SUMMARY OF LAW ON WARRANTIES AND DISCLAIMERS IN THE SALE OF SEED

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FOREWORD

This Summary has been prepared by ASTA Legal Counsel, in cooperation with the ASTA Board of Directors and Legislative and Legal Concerns Committee, as a tool to be used by seed company executives and their lawyers in addressing concerns about legal liability that may arise from the sale of seed. In addition to the legal research that has gone into its preparation, the authors have drawn upon the experiences of many ASTA members over the years and, where appropriate, the Summary makes specific reference to reported cases in which seed companies have been involved. The Summary seeks to present the "law of the land" as it currently stands, primarily in the context of conventional seed not produced from the use of modern biotechnology.

This Summary is intended to provide the reader with an overview of relevant principles of law governing liability for defective seed, with emphasis on the effective use of warranties and disclaimers. It is not intended as a primer on seed law regulatory compliance. Neither is it intended as a substitute for consultation with a lawyer who is acquainted with a particular company's business and with local law. Legal advice is essential to ensure that contractual warranties are effectively integrated with marketing and advertising practices. Moreover, legal counsel is necessary to ensure that the provisions of applicable state law are reviewed.

This Summary also does not purport to describe the specific laws of each state. Furthermore, although this Summary is believed to be current as of the publication date, the material is subject to modification by legislatures, administrative agencies and the courts.

For these reasons, this Summary is intended solely for the background education and as a reference source for the seed company executive and lawyer. It offers both conceptual and practical guidance about common legal issues that must be considered in the sale of seed and, in the context of a specific case, provides a starting point for the seed company's counsel.

TABLE OF CONTENTS

SUMMARY OF LAW

ON WARRANTIES AND

DISCLAIMERS

IN THE SALE OF SEED 1/

I. INTRODUCTION

Those who produce and sell merchandise, including seed, may be liable under various legal theories when the product involved is defective in some way. The contract of sale is the primary source of liability. Regardless of whether the transaction is a simple over-the-counter retail sale, or a complex negotiated sales arrangement, contractual liability is created on the part of the seller to the buyer. The extent of that liability is determined by the reasonable expectations of the parties to the sale under contract and commercial law.

If the buyer is somehow physically harmed by the seller's negligence, the seller may be liable under tort law. Generally, such negligence must go beyond selling a product that is merely unsatisfactory. The buyer must ordinarily sustain some personal injury or property damage in order to recover under tort law. Liability under tort law is not limited to the contractual expectations of the parties, but encompasses all damages resulting from the negligent act, and may additionally include punitive damages for intentional or grossly negligent behavior.

1/ The first edition of the Summary was prepared under the auspices of ASTA by John P. Manwell and Stephen E. Story. Both Mr. Manwell and Mr. Story were with the law firm of Kirkland & Ellis at that time.

A 1987 revision was prepared by Mr. Manwell. Mr. Manwell, who was legal counsel for ASTA, was then a partner in the Washington, D.C. law firm of Wiley, Rein & Fielding.

The Summary was comprehensively revised in 1994 by Gary Jay Kushner, partner in the Washington, D.C. law firm of Hogan & Hartson L.L.P., and Thomas E. Joaquin, an associate with the firm. Mr. Kushner currently serves as ASTA Legal Counsel

Mr. Kushner has since updated the manual in 1996, 2003, and 2017. Edward L. Korwek, also a Hogan & Hartson partner at the time, contributed the biotechnology discussion in the 2003 version. Mary Lancaster, a Hogan Lovells US LLP summer associate, contributed to the updates in the present version.

Finally, a buyer who is harmed by a dangerously defective product may sue under the doctrine of "strict product liability" (or simply, "strict liability"), which holds sellers and producers liable irrespective of negligence. Strict liability is a judicially created doctrine intended to shift the costs of dangerously defective products to sellers and producers, who may best be able to avoid the defect or to insure against the loss. As with negligence, a disappointed buyer may not sue in strict liability for a product that is merely unsatisfactory. The product must be dangerous, in the sense that it must cause personal injury or damage to property. Damages allowed are similar to those recoverable in negligence cases.

As a general matter, sellers and producers of conventional seed will be liable to buyers under contract and commercial law. Much less common are tort cases concerning liability for negligence. Rarer still are cases based upon strict liability. Accordingly, although this Summary includes a discussion of cases involving negligence and strict liability arising from the sale of seed, the central focus is on contract and commercial law. In addition, specific topics that may affect liability, such as vigor testing and arbitration laws, are discussed.

Plants produced through the use of modern biotechnology. and their seed, present a host of legal considerations, sometimes the same and sometimes very different from those described herein for conventional seed. Adventitious pollen flow and seed commingling can result in traits subject to biotechnology regulations appearing in conventional seed. As an example, the presence of StarLink® corn in seed, grain, and processed human food products raised a litany of legal issues pertaining to the general subject of liability. 2/ Tort theories of recovery for any harm caused under such circumstances include trespass, conversion, public and private nuisance, negligence, and failure to warn. On the contract side, implied warranty of fitness is relevant. Lawyers can be and have been very creative in developing various legal theories of liability with respect to so-called "genetically engineered" seeds.

Traditional cases arising from the sale of seed share characteristics common enough to set them apart under the broad category of contract and commercial law. Unlike manufactured items, seed is a living organism and cannot be absolutely guaranteed; even under the best conditions, not every seed will sprout and flourish. Often, defects in the product do not show themselves for a long period, until the seed has failed to sprout, the plant has not borne fruit, or the fruit itself proves to be diseased. Once the defect becomes obvious, it

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2/ *See*, *e.g.*, In Re StarLink® Corn Product Liability Litigation, 212 F. Supp. 2d 828 (N.D. Ill. 2002) (fifteen separately filed cases from all over the country were consolidated involving 57 counts against Aventis CropScience, the seed developer, and the distributor, Garst Seed Company).

may be too late to avoid the loss of an entire crop. At times, farmers and others (including dealers and other consumers) faced with these circumstances may look to their suppliers to make up their losses.

Seed companies have traditionally been able to limit their liability in these cases. Sales documents, invoices and product labels can limit warranties to those expressly made. Damages may be contractually limited to the price of the seed. Finally, the seller may place conditions on the time and manner for making a claim. Such limitations, however, are not themselves without limits.

Seed companies need sales documents that are written and presented in a manner that protects the rights of the company and that clearly set forth the rights and obligations of the buyer. Legal clauses do not exist in a vacuum, however. The efficacy and fairness of protective clauses vary with marketing methods and sales arrangements. A clause that is sufficient for a negotiated purchase agreement with a large commercial farm, for example, may be inappropriate for sales to a smaller customer who buys infrequently from a catalogue. In addition, protective clauses must be reviewed frequently to ensure continued usefulness. Changes in legislation, interpretation by courts, and advances in technology may affect the viability of protective clauses. Each company needs carefully drafted clauses, integrated with overall sales procedures, routinely reviewed against changes in the law.

This Summary includes recommendations concerning drafting warranties and disclaimers. An example warranty and disclaimer clause is provided for purposes of illustration. No single clause, however, will be correct for every seller in every state. Each seller varies in its size, market, products and overall sales objectives. Factual issues such as past course of conduct with particular customers, advertising and sales claims may affect the efficacy of a clause. Additionally, state laws vary, both as written and as interpreted by various local courts. Thus, each company must evaluate its own situation and exercise its independent judgment in drafting warranty and disclaimer clauses.

This Summary cannot substitute for the advice of the company's own lawyer, who is familiar with the company's policies and situation and has the opportunity to study the most current applicable statutory and case law. Close consultation with counsel is required to ensure that clauses are effectively drafted to meet the requirements of law and the particular company. Additionally, contractual and sales documents must be reviewed frequently. Local law may evolve over time as a result of legislative or regulatory changes or judicial decisions. Requirements may be different as the company's size, objective or customer base change. Finally, counsel can help ensure that sales policies set by management are understood and followed throughout the organization.

II. LAWS AFFECTING WARRANTIES GENERALLY

Warranties and disclaimers fall under the traditional principles of contract law. 3/ A warranty is a guaranty or an assurance of the quantity, quality, character or fitness of a particular product. A seller of a product such as seeds may be liable for warranties that are made orally, expressly in the terms of sale, or implied through industry practice, circumstances of the sale, or statute. A disclaimer attempts to negate a warranty, and thus limit the liability of the seller. Warranties may normally be disclaimed, unless such disclaimers are forbidden by statute or found unconscionable by a court.

The Uniform Commercial Code (U.C.C.), which has been adopted in some form in every state but Louisiana, governs commercial transactions such as the sale of seeds. The U.C.C. specifically addresses warranties, including creation, disclaimers and limitations.

Although the U.C.C. has improved consistency in commercial law, it has not eliminated all differences between jurisdictions. Some states have adopted non-uniform provisions, or have conflicting provisions in other parts of their codified law. Different jurisdictions may also have different judicial interpretations of identical provisions. Therefore, a disclaimer that is effective for use in one jurisdiction may not be appropriate in another. 4/

The effectiveness of warranties may be limited if the seller is liable for negligence, though commercial law has generally supplanted tort claims arising from defective, non-dangerous products. Warranties are also affected by various state and Federal statutes. Federal and state seed acts, for example, mandate labeling and certification requirements that can create liability that may not be effectively disclaimed.

3/ Often the seed company will have a contractual arrangement only with the dealer, and not with the final purchaser. In an earlier era, only the actual parties to a contract—those "in privity" with each other—could sue or be sued for breach of contract. Under this rule, a buyer could sue only his or her supplier, who might then have a claim against the producer. The majority of states no longer require privity to sue the producer. Even where the buyer cannot sue the producer directly, local court rules will generally allow a dealer who is sued by a buyer to bring the producer into the suit by means of a "cross-claim." As a practical matter, a producer will normally be part of a suit alleging defective seed. This Summary assumes that the ultimate buyer will be able to maintain an action against the producer directly.

4/ Determining which state law should apply to a contract can be a complex issue in itself, and is beyond the scope of this Summary. It is sufficient to note that there are some devices, such as contractual choice of law clauses, to obtain some predictability in this area, though these devices should not be relied upon blindly.

III. WARRANTIES UNDER THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code generally governs the creation of warranties as well as disclaimers and limitations of liability.

A. Express Warranties

An express warranty is one that is affirmatively given by the seller. A seller may create an express warranty by making any oral or written statement to the buyer regarding the goods. Express warranties may arise from advertisements, sales materials, and product packaging. The term "warranty" or "guarantee" need not be used, and the seller need not intend to make a warranty. 5/ It is sufficient that the statement concerns a factual quality about the product, and that the statement comes to the attention of the buyer during the sale. 6/ Declarations of variety, germination percent or of purity on seed packages, for example, create express warranties. Additionally, statements made in advertising or labeling concerning the quality or character of the product may result in express warranties. 7/ Labels merely claiming that the

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5/ U.C.C. § 2-313.

