

# Implied Warranties Under the UCC (TX)

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This Practice Note discusses implied warranties under the Texas Uniform Commercial Code equivalent of model UCC Article 2 in a sale of goods transaction, found at Tex. Bus. & Com. Code Ann. § 2.101. It includes an overview of the implied warranties of merchantability and fitness for a particular purpose, and the implied warranties of title and against infringement, as well as effective disclaimers of each of these warranties. This resource includes links to general and state-specific standard documents, standard clauses and practice notes.

Warranties are an important part of a sale of goods transaction. Unless properly disclaimed, the Texas Uniform Commercial Code (UCC) imposes warranty obligations on the seller that are implied by the operation of law, custom or the conduct of the parties, regardless whether they are included in the written agreement. Therefore, both parties entering into a sale of goods transaction should be aware of the treatment of both implied and express warranties under the UCC.

This Note explains how implied warranties are created under Texas law and how they can be effectively disclaimed. For a discussion of express warranties in a sale of goods transaction under the model UCC, see Practice Note, UCC Article 2 Express Warranties (<http://us.practicallaw.com/8-519-5098>).

For a discussion of both express and implied warranties in a lease of goods transaction under the model UCC, see Practice Note, Equipment Lease: UCC Article 2A Express and Implied Warranties (<http://us.practicallaw.com/4-516-9614>).

## WARRANTIES: A GENERAL OVERVIEW

Under common law, a warranty is an undertaking by the seller, made concurrently with the contract, that a certain fact about the goods is or will be as stated or promised. If this fact is not true when the

warranty is made or stops being true within the term of the warranty, the buyer:

- Has a claim for breach of warranty against the seller.
- Can recover damages if it can prove they resulted from the breach.

Warranties are either:

- **Express.** An express warranty is part of the bargain between the seller and the buyer and may be:
  - written;
  - verbal;
  - by model; or
  - by sample.
- **Implied.** An implied warranty is not bargained for or stated in the contract. It is implied by law, unless it is disclaimed by the seller.

## REPRESENTATION VERSUS WARRANTY

The terms "representation" and "warranty" are often used together in commercial transactions, but there are distinct differences between them:

- **Representation.** A representation is an assertion of a fact, which is given by one party to induce another party to enter into a contract or take some other action. If a representation is untrue, it is inaccurate. The maker of the inaccurate statement has made a misrepresentation, and the recipient is entitled to remedies for misrepresentation.
- **Warranty.** A warranty is a promise that an assertion of fact is true, supported by an implied promise of indemnity if the assertion is false. If a warranty is untrue, it is breached and the recipient of the warranty is entitled to damages for breach of contract.

For more information on remedies for misrepresentation and breach of warranty, see Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Remedies for Inaccuracy or Breach of Representations and Warranties (<http://us.practicallaw.com/9-519-8869#a644271>). For a discussion of the interrelationship between representations, warranties, covenants, rights and conditions, see Practice Note, Relationship between Representations, Warranties, Covenants, Rights, and Conditions (<http://us.practicallaw.com/7-519-8870>).

## IMPLIED WARRANTIES UNDER UCC CHAPTER 2

In addition to express warranties (Tex. Bus. & Com. Code Ann. § 2.314), the UCC provides for the following implied warranties:

- Of merchantability (see Tex. Bus. & Com. Code Ann. § 2.314(a) and Implied Warranty of Merchantability).
- Of fitness for a particular purpose (see Tex. Bus. & Com. Code Ann. § 2.315 and Implied Warranty of Fitness for a Particular Purpose).
- Of title (see Tex. Bus. & Com. Code Ann. § 2.312(a) and Implied Warranty of Title).
- Against infringement (see Tex. Bus. & Com. Code Ann. § 2.312(c) and Implied Warranty Against Infringement).
- From course of dealing (see Tex. Bus. & Com. Code Ann. § 2.314(c) and Implied Warranty From Course of Dealing).
- From usage of trade (see Tex. Bus. & Com. Code Ann. § 2.314(c) and Implied Warranty From Usage of Trade).

