IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MARK NEUSER and ARLAN and
MARCIA HINKLEMANN, individually
and on behalf Wisconsin
residents similarly situated,

Plaintiffs,

v.

MEMORANDUM AND ORDER
06-C-645-S

CARRIER CORPORATION,

Defendant.

Plaintiff Mark Neuser commenced this products liability class action in the Circuit Court for Dane County Wisconsin, alleging that defendant Carrier Corporation manufactures and sells high efficiency furnaces with defective secondary heat exchangers which fail prematurely. Plaintiff alleged claims for negligence, fraud and misrepresentation, violation of Wisconsin's deceptive and unfair trade practices law, breach of warranty and unjust enrichment. The case was removed to this Court pursuant to diversity of citizenship, 28 U.S.C. §§ 1332, 1441 and 1446. On December 8, 2006 a second amended complaint was filed adding Arlan and Marcia Hinklemann as plaintiffs.

The matter is presently before the Court on defendant's motion to dismiss plaintiffs' statutory fraudulent representation misrepresentation claims pursuant to Wis. Stat. § 100.18 on the

basis that they are barred by the applicable statute of repose and there are insufficient allegations of an affirmative misrepresentation. The following is a summary of the allegations of the second amended complaint relevant to the § 100.18 claims.

FACTUAL ALLEGATIONS

Defendant manufactures and sells high efficiency furnaces. Prior to 1988 defendant's furnaces included secondary heat exchangers manufactured from corrosion resistant stainless steel, the standard material in the industry for that application. Starting in 1988 defendant began selling furnaces which included secondary heat exchangers made from polypropylene-laminated (PPL) mild steel, a material which it knew to be cheaper, but less corrosion resistant than stainless steel.

High efficiency furnaces employ secondary heat exchangers to extract heat from furnace gases through condensation thereby increasing efficiency from 80% to 90%. The condensate formed in the secondary heat exchanger is highly acidic and corrosive. During the operation of defendant's furnaces PPL in the secondary heat exchanger is exposed to temperatures in excess of its tolerance and peels away from the mild steel, exposing the steel to corrosive condensate. The resulting corrosion introduces solids into the condensate which plugs the system causing the condensate to back up and damage other furnace components. This causes a

variety of operational problems and ultimately causes the furnace to fail prematurely. In some instances the corrosion causes a perforation of the secondary heat exchanger and results in carbon monoxide leaking from the furnace. Although the expected typical lifetime of a furnace is twenty years, the average life of defendant's furnaces is nine years. Defendant was aware of these facts prior to 1988.

In 2000 plaintiff Neuser purchased a home equipped with a Carrier high efficiency furnace which had been installed in 1993 or 1994. On April 1, 2006 the furnace began emitting carbon monoxide because the secondary heat exchanger had corroded and failed. The furnace was condemned by Madison Gas & Electric Company. On April 3, 2006 plaintiff Neuser purchased a new high efficiency Carrier furnace to replace the failed furnace. At the time of purchase, he was provided with a limited warranty which provided:

> FIVE YEAR LIMITED WARRANTY - Carrier (hereinafter referred to as "Company") warrants this furnace to be free from defects in materials and workmanship. If a defect is found within five years from the date of original installation of furnace (whether or not use begins on that date) Company will provide a new or remanufactured part at Company's sole option, to replace any defective part, without charge for the part itself.
>
> * * *
>
> B. LIFETIME LIMITED WARRANTY ON HEAT EXCHANGER ONLY - The Company warrants to the original purchaser, during his or her lifetime, that the heat exchanger will be free

> from defects materials and workmanship: provided, however, this warranty will apply only to the original installation of the furnace in a single family dwelling ....
>
> The Company's warranty obligation in A or B above shall be, at its sole option, to provide a new heat exchanger without charge for the heat exchanger itself....
>
> None of these warranties include labor or other costs incurred for diagnosing, repairing, removing, installing, shipping, servicing or handling of either defective parts, or replacement parts, or new units.

On June 6, 1994, plaintiffs Arlan and Marcia Hinkelmann purchased a new carrier high efficiency furnace. In fall of 2006 the secondary heat exchanger failed and the furnace could only warm the house to 51° F. The Hinkelmanns purchased a replacement furnace from a competitor of defendant.

In a recent letter sent to Carrier dealers and employees defendant stated as follows: "The secondary heat exchanger material was changed to PPL to enhance the heat exchanger's durability against corrosive flue gasses and acidic condensate. The change was made after many years of investigation and testing. The material greatly enhances the secondary heat exchanger's ability to resist corrosion from acids during the condensing of flue gases."

MEMORANDUM

Defendant's motion is in two parts. First, defendant argues that the three year statute of repose in Wis. Stat. § 100.18(11)(b)3 bars all claims except plaintiff Neuser's claim based on the 2006 new furnace purchase. Concerning Neuser's 2006 purchase, defendant argues that the allegations are insufficient to meet the affirmative misrepresentation requirement of 100.18(1). Plaintiffs oppose the statute of repose defense arguing that the discovery rule, continuing violation and fraudulent concealment doctrines all overcome the strict operation of the statute. Plaintiff Neuser contends that the furnace warranty provided by defendant is sufficient to constitute an affirmative misrepresentation within the meaning of § 100.18.

A claim should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

Statute of Repose

Wisconsin Statute § 100.18 provides in relevant part:

> (1) No person ... with intent to sell ... merchandise ... shall make a statement or representation of any kind to the public ... which ... statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.
>
> * * *
>
> (11)(b)3. No action may be commenced under this section more than three years after the occurrence of the unlawful act or practice which is the subject of the action....

