

E-voting Vendors Commonly Refuse to Promise That Their Voting Machines Work

(By contractually disclaiming “implied warranties” that are supposed to apply to all sales of goods under the Uniform Commercial Code)

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EXECUTIVE SUMMARY: By their own admission in the words of their signed contracts with government agencies, voting machine vendors “disclaim” or refuse to stand behind their products. The voting machine vendors also refuse to promise that their products will work or that they will be fit even for ordinary uses or for any particular purpose that the vendor knows very well or has reason to know is the purpose for buying the machines. Because these “disclaimers of implied warranties” routinely appear in contracts to purchase voting machines, activists and government officials should not allow or approve such low standards to be brought into our election processes. This point is of sufficient strength and importance in making points concerning both the importance of elections as well as the low quality of voting machines that citizens may consider holding an “intellectual sit-in” so to speak and simply keep asking the question in different forms over and over again: How could the government agree to run our elections without obtaining a promise or warranty that the machines will work? How could the vendors think they should be allowed to present these kinds of risks to democracy if they’re not willing to stand behind their products 100%? Does this constitute recklessness? Corporate favors? What’s going on here?

Also discussed is the status when the implied warranties are disclaimed as above, but a short term limited warranty is provided in place of the implied warranties, which is still a woefully insufficient state of affairs for elections, which are supposed to be highly reliable “fail safe” events involving ballot collection and simple acts of addition. The FTC explains the implied warranty of merchantability (which vendors deny they are making when selling voting machines to our governmental officials, as follows:

“{The implied warranty of merchantability means that the goods} will do what they are supposed to do and that there is nothing significantly wrong with them. In other words, it is an implied promise that the goods are fit to be sold. The law says that merchants make this promise automatically every time they sell a product they are in business to sell.”

See <http://www.ftc.gov/bcp/online/pubs/buspubs/warranty.htm> (click “understanding warranties” link, paragraph 4 in the “understanding warranties” section)

Voting machine vendors are most definitely “merchants” under the law. The following more extended discussion explains this in more detail, and suggests how citizens can use this law to frame questions and objections to voting machine sales.

Sources of Law Used In this Paper:

State Law:

- <http://www.law.cornell.edu/ucc/2/2-314.html> (2-314 on implied warranty of merchantability)
- <http://www.law.cornell.edu/ucc/2/2-315.html> (2-315 on implied warranty of fitness for a particular purpose)
- <http://www.law.cornell.edu/ucc/2/2-316.html> (2-316 on disclaimers of implied warranties)
- <http://www.law.cornell.edu/ucc/2/2-316.html> (2-313 on express warranties and different forms thereof)

Federal Law:

Magnuson Moss Warranty Act, and the discussion of implied warranties together with this Act found at <http://www.ftc.gov/bcp/online/pubs/buspubs/warranty.htm>

Legal Discussion for the Layperson

Implied warranties are part of contracts for sales of goods automatically, and require that the goods be fit for their normal use or any particular use the seller has reason to know of. Voting machine vendors, by having contracts that disclaim these implied warranties in a way equivalent to an “as is, and with all faults” are specifically telling us that they DO NOT PROMISE THAT THE GOODS WILL BE FIT FOR THEIR NORMAL USE, i.e. that they will work in a general sense. This occurs whenever vendors, as they commonly do, disclaim the implied warranties that are part of every contract for the sale of goods as a matter of law (i.e. automatically).

Because contracts for the purchase of voting machines are “sales of goods” they are subject to the Uniform Commercial Code (“UCC”) as adopted in all 50 states except Louisiana, regardless of whether the goods are for business, government or consumer use. Under the UCC, “*Implied warranties*” are automatically added by law to every verbal or written contract for the sale of goods, and they are (1) the “*implied warranty of merchantability*,” and (2) wherever the seller has reason to know a particular purpose of the buyer, the “*implied warranty of fitness for a particular purpose*” also arises. As will be evident from the meanings of these warranties, the reason they are implied into every transaction for the sale of goods is that a rational buyer would not usually contract to purchase without them. Implied warranties are defined at UCC 2-314 which is located here: <http://www.law.cornell.edu/ucc/2/2-314.html>

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§ 2-314. Implied Warranty: Merchantability; Usage of Trade.