### IMPLIED WARRANTY OF MERCHANTABILITY

The implied warranty of merchantability is based on the unstated, reasonable expectation of the buyer that the goods purchased are:

- Not defective.
- Fit for the ordinary purposes for which they are used.

It applies only to a seller who is a merchant concerning the goods being sold (see Tex. Bus. & Com. Code Ann. § 2.314(a)). A seller is generally a merchant if it is engaged in the business of selling the types of goods being sold under the agreement, for example, a distributor or reseller of goods (see Standard Document, Product Reseller Agreement (Pro-Supplier) (<http://us.practicallaw.com/4-517-9793>)). A seller is a merchant if, as part of his business, he holds himself out as having knowledge or skill specific to the goods. A seller who hires an agent or broker with such knowledge or skill can also impose the same knowledge and skill on the seller (see Tex. Bus. & Com. Code Ann. § 2.104(a)).

### DEFINITION OF MERCHANTABLE GOODS

A merchant makes the implied warranty (unless properly disclaimed) that the goods it sells are merchantable. To be merchantable, the goods must at least:

- Pass without objection in the trade under the contract description (see Tex. Bus. & Com. Code Ann. § 2.314(b)(1)).
- In case of fungible goods, be of fair average quality within the description (see Tex. Bus. & Com. Code Ann. § 2.314(b)(2)).
- Be fit for the ordinary purposes for which they are used (see Tex. Bus. & Com. Code Ann. § 2.314(b)(3)).
- Within variations permitted by the agreement, be of even kind, quality and quantity within each unit and among all units (see Tex. Bus. & Com. Code Ann. § 2.314(b)(4)).
- Be adequately packaged and labeled as the agreement may require (see Tex. Bus. & Com. Code Ann. § 2.314(b)(5)).
- Conform to any promises or affirmation of facts on the container or label, if any (see Tex. Bus. & Com. Code Ann. § 2.314(b)(6)).

For example, sheetrock was found to be merchantable when:

- The sheetrock at issue was manufactured in sheets of homogeneous gypsum, sometimes laminated, as is sheetrock generally manufactured.
- The product at issue:
  - was of fair average quality; and
  - was fit for the ordinary purposes of which it is used, and of even kind, quality, and quantity within each unit and among all units involved.

(See *Tracor, Inc. v. Austin Supply & Drywall Co.*, 484 S.W.2d 446, 448 (Tex. Civ. App.—Austin 1972), writ refused NRE (Jan. 31, 1973).)

The implied warranty of merchantability also applies to sales of food and drinks, which have to pass the fit-for-ordinary-purposes component of the merchantability test (see Tex. Bus. & Com. Code Ann. § 2.314(a), cmt. 5).

### DISCLAIMER IS COMMON

Because the implied warranty of merchantability under the UCC is based on such vague terms as "ordinary," "fair" and "adequate" it can easily provide the basis for a breach of warranty claim for almost any dissatisfied buyer. Therefore many sellers:

- Provide a limited, exclusive and express warranty, for example, that the goods will conform to seller's specifications.
- Disclaim the warranty of merchantability.
- Disclaim all the other implied warranties.

The UCC permits the disclaimer of both express and implied warranties (see Tex. Bus. & Com. Code Ann. § 2.316). For more information on how a seller can make an express warranty and effectively disclaim implied warranties under the model UCC, see Practice Note, UCC Article 2 Express Warranties: Pro-Seller Considerations: Limitation and Disclaimer of Express Warranties Under UCC Article 2 (<http://us.practicallaw.com/8-519-5098#a107272>).

For a sample clause which effectively disclaims both implied and express warranties, see Standard Clauses, General Contract Clauses: Product Warranty and Disclaimers (<http://us.practicallaw.com/4-521-5263>).

