HENNINGSEN V. BLOOMFIELD MOTORS: LAST STOP FOR THE DISCLAIMER

Freedom of contract has long been a keystone of the free enterprise system.[1] That men of age and sound mind shall be free to enter into contracts of their choosing, which will be recognized and enforced, is the foundation of Anglo-American contract jurisprudence. Courts, adhering to the principle that their function is to interpret and not to make contracts for the parties,[2] have been hesitant to find contracts void on public policy grounds.

As commercial society has expanded, the single transaction has yielded its importance to volume production, distribution, and sales.[3] The resulting standardized contract gently and then disrespectfully disturbed the comparative tranquillity of contract law.[4] Form contracts, drawn by a business firm, or a coalition of firms, to minimize or avoid juridical risks, have been used in transactions involving the firm's products or connected services. Standardized contracts are particularly popular with enterprises in strong bargaining positions. If a prospective customer objects to its use, the large business may well be in a position to ignore the transaction altogether and to deal with another more ready to accept the terms dictated. Thus, the weaker party often has no choice of contract terms and must accept dictated conditions or forego the transaction. Courts, aware of the position of such parties, have been sympathetic, but have remained hesitant to alter the axiom that their function is merely to interpret contracts. Tribunals have had to strain interpretations to relieve parties of unduly burdensome or unjust provisions,[5] although in those states which have adopted the Uniform Commercial Code such provisions may be subject to deletion by application of the unconscionable clause language of § 2-302.

From this problem has evolved a potent weapon for the rather bare arsenal of the buyer,—the implied warranty of merchantability. This buyer-protecting device entails an implied undertaking by the seller that all goods sold are fit for the purposes to which such goods are ordinarily put.[6] The warranty is imposed by operation of law independent of the express intent

---

1 Pound, Liberty of Contract, 18 Yale L.J. 454 (1909); Williston, Freedom of Contract, 6 Cornell L.Q. 365 (1921); Hamilton, Freedom of Contract, 3 Encyc. Soc. Sci. 450 (1937). This premise is reflected in the Uniform Commercial Code. See, UCC § 1-102.

2 Imperial Fire Ins. Co. v. Coos County, 151 U.S. 452, 462 (1894); Urian v. Scranton Life Ins. Co., 310 Pa. 144, 165 Atl. 21 (1933).

3 Pausnitz, The Standardization of Commercial Contracts in English and Continental Law (1937), 52 Harv. L. Rev. 700 (1939); Llewellyn, What Price Contract—An Essay in Perspective, 40 Yale L.J. 704 (1931); Isaacs, The Standardizing of Contracts, 27 Yale L.J. 34 (1917).

4 Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L.Rev. 629, 631 (1943).

5 Kessler, op. cit. supra note 4, at 633.

6 Franklin Motor Car v. Ratliff, 207 Ala. 341, 92 So. 449 (1922); Swartz v. Edwards Motor Car Co., 49 R.I. 18, 139 Atl. 466 (1927).

of the contracting parties. Caveat emptor is dealt a forceful blow. The jurisprudential basis of the warranty is that all sellers should be held to assume the obligations which good faith sellers normally assume under like circumstances.[7] Such theory was incorporated into the Uniform Sales Act and the Uniform Commercial Code.[8]

Sellers, taking full advantage of their superior bargaining position, have been quick to attempt to free themselves from this expanding burden of warranty liability by disclaiming or expressly negating any implied warranty which might exist. While the disclaimer is not inherently unfair where both parties are in substantially equal bargaining positions, in the usual instance of the standardized sales contract, there is no such equal or near-equal footing. The buyer is forced to disarm himself expressly of the shield the law has given him. The Courts, aware of this inequality, have tended to construe disclaimer clauses strictly against the seller[9] and by one means or another have succeeded in vitiating their effect.[10] Lip service has continued to be paid to the parties' ability to contract away all liability, and though numerous decisions have nullified the effects of disclaimer clauses, no permanent change in judicial attitude has resulted in any denial that by proper words all warranties might be excluded.[11] The result has been a battle of wits between the draftsmen and the Courts.[12]

Many cases have been resolved in favor of the buyer on the ground that the disclaimer was obtained deceptively. A disclaimer in fine print,[13] or in an obscure place,[14] which the buyer excusably did not read, has been held not to negative liability.[15] The Uniform Commercial Code has embodied this approach stating that if the parties in good faith and without coercion agree to exclude implied warranties, they may do so if the ex-

---

7 Warranties of Kind and Quality Under the Uniform Revised Sales Act, 57 Yale L.J. 1389 (1948).

8 Uniform Sales Act § 15(2); UCC § 2-314(1).

9 Main v. El Dorado Dry Goods Co., 83 Ark. 15, 102 S.W. 681 (1907); Main v. Dearing, 73 Ark. 470, 84 S.W. 640 (1905); Hall Furniture Co. v. Crane Manufacturing Co., 169 N.C. 41, 85 S.E. 35 (1915); Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922); United Fig and Date Co. v. Falkenburg, 176 Wash. 122, 28 P.2d 287 (1934).

