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Purchasing from Merchants on **eBay**® and the **Implied Warranty of Merchantability**: An Overview

By Gary E. Sullivan

Most people have heard of eBay, one of many online auction sites where users can go to sell those items that have been cluttering up their attics or garages for too long. Since its inception, eBay has morphed from an outlet for selling unused or unwanted items to a massive platform for conducting e-commerce transactions between and among individuals, retailers and other businesses. As recently as October 2008, the number of “active users” on eBay numbered more than 85 million.¹ Unlike “old-fashioned” transactions involving face-to-face interactions, however, the buyer on eBay is purchasing an item he has never seen from someone he has never met.

Most experienced merchant sellers on eBay—many with online stores and long online sale histories—have warranty disclaimers. Some merchant sellers may replace those disclaimed warranties with express warranties. Many merchant sellers provide neither express warranties nor warranty disclaimers. Transactions involving these sellers may, however, still be covered² under the implied warranty of merchantability (IWM). The purpose of this article is to point out ways in which Alabama buyers can use eBay’s present services to protect themselves when dealing on eBay by determining whether a particular transaction is likely to be covered by the IWM.

The UCC, "Merchants" and the IWM

The effect and purpose of the IWM is best understood in the context of the historical emergence of the Uniform Commercial Code ("U.C.C.") as the authoritative source of law covering sales transactions. While the U.C.C. was being drafted during the 1940s, it was heavily affected by the legal scholarship of the drafting committee's chief reporter, Karl Llewellyn. Llewellyn's intention for Article 2 (covering sales of goods) was to make a functional and predictable business law for business people—regardless of whether that followed contemporary business practice or legal norms. Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules*, 73Geo. L.J. 1141, 1151 (1985). One aspect of this was that he wanted to make it such that the courts did

not twist the businessman's law to accommodate justice for the non-businessman. *Id.* at 1147-48. By separating out merchants from non-merchants, the courts could apply business law to business people without having to muddy the waters with concessions for non-businesspeople. *Id.* Originally, Article 2 explicitly provided for the application of "merchant provisions" to non-merchants so long as the "circumstances and underlying reasons justify extending its application." *Id.* at 1174 (citing U.C.C. § 1-102(3) of the 1949 draft). The provision was removed before adoption so it appears today that there are two distinct classes of provisions, *id.* at 1176, even though there are some remnants of the original plan in section 1-102(1) and Comment 1 of section 2-104. *See id.* at 1181.

The U.C.C. as it was finally adopted, however, did not explicitly state Llewellyn's intention. The comments to section 2-104, the provision defining "merchant," lend themselves to the understanding that there are two types of merchants: practices merchants and goods merchants. A practices

merchant is one "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction." U.C.C. § 2-104 cmt. 2 (2003). This language, the comment states, would apply to nearly all businesspeople because the provisions to which this applies—dealing with the statute of frauds, firm offers, etc.—are common practices to all businesspeople. *Id.*

The U.C.C.'s IWM clause, however, only applies "if the seller is a merchant with respect to goods of that kind." U.C.C. § 2-314 (2003). Goods merchants are those that have a "professional status as to particular kinds of goods." U.C.C. § 2-104 cmt. 2 (2003). Presumably, this would encompass the remainder of the merchant definition under section 2-104, i.e., one who "deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the . . . goods involved in the transaction." U.C.C. § 2-104 (2003). Although a goods merchant is likely to also be a practices merchant, it is not necessarily so.

