



# Rights and Liabilities Arising from the Sale of Defective Agricultural Goods

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State statutes regulate the sale and distribution of commercial feeds, meat and poultry products, and livestock. These statutes vary across jurisdictions with violations potentially resulting in both criminal and civil liability. In all jurisdictions, however, sales transactions involving agricultural products and inputs as goods under the Uniform Commercial Code (UCC) are subject to similar provisions concerning express and implied warranties.

Farmers and ranchers are most likely to encounter these provisions in transactions involving the sale or purchase of livestock and in the purchase of feed, seed, or herbicides. This bulletin reviews the basic UCC provisions governing sales of agricultural products and examines how these provisions have been treated by the courts. Also addressed are the liability issues associated with the sale of livestock for human consumption that contain prohibited levels of drug residues.

## Creation of Warranties

Every sale transaction involving livestock, feed, seed, or pesticide has the possibility of creating express or implied warranties. Express warranties are stated (either orally or in writing) as part of the sales agreement, but implied warranties are read into the sales agreement by the UCC, absent specific language or circumstances disclaiming or excluding warranties. A sales agreement may result in the creation of two types of implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

## Express Warranties

Under the UCC, an express warranty can be created in three ways. In each case, it is important that the event creating the express warranty occur at a time at which the buyer could have relied upon it. The first way an express warranty can be created is

for the seller to make any affirmation of fact or promise that relates to the goods and becomes part of the basis of the bargain. Oral or written statements concerning the goods that the buyer relies on in purchasing the goods can create an express warranty. For example, a statement by the seller that "all of my cows are bred," or "all of my hay is of the highest quality" creates an express warranty that the goods (cows and hay) will conform to the particu-

lar affirmation or promise.<sup>1</sup> Likewise, statements contained in product labels may be deemed to create express warranties.

An express warranty also can be created if the seller makes any description of the goods that becomes part of the basis of the bargain. The warranty is that the goods will conform to the description.

A third method of creating an express warranty is for the seller to display a sample or model of the goods. If the sample or model becomes part of the basis of the bargain, the warranty is that all of the goods will conform to the sample or model. For example, in a 1993 North Dakota case, the court found that a farmer breached an express warranty in an oral contract for the sale of hard red spring wheat to be resold by the buyer to other farmers for seeding when the seed sold turned out to be winter wheat.<sup>2</sup>

Express warranties typically involve the seller's oral or written statements concerning the goods. If the statements tend to induce the buyer to make the purchase, they may be considered express warranties. But, "puffing talk," statements of value or mere opinions of the seller, generally do not create an express warranty. In one case, a seller's statement that allegedly defective seeds were "good seed" created no express warranty,<sup>3</sup> nor in another, did a seller's statement that a herbicide would "do a good job."<sup>4</sup> An important point to remember is that, once made, an express warranty is very difficult to disclaim or limit.<sup>5</sup>

Parties to sales contracts should exercise caution when reducing oral agreements to writing with the intent of making the written contract the final agreement between the parties. Oral statements may inadvertently be omitted from a later writing, but they could have served as the basis of the bargain. As such, an express warranty could have been created orally, but be eliminated by a subsequent writing omitting the relied upon oral statements. The most prudent approach is to ensure that all previously negotiated terms are incorporated into any subsequent written agreement.

Any representations made by a company, its employees, consultants, or agents pertaining to a product, whether oral or written, can potentially be treated as express warranties. Thus, an important part of any loss-prevention program is to closely monitor any representations made and provide training concerning appropriate representations.

### Implied Warranties

Implied warranties are imposed by law to assure a fair result and fulfill the buyer's typical expectations that an acceptable product is being purchased. There are two types of implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

**Implied warranty of merchantability.** A warranty of merchantability is imposed on all goods sold by merchants. The warranty exists even if the seller made no statements or promises concerning the goods and did not know of any defect. Merchant-sellers warrant that the goods they sell are merchantable. This means the goods will be what they are described to be and will be fit for the ordinary purposes for which such goods are used. A merchant is defined as:

“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.”<sup>6</sup>

Courts are divided on the issue of whether a farmer is a merchant with the outcome depending on the jurisdiction and the facts of the particular case. Unfortunately, in many instances, farmers and ranch-

ers cannot know with certainty whether they are merchants without becoming involved in legal action on the issue.

