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C. Rauch Wise

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SOUTH CAROLINA AMENDMENTS TO ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE

I. INTRODUCTION

In 1951 the National Conference of Commissioners on Uniform Laws drafted the Uniform Commercial Code. Since the Code was initially drafted, it has been enacted by every state except Louisiana. Each state which has enacted the Code has, however, made some non-uniform amendments. The vast majority of the South Carolina Uniform Commercial Code amendments are found in Article 2 of the Code, and these amendments will be discussed in this article.

Although South Carolina has its own reporter's comments parallel to those of the official editorial board, these comments were written prior to the adoption of the amendments. They do not, therefore, reflect the reporter's views or interpretations of the amendments.

II. EFFECT OF CHANGING AN IMPLIED WARRANTY TO AN EXPRESS WARRANTY—SECTIONS 2-313(1)(a) and 2-314(2)(f)

The Code divides warranties into two categories—express and implied. While these are the same terms as used for pre-Code warranties, they do not encompass the same concepts. Under section 2-314, implied warranties are always given when the product is sold by a merchant. The express warranties under section 2-313, however, are given only when a statement concerning the product or a sample or model of the product is made a part of the basis of the bargain regardless of the status of the seller. In amending sections 2-313 and 2-314, the South Carolina Legislature took an implied warranty¹—that goods must conform to any affirmation of fact made on the container or label—and made it an express warranty.²

It is necessary to compare this amendment with the meanings given express and implied warranties by the Code framers in order to show the significance, or lack of significance of this

1. UNIFORM COMMERCIAL CODE § 2-314(2)(f) (1962 version).

2. S.C. CODE ANN. § 102-313(1)(a) (Supp. 1966).

change. First, consider the pre-amendment distinction that implied warranties are given by merchants, while express warranties are given by anyone who sells a product. On its face the South Carolina amendment may seem to extend the effect of a warranty given on a container or label and to create an express warranty where none was intended. An examination of the prerequisites for an express warranty, however, will show that such expansion is illusory. A statement of fact on a container or label does not of itself create an express warranty. The fact so stated must become a part of the basis of the bargain. This is true under the original Code and under the South Carolina amendment. The South Carolina legislature did not amend the Code so that an express warranty arose whenever the product is sold with a statement of fact on the container or label; they still retained the basis of the bargain test.

The pre-Code case of *Beckett v. F. W. Woolworth Co.*³ may be used to demonstrate the result that will apparently be reached in South Carolina after the amended Code. In *Beckett*, the plaintiff sought to recover for damages sustained when the mascara which she purchased failed to be either "run proof" or "harmless" as stated on the label. Under the Uniform Sales Act, in order to create an express warranty, the plaintiff was required to prove that she had relied upon the statements on the container or label.⁴ She was unable to prove such reliance. Under the original Code, however, to create an express warranty the plaintiff would be required to prove that the statements formed a basis of the bargain. Whether the difference between the two tests is merely a question of semantics or is a difference of basic legal concepts is debatable.⁵ Under the amended Code

3. 376 Ill. 470, 34 N.E.2d 427 (1941).

4. UNIFORM SALES ACT § 12.

5. The New York Law Revision Commission in commenting on section 2-313(1) stated that the extent to which the Code changes present law is unclear. One reason for this is the Code's failure to define "basis of the bargain." The Commission concluded that "[p]ossibly for lack of any other meaningful standard, courts must employ the test of whether the buyer relied on the affirmation or promise, the test presently employed in Section 12 of the Uniform Sales Act." 1 N.Y.L. REV. COMM'N REP. STUDY OF THE UNIFORM COMMERCIAL CODE at 392-93 (1955). As the Commission points out, however, the Code's use of basis of the bargain rather than reliance, indicates an intent to modify present law.

Richard Duesenberg and Lawrence King suggest that the Code does not change the present law.

Whether one speaks of reliance or basis of the bargain, little difference exists between the two. In neither case should the statement be required to have been the sole factor leading the

in South Carolina the plaintiff in an identical suit, would also have to prove that the statements formed a basis of the bargain. Under the original Code, however, rather than proving an express warranty, the same plaintiff, under the implied warranty provisions of 2-314, would only have to prove that the defendant was a merchant as defined by the Code⁶ and that the statements were contained on the product. This seems to be a lesser burden than proving that the statements on the container or label formed a basis of the bargain, as required for an express warranty under the South Carolina amendment.