### DISCLAIMER MUST USE SPECIFIC LANGUAGE

The language excluding or modifying the implied warranty of merchantability must:

- Specifically mention merchantability.
- Be conspicuous (see Implied Warranty of Merchantability: Disclaimer Must Be Conspicuous).
- Be communicated before the sale (see *Dewayne Rogers Logging, Inc. v. Propac Indus., Ltd.*, 299 S.W.3d 374, 390 (Tex. App.—Tyler 2009, pet. denied)).

(See Tex. Bus. & Com. Code Ann. § 2.316(b).)

While the UCC does not require the disclaimer to be in writing, in practice, it almost always is. For an example of contract language disclaiming the implied warranty of merchantability in a sale of goods transaction, along with all other warranties, see Standard Clauses, General Contract Clauses: Product Warranty and Disclaimers: Section 1.2 (<http://us.practicallaw.com/4-521-5263>). For an example

of a long-form warranty section incorporating traditional disclaimer language, see Standard Documents, General Terms and Conditions for the Sale of Goods (Pro-Seller): Section 11 (<http://us.practicallaw.com/9-580-9577>) and Sale of Goods Agreement (Pro-Seller): Section 14 (<http://us.practicallaw.com/2-518-9260>).

### DISCLAIMER MUST BE CONSPICUOUS

A conspicuous provision is one that a reasonable person against whom the provision is enforced should have noticed (see Tex. Bus. & Com. Code Ann. § 1.201(b)(10)). Texas courts have generally found a provision to be conspicuous if it is either in:

- Capitalized letters.
- Bold typeface.
- Italicized letters.
- A different color.
- Larger sized text.
- A separate section requiring acknowledgment.

(See *Dewayne Rogers Logging, Inc. v. Propac Indus., Ltd.*, 299 S.W.3d 374, 390 (Tex. App.—Tyler 2009, pet. denied) (language in "capital letters equal in size to surrounding text, and [] in contrasting bold type" was conspicuous).)

While there are many ways to differentiate the warranty disclaimer from the rest of the document, in Texas it commonly appears in both capitalized and bold letters (see Standard Clauses, General Contract Clauses: Product Warranty and Disclaimers: Section 1.2 (<http://us.practicallaw.com/4-521-5263>)). The disclaimer language itself must be conspicuous, not just the heading for the section in which the disclaimer is found (see *Cate v. Dover Corp.*, 790 S.W.2d 559, 561 (Tex. 1990)).

### "AS IS" DISCLAIMER OF WARRANTY

Sometimes, the seller can exclude certain implied warranties by including written, conspicuous language stating that the equipment is sold:

- "As is."
- "With all faults."
- Subject to other language that brings the buyer's attention to the exclusion of warranties and clearly states that the sale does not contain any implied warranties. This is the riskiest approach for the seller if it wants to be sure that it has excluded the implied warranty because the UCC provides no guidance on acceptable alternative language.

(See Tex. Bus. & Com. Code Ann. § 2.316(c).)

In some instances, though, an "as is" disclaimer will be ineffective. In the following situations, such a disclaimer will not be enforceable:

- The buyer was induced to enter the sale agreement by a fraudulent representation or the seller's concealing of information.
- The seller keeps the buyer from inspecting the goods when the buyer is entitled to do so.
- The "as is" disclaimer is a boilerplate provision and the parties do not have equal bargaining power.

(See *Prudential Ins. Co. of Am. v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995).)

The seller **can** use proper "as is" language to effectively disclaim the implied warranties of:

- Merchantability (see Implied Warranty of Merchantability: Disclaimer Must Use Specific Language).
- Fitness for a particular purpose (see Implied Warranty of Fitness for a Particular Purpose: Disclaimer Must Be Conspicuous).

The seller **cannot** use proper "as is" language to disclaim the implied warranties:

- Of title (see "As Is" Disclaimer Does Not Disclaim Implied Warranty of Title).
- Against infringement (see "As Is" Disclaimer Does Not Disclaim Warranty Against Infringement).

Some sellers may be uncomfortable relying on just the "as is" disclaimer because of its brevity. Therefore, some sellers like to include both:

- "As is" disclaimer language.
- Traditional disclaimer language that specifically mentions each type of warranty being disclaimed.

