

4.21 BREACH OF EXPRESS WARRANTY ON SALE OF GOODS
(Approved before 1984)

Plaintiff-buyer claims breach of an express warranty contending that [the goods] did not conform to an affirmation of fact [or promise] made by the defendant-seller to the plaintiff-buyer, about the goods. In that regard I charge you that any affirmation of fact [or promise] made by the defendant-seller to the plaintiff-buyer which related to [the goods] and became part of the basis of the bargain created an express warranty that the goods would conform to the affirmation [or promise]. In this case the affirmation of fact [or promise] was [state the affirmation of fact or promise].

If you find that [the goods] in fact conformed to that express warranty your verdict will be for defendant-seller. If you find that [the goods] did not conform to that express warranty you must then determine whether plaintiff-buyer gave notice of that fact to defendant-seller within a reasonable time after he/she discovered or should have discovered that [the goods] did not conform to the express warranty. When plaintiff should have discovered that [the goods] did not conform depends upon all the facts and circumstances, including the nature of the nonconformity, the time when [the goods] were put in use and whether the nonconformity was discoverable by customary and reasonable inspections.

Notice will be sufficient in form if it informed the defendant-seller that plaintiff-buyer claimed that [the goods] were nonconforming. If you find that plaintiff-buyer did not give such notice or did not give it within a reasonable time after he/she discovered the nonconformity or should have discovered the nonconformity, your verdict will be for defendant-seller. If you find that notice was given within a reasonable time after plaintiff-buyer discovered or should have discovered the nonconformity, your verdict will be for plaintiff-buyer and you will proceed to consider the measure of damages.

Cases and Commentary:

This charge assumes that there has been a finding as a matter of law that seller has made an express warranty relating to the goods and buyer brings an action for damages. However, the language may be adapted for use where buyer counter-claims for damages or where buyer raises breach of express warranty as a defense to seller's action for the contract price.

See Graulich Caterer Inc. v. Hans Holterbosch, 101 N.J. Super. 61 (App. Div. 1968). This charge is not intended for use in a personal injury action or other action sounding in tort. Cf. *Collins v. Uniroyal, Inc.*, 126 N.J. Super. 401 (App. Div. 1973), *aff'd*, 64 N.J. 260 (1974), where the court charged the jury on breach of an express warranty in a personal injury action.

This charge is based upon N.J.S.A. 12A:2-313(1)(a); however, an express warranty may also be based upon N.J.S.A. 12A:2-313(1)(b) or (c) which provide as follows:

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

- (c) 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.

N.J.S.A. 12A:2-313(2) states:

It is not necessary to the creation of an express warranty that the seller use formal words such as ‘warranty’ or ‘guarantee’ or that he/she have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

Whether affirmations of fact made by seller are woven into the fabric of an agreement and whether there are facts which take such affirmations, once made, out of the agreement requires clear affirmative proof and is usually a fact issue. *See N.J.S.A.* 12A:2-313 Official Comment 3.

What is reasonable time for taking any action [under the U.C.C.] depends on the nature, purpose and circumstances of such action. *N.J.S.A.* 12A:1-204(2).

As to the notice of breach requirement, a distinction is made between notice where the goods have been accepted by the buyer *N.J.S.A.* 12A:2-607(3)(a) and where goods have been rejected by the buyer *N.J.S.A.* 12A:2-602(1).

See N.J.S.A. 12A:2-714 and 2-715 regarding damages for breach of warranty under the U.C.C. See also *N.J.S.A.* 12A:2-712 for definition of “cover.”

See exclusion or modification of express warranties. *N.J.S.A.* 12A:2-316(1).

See also Model Civil Charge 4.45 regarding actions brought under the Motor Vehicle Lemon Law, *N.J.S.A.* 56:12-29 *et seq.*