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SALES WARRANTIES IN ILLINOIS: COMMERCIAL CODE AND PRE-CODE LAW

GEORGE J. SCHAFFER*

The Uniform Sales Act was approved by the National Conference of Commissioners on Uniform State Laws in 1906 and adopted in Illinois on June 29, 1915. Other parts of Illinois commercial law are equally antiquated. Thus the need for a modern code of commercial law to govern commercial transactions in an industrial state such as Illinois in 1962 should be obvious. The Uniform Commercial Code, as adopted in Illinois,1 (hereinafter referred to as the Code), does modernize Illinois commercial law; of particular concern for our purpose is the replacement of the Uniform Sales Act,2 (hereinafter referred to as the Sales Act), with Article 2 of the Code and the changes it effected in warranty law in sales transactions. Although most of the substance of the Sales Act has been incorporated into Article 2 of the Code, it has been completely rewritten with numerous revisions and many new provisions. The law of warranty, among others, is revised and improved and should provide greater purchaser protection in sales transactions under Illinois commercial law.3

The purpose of this article is to compare the law of sales warranties in Illinois, under the Sales Act, with the rules of warranty law that might reasonably be expected to prevail after the Code

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becomes effective, and comment on such changes in Illinois warranty law of sales. The following comparison between Code and pre-Code warranty law in sales transactions in Illinois is divided into four main categories: (1) warranties in general, (2) express warranties, (3) implied warranties, and (4) disclaimer of warranties.

WARRANTIES IN GENERAL

The warranty obligation is one of the most important parts of a contract of sale and a large portion of sales litigation arises from it. Such warranty obligations may be divided into three classes: express, implied, and statutory. In the Sales Act, the legislature categorized warranties as express or implied. The implied warranty of title of the Sales Act becomes, under the Code, a

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4. Eighteen jurisdictions have now adopted the Uniform Commercial Code, including New York, McKinney's Uniform Commercial Code, §§ 1-101 to 10-105; and Michigan, Comp. Laws Supp. §§ 1101-9994. However, the effective date in Michigan is delayed until January 1, 1964, and in New York until September 27, 1964.


6. Vold gives a “Rough Definition of Seller's Warranty” as:
   “A seller's warranty in connection with a contract to sell or a sale of goods is an obligation, incidental to the deal. Under it the seller becomes answerable for various matters relating to the goods. . . . It may arise from the terms of the seller's actual promises, express or implied in fact. . . . The seller's warranty obligation thus may be either promissory in nature, or independently imposed by law, or both. A convenient figure of speech in which to describe its possible triple nature is to call it a three-pronged type of obligation: prong no. 1, the promissory warranty, is strictly contractual; prong no. 2, the warranty obligation is based on the seller's representations inducing the deal, is independently imposed by law, comparable to tort obligations; prong no. 3, also is independently imposed by law, apart from the seller's representations, for strictly public policy reasons.”


7. According to Williston:
   “There is no more troublesome word in the law than the word warranty. . . . In the law of sales in England * meaning is given to warranty: namely, an agreement with reference to goods which are the subject of a contract of sale but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages . . . .
   “The variety of meaning attached to the word warranty is a source of confusion, and it is obviously a service to the law to limit the word to one meaning. Accordingly in the Sales Act the word is limited to what is probably its essential meaning—a material promise, or a material affirmation from which a contractual or quasi-contractual obligation may be implied.”


statutory express warranty, thus introducing all three types of warranties as named above into Illinois sales law.\textsuperscript{10}

\textbf{Definition}

Illinois and federal courts interpreting Illinois sales law define a "warranty" arising from a contract of sale, as a promise of agreement by the seller that the article sold has certain qualities, or that the seller has good title thereto.\textsuperscript{11} An express warranty is one imposed by the parties to the contract and is a part of the contract of sale,\textsuperscript{12} whereas an implied warranty is not one of the contractual elements of the sale but is, instead, imposed by law.\textsuperscript{13}

This definition confirms section 12 of the Sales Act which defines an express warranty as "any affirmation of fact, or any promise by the seller relating to the goods," and recognizes that such express warranty, as well as a warranty implied by law, becomes a part of the seller's obligation in a contract of sale. Express warranties arise, therefore, out of the facts of negotiation,\textsuperscript{14} and implied warranties depend on conditions rather than negotiations for their existence.\textsuperscript{15}

The Code does not change this basic warranty obligation concept in Illinois law. On the contrary, the Code consolidates and systematizes basic principles of warranty law with the result that express warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic terms. Implied warranties on the other hand, rest so clearly on a common factual situation or set of conditions that no particular language of action is necessary to evidence them and they will arise in such a situation unless unmistakenly negated.\textsuperscript{16}

\textsuperscript{10} This fact is significant when viewed in relation to Code § 2-316 which provides for the exclusion of implied warranties only. Code § 2-312, warranty of title and against infringement, contains within itself in sub-sections (2) and (3) specific procedures for disclaiming or modifying these warranties.

\textsuperscript{11} Chanin v. Chevrolet Motor Co., 15 F. Supp. 57 (N.D. Ill. 1935), aff'd, 89 F.2d 889 (7th Cir., 1937).

\textsuperscript{12} Paul Harris Furniture Co. v. Morse, 10 Ill. 2d 28, 139 N.E.2d 275 (1956).

\textsuperscript{13} Beckett v. F. W. Woolworth Co., 376 Ill. 470, 34 N.E.2d 427 (1941).

\textsuperscript{14} Paul Harris Furniture Co. v. Morse, supra n.12.

\textsuperscript{15} Beckett v. F. W. Woolworth Co., supra n.13.

\textsuperscript{16} U.C.C. Off. Com. 2-313 point 1.
Nature and Validity

A warranty is said to be contractual in nature and implies an agreement to indemnify or make payment of money to the vendee in case of a breach.\footnote{17} It is an incident to a contract of sale and assumes, or necessarily implies, the existence of a contract, although it is not an essential element of a sale.\footnote{18} Both the Code and Sales Act provide remedies for the buyer in case of a breach of warranty by the seller,\footnote{19} and allow the exclusion of implied warranty obligations.\footnote{20} Hence they are in accord with the above statement. With respect to the attitude of the courts, in the recent case of \textit{Carolet Corp. v. Garfield},\footnote{21} brought under the Code in the State of Massachusetts, the court said: "In more recent times the general course of decision has been to treat express warranties as contracts of indemnity rather than as representations, unless a recovery in tort for deceit is specifically sought."

Relative to the question of validity of a warranty, Illinois pre-Code law requires that the warranty be made at the time of the sale or, if made afterward, that it be based on a new consideration.\footnote{22} On this question an important change is made in Illinois warranty law by the Code. Technicalities which at present hamper adjustment of a sales contract after the bargain has been made will no longer be controlling. The Code seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to such technicalities, (such as consideration) which at present hamper such adjustments. Code section 2-209 provides:

"(1) An agreement modifying a contract within this article needs no consideration to be binding. . . ."

In addition to modification of a contract of sale by express agreement without consideration, modification under the Code may be established by a course of conduct,\footnote{23} subject, however, to the requirements of Code section 2-209(2) and (3).

