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# 15 Warranties, Disclaimers, and Limitations

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## I. [15.1] INTRODUCTION

The Uniform Commercial Code (UCC) provides under Article 2, 810 ILCS 5/2-101, *et seq.*, for four types of warranties in connection with the sale of goods: warranties of title and noninfringement (810 ILCS 5/2-312), express warranties (810 ILCS 5/2-313), implied warranties of merchantability (810 ILCS 5/2-314), and implied warranties of fitness for a particular purpose (810 ILCS 5/2-315). In addition to examining these four types of commercial warranties, this chapter discusses warranty disclaimers and limitations and pertinent information on applicable federal law, primarily the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act (Magnuson-Moss), Illinois consumer protection statutes, and common-law implied warranties.

This chapter attempts to provide both a broad overview of Article 2 warranties, as well as a detailed discussion of influential Illinois warranty cases. All fifty states have adopted some form of Article 2 of the UCC, including Illinois in 1961. Thus, this chapter discusses illustrative cases from other jurisdictions when there are no Illinois cases on point. To access the versions of the UCC adopted by each of states, see www.law.cornell.edu/uniform/ucc.html.

## II. [15.2] DEFINITION OF "WARRANTY"

In the realm of contract law, Illinois courts may define a "warranty" as "a 'promise that a proposition of fact is true [that] amounts to [a] promise to indemnify promisee for any loss [if] the fact warranted proves untrue.' " *Siler v. Northern Trust Co.*, 80 F.Supp.2d 906, 910 (N.D.Ill. 2000), quoting BLACK'S LAW DICTIONARY, p. 1586 (6th ed. 1990). *See also Indeck North American Power Fund, L.P. v. Norweb PLC*, 316 Ill.App.3d 416, 735 N.E.2d 649, 659, 249 Ill.Dec. 45 (1st Dist. 2000).

As originally stated by Judge Learned Hand in *Metropolitan Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946), a warranty may also be understood as "an assurance [by] one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee [of] any duty to ascertain the fact for himself; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue." *Capitol Bankers Life Insurance Co. v. Amalgamated Trust & Savings Bank*, No. 92 C 4480, 1993 U.S.Dist. LEXIS 6032 at *10 (N.D.Ill. May 5, 1993), quoting *Vasco Trucking, Inc. v. Parkhill Truck Co.*, 6 Ill.App.3d 572, 286 N.E.2d 383, 386 (4th Dist. 1972).

In 1985, the Northern District Court of Illinois adopted Judge Hand's definition of "warranty" and added that a warranty is also a "promise that a proposition of fact is true [and] that certain facts are truly as they are represented to be and that they will remain so, subject to any specified limitations." *Consolidated Freightways Corp. v. Niedert Terminals, Inc.*, 612 F.Supp. 1391, 1396 (N.D.Ill. 1985), quoting BLACK'S LAW DICTIONARY, p. 1423 (5th ed. 1979).

A simpler way to view a warranty is to consider it a contract in its own right. *See, e.g., Bormann v. Simpson*, 45 Ill.App.3d 176, 359 N.E.2d 824, 827, 3 Ill.Dec. 965 (5th Dist. 1977) (noting warranty is contract).

Regardless of any generic definition of the term "warranty," the resolution of a dispute involving a warranty often relies heavily on the unique facts and circumstances of the case, the precise language of the warranty in question, and prior interpretations of the applicable statutory sections. While it is helpful to speak in generalities to arrive at a basic understanding of the law of warranties, the unique factual details of specific claims are what distinguish the cases and influence the courts' applications of the various sections of the Uniform Commercial Code. *See, e.g., Hasek v. DaimlerChrysler Corp.*, 319 Ill.App.3d 780, 745 N.E.2d 627, 634, 253 Ill.Dec. 504 (1st Dist.) (holding that since express warranties are contractual in nature, language of warranty itself is what controls and dictates obligations and rights of various parties), *appeal denied,* 195 Ill.2d 578 (2001). *See also Federal Insurance Co. v. Village of Westmont,* 271 Ill.App.3d 892, 649 N.E.2d 986, 990, 208 Ill.Dec. 626 (2d Dist. 1995) (holding that issue of whether implied warranty has been breached is question of fact).

## III. [15.3] UCC §2-312: WARRANTY OF TITLE

Uniform Commercial Code §2-312(1) embodies the basic legal concept that a warranty of good title is an automatic, even intrinsic, part of any contract between a buyer and a seller for the sale of goods. 810 ILCS 5/2-312(1). This concept of an inherent warranty of title has a longstanding precedent in Illinois. *See, e.g., Tyler v. Bailey,* 71 Ill. 34, 36 (1873) (holding that person who sells personal property is always warranting title).

While it may be tempting to read §2-312(1) as containing an "implied" warranty, relying on this terminology is misleading. The UCC does not designate warranty of title under §2-312(1) as being an implied warranty. Rather, implied warranties are set forth in 810 ILCS 5/2-314 and 5/2-315. As such, a §2-312(1) warranty of title is not subject to exclusion or modification under UCC §2-316 (addressing exclusions or modifications of warranties). See §15.36 below. However, a §2-312(1) warranty of title is governed by §2-312(2). Section 2-312(2) allows a warranty of title to be excluded or modified either by specific language or by circumstances giving the buyer reason to know that the seller does not claim title. See §15.7 below.

### A. [15.4] Scope of Warranty

There are two fundamental types of warranties of title. The first warrants that the title conveyed is good and that its transfer is rightful. 810 ILCS 5/2-312(1)(a). The second warrants that the goods are delivered free from any security interest or other lien of which the buyer has no knowledge. 810 ILCS 5/2-312(1)(b). "Knowledge," as used in §2-312(1)(b), however, is actual knowledge, as distinct from notice. Official Comment 1, 810 ILCS 5/2-312. These two types of warranties of title are subject to the exceptions outlined in §2-312(2). See §15.7 below.

The Official Comments on the Uniform Commercial Code contain insight into the drafters' goal of protecting buyers: "Subsection (1) makes provision for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receive a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit to protect it." Official Comment 1, 810 ILCS 5/2-312. *See also Rockdale Cable T.V. Co. v. Spadora,* 97 Ill.App.3d 754, 423 N.E.2d 555, 558, 53 Ill.Dec. 171 (3d Dist. 1981) (noting that in sale of goods there is warranty given by seller that title conveyed shall be good).

### B. [15.5] UCC §2-401: When Title Is Transferred

A discussion of warranty of title would not be complete without explaining when the warranty of title passes to the buyer. Although parties may make the transfer of title part of their agreement, §2-401 of the Uniform Commercial Code offers rules for title passing from the seller to the buyer in the absence of any such agreement. 810 ILCS 5/2-401(2).

Title passes to the buyer "at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." *Id.* Thus, title passes when the seller has delivered the goods. However, delivery does not necessarily mean that title passes when the seller takes the goods to a location. Title can pass in two ways. First, the contract can authorize the seller to send the goods to the buyer, but not require the seller to deliver them at the buyer's destination. 810 ILCS 5/2-401(2)(a). Thus, the seller is not actually physically delivering the goods to the buyer. Second, the contract may require a delivery at a specified destination. *Id.;* 810 ILCS 5/2-401(2)(b). In the first situation, title passes at the time and place of shipment. Thus, the buyer carries the risk of loss during the shipment. 810 ILCS 5/2-509(1)(a). In the second situation, title transfers when the buyer actually receives the goods. 810 ILCS 5/2-401(2)(b). Thus, the seller carries the risk of loss during the shipment. 810 ILCS 5/2-509(1)(b). If the seller retains any part of the title in goods shipped or delivered, then it is limited in effect to a reservation of a security interest. 810 ILCS 5/2-401(1).

In some situations, goods are delivered without moving the goods (*e.g.*, all equipment in construction of a bowling alley). In this situation, if the seller is to deliver a document of title, title passes when the seller delivers such documents. 810 ILCS 5/2-401(3)(a). If no documents of title are to be delivered and the contract identifies the goods, title passes at the time and place of contracting. 810 ILCS 5/2-401(3)(b). Identifying the time and place of when title transfers will enable parties to determine when the warranty of title is given effect.

### C. [15.6] UCC §2-403: Power To Transfer Title

The Uniform Commercial Code provides that a purchaser of goods only acquires the title to the property that the transferor had or had power to transfer. 810 ILCS 5/2-403. However, the UCC protects purchasers of goods and reflects its policy of purchasing clean title along with the goods. To this end, the UCC provides that if the seller only has a limited interest in the goods, the purchaser acquires only that limited interest. This is called "voidable title." Once a holder of voidable title sells it to a good-faith purchaser for value, the good-faith purchaser acquires good title. *Id.* This means that if a buyer purchases a good from a seller, but has no knowledge that it has defective title, the buyer may then sell the good to a good-faith purchaser for value. The good-faith purchaser for value then has clean title to the goods.

Moreover, the person with voidable title has the power to transfer good title even though

**(a) the transferor was deceived as to the identity of the purchaser, or**

**(b) the delivery was in exchange for a check which is later dishonored, or**

**(c) it was agreed that the transaction was to be a "cash sale", or**

**(d) the delivery was procured through fraud punishable as larcenous under the criminal law.** *Id.*

In addition, if a person entrusts goods to a "merchant who deals in goods of that kind," then the merchant may transfer all rights to a "buyer in ordinary course of business." 810 ILCS 5/2-403(2). "Merchant" is defined in §2-104 of the UCC and "buyer in the ordinary course of business" is defined in UCC §1-201(9).

These provisions demonstrate the UCC's strong protection of innocent purchasers. Because of this strong protection, in almost every commercial transaction, passing good title is assumed. Thus, specific language must be used to disclaim or limit the warranty of a good title. See §15.7 below.

### D. [15.7] UCC §2-312(2): Limitation of Warranty

Section 2-312(2) of the Uniform Commercial Code enables a seller to exclude or modify a §2-312(1) warranty of title either by (1) specific language or (2) circumstances that give the buyer reason to know that the person selling does not claim title in himself or herself or that the seller is purporting to sell only such right or title as the seller or a third person may have.

Courts have consistently emphasized that for a court to consider excluding a §2-312(1) warranty of title, precise and unambiguous language must be used to trigger §2-312(2). *See, e.g.*, *Rockdale Cable T.V. Co. v. Spadora*, 97 Ill.App.3d 754, 423 N.E.2d 555, 558, 53 Ill.Dec. 171 (3d Dist. 1981) (finding bill of sale in question lacked specificity of language required by §2-312(2)). *See also Moore v. Pro-Team Corvette Sales, Inc.*, 152 Ohio App.3d 71, 786 N.E.2d 903, 905 (2002) (holding specific language is necessary to relieve buyer of idea that any disclaimer of warranty relates only to quality; citing Illinois caselaw); *Jones v. Linebaugh*, 34 Mich.App. 305, 191 N.W.2d 142, 144 – 145 (1971) (noting that very precise and unambiguous language must be used to exclude warranty of title because warranty is so basic to sale of goods).

The following is an example of a warranty of title:

> **Seller warrants and represents that seller has absolute and good title to and full rights to dispose of the goods, and that there are no liens, claims or encumbrances of any kind against the goods.** 1 UNIFORM COMMERCIAL CODE: LEGAL FORMS §2:447 (4th ed. 2005).

An exclusion of a warranty of title is as follows:

> **Seller makes no warranty as to the title to the goods, and buyer assumes all risks of non-ownership of the goods by seller.** 1 UNIFORM COMMERCIAL CODE: LEGAL FORMS §2:450.

Alternatively, the following exclusion comes from *Quality Components Corp. v. Kel-Keef Enterprises, Inc.*, 316 Ill.App.3d 998, 738 N.E.2d 524, 536, 250 Ill.Dec. 308 (1st Dist. 2000), quoting *Sunseri v. RKO-Stanley Warner Theatres, Inc.*, 248 Pa.Super. 111, 374 A.2d 1342, 1345 (1977):

**[**T**]he seller does not warrant that he has any right to convey the title to the goods.**

As an alternative to the language specificity requirement, if there are circumstances giving the buyer reason to know that the person is purporting to sell only such right or title as he or she may have, the buyer cannot later complain that he or she received less than bargained for. *Rockdale Cable T.V., supra*, 423 N.E.2d at 558.

Section 2-312(2) recognizes that sales by sheriffs, executors, certain foreclosing lienors, and persons similarly situated may be so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer, and therefore, no personal obligation is imposed on a seller who is purporting to sell only an unknown or limited right. Official Comment 5, 810 ILCS 5/2-312. Official Comment 5 also states that §2-312(2) does not address issues relating to restitution arising in these cases, such as when a unique article is reclaimed after it is sold by a third party claiming to be the rightful owner. *See, e.g., Bormann v. Simpson*, 45 Ill.App.3d 176, 359 N.E.2d 824, 826, 3 Ill.Dec. 965 (5th Dist. 1977) (holding judicial sale of decedent's estate was not within purview of UCC as these sales are governed by common law). In addition, foreclosure sales under Article 9 of the UCC, 810 ILCS 5/9-101, *et seq.*, are not subject to §2-312(2). See 810 ILCS 5/9-610.

### E. [15.8] UCC §2-312(3): Supplementary Warranties

Uniform Commercial Code §2-312(3) subjects a merchant seller to a special warranty of noninfringement. 810 ILCS 5/2-312(3). Section 2-312(3) provides that a merchant seller warrants that the goods it sells are free from any rightful third-party claim, except that a buyer who furnishes specifications to the seller must hold the seller harmless against any claim arising out of compliance with the specifications. However, a merchant seller's §2-312(3) warranty is still subject to the same waiver and disclaimer rules as the default §2-312(1) title warranty. Unlike UCC §2-316, §2-312(3) does not create any specific requirements that the disclaimer or modification be contained in a record or be conspicuous.

