Sales: Liability of a Manufacturer of Ingredient to Another Food Processor Based on Breach of Warranty of Fitness for Human Consumption

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faith purchaser for value to take free of the defect.\textsuperscript{31} The broad definition given to "purchasers" would probably include any type of creditors.\textsuperscript{32} Therefore, under the Uniform Commercial Code, the principal case would probably have been decided the same way.

IRVIN J. FRIEDLAND

Sales: Liability of a manufacturer of ingredient to another food processor based on breach of warranty of fitness for human consumption—Plaintiff biscuit company used snow ice to reduce the temperature of the dough in its preparation of frozen biscuits to be sold to the public. Shipments of ice were delivered each day by a distributor, Crossland Ice Service, from defendant ice company. The defendant placed the shipping tags on the bags of ice and knew the destination and that the ice would be used by the biscuit company for preparing food for human consumption. Glass was discovered in several of the bags of ice after some frozen biscuits had already been prepared with part of the ice shipment. Plaintiff destroyed all dough that had been prepared with that shipment of ice and, being uncertain as to which day's shipment of ice contained the glass, recalled and destroyed those biscuits already distributed that may have been contaminated by the glass.

At the trial in district court\textsuperscript{1} the jury made several findings: that the ice contained glass when sold and delivered; that the defendant knew it was to be used in the preparation of food for human consumption; and that the plaintiff had been injured as a result of the contamination of the ice with glass. The jury determined damages using as a basis the cost of biscuit materials destroyed, and the cost of distribution and recall of the biscuits. Nevertheless, the court denied recovery n.o.v. holding that the remedy for breach of implied warranty of fitness for human consumption was available only to a consumer.

\textit{Held}, reversed on appeal.\textsuperscript{2} It was determined that a food processor who discovers that his product has been adulterated by a deleterious substance in one of the ingredients supplied by another manufacturer may recover from that manufacturer (although there is no privity or allegation of negligence) on the ground that there has been a breach of warranty of fitness for human consumption.

The court found that the ice, if not a food in the nutritive sense,

\textsuperscript{31} \textit{Uniform Commercial Code}, §1-201 (33), and §1-201 (34).

\textsuperscript{32} \textit{Uniform Commercial Code}, §6-110 (2).


\textsuperscript{2} Gladiola Biscuit Company v. Southern Ice Company, 267 F. 2d 138 (5th Cir. 1959).
must be regarded as a commodity for human consumption. The Texas court has held that in the case of food products, a consumer can recover directly from the manufacturer for injury from contaminated food on the ground of breach of implied warranty of fitness for human consumption imposed by operation of law as a matter of public policy. In the present case the court looked to the nature of the "public policy" upon which this implied warranty is based and determined it to be the protection of consumers from the injurious consequences of deleterious foods and beverages. The court decided that this protection could only be adequately achieved by preventing unfit products from entering the market.

Up to this time the implied warranty of public policy for the protection of the consumer was used as a consumer's remedy to compensate for personal injury occasioned by eating or using the contaminated product. Since this warranty is created by operation of law it need not depend on any privity between the parties. In the present case, however, this warranty was used in favor of a food processor, not a consumer, and recovery was allowed for property damage rather than personal injury.

Here the court seems to have expanded the scope of the public policy warranty. Adequate protection of the consumer requires that an implied warranty of law be imposed on all who manufacture or process food products or any ingredients thereof. This warranty is available to anyone who may be injured by reason of the contamination of the product, whether by personal injury from the use of the product or property damage because of inability to use or resell the product.

In similar cases where a manufacturer or processor has attempted to recover property damage for breach of warranty the courts have generally denied recovery in the absence of privity. For example, recovery was denied in a case where a manufacturer sold cholate with peanuts as "peanut waste" to a company in which turn sold the

3 Jacob E. Decker & Sons v. Capps et al, 139 Tex. 609, 164 S.W. 2d 828, 142 A.L.R. 1479 (1942). The manufacturer of sausage sold by it to a retailer for resale for human consumption was held liable to a consumer for injuries sustained as a result of eating the sausage which was contaminated, under an implied warranty of fitness for human consumption imposed by operation of law as a matter of public policy.

4 "Texans cannot be assured of food fit for Texans unless those who package it, and those who furnish its essential ingredients supply the items fit for consumption. Gladiola Biscuit Company v. Southern Ice Company, supra note 2 at page 141.


