

Working Paper: #3



THE CONSUMER
PARTNERSHIP
(GHANA)

consumer education is self-preservation



GUARANTEES AND WARRANTIES

GUARANTEE IS NOT A SHOE: A CONSUMER GUIDE TO WARRANTIES

Many products in Ghana are sold with limited warranties providing relatively insufficient insurance. This warranty also includes seven-day money-back guarantees for IT products, seven-day replacement warranties for secondhand auto parts, and one year repair after sales service warranties for brand new automobiles and other electrical products with no coverage on part replacements. On the other side of the fence, a lot of secondhand electrical products and e-waste are deliberately sold cheaply as 'untested' or 'as is' on our markets, offering no chance of a warranty- not even ten seconds after purchase. There

This Working Paper was prepared by Jean Lukaz MIH and was first presented to ISO-COPOLCO Task Group on Warranties in June 2010 as a second step in moving for an International Standard on Warranties

THE UN GUIDELINES FOR CONSUMER PROTECTION, 1999 / 2003 (Excerpts)

In the UN Guidelines, the provision on warranties is mentioned in:

Paragraph 3: The legitimate needs which the guidelines are intended to meet are the following:

III. Guidelines (A) The protection of consumers from hazards to their health and safety;

A. Physical safety

Paragraph 12. Appropriate policies should ensure that goods produced by manufacturers are safe for either intended or normally foreseeable use. Those responsible for bringing goods to the market, in particular suppliers, exporters, importers, retailers and the like (hereinafter referred to as “distributors”), should ensure that while in their care these goods are not rendered unsafe through improper handling or storage and that while in their care they do not become hazardous through improper handling or storage. Consumers should be instructed in the proper use of goods and should be informed of the risks involved in intended or normally foreseeable use. Vital safety information should be conveyed to consumers by internationally understandable symbols wherever possible.

Paragraph 13. Appropriate policies should ensure that if manufacturers or distributors become aware of unforeseen hazards after products are placed on the market, they should notify the relevant authorities and, as appropriate, the public without delay. Governments should also consider ways of ensuring that consumers are properly informed of such hazards.

Paragraph 14. Governments should, where appropriate, adopt policies under which, if a product is found to be seriously defective and/or to constitute a substantial and severe hazard even when properly used, manufacturers and/or distributors should recall it and replace or modify it, or substitute another product for it; if it is not possible to do this within a reasonable period of time, the consumer should be adequately compensated...

are also warranty problems with imported goods that have got no local manufacturers’ representatives be they wholesalers or distributors.

Guarantee was the local nickname of a kind of shoe with thick durable and utilitarian soles that was fashionable in the 70’s. It earned its name from the assurance of durability that was associated the purpose of guarantees issued by manufacturers to consumers.

A PROMISE ON THEIR HONOUR

A warranty is a contractual promise by the seller [to a consumer] regarding the quality, character, or suitability of the goods he has sold.

Guarantee and warranty are two interchangeable terms and there are reference points for the reliability and quality of products. The economic importance of product warranties is *to provide insurance against unsatisfactory product performance*. Consumers are naturally risk averse and do not want to be shortchanged in broad daylight without any access to redress, and so providing them with the insurance of a warranty may seem beneficial. Traditionally, warranties provide less than full insurance by manufacturers against unsatisfactory product performance and this serves as risk-sharing between consumers and producers.

Manufacturers, for example, give implied warranties to retailers, who, in turn, give the same warranties to consumers. In this way, all parties connected with the sale of a product are given protection. In addition, manufacturers often give express warranties directly to consumers as an incentive to buy their products. Warranties help to improve the quality of products found in the marketplace.

Warranties must state exactly what is covered and what is not covered, the timeframe of coverage and what constitutes a breach of the terms. In addition warranties must state what both the seller and consumer must do in the event that something went wrong with the product. Terms and conditions and the small print in service agreements may also be considered as statements of warranty.

CATEGORIES OF WARRANTIES

Product Warranties

In all contracts for or sale of goods, consumers are protected by the inclusion of a number of statutory conditions and statutory warranties. The statutory conditions usually require that:

- 1) *Goods must be of merchantable quality* – they must meet a level of quality and performance that would be reasonable to expect, given their price and description. They should also be free from defects that were not obvious at the time of purchase;
- 2) *Goods must be fit for their intended purpose* – they should be suitable for any particular purpose the buyer made known to the seller;
- 3) The *goods must match the description given* to the consumer, or the sample shown;
- 4) A consumer must receive clear title to the goods – that is, the seller must be entitled to sell the goods.

