Seller Beware! What Manufacturers Should Know About Consumer Warranty Law

By Randy T. Moore and Ryan P. Buggerello, Snell & Wilmer L.L.P.

Consumer protection for the sale of consumer goods is further extended, to consumers with broader remedies against consumers by imposing additional obligations on manufacturers and sellers of consumer goods while providing broad remedies to those who purchase them. These laws are intended to improve the adequacy of information available to consumers, prevent deception, and improve competition and the marketing of consumer products. While the salutary purposes of these laws are laudable, they can present traps for the unwary manufacturer or seller and impose liability on them that far exceeds the cost of the product itself. Moreover, a poorly-handled warranty claim can result in a loss of customer confidence or satisfaction, which, in turn, can lead to a loss of goodwill and the loss of market share. Consequently, a manufacturer or seller of consumer products must have an understanding of consumer protection laws and be able to address claims that might arise under these laws in a prompt, efficient and cost-effective manner. This article, which is the third in a five-part series, is intended to provide recreational boat and equipment manufacturers with a basic understanding of consumer warranty law and practical advice on how to minimize liability for warranty claims.

An overview of consumer warranty law

There are three primary sources of warranty law: (1) the Uniform Commercial Code (UCC), (2) the federal Magnuson-Moss Warranty Act (Magnuson-Moss), and (3) state consumer warranty statutes, which might be referred to as "lemon laws." Warranties for the sale of goods are basically and most broadly covered in Article 2 of the UCC. Nonetheless, subtle differences from one state to another, the UCC is intended to simplify the law governing commercial transactions and make it uniform among all jurisdictions. The UCC is amplified in certain substantive ways as to consumer sales by state consumer warranty legislation, such as California’s Song-Beverly Consumer Warranty Act (Song-Beverly). A buyer also does not need to demonstrate his or her reliance on the warranty in order to assert a claim for its breach. The basis of the breach of warranty requirement means only that the affirmation, description, model or sample was a factor or a consideration in inducing the buyer to purchase the good. Warranty statements by the seller are presumptively part of the basis of the bargain, and it is up to the seller to prove otherwise. Most state statutory schemes, including Song-Beverly, are limited in their scope to sales of consumer goods (i.e., a product that is used, bought or leased primarily for personal, family, or household purposes). Song-Beverly also limits its coverage to a single type of transaction – one in which the manufacturer, distributor or retailer undertakes to preserve or maintain the utility or performance of the consumer goods or provide compensation if there is a failure in utility or performance of the product. Thus, while the boat advertising brochure referred to above resulted in an express warranty under the UCC, it was held not to have created an express warranty

As a general rule, there is no law that requires manufacturers of consumer products to provide an express warranty with the sale of their product. But few manufacturers would stay in business if they did not stand behind their products with an express warranty. Indeed, express warranties on consumer products have become a primary sales and marketing tool as manufacturers and sellers compete for market share by offering warranties that last longer and provide broader coverage.

Once a manufacturer offers an express warranty, federal and state consumer warranty laws apply and govern virtually every aspect of it, including its creation, its acceptable form, its duration, and the manufacturer’s duties regarding disclosure of information about and compliance with the warranty. These laws also create the remedies that a consumer has for the breach of a warranty or failure to comply with warranty warranty legislation.

Under the UCC, an express warranty is created when the seller makes an affirmation of fact or promise to the buyer that relates to the goods and becomes the basis of the bargain. The express warranty is that the goods will conform to the affirmation or promise. The seller can also create express warranties by providing a description of the goods. The description need not be in writing; technical specifications, such as blueprints or design drawings, can result in warranties if they are made the basis of the bargain. A sample or model of the product that is offered for inspection may also create a warranty that the actual product will conform to the sample or model.

To create an express warranty the seller does not need to use formal words such as “warrant” or “guarantee.” Nor is it necessary that the seller have a specific intention to make a warranty. For example, statements in an advertising brochure that a boat was “a picture of sure-footed seafaring-ness” and “a carefully equipped and very seaworthy vessel” were specific and unequivocal enough to create warranties under the UCC.

On the other hand, an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods (sometimes called “puffery”) does not create a warranty. There usually is no clear line between an affirmation of fact and puffery; the issue will be left up to the jury to decide based on all of the circumstances of the purchase transaction.
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Consumer warranty laws, sometimes called "lemon laws," have sought to provide further protection for consumers by imposing additional obligations on manufacturers and sellers of consumer goods while providing broad remedies to those who purchase them. These laws are intended to "improve the adequacy of information available to consumers, prevent deception, and improve competition and the marketing of consumer products." While the salutary purposes of these laws are laudable, they may result in broader liability than the sellers of the goods in question. Most recently, "lemon laws," have sought to provide a primary sales and marketing tool as an affirmative warranty with the sale of their products, including express and implied warranties, and remedies that are available for the breach of these warranties.