- (1) Unless excluded or modified (Section [2-316](#)), **a warranty that the goods shall be merchantable is implied in a contract for their sale** if the seller is a merchant with respect to goods of that kind. [...]
- (2) **Goods to be merchantable must be at least such as**

- (a) **pass without objection in the trade** under the [contract](#) description; and
- (b) in the case of fungible {identical, replaceable, like gallons of gas} [goods](#), are of fair average quality within the description; and
- (c) **are fit for the ordinary purposes** for which such [goods](#) are used; and
- (d) **run**, within the variations permitted by the [agreement](#), **of even kind, quality and quantity within each unit and among all units involved**; and
- (e) are adequately contained, packaged, and labeled as the [agreement](#) may require; and
- (f) **conform to the promise or affirmations of fact made on the container or label if any.**

(3) Unless excluded or modified (Section [2-316](#)) other implied warranties may arise from course of dealing or usage of trade.

§ 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the [seller](#) at the time of contracting **has reason to know any particular purpose** for which the [goods](#) are required and that the [buyer](#) is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified {disclaimed} under the next section {2-316} **an implied warranty that the goods shall be fit for such purpose.**

Source: <http://www.law.cornell.edu/ucc/2/2-314.html> and <http://www.law.cornell.edu/ucc/2/2-315.tml>

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Among other things, the “implied warranty of merchantability” requires that the goods sold are for example “fit for their normal purposes” and will “pass without objection in the trade.” UCC 2-314.

The “implied warranty of suitability for a particular purpose” requires that the goods be fit for the particular purpose of the buyer if the seller has “reason to know” a particular purpose of the buyer. UCC 2-314

Of particular interest is that Diebold, Sequoia, and ES&S will routinely attempt to disclaim these implied warranties in the sales contracts they sign.

Disclaimers are covered by UCC 2-316. <http://www.law.cornell.edu/ucc/2/2-316.html>
Roughly equivalent to attempting to sell something “as is”, these disclaimers of the implied warranty of merchantability and fitness for a particular purpose constitute legal claims by these vendors that they are NOT promising that the goods they sell are “fit for their normal use” nor are they promising that they are “fit for the particular use” of your jurisdiction, nor are they promising that the voting machines in question would “pass without objection in the trade.” In other words, they refuse to promise that the voting machines will work.

Given that elections, somewhat like fire protection and water provision are expected to be “no fail” operations, it is more than unreasonable for governments to sign contracts for voting machines where the manufacturer, the party in the best position to know the capabilities of their machines, will not stand behind their products or even make the contractual claim that they will work, which is the minimum expected standard for every sale of goods in the United States of America, whether it is a mousetrap, a refrigerator or a gallon of paint.

Most importantly, this is not an “argument” we have about the vendors, it is a contractual provision that the vendors **INSIST** on and will refuse to do business without. The vendors themselves are saying this right in the contract. And they’re saying that they’re not promising anything.

In light of the above, it is worth asking, again and again, why the vendors won’t promise that the voting machines will be fit for normal use or for your county’s particular purpose, and how your local government could possibly agree to do business under these types of terms. It may well be that moving on to talk about any other point is moving to a weaker argument, so you may just want to insist on an answer to this question. Happy Hunting!

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§ 2-313. **Express Warranties** by Affirmation, Promise, Description, Sample.

(1) **Express warranties by the seller are created as follows:**

- (a) **Any affirmation of fact or promise** made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) **Any description of the goods** which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) **Any sample or model** which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) **It is not necessary to the creation of an express warranty that the seller use formal words such** as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Source: <http://www.law.cornell.edu/ucc/2/2-313.html>

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You may find a twist in your particular contract where the implied warranties are disclaimed, but a one or two year written warranty or service contract is in the contract nevertheless, or separately purchased. These are express warranties, covered by UCC 2-313 (see above). This does not get the voting machine vendors off the hook (see below).

Express Warranty. In UCC 2-313 reprinted above, you can see that express warranties can be created in surprising ways, including verbal statements and even samples or models, in addition to written express warranties. A description of goods is an express warranty in many cases that the goods will match that description. The most important parts are bolded in the excerpt above.

The presence of a short term warranty does not get them off the hook for the warranty disclaimer because at best the express warranty lasts only a short time and then terminates, even if the express warranty is a full and not the more usual limited warranty. The more typical limited one or two year warranty substitutes a lot of “swiss cheese” fine print where the manufacturer’s lawyers carefully limit coverage to those things that they know are more likely to be OK, and avoid covering the bigger risks. Alternatively, the express warranty will only cover parts but not labor, or covers the first thousand dollars of work but not the remainder, and so forth.

