Do Statutory Exclusions of Implied Warranties in Livestock Sales Immunize Sellers from Liability?

by

D. L. Uchtmann, M. E. Sarhan, & H. Charalambous

Originally published in OKLAHOMA CITY UNIVERSITY LAW REVIEW
8 OK. CITY UNIV. L. REV. 21 (1983)

DO STATUTORY EXCLUSIONS OF IMPLIED WARRANTIES IN LIVESTOCK SALES IMMUNIZE SELLERS FROM LIABILTY?

D. L. UCHTMANN,* M. E. SARHAN,** AND H. CHARALAMBOUS***

Until recently, buyers of diseased livestock in twenty-one states could use the implied warranty provisions of the Uniform Commercial Code (U.C.C.)[1] to recover incidental and

---

* Professor of Agricultural Law, University of Illinois; B.S. (1968), University of Illinois; M.A. (1972), University of Leeds, England; J.D. *cum laude* (1974), The Cleveland State University.

** Assistant Professor of Livestock Marketing, University of Illinois; M.S. (1973), M.A. (1974), Ph.D. (1976), University of California-Davis.

*** Research Assistant, Agricultural Law, University of Illinois; A.B. (1979); M.B.A. (1980), Washington University (St. Louis).

1. U.C.C. § 2-314 (1978) provides:

(1) Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (§ 2-316) other implied warranties may arise from course of dealing or usage of trade.

U.C.C. § 2-315 (1978) provides:

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

consequential damages from their sellers.[2] Buyers did not need to resort to such causes as fraud[3] or products liability[4] theories, for example, because buyers prevailed in a variety of cases based on the Uniform Commercial Code (U.C.C.).[5] In 1976, the Nebraska legislature amended section 2-316 of Nebraska's commercial code to exclude certain livestock from the implied warranty provision. Nebraska section 2-316 states; "[W]ith respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from disease."[6] By 1982, twenty other states enacted

---

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.

2. In most cases, the buyer of diseased livestock will accept the animals not knowing that they are nonconforming goods. *See* Eftink, *Implied Warranties in Livestock Sales: Case History and Recent Developments*, 1982-83 AGRIC. L.J. 207, 213-14 (1982) [hereinafter cited as Eftink]. When suing for damages, the applicable code sections will be U.C.C. § 2-714 and § 2-715. U.C.C. § 2-714 (1978) provides:

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

U.C.C. § 2-715 (1978) states:

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

3. *See infra* text accompanying notes 83-94.

4. *See infra* text accompanying notes 101-109.

5. *See e.g.*, Paullus v. Liedkie, 92 Idaho 323, 442 P.2d 733 (1968); Vorthman v. Keith E. Myers Enter., 296 N.W.2d 772 (Iowa 1980); Pudwill v. Brown, 294 N.W.2d 790 (S.D. 1980).

6. NEB. REV. STAT. § 91-2-316(3)(d) (1980).

similar exclusion statutes,[7] partly shifting the risk of loss due

---

7. ALA. CODE § 2-15-4 (Supp. 1983): "With respect to the sale of cattle, swine, sheep, goats, horses, mules and asses, there shall be no implied warranty that such livestock are free from disease provided that all existing or future federal and state statutory and regulatory requirements have been complied with concerning the inspection and disease prevention and control on such livestock." ARK. STAT. ANN. § 85-2-316(3)(d)(ii) (Supp. 1983): "With respect to the sale of bovine, porcine, ovine, and equine animals, or poultry, there shall be no implied warranty that the animals are free from disease or sickness. This exemption shall not apply when the seller knowingly sells animals which are diseased or sick." FLA. STAT. ANN. § 672.316(3)(d) (West Supp. 1983): "In a transaction involving the sale of cattle or hogs, there shall be no implied warranty that the cattle or hogs are free from sickness or disease. However, no exemption shall apply in cases where the seller knowingly sells cattle or hogs that are diseased." GA. CODE ANN. § 109A-2-316(3)(d) (Supp. 1980): "[W]ith respect to the sale of cattle, hogs and sheep by a licensed auction company or by an agent, there shall be no implied warranty by said auction company or agent that the cattle, hogs, and sheep are free from disease: Provided, however, that the provisions of this subsection shall not be applicable to brucellosis reactor cattle detected at an official State laboratory within 30 days following the sale." ILL. REV. STAT. ch. 26, § 2-316(3)(d) (Smith-Hurd Supp. 1983): "[T]he implied warranties of merchantability and fitness for a particular purpose do no apply to the sale of cattle, swine, sheep, horses, poultry and turkeys, or the unborn young of any of the foregoing, provided the seller has made reasonable efforts to comply with State and federal regulations pertaining to animal health. This exemption does not apply if the seller had knowledge that the animal was diseased at the time of the sale." IND. CODE § 26-1-2-316(3)(d) (Burns 1983): "With respect to the sale of cattle, hogs, or sheep, there is no implied warranty that the cattle, hogs, or sheep are free from disease, if the seller shows that all state and federal regulations concerning animal health have been complied with." IOWA CODE ANN. § 554A.1 (West Supp. 1982):

> Notwithstanding Section 554-2316, subsection 2, all implied warranties arising under §§ 554.2314 and 554.2315 are excluded from a sale of cattle, hogs, sheep and horses if the following information is disclosed to the prospective buyer or the buyer's agent in advance of the sale, and if confirmed in writing at or before the time of acceptance of the livestock when confirmation is requested by the buyer or the buyer's agent:(a) That the animals to be sold have been inspected in accordance with existing federal and state animal health regulations and found apparently free from any infectious, contagious, or communicable disease.(b) One of the following, as applicable:(1) Except when the livestock have been confined with livestock from another source or assembled within the meaning of subparagraph 2 of this paragraph, the name and address of the present owner, and whether or not that owner has owned all of the livestock for at least thirty days.(2) If the livestock have been confined with livestock from another source or assembled from two or more sources within the previous thirty days, the livestock shall be represented as being "assembled livestock." As used in this subparagraph, "confined with livestock from another source" means the placement of livestock in a livestock auction market, yard, or other unitary facility in which livestock from another source are confined, but does not include livestock confined at the facility where the sale takes place if such confinement is for less than forty-eight hours prior to the day of sale; provided that

> livestock which are not sold after being confined with livestock from another source at a facility and offered for sale shall be deemed "assembled livestock" for the thirty-day period following the day when offered for sale.
>
> If the livestock are represented as being "assembled livestock," the name and address of the present owner shall be disclosed.
>
> In the case of an auction sale, the disclosure required by this subsection shall be made verbally immediately before the sale by the owner, an agent for the owner, or the person who is conducting the auction of the lot of livestock in question. Warranties shall be implied to the person who is conducting the auction only if the disclosure contains representations which he or she knew or had reason to know were untrue.

