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Renaud Baguenault De Puchesse  
*University of Georgia School of Law*

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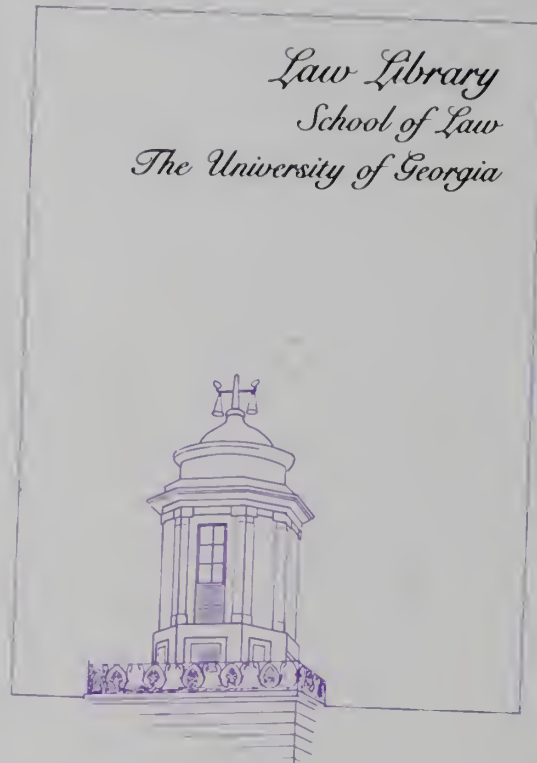
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THE WARRANTY OF QUALITY IN SALE OF GOODS  
UNDER THE PERSPECTIVE OF THE  
AMERICAN AND FRENCH LAW

Renaud Baguenault De Puchesse

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THE WARRANTY OF QUALITY IN SALE OF GOODS  
UNDER THE PERSPECTIVE OF THE  
AMERICAN AND FRENCH LAW

by

RENAUD BAGUENAUT DE PUCHESSE

Legal Adviser and

DESS in Fiscal and Business Law Degrees 1986

Master of Laws Degree 1985

(University of LYON III)

FRANCE

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of The University of Georgia in Partial Fulfillment  
of the  
Requirement for the Degree

MASTER OF LAWS  
(LL.M.)

ATHENS, GEORGIA

1989

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by

RENAUD BAGUENAUT DE PUCHESSE

Approved:

Michael Wells Date May 25, 1989  
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John Dowling  
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5-26-89  
Date



To my mother and my father,  
who urged me to come and study in the United States.  
They were definitely right.

To my brother,  
who has just started his legal studies. I wish he would  
encounter as much satisfaction as me.

To Nathalie,  
who throughout this past year has been a tremendous  
incentive as well as a priceless support. She has undoubte-  
dly some part in this achievement.

R.B.P.

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## INTRODUCTION

The least one can say when dealing with a comparison between common law and civil law systems is that their approach to legal problems is drastically different. This is particularly true with regard to countries like France and the United States. Whereas the French legal system is primarily based upon statutes and codes, the American one relies heavily on case law. Moreover, there is not only one american set of rules but rather fifty different ones, which renders particularly difficult and uncertain any comparative study between French and American legal rules. Indeed, the former are uniform throughout the country whereas the latter are characterized by their diversity. Nevertheless, it has happened in the most recent American legislative history that, in certain areas, nationwide legislative attempts of unification and standardization blossomed into reality. That is noticeably the case with the adoption of the Uniform Commercial Code<sup>1</sup> which governs the sale of goods law.

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<sup>1</sup>The Uniform Commercial Code has been adopted in all the states but Louisiana.



In most market economy countries, warranty policies have become major considerations in the overcompetitive conquest of consumers. In this context, the need has been felt in France as well as in the United States over the last few decades to protect consumers against dangers inherent to the inequality of bargaining power with merchant and manufacturers and consequently to assure consumers adequate remedies in case of defective product. Likewise, in commercial transactions, assurance of the product's quality is of the utmost importance: imperfect goods may generate economic disasters which may be hardly commensurable. Legally speaking, if the seller's warranty obligations are statutorily regulated under the American and French law, there are still some issues which are unsettled or evolving through judicial precedents. In that respect, the possibility for the seller to limit his warranty liability and the actual bearing of the warranty all along the chain of distribution of a product are indeed striking illustrations.

That is why undertaking a comparison between american and french rules as regards the warranty of quality in sale of goods is most tempting . Tangible bases such as the American Uniform Commercial Code (U.C.C.) and the French Civil Code (Civ.C.) will be our major tools to assess similarities and differences. We will also refer to specific consumer protection oriented statutes. In order to

get into deepest details , it is necessary to narrow such a comparative study. Thus the warranty of title will not be dealt with. Nor we will focus on the warranty of quality in real property transactions which would deserve because of their specificity an entire paper. An endeavour to cover as completely as possible the relevant issues raised by the warranty of quality in sale of goods requires us to go through four areas of interest.

The first part of the paper will be devoted to defining which kinds of defect may give birth to an action for breach of warranty of quality (I).

Once given an overview of what may constitute a warranty of quality, it will be necessary to point out which conditions have to be carried out to achieve a warranty action (II).

Assuming such conditions are met, what would then be the remedies available to an aggrieved buyer (III)?

Finally, we will have to contemplate to whom does the seller's warranty of quality extend (IV)?

## CHAPTER I. THE CONCEPT OF WARRANTY OF QUALITY

In the process of widening the seller's responsibility for quality and the buyer's protection against defective goods, both American and French law use warranties implied by law (A) and warranties created by the parties to the contract themselves (B).

### A) LEGAL WARRANTIES:

While the French tradition has ever been to secure the buyer a legal warranty,<sup>2</sup> the American tendency, deeply marked by the principle of caveat emptor,<sup>3</sup> has been rather slow to admit and enforce implied by law warranties.<sup>4</sup> However, the most recent historic evolution of the American warranty law<sup>5</sup> has led to a complete incorporation of

---

<sup>2</sup>The original version of the French Civil Code (1804) already contained articles 1641 and following dealing with warranty against defects in the thing sold.

<sup>3</sup>The principle of caveat emptor was illustrated by the maxim : "He who does not open his eyes, opens his purse."

<sup>4</sup>Still in the middle of the last century, the rule was firmly established that in the absence of an express warranty or fraudulent misrepresentation, the seller are not responsible for defects. See Chief Justice Gibson opinion in *McFarland v. Newman*, 9 Watts 55, 57, 34 Am.Dec 497, 499 (Pa.1839).

<sup>5</sup>The original Uniform Commercial Code was promulgated in 1952.

implied warranties<sup>6</sup> as legal tools at the unsatisfied buyer's disposal. The purpose of the following discussion will be to address the U.C.C. implied warranties (a) and its french counterpart: the legal hidden defect warranty (b)

a) Implied Warranties under the U.C.C.

The drafters of the U.C.C. distinguished the implied warranty of merchantability (1) from the implied warranty for fitness of a particular purpose (2).

1) The implied warranty of merchantability (S. 2-314)<sup>7</sup>

<sup>6</sup>U.C.C. S.2.314 and S.2.315.

<sup>7</sup>U.C.C., S. 2.314 provides :

"(1) 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 the 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 promise or affirmations of fact made on the container or label if any ".

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

If one looks for the underlying basis of the implied warranty of merchantability, one will stress the general assumption that the seller induces the buyer's reliance by his superior knowledge in the market place as to goods sold. If one has to define what is expected from "merchantable" goods, one will be likely to say that they should be fit for their ordinary purpose. That is why the notion of implied warranty of merchantability will be studied under two angles: as to the seller (11), as to the good sold (12).

#### 11) As to the seller

According to S. 2-314(1), the implied warranty of merchantability attaches only if the seller is a "merchant with respect to the goods of that kind." As every provision of the U.C.C. is to be read in the light of each other, it seems logical to refer to the definition of merchant provided by S. 2-104(1)<sup>8</sup> Two alternative criteria may be drawn from that definition: the seller is the one who either deals with some goods (111) or has some knowledges with respect to the goods sold (112).

---

<sup>8</sup>S. 2-104(1) provides: "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill particular to the practice 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.



111) The seller "deals in goods of that kind"

It is no doubt that someone who is used to selling goods must have some special knowledge or skills related to these particular goods and therefore has to face potential problems that might arise from defective products. It is more disputable to hold a merchant liable for a product's defectiveness when the selling of that product happens to be rare and constitute a small part of his business. Nevertheless, courts have adopted a fairly broad construction of the merchant notion and declared sellers liable, whether or not they regularly sold a particular product.<sup>9</sup> Likewise, a seller may be deemed a merchant for purposes of S.2-314(1) at any market level: manufacturers,<sup>10</sup> wholesaler and retailers.<sup>11</sup> As broad as the merchant concept may be contemplated it does not embrace a doctor who incidentally supplies goods and whose

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<sup>9</sup>See, e.g., Blockhead, Inc. v. Plastic Forming Co., 402 F. Supp. 1017, 18 U.C.C. Rep. 636 (D.Conn. 1975).

<sup>10</sup>See, e.g., Safeway Stores, Inc. v. L.D. Schreiber Cheese Co., 326 F. Supp. 504, 509, 9 U.C.C. Rep. 407, 414 (W.D. Mo.1971) (cheese manufacturer); Hester v. Purex Corp., 534 P.2d 1306,1307 16 U.C.C. Rep. 697,699(Okla. 1975)(cleaning product manufacturer).

<sup>11</sup>See, e.g., Calloway v. Manion, 572 F.2d 1033, 1035, 23 U.C.C. Rep. 1143, 1145 (5th Circ. 1978) (horse dealer); R. Clinton Constr. Co. v. Bryant & Reaves, Inc., 442 F.Supp. 838, 846, 23 U.C.C. Rep. 310, 319 (N.D. Miss. 1977) (antifreezer seller).



activity primarily consists on rendering services rather than selling goods.<sup>12</sup>

112) The seller has expertise with respect to the goods sold

It has here to be observed that there is a latent conflict between, on the one hand, the merchant definition set forth in S. 2-104(1), and on the other hand, the Official Comment 3 to S. 2-314. Indeed, the latter suggests that "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." Yet, an occasional seller might very well possess such knowledge or skill mentioned in the U.C.C. definition of a merchant. Up to now, Official Comment 3 has prevailed and courts have been reluctant to hold that a non-professional seller is a "merchant" for purposes of S. 2-314(1).<sup>13</sup> Thus, the isolated-sale exception has been used as an efficient means to avoid strict liability warranty. However, it would seem rational to use the following test: has the seller special expertise as to the

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<sup>12</sup>See, e.g., *Berry v. G.D. Searle & Co.*, 309 N.E.2d 550, 14 U.C.C. Rep. 346 (Ill.).

<sup>13</sup>See, e.g., *Siemen v. Alden*, 34 Ill.App. 3d 961, 964, 341 NE.2d 713, 715, 18 U.C.C. Rep. 884, 887 (1975) (a sawmill owner in the sale of a saw to another sawmill); *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F.Supp. 522, 528, 12 U.C.C. Rep. 810, 817 (D.D.C. 1971) (a beer producer in the sale of carbon dioxide it has in excess of its beer production).

goods sold? That would enable courts, in certain circumstances, to hold that a mere user is a "merchant" as well as to discharge from his warranty liability a seller which is incidentally a supplier of a particular product.

## 12) As to the good sold

Even though S.2-314(2) gives an impressive list of criteria of merchantability, we will only focus, as a workable tool for this study, on the third one: "Goods to be merchantable must be fit for the ordinary purpose for which such goods are used."

Indeed, in the context of a comparative study with the french law, the five other standards of merchantability have to do with other seller's obligations, namely giving information and delivering the good to the buyer. These obligations, though closely connected with the obligation of warranty are subjected under the french law to specific rules<sup>14</sup> and therefore are beyond the scope of our discussion. That is why the concept of merchantability will here be restricted to the notion of fitness for an ordinary purpose (121). Whether used goods have to be fit for their ordinary purpose will also be debated (122).

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<sup>14</sup>The obligation of delivery is ruled by articles 1604 to 1624 of the Civil Code.

The obligation to give information is generally speaking a case law obligation and has been embodied by specific laws (Act of 10/01/1978 on the consumer protection).

121) The notion of fitness for an ordinary purpose

It may be asserted that the goods which are unfit for their ordinary purpose are "substandard". That is to say that such goods are not reasonably safe or able to perform their ordinary purpose. In both cases, these goods must contain an inherent defect.<sup>15</sup> In order to ascertain a defect, goods have to be compared with other goods of the same kind. A product may be imperfect without being defective. Despite its imperfection, is it fit for its ordinary purpose ? That leads us to consider what is an "ordinary" purpose . It may be opposed to an "extraordinary" purpose when goods are used under abnormal conditions<sup>16</sup> and to a "specific" purpose intended by the buyer<sup>17</sup> and not necessarily communicated to the seller.

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<sup>15</sup>Three general types of defects are to be considered: manufacturing defects, design defects and failure to give the buyer proper instructions with respect to the goods.

<sup>16</sup>See, e.g., in *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C.App. 684, 222 S.E.2d. 709, 19 U.C.C.Rep. 106 (1976), plaintiff purchased equipment for a water filt plant. Apparently as a result of excessive water pressure, the equipment failed to filter the water sufficiently to meet governmental regulations. The court concluded that "the evidence .....merely establishes that the distributor heads were not fit for use under excessive water pressure as contained by the Water Corp.'s system, which was not the ordinary purpose for which the goods were sold."

<sup>17</sup>For a general discussion of implied warranty of fitness for a particular purpose, see infra Ch.I) A) a) 2).

## 122) Used goods and warranty of merchantability

The warranty of merchantability that may attach used goods is neither directly addressed by S. 2-314 nor by any other U.C.C. provisions. Hence, one could conclude that there is no legal obligation of warranty merchantability. This would be going too far since we may draw from official Official Comment 3 S.2-314<sup>18</sup> that under certain circumstances merchantability of second-hand goods may be required from the seller. Facts like the extent of goods prior use, the buyer's knowledge that the goods are used and a discount price are taken into account to determine what may be expected from the goods in terms of merchantability. Furthermore, whenever used goods are sold by a non-merchant, the implied warranty of merchantability is more than unlikely to attach. Ultimately, it frequently occurs that used goods are sold "as is" which under S.2-316(3)(a) is squarely equivalent to a disclaimer.<sup>19</sup>

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<sup>18</sup>Official Comment 3 S.2-314 provides in part: "A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves such obligation as is appropriate to such goods for that is their contract description."

<sup>19</sup>For a general discussion on warranty disclaimers, See Ch.II) B) supra.

2) Implied warranty for a particular purpose (S.2-315)<sup>20</sup>

Unlike the implied warranty of merchantability which is to a large extent an objective warranty that applies to inherently defective products, the implied warranty for fitness of a particular purpose is rather a subjective warranty.<sup>21</sup> Indeed the goods might function properly, have no inherent defect and at the same time may not be fit for the buyer's particular purpose. Conditions needed for its application are subject to difficulties of appraisal (21) and to evidentiary problems.(22)

21) As to the seller

The implied warranty of S.2-315 will arise only if the seller should know the buyer's special purpose for which the goods are required. It does not necessarily mean that the seller actually knows the particular purpose. The buyer who has to prove his special intended use of the goods will likely be successful in his task whenever he is able to shower either of the following elements: actual

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<sup>20</sup>S. 2-315 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 on the seller's skill or judgment to select or furnish suitable goods, there is unless exclude or modified under the next section an implied warranty that the goods shall be fit for such purpose."

<sup>21</sup>The implied warranty of fitness for particular purpose is often presented as a contextual or environmental warranty.



communication by the buyer of his particular purpose,<sup>22</sup> goods particularly manufactured and assembled for buyer's business,<sup>23</sup> past dealings between parties.<sup>24</sup> In sum, any time the buyer is able to prove, under the circumstances surrounding the sale, that the seller has "reason to know" his particular purpose he will meet the first requirement of S.2-315.

22) As to the buyer

The burden of proof which hangs over the buyer is fairly heavy since, in addition to the seller's knowledge of his special purpose, the buyer has also to prove his own reliance upon the skill or judgment of the seller to select an article suitable for his needs. The relevant issue is thus to define which kind of evidence is most useful in showing the buyer's reliance.

A provision empowering the seller to select the proper product according to the buyer's needs is an "ideal" situation. Otherwise, reliance will be inferred from circumstances surrounding the sale. As a matter of general rule, comparison between respective expertise of the buyer

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<sup>22</sup>See, e.g., *Catania v. Brown* 231 A2d 668 (Conn.Cir. Ct.1967), 4 U.C.C. Rep. 443.

<sup>23</sup>See, e.g., *Jones, Inc. v. W.A. Wiedebush Plumbing & Heating Co.*, 201 S.E.2d 248 (W.Va. 1973), 13 U.C.C. Rep. 818.

<sup>24</sup>See, e.g., *Utah Cop. Ass'n v. Egbert-Haderlie Hog Farms, Inc.*, 550 P.2d 196 (Utah 1976), 19 U.C.C. Rep. 1095.



and the seller as to the goods subject to the sale is used by courts as a persuasive means to assess the buyer's reliance on the seller.<sup>25</sup> Likewise, it is well settled that if the buyer participated in the goods selecting process, he should be estopped from claiming his reliance on the seller.<sup>26</sup>

These developments concerning implied warranties under the U.C.C. provisions would be incomplete if it were not mentioned that there expressly exists an implied warranty created by course of dealing or usage of trade.<sup>27</sup> To a certain extent, this implied warranty overlaps with S.2-314(2)(a)<sup>28</sup> and seems to be used by courts to state an implied warranty of merchantability or of fitness for a particular purpose when they refer to the surrounding circumstances of the sale.

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<sup>25</sup>See, e.g., Carson v. Chevron Chemical Co. 635 P2d 1248 (Kan. Ct. App. 1981), 32 U.C.C.Rep. 834.

<sup>26</sup>See, e.g., Keith v. Buchanan, 173 Cal.App.3d 13, 220 Cal.Rptr. 392 (1985).

<sup>27</sup>S. 2-314(3), See note 7/ *supra*.

<sup>28</sup>S. 2-314(2)(a) provides: "Goods to be merchantable must be at least such as pass without objection in the trade under contract description."

b) The Civil Code Hidden Defect Warranty (Art.1641)<sup>29</sup>

On the one hand, as far as the thing sold is concerned, the Art. 1641 sets up very precise conditions to be complied with to trigger the legal warranty (1). On the other hand, in contrast with S. 2-314(1),<sup>30</sup> there is no special requirement as to the seller (2).

1) As to the goods sold

Civ.C.Art. 1641 describes hidden or material defects as imperfections gathering two features. Imperfections must prevent the buyer from using the goods as he intended (11) and must not be discoverable by the buyer at the time of the purchase (12).

11) The goods must be defective

Two issues have to be contemplated: what is legally speaking a defect? (111) and how should the "pre-existing defect" rule be understood? (112)

111) The legal concept of defect

Whichever imperfection the goods may reveal, they will not necessarily be deemed defective pursuant to

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<sup>29</sup>C.Civ. Article 1641 provides: "The seller must warrant against hidden defects in the thing sold which make it unfit for the use for which it is intended, or so impair this use that the buyer would not have acquired it, or would only have paid a lower price, if he had known of them."

<sup>30</sup>S. 2-314(a) sets forth as a matter of principle that the seller has to be a merchant.

Civ.C.Art. 1641. That is to say that only serious imperfections are taken into account whereas mere inconvenience in the use are not.<sup>31</sup> Serious imperfections might be defined as sufficiently grave to significantly prevent the use of the goods intended by the parties or to substantially lessen the goods' worth.<sup>32</sup>

112) The defect must exist prior to the sale

It is the buyer's duty to prove that the defect existed at the time of the sale. This condition is not expressly mentionned by Civ.C.Art. 1641 but is a well-settled case law rule.<sup>33</sup> It means that the defect is inherent to the goods sold and results neither from misuse of the buyer (1121), nor from natural wear and tear (1122).

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<sup>31</sup>See, e.g., Nimes, 12/18/1983, D.1983. 29. (there is no material defect for a car whose floor vibrates.)

