Louisiana Law Review

Volume 43 | Number 4
Symposium: Maritime Personal Injury
March 1983

Redhibition: An Argument for the Adoption of a Professional Seller Standard for Automobile Dealers

Jeanne Frances Harvey

REDHIBITION: AN ARGUMENT FOR THE ADOPTION OF A PROFESSIONAL SELLER STANDARD FOR AUTOMOBILE DEALERS

Since the purchase of an automobile typically represents the investment of a significant portion of a person's budget, it is understandable that discontented buyers often resort to an action in redhibition to rescind the sale or reduce the price of their purchase. The buyer can choose three possible defendants: the dealer, the distributor, or the manufacturer. The right to recover damages depends upon the defendant's actual or imputed knowledge of the vice and his failure to disclose it, in other words, whether the court finds the defendant to be a good faith or bad faith seller. In order to give greater protection to the consumer, Louisiana courts should apply, or the legislature should adopt, a professional seller standard for automobile dealers. This standard would require one who makes his living at selling products to know the quality of his wares, and knowledge of vices in the wares would be imputed to the dealer, even in the absence of actual knowledge. The need for adoption of this standard is better understood by viewing the typical marketing scheme for automobiles[1] and the liability that the law presently attaches to its participants in an action in redhibition.

Redhibition is the avoidance of a sale on account of some unremedied vice or defect in the thing sold that renders it either absolutely useless or its use so inconvenient that it must be supposed that the buyer would not have purchased it if he had known of the defect.[2] To maintain an action in redhibition, the buyer first must prove that the vice existed at the time of the sale.[3] Second, the buyer must show that the defect was not known or discoverable upon a reasonable inspection.[4] Third, it is necessary to show the redhibitory nature of the thing, *i.e.*, that the thing is either absolutely useless for its intended purpose or that its use is so inconvenient that it must be supposed that the buyer would not have purchased it had he known of the defect.[5] Finally, if the seller was ignorant of the defect, the buyer must prove that the seller could not or would not correct the defect when given a reasonable opportunity to do so.[6] If, however, the seller knew of the defect or was otherwise in bad faith or if the buyer is

---

1. This note will deal specifically with actions in redhibition for sales of automobiles and motor homes, two of the most common purchases for which this remedy has been chosen.

2. LA. CIV. CODE art. 2520.

3. LA. CIV. CODE art. 2530; Associates Fin. Servs. Co. v. Ryan, 382 So. 2d 215 (La. App. 3d Cir. 1980).

4. LA. CIV. CODE arts. 2521-2522.

5. LA. CIV. CODE art. 2520.

6. LA. CIV. CODE art. 2531; Jordan v. LeBlanc & Broussard Ford, Inc., 332 So. 2d 534 (La. App. 3d Cir. 1976).

suing the manufacturer, the buyer is not required to give the defendant an opportunity to repair.[7] In such a case, the seller is liable not only for the return of the purchase price and the expenses of the sale, as is every good faith seller, but also for any other damages that the buyer incurred and for reasonable attorney's fees, as a result of the seller's violation of Louisiana Civil Code article 1901's standard of good faith performance.[8] The buyer must bring the action of redhibition within one year from the date of the sale[9] unless the seller was in bad faith or was a manufacturer, in which case the buyer must sue within one year from the date of discovery of the defect.[10] Because liability beyond restoration of the price depends upon the seller's knowledge of the redhibitory condition, the liability of the manufacturer, to whom such knowledge is imputed, is the greatest. The manufacturer is always deemed a bad faith seller fully responsible for the return of the purchase price, the expenses of the sale, the damages that the buyer incurred, and reasonable attorney's fees.[11] Distributors[12] and dealers may be equally responsible if knowledgeable of the defect, but because such knowledge is not imputed to them, their responsibility usually is somewhat less.

Source of the Liability of a Manufacturer

Roman and French law envisioned a situation in which buyers and sellers were presumed to enter into bargaining personally and to

7. LA. CIV. CODE art. 2531. The Civil Code affords the good faith seller an opportunity to repair; however, no such opportunity is given to the bad faith seller. Moran v. Willard E. Robertson Corp., 372 So. 2d 758 (La. App. 4th Cir. 1979). Any seller who knew of the defect and failed to declare it or any seller to whom knowledge of the defect is imputed is a bad faith seller. LA. CIV. CODE art. 2545; Doyle v. Fuerst & Kraemer, Ltd., 129 La. 838, 56 So. 906 (1911).

