Contract Warranties and Remedies: A Comprehensive Survey of the Creation, Modification and Exclusion of Contract Warranties and Remedies for Attorneys and Contracting Professionals

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SURVEY

CONTRACT WARRANTIES
AND REMEDIES

A COMPREHENSIVE SURVEY OF THE CREATION,
MODIFICATION AND EXCLUSION OF CONTRACT
WARRANTIES AND REMEDIES FOR ATTORNEYS AND
CONTRACTING PROFESSIONALS

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CONTRACT WARRANTIES AND REMEDIES

I. INTRODUCTION

A warranty is the seller's or maker's assurance of the integrity of a product or service. Warranties address attributes such as character, quality, performance, durability, longevity, type, and title. Remedies define the seller's or maker's responsibility to repair or replace the defective product, correct the deficiencies in the service, and otherwise indemnify the purchaser. It is important that both sellers and purchasers understand the types of warranties, the responsibilities and obligations warranties create, and what actions are required to protect enforceability of the warranty. This article discusses the types of warranties and remedies that are available by contract and by operation of the law. It also discusses how these warranties and remedies can be limited, waived, and excluded by contract language, actions of the parties, and operation of the law.

II. WARRANTIES - GENERAL

There are two categories of warranties; express warranties and implied warranties created by the Uniform Commercial Code, statutes, and common law. Express warranties are generally written warranties. They are either offered by the seller as an inducement to the purchaser or are negotiated between the purchaser and seller as part of the contract. Implied warranties operate by virtue of statutes and common law. Implied warranties may not be available to the purchaser in all situations and can be deleted, modified, or waived in situations where they would otherwise apply.

In order to fully understand warranties and remedies, one must be able to distinguish between two basic types of contracts. These are contracts for services and contracts for the sale and purchase of goods. The reason that it is important to distinguish between these two categories is that Article Two of the Uniform Commercial Code (U.C.C.) applies to contracts for the sale and purchase of goods. Article Two of the U.C.C. acts as a gap filler in the contract. It actually injects into the sales agreement many terms and conditions, including warranties and remedies, that the parties do not expressly address. Therefore, unless the contract specifically changes or excludes an applicable U.C.C. term, the U.C.C. term will govern the transaction. However, there are some U.C.C. terms such as the time limit to bring an action for breach, including warranty failures, which cannot be modified or excluded by the parties. The U.C.C. is codified in North Carolina as Chapter
25 of the General Statutes. The subsections of the General Statutes are numbered the same as the U.C.C. Articles and Sections.

The U.C.C. defines "goods" as all things which are movable at the time of identification to the contract. The definition encompasses the unborn young of animals as well as growing crops, timber, minerals, or structures which are removed or severed from the land coincident with the sales transaction.

The warranty rights granted by the U.C.C. are called implied warranties. These warranties apply to contracts which fall under the U.C.C. for the purchase and sale of goods but do not apply to contracts for services. If a contract is predominantly concerned with the sale of goods and contains services which are supplemental to the sale, then the whole contract is governed by the U.C.C. An example of this type of contract would be the purchase and planting of ornamental shrubs. The primary value of the contract is the purchase of the shrubs. The planting services are a minor portion of the contract. If the contract is primarily for services such as a contract for design, engineering, or construction, neither the contract nor items delivered under the contract such as drawings, specifications, calculations, or completed structures are subject to the U.C.C.

III. IMPLIED WARRANTIES

There are two implied warranties under the U.C.C.; the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

In order to be merchantable, the goods must be of a quality that would pass without objection in the trade and be fit for the ordinary purposes for which such goods are used. Other requirements of merchantability are that the goods be adequately packaged and labeled and the goods conform to any promises or facts made on the carton or label.

The warranty of merchantability follows goods that are purchased for resale and covers food and drink whether consumed on or off the premises where purchased. Second hand goods are also covered. However, coverage is limited to their specific contract

description and not general purposes.⁸

To create an implied warranty of merchantability the goods
must be purchased from a seller who is a merchant in goods of the
kind purchased. The term merchant implies that the seller is a
person who holds himself out as one who has knowledge and skill
particular to these goods. Therefore, no warranty of
merchantability would attach to goods purchased from an occa-
sional seller or to a sale of goods isolated from the merchant's gen-
eral trade. Two examples where the warranty would not attach are
the purchase of a new electric motor from a homeowner or the
purchase of the used delivery truck from an appliance store. How-
ever, a non-merchant seller is under an obligation to disclose
known material defects which cannot be reasonably discovered by
the purchaser.⁶

The implied warranty of fitness for a particular purpose is cre-
ated when the purchaser relies on the seller's skill and judgement
to furnish suitable goods. The seller in this instance need not be a
merchant. However, the seller must know the intended purpose of
the goods or that the purchaser is relying on the seller in choosing
the goods.⁷

The warranty that attaches to this sale is that the goods are fit
for the purchaser's specific use. This warranty differs from the
warranty of merchantability which says that goods must be fit for
ordinary use. Therefore, goods designed for ordinary use may not
be fit for use under special conditions that require extreme reliabil-
ity, high durability, or special modification of the goods.

