

**3230 EXPRESS WARRANTY UNDER THE UNIFORM COMMERCIAL CODE**

Any affirmation of fact (or promise) made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation (or promise).

(Any description of goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.)

(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. In order to constitute a sale by sample, it must appear that the parties contracted with reference to the sample, with the understanding that the whole was like it. Whenever the designation of the quality is by reference to a sample, the sale is by sample. Otherwise, whether a sale is by sample is determined by the intent of the parties as shown by the terms of the contract and the circumstances surrounding the transaction.)

**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. No substantive changes were made to the instruction.

Wis. Stat. § 402.313.

The first paragraph is from Wis. Stat. § 402.313(1)(a).

A buyer has the burden of proving the purchase was consummated on the basis of factual representation regarding the title, character, quality, identity, or condition of the goods. Ewers v. Eisenzopf, 88 Wis.2d 482, 491, 276 N.W.2d 802 (1979). The court in Ewers noted that the UCC does not require a warranty to be stated with any degree of preciseness, only that the seller's statements are an affirmation of fact that the goods shall conform to the affirmation or promise. Additionally, the court stated that "no technical or particular words need be used to constitute an express warranty, yet whatever words are used must substantially mean the seller promises or undertakes to insure that certain facts are, or shall be, as he represents them." 88 Wis.2d at 488.

The second element to establish the express warranty is that the affirmation of fact or promise becomes a "basis of the bargain." This statutory phrase does not require the affirmation to be the sole basis for the sale, only that it is a factor in the purchase. Moreover, the seller's intent to establish a warranty and the buyer's reliance on the affirmation are not determinative as to whether the representation is a basis of the bargain. Ewers v. Eisenzopf, supra at 488.

The prevailing test in Wisconsin for determining whether an express warranty has been created is set forth in Ewers. The court, quoting a federal decision, stated at 489:

The true test is not whether the seller actually intended to be bound by his statement but rather whether he made an affirmation of fact the natural tendency of which was to induce the sale and which did in fact induce it. Citing Pritchard v. Liggett & Myers Tobacco Co., C.A. 1965, 350 F.2d 479, 481 cert. denied, 86 S. Ct. 549, 382 U.S. 987, 15 L. Ed.2d 475, opinion amended 370 F.2d 95, cert. denied, 87 S. Ct. 1350, 386 U.S. 1009, 18 L. Ed.2d 436.

The seller's lack of experience in the field is inconsequential to the determination of whether a warranty was made during a sale. Ewers v. Eisenzopf, supra at 490.

See also Acme Equip. Corp. v. Montgomery Coop. Creamery Ass'n, 29 Wis.2d 355, 138 N.W.2d 729 (1965); Hellenbrand v. Bowar, 16 Wis.2d 264, 114 N.W.2d 418 (1961); Kennedy-Ingalls Corp. v. Meissner, 11 Wis.2d 371, 105 N.W.2d 748 (1960); 67 A.L.R.2d 619 (1959).

The second paragraph is from Wis. Stat. § 402.313(1)(b) (1965).

The third paragraph is from Wis. Stat. § 402.313(1)(c).