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IV. CONCLUSION

In *Smith v. Maryland* the Supreme Court held that there was no legitimate expectation of privacy in the numbers dialed from a private residential telephone. Based upon opinion and belief rather than demonstration or experience, the Court held that not only did the petitioner exhibit no subjective expectation of privacy, but that even if he had, society would not recognize that expectation as reasonable. In so holding, the Court foreclosed any future argument that pen register surveillance should be subject to the restrictions of the fourth amendment. It is unfortunate that the Court closed the book on this chapter of the fourth amendment without examining factors such as the potential for abuse of pen register surveillance, the possible chilling effect on first amendment free speech rights, and the general absence of exigent circumstances that would prevent the timely procurement of a warrant. Indeed, when these factors are properly weighed, the general public, of whose expectations the Court speaks so knowledgeably, may not only be prepared to recognize Michael Lee Smith's expectations of privacy as reasonable, but may demand such protection for themselves.

Les Brannon

Barker v. Allied Supermarket: An Expanded Interpretation of the UCC's "Contract for Sale"

Brack Barker entered Arlan's Food Store in Midwest City, Oklahoma, for the purpose of purchasing groceries. When he lifted a carton of Dr Pepper from the self-service shelf and attempted to place it in his shopping cart, one of the bottles exploded, injuring Barker's right eye. Two years and one day later Barker filed suit against both the retailer and the manufacturer of the beverage for negligence and breach of an implied warranty of merchantability. The trial court sustained the defendants' demurrers, concluding that the action sounded in tort¹ and was barred by the applica-

Legislative Proposal, 38 S. CAL. L. REV. 622, 628 (1965). Justice Marshall did not expressly discuss the chilling effect of the pen register on the first amendment freedoms of the groups he enumerated, but that appears to be the next logical step in his analysis. *But see* Note, *supra* note 1, at 1035 n.45.

1. In sustaining the demurrers, the trial court relied on *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974). In *Kirkland* the Oklahoma Supreme Court held that the two-year tort limitations period applies in actions brought by persons physically injured by a defective product. The trial court in *Barker* interpreted *Kirkland* as also holding that the limitations period was based on a theory of manufacturer's products liability and applied whether or not the plaintiff pleaded contractual liability based on implied warranty. *Barker v. Allied Supermarket*, 20 U.C.C. Rep. 6 (Okla. Ct. App. 1976). The trial court interpreted *Kirkland* as abolishing an action for breach of warranty. *Id.* at 8.

ble two-year statute of limitations.² The Oklahoma Court of Appeals reversed in part,³ holding that plaintiff had pleaded a cause of action for breach of an implied warranty of merchantability against the food store⁴ and that the limitations period for this cause of action was five years.⁵ On separate applications of the plaintiff and the food store, the Oklahoma Supreme Court granted certiorari. *Held, decision of court of appeals vacated; judgment of trial court reversed and remanded*: A buyer of goods who is invited by a merchant to take possession thereof from a self-service display and to defer payment to some time subsequent to the taking of possession has the protection of an implied warranty of merchantability that arises from a contract for sale. *Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979).⁶

I. UNIFORM COMMERCIAL CODE—"CONTRACT FOR SALE"

When a consumer sues a retailer for damages for breach of an implied warranty, it is necessary to establish the existence of a warranty.⁷ Because article 2 of the Uniform Commercial Code (UCC) provides that a warranty arises from a contract for sale,⁸ the consumer ordinarily must prove

2. OKLA. STAT. ANN. tit. 12, § 95 (West 1960).

3. The court of appeals affirmed the trial court's dismissal of the suit against the defendant manufacturer, holding that plaintiff had failed to allege a contractual relationship between himself and the bottler and that such a relationship was essential for an action under the Uniform Commercial Code. *Barker v. Allied Supermarket*, 20 U.C.C. Rep. 6, 10 (Okla. Ct. App. 1976).

4. The court of appeals found that the trial court erred in its interpretation of *Kirkland*, see note 1 *supra*, and stated that breach of warranty is still recognized as a valid cause of action as provided in the Uniform Commercial Code. 20 U.C.C. Rep. at 9; see *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1364-65 (Okla. 1974). See also *O'Neal v. Black & Decker Mfg. Co.*, 523 P.2d 614 (Okla. 1974); *Moss v. Polyco, Inc.*, 522 P.2d 622 (Okla. 1974).

