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Rescission of an Auto Sale Under the Uniform Commercial Code -- How to Get Rid of a Four-Wheeled Lemon

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The court accomplished this without becoming embroiled in the academic controversy over the res judicata effects to be accorded internationally foreign judgments, a controversy which seems destined to confuse, rather than clarify an already difficult concept.

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RESCISSION OF AN AUTO SALE UNDER THE UNIFORM COMMERCIAL CODE—HOW TO GET RID OF A FOUR-WHEELED LEMON

Plaintiff purchased a new 1970 Jaguar automobile from defendant dealer. Express warranties were made in the sales contract and the warranty booklet, both of which were given to plaintiff upon delivery of the vehicle. The booklet additionally disclaimed any warranty not specifically mentioned and limited plaintiff's remedies to the repair or replacement of defects. Both the disclaimer and limitation clauses were in the same size, style, color, and print as the remaining portions of the booklet. Problems in the steering, air conditioning, and doors developed almost immediately. The vehicle also developed a tendency to stop for no apparent reason. After three months, during which defendant had possession for repair purposes for approximately fifty percent of the time, plaintiff sued for rescission, or alternatively, for damages for breach of the implied warranty of merchantability. The trial court ordered defendant to transfer to plaintiff a new 1970 Jaguar with equipment comparable to that of the non-conforming vehicle. When compliance with this order was found to be impossible,[1] an amended final judgment was then entered, awarding damages of $6,500.00, the market value of the car on that date. Since the original price of the vehicle was $7,676.00, plaintiff was forced to bear the depreciation loss of $1,176.00. Defendant appealed, and plaintiff cross-appealed on the depreciation assessment. The District Court of Appeal, Third District, *held*, affirmed: The limitations and disclaimers were ineffective, rescission was proper, but plaintiff must bear the depreciation. *Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc.*, 258 So.2d 319 (Fla. 3d Dist. 1972).

The decision in the instant case turned substantially on interpretations of various sections of the Uniform Commercial Code,[2] which has been adopted in all jurisdictions except Louisiana.[3] *Dade County Dairies* presented a case of first impression for Florida in dealing with

1. The action did not come to trial until the latter part of 1971, and vehicles which could comply with the court's order were unavailable.

2. Hereinafter referred to as the "Code."

3. Florida was one of the last states to do so, adopting the Code on Jan. 1, 1967. *See* FLA. STAT. § 680.101 (1971).

express warranties, implied warranties, rescission, and limitation of remedies under the Code.

At common law, parties to a contract were competent to provide an exclusive remedy for its breach.[4] This rule, however, was eroded by a recent line of consumer-oriented decisions.[5] The trial court in *Dade County Dairies* had held the attempted limitation of the remedy to be effective,[6] but gave plaintiff relief through an extremely broad construction of that clause. The same result was reached on appeal, but through an entirely different approach. The appellate court held the limitation of the remedy clause to be ineffective because the limitation was not conspicuous.

No section of the Code requires that limitations of remedies be made in a conspicuous manner. The one part of the Code that controls attempted limitations of this type is the unconscionability section.[7] *Henningsen v. Bloomfield Motors, Inc.*,[8] involved a limitations of remedies clause that, as in *Dade County Dairies*, limited remedies to replacement or repair of parts. In holding that limitation to be unconscionable, and thus inoperative, the court noted that in an adhesion contract the misuse of a superior bargaining position results in an agreement that more closely resembles a law than a contract. The Code, in adopting the reasoning of *Henningsen*, thus provides a check on the power to limit remedies through the requisite of conscionability. The *Dade County Dairies* court, however, in declining —or neglecting—to make use of the safeguard of the unconscionability provisions, has added a new dimension to Florida's version of the Code. In measuring the attempted limitation by the standard required to dis-

4. *See, e.g.*, Tucker v. Traylor Eng'r. & Mfg. Co., 48 F.2d 783 (10th Cir. 1931); D'Arcy Spring Co. v. Ansin, 196 Ind. 98, 146 N.E. 214 (1925).

5. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1959).

