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LegalLines: "This Meat Stinks!" — A Primer on Warranties

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Virtually all franchise arrangements involve at least some transactions in goods. If something goes wrong, product warranties may serve to protect franchisees or, conversely, to protect their customers at the franchisee's expense. It is important for franchisees to protect themselves by understanding what does and does not constitute a warranty – both in their purchases from their franchisor and third party suppliers and in their sales to customers.

An express warranty can be created by any promise or affirmation that becomes a basis for the transaction involved. There are two distinct requirements for an express warranty to arise. First, the seller must make a promise or affirmation; second, that promise or affirmation must become a basis for the bargain. This means that an express warranty is only created if the buyer relies on the seller's promise or affirmation in making its decision to make a purchase from the seller. If the seller makes a false promise or affirmation and the buyer knows it is false, no express warranty will arise.

Any oral or written promise or affirmation that becomes the basis for a bargain creates an express warranty that the goods or services involved will meet the standards and expectations established by such promise or affirmation. Such statements can be relatively informal, and words such as "warrant" or "guarantee" are not required for a statement to constitute an express warranty. The seller need not intend to create a warranty in order for one to arise. A description of goods or a sample or model of the goods provided to the purchaser also can create an express warranty if it becomes a basis of the bargain.

Importantly, statements of opinion, including sales talk and product "puffery" do not create express warranties. Thus, franchisees should be careful not to misconstrue their franchisor's or third-party suppliers' statements as creating a warranty when in fact none exists. On the same token, however, franchisees should be careful not to overstep the line between selling their products or services and making indiscriminate promises, thereby creating binding warranties that their products and services cannot live up to.

Whether or not an express warranty is available to you as a franchisee, or to your clients or customers, there are two types of implied warranties that may also arise from a sale of goods. These are the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

The implied warranty of merchantability imposes an obligation on all merchants that their goods must be fit for their ordinary use under ordinary conditions. For example, in Ponderosa System, Inc. v. Brandt, a franchisee sued Ponderosa and a third-party meat supplier for supplying "spoiled, rancid, and rodent damaged" meat. The court found in favor of the franchisee under the implied warranty of merchantability because the rotten meat was not fit for sale to its customers. In contrast, in the famous case of Holowaty v. McDonald's Corp., the plaintiff suffered second degree burns when she spilled hot coffee on her lap while exiting a McDonald's drive-thru and sued McDonald's Corp. under the implied warranty of merchantability, arguing that the coffee was unreasonably hot. The court ruled in favor of McDonald's, stating that the coffee, made in compliance with McDonald's Corp.'s specifications, was safe for normal handling and consumption and was sold at a temperature that was consistent with the industry standard.

The implied warranty of fitness for a particular purpose applies against all sellers of goods, but only in certain circumstances. For this warranty to apply, the buyer must be purchasing the goods for some purpose other than their normal use; the circumstances must be such that the seller is aware of that particular purpose; the seller must have special skill or judgment in the relevant industry; and the buyer must rely on such special skill or judgment in choosing to purchase the goods. Absent any one of these elements, an implied warranty of fitness for a particular purpose will not arise. However, sales of specialty equipment by franchisors to franchisees, for use in the franchised business, may be the type of goods and circumstances for which implied warranties of fitness applies.

Both of the implied warranties can be waived, and they often are in standard form franchise and supply agreements, so this is an issue to consider in negotiating such agreements if the franchisor is regularly supplying franchisee goods. Language such as "as is" or "with all faults" included in the contract is sufficient to waive the implied warranties. It is also important to remember that the all of these warranties only apply to the sale of goods. Thus, generally, no such warranties will be available as against a franchisor in connection with a franchise license if no sales of goods are involved.

However, franchisors may be held liable for breach of an implied warranty if they require their franchisees to purchase goods from a sole designated supplier. This was the case in Ponderosa, where the franchisor was held liable because its sole designated supplier sup-plied rotten meat that was unfit for sale to the franchisee's customers. In addition, had McDonald's specifications called for excessively hot coffee, good-faith compliance with those specifications by the franchisee in the Holowaty case may have given that franchisee the ability to force McDonald's to pay any judgment entered on behalf of the infamous "spilled coffee" plaintiff.

So what does all of this mean? What are my rights if my franchisor breaches a warranty in the sale of goods? These are complicated questions, and their answers depend upon the language of your franchise agreement, the severity of the breach, and other factors. If you believe your franchisor or supplier has breached a warranty and wish to pursue your legal remedies, you should consult a competent attorney who understands the issues involved and who has experience representing franchisees in litigation against their franchisors.

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