



Getting Paid: Making Your Communications Work for YOU

2025 ASA/AFRA Annual Conference

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Who is this Guy?



- Aviation attorney since 1992
- General Counsel to the Aviation Suppliers Association since 1997
- Our law firm represents and counsels air carriers, manufacturers, repair stations and distributors
- Advise businesses on transactions in aircraft, engines, inventories and parts



What's It All About?

- Your purchase orders, invoices and other communications together can make up the terms of a contract
- Properly drafted, these commercial documents can help protect your commercial rights



Clarity

- Keep sentences simple and short
- If you must include modifiers, like adjectives or adverbs, use only one per sentence
- Multiple modifiers raise the ambiguity of whether the second modifier modifies the entire sentence or just the first modifier
 - Ambiguous sentences may not be enforceable!
 - *Contra Proferentem* – the document will be interpreted against the drafter



Uniform Commercial Code

- Published in 1952
- Adopted in all 50 states and DC
- Applies to sale of goods
- Provides the buyer of goods with certain implied warranty rights:
 - Implied warranty of merchantability
 - Implied warranty of fitness for a particular purpose
 - IF the buyer adequately communicates needs and relies on seller's expertise



UCC Warranty Rights

- Implied warranty of merchantability
 - The goods would pass without objection in the trade under the contract description
 - The goods are of fair average quality within the description
 - The goods are fit for the ordinary purposes for which such goods are used
 - The goods are uniform, within the variations permitted by the agreement
 - The goods are adequately contained, packaged, and labeled as the agreement may require
 - The goods conform to the promise or affirmations of fact made on the container or label (if any)



Breach of the Implied Warranty of Merchantability

- If you purchase an item and it does not meet the requirements of the implied warranty
 - You may have a breach of the implied warranty of merchantability
 - You may be entitled to contract damages:
 - Direct damages, like the amount you paid
 - Consequential damages, like lost profits
 - Must have been reasonably foreseeable by the seller
 - In aviation, a part failure can have *significant* consequential damages



Excluding the Warranty of Merchantability

- To exclude or modify the implied warranty of merchantability or any part of it
 - The language must mention merchantability and must be conspicuous
- Disclaimer should be obvious and explicit, in type larger than other type of the document
- Disclaims warranty that parts are of such a quality that they could be resold in the ordinary marketplace



Sample Language

- ***The implied warranty of merchantability is explicitly excluded and does not apply to the parts subject to this agreement***



Rocky Mountain Helicopters, Inc. v. Bell Helicopter Co

- Defendant Bell Helicopter sold helicopters to Rocky Mountain, Inc.
 - The helicopters included parts (clutches) sold to Bell by Borg-Warner.
- Three helicopters crashed
 - Rocky Mountain sues, claiming breach of the warranties of merchantability, and fitness for intended use
- Bell files a motion to dismiss, because the sales contract language says:
 - "BELL HELICOPTER COMPANY makes no warranty whatever with respect to engines, tires, wheels, ignition apparatus, starting devices, generators, batteries, instruments or other trade accessories, manufactured by others except BELL assigns to the BELL purchaser the manufacturer's warranty."
- What happened?



Rocky Mountain Helicopters, Inc. v. Bell Helicopter Co.

- Bell’s Motion to Dismiss was granted, all implied warranties had been excluded from their sale.
 - “Court finds that the language contained in the contract between the parties is sufficient to exclude all implied warranties, including warranties of merchantability and fitness for a particular purpose.”
- A Bell supplier had also made a Motion to Dismiss that was “carried along” because of a lack of evidence in the record as to whether the supplier had offered a warranty that might extend to Rocky Mountain Helicopters.



UCC Warranty Rights

- Implied warranty of fitness for a particular purpose
 - Where the seller at the time of contracting has reason to know:
 - any particular purpose for which the goods are required
 - that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods
- There is an implied warranty that the goods shall be fit for such purpose



Implied Warranty of Fitness

- If the seller knows that you are relying on his/her expertise to choose the currently-appropriate part for your installation
 - Then the seller may be providing an implied warranty of fitness for that installation
- Distributors should be wary of providing any warranty of fitness due to airworthiness issues that must be ‘found’ upon installation
- Repair stations should likewise be cautious about collecting all of the facts, because a component might have multiple eligible installations and there may be configuration differences



Excluding the Warranty

- To exclude or modify the implied warranty of fitness for a particular purpose
 - Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.



