**Disclaimer of Warranty and Limitation of Remedies**

Welcome to this podcast on Disclaimer of Warranty and Limitation of Remedies brought to you by CALI. I am Professor Scott J. Burnham. Another podcast called Warranties discussed what warranties are provided by the default rules of Article 2. The topic of this podcast is a basic overview of how the seller may disclaim those warranties or limit the remedies for their breach.

The main lesson of warranty law is that the large print giveth and the fine print taketh away. That is, even though these warranties are given by the law, we generally have freedom of contract to not give them, which we call disclaiming them, or freedom to give them but limit the remedy for breaching them. However, a seller has to jump through a number of statutory hoops in order to do that effectively.

Let’s start with disclaiming express warranties. Section 2-316(1) says that if a seller both gives and disclaims express warranties, then it is deemed to have given them. This makes sense if you look at the standard warranty language used by most businesses. They usually start by disclaiming all warranties and then giving an express warranty. For example, a standard new car warranty starts off by saying we’re giving you no implied warranties and we are giving you no express warranties, but we are promising that for 3 years or 36,000 miles, whichever comes first, we will repair or replace any defective parts. So they are clearing the ground and then building up an express warranty. It is obviously a contradiction that they said there are no express warranties but then gave you an express warranty. So § 2-316(1) makes clear that if they both disclaim an express warranty and give an express warranty, then it is considered to be given. So what’s the point of disclaiming express warranties? The disclaimer operates like the parol evidence rule -- they are really saying that there are no express warranties except what you are given here in this particular document.

Let’s now turn to the warranties that are found in every contract for the sale of goods. Section 2-312(2) says that the warranty of good title can be excluded only by “specific language.” That is, the seller can’t just write something like “There are no warranties.” They would have to specifically state, “I am not giving you a warranty of good title.” There is a gap in the Code in that it does not say how to disclaim the warranty against infringement, but if I were drafting a disclaimer of that warranty, I would use specific language so I would more likely be home free.

As I just mentioned, often a seller disclaims the implied warranties. Section 2-316 gives the seller two ways to do that, what I call the hard way in § 2-316(2) and the easy way in § 2-316(3). The hard way to do it says to disclaim the implied warranty of merchantability it must use the word *merchantability* in the case of a writing and it must be conspicuous, and to exclude the implied warranty of fitness the exclusion must be by writing and conspicuous. In other words, to disclaim the implied warranty of merchantability, use the magic word *merchantability* and make it conspicuous. So if you stated “there are no are implied warranties” in great big letters, you are not disclaiming the implied warranty of merchantability. That is why sellers often state something to the effect that “There are no warranties express or implied, including but not limited to the implied warranty of merchantability.” If that is conspicuous as defined in the statute, then it is likely to be an effective disclaimer. Disclaiming the implied warranty of fitness for a particular purpose, however, does not require any particular words.

There is an easier way to disclaim the implied warranties. Section 2-316(3) says you can use expressions like “as is” that call to the buyer's attention that there are no implied warranties. So, all a seller has to do is state in the contract, “These goods are sold AS IS” and that disclaims the implied warranties. The statute does not say that disclaimer has to be conspicuous, but many cases have required it. By the way, that language does not disclaim the § 2-312 warranties of title and against infringement. Even though the Code tells us those warranties are found in every contract for the sale of goods, they are not called implied warranties. As previously mentioned, they have to be separately disclaimed and brought home to a buyer. So, the “as is” language will disclaim only the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

While sellers of used goods, such as used car dealers, often disclaim the implied warranties, most sellers of new products do give you those warranties. However, they will often limit the remedies that are available under those warranties. Section 2-719 allows them to do that for the most part. For example, they could say, we are giving you a one-year warranty and if anything goes wrong we will repair or replace it. We are so used to seeing that warranty, that we may forget that the Code remedy for breach of warranty in § 2-714(2) is money damages. That is why we call anything else a limitation of remedy.

Another form of limitation of remedy is to disclaim liability for consequential damages or limit the amount of the loss. For example, assume you bought computer software for $100 and installed it in your computer and it caused your computer to go down. You lost all sorts of other programs and you had $1,000 worth of damages. Now this transaction may not be a sale of goods, but sellers of software often model their warranties after Article 2 warranties, so it is an analogous transaction. It is likely that the seller’s warranty said something like, “We limit the damages under our warranty to the purchase price of the product and we are not liable for consequential damages.” In that case, you may have a claim for breach of warranty, but you can only recover $100.

One exception to the rule allowing sellers to disclaim liability for consequential damages is that in the case of consumer goods, it is presumptively unconscionable to limit consequential damages for injury to the person. For example, if a tire dealer sold tires to you and the contract said “we are not liable for consequential damages,” but a tire blew out and caused personal injury, then that disclaimer would not be effective. But with that exception, it is generally possible under § 2-719 to exclude consequential damages. For example, that same disclaimer would probably be effective if the tires were sold to a commercial truck driver.

These are the general rules on disclaimer and limitation of remedies in the Code, but many states have enacted variations on these rules. For example, some states provide that in the sale of plants or livestock, there is no implied warranty that the plants or livestock are free of disease. If you were a buyer in such a state, the risk shifts to you, and you would want to get an express warranty from the seller. In addition, there are a number of other state and federal laws that affect warranties, especially in the area of consumer law. Examples are the federal Magnuson-Moss Warranty Improvement Act and state Lemon Laws. There also may be state and federal laws regulating particular transactions. Those laws are beyond our discussion, but obviously when you have an issue involving warranty, you will have to research the applicable law in your jurisdiction.

Let’s briefly review this podcast. At this point, you should be able to identify the various warranties that may be given in a transaction involving the sale of goods, and you should be able to determine whether a seller has effectively disclaimed those warranties or limited the remedy for breach of warranty.

I hope you’ve enjoyed this podcast on Disclaimer of Warranty and Limitation of Remedies.

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