

Frequently Asked Questions:

Product Warranties

What is a warranty?

A warranty is a statement by a product seller or manufacturer that it will work as stated. It can be express or implied. Express warranties use words to describe the seller's promise and are normally in writing. Implied warranties arise from the transaction itself, and depend on the conduct of the seller and the understanding of the buyer.

How do I determine if a term is a Condition or Warranty?

Warranties need to be distinguished from conditions to determine the remedies for a breach. A condition is key to the purpose of the agreement and, if it is not met, the purchaser may be allowed to cancel the contract. On the other hand, a breach of warranty gives rise to a claim for damages, but does not give the injured party the right to reject the goods and treat the contract as voided.

The courts have held that whether a term is a warranty or a condition is a substantive difference, meaning that the court, will determine how to classify the promise in a contract, not the parties. Therefore the parties cannot simply say, "It is a warranty." The court will look at purpose of the contract and consider whether the term in question is central to that purpose, or secondary to it.

What is a Limited Warranty?

Express warranties are often limited by the wording of the provisions. For example, it is common that a warranty be limited in time. In general, the quality or fitness for purpose of a product is warranted only for a specific length of time after purchase. The warranty can also be limited by other factors, such as the use to which the product is put, by whom and the degree of quality warranted (i.e. materials only, workmanship, etc.).

An express warranty can also be limited by certain exclusions described in the contract of sale. Generally, exclusions of liability in contracts between commercial parties will be enforceable (unless they are unconscionable or otherwise against public policy). These clauses are also unenforceable if the seller knew of the defect at the time of sale. In some provinces, there are statutory restrictions that govern the validity of exclusion clauses.

However, in the absence of any statutory barriers, the scope of an express warranty can be considerably limited. If there is a disagreement about the meaning of an exclusionary clause, these clauses will be strictly interpreted against the manufacturer or seller. A properly drafted exclusion clause (also called an exemption clause) can, however, be extremely effective in limiting liability.

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What is an Exclusionary Clause?

A warranty can contain terms that try to exclude or limit the manufacturer or distributor's liability for negligence, implied warranties at common law or even the statutory implied conditions under Sale of Goods or Consumer Protection legislation. These clauses may serve as a complete defence to a claim in contract or in negligence. Accordingly, terms which claim to limit liability are carefully examined by the court. In addition, the party who is relying on the exclusion has the responsibility to prove that the other party to the contract not only understood but also agreed to the term before entering into the agreement.

When are Exclusionary Clauses NOT Enforced?

Exclusionary clauses will generally be enforced according to their terms in contracts involving commercial parties. However, they will be strictly interpreted *against* the party in whose favor they are drafted. The courts and legislatures have developed the following grounds to restrict the application of exemption clauses:

a. *Lack of Adequate Notice*

Where there is unequal bargaining power among the parties, onerous or otherwise unusual clauses must be brought to the weaker party's attention. This is especially true where the clause is "buried" in a long and otherwise standard form agreement. Some courts have held that, even where there has been enough time to read the contract, "standard form" contracts are not meant to be read. In many circumstances, an average, or even a sophisticated consumer could spend hours reading the contract and yet still not understand the implication of most of the terms. Therefore, as a general rule, any significant limitations or exclusions of liability should be brought to the attention of the purchaser before the sale.

b. *Misrepresentation*

If the effect of the exclusionary clause is misrepresented then the clause will not apply.

c. *Strict Interpretation*

Exclusionary clauses must be clear, direct, unambiguous and must not be inconsistent with any other provisions in the warranty.

d. *Unconscionability*

The Supreme Court of Canada endorses the policy that a court may exercise its discretion in refusing to enforce exclusionary clauses if they are unconscionable, unfair, unreasonable or otherwise contrary to public policy. However, generally speaking, if the parties are of equal bargaining power, the court will enforce the agreement made by the parties.

What are Statutory Restrictions on Exclusions?

In many provinces there are also statutory restrictions that govern the validity of exclusion clauses. One example is found in Ontario's *Consumer Protection Act* (CPA) which states that the implied conditions and warranties found in the *Sale of Goods Act* cannot be varied or excluded if the contract involves a "consumer sale" as defined by the CPA. The CPA also imposes restrictions on "executory contracts," contracts between a purchaser and a seller where delivery of the goods or performance of the services, or payment in full of the consideration is not made at the time the contract is entered into.

Conclusion

Warranties provide effective limitations on a manufacturer or seller's liability. A manufacturer or seller will often warrant that the product will work as intended for a specific period of time and agree to fix or replace the product during that timeframe. However, the manufacturer or seller will also want to exclude or limit its liability both during and after that time period. It can do so successfully with a carefully drafted warranty.

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