SCUDDER & ROBICHEAUX

Attorneys at Law

Memorandum

Re: Bad Advice

To: Alex Associate

From: Mary Russell Holmes

We have been retained by Roberta Fozworthy of Boone, North Carolina. Fozworthy is a second-year student at the University of Florida Law School. I took this statement from her:

> THIS STATEMENT IS GIVEN IN THE CONTEXT OF LEGAL REPRESENTATION AND AS SUCH IS PRIVILEGED.
>
> My name is Roberta Fozworthy. I am over 21 years of age, and I am now a student at the University of Florida Law School. Last year, as a first-year student, I was required to take a course in Property, taught by Professor Brouder. Professor Brouder assigned materials by Professor D. Leslie of the University of Virginia, titled "Property, The CaseFile Method." At Brouder's direction, I purchased a password over the Internet for $24. This entitled me to print out the CaseFiles for Property, which I did.
>
> CaseFiles varied from ten to twenty-five pages. Each had a fact situation, followed by several precedents. One topic was the Rule Against Perpetuities. It described a firm of mineral speculators purchasing 50-year options to purchase land. One of the states where the firm was doing business was North Carolina.
>
> My brother and I own a farm in North Carolina, as tenants in common. The farm came to us after our parents died in an accident. This summer, after the end of the Property class, my brother and I were offered $5,000 for a right to purchase our farm for $750,000. The option was to last 50 years, and the price was indexed to an inflation formula. The buyer was Hurt Investors, Inc..
>
> My brother was hesitant to sign the option, but I looked at Property CaseFile 15.0 and found that since the option was longer than 21 years, it was void from the start in North Carolina. So, we would get $5,000 for an option that the Hurt firm could never exercise. (I told him that we might have to give the money back at some point, but maybe the firm would never try to exercise the option.) He thought I was being naughty; but I told him that if the firm wanted to do business in North Carolina, it had better know North Carolina law. We signed the option and were paid the $5,000.
>
> This fall, a deposit of strachiam, a mineral now valuable for lining fiber optic cable, was discovered in our county. The deposit ran smack through our farm. The Hurt firm gave notice to exercise the option. I wrote a letter citing the North Carolina case from CaseFile 15.0 and inclosing a check for $5,000.
>
> My check was returned. The case set out in CaseFile 15.0 was not good law in North Carolina, and it was not good law when we used it in Property. No one told us that.

What I need you to consider is whether Fozworthy has a cause of action against the Virginia professor. I am having another associate look into whether there is a theory for Brouder's liability. I wonder if we can get Leslie for a breach of warranty under the Uniform Commercial Code?

Memorandum

Re: Bad Advice

To: Alex Associate

From: Perry Paralegal

I looked at CaseFile 15.0 (I had to buy a password to do so. I put it on my expense voucher.) The case is Village of Pinehurst v. Regional Investments of Moore, Inc. 330 N.C. 725, 412 S.E.2d 645, Supreme Court of North Carolina, 1992. It holds that an option to buy is void if its duration is longer than 21 years. It was overruled by statute four years ago, and was not good law in North Carolina when the course was offered.

I contacted Professor Brouder. He said that Fozworthy had come into his office in the fall to complain about CaseFile 15.0. He, in turn, called Leslie, and left a voicemail message. In reply, he received this e-mail:

> Olin,
>
> Sorry to be playing phone tag. It is certainly too bad what happened to your student. But why does she blame me? I made no representation that the cases were "good law."

Because Ms. Holmes mentioned the UCC, I concentrated on finding cases applying that statute. I don't know what state's law applies. Leslie is in Virginia, as is his Internet provider. The class was in Florida. The password firm is in California. The land is in North Carolina. However, all of these states have adopted the Uniform Commercial Code (as has every state except Louisiana), so it may not matter which state law applies.

NEW BALANCE ATHLETIC SHOE, INC. v. BOSTON EDISON CO.

1996 WL 439396
Superior Court of Massachusetts, Suffolk County, 1996

LAURIAT, J.