A contract may include both implied warranties and express
warranties. Under the U.C.C. and common law, all warranties are
considered to be and shall be construed as consistent with each
other and cumulative unless expressly excluded or modified.⁸ In-
consistencies between or among warranties must be resolved so
that their overall effect is cumulative and consistent.

Both implied warranties may be excluded or modified.⁹ To exclude
or modify the implied warranty of merchantability the language
must mention merchantability and must be conspicuous. Conspicu-
ous means that the words are in larger and bolder type than the

surrounding words so that a reasonable person reading the document should notice the words. The following is an example of an exclusion clause that would effectively exclude all the implied warranties and limit warranties and remedies to those expressly written into the contract:

THE WARRANTIES, GUARANTEES, AND REMEDIES SET FORTH IN THIS AGREEMENT ARE THE PURCHASER'S EXCLUSIVE WARRANTIES AND REMEDIES AGAINST THE SELLER FOR DEFECTS AND ARE IN LIEU OF ANY OTHER WARRANTIES, GUARANTEES, OR REMEDIES EXPRESS OR IMPLIED INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

The implied warranties may also be excluded by a statement that 'there is no warranty' or that 'there is no warranty beyond the express warranty.' Other methods of excluding both implied warranties are with expressions like 'AS IS', 'AS THEY STAND', or 'WITH ALL FAULTS.' These expressions act to shift all the risk to the purchaser.

Inspection by the purchaser or the purchaser's refusal to inspect the goods also excludes the implied warranties as to those defects which should have or could have been detected by the inspection. Deference may be given to the skill of the inspector. An expert or an inspector in a commercial situation will be held to a higher standard than an ordinary consumer.11

The purchaser's failure to inform the seller of defects discovered upon inspection and the acceptance and use of the goods with the defect acts as a waiver of the warranties, and the purchaser may be unable to force the seller to correct the defects or the purchaser may not reject the goods or revoke acceptance at a later time.12

The implied warranties may also be excluded or modified by bargained-for express warranties which hold the goods to specific standards of quality and performance as well as course of dealing, course of performance, and usage of trade.13

Other terms of the contract such as a LIMITATION OF LIAB-

ABILITY clause can operate to limit the purchaser's available remedies to include monetary recovery for a warranty breach. These terms contractually limit the seller's liability as to the maximum recoverable amount of monetary damages including damages to the warranted items, exclude or limit liability for property damage beyond the actual goods warranted, and exclude liability for consequential damages such as loss of the use of property, additional costs, and lost profits. These terms usually include limitation of liability for other causes of action beyond the contract such as tort, negligence, and strict liability. 14

IV. STATUTORY WARRANTIES

Closely related to implied warranties under the U.C.C. are warranties designated by statute or that arise by operation of law depending on the scope of services or types of items designated in the contract. As the North Carolina Supreme Court stated in Potter v. Carolina Water Co., 15 "all laws relating to the subject matter of a contract enter into it and form part of it as if expressly referred to or incorporated in its terms unless there is something in the contract excluding such hypothesis." 16

In construction contracts, the contractor implicitly warrants that his work will be performed in a proper and workmanlike manner. This warranty requires the contractor to perform all work in an ordinary skillful manner as a skilled workman should do it. 17 The contractor's duty to construct in a workmanlike manner includes the materials incorporated into the construction. 18 The implied warranty of workmanship does not extend beyond the date of acceptance unless the defects are latent. 19 Therefore, the purchaser of construction services should perform periodic inspections and a final pre-acceptance inspection and notify the contractor in writing of all discrepancies prior to accepting the construction and making the final payment. Final payment should be withheld until the discrepancies are corrected to the satisfaction of the contract docu-

16. Id. at 117, 116 S.E.2d at 378.
The inspection and list of discrepancies is commonly referred to as the 'punch list' or 'punch listing.'

