Proposed Revisions Concerning Products Liability Caveat Vendor

James J. White
University of Michigan Law School, jjwhite@umich.edu
Available at: https://repository.law.umich.edu/other/106

Follow this and additional works at: https://repository.law.umich.edu/other
Part of the Commercial Law Commons, Consumer Protection Law Commons, and the Torts Commons

Recommended Citation
ALI-ABA Course of Study
The Emerged and Emerging New Uniform Commercial Code

December 8-10, 1994
New York, New York

Proposed Revisions Concerning Products Liability Caveat Vendor

By

James J. White
University of Michigan Law School
Ann Arbor, Michigan
Both industrial sellers and consumer sellers should look at proposals for revision of the sections relating to warranty liability in Article 2. Particularly important are the sections on warranty, express and implied, on third-party liability, disclaimers and limitation of remedy, notice, and statute of limitations. Using current law as a baseline, revised Article 2 increases sellers' liability in at least half a dozen ways and decreases it in no significant way.

1. Express Warranty, 2-313. Revised 2-313 expands sellers' liability in at least three important ways.

   a. For all practical purposes the reliance requirement is gone from 2-313. Reliance on a warranty was a requirement for recovery under the Sales Act; in current Article 2 express warranties must be part of the "basis of the bargain." This requirement has now shrunk to a provision that denies warranty liability only where the seller "establishes by clear and convincing evidence that the buyer was unreasonable in concluding that an affirmation or promise, description or sample became part of the agreement."

   b. Revised Section 2-313(c) "presumptively" creates a warranty to persons who were not parties to the contract with certain limitations specified 2-313 (d).

   c. Revised Section 2-313(a) contains the statement from current 2-313 that words like "warrant" and "guarantee" need not be included to make a warranty, but omits the reference in current 2-313 to
puffing ("but an affirmation merely of the value of the goods or a statement merely to be the seller's opinion or accommodation of the goods does not create a warranty.")

d. Consider how the new modifications might work.

(1). Assume that United Airlines buys Pratt & Whitney jet engines for its new 737s. The engines do not produce the thrust as promised, require more maintenance than expected and require expensive protection against icing. Assume that Pratt and Whitney had an effective disclaimer in its agreement with United Airlines and had warned that in certain applications the engine would not perform exactly as both it and United had hoped it would.

May United search the United States, or perhaps the world market, for advertisements, brochures, and technical manuals that have been passed out to potential buyers by Pratt & Whitney describing this engine? If they find one that specifies how it deals with ice, projected time until overhaul, projected maintenance costs, may they rely on it, notwithstanding the fact they did not have such express warranties in their contract? Note that there is no requirement in 2-313(c) that the warranty be part of the contract between the buyer and seller. Nor is there any requirement there that the buyer know of the warranty only that it be made to the "public." Presumably all advertisements—even if not widely distributed—are to the "public" and so
available for ex post facto reliance.

Section 2-313(d) denies the warranty if it is made to "a segment of the public of which the buyer was not a part". Since "consumer" is used elsewhere but not here, it is clear that "public" does not refer just to consumers. Presumably United Airlines is a segment of the public. Moreover its "segment" would include all airlines flying 737's.

(2) Assume that China Air Lines sues Pratt & Whitney for promises made in private negotiations to United Airlines and for promises made in certain technical manuals and brochures distributed to several potential buyers in the United States. Assume for the purpose of the argument that China Air Lines did not know of those promises until it took discovery after it had commenced its law suit.

Can Pratt & Whitney win on the argument that under 2-313(b) that "the buyer was unreasonable in concluding that an affirmation, promise, description, or sample became part of the agreement." If one assumes that the buyer had to know of the warranty at the time the agreement was made (i.e., one in ignorance of a promise is incapable of concluding that the promise became part of the agreement), there is some hope for sellers. That is not what the section means; the buyer will argue that its reasonableness must be measured after it found out about the affirmation. Ignorance of the affirmation is no defense.
Buyer could have difficulty proving that private promises to other airlines should become part of its agreement. On the other hand, the same engine should perform the same way in a 737 whether it is in China Air Lines’ 737 or the 737 of United.

It is hard to see how a seller will successfully defend a case under 2-313(b) since it must show by "clear and convincing evidence" that the buyer was unreasonable. If buyer’s ignorance of the warrants at the time of the deal does not render reliance unreasonable, what does?