The policy underlying §2-312(3) is "that a merchant who regularly deals in like goods has a duty to insure that no claim of infringement by a third party mars the buyer's title." *Johnson Electric North America Inc. v. Mabuchi Motor America Corp.*, 98 F.Supp.2d 480, 489 (S.D.N.Y. 2000), quoting *Dolori Fabrics, Inc. v. Limited, Inc.*, 662 F.Supp. 1347, 1358 (S.D.N.Y. 1987). Courts have interpreted §2-312(3) to entitle the buyer of an infringing good to indemnification from the seller for any claims by a third party for infringement. *See Dolori Fabrics, supra* (holding that catalog vendor who purchased infringing dresses for resale was entitled to indemnification from manufacturer). *See also Golden Trade, S.r.L. v. Jordache*, 143 F.R.D. 504, 507 (S.D.N.Y. 1992) (finding that when third-party defendant manufactured and sold jeans to defendant that infringed on plaintiff's patent, third-party defendant could be liable for consequential damages paid by defendant to plaintiff for patent infringement and for costs of litigation).

As with §2-312(2), §2-312(3) sales by sheriffs, executors, certain foreclosing lienors, and persons similarly situated are recognized as possibly being so unusual that their peculiar character should be immediately apparent to the buyer, and therefore, no personal obligation is imposed on a seller purporting to sell only an unknown or limited right.

## IV. [15.9] A CONTRACT FOR SERVICES OR GOODS? THE PREDOMINANT-PURPOSE TEST

Article 2 of the Uniform Commercial Code applies to "transactions in goods." 810 ILCS 5/2-102. The UCC defines "goods" as "all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale." 810 ILCS 5/2-105(1). However, sometimes contracts are arguably agreements for both goods and services. The general rule is that there is a transaction in goods under the UCC only if the contract is predominantly for goods and incidentally for services. This analysis is known as the predominant-purpose test. *See, e.g., Jannusch v. Naffziger,* 379 Ill.App.3d 381, 883 N.E.2d 711, 318 Ill.Dec. 480 (4th Dist. 2008). Prior to filing under the UCC, it should be determined whether the UCC applies, as it may be preempted by any number of federal statutes. See §15.47 below.

In *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.,* 199 Ill.2d 325, 770 N.E.2d 177, 195, 264 Ill.Dec. 283 (2002), the Illinois Supreme Court explained:

> **Under this test, if the contract is predominantly for the sale of goods, with services being incidental thereto, the contract will be governed by article 2. Conversely, if the contract is predominantly for services, with the sale of goods being incidental thereto, the contract will not fall within article 2.**

In *Jannusch, supra,* the plaintiffs sued the defendants for breach of an oral contract to sell the business to the defendant. The plaintiffs operated a business serving concessions to the general public at festivals and events throughout Illinois and Indiana. The oral agreement was to include a truck and all equipment associated with it, including refrigerators, freezers, roasters, chairs, tables, fountain service, signs, and lighting equipment. Applying the predominant-purpose test, the appellate court agreed with the trial court and held that it was a contract predominantly for the sale of goods. Thus, the UCC applied to the enforceability of the oral contract the parties entered into. 883 N.E.2d at 714 – 715. *See also Brandt v. Boston Scientific Corp.,* 204 Ill.2d 640, 792 N.E.2d 296, 275 Ill.Dec. 65 (2003) (surgically implanted medical device is predominantly contract for services and only incidentally for purchase of goods; note: it should be determined whether this case was overruled and parallel state claims were preempted by U.S. Supreme Court (see §15.47 below)); *Heuerman v. B & M Construction, Inc.,* 358 Ill.App.3d 1157, 833 N.E.2d 382, 295 Ill.Dec. 549 (5th Dist. 2005) (rejecting defendant's argument that contract for construction work was contract for goods); *Pitler v. Michael Reese Hospital,* 92 Ill.App.3d 739, 415 N.E.2d 1255, 1257 – 1258, 47 Ill.Dec. 942 (1st Dist. 1980) (finding that hospital's delivery of radiation treatment was predominantly for services, so breach of warranty claim was properly dismissed); *Nitrin, Inc. v. Bethlehem Steel Corp.,* 35 Ill.App.3d 577, 342 N.E.2d 65, 78 (1st Dist. 1976) (concluding that plaintiff's breach of implied warranty of merchantability claim was properly stricken by trial court because construction contract was predominantly for services).

Since statutes of limitation vary between contracts for goods and contracts for services, the distinction can sometimes be fatal to a plaintiff's claim. *See, e.g., Tivoli Enterprises, Inc. v. Brunswick Bowling & Billiards Corp.*, 269 Ill.App.3d 638, 646 N.E.2d 943, 947 – 948, 207 Ill.Dec. 109 (2d Dist. 1995) (holding that bowling lane construction contract was predominantly for goods, so dismissal under UCC statute of limitations was proper). *See also Bob Neiner Farms, Inc. v. Hendrix*, 141 Ill.App.3d 499, 490 N.E.2d 257, 258 – 259, 95 Ill.Dec. 784 (3d Dist. 1986) (finding that building construction contract was primarily for goods, so plaintiff's claim was properly dismissed under UCC statute of limitations).

## V. [15.10] UCC §2-313: EXPRESS WARRANTIES

Under the Uniform Commercial Code, an express warranty may be oral or may be created by a description, sample, or model. 810 ILCS 5/2-313; *Hasek v. DaimlerChrysler Corp.*, 319 Ill.App.3d 780, 745 N.E.2d 627, 639, 253 Ill.Dec. 504 (1st Dist. 2001). Illinois courts have held that whether an express warranty exists is to be determined from the intent of the parties as shown by expressions or words used in the contract and the meaning to be given to them. *MacAndrews & Forbes Co. v. Mechanical Manufacturing Co.*, 367 Ill. 288, 11 N.E.2d 382, 386 (1937). *See also Lenox, Inc. v. Triangle Auto Alarm*, 738 F.Supp. 262, 265 (N.D.Ill. 1990) (holding that express warranty requires that seller make or accede to some representation regarding performance or quality of product); *Beckett v. F.W. Woolworth Co.*, 376 Ill. 470, 34 N.E.2d 427, 429 (1941) (holding that "express warranty" is one imposed by parties to sale contract and is part thereof). As such, the adoption of §2-313 of the UCC codified and clarified what was already common-law practice in Illinois.

Section 2-313(1) sets forth the circumstances under which a seller creates an express warranty:

a. Any affirmation of fact or promise made by the seller relating to the goods that becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

b. Any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

c. Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Predictably, a recurring issue in litigation involving §2-313 is the question of whether the seller's words or actions indeed became part of the "basis of the bargain."

Section 2-313(2) attempts to set some boundaries as to when a seller may create a warranty, noting that it is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty. However, a mere affirmation of the value of the goods or a statement purporting to be the seller's opinion or commendation of the goods does not create a warranty. Establishing the

boundaries set forth in §2-313(2) often becomes a question of fact. In other words, under Illinois law, an express warranty exists if the seller assumes the responsibility to assert a fact of which the buyer is ignorant. However, an express warranty is not created if the seller merely states an opinion or judgment on the matter of which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his or her judgment. *See, e.g., Roberts v. Robert V. Rohrman, Inc.*, 909 F.Supp. 545, 551 (N.D.Ill. 1995) (holding that it was question of fact as to whether reasonable inspection by seller of vehicle prior to sale would have revealed that odometer was incorrect).

Concerning the burden of proof, in Illinois, a reviewing court may not reverse a trial court's judgment regarding the existence of an express warranty merely because different conclusions might have been drawn. The findings of the trial court will not be disturbed on appeal unless they are against the manifest weight of the evidence. *Felley v. Singleton*, 302 Ill.App.3d 248, 705 N.E.2d 930, 933 – 934, 235 Ill.Dec. 747 (2d Dist. 1999) (emphasizing that whether express warranty exists is usually factual issue to be determined by trier of fact).

### A. [15.11] Plaintiff's Prima Facie Case

It is well settled in Illinois that in a suit for damages for breach of a written express warranty, the burden of proof is on the plaintiff. To make a prima facie case for breach of a written express warranty, a plaintiff must show by a preponderance of the evidence (1) the terms of the warranty, (2) the failure of some warranted part, (3) a demand on the defendant to perform under the terms of the warranty, (4) a failure of the defendant to do so, (5) compliance with the terms of the warranty by the plaintiff, and (6) damages measured by the terms of the warranty. *Pearson v. DaimlerChrysler Corp.*, 349 Ill.App.3d 688, 813 N.E.2d 230, 236, 286 Ill.Dec. 173 (1st Dist. 2004), citing *Hasek v. DaimlerChrysler Corp.*, 319 Ill.App.3d 780, 745 N.E.2d 627, 638, 253 Ill.Dec. 504 (1st Dist. 2001). *See also Weng v. Allison*, 287 Ill.App.3d 535, 678 N.E.2d 1254, 1256, 223 Ill.Dec. 123 (3d Dist. 1997) (finding that seller's affirmations to buyer that car was "mechanically sound," "in good condition," and had "no problems" created express warranty); *Caterpillar, Inc. v. Usinor Industeel*, 393 F.Supp.2d 659, 677 (N.D.Ill. 2005) (holding that to state claim for breach of express warranty in Illinois, plaintiff must show breach of affirmation of fact or promise that was made part of basis of bargain).

However, it is not necessary for the buyer to show reasonable reliance on the seller's affirmations to make the affirmations part of the basis of the bargain. *Weng, supra*. The issue of reliance is discussed in further detail in §15.12 below.

The Official Comments on the Uniform Commercial Code explain that "express" warranties rest on "dickered" aspects of the individual bargain and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. Official Comment 1, 810 ILCS 5/2-313; *Alan Wood Steel Co. v. Capital Equipment Enterprises, Inc.*, 39 Ill.App.3d 48, 349 N.E.2d 627, 632 (1st Dist. 1976) (holding that express warranties rest on dickered terms of individual bargain and are therefore contractual in nature).

An affirmation of quality amounting to an express warranty must have been made at the time of the sale with the intention of warranting quality and not as a mere expression of opinion. A

seller may later try to disclaim a warranty, but a disclaimer is ineffectual if it is made after a contract is concluded and the buyer did not assent to the change. *Keller v. Flynn*, 346 Ill.App. 499, 105 N.E.2d 532, 535 (2d Dist. 1952) (finding that defendants warranted that hogs had been treated for cholera and were safe and that plaintiff relied on this warranty). A buyer is not barred from relying on an express warranty of quality simply because the buyer inspected the goods when the defects were such as would become apparent only by time and use. *Hodgman v. State Line & Sullivan R.R.*, 45 Ill.App. 395 (2d Dist. 1892).

NOTE: In Illinois, administrators, executors, and trustees have no authority to bind an estate by making an express warranty of property transferred at a judicial sale. An administrator is given no power to enter into contracts of warranty for the estate and, if an administrator warrants goods expressly, the administrator binds himself or herself personally, not the estate. *Bormann v. Simpson*, 45 Ill.App.3d 176, 359 N.E.2d 824, 827, 3 Ill.Dec. 965 (5th Dist. 1977). For more on limitations on administrators' powers, *see First of America Trust Co. v. First Illini Bancorp, Inc.*, 289 Ill.App.3d 276, 685 N.E.2d 351, 356, 226 Ill.Dec. 248 (3d Dist. 1997) (explaining that in Illinois executor has no authority to bind estate by contract and thus contract entered between executor and third person personally binds executor).

### B. [15.12] Reliance

The Official Comments on the Uniform Commercial Code explain that no specific intention to make a warranty is necessary if any of the factors listed in §2-313(1) are made part of the basis of the bargain. Official Comment 3, 810 ILCS 5/2-313. In actual practice, affirmations of fact and promises made by the seller about the goods during a bargain are regarded as part of the description of the goods; hence, no particular reliance on these statements needs to be shown in order to weave them into the fabric of the agreement. Rather, any fact taking these affirmations or promises out of the agreement requires clear affirmative proof. The issue is normally one of fact. *Id.*

To determine whether a statement formed the basis of the bargain, the court must examine "the circumstances surrounding the sale, the reasonableness of the buyer in believing the seller, and the reliance placed on the seller's statement by the buyer." *Jones v. Davenport*, No. 18162, 2001 Ohio App. LEXIS 226 at *17 (Jan. 26, 2001), quoting *McCormack v. Knight*, No. CA88-11-080, 1989 Ohio App. LEXIS 2347 at *4 (June 19, 1989).

The UCC apparently intends that the buyer need not place particular reliance on the seller's affirmations in order for these affirmations to be considered part of the basis of the bargain. Any affirmation of fact or promise by the seller is presumed to be a part of the basis of the bargain, and the burden is on the manufacturer to show, by clear proof, that the parties did not intend their bargain to include these affirmations. *Yarusso v. International Sport Marketing, Inc.*, No. 93C-10-132 SCD, 1999 Del.Super. LEXIS 231 at *19 (Apr. 1, 1999).

However, significant reliance by the buyer on his or her examination of the product before the deal is completed has been held by prevailing caselaw to indicate that the buyer's lack of reliance on the seller's affirmations or descriptions precluded the creation of an express warranty. *Alan Wood Steel Co. v. Capital Equipment Enterprises, Inc.*, 39 Ill.App.3d 48, 349 N.E.2d 627,

635 (1st Dist. 1976), citing *Janssen v. Hook,* 1 Ill.App.3d 318, 272 N.E.2d 385 (2d Dist. 1971), and *Sylvia Coal Co. v. Mercury Coal & Coke Co.*, 151 W.Va. 818, 156 S.E.2d 1 (1967).

