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Edited by

Arundel McDougall

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Chapter 12

Product Liability Claims In Contract: United States of America

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Bradley Arant Boult Cummings LLP

Bradley Arant Boult Cummings LLP (BABC) is one of the largest and longest established law firms in the southeastern United States. The firm has more than 370 attorneys serving individuals, emerging businesses, and established regional, national and international clients from our offices in Alabama, North Carolina, Mississippi, Tennessee and Washington, DC.

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Chapter 12

Product Liability Claims In Contract: United States of America

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1. INTRODUCTION

Product liability law in the United States is largely tort-based. To the extent that contract-based product liability claims also exist in the United States, they are found primarily in the realm of warranty law. In fact, a product liability plaintiff often can plead a cause of action arising from the same facts under either a tort or a warranty theory. Each theory, however, presents its own unique advantages and disadvantages. For example, a buyer of defective goods may choose to pursue his or her claims under a tort theory rather than a warranty theory in order to obtain a greater potential recovery (i.e., punitive damages) or to avoid certain warranty-based defenses, such as lack of privity, failure to give notice, disclaimers, or limitations of remedies. On the other hand, damages for pure “economic loss” – i.e., damages for inadequate value, repair or replacement costs, diminution in value, or consequential loss of profits – often cannot be recovered in tort. Under such circumstances, the plaintiff must pursue a breach of contract or warranty claim if he or she is to recover at all.¹

Although it is to a certain extent contractual in nature, warranty law in the United States is primarily a creature of statute. One of the primary sources of warranty law in the United States is the Uniform Commercial Code (“UCC” or “Code”). Originally promulgated in 1951 by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in an effort to achieve uniformity in American commercial law, the UCC has been adopted in various forms in all fifty states.

1. James J. White & Robert S. Summers, *Uniform Commercial Code: Practitioner Treatise Series*, 5th edn vol. 1 (St. Paul: Thomson/West 2006), 600–601.

In the context of product liability claims, the most important portion of the UCC is Article 2, which applies to “transactions in goods.”² The UCC defines “goods” as “all things that are movable at the time of identification to a contract for sale.”³ The term includes “future goods, specially manufactured goods, the unborn young of animals, growing crops, and other identified things attached to realty as described in section 2-107 [i.e., oil, gas, crops, timber, etc.]”⁴

Article 2 of the UCC contains a number of important provisions, relating to the creation and disclaimer of express and implied warranties. These provisions include *inter alia* section 2-313 (express warranties), section 2-313A (obligations to remote purchasers arising from record accompanying goods), section 2-313B (obligations to remote purchasers arising from advertisements or similar communications to the public), section 2-314 (implied warranty of merchantability), section 2-315 (implied warranty of fitness for particular purpose), section 2-316 (exclusion or modification of warranties), section 2-317 (cumulation and conflict of warranties express or implied), section 2-318 (third party beneficiaries of warranties express or implied), section 2-718 (liquidation or limitation of damages), and section 2-719 (contractual modification or limitation of remedy).

Additionally, the Magnuson-Moss Warranty Act, which was enacted by Congress in 1975, limits the ability to disclaim implied warranties with respect to “consumer products,” requires certain disclosures with respect to written warranties, and creates various federal causes of action for breach of warranty in the consumer product context.⁵

2. WARRANTIES

A warranty is “[a]n express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller’s promise that the thing being sold is as represented or promised.”⁶

2.1. EXPRESS WARRANTIES

Section 2-313 of the UCC governs express warranties.⁷ Under the most recent version of section 2-313,⁸ a “seller” creates an express warranty to an “immediate buyer” in three ways:

- (a) Any affirmation of fact or promise by the seller which relates to the goods and becomes a part of the basis of the bargain creates an

2. UCC § 2-102.

3. UCC § 2-103(k).

4. *Ibid.*

5. 15 U.S.C. §§ 2301-2312.

6. Bryan A. Garner (ed.), *Black’s Law Dictionary*, 7th edn (St. Paul: West 1999), 1581.

7. UCC § 2-313.

8. The drafters of the UCC recently made significant revisions to the provisions of Art. 2 dealing with warranties. These revisions have yet to be adopted by every jurisdiction in the United

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.⁹

Express warranties under the UCC are made by a “seller” to an “immediate buyer.”¹⁰ The Code defines “seller” as “a person that sells or contracts to sell goods.”¹¹ An “immediate buyer” (a term which was introduced by the recent revisions to Article 2) is “a buyer that enters into a contract with the seller.”¹²

Section 2-313 makes clear that [it] is not necessary to the creation of an express warranty that the seller use formal words such as “warranty” or “guarantee” or that the seller have a specific intention to make a warranty.¹³ On the other hand, “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.”¹⁴ Such representations are considered to be “puffing” and are not actionable under the UCC.

Additionally, the drafters of the UCC recently added subsection (4) to section 2-313, which provides that “[any] remedial promise made by the seller to the immediate buyer creates an obligation that the promise will be performed upon the happening of a specified event.”¹⁵ This subsection thus creates an enforceable obligation on the part of the seller when the seller has committed itself to taking certain remedial action upon the happening of a specified event – e.g., a promise to repair or replace a defective product.

The drafters of the UCC also recently added two new sections, addressing the warranty rights of “remote purchasers” – i.e., those purchasers who are not in privity of contract with the seller. The Code defines a “remote purchaser” as a “person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.”¹⁶ Although no case law has discussed whether the “normal chain of distribution” includes selling or

States. Accordingly, reference to individual state statutes is recommended to determine whether these provisions have been adopted by the individual states. To avoid confusion, however, all citations will be to the current version of the UCC, which includes the recent revisions to Art. 2.