5. OKLA. STAT. ANN. tit. 12A, § 2-725(1) (West 1963).

6. The court also held that the UCC-based implied warranty of food or drink under U.C.C. § 2-314 extends from a food packager-bottler to a consumer at a retail supermarket notwithstanding lack of privity. Accordingly, *Barker* could pursue his warranty claim against the bottler. See *Jackson v. Cushing Coca-Cola Bottling Co.*, 445 P.2d 797 (Okla. 1968); *Southwest Ice & Dairy Prods. Co. v. Faulkenberry*, 203 Okla. 279, 220 P.2d 257 (1950). The recent trend has been to reject the privity requirement completely in actions in which the buyer seeks to recover for product-caused personal injuries against a remote manufacturer. See *generally* Annot., 75 A.L.R.2d 39, 88 (1961). Even in jurisdictions that still enforce the privity requirement in products liability actions brought on a theory of breach of warranty, courts have abolished the privity requirement as against public policy in cases based on an injury caused by food products. See *id.* at 71. This exception to the general rule applies even when the injury is caused by a defect in the container in which the food product was sold. See, e.g., *Vassallo v. Sabatte Land Co.*, 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (1963).

7. *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874 (1974), *aff'd in part and rev'd in part sub nom.* *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975).

8. U.C.C. § 2-314(1) provides:

Unless excluded or modified (Section 2-316), 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. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

first that a contract for sale existed at the time of the injury.⁹ Whether a contract for sale exists when a consumer removes goods from the grocery shelf in a self-service store¹⁰ is a question that has been addressed by the courts of appeals in Maryland,¹¹ Georgia,¹² and North Carolina.¹³ Each court found that a contract for sale is formed when the consumer removes a product from the shelf. Relying on the relevant provisions of the UCC, these courts have recognized that the phrase "contract for sale" generally includes both a present sale and a contract to sell at a future time¹⁴ and that passage of title does not determine whether a contract for sale has been formed.¹⁵ Further, these courts have found that the consumer's option to return merchandise at any time prior to payment does not affect the formation of the contract.¹⁶

The leading decision to find the formation of a contract in the act of selecting a product from the shelf is *Sheeskin v. Giant Food, Inc.*¹⁷ In this case the Maryland court reasoned that the retailer's act of placing the goods upon the shelf with a price affixed to their container constituted an

9. *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874, 880 (1974), *aff'd in part and rev'd in part sub nom.* *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975); U.C.C. § 2-314, Comment 13. The consumer must also show that the warranty was breached and that the breach of warranty was the proximate cause of the loss sustained.

10. *Cf. Green v. Safeway Stores, Inc.*, 541 P.2d 200 (Okla. 1975) (breach of warranty clearly existed when bottle exploded after consumer had paid for it).

11. The leading case is *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874 (1974), *aff'd in part and rev'd in part sub nom.* *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975). In *Sheeskin* bottles of Coca-Cola exploded after the consumer had lifted the bottles and had taken three or four steps toward his shopping cart.

12. In *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976), bottles exploded as the consumer was placing them on the check-out counter for payment.

13. In *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972), a bottle of Sprite exploded as the consumer was carrying it directly to the check-out counter. *See generally* Annot., 78 A.L.R.3d 697 (1977).

14. U.C.C. § 2-106(1) provides: "In this Article unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods. 'Contract for sale' includes both a present sale of goods and a contract to sell goods at a future time." *See Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691, 694 (1976); *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874, 883 (1974), *aff'd in part and rev'd in part sub nom.* *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975); *cf. Gillespie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441, 444 (1972) (court was concerned with when a sale occurs).

15. U.C.C. § 2-401 provides: "Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies *irrespective of title* to the goods except where the provision refers to such title." (Emphasis added.) *See Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691, 694 (1976); *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874, 883 (1974), *aff'd in part and rev'd in part sub nom.* *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975). *But see Gillespie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441, 444 (1972) (passage of title was determinative of whether a contract for sale existed).

