

Question MPT 2 - July 2023 - Selected Answer 1

***** MPT 2 STARTS HERE *****

Mr. Anthony Martin

July 25, 2023

Law Offices of Bradley Wilson

2405 Main Street

Creedence, Franklin 33805

Dear Mr. Martin,

I hope this letter finds you well since you last spoke with our firm about your potential legal claims. Mr. Wilson has asked me to address your questions about any possible legal rights you may have against "The Den Breeder's" owner Mr. Simon Shafer. I hope that the following explanations for each issue we have identified in your case help to address the questions you have and have brought before our firm. We look forward to hearing back from you and please do not hesitate to contact our office if you need any further explanation for any of these points.

You have several possible issues in your case, that primarily relate to your written contract with Mr. Shafer for the sale of Ash, and at your disposal you have two laws

that could provide you claims from which to sue, called the Franklin Pet Purchaser Protection Act (FPPPA) and the Uniform Commercial Code. We discuss each in turn based on how a court might analyze them in the same order. Because you entered into a private agreement, a court will look there first to try and enforce the contract you signed with Mr. Shafer before looking to any available claims you might have from the law.

Will the court hold you to your original contract you signed with Mr. Shafer?

The court will most likely not hold you bound to your contract with Mr. Shafer due to its poor drafting and unclear terms, at least not to allow you to pursue claims under relevant laws I outline later.

In Franklin, a court will first turn to the language of the contract you originally signed on June 12, 2023. Generally a court will try and give a lot of weight and validity to a private contract that two parties have agreed to. Since you provided this contract to us, we have been able to review the language and apply some legal understanding to some of the terms that a court will look to in decided your case.

A court will first look at whether or not there are any terms that are "ambiguous" on their face. This concept in contracts law simply means a that court wants to look at each word within the document and try to figure out what it means. If the court determines that it means what it says, and is clear, then they will do no further deciding about what it means. But, if a court finds that a certain word in a contract is unclear, then they will dig a bit deeper to determine what it means and what it should mean in the context of the whole contract.

In the case of any unclear words, the good news for your contract is that a court in Franklin must understand the contract *against* the person that prepared it, and here you did not prepare or have any say on the words of the contract, so a court would most likely find any unclear words in your favor, and not Mr. Shafer. Mr. Shafer gave you a "dog purchase agreement" to sign and that is the contract which we are talking about that a court will look to in your case.

There is a recent case from one of our higher courts here in the state of Franklin called *Cohen v. Dent* from the year 2020. In that case a person who was in a similar place such as yourself, sued a dog breeder for the same two claims you are wishing to pursue, the seller to give back the money for the dog and for the seller to pay for the surgery necessary to fix the dogs condition.

In that case, the court looked to three types of unclear terms in a contract between the buyer and seller that is very similar to your contract with Mr. Shafer.

First, the court looked to a "1-year remedy" term for a congenital condition that did not say when that one year started.

Second, the court looked to the lack of terms over who would pay for any remedies that the buyer could get under the contract.

Third, the court looked to the contract requiring test results, but did not say when those results needed to be provided exactly.

The court in *Cohen* held that the contract's own vague and uncertain terms and lacking of some the court would have liked to see led it to prevent the seller in that case from preventing the buyer's legal claims.

While your contract's terms do differ, there are some similarities between these vague terms in Cohen and your case.

Your contract on the one hand does state that your dog must not be older than one year, which is more defined than Cohen. But your contract also leaves out what happens after you contract the breeder within the 24 hour time frame, only that Mr. Shafer was then allowed to seek his own diagnosis. This lack of who will be paying for any possible surgery is the same type of lacking terms and uncertainty that the court was very hesitant to lean on in Cohen. Further, your contract only specifies that in the event of a serious illness, you may only get a replacement for the dog, which is pretty vague, since a court will want to know what a replacement would look like? Just

like in Cohen, without more definite terms to what a replacement is, its hard to say whether or not you would be getting your same value and companionship.

