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## Sale Warranties under Wyoming Law and the Uniform Commercial Code

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against the seller. Except as to those defenses which may be asserted against a holder in due course, this agreement may be enforced by an assignee for value who takes in good faith and without notice of a claim or defense. It should be noted that this section is expressly made subject to any statute or decision which establishes a different rule for buyers of "consumer goods." "Consumer goods" are defined as those goods used, or bought for use, primarily for personal, family, or household purposes.<sup>49</sup> While the Code appears to recognize the need for a different rule in the case of "consumer goods," as opposed to those transactions between merchants, it expressly makes no effort to solve the basic problem of whether a finance company should be given the benefit of holder in due course status.<sup>50</sup>

In conclusion, it is submitted that the courts can best serve the interest of justice by adopting a reasonable standard to govern the determination of good faith on the part of finance companies in the conditional sales contract-promissory note situation. Where the claim of defense assertable against the dealer is groundless, the finance company should be able to prevail in a trial on the merits. If the claim is valid, however, the finance company should not be considered insulated from the claim where it has so involved itself with the business of the dealer that it may not, in the eyes of justice, be deemed a true holder in due course. As stated in a New York case, ". . . if any hardship is imposed by this rule, it is only the hardship that has always followed the refusal of the law to permit the divorce of honor from enterprise."<sup>51</sup>

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### SALE WARRANTIES UNDER WYOMING LAW AND THE UNIFORM COMMERCIAL CODE

The sales warranties under the Uniform Commercial Code<sup>1</sup> are in many ways similar to the sales warranties contained in the Uniform Sales Act; however, there are significant differences that are worthwhile to note. This article will attempt to illustrate, by comparison, some of the more important differences between the two uniform acts. The comparison will actually be between existing Wyoming law and the Code since the Uniform Sales Act is law in Wyoming.<sup>2</sup>

There seems to be little change in the Code with respect to the express warranty, and the implied warranties of title, sale by sample and sale by

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49. Uniform Commercial Code § 9-109 (1).

50. See Uniform Commercial Code § 9-206, comment (2) (Uniform Laws Annotated 1958) in which it is stated: "This article takes no position on the controversial question whether a buyer of consumer goods may effectively waive defenses by contractual clause or by execution of a negotiable note."

51. Buffalo Industrial Bank v. De Marzio, supra note 46, at 786.

1. Hereinafter called the Code.

2. The warranty provisions of the Sales Act can be found in W.S. § 34-177 through § 34-181. The warranty provisions of the Code are found in § 2-312 through § 2-318.

description. Differences are more apparent in the implied warranties of merchantability and fitness for a particular purpose. Significant changes appear in the Code in its provisions for regulating the conflicts between express warranties and disclaimers and conflicts between express and implied warranties. Finally, the Code rejects the requirement of privity in actions for breach of warranty in certain cases. These matters will be discussed in this order.

The express warranty,<sup>3</sup> implied warranty of sale by sample,<sup>4</sup> and by description<sup>5</sup> are grouped under one express warranty section of the Code.<sup>6</sup> The warranties of description and sample are designated as express rather than implied warranties since they rest on the "dickered" aspects of the individual bargain and go to the essence of the bargain. As express warranties they are less vulnerable to words of disclaimer in a standard printed form.<sup>7</sup> The express warranty does not extend to "sales puffs" by a seller. It is recognized that a seller's expression of value or his opinion of the goods does not form a part of the bargain.<sup>8</sup>

The Code purports to completely revise the warranty of title section of the Uniform Sales Act.<sup>9</sup> The warranty of quiet possession is omitted entirely but it is inherent in the general warranty of good title.<sup>10</sup> Even so, one writer feels that this warranty will be lost under the Code since it is not specifically provided for and since other sections of the Code appear to be in conflict with its preservation.

