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Damages and Problems of Proof with Planted Nonconforming Seeds

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I. INTRODUCTION

Defective seed cases offer an opportunity for insight into evidentiary problems associated with proof of damages. Suits are usually initiated pursuant to several theories: breach of warranty, strict liability, negligence or fraud. In conjunction with common law liability grounds, a plaintiff often makes reference to violations of the Federal Seed Act1 or comparable state legislation prohibiting seed adulteration and misbranding.2 Recoverable damages for nonconforming seeds that are planted include compensatory
awards, as well as lost profits, where such losses are appropriately established. This Article examines the factors necessary for recovery of damages for nonconforming seeds.

II. SEED DEVELOPMENT

Farmers can encounter numerous practical problems with seed quality. A farmer-purchaser contemplates receiving vigorous seeds that will appropriately mature under diverse environmental conditions. However, adverse weather or inappropriate planting techniques can result in poor seed performance. Appropriate seed must be selected for maximum crop development. Every variety of seed has a "zone of adaptation" which is the geographic area with the best soil and environmental conditions for that particular variety.¹

Seed lots can differ considerably as to germination abilities, purity, and storability. Passage of time causes varying degrees of quality deterioration in all seeds. Loss of quality can often be attributed to one of two basic problems—either prior to packaging the seeds had low storage potential, or after packaging, the seeds deteriorated due to unfavorable storage conditions. An indication of low storage potential might be manifested by numerous complaints about a seedman's entire seed lot rather than difficulties with a more limited quantity.²

Post-packaging storage problems can arise at any of three levels: seedman storage, distributor storage, or consumer storage. Seeds are distributed in a dehydrated condition, with moisture too low for germination. In order to develop, seeds must be watered. Until photosynthesis provides food for the plant, a seedling must utilize the seed unit food reserves. Accordingly, seeds are destructible living entities and must be afforded adequate protection prior to planting. To insure preservation, seeds must be stored in a cool, dry location.³

Farmers must employ appropriate cultivating techniques to maintain seed viability. Often farmers want to plant in dry soil to avoid problems with working waterlogged fields. However, excessively dry soil will curtail germination in that seeds will partially hydrate but not sprout. On the other hand, seedbed moisture produces adverse storage conditions which facilitates fungi and insect

4. Reusche, Hazards of the Seed Bed in Mississippi Seed Laboratory Short Course for Seedmen 95 (1982).
5. Id. at 98.
destruction. During the period prior to complete hydration some degree of germination potential is inevitably lost.\(^6\) Planting operations should produce a seedbed providing sufficient air, water, and soil texture. Inadequate seedbed consistency may result in poor seed/soil contact, while improperly adjusted planting equipment may plant seeds at inappropriate depths or may adversely pack soil around the seed. Moreover, utilization of pre-emergent herbicides or herbicide residuals incompatible with the seeds being planted will hinder growth.\(^7\)

Environment can directly affect seed development. Soil moisture is significant in that waterlogged earth reduces oxygen availability, and dry soil provides poor hydration. Low soil temperatures slow growth and engender rot. Soil consistency can adversely influence seed development because high bulk density or dry, crusty soil makes the seed utilize excessive energy in sprouting. Soil variability, even within the same plot, results in various textures, drainage, and organism susceptibility that hinders uniform seed maturation.\(^8\)

Timely planting is also necessary to promote good yield. Planting done on inappropriate dates may encounter vernalization problems. Vernalization is the process whereby the plant changes from vegetative growth to reproductive growth.\(^9\) Farmers generally cultivate to obtain grain, fruit, or vegetables rather than merely large plants. If a plant does not vernalize but instead remains in the vegetative growth stage, it only produces a leaf, rather than the seed, vegetable or grain.\(^10\) A plant vernalizes after it receives a sufficient amount of cool temperatures over a period of time, which causes a change from the vegetative to the reproductive-yielding state. Accordingly, vernalization is one of the numerous factors directly affecting the yield of a seed variety. By untimely planting, seeds can be exposed to temperatures not conducive to maximum reproductive growth.\(^11\)

6. Id.
7. Id. at 100.
8. Id.
10. Id.
11. Id.
III. LIABILITY THEORIES, DISCLAIMERS, AND REMEDY LIMITATIONS

A. Theories of Liability Available to the Buyer

Under the negligence theory, mislabeling can constitute a private cause of action. Negligence allegations are usually brought in conjunction with assertions that seeds do not conform to statutory branding requirements.\(^1\)\(^2\) A buyer can also allege negligence on the basis that a seedman did not exercise customary care in identifying, selecting, sorting, chemically treating and packaging seeds.\(^1\)\(^3\) Effective and sufficient seed testing can be an important factor in determining whether a seedman exercised customary care.\(^1\)\(^4\) The Federal Seed Act requires labeling disclosures as to variety, germination rate, noxious weed content, and percentage of inert...
DAMAGES IN NONCONFORMING SEED CASES

matter. A disclaimer, limited warranty, or nonwarranty clause in any advertising, invoice, labeling, or written matter pertaining to seeds shall not constitute a defense in any prosecution brought under the Federal Seed Act. However, the use of a disclaimer, limited warranty, or nonwarranty clause as a defense in any proceeding not brought under the Federal Seed Act is possible.

The North Carolina Seed Act, a representative branding statute based on the Recommended Uniform State Seed Law, regulates the labeling, possessing for sale, and sale of agricultural seeds, vegetable seeds, and screenings to prevent misrepresentation. Labels must bear the commonly accepted name, lot identification, net weight, origin (if known), percentage of inert matter, percentage of agricultural seeds other than the variety enumerated on the label, percentage of all weed seeds, germination rate, and the name and address of the seedman labeling and/or distributing the seeds. The use of a disclaimer, non-warranty, or limited warranty clause in any invoice, advertising, or written matter pertaining to any seeds shall not constitute a defense in any prosecution

15. 7 U.S.C. § 1571 (1982). The fundamental duty of a seed distributor is to properly label the seed. 7 U.S.C. § 1551; Fagerberg v. Webb, 678 P.2d 544 (Colo. App. 1983), aff'd in part, rev'd in part sub nom Webb v. Dessert Seed Co., 718 P.2d 1057 (Colo. 1986). This Act, regulating the interstate marketing of seeds, is complemented by state seed laws which control intrastate marketing of seeds. See E.K. Hardison Seed Co. v. Jones, 149 F.2d 252 (6th Cir. 1945). When cotton was labeled as absent of noxious weed, but contained seeds of the "despised cocklebur", the Fifth Circuit Court of Appeals held that the United States had the burden, because it concerned the Federal Seed Act, to show that by valid sampling the seed did not satisfy requirements under the Act. Federal Seed Act, §§ 201(a)(5), (d), 403(a), 405, 7 U.S.C. §§ 1571(a)(5), (d), 1593(a), 1595 (1973); Coweta Warehouse & Gin Co. v. United States, 380 F.2d 6 (5th Cir. 1967). See, e.g., Wadley, The Federal Seed Act: Regulation of Seed Sales and Remedies Available to the Seed Purchaser,, 27 S.D.L. Rev. 453 (1982).


