

# The California Song-Beverly Consumer Warranty Act: Overview

PRACTICAL LAW COMMERCIAL TRANSACTIONS,  
WITH KERRY W. FRANICH AND SCOTT J. HYMAN, SEVERSON & WERSON

Search the [Resource ID numbers in blue](#) on Westlaw for more.

**Practice Note giving an overview of California Song-Beverly Consumer Warranty Act (Song-Beverly Act) provisions applying to the sale of consumer goods in California. This Note discusses interaction of the Song-Beverly Act with the California Commercial Code (UCC), addresses the parties and transactions covered by the Song-Beverly Act, details warranty protections offered by the Song-Beverly Act to buyers of consumer goods, and outlines remedies established by the Song-Beverly Act for buyers of consumer goods.**

The California Song-Beverly Consumer Warranty Act (Song-Beverly Act) (Cal. Civ. Code, §§ 1790 to 1795.8) was enacted in 1970. The Song-Beverly Act:

- Puts in place mechanisms to ensure that buyers of consumer goods obtain the benefit of an express warranty given with the goods (see Service and Repair, Replacement, or Refund).
- Provides that every retail sale of consumer goods in California is accompanied by certain implied warranties and strictly limits how those warranties may be disclaimed (see Implied Warranties).
- Establishes for buyers of consumer goods damaged by a failure to comply with an obligation under the Song-Beverly Act or under an express or implied warranty remedies of:
  - damages;
  - equitable relief;
  - civil penalties; and
  - recovery of litigation costs and expenses, including attorneys' fees.
- (See Damages, Equitable Relief, Civil Penalties, and Costs and Expenses.)

For more information about consumer protection in the United States generally, see Practice Note, Consumer Protection: Overview ([5-575-0814](#)). For more information about the federal Magnuson-Moss Warranty Act, see Practice Note, The Magnuson-Moss Warranty Act for Consumer Goods ([0-581-0467](#)).

## THE CALIFORNIA SONG-BEVERLY CONSUMER WARRANTY ACT

The Song-Beverly Act provides different and more extensive protections to buyers of consumer goods than the California Commercial Code (UCC) (see, for example, *Jiagbogu v. Mercedes-Benz USA*, 118 Cal. App. 4th 1235, 1240 (2004)). The purpose of the Song-Beverly Act is to deliver to buyers of consumer goods the benefit of additional protections and it is construed by the courts to carry out this objective (see *Joyce v. Ford Motor Co.*, 198 Cal. App. 4th 1478, 1486 (2011)).

## THE SONG-BEVERLY ACT AND THE UCC

The Song-Beverly Act was intended to supplement rather than supersede the UCC, but where there is a conflict between the two, the Song-Beverly Act controls (Cal. Civ. Code § 1790.3 and see *Joyce*, 198 Cal. App. 4th at 1486 and *Jiagbogu*, 118 Cal. App. 4th at 1242).

For example, courts have held that the four-year statute of limitations of California Commercial Code Section 2725 (Section 2725) applies to actions for breach of warranty under the Song-Beverly Act, rather than the three-year statute of limitations of California Code of Civil Procedure § 338(a) for liability created by statute. Section 2725 specifically governs actions for breach of warranty in a sale of goods context, and the Song-Beverly Act supplements the UCC rather than superseding it. (*Krieger v. Nick Alexander Imports, Inc.*, 234 Cal. App. 3d 205, 215 (1991).)

On the other hand, courts have also held that UCC reasonable time requirements for a buyer's rightful rejection of goods, revocation of acceptance, and notice of breach (Cal. Com. Code §§ 2602(1), 2607(3), and 2608(2)) do not apply to actions under the Song-Beverly Act (see *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297, 1307 (2009)). For example, in *Krotin v. Porsche Cars North America, Inc.*, the court held that, in contrast to the UCC, the Song-Beverly Act does

not impose a similar reasonable time requirement for consumers to have the benefit of their rights under the statute (38 Cal. App. 4th 294, 301-02 (1995)).

