

PAINT INDUSTRY PRODUCT LIABILITY

NATIONAL PAINT, VARNISH AND LACQUER ASSOCIATION, INC.
1500 RHODE ISLAND AVE., N.W. WASHINGTON 5, D. C.

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FOREWORD

This pamphlet was prepared in light of the ever increasing importance of product liability in the realm of every day commerce. The development of an informational pamphlet at this time was recommended by the Interest of End Users Sub-Committee of the Chemical Coatings Steering Committee. The work started by this original group was subsequently completed by the Business Operations Sub-Committeee and approved by the Chemical Coatings Steering Committee, and submitted to the Executive Committee with the recommendation that this information be furnished to all Chemical Coatings manufacturers of our Association. The Executive Committee, in approving this pamphlet, recognized that it was applicable and valuable not only for Chemical Coatings manufacturers, but Trade Sales manufacturers as well. Therefore, this Product Liability Pamphlet is distributed to all members of the Association with grateful acknowledgment to the following members who cooperatively planned, prepared, and edited this publication of the National Paint, Varnish and Lacquer Association:

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T. N. Armel	W. C. Martin
E. F. Cox	H. J. Mather
J. B. Dietz	C. L. Raffi
D. S. Gaarder	C. W. Scott
H. C. Grawemeyer	A. W. Slocum
W. I. Longsworth, Jr.	H. E. Stone
	J. D. Watson



Executive Vice President

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0007-SWP-0059293

INDEX

Foreword 1

Introduction 5

I. Legal bases for liability of manufacturer for harm caused by product or failure of product to perform satisfactorily 7

A. Negligence 7

B. Warranties 9

1) Express Warranties 9

2) Implied Warranties 10

3) Damages for Breach of Warranties 11

II. Avoidance or Limitation of Liability .. 12

A. Product Liability Insurance 12

B. Adequate and Accurate Labeling 13

C. Disclaimers 17

Exhibits 21

1) Conditions of Sale on Customer Order Acknowledgments 21

2) Contract Coverage Acceptance of Orders 21

3) Disclaimer of Liability on Letterheads and Invoices 22

4) Letter of Disclaimer to Customers 22

5) Disclaimer of Liability on Customer Service Literature 23

Table of Cases 24

0007-SWP-0059294

INTRODUCTION

A problem of mounting importance today, is the great increase of product liability suits and the increasing number of recoveries. The Wall Street Journal as early as 1960, estimated that an average of 10,000 product liability cases were then being instituted yearly and that the figure was climbing. The New Jersey Supreme Court, after reviewing recent product liability developments, stated: "Primarily, they reveal a trend and design in legislative and judicial thinking toward providing protection for the buyer." The following language of the New York State Court of Appeals, in a product liability decision on February 22, 1962, is indicative of this trend in judicial thinking: "We are doing nothing more or less than carrying out an historic and necessary function of the court to bring the law into harmony with modern-day needs and with concepts of justice and fair-dealing".

In view of these developments, we have prepared this pamphlet to acquaint Association members with the general problem, its legal aspects and some means that may be helpful either in avoiding or limiting product liability.

The statements or conclusions contained herein are not to be considered as either a suggested policy or enunciation of industry standards. They are included merely for guidance and informational purposes. Association members are urged to refer this pamphlet to their own counsel for review and advice in light of the law of the particular state in which the manufacturer is located and also in light of any facts or circumstances which may be peculiar to that manufacturer and his method of doing business. Members actually presented with product liability problems are by all means, urged to consult and rely on their own counsel. Appendices I through VI are incorporated to show the cases researched in the preparation of this pamphlet and to provide a ready reference to current cases for individual company or private counsel.

0007-SWP-0059295

PRODUCT LIABILITY

I. Legal bases for liability of manufacturer for harm caused by product or failure of product to perform satisfactorily.

Under common law, a manufacturer's liability for personal injuries or economic loss sustained as a result of his placing on the market a dangerous or defective product, may be based on either or both of two separate causes of action or means of recovery. (1) Negligence (2) Breach of Warranty. The great majority of early recoveries were based on the negligence of a manufacturer. Today, however, negligence is often not a factor, and courts may simply find that injury resulted from the normal use of the product and that this is reason enough to hold a company liable.

A. NEGLIGENCE

Ordinarily, a manufacturer is not liable for resulting injury or property damage when he has exercised reasonable care in placing an efficacious product on the market. The usual forms of negligence by a manufacturer can be summarized as follows:

1. Failure to exercise due care in the selection and purchase of ingredients for incorporation into the finished product,
2. Failure to exercise due care in the adoption of a formula which will produce a finished product which is safe and efficacious for the use for which it is sold,
3. Failure to make proper inspections and tests during the course of manufacture and after the product is finished and ready for distribution,
4. Failure to label his product with appropriate warnings and directions for use or to carelessly make false and misleading representations on the label or in advertisements and sales literature as to the safety and usability of the product,
5. Failure to exercise due care in the packaging and preparation of his product for distribution and sale.

With respect to No. 4, there are today, State and Federal Laws which prescribe labeling requirements for the products of our industry, e.g., the Federal Hazardous Substances Labeling Act. While some courts take the position that non-compliance with these State or Federal Laws is mere evidence of negligence, most jurisdictions today generally support the theory that non-compliance with statutory laws is negligence *per se*, and renders the manufacturer liable without actual proof of specific negligence. Proper labeling of your products is ex-

0007-SWP-0059296

tremely important and will be considered more thoroughly in Part II—Avoidance or Limitation of Liability.

The earlier product liability decisions adopted the rule that a remote party could not maintain a negligence action directly against the manufacturer since there was no "privity of contract" with the manufacturer. Privity was a requirement that a direct contractural relationship exist between the plaintiff and the defendant. However, in 1916, the rule which is now the general one today, was developed in the famous MacPherson vs. Buick Company case. Judge Cardozo premised his decision on the traditional tort theory of "foreseeability" rather than privity of contract and held the automobile manufacturer liable to a remote purchaser injured by reason of a defective wheel. The following statement in the opinion, illustrates the thinking of the court in this case: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, *irrespective of contract,* the manufacturer of this thing of danger is under a duty to make it carefully."

Situations involving liability of a chemical coatings manufacturer for negligence in manufacture either to a buyer or third party would primarily arise in the area of coatings applied to cans, cap liners and similar food packages. It is difficult to envision a situation involving a coating on an appliance or automobile where there is an inherent danger similar to that in the MacPherson case.

Even under the MacPherson rule, a manufacturer would normally not be liable to the ultimate consumer for breach of express or implied warranties unless the manufacturer sold to him directly. However, it will be noted in the following discussion, that even in warranty cases, the courts are dispensing with the old privity of contract requirements.

Damages recovered for negligence will generally be upheld if they bear a reasonable relation to the injury or loss sustained. In personal injury cases such facts as the age and health of the injured party, earning power prior and subsequent to the injury, disability resulting, whether temporary or permanent, medical and other expenses, as well as physical pain or suffering, are considered by the courts. In property damage cases the measure of damages is usually the difference in the market

value of the property immediately before and the value subsequent to the occurrence or accident.

B. WARRANTIES

A warranty action is not based on any negligence of the manufacturer. This action is premised on the fact that the manufacturer has placed on the market an unsafe or unsatisfactory product despite an express or implied representation to the purchaser that it was safe or satisfactory for use. The court in such an action is not concerned with the diligence of the manufacturer, but rather whether he made representations to the contrary when his product put to its intended use, resulted in damage.

