

# Express and Implied Warranties

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We often think of contract law as primarily concerning promises of performance. However, it also encompasses binding representations of fact. Promises of performance are typically forward-looking (“I will pay”), whereas representations pertain to past or present reality (“This house is not infected with termites.”). Warranties are contractually binding representations, and they play a key role by allocating risk concerning facts, even those unknown to the parties.

A warranty can be seen as a particular type of promise. Rather than making a commitment about the future, a warranty assures that the warranting party’s representation, whether express or implied, is true. It is important to note that in this context, the term “warranty” differs from its everyday usage. For instance, a statement like “I guarantee this laptop will work properly, and if it doesn’t, I will fix it for free” is not technically a warranty as the term is used here.

In modern business contracts (such as mergers and acquisitions, asset sales, or corporate finance agreements), the representations and warranties section is heavily negotiated. For example, a party might represent that it holds a good title to an item being sold, that the company has certain assets, or that there are no pending lawsuits against it. A warranty is a promise that these representations are true, and it can either be absolute (“I represent that the company was properly incorporated”) or qualified (“to the best of my knowledge, the horse is healthy”). By warranting the truth of an existing fact, a party exposes itself to breach of contract damages if the warranty proves false, thereby providing the other party with greater assurance regarding the terms of the transaction.

Both express and implied warranties exist across all types of contracts. However, Article 2 of the Uniform Commercial Code (and in particular UCC §§ 2-312 – 2-316, which you should read) has developed a significant body of law concerning the seller’s warranties, as the following case illustrates.

## **Bayliner Marine Corp. v. Crow**

257 Va. 121, 509 S.E.2d 499 (Supreme Court of Virginia 1999)

KEENAN, Justice.

In this appeal, the dispositive issue is whether there was sufficient evidence to support the trial court’s ruling that the manufacturer of a sport fishing boat breached an express warranty and implied warranties of merchantability and fitness for a particular purpose.

In the summer of 1989, John R. Crow was invited by John Atherton, then a sales representative for Tidewater Yacht Agency, Inc. (Tidewater), to ride on a new model sport fishing boat known as a 3486 Trophy Convertible, manufactured by Bayliner Marine Corporation (Bayliner). At that time, Tidewater was the exclusive authorized dealer in southeastern Virginia for this model Bayliner boat. During an excursion lasting about 20 minutes, Crow piloted the boat for a short period of time but was not able to determine its speed because there was no equipment on board for such testing.

When Crow asked Atherton about the maximum speed of the boat, Atherton explained that he had no personal experience with the boat or information from other customers concerning the boat's performance. Therefore, Atherton consulted two documents described as "prop matrixes," which were included by Bayliner in its dealer's manual.

Atherton gave Crow copies of the "prop matrixes," which listed the boat models offered by Bayliner and stated the recommended propeller sizes, gear ratios, and engine sizes for each model. The "prop matrixes" also listed the maximum speed for each model. The 3486 Trophy Convertible was listed as having a maximum speed of 30 miles per hour when equipped with a size "20x20" or "2019" propeller. The boat Crow purchased did not have either size propeller but, instead, had a size "20x17" propeller.

At the bottom of one of the "prop matrixes" was the following disclaimer: "This data is intended for comparative purposes only, and is available without reference to weather conditions or other variables. All testing was done at or near sea level, with full fuel and water tanks, and approximately 600 lb. passenger and gear weight."

Atherton also showed Crow a Bayliner brochure describing the 1989 boat models, including the 3486 Trophy Convertible. The brochure included a picture of that model fully rigged for offshore fishing, accompanied by the statement that this model "delivers the kind of performance you need to get to the prime offshore fishing grounds."

In August 1989, Crow entered into a written contract for the purchase of the 3486 Trophy Convertible in which he had ridden. The purchase price was \$120,000, exclusive of taxes. The purchase price included various equipment to be installed by Tidewater including a generator, a cockpit cover, a "Bimini top," a winch, a spotlight, radar, a navigation system, an icemaker, fishing outriggers, an automatic pilot system, extra fuel gauges, a second radio, and air conditioning and heating units. The total weight of the added equipment was about 2,000 pounds. Crow did not test drive the boat after the additional equipment was installed or at any other time prior to taking delivery.

When Crow took delivery of the boat in September 1989, he piloted it onto the Elizabeth River. He noticed that the boat's speed measuring equipment, which was installed in accordance with the contract terms, indicated that the boat's maximum speed was 13 miles per hour. Crow immediately returned to Tidewater and reported the problem.

