



## Drilling Down: Breach of Express Warranty

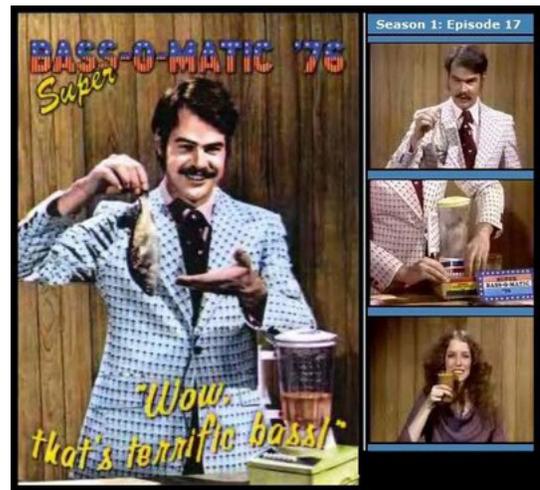
*By Attorney Brian Comer, Chair of Products Liability Practice Group  
803-255-0446, bcomer@collinsandlacy.com. Originally posted on May 26, 2011  
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Okay, let's get this warranty party started. A South Carolina products liability action can be brought pursuant to various different theories, including strict liability, negligence, and breach of warranty.

If your theory of choice is "breach of warranty," then it is important to understand that there are different types of warranties, as provided by statute and common law. One is breach of "express warranty," which I will discuss below.

An express warranty is probably what a non-practitioner/layperson thinks of when they hear "breach of warranty." A warranty generally conjures up images of that long, boilerplate document you received when you last purchased GLH Spray-On Hair, a Super Bass-o-Matic, Flowbee, or other product. (If you have a favorite product infomercial or SNL parody that I can link, shoot me a comment...I love them).

It usually lays out a ton of different terms and conditions, and many times it requires the purchaser to mail in some sort of postcard so as to register the purchase of the product and make the warranty effective.



Although this is an example of an express warranty, South Carolina law does not limit an express warranty to the terms contained in a document entitled “Warranty.” Instead, South Carolina has codified what constitutes an express warranty at S.C. Code Ann. § 36-2-313. This statute sets forth the following:

SECTION 36-2-313. Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise, including those on containers or labels, made by the seller to the buyer, whether directly or indirectly, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

There is South Carolina case law interpreting this statute that is helpful. See, e.g., *Triple E, Inc. v. Hendrix and Dail, Inc.*, 344 S.C. 186, 543 S.E.2d 245 (Ct. App. 2001); *First State Sav. and Loan v. Phelps*, 299 S.C. 441, 385 S.E.2d 821 (1989).

However, the most helpful resource I found was to go to the statute itself and read the Official and South Carolina Reporter’s Comments. Some bullet points from these comments are as follows:

- Express warranties rest on “dickered” aspects of the individual bargain and are the essence of the bargain. (I had to look up “dickered”....it means the “process of bargaining” or something to that effect). Official Cmt. 1.

- The statute deals with affirmations of fact, descriptions of the goods, exhibition or samples, or other parts of the negotiation the result in a contract. Intent to create a warranty is not required. Affirmations of fact by the seller include descriptions of the goods, and a buyer does not have to show reliance. Official Cmt. 3.
- Express warranties deal with what a seller has agreed to sell as described. Therefore, a clause generally disclaiming “all warranties, express or implied” cannot reduce the seller’s obligations with regard to the description and cannot be given literal effect. This does not mean people cannot make their own bargain, but good faith is a factor for determining what was agreed to by the parties, and the probability is small that the buyer did not pay for what was described. Official Cmt. 4.
- A description does not have to be words. Technical specifications, blueprints, samples, illustrations, etc. may be an affirmation of fact if part of the basis of the bargain. Official Cmt. 5.
- When the affirmation of fact occurs is immaterial. The question is whether it was to be regarded as part of the contract. Official Cmt. 7. (Although immaterial, it sounds like it has to come before the sale, though, to be part of the bargain...that is just my opinion).
- Typical statements held to be an express warranty under South Carolina law include representing that a carpet is of first quality, colorfast, will not fade, and is suitable for the hotel needs of a buyer. S.C. Reporter Cmt. (citing *Spartanburg Hotel Corp. v. Alexander Smith*, 231 S.C. 1, 97 S.E.2d 199 (1957)). Another example is “fertilizer compounded of the purest materials and of the highest standard.” *Id.* (citing *Robson v. Miller*, 12 S.C. 586 (1879)). Another example is a case where insecticide was represented to be “not harmful to pigs and would not damage buyer’s pigs.” *Id.* (citing *Herndon v. Southern Pest Control Co.*, 307 F.2d 753 (4th Cir. 1962)).
- A seller does not have to use the word “warrant” or even intend to create a warranty. S.C. Reporter Cmt.

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