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VIRGINIA COMMENTS

IMPLIED WARRANTIES IN THE SALE OF FOOD

Prior to the recent case of *Swift & Co. v. Wells*,¹ Virginia based the liability of a manufacturer to a consumer for latent defects in food in sealed containers solely on negligence.² The issue of whether there was an implied warranty of wholesomeness had never been litigated.³ In *Swift* the plaintiff's husband, acting as agent for plaintiff, bought from a retail dealer a pork shoulder wrapped in cellophane and labelled "Swift's Premium Picnic Shoulder." Because of a deleterious substance⁴ in the shoulder at the time of packing, the plaintiff was made ill. She based her action against the manufacturer upon a breach of implied warranty rather than negligence, and the Virginia Supreme Court of Appeals held that the manufacturer of food *does* impliedly warrant his product to the consumer-purchaser, regardless of the lack of privity.⁵ The court, following a recent Texas case⁶ which predi-

¹201 Va. 213, 110 S.E.2d 203 (1959).

²Norfolk Coca-Cola Bottling Works v. Krausse, 162 Va. 107, 173 S.E. 497 (1934).

³110 S.E.2d at 207.

⁴Had the deleterious substance been something which could have been discovered by examination of the cellophane wrapped package, this would not have been a true sealed package case. But because the plaintiff's illness was caused by bacteria not visible to the human eye, detection by examination was impossible, and the sealed package doctrine was applicable. 110 S.E.2d at 204.

⁵Most of the more recent cases in other states have reached a similar result. Alabama Coca-Cola Bottling Co. v. Ezzell, 22 Ala. App. 210, 114 So. 278 (1927); Rubino v. Utah Canning Co., 123 Cal. 2d 18, 266 P.2d 163 (1954); Patargias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947); Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Le Blanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952); Biederharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939); Brussels v. Grand Union Co., 14 N.J. Misc. 751, 187 Atl. 582 (1936); Ada Coca-Cola Bottling Co. v. Asbury, 206 Okla. 269, 242 P.2d 417 (1952); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942). The same result is reached in at least one other jurisdiction on the theory that the manufacturer's warranty runs with the item sold, as covenants run with the land. Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937). But a few courts adhere to the rule that the consumer, lacking privity, cannot sue the manufacturer on an implied warranty. Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S.W.2d 701 (1930); Pelletier v. DuPont, 124 Me. 269, 128 Atl. 186 (1925); Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935); Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952). The consumer may, of course, sue the manufacturer for negligence and may in some instances have the doctrine of *res ipsa loquitur* applied in his favor. Atlanta Coca-Cola Bottling Co. v. Shipp, 41 Ga. App. 705, 154 S.E. 385 (1930); Annot., 52 A.L.R.2d 117 and 159 (1957).

⁶Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

cated the result on public policy, reasoned that "this permits the placing of the loss occasioned upon the manufacturer who is in the best position to prevent the production and sale of unwholesome food."⁷

The *Swift* decision is important because it gives the plaintiff a more effective remedy against the manufacturer. But it is also important because of the effect it may have on related problems involving implied warranties: (1) whether or not the *retailer* is liable to the consumer-purchaser for defective food sold in sealed containers; and (2) whether or not the retailer or manufacturer is liable to a consumer who is someone other than the purchaser of the food.

In states which have not passed the Uniform Sales Act,⁸ a minority of the courts which have considered the first problem above have held the retailer liable on the theory of implied warranty.⁹ In these jurisdictions reliance is placed upon the policy argument that the public health is protected by holding the retailer liable, and language like the following is not uncommon: "[W]e are confronted with the argument that . . . [a] choice must be made between facilitation of commerce and the preservation of public health. In such a choice it seems to us there is no question that the latter should prevail."¹⁰ Although the Virginia Supreme Court of Appeals has never been confronted with this question, there is dictum which indicates a similar approach to the problem.¹¹ This reasoning is supported by logic if the consumer has no direct warranty action against the manufacturer, but it is questionable when the consumer does have such a remedy. For if the consumer may sue the manufacturer on implied warranty, this deterrent protects the public health, and commerce is promoted by eliminating the innocent retailer. Nevertheless, courts which permit a direct warranty action against the manufacturer have also held a retailer liable on im-

⁷110 S.E.2d at 209.