<sup>32</sup>See, e.g., Civ. 01/30/1967, J.C.P.1967. II. 15025 (an impotent bull); Comm. 07/01/1969, Bull.Civ. IV, # 255 (rotten cheese); Comm. 05/11/1965, Bull. Civ.III, # 306 (an unseaworthy boat); Civ. 11/22/1978, D. 1979, I.R. 147 (an unworkable alarm-system); Comm. 05/15/1972, Bull.Civ., # 144 (an household appliance which kept breaking down); Civ. 11/28/1979, D.1980, I.R. 566 (a T.V. set which imploded); Comm. 06/13/1977, Bull.Civ. IV, # 47, 9 a powerless motor for the intended use).

<sup>33</sup>See, e.g., Civ., 02/09/1965, Bull. Civ.III, # 103; Comm. 12/10/1973, D.1975. 122.; Civ., 01/12/1977, Bull. Civ.I, # 28; Comm. 18/01/1984, Bull. Civ. IV, # 26. (Mandatory rule to show that the defect existed before the sale or delivery of the good, or was already in germ.)

### 1121) Misuse of the buyer

For obvious reasons french case law has always admitted that the manufacturer or seller could not be held liable for abnormal or unforeseeable use of the goods by the buyer.<sup>34</sup> Indeed, the goods are not inherently defective: the defect is the result of buyer's misuse. In case of a special purpose intended by the buyer, it has to be known by the seller and not only wanted by the buyer.<sup>35</sup> Buyer's special purpose might be presumed from his past dealings with the seller.<sup>36</sup>

### 1122) Natural wear and tear

However high a product quality may be, there is normal expectations, in terms of length, beyond which the product is not any more able to be fit for its use. That is why for each particular product courts will estimate whether the defect is the result of a normal wear and tear.<sup>37</sup> It has to be underlined that not as much should be

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<sup>34</sup>See, e.g., Comm. 03/17/1964, Bull. Civ. III, # 156 (a private car is not supposed to be used as a motor racing car); Civ. 01/24/1978, J.C.P. 1968. II. 15429. (fresh cheese is not supposed to be preserved for months); Comm. 01/19/1978, Bull. Civ. IV, # 17. (no warranty attaches when the product is not used pursuant to the manufacturer's instructions).

<sup>35</sup>See, e.g., Civ. 01/24/1968, D. 1968. Somm. 122.

<sup>36</sup>See, e.g., Comm. 03/14/1972, Bull. Civ. IV, # 88.

<sup>37</sup>See, e.g., Civ. 05/29/1963, Gaz. Pal. 1963.2.363. (electric wires expected to wear out after few years.)

expected from used goods as from new goods. Discount price in this context is an element of appraisal.<sup>38</sup>.

## 12) The defect must be hidden

Art. 1642 provides: "The seller is not responsible for obvious defects which the buyer could have ascertained for himself." Indeed, it seems logical that a buyer be not entitled to complain about what he was aware of or should have discovered.<sup>39</sup> Thus the defect must be hidden at the time of the sale. In other words, it must be neither conspicuous (121) nor revealed to the buyer.(122)

## 121) Conspicuous or visible defect

A defect is not hidden , even if it might be actually ignored by the buyer, whenever the latter could have readily discovered it. The buyer is expected to carry out basic ascertainings.<sup>40</sup> Buyer's technical knowledges as to the goods will determine the extent of his checking. A deeper care is required from a professional: a defect

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<sup>38</sup>See, e.g., Rouen, 02/14/1979, D. 1980, I.R. 223.

<sup>39</sup>Plenty of Civil Code rules are underlied by the following maxim : " Law's purpose is to help the one who is awake and to disregard the one who is asleep."

<sup>40</sup>See, as an illustration of visible defects, Comm. 02/05/1974, Bull.Civ. IV, # 50 (stains on a coat which was on display for a long time); Comm. 01/24/1984, Bull. Civ.IV, # 34 (a new vehicle with many blight parts).



might be hidden for a consumer and visible for a professional.<sup>41</sup>

## 122) Revealed hidden defect

It may happen that the defect is not conspicuous nor deemed hidden because the buyer knew it before entering into the contract.<sup>42</sup> The buyer has to act in good faith: he is not allowed to complain about what he knowingly agreed upon. In other words if the seller revealed some product's imperfection the buyer lost his cause of action under Art. 1641 & following.

## 2) As to the seller

Unlike the warranty of merchantability which is roughly its American counterpart, french legal warranty does not require as a condition the seller to be a merchant. Generally speaking, as far as the legal warranty scope of application is concerned,<sup>43</sup> it makes no difference whether the seller is a mere occasional seller or professional dealer.

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<sup>41</sup>See, e.g., Comm. 10/05/1965, D.1965. 831.(a truck bought by a truck driver); Paris 12/11/1975 J.C.P. 1977. II. 18531. (a second-hand car bought by a garage owner); Comm. 02/15/1982, Bull.Civ.IV, #59 ( stained fruits purchased by a professional).

<sup>42</sup>See, e.g., Comm. 02/05/1974, D.1974, I.R. 116.

<sup>43</sup>We will see (in Ch.III) that as regards the extent of remedies there is a good deal of difference between non-merchant and merchant seller.

## B) EXPRESS WARRANTIES

Under both American and French legal systems, two key ideas govern the rules applicable to express warranties. On the one hand, as a matter of principle, parties to a contract are free to set up their agreement according to their desires and needs. On the other hand, some statutes have been enacted in order to protect consumers against the superior bargaining power of the seller.<sup>44</sup> As to the integration of the foregoing considerations within the policy governing express warranties, we will see a good deal of difference between the American and French sets of rules (a). Likewise, as to links and interactions between legal and contractual warranties under both systems (b), dissimilarities will be pointed out.

### a) Express Warranties' Policy

Whereas the notion and regime of express warranty have been widely developed by the U.C.C. (1), these issues have not been specifically addressed by the French legislature (2).

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<sup>44</sup>The Magnuson-Moss Warranty Act (Act of January 4, 1975) has established federal standards for consumer product warranties. Statute # 78-23 on consumer information and protection (Statute of January 10, 1978).



1) The sophisticated concept and regime of express warranties under U.C.C. (S. 2-313)<sup>45</sup>

A quick look at U.C.C. S.2-313 indicates that the concept of express warranty is broadly conceived (11) and the regime of express warranty is closely tied to an element --the basis of the bargain -- whose construction by courts is still uncertain (12).

11) The concept of express warranty

It may be presented through a general principle (121) which is subjected to some limits (122).

111) General Principle

Roughly speaking, any or almost any representations of the goods may create an express warranty. Whatever the way of presenting the quality of his products may be, the

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<sup>45</sup>U.C.C. Section 2-313 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 if the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is 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.

seller may be held liable: written or oral statements,<sup>46</sup> blueprints as well as brochures<sup>47</sup> samples like models<sup>48</sup> may amount to an express warranty. It has here to be noted that the Magnuson-Moss warranty Act,<sup>49</sup> which deals with written consumer product warranties, does not regulate the substance of warranty terms nor required any business to offer a warranty to consumers. However wide the concept of warranty may be, it is nevertheless subjected to certain limits (122).

#### 112) Limits

Two limits have to be spelled out: generic description (1221) and "puffing" (1222).

##### 1121) Generic description

A too general or generic term does not amount to express warranty by description. Describing the general nature and function of a product does not characterize its

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<sup>46</sup>See, e.g., *KLPR TV, Inc. v. Visual Elelecs. Corp.*, 327 F.Supp. 315, 324, 9 U.C.C.Rep. 649, 661 (W.D. Ark. 1971)(oral statement that commercial television equipment would produce top-quality picture).

<sup>47</sup>See, e.g., *Interco, Inc. v. Randustrial Corp.*, 533 SW2d 257 (Mo.Ct.App. 1976), 19 U.C.C.Rep. 464 (language in the seller's catalog that stated that a floor-covering product would absorb considerable flex without cracking).

<sup>48</sup>See, e.g., *Zappala & Co. v. Pyramid Co.*, 439 NYS2d 765 (NY App.Div. 1981), 31 U.C.C.Rep. 550 (seller's delivery of discolored concrete blocks differing from sample).

<sup>49</sup>See note 44/ supra.

quality. No court has yet accepted the generic description theory. Indeed, if it were the case, as it is hardly conceivable to contemplate a sale with no identification of the product sold, U.C.C. S.2-316(2)<sup>50</sup> would be unworkable. Put it another way, assuming a generic description deemed an express warranty of merchantability, it would be inconsistent to give afterwards effect to a disclaimer of the implied warranty of merchantability.

#### 1122) Puffing

A certain level of specificity and objectivity is to be required of seller's representations of the goods to distinguish an express warranty from mere puffing or seller's talk.<sup>51</sup> Drawing the line between warranty and seller's talk, namely between statement of fact and opinion, may be not obvious. Mathematical precision<sup>52</sup> is to be opposed to imprecise affirmations.<sup>53</sup> Certain factors are constantly taken into account to determine whether seller's affirmations are enforceable sales talk :

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<sup>50</sup>S.2-316(2) allows, under certain conditions, to disclaim the implied warranty of merchantability. (for a general discussion on disclaimers, See Ch.II).

<sup>51</sup>This statement is supported by U.C.C. S.2-313(2), See note 45/ *supra*.

<sup>52</sup>See, e.g., *Woodbury Chem. Co. v. Holgerson*, 439 F.2d 1052, 1054, 8 U.C.C. Rep. 999,1001 (10th cir. 1971) (weed-killer 80% effective).

<sup>53</sup>See, e.g., *Bickett v. W.R. Grace Co.*, 12 U.C.C. Rep. 629 (W.D.Ky. 1972).

seller's attempt to hedge his representations<sup>54</sup> and buyer's knowledge or expertise as to the goods purchased.<sup>55</sup>

## 12) The regime of express warranty

A mere reading of S.2-313 points out that the basis of the bargain is the keystone to ascertain whether seller's representations may trigger seller's express warranty obligations. It is thus necessary to present what the basis of the bargain test consists in (121). Certain related issues will thereafter be discussed (122).

### 121) Presentation of the basis of the bargain test

However seller's representations may be made, they will only trigger seller's express warranty obligations if they can be deemed "part of the basis of the bargain." The basis of the bargain requirement roughly equates with showing the buyer's reliance on the seller's representations. There is a presumption that seller's affirmations go to the basis of the bargain and are consequently express warranties. This statement finds both textual<sup>56</sup> and

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<sup>54</sup>See, e.g., *Matlack, Inc. v. Hupp Corp.*, 57 FRD 151 (ED Pa. 1972) 12 U.C.C. Rep. 420. ("We do believe that we have the engine that will 'fill the bill' in all categories so far as your application is concerned").

<sup>55</sup>On purpose, this element will be discussed in the following paragraph dealing with the basis of the bargain.

<sup>56</sup>Official Comment 8, S. 2-313 states: "Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question



judicial<sup>57</sup> supports. However, the presumption of reliance is rebuttable when the seller proves that the buyer did not in fact rely upon seller's representations.<sup>58</sup>

Even though Official Comment 3 S.2-313<sup>59</sup> seems particularly clear as to the non-requirement of reliance, numerous cases evidenced that whenever seller's statements induced the purchase the basis of the bargain test is met.<sup>60</sup> Likewise there are some cases which denied buyer's claim when he can not prove that he acted on the basis of the seller's representations.<sup>61</sup> Buyer's knowledge and

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remains the same: what statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all statements of the seller do so unless good reason is shown to the contrary."

<sup>57</sup>The presumption of warranty is supported by Judge Trobiner's opinion in *Hauter v. Zogarts*, 14 Cal. 2d 104, 534 P.2d 337, 16 U.C.C.Rep.Serv. 938 (1975).

<sup>58</sup>See, e.g., *Sessa v. Riegle*, 427 F.Supp. 760 (ED Pa.1977) 21 U.C.C.Rep. 745, aff'd mem., 568 E2d 770 (3d Cir. 1978), (in a horse sale the buyer relied on his agent).

<sup>59</sup>Official Comment 3, S.2-313 states in particular: "In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of the goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement."

<sup>60</sup>See, e.g., *Palmer v. A.H. Robbins Co., Inc.*, 684 P.2d 187, 38 U.C.C. Rep.Serv. 1150 (Colo.1984); *Fletcher v. Coffee County Farmers Coop.*, 618 S.W.2d 490 (Tenn. Ct. App.1984), 470 N.E.2d 137, 39 U.C.C. Rep.Serv. 1239.

<sup>61</sup>See, e.g., *Hagenbuch v. Snap-On-Tools Corp.*, 339 F.Supp. 676 (DNH 1972), 10 U.C.C. Rep. 1142.; 490 P2d 475 (NM Ct.App. 1971), 9 U.C.C. Rep. 794, aff.'d on this point, 497 P2d 732 (NM 1972), 10 U.C.C. Rep. 1010.

expertise are decisive to determine whether such a buyer may have reasonably relied upon the seller's assertions. The higher the buyer's knowledge, the less he has reason to recklessly rely upon seller's statements and accordingly the more he should be able to draw the distinction between express warranty and puffing.<sup>62</sup>.

## 122) Issues related to some express warranties

Two major issues have to be addressed: post-agreement warranties (1221) and integration clauses (1222).

### 1221) Post-agreement warranties

Official Comment 7 S. 2-313<sup>63</sup> indicates that seller's representations, even if made after the closing of the deal, may amount to an enforceable express warranty. No matter how clear is that comment there has been a split among courts about its application. Some courts simply ignored it.<sup>64</sup> Others admitted that subsequent

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<sup>62</sup>Thus, to a large extent the basis of the bargain test and the concept of puffing are interdependent.

<sup>63</sup>Official Comment 7, S.2-313 states:  
"The precise time when words of description or affirmation are made or samples are shown is not material."

<sup>64</sup>See, e.g., Byrd Motor Lines Inc. v. Dunlop Tire & Rubber Corp., 304 S.E.2d 773, 36 U.C.C. Rep.Serv. 1169 (N.C.Ct.App. 1983); Cutherson v. Clark Equip. Co., 448 A.2d 315, 34 U.C.C. Rep.Serv. 71 (Me. 1982).



representations to a sale might constitute an actionable modification of warranty.<sup>65</sup>

It is somewhat difficult to contemplate in post-agreement warranties a potential basis of the bargain. Indeed how to conceive that a post-agreement induced the purchase? A showing of reliance to characterize the basis of the bargain should be thus discarded with respect to post-agreement warranties.

#### 1222) Integration or merger clauses

If the express warranty is spelled out in a writing so that it appears to be a final expression of the parties' intent the buyer is unlikely to prove prior or contemporaneous written or oral express warranties. This is the result of the application of the parole evidence rule.<sup>66</sup> A very carefully drafted merger clause<sup>67</sup> will

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<sup>65</sup>See, e.g., *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974), 15 U.C.C. Rep. 769; *Autzen v. John C. Taylor Lumber Sales, Inc.*, 280 Or.783, 572 P.2d 1322, 23 U.C.C. Rep.Serv. 304 (1977); *Downie v. Abex Corp.*, 741 F.2d 1235, 39 U.C.C. Rep.Serv. 427 (10th Cir. 1984).

<sup>66</sup>S.2-202 embodies the parole evidence rule:

"Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as the final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (S. 1-205) or by course of performance (S. 2-209).

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

prevent the buyer from alleging any affirmation, representation, promise or warranty external to the parties' written agreement. Actually, a merger clause operates as a real disclaimer provided it complies with all requirements of S. 2-316.<sup>68</sup>

## 2) The specificity of the express warranty under the french law

Express warranties are mostly to be drawn from the general conditions of the contracts of sale. Two features have to be highlighted: seller's warranty obligations are time limited (21) and widen his obligations under the legal warranty (22).

### 21) As to the warranty period

One is most likely to find in general conditions of sale contracts a precise warranty period which varies from a few months to one year or even longer. This express warranty period must be clearly distinguished from the short time-limit of Civ.C.Art. 1648.<sup>69</sup> Whereas the former

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<sup>67</sup>A good example of integration clause can be found in J.McDonnell & E.Coleman, Commercial and Consumer Warranties, Ch.5, 5.09, 5-71: "THIS AGREEMENT SIGNED BY BOTH PARTIES AND SO INITIALED BY BOTH PARTIES IN THE MARGIN OPPOSITE THIS PARAGRAPH CONSTITUTES A FINAL WRITTEN EXPRESSION OF ALL TERMS OF THIS AGREEMENT AND IS A COMPLETE AND EXCLUSIVE STATEMENT OF THOSE TERMS."

<sup>68</sup>For a general discussion on disclaimers, See Ch.II).

<sup>69</sup>C.Civ.Art. 1648 provides: "The action to which material defects give rise must be brought by the purchaser within a short time-limit, depending upon the nature of the

limits the warranty period the latter has to do with a limitation period to bring a warranty action. In other words, the legal short delay compels the buyer to sue the seller shortly after the defect has been discovered whereas the express warranty period specifies the period within which the defect must occur.

22) As to the protection offered

It has here to be recalled that, under C.Civ. Art. 1641, legal protection will be offered only if the defect is hidden, sufficiently grave, and existing prior to the sale contract. There is no doubt that express warranties will also require the defect not to be conspicuous at the time of the sale. In contrast, express warranties appears to be much less exacting as regards the pre-existing (221) and seriousness (222) features of the defect.

221) As regards the pre-existing defect rule

In both legal and express warranties the seller is not held liable for defects resulting from buyer's misuse or fair wear and tear of the goods sold. Thus, it is very common for sellers to introduce into their general conditions of sale explicit provisions such as: "The warranty does not cover costs of repairing in case of

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material defects, and the custom of the place where the sale took place."

normal wear and tear of the sewing machine or accident cause by misuse or lack of maintenance."<sup>70</sup>

However, there is a substantial difference between legal and express warranty in terms of proving a defect's pre-existence. Indeed, under Civ.C. 1641 and following, the buyer is to prove the machine malfunctioning. This may sometimes be tough especially when the defect occurs long after the sale. In contrast, stipulating an express warranty period amounts to presume the defect's pre-existence during that entire period: whichever malfunctioning may come up over the express warranty period it is presumed to be caused by a manufacturing defect. Consequently, the buyer has not to prove it. Ultimately, the seller will have a hard time to rebut the presumption. Only a showing of buyer's misuse of the machine might relieve the seller of his liability. Thus, express warranty equates with a good working warranty during a certain period of time.

## 222) As regards the seriousness of the defect

According to the terms of Civ.C.Art. 1641, defects that trigger the legal warranty must be of a certain gravity. Defects affecting the product usefulness are considered whereas those related to its amenities are simply neglected. This distinction does not exist with

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<sup>70</sup>Warranty clause of Singer sewing machines.

express warranties. Contract's provisions dealing with warranty indicate only that the goods sold are guaranteed for a certain period of time. That is to say that express warranties protect buyers against any kind of damage provided that the damage occurs during the warranty period and is not due to misuse of the product. Whether or not the damage complained of is included in the hidden defects of Civ.C.Art. 1641 is of no significance. Put it another way minor defects will be covered by the express warranty whereas under the legal warranty they will not.

b) Relationships or links between legal and express warranties

Generally speaking both warranties are conceived as efficient tools for buyer to compel seller to implement one of his most important obligations. To what extent, under both American and french laws, has such a purpose been achieved?

1) Under the perspective of the American law

Actually, numerous express warranties describe goods as being merchantable free of defects in material and workmanship. Likewise seller may also expressly warrant that goods are fit for the buyer's special purposes.<sup>71</sup>

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<sup>71</sup>See, e.g., *Uganski v. Little Giant Crane & Shovel, Inc.*, 192 Nw2D 580 (Mich.Ct.App.1971), 10 U.C.C.Rep. 57 (power crane); *Acme Pump Co. v. National Cash Register Co.*, 337 A2d 672 (Conn. CP 1974), 16 U.C.C.1242 (bookkeeping machine).



Indeed, as a practical matter, it is difficult to imagine circumstances in the real world where the particular purpose warranty will not be characterized as express. In other words a written document is likely to be drafted when the buyer wishes to get goods fit for a particular purpose. Thus implied and express warranties may apparently cover the same area. Yet, whenever there may be an overlap between express and implied warranties, a cautious buyer should allege both of them.<sup>72</sup>

Furthermore, before getting to the litigation stage, an aggrieved buyer is much more likely to obtain appropriate remedies from the seller if he can rest upon an express warranty made by the seller. Indeed sellers are not familiar with implied warranties.

The foregoing considerations have been largely pragmatic. They tended to point out that, even if express warranties' content may embrace implied warranties, express warranties of quality, particularly those reduced to writing, are much more useful for buyers than warranties implied in law.

This last comment may be equally drawn from french legal and express warranties.

