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## Sales -- Strict Liability For Breach of Warranty: Gore v. George J. Ball, Inc.

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If adopted the partial-enforcement doctrine will support the equities of each situation rather than mechanically apply legalistic rules of interpretation. As stated in *Ehlers*, the result will be that the legitimate interests of the covenantee will be protected without undue hardship to the covenantor when the public interest is not adversely affected.<sup>50</sup> This balancing of conflicting interests will enable the courts to dispense justice rather than act as legal technicians.

DAVID M. RAPP

**Sales—Strict Liability For Breach of Warranty: *Gore v. George J. Ball, Inc.***

As a general rule two parties may deal with each other as they wish, and if their ensuing agreement is voluntarily and fairly entered into, it will be enforceable in a court of law. However, this fundamental right of freedom of contract is subject to the limitation, *inter alia*, that the agreement may not be against public policy. The vague and somewhat amorphous concept of public policy has been applied by courts to invalidate contracts which in the opinion of the court tend to be injurious to the public welfare, to sound morality, or to the interests of society.<sup>1</sup> In *Gore v. George J. Ball, Inc.*,<sup>2</sup> the North Carolina Supreme Court refused to enforce a limitation-of-damages clause in a contract between a seed seller and a farmer because such a provision "is contrary to the public policy of this State."<sup>3</sup>

In 1965, using an order blank obtained from a George J. Ball, Inc. catalogue, C. O. Gore ordered four ounces of Heinz 1350 tomato seeds at a cost of five dollars. Shortly thereafter Gore received from Ball several packets of seed labeled "Heinz 1350 Tomato Seed." Included

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contract or clause to be enforced according to any one of the three theories:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

<sup>50</sup>See text accompanying note 27 *supra*.

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<sup>1</sup>*E.g.*, *Pope Mfg. Co. v. Gormully*, 144 U.S. 224 (1892); *Perkins v. Hegg*, 212 Minn. 377, 3 N.W.2d 671 (1942).

<sup>2</sup>279 N.C. 192, 182 S.E.2d 389 (1971).

<sup>3</sup>*Id.* at 203, 182 S.E.2d at 395.

on each package of seed, on the invoice delivered to Gore, and in the seed catalogue was a clause purporting to limit Ball's liability for any breach of warranty to the return of the buyer's purchase price. Gore planted the tomato seeds, but when they germinated they produced not Heinz 1350 tomatoes but a completely different variety "wholly unsuited for sale for table use and useful only in the production of tomato paste."<sup>4</sup> After refusing to accept a refund of his five-dollar purchase price, Gore filed suit against Ball alleging breaches of an express warranty of description and of the implied warranty of fitness and seeking to recover consequential damages, including lost profits.<sup>5</sup>

Justice Lake, writing for the North Carolina Supreme Court, found that the defendant seed seller had warranted the seed contained in the packets to be "Heinz 1350 tomato seed" and that delivery of a different variety of seed by defendant constituted a breach of its contract.<sup>6</sup> The court made no specific finding as to whether the limitation-of-damages clause was incorporated into the contract but stated that even if it were a part of the contract, it would not be enforceable because it was contrary to the public policy of North Carolina.

The *Gore* court noted that an agreement is against public policy when it "tend[s] to the violation of a statute."<sup>7</sup> In support of this proposition the court cited *Cauble v. Trexler*,<sup>8</sup> a case in which the North Carolina Supreme Court refused to allow a foreclosure of a second mortgage on farmland because the mortgage was violative of the purpose of the Emergency Farm Mortgage Act of 1933.<sup>9</sup> In that case a federal land bank agreed to lend to a mortgagor-farm owner 2,600 dollars on the condition that the mortgagee would agree to accept this amount as a full satisfaction of the farmer's debt. The mortgagee agreed in writing to scale down the amount owed, but after receiving the money he coerced the owner of the farm into giving him a second mortgage on the balance of the debt. The North Carolina Supreme Court noted that

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<sup>4</sup>*Id.* at 195, 182 S.E.2d at 390.

<sup>5</sup>The court noted that plaintiff's complaint was not a "model of clarity and precision as to the theory upon which he relied." 279 N.C. at 198, 182 S.E.2d at 392. Plaintiff appears to have alleged that defendant expressly warranted the seeds to be a specific kind and variety. In addition plaintiff alleged the breach of an implied warranty of fitness for a particular purpose. Both these warranties must have arisen under the common law of North Carolina, if at all, because the *Uniform Commercial Code* had not been enacted in North Carolina at the time of the transaction in issue.

