Chapter 17. Disclaimers and Limitations of Warranties

17.1. Disclaimer of Warranties

17.1.1. Conflicting Warranties. What happens when more than one warranty is given? How are they to be interpreted together? For example, in a sale there may be (1) an implied warranty of merchantability, (2) a description of the goods on the package (such as "high gloss enamel paint"), and (3) an oral affirmation of fact by the salesperson ("this paint will only require one coat").

Under UCC § 2-317, "[w]arranties whether express or implied shall be construed as consistent with each other and as cumulative," unless such construction is unreasonable. This "cumulative" concept is important. For example, an express warranty does not displace an implied warranty of merchantability if the two warranties can reasonably be construed as cumulative or otherwise consistent with each other.

In those rare cases where warranties cannot reasonably be construed as cumulative or consistent, apply the rules of § 2-317 to determine which of the express warranties will prevail.

☑ **Purple Problem 17-1.** The packaging on a particular shirt describes the shirt as "wrinkle free." A card attached to the shirt reads: "Dry at normal temperature in standard dryer; remove promptly when drying cycle is finished. Manufacturer makes no warranty that fabric will be wrinkle free if hand-washed, dried at high or low temperatures, or not removed promptly when drying is finished." Can this language be read consistently with "wrinkle free?"

☑ **Purple Problem 17-2.** A used car dealer sells a car with an express warranty that the seller will repair any defect to the transmission that arises during the next 90 days. The transmission fails after 120 days. Does the buyer have a claim?

17.1.2. Statutory Disclaimer of Warranties and Statutory Prohibitions. Some jurisdictions have enacted nonuniform warranty statutes providing that either (1) an implied warranty is not given in certain transactions, or (2) an implied warranty may not be disclaimed in certain transactions. An example of the former is Montana Code § 30-2-316(3), which provides:

> (d) in sales of cattle, hogs, sheep, or horses, there are no implied warranties, as defined in this chapter, that the cattle, hogs, sheep, or horses are free from sickness or disease;
>
> (e) in sales of any seed for planting (including both botanical and vegetative types of seed, whether certified or not), there are no implied warranties, as defined in this chapter, that the seeds are free from disease, virus, or any kind of pathogenic organisms.

If you were a buyer of cattle in Montana, it would be important to know that the default rule is that you are not getting an implied warranty. You could then bargain for an express warranty.

An example of the latter is 9A Vermont Statutes § 2-316(5):

> (5) The provisions of subsections (2), (3) and (4) of this section shall not apply to sales of new or unused consumer goods or services. Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be

unenforceable. For the purposes of this section, "consumer" means consumer as defined in chapter 63 of Title 9.

17.1.3. Disclaimer of Express Warranties. Having provided for warranties, implied warranties, and express warranties in §§ 2-312 through 2-315, the UCC allows, under the principle of freedom of contract, for the exclusion or modification of such warranties ***if*** the requirements contained in § 2-316 are met. These requirements as to a valid disclaimer vary based upon the type of warranty involved. As a general rule, it is easier to disclaim an implied warranty than an express warranty.

17.1.3.1. If an ***express warranty*** exists, under § 2-316(1) any words or conduct negating or limiting the express warranty shall:

- First be construed, if reasonable, as ***consistent*** with the express warranty;
- If not consistent, they are ***inoperative*** and will not be effective to disclaim the express warranty, ***unless*** the parol evidence rule dictates a different result. (We'll get to the parol evidence rule in Chapter 9.)

For example, if a sales contract describes the vehicle as a "2010 Toyota Matrix" and states conspicuously, "There are no express warranties," the seller has nevertheless given an express warranty that the vehicle is a 2010 Toyota Matrix. To effectively disclaim, the contract would have to have specific language such as "seller makes no warranty or representation that the year or model is in fact as described."

☑ **Purple Problem 17-3.** Bill is interested in buying Sam's boat. Sam told Bill that the boat had been winterized. Bill agreed to buy the boat, and wrote a check for $10,000. On the bill of sale, Sam writes "**AS IS – NO WARRANTIES GIVEN."** Bill later discovers that the boat has not been winterized.

(1) Has Sam made a warranty?

(2) If so, applying § 2-316(1), what is the effect of the "as is" language in disclaiming that warranty?