Additionally, while not addressed directly the court in *Cohen*, your contract does not define either of the disease terms, "serious illness" and "congenital defect." In Cohen the contract at least listed out examples of what would be included in a congenital defect, but with your contract its hard to tell what any of these words are supposed to mean. Bring that together with this idea that the illness must "prevent the dog from being a companion." A court could interpret that, any reasonable person could interpret that a variety of ways.

Therefore, in your case, a court would most likely find that your contract, similar to the one in *Cohen* was not drafted well and has uncertain terms. But, like I said above, a court will not hold that against you, but instead will allow you to pursue other claims, *in spite* of your private contract with Mr. Shafer.

Do you have any claims under the Franklin Pet Purchaser Protection Act (FPPPA)?

Yes, you do have claims for certain remedies under the FPPPA, such as getting Mr. Shafer to pay for Ash's surgery while also keeping Ash and not having to return him. However, you must take one important step in order to access these claims.

Under this Franklin law, the FPPPA provides you three possible claims against Mr. Shafer, but you must first do the following:

You MUST first have Dr. Turner sign a "Certification of Unfitness of Dog or Cat for purchase" very soon, because under that law it must be done within 180 days for a congenital defect. Sec. 753(a) of the law requires a licensed veterinarian do this, and it would be quite simple in your position since Dr. Turner already suggested in her email message you shared with us that she would do it.

If you successfully have Dr. Turner complete that action, then you could possibly have the following remedies at your disposal under FPPPA Sec. 753(b) I have put them in order with what I think your preference would be based on your desires you shared with our firm.

Subsec. (3) **Keep Ash and receive reimbursement** from Mr. Shafer for the veterinary services from a licensed vet or your choosing, for costs of Ash's surgery and post-operation treatment. Total : Keep Ash (priceless) + \$8,000 for surgery and + other expenses.

Subsec. (1) return Ash to Mr. Shafer and **receive a refund of the purchase price** and likely get taxes and reasonable veterinary costs from Dr. Turner's evaluation of Ash. Total: \$2,500 and whatever costs from Dr. Turner's eval.

Subsec. (2) return Ash to Mr. Shafer and receive a **replacement animal** of the purchaser's

choice of equivalent valuer and reasonable veterinary costs from Dr. Turner's evaluation of Ash.
Total: not quantifiable.

However, under Subsec. (c) of that same law, Mr. Shafer could contest your chosen remedy's amount or validity and has his own right under the law to choose a vet himself to look at Ash.

Under that case I mentioned earlier, *Cohen*, there the bulldog's owner wanted to keep the dog, (named Buddy), and get the cost of the surgery paid for by the seller. There the court made it clear that under FPPPA that owner had the right to seek the remedies above, but specifically that in making a contract with the breeder, the owner *did not waive* their rights to do so. They made this determination after looking at how ambiguous the contract was about remedies.

You made it pretty clear to us at the firm that you deeply care for Ash and want to see him in your life for a long time, and wish to care for him and have Mr. Shafer contribute to that care. As I stated earlier about your contract's terms, your remedies are pretty unclear and ambiguous too, even if different than the contract in *Cohen*, thus I do not believe the court would find your contract as a waiver of these FPPPA remedy rights either.

Here, the FPPPA gives you options and rights to try and get the outcome you want. But as stated above, you **MUST** have Dr. Turner fill out the proper certification form under Franklin Law.

If you need us to further look into or locate that form, I believe that could be arranged, but I will need to look into more myself if the firm can do that or not.

Do you have any claims under the Uniform Commercial Code (UCC)?

Outside of the specific Franklin state law of the FPPPA, there are broader claims for your contract/transaction you could bring under what's called the Uniform Commercial Code. In fact, the FPPPA has a specific provision that does not limit you to its rights/remedies only, so you most likely should look to other law such as the UCC for basis for more claims if possible.

