**Warranties**

Welcome to this podcast on Warranties brought to you by CALI. I am Professor Scott J. Burnham.

The topic of this podcast is a basic overview of when warranties are given. An additional podcast will discuss how warranties can be disclaimed or limited.

The primary issue in warranty law is what is the level of quality that a buyer can expect. In contracts for services, we don’t call it a warranty. If you contract for a service, like from a doctor or a contractor, the level of performance you would expect comes from the common law and it is of course a reasonable level. You can pretty much look to the tort standard. You can ask, “What is the standard of performance that you would expect from that type of person in that particular community?” For example, if I hire a contractor to put a roof on my house, there are some specific standards, such as the type of shingle to be used and the color. But if I questioned the quality of the installation, I would likely have to get testimony from another roofing contractor in the community regarding whether the performance was acceptable.

We are going to focus on warranties for the sale of goods under Article 2 of the UCC, where the warranties are provided by statute. The Official Comment to § 2-313 says that the purpose of warranty law is to determine what it is that the seller has in essence agreed to sell. The standards are historical, going back to the Middle Ages. We will see that there are sometimes different rules for merchant sellers, because when you buy something from a merchant, you may have one expectation and when you buy it from an ordinary person you might have a different expectation. In the law, those expectations can be either express or implied, that is, expressly stated by the parties or supplied by the law.

Let’s start with express warranties, dealt with in § 2-313. It’s really easy to create an express warranty. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. You don’t need the word warranty or a fancy filigree border. So if I sell you my 2016 Honda Fit automobile for $10,000, then I have given you express warranties. I have affirmed that it is made by Honda, that it is the Fit model, and that it is the 2016 model year. It is that easy to create express warranties. Note also that all sellers of goods give express warranties, not just merchants. Note, however, that I have not promised anything about the quality of the car. You might think that because I described it as an “automobile,” I might be promising that it performs like an automobile and it is not just 2000 pounds of plastic and metal. But courts have rejected that argument, so if you want a promise of quality, you had better get the seller to state it expressly.

Express warranties can be created in other ways as well, even without words. For example, if I show you a model or a sample, I am promising that the goods will conform to that model or sample. There was a case in my home state of Montana where a seller of Flathead cherries showed some cherries to a store, and the store said, “We will buy 10 flats.” When the cherries arrived, they were not on average as big and ripe and red as the sample the seller had shown to the buyer. This was a breach of express warranty, for the seller when showing the sample was in effect saying, “I promise that the cherries will, on average, look like this.”

Now we are going to turn to implied warranties. Actually, the first two are technically not called implied warranties even though the Code says they are found in every applicable contract. The reason for that will become clear when you study disclaimer of warranties, for a disclaimer of implied warranties does not disclaim them since they are not technically implied warranties. The first of these warranties found in every contract for sale is the § 2-312(1) warranty of title. The warranty of title is quite simple – in every contract, the seller warrants that they have good title and clear title to what they are selling. So if I steal a car and sell it to you, then I have obviously breached the warranty of title since I don't own what I'm selling – I don’t have good title to it. Another situation arises when there is a security interest in goods I'm selling so that they are subject to a claim by a third party and I don’t have clear title. Unless you have actual knowledge otherwise, I am warranting that the goods are free of all liens.

The next warranty that is not an implied warranty is the § 2-312(3) warranty against infringement. This warranty is not given by every seller but only by a seller who is a merchant who regularly deals in goods of the kind. This warranty means the seller promises that no third party has a copyright, trademark, or patent claim in the goods. This warranty is becoming more important as we have more and more “smart goods” that contain intellectual property. A good example is the litigation against Blackberry where a third party claimed that Blackberry was infringing its patents and threatened to get an injunction. If that third party had succeeded in its claim against Blackberry and you could not use your Blackberry device, then you would have a claim for breach of the warranty against infringement.

An interesting thing about UCC warranties is that they are given by the *seller*, the one who sold it to you. So in that last example, if you bought the Blackberry from Best Buy, then your claim for breach of warranty would be against Best Buy, not against Blackberry. This indicates that warranty claims are an example of strict liability – the seller is liable even though they are not at fault. Of course, Best Buy would have the same claim against its seller and the claim would eventually reach the responsible party.

Now on to the implied warranties that are called implied warranties. Section 2-314 says that a seller who is a merchant who deals in goods of the kind gives a warranty that the goods shall be merchantable. What that generally means is that they are fit for the ordinary purposes for which such goods are used. So if a car dealer sells me an automobile, then under the implied warranty of merchantability, I am entitled to a certain amount of automobile quality – it's got to run like an ordinary car. This warranty even applies to used goods. If that car has 100,000 miles on it, I'm still entitled to what a buyer would reasonably expect from a car with 100,000 miles on it. So if the transmission failed, there would be a warranty of merchantability, but all I would be entitled to is the performance ordinarily expected from a transmission with 100,000 miles on it. I would have to prove that transmissions ordinarily last more than 100,000 miles to succeed in that claim.

Notice that this warranty is only given by merchants who deal in goods of the kind. If I personally sell my car to you, as in our earlier example under express warranty, then I don’t give this implied warranty since I'm not in the car business. That means that I have made no promises about the quality of that car. If I'm making no implied promise about the quality of the car, then the burden shifts to you to get me to make some express promise.

Section 2-315 is the implied warranty of fitness for a particular purpose. Remember that we said in connection with the implied warranty of merchantability that the seller warrants that goods are fit for the *ordinary* purposes. So if you want the goods for some *special* purpose, you have to communicate to the seller that you are looking for them for a special purpose and if the seller then selects the goods for that purpose, and you rely on that selection, then you're getting a warranty that they are fit for that particular purpose. For example, if I said to a car dealer that I need a car to race in the Baja 500 and the seller says “I have just the car for you,” and points one out, and I buy it in reliance on the recommendation, that would create the implied warranty that it was suitable not just for the ordinary purpose of a car but fit for that race. Note that this warranty can be given by any seller of goods, and not just by a merchant.

Those are the principal warranties that a buyer gets. Before we conclude, we should say a word about the remedies for breach of warranty, because the remedy is probably not what you think. We often think of the buyer returning the goods or getting the seller to repair or replace them, but that is not the Code remedy. The Code remedy, found in § 2-714(2) is money damages measured by the difference in value between what the seller promised and what the buyer got. This is not always easy to compute. For example, for $1000, I buy a computer and the seller says the computer will perform a certain function. It does not perform that function and I have a claim for breach of express warranty. The seller says that they sell computers that don’t perform that function for $950, so I should get $50 in damages. On the other hand, I find a computer repair shop that will install that function for $100. Should I get the cost of repair? Many courts find that the cost of repair is a handy measure of the difference in value between what you got and what you were entitled to. In addition, the buyer can get incidental damages and consequential damages that result from the breach of warranty.

However, the bad news is that while the Code provides for these remedies and these warranties, it also provides for freedom of contract, so the seller can disclaim the warranties or limit the remedies. That is the topic of another podcast.

Let’s briefly review this podcast. At this point, you should be able to identify the various warranties that are given by the Code in transactions involving the sale of goods, and you should be able to determine the remedy the buyer is entitled to when there is a breach of warranty.

I hope you’ve enjoyed this podcast on Warranties.

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