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<sup>72</sup>Indeed both express and implied warranties are subjected to various requisite conditions for their characterization, See Ch.I) A) a) & B) a) supra.



## 2) Under the perspective of the french law

Relationships or links between express and legal warranty have to be contemplated whether the express warranty period is still running or not.

During the express warranty period, the express warranty protection should primarily come into play. Assuming the legal warranty features are also met, could the buyer invoke the benefit of the legal warranty rather than the express warranty protection? And what if the buyer has not complied with his own obligations under the express warranty provisions?<sup>73</sup> Even in that case, the buyer should be able to seek the legal warranty<sup>74</sup> protection if he is willing to do so.<sup>75</sup>

It often happens that express warranties are not enforceable because the warranty period is over. The relevant issue then is: is the aggrieved buyer allowed to trigger then the legal warranty? Judicial precedents<sup>76</sup>

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<sup>73</sup>For instance, the buyer made the good be fixed by someone who is not a manufacturer's representative.

<sup>74</sup>See, e.g., Civ., 07/15/1975, Bull.Civ.I, # 243, 204.: as a matter of principle to have made the good fixed by somebody else than the seller himself does not prevent the aggrieved buyer from exercising his rights pursuant to C.Civ.Art. 1641 and following.

<sup>75</sup>The buyer may be willing to get the contract's rescission, which is possible under the legal warranty and may be not under the express warranty.

<sup>76</sup>See, e.g., Nice, 10/23/1957, Gaz. Pal., 1957, 2nd. Tables; Poitiers, 11/22/1961, D.1962, Somm.18; Comm. 04/28/1971, J.C.P., 1972. II 17280, 2nd case; Comm., 11/08/1976m Gaz.Pal., 1977, 2nd. 434.

and statutory provisions<sup>77</sup> lead undoubtedly to a positive answer. However, a good deal of time will have necessarily elapsed from the time of the sale and consequently the buyer will be unlikely to prove that malfunctioning is the result of a manufacturing defect and not of wear and tear or misuse.

The foregoing considerations do not mean that a warranty period stipulation is of no importance. All along that period, the buyer is probably given a better protection than under the legal warranty.<sup>78</sup> But, the legal warranty may either "preempt" the express warranty during the express warranty period or outlast the express warranty extinction.

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<sup>77</sup>Decree # 78-373 related to consumers information and protection. (Decree of 03/24/1978).

<sup>78</sup>See, Ch. I) B) a) 21) & 22) supra.

## CHAPTER II. CONDITIONS TO IMPLEMENT THE WARRANTY OF QUALITY

Assuming the existence of a warranty of quality, it will be only given effect if certain conditions are satisfied: some of them are positive, others are negative.

As to positive conditions, they might be summed up in the idea of causation. Whereas the French approach is rather to include the notion of causation within the hidden defect warranty concept the American view is to clearly distinguish the existence of a warranty from its breach and to point out that damages suffered are due to the breach of warranty.<sup>79</sup> The buyer is to prove two elements of causation: The buyer has first to establish that the loss sustained occurred because of the breach of the warranty, thus because of the goods' defects. Accordingly, the buyer has to show that the goods were defective at the time of the sale.<sup>80</sup> Indeed, the warranty relates, as a matter of

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<sup>79</sup>Official Comment 13, S.2-314 provides: "In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the seller resulted from some action or event following his own delivery of the goods can operate as a defense."

<sup>80</sup>See, e.g., *Q.Vandenberg & Sons, N.V. v. Siter*, 204 Pa.Super.392, 398, 204 A.2d 494, 497 (1964)

principle, to the condition of goods at the time of the contract or shipment.<sup>81</sup>

In addition assuming the goods are both warrantied and inherently defective, the buyer still has the burden to demonstrate that "the breach of warranty was the proximate cause of the loss sustained."<sup>82</sup> Whenever buyer's conduct intervenes and lessens the connection between the breach and the loss, he may be deprived of his right to get any remedy. That is among others the case if the buyer knowingly used a defective product<sup>83</sup> or he failed to discover defects he should have discovered.<sup>84</sup>

U.C.C. S.2-316(3)(b)<sup>85</sup> which deals with disclaimer implied by examination (or non-examination) heavily sup-

<sup>81</sup>See, e.g., *Prutch v. Ford Motor Comp.*, 574 P.2d 102, 105, 23 U.C.C.Rep.637, 640 (Colo.Ct.App. 1977); *Herbstman v. Eastman Kodak Co.*, 68 N.J. 1, 8-9, 342 A.2d 181, 184, 17 U.C.C.Rep.39, 43 (1975) (consumer case).

<sup>82</sup>Official Comment 13, S.2-314 See note 79.

<sup>83</sup>Official Comment 5, S.2-715 provides in part: ". . . If the buyer did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty."

<sup>84</sup>Official Comment 13, S.2-314 in fine provides: "Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury."

<sup>85</sup>S.2-316(3)(b) provides: "When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him."

ports this latter consideration. Exactly like the conspicuousness defect test under the French law, buyer's failure to undertake reasonable inspection of the goods and to find out the defect he is complaining of will be basically determined under the following criterion: the buyer's degree of expertise as to the goods purchased.<sup>86</sup>

As regards negative conditions, the seller's warranty obligations will only be triggered if the buyer does not wait too long to file a suit (A) and does not face warranty disclaimer's issue (B).

(A) AS TO THE TIME ALLOWED TO BRING AN ACTION

Under both American (a) and French (b) systems, express provisions specify a certain period of time during which the aggrieved buyer may rightfully claim his rights.

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<sup>86</sup>Official Comment 8, S.2-316 states: " A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe."

See, e.g., General Instr. Corp. v. Pennsylvania Pressed Metals, Inc. 366 F.Supp. 139, 13 U.C.C.Rep.829 ( M.D. Pa. 1973), aff'd mem., 506 F.2d 1051 (3d Circ. 1974): a buyer's failure to discover that sleeve bearings for bomb fuses were packed in oil of the wrong thickness barred him from consequential damages. The nondiscovery was unreasonable because "a mere visual inspection of the whole contents of the bag would at least have put anyone who regularly handled these bearings on notice that something was amiss." Id. at 149, 13 U.C.C.Rep. at 836.



a) The statute of limitations and the buyer's duty to give notice or the U.C.C. requirements.

Under the U.C.C., the buyer has to be extremely vigilant as soon as he discovers some product's imperfections. He has to bear in mind that he must bring his action within a certain period of time (1). In addition he is required to notify the buyer of the alleged breach of warranty (2).

1) The statute of limitations (U.C.C. S 2-725)<sup>87</sup>

One may infer from S.2-725 a principle (11) which may be subject to exceptions (12).

11) Principle

An action for breach of warranty must be commenced within four years after tender of delivery is made.

The U.C.C. drafters have considered that the four years period begins to run when the cause of action arises, here when the breach of warranty occurs. Surprisingly they have adopted as a reference point for the breach of warranty the tender of delivery. One could regret that the

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<sup>87</sup>S. 2-725 provides in its two first subsections:  
 (1) "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it. (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."



starting point of the four-year period not be the discovery of the breach. Nevertheless, this quite long period of time to bring an action and the certainty secured as to its computation might very well counterbalance unfairness that could result for cases where goods' defects appeared after the four-year period had elapsed.

## 12) Exceptions

Contracting parties may modify the period of limitation. There are two means whereby contracting parties may depart from the period generally allowed to bring an action for breach of warranty: the future performance exception (121) and an agreement to reduce the period of limitation (122).

### 121) The future performance exception

The computation of the four year period might start from the discovery of the defect" where a warranty explicitly extends to future performance of the goods and discovery of the breach must await such performance."<sup>88</sup> The word "explicitly" leads to consider that only express warranties might create the future performance exception. Indeed courts have never recognized that implied warranties

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<sup>88</sup>S.2-725(2), See note 87/ *supra*.

may be concerned.<sup>89</sup> That is not to say that any express warranty necessarily extends to future performance. The express warranty must look to the future, namely provide a specific durational promise for the goods. An express warranty stating that the goods will perform in a certain way or be free of defects for a certain period of time suspends the clock until discovery of breach and gives four years from discovery to bring suit for breach of the express warranty.<sup>90</sup>

122) An agreement to reduce the period of limitation

It is up to the contracting parties to reduce in their agreement the period of limitation to not less than one year.

But they have to be careful in the drafting of the contractual reduction. They must expressly indicate that the suit is to be brought within a certain period of time after the cause of action has accrued. Wording creating

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<sup>89</sup>See, e.g., Grand Island School Dist. No. 2 v. Celotex Corp., 279 NW2d 603 (Neb.1979), 26 U.C.C.Rep.939; Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F2d 737 2d Circ. 1979), 26 U.C.C.Rep.1162; South Burlington School Dist. v. Calcagni-Frazier-Zajchowski Architects, Inc., 410 A2d 1359 (Vt.1980), 28 U.C.C.Rep. 1382.

<sup>90</sup>U.S.Indus., Inc. v. Mitchell, 252 S.E.2d 672 (Ga.Ct.App. 1979), 26 U.C.C. Rep. 90 See, e.g., (express warranty that poultry cages sold to plaintiff had been treated to prevent rusting for 10 years).

limited remedies<sup>91</sup> or express warranties of limited duration<sup>92</sup> or language indicated specific time in which the buyer must notify the seller does not equate with an agreement to reduce the period of limitation to bring a suit.

In addition to the statute of limitation requirement, the aggrieved buyer, prior to the litigation stage, has to comply with another duty: to give the seller notice of the breach of warranty.

2) The buyer's duty to give notice (U.C.C. S.2-607(3)(a))<sup>93</sup>

It is clear from S. 2-607(3)(a) that failure to give timely notice of the breach deprives the buyer of any remedy. The stringency of such a rule induces the following issues to be examined: What should be the notice like? (21), What is a reasonable time to give notice? (22), Who is to be notified? (23)

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<sup>91</sup>A warranty that sets a period of one year in which the seller will repair or replace defective parts does not reduce the statute of limitation to one year.

<sup>92</sup> In *Dennin v. General Motors Corp.*, 78 Misc. 2d 451, 357 N.Y.S.2d 668, 15 U.C.C.Rep. 102(Sup.Ct. 1974), seller's warranty covered defects for "a period of 12 months or 12,000 miles, whichever occurs the first." The court rejected seller's claim that this language reduced the period of limitation to one year.

<sup>93</sup>S. 2-607(3)(a) provides: "Where a tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy."

21) What should be the notice like?

The primary purpose behind the notice requirement is to afford the seller an opportunity to voluntarily remedy the problem and consequently to avoid needless litigation. That is why a proper notice should only be such as informing the seller that the transaction is claimed to involve a breach. The concept of notice is thus broadly conceived: a written notice is the best but an oral notice is sufficient.<sup>94</sup> No magic words are necessary: whenever the seller may be deemed alerted of the breach of warranty an appropriate notice has been given.<sup>95</sup>

22) What is a reasonable time to give notice?

What amounts to a reasonable time depends upon the circumstances and the kind of product involved. Courts will treat differently the timeliness of notice when the buyer is a mere consumer or a merchant buyer.<sup>96</sup> The rule

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<sup>94</sup>See, e.g., *Oregon Lumber Co. v. Dwyer Overseas Timber Prods. Co.*, 571 P2d 884 (Ore.1977), 23 U.C.C.Rep.87; *Boeing Airplane Co. v. O'Malley*, 329 F2d 585 (8th Cir. 1964), 2 U.C.C.Rep. 110 (seller did not receive formal written notice of defects in helicopter until more than one year after delivery, but deller's general awareness of malfunctions long before that time constituted sufficient notice.)

<sup>95</sup>See, e.g., *Alafoss, h.f. v. Premium Corp. of America*, 599 F2d 232 (8th Cir. 1979), 26 U.C.C.Rep. 832.

<sup>96</sup>Official Comment 4, S. 2-607(3)(a) makes clear that: "The time of notification is to be determined by applying commercial standards to a merchant buyer." A reasonable time" for notification from a retail consumer is to be judged by different standards so that in the case it will be extended, for the rule of requiring notification is



will be more liberally applied to the former. Courts take also into consideration the nature of the goods sold. Notice should be promptly given for perishable goods.<sup>97</sup> The starting point of the period of time to give notice is when the buyer discovers or should have discovered seller's breach of warranty. For a latent defect courts will be more flexible as to the computation of the delay to give notice.<sup>98</sup>

### 23) Who is to be notified?

Nowadays it is more than frequent that a product goes through a long chain of distribution and the question thus is whether whom the retail buyer has to give notice to.

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designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."

<sup>97</sup>See, e.g., *Maine Potato Growers, Inc. v. Pennsylvania Co-op Potato Growers, Inc.*, 9 U.C.C.Rep. 842 (US Dept.Ag. 1971): 12 days too long for rotten potatoes.; *Mazur Bros. v. Jaffe Fish Co.*, 3 U.C.C.Rep. 419 (Vet. Adm. CAB, 1965): delay of five days in notifying local supplier of defective raw shrimp is too long).

<sup>98</sup>See, e.g., *Waddell v. American Breeders Serv., Inc.*, 161 Mont. 221, 505 P2d 417, 11 U.C.C.Rep. 1157 (1973): a cattle bought semen for artificial insemination of his cows. The buyer put the insemination cows in a pasture with a "clean-up" bull to cover any cows that had not been successfully impregnated. When the buyer discovered that the clean-up bull was "overused", he replaced it with another bull. Months later, when the failure of his calf crop made it clear that the semen had been defective, the buyer notified and sued the seller. The seller protested that the buyer should have given notice when he replaced the clean-up bull; he should have known that the semen was not working when he saw how hard the bull was working. Unpersuaded, the Court held that the buyer's later notice was timely.

There is no doubt that failure to give notice to the immediate seller bars a warranty action against the latter. The issue is rather whether the remote manufacturer, if sued, may be able to raise the failure to give notice as an available defense. The Courts' trend, especially where economic loss is involved, is to require the aggrieved purchaser to notify the manufacturer.<sup>99</sup> Indeed it seems logical to compel the purchaser to fulfill such a duty when he is given the right to pursue on a warranty theory a member of the chain of distribution with whom he had no contractual relationships.<sup>100</sup>

b) The short-time limit of C.Civ.Art.1648<sup>101</sup>

No matter how well-founded a buyer's claim is as regards the breach of quality, he may be barred from any recovery if he tardily files a suit. That is substantially the understanding of Art. 1648 which compels the buyer to bring an action within a brief delay. This is trial

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<sup>99</sup>See, e.g., *Western Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P2d 806 (Wyo. 1980), 28 U.C.C. Rep. 356; *McCunev. Alioto Fish Co.*, 597 F.2d 1244 (9th Circ. 1979), 26 U.C.C. Rep. 912.

<sup>100</sup>For a general discussion on privity issues, See Ch. IV.

<sup>101</sup>C.Civ. Art. 1648 provides: "The action to which material defects give rise must be brought by the purchaser within a short-time limit, depending upon the nature of the material defects, and the custom of the place where the sale has taken place."



courts' duty to determine whether the buyer has complied with the short-time limit requirement.

Two issues as to the application of such a rule have to be addressed: What is the starting point of the short-time limit? (1)

What is the length of the short-time limit? (2)

# 1) The starting point of the short-time limit

As matter of principle, the clock starts ticking as soon as the buyer discovers or should have discovered the defects.<sup>102</sup> There is a split among courts as to the construction of such a principle. Actually it may be interpreted in two different ways. The delay's computation may start running from the very day when the goods stops working, which makes the buyer aware of the unfitness of the thing for its intended use.<sup>103</sup>

The start of the short-time limit may also be delayed until the purchaser knows what was the exact nature of the goods' defects. This latter approach seems to be favored by the majority of courts which consider that only an expert's report will give prominence to hidden defects.<sup>104</sup>

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<sup>102</sup>See, e.g., Comm. 12/03/1957, Bull.Civ. III, # 332; Comm. 05/04/1971, Bull.Civ. IV, # 122; Comm. 0218/1974, J.C.P. 1974. II. 17798; Comm. 12/09/1975, D.1976. Somm.28.

<sup>103</sup>For cases supporting this view, See, e.g., Comm. 10/11/1971, D.1972. 139; Civ.11/21/1973, D.1974.Somm. 12.

<sup>104</sup>See, e.g., Civ. 05/16/1973, J.C.P.1975. II. 17932; Amiens, 03/20/1975, D.1975 Somm.108; Comm.02/16/1972, D.1977, I.R.248.

Indeed, prior to the expert's report communication, there is still doubt as to whether product's unfitness is due rather to a misuse of the buyer than to a real hidden defect. Practically speaking the sole expert's assistance will reveal and prove the defect's existence which so far could be only suspected. Consequently, it would be fair to delay the short-time period's computation until the report of the expert indicates the defect's nature.<sup>105</sup>

## 2) The length of the short-time limit

What is to be understood from a "brief delay"? The appraisal of such a limit will depend on the nature of the goods sold and the circumstances surrounding the case. One can not lay down the same time to claim for sophisticated material's defects and for mere household defective equipment. Even for similar products, a great diversity of short-time limit's estimation has to be noted.<sup>106</sup> In the real world, it frequently happens that before getting to the litigation stage, the buyer will try to obtain an informal dispute settlement with the seller. Some courts

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<sup>105</sup>See, for a good example supporting this view, Comm. 10/24/1962, D.1962. 46.

<sup>106</sup>For cases dealing with cars, See, e.g., Civ. 07/10/1956, D.1956. 719 (delay of one year held reasonable) Comm. 10/03/1956, G.P.1956, 2, 323 (twenty months not too long) Comm. 12/13/1973, Bul. Civ. IV, # 372 (delay of two years acceptable). In contrast, See, e.g., T.I. Nimes, 02/24/1970, J.C.P.1971.IV.153 (eight months too long). T.G.I.Colmar, 12/09/1977, D.1979, 505.( six months too long).

simply denied any interrupting effect to informal dispute settlement's attempts.<sup>107</sup>

Some others, on the contrary, admitted that while the buyer is trying to get a compromise with the buyer he should not be expected to file a suit.<sup>108</sup> Indeed this latter approach seems to be adopted to business transactions and thus more realistic.

#### B) AS TO WARRANTY DISCLAIMERS

As a preliminary comment, it is noteworthy that both systems approach differently warranty disclaimer and remedy limitations issues: the square point of view of the French law contrasts with the subtle nuance of the American law.

The former simply equates the warranty limitations' regime with that of warranty disclaimers, which renders of no avail any conceptual distinction. The latter, on the contrary, clearly distinguishes warranty exclusions which negate any express or implied warranty obligations from warranty limitations which only determine available remedies once a breach has occurred. Accordingly, the U.C.C. provides two distinct procedures for disclaiming warranties (S.2-316) and for limiting remedies (S.2-718 &

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<sup>107</sup>See, e.g., Comm. 02/02/1971, Bull.Civ. IV, # 34; Civ. 11/12/1975, Bull.Civ. I, # 325; Colmar, 12/09/1977, See note 106 supra.

<sup>108</sup>See, e.g., Civ. 07/10/1956, D.1956., 719; Comm. 10/24/1962, D.1962. 46; Paris, 12/09/1968, D.1969. Somm. 42; Rouen, 02/14/1979, D.1980, I.R. 223.

2-719) and expressly builds up a bridge between the two sets of provisions.<sup>109</sup> That is why remedy limitations will more appropriately be discussed in the next chapter.<sup>110</sup>

Generally speaking warranty disclaimers policies are inspired by two different and sometimes inconsistent considerations: on the one hand, the freedom of contract and on the other hand, the buyer's protection, in particular, the final consumer.

Whereas the American view is rather to favour the former (a), the French one is fully inclined to opt for the latter (b).

a) Warranty Disclaimers under the American Law:

An efficient tool of defense for the seller.

It seems appropriate to divide the following developments into two parts. First, we will give an overview of the basic rules governing the validity of disclaimers in the most frequent context they may occur, namely when the seller attempts to negate his warranty obligations implied by law (1).

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<sup>109</sup>S. 2-316 (4) provides: "Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (S.2-718 & 2-719.)"

<sup>110</sup>For a general discussion on remedies for breach of warranty, See Ch.III.

We will then have to address specific issues (2) raised by some warranty disclaimers: express warranty disclaimers and the "as is" stipulation.

