

3220 EXPRESS WARRANTY: GENERAL

An "express warranty" is an express statement of fact material to the transaction which is a part of the contract between the parties (and collateral to the express object of such contract). Any direct and positive representation of a fact (affirmation of a fact) (or acts equivalent to such affirmation) made by the seller to the purchaser during the negotiations to effect a sale respecting the quality of the article or the efficiency of the property sold, constitutes a warranty if relied upon by the purchaser in making the purchase.

The principal elements of an express warranty are: (1) (affirmation of a material fact) (a direct and positive representation of a fact) (a promise material to the transaction by the seller); (2) inducement to the buyer; (3) reliance thereon by the buyer. The test in determining whether (name) made an express warranty is not whether the seller actually intended to be bound by the statement but whether he or she made (an affirmation of a material fact) (a direct and positive representation of a fact) (a promise material to the transaction), the natural tendency of which was to induce a sale and which in fact did induce a sale.

In your consideration of the question as to whether (name) made an express warranty [here set out the purported warranty], you will take into consideration what the parties said at the time of the negotiations of the sale; the relation between the parties and what both parties fairly understood by the language that was used at the time of the sale, together with all other credible evidence in this case bearing upon this subject matter.

No particular form of words or expression is necessary to constitute an express warranty; nor is it necessary that the seller use formal words such as "warrant" or "guarantee," or other words of precisely the same meaning. Any word of affirmation used in such a manner as to show that one party expects or desires that the other party rely thereon as

a matter of fact, instead of taking it as an expression of opinion or mere sales talk, constitutes a warranty. But a statement purporting to be merely the seller's opinion or belief with respect to the transaction, not amounting to a positive statement or affirmation of fact, does not create a warranty.

COMMENT

The instruction and comment were originally published in their present form in 1967. The comment was updated in 1980. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction.

As to the second paragraph, see Ewers v. Eisenzopf, 88 Wis.2d 482, 489, 276 N.W.2d 802 (1979).

An "affirmation of fact" is any statement concerning a subject matter of a transaction, which might otherwise be only an expression of an opinion or "seller's talk," and which is affirmed as an existing fact material to the transaction and reasonably induces the other party to consider and rely upon it as a fact. 3 Pomeroy's Equity Jurisprudence (5th) §§ 877 and 878 (1941). 2A, Words and Phrases, Affirmation of Fact, 361 (1955). See also 94 A.L.R.3d 729 (1979).

As to the last paragraph, see Murray v. Holiday Rambler, Inc., 83 Wis.2d 406, 265 N.W.2d 513 (1978); Acme Equip. Corp. v. Montgomery Coop. Creamery Ass'n, 29 Wis.2d 355, 138 N.W.2d 729 (1965); Borg v. Downing, 221 Wis. 463, 266 N.W. 182 (1936); White v. Stelloh, 74 Wis. 435, 43 N.W. 99 (1889); Tenney v. Cowles, 67 Wis. 594, 31 N.W. 221 (1887).

A statement subsequent to the bargain cannot amount to a warranty unless there is a new consideration. Zinzow Constr. Co. v. Giovannoni, 263 Wis. 185, 56 N.W.2d 782 (1952).

In Garner v. Charles A. Krause Milling Co., 193 Wis. 80, 213 N.W. 637 (1927), it was said that the rights of parties to a sales contract are not necessarily determined exclusively under the Uniform Sales Act. Wis. Stat. §§ 401.102(3) and 401.103 make it clear that the Uniform Commercial Code is not necessarily the exclusive determinant of the parties' rights to a sales contract.

See also 67 A.L.R.2d 619, 633 (1959); 77 C.J.S. Sales § 310 (1952, Supp 1963).

For earlier Wisconsin cases involving express warranties, see Kathan v. Comstock, 140 Wis. 427, 122 N.W. 1044 (1909); Matteson v. Rice, 116 Wis. 328, 92 N.W. 1109 (1903); Hoffman v. Dixon, 105 Wis. 315, 81 N.W. 491 (1900); White v. Stelloh, 74 Wis. 435, 43 N.W. 99 (1889); Neave v. Arntz, 56 Wis. 174, 14 N.W. 41 (1882).

See Wis JI-Civil 3230 and Wis. Stat. § 402.313 for express warranties under the Uniform Commercial Code.