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Uniform Commercial Code - Farmers as Merchants in North Carolina

Beverly Wheeler Massey

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N.C. Court Breaks New Ground

INTRODUCTION

One of the “underlying purposes [of the Uniform Commercial Code] is] . . . to make uniform the law among the various jurisdictions.” As a general rule courts of the forty-nine states which have adopted the Code have achieved uniformity in their interpretation and application of Code provisions. Courts of the various jurisdictions, however, have reached inconsistent results in the determination of whether a farmer is a merchant within the meaning of the Code. As indicated by Currituck Grain, Inc. v. Powell, the North Carolina Court of Appeals is in accord with five other state courts and three federal courts in holding that a farmer may be a merchant for purposes of the statute of frauds provision of the Code.

Section 2-201 bars a merchant-seller from raising the statute of frauds as a defense in an action based on an oral sales contract if he has received a written confirmation of the contract from the merchant-buyer within a reasonable time and has failed to object in writing to the confirmation within ten days. This note briefly examines approaches of other courts to the issue of the farmer as a

1. N.C. GEN. STAT. ch. 25 (1965). (The North Carolina cite corresponds to the 1962 Official Text except that the chapter number “25” precedes each section).
2. U.C.C. § 1-102(2)(c).
3. Louisiana has adopted Articles 1, 3, 4 and 5 only; see R. Braucher & R. Riegert, INTRODUCTION TO COMMERCIAL TRANSACTIONS xxxvii (1977).
4. [1966] 3 BENDER’S U.C.C. SER. § 1.01 (1966) [hereinafter cited as BENDER].
5. See, e.g., Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E.2d 559 (1975) (farmer held to be a merchant); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663 (Iowa 1977) (farmer held not to be a merchant). See generally 3 BENDER, supra note 4, at note 17.
8. N.C. GEN. STAT. § 25-2-201(2) (1965) (Formal Requirements; statute of frauds).
merchant and the impact and potential scope of the *Currituck Grain* decision.

**The Case**

Plaintiff brought an action in Currituck County District Court for breach of an oral contract entered into in 1974, in which plaintiff agreed to purchase and defendant agreed to sell corn and soybeans at a later date for a specified price. The alleged breach consisted of defendant's failure to deliver the corn and soybeans.

Although the defendant had been a farmer for approximately two and one-half years he had never sold corn or soybeans prior to the date of the alleged contract. In addition to denying the existence of the alleged contract, defendant pleaded G.S. § 25-2-201(1), the statute of frauds provision of the Code, as an affirmative defense.

In response to defendant's motion for summary judgment, plaintiff claimed that both plaintiff and defendant were merchants within the meaning of G.S. § 25-2-104(1). Plaintiff further claimed that because it had mailed a written confirmation of the contract to defendant to which defendant had failed to object within ten days, defendant was barred from asserting the statute of frauds provision by G.S. § 25-2-201(2).

10. Id. at 566, 222 S.E.2d at 3.
11. 38 N.C. App. at 8, 246 S.E.2d at 854.
12. N.C. GEN. STAT. § 25-2-201(1) (1965) provides:
Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
13. N.C. GEN. STAT. § 25-2-104(1) (1965) provides:
“Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
14. N.C. GEN. STAT. § 25-2-201(2) (1965) provides:
Between merchants if in a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.
The district court entered summary judgment for defendant based on defendant’s affidavit which, according to the district court, established that the defendant was not a merchant.

On appeal the North Carolina Court of Appeals, in a well-reasoned opinion by Judge Arnold, reversed the district court’s order for summary judgment and remanded the case for trial because the defendant’s affidavit failed to establish that defendant was not a merchant under G.S. § 25-2-201(2). Judge Arnold pointed out that defendant had failed “to show the absence of a genuine issue of material fact” required by Rule 56(c) because the affidavit did “not establish whether the defendant had ever negotiated with grain dealers prior to 1974, whether he had ever sold corn and soybeans previously, or whether he had knowledge of the customs and practices peculiar to the marketing of these grains.”

