

Defenses to Breach of Warranty Actions

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In 1982, the Illinois Supreme Court ruled that a product liability plaintiff seeking damages solely for economic losses may not sue in tort. *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill. Dec. 746 (1982). *Moorman* and its progeny have made it clear that the remedy for economic loss lies in contract. As a result, Illinois plaintiffs must look to warranties as the basis for economic loss claims, which in turn has increased the importance of warranty law in this state.

It is a rare products liability case that is filed today that does not contain some type of breach of warranty claim. In order to be able to properly defend against claims of breach of express or implied warranties, defense counsel must be familiar with the possible defenses to such claims.

1. Nonexistence of Warranty

The simplest defense to a breach of warranty action is that there is no warranty. In order for statements by a seller to constitute an express warranty, they must become part of the benefit of the bargain. *Wheeler v. Sunbelt Tool Co.*, 181 Ill.App.3d 1088, 537 N.E.2d 1332 (4th Dist. 1989). If the defendant can show that the claimed statements

were mere puffery and did not become part of the benefit of the bargain, then the defendant can show that no express warranty existed. Whether statements made by the defendant constitute puffery or an express warranty is generally a question of fact. *Redmac, Inc. v. Computerland of Peoria*, 140 Ill.App.3d 741, 489 N.E.2d 380 (3rd Dist. 1986). No bright-line distinction between express warranties and puffing exist, but sales talk which “relates only to the value of the goods or the seller’s personal opinion and commendation of the goods is considered puffing and is not binding on the seller.” *Id.* at p. 382. Numerous Illinois courts have used the following language to differentiate between the two:

To determine whether or not there is a warranty, the decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment on a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty and in the latter there is not. *Weiss v. Rockwell Manufacturing Co.*, 9 Ill.App.3d 906, 293 N.E.2d 375, 381 (1st Dist. 1973).



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See also, *Keller v. Flynn*, 346 Ill.App. 499, 105 N.E.2d 532, 536 (2nd Dist. 1952); *Felley v. Singleton*, 302 Ill.App.3d 248, 705 N.E.2d 930, 935, 235 Ill.Dec. 747 (2nd Dist. 1999).

When the plaintiff is suing for breach of the implied warranty of merchantability, the defendant can try to argue that the defendant was not a merchant (as defined by 810 ILCS 5/2-104(1)) or that the goods were of merchantable quality. If the suit is based on an alleged breach of the implied warranty of fitness for a particular purpose, the defendant can try to argue that he or she had no reason to know how the plaintiff intended to use the goods in question (as required by 810 ILCS 5/2-315).

In addition, plaintiff must plead facts which would give rise to a cause of action for breach of warranty. Where the plaintiff has done nothing more than provide a formulaic recitation of the elements of a claim, without pleading the facts necessary to suggest that a warranty existed, the defendant should file a motion to dismiss the plaintiff's complaint. *Heisner v. Genzyme Corp.*, 2008 WL 2940811 (N.D. Ill. 2008).

2. Buyer's Misuse or Non-compliance with Conditions of the Warranty

Comments to some of the provisions of the UCC, as well as the provisions themselves, provide defendants with defenses related to the buyer's misuse of the product. Official Comment 13, 810 ILCS 5/2-314 states that in actions based on the implied warranty of merchantability, "an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense." Official Comment 8, 810 ILCS 5/2-316 states that if the buyer knows of a defect but uses the product anyway, then the proximate cause of any injuries is the buyer's conduct—and not the defect. In addition, under Section 2-715 of the UCC, a buyer may not recover for damages caused by his own conduct. 810 ILCS 5/2-715.

Misuse is a defense which may be raised as an affirmative matter to reduce plaintiff's damage award in a breach of warranty action. *Wheeler*, supra. Misuse of a product is use for a purpose neither intended nor foreseeable, not use in a manner which is neither intended nor foreseeable. *Williams v. Brown Manufacturing Co.*, 45 Ill.2d 418, 261 N.E.2d 305 (1970); *Wheeler*, supra. A manufacturer or seller is entitled to have its instructions for

the use of a product followed by the user. *Wheeler*, supra. A failure to follow instructions for the use of a product can be a use which is neither reasonably foreseeable nor intended by the manufacturer. *Stephenson v. Dreis & Krump Manufacturing Co.*, 101 Ill.App.3d 380, 428 N.E.2d 190, 56 Ill.Dec. 871 (3rd Dist. 1981); *Stewart v. The Von Solbrig Hospital, Inc.*, 24 Ill.App.3d 599, 321 N.E.2d 428 (1st Dist. 1974). Whether misuse has occurred is ordinarily a question of fact to be decided by the jury. *Nelson v. Hydraulic Press Manufacturing Co.*, 84 Ill.App.3d 41, 404 N.E.2d 1013, 39 Ill.Dec. 422 (2nd Dist. 1980).