17. Id.

18. N.C. Gen. Stat. § 106-277 (1978). Prior to initiating suit, a farmer's attorney might explore statutory arbitration possibilities. A request can be made that the State Department of Agriculture name a committee to investigate and advise about a nonconforming seed problem. Such an investigation/arbitration committee is generally composed of a seedman, a farmer, college extension and research personnel, and state department of agriculture representatives. After evaluating the situation, a statement as to causation and suggested disposition is issued. The arbitration committee recommendations are not binding. N.C. Gen. Stat. § 106-277.29 (1978).

under the North Carolina Seed Act.\textsuperscript{20} This disclaimer prohibition applies only to prosecutions or proceedings for confiscation of seeds bought pursuant to the Act.\textsuperscript{21} North Carolina General Statutes Section 106-277.11 has no other bearing upon any effect of disclaimer or limitation/ modification clauses.\textsuperscript{22}

Jurisdictions are divided on the significance of misbranding statutes regarding negligence and strict liability claims. Although violation of a safety statute is always negligence per se, the North Carolina Seed Act has been held not to be a safety statute.\textsuperscript{23} Accordingly, evidence of a statutory violation is not automatic proof of negligence, but is useful in establishing a standard of care.\textsuperscript{24} Some states hold that a failure to perform the statutory duty of appropriate seed labeling is negligence per se, and if the injury is the proximate result of the negligent act, there is liability.\textsuperscript{25}

A seedman can be held liable for negligently selecting, processing, and handling seed.\textsuperscript{26} In \textit{Gauthier v. Bogard Seed Co.},\textsuperscript{27} the seed merchant had exclusive control over the product from the time of purchase from seed husbandmen until shipment to consumer farmers. During the possession interval, the seedman stored the seed, removed unwanted debris by mechanical means, and packaged the final product for commercial distribution.\textsuperscript{28} While no direct evidence of negligence was presented at trial, witnesses testified that seeds could be injured by improper handling or exposure to plant diseases.\textsuperscript{29} The appellate court rejected a presumption of negligence under \textit{res ipsa loquitur}.\textsuperscript{30} Application of \textit{res ipsa} is defeated if an inference that the injury was due to a cause other than defendant's negligence could be drawn as reasonably as an assump-

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\textbf{20. N.C. GEN. STAT. § 106-277.11 (1978).} \\
\textbf{21. Id.} \\
\textbf{22. Gore v. George J. Ball, Inc., 279 N.C. 192, 206, 182 S.E.2d 389, 397 (1971) (since the events occurred prior to the effective date of the Uniform Commercial Code, the Code provisions did not apply).} \\
\textbf{23. Gore, 279 N.C. at 198, 182 S.E.2d at 392.} \\
\textbf{24. Id.} \\
\textbf{25. Agricultural Services, 551 F.2d at 1068; Nakanishi v. Foster, 64 Wash. 2d 647, 393 P.2d 635 (1967) (statutory violation was negligence per se).} \\
\textbf{26. Gibson v. Worley Mills, Inc., 614 F.2d 464 (5th Cir.), modified on other grounds, 620 F.2d 567 (1980) (defendant was negligent as a matter of law for selling a seed mixture that was forbidden by federal and state law).} \\
\textbf{27. 377 So. 2d 1290 (La. Ct. App. 1980).} \\
\textbf{28. Id. at 1292.} \\
\textbf{29. Id.} \\
\textbf{30. Id. at 1293.}
\end{flushleft}
tion that damages were appropriately attributable to defendant's actions.\textsuperscript{31} The seedman's alleged negligence was not found to be the most plausible explanation for the plaintiff's injuries.\textsuperscript{32} Even assuming crop deficiencies were caused by seed damage, rather than other factors such as adverse weather conditions or poor soil preparation, damage could easily have resulted after the merchant relinquished control of the seed.\textsuperscript{33}

Seedmen may be liable for failure to exercise customary care in identifying the seeds. Thus, a seedman was found liable for marketing seeds as "pedigreed strains" without having first reasonably attempted to ascertain that the seeds of the given lot were true to type.\textsuperscript{34} Seeds not of proper pedigree, called "rogues",\textsuperscript{35} often will reduce total yield by failing to mature on the same schedule as pedigreed seed or by insufficient bearing.\textsuperscript{36}

Provided a particular seed variety has a reasonable potential for successful yields, a seedman has no duty to disclose that other seed varieties are more readily adaptable to a given geographic area.\textsuperscript{37} Requiring the farmer to bear the loss from "the failure of a risky but potentially harvestable seed type recognizes farming realities."\textsuperscript{38} The farmer controls the crop and the method of its planting. In practicing his profession, he must familiarize himself with the seed he plants and variables such as weather, time of planting, soil conditions, and his own skills, all of which directly affect seed yield.\textsuperscript{39} The individual farmer must use his skill and judgment to choose the seed he believes will result in the most successful yield in light of the numerous variables determining yield. If the seed he

\textsuperscript{31.} Id. at 1292-93.
\textsuperscript{32.} Id. at 1293.
\textsuperscript{33.} Id.
\textsuperscript{34.} Klein v. Asgrow Seed Co., 246 Cal. App. 2d 87, 92, 54 Cal. Rptr. 609, 612 (1966) (liability was based upon the violation of implied and express warranties and upon misrepresentation made to the buyer). \textit{See also} Agricultural Services, 614 F. Supp. at 682.
\textsuperscript{35.} "Rogues" is synonymous with "off-type", "off-brand", "off-grade" and "mongrel." \textit{Klein}, 246 Cal. App. 2d at 91 n.1, 54 Cal. Rptr. at 612 n.1.
\textsuperscript{36.} Klein, 246 Cal. App. 2d at 98, 54 Cal. Rptr. at 619.
\textsuperscript{38.} Crawford, 614 F. Supp. at 688.
\textsuperscript{39.} Id.
purchases has a reasonable potential for a good yield, whether production is maximized often is dependent on the panoply of choices the farmer makes in the cultivation process.\textsuperscript{40}

Sometimes nonconforming seed cases are pursued under a violation of good faith argument.\textsuperscript{41} Farmers can allege that a seedman exercised unconscionable conduct in selecting and recommending inappropriate seeds.\textsuperscript{42} U.C.C. section 1-203 states that every contract or duty set forth under the U.C.C. imposes an obligation of good faith in its performance or enforcement. A successful plaintiff must establish a lack of good faith on the part of the seedman regarding the seed selection process, or show a failure to deal fairly with the farmer-consumer, as well as the farmer's reasonable reliance on the seedman's inappropriate conduct. When a farmer who has the necessary information about seed types selects one particular type, his affirmative, informed, volitional action precludes reliance on a seedman's selection or recommendation. In this situation, a cause of action based on a violation of good faith does not arise.\textsuperscript{43}

A material misrepresentation, constituting actual fraud, may give rise to a tort action for deceit. The essential allegations of an action for deceit are: (1) the defendant made the representations; (2) he knew at the time the representations were false or made them with the equivalent of such knowledge; (3) he made the representations with the intention and purpose to deceive the plaintiff; (4) the plaintiff relied upon the representations; and (5) the plaintiff sustained the alleged loss and damage as the proximate result of the false representations having been made.\textsuperscript{44}

\textsuperscript{40} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
In *F. H. Woodruff and Sons v. Brown*, a seedman misrepresented that he grew, rather than merely distributed, a particular variety of onion seed. Since onion seed varieties are virtually indistinguishable by visual examination, some farmers deem it good practice to buy seeds from a grower whom they know, rather than from a seed dealer. Thus the plaintiff stated that if he had known the defendant was not the seed producer, he would not have made the purchase. The seeds provided, while of adequate quality, were not the requested variety. This was an adequate basis for a cause of action founded on a fraudulent misrepresentation of a present, existing fact—that the defendant grew the seed. Warranty disclaimer clauses and damage limitations in the contract provided no escape from the legal consequences of the deceit.