### TRADITIONAL DISCLAIMER LANGUAGE

Many sellers rely on traditional, specific and conspicuous disclaimer language because:

- The "as is" disclaimer is effective for only some warranties.
- Using both the "as is" disclaimer and the traditional disclaimer may make the seller's entire disclaimer ambiguous because the buyer may question whether the parties included the traditional disclaimer to qualify the "as is" disclaimer. This is so especially because there is wide variation in how attorneys draft traditional disclaimers.

In addition, a general disclaimer by the seller of "all warranties, express or implied" is not effective to negate an express warranty (Tex. Bus. & Com. Code Ann. § 2.313, cmt. 4). Therefore, instead of providing a general disclaimer, a seller more commonly prefers to provide the buyer with an express warranty in the contract, but then seeks to:

- Make the express warranty the only warranty given.
- Limit the scope of the express warranty.
- Limit the duration of the express warranty.
- Limit the applicability of the express warranty.

For more information on making an exclusive, limited, express warranty and then disclaiming all other warranties under the model UCC, see Practice Note, UCC Article 2 Express Warranties: Pro-Seller Considerations: Limitation and Disclaimer of Express Warranties Under UCC Article 2 (<http://us.practicallaw.com/4-516-9614>).

For an example of a long-form warranty section incorporating the traditional disclaimer language, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 14 (<http://us.practicallaw.com/2-518-9260>).

### IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

In contrast to the concept of merchantability, which is based on the ordinary use of the goods, the implied warranty of fitness for a particular purpose is based on the specialized needs of the buyer.

The creation of the implied warranty of fitness for a particular purpose requires that the seller, when entering into the contract, knows or has reason to know both:

- The particular purpose for which the buyer is purchasing the goods.
- That the buyer is relying on the seller's skill and judgment to provide goods.

(See Tex. Bus. & Com. Code Ann. § 2.315.)

Equipment may be merchantable, but may not fulfill the particular purposes of the buyer, which are known to the seller. If so, the seller breaches the implied warranty of fitness for a particular purpose (see *ASAI v. Vanco Insulation Abatement, Inc.*, 932 S.W.2d 118, 122 (Tex. App.—El Paso, 1996) (noting that the particular purpose must differ from the ordinary use, and the ordinary use is covered by the warranty of merchantability)).

For example, hay may be "merchantable" because it is fit for the ordinary purpose for which hay is used (see Definition of Merchantable Goods). If the buyer intends to use the hay for the particular purpose of feeding cattle, though, the seller breaches the implied warranty of fitness for a particular purpose if:

- The seller is (or should be) aware of the buyer's particular purpose.
- The seller is (or should be) aware that the buyer is relying on the seller's expertise to recommend and sell hay fit for livestock consumption.
- The hay is unfit for livestock consumption, harming the livestock.

(See *Lester v. Logan*, 893 S.W.2d 570, 574-75 (Tex. App.—Corpus Christi 1994), writ denied, 907 S.W.2d 452 (Tex. 1995).)

Determining whether the implied warranty of fitness for a particular purpose exists is a question of fact. The buyer need not actually inform the seller of the particular purpose. For example, the seller may have reason to know the particular purpose from past dealings with the buyer or be able to deduce it from knowledge of the buyer's business. However, actual reliance by the buyer on the seller's expertise is required (see Tex. Bus. & Com. Code Ann. § 2.315, cmt. 1).

### DISCLAIMER MUST BE CONSPICUOUS

The seller can disclaim the implied warranty of fitness for a particular purpose. Any language excluding or modifying the implied warranty of fitness for a particular purpose must be:

- In writing.
- Conspicuous (see Implied Warranty of Merchantability: Disclaimer Must Be Conspicuous).

(See Tex. Bus. & Com. Code Ann. § 2.316(b).)

The seller can also exclude the implied warranty of fitness for a particular purpose by including written, conspicuous alternative "as is" language (see "As Is" Disclaimer of Warranty).