1) General rules governing warranty disclaimers's validity

Generally speaking, the implied warranties of merchantability and fitness for a particular purpose are subject of being disclaimed. To achieve such a purpose, the seller is to strictly follow some requirements set forth in S.2-316(2) (11). Whenever sale of consumer goods is involved, the Magnusson-Moss Warranty Act<sup>111</sup> may be applicable and secure a greater protection to consumers (12).

11) The S.2-316(2) requirements<sup>112</sup>

In order to disclaim his implied warranty of merchantability, the seller has to straightforwardly comply with two requirements: his warranty disclaimer must mention merchantability (111) and be conspicuous (112). Ultimately,

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<sup>111</sup>15 USC Subsection 2301-2312 (1982).

<sup>112</sup>S.2-316(2) provides: "Subject to subsection (3), to exclude or to modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness for a particular purpose the exclusion must be in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."



he may face the problem of the unconscionability of his otherwise valid disclaimer (113).

111) The language to be mentioned

A failure to use the word "merchantability" is more than likely to equate with a court's refusal to uphold the warranty of merchantability disclaimer.<sup>113</sup> Only few decisions ignored the merchantability requirement.<sup>114</sup>

Unlike a disclaimer of merchantability, disclaimers of warranty for fitness for a particular purpose may be found in a general language and hence no "magic words" are necessary. Likewise, a disclaimer of fitness for a particular purpose must be in writing whereas a disclaimer of merchantability may be oral.

From these last considerations, one may humbly formulate the following comments. A seller willing to

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<sup>113</sup>See, e.g., *Curtis v. Murphy Elevator Co.*, 407 F.Supp. 940 (E.D. Tenn.1976), 19 U.C.C.Rep. 145: "All warranties, express, implied and statutory, shall terminate upon final acceptance of the work covered by this contract." not held effective. *Discount Drug Corp. v. Honeywell Protection Servs., Div. of Honeywell, Inc.*, 450 A2d 49 (Pa.Super.Ct.1982), 34 U.C.C.Rep. 491: "Except as may be provided elsewhere in the agreement, it is not the intention of the parties that the the contractor assume responsibility for any loss due to contractor's negligent performance or failure to perform under this agreement or for any loss or damage sustained through burglary, theft, fire, or any other clause." not recognized as a disclaimer.

<sup>114</sup>For a good example, See *Rotho-Lith, Ltd v. F.P. Barlett & Co.*, 297 F2d 497 (1st Cir. 1962), 1 U.C.C.Rep. 73: "Any and all warranties, guarantees, or representations whatsoever are excluded." upheld as disclaimer.

disclaim implied warranties is unlikely to use oral disclaimers which are by nature subject to evidence problems. Therefore oral warranty disclaimers rarely occur and may not be upheld because of the parol evidence rule. It would have been more consistent to require "magic words" to create a disclaimer of warranty of fitness for a particular purpose and only a general language to render effective a warranty of merchantability disclaimer. Indeed, the former is peculiar and should be underscored by a specific disclamatory language while the latter, which tends to negate a general warranty<sup>115</sup> should require general disclamatory language.

#### 112) The conspicuousness requirement

The conspicuousness test it is construed as strictly by courts. S.1-201(10)<sup>116</sup> gives a definition and examples of what is a conspicuous language. Official Comment 10 to S.1-201(10) specifies that "the test is whether attention can reasonably be expected to be called to it." The test will be perfectly satisfied whenever the disclaimer appears

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<sup>115</sup>S.2-314 sets forth six different criteria of merchantability.

<sup>116</sup>S.1-201(10) provides: "Conspicuous": A term of clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is a larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term of clause is "conspicuous" or not is for decision by the court.

on the front of the form, is printed in a larger type than the rest of the form and is closed to the buyer's signature space. That is why the case law is full of decisions holding disclaimers invalid if not printed in contrasting type or color<sup>117</sup> or if mentioned on the reverse of the form with no language on the front calling attention to it.<sup>118</sup>

113) The issue of the unconscionability of a warranty disclaimer

One may wonder whether a warranty waiver in complete conformity with S.2-316 requirements, as earlier discussed, may be declared unconscionable under S.2-302<sup>119</sup> and therefore not be enforced.

In other words, should the specific provision, namely

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<sup>117</sup>See, e.g., Tribble Trucking Corp. v. General Motors Corp., 14 U.C.C. Rep. 63 (ND Ga. 1973) (too slight a contrast in type). DeLamar Motor Co. v. White, 460 S.W.2d 802 (Ark. 1970), 8 U.C.C. Rep. 437 (Pa.Ct.CP 1966) (slight variation in type not enough to do job).

<sup>118</sup>See, e.g., Hunt v. Perkins Mach.Co., 226 N.E.2d 228 (Mass. 1967), 4 U.C.C.Rep. 281; Massey-Ferguson v. Utley, 439 S.W.2d 57 (Ky. Ct.App. 1969), 6 U.C.C. Rep. 51 (disclaimer on back of form referred to by words on front in only ordinary type).

<sup>119</sup>S.2-302(1) provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

S.2-316, prevail over the general provision, S.2-302, and not be thwarted by the unconscionability theory?

According to Professor Arthur Leff,<sup>120</sup> the answer is definitely positive. He pointed out that the extreme preciseness of S.2-316 and the cross reference with general concepts like course of dealing, course of performance or trade usage but not unconscionability were strong arguments in favor of the preemption of S.2-316 over S.2-302. Courts' attitude towards this issue reveals some uncertainty: decisions may be found on both directions.<sup>121</sup> We will allow ourselves to rather support the preemptive view resting upon the following factors. Courts have distinguished two types of unconscionability: procedural and substantive unconscionability.

The former tends to protect consent's impairment of the party who, because of a lack of bargaining power, is forced to accept a "take it or leave it" transaction or, because of a lack of sophistication, may underestimate the warranty disclaimer's significance. The unequivocal

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<sup>120</sup>Leff, "Unconscionability and the Code - The Emperor's New Clause," 115 U.Pa.L.Rev. 485 (1967)

<sup>121</sup>See, e.g., for cases deeming unconscionable some warranty disclaimers: *Zabriskie Chevrolet, Inc. V. Smith*, 240 A.2d 195 (NJ Super.Ct.Law Div. 1968), 5 U.C.C. Rep. 30; *Murray V. Holiday Rambler, Inc.*, 265 N.W.2d 513 (Wisc.1978), 24 U.C.C.Rep. 584.

See, e.g., for cases supporting the preemptive view: *Marshall v. Murray Oldsmobile Co.*, 154 S.E.2d 177 (Va. 1967), 4 U.C.C. Rep. 172; *Koehring Co. V. A.P.I., Inc.*, 369 F.Supp. 882 (ED Mich.1974) 14 U.C.C.Rep. 368.



guidelines of S.2-316 and especially the conspicuous requirement seem to completely set aside this fear that a disclaimer be not brought to the buyer's attention. As to the inequality of bargaining power, it should be primarily invoked in consumers'sale in which the Magnusson-Moss Warranty Act may be able to come into play and therefore ensure a appropriate protection to the consumer.<sup>122</sup>

With respect to the substantive unconscionability, one may say that its purpose is to avoid enforcing clauses which are per se of a particular harsh impact. Taking into account that unconscionability is to be measured at the time the contract was made, it merely would mean that S.2-316 would be of no more relevance since it would make no sense to comply with a provision whose effect is undermined by another: what would be expressly recognized under S.2-316, namely disclaiming warranty, would be deemed substantively unconscionable under S.2-302.

We consequently are inclined to think that the unconscionability theory should not interfere and strike down a properly drafted warranty disclaimer.

12) The Magnusson-Moss Warranty Act impact in the sale of consumer goods.

As a matter of principle attempts by the seller to disclaim warranty liability are limited with respect to

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<sup>122</sup>For a general discussion, See Ch.II. B) a) 12).



consumer transactions. Before getting to the particular issue of warranty disclaimers in consumers sale of goods, it seems necessary to identify the scope of the Magnusson-Moss Warranty Act.

It covers the sale of both new and used consumer product. A consumer is anyone who buys a consumer product for purposes other than resale. A consumer product means any tangible personal property which is normally used for personal, family or household purposes. In that context, the Warranty Act to written warranties to consumers on consumer products. That is not to say that sellers are under compulsion to issue written warranties. The Warranty Act continues to let sellers decide whether it should to their benefit to provide written warranties to consumers. If they elect to do so, sellers will face to provide a full or limited warranty<sup>123</sup> depending upon whether the warranty meets the federal minimum standards.<sup>124</sup> However, it is

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<sup>123</sup>15 USC Section 2303 (a) (1982).

<sup>124</sup>15 USC Section 2304 (1982) provides in part "In order for a warrantor warranting a consumer product by means of a written to meet the federal minimum standards for warranty

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 108(b) [15 USCS Sub.S. 2308(b)], such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the

noteworthy that whether or not the warranty is full or limited, no disclaimer or modification of implied warranty is permissible if a written warranty is given.<sup>125</sup> If the warrantor offers a full warranty, he may not impose any limitation on the duration of any implied warranty nor restrict the general four year period from the date of sale to bring an action pursuant to the statute of limitation. In contrast, a limited warranty can limit implied warranties to the duration of the written warranty if the limitation is conscionable and displayed on the face of the warranty.<sup>126</sup>

The distinction between full and limited warranties also affects remedy limitations.<sup>127</sup> In sum, a common language like "All warranties express or implied are hereby disclaimed" are not given effect for consumer transactions pursuant to the Magnusson-Moss Warranty Act.

## 2) Special related issues

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warranty; and

(4) if the product (or component part thereof) contains a defect or malfunction after a reasonable of attempts by the warrantor to remedy defects or malfunction in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be).

<sup>125</sup>15 USC Section 2308 (a) (1982).

<sup>126</sup>15 USC Section 2308 (b) (1982).

<sup>127</sup>For a general discussion, See Ch. III.

Because of their peculiarity or their distinctive treatment under the American law two issues have to be addressed: Express warranty disclaimers (21) and the "as is" clause (22).

#### 21) Express warranty disclaimers

As a matter of principle, once an express warranty has been made it is virtually impossible to disclaim it.<sup>128</sup> It is even surprising to consider such problem in the sense that it is necessarily inconsistent to formulate a statement and thereafter to deny it. But, as we have seen the concept of express warranty is so broad that an express warranty may have been created without the seller's actual awareness.<sup>129</sup> Anyway, in spite of the general notion that express warranties are mostly express and should not consequently be disclaimable after their creation, the U.C.C. drafters specifically addressed such an issue and prohibited unreasonable post-creation disclaimers.

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<sup>128</sup>Official Comment 4, S.2-313 provides in part: "A clause generally disclaiming "all warranties, express or implied" can not reduce the seller's obligation with respect to such description and therefore can not be given literal effect under S.2-316."

<sup>129</sup>In particular warranty created by description, sample or model.

Thus, S.2-316(1)<sup>130</sup> makes it clear that language or conduct of disclaimer of warranty is to be construed consistently with language or conduct of disclaimer and whenever such a construction is not reasonable the language or conduct of warranty is to be given effect. There is no shortage of cases that simply have ignored attempts to disclaim express warranties after one has been created.<sup>131</sup>

## 22) The "as is" clause

Practically as well as legally speaking, the "as is" stipulation deserves particular attention. Indeed in business practices especially for the sale of used goods, "as is" clauses are very frequent. Moreover the "as is" stipulation may be even used for new goods by dealers who want to negate their own implied warranty obligations and only pass the manufacturer's express warranty through to the ultimate buyer.<sup>132</sup>

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<sup>130</sup>S.2-316 (1) provides: "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (S. 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

<sup>131</sup>See, e.g., *Community Television Serv. Inc. v. Dresser Indus.*, 586 F.2d 637 (8th Circ. 1978), cert.denied, 441 U.S. 932 (1979); *Whitaker v. Farmhand, Inc.*, 173 Mot. 345, 567 P.2d 916 (1977).

<sup>132</sup>Under the Magnusson-Moss Warranty Act, the manufacturer who markets goods with an express warranty cannot disclaim the Code implied warranties, but the dealer is free to do so if he makes no independent warranties (15 USC Section 2308(a)(1976)).

In addition, and even if S.2-316(3)(a)<sup>133</sup> is specifically devoted to defining what the legal impact of "as is" stipulation should be, it is paradoxical to note that U.C.C. drafters seem to have rather generated than solved problems by addressing the "as is" clause the way they did: " Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is"".

With no further requirements, S.2-316(3)(a) may cut down the stringency and preciseness of S.2-316(2) to enforce implied warranties disclaimers in the sense that it cannot be strictly inferred from the language of S.2-316(3)(a) that there is any requirement of writing, mention of merchantability and conspicuousness.<sup>134</sup> Would it be to say that an "as is" stipulation is the safest way for the seller to disclaim his implied warranties obligations and a complete substitute for S.2-316(2)? The answer is certainly negative. First, as suggests S.2-316(3)(a) itself and also

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<sup>133</sup>S.2-316(3)(a) provides: "Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."

<sup>134</sup>This statement is supported by a textual argument: S.2-316 (3)(a) starts with the following precision: "Notwithstanding subsection (2) "which tends to make independent each of the two provisions.



its Official Comment 7<sup>135</sup> courts should test whether the language used, namely the "as is" clause, is commonly understood to exclude warranties. A consumer buyer may for instance contend that he is unaware of what the "as is" language means so that the circumstances negate the alleged disclaimer.<sup>136</sup> Second, any use of synonymous language like "in its present condition", "as and where it stands" or "what you see is what you get" may not be construed by courts as commonly understood as a disclaimer.<sup>137</sup> Third and most important, courts have approached the issue of effectiveness of an "as is" clause by asking whether the language was placed in the agreement so as to draw the buyer's attention. One will notice that it is squarely equivalent to the conspicuousness test. Thus, although conspicuousness is not explicitly by the Code, the majority of cases, highlighting the necessity of protecting buyers from unexpected and unbargained language of disclaimer hold

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<sup>135</sup>Official Comment 7, S.2-316(3)(a) provides in part "Paragraph (a) of Subsection (3) deals with general terms such as "as is", "as they stand", "with all faults" and the like.

Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved."

<sup>136</sup>See, e.g., Knipp v. Weinbaum, 351 So.2d 1081 (Fla. Dist. Ct. App. 1977), 22 U.C.C. Rep. 1141.

<sup>137</sup>See, e.g., Pearson v. Franklin Laboratories, Inc. 254 NW2d 133 (SD 1977), 22 U.C.C. Rep. 351: ("we accept no responsibility" not enough to qualify as "as is" sale.)

inconspicuous disclaimers ineffective.<sup>138</sup> This case law trend seems to be consistent with the general policy underlying S.2-316 which allows sellers to avoid their warranty obligations provided they give the buyer fair warning of their intent. One may add that the "as is" stipulation is of no effect towards express warranties.<sup>139</sup> This might be interesting in case of written representations of the goods by the seller.

As to oral express warranties, they will be overcome by a subsequent written "as is" stipulation as a form of merger clause under the parol evidence rule.<sup>140</sup>

As a matter of conclusion on warranty disclaimers under the American law, let's point out that under S.2-316(3)(b) and S.2-316(3)(c), two other kinds of warranty disclaimers are contemplated: disclaimer by prior examination of the goods and disclaimer by course of dealing, trade usage or course of performance. The former has been

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<sup>138</sup>See, e.g., *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345, 351 (1970); *Woodruff v. Clark County Farm Bureau Coop.*, 153 Ind.App. 31, 286 N.E.2d 188 (1972) (commercial transaction); *MacDonald v. Mobley*, 555 S.W.2d 916 (Tex.Civ.App.1977).

<sup>139</sup>See, e.g., *Bill Spreen Toyota, Inc. v. Jenquin*, 294 S.E.2d 533 (Ga.Ct.App. 1982), 35 U.C.C. Rep. 419.

<sup>140</sup>See, e.g., *Avery v. Aladdin Prods. Div., Nat'l Servs. Indus., Inc.*, 128 Ga.App. 266, 196 S.E.2d 357, 12 U.C.C. Rep. 628 (1973): an "as is" stipulation held to exclude evidence of oral alleged representations by the seller that machinery was sold in "good condition."

already discussed in this Chapter through the notion of causation which relieves the seller of his liability whenever the buyer's conduct has interfered and consequently caused the loss sustained. The latter appears as not deserving a particular focus since other Code provisions make clear that course of performance, trade usage or course of dealing may supplement the parties' agreement.<sup>141</sup>

Moreover, our purpose is to explain how to normally create a warranty disclaimer rather than to set forth how otherwise ineffectual disclaimer clause may be given effect because of a trade usage or course of dealing.

b) Warranty Disclaimers under the French Law:

An unworkable means of defense for sellers.

As a preliminary comment, it has to be underlined that unlike the American legal system the French one simply equates warranty waiver clause with remedy limitations clause as to their applicable legal regime. That is why, as a matter of convenience, we will often refer to a unique terminology: warranty-limiting clause.

Warranty waivers' regime under the French law is certainly one of the most striking examples of difference

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<sup>141</sup> Among others, S.1-205(3) indicates that a course of dealing or trade usage may "give particular meaning to and supplement or qualify terms of an agreement". Likewise S.2-208(1) makes course of performance "relevant to determine the meaning of the agreement." Moreover, S.2-202 enables all these three types of evidence to supplement the terms of a written agreement.

which may exist between a text and its construction by courts. Indeed C.Civ. drafters, through Article 1643<sup>142</sup>, distinguish the seller who knew the defects of the thing and the seller who did not<sup>143</sup>. According to Article 1643, warranty-limiting clauses are valid if the seller was unaware of the goods' defects.

Courts, by an audacious construction of Article 1643, have substituted to the C. Civ. distinction between good and bad faith sellers another one between the occasional seller, always subject to the common law and consequently presumed of good faith, and the professional seller, always deemed a bad faith seller.

Therefore, as most of sales involve a professional seller, warranty-limiting clauses are void (1). The foregoing principle may admit exception when the sale takes place between experienced professionals (2).

#### 1) Principle: Avoidance of warranty-limiting clauses.

Inspired by a permanent concern to indemnify victims to the most liberal extent possible, the French case law has negated warranty-limiting clauses'efficacy (11). This judicial hostility towards warranty-restricting clauses and

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<sup>142</sup>Article 1643 provides: "The seller is liable for hidden defects, even he did not know of them, unless, in such a case, he had stipulated that he would not be obligated for any warranty."

<sup>143</sup>The same opposition is equally important as to the extent of recoverable damages: for a general discussion, See Ch.III: Remedies for breach of warranty.



the current trend of consumer protection blossomed into a legislative reality with the "Scrivener Act".<sup>144</sup> (12)

11) The case law hostility vis-a-vis warranty disclaimers:

French courts have assimilated professional sellers and manufacturers to sellers who knew the defects of the thing sold or on account of their profession could not be ignorant of them and consequently have denied any efficacy to warranty disclaimers.<sup>145</sup> Indeed are void not only sheer waiver clauses<sup>146</sup> but warranty-restricting clauses such as limiting warranty obligations to defective product replacement<sup>147</sup> or to parts and workmanship,<sup>148</sup> defining a very short period of time to bring an action for breach of warranty<sup>149</sup> or setting up a six months warranty<sup>150</sup>. To the extent all those clauses tend to negate the legal warranty

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<sup>144</sup>Act # 78-23 (01/10/1978) on consumers' information and protection.

<sup>145</sup>See, e.g., Req. 06/05/1929, Gaz.Pal. 1929.2.433; Comm. 05/31/1949, Bull.Civ.I, # 221, 621; Comm. 10/24/1961, D.1962, 46; Comm. 05/30/1967, D.1967, 511; Comm. 07/20/1973, Bull.Civ.IV, # 254 36; Comm. 10/17/1977, Gaz. Pal. 1978.1.221.; Comm. 05/05/1982, D.1982, I.R. 358.

<sup>146</sup>See, e.g., Civ. 05/27/1969, J.C.P. 1969.II.16102; Comm. 11/04/1970, D.1971.188; Comm. 01/29/1974, D.1974.268.

<sup>147</sup>See, e.g., Comm. 07/29/1973, Bull.Civ.IV., # 264, 236.

<sup>148</sup>See, e.g., Comm. 10/14/1980, J.C.P.1981.IV.7

<sup>149</sup>See, e.g., Comm. 01/30/1952, Bull.Civ.III, # 47, 37; Comm. 06/04/1969, D.1971, 51; Comm. 12/17/1973, Gaz.Pal.1974.1.428.

