Boston College Law Review

Volume 6 | Issue 1 Article 7

10-1-1964

Article 2: Sales

Michael L. Altman

George M. Doherty

Crystal J. Lloyd

Barry E. Rosenthal

UNIFORM COMMERCIAL CODE ANNOTATIONS

This section contains a digest of all reported decisions from jurisdictions interpreting provisions of the Uniform Commercial Code published from February 22, 1964 through the first week of June, 1964, in the National Reporter System.

MICHAEL L. ALTMAN
GEORGE M. DOHERTY
CRYSTAL J. LLOYD
BARRY E. ROSENTHAL
JOSEPH F. RYAN

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WILMINGTON TRUST CO. v. COULTER
— Del. —, 200 A.2d 441 (1964)

The Wilmington Trust Company held, as co-trustee, 82% of the stock of the Toledo, Peoria & Western Railroad Company (TP & W) which it was authorized to sell with the written consent of Gladson, the other co-trustee. On April 15, 1955, the Trust Co. agreed to sell 52% of the TP & W stock to the Santa Fe and Pennsylvania Railroads at $100 per share. This sale was expressly made subject to the approval of the I.C.C., the boards of the purchasing railroads and Gladson. However, before the Pennsylvania board had approved, Heineman made an offer on behalf of the Minneapolis and St. Louis Railroad Company (M & StL) to buy all of the Trust Co.'s TP & W stock at $133.33 per share. The Trust Co. did not inform co-trustee Gladson of Heineman's offer and the April 15th agreement was subsequently confirmed. Later, under pressure from the trust beneficiaries, the Trust Co. withdrew from the April 15th agreement and ultimately sold all of its TP & W stock to Santa Fe at $135 per share. Santa Fe then sold to Pennsylvania half of the stock it had purchased at the price it had paid. Pennsylvania instituted suit against the trustees to enforce the April 15th agreement of $100 per share, and the trustees settled by paying Pennsylvania $500,000. The Trust Co. was then charged with negligence and surcharged $500,000 by the lower court for not informing co-trustee Gladson of Heineman's $133.33 offer at a time when the April 15th agreement had not yet been confirmed.

On motion for re-argument after the decree was affirmed, the Trust Co. argued that under Section 2-205 of the Uniform Commercial Code the

April 15th transaction was a binding offer which could not be revoked for a reasonable period of time, and that it could not have been withdrawn even if co-trustee Gladson had been seasonably notified of Heineman's offer. The court ruled, however, that Section 2-205 was inapplicable to the April 15th agreement because (1) the section applies only to merchants; (2) the Trust Co. in the absence of the written consent of Gladson could not make a firm offer to sell; and (3) the April 15th agreement contained no assurance that the offer would be held open. The court noted that the Trust Co. was free to repudiate its agreement of April 15th prior to approval by the Pennsylvania board, but had this approval been given and Gladson's consent received, the agreement would have taken on an entirely different aspect by reason of Section 2-204. This section provides that a contract will not fail for indefiniteness if there is a reasonably certain basis for giving an appropriate remedy.

COMMENT

Section 2-205 deals with firm offers and states that a merchant who assures that his offer will be kept open may not retract it until a reasonable time has elapsed, even though no consideration supports the promise to keep the offer open. However, there must be authority to make a firm offer, a clear statement of assurance, and in no case can the period of irrevocability exceed three months.

The court might have held Section 2-205 inapplicable on another ground, namely, that Article 2 deals solely with the sale of goods (Section 2-102) and that under Section 2-105, shares of stock are not goods. On this point, see the Official Comment to Section 2-105 and *In Re Carter's Claim*, 390 Pa. 365, 134 A.2d 908 (1957).

B.E.R.

