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Express Warranty of Fitness for a Particular Purpose: Extent of Overlap in Same Factual Context
with Implied Warranty of Fitness for a Particular Purpose

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Every law student knows that a warranty of fitness for a particular purpose is implied in a sale of goods where, at the time of contract, the seller knows or has reason to know of the buyer's particular purpose for purchasing the goods “and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.” [\[FN1\]](#) Given these facts, not only should they create an implied warranty of fitness for a particular purpose under [U.C.C. § 2-315](#) but it seems that they may reasonably be construed by the trier of the facts to also create an express warranty under [U.C.C. § 2-313\(1\)\(a\)](#). [\[FN2\]](#) Thus viewed against the existence of these particular background facts--i.e., words and conduct by the parties that satisfy the factual criteria of [U.C.C. § 2-315](#)-- it seems that the seller is promising [\[FN3\]](#) the buyer as part of their agreement [\[FN4\]](#) that the goods that the seller is furnishing will accomplish the buyer's intended purpose in making the purchase. In other words, a promise by the seller that the goods offered for sale will be fit for the buyer's particular purpose may be inferred from the same factual circumstances that give rise under [U.C.C. § 2-315](#) to an implied warranty of fitness for a particular purpose. [\[FN5\]](#)

To be sure, where the seller specifically states to the buyer that the goods will meet the buyer's needs, some courts have found that both an express and an implied warranty that the goods will meet the buyer's needs are created. *Custom Automated Machinery v. Pendee Corp.* is illustrative. [\[FN6\]](#) There, the seller knew that the buyer needed a thermoforming machine that would operate at 120 cycles per hour and that the buyer was relying, and did rely, on the seller to provide a thermoforming machine with that capacity. In fact, the seller had told the buyer during negotiations that the machine was capable of operating at 120 cycles per hour. The court had no difficulty in holding that an express warranty as well as an implied warranty for a particular purpose were created. [\[FN7\]](#) As previously mentioned, it seems that the outcome should be no different where the seller does not specifically make a promise or an affirmation of fact that the goods being offered would be suitable for the buyer's particular needs so long as the trier of fact can reasonably infer from the factual circumstances that the seller had reason to know of the buyer's purpose in wanting to purchase them and that the buyer was relying on the seller's skill or judgment to furnish such goods. [\[FN8\]](#) In such a factual context, the seller's furnishing of the goods arguably would seem to be the equivalent of the seller's making a promise or statement to

the buyer that “these goods that I am selling you will satisfy your particular needs.”

At first blush, it would follow that in virtually every case where a party sues for breach of implied warranty for a particular purpose, the party should also assert a cause of action for breach of an express warranty based on the seller's promise or affirmation inferred from the facts. [FN9] However, the chances of success when the seller has not specifically promised or affirmed that the product would meet the buyer's particular needs are not assured. For example, in *Whitehouse v. Lange*, [FN10] the sellers knew from the buyers that the buyers were purchasing a mare for breeding purposes, and the lower court found that the buyers had relied on the sellers to furnish a suitable breeding mare. It concluded that an implied warranty of fitness for a particular purpose was created but that the sellers had made no express warranty. [FN11] In other words, the lower court apparently did not infer from the circumstances--i.e., the seller's knowledge that buyer was purchasing the horses for breeding purposes and that the buyers were relying on the sellers to furnish such a mare--that the sellers had implicitly promised that the mare being offered for sale was suitable for breeding purposes and that such promise created an express warranty under [U.C.C. § 2-313\(1\)\(a\)](#).

The question is, why not? Why did the Idaho court not infer from the facts that the seller, in essence, was offering for sale a horse suitable for breeding? Stated in more detail, why did the court implicitly conclude that the seller's offer was to sell a horse and not a horse that was suitable for breeding? Certainly a reasonable interpretation of the facts would lead to the conclusion that the seller had offered to sell a horse suitable for breeding.

