Product Performance Litigation Primer: Product Claims Under Contract Theories

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I. Introduction

Plaintiffs' counsel utilize a myriad of claims to pursue product performance lawsuits. These claims span over two separate, although somewhat intermingled, theories of recovery: tort and contract. Each theory of recovery offers distinct advantages, which is why plaintiffs usually plead causes of action under both. With the decline of the privity requirement in almost all jurisdictions, plaintiffs are finding that a breach of warranty theory is an appealing route to recovery.

This primer addresses the various warranties available under Minnesota law, how they are created, how a breach occurs, and what type of damages plaintiffs may claim. This primer also briefly addresses the Federal counterpart to product warranty recovery, the Magnuson-Moss Act.

II. Minnesota

Minnesota law provides for four types of warranties which generally coincide with those under the Uniform Commercial Code. Four warranties are available: the warranty of title (Minn. Stat. § 336.2-312); express warranties (Minn. Stat. § 336.2-313); implied warranty of merchantability (Minn. Stat. § 336.2-314); and implied warranty of fitness for a particular purpose (Minn. Stat. § 336.2-315). Warranty law applies only to sales, not service, transactions. *See McCarthy Well Co. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312 (Minn. 1987).

In a typical product performance case, a plaintiff may allege a cause of action based on contract theory of breach of warranty in addition to tort theories of negligence and strict liability. Under the contract theory of breach of warranty, a plaintiff buyer essentially claims that the seller of the product breached a warranty made to the buyer that caused property damage or personal injury. 5A Minn. Prac., *Methods of Practice* § 6.67 (3d ed). To establish such a claim, a plaintiff must prove that a warranty existed, that it was breached, and that there was a causal link between the breach and the claimed harm. *Id.* Additionally, Minnesota case law has indicated that a plaintiff must also demonstrate that she used the product properly by exercising due care and that she was not aware of the defect. *Id.*

A. Warranty of Title

Every contract for sale covered by statute includes a warranty from the seller that he has clear title to the product being sold. *See* Minn. Stat. § 336.2-312. This warranty is created simply by virtue of the sale itself and by operation of the statute; there need be no

mention of such a warranty in order for it to be effective. However, if a seller wants to exclude or modify this warranty, he must include specific language to this extent in the sale agreement. The warranty may also be excluded if circumstances surrounding the sale clearly indicate to the buyer that he has reason to believe he is purchasing less than clear title.

B. Express Warranty

1. How Created

An express warranty is generally created when a seller warrants that a product will contain certain characteristics or operate in a specific way. However, more subtle ways exist to create express warranties. A seller can provide an express warranty simply by his actions, and without even knowing he is doing so. Under Minn. Stat. § 336.2-313, express warranties may be created in three ways:

- When a seller makes any affirmation of fact or promise which relates to the product and becomes part of the basis of the bargain.
- When the seller gives a description of the product which becomes part of the basis of the bargain.
- When the seller provides the buyer with a sample or model of the product which becomes part of the basis of the bargain.

The most commonly known express warranty is the first enumerated above: when the seller specifically makes any affirmation of fact or promise relating to the goods. An affirmation of fact is more specifically defined as a statement of facts relating to the subject matter of the sale. 4 Minn. Prac., *Jury Instr. Guides* 22.10 (4th ed.). Oral representations may create an express warranty, even if the transaction is between sophisticated commercial parties. 20 Minn. Prac., *Business Law Deskbook* § 8.4 (2003-2004 ed.). However, "puffing," or an affirmation merely of the value of the goods or the seller's opinion of the goods does not create a warranty. For instance, a car salesman claiming that a certain vehicle is the "best in the world" at driving through snow, or is the best value for the money compared to any other vehicle on the market constitutes puffery. Many consumers fail to realize that the two subtler ways to create an express warranty, the latter two listed above, entail the same legal consequences even if the seller did not realize he was offering a warranty.

