed that the express warranty was modified by the language on the tags attached to the seed bags.[105] The court concluded that such a modification was invalid when it was inconsistent with the express warranty, and the "negation or limitation was inoperative to the extent that such construction is unreasonable."[106] The court did not expressly find the construction unreasonable but intimated such a conclusion since Waldo Rohnert clearly breached its express warranty, and Ferry-Morse had relied on the label.[107] The Official Comments to the Code state: " 'Express' warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms."[108] Thus, the court could have inferred that the modification or exclusion of the express warranty would be unreasonable and inconsistent with the express warranty.

Instead of adopting the above construction, the court opted for the finding that such a modification of an express warranty violated the Civil Code of California,[109] which stated, "[a]ll *contracts* which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent,

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103. *Id.; see* S.D.C.L. §§ 57-4-25 to -28 (1967); U.C.C. § 2-313(1)(c):

> (1) Express warranties by the seller are created as follows:
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

104. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1064 (6th Cir. 1977).

105. *See* text of the disclaimer at note 33 *supra*.

106. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1066 (6th Cir. 1977); *see* S.D.C.L. § 57-4-34 (1967); U.C.C. § 2-316(1).

107. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1066 (6th Cir. 1977); *see* Grinnell v. Charles Pfizer & Co., 274 Cal. App. 2d 424, 440, 79 Cal. Rptr. 369, 378 (1969). *But see* U.C.C. § 2-313, Comment 3; Hauter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975) (California Supreme Court implied that the reliance requirement in *Grinnell* was not necessary).

108. U.C.C. § 2-313, Comment 1; *see* Bowen v. Young 507 S.W.2d 600, 605 (Tex. Civ. App. 1974).

109. The court had decided earlier that between Waldo Rohnert and Ferry-Morse the law of California applied to the contract. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1063 (6th Cir. 1977).

are against the policy of the law."[110] Since Waldo Rohnert violated California Seed Law[111] by negligently mislabeling the seed, there was a basis for application of the above civil code section. Waldo Rohnert argued that the court could not rely on the California Civil Code to decide an issue within the purview of the UCC. The court did not agree and cited dicta in *Klein v. Asgrow Seed Co.*[112] for the proposition that the UCC "neither expressly nor impliedly repeals"[113] such a section. The court could have avoided this issue by staying within the bounds of the Code. Not only does UCC section 2-316(1) disallow disclaimer or modification of an express warranty "to the extent that such contruction is unreasonable," but section 1-102(3) does not allow the disclaimer of "the obligations of good faith, diligence, reasonableness and care."

Limitation of Remedies for Breach of the Express Warranty

Since, as was shown above, express warranties are a part of the contract,[114] consideration should have been given to UCC section 2-719, *Contractual Modification or Limitation of Remedies*.[115] Disclaimer of warranties[116] and exclusion of remedies[117] differ significantly. Disclaimer of warranties "serves to limit liability by reducing instances where a seller may be in breach," while exclusion of remedies is "a restriction on available remedies in event of breach."[118] When Waldo Rohnert stated on its tag, "[o]ur liability on this warranty is limited in amount to the purchase price of the seed,"[119] many courts would have held that such language was a limitation of remedies despite the fact remedies were not specifically mentioned.[120] The Code's disclaimer of warranty section also makes specific reference

110. CAL. CIV. CODE § 1668 (West 1973) (emphasis added); S.D.C.L. § 53-9-3 (1967) (identical language); *see also* Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971) (violated public policy of North Carolina Seed Law). *Contra*, Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709 (10th Cir. 1974) (under Oklahoma law parties of equal bargaining power can agree to disclaim warranties, but not strict tort liability).

111. CAL. AGRIC. CODE §§ 52452-52453, 52482 (West 1968).

112. 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966).

113. *Id.* at 102, 54 Cal. Rptr. at 619.

114. *See* text accompanying notes 97-101 *supra*.

