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Sales - Privity - Disclaimer of Implied Warranty

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SALES — PRIVITY — DISCLAIMER OF IMPLIED WARRANTY — Husband purchased a new automobile from a dealer. The contract of sale contained on its reverse side an express warranty from the manufacturer to the "original purchaser" providing for the replacement of any parts which were returned to the manufacturer and were in its judgment defective. The warranty was ". . . expressly in lieu of all other warranties expressed or implied. . . . " The dealer warranty was substantially identical to that extended by the manufacturer; both adhered to the form prescribed by the Automobile Manufacturer's Association.[1] Shortly after the delivery of the automobile, wife was injured in a collision caused by a defective steering mechanism. Wife instituted suit against both dealer and manufacturer to recover for personal injuries and husband joined to recover for property damage and consequential losses arising from his wife's injuries. The action was submitted to the jury on the issue of implied warranty of merchantability; judgment was rendered for the plaintiffs against both the manu-

[1] The Automobile Manufacturer's Association includes all domestic passenger car manufacturers. AUTOMOBILE FACTS & FIGURES 70 (1959-60 ed.).

facturer and dealer. On appeal, *held,* affirmed.[2] The express disclaimer of implied warranty is invalid as against public policy; the implied warranty of merchantability extends from both the manufacturer and the dealer to the ultimate purchaser, members of his family, and to others occupying or using car with his consent. *Henningsen v. Bloomfield Motors, Inc.,* 161 A.2d 69 (N.J. 1960).

The significance of the principal case arises not only from the court's finding that notwithstanding the absence of privity of contract a manufacturer of non-food products may be liable to the ultimate user for breach of an implied warranty, but also from its holding that under some circumstances an unequivocal disclaimer of implied warranty may be of no effect although contained within a contract which by usual standards was freely entered into by the parties.

Courts have traditionally regarded implied warranty as contractual in nature and therefore have required privity between plaintiff consumer and defendant seller or manufacturer in breach of warranty actions.[3] In 1913 *Mazetti v. Armour & Co.*[4] became the precursor of a large minority of cases which no longer require privity where the product involved is a food or beverage.[5] In spite of the widespread and increasing disavowal of the privity requirement in food and beverage cases, there has been little tendency to disregard privity where the offending product is neither potable nor edible.[6] A possible change in judicial attitude was foreshadowed by the celebrated concurring opinion of Justice Traynor in which he suggested that the risk of loss arising from defective non-food products be placed upon the manufacturer thence to be distributed among the public.[7] It was suggested that this extension of an implied warranty from the manufacturer could be extended to the consumer by eliminating the privity

[2] In so holding the court did not expressly overrule either Getzoff v. Von Lengerke Buick Co., 14 N.J. Misc. 750, 187 Atl. 539 (Sup. Ct. 1936), or Glasser v. Dodge Bros. Corp., 11 N.J. Misc. 10, 163 Atl. 121 (Sup. Ct. 1932). In each case the New Jersey Supreme Court upheld a sales contract's express contractual disclaimer designed to negate any implied warranty. In neither case was it indicated whether the sales contract was a form contract.

[3] Welshausen v. Parker Co., 83 Conn. 231, 76 Atl. 271 (1910). See generally 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 389 (1906).

[4] 75 Wash. 622, 135 Pac. 633 (1913). In Mazetti v. Armour & Co. plaintiff was a restaurant operator. Among cases where plaintiff was the ultimate consumer see, *e.g.,* Florida Coca-Coca Bottling Co. v. Jordan, 62 So. 2d 910 (Fla. 1953); Cernes v. Pittsburg Coca Cola Bottling Co., 183 Kan. 758, 332 P.2d 258 (1958).

[5] The seventeen jurisdictions (in addition to five which now reach this result by statute) which now deny the necessity of privity between plaintiff and defendant have advanced a plethora of reasons: *e.g.,* the retailer is the consumer's agent to buy; the retailer is the manufacturer's agent to sell; the ultimate consumer is a third party beneficiary of the manufacturer's contract with the retailer; an implied warranty "run[s] with the goods." Wilson, *Products Liability,* 43 CALIF. L. REV. 614, 643 (1955).

