



Stockman's Liability and the Changing Livestock Genetics Market

BY A. BLAIR DUNN





In a rapidly changing livestock genetics market, lawyers and others involved in the industry need to educate themselves and act responsibly with regard to genetic transactions. Because animals are valued for both their outward appearance and bloodlines, livestock transactions can showcase genetics at its best or worst. In best-case scenarios, the sale of good genetics can lead to substantial profit for producers and great products for consumers. In worst-case scenarios, poor genetics can result in loss of economic value, loss of reputation, and even loss of livestock. These worst-case scenarios generate additional undesirable consequences, such as bad blood, monetary losses, and litigation. Stockmen and their lawyers need to be aware of warranties, both express and implied, and the effects that genetic disease and testing may have on shifting liabilities.

Legal Significance for Stockmen

Until 100 years ago, genetic issues were present but not prevalent. When a stockman shook your hand and told you that a mare, ram, cow, or boar was “sound” and described the animal’s parentage, it followed that the animal would serve the normal purpose associated with those bloodlines. These transactions were considered explicit and complete. If nothing was said of soundness or suitability, there was a good chance no warranties or other promises were present. The legal doctrine, known as *caveat emptor* or “buyer beware,” died out (except perhaps in real estate contracts).¹ The risk associated with such a transaction normally rested with the purchaser, unless there was a specific risk assumed by the seller.

In recent years, a greater understanding of what might be called hidden or latent defects in the DNA of livestock has been achieved. Laws governing commercial transactions in genetic materials of livestock have become statutory or codified to some extent in all 50 states.

Laws Governing Livestock Transactions

Livestock sales constitute a sale of goods, and the sale of goods is governed by statutes, specifically, the Uniform Commercial Code (UCC). The UCC has been adopted in 49 states as the governing law concerning sales, contracts, warranties, liability, and damages.² “Goods” under UCC §2-105 (1) are “all things (including specially manufactured goods) that are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8), and things in action. ‘Goods’ also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty.”

Livestock, as well as the genetic materials derived from them, are goods subject to the UCC or Louisiana’s Civil Code.³ The precursor to UCC Article 2 was the Uniform Sales Act promulgated by Uniform Law Commissioners in 1906. UCC Article 2 was itself promulgated in 1951 and began to be widely adopted only in the 1960s. It has the effect of shifting the burden of risk, should something go wrong, from the purchaser to the seller. When examining livestock, either the actual animal in the context of sale on the basis of that animal’s genetics or its genetic products, the UCC plays a determinable role in the formation of warranties and in damages associated with breach of those warranties. The general principle of the law of warranty is

to determine what the seller intended to sell and what the purchaser intended to buy. When dealing with genetic materials, the relevant law is the UCC express and implied warranties.

Express Warranties

Under the UCC, a seller creates an express warranty of genetic materials in the following ways:

1. any affirmation of fact or promise by the seller to the buyer concerning some “genetic good” that is the basis of the bargain;
2. any description of the “genetic goods” that is the basis of the bargain; and
3. any sample or model that is made as the basis of the bargain.⁴



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Under §2-313 “it is not necessary to the creation of an express warranty that the seller use formal words such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to make a warranty.” This means that warranties may be created in unintended ways, and it is important for a seller to be aware of the consequences of his or her words.

So what does an express warranty mean to a livestock seller or buyer in terms of today’s genetics? For example, there is a substantial increase in the price attributable to the sire of the bull and the genetic traits that are associated with the sire. It may be assumed that the genealogy of that bull, if the seller represented it, would be an express warranty provided that the description of the bull’s sire was a part of the basis of the bargain. If it is later found that that the bull’s parentage was represented incorrectly, a breach would have occurred. In similar circumstances, the court following Louisiana law analogous to the UCC in *Palmer Ranch Co. v. Campesi*⁵ held that a reduction in price was appropriate when it was proven that about 24.4 percent of the bloodlines associated with the herd were not as the seller had represented them.⁶

Express warranties can be a powerful tool both for the buyer and the seller of livestock. They can be strong selling or buying points, but care should be given to ensure that the warranties are accurate. However, the aspects of implied warranties are not quite as straightforward.

Implied Warranties

Implied warranties are not based upon express undertakings by a seller, rather they result from the facts of the transaction. Under the UCC, there are two implied warranties: Warranties of merchantability⁷ and warranties of fitness for a particular purpose.⁸

Implied Warranties of Merchantability

The first implied warranty that may arise out of livestock genetic transactions is that of merchantability. For a warranty of merchantability to arise, there must be a contract for sale and the seller must be a merchant with respect to goods of that kind. UCC §2-314(b) defines merchantability. It is applicable to a livestock genetic transaction if the good must pass without objection in the transaction as it is described and be fit for use for the ordinary purpose associated with such goods.

