

Tulsa Law Review

Volume 10 | Number 4

1975

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Recommended Citation

Charles W. Pauly, *Consumerism Takes It on the Chin: Warranty Disclaimers in Oklahoma*, 10 *Tulsa L. J.* 675 (1975).

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CONSUMERISM TAKES IT ON THE CHIN: WARRANTY DISCLAIMERS IN OKLAHOMA

Charles W. Pauly

In a day and age of expanding consumer protection many courts are extending and enlarging the provisions of the Uniform Commercial Code to reflect this trend. Courts in recent years have directed much attention to consumerism in the area of warranties of goods and disclaimers of such warranties.¹ Following the strict provisions of the Code with equally strict interpretations, most courts have been very reluctant to grant merchants much latitude in the means by which they make warranty disclaimers.² Recently the Oklahoma Supreme Court opposed this trend in *Smith v. Sharpsteen*.³

Sharpsteen involved an action for damages for breach of an implied warranty of fitness for a particular purpose. The suit arose out of a lease-purchase agreement covering a diesel powered truck tractor. The lease-purchase agreement contained a clause attempting to disclaim the seller's liability for any breach of implied warranty. By the findings of the court, the disclaimer provision was not necessarily con-

1. *Roto-Lith Ltd., v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962); *Osborne v. Genevie*, 289 So. 2d 21 (Fla. Ct. App. 1974); *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. Ct. App. 1972); *Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc.*, 68 Ill. App. 2d 297, 216 N.E.2d 282 (1965); *Woodruff v. Clark County Farm Bureau Cooperative Ass'n*, —Ind. App. —, 286 N.E.2d 188 (1972); *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345 (1970); *Minikes v. Admiral Corp.*, 48 Misc. 2d 1012, 266 N.Y.S.2d 461 (1966); see also, Lauer, *Sales Warranties Under the Uniform Commercial Code*, 30 Mo. L. Rev. 259 (1965); Cudahy, *Limitation of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127, 142 (1963); 22 DEPAUL L. REV. 794 (1973); 40 Miss. L.J. 310 (1969).

2. *Mathews v. Ford Motor Co.*, 479 F.2d 399 (4th Cir. 1973); *DeLamar Motor Co. v. White*, 460 S.W.2d 802 (Ark. 1970); *Hertz Commercial Leasing Corp. v. Transp. Credit Clearing House*, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (Civ. Ct. Rec. 1969); *Salov v. Don Allen Chevrolet Co.*, 55 Pa. D. & C.2d 180 (1971); *S.F.C. Acceptance Corp. v. Ferree*, 39 Pa. D. & C.2d 225 (1966); *Berg v. Stromme*, 79 Wash. 2d 184, 484 P.2d 380 (1971); *Dobias v. Western Farmers Ass'n*, 6 Wash. App. 194, 491 P.2d 1346 (1971).

3. 521 P.2d 394 (Okla. 1974).

spicuous within the meaning of that term in section 1-201 of the Uniform Commercial Code.⁴ However, the buyer testified that he was required to read the entire contract, and that he read and understood the warranty disclaimer paragraph. The Oklahoma Supreme Court held that despite the fact that the disclaimer did not satisfy the disclaimer provisions of Code section 2-316(2), since it was not conspicuous, this section was rendered inapplicable due to the actual knowledge of the purchaser in regard to the existence and meaning of the disclaimer. The court also held that in the absence of misunderstanding by the buyer, or sharp business practices by the seller, the disclaimer satisfied section 2-316(3), which negates any necessity of compliance with subsection (2) when "in common understanding" the disclaimer language "calls the buyer's attention" to the exclusion of warranties.⁵

Sections 2-316(2) and 2-316(3)(a) set out very rigid and objective standards for warranty disclaimers:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be a writing *and conspicuous* [emphasis added]. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.

. . .

While the Code specifically states that subsection (2) is subject to subsection (3), many courts have held that, to be effective, even under subsection (3), a warranty disclaimer must also meet the requirements of subsection (2) in that it must be conspicuous.⁶ This is an obvious

4. 521 P.2d at 396; section 1-201(10) of the Uniform Commercial Code defines "conspicuous" in this manner:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. . . . Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color.

5. 521 P.2d at 395, 396.

expansion of the express provisions of the Code. Although Oklahoma's decision is in keeping with this trend of reworking the express provisions of the Code, it does so to reach a conclusion opposed to the result of other cases. Rather than expanding upon the consumer protections of the Code, the decision restricts these protections.