Some federal district courts have declined to follow *Mexia* on the ground that it “renders meaningless any durational limits on implied warranties” (see *Marchante v. Sony Corp. of Am.*, 801 F. Supp. 2d 1013, 1022 (S.D. Cal. 2011) (*Mexia* is contrary to existing law) and *Daniel v. Ford Motor Co.*, 2013 WL 2474934, at \*8 (E.D. Cal. June 7, 2013).) However, *Mexia* has been followed by other California courts and by some federal courts (see *Donlen v. Ford Motor Co.*, 217 Cal. App. 4th 138, 149 (2013) and *Parenteau v. Gen. Motors, LLC*, 2015 WL 1020499, at \*11-12 (C.D. Cal. Mar. 5, 2015)).

## COVERAGE OF THE SONG-BEVERLY ACT

### CONSUMER GOODS

The Song-Beverly Act defines consumer goods as any new product or part of a product that is used, bought, or leased primarily for personal, family, or household purposes:

- Other than:
  - clothing (Cal. Civ. Code § 1791(c)); and
  - consumables (Cal. Civ. Code § 1791(d)).
- Including new and used assistive devices (see Assistive Devices: Express Warranty) sold at retail.

(Cal. Civ. Code § 1791(a).)

### PERSON

Under the Song-Beverly Act, a person is any individual, partnership, corporation, limited liability company, association, or other legal entity in the business of manufacturing, distributing, or selling consumer goods at retail (Cal. Civ. Code § 1791(b)).

### BUYER OR RETAIL BUYER

A buyer or retail buyer under the Song-Beverly Act is any individual who buys consumer goods from a person (Cal. Civ. Code § 1791(b) and see Person).

### RETAIL SELLER, SELLER, OR RETAILER

The Song-Beverly Act defines retail seller, seller, or retailer as any individual, partnership, corporation, association, or other legal relationship in the business of selling or leasing consumer goods to retail buyers (Cal. Civ. Code § 1791(l)).

### SALE

A sale under the Song-Beverly Act is either:

- The passing of title to the buyer from the seller for a price.
- A consignment for sale.

(Cal. Civ. Code § 1791(n).)

### SOLD IN CALIFORNIA

The Song-Beverly Act applies only to goods sold in California (Cal. Civ. Code §§ 1792, 1792.1, 1792.2, 1793.3, and 1793.6 and see, for example, *Cummins, Inc. v. Superior Court*, 36 Cal. 4th 478, 487 (2005)).

Courts have relied on California Commercial Code Section 2401 (Section 2401) in analyzing when title to consumer goods passes

from the seller to the buyer in California and the goods are therefore sold in California under the Song-Beverly Act (see Sale). Since the Song-Beverly Act supplements the UCC rather than superseding it, UCC provisions governing sales may properly be applied in the interpretation of Song-Beverly Act provisions unless there is a conflict between them (Cal. Civ. Code § 1790.3 and see The Song-Beverly Act and the UCC). Like the Song-Beverly Act, the UCC defines a sale as the passing of title to the buyer from the seller for a price (Cal. Com. Code § 2106(1)). Provisions clarifying when title passes under the UCC may also be used to elucidate the Song-Beverly Act. (See *California State Elecs. Assn. v. Zeos Int'l Ltd.*, 41 Cal. App. 4th 1270, 1275-76 (1996)).

Under Section 2401, unless the parties otherwise expressly agree, title passes to the buyer when and where the seller completes performance of the physical delivery of the goods, which is:

- At the time and place of shipment if the contract requires or authorizes the seller to send the goods to the buyer but **does not** require delivery at the destination.
- On tender at the destination if the contract requires delivery there.

(Cal. Com. Code § 2401(2).)