The Problem of Merchantability

Most of the laws in various cross-border jurisdictions contain common clauses of implied warranties on *merchantable quality of goods sold, their fitness for a particular purpose and goods matching the description or sample given*.

The common test for merchantability is whether the goods are fit for the ordinary purpose for which such goods are used. Thus, a person of normal weight who buys a chair should be able to sit on it without its collapsing. The chair should also withstand other things people commonly do with chairs, such as occasionally standing on them or dragging them across the floor.

For goods to be merchantable they must

- 1) Conform closely enough to the description in the contract without objection to others in the trade;
- 2) Be fit for the ordinary purposes for which such goods are used;
- 3) Be adequately contained, packaged, and labelled as the agreement may require;
- 4) Be of the same kind, quality, and quantity within each unit (case, package, carton);
- 5) Conform to the promises or statements of fact made on the container or label, if any.

Since most laws on sale of goods refer to the fact that goods must be of merchantable quality, the issue arises as to the nature of the parties to a contract for the sale of goods. In some jurisdictions, higher standards are required from merchants as than non-merchants. Consumers, thus, tend to place more reliance on professional sellers and that professionals are generally more knowledgeable and better able to protect themselves than non-professionals.

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Paragraph 20. Governments should, where appropriate, see to it that manufacturers and/or retailers ensure adequate availability of reliable after-sales service and spare parts.

Paragraph 21. Consumers should be protected from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts and unconscionable conditions of credit by sellers.

Paragraph 22. Promotional marketing and sales practices should be guided by the principle of fair treatment of consumers and should meet legal requirements. This requires the provision of the information necessary to enable consumers to take informed and independent decisions, as well as measures to ensure that the information provided is accurate.

WARRANTIES IN GHANA

In Ghana, consumer protection in the area of warranties is offered in a number of scattered regulations in various sectors but the main laws on trade such as the Sale of Goods Act 1962 (Act 137; section 13) and Hire Purchase Decree 1972 (NRCD 292) provide that there is an *implied* condition that goods are free from defects which are not declared or known to the buyers at the time a contract is made and that the owner of goods that are under a hire-purchase agreement should ensure that the goods are of merchantable quality and free from undeclared defects, respectively.

This is unlike in the US, where by federal law--the Magnuson- Moss Warranty Act of 1974--"warranties must be simply and clearly written, conspicuously disclose all important provisions, and must be available for inspection at the point of sale before the product is purchased."

In this case, the professional sellers are *merchants*, who business people that regularly deal in the kinds of goods being sold, or purport to have some special knowledge about the goods, or employed an agent in the sale who fits either of the two descriptions. In this case, if a consumer buys a used car from a used-car dealer, the dealer is a merchant for the purposes of his contract. But if he buys a refrigerator from a used-car dealer, the dealer is probably not considered to be a merchant for the purposes of that sale but will still be bound by the fitness for purpose clause.

SERVICE WARRANTIES

It appears that warranties tend to be contended when dealing with products and one may question why service providers may not bound by provisions in such laws. The sale of goods laws in most jurisdictions do not cover contract for services or employment or sale of land (which is not movable)

In as much as services are intangible and have other variable characteristics, the service delivery process involves the use of tangible resources which when defective can highly impact on the eventual service outcome. For example, how does an hotelier guarantee a guest or consumer an intangible good night's sleep when a guest pays for an overnight stay in a hotel room? What if the consumer had taken too much caffeine and that kept him awake or a change in environment engendered an allergic reaction on the consumer other than

excessive noise in the hotel due to ongoing construction that is not insulated against by the thin hotel room walls or the noise of dripping water from a broken tap in the guest room?

All contracts for or sale of services also contain a number of statutory warranties, which require that:

- 1) *Services must be of merchantable quality and must be carried out with due care and skill* – they must meet a level of quality and performance that would be reasonable to expect from an expert, given their price and description. They should also be free from consequent defects that were not existent prior to the service delivery;
- 2) *Fitness for Purpose*- The service and any materials supplied in connection with the service must be reasonably fit for the purpose for which the consumer made known to the seller and for which they are supplied;
- 3) *The service delivered must match the description given by the consumer and the solution prescribed by the service provider or expert.*

TYPES OF WARRANTIES

Statutory or Implied Warranties

Consumer protection in the area of warranties is offered in a number of scattered laws and regulations in various sectors usually provide that there is an *implied* condition that goods are free from defects which are not declared or known to the buyers at the time a contract is made. We would need to clarify what constitutes a statutory warranty according to the law and what is voluntary warranty that is usually provided by the manufacturer at little or no cost. Consumers' rights are embedded in National Sale of Goods or Fair Trade or Warranty Laws and automatically form part of every contract between buyer and seller, and are called statutory rights. Almost every purchase consumers make is covered by a statutory or an implied warranty.

