Hi, students. This is Professor Faith, and I'm recording this lecture for my business law students. In this lecture, we'll be working on product liability. There are several course-level objectives related to this topic, including examining different factual scenarios and how product liability might apply to them, looking at defenses to product liability claims, and discussing warranties under the UCC.

This is one of those topics that crosses the neat boundaries we've created around different areas of law. There are three interrelated ideas or areas of law here. One, where we've really started, has to do with the remedies under contracts. When someone sells you a product or a service and they don't perform, it doesn't meet the requirements of the contract, or it doesn't meet the description of the goods, there are remedies under contract law. These remedies vary somewhat depending on whether it's a services, real estate contract, or sale of goods.

When you look at contracts generally, they're really an action against the other party to the contract, and that's measured mostly in financial loss. It's about the deal or bargain that you should have gotten but for the breach by the other party. So it's really a financial question.

Because of the limitations of contract law generally, other areas of the law have developed to try and fill in the gaps for parties that are injured and not really made whole by a contract action. On one side, you have product liability claims, and on the other, you have warranties.

Warranties are sort of contract actions. The textbook suggests, and it's probably fair to say, that warranties are really their own area of law. To some extent, especially under the UCC, that's true because of the existence of implied warranties by statute.

On the other side, you have product liability, which is not a contract issue at all. It's really a tort issue, and it's an action against other people, not necessarily the seller of the goods, though everybody involved can be liable. But usually, with a product liability claim, you're aiming for the person that made the product.

These are all tools in the toolset for lawyers to solve legal problems of clients when they're injured by a product and they need some kind of remedy for that injury.

I asked ChatGPT for some images of different scenarios, which seem frankly like a grab bag of things that have nothing to do with each other. You have a 19th-century pharmacist selling somebody dandelion, an early 20th-century car with a broken tire, and then a lawyer on the right asking you to call them if you've been injured by a defective medication. At the bottom, I asked ChatGPT for a laptop battery that was on fire, and that's what it gave me - the battery on top of the laptop, but not quite what you would think.

What do these really have in common? Well, these are all product liability issues. It's an interesting development in the law, in a way. In the early and middle 19th century, there was an action against the maker of a medication that had been mislabeled and was, in fact, a poison that injured the customer. But the pharmacist didn't know, so holding the pharmacist liable for something they didn't do didn't make sense. The question was, could you reach the person that actually made the compound? That is an idea out of product liability, really not one of an action on a contract.

The Buick v. McPherson case, which is the top image in the middle, is about a bad tire on an old car - well, relatively new car for the time, but old to us. We're talking about the 1920s here. The question was whether you could hold Buick responsible for that rather than the seller of the car. Again, it's the idea that the manufacturer ought to be the one that pays. It's really they who made the tire, and they didn't make it very well, as opposed to the seller, which just simply sells the assembled car.

The late-night TV ads about being injured by a medical device or a drug are again related to modern product liability claims. A lot of these are medical claims of people's injuries as a result of using medications or getting a procedure or something else related to medical technology.

Then, maybe this is a few years out of date now, but there were cases where people had laptops that exploded because the lithium-ion batteries were either overcharged or improperly manufactured, causing injuries. This situation doesn't get solved if you just make a warranty claim saying, "Fix my laptop." By the way, I have a $100,000 medical bill. The warranty doesn't cover that; it's not designed to fix that.

So these different things over a relatively long period of time share in common this idea that maybe the best remedy for them is a product liability claim.

Let's talk about warranties, which under product liability claims is really about the sales of goods under the UCC. You probably have some familiarity with this idea. Pretty much every electronic device you buy comes with some kind of warranty, and it says something about the obligation of perhaps the manufacturer to repair or replace the item if it doesn't function correctly within some period of time. If you've ever looked at those, you probably notice they all kind of look the same in terms of the language of the warranty. We'll get to that in a minute and explain why that is.

I think we've all interacted with this - we've had a warranty problem and perhaps needed to file a claim to get something fixed. Warranties are representations that a good will work as promised. There are different issues here, but it's primarily about factual representations about how the product is supposed to work.

You have express warranties and implied warranties under the UCC. Express warranties are a little bit different because they're what was said to you factually at the time of the sale.

