

# Table of Contents

## CHAPTER 1. AN OVERVIEW OF WARRANTIES

- § 1:1 Overview
- § 1:2 Determining whether UCC applies
- § 1:3 Types of warranties—Consumer warranties
- § 1:4 —Warranty of title and patent infringement—Title
- § 1:5 — —Patent infringement
- § 1:6 —Express warranties
- § 1:7 — —Examples for contracts or forms
- § 1:8 — —Build and retain a file
- § 1:9 —Implied warranties—Merchantability
- § 1:10 — —Fitness for a particular purpose
- § 1:11 — — —Reliance
- § 1:12 — — —Inclusion in standard form
- § 1:13 — —Indemnification
- § 1:14 Types of contracts—Data processing
- § 1:15 —Construction
- § 1:16 —Consulting
- § 1:17 —International sales
- § 1:18 Requirement that goods be defective
- § 1:19 —Expert testimony
- § 1:20 —Malfunction theory
- § 1:21 Warranties of compliance with federal regulations
- § 1:22 Warranties and privity of contract—Warranty chains
- § 1:23 —Assignment of warranties
- § 1:24 —Warranties from a manufacturer when the buyer purchases from a distributor
- § 1:25 —Avoidance of the privity requirement
- § 1:26 —Warranties in third-party lease transactions
- § 1:27 Warranties for services
- § 1:28 Legal nature of claim for breach
- § 1:29 Disclaimer of warranties
- § 1:30 Unfair trade practices

## CHAPTER 2. WARRANTY DISCLAIMERS AND REMEDY LIMITATIONS

- § 2:1 Introduction
- § 2:2 Disclaimers of warranties
- § 2:3 —Appearance
- § 2:4 —Timing

- § 2:5 —Content—Express warranties
- § 2:6 — —Implied warranties
- § 2:7 — — —Merchantability
- § 2:8 — — —Fitness for a particular purpose
- § 2:9 — — —The “as-is” disclaimer
- § 2:10 —Examination of goods
- § 2:11 Limitations on remedies—Repair or replacement
- § 2:12 —Limitation of liability
- § 2:13 — —Limitation of liability to a set amount is valid if  
the parties expressly allocate the possible losses
- § 2:14 — —Limitation of liability clause capped damages for  
both tort and contract claims
- § 2:15 — —Return of monies paid
- § 2:16 — —Limitation of liability clause did not apply to  
product liability claim
- § 2:17 — —Nonnegotiated disclaimer and remedy limitation  
clause found ineffectual in commercial transaction
- § 2:18 — —Remedy limitation clause in a software license  
was not unconscionable
- § 2:19 — —Contract provision capping the parties’ damages  
was neither a remedy limitation subject to failure of  
its essential purpose, nor was it a liquidated damages  
provision subject to reasonableness
- § 2:20 — —Where seller of computer system failed to deliver  
the system, limitation of damage clause based on  
breach of warranty did not apply
- § 2:21 Failure of condition precedent
- § 2:22 Third-party warranties—Leases
- § 2:23 —Remote purchasers
- § 2:24 Exceptions to the enforceability of the seller’s  
disclaimers and limitations
- § 2:25 —Failure to raise as affirmative defense
- § 2:26 —Fraud
- § 2:27 —Ambiguity
- § 2:28 —The battle of the forms
- § 2:29 —Statutory provisions
- § 2:30 —Unconscionability
- § 2:31 — —Location of disclaimer on back of form as  
unconscionable
- § 2:32 — —Clauses held enforceable where purchasers of  
equipment were large, sophisticated corporations that  
engaged in lengthy negotiations before contracting  
with seller
- § 2:33 — —Consequential damage exclusion held  
unconscionable where parties had unequal bargaining  
power and seller did not make buyer aware of  
exclusion
- § 2:34 — —Provision limiting damages to amount of purchase  
price held enforceable

