

# E-Commerce and Products Liability: A Primer on Exposure at the Speed of Light

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## I.

### INTRODUCTION

**P**roduct sellers face both promise and peril as they move into the world of electronic commerce (E-commerce). The promise is obvious: global markets beckon at the speed of light.

This article addresses one of the evolving legal perils associated with such market activity: the vulnerability of sellers to a range of products liability law that matches the worldwide market. Its analysis concentrates on the common law of the individual states that comprise the United States — the major hub of E-commerce. However, it is also worth noting that the broad parameters of products liability law across the industrialized world provide, at least theoretically, considerable room for consumer litigation.<sup>1</sup> Thus, this analysis of United States law will recommend courses of action that may be prudent for global e-marketers who wish to minimize the risk of liability for products that allegedly caused injury. Because the law of E-commerce is only now in the birth process, however, the recommendations offered are necessarily predictive.

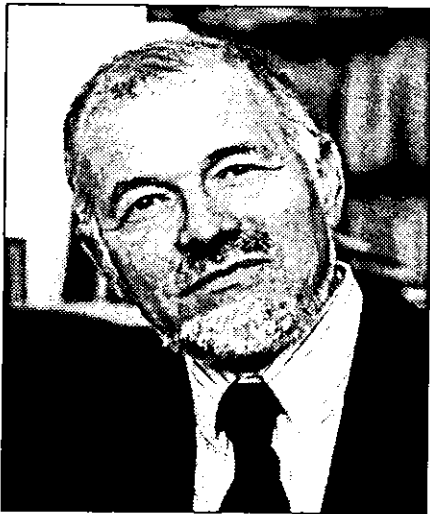
## II.

### PRODUCTS LIABILITY: A BRIEF OVERVIEW

It is first necessary to define products liability, a concept that has come to symbolize some of the most worrisome aspects of law for enterprises. In common parlance, products liability is liability imposed on sellers, under a variety of theories, for injuries or damages associated with products. In the United States, this kind of liability originated with judge-made law. In other

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<sup>1</sup>See, e.g., Marshall S. Shapo, *Comparing Products Liability: Concepts in European and American Law*, 26 CORNELL INT'L L.J. 279 (1993); Mark A. Behrens & Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But Access to Recovery is Limited by Formidable Barriers*, 16 W. PA. J. INT'L BUS L. 669 (1996).



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countries, however, and to some recent extent in the United States, liability is grounded in legislation. The bases for liability are several and diverse in theory. Liability may arise from specific representations by the seller, even when made without negligence or higher degrees of fault. Liability also may stem from careless conduct by the seller (i.e., negligence) in the process of designing, manufacturing or selling goods. Most controversial with respect to design claims, liability may be premised on an allegation that a product is dangerously defective, even if the injured person cannot prove fault.

### III. REPRESENTATIONS

The most direct form of products liability arises from a seller's representations. These may appear on the labeling or packaging of the product, and also in a variety of media and promotional forms.

#### A. *Express Warranty*

##### 1. Actionable Language

The simplest type of representation is the express warranty. Essentially a creature of contract law, an express warranty under the Uniform Commercial Code is "[a]ny affirmation of fact or promise made by the seller to the buyer



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which relates to the goods and becomes part of the basis of the bargain.”<sup>2</sup>

The language of this definition appears to contemplate a direct transaction between the parties — an exchange of money for goods based on an agreement about the character and quality of goods and price. Even historically, however, the deal did not have to be face to face; an express warranty could be created by a document sent by post.

a. No Privity Hurdle

With the development of products liability law over the last generation, a seller at the top of an extended distribution chain can be liable on an express warranty even if the document containing that language passes through a number of intermediaries. Thus, for example, representations in an owner’s manual for a product may constitute express warranties.<sup>3</sup>

Indeed, advertisements may be construed as express warranties to “ultimate consumers” who buy the product from an intermediate seller. On this point, *Rogers v. Toni Home Permanent Co.*,<sup>4</sup> is a landmark case. In its 1958 decision, the Ohio Supreme Court spoke of “glowing” descriptions of the “worth, quality and benefits” of products presented in advertisements. The court concluded that warranties in advertisements (and on labels) were “inducements to the ultimate consumers,” for which the manufacturers should “be held to strict accountability” as to consumers who purchased products “in reliance on such representations” and were injured by defects in the products.<sup>5</sup> In a more recent

<sup>2</sup>U.C.C. § 2-313(1)(a).

<sup>3</sup>See, e.g., *Kinlaw v. Long Mfg. N.C., Inc.*, 259 S.E.2d 552, 557 (N.C. 1979) (tractor).

<sup>4</sup>147 N.E.2d 612 (Ohio 1958).

<sup>5</sup>*Id.* at 615-16.

case involving a sales brochure for a grain storage building, another court emphasized that the defendant's representations told the "ultimate customers," not the dealers, that "its designs will be tailor-made and of highest quality."<sup>6</sup>

The Ohio court's language in *Rogers* demanding "strict accountability" underscores the fact that express warranties are a commercial-law version of strict liability. Having once established the warranty, the plaintiff need only demonstrate that the product breached the warranty; the plaintiff need not show fault on the part of the manufacturer.

Since courts now accept that printed warranties can leap distributional boundaries, it seems illogical that courts would construct barriers against express warranties presented in electronic form. These communications are the electronic equivalent of print documents, reducible to hard copy simply by engaging a printer. The verbal content of the warranty itself is identical, whether presented in electronic or conventional print form. Beyond the close parallels to warranties in conventional contract documents, warranty language on the Web presents strong analogies to all manner of pre-Web media. Since the warranty can be printed out, it is like a newspaper ad. Because the warranty is electronically transmitted, it is similar to radio and television. And, since it may be introduced by bright color logos, it is like the billboards, a medium viewed by courts as symbolic of the power of modern advertising.<sup>7</sup>

#### b. Warranties in Multiple Media

Rules governing the point at which a statement becomes an express warranty in E-commerce presumably will parallel those that govern printed purchase orders. Yet some issues may arise regarding a claimant's efforts to allege a functional integration of electronic documents with those originally found in print form. In this regard, a recent Michigan case dealt with two different pieces of paper involved in the purchase of an industrial strap. Consider, for example, the following words and symbols in an electronic price quotation from the seller: "800 # Break #380 Strength." A specification on a separate paper created by the buyer states: "AVE BREAKING STRENGTH: 800 LBS." For those who might view the melding of two paper documents as pushing the envelope to derive a warranty, it may be even more a stretch to combine a seller's e-document with a buyer's printed one. Yet, in principle, it would appear that the analysis should be the same. On facts closely analogous to

<sup>6</sup>*Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 831 P.2d 724, 731 (Wash. 1992).