<sup>6</sup>279 N.C. at 200, 182 S.E.2d at 393.

<sup>7</sup>*Id.* at 203, 182 S.E.2d at 395.

<sup>8</sup>227 N.C. 307, 42 S.E.2d 77 (1947).

<sup>9</sup>Act of May 12, 1933, ch. 25, § 32, 48 Stat. 31.

the primary object of the federal statute was to relieve farmers from their load of oppressive debts, and thus any agreement in contravention of the statute was void as against public policy.<sup>10</sup> In another North Carolina case, *Courtney v. Parker*,<sup>11</sup> the court refused to allow recovery by a building materials company on a contract because the company was transacting business under an assumed name in direct violation of a statute. The court stated:

It is well established that no recovery can be had on a contract forbidden by the positive law of the state, and the principle prevails as a general rule whether it is forbidden in express terms or by implication arising from the fact that the transaction in question has been made an indictable offense or subjected to the imposition of a penalty.<sup>12</sup>

In *Gore* the court held that the limitation-of-damages clause was contrary to the purpose of the North Carolina Seed Law.<sup>13</sup> This act makes it unlawful

to sell, offer for sale or expose for sale within this State . . . vegetable seeds . . .

c. Not labeled in accordance with the provisions of this article or having a false or misleading labeling or claim.

. . . . .  
j. To which there is affixed names or terms that create a misleading impression as to the . . . kind and variety, . . . quality or origin of the seeds.<sup>14</sup>

The violation of any provision of the act is a misdemeanor punishable by a fine of not more than five hundred dollars.<sup>15</sup> According to the court, this statute was intended to protect farmers against the disastrous consequences of the sale and delivery to them of falsely labeled seed.<sup>16</sup> Thus, the underlying policy of the statute would forbid enforcement of a limitation-of-damages clause in a seed sales contract.

The court in *Gore* could have grounded its refusal to enforce the objectionable clause on alternative legal theories. It might have said as the South Carolina Supreme Court did in *Stevenson v. B. B. Kirkland*

<sup>10</sup>227 N.C. at 311, 42 S.E.2d at 80-81.

<sup>11</sup>173 N.C. 479, 92 S.E. 324 (1917).

<sup>12</sup>*Id.* at 480, 92 S.E. at 324.

<sup>13</sup>N.C. GEN. STAT. § 106-277 to -277.28 (1966), *as amended*, (Supp. 1971).

<sup>14</sup>*Id.* § 106-277.9(1) (1966).

<sup>15</sup>*Id.* § 106-277.24 (1966).

<sup>16</sup>279 N.C. at 204, 182 S.E.2d at 396.

*Seed Co.*<sup>17</sup> that the limitation-of-damages clause was not a part of the agreement between the two parties. In *Stevenson*, in an analogous fact situation, the South Carolina court stated that "the nonwarranty clause printed in appellant's catalogue, on its invoice sheets, and on cards inserted in its seed bags is immaterial. For such a clause to be applicable in any case, it must be shown that it was brought to the attention of the purchaser."<sup>18</sup> The court in *Gore* refused to decide that as a matter of law the clause did not become a part of the agreement, stating that even if it were a part of the contract it would be invalid.

The *Gore* court also rejected the reasoning of a Washington case, *Nakanishi v. Foster*,<sup>19</sup> in which defendant had sold mislabeled lettuce seed. The court in *Nakanishi* found that the seller had violated the provisions of a state statute (similar to the North Carolina Seed Law) that regulated the selling and labeling of seed. Since the Washington act was penal in nature and was enacted for the protection of the farmer, the court found that defendant's violation of the statute constituted negligence per se.<sup>20</sup> The *Gore* decision disagreed with this analysis and held that defendant's violation of the seed act could not be negligence per se because the North Carolina Seed Law was not a safety statute.<sup>21</sup>

The North Carolina court in *Gore* avoided the reasoning in *Stevenson* and *Nakanishi* in order to hold specifically that a limitation-of-damages clause included by a seed seller in a sales contract is against public policy. The court's holding, however, is based on a questionable interpretation of the North Carolina Seed Law. The act explicitly exempts from liability any person who sells

vegetable seeds which were incorrectly labeled or represented as to origin, kind or variety when such seeds cannot be identified by examination thereof unless such person has failed to obtain an invoice or

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<sup>17</sup>176 S.C. 345, 180 S.E. 197 (1935).