(3) Assume a buyer who sees the television advertisement that shows how a Lincoln Continental squats down one or two inches when it goes fast and emphasizes the power and performance of its engine. Buyer is involved in an accident and sues the seller for breach of warranty based upon that television ad. Assume further that the automobile is successful beyond the Ford’s dream and attracts a large number of aging Corvette drivers who drive just as fast as when they were young, but not as well. Those buyers have a wide range of accidents with the new Continental. Plaintiff brings a class action suit dependent upon the advertisement and irrespective of the fact that most of the purchasers of the automobile never saw the television advertisement.

If the advertisement is an affirmation or a promise of how the automobile will handle at high speed and is broken, can there now be a recovery on behalf of the
class irrespective of the fact that only a few of them ever saw the advertisement? Surely Ford will have a hard time showing "by clear and convincing evidence" that the buyers were unreasonable in concluding that the affirmation was part of the bargain if it is not protected by a buyer's ignorance of the advertisement. As to some of the damages, Ford might be saved by revised 2-318(d)(3)(no consequential damages against a remote seller).

c. Revised 2-313 invites every disappointed industrial buyer to make claims on the basis of technical writings, brochures, television advertisements, and written advertisements. Presumably consumers can be foreclosed by making the advertisements yet less informative than they are today. (See the cigarette ads.) But I doubt that we should give industrial sellers a major disincentive against disclosure of technical material. If the technical material is important for the buyer to understand the product and to determine whether it is suitable for buyer's use, it is desirable to encourage the seller to give as much detail to the buyer as possible. If, no matter what the contract says, such disclosure may become a warranty—as seems to be the case under 2-313—revised 2-313 will give the seller an incentive not to disclose relevant data in its industrial advertising and technical materials.

2. Section 2-314. Implied Warranty of Merchantability

The only significant addition in revised 2-314 is subsection 2-314(b)(7) which says that a seller impliedly warrants "in the
case of goods purchased for human consumption or for application to the human body, [the goods are] reasonably fit for consumption or application." The comment notes that this section rejects the "foreign/natural ingredient" dichotomy and leaves the courts to determine when goods containing natural ingredients (e.g., bones, cherry pits ...) are not reasonably fit for consumption. If that were all revised 2-314(b)(7) did, sellers should have no complaint.

Revised 2-314(b)(7) can be read as aimed at the pariah products (cigarettes, alcohol, snuff, guns, and even butter). Recall the old comment, undoubtedly written by Prosser that appears in current 402(A) which says:

"Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous." Restatement of Torts 2d § 402A, Comment i.

Arguably no exception like that in the 402(A) comment was ever built into 2-314. It always required goods to be fit for the ordinary purposes for which they are used and one could always have argued that if cigarettes cause cancer, they are not fit for those ordinary purposes. On the other hand, under the current 2-314, one could argue that "ordinary purposes" have the
meaning described by Prosser's comment in 402(A), namely that the warranty was freedom from foreign substances, not a warranty that the substances known to be present in cigarettes or alcohol would not be injurious. Under that interpretation, cigarettes that caused cancer or heart disease, alcohol that caused drunkenness and cirrhosis, bullets that killed and butter that fattened would not be lacking in merchantability because of those facts.

The addition of (b)(7) makes that argument harder for a defendant seller. To maintain that cigarettes are "fit for ordinary purposes" because their ordinary purposes are to make people psychologically content, to satisfy their cravings for nicotine and oral stimulation is harder under the proposed language, for revised 2-314 makes the specific warranty that such goods are reasonably fit for "consumption". The new warranty seems to be saying more than they are fit for ordinary purposes; it is saying they are fit for a particular purpose, namely, consumption, i.e., a warranty that "this commodity does not cause disease."

Do we wish to impose such an implied warranty on the manufacture of consumer products that are known or widely believed to have injurious consequences when a large part of the adult population of the world--knowing of those injurious consequences--nevertheless chooses to confront them? I doubt it. If that is what 2-314(b)(7) means, I assume that the manufacturers of snuff, cigarettes, alcohol--possibly even butter, coffee, and the like--will argue for change in (b)(7).

3. Section 2-316

Section 2-316 is similar to the old 2-316 but it has two or three changes that are deleterious to the seller's interests.

a. Compare old (3)(b) with new (d)(2).
Section 2-316(3)(b). Notwithstanding subsection (2) . . . (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him[.]

Revised Section 2-316(d)(2). Except in a consumer contract, the following rules apply: . . . (2) If the buyer before entering into the contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to nonconformities that an examination in the circumstances would have revealed.

