

The Effect of Warranties on Seed Sales With an Eye to the U.C.C., Unconscionability and the California Agricultural Code

This article deals with the creation of express warranties in seed sales. Arguments are posed which should reverse the trend of honoring disclaimers which are inconsistent with express warranties. This article offers policy reasons which call for and justify this result.

Circumstances surrounding the sale of seed in today's commercial society unfairly favor the seed dealer at the expense of the seed purchaser.¹ Seed dealers often disclaim liability for the non-productiveness of any seed they sell.² In addition, most seed sale contracts contain terms limiting the liability of the seller, therefore putting the risk of loss on the seed purchaser.³ Whether the universal custom among seed dealers⁴ of passing the risk of such economic loss onto the purchaser of seed is consistent with current warranty law is the focus of this article.⁵

1. This article considers the seed purchaser to be a family farm unit. The law of warranties applies to large co-operative farms as well, as does the reasoning of this article. [Appreciation is given to Terry Price for suggesting the subject of this article.]

2. For examples of disclaimers, *see* notes 28, 48 & 49 *infra*.

3. The custom of non-warranty or limiting the buyer's recovery to the purchase price of the seed has prevailed in the industry for many years. In *Hoover v. Utah Nursery Co.*, 79 Utah 12, 7 P.2d 270, 272 (1932), the court declared, "The evidence as to the existence and universality of the custom is undisputed." The custom continues in full force today. Interview with Robert Scaggs, Program Supervisor of Nursery and Seed Services, Department of Food and Agriculture, in Sacramento, Cal. (February 13, 1978); Interview with Burt Ray, Director of the Foundation of Seed and Plant Materials Services for the Agriculture Department of the University of California, at Davis, Cal. (February 13, 1978). Representatives of local seed companies confirm the existence of the custom.

4. For discussion of courts' treatment of seed sale custom, *see* note 32 *infra*.

5. Although this article deals primarily with California law, to a large extent it applies to the law of other states. When researching the law pertaining to seed sale contracts outside of California, one should consult the relevant state Deceptive Trade Practices Act, seed laws and amendments to the U.C.C. For further general information on warranty and disclaimer regulations, write to the American Seed Trade Associations, 1031 15th Street N.W., Suite 964, Washington, D.C. 20005.

Seed sales are unique because seed is a unique chattel. A buyer purchases seed for what the seed, after many hours of planting and cultivating, will produce. Defective seed is not easy to identify and therefore the buyer will not readily discover any existing latent defects in the seed. The effect of the limited liability clause on the farmer's recovery for breach of warranty only becomes clear after the farmer discovers the defect and the crop has failed.⁶

The difference in the amount of the loss that the farmer suffers and the purchase price of the seed can be overwhelming. The purchase price of a parcel of seed is usually insignificant compared with the value of the fully matured crop. For example, the purchase price of the seed may be one hundred dollars but the resulting loss upon failure of the crop could be ten thousand dollars. The return of the purchase price of the seed is not an adequate remedy for the loss the farmer suffers. The seed dealer, however, can more easily absorb the loss.⁷ The seed dealer can insure against seed defects and pass the insurance expense along to the rest of the agriculture community through a small increase in the purchase price of the seed. Such risk allocation is common in other commercial areas.⁸

This article contends that the description on the label, present in all sales of seed, creates an express warranty which courts should find immune to the words of disclaimer or words tending to limit the seller's liability to the purchase price of the seed. Part I of the article sets forth the law of warranties in seed sales and demonstrates why the sellers should bear the risk of seed defects. Part II presents equitable considerations that should convince courts to disallow the seller's disclaimers and limited liability provisions and suggests an efficient means to help the seller bear the resulting burden.

I. EXPRESS WARRANTIES IN SEED SALES

An express warranty is a promise that the thing which is the subject of the contract is of a certain quality or capacity.⁹ In the common situation of an over-the-counter transaction between a merchant and a purchaser

6. The purpose of a limitation of liability clause is to shape the parties' remedies to their particular requirements. The clause should be reasonable so as to afford a fair quantum of remedy for breach of any obligations. See U.C.C. § 2-719, Comment (1). For a discussion of why seed sellers' limitations of liability are unreasonable, see text accompanying notes 38-40 *infra*.

7. See Cudahy, *Limitation of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127, 134-35 (1963); Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281, 313 (1961).

