

# TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

## Legal Assistance Note

### “As Is”—Four Letters, Two Words Your Client Didn’t Bother to Read or Understand

You are sitting at your desk when your client, Private First Class (PFC) FastCar, walks in. He just completed advanced individual training and, with money to burn, purchased a 1996 fire-engine red Ford Mustang convertible from the local used-car dealership. Private First Class FastCar tells you what a good deal he got on the car. The dealer told him, “This car is what a car should be, and it can be yours for only \$300 a month!” The dealer also said, “Although it is an ‘as is’ sale, the car comes with a one month, 50-50 warranty.”<sup>1</sup> You ask PFC FastCar what brings him into your office. He tells you “the car won’t run” and that he does not have the \$1000 the dealer wants to fix it. FastCar says he took the car to another mechanic, who said the car previously had been wrecked and sold for salvage, and is now probably unsafe to drive. FastCar does not want to continue paying for the car and wants you to get him out of the deal. What do you do?

Used car purchases are often the bane of a legal assistance attorney’s existence. To assist soldiers with problems associated with such purchases, as in the above scenario, legal assistance attorneys must have a basic understanding of general warranty law. The basis of warranty law is that goods sold carry with them certain warranties as to their quality and performance, and that if the goods do not meet these standards, then the buyer has a remedy.<sup>2</sup> Therefore, the first step in any case in which the goods are non-conforming or defective is determining the warranties that came with the goods. The law recognizes two basic kinds of warranties: express and implied.

## Express Warranties

Express warranties are created affirmatively by the seller and are present to some extent in all transactions.<sup>3</sup> An express warranty may exist even if the seller did not intend to create such a warranty.<sup>4</sup> The benefit of an express warranty is that the seller cannot disclaim them.<sup>5</sup> Upon proving the existence of an express warranty, the buyer only needs to show the product’s failure to conform to the affirmation, promise, description, sample, or model to have a remedy under the Uniform Commercial Code (UCC).<sup>6</sup>

Section 2-313 of the UCC recognizes three types of express warranties the seller can create:

- (1) By an affirmation of fact or promise, which includes most things the seller says about the product;
- (2) By description of the goods, created by contract descriptions or pictorial descriptions made part of the basis of the bargain; and
- (3) By sample or model, which guarantees that the actual product purchased by the buyer will conform to the sample or model the seller showed the buyer or displayed at the store or lot as part of the basis of the bargain.<sup>7</sup>

The opening scenario only potentially raises the first type of express warranty, those created by the seller’s affirmation or promise. Two major issues surround such warranties: (1) whether the statement or promise is a fact rather than merely “puffing;” and (2) whether the statement is of a kind that reasonably could play a role in the buyer’s decision. The former is an objective standard of the capacity of the statement under the circumstances to reasonably play a role in the bargain, and

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1. A one-month 50-50 warranty means the dealer promises to repair the product for the first month, with the consumer paying half the cost of parts and labor and the dealer paying the rest. This warranty requires the consumer to take the car to the dealer to be serviced. *Most “50-50” Warranties Are Illegal*, NCLC REPORTS, Nov./Dec. 1999, at 9 [hereinafter *Deceptive Practices and Warranties*].

2. See generally U.C.C. art. 2 (LEXIS 2002) (adopted in some form in every state except Louisiana). The Uniform Commercial Code (UCC) is not completely uniform throughout the jurisdictions that have enacted it, so attorney’s must be familiar with the version adopted in their state. A good reference for the UCC and the cases reported under this statute is the Uniform Commercial Code Reporting Service available on Westlaw.

3. NATIONAL CONSUMER LAW CENTER, CONSUMER WARRANTY LAW § 3.1 (2d ed. 2001) [hereinafter *CONSUMER WARRANTY LAW*].

4. U.C.C. § 2-313 cmt. 3 (“[n]o specific intention to make a warranty is necessary”).

5. *Id.* § 2-316(1).