Of course, in any given case there may be factors that would lead a trier of the facts to find that an implied warranty under [U.C.C. § 2-315](#) was created and, at the same time, conclude that the same circumstances did not also create an express warranty that the goods would satisfy the buyer's particular needs. Suppose, for example, the buyer tells the seller that it needs paint for the exterior walls of a stucco building which are in a chalky and powdery condition, and the seller knows that the buyer is relying on the seller's “skill or judgment” to select a suitable paint. The seller says “I would recommend paint x or y” or “in my opinion, paint x or y will do a good job.” The buyer purchases paint x, but it does not adhere to the powdery surfaces, so he sues for breach of an express warranty and an implied warranty of fitness for a particular purpose. Here it might be argued that although an implied warranty arose under [U.C.C. § 2-315](#), no express warranty was created because the seller's statement did not amount to a promise or affirmation of fact but rather was only an expression of opinion or recommendation. This distinction was made in *Tyson v. Ciba-Geigy Corp.* [FN12] There, plaintiff-buyer told defendant-Farm Chemical's sales representative that it needed an herbicide for the no-till cultivation of soybeans. Farm Chemical's representative “gave Dual 8E a good recommendation and told plaintiff that it would ‘do a good job’.” [FN13] Plaintiff relied on this recommendation and purchased Dual 8E from Farm Chemical, which proved to be ineffective. The court held that the statement “Dual 8E would ‘do a good job’ is a mere expression of opinion and did not create an express warranty” [FN14] but that the trial court erred in directing a verdict on the issue of whether a [U.C.C. § 2-315](#) implied warranty had been created because there was evidence “to support a finding that the seller, Farm Chemical, had reason to know of the particular purpose, the no-till cultivation of soybeans, for which the product was required and that plaintiff was relying on its recommendation when he ordered the Dual 8E.” [FN15] A party must therefore be aware that there are factual circumstances from which it may be concluded that a seller's statement that a

product will be suitable for the buyer's purpose is sufficient to satisfy the requirement of [U.C.C. § 2-315](#) that the buyer rely on the seller's "skill or judgment," but at the same time not sufficient to satisfy the "promise or affirmation of fact" requirement of [U.C.C. § 2-313\(1\)\(a\)](#).

What about the reverse situation? Are there circumstances where a court will find that the seller has expressly warranted that the goods will meet the buyer's needs but will also conclude that an implied warranty under [U.C.C. § 2-315](#) was not created? One answer depends on the eternal debate about whether a buyer's reliance on a seller's promise or affirmation of fact is necessary to the creation of an express warranty under [U.C.C. § 2-313\(1\)\(a\)](#). Insofar as an implied warranty is concerned, it is clear that a buyer must prove that it actually relied on the seller's "skill or judgment" in order to establish the existence of the warranty. Absent such reliance, no implied warranty arises. However, the same is not necessarily true for the creation of an express warranty. There are courts that have used a contract approach to determine whether an express warranty has been created. [\[FN16\]](#) If a contract approach is used, then reliance by the buyer on the seller's promise or affirmation of fact is not necessary to create an express warranty, just as reliance is irrelevant to the formation of a contract. [\[FN17\]](#) As stated in pertinent part in the Restatement Second of Contracts, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." [\[FN18\]](#) Thus an express warranty becomes part of the sales contract in the same manner as every other term of the sales contract--by a showing that there is mutual assent and consideration. In short, if a contract approach is used, then a seller's promise as to the quality of the goods should be treated no differently from the seller's promise as to the quantity of goods being offered for sale. Both promises should become part of the sales contract unless the seller can show that its promise as to the quality of the goods lacked mutual assent or consideration. Thus if the circumstance shows that the buyer did not rely on the seller's skill or judgment to furnish goods to meet the buyer's known needs, an express warranty may still be created if a contract approach is used, even though an implied warranty of fitness for a particular purpose will not arise.

Another and different answer will depend on various scenarios, including (i) whether the express warranty was made during the negotiations leading to the execution of a completely integrated written contract; (ii) whether the express warranty is contained in a written agreement; and (iii) whether the buyer learned from the seller before entering a written agreement that the warranty was not true.

First, let us take the case where the parties execute a completely integrated contract of sale that does not contain an express warranty. Under this scenario, the parol evidence rule should preclude the buyer from offering evidence of any express warranty that the seller made during the negotiation in order to include it as a term of the agreement. [\[FN19\]](#) In contrast, an implied warranty, it has been explained, is not a term of the contract but is a warranty implied as a matter of law. Thus the parol evidence rule will not preclude the buyer from proving any statements that the seller made during negotiation in order to establish the existence of an implied warranty of fitness for a particular purpose under [U.C.C. § 2-315](#). [\[FN20\]](#) Put differently, the parol evidence rule will not prevent the buyer from proving the discussions of the parties, including the seller's statements during the negotiation, in order to show that the seller had reason to know of the buyer's purpose in purchasing the goods and that the buyer was relying on the seller's skill or judgment to furnish such goods.

