**2022 Bankruptcy at the Beach**

**Commercial Law Update**

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1. **Statute of Frauds.**

***Fertilizantes Tocantins S.A. v. TGO Agriculture (USA), Inc.*, Case No. 8:21-cv-2884-VMC-JSS, 2022 Wl 1121008 (M.D. Fla. Apr. 14, 2022)**

Background: The plaintiff was a Brazilian fertilizer supplier, and the defendant was an international exporter and importer of fertilizer and other related products. The plaintiff alleged that the parties had engaged in “extensive negotiations” regarding the plaintiff’s purchase of a large amount of fertilizer, which was evidenced by confirmation emails and/or WhatsApp messages from the plaintiff to the defendant. In April 2021, the plaintiff’s representative contacted the defendant’s representative regarding shipping instructions for the purchase and asked “do we already have a contract for this deal?” The defendant’s representative responded that the shipping instructions had been received and that the defendant would “return with the contract once available.” The defendant never shipped the fertilizer, so the plaintiff sued for breach of express contract, declaratory relief, and breach of implied contract.

UCC Application: The defendant filed a motion to dismiss, arguing, among other things, that the allegations in the complaint were insufficient to support the existence of an express contract under the Florida UCC’s Statute of Frauds. Specifically, the defendant argued that: 1) it did not accept any order from the plaintiff in writing; and 2) any written communications do not evidence a meeting of the minds between the parties. The plaintiff countered that the Statute of Frauds does not apply if a merchant provides written confirmation of the agreement, and the party receiving the confirmation does not object within 10 days. The court found that, viewing the allegations in the complaint as true, the plaintiff had alleged an agreement between merchants that would satisfy the Statute of Frauds. For the same reasons, the court also found that the plaintiff had sufficiently alleged its alternative claim for breach of implied contract.

***Gemstone Foods, LLC v. AAA Food Enterprises, Inc.*, Case Nos. 5:15-cv-02207-MHH, 5:15-cv-01179-MHH, 2022 WL 433318 (N.D. Ala. Feb. 11, 2022), 2022 WL 439538 (N.D. Ala. Feb. 12, 2022)**

Background: The plaintiffs and defendants were involved in the poultry processing industry. The plaintiffs alleged that Mike Ensley, who started the two plaintiff companies, and poultry broker Annette Carr injured the plaintiffs by having them pay fraudulently inflated invoices, diverting business away from the plaintiffs to companies owned by the defendants, implicating the plaintiffs in a fraudulent labeling scheme, stealing the plaintiffs’ property and information, and starting a company to directly compete with the plaintiffs.

UCC Application: The parties both filed summary judgment motions. With respect to the claims related to the inflated invoices, Carr argued that the alleged agreement regarding the pricing for her brokerage services was not enforceable under the Alabama UCC’s Statute of Frauds. The court found the agreement between the plaintiffs and Carr to be a hybrid contract, that involved the poultry goods, but also an array of services provided by Carr. As such, applying the predominant purpose test, a reasonable jury could have found that the agreement was primarily one for services, and denied summary judgment.

1. **Security Interests.**

***1944 Beach Boulevard, LLC v. Live Oak Banking Company (In re NRP Lease Holdings, LLC)*, 20 F.4th 746 (11th Cir. 2021)**

Background: A secured creditor filed a financing statement listing the debtor’s name as 1944 Beach Blvd., LLC, instead of the debtor’s correct name, 1944 Beach Boulevard, LLC. The Florida Secured Transaction Registry (the “Registry”) provides search results by taking the searcher to the place in the Registry where the searched name could be found alphabetically, providing a list of twenty names with the searched name (or the closest name to the searched name) at the top. The searcher can then search the names immediately surrounding the searched name by clicking on the “previous” or “next” buttons. A search of “1944 Beach Blvd., LLC” did not show the UCC filing on the first page of the results. However, the UCC could be found on the page immediately preceding the first page of the results. After the debtor filed bankruptcy, the debtor sued to avoid the blanket lien on its assets, arguing that the UCC was seriously misleading.

UCC Application: Under Florida’s prior version of § 9-506 of the UCC, a financing statement was effective unless “seriously misleading,” but the statute provided no definition of the term. Courts ultimately adopted a “reasonably diligent searcher” standard, which required the court to determine on a case-by-case basis whether a hypothetical reasonable searcher would have found the financing statement despite an error in the debtor’s name. Florida then adopted the revised § 9-506 of the UCC, which abrogated the “reasonably diligent searcher” standard and instead adopted the rule that a financing statement is only effective if a search of the debtor’s correct name in the Registry using the Registry’s standard search logic would produce the financing statement.

