

## REPRESENTATIONS AND WARRANTIES IN CONTRACTS

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Representations and warranties are among contractual mechanisms used to allocate risks between the parties. Representation is a statement of fact intended to induce reliance and action by a party to a contract. Warranty, on the other hand, is a guaranty that certain facts relating to the title, quality, character, identity or condition of a product, property or services that are subject of a contract are accurate.

### 1. TORT

Representations provide assurances and certain level of comfort to the party receiving them in a contractual relationship that a certain fact is true. Express Representations in contracts often include the authority of entity to enter into the agreement, the accuracy of financial statements, the existence or lack thereof of claims, liens, encumbrances and legal actions.

It is noteworthy that, except in situations where a party owes a fiduciary duty to third parties, generally there is no duty for that party to look behind representations to ensure the representations are in fact true. If, however, a party becomes aware of facts that would make a reasonably prudent person suspicious, the party does have a duty to investigate further, and will be chargeable with knowledge of matters that would have been revealed by such an investigation. Miller v Bechtel Corp. (1983) 33 C3d 868, 875, 191 CR 619.

#### A. MISREPRESENTATION

In law, for misrepresentation, there could either be a contract action (or rescission) or tort action for fraud. For intentional fraud, the plaintiff must prove these elements: 1) Misrepresentation (concealment, non-disclosure, or false representation); 2) Knowledge of falsity (scienter); (3) Intent to Induce Reliance; (4) Justifiable Reliance; and (5) Damages.

A misrepresentation made negligently may also be actionable in both contract and tort. See Quality Wash Group V, Ltd. v Hallak (1996) 50 CA4th 1687, 1696, 58 CR2d 592 (when party makes false statement honestly, believing it to be true, he may be liable for negligent misrepresentation, a form of deceit); Continental Airlines, Inc. v McDonnell Douglas Corp. (1989) 216 CA3d 388, 404, 264 CR 779 (negligent misrepresentation as form of fraud).

Representations that later prove false and that may support an action for damages or rescission are not limited to express representations in a written contract. See, *e.g.*,

Riverisland Cold Storage, Inc. v Fresno-Madera Prod. Credit Ass'n (2013) 55 C4th 1169, 151 CR3d 93 (misrepresentations regarding content of document to be signed); Ron Greenspan Volkswagen, Inc. v Ford Motor Land Dev. Corp. (1995) 32 CA4th 985, 38 CR2d 783 (contract provision stating that all representations are contained therein does not prevent action for fraud).

## **B. OPINIONS ARE NOT ACTIONABLE**

Statements of opinions, generally, are not actionable for fraud. Certain statements, such as statements regarding price and value are deemed reflections of the speaker's state of mind and not statements of fact.

To ascertain what constitutes fact and opinion for fraud purposes, one needs to consider whether the person to whom the statement is being made regards the statement as opinion or fact. In turn, this latter inquiry would depend on the relationship of the parties, their sophistication, how plausible the statement is on its face, other communications between the parties and trade and usage practices.

## **2. CONTRACTUAL WARRANTY**

Contractual warranties can be found in contract for sale of goods and services. As stated before, contractual warranty is a promise or commitment that certain facts relating to the title, identity, character, quality or condition of the property or services that are the subject of the contract are or will be true.

It is noteworthy to assert that warranties serve to allocate the risk of loss on the party accepting such risk thus reflecting the price paid and accepted.

Warranties differ from representations in a sense that warranties form the basis of the contract and create a contractual obligation on the part of the warrantor to ensure what has been warranted are true. On the other hand, representations are not considered as guarantees, rather as statements of fact intended to induce reliance.

### **A. EXPRESS WARRANTIES FOR GOODS SOLD**

Under Commercial Code Section 2313, there are three ways a seller of goods may create an express warranty:

- "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Com C §2313(1)(a).
- "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." Com C §2313(1)(b).

- "Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model." Com C §2313(c).

Sellers of goods could create express warranties through their words or conduct, no intention required. Formal language such as "warrant" or "guaranty" is not required. In general, statements concerning the value of the goods sold and statements of the seller's opinion (sales talk) do not constitute warranty. Nonetheless, courts construe unqualified statements liberally in favor of injured consumers, however, thus narrowing the defense that a statement is merely an opinion. Hauter v Zogarts (1975) 14 C3d 104, 112, 120 CR 681.

The requirement that the statement or act at issue be "part of the basis of the bargain" is not onerous. All of the seller's statements become part of the basis of the bargain, unless good reason is shown to the contrary.

## **B. IMPLIED WARRANTY OF MERCHANTABILITY**

If seller is a merchant with respect to the sale of the goods at issue, then the warranty of merchantability is implied in every contract of sale of such goods. The warranty of merchantability is implied by operation of law and not through the conduct or express words of the merchant of the goods sold. Hence, liability under this warranty is found when the goods are not merchantable under the Commercial Code, irrespective of what the merchant did or stated. Merchantable under the Com C § 2314 (2):

- “(a) Pass without objection in the trade under the contract description; and
- (b) In the case of fungible goods, are of fair average quality within the description; and
- (c) Are fit for the ordinary purposes for which such goods are used; and
- (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) Are adequately contained, packaged, and labeled as the agreement may require; and
- (f) Conform to the promises or affirmations of fact made on the container or label if any.”

It is noteworthy that merchantability does not require that the goods satisfy any and all expectations of the buyer; it merely imposes a MINIMUM level of quality to be met.

## **C. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE**

Generally, when the seller of goods knows or has to reason to know at the time of entering into contract that the goods are required for a particular purpose and the buyer is

relying on seller's skill and judgment to select the goods, then an implied warranty of fitness is created for the goods sold. A "particular purpose" is different from an ordinary purpose. "Particular Purpose" envisions a specific use by the buyer that is peculiar to the nature of the buyer's business, while the ordinary purposes for which goods are used are those envisioned by the concept of merchantability and go to uses that are customarily made of the goods at issue. Mills v Forestex Co. (2003) 108 CA4th 625, 636, 134 CR2d 273.

## **SALIENT NOTE**

This article NEITHER supplants NOR supplements the breadth or depth of such rarefied topic. In fact, this article ONLY provides a rudimentary analysis of such esoteric subject matter.

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