SECTION 2-305. Open Price Term

AMERICAN SAND & GRAVEL, INC. v. CLARK & FRAY CONSTR. CO.
2 Conn. Cir. 284, 198 A.2d 68 (1964)

In 1961, the defendant-buyer negotiated with the plaintiff-seller for the possible purchase of 20,000 to 25,000 tons of bankrun sand at 45 cents per ton. The plaintiff heard nothing further from the defendant until February 3, 1963, when the defendant requested, and in the following weeks received, 1538.30 tons of sand. The plaintiff charged 55 cents, the price charged to all customers except those with special arrangements.

When the defendant refused to pay, the plaintiff brought the present action for the price. The defendant argued that a contract existed at a price of 45 cents per ton. The court ruled that no contract existed at 45 cents because a gap in time of between one and two years was an unreasonable length of time for the plaintiff to be expected to wait in order to learn whether the defendant accepted at the special price. The court further ruled that, even if a contract for 45 cents did exist, it was conditional on the purchase of between 20,000 and 25,000 tons. Since no contract existed at 45 cents and since the parties had not agreed on the price when the sand

was acquired, the defendant was required under Section 2-305(1)(a) to pay a reasonable price, which was 55 cents.

COMMENT

Under Section 2-305(1)(a), when nothing is said as to price, the price is a reasonable one. This is the same rule that obtained under Section 9(4) of the Uniform Sales Act.

B.E.R.

SECTION 2-313. Express Warranties by Affirmation, Promise, Description, Sample

HAMILTON v. SCHWADRON
82 N.J. Super. 493, 198 A.2d 128 (1964)

The plaintiff purchased a diamond ring from the defendant for $6,500. The defendant, who held himself out as an expert in diamonds, represented that the retail market value of the ring was $8,000 to $9,000. The ring, however, was later appraised for only $5,500. The plaintiff then delivered the ring back to the defendant to receive in return either his $6,500 or a ring of the value originally represented. The defendant neither returned the $6,500 nor delivered a new ring, and refused to return the $5,500 ring. The plaintiff brought suit and obtained from the trial court a writ of Capias Ad Respondendum and an order that the defendant be held to bail of $6,500. The defendant moved to quash the writ and discharge the bail order, which motion the court granted. The plaintiff appealed, alleging that the trial court erred in granting the defendant's motion and that the original order should be reinstated.

The superior court reinstated the writ of Capias and the bail order, holding that an order to hold to bail for the fraudulent contraction of a debt did not have to be supported by proof of a fraudulent intent at the time of the contracting. There was sufficient proof of conversion by the defendant, a fraudulent act which resulted directly from the bailment contract. This was sufficient under New Jersey law to justify the issuance of a Capias. The defendant contended that his representations went only to the value of the ring and that such misrepresentations under Section 12 of the Uniform Sales Act (R.S. 46:30-18, N.J.S.A.) could not be construed as a warranty. But the court summarily dismissed this argument, noting that the action was not predicated upon breach of warranty but upon whether there was sufficient evidence of fraud to justify the issuance of a Capias. Section 2-313(2) of the Uniform Commercial Code was cited but did not govern the case.

COMMENT

Though Section 2-313(2) specifically provides that "an affirmation merely of the value of the goods . . . does not create a warranty," nothing in the Code precludes a party from bringing an action for fraud when an intentional misrepresentation of value is made.

M.L.A.

SECTION 2-314. Implied Warranty: Merchantability; Usage of Trade

WEBSTER v. BLUE SHIP TEA ROOM, INC.
— Mass. —, 198 N.E.2d 309 (1964)

The plaintiff, a New Englander, was served fish chowder in the defendant's restaurant. Though she looked at the spoonfuls while eating, she failed to notice a fishbone which subsequently lodged in her throat. An action for breach of implied warranty of merchantability was brought under Section 2-314, and the plaintiff received a verdict. On appeal, the court reversed, holding that there is no implied warranty that fish chowder will not contain fishbones. As a matter of law, fishbones do not constitute a foreign substance nor do they render the chowder unwholesome; the presence of fishbones in fish chowder is to be anticipated. In recounting the history of fish chowder, the court noted the hearty nature of the dish and emphasized that neither ancient nor modern recipes called for the removal of fishbones.

