PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT
Revised Working Draft, Sections 2-313 through 2-318
January, 1996

SECTION 2-313. EXPRESS WARRANTIES.

(a) If a buyer claims that goods do not conform to an express warranty made by the seller to the buyer under this section the following rules apply:

(1) An affirmation of fact or promise which relates to the goods, a description of the goods, or any sample or model of the goods, may create an express warranty that the goods will conform to the affirmation of fact, promise or description or that the whole of the goods will conform to the sample or model.

(2) An express warranty is created if the affirmation, promise or description, or the sample or model, are made or furnished by the seller to the buyer and become part of the agreement. To create an express warranty it is not necessary that the seller use formal words, such as "warrant" or "guarantee", or have a specific intention to make a warranty.

(3) The affirmation, promise, description, or sample or model become part of the agreement unless the seller establishes that a reasonable person in the position of the buyer would conclude otherwise. If the seller establishes that an affirmation or promise was merely of the value of the goods or purported to be merely the seller's opinion or commendation of

the goods the affirmation or promise does not become part of the agreement.

(b) A seller may make an express warranty under subsection (a) to (i) an "immediate buyer", (ii) a remote buyer or lessee through an authorized dealer or other intermediary, or (iii) a remote buyer or lessee by any medium of communication to the public, including advertising. Where an express warranty is made by a seller to a remote buyer or lessee the following rules apply:

(1) Subject to subsection (d) of Section 2-318, the express warranty is deemed to be part of an agreement to purchase the goods with the seller and may be enforced by the remote buyer or lessee directly against the seller under this Article;

(2) In the case of a communication to the public, the remote buyer or lessee must establish that the buyer or lessee was reasonable in concluding that the communicated affirmation of fact, promise, description, or sample or model became part of the deemed agreement with the seller.

SOURCE: Sales, Section 2-313 (May, 1995)

Notes

1. The May, 1994 Draft of Section 2-313 was further revised after the March, 1995 meeting of the Drafting Committee to clarify and narrow its scope. The January, 1996 Draft implements changes made at the October 15, 1995 meeting of the Drafting Committee and follows but is not identical to Alternative 1 proposed by the ABA Task Force in their Memo of December 4, 1995.

2. Subsection (a) states the general principles applicable to any buyer who claims a breach of express warranty. Subsection (a)(1) states what affirmations or promises by the

seller can create an express warranty. In contrast, subsection (a)(3) states what affirmations and promises (puffing) cannot create an express warranty. Subsection (a)(2) states when an express warranty is created and subsection (a)(3) states when an affirmation, promise, description or model becomes part of the agreement with the seller. Note that the "presumption" language is dropped, but the effect is roughly the same.

3. The first sentence of subsection (b) is taken without change from the first clause in §2-313(2) of the 1990 Official Text.

4. The last sentence of subsection (a)(3) is taken from the last clause in §2-313(2) of the 1990 Official Text. It defines "puffing" in a direct contractual relationship and states that a seller can defend an express warranty claim on the ground that what was said was puffing. The assumption is that the buyer must plead and prove that an express warranty was made and that the usual tests and factors will be relevant in drawing the appropriate lines between express warranty and puffing.

5. Subsection (b) states to whom an express warranty may be made deals with two cases where express warranties are made to "remote buyers." This term is defined in §2-318(a). Both may be enforced directly against the seller under Article 2, subject to §2-318(d). In essence, the seller's affirmations and promises create an obligation to the buyer that the goods purchased from another seller will conform to the warranties made. How should this obligation be described? The word "agreement" is used, but this does not quite fit. Simply put, there is a "bargain of sorts" between the seller and the remote buyer which is created by and enforced under Article 2. It is treated as if it were a contract claim rather than a tort claim for innocent, material misrepresentation. It is, in short, it is "deemed" to be part of an agreement of purchase between the seller and the remote buyer or lessee and is enforceable under Article 2.