6. See *id.* §§ 2-313(1), -601, -608, -711.

7. *Id.* § 2-313(1)(a)-(c).

the latter is a subjective standard of whether the statement actually did play a role in the bargain.<sup>8</sup> “This car has never been wrecked” and “the car had only one owner” are examples of statements that courts have found express warranties by affirmation of fact or promise.<sup>9</sup>

The dealer’s statement to PFC FastCar that “[the] car is what a car should be,” however, is ambiguous in nature and communicates no fact or promise. Section 2-313(2), UCC, provides that “an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.”<sup>10</sup> Therefore, the dealer’s statement to PFC FastCar did not create an express warranty.

### Implied Warranties

If the seller does not create an express warranty, an implied warranty may still apply to the purchase. The UCC and common law create implied warranties irrespective of the seller’s actions or representations.<sup>11</sup> The UCC recognizes two types of these warranties: (1) the implied warranty of merchantability; and (2) the implied warranty of fitness for a particular purpose.<sup>12</sup> The implied warranty of merchantability is the most important warranty in the UCC, and is the focus of the remainder of this note.

Every contract for the sale of goods by a seller, so long as the seller is a merchant of goods of that kind,<sup>13</sup> contains a warranty that the goods shall be merchantable, unless otherwise excluded or modified.<sup>14</sup> The implied warranty of merchantability imposes a baseline standard—it promises that the goods are: (1) fit for the ordinary purpose for which they are used; and (2) can be used with reasonable safety, efficiency, and comfort.<sup>15</sup>

The seller can disclaim this warranty only under very restricted circumstances.<sup>16</sup> The seller can limit or disclaim the warranty only if he uses the language required by the UCC; unless the seller uses expressions similar to “as is” or “with all faults,” UCC section 2-316(2) states that the disclaimer must contain the word “merchantability.” The disclaimer must be conspicuous and available to the consumer before the contract is signed.<sup>17</sup> Whether the warranty disclaimer is conspicuous is a question of law for the court, and depends on the entire circumstances of the transaction,<sup>18</sup> including the location of the disclaimer in the contract, size and color of type, surrounding words, and the timing of the disclosure.<sup>19</sup> The question is objective: whether a “reasonable person” ought to have noticed the disclaimer. What the particular buyer noticed or read is less important than the type size of the disclaimer and its location in the contract.<sup>20</sup> In addition to the restrictions on disclaimers imposed by the UCC, about a third of the states have statutes that preclude or restrict a seller’s ability to disclaim implied warranties.<sup>21</sup>

The ability to disclaim the implied warranty of merchantability is also limited when a written warranty or service contract is provided. The Magnuson-Moss Warranty Act<sup>22</sup> (MMWA) states that when a supplier<sup>23</sup> provides a “written war-

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8. See CONSUMER WARRANTY LAW, *supra* note 3, § 3.2.1.

9. See, e.g., *City Dodge, Inc. v. Gardner*, 208 S.E.2d 794 (Ga. 1974), *Rogers v. Crest Motors, Inc.*, 516 P.2d 445 (Colo. 1973).

10. U.C.C. § 2-313(2).

11. See CONSUMER WARRANTY LAW, *supra* note 3, § 1.7.1.1.

12. U.C.C. §§ 2-314, -315.

13. A “merchant with respect to the goods of the kind sold in the transaction” simply has a professional status as to a particular kind of goods. *Id.* § 2-104 cmt. 2.

14. *Id.* § 2-314.

15. See CONSUMER WARRANTY LAW, *supra* note 3, § 4.2.3.2.

16. *Id.* § 4.2.2.

17. *Id.* § 2-316(2).

18. See *id.* § 1-201(10) (defining “conspicuous”).

19. CONSUMER WARRANTY LAW, *supra* note 3, § 5.8.1.

20. See *id.*

21. See *id.* § 14.11 (providing a state-by-state summary of special rules that restrict disclaimers of used car warranties or set standards for the condition of used cars).

ranty” or enters into a “service contract,” and the MMWA otherwise applies, that party cannot disclaim implied warranties. Where a dealer offers a 50-50 or other written warranty, the MMWA prohibits the dealer from disclaiming implied warranties during the term of the written warranty.<sup>24</sup> Consequently, while the consumer must pay fifty percent of a repair under the written warranty, the consumer may be entitled to a warranty repair at no charge under the implied warranty of merchantability.