An implied warranty in construction contracts or any contract where the seller or contractor will be required to fabricate items or perform work to plans and specifications furnished by the purchaser is the warranty of Adequacy of Plans and Specifications. This warranty covers the contractor rather than the purchaser. Under this warranty, the contractor will be allowed to recover the contract consideration from the purchaser if the contractor complies with the purchaser's plans and specifications and the resulting product is inadequate.\textsuperscript{20} Under \textit{Spearin} a contractor who agrees to undertake work that is possible to be performed shall not be excused or entitled to additional compensation because he encounters unforeseen difficulty. However, a contractor does not assume risks incident to a defective design where that design was prepared by another party to the contract and the contractor was required by the terms of his contract to follow it, and did follow it. The risks incident to defective design are not shifted to the contractor by standard contract clauses which require him to visit the site, check the plans, and inform himself of the work.\textsuperscript{21} If a contractor does not comply with the plans and specifications notwithstanding that they are defective, he proceeds at his own risk and guarantees the suitability of the work.\textsuperscript{22}

The main controversy when dealing with problems concerning purchaser-specified goods is the determination of whether the problem arises from a quality, material, or workmanship defect or arises because the goods are not suitable for the specified purpose. If the problem is caused by inadequate quality, defective workmanship, or defective materials (to include latent manufacturing defects) it will be covered under the contractor's warranty. However, if the goods meet and are installed in accordance with the specifications, and either the goods or specifications are unsuitable for the intended purpose or the specifications are faulty, neither the unsuitability nor the fault are covered by the contractor's warranty.\textsuperscript{23} Where the contractor proposes a substitute to purchaser


\textsuperscript{21} \textit{Spearin}, 248 U.S. at 136 (citing Christie v. United States, 237 U.S. 234 (1915)).


\textsuperscript{23} \textit{See} Trustees of Ind. Univ. v. Aetna Casualty & Sur., 920 F.2d 429 (7th
specified goods, and the purchaser approves the use of the substitute items, the purchaser can be held to have adopted the items and assumes the risk of their unsuitability unless the purchaser contractually shifts this risk to the proposer as part of the bargain for allowing the substitution.24

However, the contractor can incur liability for specification or product unsuitability depending on his level of involvement in preparing the specifications and selecting the substitute items and his level of knowledge compared to that of the purchaser/owner.25 The contractor can also incur liability if he knows or should know that the goods or plans are obviously unsuitable for the specified application or that the plans are obviously defective.26

Appropriate language to shift the risk for the unsuitability of a contractor recommended substitution might be as follows:

Purchaser has reviewed the Contractor's proposal to use ______________ as a substitute for the specified ______________. Purchaser hereby allows the use of ______________. However, Contractor shall assume all risk of defects and unsuitability of this substitute product. This product shall be covered by all warranties and remedies stated in the Contract Documents and available at law. The Contractor remains completely responsible for the performance of all Work in accordance with the Contract Documents.

The parties may wish to temper the contractor's assumption of all the risk by using the following sentence in place of the third sentence in the above term.

"Contractor hereby guarantees that the substituted item shall be of equal or greater quality and suitability than the originally specified item."

In this case the contractor will still have the defense that the original item or specification was unsuitable and that he has not assumed additional liability beyond that of the original contract.

Cir. 1990).


THE CONTRACTOR SHALL NOT BE REQUIRED TO CORRECT DEFECTS CAUSED BY IMPROPER INSTALLATION, OPERATION, HANDLING, MISUSE, OR NEGLIGENCE BY THE PURCHASER OR OTHERS BEYOND THE CONTRACTOR’S CONTROL.  

A BUILDER-VENDOR IMPLICITLY WARRANTS THAT THE DWELLING HE HAS BUILT AND SOLD IS LIVABLE, AND THE SELLER OF LAND IMPLICITLY WARRANTS THAT THE LAND IS USEABLE FOR ITS COVENANTED PURPOSE IF IT IS OFFERED FOR SALE FOR THE COVENANTED USE.  

THERE ARE ALSO STATUTORY REQUIREMENTS FOR THE QUALITY OF PROFESSIONAL SERVICES. HOWEVER, DAMAGES ARE USUALLY RECOVERED THROUGH A TORT ACTION FOR MALPRACTICE RATHER THAN AN ACTION FOR BREACH OF A CONTRACT WARRANTY.  

UNLESS PROHIBITED BY STATUTE OR PUBLIC POLICY, STATUTORY WARRANTIES CAN BE MODIFIED OR EXCLUDED BY THE CONTRACT LANGUAGE. THE LANGUAGE MUST BE SPECIFIC AS TO THE WARRANTY AND THE LIMITATION, MODIFICATION, OR EXCLUSION.  

V. EXPRESS WARRANTIES  

EXPRESS WARRANTIES ARE AFFIRMATIONS OF FACTS OR PROMISES THAT THE SELLER MAKES TO THE PURCHASER ABOUT THE GOODS. EXPRESS WARRANTIES ARE ESSENTIAL ELEMENTS OF THE CONTRACT OR A BASIS FOR THE BARGAIN AND AS SUCH ARE INCORPORATED IN THE CONTRACT. THE SELLER OFFERS EXPRESS WARRANTIES AS AN INDUCEMENT TO THE PURCHASER, OR THE PURCHASER AND SELLER NEGOTIATE THE WARRANTIES WHICH EXPRESSLY OBLIGATE THE SELLER TO DELIVER GOODS OF A SPECIFIC QUALITY.  