Another important aspect of creating express warranties is that the "warranted" representation must be made part of the basis of the bargain. This means that communications regarding the affirmation, description, or sample must have played a part in the agreement between the seller and buyer. 4 Minn. Prac., *Jury Instr. Guides* 22.10. The buyer does not need to prove that it relied on the representation or that the representation induced the buyer to purchase the goods. *Id.* In fact, although the question is still somewhat open in Minnesota, it appears as though the representation need only be a part of the basis of the bargain, not a central criterion to the parties' negotiations. *Id.*

Additionally, under the express warranty statute, it is not necessary that the seller use formal words such as "warrant" or "guarantee" to create the warranty. The query is simply whether an ordinary person would understand the representation to constitute an express warranty. 4 Minn. Prac., *Jury Instr. Guides* 22.10.

2. Disclaimer of an Express Warranty

Whether an express warranty was created from any of the above language or actions is a question of fact. If a seller makes an express warranty but them attempts to disclaim the warranties, courts must decide whether the two conflict or whether they can be construed consistently with one another. *See* Minn. Stat. § 336.2-316. However, once an express warranty is made, it is very difficult to disclaim.

C. Implied Warranty of Merchantability

1. How Created

The implied warranties available in Minnesota are imposed by law and operate for the protection of the buyer; they do not depend on the affirmative intent of the parties. The first of two implied warranties is the warranty of merchantability, Minn. Stat. § 336.2-314. This is perhaps the most important of all warranties with respect to product liability since it provides a more valuable remedy to injured persons than most other theories of recovery. In fact, this implied warranty may even cover the defective installation of a product sold. Essentially, this warranty is extremely broad and is liberally construed by courts. The warranty arises from the sales transaction itself, not the sales contract, meaning that no particular language or action is necessary for it to apply. *See* U.C.C. § 2-313, cmt. 1.

One important fact specific to this warranty, however, is that it applies to sales transactions only in which the seller is a merchant. A merchant generally is defined as a person who deals in goods of the kind involved in the transaction, or who otherwise by occupation holds himself out as having the knowledge or skill peculiar to the goods involved. *See* Minn. Stat. § 336.2-104(1). However, for implied warranty purposes, the standard is more stringent: one must be a merchant with respect to "goods of that kind," meaning goods of the kind that are the subject of the transaction at issue. See Minn. Stat. § 336.2-314(1); U.C.C. § 2-104(1), cmt. 2. Thus, a person making an isolated sale is not a "merchant" within the meaning of the implied warranty of merchantability.

2. Definition of "Merchantable"

A common question that arises is, "what makes goods merchantable?" This query is typically a determination of fact. Minn. Stat. § 336.2-314 enumerates that merchantable goods at least:

- Pass without objection in the trade

- Are of fair average quality within the description
- Are fit for the ordinary purposes for which such goods are used
- Run of even kind, quality, and quantity within each unit and among all units involved
- Are adequately packaged, contained, and labeled
- Conform to the promises or affirmations of fact made on the container or label if any.

These requirements are extremely broad. Regarding the third element, that the goods are fit for ordinary purposes, Minnesota courts have stated that this requirement is breached when a product is defective to a normal buyer making ordinary use of the product. *See Holowaty v. McDonald's Corp.*, 10 F.Supp.2d 1078, 1086 (D.Minn. 1998); *Peterson v. Bendix Home Systems*, 318 N.W.2d 50, 52 (Minn. 1982). For example, the sale of "standard grade" pecans that were moldy and unfit for human consumption violated this requirement because their ordinary use was for baking cookies and candies. *Willmar Cookie Co. v. Pippin Pecan Co.*, 357 N.W.2d 111, 114 (Minn. App. 1984). Regarding the last element, that the goods conform to promises on the label, it is important to note that the Minnesota Supreme Court has said that the sale of an article under a trade name does not negate the warranty that the product is reasonably fit for the general purpose for which it is manufactured and sold. *See Dougall v. Brown Bay Boat Works & Sales, Inc.*, 178 N.W.2d 217, 220-221 (Minn. 1970).

