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Sales—Liability of Cigarette Manufacturer under Implied Warranty.—Ross v. Philip Morris & Co

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relying on *Grimshaw*[28] and the *Continental Casualty*[29] cases coupled with an interpretation of the Assistant Secretary of Defense's June 4, 1956 letter to overrule its holding in *Gypsum*.[30] In attempting to justify its result the court stated it was the

> probable intention of Congress to permit furnishing of bonds by military housing contractors which did not conform with the requirements of the Miller Act, so long as the form thereof was satisfactory to the Secretary of Defense or his designee.[31]

The court thus has dismissed the important conclusions reached in the most recent federal case, *Travis*, and overlooked the relevant portions in the Hearings before the House Banking and Currency Committee that shed light on Congress' intent in enacting the Capehart Act and its Amendment.

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Sales—Liability of Cigarette Manufacturer Under Implied Warranty.—***Ross v. Philip Morris & Co.***[1]—Plaintiff, a resident of Missouri, and a confirmed smoker since 1934, smoked several packages daily of Philip Morris cigarettes from 1934 until 1952. In 1952, plaintiff discovered that he had throat cancer. As a result of an operation for the cancer, plaintiff had to breathe through an opening in his neck and speak with the aid of an electrical device attached to his throat. Plaintiff sued defendant cigarette manufacturer, *inter alia*, for breach of implied warranty. Judgment was entered for the cigarette manufacturer, and plaintiff appealed. In affirming the decision of the district court, the Circuit Court of Appeals HELD: Under Missouri law, a manufacturer's implied warranty means that the product is reasonably fit for its intended use and, under proper circumstances, the manufacturer is an insurer against recognizable dangers, but such implied warranty does not extend to harmful effects which no developed human skills or developed scientific knowledge could have anticipated during the period of plaintiff's use of the product.

The controversy concerning the connection between cigarette smoking and cancer was emphasized with the Report of the Advisory Committee to the Surgeon General of the United States.[2] This Report, after discussing the many aspects of public health and smoking, concluded that smoking and cancer are causally related.[3] By connecting smoking and cancer, this Report will likely promote actions against cigarette manufacturers based on implied

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[28] Supra note 9.
[29] Supra note 10.
[30] Supra note 8.
[31] Supra note 1, at 516, 197 A.2d at 566.

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[1] 328 F.2d 3 (8th Cir. 1964).
[2] Smoking and Health, Report of the Advisory Committee to the Surgeon General of the Public Health Service, Public Health Publication No. 1103 (1964).
[3] Id. at 37.

warranty. The courts in recent years have concerned themselves with this problem, even before the Surgeon General's Report.

On facts similar to those of the instant case, the Fifth Circuit in *Green v. American Tobacco Co.*,[4] concluded, contrary to the instant case, that the manufacturer's knowledge or opportunity for knowledge of the dangerous quality in his product did not qualify his liability for breach of implied warranty. In reaching this determination, the court certified a question to the Florida Supreme Court.[5] In its answer, the Florida court, holding absolute liability, based its determination on these factors: (1) there was no precedent in Florida law for the "human skill and foresight test," and (2) rulings in Florida case law negate such a test.[6]

Both the instant case and *Green* rest on the premise that the implied warranties involved in the sale of cigarettes are similar to those involved in the sale of foods.[7] This classification has not always been the rule;[8] it has,

[4] Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963). Plaintiff had smoked about two packages of the defendant's cigarettes daily from 1925 till 1956. On remand for trial, a federal court jury decided on Nov. 28, 1964, that cigarettes are "reasonably safe and wholesome" and therefore denied damages to the estate of Green. The question of liability was presented to the jury in the form of two questions: (1) Are cigarettes reasonably safe and wholesome for human consumption? (2) If they are not, what damages should be awarded to Mr. Green's estate? The jury decided the answer to the first question in the affirmative. N.Y. Times, Nov. 29, 1964, p. 1, col. 3.

