

ISSUES PRESENTED

The client is evaluating the possibility of bringing two separate class actions against two different manufacturers. One manufactures garden tractors and the other manufactures all-terrain vehicles. Both products are defective and pose a risk of danger to purchasers because they do not include safety guards. None of the potential class members, however, have been injured by the defective products. The remedy sought will be the actual cost of placing guards on the unsafe products. In light of these facts, the following issues were researched:

(1) If the economic-loss rule in Texas precludes the class from bringing claims for strict products liability and negligence, does the potential class have a cause of action for breach of express or implied warranties under state law and under the federal Magnuson-Moss Act?

(2) Can the consumers hold the retailers/dealers liable under a breach-of-warranty claim?

(3) Is the consumer restricted to bringing a claim within the time frame specified in the warranty or is the breach-of-warranty claim governed by the four-year statute of limitations?

(4) Are there any federal statutes which regulate the all-terrain or garden tractor industry which preempt the state law remedies?

DISCUSSION OF AUTHORITY

I. Breach Of Warranty Claims Under The Uniform Commercial Code

A. Economic-Loss Rule

The nature of the economic damages being sought in the two class actions does limit the causes of action the classes can bring under Texas law. Economic losses are not recoverable as an element of damages under strict product liability. *Purina Mills, Inc. v. Odell*, 948 S.W.2d 927 (Tex. App.—Texarkana 1997, reh'g overruled and review denied). In addition, when the loss is to the product itself, recovery may not be had on the basis of negligence. *Brewer v. GMC*, 926 S.W.2d 774 (Tex. App.—Texarkana 1996, reh'g overruled); *see also Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex. 1986) (holding that a consumer cannot recover for defects in his home under a negligence theory); *Arkwright-Boston Manufacturers Mutual v. Westinghouse Electric Corp.*, 844 F.2d 1174 (5th Cir. 1988) ("Texas tort law would not allow Arkwright to recover in tort for its economic loss."). The consumers' state law claims, therefore, appear to be limited to breaches of express and implied warranties, for which economic losses are recoverable. *Purina Mills, Inc.*

B. Express Warranties

Under Tex. Bus. & Com. Code Ann. § 2.313 (West 1994), consumers may bring a claim for breach of express warranties. Of course, the consumers' breach-of-express-warranty claims in the instant case, if any, will depend upon the statements made by the manufacturers and the sellers as to the safety features of the products. An "express warranty" is a promise made by the seller which becomes part of the basis of the bargain

between the consumer and the seller. *Lujan v. Tampo Manufacturing Co.*, 825 S.W.2d 505, 511 (Tex. App.— El Paso 1992, no writ) ("An express warranty is created when a seller makes an affirmation of fact or a promise to the buyer which relates to the products or goods sold and warrants a conformity to the affirmation or promise."). The promise need not use the words "warrant" or "guarantee" to constitute an express warranty. An express warranty can be made orally or in sales brochure. *Church & Dwight Co. v. Huey*, 961 S.W.2d 560 (Tex. App.—San Antonio 1997, reh'g overruled and review denied). Any representations as to the description of the product which become the basis of the bargain such that the goods shall conform to that description is an express warranty. *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544 (Tex. 1986). An express warranty is breached when the product fails to comply with the terms of a definite warranty. *Valley Datsun v. Martinez*, 578 S.W.2d 485 (Tex. Civ. App.—Corpus Christi 1979, no writ).

Express warranties cannot be disclaimed to the extent that the express promises are negated. See Tex. Bus. & Com. Code Ann. § 2.316(a); *Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611, 615 (Tex. App.—Dallas 1973, no writ) (a contract clause disclaiming all warranties cannot reduce the seller's obligations with respect to a description of the goods sold). Express warranties, however, may be limited in time by the manufacturer or seller under Tex. Bus. & Com. Code Ann. § 2.719 (West 1994). Because the Uniform Commercial Code does not require a seller to give any express warranties in the first place, the availability of placing time limits on express warranties is considered a matter of allocating risks. *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Westinghouse Electric*

Corp., 844 F.2d at 1179. These time limitations are generally not considered to cause a stated remedy to fail of its essential purpose as provided under § 2.719. *Id.*