On remand defendant testified that he had never sold corn or soybeans prior to the transaction in question. The case again went before the court of appeals when defendant appealed a verdict for plaintiff. Defendant claimed, inter alia, that the district court erred in failing to grant his motion for a directed verdict and for a judgment notwithstanding the verdict since, according to defendant, he was not a merchant as a matter of law under the criteria established by Judge Arnold. Defendant claimed he therefore was entitled to the statute of frauds defense. Judge Webb, speaking for the court, disagreed stating that “the [prior] opinion does not hold as to what constitutes a merchant within the meaning of the statute.” He then held that the evidence was sufficient to sustain the jury’s finding that the defendant-farmer, by his occupation, held himself

16. 28 N.C. App. at 568, 222 S.E.2d at 4.
17. The opinion does not indicate whether the defendant testified as to Judge Arnold’s other two criteria. However, the record on appeal contained testimony by the defendant that he had never sold any corn, soybeans or other grain prior to 1974 and that he had no knowledge of the customs and practices with respect to the marketing and selling of the grain he produced.
18. 28 N.C. App. at 568, 222 S.E.2d at 4.
19. 38 N.C. App. at 8, 246 S.E.2d at 854.
20. Although the court did not address whether the jury should have decided the merchant issue, other courts have commented on this question. See Continental Grain Co. v. Martin, 536 F.2d 592 (5th Cir. 1976); Sand Seed Serv., Inc. v. Poeces, 249 N.W.2d 663 (Iowa 1977); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352 (Tex. 1977); Lish v. Compton, 547 P.2d 223 (Utah 1976). The unanimous opinion of those courts is that whether a farmer is a merchant is ordinarily a question for the fact-finder’s determination. However, if all of the facts relevant to the merchant issue are undisputed and if reasonable minds would draw no different inferences from the facts, then the question is one of law for the courts to determine.
out as having knowledge or skill peculiar to the practices or goods involved in the transaction and was therefore a merchant for purposes of G.S. § 25-2-201(2). The court, however, granted defendant a new trial on other grounds.

BACKGROUND

A. A FARMER IS NOT A MERCHANT

To date, six of the twelve states which have considered the question have refused to apply the status of merchant to farmers. Each case involved the applicability of the “merchant’s exception” to the statute of frauds. Although section 2-104(1) of the Code defines the term “merchant,” two courts did not rely on that definition in reaching their decisions. Rather, they relied upon the plain meaning of the term “merchant.” Two other courts established factors which they used in determining if a person is a merchant under 2-201(2). The Kansas Supreme Court stressed professionalism as a factor along with special knowledge and commercial experience. The South Dakota Supreme Court stressed not only particular knowledge or experience in selling, buying or dealing in future commodity transactions, but also the parties’ relative knowledge of the marketplace. The Iowa Supreme Court applied the same test

21. 38 N.C. App. at 12, 246 S.E.2d at 856. On the second remand, defendant was found liable for the full amount of the contract.


23. U.C.C. § 2-201(2).


25. “Professional trader” was the definition used in Cook Grains, Inc. v. Fallis, 239 Ark. 962, 395 S.W.2d 555 (1965). “One whose occupation is that of buying and selling” was the definition used in Lish v. Compton, 547 P.2d 223 (Utah 1976). The Lish court held that a man who had been a hay and grain farmer for 25 years and who negotiated and contracted the sale of his crops each year was not a merchant with regard to an oral contract to sell his 1973 wheat crop.

26. In Decatur Coop. Ass’n v. Urban, 219 Kan. 171, ___, 547 P.2d 323, 328 (1976) the court held that defendant, a member of plaintiff-cooperative, a wheat farmer 20 years, a custom harvester of wheat and other grains for other farmers and a grower of 500 acres of wheat in the year of the contract, was not a merchant. Although the court acknowledged the presence of special skill or knowledge, it stressed the absence of professionalism. See also 3 BENDER, supra note 4, at § 1.02.

27. Although the defendant-farmer had sold grain prior to the transaction in
that the North Carolina Court of Appeals used in the Currituck Grain case but reached a different result. The Iowa court held that a farmer who sold only the crops he grew and who sold those crops only three times prior to the creation of the oral contract in question was not a merchant with regard to the transaction since he was an expert in growing crops, not in selling them.

B. A Farmer Is a Merchant

The five other state courts and three federal courts which held that a particular farmer may be a merchant under section 2-201(2) relied on one or more of five factors. The most common factor considered was the farmer's prior experience in selling his crop including frequency and duration of sales of the particular crop. Other factors considered include the farmer's familiarity with the market, the number of years he had been a farmer, the contractual question, the court held that he was not a merchant with regard to a contract for the future sale of his grain since he had sold his grain only to local elevators for cash or had stored it under a federal loan program. The opinion failed to state how many years the defendant had been a farmer. The court also stressed the parties' unequal knowledge of market fluctuations and of many factors affecting the market. Terminal Grain Corp. v. Freeman, S.D., 270 N.W.2d 806 (1978).

