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Co.,²⁸ decided in 1964, the Illinois Appellate Court held for proration in adopting the Oregon view. Earlier, the Illinois Appellate Court had adopted the same view in *Laurie v. Holland America Ins. Co.*²⁹ and *Continental Casualty Co. v. New Amsterdam Casualty Co.*³⁰ However, Illinois through the present decision has placed itself firmly within the majority. Even though the minority has been adopted in several states,³¹ it does not represent the current trend. It appears from a survey of the recent cases involving the excess v. escape controversy that the majority position as evidenced by the case at bar, has continued to influence courts throughout the country.³²

Donald Lavin

²⁸ 49 Ill. App. 2d 59, 198 N.E.2d 723 (1964), *subsequently overruled* in *Jensen v. New Amsterdam Ins. Co.*, 65 Ill. App. 2d 407, 213 N.E.2d 141 (1965).

²⁹ 31 Ill. App. 2d 437, 176 N.E.2d 678 (1961).

³⁰ 28 Ill. App. 2d 489, 171 N.E.2d 406 (1960).

³¹ *Continental Cas. Co. v. St. Paul Mercury Fire & Marine Ins. Co.*, 163 F.Supp. 325 (D.C. Fla. 1958); *Arditi v. Mass. Bonding & Ins. Co.*, 315 S.W.2d 736 (Mo. 1958); *Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co.*, 28 N.J. 554, 147 A.2d 529 (1959); *Reetz v. Werch*, *supra* note 24; *Farmers Insur. Exch. v. Fidelity & Cas. Co. of New York*, 374 P.2d 754 (Wyo. 1962).

³² *Continental Cas. Co. v. American Fid. & Cas. Co.*, 275 F.2d 381 (7th Cir. 1960); *Fund Insurance Group*, 262 F.2d 239 (D.C. Cir. 1958); *American Surety Co. of New York v. Canal Ins. Co.*, 258 F.2d 934 (4th Cir. 1958); *United Services Automobile Assoc. v. Russom*, 241 F.2d 296 (5th Cir. 1957); *Citizens Cas. Co. of New York v. Allied Mutual Ins. Co.*, 217 Md. 494, 144 A.2d 73 (1958); *General Acc. Fire & Life Assur. Corp. v. Piazza*, 4 N.Y.2d 659, 176 N.Y.S.2d 976, 152 N.E.2d 236 (1958).

SALES—UNIFORM COMMERCIAL CODE—IMPLIED WARRANTY AGAINST OBSCENITY

Plaintiff, a liquor store owner, brought an action for breach of implied warranty against a magazine distributor who had sold him certain magazines. After reselling some of the magazines to the public, it was determined by the Liquor Control Commission that they contained obscene material. As a result, plaintiff could not resell any more of these magazines and also had his liquor license revoked. In his complaint, the plaintiff asserted that the defendant had breached his implied warranty that the magazines were merchantable¹ and fit for the purpose of resale.² The Cir-

¹ UNIFORM COMMERCIAL CODE § 2-314. The Uniform Commercial Code became effective in Illinois on July 1, 1962. To date the Code has been adopted or is in effect in every state except Arizona, Idaho, and Louisiana. ³ UNIFORM COMMERCIAL CODE REPORTING SERVICE Release 5 (July 6, 1966).

² UNIFORM COMMERCIAL CODE § 2-315.

cuit Court of Cook County dismissed the complaint and on appeal, the Appellate Court of Illinois affirmed on the ground that the plaintiff knew or should have known that the magazines were obscene. *Haralampopoulos v. Capital News Agency, Inc.*, 70 Ill. App. 2d 17, 217 N.E.2d 366 (1966).

The *Haralampopoulos* case is important in that it is the first attempt to extend the implied warranties section of the Uniform Commercial Code³ to cover the sale of obscene magazines.⁴ The purpose of this note will be to explore the theory of implied warranties, the extent to which they are used now and how they may be applied in the future.