<sup>7</sup>*See, e.g., Scheuler v. Aamco Transmissions, Inc.*, 571 P.2d 48, 51 (Kan. Ct. App. 1977) (quoting 2 Lewis R. FRUMER & MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* ¶ 16.04[4][a], at 3-223 (noting that manufacturers advertise "on labels, on billboards, on radio and T.V., in newspapers and magazines," and in brochures provided to dealers to pass on to customers)).

these, the Michigan court concluded that the evidence would permit a finding of breach of express warranty “that the strapping was to have an average breaking strength of eight hundred pounds.”<sup>8</sup> Among other lessons, this decision offers that quantitative precision in a statement can form the principal touchstone for liability.

c. Generalities: Puffs and More

The nature of advertisements in electronic form offers another potentially interesting set of issues. Much advertising takes the form of imprecise generalities — in TV commercials, on billboards, or in headline catchwords found in the print media. Like the law of fraud, the law governing express warranties has a term for generality that falls on the nonliability side of the line: “puffery.” Colorful compressed slogans designed to draw consumers are likely to garner leeway from the courts, which will be reluctant to qualify these slogans as express warranties.

Nevertheless, as concerns E-commerce, courts must not only confront whether there is a contextual or substantive difference between electronic representations and those initially communicated in print, but also whether there are differences between electronic representations and those made orally. While social-science researchers may debate for some time whether the same words make a different impression in E-commerce than they do in more traditional media, there certainly is evidence that people are more likely to remember what they see than what they hear. The glitz of the computer screen may provide a boost to the enforcement of liability theories against E-commerce business operations.

In 1965, for example, the Arkansas Supreme Court held that the term “A-1” was an express warranty.<sup>9</sup> In 1971, the Oklahoma Supreme Court went so far as to say that a statement representing that a station wagon was in “A-No. 1 condition” and could be relied on “because it had been a family car” might constitute a “fraudulent misrepresentation.”<sup>10</sup> Hopefully, courts in the 21st Century will be no more likely to find that such language constitutes an express warranty in print and electronic media (including the Web) than they are in face-to-face interactions. Increasingly, consumers and the judiciary discount such language because of growing customer sophistication, jaded perceptions of strict liability, and the continuing drumbeat of state and federal tort reform.

d. “Red-flag” Words.

<sup>8</sup>Scott v. Illinois Tool Works, Inc., 550 N.W.2d 809, 814 (Mich. Ct. App.1996) (finding breach of an express warranty based upon price quotation with both handwritten and typewritten terms plus specification on separate paper created by plaintiff’s employer).

<sup>9</sup>Loe v. McHargue, 394 S.W.2d 476, 476-78 (Ark. 1965).

<sup>10</sup>Morris Chevrolet, Inc. v. Pitzer, 479 P.2d 958, 959-61 (Okla. 1971).

To be sure, there are some words that are risky for sellers to use, whether Web-related or not. High on the list of red-flag words is the term, "safe." By itself, the term may well be viewed as an express warranty, particularly as to products for which the consumer's focused interest is accident-free performance. For example, the court found liability in an emotionally charged case when a vaporizer, intended for use by children, tipped over and caused disfiguring burns.<sup>11</sup> The word "safe" even generated liability for a device used to help unskilled golfers improve their game. The little-used theory of non-fault misrepresentation in section 402B of the Restatement (Second) of Torts prevailed to support liability in that instance.<sup>12</sup>

Obviously, the use of other words that virtually insure the safety of a product include "guarantee" and "warranty." Those words are likely to expose sellers to relatively expansive remedies. Thus, a tire manufacturer was unsuccessful in arguing that the words "guaranteed for 36,000 miles . . . against blowout" promised only to provide a replacement tire if a blowout occurred. In recognizing this language as an express warranty of quality so as to support a finding that the disclaimer was unconscionable, the court reversed a directed verdict for the defendant sellers. It declared that if the defendants did "not want to be liable for consequential damages, they should not expressly warrant . . . tires against blowouts."<sup>13</sup>

Another example of the perils of using "guarantee" language in the Web setting occurred in a grisly case involving the failure of an automatic transmission, resulting in injuries inflicted by a driverless automobile. Beyond providing a written "[L]ifetime [G]uarantee" that accompanied the transmission, the defendant had extolled its "Coast-to-Coast Ironclad Guarantee" in national advertising (including newspaper ads and radio commercials). Upholding a jury finding of express warranty, the court remarked that "[a]dvertising may be the basis of or form a part of an express warranty."<sup>14</sup> With the Internet now situated as a vehicle for national advertising, it is reasonable to expect that courts will transfer these holdings to E-advertising.

The interpretive breadth to which courts may stretch express warranty and similar concepts is evident in a case involving Honda Motors. Honda's advertisements for its all-terrain vehicles "extolled the use of all-terrain vehicles in general," and featured "representations concerning the safety of all-terrain vehicles and, without being model-specific, portrayed all-terrain vehicles as

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<sup>11</sup>See, e.g., *McCormack v. Hanksraft Co.*, 154 N.W.2d 488 (Minn. 1967).

<sup>12</sup>*Hauter v. Zogarts*, 534 P.2d 377 (Cal. 1975).

<sup>13</sup>*McCarty v. E.J. Korvette, Inc.*, 347 A.2d 253, 262 (Md. Ct. App. 1975).

<sup>14</sup>*Scheuler v. Aamco Transmissions, Inc.*, 571 P.2d 48, 51 (Kan. Ct. App. 1977).

being suitable for use by the entire family — including small children.” The court concluded that such advertising provided a basis for suit under Restatement section 402B, assuming that Honda’s “advertising about all-terrain vehicles in general . . . contained misrepresentations applicable to all Honda all-terrain vehicles,” including the one that seriously injured the 12-year-old plaintiff.<sup>15</sup>

To this extent the Honda case and the vaporizer case make the same point: representations of safety about products that may be used by or for children flash warning signals to the courts. In reversing a judgment for the manufacturer in the ATV case, the court referred to the fact that the defendant had “represented that all-terrain vehicles could be operated by young children.”<sup>16</sup> Given the law’s solicitude for children, it would appear that Web advertisers act as much to their peril with respect to child-directed representations as do advertisers in any other medium.

## 2. Reliance Requirement

### a. Stronger and Weaker Versions

A continuing battleground for express representations involves the question whether the plaintiff must demonstrate reliance to make out a case. One Uniform Commercial Code (hereinafter UCC) comment on express warranty implies a strong requirement of individualized reliance, stating that “[e]xpress’ warranties rest on ‘dickered’ aspects of the individual bargain.”<sup>17</sup> Although this statement places a significant burden on consumers, sellers must reckon with comment 3, which declares that “[i]n actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the descriptions of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.”<sup>18</sup> Beyond that, comment 3 also requires that “any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.” Indeed, there is established authority for the proposition that “[i]t is unnecessary that the buyer actually rely” on any statement that is a “description of the goods, other than a seller’s mere opinion of the product.”<sup>19</sup>

Electronic sellers may find that the “dickered bargains” comment is a powerful tool for defense when the representations, on which plaintiffs premised their suit, do not appear in the Web materials that allegedly stimulate the sale.