10 Hardy v. G.M.A.C., 38 Ga. App. 463, 144 S.E. 327 (1928) noted in 42 Harv. L. Rev. 710 (1929), 27 Mich. L. Rev. 592 (1929); Hughes v. National Equipment Corp., 216 Iowa 1000, 250 N.W. 154 (1933); Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927).

11 Note, 23 Minn. L.R. 784, 796 (1939); Linn v. Radio Center Delicatessen, 169 Misc. 879, 9 N.Y.S.2d 110 (Mun. Ct. N.Y. 1939).

12 Supra note 7, at 1401.

13 Weedworth v. Rice Bros. Co., 110 Misc. 158, 179 N.Y. Supp. 722 (Sup. Ct. 1920), aff'd, 193 App. Div. 971, 184 N.Y. Supp. 958 (1920).

14 Linn v. Radio Center Delicatessen, supra note 11; Angerosa v. White and Co., 248 App. Div. 425, 290 N.Y. Supp. 204 (1936), aff'd, 275 N.Y. 524, 11 N.E.2d 325 (1937); Black v. B. B. Kirkland Seed Co., 158 S.C. 112, 155 S.E. 268 (1930).

15 Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117 (1943).

clusion is in specific terms,—inconsistencies being resolved against the seller.[16]

Specifically, the Courts have inhibited the use of disclaimers in certain types of transactions. Thus, in *Linn v. Radio Center Delicatessen*, a New York court recognized that disclaimers in the retail sale of food should not be tolerated because public health is involved, and, "it is against natural justice and good morals to permit an individual or corporation to manufacture food containing foreign substances and to escape the consequences of his acts by a disclaimer."[17]

It is upon this scene that the case of *Henningsen v. Bloomfield*[18] appears. Mr. Henningsen purchased a new 1955 sedan from an authorized Plymouth dealer. The purchase order (consisting of a one page printed form) was executed by the buyer only. Near the bottom of the page and continued on its reverse side appeared in fine print a disclaimer of all express and implied warranties, other than the customary ninety day warranty on parts. This disclaimer was not brought to the attention of the purchaser.

About ten days after purchase, Mrs. Henningsen, while operating the automobile at a moderate speed over a smooth highway, heard a loud noise from the forward part of the car. The steering wheel spun in her hands. The car veered sharply off the road and was totally demolished.

An action was brought by Mr. Henningsen and his wife against the manufacturer and the dealer to recover for the injuries sustained by Mrs. Henningsen. The complaint sounded in both tort and contract, on theories of negligence and violation of express and implied warranties. Both the manufacturer and dealer denied the existence of an implied warranty and the ability of the wife to recover under a contract to which she was not a party. The limitation of liability clause was also pleaded as an affirmative defense.

As a result of pre-trial proceedings, there was a waiver of the express warranty count. The trial court dismissed the negligence count but upheld a jury verdict on implied warranty. On appeal the New Jersey Supreme Court affirmed.

The major effect of the decision is in the area of disclaimer application and limitation. Because of the waiver of the express warranty count, contractual relief was based on an initial finding that an implied warranty of merchantability existed despite contract provisions to the contrary. Defendant-Manufacturer claimed that lack of contractual privity neutralized any possibility of an implied warranty since such can arise only as an incident of a valid contract.[19]

The court reviewed the economic and social considerations basic to those decisions which have projected the manufacturer's liability to the ultimate consumer even in the absence of any direct contractual relationship

16 UCC § 2-316.

17 169 Misc. 879, 880, 9 N.Y.S.2d 110, 112 (1939).

18 161 A.2d 69 (N.J. 1960).

19 Id. at 80.

between them.[20] It adopted the view announced in *Mazetti v. Armour and Co.*,[21] that concepts of social justice require that the liability of a food processor or manufacturer to his immediate purchaser be extended to the ultimate purchaser despite the lack of any contractual relationship between them with the result that the manufacturer's implied warranty of merchantability runs with the food into the hands of the ultimate purchaser. In effect the court in Henningsen is extending this principle to manufacturers and ultimate purchasers of new automobiles.[22] In spite of this extension Henningsen, the purchaser, is faced with the task of establishing the invalidity of the clause in the retail contract purporting to disclaim any warranties of either the manufacturer or dealer except those expressly provided for in such contract.[23]

Two notable approaches have been used to limit the intended effects of broad disclaimer clauses. One is illustrated in the decision, *Meehan v. Kaveny Bros. Oil Co.*, a case dealing with the purchase of a home oil storage tank.[24] There the Court treated the warranty-disclaimer clause as being divisible into distinct sections based on the use of conjunctive language. The court held that the first section was a general warranty not limited to a one-year period, while the second part of the clause referred solely to the replacement by the seller of defective equipment returned within the year period.

---

20 Id. at 81.

21 75 Wash. 622, 135 P. 633 (1913).

22 Supra note 18, at 84.

23 The disclaimer and limitation of liability clause contained in the purchase contract provided:

"It is expressly agreed that there are no warranties, express or implied, made by either the dealer or the manufacturer on the motor vehicle, . . . furnished hereunder except as follows:

The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer, except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory, any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles. This warranty shall not apply to any vehicle which shall have been repaired or altered outside of an authorized service station in any way so as in the judgment of the manufacturer to affect its stability and reliability, nor which has been subject to misuse, negligence or accident."