17.1.4. Disclaimer of Implied Warranties.

17.1.4.1. UCC § 2-316(2) sets forth requirements that may be satisfied to exclude or modify an ***implied warranty***, summarized as follows:

To modify/disclaim implied warranty of merchantability:	**To modify/disclaim implied warranty of fitness for a particular purpose**:
disclaimer language must mention "merchantability"	no requirement of mention of "fitness for particular purpose"
may be oral or written	cannot be oral; must be written
if written, must be conspicuous	must be conspicuous
no examples of safe harbor language	safe harbor language: "there are no warranties which extend beyond the description on the face hereof

17.1.4.1.1. "Conspicuous" is defined at UCC § 1-201(b)(10). To be conspicuous, the language must be so written that a reasonable person would notice it, which, according to Official Comment 10 to that section, is a *matter of law* for the court to decide. A non-exclusive listing of "conspicuous" terms includes:

- a heading in capitals
- a heading in contrasting type, font or color to the surrounding text of the same or lesser size
- language other than a heading which is in larger type than the surrounding text
- language other than a heading which is in contrasting type, font or color to the surrounding text of the same size
- language set off from the surrounding text of the same size by symbols or other marks that call attention to the language

See William H. Danne, Jr., Annotation, *Construction and Effect of UCC § 2-316(2) Providing That Implied Warranty Disclaimer Must be "Conspicuous,"* 73 A.L.R.3d 248 (1976).

☑ **Purple Problem 17-4.** In a contract for the purchase of a bicycle, a disclaimer of warranties is contained on page 4 of 5 pages. There are no headings; only paragraph numbers. Whereas the surrounding text is in normal letters, the disclaimer is in all capital letters. Has the conspicuousness requirement been met?

17.1.4.2. Curiously, § 2-316(3) provides an alternate set of rules pursuant to which an implied warranty (but not an express warranty) can be disclaimed. ***Your analysis of the disclaimer of implied warranties should never stop at § 2-316(2); if an implied warranty is not effectively disclaimed there, perhaps a disclaimer exists under § 2-316(3).***

Under § 2-316(3)(a), *all* implied warranties are excluded by expressions like "as is," "with all faults," or similar language that calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.

Note that unlike § 2-316(2), there is no requirement that the disclaimer must be "conspicuous." But in order to call the buyer's attention to the exclusion, all drafters are wise to use conspicuous language when disclaiming under § 2-316(3)(a). See also Comment 1 to § 2-316, which states that implied warranties may be excluded "only by conspicuous language or other circumstances which protect the buyer from surprise." Compare *O'Neil v. International Harvester Co.*, 575 P.2d 862 (Colo. App. 1978) ("as is" language does not need to be conspicuous) to *White v. First Federal Savings & Loan Ass'n of Atlanta*, 280 S.E.2d 398 (Ga. App. 1981)("as is" language must be conspicuous).

An express limitation on § 2-316(3)(a) is the introductory phrase of "unless the circumstances indicate otherwise." Sometimes circumstances may not allow "as is" or similar language to constitute a disclaimer. For example, usage of trade and course of dealing may be circumstances which make an "as is" clause insufficient to disclaim an implied warranty. *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 268 A.2d 345 (N.J. Sup. 1970).

Under § 2-316(3)(b), there is no implied warranty with regard to defects which an examination would have reasonably revealed, IF the buyer examined the goods before entering the contract OR refused, upon the seller's request, to examine the goods. Comment 8 explains that to bring the transaction within the scope of "refused to examine" in paragraph (b), it is not sufficient for the goods to be merely available for inspection; there must be a demand by the seller that the buyer examine the goods fully.

☑ **Purple Problem 17-5.** Jane wants to buy a used car from Larry's Auto Sales. Jane takes the car for a test drive. During the test drive, she stops at her mechanic's shop to have the engine checked. One month after the sale, Jane discovers that the catalytic converter is not working, requiring $2,000 in repairs. Can Jane bring a claim for breach of the implied warranty of merchantability against Larry's Auto Sales?

An implied warranty may be excluded under § 2-316(3)(c) by course of performance, course of dealing, or usage of trade. This subsection was applied in *Spurgeon v. Jamieson*, 521 P.2d 924 (Mont. 1974), where the court found that usage of trade in the farming industry excluded implied warranties in the sale of used farm equipment, with the exception of a 50/50 implied warranty under which each party to the transaction paid for one-half of the cost of repairs.

17.1.5. Disclaimer of Warranties of Title and Against Infringement.

17.1.5.1. Recall from previous chapters that the Code does not describe the warranties of good title (§ 2-312(1)) or against infringement (§ 2-312(3)) contained in every contract as "implied warranties." Therefore, ***an effective disclaimer of implied warranties under § 2-316(2) or § 2-316(3) does not disclaim these warranties.***

Although the UCC provides that the warranties of good title and against infringement are found in every contract, and thus they function like an implied warranty, Official Comment 6 to § 2-312 calls our attention to the fact that they *are not designated as implied warranties*. Why is this significant? If these warranties are not to be treated as implied warranties, the rules of § 2-316(3) allowing the exclusion of implied warranties in certain circumstances do not apply, nor does § 2-317(c), which states that an express warranty displaces an inconsistent implied warranty. *Kel-Keef Enterprises v. Quality Components Corp.*, 738 N.E. 2d 524, 536-37 (Ill. App. 2000).