28. Based on the criteria set out in U.C.C. § 2-104(1) (Definitions: "Merchant").


30. U.C.C. § 2-201(2).

31. Continental Grain v. Harbach, 400 F. Supp. 695 (N.D. Ill. 1975) (defendant-farmer had sold soybeans for only a few months but had sold corn for five to six years previously; the court held that defendant failed to prove that corn and soybeans are not the same kind of goods); Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E.2d 559 (1975) (for at least five years previous, defendant sold his crops to grain elevators in cash sales and in future contracts); Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.E.2d 628, 630 (1974) (defendants had sold soybeans and other grains for several years; the court held that "a farmer who regularly sells his crops is a person 'who deals in goods of that kind' " and is therefore a merchant); Barron v. Edwards, 45 Mich. App. 210, 206 N.W.2d 508, 511 (1973) (the court found that "plaintiff had sold sod on numerous occasions"; the court made no in-depth discussion of the merchant issue); Rush Johnson Farms, Inc. v. Mo. Farmers Ass'n., 555 S.W.2d 61 (Mo. 1977) (defendant "had sold soybeans to elevators for many, many years"); Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973) (defendant sold beans "for a number of years"); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352 (Tex. 1977) (defendant had sold one wheat crop annually for seven years prior to the transaction in question).

32. Continental Grain Co. v. Harbach, 400 F. Supp. 695 (N.D. Ill. 1975) (defendant was the president of a farming corporation and was familiar with the Chicago Board of Trade); Rush Johnson Farms, Inc. v. Mo. Farmers Ass'n., 555 S.W.2d 61 (Mo. 1977) (defendant checked with many grain elevators to determine the current market price, was familiar with the operation of grain elevators
amount in question\textsuperscript{34} and whether the crop sold was the farmer's principal crop.\textsuperscript{35}

C. THE EFFECT OF BEING A MERCHANT UNDER 2-201

Although thirteen different Code provisions\textsuperscript{38} apply to merchants, it should be emphasized that the cases mentioned above and the Currituck Grain case were concerned with whether a farmer was a merchant under the statute of frauds provision of the Code.\textsuperscript{37} Under 2-201(2), if the oral contract arises "between merchants"\textsuperscript{38} and the buyer sends the seller a written confirmation of the contract within a reasonable time, the statute of frauds provision is unavailable as a defense for the merchant-seller unless he objects in writing to the contents of the written confirmation within ten days of its receipt.\textsuperscript{39} By holding him a merchant under 2-201(2), the courts place a minimum burden on a farmer. That section requires him as a merchant merely to open his mail, read the sale confirmation and promptly notify the buyer of any objections.\textsuperscript{40}

If the farmer-seller is not a merchant under 2-201(2), then the merchant-buyer bears a disproportionate risk with regard to future

\textsuperscript{33} Continental Grain Co. v. Harbach, 400 F. Supp. 695 (N.D. Ill. 1975) (20 years); Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E.2d 559 (1975) (34 years); Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973) (many years).

\textsuperscript{34} The court held in Continental Grain Co. v. Brown, 23 U.C.C. Rep. 872 (W.D. Wis. 1978) that the transaction was not a "casual sale," and therefore defendant was a merchant because of the contract price and the amount of grain involved.

\textsuperscript{35} In Continental Grain Co. v. Harbach, 400 F. Supp. 695 (N.D. Ill. 1975) defendant grew and sold soybeans and potatoes. The transaction in question involved soybeans. The court held that defendant had failed to prove that corn and soybeans are not the same kind of crop. Continental Grain Co. v. Brown, 23 U.C.C. Rep. 872 (W.D. Wis. 1978). See also 3 BENDER, supra note 4, at § 1.02.

\textsuperscript{36} 3 BENDER, supra note 4, at § 1.02.

\textsuperscript{37} N.C. GEN. STAT. § 25-2-201(2) (1965).

\textsuperscript{38} U.C.C. § 2-104(3) provides: "'Between merchants' means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants."

\textsuperscript{39} U.C.C. § 2-201, Comment 3. The plaintiff-buyer still must prove the existence of the oral contract.

\textsuperscript{40} 3 BENDER, supra note 4, at § 2.04(2).
commodity contracts. For example, assume the following facts: An oral contract was made on July 1 for the sale of one hundred bushels of soybeans for delivery in the fall at a price of $6 per bushel, the July market price. The farmer-seller received within a reasonable time a written confirmation of the oral contract, signed by the merchant-buyer. The farmer did not object to the confirmation. On September 1, the market price for soybeans dropped to $5 per bushel. Under these facts, the merchant-buyer would be bound to the contract by his written confirmation since it would constitute a "writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." If, however, the market price had risen instead of dropped, the seller-farmer who was not a merchant legally would be free to take advantage of the subsequent rise in price by denying the existence of the oral contract. As a non-merchant he would be entitled to assert G.S. § 25-2-201(1) as a defense in an action by the original buyer-merchant to enforce the contract since no "writing . . . signed by the party against whom enforcement is sought" exists.

