

Question MPT-2 – July 2023 – Selected Answer 1

Law Offices of Bradley Wilson

2405 Main Street

Creedence, Franklin 33805

To: Anthony Martin

From: Bradley Wilson

Date: July 25, 2023

Re: Potential Lawsuit Against

Mr. Martin,

You asked us about the potential for suit regarding your dog, Ash, that you purchased from the Den Breeder owned and operated by Simon Shafer ("Shafer"). There are two potential areas for suit that we have highlighted below: one under the local pet purchasing law (the FPPPA) and a second under the Uniform Commercial Code (the UCC) for breach of contract. It is likely you can seek a remedy under both laws together, allowing you to keep Ash, recover the full purchase price, and receive reimbursement for the surgery cost. The specifics of each remedy are outlined below.

1. Are your remedies limited by the dog purchase contract you signed?

No, the contract is likely ambiguous enough that your remedies are not limited and a court would look to relevant statutory law, including the FPPPA and the UCC.

When interpreting a written contract, courts will review the language of the document. Cohen v. Dent. If the document is unambiguous, courts will follow the language unless they conflict with relevant statutes. Cohen v. Dent. But, if the terms are ambiguous, courts resolve those ambiguities in part in reliance on the statutes, but also construe the document most strongly against the party who prepared it. Cohen v. Dent. Courts view the document in favor of the party who did not draft the contract. Cohen v. Dent. A contract is ambiguous if it does not answer the key issues of the case. Cohen v. Dent.

In Cohen, another case about a non-conforming dog, the dog purchase contract was ambiguous because it did not explain when the time limit for the remedy began to toll, how to provide relevant evidence required under the contract, and did not specifically address damages or refunds - though it mentioned a choice of remedies. Cohen v. Dent. Thus, the court rejected the defendant's claim that the contract barred recovery

because it was not unambiguous enough to find that it did bar recovery. Cohen v. Dent.

Here, your contract is similar to the contract in Cohen because the major issues are not clearly specified. The contract points out that all dogs have the potential for diseases that cannot always be eliminated and requires that you report a congenital defect diagnosis in writing within 24 hours. But, the contract, like in Cohen, does not make clear when the time limit starts. It could start once the doctor makes an initial diagnosis, confirms the diagnosis, or sends you a follow-up email in writing. Additionally, like in Cohen, your contract highlights that there is a remedy, but is unclear if there is also an opportunity for damages. Although your contract says the breeder may seek its own diagnosis, there is no time limit or specific instruction as to how this is to be done. Thus, your contract is likely just as ambiguous as the contract was in Cohen. Because Shafer drafted the contract here, a court would likely construe it against Shafer and in your favor.

No, your contract likely does not bar recovery.

2. Can you recover the cost of surgery and keep Ash under the Franklin Pet Purchaser Protection Act (FPPPA) because Ash suffers from a congenital defect?

Yes, under the FPPPA because Ash was purchased about a month and a half ago and has since been diagnosed with PSP, a liver shunt that is a congenital defect, you may elect a remedy under the FPPA. You can choose to keep Ash and recover the surgery price under the FPPA.

The FPPPA governs the sale of dogs. Cohen v. Dent. At minimum a pet purchaser is entitled to remedies under the FPPPA, though they may also get remedies under the UCC. Cohen v. Dent. A pet purchaser may seek damages if they can show within 180 calendar days of the sale that the animal is unfit for purchase due to a congenital malformation that adversely affects the health of the animal. Franklin Pet Purchaser Protection Act 753. This must be proven by a vet certification. Franklin Pet Purchaser Protection Act 753. The purchaser may choose any of the following: (1) return the animal and receive a full refund, including taxes and vet costs related to the certification, (2) return the animal, get an exchange animal, and receive vet costs, or (3) keep the animal and receive reimbursement for vet costs (for any vet the purchaser chooses) to cure the animal. Franklin Pet Purchaser Protection Act 753.

In Cohen v. Dent, a buyer purchased a dog who was later diagnosed with hip dysplasia. The contract provided a one year guarantee for defects, but was unclear as

to what remedies could be pursued. The plaintiff also sought to keep her dog, recover the purchase price, and have the breeder pay for the surgery. The court awarded, under the FPPPA, the cost of the surgery and allowed the plaintiff to keep the dog based on a finding of a congenital defect, in addition to allowing UCC remedies.