⁸The handling of the first problem under the Sales Act is discussed later in this comment. See text accompanying notes 23-29 *infra*.

⁹*Sencer v. Carl's Mkts., Inc.*, 45 So. 2d 671 (Fla. 1950).

¹⁰*Rabb v. Covington*, 215 N.C. 572, 2 S.E.2d 705, 707 (1939).

¹¹"[G]enerally the vendor has opportunities for information as to the wholesomeness of his foodstuff which the vendee cannot have. In business for profit he must bear this burden which the law puts upon him." *Colonna v. Rosedale Dairy Co.*, 166 Va. 314, 186 S.E. 94, 97 (1936). The case involved impure milk which was apparently packed by the retailer, and the language is therefore dictum when applied to a case in which a retailer purchased from a manufacturer. In the sale of goods other than food, the retailer is not liable for latent defects if he is not the manufacturer and if the buyer knows that. *Belcher v. Goff Bros.*, 145 Va. 488, 134 S.E. 588 (1926). It therefore appears that, despite the *Colonna* case, the question is still open in Virginia as to retail liability in the case of food sold in sealed packages.

plied warranty, although not without some controversy.¹² A principal effect of this holding is to permit the consumer the convenience of suing the local retailer rather than the less accessible manufacturer, but public policy should not be predicated upon the convenience of one party at the expense and inconvenience of another party who is without fault.¹³

Of course, in some cases of this nature it is virtually impossible for the plaintiff to sue the manufacturer in the state of plaintiff's residence. In such a case, because the manufacturer is located in a distant state and is not "doing business"¹⁴ in the plaintiff's home state, the expense and inconvenience may effectively eliminate the plaintiff's remedy.¹⁵ Policy considerations in this situation would indicate that a recovery may be had against the retailer, with the retailer bearing the subsequent expense and inconvenience of suing the manufacturer. The fact that several recent cases have so held is an indication that this consideration may be controlling in some instances.¹⁶

The majority rule on the first problem is that, in the absence of statute, the retailer does not impliedly warrant to the consumer the contents of a sealed package of food.¹⁷ Courts following this rule hold

¹²Florida: *Hoskins v. Jackson Grain Co.*, 63 So. 2d 514 (Fla. 1953) (manufacturer liable); *Sencer v. Carl's Mkts., Inc.*, 45 So. 2d 671 (Fla. 1950) (retailer liable; three judges concurring, two concurring specially, and two dissenting). Texas: *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942) (manufacturer liable); *Griggs Canning Co. v. Josey*, 138 Tex. 623, 164 S.W.2d 835, 142 A.L.R. 1424 (1942) (retailer liable, one judge dissenting).

¹³Waite, *Retail Responsibility and Judicial Law Making*, 34 Mich. L. Rev. 494, 514 (1936).

¹⁴If the manufacturer is a corporation doing business in the plaintiff's home state, statutes generally permit service of process on the foreign corporation. See Va. Code Ann. §§ 13.1-111 and 13.1-119 (1950). Many manufacturers whose food products are sold within the state are transacting business as defined in such a statute and are amenable to service of process. But when a manufacturer sells goods to a large retail corporation, and that corporation ships the goods from its central depot to its stores in several states, the manufacturer is not transacting business in those states. 23 Am. Jur. *Foreign Corporations* § 371 (1939). Cf. *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956). Therefore the consumer would not be able to sue the manufacturer locally, and his remedy against the manufacturer may have become ineffective. For a detailed examination of what constitutes "doing business," see *Caplin, Doing Business in Other States* (1959).

¹⁵The injured consumer may have another remedy if the jurisdiction allows third party practice. In *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951), the plaintiff was unable to have process served on the manufacturer. He sued the retailer, and the retailer impleaded the wholesaler who had sold him the goods. The wholesaler was held primarily liable to the consumer.

¹⁶Annot., 142 A.L.R. 1434, 1435 (1943).