A contract requiring or authorizing shipment but not requiring delivery at the destination is a shipment contract. A contract requiring delivery at the destination is a delivery contract. The presumptive form of contract in California is the shipment contract. (Cal. Com. Code § 2503, official cmt. 5, and see *Gaynor v. W. Recreational Vehicles, Inc.*, 473 F. Supp. 2d 1060, 1062 (C.D. Cal. 2007).)

Applying Section 2401 in Song-Beverly Act decisions, courts scrutinize whether contract language requires:

- A non-California seller to deliver the goods to a California location, so that:
  - title passes to the buyer in California;
  - the goods are sold in California under the Song-Beverly Act; and
  - its provisions apply.
- (See, for example, *California State Elecs. Assn.*, 41 Cal. App. 4th at 1277 (the paperwork of a Minnesota manufacturer and mail-order distributor had no provision requiring delivery to buyers in California, the terms were shipment contracts, and title passed to California customers in Minnesota).)
- A California seller to deliver the goods to an out-of-state location, so that:
  - title passes to the buyer at that location and not in California;
  - the goods are not sold in California under the Song-Beverly Act; and
  - its provisions do not apply.
- (See, for example, *Gaynor*, 473 F. Supp. 2d at 1064 (where the contract did not require delivery to a specific location or that the vehicle be tendered in Arizona, the fact that the parties agreed to transport it to Arizona for tax purposes did not create a delivery contract, the contract was a shipment contract, and title passed to the buyer in California at the time and place of shipment).)

To avoid unintended results, parties should consider the shipment and delivery language in their sale of goods contracts, having in mind whether, under the rule of Section 2401 and in the

circumstances of the sale, the provisions of the Song-Beverly Act would or would not apply.

### UNAUTHORIZED OR UNREASONABLE USE OF GOODS

The provisions of the Song-Beverly Act do not apply if a defect in consumer goods is caused by unauthorized or unreasonable use of the goods after their sale (Cal. Civ. Code § 1794.3). Unauthorized or unreasonable use is an affirmative defense that a Song-Beverly Act defendant must allege and prove (*Jones v. Credit Auto Ctr., Inc.*, 237 Cal. App. 4th Supp. 1, 11 (2015)).

### EXPRESS WARRANTIES

Under the Song-Beverly Act, an express warranty is defined as:

- A written statement by the manufacturer, distributor, or retailer in a sale of a consumer good to a consumer, undertaking to:
  - preserve or maintain the utility or performance of the consumer good; or
  - provide compensation if there is a failure in utility or performance.
- If a sample or model is used, an affirmation that the whole of the goods conforms to the sample or model.

(Cal. Civ. Code § 1791.2(a).)

Formal words like “warrant” or “guarantee”:

- If used, create an express warranty.
- Are not necessary to create an express warranty.

(Cal. Civ. Code § 1791.2(b).)

An express warranty is not created by:

- An affirmation merely of the value of the goods.
- A statement that purports to be merely an opinion or commendation of the goods.
- Expressions of general policy about customer satisfaction which are not subject to any limitation.

(Cal. Civ. Code § 1791.2(b), (c) and see *Smith v. LG Elecs. U.S.A., Inc.*, 2014 WL 989742, at \*4 (N.D. Cal. Mar. 11, 2014) (to create a warranty, a statement must be specific and unequivocal, rather than a generalized and vague statement of opinion and sales puffery).)

Under the Song-Beverly Act, the right of manufacturers, distributors, and retailers to make express warranties about consumer goods is generally unaffected (Cal. Civ. Code § 1793). Express warranties are required for assistive devices (Cal. Civ. Code § 1793.02(a) and see Assistive Devices: Express Warranty) but not otherwise. However, if an express warranty is given:

- The manufacturer, distributor, or retailer may not limit, modify, or disclaim the **implied** warranties provided by the Song-Beverly Act for a sale of consumer goods (Cal. Civ. Code § 1793 and see Implied Warranties).
- For a consumer good accompanied by an express warranty, the Song-Beverly Act establishes responsibilities of:
  - service and repair;
  - replacement; or
  - refund.
- (See Service and Repair, Replacement, or Refund.)