6. Under subsection (b)(2), where an express warranty is made to the public by any medium of communication, including advertising, the remote buyer or lessee must establish both that an affirmation of fact or promise or description was made (that is was not "puffing") and that it became part of the "deemed agreement" with the seller. The remote buyer does not get the benefit of any presumption and is required to prove that its expectations were reasonable. This implements the decision of the Drafting Committee at the October, 1995 meeting.

7. The phrase "or lessee" in subsection (b) puts the lessee in the same position as a "remote buyer" when enforcing express warranties made by the seller.

SECTION 2-314. IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE.

(a) Subject to Section 2-316 or other inconsistent law, a warranty that goods are merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. The serving for value of food or drink to be consumed either on the premises or elsewhere is a sale under this section.

(b) To be merchantable, goods, at a minimum, must:

(1) pass without objection in the trade under the contract description;

(2) in the case of fungible goods, be of fair average quality within the description;

(3) be fit for the ordinary purposes for which such goods are used;

(4) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;

(5) be adequately contained, packaged, and labeled as the agreement or circumstances may require; and

(6) conform to the promise or affirmations of fact if any made on the container or label;

[(7) in the case of goods sold for human consumption or for application to the human body, be reasonably fit for consumption or application.**]**

(c) Subject to Section (former 2-316), other implied

warranties may arise from course of dealing or usage of trade.

SOURCE: Sales, Section 2-314 (March, 1995)

Notes

1. Subsection (b)(7) was deleted at the October, 1995 meeting of the Drafting Committee. The problems are too complex to catch in a single sentence and are best left for the courts to resolve under the more general standard of merchantability in §2-314(b) or the evolving law of products liability. See Restatement of the Law Torts: Products Liability §2, comment (g) (Tent. Draft No. 2, March 13, 1995).

Under proposed Section 2-318A, tort law rather than Article 2 would govern if an allegedly unmerchantable product "proximately caused injury to person or property" and was defective under applicable products liability law.

2. Revised §2-314 is not intended to displace or preempt any inconsistent state law, such as the so-called "blood shield" statutes enacted by many states, which immunize suppliers of blood and other body parts from implied warranty liability under Article 2 or strict liability in tort. See, e.g., Doe v. Travenol Laboratories, Inc., 698 F. Supp. 780 (D. Minn. 1988).

SECTION 2-315. IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE. Subject to Section 2-316, if a seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods are fit for that purpose.

SOURCE: Sales, Section 2-315 (March, 1995)

SECTION 2-316. EXCLUSION OR MODIFICATION OF WARRANTIES.

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to <u>exclude or modify</u> warranty must be construed wherever reasonable as consistent with

each other. Subject to Section 2-202 with regard to parol or extrinsic evidence, if such a construction is unreasonable words excluding or modifying an express warranty are inoperative to that extent.

(b) Except in a consumer contract, if language in an agreement is construed to exclude or modify an implied warranty, the following rules apply.

(1) Unless the circumstances indicate otherwise, all implied warranties are excluded or modified by expressions like "as is", "with all faults", or other language that under the circumstances clearly calls the buyer's attention to the exclusion or modification of the warranties and clearly indicates that the implied warranties have been excluded or modified.

(2) Language of exclusion or modification contained in a standard form record or in a standard term in a record must be conspicuous. To exclude or modify only the implied warranty of merchantability, the language must also mention merchantability. Conspicuous language that states "These goods may not be merchantable; that is, not suitable for ordinary use," or language of similar import is sufficient. To exclude or modify only the implied warranty of fitness, conspicuous language is sufficient if it states "There are no warranties that these goods will conform to the purposes for which they are purchased made know to the seller," or words of similar effect.

(3) If the buyer before entering into the contract has

examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to nonconformities that an examination should in the circumstances have revealed.

(4) An implied warranty may be excluded or modified by course of dealing or of performance or usage of trade.