In *Nelson v. Union Equity Cooperative Exchange*,<sup>7</sup> the Texas Supreme Court ruled that a farmer who sold cotton and wheat produced on his 1,200-acre farm was a merchant. The farmer sold all of his production for each of the previous five years and daily kept abreast of current market prices and conditions by talking to grain dealers and listening to the radio.<sup>8</sup> Conversely, the South Dakota Supreme Court in *Terminal Grain Corporation v. Freeman*,<sup>9</sup> concluded that “the average farmer...with no particular knowledge or experience in selling, buying, or dealing in future commodity transactions, and who sells only the crops he raises to local elevators for cash or who places his grain in storage under one of the federal loan programs is not a ‘merchant.’” Other jurisdictions have ruled both ways depending on the facts of the particular case.<sup>10</sup>

In general, courts consider several factors in determining whether a particular farmer is a merchant. These factors include (1) the length of time the farmer has been engaged in marketing products produced on the farm; (2) the degree of business skill demonstrated in transactions with other parties; (3) the farmer's awareness of the operation and existence of farm markets; and (4) the farmer's past experience with or knowledge of the customs and practices unique to the marketing of the product sold.

In order for goods to be merchantable, they must be goods that:

- (a) Pass without objection in the trade under the contract description.
- (b) In the case of fungible goods, are of fair average quality within the description (“fair average quality” means goods centering around the middle range of quality).
- (c) Are fit for the ordinary purposes for which such goods are used.
- (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved.
- (e) Are adequately contained, packaged, and labeled as the agreement may require.
- (f) Conform to the promises or affirmations of fact made on the container or label if any.<sup>11</sup>

In order to recover damages for breach of the implied warranty of merchantability, a buyer must show the product was defective when it left the seller's control and that the defect caused the buyer's injury. As expected, much of the focus in cases involving

defective agricultural goods centers on whether the goods are fit for the ordinary purposes for which they are used. For example, one court has held that corn containing vomitoxin that caused reproductive problems in pigs was unfit for its ordinary purposes.<sup>12</sup> Another court ruled that bean seed was not fit for its ordinary purpose when the purchaser discovered, after planting, that the seed was infected with a seed-borne bacterial disease.<sup>13</sup> This defect, the court held, invalidated the label provisions that attempted to disclaim warranties for merchantability and fitness.

Merchantability can also involve the standard of merchantability in the particular trade. Usage of trade is defined 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.”<sup>14</sup> If a product fails to satisfy industry standards, an implied warranty of merchantability may arise. For example, one court has held that feed for breeding cattle normally does not contain the female hormone stilbestrol because it is known to cause abortions in pregnant cows and sterility in bulls.<sup>15</sup>

Even if a particular farmer does not qualify as a merchant, known product defects must be disclosed to a potential buyer. Every seller with knowledge of defects must fully disclose defects that are not apparent to the buyer on reasonable inspection. This duty arises out of the underlying rationale behind the implied warranty of merchantability, which is to assure that the buyer is getting what is being paid for, and the UCC’s requirement that market participants operate in “good faith.”

#### **Implied warranties in livestock transactions.**

Historically, the UCC warranty provisions applied to sales transactions involving livestock.<sup>16</sup> However, in the mid-to-late 1970s, the livestock industry successfully lobbied for an exclusionary provision limiting the application of implied warranties in livestock sales.<sup>17</sup>

Some version of the statutory exclusion of implied warranties has now been adopted in almost one-half of the states, in particular those states where the livestock industry is of major economic importance.<sup>18</sup> The Kansas statute is typical of the modification:

Kan. Stat. Ann. § 84-2-316(3)(d): [W]ith respect to the sale of livestock, other than the sale of livestock for immediate slaughter, there shall be no implied warranties, except that the provisions of this paragraph shall not apply in any case where the seller knowingly sells livestock which is diseased.

