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SALES AND SECURED TRANSACTIONS

DOUGLASS G. BOSHKOFF†

THERE was little activity by the Michigan Supreme Court in this area during the current Survey period. Only one case, in the field of sales, merits textual treatment.

*Richardson v. Messina*¹ raised the question of whether a seller might effectively disclaim liability for breach of an implied warranty of fitness for a special purpose through the use of the following language in the agreement between the parties:

. . . There are no understandings, agreements, representations or warranties, express or implied, not specified herein, respecting this contract or the property above mentioned. . . .²

The quoted language refers both to express and implied warranties. The former are derived from affirmations by a seller, relating to his product, which induce reliance by the purchaser.³ Implied warranties are legal obligations, not necessarily resting upon affirmations of fact but imposed by operation of law for the buyer's protection and based upon the nature of the transaction. Thus, in most sales there is an implied warranty that the goods are of merchantable quality.⁴ If the Buyer has made known to the seller his special needs and has relied upon the seller's skill and judgment in his selection of the article then there is an implied warranty that the goods shall be fit for a special purpose.⁵ The nature and extent of these implied warranties are spelled out in the Uniform Sales Act, adopted by this State in 1915.⁶

It is reasonable to expect that in certain situations the seller will not want to run the risk of implied warranty liability. An express warranty may have the effect of protecting him by negating any inconsistent implied warranties.⁷ But more important, the Uniform Sales Act recognizes elimination of implied warranty liability by

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1. 361 Mich. 364, 105 N.W.2d 153 (1960).

2. Plaintiff's Exhibit 1.

3. Uniform Sales Act § 12, Mich. Comp. Laws § 440.12 (1948), Mich. Stat. Ann. § 19.252 (1959).

4. Uniform Sales Act § 15(2), Mich. Comp. Laws § 440.15(2) (1948), Mich. Stat. Ann. § 19.252 (1959).

5. Uniform Sales Act § 15(1), Mich. Comp. Laws § 440.15(1) (1948), Mich. Stat. Ann. § 19.252(1) (1959).

6. Notes 4 & 5 supra.

7. Uniform Sales Act § 15(6), Mich. Comp. Laws § 440.15(6), Mich. Stat. Ann. § 19.255 (1959).

agreement,⁸ thus giving at least prima facie validity to exculpatory language like that involved in the *Richardson* case. However, the provision in the Sales Act, as administered by the courts, has been limited in operation. Disclaimers have been ignored on the ground that there was no mutual assent to the clause. The doctrine of strictly construing a document against its draftsman has been invoked, and recently a disclaimer was branded as unconscionable and unenforceable.⁹ There are several cases on the question in Michigan. Unfortunately, the path followed by the Michigan Supreme Court has not always been clear.

The first decision on the subject appears to be *Little v. G. E. Van Syckle & Co.*¹⁰ decided in 1898, prior to passage of the Sales Act. Buyer had purchased a piano which turned out to be in poor condition and he claimed breach of an implied warranty of fitness for a special purpose. Although the Sales Act was not yet even drafted, such a warranty had already secured judicial recognition. Seller's objection to introduction of testimony on the implied warranty issue was based upon a contractual disclaimer.

"I also certify that I fully understand the terms of this contract, and that there is no agreement or understanding between the salesman and myself otherwise than herein mentioned."¹¹ In a quotation from Justice Moore's opinion we are told:

. . . If a vendor in such cases desires to avoid that warranty which the law implies, he must incorporate it in his contract, or insert therein a warranty which will exclude all others. Where a parol express warranty has been agreed upon outside the written contract, and that contract is such as the law implies without any agreement, the vendee cannot be deprived of the benefit of this warranty by a provision in the contract that "there is no agreement or understanding between the salesman and myself otherwise than herein mentioned." Such a clause is not in conflict with the implied warranty which the law attaches to all such contracts.¹²

The first sentence apparently states a position, untenable even in 1898,¹³ that you must give some type of express warranty to negate implied warranties. In any event, it seems clear that passage of

8. Uniform Sales Act § 71, Mich. Comp. Laws § 440.71 (1948), Mich. Stat. Ann. § 19.311 (1959).

9. Prosser, *the Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1099, 1131-1133 (1960); Vold, *Sales*, 444-447 (2nd ed., 1959).

10. 115 Mich. 480, 73 N.W. 554 (1898).

11. 115 Mich. at 482, 73 N.W. at 554 (1898).

12. 115 Mich. at 483-84, 73 N.W. at 555 (1898).

13. Cf. *Alaska Pacific Salmon Co. v. Reynolds Metals Co.*, 163 F.2d 643 at 656 fn. 8 (2d. Cir., 1947).

the Uniform Sales Act in 1915 meant that a disclaimer alone could do the job.¹⁴

The next case presenting the issue of validity of such a clause in an implied warranty context was *Youngs v. Advance-Rumely Threshing Company*,¹⁵ decided in 1921. The contract contained an express warranty and a disclaimer:

There are no representations, warranties or condition express or implied, statutory or otherwise, except those herein contained and no agreement collateral hereto shall be binding upon either party unless in writing hereupon or attached hereto, signed by the purchaser and accepted by the vendor at its head office.¹⁶

This time the language was judged sufficient to prevent a claim of implied warranty. The Sales Act was not cited and no mention was made of the *Little* case. The Court relied upon analagous but not controlling Michigan authority.¹⁷

Ten years later, Volume 255 of the Michigan Reports produced two cases of interest. The first was *Kolodzcak v. Peerless Motor Co.*,¹⁸ decided on June 3, 1931, in which the contract provided: "There are no understandings, agreements or warranties, expressed or implied, not specified herein, respecting this contract or the goods hereby ordered."¹⁹

