# Chapter 15. Express Warranties

**15.1. Creation of Express Warranties.** In contrast to the implied warranties, which arise automatically by operation of law when the required elements set forth in UCC § 2-314 (merchantability) or § 2-315 (fitness for a particular purpose) exist, an express warranty is created by the seller. Both merchant and non-merchant sellers can create an express warranty. Express warranties are governed by UCC § 2-313:

> § 2-313. Express Warranties by Affirmation, Promise, Description, Sample.
>
> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but 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.

The following chart summarizes how a seller can create an express warranty under § 2-313:

| | | |
|---|---|---|
| Any (*i.e.*, oral, written, conduct)<br>- affirmation of fact or<br>- promise<br>made by seller to buyer relating to goods | *which becomes part of the basis of the bargain* | Creates a warranty: goods shall conform to the affirmation or promise |
| Any description of the goods (see comment 5 for "description" – needs not be by words) | *which becomes part of the basis of the bargain* | Creates a warranty: goods shall conform to the description |
| Any sample or model | *which becomes part of the basis of the bargain* | Creates a warranty: goods shall conform to the sample or model |

UCC § 2-313(2) notes that a seller does not need to use formal words such as "warrant" or "guarantee" to give rise to an express warranty, nor is the seller required to have specific intent to make a warranty. In other words, if you advertise your car for sale in the classified ads with the description "2012 Honda Fit; single owner," you are making a warranty whether you intend to or not.

Notice that the same section also 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." In other words, affirmations of fact give rise to a warranty, whereas a mere affirmation of the value or a seller's opinion does not. It is not always easy to distinguish between the two.

A number of factors may help distinguish the line between puffing and affirmations of fact. In *Federal Signal Corp. v. Safety Factors, Inc.*, 886 P.2d 172, 178-79 (Wash. 1994), the court considered whether the statements were:

- oral rather than written,
- general rather than specific,
- "hedged" in some way,
- phrased in terms of opinion rather than fact, or
- capable of objective measurement.

Express warranties may be created in a number of contexts, both oral and written, including negotiations, promotional materials, offers, packaging, and contracts. For examples of each, see the following series of annotations by Gary D. Spivey: *Statement in Contract Proposals, Contract Correspondence, or Contract Itself as Constituting "Affirmation of Fact" Giving Rise to Express Warranty Under U.C.C. § 2-313(1)(a)*, 94 A.L.R.6th 1 (2014); *Oral Statement as Constituting "Affirmation of Fact" Giving Rise to Express Warranty Under UCC § 2-313(1)(a),* 88 A.L.R.6th 1 (2013); *Statement in Product Packaging, User Manuals, or Other Product Documentation as Constituting "Affirmation of Fact" Giving Rise to Express Warranty Under UCC § 2-313(1)(a)*, 84 A.L.R.6th 1 (2013); *Statement in Advertisements, Product Brochures or Other Promotional Materials as Constituting "Affirmation of Fact" Giving Rise to Express Warranty Under UCC § 2-313(1)(a)*, 83 A.L.R.6th 1 (2013).

☑ **Purple Problem 15-1.** Characterize the following in accordance with one or more sources of warranty in § 2-313:

a. Affirmation of fact

b. Promise

c. Affirmation of value, opinion, or commendation (*i.e.*, "puffing")

d. Description

e. Sample

f. Model

1. A tag on a necklace chain in a jewelry store states: "solid 14-karat gold."

2. You walk into a jewelry store and tell the clerk "I'm looking for a 14-karat gold chain." The clerk pulls out a chain and shows it to you.

3. A jewelry store clerk tells you "this chain is the finest that we sell."

4. A diamond ring bears a tag which states "V.V.S. quality," which is a trade term indicating a quality classification used by gemologists.

5. A picture of a watch with a face that glows in the dark is on the outside of the box in which the watch is packaged.

6. In a newspaper advertisement, the jewelry store states: "lifetime guarantee of internal parts of all watches sold by us." This ad is not visible in the store itself.

7. You point to a particular watch on display and tell the clerk that is the watch you want; the clerk doesn't sell you the display watch, but reaches into a cupboard with a supply of watches and hands you a box, saying, "here it is."

8. You're looking for loose artificial gems to incorporate into jewelry you are making. You walk into a store and see a barrel full of loose gems. The clerk pulls a handful of them out for you to look at, and after examining them, you ask for two pounds of gems from the barrel.

9. A jewelry clerk scratches a glass with a gem to demonstrate its hardness.

☑ **Purple Problem 15-2.** Are the following statements contained in an ad for a used car affirmations of fact or opinion? What criteria are you using to make the distinction?

