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# The Need for Protection of the Consumer of Services

Robert M. Feinson

In other words, the inquiry would shift to the rule of reason rubric, with the burden of proof of unreasonableness on the plaintiff, as it ordinarily would be.

### IV. Conclusion

It is submitted that by means of the foregoing *conditional per se* approach, the determination of the legal status of territorial restraints would be more logical, workable and equitable than the present procedure explained in the *Schwinn* case.[149] Where it is fair to do so, the courts would be able to forego elaborate examination of business circumstances surrounding the restraint. But where the purpose and effect of a restraint allow for an inference that the restraint may further the ends of antitrust, common sense and fairness militates for a thorough inquiry into the actual effects on competition. Businessmen would favor such a procedure, knowing that necessary business conduct toward an acceptable end would not be arbitrarily prohibited under an inflexible per se rule. Consumers would benefit from enhanced competition, that is presently precluded, in those instances where territorial limitations have beneficial overall effects. And as suggested previously, the burden on the Supreme Court of deciding complicated antitrust cases could be mitigated by revision of the Expediting Act, or some similar change of procedure. It is therefore suggested that a conditional per se approach to the legal status of vertical territorial and customer restraints is an improvement upon the existing law and a fair compromise among the competing interests of manufacturers, dealers, plaintiffs, courts, and consumers.

Kenneth D. Weiss

## THE NEED FOR PROTECTION OF THE CONSUMER OF SERVICES

### Introduction

A legal distinction has been made for hundreds of years between sales and service contracts. For example, the original English Statute of Frauds,[1] passed in 1677, declared itself applicable to any contract for the sale of goods worth more than ten pounds,[2] but not applicable to service contracts if the work could be performed within one year.[3] Today there exists a whole body of law dealing with the sales contract as separate from other types of contracts. This

149. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

1. 29 Chas. 11.
2. Fuller, L., and Braucher, R., Basic Contract Law (1963) at 796.
3. *Id.*

separate treatment of sales contracts has been justified on the grounds that the sales situation presents problems too specific to be handled by the general contract laws.[4]

Whatever relevancy the distinction between sales and nonsales contracts has with respect to the solutions of various contract problems, such a distinction would seemingly be irrelevant in determining the applicability of consumer protection measures. Currently, however, most courts and legislatures are making the applicability of consumer protection measures dependent upon the presence of a sale. The recent federal consumer protection laws have dealt exclusively with sales transactions,[5] and, courts appear willing to give more protection to the consumer of goods by more readily and more extensively reading implied warranties into sales contracts than into the service contracts. Manufacturers and vendors thus impliedly warrant that their goods are of at least average quality[6] and are suitable for the intended use.[7] However, all that a servicer[8] impliedly warrants is that he possesses the ordinary skills of the trade[9] and that he uses those skills in performing the work.[10] The result that the service produces is not warranted,[11] *e.g.*, an auto repairman who fixes brakes warrants only that he has the skill of an average repairman but he does not warrant that the brakes are fixed.

A consumer not in privity on the contract will also find a big difference between a sales contract and a service transaction. While today there is a trend towards strict liability in torts applied to the vendor in a sales contract[12] notwithstanding lack of privity, the consumer not in privity on the non-sales contract must prove negligence on the part of the servicer in order to recover for his damages.[13]

In determining whether the present market situation continues to justify this laissez-faire policy exhibited by the courts and legislatures, it must first be determined whether the purposes for having consumer protection are applicable to the non-sales situation and, if so, whether the practices in the market justify legislative and judicial intervention on behalf of the consumer.

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4. G. Bogert, W. Britton, W. Hawkland, Sales and Security (1962) at 3.

5. For a list of the recent Federal Acts dealing with consumer protection see, Forte, *The Department of the Consumer*, 20 Vand. L.R. 969 (1967).

6. Uniform Commercial Code § 2-314.

7. Uniform Commercial Code § 2-315.

8. Servicer as used in this article means: A person who provides services as his occupation and holds himself out as having knowledge or skill peculiar to the practices involved in the transaction.

9. Pussey v. Webb, 18 Del. 490, 47 A. 701 (charge to the jury, 1900).

10. *Id.*

11. *Id.*

12. Greenman v. Yuba Power Prds. Inc., 27 Cal. Rptr. 2d 697, 377 P.2d 897 (1963). *See also*, Restatement of Tort 2d § 402 A.