[6] There is an increasing tendency to disregard privity where the product is intended for intimate use. See, *e.g.,* Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958) (home permanent solution); Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954) (hair dye); Kruper v. Proctor and Gamble Co., 113 N.E.2d 605 (Ohio Ct. App. 1953), *rev'd on other grounds,* 160 Ohio St. 489, 117 N.E.2d 7 (1954) (soap).

[7] Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944).

requirement. Justice Traynor's suggestion went without support until 1958 when the Michigan Supreme Court held that a remote buyer might recover from the manufacturer of defective cinder blocks for breach of implied warranty in spite of the absence of privity.[8] In the principal case the New Jersey Supreme Court follows those few recent decisions which depart from the privity requirement previously applied to cases involving breach of warranty of non-food products. Although the court alluded to the doctrine exemplified by *Baxter v. Ford Motor Co.*[9] it rested its negation of the privity rule upon a realization that there is "no rational basis for differentiating between a fly in a bottle of beverage and a defective automobile."[10] In its decisive extension of a manufacturer's implied warranty of a non-food product, the New Jersey court emphasizes Professor Prosser's prediction that the prerequisite of privity between consumers and manufacturers of such products will command an ever-decreasing judicial following.[11]

Having established that an action for breach of warranty will lie against a manufacturer without privity of contract, the court then determined the effect of the express disclaimer of implied warranty included within the sales contract. Under the Uniform Sales Act when goods are bought by description from a dealer in such goods, an implied warranty of merchantability arises obligating the seller to provide goods of a quality at least equal to that exhibited by other goods of the same nature.[12] Sellers and manufacturers have reacted to this imposition of strict liability by inserting disclaimer clauses which purport to relieve them of liability based upon implied warranty.[13] Disclaimer clauses have been uniformly recognized

[8] Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958). The Michigan decision was followed by similar decisions in Hinton v. Republic Aviation Corp., 180 F. Supp. 31 (S.D.N.Y. 1959) (airplane); Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 569 (1959) (truck); B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959) (auto tire); Continental Copper & Steel Industries v. E. C. "Red" Cornelius, Inc., 104 S.2d 40 (Fla. Ct. App. 1958) (cable); and a strong dictum in Beck v. Spindler, 99 N.W.2d 670 (Minn. 1959).

[9] 168 Wash. 456, 12 P.2d 409 (1932), *aff'd per curiam on rehearing,* 15 P.2d 1118 (1932), *aff'd on second appeal,* 179 Wash. 123, 35 P.2d 1090 (1934) (advertising statements may constitute an express warranty to the ultimate consumer).

[10] Principal case at page 83.

[11] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099, 1113 (1960): ". . . the dam has busted and those in the path of the avalanche would do well to make for the hills."

In those jurisdictions which have adopted the Uniform Commercial Code the privity requirement is abrogated to a limited extent by § 2-318 which provides that "a seller's warranty . . . extends to any . . . person who is in the family or household of his buyer . . . if it is reasonable to expect that such person may use . . . the goods. . . ." UNIFORM COMMERCIAL CODE § 2-318.

[12] UNIFORM SALES ACT §15. The leading case establishing an implied warranty of merchantability is Jones v. Just, [1868] 3 Q.B. 197. See also, *e.g.,* Adams v. Peter Tramontin Motor Sales, 42 N.J. Super. 313, 324, 126 A.2d 358, 363 (1956); Giant Mfg. Co. v. Yates-American Mach. Co., 111 F.2d 360, 365 (8th Cir. 1940).