- 9. UCC § 2-313(2).
- 10. *Ibid.*
- 11. UCC § 2-103(o).
- 12. UCC § 2-313(1).
- 13. UCC § 2-313(3).
- 14. *Ibid.*
- 15. UCC § 2-313(4).
- 16. UCC §§ 2-313A(1)(b) & 2-313B(1)(b).

purchasing goods through an internet seller (like eBay), commentators have noted that the Code clearly envisions warranty rights extending to remote purchasers buying new goods on the internet.¹⁷ As noted by the comments to the Code, however, warranty rights do not extend to “gray” goods, which may include goods sold by unauthorized dealers on the internet.¹⁸

Under the new section 2-313A (which “applies only to new goods and goods sold or leased as new goods in a transaction of purchase in the normal chain of distribution”), a seller creates an obligation to a remote purchaser by packaging the goods with a record containing essentially the same sorts of affirmations or promises discussed in section 2-313 – if the seller *reasonably expects* the record to be, and the record is, furnished to the remote purchaser.¹⁹ This will certainly be the source of some litigation. Although section 2-313A has not yet been adopted by most jurisdictions, commentators have observed that “[t]he basic principle of 2-313A is not new to the case law of sales” in the United States and that “[t]he new section codifies for the first time a large body of case law on what are commonly called “pass-through warranties.”²⁰

Section 2-313(A)(3) provides:

(3) If in a record packaged with or accompanying the goods the seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, and the seller reasonably expects the record to be, and the record is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that:

- (a) the goods will conform to the affirmation of fact, promise, or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise, or description created an obligation; and
- (b) the seller will perform the remedial promise.²¹

As with section 2-313, it is unnecessary under section 2-313A for the seller to use formal words such as “warrant” or “guarantee” or to have a specific intent to create a warranty to a remote purchaser.²² Additionally, mere

17. White & Summers, *supra* n. 1, vol. 1, at 648–49.

18. *Ibid.* at 649–50 (providing as an example of a “gray” good, the sale of a camera by an unauthorized dealer where the manufacturer’s warranty is only effective when sold through an “authorized dealer”); see also UCC § 2-313A cmt. 3 (defining “gray” goods as those goods “sold outside the normal chain” of distribution or “salvaged goods”).

19. UCC § 2-313A.

20. White & Summers, *supra* n. 1, vol. 1, at 644.

21. UCC § 2-313A(3).

22. UCC § 2-313A(4).

affirmations by the seller regarding the value of the goods or the seller's opinions or commendations regarding the goods do not create warranty obligations.²³

Additionally, section 2-313A(5) provides specific rules governing the remedies available to a remote purchaser.²⁴ A “seller may modify or limit the remedies available to a remote purchaser if the modification or limitation is furnished to the remote purchaser no later than the time of purchase or if the modification or limitation is contained in the record that contains the affirmation of fact, promise, or description.”²⁵ In the absence of a modification or limitation of remedy, a seller who breaches a warranty to a remote purchaser under section 2-313A is liable for incidental or consequential damages, but not for lost profits.²⁶ The remote purchaser may recover as direct damages for breach of the seller's obligations arising under section 2-313A(3) “the loss resulting in the ordinary course of events as determined in any reasonable manner.”²⁷

Under 2-313A(6), for a remote purchaser to recover against a seller (other than with respect to a remedial promise) the goods must have failed to conform to the affirmation, promise, or description “when the goods left the seller's control.”²⁸ In other words, sellers are not responsible to remote purchasers for defects created later in the distribution chain.

The new section 2-313B, on the other hand, addresses a seller's obligations to a remote purchaser arising from advertisements or similar communications to the public regarding its products.²⁹ As with section 2-313A, section 2-313B only applies to “new goods.”³⁰ section 2-313B(3) provides:

(3) If in an advertisement or a similar communication to the public a seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, and the remote purchaser enters into a transaction of purchase with knowledge of and with the expectation that the goods will conform to the affirmation of fact, promise, or description, or that the seller will perform the remedial promise, the seller has an obligation to the remote purchaser that:

(a) the goods will conform to the affirmation of fact, promise, or description unless a reasonable person in the position of the remote

23. *Ibid.*

24. UCC § 2-313A(5).

25. UCC § 2-313A(5)(a).

26. UCC § 2-313A(5)(b).

27. UCC § 2-313A(5)(c).

28. UCC § 2-313A(6).

29. UCC § 2-313B.

30. UCC § 2-313B(2).

- purchaser would not believe that the affirmation of fact, promise, or description created an obligation; and
- (b) the seller will perform the remedial promise.³¹

Under section 2-313B, the seller's obligation to the remote purchaser arises when the purchaser reasonably "enters into a transaction of purchase with knowledge of and with the expectation that the goods will conform to" the affirmation, promise, or description contained in the seller's advertisement or other similar communication to the public.³² As under sections 2-313 and 2-313A, the seller does not have to use magic words, such as "warranty" or "guarantee," or have any specific intent to undertake an obligation, but mere statements of value or opinion do not create an obligation.³³ Likewise, the remedy provisions of section 2-313B are essentially the same as those specified in section 2-313A – i.e., the seller may modify or limit the remedies no later than the time of purchase, the seller is not liable for lost profits, and the purchaser's damages are the "loss resulting in the ordinary course of events as determined in any reasonable manner."³⁴ As with section 2-313A (and with the exception of a "remedial promise"), the defect must have existed when the goods left the seller's control in order for the remote purchaser to recover against the seller.³⁵

Although section 2-313B is new to the UCC, the basic principle is not.³⁶ "The section codifies for the first time a body of case law extending a seller's obligations for new goods to remote purchasers."³⁷ Furthermore:

As Comment 1 states, the "normal situation where this obligation will arise is when a manufacturer engages in an advertising campaign directed towards part or all of the market for its product and will make statements that if made to an immediate buyer would amount to an express warranty or remedial promise under section 2-313. The goods, however, are sold to someone other than the recipient of the advertising [with the result that no express warranty could arise under 2-313] and are then resold or leased to the recipient." If the seller's advertisement is made to an immediate buyer, the seller is not liable under this section. Whether such a seller incurs liability to an immediate buyer is, according to Comment 1, determined by section 2-313 on express warranties, and 2-313B is inapplicable.³⁸

31. UCC § 2-313B(3).

32. *Ibid.*

33. UCC § 313B(4).

34. UCC § 313B(5).

35. UCC § 313B(6).

36. White & Summers, *supra* n. 1, vol. 1, at 646.

37. *Ibid.*

38. *Ibid.*

2.3. IMPLIED WARRANTIES

In addition to the express warranties and obligations to remote purchasers discussed above, the UCC provides for several implied warranties – i.e., warranties that are not necessarily dependent upon the conduct of the seller, but rather, arise as a matter of law in every sale of goods unless specifically disclaimed, limited, or modified. In the product liability context, the two most important implied warranties are the implied warranty of merchantability (section 2-314) and the implied warranty of fitness for a particular purpose (section 2-315).

Section 2-314 provides that “[unless] excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”³⁹ For the implied warranty of merchantability to arise, the seller must be “a merchant with respect to goods of that kind.”⁴⁰ The UCC defines “merchant” as follows:

- (1) “Merchant” means a person that deals in goods of the kind or otherwise holds itself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction or to which the knowledge or skill may be attributed by the person’s employment of an agent or broker or other intermediary that holds itself out by occupation as having the knowledge or skill.⁴¹

As set forth above, a “merchant” is one “that deals in goods of the kind” or “otherwise holds itself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction.”⁴² “The first phrase captures the jeweller, the hardware store owner, the haberdasher, and others selling from inventory. The second description, having to do with occupation, knowledge, and skill, includes electricians, plumbers, carpenters, boat builders, and the like.”⁴³

Section 2-314 further requires that the goods be “merchantable.”⁴⁴ To be merchantable, the goods must at least:

- (a) pass without objection in the trade under the contract description;
- (b) in the case of fungible goods, are of fair average quality within the description;

39. UCC § 2-314(1).

40. *Ibid.*

41. UCC § 2-104(1).

42. *Ibid.*

43. White & Summers, *supra* n. 1, vol. 1, at 660.

44. UCC § 2-314(1).

- (c) are fit for the ordinary purposes for which goods of that description are used;
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
- (e) are adequately contained, packaged, and labelled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.⁴⁵

There are numerous cases from every jurisdiction in the United States addressing the issue of whether certain products are “merchantable” for purposes of section 2-314. We will not attempt to summarize these cases in this chapter. The lesson from the cases, however, is that, if a product conforms to the quality of other brands in the market, it usually will be deemed merchantable for purposes of section 2-314.⁴⁶ In other words, “merchantability” does not mean perfection, but rather, compliance with industry standards.⁴⁷

In addition to the fairly broad and general implied warranty of merchantability set forth in section 2-314, the UCC creates a much narrower and more specific implied warranty in section 2-315, which is known as the implied warranty of fitness for a particular purpose.⁴⁸ Section 2-315 reads in full:

Where the seller at the time of contracting has reason to know of 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 unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.⁴⁹

45. UCC § 2-314(2).

46. White & Summers, *supra* n. 1, vol. 1, at 667.

47. See, e.g., *Jetero Constr. Co. v. S. Memphis Lumber Co., Inc.*, 531 F.2d 1348, 1352–53 (6th Cir. 1976) (finding lumber was not merchantable where studs delivered were “much lower in quality” than those agreed upon and were not fit for ordinary purpose of constructing building); *Skelton v. Gen’l Motors Corp.*, 500 F. Supp. 1181, 1191–92 (N.D. Ill. 1980) (finding that automobile was merchantable because it was fit for its ordinary purpose of driving even though it had transmission problems), *rev’d on other grounds*, 660 F.2d 311 (7th Cir. 1981); *Nerud v. Haybuster Mfg., Inc.*, 340 N.W.2d 369, 376 (Neb. 1983) (finding haystacking machine that would consume itself in flames after a half day not merchantable), *overruled on other grounds*, *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56 (Neb. 1987); *Pronti v. DML of Elmira, Inc.*, 478 N.Y.S.2d 156, 157–58 (N.Y. App. Div. 1984) (finding dining room furniture was merchantable where it was suitable for ordinary use (“to place food for meals, sit on chairs, store items”) even though furniture had defects); *Bernard v. Dresser Indus., Inc.*, 691 S.W.2d 734, 738 (Tex. App. 1985) (finding that pressure gauge that would not test for pressure – a gauge’s ordinary use – not merchantable); *Thomas v. Ruddell Lease-Sales, Inc.*, 716 P.2d 911, 915 (Wash. Ct. App. 1986) (finding sports car was not merchantable where it had been wrecked and repaired).

48. UCC § 2-315.

49. *Ibid.*

To recover under the implied warranty of fitness for a particular purpose, a plaintiff must show the following: (1) that the seller at the time of contracting had reason to know the buyer's particular purpose; (2) that the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish suitable goods; and (3) that the buyer, in fact, relied upon the seller's skill or judgment.⁵⁰

Goods that are "merchantable" within the meaning of section 2-314 will not necessarily satisfy the implied warranty of fitness for a particular purpose under section 2-315.⁵¹ Additionally, "[t]he most common circumstance in which one meets the warranty of fitness for a particular purpose is where a business buys goods that have to specially manufactured and assembled for its business."⁵²

2.4. CUMULATION AND CONFLICT OF WARRANTIES EXPRESS OR IMPLIED

The UCC provides for the creation of both express and implied warranties. Thus, it is entirely possible that both types of warranties may arise as part of the same transaction. Section 2-317 of the UCC addresses this situation.⁵³ It provides that "[warranties] whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant."⁵⁴ Additionally, section 2-317 specifies the following "conflict-of-warranties" rules: (a) "[exact] or technical specifications displace an inconsistent sample or model or general language of description"; (b) "[a] sample from an existing bulk displaces inconsistent general language of

50. *Ibid.*; White & Summers, *supra* n. 1, vol. 1, at 678–79.