\footnote{17} Dewar v. Loy, 248 Ill. App. 396 (1927).
\footnote{18} Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 334 Ill. 281, 165 N.E. 793 (1929).
\footnote{19} I.S.A. § 69; I.C.C. §§ 2-713, 2-714, 2-715.
\footnote{20} I.S.A. § 71; I.C.C. § 2-316.
\footnote{22} Towell & Towell v. Gatewood, 5 Ill. 22 (1839).
\footnote{23} I.C.C. § 2-208.
This may appear to open the door and allow unscrupulous people to extort modification of their contracts, or permit fraud and economic duress through the enforcement of a modified agreement not supported by consideration. However, Code section 2-209(2) specifies a procedure for modification or rescission of a written agreement, and section 2-209(3) makes operative the Statute of Frauds of the Sales Article applicable to the revisions of contracts. Since modifications made under section 2-209 must meet the test of good faith imposed by the Code, the extortion of modification of a contract of sale without legitimate commercial reason will be a violation of the duty of good faith of the Code.

**Parties**

Under Pre-Code Illinois law, in order for one to be liable on a warranty, it must be either his contract or that of his authorized agent, or he must have ratified a contract of warranty in a contract of sale wherein he is the seller. Further, a warranty is addressed to some particular person, generally the buyer, who alone can avail himself thereof. Privity of contract, therefore, is generally required between the warrantor and the person seeking recovery, although it is not of necessity confined to the person to whom title has been transferred.

The Sales Act does not specify whether a seller's warranties run to third parties. The Code, however, makes a limited change in the rule of privity of contract between the injured person and the seller by eliminating the need for privity of contract in the case of any natural person who is in the family or household of his

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24 I.C.C. § 2-209(2) provides: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party."

25 I.C.C. § 2-201.

26 I.C.C. § 1-203.

27 I.C.C. § 2-103(b) defines "good faith" as follows: "'Good Faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."


30 Chanin v. Chevrolet Motor Co., 89 F.2d 889 (7th Cir. 1937).


32 I.C.C. § 2-318.

33 Facciolo Paving and Construction Co. v. Road Machinery, Inc., 8 Pa. Chest. 378 (1958) (plaintiff corporation, successor to an individual purchaser of a machine from
buyer,\textsuperscript{34} or who is a guest in his home,\textsuperscript{35} if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in his person by breach of the warranty.\textsuperscript{36} Query: is the guest in the home still protected when the family and guest have departed from the host’s home and are now at the picnic grounds when the breach of warranty causes the injury?

As to the vendee’s vendee, the Code takes a neutral position and does not extend the provisions of Code section 2-318 to include him.\textsuperscript{37} This continues existing Illinois case law under the Sales Act in which a sub-vendee cannot act directly against an original vendor because of the lack of privity of contract.\textsuperscript{38} Exceptions to the rule of requirement of privity of contract between the injured person and the seller under the Code, (and continuing pre-Code law on this subject) are generally based on tort;\textsuperscript{39} for tort remedies as well as remedies for breach of warranty are available based on the same set of circumstances under both pre-Code and Code law.\textsuperscript{40} Certainly the tort aspect of products liability should not be overlooked in Illinois cases as a means of avoiding the privity of contract rule when recovery is sought for injury caused by breach of warranty by a person other than the buyer,\textsuperscript{41} as well as the effect of statements made in advertising\textsuperscript{42} as origina-

\textsuperscript{34} Ibid. (Corporation neither a member of family or of household not within class for whose benefit this section provides.)

\textsuperscript{35} Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961) (automobile not a “home” within this section (2-318) covering third party beneficiaries of warranties and guest passenger in automobile not a statutory beneficiary).

\textsuperscript{36} Jacquot v. Wm. Filene’s Sons Co., 337 Mass. 315, 149 N.E.2d 635 (1958) (in action of contract by buyer to recover for injuries caused by artificial fingernail kit purchased from defendant, if the purchase was made by the buyer for her own account and not as agent for her husband, he had no cause of action).

\textsuperscript{37} Facciolo Paving and Construction Co. v. Road Machinery, Inc., supra n.33. (even though individual purchasers rights and liabilities in subject matter of contract were assigned to plaintiff successor corporation, this section (2-318) does not change existing case law which requires privity of contract between the parties in order to extend the seller’s warranties to other persons in the distributive chain).

\textsuperscript{38} Chanin v. Chevrolet Motor Co., supra n.30.

\textsuperscript{39} For a discussion of the rule of “privity of contract” and exceptions thereto as developed in tort liability, see Prosser, Torts § 84 (2d ed. 1955); and Note, 46 Harv. L. Rev. 161, 162 (1932).


\textsuperscript{42} Williston on Sales § 202 (Rev. Ed. 1948). “In the second place the statement may
ting a direct warranty between the manufacturer and the consumer.\textsuperscript{43}

The last sentence of Code section 2-318 may at first glance seem to present a problem of disclaimer by the seller as to third party beneficiaries of warranties in the provision. It reads: "A seller may not exclude or limit the operation of this section." However, an express warranty must first have been made by the seller to the buyer, or implied warranties not negated, in order that a third party benefit from them.\textsuperscript{44}

With regard to foodstuffs and like goods designed for human consumption, the requirement of privity of contract is not controlling in Illinois pre-Code law.\textsuperscript{45} One purchasing food which is deleterious has a remedy against either the person from whom the food was last purchased, or against a prior seller thereof,\textsuperscript{46} and where an article of food or drink is sold in a sealed container for human consumption, the warranty of wholesomeness and fitness for human consumption runs with the sale of the article for the benefit of the consumer thereof notwithstanding the absence of privity of contract between the ultimate consumer and the manufacturer, packer or processor.\textsuperscript{47} The warranty of wholesomeness arises, however, out of public policy as expressed in the pure food statute of the state of Illinois.\textsuperscript{48}

Under the Code the serving for value of food or drink to be consumed on the premises or elsewhere is a sale,\textsuperscript{49} thus rejecting cases to the contrary in pre-Code Illinois law, which required that such action be brought under the warranty of wholesomeness of the Illinois Pure Food Act.\textsuperscript{50} The principal implied warranty (merchantability) is to be found in Code section 2-314(1) which pro-

\textsuperscript{43} Vold, Law of Sales § 93 (2d ed. 1959), discussing privity of warranty in f. 30: "This is notably true where the ultimate consumer has relied on express representations found in the manufacturer's labels or other advertising," and citations thereto.

\textsuperscript{44} U.C.C. Off. Com. § 2-318 point 1.

\textsuperscript{45} Haut v. Kleene, 320 Ill. App. 273, 50 N.E.2d 855 (1943).


\textsuperscript{47} Patargas v. Coca-Cola Bottling Co. of Chicago, 332 Ill. App. 117, 74 N.E.2d 162 (1947).


\textsuperscript{49} I.C.C. § 2-314(1).

\textsuperscript{50} Williams v. Paducah Coca-Cola Bottling Co., \textit{supra} n.48.
vides: "Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale," and sub-sections (2) (c) which provide: "are fit for the ordinary purpose for which such goods are used"; but the warranty of merchantability is being extended, under the Code, to include the container in which the goods are enclosed, even though it was said that "there was no sale of the container but a mere lending thereof." Other cases decided under the Code hold that privity of contract is not necessary in cases of breach of warranty in the sale of food for human consumption, continuing pre-Code law. The Code, therefore gives an additional remedy for breach of warranty with respect to the sale of food while continuing existing law relative to privity of contract in cases where the sale of food is not involved.

