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Article 2: Sales

Barry L. Wieder

Arnold W. Proskin

his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

Skinner v. Tober Foreign Motors, Inc., — Mass. —, 187 N.E.2d 669 (1963).

See the Annotation to Section 2-209, infra.

SECTION 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition

parties had agreed to arbitrate.

In reversing, the Appellate Division noted that numerous decisions had established that the intent to create an arbitration agreement must be clearly established. Such an agreement cannot depend on conflicting fine print in commercial forms. As a matter of law, there was no agreement to arbitrate.

Although the Code was not in effect at the time of this decision, the court found Section 2-207 useful in its application to this problem. The arbitration clause, whether viewed as a material alteration under subsection (2) or as a term nullified by conflicting provisions in the forms (Comment 6), would not become part of the contract.

[Annotator's Comment: The approach of the court seems correct in light of the marked effect this provision would have on the normal remedies for breach of contract. The court limited its holding to the application of the arbitration clause while recognizing that a different principle might govern other terms appearing in the forms.]

SECTION 2-209. Modification, Rescission and Waiver.

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Skinner v. Tober Foreign Motors, Inc., — Mass. —, 187 N.E.2d 669 (1963).

A Connecticut resident purchased an airplane from a Massachusetts corporation. The bill of sale, installment contract and note were executed in Massachusetts, and were of a type used in Connecticut, which the seller believed to be necessary because the buyer lived in Connecticut and the plane was to be based there. The buyer agreed under the contract to pay $200 per month for twenty-four months and the balance on the twenty-fifth month. The plane was delivered to the buyer, but before the first payment fell due, trouble developed in the engine, which would cost $1,400 to repair or replace. To alleviate buyer's difficulties, and rather than accept the return of the plane, the seller orally agreed to lower the payments for the first year to $100 per month. The buyer agreed and installed a new motor. Five months later, seller informed the buyer that the payments would have to be increased to the original $200 per month or "he would have to take action." The buyer continued to make the $100 payments. Without demand for full payment, the seller repossessed the plane and caused it to be sold at a sheriff's sale. The buyer then brought suit seeking equitable replevin or damages. The master found the seller liable to the buyer for the value of the plane less the balance of the purchase price.

On appeal, the court affirmed, answering the seller's main argument that Connecticut law should control by holding that the parties had not agreed that Connecticut law should control and that the "transaction bore an appropriate relation to" Massachusetts since the transaction was executed and the plane was delivered to the buyer in Massachusetts, the law of which should govern under Section 1-105. Section 9-103 was held not to control since the dispute was not over the validity of perfection of the security interest but involved the sales aspects of the transaction under Article 2 as indicated in Section 2-102. The seller also contended that the oral modification was invalid and

unenforceable because it did not comply with the statute of frauds (Section 2-201) and because it was not supported by consideration. The court dismissed both arguments because the seller had not pleaded the statute of frauds, and the modification required no consideration under Section 2-209(1).

[Annotator's Comment: Although the court did not consider the question of enforceability of the oral modification, it does raise a perplexing problem. From subsection (3) and the Official Comment to Section 2-209, it appears that to be enforceable, any modification of a contract which is within the purview of Section 2-201 must itself satisfy the statute of frauds requirements.

From the facts reported, it seems that this modification did not satisfy these requirements. But, even if the seller had pleaded the statute of frauds, not all would have been lost for the buyer, for subsections (4) and (5) of Section 2-209 causes an unenforceable modification to operate as a waiver. In this instance, buyer could argue that the oral modification, although unenforceable because of its failure to meet the requirements of the statute of frauds, acted as a waiver of the contract payment terms, and these were replaced by the payment terms in the modification. This waiver was effective until seller retracted it by reasonable notice. Buyer would concede seller's notifying him of his retraction of the waiver, but he would rightly contend that, by the seller's accepting two more payments under the terms of the modification, the seller's retraction of the waiver lost its force. Hence, the buyer was not in default since the terms of the modification controlled until effectively retracted, and seller had no right to repossess the plane. Had the seller not accepted any payments lower than the ones called for in the sales contract after notifying buyer of his retraction of the modification, the buyer would have been in default and the seller would then have had the right to take possession of the plane.