It omits any warranty of quiet possession which is specifically provided for in Section 12 (2) of the Uniform Sales Act. In view of the provision in Section 2-725 (2) that "A breach of warranty occurs when tender of delivery is made," this is a serious deficiency in the Code. Quiet possession may not be disturbed for some time after delivery, and Section 2-725 (1) sets a short Statute of Limitations of four years and, by agreement, a still shorter one of "not less than one year."<sup>11</sup>

The warranty of title section of the Code would provide a warranty of title to a buyer of a patent.<sup>12</sup> It has been suggested that the warranty of quiet possession in the Uniform Sales Act is broad enough to protect such a buyer and a specific warranty is unnecessary.<sup>13</sup>

The present Wyoming law provides for an implied warranty of mer-

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3. W.S. § 34-177.
  4. W.S. § 34-181.
  5. W.S. § 34-179.
  6. Uniform Commercial Code § 2-313.
  7. Uniform Commercial Code § 2-313, Comment 1.
  8. Uniform Commercial Code § 2-313 (2).
  9. W.S. § 34-178.
  10. Uniform Commercial Code § 2-312, Comment 1.
  11. Hall, Article 2—Sales—From Status to Contract?, Wis. L. Rev. 209 (1952).
  12. Uniform Commercial Code § 2-312 (3).
  13. Goodwin, How the Adoption of the Uniform Commercial Code would affect the Law of Sales in Oregon, 30 Ore. L. Rev. 212 (1951). "However, despite the absence of authority upon the point, it is believed that the wording of the warranty of quiet possession in the Uniform Sales Act is broad enough to protect a buyer against liability of patentees."

chantable quality but does not attempt to define "merchantable quality."<sup>14</sup> The Code contains a similar implied warranty but is more specific in its treatments of it.<sup>15</sup> The Code energetically enumerates qualities and attributes of the term "merchantable."<sup>16</sup> This enumeration does not purport to exhaust the meaning of "merchantable" nor to limit the definition, but, on the contrary, the intention is to leave open other attributes of merchantability. At the very least, such a definition would create a certainty that is not present in our present implied warranty of merchantable quality. This warranty is further delimited by a clear definition of the word "merchant."<sup>17</sup> The Uniform Sales Act does not define "merchant" and, in fact,

... only in the doctrine of warranty of merchantability does the text of the present Uniform Sales Act contain special provisions for a "seller who deals in goods of that description" (Section 15 (2)).<sup>18</sup>

It can be seen that the implied warranty of merchantability under the Code is restricted to a much smaller group than everyone who is engaged in business since it requires a professional status on the part of the seller as to particular kinds of goods. For instance, a person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply.<sup>19</sup>

Our present statute does not contain an implied warranty as to fitness for any particular purpose except where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required.<sup>20</sup> In dealing with this same implied warranty, the Code would extend it to the situation where the seller at the time of contracting has reason to know any particular purpose for which the goods are required.<sup>21</sup>

Under our present law, therefore, the buyer has the burden to make

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14. W.S. § 34-180 (2).

15. Uniform Commercial Code § 2-314. The principal warranty in this section is found in subsection (1) wherein "... 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."

16. Uniform Commercial Code § 2-314 (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 a 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."

17. Uniform Commercial Code § 2-104. Merchant is defined as "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 transactions 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."

18. Rabcl, *The Sales Law in the Proposed Commercial Code*, 17 U. of Chi. L. Rev. 427 (1950).

19. Uniform Commercial Code § 2-314, Comment 3.

20. W.S. § 34-180 (1).

21. Uniform Commercial Code § 2-315.

known the particular purpose of the goods for the warranty to attach; whereas, the Code would charge the seller with knowledge of the particular purpose if he had reason to know at the time of the contracting. This slight charge of emphasis in the Code would seem to be to the buyer's benefit since under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended.<sup>22</sup>

In *Salt Lake Hardware Co. v. Connell*<sup>23</sup> our court dealt with our present statute on implied warranty as to fitness for any particular purpose. In that case, the buyer, Mrs. Connell, wished to purchase an oil still for refining oil recovered from wells located at Spring Valley in Unita County. She made a trip to Salt Lake City to arrange for the purchase of the still. The Western Heating and Sheet Metal Works of Salt Lake City, after hearing of her needs and purposes of such a still, agreed to construct it for her. When she returned to Wyoming she received a letter of specifications for the still from the metal works. She signed her name below the typewritten word "accepted" and returned the letter. The letter stated that "all labor and material guaranteed to be strictly first class." The still was delivered and assembled but did not function properly and condemned by the State Oil and Gas Inspector as being wasteful and impractical. The assignee of the metal works sued her for the balance of the purchase price of the oil still. The Supreme Court affirmed the lower court decision for the buyer and found that an implied warranty as to fitness for a particular purpose existed. After quoting what is now Wyoming Statutes 34-180 (1), the court said:

