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Sales—Written Warranties Received Subsequent to Consummation of Sale— Rights of Buyer Unaffected.—Sensabaugh v. Morgan Brothers Farm Supply

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of Common Pleas construed this section as imposing liability on the individual signer since the instrument failed to clearly show that he signed only on behalf of another named on the paper.[17]

The New Jersey Legislature, which is currently considering adoption of the UCC, has established a Commission to study the Code. In its report to the Legislature, the Commission referred to the "unfortunate rule" in New Jersey whereby parol evidence could be used to exonerate the agent, even in cases where a holder in due course had acquired the instrument, and said that such rule had been reversed by the Appellate Division in the present case.[18] (The New Jersey Supreme Court's reversal of the Appellate Division had not yet been announced.)

In any event, skillful execution by an agent or other representative intending to bind only his principal, should follow the illustration contained in Comment 3(c) to UCC Section 3-403: "Peter Pringle, by Arthur Adams, Agent." It might also be advisable to use the name of the intended maker, rather than the customary "we," in the promissory section of the body of the instrument. With these safeguards, non-liability of the authorized representative will be assured, regardless of the jurisdiction.

ROBERT J. ROBERTORY

Sales—Written Warranties Received Subsequent to Consummation of Sale—Rights of Buyer Unaffected.—*Sensabaugh v. Morgan Brothers Farm Supply*.[1]—Defendant-contractor purchased a bulldozer and loader from plaintiff, authorized dealer of J. I. Case Company, and signed sales contracts which contained no references to warranties. Upon subsequent delivery of the machines, defendant received manuals of instructions, each containing a warranty and warranty-disclaimer clause printed on the back cover. The clause limited J. I. Case's liability to a computable period of time and disclaimed the existence of any other warranties "express, implied or statutory." The manuals were not filled out or signed, nor did either identify any particular purchase or machine. Plaintiff-dealer brought suit for balance of purchase price of the two machines. Defendant-purchaser, who had experienced considerable mechanical difficulty with the machines, counterclaimed for breach of implied warranty of merchantability. The trial court held that the defendant-purchaser was bound and limited by the express warranty-disclaimer on the back cover of the manual. On appeal, the Court of Appeals of Maryland reversed. HELD: the mere delivery of a printed and unexecuted warranty-disclaimer form after the sale has been consummated does not bind the parties. The case was remanded for a determination of

[17] Grange Nat'l Bank v. Conville, supra note 11.

[18] Report of the (New Jersey Legislative) Commission to Study and Report Upon the Uniform Commercial Code 284 (1960).

[1] 165 A.2d 914 (Md. 1960).

whether there existed express verbal warranties or an implied warranty of merchantability.

Under the common law a statement made subsequent to the bargain is without binding force upon the parties. The seller's liability on a warranty is based upon the contract wherein consideration and reliance are essential. If the statement is unknown to the buyer at the time the sale is consummated, it is manifest that no consideration is given for it and no reliance made upon it. If no warranty is made at the time of the sale, a subsequent warranty will be valid only if new consideration is given for it.[2]

The Uniform Sales Act, Section 12,[3] follows the common law approach. Construing this provision, the court in *Smith Company v. Fisher Plastics Corp.*[4] concluded: "The Uniform Sales Act defines a warranty as an affirmation of a fact relating to the goods if the natural tendency of such affirmation is to induce the buyer to purchase the goods, and if he purchases relying thereon. A statement of fact made after title to the goods had passed to the buyer cannot be construed as a warranty relating back to the time of the sale." Thus, under the common law or the Uniform Sales Act, an express warranty must be within the cognizance of both parties at the time the contract is negotiated.

The Uniform Commercial Code continues this approach, as evidenced by Section 2-313(1)(a), which reads: "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 . . . ." A statement unknown to the buyer cannot become part of the basis of the bargain.

The common law doctrine concerning statements made subsequent to the bargain applies to disclaimers as well as warranties. After a contract to sell has been entered into, a unilateral disclaimer is ineffectual.[5] This is not to say that disclaimer is denied the vendor. Since warranty is a contractual matter, it is held at common law that the parties are free to make their own agreement and to negate an implied warranty that would otherwise exist.[6]

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[2] 1 Williston, Sales § 211 (rev. ed. 1948). Williston, What Constitutes An Express Warranty In The Law of Sales, 21 Harv. L. Rev. 555, 573-74 (1908).

[3] Corresponds to Md. Ann. Code art. 83, § 30 (1957).

[4] 76 F. Supp. 641 (D. Mass. 1948).

[5] Distillers Distributing Corp. v. Sherwood Distilling Co., 180 F.2d 800 (4th Cir. 1950); Landman v. Bloomer, 117 Ala. 312, 23 So. 75 (1898); Edgar v. Breck, 172 Mass. 581, 52 N.E. 1083 (1899); Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N.W. 484 (1917); Ward v. Valker, 44 N.D. 598, 176 N.W. 129 (1920); Diepeveen v. Vogt, Inc., 27 N.J. Super. 254, 99 A.2d 329 (1953); Bell v. Mills, 78 App. Div. 42, 80 N.Y. Supp. 34 (1902); Davis v. Ferguson Seed Farms, 255 S.W. 655 (Tex. Civ. App. 1923); Ingraham v. Associated Oil Co., 166 Wash. 305, 6 P.2d 645 (1932).

