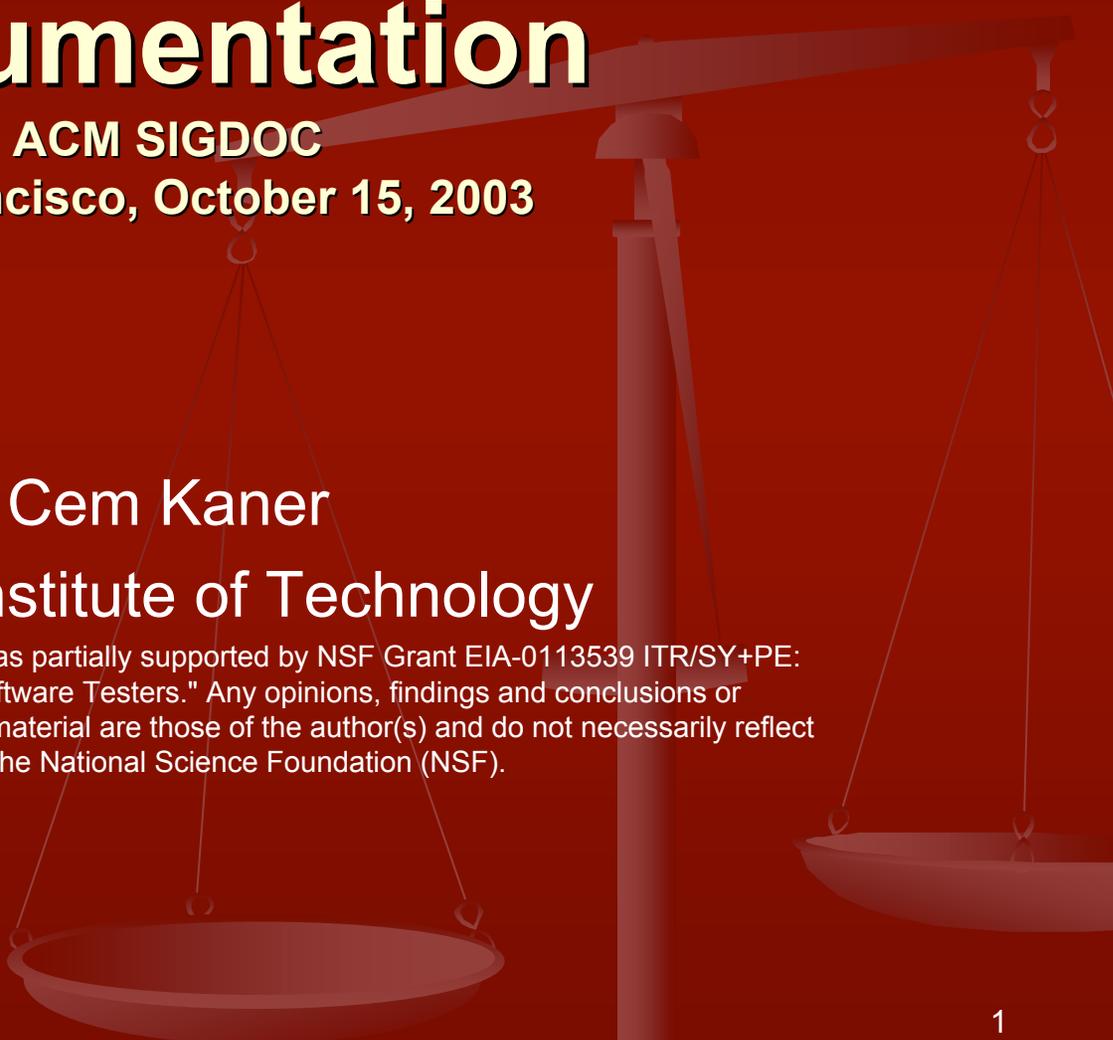


Liability for Defective Documentation



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Daughtrey v Ashe

- W.H. Daughtrey buys \$15000 diamond bracelet for his wife (October 1995)
- Unknown to Daughtrey, seller puts an appraisal in the box, v.v.s. quality
- Wife opens box Xmas 1995, sees appraisal
- Daughter gets new appraisal, 1999, *not v.v.s. quality*
- Daughtrey demands replacement diamonds of v.v.s. quality

Who should win, and why?