8. See ANGELL, *INSURANCE PRINCIPLES AND PRACTICES* 751-77 (1959).

9. This article argues that express warranties arising out of seed sales should not be vulnerable to disclaimers. The article does not consider implied warranties since sellers can effectively disclaim implied warranties. See U.C.C. §§ 2-314, 2-315.

of seed, the merchant often makes a representation concerning the seed sold. This representation can be either in the form of a verbal assertion or a description on a seed container label. When merchants make such representations, they create an express warranty that the seeds will conform to the representation. Express warranties, therefore, arise whenever the seller makes an affirmation of fact relating to the seeds which goes to the basis of the bargain.¹⁰

Although affirmations of fact usually arise verbally or by a descriptive label, a merchant's silence may also create an express warranty. When a buyer of seed specifically asks a merchant for a particular type of seed by using a descriptive name well known in the trade and the merchant purports to fill the order, the merchant creates an express warranty.¹¹ In most cases, however, a sale follows a merchant's overt description of the goods to the buyer.¹² For example, when sellers display a container of seeds labeled as a particular type, they describe the seeds contained therein and create an express warranty as a matter of law.¹³

Express warranties can also arise through compliance with a state seed certification statute. California has enacted legislation governing the sale, regulation and labeling of seeds,¹⁴ as have other states¹⁵ and the federal government.¹⁶ To sell seeds within these jurisdictions, sellers

10. According to the U.C.C., the seller creates express warranties 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.

U.C.C. § 2-313(1).

11. *E.g.*, *Brock v. Newark Grain Co.*, 64 Cal. App. 577, 222 P. 195 (2d Dist. 1923). The buyer in *Brock* specifically requested "Sonora Wheat" and the merchant purported to fill the order. Filling the request amounted to a representation of fact on the part of the merchant that the goods conformed to the description. Thus, the seller created an express warranty that the grain sold was "Sonora Wheat."

12. *E.g.*, *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (3d Dist. 1966) (merchant sold seeds labeled as "VF-36" tomato seeds).

13. *See* note 10 *supra*.

14. California Seed Law, CAL. FOOD & AGRIC. CODE §§ 52251-52515 (West 1968 & Cum. Supp. 1977). The California Agriculture Code was renamed the California Food and Agriculture Code by 1972 Cal. Stats. 468.

15. Typical seed statutes with basically the same requirements as the California Seed Law are in effect in Arizona, ARIZ. REV. STAT. §§ 3-231-3-242 (1974); Illinois, The Illinois Seed Law, ILL. REV. STAT. §§ 5-401-5-415 (1975); Indiana, IND. CODE ANN. §§ 15-4-1-4-15-4-1-13 (Burns 1973); Minnesota, MINN. STAT. ANN. §§ 21.47-21.58 (West 1963).

16. 7 U.S.C. §§ 1551-1610 (1939). Because the Seed Act's labeling requirements are so comprehensive, the Fair Packaging and Labeling Act, 15 U.S.C. § 1459(a)(5), does not apply to seeds. 15 U.S.C. §§ 2301-2312 (1976) may be important as background to understanding the extent to which sellers of most commodities may employ disclaimers in

must comply with the applicable regulations. In California, the seed label must carry information as to each kind, type or variety of seed in excess of one percent of the whole that the particular package contains.¹⁷ This statutorily required label is an affirmation of fact. Under the Uniform Commercial Code (U.C.C.) such affirmation creates an express warranty that the contents of the container comply with the label.¹⁸

No California court has addressed specifically whether the state statute requiring the certification tag to be affixed to the seed container creates an express warranty that is less equivocal than a warranty created by a commercial label. Other states, however, have held that similar state certification creates an express warranty as a matter of law.¹⁹ Even prior to the adoption of the U.C.C. when courts considered a warranty through description to be an implied warranty,²⁰ one state court held that a statute requiring manufacturers to label seed containers as to purity of contents created an express warranty that the seeds would conform to the label.²¹

A seller's affirmation of fact concerning the seeds, however, will not necessarily create an express warranty which will prevail when the seeds fail. The seller may disclaim the warranty or limit his or her liability. Under the U.C.C. section 2-316 a disclaimer of liability is valid only if it is not inconsistent with an express warranty.²² If courts cannot give the

warranty actions but it specifically exempts seed sales from coverage. 15 U.S.C. § 2311(a)(2) (1976).

17. CAL. FOOD & AGRIC. CODE § 52452(a) (West 1968). The seeds are subject to sample and inspection by the enforcing officers of the Act, CAL. FOOD & AGRIC. CODE § 52361 (West 1968) and non-compliance may give rise to civil penalties. CAL. FOOD & AGRIC. CODE § 52513 (West 1968).

18. See U.C.C. § 2-313, note 10 *supra*.

19. The Supreme Courts of Arkansas and Minnesota have recognized the creation of an express warranty through compliance with the state certification requirements. *Walcott & Steele Inc. v. Carpenter*, 246 Ark. 95, 436 S.W. 2d 820 (1969) (purchaser of cotton seed sued seed dealer for non-compliance with statutorily required certification tag); *Mallery v. Northfield Seed Co.*, 196 Minn. 129, 264 N.W. 573 (1936) (purchaser of alfalfa seed sued for breach of an express warranty).