EXPRESS WARRANTIES FALL INTO TWO BROAD CATEGORIES: DESCRIPTIVE WARRANTIES AND PERFORMANCE WARRANTIES. A DESCRIPTIVE WARRANTY DESCRIBES THE PHYSICAL CHARACTERISTICS SUCH AS SIZE, MATERIAL CONTENT, AND COLOR. THE DESCRIPTION CAN BE IN WORDS, SPECIFICATIONS, DRAWINGS, BLUEPRINTS, OR SYMBOLS. SAMPLES OR MODELS OF THE GOODS CAN ALSO CREATE AN EXPRESS WARRANTY. THE PERFORMANCE WARRANTY SPECIFIES THE REQUIRED PERFORMANCE, DURABILITY, AND LONGEVITY OF THE GOODS AND ARE USUALLY CONTAINED IN TECHNICAL SPECIFICATIONS. MANY EXPRESS WARRANTIES COMBINE DESCRIPTIVE AND PERFORMANCE REQUIREMENTS SO THAT THE PURCHASER IS ASSURED THAT HE WILL RECEIVE GOODS THAT WILL BE FABRICATED AND WILL PERFORM TO HIS REQUIREMENTS AND EXPECTATIONS.  

It is not necessary to use specific language to create an express warranty nor is it necessary that the seller intends to create the warranty to have an express warranty attach to the goods. However, statements by the seller as to his opinion about the value or quality of the goods do not create a warranty. This limitation arises because the purchaser should not reasonably rely on such statements of opinion, sometimes called “puffing”, in making his decision, even though in fact they were influential. The general test between “puffing” and warranty statements is whether a reasonable person in the position of the purchaser would find the statement reliable.

The easiest way a purchaser can circumvent this problem is to incorporate all the warranty and guarantee terms into the written agreement. The purchaser must consider all of his requirements when determining his warranty criteria. Quality factors such as workmanship, materials, fabrication methods, and specifications must be addressed. Other requirements such as those contained in industry codes, or statutes should be incorporated by reference into the contract and the express warranty. Time of need and the consequences of late or early delivery may also be critical, especially if the goods are part of a project managed under a “JIT”, Just In Time, or “MRP”, Manufacturing Resources Planning, schedule. If the purchaser desires that delivery be guaranteed at a specific time and no later, then a TIME IS OF THE ESSENCE clause must be in the contract to give notice that delivery at the stated time is an essential element of the contract. Without this clause, the seller will be allowed to deliver the goods within a reasonable time of the contracted delivery date.

The warranty should expressly extend the original warranty terms and period to any repairs and replacements made under the warranty. The warranty period for the repair should begin at the satisfactory completion of the repair.

If the purchaser desires the express warranties to extend more than four (4) years from the date of delivery (or tender by the seller), then the contract must include warranty language that specifically relates to the future performance of the goods under U.C.C. § 2-725(2).31

The following general express warranty statement should be sufficient to ensure that the goods must conform to all of the con-

31. See discussion of “Warranties of Future Performance” under IX Warranty Periods/Statute Of Limitations.
CONTRACT WARRANTIES

tract requirements.

"Seller hereby warrants that the (goods) shall be free from defects in (design (if applicable)), materials, and workmanship, shall conform to the contract requirements, and shall be suitable for its (their) intended purpose for a period of ________ years.

Because they are part of the basis of the bargain, express warranties cannot be excluded or modified by a clause which generally disclaims all express and implied warranties. It would be a violation of good faith to offer an inducement and then by other language withdraw or limit it. The exclusion or modification language must be specific as to the express warranty and agreed to by both parties. However, limitation of liability terms can act to limit the purchaser's remedies and even express warranties are subject to waiver if the buyer fails to reject the goods or to provide notice of defects. Express warranties are also subject to interpretation based on course of performance, course of dealing, and trade practices.

VI. BATTLE OF THE FORMS

The purchaser's express warranties can be modified or excluded from the contract when the contract is created by two separate forms. This situation can occur when an offer made on one form is accepted on a separate form. Making purchases with a purchase order form is an example of this method. The purchaser sends out a purchase order which the seller accepts by either promptly shipping the goods or sending the purchaser an acknowledgement. The purchase order is preprinted with the purchaser's terms and conditions for entering into the contract. The purchaser completes the form by inserting the type, quantity, price, quality, delivery, and other terms. The seller's acknowledgement is also by a form that has predetermined conditions printed on it. What happens if there are differing and additional conditions between the two forms? Has a contract been made or have the parties merely exchanged counteroffers? Does it make a difference who sent the first form? The purchaser may be the second to send the form when accepting a seller's proposal by sending a purchase order referencing the seller's proposal.