<sup>15</sup>Ladd v. Honda Motor Co., 939 S.W.2d 83, 99 (Tenn. Ct. App. 1996).

<sup>16</sup>*Id.* at 100.

<sup>17</sup>U.C.C. § 2-313 cmt. 1.

<sup>18</sup>*Id.* cmt. 3.

<sup>19</sup>*See, e.g.,* Martin v. American Med. Sys., Inc., 116 F.3d 102, 105 (4th Cir. 1997), referring to Daughtrey v. Ashe, 413 S.E.2d 336, 338-39 (Va. 1992), in which the court says that “any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.”

Illustrative of the obstacles posed for buyers by the reliance requirement is a case involving the purchase of paneling that contained urea formaldehyde. The purchase was made before the buyer received a letter from the seller's president stating that the chemicals used in the paneling were "non-toxic." The letter came in response to an inquiry placed by the plaintiff when he began to suspect that the paneling had caused respiratory problems. The court rejected the suit, ruling that the letter "formed no part of the basis of the sale" because the purchase had preceded receipt of the letter.<sup>20</sup>

A Washington decision involving vehicles used by youngsters exhibits an even more uncompromising reliance requirement. In that case, two young children sued under section 402B for injuries that occurred while riding a trail mini-bike. The court determined that the Restatement did "not apply where the representation is not known, or there is indifference to it, and it does not influence the purchase or subsequent conduct."<sup>21</sup>

b. Particular Reliance Unnecessary

The range of judicial views on the reliance requirement is illustrated by the opinions of the federal district court and the Third Circuit Court of Appeals in the celebrated *Cipollone* cigarette case. District Judge Sarokin, quoting comment 3 for the proposition that "no particular reliance . . . need be shown," labeled "the [u]ltimate inquiry" as whether an affirmation is part of the "fabric of the agreement." He then held that a buyer "need not show particular reliance to establish this fact."<sup>22</sup> Judge Sarokin drew from various Code comments the proposition that section 2-313 "centers on whether the agreement or bargain . . . objectively viewed, contains the affirmations or promises — not on whether a buyer's purchasing decision, subjectively viewed, depends on the statements."<sup>23</sup> This led him to conclude that "a statement in an advertisement becomes part of the basis of the bargain, if, objectively viewed, the statement would tend to induce the purchase of the advertised product."<sup>24</sup> However, "[w]hether or not the statement actually induced a particular purchase is not relevant to a determination of whether the statement may constitute an express warranty."<sup>25</sup>

<sup>20</sup>*Schimmenti v. Ply Gem Indus., Inc.*, 549 N.Y.S.2d 152, 154 (App. Div. 1989). *Cf. Wheeler v. Sunbelt Tool Co.*, 537 N.E.2d 1332, 1341 (Ill. App. Ct. 1989), arising out of an accident attributed to an allegedly defective tool. The court rejected the suit when the plaintiff and his employer either did not see, or could not remember seeing, a warranty-instruction pamphlet before the accident.

<sup>21</sup>*Baughn v. Honda Motor Co.*, 727 P.2d 665, 668 (Wash. 1986).

<sup>22</sup>*Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208, 213 (D.N.J. 1988), *aff'd in part and rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992).

<sup>23</sup>*Id.* at 214.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

### c. Compromise Positions

The Third Circuit Court of Appeals adopted a somewhat different approach. It was not persuaded by the manufacturer's contention that the plaintiff must show reliance. The court of appeals observed that the manufacturer had "fail[ed] to explain how reliance can be relevant to 'what a seller agreed to sell.'"<sup>26</sup> Yet it also could not agree with the district judge's "purely objective theory," noting that such a theory "fails to explain how an advertisement that a buyer never even saw becomes part of the 'basis of the bargain.'"<sup>27</sup> Instead, the appellate court's interpretation of New Jersey law steered a middle course: "[a] plaintiff effectuates the 'basis of the bargain' requirement . . . by proving that she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise."<sup>28</sup>

According to the Third Circuit, the trial court's jury instructions had not required the plaintiff to prove that his decedent had "read, seen, or heard the advertisements at issue," and did not allow the defendant to prove that if she had, she did not believe their assurances of safety.<sup>29</sup> Nevertheless, the Third Circuit declined to order a directed verdict for the manufacturer on the express warranty claim, indicating that the jury should be asked whether the decedent "disbelieved the advertisements." This inquiry was "distinct from 1) whether she should have disbelieved the advertisements, and 2) whether it would have been unreasonable to smoke had [the manufacturer] not been advertising that smoking was safe."<sup>30</sup>

Another search for the middle ground appeared in *Ladd v. Honda Motor Co.*,<sup>31</sup> a Tennessee decision involving serious injuries to the 12-year-old user of an all-terrain vehicle who had been allowed to operate the vehicle by his uncle (the owner) and his father. The court drew on advertisements that "represented that all-terrain vehicles could be operated by young children," which it found "materially influenced" the decisions of the uncle and the father.<sup>32</sup>

### d. Disagreements Summarized

There are strong cross-currents in the law about the existence and nature of a reliance requirement for express statements that turn out to be misstatements. On the one hand, there is considerable logical force in the rhetorical question

<sup>26</sup>*Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 567 (3d Cir. 1990), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992).

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 569.

<sup>30</sup>*Id.* at 570.

<sup>31</sup>939 S.W.2d 83 (Tenn. Ct. App. 1996).

<sup>32</sup>*Id.* at 100.

tendered by UCC commentators: "Why should one who has not relied on the seller's statement have the right to sue?"<sup>33</sup> On the other hand, echoing the lament of some commentators that "the reliance requirement may disappear altogether,"<sup>34</sup> a Tenth Circuit opinion cited several decisions to support the majority rule that it is "unnecessary to require reliance from the buyer before a statement by the seller can be considered an express warranty."<sup>35</sup>

e. Advice to Sellers

The comments to section 2-313 disclose a logic not altogether clear. It is certainly not unreasonable to interpret the comments as requiring that the consumer specifically perceive the statement at issue, as opposed to proving simply that the advertiser launched a statement over the wires or into print that had a natural tendency to persuade consumers to buy its product. Moreover, on the tort side, section 402B specifically requires that the consumer show "justifiable reliance."<sup>36</sup>

However, with the law concerning E-commerce largely undeveloped, advertisers are advised to assume that what they sow on the Web with intent to sell may generate a presumption of reliance by injured consumers. The risk-averse advertiser must assume that any express warranty is vulnerable to claims by a range of people who have not specifically relied on it. If anything, the vastness of the Web environment will expand this field of liability. Furthermore, courts may not sympathize with efforts to cabin responsibility for misstatements intended to persuade large audiences of people across the oceans. On the flip side, sellers will contend that they should be shielded from what amounts to unlimited liability, perhaps citing Mr. Justice Cardozo's concerns about "liability in an indeterminate amount for an indeterminate time to an indeterminate class."<sup>37</sup>

The most basic caution is that E-marketers avoid unqualified safety language, including all variants of the word "safe." They should avoid as well any broad warranty-guarantee language, unless the seller is fully prepared to stand behind a product, save whatever limitation can legally circumscribe a warranty. As to whether particular words or phrases cross the line beyond sellers' "puffery," probably the best advice is that sellers must use common sense with a certain degree of risk aversion. Seeking counsel's advice on breadth or limits of selling language is surely in order.