KAN. STAT. ANN. § 84-2-316(3)(d) (1983): "[W]ith respect to the sale of livestock, other than the sale of livestock for immediate slaughter, there shall be no implied warranties, except that the provisions of this paragraph shall not apply in any case where the seller knowingly sells livestock which is diseased." KY. REV. STAT. § 355.2-316(3)(d) (Supp. 1982): "[W]ith respect to the sale of bovine, porcine, and equine animals or poultry there shall be no implied warranty that the animals are free from disease or sickness. This exemption shall not apply when the seller knowingly sells animals which are diseased or sick." MICH. COMP. LAWS ANN. § 440.2316(3)(d) (West Supp. 1982): "[W]ith respect to the sale of cattle, hogs, or sheep, there is no implied warranty that the cattle, hogs, or sheep are free from disease, if the seller shows that all state and federal law concerning animals health has been satisfied." MISS. CODE ANN. § 75-2315 (1981): "[W]ith respect to the sale of cattle, hogs, and sheep, there shall be no implied warranty that the cattle, hogs, and sheep are free from sickness or disease at the time the sale is consummated, conditioned upon reasonable showing by the seller or his agent that all state and federal regulations pertaining to animal health were complied with." MO. ANN. STAT. § 400.2-316(5) (Vernon Supp. 1983): "A seller is not liable for damages resulting from the lack of merchantability or fitness for a particular purpose of livestock he sells if the contract for the sale of the livestock does not contain a written statement as to a warranty of merchantability or fitness for a particular purpose of the livestock." *See also* MO. ANN. STAT. § 277.141 (Vernon Supp. 1983): "If a contract for the sale of livestock does not contain a written statement as to a warranty of merchantability or fitness for a particular purpose, the seller is not liable for damages resulting from the lack of merchantability or fitness for a particular purpose of the livestock sold under the terms of that contract." MONT. CODE ANN. § 30-2-316(3)(d) (1983): "[I]n sales of cattle, hogs, sheep, and horses, there are no implied warranties, as defined in this chapter, that the cattle, hogs, sheep or horses are free from sickness or disease." N.D. CENT. CODE 41-02-33(3)(e) (1983): "With respect to the sale of cattle, hogs, sheep, and horses, there shall be no implied warranty that cattle, hogs, sheep, and horses are free from sickness or disease at the time the sale is consummated, conditioned upon reasonable showing by the seller that all state and federal regulations pertaining to animal health were complied with." OKLA. STAT. ANN. tit. 12A, § 2-316(3)(d) (West Supp. 1983): "[T]he implied warranties of merchantability and fitness do not apply to the sale or barter of livestock or its unborn young, provided that seller offers sufficient evidence that all state and federal regulations pertaining to the health of such animals were complied with; provided, however, that the implied warranties of merchantability and fitness shall apply to the sale or barter of horses." OR. REV. STAT. § 72.3160(3)(d) (1981): "With respect to the sale of livestock between merchants, excluding livestock sold for immediate slaughter, there shall be no implied warranty that the livestock animal is free from disease except where the seller had

to diseased animals to buyers.[8]

What cause of action will buyers in these states now rely on? This article first explores the scope of the applicable state exclusionary statutes. Next, the five alternate theories of seller liability will be examined. Finally, the article will suggest the one theory which offers a buyer in a given state the best opportunity for recovery of damages. This article does not address the conflicts of law questions in livestock sales.

I. THE STATUTES

For convenience, the statutes will be discussed in groups according to the type of animals covered. Horses are not specifically covered in this article because horses sold for breeding purposes are typically adequately insured[9] and generate little litigation based on a breach of warranty cause of action. It should be noted, however, that a given state's exclusion statute may be discussed in more detail in one section than another, depending on the developments in that state.

A. CATTLE AND HOGS

All of the exclusion statutes cover cattle and hogs. According to the United States Department of Agriculture statistics for 1981, "exclusion states" accounted for seventy-one and one tenth (71.1) percent of the total cash receipts from sales of cattle, calves, beef, and veal,[10] and seventy-six and six tenths (76.6) percent of the total cash receipts from sales of

---

knowledge or reason to know that the animal was not free from disease at the time of the sale." S.D. CODIFIED LAWS ANN. § 57A-2-316.1 (1980): "Notwithstanding § 57A-2-316, there is no implied warranty on the sale of cattle, hogs, or sheep that such cattle, hogs, or sheep are free from disease." TENN. CODE ANN. § 47-2-315 (Supp. 1983): "With respect to the sale of cattle,hogs, sheep, and horses, there shall be no implied warranty that the cattle, hogs, sheep, and horses are free from disease." TEX. BUS. & COM. CODE ANN. § 2.316(f) (Vernon Supp. 1982): "The implied warranties of merchantability and fitness do not apply to the sale or barter of livestock or its unborn young." WYO. STAT. § 34-21-233(c)(v) (Supp. 1983): "With respect to the sale of cattle, hogs, sheep and horses, there shall be no implied warranty that the cattle, hogs, sheep and horses are free from disease."

8. *See* Eftink, *supra* note 2, at 215.

9. *See generally* Fabiani, *Livestock Insurance: A Horse of a Different Color*, 1979 INS. L.J. 431.