51. White & Summers, *supra* n. 1, vol. 1, at 679 (citing the following example: "bright, white loafers could be perfectly *merchantable* but would hardly be *fit for the purpose* of a job interview at a Wall Street firm"). See, e.g., *Price Bros. Co. v. Philadelphia Gear Corp.*, 649 F.2d 416, 423–24 (6th Cir. 1981) (finding no breach of the implied warranty of fitness for a particular performance where plaintiff exercised its own judgment in selecting components ordered and had "skill and knowledge . . . superior to that of the seller"); *Wisconsin Elec. Power Co. v. Zallea Bros., Inc.*, 606 F.2d 697, 702–03 (7th Cir. 1979) (finding no breach of the implied warranty of fitness for a particular purpose where plaintiff failed to communicate to defendant that it was relying on defendant to select appropriate, non-corrosive metal for steam in plaintiff's pipes); *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15, 17 (Miss. 1981) (finding breach of implied warranty of fitness for a particular purpose where inexperienced, plaintiff farmer relied on tractor salesman's skill and judgment to select suitable equipment for plaintiff's farming operation); *Tyson v. Ciba-Geigy Corp.*, 347 S.E.2d 473, 477–78 (N.C. Ct. App. 1986) (finding breach of implied warranty of fitness for a particular purpose where seller had reason to know of particular purpose, based on conversations with buyer, and that buyer was relying on seller's recommendations when selecting the product).

52. *Ibid.*

53. UCC § 2-317.

54. *Ibid.*

description”; and (c) “[express] warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.”⁵⁵

3. WHO CAN BRING A CLAIM?

As discussed earlier, express warranties under section 2-313 and the implied warranties under sections 2-314 and 2-315 extend to the immediate buyer of the product. Additionally, sections 2-313A and 2-313B (if they have been adopted by the particular jurisdiction) create warranty-like obligations between a seller and a remote purchaser.

With respect to claims by third-party beneficiaries of express or implied warranties, the UCC addresses this issue in section 2-318, in which the Code provides three alternatives from which states may choose (Alternatives A, B, & C). The current version of Alternative A of section 2-318(2) reads as follows:

ALTERNATIVE A

(2) A seller’s warranty to an immediate buyer, whether express or implied, a seller’s remedial promise to an immediate buyer, or a seller’s obligation to a remote purchaser under section 2-313A or 2-313B extends to *any individual who is in the family or household of the immediate buyer or the remote purchaser or who is a guest in the home of either if it is reasonable to expect that the person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty, remedial promise, or obligation.* A seller may not exclude or limit the operation of his section.⁵⁶

As mentioned previously, the UCC was amended recently to include sections 2-313A and 2-313B (relating to remote purchasers), and the amended version has not yet been adopted by all jurisdictions. As shown above, section 2-318 was also amended to incorporate references to these new provisions. Aside from these technical revisions, however, the scope of section 2-318, Alternative A, is the same – it permits any family member or houseguest of the buyer to recover for personal injuries suffered as a result of a breach of warranty, *if it is reasonable to expect that the person may use, consume, or be affected by the goods.*⁵⁷ This is currently the law of a majority of jurisdictions in the United States.⁵⁸

55. *Ibid.*

56. UCC § 2-318(2), Alt. A (emphasis added).

57. *Ibid.*

58. White & Summers, *supra* n. 1, vol. 1, at 744.

The current version of section 2-318(2), Alternative B, reads as follows:

ALTERNATIVE B

(2) A seller's warranty to an immediate buyer, whether express or implied, a seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under section 2-313A or 2-313B extends to *any individual who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by the breach of the warranty, remedial promise, or obligation*. A seller may not exclude or limit the operation of this section.⁵⁹

As with Alternative A (and aside from the incorporation of language relating to sections 2-313A and 2-313B), the scope of the current version of Alternative B is essentially the same as that of its predecessor – it permits “any individual who may be reasonably expected to use, consume, or be affected by the goods” to recover for personal injuries arising from a breach of warranty.⁶⁰ Thus, Alternative B eliminates Alternative A's requirement that the plaintiff be a member of family member or houseguest of the buyer.⁶¹ Eight states have adopted Alternative B.⁶²

Alternative C to section 2-318 now provides:

ALTERNATIVE C

(2) A seller's warranty to an immediate buyer, whether express or implied, a seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under section 2-313A or 2-313B extends to *any person that may reasonably be expected to use, consume, or be affected by the goods and that is, injured by the breach of warranty, remedial promise, or obligation*. A seller may not exclude or limit the operation of this action with respect to injury the person of an individual to whom the warranty, remedial promise, or obligation extends.⁶³

As with Alternatives A and B, the scope of the current version of Alternative C is essentially the same as its predecessor. Moreover, like Alternative B, Alternative C extends to “any person that may reasonably be expected to use, consume, or be affected by the goods.”⁶⁴ Alternative C goes even further than Alternative B, however, by not limiting its scope to personal injury claims.⁶⁵ Thus, in states that have adopted Alternative C and in the absence of a valid limitation or disclaimer, individuals, who are not buyers but who

59. UCC § 2-318, Alt. B (emphasis added).

60. *Ibid.*

61. Compare UCC § 2-318, Alt. A, with UCC § 2-318, Alt. B.

62. White & Summers, *supra* n. 1, vol 1, at 746.

63. UCC § 2-318, Alt. C (emphasis added).

64. *Ibid.*

65. Compare UCC § 2-318, Alt. B, with UCC § 2-318, Alt. C.

were reasonably expected to use, consume, or be affected by the product, can potentially recover for economic losses in the absence of personal injury.⁶⁶ At least eight states have adopted Alternative C or a similar provision.⁶⁷

4. CLAIMS ALONG THE SUPPLY CHAIN

As previously discussed, express warranties (under section 2-313) and the implied warranties of merchantability (under section 2-314) and fitness for a particular purchase generally only extend to an immediate buyer – i.e., a buyer in contractual privity with the seller.