<sup>150</sup>See, e.g., Comm. 12/07/1976, Gaz.Pal.1977.2.433.



for concealed defects, they are of no effect whereas they may be sustained for minor defects which, by nature, are not within the scope of Article 1641.

It seems necessary to add that the presumption of knowledge of the defect against professional sellers is irrebutable: French case law does not admit contrary evidence, nor allow, as a cause of exoneration, the technical impossibility of discovering the defect.<sup>151</sup> It is unavailing for the seller to contend that he was unaware of the defect because he was using a new technique or new materials whose dangers were unknown and could only be revealed through their actual use.<sup>152</sup>

Generally speaking and in sum, an express warranty should never deprive buyers from alleging the legal warranty whenever the Article 1641 and following are met<sup>153</sup> and even if there is an "as is" stipulation in the contract.<sup>154</sup> This severe case law towards sellers found a statutory echo in the "Scrivener Act" on consumer's information and protection.

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<sup>151</sup>See, e.g., Comm. 11/27/1973, 1973, J.C.P.1974.II.17887.

<sup>152</sup>See, e.g., Civ., 07/17/1972, Bull.Civ.III, # 473, 344.

<sup>153</sup>See, e.g., Comm. 01/04/1957, Bull.Civ. III, # 6.

<sup>154</sup>See, e.g., Civ. 05/04/1966, Bull.Civ.I, # 271. Comm. 12/14/1970, Bull.Civ.IV, # 345.

12) The statutory consumers' protection against warranty disclaimers

The Act of 01/10/1978 on consumers' information and protection, the so-called "Scrivener Act" aims to shield against clauses imposed upon consumers or non-professional by an abuse of bargaining power superiority of professional sellers.

A Decree of 03/24/1978<sup>155</sup> has been passed to enforce the "Scrivener Act". In particular, Article 2 of the Decree provides that "any clause whose object or effect is to delete or reduce non-professional or consumers remedy rights in case of breach of any seller's obligations" is abusive according to the "Scrivener Act." Obviously the seller's warranty obligations are directly concerned and one can see through that Decree's provision a legislative consecration of the hidden defect warranty case law. The french legislator's goal is clearly to avoid express warranties that may circumvent the legal protection automatically secured to consumers. That is why Article 4 of the Decree requires that contracts which contain an express warranty stipulation must mention that "in any case the legal warranty which compels the professional seller to guarantee the buyer against any hidden defects of the thing sold will be given effect."

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<sup>155</sup>Decree # 78-464 (03/24/1978).

2) Exception: Validity of warranty-limiting clauses in contracts between professional of the same expertise

To the extent that it is normal to protect naive purchasers against the danger of defective products, it seems equally to be fair to let a professional buyer, aware of the inherent defects of certain goods, evaluate the injurious consequences of hidden defects if he is willing to accept a contract containing warranty-limiting clauses. Where contracting parties are experienced professionals, the french case law has acknowledged the validity of warranty-limiting clauses (21) but, at the same time, restricting the impact of such an exception (22).

21) The scope of application of the exception

By two decisions of 10/30/1978 and 11/06/1978 <sup>156</sup>, the French Supreme Court set forth, as matter of principle, that warranty disclaimers issued by professional sellers may be given effect if the seller and the purchaser were of comparable experience and expertise. However, neither of those decisions, though they stated the validity of warranty disclaimers where seller and buyer were doing business in the same special field, enforced the warranty-limiting clauses.

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<sup>156</sup>Comm. 10/30/1978 & 11/06/1978, R.T.D.Civ.1979, 392; J.C.P.1979.II.19178.

In the 10/30/1978 judgment, the Supreme Court refused to take into account the litigated clause because the invoked hidden defect was particularly difficult to find out: according to the Court's reasoning, the defect was "so well hidden" that it prevented the warranty disclaimer from being given effect. This argument which seems to equate the notion of hidden defect warranty with the possibility of disclaiming the legal warranty is debatable.

In the 11/06/1978 decision, the warranty-limiting clause was dismissed because the buyer, though professional and acting as such, was a "client-user" and did not have the same expertise as the seller.<sup>157</sup> The Supreme Court's reluctance to enforce the foregoing disclaimers leads one to wonder whether there may be concrete situation in which warranty disclaimers will be given effect.

## 22) The impact of the exception

One may legitimately doubt that the concept of professionals of the same speciality, as restrictive as it is so far construed by courts, gives firm ground for sellers to escape their warranty liability through disclaimers. Indeed judicial precedents have rather pointed out illustrations where the disclaimers' validity between certain professionals is reaffirmed as matter of principle but not

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<sup>157</sup>In this case, the buyer was an excavating contractor who purchased a mechanical digger from the seller.

enforced.<sup>158</sup> The issue lies on the understanding of the notion of professionals of comparable expertise. One could have thought that an excavating contractor had particular knowledges about mechanical digger<sup>159</sup> which should have allowed the upholding of the disclaimer. The Supreme Court, in that case, was much more exacting. First, however important an excavating contractor's expertise may be as to materials used in his trade, he is not deemed a professional of the same special field as his vendor. Identity of trade speciality should consequently be restricted to consecutive professional sellers of a same product. This latter argument is sustained by the Supreme Court's reference to the notion of "client-user".

Thus, the decisive test should not be the comparable expertise as to certain goods but rather the buyer's situation in the chain of distribution: the "client-user" is assimilated to a consumer who purchases goods with the intent to use, either commercially or privately, but with no intent to resell. The "client-user" is distinguished from the professional who buys products in order to resell with or without product's modification.

Surprisingly, however great his expertise might be, the "client-user" will be protected like an ordinary

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<sup>158</sup>See, e.g., Comm. 04/18/1980, Bull.Civ.IV, # 170; Comm. 11/04/1980, Bull.Civ.IV, # 365.

<sup>159</sup>See, Comm. 11/06/1978, supra note 156.



### CHAPTER III. REMEDIES FOR BREACH OF WARRANTY

Whenever a consumer purchases an automobile, a refrigerator or a stereo that turns out to be defective, he is primarily concerned with the possible means of allowing him to get a product suitable for his desires.

If an altimeter breaks down and causes an airplane's crash and numerous passengers' death, the greatest preoccupation is suddenly shifted to the allowance of damages.

These two examples highlight the two categories of remedies a breach of warranty may trigger, namely the remedies as to the goods themselves (A) and as to the award of damages (B).

#### A) AS TO THE DEFECTIVE GOODS

It seems here appropriate to distinguish express remedies (a) from legal ones (b).

##### a) Express Remedies

Under both America and French systems, the freedom of contract enables contracting parties to include remedies appropriate to their particular needs in their agreement. In both commercial and consumers sales, most warrantors will provide specific remedies to cure a defect's occurrence

(1). But, at the same time, sellers in fact will combine express remedies with a limitation of their liability rendering necessary a due care from the legislative body (2).

# 1) Catalogue of express remedies

Most vendors or manufacturers expressly guarantee that the product sold, if the case arises, will be made to conform to what the buyer contracted for. This explains why a warranty of repair or replacement of defective parts clause is so widespread in contract of sales. There are as many different warranty of repair and replacement stipulations as there are different warrantor's wishes: some intend to repair only,<sup>162</sup> some others provide an option, at the warrantor's election, between repairing or replacing.<sup>163</sup> Likewise, some warranties will leave

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<sup>162</sup>"Chevrolet (Chevrolet Motor Division, General motors Corporation) warrants to the owner of each 1973 model Nova and Vega motor vehicle that for a period of 12 months or 12,000 miles, whichever first occurs, it will repair any defective or malfunctioning part of the vehicle-except tires which are warranted seperately by the tire manufacturer. This warranty covers only repairs made necessary due to defects in material or workmanship."

The above mentioned clause has been debated in Goddard v. General Motors Corp., 60 Ohio St.2d 41, 396 N.E.2d 761,27 U.C.C. Rep.Serv, 973 (1979).

<sup>163</sup>"International Harvester Company warrants to the original purchaser each item of new farm and industrial equipment to be free from defects in material and workmanship under normal use and service. The obligation of the Company under this warranty is limited to repairing and replacing, as to the Company may elect, free of charge for installation, at the palce of business of a dealer

labour's costs to the purchaser whereas some other will not.<sup>164</sup> Generally speaking, any warranty of repair or replacement purports to give the buyer the assurance of freedom from defects in material and workmanship.

The refund of purchase price warranty is also a very common formal express warranty where repair or replacement may not be the appropriate solution.<sup>165</sup> Indeed where a consumer goods is involved it may be adequate for the unsatisfied buyer to get the return of the purchase price. In commercial transactions, however, the economic loss resulting from a defective goods may by far exceed the

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of a Company authorized to handle the equipment covered by this warranty, any parts that prove, in the Company's judgment, to be defective in material or wormanship within twelve months or 1500 hours of use, whichever occurs first, after delivery to the original purchaser."

This clause has been litigated in *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784, 25 U.C.C. Rep. Serv. 91 (1978).

<sup>164</sup>"Your franchise Saab dealer will repair or replace defective parts at no charge for parts and labor, provided, however, that it is notified of the defect within the above stated warranty period."

This is part of a warranty clause which has been discussed in *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 22 U.C.C. Rep.Serv. 945 (Minn. 1979).

<sup>165</sup>"100% GROWER GUARANTEED Satisfaction guaranteed or the purchase price of this product will be refunded immediately by KALO Laboratories, Inc. Manufacturer's liability is limited to this refund."

This provision has been litigated in *Majors v. Kalo Laboratories, Inc.*, 407 F.Supp. 20, 18 U.C.C. Rep. Serv. 592 (M.D.Ala. 1975).

price of that goods. This is why most warranties, if not all, limit remedies available to the return of the price or the repair or replacement of defective parts.

Accordingly it is logical to determine to which extent remedy limitations will be given effect if they are challenged in courts.

## 2) Validity of limited express remedies

The French position towards such limitations is drastic (21) whereas the America one, though stringent, leaves some room to ingenious warranty drafters to efficiently restrict remedies provided to repair, replacement or refund of the price (22).

### 21) Strict invalidity of limited remedies under the French law

The clauses stating that the seller's liability is "expressly limited to repair of defective parts"<sup>166</sup> or only consists "in supplying replacement parts to the exclusion of labor and shipment's costs"<sup>167</sup> are definitely void. One may here recall the general principle under which remedy limitations are strictly equated with warranty

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<sup>166</sup>See, e.g., Comm., 07/17/1964, Bull.Civ. III, # 381; Civ. 03/27/1969, D.1969, 635.

<sup>167</sup>See, e.g., Comm. 10/17/1977, Bull.Civ., # 233, 197.

disclaimers by the French case law and consequently are not enforceable.<sup>168</sup>

Given that, those very frequent above-mentioned clauses which are legally of no effect will practically achieve their purpose whenever consumers are concerned. Indeed only few of them, if any, are aware of that case law and will go before courts to enforce their rights. In that context, the Decree of 03/24/1978 which requires mention of the legal warranty existence may have been a step towards a greater efficiency of consumers' protection. Though, especially for worthless items, consumers will still hesitate to bring a suit.

## 22) Potential validity of limited remedies under the America law

Generally speaking, the U.C.C. allows the seller not only to disclaim warranties<sup>169</sup> but also to limit and even exclude remedies afforded to the buyer in case of breach of the warranty. One may, by the way, raise the interesting question as to whether there is any difference in terms of effect between warranty disclaimers and remedy exclusions. Indeed where a seller extends no remedy at all for defects in specified parts, he makes no warranty as to these parts.

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<sup>168</sup>For a general discussion on warranty disclaimers under the French law, See Ch.II) B) b) supra.

<sup>169</sup>For a general discussion on warranty disclaimers under the American law, See Ch.II) B) a) supra.



Consequently, by eliminating certain remedies, can a sly warranty drafter be able to circumvent all the warranty disclaimers requirements as set forth in S.2-316? The answer, as we will see, is negative. Whenever a seller restricts his liability by providing some specific remedies and thus excluding some others, S.2-719(1) & (2)<sup>170</sup> will come into play and impose requirements on such a limitation of remedy to be given effect. The remedy provided in the express warranty must be understood as the exclusive remedy for breach of warranty (221) and not be so inadequate that "circumstances cause it to fail of its essential purpose" (222).

#### 221) Requirement of a language of exclusiveness

Under S.2-719(1)(b) as supplemented by its Official Comment 2<sup>171</sup> there is a presumption that express and legal

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<sup>170</sup>S.2-719 provides:

(1) Subject to the provisions of subsections (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 Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; 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 to fail of its essential purpose, remedy may be had as provided in this Act.

<sup>171</sup>Official Comment 2, S.2-719 indicates:

" Subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy

remedies are cumulative. Thus if the warranty is not carefully drafted and does not express some unambiguous intent to make a remedy exclusive by using words like "only", "sole" or the like, the aggrieved buyer will be free to seek any additional remedy not mentioned in the contract.<sup>172</sup> Courts have large discretion when evaluating words of exclusivity. When the buyer is a consumer, the court will scrutinize the contract language and may set aside the apparent intent of the draftsman as to the remedy's exclusiveness: a statement that warranty of repair or replacement is "expressly in lieu of all other warranties or obligations" has been struck down as non-exclusive in consumer cases.<sup>173</sup>

222) Possible failure of an exclusive remedy of its essential purpose

Assuming the existence of an exclusive remedy as above defined, the inquiry then becomes whether "an

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under the contract, this must be clearly expressed."

<sup>172</sup>See, e.g., *Ford Motor Co. v. Reid*, 250 Ark. 176, 465 S.W.2d. (1971) (since remedy of repair or replacement of defective parts was nowhere expressly stated to be exclusive remedy, purchaser of an automobile which caught fire in garage and burn down house could recover damages of \$ 89.279 for loss of car and house); *Herbstman v. Eastman Kodak Co.*, 131 N.J.Super 439, 330 A.2d 384 (1974) (warranty provision stating "We will repair your camera at no charge within one year after purchase" does not operate to exclude all other remedies, and plaintiff was entitled to alternative of cash refund).

<sup>173</sup>See, e.g., *Stream v. Sportscar Salon, Ltd.*, 91 Misc.2d. 99, 397 N.Y.S.2d. 677 (1977).

exclusive remedy fails of its essential purpose" and if it does, the buyer will be able to invoke all remedies allowed by the Code. <sup>174</sup> Two issues have to be addressed: What is an essential purpose? (2221) and when does an exclusive remedy fail of its essential purpose (2222)?

2221) What is an essential purpose?

To what extent can an exclusive remedy of repair or replacement fall short of its essential purpose? In *Beal v. General Motors Corp.*,<sup>175</sup> the court explains that an essential purpose "is to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct and consequential damages that might otherwise arise. From the point of view of the buyer the purpose of the exclusive remedy is to give him goods that conform to the contract within a reasonable time after a defective part is discovered. Similarly, the essential purpose of a refund of price warranty is, for the purchaser, to restore the warranted value of the goods while, for the seller, disallowing any further liability. In sum, from the buyer's standpoint, which is here primarily relevant, the essential purpose of a limited

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<sup>174</sup>S.2-719(2).

<sup>175</sup>354 F.Supp. 423, 426, 12 U.C.C.Rep. 105, 109 (D.Del. 1973).

remedy is to secure the value of his disappointing bargain.<sup>176</sup>

2222) When does a limited remedy fail of its essential purpose?

Courts have found a warranty of repair or replacement to fail its essential purpose where a product has a latent defect, not discoverable within the time limitation of the warranty,<sup>177</sup>, when the warrantor fails to correct the defect within a reasonable time<sup>178</sup> and when the seller is unable to cure the nonconformity of the goods.<sup>179</sup> Similarly, a refund of the price limitation fails of its essential purpose where the warrantor refuses to provide the refund after the breach or as in *Neville Chemical Co. v. Union Carbide Corporation*,<sup>180</sup> where the buyer incurs large losses due to a latent product defect.

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<sup>176</sup>Official Comment 1, S.2-719 expressly states: "...where an apparent fair and reasonable clause because of the circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article."

<sup>177</sup>See, e.g., *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d. 398, 244 N.E.2d. 685 (1968).

<sup>178</sup>See, e.g., *Massey-Ferguson, Inc. v. James W. Laird*, 432 So.2D 1259, 36 U.C.C. Rep.Serv. 437 (Ala. 1983).

<sup>179</sup>See, e.g., *Osburn v. Bendix Home Sys., Inc.* 613 P.2d. 445, 29 U.C.C.Rep. Serv. 119 (Okla. 1980).

<sup>180</sup>294 F.Supp. 649, 5 U.C.C.Rep.Serv. 1219 (D.Pa. 1968), aff'd in part and rev'd in part, 422 F.2d. 1205, 7 U.C.C.Rep. Serv. 81 (3rd Circ.1970).

One may infer, from the case law dealing with the "failure of essential purpose" issue, two categories of situations in which courts are willing to strike down a remedy limitation because of failure if its essential purpose:

First, where the seller does not provide the promised limited remedy. In this case, it is simply a failure of a general duty to fulfill any contract obligation, here an obligation to repair or replace or refund the price. There is accordingly no need to refer to a failure of limited remedy's essential purpose when it is obviously a breach of a contract obligation.

Second, where there is a latent defect undiscoverable within the warranty period and/or causing large losses. In this hypothesis, it rather involves unconscionability considerations. Indeed, in the Neville case, the court discussing the price refund limitation stated that "such limitation on time and damages, when the defect is latent, are illusory and under the circumstances of this case represent no remedy at all."<sup>181</sup>

Stating that a remedy is "illusory" is very much like deeming the remedy limitation unconscionable. There is no doubt that, through S.2-719 and its Official Comment 1,<sup>182</sup>

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<sup>181</sup>294 F.Supp. at 655, 5 U.C.C. Rep.Serv. at 1224.

<sup>182</sup>S.2-719(3) expressly authorizes courts to set aside unconscionable consequential damages limitations or exclusions.



the U.C.C. drafters intended to avoid unconscionable consequences of limitation of remedy. That is why it is very well arguable not to give effect to a limiting remedy clause because of its unconscionability but at the same time it clearly raises the question of a real ground of existence for the "failure of essential purpose" notion or rather to which extent this notion might be different from the unconscionability concept.

b) Legal Remedies

The contemplated issue over the following developments is whether there is any provision under both American and French related pieces of legislations that allows the contract's rescission and consequently the recovery of the purchase price for the buyer and the return of the defective goods for the seller. If the answer is unambiguous under the French law which specifically authorizes the contract's rescission for breach of warranty against hidden defects (1), the solution given by the American law is not as clear :the revocation of acceptance followed by the contract's cancellation being the sole and debatable way out (2).

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Official Comment 1, S.2-719 states "there must be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract."

1) The Article 1644<sup>183</sup> of the Civ.C. or a provision to get the contract's rescission

Under Art. 1644, the purchaser is given the possibility to get the resolution of the sale, the so-called "redhibitory action", on account of hidden defects in the goods. The buyer must then give back the thing in the same condition as it was delivered. The seller is to return the purchase price and the expenses connected with the sale. By costs occasioned by the sale, one may include all the expenses incurred in seeking the contract's rescission: among others the travelling costs due to the trial<sup>184</sup> and the expert's fees for the ascertainment of the defect.<sup>185</sup> As to attorney fees, they may be recoverable under the general related provision of the New Civil Procedure Code.<sup>186</sup> The purchase price is to be supplemented by interests accrued from the time of the sale up to the restoration.<sup>187</sup>

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<sup>183</sup>Article 1644 provides: "In the cases specified by articles 1641 and 1643, the buyer may elect to return the thing and recover the price, or to keep the thing and obtain a return of part of the price, as determined by experts."

<sup>184</sup>See, e.g., Req. 04/26/1870, D.1871, 11.

<sup>185</sup>See, e.g., Civ. 01/04/1965, D.1965, Somm.78.

<sup>186</sup>New Civil Procedure Code, Article 700 provides: "Where it appears inequitable to burden one party with sums expended by him and not included in the costs, the judge may order the other party to pay him such an amount as he determines."

<sup>187</sup>See, e.g., Comm. 06/25/1980, D.1981, I.R. 40.

Still under Art.1644, the disappointed buyer may alternatively elect to keep the goods and get back part of the price: this is the so-called "estimatory action". It necessarily implies that the defect does not render the goods' use absolutely impossible but only inconvenient or imperfect. This cutting-back of the initial price theoretically is what the buyer would not have given if he had known of the vice.