This means that if something is described as being purchased for a normal purpose (such as semen to artificially inseminate, embryos for transplant, or actual males or females of a species for breeding purposes) that good need only perform the basic function associated with it to be merchantable. For example, if a seller were to sell a bull for breeding purposes, it would only need to perform the function of successfully impregnating cows at a proper conception rate. If the bull was infertile and had been sold under the guise of being a breeding bull, the infertility would be a breach of the implied warranty associated with selling a bull for breeding.

However, a bull would not be required to pass perfect genetics. In fact, the U.S. District Court for the Eastern District of Texas discussed such a situation in *Two Rivers Company v. Curtiss Breeding Service*.⁹ The court in dictum offered the analysis that “Two Rivers purchased the semen to artificially inseminate its half blood Chianina heifers and to eventually create a purebred Chianina herd. This goal can still be achieved. The Farro semen had an acceptable conception rate.” The court also discussed that, because the semen was not free of all genetic abnormalities, this was not uncommon because genetic defects are present in all livestock and all bulls carry recessive genes.

Because conception is the ordinary purpose of semen, the fact that it achieves that purpose may be enough to meet the implied warranty of merchantability. As with anything, merchantability is something that can be interpreted in many ways and it is possible that passing along harmful genetics, even if they meet ordinary purpose, could still create liability. Whether or not semen or other genetic materials are merchantable would largely depend upon the description of those materials in the contract.

If a “genetically superior breeding bull” had been described as the good sought after by the buyer, then the implied warranty of merchantability might not have applied and instead an implied warranty of fitness for particular purpose might have applied, as discussed below. *Two Rivers* also discussed the warranty of fitness and found that the buyer was not relying on the skill of the seller in selecting the goods.

Implied Warranty of Fitness for Particular Purpose

U.C.C. §2-315 defines the implied warranty of fitness as such: Where the seller at the time of contracting has 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, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Applying this to livestock genetics any time a transaction occurs between parties with a known genetic goal in mind, a particular purpose may be present, and, unless disclaimed, a warranty of fitness for that purpose could be present.

In addition, a strong argument can be made that if the seller knows that the genetic good is being purchased for the purpose of building seed stock or breeding business, then there is a particular purpose for the genetic materials in a transaction to be free from hidden or latent defects in the form of recessive genes. In that instance, if the seller did not disclaim the implied warranties, the seller might be liable for any genetic defects that surfaced later.

However, the most important requirement for an implied warranty of fitness is the party’s expectations. In order for an implied warranty to exist, the buyer must be relying on the sell-



er's skill to select the goods and the seller must have reason to believe that the buyer is relying on the seller's skills.

Damages from Breach of Warranties, Fraud, and Misrepresentation

It is important for stockmen to be educated as to what risk they are exposed to in both selling and buying. If, for some reason, something goes wrong, the law will determine which party is liable.

If there is a breach of warranty, either implied or express, the seller may be liable to the buyer of the genetic goods for certain damages. UCC 2-§715 states that a seller, in the event of a breach, will be liable for both:

1. Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the delay or other breach, and
2. Consequential damages resulting from the seller's breach including "(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty."

This means that in the event of a breach of an expressed or implied warranty for genetic materials, the seller would be liable to the buyer for the reasonable costs incurred in the course of dealing with the goods and also any real loss that occurred as a result of the use of the "genetic goods." It is also very important to note that if a genetic good was warranted by the seller, either expressly or impliedly, and there was a breach of the warranty that resulted in injury to a party or their property, the seller would be liable for any of those damages as well.

Damages are not strictly limited to these breaches of warranties in genetic transactions. There may be causes of action in tort law for fraud and misrepresentation. There is the potential that genetic materials carrying a genetic defect could potentially cause a seller to incur liability for a defect under Restatement of the Law, Second, Torts, §402A.¹⁰ In fact, *Two Rivers* examined this tort liability but found that under Texas product lia-

bility law, economic loss does not qualify as damages in a tort cause of action.