The new sections 2-313A and 2-313B (which have not yet been adopted by most jurisdictions) remove this privity requirement and extend warranty obligations to “remote purchasers” under certain circumstances. Specifically, section 2-313A permits a “remote purchaser” to assert a claim against a seller “[i]f in a record packaged with or accompanying the goods the seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, and the seller reasonably expects the record to be, and the record is, furnished to the remote purchaser” and the goods fail to conform to such affirmation, promise, or description, or the seller fails to fulfil the remedial promise.⁶⁸ Section 2-313B, on the other hand, allows a “remote purchaser” to recover against a seller when products fail to conform to affirmations, promises, or descriptions made in advertisements or similar communications to the public and the purchaser enters into the purchase “with knowledge of and with the expectation that the goods [would] conform to the affirmation of fact, promise, or description, or that the seller will perform the remedial promise.”⁶⁹ Under each of these provisions, the goods must have been defective when they left the seller’s control in order for the remote purchaser to recover.⁷⁰

Additionally, with respect to claims for personal injury arising from a breach of an express or implied warranty, the various alternatives of section 2-318(2) remove the privity requirement for certain individuals.

Under Alternative A, which is the majority rule in the United States, any family member or houseguest of the buyer may recover for personal injuries suffered as a result of a breach of warranty, *if it is reasonable to expect that the person may use, consume, or be affected by the goods.*⁷¹

66. *Ibid.*

67. White & Summers, *supra* n. 1, vol. 1, at 746.

68. UCC § 2-313A.

69. UCC § 2-313B.

70. UCC §§ 2-313A & 2-313B.

71. UCC § 2-318(2), Alt. A; White & Summers, *supra* n. 1, vol. 1, at 744.

Under Alternative B “any individual who may be reasonably expected to use, consume, or be affected by the goods” may recover for personal injuries arising from a breach of an express or implied warranty.⁷²

Alternative C goes even further than Alternative B by eliminating the personal injury language and thus eliminating any privity requirement altogether.⁷³

In addition to the statutory provisions, which relate to the consumers’ rights to bring warranty actions against sellers and manufacturers, it is also important to note that manufacturers and sellers may also contractually allocate the risk associated with defective products by entering into indemnification agreements amongst themselves.

5. WHAT DAMAGE IS COVERED?

The general measure of damages for breach of warranty under the UCC is “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had as warranted, unless special circumstances show proximate damages of a different amount.”⁷⁴

The UCC also permits, “in a proper case,” the recovery of “incidental and consequential damages.”⁷⁵ “Incidental damages” include “expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.”⁷⁶

“Consequential damages” include: (a) “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise”; and (b) “injury to person or property proximately resulting from any breach of warranty.”⁷⁷

One of the most important (and frequently litigated) categories of “consequential damages” in the commercial setting is lost profits. “Most courts have permitted recovery of lost profits [as consequential damages] under the Code provided the buyer can meet judicially imposed foreseeability and certainty requirements.”⁷⁸ In fact, the recovery of lost profits has become commonplace in the manufacturing setting – e.g., where a seller provides

72. UCC § 2-318(2), Alt. B.

73. See UCC § 2-318(2), Alt. C.

74. UCC § 2-714(2).

75. UCC §§ 2-714(3) & 2-715.

76. UCC § 2-715(1).

77. UCC § 2-715(2).

78. White & Summers, *supra* n. 1, vol. 1, at 724.

goods to a manufacturing company with knowledge that they will be used in the manufacturing process.⁷⁹ As discussed previously, however, sections 2-313A and 2-313B do not permit the recovery of lost profits by a remote purchaser.⁸⁰

Furthermore, Alternatives A and B of section 2-318(2) only authorize the recovery of damages arising from personal injury by third-party beneficiaries of warranty obligations—i.e., those individuals who lack privity with the seller, but are nevertheless harmed by the breach of warranty.⁸¹

The recovery of punitive damages is not authorized by section 2-714 or 2-715.⁸² Moreover, “[t]he general rule is that punitive damages cannot be recovered for mere breach of warranty, express or implied, absent some behaviour on the part of the seller that would qualify as an independent tort, particularly fraud.”⁸³

6. WHAT IS THE TEST FOR BREACH OF WARRANTY?

The UCC’s provisions regarding express warranties (section 2-313), obligations to remote purchasers (section 2-313A and 2-313B), and implied warranties (section 2-314 and 2-315) were discussed in greater detail earlier in this chapter. It is important to note, however, that the plaintiff in a breach of warranty case does not have to prove negligence on the part of the seller.⁸⁴ Rather, the plaintiff must show that the goods fail to “conform” in some way to the affirmations, descriptions, or promises contained in an express warranty, a record accompanying the goods, or an advertisement or similar communication to the public (sections 2-313, 2-313A, and 2-313B) or that the goods are not “merchantable” (section 2-314) or fit for the buyer’s particular purpose of which the seller had reason to know at the time of purchase (section 2-315).

The elements that a plaintiff must establish to prevail on a breach of warranty claim have been summarized as follows:⁸⁵

First, the claimant must prove that the defendant made a warranty, express or implied, and so incurred an obligation under 2-313, 2-314, or 2-315. Second, the claimant must prove that the goods did not comply with the warranty. Third, the claimant must prove that the injury was caused, proximately and in fact, by the defective nature of the goods

79. *Ibid.* at 724–25.

80. UCC §§ 2-313A(5)(b) & 2-313B(5)(b).

81. UCC § 2-318, Alt. A & B.

82. See UCC §§ 2-714 & 2-715.

83. Clark & Smith, *supra* n. 70, vol. 1, at 7-194.

84. White & Summers, *supra* n. 1, vol. 1, at 602.

85. The example arises in the context of a defective chainsaw.

(and not, for example, by his careless use of the saw). Fourth, damages must be proved. Finally, the claimant must fight off all sorts of affirmative defences such as disclaimers, statute of limitations, privity, lack of notice, and assumption of the risk.⁸⁶

7. ON WHOM IS THE BURDEN OF PROOF?

As discussed in the preceding section, the burden of proof in breach of warranty cases is on the plaintiff to establish each of the necessary elements of his or her claim, including: (1) the existence of a warranty, express or implied; (2) the noncompliance of the goods with the warranty; (3) that the injury was caused, proximately and in fact, by the defective or nonconforming nature of the goods; and (4) damages.⁸⁷ The UCC does not provide for any presumptions of defectiveness. The defendant bears the burden of proof with respect to any affirmative defenses.