13. Moody v. Martin Motor Co., 203 Ga. 18, 46 S.E.2d 197 (1948) (citing MacPherson v. Buick Motors Co., 217 N.Y. 382, 111 N.E. 1050 (1916). *See also*, Central & Southern Truck Lines v. Westfall G.M.C. Truck, Inc., 317 S.W.2d 841 (Mo., 1958).

## I. Functions of Consumer Protection

There are three main functions of consumer protection that have come to be accepted as sufficient reasons for government interference into the mechanisms of the market place.[14] One such function, to insure public safety, clearly does not depend on the type of transaction involved. The substandard services of a servicer can be as dangerous to the public as a defective product produced by a manufacturer and sold by a vendor. For example, a car which has defective brakes caused by an automobile repairman is as much a hazard to the public as is a car with defective brakes sold by a dealer.

A second function of consumer protection, long considered the most important, if not the only function, is the prevention of frauds.[15] Whether the transaction involves a sale of goods or services, the evil to be prevented is the fraud. In this area there has not been the usual attempt to distinguish between sales and services for it is clear that the distinction is irrelevant.

Implicit in the passage of the Fair Packaging and Labeling Acts[16] is a third function of consumer protection. That function is to correct an imbalance existing in favor of the supplier in the pricing mechanism of the market created by the use of trade names, certain types of advertisement and promotional campaigns, and the presence on the market of non-comparable fungible goods.[17] This type of protection is needed because the consumer is normally uninformed and has no convenient way of obtaining the necessary information to assist him in making a rational decision. In this respect the consumer of services is in a far less favorable position than the consumer of goods. Where the latter generally has the object to inspect, all that the purchaser of services normally has is the advice of the person who will perform the service. Clearly the rational and policy considerations supporting the Fair Packaging and Labeling Acts also support, at least as strongly, similar protections for the consumer of services.

## II. Business Practices

There are practices in both sales and service transactions which can place the consumer in an unfavorable position. In the area of sales, there has been concern for such evils as the referral contract,[18] installment buying agreements,[19] and financing charges.[20] But many practices in the area of services such as those often employed in the automobile repair industry are equally disadvantageous

14. *See*, Barber, *Government and the Consumer*, 64 Mich. L.R. 1197 (1966).
15. *Id.*
16. 80 Stat. 1296-1302, P.L. No. 89-775, 21 U.S.C. 1415 (1966).
17. *See* Barber, *supra* note 14.
18. *See* Comment, *Referral Sales Contracts: To Alter or Abolish*, 15 Buf. L.R. 669 (1966).
19. *See Instalment Sales*, 2 Colum. J. of L. and Soc. Prob. 1 (1966).
20. *See* Jorden and Warren, *Disclosure of Financial Charges*, 64 Mich. L.R. 1269 (1966).

to the consumer yet have been largely ignored. For instance, recent studies[21] have disclosed that as many as 50-70% of the auto repairmen do not perform the work for which they have charged their customers. Or if the repairs are made, second hand or rebuilt parts are sometimes used and billed as new parts. Even if the work is performed and new parts are used, often there has been no need for the repairs in the first place.[22]

The dearth of legislation, case law, and literature on the subject of consumer protection from the providers of services is not justified by the number of problems involved in the area. Miss Betty Furness, the former Special Assistant to the President for Consumer Affairs, has stated that the most frequent complaint received by her office involves repairers of cars and appliances.[23]

## III. Consumer Protection

### A. *Fraud*

As already noted with respect to preventing frauds there has usually not been a distinction made between sales and services. Also, the definition of actionable fraud does not turn on the type of transaction involved.[24]

In New York, there is a Bureau of Consumer Frauds and Protection[25] under the State Attorney General which has the power to dissolve a corporation on the grounds that it has conducted its business in a "persistently fraudulant or illegal manner."[26] Alternatively, the New York Executive Law permits the Attorney General to bring an injunctive proceeding against any person who engages in repeated fraudulent or illegal acts in the transaction of his business.[27] The Bureau has been concerned with the problems of dishonest repairmen and has used its full power in dealing with them.[28] However, the protection that the Bureau can give to consumers as a group is limited to preventing *repeated* acts of fraud and it cannot aid the individual consumer directly.

