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COMMENTS

THE SALES STATUTE OF LIMITATIONS IN THE UNIFORM COMMERCIAL CODE—DOES IT PRECLUDE PROSPECTIVE IMPLIED WARRANTIES?

During the past decade, there has been an increased realization that consumers need protection. Warranties of merchantability¹ and fitness for the buyer's particular purpose,² implied in a contract for the sale of goods, are excellent means for providing that protection. For this reason, some courts have limited the application of the archaic requirement that there be privity of contract in an action for breach of warranty,³ and, in some instances, the Uniform Commercial Code has extended warranties to persons other than the immediate purchaser.⁴ Thus, it is now possible in some cases for a buyer to recover against a manufacturer on the implied warranty that the manufacturer gave to the retailer,⁵ or in other words, for a consumer to recover against someone who did not sell him the goods.

However, the impact of these protective measures may be negated somewhat by the Code statute of limitations for breach of warranty actions.⁶ Terminology in the statute of limitations section apparently has overruled long settled case law, and precluded any cause of action for breach of an implied prospective warranty where the cause of action accrues more than four years after delivery of the goods. This comment will attempt to deal with this problem in the hope that it will both shed light on the problem and bring help to the consumer.

Pre-Code law differentiated between a present and a prospective warranty.⁷ A present warranty relates only to the condition of the goods at the time of the sale, and the breach occurs at that time. A prospective warranty relates to the

1. U.C.C. § 2-314.

2. U.C.C. § 2-315.

3. See *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961). See generally Prosser, *The Assault Upon the Citadel*, 69 *Yale L.J.* 1099 (1960); Comment, *Sale of Goods in Service-Predominated Transactions*, 37 *Fordham L. Rev.* 115 (1968).

4. U.C.C. § 2-318 states: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

5. See Prosser, *supra* note 3. See also Comment, *Sale of Goods in Service-Predominated Transactions*, 37 *Fordham L. Rev.* 115 (1968).

6. U.C.C. § 2-725.

7. See *Allen v. Todd*, 6 *Lans.* 222 (N.Y. 4th Dep't 1872). See also *Citizens Util. Co. v. American Locomotive Co.*, 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962); 31 *Fordham L. Rev.* 609 (1963).

future state of the goods, and the breach must occur in the future. Thus "the clocks are in good working order" is a present warranty, while "the seeds will produce flowers in June" is a prospective warranty. The courts had adopted the rule that where the warranty depends upon the occurrence or nonoccurrence of a future event the warranty is a prospective one.⁸

Under Article 2 of the Code, an action for breach of warranty must be brought within four years after the cause of action has accrued.⁹ "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty *explicitly* extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."¹⁰

The meaning of the word "explicitly" creates the problem. "Explicit" is defined as "1. Distinctly stated; plain in language; clear . . . 3. Clearly developed."¹¹ A warranty could be express and yet not be explicit. Thus if a buyer asked a merchant for "a peach tree" and the seller then gave the buyer a tree from the nursery, there would be an express warranty that the merchandise sold was a peach tree since the buyer's description would create an express warranty.¹² Yet, in the example cited, it is doubtful whether the warranty was explicit in that it was not "distinctly stated" to be such.

More obvious, however, is the problem that arises with implied warranties. It would seem that an *implied* warranty could not be *explicit*, and therefore could not explicitly extend to future performance of the goods. Thus under the Code there could be no implied prospective warranties. However, the section should not be read to mean that any action for breach of an implied warranty must be brought within four years after the time of delivery. "If that result were intended it could have been obtained through the use of 'express' and 'implied' warranty terminology carefully used elsewhere in the statute."¹³ Indeed, the use of the word "explicit" seems to create a third class of warranties which is comprised of both express and implied warranties, and thus it has been suggested that the word "explicitly" be deleted from the statute in order to avoid any inference that a prospective warranty must be an express one.¹⁴

8. See, e.g., *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961); *Moss v. Smith*, 181 Cal. 519, 185 P. 385 (1919); *Sherer v. Park Nursery Co.*, 103 Cal. 415, 37 P. 412 (1894); *Puretex Lemon Juice, Inc. v. S. Riekas & Sons, Inc.*, 351 S.W.2d 119 (Tex. Civ. App. 1961).

9. U.C.C. § 2-725.

10. U.C.C. § 2-725(2) (emphasis added).

11. Webster's New Collegiate Dictionary 291 (1961).

12. U.C.C. § 2-313 states: "(1) Express warranties by the seller are created as follows: . . . (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."

13. Hogan & Penney, *Commercial Law*, 14 Syracuse L. Rev. 248, 252 (1962-63) (citations omitted).

14. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A.L. Rev. 281, 333-34 (1961).

The official comments to the warranty of title section¹⁵ state that the warranty of title, which is neither express nor implied, is not one which extends to the future performance of the goods. However, no similar comment is made to the sections containing the implied warranties of merchantability¹⁶ and fitness.¹⁷ Thus, some inference may be drawn that these implied warranties can explicitly extend to future performance of the goods.

"When a warranty, express or implied, clearly relates to a *future* event, or it is within the contemplation of the parties that it have future effect, is it not more reasonable to follow the general rule which allows parties to enter into contracts the performance of which may not be fulfilled until some time in the future?"¹⁸ Since "freedom of contract is a principle of the Code,"¹⁹ and since the Code intends the contract to consist of the complete understanding of the parties, the answer to this question should be in the affirmative in cases of implied as well as express warranties. Where, for example, seeds are sold and impliedly warranted to produce a specific fruit, the statute of limitations should not begin to run until it can be ascertained that the wrong seeds were sold.²⁰ If a manufacturer understands that a certain product will be used for a particular purpose and knows that it will be impossible to detect any defects in the goods until a later period, the breach of warranty should not cause the statute to begin to run until it has become possible to ascertain whether there is a defect. This logic has been followed in two lower court Pennsylvania cases which were decided under the Code.