ANALYSIS

Recognizing the disjunctive language of the statutory definition of "merchant," the court in *Currituck Grain, Inc. v. Powell* established a three-pronged test based on the "plain words of the statute":

As applied to this case a merchant is
(1) one who deals in corn or soybeans, or
(2) one who by his occupation holds himself out as having knowledge or skill peculiar to the practice of dealing in corn or soybeans, or
(3) one who by his occupation holds himself out as having knowledge or skill peculiar to the goods involved in the transaction which are corn and soybeans.

The court held that evidence that defendant was a farmer raising corn and soybeans sufficiently supported the jury's finding that

41. *Id.*
42. U.C.C. § 2-201(1) (Formal Requirements; Statute of Frauds).
43. *Id.*
44. 38 N.C. App. 7, 246 S.E.2d 853.
45. *Id.* at 10, 246 S.E.2d at 855.
46. *Id.* at 9, 246 S.E.2d at 855. A fourth prong, based on employment of an agent or broker, is present in the statute but was not discussed by the court since no facts indicated any such agency relationship.
defendant was a merchant under the second and third prongs of the test. 47

Note that the court in *Currituck Grain* did not find that the defendant had actual knowledge or skill peculiar to the goods or practices, but rather found that by his occupation of farming, defendant held himself out as having that knowledge. The court did not consider any of the factors other courts have considered, such as the farmer's prior experience in selling his crop, the number of years he had been a farmer, the size of the transaction in question and the question of whether the commodity involved was the farmer's principal crop. 48 Such factors would relate to the question of whether a farmer was a merchant only if the courts based their decisions on the extent of the farmer's actual knowledge of the goods or the practices involved in the transaction. The court also failed to consider the criteria suggested on the initial appeal: (1) defendant's experience in negotiating with grain dealers, (2) defendant's experience in selling corn and soybeans and (3) defendant's knowledge of the customs and practices peculiar to the marketing of corn and soybeans. 49 Those criteria are closely in line with the actual knowledge test. Thus, while other courts which held a farmer to be a merchant based their decisions on an "actual knowledge" test, as did Judge Arnold, the court in *Currituck Grain* indicated that it will follow an "occupation" test in deciding who is a merchant for purposes of the statute of frauds provision of the Code. The court also noted that "none of the cases construe the statute as we do, but we believe the plain words of the statute govern." 50

In reaching its decision, the court may have disregarded the most obvious ground for holding that the defendant-farmer in this case was a merchant, the first prong of the test, dealing in corn or soybeans. Since the Code does not define the term "deals," the court could have used the plain meaning of that term, "to buy or sell," to hold that the defendant-farmer was a merchant because he "dealt" in corn and soybeans. 51 Seemingly, however, the court intentionally declined to utilize the first prong of the test in this fact situation. Virtually any person whose occupation is farming would

47. Id. at 10, 246 S.E.2d at 855.
48. See supra notes 31 through 33.
49. If the court on the second appeal had relied on the factors suggested by Judge Arnold, it would seem, in light of the defendant's testimony that he had never sold corn or soybeans before, that defendant would not have been deemed a merchant. 28 N.C. App. at 568, 222 S.E.2d at 4.
50. 38 N.C. App. at 10, 246 S.E.2d at 855.
be a merchant for purposes of the statute of frauds provision under the occupation test, the second and third prongs. The court therefore can apply the first prong, the dealing test, to persons who farm but whose occupation might not be farming. For example, a carpenter who also raises and sells a soybean crop each year probably does not hold himself out by his occupation of carpentry as having knowledge or skill peculiar to soybeans or peculiar to the practice of dealing in soybeans. But if he has "dealt" previously in soybeans, that is, if he previously has bought or sold soybeans, then he would be a merchant under the first prong of the test. The question of how many times he must have bought or sold soybeans before he "dealt" in soybeans is unanswered in North Carolina.

CONCLUSION

In Currituck Grain, Inc. v. Powell the North Carolina Court of Appeals indicates that every farmer is a merchant for purposes of G.S. § 25-2-201(2) with regard to the type of crops he grows and sells. The defendant-farmer had farmed only about two and one-half years prior to the alleged contract and had never sold corn or soybeans prior to the transaction in question. Thus the court in Currituck Grain seemed to define even the casual or inexperienced farmer as a merchant. In addition, a farmer who is very experi-

52. 38 N.C. App. 7, 246 S.E.2d 843 (1978).
53. Id. at 8, 246 S.E.2d at 854. Cf. Continental Grain Co. v. Harbach, 400 F. Supp. 695 (N.D. Ill. 1975) (defendant who had sold corn for five to six years prior to the transaction in question and who had been a farmer for 20 years was held to be a merchant); Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E.2d 559 (1975) (defendant, a farmer for 34 years, had sold his crop for at least five years prior to the transaction in question and was held to be a merchant); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352 (Tex. 1977) (defendant who had sold his wheat crop for seven years prior to the transaction in question was held to be a merchant). But cf. Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663 (Iowa 1977) (defendant sold his crops three times prior to the transaction in question and was held not to be a merchant); Decatur Coop. Ass'n. v. Urban, 219 Kan. 171, 547 P.2d 323 (1976) (defendant, a farmer for 20 years, was held not to be a merchant); Lish v. Compton, 547 P.2d 223 (Utah 1976) (defendant, a farmer for 25 years who negotiated and contracted the sale of his crops each year was held not to be a merchant).
54. Official Comment 1 to N.C. GEN. STAT. § 25-2-104 (1965) may seem contrary to Currituck Grain. It contrasts the "casual or inexperienced seller" to the merchant as follows:

This Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer . . . . This section lays the foundation of this policy by defining those who are to be regarded as professionals or "merchants" and by stating when a transaction is deemed to be "between merchants".
enced in selling his crops may operate under the mistaken belief that if he did not sign anything no binding agreement exists. Under the *Currituck Grain* decision both farmers, because of their occupations, will be considered merchants despite their inexperience or ignorance of the law. Neither will be entitled to the statute of frauds defense in an action brought by the buyer to enforce the oral contract.

Even though *Currituck Grain* appears out of line with other cases holding a farmer to be a merchant and with the implied criteria set forth in the appellate court's previous opinion, the decision is justified by the Code. In reaching its decision, the North Carolina Court of Appeals followed the literal meaning of section 2-104. Upon close examination of the Code's definition of merchant, the occupation test is technically more correct than the actual knowledge test. Section 2-104 never refers to actual knowledge as a basis for applying the merchant status to a person.55

The decision also complies with the spirit of the Code. The Official Comment56 to section 2-104 recognizes that a person may be a merchant for purposes of one Code provision and not for purposes of another.57 The Comment indicates the existence of a broad definition of "merchant" and of a narrow definition as well. Section 2-201(2), the merchant's exception to the statute of frauds, falls within the broad definition of "merchant."58 According to Comment Two, section 2-201(2) is one of the sections which

rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business, would, therefore, be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . ." since the practices involved in the transaction are non-specialized business practices such as answering mail.

However, Official Comment 2 to the same section seems to conflict with Official Comment 1.

55. The actual knowledge test, however, does seem to be fairer and has been used more than the occupation test. It does seem unfair to require a "mere tiller of the soil" to be familiar with the Uniform Commercial Code. Perhaps the legislature should redefine the Code definition of "merchant" as to farmers.


57. 3 BENDER, supra note 4, at § 3.03(1)(b). See also Clifford, Article Two: Sales, 44 N.C. LAW REV. 539 (1966).

58. The other Code sections falling within the broad definition of "merchant" are § 2-205 (firm offers), § 2-207 (Confirmatory Memoranda) and § 2-209 (Modification).
In light of the Official Comment's assertion that facts which "may be sufficient to establish the merchant status [are] indicated by the nature of the [various] provisions,"\(^{59}\) little danger exists that North Carolina courts will hold an inexperienced farmer to the standards of a merchant with regard to any Code provisions which are interpreted under the narrow definition of merchant,\(^{60}\) such as section 2-314,\(^{61}\) the implied warranty of merchantability. Assume, for example, that the farmer-seller in *Currituck Grain* had fulfilled the contract and had delivered the corn and soybeans to the buyer as required by the contract; but upon inspection the buyer discovered that for some reason the corn and soybeans were not of merchantable quality. Under section 2-314, the warranty of merchantability is implied only "if a seller is a merchant with respect to goods of that kind." Comment Three to section 2-314 states that "a person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section . . . ." Therefore, the farmer-seller in *Currituck Grain* seemingly would not be a merchant for purposes of section 2-314; and as a result, the implied warranty of merchantability would not exist. That same inexperienced farmer was a merchant in *Currituck Grain* under the broad definition for purposes of section 2-201(2).

*Beverly Wheeler Massey*

\(^{59}\) N.C. GEN. STAT. § 25-2-104 (1965) (Official Comment 2).

\(^{60}\) *Id.*

\(^{61}\) *Id.* § 25-2-314(1) provides: "Unless excluded or modified (§ 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."