Sale of Goods - Disclaiming of Warranties and Consequential Damages

3/19/14

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Illinois law allows sellers to limit their risk and exposure by disclaiming, among other things, warranties and damages. Under the Uniform Commercial Code (the "UCC" – adopted in Illinois and 48 other states), a seller of goods can disclaim all warranties, both express and implied, and within limits, certain damages allegedly caused by the use of goods. In addition to the UCC, there are other laws, including consumer protection laws, that must be considered when disclaiming warranties and modifying or limiting damages, to ensure that the desired provisions are enforceable under Illinois law. This article encourages sellers to look carefully at their sales contracts, and other documents used in a transaction (such as the backside of an invoice, a transmittal from the seller accepting an offer to purchase, or even a bill of lading), to avoid potential liabilities.

The UCC

Article 2 of the UCC deals with the sale of goods only (not services), including warranties that are imposed as part of the sale, as a matter of law. It is important to understand what those warranties are, and how to disclaim those warranties. Disclaimers are strictly construed against the party drafting the contract, so it is important to use careful consideration when drafting disclaimers, as well as other contract terms and conditions so as not to negate the disclaimers.

Express warranties are affirmative promises about the quality and features of the goods being sold. Illinois courts have found that brochures and advertisements may constitute express warranties. Also, an express warranty can be created when using samples or models.

The UCC imposes two types of *implied* warranties: a warranty of "*merchantability*" of the goods being sold, and a warranty that the goods are "*fit for a particular purpose*." Implied warranties become part of a sale transaction unless legally excluded, to allow buyers to purchase goods and be confident that they meet certain minimum standards.

How can a seller "disclaim" express or implied warranties?

First, all warranty disclaimers must be in writing and conspicuous. Illinois courts favor disclaimers that are set off from the rest of the document and highlighted by a heading. A disclaimer "buried" or "lost" in the fine print or hidden in the other terms and conditions of the contract is not enforceable. Moreover, the disclaimer should be printed in all "caps" (capital letters), bold or dark letters, larger font than the letters around it, and maybe in a different color ink if possible, or a combination thereof. And when a contract requires the signature of the buyer, it is recommended that there should be a space for the buyer to provide his or her signature or initials next to the disclaimer, so there is no question that the buyer saw the disclaimer.

Second, in order to disclaim "implied" warranties, a seller must expressly exclude all types of implied warranties, including specifically a warranty of "merchantability," and a warranty that the goods are "fit for a particular purpose."

The UCC provides that it is acceptable to use expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. But if the seller desires to disclaim warranties of merchantability, the disclaimer must conspicuously mention merchantability. Similarly, a disclaimer of the "*fit for a particular purpose*" implied warranty should also be mentioned, though the UCC provides that language

to exclude all implied warranties of fitness is sufficient if the contract provides that, "There are no warranties which extend beyond the description on the face hereof."

The following disclaimer has been upheld by Illinois courts to effectively exclude all express and implied warranties.

ALL WARRANTIES OF ANY KIND WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, ARE HEREBY DISCLAIMED. ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED. THE MACHINERY (INCLUDING ANY ACCESSORIES AND COMPONENTS) IS SOLD 'AS IS.'

A court has noted, for example:

- That the language specifically mentioned merchantability.
- Was written in a contrasting type set (large, bold letters).
- Sufficiently called the buyer's attention to the exclusion of all warranties.

If a standard sales contract (signed by all parties) is not used, it is recommended that the seller include similar language in his or her transmittal (email, letter, fax) accepting the offer to purchase and agreeing to provide the goods ordered, and/or other sales documents provided when the goods were shipped. This language should also be prominently displayed on the invoice.

A prudent seller will also include in any sales contract an explicit "integration clause" that provides that the contract is a complete expression of the parties' entire agreement. For example:

This agreement constitutes and contains the entire agreement between the parties. All prior or contemporaneous understandings or agreements between the parties, if any, whether written or oral or express or implied, are merged into and with this Agreement, which fully and conspicuously states and expresses the parties' understanding and agreement.

This provision prevents the buyer from claiming to rely upon any prior or contemporaneous oral agreements that may have occurred between the parties that are not included in the final written contract. This applies not only to warranties but all other aspects of the contract, such as price and delivery date.

Finally, the UCC also allows sellers to limit, alter or disclaim their exposure for damages recoverable under the UCC or for breach of any warranties provided. For example, the UCC allows a seller to expressly provide in a sales agreement that a buyer's remedy is limited to return of the goods and repayment of the price, or to repair and replace the non-conforming goods or parts. (It is recommended that such a remedy be considered, especially in the sale of consumer goods, since it is the "very essence of a sales contract that at least minimum adequate remedies be available;" otherwise, a provision for the limitation of damages may be found unconscionable and thus, unenforceable.)

More importantly, a prudent seller will disclaim all *consequential* damages in all of its contracts. The UCC provides:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The following contract provision was upheld in Illinois disclaiming any responsibility for consequential damages for both the seller and the manufacturer:
In no event shall Seller or the manufacturer of the [product] (including its officers, agents, employees, representatives, attorneys and parent, subsidiary and affiliated companies) be liable for damages of any nature, including without limitation, special, direct, indirect, incidental or consequential damages, whether or not relating to or in any manner resulting from or arising out of any nonconformity of the [product and accessories] to the warranty herein, any defect in material and workmanship, any

performance or nonperformance by Seller of any of the obligations or delay of delivery or failure to deliver for whatever cause, other than damages expressly provided for above.

In conclusion, careful consideration must be made in the drafting of disclaimer provisions, and the placement of those terms in a sales contract, or in any document used in the sales transaction that incorporates the terms and conditions of the sale (including invoices or other sale documents if a traditional "sales contract" is not used) to protect the seller from liabilities down the road.