Manufacturers, distributors, or retailers making express warranties for consumer goods must fully set out the warranties in language that:

- Is:
  - simple; and
  - readily understood.
- Clearly identifies the party making the express warranties.
- Conforms to the federal standards for disclosure of warranty terms and conditions in:
  - the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act; and
  - the Federal Trade Commission regulations adopted under that act.

(Cal. Civ. Code § 1793.1(a)(1) and for more information about the Magnuson-Moss Warranty Act, see Practice Note, The Magnuson-Moss Warranty Act for Consumer Goods ([0-581-0467](#)).)

If a manufacturer, distributor, or retailer provides a warranty or product registration card or form or an electronic warranty or product registration form to be completed and returned by the consumer, the card or form must contain statements that:

- Are each clearly and conspicuously displayed.
- Inform the consumer that:
  - the card or form is for product registration.
  - failure to complete and return the card or form does not diminish the consumer’s warranty rights.

(Cal. Civ. Code § 1793.1(a)(1).)

### ASSISTIVE DEVICES: EXPRESS WARRANTY

The Song-Beverly Act defines an assistive device as any instrument, apparatus, or contrivance (including any component or part of or accessory to the device) used or intended to be used to assist a disabled individual in either:

- The mitigation or treatment of:
  - an injury; or
  - a disease.
- The structure or a function of the body.

The term does not include prescription lenses and other ophthalmic goods unless they are sold or dispensed to a blind person and intended to assist the person’s limited vision. (Cal. Civ. Code § 1791(p).)

All new and used assistive devices sold at retail in California must have the retail seller’s written warranty, including required language:

- Warranting the device to be specifically fit for the particular needs of the buyer.
- Stating that if the device is not specifically fit for the buyer’s particular needs, it may be returned to the seller within 30 days (or a longer period specified by the retail seller) of the later of:
  - the buyer’s actual receipt of the device; or
  - completion of fitting by the seller.
- Stating that, if the device is returned, the seller will:
  - adjust or replace it; or
  - promptly refund the total amount paid.

- Stating that the warranty does not affect the buyer's protections and remedies under other laws.

(Cal. Civ. Code § 1793.02(a)(1).)

The warranty must be delivered to the buyer at the time of the sale (Cal. Civ. Code § 1793.02(b)). If the device is returned and the seller, instead of adjusting or replacing it to be specifically fit for the buyer's needs, refunds the amount paid, the transaction is rescinded and the seller:

- Must cancel all contracts executed by the buyer in connection with the sale.
- May not charge a penalty or other fee for the purchase, fitting, financing, or return of the device.

(Cal. Civ. Code § 1793.02(c).)

Under the Song-Beverly Act, the written warranty for assistive devices required under Civil Code Section 1793.02 **does not** constitute an express warranty for purposes of Civil Code Sections 1793.2 and 1793.3 (see Service and Repair, Replacement, or Refund) (Cal. Civ. Code § 1793.02(h)).

Under the Song-Beverly Act, every sale of an assistive device at retail in California also has the retail seller's **implied** warranty that the device is specifically fit for the particular needs of the buyer (Cal. Civ. Code § 1792.2(b) and see Assistive Devices: Implied Warranty). This implied warranty, the express warranty of Section 1793.02, and the associated rights and remedies are:

- Not subject to waiver.
- Cumulative with any other rights and remedies of the buyer.

(Cal. Civ. Code § 1793.02(f).)

## SERVICE AND REPAIR, REPLACEMENT, OR REFUND

### Manufacturer

When a manufacturer makes express warranties for consumer goods sold in California, the Song-Beverly Act requires the manufacturer either to maintain sufficient California service and repair facilities or to designate and authorize independent California facilities as service and repair facilities, both:

- Reasonably close to all areas where its consumer goods are sold.
- To carry out the terms of the warranties.