10. *1981 Livestock and Meat Statistics*, ECON. RESEARCH SERV. DEPT. OF AGRIC. 32 (1982).

hogs, pork, and lard.[11] Five of the top six cattle states (Texas, Kansas, Nebraska, Iowa, and Oklahoma) are exclusion states. These five states comprise forty-six (46) percent of the total dollar sales of cattle.[12] Iowa alone had a 25.2 percent share of total hog-related sales followed by Illinois with eleven and seven tenths (11.7) percent.[13]

The statutes exempting diseased livestock from the implied warranty vary in what elements are required for the exemption. Arkansas,[14] Florida,[15] Illinois,[16] Kansas,[17] Kentucky,[18] and Oregon[19] all share the stipulation that the exemption does not apply if the seller *knowingly* sells diseased cattle. Thus, if the buyer can show common law fraud,[20] he can recover under the state uniform commercial code. The Arkansas and Kentucky[21] statutes also cover situations in which the animals are "sick."[22] Whether this is a meaningful distinction is subject to some speculation. Oregon's statute prevents exemption from implied warranty when "the seller had . . . reason to know that the animal was not free from disease at the time of the sale."[23] Interpretation of Oregon's statute indicates a seller could lose the exemption if he was

---

11. *Id.* at 37.
12. *Id.* at 32.
13. *Id.* at 37.
14. ARK. STAT. ANN. § 85-2-316(3)(d)(ii) (Supp. 1983).
15. FLA. STAT. ANN. § 672.316(3)(d) (West Supp. 1983).
16. ILL. REV. STAT. ch. 26, § 2-316(3)(d) (Smith-Hurd Supp. 1983).
17. KAN. STAT. ANN. § 84-2-316(3)(d) (Supp. 1983).
18. KY. REV. STAT. § 355.2-316(3)(d) (Supp. 1982).
19. OR. REV. STAT. § 72.3160(3)(d) (Supp. 1981).
20. *See* Citizens State Bank v. Gilmore, 226 Kan. 662, 603 P.2d 605 (1979). In that case the plaintiff, a secured creditor of the buyer of diseased cattle, alleged the seller knew the cattle were diseased when he sold them. The court defined common law fraud as follows:

> At the outset, it should be pointed out that fraudulent misrepresentation not only includes affirmative acts and misstatements of fact but also the concealment of acts and/or facts which legally or equitably should be revealed. The fraudulent misrepresentations in the case at bar were principally of the latter category and consist of the concealment of facts rather than the affirmative misstatements of facts.

Id. at 667, 603 P.2d at 610.
21. ARK. STAT. ANN. § 85-2-316(3)(d)(ii) (Supp. 1983); KY. REV. STAT. § 355.2-316(3)(d) (Supp. 1982).
22. *Id.*
23. *Id.*

negligent in failing to discover the disease.

The states' exclusion statutes previously discussed deviate from the U.C.C. implied warranty by imposing a scienter standard. Neither of the U.C.C. implied warranties has a scienter requirement.[24] Section 2-314 provides for an implied warranty of merchantability where the seller is a merchant with respect to the kind of goods sold.[25] Generally, the goods must be "fit for the ordinary purpose for which such goods are used" to be considered merchantable.[26] Section 2-315 contains an implied warranty of fitness for a particular purpose where the seller at the time of creation of the contract had reason to know of a particular purpose for which the goods were required,[27] the buyer relied on the seller's skill or judgment to supply suitable goods,[28] and the seller had reason to know of the buyer's reliance.[29] Official comment 4 indicates that only merchants will be liable under section 2-315 because only merchants have the "skill or judgment" on which a buyer would rely.

If the buyer can show that the seller knowingly sold him diseased cattle, he can recover under a fraud theory[30] or a civil cause of action under a state's animal disease control statute.[31] In addition, if the buyer can show that the seller did not comply with regulations pertaining to the health of animals, he may recover under an implied warranty theory. Seven states provide that the seller will not be exempt from implied warranty liability unless he proves compliance with all state and federal regulations pertaining to the health of the animals. The exact wording of the statutes varies. Illinois appears to have the wording most favorable to sellers: ". . . provided that the seller has made reasonable efforts to comply with state and federal regulations pertaining to animal health."[32] "Reasonable efforts" may not be the same as actual compli-

24. U.C.C. §§ 2-314, 2-315 (1978). *See supra* note 1.
25. *Id.*
26. U.C.C. § 2-314 (1978).
27. U.C.C. § 2-315 (1978). *See supra* note 1.
28. *Id.*
29. *Id.*
30. *See infra* text accompanying notes 83-94.
31. *See infra* text accompanying notes 96-100.
32. ILL. STAT. ANN. tit. 26, § 2-316(3)(d) (1983).

ance with the statute. Similarly, the North Dakota[33] and Mississippi[34] statutes are "conditioned upon reasonable showing by the seller that all state and federal regulations pertaining to animal health were complied with."[35]

At the other end of the spectrum, Indiana,[36] Iowa,[37] Michigan,[38] and Oklahoma[39] require that the seller show actual compliance with all applicable state and federal regulations, as opposed to showing *reasonable* compliance. The Iowa statute imposes an additional requirement that the animals must be "found apparently free from an infectious, contagious, or communicable disease."[40] One commentator argues that the Iowa law offers buyers only "illusory protection" even though it has the most requirements for a seller seeking exemption.[41]

The Georgia amendment to § 2-316 offers the buyer even less protection than the statutes discussed above. Rather than require that the seller show compliance with applicable state and federal regulations, the Georgia statute provides "that the provisions of this subsection shall not be applicable to brucellosis reactor cattle detected at an official State Laboratory within thirty days following the sale."[42] In terms of the national livestock market, this may not be significant because Georgia accounted for only seven tenths (0.7) percent of the total dollar value of sales of cattle, calves, beef and veal in 1981.[43] On the other hand, the states previously discussed which require that the seller show actual or attempted compliance with all applicable state and federal regulations[44] accounted for only nineteen and nine tenths (19.9) percent of

---

33. N.D. CENT. CODE § 41-02-33(3)(e) (Supp. 1981).

34. MISS. CODE ANN. § 75-2-315 (1981).

35. *See supra* notes 33 and 34.

36. IND. STAT. ANN. § 26-1-2-316(3)(d) (Supp. 1983).

37. IOWA CODE ANN. § 554A.1 (Supp. 1983).

38. MICH. COMP. LAWS ANN. § 440.2316(3)(d) (Supp. 1982).

39. OKLA. STAT. ANN. tit. 12A, § 2-316(3)(d) (Supp. 1983).

40. IOWA CODE ANN. § 554A.1 (Supp. 1983).

41. *See generally* Note, *The Iowa Livestock Warranty Exemption: Illusory Protection for the Buyer*, 67 IOWA L. REV. 133 (1981) [hereinafter cited as Note, *Iowa Livestock*].