Disclaimers of implied warranties followed by limited express warranties are illegal under the federal law Magnuson Moss Warranty Act. The Magnuson Moss Warranty Act applies to consumer transactions only and prohibits requires that implied warranties not be disclaimed whenever an express warranty is offered or sold. This is based on several important reasons that, while they may or may not directly apply because this particular federal law is applicable to consumer purposes only, nevertheless point to the problems your local county SHOULD have with the voting machine contracts:

- (1) The disclaimer of the implied warranty wipes the warranty slate clean in terms of the basic promise that they voting machines will work, because the implied warranty is your basic catchall provision for major problems, while express warranties rarely equal this and often cover only small problems.
- (2) To the extent your county buys a warranty after the implied warranties are disclaimed, they are paying to get back a part of the basic implied warranty promise, but only a part of it, only for a short period of time, and without really being able to understand the full operation of the express warranty like a person can understand the common sense implied warranties of being “fit for their normal use” or Thus, if your county’s contract were deemed to be ‘for consumer purposes’ the disclaimer of implied warranties would violate federal law. The better view is that voting machine contracts are sales of goods but not sales of consumer goods, but in any case the combination of the implied warranty disclaimer and the express warranty, when that

occurs, is automatically a deceptive practice in consumer law, and it *possibly* may be deceptive in area of non-consumer sales of goods.

The bottom line is that the UCC clearly applies to voting machines contracts in all states, and Magnusson Moss Warranty Law at least applies by analogy in a political sense to allow certain observations to be made, even if it might not be held to apply directly. The vendors should not have the leverage to insist upon these kind of “no responsibility” terms where county or state governments pay over a hundred dollars an hour for service calls over and above the contract price by pointing out that “gee, we never said it would work we disclaimed any warranties”. Because the government should have enough bargaining power to insist on proper terms, your government is irresponsibly jeopardizing the public’s elections with these contract terms. On the other hand, if the vendors DO have the leverage to insist upon these kinds of disclaimers, then your local government is contracting elections away to a more powerful organization that your government is clearly unable to control and supervise, and this raises also the question of why the government is so weak and the vendor so relatively strong.

Hopefully the above is clear to you, but it all boils down to the idea that disclaimers of implied warranties mean that the vendors are refusing to promise that the machines will work, and that can’t be right for elections in “the world’s leading democracy”.

The “goal” in a very loose sense is to either stop ill –advised sales where there is no belief that the machines will perform that is backed up, or force that backup to become part of the contract such that if something does go wrong there is recourse for the taxpayers and not at taxpayers expense. Possibly this may exist in the form of an express warranty in a contract related document or a sales presentation or verbal statement by the vendors, so even in cases of disclaimers, there may be an express warranty that can be proceeded on. Express warranties can never be disclaimed because they’ve been made, expressly, and all warranties are to be construed to be consistent with each other and not to cancel each other out.

Some answers to some possible responses by officials or vendors are included below. Please check with your own state’s laws to find the particular title your UCC is in, and check for possible minor variations in the definitions of the implied warranties in your state.

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FREQUENTLY ASKED QUESTIONS (GOOD QUESTIONS TO ASK)

What do vendor purchase contracts look like and where do I get one?

You can see an example of a vendor contract by clicking on the contract link at the bottom of the page at www.votersunite.org/info/lehtolawsuit.asp (Sequoia contract). You can also request a copy of your state's contract through your local county elections department or possibly the secretary of state in your state, through your state's Freedom of Information Act law or Public Disclosure Act. In most states it is not legal to force you to use a particular form so a letter requesting a copy will likely do the trick.

What are some of the other issues that can be presented by purchase contracts?

The example contract stated in the link in the paragraph above also contains a provision in paragraph 37 that obligates the county to cooperate with Sequoia to resist any subpoena, lawsuit or public records request that a citizen may file "in any way concerning" their equipment. This and similar provisions basically constitute law (since contracts are "private law") intended to be enforceable in courts that requires the county governments to gang up with the vendors against their own citizens whenever they seek information about voting machines. The contracts usually also contain software licensing agreements as an Appendix or as a separate document where governments pay tens of thousands of dollars a year in ongoing licensing fees for software, without which the voting machines are useless because they are "proprietary." There will also be attempts to create confidentiality agreements whereby the government agrees to keep secrets from the citizens it is pledged to serve in favor of the corporation's interest. The contract will also attempt to prevent the government from looking into, testing, or otherwise getting too nosy with the software, or allowing citizens to test it without the approval of the vendor or in predefined ways that are easy to get around.