In a recent decision in one of our industrial states, the court stated: "A manufacturer is required to exercise only ordinary care in the fabrication of his products; if he is not negligent, he is not liable to a consumer for defects. *But by making affirmative warranties, he has enlarged his duty beyond that imposed by law, and assumes 'the risk of injuries proximately caused by such misrepresentation.'*" The same rule applies to the implied warranties which are created by law as an enlargement of the duty of the manufacturer even when no express warranty is made by him.

1) *Express Warranties*

A manufacturer expressly warrants the safety and usefulness of his product when he makes any statement or promise relative to safety or usefulness the natural tendency of which is to induce the purchaser into buying the product, and which is relied upon by the purchaser. Express Warranties by a manufacturer are generally made on the labels or in advertising and sales literature. Other classes of sellers such as dealers, warrant orally or in the invoice of sale. No specific intent to warrant need be shown, if the statements or claims made would lead a reasonable buyer to believe that such statements had been made to induce the sale. Nor does the seller need to use the word "warrant", so long as the natural import of his words consists in a representation of some characteristic of the goods sold.

The attitude of the courts with respect to express warranties is reflected in the following language of a State Supreme Court: "Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumer, and the manufacturer ought to be held to strict accountability to any consumer who buys the

0007-SWP-0059297

product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious."

2) *Implied Warranties*

Today, manufacturers, even in the absence of an express warranty, are generally subject to laws creating implied warranties that their products are of merchantable quality and reasonably fit for the use for which sold.

Under the Uniform Sales Act, there is no implied warranty as to fitness for any particular purpose in the case of a contract to sell or a sale of a specified article under its patent or other trade name. However, where the goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality.

The usual defenses in a warranty action include: (1) Plaintiffs own negligence or misuse as the proximate cause of the injury; (2) Lack of privity; and (3) An effective disclaimer of liability by the manufacturer.

Formerly, a manufacturer would not be liable to the ultimate consumer for breach of express or implied warranties unless that manufacturer sold to him directly. For years, ultimate consumers were allowed to recover against remote manufacturers only in cases involving food, drink and drugs. Others were free of such liability. This is not so today. More recently, the courts have moved into broader fields and are dispensing with the requirements of privity or direct contractural relationship in cases involving non-food products. For example, absolute liability has been imposed in these recent cases: (1) Home permanent wave sets causing loss of hair; (2) Inflammable cowboy suits burning little children; (3) Defective wire ropes causing scaffolding to collapse; and (4) Soap detergent causing skin rash. The most recent example of the courts dispensing with the old privity requirements is aptly illustrated in a 1962 decision by a State Court of Appeals. Plaintiff, a sweater manufacturer, purchased from its suppliers for use in making sweaters, a fabric treated with a chemical resin manufactured by the defendent company. It was alleged that in purchasing the resin treated fabric, plaintiff relied upon the manufacturer's advertisement that a fabric treated with this resin would not shrink or lose its shape when washed. It cited the garment tags supplied by the manufacturer that read ". . . this fabric . . . will not shrink or stretch out of fit". The court upheld the lower court's decision

in favor of the plaintiff and made the following statement in connection with the manufacturer's lack of privity defense:

"The world of merchandising is no longer a world of contract. It is, rather a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels prove false, and the user or consumer is damaged by reason of his reliance on those representations, it is impossible to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity."

The third defense, disclaimer of liability, will be considered under Section II—Avoidance or Limitation of Liability.

3) *Damages for Breach of Warranties*

The general rules with respect to damages for breach of Implied or Express Warranties are set forth in the Uniform Sales Act which prevails today in 35 States. Under the Sales Act, the measure of damages for breach of warranty is the loss directly and naturally resulting from the breach. With respect to breach of warranty of quality, the measure of direct damages recoverable under the Sales Act is the difference between actual value when delivered to buyer and value if they had conformed with warranty.

In addition to direct damages, however, consequential damages are also recoverable for breach of warranty. Physical injury to the buyer through the use of the goods is the most common example. Where a husband or father is the buyer, frequently medical expenses for the wife or children have been held elements of damage. In a case involving the fitness of turkey poults, buyer recovered damages including all costs incurred by him in reducing such loss and his loss of profit. Loss of "good will" has also been recognized as an element of damages flowing from the use of unfit material from one who warranted it to be fit.

In a defective roofing case all inconvenience. annoyance and sickness caused by leaks was held recoverable. In another case where goods were bought for export to South America, a buyer recovered the cost of freight to a subvendee and return, insurance on shipment, carting and loss of profits. In a sale of defective machinery a state court held as proper items of damages for breach of warranty, the expenses incurred by the buyer in selling the machine, the purchase price and installation cost of certain other equipment used in connection with the machine, otherwise unuseable and unmarketable, and the cost of testing batches of chemicals produced by

0007-SWP-0059298

the machine. These items were all considered as losses directly and naturally resulting from the breach.

To illustrate the extent of such damages, in a case discussed later in this pamphlet involving a roof primer, plaintiff recovered $111,000.00. A counterclaim action based on defective paint against a paint manufacturer who had sued for the value of the paint, resulted in a verdict for the defendant in the amount of $104,000.00. In another case involving paint causing eye injury, plaintiff recovered $15,000.00. A sum of $78,000.00 was recovered in a case involving the use of hydraulic fluid which caused fire. In a case referred to earlier, a remote purchaser recovered $208,000.00 from a resin manufacturer when the resin used in making sweaters caused the sweaters to shrink. Just a few years ago, an oil company which manufactured a product as grease for machinery, paid damages of over $10,000,000.00 when the grease was responsible for the contamination of cattle food.

II. Avoidance or Limitation of Liability.

A. PRODUCT LIABILITY INSURANCE

Before discussing actual means of avoiding or limiting liability, it is appropriate to mention product liability insurance. Obviously such insurance provides a form of protection and should be considered by Association members. There are, however, many pitfalls in product liability insurance and you are urged, in advance of buying such insurance, to have the policy studied by company or individual counsel. As with all types of insurance, the "product hazard" coverage contained in the more common Comprehensive General Liability policy, is subject to limitations, conditions and exclusions. It is extremely important to read carefully these conditions, limitations, etc., since they can represent protection you may think you have, but actually do not.

Perhaps the most common problem connected with product liability coverage has centered around the use of the words "accident" and "occurrence." The greatest care must be exercised in making sure that all definitions in the insurance policy conform to the insured's understanding, especially the definitions of "accident" or "occurrence." In many cases a narrow definition of either of these words, or a definition which is at variance with the generally accepted meaning, may relieve the insurance company of liability under its policy. Companies take out liability policies not only to protect themselves against loss but also to preserve good customer relations. If a narrow definition permits the insurance company to escape paying for a customer's loss, the manufacturer may very often have to pay the loss out of his own pocket to preserve good relations with the customer.

While most policies are drafted with a carefully defined "accident" coverage only, today there are companies which extend coverage on an unconditional "occurrence" basis, thereby insuring against claims where there is no act of the manufacturer, unintentional or otherwise, which contributed to the failure of the product. Such insurance, of course, involves greater risks and correspondingly increased premiums.