(1) best in its class

(2) A-1 condition

(3) superb handling

(4) runs and drives good

(5) top quality

(6) new tires

(7) good rubber

(8) single owner

(9) clean as your mom's car

(10) 30,000 miles

**15.2. Basis of the Bargain.** Not only must there be an express warranty by affirmation of fact, promise, description, sample or model, but according to UCC § 2-313(1), the warranty must be part of the ***basis of the bargain***. To what extent does a buyer have to be aware of the warranty prior to the purchase? If you buy a watch because you like it, and you're not even aware of a description that it is "14-karat gold," can you later sue for a breach of this warranty if you discover that the watch is not made of 14-karat gold? Does the buyer have to establish that she would not have purchased the product in the absence of the warranty?

15.2.1. Official Comment 1 to § 2-313 states that "'express' warranties rest on 'dickered' aspects of the individual bargain," giving rise to the argument that the buyer must have ***some knowledge*** of the warranties in order for them to become a part of the basis of the bargain.

15.2.1.1. Many courts have stated that the buyer does not have to have actual knowledge of the specific terms of the express warranty. However, usually in these cases the buyer was generally aware that some sort of warranty was offered. See, for example, *Murphy v. Mallard Coach Co.*, 179 A.D.2d 187, 193 (N.Y. App. Div. 1992), where the court stated "[to require knowledge of the terms of the warranty at the time of sale] is to ignore the practical realities of consumer transactions wherein the warranty card generally comes with the goods, packed in the box of boxed items or handed over after purchase of larger, non-boxed goods and, accordingly, not

available to be read by the consumer until after the item is actually purchased and brought home. Indeed, such interpretation would, in effect, render almost all consumer warranties an absolute nullity."

15.2.2. Official Comment 3 to § 2-313 provides that "no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such [express warranties], once made, out of the agreement requires clear affirmative proof."

15.2.2.1. Some courts have relied on Official Comment 3 to conclude that no ***specific*** reliance is required of a purchaser. See, for example, *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259 (Ala. 1983), where a farmer purchased a combine but was not given the specific terms of a warranty until after the sale, and thus could not have relied specifically upon those terms in forming his decision to purchase the combine. However, the court noted that he was generally familiar with the types of warranties provided by combine manufacturers, and had expected some form of warranty.

15.2.2.2. Some courts, relying on Comment 3 and in particular the last sentence thereof, have held that an express warranty made during the bargain is ***presumed*** to be part of the basis of the bargain unless clear, affirmative proof otherwise is shown. *Weng v. Allison*, 678 N.E.2d 1254 (Ill. App. Ct. 1997). Thus, the burden shifts to the seller to establish by clear, affirmative proof that the warranty did not become a part of the basis of the bargain.

15.2.2.3. Several courts (some commentators believe a majority of courts) have ruled that in order to become a "part of the basis of the bargain," the buyer must have relied upon the express warranty.

15.2.2.4. See Frank J. Wozniak, Annotation, *Purchaser's Disbelief in, or Nonreliance Upon, Express Warranties Made by Seller in Contract for Sale of Business as Precluding Action for Breach of Express Warranties*, 7 A.L.R.5th 841 (1992).

### 15.2.3.1 Case: *Schmaltz v. Nissen*

## Schmaltz v. Nissen

Supreme Court of South Dakota
November 9, 1988

431 N.W.2d 657. Gary SCHMALTZ, Plaintiff and Appellee, v. Abner T. NISSEN, d/b/a Nissen Seed & Feed of Newell, South Dakota; Farmers Feed & Seed of Sturgis, South Dakota; and Crown Quality Seed Company, Inc., of Vernon, Texas, Defendants and Appellants. Frank NIBLE, Plaintiff and Appellee, v. FARMERS FEED & SEED OF STURGIS, South Dakota and Crown Quality Seed Company, Inc., of Vernon, Texas, Defendants and Appellants. Argued March 23, 1988. TUCKER, Circuit Judge, sitting for

HENDERSON, J., disqualified. WUEST, C.J., and MORGAN, J., concur. SABERS and MILLER, JJ., concur specially.

**Summary of Facts:**

Crown Quality Seed Company processes and markets sorghum seed under the name of "Big Red #1." Crown sold its seed through a chain of distributors. Farmers Schmaltz and Nible bought bags of Big Red #1 sorghum seed from one of these distributors. The farmers planted the sorghum seed, but it didn't grow. The bags of seed were labeled, and contained several warranties, including: "This quality seed is protected by Heptachlor insecticide treatment to help ensure stronger stands, superior quality and increased yields." The farmers sued Crown and its distributor for breach of its express warranties. The district court ruled in favor of the farmers. The Supreme Court reversed based upon its finding that the warranty had not become a part of the basis of the bargain, because Schmaltz was unaware of it at the time he bought the bags of seed. Following is the court's discussion of this issue.