This scenario is referred to as "The Battle of the Forms", and is governed by U.C.C. § 2-207. Under U.C.C. § 2-207(1), a seasona-

ble act which indicates acceptance (such as shipping the goods) or a written confirmation (the acknowledgement) sent within a reasonable time operates as an acceptance even though it contains additional or different terms from the offer, unless the acknowledgement specifically states that acceptance is expressly conditioned to the offeror's accepting the additional or different terms. If the offer does not expressly limit acceptance to the terms of the offer, the additional terms shall be construed as proposals for addition to the contract. If the seller ships the goods as his act of acceptance, the additional or differing terms can be on the shipping documents or invoice. Therefore, exchange of the forms will constitute a contract when neither the offer nor the acceptance is expressly conditioned on the acceptance of the stated terms or when the offer is expressly conditioned and the acceptance is not conditioned or when the seller accepts the offer as presented.

Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract even if the writings do not establish a contract. In such cases the terms of the contract shall be those terms to which the parties agree plus any supplemental terms governed by the U.C.C. Therefore, if the purchaser and seller exchange an offer and an acknowledgement each with different and additional terms and the acceptance of each is expressly conditioned on accepting the stated terms, exchange of the forms does not establish a contract under U.C.C. § 2-207(1). However, once the parties begin to carry out the contract such as by shipping and receiving the goods, U.C.C. § 2-207(3) locks them into a contract by their actions, and neither can reject his obligations by declaring the contract invalid.

If the goods turn out to be defective, what is the warranty, what is the remedy, and what enforcement methods are available? One theory holds that conflicting terms between the offer and acceptance cancel each other out when they form a contract. This theory is referred to as the "Knock Out Rule". Therefore, express warranties in the purchaser's offer may be knocked out of the contract by the seller's acknowledgement which contains language modifying or excluding the warranties. In this case the U.C.C. would act as a gap filler and inject implied warranties into the con-

35. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3, at 34 & n. 17, 18 (3d ed. 1988).
tract. Another theory holds that the term in the first form will become part of the contract and the conflicting term on the second will be dropped. In this case, if the purchaser is acknowledging a seller's offer, the purchaser's conflicting terms are dropped and the seller's, not the U.C.C.'s, terms will prevail.38

If the offer contains terms which are not addressed in the acknowledgment, then those terms will become part of the contract. The silence in the second form will not cause the U.C.C. to supply its terms, which could be either concurring or differing from the terms in the first form, to the second form.37 However, terms in the acknowledgement (second form) which are not addressed in the offer (first form) are additional terms that must enter the contract through U.C.C. § 2-207(2). If acceptance is expressly limited to the additional terms, the second form is not an acknowledgement but a counteroffer. The offeror can accept the counteroffer by a written acceptance or by such actions as receiving the goods. Once the contract is formed, the counteroffer terms could become part of the contract in spite of U.C.C. § 2-207(3).38

In order to provide maximum protection to the desired terms, an offeror should always expressly condition his offer to the seller's accepting the terms of the offer without changes or additions.

The above brief summary of the general rules concerning purchase orders and acknowledgements indicates that there are four considerations in determining whether the exchanged forms constitute a contract and what terms are included in the contract. First, do either or both of the forms expressly condition acceptance to their terms? Second, who sent the first form? Third, what terms appear on the first form that are not on the second? Fourth, what differing terms appear on both forms?

VII. Remedies

Remedies define the purchaser's rights against the seller should there be a claim under the warranty. Part of the bargain in the express warranty should be the purchaser's remedies. What will the seller do to correct the nonconforming goods or services? What damages (expenses) can the purchaser collect as a result of the problem? In most consumer purchases the seller agrees to re-

36. Id., at 35.
37. A gap filler will not knock out an explicit contrary term in the offer. Id. at 37 n. 24.
38. See Id. at 37 n. 25, 26.
pair or replace the item or refund the purchase price. It is usually the purchaser's responsibility to return the item to a specific place without compensation for loss of use, transportation costs, or any required reinstallation.

In a commercial situation, the losses from a defective item or service can be substantial. Therefore, the express remedies should be carefully considered when negotiating the contract. The simple repair or replace upon return to the seller's facility may be woefully deficient in respect to the purchaser's economic loss if his facilities sit idle because of malfunctioning or undelivered items. Some of the major considerations in determining the remedies should include the seller's responsibility to remove and reinstall the defective item; transportation, packaging, and handling if necessary; repair at purchaser's facility; compensation for loss of use and use of purchaser's assets; seller's overtime costs; seller's responsiveness; and responsibility for damage to other components, equipment, and systems.

