

Drafting, Negotiating and Litigating Warranties In Contracts For The Sale Of Goods: Considerations Under The UCC Article 2



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Introduction

The importance of Article 2 of the Uniform Commercial Code (“UCC”), 810 ILCS, 5/2-101, *et seq.*, as a source of state and federal contractual law cannot be overstated. The body of case law on this topic demonstrates that UCC warranty claims are some of the most heavily litigated aspects of contracts for the sale of goods. Litigation commonly occurs when parties disagree over whether warranties were violated, properly disclaimed, or drafted so as to limit or exclude a party’s liability.

Warranty liability arises when damage is caused by the failure of a product to meet express or implied representations on the part of the manufacturer or other supplier.¹ The UCC provides a carefully-articulated system that governs the economic relations between suppliers and consumers of goods, including those situations in which commercial expectations are not met and the buyer suffers economic loss.² Economic loss is that damage that occurs when a defect to a good is qualitative in nature and when the harm caused by the defect relates to a consumer’s expectation that the product is of a particular quality so that it is fit for ordinary use.³ In those situations, the UCC limits consumers to contract law rather than tort law.⁴

This paper focuses on issues that arise from the breach of contracts for the sale of goods and discusses the provisions of the UCC and the Illinois Code of Civil Procedure (the “Code”) at issue in the drafting, negotiation, and litigation of warranties.

Contracts for the Sale of Goods

Article 2 is limited in application to “transactions in goods.”⁵ Section 2-105(1) defines “goods” as “all things . . . which are movable at the time of the identification to the contract for sale[.]”⁶ “The definition of goods is based on the concept of moveability and is not intended to deal with things that are not fairly identifiable as movable before the contract is formed.”⁷

Additionally, the UCC defines a “sale” as “the passing of title from the seller to the buyer for a price.”⁸

Where a sale of goods additionally requires the seller to perform services, Illinois law classifies the agreement as “mixed” and requires courts to apply a predominant purpose test to determine whether the UCC governs the contract.⁹ The central query of the test is whether the purpose of the agreement is the rendition of service, with goods incidentally involved (*e.g.*, a contract with an artist for a painting), or whether it is a transaction of sale, with labor incidentally involved (*e.g.*, a contract for the purchase and installation of a water heater).¹⁰ If the contract’s primary purpose is the sale of goods, then the entire contract falls within the ambit of the UCC.¹¹

Case Study - *NIM Plastics Corp. v. Standex Int'l Corp.*, 11 F. Supp. 2d 1003, 1004 (N.D. Ill. 1998)

NIM Plastics Corporation (“NIM”) is in the business of extruding polycarbonate resin into sheets and film which it then markets and sells to its customers. Mold-Tech is in the business of applying textured and chemically “etched” finishes on rolls to be used by customers to produce or manufacture the resin sheets of film.

NIM wanted one of its existing rolls refinished with a textured matte finish (hereinafter referred to as the “Roll”). NIM and Mold-Tech entered into an oral contract. Under the agreement, Mold-Tech agreed to “refinish” NIM’s existing Roll with a matte finish replicating the matte finish then on the Roll and to chemically “etch” the matte finish onto the existing Roll. Mold-Tech had the Roll sandblasted, resurfaced, and returned it to NIM. The surface applied to the Roll did not replicate the matte finish that was on the Roll when it was received by Mold-Tech.

NIM sued for breach of implied warranty, arguing that even if Mold-Tech agreed to provide services in connection with the application of a new surface to the Roll, the predominant

purpose of the agreement was a good, namely NIM's purchase of the new surface. The court dismissed the complaint for failure to state a claim upon which relief may be granted.

The court found that the parties' contract for Mold-Tech to provide a new matte surface for NIM's Roll was a service contract, not a sale of goods as defined by the UCC. The agreement between NIM and Mold-Tech called for Mold-Tech to refinish and etch NIM's existing Roll. Further, NIM owned the surface of the Roll throughout the transaction. In short, the new surface was not an identifiable moveable thing as contemplated by the UCC, and the new surface was not sold in the sense that title to it could be passed.

The court determined that the primary purpose of the agreement for Mold-Tech to perform refinishing work on NIM's existing Roll -- like other types of work performed on another's existing property, *e.g.*, sanding someone's table, waxing someone's floor and painting someone's chair -- was the performance of a service and, thus, failed the predominant purpose test.

As demonstrated in the *Nim* case, the predominant purpose test involves a review of the language of the agreement at issue under the totality of the circumstances.¹² Courts review the facts of the case to determine where the contract at issue falls on the continuum of goods and services. If a contract is not for the sale of goods under the predominant purpose test, then the UCC does not apply, and the practitioner should bring a common law claim for breach of contract.