In *Weng v. Allison,* 287 Ill.App.3d 535, 678 N.E.2d 1254, 223 Ill.Dec. 123 (3d Dist. 1997), the court reversed the trial court's ruling that the statements of the seller were not part of the basis of the bargain because no reasonable person could have relied on the statements. In *Weng,* it was found that the trial court misconstrued the role of reliance in determining whether an affirmation of fact or description is part of the basis of the bargain. The *Weng* court held that affirmations of fact made during the bargaining are presumed to be part of the basis of the bargain unless clear, affirmative proof otherwise is shown.

The matter of timing may also become relevant in a discussion of reliance. For example, the Third District Appellate Court held that a sales brochure for a water well drilling rig did not create an express warranty in the sale of the rig to the buyer when the buyer testified that he did not rely on the sales brochure and could not even recall whether he initially saw the brochure before or after the sale. *Adolphson v. Gardner-Denver Co.,* 196 Ill.App.3d 396, 553 N.E.2d 793, 798, 143 Ill.Dec. 86 (3d Dist. 1990).

## C. [15.13] UCC §2-313(1)(b): Warranty of Description

Section 2-313(1)(b) of the Uniform Commercial Code establishes that any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods "shall conform to the description." 810 ILCS 5/2-313(1)(b). The §2-313 "basis of the bargain" element, however, does require that a plaintiff show a reliance on the seller's representations when deciding whether to purchase the goods.

### 1. [15.14] Defining the Basis of the Bargain

Section 2-313(1) of the Uniform Commercial Code gives express warranty effect to a seller's descriptions or affirmations if they are "part of the basis of the bargain." 810 ILCS 5/2-313(1). Generally, disclaimers of affirmations or descriptions found to be express warranties are invalid if the disclaimer is inconsistent with the terms of the parties' agreement. *Alan Wood Steel Co. v. Capital Equipment Enterprises, Inc.,* 39 Ill.App.3d 48, 349 N.E.2d 627 (1st Dist. 1976) (when buyer's decision to buy was primarily based on opinions and observations of its skilled inspectors who examined crane on two different occasions and when evidence indicated that parties intended that crane be sold as inspected without warranties, no express warranty was included in terms of contract). Significant reliance by the buyer on his or her examination of the product before the deal is completed has been held to indicate that the buyer's lack of reliance on the seller's affirmations or descriptions precluded the creation of an express warranty. 349 N.E.2d at 635.

Documents, brochures, and advertisements may constitute express warranties under the UCC, and when these affirmations are made during the bargaining process, they are presumed to be part of the bargain unless clear, affirmative proof shows otherwise. *Crest Container Corp. v. R.H. Bishop Co.,* 111 Ill.App.3d 1068, 445 N.E.2d 19, 24, 67 Ill.Dec. 727 (5th Dist. 1982) (noting that it is clear that documents and brochures may constitute express warranties).

### 2. [15.15] Express Warranties vs. Puffing

Sales talk that relates only to the value of the goods or the seller's personal opinion or commendation of the goods is considered "puffing" and is not binding on the seller as an express warranty under §2-313 of the Uniform Commercial Code (810 ILCS 5/2-313). *Redmac, Inc. v. Computerland of Peoria,* 140 Ill.App.3d 741, 489 N.E.2d 380, 382, 95 Ill.Dec. 159 (3d Dist. 1986) (finding that computer salesman's statements that system would be "free from defects" upon delivery or be repaired during manufacturer's warranty period and would "work for a reasonable period of time" were not mere salesman "puffing" but were express warranties binding on seller).

To date, Illinois courts have not created any bright-line test to distinguish express warranties from puffing. *Id.* (holding that no bright-line distinction between express warranties and puffing exists; whether issue is one of law or fact may be debatable; however, it is generally considered question of fact). As such, courts may reach different results in similar cases when attempting to distinguish an express warranty from mere puffing. For example, in *Felley v. Singleton,* 302 Ill.App.3d 248, 705 N.E.2d 930, 235 Ill.Dec. 747 (2d Dist. 1999), the court upheld a verdict finding a breach of an express warranty brought by an unhappy used car buyer. The buyer had purchased a six-year-old Ford Taurus based on a statement made by the salesperson that the car was in good mechanical condition. The court held that the seller's representations were presumed to be affirmations of fact that constituted an express warranty, regardless of the buyer's reliance on them, unless the seller showed by clear affirmative proof that the representations did not become part of the basis of the bargain. *See also Weng v. Allison,* 287 Ill.App.3d 535, 678 N.E.2d 1254, 1256, 223 Ill.Dec. 123 (3d Dist. 1997) (finding that used car seller's statements to buyers that car was "mechanically sound," "in good condition," and had "no problems" were affirmations of fact and descriptions that created express warranty). *But see Web Press Services Corp. v. New London Motors, Inc.,* 203 Conn. 342, 525 A.2d 57 (1987) (Connecticut Supreme Court held that seller's statements that used vehicle was excellent and in mint condition did not create express warranty when buyer was permitted to examine and drive vehicle prior to purchase); *Anderson v. Bungee International Manufacturing Corp.,* 44 F.Supp.2d 534, 541 (S.D.N.Y. 1999) (finding that statements "Premium Quality" and "Made in the USA," to extent that they connote superior quality, were descriptions of goods and were not part of basis of bargain within meaning of §2-313; rather, statements that products were of premium or superior quality were generalized statements of salesmanship and mere puffery).

It is important to remember that the mere use of descriptive terms in a sales contract is not operative to bring into existence express warranties when the subject matter of the sale may be determined by independent means not connected with the description. *Grass v. Steinberg,* 331 Ill.App. 378, 73 N.E.2d 331 (1st Dist. 1947) (finding that sale was not sale by description but of specific article in existence and thoroughly and repeatedly inspected by plaintiff and his experts, who were all well qualified to make such inspection, and that plaintiff did not rely on any warranty but only on his examination of property purchased, and holding that there could be no such warranty, either express or implied, as to justify rescission).

### D. [15.16] UCC §2-313(1)(c): Warranty by Sample and Model

Section 2-313(1)(c) of the Uniform Commercial Code provides that a seller's sample or model of a good that is made part of the basis of the bargain creates an express warranty that all of the goods will conform to the sample or model. 810 ILCS 5/2-313(1)(c). Whether a sample is made part of the basis of the bargain is essentially a question of fact. *Eaton Corp. v. Minerals Technologies Inc.*, No. 96CV162, 1999 WL 33485557 at *9 (W.D.Mich. Mar. 19, 1999).

The terms "sample" and "model" are not synonymous. The Official Comments on the UCC clarify the differences in these terms. Section 2-313(1)(c) applies to both a sample actually drawn from the bulk of the goods that are the subject matter of the sale and to a model that is offered for inspection when the subject matter is not at hand and has not been drawn from the bulk of the goods. However, the basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. Official Comment 6, 810 ILCS 5/2-313.

The Official Comments do draw other distinctions between samples and models and indicate that a straight sample may be more persuasive than an illustrative model. In general, the presumption is that any sample or model, just like any affirmation of fact, is intended to become a basis of the bargain. When the seller exhibits a sample purporting to be drawn from an existing bulk of goods, good faith requires that the sample be fairly drawn. But, in mercantile experience, the mere exhibition of a sample does not by itself show whether it is merely intended to *suggest* or to *be* the character of the subject matter of the contract. The question is whether the seller has so acted with reference to the sample as to become responsible that the whole shall have at least the values shown by it. If the sample has been drawn from an existing bulk of goods, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model. *Id.*

The Official Comments also indicate that the precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language, samples, or models should be regarded as part of the contract. If language that would otherwise create an obligation under §2-313 is used after the closing of the deal (as when the buyer, when taking delivery, asks and receives an additional assurance), an obligation will arise if the requirements for a modification are satisfied. Official Comment 7, 810 ILCS 5/2-313. *See Downie v. Abex Corp.*, 741 F.2d 1235 (10th Cir. 1984).

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✓ Naturally, sellers may contract around their use of samples or models if they do not want them to become a basis of the bargain. Consider the following language:

> **The [model or sample] shown by seller to buyer is used for demonstration purposes only. There is no warranty that the goods as delivered shall conform to the [model or sample], and conformity of the goods to the [model or sample] is not part of the basis of the bargain between the parties.** 1 UNIFORM COMMERCIAL CODE: LEGAL FORMS §2:541 (4th ed. 2007).

## E. [15.17] Drafting or Scrutinizing Express Warranties

To create an "express warranty" of goods sold, no particular words or forms of expression are necessary, but a positive assertion of a matter of fact by a seller at the time of the sale for the purpose of assuring the buyer of this fact and of inducing the buyer to make the purchase constitutes a warranty if relied on by the buyer. *Beckett v. F.W. Woolworth Co.*, 376 Ill. 470, 34 N.E.2d 427, 430 (1941).

It is important to consider the following elements when drafting or scrutinizing a seller's warranty:

1. a detailed description of the goods (810 ILCS 5/2-313(1)(b));

2. express representations about the goods as set forth in the contract of sale (810 ILCS 5/2-313(1)(a));

3. implied warranty of merchantability (810 ILCS 5/2-314);

4. implied warranty of fitness for a particular purpose (810 ILCS 5/2-315);

5. exclusion or modification of warranties (*e.g.*, use of warnings, restrictions, or directions) (810 ILCS 5/2-316);

6. exclusion of parol evidence (*id.*);

7. cumulation and conflict of warranties (810 ILCS 5/2-317);

8. the authority, or lack thereof, of salespersons or other employees to make warranties;

9. limitation on remedies for breach (*e.g.*, include a limitation period); and

10. potential applicability of the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act.

The following are sample forms of express warranties and exclusions of implied warranties. The first sample provision is an express warranty of fitness for a particular purpose and merchantability:

**Seller warrants that (1) the goods to be supplied pursuant to this agreement are fit and sufficient for the purpose intended; (2) the goods are merchantable, of good quality, and free from defects, whether patent or latent, in material or workmanship; and (3) the goods sold to the buyer pursuant to this agreement conform to the standards required by Section ___ of this agreement.**

**Seller warrants that Seller has title to the goods supplied and that the goods are free and clear of all liens, encumbrances, and security interests. All warranties made in this agreement, together with service warranties and guarantees, shall run to Buyer and Buyer's successors, assigns, and customers.**

**SELLER MAKES NO OTHER WARRANTY OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED; AND ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE WHICH EXCEED THE AFORESTATED OBLIGATION ARE HEREBY DISCLAIMED BY SELLER AND EXCLUDED FROM THIS AGREEMENT.**

The second sample provision is a more detailed express warranty that is limited only to those components actually manufactured by the seller:

**Seller warrants to the original owner of [**product**] that [**product**] will be free of defective material and workmanship for a period of five years and a two-year warranty on all other components manufactured by Seller (excluding normal wear parts), commencing with the date of shipment from the factory. Seller warrants products or component parts used on [**product**], but not manufactured by Seller, to the purchaser, to the same extent that they are warranted by the original manufacturer to Seller.**

**The warranty becomes valid upon the receipt of "Payment in Full" by Seller. Only defects called to Seller's attention during this period of time will be covered under this warranty. This warranty is null and void if**

**[**Product**] is altered in any way without the advanced written consent of Seller; or**

**[**Product**] is not installed within 120 days of original shipment.**

**Seller will not be responsible for any installation (labor) costs incurred during replacement or for replacement or repair of any materials subjected to excessive abuse, misuse, or improper installation.**

**Seller will repair or replace at its discretion and at no charge, with freight prepaid (carrier of Seller's choice), any [**product**] or its component parts that are found defective upon inspection by an authorized representative of Seller. This provision of repair or**

**replacement shall be the limit of Seller's responsibility under this warranty. Seller shall not be responsible for other losses or damages claimed to be caused by any [**product**] or [**product**] parts covered under this warranty.**

**No other oral or written representation made by Seller or its agents are part of this warranty unless specifically set forth in writing by an authorized representative of Seller.**

**The above set forth warranty is Seller's sole warranty.**

**SELLER MAKES NO OTHER WARRANTY OF ANY KIND WHATSOEVER, EXPRESSED OR IMPLIED; AND ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE EXCEEDING THE AFORESTATED OBLIGATION ARE HEREBY DISCLAIMED BY SELLER AND EXCLUDED FROM THIS AGREEMENT.**

The next sample provision warrants only the product's workmanship and that the product is free from defects. This sample contains a one-year limitation period.

**Seller warrants that all of its products shall be free from defects in materials and workmanship for a period of one year from delivery to its customers.**

**Seller makes no other warranty of any kind whatsoever, express or implied, and hereby disclaims all implied warranties of merchantability and fitness for a particular purpose.**

**Seller's liability under its express warranty is limited to the repair or replacement of the defective products, and under no circumstances shall Seller be liable for special, indirect, or consequential damages. No action, regardless of form, arising out of your purchase of Seller's products may be brought by you more than one year after the cause of action has occurred.**

The next sample provision also warrants the product's workmanship and that the product is free from defects, but further warrants that the product conforms to a specified description:

**WARRANTY. Seller warrants that its products will be free from material defects and further warrants that such products will conform to the description and/or specified parameters set forth in Seller's Specification Sheet.**

**THE WARRANTIES SET FORTH HEREIN ARE EXPRESSLY IN LIEU OF ANY OTHER EXPRESS OR IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NONINFRINGEMENT, OR ANY OTHER OBLIGATION ON THE PART OF SELLER. NO DESCRIPTIONS OTHER THAN THOSE IN THIS DOCUMENT OR IN SELLER'S SPECIFICATION SHEET SHALL BE DEEMED A WARRANTY BY DESCRIPTION OR OTHERWISE HAVE ANY LEGAL EFFECT. IF EXAMPLES WERE EXHIBITED TO BUYER, SAME WERE FOR GENERAL INFORMATIONAL PURPOSES ONLY AND SHALL NOT BE DEEMED A WARRANTY BY SAMPLE OR MODEL OR OTHERWISE HAVE ANY LEGAL EFFECT.**

**BUYER'S SOLE AND EXCLUSIVE REMEDY, AND SELLER'S SOLE LIABILITY, WITH RESPECT TO ANY BREACH OF WARRANTY SHALL BE, AT SELLER's OPTION, (1) REPAIR OR REPLACEMENT OF THE DEFECTIVE OR NONCONFORMING PRODUCT AS SET FORTH BELOW OR (2) REFUND OF BUYER'S PURCHASE PRICE FOR THE DEFECTIVE OR NONCONFORMING PRODUCT.**

Stephen M. Flanagan provides other express warranties, the first of which is a warranty in which the goods conform to a sample or model:

> **Seller warrants that the goods when delivered shall conform to the sample/model that was [exhibited or demonstrated] to buyer on [date], by [name], the sales representative of seller, at [street address, city, county, state].** 1 UNIFORM COMMERCIAL CODE: LEGAL FORMS §2:482 (4th ed. 2007).