The requirement that the merchant or manufacturer stand behind any statement of fact placed on the container or label of his product does not place him at any disadvantage. While the comments to Section 2-314 state that the list of situations which create implied warranties is not to be exhaustive, a South Carolina court would be justified in excluding from this section statements of fact contained on a label or container as this provision was specifically removed from Section 2-314 by the South Carolina legislature.

Richard W. Duesenberg and Professor Lawrence W. King in their treatise on Article Two indicate that the inclusion of subsection (f) (the provision that makes a statement on a container or label an implied warranty) in section 2-314 was redundant, for an express warranty based on the labels would almost always be created.⁷ They reason that the statement of fact on the container or label would always be part of the basis of the bargain and therefore become an express warranty. Whether this statement is true is debatable for it would depend

buyer to purchase. In either case, the statement should, at least, be one of such factors. What is really crucial is whether the statement was made as an affirmation of fact, the goods did not live up to the statement, and the defect was not so apparent that the buyer could not be held to have discovered it for himself.

3 R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 6.01 6-2 n.2 (1966).

6. UNIFORM COMMERCIAL CODE § 2-104(1) (1962 version). This section 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 peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

7. 3 R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 7.01[3][f] (1966).

upon the proof that the statement of fact found on the container or label formed a basis of the bargain. On the other hand, if the statement of fact found on the container or label created an implied warranty, this warranty would always be given whenever the product is sold by a merchant.

The error of the South Carolina amendment can be stated in this manner: To make the statements contained on a label or container express warranties was unnecessary because they would have become express warranties without being specifically mentioned when such statements of fact form a basis of the bargain. Moreover, to take subsection (f) out of Section 2-314 could prevent statements of fact on containers or labels from becoming implied warranties when the product is sold by a merchant. Thus, in the case previously mentioned, the plaintiff could have recovered on the basis of an express warranty under the original Code if she had also proved the statement of fact formed a basis of the bargain. The South Carolina amendment was not needed to achieve this result.

III. DISCLAIMER OF WARRANTIES IN SOUTH CAROLINA

A. *Express Warranties*

Section 2-316(1) of the South Carolina version of the Uniform Commercial Code⁸ is the same as the 1954 version of the Code which stated basically that an express warranty could not be disclaimed. This section was changed in the 1962 version of the original Code to read:

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 (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.⁹

The change in the wording of section 2-316(1) was made largely to meet the objections of the New York Law Revision

8. S.C. CODE ANN. § 102-316(1) (Supp. 1966). This section provides: "If the agreement creates an express warranty words disclaiming it are inoperative."

9. UNIFORM COMMERCIAL CODE § 2-316(1) (1962 version).

Commission¹⁰ that the 1954 version of the section 2-316(1) would reverse their famous (or infamous) case of *Lumbrazo v. Woodruff*.¹¹ *Lumbrazo* involved a suit by a purchaser of what were purported to be "Japanese onion sets." The plaintiff sought to prove that the defendant had in fact not delivered "Japanese onion sets" and as a result had breached an express warranty that the onion sets delivered were "Japanese onion sets." The defendant sought to rely on a warranty disclaimer that excluded all warranties both express and implied. The New York court held that the disclaimer was to be given effect and that any express warranty of description was disclaimed. Whether the 1962 version of the Code will save the *Lumbrazo* case, however, is questionable.

One commentator said of the 1962 change of Section 2-316(1):

I have indulged in this prologue not so much to amuse as to justify the conclusion now proffered that it is impossible to predict with any degree of precision what effect Section 2-316(1) will have . . . Its language says nothing; it means nothing.¹²

Although commenting mainly on California law, his statement is generally applicable.

Noting that an express warranty must form a basis of the bargain, another commentator points out that "[i]t is illogical to allow its disclaimer."¹³ Dean William Hawkland generally favors the 1962 version. He indicates however, that it will not have the effect of saving the *Lumbrazo* case.¹⁴ He gives the example of a buyer who wishes to purchase a rebuilt 1,136 KW General Electric generator. The buyer has on prior occasions purchased rebuilt generators from the seller and he knows that they generally perform well and is, therefore, willing to take the risk of its failure to perform. If the seller were to deliver a 1,000 KW Westinghouse generator, there would be a breach of the express warranty created by the description of the pro-

10. 1 N.Y.L. REV. COMM'N REP. STUDY OF THE UNIFORM COMMERCIAL CODE at 741-46 (1955).