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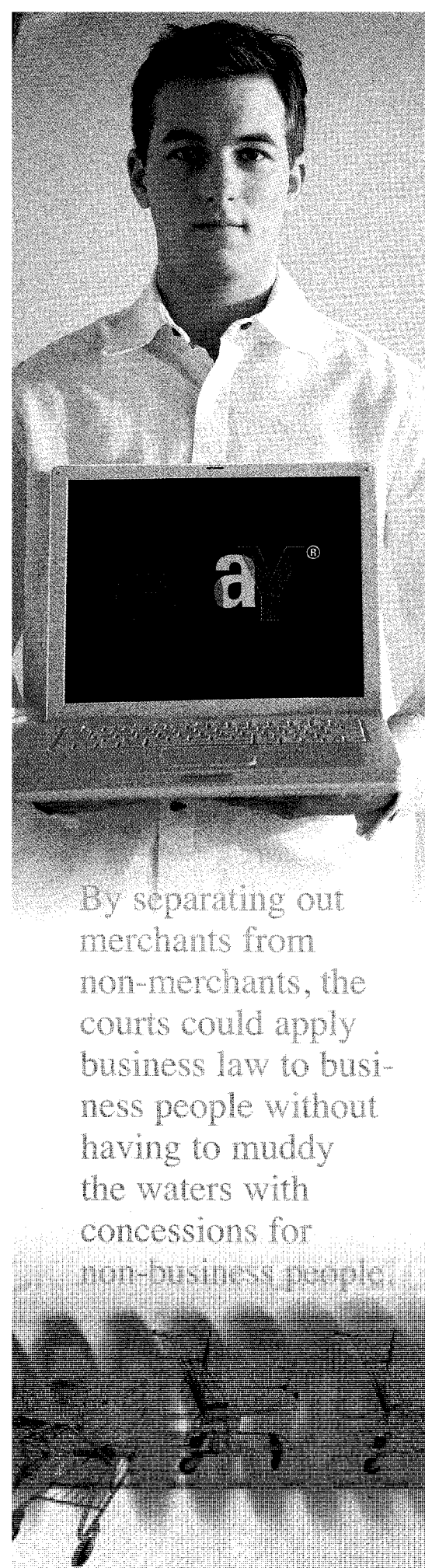
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Despite its division implied by the comments, the definition of “merchant” under section 2-104 was written as a single piece: “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.” *Id.* This, unfortunately, led to problems of interpretation since the comments do not make it explicitly clear that section 2-104 is to be divvied up between the various merchant provisions.

Courts have not always come to the same conclusions as to what a merchant with respect to goods of the kind is. Dealers in a particular good are generally held as merchants with respect to goods of that kind.³ When dealer status is questionable, the courts tend to use the “sales over time” test.⁴ With those who are obviously not dealers, however, sales over time are irrelevant, but, depending on the jurisdiction, specialized knowledge may or may not make them a “merchant with respect to goods of the kind” anyway.⁵ Those who are obviously not dealers and have no special knowledge as to the goods are not merchants,⁶ and those carrying out isolated transactions are generally not merchants, regardless, under 2-314, comment 3.⁷

Despite what was lost in its application, Llewelyn’s merchant/non-merchant dichotomy was a reasonable response to the problem of courts equitably meddling with business law because, at the time of the U.C.C.’s framing, it was easily applicable to the three main types of sales transactions: merchant, face-to-face sales to a buyer; non-merchant, face-to-face sales to a buyer; and merchant, long-distance sales to a buyer. In any face-to-face sale, the buyer had the opportunity to see with whom he was dealing. If he was dealing with a merchant, he was likely to be familiar with the merchant’s “professional” reputation and rely on that knowledge and the implied warranty that what the merchant sold was in fact merchantable. If he was shopping at a yard sale or flea market, the buyer was likely to understand that he was dealing with someone who was simply trying to make some extra cash and probably did not know significantly more about the item than the buyer himself.

The long-distance sale that existed at the time (e.g., buying from a catalogue) was almost exclusively between merchants, or

at least from a merchant to a consumer. In either case, the seller was a merchant, whose “professional” reputation again likely preceded him. This provided the buyer with some indication of what to expect from the transaction despite being unable to see and handle the product before purchasing it. The U.C.C. furthermore provided the buyer with the assurance that a contract for sale with a merchant included a warranty that what he bought would fit the description provided and function as it was intended. *See* U.C.C. § 2-314 (2003). The invention of the Internet, however, has thrown a radically different type of distance-sale transaction into the mix—one which the U.C.C. strains to incorporate.

