Chapter 10. Warranties in General

The meaning of "warranty." Professor Ellen Taylor perhaps said it most concisely: "A warranty is a promise or representation that some fact or state of things is true." *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. REV. 231, 233 (1996).

An often quoted definition from *Black's Law Dictionary* provides a wordier definition of warranty in the commercial sale-of-goods context:

> An assurance or guaranty, either express in the form of a statement by a seller of goods, or implied by law, having reference to and ensuring the character, quality, or fitness of purpose of the goods. A warranty is a statement or representation made by seller of goods, contemporaneously with and as a part of contract of sale, though collateral to express object of sale, having reference to character, quality, fitness, or title of goods, and by which seller promises or undertakes to insure that certain facts are or shall be as he then represents them.

p. 1586 (6th Ed.1990).

Kinds of warranties. So what is it that is being represented as true? For a warranty, it's something about the good itself, as opposed to being a promise about what the seller will do (such as deliver a good by a certain date). So a warranty might be about the quality of the good, or it might be about the good being free of an encumbering claim by a third party. It might be express – that is, stated explicitly aloud or in writing – or it might be implied. The following are particular kinds of warranties provided for under the UCC, and they are the subject of chapters that follow:

- Warranty of Title, § 2-312
- Warranty Against Infringement, § 2-312
- Implied Warranty of Merchantability, § 2-314
- Implied Warranty of Fitness for Particular Purpose, § 2-315

- Express Warranties, § 2-313

Warranty liability does not depend on fault. A key concept about warranties is that a claim for breach of warranty does not turn on whether the warrantor is at fault. It's just about whether the warranty was breached – that is, whether the representation turned out to be untrue.

In this sense, breach-of-warranty claims are like regular breach-of-contract claims, which turn on whether the obligations of the contract have been fulfilled, not on the defendant's blameworthiness, such as whether the defendant was careless. See William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 653 (1999) ("Because contractual liability is strict liability, even an involuntary breacher is liable for damages[.]").

Even though it's not a departure from regular contractual liability for warranty liability to be assigned regardless of fault, the strict-liability functioning of warranty liability is worth underlining. That's because it often strikes students as counter-intuitive.

Suppose there is a restaurateur named Rachel who goes to super-human lengths to make sure the food she serves is safe. She personally supervises the picking of produce, the butchering of meat, and the handling of everything before it reaches her restaurant. But she doesn't stop there. She uses ultra-expensive laboratory equipment to test each batch of ingredients for pathogens and toxins. In fact, Rachel has yet to turn a meaningful profit after 10 years of operation because of her extravagant spending on food safety. Yet suppose that despite all these efforts, something slips by and Rachel winds up serving food with *botulinum* bacteria causing a patron to suffer botulism. What result? Rachel is on the hook for breach of the implied warranty of merchantability. It doesn't matter that she is innocent and even saintly. Warranty liability is strict.

A good real-world illustration is the case of *Reese v. Ford Motor Co.*, 499 Fed. Appx. 163 (3d Cir. 2012). The Reeses wanted to purchase a new Mercury Monterey minivan from Faulkner-Ciocca Ford Mercury. Because the Faulkner-Ciocca dealership didn't have what the Reeses wanted in stock, they obtained a Mercury Monterey from Magarino Ford–Mercury, another dealership in another town. Faulkner-Ciocca then sold that vehicle to the Reeses.

Some three years later, the Monterey caught on fire. The Reeses sued Faulkner-Ciocca Ford Mercury, among others, for breach of the implied warranty of merchantability. Faulkner-Ciocca tried to escape liability by suggesting that the wiring that caused the fire was installed by someone else – before Faulkner-Ciocca ever got the vehicle. The court rebuffed that defense:

> It is irrelevant whether the Reeses are able to show that it was Faulkner or another entity in the distribution chain that was responsible for making the alteration that rendered the product defective. See *Walton v. Avco Corp.*, 530 Pa. 568, 610 A.2d 454, 458 (1992) ("The social policy reflected in the imposition of the seller's liability is clear. When a product is released into the stream of commerce, it is the seller or manufacturer who is best able to shoulder the costs and to administer the risks involved. Having derived a benefit from engaging in business, they are particularly able to allocate the losses incurred through cost increases and insurance."). All the Reeses are required to do at trial—assuming the other elements of their claims are satisfied—is to prove that the wiring was installed by the time the car was sold to them by Faulkner.

499 Fed. Appx. at 167.

Is warranty liability within the sphere of tort or contract? One question that has been debated over the years is whether warranty law is properly considered to be within the realm of tort law or contract law.

The answer is both, according to Dean Prosser, one of America's most famous legal scholars. See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1127 (1960) ("[W]arranty is a matter of tort as well as contract."). In an often-quoted passage, Prosser said this about warranty:

> The adoption of this particular device was facilitated by the peculiar and uncertain nature and character of warranty, a freak hybrid born of the illicit intercourse of tort and contract. "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual, and at the same time came to lie mainly in contract." …

Id. at 1126, quoting Note, *Necessity for Privity of Contract in Warranties by Representation*, 42 HARV. L. REV. 414 (1929) (footnotes and citations omitted).

Ultimately, warranty liability isn't comfortably characterized either as tort liability or contractual liability. For instance, it's often the case that you can sue for breach of warranty where you're not a party to the relevant sales contract. That means that breach-of-warranty analysis in a given case may sidestep issues such as offer and acceptance or the sufficiency of consideration.

So, for the avoidance of a great deal of frustration, it's probably best to embark on the study of warranties with the view that breach of warranty is its own thing. Not tort, not breach of contract. Just warranty.