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Sales—The Uniform Commercial Code and Implied Warranties of Quality in Sales-Service Transactions

While at a beauty parlor, Mrs. Newmark received a hair permanent recommended by the beauty parlor operator. When the waving solution was applied, Mrs. Newmark experienced a burning sensation on her upper forehead. Shortly thereafter blisters appeared, followed by a loss of hair. Mrs. Newmark brought an action based on breach of an implied warranty of fitness of the waving solution. The trial court ruled that there was no implied warranty since the Uniform Commercial Code's requirement of a "sale" had not been satisfied. Mrs. Newmark appealed this determination. *Held*, reversed. Liability for breach of warranty under the Uniform Commercial Code must be extended to any commercial transaction where one person supplies a product to another, whether or not the transaction is technically considered a sale. *Newmark v. Gimbel's, Inc.*, 246 A.2d 11 (N. J. Super. 1968).

Prior to the Uniform Commercial Code, courts generally held that implied warranties of quality¹ arose only from sales contracts, and not from contracts for the rendition of services.² And, where the service to be rendered incorporated the use of a product, such arrangements were considered contracts for services.³ Thus, a transaction which initially could be considered a sale lost this classification when service became a component of the transaction.⁴ Even

¹ Implied warranties of quality are implied warranties of merchantability and implied warranties of fitness for a particular purpose. See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

² See W. PROSSER, TORTS § 95 (3d ed. 1964); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); 26 MD. L. REV. 182 (1966).

³ See, e.g., *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954). This is perhaps the leading case in which the court did not find a sale. The plaintiff was a patient in defendant hospital and became seriously ill due to a transfusion of contaminated blood. The court held that plaintiff's contract with defendant was primarily one for the rendition of services.

⁴ The weakness of the sales-service distinction is obvious in the pseudo-dichotomy between sales and sales-services involving the same product. For example, in *Newmark*, if Mrs. Newmark purchased the waving solution from the hairdresser and applied it herself, there could be no denial of a breach of implied warranty if the solution proved defective. Similarly, if Mrs. Newmark purchased the solution from the hairdresser and had a neighbor apply it, the hairdresser would be liable for breach of implied warranty if the solution was defective. However, according to the sales-service rule, if she permitted the hairdresser to apply the waving solution, she may only recover from the hairdresser if the hairdresser is negligent in the application of the solution. Here she is entitled to no implied warranty protection. This strange

under the recently enacted Uniform Commercial Code, the requirement of a technical "sale" has been considered essential to recovery against the vendor for breach of implied warranty.⁵ *Newmark v. Gimbel's, Inc.*⁶ is the first decision to completely discard the requirement of a "sale" under the Uniform Commercial Code warranties. In effect, the result of this decision is to create a new cause of action similar to strict liability in tort,⁷ which will permit recovery for breach of implied warranty in many instances formerly barred by the sales-service distinction.

Although extending the Uniform Commercial Code's implied warranties to such transactions would result in a quasi-strict liability being imposed on the seller-servicer,⁸ there are numerous policy reasons which tend to justify such an extension. The seller is normally in a better position to know and control any possible defects in the product used.⁹ In certain situations, he may use tests to determine the susceptibility of customers to harm from the use of the product.¹⁰ Moreover, should a defect occur in the product, the seller is in the best position to compensate his customer. He is known to his customers and subject to their suits, while the manufacturer of the product is often unknown and beyond the process of courts available to the customer.¹¹ The seller may be able to distribute the losses himself, or he can pass the loss back to his supplier, by negotiations or legal proceedings based on the same warranty principles benefiting the customer.¹² The seller may help to prevent future harm because he is in a strategic position to promote safety through pressure on his suppliers.¹³

result is due solely to the former transactions being classified as "sales", while the latter transaction is considered a "service." See 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 19.02[1] at 498 n.1 (1968).