If language can be read to suggest particular performance standards, some courts may construe that same language as an express warranty or an actionable

<sup>33</sup>JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 334 (4th ed.1995).

<sup>34</sup>*Id.*

<sup>35</sup>*Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 645 (10th Cir. 1991).

<sup>36</sup>RESTATEMENT (SECOND) OF TORTS § 402B (1965).

<sup>37</sup>*Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

misrepresentation. In an interstate market, cautious sellers should assume that they are subject to judgment by the lowest common denominator — that is, the most expansive interpretation applicable.

### *B. Other Nonfault Liabilities*

Sellers should also remember that liability under the doctrines of express warranty and nonfault misrepresentation is liability without fault. Over a period of time extending to the early days of the Republic, courts have imposed liability for misrepresentation under various labels, without requiring fault on the part of the defendant. As early as 1839, in an era when the Supreme Court was more inclined to insert itself into the common law than in the days of the Internet, the Court spoke in broad terms of the basis for liability in a case involving the sale of a mine: “even if the party innocently misrepresents a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party.”<sup>38</sup> In some cases of misrepresentation, as with mistake, the remedy may be nothing more than rescission; but there is liability nevertheless.<sup>39</sup> It is worth emphasizing that, whether discussing express warranty liability or misrepresentation without fault, all the plaintiff need show is that the statement at issue turned out to be false; the seller’s good faith in making the statement will not save him.

### *C. Fraud*

In addition to various types of nonfault liability for misrepresentation, there is a substantial body of law that imposes liability for culpable misstatements of fact. Most of the legal controversy in this area arises over application of the law of fraud or deceit. The central element of that doctrine is the requirement that the defendant have made its misrepresentation with “scienter,” i.e., knowingly, or at least in reckless disregard of its truth or falsity.<sup>40</sup> Although courts usually hold plaintiffs to a high standard of proof for fraud, some decisions have broadly defined scienter. An extreme example occurred when an Ohio court imposed liability on a broker for fraud because he represented that a home had tile walls, as opposed to a thin veneer of masonry that concealed earth, clay and straw. The conduct constituted fraud because the defendant’s assertion was unqualified, without “knowledge as to whether his assertion [was] true or

<sup>38</sup>Smith v. Richards, 38 U.S. (138 Pet.) 26, 36 (1839).

<sup>39</sup>See generally MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶ 2.04 (3d ed. 1994).

<sup>40</sup>The classic source is Derry v. Peek, 14 App. Cas. 337 (H.L. 1889).

false.”<sup>41</sup> Such a literal application of the scienter definition warns E-sellers to carefully investigate the truth of any assertion. The uncomfortable parallels between fraud and nonfault misrepresentation theories may spell liability.

### 1. Misleading by Nondisclosure

Sellers should also be careful about misleading promotion of a product because of what the product image conceals. It is hornbook law that there is no liability for failing to disclose vital facts about a product if there has been no query about the existence of those facts. The classic example is termites: if the buyer does not ask, the seller need not tell.<sup>42</sup> Yet, there may be liability for the failure to disclose matters “necessary to prevent [the seller’s] partial or ambiguous statement of the facts from being misleading.”<sup>43</sup> Courts are most likely to impose liability for “fraudulent concealment” when there is evidence of active cover-up or stonewalling tactics. Illustrative is a case in which the manufacturer of a control knob on an LPG water heater became aware of explosions that occurred when the knob stuck, did not report these incidents to the Consumer Product Safety Commission, and instructed its personnel to handle such occurrences with “the foregone conclusion that we are not involved.”<sup>44</sup>

The eruption of tobacco litigation has also occasioned one decision that virtually ratifies a cause of action for nondisclosure that nicotine is addictive. In that case, the court found an underlying act — the defendant’s manipulation of the level of nicotine in its products. Although the plaintiff’s pleading initially lacked sufficient particularity, the court granted leave to amend, noting that the plaintiff had “all but sufficiently pleaded common law fraud by nondisclosure.”<sup>45</sup>

Obviously, one party to a sale need not disclose all the particulars of a matter that is vital to the other. The other party retains the burden to inquire about matters that ordinarily are not disclosed unless asked. However, when physical safety is involved, the margin for nondisclosure begins to shrink. As has been the case with sexually transmittable diseases,<sup>46</sup> sellers of chattels are well advised to inform consumers about known risks of product injury.

### 2. Punitive Damages

When a seller’s misstatement or decision to withhold material information approaches willfulness or recklessness, if not more culpable conduct, punitive damages become a possibility. Of course, the label on the action is not crucial; rather, it is the nature of the conduct. To warrant punitive damages, the

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<sup>41</sup>Pumphrey v. Quillen, 135 N.E.2d 328, 331 (Ohio 1956).

<sup>42</sup>See, e.g., Swinton v. Whitinsville Sav. Bank, 42 N.E.2d 808 (Mass. 1942).

<sup>43</sup>RESTATEMENT (SECOND) OF TORTS § 551(2)(b) (1977).

<sup>44</sup>Holmes v. Wegman Oil Co., 492 N.W.2d 107, 109 (S.D. 1992).

<sup>45</sup>Witherspoon v. Philip Morris, Inc., 964 F. Supp. 455, 460-61 (D.D.C. 1997).

<sup>46</sup>See, e.g., Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Ct. App. 1984).

defendant's behavior must meet relevant legal standards. In that regard, it may not be sufficient to equate relatively innocent behavior with scienter because it consisted of an unqualified assertion. However, even a claim under the strict liability label may support punitive damages if the defendant sold a product with actual knowledge of its dangers.<sup>47</sup>

#### D. *Negligent Misrepresentation*

Negligent misrepresentation is a hybrid doctrinal creature that struggles for existence in the world of tort theory. In recent years, it has become something of a staple in consumer pleadings, although there is relatively little focused appellate treatment or judicial definition of the theory. Negligence is a well-established, broad category of tort law, and courts often have difficulty affixing the general negligence definition to the specific act of misrepresentation as a separate doctrine. However, in theory, there should be no difficulty defining a separate classification of negligent misrepresentation that simply occupies a place on the spectrum of culpability ranging from fraud to innocent misrepresentation. As the Colorado Supreme Court has observed, negligent misrepresentation is an "independent tort claim" that exists "independent of any principle of contract law."<sup>48</sup>

##### 1. Economic Loss

To avoid liability for personal injuries under negligent misrepresentation, E-sellers (like others) must meet the ordinary standards of prudence when investigating the bases of product claims. Courts may not welcome claims for negligent misrepresentation involving economic loss, but they may define economic loss rather broadly. In this regard, two cases involving agricultural products are significant because each denied liability in a legal atmosphere that had favored claimants who sued for nonfraudulent misrepresentation. In the first, the Sixth Circuit Court of Appeals rejected a claim by a watermelon grower that use of a soil fumigant in the manner recommended by the seller's representative had destroyed his crop.<sup>49</sup> At issue was Michigan law, which had effectively imposed liability without fault for misrepresentation in the early 20th Century.<sup>50</sup> However, in the last decade of this century, Michigan law had come to oppose tort liability for "economic loss caused by a defective product purchased for commercial purposes," requiring such buyers to sue under the

<sup>47</sup>See *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 470-75 (N.J. 1986).