**B. Disclaimers of Express and Implied Warranties**

Plaintiffs often allege breach of express or implied warranty as a cause of action for nonconforming seeds. In response, seedmen have traditionally relied on limited warranties, warranty disclaimers, and limitations on damages to avoid or reduce liability. While in the past courts have often upheld such contractual clauses when well drafted, judges are now increasingly receptive to equity arguments as an appropriate basis to nullify contractual warranty and damage limitations.

Under the Uniform Commercial Code, an express warranty by the seller can be created by:

(a) Any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain, such that the goods must conform to the affirmation; and

(b) Any description of the goods that is made part of the basis of the bargain, such that the goods must conform to the description.

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45. 256 F.2d 391 (5th Cir. 1958).
46. *Id.* at 392.
47. *Id.*
48. *Id.* at 393.
49. *See infra* notes 50-55 and accompanying text.
52. U.C.C. § 2-313(1) (1977). Additionally, an express warranty can be cre-
It is virtually impossible to disclaim express warranties mandated by federal and state seed labeling laws. Consequently, as a marketing practice, express warranties conforming to statutory

ated by a sample. See Stumler v. Ferry-Morse Seed Co., 644 F.2d 667 (7th Cir. 1981) (a brochure, listing various types of tomato seed varieties and depicting certain characteristics of the fruit each tomato seed would produce, created express warranties as to the type and quality of the seed); Agricultural Services, 551 F.2d 1057 (court disregarded seller's contention that delivery of defective seeds was in conformance with past orders because the past orders were samples. Sale by description or sample requires that the seed conform to the description or the sample. Past descriptions or samples must be the result of and conform to a mutual agreement); Jones v. Barteldes Seed Co., 192 F.2d 125 (6th Cir. 1951) (description of goods in a telephone conversation created express warranty of description); Dessert Seed Co. v. Drew Farmers Supply, Inc., 248 Ark. 858, 454 S.W.2d 307 (1970) (seed grower certified on tags, as required by Arkansas law, that the bag contained Pink Slipper variety and therefore an express warranty on the contents of the bag was created on which the buyer was allowed to place the utmost reliance); Walcott & Steele, Inc. v. Carpenter, 246 Ark. 93, 436 S.W.2d 820 (1969) (as a matter of law, germination certificates on tags attached to bags of cotton seed as required by Arkansas law created a warranty by the seller who caused the tags to be attached, that the contents were as stated thereon within reasonable and recognized tolerances. The warranty was subject to the time limit set out in the applicable state regulations); Nezperce Storage Co. v. Zenner, 105 Idaho 464, 670 P.2d 871 (1983) (seller's representation that seed was spring wheat, not winter, created express warranty); Warren v. Joseph Harris Co., 67 N.C. App. 687, 313 S.E.2d 901 (1984) (evidence was sufficient for a jury to find that seller of cabbage seed made an "affirmation of fact or promise", that such affirmation related to the goods, that the representations became "part of the basis of the bargain", and that the goods did not conform to the affirmation or promise. The issue of the existence of an express warranty precluded a directed verdict for defendant); Farmers Union Cooperative Gin v. Smith, 9 U.C.C. Rep. Serv. (Callahgan) 823 (Okla. App. 1971) (label on bags describing seeds as "Sorghum Sundangrass Hybrid" created an express warranty that the seeds would conform to expectations normally associated with this type of plant); Albin Elevator Co. v. Pavlica, 649 P.2d 187 (Wyo. 1982) (defendant's oral confirmation and verification of the transaction by signing a sales ticket which said "spring wheat" created an express warranty). But see Bickett v. W.R. Grace & Co., 12 U.C.C. Rep. Serv. (Callahgan) 628 (W.D. Ky 1972) (defendant's product manual stated that one type of seed was of "a pure single cross, excellent yield in area of adaptation, ability to use high levels of fertility and available moisture, superior standability." Another variety was described as possessing "very good standability, can stand high population under adequate fertility program, good blight tolerance, high test weight." The court found these statements to be merely the seller's opinion or legally permissible puffing); Pioneer Hi-Bred Int'l, Inc. v. Talley, 493 S.W.2d 602 (Tex. Civ. App. 1973) (no express warranty created when farmer did not rely on seed producer's brochure advertisements because his source for the seed information was a retail dealer who was not an agent or representative of the producer).
branding requirements may be desirable even from the seedman's perspective because they entail little or no additional liability.\footnote{53}{J. MANWELL & S. STORY, SEEDMAN'S WARRANTIES AND DISCLAIMERS 10 (1983); Walcott & Steele, Inc. v. Carpenter, 246 Ark. 95, 436 S.W.2d 820 (1969).}

Unless appropriately excluded or modified, 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.\footnote{54}{U.C.C. § 2-314(1) (1977). See, e.g., Fred J. Moore, Inc. v. Schinmann, 40 Wash. App. 705, 700 P.2d 754 (1985). For an implied warranty of merchantability, one must deal in goods of the kind; a single transaction will not suffice. The definition of a merchant is more narrowly construed under § 2-314 than § 2-104. Whether a farmer is a merchant under the U.C.C. is a question of fact unless the facts are undisputed. Where farmers of mint for mint oil made one sale of mint roots to another mint farmer, the sellers were not merchants for purposes of breach of the implied warranty of merchantability and thus no warranty was created. See also Nezperce Storage Co. v. Zenner, 105 Idaho 464, 670 P.2d 871 (1983) (determination of whether farmers were "merchants" was irrelevant to recovery of consequential damages for breach of the express warranty. Section 2-313(1) provided that express warranties were given because the farmers were sellers. But a finding that farmers are "merchants" is a prerequisite to relief under § 2-314.)}

Goods to be merchantable must be at least such as:
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the [contract] 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
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to any promises or affirmations of fact made on the container or label, if any.\footnote{55}{U.C.C. § 2-314(2) (1977). See Bickett v. W.R. Grace & Co., 12 U.C.C. Rep. Serv. (Callaghan) 679 (W.D. Ky. 1972) (there was no warranty of good yield or warranty against disease in the sale of seed); Hagert v. Hatton Commodities, Inc., 350 N.W.2d 591 (N.D. 1984) (attaching a tag labeled "certified seed" to a bag of seed is a warranty); see also Agricultural Services, 551 F.2d 1057; L.A. Green Seed Co. v. Williams, 246 Ark. 454, 438 S.W.2d 717 (1969).}

warranty that the goods shall be fit for a particular purpose arises where the seller at the time of contracting had reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.\textsuperscript{57} When seeds are sold, there arises an implied warranty that the seed will appropriately grow, develop, and produce. Seed that is incapable of engendering healthy plants is not fit for its intended use.\textsuperscript{58}

