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William D. Harrison

SALES—UCC WARRANTY PROVISIONS EXTENDED TO CHATTEL LEASES BY ANALOGY

In *Redfern Meats, Inc. v. Hertz Corp.*,[1] the Georgia Court of Appeals held that the warranty provisions of the Georgia Uniform Commercial Code[2] are applicable to those chattel leases which are analogous to sales. Plaintiff, Redfern, entered into an indefinite leasing agreement with defendant, Hertz, to rent trucking equipment for the refrigerated transportation of its meats. The agreement required Redfern to buy the equipment according to a depreciation schedule if either party cancelled the lease within eight years of the lease date.[3] The agreement also contained a disclaimer which purported to relieve Hertz of any liability for damage to any property placed in a vehicle furnished by Hertz. The non-liability clause was not conspicuous and did not mention merchantability.[4]

In the course of transportation, a load of meat was destroyed when one of the truck refrigeration units failed. Redfern sued Hertz for breach of a bailor's warranty under Ga. Code Ann. §12-204 (Rev. 1973)[5] and for breaches of implied warranties of merchantability and fitness for a particular purpose under Ga. Code Ann. §§103A-2-314 and 109A-2-315 (Rev. 1973),[6] and moved for summary judgment.[7] Hertz denied liability based on

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1. 134 Ga. App. 381, 215 S.E.2d 10 (1975).
2. GA. CODE ANN., tit. 109A (Rev. 1973).
3. 134 Ga. App. at 386, 215 S.E. 2d at 14-15.
4. The agreement stated:
   "Hertz shall not be liable for loss of or damage to any property left, stored, loaded or transported in or upon any vehicle furnished by Hertz to customer pursuant to this Agreement, whether or not due to the negligence of Hertz, its agents or employees, and Customer hereby agrees to hold Hertz, its agents and employees, harmless from and to defend and indemnify them from and against all claims based upon or arising out of such loss or damage."
   Id. at 382, 215 S.E.2d at 12.
5. The court of appeals found that the non-liability clause exculpated Hertz on this count because the disclaimer was not opposed to public policy, and the inclusion of Hertz's own negligence was valid since the failure of the refrigerator unit was not wilful or wanton misconduct. *Id.* at 384, 215 S.E.2d at 13.
6. GA. CODE ANN. §109A-2-314(1) (Rev. 1973) provides that "[u]nless excluded or modified (109A-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale. . . ." Likewise, GA. CODE ANN. §109A-2-315 (Rev. 1973) states:
   Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.
   The court held that Hertz could not escape liability under its disclaimer because the clause did not conform to the requirements of GA. CODE ANN. §109A-2-316(2) (Rev. 1973) which provides in part:
   [T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and . . . be conspicuous, and to exclude or modify any implied warranty or fitness the exclusion must be by a writing and conspicuous.
7. Express warranties under GA. CODE ANN. §109A-2-313 (Rev. 1973), though made an

its non-liability clause and moved for judgment on the pleadings.[8] The trial court granted Hertz's motion and dismissed the suit. Redfern appealed to the Georgia Court of Appeals.

The specific language of article 2 of the Georgia Uniform Commercial Code[9] has until now been read to compel the Georgia courts to apply the Uniform Commercial Code warranty provisions only to sales.[10] According to one authority, the reasons these warranties have been implied in sales are: (1) to be an impetus for making products safer; (2) to protect the public from the use of defective products; and (3) to spread the losses occasioned by defective parts over a broad base.[11] By 1956, commentators began calling for the extension of the warranties to non-sale matters.[12] Courts also early recognized that these warranties should apply to leases for the same reasons they are applied to sales, in that a lessee often relies on a lessor's representations (express or implied) regarding the fitness or merchantability of the leased product the same as a buyer would rely on those of a seller.[13] It has been asserted that a lessee may rely more on his lessor than a buyer on his seller, because the lessee spends less time in shopping for the product and is less able to judge the quality of a leased product which he does not expect to own.[14] There is also specific language in the Uniform Commercial Code requiring that it be "liberally construed and applied to promote its underlying purposes and policies,"[15] and applying the Code to "transactions in goods."[16] One court of another jurisdiction, using a liberal interpretation of "transaction" in this section,[17] applied the Uniform Commercial Code directly to equipment leases.[18]

An official comment to section 2-313 of the Uniform Commercial Code

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issue in appellant's supplemental brief (Supplemental Brief for Appellant at 4, Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975)), were excluded from the decision because proof of such warranties in Hertz's advertising was precluded by the parol evidence rule. 134 Ga. App. at 393, 215 S.E.2d at 18.

8. 134 Ga. App. at 382, 215 S.E.2d at 12.

9. The provisions referred to are: (1) " 'Buyer' means a person who buys or contracts to buy goods." GA. CODE ANN. §109A-2-103(1)(a) (Rev. 1973); (2) " 'Seller' means a person who sells or contracts to sell goods." GA. CODE ANN. §109A-2-103(1)(d) (Rev. 1973); and (3)

> In this Article unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods. 'Contract for sale' includes both a present sale of goods and a contract to sell goods at a future time. A 'sale' consists in the passing of title from the seller to the buyer for a price. . . .