In addition to expressly bargained remedies, Parts Six and Seven of U.C.C. Article Two provide the purchaser with rights and remedies for breach of warranty. Among these remedies is the right to procure substitute goods with the seller liable for the difference between the cost of the substitute goods and the original contract price, and the purchaser's right to recover incidental costs for the inspection, receipt, transportation, and storage of rejected goods.

The U.C.C. limits consequential damages to those losses resulting from general or particular requirements which the seller actually knew at the time of contracting. The purchaser must take reasonable actions to mitigate his damages by such methods as using substitute items or procuring from another source or expediting. Therefore, if consequential damages are covered, the contract should specifically address them by defining their cause and their resulting damage to the purchaser. For goods that are unique to the seller and essential to the purchaser, the purchaser will be entitled to have the seller deliver the goods as specified. This remedy called Specific Performance is an extreme remedy which courts reluctantly impose for goods and rarely impose for services, especially those of a personal or individual nature.

As with warranties, remedies are also cumulative. A resort to any specific remedy is optional unless the contract expressly provides that the stated remedy is exclusive, in which case it is the sole remedy.\(^{43}\) Therefore, a limited time repair or replace warranty will not exclude the purchaser's right to pursue other available remedies unless the contract expressly states that this remedy is the only remedy. Official Comment 2 to U.C.C. § 2-719 states that this subsection "creates a presumption that clauses prescribing remedies are cumulative rather than exclusive." If the parties intend the term to describe the sole remedy under the contract, this intention must be clearly expressed.\(^{44}\)

Another remedy offered by the U.C.C. is allowing the purchaser to pursue all remedies provided by the U.C.C. if an exclusive or limited remedy fails to achieve its essential purpose.\(^{45}\) This remedy is primarily used in cases where an exclusive repair or replace remedy does not correct the problem because the seller negligently repairs the goods or repairs cannot put the goods into their warranted condition such as when a faulty electrical component causes a fire which totally destroys the warranted item. As White & Summers point out, once the court determines that the exclusive remedy has failed, the U.C.C. allows the purchaser to pursue all U.C.C. remedies even though some of them, such as consequential damages, were excluded under the original warranty.\(^{46}\) Therefore, an extremely narrow warranty may become a detriment to the seller.

A seller can attempt to protect himself against the full impact of a failure of the remedy finding by defining the essential purpose of the remedy and stipulating that the purchaser would be entitled to a replacement or refund if the goods cannot be repaired to their warranted condition.

Remedies can be modified or excluded by the contract unless the limitation or exclusion is unconscionable, e.g., limiting or excluding damages for personal injury. However, limiting or excluding property damages in a commercial setting is allowed.\(^{47}\) Therefore, terms which limit liability or consequential damages can preclude recovery under the warranty terms. Consequential dam-

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\(^{46}\) White & Summers, supra note 35, § 12-10 at 603.

ages and limitation of liability are two items that traditionally prolong contract negotiations.

VIII. LIQUIDATED DAMAGES

In situations where actual damages cannot be determined with reasonable certainty, the purchaser may elect to use liquidated damages in place of actual damages. Although the agreement to use liquidated damages implies that the parties realize that the actual damages are unknown or difficult to calculate, the amount established as liquidated damages must be reasonable in light of the actual harm. If the amount of liquidated damages is considered to be excessive, it will be deemed a penalty and will be unenforceable. Therefore, in establishing the amount, the parties must be reasonable in their assumptions and estimates. It may be beneficial to state the reasons and assumptions in the contract as part of the liquidated damages terms and close with a sentence such as the following:

"The parties agree that (sum of liquidated damages) is a reasonable and fair and equitable amount for the (loss of) or (failure to perform) (the warranted item).

Even though both parties may agree on the amount of liquidated damages and write the amount into the contract, a party may still challenge the reasonableness of the amount in a court action to enforce payment.

IX. WARRANTY PERIODS/STATUTE OF LIMITATIONS

The U.C.C. states that an action for breach of any contract must be commenced within four (4) years after the cause of action accrues. By contract, the parties may reduce this period to not less than one (1) year but may not extend it beyond the four year limit. The critical question is when does the action for breach of warranty accrue. The answer is found in U.C.C. § 2-725(2) which states that a breach of warranty accrues when the seller tenders delivery except where a warranty explicitly extends to the future performance of the goods. If the warranty extends to future performance, the cause of action accrues when the breach is or should have been discovered. The warranty of future

performance moves the start of the four year statue of limitations from the date of tender to the date of discovery of the breach.