Recent Developments

As use of the Internet has become more widespread, more and more companies have begun using it as a medium for sales transactions. With the advent of online auction sites, everyone could get in on the action. Over the long Labor Day weekend of 1995, a software developer named Pierre Omidyar sat down to write the code for the online auction site that would become eBay. ADAM COHEN, *THE PERFECT STORE* 21 (Little, Brown and Company 2002). Originally known as AuctionWeb, it quickly took over the entire eBay.com Internet domain, which Omidyar had been using to host the site for his consulting company, Echo Bay. *Id.* From its first sale (of a broken laser pointer), *Id.* at 4, through its public offering in 1998 (making it worth \$2 billion), *Id.* at 148, to its current status as the world’s largest online marketplace, About eBay, <http://news.ebay.com/about.cfm> (last visited Feb. 20, 2009), eBay has drastically altered the landscape of the distance-sale transaction by giving every person with a box of baseball cards and a dream the ability to sell to anyone anywhere in the world.

The Internet long-distance transaction has created a drastically different situation from any of those that existed at the time of the framing of the U.C.C. Mixing elements of previous long-distance transactions with the façade of the face-to-face transaction (by creating “stores” and

“about me” pages), Internet transactions can be particularly confusing. In this new form of transaction, the buyer never sees the seller or the item. More often than not, he is not familiar with the seller because, even if the seller is a merchant, it is not likely a widely known one.

The buyer has lost many of the protections in which he has come to trust: he cannot see the actual item before purchasing it; he cannot meet the seller before dealing with him; the buyer’s displeasure with the transaction, despite the feedback system, will likely have little impact on the overall reputation and business of the seller; and the buyer has a veil cast between himself and the seller making it difficult to determine whether the person with whom he is dealing is subject to implied warranties that will protect the buyer in case eBay’s protective measures break down.

eBay Sellers and the IWM

To determine how well protected a buyer will be in any given sales transaction with a seller on eBay, one must find out as much about the sale and the seller as possible. In a face-to-face transaction, the buyer will generally learn whether

the seller is a professional. In an internet transaction through eBay, the buyer must put a little more work into discovering whether the seller is a dealer in those goods, whether the seller is knowledgeable in those types of goods, whether it is a company or an individual and to what degree the transaction in question is protected by warranties.

When the buyer has found an item on which he wants to bid, he should first look to see whether the seller has provided an express warranty on the product. These are usually found, if present at all, toward the bottom of the product description page after the description of the item. Express warranties are often given by professional sellers because, despite the potential liability they create, the indication of quality they provide helps distinguish the product from the myriad of other similar ones. Express warranties are binding on all sellers, U.C.C. § 2-313 (2003), and should be carefully scrutinized.

Next, the buyer should look for a disclaimer of warranties. This is extremely important because all warranty protections can be disclaimed by language, such as “with all faults” or “as is,” that call the buyer’s attention to exclusion of warranties. U.C.C. § 2-316(3)(a) (2003). Otherwise, the implied warranty of merchantability can only be excluded through an explicit reference to merchantability

and, with written exclusions as would be necessary in the case of an eBay transaction, the writing must be conspicuous. U.C.C. § 2-316(2) (2003). If there is such an exclusion, the buyer must beware; however, even in the presence of such exclusions, additional information will assist in the buyer in his decision of whether to deal with that seller.

eBay currently provides several ways for the buyer to get to know the seller. The “My World” page and the optional “Me” page both provide excellent sources of information about the seller. Both of these pages provide a lot of the same information, but the buyer should still look at both pages to make sure to get the fullest picture of with whom he is dealing.

Every seller will have a “My World” page, which can be found by clicking the hyperlinked name of the seller. The “My World” page will provide a summary of the seller’s feedback information at the top of the page, including the feedback score and percentage of positive feedback, eBay’s new Detailed Seller Rating and a scrolling list of recent feedback. This page can also include a section describing the seller, a description of the seller’s store and a list of the seller’s listed items. Most important here is the seller description, particularly the “All About Me” section. This will include a section in which the seller describes himself, as well as sections detailing what

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types of items the seller likes to buy, sell and collect. A second section may have interests or, in the case of a business, information about the business, such as its history and background, payment policy, shipping information, return policy, and contact information.

