

## Caveat Venditor “Let the Seller Beware, at Least for Awhile”<sup>1</sup>

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A seller of goods or services normally worries about defining its warranty obligations and determining how long it is required to fulfill its warranty obligation to the buyer? The first installment will discuss how long sellers must worry about fulfilling their warranty obligations at common law and under statute. The second installment will discuss how the seller of goods and services can legally limit and modify both its time limits and obligations to the buyer.

### ***Installment One – How Long?***

How long, in legal terms, is called limitations. Limitations is generally governed by statute. In a commercial context, for suits to recover economic damages for breach of warranty, a four year statute of limitation applies to the sale of services or the sale of goods. That means, that a claim against the seller of the services or goods by the buyer to recover economic damages (as opposed to property damage or for personal injury damage) must be brought by the buyer within four years from the date that the cause of action begins to run, or it is “time barred”. Various factors govern “when” the four years begins to run (or, in legal terms, “when the cause of action accrues”).

**Determining what is being sold.** To determine when the four years starts to run, one must first determine if the transaction is a sale of services or a sale of goods. Different laws govern the sale of services and the sale of goods. While in many transactions it is obvious whether services or goods form the basis of the transaction, in some situations both goods and services are provided by the same seller. In transactions involving both services and goods, courts consider whether the essence or dominant factor of the transaction is a sale of goods or services. Normally, if goods are provided *and* installed by the same contractor, and the goods would be of no value unless they were installed properly (for example, roofing shingles are of little value unless installed properly on a roof), the dominant factor of the transaction will usually be the sale of services. On the other hand, for suppliers who does not install, the transaction will simply be a sale of goods. As a rule of thumb, general contractor and subcontractor’s agreements are considered sales of services. A supplier’s agreement is normally the sale of goods, unless the supplier also installs the goods sold.

**Sale of Goods.** If the agreement is for the sale of goods (which is governed by the Uniform Commercial Code), suit must be brought within four years from the time of delivery of the goods, regardless of when the defect is discovered. The only exception to this rule is when the warranty extends to future performance, wherein the cause of action must be brought within four years of the date the aggrieved party knew, or should have known of the alleged defect, so long as the defect is discovered within the future warranty period. For a warranty to extend to future performance, the warranty must be express (either oral or in writing) but may not implied from the transaction.

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<sup>1</sup> The article first appeared in the June 2007 issue of issue of the Newsletter of the South Texas Chapter of the Associated Builders & Contractors Association.

As a practical matter, if suit is brought within four years of the date of delivery, there will not be a limitations problem. If suit is brought more than four years after the date of delivery, there must be a future performance warranty to extend the four year limitations period.

**Sale of Services.** If the agreement is for the sale of services (which is governed by common law) suit must be brought within four years from the date when the aggrieved party knew or should have known of the defect. This is known in legal terms as the discovery rule. The discovery rule has some restrictions however. The courts have determined that the discovery rule can only be used for defective services which are inherently undiscoverable at the time performed, but the defect can be objectively verified at the time it is discovered. If the buyer can satisfy the terms of the discovery rule, there is no limitation on when the defect must be discovered.

As a practical matter, if suit is brought within four years of the date the service was completed, there will be no issue regarding limitations. If suit is brought more than four years after the date of completion of the work, the discovery rule, with its restrictions, must be applicable to extend the limitations period.

**Example.** An example will illustrate the differences. An Owner agrees that Contractor will build a new building for the Owner. As part of the construction, the Contractor agrees that a Subcontractor will provide and install windows. The Subcontractor agrees that a Supplier will provide the windows to the Subcontractor. The windows are delivered to the Subcontractor on January 15, 2007. The installation of the windows was complete on February 15, 2007. The building is delivered to the Owner for its intended purpose on June 15, 2007. On May 15, 2011, the Owner discovers the windows seals have broken and are defective.

In this example, suit for economic damages against the supplier [i.e. a suit for the sale of goods] would be time barred because the defect was discovered more than four years after the date of delivery. The sale of the windows by the supplier is a sale of goods and suit must be brought within four years of the date of delivery, i.e., January 15, 2011, regardless of when the defect is discovered.

If the supplier had provided a warranty that extended to future performance, (i.e. the windows are warranted to be free of any defects for a period of 5 years), the cause of action would not have been time barred. In that instance, suit should have been brought within four years of the date of discovery of the defect, so long as the defect was discovered within the five year warranty period from the date of delivery. In this example, the defect was discovered on May 15, 2011, which was within the five year warranty period from the date of delivery on February 15, 2007. Suit for economic damages would need to be brought by May 15, 2015, four years from the date of discovery. As a caveat, notice of the defect must be provided to the supplier within a reasonable time after the defect is discovered or any claim for economic damages will be barred.

Suit by the Owner against the Contractor, or suit by the Contractor against the Subcontractor, for economic damages [ i.e., suit for the sale of services] would not be time barred if brought within four years of the date the aggrieved party knew or should have known of the defect. It should be remembered that the discovery rule in the services context applies to service defects which are inherently undiscoverable when the service was rendered, but objectively verifiable when it was discovered. In this example, the defect was discovered on May 15, 2011. If one assumes that the defect was inherently undiscoverable when the windows were installed (defective seal material), but objectively verifiable when the defect was discovered (expert window manufacturer would not have used that type of seal material), suit must be brought within four years, i.e. by May 15, 2015. If on the other hand, the defect was discoverable when the service was completed (i.e. sealing material to the eye was brittle and breaking off to the touch, suit would have been time barred if not brought within four years after the date the service was completed.

The second installment will discuss legal means and methods a seller may use to modify its warranty obligations and limit its obligations to and the amount of damages which might be recoverable by the buyer.

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