42. GA. CODE ANN. § 109A-2-316(3)(d) (Supp. 1980).

43. *See supra* note 10.

44. *See supra* text accompanying notes 30-40.

total dollar sales.[45] Texas, Kansas, and Nebraska, the three states leading in total dollar sales comprised over thirty percent of total dollar sales nationally. Each of these states lacks the requirement that the seller of diseased livestock make a showing of compliance with other applicable regulations before the seller is eligible for exemption from the implied warranty provisions.

B. SHEEP

The exclusion statutes operated to exempt a high percentage of the cattle and hog markets from the implied warranty provisions. In contrast, the exclusion statutes applied to only forty-eight and one tenth (48.1) percent of the cash receipts from sales of sheep, lambs and mutton in 1981.[46] The reason for this seems to be the relative lack of concentration of the sheep market, combined with the fact that Colorado and California, two *non-exclusion* states, accounted for over 24 percent of the total sales.[47]

Were it not for the fact that Oregon had a relatively significant share of cash receipts from sales of sheep in 1981 (3.5 percent),[48] it would be possible to ignore Oregon's confusing

---

45. *See supra* note 10.

46. *1981 Livestock and Meat Statistics*, ECON. RESEARCH SERV., DEPT. OF AGRIC. 37 (1982).

47. It is interesting to note that several states which appear to have negligible markets in sheep nevertheless excluded sheep from implied warranty protection through exclusion statutes. In 1981, for example, Georgia's cash receipts from the sale of sheep, lambs, and mutton were relatively small. *Id.* On the other hand, the Georgia exclusion statute does not apply to the sale of chickens, even though the state accounted for over 10 percent of all chicken sales nation-wide in 1980, ranking third among states. *1980 Livestock and Meat Statistics*, ECON. RESEARCH SERV., DEPT. OF AGRIC. 318 (1982). Similarly, Indiana and Mississippi, both significant in the chicken market (Indiana's share of sales was 3.2 percent, placing Indiana eighth overall; Mississippi had a 3.1 percent share, for tenth place) enacted exclusion statutes which cover a much less significant sheep market but not sales of chicken.

In the chicken industry, the processor has complete control over the animals. The industry utilizes highly advanced disease management programs. Along with the general integrated nature of the industry, such factors may explain why implied warranty exclusions were not extended to chickens in Indiana and Mississippi. Further, Georgia may have enacted the warranty exclusion to protect its marketers who export large quantities of chicken to other states from unlimited liability and fraudulent claims. Other states do not export chicken in the same volume as Georgia.

48. *1981 Livestock and Meat Statistics*, ECON. RESEARCH SERV., DEPT. OF AGRIC. 42 (1982).

exclusion law. The Oregon statute provides:

> With respect to the sale of livestock between merchants, excluding livestock sold for immediate slaughter, there shall be no implied warranty that the livestock animal is free from disease except where the seller had knowledge or reason to know that the animal was not free from disease at the time of the sale.[49]

Facially, the statute appears satisfactory. The phrase however, "between merchants" presents a problem. The Oregon exclusion statute covers only transactions where both buyer and seller are professionals with respect to a given type of livestock.[50] Courts in ten states have had an opportunity to de-

---

49. OR. REV. STAT. § 72.3160(3)(d) (Supp. 1981).

50. U.C.C. § 2-104 (1) (1978) defines "merchant" as follows:

"Merchant" means 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 goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-104(3) (1978) provides:

"Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

See U.C.C. § 2-104 comment 2 (1978). In contrast with the Oregon statute, the implied warranty of merchantability under U.C.C. § 2-314 (1) (1978) requires only the seller be a merchant: "Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *Id.*

Therefore, the Oregon statute permits consumer purchasers of diseased livestock to recover damages for a breach of the implied warranty of merchantability.

When is a farmer a merchant with respect to livestock? To begin, it is clear livestock are "goods" under Article 2. " 'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . . 'Goods' also includes the unborn young of animals . . . ." U.C.C. § 2-105(1) (1978); *See* Note, *The Case of the Sick Pigs: Ruskamp v. Hog Builders, Inc. and the Implied Warranty of Fitness under the U.C.C.*, 20 S.D.L. REV. 659, 661 (1975).

In Iowa, for example, a farmer is *not* a merchant unless he meets certain conditions. *See* Note, *Iowa Livestock*, *supra* note 40, at 1410. Courts in other states that decided the warranty of merchantability issue with respect to livestock do not distinguish between farmers or merchants; the defendant is usually considered a "dealer." *See e.g.*, Calloway v. Manion, 572 F.2d 1033, 1035 n.2. (5th Cir. 1978) (defendant was "a professional horse trader"); Sessa v. Riegle, 427 F. Supp. 760, 769 (E.D. Pa. 1977) (sold and raced horses for a living); Woodruff v. Clark County Farm Bureau Coop Ass'n, 153 Ind. App. 31, 43, 286 N.E.2d 188, 195 (1972) (bureau regularly selling chickens); Garner v. S & S Livestock Dealers, Inc., 248 So. 2d 783, 785 (Miss. 1971) (defendant company described without elaboration as "a merchant with respect to

cide whether a farmer is a merchant in the context of sales of goods which he has farmed. One commentator has observed that courts in five states have decided that a farmer is a merchant under the U.C.C., while five have decided that he is not.[51] Only one case has addressed the issue of the farmer as a merchant of livestock.[52] In *Fear Ranches, Inc. v. Berry*[53] the buyer sued the two ranchers who had sold diseased cattle. The court distinguished the two defendants to hold that under the New Mexico U.C.C., the rancher who was not a trader was also not a merchant:

> The record shows, and the trial court found, that defendants Berry had theretofore sold all cattle they raised or fed to packers; that the sale to Perschbacker was the first sale to a non-packer, and, "was forced by financial difficulties." Thus this sale was the dealing in a different classification of stock than this cow and calf sale for resale. This was a sufficiently different type of business and type of goods than theretofore sold. This is a sufficient difference to support the trial court's conclusion. It is not sufficient to say that Berry had always dealt in "cattle," as such a category includes too many entirely different "goods." As to defendant Perschbacker, he was a trader and bought and resold, and acted as agent for sales of cow and calf units, as well as steers, heifers, feeders, and other "goods."[54]

The court's ruling in *Fear Ranches* implies that the farmer who only sells livestock directly to a farm bureau, livestock company, or packer, is not a merchant. On the other hand, the farmer who becomes an agent for others or trades in livestock, is a merchant.[55] Assuming that farmers are

---

livestock"); Hinderer v. Ryan, 7 Wash. App. 434, 499 P.2d 252 (1972) (defendant described as "a hog buyer"); S-Creek Ranch, Inc. v. Monier & Co., 509 P.2d 777, 778 (Wyo. 1973) (defendant company acted "as a livestock commission firm advertising and offering sheep for sale").