11. 256 N.Y. 92, 175 N.E. 525 (1931).

12. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A.L. REV. 281, 310-11 (1961).

13. Note, *Limitations on Freedom to Modify Contract Remedies*, 72 YALE L.J. 723, 739 (1963).

14. 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 1.190301 at 72-74 (1964) (hereinafter cited as W. HAWKLAND).

duct. Hawkland then states that even with a disclaimer clause, the contract could not be performed by delivery of the 1,000 KW Westinghouse generator for it would be inconsistent to allow the disclaimer when a specific express warranty is created.¹⁵ If a General Electric 1,136 KW generator were delivered and produced only 1,000 KW, then the disclaimer would be valid as against this breach of the implied warranty of merchantability. The warranty created by the description is that the product will conform to the description and is not a warranty concerning the merchantability of the product.¹⁶ Hawkland then states:

A reasonable man would not take this generally stated disclaimer to mean that the seller could perform the contract by delivering a generator made by someone other than General Electric or having a capacity other than 1136 KW. The rejection of the disclaimer in this situation, therefore, has the merit of protecting the buyer from unexpected and unbargained for risks.¹⁷

Thus, if a contract calls for the delivery of "Japanese onion sets" it could not, under the Code, be performed by the delivery of onion sets other than "Japanese onion sets." Therefore, if the *Lumbrazo* case were to arise under the Code and the contract contained a general disclaimer of all warranties, the sole question would be whether or not "Japanese onion sets" were in fact delivered. If *Lumbrazo* had arisen under the Code, moreover, the express warranty of description could not be disclaimed. At the same time the seller would not be warranting the merchantability of the onion sets.

This is apparently the position adopted by the South Carolina court in prior decisions.¹⁸ In *Black v. B. B. Kirkland Seed Co.*¹⁹ the plaintiff was suing for breach of warranty alleging that the

15. *Id.* at 73.

16. Speculation can be made, however, with respect to at what point the failure of a product to perform becomes a breach of the warranty of description. For example, if the sales contract describes the product as "one 1960 Ford automobile," can the contract be performed by delivery of a 1960 Ford with four defective wheels and a motor that will not run? The precise question being, has the seller in fact delivered an automobile?

17. W. HAWKLAND, *supra* note 14, at 73.

18. See, e.g., *Stevenson v. B.B. Kirkland Seed Co.*, 176 S.C. 345, 180 S.E. 197 (1935); *Black v. B.B. Kirkland Seed Co.*, 158 S.C. 112, 155 S.E. 268 (1930).

19. 158 S.C. 112, 155 S.E. 268 (1930).

defendant had failed to deliver abruzzi rye called for in the contract of sale. The defendant relied on a disclaimer clause. The court decided that the only cause of action stated was for breach of an express warranty. The "only questions that should have been submitted to the jury, therefore, were: (1) Whether or not plaintiff applied for and received rye represented to be abruzzi rye; and (2) if so, whether the rye delivered was in fact abruzzi rye."²⁰ This would be the same test applied today if a contract contained a description of the product and also a general disclaimer.

Disclaimers are not, however, totally inoperative.²¹ If, for example, a seller agrees to supply a brewer with "rustproof" cans this warranty could be disclaimed if the disclaimer were to read: "The seller will use his best efforts to provide cans which will not rust but it is expressly understood that the seller has no other responsibility with respect thereto, and it is agreed that the buyer assumes the risk that the cans might rust." Actually, the express warranty is not disclaimed. A more accurate statement would be to say that in reading the contract as a whole the description of "rustproof" cans never really becomes a basis of the bargain and therefore no express warranty was in fact created. Similar results should be reached under the 1954 version. Since the express warranty was not created, the question of disclaiming an express warranty, an act prohibited by the 1954 version of the Code, could not arise. Thus the conclusion is reached that the actual operational differences between the 1954 and 1962 version of section 2-316(1) are non-existent. Even so, the 1962 version is preferable as it clearly allows the parties to define terms used in the contract.

B. Disclaimer of Implied Warranties

(1) Merchantability

Generally, an implied warranty of merchantability must be disclaimed by specific words.²² There are, however, certain

20. *Id.* at 116, 155 S.E. at 269.

