

FIRE COUNSEL NOTES



When Buying Fire Equipment - Watch the Clock and the UCC!

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While most fire equipment, particularly fire apparatus, is purchased with the expectation that it will have a long useful life, if defects or problems develop with the item purchased do develop, there may very well be limits on the ability of the fire protection district buyer to seek relief from the seller by repair or replacement due to the passage of time from purchase to the onset of the defect or the terms of the contract entered into for the purchase. For this reason, when districts purchase equipment, they need to be aware of contract provisions and time limits imposed by law or the contract with the seller which make prompt and timely assertion of a defect critical to obtaining relief from a purveyor of fire equipment or apparatus.

Most transactions involving fire equipment purchases are governed by the "Uniform Commercial Code" [UCC] which is a body of legal rules applicable to various types of commercial transactions, including the "sale of goods" which is the subject of Article 2 of the UCC. The provisions of Article 2, in turn, establish rules about the presentation of claims and time limits for bringing claims based upon defects in goods sold under contracts subject to the UCC. Section 2-725 of the UCC provides that "an action [lawsuit] for breach of a contract for sale must be commenced within 4 years after the cause of action [legal claim] has accrued." What does this mean? Generally, that a claim based on a defect in a "good" [fire equipment or apparatus] must be asserted by filing

a lawsuit within 4 years of the purchase of the equipment or apparatus. A claim based on defect is usually based on a "breach of warranty", that is, that the item of equipment or apparatus fails to perform as warranted by the seller or manufacturer of the item. Section 2-725 goes on to provide that "a cause of action for a breach of warranty accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach...and...a breach of warranty occurs when tender of delivery is made." Read together, and put simply, the general rule under the UCC gives a purchaser 4 years from the date of delivery to assert a claim based on defect in the equipment or apparatus purchased. If the buyer fails to meet that deadline, the claim will be barred and no recovery can be obtained from the seller no matter how glaring or serious the defect may be.

While the foregoing states the general rule, there are, as with most matters involving the law, exceptions and provisos. Section 2-725 permits the parties to a contract to shorten the statute of limitations applicable to the transaction so long as it is not less than 1 year. However, the limitations period cannot be extended beyond the 4 years provided in 2-725. Thus, a contract entered into by a district to purchase equipment or apparatus may contain a clause in the document submitted by the seller which shortens significantly the amount of time within which a claim must be presented or be time barred. On the other hand, a

warranty in a contract which is applicable to a particular item of equipment or an apparatus, may extend the time within which a claim may be presented if the warranty "explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance..." in which case "... the cause of action accrues when the breach is or should have been discovered". What does this mean? It means that if a seller or manufacturer has given a warranty on the item purchased which is based on its performance, the time limit to file a lawsuit on the claim will begin to run from the time that the buyer knows or should have known of the defective performance. This time period can either be the general rule of Section 2-725 or it could be a shorter time period as defined in the contract [but not less than 1 year].

This is not the end of the story, however, because the type of warranty and its terms may also affect the time limit within which a claim for defective performance must be asserted. Under the UCC, there are three general forms of warranty: express, implied as to merchantability, and implied for a particular purpose. Within each of these types of warranties, there are different possible time limits to assert a claim. Under Section 2-313 of the UCC, an express warranty is exactly what the name indicates and it can be created by "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...or...any description of the

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goods which is made part of the basis of the bargain...or...any sample or model which is part of the basis of the bargain". Notably, the words "guarantee" or "warranty" do not have to be used to create an express warranty. An example of an express warranty would be a guarantee that a pump on a fire apparatus would pump a certain volume of water and last for a specified period of time. Under Section 2-314 of the UCC, there is also an "implied warranty of merchantability" which in simple terms means that the goods sold will meet the ordinary expectations of buyers for that type of product ["pass without objection in the trade under the contract description...and...are fit for the ordinary purposes for which such goods are used"]. An example of a breach of an implied warranty of merchantability would be a fire pumper which simply does not pump. Implied warranties can arise from the "course of dealing or usage of trade"—meaning that the transactions between the particular buyer and seller or the general expectations in the field in which the product is used can create implied warranties. The third type of warranty is also implied and is that of "fitness for a particular purpose". Section 2-315 of the UCC provides that "...where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and 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." A "particular purpose" means that the product is going to be used by the buyer in a manner which is "peculiar to the nature of his business" and it is in contrast to the implied warranty of merchantability discussed above which applies to the customary use made of the product. An example of a breach of an implied warranty of merchantability might be a sale of a fire apparatus which the seller is aware is intended to be used by the buyer to fight brush fires, but which, in fact, is not designed, intended, or capable of performing that function. Reading about these various types of warranties may give fire district trustees and chiefs a warm and fuzzy feeling about the protections afforded buyers of fire equipment and apparatus. But read on.