6/ The official comment to the U.C.C. notes that the time when the warranty comes before the buyer is not decisive. If the warranty is fairly considered to be part of the contract, the warranty will be effective. Official comment to U.C.C. § 2-313. A warranty that is received after the sale may also be effective as a modification to the sales agreement, which would be valid under the U.C.C. even without additional consideration. U.C.C. § 2-209. It has been held, however, that a warranty that comes before the buyer only after completion of the sale (such as a warranty that appears only on packaging of seed that is delivered well after the sale) is not effective. *E.g., Schmaltz v. Nissen,* 431 N.W.2d 657 (S.D. 1988); *cf. Jones v. Clark,* 244 S.E.2d 183 (N.C. 1978) (finding no privity between buyer of modular home and manufacturing inspector who designated the home fit for habitation). *But see*, Pittman v. Henry Moncure Motors, Inc., 778 S.E.2d 475, No. COA14-1186, 2015 WL 5123896 (N.C. Ct. App. Sept. 2015) (an unpublished decision distinguishing *Jones* and finding privity between buyer and seller) As a practical matter, it is wise to assume that any warranty that appears in conjunction with the product may provide a basis for liability. *Harris Moran Seed Co., Inc. v. Phillips*, 949 So. 2d 916 (Ala. Ct. App. 2006) (finding that express warranty laid out in agreement between seed company and distributor may bind farmers as third-party beneficiaries to exclusive-remedy provisions, such as return-of-purchase.)

7/ *See, e.g.*, *Helena Chemical v. Wilkins*, 47 S.W.3d 486 (Texas 2001). The Texas Supreme Court found the specificity of the seed producer's statements amounted to more than mere puffery under the state's Deceptive Trade Practices Act. The

product is "good seed" or "top quality seed," on the other hand, have been found to be "mere puffery," and fall short of the type of statement that creates a warranty. 8/ Producers should carefully review advertising materials to ensure that unintended express warranties are not created. Descriptions that are susceptible to objective measurement are likely to create express warranties.

The Federal Seed Act and various state seed laws require the disclosure of information concerning seed variety and germination percent on product labels. 9/ These required statements have been held to create express warranties. 10/ Because these labeling requirements are virtually universal, every seed sale contains this express warranty.

The courts, however, have not stated precisely what is warranted by these statutorily required labels. The germination statement on a label means that, when tested within the required period prior to sale, the seed achieved the stated minimum germination percent. At best, this germination percent should be warranted at the time of delivery. 11/ Evidence that the product tested satisfactorily within the period required by statute should be sufficient to establish that the seller met the requirements of the warranty. A Texas appellate court, for example, held that the germination statement "was merely a representation that the seed had been tested and had germinated at 85% or higher." 12/ Moreover, the court noted that under Texas law a seed producer is entitled to use the highest test result if the seed is tested more than once -- a rule that is inconsistent with the view that the stated germination percent creates a warranty. 13/

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producer made claims that the seed had "excellent weatherability" and "the stamina and hardiness to withstand [ ] harsh conditions." *Id.* at 502-503.

8/ *See, e.g., Schmaltz v. Nissen*, 431 N.W.2d 657 (S.D. 1988); *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078 (Ind. 1993) *abrogated by Hyundai Motor America, Inc. v. Goodwin,* 822 N.E.2d 947 (Ind. 2005).

9/ *See* discussion Section IV.A*., infra.*

10/ *See, e.g., Walcott & Steele, Inc. v. Carpenter*, 436 S.W.2d 820, 822-23 (Ark. 1969); *Mallery v. Northfield Seed Co.*, 264 N.W. 573 (Minn. 1936).

11/ *See Anderson v. Thomas,* 336 P.2d 821 (Kan. 1959).

12/ *Crosbyton Seed Co. v. Mechura Farms*, 875 S.W.2d 353 (Tex. Ct. App. 1994).

13/ The court, however, refused an instructed verdict for the seed company because there was evidence that the seed had not been tested properly. The seed had been treated with a herbicide after germination testing was complete. An official from the Texas Department of Agriculture testified that the seed, once treated, became an entirely new lot. The court held that the jury could reasonably have found that the treated seed had not met the warranted germination statement, since it had not been separately tested after treatment. *Id.* at 362.

A Louisiana court, however, has held that a tag stating that seed had been tested and found to have a 70% germination created an express warranty that 70% of the seed would germinate. 14/ The appellate court upheld the determination that the seed was "defective" despite evidence of tests documenting germination at 70%, when the buyer produced evidence that the seed tested later at a much lower percentage. It is unclear from the decision whether the court of appeals believed that the later tests established that the seed was defective at the time of delivery, or whether the court was enforcing a continuing warranty that the seed would germinate at 70% when planted. No appellate case has been found holding that the germination statement is a warranty that the seed will germinate at some future time (let alone produce a crop) regardless of post-sale conditions.

B. Implied Warranties

Under both the U.C.C. and prior common law, two implied warranties may arise at the time of sale — the warranties of "merchantability" and "fitness for a particular purpose."

1. Implied Warranty of Merchantability

The warranty of merchantability essentially provides that the goods are of fair, average quality and are fit for the ordinary purposes for which the goods are used. Under the U.C.C., merchantable goods:

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods [which includes seeds], are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

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14/ *Williams v. Ring Around Products, Inc.,* 344 So. 2d 1125 (La. Ct. App. 1977); *but see Gauthier v. Bogard Seed Co.,* 377 So. 2d 1290 (La. Ct. App. 1980) (refusing to follow *Ring Around Products* where later tests confirmed the germination percent on the label).

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any. 15/

2. Implied Warranty of Fitness for a Particular Purpose

When a seller has reason to know of a particular purpose for which goods are required, and knows that the buyer is relying on the seller's skill or judgment to select or furnish the goods, the law also implies a warranty of "fitness," ensuring the seller that the goods are fit for the particular purpose. The particular purpose can be broad; a Florida Court, for example, has held that seeds which are incapable of producing healthy plants breach the warranty of fitness, as well as the warranty of merchantability. 16/ On the other hand, a Texas appellate court rejected a similar claim, holding that seed that did not produce a commercial crop failed in its ordinary purpose, but not a particular purpose of the buyer. 17/

Most often, the stated purpose is specific and peculiar to that buyer's needs. An Idaho court found that a seller breached the warranty of fitness by conveying bean seed which the seller knew required 120 days to mature to a farmer in Idaho, a state that has a 90-day growing season for beans. The seller knew about the product's lengthy maturity period, whereas the farmer did not. The court held that the 90-day growing period for beans in Idaho was common knowledge, and the seller must, therefore, have known that the seed would not meet the buyer's requirements. 18/

15/ U.C.C. § 2-314(2) (bracketed words supplied).

16/ *Pennington Grain & Seed, Inc. v. Tuten,* 422 So. 2d 948, 951 (Fla. App. 1982).

17/ *Crosbyton Seed Co.*, 875 S.W.2d at 365.

18/ *Clement's Farms, Inc. v. Ben Fish & Son,* 814 P.2d 941 (Idaho Ct. App. 1990), *vacated on other grounds,* 814 P.2d 917 (Idaho 1991). Another example is the unpublished decision of the California Superior Court in *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.,* No. 196702 (May 5, 1986), *aff'd,* 246 Cal. Rptr. 823 (Cal. Dist. Ct. App. 1988). In that case, the court found that a seed company had recommended "Jackpot" rye grass, an annual rye grass, though it knew the customer's purpose was to produce sod, which requires a perennial rye grass. The court, however, upheld a contract clause limiting damages to the price of the seed, and the appellate court affirmed. The *Nunes* court emphasized that plaintiffs were one of the two largest companies in the business with a twenty year commercial history between plaintiffs and

Unless the seller takes action to exclude or modify these warranties, which are created by law, the seller may be liable for damages if the seed is either not merchantable or is unfit for the buyer's particular purpose. The U.C.C., however, allows exclusion or modification of both these implied warranties.

C. Disclaimers of Express Warranties

Express warranties may be disclaimed by a provision that clearly negates their existence. A seller should realize, however, that courts look upon inconsistent statements in the language of a warranty and disclaimer with suspicion. 19/

The U.C.C. provides that the express warranty and the disclaimer must be construed as consistent with each other. To the extent that such consistency is "unreasonable," it is the disclaimer that is to be considered ineffective. 20/ This provision has led some courts to invalidate disclaimers under certain circumstances. A general disclaimer, for example, is ordinarily ineffective to negate express warranties as to seed type or germination percent, and will be disregarded as "unreasonable" for this purpose. 21/ In addition, some courts have invalidated as contrary to public policy provisions purporting to disclaim express warranties arising from statements required under state and federal seed laws. 22/

Disclaimers must be conspicuous. Factors such as location of the warranty, type size, ink color, and specificity of terms all relate to the

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defendants and as such can be held to a higher standard for knowledge, understanding, and acceptance of limitation clauses. *Id*. at 1539.

19/ Where an express warranty for the purpose stated existed, the producer's general warranty disclaimer did not include a warranty against damages arising from use in accordance with the stated purpose. *See Gooch v. E.I. Du Pont Nemours & Co.*, 40 F.Supp. 2d 863, 869 (W.D. Ky. 1999).

20/ U.C.C. § 2-316(1).

21/ *Lutz Farms v. Asgrow Seed Co.,* 948 F.2d 638 (10th Cir. 1991) (applying Colorado law); *Walcott & Steele, Inc. v. Carpenter,* 436 S.W.2d 820 (Ark. 1969); *Mallery v. Northfield Seed Co.,* 264 N.W. 573 (Minn. 1936).

22/ *E.g., Klein v. Asgrow Seed Co.,* 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (3d Dist. 1966); *cf. Nunes Turfgrass*, 246 Cal. Rptr. 823 (holding that omission of percentage by weight, as required by state and federal law, violated the express warranty that seed conformed to labeling description); *Agricola Baja Best, S. De. R.L. de C.V. v. Harris Moran Seed Co.*, 44 F. Supp. 974 (S.D. Cal. 2014) (distinguishing *Klein* and following *Nunes* analysis).

conspicuousness of a disclaimer. 23/ A disclaimer that is brought to the attention of the buyer only after the sale will almost certainly be ineffective. Therefore, disclaimers that appear only on the package or invoice will not be effective if that package or invoice is not seen by the buyer until after the sale.

Because it may be impossible to disclaim effectively statements required by law to appear on package labels or tags, a seed company faces no additional risk by clearly and affirmatively warranting that the seed is as described in those statements. As a practical matter, such a warranty may also be desirable from a marketing standpoint. In particular situations, it may be possible to disclaim other express warranties if the language is conspicuous, the warranty can be reasonably construed, and the result is not unconscionable. Given these limitations, however, it is advisable to ensure in the first instance that all statements contained in sales and advertising materials comport with the minimum standards that the company wishes to guarantee.