[6] Baglehole v. Walters, 3 Camp. 154, 170 Eng. Rep. 1338 (1811); Shepherd v. Kain, 5 B. and Ald. 240, 106 Eng. Rep. 1180 (1821); J. I. Case Threshing Mach. Co. v. McClamrock, 152 N.C. 405, 67 S.E. 991 (1910); Dowagiac Manufacturing Co. v. Mahon and Robinson, 13 N.D. 516, 101 N.W. 903 (1904).

But see, Comment, Last Stop for the Disclaimer, 2 B.C. Ind. & Com. L. Rev. 133 (1960), and cases cited therein.

Such disclaimer must, however, be fairly brought home to the buyer before the contract is concluded.[7]

Under the Uniform Sales Act, for a disclaimer to be effective, it must be arrived at by "express agreement," negativing any attempted unilateral insertion of a disclaimer subsequent to the agreement.[8]

The Uniform Commercial Code follows the common law and Sales Act in permitting the parties to make their own contract.[9] Although under Section 2-209(1) of the Code[10] there need not be new consideration to support a modification of a contract, nevertheless, such modification must be by "agreement," again countering any attempted unilateral modification.

It is therefore apparent that if a manufacturer or vendor is of a mind to limit his liability by use of a disclaimer of warranty, such disclaimer must be made a part of the sales bargain and cannot be unilaterally inserted into the bargain subsequent to its consummation. Typical day to day attempts to accomplish this very task, nevertheless, include the use of printed disclaimers on manufacturer's stationery,[11] enclosed in packaged goods,[12] on bills presented upon delivery of goods,[13] pasted on delivered containers,[14] or printed on invoices or shipping tags,[15] all ineffectual.

As shown above, for the same reasons that such subsequent statements of disclaimer are ineffective in protecting the seller, subsequent statements of warranty are equally ineffective in benefiting the buyer. The law on the subject would appear to be well settled and yet the very type of "warranty" here involved presents itself to the average citizen repeatedly. There are probably innumerable consumer-holders of unenforceable warranties, that is, certificates received upon purchase and carefully packaged with the item, or received some time after delivery of the item.

It would appear that if the consumer wants to take advantage of the written warranty he must ask, before the sale is closed, whether or not the item is protected by a warranty and if so, what the terms are, or in some manner incorporate the warranty into the bargain. Of course, so far as the buyer is concerned, the written warranty is not usually vital. Frequently there is sufficient sales talk and reliance thereon to establish an express war-

[7] Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117, 157-58 (1943).

[8] Uniform Sales Act (hereinafter cited as USA) § 71: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealings between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

[9] UCC § 2-316(2): ". . . to exclude or modify the implied warranty of merchantability a writing must be conspicuous . . . ."

[10] UCC § 2-209(1): "An agreement modifying a contract within this Article needs no consideration to be binding."

[11] Distillers Distributing Corp. v. Sherwood Distilling Co., supra note 5.

[12] Diepeveen v. Vogt and Bell v. Mills, supra note 5.

[13] Edgar v. Breck, supra note 5.

[14] Ingraham v. Associated Oil Co., supra note 5.

[15] Moorhead v. Minneapolis Seed Co., supra note 5.

ranty,[16] and if not, the law prescribes implied warranties of merchantability[17] and, in certain instances, of fitness for a particular purpose.[18]

SCOTT R. FOSTER

Statutory Change—Effect of Upon a Prior Consent Decree—Equity.—***System Federation No. 91, Railway Employees' Dept. v. Wright.***[1]**—In 1945 twenty-eight nonunion employees of the Louisville and Nashville Railroad sought an injunction and $140,000 in damages against the employer railroad and a number of unions representing the employees, alleging certain discriminatory practices directed towards them by reason of their nonmembership in the union. The parties entered into a consent decree and the plaintiffs received $5,000 in consideration thereof. The decree specifically enjoined discrimination against said plaintiffs because of their refusal to join or to continue membership in the unions. At the time of entry of the decree Sections 2(4) and 2(5) of the Railway Labor Act[2] were in effect. These sections specifically prohibited negotiations for the purpose of entering into a union shop agreement. The present action was instituted for the purpose of modifying this decree to allow the prior defendants to negotiate for a union shop. The petitioners relied on the 1951 Amendment to the Railway Labor Act[3]

[16] Williston, What Constitutes An Express Warranty In The Law of Sales, supra note 2.

[17] USA § 15(2): "Where the goods are bought by description from a seller who deals in goods of that description . . . there is an implied warranty that the goods shall be of merchantable quality." UCC § 2-314(1): ". . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . ."

[18] USA § 15(1): "Where the buyer . . . makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's judgment . . . there is an implied warranty that the goods shall be reasonably fit for such purpose." UCC § 2-315: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose."

[1] 364 U.S. 642 (1961).

[2] Section 2(4) making it, ". . . unlawful for any carrier . . . to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . ."

Section 2(5) "No carrier . . . shall require any person seeking employment to sign any agreement . . . promising to join or not to join a labor organization; . . . ." 44 Stat. 577 (1926), 45 U.S.C. § 152 (1958).

[3] Section 2(11) ". . . any carrier . . . and a labor organization . . . shall be permitted—

> (a) to make agreements requiring as a condition of continued employment that . . . all employees shall become members of a labor organization. . . . Provided, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms as are generally applicable to any other member or to employees with respect to whom membership was denied for any reason, other than failure of the employee to tender periodic dues, etc. . . ." 64 Stat. 1238 (1951), 45 U.S.C. § 152 (1958).