During the next 12 to 14 months, while Crow retained ownership and possession of the boat, Tidewater made numerous repairs and adjustments to the boat in an attempt to increase its speed capability. Despite these efforts, the boat consistently achieved a maximum speed of only 17 miles per hour, except for one period following an engine modification when it temporarily reached a speed of about 24 miles per hour. In July 1990, a representative from Bayliner wrote Crow a letter stating that the performance representations made at the time of purchase were incorrect, and that 23 to 25 miles per hour was the maximum speed the boat could achieve.

In 1992, Crow filed a motion for judgment against Tidewater, Bayliner, and Brunswick Corporation, the manufacturer of the boat's diesel engines.<sup>1</sup> Crow alleged, among other things, that Bayliner breached express warranties, and implied warranties of merchantability and fitness for a particular purpose.

At a bench trial in 1994, Crow, Atherton, and Gordon W. Shelton, III, Tidewater's owner, testified that speed is a critical quality in boats used for offshore sport fishing in the Tidewater area of Virginia because of the distance between the coast and the offshore fishing grounds. According to these witnesses, a typical offshore fishing site in that area is 90 miles from the coast. Therefore, the speed at which the boat can travel to and from fishing sites has a major impact on the amount of time left in a day for fishing.

Crow testified that because of the boat's slow speed, he could not use the boat for offshore fishing, that he had no other use for it, and that he would not have purchased the boat if he had known that its maximum speed was 23 to 25 miles per hour. Crow testified that he had not used the boat for fishing since 1991 or 1992. He admitted, however, that between September 1989, and September 1994, the boat's engines had registered about 850 hours of use. Bob Schey, Bayliner's manager of yacht testing, testified that a pleasure boat in a climate such as Virginia's typically would register 150 engine hours per year.

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<sup>1</sup> Crow nonsuited his claim against Tidewater prior to trial. The negligence claim against Brunswick was dismissed in the trial court's final judgment order.

The trial court entered judgment in favor of Crow against Bayliner on the counts of breach of express warranty and breach of implied warranties of merchantability and fitness for a particular purpose. The court awarded Crow damages of \$135,000, plus prejudgment interest from June 1993. The court explained that the \$135,000 award represented the purchase price of the boat, and about \$15,000 in “damages” for a portion of the expenses Crow claimed in storing, maintaining, insuring, and financing the boat.

On appeal, we review the evidence in the light most favorable to Crow, the prevailing party at trial.... We will uphold the trial court’s judgment unless it is plainly wrong or without evidence to support it....

Crow argues that the “prop matrixes” he received created an express warranty by Bayliner that the boat he purchased was capable of a maximum speed of 30 miles per hour. We disagree.

Code § 8.2–313 provides, in relevant part:

Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made a part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

The issue whether a particular affirmation of fact made by the seller constitutes an express warranty is generally a question of fact. See *id.*, Official Comment 3; *Daughtrey v. Ashe*, 243 Va. 73, 78, 413 S.E.2d 336, 339 (1992). In *Daughtrey*, we examined whether a jeweler’s statement on an appraisal form constituted an express warranty. We held that the jeweler’s description of the particular diamonds being purchased as “v.v.s. quality” constituted an express warranty that the diamonds were, in fact, of that grade. *Id.* at 77, 413 S.E.2d at 338.

Unlike the representation in *Daughtrey*, however, the statements in the “prop matrixes” provided by Bayliner did not relate to the particular boat purchased by Crow, or to one having substantially similar characteristics. By their plain terms, the figures stated in the “prop matrixes” referred to a boat with different sized propellers that carried equipment weighing substantially less than the equipment on Crow’s boat. Therefore, we conclude that the statements contained in the “prop matrixes” did not constitute an express warranty by Bayliner about the performance capabilities of the particular boat purchased by Crow.

Crow also contends that Bayliner made an express warranty regarding the boat's maximum speed in the statement in Bayliner's sales brochure that this model boat "delivers the kind of performance you need to get to the prime offshore fishing grounds." While the general rule is that a description of the goods that forms a basis of the bargain constitutes an express warranty, Code § 8.2-313(2) directs that "a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

The statement made by Bayliner in its sales brochure is merely a commendation of the boat's performance and does not describe a specific characteristic or feature of the boat. The statement simply expressed the manufacturer's opinion concerning the quality of the boat's performance and did not create an express warranty that the boat was capable of attaining a speed of 30 miles per hour. Therefore, we conclude that the evidence does not support the trial court's finding that Bayliner breached an express warranty made to Crow.