Disclaimers of implied warranties are permissible under the Uniform Commercial Code.\textsuperscript{59} To exclude or modify the implied warranty of merchantability, the language must mention merchantability and in the case of a writing, must be conspicuous because the bacterially diseased bean seeds had a general reputation in the trade as being disease free); Asgrow Seed Co. v. Gulick, 420 S.W.2d 438 (Tex. Civ. App. 1967) (knowledge that the sellers limited their liability with terms and conditions on products and orders, was imputed to the buyers of sorghum seed and therefore incorporated into the contract by implication). \textit{Cf.} Williams v. Ring Around Products, Inc., 344 So. 2d 1125 (La. Ct. App. 1977) (defendant seed processor's testimony that limitation of warranty to the purchase price of seed was customary in the industry was insufficient to establish warranty because farmer testified that there was no such limitation on the seed when purchased); Mallory v. Conida Warehouse Inc., 134 Mich. App. 28, 350 N.W.2d 825 (1984) (implied warranty was not waived by buyers by trade usage since there did not exist a mutual understanding between seed growers and farmers).

\textsuperscript{57} U.C.C. § 2-315 (1977). \textit{See} Agricultural Services, 551 F.2d 1057. \textit{See also} Crawford, 614 F. Supp. 682 (variety of seed sold was not recommended for Florida area, but held merchantable under § 2-314 because other farmers had used it successfully in plaintiff's locality and it was fit for ordinary purpose of growing wheat with the potential for a normal economic yield. Additionally, seller was never asked to advise a certain type of seed; this seed was requested by the farmer). \textit{See also} Warren v. Joseph Harris Co., 67 N.C. App. 687, 313 S.E.2d 901 (1984); Fletcher v. Coffee County Farmers Cooperative, 618 S.W.2d 490 (Tenn. App. 1981).


\textsuperscript{59} \textit{See generally} Annotation, Construction and Effect of U.C.C. § 2-316(2) Providing That Implied Warranty Disclaimer Must be "Conspicuous", 73 A.L.R. 3d 248 (Supp. 1986). Typical disclaimers and limitations of obligations of a sale are not favored and are strictly construed against the seller. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). If the bargain has been completed, a seller's disclaimer at the time of delivery of the goods is ineffective, though it is printed on labels or other documents. Klein, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966) (disclaimer ineffective on invoices and containers); Pennington Grain & Seed, Inc. v. Tuten, 422 So. 2d 948 (Fla. 1982) (disclaimer inva-
A conspicuous writing is also necessary to exclude or modify an implied warranty of fitness. All implied warranties can be excluded by expressions like "as is", "with all faults", or other language that in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there are no implied warranties. A pattern of dealing or course of performance or a trade usage can also be a basis to exclude or modify implied warranties. However, usage of trade is not established merely by

60. See Dessert Seed Co., 248 Ark. 858, 454 S.W.2d 307 (disclaimer held inconspicuous because it omitted the word "merchantability" and only the seed type was capitalized); Mallory v. Conida Warehouses, Inc., 134 Mich. App. 28, 350 N.W.2d 825 (1984) (disclaimer containing the word "merchantability" held inconspicuous because of stylistic ambiguity); Zicari v. Joseph Harris Co., 33 A.D.2d 17, 304 N.Y.S. 918 (1969) (omission of the word "merchantability" held inconspicuous); Walter Baxter Seed Co. v. Rivera, 677 S.W.2d 241 (Tex. Civ. App. 1984) (disclaimer and limitation of remedies, both in small print adjacent to laudatory language held inconspicuous).


63. U.C.C. § 2-316(3)(c) (1977). An examination of goods can also serve as a foundation for exclusion or modification of implied warranties, U.C.C. § 2-316(3)(b). See also Nakanishi v. Foster, 64 Wash. 2d 647, 393 P.2d 635 (1964) (fifteen-year history of transactions between buyers and seller, in which disclaimers were attached to all bags and found on all orders and invoices, precluded recovery by buyers, although they had not signed contract with disclaimer or read invoices or tags which contained disclaimers). Cf. Williams v. Ring Around Products, Inc., 344 So. 2d 1125 (La. Ct. App. 1977); Latimer, 149 Mich. App. 620, 386 N.W.2d 618 (general use of disclaimers in the trade did not preclude recovery where buyer did not read disclaimers subsequent to planting). See also Agricultural Services, 551 F.2d at 1066 (prior course of dealings and the usage of the trade modified implied warranties by tags).
showing that other sellers of seed use comparable exclusionary language in their conditions of sale and purchase orders.\textsuperscript{64}

C. Limiting a Buyer's Remedies

An agreement may provide for remedies in addition to or in substitution for those provided in the Uniform Commercial Code, and may limit or alter recoverable damages, such as limiting the buyer's remedies to return of the goods and repayment of the purchase price or replacement of nonconforming goods.\textsuperscript{65} To be effective, an exclusive or limited remedy must not fail of its essential purpose.\textsuperscript{66} Courts have voided disclaimers and limited remedies, (1) where the seller sought to exempt himself from liability resulting from his own negligence or intentional acts, or (2) where statutory law mandating a specific seed description created an express warranty that the seller sought to modify.\textsuperscript{67} Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. A limitation of consequential damages for a commercial loss is not prima facie unconscionable.\textsuperscript{68}

The official drafting committee comments to U.C.C. section 2-719 state that parties are free to shape remedies to particular requirements, and reasonable agreements limiting or modifying remedies are to be given effect. However, at least minimally adequate remedies should be available. If parties intend to conclude a sales contract they must accept the legal requirement of at least a fair quantum of remedy for breach. Thus, any clause that modifies or limits Uniform Commercial Code remedial provisions in an unconscionable manner is subject to deletion. In that event all available

\begin{itemize}
\item \textsuperscript{64} Zicari, 33 A.D.2d at 23, 304 N.Y.S. at 923.
\item \textsuperscript{67} See Walcott & Steele, Inc., 246 Ark. 95, 436 S.W.2d 820 (express warranty, created by certification tag as required by law, could not be modified); Pennington Grain & Seed, Inc. v. Tuten, 422 So. 2d 948 (Fla. Dist. Ct. App. 1982) (disclaimer and limitation of damages held ineffective because it was an un bargained for, unilateral attempt to limit defendant's contractual obligations); Mal ley v. Northfield Seed Co., 196 Minn. 129, 264 N.W. 573 (1936) (tag warranting seed purity could not be disclaimed).
\item \textsuperscript{68} U.C.C. § 2-719(3) (1977).
\end{itemize}
remedies are applicable as if the stricken clause had never existed. 69

