Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our "Listen and Learn" series, we are discussing contracts – specifically, warranties and the disclaimer of warranties under the UCC. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the Law School Toolbox podcast. If you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back to the "Listen and Learn" series. Today we're discussing contracts – and specifically, warranties and the disclaimer of warranties under the UCC. First, we will talk about express warranties and what may create such a warranty under the UCC. Then we will talk about two implied warranties that are created in certain UCC contracts. And we will talk about whether and how a party may disclaim any express or implied warranties. We will also use several hypos to illustrate how these rules work in practice.

Lee Burgess: But before we get into that, let's review a couple of key concepts that are relevant to our discussion of warranties. First, in this episode, we are talking about express and implied warranties under the UCC. It is important to remember that the UCC applies to contracts for the sale of goods. Goods are things that are movable at the time of contracting. In other words, these warranties and disclaimer rules do not apply to contracts for services or the sale of land, because those contracts are governed by the common law, not the UCC. The rules we are discussing today only apply to contracts that are governed by the UCC – contracts for the sale of goods.

Lee Burgess: Second, let's briefly define what we mean by express and implied warranties. Express warranties are created by an express statement or representation of the seller to the buyer of the goods. We will get into details of what constitutes an express warranty by the seller in just a few minutes, but for now, it is important to understand that express warranties are different from implied warranties. By implied warranties, we mean warranties that the UCC implies into certain contracts for the sale of goods, regardless of whether the parties discuss or are even aware of the warranty. As you likely know, there are certain circumstances in which a court will imply terms into a contract that are not expressly written or agreed to by the parties. An implied warranty under the UCC is one of these circumstances. We will discuss other circumstances in which courts will imply terms into a contract, such as the implied obligation of good faith and fair dealing, in another podcast episode. But for today, just understand that there are several circumstances in which courts may imply terms into a contract, and the implied warranties we're discussing are one of those circumstances.

Lee Burgess: Now that we have reviewed some basic concepts, let's orient ourselves as to where this discussion of warranties fits into a full contracts outline. When we talk about whether a contract contains an express or implied warranty, we are in the major topic of contract interpretation. Generally, it is helpful to think about contracts concepts as fitting under one of several major headings, such as formation, interpretation, breach, and remedies. Today we are under the "interpretation" heading.

Lee Burgess: Now that we have oriented ourselves regarding where our discussion of warranties fits into the subject of contracts, let's get started with express warranties. Under the UCC, a seller may create an express warranty in any of the following ways: (1) by making an affirmation of a fact or a promise related to the goods; (2) by providing a description of the goods; or (3) by providing a sample or model of the goods. If the seller provides any of these, this creates an express warranty, as long as the seller's affirmation of fact, promise, description, sample, or model is made part of the basis of the bargain between the buyer and seller. This means that the buyer is buying the goods, and/or buying them at that price, at least in part, because of the seller's affirmation of fact, promise, description, sample, or model. Additionally, the UCC specifies that the seller does not have to use formal words like "warrant" or "guarantee" to create an express warranty. However, a seller's mere affirmation of the value of a good or a statement purporting to be the seller's opinion does not create an express warranty.

Lee Burgess: As you may suspect, there is not always a bright line between what constitutes an affirmation of fact or a promise, versus an affirmation of the value of a good or the seller's opinion. And whether a seller's words or conduct constitute an express warranty is a common issue in express warranty questions.

Lee Burgess: So, let's look at an example of whether the seller's words or conduct constitute an express warranty: "Buyer is shopping for a collectible car at a classic car sales shop. Buyer tells Seller he wants a car that is drivable and in good condition for a classic car. Seller shows Buyer a 1962 Porsche and tells Buyer that the car is in great condition for a classic car. Seller also tells Buyer that the car has only had two previous owners, and that the prior owners wanted to keep up its value by not driving the car. As a result, Seller tells Buyer the car has only been driven 50,000 miles since 1962. Seller then states, 'This car will run for another 100,000 miles, and is worth at least 25% more than our asking price.' Based on the seller's statements about the car, Buyer agrees to purchase the car for 10% over the asking price. Buyer takes the car in for a service a week after purchase. At the service, Buyer learns that the car's odometer has been adjusted to knock the tracked mileage down from 250,000 miles to 50,000 miles. The mechanic also tells Buyer that the car will not run more than another 1,000 miles without a new transmission. Buyer feels duped by Seller and sues Seller for a breach of express warranties. Is Buyer likely to prevail?"