We next consider whether the evidence supports the trial court's conclusion that Bayliner breached an implied warranty of merchantability. Crow asserts that because his boat was not capable of achieving a maximum speed of 30 miles per hour, it was not fit for its ordinary purpose as an offshore sport fishing boat. Bayliner contends in response that, although the boat did not meet the needs of this particular sport fisherman, there was no evidence from which the trial court could conclude that the boat generally was not merchantable as an offshore fishing boat. We agree with Bayliner's argument.

Code § 8.2-314 provides that, in all contracts for the sale of goods by a merchant, a warranty is implied that the goods will be merchantable. To be merchantable, the goods must be such as would "pass without objection in the trade" and as "are fit for the ordinary purposes for which such goods are used." Code § 8.2-314(2)(a), (c). The first phrase concerns whether a "significant segment of the buying public" would object to buying the goods, while the second phrase concerns whether the goods are "reasonably capable of performing their ordinary functions." *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wash.2d 413, 886 P.2d 172, 180 (Wash.1994). In order to prove that a product is not merchantable, the complaining party must first establish the standard of merchantability in the trade. *Laird v. Scribner Coop, Inc.*, 237 Neb. 532, 466 N.W.2d 798, 804 (Neb.1991). Bayliner correctly notes that the record contains no evidence of the standard of merchantability in the offshore fishing boat trade. Nor does the record contain any evidence supporting a conclusion that a significant portion of the boat-buying public would object to purchasing an offshore fishing boat with the speed capability of the 3486 Trophy Convertible.

Crow, nevertheless, relies on his own testimony that the boat's speed was inadequate for his intended use, and Atherton's opinion testimony that the boat took "a long time" to reach certain fishing grounds in the Gulf Stream off the coast of Virginia. However, this evidence did not address the standard of merchantability in the trade or whether Crow's boat failed to meet that standard. Thus, we hold that Crow failed to prove that the boat would not "pass without objection in the trade" as required by Code § 8.2-314(2)(a).

We next consider whether the record supports a conclusion that Crow's boat was not fit for its ordinary purpose as an offshore sport fishing boat. Generally, the issue whether goods are fit for the ordinary purposes for which they are used is a factual question. See [citation]. Here, the evidence is uncontroverted that Crow used the boat for offshore fishing, at least during the first few years after purchasing it, and that the boat's engines were used for 850 hours. While Crow stated that many of those hours were incurred during various repair or modification attempts and that the boat was of little value to him, this testimony does not support a conclusion that a boat with this speed capability is generally unacceptable as an offshore fishing boat. Thus, considered in the light most favorable to Crow, the evidence fails to establish that the boat was not fit for the ordinary purpose for which it was intended.

We next address Crow's claim that Bayliner breached an implied warranty of fitness for a particular purpose. Code § 8.2-315 provides that when a seller "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 shall be fit for such purpose." ... This statute embodies a long-standing common law rule in Virginia. *Layne-Atlantic Co. v. Koppers Co.*, 214 Va. 467, 471, 201 S.E.2d 609, 613 (1974). The question whether there was an implied warranty of fitness for a particular purpose in a sale of goods is ordinarily a question of fact based on the circumstances surrounding the transaction....

For these reasons, we will reverse the trial court's judgment and enter final judgment in favor of Bayliner.

Reversed and final judgment.

### Notes and Questions

1. Express warranties in a sale of goods transaction are governed by UCC § 2-313. Under this section, an express warranty does not require the use of specific terms like guarantee or warranty, nor does it necessitate an explicit promise. It is sufficient that

the seller makes a representation concerning the goods, provides a description, or displays a sample or model thereof.

However, UCC § 2-313(2) clarifies that “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.” Courts have consistently held that general sales talk, puffery, or exaggerated claims do not establish an express warranty. Do you agree that the statement in *Bayliner Marine* that the boat “delivers the kind of performance you need to get to the prime offshore fishing grounds” is such a statement?

UCC § 2-313(1) further specifies that for a seller’s statement to become a warranty, it must “become part of the basis of the bargain.” Courts, however, are divided on what this means. Some courts require the plaintiff to prove actual reliance on the false statement, while others do not require any proof of buyer reliance. Finally, some courts take the middle ground by applying a presumption that the buyer relied on the seller’s representation, which the seller can rebut with contrary evidence.

2. The UCC allows sellers to negate or limit any express warranty, provided that these disclaimers comply with the code’s requirements. Under UCC § 2-316(1), a disclaimer of an express warranty is ineffective if it cannot be interpreted as consistent with other terms in the contract that create the express warranty. UCC § 2-316 Cmt. 1 clarifies that this section “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...”