3. Course of Dealing

Unless excluded, the implied warranty of merchantability may arise from course of dealing between the parties or usage of trade. A "course of dealing" is defined as the past pattern of conduct between the parties that fairly establishes a common basis of understanding; "usage of trade" is any practice or method of dealing that is regularly used in a place, vocation or trade. 4 Minn. Prac., *Jury Instr. Guides*, 22.30 (4th ed.). Minnesota courts have clarified that the term "course of dealing" is restricted to "a sequence of previous conduct between the parties," and that a single act may not be sufficient to establish such a common basis of understanding. *Id.*

4. Disclaimer of Implied Warranty of Merchantability

The implied warranty of merchantability may be excluded or modified in accordance with Minn. Stat. § 336.2-316, but an important requirement arises in this respect. In order to exclude the warranty of merchantability, a seller must specifically state the word "merchantability" in its exclusion. This requirement coincides with the broad policy and construction of the statute: to protect buyers from faulty goods purchased from merchant sellers.

D. Implied Warranty of Fitness for a Particular Purpose

1. How Created

The second implied warranty available under Minnesota law is the implied warranty of fitness for a particular purpose, found in Minn. Stat. § 336.2-315. This warranty has also proven to be important in the products liability area. The warranty exists when the seller at the time of contracting has reason to know of any particular purpose for which the goods are required, and when the buyer relies on the seller's skill or judgment to furnish suitable goods for such a purpose.

2. Applicability and Disclaimer

This warranty applies to all sellers, not just merchants. Of course, normally a seller with skill will be a merchant. To establish liability, it must be proven that the buyer did rely on the seller's skill and judgment. This normally occurs where the buyer is an individual, not another merchant who is familiar with the goods.

Also, like the implied warranty of merchantability, it too may be disclaimed; however, no specific language is needed to exclude this warranty. The message must just convey to the buyer that there is no warranty of fitness for a particular purpose.

E. Integration of Breach of Warranty and Tort Claims in a Product liability Action

When a plaintiff brings a product liability action that includes both breach of warranty and tort claims, jurisdictions differ as to whether the breach of warranty claims may stand or whether they are subsumed under the tort claims. The Minnesota Supreme Court has not definitively resolved the issue, and therefore, Minnesota's stance on the issue must be derived from Court of Appeals and Eighth Circuit decisions.

In Minnesota, it appears that an implied warranty of merchantability theory is merged with strict liability and negligence into a single theory of recovery. *See* 4 Minn. Prac., *Jury Instr. Guides—Civil Cat.* 22 Intro (4th ed.); *Piotrowski v. Southworth Products Corp.*, 154 F.3d 748 (8th Cir. 1994)(*citing Westbrock v. Marshalltown Mfg. Co.*, 473 N.W.2d 352, 356 (Minn. App. 1991); *Gross v. Running*, 403 N.W.2d 243, 245 (Minn. App. 1987), and noting that these cases cited *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616 (Minn. 1984) for this merger proposition, although the *Bilotta* court did not specifically hold that strict liability and implied warranty of merchantability theories merged).

However, in cases in which a plaintiff asserts product liability tort theories of recovery, she is entitled to also assert the theories of breach of express warranty and breach of implied warranty of fitness for a particular purpose. See 4 Minn. Prac. Jury Instr. Guides—Civil Cat. 22 Intro. (4th ed)(Committee on Jury Instruction Guides of the Minnesota District Judges Association implied that these two theories were not subsumed under tort claims); *see also* 4A Minn. Prac., *Jury Instr. Guides* 75.20 (4th ed.). Minnesota courts have not indicated that either of these two theories is merged with strict liability for a single theory of recovery. *Id.* The justification for this is that the latter two theories rely on statements or representations made by the seller, whereas the implied

warranty of merchantability is invoked by operation of statute. 4 Minn. Prac. *Jury Instr. Guides—Civil Cat.* 22 Intro. Thus, it appears as though the latter two are not preempted by product liability tort theories. *Id.*

Under Minnesota law, a seller's warranty, whether express or implied, extends to any person who may reasonably be expected to use the goods and who is injured by breach of the warranty, i.e., no privity is required. *See* Minn. Stat. § 336.2-318. This is a broader standard than some states, which restrict a seller's liability to only the harmed individual or family members. A seller is prohibited from limiting or excluding this provision in a disclaimer. However, a buyer does have the duty to notify the seller of a breach of warranty within a reasonable time after the buyer discovers, or should have discovered, the breach. *See* Minn. Stat. § 336.2-607. The buyer may be barred from any remedy if she fails to give proper notice.