### B. *Implied Warranties*

There are basic distinctions between the types of warranties courts will read into a sales or service contract. Often courts have refused to imply a war-

21. The Citizens Committee for Metropolitan Affairs, Inc. has conducted surveys of automobile repair shops in Manhattan and in Buffalo, N.Y. Results of the Manhattan survey, reported in the N.Y. Times, Oct. 1, 1967, IV, 2:5, showed that 11 out of 19 mechanics could not diagnose a simple malfunction in the test car. In Buffalo, in 8 out of 12 garages sampled, the mechanic was unable to locate a simple malfunction. Also in both cities the cost of repairs ranged from $0 to $40 for the same simple problem.

22. *See* N.Y. Times, Nov. 12, 1967, § III at 1 col. 1.

23. *See* N.Y. Times, Oct. 9, 1967 at 94 col. 7.

24. Restatement of Tort 2d § 310.

25. *See generally*, Mindell, *The New York Bureau of Consumer Fraud and Protection —A Review of Its Consumer Protection Activities*, 11 N.Y.L.F. 603 (1965).

26. N.Y. Bus. Corp. Law § 1101 (1965).

27. N.Y. Exec. Law § 63(12) (1951); as amended, L. 1954, Chapt. 68, § 2.

28. *See* N.Y. Times, Dec. 7, 1967, at 50 col. 5.

ranty in a non-sales transaction stating that one could not be implied.[29] Not only can warranties be implied in non-sales transactions but it is possible that the usual sales warranty can be read into a non-sales situation.[30]

Professor Farnsworth in a leading article[31] on this topic has suggested that the use of an analogy to sales law can aid in finding solutions in non-sales transactions. The use of this technique would depend upon the transfer of property or the transfer of possession of property. Thus, where a person has a set of pistons installed in his car, the pistons would be warranted but this warranty need not be extended to the services or labor of the supplier.[32]

In order to determine whether a new situation calls for an application of an implied warranty, circumstances where such a warranty has recently been extended should be examined.

1. *Real Estate*

In the past few years, courts have started to read implied warranties into contracts for the sale of houses.[33] Even though a sales transaction is involved, historically there have not been warranties implied in contracts for the sale of real estate. These cases have arisen out of comparable factual situations. For example, a person may purchase a house from a developer or builder when it is either under construction[34] or completed[35] and after moving into the house finds the construction defective. Cases of this nature have recently been decided in favor of the purchaser because of the differences between the knowledge of the parties and the reliance the purchaser placed on the skill of the developer:

> When a vendee buys a development house from an advertised model . . . he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional advisor of his own, he has no real competency to inspect on his own . . . . If there is improper construction . . . and . . . [foreseeable] injury . . . [t]he public interest dictates that if such injury does result . . . , its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation.[36]

The courts are balancing the reasons for protecting the consumer with the burden the imposed liability places on the seller. In a sale of a house the consumer

29. *See* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 Colum. L.R. 653 (1957).
30. Uniform Commercial Code § 2-313 comment 2.
31. *See* Farnsworth, *supra* note 29.
32. *Id.* at 672.
33. *See generally*, Bearman, *Caveat Emptor in Sales of Reality*, 14 Vand. L.R. 541 (1961). *See also*, Note, *Implied Warranties*, 1 Calif. W.L.R. 110 (1965); Note, *Implied Warranties of Fitness for Habitation in Sale of Residential Dwellings*, 43 Denver L.J. 379 (1966).
34. Gilisan v. Smolenoke, 153 Colo. 274, 387 P.2d 260 (1963).
35. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).
36. Schipper v. Levitt & Sons Inc., 44 N.J. 70, 207 A.2d 314, at 325-26 (1965).

is unable to meaningfully examine the house to determine if it is fit. These decisions are not supported solely by the fact that the consumer is or can be injured. The courts also base their position on the fact that the developer and builder are in the best position to examine the houses, to avoid any defects and to withstand the economic loss resulting from liability.[37]

*2. Bailments*

An area of non-sales transactions where there has been great developments in reading implied warranties into contracts is bailments for hire. Again, as in the sale of real estate situation, consideration for the imbalance in knowledge of the two parties and the capacity of the servicer to avoid the injury or to withstand economic loss are determinative of the issues. The New Jersey court in *Cintrone v. Hertz Truck Loading and Rental Service*[38] stated:

> There is no good reason for restraining [implied] warranties to sales. Warranties of fitness are regarded by law as an incident of a transaction because one party is in a better position than the other to know and control the condition of the chattel transferred and to distribute the losses which may occur because of a dangerous condition the chattel possesses.[39]