COMMENT

Compare DeGraff v. Myers Foods, Inc., 19 Pa. D. & C.2d 19 (Bucks County Ct. 1958), in which it was held to be a question of fact whether the seller of chicken pie impliedly warrants that the pie will be free from bones.

J.F.R.

EPSTEIN v. GIANNATTASIO
25 Conn. Super. 109, 197 A.2d 342 (1964)

The plaintiff went to the defendant Giannattasio's beauty parlor for a beauty treatment during which products manufactured by the defendants Sales Affiliates, Inc. and Clairol, Inc. were used. Alleging that such treatment caused her acute dermatitis and loss of hair, the plaintiff brought suit for negligence and breach of warranty. All three defendants demurred on the ground that the transaction did not amount to a sale of goods; in addition, Clairol, Inc. demurred on the ground that any warranties it might have given did not extend to the plaintiff. The court first held that on the basis of *Simpson v. Powered Prods., Inc.*, 24 Conn. Super. 409, 192 A.2d 555, annot. 5 B.C. Ind. & Com. L. Rev. 156 (1963), Clairol's second ground for demurring was unavailing. It then sustained the three demurrers on the ground that the predominant feature of the beauty treatment was service and not a sale of goods and that under Sections 2-102, 2-105 and 2-106, a warranty action could not lie unless there were a sale of goods within the meaning of the Code.

COMMENT

In the course of its opinion the court cited *Albrecht v. Rubinstein*, 135 Conn. 243, 63 A.2d 158 (1948), and *Lynch v. Hotel Bond Co.*, 117 Conn. 128, 167 Atl. 99 (1933), for the proposition that the serving of food in restaurants is fundamentally a service and not a sale of food. It then analogized these cases to the present one and held that the beauty treat-

ment was better characterized as a service than a sale of the products applied to the plaintiff's hair. But it is difficult to understand why the court cited *Albrecht* and *Lynch* when the proposition for which these cases stand has been expressly repudiated by Section 2-314 which provides that "the serving for value of food or drink to be consumed on the premises or elsewhere *is a sale.*" (Emphasis supplied.). See *Webster v. Blue Ship Tea Room, Inc.*, 198 N.E.2d 309 (Mass. 1964), annotated in this issue under Section 2-314.

In sustaining the manufacturers' demurrers on the ground that there was no sale of goods to the plaintiff, the court has come into conflict with a previously decided Connecticut case which dispensed with the requirement of a sale: *Connolly v. Hagi*, 24 Conn. Super. 198, 188 A.2d 884 (1963), annot. 5 B.C. Ind. & Com. L. Rev. 303 (1964). In that case the plaintiff was performing a service, repairing the defendant Hagi's automobile, when due to a mechanical defect in the car he was injured. He sued Hagi for negligence and also the manufacturer Chrysler for breach of warranty. Chrysler demurred, alleging lack of privity, but the court overruled the demurrer, stating: "It would appear that the warranty should be extended to all those who could reasonably be anticipated to use, occupy, or service the operation of the chattel. . . . [T]he protection of the automobile repairman against dangers of a defectively manufactured motor vehicle is a logical development of the modern trend of employing warranties of merchantability and use as a matter of public policy. *The necessity of a contract of sale between the parties is disappearing.* It is the ultimate consumer who is to be protected. The plaintiff may be regarded as an ultimate consumer within this concept." (Emphasis supplied.) In taking this position, the *Connolly* court was merely extending the car owner's warranty to the plaintiff as Section 2-318 permits. Not incidentally, it was also affirming the liberal approach earlier taken in *Simpson v. Powered Prods., Inc.*, cited supra, and *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

M.L.A.