(e) Subject to Section 2-318A, terms in a consumer contract excluding or modifying the implied warranty of merchantability or the implied warranty of fitness for particular purpose must be in a record. The terms are inoperative unless the seller proves by clear and affirmative evidence that the buyer expressly agreed to them.

(f) Remedies for breach of warranty may be limited in accordance with this Article on liquidation or limitation of damages and on contractual modification of remedy.

SOURCE: Sales, Section 2-316 (March, 1995)

Notes

1. Subsection (a) preserves the policy that when an express warranty and a term excluding or modifying that warranty are inconsistent, the disclaimer is inoperative, subject to §2-202 (the "parol evidence rule"). The enforceability of merger clauses in standard form contracts is governed by §2-206(a).

2. Subsection (b) now regulates the exclusion or modification of implied warranties in commercial contracts. After the October, 1995 meeting of the Drafting Committee, subsections (b), (c), and (d) of the October, 1995 Draft were integrated into a single, new subsection (b). Subsection (b)(1) states the standard where the language of disclaimer is not contained in a standard form record or standard term. There is no requirement that the language be in a record. Subsection (b)(2) states the standard if the language of exclusion or modification is contained in a standard form record or in

standard terms. Compliance with these standards should give the seller a "safe harbor" from later attacks unless other aspects of the doctrine of unconscionability apply. See §2-105(a).

3. Subsection (e), which is subject to new §2-318A, states the exclusive requirements in a consumer contract for the seller to disclaim or limit any implied warranty. This applies to new, used, or distress goods or seconds, and preempts Subsection (b). Rather than providing that such disclaimers are inoperative, subsection (e) puts the burden on the seller to show by clear and affirmative evidence that the consumer expressly agreed to the term in the record. This is a more exacting requirement than those imposed by §2-106, on Standard Form Records.

SECTION 2-317. CUMULATION AND CONFLICT OF WARRANTIES.

Warranties, whether express or implied, must be construed as consistent with each other and as cumulative. However, if that construction would be unreasonable, the intent of the parties determines which warranty prevails. In ascertaining that intent, the following rules apply:

(1) Exact or technical specifications prevail over an inconsistent sample or model or general language of description.

(2) A sample from an existing bulk prevails over inconsistent general language of description.

(3) Except in a consumer contract under Section 2-316(e), an express warranty prevails over inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

SOURCE: Sales, Section 2-317 (March, 1995)

Notes

1. One change was made in §2-317. An implied warranty of merchantability in a consumer contract that is inconsistent with an express warranty is not displaced under §2-317(3). Rather, the requirements of §2-316(b) must be satisfied.

SECTION 2-318. EXTENSION OF EXPRESS OR IMPLIED WARRANTIES.

(a) In this section:

(1) "The seller" includes a manufacturer but does not include a seller in a contract for sale governed by the United Nations Convention on the International Sale of Goods;

(2) "Immediate buyer" means a buyer in privity of contract with "the seller;"

(3) "Remote buyer" or lessee means a buyer or lessee from a seller other than "the seller;"

(4) "Goods" includes a component incorporated in substantially the same condition into other goods; and

(5) "damage" means all loss resulting from a breach of warranty other than personal injury or damage to property other than the goods sold or leased.

(b) Subject to Section 2-318A, the seller's express or implied warranty, made to an immediate buyer, extends to any remote buyer or lessee who may reasonably be expected to purchase **[**use or be affected by**]** the goods and who is damaged by breach of the warranty. The rights and remedies of a remote buyer or lessee against the seller for breach of a warranty extended under this subsection are determined by the enforceable terms of the contract between the seller and the immediate buyer and this Act.

(c) Irrespective of subsection (b), if the seller makes an express warranty to a remote buyer or lessee under Section 2-313(d) or a court decides that a remote buyer or lessee may

enforce a breach of warranty claim directly against a seller, the following rules apply:

(1) The remote buyer or lessee may sue the seller without regard to the terms of the contract between the seller and the immediate buyer; and

(2) The remote buyer's or lessee's rights and remedies against the seller are determined under this Act, as modified by subsection (d).