¹⁷*Bigelow v. Maine Cent. R.R.*, 110 Me. 105, 85 Atl. 396 (1912) (dining car case, railroad treated as a retailer); *Kroger Grocery Co. v. Lewelling*, 165 Miss. 71, 145

that a retailer only warrants that he has purchased from a reliable manufacturer and that there is no *apparent* defect in the food.¹⁸ In *Pennington v. Cranberry Fuel Co.*,¹⁹ the West Virginia Supreme Court of Appeals said that the buyer "might reasonably expect the seller's experience and judgment to protect him against goods of low grade or dishonest manufacture or preparation, and that he would exercise reasonable prudence and care in selecting the brand of the manufactured or prepared food that he would sell in sealed packages. Beyond this, we cannot see where the buyer would be relying upon the seller in the purchase of goods contained in sealed packages."²⁰ Similarly, the Supreme Court of Maine, noting that there is no opportunity for inspection of goods in sealed packages, adopted the rule that the seller is not liable for defects in these goods.²¹ If the purchaser has a warranty action against the manufacturer, the rule established in these cases is sound—the purchaser has not been left without a remedy; the innocent retailer is protected; and public health and economy are promoted.

With the passage of the Uniform Sales Act, an anomalous result may occur. Since the majority rule at common law releases the retailer²² and since the Sales Act is a codification of the common law,²³ one would expect the result under the Sales Act to be basically the same as that at common law. This has not been the case, however, since practically all the courts that have considered the question have held that the retailer is liable under the Sales Act on a theory of implied warranty.²⁴ In some states in which no implied warranty ex-

So. 726 (1933); *Hopkins v. Amtorg Trading Corp.*, 265 App. Div. 278, 38 N.Y.S.2d 788 (Sup. Ct. 1942); *Pennington v. Cranberry Fuel Co.*, 117 W.Va. 680, 186 S.E. 610 (1936); Annot., 142 A.L.R. 1434 (1943); Annot., 90 A.L.R. 1269 (1934).

¹⁸*Kroger Grocery Co. v. Lewelling*, 165 Miss. 71, 145 So. 726 (1933).

¹⁹117 W. Va. 680, 186 S.E. 610 (1936).

²⁰Id. at 684, 186 S.E. at 611. In West Virginia the retailer is liable for defects in unsealed packages of food. *Burgess v. Sanitary Meat Mkt.*, 121 W. Va. 605, 5 S.E.2d 785 (1939). An illustration of how the cases may be confused is seen in *Kyle v. Swift & Co.*, 229 F.2d 887 (4th Cir. 1956). That case involved a hidden defect in a sealed package of wieners—a clear case for application of the sealed package doctrine—but the court, applying West Virginia law, followed the *Burgess* case, *supra*, and held the retailer liable.

²¹*Bigelow v. Maine Cent. R.R.*, 110 Me. 105, 85 Atl. 396 (1912).

²²See note 17 *supra* and accompanying text.

²³"The drafters of the Sales Act undoubtedly intended to codify the general rules applicable to contracts of sales . . ." *Funt v. Schiffman*, 115 Misc. 155, 187 N.Y.S. 666, 667 (Sup. Ct. 1921).

²⁴*Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932); *Martin v. Great Atlantic & Pacific Tea Co.*, 301 Ky. 429, 192 S.W.2d 201 (1946); *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918).

isted prior to the Sales Act, such a warranty has been established under the Act.²⁵ Usually, the implied warranty of wholesomeness is said to exist under Section 15(1) of the Uniform Sales Act, which provides that the seller must know the particular purpose for which the goods are bought *and* the buyer must rely on the skill and judgment of the seller. It is held that the mere purchase of food acquaints the seller with the particular purpose for which it is bought.²⁶ Moreover, it is also held that the sale itself is proof that the buyer relied on the skill and judgment of the seller.²⁷ If the seller had some opportunity for superior knowledge as to the contents of the package, the inference of reliance by the purchaser would be reasonable. But when the retailer and purchaser are on equal footing and, in fact, the purchaser has the only opportunity for examination when he opens the package, the reasoning is questionable.²⁸ Notwithstanding the above, the retailer's liability under the Uniform Sales Act is well settled.²⁹