SECTION 2-315. Implied Warranty: Fitness for Particular Purpose

BOEING AIRPLANE CO. v. O'MALLEY
329 F.2d 585 (8th Cir. 1964)
Annotated under Section 2-316, infra.

SECTION 2-316. Exclusion or Modification of Warranties

BOEING AIRPLANE CO. v. O'MALLEY
329 F.2d 585 (8th Cir. 1964)

On October 6, 1959, Vertol Aircraft, a division of Boeing, sold Atlas Corporation a helicopter. Article 6 of the contract of sale, entitled "Warranty," stated:

> (a) Vertol warrants that it is the full legal and beneficial owner of the helicopter described in Article 1, and that it is not subject to any

lien, charge, or encumbrance.
(b) The foregoing warranty is given and accepted in lieu of any and all other warranties, express or implied, arising out of the sale of helicopter.

Atlas Corporation had been organized for the purpose of buying the helicopter which was to be used in various lifting and transportation work. The officials of Atlas were inexperienced in the use of helicopters, which Vertol's agents knew. After purchasing the craft, Atlas found it inadequate for its purposes and notified Vertol. Eventually, Atlas went into liquidation and in February, 1961, demanded the return of its purchase price plus damages. By the terms of the contract, Pennsylvania law was to control. At the trial, the court found that an implied warranty of fitness for a particular purpose had arisen under Section 2-315, that it had not been effectively disclaimed in the contract of sale, and that it had been breached. Judgment was accordingly given to the plaintiff.

On appeal, affirmed. Vertol knew the particular purposes for which the helicopter was to be used and was aware that Atlas was relying on its (Vertol's) skill and judgment in the selection of the helicopter. Hence there arose under Section 2-315 an implied warranty of fitness. As to the disclaimer, Section 2-316 of the controlling 1954 Code provided that exclusions of the implied warranties of merchantability and fitness for a particular purpose had to be in specific language and that ambiguities were to be resolved against the seller. Here, the disclaimer was not so "clear, definite, and specific" as to leave the intent of the parties free from doubt. The court noted parenthetically that even if the 1958 version of Section 2-316 were applicable, the disclaimer would not have been effective since it was not conspicuous, being in the same color and size of print as the rest of the contract.

The court also noted that Atlas' notification of breach was not given so long after the sale as to be unreasonable as a matter of law. Although some fourteen months had passed between sale and notification, Vertol was at all times aware of the difficulty Atlas was experiencing, and this constituted notification under Section 1-201(27). Official Comment 4 to Section 2-607 provides that notification of breach "need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched."

COMMENT

Under Section 2-316 of the 1954 Code, a general disclaimer was of no value since the exclusion of the implied warranties of merchantability and fitness for a particular purpose both required specific language. Under the 1958 version, a general disclaimer is still ineffective to exclude the implied warranty of merchantability but it is effective to exclude the implied warranty of fitness for a particular purpose if it is in writing and conspicuous.

G.M.D.

SECTION 2-318. Third Party Beneficiaries of Warranties Express or Implied

YENTZER v. TAYLOR WINE CO.
409 Pa. 338, 199 A.2d 463 (1964)

Plaintiff, a hotel manager, personally purchased on his employer's behalf certain bottles of liquor which were intended for consumption by the hotel guests. While preparing the wine for serving, the plaintiff was struck and injured in the eye by a cap which was suddenly propelled from one of the bottles. In an action against the manufacturer for breach of the warranties that the goods were safely packed and fit for the ordinary purposes for which they were bought, the lower court, citing *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), held that the plaintiff could not recover and dismissed the complaint.

The supreme court reversed, holding that since the hotel manager had *personally* purchased the wine, he was a buyer within the definition of Section 2-103(1)(a) and as such could recover under Pennsylvania case law which extends warranties in food cases to persons in the distributive chain. This was consistent with Section 2-318 which extends warranty protection to guests of a buyer and to members of his family and household but which takes no position on the question whether warranties should be extended to the employee of a purchaser. Two judges dissented, noting that the plaintiff could not be a "purchaser" as that term is defined in Section 1-201(32, 33) since as a mere agent of the employer, the plaintiff acquired no "interest" in the liquor such as to qualify him as a purchaser.

