Products Liability NEWSLETTER

OSB Products Liability Section

A section newsletter of the Oregon State Bar

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Notes from the Chair

Todd A. Bradley, Gaylord Eyerman Bradley, PC

Fall CLE featuring Robert Peck

Each Fall for many years, the Products Liability Section has sponsored a CLE program in conjunction with the annual section meeting. This year, we presented an afternoon program in Portland on October 11, with keynote speaker Robert Peck of the Center for Constitutional Litigation. Mr. Peck is a nationally-known and respected appellate attorney who has appeared in many state and federal courts, including numerous appearances before the U.S. Supreme Court, on legal issues central to products liability practice, such as pre-emption and punitive damages. Additionally, the many attendees heard lively exchanges between Jay Beattie, William Gaylord, The Honorable W. Michael Gillette, and James S. Coon—all of whom are well known and respected by members of this section. Thanks are in order to the speakers and all who attended. And a special thanks is extended to Deanna Wray, Scott Kocher, Andrew Lee, and Rachel Robinson, for volunteering their time to make the CLE happen. Thanks also to OSB staff for all their work behind the scenes to make our programs run smoothly.

In this Issue

David Rocker and Blake Robinson call our attention to a new CPSC program intended to make it easier for consumers to register complaints. As they note, it's not clear how well this program will work for either consumers or manufacturers, but as lawyers we need to be aware of these potential sources of information about the products that feature in our cases.

Steve Yoshida presents an essay on limited warranties and what happens when the consumer concludes that the product has failed in its essential

purpose. These can be pesky cases in which both sides of the dispute have become frustrated, if not downright disgusted, with each other. With consumer products they can also be cases that do not have enough money at stake to justify 10 hours of research. Steve's article is one you can cut out and keep handy for the next time you hear from an angry RV owner or dealer.

I need to point out, again, that our contributors are volunteers who took time out of their busy practices to submit useful information to lawyers who might turn out to be their opponents in court. If you find their articles worthwhile, or even merely interesting, consider letting them know. The editors of the newsletter are always looking for articles of interest to our section. This could be an original article, news item, case report, or essay from another periodical. If you have an idea, or if you run across something you think would be worth publishing in our newsletter, Andy Lee wants to hear from you.

New CPSC Website Raises Issues for Consumers and Businesses

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The Consumer Products Safety Commission ("CPSC") launched a new public database, www.saferproducts.gov, on March 11, 2011. The database will enable consumers to file incident reports and allow manufacturers, retailers, distributors, and consumers to monitor and view the reports. Manufacturers can register to receive e-mail and text message alerts whenever a consumer files an incident report involving their products. Consumers who file a complaint can register to receive updates from the CPSC on the status of the complaint and whether the manufacturer filed responsive comments.

A timeline is triggered when an incident report is filed with the CPSC. Regardless of whether the manufacturer is registered with the CPSC, within five business days of the CPSC receiving an incident report, the CPSC must provide the report to the appropriate manufacturer. The CPSC then has ten business days to publish the incident report to the database. For manufacturers, this means having a relatively short time to decide how to respond to the incident report, if at all, before it becomes public. While the database provides manufacturers an opportunity to respond to incident reports, it does not alter the mandatory reporting requirements under Section 15 of the Consumer Products Safety Act.

A manufacturer can respond to incident reports in several ways. The manufacturer can submit comments on the report to the CPSC. Those comments can be private or published to the database, depending on the manufacturer's preference. The manufacturer can provide the CPSC with confidential information related to the incident report. The CPSC will redact any information that it agrees is confidential. Another option is for a manufacturer to identify information it believes is materially inaccurate and ask the CPSC to correct it. Or a manufacturer can choose to take no action at this initial stage.

Given the tight deadlines and public nature of the incident reports, it is imperative that manufacturers have an organized, streamlined approach to handling the reports. Manufacturers should consider appointing a specific

employee to monitor deadlines and formulate a response whenever notice of an incident report is received. While a form response may be useful for some incident reports, the severity or type of incident may call for varying responses. Unless a manufacturer moves quickly, it will lose the opportunity to deal proactively with a complaint, and will instead be left to react to information already placed on the CPSC website.

