

CONTRACTOR ALERT

Contractor Alert is a joint publication by this Contractor and the law offices of Richard M. Sissman, Esquire, located at 1485 Chain Bridge Road, Suite 105, McLean, VA 22101. This newsletter is designed to give general information on the matters covered. Space limitation prevents exhaustive treatment or analysis of this topic. This newsletter is not intended to substitute for advice on specific legal problems. If you are interested in receiving a complimentary issue or to be placed on our mailing list, contact Richard M. Sissman, Esq. We welcome and appreciate your suggestions for future article topics.

Joint Publication by this Contractor and Richard M. Sissman, Esquire
LXXXI--Aug-Sep 2000

ARE CONSEQUENTIAL DAMAGES COMPENSABLE FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY IN THE ABSENCE OF PRIVACY OF CONTRACT

May you collect consequential damages against another for breach of an implied warranty of merchantability in the absence of privity of contract with that contractor? The Virginia Supreme Court analyzed such a question as set forth below.

Beard Plumbing and Heating, Inc. ("Beard") was the plumbing subcontractor in a condominium development in Woodbridge, Virginia. Beard installed post-chlorinated polyvinyl chloride plumbing fittings in the homes in the project. The fittings were manufactured by Thompson Plastics, Inc. ("Thompson") and NIBCO, Inc. ("NIBCO") and purchased from third-party suppliers. There was no contract between the manufacturers and Beard. The fittings cracked and subsequently leaked when hot water was used in the system. The general contractor required Beard to replace the fittings and to repair the damage to the homes and then dismissed Beard from the job.

Beard filed suit against Thompson and NIBCO in the United States District Court for the Eastern District of Virginia, alleging both negligence and breach of warranty. Beard claimed the fittings were defective and that "certain adapters failed when they attempted to shrink around thermally-expanded metal fittings during cool-down." Beard identified its damages as the uncompensated cost to repair the homes, loss of the remainder of its contract with the general contractor, revenue lost due to damage to business reputation, \$165,878.93 which it paid to settle a suit filed against it by the general contractor. NIBCO and Thompson filed summary judgment with the trial court which agreed with NIBCO and Thompson holding that Beard's claim for economic loss could not be recovered in a negligence claim and that Beard failed to demonstrate a breach of warranty claim.

The federal appellate court determined that the trial court correctly held that Beard's negligence claim was barred as a matter of law because it sought only economic damages. Finding that no Virginia case has construed the Commercial Law ^{8.2-318} to determine whether it abrogated the privity requirement for recovery of economic loss damages in negligence cases, the Court of Appeals nevertheless concluded that its own precedent and Virginia case law, particularly *Blake Construction Co. v. Alley*, 233 Va. 31, 353 and *Sensenbrenner v. Rust* (1988), "strongly supports the conclusion that the Commercial Code has not abrogated the privity requirement in negligence actions seeking recovery for economic loss. The Court of Appeals, however, determined that the district court's ruling addressed only Beard's claims for negligence and breach of the implied warranty of fitness for a particular purpose and did not resolve Beard's claim that NIBCO and Thompson had also breached the implied warranty of merchantability.

Before remanding the case to the district court for resolution of Beard's breach of the implied warranty of merchantability claim, the Court of Appeals observed that Beard's claim would be barred, as a matter of law, if privity were required to recover the damages claimed by Beard for breach of the warranty. The Court of Appeals noted that, as in the case of negligence actions, the effect of ^{8.2-318} on the privity requirement in breach of warranty actions seeking economic loss damages has not been considered by the Virginia Supreme Court.

The question posed to the Virginia Supreme Court is privity required to recover economic loss under Va. Code ^{8.2-715(2)} due to the breach of the implied warranty of merchantability, notwithstanding the language of Va. Code 11 8.2-318?

To answer this question, the Supreme Court determined whether ^{8.2-715(2)} requires the existence of a contract for the recovery of economic loss damages in breach of warranty cases.

Section 8.2-715(2) provides:

Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty. This section does not address economic loss damages. Section 8.2-715(2)(a) is part of the UCC, a comprehensive statutory scheme affecting commercial transactions.

The language of the section itself contains a presumption that there is a contract between the parties. The phrase "at the time of contracting" in subparagraph (a) conveys the understanding of a contract between two parties. The Court concluded that ^{8.2-715(2)(a)} required a contract between the parties for the recovery of consequential economic loss damages incurred as a result of a breach of warranty by the seller.

The second part of the certified question asked the Court to determine whether the provisions of ^{8.2-318} supersede the contract requirement of ^{8.2-715(2)(a)}. Section

^{8.2-318} provides in pertinent part:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of

warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods[.]

Accordingly, the Virginia Supreme Court concluded that ' 8.2-715(2)(a) requires a contract between the parties for recovery of consequential economic loss damages in a claim for breach of the implied warranty of merchantability.

If you should have any further questions, please call Mr. Sissman at 703-903-9646 in Virginia.