## TABLE OF CONTENTS

|        |                                                                                                                                                            |
|--------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| § 2:35 | — —Damage limitation clause on back of delivery receipt held enforceable where buyer had choice of obtaining good elsewhere                                |
| § 2:36 | — —Hold harmless clause in lease agreement held unconscionable where lessor did not draw unsophisticated lessee's attention to the existence of the clause |
| § 2:37 | — —Warranty disclaimers in third-party leases                                                                                                              |
| § 2:38 | — —Provision disclaiming remedies if buyer did not test goods before accepting them was not unconscionable                                                 |
| § 2:39 | — —Disclaimer of warranty on sale of livestock was not unconscionable                                                                                      |
| § 2:40 | — —Unequal bargaining power of commercial parties support finding of unconscionability                                                                     |
| § 2:41 | —Failure of essential purpose                                                                                                                              |
| § 2:42 | — —Jury instructions                                                                                                                                       |
| § 2:43 | — —Revocation of acceptance may be allowed if limited remedy fails of its essential purpose                                                                |
| § 2:44 | — —Validity of limited liability clause when limited remedy fails of its essential purpose                                                                 |
| § 2:45 | — —Failure to promptly perform under repair or replace limited remedy constituted failure of essential purpose                                             |
| § 2:46 | — —Reasonable time for return of payments                                                                                                                  |
| § 2:47 | — —Imposition of additional or modified conditions                                                                                                         |
| § 2:48 | — —Backup to limited remedy clause upheld                                                                                                                  |
| § 2:49 | — —Warranty failed of its essential purpose despite seller's good faith attempts at repair                                                                 |
| § 2:50 | — —Failure of express warranty did not invalidate clause excluding consequential damages                                                                   |
| § 2:51 | — —Failure of express warranty does not revive disclaimed implied warranties                                                                               |
| § 2:52 | — —Issue of fact existed as to whether warranty failed of its essential purpose where computer equipment allegedly did not meet specifications             |
| § 2:53 | — —Warranty did not fail of its essential purpose where seller complied with warranty by repairing or replacing defective goods                            |
| § 2:54 | — — —Buyer required to demonstrate unanticipated circumstances                                                                                             |
| § 2:55 | — —Limitation of express warranty was invalid where seller failed to correct defects in computer equipment                                                 |
| § 2:56 | — —Remedy limitation to repair or replace cannot fail of its essential purpose if buyer does not allow seller to replace equipment in dispute              |
| § 2:57 | — — —Substantial compliance                                                                                                                                |
| § 2:58 | — —Failure of remedy limitation to fully compensate the buyer                                                                                              |

- § 2:59 — —Remedy limitation can fail of its essential purpose without being unconscionable
- § 2:60 — —Failure of essential purpose of limited remedy did not render it unconscionable
- § 2:61 — —Vehicle repair warranty failed of its essential purpose; Inconsistent warranty provisions construed against the seller
- § 2:62 — —Full refund remedy cannot fail of essential purpose
- § 2:63 — —Latent defects

### **CHAPTER 3. FIGHTING THE BATTLE OF THE FORMS OVER WARRANTY PROVISIONS**

- § 3:1 What is the battle of the forms?
- § 3:2 General rules of the battle of the forms—Introduction
- § 3:3 — —“Invoices” and “price quotations” can be “forms”
- § 3:4 — —Terms incorporated by reference
- § 3:5 — —Timing of the form—The forms must be on the field while the battle is raging—Once you sign a deal, the battle is over
- § 3:6 — —Sales terms and conditions sent after oral contract was formed and goods were shipped did not operate against the buyer
- § 3:7 — —Limitation provision sent after parties signed offer not modification of contract due to inconsistent terms
- § 3:8 — —Material alterations to the contract
- § 3:9 — —Contract acceptance or counteroffer—Whether contract existed or was merely a counteroffer depended on whether the parties had reached a “commercial understanding”; Courts supply UCC gap-fillers for discrepant warranty terms
- § 3:10 — —Seller’s disclaimer of liability for consequential damages survived the battle
- § 3:11 — —Seller’s disclaimer of warranties and limitation of liability fails
- § 3:12 — —Additional terms not included when expressly limited in the acceptance
- § 3:13 — —Assent provision narrowly construed
- § 3:14 — —Course of dealing
- § 3:15 Incorporate by reference
- § 3:16 Conclusions and recommendations

