I Didn't Give a Warranty, We Didn't Even Have a Contract!

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The number of people who conduct business without any written contract never ceases to amaze. Although many of them recognize that they have entered into binding arrangements, they have little idea of the extent of their obligations, until a problem arises and they ask their attorney. At that point, they are often surprised to learn that they have provided warranties to the buyers of their products and may be subject to an array of damages.

When a business transaction involves the sale of goods and there is no written agreement between the parties, the Uniform Commercial Code will impose terms upon the parties, including warranties. To determine the terms of the agreement between parties, the UCC will look to the negotiations between the parties, the prior course of dealing between parties, and the commercial standards within the particular industry for the goods that were sold. Among other terms, the UCC may impose three different warranties from a seller of goods to the buyer. These are the warranty of fitness for a particular purpose, the warranty of merchantability and the warranty of title and against infringement.

Three Types of Warranties

The warranty of fitness for a particular purpose arises whenever the buyer relies upon the expertise of the seller in selecting a product to perform a particular function that has been described by the buyer. In other words, the seller provides a product and say that it will do what the buyer wants. It commonly is created by a salesman who provides his recommendations to a seller to purchase his product because it is the solution to the seller's problem.

The warranty of merchantability requires that the goods sold be fit for the general purpose appropriate for such goods, as recognized in the trade in which the goods are normally used. It differs from the warranty of fitness for a particular purpose in that the warranty of merchantability is governed by the uses which are customarily made of such goods, while the warranty of fitness for a particular purpose envisages a specific use that the buyer expresses that is peculiar to his expressed purpose. For example, a lawn mower is merchantable if it is fit to cut grass safely when it is used in a normal manner, but may subject to a warranty of fitness for a particular purpose to cut bamboo shoots, if that was the use that the buyer expressed to the seller and the buyer relied upon the seller's skill or judgment to select a mower that was fit for that purpose.

The third type, a warranty of title and against infringement, is a different animal. It does not warrant that a product is fit to perform a specific function, but only that the design does not infringe upon a third party's copyright or patent. This becomes particularly dicey when a seller is not the manufacturer of the product it sells because the

seller often does not know how the product was designed or who manufactured the parts used in the product.

For example, a bottle opener may have been manufactured using a stolen design and sold to an intermediary, who subsequently sells it to Buyer #1. The bottle opener travels down the chain of buyer and seller, and is sold by Buyer #1 to Buyer #2. Buyer #2 then is sued for patent infringement by the original rightful owner of the patent and all the goods are confiscated. Absent a disclaimer of the warranty of title and against infringement, even though Buyer #1 did not manufacture the bottle opener, it may be liable to Buyer #2 for damages, which may include the cost of the bottle openers that were confiscated as a result of the lawsuit, Buyer #2's lost profits and the attorneys' fees that Buyer #2 incurred in defending the lawsuit brought by the owner of the patent.

How Can I Avoid Providing These Warranties?

Generally, warranties of merchantability and of title and against infringement are presumed to be terms of an agreement to sell goods and need to be conspicuously disclaimed. The warranty of fitness for a particular purpose requires more contact between the parties because it arises from the interaction between the buyer and seller, as described above. Once created, however, it too must be disclaimed by conspicuous language.

Disclaimer of warranties under the UCC is not a game of "hide the ball." While warranties may be excluded or modified by the parties' course of dealing, their course of

performance or trade usage, those avenues of disclaimer are far from a sure shot. The most reliable method to disclaim warranties is by use of clear written language that is conspicuous to the buyer. A written disclaimer also may be deemed to be unenforceable by a court if it is provided after the buyer orders goods, and the disclaimer materially alters the terms of the buyer's offer to purchase.

A reliable method to disclaim warranties is to require all orders to be made on a purchase order form that is drafted by the seller and contains all desired disclaimers. The use of the purchase order form by the buyer should be a prerequisite to any purchase, and should be signed by the buyer. You should consult with your attorney for the language that is suitable for your business.

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