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# Implied Warranty: Disclaimer Ineffective

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convicting him of a lesser included offense, cannot render an acceptable verdict in line with the laws of Florida.<sup>29</sup>

CHARLES KANTOR

## IMPLIED WARRANTY: DISCLAIMER INEFFECTIVE

Plaintiff brought an action against the manufacturer and retail dealer alleging breach of express and implied warranties and demanding return of the purchase price of a "lemon" automobile. The trial court granted final summary judgment for the manufacturer based upon a lack of privity and the disclaimer of warranties contained in the contract of sale. The District Court of Appeal, Third District, affirmed, *per curiam*. On certification to the Supreme Court of Florida, *held*, reversed and remanded: An action may be maintained against a manufacturer notwithstanding a lack of privity.<sup>1</sup> Furthermore, the terms of the contract of sale do not operate to disclaim implied warranties. There is no sound reason for distinguishing between liability for personal injury and economic loss on these issues,<sup>2</sup> and liability is particularly warranted where the manufacturer uses mass advertising to market his product.<sup>3</sup> *Manheim v. Ford Motor Co.*, 201 So.2d 440 (Fla. 1967).

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29. The Supreme Court reaffirmed this view in the recent case of *Little v. State*, 206 So.2d 9 (Fla. 1968). The Court held that where the lower court in a robbery prosecution found that the crime of robbery had been proved, the defendant was entitled to an instruction on the lesser included offense of larceny.

1. Except for the advertising rationale, this issue will not be noted because it was already well established in Florida that lack of privity did not bar an implied warranty action against a manufacturer. *Lily-Tulip Cup Corp. v. Bernstein*, 181 So.2d 641 (Fla. 1966); *Power Ski, Inc. v. Allied Chem. Corp.*, 188 So.2d 13 (Fla. 3d Dist. 1966). *See also Engel v. Lawyers Co-operative Publishing Co.*, 198 So.2d 93 (Fla. 3d Dist. 1967) (warranty coverage still limited to users of the product).

2. A well-developed discussion of this point may be found in *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), *reversing* 82 N.J. Super. 319, 197 A.2d 589 (App. Div. 1964).

3. It should be emphasized that the decision went on to only discuss the manufacturer's liability under implied warranties. The court did not hold that the mass advertising created either an express or implied warranty. The failure to clearly state what express warranty liability existed or to distinguish between express and implied warranty liability considerably clouded the opinion.

Some jurisdictions have used mass advertising by the manufacturer as a rationale for eliminating the privity requirement in implied warranty actions. *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1964); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); *Tedder v. Pepsi-Cola Bottling Co.*, 270 N.C. 301, 154 S.E.2d 337 (1967); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965); *Markovich v. McKesson & Robbins, Inc.*, 106 Ohio App. 265, 149 N.E.2d 181 (1958); *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

Other jurisdictions have held that mass advertising creates an express warranty upon which the ultimate buyer may bring an action. *Graham v. John R. Watts & Son*, 238 Ky. 96, 36 S.W.2d 859 (1931); *Worley v. Proctor & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253

Over a century and a half ago Lord Ellenborough thundered that, "The purchaser cannot be supposed to buy goods to lay them upon a dung-hill."<sup>4</sup> The implied warranty is the law's recognition of this self-evident fact. An implied warranty arises by operation of law, irrespective of the intention of the seller,<sup>5</sup> and exists to protect the consumer from defects which he has neither the capacity nor the opportunity to detect.<sup>6</sup> Because the warranty is implied as an incident to the contract of sale, an integration clause does not preclude its implication.<sup>7</sup>

A disclaimer is a contractual provision by which the buyer and the seller negate the implication of the warranty.<sup>8</sup> Traditionally, courts allowed the parties to the contract to disclaim all implied warranties.<sup>9</sup> Such disclaimers are becoming more and more prevalent in modern society because lack of privity no longer effectively immunizes the manufacturer from liability. However, concomitant with the judicial assault upon the citadel of privity is the rising judicial assault upon the bastion of the disclaimer. Courts today commonly refuse to give full effect to purported disclaimers by declaring them to be too ambiguous, by refusing to enforce them when they are not sufficiently brought to the buyer's attention and by using the "displacement theory."