The MMWA does allow a supplier to limit implied warranties to the same duration as the written warranty;<sup>25</sup> however, if the dealer does not do so explicitly, then the implied warranty has no term limit whatsoever.<sup>26</sup> Typical 50-50 warranties never specify such a term limitation, so these warranties come with unlimited implied warranties of merchantability. For example, if a dealer attempts to sell a car “as is” with a one-month 50-50 warranty, as in PFC FastCar’s scenario, then the disclaimer of implied warranties is ineffective. The car comes with an unlimited implied warranty of merchantability because the seller specified no shorter term.<sup>27</sup>

The seller’s conduct may also invalidate an “as is” disclaimer. For example, the seller may attempt to divert the buyer’s attention from the disclaimer by treating the document as a mere receipt; by explaining that the document is “just a form from headquarters;” by admonishing the buyer that the contract is “just a bunch of legalese;” by discouraging the buyer from reading the contract by saying, “It’s just what we agreed on, don’t you trust me?;” by rushing the contract signing; or by

putting a hand over part of the contract during the signing, in an attempt to mislead the buyer. Such conduct should invalidate an “as is” disclaimer under the UCC.<sup>28</sup>

In used car sales, the Federal Trade Commission’s (FTC) Used Car Rule<sup>29</sup> imposes additional requirements for disclaimers to be conspicuous. The FTC requires the “as is” on the window form, although separate from the contract document, to be in large, boldface capital letters. The Rule requires the seller to post the window form on a window of the car, and also to give a copy of this form to the buyer.<sup>30</sup> Although the FTC Act does not provide a private right of action for a violation of an FTC Rule, the FTC interprets a violation of the Used Car Rule as an unfair and deceptive practice (UDAP).<sup>31</sup> The Rule also specifies certain used car sales practices as unfair or deceptive. Consequently, a violation of the FTC Rule should be a state UDAP violation.<sup>32</sup> A purchaser could also argue that a violation of the Used Car Rule automatically violates the MMWA, which does authorize a private action for damages and attorney’s fees.<sup>33</sup>

### *Cancellation*

When a warranty exists, either express or implied, and the goods or the seller’s conduct does not conform to the contract obligations, the buyer may seek to “cancel” the sale and to exchange the goods for the money paid. The buyer may cancel by either rejecting or revoking acceptance of the goods in a timely manner:<sup>34</sup> the buyer must reject soon after delivery, and must revoke soon after discovery of the nonconformity. In

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22. 15 U.S.C. §§ 2301-2312 (2000).

23. The UCC defines “supplier” as “any person engaged in the business of making a consumer product directly or indirectly available to consumers,” *id.* § 2301(4), and therefore includes both retailers and manufacturers.

24. Deceptive Practices and Warranties, *supra* note 1, at 9.

25. 15 U.S.C. § 2308(b).

26. *See id.*

27. *See* Deceptive Practices and Warranties, *supra* note 1, at 9.

28. *See id.* *See generally* U.C.C. §§ 2-316(3)(a) (LEXIS 2002) (providing for treating the disclaimer as invalid when “circumstances” dictate), 2-316(2) (provides for treating the disclaimer as invalid when it is not “conspicuous”), 1-203 (providing for treating the disclaimer as invalid when there is a violation of the good faith duty imposed in the UCC), 1-103 (providing for treating the disclaimer as invalid as a defense of mistake against the seller’s assertion of the disclaimer, as an equitable estoppel, or as unconscionable).

29. 16 C.F.R. § 455 (LEXIS 2002).

30. *Id.* § 455.2(a).

31. The UDAP statutes are state laws of general applicability that prohibit deceptive and often unfair practices. They usually provide strong remedies, such as attorney fees and multiple or minimum damages, and apply to oral misrepresentations, the failure to disclose material facts, and unfair practices irrespective of any contractual disclaimers or limitations or UCC restrictions on consumer warranty rights. *See generally* NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (5th ed. 2001) [hereinafter UDAP] (providing detail on UDAP statutes, including summaries of every state’s statute, and analysis of scope, remedies, and litigation issues).

32. *See* CONSUMER WARRANTY LAW, *supra* note 3, § 14.7.8 (citing UDAP, *supra* note 31, § 3.4.4.5 (3d ed. 1991 and Supp.)).