Defective Documentation

- Customer Care Institute
 - Repeated studies in the 1990's
 - Half the software publishers surveyed didn't put their user docs through verification by the software testing group
- STAR conference "survey" at keynote, 1996
 - Same result (slightly more disturbing because of audience)

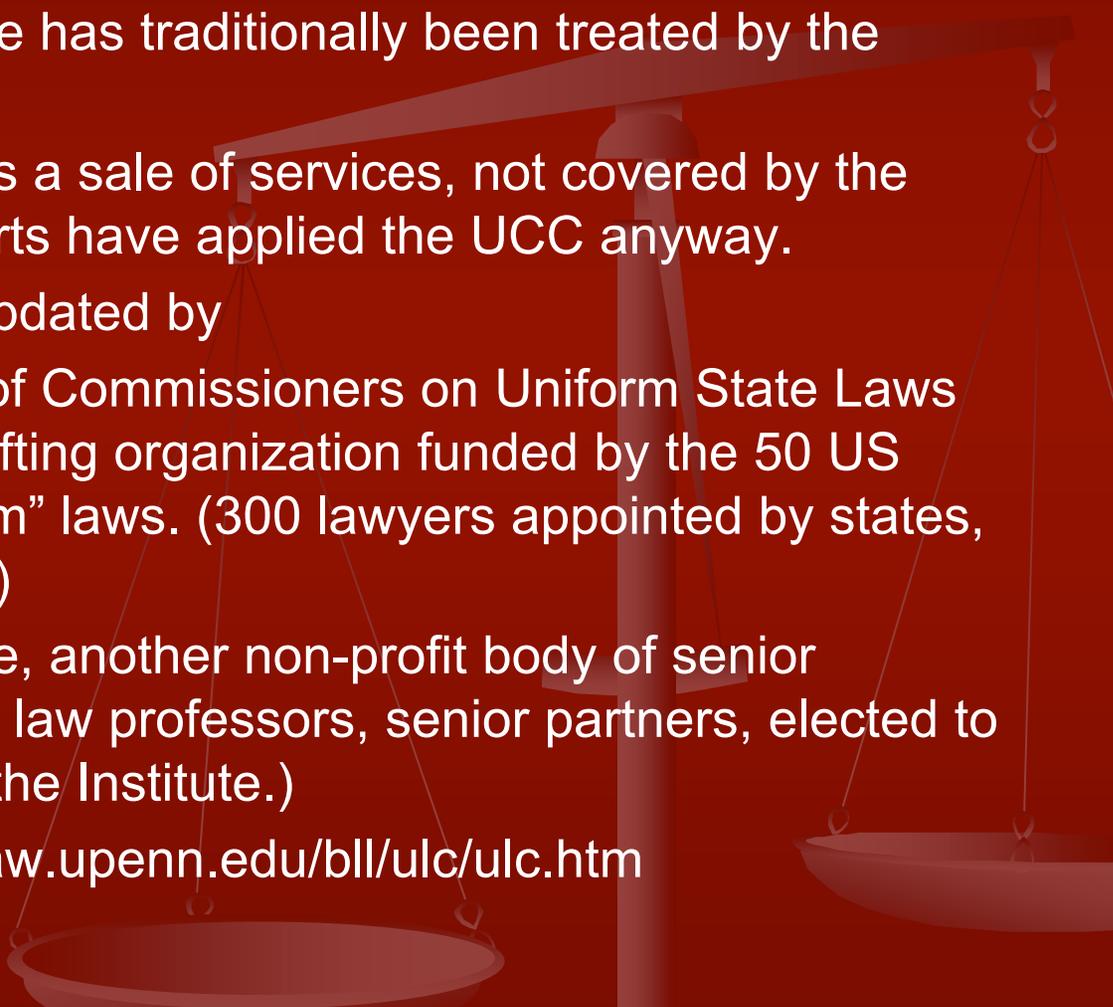
Defective Documentation

- People do read (some of) the documentation (at some point)
 - Tech support study at ShareData (mid-1990's) with David Pels.
 - Product was a financial application, customers paid for a flat fee service contract and had unlimited support-call rights.
 - Callers were typically HR staff or other accounting / administrative staff
 - We asked callers
 - (a) if they had checked the manual or help before calling (almost 100% said yes) (no surprise)
 - (b) what they found (88% gave us information, such as complaint about a diagram on a page, confusing index, confusing wording, etc.) demonstrating that they had actually checked the docs before calling.

Contract Law Fundamentals

- A contract is an agreement between two or more people (or companies) that creates obligations to do or to provide particular things.
 - In many cases, there is no agreement-creation process. Instead, we talk of the voluntary assumption of an obligation as the basis of the contract.
- A software contract can involve goods (such as a program bought at a store) or services (such as custom programming), or some mix of the two (such as a program that comes with a maintenance contract).