<sup>48</sup>*Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 72 (Colo. 1991).

<sup>49</sup>*Bailey Farms, Inc. v. Nor-Am Chem Co.*, 27 F.3d 188 (6th Cir. 1994).

<sup>50</sup>See, e.g., *Aldrich v. Scribner*, 117 N.W. 581 (Mich. 1908).

Uniform Commercial Code.<sup>51</sup> The Sixth Circuit's decision drew on later state precedent, concluding that Michigan law would "bar any recovery for economic losses based upon the tort of negligent misrepresentation."<sup>52</sup> The court observed, *inter alia*, that "the UCC contains a specific remedy for misrepresentation or fraud."<sup>53</sup>

In another farm products case involving a product advertised to protect tomatoes against frost (Frostguard®), the Tennessee Supreme Court continued to narrow liability.<sup>54</sup> A 1966 decision dealing with a poorly functioning tractor had made Tennessee a leader in imposing liability for innocent misrepresentations under section 402B of the Restatement (Second).<sup>55</sup> But a quarter century later, the Tennessee court in *Brooks Farms* overruled the earlier case, concluding that suits would not lie for "*pecuniary loss* based on innocent misrepresentation."<sup>56</sup> Still later, answering certified questions focused on negligent misrepresentation in the Frostguard® case, the Tennessee court invoked the *Brooks Farms* decision against a farmer who sued for crop damage. Noting that "the plaintiffs sued for 'economic damages resulting from lost profits,'" the court summarized Tennessee law, observing that "product liability claims resulting in pure economic loss can be better resolved on theories other than negligence."<sup>57</sup> What makes this pair of cases particularly interesting is that the damage claimed in each could have been characterized as property damage, since there was physical injury to the crops.<sup>58</sup>

Like other sellers, electronic sellers may reasonably assume that many jurisdictions will refuse to impose tort liability for economic loss arising from misrepresentation that is no more than negligent, effectively restricting plaintiffs to claims under the UCC. Thus, sellers would be well advised to muster Code defenses, providing disclaimers and limitations of liability in their electronic sales documents.<sup>59</sup> However, plaintiffs might still opt for negligent misrepresentation in those jurisdictions inclined to provide a rather full spectrum of liability for economic loss arising from statements that turn out to be untrue.

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<sup>51</sup>*Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612, 618 (Mich. 1992).

<sup>52</sup>*Bailey Farms*, 27 F.3d at 191.

<sup>53</sup>*Id.* at 192.

<sup>54</sup>*Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128 (Tenn. 1995).

<sup>55</sup>*Ford Motor Co. v. Lonon*, 398 S.W.2d 240 (Tenn. 1966).

<sup>56</sup>*First Nat'l Bank of Louisville v. Brooks Farms*, 821 S.W.2d 925, 930 (Tenn. 1991).

<sup>57</sup>*Ritter*, 912 S.W.2d at 133. *See generally* Kurtis B. Reeg & Marshall S. Shapo, *The Economic Loss Rule: Easier to State Than to Apply*, 18 LEADER'S PROD. LIAB. LAW & STRATEGY 5 (1999).

<sup>58</sup>*See Ritter*, 912 S.W.2d at 132 (quoting federal appellate court's description of "extensive damage to . . . crops"); *Bailey Farms, Inc. v. Nor-Am Chem Co.*, 27 F.3d 188, 190 (6th Cir. 1994) (allegation that fumigant "destroyed" crop).

<sup>59</sup>*See infra*, text accompanying notes 78-96.

#### IV. NEGLIGENCE

The staple theory of tort litigation is negligence. The legal formulae for defining negligence vary, but they coalesce around the concept of conduct that falls below the standard of reasonably prudent care under the circumstances. Some courts associate the standard with various economic formulae, finding negligence when the cost of the plaintiff's injury exceeds the cost of preventing the accident.

Whatever the specific verbal formula, the negligence standard applies across the board to all forms of activity associated with the making of products. This includes the requirement of reasonable care in designing the product, in fashioning warnings for the product, and in manufacturing it, including the selection of quality control standards.<sup>60</sup> Generally, a seller is held to the reasonableness test when investigating the risks of the product, including risks that become apparent while the product is on the market.<sup>61</sup> With respect to all these activities, the test for seller conduct when selling the product presumably will not differ, whether selling on or off the Web. Therefore, it is sufficient to briefly summarize only the major elements involved in the determination of whether a Web seller has been negligent.

##### A. *Balancing Tests*

Under a negligence standard, sellers who design products are subject to a balancing test, as to both design and the process of manufacture. As indicated above, this may consist of balancing the costs of injury against the costs of precaution. Another form of balancing compares the utility of a product with its risks. Tests of both kinds imply quantitative elements that are subject to comparison. However, since sellers can only roughly calculate the dollar costs of risk or accident before the event, these tests provide rough guidelines at best. At the first cut of risk management, common sense is a good check on whether consumer exposure to a particular risk or set of risks is prudent. When a seller

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<sup>60</sup>For a discussion of negligent misrepresentation, see *supra*, text accompanying notes 42-53.

<sup>61</sup>This duty certainly requires sellers to make changes in new units of a product line once they have information in hand about unreasonable risks. Some jurisdictions have suggested that sellers may need to warn users of already marketed products about their risks. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 (1998). However, courts have generally drawn the line against requiring sellers to recall and retrofit products whose dangers have only become apparent over time, absent a regulatory order. See *id.* § 11.

is in doubt, the advice of counsel is desirable, even though the lawyer often will use trained intuition rather than computer projections.