The court further noted:

> A bailor for hire, . . . puts motor vehicles in the stream of commerce in a fashion not unlike a manufacturer or retailer.[40]

Thus it was held, that the rules of liability of a manufacturer are applicable to the bailor-bailee relationship.[41]

*3. Pure Services*

The usual warranty which is implied in a service contract is that the person has the ordinary skills of the trade.[42] At least one court has gone beyond this limited warranty. In *Broyles v. Brown Engineering Co.*,[43] the defendant had contracted to render civil engineering services and to submit plans and specifications to the plaintiff for the drainage of land to be used for a housing development. When the plans proved to be inadequate, the court allowed recovery for the resulting damages on the theory of the implied warranty that the plans would be adequate.[44] Here the court found that the plaintiff relied on the servicer because he possessed the skill to perform the work. The court, however, limited its decision by drawing a very reasonable distinction between two groups

37. *Id.*
38. 45 N.J. 434, 212 A.2d 769 (1965).
39. *Id.* at 446, 212 A.2d at 775.
40. *Id.* at 450, 212 A.2d at 777.
41. *Id.* at 452, 212 A.2d at 777-78.
42. Pussey v. Webb, 18 Del. 1490, 47 A. 701 (charge to the jury, 1900).
43. 275 Ala 35, 151 So. 2d 767 (1963).
44. *Id.* at 38, 151 So. 2d 770 (1963).

of persons or businesses which provide services. One group is confronted with uncontrollable factors which are similar to those confronting manufacturers and vendors. The other is confronted with uncontrollable factors unlike those confronting either the vendor or the manufacturer. The first group should warrant their services while the second need not. Thus, where the same type of factors are out of the control of both the servicer and the manufacturer in their respective transactions, there should not be a distinction made between them based on the type of transaction involved. Holding the servicer liable would not burden him any more than the implied warranties presently burden the vendors and manufacturers.[45] At the same time, there is a reluctance to extend liability beyond that which the manufacturer and vendor presently experience.

This concern with *overly* extended liability is not new. Judicial concern of this nature arose in another context and acted to limit the liability for the negligence of certain servicers. In 1931, a New York court[46] stated in a case involving the liability of an accountant to a third person who had relied on the reports prepared by the accountant for another person:

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indetermniate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.[47]

And with respect to attorneys, a Kentucky court[48] stated that:

> To hold an attorney responsible for the damages occasioned by an erroneous judicial order, . . . would make the practice of law one of such financial hazard that few men would care to incur the risk of its practice.[49]

Thus a countervailing interest is the preservation of the availability of the services themselves. Application of this concern for the extension of liability into the area of services where there is a risk no greater than that which the manufacturer and vendor take, leads to the conclusion that there should be an implied warranty similar to but arguably not greater than that offered by the manufacturer and the vendor.

To determine when an implied warranty should be read into a particular type of contract, it is suggested that rather then looking for an analogy in sales, one should consider whether the consumer is in need of such protection, whether the protection is no more than is expected of vendors and manufacturers,

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45. *See generally, Calabresi, Some Thought on Risk Distribution in the Law of Torts*, 70 Yale L.J. 499 (1961).
46. Ultra Mares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).
47. *Id.* at 179-180, 174 N.E. 444.
48. Rose v. Davis, 288 Ky. 674, 157 S.W.2d 284 (1941).
49. *Id.* at 676, 157 S.W. at 285.

whether the servicer is dealing with the same type of uncontrollable factors as is the vendor and the manufacturer, and whether the servicer is in a position to distribute the loses or to insure against them. At least in situations where the answers to the above considerations are in the affirmative a warranty would be justified.

### C. *Legislation*

Some legislators are awakening to the fact that the consumer of services is in need of protection. Two bills[50] were recently introduced in the New York State legislature to license automobile mechanics. Although both bills set up a commission to regulate and license the mechanics, there is a clear difference in the types of protection intended by each.

Bill S2281[51] is aimed solely at promoting traffic safety through the licensing of auto mechanics.[52] Under this bill, the only person who will be licensed is the owner of the repair shop.[53] He must furnish satisfactory evidence of good moral character, competency, and adequate equipment for the shop.[54] A license may be revoked for fraudulent practices or for the practice of deceptive advertising.[55] Yet, under the proposed legislation it is not the commissioner's responsi-

50. There were at least six different Bills introduced in 1968 to license auto repairmen. Bills S 824 (A1066) and S 2281 (A 2961) will be considered for they are the two most comprehensive proposals.