The "Me" page, on the other hand, is optional but can also be quite useful where it is present. It can be found by clicking on the "me" image next to the seller's name. In a lot of cases, it is unhelpfully similar to the "My World" page because it generally provides again a list of the seller's available items along with a static list of the seller's feedback. The useful difference between the pages is the "Me" page's less formulaic structure. The top part of the page is usually a description of the seller's online and/or brick-and-mortar business in whatever form the seller chooses, often including pictures, custom layouts and more detail than that included on the "My World" page.

A third option is to search any links included on the "My World" and "Me" pages. Occasionally, sellers will include links to other Web sites, such as MySpace or a business Web site. These pages can also be useful in gaining information about a seller, but buyers should understand that these sites will have different standards regarding the offensiveness of what is posted on them. They can be useful tools, but should be used with care.

Alabama's Construction of "Merchant" and eBay Transactions

Alabama's implied warranty of merchantability statute is found at *Alabama Code* section 7-2-314, and is essentially the same as section 2-314 of the U.C.C. See ALA. CODE § 7-2-314 (1975). The relevant part provides: "[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." *Id.* The question to be asked regarding eBay sellers is: what is a "merchant with respect to goods of that kind"? To answer this question, we must look to section 2-104, which in Alabama is identical to U.C.C. section 2-104 discussed above.

Most of the Alabama decisions to address this point have interpreted section 2-104's merchant definition in a way consistent with the above analysis. Some cases have simply found under the first clause of section 2-104 that, because the seller was a dealer in the goods of the kind, they were a merchant. See *Agri-*

Business Supply Co., Inc. v. Hodge, 447 So. 2d 769 (Ala. Civ. App. 1984) ("The evidence is undisputed that plaintiff is and has been for a number of years in the business of selling equipment to people who raise chickens."). This is perhaps the easiest method of determining that a seller is a merchant because it is usually obvious that the seller has a "professional status" as a merchant. The following two cases take a slightly more in-depth look at the analysis.

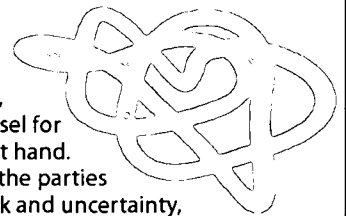
In *Donald v. City National Bank of Dothan*, 329 So. 2d 92 (Ala. 1976), the Alabama Supreme Court determined that a bank was not a merchant because it was neither a dealer nor did any of its employees have knowledge relating to the goods in question. *Id.* at 95. An official of the City National Bank of Dothan had contacted the plaintiff to see if he would be interested in buying a repossessed boat. The plaintiff had then paid to have the boat inspected twice before agreeing to buy it. After the plaintiff sued for a breach of warranty, the court concluded that, although a bank could be a merchant, "[n]o evidence was offered that the City National Bank of Dothan deals in the kind of goods involved in this transaction—boats—or that it holds itself out as having knowledge or skill peculiar to such goods." *Id.* It further noted that the sale of the boat was an "isolated transaction." *Id.*

In *Bradford v. Northwest Alabama Livestock Association*, 379 So. 2d 609 (Ala. Civ. App. 1980), the court held that

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an auctioneer was a merchant and that, through his agency and the operation of section 2-314(1), the farmers for whom he worked were as well. *Id.* at 611. The Bradfords filed a suit against the auction company because of the loss of a sale due to the death of 49 of their cattle in the company's pens. In the end, the case turned on whether the farmers were merchants. *Id.* Although farmers are usually not merchants under the U.C.C. in Alabama, the court held that they could be if they "employed an agent who by his occupation holds himself out as having knowledge or skill concerning the goods involved in the sale." *Id.* The court then found the defendant, their agent, to be a merchant because it "was in the business of selling cattle ... and had been so engaged for a number of years and held itself out as having the knowledge and skill to conduct such sales." *Id.*