As a contrast, the second sample provision from Flanagan contains an express warranty disclaiming specific conformance to a sample or model:

> **The [sample or model] identified in Section ___ of this agreement has been supplied by seller to buyer. This [sample or model] is intended to serve only as an approximation of the goods subject to this agreement and does not conform to the agreed-on specifications set forth in Section ___ of this agreement. [If appropriate, add: "The (sample or model) is supplied to buyer only to provide a rough illustration of the size, weight, color and durability of the finished goods."]. The goods to be delivered under this agreement shall conform to the specifications as agreed on rather than to the [sample or model] supplied to buyer. Seller makes no warranty that the goods supplied will conform to the [sample or model], and any deviation of the [sample or model] from the specifications shall be controlled by the specifications.** 1 UNIFORM COMMERCIAL CODE: LEGAL FORMS §2:489.

## VI. [15.18] UCC §§2-314 and 2-315: IMPLIED WARRANTIES

The recognition of implied warranties by Illinois courts predates the state's adoption of Article 2 of the Uniform Commercial Code. *See, e.g., Charles v. Judge & Dolph, Ltd.*, 111 F.Supp. 794 (N.D.Ill. 1953) (holding implied warranties are contained in every contract of sale unless expressly rejected by parties to contract).

Article 2 imposes or implies two types of warranties in certain transactions. These implied warranties automatically become a part of the transaction unless properly excluded. These implied warranties, when present, create buyer rights and seller obligations in addition to any express warranties that might also exist.

The first type is an implied warranty of merchantability under §2-314 of the Uniform Commercial Code. 810 ILCS 5/2-314. This warranty presumes that there is an implied promise that the product is fit for the ordinary purposes for which it is intended (*e.g.,* a truck must be fit

for the ordinary purpose of driving). The second is an implied warranty of fitness for a particular purpose under UCC §2-315. This warranty presumes there is an implied promise that the product is fit for the particular purpose of the buyer (*e.g.*, the truck must be fit for use for the particular purpose of pulling a horse trailer).

### A. [15.19] UCC §2-314: Implied Warranty of Merchantability

Unless excluded or modified (see 810 ILCS 5/2-316), a warranty of merchantability is implied in every sale of goods by a merchant of the goods. 810 ILCS 5/2-314(1); *Brandt v. Boston Scientific Corp.*, 204 Ill.2d 640, 792 N.E.2d 296, 299, 275 Ill.Dec. 65 (2003). A product breaches the implied warranty of merchantability if it is not "fit for the ordinary purposes for which such goods are used." 810 ILCS 5/2-314(2)(c). If the seller is a merchant with respect to the goods being sold, a warranty is implied in the contract for the sale of the goods. Also note that the warranty of merchantability applies to sales for use as well as to sales for resale. See Official Comment 1, 810 ILCS 5/2-314.

For goods to be merchantable, they must, at a minimum, meet all of the following criteria:

1. pass without objection in the trade under the contract description;

2. in the case of fungible goods, be of fair average quality within the description;

3. be fit for the ordinary purposes for which the 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. be 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. 810 ILCS 5/2-314(2).

A buyer bears the burden of proving breach of an implied warranty of merchantability. *Alvarez v. American Isuzu Motors*, 321 Ill.App.3d 696, 749 N.E.2d 16, 22 – 23, 255 Ill.Dec. 236 (1st Dist. 2001) (explaining that to prove breach of implied warranty of merchantability, plaintiff must prove that product was defective and that defect existed when product left defendant's control, but also noting that plaintiff is not required to prove specific defect and that defect may be proven inferentially by direct or circumstantial evidence). *See also Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 898 (7th Cir. 2005) (explaining that in cases involving implied warranty of fitness for ordinary purpose, buyer is party bearing burden of proving warranty's breach).

Since Illinois is a fact-pleading state, a plaintiff bringing a claim alleging an implied warranty of merchantability in state court must adequately allege facts that define the ordinary use for the goods. Conclusory allegations regarding merchantability and fitness are not sufficient to state a claim for an implied warranty of merchantability. But note that Illinois' fact-pleading rules do not

apply to warranty claims under the Uniform Commercial Code brought in federal courts sitting in Illinois. *See Industrial Steel Service, Center v. Praxair Distribution, Inc.,* No. 04 C 2781, 2004 U.S.Dist. LEXIS 17563 (N.D.Ill. Sept. 1, 2004) (discussing this pleading distinction).

### 1. [15.20] Comparison to Strict Liability in Tort

A claim for a breach of an implied warranty of merchantability is similar in several respects to a claim for strict product liability. There are striking similarities between causes of action for breach of an implied warranty and strict liability in tort. Indeed, several courts have held that strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action. *Donald v. Shinn Fu Company of America,* No. 99-CV-6397 (ARR), 2002 WL 32068351 at *4 (E.D.N.Y. Sept. 4, 2002). *See also Roback v. V.I.P. Transport, Inc.,* No. 91 C 5902, 1994 U.S.Dist. LEXIS 9097 at *16 (N.D.Ill. July 6, 1994) (observing that breach of implied warranty and strict liability are nearly identical); *Webster v. Pacesetter, Inc.,* 259 F.Supp.2d 27, 38 (D.D.C. 2003) (noting that differences between strict liability in tort and implied warranty, if any, are conceptual); *Garcia v. Edgewater Hospital,* 244 Ill.App.3d 894, 613 N.E.2d 1243, 1249, 184 Ill.Dec. 651 (1st Dist. 1993) (noting that claim for tort of strict products liability is essentially claim for breach of implied warranty of merchantability "divested of the contract doctrines of privity, disclaimer and notice"), *overruled in part on other grounds by Brandt v. Boston Scientific Corp.,* 204 Ill.2d 640, 792 N.E.2d 296, 275 Ill.Dec. 65 (2003). The *Garcia* court continued, observing that "the two theories . . . are not synonymous. The ultimate participant in strict liability actions is the manufacturer, whereas the ultimate participant in implied warranty of merchantability actions is a merchant." 613 N.E.2d at 1249 – 1250. *See also State Farm Fire & Casualty Co. v. Miller Electric Co.,* 204 Ill.App.3d 52, 562 N.E.2d 589, 595, 150 Ill.Dec. 59 (2d Dist. 1990); *Jarvis v. Ford Motor Co.,* 283 F.3d 33, 63 n.16 (2d Cir. 2002) (attempting to reconcile New York Court of Appeals holding that "strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action" (quoting *Denny v. Ford Motor Co.,* 87 N.Y.2d 248, 662 N.E.2d 730, 741 (1995)) and that "it would not be correct to infer that the tort cause of action has completely subsumed the older breach of implied warranty cause of action or that the two doctrines are now identical in every respect" (quoting *Denny, supra,* 662 N.E.2d at 734)).

In *O'Malley v. American LaFrance, Inc.,* No. 00-CV-1421 (ARR), 2002 WL 32068354 (E.D.N.Y. Dec. 30, 2002), the court discussed in greater detail the difference between claims for breach of implied warranty and strict liability. The *O'Malley* court noted:

> **Generally speaking, "strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action." *Mendel v. Pittsburgh Plate Glass Co.,* 25 N.Y.2d 340, 345, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969). However, it is not true, as a matter of law that all breach of implied warranty claims are identical to their strict products liability cousins. *Denny et al. v. Ford Motor Co.,* 87 N.Y.2d 248, 256, 639 N.Y.S.2d 250, 662 N.E.2d 730 (1995). First, a products liability claim requires a different showing than does a breach of warranty claim. For the former, the plaintiff must demonstrate that the product at issue is not reasonably safe. This requires a risk-utility balancing that takes into account, *inter alia,* the usefulness of the product, the cost of an alternative**

> **design, and the likelihood of the product causing injury. *Id.* at 258, 639 N.Y.S.2d 250, 662 N.E.2d 730. In contrast, a breach of implied warranty claim asks whether the product is "fit for the ordinary purposes for which such goods are used." *Id.* at 258, 639 N.Y.S.2d 250, 662 N.E.2d 730. An injury can thus fail as a products liability claim and succeed as a breach of implied warranty claim.** 2002 WL 32068354 at *8.

An implied warranty of merchantability is an action in contract. Strict liability is a tort action. See RESTATEMENT (SECOND) OF TORTS §402A, cmt. m (1965). *See also Garcia, supra.* The proper test for distinguishing tort and contract is (a) the nature of the defect and (b) the manner in which the injury occurred. *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill.2d 21, 682 N.E.2d 45, 51, 224 Ill.Dec. 484 (1997). In Illinois, there is no tort recovery when the product damages itself only, even if the damage is a result of a sudden and calamitous event. *See Trans States Airlines, supra,* 682 N.E.2d at 54 – 55, in which the Illinois Supreme Court adopted the U.S. Supreme Court's economic-loss doctrine as set forth in *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 90 L.Ed.2d 865, 106 S.Ct. 2295 (1986), and partially overruled its decision in *Vaughn v. General Motors Corp.,* 102 Ill.2d 431, 466 N.E.2d 195, 80 Ill.Dec. 743 (1984).

Some courts have agreed that strict liability and breach of implied warranty claims are not identical. It is certainly plausible that a jury could find no product defect when there is a simultaneous finding of breach of warranty. *See, e.g., Jarvis, supra.* Alternatively, a court may also find that there is no product defect and no breach of warranty but arrive at this conclusion by employing different reasoning. For example, in *Huebner v. Hunter Packing Co.*, 59 Ill.App.3d 563, 375 N.E.2d 873, 16 Ill.Dec. 766 (5th Dist. 1978), the plaintiffs brought two claims against a meat packing company after contracting trichinosis from contaminated pork. The plaintiffs' first claim alleged a breach of implied warranty. The court affirmed dismissal of this claim by reasoning that it was a factual impossibility that the plaintiffs had contracted trichinosis when they were also claiming that the meat had been properly cooked. The court took judicial notice of the undisputed scientific fact that a thorough cooking to 137° Fahrenheit would destroy all trichinae. The plaintiffs' second claim sounded in strict liability. Here, the court also affirmed dismissal of the plaintiffs' claims, this time by reasoning that the raw pork containing trichinae was not in a defective condition that was unreasonably dangerous since the buyers could have eliminated any risk simply by properly cooking the pork. Thus, this claim failed to state a cause of action under a theory of strict liability in tort.

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✓ The Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* addresses product liability actions and provides for dismissal of claims against nonmanufacturing defendants in any product liability action based in whole or in part on the doctrine of strict liability in tort. 735 ILCS 5/2-621(a). In 1995, the legislature amended §2-621 via P.A. 89-7, substituting the words "on any theory or doctrine" for "in whole or in part on the doctrine of strict liability in tort." However, the Illinois Supreme Court declared the entirety of P.A. 89-7 unconstitutional in *Best v. Taylor Machine Works,* 179 Ill.2d 367, 689 N.E.2d 1057, 228 Ill.Dec. 636 (1997). As such, §2-621 reverted back to its pre-amendment form and applies only to actions based in whole or in part on the doctrine of strict liability in tort. In other words, breach of warranty of merchantability claims are contract actions, not tort claims, and thus are outside the scope of §2-621. *See, e.g., Caterpillar, Inc. v. Usinor Industeel,* 393 F.Supp.2d 659, 685 – 686 (N.D.Ill. 2005) (discussing defendants' misplaced reliance on caselaw interpreting version of §2-621 as amended by P.A. 89-7 after *Best* had already struck down P.A. 89-7).

### 2. [15.21] Goals of the Implied Warranty of Merchantability

Uniform Commercial Code §2-314 is intended to clarify that the seller's obligation applies to present sales as well as to contracts to sell that are contingent on an examination of specific goods. Official Comment 1, 810 ILCS 5/2-314. The stated purpose of UCC §2-316(2) is to protect a buyer from a disclaimer not bargained for by denying effect to the disclaimer when it is inconsistent with contract language of express warranty. However, §2-316(2) permits exclusion of implied warranties by conspicuous language in the contract. *Garcia v. Edgewater Hospital,* 244 Ill.App.3d 894, 613 N.E.2d 1243, 1250, 184 Ill.Dec. 651 (1st Dist. 1993), *overruled in part on other grounds, Brandt v. Boston Scientific Corp.*, 204 Ill.2d 640, 792 N.E.2d 296, 275 Ill.Dec. 65 (2003).

Official Comment 2 on UCC §2-314 notes that issues surrounding whether a warranty was created rest on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant-seller.