From a manufacturer's perspective, the new database has advantages and disadvantages. By receiving notice of complaints before publication, manufacturers can perform their own investigation of the incident and involve their public relations team when necessary. With all complaints available and searchable in a central location, manufacturers can monitor competitors' products. Manufacturers will know what information about their products consumers will find on the CPSC website, and can act accordingly. Because the new system allows manufacturers to object to materially inaccurate information contained in complaints, manufacturers may be able to prevent misleading information from reaching the public.

From a consumer's perspective, the new database makes it easier to file product safety complaints. The search function allows consumers to research potential safety issues of products that they are considering buying or that they have already purchased. If a consumer believes that a product creates a potential safety hazard, the consumer can quickly search the website to determine if others have raised similar concerns. The website also provides an effective tool for third-party public interest groups to monitor product safety. Regarding product liability litigation, attorneys might consider checking the database to see if similar incidents have been reported.

There is some worry that while this sounds good in theory, the CPSC website might become a forum for consumers to voice illegitimate complaints about products, or that if the CPSC routinely accepts any objections raised by manufacturers, consumers could be left feeling frustrated and ill-informed. It remains to be seen how liberally the CPSC will strike information from complaints that a manufacturer argues is inaccurate. The tight timeframe from receipt of complaint to publishing could hamper the quality control of what eventually makes it on to the website. To be fair to all involved, the CPSC will need to find a happy medium between "anything goes" and "strike everything." In the former environment, manufacturers may have misleading information about their products published on a government

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website, potentially harming the manufacturer and consumers who rely on the website to determine product safety. In the latter environment, companies may seek to improperly squelch legitimate complaints about real safety issues. An effective screening process is in the interests of both consumers and manufacturers.

Broken Products and Promises: Application of the Failure of Essential Purpose Doctrine to Limited Repair Warranties

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From automobiles to mobile phones, the vast majority of consumer products today come accompanied by packaging or warranty booklets that contain limited repair warranties. These limited repair warranties purport to disclaim all other express and implied warranties, while limiting the manufacturer's obligation to repairing or replacing, at its option, defects in materials and workmanship. At first blush, the meaning and application of this type of limited repair warranty seem fairly simple and straightforward: if a warranted product malfunctions, the manufacturer will fix it. But, what if the "fix" takes several months to complete? What if the manufacturer is able to repair all major deficiencies with the product, but very minor problems persist. Or, what if, despite evidence that the product has been fully repaired, the consumer has simply lost all confidence in the product and believes that he did not get what he bargained for? This article provides an introduction to some of these more thorny issues raised by limited repair warranty disputes and addresses the "failure of essential purpose" doctrine.

Limited Repair Warranties

Limited warranties restrict the remedies available to one or both of the parties once breach is established. Limited warranties are permitted under Oregon and federal law governing product warranties. The Oregon Uniform Commercial Code 2-179 provides that parties to a contract may limit the buyer's remedies to repair and replacement of goods. ORS 72.7190(1)(a). Similarly, the language of the Oregon Consumer Warranty Act, ORS 72.8010, *et seq.*, and the federal Magnuson-Moss Warranty Act,15 USC § 2310, *et seq.*, contemplate that manufacturer express warranties will limit the consumer's remedy to repairs. Both Acts define manufacturer warranties in terms of promises to repair, preserve and maintain the utility of the warranted consumer goods. *See*, ORS 72.8060; 15 USC § 2301(6)(B).

Limited warranties most often contain remedial promises to repair, but they do not necessarily warrant anything regarding the condition of the product. In fact, because limited repair warranties by their very nature contemplate the necessity of repairs, product failure alone will generally not support a claim for breach. *See, Tacoma Boatbuilding Co. v. Delta Fishing, Co.*, 28 UCC Rep Serv 26 (WD Wash 1980). Under the terms of most limited repair warranties, the consumer's exclusive remedy for a defective product consists of delivering the product to the manufacturer or its dealer for repairs.

