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THE IMPACT OF OLIGOPOLY ON WARRANTY LAW

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Introduction

The governmental structure of the United States draws a significant amount of its vitality from the substance of economics.[1] On the other hand, the legal framework that evolved from the Constitution has played an important role in shaping the economy. It has been argued that many of the conflicts that have been resolved by the Supreme Court are permeated with definite economic overtones.[2] That the courts possess a powerful voice in shaping, or curtailing, economic trends was reflected in the clash between the New Deal and the U.S. Supreme Court.[3] Yet perhaps the most visible indication of the inextricable association of law with economic policy occurred in 1890 with

1 Beard, *An Economic Interpretation of the Constitution of the United States* (1913). In particular see Chapter VI, "The Constitution as an Economic Document," p. 152.

2 Lerner, "The Supreme Court and American Capitalism," 42 *Yale Law Journal* 668 (1933).

3 For cases nullifying the New Deal see: Panama Refining Co. v. Ryan, 293 U.S. 389 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Norman v. Baltimore and O.R.R. Co., 294 U.S. 240 (1935); Retirement Board v. Alton R. Co., 295 U.S. 330 (1935); Louisville Bank v. Radford, 295 U.S. 555 (1935). For a general discussion see: Jackson, *The Struggle for Judicial Supremacy* (1941); Stern, "The Problems of Yesteryear—Commerce and Due Process," 4 *Vanderbilt L. Rev.* 446 (1951). The Supreme Court subsequently changed its attitude, see Wickard v. Filburn, 317 U.S. 111 (1942); Stern, "The Commerce Clause and the National Economy," 59 *Harv. L. Rev.* 645, 883 (1946).

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the passage[4] of the Sherman Antitrust Act.[5] The lawmakers, and subsequently the courts,[6] took express cognizance of a market situation[7]—monopoly[8]—and expressed their disfavor.[9]

Antitrust legislation and the court's ensuing interpretation have had a great impact on the many forces operating in the market place. Conversely, the exposure of the courtroom to the tensions of the economy has generated upheavals in legal thinking.[10] For along with accomplishing, to a degree,[11] its intended result, antitrust law has forced the courts to become acquainted with refined economic theories.[12] During the course of numerous antitrust hearings, judges have become educated in the components and pressures that exist in the economy. The vernacular of the economist has often appeared in appellate court decisions.[13]

Because the antitrust laws were basically directed towards "bigness"[14] it was only natural that the position of the large manufacturer in the market place be under constant examination. And it was a matter of great significance that the courts recognized the existence of a substantial economic distance between the manufacturer and the ultimate consumer—a distance that could be measured in terms of the

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4 For a summary of public opinion towards economic conditions prior to the passage of the Sherman Act see Gordon, "Attitudes Toward Trusts Prior to the Sherman Act," 30 *The Southern Economic Journal* 156 (1963).

5 26 Stat. 209, as amended; 15 U.S.C. 1-8.

6 One of the most significant cases was decided twenty-one years after the Sherman Act was passed: Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1, 31 S. Ct. 502 (1911).

7 Many feel that the market place prior to the Sherman Act reflected the philosophy of Social Darwinism. For background material in this area see Hofstadter, *Social Darwinism in American Thought* (1944).

8 For a general discussion of monopoly see: Laidler, *Concentration of Control in American Industry* (1931); Seager and Gulick, *Trust and Corporation Problems* (1929); Watkins, *Industrial Combinations and Public Policy* (1927); Ripley, *Trusts, Pools, and Corporations* (1916).

9 See note 6, *supra*.

10 Rostow, "Monopoly Under the Sherman Act: Power or Purpose," 43 *Ill. L. Rev.* 745 (1948); Johnson and Stevens, "Monopoly or Monopolization—A Reply to Prof. Rostow," 44 *Ill. L. Rev.* 269 (1949).

11 It has been argued with much force that enforcement of antitrust laws is a ritual with very little trustbusting actually occurring. Arnold, *The Folklore of Capitalism* 207 (1937).

12 Hale and Hale, "Monopoly in Motion: Dynamic Economics in Antitrust Enforcement," 41 *Va. L. Rev.* 431 (1955); Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," 22 *U. Chi. L. Rev.* 157 (1954); MacDonald, "Product Competition in the Relevant Market Under the Sherman Act," 35 *Mich. L. Rev.* 69 (1954).

