

1 **13-1428. Creation and breach of express warranty.**

2 A supplier's [description] [statement of fact] about [goods] [a product] which ~~[[he]-[she]~~
3 ~~[[it]]~~the supplier sells, creates a warranty that the [goods] [product] will conform to the [description]
4 [statement of fact], if,

5 (1) the supplier communicated the [description] [statement of fact] under
6 circumstances which make it fair to regard it as part of the contract, and

7 (2) the [description] [statement of fact] is of a kind which would influence the
8 buyer's decision to buy the [goods] [product].

9 [A warranty is not created by sales talk which a reasonably prudent buyer would interpret
10 as merely a salesperson's recommendation or opinion.]

11 [A sample or model of the [goods] [product] may be used to create a warranty that the
12 [goods] [product] will conform to the sample or model.]

13 A supplier breaches an express warranty if the [goods] [product] do not conform to the
14 supplier's [description] [statement of fact] of their condition or promised performance.

15 USE NOTES

16 The proof in a case will dictate the choice between "goods" and "product." Ordinarily
17 "goods" will be used in a case involving only economic loss.

18 Only the bracketed second paragraph of this instruction shall be used where sufficient
19 evidence has been introduced at trial to justify a jury's conclusion that the statements relied upon
20 in creating an express warranty were merely "puffing". The third paragraph will be used where the
21 warranty was allegedly created by exhibiting a sample or model of the product.

22 [As amended, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-
23 2025-00126, effective for all cases pending or filed on or after December 31, 2025.]

1 **Committee commentary.** — Beginning with this instruction, Chapter 14 states the elements of,
2 and defenses to, actions for breach of express and implied warranties as codified in [~~55-2-313 to~~
3 ~~55-2-318 NMSA 1978~~]NMSA 1978, §§ 55-2-313 to -318 (1961). The language of the statute, and
4 consequently the language of the instructions, is the language of sales law. While breach of
5 warranty instructions seem best suited for cases involving commercial loss, personal injury cases
6 may involve breach of express warranties and actions for breach of the implied warranties
7 contained in this chapter are clearly available to a plaintiff as additional theories of liability.
8 *Perfetti v. McGhan Med.*[~~Medical~~], 1983-NMCA-032, 99 N.M. 645, 662 P.2d 646[~~(Ct. App.~~
9 ~~1983)~~], cert. denied, 99 N.M. 644, 662 P.2d 645 (1983).

10 Nonetheless, products which are sold in a defective condition and give rise to strict liability are
11 products which, almost invariably, give rise to an action for breach of implied warranty. Most
12 courts and commentators have been unable to state a rational distinction between the
13 merchantability standard of [~~55-2-314 NMSA 1978~~] Section 55-2-314 and the comparable
14 standard in strict liability of [§]Section 402A of Restatement (Second) of Torts. See discussion in
15 White and Summers, Uniform Commercial Code, § 9-7 (1972 ed.). While it is clear that the code
16 remedies are available in the personal injury case, it is not clear that strict liability in tort is
17 available to the plaintiff who has sustained purely economic loss, consisting of loss of bargain and
18 consequential damage such as loss of profits. See the introduction to this chapter. Thus, it is
19 contemplated that the breach of warranty instructions in this chapter will be the instructions
20 ordinarily given in a case involving purely economic loss.

21 Section 55-2-313 [~~NMSA 1978~~] uses the language "part of the basis of the bargain" to state the
22 requirement that the statement or promise which creates a warranty must have been communicated
23 at a time and under circumstances which justify a conclusion that the seller and buyer regarded the

1 statement as contractual. As stated in the excellent discussion of express warranties in *Vitro Corp.*
2 *of Am. v. Texas Vitrified Supply Co.*, 1962-NMSC-151, 71 N.M. 95, 376 P.2d 41[~~(1962)~~], it is not
3 necessary that the giving of a warranty be simultaneous with the sale. *Id.* ¶ 24[~~71 N.M. at 104~~].
4 This is similarly recognized by the code. Uniform Commercial Code, 1962 Official Text, § 2-313,
5 comment 7 (1962). However, the statement relied upon must have been made under circumstances
6 which justifiably infer reliance by the buyer. *Stang v. Hertz Corp.*, 1971-NMCA-132, ¶¶ 5-9, 83
7 N.M. 217, [219,]490 P.2d 475[~~(Ct. App. 1971)~~], *rev'd on other grounds*, 1972-NMSC-031, 83
8 N.M. 730, 497 P.2d 732[~~52 A.L.R.3d 112 (1972)~~] (holding that insufficient evidence existed that
9 a statement by lessor concerning "good tires" on a leased vehicle became part of the basis of the
10 bargain).

11 The committee believes that the phrase "basis of the bargain" is awkward and has used instead the
12 equivalent statement from *Vitro Corp.*[~~*of Am. v. Texas Vitrified Supply Co.*~~], 1962-NMSC-151, ¶
13 24,[~~*supra.*~~] "It is enough if it is made under such circumstances as to warrant the inference that it
14 enters into the contract as finally made."[~~71 N.M. at 104.~~]

15 The language of the Uniform Commercial Code is poor language for jury consideration and,
16 therefore, other words have been selected to express the matter. The phrase "statement of facts"
17 was used in preference to "representation," as that phrase finds more acceptance in contract law
18 than in tort law. However, the "statement of facts" is more than merely an opinion. It is intended
19 that the phrase "statement of facts" is more of a "promise or affirmation of facts".

20 Section 55-2-313 [~~NMSA 1978~~] carries forward the common-law recognition that not all
21 statements made during negotiation of a contract can be fairly regarded as warranties. This is
22 implicit in the definition of express warranty. In an appropriate case, the second paragraph of this

- 1 instruction explicitly states that mere sales talk or puffing does not constitute contractual language.
- 2 Uniform Commercial Code, 1962 Official Text, § 2-313, comment 8.
- 3 [As amended by Supreme Court Order No. S-1-RCR-2025-00126.]