### 3. [15.22] Definition of "Merchant"

For a buyer to have a claim under §2-314 of the Uniform Commercial Code, the seller must be a merchant. *See, e.g., Laird v. Scribner Coop, Inc.,* 237 Neb. 532, 466 N.W.2d 798, 804 (1991). The UCC defines a "merchant" 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 Official Comments on the UCC make it clear that the definition of a "merchant" is a narrow one. Official Comments 1, 2, and 3, 810 ILCS 5/2-104. However, whether the individual in question is a merchant is a question of fact to be resolved at trial. *See, e.g., Federal Insurance Co. v. Village of Westmont,* 271 Ill.App.3d 892, 649 N.E.2d 986, 990, 208 Ill.Dec. 626 (2d Dist. 1995).

The warranty of merchantability is only applicable to a person who, in a professional status, sells the particular kind of goods giving rise to the warranty. Likewise, "[a] person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply." Official Comment 3, 810 ILCS 5/2-314. For example, one court found that a state university's athletic director, football coach, and athletic trainer, who allegedly furnished a football player with a defective helmet, did not qualify as merchants and could not be held liable for breach of the implied warranty of merchantability. *Hemphill v. Sayers,* 552 F.Supp. 685 (S.D.Ill. 1982).

### 4. [15.23] Standard of Merchantability

To be merchantable, goods must be, among other things, fit for the ordinary purpose for which these goods are used and passable without objection in the trade under the contract description. *See, e.g., Lipinski v. Martin J. Kelly Oldsmobile, Inc.,* 325 Ill.App.3d 1139, 759 N.E.2d 66, 259 Ill.Dec. 586 (1st Dist. 2001) (holding that when sales contract did not specify in what condition car was sold, car must at least have been fit for ordinary purpose of driving). *See also Custom Automated Machinery, Division of Custom Aluminum Products, Inc. v. Penda Corp.,* 537 F.Supp. 77 (N.D.Ill. 1982) (finding that evidence established thermoforming machine failed to meet basic standards of merchantability when there was testimony that platens were misaligned, sheet load table was defective, fan was improperly located, and machine failed to operate consistently at requisite cycles per hour).

Regarding automobiles, fitness for the ordinary purpose of driving implies that the vehicle should be in a safe condition and substantially free of defects. Breach of an implied warranty of merchantability also may occur when the warrantor has unsuccessfully attempted to repair or replace defective parts. *Check v. Clifford Chrysler-Plymouth of Buffalo Grove, Inc.,* 342 Ill.App.3d 150, 794 N.E.2d 829, 836, 276 Ill.Dec. 579 (1st Dist. 2003). *See also Crest Container Corp. v. R.H. Bishop Co.,* 111 Ill.App.3d 1068, 445 N.E.2d 19, 23, 67 Ill.Dec. 727 (5th Dist. 1982) (holding there was sufficient evidence that coils were not fit for their intended purpose when testimony revealed that coils were too thin and that one-half inch tubing is not used in steam heating system; expert testimony established it was standard industry practice to pre-pitch coils, yet coils were not pitched or were pitched in wrong direction, causing them to split and eventually leak); *Comark Merchandising, Inc. v. Highland Group, Inc.,* 932 F.2d 1196, 1204 (7th Cir. 1991) (holding that merchantability does not look only at particular use to which buyer puts goods; rather, it is appropriate to analyze transaction from selling merchant's perspective).

### 5. [15.24] Course of Dealing and Usage of Trade

The Uniform Commercial Code provides that in addition to the implied warranty of merchantability arising from the sale of a good, other implied warranties, unless excluded or modified, may arise from course of dealing, course of performance, or usage of trade. 810 ILCS 5/2-314(3). For example, in the case of a pedigreed dog, a dog breeder would be obligated to provide pedigree papers to evidence conformity of the animal to the contract. Official Comment 12, 810 ILCS 5/2-314. Official Comment 12 explains that the purpose of §2-314(3) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties.

Courts will look to any deviation between the goods sold and industry standards. In *Toyomenka (America), Inc. v. Combined Metals Corp.*, 139 Ill.App.3d 654, 487 N.E.2d 1172, 94 Ill.Dec. 295 (1st Dist. 1985), the court found that there was a breach of an implied warranty concerning the hardness of stainless steel when it was industry custom for the type of steel at issue to have a hardness range of 70 to 80 on the applicable scale, whereas the steel delivered tested at a hardness varying from only 58 to 67.

UCC §2-316(1) provides that negation or limitation of warranties is inoperative to the extent that such a construction is unreasonable. UCC §1-205(4) provides that express terms of the parties' agreement control both courses of dealing and usages of trade when construing courses of dealing and usages of trade consistently with the express terms would be unreasonable. As such, "permitting an express warranty which clearly appears of record to be negated by a custom or a usage of trade excluding all such warranties would amount to an unreasonable construction of the terms of the parties' agreement." *Bodine Sewer, Inc. v. Eastern Illinois Precast, Inc.*, 143 Ill.App.3d 920, 493 N.E.2d 705, 710, 97 Ill.Dec. 898 (4th Dist. 1986). *But see Southern Concrete Services, Inc. v. Mableton Contractors, Inc.*, 407 F.Supp. 581 (N.D.Ga. 1975) (holding that buyer could not introduce evidence relying on custom in trade when contract for sale of concrete specified that conditions not incorporated in contract would not be recognized).

### 6. [15.25] Used Goods

Uniform Commercial Code §2-314 does not specifically address whether the sales of both new and used goods give rise to implied warranties. The Official Comments on the UCC note the following:

> **A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.** Official Comment 3, 810 ILCS 5/2-314.

*See, e.g., Lipinski v. Martin J. Kelly Oldsmobile, Inc.,* 325 Ill.App.3d 1139, 759 N.E.2d 66, 75, 259 Ill.Dec. 586 (1st Dist. 2001) (holding, with regard to automobiles, warranty of fitness "for the ordinary purpose of driving" implies that used vehicle should be in safe condition and substantially free of defects). *See also Overland Bond & Investment Corp. v. Howard,* 9 Ill.App.3d 348, 292 N.E.2d 168, 172 – 173 (1st Dist. 1972) (finding sale of used car did give rise to implied warranty of merchantability requiring vehicle to be in safe condition and substantially free of defects); *Whittle v. Timesavers, Inc.,* 614 F.Supp. 115, 117 (W.D.Va. 1985) (holding provisions of UCC relating to warranties applies to all goods, without any distinction as to whether goods are new or used goods; therefore, any warranty authorized by UCC may arise with respect to sale of used or secondhand goods).

### B. [15.26] UCC §2-315: Implied Warranty of Fitness for a Particular Purpose

Whether an implied warranty of fitness for a particular purpose under §2-315 of the Uniform Commercial Code arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting parties. Official Comment 1, 810 ILCS 5/2-315. The buyer need not provide the seller with actual knowledge of the particular purpose for which the goods are intended or of his or her 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, but the buyer, of course, must actually be relying on the seller. *Id.*

NOTE: A contract for sale of a good may create both a warranty of merchantability and one of fitness for a particular purpose. Unless expressly rejected by parties to the contract, various statutory implied warranties may be contained in the same contract of sale. *L.O. Whybark Co. v. Haley,* 37 Ill.App.2d 22, 184 N.E.2d 798 (2d Dist. 1962) (abst.).

#### 1. [15.27] Pleading Requirements

To recover for breach of an implied warranty of fitness for a particular purpose under §2-315 of the Uniform Commercial Code (810 ILCS 5/2-315), a plaintiff must show that (a) he or she had made known to the seller the particular purpose for which the article was purchased, (b) he or she relied on the seller's skill or judgment, (c) there was some defect in the article sold that rendered it unfit for its purpose, and (d) damages resulted from the defect. *See Mullen v. General Motors Corp.,* 32 Ill.App.3d 122, 336 N.E.2d 338 (1st Dist. 1975) (holding that to recover on theory of breach of implied warranty of fitness in connection with tire blowout, it was necessary for buyer to prove that she made known to seller purpose for which tire was purchased, that she relied on seller's judgment, that there was some defect in tire when sold that rendered it unfit for intended use, and that her injury was caused by this defect). *See also AFA Corp. v. Phoenix Closures, Inc.,* 501 F.Supp. 224 (N.D.Ill. 1980) (when sellers of liquor bottle cap liners knew specific purpose for which manufacturer of bottle cap intended to use materials, when manufacturer relied on sellers' representations that materials would be suitable as liquor closures, and when products were unfit for use in liquor closures and manufacturer suffered damage as result, manufacturer could recover for breach of implied warranty of fitness for particular purpose); *Siemen v. Alden,* 34 Ill.App.3d 961, 341 N.E.2d 713 (2d Dist. 1975) (finding that when, in his search for ripsaw, buyer was directed to sawmill operator who had secondhand saw for sale

and buyer purchased saw solely on his son's recommendation, buyer was not relying on seller's skill in buying saw within meaning of §2-315 requiring reliance for implied warranty of fitness for particular purpose).

### 2. [15.28] Particular Purpose

There is some ambiguity as to the significance of the phrase "particular purpose" to the overall meaning of §2-315 of the Uniform Commercial Code. 810 ILCS 5/2-315. A particular purpose differs from the ordinary purpose for which goods are used in that it envisages a specific use by the buyer that is peculiar to the nature of the buyer's business, whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses that are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking on ordinary ground, but a seller may know that a particular pair would be used for climbing mountains.

In *Overland Bond & Investment Corp. v. Howard,* 9 Ill.App.3d 348, 292 N.E.2d 168 (1st Dist. 1972), the court held that a buyer of a used car who informed the salesman that he was a salesman who needed his car for business purposes and relied on the seller's skill and judgment in selecting a suitable car for him, an implied warranty of fitness for a particular purpose arose as a matter of law. The buyer's acts of having the car towed to the dealer's place of business and of informing the dealer's employees that the brakes had gone out and needed repair was sufficient notice to the dealer that its implied warranties of merchantability and fitness for a particular purpose had been breached. When the transmission fell out of the used car on the day after its purchase and the brakes failed one week after repair of the transmission, the value of the buyer's contract for the car was substantially impaired so as to entitle the buyer to revoke his acceptance of the vehicle for breach of the seller's implied warranties of merchantability and fitness for a particular purpose.

In *Janssen v. Hook,* 1 Ill.App.3d 318, 272 N.E.2d 385 (2d Dist. 1971), the court found the seller was not liable to the buyer for breach of an implied warranty of fitness for a particular purpose relating to the purchase of milk delivery trucks. The court found that there was no evidence that the use of the purchased trucks on a milk route differed from ordinary use of the trucks in general or that the seller had any special "truck" skills on which the buyer relied. Notwithstanding, the seller was obviously aware that the buyer had purchased milk trucks that were in poor condition for use on the milk route.

### 3. [15.29] Seller's Knowledge of Intended Use

To state a claim for a breach of an implied warranty of fitness for a particular purpose under §2-315 of the Uniform Commercial Code (810 ILCS 5/2-315), the buyer must allege that the seller had reason to know of the particular purpose for which the buyer purchased the goods, that the buyer relied on the seller to select suitable goods, and that the seller had reason to know of the buyer's reliance. *Banco Del Estado v. Navistar International Transportation Corp.,* 954 F.Supp. 1275 (N.D.Ill. 1997). *See also Kirk v. Stineway Drug Store Co.,* 38 Ill.App.2d 415, 187 N.E.2d 307 (1st Dist. 1963) (when householder purchased household stepladder, purpose was impliedly made known to seller by very nature of article and by circumstances surrounding transaction);

*AFA Corp. v. Phoenix Closures, Inc.*, 501 F.Supp. 224 (N.D.Ill. 1980) (when sellers of liquor bottle cap liners knew specific purpose for which manufacturer of bottle cap intended to use materials, when manufacturer relied on sellers' representations that materials would be suitable as liquor closures, and when products were unfit for use in liquor closures and manufacturer suffered damage as result, manufacturer could recover for breach of implied warranty of fitness for particular purpose).

### 4. [15.30] Reliance

A requisite element of a claim for an implied warranty of fitness for a particular purpose is showing that the seller had reason to know of the buyer's reliance on the seller's skill or judgment. *Banco Del Estado v. Navistar International Transportation Corp.*, 954 F.Supp. 1275 (N.D.Ill. 1997). The issue of reliance involves an inquiry into a state of mind. It cannot be proved by direct evidence, although testimony by a buyer that he or she did so rely has been permitted. *Michaelson v. Hopkins*, 38 Wn.2d 256, 228 P.2d 759 (1951). Consequently, the question of a buyer's reliance is frequently a significant issue in litigation.

### 5. [15.31] Differences Between Implied Warranties for a Particular Purpose and Implied Warranties of Merchantability

Although an implied warranty of fitness for a particular purpose and an implied warranty of merchantability arise by operation of law in essentially the same manner, there are definite differences between the two.

To demonstrate a breach of an implied warranty of fitness for a particular purpose, a plaintiff must demonstrate that at the time of contracting the seller had reason to know of any particular purpose for which the goods were required and that the buyer was relying on the seller's skill or judgment to select or furnish suitable goods. Conversely, to prove a breach of implied warranty of merchantability, the plaintiff must show that the product left the manufacturer in a defective condition and that the defect caused the plaintiff's injuries. A product is defective if it is not reasonably fit for its intended, anticipated, or reasonably foreseeable use.

The Uniform Commercial Code appears to place a slightly higher level of accountability on sellers when there is a question of a good's fitness for a particular purpose than when there is an implied warranty of merchantability. First, UCC §2-315 requires the buyer to show that the seller had knowledge of the buyer's intention to use the goods for a particular purpose. 810 ILCS 5/2-315. The buyer must also show a reliance on the seller's representations regarding quality. This seems to place the buyer in a somewhat more challenging position than a buyer who is alleging a breach of merchantability. For example, when alleging a breach of merchantability under UCC §2-314, the focus is on the seller's status as a merchant, not the buyer's reliance. Section 2-314 does not even inquire into the merchant's level of knowledge regarding the buyer's future use of the goods. This implied warranty of fitness for a particular purpose is similar to strict liability because the relative nature of the seller's errors (*i.e.*, whether they were negligently or knowingly made) is wholly irrelevant.

