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CHAPTER HIGHLIGHTS

THIS chapter focuses on product liability: the liability that manufacturers and other sellers have to immediate purchasers, users, and consumers of products, or to affected bystanders, for physical injury and property damage caused by defective products they place on the market. The chapter opens with some background on the shift in law surrounding the protection of the public from harmful products placed on the market. The remainder of the chapter is devoted to three well-recognized theories of liability—negligence, breach of warranty, and strict liability—that a buyer may use as the basis for recovery if he or she is injured by a defective product. Similarities and differences among these theories are noted. Some discussion in the chapter revolves around the Magnuson-Moss Warranty Act, a federal law that Congress passed to help prevent deceptive practices in the field of warranties (guarantees) made by sellers of products.



Products Liability Law: An Overview

The following summary is fictitious, but it is based on a real article that appeared in a regional newspaper. It is a typical products liability case.

Superman Coaster Suspended

Visitors won't be waiting to board the Superman Ride of Steel roller coaster this weekend. Operation of this ride has been suspended indefinitely after a 55-year-old man was thrown to his death on June 1 at Silver Lake in Morton, Florida. A report by the Florida Department of Public Safety, which investigated the June 1 accident, faulted a park attendant for not making sure the man was secured by a T-bar lap restraint. Park employees said the man was properly secured and the primary cause of the accident was the configuration of the restraint system. The June 1 accident was the fifth time since 2001 that a patron has fallen from a ride made by the Competon Co. In all five cases, the T-bar lap restraint was called into question. Four of the accidents were fatal.

If any or all of the five people referred to in this newspaper article were to sue for injuries sustained, they most likely would bring their claim against the manufacturer of the roller coaster for injuries due to a defect in the roller coaster. This case would come under what the law terms *product liability*. Lawsuits involving products liability have become very common because each year many Americans are injured and often left permanently disabled, while others die, in consumer products-related accidents. All states allow some form of recovery to persons injured by defective products. Many states have enacted comprehensive products liability statutes. Products liability cases run from the obvious (a car sold without brakes that are operational) to the not so obvious (injury from exposure to tobacco or the harmful side effects from an improperly tested drug). Products liability lawsuits have been filed for such items as computers, portable hair dryers, floor wax, sporting equipment, cars, sunglasses, eye drops, electric toothbrushes, barbecue grills, power lawn mowers, contraceptives, insulation materials, and prescription drugs and vaccines. These lawsuits have often resulted in big monetary awards, often in the millions of dollars. Much of the law surrounding products liability is found in common law, except where replaced by state statutes and the Uniform Commercial Code. Because state statutory provisions can be very diverse, the U.S. Department of Commerce has issued the Model Uniform Products Liability Act (MUPLA) for voluntary use by the states.



Product Liability: A Comprehensive Definition

product liability liability of manufacturers and sellers of products to persons harmed by defects in the products

Picking up on the discussion in the opening paragraph, it is time to define products liability so as to clear up any confusion as to what it encompasses. **Product liability** refers to the liability that manufacturers or other sellers in the chain of sale (e.g., wholesalers and retailers) have not only to immediate purchasers but also to the general public (e.g., someone to whom the product was loaned, given, etc.; a consumer, a bystander) for physical injury or property damage caused by defective products they place on the market or for the failure of these products to perform adequately once they are purchased. The cornerstone of a plaintiff's case is the product's defect. There are three types of defects that incur liability: design defects, manufacturing defects, and defects in marketing. Design defects exist before the product is manufactured (poor engineering and poor choice of materials). On the other hand, manufacturing

defects occur during the construction or production of the item. Marketing defects deal with poor or improper instructions as well as failures to warn consumers of hidden dangers in the product.



Shift in the Law

caveat venditor “let the seller beware”

caveat emptor “let the buyer beware”

There has been a significant shift in the law over the years. This shift has increased protection for the public by expanding the liability of manufacturers and sellers. The rule of **caveat venditor**, or “let the seller beware,” now prevails. This rule reflects the view that the seller should bear the burden of determining that goods conform to certain standards. The rule of **caveat emptor**, or “let the buyer beware,” has practically been abandoned by the courts. This strict rule had its heyday in the nineteenth and early twentieth century when buyers were expected to examine goods they were buying and to rely on their own judgment about whether these goods were of suitable quality and free from defects. This rule assumed that both seller and buyer were in an equal position to bargain. In today’s society, however, the seller has more product knowledge, and the consumer possesses far less bargaining power than the seller. Besides, we live in an era of just prices and fair dealing in transactions. As noted in Chapter 15, the UCC insists upon these principles.

The trend in modern court cases is to allow anyone who is harmed by a product to sue whoever is in any way responsible. At one time, it was not possible for anyone except the ultimate consumer to sue. Even the ultimate consumer was limited to suing the immediate seller, with whom the consumer had a contract. This type of suit was generally not successful because harm from the defective product was seldom the fault of the retailer (the immediate seller), who had neither designed nor manufactured the product.

Today, product liability cases may be based on any one of three well-recognized theories of liability: negligence, breach of warranty, or strict liability. A buyer who is injured and elects to sue may do so using one or all of these theories as the basis for recovery in the same suit. (See also Table 18.1.)

In view of the seller’s increased liability, there has been a great proliferation of product warnings.



Negligence

Negligence, a tort discussed in Chapter 4, is the failure of a person to act carefully (exercise reasonable care), thereby causing another person to suffer physical injury or property damage (e.g., a defective tire blows out and causes total loss of the car). As applied to product liability, the law of negligence imposes a duty on the manufacturer or other seller in the chain of sale to exercise reasonable care to place a safe product on the market. A safe product is one that is free from defects. Section 402A of the Restatement (Second) of Torts states that a defect is a condition not anticipated by the user or consumer based on its intended use and that as a result, this defect makes the product unreasonably dangerous to use (i.e., it could cause serious injury, death, or property damage). Defects can arise from the design, manufacture, packaging, or labeling of a product. Negligent conduct very often relates to other factors, such as a failure to properly test or inspect the final product before it leaves the manufacturer or a failure to attach a label to a product

TABLE 18.1 Theories on Which Product Liability Cases Are Based

| Theory of Liability | Basis for Legal Action | Degree of Proof Required | Who Can Sue | Who Can Be Sued |
|---------------------|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------|---------------------------------------|
| Negligence | Tort | Defective product. Negligent conduct (fault) must be established. Product defect caused buyer's injury. | Anyone harmed. | All parties in chain of distribution. |
| Warranty | Contract | Existence and breach of warranty. Breach caused buyer's injury. | Under the UCC in most states: the buyer, members of the buyer's family, household guests. | Immediate seller. |
| | | Notice of breach given to seller. | According to modern case law, anyone harmed. | All parties in chain of distribution. |
| Strict liability | Tort | Product was unreasonably dangerous when it left the manufacturer's or other seller's control, and the buyer suffered an injury without reference to negligence. | Anyone harmed. | All parties in chain of distribution. |

properly warning of a known danger related to the product. In one sense, these failures could be considered defects.