D. Disclaimers of Implied Warranties

All implied warranties except for the warranty of merchantability may be broadly excluded by a statement expressly disclaiming all warranties, or all implied warranties. Such a statement must be made in writing and must be conspicuous. 24/ As with all disclaimers, it will almost certainly be ineffective if it does not come to the buyer's attention until after the sale. 25/

The implied warranty of merchantability may also be disclaimed. In addition to being in writing and conspicuous, the disclaimer must specifically

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23/ *See e.g., Clement's Farms, Inc. v. Ben Fish & Son,* 814 P.2d 917 (Idaho 1991); Nomo Agroindustrial Sa De CV v. Enza Zaden North America, Inc., 495 F. Supp. 2d 1175 (D. Ariz. 2007) (finding that disclaimer language on the back of an invoice is not conspicuous and fails to put the buyer on notice when "micro print that is tiny compared to the rest of the information appearing on the front of the invoice . . . states that the buyer has read and agrees to the disclaimers").

24/ U.C.C. § 2-316(2); *Jones v. Asgrow Seed Co.,* 749 F. Supp. 832 (N.D. Ohio 1990) (under Ohio law a disclaimer of warranty of fitness is valid if conspicuous and not unconscionable); *Fleck v. Jacques Seed Co.,* 445 N.W.2d 649 (N.D. 1989).

25/ *E.g., Fleck,* 445 N.W.2d 649; *Gold Kist, Inc. v. Citizens and Southern Nat'l Bank,* 333 S.E.2d 67 (S.C. App. 1985), *declined to follow by Myrtle Beach Pipeline Corp. v. Emerson Electric Co.*, 843 F. Supp. 1027, 1040 (D.S.C. 1993) (finding *Gold Kist* inapplicable because disclaimers in Gold Kist "were made subsequent to contract formation, were conveyed on the bag in which the product was carried, and were never disclosed to the purchaser.").

use the word "merchantability." 26/ Disclaimers of implied warranties are often disfavored by the courts, and may be strictly construed against the drafter. 27/ Literal compliance with the U.C.C. provisions should thus be followed.

Under the U.C.C., it is possible for implied warranties to be excluded or modified by the course of dealing, the course of contract performance between the parties, or by usage of trade. 28/ Some courts have found that it is normal usage in the seed trade to exclude implied warranties as to crop yield and disease, 29/ while other forums have rejected attempts to establish either a course of dealing or trade usage which exclude implied warranties. 30/ Although it may be possible, in the appropriate circumstances, to establish an implied trade-use disclaimer as a fall-back defense where explicit disclaimers have failed, a seed company certainly should not plan on using such a disclaimer in the normal course.

E. Limitations of Damages

Assuming that a valid warranty has been breached, what is the limit of the financial exposure of the seller? Under most commercial transactions, a buyer has the right to refuse to accept merchandise that does not conform to the sales agreement. 31/ In the case of seed, it is unlikely that the buyer will be in a position to recognize defects in the product by a visual inspection. Absent defects that are discernible by visual inspection or independent testing by the

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26/ U.C.C. § 2-316(2); *Zicari v. Joseph Harris Co.*, 304 N.Y.S.2d 918 (App. Div. 1969), *appeal denied,* 258 N.E.2d 103 (N.Y. 1970).

27/ *Martin Rispens & Son v. Hall Farms,* 621 N.E.2d 1078 (Ind. 1993) *abrogated by Hyundai Motor America, Inc. v. Goodwin,* 822 N.E.2d 947 (Ind. 2005).

28/ U.C.C. § 2-316(3)(c).

29/ *E.g., Bickett v. W.R. Grace Co.,* Prod. Liab. Rep. (CCH) 6878 at 11,726 (W.D. Ky. 1972).

30/ *Pennington Grain & Seed, Inc. v. Tutee,* 422 So. 2d 948, 951 (Fla. Dist. Ct. App. 1982) (warranty printed on soybean seed bag is ineffective "because it amounted to a post-contract, unbargained-for unilateral attempt to limit" implied warranty of merchantability and fitness.); *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.,* 625 P.2d 171 (Wash. App. 1981)(an invoice sent after an oral contract for sale of seed may be considered a warranty), *distinguished by*, Puget Sound Financial v. Unisearch, 47 P.3d 940 (Wash. 2002); *Zicari v. Joseph Harris Co.,* 304 N.Y.S.2d 918 (App. Div. 1969), *appeal denied,* 258 N.E.2d 103 (1970).

31/ U.C.C. § 2-601.

buyer, 32/ defects in the product will not be apparent until after the seed has been accepted and planted. 33/

Under the U.C.C., a buyer that does accept non-conforming seed may obtain damages consisting of the difference between the value of the non-conforming seed and the value that the seed would have had, had it been as warranted, plus incidental and consequential damages. 34/ Incidental damages include expenses incident to inspecting, receiving, handling and transporting the goods, as well as any other reasonable expense associated with covering the loss. Consequential damages include losses resulting from the product's failure to meet particular requirements of which the seller was aware at the time of the sale. 35/ Combined, these damages can be significant, and may far exceed the replacement value of the defective seed.

The largest portion of damages requested is likely to be lost profits. Often, sellers of commercial quantities of seed know at the time of the sale that the buyer's requirements include growing a crop for sale. Thus, lost profits may fit the definition of consequential damages. Some courts allow lost profits, computed by using historical data or a neighbor's experience. 36/ Others,

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32/ *Jacob Hartz Seed Co. v. Coleman,* 612 S.W.2d 91 (Ark. 1981) (discussing the buyer's obligation to reject within a reasonable time after testing establishes a defect in the seed).

33/ A buyer is deemed to have accepted a good if the buyer has had a reasonable opportunity to inspect the seed, has failed to effectively reject the seed, or had performed any act that is inconsistent with the seller's ownership of the seed. *See* U.C.C. §2-606. A buyer who immediately resold a shipment of seedlings was deemed to have accepted the goods and could not recover from the original seller for the eventual discovery of defects with the seedlings. *Riddle v. Heartland Nursery Co.*, No. M2000-02190-COA-R3-CV, 2001 WL 1346261 (Tenn. Ct. App. Nov. 2, 2001). Under Maine law, a buyer who inspects seed prior to acceptance is not precluded from claiming a breach of express warranties if the buyer discovers a defect after acceptance. *See Maine Farmers Exchange v. McGillicuddy*, 697 A.2d 1266 (Maine 1997).

34/ U.C.C. § 2-714.

35/ U.C.C. § 2-715. If the buyer could have mitigated the damages in some way, but failed to do so, the damages that could have been avoided are not recoverable. *Id.* § 2-715(2).

36/ *Ciba-Geigy Corp. v. Murphree,* 653 So.2d 857 (Miss. 1994); *Ouwenga v. Nu-Way Ag, Inc.,* 604 N.E.2d 1085 (Ill. 1992); *Schmaltz v. Nissen,* 431 N.W.2d 657 (S.D. 1988); *Pennington Grain & Seed, Inc. v. Tuten,* 422 So. 2d 948 (Fla. Dist. Ct. App. 1982); *Walcott & Steele, Inc. v. Carpenter,* 436 S.W.2d 820 (Ark. 1969); *Klein v. Asgrow Seed Co.,* 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (3d

although admitting that lost profits are allowable in theory, have made it difficult or impossible to obtain lost profits as a practical matter because of the speculative nature of these damages. 37/

Under the U.C.C., parties to a contract can limit the damages that are available on breach of warranty. Damages can specifically be limited to "return of the goods and repayment of the price or to repair or replacement of nonconforming goods or parts." 38/ The limitation must be labeled as the "exclusive" remedy, and the clause should be brought to the buyer's attention. A remedy not expressly labeled as "exclusive" will be construed as additional to those available under the U.C.C., and thus will not effectively limit the remedy. 39/

In the case of commercial goods such as seeds, the agreement may include a disclaimer of all consequential damages, so long as this exclusion is not "unconscionable." 40/ Whether a particular disclaimer is unconscionable depends on the overall circumstances of the sale, including the size and bargaining power of the parties, and whether the buyer was in a position to appreciate the meaning of the clause. 41/ The courts have split on this issue, owing in part to differences in factual circumstances, but also to varying interpretations of unconscionability. 42/ Some courts have held that limitations of damages are

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Dist. 1966) *disagreed with by Agricola Baja Best S. De. R.L. de C.V. v. Harris Moran Seed Co.*, 44 F. Supp. 3d 974 (S.D. Cal. 2014)..

37/ *Dixon Dariy v. Conagra Feed*, 519 S.E.2d 729 (Ga. Ct. App. 1999) *distinguished by Sunstate Indus. Inc. v. VP Group, Inc.*, 679 S.E.2d 824 (Ga. Ct. App. 2009); *Morey v. Brown Milling Co.,* 469 S.E.2d 387 (Ga. Ct. App. 1996); *Albin Elevator Co. v. Pavlica,* 649 P.2d 187 (Wyo. 1982); *Blackburn v. Carlson Seed Co.,* 321 SW.2d 520 (Mo. Ct. App. 1959); *Hayman v. Shoemake,* 203 Cal. App. 2d 140, 158, 21 Cal. Rptr. 519 (5th Dist. 1962) (noting that, although lost profits are allowable, variables such as weather, farming practices, irrigation timing and market conditions make the computation extremely difficult).

38/ U.C.C. § 2-719(1)(a).

39/ *Id.* § 2-719(b); *see e.g., American Nursery Prods., Inc. v. Indian Wells Orchards,* 797 P.2d 477 (Wash. 1990) *distinguished by Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d 1547, 1554 (9th Cir. 1994) (distinguishing contract remedies from warranty disclaimers).

40/ U.C.C. § 2-719(3).

41/ *See, e.g., Jones v. Asgrow,* 749 F. Supp. 832 (N.D. Ohio 1990); *American Nursery Prods., Inc.*,797 P.2d 477; *see also* the discussion of unconscionability *infra,* at Section III.G.

42/ *Compare Estate of Arena v. Abbott & Cobb, Inc.,* 551 N.Y.S.2d 715 (NY App. Dist. 1990)(limiting damages to the cost of the seed), *appeal denied,* 556

unenforceable when the damages arise from a violation of a statutory duty, such as proper labeling of seeds. 43/

A seller can waive an otherwise valid limitation by failing to fulfill the obligations of the warranty provision, in a timely manner, after a valid claim has been filed. 44/ It is, therefore, wise policy to respond promptly to apparently valid claims concerning a breach, offering to fulfill the provisions of the limited warranty by providing new product or refunding the purchase price.

As a practical matter, seed companies may wish to limit damages to the cost of the seed and expressly exclude consequential damages, consistent with marketing strategies. Although a carefully drafted and conspicuous clause may provide substantial protection, especially in sales to large, sophisticated buyers, there is no guarantee that the limitation will be effective in all factual situations or in all jurisdictions.

