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15

Breach of Warranty

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A. [15.1] Cause of Action

This chapter provides an overview of the cause of action for breach of warranty in connection with the sale of goods. Claims for breach of warranty involving goods are governed by the Uniform Commercial Code (UCC), 810 ILCS 5/1-101, *et seq.* A seller of goods may provide a number of different warranties that arise through representations, statements, or actions of the buyer or are implied by the UCC. These warranties are set forth in §§2-312 through 2-315 of the UCC, 810 ILCS 5/2-312 through 5/2-315. If the goods delivered to a buyer fail to meet the standards imposed by these warranties, the buyer may be able to recover damages for resulting economic loss, property damage, or personal injury.

B. [15.2] What Law Controls

For the warranty provisions of the Uniform Commercial Code to apply, the transaction must first come within the scope of Article 2 of the UCC. Article 2 applies to “transactions in goods.” 810 ILCS 5/2-102. While this test is conceptually simple to apply, there are a great many contracts that involve *both* goods and services. Nationwide, courts have adopted a number of different approaches to determine whether a mixed contract falls within Article 2. Illinois courts have generally resolved questions about application of Article 2 by looking at the “predominant purpose” of the transaction. *See Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 770 N.E.2d 177, 194, 264 Ill.Dec. 283 (2002); *Heuerman v. B & M Construction, Inc.*, 358 Ill.App.3d 1157, 833 N.E.2d 382, 386, 295 Ill.Dec. 549 (5th Dist. 2005); *Meeker v. Hamilton Grain Elevator Co.*, 110 Ill.App.3d 668, 442 N.E.2d 921, 922, 66 Ill.Dec. 360 (4th Dist. 1982); *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145, 1153 (7th Cir. 1989); *WICO Corp. v. Willis Industries*, 567 F.Supp. 352, 355 (N.D.Ill. 1983). Under this test, the UCC has been applied to transactions that might not ordinarily be thought of as involving the sale of goods, such as computer software licenses. *See, e.g., ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (applying Wisconsin law).

This chapter discusses only warranty claims that arise under the UCC. However, parties to common-law contracts may also have causes of action for breach of implied or express warranties. In addition, factual circumstances that may give rise to a cause of action for breach of warranty under the UCC may also give rise to a cause of action based in tort. It should be noted that in the case of personal injury, claims for breach of warranty sometimes arise simultaneously

with claims of strict tort liability and negligence. While the same set of facts may give rise to liability for both breach of warranty and in tort, it is important to recognize that breach of warranty is its own conceptually distinct cause of action arising in contract. This chapter does not consider the contours of the tort cousins to breach of warranty. However, one important distinction is that while a buyer cannot recover for purely economic loss in tort, a cause of action for breach of warranty will ordinarily permit recovery for economic loss. *See Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982).

C. [15.3] Elements

While a seller of goods may create a warranty in multiple ways, the basic elements of any claim for breach of warranty are (1) the existence of an express or implied warranty, (2) the goods did not comply with that warranty, and (3) the failure to comply with the warranty caused an injury.

A warranty is a statement or representation, made by a seller of goods as a part of a contract of sale, concerning the character, quality, or title of goods. *See, e.g., Vasco Trucking, Inc. v. Parkhill Truck Co.*, 6 Ill.App.3d 572, 286 N.E.2d 383 (4th Dist. 1972). The Uniform Commercial Code's statutory scheme provides for two general types of warranties: express and implied. The creation of express warranties is governed by 810 ILCS 5/2-313, which outlines when a seller's statements, affirmations, representations, or even actions will give rise to a warranty. The UCC also provides additional implied warranties that are included in the contract unless disclaimed — a warranty of merchantability (810 ILCS 5/2-314) and a warranty of fitness for a particular purpose (810 ILCS 5/2-315). The UCC also provides a warranty of title and against infringement (810 ILCS 5/2-312), but consideration of this additional warranty is beyond the scope of this chapter.