An ultimate consumer who purchases a defective product and is injured, dies, or suffers property damage most likely will initiate a lawsuit. (In case of death, the person's estate would bring the suit.)

The driver for a local soft drink company delivered several cases of its soft drink to a restaurant. When a waitress was placing glass bottles of the drink in a large refrigerator in the restaurant's kitchen, a bottle exploded in her hand. The bottle broke into two jagged pieces and inflicted a deep cut, severing blood vessels, nerves, and muscles in the palm of her hand and thumb. The waitress could sue the soft drink company for negligence.

Whom does the ultimate purchaser sue to recover damages? This question was answered by the court in the landmark case of *MacPherson v. Buick Motor Co.* (111 N.E. 1050). This famous New York Court of Appeals case established beyond question that the manufacturer or any other seller in the chain of distribution (e.g., a wholesaler or retailer) responsible for placing the defective product on the market is liable. This case further established that others (e.g., innocent bystanders) who were harmed by the defective product could also sue. Negligent conduct very often relates to a manufacturer's improper design of the product, a failure to inspect the product properly for defects after it leaves the assembly line, a failure to test the product adequately, or a failure to warn of a known danger related to the product.

Suing under the negligence theory of product liability is often an unsatisfactory remedy for the injured plaintiff to pursue because proving specific acts of negligence on the part of the defendant is difficult. For example, it may be hard to prove that the manufacturer was careless in designing the product or failed to test the product after it came off the assembly line. Determining negligence in this case may involve a visit to the manufacturer's plant to examine the facilities and processes used to produce and test a product. Acquiring information in this fashion could be costly and futile.



Warranty Liability

warranty guarantee by seller that goods are not defective and that they are suitable for intended use

The story of warranty begins with a contract for the sale of goods. In that contract, as an inducement to buyers, sellers guarantee that the products they sell will conform to certain qualities, characteristics, or conditions and that they are suitable for the use for which they are intended. This guarantee by a seller is called a **warranty**. If a warranty is false, the seller has committed a breach. If the buyer suffers harm as a result of the breach, he or she may bring an action for damages.

Article 2 (on sales) and Article 2A (on leases) of the Uniform Commercial Code (UCC) designates several types of warranties that can arise in a sale or lease contract. There are two types of warranties made by sellers: express warranties and implied warranties.



Express Warranties

express warranty seller's statement of fact, promise, description, or model that buyer relies upon when purchasing goods

An **express warranty** is an oral or written guarantee given by manufacturers and sellers (e.g., retailers). Exactly what they promise in their express warranties is entirely up to them. A manufacturer's express warranty is generally in writing, either on a separate card or as part of the instructions packed with the product. As indicated, express warranties may be oral or written. Accepting an oral warranty is not a good idea because the buyer may have a problem establishing its existence if the seller should deny having given such a warranty. Under the UCC, a seller's express warranty may arise in several ways (UCC 2-313). The seller may make a factual statement or a promise, orally or in writing, about the product. The seller may also describe the goods to the buyer or show the buyer a sample of the item being sold. To constitute an express warranty, the statement, description, or sample must be part of the basis of the sale; that is, it must be one of the reasons that the buyer purchased the goods. Under the Code, the burden is on the seller to disprove the existence of an express warranty.

Statement of Fact or Promise Any oral or written statement of fact or any promise made to the buyer by the seller relating to the goods creates an express warranty.

You went to a used car dealer to purchase a used car with a V-8 engine and saw a model you liked; because of your lack of knowledge about cars, however, you could not tell whether it had a V-8 or a V-6 engine. When you asked the salesperson, she said: "This car absolutely has a V-8 engine." Based on this response and your desire for the car, you made the purchase. A few days later, not satisfied with the performance of the engine, you took the car to a garage for an evaluation, only to discover that the engine was a V-6.

In this example, the salesperson's statement is an express warranty. You bought the car not only because you liked the color and that it was in excellent condition

but also because of the salesperson's guarantee, "This car absolutely has a V-8 engine." The salesperson did not actually use the word *warranty* or *guarantee*, but that is not necessary. Under the UCC, her statement would be taken to mean, "I guarantee [promise] that this car has a V-8 engine." The salesperson could argue in court that she did not intend to give a warranty, but a court of law would follow the UCC and would probably say she did. It is not necessary that a seller intend to make a warranty. If what is said or done induces the person to buy the product, under the Code an express warranty is created.

A seller's written statement or promise may be expressed in the written contract of sale or in a separate document. Manufacturers and sellers can even create warranties through their advertisements in newspapers, brochures, and TV commercials. For example, because a TV commercial by the manufacturer said it was safe to drive on mountainous terrain at high rates of speed, you purchased a pickup truck with four-wheel drive. Courts have ruled that if you are injured while trying to do what the ad said the truck could do, a breach of an express warranty has occurred for which you may file an action for damages.

Sellers often make a variety of statements about their products. As a buyer in the marketplace, the law holds you responsible for determining which of these statements are warranties and which are simply puffing. **Puffing**, or statements by salespersons expressing their opinions about the goods they sell, does not form an express warranty (a statement of fact). The statement, "This car has the best used-car value in town," made to you by a salesperson as an inducement to purchase the car is not an express warranty. It is merely the salesperson's opinion. On the other hand, a statement of opinion made to a layperson by a seller who works as an expert is generally considered to be a warranty.

puffing salespersons' statements expressing opinions about goods they sell; type of advertising that exaggerates the quality of merchandise

The Code does not distinguish between representations of fact and opinion. Courts, however, have held that the more specific the statement, the less likely it will be treated as opinion or puffing as a matter of law.

Because an express warranty is considered part of the sales contract, part of the purchase price is consideration for the warranty. If there is a breach of warranty by the seller, the buyer may recover damages, but the sales contract remains in force.

Under the UCC, it is not essential that a warranty be given by the seller at the time of the sale. A warranty, oral or written, given by the seller following the transaction becomes a part of the original sales contract without additional consideration (UCC 2-209). An oral warranty is enforceable even though the original sales contract was in writing. As a practical matter, however, the buyer must be able to prove the existence of an oral warranty, or it will not be enforced by the courts.

Harkness purchased a guitar from the House of Music without any warranty. About a week after Harkness made the purchase, she expressed some concern about a guarantee and talked to the owner of House of Music about it. The owner said, "I guarantee all musical instruments I sell against all defects for one year." This oral warranty, although made after the sale of the guitar, was binding.