[5] The history of the *Green* case is important. In 304 F.2d 70 (5th Cir. 1962) the court, in affirming the decision of the district court, held: Under the theory of implied warranty the manufacturer was not an absolute insurer of its product and was not liable for plaintiff's death which resulted from lung cancer caused by smoking defendant's cigarettes, in view of the jury's finding that there was no developed human skill or foresight which could give the defendant a knowledge of possible harmful effects. The court, however, felt the question of liability was so important, that a question was certified to the Florida Supreme Court concerning the liability of cigarette manufacturers under Florida's implied warranty doctrine. The certified question was as follows:

> Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of main stream smoke from such cigarettes, of contracting cancer of the lung? Green v. American Tobacco Co., 154 So. 2d 169, 170 (Fla. 1963).

The Supreme Court of Florida answered this question affirmatively, saying that a "manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty. . . ." Id. at 170.

The Fifth Circuit, after receiving the answer to the certified question, remanded the case to determine the issue of liability in the light of the Florida court's interpretation. Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963).

[6] Green v. American Tobacco Co., 154 So. 2d 169, 170 (Fla. 1963).

[7] In *Ross*, the court stated that it "would impose the same strict liability upon a manufacturer of cigarettes as has been applied in the food and beverage cases." Supra note 1, at 8. In *Green*, the court stated that for "products intended for human consumption, and the use of which may cause injury or death, the jury may properly apply a very strict standard of reasonableness." Supra note 4, at 676.

[8] Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009 (1915).

however, been gaining acceptance.[9] In the sale of food an implied warranty runs that it is fit for the purpose of human consumption.[10] The rationale supporting this is that deleterious food is so dangerous that, when neither party is at fault, the one placing the defective food on the market should bear the loss.[11] The reliance which the buyer places on the seller's superior knowledge, as well as the buyer's relative inability to bear loss, sustain this approach.[12]

In the usual implied warranty case involving food, the presence of a foreign substance has been the basis of liability.[13] The warranty is that food is wholesome, fit for its purpose, and of merchantable quality,[14] but this does not imply absolute perfection.[15] The finding of "a mouse in a Coke bottle" is certainly not to be expected and makes the product not only unmerchantable but unwholesome.[16] Where the problem involves the presence of a substance not foreign to the product, a number of cases have reached a different result by holding no liability.[17] In this situation, the courts feel that, for example, a turkey bone in turkey soup is not a foreign substance and one who partakes of the soup ought to anticipate the bone.[18]

The instant decision and *Green*, after determining that similar warranties attach to cigarettes as to food,[19] indicated that the law of implied

[9] Restatement (Second) Torts § 402A, Comment d, at 2 (Tent. Draft No. 7 1962).

[10] 1 Williston, Sales § 242 (rev. ed. 1948).

[11] Keeton, Products Liability—Current Developments, 40 Texas L. Rev. 193 (1961).

[12] Ibid.

[13] Commenting on this, Prof. Spruill has said: "[T]he rats of Hamlin were as nought in comparison with that horde of mice which has sought refreshment within Coca-Cola bottles and died of a happy surfeit." Spruill, Privity of Contract as a Requisite on Warranty 19 N.C.L. Rev. 551, 566 (1941).

[14] Borman v. O'Donley, 364 S.W.2d 31, 35 (Kansas City, Mo., Ct. App. 1962).

[15] "There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." Restatement (Second) Torts, supra note 9, Comment k, at 5.

[16] Beyer v. Coca-Cola Bottling Co., 75 S.W.2d 642 (St. Louis, Mo., Ct. App. 1934). A large number of states apply strict liability with or without privity, regardless of negligence, Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19, 25 (5th Cir. 1963). The Restatement (Second) Torts, supra note 9, at 9, lists 19 states which by case law impose strict liability in food and drink cases and 5 states which have statutes to the same effect.

[17] Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936) (chicken bone in chicken pie); Silva v. F. W. Woolworth Co., 28 Cal. App. 2d 649, 83 P.2d 76 (1938) (turkey bone in turkey dinner); Brown v. Nebiker, 229 Iowa 1223, 296 N.W. 366 (1941) (sliver of bone in breaded porkchop). Contra, Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A.2d 913 (1942) (oyster shell in canned oysters); Wood v. Waldorf System Inc., 79 R.I. 1, 83 A.2d 90 (1951) (chicken bone in chicken soup).

[18] See Silva v. F. W. Woolworth Co., supra note 17; Mix v. Ingersoll Candy Co., supra note 17.