The UCC is recognized in almost all states in the USA, and is the uniform laws we can look to involving disputes with contracts, like yours and Mr. Shafer's, that relate to what we call "goods" and most typically "merchants."

A good is simply a piece of personal property that is moveable. Courts in Franklin have routinely held dogs to be goods, so Ash would be a good.

A merchant is someone who deals in goods, typically of a certain kind. Courts in Franklin have routinely held that dog breeder is a merchant, so Mr. Shafer would be a merchant.

Under the UCC, merchants (Mr. Shafer) must comply with the what we call the "Implied Warranty of Merchantability." And a court will find this no matter what in every contract where someone is deemed to be a merchant. Thus, Mr. Shafer had a duty to comply with that warranty under the UCC. Under the UCC it is possible for your contract to stand in the way of these claims, but without getting too much into under Sec. 2-316, your contract language does not satisfy the express disclaimer of the warranty that that section requires.

So, you could potentially bring a claim *in breach* of that implied warranty. The implied warranty is breached when these are not met:

- (a) pass without objection in the trade under the contract description; and
- (c) are fit for the ordinary purposes for which such goods are used.

The case I mentioned earlier found that first one not passed when the Vet certified the dog as unfit for purchase. You could have the same result for that prong, so long as you are able to obtain such a certification. Just like in Cohen, your dog Ash was also not fit for the ordinary purpose of a dog, because where the Cohen's bulldog could not walk, run, or jump without pain, your dog Ash was not eating and would just lie there for hours, in your own words seeming depressed.

The only weakness to this claim is the existence of the case in Franklin of *Tarly v. Paradise* (Fr. Ct. App. 1995), where a person suing in breach of the implied warranty did not succeed where there was an explicit requirement in the buyer's contract that required examination to be made within 2 days of purchase, and where the defect "could have been revealed" in the examination if it had been sought. First, your contract does have a similar timeframe requirement that the court might hold you to after you discovered the congenital defect from Dr. Turner, but if you are held to it you likely complied within 24 hours since you called Mr. Shafer. Further, based on everything you gave us from Dr. Turner, it is our understanding that there is much scientific dispute with regards to Ash's specific congenital defect and how it is detectable/when it arises. Thus, Mr. Shafer would not be able to rely on *Tarly* as a good defense, since it is hard to find that this specific liver stent could have been found immediately, and there is no timeframe with which you have not complied.

You could also potentially bring a claim for damages under the UCC Sec. 2-714. Since you were the acceptor of a dog with a defect that you did not know about, Mr. Shafer most likely violated what is known as the "perfect tender rule" of a merchant of goods under the UCC. Mr. Shafer had a duty to give you the buyer a good that was conforming, here he did not since Ash does have a medical congenital condition. This will be considered a nonconforming good under Franklin Law as the case decided about dogs with certain problems in *Jackson v. Mistover Kennels* (Fr. Ct. App. 2005).

Under that section your damages you could possibly get from Mr. Shafer are the difference at time of your sale between the dog as you were promised ("warranted") and the actual dog you got. An older case in Franklin also held that you could technically get the whole price of the contract refunded if the court follows the assumption that "no buyer would agree to purchase an animal it knew to have a congenital defect. *Dalton v. Jackson* (Fr. Ct. App. 1997). This remedy would be right in line with what you were looking for.

However, you could possibly only get the full contract price refunded, if your claim for a breach of the implied warranty is deemed valid. In the Cohen case i mentioned earlier, a Franklin court can look to that greater refund remedy only in the specific circumstances of UCC Sec. 2-714(2), and not in a more generally applicable rule of UCC Sec. 2-714(1) the difference between the dog you expected and that dog you got.

Are there any potential next steps you could take right now without legal action?

Yes there are, you could always reach back out to Mr. Shafer prior to any legal actions taken by our office our any other legal representation, and try to work things out.

