JASON'S FOODS, INC. v. PETER ECKRICH & SONS, INC.,
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
774 F.2d 214; 1985 U.S. App. LEXIS 23484; 41 U.C.C. Rep. Serv. (Callaghan) 1287
October 2, 1985

JUDGES: Posner and Coffey, Circuit Judges, and Dumbauld, Senior District Judge. *

POSNER, Circuit Judge.

The jurisdictional question that led us to order a limited remand in *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc., 768 F.2d 189 (7th Cir. 1985),* has been answered by the district judge: the defendant's principal place of business is Indiana, so there is diversity jurisdiction, and we can proceed to the merits of the appeal. *Section 2-509(2) of the Uniform Commercial Code* as adopted in Illinois (whose law, the parties agree, governs this diversity suit) provides that where "goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer . . . (b) on acknowledgment by the bailee of the buyer's right to possession of the goods." Ill. Rev. Stat. ch. 26, para. 2-509(2). We must decide whether acknowledgment to the *seller* complies with the statute. There are no reported cases on the question, either in Illinois or elsewhere. Three commentators have opined that acknowledgment must be to the buyer, but without discussion. See Nordstrom, Handbook of the Law of Sales 404-05 (1970); Howard, *Allocation of Risk of Loss Under the UCC: A Transactional Evaluation of Sections 2-509 and 2-510*, *15 UCC L.J. 334, 347 n. 42 (1983);* Comment, *Risk of Loss Under Section 2509 of the California Uniform Commercial Code*, *20 UCLA L. Rev. 1352, 1358 n. 30 (1973). ...*

On or about December 30, 1982, Jason's Foods contracted to sell 38,000 pounds of "St. Louis style" pork ribs to Peter Eckrich & Sons, delivery to be effected by a transfer of the ribs from Jason's account in an independent warehouse to Eckrich's account in the same warehouse -- which is to say, without the ribs actually being moved. In its confirmation of the deal, Jason's notified Eckrich that the transfer in storage would be made between January 10 and January 14. On January 13 Jason's phoned the warehouse and requested that the ribs be transferred to Eckrich's account. A clerk at the warehouse noted the transfer on its books immediately but did not mail a warehouse receipt until January 17 or January 18, and it was not till Eckrich received the receipt on January 24 that it knew the transfer had taken place. But on January 17 the ribs had been destroyed by a fire at the warehouse. Jason's sued Eckrich for the price. If the risk of loss passed on January 13 when the ribs were transferred to Eckrich's account, or at least before the fire, Jason's is entitled to recover the contract price; otherwise not. The district judge ruled that the risk of loss did not pass by then and therefore granted summary judgment for Eckrich.

Jason's argues that when the warehouse transferred the ribs to Eckrich's account, Jason's lost all rights over the ribs, and it should not bear the risk of loss of goods it did not own or have any right to control. Eckrich owned them and Eckrich's insurance covered any ribs that it owned; Jason's had no insurance and anyway, Jason's argues, it could not insure what it no longer owned. (The warehouse would be liable for the fire damage only if negligent. Cf. *Refrigeration Sales Co. v. Mitchell-Jackson, Inc.*, 770 f.2d 98 (7th Cir. 1985).) Finally, Jason's points out that the draftsmen of the Uniform Commercial Code were careful and deliberate. Both subsections (a) and (c) of section 2-509 (2) -- the subsections that surround the "acknowledgment" provision at issue in this

case -- provide that the risk of loss passes to the buyer on or after "his receipt" of a document of title (negotiable in (a), nonnegotiable in (c)). If the draftsmen had meant that the acknowledgment of the buyer's right to possession of the goods -- the acknowledgment that is subsection (b)'s substitute for a document of title -- must be to the buyer, they would have said so. ...

The suggestion that the acknowledgment contemplated by subsection (b) can be to the seller seems very strange. What purpose would it serve? When Jason's called up the warehouse and directed that the transfer be made, it did not add: and by the way, acknowledge to me when you make the transfer. Jason's assumed, correctly, that the transfer was being made forthwith; and in fact there is no suggestion that the warehouse clerk ever " acknowledged" the transfer to Jason's. If the draftsmen of subsection (b) had meant the risk of loss to pass when the transfer was made, one would think they would have said so, and not complicated life by requiring "acknowledgment. "

A related section of the *Uniform Commercial Code, section 2-503 (4) (a)*, makes acknowledgment by the bailee (the warehouse here) a method of tendering goods that are sold without being physically moved; but, like section 2-509 (2) (b), it does not indicate to whom acknowledgment must be made. The official comments on this section, however, indicate that it was not intended to change the corresponding section of the Uniform Sales Act, section 43(3). See UCC comment 6 to § 2-503. And section 43 (3) had expressly required acknowledgment to the buyer. See, e.g., *Peelle Co. v. Industrial Plant Corp., 120 N.J.L. 480, 200 A. 1007 (1938).* Rules on tender have, it is true, a different function from rules on risk of loss; they determine at what point the seller has completed the performance of his side of the bargain. He may have completed performance, but if the goods are still in transit the risk of loss does not shift until the buyer receives them, if the seller is a merchant. See *UCC § 2-509 (3)* and UCC comment 3 to section 2-509. In the case of warehouse transfers, however, the draftsmen apparently wanted risk of loss to conform to the rules for tender. For comment 4 to section 2-509 states that "where the agreement provides for delivery of the goods as between the buyer and seller without removal from the physical possession of a bailee, the provisions on manner of tender of delivery apply on the point of transfer of risk." And those provisions as we have said apparently require (in the case where no document of title passes) acknowledgment to the buyer. The acknowledgment need not, by the way, be in writing, so far as we are aware. Jason's could have instructed the warehouse to call Eckrich when the transfer was complete on the warehouse's books. See *Whately v. Tetrault, 29 Mass. App. Dec. 112, 5 UCC Rep. Serv. (Callaghan) 838 (1964).* That is why Jason's case is not utterly demolished by the fact that the document of title -- that is, the warehouse receipt -- was not received by Eckrich till after the fire. Acknowledgment in a less formal manner is authorized; indeed, section 509(2) (b) would have no function if the only authorized form of acknowledgment were by document of title, whether negotiable or nonnegotiable.

The second sentence of comment 4 to section 509 is also suggestive: "Due delivery of a negotiable document of title covering the goods or acknowledgment by the bailee that he holds for the buyer completes the 'delivery' and passes the risk." The reference to a document of title is to subsections (a) and (c); and in both of those cases, of course, the tender involves notice to the buyer. It would be surprising if the alternative of acknowledgment did not. ...

AFFIRMED.