115. S.D.C.L. §§ 57-8-49 to -51 (1967); U.C.C. § 2-719.

116. S.D.C.L. §§ 57-4-34 to -39 (1967); U.C.C. § 2-316.

117. S.D.C.L. §§ 57-8-49 to -51 (1967); U.C.C. § 2-719.

118. Billings v. Joseph Harris Co., 27 N.C. App. 689, —, 220 S.E.2d 361, 365 (1975); WHITE & SUMMERS, *supra* note 13, at 383-84.

119. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1063 (6th Cir. 1977).

120. Dow Corning Corp. v. Capitol Aviation, Inc., 411 F.2d 622, 626 (7th Cir. 1969); *see* J.A. Jones Constr. Co. v. City of Dover, 372 A.2d 540 (Del. 1977) (limitation of liability treated by the court as a limitation of remedies); J.D. Pavlak, Ltd. v. William Davies Co., 40 Ill. App. 3d 1, 351 N.E.2d 243, 245 (1976) ("seller will allow for excess fat content at invoice price and buyer will accept such as full settlement" treated by court as limitation of remedy); Kansas City Structural Steel Co. v. L.G. Barcus & Sons, 217 Kan. 88, 535 P.2d 419 (1975) (limitation of damages treated by the court as a limitation of remedies); WHITE & SUMMERS, *supra* note 13, at 376-77. *Contra*, Water Works & Indus. Supply Co. v. Wilburn, 437 S.W.2d 951 (Ky. 1968).

to the limitation of remedies.[121] The *Ag. Services* court could best have avoided this section in a passing comment rather than with tacit disregard. The court could have interpreted this disclaimer clause as only applying to warranties and not to remedies.[122]

UCC section 2-719 allows limitation of recoverable damages to the repayment of the purchase price of the goods.[123] It also allows limitation or exclusion of consequential damages so long as the limitation or exclusion is not unconscionable.[124] The limitation of damages for commercial loss is not prima facie unconscionable.[125] Between parties of equal bargaining power in a commercial setting unconscionability is rarely found to exist.[126] It is not known whether Waldo Rohnert and Ferry-Morse were of equal bargaining power. The court may have determined that they were of equal bargaining power since they were experienced seed sellers and had dealt with each other on three separate occasions. The court may have found, however, that they were of unequal bargaining power since there was not enough time for Ferry-Morse to adequately test the seed. Ferry-Morse had to rely on Waldo Rohnert's good faith and expertise and was therefore at a distinct bargaining disadvantage.

In the event the court had held the parties to be of equal bargaining power, it would have also had to decide whether the limitation was optional or exclusive.[127] If recovery of the purchase price was the exclusive remedy, Ferry-Morse could not have recovered from Waldo Rohnert. The contrary would have been true if the remedy was optional. Section 2-719(1)(b) states, "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy." The cases vary on what language is necessary to produce exclusiveness of remedy.[128]

In summary, had the court decided to consider the limitation of remedies issue, it would have had three questions to resolve: (1) whether the language limited remedies or disclaimed warranties; (2)

121. S.D.C.L. § 57-4-39 (1967); U.C.C. § 2-316(4).

122. Water Works & Indus. Supply Co. v. Wilburn 437 S.W.2d 951 (Ky. 1968).

123. S.D.C.L. § 57-8-49(1) (1967); U.C.C. § 2-719(1)(a):

> "[T]he agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts."

124. S.D.C.L. § 57-8-51 (1967); U.C.C. § 2-719(3).

125. *Id.*

126. *Id.; see* U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043 (6th Cir. 1975); Cryogenic Equipment, Inc. v. Southern Nitrogen, Inc., 490 F.2d 696 (8th Cir. 1974); J.D. Pavlak, Ltd. v. William Davies Co., 40 Ill. App. 3d 1, 351 N.E.2d 243 (1976); *see also* Dow Corning Corp. v. Capital Aviation, Inc. 411 F.2d 622 (7th Cir. 1969).