The distinction is important. The ten-year statute of limitations that generally governs claims on written contracts contains an express exception for actions governed by Article 2 of the UCC.¹³ Section 2-725 of the UCC provides that an action for breach of any contract for the sale of goods must be commenced within four (4) years after the cause of action has accrued.¹⁴

A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.¹⁵

Express Warranties

Warranties are “creatures of contract.”¹⁶ At its most basic level, a warranty is an assurance by one party of the existence of a fact upon which the other party may rely and a promise to indemnify the promisee for any loss if the fact warranted proves untrue.¹⁷ To recover on a warranty claim, a party need only show that the warranty is part of the contract, is relied upon, and was breached.¹⁸ As with all contracts, the language of an express warranty governs the obligations and rights of the parties.¹⁹ Nonetheless, it is not necessary to the creation of an express warranty that the seller uses formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty.²⁰ On the other hand, an express warranty will not be created by a seller's mere affirmation of the value of the goods or a statement of the seller's opinion of the goods.²¹

Section 2-313(1) sets out the three circumstances in which an express warranty is created, by affirmation, by description, or by sample or model, and § 2-313(2) contains the caveat that formal words and specific intention are not required to create an express warranty.²² Whether an express warranty exists is a question of fact.²³ “To determine whether or not there is a warranty, the decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment on a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty and in the latter there is not.”²⁴

In a suit for damages for breach of a written express warranty, the burden of proof is on the plaintiff to show by a preponderance of the evidence the terms of the warranty, the failure of

some warranted part, a demand upon the defendant to perform under the terms of the warranty, a failure of the defendant to do so, a compliance with the terms of the warranty by the plaintiff, and damages measured by the terms of the warranty.²⁵

Implied Warranties

The two sections immediately following § 2-313 address the types of implied warranties: Implied Warranty of Merchantability, § 2-314, and Implied Warranty of Fitness for a Particular Purpose, §2-315.²⁶ As their titles imply, these warranties are automatically imposed in certain transactions, unless properly excluded, and are in addition to any express warranties that may have been created.²⁷ The implied warranty of merchantability presumes that there is an implied promise that the product at issue is fit for the ordinary purpose for which it is intended (*e.g.*, a shoe must be fit for walking on ordinary ground).²⁸ The implied warranty of fitness for a particular purpose presumes there is an implied promise that the product is fit for the particular purpose of the buyer (*e.g.*, a shoe must be fit for the particular purpose of climbing mountains).²⁹

Implied Warranty of Merchantability

Unless excluded or modified, every sale of goods includes an implied warranty of merchantability.³⁰ The warranty applies to the sale of goods as well as to the re-sale of goods.³¹ For goods to be merchantable, they must meet the following minimum requirements:

1. Pass without objection in the trade under the contract description;
2. In the case of fungible goods, are of fair average quality within the description;
3. Are fit for the ordinary purposes for which such goods are used;
4. Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
5. Are adequately contained, packaged, and labeled as the agreement may require;
and

6. Conform to the promises or affirmations of fact made on the container or label if any.³²

Other than the factors listed above, industry standards may also dictate if an implied warranty is present. Implied warranties may arise from the course of dealing, course of performance, or usage of trade.³³ For example, a dog breeder is obligated to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog.³⁴

To prove breach of the implied warranty of merchantability, the buyer must prove that the product was defective and that the defect existed when it left the seller's control.³⁵ The buyer may meet his burden through the use of direct and circumstantial evidence.³⁶ For example, in a case brought against a thermoforming machine manufacturer, liability for breach of the implied warranty of merchantability existed where there was testimony that platens were misaligned, the sheet load table was defective, a fan was improperly located, and the machine failed to operate consistently at requisite cycles per hour.³⁷

While breach of implied warranty of merchantability and strict liability are similar, they are not synonymous.³⁸ It has been stated that a breach of implied warranty theory is a form of strict liability without the necessity of proving negligence or fault on the part of the defendant.³⁹ Another way to look at it is that implied warranty liability is essentially strict liability but with the contract doctrines of privity, disclaimer, and notice.⁴⁰ The existence of a defect in a product has been held to be a necessary requirement to prevail under either theory.⁴¹ More obviously, implied warranty of merchantability is an action in contract and strict liability is grounded in tort. The ultimate participant in a strict liability action is the manufacturer; whereas the ultimate participant in implied warranty of merchantability is a merchant.⁴² For example, in a case brought against an athletic director, football coach and athletic trainer, who allegedly furnished a defective helmet to a football player, the defendants could not be held liable for a breach of a

warranty of merchantability because they were not merchants.⁴³ On the other side of the coin, the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, addresses products-liability actions and provides for dismissal of claims against non-manufacturers in any products-liability action based in whole or in part on the doctrine of strict liability in tort.⁴⁴ The practitioner must be mindful that while courts may often consider the two types of claims to be identical, they are not. And for different reasons, both types of actions can be dismissed.