Description of the Goods If the buyer purchases goods after they are described by the seller, either orally or in writing (including drawings), there is an express warranty that the goods obtained by the buyer will conform to the description.

If you purchase goods after reading a description in a catalog or on the label of a can or box, an express warranty of description is also created.

You purchased a can of Quick-Sun at a drugstore because the words on the label stated that the contents, when applied, would give you a deep tan within fifteen minutes. This description on the can is an express warranty.

Sample of the Goods Sometimes the buyer purchases goods after inspecting a sample or model of these goods. In this case, there is an express warranty that the goods delivered to the buyer will conform to the sample or model.

The local jeweler was taking orders for class rings. Before you ordered a ring, the jeweler showed you a sample of the ring you intended to buy. The jeweler, by showing you the sample, made an express warranty that the ring delivered to you would be like the sample.



Implied Warranties

implied warranty obligation imposed upon seller by law

An **implied warranty** is an obligation the law imposes on a seller. An implied warranty is not in writing and is not part of the sales contract. When a sale of goods is made, however, certain warranties become part of the sale even though the seller may not have intended to create them. These implied warranties protect the buyer when there is little or no opportunity to inspect the goods or the seller does not expressly warrant the goods. Breach of the implied warranty is grounds for a suit for money damages if injury or damage results from use of the product. In some cases, disaffirmance of the contract is also grounds for a lawsuit for breach of warranty. The UCC has established two types of implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose (UCC 2-314; UCC 2-315). The question sometimes comes up about how long an implied warranty lasts. In most states, an implied warranty lasts forever. In a few states, however, the implied warranty lasts only as long as an expressed warranty that comes with the product. In these states, if there is no express warranty, the implied warranty lasts forever.

merchantable goods goods fit for the purposes for which they would ordinarily be used

Merchantability If a sale of new or used goods is made by the merchant who ordinarily deals in these goods, there is always an implied warranty that the goods are merchantable. **Merchantable goods** are goods that are fit for the ordinary purposes for which they are manufactured and sold and also are of average quality. Merchants have been held liable for breaching this warranty for many reasons as for example because of a dead mouse found in a soft-drink container or a worm found in a can of peas. Section 2-314 of the Code outlines the minimum requirements of merchantability. In addition to what was stated, also included under the Code are the requirements that goods (1) be adequately contained, packaged, and labeled and (2) pass without objection in the trade under the contract description. If you purchase a pocket calculator, you have the right to expect that it will perform the functions (e.g., addition and subtraction) indicated on the calculator and that you will not unexpectedly be harmed because of improper manufacturing or labeling.

You purchased an electric razor from Grigsby's Department Store. The first time you used the razor, a defect caused the motor to burn out. Because the razor was not merchantable, Grigsby's Department Store was liable for breach of the implied warranty of merchantability.

The implied warranty of merchantability is a very broad warranty. It also applies to the sale of food or drink that is consumed on the premises (as in a restaurant) or elsewhere (e.g., food purchased from a store and eaten at home) (UCC 2-314). In this case, merchantability means that the food is fit for human consumption.

The test of merchantability in the case of foods is generally based on what a reasonable person can expect to find in the food. For example, a person eating a doughnut would not expect to find a human fingernail embedded in the doughnut whereas a person can reasonably expect or anticipate finding a small fish bone in his or her fish chowder soup that he or she ordered in a restaurant. A classic case on the reasonable expectation test is *Webster v. Blue Ship Tea Room* (347 Mass. 421 N.E.2d 309). The case involved a Mrs. Webster who ordered fish chowder soup in the Blue Ship Tea Room. After three or four spoonfuls of the chowder she became aware that a fish bone had lodged in her throat. She was taken to the hospital where the bone was removed. She sued the Blue Ship Tea Room alleging breach of the warranty of merchantability. The court denied her claim. In reaching its conclusion, the court said: "We should be prepared to cope with the hazards of fish bones, the occasional presence of which . . . do not impair their fitness or merchantability." This opinion illustrates one approach a court might take. Consequently, each case brought to court involving a merchantability-of-food case will need to be decided based on the facts of the case.

An implied warranty of merchantability exists whether a merchant is selling to another merchant or to an ultimate consumer. No implied warranty of merchantability, however, exists in a sale of goods by a nonmerchant. For example, if you sell two snow tires at a garage sale, there is no implied warranty of merchantability.

Fitness for a Particular Purpose An implied warranty that goods will be fit for a particular purpose arises if at the time the contract is made, the seller knows or has reason to know the buyer's purpose and the buyer relies on the seller's skill or judgment to select something suitable (UCC 2-315). (This warranty cannot be applied when the buyer and seller have equal skill and knowledge.) This warranty applies to both merchants and nonmerchants.

Preston told Hunter, the owner of a retail paint store, that he wanted to paint the exterior of his brick house. Hunter recommended Clean Gloss Shingle and Shake paint and told Preston how to apply the paint. Preston followed the instructions carefully and applied 6 gallons. Three months later, most of the paint had peeled, flaked, or blistered. Hunter is liable for breach of an implied warranty of fitness for a particular purpose.

Goods recommended by the seller under their trade name continue to give the buyer protection under the implied warranty of fitness for a particular purpose as long as there was actual reliance on the seller's judgment.

Carp went to Auto Finishers and asked for a cleaner that would remove spots from the cloth upholstery in her new car. The seller recommended Easy Clean, the trade name of a new product on the market. When applied, however, the cleaner discolored Carp's upholstery. When Carp discovered that several other people had the same experience with Easy Clean, she had the cleaner professionally tested at a laboratory. The lab report indicated that the chemicals in the cleaner were too strong. The store was liable for breach of the implied warranty of fitness.

If the buyer does not rely on the seller's judgment but personally selects the goods, including brand-name items, or describes to the seller the type of goods he or she needs, the implied warranty of fitness for a particular purpose does not apply.



Warranty of Title

In every sale of goods under the UCC, there is an implied warranty of title by the seller, both merchant and nonmerchant (UCC 2-312). In other words, the seller automatically guarantees that he or she owns the goods (has good title) free of any encumbrances and liens and has the right to sell them.

Heinz sold a police scanner, which she had stolen, to Vance. Vance was unaware that it had been stolen. McAllister, the true owner, identified the police scanner to the police by the serial number, and it was returned to him. Vance can sue Heinz for breach of the implied warranty of title.

The warranty of title is an implied warranty. To distinguish it from those implied warranties that may be excluded from a sales contract, however, it is not designated as such under the UCC.