127. S.D.C.L. § 57-8-49(2) (1967); U.C.C. § 2-719(1)(b).

128. Wyatt Industries, Inc. v. Publicker Industries, Inc., 420 F.2d 454 (5th Cir. 1969) (remedy exclusive where the warranty was limited to the replacement cost for defective work or material and for no other damages or losses); *cf.* Water Works & Indus. Supply Co. v. Wilburn, 437 S.W.2d 951 (Ky. 1968) (limitation applied only to the express warranty and not to remedies).

whether the exclusion of consequential damages was unconscionable; and (3) whether the stipulated remedy was exclusive or optional. As indicated above, the court made no reference to this section of the Code in its opinion. The court could have resolved any one of these issues in favor of Ferry-Morse and achieved the same equitable result. Acknowledged dismissal or discussion of these issues would have been preferable to their complete disregard. As the matter now stands, there is no basis for the resolution of similar incidents.

CONCLUSION

The *Ag. Services* decision was somewhat inconsistent since it allowed the disclaimer of the implied warranties but not the disclaimer of the express warranty. The court was caught between the history of similar seed cases, which generally disallowed recovery on the part of seed buyers, and the modern trend of placing full liability on the ultimate wrongdoer. Consequently, it is difficult to predict how other courts will resolve these same issues.

The *Ag. Services* court interpreted sections of the Code to allow the disclaimer of the implied warranties. It determined that both the implied warranties of merchantability and fitness for a particular purpose existed, but had been disclaimed. The disclaimer was upheld because of the buyer's knowledge of it and because of the past business practices between the parties. There were, however, some shortcomings to this portion of the court's decision. First, the court spoke of limitations of remedies and liabilities when it really meant disclaimer of warranties.[129] Secondly, despite the omission of the word "merchantability" from the disclaimer clause, the court allowed the limitation of the implied warranty of merchantability. The court's decision on this issue, though perhaps correct, was made after a perfunctory analysis, which fell far short of the discussion deserved when considering disclaimer of such an important warranty.

The *Ag. Services* court was not so willing to allow the disclaimer or limitation of the express warranty. The court resorted to statutory law, outside of the Code, to declare such a disclaimer void as against public policy. This was perhaps unfortunate since the Code, especially Article Two, is flexible enough to accommodate liberal interpretation.[130] As indicated above, the court could have achieved the same equitable result and still have done justice to the Code.

The *Ag. Services* decision indicates the implied warranty of merchantability may be disclaimed by specific notice to the buyer that the "merchantability" of the seed is not warranted. It may also

129. Ag. Services Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1066 (6th Cir. 1977) (limitation of remedies generally refers to limitation of damages, which the court spoke of, *see* text accompanying notes 114-121 *supra*; disclaimer of warranties reduces the instances where the seller may be in breach, therefore no damages are recoverable, *see* text accompanying note 118 *supra*).

130. S.D.C.L. §§ 57-1-4 & -29 (1967); U.C.C. §§ 1-102(1) & 1-106(1).

be disclaimed by a course of dealing, a course of performance, or a usage of the trade. The implied warranty of fitness for a particular purpose may also be disclaimed by a conspicuous writing, a course of dealing, a course of performance, or a usage of trade. The decision indicates that the implied warranties between experienced businessmen may be readily disclaimed. Whether a farmer is such an experienced businessman remains unanswered.

The decision indicates an unwillingness to allow the limitation or disclaimer of express warranties. Whether a seed seller may ever contractually limit the buyer's consequential damages from the breach of an express warranty also remains unanswered. Seed sellers may avoid the problem altogether by not making any express warranties. UCC section 2-719 allows a seller to limit his liability by making clear, in the contract, what the *exclusive remedy* of the buyer is in event of breach of the express warranty. In a commercial setting, such a limitation is rarely unconscionable, but the seller still faces the possibility that some courts will declare such a limitation of remedies void as against public policy.

In comparison to pre-Code case law, the *Ag. Services* decision indicates a modern attitude towards granting relief for seed buyers beyond the purchase price of the seed. Many policy and economic factors are involved in such a decision, whether or not they are set forth by the court. Interpretation of the Code certainly allows for these factors to be taken into consideration. It is hoped other courts will more carefully analyze the Code rather than blindly follow this decision.

MARTEN A. TROTZIG