The most common type of implied warranty — a "*warranty of merchantability*," means that the seller promises that the product will do what it is supposed to do. For example, a car will run and a toaster will toast.

Another type of implied warranty is the "*warranty of fitness for a particular purpose*." This applies when you buy a product on the seller's advice that it is suitable for a particular use. For example, a person who suggests that you buy a certain DVD player that works with DVDs from all regions means that it must actually do so with no limitations the regional zoning. If your purchase does not come with a written warranty, it is still covered by implied warranties unless the product is marked "as is," or the seller otherwise indicates in writing that no warranty is given, which is another area we shall look into.

A third type of implied warranty is the "*warranty of title*." This means that whenever goods are sold, the seller warrants that the title being conveyed is good and that the transfer is rightful. The seller also warrants that the goods shall be delivered free of any financial obligations (security interests or other liens) about which the buyer had no knowledge. When stolen goods are sold to an innocent consumer, the true owner, if discovered, is entitled to the return of the goods. The innocent consumer's remedy is against the seller for breach of warranty or title.

If a seller of goods or services does not meet any one of the obligations, it is a breach of their contract with the consumer. When this happens, consumers are entitled to a remedy from the seller. The type of remedy will depend on the circumstances but may include repair or replacement of goods, compensation for loss or damage, a refund or having an unsatisfactory service performed again. Statutory rights may have no set time limit. However, depending on the price and quality of goods, consumers may be entitled to a remedy after any manufacturers' or extended warranty has expired.

Voluntary or Extended Warranties

In addition to statutory or implied warranties being the legal obligations enshrined in the laws as part of any contract between a consumer and a seller, some businesses offer extra promises about their goods and services, even though the law does not require them to and it is important that the information be publically verifiable.

These promises, often called voluntary or extended warranties, provide extra customer protection if problems arise after a sale. Voluntary and extended warranties may also entitle consumers to a refund, replacement or repair in the event of a problem. This kind of promise, if it is offered, is in addition to consumers' statutory rights — statutory rights cannot be overruled.

Express Warranties

An express warranty is a statement of fact expressed by the seller for the purpose of having the buyer make a purchase. The express warranty may be a statement of a present fact or a promise of performance in the future. An express warranty comes about in any of three ways:

- 1) A statement of fact or promise made by the seller;
- 2) A description of the goods;
- 3) The use of a sample or model.

Express warranties are prevalent when it is costless or cheap to the manufacturer or seller of a good quality product and most often useless to the consumer. This happens in situations where the warranty is just a factual confirmation of what a product constitutes or does as implied in the contract of sale. For example, a diamond seller can disclose the weight of a diamond he is selling. He can give the buyer a warranty which states the weight of the diamond or make any other disclosure about the product's quality and give a complete warranty which guarantees that the disclosure is true (for example, the diamond seller gives the buyer a written statement guaranteeing that the diamond can be returned if an objective party finds that its weight is less than specified).

Full Warranties

To be considered as a full warranty the following must be considered:

1. The seller will fix or replace any defective product, including removal and reinstallation if necessary, free of charge;
2. The warranty is not limited in time;
3. The warranty does not either exclude or limit payment for consequential damages unless the exclusion or limitation is printed conspicuously on the face of the written warranty;
4. If the product cannot be repaired or has not been repaired after a reasonable number of efforts to repair it, the consumer may choose between a refund and a replacement;
5. The seller cannot impose duties on the consumer except reasonable duties or a duty not to modify the product;
6. The seller is not required to fulfill the warranty terms if the problem was caused by damage to the product through unreasonable use.

Incomplete or Limited Warranties

Consumers may be forced by most sellers to share the responsibility for product liability because of the moral hazard associated with their unverifiable product misuse. A limited warranty may cover only parts, and not labour, or may require the consumer to return the product to the seller or manufacturer's representative or service repair center. The consumer may be required to pay for shipping, handling, and other associated costs too.