F. Conditioning of Remedies

Parties can agree to reasonable restrictions on the procedures for requesting a remedy, including: restricting the time within which the buyer can request a remedy; 45/ specifying the means by which the buyer must notify the

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N.E.2d 1116 (NY 1990), *and Southland Farms, Inc. v. Ciba-Geigy Corp.,* 575 So. 2d 1077(Ala. 1991) (concerning crop loss caused by agricultural chemical), *with Martin v. Joseph Harris Co.,* 767 F.2d 296 (6th Cir. 1985) (requiring disclosure of the statutory rights that are altered by a limitation of liability clause), *and Lutz Farms v. Asgrow Seed Co.,* 948 F.2d 638 (10th Cir. 1991).

43/ *Kornegay Family Farms, LLC v. Cross Creek Salad, Inc.*, No. 187PA16, 2016 WL 1618272 (N.C. Sup. Ct. Sept. 22, 2016) *cert. granted*, 793 S.E.2d 217 (N.C. 2016)(revisiting the issue after forty years); *Agricultural Services Assn v. Ferry-Morse Seed* Co., 551 F.2d 1057 (6th Cir. 1977) (applying California law and citing Tennessee law); *Gore v. George J. Ball, Inc.,* 182 S.E.2d 389, 398 (N.C. 1971); *Klein v. Asgrow Seed Co.,* 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (3d Dist. 1966); *cf. Nunes Turfgrass v. Vaughan-Jacklin Seed Co.,* 246 Cal. Rptr. 823 (Cal. Dist. Ct. App. 1988); *Durham v. Ciba-Geigy Corp.,* 315 N.W.2d 696 (S.D. 1982) (holding that the false labeling of a provision to limit damages in an herbicide contract—in violation of state law—was unconscionable) *distinguished by Citibank v. Palma,* 646 S.E.2d 635, 639 (N.C. Ct. App. 2007) (where seemingly unconscionable terms are expressly permitted by State law the [terms] cannot be found unconscionable).

44/ *Devore v. Bostrom,* 632 P.2d 832 (Utah 1981).

45/ The U.C.C. has a default time limit of four years for actions brought under a warranty. That time limit may be modified by agreement to shorten

seller of a claim (*e.g.*, by registered mail at a particular address); determining that warranties can be amended only by written agreement; and specifying that arbitration is available or required prior to litigating disputed claims. As discussed in Section IV.C. below, certain states now have statutory requirements for arbitration, and may require labels to contain notices concerning arbitration procedures.

G. The U.C.C. Requirement of Overall Fairness – Unconscionability

The U.C.C. contains a provision establishing that overall fairness between the parties is an overriding concern. 46/ In addition, the Code provides specifically that contract clauses limiting or excluding consequential damages must not be unconscionable. 47/ The courts have no obligation to enforce a disclaimer or limitation that is found to have been unconscionable at the time of sale.

Traditionally, the courts have found unconscionability in consumer, rather than commercial sales. 48/ More recently, the courts have sometimes found provisions in commercial seed sales unconscionable, upholding the claims of farmers against these provisions. 49/

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the time to a minimum of one year, but cannot be extended for more than the four-year period. The start date for the limit begins upon delivery. U.C.C. §§ 2-725(1)-(2). It has been held that even an express warranty of variety does not constitute a warranty of future performance, which would cause the period to run from the time that the breach would have been discovered—that is, at the time when the crop was discernibly not the type warranted. *Stumler v. Ferry-Morse Seed Co.,* 644 F.2d 667 (7th Cir. 1981).

46/ U.C.C. § 2-302.

47/ U.C.C. § 2-719.

48/ In *American Nursery Products, Inc. v. Indian Wells Orchards,* 797 P.2d 477 (Wash. 1990), for example, the Washington Supreme Court noted that parties to commercial contracts generally have the ability to seek advice and alternative offers and that, as a result, commercial contracts will be found unconscionable only where there are sufficient indicia of unfair surprise in the negotiations.

49/ *Mullis v. Speight Seed Farms, Inc.*, 505 S.E.2d 818 (Ga. Ct. App. 1998), *cert. denied* (Jan. 8, 1999). A Georgia appellate court distinguished between limitation-of-liability clauses for general products and those for seed and held that limitations on the liability for defective seed were unconscionable because a failed crop, unlike a television or computer, cannot be repaired or replaced simply by the original cost

The Code does not define unconscionability. Although there are some consistent factors used in determining whether a bargain is unconscionable, there is enough flexibility in the courts' interpretations to make the issue uncomfortably unpredictable.

The size and sophistication of the buyer are primary considerations in making the determination of unconscionability. A smaller buyer is less likely to have the bargaining power to negotiate for removal of an unfavorable clause, so contracts with smaller buyers are more likely to be unfairly one-sided. In addition, a larger entity may be more sophisticated in its dealings, and thus may have a better understanding of the risks in a particular bargain. A seller can mitigate this factor when selling to smaller buyers by ensuring that provisions limiting damages or disclaiming warranties are pointed out to the buyer prior to the sale. 50/

The level of competition in the marketplace is also significant. If a seller dominates a particular market, a court may find that the buyer had no meaningful choice but to accept harsh terms. In 1985, the United States Court of Appeals for the Sixth Circuit, applying Michigan law, held in *Martin v. Joseph*

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of the seed. *Id. But see, Harris Moran Seed Co. v. Phillips*, 949 So.2d 916, 927-928 (Ala. Ct. App. 2006) (rejecting *Mullis* because Alabama Supreme Court reached opposite conclusion about unconscionabilty in earlier cases, finding "the exclusion of consequential damages for a commercial loss was not unconscionable")(*compare* Murdock, J. dissenting)(suggesting *Mullis* leads to a more equitable result).

50/ In *Martin v. Joseph Harris Co.*, 767 F.2d 296 (6th Cir. 1977), the court pointed out that the failure of the salesman to direct the buyer's attention to limiting clauses was a factor to consider in determining whether a sale to a relatively unsophisticated buyer was unconscionable. A seller's superior knowledge of the product, the buyer's lack of bargaining power with respect to the terms of the provision, and the seller's actions to mislead the buyer led an Idaho court to find a limitation-of-liability provision unconscionable. *Walker v. American Cyanamid Co.*, 948 P.2d 1123 (Idaho 1997) *limited by Lovey v. Regence Blue Shield of Idaho*, 72 P.3d 877, 833 n2 (upholding an arbitration agreement where the record shows no evidence that plaintiff asked for a copy of the arbitration agreement or asked any questions concerning its terms, nor that the arbitration clause was written in confusing or unclear language, or that an arbitration clause is required to be found at any specific location in a contract in order to be valid). *But see*, *Pig Improvement Co. v. Middle States Holding Co.*, 943 F. Supp. 392 (D. Del. 1996) (holding a limitation of remedies clause to be valid in spite of a disparity in bargaining power because the damage exclusion was sufficiently conspicuous and the buyer's sole shareholder was a knowledgeable businessman who understood the terms of the sale).

Harris Co., that a bargain could be one-sided even in a competitive market, if all of the sellers include the same terms. 51/

The Supreme Court of Alabama determined that a provision that is so widely used as to be a "usage of trade" may be at least presumptively reasonable. 52/ In *Southland Farms v. Ciba-Geigy Corp.,* the court examined a provision excluding consequential damages in the sale of agricultural chemicals. 53/ The court found that the limitation was a widely used and acceptable method of shifting risk in the industry, and was thus not unconscionable. 54/ The U.C.C. expressly provides parties with the opportunity to present evidence as to the "commercial setting, purpose and effect" of a particular provision before a court may determine that it is unconscionable. 55/ Thus, a seller has the opportunity to document industry practice regarding disclaimers, and to compare the particular provision used with those common in the industry.

Finally, a court may consider whether the result is substantively fair. That a defect could have been prevented by the seller, that the defect is latent, and that the contract provision may result in eliminating virtually all of the value of the bargain to the buyer, have been considered as factors in making this determination. 56/ The South Dakota courts had broadly held that disclaimers and limitations on damages were unconscionable in agricultural products cases because the buyer had no means of determining the defect in the product, and because the loss of the entire crop was an inevitable result of such a defect. 57/ The South Dakota legislature has since abrogated this holding.

51/ *Martin v. Joseph Harris Co.*, 767 F.2d 296, 301 (6th Cir. 1977).

52/ *Southland Farms v. Ciba-Geigy Corp.*, 575 So. 2d 1077 (Ala. 1991).

53/ *Id.*

54/ A comparison of *Southland Farms* and *Martin* illustrates the type of latitude that courts have in interpreting facts to determine unconscionability. Under the *Martin* decision, the widely-used provision may have been found to rob the buyer of meaningful choice in bargaining, and might thus have been unconscionable for the very reason the *Southland Farms* court found it to be presumptively reasonable.

55/ U.C.C. § 2-302(2).

56/ *Martin,* 767 F.2d at 301-02 (considering the latency of the defect, and the fact that the seller could have prevented the problem).

57/ *Schmaltz v. Nissen,* 431 N.W.2d 657 (S.D. 1988) (finding provisions unconscionable in the sale of defective seed); *Hanson v. Funk Seeds, Int'l,* 373 N.W.2d 30 (S.D. 1985) *abrogated by* 1986 S.D. Sess. Laws ch. 410 § 2–16–13. *But see*, *Muller Pallets, LLC v. Vermeer Mfg. Co.*, No-09-4016, 2010 WL 4022765 (D.S.D. Oct. 12, 2010) (noting that "it is believed [portions of *Hanson*] accurately

These decisions, however, illustrate the considerations peculiar to the sale of seed products that may move a court to find a limiting clause unfair. 58/

The Tenth Circuit, applying Colorado law, affirmed a finding that a clause limiting damages to the replacement price of the seed was unconscionable because the clause "failed in its essential purpose." Under the U.C.C., a clause limiting damages may fail in its essential purpose if it does not provide a valid remedy to the buyer when the defect actually occurs. 59/ In *Lute Farms v. Asgrow Seed Co.,* for example, a buyer sued the seller for economic losses caused by the sale of defective onion seed. 60/ The invoice and packaging contained provisions that limited damages to the purchase price of the seed. The Tenth Circuit, without much discussion, upheld the trial court's ruling that the limitation failed in its essential purpose and was unconscionable. The cases cited to support this holding indicate that the court believed the limitation clause was substantively unfair. 61/

A Michigan intermediate appellate court similarly found a clause limiting damages to the purchase price unconscionable. *Latimer v. William Mueller & Son, Inc.,* concerned a suit for damages based on a claim that red kidney beans had been infected with internal halo blight. 62/ The court found that the limitations clause would leave the farmer "with no remedy at all in that it fails in its essential purpose." 63/ In a more recent district court case in Arizona, the court took the time to articulate why limitation clauses on seed products

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describe[] the state of existing law in South Dakota about proof of breach of express warranty."). ASTA opposed the decision in *Hanson,* and took part in the litigation, filing an *amicus curiae* brief with the court.

58/ 1986 S.D. Sess. Laws ch. 410 § 2–16–13. The South Dakota courts have determined that this abrogation was not intended to be applied retroactively, and have applied *Hanson* to invalidate disclaimers in pre-1986 contracts. *Schmaltz,* 431 N.W.2d at 662-663.