**Express Warranties**

*Generally*

The Sales Act, section 12, defines an express warranty as: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

The essence of an express warranty under the Sales Act is that such express warranty shall have (1) the "natural tendency to induce the buyer to purchase the goods" and, (2) "the buyer must rely on the warranty when making the purchase." No particular words or forms of expressions are necessary to create an express warranty, and a positive assertion of a matter of fact made by the seller at the time of the sale, for the purpose of assuring the buyer of the fact and inducing him to make the purchase, if relied on by the purchaser, constitutes a warranty. The express warranty as thus defined becomes a part of the contract of sale.

52 Ibid.
53 Adams v. Scheib, 75 Pa. Dauph. 158 (1961) (the developing case law is the effect that in cases involving food or other articles for human consumption a buyer's right of action for breach of warranty is not restricted to his immediate seller).
54 Ibid. (Where the article in question is other than food, the buyer must show privity of contract in order to maintain assumpsit against a remote vendor). For pre-Code law, see Chanin v. Chevrolet Motor Co., supra n.30.
56 Ibid.
57 Paul Harris Furniture Co. v. Morse, supra n.12.
The Code emphasizes that express warranties are created by the seller during the facts of negotiation, as contrasted with the Sales Acts definition of an express warranty. However, both the Sales Act and the Code are in general accord that the express warranty consists of "any affirmation of fact or any promise relating to the goods" which contributes to and is instrumental in concluding the transaction. In addition, the Code expands the scope of express warranties to include any description of the goods, and any model or sample which is made part of the basis of the bargain by the parties to the transaction. A language variation exists in Code section 2-313(1) whereby clause (a) states, "promise . . . becomes part of the basis of the bargain," whereas clauses (b) and (c) read "description, sample or model . . . is made part of the basis of the bargain." This variation should not be significant since the essential fact is the agreement made by the parties and embraces the element in question.

The expansion of the scope of express warranties in the Code to include a warranty created by description, sample or model is a realistic appraisal of the making of a contract of sale. A contract is normally a contract for a sale of something describable and described, and such description may take the form of models, samples and various types of technical descriptions such as blue prints and specifications as well as mere words. Since the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, broadening the scope of express warranties to include sale by description, model and sample should, in practice, neutralize a clause in a form generally disclaiming "all warranties, express or implied." Such clause should not be given literal effect by the courts so as to reduce the seller's obligation with respect to such description under Code section 2-316. Although the parties should be able to make their own bargain, in determining what they agreed upon, good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

Illinois law provides no clear standards for determining when a statement is one of fact amounting to a warranty, or is a state-

58 I.C.C. § 2-313(b).
59 Id., § 2-313(c).
ment of an opinion, but both a pre-Code case decision and the Code are in accord that such formal words as "warrant" or "guarantee" are not necessary to the creation of an express warranty, nor that the seller have a specific intention to make a warranty. Further, no particular words or form of expression is necessary to create an express warranty, and a positive assertion of a matter of fact made by the seller at the time of the sale, for the purpose of assuring the buyer of the fact and inducing him to make the purchase, if relied on by the purchaser, constitutes a warranty.

In pre-Code law, whether there was an express warranty was determined from the intent of the parties, as shown by the expressions or words used in the contract, and the meaning to be given to them, in accordance with the rules applicable to the construction of contracts generally. Section 12 of the Sales Act provides that "no affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." Thus, where a representation as to the goods sold is positive and relates to a matter of fact, it constitutes a warranty; but where the representation relates to that which is merely a matter of opinion, it does not constitute a warranty. In determining whether affirmations or representations constitute a warranty or a statement of the seller's opinion or judgment, it has been stated that a decisive test is whether the seller assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment on a matter of which the seller special knowledge, and on which the buyer may be expected to have an opinion and to exercise his judgment.

Concerning affirmations of value or a seller's opinion or commendation, the basic question remains the same under the Code: "what statements of the seller have, in the circumstances and in objective judgment, become part of the basis of the bargain?"

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62 I.C.C. § 2-313(2).
63 Pre-Code law, Beckett v. F. W. Woolworth Co., supra n.13; I.C.C. § 2-313(2).
64 Beckwith v. F. W. Woolworth Co., supra n.13.
66 Ibid.
The expanded scope of express warranties to include sale by description, models, and samples, should have little effect when related to persons who have nearly equal knowledge and deal at arm's length. However, when the circumstances are such that the buyer, as a reasonable man, is entitled to rely on the seller's opinion or commendation, as when the seller has superior knowledge of the subject matter, such statement should become a part of the basis of the bargain. Even as to false statements of value the possibility may be left open to a remedy by law relating to fraud or misrepresentation.\(^7\)

Under pre-Code law, the fact that an article has a trade name does not preclude the retailer selling it from making an express warranty relative to such goods;\(^7\) and when there is an express warranty, a buyer is not required to inspect the goods,\(^7\) at the time of the sale. The Code should not change these rules. Code section 2-313(1) states that express warranties are created by:

(a) Any affirmation of fact or any 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.

Subsections (b) and (c) treat any description, and any model or sample in a like manner. Therefore, trade name articles will continue to be the subject of express warranties under appropriate circumstances. As for the exclusion of a warranty by inspection of the goods by the buyer, no valid reason exists why a buyer need examine the goods where an express warranty exists. However, lacking such an express warranty, and the opportunity to inspect the goods, good business sense should dictate that such an inspection should be made. The Code, therefore provides for the exclusion of implied warranties where the opportunity for an inspection is available and such inspection is made or should have been made by the buyer.\(^7\)

\(^7\) U.C.C. Off. Com. § 2-313, point 8.
\(^7\) Beckett v. F. W. Woolworth Co., supra n.15.
\(^7\) I.C.C. § 2-316(3)(b); Ehert Brewery v. Lebanon Valley Brewing Co., 5 Pa. Lebanon 125 (1955).
Under pre-Code law, a seller of property may, by disclaimer, refuse to warrant the property sold, but the disclaimer is ineffectual if it is made after the contract is concluded, unless the buyer assents to the change. Under the Code the precise time when words of description or affirmation are made, or samples shown so as to create an express warranty, is no longer material. The sole question is whether the language, samples, or models, are fairly to be regarded as part of the contract. If such language is used, or an act occurs after the closing of the transaction, the warranty becomes a modification and need not be supported by consideration if it is otherwise reasonable and in order. A like treatment should be accorded a similar act of disclaimer of warranty by the seller if the test of good faith is met.

Nor is it objectionable under the Sales Act as well as the Code, that more than one warranty may exist concurrently. Code section 2-317 provides:

Warranties, whether express or implied, shall be construed as consistent with each other and cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant.