Presently, there are no reported decisions interpreting any of the various state statutes. However, several points merit consideration. First, the exclu-

sion only pertains to implied warranties. Express warranties can still be made in livestock transactions, especially those involving breeding livestock. Many sellers tend to make statements that might rise to the level of an express warranty in order to induce buyers to conclude the sale. If such statements induce the purchase, they create an express warranty that can be enforced against the seller.

Most state statutory exclusions do not apply in situations where the seller knowingly sells animals that are diseased or sick. However, it is likely to be difficult for a livestock buyer to prove the seller knew the animals were diseased or sick at the time they were sold. Under the UCC, a seller “‘knows’ or ‘has knowledge’ of a fact when the seller has ‘actual knowledge’ of it.”<sup>19</sup> Thus, in order to overcome the statutory exclusion, the buyer must prove (most likely by circumstantial evidence) the seller’s actual knowledge regarding the animal’s disease or sickness.

Likewise, under most state statutes, the meaning of “diseased or sick” is unclear. For breeding animals, the failure to provide offspring may result from recognizable diseases or from genetic defects that historically have not been considered diseases. It is uncertain whether the statutory exclusion of implied warranties applies in circumstances involving genetic defects. Presently, no court in a jurisdiction having the exclusion has addressed the issue.<sup>20</sup>

**Implied warranty of fitness for a particular purpose.** A second implied warranty that can arise in a sales transaction is that the goods are fit for the buyer’s particular purpose. This warranty arises when the seller has reason to know of the buyer’s particular purpose for purchasing the goods and the buyer, in fact, relies on the seller’s skill or judgment to select or furnish suitable goods. Unlike the implied warranty of merchantability, the implied warranty of fitness for a particular purpose can be imposed on any seller (except for seed and livestock) regardless of whether the seller is a merchant. This warranty exists if the facts surrounding the sale are such that the seller should realize the buyer wishes to utilize the goods for a particular purpose and the buyer relies on the seller’s skill and judgment in furnishing suitable goods for that particular purpose.<sup>21</sup> The seller need not have actual knowledge of the particular purpose for which the goods are intended or that the buyer is relying on the seller’s skill or judgment.<sup>22</sup> The sale of specialty feeds is particularly susceptible to a claim that an implied warranty of fitness for a particular purpose has arisen. Specialty feeds are typically fed to animals with special needs, and courts generally presume that sellers know those needs.<sup>23</sup>

If reliance cannot be clearly established, some courts have still allowed a damaged buyer to recover. For example, in a Nebraska case<sup>24</sup> the plaintiff was a sophisticated buyer with considerable experience in grain and hogs, and there was little evidence that he relied on the skill and knowledge of the seller to select the particular feed corn involved, which happened to be contaminated with vomitoxin. The court, nevertheless, permitted recovery under a warranty of fitness theory for the death of the plaintiff's hogs that died after eating the contaminated corn. Similarly, in *Dotts v. Bennett*,<sup>25</sup> there was no evidence that the seller had reason to know the buyer was relying on the seller's skill and judgment to select suitable hay. However, in *Purina Mills Inc. v. Askins*,<sup>26</sup> there was evidence the salesman made specific recommendations for the dairy operation upon which the buyers apparently relied.<sup>27</sup>

A "particular purpose" differs from the ordinary purpose for which the goods are used....<sup>28</sup> The rationale is that the implied warranty of merchantability covers basic uses for goods, whereas the implied warranty of fitness for a particular purpose covers a buyer's specific use. This does not mean that a sale contract cannot include both an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. If both warranties are created, any factual issues concerning which warranty was intended by the parties to apply is resolved in favor of the warranty of fitness for particular purpose.<sup>29</sup>

### Exclusion or Modification of Implied Warranties

To disclaim or modify the implied warranty of merchantability, the seller's "language must mention merchantability and in case of a writing must be conspicuous..."<sup>30</sup> Thus, an oral disclaimer of an implied warranty is possible if the word "merchantability" is used, but for written disclaimers, the disclaiming language must not be hidden within the written document. However, a disclaimer of an implied warranty of fitness for a particular purpose must be in writing to be enforceable.