Originally, breach of warranty was a tort; the action as upon the case for the breach of an assumed duty and the wrong was a form of misrepresentation.⁵ Shortly after 1750, an express warranty began to be recognized as a term of the contract of sale.⁶ By 1810, implied warranties of quality were first established and the *assumpsit* action was accepted as matter of course.⁷ In the early leading case on implied warranty, *Gardiner v. Gray*,⁸ Lord Ellenborough ruled that, "the purchaser has a right to expect a salable article . . . without any particular warranty; this is an implied term in every such contract."⁹ The English courts expanded Lord Ellenborough's implied warranty theory to warrant the merchantable character of goods sold by a manufacturer or a dealer.¹⁰ The majority of American courts, however, did not extend the implied warranty to dealers prior to the enactment of the Sales Act.¹¹ With the passage of the Uniform Sales Act,¹² American courts began to hold dealers subject to implied warranties whether or not they had manufactured the product they sold.¹³ The Sales Act refined the common law and codified the implied warranty into two distinct types, the implied warranty that the product is fit for a

³ UNIFORM COMMERCIAL CODE §§ 2-314, 2-315.

⁴ *Haralampopoulos v. Capital News Agency, Inc.*, 70 Ill. App. 2d 17, 217 N.E.2d 366 (1966).

⁵ Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888).

⁶ Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 119 (1943).

⁷ *Id.* at 120.

⁸ 4 Campb. 144, 171 Eng. Rep. 46 (1815). See also, *Holcombe v. Hewson*, 2 Campb. 391, 170 Eng. Rep. 1194 (1810).

⁹ *Id.* at 145, 171 Eng. Rep. at 47.

¹⁰ 1 WILLISTON, SALES § 233, at 596 (3d ed. 1948).

¹¹ *Id.* at 597.

¹² The Uniform Sales Act was eventually adopted by 36 states and the District of Columbia. Left as common law states were Florida, Georgia, Kansas, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Virginia, West Virginia, with Louisiana as a civil law state. UNIFORM LAWS ANNOTATED, SALES § 1 (1964 Supp.).

¹³ Hensley, *The Implied Warranty of Merchantability*, 48 VA. L. REV. 152, 160 (1962).

particular purpose¹⁴ and the implied warranty that the goods are of merchantable quality.¹⁵

An implied warranty is not a specific promise by the seller but is read into a contract by operation of law.¹⁶ It imposes the requirement that the goods be merchantable; that they are salable in the market,¹⁷ of a quality comparable to that generally acceptable in that line of trade,¹⁸ and their sale or resale in the same market does not violate any applicable statute.¹⁹ The implied warranty that the product is fit for a particular purpose exists when the buyer's purpose is made known to the seller and the seller has undertaken the responsibility of supplying it.²⁰ These two implied warranties are neither inconsistent nor mutually exclusive and where both are present recovery for the breach of implied warranty may be based on either one.²¹

The warranties under the Uniform Commercial Code²² are substantially the same as the Uniform Sales Act with some extensions.²³ Section 2-314 provides that:

Unless excluded or modified [a] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . . Goods to be merchantable must be at least such as [pass] without objection in the trade under the contract description; [and] are fit for the ordinary purposes for which such goods are used. . . . Unless excluded or modified . . . other implied warranties may arise from course of dealing or usage of trade.²⁴

¹⁴ UNIFORM SALES ACT § 15-1: "Where the buyer, expressly or by implication, makes known to the seller, the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purposes." ILL. REV. STAT. ch. 121½, § 15-1 (1959), repealed (1962) and replaced by UNIFORM COMMERCIAL CODE, ILL. REV. STAT. ch. 26 (1962).

¹⁵ UNIFORM SALES ACT § 15-2: "Where the goods are bought by description from a seller who deals in goods of that description . . . there is an implied warranty that the goods shall be of merchantable quality." ILL. REV. STAT. ch. 121½, § 15-2 (1959), repealed (1962). This section is copied almost verbatim from § 14-2 of the ENGLISH SALE OF GOODS ACT of 1893 which was itself a restatement and codification of the common law of England as existed at that date.

¹⁶ *Warranties in Illinois—A Symposium*, 59 U. ILL. L.F. 1057, 1061 (1959).

¹⁷ *Supra* note 6, at 127.

¹⁸ UNIFORM COMMERCIAL CODE, official comment 2 to § 2-314.

¹⁹ *Supra* note 6, at 129.

²⁰ *Id.* at 133.

²¹ *Ibid.* See also *Crotty v. Shartenberg's—New Haven, Inc.*, 147 Conn. 460, 162 A.2d 513 (1960).