COMMENT

Section 2-318 extends warranty protection to the family, household and guests of a buyer who is himself protected by warranty, and thus prohibits the application of privity requirements to these persons. However, this is the extent of the Code's inroad into privity; Comment 3 to Section 2-318 makes it clear that the Code takes no position on the extension of warranty protection to others in the distributive chain. The court sensibly refused to consider the employee as a third party beneficiary under Section 2-318; but, having so done, it was faced with the privity requirements of Pennsylvania case law. In order to allow the plaintiff recovery without abandoning privity, the court relied on the fact that the plaintiff himself was a buyer under Section 2-103(1)(a), and hence within the distributive chain and covered by the warranty. This is simply not true; an agent such as the plaintiff acquires no interest in the goods such as to place him within the distributive chain. Obviously the unfortunate rationale reflects the court's dissatisfaction with its earlier decisions.

G.M.D.

EPSTEIN v. GIANNATTASIO
25 Conn. Super. 109, 197 A.2d 342 (1964)
Annotated under Section 2-314, supra.

SECTION 2-326. Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors

GANTMAN v. PAUL
203 Pa. Super. 158, 199 A.2d 519 (1964)
Annotated under Section 2-401, infra.

SECTION 2-401. Passing of Title; Reservation for Security; Limited Application of This Section

GANTMAN v. PAUL
203 Pa. Super. 158, 199 A.2d 519 (1964)

The defendant, a furniture dealer, delivered some furniture to the plaintiff at his home and issued invoices showing the date of the purchase and several payments made on account. The defendant later removed the furniture from the plaintiff's house, claiming that the goods had been delivered on an approval basis and that they had never been finally approved. In an action for replevin, the lower court entered judgment for the plaintiff, holding that title to the goods had passed to the plaintiff and that the defendant's claim that the sale had been on approval was inconsistent with the period of time the plaintiff had been allowed to keep the goods and with the considerable payments made on account.

In affirming, the appellate court noted that under Section 2-401, unless otherwise expressly agreed, title passes to the buyer at the time the seller completes his performance with reference to the physical delivery of the goods, and held that since the defendant proved neither lack of ownership in the plaintiff nor superior rights due to a lien or encumbrance, the plaintiff was entitled to replevy the goods.

COMMENT

The court permitted the defendant to introduce parol evidence to show a sale on approval despite the absence of any reference to approval in the written contract. This was proper under Section 2-326 which distinguishes a "sale on approval" from a "sale or return." In a sale on approval, the seller retains title to goods he has placed in the physical possession of a buyer until the buyer "approves" or accepts them; in a sale or return, a seller commits himself to take back the goods in the event that the buyer fails to sell them. Invariably, a sale on approval involves a consumer-buyer, whereas a sale or return involves a merchant-buyer. According to Section 2-326(4), an "or return" provision must be evidenced by a written memorandum. This is in recognition of the fact that a contract with an "or return" feature is at odds with the ordinary contract for the sale of goods; the "or return" aspect is treated as a separate contract for Statute of Frauds purposes and as contradicting the sale in so far as the parol evidence rule is concerned. However, a sale on approval is common, and parol evidence may be introduced to show that the "on approval" term is a "consistent additional term" within Section 2-202.

G.M.D.

SECTION 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over

BOEING AIRPLANE CO. v. O'MALLEY
329 F.2d 585 (8th Cir. 1964)
Annotated under Section 2-316, supra.