The former section burdens the buyer with defects the buyer "ought" to have seen, but the new section burdens him only with defects which inspection "would have revealed." Assume a buyer who inspects, fails to see a defect (and whose examination, therefore, did not and therefore would not have revealed them) and sues. Assume, for example, that a prospective buyer of a used 737 from United Airlines, examines the airplane but fails to take off the panels on the bottom and so does not examine the ribs and the keel. If he had done so, assume he would have discovered that the ribs and keel were heavily corroded. Six months after the purchase buyer sues seller for breach of warranty. Under the current 2-316, if it could be proven that a normal inspection "ought" to and would have uncovered the defects, the buyer would be stuck. Under the new wording, having done an inspection, buyer can argue that his inspection was adequate and that the absence of the "ought" language means that (d)(2) does not reach this case. In effect the buyer would argue that when an inspection has been done, no hypothetical inspection is assumed.
b. For practical purposes revised 2-316(e) outlaws disclaimers against consumers. It states: "the terms are inoperative unless the seller proves by clear and convincing evidence that the seller understood and expressly agreed to the term." Will the consumer's initials beside the disclaimer be effective? I doubt it. Seller must show not only that the consumer buyer saw the disclaimer, read it, but also that he understood it and "agreed" to it. What evidence clearly and convincingly proves "understanding"? Short of the buyer's admission, I know of none. I wonder if subsection (e) is drafted the way it is because the Drafting Committee was not willing to say the truth: "disclaimers are ineffective against consumers."

But why should disclaimers be ineffective against consumers? Most consumers can read; even people who have never been to law school can understand language like "As Is," "We make no warranties about these used cars". It has always seemed to me that consumer advocates are disdainful of the intelligence of their clients. Note that revised section 2-316 has little to do with consumers who are injured because those consumers have tort claims that will not be touched by warranty disclaimers.

Section 2-318. Rights of third parties who have no contract with the seller

a. The rule stated in revised 2-318(b) is a good one. Sellers stumbling upon 2-318(b) might think that they have found something in revised Article 2 that is favorable to a seller because it appears to equate the rights of a remote buyer to the rights of the initial buyer. But what subsection (b) gives, subsection (c) takes away. It reads in full as follows:
Revised § 2-318(c).

(c) A buyer's rights and remedies for breach of a warranty are determined under this article, as modified by subsection (d), without regard to privity of contract or the terms of the contract between the seller and the immediate buyer if:

(1) the buyer is a consumer to whom a warranty was extended under subsection (a) and the Magnuson-Moss Warranty Act applies or the seller is a merchant under Section 2-314(a) who sold unmerchantable goods; or

(2) the buyer is a member of the public to whom an express warranty was made by the seller under Section 2-313(c) or (d).

b. I am uncertain about the meaning of revised 2-318(c)(1). Probably it applies only to buyers (i) who are consumers and (ii) who are covered by Magnuson Moss or who have a claim against a merchant under 2-314(a). The other way to read it is to say that it applies to all buyers and that it covers (i) consumers under the Magnuson Moss Act and (ii) all buyers where there is warranty of merchantability under 2-314(a). I think the latter interpretation is incorrect.

c. Note that (c)(2) takes away much of the protection given by (b). Since warranty to the public is not defined in 2-313(c) or (d) and since it is possible that a warranty could be to a member of the public even though it was made in a private context. The subsection gives doubtful protection. In any event, subsection (c) clearly turns loose remote parties when the buyer's claim is based on advertising, brochures or the like.
d. The most serious threat to sellers from 2-318, is the "discovery" rule for the statute of limitations in revised 2-318(d)(3). Instead of the standard statute of limitation which runs from the time of the original sale (or from the subsequent sale), this runs from the time the remote buyer discovers or should have discovered the breach. Under this rule sellers can expect suit from remote buyers who claim never to have discovered the breach until a product failed many years after the sale. (Never mind that the machine had been overhauled 17 times.)

e. There is at least one nice thing in 2-318 for sellers. That is (d)(3) which prohibits remote buyers from recovering consequential damages. Even that present is limited by its reference to (d)(2) and by the proviso that the recovery can be had against an intermediate seller for consequential damages.

5. Notice, Revised Section 2-606(c)(1)

a. Section 2-607(3) and Article 39 of the CISG cut off a buyer's right to sue. Section 2-607(3) reads in part as follows: "Where tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Section 2-606(c)(1) of the revision says: "the buyer within a reasonable time after the buyer discovers or should have discovered a breach, shall notify the seller of the breach. However, a failure to give proper notice does not bar the buyer from any remedy that does not prejudice the seller."