In order that the exceptions set out in the excerpt quoted hereinabove from the statute shall be operative, it is obvious from the language used that two things must appear in evidence: first, that the seller was informed, expressly or by implication, of the purpose for which the goods were purchased; and second, that the buyer relied on the seller's skill and judgment.<sup>24</sup>

Under present Wyoming law there is no implied warranty as to fitness for any particular purpose in the case of a contract to sell or a sale of a specified article under its patent or trade name.<sup>25</sup> The Code would extend the warranty of fitness to include such transaction.<sup>26</sup> This would be a recognition of the trend in case law which holds a seller to an implied warranty of fitness notwithstanding the fact that the sale was of an article under its patent or trade name.<sup>27</sup>

The Uniform Sales Act does not resolve the conflict between express warranties and disclaimer clause.<sup>28</sup> The Code meets this problem and

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22. Uniform Commercial Code § 2-315, Comment 1.

23. 47 Wyo. 145, 34 P.2d 23 (1933).

24. *Ibid.* at 156, 34 P.2d at 26.

25. W.S. § 34-180 (4).

26. Uniform Commercial Code § 2-315, Comment 5.

27. Williston, Sales § 236a (rev.ed. 1948).

28. *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 190 F.2d 817 (3rd Cir. 1951), footnote 9.

provides that where there is a conflict between an express warranty and a disclaimer clause, the negation or limitation is inoperative to the extent that such construction is unreasonable.<sup>29</sup> This provision is designed to protect the buyer from unexpected and unbargained language of disclaimer.<sup>30</sup> To further this general policy, a disclaimer must be in writing and conspicuous or it will be ineffective. The section also sets forth language effecting a disclaimer.<sup>31</sup> On the other hand, the Code protects the seller against false allegations of oral warranties by its provisions on parol and extrinsic evidence,<sup>32</sup> and against unauthorized representations by the customary "lack of authority" clauses.<sup>33</sup>

It is interesting to note that one year before the Uniform Sales Act was adopted in Wyoming, our Supreme Court sustained an oral warranty over a disclaimer clause contained in a bill of sale. In *Leitner v. Thayer*,<sup>34</sup> the seller was seeking to recover upon three notes given in the purchase of a stallion. The buyer admitted signing the notes and *inter alia* contended that the seller verbally warranted the stallion was in good health "and would get sixty per cent of mares bred to him with foal, and was a good foal getter."<sup>35</sup> The seller agreed that the stallion was warranted to be a sixty per cent foal getter but argued that the only warranty their agent who made the sale was authorized to give was a written warranty, and that a bill of sale, a purported copy of which was admitted in evidence, and which the seller claimed was delivered to the buyer, was the only warranty given. The bill of sale contained the following disclaimer clause:

This Bill of Sale contains all the agreements of warranty of guarantee made by us in the sale of the above mentioned stallion, and it is expressly provided that we shall not be liable for any claim that may hereafter be made alleging any verbal agreement of ourselves or agent in the sale of said horse.<sup>36</sup>

The court, while holding on another point, said:

There was sufficient evidence to sustain the finding of the jury that the warranty was verbal, and that no written warranty was delivered; and the warranty as claimed by defendants is substantially that which plaintiffs admitted the agent was authorized to make and did make.<sup>37</sup>

At common law<sup>38</sup> and under the Uniform Sales Act,<sup>39</sup> implied warranties can be disclaimed. In the case of *International Harvester Company of America v. Leifer*,<sup>40</sup> the company sued the buyer of a truck for the

29. Uniform Commercial Code § 2-316 (1).

30. Uniform Commercial Code § 2-316, Comment 1.

31. Uniform Commercial Code § 2-316 (2).

32. Uniform Commercial Code § 2-202.

33. Uniform Commercial Code § 2-316, Comment 2.

34. 24 Wyo. 378, 159 Pac. 1084 (1916).

35. *Ibid.* at 380, 159 Pac. at 1084.

36. *Id.* at 382, 159 Pac. at 1085.

37. *Id.* at 385, 159 Pac. at 1086.