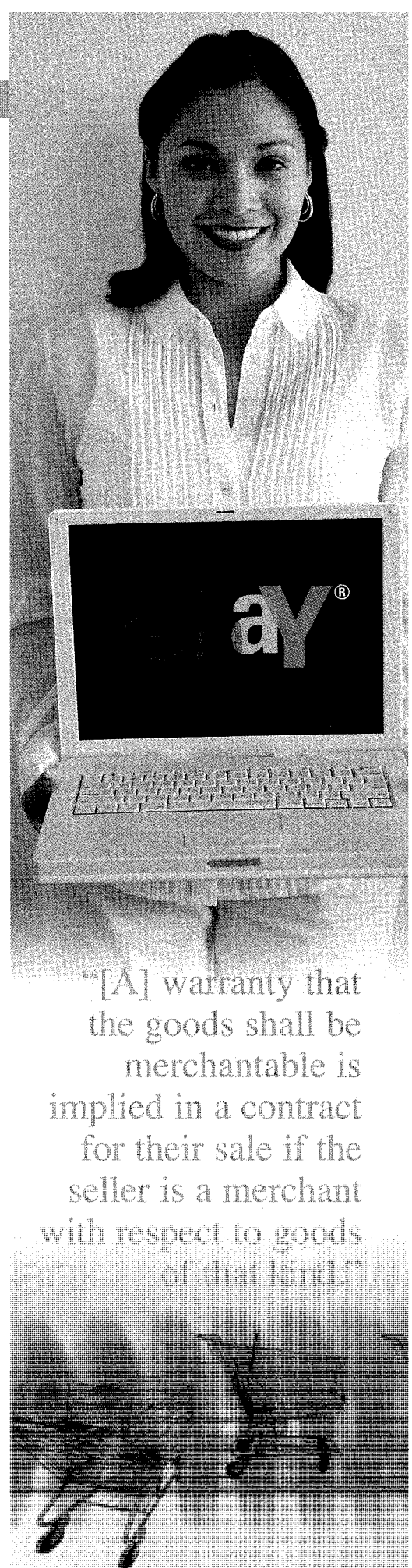
These two cases illustrate the general method of analysis under section 7-2-314, asking whether the seller was a dealer or held itself out, by its occupation, as having knowledge or skill as to the goods in question. One case, however, seems to have set the bar particularly low. In *Ex parte General Motors Corp.*, 769 So. 2d 903 (Ala. 1999), the Alabama Supreme Court stated: "It appears undisputed that Bishop is a 'seller' of automobiles, as that term is defined in § 7-2-103, Ala. Code 1975 [subsection (d) of which defines 'Seller' to be a person who sells or contracts to sell goods]. Thus, § 7-2-314's requirement that the seller be a 'merchant with respect to goods of that kind' is met . . ." *Id.* at 912. The plain words of the court would appear to undermine the comments to 2-104 that require a "professional status," but the seller in the case would still qualify as a "professional" merchant despite the court's lax choice of wording.

One final case of potential importance is *Loeb & Co., Inc. v. Schreiner*, 321 So. 2d 199 (Ala. 1975). *Schreiner* is the seminal case in Alabama on whether a farmer is a merchant. In the case, the Alabama Supreme Court held that farmers were not intended by the framers of the U.C.C. to be merchants. *Id.* at 201. The relevant part to the present discussion, however, is the court's discussion of its reasoning, and the possible analogies