Note two things about the new terminology. First, it does not say
directly what happens if the buyer fails to give notice. Only by inference does one conclude that certain remedies might be cut off. Second, to the extent that the seller is unable to prove prejudice, the failure to give notice is not relevant to a later suit.

One can only guess how the courts will use this term, but it is possible that it will effectively delete a notice requirement from the law.

b. Assume that seller sells two generators for $1 million each to buyer. Assume some difficulty with the generators and that seller does some repairs after they are installed. A year after the last work has been done the buyer notifies the seller of breach, asks for revocation of acceptance, and sues for damages. What are the consequences of 2-606 (c)(1)? Who must prove what?

The seller is likely to say had he been notified earlier he would have been more diligent in his repairs, that he might have replaced the generators, or that he might have done other things to determine whether the cause of the deficiency was his or another person’s. These complaints of seller are likely to be diffuse and non specific. Is the burden on him to prove prejudice or the burden on the buyer to prove the absence of prejudice? Assume that he does prove prejudice, what is the remedy? Under the current notice provision, the one failing to give notice is barred from all remedy; it is unequivocal. The same is true in the CISG, but there is no such bar specified in revised 2-606.

c. To the extent one regards the notice requirement in 2-607(3) as analogous to a statute of repose (i.e., after a certain period of time—when I have
heard nothing bad from my buyer—who may have been having some difficulties with the product, I can rest at ease). Presumably seller’s lack of sleep is not "prejudice" under 2-606(c)(1).

Should we dilute the strong incentive for quick action on the part of buyers? Revised 2-606’s dilution encourages "warranty" suits that really arise not from breach of warranty but from buyer’s remorse. I am always suspicious of a buyer who does not complain at the time he learns of the defect, but only after he finds that he can buy the same product or a better one at a lower price or that he has no use for the one purchased.

6. Agreed remedies, revised Section 2-719.

a. Section 2-719(b) retains the familiar denial of an exclusive remedy when it "fails of its essential purpose." Subsection (b)(2) says that "agreed remedies outside the scope of and not dependent on the failed agreed remedy are enforceable as provided in this section." From the comment it appears that revised (b)(2) validates agreements excluding consequential damages and the like even if other remedies fail. It indorses the American Electric Power line of cases on the question whether consequential damages limitations survive ouster of repair and replacement terms. Referring to only agreed remedies as "being enforceable" leaves the matter a little unclear. Invariably these "agreed remedies" are not "remedies" but prohibitions of remedies (i.e., "no consequential damages").

b. Revised Section 2-719 makes prohibitions of consequential damages invalid against consumers. The prohibition is easy to understand when
one is talking of personal injury but hard to understand otherwise.

Assume consumer buys an automobile; the automobile fails to start several mornings during a Minnesota February. As a result of consumer's late arrival at work on those mornings, she is fired from her job and--according to her later complaint--was despondent, is divorced, and suffers hundreds of thousands of dollars of lost wages, pain and suffering, and loss of consortium. Of course, one can argue that there was no proximate relationship between the unmerchantable automobile and loss of her job, much less her loss of marriage, but tell that to a jury. Why should not she be subject to the same sort of limitations that business buyers are, at least with respect to non-personal-injury losses? Consumers have economic losses and their losses for "pain and suffering" where there is no personal injury are hard to quantify and easy to exaggerate. Why not allow their prohibition?

7. Revised Section 2-725

a. In some ways the most threatening proposal of all for sellers is found in alternative two to revised 2-725(c)(2). That section would adopt the "discovery rule," for the statute of limitations in warranty cases. Currently the statute runs from the time of sale.

b. Assume that buyer buys 747 from Boeing. The aircraft works perfectly for six years. At the beginning of the sixth year, expensive additions have to be made to hydraulic system and to the mechanical parts of the rudder. Boeing maintains that the express or implied warranties given at the time of sale have run out. The buyer argues that it
could not have discovered the problem and can therefore sue for breach of warranty under 2-313 and 2-314. Because the warranty commences to run only on buyer's discovery of the defect. Why should a seller be liable indefinitely for an economic loss? Because of the discovery rule in torts is that there is no effective statute of limitations in many tort cases. Sellers of commodities that have the possibility of injuring users remain perpetually liable as long as the plaintiff can claim that he did not discover the defect until shortly before he was injured.