51. Introduced Jan. 24, 1968 by Senators Speno, Liebowitz, Niles, Lombardi, Seymour, Jr. It was introduced into the assembly by Assemblyman Terry (A 2961). The bill has not been reported out of committee.

52. S 2281, 191st Sess, § 396a (1968):

*§ 396-a. Purpose of article. The need for technical skill, training and experience, good moral character, financial stability and other fundamental qualities and qualifications in persons who own and operate shops engaged in the business of making repairs and adjustments to motor vehicles and motorcycles, having been unquestionably established and demonstrated in order to promote traffic safety, reduce highway accidents and the consequent injuries to persons and property and to establish minimum standards of competency for those engaged in the business of making repairs and adjustments to motor vehicles and motorcycles because of the inadequacy of local regulations, it is the purpose of the legislature in enacting this article to safeguard and protect the lives and property of the persons who patronize the motor vehicle repair shops of the state by making adequate provision for the regulation of motor vehicle repair shops and the owners and operators of such shops.*

53. S 2281, 191st Sess, § 396 c (1968)

*§ 396-c. Ownership of repair shops. No person shall maintain or operate a repair shop after July first, nineteen hundred sixty-eight, or hold himself out as being able to do so after such date unless he is licensed therefor pursuant to this article provided, however, that a dealer registered under the provisions of section four hundred fifteen of the vehicle and traffic law shall be excluded from the licensing requirements herein.*

54. S 2281, 191st Sess, § 396 e 3

*3. An applicant for a repair shop owner's license must establish that he is the real owner and possesses title to or is entitled to the possession of the shop. He must furnish satisfactory evidence of good moral character, competency, and adequate equipment for the shop.*

55. S 2281, 191st Sess, § 396 h

*§ 396-h. Suspension and revocation of licenses. A license to conduct and operate a repair shop may be suspended or revoked or a renewal thereof may be refused by the commissioner for any one or more of the following causes:*

bility to *prevent* frauds nor is there the mechanism for him to accomplish this. Thus the shop owner must first be convicted of fraud in a court of law before his license may be revoked. Hence, it will still remain the responsibility of the Attorney General's office to regulate this type of business practice.[56]

The second bill, S824,[57] is not limited to remedying the safety hazards inherent in auto repairs, but also attempts to protect the consumer from dishonest repairmen.[58] Under this bill a board of five persons is appointed to advise the licensing commission.[59] At least one of the members of this advisory board must have had no previous interest in the motor vehicle repair industry and he

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*1. Fraud or bribery in securing a license or in the conduct of licensed activity.*

*2. The making of any false statement as to a material matter in any application or other statement required by or pursuant to this article.*

*3. Has been guilty of fraud or fraudulent practices, or has practiced dishonest or misleading advertising.*

*4. Failure to display the license as provided in this article.*

*5. Violation of any provision of this article, or of any rule or regulation promulgated thereunder.*

*6. Conviction of any crime or offense involving moral turpitude or other cause which would permit disqualification from receiving a license upon the original application.*

56. *See* Mindell, *The New York Bureau of Consumer Frauds*, 11 N.Y.L.F. 603 (1965).

57. Introduced by Mr. Thaler Jan. 3, 1968 and by Mr. Miller in the Assembly A 1066. It has not been reported out of committee.

58. S 824, 191st Sess, § 384-a (1968)

§ *384-a. Declaration of legislative purpose. The legislature hereby finds and determines that the protection of the public health, safety and general welfare from the hazards of incompetence or dishonesty in the service and repair of motor vehicles requires adequate provision for the licensing of shops and certain personnel thereof engaged in rendering such service to assure the possession by such shops and personnel of the necessary technical training, expeirence, good moral character and other fundamental qualifications.*