(d) A remote buyer or lessee under subsection (c) has the rights and remedies available against the seller provided by this Act, except as follows:

(1) The time for giving any required notice begins to run from when the remote buyer or lessee receives the goods;

(2) A remote buyer or lessee other than a consumer buyer or lessee cannot recover consequential damages unless the conditions of subsection (3) are satisfied;

(3) Within a reasonable time after receipt of a timely notice of rejection or revocation of acceptance from the remote buyer of the sale or lease to it, and all intervening sales, the seller may tender a **[**offer to**]** refund of the price or allocable rent paid by the remote buyer or lessee or tender **[**offer to supply**]** goods that conform to the warranty. If a complying tender is made the seller's liability is limited to incidental damages under §2-705, whether or not it is accepted by the remote buyer or lessee. If the tender fails to comply with this subsection,

the remote buyer or lessee may claim damages for breach of warranty, including incidental and consequential damages under §§2-705 and 2-706.

(4) A cause of action for breach of warranty accrues no earlier than when the remote buyer or lessee receives the goods.

(e) A seller may not exclude or limit the operation of this section.

SOURCE: Sales, Section 2-318 (March, 1995).

Notes

1. Section 2-318 has been the subject of considerable discussion, both within and without the Drafting Committee, and is still a "work in progress." After the 1994 NCCUSL Annual Meeting, the May, 1994 Draft was further revised for clarity and was discussed at the March, 1995 meeting of the Drafting Committee. In response to suggestions made at that meeting, the section was further revised for clarity and consistency and subsection (c) was limited to sellers of unmerchantable new goods. This latest revision follows extended discussion at the October, 1995 meeting of the Drafting Committee.

2. Overview. Section 2-318 deals with warranty claims by a buyer [called a "remote" buyer to distinguish a buyer with privity, called an "immediate" buyer] against a seller with whom there is no privity of contract. See subsection (a) definitions. The remote buyer may be a commercial or a consumer buyer who claims for economic loss, including damage to goods sold, but not for injury to person or property other than the goods sold. See §2-318A. Section also deals with "remote" lessees.

The remote buyer or lessee may sue the seller in two types of cases. In the first, a seller's warranty made to an immediate buyer is extended to a foreseeable buyer [a "beneficiary"] who is damaged by the breach. Subsection (b). [Note that "users and persons affected" are removed from subsection (b) in this draft.] In these cases, the remote buyer's and lessee's rights against the seller are limited by the terms of the contract between the seller and the immediate buyer and the terms of this Act. It is, in short, a derivative warranty and the beneficiary stands in the shoes of the immediate buyer.

In the second, the seller is potentially liable to a remote

buyer or lessee for breach of express warranty under §2-313(c). This is not a derivative warranty under §2-318(b). Rather, the remote buyer or lessee has a direct action against the seller, the scope of which is defined by Article 2 as modified by subsection (d). They are "deemed" to have an agreement of purchase with "the seller." Similarly, if a court decides for any reason that a seller has a direct warranty obligation to a remote buyer or lessee for breach of warranty, the case is also governed by subsection (c). Note that subsection (c) has been revised in this Draft to remove all references to a consumer buyer of new goods and to leave the matter in the hands of the courts. The Consumer Subcommittee may wish to reconsider this.

3. Under subsection (b), all warranties made by a seller, including a manufacturer, for goods, including components, sold to an immediate buyer are extended to reasonably expected buyer beneficiaries who are damaged by breach of warranty. This extension is broader that Alternative C in §2-318 the 1990 Official Text in that it includes damages (not just injury) to buyers (vertical privity). But it is subject to new §2-318A.