The question arose, however, as to whether the financing statement was produced and therefore effective if it could be located by searching the previous or next names in the search results. The Registry’s explanation of the search program states that the search program will provide the name entered and also provide a list of names directly before and after the searched name. Florida bankruptcy courts split over whether searchers had a duty to check the immediately preceding and succeeding names. The court stated: “On the one hand, it is undisputed that the Registry’s standard search logic involves a comparison of the name input by the user with the names listed in the database and the subsequent display of a single page listing the twenty names most closely matching the search name. . . . On the other hand, it is also undisputed that a search using the Registry’s search logic merely takes the user to a given point in the Registry database based on the debtor name input for the search.” The court then determined that certification to the Florida Supreme Court was appropriate.

The case is scheduled for oral argument in front of the Florida Supreme Court on June 9, 2022.

***Nutrien AG Solutions, Inc. v. Dykes*, Case No. 1:19-cv-578-TFM-MU, 2021 WL 6139506 (S.D. Ala. Nov. 9, 2021)**

Background: Two farmers, Dykes and Ward, entered into an oral sharecropping agreement whereby Dykes would provide the land, seed, and fertilizer, and Ward would provide the labor, equipment, and chemicals. They would then split the proceeds from the sale of the crops 50/50. Ward began to have financial troubles and got behind on multiple bank debts. In 2015, he contacted defendant Nutrien, who agreed to extend Ward credit secured by a lien on Ward’s crops, farm products, equipment, and government programs/payments. Ward’s debt to Nutrien then “exponentially increased” over the next two years, and Nutrien would not extend additional credit for the 2018 season. Ward reached an agreement with another farmer to use his account at Nutrien to purchase the seed and chemicals Ward needed for the 2018 season. Ward then grew cotton and peanuts on Dykes’s property. Dykes alleged that Ward was not properly caring for the crops, and that Dykes had to step in and seize the crops based on his belief that Ward had defaulted on his obligations and abandoned the crops. Dykes harvested and sold the crops for $200,000. Nutrien sued Dykes to recover half of the proceeds, arguing that it had a security interest in Ward’s share of the proceeds from the crop based on the sharecropping agreement.

UCC Application: The parties agreed that Dykes and Ward had a landlord-tenant relationship pursuant to Ala. Code § 35-9-37, and Dykes contended that his landlord’s lien under Ala. Code § 35-9-30 took priority over any UCC lien that Nutrien may have had in the crops. The court noted that under well-established Alabama law, Ward, as the tenant, held legal title and the right to possession for all of the crops, subject to Dykes’s landlord lien. Based on the terms of the sharecropping agreement, Dykes was entitled to keep half of the proceeds from the sale of the crops, which satisfied his landlord’s lien. If Ward did abandon the crops, Ala. Code § 35-9-12 would have permitted Dykes to seize the crops. Based on the testimony, the court found that there was a genuine dispute of material fact as to whether Ward had actually abandoned the crops.

Nutrien also moved for partial summary judgment on Dykes’s defense that Nutrien’s security interest had not been perfected. Although Dykes conceded that value had been given for the security interest and an authenticated security agreement existed, Dykes argued that Nutrien lacked good faith by not informing Dykes of Ward’s financial troubles or Nutrien’s security interest in Ward’s crops prior to the 2018 season. The court found that Nutrien owed no duty to disclose such information to Dykes, and that such information was protected from disclosure by federal law, thus granting summary judgment as to the defense.

1. **Warranty Claims.**

***Elder v. Reliance Worldwide Corp.*, --- F. Supp. 3d ---, 2021 WL 45583569 (N.D. Ga. Sept. 27, 2021)**

Background: The plaintiffs were all purchasers of an allegedly defective water heater connector, which allegedly deteriorated over time, causing flooding, leakage, and rubber flakes and “a sludge-like substance” in the water supply. The plaintiffs sued the manufacturer and retailers of the connector, asserting claims including unjust enrichment, negligence, breach of implied warranties, and various products liability and state consumer protection claims.