Generally, the use of exclusions as defenses to claims for consequential damages based upon alleged latent defects in the product itself are considered unconscionable. 70 Often there is no means by which a farmer, with the naked eye and without the assistance of scientific examination, can discern whether a product will be effective. Discovery of a defect often must await crop development, by which time significant consequential damages may have arisen, caused by the passing of the planting season and large expenditures in cultivation. 71 Moreover, in the case of a latent defect, an exclusion limiting damages to purchase price recovery might constitute only an "illusory" remedy that represents no viable means of redress. 72 Clearly, in a situation where the latent defect is that seeds warranted to be of one type are in fact of a different but virtually indistinguishable variety, an exclusion of consequential damages in the context of crop deficiencies is unconscionable. 73

Relative bargaining power is also an appropriate consideration in determining unconscionability under the U.C.C. 74 Often a large national producer and distributor of seeds will deal with many independent, relatively small farmers. Respecting alternative supply sources, farmers are frequently confronted with a situation where seed distributors place disclaimers and exclusionary clauses in their contracts. Seeds can usually be obtained from alternative sources, but only on noncompetitive warranty terms. Moreover, seedmen often do not apprise the unadvised farmer of the fact that

73. Corneli Seed Co. v. Ferguson, 64 So. 2d 162, 165 (Fla. 1953).
contractual clauses can alter significant statutory and common law rights. A Michigan district court articulated the obligations that are required: "Before a contracting party with . . . immense bargaining power . . . may limit its liability vis-a-vis an uncounseled layman . . . it has an affirmative duty to obtain the voluntary knowing assent of the other party." 78

A party to a contract may not limit his liability for breach by a declaration extraneous to the contract, without the assent or knowledge of the other party. Furthermore, unless limitation of warranty language becomes a part of the sales contract, it does not limit recoverable damages. 76

In Pennington Grain and Seed, Inc. v. Tuten, 77 the seedman only warranted the soybean seed as described in the federally mandated labeling, with all other warranties disclaimed. The packaging was printed with a statement that liability was limited to purchase price recovery. The label also stated: "DO NOT PLANT THESE SEEDS . . . SHOULD THIS WARRANTY BE UNACCEPTABLE, BUT RATHER RETURN THE SEEDS FOR A REFUND OF THE PURCHASE PRICE." 78 The court invalidated the disclaimer/limitation language, finding that the farmer had no knowledge of such provisions at the time of contract, and that the farmer did not expressly accept such terms. 79 The court stated that warranty disclaimers are effective if the farmer knew about the non-warranty at the time the sale was made, with either direct or indirect proof of knowledge through evidence of trade custom or course of dealing, 80 Damage limitations are permissible if such statements constitute part of the agreement and are expressly consented to as an exclusive remedy. 81 However, even if a warranty

75. Martin, 767 F.2d at 301 (quoting Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 269 (E.D. Mich. 1976)).


77. 422 So. 2d 948 (Fla. Dist. Ct. App. 1982).

78. Id. at 949.

79. Id. at 951-52.

80. Id. at 951. See, e.g., Klein v. Asgrow Seed Co., 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966).

81. See Dessert Seed Co. v. Drew Farmers Supply, Inc., 248 Ark. 858, 454 S.W.2d 307, 308 (Ark. 1970); Agricultural Services, 551 F.2d 1057; Larsen v. A.C.
limitation has been brought to a buyer's attention and so made a part of the contract, the clause will not shield the seller from liability if it is contrary to public policy.82

In giving effect to damage limitations and modifications, courts have distinguished mislabeling cases from defective seed cases. In misbranded seed cases, limiting damages to recovery of the purchase price is contrary to public policy as established by state seed labeling legislation protecting farmers from the disastrous consequences of the sale and delivery of improperly labeled seed.83

Defective seed cases however, allow the seller more leeway in limiting his liability. If a remedy limitation or warranty exclusion/modification conspicuously appears in the sales contract, and the seeds are of the labeled variety with no other warranties, express or implied, a seller may limit his liability to recovery of the purchase price for such properly branded but allegedly defective seeds.84 Warranty exclusions and damages are arguably permissible where employed to prevent a seed producer/distributor from becoming an insurer of a farmer-customer's crop yields. Accordingly, a seedman may try to limit the buyer's remedies by disclaiming implied warranties. Although courts may hold ineffective the attempted disclaimers of implied warranty of seed variety, they may still uphold a disclaimer of implied warranty of quality. While growing conditions and cultivation practices have little or no effect on variety, they definitely influence quality and productiveness.

It is entirely reasonable to uphold a disclaimer or non-warranty clause in a case of variance in quality or productivity because the variance depends largely upon husbandry and weather.85 Conditions that are almost exclusively within the farmer's control or that constitute Acts of God are wholly beyond the control of the seed merchant. A producer of seeds will generally have no knowledge of field and weather conditions that will prevail when his product is utilized, and at most has only limited control over the manner in which seeds are planted. Because of the inherent uncer-
tainties in agricultural endeavors, and in view of the fact that limitations of warranty and liability are arguably appropriate if made part of the bargain between the parties, there is nothing unfair about giving effect to disclaimers.86

IV. PROOF OF DAMAGES

Recoverable damages in nonconforming seed situations vary according to the cause of action under which the farmer proceeds. Negligence and contract theories can be the basis for compensatory damages and lost profits. Suits alleging the tort of deceit or fraudulent misrepresentation can afford grounds for additional damages of a punitive nature.87

Pursuant to U.C.C. section 2-714(b), the measure of damages for breach of warranty is the difference between the value of the goods accepted and the value that the goods would have had if conforming to warranty,88 at the time and place of acceptance, un-

86. Id. at 577. A seed producer creates his warranty, express or implied, but is not guilty of fraudulent misrepresentation merely because the seed does not attain the represented germination rate. Mobil Chem. Co. v. Hawkins, 440 So. 2d 378, 382 (Fla. Dist. Ct. App. 1983) (dictum); Pennington Grain & Seed, Inc. v. Tuten, 422 So. 2d 948 (Fla. Dist. Ct. App. 1982); Corneli Seed Co. v. Ferguson, 64 So. 2d 162 (Fla. 1953);

87. Sugarland Indus., Inc. v. Falco, 360 S.W.2d 806 (Tex. Civ. App. 1962). To recover special or consequential damages in deceit and fraudulent misrepresentation actions, a plaintiff must prove his claim with reasonable certainty, and recovery is limited by “proximate cause” rules. D. DOBBS, REMEDIES, § 9.2, at 594 (1973). Punitive damages are permissible only where the fraud is gross, oppressive, or aggravated, or where it involves violation of trust or confidence. Id. at 607.