### B. *State of the Art*

A checkpoint often employed for determining whether a seller has designed a product according to standards of reasonable care is the phrase "state of the art." This phrase has some chameleon tendencies. In some states, it may be equated with "customary industry practice."<sup>62</sup> Other jurisdictions make a sharp distinction between the two concepts. The Iowa Supreme Court, for example, has stressed that "custom and practice" is "not the same as state of the art," the latter being "a defense to a design defect claim."<sup>63</sup>

The practical consequences of this distinction may be considerable: the fact that a defendant has followed industry custom may not save it from liability. The classic pronouncement on this point is Learned Hand's declaration that "common prudence" is not necessarily the measure of "reasonable prudence," punctuated by his oft-quoted declaration that "[c]ourts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."<sup>64</sup> Other definitions of state of the art include "the level of relevant scientific, technological and safety knowledge existing and reasonably feasible at the time of design,"<sup>65</sup> "the best data reasonably available at the time,"<sup>66</sup> "the aggregate of product-related knowledge which may feasibly be incorporated into a product,"<sup>67</sup> and "the aggregate of product-related knowledge existing at any given point in time."<sup>68</sup>

### C. *The E-environment*

As noted earlier, there would appear to be no significant difference in the application of the general negligence standard between Web-generated sales and products sold by other means. However, the liability of E-sellers may depend on the character of any Web representations, particularly those designed to arrest surfers with catchy phrases that might imply a product is particularly

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<sup>62</sup>See, e.g., Note, *Product Liability Reform Proposals: The State of the Art Defense*, 43 ALB. L. REV. 941, 945-46 (1979).

<sup>63</sup>Hillrichs v. Avco Corp., 514 N.W.2d 94, 98 (Iowa 1994).

<sup>64</sup>The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

<sup>65</sup>Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1347 (Conn. 1997).

<sup>66</sup>Menne v. Celotex Corp., 861 F.2d 1453, 1472 (10th Cir. 1988).

<sup>67</sup>*Product Liability of Reform Proposals*, supra note 62, at 946.

<sup>68</sup>*Id.*

advanced in its technology. In E-commerce, the factual environment to which the negligence test is applied may include the background of the electronic representations used to market the product, and whether they independently constitute express warranties or misrepresentations otherwise actionable under tort theories. Of course, this "background noise" by itself might not distinguish the potential legal consequences of sales on the Internet from those fostered by traditional media, concerning which courts often consider the representational background of product sales.<sup>69</sup> If sales on the Web carry any potential for expanded liability, the distinction is likely to lie in an amorphous, indefinable "fast track" or "new age" penumbra that suggests superior technological advancement.

#### D. *Failure to Warn*

The character of Web representations also may generate an aura of safety that affects judicial decisions about whether a seller has been negligent in failing to warn of particular product dangers. Where the seller has used unqualified language connoting safety, such as "safe" or "guarantee,"<sup>70</sup> this result is not surprising. However, even more general approbations of product capabilities may tilt courts toward plaintiffs who claim that sellers did not warn, or did not warn adequately. The stronger the commendation of a product in Web advertising, the more likely a court will conclude that a particular risk deserved mention (or stronger mention than was given).

How can E-sellers avoid liability for failure to warn? At least two situations require attention. Where the electronic document is the entire contract, the seller should provide a statement that specifically identifies the hazard at issue. The type of language required would presumably be that required in any print document.

In situations where the purchase is made in response to an advertisement or a truncated purchase order, but a full contract document which contains an adequate warning is forthcoming, the shorter E-document should prominently reference the warnings of the fuller document. A lesser alternative places a conspicuous short warning in the E-document, for which one analogy is the standardized single-sentence warnings that now accompany cigarette advertisements.

#### E. *Prominence of Warning*

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<sup>69</sup>See generally Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function, and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

<sup>70</sup>See *supra*, text accompanying notes 11-16.

Related to the prominence of cautionary language is the adequacy of any warning as positioned within the document or as type-set. With respect to how warnings are positioned, a disappointed consumer who clicked to signify acceptance without printing out the contract document might contend that screen limitations prevented her from appreciating any emphasis. With respect to type face, sellers must consider how to distinguish such a warning, especially if the purchaser's printer has different fonts than the seller's.

Warnings should be fashioned according to the potential theory of liability, i.e., express warranty, implied warranty, or negligent failure to warn. For example, where the document that persuades the purchaser to buy contains an express warranty related to safety, the drafter must take special pains to devise warning language that negates or qualifies that promise or affirmation. Thus, even with the advent of E-commerce, warning issues are likely to pervade the products liability landscape.

## V. STRICT LIABILITY

As do sellers who use traditional media, E-sellers face the risk that a court will hold them strictly liable in tort for a product defect. Under the standard formulation, such a defect is one that makes a product "unreasonably dangerous to the user or consumer."<sup>71</sup> This form of strict liability shares several common features with negligence.

### A. *The Flawed Product*

If a specific product unit turns out to have a manufacturing flaw (a feature or side effect which the seller would not have sold had it known of that problem), then the seller is likely to be strictly liable, at least for personal injury or damage to other property. That result will obtain in most jurisdictions under the theory of implied warranty of merchantability, as well as strict tort liability. Indeed, courts have frequently achieved the same outcome under the negligence label, often manipulating proof rules to do so. The method of sale is not likely to affect liability exposure for product flaws under any theory.

### B. *Design Defects*

Employing a variety of verbal formulae, many jurisdictions also impose

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<sup>71</sup>RESTATEMENT (SECOND) OF TORTS § 402A (1965).

strict liability for unreasonably dangerous products when the product unit at issue is exactly the product the manufacturer intended to sell. Not afflicted with a manufacturing defect, the product is the subject of a suit for “design defect.” Opinions diverge about how “strict” the liability is that courts impose under the label of design defects. Some analysts insist that judicial reasoning is virtually identical on both theories of strict liability and negligence for design defects. Basically, both theories are tantamount to negligence.<sup>72</sup>

### C. *Failure to Warn*

There is a parallel disagreement about whether there exists a viable separate cause of action in strict liability for failure to warn. Case law in some states equates the strict liability and negligence theories; other states distinguish them. As applied in some jurisdictions, the version of strict liability is so uncompromising that the defendant’s knowledge about the hazards of its product is irrelevant to the determination of liability related to warnings.

Illustrative of this position is a Montana case involving an herbicide in which the defendants argued that they did not know the cancer-causing properties of the product when they marketed it. They offered state-of-the-art evidence to support their contention that it was not feasible for them to have warned at the time. Answering a certified question, the Montana court rejected the defendant’s attempt to introduce state-of-the-art evidence “where alternative designs did not exist and a product’s dangers were undiscovered or undiscoverable at the time of manufacture.”<sup>73</sup> To hold otherwise, the court declared, “would inject negligence concepts into Montana’s strict products liability law and eviscerate the public policy underlying strict products liability law.”<sup>74</sup> In a case in which the defendants pressed the argument that “state-of-the-art evidence [was] admissible because Montana law recognizes the state-of-the-art defense in failure to warn claims,”<sup>75</sup> the court did not differentiate its answer to the certified question “as among manufacturing defect, design defect, or failure to warn cases.”<sup>76</sup>

Where courts take this approach, and a hazard is truly undiscoverable at the time of marketing, there is, by definition, no practical way to avoid liability for failure to warn. When the theory is applied this way, it is true strict liability.