20. California adopted U.C.C. § 2-313 governing the creation of express warranties in 1963. Prior to 1963, §§ 1732 and 1734 of the CAL. CIV. CODE governed the creation of express warranties and warranties in a sale by description. A warranty arising through description was formerly an implied warranty but the U.C.C. has converted it to an express warranty. See CAL. COM. CODE § 2313, Comment 4.

21. *Mallery v. Northfield Seed Co.*, 196 Minn. 129, 264 N.W. 573, 574 (1936). The holding of the *Mallery* court agrees with the U.C.C. that any description or affirmation of fact relating to the goods and becoming part of the basis of the bargain creates an express warranty.

22. Under the 1952 draft of the Uniform Commercial Code it was impossible to disclaim express warranties. In that draft, § 2-316(1) stated: "If the agreement creates an express warranty, words disclaiming it are inoperative." In the 1962 draft of the Code, however, U.C.C. § 2-316 underwent considerable changes with the following result:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever

language of the disclaimer and the express warranty a reasonably consistent meaning, the words of warranty should control.²³ The inference that arises when a disclaimer and an express warranty conflict is that the seller is giving something with one hand and attempting to "snatch it back" with the other.

In seed cases disclaimers are always present.²⁴ Prior to the U.C.C., courts upheld these disclaimers even when they were inconsistent with a warranty of description.²⁵ Courts upheld these disclaimers out of deference to the trade custom²⁶ and because courts generally would not rewrite a contract merely because one party had been subjected to an unfavorable bargain. Today, however, courts should give literal effect to the wording of the U.C.C. and refuse to enforce such disclaimers. Furthermore, if a buyer shows that the seller unfairly procured the contract through coercion or unequal bargaining power and thus destroyed the buyer's freedom of contract, the court would have additional grounds to delete the disclaimer.²⁷

When dealing with a seed merchant, the farmer has no control over the contract terms of warranty. The contract available to the farmer contains a provision designed to disclaim warranties which is not negotiable.²⁸ Though the buyer is free to go elsewhere to purchase the

reasonable as consistent with each other; but subject to the provision of this article on parol or extrinsic evidence (Section 2-302) negation or limitation is inoperative to the extent that such construction is unreasonable.

U.C.C. § 2-316(1).

23. The position of the U.C.C. in § 2-316 is in accord with that of the California courts. In *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 694, 268 P.2d 1041, 1047 (1954), the California Supreme Court announced the general rule that when interpreting modifications or disclaimers of warranties, courts should construe such disclaimers strictly against the seller. This rule is consistent with the established contract principle which dictates that in case of ambiguity, an agreement should be construed against the party who drafted the contract. See 4 S. WILLISTON, CONTRACTS § 605 (1961).

24. See note 3 *supra*.

25. *E.g.*, *Herrera v. Johnston*, 140 Cal. App. 2d 822, 295 P.2d 963 (3rd Dist. 1956). The container was labeled "Dark Green Zucchini Seed" but the seeds were of a different variety. Due to the disclaimer and limited liability provision the farmers recovered only the purchase price of the seed. In *Hoover v. Utah Nursery Co.*, 79 Utah 12, 7 P.2d 270 (1932), plaintiff requested "Chinese Celery Seeds" but received "celeric celery seeds", an inferior brand. The court upheld the defendant's disclaimer.

26. See note 32 *infra*.

27. The cases arising out of the contracts used in the auto industry are analogous to seed sales. In *Henningson v. Bloomfield Motors Inc.*, 32 N.J. 358, 161 A.2d 69, 86 (1960), the leading case enunciating this principle, the court found inequality in the balance of bargaining power and struck the disclaimers from the contract. California law agrees. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 26-27, 403 P.2d 145, 156-57, 45 Cal. Rptr. 17, 28-29 (1965) (Peters, J., concurring and dissenting). In *Seely*, a truck purchaser prevailed against a manufacturer for damages resulting from a defect in the truck.

28. The following is an example of a disclaimer coupled with a limitation of liability clause:

Adams Seed, Inc. GIVE NO WARRANTY, EXPRESS OR IMPLIED in connection with the sale of this seed, except to warrant, but only to the

needed seed, the contract will contain a similar disclaimer wherever the buyer goes.²⁹ Thus, if buyers purchase seeds at all, they purchase them with a disclaimer present in the contract. Such a clause is not the product of freedom of contract, but rather evidence of an adhesion contract and the unequal bargaining power which exists between buyers and sellers. Courts should hold that it is contrary to public policy to exercise such unequal bargaining power to the detriment of a helpless party.³⁰

Even in seed sales, sellers must show that they brought the disclaimer to the attention of the buyer and that the buyer was aware of all the ramifications of the disclaimer before the disclaimer becomes effective. Courts consistently have held that disclaimers in small print or hidden on the reverse side of an invoice are not conspicuous enough to meet the necessary requirement of supplying the buyer with actual notice of the disclaimer.³¹ However, courts have also held that a custom in the seed industry of nonwarranty may be an agreed upon element of the contract. The justification for this holding is that the parties are presumed to be aware of the custom and recognize it as an implied part of the contract.³²

extent of the purchase price, that the seeds sold were as described on this label or container on the date of test indicated. THE LIABILITY of Adams Seed, Inc., and of the processor, IS LIMITED in any event, including liability for negligence, TO THE PURCHASE PRICE OF THE SEED. Any civil action against Adams Seed, Inc., or the processor, arising out of the sale of this seed must be filed within six months of the date of sale. (Emphasis added).