The courts that have refused to enforce disclaimers because they were found to be ambiguous believe that the buyer cannot reasonably perceive what he is giving up.<sup>10</sup> For example, it is doubtful that the average buyer, upon reading the standard automobile warranty, realizes that he is absolving the manufacturer from all warranty liability for personal

S.W.2d 532 (1952); *Simpson v. American Oil Co.*, 217 N.C. 542, 8 S.E.2d 813 (1940); *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965); *General Motors Corp. v. Dodson*, 48 Tenn. App. 438, 338 S.W.2d 655 (1960); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932).

At least two jurisdictions have held that mass advertising creates an implied warranty in favor of the ultimate buyer. *Huscher v. Pfost*, 122 Colo. 301, 221 P.2d 931 (1950); *Miller v. Coca-Cola Bottling Co.*, 70 So.2d 409 (La. Ct. App. 1954). However, at least one court has held it to be applicable only to an express warranty action. *Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954).

4. *Gardiner v. Gray*, 171 Eng. Rep. 46, 47 (K.B. 1815).

5. *Berger v. E. Berger & Co.*, 76 Fla. 503, 80 So. 296 (1918).

6. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Greenland Dev. Corp. v. Allied Heating Prods. Co.*, 184 Va. 588, 35 S.E.2d 801 (1945); 1 S. WILLISTON, SALES § 243 (rev. ed. 1948).

7. *Liquid Carbonic Co. v. Coclin*, 161 S.C. 40, 159 S.E. 461 (1931).

8. *Nemeth v. Becker Roofing Co.*, 151 S.W.2d 559 (Mo. Ct. App. 1941).

9. For a collection of cases see, 46 AM. JUR. SALES § 333 (1943); 77 C.J.S. Sales § 317b (1952).

10. As early as 1914 it was held that a disclaimer would not be enforced because the layman could not comprehend its consequences. In refusing to enforce a standard automobile disclaimer, the Court of Appeals of Kentucky stated that:

[T]he language of the stipulation is extremely technical, "This express warranty excludes all implied warranties;" its meaning is clear to but few persons. *Int'l Harvester Co. of America v. Bean*, 159 Ky. 842, 847, 169 S.W. 549, 551 (1914). *Accord*, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

injuries<sup>11</sup> or that if one defective part causes the destruction of the entire car the manufacturer is obligated only to replace the defective part.<sup>12</sup>

Other courts have refused to enforce purported disclaimers because they were drafted so as to purposely escape the average buyer's attention.<sup>13</sup> Many disclaimers are incorporated by a vague reference and are never seen by the purchaser until after he has bought the product.<sup>14</sup> Others are hidden in paragraphs of fine print on the back of one of the pages of a long standard form contract.<sup>15</sup>

Lastly, many courts have used the "displacement theory" to circumvent purported disclaimers. These courts deny implied warranty recovery only when the same area is covered by the express warranty, which they view as displacing a coexistent implied warranty. Hence, they view a limited express parts warranty as not in conflict with general implied warranties and, absent a specific disclaimer clause in the express parts warranty, allow recovery for consequential property and personal damages.<sup>16</sup>

However, in spite of the foregoing assaults upon the bastion of the disclaimer, many courts still give full effect to them if they are drafted in an iron-clad manner. For example, a clear majority of recent decisions have upheld the standard automobile warranty and disclaimer.<sup>17</sup> There

11. The Supreme Court of New Jersey stated of the standard automobile warranty: [I]n the context of this warranty, only the abandonment of all sense of justice would permit us to hold that, as a matter of law, the phrase "its obligation under this warranty being limited to making good at its factory any part or parts thereof" signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 388, 161 A.2d 69, 93 (1960).