The four year statute of limitations extends to express as well as implied warranties unless the contract reduces the period. Therefore, unless the purchaser has an express warranty which extends to future performance, all express and implied warranties, not further restricted, will not extend beyond four years from the date of tender of the goods.50

Tender of delivery is the point at which the seller voluntarily offers to transfer the goods to the buyer.51

Whether the buyer at that time "accepts" the goods as that term is used in the Code [U.C.C. § 2-606] or withholds acceptance until he or she has had an opportunity to fully inspect for defects, does not affect when the buyer must institute suit for breach of warranty. This is so even if the defect does not appear until after the limitations period has run. Once the seller tenders the goods, the limitations period begins to run unless the contract is covered by the exception in § 2-725(2).52

Courts have narrowly interpreted the § 2-725(2) explicit warranty of future performance exception. Generally, to be held as a warranty of future performance there must be a reference to time in the warranty language. A warranty which describes technical or operational attributes (performance warranty) which cannot be confirmed without actual performance will not be regarded as a warranty of future performance even though the performance cannot be ascertained at delivery.53 Therefore, it is possible to have the warranty period expire prior to determining whether the equipment meets the specified standards, leaving the purchaser with no remedy to repair defective items. If a purchaser foresees a long time between the delivery and operation of a purchased item such as equipment installed during the early stages of a long term construction project or items purchased for repair parts or replacement stock, the warranty terms must be drafted to form a warranty of future performance to ensure warranty coverage at the time of operation or the contract must define delivery as some-

51. See U.C.C. § 2-503 for a detailed discussion of "tender of delivery."
53. Id.; see also Bernick v. Jurden, 306 N.C. 435, 444, n.3 293 S.E.2d 405, 411 n.3 (1982).
thing other than the transfer of the goods from the seller to the purchaser.

If the seller is fully responsible for the installation of the product, the tender of delivery occurs when installation is complete. If the buyer is ultimately responsible for the installation, even though the contract requires the seller to provide continuing technical support and assistance, tender would coincide with the delivery rather than the installation unless the contract contains provisions that the goods be installed and tested to assure conformance with the contract before delivery is complete.

To be construed by the courts as a warranty of future performance, the warranty must be explicit as to the items and performance warranted and specifically reference a future time. Without this explicitness, the courts will hold that this language does not constitute a separate warranty of future performance but is "merely a representation of the products' condition at the time of delivery".

The following language should preface the desired terms for a warranty of future performance so that the statements are distinguished from a normal warranty or a mere statement of quality.

Seller warrants the future performance of the (goods) as follows:
1. State the desired performance requirements.
2. State the period, term, or expiration of the warranty.
3. State the seller's obligation to remedy the defects.

The majority of jurisdictions hold that an action for breach of an implied warranty always accrues at tender of delivery. The general ruling in these jurisdictions is an implied warranty by its nature cannot explicitly extend to future performance so as to defer the accrual of a cause of action until actual or constructive discovery of the defect.

The only North Carolina case to address warranties of explicit future performance is Bernick v. Jurden. In this case the pur-
chaser of a protective mouthpiece brought an action against the manufacturer for injuries sustained when the mouthpiece shattered on impact when struck by a hockey stick. However, the Court did not address the running of the Statute of Limitations for implied warranties because the Court concluded that there was no explicit warranty of future performance.

In contracts not covered by the U.C.C., the statute of limitations is determined by state statutes. The statute of limitations in North Carolina is three years. If the contract is executed under seal, the statute of limitations is ten years. Seals do not apply to contracts governed under the U.C.C.

X. ACTUAL NOTICE OF BREACH REQUIRED TO SELLER

As part of the breach of contract/warranty action, the purchaser must plead and prove that it complied with the notice requirements of U.C.C. § 2-607(3)(a). The language of U.C.C. § 2-607(3)(a) which states “[w]here a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . .” makes clear that the requirement of notice of breach is mandatory, and if notice is not given, the buyer loses all rights to recover damages for breach of warranty.

In the majority of cases, especially those involving commercial rather than consumer buyers, the courts have held that even if the seller knows of the breach, the buyer must nevertheless give notice, so that the seller will know the transaction has become controversial to the degree that the buyer considers the seller to be in breach.

In determining whether the buyer has given notice of breach “within a reasonable time” as required by N.C. GEN. STAT. § 25-2-607(3)(a), the courts are usually guided by the basic purposes of the statute. Maybank v. S. S. Kresge Co., the leading North Carolina case on this provision of the U.C.C., contains a detailed discus-

sion of the purposes of the notice requirement:

Perhaps the most important policy behind the notice requirement is enabling the seller to make efforts to cure the breach by making adjustments or replacements in order to minimize the buyer's damages and the seller's liability. This policy obviously has its greatest application in commercial settings where there is an opportunity to minimize losses.

Another policy behind the notice requirement is to afford the seller a reasonable opportunity to learn the facts so that he may adequately prepare for negotiation and defend himself in a suit. If a delay operates to deprive the seller of a reasonable opportunity to discover facts which might provide a defense or which might lessen his liability, thus defeating the policy behind the notice requirement, the notice might be said not to have been given within a reasonable time.