Implied Warranty of Fitness for a Particular Purpose

The other type of implied warranty is the warranty of fitness for a particular purpose.

Section 5/2-315 provides:

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.⁴⁵

For an implied warranty of fitness for a particular purpose to exist, the goods must be for a purpose other than their ordinary use.⁴⁶ The buyer need not provide the seller with actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists.⁴⁷ The buyer, of course, must actually be relying on the seller. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it requires a specific use by the buyer which is peculiar to the nature of his business; whereas, the ordinary purposes for which goods are used go to uses which are customarily made of the goods in question.⁴⁸ A contract may, of course, include both a warranty of merchantability and one of fitness for a particular purpose.⁴⁹

Privity

Illinois courts acknowledge that privity of contract is an element in breach of warranty claims.⁵⁰ Privity requires that the party suing has some contractual relationship with the one sued, *i.e.* vertical privity.⁵¹ A plaintiff must satisfy at least one of three possibilities before bringing a warranty cause of action:

1. There must be privity of contract between the plaintiff and defendant;
2. The plaintiff must be in a position equivalent to that of a third-party beneficiary of the sales contract; or
3. The plaintiff must otherwise be able to sustain a tort action against the seller.⁵²

Section 2-318 governs third-party beneficiaries of express or implied warranties and provides that the applicable warranty must extend to the family or household of the buyer if members of the household would reasonably be expected to use the product.⁵³ Courts have interpreted § 2-318 as an extension of both expressed and implied warranties to the members of the purchaser's household even though the class of plaintiffs are not in contractual privity with the seller; therefore, these claimants are often referred to as having "horizontal privity."⁵⁴

Beyond this exception, the comments make clear that the section is neutral on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.⁵⁵ The UCC defers to the case law and common law in this respect. Courts have held 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."⁵⁶ It is easy enough for practitioners to create or disclaim the reach of warranties in contracts for sale based upon the parties' intention, and the opportunity to do so should not be overlooked.

Courts have also held that a warranty of safety extends to any employee of the purchaser who was injured in the use of the goods at issue, as long as safety in the use of the goods was either explicitly or implicitly part of the basis of the bargain with the employer purchased the goods.⁵⁷ Thus, breach of warranty claims are not always barred by the lack of the ultimate user's contractual privity with the manufacturer, importer, and seller when personal injury is involved.⁵⁸ However, courts have expressly declined to expand § 2-318 to include any injured party that would reasonably be expected to use, consume or be affected by the seller's goods.⁵⁹ Courts are extremely reluctant, in light of the express wording of the statute, to expand the section's operation beyond employees of the employer-purchaser absent a compelling and well-founded reason, which to date has not been presented.⁶⁰ Other than household members, employees of employer-purchasers when safety is implicated, and known remote users, plaintiffs must still demonstrate contractual privity to recover for breach of warranty claims.⁶¹

Rules for Conflicts of Warranties

As mentioned above, contracts for the sale of goods may contain both express and implied warranties. In these situations, the UCC states that warranties are to be construed as consistent with each other to the extent possible.⁶² Section 2-317 provides three rules, which mandate which warranty is dominant when a conflict arises. That section provides:

1. Exact or technical specifications displace an inconsistent sample or model or general language of description;
2. A sample from an existing bulk displaces inconsistent general language; and
3. Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.⁶³

As with most of provisions of the UCC, these rules defer to common law contract interpretation concepts. Section 2-317 is designed to aid in determining the intent of the

parties.⁶⁴ The conflicts rules can be changed by evidence tending to show that conditions existed at the time of contracting which now make the construction called for by the section inconsistent or unreasonable.⁶⁵ For example, a seller may raise inconsistency of warranties as a defense to a warranty claim, but such a defense is not available to a seller that led a buyer to believe that all of the warranties can be performed.⁶⁶

Disclaimer and Limitation of Warranties

In addition to the numerous ways that UCC warranties can arise, a seller of goods must also be cognizant of the ways these in which these various express and implied warranties may be disclaimed. Two relevant provisions of the Article 2 apply: § 2-312(2)⁶⁷ and 2-316.⁶⁸ As with all contracts, contracts for the sale of goods will be construed against its drafter.⁶⁹ This is especially true with respect to disclaimers of warranties, which must be drafted with clear and specific language.⁷⁰ Because such disclaimers are not generally favored by courts, a seller should be particularly cautious in drafting them.⁷¹ It is important to note that a seller's attempt to disclaim a warranty will be ineffectual if made after a contract is concluded, unless the buyer assents to the change.⁷²