UCC Application: Applying Georgia law, the court considered the breach of implied warranties claim in connection with motions to dismiss filed by two of the defendants. The plaintiffs alleged that defendant Home Depot, a retailer of the connector, breached the implied warranty of merchantability by selling a product with a design defect, and that the plaintiffs had relied on Home Depot’s judgment in selecting to sell the connector because Home Depot holds itself out as a “leader in product authority.” Home Depot argued that it provides products with a basic level of functionality, but does not guarantee that products will work indefinitely. Accordingly, Home Depot argued that absent an allegation that the connector failed to connect the water heater to the water supply line, the plaintiffs could not maintain their claim. The court noted that, while the implied warranty of merchantability does not promise perfection, a purchaser would not “‘reasonably expect’ that a water heater Connector would contaminate the house’s entire water supply with rubber pellets and sludge.” Therefore, the plaintiffs had adequately stated a claim for breach of the implied warranty of merchantability because the unexpected side effect of rubber pellets and sludge would have rendered the connector unmerchantable.

The plaintiffs also alleged that Home Depot breached the implied warranty of fitness for a particular purpose, alleging that after the defendants began receiving complaints about the connector, one of the defendants attributed the problems to water with high chlorine content. The plaintiffs argued as an alternative to their breach of implied warranty of merchantability that using the connector in a high chlorine area was a particular purpose that fell within the scope of the implied warranty of fitness for a particular purpose. Home Depot argued that the plaintiffs could not maintain such a claim became the plaintiffs did not allege that Home Depot knew that they were purchasing the connector specifically for use in a high chlorine area. The court agreed with Home Depot, dismissing the claim and finding, first, that use of the connector in a high chlorine area was consistent with the ordinary purpose of the plaintiff, and, second, that certain of the plaintiffs did not allege that they used, or told Home Depot that they planned to use, the connector in a high chlorine area.

***Ballard v. General Motors, LLC*, --- F. Supp. 3d ---, 2021 WL 5312298 (M.D. Ala. Nov. 15, 2021)**

Background: A personal representative brought a wrongful death action against General Motors LLC (“GM LLC”) on behalf of a decedent who was killed in a car accident. The vehicle was manufactured by General Motors Corporation. GM LLC is the entity that emerged from General Motors Corporation’s bankruptcy case. GM LLC bought most of General Motors Corporation’s assets and assumed certain liabilities, including “liabilities in warranty,” but did not contractually assume liability for any punitive damages based on General Motors Corporation’s conduct. Under Alabama law, punitive damages are the only remedy for a wrongful death action. The plaintiff therefore filed an amended complaint, asserting a claim for breach of an implied warranty of merchantability on the basis that the vehicle was unfit for its ordinary purposes due to a fuel system design issue and the vehicle’s inherent rollover instability.

UCC Application: On consideration of a motion for judgment on the pleadings, the court addressed the plausibility at the pleading stage of an implied warranty claim against an automobile manufacturer for personal injuries sustained by the deceased’s use of the automobile. The answer turned on whether GM LLC was a “seller” under Ala. Code § 7-2-314(1) (applicable “if the seller is a merchant with respect to goods of that kind”). The Alabama Supreme Court had previously found that the term “seller” included a manufacturer. *See Bishop v. Faroy Sales*, 336 So. 2d 1340 (Ala. 1976). However, GM LLC argued that the Court’s subsequent decision in *Ex parte General Motors Corp.*, 769 So. 2d 903 (Ala. 1999), had determined that a manufacturer was not a seller and thus could not be held liable for breach of an implied warranty.

The court found that an adoption of GM LLC’s argument would not be consistent with either the plain language of the UCC or Alabama case law. The plaintiff had adequately alleged that GM LLC was a seller of vehicles, such that the requirement of Ala. Code § 7-2-3141(1) that GM LLC be a “merchant with respect to goods of that kind” was satisfied. The court found that the *Bishop* case confirmed this interpretation, and distinguished *General Motors Corp.* because it was a response to a certified question as to whether Ala. Code § 7-2-318 eliminated the privity requirement where a consumer sues a manufacturer for personal injuries under an implied warranty theory, not on whether implied warranties apply to manufacturers. Any comments in *General Motors Corp.* that may have run contrary to the holding in *Bishop* were found to be dicta.