One of the first acts you should take is to have Dr. Turner sign a "Certification of Unfitness of Dog or Cat for purchase." In the *Cohen* case this fact was present and relied upon by the court. In Dr. Turner's email that you shared with us, she said that she would do so, and we think it would help your case tremendously as a starting point to have some bargaining power with Mr. Shafer as the plaintiff did in Cohen.

While I discussed the defects in your contract, it is still a legally binding contract on its face, and perhaps you and Mr. Shafer could still work things under its terms. While that seems unlikely, it is an option.

Regardless, as stated above, you MUST do this under the FPPPA in order to make some of your claims arise.

I hope you found this letter to better your understanding at the law at play in your situation and how a court might interpret them. As I said please reach out if anything in this advice is not clear as I am more than willing to assist you.

Sincerely,

/s/ _____

Examinee

Junior Associate

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July 25, 2013

Dear Mr. Martin,

In accordance with our discussion on June 24, this letter lays out your potential claims against Simon Shafer and his organization, The Den Breeder, regarding the dog, Ash, you recently purchased from him. You asked us to advise you concerning three questions: (1) whether you can keep Ash, (2) whether you can seek a refund from Shafer for the cost of Ash, and (3) whether you can compel Shafer to pay for Ash's surgery. This letter addresses each question, but first, we must determine whether the contract you signed with Shafer prevents you from seeking these remedies.

1. Does the contract you signed with Shafer prevent you from securing the remedies you seek?

Short Answer: No. While unambiguous contracts generally govern disputes between those private parties that enter them, this is not necessarily true when the relevant provision of the contract is ambiguous. *Cohen*. Because we believe that the provision related to your remedies for congenital defects is ambiguous, we believe that the contract does not prevent you from seeking such remedies under other applicable laws.

Explanation:

In general, unambiguous contracts determine the answer to disputes between the private parties that enter them, unless they conflict with relevant statutes. *Cohen*. But when a contract includes ambiguous terms, the first task is to resolve those ambiguities, in part by relying on those same statutes. *Id.* In addition, courts interpret contracts most strongly against the party who prepared it, and favorably towards those who merely sign them. *Id.*

For example, in *Cohen*, the buyer was also seeking a refund and payment from a breeder when they realized their dog suffered from hip dysplasia. The court ultimately rejected the breeder's argument that the contract involved prevented the buyer from recovering these payments because it found that the contract was ambiguous on these issues, as it failed to explain the details of a one-year remedy for congenital conditions, such as whether the buyer could obtain refunds or other monetary damages. *Cohen*. Thus, the court allowed the buyer to seek remedies under the Uniform Commercial Code (UCC) and the Franklin Pet Purchaser Protection Act

(FPPPA).

Although the contract the buyer signed in *Cohen* was simpler than your contract with Shafer, we believe you have a strong argument that the relevant language is too ambiguous to prevent you from bringing your claim. Your contract with Shafer details the remedies available if it is determined that the dog suffers a serious disease clearly attributable to Shafer--namely, returning the dog and getting a replacement. But with regard to congenital defects, the contract seems to create a separate remedy--namely, that if the dog is less than one year old, you can return the dog upon discovery of a congenital defect provided you notify Shafer within 24 hours of diagnosis. The contract says nothing more on the subject, however; it is unclear what happens if you notify Breeder in accordance with this requirement, and thus unclear to you what benefit you would receive from such a notification. Furthermore, construing the agreement against Shafer, as the law requires, this failure to detail the remedies available to you if you notified Shafer within 24 hours would prevent you from having any reason to comply.

We therefore conclude that the agreement between you and Shafer is too ambiguous to determine whether you should be allowed to pursue the remedies you are seeking, and that the UCC and the FPPPA will govern these questions instead.

2. Can you keep Ash?

Short Answer: Yes. Both the UCC and the FPPPA allow a buyer of an unhealthy pet to keep their pet. However, the statute under which you choose to seek this remedy will determine whether you can keep Ash, have your money refunded, and get paid for the costs of Ash's surgery.