F. Remedies Available Under Minnesota Law

Under a breach of warranty theory of recovery, a plaintiff may claim any of the applicable damages available under contract theory.[1] However, in order to preserve this right to claim damages, a plaintiff must provide the seller with notice of breach of warranty within a reasonable time after the buyer discovers, or should have discovered, the defect. *See* Minn. Stat. § 336.2-607.

Minnesota's analysis of purely economic loss has had a long and complex history. Generally, the economic-loss rule stands for the principle that a plaintiff cannot sue in tort to recover for purely monetary loss—as opposed to physical injury or property damage—caused by the defendant. In 2000, the Minnesota Legislature enacted a new statutory economic loss doctrine that is codified in Minn. Stat. § 604.10. The doctrine sets a boundary between contract and tort law by functioning as a filter, precluding and limiting some claims. Minn. Stat. § 604.101 cmt. The scope of the statute only addresses goods, and specifically, product defect tort claims and common law misrepresentation claims relating to the goods sold or leased. *Id.* It is very important to note that the statute does not apply to claims for personal injury. *Id.*

The language of Minnesota's economic loss doctrine states that economic loss that arises from a sale of goods that is due to damage to tangible property other than the

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[1] A buyer may seek the following remedies for a breach of contract by the seller, which are enumerated in Minn. Stat. § 336.2-711: 1) cancel the contract and recover so much of the price as has been paid; 2) cover and have damages based up on the difference between the cost of covering with similar goods and the contract price together with any incidental damages; 3) recover damages for nondelivery based upon the difference between the market price at the time when the buyer learned of the breach and the contract price together with incidental damages; 4) if the goods are identified to the contract, recover them as though the seller were insolvent; 5) in the case of unique goods, obtain specific performance; 6) utilize one's security interest in goods in his possession or control for payments made on their price and any expenses incurred in their inspection and receipt, and hold and resell the goods as though he were an aggrieved seller; 7) deduct from the price to be paid all or any part of the damages resulting from the breach, after first notifying the seller of his intentions to do so.

goods sold may be recovered in tort as well as contract. *Id.* at § 604.10(a). However, economic loss that arises from a sale of goods between parties who are each merchants in goods of the kind is not recoverable in tort, but rather only in contract. *Id.* This new statute covers goods sold or leased and applies to both consumer and merchant transactions. Accordingly, it is applicable in any claim by a buyer against a seller for harm caused by a defect in the goods sold or leased, or for an intentional or reckless misrepresentation relating to the goods sold or leased. *Id.* at § 604.10(b). The buyer may only recover: 1) loss or damage to other tangible personal property or real property, including reasonable costs of repair and replacement; 2) business interruption losses; and, 3) additional family, personal, or household expenses that are actually incurred during the period of repair. *Id.* at subd. 3. The economic loss doctrine does not apply to personal injury claims, and as revised, only applies to claims that occur on or after August 11, 2000. *Id.* at subds. 2, 6.

III. Federal

The primary protection for consumers in a federal product performance case is the Magnuson-Moss Warranty Act. This law was enacted by Congress in 1975 in response to the widespread misuse by merchants of express warranties. Hallmarks of the Act include the following:

- The Act primarily applies to products which sell at retail for more than $5 and are accompanied by written warnings.
- Actions for breach of warranty under the Act are limited to claims for direct damages only (such as repair, replacement, or refund), as opposed to consequential damages.
- Personal injuries are considered consequential damages, and therefore, the Act is inapplicable to products liability cases.

See Am. L. Prod. Liab. 3d §18:11 (2004).

Product liability is an area of law almost completely left to state regulation. If personal injuries occur as a result of a defective product, a claimant will bring a state cause of action to recover personal and property damages. Although property damages are cognizable under the Magnuson-Moss Act, since personal injuries are not, claimants do not generally use this Act as a vehicle for recovery in products cases.

IV. Conclusion

Product performance litigation is almost completely covered by state law. Minnesota's four recognizable warranties provide avenues by which consumers may raise product performance claims, yet each are created and treated differently. Although the Minnesota Supreme Court has not definitively resolved the integration of contract and tort theories of recovery, it appears that only the implied warranty of merchantability is subsumed under a tort theory of recovery. Minnesota's revised economic loss statute is

one aspect in which the legislature has drawn a clear line between contract and tort recovery.