Legally speaking, the "estimatory action" does not entitle the buyer to get the defective product fixed.<sup>188</sup> Practically speaking the "estimatory action" is very rare. The explanation is simple as much as logical: if a product is defective it may contain either material or minor defects. In the former case, the purchaser is likely to seek to get the contract's rescission because the goods are not worth keeping. In the latter assumption, there is a good deal of chance that courts deem the defect not to be hidden or sufficiently grave according to Article 1641 and its case law construction.<sup>189</sup>

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<sup>188</sup>See, e.g., Civ. 03/15/1948. D.1948, 346.

<sup>189</sup>See, e.g., Comm. 07/01/1980, Bull.Civ.III, # 131.

2) The U.C.C. S. 2-608<sup>190</sup> or a way to get around the absence of of a specific provision to obtain the contract's rescission

The issue to deal with is whether there is any possibility to recover the price of a defective product in the absence of an express warranty providing such a remedy. The ratio decidendi laid down by the recent judicial pronouncements indicate that the aggrieved buyers were allowed to get the refund of the purchase price on the basis of S.2-608, namely, the revocation of acceptance (21). Legally speaking some of these decisions are debatable (22).

21) Cases supporting the revocation of acceptance theory

Cases authorizing the unfortunate buyer to revoke his acceptance are to be divided into two categories: On the one hand, there are some cases in which the seller provides a limited warranty to repair or to replace and

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<sup>190</sup>S. 2 - 608 provides in part:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within reasonable time after the buyer discovers or should have discovered the ground for it.

subsequently breaches his warranty by refusal to repair or an unsuccessful repair. Courts then deemed revocation of acceptance following such a breach to be an available remedy.<sup>191</sup>

Upon cancellation<sup>192</sup> the buyer is entitled to the return of the purchase price. In order to trigger S. 2-608 the buyer is required to prove a non-conformity not within his knowledge at the time of acceptance and substantially impairing the goods' value to him. The buyer must revoke his acceptance within a reasonable time. Easiness of detecting non-conformity may be an hurdle to rightfully revoke acceptance.<sup>193</sup> Substantial impairment may be appraised according to the buyers' particular needs and the circumstances of the case.<sup>194</sup> The reasonable time to revoke acceptance may be extended whenever the seller unsuccessfully attempted to cure the defective goods.

On the other hand, there are some other cases in which the seller disclaimed all warranties and only passed

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<sup>191</sup>See, e.g., *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 GA. App. 462, 188 SE 2d 250 (1972).

<sup>192</sup>S.2-711 allows the buyer after a proper revocation to get the contract cancelled.

<sup>193</sup>See, e.g., *Colonial Dodge, Inc. v. Clarence R. Miller* 420 Mich. 452, 362 N.W 2d 704 (Mich. 1984) *Di Domenico Packaging Corp. v. Nails Again, Inc.* 139 Misc.2d 525, 527 N.Y.S.2d 676 (N.Y. City Civ.Ct. 1988).

<sup>194</sup>See, *Colonial Dodge, Inc. v. Clarence R. Miller's* case, note 193/ supra.



the manufacturer's written warranty. The product sold turned out to be defective right after the delivery. Some courts have held that revocation of acceptance is an available remedy even where the seller has attempted to limit his warranties and have stated that the U.C.C. provides a general remedy besides any warranty.<sup>195</sup>

This latter consideration in particular leads to further critical comments.

22) The revocation of acceptance theory or a disputable device to bring into play

The problem here to be debated is whether revocation of acceptance is an appropriate remedy to use in situations involving defective products and consequently breach of warranty.

First, one should recall that revocation of acceptance is for the judicial redressal of non-conforming goods regardless of any defect which may have existed in the product sold. Non-conformity is to be primarily viewed as a question of quantity and quality of goods: did the buyer receive exactly what the contract between the parties described? It seems that courts have equated non-

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<sup>195</sup>See, e.g., Hub Motor Co. v. Zurawski, 157 GA. App. 850, 278 SE 2d 689 (1981); Esquire Mobile Homes, Inc. v. Arrendale, 182 GA. App. 528, 356 SE 2d 250 (1987); Advanced Computer Sales v. Sizemore, 186 GA. App. 10, 366 SE 2d 303 (1988).

conformity with defectiveness by authorizing revocation of acceptance in cases dealing with defective goods.

Second, in deciding to allow revocation of acceptance where there have been valid warranty limitations, courts have either declared S. 2-608 a general ever available remedy or deemed exclusion of warranties to be unconscionable. Both these holdings are disputable.

To state S. 2- 608 as an available remedy, even where the seller has attempted to limit his warranty obligations, is no less than to totally undermine seller's intent to restrict his liability which is expressly permitted by S. 2-719.

Likewise, to allow revocation of acceptance to come into play because of the warranty exclusion's unconscionability is first to admit that an otherwise valid exclusion of warranty may be unconscionable.<sup>196</sup> Even assuming that a warranty disclaimer could be unconscionable, it might only be so under S. 2-302 which expressly refers to the time of the contract making to determine the unconscionability of the clause in a contract. In *Freeman v. Hubco Leasing*<sup>197</sup> and in *Esquire Mobile Home Inc. v. Arrendale*<sup>198</sup> sellers actually took no

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<sup>196</sup>For a discussion on this particular issue, See Ch.II) B) a) 113) supra.

<sup>197</sup>253 Ga. App. 698, 324 S.E.2d 462 (1985).

<sup>198</sup>See note 194/ supra.

warranty responsibilities and there were only remedies against the manufacturer who subsequently went out of business. At the time of the contract, the exclusion of warranty provision was not unconscionable for the buyer was given remedies against the manufacturer.

As a matter of conclusion on that debatable issue, one should add that most of the cases above cited were consumer cases where the attendant circumstances deprived the purchaser of any remedy. This latter consideration might have led courts to a certain leniency towards plaintiffs.

#### B) AS TO THE AWARD OF DAMAGES

Because of the proximity between non-conformity and warranty of quality obligations under both systems, it may be useful to underscore that the following discussion will be based on the assumption that the buyer has accepted the goods, let reasonable time to revoke his acceptance go by, discovered the defect and is now seeking damages for breach of warranty. Both America and French law guarantee the aggrieved buyer rights to damages but differ as to the means to get them.

Whereas the U.C.C. itself provides an elaborate set of rules dealing with damages' award (a), the Civ.C. related provision has been superseded by courts' construction (b).

a) The Elaborate Regime of Damages under the U.C.C.

The disappointed buyer who has overcome all the previous hurdles erected in his way will be awarded damages which under the U.C.C. relevant provisions, are classified (1) and may be limited (2).

1) The U.C.C. damages classification

At the heart of the classification lies a fundamental distinction between, on the one hand, direct damages to the extent the goods are worth less than they were warranted to be (11) and, on the other hand, indirect damages as a result of the breach of warranty under the circumstances contemplated by the parties at the time the contract was entered into (12).

11) General, direct or primary damages (S.2-714)<sup>199</sup>

S.2-714 (2) specifically sets forth the damages for breach of warranty as "the difference at the time and place of acceptance between the value of the goods accepted and

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<sup>199</sup>S. 2-714 provides:

- (1) "When the buyer has accepted goods and given notification [Sub.(3) S.2-607] he may recover as damages for any non-conformity of tender of 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."

the value they would have had if they had been as warranted unless special circumstances show proximate damages of a different amount".

Accordingly we have to separate the general way of measuring general damages (111) from the measure of general damages under special circumstances (112).

#### 111) The basic measure of general damages

From the letter of S.2-714 (2) it is suggested that the common measure of general damages is reflected by the diminution in value of the goods caused by the breach of warranty. Courts are inclined to state that the cost of repair provides the most objective measure of the difference in the value of the goods as warranted and as received whenever a reasonable expenditure will bring the goods into conformity with their warranties.<sup>200</sup> This latter precision leaves the door open to another scheme to measure primary damages when repair of the goods is impossible or inappropriate. In that case, damages will be awarded on the basis of the difference between the value of the goods as warranted, which may be either the purchase price<sup>201</sup> or the fair market value at the time

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<sup>200</sup>See, e.g., *Tarter v. Monark Boat Co.*, 430 F.Supp. 1290 (ED Mo.1977), 22 U.C.C.Rep. 33, aff'd, 574 F2d 984 (8th Cir.1978); *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F.Supp. 364 (ED Mich. 1977), 21 U.C.C.Rep.80.

<sup>201</sup>See, e.g., *McGrady v. Chrysler Motors Corp.*, 46 Ill.App. 3d 136, 360 N.E.2d 818, 21 U.C.C. Rep. 532 (1977); *Louis DeGidio Oil & Gas Burner Sales & Serv., Inc. v Ace*



acceptance,<sup>202</sup> and the value of the goods as accepted, which may be the price received on resale<sup>203</sup> or the market price of the goods as accepted if no resale is held.<sup>204</sup>

Still under S.2-714(2), general damages' calculation is to be based upon a different standard where "special circumstances show proximate damages of a different amount."

112) The measure of general damages under special circumstances

Special circumstances may lead to recover direct damages of a different amount from what "the difference in value" standard would have determined. This means that under special circumstances direct damages may be either bigger or on the contrary smaller than under normal circumstances.

On the former assumption, it seems that courts have primarily used special circumstances to award, in addition

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Eng'r Co., 302 Minn. 19, 225 N.W.2d 217, 15 U.C.C.Rep. 801 (1974).

<sup>202</sup>See, e.g., *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 20 U.C.C. Rep. 1181 (8th Cir. 1977); *Neuman v. Spector Wrecking & Salvage Co.*, 490 S.W.2d 875, 12 U.C.C. Rep. 254 (Tex.Ct.App. 1973).

<sup>203</sup>See, e.g., *Bergenstock v. Lemay's GMC, Inc.*, 372 A2d 69 (RI 1977), 22 U.C.C. Rep. 958; *ITT-Industrial Credit Co. v. Milo Concrete Co.* 229 SE2d 814 (NC Ct.App. 1976), 20 U.C.C. Rep. 1067.

<sup>204</sup>See, e.g., *Simmons v. C.W. Myers Trading Post, Inc.* 290 SE2d 710 (NC Ct.App. 1982), 33 U.C.C. Rep. 1339.

to primary damages, consequential and incidental damages.<sup>205</sup> Such a construction of S.2-714(2) is needless since S.2-714(3) itself allows "in a proper case" to obtain incidental and consequential damages.

In the latter assumption, courts have rightfully invoked special circumstances to lower damages in order to avoid what appeared to be a windfall in favor of the buyer. Two illustrations may be given: first, when the repairs make the goods superior to what they would have been as warranted. This may happen in case of a breach of warranty which occurs long after the delivery and thus implies a significant buyer's prior use.<sup>206</sup> Second, when the subjective loss, namely the loss of a particular buyer, is different and by assumption lesser than the objective loss, namely the loss of a general class of buyer. This is the case when the goods'ultimate value to the particular buyer is greater than their objective market value at the time of acceptance.<sup>207</sup>

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<sup>205</sup>See, e.g., Prutch v. Ford Motor Co., 574 P.2d 102, 23 U.C.C. Rep. 637 (Colo.Ct.App. 1977); Murray v. Kleen Leen, Inc., 354 N.E.2d 415 (Ill. App.Ct. 1976), 20 U.C.C. 298.

<sup>206</sup>See, e.g., Community Television Servs. Inc. v. Dresser Indus., 435 F.Supp. 214 (DSD 1977), 12 U.C.C. Rep. 686.

<sup>207</sup>See, e.g., Vorthman v. Keith E. Meyers Entreprises, 296 N.W.2d 772 (Iowa 1980), 30 U.C.C. Rep. 924.

Actually, one may doubt from the foregoing discussion of the real usefulness of the "special circumstances" exception which appears to be either superfluous or of a little practical importance.

12) Special, indirect or resultant damages

As S.2-715 suggests, we have to distinguish incidental damages (121) from consequential damages (122). As we will see, to accurately allocate indirect damages among the two above-mentioned categories may be of a certain significance.

121) Incidental damages (S.2-715(1))<sup>208</sup>

As to their nature, incidental damages are very much like expenses connected to the sale under Civ.C. Art. 1646<sup>209</sup> in the sense that they encompass any reasonable expenses incidental to the breach of warranty like charges for the inspection that revealed the defect's nature or transportation costs incurred by the buyer in connection with the sale. However, emphasizing our hypothetical situation under which the buyer has retained the defective

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<sup>208</sup>S. 2-715(1) provides:  
 "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."

<sup>209</sup>See Ch.III) A) b) 1) supra.

goods, there is a threshold problem to be solved as to whether S.2-715(1) incidental damages are available where the buyer has accepted the goods. Indeed S.2-715(1) itself and its Official Comment 1<sup>210</sup> do stress the fact that incidental damages are usually linked to goods "rightfully rejected" or connected with "effecting cover."

Although eminent authorities<sup>211</sup> deny the buyer's right to get incidental damages when he retains the goods, both judicial precedents and textual argument may support the opposite view.

At least two cases have awarded incidental damages where the buyer had kept defective goods.<sup>212</sup> Even more persuasive is S.2-714(3) itself which, dealing with "buyer's damages for breach in regards to accepted goods", expressly refers to incidental damages as being recoverable.

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<sup>210</sup>Official Comment 1, S.2-715(1) states: "Subsection (1) is intended for the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods whose acceptance may be justifiably revoked, or in connection with effecting cover where the breach of the contract lies in non-conformity or non-delivery of the goods. The incidental damages listed are not intended to be exhaustive but merely illustrative of the typical kinds of incidental damage."

<sup>211</sup>See "Article Two: Warranties in commercial transactions" 64 Cornell L.Rev. 30, 115-116 (1978).

<sup>212</sup>See, *Safeway Stores, Inc. v. L.D. Schreiber Cheese Co.*, 326 F.Supp. 504 (WD Mo.1971), 9 U.C.C. Rep. 407; *Lewis v. Mobil Oil Corp.*, 438 F2d 500 (8th Cir.1971), 8 U.C.C. Rep. 625.

122) Consequential damages (S.2-715(2))<sup>213</sup>

Practically speaking, consequential damages suits undoubtedly are "big money" suits. Legally speaking, consequential damages probably are one of the hottest and most litigated issues as to their content as much as to their possible limitations.<sup>214</sup> S.2-715(2) clearly indicates the width of such a notion by stating that it might include "any loss" resulting from the seller's breach of warranty as well as property damage and personal injury. However, at the same time, S.2-715(2) sets up limits as to the recoverability of consequential damages. Not only the plaintiff has to prove the breach and the injury caused thereby but also that the injury could have been contemplated by the seller and was unavoidable. This is the foreseeability test and the mitigation duty that the buyer has to satisfy under S.2-715(2).<sup>215</sup> In addition,

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<sup>213</sup>S.2-715(2) provides:

"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."

<sup>214</sup>For a general discussion on limitation of damages, See Ch.III) B) a) 2) infra.

<sup>215</sup>The foreseeability test is expressed in the seller's "reason to know" that the breach of warranty will cause damage.

The buyer's mitigation duty is embodied by the sole recovery of loss "which could not reasonably be prevented by cover or otherwise".



there must be some tangible basis for calculating these damages: this is the certainty requirement. Lost profits, which are by far the most important categories of consequential economic damages, have to be proved with a reasonable certainty. That is why courts are reluctant to award damages in the form of lost profits to a new business enterprise. Plaintiff in such a situation will have a difficult burden of proof.<sup>216</sup>

A quirk has here to be underlined: under the so-called "American rule", attorney fees, which seem by nature to comply with the consequential damages' definition, are not recoverable absent an express contractual or statutory provision.<sup>217</sup>

As a matter of conclusion on indirect damages, we may underline the potential interests of the dichotomy between incidental and consequential damages. First, the recovery of consequential damages is more severely ruled. The foreseeability and mitigation hurdles are much more difficult to overcome than the reasonableness test applied for incidental damages recovery.

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<sup>216</sup>See, e.g., *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 300 N.W.2d 358 (Neb.1978), 23 U.C.C. Rep. 342.

<sup>217</sup>Under the Magnusson-Moss Warranty Act, 15 USC S.2310(d)(2), courts may allow the recovery of attorney fees in consumers sales' cases.

Second, and even more significant, whereas it is common to contractually exclude consequential damages from recovery, it is fairly rare that sellers take pain to push aside their liability for incidental damages as well. By so doing, they take the chance that courts will broaden the incidental damages' notion so that they award money damages for what should have been deemed consequential damages and consequently excluded from recovery.<sup>218</sup>

2) Limitation of damages under the U.C.C.

The issue here to be debated is whether primary or resultant damages may efficiently be limited or excluded. The answer is definitely positive provided that the limitation or exclusion is not unconscionable. The U.C.C. has two separate provisions that may be invoked to declare damages' limitation or exclusion unconscionable and thus of no effect.<sup>219</sup> The relevant question is then to determine to what extent unconscionability may defeat primary (21) and consequential (22) damages' limitations.

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<sup>218</sup>See, e.g., McGinnis v. Wentworth Chevrolet Co., 645 P2d 543 (Ore.Ct.App. 1982), 33 U.C.C. Rep. 1315; Council Brothers, Inc. v. Ray Burner Co., 473 F2d 400 (5th 1973), 11 U.C.C. Rep. 1126.

<sup>219</sup>S.2-302 and S.2-719(3).

21) Primary damages' limitation

The general unconscionability provision, S.2-302, may apply to all contracts and consequently be used against primary damages' limitation or exclusion. In that event, the clause's unconscionability is to be tested at the time of the making of the contract. In addition, Official Comment 1 S. 2-719 states in part that "any clause purporting to modify or limit the remedial provisions of Article 2 in an unconscionable manner is subject to deletion and in that event the Code remedies are applicable as if the stricken clause had never existed."

In other words, a clause that does not provide a fair quantum of remedy fails the Code's test of conscionability. As indicated earlier,<sup>220</sup> S.2-719(2) assumes the fairness of the remedy limiting clause at the time of the making of the contract, which clause may become unfair due to later circumstances under the "failure of essential purpose" test.

Taking into account the foregoing considerations, we can first say that limitation as opposed to exclusion of primary damages is prima facie conscionable. Second, if a primary damages' limitation clause is to be challenged because of circumstances subsequent the making of the contract, the "failure of essential purpose" test should come into play and not the unconscionability theory, which

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<sup>220</sup>See Ch.III) A) a) 22) supra.

should only be contemplated at the time of the conclusion of the contract. However, as we have seen,<sup>221</sup> the "failure of essential purpose" test is often equated by courts with a post-contract unconscionability test.

22) Consequential damages' limitation (S.2-719(3))<sup>222</sup>

Unconscionability under S.2-719(3) is emphasized as the primary test of validity for clauses limiting or excluding consequential damages. With respect to the burden of proof and the likelihood to get such clauses declared unconscionable, it appears relevant to separate commercial (221) from consumers' transactions (222).

221) In commercial transactions

The U.C.C. drafters, through S.2-719(3) and its Official Comment 3,<sup>223</sup> specifically provide that limitation of liability for consequential losses in a commercial case is not prima facie unconscionable.

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<sup>221</sup>See Ch.III) A) a) 222) supra.

<sup>222</sup>S.2-719(3) provides:

"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."

<sup>223</sup>Official Comment 3, S.2-719 states:

"Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316."

Accordingly, most assertions of unconscionability of consequential damages' limitation or exclusion in commercial transactions have met with a refusal.<sup>224</sup>

However, there are three kinds of situations in which exceptions will be preferred to the general foregoing rule. First, where personal injury has occurred, courts are likely not to uphold consequential damages' limitations.<sup>225</sup> Second, exactly as French courts, which strike down warranty-limiting clause in case of a "too well hidden defect,"<sup>226</sup> some American courts refused to enforce consequential damages' limitation where latent or undiscoverable defects were encountered.<sup>227</sup> Third, where circumstances caused a remedy to fail of its essential purpose, some courts have denied any effect to a coupled clause excluding consequential damages.<sup>228</sup>

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<sup>224</sup>See, e.g., *Argo Welded Prods. v. J.T. Ryerson Steel & Sons, Inc.*, 528 F.Supp. 583 (E.D. Pa. 1981), 33 U.C.C. Rep. 1349; *Johnson v. John Deere Co.*, 306 NW2d 231 (S.D. 1981), 31 U.C.C. Rep. 992.

<sup>225</sup>See, e.g., *Schlenz v. John Deere Co.*, 31 U.C.C. Rep. 1020 (D. Mont. 1981); *Morrow v. New Moon Homes, Inc.*, 548 P2d 279 (Alaska 1976), 19 U.C.C. Rep. 1.