8. Associates Fin. Servs. Co. v. Ryan, 382 So. 2d 215, 220 (La. App. 3d Cir. 1980). *See also* Note, *Sales—Implied Warranty—Liability of Producer*, 13 LA. L. REV. 624 (1953).

9. LA. CIV. CODE art. 2534.

10. LA. CIV. CODE art. 2546. The prescriptive period runs from the date of the last attempt to repair, when the dealer has tried to do so. White v. Martin GMC Trucks, Inc., 359 So. 2d 1094 (La. App. 3d Cir.), *writ granted in part with remand*, 362 So. 2d 1116 (La. 1978), *original opinion reinstated on remand*, 365 So. 2d 1135 (La. App. 3d Cir. 1978), *writ denied*, 367 So. 2d 391 (La. 1979); Williams v. Lucien J. Caruso, Inc., 374 So. 2d 113 (La. App. 4th Cir. 1979) (repair of house); Brown v. Dauzat, 157 So. 2d 570 (La. App. 3d Cir. 1963) (repair of house).

11. Doyle v. Fuerst & Kraemer, Ltd., 129 La. 838, 56 So. 906 (1911); George v. Shreveport Cotton Oil Co., 114 La. 498, 38 So. 432 (1905).

12. Because of the distributor's position as middleman, he is treated sometimes as a dealer and sometimes as a manufacturer. The Automobile Dealers Day in Court Act, 15 U.S.C. § 1221-1233 (1976), demonstrates the nature of the classification of the distributor in its definitions.

possess approximately equal bargaining power.[13] This idea was based on the presumption both that the seller was the manufacturer of the thing sold and that the nature of the thing sold was relatively uncomplicated as compared to the machinery sold today. This theory, as reflected in the works of several scholars, was the basis of the Louisiana Supreme Court's decision in *Doyle v. Fuerst & Kraemer, Ltd.*,[14] which established the presumption that a manufacturer knows the defects in the products which he produces. In *Doyle*, the supreme court cited Pothier's proposition that a workman is responsible for damages from defects in the things he produces under the theories of *spondet peritiam artis* (he gives the solemn pledge of proficiency in his art) and *imperitia culpae annumeratur* (incompetency is reckoned a fault).[15] The court also cited Dalloz for the principle that good faith does not exclude incompetency.[16] *Doyle* is the basis in Louisiana for the imputation to a manufacturer of knowledge of the vices in his product.

An interesting aspect in establishing the liability of a manufacturer arises from the language of the Civil Code articles on redhibition.[17] The Code uses the word *manufacturer* only in article 2531, which gives the seller of the defective thing a right of action against its manufacturer. In all of the other redhibition articles, only the word *seller* is used. This choice of language gives rise to the issue of how the manufacturer's liability for defects is established. In one case, *Borne v. Mike Persia Chevrolet Co.*,[18] the defendant manufacturer argued that a "manufacturer" was not a "seller" within the meaning of the Civil Code articles on redhibition because the word "seller" contemplated the buyer's immediate vendor. The court, however, rejected this argument, stating that such a finding would ignore the fact that a manufacturer sells to dealers and through them to consumers by using national advertising campaigns and good reputation.

Once a manufacturer is called a seller for purposes of redhibition, there still remains the problem of how a buyer can sue his seller's seller. The landmark redhibition case of *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*[19] abolished privity of con-

13. F. STONE, TORT DOCTRINE § 427 in 12 LOUISIANA CIVIL LAW TREATISE 555 (1977).

14. 129 La. 838, 56 So. 906 (1911) (citing the following commentators: Kent, Dalloz, Troplong, and Pothier).

15. 1 R. POTHIER, TREATISES ON CONTRACTS—CONTRACT OF SALE NO. 214 (L. Cushings trans. 1839).

16. 129 La. at 843, 56 So. at 908 (citing Dalloz, CODE ANNOTES, art. 1645, nos. 15 & 16).

17. LA. CIV. CODE arts. 2520-2548.

18. 396 So. 2d 326 (La. App. 4th Cir. 1981).