To meet this requirement, a manufacturer may enter into warranty service contracts with independent service and repair facilities (Cal. Civ. Code § 1793.2(a)(1)).

The manufacturer must make available to authorized service and repair facilities sufficient service literature and replacement parts to do the repairs during the express warranty period (Cal. Civ. Code § 1793.2(a)(3)).

The Song-Beverly Act also provides mechanisms for buyers to receive the information they need to identify locations where service and repair may be obtained (Cal. Civ. Code § 1793.1(e)).

The buyer must deliver nonconforming goods to the manufacturer's California service and repair facility unless delivery of the goods is not reasonably achievable for the buyer because of:

- The goods' size and weight.
- The goods' method of:

- attachment; or
- installation.

- The nature of the goods' nonconformity.

If the buyer is unable to return the nonconforming goods for one of these reasons, the buyer must notify either the manufacturer or its nearest California service and repair facility, and written notice of nonconformity constitutes return of the goods (Cal. Civ. Code § 1793.2(c)).

The manufacturer may then either:

- Service or repair the goods at the buyer's residence.
- Pick up the goods for service and repair.
- Arrange for transporting the goods to its service and repair facility.

When a buyer is unable to return the nonconforming goods for one of the specified reasons, all reasonable costs of transporting the goods are at the manufacturer's expense, as are reasonable transportation costs after delivery to the service and repair facility until return of the goods to the buyer (Cal. Civ. Code § 1793.2(c)).

When the manufacturer has California service and repair facilities and service or repair is needed because consumer goods do not conform to the manufacturer's express warranties:

- The work must be started within a reasonable time by the manufacturer or its California representative.
- The goods must be serviced or repaired to conform to the warranties within 30 days unless the buyer agrees otherwise in writing.

However, if there is a delay beyond the control of the manufacturer or its representative, the 30-day requirement is extended and conforming goods must be tendered as soon possible after the delay is resolved (Cal. Civ. Code § 1793.2(b)).

If the manufacturer or its California representative fails to conform consumer goods to the manufacturer's express warranties after a reasonable number of service or repair attempts, the manufacturer must generally either:

- Replace the goods.
- Reimburse the purchase price paid by the buyer, less the amount directly attributable to the buyer's use before discovery of the nonconformity.

(Cal. Civ. Code § 1793.2(d)(1).)

The Song-Beverly Act has similar provisions applying specifically to new motor vehicles (Cal. Civ. Code § 1793.2(d)(2)).

What qualifies as a reasonable number of repair attempts is a question of fact to be considered based on the particular circumstances, but:

- There must at a minimum be more than one opportunity to fix the nonconformity (see *Silvio v. Ford Motor Co.*, 109 Cal. App. 4th 1205, 1209 (2003)).
- Each occasion when an opportunity for repairs is provided counts as an attempt even if no repairs are actually done.
- The repair efforts of a manufacturer and its authorized repair facility are not treated separately, but are aggregated to calculate the number of repair attempts.

(*Robertson v. Fleetwood Travel Trailers of Cal., Inc.*, 144 Cal. App. 4th 785, 799 (2006).)

Other circumstances juries might consider include:

- How easy or difficult it is for a repair facility to duplicate a problem.
- How much detail a buyer gives in assisting the diagnostic process.
- Whether a repair facility has a protocol for gathering information needed to locate or duplicate a problem.
- Whether a buyer omits important information bearing on diagnosing or duplicating a problem.
- Whether a problem is a generic one with dozens of potential causes.
- Whether a manufacturer has published technical service bulletins on diagnosis and repair.

(Judge Ronald F. Frank, 39-NOV L.A. Law. 27, 30 (2016).)

### Retail Seller or Independent Facility

The Song-Beverly Act provides a buyer with other recourse if a manufacturer making an express warranty for consumer goods sold in California either does not:

- Have California service and repair facilities.
- Make available to authorized service and repair facilities sufficient service literature and replacement parts to do the repairs during the express warranty period.