Some companies, in order to minimize insurance expenses, are self-insured to a certain amount and obtain product liability insurance only for the unusually large or catastrophic claims.

In most policy contracts, definitions of "product hazard" limit protection to accidents or occurrences involving your products only when they are *not* on premises owned or controlled by you and *after* you have relinquished possession and control of them. In addition, coverage normally extends to containers *other than vehicles*, but does not cover property used by others in selling your products, but not sold itself. In addition, you are not protected against loss of customers or goodwill. Under a so-called "defective products clause", you can not recover the cost of repairing or replacing a defective product. Furthermore, this same clause says that your customers *loss of use* of the defective product is not insured and there is no guarantee of the performance of your product.

The type of insurance you should buy or the dollar amount of protection you should have is neither recommended nor suggested. These are individual matters for each company to decide. We do, however, recommend careful study and review by legal counsel.

B. ADEQUATE AND ACCURATE LABELING

As stated earlier, proper labeling of a manufacturer's products is very important and can not be stressed too strongly. While disclaimers of liability can be effective in some cases, the most effective means of avoiding or limiting your liability is to label your products as accurately and as thoroughly as possible.

The necessity for proper and adequate labeling is illustrated in a 1958 case involving a manufacturer of dry cement paint. The directions on the box contained a warning that the paint was strongly alkaline and to avoid contact with the skin. The label also

0007-SWP-0059299

stated that the product contained Portland Cement and calcium oxide. Portland Cement is 50 to 60 percent calcium oxide and calcium oxide is lime. The father of the boy, who was blinded when his eye accidently came into contact with the dripping brush, testified that if he had known the paint contained lime he would not have used it or would have taken extra precautions. The court in allowing recovery, ruled that the careless actions of the father and boy did not mitigate the failure to *properly* and *thoroughly* label the product.

In another action by a purchaser of a can of roof primer against the manufacturer for destruction of a warehouse by fire, plaintiff recovered $111,000.00 when his unskilled employee heated a can of the primer on an open stove. The primer was determined to have a flash point of 80°F. In a pamphlet accompanying the primer, there was a caution not to heat the primer with an open flame nor to thin it, stating that either would damage the waterproofing qualities. A section of the state code required the word "explosive" on the label of any container which contained certain petroleum derivatives or explosives. The roof primer was determined to be a petroleum product and did not contain the required labeling. The court held that the question whether the product contained the substances regulated by statute so as to require the use of the word "explosive" on the label was properly one of fact for the jury. On the issue of negligence, the court ruled that the language referred to in the instruction pamphlet amounted to a direction for using the product to obtain the greatest utility from it and that the failure to warn that heating of it might pose a hazard of explosion or fire constituted negligence. The court also rejected arguments on contributory negligence, as well as the argument that the plaintiff had made an improper use of the product which could not have been anticipated by the manufacturer.

Labeling problems have been accentuated in recent years through the passage of numerous State and Federal Laws controlling types of label statements. The Federal Hazardous Substances Labeling Act is perhaps the best example. The National Paint, Varnish and Lacquer Association, following issuance of the Food and Drug Administration's Regulations under the new Act, revised its recommended precautionary labels which have been issued to all members. These recommended labels not only conform to the new Federal Regulations, but will also satisfy most State or local labeling requirements. You are urged to follow these recommendations closely in preparing your labels.

Precautionary labels designed to acquaint users with hazards existing in the use of products, are divided into two large sub-divisions as far as our industry is concerned. One group of label laws is directed toward precautionary labeling of paint and paint products. The other group of laws covers paints and paint products as well as many other chemical and pharmaceutical items. The first category we refer to as paint labeling legislation, and the second, hazardous household products legislation.

States with laws on hazardous substances are California, Colorado, Hawaii, Illinois, Indiana, Kansas, Massachusetts, Minnesota, New Jersey, New York, Ohio, Oregon, Texas and Vermont. These hazardous products laws relate generally to retail sales and do not seek to bring under their jurisdiction industrial transactions which do not involve a marketing of the product as such to individual members of the public.

The following states have labeling statutes limited to paint products as such: Alabama, California, Georgia, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Mississippi, Nebraska, North Dakota, Ohio, Pennsylvania, South Dakota, Vermont, Virginia and Wyoming. Eleven states now require formula labeling of products handled by paint distributors and dealers. These states are: Alabama, Iowa, Minnesota, Mississippi, Montana, Nebraska, North Dakota, South Dakota, Vermont, Virginia and Wyoming. Generally, the formula labeling legislation, since its object is to protect retail purchasers, exempts industrial transactions from its coverage, since the industrial user, buying in large quantities and frequently by specification, pretty well knows what is in the product that he is purchasing.

The Cities of New York, Buffalo and Baltimore have special municipal ordinances relating to paint. The Fire Department in New York has one set of regulations to protect against the hazards of flammability and combustibility, while in the same city the Health Department has other regulations to protect the health of its citizens from harmful ingredients in paint.

The Interstate Commerce Commission prescribes labeling requirements for flammable liquids or solids which cover paints and paint products with flash points of 80°F. or lower. The same regulations provide specific methods of packing and contain specifications of containers, with special rules for those liquids with a flash point under 20°F.

Most labeling laws were enacted to protect consumers and "do-it-yourself" users of products. Thus, under the Federal Hazardous Substances Labeling

0007-SWP-0059300

Act, and virtually all state laws, transactions which put the products into the hands of industrial users as distinguished from homes, are not covered. But this does not mean that a manufacturer of chemical coatings intended for industrial use is absolved from the necessity of careful labeling of his products.

Frequently, the industrial sale brings the product into use in a state or city which has laws to protect workmen in their use of the product during manufacturing processes. Safety requirements for transporting products frequently require labeling flammable or extremely hazardous products and various regulations at the point of use must be observed whenever the product has a latent peril or hazard to the user.

Manufacturers therefore, should ascertain, even in the case of industrial sales, whether the product is to be applied in a state with either a state labor or health regulation for the protection of workmen. In interstate commerce it is always required that flammable products bear the diamond red label prescribed by the Interstate Commerce Commission.

Tied up with these laws and regulations is the well established line of court decisions which state that failure of a manufacturer to comply with the labeling statutes or regulations gives rise to a presumption of negligence. Of course, while these statutes and administrative regulations dictate what the manufacturer must show on the labels of products sold in interstate or intrastate commerce, they do not, however, completely represent a manufacturers duty to label insofar as potential civil liability is concerned. Compliance with the labeling provisions of a particular law may not amount to compliance with the common law standard and civil liability may result. This was illustrated in a 1956 decision which held that the fact that the label on the container of carbon tetrachloride had been approved by the United States Surgeon General was not controlling on the question of its adequacy in a product liability suit.

The following points are generally followed today by the courts in determining whether a particular label is or is not adequate: (1) Sufficiency or accuracy of a label depends upon the interpretation by the average purchaser after reading the label entirely and in context; (2) A label while true in the strict sense of the word may be deceptive to the average purchaser for whose use the product is intended. Ambiguity and indirection must be avoided to the same extent as unequivocal false statements or non-disclosure. Your label may be technically accurate, but easily subject to misinterpretation by the intended consumer; (3) Broad

general terms used in label claims will be construed strictly against the manufacturer. Claims of uses and advantages should be restricted, therefore, to the specific or the manufacturer faces the possibility that they will be construed to cover matters not intended to be covered.

