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Morris G. Shanker

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The Seller's Contractual Obligation Under U.C.C. 2-313 to Tell the Truth

(A Post Script and Concurring Comments to Professor Heckman's Sales Warranty Article)

*Morris G. Shanker**

POST SCRIPT

PROFESSOR HECKMAN DESERVES congratulations for setting the record straight on why the Sales Act's "reliance" language, as one of the necessary elements for creation of an express sales warranty, was changed to the Commercial Code's "basis of the bargain" language. It seems self-evident that statutory changes in language usually are intended to bring about changes in result; and this would seem particularly true in a statute as carefully drafted as the Uniform Commercial Code. Yet, so many of our courts and commentators have failed to acknowledge this essential truth; assuming, instead, that the precedents on express warranties decided under pre-Commercial Code law should control the quite different statutory language found in U.C.C. 2-313.

Professor Heckman's piece first shows us, step by step, the historical legislative developments which eventually led to the "basis of the bargain" language now found in U.C.C. 2-313. These developments persuasively demonstrate that the Code drafters intended a new approach to and different meaning for express warranties. Professor Heckman also shares with us some of his personal insights regarding the dynamics which likely persuaded Professors Karl Llewellyn and Soia Mentchikoff (the chief architects of Article 2) to draft an entirely new approach to express sales warranty law. In particular, he suggests that Llewellyn and Mentchikoff specifically intended to overrule the result of *Alaska Pacific Salmon Co. v. Reynolds Metals Co.*,[1] a case in which they acted as counsel for the losing party. These personal insights are particularly illuminating,

* John Homer Kapp Professor of Law, Case Western Reserve University.

1. 163 F.2d 643 (2nd Cir. 1948).

and lend spice to his piece. Finally, Professor Heckman critiques the current judicial authorities and commentators who argue that the old "reliance" rule should be retained. These criticisms are incisive, to the point, and persuasive.

CONCURRING COMMENTS

I fully agree with Professor Heckman's analysis and conclusion that sellers should be held strictly responsible for the statements they make about the quality of their products. In fact, I think there are reasons beyond those set out by Professor Heckman which undermine the argument that the seller should be excused from liability for his actions and statements because the buyer did not "rely" on them. They are:

1. Such arguments permit sellers practically to avoid express warranty liability by placing their warranty language *within* the package where it likely will not be read until after the sale, if indeed, it is read at all.

2. Such arguments restrict express warranty protection to the most unlikely buyers; namely, those precious few and rather odd persons who prior to a sale take the time to read all the language on and within the packaging. The more typical buyer—those who do not go through this unlikely exercise—are denied express warranty protection. Yet both buyers have paid *exactly* the same price to *exactly* the same seller in order to purchase *exactly* the same goods. Logic would suggest that both buyers should end up with *exactly* the same warranty protection.

CONTRACT VS. TORT LIABILITY

The reality is that buyers pay their money for what it is that sellers, through their acts and statements, offer to sell. And, this is true whether or not the buyer knew of the representations or, even knowing of them, was skeptical about their truth.

Indeed, is this not the usual contract rule? Would any lawyer have the gall to argue that a contracting party (other than a seller) was excused from the written (or other express) terms of a contract because the other side had not read them until after the contract technically was concluded? Indeed, would any lawyer representing even a seller make such an argument with respect to a sales term other than an express warranty; for example, the quantity or delivery term?

The change in statutory language from the Sales Act's "reli-

ance" to the Code's "basis of the bargain" emphasizes the essential contractual nature of sales warranty liability. Quite true, warranty liability historically was based on tort; that is, misrepresentation or deceit. Tort responsibility is an involuntary one for which the tort feaser receives no compensation. Therefore, it quite properly should not be imposed unless the wrongful action demonstrably can be shown to have caused harm. Thus, simply making a false statement is not enough. It must also be shown that the innocent party actually was harmed by that deceit because he relied upon it.

On the other hand, express sales warranty liability today is not an involuntary one. It is one which the seller voluntarily assumes and for which the seller demands and receives a price. Indeed, the liability goes no farther than the seller is willing to assume; that is, the express warranty liability is limited to responsibility only for those express actions and statements which the seller wishes to make about the quality of the goods in return for the price he demands. Having voluntarily undertaken this liability and having set its precise limits, it surely does not lie well for the seller later to deny it because the buyer learned of the seller's actions after parting with his money rather than before doing so.

This critical difference between the involuntary and noncompensated nature of tort responsibility and the voluntary compensated nature of contract responsibility fully justifies a quite different analytical approach in defining the respective responsibilities which arise. This is a point which most courts and commentators have overlooked. Instead, they simply have knee jerked to the conclusion that contractual sales warranties should be treated exactly like the historical tort (deceit) action. But, as stated, once the seller bargains for a price in return for the representations he voluntarily makes about the quality of his goods, then we are in another ballpark; and quite correctly should be analyzing the seller's responsibility in a different way.

Surely, it is not too much to insist that a seller be held responsible for his bargain; that is, for those actions and statements for which he has demanded and received payment, precisely as any other contracting party is held strictly accountable for the breach of any other contractual term to which he has voluntarily agreed and for which he has been paid. As Professor Heckman has stated, this requires only that one demanding payment for making a representation ought to be truthful about them.