UCC § 2-316(1), however, is expressly subject to the code’s parol evidence rule (UCC § 2-202), which, under certain circumstances, might exclude oral statements, including those made by the seller regarding the sold goods. Suppose, for example, that a seller makes an oral representation regarding the goods during negotiations (“this used car has never been involved in an accident”). Later, the parties execute a written agreement that includes an integration (merger) provision, stating that the document contains all the parties’ representations and obligations toward each other. As we further discuss in the section on interpretation and the parol evidence rule, under such circumstances, the evidence concerning the oral statement might be inadmissible, meaning that it will not create an enforceable warranty.

Do you think it makes sense to apply the parol evidence rule to the seller’s oral representations? Why or why not? Some courts require the integration clause to be

conspicuous in order to waive an express warranty. *E.g.*, *Seibel v. Layne & Bowler, Inc.*, 641 P.2d 668, 671 (Or. App. 1982). Do you think that this resolves the issue?

3. The UCC also includes several implied warranties by the seller that are assumed to be part of the contract unless properly disclaimed (following a process set forth in the code; more on that below). These include a warranty that the seller is passing good title, UCC § 2–312(a)(1), and the two implied warranties that were at issue in *Bayliner Marine*: the implied warranty of merchantability, set forth in UCC § 2–314 and the implied warranty of fitness for a particular purpose under UCC § 2–315.
4. The implied warranty of merchantability arises when the seller is a merchant, as defined in UCC § 2–104(1) (“Merchant means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction...”).

UCC § 2–314(2) enumerates six promises that a merchant implicitly makes as part of the warranty, the two most important of them are those discussed in *Bayliner Marine*: That the goods would “pass without objection in the trade,” UCC § 2–314(2)(a), and that they “are fit for the ordinary purposes for which such goods are used.” UCC § 2–314(2)(c). *See, e.g.*, *Est. of Pilgrim v. Gen. Motors LLC*, 596 F. Supp. 3d 808 (E.D. Mich. 2022) (a car with a defect in design that can cause its engine to fail is unmerchantable); *Mitchell v. BBB Services Co. Inc.* 582 S.E.2d 470 (Ga. Ct. App 2003) (a bone in an hamburger breaches the implied warranty of merchantability if consumers would not reasonably expect it); *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846. (3d. Cir. 1967) (tendering one-day-old chicks that turn out to be sick breaches the implied warranty of merchantability). The court in *Bayliner Marine* discussed this warranty and ruled that the buyer did not prove it was breached. What evidence do you think the buyer was missing to substantiate his claim?

5. The implied warranty of fitness for a particular purpose is not limited to sellers who are merchants but requires the buyer to rely on the seller’s “skill or judgment to select or furnish suitable goods,” UCC § 2–315, and that the seller had “reason to know any particular purpose for which the goods are required.” *Id.* For example, “shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.” UCC § 2–315, cmt. 2. Many courts held that this warranty only applies when the buyer’s particular purpose is different from the ordinary one. *E.g.*, *Oglesbee v. Glock, Inc.*, 702 F. Supp. 3d



1172, 1177 (N.D. Okla. 2023) (buying a gun for “recreational” shooting does not satisfy the requirements of a particular purpose).

6. The implied warranties of merchantability and fitness for a particular purpose can also be disclaimed in several ways under UCC § 2-316(2)–(3). To disclaim the implied warranty of merchantability “the language must mention merchantability and in the case of a writing must be conspicuous.” UCC § 2-316(2). The code defines “conspicuous” as one “that a reasonable person against which it is to operate ought to have noticed it.” UCC § 1-201(10). When it comes to the implied warranty of fitness for a particular purpose the disclaimer must be in conspicuous writing and will be effective if it states that “[t]here are no warranties which extend beyond the description on the face hereof.” *Id.*
7. Additional methods for excluding implied warranties are outlined in UCC § 2-316(3), with the “as is” disclaimer being one of the most common in practice. While this section does not explicitly require that the disclaimer be conspicuous, most courts agree that such a requirement should be implied. *See Am. Aerial Servs., Inc. v. Terex USA, LLC*, 39 F. Supp. 3d 95 (D. Me. 2014). Additionally, sellers may limit the remedies available for a breach of warranties under UCC § 2-719, which does not require those limitations to be conspicuous.