As to the second problem—manufacturer or retailer liability to a plaintiff consumer who was not himself the purchaser of the food—the cases are in hopeless conflict. Some courts have thoroughly examined the problem and permitted the nonpurchaser to sue, dispensing with the requirement of privity.³⁰ Other courts, after an equally exhaustive survey, have retained privity as an absolute requirement and have denied recovery.³¹ Still others have permitted the nonpurchaser to sue, without discussing privity.³² The present rule in Virginia is that the nonpurchasing consumer may not sue, for he is not a party to the contract of sale.³³

²⁵Julian v. Laubenberger, 16 Misc. 646, 38 N.Y. Supp. 1052 (Sup. Ct. 1896) (retailer not liable at common law); Lieberman v. Sheffield Farms-Slawson-Decker Co., 117 Misc. 531, 191 N.Y. Supp. 593 (1921) (retailer liable under the New York law corresponding to Section 15(1) of the Uniform Sales Act).

²⁶See cases cited in note 24 supra.

²⁷This proposition is also supported by the cases at note 24 supra. Perhaps even stronger support is given by the statement made by the author of the Uniform Sales Act that "the mere fact of purchase from a dealer for immediate domestic consumption has rightly been regarded as sufficient evidence of such reliance [on the skill and judgment of the seller] . . ." 1 Williston, Sales § 242, at 634 (3d ed. 1948).

²⁸Scruggins v. Jones, 207 Ky. 636, 269 S.W. 743 (1925).

²⁹A search of cases decided under the Uniform Sales Act reveals only one leading case which held the retailer not liable. Wilkes v. Memphis Grocery Co., 23 Tenn. App. 550, 134 S.W.2d 929 (1939). The Sales Act was not mentioned in the opinion.

³⁰See, e.g., Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

³¹See, e.g., Cornelius v. B. Filippone & Co., 119 N.J.L. 540, 197 Atl. 647 (1938).

³²See, e.g., Bolitho v. Safeway Stores, Inc., 109 Mont. 213, 95 P.2d 443 (1939).

³³Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936).

If a purchaser has an implied warranty on the ground of public policy, then other persons who may reasonably be expected to consume the food should enjoy the same status. Accordingly, the Mississippi Supreme Court held that "the manufacturer impliedly warranted the purity of the [sealed] drink to such of the public as became the rightful possessor and owner of the Coca-Cola."³⁴ Connecticut provides by statute that warranties of wholesomeness "extend to the purchaser and to all persons for whom such food or drink is intended."³⁵ Similarly, the Uniform Commercial Code provides that a guest or any member of the household for which the food is purchased may sue if he might reasonably have been expected to consume the food.³⁶ These manifestations of judicial and legislative opinion show a strong trend toward holding the manufacturer liable to any person who may reasonably be expected to consume the food.

A third problem is that of the manufacturer's contractual disclaimer of warranty. Few, if any, cases have resolved this precise point.³⁷ The limited authority available indicates that the common law governing other sales of personalty will apply, so that the parties to the transaction may by contract eliminate all warranties, both express and implied.³⁸ Courts showing grave concern for public health in other food cases may be expected to view such disclaimers of warranty as against public policy and therefore void. In the absence of such clean-cut holdings, the manufacturer may attempt to relieve himself of all liability, but courts have demonstrated a marked reluctance to waive the provisions of a warranty implied by law.³⁹

There is one basic proposition which affects all the above problems: the consumer who is unable to protect himself adequately against hidden defects in food must be afforded a remedy when he suffers injury. The remedy should be against the one best able to remove hidden defects, for in that manner the cause of harm will be more readily eliminated. Therefore, a manufacturer should be held responsible for defects in his food products despite disclaimers of warranty and the plaintiff's lack of privity. On the other hand, a retailer

³⁴*Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305, 307 (1927).

³⁵Conn. Gen. Stat. Supp. § 2859 d (1955).

³⁶Uniform Commercial Code § 2-318.

³⁷A search of American cases back to 1916 reveals no cases precisely on point.

³⁸In *Garofalo Co. v. St. Mary's Packing Co.*, 339 Ill. App. 412, 90 N.E.2d 292 (1950), the plaintiff retailer bought a lot of canned tomato juice from defendant. The sale was "as is no recourse." The goods were seized by the health department for impurities, and the plaintiff attempted to recover his loss from the seller. It was held that the parties had negated all warranties, express or implied.

³⁹See *Vold*, Sales § 150 (1931).