59. S 824, 191st Sess, § 384d

§ *384-d. Advisory board of examiners. There shall be in the department of motor vehicles an advisory board of examiners of licensed motor vehicle repairmen and licensed motor vehicle repair shops consisting of five members appointed and subject to removal by the commissioner. The commissioner shall designate one member as chairman. Each member of the board shall be a citizen of the United States, a resident of this state and shall hold office for three years. Two of the members shall be individuals with at least six years of experience in the service and repair of motor vehicles, provided, however, that after September first, nineteen hundred sixty-eight, they shall be licensed motor vehicle repairmen. The third member shall be an individual who has had at least six thousand hours experience in managing a service department for a manufacturer of motor vehicles. The fourth member shall be appointed by the commissioner of education of the state, and have had at least two years' experience teaching engineering. The fifth member shall be an individual who shall have had no previous, and have no present interest in any motor vehicle repair industry and whose membership on the board would in the opinion of the commissioner be representative of the interests of the consumer or customer of the motor vehicle repair industry. Each member of the board shall receive a per diem allowance of twenty-five dollars per day for each day spent in the work of the board and he also shall receive his reasonable and necessary traveling and other expenses while engaged in the performance of his duties. The board shall, subject to the approval of the commissioner, make such rules and regulations as may be necessary with due regard to the public interest to carry out the purposes of this article and to determine the character, fitness and competency of applicants and shops for licensing.*

would thus supposedly represent the interest of the consumer of the motor vehicle repair industry.[60]

Under this second bill, not only must the owner of the shop be licensed[61] but at least one shop repairman must obtain a license.[62] To qualify for a license, an individual must be able to pass an examination given by the commissioner and have either 4,000 hours of practical work or 2,000 hours of work and successful completion of a course of study approved by the commissioner.[63] A shop seeking a license must employ a licensed repairman who will supervise all the servicing and repairing of motor vehicles and meet any other standards set by the commissioner.[64]

The grounds for revocation reflect the types of protection that the act is to provide. If the mechanic has practiced deceit or fraud upon *a* customer[65] or has engaged in or has aided or abetted another in engaging in untrue, misleading

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60. S 824, 191st Sess, § 384d

61. S 824, 191st Sess, § 384 e 5

*5. The commissioner shall issue a certificate which qualifies a business as a licensed motor vehicle repair shop, to a person, partnership or corporation applying therefor upon compliance with the following requirements:*

*a. . . . .*

*b. the business must employ on a full-time basis at least one licensed motor vehicle repairman who shall supervise the servicing and repair of motor vehicles;*

*c. the business must meet and maintain all standards of operation as set forth in rules and regulations promulgated pursuant to this article, and must comply with any other rules and regulations pertaining to it which are promulgated pursuant to other provisions of this chapter.*

62. S 824, 191st Sess, § 384 e 5

63. S 824, 191st Sess, § 384 e

*§ 384-e. Qualifications; Standards; examination. 1. Upon the filing of an application on a form prescribed by the commissioner, the commissioner shall issue a certificate as licensed motor vehicle repairman to any person who pays a fee of twenty-five dollars, is at least eighteen years of age, of good moral character, and has passed the prescribed examination.*

*2. . . . .*

*3. No person shall be eligible to take the examination unless he has had either (a) at least four thousand hours of practical experience in the repair and service of motor vehicles, or (b) at least two thousand hours of practical experience and in addition thereto has successfully completed a course or courses of study in the repair and service of motor vehicles approved in accordance with the rules and regulations established by the board as to method, content and supervision, which approval may be withdrawn if in the opinion of the board the course or courses is or are not being conducted properly as to method, content and supervision, or (c) any experience, education or combination thereof which, in accordance with the rules and regulations of the board, shall be deemed the equivalent of the foregoing.*

64. S 824, 191st Sess, § 384 e 5, *supra* n.55.

65. S 824, 191st Sess, § 384 f 1 a & c

*§ 384-f. Revocation or suspension of license. 1. The license of any person, partnership or corporation, licensed under this article may be suspended or revoked or renewal thereof refused by the commissioner, or the holder thereof may be censured, upon determination made by the commissioner after notice and hearing before him or his deputy or a member of the board or other hearing officer designated by the commissioner that a licensee*

*(a) has practiced fraud or deceit upon a customer;*

*(b) . . . .*

*(c) has aided or abetted another in practicing fraud or deceit upon a customer or in establishing his qualifications for a license under this article;*

or deceptive advertising or other unlawful selling practices,[66] his license can be revoked. Since it would be the commissioner's responsibility to prevent frauds and other unlawful practices, the proposed bill gives him the authority to investigate the business practices of the licensee.[67]

To insure the safety of the consumer, the repairman must not only prove that he is qualified to obtain a license but he must maintain his skills and keep abreast of the improvements in the trade since his license can be revoked if he becomes incompetent to engage in the trade.[68]

By providing for the revocation of the license for failure to give the consumer an itemized bill of the work performed[69] or, if requested, all of the old parts for which he has rendered a replacement charge,[70] the proposed bill not only aids the consumer in obtaining information but also discourages the repairmen from charging for unperformed work or unnecessarily replaced parts.