In addition to disclaiming warranties that arise by contract and operation of law, prudent sellers may also wish to limit a buyer's potential remedies, which is expressly provided for in § 2-719.⁷³ The UCC treats limitations of warranties as separate from disclaimers of warranties because, obviously, there is need to limit remedies for breach of warranty where one does not exist in the first place.⁷⁴

Disclaiming Express Warranties

Under § 2-316, words and conduct relevant to the creation of express warranties will be construed as consistent with words or conduct tending to negate or limit them wherever

reasonable.⁷⁵ However, negation or limitation is inoperative to the extent that such a construction is unreasonable.⁷⁶ The purpose of this section is to protect a buyer from surprise by those frequent clauses in sales contracts which seek to exclude “all warranties, express or implied” by requiring disclaimers to be conspicuous.⁷⁷ The section also protects a seller against false allegations of oral warranties by its incorporation of the provisions of Article 2 regarding the admission of parol and extrinsic evidence.⁷⁸ For example, generally, a written disclaimer of an express warranty contained elsewhere in the contract is inoperative.⁷⁹ But this general rule is subject to parol and extrinsic evidence which would indicate that it is reasonable to construe the disclaimer as negating the express warranty.⁸⁰

Disclaiming Implied Warranties

Section 2-316 provides rules for modifying and excluding implied warranties, that exist unless disclaimed.⁸¹ Whether an implied warranty is properly disclaimed depends first on the language of the disclaimer, and second, on the conspicuousness of such language.⁸² Successful examples of conspicuousness include: a heading in capital letters equal to or greater in size than the surrounding text; contrasting type, font, or color to the surrounding text of the same or lesser size; and the language larger than surrounding text or contrasting in type, font or color.⁸³

To disclaim the implied warranty of merchantability, the seller must mention merchantability, and if disclaimer is made in writing, it must be conspicuous.⁸⁴ Unlike the implied warranty of merchantability, implied warranties of fitness may be excluded by general language but must be in a conspicuous writing.⁸⁵ Section 2-316 provides fail safe language that may be employed to successfully disclaim the warranty of fitness: “There are no warranties which extend beyond the descriptor on the face hereof.”⁸⁶

Section 2-316 also provides common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.⁸⁷ For example, general terms such as "as is," "as they stand," and "with all faults" are generally understood to mean that the buyer takes the entire risk as to the quality of the goods involved.⁸⁸ In addition, warranties may be excluded or modified by the circumstances where the buyer examines at the time of the making of the contract the goods or a sample or model of them.⁸⁹ However, given the vast expanse of case law on this topic, which at times seems inconsistent with Article 2 itself, it is best that sellers err on the side of caution and articulate all disclaimers in writing and include the term "merchantability" as well as the phrases "as is" and "with all faults" in the language of the disclaimer.⁹⁰

Drafting Disclaimer of Warranties

When drafting a disclaimer, a seller must not only scrutinize every word but must also be mindful of where and how the disclaimer appears. The disclaimer must be conspicuous. The headings should be capitalized and set off in bold-type face. The disclaimer should be set-off from the rest of the document but should appear on the front page in the center of the document. It is also good practice to allow a signature blank next to the disclaimer for the buyer's initials.⁹¹

Case Studies: Drafting Disclaimers of Warranties

The following disclaimers have been upheld as valid:

ALL WARRANTIES OF ANY KIND WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, ARE HEREBY DISCLAIMED. ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED. THE MACHINERY (INCLUDING ANY ACCESSORIES AND COMPONENTS) IS SOLD "AS IS."⁹²

The following language was upheld as a valid disclaimer, even though it was printed on the back of the purchase agreement, because the buyer's signature acknowledged that she had read it and agreed to its terms:

FACTORY WARRANTY: ANY WARRANTY ON ANY NEW VEHICLE OR USED VEHICLE STILL SUBJECT TO A MANUFACTURER'S WARRANTY IS THAT MADE BY THE MANUFACTURER ONLY. THE SELLER HEREBY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

USED VEHICLE WHETHER OR NOT SUBJECT TO MANUFACTURER'S WARRANTY: UNLESS A SEPARATE WRITTEN INSTRUMENT SHOWING THE TERMS OF ANY DEALER WARRANTY OR SERVICE CONTRACT IS FURNISHED BY DEALER TO BUYER, THE VEHICLE IS SOLD "AS IS — NOT EXPRESSLY WARRANTED OR GUARANTEED" AND THE SELLER HEREBY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.⁹³

An Indiana court found that both of the following disclaimers satisfied the requirements of the UCC, observing that both writings specifically mentioned merchantability and fitness, that both writings were conspicuous, and that the heading for the paragraph in the bill of sale was in capitals. The court also emphasized the importance of conspicuous language in the body of the paragraph because it was set off from the rest of the document near the middle of the page. Most importantly, the initials of the buyer next to the paragraph disclaiming liability provided direct evidence of the requirement that the writing be conspicuous since initials indicate that the buyer did, in fact, notice the disclaimer.