On August 13, 1994, the facility at 65 North Beacon Street in Boston owned by New Balance Athletic Shoe, Inc. ("New Balance"), was severely damaged by fire. New Balance alleges in this action that the cause of the fire was an electrical power surge caused by and emanating from equipment owned and operated by the Boston Edison Company ("Boston Edison"). New Balance has brought claims for negligence (Count I) and breach of warranty under the Uniform Commercial Code ("UCC") (Count II). G.L. c. 106, §§ 2-315, 2-316. Boston Edison has now moved to dismiss Count II. During the hearing, both parties agreed that the court should treat the motion as one for summary judgment.

Discussion

. . . In Count II, New Balance advances a theory of liability analogous to a product liability claim. Massachusetts has not adopted a "true" strict product liability theory as set forth in § 402A of the Restatement Second of Torts.[*] However, our courts have reached essentially the same result via a breach of warranty analysis under the Uniform Commercial Code. Actions alleging breach of warranty are governed by the provisions of the Uniform Commercial Code. Essentially, the breach of warranty analysis encompasses all of the policies found in § 402A.

Accordingly, the critical question raised by this motion is whether electricity is a "good" as defined in the Uniform Commercial Code. See G.L. c. 106, § 2-105. If the answer to this question is in the affirmative, as New Balance asserts, then the sale of electricity may be subject to the warranty provisions of the Uniform Commercial Code. If so, then upon this record, an action for breach of warranty may survive summary judgment scrutiny. If, however, electricity is found not to be a "good" as defined by the Uniform Commercial Code, the warranties in the Uniform Commercial Code would not apply and Count II must fail as a matter of law. See G.L. c. 106, § 2-102 (UCC applies only to the sale of "goods").

New Balance contends, and the court agrees, that the issue presented by this case is one of first impression in this Commonwealth. Other jurisdictions that have adopted the Uniform Commercial Code have wrestled with this issue. For example, Indiana has subjected public utility companies to liability for producing electricity by holding that the sale of electricity does involve the sale of a "good" under the Uniform Commercial Code. See Helvey v. Wabash County REMC, 151 Ind.App. 176, 278 N.E.2d 608 (1972). Indiana has limited this holding to cases where the electricity has passed the customer's electric meter. See Petroski v. Northern Indiana Pub. Serv. Co., 171 Ind.App. 14, 354 N.E.2d 736 (1976). Indiana supports this conclusion by finding that electricity is a thing existing and moveable. The court in *Helvey*, applying the definition of a "good" under the Uniform Commercial Code, said "[l]ogic would indicate that whatever can be measured in order to establish the price to be paid would be indicative of fulfilling both the existing and moveable requirements of goods."

This court, however, is troubled by the sweeping implications that this analysis may have on public utilities. One can foresee a logical extension from electric companies to providers of natural gas and water. Courts in Georgia and Pennsylvania have made this extension. See Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964) (applying breach of warranty analysis to case involving provider of natural gas). This application of the Uniform Commercial Code has also implicated municipalities who provide water. See Gall v. Allegheny Health Dept., 521 Pa. 68, 555 A.2d 786 (1989) (applying breach of warranty analysis to water supplier); Zapp v. Mayor & Council of Athens, 180 Ga.App. 72, 348 S.E.2d 673 (1986) (holding that water is a "good" as defined in the Uniform Commercial Code).

Boston Edison asserts that public utilities are so heavily regulated that this fact should place them outside the traditional scope of tort and contract law, at least under the circumstances of this case. This argument is not without merit. Product liability law is rooted in public policy considerations. These considerations may not be as important when the defendant is a public utility company.

---

[*] "Strict liability" means that if the product is defective, the manufacturer is liable even though it was not careless in the manufacturing process.—Perry.

The court seeks to protect the public by policing companies who participate in the open market. The court accomplishes this policing by imposing a duty on companies to "prevent the release" of defective products onto the market. Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 355 (1983) (citations omitted). The reasons underlying this important role may not be as compelling in cases involving public utilities, since public utilities in many respects cannot be compared to companies competing on the open market to sell a product. Public utilities are subject to stringent regulations. Regulators control entry into the business of providing a public utility. Utility companies undertake a public duty to provide service. Moreover, a public utility has to comply with a closely regulated rate or price schedule. Thus, public utilities do not slip easily into the category of companies that require the imposition of product liability to adequately protect the consumer. See Torts of Electric Utilities: Can Strict Liability Be Plugged In?, 11 Loy.L.A.L.Rev. 775 (1978).