Here, you sought a certification by your vet approximately 1.5 months after you bought Ash, well within the 180-day time limit. Your vet has emailed confirming that Ash was diagnosed with a liver shunt - a congenital defect that adversely affects Ash's health. The vet confirmed your observations, that Ash is lethargic, confused, and sometimes uncoordinated after observation. Thus, like the plaintiff in Cohen, you can likely seek a remedy of your choice under the FPPPA, including keeping Ash and seeking costs of surgery. This would also likely include post-surgical costs since the FPPPA allows for remedies "for the cost of cure." The other party may argue the cost of surgery here is three times the cost of Ash, while in Cohen the dog was far more expensive than the surgery. While we would need to do additional research to confirm this is not a problem if it came up at trial, an initial reading of the FPPPA indicates there is nothing in the statute itself that indicates this should not limit your remedies. We would want to research this further if you do pursue litigation.

Yes, you can recover under the FPPPA in the form of surgery costs and keeping Ash.

But, the FPPA does not limit rights or remedies the purchaser may have under other laws. Franklin Pet Purchaser Protection Act 753; Cohen v. Dent. Thus, purchasers may also seek remedies under the Uniform Commercial Code (UCC).

3. Can you recover under the Uniform Commercial Code (UCC) for breach of contract because Ash was not fit for the ordinary purpose which he was purchased for, a healthy dog?

Yes, you can likely recover because you did not receive a dog that would pass inspection without objection and that is fit as an ordinary dog. You can likely recover the full purchase price.

3(a). The Implied Warranty of Merchantability

When a buyer purchases goods from a merchant, there is an implied warranty of merchantability. UCC 2-314. The merchant must deal in goods of that kind. UCC 2-314. Dog are considered goods under the UCC, and breeders are considered merchants. Cohen v. Dent.

The implied warranty of merchantability requires that the goods pass without objection in the trade under the contract description and be fit for the ordinary

purpose for which such goods are used. UCC 2-314. The sale of an animal creates such a warranty. Cohen v. Dent.

In Cohen, the dog with hip displasia was a nonconforming good because the plaintiff did not get what she wanted, a healthy dog. Cohen v. Dent. The vet's certification that the dog was unfit for purchase meant that the dog could not pass without objection as required under the implied warranty of merchantability. Cohen v. Dent. Furthermore, the dog was not fit for ordinary purpose because it could not run, walk, or jump without pain. Cohen v. Dent. And in Dalton, the court found a pet parrot was not fit for the ordinary purpose of a living pet because it died within two weeks of purchase.

Here, Ash would not satisfy the implied warranty of merchantability. A court would likely find Ash to be non-conforming. He has a congenital defect that makes him unfit for purchase. Ash is lethargic, confused, and sometimes uncoordinated after observation as a result of this defect, thus he could not "pass without objection."

3(b). Potential Waiver of the Implied Warranty of Merchantability

The implied warranty of merchantability may be excluded or modified only if it mentions merchantability and if the exclusion is given in writing. UCC 2-316. But, regardless of such a disclaimer, all implied warranties may be excluded with expressions like "as is" or "with all faults" or other language that indicates exclusion of the warranty. UCC 2-316. However, the buyer must (1) have been given the opportunity to inspect the goods (or waived such an opportunity, and (2) the inspection must have been able to reveal the defect. UCC 2-316.

Although Shafer may argue by acknowledging the risks of purchasing a dog - including that the dog may have a defect not discovered upon purchase - is a waiver of the implied warranty, this is likely not the case. Your contract did not clearly waive the implied warranty of merchantability. Additionally, though you were given an opportunity to inspect Ash when you went to pick him out, your inspection, under the circumstances of a purchaser picking a dog, would not have revealed his defect. At 8 weeks many Irish wolfhounds do not always even show signs of a liver shunt. Thus, any arguable waiver should not be an issue during your litigation.

3(c). Damages

When a buyer has accepted the goods, they can recover damage for any nonconformity of the goods. UCC 2-714. These damages are measured by the difference between the value of the goods accepted at the time and place of acceptance, and the value of the goods as they would have been if they were as warranted. UCC 2-714. For dogs, this means the damages are the difference between

the values of the dog as warranted (what you would have wanted to get had the dog been compliant with the contract) and the actual dog. Cohen v. Dent. However, courts have "repeatedly" awarded the full purchase price of the dog because "no buyer would agree to purchase an animal it knew to have a congenital defect that might lead to death or might require expansive surgery to correct." Cohen v. Dent. In Cohen, the court awarded remedies under both the FPPPA and the UCC, including full purchase price of the dog.