19. 262 La. 79, 262 So. 2d 377 (1972).

tract as a requirement in the buyer's suit against either the distributor or the manufacturer.[20] Justice Barham, in a later law review article, offered three possible explanations for this consumer right.[21] First, he suggested that the warranty against redhibitory vices was a stipulation pour autrui made in favor of the ultimate consumer, but he discounted this explanation for two reasons. He found that there was no authority in the Civil Code, as there was in the Code Napoleon, for the proposition that a man was presumed to have stipulated for himself, his heirs, and assigns unless the contrary was expressed. In fact, Justice Barham stated that there was a strong judicially created presumption that unless a contract contained an express stipulation for the benefit of a third party, there was no stipulation pour autrui. Furthermore, Barham said that such stipulations seldom appeared in sales contracts and, therefore, that this theory was untenable in Louisiana because the requirement for express stipulation was ignored when applied to this particular situation.[22] Justice Barham's second theory for the lack of a privity requirement was a transmission theory. The buyer's right to sue for breach of warranty against redhibitory vices was transmitted with the object of the sale as an accessory of that object.[23] The third theory suggested was subrogation. Courts had used Civil Code article 2503, from the section on eviction, to extend the right of subrogation to the area of redhibition.[24] Thus a subvendee was subrogated to all the rights of his immediate vendor to sue for breach of the warranty against redhibitory vices. The problem with this extension arose in the area of prescription. If the second vendor's right of action in warranty had prescribed against his vendor,

20. The rule set forth in *Media* abolishing the requirement of privity gives the Louisiana consumer a distinct procedural advantage over consumers in some common law states. The Uniform Commercial Code imputes in every sale by a merchant a warranty from the manufacturer to the ultimate consumer that the goods sold are merchantable and, in certain circumstances, that the goods are fit for the purpose for which they are purchased. U.C.C. § 2-314 & 2-315 (1978). Although §§ 2-318 of the U.C.C. does not require privity in cases where personal injury damages are sued for, there is a split of authority as to whether privity is required where the damages are purely economic. For example, in New York, lack of privity is a bar to an action under the implied warranty of merchantability where damages are purely economic. Hole v. General Motors Corp., 83 A.D.2d 715, 442 N.Y.S.2d 638 (App. Div. 1981); Mendelson v. General Motors Corp., 105 Misc. 2d 346, 432 N.Y.S.2d 132 (Sup. Ct. 1980). Thus, in New York, it would be necessary to find an express warranty from the manufacturer to the particular plaintiff in order to maintain an action against the manufacturer. However, some states have extended the implied warranty to remote purchasers without privity. Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49 (Mo. Ct. App. 1981).

21. Barham, *Redhibition: A Comparative Comment*, 49 TUL. L. REV. 376 (1975).

22. *Id.* at 380.

23. *Id.* at 381.

24. *Id.* at 383.

the subvendee's right by subrogation had also prescribed.[25] Barham suggested that rather than extending Civil Code article 2503, it would have been better to analogize the warranty against eviction to the warranty against redhibitory vices, but even with that analogy, he found that the same prescription problems arose. He thus concluded that the transmission theory was the most practical.[26] It must be remembered, however, that the *Media* court did not identify or espouse any particular theory as the basis of the consumer's right to sue the manufacturer without privity; the court simply said that it was following "the consumer protection rule" in abolishing the privity requirement.[27] To summarize, Louisiana courts have based the manufacturer's imputation of knowledge of the vices in his wares on the once accurate thesis that the seller and manufacturer are one and the same person. This imputed knowledge, under article 2531, always results in the manufacturer being a bad faith seller, who is afforded no opportunity to repair and who must pay attorney's fees and damages in addition to the expenses of the sale and the restitution of the purchase price. Under Civil Code article 1901, the seller is entitled to the buyer's good faith performance (payment of the price). By imputing knowledge of the vice, the courts are punishing a manufacturer by depriving him of the buyer's performance and not allowing him a chance to repair the vice. This severe sanction may be justified by saying that since the manufacturer is the artisan, he should know of the vices of his wares if anyone should and, further, that the fear of liability for the return of the retail price, not the wholesale price, plus other damages will encourage him to produce fit products. Louisiana courts thus far have held that the benefits of such a punitive system outweigh the consequences.