⁵ See, e.g., *Epstein v. Giannattasio*, 25 Conn. Supp. 109, 197 A.2d 342 (1963). See generally Annot., 17 A.L.R.3d 1010, 1049 (1968).

⁶ 246 A.2d 11 (N.J. Super. 1968).

⁷ Liability is not based on fault in either instance. See Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); RESTATEMENT (SECOND) OF TORTS § 402A (1967).

⁸ "Seller" means a person who sells or contracts to sell goods." W. VA. CODE ch. 46, art. 2, § 103 (1)(d) (Michie 1966). The Uniform Commercial Code appears in chapter 46 of the West Virginia Code, with the article and section numbers of the West Virginia Code being the equivalent of the corresponding section of the Uniform Commercial Code. Thus the above citation corresponds with Uniform Commercial Code § 2-103 (1) (d).

⁹ 2 F. HARPER AND F. JAMES, TORTS § 28.19 at 1577 (1956).

¹⁰ *Newmark v. Gimbel's, Inc.*, 246 A.2d 11 (N.J. Super. 1968).

¹¹ 2 F. HARPER AND F. JAMES, TORTS § 28.30 at 1600 (1956).

¹² *Id.*

¹³ *Id.*

Nevertheless, while these policy reasons may indicate that the seller of the defective product may be in the best position to accept liability, the Uniform Commercial Code has not expressly extended warranty coverage into this area.¹⁴ Conscious of this, the draftsmen of the Code have indicated that the Code's implied warranties need not be restricted to technical sales.¹⁵ Perhaps because of this, it has been suggested that the Code's warranties can be extended into the non-sales area by analogy to the Code provisions.¹⁶ This contention appears strengthened by the Code's implied warranty of merchantability, which expressly covers the sale of food in restaurants,¹⁷ a formerly troublesome area caused by the service problem.¹⁸ However, such analogizing may not persuade some courts.¹⁹

Another method suggested for circumventing the "sale" requirement is a severability technique by which the contract is divided into one for sale and one for service.²⁰ This may seem justifiable, since the sale would thus be exposed, supposedly satisfying the Code's

¹⁴ W. VA. CODE ch. 46, art. 2, § 314 (Michie 1966) (implied warranty of merchantability); W. VA. CODE ch. 46, art. 2, § 315 (Michie 1966) (implied warranty of fitness for particular purpose).

¹⁵ UNIFORM COMMERCIAL CODE § 2-313, Comment 2 provides:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. . . . [T]he matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

See 1 W. HAWKLAND, A TRANSITIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.906 at 90 (1964).

¹⁶ See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

¹⁷ "Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale." W. VA. CODE ch. 46, art. 2, § 314(1) (Michie 1966).

¹⁸ Note, *Implied Warranty and the Sale of Restaurant Food*, 63 W. VA. L. REV. 326 (1961). See Annot., 7 A.L.R.2d 1027 (1949).

¹⁹ E.g., *Purlmutter v. Beth David Hospital*, 308 N.Y. 100, 107, 123 N.E.2d 792, 796 (1954).

[T]here can be no doubt that, when one goes into a restaurant, he does so in order to buy what the restaurant in truth has to sell, namely, food. That is not so, though, when one enters a hospital as a patient; he goes there, not to buy medicine or pills, not to purchase bandages or iodine or blood, but to obtain a course of treatment in the hope of being cured of what ails him.

Purlmutter v. Beth David Hospital, 308 N.Y. 100, 107, 123 N.E.2d 792, 796 (1954).

²⁰ See *Purlmutter v. Beth David Hospital*, 308 N.Y. 100, 108-09, 123 N.E.2d 792, 796 (1954) (dissenting opinion); see also 18 OKLA. L. REV. 104, 106 (1965); Note, *Liability for the Supplying of Impure Blood*, 1965 Wis. L. REV. 374, 383.

requirements and permitting the implied warranties to attach. Such contracts would appear to fall into three major categories: (1) where the goods mark the predominant part of the transaction,²¹ (2) where the goods and services appear to be equal components of the transaction;²² and (3) where the services compose the greater part of the transaction.²³ Of course, a variance in the factual situation could result in the transaction fitting into another category. The result would be that there could never be a clear distinction between sales, sales-service, and service situations. In addition to other problems with this method,²⁴ the problem of the weight to be given each of the two parts of the contract would result in considerable confusion. This method has not been accepted by the courts.²⁵

Nevertheless, if the warranties are to extend to transactions previously deemed services, a criterion must be found to determine their applicability to specific situations. Unquestionably the implied warranties of the Uniform Commercial Code were intended to give protection against defective products. Therefore, the determining factor as to whether or not the warranties would apply could be whether there are products which pass to the customer in the transaction,²⁶ and not whether a technical sale is involved. This technique

²¹ *Burge Ice Machine Co. v. Weiss*, 219 F.2d 573 (6th Cir. 1955) (prior to Uniform Commercial Code; contract for sale and installation of refrigerator is for goods, not services); *Garver v. Denn*, 117 Utah 180, 214 P.2d 118 (1950) (prior to Uniform Commercial Code; contractor who furnished and installed air conditioner was seller).

²² *Jackson v. Muhlenberg Hospital*, 96 N.J. Super. 314, 232 A.2d 879 (1967) (diseased blood sold, recovery denied on other grounds); *Delo Auto Supply, Inc. v. Tobin*, 198 Misc. 601, 100 N.Y.S.2d 135 (Sup. Ct. 1950) (prior to Uniform Commercial Code; installer of defective truck clutch liable).

²³ *Cheshire v. Southampton Hospital Ass'n.*, 53 Misc.2d 355, 278 N.Y.S.2d 531 (1967) (defective pin inserted in leg by doctor was service); *Aegis Products, Inc. v. Arriflex Corp. of America*, 25 App. Div.2d 639, 268 N.Y.S.2d 185 (1966) (repairing movie camera was service).

²⁴ As to contracts for labor being indivisible under the statute of frauds, see 26 Md. L. Rev. 182, 183 (1966). See also 2 A. CORBIN, CONTRACTS § 476 (1950).

²⁵ *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 104, 123 N.E.2d 792, 794 (1954).

²⁶ *Magrine v. Krasnica*, 94 N.J. Super. 228, 236-38, 227 A.2d 539, 544-45 (1967). Dentist's hypodermic needle broke in plaintiff's jaw; plaintiff's claim of strict liability in tort against the dentist was rejected. In discussing implied warranties, the court held that the dentist was not a supplier and therefore not subject to warranty liability. However, note that although the needle was defective, no sale of the needle was intended between plaintiff and the dentist. This would preclude recovery for breach of implied warranty.

has been employed by English courts in similar situations.²⁷ When there is a transaction involving legal aspects of both sale and service, the English courts simply imply a warranty that the materials used are fit for the purpose.²⁸ In *Newmark v. Gimbel's, Inc.*,²⁹ a similar concept seems to have been applied.³⁰ The Code's implied warranties governed the transaction in which a product was supplied, whether or not the transaction was technically considered a sale.³¹ This is seemingly a more logical approach than caviling at the definition of "sale",³² and results in the supplier's responsibility no longer being diminished when he also renders a service.

In the present trend toward strict liability,³³ the *Newmark* approach may gain acceptance. While a policy which holds the seller of goods to strict liability where services are an element of the contract may seem harsh, it must be remembered that such a seller is held to account where there is merely a sale. Therefore it may be that the services defense is short-lived, for there is little logic in confining the benefits of the Uniform Commercial Code's implied warranties of quality to the "do-it-yourselfer," which is seemingly contrary to the spirit of the Code.³⁴ Besides, the seller will have an

²⁷ *E.g.*, *Watson v. Buckley*, [1940] 1 All E.R. 174 (K.B. 1939) (hairdresser liable for breach of warranty for defective dye used on plaintiff's hair); *Dodd v. Wilson*, [1946] 2 All E.R. 691 (K.B.) (surgeon held liable for injuries to cattle after vaccinating with defective vaccine); *G.H. Meyers & Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46, 150 L.T.R. 96 (1933) (warranty applied to connecting rods installed in a motor which subsequently broke due to defects in their manufacture).