29. See note 3 *supra* and note 32 *infra*.

30. U.C.C. § 2-302 governs unconscionable contracts. California has not enacted this section, but unconscionability is a well established doctrine, which California courts apply as a matter of judicial discretion. As the comments of the CAL. COM. CODE indicate, "[W]hat seems to be new law may simply be a reinstatement of the broad equity powers which the California courts have always assumed they held. It is well known that judges have by construction and interpretation avoided enforcement of harsh bargains." U.C.C. § 2-302, California Code, comment 1. Section 2-302 merely extends the ancient rule that "equity will not enforce an unconscionable bargain". 1 A. CORBIN, CONTRACTS § 128 (1950).

31. *E.g.*, *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609, 616 (3d Dist. 1966) (small print disclaimer in contract between tomato growers and immediate supplier of VF-36 tomato seed).

32. If at the time of sale, there exists a well known general custom among all merchants of a particular product not to warrant the product, the court will consider the custom to be part of the contract. *Miller v. Germain Seed & Plant Co.*, 193 Cal. 62, 222 P. 817 (1924) (general custom of non-warranty bound buyer even though ignorant of the custom); *Herrera v. Johnston*, 140 Cal. App. 2d 822, 295 P.2d 963 (3d Dist. 1956) (custom limited buyer's recovery to purchase price of seeds); *Hoover v. Utah Nursery Co.*, 79 Utah 12, 7 P.2d 270 (1932) (non-warranty clause on package and custom of non-warranty).

The only reason courts give for deferring to custom is that the parties to the contract both know or are presumed to know the custom. *Ezer, The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281, 317 (1961). Commentators believe the rule to be in line with the U.C.C., for if such a commonly known trade custom does exist, any warranty contrary to such custom could not

Courts should scrutinize closely a disclaimer of warranty before allowing it to have an effect on a valid contract. In so doing, the courts should look to the totality of the circumstances surrounding the creation of the contract including the intent of the parties, the legislative intent behind the U.C.C. provision governing disclaimers³³ and the substance and intent of the state and federal laws governing the sale of seeds. By looking to all of these factors, a court should conclude that a disclaimer of warranty has no place in a contract for the sale of seeds.

In addition to the frequent use of disclaimers, seed sellers often attempt to limit their liability upon breach of an express warranty to the purchase price of the seed. The following is a typical example of an express warranty coupled with a disclaimer and limited liability provision:

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 the 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.³⁴ (Emphasis added).

For a merchant of seed to contractually limit the remedy of a purchaser who suffers a loss due to the merchant's breach of an express warranty, the clause limiting the remedy must comply with the requirements of either U.C.C. section 2-718 or U.C.C. section 2-719. U.C.C. section 2-718³⁵ governs the liquidation or limitation of damages. U.C.C.

have gone to the basis of the bargain. *See* Cudahy, *Limitation of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127 (1963). It seems difficult to understand, however, why courts presume that buyers of goods give more weight to a general rumor than they would give to what a seller expressly tells them. If this practice of non-warranty is so universal as to create a general custom among merchants, it may be that buyers have no freedom to contract for a warranty.

33. U.C.C. § 2-316(1) governs the exclusion or modification of warranties. For full text of U.C.C. § 2-316(1), *see* note 22 *supra*. This section does not solve the problem of interpretation that exists when express warranties and disclaimers are inconsistent. It does suggest that courts try to salvage an express warranty by reconciling it in a reasonable manner with the words of disclaimer. If a reasonable interpretation showing consistency of the warranty and disclaimer is impossible, the words of warranty should control. Therefore the U.C.C. leaves with the courts the problem of whether the disclaimer and the express warranty are reasonably consistent.

In *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975), the plaintiff sued for personal injuries resulting from a defective product. The court held that since a disclaimer or modification of liability is inconsistent with an express warranty, words of disclaimer or modification give way to words of warranty unless some clear agreement between parties dictated the contrary result.

34. *Agricultural Serv. Ass'n., Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1062 (6th Cir. 1977) (seller sold mislabeled seed in violation of an express warranty).

35. *See* note 37 *infra*, for the text of U.C.C. § 2-718.

section 2-719³⁶ governs the contractual modification or limitation of remedies.