8. EXCLUSION AND LIMITATION OF LIABILITY

8.1. EXCLUSION OR MODIFICATION OF WARRANTIES

Section 2-316 of the UCC generally governs the exclusion or modification of warranties.⁸⁸ Subsection (1), which deals with attempted disclaimers of express warranties, provides that “[w]ords or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to section 2-202, negation or limitation is inoperative to the extent that such construction is unreasonable.”⁸⁹ In other words, a seller who explicitly “warrants” or “guarantees” that a product is without defects cannot subsequently set up a disclaimer of express warranties when sued for the cost of repairing the product. UCC commentators have explained the effect of section 2-316(1) as follows:

Most 2-316(1) questions arise when a seller sets up a disclaimer against an express affirmation or description appearing outside the specific warranty clause of the contract. If the affirmation or description creates a warranty, subsection (1) resolves the conflict in the buyer’s favour. Yet 2-316(1) allows the factfinder to decide that the language of disclaimer itself prevents an affirmation or description which would otherwise

86. *Ibid.*

87. *Ibid.*

88. UCC § 2-316.

89. UCC § 2-316(1).

create warranty from doing so. Comment 1 to 2-316 states that subsection (1) “seeks to protect a buyer from *unexpected* and *unbargained* language of disclaimer by denying effect to such language when inconsistent with language of express warranty ***.”⁹⁰

Subsection (1) of 2-316 makes clear that it is “subject to section 2-202,” relating to parol or extrinsic evidence. Section 2-202 provides that “[t]erms with respect to which the confirmatory records of the parties agree or which are otherwise set forth in a record intended by the parties as a final expression of their agreement . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. . . .”⁹¹ The reference to section 2-202 is “intended to protect the seller against “false allegations of oral warranties.””⁹² Thus, when a seller explicitly disclaims or limits warranties in a “record intended by the parties as a final expression of their agreement” (such as a sales contract containing a merger clause), the buyer cannot base a warranty claim on prior or contemporaneous oral representations (such as those made by a salesperson) that are inconsistent with the written contract.

The current version of 2-316(2) requires that “to exclude or modify the implied warranty of merchantability or any part of it in a consumer contract the language must be in a record, be conspicuous, and state “The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract.” . . .”⁹³ “[I]n any other contract the language must mention merchantability and in case of a record must be conspicuous.”⁹⁴

Section 2-316(2) thus makes a distinction between “consumer contracts” and “any other contract.”⁹⁵ Under the UCC, a “consumer” means “an individual who buys or contracts to buy goods, that at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes.”⁹⁶ A “consumer contract” is “a contract between a merchant seller and a consumer.”⁹⁷

All written disclaimers under section 2-316(2) must be “conspicuous.”⁹⁸ “Conspicuous” generally means that a term is “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.”⁹⁹ “Whether a term is “conspicuous” or not is a decision

90. White & Summers, *supra* n. 1, vol. 1, at 784–85.

91. UCC § 2-202.

92. White & Summers, *supra* n. 1, vol. 1, at 787.

93. UCC § 2-316(2) (emphasis added).

94. *Ibid.*

95. *Ibid.*

96. UCC § 2-103(1)(c).

97. UCC § 2-103(1)(d).

98. UCC § 2-316(2).

99. UCC § 2-103(1)(b).

for the court.’¹⁰⁰ The UCC considers the following to be examples of “conspicuous” terms:

(i) for a person:

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or colour to the surrounding text; and

(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or colour to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language; and

(ii) for a person or electronic agent, a term that is, so placed in a record or display that the person or electronic agent may not proceed without taking action with respect to the particular term.¹⁰¹

With respect to the implied warranty of fitness for a particular purpose, any exclusion or disclaimer generally “must be in a record and conspicuous.”¹⁰² “Language to exclude all implied warranties of fitness in a consumer contract must state ‘The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract . . .’¹⁰³ ‘[I]n any other contract the language is sufficient if it states, for example, that ‘There are no other warranties that extend beyond the description on the face hereof.’ ”¹⁰⁴ Language that is, sufficient under section 2-316(2) to exclude or modify warranties in a consumer contract is also sufficient to exclude or modify warranties in any other contract.¹⁰⁵

Despite the rather specific requirements set forth in subsection (2), subsection (3) provides the easiest way for a seller to exclude all implied warranties. It states that ‘unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is,” “with all faults” or other language that in common understanding calls the buyer’s attention to the exclusion of warranties, makes plain that there is no implied warranty, and, in a consumer contract evidenced by a record, is set forth conspicuously in the record.’¹⁰⁶

Section 2-316(3) further provides that “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 after a demand by the seller there is no implied warranty with regard to defects that an examination in the

100. *Ibid.*

101. UCC § 2-103(1)(b).

102. UCC § 2-316(2).

103. *Ibid.*

104. *Ibid.*

105. *Ibid.*

106. UCC § 2-316(3).

circumstances should have revealed to the buyer.”¹⁰⁷ Additionally, “an implied warranty may also be excluded or modified by course of dealing or course of performance or usage of trade.”¹⁰⁸

8.2. LIMITATION OF REMEDIES

Section 2-316(4) provides that “[r]emedies for breach of warranty may be limited in accordance with sections 2-718 and 2-719.”¹⁰⁹

Section 2-718(1) allows the parties to agree to a sum for liquidated damages for a breach by either party.¹¹⁰ A “liquidated-damages clause” is a “contractual provision that determines in advance the measure of damages if a party breaches the agreement.”¹¹¹ The liquidated damages, however, must be “an amount that is, reasonable in the light of the anticipated or actual harm caused by the breach and, in a consumer contract, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.”¹¹²

Section 2-719, on the other hand, governs the contractual modification or limitation of remedies.¹¹³ It permits the parties to “provide for remedies in addition to or in substitution for those provided in [Article 2], as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts...”¹¹⁴ Additionally, “resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.”¹¹⁵