Now let us assume that the express warranty is contained in a written contract that is a complete and exclusive statement of the parties' agreement. Here oral disclaimer statements

made during the negotiation should not be admissible to negate or limit the express warranty which is a term of the written contract. [\[FN21\]](#) With respect to the implied warranty of fitness for a particular purpose, oral disclaimer statements will be legally insufficient to disclaim the warranty. [\[FN22\]](#) However, those oral disclaimer statements “may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had ‘reason to know’ under the section [\[U.C.C. § 2-315\]](#) on implied warranty of fitness for a particular purpose.” [\[FN23\]](#) Thus the oral disclaimer statements in this hypothetical may prevent an implied warranty from arising under [U.C.C. § 2-315](#) but will not prevent the creation of an express warranty to that effect. [\[FN24\]](#)

Further, in this hypothetical, suppose that, before the buyer signed the agreement, the buyer learned that the seller's statements were not true. Under these circumstances, there would be no reliance and hence no [U.C.C. § 2-315](#) warranty. However, based on a contract approach which looks to the outward manifestations of the parties, an express warranty may exist even though the buyer signed the agreement knowing that the seller's written warranty was not true. In this situation, the Second Circuit has held that unless the buyer has acquired its knowledge from the seller, the seller's written warranty is enforceable. [\[FN25\]](#) However, even if the buyer acquired the information from seller, it may be argued that evidence of such information should not be admitted to negate the express warranty because of the parol evidence rule. [\[FN26\]](#)

[\[FN1\]](#). [U.C.C. § 2-315](#). “The buyer, of course, must actually be relying on the seller.” (Official Comment 1 to [§ 2-315](#)).

[\[FN2\]](#). Under [U.C.C. § 2-313](#)(1)(a), a seller's promise or affirmation of fact that becomes part of the basis of the bargain creates an express warranty that the goods will conform to the promise or affirmation.

[\[FN3\]](#). “A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.” ([Restatement \(Second\) of Contracts § 4 \(1981\)](#)). Also, “intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance. ([Restatement \(Second\) of Contracts § 4](#) at Comment a).

[\[FN4\]](#). See [U.C.C. § 2-204](#) (“A contract for the sale of goods may be made in any manner sufficient to show agreement”). In pertinent part, “agreement,” as used in the U.C.C., “means the bargain of the parties in fact, as found in their language or inferred from other circumstances” ([U.C.C. § 1-201](#)(3)).

[\[FN5\]](#). The warranty created by [U.C.C. § 2-315](#) is implied as a matter of law. See [Quality Acceptance Corp. v. Million & Albers, Inc., 367 F. Supp. 771, 14 U.C.C. Rep. Serv. 78 \(D. Wyo. 1973\)](#).

[\[FN6\]](#). [Custom Automated Machinery v. Penda Corp., 537 F. Supp. 77, 33 U.C.C. Rep. Serv. 856 \(N.D. Ill. 1982\)](#). Accord, [Shotkoski v. Standard Chemical Mfg. Co., 195 Neb. 22, 237 N.W.2d 92, 18 U.C.C. Rep. Serv. 328 \(1975\)](#) (seller stated that cattle feed supplement would increase milk production); [Larutan Corp. v. Magnolia Homes Mfg. Co. of Nebraska, 190 Neb. 425, 209 N.W.2d 177 \(1973\)](#) (seller assured buyer that Paczyme, a soil compaction substance,

could do the job).

[FN7]. [Custom Automated Machinery](#), 537 F. Supp. at 83.

[FN8]. This assumes that the factual circumstances were communicated from the buyer to the seller.

[FN9]. Sometimes a party alleges only a claim for breach of an implied warranty of fitness for a particular purpose. See [Kokomo Opalescent Glass Co. v. Arthur W. Schmid Intern., Inc.](#), 371 F.2d 208 (7th Cir. 1966); [Outlook Windows Partnership v. York Intern. Corp.](#), 112 F. Supp. 2d 877, 43 U.C.C. Rep. Serv. 2d 546 (D. Neb. 2000); [Circle Land and Cattle Corp. v. Amoco Oil Co.](#), 232 Kan. 482, 657 P.2d 532, 35 U.C.C. Rep. Serv. 403 (1983); [Handy v. Holland Furnace Co.](#), 11 Wis. 2d 151, 105 N.W.2d 299 (1960); [Frisken v. Art Strand Floor Coverings](#), 47 Wash. 2d 587, 288 P.2d 1087 (1955).

[FN10]. [Whitehouse v. Lange](#), 128 Idaho 129, 910 P.2d 801, 31 U.C.C. Rep. Serv. 2d 78 (Ct. App. 1996).

[FN11]. [Whitehouse](#), 128 Idaho 129, 910 P.2d at 804.

[FN12]. [Tyson v. Ciba-Geigy Corp.](#), 82 N.C. App. 626, 347 S.E.2d 473, 2 U.C.C. Rep. Serv. 2d 452 (1986).

[FN13]. [Tyson](#), 347 S.E. 2d at 477.