6 "Such a warranty is an obligation which the law imposes without regard to the supposed agreement of the parties. It is neither promissory nor contractual in its nature." Fossum v. Timber Structures, Inc., _____ Wash. _____, 341 P. 2d 157, 161 (1959); B. F. Goodrich v. Hammond, 269 F. 2d 501 (10th Cir. 1959).

merchandise as "chocolate with peanuts" to plaintiff to be manufactured into chocolate bars for sale to the consuming public. Although the chocolate was found rancid and unfit for human consumption, the plaintiff was unable to recover for breach of warranty from the original manufacturer because there was no contractual relation between them. On the basis of the present decision a Texas court would probably have found the original manufacturer liable for having breached the implied warranty imposed by law for the protection of the consumer. A possible distinction from the facts in the present case which might be drawn is that the candy manufacturer would very likely not expect chocolate "peanut waste" to be resold for manufacture of chocolate bars by the sub-purchaser. The court in the present case did not lay any stress on the knowledge of the manufacturer of the intended use of the product, but the jury had made a specific finding that the ice company had actual knowledge that the ice would be used in the preparation of food. It is suggested that the Texas court would probably limit the applicability of the rule in the present case to those cases in which the defendant manufacturer knows or should know that the product will be used for human consumption.

Perhaps, logically, the rule of the present case could be extended to products which are dangerous instrumentalities. In a New York decision an airlines company was unable to recover the cost of repairing latent defects in airplane engines allegedly caused by the negligence of the defendant manufacturer of those engines because of lack of privity. The engines were first sold to the aircraft manufacturer who sold the airplanes to the plaintiff. The fact that the faulty engines rendered the airplanes on which they were installed imminently dangerous to life would seem to bring the case under the rule in the present case. The engine manufacturer would surely know that the aircraft engines were to be used on aircraft, and if defectively made would make the aircraft dangerous. A Texas court might very well decide that the public policy for the protection of the consumer-passenger would require an implied warranty to be imposed on all who supply component parts of an aircraft so that anyone who might be physically injured by reason of defective manufacture may recover for breach of that warranty. However, in the Trans-World Airline case the claim was for the cost of repairing the engines to make them safe for flight. The Texas court has restricted the rule in the Decker decision to cases involving products for human consumption. Since the court in the present case took the time to determine that ice is a commodity for human consumption, it may have intended that this warranty by restricted to such products. It seems clear that this liability without fault

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based on public policy warranty sans privity should be limited at least to products which if defectively manufactured would be dangerous to the life or health of the consumer.10

One question raised by this case is the type and extent of property damages recoverable by one who purchases for resale for breach of this implied warranty. Here plaintiff's recovery was limited to necessary expenditures; but these were the only damages claimed. Loss of expectant resale profit was not included. In those cases where privity of contract is established, loss of profits is recoverable for breach of warranty damages.11 A retail grocer has been allowed to show as an element of damages, that business dropped after a customer in his store discovered a dead mouse in a bottle of milk supplied by the defendant dairy company.12 It is suggested that loss of profits or loss of business should not be recoverable under the present theory. Since this implied warranty is imposed by law for the protection of the consumer, it would seem that damages should be limited to those necessary to protect the consumer. In most situations these would be only the necessary expenditures; the cost of taking the product off the market and the cost of the goods which are destroyed, or where possible, the cost of remedying the defect in the product so as to make it safe for the consumer.

It seems that this implied warranty can only be imposed for the benefit of the purchaser for resale on products upon which it would be imposed for the benefit of the consumer.13 It should only be imposed in those situations where the defendant manufacturer knows or has reason to know the intended use of his product. It is suggested that damages be limited to only those expenditures necessary to protect the consumer from the harmful product.

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10 Thus in a somewhat similar fact situation a contractor could not recover against the remote manufacturer for defective building laths by using the theory in this case. The faulty laths would not be said to make the building a dangerous instrumentality. A.J.P. Contracting Corp. v. Brooklyn Builders Supply Co., 171 Misc. 157, 11 N.Y.S. 2d 662 (1938).
13 At the present time most jurisdictions which apply this warranty based on public policy restrict it to certain products: food, beverages, and drug items. Alexander v. Inland Steel Co., 263 F. 2d 314 (8th Cir. 1959); La Hue v. Coca Cola Bottling, Inc., 50 Wash. 2d 645, 314 P. 2d 421 (1957).