Section 2-719(2), however, does place an important limit on the enforceability of an exclusive remedy provision.¹¹⁶ Specifically, it provides that “[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.”¹¹⁷ Thus, under section 2-719(2), a buyer can seek to avoid an exclusive remedy provision by arguing that the remedy fails of “its essential purpose.”¹¹⁸

Official Comment 1 to this subsection explains that it applies to “an apparently fair and reasonable clause,” which “because of circumstances fails in its

107. UCC § 2-316(3)(b).

108. UCC § 2-316(3)(c).

109. UCC § 2-316(4).

110. UCC § 2-718(1).

111. Garner (ed.), *Black’s Law Dictionary*, *supra* n. 6, at 942.

112. *Ibid.*

113. UCC § 2-719.

114. UCC § 2-719(1).

115. *Ibid.*

116. UCC § 2-719(2).

117. *Ibid.*

118. *Ibid.*

purpose and operates to deprive either party of the substantial value of the bargain. . . .”¹¹⁹ Moreover:

The most frequent application of 2-719(2) occurs when under a limited “repair and replacement” remedy, the seller is unwilling or unable to repair the defective goods within a reasonable period of time. Thus the limited remedy fails of its essential purpose, that is, fails to cure the defect. A remedy also fails when the seller is willing and able to repair, but the repairs cannot be done. This might happen because the goods have been destroyed.¹²⁰

Section 2-719(3) provides for the limitation or exclusion of consequential damages “unless the limitation or exclusion is unconscionable.”¹²¹ “Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.”¹²² Thus, under section 2-719(3), purported disclaimers of liability for personal injury arising from a defective consumer product generally will not be enforced, whereas an exclusion of commercial consequential damages (such as lost profits) likely will.

8.3. MAGNUSON-MOSS WARRANTY ACT

In 1975, Congress enacted the Magnuson-Moss Warranty Act, which establishes comprehensive federal standards for consumer product warranties and which creates a federal private right action for consumers damaged by breach of warranty or service contract obligations.¹²³

Magnuson-Moss, which applies to consumer product warranties, does not completely pre-empt the UCC and other state laws relating to warranties,¹²⁴ but it does pre-empt the UCC to the extent that it expressly prohibits disclaimers of implied warranties in written warranties:

The Warranty Act flatly prohibits any supplier from disclaiming an implied warranty arising under state law, if the supplier makes a written warranty pertaining to the consumer product, or within 90 days of the time of sale, enters into a service contract with the consumer that applies to the product. If a limited warranty is offered, Magnuson-Moss permits implied warranties to be limited to the duration of the written warranty, if

119. White & Summers, *supra* n. 1, vol. 1, at 829 (quoting UCC § 2-719(2), cmt. 1).

120. *Ibid.* at 829–30.

121. UCC § 2-719(3).

122. *Ibid.*

123. 15 U.S.C. §§ 2301-2312; Clark & Smith, *supra* n. 70, vol. 2, at 14-1–14-2.

124. Clark & Smith, *supra* n. 70, vol. 2, at 14-2–14-3.

the limitation is conscionable and is set forth in “clear and unmistakable language and prominently displayed on the face of the warranty.” The Warranty Act, however, does not restrict a seller’s ability to disclaim implied warranty liability if he does not extend a written warranty.¹²⁵

The Magnuson-Moss Act is primarily concerned, however, with written warranties. It requires that ‘written warranties on consumer products actually costing the consumer more than USD 10 at retail be clearly and conspicuously designated as either “full (statement of duration) warranty” or “limited warranty.”’¹²⁶ A “full warranty” must satisfy certain federal “minimum standards” which are set forth in 15 U.S.C. § 2304.¹²⁷ These “minimum standards” require *inter alia* the following: (1) the warrantor must “remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty”; (2) the warranty “may not impose any limitation on the duration of any implied warranty on the product”; (3) the “warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty”; and (4) “if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be).”¹²⁸ Additionally, the warrantor generally cannot “impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty. . . .”¹²⁹ Any written warranty which does not comply with these requirements must be conspicuously designated a “limited warranty.”¹³⁰

15 U.S.C. § 2304(c), however, relieves the warrantor from performing the duties required by 15 U.S.C. § 2304(a) (with respect to repairing and replacing the product) “if he can show that the defect, malfunction, or failure of any warranted customer product to conform with a written warranty, was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).”¹³¹

125. *Ibid.* at 14-13-14-14 (citing 15 U.S.C. § 2308).

126. *Ibid.* at 14-12 (citing 15 U.S.C. § 2302(a)).

127. *Ibid.*; 15 U.S.C. § 2303(a)(1).

128. 15 U.S.C. § 2304(a).

129. 15 U.S.C. § 2304(b)(1).

130. 15 U.S.C. § 2303(a)(2).

131. 15 U.S.C. § 2304(c).

Magnuson-Moss also requires the Federal Trade Commission to prescribe rules, which set forth the terms and conditions that must be fully and conspicuously disclosed in written warranties involving consumer products.¹³² The FTC's disclosure rule, which applies to consumer products that retail for more than USD 15, requires *inter alia* the following:

The rule mandates five items of information in all written warranties (1) an explanation of warranty coverage; (2) a statement of warranty remedy; (3) a statement of how long the warranty lasts; (4) an explanation of how a customer gets warranty service; and (5) a statement concerning legal rights. Warranties covered by the disclosure rule must also include four other items of information if relevant. These are: (1) limitations on who is covered; (2) the availability of an informal dispute settlement mechanism; (3) limitations on the duration of implied warranties; and (4) limitations on incidental or consequential damages.¹³³

The Act also creates four separate private causes of action: (1) failure to comply with any obligation under the Act; (2) breach of written warranty; (3) breach of implied warranty; and (4) breach of service contract.¹³⁴ Such actions may be filed in either state or federal court.¹³⁵ However, in order to file a Magnuson-Moss action in federal court, each claim must be at least USD 25 and the total amount in controversy for all claims must be at least USD 50,000.¹³⁶ In a class action, at least 100 plaintiffs must be named.¹³⁷

