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Utah Supreme Court Holds that Promotional Materials May Constitute an Express Warranty

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UTAH SUPREME COURT HOLDS THAT PROMOTIONAL MATERIALS MAY CONSTITUTE AN EXPRESS WARRANTY

In *State of Utah by the Division of Consumer Protection v. GAF Corp.*, 760 P.2d 310 (Utah 1988), the Utah Supreme Court held that promotional materials provided by a manufacturer to a retailer, which were then provided to a consumer, could be construed as the basis for an express warranty. The court also held that such a warranty may exist despite the absence of privity between the manufacturer and the consumer and the absence of apparent authority between the manufacturer and retailer.

Background

In June 1974, Dr. Dewey MacKay contracted with Pendleton Builders ("Pendleton") to install a new roof on his home. Pendleton showed Dr. MacKay a sample of a Slate Blend Timberline asphalt shingle made by GAF Corporation ("GAF"). Pendleton also showed Dr. MacKay materials promoting the shingle, including pictures of a house newly roofed with the shingles.

According to his deposition, Dr. MacKay was also informed by either Pendleton or its subcontractor that the shingle was GAF's top-of-the-line, self-sealing shingle. Dr. Mackay was further informed that the shingle was made of the highest quality asphalt and that it carried a twenty-five-year guarantee. Upon these representations, Dr. MacKay purchased Timberline shingles and had them installed on his roof.

In 1981, the shingles started to curl due to improper sealing. Dr. MacKay contacted GAF, who sent its representative to Dr. MacKay's home to conduct tests on the shingles. The tests demonstrated that the shingles were defective at the time they had been installed. Thereafter, GAF informed Dr. MacKay that GAF's liability was limited by GAF's written "Asphalt Shingle Warranty." Dr. MacKay did not possess a copy of the warranty.

After learning of GAF's limited liability, Dr. MacKay complained to the State of Utah Division of Consumer Protection ("the Division"). The Division thereafter filed a suit against GAF alleging that GAF had violated the Utah Consumer Sales Practices Act ("the Act"), Utah Code Ann. §§ 13-11-1 to 13-11-23 (1987). The trial court granted GAF's motion for summary judgment because it reasoned that the Division was not authorized to sue on behalf of a consumer based on the consumer's complaint filed with the Division. Additionally, the court held that Pendleton did not possess the requisite authority to make express warranties about GAF's products and that GAF's liability was limited by its written warranty. On appeal, the Utah Supreme Court reversed the trial court's summary judgment order and remanded the case for further proceedings.

Utah Supreme Court: Division of Consumer Protection Need Not Sue First

The court first considered whether the Division could sue for damages to a consumer based on the consumer's complaint filed with the Division. GAF argued that the Division's enforcing authority under § 13-11-17 of the Act, which was amended in 1983, allows the Division to recover damages only for those consumers who file complaints with the Division *after* the Division has already instituted a lawsuit. The court disagreed, stating that such a construction of the statute would defeat the objective of providing a remedy to consumers who have purchased defective products and who cannot or choose not to file a law suit for economic reasons.

The court noted that, prior to the 1983 amendment, the Act authorized the Division to collect damages only on behalf of consumers who complained to the Division *before* the Division filed suit. The court held that the 1983 amendment was intended to allow consumers to join a pending action within a reasonable time after the Division filed suit, thereby eliminating the need for the Division to file a new lawsuit for subsequent consumer complaints about the same product or service.

Deceptive Practices Include Untrue Representations

The court then considered whether the Division had stated a valid claim for which relief could be granted. The Division's first claim for relief was based on § 13-11-4(2)(b) of the Act. Under that provision, deceptive practices or acts

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include untrue representations made by a supplier about a product's standard, quality, grade, style, or model. The Division alleged that GAF had represented the Timberline shingles to be top-of-the-line shingles but that they were in fact defective. The court held that the Division's allegation, if proven, would be a violation of the Act. The court further held that the applicable version of § 13-11-4(2)(b), prior to being amended in 1985, did not require intent to deceive on the part of the supplier. Accordingly, despite the fact that GAF was unaware of the defective condition of the shingles, the Division had stated a valid claim for relief under the Act.

The Division's second claim for relief was based on § 13-11-4(2)(j), which defines deceptive practices and acts to include false representations of warranties. The Division argued that GAF, through its promotional materials or its agent, Pendleton, made deceptive representations about the shingles' express warranty. Although the court stated that generally speaking this claim was a valid claim for relief under the Act, the court held that, here, Pendleton did not have apparent authority to make representations regarding GAF's products. An agent's statements may be imputed to a principal when the principal knows of or agrees with the statements. In such cases the agent would be held to have apparent authority for the principal. However, here the court held that merely providing Pendleton with promotional materials was not enough to establish Pendleton's apparent authority for GAF. Therefore, to the extent the Division's claims against GAF were based on statements made by Pendleton they failed to state a claim for relief under the Act.

Promotional Representations Construed as an Express Warranty

The court reasoned that GAF's promotional materials provided a valid basis for the Division's breach of warranty claim. An express warranty may exist if it is reasonable to conclude that a person entered into a transaction based on a seller's statement of fact, promise or description of the products. Although actual reliance on the statement need not be shown, the statement should form a part of the basis of the bargain. The court held that the representations about the quality of the shingles contained in GAF's promotional materials could constitute express warranties under the Act.

Finally, the court held that privity of contract is not required to demonstrate a breach of an express warranty. The court stated that manufacturers create a large part of the demand for their products through representations in promotional materials. Therefore, it is not unjust to hold manufacturers accountable under an express warranty, despite a lack of privity. The court held Dr. MacKay's testimony established a prime facie case that the promotional materials provided express warranties and thus summary judgment was inappropriate. The court reversed the trial court's order of summary judgment and remanded the case for further proceedings.

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