13 An excellent example is U.S. v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945). Judge Learned Hand made, in his decision, an exhaustive survey of the aluminum industry. He expressed his conclusions in the economist's language.

14 Brandeis, *The Course of Bigness* (1934).

existing and potential market power of the large corporate producer and by the dependence of the consumer upon the movement of this power.

The Market Structure Changes to Oligopoly

During the time that the courts were becoming attuned to the complexities of the market place, the economic framework of the nation was undergoing a transition from a somewhat competitive structure to oligopoly.[15] Many markets crystallized so that control of each resulting market was possessed by two or three large manufacturers.[16] Moreover, products became identical in appearance and in price.[17] This meant that the range of consumer product choice was reduced. Furthermore, the manufacturer grew confident in the economic scope of his position—a scope that was compounded by the existence of well delineated market boundaries, by the presence of a specific number of competitors,[18] and by the absence of real competition.[19]

Effective methods of promotion and advertising have intensified the power inherent in oligopoly. Large corporations now devote large shares of their budgets to researching, altering, and shaping consumer desires.[20] Consumers are analyzed in terms of their ethnic, cultural and economic backgrounds,[21] and sales programs are planned upon the results of such investigations. Motivational research[22] and group[23]

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15 Oligopoly is defined as the existence of, "a few sellers of identical or closely substitutable products." Back, *Economics* 491 (1957).

16 The implications of the contemporary oligopolistic society is a frequent source of discussion. A leading economist contends that the ultimate impact of oligopoly is a misdirected emphasis on production—to the exclusion of more basic social needs. Galbraith, *The Affluent Society* (1958).

17 "A close examination of oligopoly shows that price competition, the very motor of the competitive model, is not only sharply circumscribed but has to be." Galbraith, *American Capitalism* 44 (1952).

18 See note 15, *supra*.

19 "There usually grows up the realization that competition is ruinous. Formal or informal meetings are held, whose theme song is, 'We are all in it together.'" Samuelson, *Economics* 466 (1955). Also see Burns, *The Decline of Competition* (1963).

20 David Potter contends that the modern citizen must be educated to perform his role as a consumer, and "the only institution which we have for instilling new needs, for training people to act as consumers, for altering men's values, and thus for hastening their adjustment to potential abundance is advertising." Potter, *People of Plenty*, 167 (1954). The consumer, "is subject to the forces of advertising and emulation by which production creates its own demand." Galbraith, *supra* note 16, at 260. For a popular description of the impact of advertising see Packard, *The Hidden Persuaders* (1957). For a contra view see Baur, "Limits of Persuasion: The Hidden Persuaders Are Made of Straw," 30 *Harvard Business Review* 105 (1958).

21 Schwartz, "Fragmentation of the Mass Market," *Duns Review* (1962).

22 Dichter, *The Strategy of Desire* (1960).

23 Modern man is, because of contemporary pressures, increasingly "other directed," *i.e.*, he conforms to group patterns. Manufacturers reach the group via group leaders or "the reference group." Riesman, *The Lonely Crowd* (1954).

oriented product presentation can make it a probability that former luxury goods[24] will be purchased as necessities.

Finally, the impact of another oligopolistic phenomenon, planned obsolescence, has been substantial.[25] Manufacturers design and produce goods so that within a predicted period of time they become mechanically or functionally obsolete.[26] This device generates high sales turnover and increased consumer dependence.[27]

The terminal effect of oligopoly is that the consumer's freedom of product choice is restricted. He either purchases a product, one that he now considers a necessity,[28] from one of three or four manufacturers, or he goes without.[29] But perhaps the most significant result is that those manufacturers who survived the wars of imperfect competition, and thus became oligopolists, secured the power to dictate to consumers whatever sales terms they desired. The usual give and take of bargaining associated with parties contracting on equal terms disappeared.[30] The standardized mass contract made its appearance.[31] Thus not only was the consumer's product choice narrowed but his power to dictate any of the contract terms was removed.[32]

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24 "It frequently happens that an element of the standard of living which set out with being primarily wasteful ends with becoming, in the apprehension of the consumer, a necessary of life . . ." Veblen, *The Theory of the Leisure Class,* 138 (1899). It has been argued that the impact of status on the consumer accounts for increased sales of luxury items. Packard, *The Status Seekers* (1959). Another view is that the group determines when a luxury becomes a necessity. Whyte, *The Organization Man,* 347 (1956).