<sup>72</sup>See, e.g., Sheila Birnbaum, *Unmasking the Test for Design Defect; from Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 539 (1980).

<sup>73</sup>*Sternhagen v. Dow Co.*, 935 P.2d 1139, 1147 (Mont. 1997).

<sup>74</sup>*Id.*

<sup>75</sup>*Id.* at 1141.

<sup>76</sup>*Id.* at 1142.

#### D. *Overlap of Design and Warnings*

In practice, the categories of design defect and failure to warn may substantially overlap. Suits for failure to warn explicitly target a lack of relevant, material information about a product hazard. Moreover, suits for design defect often entail at least an implicit claim that the seller should have done more in providing such information. This is clearly the case in those jurisdictions that either partially or completely rely on a "consumer expectations" test for design defect. Presumably, the provision of adequate information about the dangers of a product would undermine a claim that the product disappointed the consumer's expectations. By comparison, one would expect that courts would put less weight on the informational content of a product sale under a "balancing" test, like those that employ the terminology of risk/utility or cost/benefit analysis.

#### E. *Product Image*

Sellers who seek to avoid strict liability must tailor their risk avoidance to the particular category of strict liability. This might entail adopting better quality control to minimize manufacturing defects, or building more safety into designs. One of the most effective avoidance strategies may lie in critical review of product promotion, since the representational background of product sales influences judicial decisions even where liability theories do not depend on specific product representations.<sup>77</sup> Determinations of strict liability, like those of negligence, are often tied to the character of product advertising, even when the advertising does not constitute an express warranty or an actionable misrepresentation. However product promotion is filtered through liability theories, many courts consider the image of products presented to the consumer. Thus, sellers in nationwide and international E-markets are well-advised to scrutinize the features and qualities with which their advertising endows their products. It sometimes may be prudent to soften the enthusiasm in words or pictures or to provide warnings where advertising could be considered insufficiently qualified as to safety.

## VI.

### DISCLAIMERS AND LIMITATIONS OF LIABILITY

One might expect a period of development in the law regarding sellers' efforts to contractually avoid liability with respect to E-sales. The basic law

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<sup>77</sup>See generally Shapo, *supra* note 69.

for conventional written documents is clear enough, since it is generally enshrined in the Uniform Commercial Code. Whatever new problems may arise are likely to occur because of the electronic form itself, with respect to documents that are self-contained on the Web, and when sellers employ two different contractual media (as in sales initiated by Web transmissions that make reference to later printed documents).

### A. *The Code Basis*

The principal foundation for disclaimers is familiar to commercial and consumer lawyers; it is section 2-316 of the Uniform Commercial Code. To disclaim implied warranties of merchantability in a written document, a seller must mention merchantability and do so conspicuously; disclaimers of the implied warranty of fitness “must be by a writing and conspicuous.”<sup>78</sup> The Code provides several specific examples of the relative ease and spareness with which sellers may disclaim. Language like “as is” or “with all faults,” “which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty,” will suffice to exclude all implied warranties.<sup>79</sup> Moreover, sellers may exclude or modify implied warranties “by course of dealing or course of performance or usage of trade.”<sup>80</sup> Specifically with respect to the fitness warranty, sellers need only say that “[t]here are no warranties which extend beyond the description on the face hereof.”<sup>81</sup>

### B. *Conspicuousness*

It is thus initially simple to choose words that will disclaim, electronically or otherwise. However, the requirement of conspicuousness will often lend itself to factual questions, requiring some attention to the prominence of disclaimers. Print size, headings and placement within a document are all important factors in the determination of whether a disclaimer is conspicuous. In an illustrative decision refusing to enforce a disclaimer, the court noted that the clause was smaller in print than other language on an order form, and the format of the form could lead a reader to “reasonably conclude that there was little to the document, other than the statement of the order and delivery dates.”<sup>82</sup>

<sup>78</sup>U.C.C. § 2-316(2).

<sup>79</sup>*Id.* § 2-316(3)(a).

<sup>80</sup>*Id.* § 2-316(3)(c).

<sup>81</sup>*Id.* § 2-316(2).

<sup>82</sup>*Anderson v. Farmers Hybrid Cos.*, 408 N.E.2d 1194, 1200 (Ill. App. Ct. 1980).

Risk-averse companies selling at the click of a mouse may want to assess the limitations of screen reading as contrasted with the perusal of hard copy. For example, sellers wishing to disclaim should attend to conspicuousness where type face may not appear identically on recipients' screens, or may not print out in recipients' fonts as it appears on the seller's copy or screen. Thus, sellers may need to use various devices to assure that disclaimers draw the purchasers' attention, including prominent placement, the use of capital letters, and the use of symbols that are universal across software programs.

### *C. Disclaimer in the Contract Document*

Prudent sellers also will make sure that disclaimer language appears in the Web transmission of a document that purports to embody the entire agreement. In a federal case involving an "otherwise conspicuous" disclaimer appearing in an instruction manual delivered two weeks after the sale of a spray rig, the court refused enforcement on grounds that the disclaimer "did not form a part of the basis of the bargain."<sup>83</sup> That same ruling obtained in a Massachusetts case involving a warranty exclusion that did not appear in the purchase and sale agreement or the service policy, but was printed on an unnumbered page after the index of an owner's manual. The court determined that this language was "not effective to limit the defendant's liability for negligence."<sup>84</sup>

### *D. Effects of E-environment on Comprehension*

One feature of E-commerce that has not yet been tested with respect to disclaimers (or any other known feature of contracting), is the communicative effect of the electronic environment on purchasers, apart from the physical limitations of the screen. It may take some time to accumulate the behavioral research necessary to determine what differences, if any, exist with respect to comprehension of computer messages as contrasted with print or other forms of electronic messaging. Particularly in the case of people who have been conditioned for many years to non-computer transmission of information, it is at least worth asking whether there are significant differences in absorption and understanding that affect liability.

### *E. The Pace of Web Life and Conflicting Messages*

Sellers may be vulnerable to arguments that disclaimers were insufficiently

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<sup>83</sup>Bowdoin v. Showell Growers, Inc., 817 F.2d 1543, 1545 (11th Cir. 1987).

<sup>84</sup>Omni Flying Club, Inc. v. Cessna Aircraft Co., 315 N.E.2d 885, 888 (Mass. 1974).

conspicuous, or not otherwise sufficiently powerful — especially in an environment where the Web itself has added an increment of pressure to transactions and the manner in which they arise. Even judges, themselves hurried by the insistent demands of E-transmissions, may tilt toward unsympathetic construction of disclaimers. A South Dakota decision, entered before the advent of the Web, suggests a tone for the future. The court there refused to enforce a disclaimer for defective cattle vaccine that was not typographically emphasized and resided on the last page of a pamphlet that “extol[led] the virtues and effectiveness of the vaccine.”<sup>85</sup> It expressed “doubt that a busy rancher would pour over the last few lines of the paragraph after earlier being assured of the safety and effectiveness of the vaccine, the directions for its use, and the steps to be taken should an anaphylactic reaction occur”<sup>86</sup> — which was not the problem that afflicted the plaintiff’s animals.

