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Sales - Warranties - Disclaimer of Implied Warranties - Prohibition of as against Public Policy

Lucas A. William

much criticism of the view that they provide only conditional insurance.[13]

It is submitted that by these conditional acceptance provisions insurance companies are trying to protect themselves at the expense of their applicants. They take the premiums but try to withhold protection. The binding clause is properly interpreted as ambiguous on its face.

North Dakota recognizes that anyone who solicits insurance in a bona fide manner serves as an agent and can bind his principal;[14] furthermore, North Dakota recognizes that such an agent has the implied authority to write temporary policies.[15] In addition North Dakota generally construes ambiguous policies against the insurer.[16]

No North Dakota case has directly construed the meaning of a conditional "binding receipt." It seems that the better reasoning would permit our courts to accept the position of the dissent in the principal case and consider ambiguous binding receipts as providing unconditional interim insurance until complete rejection of the application is made.

R. JON FITZNER

SALES—WARRANTIES—DISCLAIMER OF IMPLIED WARRANTIES —PROHIBITION OF AS AGAINST PUBLIC POLICY—Plaintiff purchased one of defendant-dealer's automobiles, signing the standard contract of the Automobile Manufacturers Association which warranted that the vehicle was free from defects in parts, agreed to replace those parts if found defective, and provided that the warranty was in lieu of all other warranties, express or implied. The buyer brought this action to rescind the purchase because of a breach of the implied warranty of

13. See generally Havighurst, LIFE INSURANCE BINDING RECEIPTS, 33 Ill. L. Rev. 180 (1938); Western and Southern Life Ins. Co. v. Vale, 213 Ind. 601, 12 N.E.2d 350 (1938); Francis v. Mut. Life Ins. Co. of New York, 55 Ore. 280, 106 Pac. 323 (1910); Starr v. Mut. Life Ins. Co. of New York, 41 Wash. 228, 83 Pac. 116 (1905).

14. Fargo Nat'l Bank v. Agricultural Ins. Co., 184 F.2d 676 (8th Cir. 1950).

15. Michigan Idaho Lumber Company v. Northern Fire and Marine Ins. Co., 35 N.D. 244, 160 N.W. 130 (1916); Ulledalen v. United States Fire Ins. Co., 74 N.D. 589, 23 N.W.2d 856 (1946) Agent allowed to insure during the lapse of time between the time of application and the issuing of the policy.

16. Minnesota Mut. Life Ins. Co. v. Marshall, 29 F.2d 977 (8th Cir. 1928); Beauchamp v. Retail Merchants Ass'n. Mut. Fire Ins. Co., 38 N.D. 483, 165 N.W. 545 (1917); Persellin v. State Automobile Ins. Ass'n., 75 N.D. 716, 32 N.W.2d 644 (1948) ". . . where the terms of an insurance policy will bear two interpretations, that one will be adopted which sustains the claim for indemnity."

fitness. The Supreme Court of North Dakota *held,* one judge dissenting, that the express warranty disclaimed implied warranties and that the disclaimer was not contrary to public policy. *Knecht v. Universal Motor Company,* 113 N.W.2d 688 (N. D. 1962).

The early common law did not recognize implied warranties of quality in the sale of chattels.[1] The maxim *caveat emptor* was generally applied to relieve the seller from liability when the goods he sold were defective or of a poor quality.[2] The doctrine of implied warranty, which arose in order to alleviate the harsh results of the rule of *caveat emptor,*[3] probably had its origin in the case of *Gardiner v. Gray.*[4] From a rather limited application in that case the doctrine has developed into one of the most controversial areas of the law of sales.[5]

In North Dakota, as in other jurisdictions where the Uniform Sales Act is in effect, certain specified implied warranties are imposed by operation of law and become a part of the contract by virtue of the statute.[6] A warranty of merchantability is a warranty that the goods are reasonable fit for the general purpose for which they are sold, while a warranty of fitness is a warranty that the goods are suitable for the special purpose of the buyer.[7]

Parties who buy and sell goods may usually, by appropriate terms in their contracts, disclaim whatever warranties they please, including implied warranties.[8] This rule was codified into section 71 of the Uniform Sales Act.[9] Nevertheless, since implied warranties arise to protect the buyer, courts have generally held that disclaimers must be strictly construed against the seller and must be express in their terms.[10] In an effort to

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1. 1 WILLISTON, SALES § 228 (rev. ed. 1948).
2. **Ibid.**
3. Swift & Co. v. Etheridge, 190 N.C. 162, 129 S.E. 453 (1925).
4. 4 Camp. 144, 171 Eng. Rep. 46 (1815).
5. VOLD, SALES 444 (2d ed. 1959).
6. N.D. Cent. Code § 51-01; Deere & Webber Co. v. Moch, 71 N.D. 649, 3 N.W.2d 471 (1942).
7. Dunbar Bros. Co. v. Consolidated Iron-Steel Mfg. Co., 23 F.2d 416, 419 (2d Cir. 1928); Knapp v. Willys-Ardmore, Inc., 174 Pa. Super. 90, 100 A.2d 105 (1953).
8. VOLD, SALES 444 (2d ed 1959); 1 WILLISTON, SALES § 239C (rev. ed. 1948); See Minneapolis Threshing Mach. Co. v. Hocking, 54 N.D. 559, 209 N.W. 996 (1926).
9. N.D. Cent. Code § 51-02-72. "Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties . . . ."
10. See, **e. g.,** Roberts Distrib. Co. v. Kaye-Halbert Corp., 126 Cal. App. 2d 664, 272 P.2d 886 (Dist. Ct. App. 1954); Wade v. Chariot Trailer Co., 331 Mich. 576, 50 N.W.2d 162 (1951); Deere & Weber Co. v. Moch, 71 N.D. 649, 3 N.W.2d 471 (1942).