### **CHAPTER 4. DAMAGES FOR BREACH OF WARRANTY**

- § 4:1 Introduction and overview

## TABLE OF CONTENTS

|        |                                                                                                                                               |
|--------|-----------------------------------------------------------------------------------------------------------------------------------------------|
| § 4:2  | Damages for nonconforming goods: Breach of warranty                                                                                           |
| § 4:3  | Notice of the breach                                                                                                                          |
| § 4:4  | —Buyer barred from recovery because it failed to<br>timely notify seller of breach                                                            |
| § 4:5  | —Commencement of time to provide notice                                                                                                       |
| § 4:6  | —Notice of breach versus notice of failure or defect                                                                                          |
| § 4:7  | —Notice to remote sellers                                                                                                                     |
| § 4:8  | —Failure of nonbuyer to give notice does not bar<br>recovery                                                                                  |
| § 4:9  | —Seller's prior knowledge of defect does not excuse<br>failure to provide notice                                                              |
| § 4:10 | —Filing of complaint within statute of limitations                                                                                            |
| § 4:11 | —Notice requirement of § 2-607 does not limit buyer's<br>right to cover with substitute goods                                                 |
| § 4:12 | —Failure to provide notice precludes common law<br>remedies                                                                                   |
| § 4:13 | —Warranties for services                                                                                                                      |
| § 4:14 | —How specific should the notice be?                                                                                                           |
| § 4:15 | — —Court distinguished between notice of problems<br>with goods and notice of breach                                                          |
| § 4:16 | — —Buyer was barred from recovery because it never<br>clearly notified seller of breach and continued to buy<br>replacement parts from seller |
| § 4:17 | — —Buyer's angry letters to seller were not sufficient<br>notice                                                                              |
| § 4:18 | — —Sample letter                                                                                                                              |
| § 4:19 | —Form of notice                                                                                                                               |
| § 4:20 | Mitigation of warranty damages                                                                                                                |
| § 4:21 | Breach of express warranty                                                                                                                    |
| § 4:22 | Economic damages                                                                                                                              |
| § 4:23 | No punitive damages for economic loss                                                                                                         |
| § 4:24 | —No recovery in tort for design services where failure<br>resulted only in economic loss                                                      |
| § 4:25 | —A buyer or seller may not recover in tort for purely<br>economic losses                                                                      |
| § 4:26 | —Buyer could not recover under negligent<br>misrepresentation for solely economic loss                                                        |
| § 4:27 | —Economic loss doctrine barred product liability claim                                                                                        |
| § 4:28 | —Breach of implied warranty in tort                                                                                                           |
| § 4:29 | Liquidated damages                                                                                                                            |
| § 4:30 | —The law                                                                                                                                      |
| § 4:31 | —Summary                                                                                                                                      |
| § 4:32 | Personal injury damages                                                                                                                       |
| § 4:33 | Consequential damages                                                                                                                         |
| § 4:34 | Revocation and rejection of goods in lieu of warranty<br>claims                                                                               |
| § 4:35 | —Seller's right to cure                                                                                                                       |

- § 4:36 —Rejection of goods—Where buyer's sample testing was random and reasonable, buyer properly rejected goods
- § 4:37 — —Continued use of item may preclude rejection
- § 4:38 — —Buyer who improperly exercised ownership of goods was not entitled to damages for breach of warranty
- § 4:39 —Revocation of acceptance—Buyer was permitted to revoke acceptance because seller's continued attempts to repair failed
- § 4:40 — —Buyer who properly revoked acceptance of goods was entitled to reasonable post-revocation use
- § 4:41 — —Unreasonable revocation
- § 4:42 — —Disclaimer of warranties
- § 4:43 Proof issues
- § 4:44 —Illustrative questions and answers
- § 4:45 —Illustrative case
- § 4:46 Setoff—The law
- § 4:47 —Illustrative case

## **CHAPTER 5. THE IMPLIED WARRANTY OF MERCHANTABILITY**

- § 5:1 Introduction
- § 5:2 Merchantability under the UCC
- § 5:3 Relationship to other types of warranties—Fitness for a particular purpose
- § 5:4 —Express warranties
- § 5:5 —Tort claims
- § 5:6 Condition of goods—Fit for ordinary use
- § 5:7 — —Unreasonably dangerous
- § 5:8 —Conformance to existing industry standards
- § 5:9 —Comparable to existing goods of that kind
- § 5:10 —Course of dealing
- § 5:11 —Less than perfect
- § 5:12 —Variations of the agreement
- § 5:13 —Component parts doctrine
- § 5:14 Presence of warnings
- § 5:15 Used goods
- § 5:16 Food
- § 5:17 Misuse of goods
- § 5:18 Inherently dangerous goods
- § 5:19 Duration of warranty
- § 5:20 Statute of limitations
- § 5:21 —Tolling
- § 5:22 Requirements of a claim—Sale by a merchant
- § 5:23 —Notice to seller
- § 5:24 —Status of goods at time of sale

## TABLE OF CONTENTS

- § 5:25 —Elements of proof
- § 5:26 —Foreseeability of use
- § 5:27 —Responsible party under warranty
- § 5:28 —Sale required
- § 5:29 Preemption
- § 5:30 Disclaiming the warranty of merchantability—General code requirements
- § 5:31 —Required language
- § 5:32 —Conspicuousness
- § 5:33 —Other ways the warranty of merchantability can be disclaimed
- § 5:34 — —“As is” clauses
- § 5:35 — —Examination or opportunity to examine
- § 5:36 — —Manufactured to purchaser’s specifications
- § 5:37 — —Disclaimer by other circumstances
- § 5:38 — —Inconsistent express warranty

## **CHAPTER 6. THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE**

- § 6:1 Introduction
- § 6:2 Particular versus ordinary purpose
- § 6:3 —Particular purpose
- § 6:4 —Merger of implied warranties
- § 6:5 —Identifying the goods
- § 6:6 Proper use of goods
- § 6:7 Seller’s reason to know
- § 6:8 Buyer’s reliance on the seller’s skill or judgment
- § 6:9 Disclaimer of the implied warranty of fitness for a particular purpose
- § 6:10 —Conspicuous
- § 6:11 —Inspection
- § 6:12 —Effect on breach of contract claim
- § 6:13 Accrual of claim
- § 6:14 Conflict between warranties

## **CHAPTER 7. EXPRESS WARRANTIES UNDER THE UNIFORM COMMERCIAL CODE**

- § 7:1 Introduction
- § 7:2 Creation of express warranties—Affirmations
- § 7:3 — —Descriptions
- § 7:4 — —Samples
- § 7:5 — —Advertising
- § 7:6 — —Installation
- § 7:7 — —Restatement of other’s affirmation

- § 7:8 — —Certification mark
- § 7:9 Reliance requirement
- § 7:10 Privity
- § 7:11 Presence of a defect
- § 7:12 —Type of defect
- § 7:13 Puffing
- § 7:14 Breach of warranty
- § 7:15 Duration of warranty
- § 7:16 —Tolling
- § 7:17 Misuse of goods
- § 7:18 Transfer/adoption of express warranty liability
- § 7:19 Preemption
- § 7:20 Contractual promises
- § 7:21 —Course of performance
- § 7:22 Statute of limitations

## **CHAPTER 8. PRIVITY OF CONTRACT IN UCC WARRANTY CASES**

- § 8:1 Introduction
- § 8:2 Privity of contract
- § 8:3 UCC § 2-318
- § 8:4 —Alternative A
- § 8:5 — —Entities extended coverage
- § 8:6 — —Vertical privity
- § 8:7 — —Types of damages
- § 8:8 —Alternative B—Entities extended coverage
- § 8:9 — —Types of damages
- § 8:10 —Alternative C
- § 8:11 —Other approaches
- § 8:12 Privity and other defenses under the UCC
- § 8:13 Third-party beneficiary
- § 8:14 Agency
- § 8:15 The Magnuson-Moss Warranty Act
- § 8:16 Retroactive application
- § 8:17 Other ways to establish privity—Third-party beneficiary
- § 8:18 —Agency
- § 8:19 Obligations to remote purchasers
- § 8:20 Conclusion

Appendix 8-A. Table of Code Variations by State

## **CHAPTER 9. WARRANTY ISSUES IN COMPUTER HARDWARE AND SOFTWARE TRANSACTIONS**

- § 9:1 Introduction
- § 9:2 Turnkey contracts—Introduction to turnkey systems

## TABLE OF CONTENTS

|        |                                                                                                               |
|--------|---------------------------------------------------------------------------------------------------------------|
| § 9:3  | —Warranties under turnkey contracts                                                                           |
| § 9:4  | —Liabilities and remedies                                                                                     |
| § 9:5  | Warranties in hardware contracts—Introduction                                                                 |
| § 9:6  | —Warranties                                                                                                   |
| § 9:7  | — —Duration of the warranty                                                                                   |
| § 9:8  | — —Warranty of compatibility                                                                                  |
| § 9:9  | — —No refurbishments                                                                                          |
| § 9:10 | — —The configuration warranty                                                                                 |
| § 9:11 | — —Upgrade protection warranty                                                                                |
| § 9:12 | — —Expendable items                                                                                           |
| § 9:13 | — —Privity of contract                                                                                        |
| § 9:14 | — —Tolling of the warranty                                                                                    |
| § 9:15 | Warranties and maintenance agreements                                                                         |
| § 9:16 | Software licenses—Introduction                                                                                |
| § 9:17 | —Software warranty checklist                                                                                  |
| § 9:18 | Litigation examples                                                                                           |
| § 9:19 | —Merchantability                                                                                              |
| § 9:20 | —Acceptance of software with knowledge of limitations<br>precludes merchantability claim                      |
| § 9:21 | —Limitations of liability and disclaimers of<br>warranties—Effective disclaimers and liability<br>limitations |
| § 9:22 | — —Examples where disclaimers were ineffective or<br>issue of fact existed as to validity                     |
| § 9:23 | —Warranties and privity of contract issues—Third-<br>party leases                                             |
| § 9:24 | — —Privity issues with dealers or distributors                                                                |
| § 9:25 | — —Distributors as agents?                                                                                    |
| § 9:26 | — —Finance companies as agents?                                                                               |
| § 9:27 | —Warranties and adhesion contracts                                                                            |
| § 9:28 | —Warranty of future performance                                                                               |
| § 9:29 | —UCC Article 2 and computer leases                                                                            |
| § 9:30 | —Express and implied warranties under UCC Article<br>2A                                                       |
| § 9:31 | —The statute of limitations                                                                                   |
| § 9:32 | —The effect of integration clauses on warranties                                                              |
| § 9:33 | —Upgrades                                                                                                     |
| § 9:34 | —The buyer's burden of proof                                                                                  |
| § 9:35 | —Y2K cases alleging breach of warranties                                                                      |
| § 9:36 | — —No actionable injury                                                                                       |
| § 9:37 | — —Cases involving breach of express warranty<br>claims                                                       |
| § 9:38 | Seller's liability for misrepresentations of computer<br>performance                                          |
| § 9:39 | Warranties under the Uniform Computer Information<br>Transactions Act—Introduction                            |
| § 9:40 | —Scope and definition of terms                                                                                |