Any warranties on the products sold hereby are those made by the manufacturer. The Seller hereby disclaims all warranties, either express or implied, including any implied warranty of

merchantability or fitness for a particular purpose, and neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of said products. . . .

NEW VEHICLE, ANY WARRANTIES ON THE PRODUCT SOLD HEREBY ARE THOSE MADE BY THE MANUFACTURER(S). DEALER INSTALLED EQUIPMENT IS NOT COVERED BY THE MANUFACTURER WARRANTY. WARRANTIES, IF ANY, ON THIS EQUIPMENT ARE THOSE OF THE RESPECTIVE MANUFACTURER(S). THE SELLING DEALER, HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND THE SELLING DEALER, NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF SAID PRODUCT.⁹⁴

Remedies for Breach of Warranty under the UCC

Depending on when the breach of warranty is raised, buyers have several remedies available to them under the UCC, including the procurement of substitute goods,⁹⁵ repudiation of the contract,⁹⁶ and specific performance.⁹⁷ This paper will focus only on the measure of damages for breach of warranty following acceptance of the goods and after the time for repudiation has passed.⁹⁸ In this instance, the measure of damages for a breach of warranty claim after non-conforming goods have been accepted is generally the difference at the time and place of acceptance between the value of the goods and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.⁹⁹ The UCC further provides that the buyer may deduct such damages from the contract price if the buyer still owes part of the purchase price, and frequently the two remedies will be available concurrently.¹⁰⁰

A buyer may also be awarded consequential and incidental damages.¹⁰¹ Incidental damages 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.¹⁰² Consequential damages include 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, as well as injury to person or property proximately resulting from any breach of warranty.¹⁰³

Limiting and Modifying Remedies under the UCC

In addition to disclaiming remedies, sellers may avoid liability by limiting the remedies available to buyers subsequent to breach. Both § 2-316 and § 2-719 are relevant in this regard. As discussed at length aboveherein, § 2-316 focuses on contractual language a seller can use to disclaim or modify a warranty itself.¹⁰⁴ In contrast, § 2-719 focuses on limiting a buyer's remedies following breach of a warranty that has not been disclaimed.¹⁰⁵ Modification of remedies can include clauses that provide for the replacement, the replacement cost, and/or the repair of non-conforming goods. Limitations of remedies can include clauses that limit warranties by time or upon the occurrence of a particular event, *e.g.*, a 44,000 mile or 5-year power train warranty for an automobile. Sellers should also be clear to limit warranties to the contract buyer such that the warranty will not extend to third party purchasers, wherever possible. However, a seller may not in any case exclude or limit the operation of § 2-318 itself.¹⁰⁶

In terms of limiting remedies pursuant to § 2-719, parties are left free to shape their remedies to their particular requirements, and those agreements will be given effect.¹⁰⁷ The UCC's generally *laissez faire* approach to limitation of remedies is restricted only in so far as parties cannot enter into unconscionable agreements that deprive either party of the substantial

value of the bargain.¹⁰⁸ Any clause that attempts to deprive a party of “at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract” is subject to deletion, and, in that event, the remedies made available by Article 2 are applicable as if the stricken clause had never existed.¹⁰⁹

Subsection 1(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive.¹¹⁰ Therefore, if the parties intend the term to describe the sole remedy, this must be clearly expressed.¹¹¹ Subsection 3 recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner.¹¹² To the extent a seller is unable to favorably allocate risk of breach to a buyer in a manner that does not run afoul of § 2-719, the practitioner instead should consider disclaiming warranties in the manner provided in § 2-316. However, this approach may not always be possible if a buyer refuses to close a transaction unless warranties are made, which makes it all the more important that sellers limit remedies in a manner which will be given effect by the courts.