Lee Burgess: Well, to answer this question, we must consider the three ways that a seller may create an express warranty under the UCC. We can easily eliminate the third way – the seller did not provide a model or sample of the good to which the good did not conform. He showed the buyer the actual car, so method three is not at issue here. Buyer's best arguments are that the seller's statements were affirmation of fact or promises about the car and/or descriptions of the car. Alternatively, Seller will argue that the statements were mere affirmations of the value of the car and/or statements of the seller's opinions.

Lee Burgess: So let's analyze each of Seller's statements based on the rule. Seller's first statement is that the car is in great condition for a classic car. Buyer will argue that this is a statement of fact by the seller about the car, but Seller is more likely to succeed on his argument about this statement. Stating that the car is in great condition for a classic car sounds subjective and more like the seller's opinion about the car. After all, what constitutes "great condition" for a classic car may vary widely from person to person. And Seller's first statement is more likely a statement of Seller's opinion than a statement of fact. Remember, Seller next said that his car only had two previous owners who rarely drove the car, and that the car has only 50,000 miles on it. Buyer now has evidence that the car had 250,000 miles on it when Seller made this statement. How many owners have owned and driven the car and the number of miles are likely specific enough statements about the car to constitute statements of fact. There is an objective number of previous owners and an objective number of miles that the car has been driven. And even though Buyer may struggle to prove how many previous owners drove the car, Buyer has evidence that the seller's statement of fact regarding the mileage on the car was wrong. This is Buyer's best claim for breach of an express warranty.

Lee Burgess: Seller's final set of statements is that the car will run for another 100,000 miles, and is worth 25% more than the asking price. As with Seller's first statement, Seller is more likely to prevail on Buyer's claim about these statements. There is no way to objectively prove that the car will definitely run for another 100,000 miles. Therefore, a reasonable buyer would interpret this as Seller's opinion, not a statement of fact. Additionally, the seller's statement that the car is worth 25% more than the asking price is likely a mere affirmation of value or opinion. The seller is stating what he thinks the car is worth, but as with Seller's first statement, a reasonable buyer would interpret this as the seller's opinion about the value of the car.

Lee Burgess: So now that we understand express warranties, let's move on to the UCC implied warranties. There are two UCC implied warranties: (1) the warranty of merchantability; and (2) the warranty of fitness for a particular purpose. So let's talk about when these apply and what they require.

Lee Burgess: First, the implied warranty of merchantability applies to all contracts for the sale of goods in which the seller is a merchant. You may recall that a seller is considered a merchant under the UCC if the seller regularly deals in contracts of the kind being sold in the contract. This means that if you see a merchant seller under the UCC, the implied warranty of merchantability applies to the contract. Next, we must talk about what this warranty requires. The implied warranty of merchantability warrants that the goods are fit for their ordinary purpose. For example, if a merchant seller sells a buyer a car, the car must be fit for its ordinary purpose – driving from point A to point B.

Lee Burgess: The second implied warranty – the implied warranty of fitness for a particular purpose – applies in more narrow circumstances than the implied warranty of merchantability. In particular, the implied warranty of fitness for a particular purpose only applies when, (1) the seller knows or has reason to know of the buyer's particular purpose for the goods; and (2) the buyer relies on the seller's skill or judgment to select or furnish suitable goods for that particular purpose. And as the title suggests, this warranty requires that the goods are fit for the buyer's particular purpose, even if that is not the ordinary purpose for which someone would purchase the goods.

Lee Burgess: Now, as you likely noticed, the UCC warranties generally protect buyers, meaning that a seller may not want to include these warranties in the contract. This brings us to our next topic: When and how may a seller disclaim or limit these warranties? The answer to this question is easy with regard to express warranties – never. A seller cannot disclaim an express warranty. This rule makes sense when we think about it in practice. After all, it seems unfair to the buyer to let the seller expressly warrant one thing, but then negate that by disclaiming all warranties in the same transaction.

Lee Burgess: Let's look at a short hypo to illustrate this point. Consider a seller who advertises a painting for a sale as a genuine Picasso painting. A buyer sees the advertisement and contacts the seller about purchasing the painting. After the buyer inspects the painting, the two agree on a price and draw up a contract for the sale of the painting. The written contract also describes the painting as a genuine Picasso painting, but the contract also states that the seller disclaims any and all express and implied warranties with regard to the painting. Has the seller warranted that the painting is a genuine Picasso painting?