<sup>226</sup>See, Ch. II) B) b) 2) supra.

<sup>227</sup>See, e.g., *Majors v. Kalo Laboratories, Inc.*, 407 F.Supp. 20 (M.D. Ala. 1975), 18 U.C.C. Rep. 592; *Johnson v. Mobil Oil Corp.*, 415 F.Supp. 264 (E.D. Mich. 1976), 20 U.C.C. Rep. 163.

<sup>228</sup>See, e.g., *Phillips Petroleum Co., Norway v. Bucyrus-Eric Co.*, 131 Wisc.2d 21, 1 U.C.C. Rep. Serv. 2d 667 (1986); *RRX Indus., Inc. v. Labcon, Inc.*, 772 F.2d 543, 41 U.C.C. Rep. Serv. 1561 (9th Cir. 1985).



222) In consumers transactions

There is little doubt that consequential damages limitations with respect to consumers sales are viewed with skepticism by both the Magnusson-Moss Warranty Act and the U.C.C. itself and thus unconscionability is likely to come into play.

Under the Magnusson-Moss Warranty Act, a full warranty may not exclude or limit consequential damages unless the language conspicuously appears on the face of the warranty.<sup>229</sup>

As to the U.C.C., S.2-719(3) makes clear that where consumers are personally injured as a result of a defective product, they should have no difficulty persuading the court that the consequential damages exclusion was unconscionable.<sup>230</sup> The same result is also likely to be reached where consequential damages consisted of property damage<sup>231</sup> even though, unlike injury to the person cases, limitation is not here prima facie unconscionable. Even when the loss is economic but the goods are consumer goods, courts will generally be more receptive to the consumer who

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<sup>229</sup>15 USC S.2304(a)(3).

<sup>230</sup>See, e.g., Tuttle v. Kelly Springfield Tire Co., 585 P.2d 1116 (Okla. 1978); Collins v. Uniroyal, Inc., 64 N.J. 260, 315 A.2d 16 (1974).

<sup>231</sup>See, e.g., Gladden v. Cadillac Motor Car Div., 83 N.J. 320, 416 A.2d 394 (1980).

seeks to recover damages than to the non-consumer who seeks the same.<sup>232</sup>

b) The Case Law Construction of the Civil Code's Regime of Damages

The starting point of the further discussion is contained in Civ.C.Art. 1645.<sup>233</sup> Exactly like warranty disclaimers' issues, the Civ.C. sets up a distinction between the good and bad faith seller. Only the latter who is supposed to know of the goods' defects will be held liable for "all damages incurred by the buyer." The French case law with the same strength and constancy as showed in warranty disclaimers' cases<sup>234</sup> has irrebutably equated the professional seller with the bad faith seller (1) and rendered him responsible for all damages sustained by the aggrieved buyer (2).

1) Presumption of professional seller's bad faith

The bad faith seller is the one who, prior to the sale, knew of the defects or on account of his profession

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<sup>232</sup>See, e.g., McCarthy v. E.J. Korvette, Inc., 28 Md.App. 421, 347 A.2d 253 (1975); Schroeder v. Fageol Motors Inc., 86 Wash.2d 256, 544 P.2d 20 (1975).

<sup>233</sup>Art.1645 provides:  
"If the seller knew of the defects in the thing, he is liable not only for the price which he has received therefor, but also for all damages incurred by the buyer."

<sup>234</sup>For a general discussion, See Ch.II) B) b) 2) supra.

should have known or could not be unaware of them. There is no shortage of cases holding such a presumption: courts have made no distinction between the members of the chain of production and distribution.<sup>235</sup> Nor is there any difference as to the nature of the goods involved.<sup>236</sup>

The underlying rationale of such a presumption seems to be contained in the professional seller's burden of checking and knowing his products.<sup>237</sup> The bad faith presumption is irrebutable: it is of no avail for the seller to prove that the defect could not at all be detected even by an expert seller.<sup>238</sup> However, the professional seller may be exempted of his liability in cases in which damage is primarily due to the buyer's fault.<sup>239</sup> This is only application of the general

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<sup>235</sup>For an illustration concerning the manufacturer, See, Comm. 07/17/1964, Bull.Civ.III, # 381.

For an exemple involving a wholesaler, See, Comm. 12/17/1973, Bull.Civ. IV, # 367.

For a case dealing with a mere retailer, See, Civ. 01/22/1974, D.1974, 288.

<sup>236</sup>See, e.g., Douai, 12/10/1963, Gaz.Pal. 1964.1.231. (gas bottle); Comm. 07/17/1964, Bull.Civ.III, # 381. (ship); Civ. 07/19/1965, D.1965, 389 (bread); Civ. 11/28/1966, D.1967, 99 (lemonade bottle); Civ. 03/27/1969, D.1969, 633 (real estate); Civ. 07/16/1971, Gaz.Pal. 1971.2.810; Civ. 11/21/1972, J.C.P. 1974. II.17890 (automobile).

<sup>237</sup>See, e.g., Comm. 04/27/1971, J.C.P. 1972.II.17280.

<sup>238</sup>See, e.g., Comm. 11/08/1972, D.1973, Somm. 52; Comm. 11/27/1973, Bull.Civ. IV, # 344 & 345; Rouen, 02/22/1974, D.1974, Somm. 68.

<sup>239</sup>See, e.g., Comm. 02/17/1976, J.C.P. 1976.II.18482.

contract liability principle pursuant to which the injury sustained must be basically caused by the breach of the contract, here the existence of hidden defects.

## 2) Extent of damages

The seller's breach of warranty may compel him to pay money damages to the aggrieved buyer himself as well as to injured third parties.<sup>240</sup> The professional seller is primarily held liable for all damages incurred by the buyer. The whole of the harm sustained will be compensated whatever contractual remedy limitations might have been stipulated. One should here bear in mind the well settled principle under which limiting-remedy clauses are treated as if they had never existed.<sup>241</sup> The aggrieved purchaser is thus entitled not only to get back the purchase price and the expenses directly connected to the sale but also be compensated for inconvenience created<sup>242</sup> and lost profits.<sup>243</sup>

The duty of compensation which weighs on the professional seller is extended to all damages suffered by

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<sup>240</sup>For a general discussion on nonhorizontal privity victims, See Ch.IV) B) b) *infra*.

<sup>241</sup>For a general discussion on warranty limitations under the French law, See Ch.III) A) a) 21) *supra*.

<sup>242</sup>See, e.g., Comm. 10/16/1972, D.1973, 290; Comm. 10/08/1973, Bull.Civ. IV, # 272.

<sup>243</sup>See, e.g., Civ. 01/30/1967, J.C.P. 1967.II.15025; Lyon, 10/18/1979, Gaz.Pal. 1980. 1. Somm. 304.

third parties because of the product's defects. This liability is due by the manufacturer<sup>244</sup> and the retailer as well,<sup>245</sup> the latter being able thereafter to sue the former to get compensated.<sup>246</sup> Third party victims have a direct cause of action against the professional seller.<sup>247</sup>

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<sup>244</sup>See, e.g., Civ. 11/15/1972, Bull.Civ. I, # 246.

<sup>245</sup>See, e.g., Civ. 06/22/1971, D.1971, Somm. 191.

<sup>246</sup>See, e.g., Civ. 11/12/1961, Bull.Civ. I, # 595.

<sup>247</sup>See, e.g., Civ. 11/15/1972, Bull.Civ. I, # 246; Civ. 12/05/1972, D.1973, 401.

For a general discussion on warranty beneficiaries issues, See Ch.IV) *infra*.



#### CHAPTER IV. BENEFICIARIES OF WARRANTY OF QUALITY

In today's business practice, a product frequently is distributed from the manufacturer to the ultimate purchaser through a panel of middlemen such as wholesalers, retailers and dealers. In that context and in addition to his rights against his own seller, the question as to whether a product's final user has a cause of action against a remote seller or the manufacturer may arise if the product turns out to be defective. A breach of warranty action is based on the notion of contract. Thus, where no contractual relationships exists between the plaintiff and the defendant, as between the ultimate buyer and the manufacturer, the latter will try to escape from his liability by raising lack of privity<sup>248</sup> as a defense. Whenever the buyer and the seller occupy adjacent links in the chain of distribution, they are deemed to be in vertical privity with each other. To what extent may the party being sued, as the manufacturer in the above example, successfully

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<sup>248</sup>Privity of contract is that connection or relationship which exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant in respect of the matter sued on (Black's law dictionary 1362, 4th ed. 1968).

allege lack of vertical privity as a defense to a warranty action? (A)

Apart from the actual purchaser himself, there are some other persons closely surrounding him, as the buyer's family in case of consumer goods or the purchaser's employees in commercial transactions, who are likely to get injured by defective goods.

These persons are obviously not within the chain of distribution of the goods but nevertheless affected by the goods' imperfection. Whenever the party who seeks to get damages for breach of warranty is outside of the chain of distribution, he is not in horizontal privity with the manufacturer or distributor of the goods. In spite of lack of horizontal privity, can a manufacturer or any of the sellers be held liable for breach of warranty vis-a-vis such "alien" to the contractual arrangements? (B)

#### A) The Vertical Privity Issue

The issue that underlies our discussion is whether the buyer is allowed to extend the class of potential defendants to his action for breach of warranty beyond the party who last sold the goods to him. Starting from a very strict vertical privity requirement<sup>249</sup> the present American

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<sup>249</sup>See, e.g. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Exch. 1842), *Huset v. J.I. Case Threshing Machine Co.*, 120 F.865 (8th Circ. 1903); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, aff'd on rehearing, 168 Wash. 465, 15 P.2d 1118 (1932).

case law tendency is rather towards the elimination of the vertical privity defense (a). In contrast, the French case law has always been clear as to the existence of a direct cause of action of a sub-purchaser against a remote seller or the manufacturer<sup>250</sup> (b).

- a) Under the American Law: A trend in favor of vertical privity's abolishment.

The absence of vertical privity and its consequences may be differently approached whether we deal with a breach of express (1) or implied warranty (2).

1) In the context of express warranty

The contemplated hypothetical situation is where a manufacturer issues a written express warranty, is sued by a retail purchaser for breach of express warranty and raises the vertical privity defense. The issue is then whether privity of contract is essential to allow an action against a manufacturer for breach of warranty. Both common sense and legal arguments strongly are in favor of discarding the privity requirement.

There is little doubt that the warranty which effectively induces the purchase is given by the manufacturer through mass advertising and labeling to ultimate business users or consumers with whom he has no direct contractual relationship. Under these circumstances, it is highly

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<sup>250</sup>See, e.g., Civ. 01/12/1884, D.P.85.1.357.

unrealistic to limit purchasers' protection to warranties made directly to him by his immediate seller. The protection he really needs is against the manufacturer whose published representations caused him to make the purchase.

Official Comment 2 to S.2-313<sup>251</sup> underscores how little sense it would make to retain the vertical privity defense when an express warranty is intended for no member of the chain of distribution but the ultimate buyer and actual user. There is no shortage of cases sustaining that point of view.<sup>252</sup> In the context of consumer goods it is noteworthy that the Magnusson-Moss Warranty Act<sup>253</sup> sets forth a direct cause of action for the aggrieved buyer against the manufacturer.

Vertical privity as an available defense for breach of implied warranty is definitely of a greater effectiveness.

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<sup>251</sup>Official Comment 2, S.2-313 states: "Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract."

<sup>252</sup>See, e.g., Whitaker v. Farmhand, Inc., 567 P.2d 916 (Mont.1977), 22 U.C.C.Rep. 375; Ferguson v. Sturm, Ruger & Co., 524 F.Supp. 1042 (D.Conn. 1981), 33 U.C.C.Rep. 548; R & L Grain Co. v. Chicago Eastern Corp., 531 F.Supp. 201 (ND Ill.1981), 33 U.C.C.Rep. 532.

<sup>253</sup>15 USC S. 2310 (d)(1976).

## 2) In the context of implied warranty

The provisions enshrined in the U.C.C. do not address the vertical privity issue, and also as suggested in Official Comment 3, S.2-318<sup>254</sup>, the Code is "neutral" with respect thereto.

The courts have therefore felt free to shape their own vertical privity rules.<sup>255</sup> Only the implied warranty of merchantability<sup>256</sup> will be discussed further. Indeed the implied warranty of fitness for a particular purpose<sup>257</sup> is only conceivable between the purchaser and his immediate seller. We should here recall that the concept of warranty of fitness for purpose does not embrace inherently defective goods but rather special use intended by the buyer and communicated to the seller whose expertise is relied upon.<sup>258</sup>

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<sup>254</sup>Official Comment 3, S.2-318 provides in part:  
 " . . . the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extends to other persons in the distributive chain."

<sup>255</sup>See, e.g., *Morrow v. New Moon Homes, Inc.*, 548 P. 2d 279, 287-88 (Alaska 1976); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2D 77, 81 (Tex. 1977); *Spring Motors Distributors, Inc. v. Ford Motors Co.*, 98 N.J. 555, 489 A.2d 660, 676 (1985).

<sup>256</sup>S. 2-314.

<sup>257</sup>S. 2- 315.

<sup>258</sup>See for a general discussion, Chap. I) A) a) 2) supra.



Whenever lack of vertical privity is raised against a breach of implied warranty of merchantability, the key issue will be: what kind of injury is suffered by the aggrieved plaintiff? Personal injury and property loss (21) have to be separately treated from economic losses (22).

21) In case of personal injury and property loss

As a matter of well settled result, the lack of vertical privity will not be a bar to recovery for personal injury. Only the legal tool supporting such an outcome has changed over the last few decades. Initially, as the famous decision in *Henningsen v. Bloomfield Motors, Inc.*<sup>259</sup> bore witness, the removal of vertical privity as a defense rested upon the implied warranty of merchantability theory. Indeed the New Jersey Supreme Court abolished the vertical privity requirement in a case dealing with a defective automobile which caused personal injury by stating: ". . . we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of ultimate purchaser."

The implied warranty theory in cases involving personal injuries has now been superseded in most

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<sup>259</sup>32 N.J. 358, 161 A.2d 69 (1960).

jurisdictions by a strict tort liability theory whose ground is to be found in S. 402 A of the Restatement 2nd of Torts.<sup>260</sup> The same approach has been followed by the courts for property loss which is clearly in the picture of S. 402 A of the Restatement 2nd of Torts.<sup>261</sup> Thus most courts will first examine the plaintiff's losses and then classify them as personal injury or property damage which are recoverable under S. 402 A.<sup>262</sup>

In contrast, economic damage is primarily recoverable under contract theory and therefore subject to the U.C.C. provisions.

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<sup>260</sup>RESTATEMENT (SECOND) OF TORTS S. 402 A.

Special Liability of Seller of Product for Physical Harm to User or Consumer:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- a) the seller is engaged in the business of selling such a product, and
- b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

<sup>261</sup>See, e.g., *Rossingno v. Danbury School of Aeronautics, Inc.*, 227 A2d 418 (Conn. 1967), 4 UCC Rep. 305; *Suvada v. White Motor Co.*, 210 NE2d 182 (Ill. 1965), 2 UCC Rep. 762.

<sup>262</sup>See, e.g., *Alfred N. Koplin & Co. v. Chrysler Corp.*, 49 Ill. App.3d 194, 364 N.e..2D 100 (1977) ("The line of demarcation between physical harm and economic loss in our view reflects the line of demarcation between tort theory and contract theory.").

## 22) In case of economic loss

Should lack of vertical privity bar compensation for economic losses? An answer to such a question would lead us to address two issues, namely: (i) on what basis (221)? and (ii) to what extent (222)?

### 221) On what basis

In *Santor v. A & M Karagheusian, Inc.*,<sup>263</sup> the New Jersey Supreme Court not only disregarded the absence of privity of contract but also stated that the manufacturer of products, here carpets, is strictly liable in torts to ultimate consumer for injuries resulting from defective products even where only damage to articles sold or to other property of consumer is involved.

If vertical privity may be discarded when the buyer has suffered purely economic loss, it is clear that it will not be any longer strict torts rules but Article 2 of the U.C.C. which should govern economic loss.<sup>264</sup> In a recent decision, the New Jersey Supreme Court itself rejected the

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<sup>263</sup>44 N.J. 52, 207 A.2d 305 (1965).

<sup>264</sup>See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). In that case it was held that: ". . . the history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries."

application of strict liability to the commercial context.<sup>265</sup>

222) To what extent

There is actually a split of authority between jurisdictions which have retained the vertical privity requirement<sup>266</sup> and jurisdictions which have abolished the vertical privity bar in cases concerning economic loss incurred by consumer<sup>267</sup> as well as by commercial purchasers.<sup>268</sup> In jurisdictions where lack of privity has been abrogated as a defense to a breach of warranty action, there are still some interesting issues to be debated: What about the effectiveness of a remote seller's disclaimer or limitation of warranty against the palintiff with whom he had no contractual links? What about the

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<sup>265</sup>Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 489 A. 2d 660(1985).

<sup>266</sup>See, e.g., Candlelight Homes, Inc. v. Zornes, 414 N.E. 2d 980, 982 (Ind. Ct. App. 1981); Professional Lens Plan, Inc. v. Polaris Leasing Corp., 234 Kan. 742, 755, 675 P. 2d 887, 898-99 (1984).

<sup>267</sup>See, e.g., Morrow v. New Moon Homes, Inc., 548 P.2d 279, (Alaska 1976); Nobility Homes, Inc. v. Shivers, 557 S.W. 2d 77 (Tex. 1977).

<sup>268</sup>See, e.g., Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal.Rptr. 17 (1965); Acadina Health Club, Inc. v. Hebert, 469 So. 2d 1186 (La. Ct. App. 1985); Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555 A. 2d 660 (1985).

notice of breach requirement under S.2-607(3)(a)?<sup>269</sup> It seems logical to enforce the initial provisions of the contract, such as a warranty disclaimer, in the same way as they would have operated had the parties been in privity. Indeed, the ultimate purchaser who seeks to claim his rights flowing from a breach of warranty can not be held to have greater rights than the one from whom he purchased the goods. The enforceability of the remote seller's contract defenses in the nonprivity context will protect him from an unlimited liability and therefore be consistent with the denying of the recovery of economic loss under strict liability in tort.<sup>270</sup>

b) Under the French law: The vertical privity defense disregarded

As a matter of principle, the purchaser's cause of action is primarily against his own seller because they are in privity of contract. Since most products nowadays are channelled through a long chain of distribution, each

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<sup>269</sup>See our discussion on that issue, Ch.II) A) a) 23) supra.

<sup>270</sup>/ See for a general discussion on the extension of warranty disclaimers and limitations in a nonprivity context:

\* Enforcing manufacturers'warranty exclusions against non-privity commercial purchasers, 20 Georgia L.Rev. 461 (1986).

\* Enforcing the rights of the remote seller under the U.C.C.: warranty disclaimers, the implied warranty of merchantability and the notice requirement in the nonprivity context, 47 Univ. of Pittsburgh L.Rev. 873 (1986).



member of the chain has a cause of action against his own seller in case of an unsafe product. That is why in order to avoid waste of time inherent to endless litigations and to better protect the ultimate purchaser's rights, the French case law has already a century ago<sup>271</sup> abolished the vertical privity requirement and ever since stuck to that position (1). Only the rationale underlying such a case law has been debated over the last decades to finally come to be recently settled (2).

1) The vertical privity hurdle wiped out by a constant case law

According to a well settled case law, the final purchaser of a defective product has a cause of action against his own seller as well as against any of the remote sellers.<sup>272</sup> Initially the sub-purchaser suing the manufacturer could bring either a breach of warranty action or a tort action based on the notion of negligence.<sup>273</sup> The French Supreme Court in a decision rendered on 10/09/1979<sup>274</sup> held that the sub-purchaser's cause of

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<sup>271</sup>See, e.g., Civ.01/12/1884, D.P.85.1.357.

<sup>272</sup>See, e.g., Civ. 02/04/1963, S.1963.193, D.1963. Somm.75; Civ., 01/05/1972, J.C.P.1973.II.17340; Comm.10/18/1982, Bull.Civ. III, # 318, 268.

<sup>273</sup>See, e.g., Comm. 06/26/1978, Bull.Civ.IV, # 177, 150.