New Balance has not pointed this court to any Massachusetts law, statutory or otherwise, which compels the result it seeks. In light of the regulatory role of the legislature in this area, this court is not inclined to indulge in judicial legislation. The decision to expose public utilities to liability for their "products" is best left in the capable hands of the legislative body that is charged with regulating those utilities.

Accordingly, this court finds that electricity is not a "good" as defined in the Uniform Commercial Code. There is therefore no basis to apply the warranty provisions of the Uniform Commercial Code. Count II of New Balance's complaint must fail as a matter of law.

ADVENT SYSTEMS LIMITED v. UNISYS CORP.

925 F.2d 670
United States Court of Appeals, Third Circuit, 1991

WEIS, J.

Plaintiff, Advent Systems Limited, is engaged primarily in the production of software for computers. As a result of its research and development efforts, by 1986 the company had developed an electronic document management system (EDMS), a process for transforming engineering drawings and similar documents into a computer data base.

Unisys Corporation manufactures a variety of computers. As a result of information gained by its wholly-owned United Kingdom subsidiary during 1986, Unisys decided to market the document management system in the United States. In June 1987 Advent and Unisys signed two documents, one labeled "Heads of Agreement" (in British parlance "an outline of agreement") and, the other "Distribution Agreement."

In these documents, Advent agreed to provide the software and hardware making up the document systems to be sold by Unisys in the United States. Advent was obligated to provide sales and marketing material and manpower as well as technical personnel to work with Unisys employees in building and installing the document systems. The agreement was to continue for two years, subject to automatic renewal or termination on notice.

During the summer of 1987, Unisys attempted to sell the document system to Arco, a large oil company, but was unsuccessful. Nevertheless, progress on the sales and training programs in the United States was satisfactory, and negotiations for a contract between Unisys (UK) and Advent were underway.

The relationship, however, soon came to an end. Unisys, in the throes of restructuring, decided it would be better served by developing its own document system and in December 1987 told Advent their arrangement had ended. Unisys also advised its UK subsidiary of those developments and, as a result, negotiations there were terminated.

Advent filed a complaint in the district court alleging, inter alia, breach of contract, fraud, and tortious interference with contractual relations. The district court ruled at pretrial that the Uniform Commercial Code did not apply because although goods were to be sold, the services aspect of the contract predominated.

A jury found for Unisys on the fraud count, but awarded damages to Advent in the sum of $4,550,000 on the breach of contract claim, and $4,350,000 on the count for wrongful interference with Unisys U.K. The district court granted judgment n.o.v. to defendant on the interference claim but did not disturb the verdict awarding damages for breach of contract.

On appeal Advent argues that the Distribution Agreement prohibited Unisys from pressuring its UK subsidiary to terminate negotiations on a corollary contract. Unisys contends that the relationship between it and Advent was one for the sale of goods and hence subject to the terms of statute of frauds in the Uniform Commercial Code. Because the agreements lacked an express provision on quantity, Unisys insists that the statute of frauds bans enforcement. In addition, Unisys contends that the evidence did not support the damage verdict.

Software and the Uniform Commercial Code

The district court ruled that as a matter of law the arrangement between the two parties was not within the Uniform Commercial Code and, consequently, the statute of frauds[*] was not applicable. As the district court appraised the transaction, provisions for services outweighed those for products and, consequently, the arrangement was not predominantly one for the sale of goods. . . .

In support of the district court's ruling that the U.C.C. did not apply, Advent contends that the agreement's requirement of furnishing services did not come within the Code. Moreover, the argument continues, the "software" referred to in the agreement as a "product" was not a "good" but intellectual property outside the ambit of the Uniform Commercial Code.

Because software was a major portion of the "products" described in the agreement, this matter requires some discussion. Computer systems consist of "hardware" and "software." Hardware is the computer machinery, its electronic circuitry and peripheral items such as keyboards, readers, scanners and printers. Software is a more elusive concept. Generally speaking, "software" refers to the medium that stores input and output data as well as computer programs. The medium includes hard disks, floppy disks, and magnetic tapes.

In simplistic terms, programs are codes prepared by a programmer that instruct the computer to perform certain functions. When the program is transposed onto a medium compatible with the computer's needs, it becomes software. The process of preparing a program is discussed in some detail in Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1229 (3d Cir. 1986) and Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983). See also Rodau, Computer Software: Does Article 2 of the Uniform Commercial Code Apply?, 35 Emory L.J. 853, 864-74 (1986).