***Moyer v. Forest River, Inc.*, Case No. 1:20-cv-754-TCB, 2021 WL 6930587 (N.D. Ga. Nov. 30, 2021)**

Background: The plaintiff purchased a motorhome, signing a sales contract that provided for no express or implied warranties and a one-year limitations period. However, the defendant provide a separate limited warranty to the plaintiff, warranting that the body of the motorhome would be free from substantial defects attributable to the defendant. The plaintiff was required to give notice before any warranties could be enforced. After purchasing the motorhome, the plaintiff noticed that water leaked through the windshield, the shower leaked, and the air conditioning did not function properly. The plaintiff took the motorhome in for repairs multiple times. More than one year after purchasing the motorhome, the plaintiff sent the defendant a letter purporting to revoke acceptance of the motorhome. The defendant offered to transport the motorhome to its facility to exercise its final repair opportunity, but the plaintiff refused on the basis that his acceptance had been revoked. The plaintiff kept the motorhome, continuing to use it both before and after filing suit. The plaintiff asserted various claims, including breach of express warranty.

UCC Application: On consideration of the defendant’s motion for summary judgment, the court granted the motion because the plaintiff had not permitted the defendant to exercise its final repair opportunity. The terms of the written warranty, which required the plaintiff to allow the defendant an opportunity to cure prior to filing suit for breach of warranty, controlled. In response to certain of the plaintiff’s contentions, the court additionally found that there is no “seasonableness” requirement in the terms of the warranty.

***Barnes v. Medtronic, Inc.*, Case No. 1:20-cv-04310-JPB, 2021 WL 3742436 (N.D. Ga. Aug. 24, 2021)**

Background: After being involved in a car accident, the plaintiff had a SynchroMed Device implanted in her spine to deliver a muscle relaxer. The device was subsequently replaced two times. The third device malfunctioned and failed, resulting in the plaintiff experiencing severe vomiting, six seizures, worsened muscle spasticity, and dramatic changes in mood. The plaintiff sued for, among other things, breach of the implied warranty of merchantability and breach of express warranty.

UCC Application: The defendants filed a motion to dismiss, asserting that the claims were preempted by federal law and were inadequately pled. With respect to the breach of implied warranty of merchantability claim, the plaintiff must plead: 1) that the goods were subject to the warranty; 2) that the goods were defective; 3) that the injury was caused by the defective goods; and 4) that damages were incurred as a result. The plaintiff must also show contractual privity with the manufacturer. The plaintiff alleged that the defendants breached the implied warranty of merchantability under Georgia law by violating various federal statutes that prevent the manufacture and distribution of adulterated products. Although the implied warranty of merchantability normally does not exist between a manufacturer and remote customer because there is no privity of contract between them, in this case the plaintiff had alleged an express warranty had been extended by the defendants, such that privity had been sufficiently pled.

With respect to the breach of express warranty claim, the plaintiff must plead that she gave defendant: 1) notice of the defect; and 2) a reasonable opportunity to repair the defect. The court dismissed the claim, finding that the plaintiff had not sufficiently pled the claim because she did not make any allegations that she had sent notice to or otherwise communicated with the defendants in any way before filing suit.

The court also addressed whether the plaintiff’s state law claims were preempted by the Medical Device Amendments of 1976, which gave the FDA regulatory authority over medical devices. The court noted that the plaintiff could proceed with the state law claims so long as she claimed “the ‘breach of a well-recognized duty owed to her under state law’ and so ‘long as she can show that she was harmed by a violation of applicable federal law.’” The breach of implied warranty of merchantability is not expressly or impliedly preempted if the plaintiff alleges that the defendant violated federal law and the plaintiff can show a causal link between the violation and the breach, which the plaintiff here had done.

***Tershakovec v. Ford Motor Company*, --- F. Supp. 3d ---, 2021 WL 2700347 (S.D. Fla. July 1, 2021)**

Background: The plaintiffs were all purchasers of the Ford Shelby GT350 Mustang, which is primarily purchased for its racing and track capabilities. The lowest two packages of the vehicle did not come with transmission and differential coolers that prevent the engine from overheating at prolonged high speeds. Instead, the lowest two packages were programmed with “Limp Mode”, which would rapidly decelerate the vehicle when the engine temperature got too high. The plaintiffs alleged that the vehicles were unusable for sustained track driving because they would unexpectedly enter Limp Mode on both the track and the open road. As such, they asserted that the frequent occurrence of Limp Mode was a breach of Ford’s express and implied warranties, among other claims.