Section 100.18(11)(b)3 is a statute of repose, which requires the commencement of an action within three years after defendant's action which led to the injury, regardless of whether plaintiff has discovered the injury or wrongdoing. Kain v. Bluemound East Industrial Park, Inc., 2001 WI App 230, ¶ 14, 248 Wis. 2d 172, 635 N.W.2d 640. Any actionable conduct by defendant concerning plaintiff Neuser's home purchase and the Hinkelmann's furnace purchase occurred at the time of those purchases more than ten years prior to the commencement of this action. Accordingly, claims under 100.18 arising from any misconduct inducing those purchases is clearly barred by the three year statute of repose.

Plaintiffs' three arguments to the contrary are unpersuasive. There is no basis for this Court to disregard the clear and consistent conclusions of the Wisconsin Courts of Appeals that the discovery rule does not apply to § 100.18 claims. Id.; Selzer v.

Brunsell Bros., Ltd., 2002 WI App 232, ¶ 29, 257 Wis. 2d 809, 652 N.W.2d 806. When applying state law under diversity jurisdiction, the Court must predict how the Wisconsin Supreme Court would decide the issue. Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F.3d 1087, 1090. (7th Cir. 1999). However, in the absence of a supreme court decision, decisions of the appellate courts control, unless there are persuasive indications that the supreme court would rule otherwise. Id. There are no such persuasive indications. The language of § 100.18(11)(b)3 is clearly that of a statute of repose. In applying other statutes of repose the Wisconsin Supreme Court has deferred to the legislative branch, rejecting all attempts to apply the discovery rule based on equitable arguments. Castellani v. Bailey, 218 Wis. 2d 245, 252-55, 578 N.W.2d 166 (1998). Accordingly, the discovery rule does not apply to this claim.

Plaintiffs' additional arguments seeking to avoid the statute of repose on equitable principals of fraudulent concealment and equitable tolling suffer the same fate. A statute of repose is not subject to alteration based on equitable public policy arguments. Selzer, 2002 WI App at ¶ 30. The equitable tolling doctrines are treated the same as the discovery rule since they are equally based on the knowledge of the plaintiff, and statutes of repose are unaffected by what the plaintiff knows. See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990)(analyzing these

doctrines under analogous federal law). Equitable tolling and any attempted equitable extensions are incompatible with a period of repose. Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix, 283 F.3d 877, 887 (7th Cir. 2002)(Easterbrook concurring).

Finally, there is neither factual nor legal support for permitting the claim to proceed on the basis that the representation was continuing or related to future performance. A violation of § 100.18 consists of the making of an affirmative statement, and is not violated by a failure to disclose a known defect. Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, ¶40, 270 Wis. 2d 146, 677 N.W.2d. 233. In addition, plaintiff must demonstrate that the affirmative statement was a material inducement in the purchasing decision. Wis JI-Civil 2418 (cited with approval in Tietsworth, 2004 WI 32 at ¶39. There are no allegations that any affirmative statements were made to the plaintiffs after their purchases, and even if such statements were made they could not have been an inducement to make the purchase. As a result, any such alter statements could not affect the accrual date set by the statute of repose.

There is no basis to suggest that misrepresentations concerning future product performance, which are common in § 100.18 actions, permits extension of the statute of repose time period. See, e.g., Tietsworth, 2004 WI 32 (premature motorcycle engine failure); Selzer, 2002 WI App 232 (premature window rot).

To create an exception to the statute of repose for misrepresentations concerning future performance would largely negate the statute.

In the final analysis, all of plaintiffs' arguments to overcome the statute of repose defense amount to contentions that such a statute is bad public policy. The Wisconsin supreme court has flatly refused to consider such arguments finding them "better left to the legislative branch of government." Castellani, 218 Wis. 2d at 254, ¶ 15.

Warranty as Affirmative Misrepresentation

Plaintiff Neuser's claim concerning his recent furnace purchase is not time barred. Defendant's motion to dismiss goes to the sufficiency of the allegations to meet the elements of the claim. Specifically, defendant maintains that the allegations are insufficient to state an affirmative misrepresentation or reliance on such a misrepresentation in making the purchase. The only affirmative statement allegedly received by plaintiff Neuser inducing his furnace purchase was the product warranty.[1]

As the parties recognize, this Court previously addressed the identical issue in Ball v. Sony Electronics, Inc., 2005 WL 2406145 at *3, holding that a warranty promise to remedy defects did not

[1]Although there are allegations that defendant made other representations to its dealers and employees, there is no allegation that these were known to plaintiff or in any way influenced his purchase decision.

constitute an express representation that the product contained no defect:

> Plaintiff maintains that the written warranty was a representation that the camcorder was free of defects. Quite the contrary, a written warranty of the type included with the camcorder is an express acknowledgment that the product may be defective and a promise by defendant to remedy such a defect in the manner and within the time period prescribed. Defendant's express promise to remedy defects in a product is not a representation that there are none, but an acknowledgment that there might be.

Stated differently, a contractual warranty of the type involved here and in Ball is a recognition of potential defects (in a statistical sense, the inevitability of defects) in the seller's product and an allocation of risk associated with such defects. There is no reasonable way to distinguish the warranty here from that in Ball, nor is it reasonable to argue that the meaning and intent of those warranties are somehow different. Viewed in context, the warranty language is not a representation that no defects exist in the product.

ORDER

IT IS ORDERED that defendant's motion to dismiss plaintiffs' claims based on Wis. Stat. § 100.18 is GRANTED.

Entered this 9th day of February, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge