What is the proper measure of damages for breach of an implied warranty for non-conforming goods?

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The Bullet Point is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation. We're pleased to expand the Bullet Point from its previous coverage of Ohio case law to include additional areas in McGlinchey's footprint.

Ohio

Measure of Damages for breach of implied warranty

Koons v. Ozzy's Cash & Go Auto, LLC, 4th Dist. Scioto No. 20CA3919, 2021-Ohio-3337

In this appeal, the Fourth Appellate District affirmed the trial court's decision, agreeing that a buyer who revokes a contract for purchase of a motor vehicle is entitled to the return of the purchase price in addition to incidental or consequential damages.

The Bullet Point: At issue in this dispute is the proper measure of damages for a breach of an implied warranty for the sale of two motor vehicles. Here, the plaintiffs purchased two motor vehicles from the defendant's used car business. Although both vehicles were sold "as-is," the plaintiffs purchased extended warranties for both vehicles. Approximately three weeks later, the plaintiffs asked the defendant to rescind the agreements as both vehicles had significant mechanical problems. The defendant refused, stating that the plaintiffs would have to wait 30 days "for the warranty to kick in." The plaintiffs filed suit, alleging revocation of acceptance of the purchase agreements. The trial court found the "as-is" clauses in the purchase agreements were contingent upon the plaintiffs not purchasing extended warranties. As such warranties were purchased, the "as-is" clauses were negated, and consequently both vehicles were covered under implied warranties. Determining that the vehicles were non-conforming goods and that the plaintiffs properly revoked their acceptance of the purchase agreements under R.C. 1302.66, the trial court awarded the plaintiffs damages in the amount paid for both vehicles. The defendant appealed, arguing the trial court erred in awarding the return of the purchase price paid. Since the adoption of Article 2 of the Uniform Commercial Code (UCC), the law in Ohio governing contracts for the sale of goods has been codified in R.C. Chapter 1302. As such, resolution of an alleged breach of contract for the sale of a motor vehicle, goods as defined in R.C. 1302.1(A)(8), must generally be guided by the provisions of R.C. Chapter 1302. Here, the defendant argued the court should utilize the so-called "value-received" calculation for damages under R.C. 1302.88, which states the proper measure of damages is the difference between the value of the vehicles accepted and the value of the vehicles had they been as warrantied. The appellate court disagreed, as R.C. 1302.88 is inapplicable where acceptance of the goods has been revoked. Rather, "a buyer who justifiably revokes acceptance of goods under R.C. 1302.66 is entitled to the purchase price paid in addition to incidental or consequential damages under R.C. 1302.85 and 1302.89, respectively." Pursuant to R.C. 1302.85(A), "Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, *** the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid[.]" (Emphasis in opinion). Ohio courts have long held that "revocation of acceptance and recovery of damages for breach of warranty are two distinct remedies under the UCC. While the buyer may pursue either remedy or both, each is treated in a different section of the Code and offers a separate form of relief." The appellate court explained that awarding a buyer the monies paid is consistent with the purpose of rescission, which is to restore the parties back to their original positions as if the contract had never been formed. As the plaintiffs justifiably revoked acceptance of both purchase agreements, the proper calculation of damages due to the breach of warranty was the purchase price paid for the vehicles.

Mutual Abandonment of Contract

Marks v. Raymond, 2d Dist. Montgomery No. 29065, 2021-Ohio-3375

In this appeal, the Second Appellate District affirmed the trial court's decision, agreeing that the contract was mutually abandoned as the father never moved into the daughter's home, so her reciprocal agreement to provide care never materialized.

The Bullet Point: This breach of contract action brought by a father against his daughter and son-in-law centered on whether the parties mutually abandoned their contract. In this case, the parties entered into an oral contract for the father to pay the construction cost for an addition to be built onto the defendants' home. In exchange, the father was to move into the new addition for his daughter to care for him due to his failing physical and mental health. After construction was completed, the father refused to move into the addition and instead filed suit, alleging the defendants breached the contract. In response, the defendants filed an answer, affirmative defenses, and a counterclaim also alleging breach of contract. The trial court found that neither party had breached the contract, as the father's failure to move in with the defendants was not the result of a breach but rather was the result of the parties mutually abandoning said contract. The father appealed, arguing the defense of mutual abandonment was waived as it was not raised as an affirmative defense. The appellate court disagreed, noting that the defenses of acquiescence and waiver were both asserted. (Acquiescence is a person's passive acceptance or implied consent to an act. Waiver is a person's intention to relinquish a right or privilege; it "presupposes a full knowledge of an existing right or privilege and something done designedly or knowing to relinquish it." Similarly, abandonment is the intentional relinquishment of a known right, and parties may mutually abandon their rights under a contract when one party acts inconsistently with the existence of the contract and the other party acquiesces.) Therefore, by asserting acquiescence and waiver, the defendants implicitly raised the issues of mutual abandonment and whether the father intentionally relinquished his rights under the contract.