While there is no requirement of a specific disclaimer, in practice, most sellers disclaim the implied warranty of fitness for a particular purpose by specifically referring to it by name (see Standard Clauses, General Contract Clauses: Product Warranty and Disclaimers: Section 1.2 (<http://us.practicallaw.com/4-521-5263>)).

### IMPLIED WARRANTY OF TITLE

The implied warranty of title is based on the basic, unstated expectation of the buyer that:

- The seller owns the goods and has the right to sell them to the buyer.
- The goods purchased will not be subject to challenges from third parties claiming ownership or a security interest in them.

In every contract for sale, there is an implied warranty that:

- The seller conveys good title.
- The transfer is legitimate.
- The seller delivers goods that are free from any security interest or other lien or encumbrance.

(See Tex. Bus. & Com. Code Ann. § 2.312(a).)

The implied warranty of title does not apply to infringement of patents or trademarks. The implied warranty against infringement is a separate implied warranty (see Implied Warranty Against Infringement). The seller can disclaim the implied warranty of title (see Implied Warranty of Title: Disclaimer Must Use Specific Language). However, because purchasing goods with clean title is a basic, reasonable requirement for most buyers, the seller can then expect the buyer to:

- Resist the disclaimer of the implied warranty of title.
- Seek to include an affirmative, express warranty of title in the contract.

### DISCLAIMER MUST USE SPECIFIC LANGUAGE

The seller can disclaim the implied warranty of title. The implied warranty of title can be disclaimed by either:

- Specific language referring to title.
- Circumstances which give the buyer reason to know that the seller:
  - does not claim title; or
  - is selling the title that it or a third person possesses.

(See Tex. Bus. & Com. Code Ann. § 2.312(b).)

Examples of these circumstances include goods purchased in:

- An execution sale from a sheriff.
- A foreclosure sale from a secured party.

(See Tex. Bus. & Com. Code Ann. § 2.312, cmt. 5.)

If a seller wishes to disclaim the warranty of title in a contract, it generally uses a disclaimer that is:

- Specific.
- In writing.
- Conspicuous (see Implied Warranty of Merchantability: Disclaimer Must Be Conspicuous).

For an example of contract language disclaiming the implied warranty of title, along with all other warranties, see Standard Clauses, General Contract Clauses: Product Warranty and Disclaimers: Section 1.2 (<http://us.practicallaw.com/4-521-5263>).

In practice, the warranty of title is not negotiated very often because:

- Sellers do not usually disclaim the implied warranty, unless there is a particular reason for doing so.

- Buyers are generally satisfied to rely on the UCC's standard and do not generally seek an express warranty of title from the seller.
- Usually, the seller owns the goods and therefore has no reason to resist giving the warranty if the buyer does request an express warranty of title.

Disclaiming the warranty of title without good reason is usually counterproductive for the seller as it alerts the buyer that there may be a potential problem. Most buyers will then insist on an express warranty of title.

### **"AS IS" DISCLAIMER DOES NOT DISCLAIM IMPLIED WARRANTY OF TITLE**

Sometimes, the seller can exclude implied warranties by including written, conspicuous alternative "as is" language (see "As Is" Disclaimer of Warranty). However, this language is ineffective to exclude the implied warranty of title (Tex. Bus. & Com. Code Ann. § 2.312, cmt. 6).

### **IMPLIED WARRANTY AGAINST INFRINGEMENT**

The implied warranty against infringement is based on the buyer's reasonable expectation that the goods purchased do not infringe on the intellectual property (IP) rights of third parties. Under the UCC, if the seller is a merchant regularly dealing in goods of the kind sold, then there is an implied warranty that the goods will be delivered free from a third party's claim of infringement, including infringement of patent, trademark and other IP rights (Tex. Bus. & Com. Code Ann. § 2.312(c)).