51. Purcell, *What Warranties Do Farmers Give When They Sell Their Livestock?*, 1980-81 AGRIC. L.J. 117, 122 n.16 (1980).

52. *Id.* Of the cases Purcell cited, only one fact situation involved livestock. Fear Ranches, Inc. v. Berry, 470 F.2d 905 (10th Cir. 1972). *See supra* note 50.

53. 470 F.2d 905 (10th Cir. 1972).

54. *Id.* at 907.

55. *See, e.g.*, Comment, *The Farmer in the Sales Article of the U.C.C.: "Merchant" or "Tiller of the Soil?"*, 1976 S. ILL. L. REV. 237, 257-58 (supporting the decision in *Fear Ranches*); Note, *The Farmer as Merchant Under the U.C.C.*, 53

merchants with respect to livestock, the Oregon exclusion statute will apply only if both buyer and seller are merchants. The U.C.C. nebulously defines the phrase "between merchants" as "any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants."[56]

C. POULTRY

Exclusion states accounted for only twenty-six and five tenths (26.5) percent of cash sales of chicken in 1980.[57] The top two states, Pennsylvania and North Carolina, which accounted for almost twenty-five percent of sales, do not have exclusion statutes.[58] Georgia, Indiana, and Mississippi all recorded significant cash sales of chicken in 1980. Each have exclusion statutes which do not cover chicken sales.[59] Presumably, then, a buyer of diseased chickens in these five states, which accounted for over forty-two (42) percent of cash sales of chicken in 1980,[60] can still assert breach of the implied warranties of merchantability and fitness for a particular purpose under the U.C.C.

The exclusion statutes have a smaller effect on the turkey market, assuming the 1980 gross income rankings among states remain substantially the same in 1983. Only seven of the twenty-one statutes which exclude implied warranties with respect to cattle and hog sales also exclude turkey sales.[61] The turkey exclusion states received only twenty-two and seven tenths (22.7) percent of gross income from turkey sales in 1980.[62] The three states leading in turkey sales, California

---

N.D.L. REV. 587, 605 (1977) (arguing that farmers who raise livestock on a yearly or seasonal basis but sell them regularly should be considered "dealers").

56. U.C.C. § 2-104(3) (1978).

57. *1981 Agric. Statistics*, STATISTICAL REP. SERV., DEPT. OF AGRIC., 396-97 (1982).

58. *Id. See e.g., supra* note 7.

59. GA. CODE ANN. § 109A-1-316(3)(d) (Supp. 1980); IND. STAT. ANN. § 26-1-2-316(3)(d) (Supp. 1983); MISS. CODE ANN. § 75-2-315 (1981).

60. *1981 Agric. Statistics*, STATISTICAL REP. SERV., DEPT. OF AGRIC., 396-97 (1982).

61. ARK. STAT. ANN. § 85-2-316(3)(d)(ii) (Supp. 1981); ILL. STAT. ANN. tit. 26, § 2-316(3)(d) (1983); KY. REV. STAT. § 355.2-316(3)(d) (Supp. 1982); OKLA. STAT. ANN. tit. 12A, § 2-316(3)(d) (Supp. 1983); OR. REV. STAT. § 72.3160(3)(d) (Supp. 1981); TEX. BUS. AND COM. CODE ANN. § 2.316 (Supp. 1982).

62. *See supra* note 54.

(14.1 percent), Minnesota (13.2 percent), and North Carolina (12.5 percent) have not enacted exclusion statutes. Five of the seven states excluding implied warranties with respect to turkey sales do so by implication.[63] These states exclude warranties with respect to "livestock" sales in general. Although the common definition of livestock includes poultry, whether turkeys are included in the "livestock" definition depends on the statute under examination.[64]

The following table summarizes the relationship between the number of states that have exclusion statutes and the livestock industry sales in those states. It is apparent that the exclusion statutes exempt approximately three-fourths of the cattle and hog sales from implied warranty protection and about half of the sheep sales. In contrast, only about one-fourth of the poultry sales are affected by exclusion statutes.

Table 1. IMPACT OF EXCLUSION STATUTES

TYPE OF LIVESTOCK	NO. OF STATES WITH AN EXCLUSION STATUTE	% of 1981 CASH SALES HELD BY EXCLUSION STATES
Cattle	21	71.1
Hogs	21	76.6
Sheep	20	48.1
Chicken	14	25.5*
Turkey	7	22.7*

*1980 Statistics

63. KY. REV. STAT. § 355.2-316(3)(d) (Supp. 1982); MO. STAT. ANN. § 400.2-316(5) (Supp. 1982); OKLA. STAT. ANN. tit. 12A, § 2-316(3)(d) (Supp. 1983); OR. REV. STAT. § 72-3160(3)(d) (Supp. 1981); TEX. BUS. & COM. CODE ANN. § 2.316 (Supp. 1982).

64. *Compare* Laner v. State, 381 P.2d 905, 907-08 (Okla. Crim. App. 1963) ("livestock" includes fowl according to Webster's New International Dictionary and WORDS & PHRASES) *with* United States v. Cook, 270 F.2d 725, 727 (8th Cir. 1959) (citing federal tax regulations).

II. What Cause of Action May the Aggrieved Buyer Pursue?

A. EXPRESS WARRANTY

The simplest protection for a prospective buyer of livestock seeking protection against purchasing diseased livestock is to acquire an express warranty from the seller warranting the animals free of disease.[65] One commentator has suggested that buyers could also negotiate a lower purchase price for livestock or obtain insurance policies to cover the risk of loss from disease.[66] The buyer should be aware of what remedies are available before entering a transaction, particularly because standard livestock mortality insurance policies are limited in their application.[67]

What if the buyer does not have an express warranty in the contract of sale but nonetheless feels that the seller represented that the animals were healthy? Section 2-313 of the U.C.C. provides:

(1) Express warranties by the seller are created as follows:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.Four decisions, in states which now have exclusion statutes, illus-

---

65. The express warranty is found in U.C.C. § 2-313 (1978). *See* J. White & R. Summers, Uniform Commercial Code §§ 9-2-94 (2d ed. 1980).