GA. CODE ANN. §109A-2-106(1) (Rev. 1973).

10. *See* Mays v. C & S Nat'l Bank, 132 Ga. App. 602, 609, 208 S.E.2d 614, 619 (1974).

11. R. NORDSTROM, HANDBOOK OF THE LAW OF SALES §21 at 44 (1970).

12. *See* 2 F. HARPER AND F. JAMES, THE LAW OF TORTS §28.19 at 1576 (1956).

13. *See* Note, *Warranties in the Leasing of Goods*, 31 OHIO ST. L.J. 140, 144 (1970).

14. E. Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 673-74 (1957).

15. GA. CODE ANN. §109A-1-102(1) (Rev. 1973).

16. GA. CODE ANN. §109A-2-102 (Rev. 1973).

17. Hertz Comm. v. Transportation Credit Clearing House, 59 Misc. 2d 226, ____, 298 N.Y.S.2d 392, 396 (1969).

18. *Id.* at ____, 298 N.Y.S.2d at 397.

states that the warranty provisions of the Code were not designated to impair the growth of case law where circumstances arise, such as bailments for hire, in which such warranties may need to be applied.[19] Using this comment as a springboard, the New Jersey Supreme Court was the first to extend these provisions beyond the area of sales. In *Cintrone v. Hertz Truck Leasing & Rental Service*,[20] the court applied the Uniform Commercial Code rationale in anticipation of the state's adoption of the Uniform Commercial Code. Because of the potential danger of unsafe trucks and the lessee's necessary reliance on the lessor in a truck rental situation, an implied warranty of fitness, analogous to a seller's warranty, was raised.[21]

The reasoning in this case has been relied on in the expansion of the Uniform Commercial Code warranty provisions to leases in several jurisdictions.[22] One jurisdiction has considered the question and maintained the line between sales and leases for fear of producing "judicial legislation."[23] However, six courts have applied the Uniform Commercial Code warranty provisions directly to leases. Three of these courts simply made no distinction between a seller and a lessor,[24] and the other three based their decisions on a public policy approach to protect the lessee under an implied warranty of fitness.[25] The Florida Supreme Court, in *W.E. Johnson Equipment Co. v. United Airlines, Inc.*,[26] limited its holding to situations in which the lessee's reliance on the lessor was commercially reasonable and the lessor had reason to know the purpose for which the chattel was leased. Four other courts (in addition to the Georgia Court of Appeals) have extended the warranty provisions by analogy to situations involving leases of television broadcasting equipment,[27] an ice machine,[28] an accounting machine,[29] and other "equipment."[30]

The lease of an ice machine in the Arkansas case of *Sawyer v. Pioneer Leasing Corp.*,[31] like the lease in *Redfern*, contained an inconspicuous disclaimer, which purported to relieve the lessor of liability for any malfunc-

19. UNIFORM COMMERCIAL CODE §2-313, comment 2.

20. 45 N.J. 434, 212 A.2d 769 (1965).

21. *Id.* at 449-50, 212 A.2d at 777.

22. *See* Annot., *Application of Warranty Provisions of Uniform Commercial Code to Bailments*, 48 A.L.R. 3d 668 (1973).

23. Bona v. Graefe, 264 Md. 69, 74, 285 A. 2d 607, 609 (1972).

24. Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973); Bill Stremmel Motors, Inc. v. IDS Leasing Corp., 89 Nev. 414, 514 P.2d 654 (1973); Stang v. Hertz Corp., 83 N.M. 217, 490 P.2d 475 (1971).

25. W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So.2d 98 (Fla. 1970); Fairfield Lease Corp. v. U-Vend, Inc., 14 UCC Rep. Serv. 1244 (N.Y. Sup. Ct. 1974); Baker v. City of Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971).

26. 238 So. 2d 98 (Fla. 1970).

27. KLPR-TV v. Visual Elec. Corp., 327 F. Supp. 315 (W.D. Ark. 1971).

28. Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968).

29. Atlas Indus., Inc. v. Nat'l Cash Register Co., 216 Kan. 213, 531 P. 2d 41 (1975).

30. Hertz Commercial Leasing Corp. v. Transporation Credit Clearing House, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (1969).