(Cal. Civ. Code § 1793.3.)

The buyer may return the goods to:

- The retail seller who sold them.
- Any California retail seller of like goods from the same manufacturer.

(Cal. Civ. Code § 1793.3(a), (b).)

The retail seller must either:

- Service or repair the goods to conform to the express warranties given.
- Direct the buyer to an independent repair or service facility that is:
  - reasonably close; and
  - willing to accept the repair or service.
- Replace the goods with others that are:
  - identical; or
  - reasonably equivalent.
- Reimburse the purchase price paid by the buyer, less the amount directly attributable to the buyer's use before discovery of the nonconformity.

(Cal. Civ. Code § 1793.3(a), (b).)

As with return of nonconforming consumer goods to the manufacturer's service and repair facility, if a buyer is unable to return goods to the retailer because of size and weight, method of attachment or installation, or the nature of the nonconformity, the buyer must give notice to the retailer and written notice of nonconformity constitutes return of the goods. The retailer may service or repair the goods at the buyer's residence, pick up the goods for service or repair, or arrange for

transporting the goods to its business location. The retailer may recover from the manufacturer reasonable costs of transporting the goods:

- To the retailer's business location.
- After delivery to the retailer until return of the goods to the buyer.
- (Cal. Civ. Code §§ 1793.3(e) and 1793.5 and see Costs.)

A buyer may also go to an independent repair or service facility for repair or service of nonconforming goods, when:

- The buyer has first attempted to go to a retail seller for a resolution and this course of action has failed.
- The service or repair can be done economically.
- The wholesale price to the retailer of the consumer goods is at least \$50.

The manufacturer is liable for the actual and reasonable cost of the independent facility's service or repair. Any attempted waiver of the manufacturer's liability is void and unenforceable. (Cal. Civ. Code §§ 1793.3(c) and 1793.6 and see Costs.)

A manufacturer of consumer goods must provide written notice to the buyer of the buyer's retail seller and independent repair or service facility options for nonconforming goods when:

- The manufacturer makes express warranties for the goods.
- The goods have a wholesale price to the retailer of at least \$50.

(Cal. Civ. Code § 1793.3(f).)

### Costs

When a manufacturer makes express warranties for consumer goods sold in California and does not have California service and repair facilities as provided in Civil Code Section 1793.2(a) (see Manufacturer), the manufacturer is liable to retail sellers of the goods who incur costs to give effect to the manufacturer's warranties. The manufacturer's liability to retail sellers is:

- For service and repair of nonconforming goods, the amount that would be received by the retail seller for similar services to retail customers **not** under warranty protection, including:
  - actual and reasonable costs of the service and repair;
  - transportation costs for the goods, if applicable; and
  - a reasonable profit.
- For replacement of nonconforming goods:
  - the actual cost to the retail seller of the replaced goods;
  - transportation costs for the goods, if applicable; and
  - a reasonable handling charge.
- For reimbursement of the buyer:
  - the amount reimbursed; and
  - a reasonable handling charge.

(Cal. Civ. Code § 1793.5.)

Similarly, a manufacturer who gives express warranties for consumer goods sold in California is liable to independent service providers for their services and costs in giving effect to the warranties, whether the service provider is:

- An authorized service and repair facility designated by the manufacturer under Civil Code Section 1793.2.



- An independent service and repair facility providing services to a buyer under Civil Code Section 1793.3.

The amount of the manufacturer's liability (except as otherwise provided in a warranty service contract under Civil Code Section 1793.2) is the actual and reasonable costs of the service and repair, including any parts, any transportation costs for the goods or for parts, and a reasonable profit. (Cal. Civ. Code § 1793.6 and see *Manufacturer and Retail Seller* or *Independent Facility*.)