66. *See* Note, *Iowa Livestock*, *supra* note 40, at 158-59.

67. *Id.*

trate how a buyer can prove the breach of an express warranty not contained in the contract. In *Reed v. Bunger*,[68] the seller agreed to provide the buyer with "good, clean second-calf heifers."[69] The buyer prevailed on his claim of breach of express warranty under the Uniform Sales Act.[70] At trial, the buyer established that fifteen of the twenty cows purchased were older than represented or infected with mastitis, a disease which renders milk unsatisfactory for sale.[71] The Iowa Supreme Court affirmed the trial court judgment in favor of the plaintiff/buyer. The court stated:

> We must disagree with the argument there is no evidence of express warranty—or breach thereof. It is unnecessary to set out the definition of express warranty in Code Section 554.13, I.C.A., part of the Uniform Sales Law. Certainly a seller's promise to sell "good, clean, second-calf heifers" may amount to such a warranty, not, as defendant suggests, a mere statement of the seller's opinion. There is substantial evidence the 15 cows did not answer to his warranty.[72]

Similarly, in the Missouri decision, *Mitchell v. Rudasill*,[73] the defendant seller guaranteed that the udders of cows he sold were sound and stated that the cows would give adequate milk production. The court held that the seller breached an express warranty because the cows had mastitis.[74] To prevail, the buyer did not need to prove a warranty that the cows were free of mastitis;[75] "[i]t was only necessary for plaintiff's evidence to show, as it did, that the udders of a cow afflicted with mastitis were not sound, and that a cow so diseased would not give a reasonable amount of milk."[76]

Naaf v. Griffitts,[77] the Kansas Supreme Court affirmed the seller's liability for breach of an express warranty which

68. 255 Iowa 322, 122 N.W.2d 290 (1963).
69. *Id.* at 326, 122 N.W.2d at 293.
70. *Id.* at 330, 122 N.W.2d at 295.
71. *Id.* at 327, 122 N.W.2d at 294.
72. *Id.* at 332-33, 122 N.W.2d at 297.
73. 332 S.W.2d 91 (Mo. 1960).
74. *Id.* at 93.
75. *Id.* at 95.
76. *Id.*
77. 201 Kan. 64, 439 P.2d 83 (1968).

warranted that his heifers were seven or eight months pregnant. The seller advertised the heifers for sale in a newspaper. The ad read, in part, the heifers were "to calf, September, October."[78] After the buyer told the seller he was interested in heifers that would calve, the seller confirmed the advertisement's claim that the heifers were pregnant, adding that a veterinarian had given them pregnancy tests.[79] The court properly found the seller's claims constituted an express warranty.

What if the seller, while delivering receipts for the sale of chickens purchased to produce eggs, disclaims "warranties express or implied, have been made"[80] and further, requires the buyer accepts the chickens "as is"? In *Woodruff v. Clark County Farm Bureau*,[81] the court held *inter alia*, that material issues of fact existed as to whether the seller violated express warranties when its representatives promised the buyer that its chickens held for sale "would bloom out"[82] and that the buyer "would only get the good ones."[83] The court concluded the seller's disclaimer of any warranties was unreasonable under section 2-316,[84] and remanded the case for a determination of whether the seller's statements were express warranties.[85] *Woodruff* is instructive in that it shows that even in the face of purported disclaimers, a buyer can argue that the seller breached an express warranty.

B. FRAUD

Particularly in early common law cases before actions for breach of implied warranties became common place, aggrieved buyers would allege that their seller had fraudulently misrepresented the health of the animals sold. In the 1887 New York case of *Jeffrey v. Bigelow*,[86] the sellers' agent, knowing that

78. *Id.* at 65, 439 P.2d at 84.
79. *Id.*
80. Woodruff v. Clark County Farm Bureau Coop. Ass'n, 153 Ind. App. ___, 286 N.E.2d 188, 199 (1972).
81. *Id.*
82. *Id.* at ___, 286 N.E.2d at 191, 198.
83. *Id.* at ___, 286 N.E.2d at 190.
84. *Id.* at ___, 286 N.E.2d at 200.
85. *Id.* at ___, 286 N.E.2d at 201.
86. 13 Wend. 459 (N.Y. Sup. Ct. 1887).

part of the flock of sheep was diseased, sold the sheep to the buyer without notifying either the sellers or the buyer of the sheeps' diseased condition.[87] The court held that the sellers were liable to the buyer for the value of the sheep purchased as well as for the buyer's other sheep which became infected after exposure to the infected sheep.[88] Notably, the seller's fraudulent conduct exposed him to liability for consequential damages.

Not all common law decisions favored the buyer. The buyer has the burden of showing the animals were diseased and if they died, their deaths were a result of that disease. For example, in *O'Hair v. Morris*,[89] the court found for the seller: "There is no proof whatever that the hogs died of cholera. For aught that appears in the record they may have died of some other disease."[90] The buyer must also prove that the animals were not infected after the seller released them to him.

Given that the buyer can show the seller made a fraudulent representation upon which the buyer reasonably relied, the buyer must show, in most cases, he was in privity with the seller and he suffered damages as a result of the seller's misrepresentation. The privity requirement in a fraud cause of action was examined in *Citizens State Bank v. Gilmore*.[91] In *Gilmore*, the owner of cattle infected with brucellosis and quarantined sold some of the infected cattle to an innocent buyer.[92] The buyer financed the purchase by giving the Citizens State Bank a security interest in the cattle.[93] After the buyer went bankrupt the bank took possession of the cattle. Thereafter, the bank discovered the cattle were diseased, and sued the seller for fraud.[94] The seller claimed the bank had no standing to sue because it lacked the required privity.[95] The court adopted the position of the Restatement (Second) of Torts, §§ 531 and 533, and held the bank was an eligible

87. *Id.* at 460.
88. *Id.* at 461.
89. 87 Ill. App. 393 (1900).
90. *Id.* at 394.
91. 226 Kan. 662, 603 P.2d 605 (1979).
92. *Id.* at 664-65, 603 P.2d at 609.
93. *Id.*
94. 226 Kan. at 665, 603 P.2d at 609.
95. *Id.*

plaintiff if it could show that the seller knew that the buyer would secure a loan from the bank to purchase the cattle based on the seller's misrepresentations.[96] Except for the *Gilmore* case, almost all of the cases with buyers alleging fraud in exclusion states were decided in the early 1900's.[97] The remedies available under a theory of fraud are similar to those available under the U.C.C..[98]

C. *CIVIL ACTION BASED ON DISEASE CONTROL STATUTE*

Most states have statutes prohibiting owners of diseased livestock from selling or transporting them.[99] Under some statutes, the buyer of diseased animals may recover damages from the seller.[100]

---

96. 226 Kan. at 669-71, 603 P.2d at 611-13.