If the buyer fails to comply with the terms of the warranty by failing to return a warranty card during the required time period, failing to address any defects until after the warranty period as expired, or failing to take other comparable action, the seller may also attempt to use that lack of compliance as a defense.

3. Disclaimers

The Illinois UCC provides that a seller may exclude or modify the implied warranties of merchantability and fitness for a particular purpose, as set forth in 810 ILCS 5/2-316. For a written disclaimer to properly exclude the implied warranty of merchantability, it must specifically mention the word "merchantability" and the writing must be conspicuous. 810 ILCS 5/2-316; *Felde v. Chrysler Credit Corp.*, 219 Ill.App.3d 530, 580 N.E.2d 191, 162 Ill.Dec. 565 (2nd Dist. 1991). To properly exclude the implied warranty of fitness for a particular purpose, the disclaimer must also be in writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof." 810 ILCS 5/2-316(2).

For a writing to be conspicuous, as defined under the UCC, it must be "in larger or other contrasting type or color," to set it apart from the remainder of the text. 810 ILCS 5/1-201(10). In other words, the disclaimer must appear in such a way that a reasonable person would notice it. *First National Bank of Elgin v. Husted*, 57 Ill. App.2d 227, 205 N.E.2d 780 (2nd Dist. 1965)(statement that the "Buyer acknowledges delivery, examination and acceptance of said car in its present condition" was sufficient to inform the buyer of the seller's exclusion of all implied warranties); *Overland Bond & Investment Corp. v. Howard*, 9 Ill.App.3d 348, 292 N.E.2d 168 (1st Dist.



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1972) (where contract for sale of used car contained no expressions such as “as is” or “with all faults,” but rather stated that buyer “acknowledges delivery and acceptance of said motor vehicle in good condition,” implied warranties of merchantability and fitness for a particular purpose were not excluded, particularly where statement was in small print between larger type); *R.O.W. Window Co. v. Allmetal, Inc.*, 367 Ill.App.3d 749, 856 N.E.2d 55, 305 Ill.Dec. 523 (3rd Dist. 2006) (disclaimer found to be conspicuous where all invoices sent to the plaintiff contained a warranty disclaimer printed in capital letters in the center of the page); *Accurate Transmissions, Inc. v. Sonnax Industries, Inc.*, 2007 WL 1773195 (N.D. Ill. 2007) (disclaimers found to be conspicuous where they came directly after and on the same page as the warranty policy and, unlike the text of the warranties, were printed in capital letters); *Kehrer Brothers Construction, Inc. v. Custom Body Company, Inc.*, 2008 WL 182503 (S.D. Ill. 2008) (summary judgment denied where seller placed a signature line below the disclaimer and purchaser failed to sign it); *Tague v. Autobarn Motors, Ltd.*, 2009 WL 723403 (1st Dist. 2009) (auto dealer’s disclaimer of implied warranty of merchantability was not inconspicuous so as to be ineffective; disclaimer appeared on first page of purchase contract in bold capital letters directly above the buyer’s signature). Although the UCC allows for the disclaimer of implied warranties, disclaimers are not favored by the courts and are strictly construed against the seller. *Overland Bond & Investment Corp.*, *supra*.

4. Contractual Limitations of Buyer’s Remedies

Contractual limitations of a buyer’s remedies differs from a disclaimer. The former limits the remedies available for breach of warranty, the latter prevents a breach of warranty from occurring in the first place. Section 2-719 of the UCC provides that a contractual agreement “may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts.” 810 ILCS 5/2-719(1)(a). In every breach of warranty action the language of the warranty should be carefully studied to ascertain whether the express language of the warranty limits the buyer’s potential remedies.