88. See, e.g., Gold Kist Inc. v. Williams, 174 Ga. App. 849, 332 S.E.2d 22 (1985) (award of $7,900 damages for breach of warranty supported by evidence of cost of peanut seed, extra work necessary to nurture the crop and the cost of the extra work); Brown & Cassidy Warehouse, Inc. v. Sills, 236 La. 713, 109 So. 2d 67 (1959) (difference in value between certified seed rice and actual value of rice at time of transaction); Peterson v. North American Plant Breeders, 218 Neb. 258, 354 N.W.2d 625 (1984) (when a crop is injured but not rendered worthless, the measure of damages is the difference between the value at maturity of the expected crop had there been no injury and the value of the actual crop that does not mature); Arigo v. Abbott & Cobb, Inc., 86 A.D.2d 958, 448 N.Y.S.2d 311 (1982) (damages were gross profit from the expected crop of onions less the bagging expense, and no deduction from the gross profit was made for germination and for variable germination because these variables were used in determining the average yield per acre); Rotello v. Ring Around Products, Inc., 614 S.W.2d 455 (Tex. Civ. App. 1981) (market value at probable yield of damaged quantity less the unincurred expenses of cultivating, harvesting and marketing the damaged portion).
less specific circumstances show proximate damages of a different amount.\textsuperscript{89} Furthermore, section 2-715(1) defines incidental damages that result from the seller's breach as "expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, and any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach."\textsuperscript{90} Consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements. Furthermore, such damages include the buyer's needs at the time of contracting which could not reasonably be prevented by cover. Finally, consequential damages include injuries to person or property proximately resulting from any breach of warranty.\textsuperscript{91}

In \textit{Albin Elevator Co. v. Pavlica},\textsuperscript{92} a farmer sued a seed distributor under negligence and warranty theories, alleging he had contracted for winter wheat seed, but instead got summer wheat seed that did not produce a crop. The court held that lost profits were a proper element of damages under the U.C.C. which can be recovered for breach of warranties.\textsuperscript{93} A plaintiff must prove such

\begin{footnotes}
\item[89] See, \textit{e.g.}, Klein v. Asgrow Seed Co., 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966) (where the breach of warranty resulted in large loss of tomatoes, damages were the difference between the present crop's reasonable market value and the value of the expected crop, less the necessary expenses for selling and raising the crop).
\item[90] U.C.C. § 2-715(1) (1977). See, \textit{e.g.}, L.A. Green Seed Co. v. Williams, 246 Ark. 454, 438 S.W.2d 717 (1969) (while the burden of proving extent of loss incurred by way of consequential damage is on the buyer in a breach of warranty action, loss may be determined by any manner which is reasonable under the circumstances); Peterson v. North American Plant Breeders, 218 Neb. 258, 354 N.W.2d 625 (1984) (plaintiff was not entitled to recover prejudgment interest where loss of the use of proceeds from the sale of plaintiff's crop as a result of damage to the crop caused by defective seed was not a foreseeable injury proximately caused by breach of warranty so as to allow recovery of prejudgment interest as consequential damages).
\item[92] 649 P.2d 187 (Wyo. 1982).
\item[93] Id. at 191. See, \textit{e.g.}, Larsen v. A.C. Carpenter, Inc., 620 F. Supp. 1084 (E.D.N.Y. 1985) (lost profit award to farmers' organization for breach of implied warranty of merchantability with respect to shipment of potatoes could not be granted in full. Because some farmers planted substitute crops, lost profits were reduced by estimated thirty percent presumed to have been earned); Gold Kist, Inc. v. Massey, 609 S.W.2d 645 (Tex. Civ. App. 1980) (action brought pursuant to Deceptive Trade Practices Act for breach of warranty supported finding that failure of seed to be 80 percent germinating caused farmer to lose net profits of $7,500 in one year).
\end{footnotes}
loss with a reasonable degree of certainty through the use of the best available evidence, with the specific requisite evidence varying with each particular case.\(^94\) While the best proof available is mandated, absolute certainty need not be established to recover loss of future profits. The nature of farming is such that income is dependent upon the numerous variables present during any crop year, with each planting exemplifying to some extent the characteristics of a new venture. Accordingly, proof of future profits is often difficult due to potentially speculative elements that must be subjected to close scrutiny.\(^95\)

In *Pavlica*, the farmer did not have extensive experience cultivating spring wheat. Seeking to establish lost profits, he relied on the testimony of a neighboring farmer as to yields and crop values under comparable weather conditions on farms similar to his.\(^96\) However, no evidence was produced to establish similarity of the neighboring farm with the plaintiff farmer's acreage regarding specific elements such as soil type, nutrients, and cultivation.\(^97\) To recover lost profits, a farming operation's profitability must be demonstrated.\(^98\) Here, the farmer failed to offer records of past yields to establish a profitability pattern, such that under the existing conditions, a profit could reasonably have been anticipated except for the breach.\(^99\)

The dissenting opinion in *Pavlica* set forth the rationale for allowing lost profits. Proof is sufficient if there is evidence from which a reasonable estimate of damages may be formulated.\(^100\) Loss determination can be based on whatever rule is best suited for demonstrating damages, and a party prevailing on the merits should be afforded every favorable inference that may reasonably and fairly be drawn from damage evidence.\(^101\) The plaintiff's evidence was unrefuted, the neighboring farmer established that the plaintiff followed good farmer-like practices, and the weather was

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96. *Id.* at 193.

97. *Id.*

98. *Id.* (citing White v. Oregon Horticultural Supply, 40 Or. App. 323, 594 P.2d 1321 (1979)).

99. *Id.*

100. *Id.* at 194.

101. *Id.* (citing Douglas Resevoirs Water Users Ass'n v. Cross, 569 P.2d 1280 (Wyo. 1977)).
DAMAGES IN NONCONFORMING SEED CASES

favorable. While no two plots have identical productive capacity, and varying weather, soil, water availability, and cultivation affect production, the evidence introduced indicated that the plaintiff would have produced an average crop with appropriate seeds. Consequently, the dissent maintained that in estimating damages, evidence of the productivity and value of like crops in the same vicinity should have been competent.

A U.C.C. interpretation similar to the Pavlica dissent was employed in Farmers Mutual Exchange v. Dixon. The rule against recovery of vague, speculative, or uncertain damages relates primarily to ambiguity of the cause, rather than ambiguity of the measure or extent of damages. Mere difficulty in fixing an exact damage amount, where the loss proximately flows from the injury, does not constitute a legal obstacle to recovery, where the amount of recovery is within that quantity authorized with reasonable certainty by the evidence submitted. A farmer should establish a comparison with the same crop grown under comparable soil quality, cultivation techniques, planting schedule and weather. Recognizing the nature of such proof, Corbin, in his contracts treatise, concludes that:

It is not possible to state the precise degree of certainty required for the recovery of profits as damages for breach of contract. If the mind of the court is certain that profits would have been made if there had been no breach by the defendant, there will be a greater degree of liberality in allowing the jury to bring in a verdict for the plaintiff, even though the amount of profits prevented is scarcely subject to proof of all. In this respect, at least, doubts will generally be resolved in favor of the party who has certainly been injured and against the party committing the breach. The trial court has a large amount of discretion in determining whether to submit the question of profits to the jury; and when it is so submitted, the jury will also have a large amount of discretion in determining the amount of the verdict.