- § 9:41 —Express and implied warranties
- § 9:42 —Disclaiming warranties
- § 9:43 —Warranties to third parties
- § 9:44 —Conclusion

## **CHAPTER 10. WARRANTY ISSUES IN THE PURCHASE OR LEASE OF CAPITAL EQUIPMENT**

- § 10:1 Acquisitions of capital equipment
- § 10:2 —Purchase
- § 10:3 —Lease
- § 10:4 Types of warranties
- § 10:5 —Express
- § 10:6 —Implied
- § 10:7 — —Merchantability
- § 10:8 — —Fitness for purpose
- § 10:9 — —Against interference
- § 10:10 — —Workmanlike performance
- § 10:11 Avoiding warranty obligations
- § 10:12 —Express disclaimer
- § 10:13 —Use of terms indicating no warranties
- § 10:14 —Reliance
- § 10:15 —Acts of purchaser
- § 10:16 —Examination by buyer/lessee
- § 10:17 —Usage of trade, course of dealing, or course of performance
- § 10:18 —Integration clause
- § 10:19 —Statute of limitations
- § 10:20 Remedies
- § 10:21 —Revocation
- § 10:22 —Consequential damages
- § 10:23 Checklist for warranties in purchasing or leasing capital equipment—Identify the item and its cost
- § 10:24 —Installation of equipment: Site specification warranties
- § 10:25 —Warranties
- § 10:26 —Remedies

Appendix 10-A. Sample Capital Equipment Purchasing and Leasing Warranty Provisions

## **CHAPTER 11. WARRANTIES IN CONSTRUCTION CONTRACTS**

- § 11:1 Introduction
- § 11:2 Tests to determine if Article 2 applies—Whether contract is primarily for goods or services

## TABLE OF CONTENTS

|         |                                                                                                                                                 |
|---------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| § 11:3  | — —Applying the predominant factor test                                                                                                         |
| § 11:4  | — —Application of test in larger scale construction                                                                                             |
| § 11:5  | —Substantial justification for application of Article 2                                                                                         |
| § 11:6  | —Whether dispute concerns goods or services portion of a mixed contract                                                                         |
| § 11:7  | Owner’s warranties as to the accuracy of plans and specifications—The <i>Spearin</i> doctrine: The implied warranty of accuracy and suitability |
| § 11:8  | —Notice of claim                                                                                                                                |
| § 11:9  | —Repercussions of breach of implied warranty                                                                                                    |
| § 11:10 | —Elements of proof to demonstrate breach                                                                                                        |
| § 11:11 | —Defenses available to the owner                                                                                                                |
| § 11:12 | Design professional’s liability under warranty for errors—Majority view: Design professional not liable for errors or latent design defects     |
| § 11:13 | —Minority position: Design professionals impliedly warrant fitness for a particular purpose and general fitness of design                       |
| § 11:14 | Contractor’s liability under warranty law—Express warranties                                                                                    |
| § 11:15 | —Implied warranties—Contractor’s implied warranty of workmanlike performance                                                                    |
| § 11:16 | — —Implied warranty of habitability                                                                                                             |
| § 11:17 | — —Implied warranty of fitness for a particular purpose                                                                                         |
| § 11:18 | — —Implied warranty of merchantability                                                                                                          |
| § 11:19 | —Notice of breach of warranty                                                                                                                   |
| § 11:20 | —Time for bringing action                                                                                                                       |
| § 11:21 | — —Discovery rule                                                                                                                               |
| § 11:22 | —Disclaimers—Creation of warranty despite disclaimer                                                                                            |
| § 11:23 | — —Disclaimer provided after negotiations are ineffective                                                                                       |
| § 11:24 | —Waiver                                                                                                                                         |
| § 11:25 | —Condition precedent                                                                                                                            |
| § 11:26 | —Remedy limitations                                                                                                                             |
| § 11:27 | — —Consequential damages                                                                                                                        |
| § 11:28 | —Guarantees                                                                                                                                     |
| § 11:29 | Contractor’s liability under tort law                                                                                                           |
| § 11:30 | Arbitrability of breach of warranty                                                                                                             |
| § 11:31 | Third-party beneficiary of warranties                                                                                                           |
| § 11:32 | Contract term requiring manufacturer’s warranty                                                                                                 |

## CHAPTER 12. CONSULTING WARRANTIES AND CONSULTANT LIABILITY

|        |                                               |
|--------|-----------------------------------------------|
| § 12:1 | Introduction and overview                     |
| § 12:2 | —Warranty provisions in consulting agreements |