However, the scope and enforceability of limited repair warranties are not without their own limitations. A product warrantor does not have the absolute right to limit a consumer to the exclusive repair remedy where it is deemed that the remedy has "failed its essential purpose." Where such a failure has occurred, the limited warranty is deemed to have been breached and the consumer is entitled to seek remedies outside of the exclusive repair remedy.

Failure of Essential Purpose Doctrine

The failure of essential purpose doctrine derives from Section 2-719 of the UCC. The doctrine is also applicable to claims for breach of limited warranty under the Oregon Consumer Warranty Act and federal Magnuson-Moss Act. The general rule is that a limited repair warranty fails its essential purpose where warrantor is unwilling or unable to repair the product within a reasonable amount of time. It is clear that a warrantor's outright refusal to perform warranty repairs constitutes such a failure. The same goes for a warrantor's total inability to repair the defective condition after multiple attempts. On the flip side, a warrantor's successful, timely and permanent repairs cannot possibly support a claim for breach because the warrantor has fulfilled its exclusive promise to repair the product. However, few limited warranty disputes involve such cut and dry facts. More commonly, there is a genuine dispute as to the adequacy or timeliness of product repairs to support a charge that the remedy limitation failed its essential purpose.

How Do Oregon Courts Define Failure of Essential Purpose?

Oregon courts have had only limited opportunity to define what it means for a limited repair warranty to fail its essential purpose. In *Young v. Hessel Tractor & Equipment Co.*, 99 Or App 262 (1989), the buyer of logging equipment brought suit against the seller, seeking to revoke acceptance based on the seller's alleged breach of a one-year/1,500 hour limited repair warranty. The limited warranty at issue disclaimed all warranties, express or implied, except the exclusive remedy of repair or replacement for any defect in materials or workmanship. The jury returned a defense verdict at trial. Thereafter, plaintiff appealed, arguing that the trial court erred in granting the defendant seller's motion excluding plaintiff's failure of essential purpose theory from the jury. The Court of Appeals reversed and remanded for new trial. In doing so, it noted that the logging equipment at issue was subject to more than a year of continuing unsuccessful repair attempts under the limited warranty. The Court stated that, to prove failure of essential purpose of a repair remedy, the buyer must show that the seller was either unwilling or unable to repair. *Id* at 267. The Court went on to explain that such failure can be established where the buyer puts on evidence that he lost the benefit of his bargain because the limited repair remedy "was not minimally adequate." *Id.*

While the *Young* opinion spelled out the black letter standard for failure of essential purpose, it did not address more difficult questions, such as, at what point does a warrantor's unsuccessful repair attempts transform into "inability to repair" to support a charge that the remedy failed its essential purpose? And, what if the warrantor is only able to substantially repair the defective condition? The Court of Appeals ruling in *Hanson v. Signer Motors, Inc.*, 105 Or app 74, 803 P2d 1207 (1990), signaled a narrow view of the failure of essential purpose doctrine in situations where the warrantor remains ready and willing to perform repairs, even if product issues are protracted and not completely resolved. In *Hanson*, an RV buyer brought suit under the Consumer Warranty Act against the RV's manufacturer and seller, alleging breach of a limited one-year repair remedy. On appeal from a defense verdict, the plaintiff buyer argued that the trial court should have allowed recovery against the defendants. The undisputed evidence showed that the RV was subject to repeated repair attempts, and that certain cosmetic complaints remained uncorrected. Nonetheless, the Court of Appeals affirmed the trial court's verdict, explaining that because the continued problems were "relatively minor" and plaintiff was still able to use the RV for its original purpose, there was no *substantial impairment* to support a remedy outside of the limited warranty.

Id at 79. The *Hanson* court did not explicitly use "failure of essential purpose" terminology in reaching its opinion. It was also quick to point out that it was not deciding whether a showing of substantial impairment was actually required to prove breach of a limited warranty under the Consumer Warranty Act. Nonetheless, *Hanson* can certainly be read as a signal that there is no independent remedy for breach of a limited repair warranty where only minor issues exist after the completion of warranty repairs.

