Molder Beware: Are You Unknowingly Signing on to Implied Warranties?

Before signing a supply agreement with your customer, be sure to disclaim all implied warranties. Failure to do so could cost you.

Alan Rothenbuecher | Aug 15, 2022

Editor's note: As molders experience greater challenges with supply chains, material availability, and onerous contract terms, it is imperative that they take the time now to address risk. In the first article of this four-part series, Alan Rothenbuecher, a lawyer with deep ties to the plastics industry, provides advice on how molders can minimize risk related to warranties.

The risks in the manufacturing supply chain are more visible now than ever before. Supply-chain problems skyrocketed since the start of the COVID-19 pandemic. In this climate, it is critical that sellers recognize what is in their control and put safeguards in place for themselves wherever possible. One such place is in supply agreements.

More and more customers are asking their molders to sign supply agreements. This is a good thing because supply agreements are generally a product of negotiation, where the parties agree through give and take on terms and conditions that will control their relationship going forward. A supply agreement avoids the battle of the forms inherent when the molder provides a quotation incorporating its terms and conditions, and then the customer provides a purchase order incorporating conflicting terms and conditions. Whose terms and conditions control? A supply agreement avoids that battle. But that does not mean the molder simply should sign the supply agreement presented by the customer — careful review and push back is required in certain areas.

A key place for molders to implement protective measures when negotiating terms and conditions, particularly in the supply agreement, is in the warranty section. One step that no molder should overlook before signing on to a supply contract is ensuring that all implied warranties are disclaimed.

A supply agreement sets the terms and conditions that govern the parties' exchange of goods or services. All supply contracts for the purchase or sale of goods are subject to

Uniform Commercial Code (UCC) requirements. The UCC is a set of laws that applies to all commercial transactions in the United States. The UCC outlines specific implied warranties that are added to an existing contract unless the parties' supply agreement *expressly* disclaims those warranties. If implied warranties are not properly disclaimed, this can result in significant unanticipated liability for a seller.

The types of implied warranties

Warranties are promises that a seller makes regarding the quality and useability of the goods or services supplied to the buyer. Express warranties are affirmative promises that one party makes to another in an agreement. Under the UCC, implied warranties are read into a contract by courts if not visibly disclaimed. The most common are the implied warranties of merchantability, fitness for a particular purpose, and non-infringement.

Merchantability is the guarantee that the purchased goods will serve their ordinary purpose and satisfy the reasonable expectations of the buyer. Think of a piece of fruit — when you buy it, the seller is promising that it is edible. Fruit that looks fresh but has hidden defects would violate the implied warranty of merchantability.

Fitness for a particular purpose is the assurance that a product will serve an intended purpose that is clear to the buyer and seller, such as that a snow tire will be able to operate in the snow.

Non-infringement is the guarantee that the goods sold do not infringe on the intellectual property rights of others.

Each of these implied warranties may provide grounds for an unhappy buyer to pursue legal action against a molder.

Molder's liability can extend to factors beyond their control

Dissatisfaction for a buyer that arises in any of these areas in the future — even if it is due to factors beyond the seller's own production process — can lead to liability and

hurt a seller's business. In fact, these warranties generally relate to the design of the product. If the molder is not involved in designing the product but is just making the product to a specification created by the customer, then it should never agree to and, rather, should always disclaim the warranty. If you did not design the part, how can you warrant that it will do what it is intended to do, or that it will not violate someone else's similar patented design?

Many molders regularly fail to disclaim these warranties. Under the UCC, *all disclaimers of implied warranties must be visible and obvious*. If a court finds that a disclaimer is unclear or hidden within the terms of a contract, that disclaimer will not be enforceable. Using specific language to disclaim all other warranties will mitigate risk for a seller.

Key takeaways

Molders need to protect themselves against risk to ensure the future health of their business. Since most molders are not involved in the design of the buyer's product, molders need to ensure that they are not held responsible for any defects that occur beyond the actions the molder controls. Taking a closer look at supply contracts to avoid signing on to the possibility of implied warranties protects molders against this future risk.

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About the author

Often hailed as the "plastics lawyer," Alan Rothenbuecher has developed particular expertise in the plastics industry, enabling him to assess business trends and needs to proactively develop solutions for molders. His industry expertise has led to Rothenbuecher being selected to act as counsel for and to serve on the boards of trade associations and molders considered leaders in the plastics industry.