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Express warranties

As a general rule, there is no law that requires manufacturers of consumer products to provide an express warranty with the sale of their product. But few manufacturers would stay in business if they did not stand behind their products with an express warranty. Indeed, express warranties on consumer products have become a primary sales and marketing tool as manufacturers and sellers compete for market share by offering warranties that last longer and provide broader coverage. Once a manufacturer offers an express warranty, federal and state consumer warranty laws apply and govern virtually every aspect of it, including its creation, its acceptable form, its duration, and the manufacturer's duties regarding disclosure of information about and compliance with the warranty. These laws also create the remedies that a consumer has for the breach of a warranty or failure to comply with consumer warranty legislation. Under the UCC, an express warranty is created when the seller makes an affirmation of fact or promise to the buyer that relates to the goods and becomes the basis of the bargain. The express warranty is that the goods will conform to the affirmation or promise. The seller can also create express warranties by providing a description of the goods. The description need not be in writing; technical specifications, an affirmation of fact or promise to the buyer that relates to the goods and becomes the basis of the bargain. The express warranty is that the goods will conform to the affirmation or promise. The seller can also create express warranties by providing a description of the goods. The description need not be in writing; technical specifications,

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Most state statutory schemes, including Song-Beverly, are limited in their scope to sales of consumer goods (i.e., a product that is used, bought or leased primarily for personal, family, or household purposes). Song-Beverly also limits its coverage to a single type of transaction—one in which the manufacturer, distributor or retailer undertakes to preserve or maintain the utility or performance of the consumer goods or provide compensation if there is a failure in utility or performance of the product. Thus, while the boat advertising brochure referred to above resulted in an express warranty under the UCC, it was held not to have created an express warranty under Song-Beverly because the statements could not be construed as an undertaking by the seller to preserve or maintain the utility or performance of the boat. Song-Beverly is broader than the UCC in the scope of its protection, however, by not requiring that the express warranty be made the basis of the bargain and by providing that the warranty may be made by the manufacturer or distributor and not just by the seller.

Once an express warranty is created under state consumer warranty legislation, special obligations are imposed on the manufacturer, distributor and seller. For example, under Song-Beverly, the manufacturer must provide service and repair facilities in California that are reasonably close to all areas where its consumer goods are located. A buyer who has a claim for breach of warranty must notify the seller or distributor of a possible warranty failure. A buyer also has a duty to evaluate the warranty and make a reasonable judgment about whether a claim is warranted. A buyer must actually inspect the goods and make a reasonable inspection of them before a claim can be made. In addition, a buyer must try to minimize the damage to the goods before asserting a warranty claim.
sold in order to carry out the terms of the warranty. Alternatively, the manufacturer may designate and authorize independently-owned and operated service and repair facilities in California to handle warranty claims. The Act provides further requirements for manufacturers who enter into warranty service contracts with independent service and repair facilities. Song-Beverly also imposes a duty on the manufacturer or its authorized representative to begin service and repairs to conform the product to its warranty within a reasonable period of time.10 Unless the buyer agrees in writing, California law requires that the goods be conformed to the warranty within 30 days.11 Delay caused by conditions beyond the manufacturer's or representative's control will extend the 30-day requirement. But the manufacturer or its representative remains obligated to tender conforming goods as soon as the condition causing the delay has ended.12 If the manufacturer or its authorized dealer cannot conform the goods to the warranty within a reasonable period of time, or within a reasonable number of repair attempts, the manufacturer has a further obligation to either replace the goods or reimburse the buyer in an amount equal to the purchase price, less any amount directly attributable to use by the buyer before discovery of the nonconformity.13

Magnuson-Moss further regulates written warranties on consumer products and establishes consumer remedies. One of its primary purposes is to require any warrantor to fully and conspicuously disclose in simple and readily understood language the terms and conditions of the warranty.14 The Act accomplishes this goal primarily through regulations that are promulgated by the Federal Trade Commission (FTC) and published in the Code of Federal Regulations.15 These regulations impose a host of specific duties on manufacturers of consumer products, including a duty to provide sellers with warranty materials that are necessary to make the text of the warranty readily available for examination by the prospective buyer.16

Magnuson-Moss also attempts to encourage the fair and expeditious private settlement of consumer disputes by allowing warrantors to set up informal dispute settlement procedures that meet FTC requirements.17 Manufacturers who wish to avail themselves of these informal dispute resolution procedures must follow elaborate guidelines established by the FTC.18 When an informal dispute resolution procedure is effectively incorporated into a written warranty, it can serve as a prerequisite to the filing of a lawsuit under the Act.19

Implied warranties

An implied warranty, unlike the contractual express warranty, arises by operation of law. A manufacturer's or seller's liability for an implied warranty does not depend on its specific conduct or promises. It turns instead on whether the product is merchantable or fit as required under the applicable warranty laws.