Buyer also might have argued that neither Article 2 nor any other article of the UCC governs the enforceability of the modification, because, in treating the modification as a separate transaction, it was neither a sale of goods nor any type transaction which is covered by the Code. This argument would win the battle but buyer would lose the war, for the court would in all likelihood apply the common law of contracts and hold the modification to be unenforceable as not being supported by consideration, or, if consideration were found, the court would hold it unenforceable by its noncompliance with the common law statute of frauds.

The fact that the Massachusetts Supreme Judicial Court so readily accepted Section 1-105 and thereby applied Massachusetts law in this well-reasoned opinion is an indication that the court is accepting the Code in exchange for time-embedded concepts.]

SECTION 2-302. Unconscionable Contract or Clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962).

See the Annotation to Section 2-314, infra.

Willman v. American Motor Sales Co., 44 Erie Leg. J. 51 (1961).

See the Annotation to Section 2-316, infra.

SECTION 2-305. Open Price Term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

Republic-Odin Appliance Corp. v. Consumers Plumbing & Heating Supply Co., 45 Erie Leg. J. 121 (Pa. 1961).

This is a suit by the seller to recover the "price" of goods sold and delivered to the buyer. The primary dispute was whether the buyer was the defendant, a Pennsylvania corporation, or an Ohio corporation

which had the same name and the same president as the defendant, but which was not a party to this suit. In prior dealings, the plaintiff, following instructions, sent to the Ohio corporation the original invoices for goods ordered by and delivered to the defendant in Pennsylvania. The Ohio corporation then made payment from vaguely separated accounts in an Ohio bank. In deciding for the plantiff, the court, noting that there was no agreed price for the goods delivered, relied on Section 2-305 and inferred a reasonable price, which was amply evidenced by plaintiff's catalogs which had formed the basis of pricing in prior dealings.

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

(1) Unless excluded or modified (Section 2-316), 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. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962).

Plaintiff (buyer) purchased an automobile from White (dealer) which was manufactured by Ford whose contract of sale, which embodied the entire transaction, did not specifically exclude a warranty of merchantability. New cars delivered by the manufacturer to the dealer are operational and the dealer performs only "make ready" service which includes tune-up, transmission adjustments, and state inspection. Shortly after the car was delivered, the buyer noticed stiffness in the steering. About one month later, when the car was given its

1,000 mile check-up by the dealer, nothing defective was discovered in the steering mechanism. A few days later, the steering failed and this resulted in the destruction of the car and serious injuries to the buyer. Buyer brought an action against Ford for breach of warranty and negligence. Ford joined the dealer as a third party defendant alleging the dealer's negligence. The evidence indicated that the steering defect was caused by a jam nut not properly secured by the manufacturer. The jury, by special verdict, found that Ford was guilty of breach of warranty and negligence, both being proximate causes of the accident; that the dealer was guilty of negligence, which was the proximate cause of the accident; and that the buyer was not contributorily negligent. The court entered judgment against Ford with a right of contribution against the dealer. Ford moved that the verdict should be set aside, and the dealer moved that it should not be held liable to Ford for contribution.

The court denied Ford's motion on the ground that Ford had warranted the new car impliedly (Section 2-314) since it had not specifically excluded this warranty as provided by Section 2-316. Lack of privity does not bar buyer's claim for breach of warranty or for negligence. The court also found that the evidence supported the verdict.

On the other hand, the court granted dealer's motion and thereby removed its duty of contribution to Ford. This consideration was based on the fact that Ford could not recover from the dealer for negligence in failing to discover and remedy the defect caused by Ford's own negligence.

[Annotator's Comment: The buyer in the instant case chose to sue Ford and was successful. Had he sued the dealer, Section 2-314 would have raised the same implied warranty running from the dealer to the seller. In that case, the dealer would probably have had the right of indemnity from Ford based upon Ford's breach of implied warranty (Section 2-314) to the dealer. This, at least, is implicit in Sections 2-607(5), 2-714 and 2-715(2).