25 Planned obsolescence comes in many forms: functional obsolescence—the introduction of another product that performs the same function in a better way; quality obsolescence—deliberate underengineering a product; obsolescence of desirability—yearly or regular superficial changes in products in order to persuade the public to purchase new items. Beckman and Davidson, *Marketing* 435 (1962).

26 "Planned Obsolescence—Part I: Do We Need It to Prosper?" *Printers' Ink,* May 19, 1961.

27 "Planned Obsolescence—Is It Wrong, Is There a Better Way?" *Printers' Ink,* May 26, 1961. Also see Packard, *The Waste Makers* (1960).

28 See note 24, *supra.*

29 It is, of course, the purpose of advertising and promotion to see to it that the consumer does not consider the possibility of not purchasing the item.

30 A detailed treatment of freedom of contract is not within the scope of this article. However, since, in some cases, the warranty depends upon the contract a cursory examination is in order.

31 "In recent times the marketing process has been getting more highly organized than ever before . . . The standardization contract with its broad disclaimer clauses is drawn by legal advisers of sellers widely organized in trade associations. It is encountered on every hand. Extreme inequality of bargaining between buyer and seller in this respect is now often conspicuous. Many buyers no longer have any real choice in the matter." Vold, *Law of Sales,* 2d ed. 447 (1959).

32 This type of contract has been labeled contract of adhesion. "The name contract of adhesion indicates that the legal transaction is not formulated as a result of the give and take of bargaining where the desires of one party are balanced by those of the other." Lenhoff, "Contracts of Adhesion and The Freedom of Contract." "A Comparative Study in the Light of American and Foreign Law," 36 *Tulane L. Rev.* 481 (1962).

Modern courts have recognized the part that oligopoly plays in altering the components of any transaction.[33] Moreover, cognizance of this market phenomenon is not restricted to any single part of the transaction. Recent decisions indicate that the existence of oligopolistic pressure is being recognized in warranty law.[34]

Warranty

Since in an oligopolistic economy all products have similar characteristics[35] and are offered at the same price,[36] the manufacturer must resort to other devices to attract consumer attention to his product.[37] One such device is attaching a warrany to the item.[38] Automobile and appliance producers in particular attempt to interest customers with attractive warranties. But when one manufacturer discovers a new sales gimmick, all others who produce similar goods must follow or be prepared to lose their share of the market. Thus most oligopolists offer warranties—usually in standardized[39] form. And since the customer has no voice in composing the terms of the warranty the courts have been required to reappraise warranty law and its place in the modern sales transaction.

A Basic Definition of Warranty

In general a warranty[40] exists when the seller, either expressly or by some other action, becomes answerable for various matters relating to the goods sold.[41] There are two types of warranties—express and implied. An express warranty comes into existence when the vendor makes articulated promises or representations, either verbal or written, to the vendee.[42] If, when purchasing the goods, the purchaser relies upon the seller's promises, the latter is obligated to stand behind his product to the limits of his representations.[43]

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33 Kessler, "Contracts of Adhesion—Some Thoughts about Freedom of Contract," 43 *Colum. L. Rev.* 629 (1943). Virginia has legislated against oligopolistic contracts by requiring that when the vendor furnishes a standardized contract form, the typography of the provisions must be of adequate size. *Va. Code Ann.* tit. 11, § 11-4 (1956).

34 The automotive oligopoly is discussed at length in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69 (1960).

35 See note 15, *supra.*

36 See note 17, *supra.*

37 See note 19, *supra.*

38 In addition to the sales angle, warranty cards filled in by customers are used in market research surveys. Beckman and Davidson, *supra* note 25, at 618.

39 Sales, "Standard Form Contracts," 16 *Modern L. Rev.* 318 (1953).

40 The early law of warranty is discussed in Williston, Sales, sec. 195 (1948).

41 Vold, *Law of Sales,* 2d ed. 426 (1959).

42 See note 41, *supra* at 427.

43 For remedies for breach of warranty see the Uniform Sales Act, sec. 69. Different results would be obtained in sec. 2-608 of the *Uniform Commercial Code.*

Implied warranties,[44] unike express warranties, do not appear through articulation of specific qualities that are alleged to be contained within the product, but instead are imposed by law.[45] The contract between the vendor and the vendee does not furnish the origin of implied warranty.

The legal ramifications generated by implied warranty have great importance in the modern economic society. Thus an automobile is expected to function as a normal car should. In other words, while the court will scrutinize the declarations of the parties,[46] the thrust of its examination is directed towards the product itself. The legal system, via implied warranty, has placed basic responsibilities upon the shoulders of the oligopolists. Moreover, it is through this analysis of products and their efficacy to accomplish an indicated objective that courts have expressed an awareness of contemporary market conditions.

Privity of Contract

Oligopolists have not been defenseless against implied warranty; they have had the benefit of what has been labeled privity of contract.[47] The courts have held that there must be a contractual relationship between the seller and buyer before the latter can sue for breach of warranty.[48] This requirement has had the effect of placing a legal shield, in the form of the retailer, in front of the manufacturer. This was because there was no contract between the manufacturer and the ultimate purchaser, and so, according to long standing legal theory,[49] no warranty could exist between the two. The purchaser was forced to sue the retailer, who, in turn, had a right of action against the manufacturer.

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44 Prosser contends that three theories provide the basis for implied warranties: (1) tort theory, with strict liability for misrepresentation of fact; (2) contract theory, the warranty having been agreed upon by the parties either expressly or tacitly; (3) warranty imposed by law. Prosser, "The Implied Warranty of Merchantable Quality," 27 *Minn. L. Rev.* 117 (1943).

45 "An implied warranty is not one of the contractual elements of an agreement. It is not one of the essential elements to be stated in the contract, nor does its application or effective existence rest or depend upon the affirmative intention of the parties. It is a child of the law." Bekkovold v. Potts, 173 Minn. 87, 216 N.W. 790, 791 (1927).

46 Discussion of the neutralizing effect of the disclaimer clause is postponed for several paragraphs.

47 "To sustain a finding that there was a breach of warranty, express or implied, there must have been evidence of a contract between the parties, for without a contract there could be no warranty." Welshausen v. Charles Parker Co., 83 Conn. 231, 233, 76 Atl. 271 (1910).

48 See note 47, *supra*.

49 The historical basis of this theory was Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

The privity of contract requirement left the consumer in a disadvantageous legal position. Suppose the retailer was insolvent? Furthermore, the ultimate consumer was not always the contract buyer, i.e., that person who dealt directly with the retail seller. Thus the privity rule could possibly eliminate the ultimate consumer's cause of action even against the retailer.[50]

The Privity of Contract Rule Under Attack

It did not take the courts long to realize that the large corporate producers were deriving a legal benefit that was out of line with the demands of contemporary society. It became clear that the retailer was merely a conduit through which goods passed from the manufacturer to the consumer. The privity rule began to be subjected to judicial emasculation[51] in implied warranty cases:[52] first in the food industry,[53] then in other business areas.[54]

The reasoning[55] used by the courts in ignoring the privity rule is predicated upon two factors: the definitive composition[56] of implied warranty and modern economic conditions.[57]

Implied Warranty as a Creature of Law

Implied warranty is a creature of law and, therefore, does not depend upon the existence of a contractual foundation. Thus, since a contract is superfluous, there is no legal thread (in the form of a contract) between seller and ultimate consumer through which privity can be expected to flow. The consumer is not required to deal face to face and upon contractual terms with the seller before an implied warranty can exist. This means that immediately upon the product's entrance into the flow of commerce the manufacturer is held to have

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50 James, "Products Liability," 34 *Texas L. Rev.* 44 (1955).

51 Significant cases along the lines of development include Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (1903); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Carter v. Yardley and Co., 319 Mass. 92, 64 N.E. 693 (1946).

52 "Nearly a third of the American jurisdictions have broken away to some limited extent from the requirement of privity of contract, and have found some way to extend strict liability to the consumer." *Prosser On Torts*, 2d ed., 507.

53 Jacob E. Decker and Sons v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942).

54 Privity held inapplicable because of its historical origins, see Williston, *Sales*, sec. 237 (1948); requirement of privity satisfied by commercial advertising, Madouras v. Kansas City Coca Cola Bottling Co., 230 Mo. App. 275, 90 S.W. 2d 445.