1. [15.4] Breach of an Express Warranty

Express warranties may be created by any number of oral or written statements. The Uniform Commercial Code provides that an express warranty may be created by (a) an affirmation of fact or promise that is part of the basis of the bargain, (b) a description of the goods that is part of the basis of the bargain, or (c) a sample or model that is part of the basis of the bargain. 810 ILCS 5/2-313(1).

The key question in all three cases is whether the seller's statement, description, sample, or model formed part of the "basis of the bargain." The "basis of the bargain" requirement has been held to mean that the representation must go to the essence of the bargain or be a basic assumption of the parties' agreement. *See Alan Wood Steel Co. v. Capital Equipment Enterprises, Inc.*, 39 Ill.App.3d 48, 349 N.E.2d 627, 632 (1st Dist. 1976). In evaluating whether a representation was the basis of the bargain, the seller need not have had specific intent to provide a warranty or used specific words such as "warrant" or "guarantee." 825 ILCS 5/2-313(2). Illinois caselaw interpreting §2-313 contains conflicting statements about whether a buyer must demonstrate reliance on a seller's statement for it to be part of the basis of the bargain. While some cases examine a buyer's reliance, proof of reliance is not required to establish the existence of an express warranty. *See Weng v. Allison*, 287 Ill.App.3d 535, 678 N.E.2d 1254, 1256, 223

Ill.Dec. 123 (3d Dist. 1997). Rather, as the Third District pointed out in *Weng*, affirmations of fact about the qualities of the goods are presumed to be part of the basis of the bargain absent proof that they were *not* part of the contract. *Id.* Official Comment 3 to §2-313 appears to support the interpretation of the Illinois appellate court in *Weng*. UCC Comment 3, 810 ILCS 5/2-313. However, given that some Illinois decisions still purport to require a buyer's reliance, plaintiffs should plead reliance whenever possible. *See, e.g., Coryell v. Lombard Lincoln-Mercury Merkur, Inc.*, 189 Ill.App.3d 163, 544 N.E.2d 1154, 1158, 136 Ill.Dec. 379 (2d Dist. 1989).

The elements of a claim for breach of express warranty under §2-313 are as follows:

- a. There was a sale of goods.
- b. There was an affirmation of fact or promise about the quality of the goods, or a sample or model was provided.
- c. The promise or affirmation (or sample or model) was part of the basis of the bargain.
- d. The goods were not as warranted.
- e. The buyer provided the seller notice of breach of warranty. 810 ILCS 5/2-607(3).
- f. An economic loss or personal injury occurred as a result of the breach of warranty.

2. [15.5] Breach of the Implied Warranty of Merchantability

The first implied warranty provided by the Uniform Commercial Code is the implied warranty of merchantability. This warranty provides that any seller who is a merchant selling goods of that kind impliedly warrants that the goods are merchantable. The statute defines "merchantable" to require that — at a minimum — the goods must (a) "pass without objection in the trade under the contract description," (b) for fungible goods be of "fair average quality within the description," (c) be "fit for the ordinary purposes for which such goods are used," (d) "run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit," (e) be "adequately contained, packaged and labeled as the agreement may require," and (f) "conform to the promises or affirmations of fact made on the container or label." 810 ILCS 5/2-314(2). The warranty of merchantability will be implied only if the seller is a "merchant," which is defined as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." 810 ILCS 5/2-104(1).

The elements of a claim for breach of the implied warranty of merchantability under §2-314 are as follows:

- a. There was a sale of goods. 810 ILCS 5/2-314(1).
- b. The seller was a merchant with respect to goods of that kind. *Id.*

- c. The goods were not “merchantable” at the time of sale. 810 ILCS 5/2-314(2).
- d. The buyer provided the seller notice of the breach of warranty. 810 ILCS 5/2-607(3).
- e. An economic loss or personal injury occurred as a result of the breach of warranty.