Fraudulent Investment

Uren v. Scoville, 1st Dist. Hamilton No. C-170438, 2021 Ohio App. LEXIS 3346 (Sep. 29, 2021)

In this appeal, the First Appellate District affirmed the trial court's decision, agreeing that transfers of "employment commissions" for work related to a fraudulent investment scheme were in violation of Ohio's Uniform Fraudulent Transfer Act.

The Bullet Point: In this class-action lawsuit, the plaintiffs sought to claw back money from the defendant, alleging he received funds in violation of Ohio's Uniform Fraudulent Transfer Act (UFTA). Specifically, the members of the class invested funds with a non-defendant principal actor who allegedly perpetuated a criminal fraud by operating a "Ponzi scheme." The class brought an action against the defendant on the theory that certain transfers he received from the principal of the Ponzi scheme, a "debtor" under Ohio's UFTA, were in violation of R.C. 1336.04(A)(1) and (2), resulting in unjust enrichment. Under Ohio's UFTA, a transfer made by a debtor is fraudulent as to a creditor if the debtor made the transfer (1) with actual intent to hinder, delay, or defraud any creditor of the debtor, or (2) without receiving a reasonably equivalent value in exchange if the debtor was engaged in a business or transaction for which the debtor's remaining assets were unreasonably small in comparison. R.C. 1336.04(A)(1) and (2). Here, the class alleged the defendant received transfers of "cash or cash equivalents" from the principal-debtor, during a time period when the principal-debtor was "insolvent," that exceeded the sum of funds the defendant had deposited with the principal-debtor, without the principal-debtor receiving "any reasonably equivalent value" in exchange. Further, the class alleged the transfers to the defendant were made "with the actual intent to hinder, delay, or defraud the class as creditors of the principal-debtor," and that the defendant had a "business relationship" with the principal-debtor "at the time" of the subject transfers. Finally, the class asserted that the principal-debtor had paid the defendant a percentage of investor funds in exchange for referring others to invest in the scheme. Following a hearing, the trial court granted the class's motion for summary judgment. On appeal, the defendant argued he could not be subject to the class's claw-back claims because he was only a limited partner in a specific investment fund held by the principal-debtor, and that he had invested more money with the principal-debtor than he had withdrawn over the years. The defendant further argued the transfers of funds he received were not fraudulent under R.C. 1336.04(A)(2) because the transfers were his "employment commissions" for work related to the investment fund and that through said work, the principal-debtor received a reasonably equivalent value in exchange for the transfers. As the court noted, the defendant not only failed to provide any legal authority for his contention that he should be credited for his "commissions" related to the fraudulent scheme, but the case law found by the court is contrary to this position. Rather, transfers of said "commissions" for work the defendant performed in furtherance of the scheme were in violation of Ohio's UFTA and fraudulent as to the class.

FCRA Claim

Sterling v. Experian Information Solutions, Inc., N.D.Ohio No. 3:19-cv-2993, 2021 U.S. Dist. LEXIS 180413 (Sep. 22, 2021)

In this matter, the United States District Court for the Northern District of Ohio, Western Division, dismissed the consumer's complaint brought under the Fair Credit Reporting Act as the consumer failed to allege any inaccuracy in his consumer report.