21. W. HAWKLAND, *supra* note 14, at 74.

22. UNIFORM COMMERCIAL CODE § 2-316(2) (1962 version). This section provides:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in the case of writing must be conspicuous. . . . Language to exclude all implied warranties of fit is sufficient if it states for example, that "There are no warranties which extend beyond the description on the face hereof."

statutory exceptions to the specific wording requirement and South Carolina has made certain changes in this area.²³ Section 2-316(3)(a) of the 1962 version of the Code provides that by the use of such phrases as "as is" or "with all faults" the implied warranty of merchantability may be disclaimed. South Carolina has changed this section by deleting the words "as is" and "with all faults" and requiring that such a disclaimer may be made by specific words only. Prior to the Code, similar phrases were held to exclude the implied warranty of merchantability. Apparently, in South Carolina there have been no decided cases prior to the adoption of the Code on this point. The court has held, however, that whether the seller intends to warrant the product is a question for the jury.²⁴

Section 2-316(3)(c) allows an implied warranty of merchantability to be excluded by usage of trade. South Carolina amended this section by the addition of the phrase "between merchants" before "usage of trade." The Code defines usage of trade as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."²⁵ Since, in order for usage of trade to be applicable, the transaction will most likely be between merchants, the addition of the words is somewhat superfluous. The added language excludes, however, the situation in which both parties are familiar with the usage of trade, but one of them is not a merchant. Since the obvious purpose of this change is to protect the unaware non-merchant, the general obligation of good faith imposed by the Code²⁶ should be ade-

23. S.C. CODE ANN. §§ 10.2-316(3)(a) and (c) (Supp. 1966). Subsection (a) of the South Carolina version provides:

[U]nless the circumstances indicate otherwise, all implied warranties are excluded by *specific language* which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty

Subsection (c) of the South Carolina version provides:

[A]n implied warranty can also be excluded or modified by courses of dealing or course of performance or, *between merchants* by usage of trade.

The portions in italics indicate changes made by the South Carolina amendment.

24. Rodrigues ads. Habersham, 1 Speers 314 (S.C. 1843).

25. UNIFORM COMMERCIAL CODE § 1-205(2). For a discussion of usage of trade in South Carolina, see Note, *Custom and Usage in Contracts in South Carolina*, 10 S.C.L.Q. 420 (1958).

26. UNIFORM COMMERCIAL CODE § 1-203 (1962 version).

quate protection of a non-merchant from a merchant who knows the usage of the trade.

(2) Fitness for a particular purpose

The warranty of fitness for a particular purpose is found in Section 2-315 of the Code. Under the 1962 version of the Code this warranty could be excluded by section 2-316(2) by *general language* which was written and conspicuous. This section stated that an implied warranty of fitness for a particular purpose may be excluded by the use of this language: "There are no warranties which extend beyond the face thereof." Under the South Carolina amendment to this section, the warranty of fitness can be excluded only by *specific language* which must be in writing and conspicuous. If a purchaser relies upon the seller's judgment, and the seller knows the purchaser's needs, the disclaimer of the warranty of fitness for a particular purpose should be specific. This will avoid any surprise disclaimers.

C. Construction of Disclaimers

The last sentence of section 2-316 as amended by South Carolina, says that if a sales contract has a warranty disclaimer clause which is ambiguous, the ambiguity will be construed against the seller.²⁷ In today's market the seller is generally the party with the greater bargaining power and, therefore, this clause should not cause considerable difficulty. There are a few situations, however, in which the buyer has the greater bargaining power, e.g., when the product is perishable (farm products). In such a situation any ambiguity in a warranty disclaimer clause would be construed against the seller of the perishable farm products.

A suggested change has been that the disclaimer should be construed in all situations against the person with the greater bargaining power.²⁸ Such a change would create the problem of proving who had the greater bargaining power. This burden

27. The South Carolina amendment to section 2-316(2) apparently is taken from the 1952 version of the Code. This section of the 1952 version of the Code provided:

Exclusion or modification of the implied warranty of merchantability or of fitness for a particular purpose must be in specific language and if the inclusion of such language creates an ambiguity in the contract as a whole it shall be resolved against the seller

Uniform Commercial Code § 2-316(2) (1952 version).

28. When the buyer actually has the greater bargaining power, it is doubtful that the sales contract will contain a warranty disclaimer.

would raise an interesting question. For example, if one party actually did not have the greater bargaining power but convinced the other party that he did, who would actually have the greater bargaining power for purposes of this Code section? The present version of the Code avoids these problems, by specifically setting out that an ambiguous contract provision will be construed against an ascertainable person, the seller. This gives the parties to a contract an indication of the manner in which courts will construe the contract, a factor which should be weighed before any further changes are made in this section.