OTHER ISSUES IN WARRANTIES

Secondhand Goods

The question of secondhand goods comes up when discussing warranties as this is a prevalent case in developing countries where these goods mostly have no standards and are sold with no warranties or rather on the basis of 'as is'. 'As is' sales are, fortunately, illegal in some jurisdictions since they are in direct contravention of consumers' statutory rights that apply whether the goods are new or second-hand.

Depending on the circumstances, a consumer can reasonably expect these goods will meet the statutory conditions and their inherent implied warranties. For example, a second-hand vacuum cleaner should work without the requirement of any immediate repairs if it has been sold for the purpose of vacuuming (and not spare parts). Depending on factors like price and age, it may not be reasonable to expect it will last as long, or perform to the same standard as a new one, though.

It should be reasonable to expect that if a secondhand dealer does not offer any warranty, especially in the case of secondhand automobiles and electrical products, it will lead consumers to believe his product is of poor quality. On the other hand, if the market is competitive, then this will clearly not be the case. That is, if there is free entry into the sellers' activity, then warranty disclosures will distinguish good sellers from bad sellers. If any good seller should be lumped with the bad sellers due to nondisclosure, then the good seller could costlessly disclose his quality and be distinguished, getting probably a higher price, thereby making warranties a marketing tool and an incentive for consumers to make purchase decisions.

Lack of Consumer Information on Product Quality and Seller Deception

All this borders on information about product quality. Manufacturers and retailers may know the quality of the item they sell but it may be in their interest to withhold that information. If there is no way for buyers to learn about the sellers' quality, then this will force all items, fake and original, to sell at the same price. And it is worse when there is no way sellers of good-quality items can distinguish themselves from sellers of low-quality items, thereby granting the low-quality sellers an economic opportunity to hide their inferior quality. This has been called the "lemons problem."

Given this situation, there is an avenue for unscrupulous businessmen to exploit consumers by selling them inferior or fake products and only offering replacement warranties that put these poor consumers, who want to enjoy some cheap luxury, into a constant *cycle of warranty rip-off*.

Unverifiable Claims and Product Misuse

One major reason for lower coverage of warranties generally is the result of unverifiable risk-averse consumer claims that put manufacturers in a risk-neutral position and reduces the incentive for warranty provision and creating a consumer moral hazard and further on, producer moral hazard. In some cases, manufacturers as well as consumers may be risk averse leading to incomplete warranties. Typical examples are secondhand automobiles and secondhand electrical products.

If consumers cannot determine the quality of a product from its external features either from genuine quality marks before buying and manufacturers cannot prove consumer product misuse that will ultimately lead to 'false'

warranty claims, we are left with an insurance abyss that insurance companies try to exploit with extended warranties, whereby consumers pay some extra cash that will assure them of a total product replacement even in the event of loss due to product misuse.

Warranties as Signals of Quality

Practically, consumers draw inferences about products from their warranty. Consumers have grown to believe that the longer the warranty period for a product, the higher its quality and reliability and the lesser the risk associated with the product. This is usually the case of products with observable quality traits or known quality brands.

Consumer information is often quite poor about those products which are new. Both new products and products with intrinsic quality features that cannot be observed by the consumer present questionable quality evaluations and their associated absence of warranties. It is just these products where (temporary) monopoly is likely to be found. Also of particular interest is the case where there is a single seller or monopoly. Warranties may serve as a basis for competition for manufacturers as they arguably indicate signals of product quality.

Although this may not be true in the case of fake and counterfeit products, consumers usually have very little information on which to make product reliability judgments. Comparative testing reports such as the popular *Consumer Reports* in several Western countries and other online product comparison websites do offer some respite to consumers but consumers in Ghana are left to the will of manufacturers, suppliers and retailers when it comes to the issue of warranties.

Cross-border Sale of Goods

In 1980 a group of nations adopted a uniform law governing contracts for the international sale of goods, the UN Convention on the International Sale of Goods (CISG). It was designed to provide a uniform code for international contracts. Companies selling across borders may choose not to have the CISG apply to their contracts but that must surely be stated or communicated to the consumer. Unfortunately, CISG only applies to sales contracts between merchants [B2B] and not that of merchants and consumers [B2C].

Exclusions of Warranties

Small Print

Consumers have been missing out on the small print in sales contracts, whereby sellers hold a trump card to exclude their responsibility for warranties. Disclaimer clauses embedded in the terms and conditions of a sales contract are very often inconspicuous to the consumer due to the smallness of the font size and the placement of the disclaimer, which is usually in a footnote or on the reverse side of the sheet. For exclusion clauses to be legally effective, they must be printed or written into the contract in large type letters, or in ink of a different colour, so that the person reading the contract is not likely to overlook it. If the seller wants the consumer to be bound by the terms, he would usually let the consumer sign the exclusion clause as having understood and agreed to the terms.

