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Breach of Warranty

CHRISTOPHER TOMPKINS
Jenner & Block LLP
Chicago

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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 either arise through representations, statements, or actions of the buyer, or are implied by the UCC. These warranties are set forth in §§2-313 through 2-315 of the UCC, 810 ILCS 5/2-313 through 5/2-315. If the goods sold to a buyer fail to meet the standards imposed by these warranties, then 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 the supply of *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 – 923, 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 a number of types of contracts that do not deal with subjects that might ordinarily be thought of as goods, such as a computer software license. *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 both for 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. 443 (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 implied or express warranty, (2) that the goods did not comply with the warranty, and (3) that the failure to comply with the warranty caused an injury.

A warranty is a statement or representation made by a seller of goods contemporaneously with and as a part of a contract of sale, having reference to the character, quality, or title of goods, by which the seller undertakes that certain facts will be as represented to the buyer. *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 that there are two additional warranties that can be implied in a sale of goods 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 three general ways in which an express warranty may be created: (a) by any affirmation of fact or promise that is part of the basis of the bargain; (b) by any description of the goods that is part of the basis of the bargain; or (c) by 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 formed part of the "basis of the bargain." That is, the statement 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, 633 (1st Dist. 1976). In evaluating whether a statement

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). While some cases examine a buyer’s reliance to determine if the statement was the “basis of the bargain,” 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, 223 Ill.Dec. 123 (3d Dist. 1997). However, given that some Illinois decisions still purport to require proof of reliance, plaintiffs should plead reliance when it exists. *See, e.g., Coryell v. Lombard Lincoln-Mercury Merkur, Inc.*, 189 Ill.App.3d 163, 544 N.E.2d 1154, 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. 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 the goods (a) “pass without objection in the trade under the contract description,” (b) be of “fair average quality within the description,” (c) be “fit for the ordinary purposes for which such goods are used,” (d) “run . . . 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 on the container or label.” 810 ILCS 5/2-314(2).

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

- 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. 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 of the buyer's purpose, (b) the seller had reason to know that the buyer was relying on the seller's skill or judgment to select suitable goods, 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 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. 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 any 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," 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, 61 Ill.Dec. 746 (1982); *Nelligan, supra*; *LaPorte v. R.D. Werner Co.*, 561 F.Supp. 189 (N.D.Ill. 1983).

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 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 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 (S.D.Ill. 1982). On the other hand, other cases have found that the provision does apply to employees of the ultimate purchaser. *See Whitaker v. Lian Feng Machine Co.*, 156 Ill.App.3d 316, 509 N.E.2d 591, 108 Ill.Dec. 895 (1st Dist. 1987).

Second, there are two significant exceptions in the case of "vertical privity," *i.e.*, sellers in the distribution chain who are not in direct privity with the buyer. 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." 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, 104 Ill.Dec. 898 (1986). However, the Illinois Supreme Court has eliminated the privity requirement for actions against a remote manufacturer involving personal injury. *See Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965); *Berry v. G.D. Searle & Co.*, 56 Ill.2d 548, 309 N.E.2d 550 (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 (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. *Finch v. Ford Motor Co.*, 327 F.Supp.2d 942 (N.D.Ill. 2004).

See Chapter 6 of this handbook for more on Magnuson-Moss.

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 U.S.Dist. LEXIS 2202 (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 the Uniform Commercial Code. Under 810 ILCS 5/2-714(2), a buyer can recover “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.” 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.”

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 statement of the damages resulting from the goods not being as warranted.

J. [15.13] Affirmative 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 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 all warranties or all express 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) requires a buyer who has accepted goods to 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 has 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, 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, 509 (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 portion of the potential users of a product. *Presbrey v. Gillette Co.*, 105 Ill.App.3d 1082, 435 N.E.2d 513, 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

[Caption]

COMPLAINT FOR BREACH OF WARRANTY

Plaintiff, _____, by and through [his] [her] attorney, _____, complains of Defendant, _____, as follows:

1. On [date], in _____, _____ County, Illinois, Defendant sold and delivered to Plaintiff goods for the sum of \$_____, which Plaintiff paid to Defendant.

2. As part of the consideration for Plaintiff's purchase of the goods, a warranty arose as follows:

[describe 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); express warranties in a writing should be attached]

3. Plaintiff [relied on] [believed] the representation and warranty in purchasing and paying for the goods. [Or describe other facts demonstrating that the warranty was the basis of the bargain.]

4. At the time of sale and delivery, the goods were not as warranted to Plaintiff for the following reasons:

[describe]

5. As a result, the goods were not worth what Plaintiff paid, but were worth only \$_____.

6. As a result of the breach of warranty, Plaintiff was damaged in the sum of \$_____ for the following reason[s]:

[describe/list]

WHEREFORE, Plaintiff prays for judgment in favor of Plaintiff and against Defendant for the sum of \$ _____, for costs of this action, and for such other or further relief as this Court deems just.

[Party]

By: _____
Attorney for Plaintiff
[attorney information]