The Court was of the opinion that the words were "plain and emphatic" and there could be "no implied warranty of any kind read into the contract."²⁰ But three weeks later, in *Lutz v. Hill-Diesel Engine Co.*,²¹ nothing "plain and emphatic" was found in the following language: "It is expressly agreed and hereby acknowledged that this contract constitutes the only agreement between the parties thereof and that no other verbal contracts or agreements exist between said parties."²²

Nothing was said about the three week old decision in *Kolodzcak*. The court regarded the clause as inoperative in regard to implied warranties. The *Youngs* case was alluded to as an example of effective language but the court proceeded apparently to apply

14. Uniform Sales Act § 71, Mich. Comp. Laws § 440.71 (1948), Mich. Stat. Ann. § 19.311 (1959).

15. 215 Mich. 682, 184 N.W. 525 (1921).

16. 215 Mich. at 685, 184 N.W. at 536 (1921).

17. *Bates Tractor Co. v. Gregory*, 199 Mich. 8, 165 N.W. 612 (1917). (Buyer relied on fraud and not on breach of warranty).

18. 255 Mich. 47, 237 N.W. 41 (1931).

19. 255 Mich. at 48, 237 N.W. at 41 (1931).

20. 255 Mich. at 49, 237 N.W. at 41 (1931).

21. 255 Mich. 98, 237 N.W. 546 (1931).

22. 255 Mich. at 101, 237 N.W. at 547 (1931).

the doctrine of strict construction and did not find that implied warranties were within the phrase "agreements or understandings."

At this point the post Sales Act score was 2-1 in favor of disclaimers and it could have been observed that the two effective disclaimers had specifically referred to implied warranties. Thus although *Kolodzcak* was ignored by Justice Clarke in *Lutz*, a sensible distinction could have been drawn between the cases.

The next decision came 20 years later in *Wade v. Chariot Trailer Co.*²³ Here an order for a trailer stated: "It is further agreed that there are no understandings, agreements or representations, express or implied, not specified herein respecting this order and terms mentioned, and this instrument contains the entire agreement between the parties, and is binding on both parties."²⁴

The language here seems to fall between *Lutz* and *Kolodzcak* in excluding implied warranties. Reference to "implied" gives a warning as to the scope of exclusion attempted but the absence of "warranty" arguably makes the intent less clear than in *Kolodzcak*. The Court held that the quoted language did not prevent the purchaser from relying on an implied warranty of merchantability. *Lutz* is cited for the principle of strict construction and *Kolodzcak* was distinguished on its facts because of the presence there of an express warranty in addition to the disclaimer. This factual distinction is not significant²⁵ but the opinion can be read as a confirmation of the Court's intention to disregard disclaimers when confronted with anything but the most clear and explicit language.

Having examined all the relevant Michigan decisions, we can now return to *Richardson*. Looking at the language of the disclaimer it would appear that any implied warranty would be excluded as it bears a great similarity to that in *Kolodzcak*. But the result is exactly opposite to that. Neither the Sales Act nor any cases decided since its enactment are cited. Reliance is placed upon the 1898 decision in *Little*, and the out-dated language of Justice Moore, al-

23. 331 Mich. 576, 50 N.W.2d 162 (1951).

24. 331 Mich. 579, 50 N.W.2d at 164 (1951). The conditional sales contract also contained a disclaimer but it is not here considered since the one quoted was more favorable to the seller's position.

25. It might be argued that the presence of an express 90 day warranty in *Kolodzcak* made the disclaimer more palatable. But the protection given by the warranty was illusory since it reserved to the seller the right to determine whether there was a breach of the warranty. See 255 Mich. 48, 237 N.W.2d at 41 (1931). For a discussion of the illusory nature of this type of warranty see *Henningson v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960); *Noted* 74 Harv. L. Rev. 630 (1960), 7 Wayne L. Rev. 382 (1960). Thus, distinguishing *Kolodzcak* from *Wade* on this basis is a play upon facts having no legal significance. Either *Wade* overrules *Kolodzcak* or there is another line of harmonization as suggested in the text.

ready noted, is quoted in support of the result. In fairness to the court, it should be pointed out that only *Little* was cited in the briefs.

In addition, there exists a basis on which to disregard the warranty without inquiring into the basic validity of such a clause. The contract provided that a condition precedent to liability was proper functioning of the goods sold. Since the goods did not function it would seem that the testimony on the failure to function could be considered without reference to implied warranty or disclaimer. Nevertheless, the court did not adopt this approach but, after placing heavy reliance on *Little*, remarked:

Our conclusions in this respect, we might add, are fortified by certain provisions of the instruments before us . . . [referring to the condition precedent]. As the trial court correctly observed with respect to this language, it clearly meant that "the purchasers intended that all of the equipment would operate properly before payments were to become due."²⁶

No complaint is advanced concerning the result which was certainly fair. On the other hand, as warranty liability is rapidly being extended and developed,²⁷ sellers of chattels can be expected to place ever increasing reliance on disclaimers. Given the previous relevant decisions in this jurisdiction, it would have been helpful to have had a current statement of the Court's position on disclaimers. It is hard to believe that the Court means to resurrect *Little*.

In conclusion, attention is called to section 5833 of the recently passed revised judicature act, which provides that the statute of limitations on actions for breach of warranty of quality or fitness begins to run when the defect is discovered or should reasonably have been discovered.

26. 361 Mich. at 368, 105 N.W.2d at 155.