---

[*] The Statute of Frauds deals with whether an agreement must be in writing to be enforceable.

The increasing frequency of computer products as subjects of commercial litigation has led to controversy over whether software is a "good" or intellectual property. The Code does not specifically mention software.

In the absence of express legislative guidance, courts interpret the Code in light of commercial and technological developments. The Code is designed "[t]o simplify, clarify and modernize the law governing commercial transactions" and "[t]o permit the continued expansion of commercial practices." 13 Pa.Cons.Stat.Ann. § 1102 (Purdon 1984). As the Official Commentary makes clear:

> This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.

Id. comment 1.

The Code "applies to transactions in goods." 13 Pa.Cons.Stat.Ann. § 2102 (Purdon 1984). Goods are defined as "all things (including specially manufactured goods) which are moveable at the time of the identification for sale." *Id.* at § 2105. The Pennsylvania courts have recognized that " 'goods' has a very extensive meaning" under the U.C.C. Duffee v. Judson, 251 Pa.Super. 406, 380 A.2d 843, 846 (1977); see also Lobianco v. Property Protection, Inc., 292 Pa.Super. 346, 437 A.2d 417 (1981) ("goods" under U.C.C. embraces every species of property other than real estate, choses in action, or investment securities.).

Our Court has addressed computer package sales in other cases, but has not been required to consider whether the U.C.C. applied to software per se. See Chatlos Systems, Inc. v. National Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980) (parties conceded that furnishing the plaintiff with hardware, software and associated services was governed by the U.C.C.); see also Carl Beasley Ford, Inc. v. Burroughs Corporation, 361 F.Supp. 325 (E.D.Pa.1973) (U.C.C. applied without discussion), aff'd 493 F.2d 1400 (3d Cir. 1974). Other Courts of Appeals have also discussed transactions of this nature. RRX Industries, Inc. v. Lab-Con, Inc., 772 F.2d 543 (9th Cir. 1985) (goods aspects of transaction predominated in a sale of a software system); Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 742-43 (2d Cir. 1979) (in sale of computer hardware, software, and customized software goods aspects predominated; services were incidental).

Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.

That a computer program may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace. The fact that some programs may be tailored for specific purposes need not alter their status as "goods" because the Code definition includes "specially manufactured goods."

The topic has stimulated academic commentary with the majority espousing the view that software fits within the definition of a "good" in the U.C.C.

Applying the U.C.C. to computer software transactions offers substantial benefits to litigants and the courts. The Code offers a uniform body of law on a wide range of questions likely to arise in computer software disputes: implied warranties, consequential damages, disclaimers of liability, the statute of limitations, to name a few.

The importance of software to the commercial world and the advantages to be gained by the uniformity inherent in the U.C.C. are strong policy arguments favoring inclusion. The contrary arguments are not persuasive, and we hold that software is a "good" within the definition in the Code.

The relationship at issue here is a typical mixed goods and services arrangement. The services are not substantially different from those generally accompanying package sales of computer systems consisting of hardware and software.

Although determining the applicability of the U.C.C. to a contract by examining the predominance of goods or services has been criticized, we see no reason to depart from that practice here. As we pointed out in De Filippo v. Ford Motor Co., 516 F.2d 1313, 1323 (3d Cir. 1975), segregating goods from non-goods and insisting "that the Statute of Frauds apply only to a portion of the contract, would be to make the contract divisible and impossible of performance within the intention of the parties."

We consider the purpose or essence of the contract. Comparing the relative costs of the materials supplied with the costs of the labor may be helpful in this analysis, but not dispositive. Compare RRX, 772 F.2d at 546 ("essence" of the agreement) with Triangle, 604 F.2d at 743 ("compensation" structure of the contract).

In this case the contract's main objective was to transfer "products." The specific provisions for training of Unisys personnel by Advent were but a small part of the parties' contemplated relationship. . . .

We are persuaded that the transaction at issue here was within the scope of the Uniform Commercial Code and, therefore, the judgment in favor of the plaintiff must be reversed. . . .

GOODMAN v. WENCO FOODS, INC.