16. *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691, 694 (1976); *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874, 883 (1974), *aff'd in part and rev'd in part sub nom.* *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975); *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441, 444 (1972).

17. 20 Md. App. 611, 318 A.2d 874 (1974), *aff'd in part and rev'd in part sub nom.* *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975).

offer to the consumer to enter into a contract.¹⁸ Because the UCC provides that an offer to make a contract invites acceptance in any manner reasonable under the circumstances,¹⁹ under the terms of the retailer's offer a consumer could accept by promising to pay for the goods, as evidenced by taking physical possession of the goods after removing them from the shelf.²⁰ The Maryland court held that a contract for sale came into being at that moment.²¹ The court reached this conclusion even after recognizing that a customer may change his mind and return goods to the shelf.²² The consumer's option to replace the product on the shelf merely indicated an agreement by the contracting parties to permit the consumer to end his contract.²³

The court acknowledged the existence of contrary decisions in other jurisdictions.²⁴ Nevertheless, the court distinguished these decisions because they were decided apart from the UCC and pursuant to law that held passage of title to be a legal prerequisite to any warranty action.²⁵ Each of these decisions had found that a contract did not exist because the consumer had not yet purchased the good.²⁶ The Maryland court rejected this reasoning, holding that a contract for sale did not depend upon the passage of title and could arise before payment actually was made and title passed.²⁷

In *Fender v. Colonial Stores, Inc.*²⁸ the Georgia Court of Appeals agreed with the *Sheeskin* decision, finding that a contract for sale arose when a

18. 318 A.2d at 822. The terms of the offer were that the retailer would pass title to the goods when the buyer presented them at the check-out counter and paid the stated price. *But see* Gillispie v. Great Atl. & Pac. Tea Co., 14 N.C. App. 1, 187 S.E.2d 441, 444 (1972) (title passed when buyer took possession of goods with intention of paying for them).

19. U.C.C. § 2-206(1) provides: "Unless otherwise unambiguously indicated by the language or circumstances (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances"

20. 318 A.2d at 882. A consumer could also accept by paying for the goods or by promising to pay for the goods, as evidenced by physical delivery of the goods to the check-out counter. *Id.*

21. *Id.* at 883. The contract is a bilateral executory agreement to transfer title to the goods for a price. *See* note 54 *infra*.

22. 318 A.2d at 883.

23. *Id.*

24. *See* Lasky v. Economy Grocery Stores, 319 Mass. 224, 65 N.E.2d 305 (1946) (the offer could not be considered as accepted until the price was paid); *Day v. Grand Union Co.*, 280 A.D. 253, 113 N.Y.S.2d 436, *aff'd mem.*, 304 N.Y. 821, 109 N.E.2d 609 (1952) (no warranty was implied because there was no contract for sale); *Loch v. Confair*, 361 Pa. 158, 63 A.2d 24 (1949) (to find a contract of sale upon the buyer's selecting the bottles from the shelf would "require that the law remain blind to reality and completely ignore established basic legal concepts").

25. 318 A.2d at 883.

26. *See* *Day v. Grand Union Co.*, 280 A.D. 253, 113 N.Y.S.2d 436, 437, *aff'd mem.*, 304 N.Y. 821, 109 N.E.2d 609 (1952), in which the court stated that "if the classic tests to be applied to contracts are employed here there was yet no contract and, of course, no implied warranty resting on contract."

27. 318 A.2d at 883. The court emphasized that the UCC embodied a flexible approach to contracting, rejecting the more rigid concept of title to which the Uniform Sales Act adhered. *See* note 14 *supra*.

28. 138 Ga. App. 31, 225 S.E.2d 691 (1976).

consumer removed goods from the shelf.²⁹ By taking physical possession of the goods, the consumer promised to pay their stated price; this promise was sufficient consideration to support a contract.³⁰

The North Carolina Court of Appeals reached a similar result in *Gillispie v. Great Atlantic & Pacific Tea Co.*,³¹ but based its decision on analysis of passage of title and occurrence of the sale. The court first listed several basic UCC principles: warranties arise only upon a sale of goods;³² a sale consists of the passing of title from the seller to the buyer for a price;³³ and unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the delivery of the goods.³⁴ With these principles in mind, the court concluded that once the consumer took possession of the goods with the intention of paying for them, the seller had completed his delivery and title had passed.³⁵ This title-based rationale was rejected in both *Fender*³⁶ and *Sheeskin*.³⁷

Finally, in *Lucchesi v. H.C. Bohack Co.*³⁸ a bottle of soda exploded when a consumer placed it on the checkout counter. The New York Supreme Court allowed recovery based on its finding that an implied warranty existed. The court did not, however, discuss the preliminary issue of whether a contract for sale had been established.