### **Note: Warranties in context**

In this section, we focus on the rules regarding contractual warranties, particularly under Article 2 of the UCC. However, in real-life cases involving breaches of warranty, additional claims and causes of action often arise.

### **Mutual Mistakes**

There is a partial overlap between the rules regarding warranties and the doctrine of mutual mistake, which we cover in more depth elsewhere. In many cases, though not all (can you think of why?), a mistake regarding pertinent facts may give rise to a buyer’s claim under either option. The Restatement explains why, in such situations, buyers typically prefer to rely on a breach of warranty claim rather than seeking to avoid the contract under the doctrine of mutual mistake:

The rule [concerning mutual mistakes] has a close relationship to the rules governing warranties sale by a seller of goods or of other kinds of property. A

buyer usually finds it more advantageous to rely on the law of warranty than on the law of mistake.

Because of the broad scope of a seller's warranties, a buyer is more often entitled to relief based on a claim of breach of warranty than on a claim based on mistake. Furthermore, because relief for breach of warranty is generally based on the value that the property would have had if it had been as warranted (see Uniform Commercial Code § 2-714(2)), it is ordinarily more extensive than that afforded if he merely seeks to avoid the contract on the ground of mistake.

Nevertheless, the warranties are not necessarily exclusive and, even absent a warranty, a buyer may be able to avoid on the ground of mistake...

Restatement (Second) of Contracts § 152, cmt. g.

### **Tort Claims and Product Liability**

Liability for breach of warranties, and in particular the implied warranty of merchantability, is somewhat similar to product liability claims under tort law. *See* Restatement (Third) of Torts, Products Liability § 1 ("one engaged in the business of selling ... a defective product is subject to liability for harm to persons or property caused by the defect."). In fact, product liability laws were partly developed as a response to limitations in traditional contract warranty law, such as the ease of disclaiming them or the need to prove contract privity (which can be challenging when, for example, buyers purchase from sellers who are not the manufacturers).

In cases involving personal physical injuries, modern product liability laws typically provide buyers with a more favorable cause of action than contractual warranty claims. However, contractual warranties, often bolstered by consumer protection legislation, are more relevant in cases of economic loss, where a defect causes financial loss but no physical harm to persons or property. For instance, if a defective product forces a business to shut down, resulting in lost revenue, this would be considered an economic loss. In such cases, warranty law might be the preferred claim because recovery in tort is typically unavailable for purely economic loss. Restatement (Third) of Torts, Products Liability § 21. Not surprisingly, jurisdictions differ in how they define "economic loss," a topic that is well beyond the scope of a course in contract law.

There are, of course, other differences between a cause of action in contract law and tort law, such as the availability of punitive damages in tort law or the typically longer statute of limitation period under contract law.

## Consumer Legislation and the Magnuson-Moss Warranty Act

Contractual warranties, including those under the UCC, are often supplemented or affected by a host of federal and state consumer protection laws, which may require certain terms in consumer contracts or prohibit the inclusion of others. A course on contract law typically can only scratch the surface of this large and complex body of law.

One important example is the Magnuson-Moss Warranty Act (MMWA). “Congress passed the MMWA in 1975 in response to an increasing number of consumer complaints regarding the inadequacy of warranties on consumer goods. The purpose of the MMWA is to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.” *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1272 (11th Cir. 2002) (internal citations omitted).

Buyers often encounter a so-called warranty package that disclaims implied warranties of merchantability and fitness for a particular purpose (while also excluding consequential damages and instead limiting remedies to repair or replacement of defective products). The MMWA addresses this by preempting UCC § 2-316 (which, as you surely remember, deals with disclaimers of warranties). Under the MMWA, if sellers provide any written warranty for the goods, they cannot disclaim implied warranties. 15 U.S.C. § 2308(a). However, the MMWA allows the duration of implied warranties to be limited to the length of the express warranty, as long as the limitation “is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.” 15 U.S.C. § 2308(b). The rationale for this provision is that express warranties may sometimes give consumers fewer rights than they appear to, so the MMWA requires sellers to comply with the implied warranties under the UCC.

The MMWA also requires sellers to disclose whether their warranties are “full” or “limited.” A full warranty cannot limit the duration of implied warranties, must provide for remedying of defects within a reasonable time at no extra charge, allow consumers to rescind the purchase or receive a new product if repairs are inconvenient, and must state any exclusions of consequential damages in conspicuous language. Otherwise, the warranty is considered limited. 15 U.S.C. §§ 2303–2304. Although the intent was to encourage companies to offer full warranties, most modern warranties are limited.