Although protected buyers and lessees are called beneficiaries under subsection (b), the extension is based upon policy rather than intention of the parties. A seller should be responsible to foreseeable buyers and users for at least the quality of the goods warranted to the immediate buyer. But, since the warranty is derivative, the beneficiary is bound by the terms and conditions of the contract between the seller and immediate buyer. Thus, disclaimers and agreed limited remedies in that contract bind the beneficiaries as well. See subsection (a), last sentence. Put differently, policy may dictate an extension under subsection (a), but it does not require seller liability beyond that for which it bargained with the immediate buyer.

This extension is in the borderland between warranty, a contract theory, and tort. The extension in subsection (b) is justified on grounds similar to those for imposing strict tort liability. But the limitations on the extension are determined by contract, the bargain between the seller and the immediate buyer.

4. The derivative theory of subsection (b) does not apply to the cases described in subsection (c). Thus, protected remote buyers and lessees may sue the seller free of the lack of privity defense and the terms in the contract between the seller and the immediate buyer.

There is no intention to preclude the courts from applying the principle of subsection (c) to unmerchantable goods which are

sold by M to R and resold to a commercial buyer. See §2A-209. See also, Hininger v. Case Corp., 23 F.3d 124 (5th Cir. 1994), where the court, applying Texas law, held that the privity defense was available to the manufacturer of a component which was resold as part of a combine to a commercial buyer but not to the manufacturer of the combine which is resold to a commercial buyer.

5. Remote buyers and lessees protected under subsection (c) who sue the seller for a breach of a warranty are not subject to the "no privity" defense or the limitations of subsection (b). They may sue the seller as if there were privity of contract under Article 2, subject to subsection (d). Subsection (d) provides adjustments that reflect the reality that the remote buyer has not contracted with the seller.

A key issue in subsection (d) is the treatment of consequential damages. Should the seller be liable to a remote buyer or lessee with whom it has not contracted for consequential damages proved under §2-706? For remote consumer buyers the answer is yes. For remote commercial buyers and lessees, the answer is no unless the seller has failed to tender either a refund or conforming goods within a reasonable time. If the complying tender is made and the buyer does not accept it, consequential damages are foreclosed. The seller, of course, may still exclude liability for consequential damages to a remote buyer by an agreement with that buyer, i.e., through a dealer.

6. The definition of "the seller" in subsection (a) excludes a seller whose sale is governed by the Convention on the International Sale of Goods. Under CISG, the seller's liability for non-conforming goods extends only to the immediate buyer. Lack of privity is a defense. Article 2's definitions, however, includes any seller of goods and, arguably, includes a CISG seller who sells to an immediate CISG buyer who resells to a non-CISG remote buyer in the United States. Thus, the CISG seller could be liable to the non-CISG remote buyer under §§2-313 and 2-318. Complex federal preemption issues aside, the exclusion in subsection (a) is designed as a matter of state law to insulate the CISG seller from this risk, at least where economic loss is involved.

SECTION 2-318A. INJURY TO PERSON OR PROPERTY RESULTING FROM BREACH OF WARRANTY.

(a) In this Section "property" means any real or personal property other than the goods purchased which caused the injury.

Where personal injuries are involved "person" means an individual but not an organization.

(b) Any claim under this article for injury to person or property resulting from a breach of warranty is subject to the following rules:

(1) If the goods are defective under applicable products liability law this article does not apply to the claim.

(2) Subject to subsection (c), if the goods are not defective under applicable products liability law this article applies to the claim.

(c) Claims under subsection (b)(2) for injury to person or property resulting from a breach of warranty are subject to this article and the following rules:

(1) the plaintiff must be an "immediate" buyer or a remote buyer or lessee to whom a warranty is extended under Section 2-318;

(2) the injury must proximately result from any breach of warranty;

(3) No claim shall be barred for a failure to give notice before suit as required by Section 2-608(c)(1);

(4) where injury to a person is involved, any agreement however expressed that excludes or modifies the implied warranty of merchantability or excludes or limits consequential damages for injury to the person is unenforceable;

(5) If a breach of warranty proximately results in

injury to a person or property, a cause of action accrues when the purchaser discovers or should have discovered the breach.