IV. PRIVACY, NOTICE REQUIREMENT, AND STATUTE OF LIMITATIONS

A. *Privacy not required under the Code*

South Carolina has made several changes in the Code in what could be called the "products liability" area.²⁹ The present version of the official Code offers three alternatives to Section 2-318's privacy requirements,³⁰ indicating that this is a policy question. South Carolina, however, chose to adopt a fourth version—one of its own making. Section 10.2-318 of the South Carolina Code states that privacy is no longer required for either

29. S.C. CODE ANN. § 10.2-318 (Supp. 1966) (privacy not required for a warranty action); § 10.2-607(3)(a) (notice not required as a condition precedent for a warranty action when personal injury is involved resulting from the use of consumer goods); § 10.2-725 (cause of action for warranty accrues when defect is or should have been discovered; also, length of time for warranty action changed from four to six years).

30. The three alternatives proposed by the Code drafters are:

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 the warranty. A seller may not exclude or limit the operation of this section.

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.

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 the 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.

UNIFORM COMMERCIAL CODE § 2-318 (1966 amendment).

personal injury or property damage. Prior to the adoption of the Code, the South Carolina Supreme Court had held that privity was a requirement for an express warranty action.³¹ Most jurisdictions have dispensed with the privity requirement in cases involving personal injury but have retained the requirement in cases involving property damage. This was the position of the most extreme of the alternatives offered by the drafters of the original Code. The South Carolina legislature, by this amendment, has placed South Carolina in a small but growing number of states which have abolished the privity requirement for both personal injury and property damage.³²

Section 2-318, it should be remembered, is a privity section and does not affect warranties, disclaimers, or limitation on warranties contained elsewhere in the Code. The last sentence of the section states that "[a] seller may not exclude or limit the operation of this section." Thus, the seller cannot limit the persons to whom the section gives a right of recovery, but the seller may still disclaim warranties or limit their application within the limitations set by other sections of the Code.³³ The legislature does place one illogical limitation on this section. The application of the section is limited to natural persons which therefore excludes its application for corporations. Thus, if a corporation were to sue on a warranty action, privity would still be a requirement since pre-Code law would be applicable.

B. The Notice Requirement for Warranty Actions

The second change in this "products liability" area is that in South Carolina, notice is not required in the case of consumer goods if personal injury results.³⁴ The original version of the Code required notice to be sent to the seller under all circumstances. Apparently, this change is merely a continua-

31. See *Odom v. Ford Motor Co.*, 230 S.C. 320, 95 S.E.2d 601 (1956). But see *Springfield v. Williams Plumbing Supply Co.*, 249 S.C. 130, 153 S.E.2d 184 (1967). See also Note, *Odom v. Ford and the Privity Requirement in South Carolina*, 17 S.C.L. REV. 259 (1965).

32. See, e.g., *Gherna v. Ford Motor Co.*, 246 Cal. App. 639, 55 Cal. Rptr. 94 (Ct. App. 1966); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965); *Santor v. A&M Karagheusian*, 44 N.J. 52, 207 A.2d 305 (1965); *Ford Motor Co. v. Grimes*, 408 S.W.2d 313 (Tex. Ct. Civ. App. 1966). See generally Annot. 16 A.L.R.3d 683 (1967).

33. UNIFORM COMMERCIAL CODE § 2-316 (disclaimer of warranties); § 2-719 (limitation of remedies).

34. S.C. CODE ANN. § 10.2-607(3) (a) (Supp. 1966).

tion of pre-Code South Carolina law. The notice requirement was a creation of the Uniform Sales Act³⁵ which was not adopted in South Carolina.

The requirement that notice be given to the seller when personal injury is involved has been criticized.³⁶ Dean Prosser states:

As between the immediate parties to the sale, this is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries and notice to a remote seller, it becomes a booby-trap for the unwary. The injured consumer is seldom "steeped in the business practice which justifies the rule," and at least until he has had legal advice, it will not occur to him to give notice to one with whom he has had no dealing.³⁷

When a personal injury and notice requirement were previously considered, many courts carved out several exceptions to the rule. Courts held that the notice provision was not intended to apply to personal injuries,³⁸ that it was entirely inapplicable as between parties who had not dealt with one another as the defendant was not the immediate seller,³⁹ and, that personal injuries were consequential damages, the right to which could not be impaired under the Uniform Sales Act.⁴⁰ One court even held that notice given after the original complaint had been served was sufficient, when the complaint was later amended to allege notice.⁴¹

The notice requirement does serve a useful function when two businessmen are involved in the sale and the breach of warranty does not result in personal injury. For example, if the seller

35. UNIFORM SALES ACT § 49. This section provides:

But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor.