Why can't various limited testing that is done prove that the voting machines count fairly?

Computers can count to be sure, but they are just as happy to count wrongly when told to do that on election day as they are to count correctly the day before the election or in "parallel testing" on election day. They do as they are told. The concern is not that the computers can't count at all, the concern is the extremely high risk that the computers will be told to count wrongly when it really counts – on election day. All of the pre-election testing that is claimed by officials as buttressing the reliability of the machines is a façade at best: Nobody ever said computers were incapable of simple addition. Computers are, of course, incapable of simple addition performed visibly and transparently, because humans can't see or verify electrons on hard drives. Furthermore, any type of limited testing (and the testing is always the same or defined beforehand) is not a fair test, any more than telling the drug addict on which single day of the month they will have their urine test performed is a fair test of drug use for that month, or telling students what questions will be on the exam before it occurs. Testing, if it could ever

work, must be unlimited and in must be “surprise” testing where the methods of testing are not known in advance.

What other problems exist with voting machines and the contracts for them?

There are many. The privatize vote counting and take it away from the people. They create secret vote counting procedures under claims of “trade secrecy.” They are readily changed in terms of election results without leaving evidence, particularly by insiders trying to stay in power or sell elections to others. The vendors claim they are not subject to the Constitution, so privatization of elections downsizes our constitutional rights. It is not known why vendors refuse to perform the simple acts of addition needed for vote counting in public, or what’s secret about it since it must follow the state’s rules for vote counting and anything in addition to those rules would be impermissible “creative accounting.”

How do I find my state’s UCC?

It will usually have its own title in your state’s code. The UCC is divided into Titles 1 through 9 with a couple numbers skipped, but of interest to us is Title 2 on sales transactions.

Isn’t this just applicable to “consumer” transactions, and inapplicable to government contracts?

No. The UCC is fully applicable to government contracts when they involve sales of goods, because Title 2 of the UCC governs sales of goods, it is not a consumer law applicable only to consumer or personal transactions, it is rather a law of general applicability to sales of goods whether they be business, government and consumer transactions.

How do I find the implied warranties and the law of UCC disclaimers of them?

Once you find the Title or volume that governs UCC sales in your state, just add the last series of digits cited here in the form of 2-XXX to form the complete statute. UCC 2-314 covers implied warranties, UCC 2-316 covers the disclaimer of implied warranties.

Isn’t disclaiming warranties a “routine” term in contracts?

There are several responses to this statement (1) Elections are not “routine” they are subject to very high “fail safe” expectations but disclaimers head directly in the opposite direction of the public requirement (2) Disclaimers are fairly common especially with used car dealers in many states, (3) Even where it is not uncommon for parties with bargaining power to attempt to dictate unfair terms such as by disclaiming implied warranties without the buyer fully understanding what that in fact means, this kind of leverage should not be exerted against our elections, and vendors should not have this kind of leverage or power advantage over our government.

When are disclaimers properly used?

If one is indeed selling a defective or damaged good, a disclaimer would be appropriate together with price discounts of 50% or more that would occur in such situations. Assuming it could even be credibly maintained that elections should be operated under anything less than a performance guarantee by a vendor who stands behind its product and takes care of things when they go wrong without charging hundreds of dollars an hour, a price discount would typically apply when something is sold as is because a very significant risk is being taken on by the buyer.

Can I use this legal information in my own consumer purchases?

The Magnusson Moss Warranty Act definitely applies to consumers, and the UCC applies to consumers and everything else involving sales of goods. In some states there are restrictions in consumer sales that an “as is” sale can not happen unless the buyer and seller specifically negotiate with regard to the general defect in question, so that there is a chance for the price to be adjusted accordingly. In other states, even abusive “as is” disclaimers will be upheld. But in the case of voting machines, the arguments apply on the political level no matter what the legal effectiveness of the disclaimers happens to be. The point is that the vendors are stating, whether it is legally effective or not, that they will not promise that the voting machines will work, and that is incredibly bad public policy.

What if our vendor offers a full warranty?

In this so far unheard of case, the vendor would then be standing behind their product. Magnusson Moss Warranty Act requires that written warranties be either “full” or “limited”, and when they are “full warranties” they are required to be comprehensive. The full warranty should last for the life of the product, not just a few years, otherwise elections that are in the future are being endangered and/or the county budget is being endangered in the future after the warranty expires.