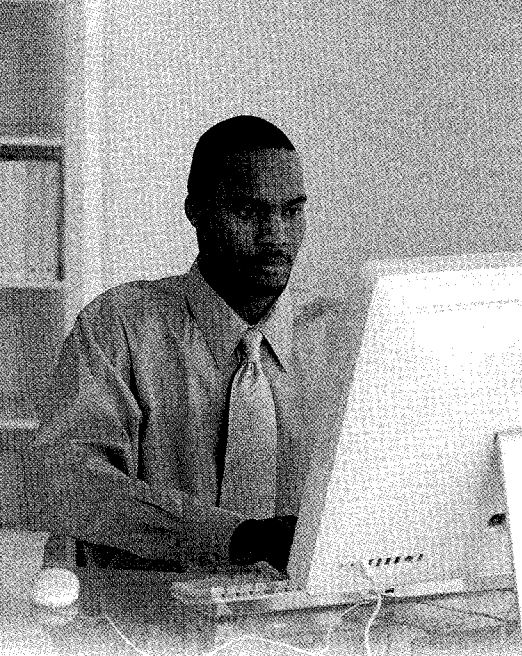
that could be gleaned from the court's focus on the official comment's dichotomy of "causal seller" v. "professionals." *Id.* at 202. The court followed essentially the same analysis as stated above, comparing the facts of the case with the three clauses under section 2-104(1). *See id.* at 201-02. After discarding clause 3 as inapplicable to the facts and finding that a farmer did not "by his occupation so hold himself out" as having knowledge or skill peculiar to the practices or goods involved under clause 2, the court held that even having considerable knowledge and selling one's own product did not make a farmer a merchant. *Id.* at 202. Although so far this analysis has been confined to farmers, the potential applicability to some eBay sellers makes it something of which the buyer should be aware.

In applying these cases to the eBay buyer's predicament, there are three factors of which the buyer should take note in determining whether he will be protected by implied warranty of merchantability: a seller's eBay store and any other items that the seller has listed, indications of "professionalism" on the "My World" and "Me" pages and Power Seller status. Although eBay stores are not required to sell items within a single category, odds are that the store will have a central theme. If the item the buyer is purchasing is from that store or within that store's theme, it provides a strong implication that the seller is a "dealer in goods of that kind." Looking at items listed on the seller's "My World" page, "Me" page or "Items for Sale" page (which can be reached through the link of the same name on the left of the "My World" page) can provide the buyer with further support for the seller's status as a "dealer in goods of that kind." Items sold within the last 90 days can also be viewed on the "Feedback Profile" page, which can be found by clicking on the hyperlinked number in parentheses next to the user name.

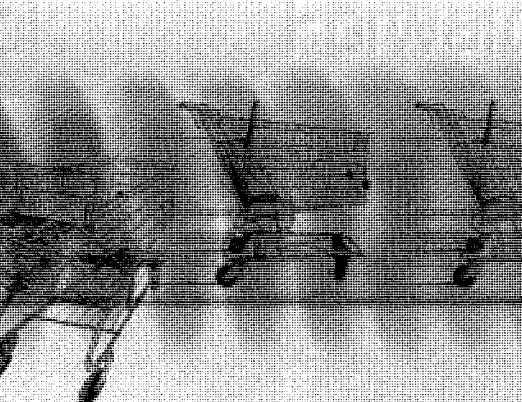
The "My World" and "Me" pages can also be a useful place to find indications of the seller's "professional" status as a dealer or one knowledgeable as to those goods. The parts of these pages in which the seller describes himself or his business are often used to highlight the knowledge



"[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."



For those sellers who are not obviously dealers in goods of the kind, the buyer must be more careful.



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that the seller or his employees have regarding the product or the length of time that the seller has been dealing in that type of good. Both are excellent indicators of a seller who would fall within the “merchant” category.

Lastly, the eBay-created status of a Power Seller can be a useful, but also misleading designation. The qualifications for a seller to become a Power Seller are that they maintain minimum sales requirements over long periods of time, including both minimum income and items sold requirements; attain a high feedback rating with a near perfect positive feedback record; maintain a high Detailed Seller Rating; and comply with eBay’s rules. Although this collection of qualifications would seem to indicate a merchant status, the eBay designation includes all items sold by the seller and does not necessarily indicate a “merchant with respect to goods of that kind.” The other indicators previously mentioned should be used to make sure that the seller falls under that description as well.