Lee Burgess: To answer this question, we must start with our express warranty rule and determine whether the seller has created an express warranty. Remember, if a seller provides a description of a good, and that description becomes part of the basis of the bargain between the buyer and seller, the description creates an express warranty that the good conforms with the description. Here, the seller provided a description of the good as a genuine Picasso in the advertisement and the contract, and this description became part of the basis of the bargain, because the buyer contacted the seller to purchase the painting after reading the description in the advertisement, and the parties reiterated this description in the contract. Therefore there is an express warranty that the painting is a genuine Picasso. But what about the seller's attempt to disclaim all express and implied warranties in the contract? This is inconsistent with the seller expressly warranting that the painting is a genuine Picasso. Therefore, the seller's attempt to disclaim the express warranty is ineffective. As noted above, this makes sense, because it seems unfair to the buyer to allow a seller to say inconsistent things about the painting in the same transaction. That is why when an attempted disclaimer of warranties is inconsistent with an express warranty, the express warranty wins. The disclaimer of a clear express warranty is ineffective.

Lee Burgess: So now let's move on to whether and how a seller may disclaim the implied warranties of merchantability and/or fitness for a particular purpose. To answer the first question – yes, a seller may disclaim these implied warranties. To do so, the seller must either, (1) make a conspicuous disclaimer in writing; or (2) use a phrase such as "as is", or "with all faults", or other language that would indicate to the buyer that the seller is disclaiming all implied warranties. However, the seller need not specifically mention each implied warranty; rather, including the following language in a written contract is generally sufficient to disclaim both implied warranties: "There are no warranties which extend beyond the description on the face hereof." Of course, the language must also be conspicuous, meaning that it is set off from the surrounding text using headings, font size, font type, or other means to call attention to the language.

Lee Burgess: Even if the seller does not disclaim the implied warranties, there are two additional situations in which these warranties may not apply. First, a buyer may waive an implied warranty if the buyer could have discovered a defect by reasonable inspection, and fails to do so. Second, the warranties may not apply based on course of dealing, course of performance, or usage in the trade. By "course of dealing", we mean prior contracts between these same parties in which implied warranties were regularly disclaimed or waived by the buyer. By "course of performance", we mean prior instances of performance of this contract in which the implied warranties were disclaimed or waived by the buyer. And by "usage in the trade", we mean what is customary in this particular industry or trade.

Lee Burgess: Now, one tip regarding these additional situations in which the implied warranties may not apply: You would need specific facts indicating one of these circumstances is applicable. So, look for facts such as a buyer who did not conduct a reasonable inspection of goods upon receipt; parties who have contracted many times in the past; parties who have an ongoing or installment contract with many instances of performance; or details about the common practices in a particular industry. Without detailed facts about any of these, the implied warranties likely apply if the requirements for applying them are satisfied and they have not been sufficiently disclaimed by the seller.

Lee Burgess: Now that we have discussed all of the applicable rules, let's test our understanding of these rules with a hypo. Here is a hypo adapted from the February 2016 California bar exam:

Lee Burgess: "On January 24th, Super Chemicals (also known as Super), sent out samples of epoxy to surfboard manufacturers with a mailer stating, 'Best epoxy on the market!' On February 1st, Bing Surfboards (known as Bing), received the sample and mailer. Bing used Super's epoxy to manufacture a surfboard and was happy to discover that the surfboard hardened properly. That same day, Bing contacted Super and indicated that it did not only want to use this epoxy to make surfboards, it also wanted to use the epoxy to manufacture a line of water sport glue that would mend wetsuits or drysuits by sealing holes and hardening in seconds. Bing asked Super if the epoxy, if applied in a small amount, would be able to harden in seconds to seal a tear in a wetsuit or drysuit. Super responded, 'Absolutely!' That same day, the parties entered into a written contract in which Bing agreed to purchase 400 gallons of epoxy from Super. The contract also stated, 'Seller disclaims all express and implied warranties.' This language was included on the third page of the five-page contract, on a large font under a bold heading that stated, 'Disclaimer of warranties.' On February 15th, Bing received the epoxy and paid in full upon delivery. On February 20th, Bing tested the epoxy by manufacturing 50 surfboards. The epoxy did not harden properly, leaving the surfboards useless. Bing also tested the epoxy on several wetsuits and drysuits to see if it could repair the tears. Again, the epoxy did not harden. On February 23rd, Bing emailed Super, stating that the epoxy had failed to harden properly and that it was returning the remaining epoxy. Bing sued Super for breach of warranties. Is Bing likely to prevail?"