- § 12:3 —Causes of action for breach of warranty in the consultant context
- § 12:4 Theories of recovery—Express breach of contract
- § 12:5 —Breach of implied warranty
- § 12:6 —Negligence
- § 12:7 — —Standard of care
- § 12:8 — —Duty
- § 12:9 — — —Professional duties
- § 12:10 — — —Statute or regulation
- § 12:11 — —Damages
- § 12:12 —Strict liability
- § 12:13 —Fraud
- § 12:14 Defenses
- § 12:15 —Contract defenses—Estoppel
- § 12:16 — —Lack of privity
- § 12:17 — —Statute of limitations
- § 12:18 — —Damage limitation clauses
- § 12:19 — —*Res judicata*
- § 12:20 —Tort defenses—No duty to injured party
- § 12:21 — —Lack of causation
- § 12:22 — —Economic loss doctrine
- § 12:23 —Liability limitation clauses
- § 12:24 Conclusion

## CHAPTER 13. WARRANTIES IN GOVERNMENT CONTRACTS

- § 13:1 Introduction
- § 13:2 Governing regulations and statutes—Regulations
- § 13:3 —Statutes
- § 13:4 —Uniform Commercial Code (UCC)
- § 13:5 Warranties—In general
- § 13:6 —Commercial items
- § 13:7 —Express warranties—Reasonableness and interpretation of specific clauses
- § 13:8 — —Inspection and acceptance—Generally
- § 13:9 — — —Latent defects
- § 13:10 — —Construction warranties—Material and workmanship
- § 13:11 — — —Latent defects
- § 13:12 — — —Affirmation, promise, description, or sample
- § 13:13 — —Supply warranties—Performance specifications
- § 13:14 — — —Design specifications
- § 13:15 — — —Sample supply specification warranties
- § 13:16 — —Commissions or contingent fees
- § 13:17 —Implied warranties—Government warranties—Generally

## TABLE OF CONTENTS

|         |                                                       |
|---------|-------------------------------------------------------|
| § 13:18 | — — —Specifications                                   |
| § 13:19 | — — —Superior knowledge                               |
| § 13:20 | — — —Reasonable diligence or hindering<br>performance |
| § 13:21 | — — —Spearin doctrine                                 |
| § 13:22 | — — —UCC warranties                                   |
| § 13:23 | — — Contractor warranties                             |
| § 13:24 | Government contractor defense                         |
| § 13:25 | Conclusion                                            |

## **CHAPTER 14. CONSUMER WARRANTIES UNDER THE MAGNUSON-MOSS WARRANTY ACT**

|         |                                                                                    |
|---------|------------------------------------------------------------------------------------|
| § 14:1  | Background                                                                         |
| § 14:2  | Brief summary of the law                                                           |
| § 14:3  | Discussion of the Act's substantive provisions and<br>regulations                  |
| § 14:4  | —Part 700: Interpretations of Magnuson-Moss<br>Warranty Act                        |
| § 14:5  | —Part 701: Disclosure of written consumer product<br>warranty terms and conditions |
| § 14:6  | —Part 702: Pre-sale availability of written warranty<br>terms                      |
| § 14:7  | —Full and limited warranties                                                       |
| § 14:8  | —Implied warranties                                                                |
| § 14:9  | — — Under the UCC and the Act                                                      |
| § 14:10 | — — Warranty disclaimers                                                           |
| § 14:11 | — — Privity                                                                        |
| § 14:12 | —Written warranty                                                                  |
| § 14:13 | —Not for resale                                                                    |
| § 14:14 | —Enforcement                                                                       |
| § 14:15 | — — Federal                                                                        |
| § 14:16 | — — Private                                                                        |
| § 14:17 | — — —Scope of action created under § 110(d)                                        |
| § 14:18 | — — —Personal injury claims and punitive damages                                   |
| § 14:19 | — — —Opportunity to cure                                                           |
| § 14:20 | — — —Attorneys' fees                                                               |
| § 14:21 | — — —Class actions                                                                 |
| § 14:22 | — — —Amount in controversy                                                         |
| § 14:23 | — — —Statute of limitations                                                        |
| § 14:24 | Damages                                                                            |
| § 14:25 | Informal dispute resolution mechanisms                                             |
| § 14:26 | —Scope—Sale of goods                                                               |
| § 14:27 | — — Form of mechanism                                                              |
| § 14:28 | — — Oral warranties                                                                |
| § 14:29 | — — Third parties                                                                  |

- § 14:30 —Application—Attorneys fees
- § 14:31 —Application
- § 14:32 —Preemption—Federal laws
- § 14:33 — —State laws

Appendix 14-A. Useful Materials on the MMWA Available at the FTC Web Site *www.ftc.gov*

Appendix 14-B. Federal Trade Commission Regulations under the Magnuson-Moss Warranty Act