Second, under §2-315, a seller may be found liable for providing goods that are below the buyer's subjective expectations, even if the goods objectively satisfy a general standard of

quality. Conversely, when an implied warranty of merchantability is at issue, this warranty creates only a minimum standard of general fitness or utility. The buyer's subjective expectations are not relevant.

**PRACTICE POINTER**

✓ Remember, if you are drafting the warranty or contracting with a seller, you can always expressly include desirable controlling language in the sales contract. If you want a conditional warranty of fitness for a particular purpose, consider including some variation of the following language:

> **The Seller warrants that the machinery described herein is fit for the purpose of [describe purpose] when properly set up and operated under favorable conditions. This warranty is given upon the express condition that within ____ days after first use the Purchaser shall give notice in writing to the Seller, stating in what respects the machine has failed to fulfill the warranty. (Failure to give notice within such period shall be a waiver of this warranty and any assistance rendered thereafter shall not extend to revive it.)**
>
> **The Seller shall be allowed a reasonable time after receipt of such notice to remedy the defect, if any, and the Purchaser agrees to render friendly assistance. If the machine cannot be made to fulfill the warranty and the Purchaser promptly returns it to the Seller at his place of business, the Seller will either furnish another machine with the same warranty, or at his option, refund the amount paid, which shall constitute a settlement in full of all claims of every nature, the Seller's liability being expressly limited to replacing the machine, or at his option refunding the purchase price.** 1 UNIFORM COMMERCIAL CODE: LEGAL FORMS §2:536 (4th ed. 2007).

## VII. [15.32] UCC §2-317: CUMULATION AND CONFLICT OF WARRANTIES

The Uniform Commercial Code contemplates an express and implied warranty existing in a contract simultaneously. When this occurs, the UCC makes clear that the warranties are to be construed as consistent with each other. 810 ILCS 5/2-317; *Quality Components Corp. v. Kel-Keef Enterprises, Inc.*, 316 Ill.App.3d 998, 738 N.E.2d 524, 536 – 537, 250 Ill.Dec. 308 (1st Dist. 2000). However, if such construction is unreasonable, then the intention of the parties determines which warranty is dominant. To determine which warranty is dominant, the UCC uses the following rules:

a. Exact or technical specifications displace an inconsistent sample or general language of description. 810 ILCS 5/2-317(a).

b. A sample from existing bulk displaces inconsistent general language of description. 810 ILCS 5/2-317(b).

c. Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose. 810 ILCS 5/2-317(c).

The comments make clear that the rules are designed to aid in the determination of the parties' intentions. However, evidence may be introduced that shows that the conditions at the time of the contract make the construction called for by this section inconsistent or unreasonable. Official Comment 3, 810 ILCS 5/2-317.

## VIII. [15.33] DISCLAIMER OF WARRANTIES

The Uniform Commercial Code provides for means to disclaim warranties of title; express warranties created by affirmation, promise, description, or sample; and implied warranties. See 810 ILCS 5/2-312(2) and 5/2-316, respectively. In other words, these warranties can be excluded from the sale or lease transaction if the UCC requirements are carefully met. As with most written documents of a contractual nature, an instrument of warranty is to be construed most strongly against its drafter. *Imperial Stamp & Engraving Co. v. Bailey*, 82 Ill.App.3d 835, 403 N.E.2d 294, 38 Ill.Dec. 206 (2d Dist. 1980). In addition to disclaimers, sellers may also be able to limit a buyer's potential remedies. 810 ILCS 5/2-719.

### A. [15.34] Disclaiming a Warranty of Title

Uniform Commercial Code §2-312(2) enables a seller to exclude or modify a §2-312(1) warranty of title by (1) specific language or (2) circumstances that give the buyer reason to know either that the seller does not claim title in himself or herself or that the seller is purporting to sell only such right or title as the seller or a third person may have. 810 ILCS 5/2-312. See §15.7 above.

### B. [15.35] Disclaiming Express Warranties

Section 2-316(1) of the Uniform Commercial Code sets forth the requirements for exclusions or modifications of express warranties as follows:

> **Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.** 810 ILCS 5/2-316(1).

As noted in §15.33 above, disclaimers are strictly construed against their drafters. This stance, coupled with the fact that courts generally do not favor disclaimers, means that sellers must carefully craft any disclaimer they make. For example, an "as is" clause may be qualified by certain express warranties, and under the UCC, "a written disclaimer of an express warranty

contained elsewhere in the same contract is generally inoperable." *AAR International, Inc. v. Vacances Heliades S.A.,* 202 F.Supp.2d 788, 795 (N.D.Ill. 2002), quoting *Lake Bluff Heating & Air Conditioning Supply, Inc. v. Harris Trust & Savings Bank,* 117 Ill.App.3d 284, 452 N.E.2d 1361, 1367, 72 Ill.Dec. 665 (2d Dist. 1983). But note that "[t]his general rule is subject to parol or extrinsic evidence 'which would indicate that it is reasonable to construe the disclaimer as negating the express warranty.' " *Id.*

### C. [15.36] Disclaiming Implied Warranties

Uniform Commercial Code §2-316 provides for exclusions or modifications of implied warranties:

> **(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."**
>
> **(3) Notwithstanding subsection (2)**
>
> **(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and**
>
> **(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and**
>
> **(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade; and**
>
> **(d) the implied warranties of merchantability and fitness for a particular purpose do not apply to the sale of cattle, swine, sheep, horses, poultry and turkeys, or the unborn young of any of the foregoing, provided the seller has made reasonable efforts to comply with State and federal regulations pertaining to animal health. This exemption does not apply if the seller had knowledge that the animal was diseased at the time of the sale.** 810 ILCS 5/2-316.

Pursuant to §2-316(2), to effectively disclaim an implied warranty of merchantability, the disclaimer must be conspicuous. The Uniform Commercial Code defines "conspicuous" as follows:

> **A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color.** 810 ILCS 5/1-201(10).

The UCC also provides guidance as to the content of an effective disclaimer. In *Perry v. Gulf Stream Coach, Inc.*, 814 N.E.2d 634, 646 (Ind.App. 2004), the court upheld a disclaimer because the purchase agreement alerted the buyers to read the reverse side of the agreement and the disclaimer of implied warranties was contained in a paragraph entitled "Warranties," written in all capital letters and underlined. Since the *Perry* court held that the disclaimer was conspicuous, no implied warranties were applied.

Although language must be specific to disclaim the implied warranty of title, no particular words are necessary to exclude or modify the implied warranty of fitness for a particular purpose. However, the warranties should be in writing and should be conspicuous. "Examples of conspicuousness include, 'a heading in capitals 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 language larger than surrounding text or contrasting in 'type, font, or color.' " *M. Block & Sons, Inc. v. International Business Machines Corp.*, No. 04 C 340, 2004 U.S.Dist. LEXIS 12743 at *25 (N.D.Ill. July 8, 2004), quoting §1-201(b)(10) of the Model Uniform Commercial Code. Language to exclude all implied warranties is sufficient if it states, for example: "There are no warranties which extend beyond the description on the face hereof," or similar language. 810 ILCS 5/2-316(2). Unless the circumstances require something more specific, an implied warranty can be excluded by expressions like "as is" or "with all faults." 810 ILCS 5/2-316(3)(a). *See Quality Components Corp. v. Kel-Keef Enterprises, Inc.*, 316 Ill.App.3d 998, 738 N.E.2d 524, 250 Ill.Dec. 308 (1st Dist. 2000).

Section 2-316(3)(a) states that "all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." 810 ILCS 5/2-316(3)(a). Several Illinois courts have found the phrase "as is" sufficient to disclaim the implied warranty of merchantability and that the prominent placement and size of the disclaimer in the purchase agreement is fatal to a plaintiff's argument. *See, e.g., Mitsch v. General Motors Corp.*, 359 Ill.App.3d 99, 833 N.E.2d 936, 295 Ill.Dec. 730 (1st Dist. 2005). *See also Basselen v. General Motors Corp.*, 341 Ill.App.3d 278, 792 N.E.2d 498, 508, 275 Ill.Dec. 267 (2d Dist. 2003).

However, at least one Illinois court has found that a sales contract stating that all other guarantees were null and void did not disclaim implied warranties under Illinois law because the contract did not use the word "merchantability" and did not conspicuously disclaim the implied warranty. *S.A.M. Electronics, Inc. v. Osaraprasop,* 39 F.Supp.2d 1074 (N.D.Ill. 1999). Other Illinois courts have held that the word "merchantability" must be included in the disclaimer. *See Schultz v. Jackson*, 67 Ill.App.3d 889, 385 N.E.2d 162, 24 Ill.Dec. 395 (3d Dist. 1979) (holding that unless "merchantability" appears in written disclaimer, implied warranty of merchantability survives language of disclaimer). *See also Board of Managers of Village Centre Condominium Ass'n v. Wilmette Partners*, 198 Ill.2d 132, 760 N.E.2d 976, 981, 260 Ill.Dec. 203 (2001) (holding

that condominium unit sales agreement did not waive implied warranty of habitability, as agreement's disclaimer did not use that particular phrase, and agreement's use of phrase "warranties of merchantability and fitness for a particular purpose" was not effective substitute even while noting that implied warranty of habitability is wholly different than implied warranty of merchantability). Other courts have disagreed with the reasoning in *Schultz,* explaining that the *Schultz* court's holding is inconsistent with the plain language of the UCC. *Lefebvre Intergraphics, Inc. v. Sanden Machine Ltd.,* 946 F.Supp. 1358, 1363 (N.D.Ill. 1996).

Given the inconsistency between the language of the UCC and Illinois' caselaw, erring on the side of caution would lead one to draft a more expansive warranty by including both the term "merchantability" in the disclaimer and the phrases "as is" or "with all faults." 810 ILCS 5/2-316(2) through 5/2-316(3).

### D. [15.37] Drafting and Scrutinizing Warranty Disclaimers

To disclaim an implied warranty of merchantability, the language must be conspicuous and must mention merchantability. For other warranties, the language must be conspicuous. *See, e.g., MAN Roland Inc. v. Quantum Color Corp.,* 57 F.Supp.2d 568 (N.D.Ill. 1999). Consequently, those drafting and attacking warranty disclaimers must carefully scrutinize every word and all the details of where and how the disclaimer is displayed. For example, the disclaimers should mention merchantability and fitness. The writings should be conspicuous. The headings should be in all capital letters. In addition, the language in the disclaimer should be set off from the rest of the document, near the middle of the page. Additionally, there should be space for the buyer's signature or initials next to the paragraph disclaiming liability. This will indicate that the buyer did in fact notice the disclaimer. *See In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation,* 204 F.Supp.2d 1149, 1154 (S.D.Ind. 2002).

In *MAN Roland, supra,* the court found the following disclaimer to be effective:

> **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."** 57 F.Supp.2d at 573.

In *Wilson v. Royal Motor Sales, Inc.,* 812 N.E.2d 133, 137 (Ind.App. 2004), the court found that the following language, which was printed on the back of the purchase agreement, was sufficiently conspicuous to be a valid disclaimer of any implied warranties when 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.**

In *Bridgestone/Firestone, supra,* an Indiana Court found that both of the following disclaimers satisfied the requirements of the Uniform Commercial Code:

> **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.** 204 F.Supp.2d at 1154.

The *Bridgestone/Firestone* court observed 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 *Bridgestone/Firestone* court also emphasized the importance that language in the body of a paragraph was conspicuous because it was set off from the rest of the document near the middle of the page. *But see Bailey v. Tucker Equipment Sales, Inc.,* 236 Ga.App. 289, 510 S.E.2d 904, 906 (1999) (disclaimer ineffective because body of disclaimer paragraph was neither set apart from other paragraphs nor in larger or contrasting type or color). The *Bridgestone/Firestone* court further noted, most importantly, that 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.

The following is an example of a warranty disclaimer. Note that the disclaimer paragraph uses a contrasting type and size.

**Warranty Disclaimer: No information supplied by Company constitutes a warranty regarding product performance or use.**

**Any information regarding performance or use is only offered as suggestion for investigation for use, based upon Company or other customer experience.**

**Company makes no warranties, expressed or implied, concerning the suitability or fitness of any of its products for any particular purpose.**

**It is the responsibility of the customer to determine that the product is safe, lawful, and technically suitable for the intended use.**

**[**or**]**

**EXCEPT FOR THE ABOVE EXPRESS LIMITED WARRANTIES, VENDOR MAKES AND YOU RECEIVE NO WARRANTIES, EXPRESS, IMPLIED, STATUTORY, OR IN ANY COMMUNICATION WITH YOU, AND VENDOR SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. Vendor does not warrant that the operation of the product will be uninterrupted or error-free.**

**PRACTICE POINTER**

✓ For sellers who wish to disclaim any type of implied warranty, suggested practice would be to have purchasers acknowledge and sign the disclaimer clause itself. *See, e.g., Perry v. Gulf Stream Coach, Inc.,* 814 N.E.2d 634, 646 n.8 (Ind.App. 2004). *See also Bridgestone/Firestone, supra.*

## IX. [15.38] LIMITATION OF REMEDIES AND DAMAGES

In addition to disclaimers, manufacturers can also limit their risks and exposure by limiting the types of remedies available to buyers. The two most important provisions of the Uniform Commercial Code regarding this topic are §§2-316 and 2-719, both addressing exclusion and modification of warranties.