12. In an express warranty action where a defective dashboard part almost totally destroyed a new automobile, the court held that the only obligation of the manufacturer under the contract was to give the now car-less buyer a new dashboard part. *Norway v. Root*, 58 Wash. 2d 96, 361 P.2d 162 (1961).

13. *Celanese Corp. of America v. John Clark Indus., Inc.*, 214 F.2d 551 (5th Cir. 1954); *Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954); *Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc.*, 68 Ill. App. 2d 297, 216 N.E.2d 282 (1965); *Turner v. Kunde*, 256 Iowa 835, 128 N.W.2d 196 (1964); *Black v. B.B. Kirkland Seed Co.*, 158 S.C. 112, 155 S.E. 268 (1930); *Calumet Cheese Co. v. Chas. Pfizer & Co.*, 25 Wisc. 2d 55, 130 N.W.2d 290 (1964).

14. The warranty and disclaimer in *Rozen v. Chrysler Corp.*, 142 So.2d 735 (Fla. 3d Dist. 1962) was incorporated by reference and was in the glove compartment of the automobile. Brief for Appellant at 11, *Id.*

15. The disclaimer in *Henningsen* was in the middle of about eight and one-half inches of fine print on the back of one of the pages. It was not set off in any manner. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 365, 161 A.2d 69, 74 (1960).

16. See, e.g., *Sperry Rand Corp. v. Industrial Supply Corp.*, 337 F.2d 363 (5th Cir. 1964); *Posey v. Pensacola Tractor & Equip. Corp.*, 138 So.2d 777 (Fla. 1st Dist. 1962). For a collection of cases see, 77 C.J.S. *Sales* § 316b n.95 (1952).

17. The standard automobile warranty and disclaimer has been given full force and effect in, *Min-O-Con Equip. Corp. v. T.M.K. Constr. Co.*, — Ariz. —, 424 P.2d 152 (1967); *Yanish v. Fernandez*, 156 Colo. 1225, 397 P.2d 881 (1965); *Brown v. Chrysler Corp.*, 112 Ga. App. 22, 143 S.E.2d 575 (1965); *Cox Motor Car Co. v. Castle*, 402 S.W.2d 429 (Ky. 1966) (U.C.C. case); *Hall v. Everett Motors, Inc.*, 340 Mass. 430, 165 N.E.2d 107 (1960);

is, however, a growing trend to avoid the effect of a disclaimer of implied warranties by allowing recovery on the theory of strict tort liability.<sup>18</sup>

The Florida decisions dealing with disclaimers seem to hinge upon an application of the aforementioned "displacement theory." In a case in which the purported disclaimer contained only an express parts warranty and an integration clause, the First District Court of Appeal allowed recovery on an implied warranty because its implication was not in conflict with the limited express warranty.<sup>19</sup> However, the Third District Court of Appeal refused to allow recovery under similar circumstances because the limited express parts warranty was given "in lieu of all other warranties, express or implied."<sup>20</sup> Both cases applied the displacement theory, the only distinction being that in one case the purported disclaimer displaced all other warranties while the other one did not contain this proviso.<sup>21</sup>

The decision in the instant case also seemed to rest upon the displacement theory.<sup>22</sup> The court quoted at length from *Sperry Rand Corp. v. Industrial Supply Corp.*,<sup>23</sup> and *Jarnot v. Ford Motor Co.*<sup>24</sup> Both of these cases rested upon the displacement theory.<sup>25</sup> What is perplexing, however, is that the displacement theory theoretically applies only where the limited express warranty is not given "in lieu of all other war-

Lilly v. Manning Motor Co., 262 N.C. 468, 137 S.E.2d 847 (1964); Knecht v. Universal Motor Co., 113 N.W.2d 688 (N.D. 1962); Norton Buick v. E.W. Tone Co., 351 P.2d 731 (Okla. 1965); Ford Motor Co. v. Puskar, 394 S.W.2d 1 (Tex. Civ. App. 1965); Williams v. Chrysler Corp., 148 W. Va. 655, 137 S.E.2d 225 (1964). *Contra*, Vandermark v. Ford Motor Co., 61 Cal. App. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (strict tort liability case); Haley v. Merit Chevrolet, Inc., 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966) (strict tort liability case); State Farm Mut. Life Ins. Co., v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960).

18. For a collection of cases adopting this theory see, CCH PROD. LIAB. RPT. ¶ 4070 (1966).

19. Posey v. Pensacola Tractor & Equip. Corp., 138 So.2d 777 (Fla. 1st Dist. 1962).

20. Rozen v. Chrysler Corp., 142 So.2d 735 (Fla. 3d Dist. 1962). This decision was the basis of the *per curiam* affirmance in the instant case.

21. This distinction between those purported disclaimers which do not expressly exclude all other implied warranties and those which do was noted by Judge Balaban when he denied a motion for summary judgment in an implied warranty action, and noted in part:

[T]he express warranty minus the modification provision is not inconsistent with the implied warranty. Posey v. Pensacola Tractor & Equipment Company, 138 So.2d 777, 780 (Fla. App. 1962). *Cf.* Rozen v. Chrysler Corporation, 142 So.2d 735 (Fla. App. 1962) reh. den., where an express warranty was given in lieu of all other warranties. Laurent v. Honda, Inc., 27 Fla. Supp. 183, 187 (Cir. Ct. Dade Co. 1967).

22. This writer uses the term "seemed" because the court did not expressly state why they felt the disclaimer ineffective. After a vague phrase which stated that neither lack of privity nor the disclaimer immunized the manufacturer, the court simply listed a series of case quotations in random order.

23. 337 F.2d 363 (5th Cir. 1964) (applying Florida products liability law).

24. 191 Pa. Super. 422, 156 A.2d 568 (1959).

25. Neither of these cases contained a purported disclaimer which gave a limited express parts warranty "in lieu of all other warranties express or implied." In both cases the court simply found that the asserted implied warranty was not inconsistent with the limited express parts warranty.

warranties."<sup>26</sup> Yet, despite the fact that the purported disclaimer in the instant case did contain just such a disclaimer clause,<sup>27</sup> the court gave no explanation as to why implying a warranty was not inconsistent with a contractual provision which stated that no warranties were implied.<sup>28</sup> However, notwithstanding the court's reasoning, it seems clear that Florida is now committed to a policy of protecting the consumer from disclaimers inserted by the manufacturer. Few people can quibble with this result.

The exact scope of the holding in the instant case is clouded by the now applicable Uniform Commercial Code.<sup>29</sup> It should be emphasized that in the instant case the court did not recognize the effectiveness of the disclaimer and then strike it, but rather it simply stated that the disclaimer was ineffective. Under the U.C.C. this does not become a distinction without a difference. The U.C.C. contains a section which specifically grants a seller the right to effectively disclaim warranties and even maps out the formula to be used.<sup>30</sup>

This writer sees two available alternatives open to the Florida courts to achieve the result in the instant case under the U.C.C. The first alternative would be to adopt a forthright approach and declare disclaimers contrary to public policy and hence subject to being stricken by the courts.<sup>31</sup> The U.C.C. allows for this in a section which gives a court the

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26. *Sperry Rand Corp. v. Industrial Supply Corp.*, 337 F.2d 363 (5th Cir. 1964). The purported disclaimer in *Sperry Rand* contained an express parts warranty and an integration clause, but no specific disclaimer clause. The court noted that:

[I]t is strongly and plausibly argued by Sperry Rand that the integration clause, so-called of the sales contract precludes any recovery by Industrial Supply on an implied warranty. If the general clause had expressly provided that there were no implied warranties the position of Sperry Rand would be sound. *Id.* at 371.