achieve equitable results, disclaimers have been held to be ineffective where the circumstances are such that the buyer could not be expected to be aware of the disclaimer[11] or had no actual knowledge of its presence.[12] Courts of other jurisdictions have given the disclaimer its full effect[13] and have held that it does not violate public policy.[14]

There are a number of recent cases declaring invalid disclaimers of warranties in automobile contracts[15] of which *Henningsen v. Bloomfield Motors, Inc.* [16] is probably the leading case because of the extensive and well written opinion set forth. The only variance in material facts from the instant case, for purposes of this discussion, is that there was physical and property damage as a result of the defective part. In that case the court held that the disclaimer was a contract imposed by a noncompetitive industry giving the buyer only the choice of buying a car under that contract or buying no car.[17] For this reason the court declared the disclaimer void as outside section 71 of the Sales Act, implying that such an agreement must be equitable and bargained for, rather than imposed, to be within the act.[18] The *Henningsen* case has received favorable comment from many legal writers.[19] It has been stated that:

> "Such unbridled freedom of contract as is represented by the uniform disclaimed clause of the Automobile Manufacturers Association leads to a dictation of law by con-

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11. Gray v. Gurney Seed and Nursery Co., 62 S.D. 97, 252 N.W. 3 (1933).
12. Stevenson v. B. B. Kirkland Seed Co., 176 S.C. 345, 180 S.E. 197 (1935); **cf.** Reliance Varnish Co. v. Mullins Lumber Co., 213 S.C. 84, 48 S.E.2d 653 (1948) (no finding of actual notice).
13. Shafer v. Reo Motors, 205 F.2d 685 (3d Cir. 1952); L. R. Cooke Chevrolet Co. v. Culligan Soft Water Serv., 282 S.W.2d 349 (Ky. 1955); Hall v. Everett Motors, Inc., 165 N.E.2d 107 (Mass. 1960).
14. Brokerick Haulage, Inc. v. Mack-International Motor Truck Corp., 1 App. Div. 2d 649, 153 N.Y.S.2d 127 (Sup. Ct. 1926).
15. State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 110 N.W.2d 449 (Iowa 1961); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); General Motors Corp. v. Dodson, 338 S.W.2d 655 (Tenn. App. 1960).
16. 161 A.2d 69 (N.J. 1960).
17. **Id.** at 87.
18. **Id.** at 95. The court also could see no reason for distinguishing between the automobile industry, where all manufacturers through standard trade organization sales contracts offer the same limited warranty, from traditional areas of public or quasi-public service where disclaimers of liability are denied effect, as being against public policy. The case stated that the disclaimer was "so inimical to the public good as to compel an adjudication of its invalidity."
19. See, **e.g.,** 1 CORBIN, CONTRACTS § 128 (Supp. 1961). "This treatise supports the decision (the Henningsen case) and expects it to be accepted and followed by other courts. The (disclaimer) provision should be withdrawn, and any substitute should be such as to give a buyer reasonable assurance that the machine is fit for the purposes for which it is sold and that the manufacturer will be responsible in damages in case of breach."

> tract with an effect equal to that of a uniformly adopted statute exempting an industry from all implied warranties. The result of course is to forsake the very freedom of contract that is sought to be achieved."[20]

The question arises as to whether disclaimers should be held void only when the article in question is inherently dangerous and the plaintiff has suffered personal injuries or property damage.[21] The nature of the product and the presence of personal injuries or property damage should be factors to consider, even though they are not necessary in order to hold a disclaimer void as against public policy.

In the instant case the buyer suffered no monetary loss, property damage or physical injury. Certain parts were defective and were replaced by the dealer according to the express terms of the warranty. It appears that in no other case holding the disclaimer void was it possible for the part to be repaired and replaced. The facts in the instant case should not be held sufficient to nullify section 71 of the Sales Act on the basis of public policy. It should also be noted that the North Dakota court did have precedent in that a prior case held that a disclaimer was valid, effective and not against public policy.[22]

The ideal resolution of the consumer—manufacturer—dealer conflict of damage resulting from defective construction may lie in legislative prohibition of disclaimers in certain areas. Possibly legislation should prohibit uniform disclaimers in the manufacturer's suggested contract, but retain the generally unexercised right of the buyer and the dealer to bargain freely for the warranties and disclaimers they desire in their contract. Public policy will then be determined as it properly should be, by the legislature rather than the courts.[23]

A. WILLIAM LUCAS

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20. Note, 8 U.C.L.A.L. Rev. 658, 663 (1961).
21. Note, 46 Cornell L.Q. 607, 610 (1961). An excellent discussion of the Henningsen v. Bloomfield Motors, Inc. case in which was stated that "A person whose car is seriously damaged due to a defective part would seem to be no less deserving of compensation because he was fortunate enough to escape without bodily injury."
22. Minneapolis Threshing Mach. Co. v. Hocking, 54 N.D. 559, 209 N.W. 996 (1926) (This case involved threshing machinery).
23. It should be noted that North Dakota has already enacted legislation with respect to disclaimers in two very limited areas, farm implements and seeds. N.D. Cent. Code §§ 51-07-07 and 4-09-14.