36. 2 L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY § 19.05[1], at 539 (1967); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97 (3d ed. 1964).

37. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97, at 679-80 (3d ed. 1964).

38. *Kennedy v. F.W. Woolworth Co.*, 205 App. Div. 648, 200 N.Y.S. 121 (1923).

39. *Ruderman v. Warner-Lambert Pharmaceutical Co.*, 23 Conn. Supp. 416, 184 A.2d 63 (1962).

40. *Wright Bachman, Inc. v. Hodnett*, 235 Ind. 307, 133 N.E.2d 713 (1956).

41. *Hampton v. Gebhart Chili Powder Co.*, 294 F.2d 172 (9th Cir. 1961).

were to ship a carload of a product which was defective, section 10.2-607(3)(a) would require notice by the buyer of the defect in the product. In this case the notice requirement would give the seller the opportunity to remedy the defect and therefore minimize the commercial loss to the buyer. Such a reason does not apply, however, when personal injury is involved.

A caveat in this area would be that while notice is not required for personal injury, if the litigation involves property damage in addition to personal injury, notice would apparently still be required as to the property damage.

C. Statute of Limitations

The length of a statute of limitations is not as important as the time at which the cause of action accrues. In section 10.2-725 the South Carolina Legislature changed the length of the statute of limitations, from four to six years, and the time at which the cause of action accrues for a breach of warranty action. Under the original Code, the cause of action accrues when the tender of delivery is made,⁴² except in the case of a prospective warranty "where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance."⁴³ The original version of the Code imposes an undue hardship upon the buyer who purchases a product expecting it to last a lifetime when his most effective remedy lasts only four years. Dean Hawkland, in discussing the statute of limitations provision of the Code, states that the "harshness of section 2-725 may be more fanciful than real."⁴⁴ Dean Hawkland, however, is referring to a breach of warranty of title and not to a personal injury. When a breach of warranty for title is involved, Hawkland's statement is true. If the buyer's claim against the seller for a breach of warranty of title is barred by the statute of limitations, then any action by a third party against the buyer in a dispute involving title will also be barred by the statute of limitations. In this respect, the South Carolina amendment should be changed.

42. UNIFORM COMMERCIAL CODE § 2-725(2) (1962 version). This section provides:

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

43. *Id.*

44. W. HAWKLAND, *supra* note 14, at 272.

Dean Hawkland makes no comment concerning the statute of limitations when a personal injury is involved. In such a situation, the harshness of the rule will be more real than fanciful. Louis Frumer and Melvin Friedman, in their treatise on products liability, state, concerning the breach of warranty for merchantability, that "where a product is latently defective and this is not known and cannot be known at the time of sale, a cause of action in warranty should not accrue until the defect is or should have been discovered."⁴⁵ While recognizing that the majority rule is contrary, they contend that each case should be decided on its merits with the long use of the product being evidence of the product's merchantability rather than conclusively deciding the issue on the basis of the statute of limitations.⁴⁶

A recent New York case illustrates the harshness of a rule that a warranty action accrues when tender of delivery is made.⁴⁷ The buyer had purchased a generator that allegedly would last, as per a warranty, for thirty years. When the generator failed several years later, which period exceeded the period for the statute of limitations, the buyer was not allowed to recover because his claim was barred by the statute of limitations. Another court, faced with the same factual situation, may interpret the warranty as being prospective and allow recovery.

The reason usually given for having the statute begin to run at the time of the sale is to give finality to the business transaction. This policy reason must be weighed against other factors such as compensating the plaintiff injured by the defective product. Furthermore, should the plaintiff's suit be based on negligence or the new emerging action of strict tort liability, the defendant would still need the records and files that he "destroyed" after the running of the statute of limitations for a warranty action.

A further policy argument has been given:

[E]arly imposition of the bar is the desire to allow one who has relinquished control of the agency which

45. 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 40.02[2], at 12-15 (1967).

