Disputes Involving Computer Systems (Part II) *By Mari L. Myer*

This is Part Two of a two-part article regarding disputes involving computer systems that are governed by the Uniform Commercial Code ("UCC"). Part One, which appeared in the Summer issue of this newsletter, addressed acceptance, rejection and revocation of acceptance of goods. This Part Two will address issues that may arise during litigation over nonconforming goods.

Once litigation becomes imminent, a dissatisfied purchaser of nonconforming goods will typically select two avenues of attack: warranty claims and fraud claims. In contrast, the seller will typically rely for its defense on warranty disclaimers, limitations of liability, a merger clause in the purchase agreement, and a failure by the purchaser to timely rescind the purchase agreement.

Warranty Claims

Notice Provisions

Absent a notice provision in a written agreement, the UCC requires that the purchaser's notice to the seller of a nonconformity in goods that have been accepted be "reasonable". O.C.G.A. §11-2-607(3)(a). This means that the seller simply needs to be placed on notice that the transaction is viewed by the purchaser as troublesome before the seller has been prejudiced by the purchaser's silence. The notice need not identify all of the purchaser's allegations. Clow Corp. v. Metro Pipeline Co., 442 F.Supp. 583, 588 (NDGA 1977). The reasonableness of the notice is an issue of fact.

Purchase agreements often require the purchaser to provide written notice of a warranty breach within a certain number of days following delivery of the goods. Such requirements are enforceable, although it is not clear whether courts will require strict compliance with the notice requirements specified in the purchase agreement. For example, if the purchase agreement requires notification of a warranty breach to be in writing, it is not clear whether a Georgia court will accept a purchaser's verbal notification to the seller, within the time limit specified in the written agreement, as proper notice.

Effect on Warranty Claims of Acceptance of Goods That Are Later Determined To Be Nonconforming

In the absence of contract language to the contrary, a purchaser that has accepted nonconforming goods who gives reasonable notice to the seller of the nonconformity will have available all of the implied warranties set forth in the UCC. See O.C.G.A. §§11-2-312, 314, 315, 607(3). These warranties include warranties of title (O.C.G.A. §11-2-312), merchantability (O.C.G.A. §11-2-314), usage of trade (O.C.G.A. §11-2-314(3)), and fitness for particular purpose (O.C.G.A. §11-2-315). The purchaser bears the burden of proof as to a breach of any of these warranties. O.C.G.A. §11-2-607(4). A seller's breach of any of these warranties will support an award of incidental and consequential damages to the purchaser. O.C.G.A. §11-2-715. In some instances, the breach will also support specific performance, such as where the goods are unique. See O.C.G.A. §11-2-716.

Express Warranties

A seller may make an express warranty by affirmation, promise or description, or by providing a sample of the goods to be sold. O.C.G.A. §11-2-313. An express warranty will "trump" any inconsistent implied warranty other than the implied warranty of fitness for particular purpose. O.C.G.A. §11-2-317(c). A seller cannot both set forth an express warranty and attempt to disclaim the express warranty in the same document. If there is an effort to do so, the disclaimer likely will not be enforced. See Century Dodge, Inc. v. Mobley, 272 S.E.2d 502, 504 (Ga. App. 1980).

Warranty Disclaimers

Rather than be subject to the implied warranties that are set forth in the UCC, the parties can specify particular warranties or warranty disclaimers in the written agreement, with the purchase price (presumably) reflecting the parties' relative levels of risk, or at least their relative bargaining power. See O.C.G.A. §11-2-316. A warranty disclaimer will be enforced if it is conspicuously asserted. See O.C.G.A. §11-2-316; see also Harris v. Sulcus Computer Corp., 332 S.E.2d 660, 662 (Ga. App. 1985); see also Holcomb v. Commercial Credit Svcs. Corp., 349 S.E.2d 523, 524 (Ga. App. 1986). But, the warranty disclaimer cannot be so complete as to leave the purchaser with no remedy at all. Courts will decline to enforce warranty disclaimers that, under the facts of the case, will produce an unconscionable result if enforced. See, e.g., Mullis v. Speight Seed Farms, Inc., 505 S.E.2d 818 (Ga. App. 1998) (warranty disclaimers not enforced against purchaser as to tobacco seeds, on theories that (a) seed manufacturer is in better position than farmer to bear risk of crop failure, and (b) repair or replacement is not a viable remedy following a crop failure).

An example of a warranty disclaimer that likely would be enforced is the following:

> **[Prior language in agreement should set forth some sort of warranty, so that the purchaser will not be left without any remedy.]** THIS WARRANTY IS IN LIEU OF ALL WARRANTIES OF MERCHANTABILITY, FITNESS FOR PURPOSE, OR OTHER WARRANTIES, EXPRESS OR IMPLIED. CORRECTION OF NON-CONFORMITIES IN THE MANNER AND FOR THE PERIOD OF TIME PROVIDED ABOVE, SHALL CONSTITUTE FULFILLMENT OF ALL LIABILITIES OF SELLER TO THE PURCHASER, WHETHER BASED ON CONTRACT, NEGLIGENCE OR OTHERWISE.

Another disclaimer authorized under the UCC is the following: "**THIS PRODUCT IS SOLD 'AS IS'.**" This disclaimer will effectively disclaim all implied warranties, including the warranties of merchantability and fitness for a particular purpose. See O.C.G.A. §11-2-316(3)(a).