17.1.5.2. Section 2-312(2) provides that the warranties of title can be excluded or modified only by:

1. Specific language, such as "Seller disclaims any warranties of title;"

2. Circumstances that give the buyer reason to know that the person selling does not claim title in himself (such as a police auction of recovered but unclaimed stolen items); or

3. Circumstances that give the buyer reason to know that the seller is purporting to sell only such right or title as he or a third person may have (such as an estate sale by a personal representative).

☑ **Purple Problem 17-2.** You walk into a pawn shop to buy a used camera. As you enter, you see a blinking neon light that proclaims "all sales as is." Has the pawn shop effectively disclaimed the warranties of title?

17.1.5.3 The Code does not say how the warranty against infringement can be disclaimed. Our guess is that the seller would have to use the same methods that are used to disclaim the warranty of good title. This was the approach taken by the drafters of Amended Article 2. Recall that Amended Article 2 has been withdrawn and is in effect in no jurisdiction. However, it could be cited as persuasive authority for what the Article 2 experts thought should be the rule when there is a gap in the present Article 2.

17.1.6. Post-Sale Disclaimers. Susan purchases a new jacket for mountain climbing. At the time of purchase, there are displays surrounding the jackets, stating that they are machine washable, waterproof, and are appropriate for use in weather as cold as -30º F. Susan purchases one of the jackets. When she gets home she notices a card attached to the inside of the jacket, containing differing warranties and disclaiming all other warranties, express or implied. Does the card attached to the jacket effectively modify or exclude the warranties made by the displays at the time of sale?

17.1.6.1. See *Whitaker v. Farmhand*, 567 P.2d 916, 921 (Mont. 1977), in which the court stated that "a disclaimer or limitation of warranty contained in a manufacturer's manual received by the purchasers *subsequent to the sale* does not limit recovery for implied or express warranties made prior to or at the time of sale." For a discussion of the application of the *ProCD* line of cases to disclaimers read for the first time after the purchase of a product, see Stephen E. Friedman, *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 Ariz. L. Rev. 677 (2004).

17.1.7. Limitations of Remedy. Most sellers, instead of disclaiming all warranties, give an express warranty but limit the remedy under that warranty. For example, they may agree only to repair or replace defective parts, and they may deny recovery of consequential damages. Limitations of remedies are discussed later.

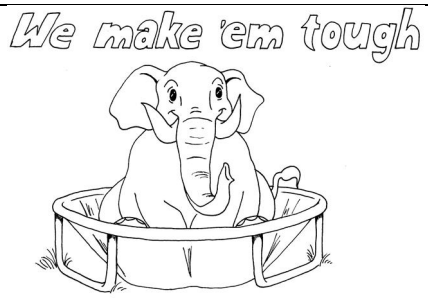
☑ **Purple Problem 17-7.** Bob, a rancher, visits Julie, a neighbor, who breeds and sells registered Angus cattle. Over a cup of coffee, Julie writes down on a tablet "Will sell 50 bred registered Angus heifers to Bob for $1250/head, to be delivered within 5 days." Both parties initial the paper. When Julie drives up with the 50 head of cattle the next day, she asks Bob to sign an acknowledgment that he has received 50 head of registered Angus cattle, and has accepted them "as is." Bob counts the number of cattle delivered, and signs the acknowledgment. A few weeks later, several of the cattle abort, and a veterinarian confirms that those cattle have brucellosis.

(1) What, if any warranties, were created at the time the contract was formed?

(2) Did the acknowledgment effectively disclaim those warranties?

17.2. Interplay of Disclaimers and Privity. If a disclaimer is made somewhere along the line of distribution, a person otherwise having a claim under the concepts of vertical *or* horizontal privity may not be able to recover against the disclaiming party.

☑ **Purple Problem 17-8.** Jump High Inc. manufactures trampolines. Jump High Inc. has prepared a brochure describing its trampolines, which includes the following statements and picture:

<table>
<tr><td>We build our trampolines to last:</td><td>A full lifetime warranty on all our frames!</td></tr>
<tr><td>• Built with stronger steel, better stitching, larger triangles, tougher springs and thicker safety pads</td><td rowspan="4"> 
</td></tr>
<tr><td>• Our trampoline frames will not warp or buckle</td></tr>
<tr><td>• Weatherproofed for use all year round</td></tr>
<tr><td>• Tested to 440 lbs.</td></tr>
</table>

Jump High Inc. sells several trampolines to Big Mountain Recreational Sales, a retailer of sporting goods and outdoor gear, along with several copies of the brochures. Big Mountain also sells one other brand of trampolines. John Jacobson comes into the store looking for a trampoline. The salesman provides John with copies of the manufacturer's brochures for both brands. After reading the brochures, John purchases a Jump High trampoline. One year later, during a birthday party at John's home for his son, Eli, the frame buckles while Eli and 5 of his friends are jumping on the trampoline. The children weigh, on average, 70 pounds each. Two of Eli's friends suffer serious injuries.

(1) Do the two injured children have a breach of warranty claim against Big Mountain Recreational Sales?

(2) Do the two injured children have a breach of warranty claim against Jump High Inc.?