46. *Id.*

47. *Citizens Utilities Co. v. American Locomotive Co.*, 11 N.Y.2d 409, 230 N.Y.S.2d 194, 184 N.E.2d 171 (1962).

eventually causes the harm to rest assured that he is not subject to a long delayed liability, as well as the belief that the plaintiff's burden of proving causation, though more onerous if considerable time precedes the harm, is an insufficient safeguard against false claims.

These considerations, however, would have to seem outweighed by the inequities of depriving the plaintiff of an effective remedy.⁴⁸

No undue burden, therefore, is imposed upon the defendant to have the cause of action accrue at the time the breach was or should have been discovered.

V. MISCELLANEOUS SECTIONS

A. *Acceptance of Goods—Generally*

The Code deems acceptance of the goods to have taken place when the buyer signifies that the goods are conforming.⁴⁹ The South Carolina amendment, however, adds the requirement that the notice of acceptance must be in writing to be effective. The reason for this change was to make the time of the acceptance more definite. One commentator on this section states that "[a]cceptance is the mental attitude of the buyer, his indicated willingness to be the owner of the goods, and this is likely to be expressed solely in words as it is by other supporting conduct."⁵⁰ Another reason suggested for not requiring the acceptance to be in writing was to allow for the unusual situation that would indicate the buyer's willingness to accept the goods and yet would not be in writing.⁵¹

The apparent reason for the South Carolina amendment is to prevent a buyer from having to use or keep goods that later are found to be defective. This problem is unlikely to occur due to the Code's provision for revocation of acceptance found in section 2-608.⁵² If a buyer finds subsequent to his inspection

48. *Developments in the Law—Statute of Limitations*, 63 HARV. L. REV. 1173, 1203 (1950).

49. UNIFORM COMMERCIAL CODE § 2-606(1)(a) (1962 version).

50. 3 R. DUESENBERG & L. KING, *SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE* § 2.04[4], at 2-50 (1966).

51. W. HAWKLAND, *supra* note 14, at 230.

52. Section 2-608 provides:

(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

and acceptance that the produce is defective, he may then, within a reasonable time after acceptance revoke his acceptance and, if he does, he will have the same rights and duties as if he had originally rejected the goods. With this protection for the buyer, it appears useless to require the seller to obtain from the buyer a written acceptance for the goods.

B. Acceptance of Goods—Commercial Unit

South Carolina has also changed the time at which acceptance occurs if a commercial unit is involved. The original Code states: "Acceptance of a part of any commercial unit is acceptance of that entire unit."⁵³ The South Carolina amendment changes this section so that acceptance of a part of a commercial unit is not acceptance of the entire unit.⁵⁴ The Code defines a commercial unit as "a unit of goods as by common usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use."⁵⁵ This definition provides the reason for the rule that acceptance of a part of a commercial unit is acceptance of the whole. To allow the buyer to accept part of a commercial unit and reject the remainder may well impair the value of the commercial unit. The legislature apparently became overly concerned with the protection of the buyer and provided it at the expense of the seller.

A buyer does not need "protection" when the entire commercial unit is acceptable. The only time a buyer may need this protection is when one part of the commercial unit is defective which renders the entire commercial unit useless or depreciates its value. The draftsman of the South Carolina amendment apparently did not properly comprehend the operation of the

(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 a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

53. UNIFORM COMMERCIAL CODE § 2-606(2) (1962 version).

54. S.C. CODE ANN. § 10.2-606(2) (Supp. 1966).

55. UNIFORM COMMERCIAL CODE § 2-105(6) (1962 version).

revocation of acceptance for commercial units found in section 2-608.⁵⁶ This section allows a buyer to revoke his acceptance of the entire commercial unit if the non-conformity of a part of the commercial unit substantially impairs the value of the whole unit. For example, suppose a buyer orders a card table and four matching chairs.⁵⁷ If the chairs are shipped first, and the buyer accepts them, he will have accepted the commercial unit. If when the table is shipped he finds that it is defective or of a contrasting color to the chairs, he could then revoke his acceptance under section 2-608. Thus the buyer is placed in the same position as if he had never accepted any part of the commercial unit, and he is protected. The seller is also protected in that he knows that as long as he delivers non-defective goods to the buyer, who has accepted the part of the commercial unit, the contract will be upheld by the courts.

C. RAUCH WISE

56. *See supra*, note 52.

57. UNIFORM COMMERCIAL CODE § 2-105(6) (1962 version). This would qualify as a "commercial unit" because it is a "set of articles."