Another disclaimer authorized under the UCC is the following: "**THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF.**" See O.C.G.A. §11-2-316(2). This disclaimer also will effectively disclaim all implied warranties, including the warranties of merchantability and fitness for a particular purpose.

Limitations of Liabiliy

Agreements governed by the UCC can contain limitations of liability. O.C.G.A. §11-2-719. Language that a court might enforce can be similar to the following: *In the event that the goods delivered by the seller fail to conform to the requirements of the purchase agreement, seller's liability with respect to the nonconforming goods shall be limited to seller's choice of repair, replacement or refund of the purchase price.*

A limitation of liability will be enforced so long as circumstances do not cause the limited remedy to fail of its essential purpose. O.C.G.A. §11-2-719(2). A limitation of consequential damages in the commercial context is not prima facie unconscionable. O.C.G.A. §11-2-719(3).

Fraud Claims

The purchaser might assert a fraud claim under either one of two possible theories. The purchaser might affirm the parties' written agreement and sue for damages resulting from the fraud. Or the purchaser might attempt to rescind the purchase agreement on the basis of the fraud. But the purchaser cannot do both. Little Sky, Inc. v. Rybka, 592 S.E. 2d 154 (Ga. App. 2003), cert. denied.

Where the purchaser sues for both breach of warranty and fraud, the purchaser in effect affirms the written agreement and binds itself thereunder, eliminating any opportunity to rescind the agreement. See Sudler v. Campbell, 550 S.E. 2d 711, 714 (Ga. App. 2001); see also Conway v. Romarion, 557 S.E. 2d 54, 56-57 (Ga. App. 2001); see also Worsham v. Provident Cos., Inc., 249 F. Supp. 2d 1325, 1331 (NDGA 2002); see also Weed Wizard Acquisition Corp. v. A.A.B.B., Inc., 201 F. Supp. 2d 1252, 1256 (NDGA 2002).

Affirming the Agreement and Seeking Damages for Fraud

If there is a properly drafted merger clause in the written agreement, the purchaser's claim of fraud after affirmance of the agreement may be the subject of summary judgment in favor of the seller. A merger clause typically will state that the parties' written agreement constitutes the entire agreement between the parties, and that no representation or statement not expressed in the written agreement will be binding on the parties. Any reliance by the purchaser, after execution of the written agreement, on any alleged misrepresentations made by the seller prior to the execution of the written agreement, would not be reasonable on the purchaser's part. Under Georgia law, such alleged reliance could not serve as the basis for a fraud claim. See Kobatake v. E. I. DuPont de Nemours & Co., 162 F. 3d 619, 625, 626 (11th Cir. 1998); see also Worsham, 249 F. Supp. 2d at 1331-1332; see also Weed Wizard, 201 F. Supp. 2d at 1257.

In a recent analysis of the effect of a merger clause on a fraud claim, the Georgia Supreme Court, sitting en banc, unanimously ruled that a merger clause barred a fraud claim, noting that, "in an arms-length business transaction, pre-contractual representations are superseded by a valid contractual merger clause, and cannot form the basis of post-contractual claims of ... fraud or misrepresentation." First Data Pos, Inc. f/k/a Microbilt Corp. v. Joseph Willis, 546 S.E. 2d 781, 782 (Ga. 2001), en banc.

Seeking Rescission of the Agreement

The purchaser might choose to rescind the written agreement rather than affirm and sue under it. If the purchaser attempts to rescind, the purchaser may not simultaneously sue to enforce the contract terms. See Sudler, 550 S.E. 2d at 714; see also Conway, 557 S.E. 2d at 56-57; see also Worsham, 249 F. Supp. 2d at 1331; see also Weed Wizard, 201 F. Supp. 2d at 1256.

The demand for rescission must be accompanied by an offer to restore any benefits to the purchaser that may have arisen under the agreement. Kobatake, 162 F.3d at 626.

The effort at rescission must be timely and must not be followed by conduct that is inconsistent with rescission. The case of Little Sky, Inc. v. Rybka, 592 S.E. 2d 154 (Ga. App. 2003), cert. denied, is instructive. In Rybka, the purchasers of a franchise discovered fraud in 1991, yet continued until 1996 to make payments on promissory notes which they had executed in connection with the purchase of the franchise. The purchasers then attempted to rescind the contract and avoid making further payments on the promissory notes, on the ground that they had been the victims of fraud in the inducement. The Rybka court noted that a party that attempts to rescind a contract on the basis of fraud must repudiate the contract promptly upon discovery of the fraud, or waive any objection to the fraud and be bound by the contract as though fraud had not occurred. Rybka, 592 S.E.2d at 156, paraphrasing Jernigan Auto Parts v. Commercial State Bank, 367 S.E. 2d 250 (Ga. App. 1988).

Conclusion

In the event that a dispute arises between the seller and the purchaser of a computer system, the outcome of the dispute likely will be governed by the language of the UCC in the absence of a written agreement. The language

of applicable warranties and warranty disclaimers, notice provisions, limitations of liability, and a merger clause will determine the outcome of the dispute if a written agreement is in place and is not timely and effectively rescinded.

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