Section 2-718 generally applies where the actual amount of damages upon breach is extremely difficult to determine prior to entering the contract. This provision enables the parties to stipulate an amount as the sole remedy for the buyer. This amount must be a reasonable estimate of the loss a breach would create.³⁷ In a seed transaction, the amount of the buyer's loss is reasonably foreseeable prior to the creation of the contract. Since the buyer's loss is reasonably foreseeable and the purchase price of the seed is not a reasonable estimate of the damage a farmer would incur upon failure of the crop, section 2-718 cannot be used to limit the buyer's recovery.

Since section 2-718 is not applicable in seed sales, merchants may be more inclined to seek the protection of U.C.C. section 2-719, which governs the contractual modification of remedy. The availability of this protection is doubtful, however, since the following requirements must be met: (1) the limitation of remedy must state that it is exclusive; (2) the remedy offered must not fail of its essential purpose, which is to give the buyer a fair quantum of remedy; and (3) consequential damages may not be limited if the limitation is unconscionable.³⁸ Since a return of the purchase price of the seed does not offer the buyer a "fair quantum of remedy" for the loss sustained,³⁹ the seed dealer should not be able to

36. See note 38 *infra*, for the text of U.C.C. § 2-719.

37. Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty. U.C.C. § 2-718(1).

38. (1) Subject to the provisions of subdivision (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) The agreement may provide for remedies in addition to or in substitution for those provided in this division and may limit or alter the measure of damages recoverable under this division, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) 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.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

U.C.C. § 2-719.

39. U.C.C. § 2-719(2) provides that a limitation of liability provision must not fail of its essential purpose. See note 38 *supra* for full text of U.C.C. § 2-719(2). The words "essential purpose" are defined in U.C.C. § 2-719, comment 1. The comment suggests that a limitation of liability clause must allow the buyer a "fair quantum of remedy." If the limiting clause fails to allow a fair quantum of remedy for breach, the buyer may

look to section 2-719 of the U.C.C. to validate the limited liability clause.

Courts also should find the limited liability clause invalid because it is unconscionable. Allowing the buyer to recover only the purchase price of the seed when the buyer's actual loss is a substantial portion of or the entire crop is an unconscionable limitation on the buyer's recovery for consequential damages. Such a limitation is in violation of U.C.C. section 2-719(b)(3).

Thus, neither section 2-718 or section 2-719 of the U.C.C. should offer protection to a seed merchant who attempts to limit the buyer's recovery to a stipulated sum that is not substantially equivalent to the loss the buyer incurs. Under both provisions of the U.C.C., the limitation of liability clause fails to adequately compensate the buyer for the loss incurred. The buyer, therefore, should recover the full amount of the loss pursuant to the standard measure of damages for breach of an express warranty.⁴⁰

In accordance with the above suggestion, some courts have refused to allow seed sellers to disclaim an express warranty or to limit the buyer's remedy to the purchase price of the seed.⁴¹ Courts have advanced two independent theories to support this conclusion. One theory is that sellers may not exempt themselves from liability which stems from either the seller's own negligent or intentional violation of the law.⁴² A second theory is that when the state law requires a description of the seed, the description creates an express warranty which is immune to disclaimers and limited liability provisions.

Two cases illustrate that sellers may not exempt themselves from liability resulting from a violation of the law. For example, the Sixth Circuit declared a seed seller's limitation of liability clause void because the seller had violated the California Seed Law⁴³ by negligently mislabeling

recover through the general remedy provisions in article 2 of the U.C.C. See U.C.C. § 2-719, comment 1.

40. The buyer's recovery would be the difference between the reasonable market value of the crop as actually produced and the value of the theoretical crop that would have been produced had there been compliance with the warranty less, in both instances, the necessary expenses for raising and selling the crop. *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609, 620 (3d Dist. 1966).

41. *E.g.*, *Agricultural Serv. Ass'n, Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (1977) (CAL. CIV. CODE § 1668 prohibited seller from limiting liability for breach of an express warranty); *Walcott & Steele Inc. v. Carpenter*, 246 Ark. 93, 436 S.W. 2d 820 (1969) (breach of express warranty that 80% of seed would germinate as stated on the certification tag); *Mallery v. Northfield Seed Co.*, 196 Minn. 129, 264 N.W. 573 (1936) (disclaimer could not void effect of an express warranty).

42. In California, CAL. CIVIL CODE § 1668 (West 1973) prohibits individuals from exempting themselves from liability that stems from a violation of law. See note 47 *infra* for text of § 1668.

43. CAL. FOOD & AGRIC. CODE §§ 52251-52515 (West 1968 & Cum. Supp. 1977)

the seed.⁴⁴ The court struck the clause from the contract and allowed the buyer to recover damages under the damage provision of the U.C.C.⁴⁵ In another case, a California appellate court struck a limitation of liability clause from the contract and awarded the buyer damages because the seller knowingly misrepresented the seed.⁴⁶ Both of these cases are based on California Civil Code section 1668 which states that sellers may not exempt themselves from liability which arises out of their own violation of the law.⁴⁷ Since the California Seed Law prohibits the mislabeling of seed, whether intentionally or negligently, both sellers were in violation of the California Civil Code section 1668.