Additional evidence of protection built into the Code to protect purchasers in sales transactions through the medium of warranties is to be found in Code section 2-316 which provides:

(1) Words or conduct relevant to the creation of an express warranty and words and conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

Thus the basic policy of the Code is to recognize that no warranty is created except by some conduct, either affirmative action or fail-

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74 Keller v. Flynn, supra n.69
76 I.S.A. § 15(6).
ure to disclose, on the part of the seller. Therefore, all warranties under the Code are made cumulative unless this construction of the contract is unreasonable.\textsuperscript{77} Where doubt exists as to which warranty was intended to be dominant, a series of rules are provided in section 2-317(a), (b), and (c) to aid in making such determination.\textsuperscript{78}

\textit{Sale by Description}

The common law rule, re-enacted by section 14 of the Sales Act, is that in a contract to sell or a sale by description there is an implied warranty that the goods will correspond with the description.\textsuperscript{79} The warranty applied where the goods are not presently on hand or in existence, and are sold by description, and is designed to insure delivery to the purchaser of those goods which he agreed to buy, and of necessity applies only to cases where the specific article bought was either not in existence or not on hand at the time and place of the sale.\textsuperscript{80}

The mere use, in pre-Code law, of descriptive terms in the sale contract is not operative to bring into existence the warranties arising from a sale by description where the sale is not such as to constitute a sale by description. An example is where the subject matter of the sale is determined by independent means not connected with the description, and the latter is only incidently inserted for purposes of identification, or where the transfer of title is directly conditioned on the goods answering the description instead of being collaterally related.\textsuperscript{81} A sale by trade name is not a sale by description in pre-Code law.\textsuperscript{82}

Warranties arising from a sale by description in Illinois law under section 14 of the Sales Act are implied warranties, whereas

\textsuperscript{77} U.C.C. Off. Com. § 2-317 point 1.
\textsuperscript{78} I.C.C. § 2-317 provides:
“(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
“(b) A sample from an existing bulk displaces inconsistent general language of description.
“(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.”
\textsuperscript{79} Grass v. Steinberg, 331 Ill. App. 378, 73 N.E.2d 331 (1947).
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid.
\textsuperscript{82} Santa Rosa-Vallejo Tanning Co. v. C. Kronauer & Co., 228 Ill. App. 236 (1923).
the Code expands the scope of express warranties arising thereunder to include a sale by description.\textsuperscript{83} Such a description need not be made by mere words, because technical specifications, blue prints and the like can afford more exact descriptions than mere language,\textsuperscript{84} and if made part of the basis of the bargain must conform to them. The rationale of a sale by description as an express warranty under the Code, and the improvement it makes in Illinois warranty law, is that the contract identifies what the seller must deliver to satisfy the contract he has made; he must deliver the thing which he has described. The significance of a description as an express warranty in a contract of sale is apparent when viewed in conjunction with Code section 2-316(1) which provides that words or conduct relevant to the creation of an express warranty and words and conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other. A description in a contract of sale as an express warranty will not be subject to exclusion under the provisions of Code section 2-316 on exclusion and modification of warranties. It would seem to be the height of inconsistency to permit a seller to insert a description in a contract of sale and then permit him to avoid its obligation as a warranty by routine use of words in the fine print of a contract form. Of course descriptions by merchants must be read against the applicable trade usages, with the general rules of merchantability resolving any doubt.\textsuperscript{85}

\textit{Sale by Model or Sample}

In Illinois pre-Code law a sale by sample is equivalent to a warranty that the sample is a true representative of the goods,\textsuperscript{86} and in every sale by sample there is an implied warranty that the bulk of the goods shall be equal to, or correspond with, the sample in quality.\textsuperscript{87} This principle is incorporated into section 16 of the Sales Act, whereby it is provided that in case of a contract to sell or a sale by sample there is an implied warranty that the bulk correspond with the sample in quality.\textsuperscript{88} Furthermore, under section

\textsuperscript{83} I.C.C. \textsection 2-313(1)(b).
\textsuperscript{84} U.C.C. Off. Com. \textsection 2-313 point 5.
\textsuperscript{85} Ibid.
\textsuperscript{87} Central Commercial Co. v. The Lehon Co., 173 Ill. App. 27 (1912).
\textsuperscript{88} I.S.A. \textsection 16.
16(c) of the Sales Act, if the seller is a dealer in goods of that kind, on a sale by sample there is an implied warranty that the goods will be free from any defect rendering them unmerchantable which would not be apparent on a reasonable examination of the sample.\(^89\)

In order that such warranties may exist and be enforced under the Sales Act, the requirements and conditions necessary in order that the transaction may be truly a sale by sample must be present.\(^90\) The chief reason for exempting sales by sample from the cardinal rule of caveat emptor is that the buyer has no chance to protect himself by an examination of the commodity sold, and hence, when the goods are in the presence of the parties at the time of the sale, and an adequate examination can be made, even if it is inconvenient or difficult, the sale is not regarded as a sale by sample in the absence of an express agreement to that effect.\(^91\)

The implied warranties, of necessity, apply only where the specific article bought was either not in existence or not on hand at the time and place of the sale,\(^92\) and where the buyer has ample opportunity to examine and inspect for himself there is no sale by sample raising the implied warranties under the Sales Act.\(^93\)

Under section 16(b) of the Sales Act there is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.\(^94\)

Under the Code a sale by model or sample which becomes part of the basis of the bargain creates an express warranty,\(^95\) and the significance of the change from an implied warranty under the Sales Act to an express warranty under the Code is comparable to the change the Code effects in warranty in a sale by description as set forth above.\(^96\) However, under the Code the basic situation is

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89 People v. Western Picture Frame Co., 368 Ill. 336, 13 N.E.2d 958 (1938).
90 Ibid.
91 Ibid.
92 Grass v. Steinberg, supra n.79.
93 Ibid.
94 I.S.A. § 16(b) provides:
"There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47(3)."
95 I.C.C. § 2-313(c).
no different affecting the true essence of the bargain when a model or sample is used rather than descriptive words alone in the contract. Code section 2-313(1)(c) includes both a sample actually drawn from the bulk of the goods which is the subject matter of the sale, and a model which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although underlying principles are unchanged by the Code, the facts are often ambiguous and the question becomes: was the thing shown as “illustrative” or as a “straight” sample? In general, the presumption is that any sample or model, just as any affirmation of fact, is intended to become part of the basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith, of course, requires that the sample be fairly drawn. But in merchantile experience the mere exhibition of a “sample” does not of itself show whether it is merely intended to “suggest” or to “be” the character of the subject matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the value shown by it. The circumstances will aid in answering this question. If the sample has been drawn from the existing bulk, it must be regarded as describing values of the goods contracted for and hence part of the basis of the bargain unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer’s initiative impairs any feature of the model.97

Warranty of Title

Under the Sales Act, unless there is an intention to the contrary, there is an implied warranty on the part of the seller that he has a right to sell goods, or will have a right to sell goods at the time the property is to pass, that the buyer will enjoy quiet possession of the goods, and that the subject of the sale is free, at the time of the sale, from any charge or encumbrance in favor of a third

person not declared or known to the buyer before or at the time when the contract of sale was made. This was substantially the rule stated in cases decided prior to the enactment of the Sales Act. Further, no warranties of title under the Sales Act are implied in sales by a sheriff, auctioneer, mortgagee or other person professing to sell by virtue of authority in fact or law.

Code section 2-312(1) restates the rules of the Sales Act, section 13(1), (2), and (3) relevant to the warranty of title, but under the Sales Act the warranty of title is an implied warranty, whereas under the Code it is a statutory express warranty. Prior to the Sales Act, this warranty arose only if the seller was in possession of the goods at the time of the sale.