II. BARKER V. ALLIED SUPERMARKET

Against this background, the Supreme Court of Oklahoma decided *Barker v. Allied Supermarket* as a case of first impression in Oklahoma. The court identified the threshold question as whether a contract for sale existed.³⁹ Agreeing with the decisions based on the UCC,⁴⁰ the court concluded that a contract for sale did exist; the merchant's act of stocking the self-service display with goods represented an offer to the shopper to enter into a contract for their sale.⁴¹ In the absence of a clear statement by the

29. 225 S.E.2d at 694.

30. *Id.*

31. 14 N.C. App. 1, 187 S.E.2d 441 (1972).

32. U.C.C. § 2-314(1) provides that a warranty is implied in a "contract for sale," but the court concerned itself with a discussion of a "sale."

33. The UCC defines a sale as "the passing of title from the seller to a buyer for a price." U.C.C. § 2-106(1).

34. *Id.* § 2-401(2).

35. 187 S.E.2d at 444.

36. 225 S.E.2d 691, 694 (Ga. App. 1976).

37. 20 Md. App. 611, 318 A.2d 874, 884 (1974), *aff'd in part and rev'd in part sub nom. Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975).

38. 8 U.C.C. Rep. 326, 328 (N.Y. Sup. Ct. 1970).

39. 596 P.2d at 871.

40. The court did not expressly distinguish the passage of title approach taken in *Gillispie*. The court noted, however, that title to goods has been deemphasized under the UCC. In particular, it cited U.C.C. § 2-401, *see note 15 supra*, which states that unless a particular UCC provision specifically refers to title, the rights and remedies of purchasers as set forth in art. 2 apply irrespective of title. The court stated that this exception in § 2-401 had not been triggered and that title to the bottle was thus irrelevant. 596 P.2d at 873.

41. *Id.* at 872.

seller that acceptance could be accomplished only by an act of payment, it was reasonable for the consumer to accept the offer by promising to deliver the goods to the checkout counter and pay for them.⁴² The court stated that the consumer's acceptance was sufficiently evidenced by his taking physical possession of the goods.⁴³ According to the court, the custom in grocery stores of allowing shoppers to change their minds and to return goods to the shelves did not prevent a contract for sale from arising at the moment the shopper lifted the goods from the shelf;⁴⁴ instead, the permission to return the goods is a custom of the trade, which in the absence of modification becomes a part of the shopping agreement.⁴⁵ An exercise of the contractual provision would therefore merely terminate the contract pursuant to the parties' shopping agreement.⁴⁶ In addition, the court noted that if the seller breached before the buyer paid for the goods, the buyer could cancel the contract and pursue his remedies for breach.⁴⁷

The essential issue in *Barker* was whether a contract for sale is formed at the moment a consumer in a self-service store takes possession of an item, despite the consumer's right to reshelve the item for any reason before payment.⁴⁸ The court in *Barker* held that a contract is formed, determining that the buyer's right to reshelve unwanted goods entitled the consumer to terminate the contract.

The Oklahoma Supreme Court's discussion of termination was premature, however, because a party cannot terminate a contract unless a legally enforceable contract existed before the termination.⁴⁹ Accordingly, the court's treatment of the buyer's option to return goods begs the question of whether a contract has been formed. The applicable provisions of the UCC or, if none are applicable, the law of contracts, determine whether a legally enforceable obligation exists.⁵⁰ Since the UCC does not specify

42. *Id.*

43. *Id.*; see note 19 *supra*.

44. 596 P.2d at 872.