In various decisions, most notably within the insurance context, courts have invoked the proposition that writers of exclusion clauses must assure that “he who runs can read.”<sup>87</sup> Where Web culture has accelerated life well beyond its traditional pace, case law implies not only strictures that courts may force on E-commerce disclaimers, but the linkage between the character of the affirmative representation and the disclaimer. These cases also suggest the close parallel between the care necessary when drafting exclusions for E-commerce and that required when fashioning warnings for the Web environment.

#### F. *Successful Disclaimers*

Different facts will necessarily breed different conclusions. Some exclusionary language has been particularly successful. In one case, a utility sued Westinghouse for serious damage to an electrical turbine that occurred when a blade broke. The plaintiff adduced a proposal by Westinghouse, later attached as an appendix to the sales contract, which said that the turbine was “reliable,” was “designed to ‘eliminat[e] . . . resonant conditions at the operating design speed,’” and would “‘provide reliable performance over extended time periods.’”<sup>88</sup> Though the court conceded that this “language, standing alone, might well be construed to create a warranty” that the turbine “blades would not crack due to resonance,”<sup>89</sup> a contract provision argued otherwise. The

<sup>85</sup>Pearson v. Franklin Labs, Inc., 254 N.W.2d 133, 141-42 (S.D. 1977).

<sup>86</sup>*Id.* at 142.

<sup>87</sup>*See, e.g.*, Bauman v. Royal Indemnity Co., 174 A.2d 585, 589 (N.J. 1961) (citing Anderson v. Fitzgerald, 4 H.L.C. 484, 510, 10 Eng. Rep. 551, 561 (1853)).

<sup>88</sup>Arkwright-Boston Mfgs. Mut. Ins. Co. v. Westinghouse Elec. Corp., 844 F.2d 1174, 1180 (5th Cir. 1988).

<sup>89</sup>*Id.* at 1181.

contract provided that, “[i]n the event of any conflict between basic Contract Document and Appendices, the basic Contract Document shall prevail.”<sup>90</sup> When considered together with a disclaimer and a limitation of liability clause, the court “simply [could not] believe that the Contract’s parties intended the Proposal’s language to create an express warranty of unlimited duration.”<sup>91</sup> Thus, careful draftsmanship may overcome judicial wariness of disclaimers that conflict with other statements, especially when the buyer is equally sophisticated. Nevertheless, the prudent E-seller must be mindful of any disparities.

### G. *Limitations of Liability*

The suggestion that sellers should consider the actual impact of disclaimers on purchasers applies as well to limitation of liability clauses. Section 2-719 of the Uniform Commercial Code allows sellers to provide substitute remedies and to “limit or alter the measure of damages . . . as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts.”<sup>92</sup>

Numerous decisions apply limitations of liability rigorously against consumers. A federal appellate court, reviewing an herbicide case, stressed that the farmer-purchaser had “read the label and chose not to return the product but to use it.”<sup>93</sup> Using a rudimentary contract analysis, it would not allow the farmer to escape his bargain.<sup>94</sup>

At the same time, it should be noted that section 2-719 contains traps for sellers. Specifically, it provides consumer remedies “[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose.”<sup>95</sup> Additionally, it has been argued that this clause is cumulative to the formal requirements that the Code imposes on disclaimers.<sup>96</sup>

Whatever stance courts assume regarding limitation of liability clauses, sellers are prudently advised to make such clauses effective in the Web environment. In that regard, the advice is analogous to advice about disclaimers: employ unambiguous language and formats that highlight the limitations. Since

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<sup>90</sup>*Id.*

<sup>91</sup>*Id.* at 1182.

<sup>92</sup>U.C.C. § 2-719(1)(a).

<sup>93</sup>Hill v. BASF Wyandotte Corp., 696 F.2d 287, 292 (4th Cir. 1982).

<sup>94</sup>*See id.* (plaintiff “cannot defeat the warrantor’s expressed intention to limit remedy by a privately held intention not to accept the limitation while accepting and using the product”).

<sup>95</sup>U.C.C. § 2-719(2).

<sup>96</sup>*See Note, Legal Control on Warranty Liability Limitations Under the Uniform Commercial Code*, 63 VA. L. REV. 791, 807 (1977).

limitations of liability are typically more subtle and technical than the ordinary disclaimer, it is especially important that sellers draw the attention of buyers.

#### H. *Apportioning Liability Among Sellers*

Finally, the same requirements for crisp delineation of duties and conspicuous placement are likely to apply to sellers who seek to transfer liability burdens to other sellers. Those fashioning contractual agreements for indemnity or other apportionments of liability on the Web should observe the need for even greater clarity and more prominent positioning than that necessary in traditional contract environments.

## VII. POLICY AND PHILOSOPHY

When considering the standards for both selling and disclaiming that may govern E-sellers, courts are confronted with an important set of normative issues concerning the duties of both sellers and purchasers. What obligations should govern sellers who profit from Web business when dealing with unsophisticated buyers who may not comprehend "clear" messages? Conversely, what responsibilities to read and reflect should regulate buyers who benefit from the economics of E-commerce?

This tension between sellers and buyers permeates both private litigation and the larger arena of public law. The tort law of this century, as a regulator of individual conduct, has featured a constant struggle over the moral responsibility of both alleged wrongdoers and claimants. Illustrations recur in cases involving reciprocal conduct by both parties, ranging from simple slip and fall cases to products liability litigation involving sophisticated machines.

In the realm of public regulation, the battle of ideas sometimes involves overtly political visions of values and empirical judgments. On the one hand, a much-valued economic freedom permits the use of time-tested selling techniques to persuade a range of buyer populations. On the other hand, and in constant tension, concerns surface about meaningful choice among persons who are ill-equipped to deal with highly technological sales techniques. As always, the developing law will continue to reflect competing and evolving ideas of responsibility that reside in the minds of consumers, legislators and judges.

It bears repeating that a potential wild card in the liability law of E-commerce is the empirical reality of buyer behavior. It is reasonable to expect that the next few years will produce research findings about whether the Web environment affects the mental capacity and behavior of readers accustomed to

other forms of seller communication. This may generate useful information about whether users respond differently on the Web to language and symbols traditionally communicated through other media.

How will the law of products liability skew in the Web millenium? This article has sought to offer some suggestions about the imminent future in this accelerating frontier. For sellers in cyberspace, the authors are unwilling to say that the only thing "to fear is fear itself." With reasonable and sensible precautions, however, the realistic fear of liability can be minimized to tolerable (if not always exculpatory) levels.