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Sales - Breach of Warranty - Notice Required by Section 49 of Uniform Sales Act Must Be Given to Seller or His Agent

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SALES—BREACH OF WARRANTY—NOTICE REQUIRED BY SECTION 49 OF UNIFORM SALES ACT MUST BE GIVEN TO SELLER OR HIS AGENT—Defendant corporation ordered certain boiler burner units through Burke, the selling agent of a boiler manufacturer. The order having been transmitted by Burke to plaintiff, the manufacturer's exclusive distributor in the area, the burner units were delivered. Defendant discovered certain defects in their specifications, notified Burke to this effect, and withheld payment of part of the purchase price. In an action by plaintiff for this unpaid balance of the agreed price, defendant asserted plaintiff's breach of warranty by way of recoupment. On appeal of the trial court's judgment for plaintiff, *held*, affirmed. Defendant could not successfully claim breach of warranty without first complying with section 49 of the Uniform Sales Act, which requires the buyer to notify the seller of an alleged breach. While defendant had given notice of its claim to Burke, there were no grounds for upsetting the trial court's determination that Burke was not plaintiff's agent. *Dodge Engineering Associates v. Noland Co.*, (Mun. Ct. App. D.C. 1957) 128 A. (2d) 655.

The character of the notice required by section 49 of the Uniform Sales Act has been well defined by extensive treatment in the relevant case

authority. Thus, it is now generally established that such notice is a condition precedent to the buyer's right to sue or to counterclaim for breach of warranty,¹ that the notice need not be in any particular form,² and that it should fairly advise the seller of the defect asserted, repel the inference of waiver, and at least implicitly assert a violation of the buyer's legal rights.³ On the other hand, there has apparently been a complete absence of judicial attention to the question of to whom this notice should be given.⁴ The question becomes critical in situations like that of the principal case where the problem of vicarious notice is involved. The present court answers this question by a rather mechanical application of the general agency doctrine that a principal will be held only for notice received by his agent acting within the scope of his authority.⁵ In view of the fact that section 49 of the Sales Act is concerned with notice of *complaints*, which the seller would not normally wish to receive, it would seem unwise to determine the efficacy of the notice by usual agency principles. Because of his adverse interest, the seller will rarely have expressly authorized anyone to receive complaints.⁶ Since the rationale of implied authority rests ultimately upon intent also,⁷ the same consideration will prevent its application, and the "reasonable belief" requirement presents real difficulties in the utilization of the doctrine of apparent authority.⁸ Consequently, if the approach of the court in the principal case is followed with strict logic, and the validity of any vicarious notice is made to depend upon its being received by an agent acting within the scope of his authority, suit against a corporation⁹ becomes virtually impossible in the usual situation. It would therefore appear expedient to abandon agency analysis altogether when dealing with section 49 notice of a vicarious nature. A more realistic approach would seem to be one recognizing both the bifurcated purpose

¹ *American Mfg. Co. v. U.S. Shipping Board Emergency Fleet Corp.*, (2d Cir. 1925) 7 F. (2d) 565; *Federal Sugar Refining Co. v. Midland Grocery Co.*, (2d Cir. 1927) 23 F. (2d) 167; *W.S. Maxwell Co. v. Southern Oregon Gas Corp.*, 158 Ore. 168, 74 P. (2d) 594 (1937), *affd.* 75 P. (2d) 9 (1938).

² *Johnson v. Kanavos*, 296 Mass. 373, 6 N.E. (2d) 434 (1937); *Hazelton v. First Nat. Stores*, 88 N.H. 409, 190 A. 280 (1937).

³ *Truslow and Fulle, Inc. v. Diamond Bottling Corp.*, 112 Conn. 181, 151 A. 492 (1930); *Hubshman v. Louis Keer Shoe Co.*, (7th Cir. 1942) 129 F. (2d) 137; *Barni v. Kutner*, (Del. 1950) 76 A. (2d) 801.

⁴ The writer has been unable to find any case dealing with this aspect of the section 49 notice.

⁵ See 3 MERRILL, NOTICE §1203A (1952).

⁶ The use of complaint departments by certain types of companies is, of course, an exception to this general rule.

⁷ See MECHEM, OUTLINE OF AGENCY §43 (1952). It should be noted that Mechem uses the term "incidental authority" to designate what is usually denominated "implied authority."

⁸ Because of the obvious adverse interest of the principal-seller, it is at least difficult to conceive of a reasonable man believing that the seller has actually authorized any given agent to receive complaints.

⁹ A corporation, of course, can receive notice only through its agents.

of this notice¹⁰ and its absolute, rather than cognitive character.¹¹ Proceeding from these premises, courts might well base their determination of whether notice to any given person has fulfilled the section 49 requirement upon such considerations as the accessibility of the person to, and his prior contact with, the buyer, the likelihood of the person's imparting the notice to the seller or to those who are charged with the duty of taking appropriate action on behalf of the seller, and the reasonable appearance of this likelihood to the buyer.

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¹⁰ Williston, the drafter of the Uniform Sales Act, considers the purpose of this section to be the imposition of a limitation upon the buyer. See 3 WILLISTON, SALES §484a (1948). Some cases, however, emphasize another function of this notice—its value in providing the seller with seasonable warning of the buyer's intention to sue, so that he will have ample opportunity to investigate and prepare a defense. *Block v. Eastern Machine Screw Corp.*, (6th Cir. 1922) 281 F. 777; *Guthrie v. J. J. Newberry Co.*, 297 Mass. 245, 8 N.E. (2d) 774 (1937).

¹¹ For an outline of the distinction between absolute notice and cognitive notice, see 1 MERRILL, NOTICE §§3 and 7 (1952). Essentially, absolute notice is effective if properly given whether or not the recipient remembers it, or even learns of it. Cognitive notice involves situations where the recipient must be aware of the notice at the relevant time.