<sup>18</sup>*Id.* at 355, 180 S.E. at 201.

<sup>19</sup>64 Wash. 2d 647, 393 P.2d 635 (1964).

<sup>20</sup>*Id.* at 656, 393 P.2d at 641; *accord*, *Hoskins v. Jackson Grain Co.*, 63 So. 2d 514, 515 (Fla. 1953) (en banc).

<sup>21</sup>279 N.C. at 198, 182 S.E.2d at 392. The North Carolina court on numerous occasions has stated that violation of a safety statute constitutes negligence per se. However, the violation must be the proximate cause of the plaintiff's injury. *E.g.*, *Bell v. Page*, 271 N.C. 396, 156 S.E.2d 711 (1967); *Reynolds v. Murph*, 241 N.C. 60, 84 S.E.2d 273 (1954). A safety statute as defined by the court is a law designed to protect the public from physical injury to person or property. *See* *Byrd, Proof of Negligence in North Carolina*, 48 N.C.L. Rev. 731, 746 (1970). The North Carolina Seed Law, which the court itself says was designed to "protect farmers from . . . disastrous consequences," 279 N.C. at 204, 182 S.E.2d at 396, is not a safety statute apparently because its purpose is only to protect an economic interest.

grower's declaration giving origin, kind and variety or to take such precautions as may be necessary to insure the identity to be that stated.<sup>22</sup>

Ball's conduct fell within this exemption as the seed of the two varieties of tomatoes were not distinguishable by physical inspection and Ball had obtained from the grower an invoice showing the variety of the seed to be Heinz 1350.<sup>23</sup> The court admitted that defendant's activity was not in violation of the statute. It stated, however, that the "provision exempting the vendor, under the circumstances designated, from the penalties imposed by the Act is not intended to absolve him from liability to the purchaser for breach of contract."<sup>24</sup> This answer is unsatisfactory because the question before the court was not whether defendant was liable for his breach of contract, but whether he could successfully limit his damages once the breach was established.<sup>25</sup> The fact that the legislature exempted some activities from the penalties of the statute would seem to imply that such conduct is not against the public policy of North Carolina. In fact it is arguable that the legislature was explicitly providing a means by which seed retailers could comply with the provisions of the statute and concomitantly protect themselves from liability.

Although *Gore's* conclusion that the limitation-of-damages clause contravenes public policy is debatable, the court's analysis is significant because it focuses attention on the inequitable nature of the contract. Perhaps the court was suggesting that in the future such oppressive terms will not be enforced in North Carolina. In essence, the *Gore* opinion declares the limitation-of-damages clause to be unconscionable. Such a result could be reached directly under the provisions of the *Uniform Commercial Code*, which had not been enacted in North Carolina at the time of the transaction between *Gore* and *Ball*.<sup>26</sup> The court

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<sup>22</sup>N.C. GEN. STAT. § 106-277.10(e) (1966).

<sup>23</sup>*Gore v. George J. Ball, Inc.*, 10 N.C. App. 310, 312, 178 S.E.2d 237, 239 (1971). The court of appeals in its discussion of negligence per se bypassed the question of whether the North Carolina Seed Law was a safety statute and instead predicated its holding on the fact that defendant did not violate the seed law. *Id.* at 313, 178 S.E.2d at 240.

<sup>24</sup>279 N.C. at 205-06, 182 S.E.2d at 397.

<sup>25</sup>*But see Zicari v. Joseph Harris Co.*, 33 App. Div. 2d 17, —, 304 N.Y.S.2d 918, 924-25 (1969), in which a New York court similarly confused the separate issues of liability for breach of warranty and ability to contractually limit damages.

