

**3201 IMPLIED WARRANTY: MERCHANTABILITY DEFINED**

An "implied warranty" is a warranty which arises by operation of law from the acts of the parties or circumstances of the transaction. It requires no intent or particular language or action by the seller to create it.

A warranty that the goods (product) shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. "Merchantability" means reasonable fitness for the general purpose for which the goods (product) are (is) sold. When a purchase is made, the seller warrants or guarantees that the goods (product) purchased:

[would pass without objection in the trade under the contract description;]

[in the case of bulk goods, are of average quality within the description;]

[are fit for the ordinary purposes for which such goods are used;]

[run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;]

[are adequately contained, packaged, and labeled as the agreement may require;]

[conform to the promises or affirmations of fact made on the container or label if any.]

**COMMENT**

The instruction and comment were originally published in 1971. The comment was updated in 1980 and 2009.

Wis. Stat. § 402.314; "Merchant" is defined in Wis. Stat. § 402.104(3).

The issue of merchantability presents a question of fact. Takera v. Ford Motor Co., 86 Wis.2d 140, 271 N.W.2d 653 (1978). A finding of merchantability requires an examination of the defects alleged to exist in the particular product in light of the standard of quality expected for that product. Takera v. Ford Motor Co., supra at 146.

Where automobiles are concerned, the term "unmerchantable" has only been applied where a single defect poses a substantial safety hazard or numerous defects classify the car as a "lemon." Takera v. Ford Motor Co., supra at 146. See also Murray v. Holiday Rambler, Inc., 83 Wis.2d 406, 265 N.W.2d 513 (1978).

Wis. Stat. § 402.314(1) "imposes an implied warranty, not because of a sale alone, but because of the special responsibilities that are placed upon a merchant who is defined as one holding himself out as having knowledge and skill peculiar to the trade involved." Samson v. Riesing, 62 Wis.2d 698, 215 N.W.2d 662 (1973). In Samson, the court held that the Wauwatosa Band Mothers, selling food in a fund raising activity, were not merchants as contemplated by the statute.

Under Wis. Stat. § 402.314, an implied warranty of merchantability can be excluded or modified pursuant to the provisions of Wis. Stat. § 402.316. Recreatives, Inc. v. Myers, 67 Wis.2d 255, 226 N.W.2d 474 (1975).

For the measure of damages for a claim under Wis. Stat. § 402.314, see Wis. Stat. § 402.714(2).