### A. [15.39] UCC §2-316

Section 2-316 of the Uniform Commercial Code addresses exclusion or modification of warranties:

> **(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.**

**(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."**

**(3) Notwithstanding subsection (2)**

**(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and**

**(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and**

**(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade; and**

**(d) the implied warranties of merchantability and fitness for a particular purpose do not apply to the sale of cattle, swine, sheep, horses, poultry and turkeys, or the unborn young of any of the foregoing, provided the seller has made reasonable efforts to comply with State and federal regulations pertaining to animal health. This exemption does not apply if the seller had knowledge that the animal was diseased at the time of the sale.**

**(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).** 810 ILCS 5/2-316.

The Official Comments on the UCC indicate that §2-316 was principally designed to deal with those frequent clauses in sales contracts seeking to exclude "all warranties, express or implied." Official Comment 1, 810 ILCS 5/2-316. It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to this language when it is inconsistent with the language of an express warranty and by permitting the exclusion of implied warranties only by conspicuous language or other circumstances protecting the buyer from surprise.

**PRACTICE POINTER**

✓ Because the purpose of §2-316 is to protect a buyer from unexpected language of a disclaimer, it is prudent for a seller to use the language of the statute to disclaim warranties. Thus, using "There are no warranties which extend beyond the description on the face hereof," is sufficient to exclude all implied warranties of fitness. 810 ILCS 5/2-316(2). Similarly, language like the above is sufficient to disclaim the implied warranty of merchantability if it uses the word "merchantability." Official Comment 3, 810 ILCS 5/2-316. Likewise, the implied warranty of merchantability can effectively be excluded by "as is" or "with all faults." 810 ILCS 5/2-316(3).

## B. [15.40] UCC §2-719

Section 2-316(4) of the Uniform Commercial Code provides that remedies for breach of warranty can be limited in accordance with UCC §2-719, which provides:

> **(1) Subject to the provisions of subsections (2) and (3) of this Section and of the preceding section on liquidation and limitation of damages,**
>
> **(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and**
>
> **(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.**
>
> **(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.**
>
> **(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.** 810 ILCS 5/2-719.

The Official Comments on the UCC explain that under §2-719 parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect. However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. Official Comment 1, 810 ILCS 5/2-719. Courts have also emphasized the importance of §2-719(3), taking seriously the UCC's requirement that the limitations not be unconscionable. *See, e.g., CogniTest Corp. v. Riverside Publishing Co.,* 107 F.3d 493, 496 (7th Cir. 1997); *Razor v. Hyundai Motor America,* 222 Ill.2d 75, 854 N.E.2d 607, 617, 305 Ill.Dec. 15 (2006) ("a limitation of consequential damages must be judged on its own merits and enforced unless unconscionable"). If the limitation of remedies is upheld, the buyer may seek no other remedy for breach of any warranty, express or implied.

In *CogniTest, supra,* the Seventh Circuit found a limitation of remedies provision in a computer software distribution contract to be enforceable when it precluded the software manufacturer from recovering lost profits from a distributor for termination of the contract prior to initial publication of the software. The software manufacturer's contractual right to retain advances that the distributor had been required to make against future inventory purchases qualified as a minimum adequate remedy.

Alternatively, the Seventh Circuit also has refused to enforce an exculpatory provision located on the reverse side of a seller's price quotation. *Berwind Corp. v. Litton Industries, Inc.*, 532 F.2d 1 (7th Cir. 1976). The provision was located under the heading "Warranty" and began, "Our liability under this contract is limited." 532 F.2d at 3. The exculpatory language did not contain the words "negligence," "tort," or their cognates. The words "special or consequential damages" were used to describe liability excluded. *Id.* The court found that the harm to the buyer was sufficiently foreseeable to support liability for negligence. As such, the exculpatory provision did not, under Illinois law, limit the seller's liability for damages for negligence in the specifications, design, engineering, and manufacture of speed reducers.

The measure of damages for a breach of warranty claim is the difference between the value of the property as warranted and the actual value on the day of the breach. "While it is not necessary that damages for breach of warranty be calculated with mathematical precision . . . basic contract theory requires that damages be proved with reasonable certainty and precludes damages based on conjecture or speculation." *Mitsch v. General Motors Corp.*, 359 Ill.App.3d 99, 833 N.E.2d 936, 939, 295 Ill.Dec. 730 (1st Dist. 2005), quoting *Valenti v. Mitsubishi Motor Sales of America, Inc.*, 332 Ill.App.3d 969, 773 N.E.2d 1199, 1203, 266 Ill.Dec. 129 (1st Dist. 2002).

Section 2-719 provides for contractual modification or limitation of remedy, allowing parties to contract for limitations on remedies or exclusiveness of a single remedy, such as replacement cost of goods. However, if circumstances cause an exclusive or limited remedy to fail of its essential purpose, a remedy may be obtained as provided in the UCC. Also, contractual damages limitations are subject to common-law unconscionability defenses.

In 2006, the Illinois Supreme Court abrogated *Adams v. J.I. Case Co.*, 125 Ill.App.2d 388, 261 N.E.2d 1, 8 (4th Dist. 1970) (which had held that repudiation of obligations of warranty destroys its benefits). The *Adams* court adopted what is called the "independent approach." Citing a 1980 case out of the Third Circuit, the *Adams* court noted that this school of thought held that a limitation of consequential damages must be judged on its own merits and enforced unless unconscionable, regardless of whether the contract also contains a limitation of remedy that has failed of its essential purpose. *Razor v. Hyundai Motor America*, 222 Ill.2d 75, 854 N.E.2d 607, 617, 305 Ill.Dec. 15 (2006), citing *Chatlos Systems, Inc. v. National Cash Register Corp.*, 635 F.2d 1081 (3d Cir. 1980) (applying New Jersey law). The *Adams* court noted that it found the independent approach to be more in line with the UCC and with contract law in general.

NOTE: UCC §2-318 protects third-party beneficiaries of warranties express or implied. A seller's implied or express warranty extends 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 this person may use, consume, or be affected by the goods and is damaged by breach of the warranty. A seller may not exclude or limit the operation of §2-318.

### C. [15.41] Drafting and Scrutinizing Remedy and Damage Limitations

Obviously, the goal of a limitation-of-remedies clause is to provide protection for the seller against breaches of contract as well as negligence. The following is a checklist for drafting an effective limitation of remedies and damages clause:

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. Consider the scope of risk that the limitation 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.

## X. [15.42] PRIVITY

In *Slate Printing Co. v. Metro Envelope Co.*, 532 F.Supp. 431 (N.D.Ill. 1982), the court found that a plaintiff must satisfy at least one of three possibilities before bringing a warranty action. The *Slate Printing* court held that (a) there must be privity of contract between the plaintiff and the defendant, (b) the plaintiff must be in a position equivalent to that of a third-party beneficiary of the sales contract, or (c) the plaintiff must otherwise be able to sustain a tort action against the seller. As such, privity of contract is an important element that must be established to pursue a breach of warranty claim.

Indeed, many Illinois courts have emphasized that privity of contract is a necessary element for an action on a warranty to recover economic losses. *See, e.g., R & L Grain Co. v. Chicago Eastern Corp.*, 531 F.Supp. 201, 208 (N.D.Ill. 1981). *See also Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill.App.3d 1068, 445 N.E.2d 19, 25, 67 Ill.Dec. 727 (5th Dist. 1982) (noting privity requires that party suing have some contractual relationship with party being sued); *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill.App.3d 828, 807 N.E.2d 1165, 283 Ill.Dec. 324 (1st Dist. 2004) (for party to recover economic damages, party must be in vertical privity of contract with seller; thus, party's cause of action was limited to immediate seller ); *Spiegel v. Sharp Electronics Corp.*, 125 Ill.App.3d 897, 466 N.E.2d 1040, 1043, 81 Ill.Dec. 238 (1st Dist. 1984) (holding that because plaintiff was not in privity with defendant, plaintiff could not recover his economic losses based on theory of breach of warranty).

### A. [15.43] Privity and the UCC

In §2-318 of the Uniform Commercial Code, governing third-party beneficiaries of express or implied warranties, the legislature expressly stated 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; the legislature left it for the courts to decide, in accordance with common-law

principles and with the guidance of the UCC, whether warranty coverage should be extended further to any other non-purchasing users of the product. *Whitaker v. Lian Feng Machine Co.*, 156 Ill.App.3d 316, 509 N.E.2d 591, 108 Ill.Dec. 895 (1st Dist. 1987) (finding that employee of ultimate purchaser had standing to pursue action against manufacturer, importer, and seller of band saw).

The purpose of §2-318 is to give the buyer's family, household, and guests the benefit of the same warranty that the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to privity. It seeks to accomplish this purpose without any derogation of any right or remedy based on negligence. It rests primarily on the merchant-seller's warranty that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used, rather than the warranty of fitness for a particular purpose. Implicit is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him or her. Official Comment 2, 810 ILCS 5/2-318.

It is interesting to note that of the three different versions of §2-318 in the Model Uniform Commercial Code, Illinois has adopted the most narrow, Alternative A. Alternative B expands protection to anyone who may be "reasonably expected" to use or consume the goods in question. Alternative C is even more expansive. Although Alternative A was intended to limit warranty protection to family, household members, and guests of the purchaser, Illinois courts have shown their willingness to liberally interpret this clause by expanding the class of proper plaintiffs. See §15.44 below.

### B. [15.44] The Expanding Class of Plaintiffs

For a plaintiff to file a claim for economic damages under the Uniform Commercial Code for the breach of an implied warranty, he or she must be in vertical privity of contract with the seller. *See, e.g., Mekertichian v. Mercedes-Benz U.S.A., L.L.C.,* 347 Ill.App.3d 828, 807 N.E.2d 1165, 1168, 283 Ill.Dec. 324 (1st Dist. 2004), citing *Rothe v. Maloney Cadillac, Inc.,* 119 Ill.2d 288, 518 N.E.2d 1028, 116 Ill.Dec. 207 (1988). This means that the UCC Article II implied warranties give a buyer of goods a potential cause of action only against the immediate seller. *Mekertichian, supra.* Although this vertical privity requirement has been challenged on a number of occasions, the Illinois Supreme Court has consistently declined to abolish the doctrine in cases in which purely economic damages are sought. *Id.*

However, there has been some judicial expansion of the class of vertical nonprivity plaintiffs, notably plaintiffs who are third-party beneficiaries to the warranty at issue. *See 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). *See also Rhodes Pharmacal Co. v. Continental Can Co.,* 72 Ill.App.2d 362, 219 N.E.2d 726, 730 (1st Dist. 1966); *Tex Enterprises, Inc. v. Brockway Standard, Inc.,* 149 Wn.2d 204, 66 P.3d 625, 628 (2003) (Washington Supreme Court carved third-party beneficiary exception out of general rule that vertical nonprivity plaintiff cannot recover from remote manufacturer for breach of implied warranty).

In *Whitaker v. Lian Feng Machine Co.,* 156 Ill.App.3d 316, 509 N.E.2d 591, 108 Ill.Dec. 895 (1st Dist. 1987), the court held that a warranty of safety extends to any employee of the purchaser

who was injured in the use of the goods, as long as safety in the use of the goods was either explicitly or implicitly part of the basis of the bargain when the employer purchased the goods. The *Whitaker* court held further that causes of action for breach of warranties of merchantability and fitness were not barred by the ultimate purchaser's employee's lack of privity with the manufacturer, importer, and seller because the purchaser bargained for a band saw that was as safe to use as any merchantable band saw, in that the purchaser could not use the band saw at all unless its employees operated the saw.

In *Reed v. City of Chicago*, 263 F.Supp.2d 1123, 1126 (N.D.Ill. 2003), the court expanded the class of potential plaintiffs even further. The *Reed* court held that a detainee who used a paper isolation gown to hang himself was a beneficiary of warranties made by the designer and manufacturer of the gown even though he was not a purchaser. The *Reed* court noted that no Illinois court had previously expanded the plaintiff class for breach of warranty actions beyond employees.

## XI. [15.45] COMMON-LAW IMPLIED WARRANTIES

Illinois courts recognize certain implied warranties at common law. These implied warranties tend to be most useful in sales transactions that do not fall under the Uniform Commercial Code, such as contracts for labor, services, and real estate. Courts applying Illinois law have held that one who contracts to perform construction work impliedly warrants that the work will be completed in a reasonably workmanlike manner. *Dean v. Rutherford*, 49 Ill.App.3d 768, 364 N.E.2d 625, 626 – 627, 7 Ill.Dec. 464 (4th Dist. 1977). *See also Naiditch v. Shaf Home Builders, Inc.*, 160 Ill.App.3d 245, 512 N.E.2d 1027, 1038, 111 Ill.Dec. 486 (2d Dist. 1987) (noting implied warranty of habitability accompanies sale of home); *Harmon v. Dawson*, 175 Ill.App.3d 846, 530 N.E.2d 564, 567, 125 Ill.Dec. 406 (4th Dist. 1988) ("one who contracts to perform construction work impliedly warrants to do the work in a reasonably workmanlike manner").

Illinois courts have not been overly zealous in finding common-law implied warranties. *See, e.g., Fink v. DeClassis*, 745 F.Supp. 509, 516 (N.D.Ill. 1990) (finding Illinois courts have not recognized common-law implied warranty that would extend to sale of corporate assets). *See also Oak State Products, Inc. v. Ecolab, Inc.*, 755 F.Supp. 235 (C.D.Ill. 1991) (finding there is no implied common-law or statutory warranty applicable to architect's services under Illinois law; absent special agreement, architect does not imply or guarantee perfect plan or satisfactory result).