33. 15 U.S.C. § 2310(d) (2000).

either case, the buyer must give the seller prompt notice. In addition, the buyer may have to provide the seller with the opportunity to remedy the nonconformity under either the statutory right to cure upon rejection or a contractual limitation on remedies.<sup>35</sup>

Generally, the buyer has four options regarding the goods after cancellation: (1) hold the goods until the seller picks them up; (2) return the goods; (3) sell the goods for the seller's account; or (4) continue to use the goods.<sup>36</sup> These options are cumulative with the buyer's right to damages and other remedies.<sup>37</sup> Whichever option the buyer exercises, he should have an expert inspect the goods at the earliest opportunity and get a signed list of problems. The buyer should have this done before returning or reselling the goods because this is his only opportunity to inspect the goods before others handle them.<sup>38</sup>

A buyer who cancels a sale should avoid using the goods because this can constitute a new acceptance. But what if continued use is unavoidable? Courts have demonstrated a willingness to approve the consumer's continued use of a car as long as the use is reasonable. The following are factors that courts consider when determining reasonable use:

- (1) The instructions, if any, that the seller gave the buyer concerning the return of the goods when the buyer apprised the seller of his revocation of the goods;
- (2) Whether the buyer's business or personal circumstances compelled the continued use;
- (3) Whether during the period of such use, the seller persisted in assuring the buyer that all nonconformities would be cured or that provisions would otherwise be made to recompense the buyer for the dissatisfaction and inconvenience which the defects caused him;
- (4) Whether the seller acted in good faith; and

- (5) Whether the buyer's continued use unduly prejudiced the seller.<sup>39</sup>

To best protect the interest of the client who must continue to use the goods, his notice of rejection or revocation should state that until the seller returns the client's money, the client will continue to use the goods to preserve them, protect the client's security interest, and minimize the seller's damages. The notice should explain the client's poor financial circumstances and any other facts that require continued use of the goods. The notice should also state that the seller may remove the goods when he returns the client's payments.<sup>40</sup>

In PFC FastCar's scenario, continued use of the vehicle would be unwise because of the safety concern. Furthermore, continued use of the goods would undermine PFC FastCar's argument that the seller breached the implied warranty of merchantability.

### Conclusion

Legal assistance attorneys must have a working knowledge of warranty law to assist clients with problems similar to PFC FastCar. A thorough client interview is the first step in evaluating and preparing a warranty case. The client should bring all documents—the contract, window sticker, advertisements, any warranties, owner's manual, repair orders, and any other paperwork—to the initial interview. Sometimes these documents have conflicting information regarding the description or vehicle identification number of the goods, the amount of the down payment, the warranties, disclaimers, or limitation of remedies. Glowing statements about the goods in advertisements may have influenced the buyer. Brochures may have created express warranties that the seller cannot disclaim.<sup>41</sup> In revocation cases, repair records are particularly important because the client must show he afforded the seller the opportunity to cure.<sup>42</sup>

Attorneys must also go behind the written documents, focusing on any oral statements made by the seller. To determine intent, the UCC gives effect to the true understandings and

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34. U.C.C. §§ 2-601, -608 (LEXIS 2002). The nonconformity must substantially impair the value of the goods to the buyer, and the buyer must have been justifiably unaware of the nonconformity when he accepted the goods. CONSUMER WARRANTY LAW, *supra* note 3, § 8.3.1.

35. See CONSUMER WARRANTY LAW, *supra* note 3, § 8.1.

36. See U.C.C. §§ 2-602, -604, -608.

37. See *id.* § 2-711.

38. CONSUMER WARRANTY LAW, *supra* note 3, § 8.4.1.

39. See *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*, 449 N.E.2d 1289 (Ohio 1983).

40. See CONSUMER WARRANTY LAW, *supra* note 3, § 8.4.6.5.

41. See U.C.C. §§ 2-313, -316.

42. See *id.* § 2-608.

expectations of the parties, rather than relying exclusively on the writings. The meaning of a contract term, admissibility of oral statements made before the signing of the writing, and the validity of disclaimers all depend, in part, on the parties' understandings and expectations.

Legal assistance attorneys must understand warranty law to assist clients after the deal is done. In addition, the preventive law efforts of a legal assistance office should aim to educate soldiers about warranties before these soldiers make major purchases. Major Kellogg.