Section 2-316 specifically provides three ways in which all implied warranties can be excluded:

- (a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
- (b) When the buyer before entering into the con-

tract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

- (c) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.<sup>31</sup>

A sale of goods "as is" puts a potential buyer on notice that there are no implied warranties, unless additional negotiations between the buyer and seller indicate the parties intended the goods to be merchantable. In that event, an implied warranty of merchantability may not be excluded by an "as is" contract clause.<sup>32</sup> In 1995, an Illinois court held that an implement dealer that sold a used tractor to a farmer limited the scope of its "as is" disclaimer by making other representations to the buyer.<sup>33</sup> While the purchase order stated the tractor was being sold "as is," it also contained a dealer's check section that made specific representations as to particular features of the tractor.

Usually, giving a potential buyer the opportunity to inspect the goods eliminates the implied warranties on any defects that could have been reasonably discovered upon inspection. Also, a seller's relationship with the buyer, industry practice, or usage of trade can exclude an implied warranty.

Some states, such as Kansas, prohibit any seller in a consumer transaction (which includes transactions involving farmers and ranchers) from excluding, modifying, or limiting implied warranties of merchantability or fitness.<sup>34</sup> Any such limitation is usually considered void unless the buyer knew of the defect before purchasing and this knowledge became part of the basis of the sale. The only exceptions are for sales of livestock for agricultural purposes (as previously mentioned) and sales of seed for planting. In seed sale transactions, the Federal Seed Act (FSA) allows seed sellers to use disclaimers, limited warranties, or nonwarranty clauses in invoices, advertising or labeling.<sup>35</sup> However, the FSA does not permit such limitations on warranties to be used as a defense in any criminal prosecution or other civil proceeding based on the FSA. Thus, seed purchasers may be faced with label disclaimers limiting liability to the price of the seed. Courts are split on the validity of such disclaimers with most courts invalidating them only if liability results from the seller's own negligence or intentional violation of the law.<sup>36</sup>

## Alternative Theories of Recovery

### Revocation of acceptance

If a buyer cannot recover damages relating to the purchase of goods on a warranty theory, an alternative may be to attempt to revoke acceptance of the goods. Under UCC § 2-608, a buyer may revoke acceptance where the nonconformity substantially impairs the goods' value if the acceptance was without knowledge of the nonconformity, and the acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances. The buyer does not have to elect between revocation and recovery of damages for breach of warranty, but can pursue either remedy.

If upon tender of delivery by the seller, the goods do not conform to the contract, the buyer has three basic options. The buyer may reject all of the goods within a reasonable time and notify the seller, accept all of the goods, despite their nonconformance, or accept part (limited to commercial units) and reject the rest. A buyer rejecting nonconforming goods is entitled to reimbursement from the seller for any expenses incurred in caring for the goods.

Nonconformity is a question of fact. In a Vermont case, contract revocation was permitted where a dairy cow purchased at auction and represented to be "clean, good, healthy, ready to be a milker" was, in fact, toothless and unable to eat commercial grain necessary for lactation.<sup>37</sup> Nonconformity was established based on the difference between the cow's condition and the contrary representation. The court allowed the buyer to revoke and return the cow in return for the purchase price.

As mentioned above, a buyer may reject nonconforming goods if such nonconformity substantially impairs the contract. A buyer is usually not allowed to cancel a contract for only trivial defects in goods. In *Hubbard v. UTZ Quality Foods Inc.*,<sup>38</sup> the court upheld a potato chip manufacturer's refusal to accept chipping potatoes from a potato grower because the potatoes failed to meet color requirements specified in the contract. The potato grower sent samples to the buyer who rejected the potatoes because the resulting chips did not meet the required color standard. The potato grower tested some of the rejected potatoes with a photo electric refraction tester, and some of the potatoes tested within a range acceptable under the contract. The court found the use of visual testing was the industry norm and, therefore, the buyer's failure to machine test the potatoes was not a breach of the contract. As a result, the court held the failure of the potatoes to satisfy the color requirement as specified in the contract substantially impaired the contract and justified the buyer's refusal to accept any of the potatoes.