As contained in Code section 2-312 the warranty of title has been completely rewritten and improved by the addition of a provision concerning infringement. Sub-section 1 provides for a buyer's basic need in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receive a good, clean title transferred to him in a rightful manner, so that he will not be exposed to a lawsuit in order to protect it. The warranty extends to a buyer whether or not the seller is in possession of the goods at the time of the sale or contract of sale was made, since the knowledge mentioned in Code section 2-312(l)(b) is by definition actual knowledge as distinct from notice.

The warranty of quiet possession of the Sales Act is abolished by the Code. Disturbance of quiet possession, however, although not specifically mentioned, is one way, among many, in which the breach of warranty of title may be shown.

Although not enumerating specific classes of persons, as does the Sales Act, the Code continues recognition that sales by sheriffs, executors, foreclosing lienors and persons similarly situated are so out of the ordinary commercial course that their peculiar character

98 I.S.A. § 13.
99 Morris v. Thompson, 85 Ill. 16 (1877).
100 I.S.A. § 13(4).
101 Illinois Cent. R.R. v. Leidig, 64 Ill. 151 (1872).
103 I.C.C. § 1-201(25).
105 I.S.A. § 13(2).
107 I.S.A. § 13(4).
should be apparent to the buyer, and therefore no personal obligation is imposed on the seller who is purporting to sell only an unknown or limited right. The Code does not touch upon and leaves open the question of restitution arising in such cases when an article so sold is reclaimed by a third party as the rightful owner.

When the goods are part of a seller's normal stock and are sold in the normal course of his business, it is his duty to see that no claim of infringement of a patent or trademark by a third party will mar the buyer's title. A sale, however, by a person other than a dealer raises no implication in its circumstances of such a warranty. Nor is there such an implication when the buyer orders goods to be assembled, prepared or manufactured on his own specifications. If, in such a case, the resulting product infringes a patent or trademark, the liability will run from buyer to seller. There is, under such circumstances, a tacit representation on the part of the buyer that the seller will be safe in manufacturing according to the specifications, and the buyer is under an obligation in good faith to indemnify him for any loss suffered.

The principal significance of the change in the warranty of title from an implied warranty under section 13 of the Sales Act to an express warranty under section 2-312 of the Code is that in not being so designated as an implied warranty, it is not subject to exclusion or disclaimer under Code section 2-316(3). Disclaimer of warranty of title, therefore, can only be accomplished by specific language to the effect, circumstances which give the buyer reason to know that the person selling does not claim title in himself, or that he is purporting to sell only such right or title as he or a third person may have.

**Implied Warranties**

*Generally*

Pre-Code Illinois law holds that implied warranties are imposed by law and do not arise from agreement of the parties, and

109 Ibid.
111 I.C.C. § 2-312(2).
112 Ibid.
113 Ibid.
under the Sales Act various statutory implied warranties are con-
tained in every contract of sale unless expressly rejected by the
parties to the contract.\textsuperscript{115} Warranties will not be implied in conflict
with the express terms of the sales agreement or contrary to the
manifest purpose of the parties where the facts clearly negative any
intention to warrant.\textsuperscript{116}

The presence of an express warranty does not necessarily pre-
vent the existence of an implied warranty; an express warranty does
not exclude implied warranties which are not inconsistent with it,
but it may exclude the implication of a warranty inconsistent there-
with.\textsuperscript{117}

The general policy of the Sales Act, followed by the Code, is
that warranties are created only by some conduct, (either by affirm-
ative acts or failure to disclose), on the part of the seller. There-
fore, all warranties are made cumulative unless this construction
of the contract is impossible or unreasonable.\textsuperscript{118} Further, the basic
policy of the Sales Act, continued by the Code, is to recognize and
carry out sales agreements according to the intention of the parties.
The Sales Act provides no guide to aid in ascertaining the intent
of the parties when such intention is clouded by ambiguity, but
the Code lays down certain rules designed to aid in ascertaining
the intention of the parties as to which of inconsistent warranties
which have arisen from the circumstances of their transaction shall
prevail. The Code establishes an order of priority as between
warranties which are inconsistent.\textsuperscript{119}

The rule of caveat emptor applies, in the absence of fraud
or express warranty, to all contracts of sale of personal property
where the buyer has equal and available means and opportunity
for examination or inspection of the property
\textsuperscript{120} and
under section 15(3) of the Sales Act, if the buyer has examined
the goods there is no implied warranty concerning defects which
such an examination ought to have revealed.\textsuperscript{121} Accordingly, with

\textsuperscript{116} Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 334 Ill. 281, 165 N.E. 793 (1929).
\textsuperscript{117} Hover v. Colonial-Premier Co., 316 Ill. App. 453, 45 N.E.2d 201 (1942).
\textsuperscript{118} U.C.C. Off. Com. § 2-317 point 1.
\textsuperscript{119} I.C.C. § 2-317(a)(b)(c).
\textsuperscript{121} Bansbach v. Allied Mach. & Welding Co., 334 Ill. App. 78, 78 N.E.2d 344 (1948).
reference to those characteristics or defects of property which are obvious or discoverable by ordinary examination, it is the general rule that no implied warranty exists where the parties deal at arms length and there has been an inspection or test of the property prior to the sale, in the absence of fraud or justifiable reliance on the seller by the buyer,122 and the opportunity to inspect, or the availability of the goods for inspection or test, prior to the sale will prevent the implication of warranties with respect thereto even though no test or inspection is actually made,123 at least where the seller resorts to no artifice to prevent the examination.124 However, the doctrine of caveat emptor does not apply, and implied warranties are not precluded with respect to defects which are not discoverable on a reasonable inspection.125

The application of the doctrine of caveat emptor in all cases where the buyer examines the goods regardless of statements made by the seller is modified by the Code. Thus, if the offer of examination is accompanied by words of their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than his examination, they give rise to an “express warranty.” It would be a question of fact as to whether a warranty of merchantability has been expressly incorporated into the agreement. On the other hand, the wording of section 2-316(3)(b) that the buyer “has refused to examine the goods” would imply a demand that the buyer examine the good fully to put him on notice that he assumes the risk of defects which the examination ought to reveal.

The particular buyer’s skill and the normal method of examining goods in the circumstances will determine what defects are excluded by the examination. 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 his field ought to observe, while a non-professional buyer will be held to assume the risk only for such defects as a layman might be expected to observe. A failure to notice defects which are obvious will not excuse a buyer, al-

123 Bansbach v. Allied Mach. & Welding Co., supra n.121.
124 Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218, 70 N.E. 319 (1904).
though he is not chargeable with detecting latent defects which his examination could not reasonably be expected to reveal.\textsuperscript{128}

**Quality or Condition of Goods**

The general rules applicable to express warranties apply to express warranties of quality,\textsuperscript{127} and an affirmation of quality amounting to a warranty must appear to have been made at the time of the sale with the intention of warranting the quality and not as a mere expression of opinion.\textsuperscript{128}

Ordinarily, at common law, there was no implied warranty of quality by a seller who was not the manufacturer.\textsuperscript{129} The Sales Act provides for implied warranties of quality under certain circumstances,\textsuperscript{130} and under the provisions of the Sales Act implied warranties of quality are limited, although the Sales Act effected a change in the law by abolishing the distinction between ordinary sellers and sellers who are manufacturers.\textsuperscript{131}

Where an article is sold without an express warranty and is tested by the buyer, any implied warranty of quality does not extend beyond the dates of acceptance and use by the buyer.\textsuperscript{132}

Limited under the Sales Act, implied warranties are divided into two principal types under the Code: fitness for a particular purpose, and merchantability and usage of trade. They will be discussed in that order.