Today's trend in judicial thinking is emphasized in the Court's opinion in the recent Tampa Drug Case. In this case the widow of a purchaser and user of a gallon of carbon tetrachloride collected $160,000.00 because of improper labeling. The label did contain precautionary statements, but did not warn that inhalation might be fatal. The State Supreme Court, in ruling that the question of whether the label adequately warned of the hazard was an appropriate question for the jury, stated "Implicit in the duty to warn is the duty to *warn with a degree of intensity* that would cause a reasonable man to exercise for his own safety the caution commensurate with the potential danger."

C. DISCLAIMERS

Disclaimer clauses intended to limit a vendor's liability have become increasingly popular in recent years. The general rule is that a manufacturer may avoid liability for negligence or breach of warranty through the use of disclaimers on the label of his products or in contracts or in invoices of sale. However, as will be later noted, disclaimers while generally recommended, are not always reliable.

With respect to negligence, the courts generally hold that clear and explicit language is required to absolve one from liability for his own neglect. Negligence can not be disclaimed unless it is established (1) that the cause of injury was specifically excepted against and (2) that knowledge of this was made known to the claimant. Questions of public policy today, have an important effect on the courts reaction to particular disclaimers where recovery is sought on the ground of the manufacturer's negligence and the general rule rarely absolves responsibility where dangerous products are involved.

The disclaimer rules for breach of warranty are not as strict. Courts have frequently held disclaimers effective as to breach of warranty, but ineffective as to negligence. In a breach of warranty action, it is not essential that the plaintiff actually read and understand the disclaimer if it was in fact made and could have been read and reasonably understood. However, recent decisions indicate that a claimant should have the opportunity to note the disclaimer before consummation of the sale. In one case the invoices contained a disclaimer of warranty and limitation of liability to the value of paint. The

0007-SWP-0059301

court in ruling for the plaintiff held that warranties of paint for specific use could not be modified by a disclaimer on the invoice, since the defendant was not aware of the disclaimer, did not agree to it and the invoice was only a memorandum of sale on a consummated contract.

A typical disclaimer clause which has found acceptance in the courts is: "It is agreed that there are no warranties, either express or implied, which are not expressly endorsed hereon." This type clause is as effective as any other provision in the contract and the attitude of the courts in accepting such disclaimer in the past may be summed up as follows: "Neither party was obliged to enter into this contract, and there is no public policy which prevents adult persons of sound mind making such agreements as they please, not prohibited by statute, or contrary to natural justice and good morals." According to the trend of the more recent decisions, however, *express* warranties on the labels of a product can not be effectively disclaimed. This now appears to be the general rule. For example, a statement on a label that a product is "safe for use" has been held to constitute an express warranty and that such statement could not be disclaimed by another statement that the "use of the product being beyond our control, we do not make any warranty express or implied, as to the effects of such use."

This trend in the law may be difficult to understand since it seems logical to assume that a purchaser who has both the warranty and disclaimer before him, should be estopped from later relying on the warranty in a law suit. The recent decisions, however, indicate a feeling in the courts that the average consumer does not fully appreciate the operative effect of a disclaimer. Some legal writers have referred to this thinking as an "under evaluation of the bargaining position of buyers" and have called this a serious impediment to the natural evolution of the law of warranty. The following language of a state supreme court justice in a most recent (January 1962) ruling on a procedural point of Product Liability Law, is illustrative of today's judicial thinking: "The argument . . . advanced by the seller and the manufacturer ignores the difficulties of the purchaser in our modern market place."

Recent cases have also tended to reduce the effectiveness of disclaimers of impiled warranties particularly where the warranty was imposed by State law or where the plaintiff was not clearly notified of the disclaimer. This has been particularly true where disclaimers of the warranties have been included in the fine print of sales contracts.

In spite of the more liberal trend, the general rule

is still that a manufacturer can effectively disclaim implied warranties. A manufacturer of an x-ray machine was held not liable where a disclaimer in the contract clearly precluded the existence of implied warranties.

A recent case clearly highlights the judicial trend toward consideration of public policy factors. After holding that the defendant auto manufacturer could not disclaim either express or implied warranties by reason of a general disclaimer contained in the purchase order, the court went on to say, "judicial process has recognized a right to recover damages from breach of warranty. The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed are a studied effort to frustrate that protection. True, the Sales Act authorized agreements between the buyer and seller qualifying the warranty obligations, but quite obviously the Legislative (sic) contemplated such stipulations be arrived at by parties of relatively equal strength. The lawmakers did not authorize the auto manufacturers to use its grossly disproportionate bargaining power to relieve itself from liability or to impose on the ordinary buyer the risk of danger to himself."

The Uniform Sales Act which is applicable in most jurisdictions today, provides that a seller is not liable if a buyer who is aware or ought to be aware of a breach of warranty, fails to give notice of the breach within a reasonable time. The purpose of this notice is to advise the seller that he must meet a claim for damages in order that he might advantageously investigate the merits of the claim. While the question of reasonableness is a question of fact for a jury, there have been cases where four months and six months delay in giving sufficient notice were held to preclude recovery. In connection with notice, it is recommended that a provision be included in disclaimers that failure of a buyer to give the seller written notice, within a specified period of time, of a claim shall constitute a waiver of all claims. Such a provision is found in most of the more recent disclaimer notices.

Protection against claims by *direct customers* is ordinarily made through provisions set forth in sales contracts or on order acknowledgments. These take the following forms: 1) Express statement of warranties made and disclaimer of all other warranties, express or implied. 2) Limitations of amount of damages in case of breach of warranty or negligence. 3) Limitation of period of time in which notice of a claim must be made. 4) Disclaimer of responsibility for results obtained by following technical advice or recommendations given by seller.

0007-SWP-0059302

5) Statement that provisions of contract or other acknowledgment form may not be modified by oral statement of salesmen but only in writing.

The general rules which we have discussed regarding disclaimers of liability are also applicable in situations involving disclaimers and attempts to limit recovery involving direct customers of a manufacturer. Here also the buyer must have adequate notification of the disclaimer or limitation prior to the consummation of the sale.

Exhibit 1 illustrates a typical statement of conditions of sale which includes all of the five previously mentioned forms of disclaiming or limiting liability. If this acknowledgment is received by the buyer prior to the shipment and receipt of the material, it would undoubtedly be effective. In the practical application, however, often times the merchandise is delivered before the order acknowledgment containing the disclaimer is sent to the buyer. One method of protecting the manufacturer in this situation is by the use of over-riding agreements covering warehouse pick-ups which are acknowledged by the customer and retained on file. (Exhibit 2)

As we have seen, disclaimers of liability contained on letterheads and invoices are usually of little legal effect in the event of a bonafide claim. The use of such clauses, however, serve a beneficial public relations function in that they stress the terms and conditions upon which the parties intend to do business and reiterate portions of the contents of the order acknowledgment. (See Exhibit 3)

One of the most frequent causes of liability is statements made by salesmen or technical service representatives to the customer. Such statements when made within the scope of employment constitute express warranties and in accordance with the recent trend may impose liability regardless of a general disclaimer of such express warranties.

Exhibit 4 illustrates a general letter of disclaimer which may be employed to notify the customer, in addition to any clause contained in the sales agreement, that the manufacturer will not be liable for any statements or recommendations made by sales or service personnel in advising the customer concerning the application of the product. This disclaimer, as indicated above, may not always be effective, but still will have its public relations effect.