Liability of Distributors

The distributor's liability can never be more than that of the manufacturer because the manufacturer is responsible for the full scope of liability in a redhibition action. There are three situations delineating the distributor's scope of liability. First, the distributor who knows of the vices in an automobile and sells it without declaring them is deemed a bad faith seller subject to full liability.[28] Second, if the distributor is in good faith, he is liable only for the purchase

25. *Id.*
26. *Id.*
27. 262 La. at 90, 262 So. 2d at 381.
28. Full liability is liability for the return of the purchase price, the expenses of the sale, the damages incurred by the buyer, and reasonable attorney's fees. LA. CIV. CODE arts. 2531 & 2545.

price and the expenses of the sale.[29] Third, the courts sometimes place the distributor in the "position of the manufacturer"[30] and therefore saddle him with imputed knowledge of the defects and its accompanying full liability, as in the case of any bad faith seller. The courts will effect this imputation of knowledge when a distributor has assumed total responsibility for domestic marketing, inspecting, and presale preparing of vehicles manufactured by a corporation chartered outside the United States.[31] This was the court's approach in *Media*, in which the seller was insolvent and the manufacturer was foreign chartered. The court's finding that the distributor was in the position of a manufacturer gave the buyer a domestic deep-pocket, which was fortunate, for his seller, a then defunct corporation, was judgment-proof.

A series of defective automobile cases following *Media* found the distributors to be in the manufacturer's position where the manufacturers were such foreign corporations as Fiat, Volvo, Volkswagen, and Toyota.[32] In all these cases, the foreign chartering of the manufacturer, which precluded recovery by the consumer without his instituting suit in the country of incorporation, played a part in determining the liability of the distributor. It is questionable whether the amenability to suit of either a manufacturer or dealer should affect the extent of liability of a distributor when the Civil Code bases the extent of liability on the good or bad faith of the defendant, that is, whether the defendant was guilty of wrongdoing or not.

Liability of Dealers

In Louisiana, there is no apparent presumption of knowledge of defects against the dealer who is not a manufacturer, nor is there a duty incumbent on him to inspect. If the defect is obvious, the seller is not expected to do anything, because an apparent defect is not redhibitory.[33] If the defect is nonapparent and the seller does not find it, he is selling in good faith. While it may appear that there is no

29. LA. CIV. CODE art. 2531.

30. *Media*, 262 La. at 90, 262 So. 2d at 380.

31. *Media*, 262 La. at 89-90, 262 So. 2d at 380.

32. Hoychick v. Gulf States Toyota, Inc., 386 So. 2d 681 (La. App. 3d Cir. 1980); Huffman-Euro Motors, Inc. v. Physical Therapy Servs., Ltd., 373 So. 2d 565 (La. App. 3d Cir. 1979); Moran v. Willard E. Robertson Corp., 372 So. 2d 758 (La. App. 4th Cir. 1979); Perrin v. Read Imports, Inc., 359 So. 2d 738 (La. App. 4th Cir. 1978). *See also* Cobb v. Insured Lloyds, 387 So. 2d 13 (La. App. 3d Cir. 1980) (the distributor of a foreign made gun was treated as a manufacter); Comment, *Automobile Sales in Louisiana: Redhibition or Retribution?*, 20 LOY. L. REV. 313, 319 (1974) (the writer expresses the opinion that the Louisiana Supreme Court allowed the plaintiff to sue the distributor because of the manufacturer's foreign chartering).