6. The warranty provided, in part, as follows:

> Subject to the condition of sale . . . and the limitations herein contained, BMH (USA) Inc. . . . warrants to the purchase of goods from a distributor/dealer for a period of twelve months or 12,000 miles, whichever first occurs after the date on which the goods are purchased by the license user thereof, *that it will exchange or repair any part in need of replacement or repair by reason of defective material or workmanship in manufacture.* . . .
>
> Exclusion of other express or implied warranties and personal injury claims; this warranty is given in lieu of all warranties, conditions and liabilities whatsoever given by BMH (USA) Inc., its servants or agents or implied by common law statute or otherwise.

Orange Motors, Inc. v. Dade County Dairies, Inc., 258 So.2d 319, 320 (Fla. 3d Dist. 1972) (emphasis added).

7. . . . It is of the very essence of a sales contract that at least a minimum of adequate remedies be available. If the parties intend to conclude a contract for sale within this Article, they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause never existed.

UNIFORM COMMERCIAL CODE § 2-719, Comment 1; FLA. STAT. § 672.719 (1971). *See also* UNIFORM COMMERCIAL CODE § 2-302; FLA. STAT. § 672.302 (1971).

8. 32 N.J. 358, 161 A.2d 69 (1959) [hereinafter cited as *Henningsen*].

claim warranties,[9] the court has created an additional avenue of attack for disgruntled consumers.

The court followed the language of the Code more closely in dealing with the attempt to disclaim warranties. In holding that this disclaimer was ineffective because it was not conspicuous, the court precisely followed the Code.[10] Additionally, the court hinted that even if the disclaimers had been effective, rescission might still have been proper since the vendor does not have an unlimited time to make the vehicle meet the standards of the remaining warranties:

> The buyer of an automobile is not bound to permit the seller to tinker with the article indefinitely in the hope that it may ultimately be made to comply with the warranty. . . . At some point in time, if major problems continue to plague the automobile, it must become obvious to all people that a particular vehicle simply cannot be repaired or parts replaced so that the same is made free from defect.[11]

The court in *Dade County Dairies* thus properly treated the warranties that it considered; however, the court did not pass upon another warranty that appeared from the evidence. The plaintiff had driven a model prior to his purchase; in addition, the defendant employed various advertising techniques and made certain affirmations as to quality. The use of a model, if it becomes part of the basis of the bargain, creates an express warranty that the goods will conform.[12] The affirmations, if more than mere "puffing," would also create express warranties.[13]

Under strict Code parlance, revocation of acceptance, rather than rescission, is the proper label for the initial relief granted in *Dade County*

9. UNIFORM COMMERCIAL CODE § 2-316(2); FLA. STAT. § 672.316 (1971) provides that any written exclusion or modification of the implied warranty of merchantability, and any exclusion or modification of an implied warranty of fitness, must be conspicuous.

10. *Id.*

11. Orange Motors, Inc. v. Dade County Dairies, Inc., 258 So.2d 319, 321 (Fla. 3d Dist. 1972).

12. *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.

UNIFORM COMMERCIAL CODE § 2-313; FLA. STAT. § 672.313 (1971).

13. *Id.*

Dairies. The term "rescission" was intentionally omitted from the Code to avoid ambiguities of interpretations.[14] In a Code state, acceptance of a new automobile may be revoked when the purchaser does not receive the item for which he bargained—a new car with new factory parts which operates as represented.[15]

Under the Code, revocation of acceptance can only be made effective if certain distinct elements are present. The non-conformity cannot be trivial.[16] Triviality is determined by the effect of the defect upon the intended use of the goods.[17] Seasonable notice of the revocation must be given to the seller.[18] In certain circumstances, the buyer must afford the seller a reasonable opportunity to cure the defects before revocation can be effective.[19] In *Dade County Dairies*, the purchaser was afraid to drive the vehicle, and since opportunity to cure had been afforded, the court could well have awarded the proper Code remedy by finding a revocation of acceptance.

In addition to its formulation of a new requirement for a proper limitation of remedy, the court also deviated from the Code by assessing the depreciation against the plaintiff. Section 2-608(3) of the Code provides that "a buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them."[20] Had

14. UNIFORM COMMERCIAL CODE § 2-608, Comment 1; FLA. STAT. § 672.608 (1971).

15. Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968).

16. Revocation of acceptance is possible only where the non-conformity substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.