Exhibit 5 illustrates a typical disclaimer appearing on technical literature and should be included on all bulletins, brochures, etc., that may find their way into the hands of a customer or prospective user.

EXHIBIT 1

Conditions of Sale on Customer Order Acknowledgments

Seller warrants that the products delivered hereunder are of uniform quality within manufacturing tolerances. Since Seller exercises no control over Buyer's methods of application or use, it does not warrant or guarantee that Buyer's end product will be free of defects.

Seller warrants that the use or sale of its products will not infringe the claims of any United States patent covering the products themselves but does not warrant against patent infringement by reason of the use of its products in combination with other materials or in the operation of any process.

Seller's liability for damages arising out of breach of warranty or negligence is hereby expressly limited to (1) the purchase price of the products delivered hereunder; or (2) in the case of finishes where refinishing is practical, to the cost of direct labor and materials used in refinishing or five times the purchase price of the products delivered hereunder, whichever is the lesser.

Failure of Buyer to give Seller written notice of claim within one year from date of delivery shall constitute a waiver of all claims in respect of such products.

All technical advice, recommendations and services are rendered by the Seller gratis. They are based on technical data which the Seller believes to be reliable, and are intended for use by persons having skill and know-how, at their own discretion and risk. Seller assumes no responsibility for results obtained or damages incurred from their use by Buyer in whole or in part.

No modifications of these terms and conditions shall be of any force unless reduced to writing and signed by the party claimed to be bound thereby; and no modification shall be effected by the mere acknowledgment or acceptance of purchase-order forms containing different terms and conditions.

EXHIBIT 2

Contract Coverage Acceptance of Orders

Gentlemen:

When orders for finishing materials are shipped from our plants, our customers receive an order acknowledgment copy of our mill order containing certain terms and conditions applicable thereto, which protect the interests of both the customer and the Jones Company.

The principal reason for our warehouse facilities at (blank) is to make available stocks for emergency service as distinguished from routine direct-from-plant shipments. The difference in time interval between receipt and shipment of an order precludes the use of order acknowledgment forms.

Since it is our mutual interest to have the same terms and conditions apply to both plant and warehouse shipments, we are attaching hereto for your acceptance, the terms and conditions to apply on orders received from you and shipped from our (blank) warehouse. This arrangement shall continue until cancelled by either party by notice in writing.

We hate to bother you with this detail, but we are most anxious to have our industrial business conducted on a uniform basis nationally.

0007-SWP-0059303

Please sign the duplicate copy of this letter in the space provided and return same to the writer's attention.

Yours very truly,
THE JONES COMPANY

By:
(Industrial Sales Manager's Signature)
(Region) Industrial Sales Mgr.

ACCEPTED BY *(Customer's name)*

Signature of Authorized Representative

EXHIBIT 3

Disclaimer of Liability on Letterheads and Invoices

Seller's liability for damages arising out of breach of warranty or negligence is expressly limited to (1) the purchase price of the products delivered hereunder; or (2) in the case of finishes where refinishing is practical, to the cost of direct labor and materials used in refinishing or five times the purchase price of the products delivered hereunder, whichever is the lesser.

All technical advice, recommendations and services are rendered by the Seller gratis. They are based on technical data which the Seller believes to be reliable, and are intended for use by persons having skill and know-how, at their own discretion and risk. Seller assumes no responsibility for results obtained or damages incurred from their use by Buyer in whole or in part. Such recommendations, technical advice or services are not to be taken as a license to operate under or intended to suggest infringement of any existing patent.

EXHIBIT 4

Letter of Disclaimer to Customers

Technical information and assistance has been one of the most important services we render to our customers. They have come to rely upon this service furnished through our company salesmen, servicemen or technical supervisors. We not only want to continue it, but to be of even greater assistance whenever possible.

Unfortunately, at times, misunderstandings have developed with regard to the limits of our responsibility in connection with such services. We have no control over the customer's manufacturing process, over the climatic conditions in his plant (or at the job), over the preparation of the surface to be coated, nor over the customer's operating personnel. Therefore, we can give no warranty that the customer's product (or the job) will be free of defects. We have always tried to make this clear to our customers. We include a statement of our responsibility for our products on order acknowledgments, letterheads and other company literature.

To summarize, we do accept full responsibility for the quality and uniformity of our finishes (or paints) but we can not guarantee the quality of the product (or the job) to which our finishes (or paints) are applied. This restatement of our long established position is made in justice to all concerned.

Above all else, we want to retain you as one of our valued customers. We will continue to furnish without charge the technical information and assistance you request, but we can not accept responsibility for decisions regarding design, manufacturing processes and procedures in your plant (or on the job you are doing). In all fairness, they belong to you.

This does not represent any change in our selling policy. It is only a restatement of the basis on which we have always dealt with our customers and we sincerely hope you will accept it in that spirit.

EXHIBIT 5

Disclaimer of Liability on Customer Service Literature

All technical advice, recommendations and services are rendered by the Seller gratis. They are based on technical data which the Seller believes to be reliable, and are intended for use by persons having skill and know-how, at their own discretion and risk. Seller assumes no responsibility for results obtained or damages incurred from their use by Buyer in whole or in part. Such recommendations, technical advice or services are not to be taken as a license to operate under or intended to suggest infringement of any existing patent.

0007-SWP-0059304

TABLE OF CASES

Extent of Liability

(a) **Cases holding manufacturer liable to remote parties:**

(1) Ebers v. General Chemical Co., 17 N.W. (2d) 176 (Mich., 1945) (liable to purchaser from dealer where express warranty made in advertising pamphlet).

(2) Mannez v. Macwhyte Co. (1946) 155 F. (2) 445.

(3) Free v. Sluss, 197 P. (2d) 854 (Cal., 1948) (express warranty on label; manufacturer liable to retail purchaser from wholesaler).

(4) Randall v. Goodrich-Gamble Co., CCH 22,279, reversed 54 N.W. (2d) 769 (Minn., 1952.) (manufacturer liable to subvendee for breach of express warranty) (reversed on rehearing because of erroneous instructions).

(5) Worley v. Proctor & Gamble Mfg. Co., 253 S.W. (2d) 532 (Mo., 1952) (warranty on label; manufacturer liable for injury to purchaser from dealer).

(6) Blessington v. McCrary Stores Corp. (1953) 305 N.Y. 140, 111 N.E. (2) 421.

(7) Burr v. Sherwin-Williams Co., 268 P. (2d) 1041 (Cal., 1954) (reversing 258 P. (2d) 58 (Cal., 1953) (pesticide manufacturer liable for property damage to non-purchaser).

(8) Graham v. Bottenfield's Inc., 269 P. (2d) 413 (Kansas, 1954) (distributor of hair preparation to beauty shop liable to customer for breach of implied warranty of fitness).

(9) Bowman v. Great A & P Tea Co., 125 N.E. (2d) 165 (C.A., N.Y., Feb. 24, 1955) (implied warranty of fitness extends to purchaser's agent where agent purchased food with joint funds for joint consumption).

(10) Mouren v. The Great A & P Tea Co., 139 N.Y.S. (2d) 375 (S. Ct., N.Y., March 23, 1955) (Meat vendor liable to purchaser's wife).

(11) Markovich v. McKesson and Robbins, Inc., (958) 106 Ohio App. 265, 149 N.E. (2) 181.