The warranty of merchantability is the most common implied warranty. Under the UCC, a warranty that the goods are merchantable is implied in a contract for their sale if (1) the seller is a merchant of goods of that kind, and (2) the warranty has not otherwise been excluded or modified.20 "Merchantable" means that the goods will (1) pass without objection in the trade under the contract description; (2) be of fair average quality within the description, if they are fungible goods; (3) be fit for the ordinary purposes for which they are used; (4) run of even kind, quality and quantity within each unit and among all units involved; (5) be adequately contained, packaged and labeled as the agreement may require; and (6) conform to the promises or affirmations of fact made on the container or label, if any.21

In California, the implied warranty of merchantability is similar to that provided by the UCC, but extends its coverage for consumer goods to the manufacturer as well as the seller.22 It also provides a prescription by which the seller can obtain immunity against the manufacturer.23

The implied warranty of fitness for a particular purpose arises if the seller at the time of contracting has reason to know of any particular purpose for which the goods are intended and the buyer is relying on the seller's skill or judgment in selecting or furnishing suitable goods. A "particular purpose" differs from an "ordinary" one in that it envisions a specific use by the buyer which is peculiar to the nature of his or her needs. But expression of the ordinary purpose of an outboard engine is to propel a boat through water, but the seller may know that a particular boat and outboard are being selected for use in saltwater. Under these circumstances, the seller's skill or judgment in selecting an appropriate outboard engine for saltwater applications may result in a warranty of fitness for that particular purpose.24

Implied warranties can be waived or disclaimed under federal and state law. Under Song-Beverly, however, these warranties can only be waived or excluded on an "as-is" or "with all faults" basis.25 Thus, neither the manufacturer, distributor, nor retailer can disclaim implied warranties in any sale of consumer goods that carry express warranties. Moreover, any disclaimer of an implied warranty must strictly comply with the provisions of the Act.26 Magnuson-Moss extends the prohibition against waiver of implied warranties to consumer transactions that include service contracts.27 It also requires that any such limitation be conspicuous and provides specific disclosure requirements.28

State consumer warranty statutes often establish the duration of an implied warranty. In California, for example, the implied warranty of merchantability and fitness is co-extensive with any express warranty that accompanies the consumer goods, provided the duration is reasonable.29 But the Act further provides that implied warranty may not be less than 60 days nor more than one year following the sale of the product.30

Consumer remedies

The heart of any consumer warranty legislation is the remedies that it affords consumers against manufacturers or sellers who do not comply with their warranty obligations. Under Song-Beverly, the measure of the consumer's damages includes his or her rights of replacement of the product or reimbursement of its purchase price, less any amount attributable to prior use.31 In addition, if the buyer establishes that the failure to comply with the Act was willful, he or she may be entitled to recover a civil penalty that may be as high as twice the amount of the buyer's actual damages. The "willful" standard is not as onerous as

Footnotes

1 Cal. Civ. Code § 1791.3 (2001) (encompassing current version of warranty laws). 2 UCC § 2-314. 3 Id. 4 Id. 5 Cal. Civ. Code § 1791.3(c). 6 Id. 7 In re Bouck & Bachman (1986) 179 Cal. App. 2d 394, 399. 8 Id. 9 Nutter v. Bachman, supra (1986) 179 Cal. App. 2d 394, 399. 10 Cal. Civ. Code § 1791.3(b)(1). 11 Cal. Civ. Code § 1791.3(c). 12 Cal. Civ. Code § 1791.2(a)(7). 13 Cal. Civ. Code § 1791.2(a)(7). 14 Cal. Civ. Code § 1791.2(b). 15 Cal. Civ. Code § 1791.2(a)(7). 16 Cal. Civ. Code § 1791.2(a)(7). 17 Cal. Civ. Code § 1791.2(a)(7). 18 Cal. Civ. Code § 1791.2(a)(7). 19 Cal. Civ. Code § 1791.2(a)(7). 20 Cal. Civ. Code § 1791.2(a)(7). 21 Cal. Civ. Code § 1791.2(a)(7). 22 Id. 23 Cal. Civ. Code § 1791.3(a)(7). 24 Id. 25 Cal. Civ. Code § 1791.3(a)(7). 26 Id. 27 Cal. Civ. Code § 1791.3(a)(7). 28 Id. 29 Cal. Civ. Code § 1791.3(a)(7). 30 Id. 31 Id. 32 Id. 33 Id. 34 Id. 35 Id. 36 Id. 37 Id. 38 Id. 39 Id. 40 Id. 41 Id. 42 Id. 43 Id. 44 Id. 45 Id. 46 Id. 47 Id. 48 Id. 49 Id. 50 Id. 51 Id. 52 Id. 53 Id. 54 Id. 55 Id. 56 Id. 57 Id. 58 Id. 59 Id. 60 Id. 61 Id. 62 Id. 63 Id. 64 Id. 65 Id. 66 Id. 67 Id. 68 Id. 69 Id. 70 Id. 71 Id. 72 Id.
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As a general rule, the remedies provided by a state consumer protection act are cumulative and are not considered as restricting any remedy that is otherwise available. This approach reflects the strong legislative policy toward providing maximum protection to consumers. Consequently, recreational boat and equipment manufacturers who seek to minimize warranty liability and related costs — while maximizing customer satisfaction — should implement a comprehensive, systematic and proactive program for manufacturing warranty policies. In the next article, we will provide specific recommendations that should be incorporated into any such warranty program.

Footnotes


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