The Act provides that consumers may bring an action for "damages or other equitable relief," but unlike the UCC, fails to provide much guidance regarding the types of remedies available.¹³⁸ As such, the remedies available in a Magnuson-Moss action largely mirror those available in a state law action under the UCC.¹³⁹

One significant difference, however, is that the court may award attorney's fees and litigation costs to successful litigants in a Magnuson-Moss case.¹⁴⁰ Although Magnuson-Moss contains no statute of limitations, courts have held that the four-year UCC statute of limitations (section 2-725) applies to Magnuson-Moss claims.¹⁴¹

132. Clark & Smith, *supra* n. 70, vol. 2, at 14-17.

133. *Ibid.* at 14-17-14-18 (citing 16 C.F.R. §§ 700.12, 700.2, 701.3(a)(1)-701.3(a)(9)).

134. *Ibid.* at 14-21 (citing 15 U.S.C. § 2310(d)(1)).

135. *Ibid.* at 14-22 (citing 15 U.S.C. § 2310(d)(3)).

136. *Ibid.*

137. *Ibid.*

138. *Ibid.* at 14-23 (citing 15 U.S.C. § 2310(d)(1)).

139. *Ibid.* at 14-23-14-24.

140. *Ibid.* at 14-25.

141. *Ibid.* at 14-27.

The Act also authorizes the United States Attorney General and the FTC to file actions in federal district court to enjoin warrantors from violating the Act.¹⁴²

9. STATUTES OF LIMITATION

Generally, the statute of limitations for breach of warranty under the UCC is four years after the right of action has accrued.¹⁴³ The drafters of the UCC, however, recently amended section 2-725, which now provides that “an action for breach of any contract for sale must be commenced within the later of four years after the right of action has accrued under subsection (2) or (3) or one year after the breach was or should have been discovered, but no longer than five years after the right of action accrued.”¹⁴⁴ Again, this amendment has not yet been adopted by all fifty states. However, the effect of this revision is to provide a plaintiff, who reasonably fails to discover a defect until after the expiration of four years, with up to another year within which to bring a claim.

Subsection (3) of 2-725 in turn governs when a cause of action for breach of warranty accrues.¹⁴⁵ It provides in relevant part as follows:

- (3) If a breach of warranty arising under section 2-312, 2-313(2), 2-314, or 2-315, or a breach of an obligation, other than a remedial promise, arising under section 2-313A or 2-313B, is claimed, the following rules apply:
- (a) Except as otherwise provided in paragraph (c), a right of action for breach of a warranty arising under section 2-313(2), 2-314, or 2-315 accrues when the seller has tendered delivery to the immediate buyer, as defined in section 2-313, and has completed performance of any agreed installation or assembly of the goods.
 - (b) Except as otherwise provided in paragraph (c), a right of action for breach of an obligation, other than a remedial promise, arising under section 2-313A or 2-313B accrues when the remote purchaser, as defined in section 2-313A or 2-313B, receives the goods.
 - (c) If a warranty arising under section 2-313(2) or an obligation, other than a remedial promise, arising under section 2-313A or 2-313B explicitly extends to future performance of the goods and discovery of the breach must await the time for performance, the right of action

142. *Ibid.* at 14-27-14-28.

143. White & Summers, *supra* n. 1, vol. 1, at 760 (quoting the unamended version of UCC § 2-725); Clark & Smith, *supra* n. 70, vol. 1, at 11-1-11-2 (same).

144. UCC § 2-725(1).

145. UCC § 2-725(3).

accrues when the immediate buyer as defined in section 2-313 or the remote purchaser as defined in section 2-313A or 2-313B discovers or should have discovered the breach. . . .¹⁴⁶

Thus, a claim for breach of warranty generally must be filed within four years of the delivery, installation, or receipt of the goods.¹⁴⁷ Subsection (c), however, creates an exception to the general rule where an express warranty (under section 2-313) or an obligation to a remote purchaser (under section 2-313A or 2-313B) “explicitly extends to future performance of the goods and discovery of the breach must await the time for performance” – in such a situation, the right of action would not accrue (and the statute of limitations would not begin running) until the time when the buyer “discovers or should have discovered the breach.”¹⁴⁸

It is important to note, however, that subsection (1) also permits the parties, if they are both businesses, to reduce the four-year limitations period to “not less than one year” (but they may not extend it).¹⁴⁹ “However, in a consumer contract, the period of limitation may not be reduced.”¹⁵⁰ The Code defines “consumer contract” as “a contract between a merchant seller and a consumer.”¹⁵¹ A “consumer” is “an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes.”¹⁵² According to the comments to the Code, because “[t]he term “consumer contract” is limited to a contract for sale between a seller that is, a “merchant” and a buyer that is, a “consumer” neither a sale by a consumer to a consumer nor a sale by a merchant to an individual who intends that the goods be used primarily in a home business qualify as a consumer contract.”¹⁵³

146. *Ibid.*

147. See UCC § 2-725(3)(a) & (b).

148. UCC § 2-725(3)(c). See, e.g., *Grand Island Express v. Timpte Indus., Inc.*, 28 F.3d 73, 74–75 (8th Cir. 1994) (finding that warranty extended to future performance where it stated that trailers would be “free from defects in materials and workmanship for a period of five years from the date-of-delivery to the First Purchaser”); *Paskell v. Nobility Homes, Inc.*, 871 S.W.2d 481, 483–84 (Tenn. 1994) (finding that “unconditional” guarantee of roof and rafter system for five years extended the warranty to future performance); *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P’ship*, 146 S.W.3d 79, 93 (Tex. 2004) (finding that warranty extended to future performance where window manufacturer “explicitly warranted” that windows would be free of defects for five years).

149. UCC § 2-725(1).

150. *Ibid.*

151. UCC § 2-103(d).

152. UCC § 2-103(c).

153. UCC § 2-103 cmt.3.