In *Perry v. Augustine*,²¹ an action was brought to recover for installing heating equipment in the defendant's home. The equipment was sold and delivered in June and July of 1961. The defendant counter-claimed in July of 1965 for breach of an *express* warranty that the heating system would heat well during the winter months. The court held that the warranty came within the exception in the statute and that it explicitly related to future performance of the goods since "[d]iscovery of a breach of that kind of a warranty . . . would necessarily have to await winter weather. Hence, the cause of action could not have accrued until winter weather conditions prevailed"²² While the warranty in this case was express, the result should be no different if there had been an implied warranty of fitness for the particular purpose. Surely the lack of an express warranty does not change the nature of the case. If there had been only an implied warranty, it would have explicitly related to future performance of the goods.

In the second case, *Hempfield Area Joint School Building Authority v. Tectum Corp.*,²³ the plaintiff alleged certain warranties relative to roofing ma-

15. U.C.C. § 2-312, Comment 2.

16. U.C.C. § 2-314.

17. U.C.C. § 2-315.

18. 31 Fordham L. Rev. 609, 614 (1963).

19. U.C.C. § 1-102, Comment 2.

20. *Contra*, *Allen v. Todd*, 6 Lans. 222 (N.Y. 4th Dep't 1872).

21. 37 Pa. D. & C.2d 416, 3 UCC Rep. Serv. 735 (C.P. Mercer County 1965).

22. *Id.* at 418, 3 UCC Rep. Serv. at 737.

23. 46 Westmoreland L.J. 265, 2 UCC Rep. Serv. 518 (C.P. Westmoreland County 1964).

terial which had been installed. The court held that the plaintiff should have the right at trial to prove that the warranties were prospective. The case is clearly correct, and one who alleges a breach of warranty should always be allowed to prove at trial that the warranty was prospective.

This logic has also been followed in a pre-Code decision in Texas where it was held that an action for breach of an implied prospective warranty did not begin to run until there could have been discovery.²⁴ Such a method for computing the statute of limitations is used in cases of fraud or deceit where the time within which an action must be brought is computed from the time the plaintiff discovered the fraud or could with reasonable care have discovered it.²⁵ Since an action in warranty was originally based on the tort of deceit,²⁶ this reasoning is not unfounded.

The underlying policy considerations for allowing an implied warranty to relate to future performance of the goods have been stated as follows:

Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff. For a limitations statute, by its inherent nature, bars a cause of action solely because suit was not brought to assert it during the period when the suit, if begun in that period, could have been successfully maintained; the plaintiff, in such a case, loses for the sole reason that he delayed—beyond the time fixed by the statute—commencing his suit which, but for the delay, he would have won.²⁷

The counter argument is simple and basically sound. The purpose of the statute of limitations is to protect the seller against fraudulent claims, to prevent harassment, to allow for orderly business transactions, and to permit the seller to close the books after four years. Since he is a virtual insurer during the period, the least that can be done is to allow him to breathe freely at one time and not subject him to liability in perpetuity. Finality in commercial dealings is the desired goal of the law.²⁸ Unless he agrees, the seller should not be bound after the four-year period.

24. *Puretex Lemon Juice, Inc. v. S. Riekes & Sons, Inc.*, 351 S.W.2d 119 (Tex. Civ. App. 1961). See also *Southern Cal. Enterprises, Inc. v. D.N. & E. Walter & Co.*, 78 Cal. App. 2d 750, 178 P.2d 785 (1947); *Crawford v. Duncan*, 61 Cal. App. 647, 215 P. 573 (1923); *Heath v. Moncrieff Furnace Co.*, 200 N.C. 377, 156 S.E. 920 (1931); *Cunningham v. Frontier Lumber Co.*, 245 S.W. 270 (Tex. Civ. App. 1922). It might also be noted that in New York, for breach of an agent's implied warranty of authority, the statute of limitations does not begin to run until knowledge of the breach. See *Moore v. Maddock*, 251 N.Y. 420, 167 N.E. 572 (1929), in conjunction with N.Y. C.P.L.R. § 206(b) and *McLaughlin*, Practice Commentary to N.Y. C.P.L.R. § 206(b) (McKinney's 1963). See also N.Y. C.P.L.R. § 206(a)(1) & (c).

25. See, e.g., Cal. Civ. Pro. Code § 338 (West 1954); N.Y. C.P.L.R. 213(9); Ohio Rev. Code Ann. § 2305.09 (Page 1954).

26. See W. Prosser, *Torts* 651 (3d ed. 1964).

27. *Dincher v. Marlin Firearms*, 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) (footnotes omitted).

28. Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 Cornell L.Q. 1, 18 (1962).

While the latter argument is technically sound, it does not contribute to an efficient market place. Manufacturers and other sellers are in a better position than consumers to bear the risk of defective goods and can always insure against the risk. In view of the necessity for the protection of the consumer, it is suggested that where factually feasible, the statute of limitations in the Uniform Commercial Code should be interpreted to aid buyers by at least offering them an opportunity to prove a prospective warranty whether it be implied or express.