



Express Warranties: Promises, Promises

by Jeffrey G. Gilmore and Bill Fisher

"This boiler will heat the whole house and more."

"We will provide windows per plans and specifications."

"Install this carpet and the home buyer will love you for it. It will make the house look like a palace."

"This beam meets all the building code requirements for your structure."

We have all heard supplier's claims about products and how they will perform. What we don't all know is that many of these claims constitute *express warranties* which, if they prove untrue, may be the basis for a successful lawsuit. When an angry buyer looks to the builder for repair of an inadequate or defective component of his house, the builder may be able to demand that the supplier pay for it based on an express warranty.

Identifying an Express Warranty

The Uniform Commercial Code (UCC) is a statute that has been adopted, with some relatively minor amendments, by virtually all of the states. Article 2 of the UCC covers the sale of movable goods for a price of \$500 or more. Transactions which are primarily sales, as opposed to contracts for services, are governed by the UCC. Thus, any sale of movable goods for a price of \$500 or more is likely to be governed by the *same* statute regardless of the state. A sale by a supplier to a builder of windows, boilers, carpet, or steel beams may well fall under control of the UCC.

The UCC defines the term express warranty to include:

- any affirmation of fact or promise made by a seller to the buyer related to the goods
- any description of the goods
- any sample or model

To create an express warranty, it is not required that the seller use formal words such as "guarantee" or "warrant." Nor is it required that the seller specifically intend to give a warranty. So long as the seller's affirmation, promise, description, sample, or model is made *part of the basis of the bargain*, it creates an express warranty that the goods will conform to the seller's representation. Representations are part of the basis of the bargain if they are made during the course of the transaction and tend to induce reliance on the part of the buyer that the goods were as represented. The *basis of the bargain* element is often not even an issue, since it is presumed that a representation about the goods made by a seller during bargaining is part of the basis of the bargain. The burden is on the seller to show that the representation was not part of the basis of the bargain.

Distinguishing Warranties From Hype

A seller's statement about the

goods may be such that the buyer could not reasonably rely on the statement. As a result, the statement could not be made part of the basis of the bargain. An example is the seller who claims that his appliance is so simple that a four-year-old could install it. Another example is the quotation at the beginning of this article regarding the carpet. The builder may want the affection of the home buyer and may hope that the modest home will look palatial, but he cannot reasonably rely on the seller's statement and sue when his wishes are frustrated.

Such claims are called *puffing*. They are a part of the business of making sales and the law takes them very lightly, as intelligent buyers should. Another category of statements that will not create a warranty is opinion. When a seller tells a buyer that the water heaters are "top notch," it is a statement of opinion and is not a warranty. Finally, a statement regarding the *value* of the goods will not be a warranty. For example, a statement that a product is worth more than a competitor's product is not a warranty.

In addition to oral or written statements, use of a *sample* or a *model* by a seller may create an express warranty. Examples would include a sample of siding or fabric.

In the typical breach of warranty case, the buyer will be able to sue and recover the difference between the value of the goods as accepted and the value the goods would have had if they had been as warranted. Courts frequently refer to the cost of repair or replacement to determine the amount that should be recovered. In addition to this measure of damages, the buyer often can recover consequential and incidental damages.

Disclaimers

Occasionally a seller will give an express warranty in one breath and attempt to disclaim it with the next. The UCC's rule of thumb is that if the seller has given an express warranty, any limitation or disclaimer of that warranty is void to the extent that it is inconsistent with the warranty. Thus, if a seller warrants that "these skylights will never cloud over due to normal use" but in the sales contract states that "no warranty is given as to the effect of prolonged exposure to the elements," the warranty stands and the disclaimer is void. However, if the warranty and disclaimer are capable of being construed as consistent with each other, they will be interpreted that way and the disclaimer will be effective. In the skylight example, a disclaimer that "no warranty is given if the skylight is exposed over an extended period of time to salt water" would be effective.

Builders should be alert to the claims made by suppliers regarding the performance and qualities of the suppliers' goods. Builders are entitled

to rely on such claims if they meet the criteria for express warranties. Suppliers, on the other hand, must be careful not to oversell their goods. What may seem to be an innocent statement about the product may come back to haunt the supplier as a suit for breach of warranty. ■

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