



# Commercial Code Warranties

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It may seem that the Uniform Commercial Code (UCC) is just one more regulatory maze in which a contractor can get lost. There are express warranties, implied warranties, warranties of merchantability and fitness, and warranties of title that may arise under the UCC. They can help you or help an unhappy client of yours. So it's important that you know what these are, when they apply to you, and how they work under the UCC.

To begin with, we'll offer a brief primer on the warranties mentioned above. In issues to come, we hope to describe in more detail how they can apply to you under the UCC.

## Warranties under the UCC

The Uniform Commercial Code (UCC) is just one of several sources of warranty obligations that can arise in a construction project. (Specific contract language, consumer legislation, and other commercial legislation are other sources.) The UCC has been adopted, with minor variations, in all states except Louisiana.

Included in the UCC are nine articles governing many types of transactions. Although other sections of the UCC may be relevant to construction contracts, Article 2, involving "Sales," is typically the subject of construction disputes. This article applies to transactions involving the *sale of movable goods*. Since most of your activities involve the performance of services, it would seem that this article would have little relevance to you. Nonetheless, many states have applied the UCC's warranty provisions where the construction services provided with "movable goods" are deemed incidental. For example, courts have held items such as air conditioning units, prefabricated buildings, and even sewage processing plants to be the sale of goods subject to the requirements of the UCC. In this case you might be held accountable for "goods" you sold.

In addition, as a contractor or subcontractor, you may rely on the UCC's provisions in seeking remedies for defective goods sold to you by material suppliers. In this case, the vendor might be held accountable for goods sold to you.

## Express Warranties

An express warranty under the UCC can be created by:

- An outright affirmation of fact or promise made by the seller to the buyer.
- A description of the goods.
- An exhibition of a sample or model. The seller doesn't have to use formal words such as "warranty" or "guarantee." Any statement about the anticipated performance of a product can create such a warranty, but mere opinions (sales pitch talk, sometimes called "puffing"), will not necessarily serve as a warranty.

The seller may also warrant goods through a description of goods such as technical specifications, blueprints, or other design criteria provided with the goods. The UCC also provides that "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." However, to establish such a warranty, the contract must clearly display the intention to contract on the basis of the sample. Both seller and buyer must have a mutual understanding that the sample or model was relied upon.

## Implied Warranties

Implied warranties arise from implied representations rather than stated promises. Even if the sales contract is in writing, an implied warranty may still be binding.

Implied warranties under the UCC include implied Warranties of Merchantability, and implied Warranties of Fitness.

A *Warranty of Merchantability* requires that goods be reasonably fit for the general purpose for which they were sold. A *Warranty of Fitness* is like the Warranty of Merchantability, except that it requires that the goods be fit for a particular purpose. It establishes that "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyers relied on the sellers' skill or judgement to select or furnish suitable goods, there is, unless modified or excluded. . . an implied warranty that the goods shall be fit for the purpose." A contractor might be justified in expecting that the lumber bought and used on an

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outdoor deck will hold up under weather conditions in a particular location, for example, depending on the details of the sales transaction. The key is that the buyer must rely on the seller's skill or judgement in connection with goods purchased. Further, where the seller is not a

merchant for the sale of the goods, or does not have the appropriate "skill or judgement," the implied Warranty of Fitness will generally not apply.

## Warranty of Title

A Warranty of Title is different from the above warranties, in that it does not apply to the fitness or performance of goods sold, but to who really owns the goods and the right to sell them. Sales contracts include a warranty by the seller that the title conveyed shall, at the time of the sale, be good, "transfer rightful," and free of claims by any third party (such as a bank or other lender), which may be unknown to the buyer. The UCC requires that if a seller is a merchant regularly dealing in these goods, he warrants... that the goods shall be delivered free of the rightful claim of any third person by way of any third person by way of or the like..."

If the IRS comes and pulls out the kitchen cabinets you've just installed because the cabinetmaker owes them money, this is the warranty that you would need to show exists.

The UCC does not classify this warranty as either implied or express.

## Finally

The UCC does permit the exclusion or modification of either express or implied warranties under certain circumstances. Express warranties can only be excluded or modified by the parties' agreement. Implied warranties may be excluded or modified by agreement of the parties or other circumstances provided the relevant statutory requirements are first satisfied. In order for the Warranty of Merchantability to be excluded or modified wholly or in part, the UCC requires that the language expressly, and in a conspicuous manner, excludes merchantability. ■

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