### Strict Liability in Tort

If the seller is unable to pursue a breach of warranty remedy or cannot revoke acceptance, an alternative might be to make a claim based on strict liability in tort. The difficulty is that an intangible commercial loss or pure economic loss is ordinarily not recoverable in strict liability. Rather, such losses are normally handled under the UCC rules governing commercial transactions.

A claim based on strict liability in tort is similar to a product liability claim for personal injury or property damage caused by defects in the design, manufacturer, production, marketing, labeling, testing, storing, or packaging of manufacture products. To obtain a recovery under a strict liability theory, the plaintiff must establish that (1) the product was defective (and, in most cases, unreasonably dangerous); (2) the defect was present when the product left the manufacturer's control; and (3) the defect was the proximate cause of the plaintiff's injury.

Courts usually allow strict liability actions in situations where a product's defective condition renders it unreasonably dangerous. However, successful application of product liability rules in livestock sale transactions may be limited because livestock are not necessarily "products" in the same sense as are manufactured goods. Several courts have addressed the question of whether a live animal can be considered a product so that an injured plaintiff can maintain a product liability-type action. For instance, one Illinois court dealt specifically with the issue of whether defective livestock were products, and held the strict liability theory inapplicable.<sup>39</sup> In that case, the buyer sued the supplier of gilts infected with bloody dysentery that were to be used for breeding purposes. Since warranties had been disclaimed, the buyer attempted to recover on a product liability theory. The court refused to extend the strict liability concept to the gilts, in part because they were not contemplated as "products" under generally accepted principals of product liability law, but also because the court believed the purpose of strict liability would be defeated if it extended to products whose character were easily susceptible to changes outside the seller's control. Likewise, in *Kaplan v. C Lazy U Ranch*,<sup>40</sup> the court held that a strict products liability action could not be maintained for injuries sustained from a fall off a horse because the nature of the horse was not fixed at the time it left the manufacturer's or seller's control. Similarly, in *Anderson v. Farmers Hybrid Co.*,<sup>41</sup> the court denied a products liability action brought by two farmers against the suppliers of allegedly diseased gilts because the nature of the gilts had not been fixed at the time they left the control of the suppliers.

In most cases, for a strict liability theory to be successful, the product at issue must also be dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer or user.<sup>42</sup> Typically, the defect must render the product not merely inadequate, but must also pose an actual danger to persons or property. In one case involving the sale of semen, the United States Court of Appeals for the 5th Circuit, applying Texas law, was unwilling to find a genetic defect to be unreasonably dangerous.<sup>43</sup> The court noted that all semen could carry defective genes and that an ordinary consumer would know of this possibility.

Similarly, in *Purina Mills, Inc. v. Askins*,<sup>44</sup> the court indicated that, upon retrial, the plaintiffs would be required to offer proof that the feed was in a defective condition that rendered it unreasonably dangerous and that the defective condition was a proximate cause of harm to the cattle, again emphasizing that strict liability applies where the product is both defective and unreasonably dangerous.<sup>45</sup>

### **Liability for Sale of Livestock Sold for Human Consumption Containing Prohibited Drug Residue Levels**

Under the Federal Food, Drug, and Cosmetic Act (FDCA), the government can prevent the introduction or delivery for introduction into interstate commerce any food that is adulterated.<sup>46</sup> Under the FDCA, food is defined as “articles used for food or drink for man or other animals, chewing gum, and articles used for components of any such article.”<sup>47</sup> Nothing in the language of the statute itself explicitly indicates that live animals raised for slaughter and consumption either are or are not food or articles used for food within the meaning of the statute. However, since 1970, the Food and Drug Administration (FDA) has maintained the offering for slaughter of live animals, whose edible tissues contain above-tolerance residues, exposes the offeror to liability for introducing adulterated food into interstate commerce, and has taken action against other purveyors of live animals in accordance with that position.