Whereas implied warranties really come from the UCC itself - it creates these and inserts them into sales contracts that don't otherwise disclaim them. This creates some other actions under warranty law against a seller. And, of course, warranties can be disclaimed or limited. For example, something sold "as is" at an auction has no warranties of any kind associated with it.

One of the big issues with warranties is the express warranties made during the sales process, and there may not be very many. If you go into a store and you're looking for a $20 item, my guess is there's probably not a lot of sales process around that. On the other hand, if you're buying an expensive electronic or a car or something more substantial, there may be a lot of statements made by the seller about the product.

The question is, which of those constitute an express warranty? What I highlight here is the importance that they be factual statements rather than just opinions or sales puffery. Really, it's a warranty objectively measured by what it should have done versus what it actually does. This maybe is a subtle point, but what is factual may be debatable. There's a question about whether that's really a factual statement or simply a matter of opinion.

On the one hand, if I say that this product should last a year, that's pretty factual. Or if I say you can expect it to last at least a year, that's probably a factual statement. So if it doesn't last that long, it's pretty easy to measure when you bought it versus when it broke to determine whether it's a warranty issue or not.

On the other hand, if you come into the electronics store and I'm selling electronics, and I say, "This is the best laptop that was ever made," I'm not sure that's a factual statement. That's really a matter of opinion, hard to evaluate. What kind of warranty is that? What are you warranting? What if I disagree with your opinion? That just doesn't really make sense legally to claim an express warranty out of that statement.

But between those two extremes, there's a lot of room in the middle for things that might be factual or might just be opinion, and that's where there might be a lawsuit about it.

The other possibility is you go to a store, and there's a model or a sample offered of the product. I think about going to the grocery store, and sometimes there's a person there that offers you samples of a product that the store sells. If you buy the product later and you take it home and it isn't at all what you tasted at the store, then that could constitute an express warranty.

Or if you go over to an outdoor enthusiast store and you want to buy a tent or other stuff like shoes, the model that you're given - if you go in the tent and you can stand up in it, and you go buy that particular type of tent, you get it home, and it doesn't work that way, or you can't assemble it that way - all those things can constitute a warranty based on the model.

Again, there's some room, there's a gray area, some room for debate about whether it's factual or not. This is all part of the sales process, representations of the seller at the time of the sale about things that the product is supposed to be able to do or functions it's supposed to provide.

Under the UCC, though, there are additional warranties implied into sales unless disclaimed. Two of them are listed here: merchantability and fitness for a particular purpose. Merchants make merchantability warranties, which means that the product you're buying is reasonably fit for its intended, ordinary purpose. When you buy that from a merchant, the product should work the way you would expect it to.

For example, you go to the grocery store and buy a gallon of milk, and you get it home and it's spoiled. You really can't do anything with spoiled milk. So that's probably a merchantability claim. You go back to the store, and they perhaps exchange it or give you back your four or five or $20 - you know, milk these days is pretty expensive - but you get back your money or you get to buy another one and not have to pay for it. That is really because of the merchantability warranty where your expectation really isn't met, and it's a reasonable expectation of what the product's supposed to do.

Fitness for a particular purpose requires a slightly different situation. I think about going into an electronic store and you're trying to purchase a particular item, and you talk to the salesperson about what you're trying to do, what functionality you need. The seller, who knows about their product, says, "Well, here you go. Here's the thing that will do that." That gets you into a fitness for a particular purpose claim where the seller knows what you're trying to do, and you can reasonably rely on their expertise in making a purchase. Again, this is another implied warranty for sales of goods.

Also, the UCC implies other kinds of warranties. For example, that the seller is selling goods without any lien or security interest in the goods, that they're free and clear, they're not infringing on other people's intellectual property rights, which we'll talk about in the last unit. And there are certain industry trade practices. For example, pedigree papers for dogs that are purebred - that's a warranty that you'll be given those pedigree papers to register your pet with the appropriate society. Again, this is a warranty under the UCC, sort of an implied warranty of title.

But warranties can be disclaimed, and it's not uncommon to see this. If you go to an auction, perhaps there are no warranties at all. If the good is sold "as is" - if you go and bid on storage lockers, for example, the auctioneer is not representing there's anything really in there or any of it's useful or any of it has any value. It's just stuff that people didn't pay the rent for in the storage facility. So it's probably sold as is, without any express or implied warranties about anything.