A recent Massachusetts decision, Webster v. Blue Ship Tea Room, Inc., 1964 Mass. Adv. Sh. 731, 198 N.E.2d 309 (1964), presented the court with the question of the liability of a restaurant owner for injuries received from a swallowed fish bone which was in a bowl of fish chowder. The court, in holding no liability, stated at 736, 198 N.E.2d at 312:

> In any event, we consider that the joys of life in New England include the ready availability of fresh fish chowder. We should be prepared to cope with the hazards of fish bones, the occasional presence of which in chowders is, it seems to us, to be anticipated, and which, in the light of a hallowed tradition, do not impair their fitness or merchantability.

[19] Supra note 7.

warranty concerning injuries received from deleterious food imposed strict liability. *Green* imposed absolute liability without qualification;[20] *Ross*, however, qualified strict liability by using a test of developed human skill or foresight at the time.[21] Thus, in Missouri, implied warranty does not cover injury from substances in the manufactured product whose harmful effects no developed human skill or foresight could have anticipated. This test, however, does not imply that the manufacturer be able to prevent the subsequent harm, but only that he be able to foresee its possibility. Text writers favor this position.[22]

In two other cases concerning smoking and cancer, *Cooper v. R. J. Reynolds Tobacco Co.*[23] and *Lartigue v. R. J. Reynolds Tobacco Co.*,[24] the courts found for the defendant cigarette manufacturers. *Cooper* discussed plaintiff's reliance on the representations of the manufacturer. The court ruled that plaintiff did not establish that defendant had made the representations. *Lartigue* faced the same question presented by the instant case. That court ruled:

> When a claim is based on injuries from food products manufactured or processed for human consumption a special rule prevails in a large majority of the states: strict liability, with or without privity, regardless of negligence . . . . However, it is necessary to show that the warranted product contained an element from which, on the basis of existing human knowledge, harm might be expected to flow.[25]

In *Pritchard v. Liggett & Myers Tobacco Co.*,[26] the plaintiff sued in implied warranty and in negligence. The Third Circuit ruled that whether there was enough evidence to establish breach of warranty of merchantability and whether the defendant was negligent in not conducting tests adequate to determine the effects of smoking were jury questions. The court stated that the jury could consider the "practices of other cigarette manufacturers and

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[20] Green v. American Tobacco Co., 154 So. 2d 169, 170 (Fla. 1963).

[21] Ross v. Philip Morris & Co., supra note 1, at 12.

[22] See James, General Products—Should Manufacturers be Liable Without Negligence? 24 Tenn. L. Rev. 923 (1957), 2 Harper & James, Torts 1584-1586 (1956).

The Uniform Commercial Code, which goes into effect in Missouri July 1, 1965, discusses implied warranty, merchantability, and usage of trade. Uniform Commercial Code, §§ 2-314, 2-315. To be merchantable, the goods must be "fit for the ordinary purposes for which such goods are used." § 2-314(2)(c). Had the Code been in operation in Missouri at the time of suit, the warranty of merchantability is the only warranty in the Code which could have been breached. In both *Ross* and *Green* the courts did not claim the cigarettes to be unmerchantable. It is submitted, therefore, that had the Code been in effect in both states at the start of the cause of action the Code would have had no effect upon the final decision. The implied warranties which are determinative here exist apart from the Uniform Commercial Code. The basis for the decisions in both cases is supported by case precedent in each jurisdiction and cited text authorities.

[23] 158 F. Supp. 22 (D. Mass. 1957), aff'd, 256 F.2d 464 (1st Cir. 1958), cert. denied, 358 U.S. 875 (1958).

[24] 317 F.2d 19 (5th Cir. 1963). Evidence was introduced showing that Lartigue smoked at least two packages of cigarettes a day from 1917 till 1954.

[25] Id. at 25, 35.