The FDCA language is broad enough to hold liable individuals who did not actually introduce drugs into livestock. Thus, not only livestock owners, but also middlemen serving as brokers between livestock owners and slaughterhouses can be held liable for introducing adulterated food into interstate commerce. However, the FDCA contains a provision allowing middlemen and similar brokers to immunize themselves from liability if they obtain a written guarantee

from the livestock seller that the livestock in question are not adulterated or misbranded. Under § 333(c) of the FDCA, a person who has received an article in good faith from another, and who has a signed certificate from that source identifying the source and guaranteeing that the article is not adulterated or misbranded, has a complete defense to prosecution for violation of the act. Without this guarantee, a middleman or livestock broker can be deemed to have represented food as unadulterated or properly labeled, and, thus, be held liable for the introduction of adulterated food products into interstate commerce if it is later determined that the slaughtered livestock have edible tissues containing above-tolerance residues.

In *United States v. Tuenta Livestock*,<sup>48</sup> the court held that live swine fit within the FDCA’s definition of food. As a result, the court held that the defendant livestock brokers could be found to have introduced food into interstate commerce under the FDCA. At issue were swine sold for human consumption that were found to contain illegal levels of the animal drug sulfamethazine. The defendants purchased the swine from individual producers and then sold the live swine to slaughterhouses. At the slaughterhouses, the swine were slaughtered and the edible tissues were shipped in interstate commerce. There was no allegation that the defendant brokers themselves gave the swine the drugs in question. Instead, it was presumed that the defendants purchased the hogs containing the illegal drug residues. The court held the brokers liable for the introduction of adulterated food products into interstate commerce. The court noted the brokers would not have been found liable had they obtained written guarantees from the livestock producers.

### **ENDNOTES**

1. See, e.g., *Smith v. Penbridge Associates*, 440 Pa. Super. 410, 655 A.2d 1015 (1995) (seller representation that two emus were a “proven breeder pair” created an express warranty that was breached when “Rachel” turned out to be a male. Importantly, the gender of an emu is not discernable by external observation.); *Texsun Feed Yards Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971) (feed manufacturer found liable for breach of express warranty when nutrition consultant recommended use of 1 pound of supplement per animal, per day. Jury determined proper rate was 2 pounds); *Miller v. Economy Hog and Cattle Powder Co.*, 228 Iowa 626 (1940) (livestock seller held liable for breach of express warranty where seller stated that all of his heifers were to “calf September, October” based on veterinarian’s tests, where, in fact, not all of the heifers were pregnant to calf by October 1).
2. *Dakota Grain Co. Inc. v. Ehrmantrout*, 502 N.W.2d 234 (N. D. 1993).
3. *Schmaltz v. Nissen*, 431 N.W.2d 657 (S.D. 1988).