But probably more common are limited warranties. And again, as I said earlier, the reason why consumer warranties look the same is because there's a federal regulation that

establishes what you have to state in the warranty for it to be a limited warranty. If you don't follow the statute, then you really are offering a full warranty, which is not really what most consumer goods sellers want to offer.

So if you look at the reading, items over $10 have nine items that have to be in the warranty under the FTC regulations for it to effectively be a limited warranty. And, you know, they commonly are repair or replace warranties. They have a limited period of maybe a year or 90 days or something like that, and they may have exclusions they don't cover. Perhaps they don't cover the labor, maybe they only cover the parts, or they don't cover misuse, or they don't cover accidental damage or things like that. So it's very common to see those. Again, it's designed to protect the seller, limit their obligations to the buyer under the warranty, and to narrowly define generally what is actually covered under the warranty.

This was controversial with Apple years ago. Lots of people had problems with iPhones and other technology getting wet, and the limited warranty really didn't cover those scenarios. So lots of broken screens, lots of soaked iPhones in the pool, and no real way to fix it except to buy another one, which is increasingly expensive.

So a lot of people in the electronics field came out with a square warranty. And Apple itself sells a warranty that's an extended period warranty, AppleCare, and it's broader in its coverage. It's not just the limited warranty provisions, but it will also cover other things over a longer period of time if there's damage to the phone or to the other device. So you see this sort of market expectation. But the way that the limited warranties work, they were really pretty minimal. And so that created a market demand for "you pay more, you get a better warranty."

So if warranty is your remedy, it's separate from the contract remedies you might have. But, you know, it can be limited. It might be disclaimed, maybe it only reaches the seller, and maybe that's not really the person that you need to be held accountable for. Perhaps you misused the product. You know, there are other defenses built in. And again, you know, the limitations on how much you can get may be limited by the language of the warranty or how it's interpreted. It may just not really solve the problem that you have.

I think about the laptop battery that explodes. Well, a warranty repair to give you a new battery or maybe even a new laptop doesn't take care of your medical bills. And what if it's outside of the warranty period when it explodes? What if it was effectively disclaimed, or maybe it was misused? I don't know. There are all kinds of factual problems and legal limitations on what warranties will cover.

So it leads us to this topic, which is the tort that covers the rest of it. When contracts and warranties aren't sufficient to make a buyer whole, then there is the possibility of these sorts of product liability claims. This is kind of a weird image from ChatGPT. I don't know why there are three people in robes talking, and it's just sort of weird. I don't know what the product is here. It's some kind of big camera or small washing machine. I don't know

anyway. But you know, it's sort of this illustration of going to court to get your remedy for a defective product.

Product liability is a sort of strict liability regimen. It's designed to hold all the parties involved in the sale liable for the defective product, not just the seller or the reseller, but everybody involved. But it's not absolute liability. And that's why I have these other bullets here because there are limitations on the liability.

For example, it has to fit into one of these three ideas for it to be a defective product: Either it was designed defectively or manufactured defectively, or it lacked sufficient warnings. Or the Restatement Second of Torts provides Section 402A, which is a different way of formulating liability for defective products under product liability.

So it's not an absolute liability. It's not "Well, if anybody's ever injured by the product, no matter what, then they're automatically, the manufacturer's automatically liable." That's not exactly how this works, but it reaches more people and it provides tort remedies which are generally broader than contract or warranty actions, if you can fit yourself into the legal definition here for recovery.

The easy one is probably understanding a lack of warning, and what this requires is for the manufacturer to know that there might be a risk based on their testing or experience, but they didn't warn you about it. So it's really a negligence question. What should they have warned you about?

Again, you look at power tools today, you get them home and you get the booklet out, and it's 100 pages. I was kidding with my students a couple years ago when I bought an electric toothbrush and it had a hundred-page manual. I said, "Maybe the world's going to end now because it's a toothbrush. How much risk can it be?" But the purpose of the booklet is to avoid a product liability claim. You know, if I knew about a risk as the maker, and I didn't disclose that to you, but I should have, then I could be liable if that risk is what injured you. Had you been warned, maybe you would have dealt with it differently.

And again, you look at power tools or toasters or stoves or other electronic devices. I mean, there are big booklets that tell you about all the risks, how not to use the product, how you can be electrocuted, you know, cut your hand off with the saw, all those things. Basic things. They're in the booklet because those are obvious risks or known risks to the manufacturer, and they really feel an obligation to warn you because a reasonable person would warn under the circumstances.