Subsection 2 provides “where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.”¹¹³ Another way of saying this is that a seller cannot make a warranty but then exclude any and all remedies available to the buyer thereunder.¹¹⁴ For example, in a typical breach of warranty case, the contract limits the remedy of the buyer to repair or replacement of a malfunctioning part. In such a case, the failure of essential purpose provision is invoked when the seller is either unwilling or unable to make the product at issue conform to the contract. Even though the contract specifically limits the remedies to repair and replacement, and even though the parties could or should have recognized that it might not be possible to repair or replace the goods at issue, the UCC excuses the buyer

from resorting to the limited remedy.¹¹⁵ In these cases, the court will assess the potential breaches envisioned by the parties when they agreed to limit their remedies and then to compare the actual breach to the parties' initial expectations.¹¹⁶ If the expectations and reality are materially the same, the remedial limitation should be enforced.¹¹⁷ If the remedial limitation cannot be enforced, the buyer may seek additional relief for breach of an implied warranty of fitness for a particular purpose even if the seller expressly disclaimed it.¹¹⁸ Some courts have expanded buyers' remedies further, holding that a buyer may additionally seek damages otherwise excluded by the contract such that a seller's breach of a limited warranty to repair and replace automatically exposes the seller to liability for the buyer's consequential damages despite an otherwise enforceable disclaimer.¹¹⁹

Drafting Remedy and Damage Limitations

A seller should keep the following considerations in mind when drafting a remedies clause in the contract for the sale of goods:

1. Consider time and money. Both a limitation period for bringing suit (*e.g.*, two years) and a restriction of remedies (*e.g.*, replacing defective parts or refunding money) are key.
2. Evaluate the scope of risk that the limitations clause should cover and all of the legal theories a claimant could possibly assert. For example, review and address any potential common-law claims.
3. Specify that the buyer cannot recover attorneys' fees and litigation costs.
4. Determine which state's law governs the contract and any dispute that may arise.¹²⁰

Notice of Claims

By way of review, each warranty claim requires the plaintiff to plead: (1) the existence of an Article 2 contract for the sale of goods; (2) the seller made certain representations regarding the goods sold; (3) the plaintiff reasonably relied on the representations; (4) the plaintiff suffered

an injury that is a proximate result of the reliance on the representations; (5) the plaintiff is in privity with the seller; (6) the plaintiff brought the action within the limitations period; and (7) the plaintiff gave notice of the loss incurred. A defendant to an action for breach of warranty may begin by attacking any of these elements.

Oftentimes, plaintiffs are unaware of the notice requirements necessary to file a claim under the UCC. Section 2-607(3)(a) requires that a buyer must give notice to the seller within a reasonable amount of time after he discovers or should have discovered a breach “or be barred from any remedy.”¹²¹ In commercial transactions, the time of notification applicable to a merchant buyer is to be determined by applying commercial standards.¹²² A reasonable time for notification from a retail consumer is to be judged by different standards, and is typically extended so as not to deprive a good faith consumer of his remedy.¹²³

Third-party beneficiaries that fall within the purview of § 2-318 are also required to notify the seller that an injury has occurred, although the measurement of reasonable time is similarly extended.¹²⁴ However, even a beneficiary is held to the use of good faith in notifying the seller. Once the third party beneficiary has had time to become aware of the legal situation, they must serve notice.¹²⁵

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched.¹²⁶ The notice does not need to include a clear statement of all the objections that will be relied on by the buyer.¹²⁷ The notification need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.¹²⁸

Conclusion

Warranty cases, whether implied or express, whether for merchantability or for fitness for a particular purpose, will be litigated with greater frequency in coming years.¹²⁹ The growing group of cases typically involves damage to property rather than personal injury.¹³⁰ Understanding the UCC and its implications in drafting, negotiating, and litigating contracts for the sale of goods is increasingly important as this field becomes more active. Each warranty case requires adherence to and knowledge of Article 2. Thus, a practitioner should not only understand the nature of the transaction when drafting a contract for the sale of goods but should also be familiar with the provisions Article 2 so as to avoid common drafting mistakes leading to litigation for breach of warranty claims.

¹ Product Liability § Defense of Warranty Actions (IICLE 2009).

² *Moorman Manufacturing Co. v. Nat'l Tank Co.*, 91 Ill.2d 69, 78 (1982).

³ *Id.*

⁴ *Id.* at 82.

⁵ 810 ILCS 5/2-102; *Lukwinski v. Stone Container Corp.*, 312 Ill. App. 3d 385, 388 (1st Dist. 2000).

⁶ 810 ILCS 5/2-105(1).

⁷ 810 ILCS 5/2-105 cmt. 1.3; *NIM Plastics Corp. v. Standex Int'l Corp.*, 11 F. Supp. 2d 1003, 1005 (N.D. Ill. 1998).