31. 244 Ark. 943, 428 S.W.2d 46 (1968).

tioning of the machine.[32] Title to the machine remained in the lessor and the lease contained no option to purchase.[33] However, parol evidence was admitted to show that the lessee would "more than likely" have been offered the machine at the termination of the lease.[34] Because the lessee was to have maintained the machine and paid for all repairs, and would probably have been able to buy the machine at the end of the lease term, the court concluded that the lease was analogous to a sale, and therefore, applied the Uniform Commercial Code warranty provisions to the lease.[35]

Although Georgia courts have in the past, had occasion to construe a "lease" as a "sale,"[36] *Mays v. Citizens & Southern National Bank*[37] was the first Georgia case to deal with the questions of extension of the warranty provisions of the Uniform Commercial Code to transactions other than sales. In *Mays*, the court refused to extend the warranties to the lease of a car because title had not passed to the lessee in accordance with the Uniform Commercial Code definition of a sale.[38] However, the court left open the question of applicability of the warranties to a chattel lease containing a provision to purchase:

> We hold the present lease agreement leasing an automobile for a period of 24 months, even though it places the burden of repairs, taxes, insurance, etc. upon the lessee is not a sale so defined. Whether it would be, or be construed to be a sale, or analogous to a sale, or equivalent to a sale, if there was a provision to purchase at the termination of the lease we do not decide.[39]

The court in *Redfern* was faced with such a purchase provision and, therefore, declared the reasoning in the *Mays* case to be inapplicable to the case sub judice.[40] The court then adopted the approach taken by the Arkansas court in *Sawyer*[41] and extended the Uniform Commercial Code warranties to a transaction analogous to a sale.[42] Several factors in the transaction indicated to the court that the transaction was a lease or service contract. There was a large differential between the purchase price and the rental price over an eight year period.[43] This the court attributed to the maintenance service supplied by Hertz.[44] All of the indicia of ownership

32. *Id.* at ___, 428 S.W.2d at 47-48.
33. *Id.* at ___, 428 S.W.2d at 48.
34. *Id.* at ___, 428 S.W.2d at 49.
35. *Id.* at ___, 428 S.W.2d at 54.
36. *See* Enterprise Distrib. Corp. v. Zalkin, 154 Ga. 97, 113 S.E. 409 (1922); Blitch & Newton v. Edwards, 96 Ga. 606, 24 S.E. 147 (1894).
37. 132 Ga. App. 602, 208 S.E.2d 614 (1974).
38. 132 Ga. App. at 609, 208 S.E.2d at 619. *See* GA. CODE ANN. §109A-2-401 (Rev. 1973).
39. 132 Ga. App. at 609, 208 S.E.2d at 619.
40. 134 Ga. App. at 389, 215 S.E.2d at 16.
41. *See* text accompanying note 31, *supra*.
42. 134 Ga. App. at 389, 215 S.E.2d at 16.
43. "Redfern would have paid $33,156.48 in rental payments (plus mileage and refrigeration charges) for a vehicle valued at $15,287. . . ." 134 Ga. App. at 391, 215 S.E.2d at 17.
44. *Id.*

were retained by Hertz—title, maintenance, fuel costs, taxes, and liability insurance.[45] However, the court held the lease analogous to a sale for two reasons: (1) the purchase agreement locked Redfern into buying the equipment at the desire of Hertz during the expectant life of the equipment; and (2) this agreement, in the opinion of the court, effectively disjoined "ownership" from "title" during the expected life of the equipment, thereby destroying any alienability of the equipment in Hertz, and rendering the retention of title by the lessor unimportant.[46]

In light of the court's rigid interpretation, in the *Mays* case, that the Uniform Commercial Code warranties are applicable only to sales, it would seem logical for the court to adopt the sales analogy approach as the line of least resistance. But from the court's reasoning there will undoubtedly be some confusion in the future, as to which factors determine whether a lease is analogous to a sale. The court determined for certain that there is a necessity for a purchase-option provision in the lease. The transfer of "ownership" rights would also seem to be important, but this is an area open to great interpretation. The court, in the *Mays* case, held that the transfer of title was necessary for a transaction to be analogous to a sale. Yet the question of title was summarily dismissed by the court a year later in the *Redfern* case. The Arkansas Supreme Court, in the *Sawyer* case, relied not only on evidence of an option to purchase, but also on the fact that the reponsibility to maintain and repair the machine was transferred to the lessee. The court, in *Redfern*, acknowledged that the lessor retained such responsibility. However, the court failed to include or distinguish this factor in its own reasoning, although readily adopting the sales analogy approach from the Arkansas court's reasoning.

The *Redfern* decision was a beneficial expansion of sales law to equipment leases. As noted by the court,[47] the use of leasing agreements has increased sharply in recent years because such arrangements often have substantial economic advantages over the use of sales transactions.[48] The expansion of the Uniform Commercial Code warranty provisions to equipment leases will certainly aid in protecting lessees from loss due to leased products which are defective, in the same manner that protection is given to buyers of defective products. However, the uncertainty as to what factors must be incorporated into a lease to bring it within the court's definition of a sales analogue may hinder achievement of the desired protection for the lessee.

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45. *Id.* at 392, 215 S.E.2d at 18.
46. *Id.* at 391-92, 215 S.E.2d at 17-18.
47. *Id.* at 391, 215 S.E.2d at 17.
48. For a discussion of the beneficial tax aspects of leasing equipment see Atlas Indus., Inc. v. National Cash Register Co., 216 Kan. 213, ___, 531 P.2d 41, 43 (1975).