55 For a general discussion on the subject see: Jeanblanc, "Manufacturer's Liability to Persons Other Than Their Immediate Vendors," 24 *Va. L. Rev.* 134 (1937); Wilson, "Products Liability," 43 *Calif. L. Rev.* 614, 809 (1955); Jaeger, "Privity of Warranty: Has the Tocsin Sounded?" 1 *Duquesne U. L. Rev.* 1.

56 See note 45, *supra*.

57 In other words, oligopoly.

certified[58] that the item will perform in a manner expected of any goods of that particular type.[59]

Moreover, the oligopolist use of advertising[60] to attract customers and to attempt to distinguish otherwise identical products has provided legal justification for ignoring privity.[61] The most revealing view of this attitude[62] is reflected in *Baxter v. Ford Motor Co.*, where the court said:[63]

> *Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from the factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable . . .*

The Economic Basis for Ignoring Privity

The legal rationale used to impute an implied warranty into products as they entered the market place was buttressed by economic justification. Courts were aware that under oligopoly significant economic power was vested in the manufacturer. For example, in *Henningsen v. Bloomfield Motors, Inc.*, the court recognized that General Motors, Ford, and Chrysler represented 93.5% of the passenger car production in 1958. Justice Francies concluded that "the gross inequality of bargaining position occupied by the consumer is thus apparent."[64]

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58 In effect this means that the implied warranty is actionable by any ultimate consumer. This has been labeled "jumping warranty." Gregory, "Trespass to Negligence to Absolute Liability," 37 *Va. L. Rev.* 359, 384 (1951).

59 For recent expressions of this approach see: Anneliese Goldberg, as Administratruix of the Estate of Edith Feis, v. Kallsman Instrument Corp. and American Airlines, Inc., 240 N.Y.S. 2d 592 (1963); Greenman v. Yuba Power Prods., Inc., 59 Cal. 67, 377 P. 2d 897 (1963).

60 See note 20, *supra.*

61 Williston contended that privity of contract was unnecessary since "manufacturers often make representations to the public which if made directly to an immediate buyer would amount to warranties." 1 Williston, *Sales* 649 (Rev. ed. 1948).

62 See Notes, 33 *Colum. L. Rev.* 868, 877-82 (1933), 42 *Harv. L. Rev.* 414, 418-19 (1928); Leidy, "Another New Tort?" 38 *Mich. L. Rev.* 964 (1940).

63 Baxter v. Ford Motor Co., 168 Wash. 456, 462-63, 12 P. 2d 409, 412 (1934).

64 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69, 87 (1960).

The courts are not alone in recognizing the oligopolists' economic advantage. State legislatures[65] expressly attempt to mitigate the effects of this power. The Uniform Commercial Code recognizes, to a degree, the existence of a third party beneficiary of contractually based warranties.[66] Vold says that the Code "is not intended either to enlarge or restrict the developing case law on whether the sellers' warranties, effective as to his buyer who resells, extend to other persons in the distributive chain."[67] In other words, the Code leaves the door open for the destruction of privity.

The Disclaimer Clause

The manufacturer-seller can utilize a strong defense against the contemporary trend of the courts to ignore the privity rule. The disclaimer clause neutralizes the impact of the modern approach. Under this clause the seller disclaims any warranties not specifically mentioned in the contract.[68] Thus implied warranties can be expressly disclaimed.

Most courts accept the disclaimer clause on a freedom of contracts theory[69]—i.e. parties can, if they so desire, enter into any contract they wish. But the freedom of contract theory is predicated upon the existence of equal bargaining power. When there is a definite variance in the bargaining strength of the participants the court must determine if the impact of this variance is sufficient enough to be judicially recognized. If recognition does occur, the effect of the disclaimer clause will be altered.[70]

Thus, just as in the case of the privity rule disintegration, a trend in favor of the vendee is now discernable. One approach is to analyze and construe the disclaimer clause so that for it to have any effect it must expressly mention and exclude implied warranties. A typical expression of this oblique approach is reflected in the treatment of a clause which said, "The instrument comprises the entire contract between the parties and any verbal . . . agreement outside or contra-

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65 "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warrant, express or implied, or for negligence, although the plantiff did not purchase the goods from the defendant . . ." *Code of Virginia*, tit. 8, § 654.3 (1962).

66 *Uniform Commercial Code*, 2-318.