²⁸ *See* 26 Md. L. REV. 182 (1966).

²⁹ 246 A.2d 11 (N.J. Super. 1968).

³⁰ Weighing . . . policy considerations, we are satisfied and hold that, stripped of its nonessentials the transaction here in question, consisting of the supplying of a product for use in the administration of a permanent wave to plaintiff, carried with it an implied warranty that the product used was reasonably fit for the purpose for which it was to be used. *Newmark v. Gimbel's, Inc.*, 246 A.2d 11, 15 (N.J. Super. 1968).

³¹ *Id.*

³² "A 'sale' consists in the passing of title from the seller to the buyer for a price." W. VA. CODE ch. 46, art. 2, § 106 (Michie 1966). "It would appear clear that the instances in which implied warranties may be imposed are not limited to 'sales' that come strictly within the means of c. 2 of the Uniform Commercial Code." *Newmark v. Gimbel's, Inc.*, 246 A.2d 11, 14 (N.J. Super. 1968). For the proposition that the definition of "sale" found in cases not involving warranties is of little value, *see* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

³³ *See* Traynor, *The Ways and Meaning of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957).

³⁴ Presently there is liability for services negligently performed and liability for breach of implied warranty when there is a sale of defective goods. Yet to say that there is no liability for defective goods when accompanied by

action against the manufacturer if he is liable for breach of warranty to his buyer.³⁵ Since the warranties are intended to cover only defective goods, recovery for breach of implied warranty should be limited to the extent that the goods are defective and to any resulting harm. Recovery should not be predicated on an implied warranty theory where the seller's negligent rendering of the services results in injury; this would properly be an action based on negligence.³⁶

John Campbell Palmer IV

**Stocks—Texas Gulf Sulphur:
Rule 10b-5 Insider Liability Expanded?**

On November 8, 1963, the defendant corporation commenced core drilling on a tract of Canadian land. When a chemical assay revealed a remarkably high mineral content,¹ the president of the corporation ordered the results of their initial drilling kept confidential, even as to other officers, directors and employees of the corporation. During the following four months, certain officers and individuals said to have received tips from these officers purchased corporation stocks or calls² thereon. On the morning of April 11, 1964, the president of the corporation read unauthorized newspaper reports of the drilling which seemed to infer a rich strike. At 3:00 p.m. on Sunday, April 12, the corporation issued a press release which purported to give the drilling results as of the release date. Designed to quell rumors of a major ore strike, the release was published in newspapers the following day. Yet, while the drilling continued, the corporation prepared for the ultimate disclosure of the discovery. A corporation statement relative to

carefully performed services leaves an inexplicable chasm between these two concepts.

³⁵ *Newmark v. Gimbels, Inc.*, 246 A.2d 11, 16 (N.J. Super. 1968); *Delta Tank Mfg. Co. v. Weatherhead Co.*, 150 F. Supp. 525, 528 (N.D. Ohio 1957) (manufacturer called the "sole and only wrongdoer").

³⁶ *E.g.*, *Aegis Productions, Inc. v. Arriflex Corp. of America*, 25 App. Div.2d 639, 268 N.Y.S.2d 185, 187 (1966).

¹ So remarkably high was the copper, zinc, and silver content, that none of five Texas Gulf Sulphur experts had ever seen or heard of a comparable initial exploratory drill hole in a base metal deposit. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 843 (2d Cir. 1968).

² "A 'call' is a negotiable option contract by which the bearer has the right to buy from the writer of the contract a certain number of shares of a particular stock at a fixed price on or before a certain agreed-upon date." *Id.* at 841 n.3.