333 N.C. 1, 423 S.E.2d 444,
Supreme Court of North Carolina, 1992

EXUM, C. J.

The plaintiff was injured when he bit down on a small bone in a hamburger sandwich purchased at Wendy's Old Fashioned Hamburgers. He brought actions in negligence and breach of the implied warranty of merchantability against Wenco Management, Wenco Foods, Inc., d/b/a Wendy's Old Fashioned Hamburgers [hereinafter Wendy's], and against Greensboro Meat Supply Co. [hereinafter GMSC], which allegedly supplied the hamburger meat for that Wendy's restaurant. . . .

I. Wendy's

At trial, only plaintiff offered evidence. Plaintiff testified that on 28 October 1983, he and an

employee stopped for lunch at the Hillsborough Wendy's restaurant. Plaintiff ordered a double hamburger and had eaten about half of it when he bit down and felt immediate pain in his lower jaw. Plaintiff took from his mouth the hamburger, a piece of bone that did not come from his mouth, and pieces of teeth. Plaintiff described the piece of bone as triangular, one-sixteenth-to one-quarter-inch thick, one-half-inch long and tapering from one-quarter inch at its base to a point. He indicated that, as far as he knew, the bone was a cow bone. It was about the size of his small fingernail, thick on one side, shaved down to a point on the other, and too small to be flexible. Plaintiff stated the bite containing the bone was mostly meat and that the bone had been in the meat, but he admitted it was possible the bone could have been in any of the condiments or in the bun. Plaintiff's luncheon companion testified he witnessed the incident and saw plaintiff show the bone to the restaurant manager. He noted plaintiff missed at least one day of work. Plaintiff's wife testified as to the extent and intensity of her husband's pain resulting from the broken teeth, and plaintiff's dentist and endodontist testified as to the dental damage, their work on his teeth over several months, and the cost of their services. . . .

A. Implied warranty of merchantability

The implied warranty of merchantability as codified under the Uniform Commercial Code, accords with prior North Carolina law. The statute states, in pertinent part:

> 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. [T]he serving of food or drink to be consumed either on the premises or elsewhere is a sale.

Goods, to be merchantable, "must be at least such as . . . are fit for the ordinary purposes for which such goods are used."

> To prove a breach of implied warranty of merchantability under N.C.G.S. § 25-2-314, "a plaintiff must prove, first[,] that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the warranty in that the goods were defective at the time of the sale; third, that his injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result. The burden is upon the purchaser to establish a breach by the seller of the warranty of merchantability by showing that a defect existed at the time of the sale."

Morrison v. Sears, Roebuck & Co., 319 N.C. 298, 301, 354 S.E.2d 495, 497 (1987) (quoting Cockerham v. Ward, 44 N.C.App. 615, 624-25, 262 S.E.2d 651, 658, disc. rev. denied, 300 N.C. 195, 269 S.E.2d 622 (1980) (citations omitted).

Wendy's admitted in its answer that it is a seller of food intended for human consumption, that it is engaged in and operates fast food restaurants, including the Hillsborough restaurant where plaintiff was allegedly injured, and that one of the products it sells is hamburgers containing meat patties made of beef products. The Court of Appeals correctly concluded these admissions establish that Wendy's is a merchant and that the foods it sells are subject to the implied warranty of merchantability.

Plaintiff's evidence, viewed in the light most favorable to him, tended to show that his broken teeth and resulting physical and financial damage were caused by biting down on a bone in a hamburger purchased from a Wendy's restaurant. Whether the bone in the hamburger caused the product to be unfit for consumption, i.e., "defective," is the keystone to resolving whether plaintiff's claims for breach of implied warranty should have survived Wendy's motion for a directed verdict.

Wendy's, relying on this Court's decision in Adams v. Tea Co., 251 N.C. 565, 112 S.E.2d 92 (1960), contends that plaintiff's claim for breach of implied warranty must fail because the bone was "natural" to the foodstuff. In *Adams* the plaintiff bit down on a piece of crystallized corn in his spoonful of cornflakes, cracking his eyetooth, and brought an action for breach of implied warranty against the retailer. This Court held that nonsuit (the precursor of a directed verdict) had been properly entered upon plaintiff's evidence, "where the substance causing the injury [was] natural to the corn flakes, and not a foreign substance, and where a consumer of the product might be expected to anticipate the presence of the substance in the food."