²² UNIFORM COMMERCIAL CODE §§ 2-314, 2-315.

²³ FLEMING, SYLLABUS ON SALES UNDER DIVISION 2 OF THE CALIFORNIA UNIFORM COMMERCIAL CODE, 10TH ANNUAL SUMMER PROGRAM FOR CALIFORNIA LAWYERS 5. See also *De Graff v. Myers Food, Inc.* 19 Pa. D.&C.2d 19 (1958).

²⁴ UNIFORM COMMERCIAL CODE § 2-314.

Section 2-315, applicable to the implied warranty of fitness for a particular purpose states: "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required . . . there is an implied warranty that the goods shall be fit for such purposes."²⁵

In the *Haralampopoulos* case, the plaintiff claims that both warranties were breached.²⁶ He contends that the magazines sold to him were not merchantable because they were declared obscene and that they were not fit for his particular purpose, known to the defendant, which was resale to the public. A close examination of the Code seems to indicate that in the *Haralampopoulos* case, the factual situation fits within the limits prescribed by sections 2-314 and 2-315. Though section 2-314 defines merchantability, it does not purport to exhaust the meaning of merchantable or negate any attributes not specifically mentioned in the text.²⁷ The language categorically states that if, in any given situation, it is felt that a buyer should be allowed to recover, the courts may impose a new quality obligation on a seller and establish new standards.²⁸ Under section 2-314, if the purchaser is buying for resale to the ultimate consumer, the goods must be honestly resellable in the normal course of business.²⁹ This warranty is broad and comprehensive and does not frustrate future development as further evidenced by subsection (3), which states that, "[o]ther implied warranties may arise from course of dealing. . . ."³⁰

The *Haralampopoulos* facts show that the magazines could not be honestly resold in the normal course of business because they were declared obscene within the purview of the applicable local ordinance.³¹ Thus, it would seem that the seller breached his implied warranty under section 2-314 because the magazines were not merchantable as defined or required in the section. Though obscenity has not, heretofore, been included in the warranty of merchantability, courts can establish a new standard.³² Few cases have interpreted this provision of the code, but sec-

²⁵ UNIFORM COMMERCIAL CODE § 2-315.

²⁶ *Supra* note 4.

²⁷ UNIFORM COMMERCIAL CODE, official comment 6 to § 2-314.

²⁸ See *Note*, 38 INDIANA LAW JOURNAL 648, 659 (1962-3).

²⁹ *Supra* note 27, official comments 1 and 8.

³⁰ Schaffer, *Sales Warranties in Illinois: Code and Pre-Code Law*, 39 CHI-KENT L. REV. 93, 117 (1962).

³¹ CHICAGO, ILL., MUNICIPAL CODE § 192-9 (1939). "It shall be unlawful for any person knowingly to exhibit, sell, print, offer to sell, give away, circulate, publish, distribute, or attempt to distribute any obscene book, magazine, pamphlet, paper, writing card, advertisement . . . or other article which is obscene. . . ."

³² *Supra* note 28.

tion 2-314 has already been applied to cars,³³ transplanted grass,³⁴ a defective heel,³⁵ and shotgun shells.³⁶ Section 2-315 applies when the seller has reason to know of the intended purpose of the sale and in each individual case it becomes a question of fact.³⁷ If the seller knows of the purpose he impliedly warrants that the goods shall be fit for that purpose.³⁸ In the *Haralampopoulos* case, the defendant admittedly sold the magazines to the plaintiff for the purpose of resale to the public. The magazines, however, were not fit for resale and it would appear that this implied warranty of fitness was breached.