<sup>26</sup>The *Uniform Commercial Code* was enacted into positive law in North Carolina by the 1965 legislature and became effective on July 1, 1967. Ch. 700, §§ 1-11, [1965] N.C. Sess. L. 768 (codified as N.C. GEN. STAT. § 25-1-101 to -10-107 (1965), *as amended*, (Supp. 1971)). The numbering of sections in the North Carolina Code corresponds to that used in the 1962 Official Text of the *Uniform Commercial Code*, except that each number is preceded by the chapter

in *Gore*, unable to rely on the statutory authority of the *Code*, had to use the only tools it had available, and thus it declared the agreement to be contrary to public policy.<sup>27</sup>

The *Uniform Commercial Code* allows a vendor and purchaser to limit contractually the remedies available to the buyer for a breach of warranty by the seller.<sup>28</sup> The *Code* specifically states that the measure of damages may be altered "by limiting the buyer's remedies to return of the goods and repayment of the price."<sup>29</sup> This is precisely the *Gore* situation. According to the *Code*, such a provision is binding on the parties "unless the limitation or exclusion is unconscionable."<sup>30</sup> Section 2-302 allows a court to find as a matter of law that the entire contract or any clause in the contract is unconscionable.<sup>31</sup> The Official Comments to the *Code* note that section 2-302 was intended to allow a court to pass directly on the unconscionability of a contract. "In the past such

number, "25." Thus, § 2-302 of the *Uniform Commercial Code* is § 25-2-302 of the North Carolina Code. The Official Comments to the *Code* have never been enacted into positive law in North Carolina. They are recorded in chapter 25 of the *General Statutes*, however, and presumably are used by North Carolina courts in interpreting specific sections of the Code.

<sup>27</sup>The court was probably correct in its determination that it lacked the statutory authority to directly invalidate a contract as unconscionable. At least one court, however, has held as a matter of common law that an unconscionable contract is unenforceable. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

Courts of equity have consistently refused to enforce unconscionable provisions in contracts. *See, e.g., Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948). Professor Pomeroy in his treatise on equity jurisprudence states that

[t]he specific performance of a contract will be refused when . . . the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and where the specific enforcement would be oppressive or harsh upon the defendant, or would prevent the enjoyment of his own rights, or would in any manner work injustice.

4 J. POMEROY, EQUITY JURISPRUDENCE § 1405(a) (5th ed. 1941).

<sup>28</sup>UNIFORM COMMERCIAL CODE § 2-316(4) [hereinafter cited as UCC].

<sup>29</sup>UCC § 2-719(1)(a).

<sup>30</sup>UCC § 2-719(3). It may have been possible to invalidate the suspect clause in the *Gore* contract without resorting to the unconscionability section of the *Code*. Section 2-719(2) imposes a limitation of reasonableness on any damages which the parties have undertaken to regulate consensually. This limitation applies "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose." UCC § 2-719(2). The Official Comment notes that the very essence of a sales contract requires "that at least minimum adequate remedies be available." UCC § 2-719, Comment 1. Arguably, the purchaser in *Gore* would be deprived of the entire benefit of his bargain if the limitation-of-damages clause were enforced, and thus he would not have the minimum adequate remedies which the *Code* requires. *See also* 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 174-75 (1964).

<sup>31</sup>UCC § 2-302. This section was deleted when the *Uniform Commercial Code* was initially enacted in North Carolina. However, the 1971 legislature incorporated the provision into the statute and it became effective on October 1, 1971. Ch. 1055, § 1, [1971] N.C. Sess. L.—(codified as N.C. GEN. STAT. § 25-2-302 (Supp. 1971)).

policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or *by determinations that the clause is contrary to public policy* or to the dominant purpose of the contract."<sup>32</sup>

The *Code* offers no explicit definition of unconscionability, but the Official Comment states that the principle is one of "prevention of oppression and unfair surprise."<sup>33</sup> Since these two abuses appear most often in contracts between two parties with unequal bargaining power, it may be helpful to analyze unconscionability in terms of disparate bargaining power. An oppressive contract may be defined as one in which a stronger party forces a weaker party to accept terms which are both burdensome and unjustified by commercial necessities. The weaker party accepts the oppressive terms, although aware of the consequences, because his bargaining power is such that he must do business on those terms or not at all.<sup>34</sup> In *Henningsen v. Bloomfield Motors, Inc.*,<sup>35</sup> a case discussed in the *Gore* opinion, the New Jersey Supreme Court refused to enforce this type of oppressive clause. In that case an automobile owner sued the dealer and manufacturer to recover for personal injuries and consequential damages to the auto incurred in an accident caused by a defect in the car's steering mechanism. The defense was based largely on a provision in the sales contract that limited the manufacturer's liability for breach of warranty to the replacement of defective parts. The type of disclaimer in question was used not only by defendant, Chrysler Corporation, but also by every other automobile manufacturer in the country.<sup>36</sup> Thus, the automobile buyer lacked any meaningful choice in the matter; he could either purchase a car and accept the limitation clause or purchase no car at all. The *Henningsen* court relied heavily on this factor in reaching its decision:

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<sup>32</sup>UCC § 2-302, Comment 1 (emphasis added). See also Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969), where the author states:

Unconscionable contracts and clauses have been surreptitiously invalidated for decades. But surreptitious invalidation created problems. The courts did not usually invalidate on the express ground that a particular clause or contract was unconscionable. Their regard for "freedom of contract" prevented such a straightforward approach or any explicit recognition of judicial control over the terms of a bargain. Instead, the courts resorted to various formal, technical devices to achieve their ends.

*Id.* at 934 (footnote omitted).

<sup>33</sup>UCC § 2-302, Comment 1.

<sup>34</sup>See Comment, *Bargaining Power and Unconscionability: A Suggested Approach to UCC Section 2-302*, 114 U. PA. L. REV. 998, 999 (1966).

<sup>35</sup>32 N.J. 358, 161 A.2d 69 (1960).

<sup>36</sup>*Id.* at 390-91, 161 A.2d at 87.

[The standardized mass contract] is used primarily by enterprises with strong bargaining power and position. "The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all."<sup>37</sup>

In the seed-sale situation a buyer also has no meaningful choice. Apparently all seed growers and retailers rely on the same or similar limitation-of-damages provisions in their sales contracts.<sup>38</sup> Thus, the farmer in *Gore* was in a worse position than the auto buyer in *Henningsen* because he could not afford the luxury of forgoing his purchase. Economic realities dictated that he buy the seeds on whatever terms they were available. The court noted that a breach of warranty for an automobile part would not automatically cause harm to the consumer, but the mislabeling of seed would unavoidably cause injury to a farmer.<sup>39</sup> "Loss of the intended crop is inevitable; the extent of the disaster is measured only by the size of the farmer's planting."<sup>40</sup>

The second element of unconscionability, unfair surprise, is perhaps best demonstrated by the fine print contract that contains a labyrinth of words and expressions defining the rights and obligations of each party. In most situations the non-drafting party either fails to read the fine print or is unable to comprehend the technical legal language. In *Henningsen* the limitation-of-damages clause appeared on the back of a sales contract and the buyer's attention was directed to it by the smallest, least legible print in the entire document.<sup>41</sup> The court concluded that even if the consumer had read the clause, he would not

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<sup>37</sup>*Id.* at 389, 161 A.2d at 86.

<sup>38</sup>279 N.C. at 202, 182 S.E.2d at 395.

<sup>39</sup>*Id.* at 208, 182 S.E.2d at 398. Of course it is possible that a better crop would result because of the inadvertent supplying of a superior strain of seed which responds well to similar cultivation methods.

The *Gore* court also failed to consider the fact that *Henningsen* dealt primarily with personal injury. Traditionally, personal injury has been thought to be a much greater wrong than mere economic injury. This distinction is evidenced by the fact that § 2-719(3) of the *Code* makes limitation-of-damages for a personal injury prima facie unconscionable, but such a contractual provision for commercial losses is allowed unless proved unconscionable.

<sup>40</sup>279 N.C. at 208, 182 S.E.2d at 398.

<sup>41</sup>32 N.J. at 365, 161 A.2d at 73. The *Henningsen* court caustically remarked that "[t]he draftsmanship is reflective of the care and skill of the Automobile Manufacturers Association in undertaking to avoid warranty obligations without drawing too much attention to its effort in that regards." *Id.* at 400, 161 A.2d at 93.

understand its legal ramifications. The *Gore* court questioned whether a prospective seed purchaser would notice the suspect clause and understand its legal implications. The opinion conceded that an experienced lawyer would have understood the significance of the provision, but the court felt that "most retail purchasers of seed are not experienced in the art of discovering such phrases in the midst of language relating to other matters."<sup>42</sup> While both *Henningsen* and *Gore* held the limitation-of-damages clause to be against public policy, the citation of section 2-302 by the *Henningsen* court suggests that it felt the case presented the type of abuses which that section of the *Code* was intended to prevent.<sup>43</sup>