## CHAPTER 15. WARRANTIES IN INTERNATIONAL TRANSACTIONS

- § 15:1 Introduction
- § 15:2 Application of the CISG
- § 15:3 Warranty provisions
- § 15:4 —Comparison of warranty provisions under the CISG and UCC—Warranties
- § 15:5 — —Warranty disclaimers
- § 15:6 — —Notice of nonconformity
- § 15:7 —Comparison of warranty provisions under the CISG and civil law

## CHAPTER 16. ILLUSTRATIVE WARRANTIES FROM SOFTWARE-RELATED TRANSACTIONS

- § 16:1 Sample warranties, warranty disclaimers, and limitations of liability clauses from software license agreements
- § 16:2 Sample warranties, disclaimers, and limitations of liability clauses from software support and maintenance agreements
- § 16:3 Sample warranties and warranty disclaimers from software trial and test agreements
- § 16:4 Sample warranties and disclaimers from joint development agreements
- § 16:5 Sample warranties from programmer's agreements
- § 16:6 Sample warranties and limitations of liability/disclaimer of warranties from software distribution agreements
- § 16:7 Sample warranties as to ownership and patent rights
- § 16:8 Software license
- § 16:9 Software purchase agreement
- § 16:10 License and services agreement
- § 16:11 Reseller agreement
- § 16:12 Asset Purchase and Sale Agreement between Telmarine Communications, Inc., and Cistera Networks, Inc.

## TABLE OF CONTENTS

- § 16:13 Master Services Agreement between General Electric Co. and Genpact Ltd.
- § 16:14 Software License and Distribution Agreement between Hewlett-Packard Company and Crossroads Systems, Inc.
- § 16:15 Software License Agreement between DCD Digital Core Design and PVI Solutions, Inc.
- § 16:16 Promotion and Distribution Agreement between WhiteSmoke, Inc. and Google Inc.
- § 16:17 Software License and Maintenance Agreement between PT XL Axiata Tbk. and mCore International, Inc.

## CHAPTER 17. WARRANTIES IN WEB SITE DEVELOPMENT AGREEMENTS

- § 17:1 Introduction
- § 17:2 —The work of others is often involved
- § 17:3 —Warranty of no disabling code
- § 17:4 —The general quality warranty
- § 17:5 —Focus on the “deliverables”
- § 17:6 —Does the developer have its own Web site?
- § 17:7 —Other warranties
- § 17:8 Sample warranty clauses
- § 17:9 Lease and transfer agreement

## CHAPTER 18. ILLUSTRATIVE CONSTRUCTION CONTRACT WARRANTIES

- § 18:1 Contractor Services Agreement—Annual Contractor Services Agreement
- § 18:2 —Master Services Agreement
- § 18:3 —Agreement for Construction Services (from a large bottling company)
- § 18:4 Independent Contractor Agreement—Guarantee
- § 18:5 —Warranty
- § 18:6 Agreement between Contractor/Builder and Subcontractor—Warranty provision 1
- § 18:7 —Warranty provision 2
- § 18:8 Terms and conditions for work to be performed on buyer’s premises—Warranty provision 1
- § 18:9 —Warranty provision 2
- § 18:10 Construction Contract warranty and correction of Work—General warranty
- § 18:11 —Major utility
- § 18:12 —Large diversified chemical company
- § 18:13 —Large diversified manufacturing company
- § 18:14 —Major utility—Materials and appurtenances
- § 18:15 —Labor, supervision, and materials
- § 18:16 —Small construction contract

- § 18:17 Engineering Contract—Workmanship
- § 18:18 —Engineering services/equipment sale
- § 18:19 Repaving and sidewalk conditions
- § 18:20 Construction projects of limited scope
- § 18:21 Turnkey design/build construction and related services
- § 18:22 Prime contractor obligation on pass-through warranties
- § 18:23 Turnkey construction contract for solar park
- § 18:24 Standard form design-build agreement for biodiesel production facility
- § 18:25 Engineering, procurement and construction management contract for production plant
- § 18:26 Cost plus incentive construction contract for production plant
- § 18:27 Construction management and general contractor's agreement for renovation of hotel/casino
- § 18:28 Engineering, procurement and construction contract for geothermal electricity generating plant
- § 18:29 Construction Contract between Atwood Oceanics Pacific Ltd. and PPL Shipyard PTE Ltd.
- § 18:30 Engineering, Procurement and Construction Contract between Seaboard Corp. and Wartsila Finland OY
- § 18:31 Engineering, Procurement and Construction Agreement between High Plains Ranch II, LLC and SunPower Corporation Systems

## **CHAPTER 19. ILLUSTRATIVE WARRANTIES FROM CONSULTING AGREEMENTS**

- § 19:1 Introduction
- § 19:2 Standard of performance warranties
- § 19:3 Miscellaneous warranties
- § 19:4 Warranty provisions with limitation of liability
- § 19:5 Warranty of fiduciary duty
- § 19:6 Warranties addressing specific types of consultants
- § 19:7 Internet services and consulting agreement
- § 19:8 Management consulting agreement
- § 19:9 Consulting Agreement between Oak Ridge Micro-Energy Inc. and Lithium Battery Engineering, LLC
- § 19:10 Consulting Agreement between MEDL Mobile, Inc. and FA Corporation