There is some confusion among Texas courts as to the privity requirement, if any, for bringing breach-of-express-warranty claims. "Privity" is defined as "a mutual or successive relationship to the same rights of property." *Lujan v. Tampo Manufacturing Co.*, 825 S.W.2d at 511. In order to bring a breach-of-express-warranty claim, the court in *Lujan* held that where an express warranty is made by the manufacturer to the seller (or lessor in that case) the buyer can only bring a breach of express warranty claim if he can show that he is in privity with the seller (or lessor). Because no such showing could be made in *Lujan*, the plaintiff's breach-of-warranty claim failed. In *Crosbyton Seed Co. v. Mechura Farms*, 875 S.W.2d 353 (Tex. App.—Corpus Christi 1994, no writ), however, the court held that whether privity is necessary should be decided on a case-by-case basis. The court concluded in *Crosbyton* that privity was not necessary as to representations made on seed bags. The court stated that so long as affirmations of fact or promise are made to the buyer, which promises relate to the goods and become part of the basis of the bargain, the representations create an express writing enforceable against the manufacturer, the seed broker, and the seller. *Id.*; *see also Church & Dwight Co. v. Huey*, 961 S.W.2d at 568 (holding that the customer could sue the manufacturer for an express warranty made by the manufacturer in its brochure, which information was given to the seller and passed on to the seller's customers).

C. Implied Warranties

1. Definition

In addition to potential liability for breach of express contracts, the Uniform Commercial Code also recognizes implied warranties. A warranty of merchantability is implied in every contract for the sale of goods. Tex. Bus. & Com. Code Ann. § 2.314 (West 1994). To be "merchantable," the product must at least be fit for the "ordinary purpose for which such goods are used" and be adequately labeled and conform to the promises or affirmations of fact stated. *Id.* § 2.314(b). The implied warranty arises from any sales contract between the seller and a purchaser unless the implied warranty is excluded or modified under § 2.316. The implied warranty in a sales contract is separate and distinct from the express warranties typically extended by the manufacturers.

2. Breach of Implied Warranty

In order to recover for breach of an implied warranty, the consumer must establish that there is a defect in the product, showing at least that the product is unfit for the ordinary purposes for which it is used because it lacks something necessary. *GMC v. Brewer*, 966 S.W.2d 56, 57 (Tex. 1998); *see also Church & Dwight Co. v. Huey*, 961 S.W.2d at 569 ("To show a breach of the warranty, a plaintiff must demonstrate both that the goods are not fit and that they suffer from a defect rendering them unfit because of a lack of something necessary for adequacy."); *Lujan v. Tampo Manufacturing Co.*, 825 S.W.2d at 510 (holding a breach of implied warranty of merchantability means a showing that the product was defective and was not fit for the purpose intended). The consumer must show that the defect was there when the product left the manufacturer, being one of design, material, or manufacturing. *Clark v. DeLaval Separator Corp.*, 639 F.2d 1320 (5th Cir. 1981). To succeed on a breach-of-warranty claim, it is vital that the plaintiff show that the product is

indeed unfit for its ordinary purpose because it lacks something necessary for ordinary use. It is not enough to show that the product does not function as well as the buyer would like or as well as the product could. *GMC v. Brewer*, 966 S.W.2d at 57. In *Brewer*, the plaintiff's claim regarding seat belts failed because the plaintiff failed to show that the product was actually defective. Instead, the gist of the cause of action was that the product failed to fulfill the "precise expectations of the consumer" in that the product was more cumbersome to use than anticipated. *Id.*

Importantly, under Texas law, there are no privity requirements to bringing a claim for breach of the implied warranty of merchantability. The plaintiff does not have to show privity between the seller and the injured buyer before bringing a breach-of-implied-warranty claim. *Crosbyton Seed Co. v. Mechura Farms*, 875 S.W.2d at 362. Likewise, a plaintiff does not have to show privity with a remote manufacturer before bringing a breach of the implied warranty of merchantability against the manufacturer. *Hininger v. Case Corp.*, 23 F.3d 124 (5th Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995). In this regard, the court in *Hininger v. Case Corp.*, 23 F.3d at 128, citing *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977), held that, unlike strict liability, a manufacturer has the ability to limit its warranty exposure against unlimited and unforeseeable liability by including a disclaimer in the materials that accompany the product or by insisting that the retailer include the manufacturer's disclaimer in its sales contract with the consumer. The availability of protecting itself against loss justifies the removal of the privity requirement.

Unless excluded or modified, the court will also find implied warranties that goods being sold are fit for a particular purpose under Tex. Bus. & Com. Code Ann. § 2.315 (West

1994), but only where there is evidence that the seller has reason to know, at the time of the sales contract, the purpose for which the goods are required and only where the buyer relies on the seller's skill or judgment to select the most appropriate product. A "particular purpose" generally means a use that is peculiar to the buyer's business. *Crosbyton Seed Co. v. Mechura Farms*, 875 S.W.2d at 365. Considering the products at issue in the instant case and the fact that the buyers are all ordinary consumers, the implied warranty of fitness for a particular purpose most likely is not relevant.