5. Insufficient Notice

Section 2-607(3)(a) of the UCC imposes a duty upon every buyer who has accepted goods to give notice of an alleged breach of an implied warranty to the seller within a reasonable time after he discovers, or should have discovered, the breach. 810 ILCS 5/2-607(3)(a); *Berry v. G.D. Searle & Co.*, 56 Ill.2d 548, 309 N.E.2d 550 (1974). The notice requirement serves to provide the seller an opportunity to cure a defect and minimize damages, protect his ability to investigate a breach and gather evidence, and it also serves to encourage negotiation and settlement. *Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill.App.3d 935, 694 N.E.2d 1021 (3rd Dist. 1998). In the context of a personal injury action, notice also informs the seller of a need to make changes in the product to avoid future injuries. *Id.*

Section 2-607(3)(a) applies to all the various beneficiaries of an implied or express warranty in addition to the purchaser of the goods. *Id.*; *Ratkovich v. Smithkline*, 711 F.Supp. 436 (N.D. Ill. 1989). Failure to provide the seller with notice of an alleged breach within a reasonable time after discovery will bar the plaintiff from any recovery. *Branden v. Gerbie*, 62 Ill.App.3d 138, 379 N.E.2d 7, 19 Ill.Dec. 492 (1st Dist. 1978)(15 month delay in providing notice sufficient to support dismissal of plaintiff’s breach of implied warranty claim); *Wagmeister v. A.H. Robins Co.*, 64 Ill.App.3d 964, 382 N.E.2d 23, 21 Ill.Dec. 729 (1st Dist. 1978)(court held that as a matter of law, 30 month delay in giving notice did not satisfy Section 2-607(3)(a)).

According to the courts, an evaluation of whether the notice requirement has been complied with must be based on the factual setting of each case and the circumstances of the parties involved. *Id.*; *Malawy v. Richards Manufacturing Co.*, 150 Ill.App.3d 549, 501 N.E.2d 376 (5th Dist. 1986). The comments to Section 2-607 indicate that notification need merely be sufficient to let the seller know that the transaction is troublesome. There is no need to state all the objections the buyer has or for the buyer to say he is holding the seller liable and threaten litigation. 810 ILCS 5/2-607, cmt. 4. Thus, failure of the product in the presence of the manufacturer can serve as adequate notice of breach of warranty. *See, e.g., Malawy, supra; Crest*



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Container Corp. v. R.H. Bishop Co., 111 Ill.App.3d 1068, 445 N.E.2d 19 (5th Dist. 1982) (where an employee of the third-party defendant, which manufactured copper coils used in building's heating units, visited the building with subcontractor's president "to get to the bottom of why these coils were leaking," where the two looked over the system together, and where the system failed to operate properly in their presence, such failure was notice to the third-party defendant of the breach of warranty). Direct pre-suit notice of a breach of warranty claim is not required when the seller has actual notice of the defect in a particular product. *In re McDonald's French Fries Litigation*, 503 F.Supp.2d 953 (N.D. Ill. 2007). General knowledge of problems with a particular product line is insufficient to satisfy the notice requirement. *Schreib v. The Walt Disney Co.*, 2006 WL 573008 (1st Dist. 2006). The filing of a lawsuit is not sufficient notice under Section 2-607(3)(a), unless the claim seeks recovery for personal injuries. *In re McDonald's French Fries Litigation, supra* (consumers were not required to give pre-suit notice of breach of warranty claims where complaint alleged that consumers suffered personal injuries as a result of consuming potato products); *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill.2d 428, 546 N.E.2d 580 (1989) (filing of a lawsuit is insufficient notice when no personal injuries have been alleged).

6. Statute of Limitations

An action for breach of any warranty must be commenced within four years after the cause of action has accrued. 810 ILCS 5/2-725(1). However, it should be noted that breach of warranty claims brought against physicians are governed by the *two year* statute of limitations set forth in 735 ILCS 5/13-212. *Desai v. Chasnoff*, 146 Ill.App.3d 163, 496 N.E.2d 1203, 100 Ill.Dec. 138 (1st Dist. 1986). Ordinarily, a cause of action for breach of warranty accrues upon delivery of the goods regardless of the aggrieved party's lack of knowledge of the breach. 810 ILCS 5/2-725(2). See also *Nelligan v. Tom Chaney Motors, Inc.*, 133 Ill.App.3d 798, 479 N.E.2d 439, 442, 88 Ill.Dec. 826 (2d Dist. 1985); *Foremost Signature Insurance Co. v. Monaco Coach Corp.*, 2006 WL 2916824 (N.D. Ill. 2006); *Accurate Transmissions, supra*. However, when a warranty "explicitly extends to future performance," the cause of action for breach of

warranty will accrue upon discovery of the breach. 825 ILCS 5/2-725(2). Whether a warranty "explicitly extends to future performance" is construed strictly, and the exception does not apply to implied warranties. See *Moorman, supra*; *Nelligan, supra*; *LaPorte v. R.D. Werner Co.*, 561 F.Supp. 189 (N.D.Ill. 1983).