Express Warranties

Sellers very often try to exclude or limit their responsibility for warranties by issuing disclaimers in the contract of sale but they hardly succeed in the courts when it is in breach of both express and implied warranties. This is because such disclaimers tend to be inconsistent with express warranty as sellers are almost always likely to make

statements about the goods they are selling or use models or samples. Obviously, sellers are less likely to fall foul of express warranties and the implied warranties of *merchantability of goods sold*, *fitness for a particular purpose and title*, if they deal in quality, defect-free goods and would not consequently be bothered about refunds and returns, and thereby issuing disclaimers.

However, effective disclaimers on estimates, which state that they do not constitute an offer and that there can be no legally binding contract based on them, may exclude sellers from express warranty.

Implied Warranties

Consumers must be wary of sellers that try to exclude their responsibility for implied warranty. For sellers to be successful they must actually mention the word *merchantability* in the exclusion and it must be conspicuous as being in large font size or in an ink of a different colour so that consumers reading the sales contract are not likely to overlook it. If the seller wants the consumer to be bound by the terms, he would usually let the consumer sign the exclusion clause as having understood and agreed to the terms. To exclude the implied warranty of fitness for a particular purpose, the exclusion must be in writing and it must in the same manner be conspicuous, e.g., ALL IMPLIED WARRANTIES [INCLUDING MERCHANTABILITY] ARE HEREBY DISCLAIMED. Of course, this does not work if the seller is flagrantly dealing in defective or fake products that shortchange consumers.

As Is Sales

Consumers that fall prey to goods sold 'as is' or 'untested' or 'with all faults' may not be covered by the implied warranties of *merchantability* and *fitness for a particular purpose* as they call the consumers attention to the inherent warranty exclusion.



Caveat Emptor

Caveat emptor [let the buyer beware] predisposes consumers to a self-responsibility for the purchases they make. This self-responsibility help exclude sellers from both implied warranties of *merchantability* and fitness for a particular purpose in situations where the seller makes the goods available for examination and demanding that the consumer examines them. Any unobserved defects post-sale, thus, remains a loss to the consumer as they are stripped of all implied warranties.

Unconscionable Disclaimers

Sale of goods contracts in which the only choice for the consumer is between '*adhering*' to the terms dictated by the seller, or not buying at all are *unconscionable*. Sellers very often try to exclude or limit their responsibility for warranties by issuing disclaimers in the contract of sale such as '*monies paid are not refundable*' and '*goods sold are not returnable*' but they hardly succeed in the courts as unconscionable deals are often in breach of both express and implied warranties.

Other cases of unconscionable disclaimers include the following situations:

-  If the seller is flagrantly dealing in defective or fake products that shortchange consumers and issuing warranty disclaimers they are considered as unconscionable;
-  Where disclaimers of warranty are not conspicuous as being in large font size or in an ink of a different colour so that consumers reading the sales contract are not likely to overlook it, they would be unconscionable;

- Disclaimers of warranty can also be unconscionable if there is a great disparity of bargaining power between the buyer and the seller and if it is believed that the disclaimer was forced on the buyer with no chance to bargain over its form;
- If a consumer suffers from personal injury from using the product purchased any warranty disclaimer preexisting is automatically rendered unconscionable. Mere property damage and economic loss may not warrant a disclaimer to be unconscionable.

The Chain of Liability

The main parties to a sale of goods contract where warranties apply are the seller and the final consumer. However, the consumer may pass on the product, without necessarily selling it, as a gift, or for use at the workplace or at home. In this case, third parties may be looking at the coverage of *extended* warranties too, including bystanders who may be affected by the defective product.

In a likely manner, manufacturers and retailers could be liable for a breach of both implied and express warranties where it applies to the goods in question.

'*Purchaser only*' disclaimer warranties have outlived their usefulness for sellers who seek to limit their responsibility under old laws of contract where those who were not party to the contract of sale had no right to enforce it.

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The Consumer Partnership (THE-COP) is a non-profit Consumer Protection Promotional Organization with the aim of promoting Consumer Education, Consumer Participation in the Standardization Process in Ghana and encouraging Consumer Comparative Shopping.

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