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Implied Warranty - Privity of Contract

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IMPLIED WARRANTY—PRIVILEGION OF CONTRACT—Absence of privity of contract between an automobile manufacturer and the ultimate purchaser and execution of a written warranty agreement between manufacturer and retailer disclaiming any implied warranty of fitness does not preclude recovery of damages by the ultimate purchaser from the manufacturer for breach of implied warranty of fitness.

*Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. 1967).

Retailer sold new Lincoln Continental automobiles which were warranted by Ford Motor Company's advertisements in magazines, newspapers, television and brochures as being constructed of quality materials and with excellent workmanship. Moreover, the Lincoln Continental retailer orally warranted to appellant, the ultimate purchaser, that a particular Lincoln Continental convertible was the finest in the world; made with perfection, and without defective parts. The retailer stated that the car was suitable for use as a motor vehicle and would be trouble-free for thousands of miles. Appellant, relying upon these warranties of the retailer and Ford Motor Company, purchased the particular Lincoln Continental convertible. Thereafter continuous corrections and repairs failed to make the automobile useful as a motor vehicle and the appellant alleged that Ford Motor Company breached an implied warranty of fitness and suitability. Ford Motor Company never authorized the retailer to warrant the Lincoln Continental automobiles as the manufacturer's agent, but did expressly warrant to the retailer that each vehicle was free under normal use from defects in material and workmanship. The warranty concluded with these words:

This warranty is expressly in lieu of any other express or implied warranty, including any implied warranty of merchantability or fitness and of any other obligation on the part of the Company, except such obligation as the Company may have assumed in its warranty and Policy manual or other separate written agreement.¹

The trial court granted motion for summary judgment in favor of the manufacturer since there was no privity of contract between the automobile manufacturer and the ultimate purchaser, and also because of the written warranty agreement between manufacturer and retailer disclaiming any implied warranty of fitness. The purchaser appealed and the District Court of Appeals for the Third District of Florida affirmed² the decision. The Supreme Court of Florida quashed³ the affirmance with directions that the purchaser was not precluded recovery from the manu-

2. 194 So. 2d 54 (Fla. 3d Dist. Ct. App. 1967).
3. 201 So. 2d at 443.
facturer on the basis of an implied warranty of fitness and suitability made by the manufacturer to the buyer.

The opinion, written by Justice Ervin,\(^4\) indicated that the manufacturer of a product which has been found to be unsuitable for use should be liable for resulting commercial loss to the ultimate purchaser even though there was no direct contractual relations between the purchaser and the manufacturer. Such liability will arise where the purchaser has relied on the manufacturer's brochures and representations made through the advertising media. Generally courts have declined to allow recovery where no accidental or tangible damage has occurred and the only loss was pecuniary expense in repairing or replacing the defective parts to prevent an accident.\(^5\) The court in the instant case, however, believed that recovery must also be allowed where the only loss sustained is pecuniary expense in repairing or replacing the defective parts.\(^6\)

While courts in other states have held the manufacturer liable without privity of contract only when there was physical injury, a few recent cases\(^7\) have held the manufacturer liable without privity of contract when there was no physical injury, but only a commercial loss resulting from defectively manufactured products. The rationale of these decisions is that commerce is no longer conducted by contracts alone, but rather by advertising, upon which the consumer relies.\(^8\) Therefore, justice demands that when the purchaser is damaged by reason of his reliance on false facts, then the manufacturer must not be able to deny liability on the absence of technical privity of contract. These cases indicate it would be unreasonable to limit a consumer's protection to only the warranties made directly to the consumer by the immediate retailer, knowing that the manufacturer influenced the purchaser to purchase the defective product. The recent holdings are evidence that the realities of today require equal protection for the purchaser from the manufacturer as well as from the retailer who is in privity of contract with the purchaser.\(^9\) The rationale for this view is that the manufacturer's warranties are a major

\(^4\) With whom Thomas, C.J., Drew, J., Thornal, J., and Barns, J., concur.


\(^6\) 201 So. 2d at 443.


\(^8\) W. PROSSER, TORTS § 511 (2d ed. 1955).

\(^9\) PROSSER, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960).
inducement for the buyer to make the purchase. This problem has also been under discussion in the *Restatement (Second) of Torts*.

Manufacturers' liability is treated by the American Law Institute in *Restatement (Second) of Torts* § 402B (1965). Section 402B deals only with physical loss and reads as follows:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller. (Emphasis added.)

Section 402B deals only with "physical harm" but it is stated in comment a following § 402B that a parallel rule, as to strict liability for "pecuniary loss" resulting from such a misrepresentation, is to be contained in a proposed § 552D. A tentative draft of the proposed § 552D and the comment dealing with pecuniary loss is as follows:

One engaged in the business of selling chattels who, by advertising, labels or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for pecuniary loss caused to another by his purchase of the chattel in justifiable reliance upon misrepresentation, even though it is not made fraudulently or negligently.

Comment:

a. This Section parallels § 402B, which states the rule as to strict liability for physical harm to a user or consumer of the chattel, where the seller makes a misrepresentation to the public concerning its character or quality. This Section states the same rule, as to liability for pecuniary loss, caused to one who purchases the chattel in justifiable reliance on the misrepresentation. The Comments under § 402B are pertinent.

It should be noted that § 552D applies only to misrepresentations of material facts and not to mere "sales talk," sometimes called "puffing."®

The court in the instant case does not give effect to the provision in the warranty excluding an implied warranty of fitness between the manufacturer and retailer since such warranty of fitness is implied by law.® The court reasoned that the manufacturer could not preclude a finding of an implied in law warranty by a mere disclaimer.

10. *Restatement (Second) of Torts* § 402B, comment g (1965).
12. Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953); McDonald v. Sanders,
Professor Williston\(^{13}\) and other writers\(^{14}\) throughout the United States are in agreement as to discarding the defense of privity of contract, and holding the manufacturers strictly accountable for the truthfulness of representations made to the public and relied upon by the purchaser.

It is submitted that progressive courts must realize that advertisements are greatly relied upon by the ordinary purchaser and consequently, the manufacturers must be held accountable for the truthfulness of the advertisements. The ordinary buyer can not be expected to have the engineering experience or opportunity to make adequate investigations of modern products and, therefore, must rely greatly upon the manufacturers' representations as to the fitness and suitability of the goods.

David J. Kozma

**WILLS—STOCK SPLIT—LEGATEE TAKES EXACT NUMBER OF SHARES BEQUEATHED**—A testatrix's bequest of a specified number of stock shares which split after she made her will but before she died was held effective to pass only the exact number bequeathed and not the total number owned at death.


Testatrix, who owned 2400 shares of Smith, Kline & French\(^1\) stock at the writing of her will completely disposed of these shares in 100 and 200 share bequests; her will provided in part, "I give and bequeath 200 shares of my Smith, Kline & French stock to St. Giles Church."\(^{12}\) Purchases and sales by her which occurred after the writing of the will had reduced to 2000 the number of shares owned when the SKF split 3 for 1. Shortly after this split testatrix died—without having changed her will. Appellant, St. Giles Church, claimed the increased number of shares resulting from the split, arguing that testatrix had indicated an intent to dispose of those particular shares of stock owned at the making of her will by the simple expedient of completely disposing of all 2400 shares. Thus, under appel-

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1. Hereinafter referred to as SKF.