⁸ 810 ILCS 5/2-106(1).

⁹ *NIM Plastics Corp., id., supra.*

¹⁰ *Meeker v. Hamilton Grain Elevator Co.*, 110 Ill. App. 3d 668, 670 (4th Dist. 1982).

¹¹ *Id.*

¹² *Bruel & Kjaer v. Vill. of Bensenville*, 2012 IL App (2d) 110500, P17-P18 (2012).

¹³ 735 ILCS 5/13-206.

¹⁴ 810 ILCS 5/2-725

¹⁵ *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 352 (Ill. 2002).

¹⁶ *Indeck N. Am. Power Fund, L.P. v. Norweb, P.L.C.*, 316 Ill. App. 3d 416, 428 (1st Dist. 2000).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 810 ILCS 5/2-313.

²⁰ 810 ILCS 5/2-313(2).

²¹ *Id.*

²² 810 ILCS 5/2-313(1), 5-2-313(2).

²³ *Felly v. Singleton*, 302 Ill. App. 3d 248, 253 (2d Dist. 1999).

²⁴ *Weiss v. Rockwell Mfg. Co.*, 9 Ill. App. 3d 906, 915 (1st Dist. 1973).

²⁵ *Hasek v. DaimlerChrysler Corp.*, 319 Ill. App. 3d 780, 793 (1st Dist. 2001).

²⁶ 810 ILCS 5/2-314, 2-315.

²⁷ *Frank v. Edward Hines Lumber Co.*, 327 Ill. App. 3d 113, 124 (1st Dist. 2001).

²⁸ *Id.*

²⁹ *Id.*

³⁰ 810 ILCS 5/2-314.

³¹ 810 ILCS 5/2-314 cmt. 1.

³² 810 ILCS 5/2-314(2).
³³ 810 ILCS 5/2-314(3).
³⁴ 810 ILCS 5/2-314 cmt. 12.
³⁵ *Alvarez v. Am. Isuzu Motors*, 321 Ill. App. 3d 696, 703 (1st Dist. 2001).
³⁶ *Id.*
³⁷ *Custom Automated Machinery, Div. of Custom Aluminum prod., Inc. v. Penda Corp.*, 537 F. Supp. 77 (N.D. Ill. 1982).
³⁸ *Garcia v. Edgewater Hosp.*, 244 Ill. App. 3d 894, 901-902 (Ill. App. Ct. 1st Dist. 1993).
³⁹ *Nave v. Rainbo Tire Service, Inc.*, 123 Ill. App. 3d 585, 592 (2d Dist. 1984).
⁴⁰ *Garcia, id., supra.*
⁴¹ *Id.*
⁴² *Id.*
⁴³ *Hemphill v. Sayers*, 552 F. Supp. 685 (S.D. Ill. 1982).
⁴⁴ 735 ILCS 5/2-621(a).
⁴⁵ 810 ILCS 582-315.
⁴⁶ *Indust. Hard Chromse, Ltd. v. Hetran, Inc.*, 64 F. Supp. 2d 741 746 (N.D. Ill. 1999)
⁴⁷ 810 ILCS 5/2-315 cmt. 1.
⁴⁸ *Id.* at cmt. 2.
⁴⁹ *Id.*
⁵⁰ *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068
⁵¹ *Crest, id., supra.*
⁵² *Slate Printing Co. v. Metro Envelope Co.*, 532 F. Supp. 431, 434 (N.D. Ill. 1982).
⁵³ 810 ILCS 5/2-318.
⁵⁴ *Lukwinski v. Stone Container Corp.*, 312 Ill. App. 3d 385, 390 (1st Dist. 2000).
⁵⁵ *Id.* at cmt. 3.
⁵⁶ *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 992 – 993 (1st Dist. 19080).
⁵⁷ *Whitaker v. Lian Feng Machine Co.*, 156 Ill. App. 3d 316 (1st Dist. 1987).
⁵⁸ *Crest, id., supra.*
⁵⁹ *Lukwinski, id., supra.*
⁶⁰ *Id.* at 392-93.
⁶¹ *Id.* at 390-91
⁶² 810 ILCS 5/2-317; *see also Kel-Keef Enterprises, Inc. v. Quality Components Corp.*, 316 Ill. App. 3d 998, 1015 (1st Dist. 2000).
⁶³ 810 ILCS 5/2-317.
⁶⁴ 810 ILCS 5/2-317 cmt. 2.
⁶⁵ *Id.* at cmt. 3.
⁶⁶ *Id.* at cmt. 2.
⁶⁷ 810 ILCS 5/2-312(2).
⁶⁸ 810 ILCS 5/2-316.
⁶⁹ *Imperial Stamp & Engraving Co. v. Bailey*, 82 Ill. App. 3d 835, 838 (2d Dist. 1980).
⁷⁰ *Id.*
⁷¹ Contract Law § 7.35 Disclaiming Express Warranties (IICLE 2013).
⁷² *Keller v. Flynn*, 346 Ill. App. 499, 507 (2d Dist 1952)
⁷³ 810 ILCS 5/2-719.
⁷⁴ 810 ILCS 5/2-316 cmt. 2.
⁷⁵ 810 ILCS 5/2-316(1).
⁷⁶ *Id.*
⁷⁷ 810 ILCS 5/2-316 cmt. 1.
⁷⁸ 810 ILCS 5/2-316 cmt. 2; *see also* 810 ILCS 5/2-202.
⁷⁹ *AAR Int'l, Inc. v. Vacances Heliades S.A.*, 202 F. Supp. 2d 788, 795 (N.D. Ill. 2002).
⁸⁰ *Id.*
⁸¹ 810 ILCS 5/2-316(2) and (3).
⁸² *Schultz v. Jackson*, 67 Ill. App. 3d 889, 892-93 (3d Dist. 1979).
⁸³ *M. Block & Sons, Inc. v. Int'l Business Machines Corp.*, No. 04 C 340, 2004 WL 1557631 at 9 (N.D. Ill. July 8, 2004).