[13] On contractual disclaimers of implied warranty, see generally Prosser, *The Implied Warranty of Merchantable Quality,* 27 MINN. L. REV. 117 (1943); Comment, 23 MINN. L. REV. 784 (1939); Comment, 1939 WIS. L. REV. 459; Comment, 31 COLUM. L. REV. 1325 (1931).

to be within the capacity of the contracting parties[14] although judicial disfavor has resulted in increasingly narrow construction of disclaimer terms.[15] In this manner the courts have balanced a desire to afford the consumer protection against defective articles with the need to preserve some freedom of contract between seller and buyer. Narrow construction of disclaimer clauses has led manufacturers and sellers to draft disclaimers so unequivocal in their rejection of implied warranties that any judicial construction is impossible.[16] Such clauses are justified where contracts of sale are individually negotiated or, at the very least, where the purchaser can choose between different warranties offered by various sellers of similar articles. In these instances there is true freedom of contract and both parties are justifiably bound by the express terms of their contract. However, in numerous cases, of which the principal case is an example, a combination of factors indicates an absence of contractual freedom. The widespread utilization by competing manufacturers of the standard form contract, or contract of adhesion, containing the same disclaimer of warranty sharply restricts the ability of the purchaser to negotiate contract terms.[17] In such a setting the purchaser must accept the form contract with its disclaimer of implied warranties or forego his purchase. Where such factors indicate a lack of contractual freedom, courts are justified in ignoring disclaimer clauses so unequivocal that they are "construction proof."[18]

[14] Deere & Webber Co. v. Moch, 71 N.D. 649, 654, 3 N.W.2d 471 (1942); Crossan v. Nole, 120 S.W.2d 189, 192 (Mo. Ct. App. 1938).

[15] Courts have held that disclaimer clauses are ineffective when the product is so defective as to amount to a "failure of consideration." Myers v. Land, 314 Ky. 514, 519, 235 S.W.2d 988 (1951). An implied warranty may not be negated although the sales contract provides that it is a total integration of all agreements between the parties. Hughes Constr. Co. v. National Equipment Corp., 216 Iowa 1000, 250 N.W. 154 (1933). An implied warranty may not be abrogated by contract provisions that no warranties have been made unless expressed. Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927).

[16] On the development of disclaimers used in sales contracts, see Bogert & Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400 (1930). On drafting a disclaimer clause which will ". . . effectively cast the risk of the transaction upon the vendee and relieve the vendor from liability for defects in the article or articles of sale," see Comment, 22 WASH. U.L.Q. 536, 537 (1937).

[17] See generally Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). On the utilization of warranties in retail sales and for examples of form contract warranties and disclaimer clauses, see Bogert & Fink, *supra* note 16. See generally Comment, 53 COLUM. L. REV. 858 (1953).

[18] See generally Llewellyn, *On Warranty of Quality and Society* (pts. 1-2), 36 COLUM. L. REV. 699, 37 COLUM. L. REV. 341 (1936-1937). In an effort to avoid disclaimers under circumstances similar to those outlined above courts often have relied upon the principle of construction that a contract provision is not effective where one party reasonably did not know of its existence; see Annot., 160 A.L.R. 357 (1946). It is submitted that this principle often has been utilized to give effect to the court's unspoken conclusion that the disclaimer is unconscionable. The doctrine is alluded to in the principal case (at 88-94) to lend unneeded weight to the court's finding that a disclaimer is of no effect when there is a lack of contractual freedom.

In jurisdictions which have adopted the Uniform Commercial Code a disclaimer negating the implied warranty of merchantability ". . . must mention merchantability and in case of a writing must be conspicuous. . . ." UNIFORM COMMERCIAL CODE § 2-316. Sec.

In the principal case the New Jersey court by recognizing actual freedom of contract to be a condition precedent to the enforcement of contractual disclaimers and by refusing to require privity of contract between the injured consumer and the manufacturer has taken a necessary step to protect the consumer from loss caused by defective goods.

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2-316 was enacted ". . . to deal with those frequent clauses in sales contracts which seek to exclude all warranties, express or implied." UNIFORM COMMERCIAL CODE, OFFICIAL TEXT, Comment 1, at 96 (1958). Another course is open to UCC jurisdictions for § 2-302 authorizes the striking of unconscionable clauses in sales contracts.