## IMPLIED WARRANTIES

The Song-Beverly Act provides that every retail sale of consumer goods in California is accompanied by:

- The manufacturer's and retail seller's implied warranty that the goods are merchantable. However, the retail seller has a right of indemnity against the manufacturer for the amount of any related liability.
- The manufacturer's, distributor's, or retailer's implied warranty of fitness for a particular purpose when the manufacturer, distributor, or retailer has reason to know at the time of the sale that:
  - the goods are required for a particular purpose; and
  - the buyer is relying on the manufacturer's, distributor's, or retailer's skill or judgment to select or furnish suitable goods.

(Cal. Civ. Code §§ 1792, 1792.1, and 1792.2.)

The duration of the implied warranties of merchantability and, if applicable, fitness for a particular purpose is:

- The same as the duration of any express warranty accompanying the goods, if reasonable, but never less than 60 days or more than a year following the sale of new consumer goods to a retail buyer.
- One year, if no duration is stated for an express warranty.

(Cal. Civ. Code § 1791.1(c).)

## IMPLIED WARRANTY OF MERCHANTABILITY

Under the Song-Beverly Act, the implied warranty of merchantability means that the consumer goods:

- Pass without objection in the trade under the contract description.
- Are fit for the ordinary purposes for which they are used.
- Are adequately;
  - contained;
  - packaged; and
  - labeled.
- Conform to the promises or affirmations of fact on the container or label.

(Cal. Civ. Code § 1791.1(a).)

California courts have held that the core test of merchantability is fitness for the ordinary purposes for which the goods are used, and this test is met if the product is both:

- In safe condition.
- Substantially free of defects.

(See, for example, *Mexia*, 174 Cal. App. 4th at 1303 and *Music Acceptance Corp. v. Lofing*, 32 Cal. App. 4th 610, 619 (1995) (breach

of implied warranty of merchantability where a piano was "virtually unplayable").)

## IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

The implied warranty of fitness means that consumer goods will be fit for a particular purpose when a manufacturer, distributor, or retailer has reason to know that:

- The goods are required for a particular purpose.
- The buyer is relying on the skill and judgment of the seller to select and furnish suitable goods.

(Cal. Civ. Code § 1791.1(b).)

## ASSISTIVE DEVICES: IMPLIED WARRANTY

The Song-Beverly Act provides that, when an assistive device is sold at retail in California, there is an implied warranty by the retailer that the device is specifically fit for the particular needs of the buyer (Cal. Civ. Code § 1791.1(b) and see *Assistive Devices: Express Warranty*).

## DISCLAIMER

The Song-Beverly Act implied warranties of merchantability and, if applicable, fitness for a particular purpose generally cannot be waived. Only a sale of consumer goods on an "as is" or "with all faults" basis, strictly complying with the relevant Song-Beverly Act provisions, constitutes a waiver by the buyer. (Cal. Civ. Code §§ 1792.3 and 1792.5.) A sale "as is" or "with all faults" means that the manufacturer, distributor, and retailer disclaim all implied warranties that would otherwise attach to the sale of consumer goods under the Song-Beverly Act (Cal. Civ. Code § 1791.3).

For an effective disclaimer, a conspicuous writing must be attached to the goods clearly informing the buyer in simple and concise language prior to the sale that:

- The goods are being sold on an "as is" or "with all faults" basis.
- The buyer has the entire risk as to the goods':
  - quality; and
  - performance.
- If the goods prove defective after the purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary:
  - servicing; or
  - repair.

(Cal. Civ. Code § 1792.4(a).)

In a sale of consumer goods by mail order catalog, the catalog must contain the required writing for each item offered "as is" or "with all faults" (Cal. Civ. Code § 1792.4(b)).

## DAMAGES, EQUITABLE RELIEF, CIVIL PENALTIES, AND COSTS AND EXPENSES

A buyer of consumer goods who is damaged by a failure to comply with an obligation under the Song-Beverly Act or under an express or implied warranty may bring an action for both:

- Recovery of damages.
- Other legal and equitable relief.