**Fitness for a Particular Purpose**

In Illinois pre-Code law there was an express warranty of fitness, as in the case of a representation by the seller of fitness for a particular purpose on which the buyer relied.\textsuperscript{133} Such warranty was broken, no matter what the general quality might have been, if the article was not, in fact, suitable for the purpose specified.\textsuperscript{134}

\textsuperscript{128} Ibid.
\textsuperscript{129} Peoria Grape-Sugar Co. v. Turney, 175 Ill. 631, 51 N.E. 587 (1898).
\textsuperscript{130} I.S.A. § 15.
\textsuperscript{131} 77 C.J.S. Sales § 329 (1952).
\textsuperscript{133} Burke v. Instant Heat Co. of America, 236 Ill. App. 275 (1925).
\textsuperscript{134} Dickey v. Ghere, 163 Ill. App. 641 (1911).
Furthermore, whether or not the seller was a grower or manufacturer, an implied warranty of fitness for a particular purpose would arise if the goods were purchased for a particular purpose which was known to the seller, expressly or by implication, and the buyer relied on the skill or judgment of the seller to furnish such goods.\(^{135}\)

Prior to the adoption of the Uniform Sales Act, which modified the former law,\(^ {138}\) the rule was that if an article was to be made or supplied to the order of a purchaser, there was an implied warranty of fitness of the article for the special purpose designed by the buyer, if that purpose was known to the seller,\(^ {137}\) but in the sale of an existing article there was not, in the absence of fraud, any implied warranty of good quality, condition, or fitness for the purpose intended.\(^ {138}\)

An implied warranty that the goods sold are fit for the particular purpose will not arise if the seller is not informed of, or expressly or impliedly acquainted with such purpose, or the buyer does not rely on the seller's skill and judgment.\(^ {139}\)

Although it is an unusual situation, under certain circumstances an implied warranty of fitness for a particular purpose may arise in the sale of second hand goods.\(^ {140}\)

Under Code section 2-315,\(^ {141}\) whether or not an implied warranty of fitness for a particular purpose arises is basically a question of fact to be determined by the circumstances of the contracting. Nor is it necessary that the buyer actually inform the seller of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment if the circumstances are such that the seller has to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller.\(^ {142}\)

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\(^{137}\) Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218, 70 N.E. 319 (1904).
\(^{138}\) Ibid.
\(^{140}\) Markman v. Hallbeck, 206 Ill. App. 465 (1917).
\(^{141}\) De Graff v. Myers Foods, Inc., 19 Pa. D. & C.2d 19 (1958) held: "This Code substantially continues the implied warranty of fitness of purpose contained in the (Uniform) Sales Act, § 15(I)."
A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business, whereas the ordinary purpose for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair of shoes was selected to be used for climbing mountains.\(^4\)

A contract may, of course, include both a warranty of merchantability and one of fitness for a particular purpose, and any question of inconsistency between or among express or implied warranties will necessarily be resolved under the provisions of Code section 2-317 on "Cumulation and Conflict of Warranties Express or Implied." In such a case any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the warranty of fitness for a particular purpose as against all other warranties except where the buyer has taken upon himself the responsibility of furnishing the technical specifications.\(^4\)

The absence from Code section 2-315 of the language used in section 15(1) of the Sales Act in referring to the seller "whether he be the grower or manufacturer or not" is not intended to impose any requirement that the seller be a grower or manufacturer. Although normally the warranty of fitness for a particular purpose will arise only where the seller is a merchant with the appropriate "skill or judgment," it can arise as to nonmerchants where this is justified by the particular circumstances.\(^4\)

The common law rule, adopted by the Sales Act, is that if a specific article, or one known, defined, and described,\(^4\) or one known under a patent or trade name,\(^4\) is ordered and furnished


\(^{147}\) Beckett v. F. W. Woolworth Co., 376 Ill. 470, 34 N.E.2d 427 (1941).
there is no implied warranty of fitness for a particular purpose, since the buyer receives what he bargained for. This rule applies even though the seller knows or is informed of such purpose. In certain cases a sale may not constitute a sale by patent or trade name so as to exclude a warranty of fitness.

The elimination of the "patent or other trade name" exception of Sales Act section 15(4) constitutes a major extension of the warranty of fitness in the Code. Under the Code the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not decisive of the issue. If the buyer himself insists on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate nonreliance if the article has been recommended by the seller as adequate for the buyer's purpose.

Despite reliance on the seller's skill and judgment by the buyer, a seller may still disclaim or modify the warranty of "fitness for a particular purpose" under Code section 2-316(2) in a given case or transaction. However, such disclaimer or modification must be in writing and conspicuous.

**Merchantability**

The general rules applicable to express warranties apply to express warranties of merchantability, and under the Sales Act, where the goods are bought by description from a seller who deals

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149 Spero Elec. Corp. v. Wilson, 330 Ill. App. 622, 71 N.E.2d 827 (1947) (catalogue description of goods "government type" raised an implied warranty the goods conformed to government requirements, and was not a trade name which would exclude warranty of fitness); Lathrop-Paulson Co. v. Perksen, 229 Ill. App. 400 (1923) (sale of bottle washing machine described as "Rotary Bottle Washer," held, descriptive words are of general application [no trade name]).
151 I.C.C. § 2-316 provides: "(2) ... and to exclude or modify any implied warranty of fitness the exclusion must be by a 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.'" Accord: Rustyk Products Co. v. Rotenberger, 73 Pa. Montg. 519 (1959).
152 Luthy v. Waterbury, 140 Ill. 664, 30 N.E. 351 (1892).
in goods of that description, whether or not he is the grower or manufacturer, there is an implied warranty that the goods are of merchantable quality.\textsuperscript{153} The implied warranty of merchantability under the Sales Act does not apply where there is no sale by description,\textsuperscript{154} and where there is a sale under a patent or trade name it has been stated that there is no implied warranty of merchantability.\textsuperscript{155} It is possible also to disclaim or exclude the implied warranty of merchantability by contract.\textsuperscript{156}

Code section 2-314(1) provides:

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

As thus rewritten, the implied warranty of merchantability represents a significant change in Illinois warranty law. Undefined under the Sales Act, the warranty of merchantability was imposed on the seller only in sales by description\textsuperscript{157} or sample.\textsuperscript{55} As defined under the Code, the warranty of merchantability is broad and comprehensive, but not so rigid as to frustrate future development, since sub-sections (2)(a) through (f) provides for minimal requirements only.\textsuperscript{159} Further evidence of intent to expand rather than limit warranty obligation under the Code is found in 2-314(3), which provides: "Unless excluded or modified (section 2-316) other implied warranties may arise from course of dealing or usage of trade." Thus, the parties may contract, unless specifically excluded, with respect to course of dealing or trade usage with respect to merchantability of goods, or impose a higher standard of merchantability by their own agreement.