38. Williston, Sales § 213 (rev.ed. 1948).

39. W.S. § 34-161.

40. 42 Wyo. 283, 293 Pac. 381 (1930).

balance due to foreclose the chattel mortgage thereon. The buyer relied on an oral express warranty not included in the written contract of sale. The sales order for the truck stated that "the purchaser agreed that this order contains the entire agreement" and on the reverse of the order the warranty was set out and below that these words appeared: "The above warranties are in lieu of all other warranties express or implied and no person, agent or dealer is authorized to give any other warranties. . . ."41 The buyer claimed the agent, in making the sale, orally agreed that the truck would be delivered with an enclosed cab and wheels of a certain size. The truck was delivered to the buyer without the enclosed cab and special wheels, but he took delivery on the promise of the local dealer that the cab and wheels would be supplied later. The court held, without relying on statutory authority,42 that

. . . the trial court was correct in excluding proof of an express oral warranty not contained, of course, in the written contract of the parties—first, because the defendant (buyer) knew and agreed, when he signed the written order, that the plaintiff's (seller) agents had no authority to make any other warranty than as expressed in the writing, and secondly, because to have allowed the introduction of such testimony would, under the circumstances, have resulted in a plain violation of the parol evidence rule.43

The Code treats the subject of cumulation and conflict of express and implied warranties with more certainty than our present law. The Uniform Sales Act handles the matter by generally stating that an express warranty does not negative an implied warranty unless it is inconsistent therewith.44

The Code makes it clear that on the question of inconsistency between express and implied warranties, any question of fact as to which warranty was intended by the parties must be resolved in favor of the express warranty, except that the warranty of fitness for a particular purpose will prevail over all other warranties.45

In the *Connell* case,46 previously discussed, the court found no inconsistency in the express warranty in the letter of specifications and the implied warranty of fitness:

It will be recalled that, in the case at bar, the Metal Works gave Mrs. Connell an express warranty of good workmanship. It is evident, under the statute, that this in no way conflicted or interfered with the operation of the implied warranty hereinabove mentioned.47

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41. *Ibid.* at 288, 293 Pac. at 382.

42. W.S. § 34-161, which says: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract of the sale."

43. *Supra* note 40 at 293, 293 Pac. at 384.

44. W.S. § 34-180 (6).

45. Uniform Commercial Code § 2-315, Comment 2 and Uniform Commercial Code § 2-317 (c).

46. 47 Wyo. 145, 34 P.2d 23 (1933).

47. *Ibid.* at 160, 34 P.2d at 28.

At common law the liability of a warrantor was contractual and, therefore, would run directly between the purchaser and his immediate seller.<sup>48</sup> The Uniform Sales Act does not treat this problem and Wyoming has no cases on this point. Recent cases have rejected the requirement of privity, at least, in food cases. In *Lombardi v. California Packing Sales Co.*,<sup>49</sup> the court followed the privity rule but recognized the fact that twelve states have rejected it in cases involving food.

The Code has recognized this trend and gives the buyer's family, household and guests the benefit of the same warranty which the buyer received in the contract of sale, thereby rejecting the privity rule.<sup>50</sup>

#### CONCLUSION

The Code would be an improvement over the Uniform Sales Act. It would give more certainty to the law of warranties; it would codify certain troubled areas in case law; and it would be beneficial to the buyer and seller alike.

The law of warranties is more certain under the Code. A disclaimer clause is inoperative as against an express warranty if it would be unreasonable. In the event that express and implied warranties are in conflict, the express warranty is favored except that the implied warranty of fitness will prevail over all. The warranty of merchantability is more clearly defined than it is under the Uniform Sales Act. The use of and the requirements for a disclaimer are more definitely prescribed.

The Code broadens the scope of the Uniform Sales Act. It provides for a seller "puffing" his goods. The warranty of fitness extends to articles sold under their patent or trade name. The Code also gives the buyer's family, household and guests the benefit of the same warranty which the buyer received in the contract of sale.

The seller would benefit from the provisions that would make his dealings with his customer more certain. The recognition of the "sales puff," the protection from false allegations of oral warranties and definite guides to make effective disclaimers, are all safeguards for him.

The buyer would benefit from the extension of the warranty of fitness to include purchases of patent or other trade name goods. Another advantage would be the extension of the buyer's warranty to his family, household and guests for goods reasonably expected to be used or consumed by them. The rules requiring conspicuous disclosure of disclaimer clauses would be an obvious protection and advantage to the buyer.

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48. Williston, Sales § 244a (rev.ed. 1948).

49. 83 R.I. 51, 112 A.2d 701 (1955).

50. Uniform Commercial Code § 2-318, Comment 2.