(12) Rogers v. Toni Home Permanent Co. (1958) 167 Ohio St. 244 147 N.E. (2) 612.

(13) Bowles v. Zimmer Mfg. Co., 277 F. 2d 868 (1960).

(14) Hansen v. Firestone Tire & Rubber Co., 276 F. 2d 254 (1960).

(15) Senter v. B. F. Goodrich Co., D.C. Colo., 127 F. Supp. 705, 707, 708.

(16) Clarkson v. Hertz Corp., 266 F 2d 948 (1959). (Wife of automobile vendor allowed to recover against rental agency for defect in car).

(17) Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120; 90 N.W. (2d) 873 (1958). (Mfgr. liable despite lack of privity).

(18) Manzoni v. Detroit Coca Cola, Inc., 363 Mich. 235; 109 N.W. (2d) 918 (1961). (food product) (Mfgr. liability in breach of warrant "available to all who may suffer damages by their use in the legitimate channels of trade").

(19) Randy Knitwear v. American Cyanamid Co. (1962) N.Y. Ct. of Appeals, Feb. 22, 1962). (Lack of privity no defense in breach of warranty action).

(b) **Cases holding manufacturer not liable to remote parties on lack of privity:**

(1) Sierocinski v. E. I. DuPont de Nemours and Co., 25 F. Supp. 706 (Pa., 1938) (No implied warranty of fitness between manufacturer and third party).

(2) Wechsler v. Hoffman-La Roche, Inc., 99 N.Y.S. (2d) 588 (N.Y., 1950) drug manufacturer not liable for injury to physician's patient).

(3) Green v. Equitable Powder Mfg. Co., 94 F. Supp. 126 (Ark., 1950), affirmed, 95 F. Supp. 127 (Ark., 1951) (explosives manufacturer not liable for injury to employee of purchaser).

(4) Campo v. Scofield, 95 N.Y.S. (2d) 610 (1950) (manufacturer not liable for injury to purchaser from retailer).

(5) Cohan v. Associated Fur Farms, 53 N.W. (2d) 788 (Wisc., 1952) (ingredient supplier not liable to purchaser from processor-dealer for loss of mink).

(6) Wood v. General Electric Co., 112 N.E. (2d) 8 (Ohio, 1953) (manufacturer not liable for injury to purchaser from dealer).

(7) Frier v. Proctor & Gamble Distributing Co., 252 P. (2d) 850 (Kan., 1953) (detergent manufacturer not liable for personal injury to ultimate user).

(8) Senter et al v. B. F. Goodrich Co., 127 F. Supp. 705 (Colo., 1954) (tire manufacturer not liable to passenger in car).

(9) Lombardi v. California Packing Sales Co., 112 A (2d) 701, (S. Ct., R.I., April 1, 1955).

(10) Zampino v. Colgate-Palmolive Co., 173 N.Y.S. 2d 117 (Sup. Ct., Mont. County, 1958) (husband not allowed to recover for loss of services).

(11) Blitzstein v. Ford Motor Co., 288 F. 2d 738 (1961). (Under Alabama Law no action under implied warranty where no privity of contract. Remanded on other grounds).

Express Warranties

(a) **Cases holding manufacturer liable for breach of express warranty:**

(1) Ebers v. General Chemical Co., 17 N.W. (2d) 176 (Mich., 1945) (insecticide manufacturer liable to remote user on basis of safety claims made in advertising pamphlet).

(2) Free v. Sluss, 197 P. (2d) 854 (Cal., 1948) (Soap manufacturer liable to remote user on guarantee of quality made on the label).

(3) Simpson v. American Oil Co., 14 S.E. (2d) 638 (N.C., 1941) (insecticide manufacturer liable to remote purchaser on basis of safety claims made on label).

(4) Lindroth v. Walgreen Co., 87 N.E. (2d) 307 (Ill., 1949), affirmed 94 N.E. (2d) 847 (Ill., 1950) (manufacturer liable to remote user partially on

0007-SWP-0059305

safety claims made on the label and in pamphlet accompanying the product).

(5) Worley v. Procter & Gamble Mfg. Co., 253 S.W. (2d) 532 (Mo., 1952) (liable for warranty of safety on label).

(6) Park v. Moorman Mfg. Co., 241 P. (2d) 914 (Utah, 1952) (statement by salesman held express warranty).

(7) Wasatch Chemical Co. v. Leon, 259 P. (2d) 301 (Utah, 1953) (pesticide manufacturer liable to purchaser on basis of oral claims for safety made at the time of sale).

(8) India Paint and Lacquer Co. v. United Steel Products Corp., 267 P. (2d) 408 (Cal., 1954) (manufacturer of paint held liable for express warranty notwithstanding disclaimer on invoice).

(9) Swan v. American Cyanamid Co., 88 S.E. (2d) 152 (St. Ct., Ga., July 11, 1955) (statement in advance bulletin constituted express warranty of safety).

(10) Crystal Coca-Cola Bottling Co. v. Cathey 317 P. (2d) 1094 (S. Ct., Ariz., 1957).

(11) Markovich v. McKesson and Robbins, Inc., 149 N.E. 2d 181 (C.A.—Ohio, Apr. 2, 1958) (radio broadcast held to constitute express warranty).

(12) Rogers v. Toni Home Permanent Co., 147 N.E. (2d) 612 (S. Ct., Ohio, 1958) (advertising constituted an express warranty from manufacturer to remote user).

(13) Nicholson v. Heiden 266 F. 2d 480 (1959) (Express warranty that pigs "free from disease").

(14) Royce Chemical Co. v. Sharples Corp., 285 F. 2d 183 (1960) (rehearing denied 1961).

(15) Randy Knitwear v. American Cyanamid Co. (1962) (N.Y. Ct. of Appeals, Feb. 22, 1962). (Lack of privity no defense in breach of warranty action).

(b) **Cases holding manufacturer not liable for breach of express warranty:**

(1) North American Fertilizer Co. v. Combs, 212 S.W. (2d) 526 (Ky., 1948) (designation of fertilizer as "6-8-6" constituted express warranty that product had specified formulation, but theory of action was not that this warranty was breached).

(2) Gibson v. California Spray-Chemical Corp., 188 P. (2d) 316 (Wash., 1948) (no evidence of express warranty of safety).

(3) Sawyer v. Pine Oil Sales Co., 155 F. (2d) 855 (La., 1946) (statement on label that "It will not injure the skin . . ." was not a warranty against non-injury to the eye).

(4) Murphy Laboratories v. Emery Industries, 95 F. Supp. 651 (Pa., 1951).

(5) Adler v. U. S. for Use and Benefit of General Tire & Rubber Co., 270 F. 2d 715 (1959) (Failure to give reasonable notice of breach).

(6) London v. Curlee, 336 S.W. 2d 836 (1960) (failure to fulfill conditions precedent to express warranty).

Implied Warranties

(a) **Cases holding manufacturer liable for breach of implied warranty:**

(1) Pietrus v. J. R. Watkins Co., 38 N.W. (2d) 799 (Minn., 1949) (manufacturer of hair shampoo).

(2) Bianchi v. Denhold & McKay Co., 19 N.E. (2d) 697 (Mass., 1939) (manufacturer of face powder; question of allergy involved).

(3) Wasatch Chemical Co. v. Leon, 259 P. (2d) 301 (Utah, 1953).