The court mentioned that Ford did not specifically and conspicuously disclaim its warranty of merchantability in its contract as provided in Section 2-316. It seems likely that if Ford did specifically disclaim its implied warranty in strict compliance with Section 2-316, the disclaimer would probably be disregarded by the court's invoking Section 2-302. Two cases which indicate this result are *Willman v. American Motors*, 44 Erie Leg. J. 51 (Pa. 1961) (annotated at Section 2-316, infra), and *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (2 B.C. Ind. & Com. L. Rev. 267 (1961)). In these cases, the courts noted that the bargaining between an automobile manufacturer and a buyer could not be at arm's length due to their unequal positions and that such a disclaimer clause would be unconscionable and against public policy. This language is a warning to manufacturers that the court would invoke its power under Section 2-302 and disregard this "out."]

Adams v. Scheib, 408 Pa. 452, 184 A.2d 700 (1962).

Consumer, who purchased raw pork sausage from a retailer, alleged that she, several members of her family and guests contracted trichinosis from eating the pork. Each brought an action for breach of implied warranty. The retailer attempted to join wholesalers, who sold the pork to the retailer, as additional defendants, but they were granted compulsory nonsuits because the retailer failed to prove that the alleged infected pork was from the pork purchased from them. In his charge, the trial judge instructed the jury, at plaintiffs' request, that if plaintiffs bought pork from defendant, and if that pork was infected with trichinae, the defendant breached his warranty and plaintiffs may recover. The warranty that food is wholesome is implied irrespective of the defendant's knowledge of its diseased quality. The jury returned a verdict in favor of retailer, and plaintiffs' motion for a new trial was granted because the trial judge declared that the verdict was against the evidence, the weight of the evidence, the law, and the charge of the court.

The Pennsylvania Supreme Court reversed and reinstated the verdict, holding that the charge, while erroneous, was favorable to the plaintiffs and they had no cause to complain. The court stated that under Section 2-314 an implied warranty did arise, but when applied to the sale of raw pork, the jury must decide the added fact of whether it was properly cooked. That this fact was not presented to the jury, gave plaintiffs an undue advantage.

[Annotator's Comment: All goods which are impliedly warranted by Section 2-314(c) must be fit for the ordinary purposes for which they are used. By no means should this opinion be interpreted as limiting the fitness requirement to the sale of raw pork.]

SECTION 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), 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. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all

faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

Willman v. American Motor Sales Co., 44 Erie Leg. J. 51 (Pa. 1961).

The purchaser brought an action for breach of implied warranty of merchantability against the dealer and the manufacturer after his automobile was destroyed in a fire caused by a faulty power brake system. Although the manufacturer agreed in writing to replace any defective part, it further stipulated that "this warranty [is] expressly in lieu of all other warranties expressed or implied and of all other obligations or liabilities on its part." The jury found for the plaintiff against both defendants with liability over in favor of the dealer against the manufacturer. Chrysler Corporation, the manufacturer, moved for judgment n.o.v. and a new trial alleging that the clause constituted a valid disclaimer of the implied warranty of merchantability.

The court held that a disclaimer clause must be sufficiently specific to exclude a warranty which arises independently of the contract, such as the warranty of merchantability. Although Section 2-316 (1953 version of the Code) establishes certain standards for excluding implied warranties, the language of this clause did not include any of the expressions in Section 2-316(2)(a) nor did it adequately disclose to the buyer that there was to be no implied warranty. The effective negation of implied warranties requires either the use of statutory expressions or clear and definitive words of exclusion.

Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959) had clearly determined that the purchaser did not have to establish privity in order to impose liability for breach of warranty against the manufacturer.

[Annotator's Comment: In a footnote the court noted the possible use of Section 2-302(1) in cases where the disclaimer provision satisfies the requirements imposed by Section 2-316. Courts in sympathy with a buyer who is compelled to accept a one-sided and oppressive contract can strike the clause and thereby avoid "any unconscionable result." The court cited *Henningsen v. Bloomfield Motors, Inc.* 32 N.J. 358, 161 A.2d 69 (1960) in which the New Jersey court held the same

disclaimer clause to be against public policy and void as a matter of law. The authors of the Code have utilized this public policy element in Section 2-302.