Uniform Commercial Code



- Article 2 governs contracts for sale of goods in USA.
- Sale of packaged software has traditionally been treated by the courts as a sale of goods.
- Sale of custom software is a sale of services, not covered by the UCC, though several courts have applied the UCC anyway.
- UCC is maintained and updated by
 - National Conference of Commissioners on Uniform State Laws (NCCUSL) a legal drafting organization funded by the 50 US states to write “Uniform” laws. (300 lawyers appointed by states, typically by Governor.)
 - American Law Institute, another non-profit body of senior lawyers (3000 judges, law professors, senior partners, elected to a life membership by the Institute.)
- Article 2 “update”: www.law.upenn.edu/bll/ulc/ulc.htm

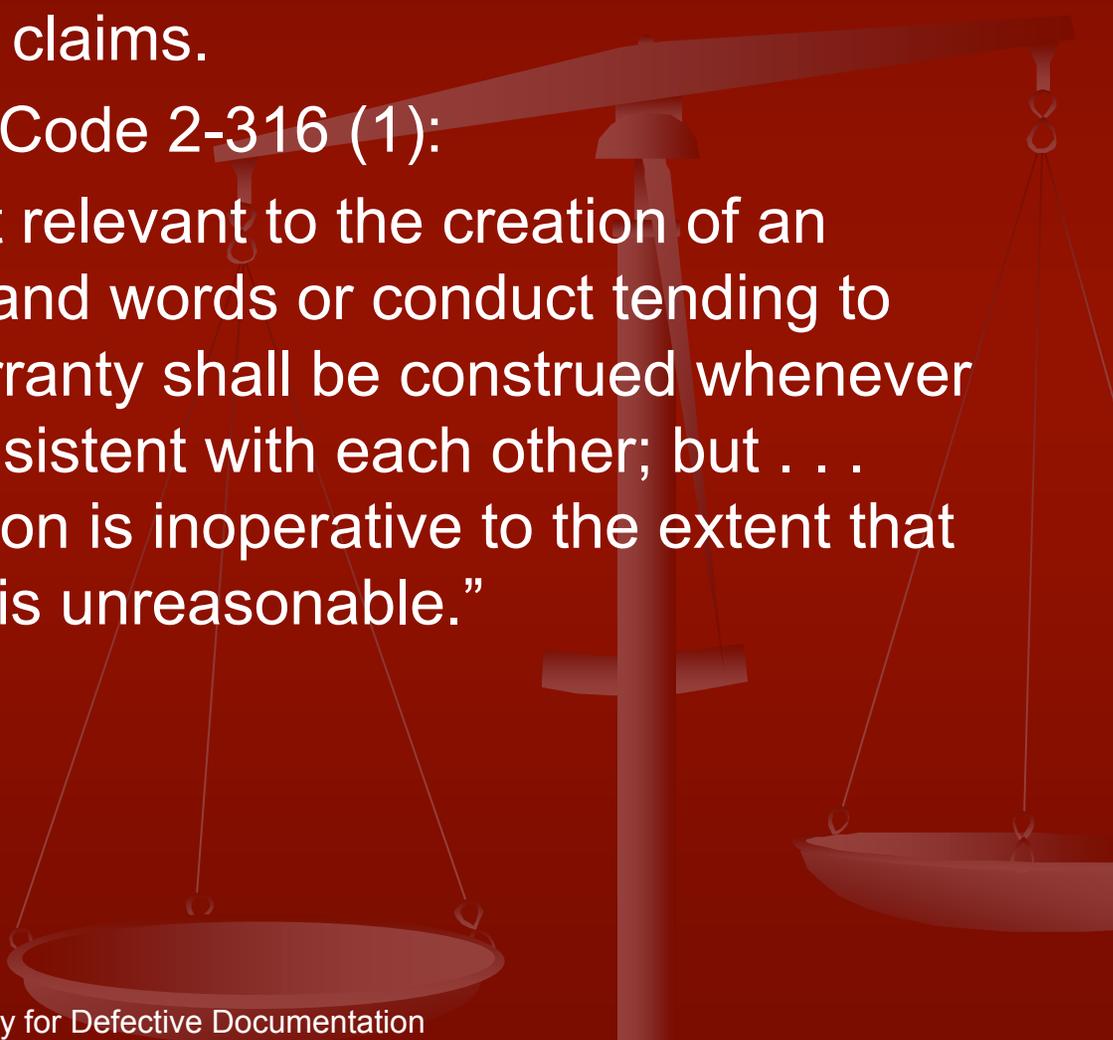
Express Warranties

- *A warranty is a statement of fact, either articulated or implied by law, respecting the quality or character of the goods to be sold.*
- **Express Warranties are defined in the Uniform Commercial Code (2-313).** *Under the Uniform Commercial Code an express warranty is:*
 - 2-313(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain . . .
 - 2-313(b) Any description of the goods which is made part of the basis of the bargain . . .
 - 2-313(c) Any sample or model which is made part of the basis of the bargain.

Implied Warranties

- Under U.C.C. 2-314, a warranty that goods are merchantable is implied in a contract for their sale.
 - Merchantability requires that the program do what a reasonable customer would expect it to do (and that it be salably packaged).
 - The seller can exclude the warranty, but it must be done correctly.
- California Civil Code 1792.4 (a) No sale of goods . . . , on an “as is” . . . basis, shall be effective to disclaim the implied warranty of merchantability . . . unless a conspicuous writing is attached to the goods which clearly informs the [consumer], prior to the sale, in simple and concise language.

Warranty Disclaimers



- You can't disclaim an express warranty -- you are accountable for your claims.
- Uniform Commercial Code 2-316 (1):
 - “Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable.”

Express Warranties

- Article 2 Official Comment 3

“In actual practice, affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.”

Express Warranties

- Article 2 Official Comment 7

“The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification.”

On the basis of this language, Daughtrey won in the Supreme Court of Virginia. (He would not have won in some other states.)

Express Warranty

- Article 2 revision has clarifying amendments, new Section 313A

“(2) If a seller in a record packaged with or accompanying the goods makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods ... and the seller reasonably expects the record to be, and the record is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that:

“(a) the goods will conform to the affirmation of fact, promise or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation;

Express Warranty