The commissioner is given the authority to investigate, on his own initiative, the business practices of any person holding a license under this proposed act.[71] This is a very important aspect of this type of legislation for the consumer is often unaware of the fact that he is being cheated or that the servicer is incompetent. It may only be through the investigations by the commissioner that these facts can be obtained.

## SUMMARY

Consumer protection, except for protection from fraud, has in the past been strictly limited to sales transactions. However, there have been in recent years a few notable divergences from this limit. Implied warranties have been extended to sales of houses, bailments for hire and at least in one case to a con-

66. S 824, 191st Sess, § 384 f (1) (e) A license can be revoked if the person
*(e) has engaged in or has aided or abetted another in engaging in untrue, misleading or deceptive advertising as defined by section 190.20 of the penal law or unlawful selling practices as defined by section three hundred ninety-six of the general business law;*

67. S 824, 191st Sess, § 384 f 2
*2. The commissioner shall have the power to enforce the provisions of this article and, upon the complaint of any person, or on his own initiative, to investigate any violation thereof or to investigate the business, business practices and business methods of any person applying for or holding a license under this article, if in the opinion of the commissioner such investigation is warranted. Each such applicant or licensee shall be obliged, on the request of the commissioner, to supply such information as may be required concerning his business, business practices or business methods or proposed business practices or methods.*

68. S 824, 191st Sess, § 384 f 1 g. A license can be revoked if the person
*(g) is incompetent or untrustworthy to engage in his trade;*

69. S 824, 191st Sess, § 384 f (1) (h). A license can be revoked if the person
*(h) has failed upon request to render to the customer an itemized bill, in writing, containing such details as may be required by the rules and regulations of the board;*

70. S 824, 191st Sess, § 384 f (1) (i). A license can be revoked if the person
*(i) has failed to leave with the customer upon request in writing all parts for which he has rendered a replacement charge excepting those parts which the board, by its rules and regulations, determines to be too hazardous, or unnecessary or inexpedient to leave with the customer.*

71. S 824, 191st Sess, § 384 f 2, *supra* n.62.

tract for services. In each case where the warranty was extended into a new area the court first determined that the consumer was at a disadvantage for he lacked the knowledge to make his own determinations. The courts then considered the burden that the liability would place on the supplier. If this burden was similar to that placed on a vendor then liability was imposed. Another consideration has been whether the type of control the supplier of services had over the results was similar to the control that the vendors and manufacturers had over their goods. If the same type of factors are out of the control of both then there should not be a distinction made between the types of transactions involved.

The consumer of services has been ignored by those who have professed to protect consumers. He is not as well protected by legislation as is the consumer of goods and he is not as well protected with respect to the types of warranties that the courts will impose. Legislation to protect the service consumer can be directed at various goals. As in the proposed New York Mechanics Licensing Acts, the legislation can be aimed at solving the safety problems alone or alternatively at the collective problems of safety, economic and quality protection. Even without legislation, judicially imposed warranties need not be limited to sales transactions but can be used in service transactions. Not only can the parts be warranted but the services can be warranted as well. The protection offered the consumer of services must equal those given to the goods consumer where the needs and problems are the same.

ROBERT M. FEINSON

## DEMISE OF THE DOCTRINE OF *CAPITAL WINE AND SPIRIT V. POKRASS*

### INTRODUCTION

A stockholder's derivative action is a form of suit available to shareholders to vindicate a corporate claim and thereby protect their interest in a corporation when corporate management breaches its trust or is careless in managing the business of a corporation.[1] When a corporation has an action against a party it is management's duty to bring a *direct* action to recover the damages owed to the corporation. However, if management refuses to bring suit, only then can a stockholder bring a *derivative* action against management for these damages.

In *Pollitz v. Gould*[2] such an action was brought by a stockholder of the Wabash Railroad Company to set aside as fraudulent a transfer and exchange of stock. The question presented to the Court of Appeals was whether a stock-

1. Chaplin v. Selznick, 186 Misc. 66, 58 N.Y.S.2d 453 (1945).
2. 202 N.Y. 11, 94 N.E. 1088 (1911).