The rise of the discovery rule in torts is one of the most pernicious changes in our law since 1900. I would argue that that rule should not be incorporated into our sales law. It need not be added here to save consumers because any consumer whose blood has been spilt will be able to recover on a tort theory outside of Article 2.

CONCLUSION

By my calculation there is one small scrap in this heap for sellers, namely, a restriction on consequential damages found in 2-318. Everything else--including things that seem to be favorable to sellers such as the incorporation of the third-party beneficiary theory in 2-318(a)--proves to be inconsequential or contrary to the seller's interests. Some of these are contrary to the seller's interests in a small way; others could grow large. If the Drafting Committee had followed the direction of the Article 2 Study Committee, it would have proposed few or none of the changes I have discussed above. Unless there is considerable change in these provisions, I fear that revised Article 2 will stumble at the starting line.
To see how a modern commercial sales law dealing only with business parties might describe a seller’s liability, consider sections 35 through 40 of the Convention on Contracts for the International Sale of Goods.

**Convention on Contracts for the International Sale of Goods**

**Section II. Conformity of the goods and third party claims**

**Article 35**

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of
conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities of characteristics.

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any nonconforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.
Revised Section 2-313. Express Warranties By Affirmation, Promise, Description, or Sample.

(a) Except as otherwise provided in subsection (b):

(1) An affirmation of fact or promise by the seller, including a manufacturer, made directly or through a dealer to the buyer which relates to the goods presumptively becomes part of the agreement between the seller and buyer and creates an express warranty that the goods will conform to the affirmation or promise. To create an express warranty by affirmation or promise, it is not necessary that the seller use formal words, such as "warrant" or "guarantee", or have a specific intention to make a warranty.

(2) A description of the goods presumptively becomes part of the agreement between the seller and buyer and creates an express warranty that the goods will conform to the description.

(3) A sample or model that is made part of the agreement presumptively creates an express warranty that the whole of the goods will conform to the sample or model.

(b) An express warranty is not created under subsection (a) if the seller establishes by clear and convincing evidence that the buyer was unreasonable in concluding that an affirmation, promise, description, or sample became part of the agreement.

(c) Except as otherwise provided in subsection (d), a description, affirmation of fact, or promise made by a seller, including a manufacturer, to the public which relates to goods to be sold presumptively creates an express warranty to any buyer that the goods will conform to the description, affirmation, or promise. Subject to Section 2-318, the buyer may enforce the express warranty directly against the seller, whether or not the express warranty is part of
the contract with the buyer's immediate seller.

(d) An express warranty is not created under subsection (c) if the seller establishes that the description, affirmation of fact, or promise:

(1) was made more than a reasonable time before or after the sale;

(2) was made to a segment of the public of which the buyer was not a part; or

(3) resulted from a mistake upon which the buyer did not reasonably rely.

Section 2-314(b)(7):

To be merchantable, goods, at a minimum, must:

(7) in the case of goods purchased for human consumption or for application to the human body, be reasonably fit for consumption or application.

Section 2-316. Exclusion or Modification of Warranties.

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed whenever reasonable as consistent with each other. Subject to Section 2-202 with regard to parol or extrinsic evidence, words negating or limiting a contract are inoperative to the extent that construction is unreasonable.

(b) Except in a consumer contract and as otherwise provided in subsection (d), to exclude or modify an implied warranty of merchantability or any part of it, the language must be in writing or contained in a record, mention merchantability, and be conspicuous.

(c) Except in a consumer contract and as otherwise provided in subsection (d), to exclude or modify an implied warranty of fitness, the language of exclusion must be in a writing or contained in a
record and be conspicuous. Language excluding all implied warranties of fitness is sufficient if it states "There are no warranties that extend beyond the description on the face hereof," or words of similar import.

(d) Except in a consumer contract, the following rules apply:

(1) All implied warranties are excluded by expressions like "as is", "with all faults", or other language that in common understanding or under the circumstances calls the buyer's attention to the exclusion of warranties and clearly indicates that there is no implied warranty.

(2) If the buyer before entering into the contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to nonconformities that an examination in the circumstances would have revealed.

(3) An implied warranty may be excluded or modified by course of dealing, course of performance, or usage of trade.

(e) In a consumer contract, terms disclaiming or limiting the implied warranty of merchantability or the implied warranty of fitness for particular purpose must be in a writing or record. The terms are inoperative unless the seller proves by clear and convincing evidence that the buyer understood and expressly agreed to the term.