(4) Burr v. Sherwin-Williams Co., 258 P. (2d) 58 (Cal., 1953) (pesticide) (reversed 268 P. (2d) 1041 (Cal., 1954).

(5) Martin v. J. C. Penney Co., 313 P. (2d) 689 S. Ct. Wash., 1957) (seller of shirt which burned with explosive rapidity).

(6) Simmons v. The Wichita Coca-Cola Bottling Co., 309 P. (2d) 633 (S. Ct. Kan., 1957) (bottler of beverage held liable for implied warranty of fitness for human consumption without regard to negligence).

(7) Nichols v. Nold 174 Kan., 613, 258 P. 2d 317 (Recovery against manufacturer by purchaser's daughter).

(8) Zampino v. Colgate-Palmolive Co., 173 N.Y.S. 2d 117 (Sup. Ct., Mont. County, 1958).

(9) Brennan v. Shepherd Park Pharmacy, 138 A. (2d) 494 (Mun. Ct. App. D.C., 1958) (implied warranty of hair dye even though purchased under brand name).

(10) Markovich v. McKesson and Robbins, Inc., 149 N.E. 2d 181 (C.A.—Ohio, Apr. 2, 1958) (implied warranty of home permanent).

(11) B. F. Goodrich Co. v. Hammond, 269 F. 2d 501 (Admx. of non-buyer's estate entitled to recovery on breach of implied warranty).

(12) Diamond Alkali Company v. Godwin, 112 S.E. 2d 365 (1959) (statutory implied warranty—insecticide).

(13) Gladiola Biscuit Co. v. Southern Ice Co., 267 F. 2d 138 (Liability without fault under Texas law; ice contained glass).

(14) Gray Line Co. v. Goodyear Tire & Rubber Co., 280 F. 2d 294 (1960) (Company liable for breach of implied warranty of fitness of tire supplied for highway use).

(15) Bowles v. Zimmer Mfg. Co., 277 F. 2d 868 (1960) (Implied warranty as to fitness of surgical pin).

(16) Zuckerman v. Berg Mfg. & Sales Co., 279 F. 2d 904 (1960) (Implied warranty not negatived by failure of buyer to inspect where reliance on assurances of seller as to quantity).

(17) Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120; 90 N.W. (2d) 873 (1958). (Mfgr. liable despite lack of privity).

(18) Manzoni v. Detroit Coca Cola, Inc., 363 Mich. 235; 109 N.W. (2d) 918 (1961). (food product) (Mfgr. liability in breach of warranty "available to all who may suffer damages by their use in the legitimate channels of trade").

0007-SWP-0059306

(b) Cases holding manufacturer not liable for alleged breach of implied warranty:

(1) Carter v. Yardley & Co., 64 N.E. (2d) 693 (Mass., 1946) (dicta that no implied warranty of cosmetic in absence of privity).

(2) Sawyer v. Pine Oil Sales Co., 155 F. (2d) 855 (La., 1946) (no implied warranty that soap product would not splash into eyes and cause injury).

(3) Gibson v. California Spray-Chemical Corp., 188 P. (2d) 316 (Wash., 1948) (disclaimer in sale of insecticide precluded implied warranty).

(4) Green v. Equitable Powder Mfg. Co., 94 F. Supp. 126 (Ark., 1950) (no implied warranty of explosives in absence of privity).

(5) Campo v. Scofield, 95 N.Y.S. (2d) 610 (1950) (no implied warranty in absence of privity).

(6) Tuscany v. U.S. Standard Products Co., 243 S.W. (2d) 207 (Tex., 1951) (no evidence that drug unsafe).

(7) Murphy Laboratories v. Emery Industries, 95 F. Supp. 615 (Pa., 1951).

(8) Burr v. Sherwin-Williams Co., 268 P. (2d) 1041 (Cal., 1954) (reversing 258 P. (2d) 58 (Cal., 1953) (pesticide manufacturer).

(9) Taylor v. Jacobson, 147 N.E. (2d) 770 (Sup. Ct., Mass., 1948) (purchase by brand name—no implied warranty).

(10) Jamieson v. Woodward and Lothrop, 247 F. (2d) 23 (C.A.D.C., 1957) Cert. Den. (no implied warranty where product is purchased by brand name).

(11) Whiting Corp. v. Process Engineering, Inc., 273 F. 2d 242 (no implied warranty—could not have anticipated operating conditions).

(12) Zampino v. Colgate-Palmolive Company, 187 N.Y.S. 2d 25 (1959) (ingredients not harmful, no breach of implied warranty).

(13) Sears, Roebuck & Co., 273 F. 2d 140 (Failure to give reasonable notice of breach of implied warranty).

(14) Blitzstein v. Ford Motor Co., 288 F. 2d 738 (1961). (Under Alabama Law no action under implied warranty where no privity of contract. Remanded on other grounds).

(15) Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F. 2d 497 (1962). (Buyer bound by disclaimer of warranties in sellers acknowledgment where goods accepted with knowledge of conditions in acknowledgment).

Damages for Breach of Warranty

(1) Curby v. Mastenbrook, 288 Mich. 676, 286 N.W. 123.

(2) Superior Combustion Industries, Inc. v. Schollman Bros. Co., 271 F. 2d 357.

(3) Hansen v. Firestone Tire and Rubber Co., 276 F. 2d 254. (1960).

(4) Gladiola Biscuit Co. v. Southern Ice Co., 267 F. 2d 138.

(5) Royce Chemical Co. v. Sharples Corp., 285 F. 2d 183 (1960) (Rehearing denied 1961).

(6) Albert v. Kopplin Molding Corp., 247 F. 2d 107.

(7) Nephi Processing Plant, Inc. v. Talbott, 247, F. 2d 771.

(8) Hawkins v. Jamrog, 277 Mass. 540, 179 N.E. 224, 7 A.L.R. 979.

(9) Swain v. Schieffelin, 134 N.Y. 471, 31 N.E. 1025, 18 L.R.A. 385.

(10) Paradis v. A. L. Nichols Co., 299 Mass. 364, 12 N.E. 2d 863 (1938).

(11) Grupe v. Glick, 26 Cal. 2d 680, 160 P. 2d 832 (1945).

(12) Sorenson v. Kessey Hosiery Co., Inc., 244 N.Y. 73, 154 N.E. 826 (1926).

(13) Simpson v. American Oil Co., 14 S.E. (2d) 638 (N.C., 1941).

(14) Pietrus v. J. R. Watkins Co., 38 N.W. (2d) 799 (Minn., 1949).

(15) India Paint & Lacquer Co. v. United Steel Products Corp., 267 P. (2d) 408 (Cal., 1954).

(16) Panther Oil & Grease Mfg. Co. v. Segerstrom, 224 F. (2d) 216 (C.A. 9th, June 22, 1955).

(17) Haberly v. Reardon Company, 319 S.W. 2d 859 (Sup. Ct. Missouri—1958).

(18) Randy Knitwear v. American Cyanamid Co. (1962) (N.Y. Ct. of Appeals, Feb. 22, 1962).

Disclaimers of Liability for Negligence

(a) Disclaimer effective in following cases:

(1) Gibson v. California Spray-Chemical Corp., 199 P. (2d) 316 (Wash., 1948).

(2) Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F. (2d) 817 (Del., 1951).

