



**COZEN O'CONNOR
NATIONAL AND INTERNATIONAL
SUBROGATION AND RECOVERY DEPARTMENT**

**SUBROGATION WHITE PAPER:
USE OF BREACH OF WARRANTY CLAIMS
IN PURSUING SUBROGATION CLAIMS**

By:

Mark T. Mullen, Esquire
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
Telephone: 215-665-2091
mmullen@cozen.com

The primary causes of action available to plaintiffs in typical property damage subrogation cases come from the law of torts with negligence and strict liability claims or the law of contract with breach of contract claims. In certain circumstances, breach of warranty provides an avenue of recovery. There is no single source of warranty law. Rather, there are different strands, some of which are statutory, others regulatory, and some judicially created by the courts. The primary law governing warranties in the sale of goods has traditionally been state law but there are now federal laws in certain areas.

One of the first questions to be addressed is whether the case involves the sale of a good or service. The Uniform Commercial Code, adopted by virtually every state, applies to sales of goods. Mixed transactions involving both the sale of a good and service create certain problems. Courts use different tests to determine the law that will control. The single most significant source of warranty law is provided in Article II of the Uniform Commercial Code. It covers all sales of goods in commercial transactions.

The UCC provides four basic warranties that accompany the sale of goods: the warranty of title; express warranties; implied warranty of merchantability in the sale of both business equipment and consumer goods; and an implied warranty of fitness for a particular purpose which is sometimes referred to as a contextual warranty. The Code also provides remedies for breach of warranty that include the right to reject non-conforming goods, the right to cure, and monetary damages that can include incidental and consequential losses.

The Code also provides defenses to sellers that include disclaimers, limitations, and statutes of limitation. It is important to note that almost every state has a slightly different version of Article II and judicial construction of the provisions of the Code vary upon the jurisdiction.

State and federal courts have interpreted the Uniform Commercial Code adopted by a particular state and have also expanded the doctrine of warranty in certain circumstances beyond goods to services and even the sale of homes. These common law warranties will vary from state to state.

Congress provided for the first federal intervention into the law of warranty in the Magnuson-Moss Warranty Act. It imposes various disclosures and pre-sale availability requirements for suppliers who market consumer products with written warranties.

States have also enacted consumer protection statutes and deceptive trade practice legislation that prohibit a variety of unfair trade practices in connection with consumer sales. Some of those statutes can be used in subrogation cases because the subrogating carrier stands in the shoes of the insured.

Express warranties are the easiest to understand because they are not implied as a matter of law and public policy but arise from the circumstances of the sale by things that are said and/or written. Express warranties can be included in a contract for sale. As defined by the UCC, an express warranty is created by 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 that the goods shall conform to the affirmation or promise. A statement about the value of the goods or a statement purporting to be merely the seller's opinion or recommendation of the goods does not create a warranty.

Even if no express warranty is provided, the UCC provides that a warranty that the goods shall be merchantable is implied in the contract for their sale if the seller is a merchant with respect to goods of that kind. This warranty can be excluded or modified in accordance with certain other provisions of the code. Some courts have judicially created a warranty of

habitability in other areas, including the sale of new homes, that operate similar to the warranty of merchantability provided by the UCC.

The UCC also provides that where a buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose. This is a contextual warranty because the seller must have reason to know the buyer's particular purpose of the goods, the buyer must be actually relying on the skill or judgment to select or furnish suitable goods, and the seller must have reason to know of the buyer's reliance. In theory, under this warranty the product could be free from defect but unsuitable for the particular purpose or context in which it was placed. This warranty can also be excluded or modified.

With the advancement of the modern economic loss doctrine whereby courts have attempted to strictly enforce the respective spheres of contract and tort law, breach of warranty claims are sometimes the only recourse for recovering purely economic losses where there was no property damage or personal injury. Although it varies from jurisdiction to jurisdiction, the economic loss doctrine typically precludes a party to a contract from using negligence or strict liability to recover for losses that did not involve damage to property. A breach of either an express warranty or warranties implied by law can, in some circumstances, be the only avenue of recovery if there is no applicable defense. One of the primary defenses is the statute of limitations which will typically expire four years from the date of the sale so it is absolutely imperative to check the governing law to be certain when the period commences and how long it will run. Express warranties can be limited in duration and all warranties may be subject to exclusion and/or limitation as to damages. Some courts also continue to require privity of contract in order to enforce certain breach of warranty claims.

This paper provides a very basic overview of a complex area of law that is constantly being refined by the courts interpreting statutes and regulations as well as expanding or retracting the common law.