## **CHAPTER 20. ILLUSTRATIVE CONSUMER WARRANTIES**

- § 20:1 Electrical appliance company
- § 20:2 Home electronics company
- § 20:3 Household products manufacturer

## TABLE OF CONTENTS

|         |                                              |
|---------|----------------------------------------------|
| § 20:4  | Lawn care products manufacturer              |
| § 20:5  | Television manufacturer                      |
| § 20:6  | Office products manufacturer                 |
| § 20:7  | Retail store                                 |
| § 20:8  | Bicycle manufacturer                         |
| § 20:9  | Computer manufacturer                        |
| § 20:10 | Range manufacturer                           |
| § 20:11 | Refrigerator manufacturer                    |
| § 20:12 | Faucet manufacturer                          |
| § 20:13 | Sewing Machine Manufacturer Limited Warranty |
| § 20:14 | Consumer Appliance Warranty                  |

## **CHAPTER 21. ILLUSTRATIVE WARRANTIES FROM SALES TERMS AND CONDITIONS**

|        |                               |
|--------|-------------------------------|
| § 21:1 | Introduction                  |
| § 21:2 | Illustrative warranty clauses |
| § 21:3 | Group purchasing agreement    |

## **CHAPTER 22. WARRANTIES IN MANUFACTURING AGREEMENTS**

|         |                                                                                                              |
|---------|--------------------------------------------------------------------------------------------------------------|
| § 22:1  | Common warranty issues that arise in manufacturing agreements                                                |
| § 22:2  | Sample warranty clauses—Manufacturing agreement between Xpeed Corporation and SMTC Manufacturing Corporation |
| § 22:3  | —Contract between Hughes Network Systems and Endgate Corporation                                             |
| § 22:4  | —Agreement for electronic manufacturing services between Elastic Networks, Inc. and Sanmina Corporation      |
| § 22:5  | —International manufacturing contract between Handspring, Inc. and Flextronics                               |
| § 22:6  | —Manufacturing services agreement between Sycamore Networks Inc. and Celestica Corporation                   |
| § 22:7  | —Turnkey service and purchase agreement between Cobalt Networks, Inc. and SMTC Manufacturing Corporation     |
| § 22:8  | —Electronic manufacturing services agreement between HealtheTech, Inc. and Sanmina Corporation               |
| § 22:9  | —Manufacturing and purchase agreement between Xpeed, Inc. and Victron, Inc                                   |
| § 22:10 | —Manufacture and supply agreement between Hospira, Inc. and Abbott Laboratories                              |
| § 22:11 | —Manufacturing agreement between Emulex Corporation and Benchmark Electronics, Inc                           |

## WARRANTIES

- § 22:12 —Manufacturing service agreement between Sanmina-SCI Corporation and LSI Logic Storage Systems, Inc
- § 22:13 Product manufacturing agreement between Supermicro Computer, Inc. and Ablecom Technology, Inc.
- § 22:14 Contract manufacturing agreement between Micro Component Technology, Inc. and Greatech
- § 22:15 Manufacturing and product purchase agreement between Cisco Systems International B.V. and Solectron Corporation
- § 22:16 Manufacturing agreement between New Abraxis, Inc. and APP Pharmaceuticals, LLC
- § 22:17 Master external manufacturing agreement between Kraft Foods Global, Inc. and external manufacturer
- § 22:18 Design and manufacturing services agreement between MiTAC International Corporation and Blue Coat Systems, Inc.
- § 22:19 Manufacturing Agreement between Vishay S.A. and Vishay Precision Foil VPG GmbH
- § 22:20 Manufacturing Agreement between RF Monolithics Inc. and Tai-Saw Technology Co., Ltd.
- § 22:21 Manufacturing and Supply Agreement between Vascular Solutions Inc. and Escalon Vascular Access, Inc.
- § 22:22 Manufacturing and Development Agreement between Codexis, Inc. and Lactosan GmbH & Co. KG
- § 22:23 Private Label Manufacturing and Supply Agreement between Barrier 4, Inc. and mPact Environmental Solutions, LLC
- § 22:24 Manufacturing Services Agreement between LiquidMetal Technologies Inc. and Visser Precision Cast, LLC

## APPENDICES

- Appendix A. Warranty Provisions of New York State Statutes
- Appendix B. Convention on the International Sale of Goods  
Warranty Provisions, Articles 35–39
- Appendix C. Magnuson-Moss Warranty—Federal Trade  
Commission Improvement Act

### Table of Laws and Rules

### Table of Cases

### Index