However, if the seller manufactures the goods according to specifications provided by the buyer, then the buyer must indemnify the seller from any claims of infringement of IP rights (see Tex. Bus. & Com. Code Ann. § 2.312(c)). For more information on and an example of an intellectual property indemnification clause, see Standard Document, General Purchase Order Terms and Conditions (Pro-Buyer): Section 17 (<http://us.practicallaw.com/3-504-2036>).

### **DISCLAIMER MUST USE SPECIFIC LANGUAGE**

The seller can disclaim the implied warranty against infringement based on the phrase "unless otherwise agreed" in Tex. Bus. & Com. Code Ann. § 2.312(c). The UCC does not provide any guidance regarding the disclaimer of the implied warranty against infringement as it does regarding the implied warranty of title in Tex. Bus. & Com. Code Ann. § 2.312(b) and cmt. 6.

However, in practice, disclaimers of the implied warranty against infringement tend to be treated similarly to disclaimers of the warranty of title. Most sellers make these disclaimers:

- By specifically referring to infringement.
- In writing.
- Conspicuously (see Implied Warranty of Merchantability: Disclaimer Must Be Conspicuous).

For an example of contract language disclaiming the implied warranty against infringement, along with all other warranties, see Standard Clauses, General Contract Clauses: Product Warranty and Disclaimers: Section 1.2 (<http://us.practicallaw.com/4-521-5263>).

### **"AS IS" DISCLAIMER DOES NOT DISCLAIM WARRANTY AGAINST INFRINGEMENT**

The UCC does not specifically preclude sellers from disclaiming the warranty against infringement with "as is" language. However, the seller should not rely on this language to exclude the implied warranty against infringement. In practice most sellers include a specific, written and conspicuous disclaimer.

### **IMPLIED WARRANTIES CREATED BY CONDUCT AND CUSTOM**

The parties should also consider how their own conduct and industry practices or customs impact the creation and exclusion of implied warranties. These include:

- Course of performance (see Course of Performance).
- Course of dealing (see Course of Dealing).
- Usage of trade (see Usage of Trade).

The UCC specifically recognizes that implied warranties may arise as a result of:

- Course of Dealing.
- Usage of Trade.

(See Tex. Bus. & Com. Code Ann. § 2.314(c).)

The seller can disclaim or modify these implied warranties (see Tex. Bus. & Com. Code Ann. § 2.316).

In addition to the course of dealing or usage of trade, courts also look to the course of performance between the parties to:

- Ascertain the meaning of the parties' agreement.
- Give particular meaning to specific terms of the agreement.
- Supplement or qualify the terms of the agreement.

(See Tex. Bus. & Com. Code Ann. § 1.303(d).)

### **COURSE OF PERFORMANCE**

Course of performance refers to a pattern of the parties' conduct after or under the agreement that may contradict the express terms of the agreement. A course of performance is a sequence of conduct between the parties to a particular transaction that exists if:

- The transaction involves repeated occasions for performance by a party, for example:
  - the buyer's performance of scheduled installment payments;
  - the seller's delivery of multiple items of equipment under a master agreement; or
  - the seller's resolution of equipment warranty issues.
- The other party, with knowledge of the nature of the performance and opportunity to object to any conduct that is contrary to the agreement, accepts the performance or acquiesces to it without objection. Examples include:
  - the seller repeatedly accepts or acquiesces to the buyer's late payments of installments without objection or collecting penalties;
  - the buyer repeatedly accepts or acquiesces to the delivery of equipment under a master agreement that does not conform to specifications;

- the buyer repeatedly accepts or acquiesces to the seller's lack of responsiveness on warranty issues; or
- the seller repeatedly alters equipment delivered under a master agreement to make the equipment fulfill the buyer's particular purpose, despite disclaiming the implied warranty of fitness for a particular purpose.

(See Tex. Bus. & Com. Code Ann. § 1.303(a).)

The parties can assert course of performance to show a waiver or modification of any term inconsistent with the course of performance (see Resolving Conflict Between Express Contract Clauses and Conduct or Custom).