**TUCKER, Circuit Judge:**

In this case the trial court need not determine whether the language on the seed bags constitutes an express warranty, since it is clear that such language did not in any way become the basis of the bargain. Both Nible and Schmaltz admit that they purchased the seed prior to seeing the bag containing the seed. Neither read the language supposedly creating the express warranty until after the sale was completed. Without having read or even known of this language, it is impossible to say this language was part of the basis of the bargain. For similar rulings by other courts, *see Agricultural Services Association v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (6th Cir. 1977) (purchase on basis of prior satisfactory experience with product, not description, does not make description part of the basis of the bargain); *Chemco Industrial Applicators Co. v. E. I. duPont de Nemours & Co.*, 366 F. Supp. 278 (E.D. Mo. 1973) (new label not used until after decision on purchase, could not have been part of the bargain); *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978) (seal of approval, attached to product after contract had been made, did not become a part of the basis of the bargain).

Nible also claims that an express warranty was created when an employee of Farmers Feed told him that Big Red #1 was "good seed." 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. [UCC § 2-313(2)]. General statements to the effect that goods are "the best" or are "of good quality," or will "last a lifetime" and be "in perfect condition,"

are generally regarded as expressions of the seller's opinion or "the puffing of his wares" and do not create an express warranty. *Royal Business Machines v. Lorraine Corp.*, 633 F.2d 34, 42 (7th Cir. 1980). However, words of this type may create express warranties when given in response to specific questions or when given in the context of a specific averment of fact. The words "good seed" in the context in which they were used do not create an express warranty.

The trial court's holding of breach of express warranty is hereby reversed.

### 15.2.3.2 Various Questions and Notes about *Schmaltz v. Nissen*

1. White and Summers offer a succinct and compelling challenge to those who advocate abandoning reliance: "Why should one who has not relied on the seller's statement have the right to sue? That plaintiff is asking for greater protection than one would get under the warranty of merchantability, far more than bargained for. We would send this party to the implied warranties." James J. White & Robert S. Summers, Handbook of the Law under the Uniform Commercial Code § 10-6, 463 (West 6th ed. 2010). Note: "sending this party to the implied warranties" may not provide relief if implied warranties have been disclaimed, which we'll study in the next chapter.

2. Another UCC scholar offers a different answer: "One can answer White and Summers' final rhetorical question with another question: Why should a seller be permitted to deny the validity of statements he has made in a sale context, whether or not the buyer has relied on them at the time of negotiation? To do so surely does not promote commercial honesty." Charles A. Heckman, *"Reliance" or "Common Honesty of Speech": The History and Interpretation of Section 2-313 of the Uniform Commercial Code*, 38 Case W. Res. 1, 29 (1988).

3. In the South Dakota seed case, the court did allow the farmers to bring a claim for breach of implied warranties of merchantability and fitness for a particular purpose, so the farmers did recover damages. The court refused to enforce disclaimers of these warranties, finding the disclaimers to be unconscionable. The farmers had no bargaining power, and would be left without an effective remedy if the disclaimers were enforced.

4. Some courts find that "basis of the bargain" refers to the *time* when the warranties are given. When an express warranty is given *after* the contract for sale has been formed, the following approaches have been taken by the courts:

a. Many (but not all) courts have ruled that such warranties do not become a part of the basis of the bargain. See, for example, *Global Truck & Equipment Co., Inc. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

b. If a purchaser knows generally that some form of express warranty will be provided (such as in a sale of a new car, where by usage of trade warranties are typically given), but does not receive the actual terms of the express warranty until after the sale, the warranties are a part of the basis of the bargain. *Harris v. Ford Motor Co.*, 845 F. Supp. 1511 (M.D. Ala. 1994).

c. An express warranty given after the sale may be deemed a modification of the contract if the elements of UCC § 2-209 regarding contract modification are satisfied. *Moldex, Inc. v. Ogden Engineering Corp.*, 652 F. Supp. 584 (D. Conn. 1987).

d. See Russell G. Donaldson, Annotation, *Affirmations or Representations Made After the Sale is Closed as Basis of Warranty Under UCC § 2-313(1)(a)*, 47 A.L.R.4th 200 (1986).

☑ **Purple Problem 15-3.** Martha goes to BigMart to purchase a new DVR. While in the store, she reads the box containing a BigMart brand DVR which states on the outside: "Limited Warranty – see inside." She purchases the DVR, but does not read the terms of the limited warranty when she gets home. When the DVR breaks ten weeks later, she pulls out the warranty, and reads about a one-year replacement guarantee. Did the limited warranty become a part of the basis of the bargain? List arguments in favor of ***both*** Martha and BigMart.