The scope of this theory, however, is not broad enough to offer adequate protection to the seed purchaser. Section 1668 only prohibits contracts designed to *exempt* sellers from liability. Therefore, sellers can avoid the section simply by revising their disclaimers to read, "Seller's liability on any claim of negligence is limited to twice the purchase price of the seeds."⁴⁸ In this way sellers may limit liability without exempting themselves from liability and avoid falling within the prohibitions of

requires that the label on a seed container list all components contained within which are in excess of one percent of the whole. *Id.* § 52452.

44. *Agricultural Serv. Ass'n., Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (6th Cir. 1977). The court relied on *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 100, 54 Cal. Rptr. 609, 618 (3d Dist. 1966), when it held that a contract could not exempt a seed seller from liability arising from a violation of law. 551 F.2d at 1067.

45. Plaintiff was awarded damages of \$50,985 which included marketing costs and interest. The original purchase price of the seed was \$3,515.50. In essence the plaintiff recovered the difference between the value of the crop produced and the value of the crop which should have been produced.

46. The court in *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (3d Dist. 1966), assessed damages against Asgrow Seed Co. to be the difference between the reasonable market value of the crop as actually produced and the value of the theoretical crop, which would have been produced, had Asgrow complied with the warranty. The court then deducted an amount sufficient to cover the necessary expenses for raising and selling the crop from the damage award.

47. CAL. CIV. CODE § 1668 (West 1973) provides as follows: "All 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, are against the policy of the law." [Emphasis added].

48. This sentence appears in Barber-Rowland Company's recently revised disclaimer. The full disclaimer is as follows:

WARRANTY AND LIMITATIONS OF LIABILITY: (pursuant to statutory requirements of Sec. 2-316 of the Uniform Commercial Code) Seller warrants that the seeds sold are as described on the label, within such tolerances as are recognized in the vegetable seed production industry. Since climatic conditions, agricultural practices and conditions of use and storage by buyer or user are beyond Seller's control, THE SEEDS ARE SOLD AS IS, SELLER MAKING NO WARRANTY EXPRESS OR IMPLIED, OTHER THAN THAT ABOVE. Seller's entire liability and Buyer's exclusive remedy against Seller on such express warranty is limited to the return of the purchase price of the seeds, and on any claim of negligence is limited to the return of twice the purchase price of the seeds, Seller in no event being liable for any incidental or consequential damages.

section 1668. The amount of recovery then available to the buyer would still be highly disproportionate to the amount of loss incurred.

The second theory used by some courts is that statutorily required express warranties are immune to disclaimers and limited liability provisions. The supreme courts of both Arkansas⁴⁹ and Minnesota⁵⁰ have used this theory. Both courts voided a disclaimer, holding that the government requirement that the germination percentage appear on the tag created a warranty which was immune to disclaimer. These decisions are in accord with U.C.C. section 2-316(1) which treats a disclaimer as inoperative if it is inconsistent with an express warranty.⁵¹ Since sellers can now limit their liability to twice the purchase price of the seed and avoid the consequences of section 1668, section 1668 does not offer the buyer an adequate remedy. Rather than relying on section 1668, courts should honor the statutorily required express warranty in the face of an inconsistent disclaimer.

II. COURTS SHOULD REANALYZE THE RELATIVE POSITION OF THE PARTIES

The custom among seed merchants to disclaim and limit their liability for seed failure results in an inequitable burden on the seed purchaser. The custom, however, is not required to protect the seed seller. Seed merchants may contend that without the protection of a custom of non-warranty, the ability to disclaim express warranties or the ability to limit liability upon breach, they could not survive the litigation that would come to their doors. Such a contention is not sound. There is no reason why seed dealers should enjoy a more favorable position than other sellers in the law of express warranties. The code makes no such distinction.

Seed dealers can cope with the risk of seed defects or isolated packaging errors. If courts held seed dealers liable for defective seed and conse-

49. *Walcott & Steele Inc. v. Carpenter*, 246 Ark. 93, 436 S.W. 2d 820 (1969). Farmers sued seed dealers for breach of an express warranty that 80 percent of seed would germinate as stated on the certification tag.

At the bottom of the invoice appeared this disclaimer:

NON-WARRANTY: WALCOTT & STEELE INC. Give no Warranty, Express or Implied. As to Description, Productiveness, or Any Other Matter of Any Seeds that We Sell and We Will Not in Any Way Be Responsible for the Crop. Our Liability in all Instances Is Limited To the Purchase Price of the Seed.

Id. at 822.