59/ U.C.C. § 2-719(2).

60/ 948 F.2d 638 (10th Cir. 1991). *But see Kornegay Family Farms, LLC v. Cross Creek Salad, Inc.*, No. 187PA16, 2016 WL 1618272 (N.C. Sup. Ct. Sept. 22, 2016) *cert. granted*, 793 S.E.2d 217 (N.C. 2016) (whether Cross Creek is entitled to enforce a limitation of remedies that appears on the label of its seed containers and purports to limit Plaintiffs' recovery to the purchase price of the seed when Plaintiffs' purchased seed was mislabeled and thus produced a crop other than what was expected by Plaintiffs upon purchase).

61/ *Id.* at 646.

62/ 386 N.W.2d 618 (Mich. Ct. App. 1986).

63/ *Id.* at 637.

are particularly vulnerable to findings of unconscionability. 64/ The court reasoned that "unlike many products (i.e., a television, stereo, etc.) that can repaired or replaced which would actually make the buyer whole and otherwise fulfill the purpose of the contract and related warranties, simply replacing seeds or refunding the price of seeds in the agricultural context is totally inadequate." 65/

In 1993, the Supreme Court of Indiana, on the other hand, found that a clause limiting damages to the replacement price was not unconscionable. 66/ The trial court had found for the plaintiff, who had purchased seeds that eventually produced watermelon infected with fruit blotch. The state Supreme Court reversed, finding that the plaintiff "bargained for seed, not, as its argument suggests, for a full grown crop of watermelons. If [the plaintiff] deemed recovery of the purchase price inadequate, then it was free to bargain for a more comprehensive remedy." 67/

As discussed above, a disclaimer of liability for warranties arising from statutory labeling requirements also may be unconscionable for public policy reasons. The Supreme Court of Arkansas held such a disclaimer unconscionable in a 1970 decision in which the buyer claimed that he had ordered "pink shipper" tomato seed, but had received some other type of tomato seed mislabeled as "pink shipper." 68/

In sum, protective provisions in seed sales contracts are likely to be valid, especially when the buyer is a large commercial entity with experience in these transactions. Limitations clauses typically provide for refund of the purchase price of the seed, assuring buyers some minimum of warranty protection. Seed companies should be aware, however, that certain jurisdictions may invalidate these clauses, especially when the buyer is relatively small and commercially

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64/ *Nomo Agroindustrial Sa De CV v. Enza Zaden North America*, Inc., 492 F. Supp. 1175, 1181 (D. Ariz. 2007) ("The true value of the seeds only comes from the crop yielded which is preceded by considerable time and cost expended by the farmer. A farmer's lost growing season and the accompanying loss of expected profits due to defective seeds clearly is not compensated by simply replacing or refunding the price of the defective seeds.")

65/ *Id.*

66/ *Martin Rispens & Son v. Hall Farms, Inc.,* 621 N.E.2d 1078 (Ind. 1993) *abrogated by Hyundai Motor America, Inc. v. Goodwin,* 822 N.E.2d 947 (Ind. 2005).

67/ *Id.* at 1086.

68/ *Dessert Seed Co. v. Drew Farmers Supply, Inc.,* 454 S.W.2d 307 (Ark. 1970).

unsophisticated. For companies considering inclusion of such clauses, there are a few clear lessons to be learned from the cases:

Ensure that disclaimers are **effectively communicated to the buyer prior to the sale.** This especially applies when the buyer is smaller and unsophisticated. Hiding disclaimers and limitations invites litigation, especially in regard to implied warranties. A clause in a commercial contract that is pointed out and "bargained for" during the sale is most likely to be found effective in a later suit.

Ensure that the product meets descriptions required by statute to be placed on the label or tag. Disclaimers or limitations regarding breach of express warranties created by information required by statute may be invalid for public policy reasons.

Be aware of the special responsibilities arising when a seed company, its employees, or even dealers undertake to advise farmers to use a particular seed product due to special growing conditions, such as soil type, equipment, or planting seasons. Such advice is risky and may result in special liability should the product not meet expectations.

IV. FEDERAL AND STATE LAWS AFFECTING WARRANTIES

In addition to general commercial law, transactions involving the sale of seed fall under other types of statutory regimes. The federal government and the states specifically regulate the seed industry under the Federal Seed Act and various state seed laws. Commercial transactions are also regulated by various types of consumer protection laws. Additionally, a number of states have enacted statutes that require arbitration of disputes arising from seed sales.

A. Federal and State Seed Acts

The Federal Seed Act contains requirements for labeling seeds intended for sale. 69/ Under the Act, all seeds, except for flower seeds, must be labeled with information including kind and variety, weight, and germination percent. The Act requires certification of much of this information. Selling seed in interstate commerce without meeting the detailed requirements of the Act is unlawful. The Secretary of Agriculture may inspect records and conduct hearings to investigate possible violations of the Federal Seed Act.

69/ 7 U.S.C. §§ 1551-1611 (1999).

The use of a disclaimer as a defense to a regulatory action brought under the Act is prohibited; however, the Act explicitly allows the use of these clauses in defending in other proceedings, such as civil suits brought by buyers. Thus, although sellers must always meet labeling requirements, the Act itself allows them to disclaim warranties and limit liability to buyers. Some state courts, however, have independently determined that liability for failing to meet express warranties created by the labeling statements required under the Act may not be waived for public policy reasons. 70/ Therefore, a court may find that required statements concerning type, variety and germination percent cannot be effectively disclaimed. This rationale has not been extended to disclaimers of information and warranties that exceed the Act's requirements, but are nevertheless included on tags or labels.

In addition to the Federal Seed Act, every state has enacted a similar law regulating transactions involving the sale of seed within that state. Although the substance of these laws varies from state to state, labeling requirements continue to be the primary focus. Due to variations in these laws, it is important for each seller to ensure that it meets the requirements of each state where its products are sold.

B. Consumer Protection Laws

Congress and the various states have passed laws that affect warranty disclaimers in consumer transactions. The federal statute, known as the Magnuson-Moss Warranty and Federal Trade Commission Improvement Act ("Magnuson-Moss"), severely limits a seller's ability to disclaim liability for "consumer products." 71/ The Act, however, explicitly exempts the sale of "seed for planting" from its coverage. 72/

State consumer protection laws fall into several distinct categories. These laws may modify or override the applicable sections of the U.C.C. Frequently, sellers violating these laws may find themselves with liability exceeding actual loss, including attorney's fees. These laws often apply solely to consumer, as opposed to commercial, transactions. Sellers are urged to obtain information concerning the law in each state where sales are transacted, because statutes and interpretations by the courts vary widely from state to state.

70/ *See* discussion under Section III.G., *supra*, regarding unconscionability.
71/ 15 U.S.C. §§ 2301-2312 (1997).
72/ 15 U.S.C. § 2311(a)(2) (1997).

Most states have enacted deceptive trade practices laws, often modeled after the Magnuson-Moss Act. Some of these statutes specifically address misrepresentations made in a statement of warranty. 73/ Others have been construed to apply to warranty clauses. The Texas Deceptive Trade Practices Act, for example, has been applied against a seller of cucumber seed that breached the warranty of merchantability by producing spotted, unsalable cucumbers. 74/ Significantly, the Texas statute is not limited to consumers, but applies to all buyers of goods, except for businesses with assets of $25 million or more. 75/

In *Cox. v. Lewiston Grain Growers,* a seller was liable for breach of warranty and violations of the Washington Consumer Protection Act and the state's Seed Act for mislabeling a seed product as certified when actual certification requirements had not been met. 76/ Not every state has applied deceptive practice laws to breaches of warranty, 77/ however, seed sellers should anticipate the possibility that the law may be thus applied.

A number of states have modified their commercial laws to prohibit or limit strictly the use of warranty disclaimers in consumer transactions. As a

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73/ *See, e.g.,* COLO. REV. STAT. ANN. § 6-1-105 (West 2002), *amended by*, 2017 Colo. Legis. Sess. Serv. Ch.207, S.B. 17-132 (West 2016); IND. CODE ANN. § 24-5-0.5-3 (West 2017).

74/ *Walter Baxter Seed Co. v. Rivera,* 677 S.W.2d 241 (Tex. Ct. App. 1985); *see also Gold Kist, Inc. v. Massey,* 609 S.W.2d 645 (Tex. Ct. App. 1980). The Texas Act was also applied in conjunction with a breach of warranty claim, resulting in a finding of liability for a seller who made false and misleading statements about the durability of a seed under dry land conditions. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486 (2001) *distinguished by Heard v. Monsanto Co.*, No. 07-06-0402, 2008 WL 1777989 at *3 (April 18, 2008) ("Unlike the statements in *Helena Chemical*, the Monsanto statements on which Heard relies simply say that UltraMAX is as good as ("no other herbicide") or better ("best all-around performance") than their competitors' (or maybe other Monsanto products)).

75/ TEX. BUS. & COM. CODE § 17.45(4) (2002).

76/ 936 P.2d 1191 (Wash. Ct. App. 1997) *distinguished by White v. Microsoft Corp.*, 454 F. Supp. 2d 1118, 1128 n15 (S.D. Ala. 2006) ("Cox absolutely does not stand for the proposition that a limited remedy fails of its essential purpose anytime a latent defect is involved. Rather, it is only when *both* a latent defect exists and the limited remedy would destroy the substantive value of the plaintiff's bargain that the remedy clause may be invalidated.")

77/ *See Haner v. Quincy Farm Chemicals, Inc.,* 649 P.2d 828 (Wash. 1982) (refusing to find a per se violation of the consumer protection law in a breach of warranty case).

general matter, these laws will not apply to the sale of seed to farmers for the purpose of growing commercial crops. Certain jurisdictions, however, do not so limit their consumer laws. As mentioned above, the Texas consumer statute applies to all buyers, except those with $25 million or more in assets. The West Virginia law applies to all "consumer transactions," defined as any sale to a natural person made for a "personal, family, household or agricultural purpose." 78/ Although seed producers may generally make use of disclaimers and limitations of liability, except in sales of seed packets and retail lawn seed, 79/ a careful review of applicable state law is required to ascertain liability under these laws.

C. Statutory Requirements for Arbitration

Arbitration procedures are frequently the preferred method of resolving disputes that arise from a contract. Parties agreeing to arbitration as an alternative to civil litigation can resolve a number of issues at the time of contracting, deciding, for example, which state's law will apply, how the arbitrators will be selected and how long the arbitration will take. Arbitration procedures can be more efficient and less costly than civil litigation.

A number of states have enacted laws requiring arbitration of claims concerning defective seed. 80/ ASTA has consistently supported laws requiring mandatory, non-binding arbitration. The Recommended Uniform State Seed

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78/ W. VA. CODE § 46A-6-102 to 107 (2003).