It is important to emphasize that under the Uniform Commercial Code, where a good has been accepted by the buyer, a buyer is required to notify the seller that a breach of warranty has occurred before bringing a cause of action against the seller to give the seller an opportunity to cure the defect. *Brewer v. General Motors Corp.*, 926 S.W.2d at 781; Tex. Bus. & Com. Code Ann., § 2.607(c)(1)(West 1994). Failure to notify the seller of breach of warranty and allow the seller some opportunity to cure bars recovery on the basis of breach of warranty. *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182 (Tex. App.—Dallas 1992, no writ). The notice requirement must be liberally construed. *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886 (Tex. Civ. App.—El Paso 1979, no writ).

3. Implied Warranty Disclaimers

Under Tex. Bus. & Com. Code Ann. § 2.316, the implied warranty of merchantability may be modified or excluded by the seller or manufacturer. To effectively exclude or modify an implied warranty, however, the language (1) must mention "merchantability," and (2) when written, must be conspicuous. All implied warranties are excluded by the statement "as is" or other similar language so long as the language calls the buyer's attention to the exclusion of warranties. Implied warranties may also be excluded or modified under the Uniform Commercial Code by course of dealing or usage of trade.

Significantly, § 2.316(c)(2) also provides that where a buyer, before purchasing the item, has fully examined the good or has refused to examine the product, implied warranties are excluded with respect to the defect that an examination ought to have revealed. For example, in *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. 1978), where the plaintiff refused to examine the horse for sale, the refusal was sufficient to bar the plaintiff from recovering for any defect that an examination would have revealed.

D. Duration And Statute Of Limitations

Under Tex. Bus. & Com. Code Ann. § 2.725, the statute of limitations for bringing claims under any provision of Article 2 of the Uniform Commercial Code is four years. Under this provision, however, parties may agree to reduce the period of limitation to not less than one year. Parties may not, however, extend the period of limitation beyond the specified four-year period. Generally, the limitation period on breach of an express warranty accrues from the date of delivery of the good, unless the express warranty explicitly allows for future performance. Where future performance is permitted, the discovery rule applies,

and the cause of action accrues when the breach of warranty is discovered by the plaintiff. *Winters v. Diamond Shamrock Chemical Co.*, 941 F. Supp. 617 (E.D. Tex.), *aff'd*, 149 F.3d 387 (5th Cir.1996). The limitation period for an implied warranty always accrues when the good is sold because an implied warranty cannot allow for future performance. *Cornerstone Municipal Utility District v. Monsanto Co.*, 889 S.W.2d 570 (Tex. App.—Houston [14th Dist.] 1994, reh'g overruled, writ denied)

Under Tex. Bus. & Com. Code § 2.719, parties may agree to state a fixed time for the duration of the seller's warranty. The simple duration of the warranty protection is not necessarily the same thing as a contractual limitation on the time for suit. In *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Westinghouse Electric Corp.*, the court held that under § 2.719 the parties may agree to limit the duration of the warranty protection as long as the limitation does not eliminate the essential purpose of the warranty. In *Arkwright-Westinghouse*, the equipment warranty was only available for a 12-month specified period. The court in *Pako Corp. v. Thomas*, 855 S.W.2d 215 (Tex. App.—Tyler 1993, no writ), made the point that extending the duration of a warranty is permissible, but the extension of the duration does not automatically extend the limitation period for bringing suit.

II. Magnuson-Moss Warranty Act

The federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et seq. (1982), regulates written warranties and provides a private right of action by consumers against manufacturers or retailers who fail to comply with written warranties or implied warranties. The Magnuson-Moss Act does not preempt state Uniform Commercial Code provisions unless a particular state statute conflicts with the provisions in the Magnuson-Moss Act.

Murphy v. Mallard Coach Co., 179 A.D.2d 187, 582 N.Y.S.2d 528 (1992). Importantly, the Magnuson-Moss Act specifically provides that state law governs the raising of an implied warranty claim against a supplier. *See* 15 U.S.C. § 2301(7).

Under this federal Act, sellers are not required to provide express written warranties with their products. If they do, however, they are compelled to comply with the requirements and standards set forth in the Act. Specifically, § 2302 states that written an express warranty must be conspicuous and readily understood. The warranty should also contain numerous other items, including the names and addresses of the warrantors and the identity of the parties to whom the warranty is extended. *See id.* § 2302(1)-(13). If a warranty meets the federal minimum standards for warranty set forth in § 2304, the warranty must conspicuously be designated a "full (state of duration) warranty" pursuant to § 2303(a)(1). If the warranty does not meet the minimum standards, it must conspicuously be designated a "limited warranty." Interestingly, to have a full warranty, one of the requirements for the federal minimum standards is a lack of any limitation on the duration of any implied warranty on the product. *See id.* § 2304(2).