97. *See e.g.*, O'Hair v. Morris, 87 Ill. App. 393 (1900); Conard v. Crowdson, 75 Ill. App. 614 (1898); Co-Operative Sales Co. v. Van Der Beek, 219 Iowa 974, 259 N.W. 586 (1935); Wallace v. Shoemaker, 194 Ind. 419, 143 N.E. 285 (1924); Knox v. Wible, 73 Ind. 233 (1881).

98. At common law, a defrauded buyer of diseased livestock can recover the difference between what the animals would be worth if healthy and what they are now worth. In addition, the buyer can claim all damages to his herd proximately caused by the disease, such as infection. Under the Uniform Commercial Code, the applicable provisions are sections 2-714 and 2-715, under which plaintiffs can recover similar damages. *See supra* note 2.

99. *See generally* 2 HARL, AGRICULTURAL LAW, §§ 9.06, 9.07 (1982) [hereinafter cited as HARL]. Illinois' statute is representative of most states' policies on liability for the importation of diseased animals and allowing diseased animals to run at large:

> Any owner or person having charge of any swine and having knowledge of, or reasonable grounds to suspect the existence among them of, the disease known as "hog cholera," or of any other contagious or infectious disease and who does not use reasonable means to prevent the spread of such disease; or who conveys upon or along any public highway or other public grounds or any private lands, any diseased swine, or swine known to have died of, or been slaughtered on account of, any contagious or infectious disease, shall be liable in damages to the person or persons who may have suffered loss on account thereof.

ILL. REV. STAT. ch. 8, § 191 (1981).

100. HARL, *supra* note 96, at § 9.07; *e.g.*, KAN. STAT. ANN. § 47-644 (1981) provides:

> Nothing in this article shall be so construed as to prevent the recovery of damages in civil actions against any person or persons who shall import or drive such diseased sheep into this state, or who shall allow such diseased sheep to run at large, or who shall sell such diseased sheep.

Similarly under North Dakota law buyers of diseased animals may sue sellers for damages. N.D. CENT. CODE § 36-14-22 (1980). North Dakota law also provides: "If any

If the statute does not expressly provide for a civil cause of action, may the buyer assert that a cause of action is implied under the statute? Although the answer appears unclear,[101] one commentator has suggested violation of a criminal statute governing the sale of diseased animals constitutes negligence per se.[102] On the other hand, in a 4 - 3 decision the Nebraska Supreme Court held that the seller's failure to comply with quarantine regulations for cattle infected with Bang's disease did not give rise to an implied civil action.[103]

D. *PRODUCTS LIABILITY*

The buyer of diseased livestock could advance a claim based on a product liability theory. A successful products liability suit subjects the seller to strict tort liability under section 402A of the Restatement (Second) of Torts.[104]

The buyer of gilts (unbred female pigs used for breeding purposes) pursued a products liability claim in *Anderson v. Farmers Hybrid Co., Inc.*[105] The buyer argued the gilts were defective products because they were afflicted with "bloody dysentery."[106] Affirming the trial court's decision that strict liability does not apply to living things such as animals,[107] the court noted that § 402A does not list animals as "products"[108] and concluded that because living animals do not leave the seller in a fixed state, it would be unfair to impose the risk of

---

animal is known to have been infected with or exposed to any [contagious or infectious] disease within one year prior to such disposal, due notice of such fact shall be given in writing to the person receiving the animal." N.D. CENT. CODE § 36-14-01 (1980).

101. HARL, *supra* note 96, at § 9.07.

102. HARL, *supra* note 96, at § 9.07, states:

> [S]ome courts have indicated that failure to perform a mandatory duty as required by statute constitutes negligence per se, and allows an injured person *for whose protection* the statute was enacted or *to whom a duty is owed* to bring a civil action for damages. In other words, the question whether civil liability arises from breach of a duty prescribed by statute depends on whether the statute was enacted for the benefit of individuals or rather the public at large. (emphasis original, citations omitted).

103. Strauel v. Peterson, 155 Neb. 448, 52 N.W.2d 307 (1952).

104. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

105. 87 Ill. App. 3d 493, 408 N.E.2d 1194 (1980).

106. *Id.* at 495, 408 N.E.2d at 1195.

107. *Id.* at 499-501, 408 N.E.2d at 1198-99.

108. *Id.* at 501, 408 N.E.2d at 1199.

loss on him.[109] A commentator writing in support of the implied warranty exclusion statutes has made the same argument: "[t]he heart of the seller's problem is the inability to guarantee a disease-free animal. . . ."[110]

On the other hand, the trial court in *Beyer v. Aquarium Supply Co.*[111] refused to dismiss a strict products liability complaint of an employee of a store purchasing defendant-distributor's diseased hamsters. The plaintiff-employee became ill after contact with the diseased hamsters. The court used broad language to deny the defendant's motion, stating:

> [T]here is no reason why a breeder, distributor or vendor who places a diseased animal in the stream of commerce should be less accountable for his actions than one who markets a defective manufactured product. The risk presented to human well being by a diseased animal is as great and probably greater than that created by a defective manufactured product and in many instances, for the average consumer, a disease in an animal can be as difficult to detect as a defect in a manufactured product.[112]

However, *Beyer* has not been followed. Frankly, it seems unlikely that a court would follow *Beyer* rather than *Anderson*, a more closely reasoned decision.