24 27 N.J. Super. 547, 99 A.2d 841 (1953); the language construed by the court was in the following clause:

"The seller warrants said oil heating equipment to be free from defects in material and workmanship under normal use and service, and the seller agrees to make good at its place of business any part or parts thereof . . . which shall, within one year after installation be returned to the seller with transportation charges prepaid and which upon examination discloses to the satisfaction of the seller to have been so defective. . . ."

A comparison of the language used in that warranty clause, with the one contained in the instant automobile purchase contract shows them to be essentially different, the language in the latter[25] not being susceptible to the construction given by the court in the Meehan case.

Another approach used to invalidate disclaimer provisions in the retail food and housing fields[26] has been grounded on the concepts of public policy and inequality of the relative bargaining positions. Such theory was applied a few years ago in *Kuzmiak v. Brookchester Inc.*,[27] a New Jersey housing case. It required only a finding of similarity in the automobile-purchase-contract situation to enable the court in Henningsen to render a like decision.

In the usual contract situation the premise is that the parties to a transaction not particularly effecting the public interest are bound by any liability-limiting agreement.[28] Public interest gives rise to public policy, an inherently vague term not confined to any fixed meaning since its very nature connotes change.[29] Indeed, a contract or particular provision thereof, valid in one era, may be wholly opposed to the public interest of another day.[30]

A legislative determination that the housing field required statutory and administrative regulations[31] provided the court in *Kuzmiak* supra, with an initial finding of public interest. This factor when coupled with the judicial realization of the unequal bargaining position of the tenant induced that court to nullify the landlord disclaimer-of-liability clause.

The same method of approach was adopted in the present contract case. The Court found a legislative reflection of public interest in the automotive field as evidenced by the state statutes licensing operators and requiring periodic inspection of automobiles.[32] The adoption of the Sales Act[33] was hailed as further evidence of a public interest in the rights and remedies of purchasers of automobiles.

This initial finding of a public interest was buttressed by a sense of

---

[25] Supra note 23.

[26] E.g., Hart v. Klune, 320 Ill. App. 273, 50 N.E.2d 855 (1943); Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E.2d 739 (1943); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382, (1920); Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936); Greenberg v. Lorenz, 12 Misc. 2d 883, 178 N.Y.S.2d 407 (App. Div. 1958); Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931); Jacob E. Decker and Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

[27] 33 N.J. Super. 575, 111 A.2d 425 (1955).

[28] Globe Home Improvement Co. v. Perth Amboy, Inc., 116 N.J.L. 168, 182 A. 641, (1936).

[29] Steele v. Drummond, 275 U.S. 199 (1927).

[30] Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958).

[31] Board of Tenement House Supervision, N.J.S.A. § 55.9 et seq.

[32] Title 39 covers the entire scope of state interest in the automotive field. A Division of Motor Vehicles was established, N.J.S.A. § 39:3-4; regular inspection of motor vehicles required, N.J.S.A. § 39:8-1 et seq.

[33] N.J.S.A. §§ 46:30 et seq. It is to be noted that New Jersey has not adopted the Uniform Commercial Code. § 2-316 of the Code distinctly allows this type of contractual limitation of liability.

equitable balance between buyer and seller in the automobile purchase transaction. The New Jersey court recognized that the bargaining position of the parties in relation to the actual terms of the contract is so disproportionate as to leave little chance that a retail purchaser could vary the terms of the contract drafted by the manufacturer. Indeed, the automobile sales area is marked by uniformity in the language of the purchase agreement.[34] Some legal commentators have urged this bargaining inequality as a sufficient basis, apart from judicial notions of public policy, for invalidating an otherwise effective contract.[35]

A court approaching this case de novo might have reached the desired result through a narrow factual determination, basing its holding on the location of the disclaimer clause or on a forced construction resulting in the division of the clause into two distinct sections. A decision based on the policy grounds advanced in the instant case can serve as a guide post to future adjudications in this field.[36]

A note of caution to those who may feel that this decision sounds the death-knell for disclaimer validity. A holding based fundamentally on a theory of offering protection where such protection is needed; i.e., to the disorganized and dependent consumer in the automobile purchase transaction, should not be indiscriminately extended to include technically proficient industrial purchasers or others in relatively equal bargaining position vis-à-vis the seller. Thus, in a wide area of our economy the doctrine of freedom of contract would remain functionally and economically sound.

---

[34] Automobile Facts and Figures 69 (Automobile Manufacturers Association 1958).

[35] 6 Williston, Contracts § 1751C pp. 4968-9 (rev. ed. 1936). Llewellyn, What Price Contract, 40 Yale L.J. 704 (1931).

[36] Possibly the automotive industry could rebut this initial finding of inequitable economic bargaining position between buyer and seller through the introduction of a price differential between a new car with complete warranty coverage and one whose purchase contract called for only a limited warranty agreement. This purchase contract choice might predispose a future court deciding a similar case to insist that a purchaser will not be allowed to base his recovery on a clause he specifically refused to include in his contract.