Two rules have developed for damages resulting from noncon-

102. Id. at 193-94.
103. Id. at 194.
104. Id. at 194-95. See, e.g., Walter Baxter Seed Co. v. Rivera, 677 S.W.2d 241 (Tex. Ct. App. 1984).
106. Id. at 125-26. See also Hawthorne Indus. v. Balfour MacLaine Int'l, 676 F.2d 1385, 1388 (11th Cir. 1982).
forming seeds. Where seeds are of such quality that no crop is produced, the restrictive rule applies so that lost profits are not allowed.108 Recoverable damages are limited to actual outlay, such as the price paid for the seed, the expense of preparing the soil (less general benefit such cultivation might render land), planting expenses, and the loss sustained from having land lie idle for a period of time.109 The liberal rule is applied where defective seed sprouts and produces a crop that is inferior in quality and value to the crop that would have been produced under the same circumstances had the seeds been of contract quality.110 The measure of damages is the market value of the crop that would have been produced had the seed been as represented, less foregone expenses of raising, harvesting and marketing and less the crop salvage value.111 Lost profits are easily ascertainable because the trier of fact merely evaluates the difference in value between the inferior crop and the value of the crop that would ordinarily have been produced under the same circumstances if appropriate seed had been supplied.112 The loss would not be conjectural and the damages would not be unduly speculative or beyond the contemplation of the contracting parties.113

Under any damage assessment, consideration must be given to the precious time that is expended in producing a crop. A crop failure may often result in the loss of a season or even a year. Recompense for such a loss traceable to nonconforming seed should arguably be afforded the farmer.114

While the ordinary damage for warranty breach is the difference between the actual value of the articles sold and their value if they had conformed to warranty, additional damages may be recoverable. Such damages must have been reasonably contemplated by the contracting parties as a probable result of a breach. Accordingly, special damages naturally resulting from a breach of war-

109. Id.
110. See supra notes 88-89 and accompanying text.
111. Ford, 136 Tenn. at 290, 189 S.W. at 369. See also Vaughan's Seed Store v. Stringfellow, 56 Fla. 410, 48 So. 410 (1909).
112. See supra notes 92-93 and accompanying text.
ranty as to quality or kind of seeds sold are recoverable.\textsuperscript{115} Where a warranty breach concerns the kind of seed sold, and the crop raised is inferior to the crop that would have resulted had the seeds been as warranted, the buyer is entitled to recover the difference between the value of the crop cultivated and the crop value that ordinarily would have resulted from conforming seed.\textsuperscript{116}

In Farmers Union Cooperative Gin \textit{v. Smith},\textsuperscript{117} the seller breached warranties that pasturage seed was a variety that would produce plants capable of continued growth after grazing. Due to insufficient pasturage attributable to nonconforming seed, the farmer-consumer had to sell his cattle when they were lighter in weight than they would have been if the pasture had continued to bear as represented.\textsuperscript{118} The court allowed the plaintiff to recover his lost profits.\textsuperscript{119}

The basic tests for proof of lost profits are generally uniform among various jurisdictions. The principal cause for diversity of opinion is attributable to the application of the general proposition that damages may not be appropriately awarded on a basis of speculation and conjecture.\textsuperscript{120} Decisions apparently in conflict are often reconcilable by distinguishing facts pertaining to reasonable certainty of proof of loss.\textsuperscript{121}

Where germinating qualities of a seed are seriously defective but the seed grows to a sufficient extent to prompt a farmer to care for and harvest the crop produced, the loss can best be ascertained by comparing the crop produced with the one that would in all reasonable probability have grown and matured had the seed grown properly.\textsuperscript{122} The recovery equation is sometimes formulated as gross probable gains minus expenses.\textsuperscript{123}

\begin{align*}
\textsuperscript{115} & \text{Henderson} \text{ v. Berce, 142 Me. 242, 253, 50 A.2d 45, 50 (1946).} \\
\textsuperscript{116} & \text{Id.} \\
\textsuperscript{117} & \text{9 U.C.C. Rep. Serv. (Callaghan) 823 (Okla. App. 1971).} \\
\textsuperscript{118} & \text{Id. at 825.} \\
\textsuperscript{119} & \text{Id. at 826.} \\
\textsuperscript{120} & \text{Gore v. George J. Ball, Inc., 279 N.C. 192, 208, 182 S.E. 2d 389, 398 (1971).} \\
\textsuperscript{121} & \text{Id. at 208, 182 S.E.2d at 398.} \\
\textsuperscript{123} & \text{Kitchens v. Lowe, 139 Ga. App. 526, 531, 228 S.E.2d 923, 927 (1976).}
\end{align*}
In *Hanson v. Funk Seeds International*, the plaintiff sued the seed supplier on a warranty theory, alleging that the defective seeds he planted produced underdeveloped corn. Evidence was presented by an agronomist that the plaintiff's fields had no injury attributable to disease, insects, insecticide, herbicide, mechanical processes, or fertilizer problems and that the soil had high fertility and sufficient water. Furthermore, the plaintiff's other fields developed naturally when planted with nondefective hybrid seed at about the same time as the acreage in question, and farmed under the same cultivation practices. The defendant alleged the crop failure was due to heat stress and inadequate moisture. A sufficient foundation was laid for testimony concerning yields on comparable fields. Although the plaintiff's burden of proof required a showing that a defect existed when the product left defendant's control, the court found that no specific defect need be shown if the evidence, direct or circumstantial, permits an inference that the problem was caused by the defect. A defect may appropriately be inferred from proof that the product did not perform as intended by the manufacturer.

To prove damages, evidence must be presented establishing that comparison fields are of the same soil composition, cultivated under the same procedures, planted at about the same time with the given type seed, irrigated in a like manner, and located within the same vicinity. Here, the evidence demonstrated, either directly or by permissible inference, that the corn was defective in its performance or that it otherwise failed to conform to warranty. There was no evidence that the purchased seed was improperly tampered with or otherwise exposed to any elements that would alter its condition. The court held that the plaintiff need not show that the defendant created the defect, but only that the defect existed when the defendant controlled and distributed the product.

124. 373 N.W.2d 30 (S.D. 1985).
125. *Id.* at 32.
126. *Id.*
127. *Id.* at 35.
128. *Id.* at 33. See also cases cited in *Osborn v. Bendix Home Sys., Inc.*, 613 P.2d 445, 448 n.7 (Okla. 1980).
129. *Hanson*, 373 N.W.2d at 33.
130. *Id.* at 35.
131. *Id.* at 32-33.
The dissent in *Hanson* would have found the damage award erroneous.\textsuperscript{133} To recover with mere proof of poor results would require an improper inference by the trier of fact that a defect existed, along with a subsequent inference that the defect caused the injury.\textsuperscript{134} A plaintiff should not be allowed to prove his case by basing inference upon inference.\textsuperscript{135} Here, evidence was presented furthering an assumption that a defect must have existed in the seed because other factors needed to grow the crop seemed satisfactory. In conjunction with the inference that the seed was defective, plaintiff advanced that the seed caused the economic loss.\textsuperscript{136} Permitting recovery based on a chain of inferences was unacceptable, and forced the trier of fact to indulge in guess work, speculation, and conjecture.\textsuperscript{137}

In *Morehead v. Minneapolis Seed Co.*,\textsuperscript{138} the farmer brought an action alleging breach of warranty and seeking lost profits because the total crop failed to germinate. Where no germination has occurred, damages are the cost of the seed, plus planting expenses and the value of the use of the land, less any rental value remaining at the time the seeds failed to sprout.\textsuperscript{139} The court emphasized the need for a damage measure that allows actual compensation for breach while remaining free of uncertainty, conjecture, or contingency.\textsuperscript{140} When damages are computed upon consideration of the value of land use, uncertainty of crop results is eliminated. *Reiger v. Worth Co.*,\textsuperscript{141} supports the proposition that where seeds fail to germinate, appropriate damages are the amount paid for the seed, the amount expended in soil preparation, planting, sowing, and a reasonable rent for the land.