[26] 295 F.2d 292 (3d Cir. 1961), reversing 134 F. Supp. 829 (W.D. Pa. 1955).

the quality of cigarettes they manufacture as bearing on the question of merchantability."[27]

Florida imposes absolute liability for breach of implied warranty for harm resulting from the use of cigarettes.[28] Therefore, as long as a causal connection between the cancer and smoking can be established, Florida will grant recovery. Missouri frames liability in terms of the "human skill and foresight test."[29] This stand served to protect the tobacco industry when the state of knowledge was such that a connection between smoking and cancer was not known. With the Report of the Surgeon General's Advisory Committee[30] causally connecting smoking and cancer, however, the qualified test of Missouri might not protect the manufacturer under the implied warranty theory. For, with the cigarette manufacturer now knowing the relationship between cigarettes and cancer, the qualification of "human skill and foresight" probably no longer applies. Therefore, Missouri is perhaps approaching that level of absolute liability as presently applied in Florida.

An extension of the doctrine in the instant case and in *Green* could affect other industries. For example, "ice cream and butter may contain sufficient cholesterol to be unwholesome to persons with high blood pressure and heart trouble."[31] Perhaps the next step in the extension of implied warranty will be to hold the dairy industry liable for resulting damages. Liquor manufacturers, also, might be held for resulting harm to the user, for the harm which can arise from use inheres in the product. The properties in alcohol which can cause serious health difficulties from long and substantial use, however, it appears, have not resulted in alcohol being considered unmerchantable, unfit for human consumption, or unreasonably dangerous.[32] As Judge Goodrich, concurring in *Pritchard*, said:

> If a man buys whiskey and drinks too much of it and gets some liver trouble as a result I do not think the manufacturer is liable unless (1) the manufacturer tells the customer the whiskey will not hurt him or (2) the whiskey is adulterated whiskey . . . . The same surely is true of one who churns and sells butter to a customer who should be on a nonfat diet.[33]

Turning to the *Pritchard* case, Judge Goodrich then stated, "In this case there was no claim that Chesterfields are not made of commercially satisfactory tobacco."[34] On this view, the warranty liability of dairy, liquor and tobacco producers would depend upon whether or not the product is commercially satisfactory or merchantable, that is, fit for the purpose of eating, drinking, or smoking, regardless of potentially dangerous harm from substances inhering in the product itself.[35]

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27 Pritchard v. Liggett & Myers Tobacco Co., supra note 26, at 297.

28 Green v. American Tobacco Co., supra note 4.

29 Ross v. Philip Morris & Co., supra note 1.

30 Smoking & Health, supra note 2.

31 Lartigue v. R. J. Reynolds Tobacco Co., supra note 24, at 37.

32 Restatement (Second) Torts, supra note 9, Comment i, at 5.

33 Pritchard v. Liggett & Myers Tobacco Co., supra note 26, at 302.

34 Ibid.

35 Protection from this kind of harm might better be formed through Food and Drug Administration regulations than through an extension of the warranty theory.

A possible solution to the question of the liability for cancer caused by smoking is the recent ruling of the Federal Trade Commission.[36] The Commission has ruled that cigarette manufacturers must place on every package of cigarettes a caution concerning the possible harmful effects of smoking.[37] The manufacturer, in this way, would be informing the consumer that the safety of his product for all users is questionable. If the consumer then decides to use the product, any harm caused will no longer be the responsibility of the manufacturer.[38] For, with unavoidably unsafe products, the manufacturer should not be strictly liable for damages resulting from their use as long as the product is properly prepared and proper warning is given.[39] The action on the part of the consumer using the product with knowledge of the danger is "quite often treated as assumption of risk."[40]

With the present state of knowledge concerning smoking and cancer, the Missouri position, it appears, will result in strict liability for the cigarette manufacturer. With food, which is a human need, the liability should be strict for the policy is to protect the consumer from the defective product.[41] Tobacco, however, is not a product necessary for human life. With properly prepared food, the unwholesomeness does not inhere in the food. In tobacco, however, the harmful ingredients inhere in the product. Publicity concerning the harmful effects of tobacco has alerted the public to the possible dangers. The Surgeon General's Report highlights this point. A warning on the cigarette package about possible harmful effects will emphasize this problem and serve to keep the public aware of the possible danger. With all these factors confronting the consumer, it would seem that one who buys cigarettes

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[36] 29 Fed. Reg. 8324 (1964). The Tobacco Institute, criticizing this ruling, issued the "Statement on Behalf of the Tobacco Institute, Inc." (1964).