The least compelling policy behind the requirement is the same as the policy underlying statutes of limitation: to provide a seller with a terminal point in time for liability. This policy seems the least compelling because a "reasonable time" is not a point which can accurately be predicted and because the statute of limitations reflects the legislature's judgement as to how long the seller should be subject to suit. This third policy will rarely provide a reason for holding that notice has not been seasonably given.65

This analysis is largely drawn from White & Summers, Uniform Commercial Code,66 and has been followed in many jurisdictions.

Maybank distinguishes between the timely, mandatory notice requirement in commercial settings where there is an opportunity to minimize losses and its non-requirement in personal injury cases where the damage has occurred and is irreversible.

U.C.C. § 2-607(3) does not impose any strict requirements as to the manner in which notice of breach should be given or the form to be used. Notice can be oral or written. However, oral notice should always be confirmed in writing. Official Comment No. 4 states that "the rule of requiring notification is designed to defeat commercial bad faith" and further provides:

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be

65. Id. at 134-35, 273 S.E.2d at 684 (citations omitted).
66. WHITE & SUMMERS, supra note 35, § 11-10, at 554.
watched. There is no reason to require that the notification . . . include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification . . . need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

Similarly, in *T. J. Stevenson & Co. v. 81,193 Bags of Flour,* the Fifth Circuit stated (footnotes omitted):

§ 2-607(3)(a)'s requirement of notification of breach of warranty need not be in any particular words and is ordinarily a question of fact, looking to all the circumstances of the case. Notice need not be written. It may be given in a single communication or derived from several. It is also well-established that "notice under section 2-607 need not be a specific claim for damages or an assertion of legal rights."

Several courts have held that the requirements to determine whether the notice was timely, i.e., allowing the seller an opportunity to cure or to begin preparing his defense, should also be given great weight in determining whether the notice was sufficient.

Unless required by the contract, notice need not be given during the warranty period. However, the notice of the breach must be given within a reasonable time after the period ends or it will be considered as a waiver. Timeliness is required to give the seller peace of mind from stale claims.

**XI. STATUTES OF REPOSE AND WARRANTY ACTIONS**

North Carolina General Statute § 1-50(6), the Statute of Repose for defective products, provides:

No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought

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67. 629 F.2d 338 (5th Cir. 1980).
68. *Id.* at 359.
71. *Stelco Indus., Inc. v. Cohen, 438 A.2d 759 (Conn. 1980).*
more than six years after the date of initial purchase for use or consumption.

A seller may argue that the statute of repose bars the purchaser's claim for breach of warranty. However, such an argument is without merit because N.C. GEN. STAT. § 1-50(6) is not applicable to an action to recover economic loss damages resulting from breach of contract. The clear language of the statute and the legislative history and purpose would not be consistent with barring an action for pure economic loss resulting from a breach of warranty (contract) between parties in privity.

In Bernick v. Jurden, the North Carolina Supreme Court defined N.C. GEN. STAT. § 1-50(6) as a statute of repose applicable to non-privity products liability actions. The North Carolina Court of Appeals in Steelcase, Inc. v. Lilly Co. distinguished claims resulting from products liability actions and claims for breach of contract. If N.C. GEN. STAT. § 1-50(6) were held applicable to breach of contract and warranty claims, it would limit all warranties to no longer than six years after purchase or delivery no matter how the parties bargained or contracted for them. This result infringes upon the parties freedom to bargain and contract and is not the intended result of N.C. GEN. STAT. § 1-50(6).

XII. JURISDICTIONAL CONSIDERATIONS AND A WORD OF CAUTION

This paper has looked at warranties and the law in general terms and in light of the laws of several jurisdictions. Although this paper provides accurate and authoritative information on contract warranties and remedies, it is not an all encompassing survey of all warranties or the specific legal doctrine of any jurisdiction and should not be regarded as rendering legal advice. The applicable laws in different jurisdictions may diverge on the same subject matter. In today's global commercial arena, it is possible that the laws of several countries, let alone American jurisdictions, can apply to a single transaction between parties located in the same city.

The best line of protection is to research the transaction, know what you want, and know who you are dealing with. Another good protective measure is to insert contract terms that fix the jurisdiction and laws that will govern the interpretation of the contract and its transactions. Warranties, remedies, rights, and duties under

the U.C.C. may be applicable and desirable in service contracts, especially to cover items furnished and installed under the contract. Since U.C.C. terms are not injected into service contracts, the drafters must expressly insert the appropriate language into the contract.

The examples of contract language in this paper are presented to stimulate thought rather than be the "guaranteed words" to gain protection against all problems. Contract drafters and negotiators must know the laws of their jurisdiction and the laws governing the transaction so that they can negotiate, draft, and execute contracts that fulfill their expectations. They should always seek competent professionals for legal advice and expert assistance.