(Cal. Civ. Code § 1794(a).)

The buyer's measure of damages under Civil Code Section 1794 includes:

- The rights of replacement or reimbursement under Civil Code 1793.2(d) (see Manufacturer).
- California Commercial Code Sections 2711, 2712, and 2713 when the buyer has:
  - rightfully rejected or justifiably revoked acceptance of the goods; or
  - exercised any right to cancel the sale.
- California Commercial Code Sections 2714 and 2715 when the buyer has accepted the goods, and the measure of damages includes the cost of repairs necessary to make the goods conform.

(Cal. Civ. Code § 1794(b).)

The judgment may also include a civil penalty up to twice the amount of actual damages if:

- The buyer demonstrates that the failure to comply was willful.
- The claim is not based solely on a breach of an implied warranty.

(Cal. Civ. Code § 1794(c).)

For example, a manufacturer's breach of warranty was willful where the manufacturer refused to make the buyer of a mobile home whole after:

- The buyer complained of the home's defective condition.
- The manufacturer:
  - employed a qualified and respected engineering company to test the home;
  - the company's report established the home's defective condition; and
  - the manufacturer concealed the report.

(*Troensegaard v. Silvercrest Indus., Inc.*, 175 Cal. App. 3d 218, 226 (1985).)

When a buyer prevails in an action under Civil Code Section 1794, the buyer may recover as part of the judgment costs and expenses that the court determines were reasonably incurred by the buyer in bringing and pursuing the action, including attorneys' fees based on actual time expended (Cal. Civ. Code § 1794(d)).

California courts have noted that the Song-Beverly Act's provision for recovery of costs and attorneys' fees supports its consumer protection goals by permitting consumers to seek a remedy when they would not otherwise be financially able to do so (*Wohlgemuth v. Caterpillar Inc.*, 207 Cal. App. 4th 1252, 1262 (2012) (the buyers' acceptance of the manufacturer's offer to compromise and voluntary dismissal of their action did not prevent them from being the prevailing parties under the Song-Beverly Act's attorney fee provision, when the manufacturer's offer did not address recovery of attorneys' fees and the buyers were the party with a net monetary recovery); see also *Robertson*, 144 Cal. App. 4th at 817).

In practice, a prevailing buyer's remedies against certain defendants may be limited by the FTC Holder Rule, which requires that the following notice be given to consumers in every consumer installment sales contract:

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

(16 C.F.R. § 433.2; see also *Lafferty v. Wells Fargo Bank, N.A.*, 25 Cal. App. 5th 398, 422-23 (2018) (limiting the plaintiff's recovery against the holder of the contract to the amount paid under the contract).)

However, in July 2019, the Governor of California approved new Civil Code Section 1459.5, which the State Assembly and Senate earlier passed (see California Legislative Information: AB-1821 Contracts). Section 1459.5 provides that a plaintiff who prevails on a cause of action against a defendant named pursuant to the FTC Holder Rule may, to the fullest extent permissible if the plaintiff had prevailed on that cause of action against the seller, claim from that defendant:

- Attorney's fees.
- Costs.
- Expenses.

It is not yet clear how courts will interpret Section 1459.5 and its effect on the *Lafferty* decision.

For more information about the FTC Holder Rule, see 1 Com. Asset-Based Fin. § 4:33.

## CUMULATIVE REMEDIES

Under the Song-Beverly Act, the remedies that it provides are:

- Cumulative.
- Not to be construed to:
  - restrict any remedy that is otherwise available; or
  - supplant the provisions of the California Unfair Practices Act (Cal. Bus. & Prof. Code §§ 17000 to 17101), in particular.

(Cal. Civ. Code § 1790.4.)

### ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at [legalsolutions.com/practical-law](https://legalsolutions.com/practical-law). For more information or to schedule training, call **1-800-733-2889** or e-mail [referenceattorneys@tr.com](mailto:referenceattorneys@tr.com).