[37] The FTC ruled that it is an unfair or deceptive act "to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton or other container in which cigarettes are sold to the consuming public that cigarette smoking is dangerous to health and may cause death from cancer and other diseases." 29 Fed. Reg. 8325 (1964).

The Commission first proposed specific language to be used in the warning but later eliminated the requirement of specific words. The individual advertiser may now "formulate the required disclosure in any manner that intelligibly conveys the sense of the required disclosure in a fully conspicuous fashion." 29 Fed. Reg. 8373 (1964). The rule as to advertising shall become effective July 1, 1965. 29 Fed. Reg. 8325 (1964).

[38] Dillard & Hart, Product Liability: Directions for Use and the Duty to Warn, 41 Va. L. Rev. 145, 160 (1955). In Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960), the court chose to reject the use of the disclaimer by the defendant. Quaere, whether a similar approach could be taken by the courts when it is a question of liability of a cigarette manufacturer who put a warning on his product.

[39] Restatement (Second) Torts, supra note 9, Comment k, at 5.

[40] Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale 1099, 1148 (1960). Cf. Keeton, Assumption of Risk in Products Liability Cases, 22 La. L. Rev. 122 (1961).

Strict liability is an obligation which cannot be disclaimed, Restatement (Second) Torts, supra note 9, Comment m, at 7. Strict liability, however, applies only where the defective condition of the product makes it unreasonably dangerous to the user. "Many products cannot possibly be made safe for all consumption, and any food or drug necessarily involves some risk of harm if only from over consumption. . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." Supra, Comment i, at 5.

[41] Restatement (Second) Torts, supra note 9, Comment c, at 2.

has assumed the risk of possible harmful effects from their use and should be subject to this defense in an action of implied warranty.

JAMES JEROME COOGAN

Secured Transactions—After Acquired Property Clause—Priority to "Equipment Under the Uniform Commercial Code."—*United States v. Baptist Golden Age Home.*[1]—This was a foreclosure action by the United States, brought for the use and benefit of the Federal Housing Commission, against the defendant Baptist Golden Age Home. On August 18, 1960, Baptist executed and delivered to T. J. Bettes Company an installment promissory note and deed of trust on its real property. The deed of trust and note, which were set out in the court's opinion,[2] contained an after-acquired property clause which encumbered:

> [A]ll fixtures, including but not limited to all . . . furniture . . . and other furnishings; and
>
> All articles of personal property . . . now or hereafter attached to or used in and about the building. . . .

These instruments were recorded in the office of the county recorder of deeds on August 19, 1960. Subsequently, Baptist defaulted and the entire indebtedness became due. On February 12, 1963, the Federal Housing Commission (hereinafter the United States) received by way of assignment all interest in the deed of trust and note. The United States recorded this assignment in the office of the county recorder of deeds and then commenced proceedings against Baptist to foreclose the security interest. At the foreclosure proceedings, Hilton Furniture Company intervened, alleging that it had sold Baptist certain furniture, furnishings and carpeting under a conditional sales contract dated June 18, 1962, and that the entire amount of the contract price remained unpaid. Hilton further claimed that the United States acquired no interest in this property since Hilton retained title to the goods under the conditional sales contract, and that its interest in the chattels was thus superior to that of the United States. Hilton, however, never recorded this conditional sales contract. HELD: The United States' interest in the furniture, furnishings and carpeting created by the prior deed of trust containing the after-acquired property clause was superior to Hilton's interest under Sections 9-301 and 9-312(4) of the Uniform Commercial Code.[3] The court reasoned that Hilton was not entitled to priority because it had not perfected its interest[4] in the collateral[5] by filing under Sections 9-312(4)

[1] 226 F. Supp. 892 (W.D. Ark. 1964).

[2] Id. at 896.

[3] The sections of the Arkansas Uniform Commercial Code utilized are unchanged from the official text of the Uniform Commercial Code and will be cited as "UCC § —."

[4] The court relied on UCC § 9-102, and held Hilton's retention of title was only the reservation of a "security interest." United States v. Baptist, supra note 1, at 898-99.

[5] The court found the furniture, furnishings and carpeting were "equipment" under UCC § 9-109(2) and thus filing was required. United States v. Baptist, supra note 1, at 900.