While there are no implied warranty cases that deal with obscene magazines, an analogy can be drawn with the decision in *Porter v. Craddock*.³⁹ In the *Porter* case, the defendant sold canned peach preserves to the plaintiff who intended to resell them. The preserves delivered by the defendant were labeled incorrectly as to their net weight. Under federal law, this constituted misbranding and they could not legally be resold and were subject to confiscation.⁴⁰ The court held that since the goods were misbranded and their resale was illegal, the manufacturer breached his implied warranty that the goods were merchantable.⁴¹

In both the *Haralampopoulos* and *Porter* cases, there was a sale of goods in which the seller knew that the buyer's purpose was resale to the public. In each instance, the goods that were to be resold were found to be contraband by statute and their resale unlawful; the labels on the cans were wrong and the magazines were obscene. However, the most significant similarity arises in the nature of the defect. The canned preserves in the *Porter* case were not physically defective for the preserves would not cause any harm to the buyer. The magazines in the *Haralampopoulos* case also contained no physical defect which caused them to be unsuitable. The court in *Porter* held that the seller breached his implied warranty even though the goods were not physically defective because the preserves became unmerchantable when a statute made their resale illegal. This same

³³ *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888 (E.D.Penn. 1962).

³⁴ *Bell v. Menzies*, 110 Ga. App. 436, 138 S.E.2d 731 (1964).

³⁵ *Chairaluce v. Stanley Warner Management Corp.*, 236 F. Supp. 385 (D. Conn. 1964).

³⁶ *Allen v. Savage Arms Corp.*, 52 Luzerne Leg. Reg. 159 (1962).

³⁷ UNIFORM COMMERCIAL CODE, official comment 1 to § 2-315.

³⁸ *Supra* note 28, at 660. See also UNIFORM COMMERCIAL CODE § 2-315.

³⁹ 84 F. Supp. 704 (W.D. Ky. 1949).

⁴⁰ 21 U.S.C. § 343(a) and (e). The statute says that introduction into interstate commerce of any drug or food that is adulterated or misbranded is illegal.

⁴¹ *Supra* note 39.

reasoning could be applied in the *Haralampopoulos* case even though the goods involved are dissimilar. Though the *Porter* case and other similar decisions⁴² were decided under the Sales Act, the outcome would be similar under the Code.⁴³

It was unfortunate in the *Haralampopoulos* decision that the court did not discuss or refute plaintiff's implied warranty theory. The court decided the case on two grounds; first, that the proximate cause of plaintiff's loss was his selling of the magazines to his customers and not the sale of the magazines by the defendant to the plaintiff, and second, that since the Liquor Control Commission had determined that the plaintiff knew or should have known that the magazines were obscene, the plaintiff was precluded from recovery.⁴⁴ As to the latter contention it would seem that the court erred because they based their decision on a ruling of an administrative agency which was not *res judicata*.⁴⁵ Besides, *res judicata* is only applicable when the new action is between the same parties as in the prior proceedings.⁴⁶ The present defendant was not a party to the administrative proceedings.

It is quite possible that in the *Haralampopoulos* case the court could not find that the seller breached sections 2-314 and 2-315 of the Code because the plaintiff might well have known that the magazines were obscene and sold them anyway.⁴⁷ However, if the plaintiff had no knowledge of the obscenity, it appears that these sections would be applicable. This contention is based upon the analogous decisions under the Sales Act and legal scholars' observations concerning the broad characteristics of the Code which have been previously discussed. Since their inception, implied warranties have been constantly expanding and there can be no final determination as to their ultimate scope.

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⁴² See *Myers et al. v. Malone & Hyde*, 173 F.2d 291 (8th Cir. 1949). Seller was liable to buyer for breach of implied warranty because the canned tomatoes were not resalable because they were misbranded. See also *Manning Mfg. Co. v. Hartol Products*, 99 F.2d 813, 814 (2d Cir. 1938). The court stated, "[m]erchantability . . . includes compliance with what the law requires."

⁴³ *Supra* notes 23 and 28.

⁴⁴ *Supra* note 4.

⁴⁵ *Whittle v. Board of Zoning Appeals*, 211 Md. 36, 125 A.2d 41 (1956). The court held that the doctrine of *res judicata* is not applicable where the earlier decision was made by an administrative agency. See also, *In re Whitford's Liquor License*, 166 Pa. Super. 48, 70 A.2d 708 (1950).

⁴⁶ See *U.S. v. Pink*, 315 U.S. 203 (1942); *Scott v. Industrial Accident Commission*, 46 Cal.2d 76, 293 P.2d 18 (1956); *Hoffman v. Hoffman*, 330 Ill. 413, 161 N.E. 723 (1928).

⁴⁷ UNIFORM COMMERCIAL CODE § 2-316. See also *VOLD, SALES* 436 (2d ed. 1959).