Explanation:

Both the UCC and the FPPPA are relevant in determining whether you can seek a refund from Shafer, as the FPPPA specifically states that no remedy it includes limits the rights or remedies otherwise available to you under other laws. FPPPA s. 753(d).

Under the FPPPA, a buyer has a remedy against a pet seller if a veterinarian certifies that the pet is "unfit for purchase due to a congenital malformation" within 180 calendar days of the purchase of the animal. FPPPA s. 753(a)(2). One such remedy available in these circumstances is to return the animal and receive a refund of the purchase price. *Id.* s. 753(b)(1). Alternatively, a buyer can keep the pet and receive reimbursement from the pet seller for veterinary services performed to cure the animal of the defect. *Id.* s. 753(b)(3).

Under the UCC--which, though technically only applicable to "goods," also applies to dogs--buyers may keep goods that are determined to be "nonconforming." UCC s. 2-714(1). A dog is nonconforming if, for example, the buyer does not get the "healthy dog" they bargained for. *Cohen*. However, the remedy available when a buyer keeps an unhealthy dog is limited to damages that result from the seller's breach, provided that those damages are reasonable. UCC s. 2-714(1). There are broader remedies available, however, if a seller breaches a warranty.

Here, it is clear that both the FPPPA and the UCC would allow you to keep Ash. Under the FPPPA, you secured the veterinarian's opinion that Ash had a congenital defect within 180 days of purchasing Ash, and the veterinarian agreed to sign a form certifying that opinion. Thus, you may take advantage of the remedy available under the FPPPA of keeping Ash and seeking payment for veterinary services, as discussed below. However, this would not allow you to recover a refund.

Under the UCC, you could also keep Ash; but in contrast to the FPPPA, it is unlikely that you could recover either a refund or the cost of veterinary services, unless we can demonstrate that Ash's illness is Shafer's fault (or, as discussed further below, that Shafer breached a warranty). In this instance, even if we could show that Ash's illness was Shafer's fault, it is unlikely that we could demonstrate that securing the full payment of veterinary services is reasonable, since Ash's surgery costs over three times what you paid for her.

Thus, while it is clear that you can keep Ash under either the FPPPA or the UCC, we need to determine which statute offers you the best option to both keep Ash and obtain the monetary damages you seek.

3. Can you seek a refund from Shafer?

Short Answer: Yes. The UCC permits an animal buyer to recover the purchase price of an animal if they demonstrate that the seller breached the warranty of merchantability, which is implied in most contracts between a pet breeder and a seller unless disclaimed. We conclude that Shafer did not disclaim the warranty, that Ash's liver shunt constitutes a breach, and therefore, that you can recover Ash's full purchase price.

Explanation:

As discussed above, the FPPPA allows a buyer of a pet with a congenital defect to return the animal and receive a refund of the purchase price. *Id.* s. 753(b)(1). Alternatively, a buyer can keep the pet and receive reimbursement from the pet seller for veterinary services performed to cure the animal of the defect. *Id.* s. 753(b)(3). However, the FPPPA does not permit both keeping the pet and receiving a refund, as you wish to do. Thus, we must rely on the UCC.

Under the UCC, buyers of pets may seek a full refund of the purchase price of an animal if they can show that a buyer breached an applicable warranty by, for example, selling a pet with a congenital defect. *Cohen*. This is because it is assumed that no buyer would agree to purchase an animal it knew to have a congenital defect that might require expensive surgery to correct. *Dalton*. If a buyer can demonstrate such a breach, they can recover the full purchase price of the animal under UCC 2-714(2), while still keeping the animal. *See Cohen*.