Mitigation of Exposure and Liability for the Buyer and Seller

The UCC provides that that words or conduct may exclude or limit implied warranties as long as it is done in a reasonable fashion. UCC §2-316 states that to negate an implied warranty of merchantability, the language must include merchantability, and, if written, must be conspicuous. The UCC states that implied warranties, including the warranty of merchantability, can be limited or negated:

- (a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
- (b) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
- (c) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.¹¹

It is important for stockmen to be educated as to what risk they are exposed to in both selling and buying. If, for some reason, something goes wrong, the law will determine which party is liable. If there is a breach of warranty, either implied or express, the seller may be liable to the buyer of the genetic goods for certain damages.

This is important because a buyer or seller must be sure of what the other party intends to take away from the transaction. It is important that a seller disclaim warranties because the absence of a disclaimer may make a seller liable for hidden or latent defects in the genetic goods. A good practice for buyers is to examine the genetic goods and their background in as complete a fashion as possible.

A good example of this was presented in *Two Rivers*, where the court examined an implied warranty of merchantability and held that Curtiss Breeding Services had successfully disclaimed its warranty in the contract through the language: "It [seller] makes no other warranty of any kind and hereby disclaims all warranties, both express and implied of merchantability and fitness for a particular purpose."¹²

The fact that a seller can limit genetic warranty liability in this fashion does not, however, leave the door wide open. In fact, the U.S. Court of Appeals for the Tenth Circuit, in *Schweizer v. Dekalb Swine Breeders, Inc.*,¹³ held that a Kansas statute¹⁴ "permits disclaimer of warranties for livestock unless the seller 'knowingly sells livestock which is diseased.' The



statute provides that livestock warranties may be disclaimed except where the seller knowingly or with reason to know sells livestock which is or might be diseased.” Diseased may mean a genetic disorder or defect. Many states, including Arkansas, Ohio, Tennessee, Texas, and Washington, have statutes that specifically exclude the implied warranties that livestock sold are free of sickness and disease. In these states, there is no implied warranty as to whether or not an animal is free of sickness and disease. The major issue in these particular states then becomes “does a defect equal a disease?” This is a question that stands to be decided within the livestock industry in the coming years. If a genetic defect equals a disease, then these state laws may preclude a UCC examination of implied warranty liability. However, if a genetic defect is found by the courts to be different from what was intended by excluding disease, then the UCC would control the formation of implied warranties.

Conclusion

As genetics continues to rapidly change and improve the way stockmen transact business in the livestock industry, the need will only grow for responsible producers to be educated about limiting their risks and liability both as purchasers and as

sellers. With all parties on the same page, stockmen for all breeds and all species can move forward with less chance of undesirable consequences, such as litigation.

Notes

1. In 1906, the Uniform Sales Act was promulgated as codification of the common law and was taken primarily from the English Sale of Goods Act of 1894, which served to codify the same principle of English common law. It was stated by Lord Ellenborough in discussing the reason for this codification that “under such circumstances the purchaser has a right to a saleable article answering the description in the contract Where there is no opportunity to examine the commodity, the maxim of caveat emptor does not apply. See William Prosser, “The Implied Warranty of Merchantable Quality,” 27 Minn. L. Rev. 11 (1943).
2. The only state that has not adopted the UCC Article 2 is Louisiana, which is a civil law jurisdiction and the sale of goods is covered under Louisiana Civil Code.
3. See J.W. Looney, “Warranties in Livestock, Feed, Seed, and Pesticide Transactions,” 25 U. Mem. L. Rev. 1123 (1995).
4. UCC §2-313.
5. *Palmer Ranch Co. v. Campesi*, 647 F.2d 608 (5th Cir. 1980).
6. Id. at 617.
7. UCC §2-314.
8. UCC §2-315.
9. *Two Rivers Company v. Curtis Breeding Service*, 624 F.2d 1242, 1251 (C.A.Tex. 1980).
10. “This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product.” Restatement 2d of Torts, §402A, Comments & illustrations: (a) (1965).
11. UCC §2-316.
12. *Two Rivers Company v. Curtis Breeding Service*, 624 F.2d 1242, 1252 (5th Cir. 1980).
13. *Schweizer v. Dekalb Swine Breeders, Inc.*, 954 F. Supp. 1495, 1505 (10th Cir. 1997).
14. K.S.A. 50-639(h): “Disclaimer or limitation of warranties; liabilities; attorney fees, when section inapplicable to seed for planting, livestock for agricultural purposes or disposal of surplus property by a governmental entity . . . (h) This section shall not apply to sales of livestock for agricultural purposes, other than sales of livestock for immediate slaughter, except in cases where the supplier knowingly sells livestock which is diseased.”



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