Under the Code the warranty of merchantability arises when the seller is a merchant who sells regularly the kind of goods in

\textsuperscript{153} I.S.A. § 15(2).
\textsuperscript{154} People v. Western Picture Frame Co., 368 Ill. 336, 13 N.E.2d 958 (1938).
\textsuperscript{155} Santa Rosa-Vallejo Tanning Co. v. Charles Kronauer & Co., 228 Ill. App. 236 (1923).
\textsuperscript{156} Alex J. Mandl, Inc. v. San Roman, 170 F.2d 839 (7th Cir. 1948).
\textsuperscript{157} I.S.A. § 15(2).
\textsuperscript{158} I.S.A. § 16(c).
\textsuperscript{159} U.C.C. Off. Com. § 2-314 point 6.
question,\textsuperscript{160} and it is immaterial whether he is a manufacturer or grower of such goods.\textsuperscript{161} The seller's obligation applies to present sales as well as contracts of sale, subject to the effects of any examination of specified goods,\textsuperscript{162} and the warranty of merchantability will, under the Code, apply to sales for resale as well as sale for use.\textsuperscript{163} Although a seller may not be a "merchant" as to the goods in question, if he states generally that the goods are "guaranteed" the provisions of Code section 2-314 may furnish a guide to the content of the resulting express warranty. This has particular significance in the case of second hand sales, and has further significance in limiting the effect of fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of "guarantee."\textsuperscript{164}

The question when the warranty of merchantability is imposed under the Code turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods in the agreement. The responsibility imposed rests on any merchant-seller, and the absence of the words "grower or manufacturer or not" which appears in section 15(2) of the Sales Act will not restrict the applicability of this section (2-314 of the Code).\textsuperscript{165}

Of the basic minimum elements of the warranty of merchantability to be found in Code, section 2-314(2), paragraphs (a) and (b), should be read together. Both refer to the standards of that line of the trade which fits the transaction and the seller's business. "Fair average" is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of

\textsuperscript{160} I.C.C. § 2-314(1).
\textsuperscript{161} U.C.C. Off. Com. § 2-314 point 2. Accord: Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1960) (person who, after purchase of a thing, injured because of unfitness for the intended purpose may sue the manufacturer in assumpsit on breach of implied warranty of fitness, and proof of contractual relationship or privity between manufacturer and buyer is not necessary).
\textsuperscript{162} U.C.C. Off. Com. § 2-314 point 1.
\textsuperscript{163} Ibid.
\textsuperscript{164} U.C.C. Off. Com. § 2-314 point 4.
\textsuperscript{165} U.C.C. Off. Com. § 2-314 point 2; Goepfert v. Town Motors Automotive Co., 1 Pa. Bucks 134 (1955) (implied warranties may apply to a sale of a secondhand automobile).
quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass "without objection." A fair percentage of the least is permissible but the goods are not "fair average" if they are all of the least or worst quality possible under the description.\footnote{166}.

Fitness for the ordinary purpose\footnote{167} for which goods of the type purchased are used, as opposed to the warranty of fitness for a particular purpose as found in Code section 2-315, is a basic fundamental of the warranty of merchantability as found in the Code. Merchantability or fitness for the "ordinary purpose" is an essential part of the obligation which the buyer owes to a purchaser for use. However, limitation to the "ordinary purpose" excludes the applicability of the warranty to the hypersensitive or allergic buyer. Moreover, protection under this aspect of the warranty of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be "honestly" resalable in the normal course of business because they are what they purport to be.\footnote{168} Breach of the warranty of merchantability is the basis of many tort remedies, and where fitness for the ordinary purpose for which the goods are intended is the breach complained of, proof of privity of contract is not essential to maintenance of the action by the injured party.\footnote{169}

Paragraph (d) of Code section 2-314(2), concerning evenness of kind, quality and quantity, follows case law and refers to permissive variations of quality within certain accepted limits as established by the agreement or usage of trade. Precautionary language, however, is inserted as a reminder of the frequent usages of trade which permit substantial variations both with and without an obligation to replace the varying units.\footnote{170}

Paragraph (e) of section 2-314(2) which provides: "... are adequately contained, packaged and labeled as the agreement may require," applies where the nature of the goods and of the transaction require a certain type of container, package or label. Para-
graph (f), on the other hand, applies wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labeling or the representation. This follows from the general obligation of good faith which requires that a buyer should not be placed in a position of reselling or using goods delivered under false representations appearing on the package or container.171

Subsection (3) of section 2-314 makes it implicit that usage of trade and course of dealing can create warranties, but that they are implied rather than express warranties and thus subject to modification or exclusion under Code section 2-316. Exclusion of the warranty of merchantability will be treated in the following paragraphs on disclaimer and waiver of warranty.

The Code now puts to rest any dispute that a sale of food is within the scope of Article 2 on sales. Under pre-code law, there was an implied warranty that food sold to the public was fit for consumption,172 and under the Sales Act, section 15, at least where the sale of the food is for immediate consumption, there is an implied warranty that the food is wholesome and fit for human consumption.173 The immediate seller makes such a warranty at the time the food is purchased by the consumer,174 and such warranty has been held applicable to sales by retailers of goods which are canned, bottled, or in a sealed package.175 It has been held, however, that the implied warranty of wholesomeness of food does not attach to the container itself, so as to render a retail dealer liable for a defect in the container which caused an eye injury when an attempt was made to open such container.176

The implied warranty of fitness of food for human consumption applies to a manufacturer, canner, bottler, or processor of food products for sale to the public.177 Such warranty is made

175 Ibid.
177 Sharpe v. Danville Coca-Cola Bottling Co. supra n.172.
when the food leaves the control of the manufacturer, canner, bottler, or processor, and runs with the sale of the article for the benefit of the consumer. However, since the product may pass through many person's hands before it reaches the ultimate consumer, public policy does not require anyone selling the product to warrant that no one will tamper with or adulterate the product before it comes into the hands of the ultimate consumer and after it leaves the hands of the seller.

Application of the warranty of fitness applies to food only when it has been prepared in an acceptable manner. Pork, generally fit to be eaten only when properly cooked, is not warranted for fitness for consumption when eaten raw or cooked in an unusual or improper manner. Disclaimer of the warranty of fitness or quality may be against public policy. However, where the container is damaged, a sale of the product "as is, no recourse" was held to negative the warranty that cans and contents would be fit for resale and for ultimate human consumption.

The warranty of wholesomeness in the serving of food by a restaurant keeper is recognized and applied since he is in much the same position as a retail dealer in food with respect to the food he serves to his customers. The proprietor of the eating place will be liable for his breach of warranty, whether or not he was negligent.

The serving for value of food or drink to be consumed on the premises or elsewhere is a sale under the Code. The principal warranty is found in Code section 2-314(l)(c), that the goods (food), to be merchantable, must be fit for the normal purpose for which such goods are used. This should have the effect of adding the remedy of breach of the warranty of merchantability to the existing remedy for breach of the warranty of wholesomeness in cases of sales of food for human consumption. It has been held

178 Ibid.
181 77 C.J.S., Sales, § 331 (1952).
184 Ibid.
185 I.C.C. § 2-314(l).
under the Code that a glass container was subject to the implied warranty of fitness and merchantability although only milk, and not the container, was sold; and that evidence that the container was not mishandled and evidence relating to the manner in which the container shattered were questions for the jury as to whether the dairy was liable for breach of warranty of fitness or merchantability. 