45. U.C.C. § 1-201(3) provides: "'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances *including course of dealing or usage of trade or course of performance* as provided in this Act . . ." (Emphasis added.) Course of dealing is defined in U.C.C. § 1-205. See generally Levie, *Trade Usage and Custom under the Common Law and the Uniform Commercial Code*, 40 N.Y.U. L. REV. 1101 (1965).

46. U.C.C. § 2-106(3) provides: "'Termination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On 'termination' all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives." See 596 P.2d at 872.

47. 596 P.2d at 873. The UCC provides that "[c]ancellation' occurs when either party puts an end to the contract for breach by the other. The effect of cancellation is the same as that of 'termination,' except that the cancelling party also retains any remedy for breach of the whole contract. U.C.C. § 2-106(4).

48. 596 P.2d at 872.

49. "Contract" is defined as "the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." U.C.C. § 1-201(11); see 1 A. CORBIN, CONTRACTS § 3 (1950); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1973). Under the UCC, "contract" is distinct from "agreement," which includes all agreements whether legally enforceable or not.

50. U.C.C. § 1-201(3) provides:

"Agreement" means the bargain of the parties in fact as found in their lan-

what makes a contract legally enforceable, a court is directed by section 1-103⁵¹ of the UCC to look to the common law of contracts.⁵² Pursuant to common law principles of contract, a contract did not exist in *Barker* at the time the bottle exploded.⁵³ As a general rule, mutuality of obligation is a prerequisite to the formation of an executory bilateral⁵⁴ contract.⁵⁵ The doctrine of mutuality of obligation states that when the sole consideration in a bilateral contract is the parties' promises, the promises must be binding on both parties.⁵⁶ If an executory contract based upon the consideration of mutual promises gives one party an absolute and arbitrary right to cancel the contract at any time, the contract is illusory and unenforceable.⁵⁷ Accordingly, when a consumer in a self-service store takes possession of a good by removing it from the store shelf, no contract for sale arises. The buyer's option to return the good at any time prior to paying for it destroys the mutuality of obligation and renders the shopping agreement unenforceable. In *Barker*, therefore, since no contract for sale existed, no implied warranty could arise, and thus no claim for breach of an implied warranty of merchantability could prevail. Since *Barker's* action in tort was barred by the applicable statute of limitations, the court should have denied *Barker* any recovery.

guage or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act
Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts

(Emphasis added.)

51. U.C.C. § 1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

52. The common law remains in force in aid of the general statutes of Oklahoma, and therefore the UCC. OKLA. STAT. ANN. tit. 12, § 2 (West 1960).

53. See note 24 *supra* and accompanying text.

54. An executory bilateral contract consists of mutual promises made in exchange for each other by the contracting parties. A bilateral contract is distinct from a unilateral contract, which consists of a promise made by only one of the contracting parties. In a unilateral contract only the promisor is under an enforceable legal duty. In a bilateral contract, however, both parties are promisors, and thus both are under an enforceable legal duty. See generally 1 A. CORBIN, *supra* note 49, §§ 21, 62, 70.

The self-service transaction at issue in *Barker* was a bilateral agreement. The food store had promised to transfer title to the goods for a price in exchange for the consumer's promise to pay for the goods as evidenced by the act of taking possession of the goods by removing them from the store shelf. Thus, a promise is given in exchange for a promise. See *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874 (1974), *aff'd in part and rev'd in part sub nom. Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975). Whether this bilateral transaction is a contract depends on whether these mutual promises are binding on both parties. See text accompanying note 56 *infra*.

55. *Rich v. Doneghey*, 71 Okla. 204, 177 P. 86 (1918); see 1A A. CORBIN, *supra* note 49, § 152.

56. See *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691, 694 (1976); *Consolidated Pipe Line Co. v. British Am. Oil Co.*, 163 Okla. 171, 21 P.2d 762 (1933); 1 A. CORBIN, *supra* note 49, § 147. See also *Adalex Laboratories, Inc. v. Krawitz*, 270 P.2d 346 (Okla. 1954).

57. See, e.g., *R.F. Baker & Co. v. P. Ballantine & Sons*, 127 Conn. 680, 20 A.2d 82 (1942). See generally 1 & 1A A. CORBIN, *supra* note 49, §§ 147, 152.