UCC Application: With respect to the warranty claims, Ford argued that it never breached any warranties because Limp Mode is a safety feature, not a malfunction, failure, or defect. The limited warranty covered malfunctions or failures during normal use due to a manufacturing defect, and stated that defects may be unintentionally introduced into vehicles during the design and manufacturing processes. The plaintiffs argued that the malfunction was the premature overheating due to the lack of coolers. Ford argued that premature overheating was in fact a designed safety feature, which at any rate never occurred because of Limp Mode. The court framed the real issue as whether there was a design defect, as opposed to a manufacturing defect, because while the cars did not overheat, they could not drive at high speeds for a prolonged period of time, and asked: 1) did the limited warranty cover design defects, and 2) can a safety feature that performed as intended be a design defect. Relying on prior case law interpreting the same limited warranty, the court found that a design defect was covered by the warranty. Whether Limp Mode could be considered a design defect since it worked as expected varied state to state based on various tests, including the consumer expectation test, the risk utility test, and the reasonable alternative design test. The court denied summary judgment, finding the issue to be one appropriate for determination by the jury.

Ford also argued that summary judgment should be granted on the breach of warranty claims because some plaintiffs did not experience Limp Mode and because some failed to present their vehicles to Ford for repair. The court found that while some plaintiffs may not have experienced Limp Mode, Ford had argued that Limp Mode was a conscious and well-executed design choice such that it could not also argue that Limp Mode may never occur. On the presentment issue, the plaintiffs claimed that Ford essentially waived presentment by instructing dealerships that Limp Mode is normal and to refer customers to the owner’s manual. The court found that even though presentment would have been futile, the plaintiffs were not excused from the requirement, thus granting summary judgment on the breach of express warranty claims as to any plaintiffs who failed to present their vehicles to Ford for repair.

***Harman v. Taurus International Manufacturing, Inc.*, Case No. 3:21-cv-98-ECM, 2022 WL 479139 (M.D. Ala. Feb. 16, 2022)**

Background: Plaintiff Chris Harman purchased a pistol as a gift for his wife Rita. Chris was subsequently injured when the pistol blew apart as he was shooting it, and brought claims for, among other things, breach of implied warranty against the manufacturer. He alleged that the pistol was defective and unreasonably dangerous because it had a defect that made the components subject to weakening or fracturing; that the manufacturer had actual knowledge of the defect; and that despite such knowledge, the manufacturer never remedied the defect, issued a warning to the public, or recalled the pistol. Rita also filed suit for, among other things, breach of express warranty and implied warranty of merchantability. She alleged that two pistols made by the manufacturer had the same defect, and that an individual was injured when using the other model. According to the plaintiffs, the manufacturer had notice of the defects in both pistols but failed to take any corrective action.

UCC Application: The defendant manufacturer filed a motion to dismiss or, in the alternative, a motion for a more definite statement. With respect to Chris Harman’s breach of implied warranty of merchantability claim, the manufacturer argued that it is not a seller under Alabama law and therefore cannot be liable for the implied warranty of merchantability, or if the claim could be brought against the defendant manufacturer, Chris Harman had not provided notice of the breach of warranty as required by law. The court discussed the case law regarding what privity is required for a breach of warranty claim to be brought against a manufacturer, finding that privity of contract is not required under Alabama law where the plaintiff seeks damages for personal injuries. With respect to notice, Chris argued that Alabama law only requires notice to be provided to the seller, not the manufacturer. The court disagreed, citing to case law from the Eleventh Circuit Court of Appeals that applied the notice requirement to any claim for breach of warranty by a buyer. The court found that the breach of warranty claims were due to be dismissed, but gave Chris additional time to replead the facts in an amended complaint.

With respect to Rita Harman’s breach of warranty claims, the manufacturer argued that there were no allegations that there was any reliance on the express warranty; that the warranty only extended to the workmanship of the pistol, not the design; and that the required notice and opportunity to repair the pistol were not provided. The court noted that although Rita had not pled reliance, she did argue that she chose the pistol for Chris to purchase based on the express warranty. Because Alabama law only places notice requirements on the buyer, and not third-party beneficiaries, for breach of express warranty claims, the lack of notice was not fatal to the claim. However, Rita was required to allege sufficient facts showing that the manufacturer and Chris, as the buyer, intended to bestow a direct benefit on Rita and that the warranty was subsequently breached. The court granted the motion for a more definite statement. Similarly, the court granted the motion for a more definite statement with respect to the breach of implied warranty of merchantability claim, finding that Rita had not sufficiently alleged facts to show that she was a beneficiary of any implied warranty.