50. *Mallery v. Northfield Seed Co.*, 196 Minn. 129, 264 N.W. 573 (1936). Seed company, after giving the purity and germination percentages of the seed in compliance with a statute, could not evade the effect thereof by annexing a disclaimer.

51. U.C.C. § 2-316(1). *Compare* U.C.C. § 2-313, comment 1 *and* comment 4 *with* U.C.C. § 2-316, comment 1.

quent breaches of warranty, seed dealers would have to purchase insurance to shelter themselves from liability. The seed dealers could distribute the risk throughout the agricultural community by adding the premium cost of liability insurance to the sale price of the seed.

Another reason seed dealers should bear the risk is that the cost of insurance protection to the seed merchant would be considerably less than the cost to a single farmer. The seed transaction to the farmer is only of tangential significance to his main occupation of growing, cultivating and selling agricultural goods. Therefore, the farmer is unable to assess accurately the risk of seed failure and might purchase more insurance than required. The seed merchant, on the other hand, works with seed every day and therefore can more accurately assess the risk.⁵² In addition, insurance industry efficiency in mass policy writing would reduce the cost of the insurance to the seed merchant.⁵³

Due to the problems in proving the cause of crop failures, seed sellers may complain that if disclaimers and limited liability provisions are given no effect in the face of an express warranty the cost of litigation will put them out of business. By the time the buyer's attorney notifies the seed seller of the alleged defect and pending claim, the farmer may have already turned over the land and planted a new crop. The seed seller is left in a poor position to investigate the cause of the crop failure.⁵⁴ The seller's lack of knowledge concerning the cause of the crop

52. In a recent pamphlet published by the American Seed Trade Association (ASTA) the following description of an insurance program appeared:

Generally the Lloyd's policy covers liability for damage arising out of failure of seed to conform to the variety or quality specified or to be suitable for the purpose specified, by reason of the seedman's negligence, error or omission. The kinds of errors covered include errors in germination tests, failure to germinate, mislabelling, and varietal variations.

Other coverages extend the coverage to liability for variety conformance not growing out of the seller's negligence but arising from defects in seed purchased by the seller, if labeled in accordance with federal and state seed laws, or purchased from a member in good standing of a seed growers association, or if the seed is certified seed.

Premiums for coverage for the seedman's own negligence are based on volume sales, with rates varying by type of seed sold. . . .

Coverage for seed grown under contract by others may carry a variety of rates, depending entirely on the degree of supervision by the seller over the contract growers activities. . . .

Premiums are set in the first instance based on industry experience, classified by type of seed. However, it is understood that after the first year, each company's own experience forms the basis for its premium rating.

AMERICAN SEED TRADE ASSOCIATION, SUMMARY OF LAW ON USE OF WARRANTY DISCLAIMERS BY SEEDMEN (1977).

53. The less expensive coverage available in group policy insurance plans, available from various commercial and educational organizations today, demonstrates such efficiency. See ANGELL, *INSURANCE PRINCIPLES AND PRACTICES* 751-77 (1959).

54. Interview with Burt Ray, Director of Foundation Seed and Plant Materials Service, Agriculture Department at the University of California in Davis, at Davis, Cal. (February 13, 1978).

failure makes the possibility of a quick settlement unlikely and may lead to costly and time consuming litigation.

The legislature provides an alternative to costly litigation. California recently enacted a permissive investigatory complaint procedure⁵⁵ which seed buyers can utilize upon discovery of the allegedly defective seed. If the seller wishes to participate in the complaint procedure, the seed container or an invoice must bear a statement notifying the buyer of its availability.⁵⁶ Upon crop damage due to an alleged seed failure, the buyer has the option to use this procedure or institute legal proceedings in the usual manner. If the buyer files a permissive complaint,⁵⁷ a committee of experts investigates the cause of the seed failure.⁵⁸ Upon determination of the cause of the failure, the committee reports its findings to the buyer and seller and maintains a copy of their findings as a public record.

55. CAL. ADMIN. CODE, tit. 3, §§ 3915-3921 became effective on July 28, 1977.

56. To invoke the complaint procedure, the seed seller must display on the seed container and/or invoices the following statement:

Any person in the State of California who alleges loss or damages by failure of this seed to produce or perform as represented hereon, *MAY*, within ten (10) days after the alleged defect becomes obvious, file a formal complaint in writing with the Director, Department of Food and Agriculture, 1220 N Street, Sacramento, California 95814, accompanied by a filing fee of two hundred and fifty dollars (\$250) (nonrefundable). The *CROP* as to which alleged damage is claimed *SHALL ALSO BE MAINTAINED* in the field until after inspection by the Director. [Emphasis added].

CAL. ADMIN. CODE, tit. 3, § 3867.