Exclusion of Warranties

Under the UCC, the seller may exclude certain express and implied warranties (UCC 2-316). A statement in a contract that excludes a warranty is called a **disclaimer of warranty**. If a disclaimer is used, the seller must use specific language set forth in the UCC to eliminate these warranties.

disclaimer of warranty
statement in a contract that
excludes a warranty

Express Warranties The seller may exclude an express warranty as part of a sales contract by being careful not to induce a person to buy the goods by making factual statements or promises, by describing the goods, or by producing a sample or model of the goods. The seller may also exclude an express warranty by using clear, specific language. For instance, the following warranty is legal and binding: "The goods sold under this agreement are warranted from defects in workmanship and materials for ninety days. No other express warranty is given and no affirmation by the seller, by words or actions, shall constitute a warranty."

Sometimes a sales contract includes an express warranty by the seller and also includes a statement that no express or implied warranties exist. In this case, the sentence eliminating the warranties is not binding. Take, for example, the following statements made by a seller in a sales contract: "Your Super Permanex trash container is made of thick-wall, high-molecular-weight, high-density plastic. Its rugged handles can lift up to 250 pounds. The seller makes no express warranties of this product." The sentence stating that there are no express warranties has no effect. The statements made about the trash container amount to an express warranty even though the word *warranty* or *guarantee* was not used.

Any oral warranties made by the seller, before or at the time of the sale, that are contrary to the terms of the written warranty given with the goods are not binding. Where a written warranty exists, only the terms stated in that written warranty are enforceable.

Marcus purchased a refrigerator from a local appliance dealer and, at the time of the sale, received a written manufacturer's warranty stating in part that, "For 90 days from date of delivery, Roncone Refrigeration [manufacturer] will remedy any defect or replace any part or parts found to be defective." The salesperson told Marcus that "Roncone will remedy any defects free of charge for 120 days even though the written warranty says 90 days." Because the salesperson's oral warranty is contrary to the written warranty, the oral warranty is not binding.

Implied Warranties If, before entering into the sales contract, the buyer has examined a sample or model of the goods or has refused to examine them after being given the opportunity to do so by the seller, there is no implied warranty as to defects that were or should have been obvious. This rule of caveat emptor, as noted on page 284, has practically been abandoned by the courts. It applies as long as there is no fraud on the part of the seller, such as concealing obvious defects.

You purchased a used car from the A-1 Car Company. At the time of purchase, you inspected the car but failed to notice that the two front tires were bald. Any attempt by you to cancel the contract with A-1 should fail. Bald tires constitute an obvious defect. You should have discovered this defect when you inspected the car.

The expressions "as is" and "with all faults" make it clear that no implied warranties exist and that the buyer takes the risk as to the quality of the goods.

Lloyd purchased a blender for cash from Cole's Department Store, which was running a special sale. A large sign at the counter next to the blenders read: "Prices as marked and all merchandise purchased 'as is.'" Later, when Lloyd attempted to use the blender, she found that it did not work properly. The store was not liable under an implied warranty of merchantability because the sign identified the sale of the blender as an "as is" sale.

The expressions "as is" and "with all faults," or similar expressions, will not exclude an implied warranty of title. The warranty of title is excluded only if the seller specifically states that no warranty of title is given or when the circumstances of the sale indicate that the seller does not have a clear title to the goods being sold.

The student government of Geneva University took charge of lost and found articles. To raise money for underprivileged children, the student government officers had a Christmas sale of the lost and found articles in their possession. Given the circumstances of the sale, it should be clear to any buyer that the student government does not have clear title to the goods being sold.

The implied warranty of merchantability may be excluded either orally or in writing, but the word *merchantability* must be used. If the exclusion is in writing, the clause excluding merchantability must be conspicuous. According to the UCC, a term or clause is conspicuous when it is written so that a reasonable person would notice it. The following clause, written in large, bold print, excludes the warranty of merchantability: **SELLER MAKES NO WARRANTY OF MERCHANTABILITY WITH RESPECT TO THE GOODS SOLD UNDER THE TERMS OF THIS AGREEMENT.**

The implied warranty of fitness for a particular purpose can be excluded only in writing. Although the writing must be conspicuous, no specific language need be used. The language used in the following example is sufficient: **WE MAKE NO OTHER WARRANTIES, EXPRESS OR IMPLIED, BEYOND THE WARRANTY EXPRESSED IN THIS AGREEMENT.**



Breach of Warranty

Breach of a seller's warranty ordinarily entitles a buyer to recover damages. It is a second basis for suing under the theory of products liability. The right to damages may be lost, however, unless the plaintiff proves that (1) a warranty existed, (2) there has been a breach of the warranty, (3) the breach of warranty caused a loss or injury, and (4) notice of the breach was given to the seller. It is not necessary for the plaintiff to prove that the defendant was in any way negligent. The buyer must give notice of the breach within a reasonable time after he or she has discovered or should have discovered that the goods were not as warranted. If the buyer fails to notify the seller of any breach within a reasonable time after it was discovered or should have been discovered, he or she is barred from any remedy against the seller (UCC 2-607).

Originally, because a warranty was part of a sales contract, a lawsuit for breach of an express or implied warranty was based on whether the buyer had entered into a contract of sale for a product with the seller. Parties who have contracted with each other are said to be in **privity of contract**. When privity of contract is required, only the buyer can sue for breach of warranty and can sue only the immediate seller.

privity of contract
contractual relationship

Atkinson purchased from the Ace Drugstore two bottles of Sun-Pro lotion, which was guaranteed by the manufacturer, the Altra Corporation, to protect a person's skin from sunburn. Atkinson gave a bottle to his sister to use. After they applied some of this lotion, their skin was severely sunburned.

Under the privity of contract rule, only Atkinson could sue, and he could sue only the Ace Drugstore, with whom the contract for the purchase of Sun-Pro was made. To recover for any damages, the sister would have to sue Atkinson, her brother.

The privity requirement as to who can sue for breach of warranty has been eliminated under the UCC and in the courts (the decision in the *MacPherson* case cited on page 285 was a landmark decision in the abolition of the privity requirement), thus allowing people other than the buyer to sue. Three alternatives (A, B, and C) are allowed under the Code (UCC 2-318). All three alternatives have eliminated the privity requirement. States may, if they wish, select from among these three. Most states have eliminated the privity concept and adopted one of the alternatives. Alternative A, which has been most widely adopted, extends the seller's warranty to any member of the buyer's family or household or a guest in the buyer's home who suffers personal injury while using or consuming the product. Alternative B has been adopted in some states. It extends the seller's warranty to anyone who suffers personal injury while using or consuming the product, (even a passing stranger would be covered under this alternative). Alternative C not only extends coverage to anyone while using or consuming the product, but it covers any injury, not simply personal injury. Applying alternative A, the most popular alternative to the previous example, Atkinson's sister may also sue the immediate seller.