67 Vold, *Law of Sales*, 2d ed. 452 (1959).

68 "Parties who buy and sell goods may usually by appropriate terms in their contracts disclaim whatever warranties they please." Vold, note 67, *supra*, at 444.

69 Williston, "Freedom of Contract," 6 *Cornell L. Q.* 365 (1921).

70 Davis Motors v. Avett, 294 S.W. 2d 882 (1956), disclaimer has no effect if unfairly procured; Vaughn's Seed Store v. Stringfellow, 56 Fla. 708, 48 So. 410 (1908), disclaimer void if not brought to buyer's attention; McPeak v. Baker, 236 Minn. 420, 53 N.W. 2d 130 (1952), disclaimer not clear and explicit.

dicting to, the foregoing terms and warranty are void."[71] The court refused to allow the succinctly enunciated purpose of the disclaimer clause to take effect by concluding that, "this provision does not exclude implied warranties."[72]

The second approach involves a vis-a-vis confrontation with the disclaimer clause which results in a declaration that, as a matter of law, it is void. An express recognition of the oligopolistic structure of the economy supplies the foundation of the few decisions that reflect this view.[73]

The final view is contained in the Uniform Commercial Code.[74] It allows the court to upset a contract[75] if it is found to be unconscionable. But what does unconscionable mean? Professor Hawkland says that "the basic test of unconscionability is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[76]

Conclusion

There is little doubt that implied warranty law will undergo modification in two areas. First, the privity of contract rule will be demolished. Second, the effects of the disclaimer clause will be diluted to the extent that it will not be applicable to implied warranties. Both of the modifications represent knowedge by the courts of the subtleties inherent in oligopoly and the power it deposits in the manufacturer. By altering the present effects of implied warranties the courts are attempting to render impotent the strong bargaining position that large companies possess by virtue of being participants in the contemporary economic system.

What are the ultimate effects of the court's enlightened and pragmatic approach to warranty and oligopoly? It could be argued that production costs will rise as a result of added claims. This will not occur. By legal definition an implied warranty merely obigates

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71 Minneapolis Steel and Machinery Co. v. Casey Land Agency, 51 N.D. 832, 201 N.W. 172.

72 See note 71, *supra*.

73 See note 64, *supra*, at 95. See also Linn v. Radio Center Delicatessen, Inc., 169 Misc. 879, 9 N.Y.S. 2d 110 (1939).

74 *Uniform Commercial Code*, § 2-302.

75 Professor Corbin feels that judges should be able to void unconscionable clauses through equitable doctrines and by process of interpretation. 1 Corbin, *Contracts* 128, at 400-01 (1950).

76 Hawkland, *State of New Jersey, Study of the Uniform Commercial Code* 52 (1950). See also: Notes on unconscionable contracts under the Uniform Commercial Code, in 45 *Iowa L. Rev.* 843 (1961); 109 *U. Pa. L. Rev.* 401 (1961); 45 *Va. L. Rev.* 5 & 3 (1959).

the manufacturer to produce a good that does what it is supposed to do. And, at east theoretically, manufacturers are presently doing this.

Moreover, from a competitive standpoint, manufacturers cannot afford to produce inferior goods. The distribution of inferior products always results in the eventual loss of a portion of the market. This is particularly true in an oligopolistic system where the ever present two or three competitors are constantly on the alert for any tactical marketing blunders.

Finally, because of their present economic power, manufacturers do not have to take a chance on a new, and possibly defective, product. Elaborate testing can establish the product's efficacy. This means that when a product is placed on the market it will be immune to any implied warranty attacks since it has been pretested and found to be suitable for its stated purpose.

The decisive consequence is that the changing interpretation placed upon warranty by the courts will restrict the market to those firms presently within its structure. That is, the oligopolistic framework of the economy is magnified through the functioning of the legal system. This is because only those manufacturers now in operation possess the finances to conduct severe testing before placing a product on the market that would assure immunity to warranty litigation. Those companies without resources to back testing would be precluded from entering the market.

Thus it appears that the courts take cognizance of, and condemn, the unequal bargaining position that flows from the oligopolistic framework within which large manufacturers now reside. Yet in the final analysis there is a strengthening of the manufacturer's position. The oligopolistic complexion of the economy is solidified through the courts' attempts to aid the purchaser via redefinition of warranty law.