SECTION 2-708. Seller's Damages for Non-acceptance or Repudiation

JAGGER BROS., INC. v. TECHNICAL TEXTILE CO.
202 Pa. Super. 639, 198 A.2d 888 (1964)

The defendant agreed to buy from the plaintiff 20,000 pounds of yarn at $2.15 per pound. The defendant accepted and paid for 3,723 pounds but on August 12, 1960, repudiated the contract. The plaintiff did not manufacture the remaining 16,277 pounds but brought an action for the difference between the contract price and the market price at the time and place of tender. At trial, however, the plaintiff directed its testimony to the market price at the time of repudiation and the judgment in its favor for $4,069.25 reflected this lower price. On appeal, the defendant contended that the proper measure of damages was the difference between the cost of manufacture and the contract price and that, since the plaintiff had failed to prove its cost of manufacture, it was not entitled to anything more than nominal damages. The court held that under both Section 2-708(1) of the Uniform Commercial Code and Section 64 of the Uniform Sales Act, the measure of damages for breach of contract for the sale of personal chattels is the difference between the selling price and the market value at the time and place of delivery. The court noted that the defendant made no contention that the plaintiff had not complied with Section 2-723 in establishing the market price at the time of tender.

COMMENT

The establishment of damages for breach of contract is controlled by Section 2-708(1) of the Code. This is merely a rewriting of Section 64 of the Uniform Sales Act, allowing the vendor the difference between the selling price and market value at the time and place of delivery. However, Section 2-708(1) does not control under certain exceptions enumerated in Section 2-723. These exceptions occur (1) when the action is based on anticipatory repudiation and comes to trial before the time for performance, in which case market price is determined according to the price at the time of repudiation; and (2) if there is no market price readily available at those times, in which case the price at any reasonable time, before or after the delivery date, may be substituted.

Subsection (2) of Section 2-708 also provides an alternative remedy if the difference between selling price and market price at the time and place of delivery is inadequate to put the seller in as good a position as

he would have been in had the contract been performed. Under Subsection (2) the measure of damages is expected profit (including reasonable overhead) which the seller would have made from full performance. The only requirement for the use of this alternative remedy is that the remedy in subsection (1) be inadequate.

B.E.R.

SECTION 2-723. Proof of Market Price: Time and Place

JAGGER BROS., INC. v. TECHNICAL TEXTILE CO.
202 Pa. Super. 639, 198 A.2d 888 (1964)
Annotated under Section 2-708, supra.

SECTION 2-725. Statute of Limitations in Contracts for Sale

GARDINER v. PHILADELPHIA GAS WORKS
413 Pa. 415, 197 A.2d 612 (1964)

Plaintiffs entered into an oral contract with the defendant for the sale by the latter of gas. Plaintiffs alleged that the defendant expressly and impliedly warranted that the gas would be safely transmitted into their home. The gas escaped from an underground conduit, causing the plaintiffs personal injury. The plaintiffs did not bring suit until two years and eight days after the alleged injury was incurred. The Act of 1895 provides a two-year statute of limitations for all personal injury actions and Section 2-725 of the Code provides a four-year statute for actions arising out of any breach of contract for sale.

The court held that Section 2-725 and the Act of 1895 were clearly inconsistent. However, since Section 10-103 repeals acts and parts of acts inconsistent with the Code, the four-year statute of limitations applied. Moreover, the intent of the legislature, manifested in part by Sections 1-102 and 2-715 of the Code, indicated that Section 2-725 was to be determinative.

M.L.A.

ARTICLE 3: COMMERCIAL PAPER

SECTION 3-104. Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note"

UNIVERSAL C.I.T. CREDIT CORP. v. INGEL
—— Mass. ——, 196 N.E.2d 847 (1964)

In return for siding work done on his house, the defendant executed a promissory note in favor of Allied Aluminum Associates, Inc. which subsequently negotiated the note to Universal C.I.T. Credit Corp., the plaintiff. At trial, the defendant admitted his signature on the note and on an accompanying completion certificate but alleged that the note failed to meet the requirements for negotiability set out in Section 3-104(1)(b)