(f) Remedies for breach of warranty may be limited in accordance with this article on liquidation or limitation of damages and on contractual modification of remedy.

Section 2-318. Extension of Express or Implied Warranties.

(a) A seller's express or implied warranty, made to an immediate buyer, extends to any person who may reasonably be expected to buy, use, or be affected by the goods and who is damaged by breach of the
warranty. In this section, "seller" includes a manufacturer, "goods" includes a component incorporated in substantially the same condition into other goods, and "protected person" means a person to whom a warranty extends under subsection (a).

(b) Except as otherwise provided in subsection (c), the rights and remedies of a protected person against a seller for breach of a warranty extended under subsection (a) are determined by the enforceable terms of the contract between the seller and the immediate buyer and this article.

(c) A buyer's rights and remedies for breach of a warranty are determined under this article, as modified by subsection (d), without regard to privity of contract or the terms of the contract between the seller and the immediate buyer if:

(1) the buyer is a consumer to whom a warranty was extended under subsection (a) and the Magnuson-Moss Warranty Act applies or the seller is a merchant under Section 2-314(a) who sold unmerchantable goods; or

(2) the buyer is a member of the public to whom an express warranty was made by the seller under Section 2-313(c) or (d).

(d) A buyer under subsection (c) has all of the rights and remedies against a remote seller provided by this article, except as follows:

(1) To reject or revoke acceptance, notice must be given to the remote seller within a reasonable time after the buyer discovers or should have discovered the breach of warranty.

(2) Upon receipt of a timely notice of rejection or revocation of acceptance, the remote seller has a reasonable time either to refund the price paid by the buyer to the immediate seller or cure the breach by supplying goods that conform to the warranty. If the seller complies with this paragraph, the remote buyer has no further remedy against the seller, except for incidental damages under Section 2-715(a). If the remote seller fails to comply with this subsection, the buyer may claim damages for breach of
warranty, including consequential damages under Section 2-715(b).

(3) Except as provided in paragraph (2), a buyer has no right to consequential damages unless expressly agreed with the remote seller.

(4) A [claim for relief] for breach of a warranty extended under subsection (a) or created under Section 2-313(a)(3) accrues no earlier than the time the remote buyer discovered or should have discovered the breach.

(e) A seller may not exclude or limit the operation of this section.

Section 2-606(c).

(c) If a tender has been accepted, the following rules apply:

(1) The buyer, within a reasonable time after the buyer discovers or should have discovered a breach, shall notify the seller of the breach. However, a failure to give proper notice does not bar the buyer from any remedy that does not prejudice the seller.

(2) If the claim is one for infringement or the like and as a result of the breach the buyer is sued, the buyer must so notify the seller within a reasonable time after receiving notice of the litigation or be barred from any remedy over for liability established by the litigation.

Section 2-719. Contractual Modification or Limitation of Remedy, Including Damages.

(a) Subject to this section and Section 2-718:

(1) an agreement may provide for remedies in addition to or in substitution for those provided in this article or limit or alter the measure of damages recoverable under this article, including limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of
nonconforming goods or parts by the seller; and

(2) resort to a modified or limited remedy is optional, but a remedy expressly agreed to be exclusive is the sole remedy.

(b) If circumstances cause an exclusive agreed remedy under subsection (a) to fail of its essential purpose:

(1) to the extent that the agreed remedy has failed, the aggrieved party has remedies as provided in this article; and

(2) agreed remedies outside the scope of and not dependent on the failed agreed remedy are enforceable as provided in this section.

(c) Consequential damages may be limited or excluded by agreement unless the limitation or exclusion is unconscionable. Except as otherwise provided in subsection (d), a limitation or exclusion of consequential damages for commercial loss is presumed to be conscionable.

(d) In a consumer contract, the following rules apply:

(1) If circumstances cause an exclusive, limited remedy to fail of its essential purpose and the duration of any implied warranty has not expired, a buyer may revoke acceptance and may obtain from the seller either a refund of the price paid or a replacement of the goods and has other remedies as provided in this article, to the extent permitted in Section 2-701.

(2) Any term in the contract excluding or limiting consequential damages is inoperative unless the seller proves by clear and convincing evidence that the buyer understood and expressly agreed to the term.

(3) A limitation or exclusion of consequential damages for injury to the person is unconscionable as a matter of law.
Revised Section 2-725(c) second alternative

(c) If a breach of warranty or indemnity occurs, [a claim for relief] accrues when the buyer discovers or should have discovered the breach.