Sample Language

- Language to exclude all implied warranties of fitness is sufficient if it states, for example, that
- ***"THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF"***



Other Warranty Exclusions

- Implied warranties are excluded
 - If the buyer (*before entering into the contract*) (1) has examined the parts/inventory as fully as he desired, or (2) has refused to examine them, then there is no implied warranty with regard to defects which an examination ought to have revealed
 - Refused to examine: seller must demand that buyer examine goods fully, and put buyer on notice that he assumes the risk of defects
 - This is not caveat emptor – it only applies where there was opportunity to examine before entering into the contract



Other Warranty Exclusions (Including “As-Is”)

- Implied warranties of fitness are excluded
 - by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties (unless circumstances indicate otherwise)
 - Where excluded or modified by the normal course of dealing
- Remedies for breach of warranty can be limited by contract



Sample Language

- *The parts are provided in “as-is, where-is” condition, with neither traceability nor airworthiness assurance documentation*
- This means that there is no additional warranty of the parts, and buyer takes them in the state that they are offered
- Also indicates airworthiness condition unknown
- UCC disfavors disclaimers, so make sure this statement is explicit - this sample statement probably does NOT affect implied warranty of merchantability



Sample Language

- *The buyer shall have no recourse for errors, flaws, absence, or any other failures or claims related to the traceability, airworthiness assurance, or other documentation associated with any part sold under this agreement*
- Limits any warranty actions related to the traceability or other documentation



Express Warranties

- Can limit buyers rights, for example:
 - Imposing procedural hurdles for warranty
 - Limiting remedies
 - Making certain remedies exclusive
- Can expand buyers rights, for example:
 - Expanding the time of warranty
 - Providing for streamlined remedies
 - Providing additional remedies (e.g. related to the traceability)



What if You Receive Non-Conforming Goods?

- Detected Upon Receipt
 - Reject

- Detected After Receipt
 - Revoke acceptance
 - Seek to enforce a warranty



Duty to Mitigate for Non-Conforming Goods

- If the buyer could have reduced damages by reasonable efforts but failed to do so
 - Then the seller is not responsible for the amount of damages that would have been mitigated
 - Example – cure-date limited items inappropriate for aviation that could have been sold into another industry, but instead were held until the end of the statute of limitations
 - This is why it may sometimes be commercially advisable to return non-conforming goods after properly documenting them (e.g. photos, test reports)



Returning Goods

- Be wary that the FAA may want to seize non-conforming aircraft parts
 - They may not do so without due process
 - They may take possession with the owner's permission
 - But giving that permission may undercut your contract rights, so you may need to balance voluntary cooperation with FAA seizure against your economic interests
 - There is often no penalty, *per se*, in letting the FAA inspect the non-conforming parts before you return them!



Beware of Inconsistent Language

- The UCC denies the effect of disclaimer language when inconsistent with language of express warranty
 - Example: If the terms and conditions disclaim all warranties and also provide explicit warranties, then the explicit warranties will often be given effect
 - “Each part will be accompanied by an 8130-3 tag describing its condition”
 - This warrants provision of 8130-3 tags, even if other language disclaims the provision of documentation
 - Based on its language, the 8130-3 also may become a warranty of condition



Inspection and Rejection

**How much time can you take to examine a part
before you need to make your decision about
returning it?**



Buyer's Right to Inspection

- The buyer generally has a right before payment or acceptance to inspect the goods at any reasonable place and time and in any reasonable manner
 - The buyer is not entitled to inspect C.O.D. goods before payment
- Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected
- A place or method of inspection fixed by the contract is presumed to be exclusive



Sample Language

- Inspection rights can be limited
- *“Buyer shall inspect the goods within X business days of delivery”*
- Definite inspection terms means that that rejection must be communicated within this period or else the goods are considered accepted
- A failure to define an inspection term means that the court can consider industry standard practices to identify a reasonable inspection period



Rejection

- Inspection is usually subject to a reasonable time period, but may be fixed by the contract
 - It is often good to fix a definite time for inspection in your standard terms and conditions
- Rejection occurs in the context of the inspection
 - So it typically has to be accomplished during the defined inspection period