Here, since there was a breach when Shafer delivered a non-conforming dog, you are entitled to damages. Under the UCC this means you are entitled to the difference in the value of Ash as warranted - a healthy dog - and the value of Ash with his defect. However, many courts have awarded the full purchase price of the dogs. You would need to argue you would not have purchased Ash, though Shafer may argue you had a connection with him, had you know about the defect. You likely have a strong argument to request that the court provide the full purchase price of Ash, the \$2,500, if the court follows other cases in this regard.

Conclusion

You likely have a strong legal case to recover under the FPPPA the value of the surgery (and post-surgical costs) while keeping Ash, as well as under the UCC under the purchase price. Please let us know if you have any questions or would like to move forward with this matter with us representing you.

Sincerely,

Bradley Wilson

Question MPT-2 – July 2023 – Selected Answer 2

Advice Letter

To: Anthony Martin

From: Examinee

Re: Potential Claim for Ash's Injuries Under Franklin Pet Purchaser Protection Act and the Uniform Commercial Code

I. Did signing the Dog Purchase Agreement agreement limit statutory remedies?

In short, it seems likely that the signing of the Dog Purchase Agreement did not limit any remedies under relevant statues (namely, the The Franklin Pet Purchaser Act

(FPPPA) and the Uniform Commercial Code). The court is likely to find the contract terms ambiguous and will look to the statutes to fashion the proper remedy.

While relevant statutes provides remedies for purchasers, those remedies can be limited under contract, like the one signed by you and Mr. Shafer. The court will have to interpret your contract to decide if it will preclude any remedies. When interpreting a written contract, the court will first look at the language in the document itself to decide if they are ambiguous or unambiguous. (*Cohen v Dent*, (Franklin Court of Appeal 2020)). If the terms are unambiguous, the court will apply the terms in the contract to the dispute, unless they conflict with relevant statutes. (*Id.*). If the terms of the contract are ambiguous, the court will resolve those ambiguities partly by looking to the relevant statutes as well. (*Id.*). If the contract does contain ambiguities, the court will construe the contract most strongly against the party who prepared it, and favorably to a party who had no voice in selection of the language. *Cohen* (quoting *O'day v. Schimidt*, (Fr. Sup. Ct. 1947)).

Comparing the facts of your case to the facts in *Cohen*, it seems likely that a court would find the contract terms to be ambiguous. In *Cohen*, the court found a similar contract regarding the purchase of a dog to be ambiguous because it provided no start date for the time required to be granted a remedy, it did not address refunds or monetary remedies anywhere in the contract, and the contract only required veterinarian inspections "if needed" but gave no timeline in which the inspection must be obtained for what "if needed" meant. *Cohen*. While your contract contains slightly more information than the contract at issue in *Cohen*, it shares similar failures. The "Pet Purchase Agreement" signed by you and Mr. Shafer provides no terms regarding monetary remedies or refunds, outside of saying that dog could be returned within 48 hours of purchase at "Breeder's expense". Further, the contract states that dog is meant to be "companion" and if it fails to be a "companion" there are remedies, but it is never defined what a companion is. While it seems likely that the court will find the contract ambiguous because the key issue - your remedies under the contract - are not clearly defined, your contract does contain information about the timeline in which a remedy can be sought for a congenital defect and when the inspection by a veterinarian can be done. This should be considered when deciding whether to bring a claim. If the court finds the contract to be ambiguous regarding your remedies they will then look to the relevant statutes (the FPPPA and the Uniform Commercial Code) to fashion your remedies.

II. Is there a claim for damages under the Franklin Pet Purchaser Act? If so, what are the remedies?

In short, it is likely you have a claim under the Franklin Pet Purchaser Act because of Ash's congenital defect. Under this statute, your remedy, if you choose to keep Ash, is reimbursement for veterinary services to correct or attempt to correct his condition.

The Franklin Pet Purchaser Act (FPPPA) governs the sale of household pets, including dogs. (*Cohen v Dent*, (Franklin Court of Appeal 2020)). This Act provides purchasers with a remedy if they provide certification by a licensed veterinarian showing the animal's condition within 14 business days, if the condition is an illness or symptoms of an infectious disease, or 180 calendar days for a congenital defect. ((*Cohen v Dent*, (Franklin Court of Appeal 2020); Franklin Pet Purchaser Act §753(a)(1)-(2)). It provides three remedies for purchasers: (1) return the animal and receive a refund, (2) return the animal and receive a replacement animal; or (3) retain the animal and be reimbursed veterinary costs incurred for the purpose of curing or attempting to cure the animal. ((*Cohen v Dent*, (Franklin Court of Appeal 2020); Franklin Pet Purchaser Act §753(b)(1)-(3)).

You likely have a claim under this Act. Because Ash started displaying symptoms around a month after you brought him home and you have him diagnosed shortly after, you likely meet the time requirements under the act for a congenital defect, but this will have to be proven concretely. Further, you have the correct documentation needed because you had a licensed veterinarian certify that Ash is unfit due to his congenital malformation. Under this Act, you will be provided a choice of three remedies, however if you want to keep Ash, you only have one. You may keep him and be reimbursed from Mr. Schafer for the veterinary services of your choosing for the purpose of curing, or attempting to cure Ash's condition. While this law will not get you a full refund of Ash, you can combine your remedies under the Act with your remedies under other statutes (like the Uniform Commercial Code).

The explicit language of the Franklin Pet Purchaser Protection Act (§753(d)) states that nothing in the act limits the right or remedies that are otherwise available to a purchaser under any other law. Therefore, one can still recover damages under the Uniform Commercial Code.

III. Is there a claim under the Uniform Commercial Code? If so, what are the remedies?

In short, it seems somewhat likely you have a claim under the Uniform Commercial Code because Mr. Schafer breached his implied warranty of merchantability, or at minimum delivered nonconforming goods. Your remedies under this act could be up to the full purchase price, or what is reasonable if nonconforming goods.

Article 2 of the UCC governs sale of animals. To fall under the UCC, the items sold must be "goods" and the person you purchased it from is sometimes required to be "merchant." Dogs are "goods" and pet stores and breeders are "merchants" as defined in the article. A buyer of nonconforming goods (goods that do not meet the specifications listed or contemplated in the contract) may "recover as damages for any nonconformity or tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner in which is reasonable. (UCC 2-714).

Ash must be considered a non-conforming good because you did not get what he asked for: a healthy dog. *See Jackson v. Mistover Kennels* (Fr. Ct. App 2005) ("Bo-Peep", a Maltese held to be a conforming good where the buyer paid a premium for a "teacup" and received a standard.).

Further the sale of an animal creates an implied warranty of merchantability. Goods are merchantable if they "pass without objection in the trade under the contract descriptions" and "are fit for the ordinary purpose for which such goods are used." UCC 2-314(2)(a) and (c). The certification by the veterinarian that Ash had a congenital defect likely establishes that Ash could not pass without objection. Moreover, Ash is not fit for the ordinary purpose for which he was purchased because he is lethargic, dizzy, and seems depressed. (*See Dalton v Jackson* (Fr. Ct. of App 1997) (A parrot who died two weeks after purchase deemed unfit for ordinary purpose: "at least one purpose is to stay around as a live bird."))

However, Mr. Shafer will have an argument that an examination after purchase would have revealed Ash's defect at the time of sale under *Tarby v Paradise* (Fr. Ct. App. 1995) and UCC 2-316(b) (no implied warranty exists in regard to defects which an examination ought in the circumstances to reveal to him). This argument is likely to fail for two reasons. The first being that unlike in *Tarby*, your contract with Mr. Schafer did not explicitly require an inspection by a veterinarian within a stated time after purchaser. The second reason is because there is reasonable dispute among licensed veterinarians as to when an animal should be tested for the congenital defect that Ash has and there is dispute as to how early the congenital defect will show up on testing.

If the court is to find that Mr. Schafer breached the implied warranty of merchantability, they would award damages under the general rule under UCC 2-714(2), which measures damages as the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. This would allow the court to reward you the full purchase price. However, if the court decides he did breach the warrant but instead delivered non-conforming goods, the court will award damages under UCC 2-714. Under UCC

2-714(1) the awards for damages for nonconformity of tender is that they can be computed in any manner that is reasonable. This would require the court to determine what is reasonable

IV. Conclusion

In conclusion, it seems likely that you have a claim both under the Franklin Pet Purchaser Protection Act and the Uniform Commercial Code.