4. *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 347 S.E.2d 473 (1986).
5. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) limits lawsuits against pesticide manufacturers for damages arising from an inadequate labeling or packaging of goods. Pesticide manufacturers have attempted to utilize FIFRA to shield themselves from liability arising from alleged breaches of express warranties made in connection with pesticide sales. In general, the courts hold that FIFRA does not protect a pesticide manufacturer against express warranty claims (see, e.g., *Hopkins v. American Cyanamid Company*, 666 So.2d 615 (Ca. 1996)).
6. UCC § 2-104(1)
7. 548 S.W.2d 352 (Texas 1977).
8. A dissenting opinion in *Nelson* opined that however great the farmer's knowledge and skill may be with respect to the goods involved, that was no basis for equating that knowledge and skill with an awareness of commercial business practices of merchants.
9. 270 N.W.2d 806 (S. D. 1978) (grain farmer not merchant as to sale of 8,000 bushels of grain raised by farmer).
10. See, e.g., *Decatur Cooperative Association v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976) (farmer held not to be a merchant based on pattern of marketing agricultural products); *Musil v. Hendrich*, 6 Kan. App. 2d 196, 627 P.2d 367 (1981) (farmer held to be a merchant who had been in swine business for 30 to 40 years, had sold 50 to 100 hogs per month during that time, and held himself out as having knowledge and skills peculiar to the practice and goods involved).
11. UCC § 314(2)
12. *Laird v. Scribner Coop. Inc.*, 237 Neb. 532, 466 N.W.2d 798 (1991).
13. *Latimer v. William Mueller & Son*, 149 Mich. App. 620, 386 N.W.2d 618 (1986).
14. UCC § 1-205(2)
15. *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).
16. See, e.g., *Vorthman v. Keith E. Myers Enterprises*, 296 N.W.2d 772 (Iowa 1980); *Holm v. Hansen*, 248 N.W.2d 503 (Iowa 1976); *Ruskamp v. Hog Builders, Inc.*, 192 Neb. 168, 219 N.W.2d 750 (1974); *Hinderer v. Ryan*, 7 Wash. App. 434, 499 P.2d 252 (1972).
17. In some states, such as Kansas, there are also no implied warranties that pertain to the sale of seed for planting purposes (see, e.g., Kan. Stat. Ann. § 50-639(g)).
18. States having modified the standard language of the UCC include Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin and Wyoming.
19. UCC § 1-201(25)
20. A similar uncertainty clouds the exclusion's application to the sale of semen or embryo transfers. Most likely, semen and embryo transfers are beyond the scope of most state statutory exclusions for sales of "livestock."
21. See, e.g., *Shotkoski v. Standard Chemical Manufacturing Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975) (evidence supported conclusion that decrease in dairy cows' milk production resulted from wrong instructions concerning the proper manner to feed a cattle feed supplement).
22. See, e.g., *Circle Land & Cattle Corp. v. Amoco Oil Co.*, 232 Kan. 482, 657 P.2d 532 (1983) (defendant liable for breach of warranty of fitness because company had reason to know that farmer relied on defendant's skill and judgment in recommending product).
23. See, e.g., *Midwest Game Co. v. MFA Milling Co.*, 320 S.W.2d 547 (Mo. 1959) (fish feed).
24. *Laird v. Scribner Coop. Inc.*, 237 Neb. 532, 466 N.W.2d 798 (1991).
25. 382 N.W.2d 85 (Iowa 1986).
26. 317 Ark. 58, 875 S.W.2d 843 (1994).
27. See also *Lester v. Logan*, 893 S. W.2d 570 (Tex. Ct. App. 1994) (breach of implied warranty of fitness arising from sale of hay found where seller had been selling hay for many years, seller knew that hay was to be used for livestock consumption, and buyer relied on seller's skill and judgment in selecting appropriate hay).
28. UCC § 2. 315 Cmt. 2
29. *Id.*
30. UCC § 2-316
31. *Id.* § 2-316(3).
32. See, e.g., *Alpert v. Thomas*, 643 F. Supp. 1406 (D. Vt. 1986) (purchase of an Arabian stallion).
33. *Snelten v. Schmidt Implement Co.*, 269 Ill. App. 3d 986, 647 N.E.2d 1071 (1995).
34. See, e.g., Kan. Stat. Ann. § 50-623 et. seq.
35. 7 U. S. C. § 1574 (1995)
36. See, e.g., *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966); *Dessert v. Drew Farmers Supply Inc.*, 248 Ark. 858, 454 S.W.2d 307 (1970); *Agricultural Services Association Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (6th Cir. 1977).
37. *Morrisville Commission Sales Inc. v. Harris*, 142 Vt. 9, 451 A. 2d 1092 (1982).
38. 903 F. Supp. 444 (W.D.N.Y. 1995)
39. *Anderson v. Farmers Hybrid Companies Inc.*, 87 Ill. App. 3d 493, 408 N.E.2d 1194 (1980).
40. 615 F. Supp. 234 (D. Colo. 1985).
41. 87 Ill. App. 3d 493, 408 N.E.2d 1194 (1980).
42. See Generally Restatement (2nd) of Torts § 402A (1965).
43. *Two Rivers Co. v. Curtiss Breeding Service*, 624 F.2d 1242 (5th Cir. 1980).
44. 317 Ark. 58, 875 S.W.2d 843 (1994).
45. See also *Farm Bureau Insurance Co. v. Case Corporation*, 317 Ark. 467, 878 S. W.2d 741 (1994).
46. 21 U. S. C. §§ 332(a) and 331(a) (1995)
47. 21 U. S. C. § 321(f) (1995)
48. 888 F. Supp. 1416 (S. D. Ohio 1995).

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