Lee Burgess: Now, to answer this question, we must first determine whether there are any express or implied warranties in the contract. We will start with whether Super made any express warranties. Remember that under the UCC, if a seller provides a statement of fact about the goods, or a sample of the goods that becomes part of the basis of the bargain between the buyer and seller, that creates an express warranty that the statement is true and/or the goods will be the same as the sample. Here, Super provided sample epoxy to Bing with a mailer indicating that this is the best epoxy on the market. The first issue is whether Super's statement that this is the best epoxy on the market is a statement of fact. This is likely not definite enough to be considered a statement of fact about the goods. It is more accurately characterized as a statement of the seller's opinion, because it does not include any details or qualitative facts regarding why the seller considers this epoxy "the best". Therefore, this statement does not create an express warranty that the epoxy is actually the best on the market.

Lee Burgess: The next issue is whether Super's provision of the sample created an express warranty that the epoxy will be the same as the sample. Under our rules stated above, we know that providing a sample creates an express warranty that the goods will be the same as the sample. Here, Super provided a sample that Bing tested, and the sample hardened properly. This creates an express warranty that any future epoxy purchased by Bing will conform to the sample, meaning that it will harden properly.

Lee Burgess: Now that we know the contract contains an express warranty, let's determine whether the implied warranties apply. Remember, the implied warranty of merchantability applies in every UCC contract in which the seller is a merchant, meaning a person who regularly deals in goods of this kind. Here, Super is a merchant, because at least part of Super's regular business as a chemical company is making and selling epoxy to surfboard manufacturers. Therefore, the implied warranty of merchantability applies.

Lee Burgess: Now let's turn to whether Super breached this warranty. We know that the implied warranty requires that the goods are fit for their ordinary purpose. Here, the ordinary purpose for epoxy is the manufacturing of surfboards. In particular, the epoxy is applied to the board to harden it. However, when Bing applied the epoxy to the surfboards, it did not harden properly, leaving the surfboards useless. Therefore, this epoxy was not fit for its ordinary purpose of hardening surfboards. Thus, Super breached the implied warranty of merchantability, unless this warranty was properly disclaimed, which we will discuss below. But before we do that, let's look at whether these facts also created an implied warranty of fitness for a particular purpose.

Lee Burgess: Remember, an implied warranty of fitness for a particular purpose is created when, (1) the seller knows or has reason to know of the buyer's particular purpose for the goods; and (2) the buyer relies on the seller's skill or judgment to select or furnish suitable goods for that particular purpose. Here, both of these elements are likely satisfied. First, Super knew that Bing wanted to use the epoxy to make a surf gear mending glue that would harden in seconds, because Bing told Super that it wanted to use the epoxy for that particular purpose. And Bing relied on Super's judgment that the epoxy would work for that particular purpose, because Bing asked Super if the epoxy could be used to mend surf gear and harden in seconds, and Super responded, "Absolutely!" Therefore, the implied warranty of fitness for a particular purpose also applies, unless Super properly disclaimed this warranty. And as with the implied warranty of merchantability, if the implied warranty of fitness for a particular purpose applies, Super likely breached that warranty, because the epoxy could not be used to fix surf gear.

Lee Burgess: The final issue we must discuss is whether Super properly disclaimed any of these warranties. We know that a seller cannot disclaim an express warranty, so the purported disclaimer of warranties in the written contract does not affect the express warranty that the epoxy would conform to the sample. However, we know that a seller may disclaim implied warranties, if the seller does so conspicuously in a written contract. And here, Super's written disclaimer is likely conspicuous enough to disclaim both implied warranties, because the disclaimer language was in a large font, under a bold heading that stated, "Disclaimer of warranties". Therefore, Super successfully disclaimed both implied warranties.

However, Bing may still prevail against Super for a breach of express warranty, because the epoxy did not conform to the sample.

Lee Burgess: And with that, we have wrapped up our discussion of warranties and disclaimer of warranties under the UCC. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself and Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our contact form at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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