[FN14]. But see [Larutan Corp. v. Magnolia Homes Mfg. Co. of Nebraska](#), 190 Neb. 425, 209 N.W.2d 177 (1973) (seller assured buyer that product could do the job). See also 1 J. White & R. Summers, Uniform Commercial Code 5th ed, §§ 9-4 and 9-7 (2006) (discussing difficulty in determining whether seller's statement is a warranty or only an expression of the seller's opinion, for purposes of [U.C.C. § 2-313](#)).

[FN15]. [Tyson](#), 347 S.E. 2d at 478.

[FN16]. [Lennar Homes, Inc. v. Masonite Corp.](#), 32 F. Supp. 2d 396, 404, 38 U.C.C. Rep. Serv. 2d 56 (E.D. La. 1998) (sale of goods); [Allegheny & Western Energy Corp. v. Columbia Gas System, Inc.](#), Fed. Sec. L. Rep. (CCH) P 92921, 1986 WL 13360 at *5 (S.D. W. Va. 1986) (sale of business); [CBS Inc. v. Ziff-Davis Pub. Co.](#), 75 N.Y.2d 496, 554 N.Y.S.2d 449, 553 N.E.2d 997, 1001, 7 A.L.R.5th 1154 (1990) (sale of business). See Sidney Kwestel, [Freedom From Reliance: A Contract Approach to Express Warranty](#), 26 Suffolk U.L. Rev. 959, 971-82, 988-991(1992).

[FN17]. See [Kwestel](#), 26 Suffolk U.L. Rev. at 982-88.

[FN18]. [Restatement \(Second\) Contracts § 17](#) (1981).

[FN19]. [U.C.C. § 2-202](#); Official Comment 2 to U.C.C. § 2-316; [Betaco, Inc. v. Cessna Aircraft](#)

[Co.](#), 103 F.3d 1281, 31 U.C.C. Rep. Serv. 2d 1 (7th Cir. 1996); [Beech Aircraft Corp. v. Flexible Tubing Corp.](#), 270 F. Supp. 548 (D. Conn. 1967); [Jordan v. Doonan Truck & Equipment, Inc.](#), 220 Kan. 431, 552 P.2d 881, 19 U.C.C. Rep. Serv. 1297 (1976); [Nettles v. Imperial Distributors, Inc.](#), 152 W. Va. 9, 159 S.E.2d 206, 210 (1968).

[FN20]. [Fossum v. Timber Structures, Inc.](#), 54 Wash. 2d 317, 341 P.2d 157 (1959); [McDonald v. Sanders](#), 103 Fla. 93, 137 So. 122 (1931).

[FN21]. [U.C.C. § 2-202](#). Even if admissible, the oral disclaimers may not be effective under [U.C.C. § 2-316](#), which provides that words that tend to negate or limit an express warranty are inoperative to the extent that they cannot reasonably be construed as consistent with the words or conduct relevant to the creation of the express warranty.

[FN22]. [U.C.C. § 2-316\(2\)](#).

[FN23]. Official Comment 5 to [U.C.C. § 2-316](#), which reads as follows:

Subsection (2) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had “reason to know” under the section on implied warranty of fitness for a particular purpose.

[FN24]. A question to be answered another day is: If the U.C.C. requires some form of reliance for the creation of an express warranty, should not an oral or inoperative disclaimer be relevant on the issue of reliance? In other words, should not Official Comment 2 to [U.C.C. § 2-316](#) (quoted in footnote 23 supra) apply equally to an express warranty? Further, [U.C.C. § 2-316\(3\)\(b\)](#) provides that where a buyer has examined or has refused to examine the goods before entering into the contract, “there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.” Should this also be applied where the issue is whether an express warranty was created? It has been stated that such an inspection “could not offset express warranties.” See [General Elec. Co. v. U.S. Dynamics, Inc.](#), 403 F.2d 933, 935, 5 U.C.C. Rep. Serv. 1053 (1st Cir. 1968). Nevertheless, such an inspection may preclude the creation of an express warranty if the buyer relied upon this inspection rather than the seller's promise or affirmation of fact, at least in those jurisdictions which require reliance under [U.C.C. § 2-313](#). See [Sylvia Coal Co. v. Mercury Coal & Coke Co.](#), 151 W. Va. 818, 156 S.E.2d 1, 4 U.C.C. Rep. Serv. 650 (1967).

[FN25]. E.g., [Rogath v. Siebenmann](#), 129 F.3d 261, 34 U.C.C. Rep. Serv. 2d 63 (2d Cir. 1997).

[FN26]. Sidney Kwestel, Express Warranty as Contractual--The Need for a Clear Approach, 33 Mercer Law Rev. 554, 562-67 (2002).

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