3. [15.6] Breach of the Implied Warranty of Fitness for a Particular Purpose

A seller may also impliedly warrant that the goods will be suitable for the buyer’s specific purpose if the buyer relies on the seller to pick goods for that purpose. Key to a claim for breach of the implied warranty of fitness for a particular purpose is a showing that (a) the seller had reason to know the buyer’s purpose for obtaining the goods, (b) the seller had reason to know that the buyer was relying on the seller’s skill or judgment to select suitable goods for that purpose, and (c) the buyer did in fact rely on the seller’s skill or judgment to select suitable goods. The elements of a breach of the implied warranty of fitness for a particular purpose under 810 ILCS 5/2-315 are as follows:

- a. There was a sale of goods.
- b. Prior to the sale, the seller had reason to know the particular purpose for which the buyer bought the goods.
- c. The seller had reason to know the buyer was relying on the seller’s skill or judgment to select goods suitable for that purpose.
- d. The buyer actually relied on the seller to select the appropriate goods.
- e. The goods were not suitable for that particular purpose.
- f. The buyer provided the seller notice of the breach of warranty. 810 ILCS 5/2-607(3).
- g. An economic loss or personal injury occurred as a result of the breach of warranty.

D. [15.7] Relevant Standard Jury Instructions

No Illinois Pattern Jury Instructions have been issued for breach of warranty claims.

E. [15.8] Statute of Limitations

An action for breach of warranty must be commenced within four years after the cause of action has accrued. 810 ILCS 5/2-725(1). Ordinarily, a cause of action for breach of warranty accrues upon delivery of the goods regardless of the buyer’s lack of knowledge of the breach. 810 ILCS 5/2-725(2). *See also Nelligan v. Tom Chaney Motors, Inc.*, 133 Ill.App.3d 798, 479 N.E.2d 439, 442, 88 Ill.Dec. 826 (2d Dist. 1985). However, when a warranty “explicitly extends to future performance of the goods,” the cause of action for breach of warranty will accrue upon discovery of the breach. 825 ILCS 5/2-725(2). Whether a warranty “explicitly extends to future

performance” is construed strictly, and the exception does not apply to implied warranties. See *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 454, 61 Ill.Dec. 746 (1982); *Nelligan, supra*; *LaPorte v. R.D. Werner Co.*, 561 F.Supp. 189, 191 (N.D.Ill. 1983). Note, however, that in the case of express warranties, careful attention must be given to determine if the seller’s promise constitutes a warranty under §2-725. Many sellers include clauses labeled “limited warranties” that are not warranties at all, but are instead affirmative promises to repair or replace goods for a particular period of time after sale. In such a case, an action for breach of the clause accrues not upon delivery of the goods, but upon the buyer’s failure or refusal to repair or replace the goods. *Mydlach v. DaimlerChrysler, Corp.*, 226 Ill.2d 307, 875 N.E.2d 1047, 1058 – 1061, 314 Ill.Dec. 760 (2007).

F. [15.9] Parties

Given that breach of warranty arises from a contractual arrangement, the cause of action has historically required contractual privity between the plaintiff-buyer and the defendant-seller. While privity is still generally required to assert a claim of breach of warranty, there are some important exceptions to the privity rule.

First, the Uniform Commercial Code explicitly expands warranty coverage beyond immediate purchasers to any natural person who is in the family or household of the buyer, or who is a guest in the buyer’s home, if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. 810 ILCS 5/2-318. This provision expands the scope of warranty liability to individuals said to be in “horizontal non-privity.” The precise reach of §2-318 has been the subject of some dispute in the courts. For example, it has been held not to extend a warranty covering a football helmet sold to a university to a student injured using the helmet. See *Hemphill v. Sayers*, 552 F.Supp. 685, 689 (S.D.Ill. 1982). On the other hand, other cases have found that employees of the ultimate purchaser may bring suit directly against the seller. See *Whitaker v. Lian Feng Machine Co.*, 156 Ill.App.3d 316, 509 N.E.2d 591, 595, 108 Ill.Dec. 895 (1st Dist. 1987).