Although the Magnuson-Moss Act provides a private right of action for breach of a written warranty, the Act does not contain a limitations provision for such an action. Where a federal statute fails to specify a limitations period for suits under it, courts apply the most closely analogous statute of limitations under state law. *Teamsters & Employers Welfare Trust v. Gorman Brothers Ready Mix*, 283 F.3d 877 (7th Cir. 2002). In suits brought under the Magnuson-Moss Act, the appellate courts of Illinois, as well as courts of other jurisdictions, generally consider the UCC to be the most closely analogous statute and have borrowed the limitations provision contained therein. See, e.g., *Lipinski v. Martin J. Kelly Oldsmobile, Inc.*, 325 Ill.App.3d 1139, 759 N.E.2d 66 (1st Dist. 2001); *Hillery v. Georgie Boy Manufacturing, Inc.*, 341 F.Supp.2d 1112 (D.Ariz. 2004); *Poli v. DaimlerChrysler Corp.*, 349 N.J.Super. 169, 793 A.2d 104 (2002). Accordingly, the four year statute of limitations contained in § 2-725 of the UCC applies to claims for breach of written warranty under the Magnuson-Moss Act. *Mydlach v. DaimlerChrysler Corp.*, 226 Ill.2d 307, 875 N.E.2d 1047 (2007). In cases of vehicle repair, the statute of limitations for Magnuson-Moss breach of warranty claims begins to run not at the time of delivery of the vehicle, but rather at the time promised repairs are refused or are unsuccessful. *Id.*, *Cosman v. Ford Motor Co.*, 285 Ill.App.3d 250, 674 N.E.2d 61, 220 Ill.Dec. 790 (1st Dist. 1996) (holding that breach of six year/60,000-mile limited power-train warranty could not occur until Ford refused or failed to repair the power-train); *Belfour v. Schaumburg Auto*, 306 Ill. App.3d 234, 713 N.E.2d 1233 (2nd Dist. 1999) (holding that breach of the three year/50,000-mile repair warranty could not occur until Audi refused or failed to repair the defect).

7. Purchaser's Reasonable Expectation—Food

Illinois courts have determined that a plaintiff's ability to initiate a breach of warranty action related to foreign substances in food depends on the plaintiff's "reasonable expectation" in eating that food. The reasonable expectation test provides that, regardless of whether a substance in a



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food product is a natural ingredient thereof, liability will lie for injuries caused by the substance when the consumer of the product would not reasonably have expected to find the substance in the product. *Jackson v. Nestle-Beich, Inc.*, 147 Ill.2d 408, 589 N.E.2d 547, 168 Ill.Dec. 147 (1992) (purchaser allowed to pursue breach of warranty claim when she allegedly broke her tooth on a pecan shell while biting into a chocolate-covered pecan candy).

8. Hypersensitive Plaintiff

The unusual susceptibility of a consumer to a product or an ingredient therein is generally recognized as a complete defense to a breach of warranty claim where the manufacturer did not know and had no reason to know that a very few users of its product might be injured. *Stanton v. Sears Roebuck & Co.*, 312 Ill.App. 496, 38 N.E.2d 801 (1st Dist. 1942); *Presbrey v. The Gillette Co.*, 105 Ill.App.3d 1082, 435 N.E.2d 513, 61 Ill.Dec. 816 (2nd Dist. 1982).

The rule barring the idiosyncratic plaintiff from recovery generally applies whether the suit is brought under a theory of strict liability, negligence or breach of warranty. *Id.* However, while an idiosyncratic reaction may provide a defense in most implied warranty cases in which the warranty is only that most people could use the product for the general purpose for which it was made, idiosyncrasy is not a defense when the warranty implied by the circumstances of the transaction is more specific. *Rubin v. Marshall Field & Co.*, 232 Ill.App.3d 522, 597 N.E.2d 688, 173 Ill.Dec. 714 (1st Dist. 1992)(idiosyncrasy no defense where defendant's agent recommended makeup remover, pointed to language on the box that said "recommended for all skin types" and told plaintiff, "if it wouldn't be safe for you, it wouldn't say this on the box.").