- Under Revised Article 2, it is clear that, in any state that adopts it:
 - Manufacturer accountable for all factual claims in advertising
 - Manufacturer accountable for all factual claims in the manual, online help, and packaging
 - Manufacturer will sometimes be accountable for claims in books (would need to prove some form of manufacturer sponsorship or endorsement)
- Under Revised Article 2, Daughtrey would win in every state

Express Warranty

- This is not so earth-shaking
 - UCITA drafting committee meetings, accepted as routine
 - Exchange between Nader / Paglia and the Software Publishers Association
- American culture:

“Get it in writing”

Uniform Computer Information Transactions Act

- Intended to update the UCC, to handle software more sensibly:
 - Unify treatment of products and services
 - Clarify when a contract is formed
 - Clarify the rules for informing customers of contract terms, including (especially)
 - Warranty terms
 - Remedies
 - Use restrictions
 - Transfer restrictions.
- Governs all contracts involving software and digitally stored information.
- Opt-in clauses can bring in goods sold with software.
- Current draft of UCITA: www.law.upenn.edu/bll/ulc/ulc.htm

UCITA

- UCITA revises the express warranty rules
 - substantial conformance
 - comments move back toward a reliance standard
 - much more seller friendly, like all of UCITA
- UCITA has been adopted in Maryland and VA
- Bomb-shelter laws in 4 other states
- NCCUSL has disbanded UCITA committee and is no longer pushing adoption.
 - But several courts are making decisions as if UCITA were the law in their state
 - *So we have seriously conflicting contract standards*

Defective Documentation

- The Canadian government (Industry Canada, Competition Bureau) published a 1996/97 study of claims made on the packaging of consumer software. Here is the bottom line:

“Over 2000 claims were evaluated. Overall, 163 or 8.1% of all claims evaluated were found to be misleading, representing 65% of all the software titles evaluated.”

- For detail, <http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/cp01109e.html>

Uniform Deceptive Trade Practices Act

A person engages in deceptive trade practices when s/he represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have.

California Civil Code 1770

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

- (a) Passing off goods or services as those of another.
- (b) Misrepresenting the source, sponsorship, approval, or certification of goods or services.
- (e) **Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.**
- (g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
- (h) Disparaging the goods, services, or business of another by false or misleading representation of fact.

Negotiated Contracts

- Buyer / seller can agree to lower standards for the documentation
- The contract should call this out with specificity, not just in a general disclaimer
- Don't assume that this has been done in your product's contract--review the language and get it interpreted by counsel if you are at all unsure.