In cases where the full warranty does not apply, the Magnuson-Moss Act allows an implied warranty to be limited in duration if such duration limitation is reasonable and conspicuous. *See id.* § 2308. However, this section provides that a supplier may *not* disclaim or modify an implied warranty if the supplier makes any written warranty to the consumer or if, within 90 days of the sale, the supplier enters into a service contract with the consumer which applies to the consumer product. *See id.* § 2308(a). This is a significant constraint on a supplier and represents a stricter restriction than what appears under the

Uniform Commercial Code. *See Selig v. BMW of North America, Inc.*, 832 S.W.2d 95 (Tex. App.—Houston [14th Dist.] 1992, reh'g denied).

Section 2310 contains the remedies available to consumers for violations of the Magnuson-Moss Act. Importantly, this section includes rules specific to the bringing of class actions. Briefly, under § 2310(a), a class of consumers may not commence an action (except to the extent the court is asked to determine the representative capacity of the named plaintiffs) until the class initially resorts to an informal dispute settlement procedure as set forth in that section. In addition, if an action is brought by a class, the number of named plaintiffs must number 100 or more. Under § 2310(e), no class action may be brought unless the person obligated under the warranty or service contract has been afforded an opportunity to cure the defect which constitutes the breach. In addition to the class action restrictions, the Act also requires that if the action is brought in federal district court, the amount in controversy of any individual claim must be \$25 or more and the sum of the claims must equal \$50,000, exclusive of interests and costs. *See* 15 U.S.C. § 2310(d)(3). On more general terms, a plaintiff seeking class certification under the Magnuson-Moss Act in federal court must satisfy the class-action requirements under Fed. R. Civ. P. 23 as well as the specific requirements set forth above.

The calculation of damages available for violations of the Magnuson-Moss Act is determined under state law. *MacKenzie v. Chrysler Corp.*, 607 F.2d 1162 (5th Cir. 1979); *see also Boelens v. Redman Homes, Inc.*, 748 F.2d 1058 (5th Cir.), *reh'g denied*, 759 F.2d 504 (5th Cir.1984) (holding that because Texas law does not allow punitive damages for breach of warranty a claim for punitive damages cannot count toward satisfying the

jurisdictional amount-in-controversy requirement for breach of warranty.) In addition, the prevailing consumer may recover a sum equal to the aggregate amount of costs and expenses, including reasonable attorney's fees. *See* 15 U.S.C. § 2310(d)(2).

III. Other Federal Statutes And Regulations

In addition to the issues relating to state and federal warranty claims discussed above, you were also interested in whether there were other federal statutes or regulations which apply to all-terrain vehicles or garden tractors and, if so, if such federal law preempted the state breach-of-warranty claims discussed. I was unable to locate any federal statutes or regulations which specifically regulate all-terrain vehicles or garden tractors. Congress did enact the Recreational Boating and Safety Act, 43 U.S.C. § 13101 (1998), but I did not find a specific reference to all-terrain vehicles. 33 C.F.R. 183 (1998) contains the applicable regulations for noncommercial boats, but there are no references to all-terrain vehicles. I am not certain all-terrain vehicles fall within the definition section of a boat for purposes of the regulations.

I did not find any federal legislation which specifically addresses or regulates the design, safety features, or distribution of garden tractors. As we discussed, these consumer items may be subject to specific industry specifications, but these specifications were not researched.

The Consumer Product Safety Act (CPSA), 15 U.S.C. § 2051 (1997), is intended to provide a uniform safety standard for consumer products and ultimately to protect consumers against unreasonable risks of injury associated with consumer products. Exempt from coverage are boats subjected to the safety regulations of the Recreational Boating and Safety

Act mentioned above. I only researched the CPSA statutory language and the regulations published in the CFR. From these sources, I found no specific regulations for either all terrain vehicles or garden tractors. The CPSA does purport to regulate consumer products so as to prevent or reduce an unreasonable risk of injury associated with the products. *See* § 2056.

The CPSA also allows for private rights of action under certain circumstances. In *O'Conner v. Kawasaki Motors Corp. U.S.A.*, 699 F. Supp. 1538 (S.D. Fla. 1988), the plaintiff was injured on a rented Kawasaki all-terrain vehicle. He brought a product liability claim as well as a claim for violations under the CPSA. The basis of the plaintiff's CPSA claim was that the defendant manufacturer knew that the all-terrain vehicle was defective and that it represented a substantial product hazard, but yet failed to report the defect to the CPSA Commission. The court held that the CPSA provides for private remedies, but only if a defendant has violated a specific rule under the statute. The CPSA does not allow for private rights of action to enforce the reporting requirements under the Act. The court did not cite to any CPSA rules relating to all-terrain vehicles. It appears unlikely at this time that the class will have a claim under the CPSA.