The UCC is neutral on relaxing the privity requirement that deals with the issue of who can be sued for breach of warranty. Under the UCC, the immediate seller remains as the person against whom a lawsuit may be directed. It is left to the courts to decide on a case-by-case basis if anyone beyond the immediate seller can be sued. Consequently, modern courts, with the impetus of the landmark case *Henningsen v. Bloomfield Motors, Inc.* (32 N.J. 358), have also dropped the privity requirement and now permit all individuals harmed by a product to sue not only the immediate seller but also all parties in the chain of distribution. This chain may include not only the retailer but also the manufacturer and the wholesaler. Again referring to the example given earlier, both Atkinson and his sister could, under case law, sue the manufacturer for their injuries.

There are some disadvantages to suing for breach of warranty. Failure to properly notify the seller of the breach within a reasonable time after he or she discovers or should have discovered the breach will bar the buyer from suing for the breach (UCC 2-607). As the injured party, the buyer would then have to seek another remedy. Recall also that sellers, as they are entitled to do under UCC 2-316, may and often do disclaim express and implied warranties. If a seller does give an express warranty, it often contains restrictions and limitations. Another drawback relates to an inspection of the goods. If the buyer inspects the goods but fails to discover “noticeable” defects or for some reason refuses to inspect the goods, he or she waives any benefits from implied warranties against defects that an inspection reasonably should have detected.


**Magnuson-Moss
Warranty Act** law prevent-
ing deceptive warranties and
requiring terms and conditions
to be clear and understandable

Magnuson-Moss Warranty Act

The federal **Magnuson-Moss Warranty Act** of 1975 was passed by Congress to protect purchasers of consumer goods (those goods used for personal, family, or household purposes). The act applies only to written warranties. The purpose of the act is to make available to consumer purchasers adequate and understandable information about written warranties. Up to 1975, most warranties were not understandable and were unfair; furthermore, those giving the warranties did not live up to the promises made in the warranties. This act has not replaced UCC warranty law, but in certain cases, it imposes additional standards and remedies.

Under this act, the terms of any warranty must be disclosed in simple and readily understood language and must be accessible to the consumer, as by attaching the warranty to the package or placing it in a binder with signs posted informing consumers of its availability. The law does not require manufacturers and sellers to give written warranties. If they choose to give a warranty and that warranty is written, and if the warranted goods cost more than \$10, however, the warranty must be prominently labeled as either a “full” warranty or a “limited” warranty. In addition, if the cost of the goods is more than \$15, the Federal Trade Commission requires that certain additional information in the nature of disclosures be made fully and conspicuously in “readily understood language.” Such disclosures include, but are not limited to, the parts that are covered by the warranty, the length of the warranty period (e.g., “full ten-year warranty”), a step-by-step explanation of the procedure the consumer should follow to obtain performance of any warranty obligation, and whether the enforceability of the written warranty is limited to the

original buyer or is extended to every buyer who has owned the goods during the term of the warranty period. Furthermore, if a written warranty is given, the implied warranties of merchantability and fitness for a particular purpose cannot be eliminated by the manufacturer or seller.

A *full warranty* gives the buyer much more protection than a limited warranty. For example, a full warranty many times does not have a time limit. Further, it requires a defective product to be repaired within a reasonable time at no cost to the owner. If it cannot be repaired, the “lemon clause” of the act requires the manufacturer or seller to refund the buyer’s money or to replace the product. *Limited warranties* have more restrictions than full warranties. Limited means be cautious, something is missing. For example, a limited warranty may cover only parts, not labor; allow only a prorated refund or credit (smaller refunds or credit depending on how long you’ve had the product); require you to return a heavy product to the store for service; cover only the first purchaser; charges for handling. A product can carry more than one written warranty. For example, it can have a full warranty on part of the product and a limited warranty on the rest. Very importantly, the seller can limit the time the goods are covered by any implied warranties, but it has to respond to the duration of the express warranty. Also, with a limited warranty, the buyer is not guaranteed a refund or a replacement if the product cannot be fixed. Most limited warranties cover parts but not labor. When only a limited warranty is given, this fact must be conspicuously designated. An example of a limited warranty is shown in Figure 18.1. It deals with a paper shredder.

To help consumers make better informed decisions, warranty information about a product must be readily available in the store for customer inspection. Provisions in the act provide formal and informal procedures for settling claims for breach of warranty. One significant feature allows consumers to recover attorney’s fees if a lawyer is needed to enforce a warranty.



Strict Liability

Along with negligence and breach of warranty, the third major area of products liability that a buyer may choose as the basis for recovery if he or she is injured by a defective product is strict liability. This theory, based on tort law, is now the dominant product liability theory used as a basis for lawsuits in nearly every state. Section 402a of the Restatement, Second of Torts, imposes strict liability in tort on merchant sellers for both personal injuries and property damage caused from selling a product in a defective condition that causes the product to be unreasonably dangerous. The rapid growth of this theory of liability is because the injured party does not have to prove that the defect causing the injury resulted from negligence (fault), nor does the injured party need to depend on the existence of a warranty. Strict liability (also referred to as strict product liability) focuses on the product itself and not on the conduct of the manufacturer or others in the chain of sale. Courts in strict liability cases are interested *that* a product defect arose but not *how* it arose. The injured party, suing as the plaintiff, simply needs to show that a product was unreasonably dangerous at the time it left the manufacturer’s or other seller’s control and that she or he suffered an injury, without reference to negligence. Unreasonably dangerous means the plaintiff must present evidence that the product posed a substantial likelihood of harm because (1) it contained a design

FIGURE 18.1

**Limited Express
Warranty****LIMITED WARRANTY**

General Binding Corporation (“GBC”) warrants to the original purchaser the cutting blades on this product to be free from defects in workmanship and material under normal use and service for a period of five (5) years after purchase. GBC warrants to the original purchaser that all other parts of this product to be free from defects in workmanship and material under normal use and service for a period of one (1) year after purchase. GBC’s obligation under this warranty is limited to replacement or repair at GBC’s option completely without charge for material or labor of any warranted part found defective by GBC.

THIS WARRANTY IS IN LIEU OF ALL OTHER EXPRESSED WARRANTIES. REPRESENTATIONS OR PROMISES INCONSISTENT WITH, OR IN ADDITION TO, THIS WARRANTY ARE UNAUTHORIZED AND SHALL NOT BE BINDING UPON GBC. IN NO EVENT SHALL GBC BE LIABLE FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, WHETHER OR NOT FORESEEABLE. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, SO THE ABOVE EXCLUSION OR LIMITATION MAY NOT APPLY TO YOU.

ANY IMPLIED WARRANTIES ARE LIMITED IN DURATION TO THE DURATION OF THIS WARRANTY. SOME STATES DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU.

This warranty shall be void if the product has been subjected to misuse or damaged by negligence or accident, or altered by anyone other than authorized agents of GBC.

