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Do You Need to Read the Warranty First?

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Where a written warranty for a consumer product comes wrapped in plastic and sealed in the box, can the manufacturer defeat a breach of warranty claim by contending the consumer could not have relied on the warranty at the time she purchased the goods? In other words, does the fact a written warranty is not read until the goods are delivered and the carton is opened relieve a seller of responsibility for its warranty obligations? Until recently, the answer in California was surprisingly unclear.

Until last month, the Judicial Council of California Civil Jury Instruction (CACI) No. 1240, entitled "Affirmative Defense to Express Warranty — Not 'Basis of Bargain'" provided an affi rmative defense to a claim for breach of express warranty where the defendant could prove that plaintiff did not "rely" on the warranty statements in the guarantee. Although "reliance" long ago had been removed as an element of a cause of action for breach of express warranty, CACI No. 1240 had converted the concept into an affi rmative defense. The Judicial Council's legal basis for the instruction was a questionable reading of California case law that the absence of "reliance" relieved a defendant from liability. However, on June 25, 2010, the California Judicial Council, in its most recent release of CACI jury instructions, revoked CACI 1240. The Judicial Council's decision to revoke the instruction was the result of a recent decision by the 1st District Court of Appeal, *Weinstat, et al. v. Dentsply International, Inc.* (2010) 180 Cal.App.4th 1213.

The "express warranty" story begins in 1965 when California Commercial Code (UCC) Section 2313 came into effect, which sets forth the elements for a claim for breach of express warranty. Under Section 2313, a purchaser must prove three basic elements to establish a claim for breach of express warranty: that the seller made statements that constituted an "affirmation of fact or promise" or a "description of the goods"; that the statement was "part of the basis of the bargain;" and that the warranty was breached. (Cal. U. Com. Code Section 2313.) The UCC language was a significant change from the prior law of express warranties, which explicitly required a plaintiff to prove reliance on the representations made in the warranty. The UCC replaced the "reliance" element with the requirement that a plaintiff prove that the seller's representations were "part of the basis of the bargain." In fact, Official Comment 3 to UCC Section 2313 states that "no particular reliance...need be shown in order to *weave the seller's affirmations of fact* into the fabric of the agreement." Moreover, the comment states that if the seller intends to take any affirmation, once made, out of the agreement, the seller must present "clear affi rmative proof" that it was in fact removed.

Over the years, the "part of the basis of the bargain" requirement has been described as "obscure at best" and has generated signifi cant disagreement among the courts.

The first California case to address this language was *Hauter v. Zogarts* (1975) 14 Cal.3d 104. There, the California Supreme Court discussed "for the first time" the meaning of the UCC language "part of the basis of the bargain" and considered the continued role of "reliance" in an express warranty claim under the UCC. The Court acknowledged the new UCC language as problematic, and noted that while some commentators have suggested the "part of the basis of the bargain" requirement shifts the burden of proof to the seller to show non-reliance, others have argued that the UCC language eliminates the reliance requirement altogether. While the court identifi ed the dispute, it did not resolve the controversy. Instead, after a lengthy discussion of the UCC language, the Court expressly stated that it was "not called upon in this case to resolve the reliance issue" and left it for the lower appellate courts to settle.

The next serious attempt to address this language was in *Keith v. Buchanan* (1985) 173 Cal.App.3d 13. There, the 3rd District Court of Appeal confirmed that the UCC had "purposefully abandoned" the concept of reliance and that a purchaser of goods need not demonstrate "reliance" as a prerequisite to a claim of breach of express warranty. But the *Keith* court also held that under the UCC, the burden of proof had shifted to the seller to prove that the representations were not "part of the basis of the bargain." Equating the concepts of "part of the basis of the bargain" with "reliance," the court essentially held that a defendant could rebut the claim for breach of express warranty by proving that that the representations were not an inducement for the purchase, *i.e.*, that plaintiff had not relied on the statements.

Relying solely on the court's opinion in *Keith*, the California Judicial Council published CACI jury instruction 1240 as part of its 2003 release. Instruction 1240 provided an affi rmative defense to a claim for breach of express warranty and stated that a defendant is "not responsible for any harm to plaintiff" if defendant can prove that plaintiff did not "rely" on the warranty affirmations in deciding to purchase the product. Thus, the instruction made it the seller's burden to prove non-reliance by the purchaser.

In January 2010, the 1st District issued its opinion in Weinstat, a case which arose from a pending class action involving, inter alia, breach of express warranty claims arising from defective dental equipment. Examining Section 2313 and related case law, the court held that under the UCC, the element of reliance "plays no role" in an express warranty claim — either as an element of the cause of action or as an affirmative defense. The court held that the statute creates a presumption that, once made, a sellers' representations regarding goods become "part of the basis of the bargain," and thus are enforceable warranties. It is immaterial under the UCC that the warranties were not specifi cally "bargained for" during contract negotiations and not "relied upon" by the buyer in his or her decision to buy the product. Moreover, it is irrelevant that the warranties were wrapped in plastic, sealed in a box and not delivered to the purchaser until after the contract is made — they are still considered part of the basis of the bargain and actionable if breached.

The *Weinstat* court rejected the contention — expressed in CACI 1240 — that a defendant's right to rebut a claim for breach of express warranty may include proof of non-reliance. Citing to the offi cial comment to Section 2313, the court held that the seller's "right to rebut" is limited to "clear affirmative proof" that the representations were extracted from the agreement, not that the purchaser did not rely on them. The court specifically criticized CACI 1240, asserting that it "misguidedly states that the defendant is not liable for harm to the plaintiff if the defendant 'proves that plaintiff did not rely on' the defendant's statement in deciding to purchase the product." As the court asked, "if [S]ection 2313 has eliminated the concept of reliance from express warranty law all together, by what logic can reliance reappear, by its absence, as an affi rmative defense?"

In April of this year, the California Supreme Court denied review and a request to depublish *Weinstat*. Based on the *Weinstat* opinion, the Judicial Council revoked CACI instruction 1240 on June 25, 2010, hopefully ending the confusion regarding the role of "reliance" in a breach of express warranty claim in California.

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