Second, there are some significant exceptions in the case of “vertical non-privity,” *i.e.*, cases involving a buyer and a remote seller in the distribution chain for the goods. Official Comment 3 to §2-318 states that the section does not “enlarge or restrict the developing case law on whether the seller’s warranties, given to his buyer who resells, extend to other persons in the distributive chain.” UCC Comment 3, 810 ILCS 5/2-318. Under Illinois law privity is still required in most cases involving purely economic loss. See *Szajna v. General Motors Corp.*, 115 Ill.2d 294, 503 N.E.2d 760, 767, 104 Ill.Dec. 898 (1986). However, Illinois courts have recognized some significant exceptions that apply to broad categories of cases. For example, the Illinois Supreme Court has eliminated the privity requirement for actions against a remote manufacturer involving personal injury. See *Berry v. G.D. Searle & Co.*, 56 Ill.2d 548, 309 N.E.2d 550, 556 (1974). In addition, there is some support for the view that privity is not required when the remote manufacturer knows “the identity, purpose and requirements of the dealer’s customer and manufactured or delivered the goods specifically to meet those requirements.” *Frank’s Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill.App.3d 980, 408 N.E.2d 403, 412, 42 Ill.Dec. 25 (1st Dist. 1980). However, other decisions suggest this exception does not exist. See *Caterpillar, Inc. v. Usinor Industeel*, 393 F.Supp.2d 659, 678 (N.D.Ill. 2005). Finally, the

Illinois Supreme Court has ruled that certain consumer warranties governed by the federal Magnuson-Moss Warranty Act, 15 U.S.C. §2301, *et seq.*, do create sufficient privity between consumers and remote manufacturers to support a cause of action for breach of warranty. *Szajna, supra*. This interpretation of federal law is also the subject of some dispute. *See Finch v. Ford Motor Co.*, 327 F.Supp.2d 942, 945 (N.D.Ill. 2004). See Chapter 6 of this handbook for more on Magnuson-Moss.

Given that the law in this area is continually evolving, and there are a number of exceptions made based on the unique facts of individual cases, practitioners in this area are advised to carefully consider the contours of the privity requirement as it applies to each warranty matter.

G. [15.10] Special Considerations

Pleading. A plaintiff pleading a claim for breach of express warranty must state the terms of the express warranty or attach them to the complaint. *See Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill.2d 428, 546 N.E.2d 580, 595, 137 Ill.Dec. 635 (1989). Plaintiffs must also allege a promise or affirmation by a seller. *Rowan v. Max Auto Mall, Inc.*, No. 01 C 3648, 2002 WL 215524 at *4 (N.D.Ill. Feb. 12, 2002).

Effect of other law. It is also important to note that the effect of the federal Magnuson-Moss Warranty Act should also be considered in cases involving consumer product warranties. In addition, there are numerous other federal and state statutes, such as the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*, or the federal Safe Medical Devices Act of 1990, Pub.L. No. 101-629, 104 Stat. 4511, that may supplement, or entirely preempt, warranty claims for particular kinds of products, or claims asserted by consumers.

H. [15.11] Remedies — Special Issues

Damages available to a buyer asserting a breach of warranty claim are governed by §2-714 of the Uniform Commercial Code. 810 ILCS 5/2-714. A buyer may recover all losses “resulting in the ordinary course of events from the seller’s breach as determined in any manner which is reasonable.” 810 ILCS 5/2-714(1). The UCC specifies that the usual measure of damages for breach of warranty is “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.” 810 ILCS 5/2-714(2). However, this is not the exclusive measure, and the buyer can attempt to show it was damaged in a different amount. *McGrady v. Chrysler Motors Corp.*, 46 Ill.App.3d 136, 360 N.E.2d 818, 820 – 821, 4 Ill.Dec. 705 (4th Dist. 1977); UCC Comment 3, 810 ILCS 5/2-714. Furthermore, 810 ILCS 5/2-714(3) and 5/2-715 may permit a buyer to recover incidental and consequential damages, provided such losses were foreseeable at the time of contracting, or are for “injury to person or property proximately resulting from any breach of warranty.” 810 ILCS 5/2-715(2)(b).