This limited warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

defect, (2) a flaw occurred in the manufacturing process, or (3) the product was not accompanied by appropriate warnings of a risk or hazard (failure to warn). The injured party does not have to show how or why the product became defective. Consequently, even an innocent manufacturer—one that has not even been negligent—may be liable if the injured party can show a link between the unreasonably dangerous product and the injury. Without proving to the court that this link exists, the injured party may not prevail in a lawsuit under the strict liability theory.

Viscount underwent LASIK surgery at Dell Eye Associates. The blade used for the surgery broke in her eye during the surgical procedure and cut her cornea. Viscount now has hazed vision and, according to her doctor, she will need a corneal transplant. Since the failed eye procedure, Viscount has suffered severe and painful injury. Roberts and Thiel Inc., the company that manufactured the blade, admitted the blade was defective. Viscount sued Roberts and Thiel for strict liability and most likely will be successful.

Product liability cases often hinge on testimony by expert witnesses establishing or denying a link between an alleged defect and an injury. If you are injured by a product, you should consult an experienced attorney who can advise you about the potential success of your case and how the manufacturer and other defendants

are likely to try to avoid liability. You should keep adequate records surrounding your case, including photographs of the site where the injury occurred and of the product that caused the injury.

The average consumer can presume that the product is not unreasonably dangerous and harmful if, for example, there are no warnings in the instructions that come with the product and if there are no other references to danger on the product label. The manufacturer or other sellers cannot claim as a defense that reasonable care was used to discover defects in the manufacture of the product, that reasonable care was used to prepare and sell the product, or that there was no privity of contract.

The effect of the strict liability theory in most states is therefore to make the manufacturer, seller, or whoever is in any way responsible for the harm (e.g., the designer of the product) liable without question for the safety of the product. It allows not only the buyer to sue but also other persons who used the goods and suffered injury or damage because of the defect.

While driving his new car within the speed limit down the main street of his hometown, Arnet struck a parked car and was seriously injured. The accident resulted because the newly designed steering column on this model of car broke, causing Arnet to lose control of the car. Arnet successfully sued the car manufacturer and recovered damages under the doctrine of strict liability.

In this case, although the car manufacturer proved that it was not negligent because it had used all possible care in manufacturing the car, the court nevertheless concluded that the design of this new model met the criteria for being unreasonably dangerous because the defective steering column was not a danger that a reasonably prudent person would be subjected to in a new car.



Misuse of Product by Injured Party or Subsequent Alteration

In many product liability lawsuits, manufacturers and sellers raise the improper conduct of the buyer as a defense to lawsuits by injured buyers. They claim that the buyer used their product either knowing that it was defective or in a manner not contemplated by the seller, such as in the case of a teenager who mounts the motor from a lawn mower onto a bicycle and is then thrown from the bike while riding because the motor stalls and “dies out.” Although manufacturers and sellers may generally have good cases, courts still offer some protection to the buyer by applying the comparative negligence doctrine (see page 82) or limiting a seller’s defense by requiring that the buyer’s misuse of a product not be foreseeable by the seller. Subsequent alteration of the product by the user or consumer would also be an obstacle to recovery. Section 402A of the Restatement, Second, of Torts indicates that liability exists (on the part of manufacturers) only if the product reaches the user or consumer without substantial change in the condition in which it was sold.



Damages Recoverable in a Strict Liability Case

If you are the plaintiff in a lawsuit (person bringing the action) for a defective product and you have a successful case, you are entitled to damages resulting from this product. Chapter 4 relating to torts and Chapter 5 pertaining to lawsuits should have given you a good idea of the type of damages to expect in a civil lawsuit. However,

we will briefly review the types of damages to which you may be entitled. First, there are compensatory damages that include medical bills such as payments to your doctor and to the hospital, lost earnings from being out of work, and expenses connected to any property damaged as a result of the defective product. A major component of compensatory damages is “pain and suffering,” which refer both to physical pain and mental anguish that result from your injury. If you are married and the injury has affected the relationship with your spouse, you may be entitled to loss of consortium damages. (Your wife may also be entitled to these damages.) Finally, you may under very strict circumstances be entitled to punitive damages if the court feels that the conduct of the defendant (the manufacturer or other seller) was so awful that he or she should be punished and deterred from doing anything like this again.

It is important in a strict product liability case that, if you have been injured by a product, this product be kept and not altered in any way. Keep your proof of purchase and the warranty information (including the instruction booklet) that came with the product. Also obtain and write down the name of the person who sold you the product and the name or names of any witnesses to the event causing your injury. Consult your attorney as soon as possible to first determine that you have a case and second, if you do have a case, that under her or his guidance, you gather the evidence for future hearings or a trial.



Summary

A buyer injured by a defective product may sue (as the plaintiff) a manufacturer and other sellers in the chain of distribution (as defendant or defendants) under the umbrella of products liability based on one of three well-recognized theories of liability: negligence, breach of warranty, or strict liability. (A summary of theories on which product liability cases are based and the implication of each appears in Table 18.1.) The trend in modern court cases is to allow not only the buyer of the defective product but also anyone who is harmed by this defective product to sue, and to sue whoever is in any way responsible.

The buyer who sues for negligence must prove that the defendant’s negligence caused a defective product to be placed on the market and that this defective product caused the buyer to suffer personal injury or property damage. Negligence, however, is often an unsatisfactory remedy because it is hard to prove. If the buyer instead chooses to sue for breach of warranty, he or she must establish the existence and the breach of a warranty, an injury resulting from the breach, and that notice of the breach was given to the seller. It is not necessary to prove that the defendant was negligent.

There are disadvantages to suing for breach of warranty, most notably that the buyer will have no basis for a lawsuit if the seller exercised his or her right under the Code to disclaim express and certain implied warranties. The most popular theory of liability under which to sue is strict liability. This theory, like negligence, is based on tort law. Unlike negligence, however, the buyer does not have to prove that anyone was negligent. In other words, it is a no-fault approach. The buyer must only show that at the time it left the manufacturer or another seller in the chain of the sale, the product was unreasonably dangerous due to a defect in design manufacturing, or marketing, and caused injury or damage as a result. Nearly every state has now accepted the concept of strict liability, which is outlined in Section 402A of the Restatement, Second, of Torts.

If you are the plaintiff in a lawsuit for a defective product and you win your case, you are entitled to damages resulting from this product.

Congress passed the federal Magnuson-Moss Warranty Act to help prevent deceptive warranty practices. This act has not replaced warranty law but rather imposes additional standards and remedies.

In many product liability lawsuits, manufacturers and sellers offer as a defense to lawsuits by injured buyers the improper conduct of the buyer (e.g., using the product in an unauthorized way).