79/ The applicable law in some states may not even cover the sale of seed packets. The Kansas Consumer Protection Act, for example, like the Magnuson-Moss Act, specifically excludes seed for planting. Kan. Stat. Ann. § 50-639(g) (1994). The California Consumer Warranty Act excludes household "consumables," defined so as to exempt seed from the law. CAL. CIVIL CODE § 1791(d) (West 1998).

80/ *E.g.*, ALA. CODE § 2-26-70 *et seq.* (1999); ARK. CODE ANN. § 2-23-101 *et seq.* (Michie 1999); 25 Colo. Rev. Stat. Ann. § 35-27-122 *et seq.* (West 1998); Fla. Stat. Ann. § 578.26 *et seq.* (West 2003); Idaho Code § 22-436 *et seq.* (Michie 1977 & Supp. 2003); Ill. Comp. Stat. 710 § 5/1 *et seq.* (1999); Ind. Code Ann. § 15-4-11-1 *et seq.* (West 1997); MISS. CODE ANN. § 69-3-1 *et seq.* (1999 & Supp. 2002); S.C. CODE ANN. § 46-21-260 *et seq.* (Law. Co-op 1976 & Supp. 1992); S.D. CODIFIED LAWS ANN. § 38-12A-21 *et seq.* (1985 & Supp. 2002); Act of June 20, 2003, ch. 543 § 64.002(a), 2003 TEX. SESS. LAW H.B. No. 1398; WASH. REV. CODE ANN. § 15.49.071 *et seq.* (West 1993).

Law (RUSSL), for example, includes arbitration procedures of the type that are generally supported by ASTA and the industry. 81/

Under common arbitration statutes, parties are generally required to submit contractual disputes to an arbitration board prior to recourse to the courts. The state may require that the product label inform the buyer of the arbitration procedures. RUSSL, for example, calls for the following label on seed bags or packages:

Notice Arbitration/Conciliation/Mediation Required by Several States

> Under the seed laws of several states, arbitration, mediation or conciliation is required as a prerequisite to of maintaining a legal action based upon the failure of seed to which this notice is attached to produce as represented. The consumer shall file a complaint along with the required filing fee (where applicable) with the Commissioner/ Director/Secretary of Agriculture, or Chief Agricultural Officer within such time as to permit inspection of the crops, plants or trees by the designated agency and the seedsman from whom the seed was purchased. A copy of the complaint shall be sent to the seller by certified or registered mail or as otherwise provided by state statute. 82/

When a dispute arises, the buyer (or in some cases, the seller), submits the claim to an arbitration board or council, constituted as required by the law. A dissatisfied party may still be allowed to raise any issues before a court after the arbitration is complete. Statutes of limitations are normally tolled from the

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81/ RUSSL is recommended by the Association of American Seed Control Officials, an organization of officials from state agricultural agencies. RUSSL is amended and updated routinely to reflect changes in business, law and technology. The August 2016 version of RUSSL has been used to prepare this Summary. While reference to RUSSL is helpful for purposes of illustration, RUSSL, as drafted, is not law in any state.

82/ RUSSL § 10(2). Several states' laws establish specific labeling requirements as a condition precedent to arbitration, conciliation or mediation. Although the RUSSL notification language is not inconsistent with the states' required language, this general statement might not be adequate under some of these laws.

time the dispute is filed with the arbitration board until the arbitration is completed.

In an unpublished decision, a Florida state court held that the Florida arbitration statute required mandatory arbitration only for complaints arising from the seed's failure to meet warranties explicit on the label. The statute requires mandatory arbitration for complaints arising from the seed's failure "to produce or perform as represented by the label attached to the seed as required [by law]". 83/ The Florida court in *Pero Family Farms v. Florida Seed Co., Inc.* held that the statute did not require arbitration of a complaint concerning diseased seed, since the label did not represent that the seed was free from disease. 84/ As a result, the farmer was not required to arbitrate prior to seeking recourse to the court.

This decision could seriously limit the mandatory nature of the Florida arbitration statute. 85/ The court's interpretation of the Florida statute is binding on cases falling under that state's laws; however, other states have begun to interpret their arbitration requirements in a lenient manner. In *Presley v. P & S Grain Company*, an Illinois appellate court held that the state Seed Arbitration Act did not divest the court of subject matter jurisdiction, but rather was established as an alternative form of dispute resolution. 86/ Additionally, the Texas Supreme Court, in *Helena Chemical v. Wilkins*, held that a farmer's failure to submit claims against the seller of seed to arbitration, in accordance with the Seed Arbitration Act, did not preclude a trial court's jurisdiction over the suit. 87/

In spite of these interpretations, a number of states have enacted statutes with broader language, requiring arbitration of complaints when seed fails to perform as warranted, and for general negligence, in addition to complaints arising from failure to meet representations on the label. 88/ Statutes with broader language are less susceptible to narrow interpretations.

83/ FLA. STAT. ANN. § 578.26(1)(a) (West 2003).
84/ Case No. CL 93-4438 CA (Fla. Cir. Ct. January 5, 1994).
85/ *But cf. Interlatin Supply, Inc. v. S&M Farm Supply, Inc.* 654 So.2d 254 (Fla. Dist. Ct. App. 1995), review denied, 659 So.2d 1088 (Fla. 1995) (interpreting the arbitration statute very broadly to apply to all purchasers of seed to cultivate or produce a crop though not a farmer).
86/ 683 N.E.2d 901 (Ill. Ct. App. 1997).
87/ *Helena Chemical v. Wilkinson*, 47 S.W.3d 486 (Texas 2001).
88/ States with language similar in pertinent part to the Florida statute include: Ark. CODE ANN. § 2-23-102(a) (Michie 1999); MISS. CODE ANN. § 69-3-

Arbitration clauses may be useful to both buyers and sellers. As mentioned above, arbitration tends to be less expensive than litigation. Additionally, most arbitration boards contain agricultural experts, who are better qualified than are a civil judge or jury to understand any technical issues. 89/ This technical expertise may be useful even if the case goes to trial after the arbitration, because the court will normally be able to consider the arbitration board's investigation and findings. Seed companies must review applicable arbitration laws to ensure compliance with labeling requirements, and to determine the extent that such procedures may be useful for resolving particular disputes.

V. NEGLIGENCE AND STRICT LIABILITY IN THE SALE OF SEED

A. Negligence

Occasionally, a buyer of defective seed will bring a tort claim asserting negligence on the part of the seller in addition to any claims for breach of warranty. Money damages in a tort claim can be much higher than in a simple breach of contract suit. In the first place, tort damages are not limited to those arising from the breach, as is the case in a contract claim. Historically, this results in higher damages, and damages that are more difficult to predict at the time of sale. Additionally, if the party asserts that the seller's actions were grossly negligent or intentionally harmful, punitive damages may be requested. As the term implies, punitive damages are given to punish and deter reprehensible conduct, and the amount of damages may bear little relationship to the harm actually incurred by the complaining party.

19(3)(e)(1) (1999 & Supp. 2002); and S.C. CODE ANN. § 46-21-260(1) (Law. Co-op. 1976 & Supp. 2002). Statutes explicitly covering a broader range of complaints include: ALA. CODE § 2-26-74 (1999); COLO. REV. STAT. ANN. § 35-27-122(1)(a) (West 1998); IDAHO CODE § 22-436 (Michie 1977 & Supp. 2003); S.D. CODIFIED LAWS ANN. § 38-12A-21 (1985 & Supp. 2002); WASH. REV. CODE ANN. § 15.49.071(1) (West 1993). RUSSL also contains broader language at § 10(1), requiring arbitration "[w]hen any buyer claims to have been damaged by the failure of any seed for planting to produce or perform as represented by the label required to be attached under . . . this Act, or by warranty, or as a result of negligence. . . ."

89/ RUSSL, for example, calls for a board that includes representatives of farmer organizations and seedsman's associations, as well as deans of local agricultural colleges. RUSSL § 11(1).

When the only loss sustained is the loss of profit because the product is inferior and fails to perform, the buyer will generally be restricted to contractual remedies under a legal doctrine known as the "economic loss rule." The rule is intended to restrict buyers from circumventing the contractual remedies spelled out in the U.C.C. When a defective product causes only economic damage and does not damage other property or cause personal injury, the buyer is restricted to suing under the contract. 90/

Some courts may follow a slightly different variant of the economic loss rule. A Texas appellate court, for example, considered whether a company that sold defective sorghum seed could be liable for negligence. The court in *Crosbyton Seed Co. v. Mechura Farms* held that a seller is liable under a negligence theory only if "the defendant's conduct . . . would give rise to liability independent of the fact that a contract exists between the parties." 91/ Because providing defective seed was a failure to meet a contractual duty and not a common law duty, the farmer's negligence claims were not allowed. The Texas standard expressed in *Crosbyton Seed* is unlikely to result in a negligence claim against a seller of seed under the most typical facts.

Certain courts have restricted the buyer to contract remedies even when the product did cause collateral damage to other property. The plaintiff in

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90/ *E.g., Agricola Baja Best v. Harris Moran Seed Co.*, 44 F. Supp. 3d 974, 987-988 (S.D. Cal. 2014) (granting summary judgment to defendant seed company after finding that the tomato seed and resulting plant are the same product, thus limiting damages to contract damages); *Harris Moran Seed Co. v. Phillips*, 949 So.2d 916 (Ala. Civ. App. 2006)(as in *Martin*, the seed and the resulting plant were considered the same product); *Martin Rispens & Son v. Hall Farms, Inc.,* 621 N.E.2d 1078 (Ind. 1993) *abrogated by Hyundai Motor America, Inc. v. Goodwin,* 822 N.E.2d 947 (Ind. 2005) (acknowledging the existence of the "economic-loss rule" under prior law, but abolishing vertical privity in actions against a manufacturer for breach of implied warranty); *Dakota Grain Co. v. Ehrmanrout,* 502 N.W.2d 234 (N.D. 1993); *Ringer v. Agway, Inc.*, No. CIV. A. 89-2806, 1990 WL 112091 (E.D. Pa. 1990); *King v. Hilton-Davis,* 855 F.2d 1047 (3d Cir. 1988), *cert. denied,* 488 U.S. 1030 (1989) (citing *East River Steamship Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858 (1986)). The majority of courts have refused to permit recovery for defective but safe products, at least in commercial sales, because to allow negligence claims would upset the legislative intent to have the U.C.C. govern contract claims. *See Moorman Mfg. Co. v. National Tank Co.,* 435 N.E.2d 443, 451 (1982).

91/ 875 S.W.2d 353 (Tex. Ct. App. 1994), *quoting Southwestern Bell Tel. Co. v. DeLanny,* 809 S.W.2d 493, 494 (Tex. 1991).

Hapka v. Paquin Farms, for example, had purchased potato seed that was discovered to suffer bacterial ringrot, forcing the buyer to incur the cost of sanitizing the field prior to replanting. 92/ The Minnesota courts held that, despite the collateral property damage, the product had merely failed to live up to the buyer's commercial expectations. The damage in the field was not of the "sudden and calamitous" type that created liability for negligence, and the buyer was thus limited to claims under the contract. 93/

The U.S. District Court for the Eastern District of Pennsylvania faced the identical issue in *Ringer v. Agway*. 94/ Applying Pennsylvania law, the court rejected an argument that the diseased potato tubers that sprouted from the seed were "other property" so as to allow liability for negligence. Moreover, it found that the machinery, buildings and fields that required disinfection due to the bacterial ringrot were within the risks of the contract and did not create liability for negligence.