<sup>274</sup>Civ. 10/09/1979, Bull.Civ., # 241, 192, D.1980.I.R.222; Followed later, See, e.g., Comm. 10/14/1981, G.P.1982.1.Pan. 128; Comm. 11/04/1982, Bull.Civ. IV, # 335, 284.

action against the manufacturer or any intermediate seller in case of hidden defects of the product sold is necessarily a breach cause of action and consequently had to be brought within the short-time period of Art.1648.<sup>275</sup> It has to be underlined that the sub-purchaser may seek to get the contract's rescission<sup>276</sup> as well as money damages.<sup>277</sup> If on the one hand a direct cause of action has always been available to the final purchaser against the manufacturer or any remote seller, on the other hand the rationale for such a right has been controversial.

## 2) The case law underlying rationale

Whenever a statute lays down a cause of action, there is no need for an underlying rationale: the statute itself is sufficient justification. In contrast, if a cause of action is based upon judicial precedents, it is essential to figure out which legal device may be invoked as an explanation. In case of several sales in a row the aggrieved buyer, as indicated earlier, may choose to sue any of the sellers; but there still remains the following

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<sup>275</sup>For a general discussion on the short-time period to bring an action, See Chap.II) A) b) supra.

<sup>276</sup>For a general discussion on remedies for breach of warranty, See Chap.III) supra.

<sup>277</sup>See, Comm.05/17/1982, Bull.Civ.IV, # 182, 162, D. 1983.I.R.479 (This decision overrules Comm. 02/27/1973, D.1974. 138 which only allowed money damages recovery).

issue: How to explain his direct cause of action for breach of warranty?

Three theories have been contemplated: two of them have to be set aside (21); the remaining one has to be retained (22).

## 21) The rationales to set aside

Both transfer of debt (211) and third party beneficiary (212) theories are unsatisfactory explanations.

### 211) The transfer of debt theory

According to Dean Rodiere every sale would include an implied transfer of debt of the legal warranty action.<sup>278</sup> This theory would rest upon Art.1135<sup>279</sup> in the sense that the breach of warranty action would be one of the "consequences which equity, usage or the law imposes upon the obligation according to its nature."

This theory has been rejected by courts<sup>280</sup> mainly because under Art.1690<sup>281</sup> any transfer of debt is

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<sup>278</sup>See, e.g., Aix, 10/05/1954, J.C.P.1955.II.8548 and Dean Rodiere's comments.

<sup>279</sup>Art.1135 provides: Agreements are binding not only as to what is expressed, but also as to all the consequences which equity, usage or the law imposes upon the obligation according to its nature".

<sup>280</sup>See, e.g., Civ., 03/23/1968, D.1970.663.

<sup>281</sup>Art.1690 provides: "The assignee has title with respect to third parties only upon service of notice upon the debtor. Nevertheless the assignee may also acquire title by acceptance of the assignment made by the debtor by authentic act".

subjected to formalism which is in the related context never complied with.

212) The third party beneficiary theory

Under this rationale, any intermediary in the chain of distribution of the product is supposed to stipulate that the hidden defect warranty is due to him as well as to any sub-purchaser. Thus any contract of sale would trigger an implied warranty in favor of a third party beneficiary. This explanation would find support in Art.1122.<sup>282</sup> Such a theory has to be discarded. Indeed it assumes the acceptance of the third party beneficiary. The latter would feel free to either accept the stipulation and consequently bring an action or refuse and accordingly sue under a tort basis. This would clearly contradict the Supreme Court's holding under which the purchaser's direct cause of action is "necessarily a contract action".<sup>283</sup>

22) The rationale to establish: The theory of transmission

The most accepted theory by the french doctrine <sup>284</sup>

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<sup>282</sup>Art.1122 provides: "A person is deemed to have stipulated for himself and his heirs and assigns, unless the contrary is expressed or followed from the nature of the agreement".

<sup>283</sup>See, Civ., 10/09/1979, Bull.Civ.I, # 241, 192.

<sup>284</sup>See Aubry & Rau, French Civil Law, 7th edition (1975), # 414, 638-642; The Law of Redhibition in France and Louisiana (1975), 49 Tul. L. Rev. 372-274.

and case law<sup>285</sup> is that the legal warranty for redhibitory defects is transmitted as an accessory of the object of sale from the manufacturer to the ultimate purchaser. Art.1615 states that "the obligation of deliver a thing includes its accessories and all things associated with its permanent use". The transmission of the warranty action to every purchaser would merely be an application of the above mentioned article. The Supreme Court which met in "full assembly" seemed to have expressly adopted such a theory. Indeed in its decision of 02/07/1986<sup>286</sup> it held that "the sub-purchaser takes advantage of all the rights of his predecessor in title and consequently has a direct contract cause of action for breach of warranty against the manufacturer".

#### B) The Horizontal Privity Issue

Any plaintiff who is not the actual purchaser of a product but is affected by its imperfections is a horizontal nonprivty plaintiff. Will such an aggrieved plaintiff have a cause of action against the one who manufactured or sold the defective products? Assuming a cause of action, what will be then the legal theory sustaining his claim? These important issues have been

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<sup>285</sup>See, e.g., Civ. 11/12/1884, D.P.1885.1.357, S.1886.1.149 Comm. 02/03/1976, Bull.Civ.IV, # 42, 36.

<sup>286</sup>See, Ass. Plen. 02/07/1986, D. 1986, 293; J.C.P. 1986.II.20616; G.P.1986.2.543; R.T.D.Civ.1986, 364, 605.



approached quite differently under the American and French law. The former specifically addresses the issue through a contract theory perspective whereas the latter is definitely "tort oriented". While the current American standpoint lacks uniformity and consequently certainty as to the protection assured to third party victims of a defective product (a), the French law guarantees security to horizontal nonprivity victims (b).

a) Under the American law: The U.C.C. S.2-318<sup>287</sup>  
and its uncertainties

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<sup>287</sup>S.2-318, Third Party Beneficiaries of Warranties Express or Implied, provides:

#### Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of warranty. A seller may not exclude or limit the operation of this section.

[29 states have adopted Alternative A]

#### Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

[6 states and the Virgin Islands have adopted Alternative B]

#### Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

[6 states have adopted Alternative C]

The U.C.C. drafters by adopting S.2-318 laid down a horizontal antiprivty provision. Indeed they entitled it: "Third party beneficiaries of warranties express or implied". It has been unfortunately impossible to reach a unique version of what is commonly presented as an abolition of the horizontal privity defense. S.2-318 splits into three alternatives and thus gives birth to some differences from one state to another. This lack of uniformity amounts to some uncertainties as to the protection offered to third party victims of a breach of warranty and renders necessary to discuss to whom the warranty is due (1) and which kind of injuries are covered (2).

1) As to whom the warranty is due

Alternative A is undisputably the least "open-oriented" alternative as to the class of third party victims who may have a cause of action for breach of warranty. Indeed Alternative A restricts potential beneficiaries to "any natural person who is in the family or household of his buyer or who is a guest in his home". Judicial precedents have not surprisingly deemed the buyer's children,<sup>288</sup> grandchildren<sup>289</sup> and nieces<sup>290</sup> to be

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<sup>288</sup>See, e.g., Chaffin v. Atlanta Coca-Cola Bottling Co., 194 S.E.2d 679 (Ga. Ct. App. 1972), 11 U.C.C.Rep. 737.

<sup>289</sup>See, e.g., Chastain v. Fuqua Indus., 275 S.E.2d 679 (Ga. Ct. App. 1980), 31 U.C.C.Rep. 79.

included within the privileged circle of protected victims under Alternative A. The courts' construction of this category of plaintiffs entitled to sue under Alternative A is, however, narrow, since a guest in automobile is not a "guest in the purchaser's home".<sup>291</sup> Neither a guest of a patron of a restaurant<sup>292</sup> nor a football player using a helmet supplied by a school<sup>293</sup> were considered under Alternative A to be the buyer's guests to whom the seller's warranty had to be extended. Alternative A is thus construed by courts to be strictly confined to enumerated third party beneficiaries. That is why the argument under which purchaser's employees may be encompassed among the buyer's "industrial family" has been rejected by most of the courts in states ruled by Alternative A.<sup>294</sup>

In contrast, Alternative B and C enlarge the pool of potential plaintiffs. Alternative B discards the requirement that the natural person be either a member of

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<sup>290</sup>See, e.g., Wolfe v. Ford Motor Co., 376 N.E.2d 143 (Mass. App. Ct. 1978), 24 U.C.C.Rep. 79.

<sup>291</sup>See, e.g., Marcus v. Spada Bros. Auto Serv., 4 U.C.C.Rep. 390 (Pa. Ct. CP 1967).

<sup>292</sup>See, e.g., Calanek v. Howard Johnson, Inc., 4 U.C.C.Rep. 658 (Mass. App. Dec. 1962).

<sup>293</sup>See, e.g., Hemphill v. Sayers, 552 F.Supp. 685, 35 U.C.C.Rep. 758 (S.D.Ill.1982).

<sup>294</sup>See, e.g., Bailey v. ITT Grinnel Corp., 536 F.Supp.84 (N.D.Ohio 1982); In re Johns-Mansville Asbestosis Cases, 511 F.Supp.1235, 31 U.C.C.Rep. 478 (N.D.1981); Watkins v. Barber-Colman Co., 29 U.C.C.Rep. 1271 (5th 1980).

the buyer's family or household or a guest in his home. Accordingly a mere bystander may invoke the privilege of Alternative B. Alternative C eliminates the distinction between natural and non-natural and thus widens a bit more the scope of the seller's warranty responsibility.

Lastly, under each of the Alternatives, whoever may be deemed third party beneficiary, he must "reasonably be expected to use, consume or be affected by the goods".

## 2) As to which kind of injuries is covered

The key question is whether personal injury or economic loss has been suffered by the plaintiff. Under Alternative A and B, the sole personal injuries are expressly aimed at. On the contrary, Alternative C merely refers to a person "who is injured by breach of the warranty" and therefore leads to believe that third party beneficiaries may recover property damage and economic loss as well. However, Official Comment 3 of S.2-318<sup>295</sup> has cast a doubt on such an interpretation. Eminent authorities like Professors White and Summers<sup>296</sup> construe the foregoing Official Comment as limiting Alternative C's

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<sup>295</sup>Official Comment 3, S.2-318 states in part: "The third alternative goes further, following the trend of modern decisions as indicated by Restatement 2nd of Torts, S.402 A, in extending the rule beyond injuries to the person".

<sup>296</sup>See, J.White & R.Summers, Handbook of the Law under the U.C.C. (2nd ed. 1980), S.11-5, 407.

scope of application to personal injury and property damage and not to economic loss. They draw from the reference to S.402 A the drafters' intent to only apply Alternative C to personal injury and property loss cases.

Arguments supporting the opposite approach may be equally sustained: first, Alternative C construed as economic loss not recoverable would not really be different from Alternative B; second, the Alternative C on its face is not restricted to any particular kind of harm.

It seems that Professors White and Summers's opinion has found a favorable echo in the view of courts. The Supreme Court of Iowa among others held that S.2-318, Alternative C did not extend its warranty protection to third party beneficiaries who have only suffered economic loss; the term "injured" has been interpreted to include only physical harm to the plaintiff or his property.<sup>297</sup>

b) Under the French law: An increasing protection for third party victims of a defective product

The one who is injured is not, under the French law, free to choose between a contract and tort action. If he is a contracting party or even a vertical privity victim, only a contract action will be available to him.<sup>298</sup> If he is a

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<sup>297</sup>Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 38 U.C.C.Rep. 1177 (Iowa 1984).

<sup>298</sup>See, supra Chap.IV) A) b).



third party victim, a tort action is mandatory. Thus the nonhorizontal privity plaintiffs, that is those who use the goods without having purchased them, will definitely be considered as third party victims whose cause of action must be a tort action.

Hence Civ.C. Art. 1382 and 1383<sup>299</sup> will come into play and the seller's negligence will have to be proven.<sup>300</sup> The French case law through its application of Art. 1382 and 1383 has ensured satisfactory protection to third party victims of defective products (1). A recent EEC council Directive of 07/25/1985 on product liability, which is consumer protection oriented, will in a near future provide a separate cause of action against manufacturers for defective products (2).

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<sup>299</sup>Art. 1382 provides: "Every act of a man which causes injury to another obligates the one by whose fault it occurred to give redress". Art. 1383 provides: "Everyone is responsible for the injury he has caused not only by his act, but also by his negligence or imprudence".

<sup>300</sup>We have to also add that some decisions retained the seller's responsibility on the basis of Art.1384(1) which provides: "A person is responsible not only for the injury which he causes by his own act, but also for that which is caused by the act of persons for whom he is responsible, or things which he has in his care." These decisions enlarged the notion of "things which one has in his care" by deeming the seller still responsible for the internal structure of the thing sold. See, e.g., Civ., 02/02/1982, D.1982, I.R.330 (explosion of a water-heater); Civ.11/15/1972, Bull.Civ.I, # 246. This case law seems to find better justification when the manufacturer rather than any other seller is held liable under Art.1384(1).

1) The case law application of Art. 1382 & 1383

As a matter of principle a third party victim of a defective product who brings an action under Art.1382/1383 has to show seller's negligence. Negligence consists in letting imperfect goods go into the stream of the market. The proof of such a fault has been made easier by the case law. However, since recently, a distinction is to be drawn from whether the manufacturer (11) or a mere retailer (12) is sued.

11) The manufacturer's liability is presumed

Under Art.1382/1383, the aggrieved third party victim should demonstrate the manufacturer's negligence that is a design defect or manufacturing flaw which amounted to an hidden defect. If the product's defectiveness is quite easy to ascertain, the fault which gave rise to such a defect is rather difficult to be proven. That is why the case law has decided that the manufacturer is presumed to know of his products'imperfections and consequently has to be held liable to distribute such product into the market. The mere evidence of a hidden defect will be sufficient to imply the manufacturer's negligence.<sup>301</sup>

Thus whether the victim is a contracting party or a third party the case law has ensured a similar protection

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<sup>301</sup>See, e.g., Civ, 12/05/1964, Bull.Civ.I, # 234, 181; Civ., 07/18/1972, Bull.Civ.I, # 189, 164, D.1973, S.39; Civ., 12/05/1972, D.1973.401; Comm. 06/26/1978, Bull.Civ.IV, # 177, 150.

by holding the manufacturer liable in commercializing inherently defective products. The mere retailer's situation is to that respect somewhat different.

12) The retailer's liability is to be proven

Until a recent Supreme Court's decision of 04/26/1983<sup>302</sup>, it was well settled that the mere retailer had to be equated with the manufacturer as to his liability towards third party victims whenever he delivered defective products. The situation was as like as the legal warranty due in the same conditions by the manufacturers and the mere suppliers to their purchaser.<sup>303</sup>

From now on, there is a difference between contract and tort liability due by manufacturers and retailers: the latter are not any longer presumed liable vis-a-vis third party victims simply because he sold a defective product. The mere supplier will only be held liable if he knew of the defect or was negligent in checking the product's quality before delivery.

We may imply from the 1983 Supreme Court's decision the intent to primarily channel products liability towards the manufacturer.

This is also the aim pursued by the EEC Directive of 07/25/1985 on products liability.

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<sup>302</sup>Civ., 04/26/1983 Bull.Civ.III, # 90, 71.

<sup>303</sup>See, Ch.IV) A) b) supra.

2) The EEC Directive of 07/25/1985 <sup>304</sup> on products liability

The EEC Council recently enacted a new consumer protected piece of legislation. Indeed, the 07/25/1985 EEC Council Directive, application of which in each Member State should have become reality by 08/30/1988,<sup>305</sup> sets up as a thrust that the manufacturer's liability for defective products has to be a strict liability. The Directive makes no distinction as to whether the victim of a defective product is a third party or the purchaser himself. Therefore a new cause of action will be available to victims of defective products in addition to their already existing contract and tort actions. The implementation of such a Directive requires us to explain the manufacturer's definition (21), the defect's notion (22) and the class of recoverable injuries (23).

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<sup>304</sup>Council Directive of 07/25/1985 on the approximation of the laws, regulations and provisions of the Member States concerning liability for defective products, 85/374/EEC, L2/ # 210/ 29.

<sup>305</sup>EEC Directive Art. 19 provides: "Member States shall bring into force, not later than three years from the date of notification of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof."

Comments:

\* This Directive was notified to the Member States on 07/30/1988.

\* As of 04/02/1989 France had not enacted any statute to comply with the EEC Council Directive.

## 21) The definition of manufacturer

As contemplated by the EEC Directive,<sup>306</sup> the manufacturer encompasses the one who makes the finished product as well as the raw materials and component parts. Anyone who holds himself out as a manufacturer by commercializing products under his own trademark is also aimed at. Moreover importers and suppliers, if they do not disclose the manufacturer or importer's identity, will be equated with the producer for the Directive's application purposes.<sup>307</sup> The definition of the manufacturer is thus particularly wide and virtually guarantees victims to find always someone liable for the defects of products. The effectiveness of such a protection is reinforced by the manufacturer's inability to disclaim his liability.<sup>308</sup>

## 22) The notion of defect

Under Art.1, "the producer shall be liable for damage caused by a defect in his product". The Directive goes on and specifies that "a product is defective when it does not provide the safety which a person is entitled to expect".<sup>309</sup> The Directive definitely stresses the lack of security that may flow from a defective product rather than

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<sup>306</sup>See, Art.3.

<sup>307</sup>See, Art.3 (3).

<sup>308</sup>See, Art.12.

<sup>309</sup>See, Art.6.



on its unfitness for performance. The security assured by the product has to be assessed in the context of a reasonable use.<sup>310</sup>

### 23) The class of recoverable injuries

Personal injuries and property losses will be recoverable.<sup>311</sup>

As to the latter we have to underline that the Directive does not supply any warranty for the defective product itself but only pertains to damage caused by the defective product. In addition two limits are set up: first, property losses must concern consumer goods. Accordingly, damaged property has to be normally used by the victim for his private needs.<sup>312</sup> Second there is a 500 ECU deductible from the damages awarded in order to avoid endless litigations.<sup>313</sup> The emotional distress compensation is not specifically dealt with in the Directive and remains under national sovereign regulations.<sup>314</sup>

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<sup>310</sup>See, Art.6, 1, b.

<sup>311</sup>See, Art.9.

<sup>312</sup>See, Art.6, b, (i) & (ii) .

<sup>313</sup>See, Art.6, b.

<sup>314</sup>See, Art.9 in fine.

## CONCLUSION

Our final comments will split into two categories: we will contemplate, on the one hand, the legal approach followed by the American and French system with respect to the problems raised and, on the other hand, the practical consequences which have resulted from them.

As far as the legal approach is concerned, we started this study fully convinced that common and law civil systems were to be opposed: the former highly case law oriented, the latter deeply statutory regulated. With respect to warranty issues we have to seriously qualify such an appraisal.

Indeed, we have noticed that the French law as regards the hidden defect warranty is primarily based on judicial precedents. The few related Civil Code Articles have been sometimes audaciously construed by courts. It may have even happened that the Civil Code drafters' intent has been superseded by courts' interpretation. It is not an overstatement to contend that the hidden defect warranty concept has been, on the Code's basis though, mostly defined by the case law. Likewise, and as to warranty disclaimers, available remedies in case of breach of warranty and warranty beneficiaries, the French law

solutions are either entirely judicial precedents founded or with no resemblance at all to the Code provisions.

In contrast we have seen how detailed the Uniform Commercial Code warranty provisions are and how little room has been permitted to courts to shape their policy. The area of warranty of quality is highly regulated under the American law. Not only the Uniform Commercial Code provisions are heavily relied upon but also the Code Official Comments are constantly referred to. To a certain extent these Official Comments seem to be actual pieces of legislation which courts should not depart from.

As far as the practical result achieved by our study is concerned, we can not reasonably state that either legal system better protects the disappointed buyer's interests. We may merely notice that the extent of the warranty of quality is certainly wider under the American law. Indeed, a breach of implied warranty of merchantability is easier to show than to meet the required conditions to trigger the legal hidden defects warranty. But, at the same time, the foregoing comment has to be counterbalanced by the seller's ability to disclaim his warranty obligations under the U.C.C., which is virtually impossible under the French law. The most common feature brought up is certainly the increasing protection assured to consumers. Both countries have enacted a specific body of rules to enhance consumers' protection. Even courts are inclined to rule in favor of

aggrieved consumers. As to commercial transactions, warranty of quality issues should be typically governed by the freedom of contract principle. This desire seems to find a better support under the American law.

These final considerations lead one to wonder whether differences between civil and common law systems are as great as they are thought to be. With respect to the undertaken study the answer is probably negative.





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