(3) Charles Lachman Co. v. Hercules Powder Co., 79 F. Supp. 206 (Pa., 1948) ("... Buyer assumes all risk and liability whatsoever resulting from the use of such materials . . .").

(4) Burr v. Sherwin-Williams Co., 268 P. (2d) 1041 (Cal., 1954) reversing 258 P. (2d) 58 (Cal., 1953) (disclaimer on label effective as to warranty for particular purpose).

(5) Maryland Cas. Co. v. Owens-Illinois Glass Co., 116 F. Supp. 122 (W. Va., 1953) (disclaimer effective as to negligence and warranty).

(6) Shafer v. Reo Motors, 205 F. (2d) 685 (Pa., 1953) (disclaimer releasing motor vehicle manufacturer from liability for breach of warranty and "all other obligations or liabilities" held effective bar against either breach of warranty or negligence action).

(b) Disclaimer held ineffective in following cases:

(1) Ebers v. General Chemical Co., 17 N.W. (2d) 176 (Mich., 1945) (express representation superseded disclaimer of warranty).

(2) E. I. DuPont de Nemours & Co. v. Baridon, 73 F. (2d) 26 (Iowa, 1934) (disclaimer effective as to warranty but not as to negligence).

(3) Burr v. Sherwin-Williams Co., 258 P. (2d) 58 (Cal., 1953) (disclaimer on label ineffective as to third parties not having opportunity to see the label) (reversed 268 P. (2d) 1041 (Cal., 1954)).

0007-SWP-0059307

(4) Gall v. Union Ice Co., 239 P. (2d) 48 (Cal, 1951) (disclaimer in contract between buyer and seller ineffective as to third parties).

(5) Henningsen v. Bloomfield Motors, Inc., 161 A. 2d 69 (1960) (general disclaimer not effective against implied warranty).

Disclaimer of Liability for Breach of Warranty

(a) Cases holding a disclaimer effective:

(1) Buckley v. Shell Chemical Co., 89 P. (2d) 453 (Cal., 1939) (disclaimer on order blank accompanying sale of fertilizer).

(2) E. I. DuPont de Nemours and Co. v. Baridon, 73 F. (2d) 26 (Iowa, 1934) (dicta that disclaimer effective against breach of warranty but not against negligence).

(3) Mangelsdorf Seed Co. v. Busby, 247 Pac. 410 (Okla., 1926) 29 (disclaimer on invoice accompanying sale of seed—"we give no warranty express or implied.")

(4) Gibson v. California Spray-Chemical Corp., 188 P. (2d) 316 (Wash., 1948) (disclaimer on invoice accompaning sale).

(5) Charles Loromi & Son v. Globe Laboratories, 95 P. (2d) 173 (Cal., 1939) (dicta that ineffective as to negligence).

(6) Hall v. Mosteller, 245 S.W. (2d) 338 (Tex., 1952) (disclaimer in contract effective in breach of contract action based upon failure to produce).

(7) Maryland Cas. Co. v. Owens-Illinois Glass Co., 116 F. Supp. 122 (W.Va., 1953) (disclaimer in contract).

(8) Shafer v. Reo Motors, 205 F. (2d) 685 (1953) (disclaimer in contract of sale of motor coach).

(9) Nelson v. Swedish Hospital et al., 64 N.W. (2d) 38 (Minn., 1954) (manufacturer of x-ray machine not liable where there was intervening negligence and disclaimer).

(10) Redmond v. Petty Motor Co., 121 Utah 370, 242 P. 2d 302.

(11) Burr v. Sherwin-Williams Co., 268 P. (2d) 1041 (Cal., 1954) reversing 258 P. (2d) 58 (Cal., 1953) (disclaimer on label).

(12) Cooke Chevrolet Co., Inc. v. Culligan Soft Water Service of Lexington, Inc., 282 S.W. (2d) 349 (C.A. Ky., Sept. 23, 1955) (disclaimer in sales contract for sale of truck barred suit on implied warranty).

(13) Neff v. Western Co-op. Hatcheries 241 F. 2d 357 (disclaimer against express or implied warranties negatived defendants representation that poults were "disease free").

(14) Nephi Processing Plant, Inc. v. Western Co-op. Hatcheries, 242 F. (2d) 567. (no implied warranty where warranties stipulated against).

(15) O. S. Stapley Co. v. Newby, 57 Ariz. 24, 110 P. 2d 547 (1941). (Warranties excluded).

(16) American Elastics, Inc. v. U. S., 187 F. 2d 109 (C.C.A. 2d, 1950). ("as is" and "where is" excludes warranties).

(17) Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F. 2d 497 (1962). (Buyer bound by disclaimer of warranties in sellers acknowledgment where goods accepted with knowledge of conditions in acknowledgment).

(b) Cases holding disclaimer ineffective:

(1) Jolly v. C. E. Blackwell Co., 112 Wash., 620, 211 P. 748 (1922) (disclaimer by vendor on tags does not operate in favor of buyer who resells goods with tags still attached).

(2) Meyer v. Packard Cleveland Motor Co., 140 N.E. 118 (1922) (buyer may rely on newspaper advertisement even though contract contained disclaimer as to warranties).

(3) Lutz v. Hill-Diesel Engine Co., 255 Mich., 98, 237 N.W. 546 (1931) ("No contracts or agreements other than those expressly stated"—does not exclude implied warranties).

(4) Phillips v. Sharp 44 Ohio App. 311, 185 N.E. 562 (1932).

(5) Ingraham v. Associated Oil Co., 6 P. (2d) 645 (Wash., 1932) (ineffective as to implied warranty of insecticide in view of express oral warranty).

(6) Hughes v. National Equipment Corp., 216 Iowa 1000, 250 N.W. 154 (1933) (statement in contract that it contains entire agreement does not exclude implied warranties).

(7) National Equipment Corp. v. Moore 250 N.W. 677 (1933) (standard manufacturers warranty does not exclude implied warranty of fitness of machine).

(8) Ebers v. General Chemical Co., 17 N.W. (2d) 176 (Mich., 1945) (disclaimer in advertising pamphlet accompanying sale of insecticide ineffective where express warranties in same pamphlet).

(9) Wade v. Chariot Trailer Co., 331 Mich. 576, 50 N.W. 2d 163 (1951) (exclusion of all agreements or representations does not exclude implied warranty of fitness).

(10) Keller v. Flynn, 105 N.E. (2d) 532 (Ill., 1952) (disclaimer after contract is concluded is ineffectual unless buyer assents to change).

(11) McPeak v. Boker, 53 N.W. (2d) 130 (Minn., 1952) (disclaimer in bill of sale that boat "was not guaranteed in any way" did not exclude implied warranties).

(12) Diepeveen v. Larry Vogt, 99 A. (2d) 329 (N.J., 1953) (disclaimer ineffective because made after consummation of sale).

(13) Burr v. Sherwin-Williams Co., 258 P. (2d) 58 (Cal., 1953) (disclaimer on label not seen by ultimate purchaser).

(14) India Paint & Lacquer Co. v. United Steel Products Corp., 267 P. (2d) 408 (Cal., 1954) (manufacturer of paint held liable for express warranty notwithstanding disclaimer on invoice).

(15) Diamond Alkali Company v. Godwin, 112 S.E. 2d 365 (1959) (general disclaimer not effective as to statutory implied warranty).

0007-SWP-0059308