Article 2 of the UCC provides for two types of warranties made by sellers: express warranties and implied warranties. Express warranties arise in several ways. The seller may make a factual statement or a promise about the product, may describe the goods to the buyer, or may show the buyer a sample of the item being sold. To constitute an express warranty, the statement, description, or sample must be part of the basis of the sale. Implied warranties are imposed on a seller by law. The two types of implied warranties are the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Another type of

implied warranty exists under the Code but is not designated as such: the implied warranty of title. Express warranties can be excluded from sales contracts by using clear, specific language that meets the requirements of the UCC or simply by refraining from using language, descriptions, or samples that induce people to purchase the goods. The expressions “as is” and “with all faults” exclude all implied warranties except the implied warranty of title. The implied warranty of title is excluded only if the seller specifically states that no warranty of title is given or if the buyer realizes or should realize that the seller does not own the goods. If the buyer examines the goods, sample, or model or has refused to do so after a demand by the seller, there is no implied warranty as to the defects that were or should have been obvious.

IMPORTANT LEGAL TERMS

caveat emptor
caveat venditor
disclaimer of warranty
express warranty

implied warranty
Magnuson-Moss Warranty Act
merchantable goods

privity of contract
product liability
puffing
warranty

QUESTIONS AND PROBLEMS FOR DISCUSSION

- Under the UCC, goods sold by merchants are generally covered by a warranty both express and implied. An example of an express warranty would be a warranty of
 - fitness for a particular purpose
 - merchantability
 - conformity of goods to sample or description
 - strict liability
- Under the UCC, when there has been a sale of goods, which of the following statements is correct regarding the warranty of merchantability?
 - The warranty cannot be disclaimed.
 - The warranty arises as a matter of law.
 - The warranty arises when the buyer relies on the seller's skill and judgment in selecting the goods purchased.
 - The warranty must be in writing.
- To establish the basis of a lawsuit for strict liability for personal injuries that result from the use of a defective product, the injured party (the consumer) must prove that
 - the product sold was unreasonably dangerous due to a defect
 - the seller was negligent
 - the seller breached the contract with the consumer
 - there was privity of contract
- Thompson purchased a used car from Van Bortal Sales for \$450. A clause in the written contract in boldface type provided that the car was being sold “as is.” Another clause provided that the contract was intended as the final expression of the parties' agreement. After driving the car for one week, Thompson realized that the engine was burning oil. Thompson telephoned Van Bortal and requested a refund. Van Bortal refused based on the original agreement but orally gave Thompson a warranty on the engine for six months. The engine exploded three weeks later. Can Thompson collect based on the oral warranty given to him by Van Bortal?

5. Fisk bought a used boat from the Newport Marina that disclaimed “any and all warranties” in connection with the sale. Newport was unaware the boat had been stolen from James. Fisk surrendered it to James when confronted with proof of the theft. Fisk then sued Newport. Should Fisk be successful?
6. The B&L Food Company prepared, packed, and sold quality food products to wholesalers and retailers. Marvin, while grocery shopping at Gregg’s Red & White retail store, purchased several cans of “Ma’s Fancy Baked Beans.” At dinner one evening, Eva, Marvin’s sister, bit into a spoonful of the beans and cut her mouth on small pieces of glass that were embedded in the serving of beans on her plate. Can Eva, a third party, bring an action against either Gregg’s Red & White or the B&L Food Company?
7. The county of Ontario, New York, ordered twenty-three cell doors for the new wing of the Ontario County Jail. The vice president of the company that was to manufacture the doors told the jail superintendent that he knew exactly how the cells should be constructed; the jail superintendent relied on the vice president’s statement. When the cell doors were delivered, the bars were so far apart that prisoners could wriggle through them. Instead of the standard 5 inches, the bars were $5\frac{3}{4}$ inches apart. What warranty has been breached? What is the basis for this breach of warranty?
8. Bertram purchased a reconditioned paper shredder from Alliance Paper Co. for use in her business. Before putting the shredder into use, she made some modifications that she felt would improve the efficiency of the shredder. The manufacturer of the paper shredder originally was Cohen Office Furniture and Office Equipment Co. While shredding some important office documents, an employee of Bertram was injured because the shaft holding the shredder blade came loose and severed his finger. Based on a claim of strict liability, the employee sued Cohen Office Furniture for his injuries. Legally, does the employee have a claim?
9. Dayton purchased a rug from Max Floor Covering because the owner stated that the rug was “a genuine Oriental rug.” Could this statement be considered an express warranty?
10. Jason and several members of her college soccer team purchased team jackets after seeing a sample shown to them by a salesperson from the Champion Sportswear Company. When the jackets arrived and Jason found that hers was quite different from the sample, she returned the jacket to the company. The company refused to take it back. Did Jason have the right to return the jacket? (Assume that Jason is an adult.)

CASES FOR REVIEW

1. Walker owned several pizza parlors that operated under the name of El Fredo Pizza, Inc. He planned to open a new parlor and to purchase a new oven. When a friend suggested that Walker purchase an oven from the Roto-Flex Oven Co., Walker contacted an agent from that company and negotiated the purchase of a new oven. Walker made clear the particular purpose for which he was buying the oven—to cook pizza—and that he was relying on the agent’s skill and judgment in selecting a suitable oven. Based on the agent’s suggestion, Walker contracted to purchase a custom-built, Roto-Flex “Pizza Oven Special.” Once the oven was installed, Walker had nothing but trouble—uneven heating—which caused the pizza to be improperly cooked when it came out of the oven. Roto-Flex attempted to fix the oven but could not. El Fredo brought action against Roto-Flex for breach of the implied warranty of fitness for a particular purpose. Should El Fredo be successful? (*El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 291 N.W.2d 358)
2. The Stones entered into a contract to purchase a mobile home from Mobile Housing, Inc. Mobile took the Stones through the model on display on one of its lots and informed them afterward that the one they purchased would be like the model. The one delivered, however, was very different from the model. Mobile refused to do anything about it, and the Stones sued to rescind the contract and recover the payments they had already made. Did the Stones have a legal claim? (*Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611)
3. Balch purchased a dog for \$800 from Newberry, who operated a kennel. Before the sale, Balch

informed Newberry that he wanted a male dog for breeding purposes. Newberry stated that the dog had the ability to produce pups of pedigree quality. Balch relied on this fact when he purchased the dog. After the purchase, Balch discovered that the dog was sterile and therefore of no value to Balch for breeding pups. Could Balch demand the return of his \$800 after returning the dog? (*Balch v. Newberry*, Okla. 253 P.2d 153)