UNIFORM COMMERCIAL CODE § 2-608, Comment 2; FLA. STAT. § 672.608 (1971).

17. Campbell v. Pollack, 101 R.I. 223, 221 A.2d 615 (1966).

18. Subsection (2) requires notification of revocation of acceptance within a reasonable time after discovery of the grounds for such revocation. Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance, and beyond the time for rejection after tender.

UNIFORM COMMERCIAL CODE § 2-608, Comment 4; FLA. STAT. § 672.608 (1971). *See also* UNIFORM COMMERCIAL CODE §§ 2-607(3)(a), (5); FLA. STAT. §§ 672.607(3)(a), (5) (1971); Marks v. Lehigh Brickface, Inc., 73 Dauph. Co. Rep. 244, 19 Pa. D. & C.2d 666 (1959).

19. UNIFORM COMMERCIAL CODE § 2-608 provides for an opportunity to cure in two situations. If acceptance occurred on the reasonable assumption that the non-conformity would be cured, acceptance cannot be revoked without allowing a reasonable time for cure to be effected. UNIFORM COMMERCIAL CODE § 2-608(1)(a). UNIFORM COMMERCIAL CODE § 2-608(3) provides that the buyer who revokes his acceptance has "the same rights and duties . . ." as if he had rejected. This provision thus appears to tie into UNIFORM COMMERCIAL CODE § 2-508, which burdens the rejecting purchaser with the duty to permit cure in certain circumstances. *See* Murray, *The Consumer and the Code*, 23 U. MIAMI L. REV. 11, 43 (1968). *Dade County Dairies* provides an excellent limitation on UNIFORM COMMERCIAL CODE § 2-508(1), which provides for cure upon rejection when "the time for performance has not yet expired. . . ." The warranty provisions (*See* note 6 *supra*) meant that the time for performance had not expired, but the court properly held that once notice had been given, the vendor's time to cure was not unlimited, regardless of the existence of a warranty period. *See* note 11 *supra*.

20. UNIFORM COMMERCIAL CODE § 2-608(3); FLA. STAT. § 672.608(3) (1971).

plaintiff rejected the vehicle upon delivery at the showroom, certainly no duty to bear any depreciation would have attached. In *Tiger Motor Co. v. McMurtry*,[21] the vendor's assertion of a right to setoff the use value of vendee's possession for 344 days was held to be without basis in light of section 2-608 of the Code. Such a result is consistent with Florida's posture in regard to total restoration of consideration upon rescission.[22] The immediate effect of this portion of the decision in *Dade County Dairies* is to allow the defendant to benefit from his breach at the expense of the injured party.

The subject matter of the instant case makes this decision an important one. As a case of first impression, the theories behind the decision will have a strong effect on the development of Code case law in Florida. Unfortunately, while perhaps a just result was reached, the setoff of depreciation and the "conspicuousness" requirement for limiting remedies were questionable holdings; additionally, an important express warranty aspect was neglected. Finally, to stay within the framework of the Code, revocation of acceptance, rather than common law rescission, should have been awarded. The court did, however, establish valid law in noting that, had the disclaimers of warranty been valid, rescission would still lie for failure to measure up to the remaining warranties. Additionally, the court properly balanced the vendor's right to cure before the time for performance has expired with a requirement that such cure be effected within a reasonable time of notification.

Dade County Dairies may well be the first step towards an effective and persuasive use of the Uniform Commercial Code as a consumer protection tool.

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ESTATE TAX—§ 2036 TRANSFERS WITH A RETAINED LIFE INTEREST

Decedent transferred stock in three unlisted corporations to an irrevocable trust for the benefit of his children, retaining the right to vote the transferred stock, to veto any disposition of such stock by the trustee, a bank, and to remove the trustee and appoint another corporate trustee as successor. The retained voting rights coupled with the vote of the shares owned by the decedent individually at the time of his death gave him a majority vote in each of the corporations. The Commissioner of Internal Revenue determined that the value of the shares so transferred was includable in the decedent's gross estate under the provisions of

21. 284 Ala. 238, 224 So.2d 638 (1969).

22. *See, e.g.*, Singleton v. Foreman, 435 F.2d 962 (5th Cir. 1970), for a discussion of Florida decisions on this point.