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Manufacturer's Corner: The Interplay Between Limited Remedies and Damages Limitations

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I previously have urged you to limit the remedies available under your express warranty (e.g. to repair or replacement), and to disclaim liability for incidental and consequential damages. Here, we'll discuss a common argument made by people who want to render your efforts meaningless.

This post is prompted by a recent decision out of the U.S. District Court for the Northern District of Texas, in which the plaintiff presented the argument in its classic form.[1] The defendant manufacturer sold an aircraft engine to the plaintiff.[2] The manufacturer warranted the engine against defects in material or workmanship, disclaimed its implied warranties, limited the plaintiff's remedy to repair or replacement of defective parts, and disclaimed liability for incidental and consequential damages. The plaintiff said the engine didn't work; the manufacturer tried unsuccessfully to repair it. When the repairs failed, the plaintiff sued. The manufacturer moved for summary judgment on multiple grounds, including that it was not liable for incidental and consequential damages.[3]

The plaintiff resisted, arguing that the limited remedy failed of its essential purpose, thus affording plaintiff the right to recover any and all damages to which he might be otherwise entitled, notwithstanding the disclaimer of incidental and consequential damages. This is the argument. It is made all the time, and *it's wrong*. That said, the Court bought it, and declined to enter summary judgment on the issue.

The Uniform Commercial Code affords sellers the opportunity to limit remedies for non-conformity of goods, including limiting remedies to repair and replacement. It continues to state that in the event the limited remedy "fails of its essential purpose, remedy may be had as provided in this chapter." If you stop there, the plaintiff and the Court come out looking pretty good.

But you can't stop there. The UCC separately states that the sellermay disclaim its liability for consequential damages, and that provision of the UCC is not subject to the same "failure of essential purpose" limitation. Indeed, in a case decided only three days after the case we're discussing here, the Tenth Circuit Court of Appeals observed that, under Texas law, limitations of remedy and disclaimers of damages are conceptually separate, and the failure of a limited remedy does not impair the effectiveness of a damages disclaimer.[4]

Now, in fairness to the Court, one might say that there was a reasonable possibility the plaintiff's claimed damages were *incidental* rather than *consequential* damages. This sometimes matters. The UCC specifically calls out a seller's right to disclaim consequential damages, but it does not expressly call out a right to disclaim incidental damages. Courts routinely enforce such disclaimers, but they sometimes are subject to additional exceptions including, critically, when a buyer rightfully rejects or revokes acceptance, or when a limited remedy fails of its essential purpose. Those exceptions don't hold all the time, but maybe that's where the Court here was headed? It could be.

This case demonstrates how courts sometimes conflate these two distinct issues. But you should not. It is incumbent on you, in the first place, to ensure you separately provide an exclusive limited remedy and a disclaimer of incidental and consequential damages. If you fail to do so, it only makes it easier for the court to travel down the wrong path.

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[1] *Becker v. Continental Motors, Inc.*, 2015 WL 1333235 (N.D. Tex., Mar. 24, 2015).

[2] Evidently the engine was installed in a private jet for personal use. The Court never addressed how the Magnuson-Moss Warranty Act might impact the litigation, so I won't either. But it seems like it might, if indeed the engines are normally used for personal, family, or household purposes. The FTC has shied away from a *per se* rule that the Act applies to personal aircraft, but I don't recall hearing them say it *never* applies to personal aircraft or

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personal aircraft components.

[3] Separately, the manufacturer also argued the plaintiff failed to show a defect that constituted a breach of the warranty. I think the Court gave this argument short shrift, holding simply that the plaintiff's expert concluded the engine's performance prevented the plane from being airworthy. That is not the same as concluding there was a defect in material or workmanship, which was all that was covered by the express warranty.

[4] *Pine Telephone Co., Inc. v. Alcatel Lucent USA Inc.*, 2015 WL 1383109 (10th Cir., Mar. 27, 2015). It's dicta, but whatever. It's still true. I'll let the Supreme Court of Indiana do the heavy lifting on surveying relevant authorities: *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.*, 746 N.E.2d 941 (Ind. 2001).