Sample Language

- *Buyer has 10 calendar days from receipt of the parts to inspect the parts*
- This usually means rejection must be tendered within those 10 days



Proper Rejection

- **Reject in writing and state all reasons for rejection**
- If you don't identify the defect in your rejection, and if that defect was ascertainable by reasonable inspection, then IF the seller:
 - could have cured the unstated defect if stated; or
 - request in writing a full and final written statement of all defects on which the buyer proposes to rely (after rejection; as between merchants, only)
- THEN you may be precluded from using that defect to justify rejection or establish breach



Acceptance Precludes Rejection

- Acceptance of parts by the buyer precludes rejection of the parts accepted
- If the parts are accepted with knowledge of a non-conformity then the acceptance cannot be revoked because of that non-conformity
 - unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured
 - acceptance does not of itself impair any other remedy provided by law for non-conformity



Inconsistent Use is Acceptance

- A use of the parts that is inconsistent with the Seller's ownership is generally considered to reflect an acceptance
- EXAMPLES:
 - Buyer obtains the parts and then sells them to Buyer's customer
 - Buyer obtains a part and then disassembles it to obtain and use an internal component



What if You've Already Accepted the Parts?

- The buyer may revoke acceptance of non-conforming parts where the non-conformity substantially impairs the value, IF
 - Buyer accepted on the reasonable assumption that the non-conformity would be cured and the non-conformity has not been seasonably cured; or
 - Buyer accepted without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances
- Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the non-conformity



Revocation of Acceptance: Timing

- Revocation of acceptance is not effective until the buyer notifies the seller of it
- If the parts are accepted **WITHOUT** knowledge of a *substantial* non-conformity and the buyer later discovers that non-conformity:
 - The seller must be informed of that non-conformity within a reasonable time after
 - Discovery of the non-conformity or
 - The time that the buyer reasonably should have made discovery of the non-conformity



Post-Acceptance Recovery

- The buyer may recover his losses where the buyer has
 - Accepted goods
 - Subsequently discovered a latent non-conformity, and
 - Given timely notification of non-conformity to the seller
- The measure of damages for breach of warranty is the difference *at the time of acceptance* between the value of the goods accepted and the value they would have had if they had been as warranted (plus incidental and consequential damages)



Magic Words

**Powerful Words
to Protect Your Rights**



Incorporation by Reference

“Subject to terms stated on General Conditions of Sale, enclosed”

- Parties to a contract are free to incorporate by reference, and bind themselves to, terms that may be found in other agreements
- The other agreement *should* be readily available to both parties



READ the Cross References!

- Make sure you understand the incorporated / referenced documents
- For example, it is currently popular to reference Incoterms
 - Example: under Incoterms and UCC, “F.O.B.” has different meanings
 - Under Incoterms it is solely a maritime rule
 - UCC people tried to repeal the definition of F.O.B. to avoid confusion
 - But this was not adopted by state law!
 - So look carefully at what the cross-reference really says!



Risk of Loss

“The risk of loss shall pass to the buyer when the goods are duly delivered to the carrier”

- Risk of loss traditionally happens when delivery is made to buyer
- This may be modified by contract, establishing transfer of risk of loss at any point



Export Clearance

“Without regard to any other provision in this agreement, the Buyer accepts the goods at [U.S. location] and the Buyer shall be responsible for export clearance.”

- Incoterms often assigns export clearance responsibilities; this may be modified by contract, establishing export clearance risk
- The US government has seized goods destined for foreign buyers on the suspicion that the goods are destined for Russia
- In some cases, the foreign buyer has provided direction to the carrier about a final destination that varies from what they told the seller



Location of Litigation

“This agreement is made in _____ and both parties agree that any suit brought in relation to this agreement, or to enforce any clause of this agreement, shall be brought in a court in _____, and both parties agree to be subject to the personal jurisdiction of that court”

- If you or the other party need to litigate, you can assure that the litigation is on your home turf
- This clause also confirms personal jurisdiction of the local court



Assurance of Solvency

“Buyer hereby confirms that he is solvent”

- Ordinarily, one may retrieve goods shipped on credit from an insolvent buyer within ten days of buyer’s receipt
- Fraudulent confirmation of solvency within 90 days prior to delivery eliminates the ten-day limit on retrieving goods from the estate because the Seller relied on this representation



Thank You

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