There is an exception to this rule when the seller has negligently failed to meet the requirements of an independent statute. Therefore, a seller may be liable in negligence when defective seed fails to meet descriptions required by law to appear on the product label, even absent collateral damage to property. 95/ Another exception, recognized by the Supreme Court of Idaho in *Duffin v. Idaho Crop Improvement Ass'n.,* occurs when the buyer and seller have a "special relationship" with one another. 96/ There, the court held that the association responsible for certifying seed had a special relationship with the buyers because of its exclusive authority and expertise.

92/ 431 N.W.2d 907 (Minn. Ct. App. 1988), *aff'd,* 458 N.W.2d 683 (Minn. 1990).

93/ *Id.* at 910. This holding seems to have been overruled by a Minnesota statute allowing recovery of economic loss to "other property" in tort as well as contract, at least in consumer transactions. *ZumBerge v. Northern States Power Co.,* 481 N.W.2d 103, 107 (Minn. Ct. App. 1992) *distinguished by Poppler v. Wright Hennepin Coop. Elec. Ass'n*, 834 N.W.2d 527, 547 (Minn. Ct. App. 2013) ("*Zumberge* . . . does not support the proposition that a plaintiff can recover damages for "milk loss" without regard for any change in the amount of the plaintiff's expenses.")

94/ CIV. A. 89-2806, 1990 WL 112091 (E.D. Pa. 1990).

95/ *Agricultural Services Ass'n, Inc. v. Ferry-Morse Seed Co.,* 551 F.2d 1057, 1067 (6th Cir. 1977); *Nunes Turfgrass v. Vaughan-Jacklin Seed Co.,* 200 Cal. App. 3d 1518, 246 Cal. Rptr. 823 (5th Dist. 1988).

96/ 895 P.2d 1195 (Idaho 1995).

One state court has allowed a claim for negligence for a defect resulting from a seller's failure to follow its own established practices. In *Webb v. Dessert Seed Co.,* the Colorado Supreme Court found a seller liable for negligence when the seller did not follow its normal practice of testing new varieties of seed prior to placing them on the market. 97/ The court was troubled by evidence that the seller was aware that the onion seeds that were the subject of the contract would not produce enough onions that would "bulb" for commercial sale.

The Tenth Circuit, in 1991, cited *Webb* to affirm a finding of negligence in a similar case. In *Lutz Farms v. Asgrow Seed Co.,* the seller had failed to test its product properly -- which, curiously, was once again onion seed -- prior to sale. 98/ The circuit court cited *Webb,* holding the plaintiff liable under Colorado law. The *Lutz Farms* court seemed to hold that, in Colorado, the economic loss rule did not apply in the sale of seed, the Colorado Supreme Court has since clarified the state doctrine. In *Grynberg v. Agri Tech Inc.* the court found that "seed distributors owe purchasers a general duty of care to avoid foreseeable harm." 99/ When a duty of care exists and there is no contract on which to base an injury claim, the court is apt to enforce the negligence theory against sellers of seed.

A Mississippi court also allowed a negligence claim based upon facts that seem best described as a breach of warranty. *Murphree v. Ciba-Geigy Corp.,* involved the sale of milo seed that was alleged to have been smaller than the norm. 100/ The two farmers involved in the consolidated case overplanted the seed, allegedly because of its small size. As a result of the overplanting and dry growing conditions, the crop resulted in a reduced yield. A jury awarded the plaintiffs actual damages, totaling over $110,000. In addition, the trial court allowed the jury to award an additional $1 million in punitive damages. 101/ On appeal, the Mississippi Supreme Court allowed the jury's determination of negligence to stand, but struck the award of punitive damages. 102/ In an opinion that did not address the distinction between contract and tort liability,

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97/ 718 P.2d 1057 (Colo. 1986).
98/ 948 F.2d 638 (10th Cir. 1991).
99/ 10 P.3d 1267, 1270 (Colo. 2001).
100/ Cons. Civil Action Nos. 4656/4681, Circuit Court of Calhoun County, Mississippi.
101/ ASTA opposed the decision of the trial court, and participated in the litigation on appeal, filing an *amicus curiae* brief with the Mississippi Supreme Court.
102/ *Ciba-Geigy Corp. v. Murphree,* 653 So. 2d 857 (Miss. 1994), *reh'g denied* (April 20, 1995),. The Supreme Court also reduced the total damages awarded to approximately $79,000.

the Court held that there was sufficient evidence for the jury to find that the producer was negligent in selling the smaller seed. 103/

B. Strict Liability

Under the "strict liability" doctrine, a consumer may hold a manufacturer or seller liable for damages caused by a dangerously defective product without having to prove negligence. The doctrine is a relatively modern invention designed to increase consumer safety and to transfer the cost of dangerous products to the manufacturer, who is best able to bear the cost or to eliminate the defect. Although the doctrine has been expanded significantly, it has not been applied to the sale of seed. 104/

In the first place, strict liability, like negligence, does not allow recovery of purely economic damages, as opposed to property or personal injury damages. Seed is unlikely to cause damage to other property or to persons. 105/ Strict liability is inapplicable to claims of economic damage because the proper remedy is warranty. 106/ In the second place, any damage is unlikely to result from a *"dangerous* defect" in the seed:

> It has never been controverted that the defect in the product must result in an unreasonably dangerous condition. We are here concerned with cucumber seed. Cucumber seed is not a power mower, a grinding wheel, a corn blower, a conveyer with an exposed drive shaft,

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103/ *Id.* at 868.

104/ It is possible that, in a specific situation, weed contamination might be considered to "damage" property, such as weeds in a cover crop that limit yield in the subsequent agronomic crop.

105/ *But see* H.B. 2739, 79th Leg. Assemb., Reg. Sess. (Ore. 2017)(draft legislation to "allow[ ] cause of action against patent holder for genetically engineered organism present on land without permission of owner or lawful occupant. Allows court to award prevailing plaintiff costs, attorney fees and treble economic damage). *See generally* Jeremy de Beer, "The Rights and Responsibilities of Biotech Patent Owners" (2007) 40 U.B.C. L. Rev. 343; Katie Black and James Wishart, "Containing the GMO Genie: Cattle Trespass and the Rights and Responsibilities of Biotechnology Owners" (2008) 46 Osgoode Hall L.J. 397.

106/ *Martin Rispens & Son v. Hall Farms, Inc.,* 621 N.E.2d 1078, 1089 (Ind. 1993) *abrogated by Hyundai Motor America, Inc. v. Goodwin,* 822 N.E.2d 947 (Ind. 2005); *see also Crosbyton Seed Co. v. Mechura Farms,* 875 S.W.2d 353 (Tex. Ct. App. 1994).

> flammable insulation coating, a seat belt, or an automobile. It is cucumber seed. The plaintiff makes no allegation that the resulting cucumbers could pose a threat to the safety of the ultimate consumers nor does he allege that the seeds contaminated the soil . . . . By no stretch of the judicial imagination . . . can I conclude that . . . "unreasonably dangerous" . . . can include an unreasonable danger to the plaintiff's wallet. 107/

This decision is consistent with the purposes of strict liability. The rule rejecting strict liability claims for defective seed seems to be consistently applied, albeit under varying rationales. Another plaintiff brought suit in an Indiana court complaining of property damage caused when dairy cows consumed contaminated feed. Although the court agreed that the plaintiff had met the property damage requirement, the court held that the damage was not "sudden and major," as required under the applicable Indiana statute. 108/

Finally, the doctrine of strict products liability is intended to protect consumers, not commercial parties. Although no seed cases appear to be on point, the courts have made clear that the strict liability doctrine "is designed to protect the small consumer and to allocate the risk of loss to the person most able to bear it . . . the manufacturer." 109/ Therefore, a commercial buyer should not be able to maintain a cause of action against a seller, especially if the buyer is of relatively equal size.

VI. OBLIGATIONS ARISING OUT OF SEED VIGOR TESTING

The term "seed vigor" refers to the properties of seed that determine the potential for rapid emergence under a wide variety of field conditions. The germination percentage establishes the amount of the seed that will emerge at a particular time, under optimum laboratory conditions. Because field conditions will seldom reflect these optimum conditions, germination tests cannot predict

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107/ *Briquelet v. Upjohn Co.,* No. 82-C-1352, slip op. at 3-4. (E.D. Wis. Sept. 14, 1984) ; *see also Hagert v. Hatton Commodities, Inc.,* 350 N.W.2d 591 (N.D. 1984).

108/ *Reed v. Central Soya Co., Inc.,* 621 N.E.2d 1069 (Ind. 1993) *modified,* 644 N.E.2d 84 (1994); *see also Martin Rispens & Son v. Hall Farms, Inc.,* 621 N.E.2d 1078 (Ind. 1993) *Abrogated by Hyundai Motor America, Inc. v. Goodwin,* 822 N.E.2d 947 (Ind. 2005).

109/ *Scandinavian Airlines System v. United Aircraft Corporation,* 601 F.2d 425, 428 (9th Cir. 1979).

the percentage of emergence in the field. Seed vigor tests attempt to relate laboratory emergence percentages to actual field conditions. There are a number of different seed vigor tests currently used in the industry for various purposes.

ASTA has recognized that seed vigor testing is a valuable tool for in-house information, but has expressed serious reservations concerning the uniformity, predictability and reproducibility of the various tests. 110/ Results of seed vigor tests have not been consistently correlated with field performance, nor do results of the various tests necessarily correlate with each other. Results vary with genetics, seed size, and other factors in ways that are not fully understood. As a result, ASTA has recommended that seed vigor test results not be used in advertisements, labels or product descriptions.

There is no legal requirement to perform seed vigor tests. Neither the Federal Seed Act nor any of the state seed laws require vigor testing, although some state agricultural departments may conduct such tests, either as a matter of course or upon request. 111/ In a 1982 Florida case, a farmer asked the court to find a seed producer negligent for failing to conduct vigor tests and label the product with the result. The court found for the producer, noting that there was no statutory duty requiring vigor testing, and that there was no industry custom requiring such tests. 112/

Increasingly, aggrieved seed buyers are commissioning seed vigor tests to provide evidence of the defective condition of seed. The inconsistent nature of vigor tests and the fact that seed vigor may be reduced during storage make the tests unreliable for this purpose.

The Louisiana courts considered the value of a vigor test in a 1979 case. 113/ The complaining farmer had commissioned a vigor test for soybean seed that had produced poor stands. The trial court had accepted the test as proving that the seed was defective, and held that the producer had thus

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110/ *Seed Vigor, A Position Paper by the American Seed Trade Association,* adopted June 29, 1990.