**PRACTICE POINTER**

✓ It may be argued that Illinois has been a bit stingier than other states in recognizing common-law implied warranties. As such, if a sister state's laws may arguably be applied to a suit, it would be worthwhile to determine whether that state's common law on implied warranties would offer more favorable protection for your client compared to Illinois law.

## XII. [15.46] CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

The purpose of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act), 815 ILCS 505/1, *et seq.*, is to protect consumers, borrowers, and businessmen against fraud and unfair or deceptive acts and practices in the conduct of trade or commerce. *Lyne v. Arthur Andersen & Co.*, 772 F.Supp. 1064 (N.D.Ill. 1991). The Consumer Fraud Act is not intended to protect only Illinois consumers. Rather, it also serves to prohibit fraud in conduct of any trade or commerce. *Fry v. UAL Corp.*, 136 F.R.D. 626 (N.D.Ill. 1991).

Generally, the elements of a claim under the Consumer Fraud Act are (a) a deceptive act or practice by the defendant, (b) the defendant's intent that the plaintiff rely on the deception, and (c) the fact that the deception occurred in the course of conduct involving trade and commerce. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 675 N.E.2d 584, 221 Ill.Dec. 389 (1996).

The plaintiff's reliance is not an element, but a valid claim must show that consumer fraud proximately caused the plaintiff's injury. Additionally, a complaint alleging a violation of the Consumer Fraud Act must be pled with the same particularity and specificity as that required under common-law fraud. 675 N.E.2d at 591. The plaintiff need not show that the defendant intended to deceive, but only that the defendant intended that the plaintiff rely on its act or information. Even an innocent misrepresentation may be actionable under the Consumer Fraud Act. *Check v. Clifford Chrysler-Plymouth of Buffalo Grove, Inc.*, 342 Ill.App.3d 150, 794 N.E.2d 829, 839, 276 Ill.Dec. 579 (1st Dist. 2003).

For purposes of the Consumer Fraud Act, a material fact exists when a buyer would have acted differently knowing the information or if it concerned the type of information on which a buyer would typically be expected to rely on in making a decision to purchase the product. Under the Consumer Fraud Act, the intention of the seller — the seller's good or bad faith — is not important, and a plaintiff can recover under the Act for innocent misrepresentations. For example, *Lipinski v. Martin J. Kelly Oldsmobile, Inc.*, 325 Ill.App.3d 1139, 759 N.E.2d 66, 259 Ill.Dec. 586 (1st Dist. 2001), involved the sale of a used car. In 1997, the plaintiff bought from the defendant a 1994 Oldsmobile Cutlass Supreme. Also in 1997, the car's manufacturer had issued a technical bulletin notifying dealerships that several of its car models, including the 1994 Cutlass Supreme, had a tendency to consume excess oil. The *Lipinski* court reversed the lower court's dismissal of the plaintiff's claim under the Consumer Fraud Act, holding that the plaintiff had stated a valid claim under the Act by alleging that the dealership knew this model of car had a defect, that the dealership failed to inform the plaintiff of the defect, that the plaintiff would not have purchased the car if he knew of the defect, and that as a result of the defect, the plaintiff had to replace the engine and the car diminished in value.

## XIII. [15.47] FEDERAL WARRANTY LAWS AND PREEMPTION

Congress may act to preempt state law in three ways. First, express preemption exists when Congress has legislated in clear and unequivocal terms, found within the text of a statute, that the legislation preempts state law. Second, a court may find implied preemption when a state law

actually conflicts with an act of Congress or when the federal legislation is so pervasive as to create a reasonable inference that Congress left no room for states to supplement it. Finally, state law may be preempted by federal regulations when a federal agency, acting within the scope of its congressionally delegated authority, acts to preempt state law. *Lynnbrook Farms v. Smithkline Beecham Corp.*, 887 F.Supp. 1100 (C.D.Ill. 1995).

However, even when a federal statute contains an express preemption provision, the starting point for a court's analysis is the presumption that the historic police powers of states are not to be superseded by federal statute unless this was the clear and manifest purpose of Congress. *Weiland v. Telectronics Pacing Systems, Inc.*, 188 Ill.2d 415, 721 N.E.2d 1149, 242 Ill.Dec. 618 (1999).

To the extent that there is a conflict between the provisions of a federal law and Illinois' Uniform Commercial Code, the federal law controls under the Supremacy Clause of the U.S. Constitution. See U.S.CONST. art. VI. The Magnuson-Moss Warranty — Federal Trade Commission Improvement Act, discussed in §15.48 below, is an example of a federal statute with this type of preemptive power. Other federal laws that have been the topic of litigation regarding the question of federal preemption are also mentioned in §15.49 below.

## A. [15.48] The Magnuson-Moss Warranty — Federal Trade Commission Improvement Act

In 1975, Congress enacted the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act, Pub.L. No. 93-637, 88 Stat. 2183. Magnuson-Moss is a federal statute designed to improve the adequacy of information available to consumers, to prevent deception, and to improve competition in the marketing of consumer products. It is axiomatic then that for the Act to apply, the claimant must be a consumer. 15 U.S.C. §2310(d). However, even though it is a broad federal statute designed to protect consumers, Magnuson-Moss provides no federal jurisdiction unless the amount in controversy exceeds $50,000 or the claim is a class action. *Id.; Schimmer v. Jaguar Cars, Inc.*, 384 F.3d 402 (7th Cir. 2004). However, the Act allows a plaintiff to bring a state court claim in any state or the District of Columbia. 15 U.S.C. §2310(d)(1)(A).

Magnuson-Moss applies to consumer product warranties for products typically used for personal family or household purposes. The Act permits a consumer who is injured by a supplier, warrantor, or service contractor's failure to comply with any obligation under the Act, or under a written warranty, implied warranty, or service contract, to bring a cause of action against the warrantor for damages. 15 U.S.C. §2310(d).

Under Magnuson-Moss, a warranty may be considered a "limited warranty" or a "full (statement of duration) warranty" and must be conspicuously designated as such. 15 U.S.C. §2303. If a warranty meets the minimum standards of §104 of the Act, then it is a "full" warranty and must comply with the Act. 15 U.S.C. §2303. A full warranty's failure to comply with the Act is a violation of Magnuson-Moss. However, if the warranty does not meet those specifications and is considered a "limited" warranty, it complies with Magnuson-Moss so long as it is labeled a "limited" warranty, regardless of the requirements of §104. *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill.App.3d 313, 722 N.E.2d 227, 235, 242 Ill.Dec. 738 (2d Dist. 1999); *Gilbert v. Monaco*

*Coach Corp.*, 352 F.Supp.2d 1323, 1330 (N.D.Ga. 2004) (holding that if warranty does not comply with §104, then it must be designated as limited warranty). Regardless of whether it is a limited warranty or a full warranty (which must comply with §104 of Magnuson-Moss), the remedies provision applies if the warrantor fails to comply with any obligation under a written warranty. See 15 U.S.C. §§2304, 2310; *Mydlach v. DaimlerChrysler Corp.*, 226 Ill.2d 307, 875 N.E.2d 1047, 1055, 314 Ill.Dec. 760 (2007).

Under §110(e), no action may be brought for failure to comply with any obligation under any written or implied warranty unless the person obligated under the warranty is afforded reasonable notice and opportunity to cure the failure to comply.

For purposes of establishing a cause of action for breach of express warranty under Magnuson-Moss, as opposed to the Uniform Commercial Code, the primary distinction is that under the UCC the express warranty may be oral or may be created by description, sample, or model. 810 ILCS 5/2-313(1). However, under Magnuson-Moss, the express warranty must be in writing. 15 U.S.C. §2301(6) (defining "written warranty"); *Hasek v. DaimlerChrysler Corp.*, 319 Ill.App.3d 780, 745 N.E.2d 627, 639, 253 Ill.Dec. 504 (1st Dist. 2001). But note that Magnuson-Moss imposes on manufacturers the same implied warranties that state law imposes on the buyer's immediate seller. *Alvarez v. American Isuzu Motors*, 321 Ill.App.3d 696, 749 N.E.2d 16, 255 Ill.Dec. 236 (1st Dist. 2001).

In 2007, the Illinois Supreme Court borrowed the statute of limitations period from the UCC and held that the limitations period begins to run when the manufacturer fails to repair the vehicle rather than when the car is tendered for delivery. *Mydlach, supra.* In *Mydlach,* the court ruled that the warranty to repair or replace the defective vehicle did not amount to an express warranty under the UCC. Thus, the statute of limitations did not begin to run when the car was tendered. Rather, the warranty was breached when the promised repairs were refused or unsuccessful. 875 N.E.2d at 1059. However, the court limited the remedies available to a buyer under Magnuson-Moss. A buyer may not revoke acceptance under Magnuson-Moss because a buyer is not in privity with the manufacturer. 875 N.E.2d at 1064. In addition, it should be noted that when revocation of acceptance is sought and is available, a jury trial is not allowed. *Bublitz v. Buick*, 377 Ill.App.3d 781, 881 N.E.2d 375, 381, 317 Ill.Dec. 207 (2d Dist. 2007).

### B. [15.49] Other Federal Laws

In *Lynnbrook Farms v. Smithkline Beecham Corp.*, 887 F.Supp. 1100 (C.D.Ill. 1995), the court held that the Virus-Serum-Toxin Act, 21 U.S.C. §151, *et seq.*, preempted state common law and statutory claims asserted against a cattle vaccine manufacturer, alleging that it was strictly liable for the defective and dangerous nature of its vaccines and that it breached implied warranties of fitness for a particular purpose and merchantability under Illinois' Uniform Commercial Code, that it engaged in fraudulent misrepresentation and advertising, and that it failed to warn against certain alleged dangers associated with its vaccines. The court found that these claims would impose requirements different from or in addition to those set out by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service.

In *Weiland v. Telectronics Pacing Systems, Inc.*, 188 Ill.2d 415, 721 N.E.2d 1149, 242 Ill.Dec. 618 (1999), the court held that the premarket approval by the Food and Drug

Administration (FDA) of heart pacemakers, which were Class III medical devices under the Medical Device Amendments of 1976 to the Federal Food, Drug, and Cosmetic Act (see 21 U.S.C. §360k(a)), did not impose a specific federal requirement on pacemakers and thus did not operate to preempt state common-law claims for breach of warranty and defective design and construction. However, this case has been overruled by the U.S. Supreme Court in *Riegel v. Medtronic, Inc.*, ___ U.S. ___, 169 L.Ed.2d 892, 128 S.Ct. 999 (2008), in situations in which the requirements imposed by state law are different from or in addition to those required by federal law.

In *Riegel,* the U.S. Supreme Court held that the premarket approval of a catheter by the FDA, which was a Class III medical device under the Medical Device Amendments of 1976, imposed a regime of detailed federal oversight. Once a device receives premarket approval, the manufacturer cannot make changes in design specifications, manufacturing processes, labeling, or any other attribute that would affect safety or efficacy. 128 S.Ct. at 1005. Because of this broad regulatory scheme, the Court held that state requirements for medical devices are preempted if they are "'different from, or in addition to' the requirements imposed by federal law." 128 S.Ct. at 1011, quoting 21 U.S.C. §360k(a)(1). However, the Supreme Court noted that state parallel claims may be made. 128 S.Ct. at 1011. Thus, if a device is alleged to have breached a warranty, it must be determined whether the breach of warranty is different from or in addition to the requirements imposed by federal law.

In *Malone v. American Cyanamid Co.*, 271 Ill.App.3d 843, 649 N.E.2d 493, 208 Ill.Dec. 437 (4th Dist. 1995), the court held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts breach of implied warranty claims under state law to the extent that the action relies on inadequacies in labeling or packaging of a product. See 7 U.S.C. §136v(b). The *Malone* court found that the plaintiffs' breach of implied warranty of merchantability action brought against a manufacturer of herbicide was not preempted by the FIFRA when the plaintiffs claimed that they had relied on certain representations about the effectiveness of products in advertisements and pamphlets distributed to prospective customers. The *Malone* court held that Congress did not intend that the scope of the FIFRA's preemption clause include preemption of state common-law actions for breach of implied warranty when these claims were based on the company's advertising.

In *Caterpillar, Inc. v. Usinor Industeel,* 393 F.Supp.2d 659, 673 (N.D.Ill. 2005), the court held that the United Nations Convention on Contracts for the International Sale of Goods (CISG) preempted the plaintiff's UCC claims only if the claims fell within the scope of the CISG.

In *Bank of New York v. Nickel,* 14 A.D.3d 140, 789 N.Y.S.2d 95, 99 – 100 (2004), the court determined that the International Emergency Economic Powers Act (IEEPA) and the regulations of the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury could preempt the UCC only if these federal provisions actually conflict with the UCC, either because compliance with both federal law and the UCC is impossible or because the UCC stands as an obstacle to the accomplishment and execution of the full purpose and objectives of federal law.

## XIV. [15.50] APPENDIX — ADDITIONAL RESOURCES

Friedman, Stephen E., *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 Ariz.L.Rev. 677 (2004).

Holdych, Thomas J., and Bruce D. Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties — Getting What You Pay For and Paying For What You Get*, 45 DePaul L.Rev. 781 (1996).

Moore, James E., Agristor Leasing v. Spindler: *Economic Loss, Strict Liability and the U.C.C. — What a Mess*, 34 S.D.L.Rev. 101 (1989).

Richards, Janet L., *"As Is" Provisions — What Do They Really Mean?*, 41 Ala.L.Rev. 435 (1990).

Schwartz, Gary T., *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U.L.Rev. 796 (1983).

Warkentine, Edith Resnick, *Article 2 Revisions: An Opportunity To Protect Consumers and "Merchant/Consumers" Through Default Provisions*, 30 J. Marshall L.Rev. 39 (1996).