In *Sharpensteen* the Oklahoma court held that where a buyer read and understood a warranty disclaimer, it was effective against him despite the fact that the disclaimer did not comply with section 2-316(2). The court held that the buyer's subjective awareness and understanding of the disclaimer were sufficient to render the disclaimer effective against a claim of breach of implied warranty of fitness.

In finding for the seller the court gave alternative reasons for its holding. First, the court held that the awareness of the buyer was sufficient to render the conspicuousness requirement inoperative. Second, the court held that subsection (3) of section 2-316 was satisfied; therefore, since subsection (2) is subject to subsection (3), the disclaimer need not comply with the requirements of subsection (2). If this second basis had been the only grounds for the decision, the judgment of the court would be much more defensible. It is within the court's discretion to determine, as a matter of law, that a warranty disclaimer satisfied subsection (3).⁷ However, the Oklahoma court did not restrict its decision to this rationale; on the contrary, it even limited this much of the holding by stating: "If there were any claim or evidence of misunderstanding by plaintiff or sharp business practices by defendants a contrary conclusion might be required"⁸ It seems obvious that either a disclaimer satisfies section 2-316(3) or it doesn't.

6. *Osborne v. Genevie*, 289 So. 2d 21 (Fla. Ct. App. 1974); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345 (1970); see also, 1 W.D. HAWKLAND; A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 77 (1964) wherein the author states:

While the subsection [2-316(3)(a)] does not explicitly so provide, it would seem that these phrases and expressions would have to be stated conspicuously to become effective disclaimers. Such a requirement is consistent with the general rule that the disclaimer must "call" the risk to "the buyer's attention" and "make . . . plain [to him] that there is no implied warranty."

Donovan, *Recent Developments in Products Liability Litigation in New England: The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code*, 19 ME. L. REV. 181 at 213 (1967).

7. *Geo. C. Christopher & Son, Inc. v. Kansas Paint & Color Co.*, 215 Kan. 185, 523 P.2d 709 (1974); *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967); *Tennessee Carolina Transp. Inc. v. Strick Corp.*, 16 N.C. App. 498, 192 S.E.2d 702 (1972); *Adams Van Service, Inc. v. Int'l Harvester Corp.*, 14 UCC REP. SERV. 1142 (Pa. C.P. 1973); see also, *Woodruff v. Clark County Farm Bureau Cooperative Ass'n*, —Ind. App. —, 286 N.E.2d 188 (1972).

8. 521 P.2d at 396.

The Code makes no exceptions to the section dependent on judicial determinations of sharp or unfair business practices (absent cases involving fraud, etc.).⁹ The court's first basis for its decision—the buyer's subjective awareness—seems inferior to the decision which was reached by the Oklahoma Court of Appeals:

At the trial the plaintiff in this case admitted that he had read and knew of the above provisions before signing. However, this is not enough by itself to dispense with the Code requirement that the language of disclaimer or modification of a warranty be conspicuous. . . . [K]nowledge in fact of a disclaimer provision does not ipso facto make it *conspicuous* under the . . . Code section. We conclude that the trial court properly refused to direct a verdict for defendants because the disclaimer provisions in the agreement were ineffective. They were not conspicuous but in the same kind and size of print as all the other provisions in the body of this agreement.¹⁰

Such interpretation seems far superior to that of the supreme court; if the ultimate objective of the UCC is to promote national uniformity and consistency throughout commercial transactions, then courts should stick to such an objective, at least in the absence of compelling policy considerations.

While in the present case there may have been no serious inequities done to the plaintiff by the court's holding, it is the potential long-range effects of the decision which make it a questionable opinion. The decision has taken the detached objectivity created by the UCC and placed it into a realm of subjective awareness. Taking the logical extensions of this decision, a seller of goods may well argue that all implied warranties were disclaimed and that, while the contract may not reflect this, the buyer was put on notice and subjectively was aware of the lack of warranties. Dealing with this specific question Professors White and Summers say:

Does it matter whether a disclaimer was printed conspicuously if the seller actually points it out to the buyer? Comment 1 to 2-316 indicates that the purpose of the conspicuousness requirement is to "protect the buyer from surprise" and "unexpected and unbargained language of disclaimers." This purpose should be accomplished when the buyer becomes aware in fact of the seller's disclaimer. On the other hand,