4. Hook sold two milk trucks, together with two milk routes, to Janssen. At the time of the sale, Hook told Janssen that the trucks were in good condition. Janssen, however, had inspected the trucks before purchasing them. He was aware that the trucks needed repairs and were in generally poor condition. After purchasing the trucks, Janssen spent a considerable amount of money for work done on the trucks. He then brought a lawsuit against Hook for the amount spent, claiming that the statement by Hook that the trucks were in good condition amounted to a breach of an express warranty. Is Janssen correct? (*Janssen v. Hook*, 272 N.E.2d 386)
5. Henningsen purchased a brand-new Plymouth automobile from Bloomfield Motors and gave it to his wife as a gift. While driving the new car, Henningsen's wife crashed into a brick wall and was injured because a defect in the steering wheel caused her to lose control of the car. She sued Bloomfield Motors for her injuries under the breach of the implied warranty of merchantability. Bloomfield Motors claimed that there was no privity of contract between them and Mrs. Henningsen and that she could not recover. Can Mrs. Henningsen recover from Bloomfield Motors? (*Henningsen v. Bloomfield Motors*, N.J. 161 A.2d 69)
6. While Lovitz was shooting at clay targets at the McCaun Gun Club, his Remington Model 1100 shotgun manufactured by the Remington Arms Co. exploded in his hands. Lovitz, who suffered injuries to his left hand and thumb, sued Remington, claiming that a manufacturing defect in the shotgun made the company strictly liable for his injuries. Remington contended that prior to shipment the gun was field tested, but the test did not reveal any defects. An expert witness stated at trial that each time the gun was fired, tiny particles of manganese sulfide escaped into the steel barrel causing it to crack and that the cracks continued to expand, causing the gun to explode. Can Lovitz sue Remington for injuries based on products liability? (*Lovitz v. Remington Arms Co. Inc.*, 532 N.E.2d 1091)
7. Husted purchased a used car from Reed Motors and obtained a loan through the First National Bank. The car broke down and could no longer be used. Husted refused to pay the balance due on the car. At the time the car was purchased, the contract signed by Husted contained a conspicuous clause stating that the buyer accepted the car in its present condition. The contract also contained other language indicating that the car was sold "as is." Was Husted responsible for paying the balance due on the car? (*First National Bank of Elgin v. Husted*, Ill. 205 N.E.2d 780)
8. Maritime entered into a contract to purchase a helicopter from Fairchild. Among the relevant provisions typed into the agreement in normal size, lowercase print on a regular printed form was a clause stating that the sale was to be made "as is" and that the seller gave no express or implied warranties except the warranty of title. Maritime had problems with the helicopter and sued Fairchild for an implied warranty, claiming that the helicopter was not merchantable. Fairchild defended, saying that the clause in the contract, which stated that no warranties were given with the sale of the helicopter, acted as a disclaimer of the implied warranty of merchantability. Is Fairchild correct? (*Fairchild Industries v. Maritime Air Services, Ltd.*, 333 A.2d 313)

Suppose You're the Judge

THE CASE OF THE FAULTY AIR-CONDITIONING SYSTEM

The Ridgeway Theater purchased a large air-conditioning system from Blair Manufacturing Co. The system was purchased and installed in May, prior to the start of the summer season. The sales contract contained a statement that the system would provide sufficient cooling for 1,500 people to a maximum temperature of 72°. The statement further said, "The seller makes no express warranties for this product." At the beginning of June, it became apparent to Ridgeway that the system did not work properly; it provided cool air, but not enough to enable patrons to be fully comfortable. Ridgeway complained to Blair about the air-conditioning system and withheld payment but continued to use the machine during the summer months because there was not enough time to order another system; without any air conditioning at all, the theater would have had to close down. All efforts to repair the system failed, and at the end of the summer, Ridgeway demanded that Blair take the machine back. Blair refused to accept the machine and brought suit against Ridgeway for the purchase price.

The Trial

Ridgeway testified that the temperatures during the summer in the area where the theater was located were extremely warm and that air conditioning was absolutely essential to enable customers to feel comfortable during the showing of movies. The theater stated that it relied on the wording in the sales contract that the system would produce sufficient cooling. It further stated that it could not return the air-conditioning system immediately after delivery because the theater would have had to close down and lose its costumers for the entire summer. The theater also stated that returning a large system involved a great deal of effort and expense and that it did not want to return the system until it had obtained significant use from it.

The Arguments at Trial

Blair's attorneys argued that the specific wording in the sales contract disclaiming any express warranties prevented Ridgeway from claiming that the system was defective. They further argued that the theater should have returned the system immediately when it discovered that the system was faulty. They also argued that when the theater used the system for three months and received many benefits from it, it automatically gave up its right to rescind the contract and return the system.

Ridgeway's attorneys argued that because of the size and weight of the system and the costs involved in returning it, Ridgeway had a legal right to use the system for a reasonable amount of time and then return it. They further argued that the statement in the sales contract that the system would produce sufficient cooling outweighed the importance of the statement that there were no express warranties. The theater also argued that by keeping the machine and getting some benefit from it, it was able to mitigate its damages. Otherwise, the theater could have held the manufacturer responsible for the loss of profits.

Questions to Decide

1. Who has the stronger arguments, Ridgeway or Blair? Why?
2. If you were the judge or jury hearing the case, for whom would you decide on the question of the warranty? Why?
3. If you were the judge or jury hearing the case, for whom would you decide on the question of the right to rescind the contract? Why?
4. What do you think the law should be with regard to a problem of this nature involving something that is not easily returnable?

Ethics Emphasis

Rogers went to a local restaurant in her hometown, where she purchased a chicken sandwich. As she ate the sandwich, she felt something stuck in her throat. She began to choke and turn blue. The manager immediately called the rescue squad, and it arrived in a matter of a few minutes. She was taken to the hospital, where the doctor on duty in the emergency room removed a rather large chicken bone from her throat. Rogers remained in the hospital overnight and was released the next day but remained home from work that day because her throat was very sore. She also was emotionally upset, and upon diagnosis, her doctor urged her to remain home for several days. Even though she did return to work after several days had elapsed, she had to remain under a doctor's care until she worked through this period of emotional instability. Rogers consulted with an attorney and, as a result, decided to sue the restaurant for the implied warranty of merchantability on the grounds that the chicken sandwich she purchased was not fit for human consumption. The state where she lived had not yet passed a law dealing with food cases like the Rogers case. The state legislators were dealing with two possible approaches: that injury from eating food had to meet the foreign-natural test or the reasonable expectations test to be considered a breach of the implied warranty of merchantability. In this case, the bone was a chicken bone natural to chicken (and not a foreign object) and therefore, should this theory be applied, Rogers would lose her case. With the reasonable expectations test, the jury would decide who should win based on the facts in the case.

Question to Discuss

If Rogers decided not to take her case to court but to let an arbitrator decide, and you were that arbitrator, what ethical reasons might you give for deciding the case for either party?