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In this issue of CommFax, Michigan's version of the Uniform Commercial Code's ("UCC") limited warranties is examined. In addition, the article will discuss how to properly limit or modify remedies under the Michigan UCC.

LIMITED WARRANTIES UNDER THE MICHIGAN UCC AND HOW TO PROPERLY LIMIT OR MODIFY REMEDIES

By: Sarah L. Walburn

Preliminarily, the portion of the Michigan UCC being examined in this CommFax pertains to sales. Under the Michigan UCC, "sales" is defined as "transactions in goods."

Under MCLA 440.2316(4), breach of warranty remedies can be limited or modified in accordance with MCLA 440.2719. Contractual modification or limitation of remedies provided for in MCLA 440.2719 contains specific requirements before the modification or limitation is valid.

First, the limited warranty may provide for other remedies in addition to or in substitution of those provided in the Michigan UCC. Additionally, the limited warranty may limit or alter the measure of damages recoverable under the Michigan UCC. Such limitation or alteration of the measure of damages includes return and repayment, repair,

and/or replacement of nonconforming goods or parts. MCLA 440.2719(1)(a).

Second, in order for the limited warranty to be valid, the parties must expressly agree that the limited warranty is exclusive, i.e., the sole remedy. MCLA 440.2719(1)(b). Otherwise, the limited warranty is optional. "Therefore, if the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed." MCLA 440.2719, Comment 2.

However, the Michigan UCC requires that minimum adequate remedies be available to the other party. As such, MCLA 440.2719(2) provides that "where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act." Please be aware that although the limited warranty may appear fair and reasonable at first, circumstances may arise which operate to "deprive either party of the substantial value of the bargain." This causes the limited warranty to fail of its essential purpose. MCLA 440.2719, Comment 1.

The Michigan Court of Appeals has determined that a limited warranty will fail of its essential purpose "where unanticipated circumstances preclude the seller from providing the buyer with the remedy to which the parties agreed, in which event the buyer is entitled to seek remedies under the standard UCC warranty provisions." *Kovack v Daimler Chrysler Corp*, 2006 WL 1293213, 2 (Mich App May 11, 2006). In *Kovack*,

the plaintiff presented her car for repairs several times. However, the repairs were made free of charge, and were made within a reasonable time, (within a matter of hours). Therefore, the limited warranty did not fail of its essential purpose, regardless of the amount of times the plaintiff brought the motor vehicle in for repairs.

If a warranty is limited to repair and/or replacement of nonconforming goods and/or parts, the repair or replacement must be completed within a reasonable time. For example, in *Krupp PM Engineering, Inc. v Honeywell, Inc.*, 209 Mich App 104, 109 (1995), the Michigan Court of Appeals held that "because the plaintiff was deprived of its furnace for 18 months and the furnace was not completely fixed for three years, the warranty failed in its essential purpose." Therefore, the buyer was entitled to pursue other remedies since the seller took too long to complete the repairs and/or replacements promised within the limited warranty.

Another example is *Kelynack v Yamaha Motor Corporation, U.S.A.*, 152 Mich App 105 (1986), wherein the Michigan Court of Appeals held that the limited warranty failed when the plaintiff only possessed his motorcycle for 10 weeks before it became totally inoperable. Moreover, following his return of the motorcycle to the dealer, the dealer held the motorcycle for over three months. By the time the motorcycle was returned, it was late November, and weather precluded its use. Additionally, the Court held that "where a manufacturer or dealer has limited its obligation under the sales agreement to repair or replace defective parts the seller does not have an unlimited time to make the repairs, but must rather replace the parts within a reasonable time." A "reasonable time" will depend on the nature and circumstances of the case.

The third requirement for a valid limited warranty provides that consequential damages may be limited or excluded by warranty unless the limitation or exclusion is "unconscionable." MCLA 440.2719(3). By example, an unconscionable limited warranty exists where consequential damages are limited for injury to the person in the

case of consumer goods. The courts will construe such a limited warranty as *prima facie* unconscionable, whereas a limitation of damages involving a commercial loss would not be *prima facie* unconscionable. As such, the courts draw a clear distinction between commercial loss and injury to a person in determining whether a limited warranty is valid.

Once a valid limited warranty has been effectuated, the business may be protected from large damage awards and costly remedies resulting from the breach of any contractual warranties.

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