But the Pennsylvania court was not forced to decide whether or not the clause was unconscionable, for the disclaimer was inadequate under the 1953 Code because it was not "specific." The same conclusion would be reached under Section 2-316 of the 1958 Code because "merchantability" was not expressly mentioned.]

Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962).

See the Annotation to Section 2-314, supra.

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

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Hochgertel v. Canada Dry Corp., — Pa. —, 187 A.2d 575 (1963).

The bartender of a fraternal organization was injured by flying glass fragments when an unopened bottle of carbonated soda water, located on a counter behind the bar, exploded. He sued the bottler on grounds of breach of an implied warranty of merchantability. The lower court sustained defendant's demurrer.

In affirming, the Pennsylvania Supreme Court noted that, since the bartender was neither in the family or houshold of the purchaser nor a guest in his home, he was not one entitled to recover from a remote seller under Section 2-318. The court declared that, although prior cases had extended the warranty to *sub-purchasers* in the case of food, further extension of the warranty beyond the immediate buyer must come about through the efforts of the legislature. The court suggested that plaintiff had an adequate remedy in an action for negligence.

[Annotator's Comment: The court in this case has impliedly overruled important decisions on questions of privity in the superior and federal district courts. In *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959) and *Thompson v. Reedman Motors Co.*, 199 F. Supp. 120 (E.D. Pa. 1961), each court abandoned the requirement of privity between the respective plaintiff and defendant in actions for breach of warranty. In the former case the buyer, and in the latter case a guest passenger of the buyer, of an automobile were allowed to bring an action for breach of warranty directly against the manufacturer. Both cases distinguished *Loch v. Confair*, 372 Pa. 212, 93 A.2d 451 (1953), relied upon in the instant case, on the grounds that there the

plaintiff, injured by an exploding bottle she had placed in her shopping cart, had not yet purchased the product. The court in *Thompson v. Reedman*, supra, expressly stated that it had no doubt that the Supreme Court of Pennsylvania would reach its result so long as there had been *some* purchase of the goods through which the plaintiff could claim.

While neither of these cases would be binding upon the Supreme Court, they do represent the "developing case law" referred to in the Official Comment to Section 2-318. Because of the notoriety and general approval given to these cases, it is difficult to believe that the court was unaware of them. However, the court blanketly stated, "In no case in Pennsylvania has recovery against the manufacturer for breach of an implied warranty been extended beyond a *purchaser* in the distributive chain. In fact, the inescapable conclusion from *Loch v. Confair* . . . is that no warranty will be implied in favor of one who is not in the category of a purchaser." (Emphasis by the court.) This statement perhaps will save the decisions in *Jarnot* and *Duckworth v. Ford Motor Co.*, annotated supra, under Section 2-314, but will cast a long shadow on the *Reedman* decision.

The now eroded privity doctrine was a creature of the courts at a time when distribution of goods had little resemblance to modern practices. This court states, however, that the legislature now has the responsibility for altering that doctrine. The result may be an unfortunate return to the decisions denying recovery to guests of the actual buyers of food in restaurants or drive-ins. After all, these, as well as guests in the home and members of the family, can reasonably be expected to use, consume or be affected by the goods.]

Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962).

See the Annotation to Section 2-314, supra.

ARTICLE 6: BULK TRANSFERS

SECTION 6-110. Subsequent Transfers.

When the title of a transferee to property is subject to a defect by reason of his non-compliance with the requirements of this Article, then:

(1) a purchaser of any of such property from such transferee who pays no value or who takes with notice of such non-compliance takes subject to such defect, but

(2) a purchaser for value in good faith and without such notice takes free of such defect.

In the Matter of Dee's, Inc., 311 F.2d 619 (3d Cir. 1962).

This litigation was between two trustees in bankruptcy to determine in which bankrupt's estate property should be placed. Lewis