57. A request for investigation may be initiated when any person in the State of California claims damage by reason of the failure of agricultural or vegetable seed to produce or perform as represented by the tag or label. The complainant shall:

- (a) immediately notify the person who will be designated as respondent in the complaint; and
- (b) within 10 calendar days, file a written complaint with the Director, giving information as follows:
 - (1) alleging the nature of the complaint and the causes thereof,
 - (2) accurate directions to locate the affected crop,
 - (3) evidence of purchase,
 - (4) the complainant's name and address, forwarding a copy of the complaint to said respondent, by United States certified mail; and
- (c) at the time of filing said complaint, pay to the Director a filing fee of two hundred and fifty dollars (\$250), nonrefundable, which shall be deposited in the Seed Complaint Reserve Account for the Department of Food and Agriculture Fund; and
- (d) maintain in the field the crop as to which alleged damage is claimed, or a representative portion thereof, until notified of release by the Director.

Id. § 3916.

58. Three disinterested members will compose each committee of experts, one member engaged in the production of seed, one a user of such seed and one the Assistant Director of Plant Industry or designee. *Id.* § 3918.

Filing a permissive investigatory complaint, however, does not bar further legal proceedings. If buyers wish to drop the investigatory complaint procedure they may do so at any time without prejudice.⁵⁹ Furthermore, because the complaint procedure only determines the cause of the crop failure, the parties may still institute legal proceedings to determine the validity of any disclaimer or limited liability provision.

Due to the permissive nature of the procedure, no one has utilized investigatory complaints as an alternative or supplement to litigation as of this date.⁶⁰ If the legislature made the complaint procedure mandatory, however, the seller would have the opportunity to view the defective crop. A settlement could be reached more easily without the necessity of expensive and time consuming litigation since both sides would have more information. By refusing to allow seed sellers to disclaim their liability and by instituting a mandatory complaint procedure, both the buyer and seller of seeds may be protected from "unwarranted" financial losses.

III. CONCLUSION

Courts should recognize the patent inconsistency between the seller's express warranty created through a statutorily required certification of purity and the seller's efforts to disclaim and limit liability for that same warranty. Courts can reach an equitable solution to the problems of the seed purchaser by refusing to recognize disclaimers or limitations of liability provisions inconsistent with an express warranty. The following arguments should persuade a court to adopt this position.

First, the nationwide trade custom among seed dealers of limiting their liability upon breach of warranty to a return of the purchase price of the seed robs the seed buyer of the opportunity to negotiate contract terms and to choose freely between alternative provisions. The custom violates the concept of freedom of contract which assumes that parties meet each other on an equal footing.⁶¹ Courts should find the limitation clause unconscionable and strike it from the contract, thus allowing the buyer to recover damages as if the clause never existed.

Second, courts should strike the clauses on the theory that they violate at least three provisions of the U.C.C. For the clause to be valid under U.C.C. section 2-719,⁶² it must give the buyer a fair quantum of remedy for the buyer's loss. Since the limitation of liability clause does not provide such a remedy, it fails of its essential purpose. Similarly, since the purchase price of the seed is not a reasonable estimate of the

59. *Id.* § 3915.

60. *See* note 54 *supra*.

61. *See* notes 28-30 *supra* and accompanying text.

62. *See* note 38 *supra* and accompanying text.

loss the farmer will incur, the limitation of liability clause is not valid as a provision for liquidated damages under U.C.C. section 2-718. Under U.C.C. section 2-316,⁶³ the courts should not enforce a disclaimer if it is inconsistent with an express warranty. Since the law requires the label to specify all ingredients and since the label constitutes an express warranty, the disclaimer is inconsistent with the express warranty and inoperative under U.C.C. 2-316. Therefore the court should strike the disclaimer and limitation of liability clause from the contract allowing the buyer to recover damages as if the clause never existed.

Third, buyers may also argue that the seed certification tag required by statute is an affirmation of fact relating to the seed and going to the basis of the bargain. The tag is a representation of the purity of the seed and gives rise to an express warranty that the seed will conform to the representations on the tag. Representations made in compliance with a statute should be immune to disclaimer. The merchant should not be able to escape the mandate of the statute or escape liability for non-compliance.

The above arguments and the previous discussion give the court ample reason to reanalyze the relative position of the parties. Defective seed is placed on the market because of the seed seller's errors or omissions and this should be reason enough to hold the seller liable for any resulting losses. The loss should not fall upon seed buyers who are not responsible for the defective condition of the seed and are least able to prevent the damage caused by defective seed.

A good solution to any problem should be equitable to all parties involved. A mandatory complaint procedure may serve to limit the liability of the seed dealer without resulting in a concomitant loss to the buyer. With the problem of proof solved, or at least reduced, there should be no rational basis for treating seed warranty cases differently from other warranty cases. The U.C.C. makes no such distinction and neither should the courts.

Daniel J. Callahan

63. See notes 22-25 *supra* and accompanying text.