Beyond Oregon: Varying Approaches

A look outside of Oregon shows that courts can vary widely on the question of exactly what it means for a limited repair warranty to fail its essential purpose. In this respect, it is important to note how the product defect, as well as the alleged breach, are framed by the parties and the court. Certain courts will focus on the underlying condition of the product, while others will lean more heavily on the efforts and willingness of the warrantor to perform (or attempt) repairs. For example, the Minnesota Supreme Court rejected the notion that a warrantor's good faith and continued willingness to perform limited warranty repairs is a defense to a claim that the warranty failed its essential purpose, stating that a warrantor's "commendable efforts and considerable expense" will not relieve it of liability. *Durfee v. Rod Baxter Imports, Inc.*, 262 NW2d 349, 356 (Minn 1977). Yet, in *Pierce v. Catalina Yachts, Inc.*, 2 P3d 618 (2000), the Alaska Supreme Court stated that the warrantor's state of mind in attempting to fulfill its repair obligations was relevant in determining whether the essential purpose of the remedy had failed. *Id* at 623.

Similarly, courts take divergent views on whether product components and failures should be examined individually or cumulatively under the essential purpose doctrine. Exactly how the court chooses to define the defect can be of critical importance because it may determine whether the repairs were performed within a reasonable amount of time. For instance, one week to repair one individual "widget" may be reasonable, but ten weeks to repair ten individual widgets within a "motor" might be considered unreasonable. How the defective part is defined, and whether various claimed defects can be aggregated, will often be the difference between a successful or unsuccessful claim for breach of limited repair warranty.

On one end of the spectrum, certain courts take the position that several minor nonconformities over a period of time, even if not substantial when viewed independently, should be viewed cumulatively to support a claim that the limited repair remedy failed its essential purpose. *See e.g., Murray v. Holiday Rambler, Inc.*, 83 Wis2d 406, 421, 265 NW2d 513 (Wisc 1978). Courts adopting this cumulative defect approach tend to rely on the oft-cited principle that a limited warranty does not provide license "to tinker with the article indefinitely in the hope that it may ultimately be made to comply with the warranty." *Abele v. Bayliner Marine Corp.*, 11 FSupp2d 955, 960 (ND Ohio 1997). At the opposite end of the spectrum, courts taking a more pro-warrantor approach have held that as long as the warrantor repairs the goods each time a defect arises, the limited repair remedy has not failed its essential purpose. *River Rouge School District v. Mestek, Inc.*, 2006 SL 1921466 (Mich App 2002) (HVAC seller repaired product each time the system broke down and remained willing to continue making repairs). Courts adopting this more narrow view of the doctrine tend to reject consumer attempts to aggregate defects for the purpose of establishing that the limited remedy has failed. A good example of this comes from *Mercury Marine v. Clear River Construction Co., Inc.*, 839 So2d 508 (Miss 2003). In *Mercury Marine*, a boat engine covered by a limited repair warranty broke down three separate times, prompting the buyer

to sue for breach of warranty. On appeal, the Mississippi Supreme Court acknowledged the engine breakdowns, but differentiated the causes of each failure as separate and discrete parts within the engine. The court held that the limited repair remedy did not fail its essential purpose because the same engine component never malfunctioned more than once, and the manufacturer was able to repair the distinct problems each time it was presented under the warranty. *Id* at 512.

Conclusion

The "freedom of contract" is a fundamental concept underlying contract law and is an essential element of the free enterprise system. While parties to a contract are free to allocate risks as they see fit, this freedom is not without its limits. The essential purpose doctrine, in theory, balances the competing interests of the product warrantor against those of the consumer by allowing product manufacturers and sellers to limit a consumer's available remedies, while also protecting consumers where a warrantor's unwillingness or inability to repair the product renders the limited repair remedy valueless. As this article attempts to highlight, the failure of essential purpose doctrine is malleable and highly fact-driven; leaving wide latitude for practitioners on both sides to shape the law and advocate for their clients.

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