Proof of damages often entails certain pragmatic difficulties. In *Iuliucci v. Rice*,\textsuperscript{142} a farmer purchased a quantity of seed that failed to conform to contractual standards of quality and variety.
Damages were alleged for loss of the entire crop, labor and services, lost profits, and expenses in preparing and cultivating the soil.\(^\text{143}\) Recovery was not allowed, the court holding that the evidence presented failed to provide a basis for computing damages.\(^\text{144}\) There was no proof that the seed ordered would have produced a better crop on his land, and he had never previously attempted to grow that type of crop. In the absence of proof that the seed ordered would have produced a larger crop on the particular field, there was no basis for a claim that the seed was the cause of crop failure.\(^\text{145}\) Moreover, no evidence was offered as to the crop market, and the probable cost of marketing.\(^\text{146}\)

Markets for certain crops vary considerably from time to time, so an assumed market value for a theoretical portion of a potential crop must not constitute an unduly liberal estimate. The saying "There's many a slip 'twixt cup and lip" is especially relevant to farming operations. Many factors may cause a complete reversal of expected profits: water, farming practices, irrigation timing, the nature of the harvest, transportation systems and marketing conditions. Crop production requires certain expenditures, and it is not uncommon for some farmers to operate at net losses for certain years. A plaintiff must establish in great detail a sufficient basis for the reasonable ascertainment of the damage amount, including proof of such elements as actual yield, probable yield and the projected crop value at marketing. Lost profit recovery requires a demonstration of probable gain with considerable specificity as well as a showing of the various expenses incurred in realizing profits. Consequently, some courts are careful not to be overly optimistic in calculating the reasonable market value of a theoretical crop.\(^\text{147}\)

In many jurisdictions, to recover damages, a farmer must not be contributorily negligent, assume the risk, or fail to mitigate damages.\(^\text{148}\) If a farmer plants nonconforming seeds with full knowledge of the seed type, condition, and quality, the cultivation constitutes an independent act that is an intervening, immediate,
and operating cause of the resulting damage. The plaintiff cannot recover for crop failure in such an instance, and the measure of damages is limited to the difference in value between the seed received and seed conforming to the contract. Furthermore, to recover damages, a farmer must properly plant the seeds and appropriately prepare the soil for cultivation. However, a farmer is not deprived of all damages because he neglects to diminish his loss by replanting. The award would be limited to ordinarily recoverable damages less the amount by which appropriate mitigation would have reduced the loss.

V. PRACTICAL CONSIDERATIONS FOR A FARMER’S ATTORNEY

When a client presents a nonconforming seed situation, the attorney must promptly investigate the origin, sorting, packaging, labeling, shipment, storage, and planting of the seed. Seedmen’s germination tests only estimate development potential under almost ideal laboratory conditions. Yet no matter how great the germination value, in an adverse environment no development will occur. Moreover, standard tests are often conducted several months prior to planting. Thus, potential evidentiary sources must be actively pursued to avoid reliance on speculative assertions.

A farmer’s lawyer might introduce seed vigor tests into evidence. Vigor tests are intended to estimate or project seed performance under stress conditions comparable to the cultivation environment. Seedmen groups, such as the American Seed Trade Association, have taken the position that vigor tests are not scientifically established as reliable stress tests correlated with field performance. Arguably such tests are not standardized or objective and do not produce results which are uniform or capable of duplication. Moreover, some courts have rejected vigor results where expert testimony indicated such testing was unreliable or useless. Nevertheless, some seedmen are utilizing vigor tests with greater frequency, and seedmen groups have promulgated stan-

150. Kalmbach-Burckett Co. v. Hardeman, 150 So. 460, 461 (La. Ct. App. 1933). This includes planting the seeds during the correct season.
151. Casper v. Frederick, 146 Minn. 112, 177 N.W. 936 (1920).
dardized testing procedures uniform within the industry, should producers wish to employ vigor examinations. Although no vigor tests are required by law, a customary industry practice is to test corn. Moreover, seedmen are increasingly receptive to vigor testing soybean seeds.154

The state or federal Department of Agriculture Plant Industry Division Seed Laboratory can test samples for vigor germination and identity. Test results might also be obtained from seedmen through discovery. If possible, various lots should be analyzed, including original samples and like seeds in the custody of the seedman and farmer. Efforts should be made to ascertain the exact seed identity and quality at various stages of possession by the parties. In this regard, a seedman’s quality control procedures are especially pertinent. Inquiry with the seed consumer can help determine quality level when initially purchased as well as possible farm storage deterioration and the effects of planting techniques on germination. County extension agents, familiar with local soil and weather conditions, can be utilized to evaluate strand problems. Field examination can assist in determining if poor development should be attributed to localized conditions rather than defective seeds.

Often where problems can be isolated in different areas of a field, and the same seed lot has been planted throughout the acreage, strand difficulties are most appropriately attributed to soil variability. However, where different seed lots are utilized, a definite pattern to strand development may indicate defects due to a specific lot. When weeds are found “in the drill”, that is, within the row planted by the drill rather than “outside the drill” or between the rows, seeds probably are contaminated. Moreover, when particular weeds are readily present outside a cultivated field, the land

154. AM. SEED TRADE ASS’N, Seed Vigor: A Position Paper by the American Seed Trade Association, (adopted July 2, 1981). There are three basic types of vigor tests. An accelerated aging test, conducted under warm, humid conditions, seeks to speed up seed development. The life of the seed is thereby expended to some extent. Then germination is tested. The cold test involves planting seeds in nonsterilized soil to simulate cultivation under cool temperatures, with a subsequent survivorship evaluation. Both accelerated aging tests and cold tests are intended to determine the rate of demise for weak seeds encountering extreme temperatures. In a third examination, the biochemical or TZ test, seeds are allowed to absorb moisture overnight, with temperatures favoring germination. Before germination occurs, the seeds are soaked in a chemical that will change colors in the presence of cell enzyme activity. If seeds are dead, no color change occurs.
perhaps has already been contaminated prior to the planting of the allegedly nonconforming seed.\textsuperscript{165}

VI. CONCLUSION

While the general damage rules employed in nonconforming seed cases are fairly uniform among various jurisdictions, ad hoc applications of such legal principles are the primary factor influencing recovery. Especially for lost profits awards, a plaintiff must thoroughly establish a history of successful and profitable cultivation of the given crop under conditions approximating as closely as possible those factors present in the crop year when the nonconforming seeds are utilized. Agricultural stabilization and conservation service acreage records showing past production are useful in establishing an accurate yield history. A very comprehensive demonstration comparing yields among comparable fields, cultivated utilizing similar farming practices, transportation, harvesting and marketing, will likely preclude the possibility of a finding that lost profits and compensatory damages are unduly speculative or otherwise inappropriate.

\textsuperscript{155} See supra note 4.