**Modification and Disclaimer**

**Disclaimer**

Express warranties arise out of the negotiations leading to the final agreement between the parties and are, therefore, a part of the contract. Implied warranties, on the other hand, are not promissory in their nature but are imposed by law for the protection of buyers or to improve marketing conditions. But warranties are not essential to the existence of a contract and in Illinois pre-Code law implied warranties may be expressly excluded by the terms of the contract of sale, and such terms are valid. The warranty exclusionary right may be exercised under the provisions of section 71 of the Sales Act, and the provisions of that section of the Sales Act have been held to be declaratory of the common law. A complete negation of an implied warranty occurs where there exists any words or conduct tending to show that such was the intention of the parties. Sales of property “as is” generally exclude implied warranties.

Freedom of contract is a declared principle of the Code and the parties may, by agreement, determine the standards by which the performance of their obligations under their contracts are to be measured subject to the requirement of good faith in their dealings. While the Sales Act failed to codify the rules of disclaimer, the Code, on the other hand, devotes a whole section to

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187 Ibid.
188 Paul Harris Furniture Co. v. Morse, supra n.12.
190 Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., supra n.18.
191 Alex J. Mandl, Inc. v. San Roman, 170 F.2d 839 (7th Cir. 1949).
192 Ibid.
193 Ibid.
195 I.C.C. § 1-102(3).
this purpose, and contains many provisions which tend to protect an unwary and inexperienced buyer against the tactics of a "sharp" seller in his avoidance of warranty obligations in a contract. This policy of the Code is aptly stated by a Pennsylvania court in the case of *L. & N. Sales Co. v. Little Brown Jug, Inc.*,198 in which the court said:

> The provision for the exclusion of warranties must be interpreted in a manner consistent with the general purpose of the code to promote fair dealings in business transactions.

In order to carry out this policy in sales transactions the sections of the Code relating to warranties have been rewritten as compared with the language used in the Sales Act, and realigned, in that many warranties formerly designated as implied warranties in the Sales Act are express warranties under the Code.197 The more restrictive rules of the Code for disclaimer of warranty and the resulting improvement in warranty protection in sales transactions under the Code are discussed in the paragraphs immediately following.

The warranty of title as found in the Sales Act198 is designated as an implied warranty, whereas in the Code199 the existence of such a warranty is indicated by the use of the word "warranty" alone.200 Since it is not designated as an implied warranty, the warranty of title of the Code is not subject to exclusion under Code section 2-316. Successful modification or exclusion of the warranty of title can be accomplished only by compliance with the circumstance or language requirement of Code section 2-312(2).201 The "warranty" obligation against infringement as found in subsection (3) of section 2-312 is likewise free from the effects of Code section 2-316 on the exclusion of implied warran-

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197 For specific detail, see the categories above designated "express" and "implied" warranties.
198 I.S.A. § 13.
199 I.C.C. § 2-312.
200 I.C.C. § 2-312(1).
201 Section 2-312(2) provides: "A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have."
ties. The warranty against infringement, which arises only in case of a sale by "a merchant who deals in goods of the kind"202 involved in the transaction can be excluded or modified only by agreement of the parties but, unlike the exclusion of the warranty of title, "circumstances" to modify or exclude this warranty must be such as to be a part of the agreement.203

Subject to certain exceptions such as: (1) terms in a contract which in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods (terms "as is"; "with all faults," etc.)204 (2) when the buyer before entering into the contract has examined the goods or sample or model, or has refused to examine the goods,205 and (3) by course of dealing or usage of trade,206 and limitation on the remedy for breach of warranty,207 in order to modify or exclude the implied warranty of merchantability or any part of it the language used must mention merchantability, and in case of a written obligation the exclusionary language must be written in a conspicuous manner.208

Unlike the implied warranty of merchantability, implied warranties of fitness may be excluded by general language provided the exclusionary language is in writing and "conspicuous."209 A written statement such as "there are no warranties which extend beyond the description on the face hereof" is adequate for the purpose.210 All implied warranties of fitness may be excluded, whether it be fitness for a particular purpose, or fitness for the ordinary purpose (as found in the implied warranty of merchantability211) by specific language addressed thereto or the general language excluding all warranties.

Additional evidence of Code policy to protect the existence

202 I.C.C. § 2-312(3)
203 I.C.C. § 2-312(3) provides: " 'Unless otherwise agreed' a seller who is a merchant."
204 I.C.C. § 2-316(3)(a).
205 I.C.C. § 2-316(3)(b).
206 I.C.C. § 2-316(3)(c).
207 I.C.C. § 2-316(4).
208 I.C.C. § 2-316(2).
209 Ibid.
210 Ibid.
211 Ibid.
of warranty obligations in a contract of sale is to be found in section 2-316(1) which 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 whenever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

and in section 2-317 which provides:

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant.

In ascertaining that intention, Code policy favoring the existence of warranty obligation is further evidenced in section 2-318 whereby the benefits of warranty protection are extended to include certain third party beneficiaries. However, this section should not be considered to be a total abandonment of the doctrine of privity of contract since the class of person within its protection is limited.212

CONCLUSION

As succinctly stated in the Illinois Annotations to the Uniform Commercial Code, compiled by the Illinois Uniform State Law Commission, under the heading of Reasons for the Code, “It (the Code) is not revolutionary but on the other hand it modernizes the law of [commercial transactions] in the light of the experience of over half a century of unprecedented commercial growth since four of our major acts [uniform laws] were promulgated.” The law of warranty in sales transactions shares to a great degree the modernizing effect of the Code on Illinois commercial law. The warranty provisions of the Code on sales as found in Article 2 rewrite and revise comparable provisions of the Sales Act and

212 Section 2-318 provides: “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 that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. . . .”
effect many, many changes and improvements. The scope of express warranty has been expanded to include sale by description, model and sample as well as sale by promise or affirmation of fact. Warranty of title becomes a statutory (express) warranty rather than an implied warranty, with the added provisions of warranty protection against infringement. The implied warranty of merchantability is clearly defined, yet remains flexible enough in definition to permit future expansion and development of its application. Greater consumer-purchaser protection seems assured through clarification of the troublesome status of disclaimer of warranty. In cases of warranty of title, exclusions will require specific language or circumstances to effect it. Warranty against infringement will be excluded only by agreement, and circumstances that will exclude this warranty must be such as will be regarded as part of such agreement. To exclude the implied warranty of merchantability, except for certain specific exceptions, and the implied warranty of fitness for a particular purpose, specific language requirements exist, and when written, such words of exclusion must be conspicuous. Rules are added to ascertain intention of the parties as to which is the dominant warranty where warranties conflict, and warranty protection, in appropriate situations, is extended to designated third party beneficiaries. The Code does not purport to answer all questions involved in commercial transactions, but its provisions are not so rigid as to preclude future expansion and development of commercial law in Illinois. The official comment to the Uniform Commercial Code will serve as a valuable guide to courts solving judicial problems of commercial law arising under the Code, and where problems arise outside the scope of the Code, courts should be guided in policy making decisions relating thereto by the signposts of general commercial policy to be found in the Code.