I. [15.12] Checklist for Complaint

1. A sale of goods between plaintiff and defendant.
2. The date and place of the sale and delivery of the goods.

3. A description of the goods sold.
4. The price charged to and paid by plaintiff for the goods sold.
5. A statement that in consideration of and as part of the sale, a warranty arose.
6. A description of the warranty and how it arose (expressly given or stated, implied as part of the intended use of the goods, or implied as part of the ordinary course of business of the sale of the goods). If an express warranty appears in a writing, it should be attached.
7. In the case of an express warranty, facts showing that the warranty was the “basis of the bargain,” such as the plaintiff’s reliance on the warranty in purchasing and paying for the goods.
8. A statement that the goods were not as warranted at the time of the sale and delivery.
9. A description of how the goods were not as warranted.
10. A description of the notice of breach of warranty produced to the seller.
11. A statement of the damages resulting from the goods not being as warranted.

J. [15.13] Defenses Specific to Cause of Action

There are a number of possible defenses specific to a cause of action for breach of warranty.

Lack of privity. As noted in §15.9 above, the lack of privity may be a bar to some breach of warranty claims, particularly those involving economic loss.

Disclaimer of warranty. The Uniform Commercial Code permits sellers to disclaim or exclude implied warranties. 810 ILCS 5/2-316(2). To disclaim the implied warranty of merchantability, the disclaimer must be conspicuous and specifically mention merchantability. *Id.* Similarly, a disclaimer of the implied warranty of fitness for a particular purpose must be conspicuous and in writing. *Id.* However, the UCC also validates the use of shorthand disclaimers such as “as is” and “with all faults” to exclude warranties. 810 ILCS 5/2-316(3)(a). Furthermore, the UCC provides that when the buyer had an opportunity to examine the goods or a sample or model as fully as he or she desired, or has refused to examine the goods, there is no implied warranty for defects that, in the circumstances, would have been revealed by an examination. 810 ILCS 5/2-316(3)(b). Finally, usage of the trade and the parties’ course of dealing or course of performance may exclude or modify implied warranties. 810 ILCS 5/2-316(3)(c).

Difficult issues can be presented when a seller made statements that could be considered express warranties, but also included contractual language disclaiming warranties. The UCC requires courts to attempt to harmonize express warranties with the warranty disclaimers, but gives precedence to the express warranty unless the parties, in accordance with the parole

evidence rule (810 ILCS 5/2-202), exclude express warranties that may appear in other documents by executing a writing intended to be the final and complete expression of their agreement. 810 ILCS 5/2-316(3)(a).

Lack of notice. 810 ILCS 5/2-607(3)(a) provides that a buyer who has accepted goods must notify the seller of any breach within a reasonable time after discovery. Illinois courts have dispensed with a strict reading of the notice provision in two instances: (1) the seller is deemed to have been notified when the seller had actual knowledge of the failure of the particular product (as opposed to generalized knowledge that there were problems with a product line); and (2) filing a complaint may fulfill the notice requirement if the buyer is a consumer who has suffered personal injury. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 675 N.E.2d 584, 589, 221 Ill.Dec. 389 (1996).

Statute of limitations. As discussed in §15.8 above, an action for breach of warranty is subject to a four-year statute of limitations. The statute of limitations is an affirmative defense that must be pled and proved by the defendant.

Unreasonable use and the idiosyncratic plaintiff. Sellers are generally responsible even for unknown defects. However, a buyer's use of the product in an unreasonable or unforeseeable manner is a defense to liability for breach of warranty. *See, e.g., Bethlehem Steel Corp. v. Chicago Eastern Corp.*, 863 F.2d 508, 515 (7th Cir. 1988). In addition, some cases recognize that there is no warranty against a risk that was unknown to the manufacturer and that affects only a small number of the potential users of a product. *Presbrey v. Gillette Co.*, 105 Ill.App.3d 1082, 435 N.E.2d 513, 519 – 520, 61 Ill.Dec. 816 (2d Dist. 1982).

K. [15.14] Related Actions

As mentioned in §15.10 above, when a cause of action for breach of the warranty exists, very often additional causes of action are also available to the buyer. These include rescission on the ground of mutual mistake, breach of contract, violation of the Illinois Consumer Fraud and Deceptive Practices Act, fraud, negligence, strict liability, or some other tort.

L. [15.15] Sample Form

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