For those sellers who are not obviously dealers in goods of the kind, the buyer must be more careful. When a seller has made quite a few sales but in various types of goods instead of a single kind, the analysis becomes somewhat murkier. It is equally so when the seller has made few sales, but they are all the same type of good. Has the seller reached that point at which he ceases to be a “casual seller” and has now become a “professional” internet seller? Does a seller who claims to be a retired nurse or other professional but now is an eBay power seller in goods relating to a hobby count as a merchant professional?

Since Alabama courts have never addressed any of the issues relating specifically to Internet sellers and the U.C.C. merchant, the buyer must simply trust to eBay’s built-in protections and make sure to use the other tools at his disposal to have the best information available when deciding from whom to buy.

Conclusion

It is hoped that this article has provided a framework for analyzing whether the IWM likely arises in a given eBay transaction. Given the differences in how

business between a buyer and merchant seller have evolved and changed since the time the IWM was created, such Internet transactions will continue to involve much “gray area” until the courts or the legislature provides a clearer understanding of the internet seller’s status under the merchant provisions of the U.C.C. ▲▲▲

Endnotes

1. “Has eBay Hit Its Twilights?,” *Money Magazine*, October 17, 2008.
2. This article does not address the issue of whether a given eBay seller is subject to *in personam* jurisdiction in Alabama.
3. See *Cochran v. Rockwell Int’l Corp.*, 564 F. Supp. 237, 242 (N.D. Miss. 1983); *Ashley Square, Ltd. v. Contractors Supply of Orlando, Inc.*, 532 So. 2d 710, 711 (Fla. Dist. Ct. App. 1988) (“The statute is written in the disjunctive, so if the person deals in goods of the kind, he is a ‘merchant’ under this section, whether or not he holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.”); *Laird v. Scribner Coop, Inc.*, 466 N.W.2d 798, 804 (Neb.1991).
4. See *Saratoga Spa & Bath, Inc. v. Beeche Sys. Corp.*, 656 N.Y.S.2d 787, 789-90 (N.Y.A.D. 1997); *Colopy v. Pitman Mfg. Co.*, 615 N.Y.S.2d 208, 209 (N.Y.A.D. 1994).
5. See *Cropper v. Rego Distribution Center, Inc.*, 542 F. Supp. 1142, 1154 (D.C. Del. 1982); *Joyce v. Combank/Longwood*, 405 So. 2d 1358, 1359 (Fla. Dist. Ct. App. 1981) (finding the sale of five repossessed cars in one year as isolated events because the bank did not usually deal in cars); *Ferragamo v. Mass. Bay Transp. Auth.*, 481 N.E.2d 477, 481-82 (Mass. 1985) (holding that, although transportation authority was not a seller of scrap or trolley cars, it was a merchant because it held itself out as having knowledge of the goods); *Miller v. Badgley*, 753 P.2d 530, 533-34 (Wash. Ct. App. 1988). *But see also Siemen v. Alden*, 341 N.E.2d 713, 715 (Ill. App. Ct. 1975) (stating that the “warranty of merchantability is applicable only to a person who, in a professional status, sells the particular kind of goods giving rise to the warranty.” (emphasis added)); *Fred J. Moore, Inc. v. Schinmann*, 700 P.2d 754, 756-57 (Wash. Ct. App. 1985) (intimating that holding oneself out “to have certain skills or knowledge” may not be enough to meet § 2-314 standard).
6. See *Acevedo v. Start Plastics, Inc.*, 834 F. Supp. 808, 812-13 (E.D. Pa. 1993); *Donald*, 329 So. 2d at 95; *Joyce*, 405 So. 2d at 1359.
7. See *Donald*, 329 So. 2d at 95; *Siemen*, 341 N.E.2d at 715 (holding against merchant status on the basis of “isolated or casual seller” language in comment). *But see also Cropper*, 542 F. Supp. at 1154 (mentioning argument that isolated sales cannot create merchant status, then ignoring it in the analysis, indicating that the court did not consider it dispositive).