33. LA. CIV. CODE art. 2521.

presumption of knowledge, ever since *Ross v. John's Bargain Stores Corp.*,[34] the courts have found that the seller has constructive knowledge of the vice if it is discoverable in the exercise of ordinary care. For example, the court allowed recovery of attorney's fees in one case by finding that the seller should have known of the leak in a windshield it had installed but failed to test.[35] Therefore, the court held the seller responsible as if it had known of the vice and were a bad faith seller. This practice of imputing constructive knowledge imposes a duty to inspect with ordinary care. Thus the present law is unclear as to whether a seller owes a duty to inspect to the consumer, a point which is determinative of the extent of the dealer's liability in an action in redhibition. It is at this point in the scheme of marketing automobiles that a professional seller standard is needed. The professional seller standard employed today in France[36] imputes knowledge of vices to one whose business it is to sell that product and who thus should know his wares.[37] The professional seller of automobiles would be one who exercised "a profession touching commerce in automobiles" or a "professional manufacturer or intermediary in automobiles."[38] The first advantage of imposing this professional seller standard would be to make the law in Louisiana clearer and more consistent. Presently, there is no apparent duty incumbent on a seller to inspect the car he sells for redhibitory vices, yet two situations seem to impose such a duty. First, the courts in some cases have found the seller to have constructive knowledge of a defect, saying, in effect, that he should have known of it.[39] The professional seller standard would impose a uniform duty to inspect on all professional sellers, whether manufacturers, distributors, or dealers, not leaving the seller in uncertainty as to his obligation to inspect. The other situation that highlights the inconsistency of the present law is the automobile seller who is sued in tort for damages resulting from defects in a car. To hold the dealer liable, the court must find that he had a duty, which he breached, to inspect for defects. If a dealer owes a duty to inspect for tort purposes, requiring the same inspec-

34. 464 F.2d 111 (5th Cir. 1972) (a nonauto case, but source of the theory of constructive knowledge of the seller).

35. Wade v. McInnis-Peterson Chevrolet, 307 So. 2d 798 (La. App. 1st Cir. 1975).

36. C. CIV. art. 1646 n.7.

37. Imposition of this standard was suggested in Litvinoff, *The Work of the Louisiana Appellate Courts for the 1973-74 Term—Sales*, 35 LA. L. REV. 310 (1975) and in Justice Barham's concurrence in denial of writ in Peltier v. Seabird Indus., 309 So. 2d 343 (La. 1975).

38. Judgment of 19 fevrier 1924, Paris, Gaz. Pal. 1924.1.650 (translation by this author).

39. Evangeline Medical & X-Ray Distribs. v. Coleman Oldsmobile, Inc., 402 So. 2d 208 (La. App. 1st Cir. 1981); Wade v. McInnis-Peterson Chevrolet, 307 So. 2d 798 (La. App. 1st Cir. 1975); Ross v. John's Bargain Stores Corp., 464 F.2d 111 (5th Cir. 1972).

tion for contract purposes is not a burdensome obligation. Furthermore, the new standard would equalize the protection of tort plaintiffs and contract plaintiffs in requiring inspections in anticipation of both kinds of claims.

Another advantage in imputing knowledge of vices to a professional seller would be to give more protection to the consumer by making the prescriptive period applicable to all professional sellers that of Civil Code article 2546, one year from the date of discovery of the vice, rather than one year from the date of the sale, as is applicable to good faith sellers under Civil Code article 2534. The consumer also would be entitled to attorney's fees and damages incurred, in addition to a return of the purchase price and the expenses of the sale under Civil Code articles 2531 and 2545. The state thus would be encouraging dealers to inspect and know their wares, which might prevent some injuries and losses. This standard also would be applied to distributors who earned their living by selling cars, and thus all links in the marketing chain would be required to ascertain the quality of their products or be liable for the vices in them. While the costs of inspection to professional sellers might be high, the additional expense would be justified at least partially by the fact that professional sellers hold themselves out as experts and the public relies to a great extent on their claims.

One disadvantage of imposing this standard would be that the price of the products probably would rise as the sellers passed their costs on to consumers. Also, one commentator has opposed establishing this standard on the ground that the legislature clearly indicated in Civil Code article 2545 that a vendor was in bad faith only when he knew of the vice and failed to declare it.[40] He argues that the bad faith required is the kind of fraudulent conduct defined in Civil Code article 1934(1) and that imputed knowledge is not the fraudulent behavior that the legislature envisioned as being the only basis for liability for attorney's fees and damages. Thus far no Louisiana court has adopted the professional seller standard.