The UCC permits sellers to "exclude" or "limit" the warranties that apply to a particular

transaction. This is done by language in the contract between the buyer and the seller which can eliminate one or more of the foregoing types of warranties. For example, in most fire apparatus contracts, language will be included by the seller which disclaims any and all warranties—"express or implied" except those as are expressly included in the contract or specifications for the apparatus. Thus, in most new apparatus contracts, there will be a one year "general" warranty on the apparatus that it will be free of manufacturing defects and there will be other "limited" warranties on various components of the apparatus such as the pump, booster tank, paint, body, plumbing, electrical, etc. These limited warranties proscribe the rights of the buyer of the apparatus and in addition to being limited as to the particular component of the apparatus to which they apply, they are typically time limited as well. In asserting a claim under either a general one year warranty or a limited warranty on a component of the apparatus, it is also important for the buyer to carefully read the contract language to determine whether the seller must be given actual notice of the claimed breach of warranty within the warranty time period or if the defect must simply have manifested itself during that time period regardless of when notice is given by the buyer. In most cases, contract language will make it necessary for the seller to be given notice before the end of the warranty period. Under the UCC, the seller can also limit its liability for a breach of warranty by the language of the contract and most do by providing that the buyer's remedy is limited to repair or replacement and typically not a refund. If a warranty claim is asserted during the warranty time period, it is important for the buyer to seek to keep open the warranty on the defective component until the defect is corrected to the buyer's satisfaction even though the warranty period may have expired. For example, if a problem were to develop with a pump which has a three year warranty and notice is given to the seller of the problem before the three years expires, written confirmation should be obtained that until the defect is corrected to the buyer's satisfaction, the warranty on the pump continues even though subsequent warranty repairs may be required after the three year period has expired.

If all of this were not enough, the UCC also allows sellers to limit the amount of

damages that a buyer may recover for a breach of contract by the seller. Section 2-718 only requires that the agreed (liquidated) damages set out in the contract be "reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." Each of the foregoing factors, of course, is subject to interpretation and argument. Moreover, while Section 2-718 prohibits "unreasonably large liquidated damages" and makes such terms void as a penalty, it does not contain a provision which, on the other side, prohibits a low liquidated damages figure. And, in Section 2-719, a seller can, by contract, modify or limit a remedy which a buyer would otherwise have against the seller for a breach of contract—including claims for breach of a warranty or for "consequential damages" [damages which flow from the breach such as a fire loss due to the failure of a pump]. Thus, a seller can, by including in a contract a provision setting a limit on a buyer's right to recover damages or the remedies available to the buyer, substantially reduce the liability of the seller to the buyer for a breach of warranty or defect. And, in reality, most apparatus contracts, in fact, do this by including terms which limit the seller's responsibility for a defect to its repair or replacement at the option of the seller, or which require the buyer to return a defective apparatus to the factory at the buyer's expense for repair, or which limit a buyer's total recovery for a breach of contract to the amount of the purchase price.

Finally, districts should be aware that under the New Vehicle Buyer Protection Act [815 ILCS 380], new vehicles purchased by a fire department or fire protection district are included within the protection of this law which is commonly referred to as a "lemon law" and provides recourse to a buyer where "after a reasonable number of attempts the seller is unable to conform the new vehicle to any of its applicable express warranties". In this situation the seller is required to provide the purchaser with a new vehicle of "like model line" or replace it with a "comparable motor vehicle" or accept the vehicle back and give a refund. The law goes on to define what constitutes a "reasonable number of attempts" based on the efforts of the seller made to address the defect or the amount

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of time the vehicle is out of service within the specified warranty period. Notably, the Act requires that “any action brought under this Act shall be commenced within eighteen months following the date of original delivery of the motor vehicle...”. Again, this is a strict time limit which a district must adhere to in order to obtain relief.

If all of this seems a bit complicated and confusing, it is. So what does all of it mean in practical terms to districts purchasing equipment or apparatus? A summary of key considerations might be:

1. Understand that “standard” contracts which are presented by vendors and manufacturers to fire protection districts are written for the benefit of the seller and not the buyer. Have the contract reviewed by the district’s legal counsel before it is approved and signed by the district so that the board of trustees will have a clear understanding of the terms of the contract and know the district’s rights and obligations under it. Unacceptable

terms should be renegotiated.

2. Carefully review the provisions in contracts which set out or limit warranties, remedies for defects, and other restrictions on the district’s ability to recover for a breach of warranty or a breach of the contract itself. Go through a “hypothetical” defect claim and trace how it would be handled by the seller under the contract language. If that differs from what has been represented to the district by sales representatives, be wary. Request changes if the terms are not acceptable.

3. Be certain that all terms of the transaction are contained in the contract. Any important representations made with respect to the equipment or apparatus should be in writing and set out in the contract [most apparatus manufacturers’ contracts, for example, contain a provision which expressly excludes representations or promises made by sales personnel which are not in writing and contain “integration clauses” which recite that the final written contract contains the “entire” agreement of the buyer and seller and that all prior negotiations and discussions

(representations) are merged into and contained in the written contract document]. Unwritten representations outside the contract cannot be relied on. If there are particular aspects of the equipment that are important [for example, its particular use], be certain that these are in writing and in the contract.

4. Be aware that most apparatus contracts “incorporate by reference” other documents. That is, some other separate document [such as the manufacturer’s apparatus specifications] is made part of the contract to the same extent as if written into the contract and that document will control if there is a dispute.

5. Perhaps most important, be aware of time limits in the contract which may alter the 4 years that the district will generally otherwise have to make a claim against the seller for a defect and watch the clock! Know when the limitations period begins to run and calendar it. Be prompt in giving formal notice of possible defects and claims. Make claims in writing and keep a record to show when the claim was asserted. ■

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