111/ *See, e.g.,* Tex. Admin. Code tit. 4, § 9.4-9.5 (offering vigor testing by state Department of Agriculture); Ala. Admin. Code § 80-11-2-.06 (offering the services of the Seed Laboratory of the Department of Agriculture and Industries for the testing of seed vigor).

112/ *Pennington Grain & Seed, Inc. v. Tuten,* 422 So. 2d 948, 950 (Fla. Dist. Ct. App. 1982); *but see Ciba-Geigy Corp. v. Murphree,* 653 So. 2d 857, 850 (Miss. 1994) (noting in *dicta* that "seed . . . has two characteristics which are important for farming production purposes: germination and vigor").

113/ *Gauthier v. Bogard Seed Co.,* 377 So. 2d 1290 (La. Ct. App. 1979).

breached the implied warranty of fitness. The court of appeals, however, rejected the judgment, holding that the vigor test was entitled to "little weight." The court relied on expert testimony that the "accelerated aging test" that had been used did not furnish reliable information about the seed. In addition, the producer had presented substantial evidence that the samples tested had been damaged during storage after sale. 114/

This case points out the problems with testing product after sale -- not only are the tests themselves inherently unreliable, but any defect found may not have existed before the sale. Producers face a different dilemma when considering whether to order vigor tests to disprove liability. A test showing high vigor may be evidence that any problem with the seed was the result of poor storage or adverse growing conditions. Should the test show low vigor, however, the plaintiff may obtain the results through pre-trial discovery and offer them as evidence. Because the tested seed would not have been subject to the plaintiff's control, the results may carry more weight in trial. In addition, once a particular test is chosen by the producer, it is difficult to bring the efficacy of the results into question.

Routine vigor tests may be useful as part of an overall quality control regime. The results of routine tests may be submitted as evidence to prove the quality of individual lots of seeds, as well as to demonstrate the producer's high standards of quality. Vigor testing seed on a non-routine basis to produce evidence for court, however, is clearly risky and is not recommended.

VII. EFFECTIVELY LIMITING LIABILITY

Thus far, this Summary has explored the various legal doctrines that affect a seller's legal liability under contract and tort principles. The remaining section is in the form of practical business advice and is intended to serve as a planning tool for seed company managers who wish to limit contractual liability and insure against risk. **It must be emphasized, however, that every company's situation -- for example, its size, sophistication, history of dealings in the trade, and relationships with its customers – is unique; hence, each company should determine, independently, whether and to what extent to seek to limit its liability.**

114/ The Eleventh Circuit also considered a case where vigor test results had been allowed at trial in *Edmondson v. Northrup King & Co.,* 817 F.2d 742 (11th Cir. 1987). The court did not reach the admissibility issue, instead concluding that the trial court had not committed reversible error on the particular facts of the case.

A. Effective Clauses and Sale Procedures

Producers and sellers of seed reviewing their sales documents and marketing strategy should include the following considerations:

1. **Determine the characteristics of the product that will be expressly warranted. At minimum, tolerances and characteristics required under applicable labeling laws may be expressly warranted.** Under common state law precedent, a seller is not allowed to disclaim liability for seed that does not conform to label descriptions required by state or federal law. Express statements warranting these characteristics thus create no additional liability and may be desirable from a marketing standpoint.

2. **Ensure that statements used in sales and advertising materials do not unintentionally create express warranties.** Any factual statements about seed quality may create express warranties, and such warranties are difficult to disclaim.

3. **Disclaim all other warranties in writing on all marketing and sales materials.** Disclaimers should appear on product labels, order forms, all contract documents, invoices, point of sale signs and all other promotional or advertising material. In order to be effective, the buyer must be informed of all disclaimers prior to the actual sale. In addition, certain disclaimers must be disclaimed specifically, as follows:

    a. **The implied warranty of merchantability must be disclaimed** explicitly**, using the word "merchantability," in order to be effective.**

    b. **Implied warranties of fitness should also be disclaimed separately and by name.** Although a disclaimer of "all implied warranties" has been held to be sufficient, better practice recommends disclaiming this warranty specifically by name.

    c. **Limitations on damages must be described as "exclusive."** An express remedy that is not labeled "exclusive" will be seen as additional to other remedies available under the law.

d. Limitations clauses should expressly exclude consequential damages.

e. Implied warranties of "100% Free" should be disclaimed. Special care should be exercised not to impliedly warrant that conventional seed is completely free of, for example, recombinant DNA-derived materials, such as proteins or nucleic acids, or is free of "genetically engineered" seeds themselves. Language should specifically disclaim any warranty as to complete freedom of such materials or seeds. It probably is also advisable as part of disclaimer language to include the tort defense of "assumption of the risk," stating, for example, that the buyer recognizes that conventionally-produced seeds may contain recombinant DNA-derived protein or nucleic acids not purposely intended to be present and that the buyer expressly assumes the risk that such GMO materials may be present.

4. **Make all disclaimers conspicuous.** At minimum, all disclaimers and limitations must be the same size type as the surrounding material. Use of larger type, capital letters and contrasting color or typeface is recommended to ensure conspicuousness. Use of a headline is also helpful, *e.g.*, **"Notice to Buyer: Exclusion of Warranties and Limitations of Damages and Remedy."** This example is the minimum recommended information for these purposes; a headline merely denoting a "Warranty Clause," has been deemed insufficient to call attention to the disclaimer and limitations. 115/ If the disclaimer appears on the reverse side of a form, conspicuous notice on the front, directing the reader's attention to the clause, is required.

5. **Sales personnel should be instructed to avoid recommending specific products for use in particular applications involving, for example, specific planting conditions or farm equipment.** Recommendations for particular applications create warranties of fitness for that particular purpose, which may survive disclaimers, especially in sales to smaller, unsophisticated buyers.

6. **Respond to valid demands regarding defective product quickly, and to the full extent of the exclusive remedy**

115/ *Latimer v. William Mueller & Son, Inc.,* 386 N.W.2d 618 (Mich. App. 1986).

provided for in the contract. Failure to provide in a timely manner the exclusive remedy described in the limitations clause may result in waiving the clause.

The following provides an example of a clause that would be likely to meet the general requirements described above and thus provide a basis for an effective disclaimer and limitation:

NOTICE TO BUYER:
EXCLUSION OF WARRANTIES AND LIMITATIONS OF DAMAGES AND REMEDY

We warrant that this seed conforms to the label description, as required by federal and state seed laws. WE MAKE NO OTHER WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE.

LIABILITY for damages for any cause, including breach of contract, breach of warranty and negligence, with respect to this sale of seeds is LIMITED TO A REFUND OF THE PURCHASE PRICE OF THE SEEDS. THIS REMEDY IS EXCLUSIVE.

IN NO EVENT SHALL WE BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS.

The above clause is only an example. A seed company should not adopt any clause without a full review of its individual circumstances, including its particular market, applicable state laws and case precedent, and its overall marketing plan. Consultation with the seller's lawyer is essential. In addition, as pointed out above, no clause, no matter how carefully drafted, will be effective in all factual circumstances.

B. Reviewing Sales Arrangements

As previously noted, it is essential to integrate disclaimers into marketing plans and sales materials. The most egregious and easily remedied error is the failure to bring all disclaimers to the attention of the buyer prior to the sale. Including disclaimers in all advertising, marketing and sales materials is the most efficient way to avoid this problem. In addition, particular sales arrangements provide opportunities to meet this requirement conveniently.

Master selling agreements. Sellers should consider entering into signed master selling agreements with regular customers. In addition to specifying price, delivery and payment provisions, the agreement may include all warranty clauses, including disclaimers. The existence of a signed document is evidence that the buyer is aware of and has consented to the disclaimers. If a master agreement is used, all other sales documents should specifically refer and give precedence to the master agreement to ensure that the agreement is not superseded.

Sales through brokers. A master agreement with a broker establishing the seller's warranty policy and making the broker responsible for ensuring that sales do not violate that policy is also desirable. Such an agreement may require the broker to indemnify the producer for damages resulting from the broker's failure to follow the policy. Note, however, that such an agreement defines the liability between the producer and the broker but does not bind final purchasers. Inclusion of warranty information on the producer's sales agreement, packaging and other materials that are forwarded to the purchaser is thus still strongly recommended.

Sales through dealers. A number of options exist for agreements with dealers, depending on the level of involvement with the dealer. At minimum, the producer should consider an agreement setting forth the producer's warranty and disclaimer policy. In addition, a producer can ensure that dealers are aware of the producer's other sales policies, including the need to communicate disclaimer information prior to sale and to avoid recommendations that could mature into warranties of fitness. In certain circumstances, producers may consider contractually binding dealers to particular requirements regarding sales of the product, ensuring full communication of disclaimers and the use of producer's sales materials containing the relevant clauses. Such contractual agreements may seek to obtain indemnification from the dealer should these procedures not be followed. Although these agreements will not completely shield the producer from liability, they offer some protection in a suit by the final purchaser.

C. Errors and Omissions Insurance

As previously discussed, it is impossible to guarantee that a seed producer will avoid legal liability for defective seed, regardless of the level of care used in conducting business and drafting documents. Seed company producers may consider purchasing "errors and omissions" insurance, which covers liability for damages arising from the failure of seed to conform to a warranty due to the negligence, error or omission of the insured, or to defective seed. Various types of insurance plans are currently available.

Errors and omissions insurance generally covers liability for damage arising out of the failure of the seed to conform to warranted quality or variety, or to meet a specific purpose, due to the insured's negligence, error or omission. Examples of defects normally covered include errors in germination tests, failure of the seed to germinate, mislabeling and varietal disparities. Other provisions may cover defects in the seed that are not attributable to the insured's negligence. In addition, there are optional provisions covering liability arising from contract arrangements for processing or growing seed for or by other producers.

Insurance plans vary widely, depending on the insured's annual sales volume, the type of coverage desired, and the geographic market. Rates and deductible arrangements also vary. Seed companies should carefully review the terms of any policy to ensure that they meet the company's specific needs.

VIII. CONCLUSION

Seed is a living product and its performance is affected by countless factors, many of which are beyond the control of both the producer and the buyer. The advent of modern biotechnology and other innovative plant breeding methods has created additional complexities, primarily related today to the trait performance. Purity concerns and losses arising from the failure of seed to produce a crop as expected will occur from time to time. Liability of the producer in these circumstances will most often be based on contractual grounds, normally involving warranties concerning the seed. Through careful contract and sales procedures, certain warranties may be disclaimed, damages from a breach may be limited, and the procedure for asserting claims arising from the contract may be agreed to by the parties in advance.

It is critical that seed companies consider these liability issues and develop a marketing plan that integrates well prepared contractual documents with an overall sales strategy to allocate potential losses at the time of sale. An effective plan openly communicates the standards that the seed may be expected to meet, and the extent to which the seller seeks to limit its liability. Careful and complete disclosure will not only help protect the seed producer from unexpected liability, but can provide a basis for continuing a solid business relationship with customers.