But before showing breach, the buyer must show that the pet seller conveyed a warranty to the buyer guaranteeing that the pet would be healthy. *Cohen*. Such a remedy, termed the "implied warranty of merchantability," is generally present whenever the seller is considered a "merchant" in the pet trade, as Shafer would be, and ensures that the pet sold is "fit for the ordinary purposes for which" the pet is used--namely, a pet that is healthy and remains alive. *See Dalton*. However, under certain circumstances, this warranty is waived. Waiver may occur when (1) a

contract specifically states that warranties are excluded because it uses expressions, such as "with all faults," that are commonly understood to mean that warranties are excluded, and (2) a buyer has an opportunity to examine the pet before purchasing it and either does so, or refuses to do so. UCC s. 2-316(3)(b). For example, where a buyer of a cat failed to have her cat examined within 2 days of purchase, as her contract required, the court held that there was no implied warranty because a prompt examination would have revealed the condition from which the cat suffered. *Tarly*.

Here, the contract you and Shafer entered is ambiguous with regards to warranties. It does warn that all dogs have the potential for a congenital defect, and that such diseases cannot always be eliminated; however, it also states that Shafer tries to minimize such defects, and that to the best of Shafer's knowledge, Ash was in good health at the time of sale. This suggests that the contract does not explicitly disclaim the warranty of merchantability. And, while the contract further requires that you take a dog to a veterinarian if it shows signs of a serious disease--a condition with which you complied--there is substantial reason to believe that a liver shunt would not have been revealed to a veterinarian who examined Ash at an early age, including at the time of purchase. Indeed, most specialists believe it prudent to delay such tests until 16 weeks of age, as the illness may not show up before then. This distinguishes your case from *Tarly*, where a more prompt examination would have revealed the heart condition that rendered the buyer's cat unhealthy.

For these reasons, we believe that Shafer did not properly disclaim the warranty of merchantability. Further, because you discovered Ash's health defect as soon as you could, as the liver shunt would not have shown up at an earlier examination, we believe you can demonstrate that Shafer breached the warranty. As a result, it is likely that you can recover the full purchase price of Ash under the UCC.

4. Can you compel Shafer to pay for Ash's surgery?

Short Answer: Yes. The FPPPA specifically contains a provision that allows buyers of pets with a congenital defect, per a veterinarian's opinion made within 180 days of purchase, to keep the pet and recover the costs of curing the defect. FPPPA s. 753(b)(3). We believe this opinion applies to you.

Explanation:

As discussed above, the FPPPA allows a buyer to keep a pet with a congenital defect and receive reimbursement from the pet seller for veterinary services performed to cure the animal of the defect. FPPPA s. 753(b)(3). This remedy is available when a veterinarian certifies that the pet is "unfit for purchase due to a congenital malformation" within 180 calendar days of the purchase of the animal. FPPPA s. 753(a)(2). Further, the FPPPA is not an exclusive remedy; rather, individuals can seek remedies under both the FPPPA and the UCC because the FPPPA does not limit the rights or remedies available to anyone who takes advantage of it. *Id.* s. 753(d). Indeed, in *Cohen*, the court concluded that a pet buyer was at the very least allowed to keep their pet and to request that the seller pay the cost of surgery necessary to correct the defect they suffered under the FPPPA.

Here, you have satisfied the requirements of the FPPPA. You discovered the congenital defect within 180 days of purchasing Ash, and your veterinarian has agreed to sign an opinion to that

effect. Thus, one remedy available to you is to keep Ash and demand that Shafer pay the cost of curing her defect--including the \$8,000 cost of her surgery.

Therefore, the FPPPA will allow you to keep Ash and demand that Shafer pay Ash's veterinary costs.

Conclusion

In sum, we believe that the FPPPA and the UCC govern this dispute because your contract with Shafer was ambiguous with respect to remedies for congenital defects. Both laws allow you to keep Ash. Further, because Shafer breached the implied warranty of merchantability, you can recover the costs of purchasing Ash from Shafer under the UCC. And, because you satisfy the requirements of the FPPPA, you can likely demand that Shafer pay the veterinary costs of curing Ash's defect, as well.

Please do not hesitate to contact us should you have any questions.

Sincerely,

Bradley Wilson

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