**COURSE OF DEALING**

The buyer and seller may have certain expectations based on their previous experiences with each other. A course of dealing is a sequence of conduct before the parties enter into the agreement that may establish a common basis of understanding for interpreting the agreement (see Tex. Bus. & Com. Code Ann. § 1.303(b)). A court can examine the parties' course of dealing to determine what the parties intended when they entered into a contract. Under Tex. Bus. & Com. Code Ann. § 2.314(c), the parties' course of dealing can create an implied warranty, which the seller can exclude or modify according to Tex. Bus. & Com. Code Ann. § 2.316.

**USAGE OF TRADE**

Usage of trade refers to a pattern of conduct that conforms to standard practice in a place, vocation or trade. The pattern of conduct becomes trade usage if it occurs with enough regularity that it justifies the expectation that the parties will observe the pattern of conduct in the specified transaction. A court can find implied warranties based on usage of trade even if the parties:

- Do not engage in the standard practice.
- Are not aware of the standard practice.

(See Tex. Bus. & Com. Code Ann. § 1.303(c).)

Under the UCC, trade usage does not have to stem from long-standing or universal conduct. It can also consist of:

- Relatively new practices.
- Practices accepted by a great majority of, but not necessary all, merchants.

(See Tex. Bus. & Com. Code Ann. § 1.303, cmt. 4.)

**RESOLVING CONFLICT BETWEEN EXPRESS CONTRACT CLAUSES AND CONDUCT OR CUSTOM**

Under Tex. Bus. & Com. Code Ann. § 1.303(e), Texas courts construe express contract clauses and conduct or custom whenever reasonable as consistent with each other. If it is unreasonable to construe them as consistent, Texas courts generally resolve conflicts as follows:

- Express terms prevail over course of performance, course of dealing and usage of trade.
- Course of performance prevails over course of dealing and usage of trade.
- Course of dealing prevails over usage of trade.

(See *Transcon. Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 670 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (recognizing that "[t]rade-usage evidence is admissible to explain, supplement, or qualify an agreement," but not to contradict an express term).)

**UCC CHAPTER 2 VERSUS UCC CHAPTER 2A WARRANTIES**

The warranty provisions of UCC Chapter 2, which govern sales transactions, are similar to the warranty provisions of UCC Chapter 2A, which govern lease transactions. Except for the implied warranty of title, all of the express and implied warranties of UCC Chapter 2 are included in UCC Chapter 2A, but are revised to reflect the differences between a sale of goods and a lease of goods (see Tex. Bus. & Com. Code Ann. § 2A.210, cmt.). Chapter 2A, unlike Chapter 2, contains the implied warranty against interference (see Tex. Bus. & Com. Code Ann. § 2A.211).

Warranty Type	Chapter 2 Sales	Chapter 2A Leases
Express Warranties	Tex. Bus. & Com. Code Ann. § 2.313	Tex. Bus. & Com. Code Ann. § 2A.210
Implied Warranty of Merchantability	Tex. Bus. & Com. Code Ann. § 2.314	Tex. Bus. & Com. Code Ann. § 2A.212
Implied Warranty of Fitness for a Particular Purpose	Tex. Bus. & Com. Code Ann. § 2.315	Tex. Bus. & Com. Code Ann. § 2A.213
Implied Warranty of Title	Tex. Bus. & Com. Code Ann. § 2.312(a)	None
Implied Warranty against Infringement	Tex. Bus. & Com. Code Ann. § 2.312(c)	Tex. Bus. & Com. Code Ann. § 2A.211(b)
Implied Warranty against Interference	None	Tex. Bus. & Com. Code Ann. § 2A.211(a)
Implied Warranty from Course of Dealing	Tex. Bus. & Com. Code Ann. § 2.314(c)	Tex. Bus. & Com. Code Ann. § 2A.212(c)
Implied Warranty from Usage of Trade	Tex. Bus. & Com. Code Ann. § 2.314(c)	Tex. Bus. & Com. Code Ann. § 2A.212(c)

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