1964

Doctrinal Problems of Fraud Law

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THE EDITORIAL STAFF of the Cleveland-Marshall Law Review is to be commended for making and carrying out the decision to publish this symposium issue on Fraud and Misrepresentation. The legal rules and principles related to the general question as to when an alleged misrepresentation will serve as a basis for any kind of relief in favor of the prejudiced party to a bargaining transaction are being constantly adjusted to meet new marketing practices and the ingenuity of mankind either to avoid unfavorable transactions or to induce favorable ones. It can be said without fear of contradiction that both case law and legislation during this century evidence an ever-widening recognition of the idea that the reasonable expectations of those entering into bargaining transactions should not be frustrated through deceptive practices and even innocent and non-negligent misrepresentations.

It should be apparent, however, that the creation of new rules and principles rejecting the individualistic philosophy of the Nineteenth Century that was summed up in this area of the law by the maxim *caveat emptor,* and requiring a higher standard of ethics in the negotiation of bargaining transactions render such transactions much less secure. Therefore, the social interest in the security of bargaining transactions must be weighed against the social interest in maintaining high standards in the conduct of economic affairs. In this connection, practical problems involving the limits to effective legislation have been faced by the courts in dealing with alleged oral promises and oral misrepresentations that were not incorporated into a later written document that was either required under the Statute of Frauds or that the parties voluntarily chose to make. It is obvious that a person who exercises poor judgment and makes a bad bargain will often claim that he was misled by a misrepresentation of the other party to the transaction. This is a factor relating to the proper treatment of disclaimer clauses, that is clauses reciting that a particular party or his agent has made no representations or promises other than those included in the final written trans-

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action. Greater liberality in the granting of relief has brought about an increase in the use of such disclaimer clauses. The issue in such cases is the extent to which it is possible, if at all, for businessmen to deal at arm's length and agree that one of the parties, usually a purchaser, is not relying on any alleged oral representations. It is inevitable that there would be disagreement about some of the close questions raised, especially when dishonesty or *scienter* is not established and when other sources of information to obtain the truth were readily available.[1]

The gradual erosion of the requirement that dishonesty or *scienter* be established for relief for a misrepresentation, especially damages, raises in a different way the legal effect of the representee's contributory negligence in relying on the representation. Different results have been reached and may justifiably be reached depending upon the relief sought, whether rescission or damages, and if damages whether or not damages are to be measured on the basis of the out-of-pocket principle or the benefit-of-the-bargain rule.[2] If the innocent misrepresenter is a party to the contract, then perhaps a restoration of the parties to status quo either by way of rescission or "out-of-pocket" damages would be sound notwithstanding the contributory negligence of the prejudiced party, but it does not necessarily follow that the misrepresenter who is not a party to the contract should be responsible absent dishonesty nor does it mean that a party to the contract should be responsible for damages measured on a benefit-of-the-bargain basis.[3]

This much has been said by way of indicating that legal doctrine related to fraud and mistake constitutes a compromise between competing social interests.

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[1] Dannan Realty Co. v. Harris, 5 N. Y. 2d 317, 157 N. E. 2d 597 (1959) (disclaimer clause in the purchase and sale of a leasehold interest); Wittenburg v. Robinov, 9 N. Y. 2d 261, 173 N. E. 2d 868 (1961) (disclaimer clause in sale of land); Woodruff & Sons v. Brown, 256 F. 2d 391 (5th Cir. 1958) (disclaimer clause in sale of onion seed). See, Seavey, Caveat Emptor as of 1960, 38 Tex. L. Rev. 439 (1960); Comment, The "Merger Clause" and the Parol Evidence Rule, 27 Tex. L. Rev. 361 (1949).

[2] Taylor v. Arneill, 129 Colo. 185, 268 P. 2d 695 (1954), noted 27 Rocky Mt. L. Rev. 115 (1954); Bishop v. Strout Realty Agency, Inc., 182 F. 2d 503 (4th Cir. 1950).

[3] A substantial minority of jurisdictions now clearly adopt the strict liability rule for out-of-pocket damages against a party to the transaction. Before strict liability is imposed upon one who is not a party to the contract, it is submitted that the issue as to whether he is the more logical risk bearer should be squarely faced just as the courts are now doing as regards physical harm resulting from non-negligent conduct, especially in the area of products liability.