Okay, so that's kind of an easy case, I suppose. You know, if I got injured by something I wasn't warned about, and they knew and they should have told me, okay, then there might be liability then.

Defective design, though, is a different area, harder to prove. But what you have to demonstrate is that the product's design was not safe enough relative to the market and functionality provided by the product. That's the idea. I'm balancing this usability of the product against the safety features of the product.

For example, if you buy an electric saw, you know it spins at relatively high speeds, and it can cut your hand off if you're not careful. These devices are designed for functionality and usefulness—you need to cut wood, maybe metal, whether you're working on a project at home or as a contractor. It's much faster than using a handsaw, so it allows you to work more efficiently. However, with that efficiency comes the need for safety features. Most saws don't just have an open blade; they come with protective devices that prevent accidental contact. Some may have an auto-shutoff feature or locking mechanisms that prevent the trigger from being pulled unless a button is also engaged. These features strike a balance between safety and functionality.

Another key consideration in design is cost. What safety features are available? What are other manufacturers doing? You must weigh the cost of additional safety features against the risk of injury, much like the burden versus risk analysis we discussed in negligence law. This means comparing the burden on the manufacturer to prevent harm against the likelihood and severity of potential injuries. The burden must be less than the adjusted liability for the injury.

I could make the saw 100% safe, but it wouldn't cut anything, rendering it ineffective. Or I could make it extremely safe, but that might cost $100,000, which wouldn't be feasible since most saws on the market cost less than $300. So, again, product design defects are about balancing options—what's reasonably safe relative to the product's functionality and the consumer's benefit.

Now, Restatement 402A looks at this issue from a slightly different angle. To establish liability, a product must start in a defective condition that makes it unreasonably dangerous to the consumer. The product must be sold by a merchant, someone regularly engaged in the sale of such products, and it must not have changed by the time it reaches the end user. This creates liability for the manufacturer under 402A.

One way to illustrate this is if you go to a fast-food restaurant and order a milkshake. You expect it to be consumable, with no plastic or glass bits inside. But imagine if the milkshake contained small, clear glass pieces. You might not notice them, especially in a dark chocolate shake, and swallowing them could cause serious injury. Swallowing glass is dangerous, obviously. So, when a manufacturer allows such foreign substances into the product, it's in a defective condition. The product is unreasonably dangerous to consumers who have no way of protecting themselves, as they wouldn't expect the glass to be there. This is the kind of scenario that creates liability under 402A.

Another example is the famous McDonald's coffee case from the 1990s. A woman in New Mexico bought a hot coffee, spilled it on her lap, and was seriously injured. She sued McDonald's, alleging that the temperature of the coffee was defective. At home, coffee might be served at 140 degrees, which is hot but not hot enough to cause third-degree burns. At the time, McDonald's was selling its coffee at 190 degrees. You can't drink it at that temperature; you have to wait for it to cool. But if you spill it, as happened in this case, the coffee can cause severe burns almost instantly. The woman incurred thousands, even tens of thousands of dollars in medical bills, required skin grafts, and needed hospitalization to recover. The argument was that McDonald's was selling coffee at an unreasonably dangerous temperature.

McDonald's had a reason for the higher temperature—customers on long drives wanted their coffee to stay hot. But hot water is dangerous, and McDonald's was selling it in a way that made it unreasonably dangerous. This creates the possibility of liability under 402A, as McDonald's is in the business of selling fast food, and nothing changed before the coffee reached the consumer.

However, proving liability is only the first half of the trial. The defendant can present defenses. For instance, there's an urban legend about someone using a lawnmower to cut a hedge, resulting in an injury. While I don't think this actually happened, if it did, that would be a misuse of the product and a valid defense against product liability. Unprofessional modifications could also serve as a defense. Some states might argue that if the consumer was negligent in using the product, it could bar recovery under product liability. In other cases, the defect might not be the true cause of the injury, and the defendant can raise other factors to avoid liability.

Product liability is a common cause of action because other legal remedies often don't address the full extent of the problem. For example, if you drop your phone in a pool and it's damaged, a warranty that repairs or replaces it might suffice. But if a defective product lands you in the hospital, a warranty or contract action won't cover those expenses. In such cases, tort suits are necessary to provide proper remedies. This is how warranties, contract actions, and tort suits work together to protect consumers.