E. NEGLIGENCE

Can the buyer successfully plead the sale of diseased livestock would not have occurred except for the seller's negligence in failing to discover the disease? The answer is yes, but the buyer must show negligent conduct on the part of the seller.[113] This will be difficult unless the buyer can prove that the seller did not comply with applicable state and federal disease statutes. In *DeKalb Hybrid Seed Co. v. Agge*,[114] the buyer purchased diseased baby chicks. The court held the buyer failed to allege or prove the seller's specific act of negli-

---

109. *Id.* at 500-01, 408 N.E.2d at 1198-99.
110. *See* Eftink, *supra* note 2, at 215.
111. 94 Misc. 2d 336, 404 N.Y.S.2d 778 (1977).
112. *Id.* at 337, 404 N.Y.S.2d at 779.
113. *See infra* text accompanying notes 111-112.
114. 293 S.W.2d 64 (Tex. App. 1956).

gence caused the buyer's damages.[115] Because of similar reasoning in other decisions like *DeKalb*, the buyer should pursue a civil cause of action under an animal disease control statute or argue that the breach of the statute's requirements constitutes negligence per se.[116] A creative argument was successfully advanced in *Anderson v. Blackfoot Livestock Comm'n Co.*.[117] The buyer asserted that, given the incubation period of the disease afflicting the purchased animals, the animals must have become infected while in the seller's control. Through the process of "negative inference," the successful plaintiff-buyer in *Anderson* established proximate cause.[118]

III. Which Cause of Action is Best?

The causes of action available to a buyer of diseased livestock are a function of the type of animal purchased. As previously noted with respect to cattle, in most instances a claim of breach of implied warranty is not available to buyers in the exclusion states.[119] If a buyer can show the seller did not comply with applicable animal health regulations, he may sue for breach of implied warranty in Illinois, North Dakota, Mississippi, Iowa, Michigan, and Oklahoma.[120] The Georgia exemption offers the buyer less protection.[121] The buyer of diseased cattle may also allege fraud,[122] breach of an animal health statute resulting in civil liability,[123] negligence,[124] failure of consideration under the U.C.C.,[125] and breach of an express warranty.[126]

The same remedies are available to buyers of diseased hogs as are available to buyers of diseased cattle. However, all

---

115. *Id.* at 69.
116. *See supra* text accompanying notes 96-100.
117. 375 P.2d 704 (Idaho 1962).
118. *Id.* at 710.
119. *See supra* text accompanying notes 10-13.
120. *See supra* text accompanying notes 32-44.
121. *Id.*
122. *See supra* text accompanying notes 83-94.
123. *See supra* text accompanying notes 96-100.
124. *See supra* text accompanying notes 110-113.
125. *See generally* J. White & R. Summers, Uniform Commercial Code §§ 6-1-67 (2d ed. 1980).
126. *See supra* text accompanying notes 62-88.

of the implied warranty exclusion statutes cover hog sales. Therefore, the buyer of diseased hogs would prefer to show the seller's breach of the animal disease statutes constitutes negligence *per se*.[127] Although the buyer's best theory depends on the facts, a civil cause of action under the animal health statutes appears to be easier to prove than the other causes of action.[128]

Liability for sales of diseased sheep is controlled by different rules than those regulating liability for sales of other types of diseased livestock. Because exclusion statutes cover only forty-nine (49) percent of the sheep market,[129] the buyer of diseased sheep has the option to bring an action for seller's breach of an implied warranty.[130] Even if the exclusion statute of a particular state bars such an action, the buyer still has the negligence per se argument for seller's violation of an animal disease statute.[131] Fraud is another cause of action available to the buyer of diseased sheep in an exclusion state. The reader is reminded that fraud is easy to allege but often difficult to prove.

Finally, the sales of diseased poultry are virtually unaffected by most states' exclusion statutes. Buyers of chickens and turkeys can still pursue a breach of implied warranty action.[132] Since the burden of proof is easier for the buyer to bear, it is recommended that buyers of diseased poultry exhaust the breach of implied warranty action before relying on another theory.[133] Of course, the other theories are usually available in the alternative and should be included in the pleadings to the extent they are appropriate.

CONCLUSION

The laws in twenty-one states now limit the buyer's ability to recover damages under an implied warranty theory in sales of diseased livestock. These statutes control the seller's

---

127. *See supra* note 94.
128. *See supra* text accompanying notes 98-103.
129. *See supra* note 43.
130. *See supra* text accompanying notes 43-50.
131. *See supra* note 94.
132. *See supra* text accompanying notes 51, 54.
133. *Id.*

liability in approximately three-fourths of the total cattle and hog sales, one-half of all sheep sales, and one-fourth of the chicken and turkey sales in the United States. To compound problems for buyers, particularly large volume dealers, uniformity between the states is not the norm. In fact, quite the opposite is true. The most significant disparity in the states' exclusion statutes is the type of livestock the statute excludes from implied warranty.

The statutes also differ in regard to the extent to which they preclude the use of the breach of implied warranty theory. Recovery under an implied warranty theory is permitted in a majority of states where at least one of the following conditions exists: (1) the seller knew or should have known the animals were diseased, or (2) the seller has failed to comply with applicable disease control statutes. Of the states prohibiting the buyer's use of the implied warranty theory in certain instances, only Missouri, Montana, Nebraska, South Dakota, Tennessee, Texas, and Wyoming completely prohibit the use of this theory in almost all sales of livestock.

In circumstances where the implied warranty theory of recovery is not available, other theories of recovery may subject the seller to liability for selling diseased livestock. Breach of express warranty is an obvious alternative. If the buyer cannot prove the seller breached an implied or express warranty, the buyer should assert a claim under the state animal disease statute. Other causes of action open to the buyer are negligence, fraud and products liability. Obviously when an exclusion statute operates to preclude the buyer's recovery under a warranty (express or implied) theory, the alternatives left for the buyer to pursue involve a higher burden of proof. In some cases this will result in the buyer failing to recover any damages for the sale of diseased livestock. However, many states' economies are dependent on agriculture and prefer the buyer accept the risk of loss rather than the seller as a matter of policy.

Because the statutes precluding the buyer of diseased livestock from recovering under an implied warranty theory now control a large and growing portion of total livestock sales and since alternative theories are often difficult to prove, the

buyers of diseased livestock should expect their chances to recover damages to decline. *Caveat Emptor* lives on!