⁸⁴ 810 ILCS 5/2-316(2).
⁸⁵ *Id.* at cmt. 3.
⁸⁶ *Id.* at cmt. 4.
⁸⁷ *Id.* at cmt. 6.
⁸⁸ *Id.* at cmt. 7.
⁸⁹ *Id.* at cmt. 8.
⁹⁰ 810 ILCS 5/2-216(2), 5/2-316(3).
⁹¹ *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 204 F.Supp.2d 1149, 1154 (S.D.Ind. 2002).
⁹² *MAN Roland Inc. v. Quantum Color Corp.*, 57 F.Supp.2d 568, 573 (N.D.Ill. 1999).
⁹³ *Wilson v. Royal Motor Sales, Inc.*, 812 N.E.2d 133, 137 (Ind.App. 2004) (emphasis in original).
⁹⁴ *In re Birdgestone/Firestone, Inc., id., supra*.
⁹⁵ 810 ILCS 5/2-712.
⁹⁶ 810 ILCS 5/2-713.
⁹⁷ 810 ILCS 5/2-716.
⁹⁸ For information regarding what constitutes acceptance and time for repudiation, *see*, generally 810 ILCS 5/2-606.
⁹⁹ 810 ILCS 5/2-714.
¹⁰⁰ 810 ILCS 5/2-717; *see also* 810 ILCS 5/2-714 cmt. 1.
¹⁰¹ 810 ILCS 5/2-715.
¹⁰² 810 ILCS 5/2-715(1).
¹⁰³ 810 ILCS 5/2-715(2).
¹⁰⁴ 810 ILCS 5/2-316.
¹⁰⁵ 810 ILCS 5/2-719.
¹⁰⁶ 810 ILCS 5/2-318.
¹⁰⁷ *Id.* at cmt. 1.
¹⁰⁸ *Id.*
¹⁰⁹ *Id.*
¹¹⁰ 810 ILCS 5/2-318 at cmt. 2.
¹¹¹ *Id.*
¹¹² *Id.* at cmt. 3.
¹¹³ 810 ILCS 5/2-719(2).
¹¹⁴ *Adams v. J.I. Case Co.*, 125 Ill. App. 2d 388, 401 (4th Dist. 1970).
¹¹⁵ *Interlake Packaging Corp. v. Strapex Corp.*, 842 F. Supp. 304, 307 (N.D. Ill. 1993).
¹¹⁶ *Id.*
¹¹⁷ *Id.*
¹¹⁸ *Smith v. Navistar Int'l Transp. Corp.*, 714 F. Supp. 303, 306-308 (N.D. Ill. 1989).
¹¹⁹ *Adams, id., supra*.
¹²⁰ Contract Law § 7.41 Drafting and Scrutinizing Remedy and Damage Limitations (IICLE 2013).
¹²¹ 810 ILCS 5/2-607(3).
¹²² *Id.* at cmt. 4.
¹²³ *Id.*
¹²⁴ *Id.* at cmt. 5.
¹²⁵ *Id.*
¹²⁶ *Id.* at cmt. 4.
¹²⁷ *Id.*
¹²⁸ *Id.*
¹²⁹ Products Liability § 4.34 Defense of Warranty Actions (IICLE 2009).
¹³⁰ *Id.*