The Court of Appeals construed this language as establishing a two-part inquiry: "(1) whether the substance causing the injury is natural or foreign; and (2) if natural, whether 'a consumer of the product might be expected to anticipate the presence of this substance in the food.' "

The question is whether by this language the *Adams* Court meant to adopt a two-prong test for liability under which a plaintiff could prevail on either prong, or whether it was the Court's intent to adopt the rule that whenever a substance causing injury is natural to the food itself there can be no liability because every consumer should anticipate and be on guard against the presence of such a substance. For the reasons that follow, we conclude the *Adams* Court took the latter approach.

The Court in *Adams* surveyed a number of cases from other jurisdictions in which substances "natural" to the food had caused injury. The Court regarded as anomalous the rejection of the "foreign-natural" distinction in Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A.2d 913 (1942), in which the court declined to say "as a matter of law" that a can of oysters containing a quarter-sized piece of shell "was reasonably fit for human consumption." The Court in *Adams* appeared to join what was then a majority of jurisdictions which espoused the view that a substance "natural" to the injurious food cannot be a "defect" in the food so as to cause the seller of the food to be liable. . . .

In *Adams* the Court noted that, at the time, no court except the Pennsylvania Court in *Bonenberger* had extended liability based on implied warranty to a restaurateur when the substance causing injury was natural to the food served. According to the Adams Court's research, in all other existing cases in which the food was found not to be reasonably fit for human consumption, it was by reason of contamination by a foreign substance or the food's own noxious condition. In contrast, "[b]ones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to be on his guard and anticipate against such bones." Adams v. Tea Co., 251 N.C. at 568, 112 S.E.2d at 95 (quoting Mix v. Ingersoll Candy Co., 6 Cal.2d at 682, 59 P.2d at 148).

The Court in *Adams* restated numerous holdings in which courts exercising the "foreign-natural" test articulated in *Mix* held "natural" defects in foods do not violate the restaurateur's implied warranty. In virtually every case approval of the "foreign-natural" test coincided with the courts' recognition of consumer expectations as the foundation of the test. In other words, if a substance causing injury was "natural" to the food being served, the consumer ought reasonably to anticipate its presence and could not hold the server liable for any damages it caused. . . .

Thus *Adams*, which said there was to be no liability in implied warranty whenever the injurious substance was natural to the food because the consumer should reasonably expect such substances to be present, came to be regarded as a case exemplifying the "foreign-natural" distinction in implied warranty actions. *Adams* thus articulates one branch of a dichotomy among jurisdictions as to whether a substance "natural" to a product may be a "defect" in the product: Some courts hold simply that any non-foreign substance-such as shell in oyster stew or a pit in a cherry pie-will not

support a claim for breach of implied warranty of merchantability because the possible presence of the substance should have been anticipated in every instance by the consumer; other courts hold that whether such a substance is a "defect" depends upon the "reasonable expectations" of the consumer.

In an earlier case the Court of Appeals seemed reluctant to read *Adams* (as we now read it) to preclude recovery whenever the substance causing injury is natural to the food being consumed. Coffer v. Standard Brands, 30 N.C.App. 134, 226 S.E.2d 534 (1976). In *Coffer* a breach of implied warranty claim was brought by a plaintiff whose tooth allegedly broke on a piece of filbert shell in a jar of mixed nuts. The Court of Appeals cited *Adams* as supporting the doctrine "well recognized in this and other jurisdictions passing on the question that the presence of natural impurities is no basis for liability," and held that "[s]ince the impurity complained of in this case was a natural incident of the goods in question, . . . there was no breach of the implied warranty of merchantability." Nevertheless, the court buttressed this conclusion with reasoning that seems by implication to be grounded in part on the "reasonable expectation" doctrine. The court found the food's compliance with federal and state food quality standards "highly persuasive in establishing merchantability under G.S. 25-2-314(2)(a)" . The court also noted that figures for the incidence of peanut shells in units of shelled peanuts indicated that "there is some tolerance in the trade for unshelled filberts, as well." In addition, the court found "instructive" N.C.G.S. § 106-129, under which food is not deemed "adulterated" if "any poisonous or deleterious substance . . . is not an added substance . . . [provided] the quantity of such substance . . . does not ordinarily render it injurious to health." The court's reliance on this statute suggests the court's belief that recovery for injury caused by a substance natural to the food may depend in part upon the quantity, or size, of the substance.