This point is further emphasized by *American Can Co. v. Horolamus Corp.*, 341 F.2d 730 (5th Cir. 1965). In this contemporaneous decision, the same court which decided *Sperry Rand* applied the same Florida products liability law and gave full effect to a purported disclaimer which contained a specific disclaimer clause.

27. 201 So.2d 440, 441 (Fla. 1967).

28. In the instant case the court failed to comment upon their prior holding in *Steinhardt v. Consolidated Grocery Co.*, 80 Fla. 531, 86 So. 431 (1920) wherein it was stated that, ". . . there will be no implication of warranty in conflict with the express terms of the agreement." *Id.* at 535, 86 So. at 432.

29. FLA. STAT. ch. 671-680 (1965).

The U.C.C. allows for a use of the displacement theory, in cases not involving a specific disclaimer clause, with one exception. FLA. STAT. § 672.2-317 (1965) provides that express warranties displace inconsistent implied warranties *other than* the implied warranty of fitness for a particular purpose (set forth in § 672.2-315). However, another section of the U.C.C., discussed *infra*, applies when a specific disclaimer clause is in the contract.

30. FLA. STAT. § 672.2-316(2) (1965) provides:

. . . to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.

31. ". . . we are of the opinion that Chrysler's attempted disclaimer of the implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity." *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 390, 161 A.2d 69, 95 (1960).

power to strike a contract provision which it finds to be "unconscionable."<sup>32</sup> The second alternative would be for the courts to allow recovery based upon strict tort liability.<sup>33</sup> This cause of action is independent of implied warranty liability and cannot be disclaimed.<sup>34</sup>

With the decision in the instant case, Florida seems to have now given full recognition to Lord Ellenborough's cogent statement. No longer will a manufacturer immunize itself from liability by inserting a vague phrase in a contract of sale. Henceforth, the only "lemons" Florida consumers must accept will be the agricultural variety.

RONALD WM. SABO

### LEVY AND SALE UNDER JUDGMENT EXECUTION ON STOCK IN PROFESSIONAL SERVICE CORPORATIONS

Plaintiffs brought suit to enjoin the sale of their stock in a professional service corporation to satisfy a judgment against them individually. The chancellor permanently enjoined the sale of the stock on the basis of Florida Statutes, sections 621.09 and 621.11.<sup>1</sup> The Third District Court

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32. FLA. STAT. § 672.2-302 (1965). However, it has not yet been held by any decision which this writer is aware of, that a court may use this section to void a disclaimer which meets the requirements set forth in the U.C.C. At least one legal writer has taken the position that such a valid disclaimer cannot be struck by the courts:

[I]t appears to be a matter of common assumption that section 2-302 *is* applicable to warranty disclaimers. I find this frankly, incredible. Here is 2-316 which sets forth clear, specific and anything but easy-to-meet standards for disclaiming warranties. It is a highly detailed section, the comments to which disclose full awareness of the problems at hand. It contains no reference of any kind to section 2-302, although nine other sections of article 2 contain such references. In such circumstances the usually bland assumptions that a disclaimer which meets the requirements of 2-316 might still be strikable as "unconscionable" under 2-302 seems explainable if at all, as oversight, wishful thinking or (in a rare case) attempted sneakiness. (footnotes omitted)

Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 523 (1967).

At least one court has inferentially taken the same view. Chronologically, the case was similar to the instant one in that the U.C.C. was not in effect when the cause of action arose, but it was when the case was decided. There the court refused to strike the disclaimer as contrary to public policy because they felt the legislature had established public policy when it adopted the U.C.C. which specifically declared that warranties may be disclaimed. *Murray v. Marshall Oldsmobile, Inc.*, — Va. —, 154 S.E.2d 140 (1967).

33. The RESTATEMENT (SECOND) OF TORTS § 402A (1965), provides:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer . . .

34. *Id.*, comment *m* at 355.

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1. No corporation organized under the provisions of this act may issue any of its capital stock to anyone other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated.

FLA. STAT. § 621.09 (1965).

No shareholder of a corporation organized under this act may sell or transfer his