The Bullet Point: In this matter, a *pro se* consumer filed suit against Experian and other consumer reporting agencies alleging claims under the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq. (FCRA), and seeking a court order requiring the use of a single credit score computation model. The consumer alleged the defendants engaged in a fraudulent scheme to prevent certain "undeserving" customers from obtaining financing by "intentionally sabotaging" consumers by reporting "soft scores" online but "hard scores" to financial institutions. The court construed the *pro se* complaint as making a claim for relief under § 1681e(b), which requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information" contained in the consumer report. Experian filed a motion to dismiss, arguing that the consumer failed to state a claim for relief under § 1681e(b). To succeed on a § 1681e(b) claim, the consumer must prove: "(1) [Experian] reported inaccurate information about [him]; (2) [Experian] either negligently or willfully failed to follow reasonable procedures to assure maximum possible accuracy of the information about [him]; (3) [he] was injured; and (4) [Experian]'s conduct was the proximate cause of [his] injury." Here, the complaint alleged a single instance of Experian issuing a consumer report to Huntington Bank, but the consumer failed to allege anything about the report that was inaccurate per se. Rather, the consumer stated his online Experian credit score was 621, but when Huntington Bank conducted a credit check and purchased the credit score from Experian during the same week, Experian reported the consumer's credit score as 589. The consumer was ultimately denied a mortgage loan, and the consumer contended the "drastic difference" between his online Experian credit score and the score reported to Huntington Bank was evidence the consumer report was inaccurate. The court disagreed, noting that the difference between the scores did not show that the 589-score furnished to Huntington Bank in the consumer report was inaccurate. The FCRA does not mandate the use of a specific credit scoring model. Instead, there are multiple tools and models used to calculate credit scores, and the FCRA merely contains a disclosure mandate that requires "a statement indicating that the information and credit scoring model may be different than the credit score that may be used by the lender[,]" anytime a consumer requests their credit score from a consumer reporting agency. § 1681g(f)(1). As the court noted, Experian's website contained a clear disclosure statement in accordance with § 1681g(f)(1) regarding the possibility of different credit scoring models. Nevertheless, the complaint lacked any allegation regarding the scoring model Huntington Bank utilized to evaluate the consumer's loan application. Thus, it was impossible to determine from the face of the complaint whether any "drastic difference" resulted from improper calculation, or merely resulted from the use of different scoring models. As the consumer failed to allege any inaccuracy in his consumer report, the allegations were insufficient to state a claim for relief under § 1681e(b) and the complaint was dismissed.

Florida

Back-Assessment of Property Taxes

Furst v. DeFrances, Case No. SC19-701 (Fla. 2021)

The Florida Supreme Court determined that a residential property had not "escaped taxation" under Florida Statute when it was under-taxed because of a mistaken under-valuation by the property appraiser, and the county was not entitled to back-asses the property after discovering its error.

The Bullet Point: Fla. Stat. § 193.092 permits a jurisdiction to back-assess taxes on property that has "escaped taxation." In this case, a property appraiser undervalued and undertaxed the taxpayer's property. In 2014 the taxpayer received an "implausibly low property tax bill for her waterfront property" in which taxes were being assessed based on a property value nearly $2 million lower than the value the year before, even though there had been no change to the property. This error was a result of Sarasota County's implementation of a new computer-assisted mass appraisal system. The taxpayer paid her 2014 property taxes. After Sarasota County discovered its error, it attempted the back-assess the property for the outstanding property taxes owed under Fla. Stat. § 193.092. However, the Florida Supreme Court ruled that the property did not "escape taxation" for purposes of Fla. Stat. § 193.092 and Sarasota County was not permitted to back-assess the property. Although the property was assessed based on an incorrectly low valuation, the property appraiser did not dispute the appellate court's conclusion that the entire parcel and all improvements were assessed and placed on the tax roll, and the taxpayer timely paid her taxes. The concept of escaping taxation does not include being under-taxed due to a mistaken valuation of property.

Fraud Statute of Repose

Philip Morris USA Inc. v. Principe, 2021 Fla. App. LEXIS 13205 (Fla. 3d DCA 2021)

The Third District ruled that a final judgment entered against a tobacco company after a jury had determined that it fraudulently misrepresented and concealed from a smoker the dangers associated with smoking filtered cigarettes was improper because the smoker's claims were barred by Florida's statute of repose for fraud.

The Bullet Point: Florida's statute of limitations for fraud is four years under Fla. Stat. § 95.11(3)(j). However, because a plaintiff can be the victim of fraud for some time without knowing it, the limitations period for bringing a fraud claim does not begin until the wrongdoer's acts were, or should have been, discovered. As a result, Florida's legislature has combined the fraud limitations statute with a statute of repose requiring that any fraud action must begin within twelve years of the commission of the alleged fraud, irrespective of the date that the wrongdoer's acts were, or should have been, discovered. Fla. Stat. § 95.031(2). Statutes of repose run from the date of a discrete act on the part of the defendant without regard to when the cause of action accrued or the plaintiff's reliance on the act. In this case, the Third District Court of Appeal determined that the smoker's fraud claims were time-barred by Florida's statute of repose for fraud because he filed suit against the tobacco company eighteen years after he had stopped smoking.

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