In the case before us the Court of Appeals read *Adams* as permitting recovery on implied warranty for an injury-causing substance natural to the food if presence of the substance was nevertheless not reasonably to be anticipated by the consumer.

While we disagree with this reading of *Adams* by the Court of Appeals, we think it is time to reexamine the *Adams* holding. We conclude that *Adams* should no longer be considered authoritative insofar as it holds there can never be recovery on the basis of implied warranty for injury caused by a substance in food that is natural to food. We think the modern and better view is that there may be recovery, notwithstanding the injury-causing substance's naturalness to the food, if because of the way in which the food was processed or the nature, size or quantity of the substance, or both, a consumer should not reasonably have anticipated the substance's presence. This, essentially, is the test adopted below by the Court of Appeals. . . .

We thus hold that when a substance in food causes injury to a consumer of the food, it is not a bar to recovery against the seller that the substance was "natural" to the food, provided the substance is of such a size, quality or quantity, or the food has been so processed, or both, that the substance's presence should not reasonably have been anticipated by the consumer.

A triangular, one-half-inch, inflexible bone shaving is indubitably "inherent" in or "natural" to a cut of beef, but whether it is so "natural" to hamburger as to put a consumer on his guard-whether it "is to be reasonably expected by the consumer"-is, in most cases, a question for the jury. "We are not requiring that the respondents' hamburgers be perfect, only that they be fit for their intended purpose. It is difficult to conceive of how a consumer might guard against the type of injury present here, short of removing the hamburger from its bun, breaking it apart and inspecting its small components. . . . [W]e doubt that any hamburger manufacturer seriously expects consumers to go to such lengths, especially since a hamburger sandwich is meant to be eaten out of hand, without

cutting, slicing, or even the use of a fork or knife." Evart v. Suli, 211 Cal.App.3d at 613-14, 259 Cal.Rptr. at 540. "If one "reasonably expects' to find an item in his or her food then he guards against being injured by watching for that item. When one eats a hamburger he does not nibble his way along hunting for bones because he is not "reasonably expecting" one in his food." Jackson v. Nestle-Beiche, Inc., 212 Ill.App.3d 296, 304, 155 Ill.Dec. 508, 512, 569 N.E.2d 1119, 1123 (1991).

We conclude that Wendy's implied warranty regarding "merchantable" hamburgers neither requires perfection nor stops at some manifest line between "foreign" and "natural" substances in the meat. It depends upon what the consumer should reasonably expect to encounter. . . .

Charles Pharol, Contract Law Basics

Margee Pub. Company

Sales law was first codified in the United States in the Uniform Sales Act, drafted by Professor Williston and offered for statutory adoption by the states in 1896. It was an effort to reproduce the existing law of sales in a systematic fashion rather than to effect major changes in the law.

With Professor Samuel Williston as its Reporter, and Professor Arthur Corbin as an advisor, the American Law Institute (ALI) published the Restatement of the Law of Contracts in 1932. The American Law Institute was and is an organization made up of distinguished law professors, practicing attorneys, and judges, formed for the purpose of "restating" the law in a variety of subject matters. Unlike the Uniform Sales Act the Restatement was not intended for statutory enactment. Instead, the Restatement was written to assist courts in determining the common law of contracts. Despite its claim to restate the law, however, the Restatement contained a few provisions intended to shape and influence existing doctrine. The ALI has revised the Restatement, adopting the Restatement (Second) of Contracts in 1979.

The most influential of the various efforts to systematize a portion of the law of contracts is Article 2 of the Uniform Commercial Code (U.C.C.). The U.C.C. was drafted in the 1940s by a group of scholars and practitioners headed by Professor Karl Llewellyn and working under the auspices of the ALI and the National Conference of Commissioners on Uniform State Laws. Rather than restating the law, Article 2 was an ambitious effort to simplify, modernize and standardize the various state laws governing the sale of goods. Every state except Louisiana has enacted it, and it has significantly influenced the development of contract law in areas beyond its official limitation to the sale of goods, as courts have applied it to common law contract controversies by analogy.

UCC References:

Sections: 2-102, 2-104, 2-105, 2-314.