A limitation-of-damages clause may be considered a means of allocating unknown or undeterminable risks between two contracting parties. Arguably, in a *Gore*-type situation the parties are merely allocating this burden. The seed retailer sells his goods at a relatively low price because he is not guaranteeing them. The farmer is willing to accept virtually any risk in order to avoid having to pay a higher price for the seeds. Some courts have been persuaded by this logic and have consequently upheld limitation-of-damages clauses in seed-sale cases.<sup>44</sup> For example, in *Hoover v. Utah Nursery Co.*<sup>45</sup> the court reasoned that

[t]he purchase price of a parcel of seed is usually insignificant as compared with the value of the crop that may be raised therefrom. For this small price the seed merchant may feel that he cannot afford to warrant. Crops are destroyed or impaired by many causes, [some of which are] hard to identify. The law, considering these larger facts and circumstances, gives validity to these disclaimers . . . .<sup>46</sup>

In *Gore* the North Carolina Supreme Court did not mention these considerations, perhaps recognizing that there was no mutually understood, bargained-for allocation of the risk. Any pre-litigation thought as to who should bear the burden apparently was engaged in only by the retailer, who had drafted the provision. The buyer probably never even considered the question. The *Gore* court, by invalidating the limitation-of-damages clause, may have been making a policy decision that as between the two parties the seed retailer was better able to absorb the cost of accepting the risks.

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<sup>42</sup>279 N.C. at 202, 182 S.E.2d at 395.

<sup>43</sup>32 N.J. at 404, 161 A.2d at 95.

<sup>44</sup>E.g., *Asgrow Seed Co. v. Gulick*, 420 S.W.2d 438 (Tex. Civ. App. 1967); *Hoover v. Utah Nursery Co.*, 79 Utah 12, 7 P.2d 270 (1932).

<sup>45</sup>79 Utah 12, 7 P.2d 270 (1932).

<sup>46</sup>*Id.* at 17, 7 P.2d at 273.

Two other courts recently presented with cases quite similar to *Gore* ruled that the limitation-of-damages clause was against public policy.<sup>47</sup> These decisions did not go nearly as far as *Gore*, however, because in each case the defendant was found to have been culpable in some degree. In one instance the seed grower was actually negligent,<sup>48</sup> and in the other, he fraudulently misrepresented the kind and quality of the seeds.<sup>49</sup> In contrast, the defendant in *Gore* was free of fault. The result of the court's decision in *Gore* is that seed growers and retailers are strictly liable for selling mislabeled products in North Carolina. Under the *Uniform Commercial Code*, now in force in this state, the seller by labeling his seeds to be a specific variety has given an express warranty of description<sup>50</sup> that may not be disclaimed by any inconsistent terms in the sales contract.<sup>51</sup> While the *Code* permits contractual limitation of damages, the *Gore* opinion would forbid such a modification, at least if the damages were limited to the return of purchase price. Thus, under the *Code*, a seed seller may not disclaim his liability for breach of an express warranty and under *Gore* he may not limit his damages.

ERNEST S. DELANEY, III

### Securities Regulation—A Little Light and More Obfuscation on Rule 10b-5

For a decade or more there has been a prolific development of federal case law involving private actions based on violations of section 10(b) of the Securities Exchange Act of 1934<sup>1</sup> and of the implementing

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<sup>47</sup>*Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966); *Dessert Seed Co. v. Drew Farmers Supply, Inc.*, 248 Ark. 858, 454 S.W.2d 307 (1970). In *Dessert Seed* the court stated that the limitation-of-damages clause was "unreasonable, *unconscionable*, and against sound public policy." *Id.* at 865, 454 S.W.2d at 311 (emphasis added).

<sup>48</sup>*Dessert Seed Co. v. Drew Farmers Supply, Inc.*, 248 Ark. 858, 865, 454 S.W.2d 307, 311 (1970).

<sup>49</sup>*Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, —, 54 Cal. Rptr. 609, 618 (1966).

<sup>50</sup>UCC § 2-313(1)(b).

<sup>51</sup>See UCC § 2-316(1); UCC § 316, Comment 1; UCC § 2-313, Comments 1, 4.

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<sup>1</sup>15 U.S.C. § 78j(b) (1970). The portion of the statute relevant to this discussion reads as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—