If the professional seller standard were imposed, the law would be more certain in that imputation of constructive knowledge on a case-by-case basis no longer would be necessary. The present practice of the courts is to decide in each case whether the dealer should have known of the vice. With the imputation of knowledge of the defects to all professional sellers, courts no longer would be faced with the question; they would hold that all professional sellers should have known. Imposition of the professional seller standard would allow

40. Campbell, *The Remedy of Redhibition: A Cause Gone Wrong*, 22 LA. B.J. 27 (1974).

greater consumer protection without unsettling the law in other areas related to redhibitory actions. For example, dealer fault, not simply dealer bad faith, still would be required to free the manufacturer from liability.[41] Nor would there be a change in determining indemnity or contribution among participants in the chain of distribution. Indemnity and contribution between manufacturers and dealers held liable in solido under *Media* still would not be determined on the good or bad faith of the seller, but rather on the seller's fault in causing the redhibitory vice. This conclusion is based on the court's construction of Civil Code article 2531 in *Evangeline Medical & X-Ray Distributors v. Coleman Oldsmobile, Inc.*[42] There the trial court found that Coleman, the dealer, had constructive knowledge of the defects and was, therefore, in bad faith. The manufacturer of the motor home involved argued that the seller's right to indemnification from the manufacturer under Civil Code article 2531 was granted only to the seller in good faith mentioned in paragraph one of the article. The court held that paragraph two was not limited to the seller in good faith and, therefore, that Coleman was entitled to indemnification from the manufacturer.[43] Unless the supreme court is later presented with this question and decides to the contrary, no effect will flow from the professional seller standard in the area of indemnity.

Conclusion

The advantages of instituting a professional seller standard in Louisiana outweigh the disadvantages. Such a standard would give more protection to consumers through longer prescriptive periods in which to bring actions in redhibition and by allowing the recovery of damages and attorney's fees. There would be no upheaval in the present law since the only significant effect of imposing constructive knowledge on sellers would be that courts no longer would decide on a case-by-case basis whether the seller knew of the vice. The standard also would satisfy the dictates of fairness; since the seller often claims to be a professional, his liability should be commensurate with his claims. The possible increase in the cost of automobiles would be justified by the greater degree of care dealers would exhibit in ascertaining the quality of their merchandise; likewise, there would be an

41. Bell v. Fiat Distribs., Inc., 357 So. 2d 607 (La. App. 1st Cir. 1978).

42. 402 So. 2d 208 (La. App. 1st Cir. 1981).

43. A good argument can be made that the right to indemnity granted in Civil Code article 2531 is granted only to good faith sellers. First, the right is granted in an article which addresses only the liability of good faith sellers. The rights and liabilities of bad faith sellers are addressed in another article. Second, courts refuse to hear the pleas of plaintiffs who come to court with unclean hands, and one who knew a product had a vice and sold it without declaring the vice would not have clean hands.

attendant decrease in the number of products sold containing vices. In essence, the professional seller standard would be directly aligned with "the consumer protection rule" adopted in *Media* and would support the strong public policy Louisiana has in regulating the sale of automobiles.[44]

Jeanne Frances Harvey

---

44. LA. R.S. 32:1251 (Supp. 1963) reflects this public policy:

> The legislature finds and declares that the distribution and sale of motor vehicles in the State of Louisiana vitally affects the general economy of the state and the public interest and the public welfare, and that in order to promote the public interest and the public welfare, and in the exercise of its police power, it is necessary to regulate and to license motor vehicle manufacturers, distributors, and dealers doing business in Louisiana, in order to prevent frauds, impositions, and other abuses upon its citizens, and avoid undue control of the independent motor vehicle dealer by the motor vehicle manufacturing and distributive organizations and foster and keep alive vigorous and healthy competition by prohibiting unfair practices by which fair and honest competition is destroyed or prevented, and to protect the public against the creation or perpetuation of monopolies and practices detrimental to the public welfare, to prevent the practice of requiring the buying of special features, appliances and equipment not desired or requested by the purchaser, to prevent false and misleading advertising, to prevent unfair practices by motor vehicle dealers, manufacturers and distributing organizations, to promote the public safety and prevent disruption of the system of distribution of motor vehicles to the public and prevent deterioration of facilities for servicing motor vehicles and keeping same safe and properly functioning, and prevent bankrupting of motor vehicle dealers, who might otherwise be caused to fail because of such unfair practices and competition, thereby resulting in unemployment, disruption of leases, and nonpayment of taxes and loans, and contribute to an inevitable train of undesirable consequences, including economic depression.

See also Baughman v. Quality Mobile Homes, 289 So. 2d 376 (La. App. 1st Cir. 1974).