Notes

1. Section 2-318A, which is new, is an effort to harmonize the tension between warranty theory and evolving products liability law where injury to person or property is involved. A primary source of tension is the overlap between the concept of merchantability in warranty law and the concept of defect in products liability law. A secondary source of tension is the different treatment afforded by Article 2 and products liability law to such issues as privity of contract, notice, disclaimers of warranty and exclusions of consequential damages and the statute of limitations. The resulting confusion and disagreement suggests that some legislative accommodation is needed. In short, the October, 1995 Draft of Article 2 should be revised with this tension in mind.

2. One possible solution is to delete §2-706(a)(2), which defines consequential damages to include "injury to person or property proximately from breach of warranty." Article 2 damages would be limited to economic losses, including damage to the goods sold caused by a breach of warranty. Similarly, protected persons could be limited to "buyers" of rather than "users and persons affected" by the goods.

The primary objection to this solution is that products liability law is far from uniform among the states. In fact, in some states where the scope of products liability is limited Article 2 is the main vehicle for imposing liability. Thus, the deletion of §2-706(a)(2) may exacerbate rather than reduce the tension.

3. Proposed §2-318A takes a less drastic route to harmonization.

First, "property" is defined to exclude damage to the goods purchased. This is consistent with the ALI's proposed Restatement of Products Liability and most case law.

Second, subsection (b)(1) states that if a plaintiff invokes warranty theory in a claim for injury to person or property, Article 2 does not apply if the goods are defective under applicable products liability law. If there is a manufacturing or a design defect or a failure to warn, then tort law rather than Article 2 applies. Put differently, this is a scope question which must be resolved before Article 2 can be applied.

Third, if there is no defect under products liability law, subsection (b)(2) states that Article 2 applies, subject to subsection (c). Initially, the plaintiff must establish that the goods, which are not defective under tort law, still fail to conform to a warranty made by the seller. If there is no such warranty, a judgment should be entered for the seller.

All agree that if the seller has made an express warranty or an implied warranty of fitness the conditions for the application of Article 2 exist. The disagreement is over whether goods that are not defective under tort law can still be unmerchantable under warranty law. Although the ALI has argued that the concept of defect should preempt the concept of merchantability (and in most cases it clearly would), there is some case law to the contrary. See Denny v. Ford Motor Company, ___ N.E.2d ___, 1995 WL 722844 (N.Y. 1995)(vehicle properly designed for off the road use was unmerchantable when used on the road). Moreover, the relevant factors defining merchantability in §2-314(b) are broader than those defining defect in tort. Accordingly, subsection (b)(2) implicitly gives the plaintiff an opportunity to plead and prove that non-defective goods are still unmerchantable under §2-314(b) or that the seller has made an implied warranty of fitness or an express warranty.

Fourth, subsection (c) provides special rules where non-defective goods which fail to conform to a warranty result in injury to person or property. It rejects (tentatively) the notion that the injured buyer should jump through all of the contract hoops through which a buyer seeking economic loss should jump.

1. The plaintiff is limited to a purchaser (not a user or person affected) to whom a warranty is made in a direct contractual relationship or extended under §2-318. Thus, there is no absolute bar of the "lack of privity" defense.

2. The seller's lack of notice defense is foreclosed and any agreement purporting to disclaim warranties or exclude consequential damages where injury to person or property is involved is not enforceable.

3. A "notice" statute of limitations applies.

This solution requires discussion. For example, should Article 2, which protects expectations created by contract, permit warranty theory to fill out the limitations of defect in tort and then limit or eliminate the usual contract policies in allocating risk by agreement and enforcing warranty claims? In essence, this is what proposed §2-318A does. If not, which of those limitations should be retained? Put differently, if the

nature of the loss should not dictate substance what considerations are relevant? Clearly, since injured persons are inevitably consumers the answer to some extent is in the hands of the Consumer Subcommittee.