9. UNIFORM COMMERCIAL CODE § 1-103.

10. *Smith v. Sharpsteen*, 44 OKLA. BAR ASS'N J. 3568, 3570 (Okla. Ct. App. 1973).

section 1-201(10) says, "A term or clause is conspicuous when so written. . . ." This situation is analogous to . . . [the situation] where the buyer claims the disclaimer was not actually pointed out to him. Both of these arguments would reward the convincing liar who claims that the buyer was—or was not—made aware of the disclaimer. We think the draftsmen intended a rigid adherence to the conspicuousness requirement in order to avoid arguments concerning what parties said about warranties at the time of sale.¹¹

Under the Oklahoma decision, no longer must a seller look to, nor may a buyer depend upon, the statutory requirements of the Code provisions, but rather each may be bound by a court's interpretation of subjective awareness or lack of same in the buyer.

If subjective awareness is to be controlling, will a buyer be allowed to allege a lack of such awareness even in cases where the disclaimer satisfies the statutory requirements? Why should a seller be allowed to circumvent the requirements of the Code and yet a buyer not be entitled to a similar right? While it is at least arguable that subjective awareness is desirable in this area that is not the entire issue.¹² The intent, purpose, and desired result of the enactment of this section of the Code was to bring uniformity and consistency to the entire area of warranty disclaimers. If such a purpose and goal is to be changed, it is within the power and discretion of the legislatures and should not be undertaken by the courts.

However Oklahoma does not stand alone in its interpretation. North Carolina has also accepted the concept of subjective awareness, at least in dicta. In *Tennessee Carolina Transp., Inc. v. Strick Corp.*¹³ the court stated that the purpose of the requirement of conspicuousness "despite its unqualified language" is to protect the buyer from unexpected language. Elaborating upon this point the court reasoned:

[C]ertainly actual awareness of the disclaimer is another circumstance which protects the buyer from the surprise of unexpected and unbargained language of disclaimer. . . .

[P]ossibly the disclaimer should be enforced despite its inconspicuousness since the purpose of the conspicuous requirement has been satisfied.¹⁴

11. J. WHITE, R. SUMMERS, UNIFORM COMMERCIAL CODE 361 (1972).

12. Such subjectivity might also benefit buyers because they have been held to warranty disclaimers even without notice of same in some states. See, *Koellmer v. Chrysler Motors Corp.*, 8 UCC REP. SERV. 668 (Conn. Cir. Ct. 1970); *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. Ct. App. 1970); *Architectural Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495, 333 N.Y.S.2d 818 (Sup. Ct. 1972).

13. 283 N.C. 423, 196 S.E.2d 711 (1973).

14. *Id.* at 718.

However the court concluded that it was unnecessary for it to decide whether the conspicuousness requirement had been satisfied by such other circumstances since the disclaimer was found only in the security agreement and not in the contract of sale and would still not have been effective.¹⁵

Some courts have specifically rejected the argument adopted by the North Carolina and Oklahoma courts. The Florida Supreme Court in *Rehurek v. Chrysler Credit Corp.*¹⁶ held that the fact that a purchaser of an automobile had read the retail installment contract, including the disclaimer clause, did not render effective the disclaimer which did not comply with the statute requiring a disclaimer to be conspicuous.¹⁷ Following the same line of reasoning, the Washington Court of Appeals in *Dobias v. Western Farmers Ass'n*¹⁸ held that "[k]nowledge of a disclaimer is not sufficient to give effect to that disclaimer so as to defeat an action for breach of warranty."¹⁹

CONCLUSION

While courts have held that purchasers need not have actual knowledge of a disclaimer of warranties in order to make it effective, so long as the disclaimer is in writing and conspicuous,²⁰ Oklahoma seems to be the first state to hold that if a purchaser does have actual knowledge of a disclaimer then it need not be conspicuous. Such a decision may be questioned on the grounds that it goes against the express provisions of the UCC. However an even more serious objection is that the Oklahoma courts may accept the decision as good precedent and begin to apply the Code based upon subjective determinations rather than the objectivity which the Code drafters attempted to provide. Following the precedent in this case would lead the Oklahoma courts into a further restricting and limiting of the areas of consumer protection.

15. *Id.* at 719.

16. 262 So. 2d 452 (Fla. Ct. App. 1972).

17. *Id.* at 455.

18. 6 Wash. App. 194, 491 P.2d 1346 (1971).

19. *Id.* at 1350.

20. See cases cited in note 10 *supra*.