# *Dealing with the Three-Headed Product Liability Complaint*

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In 1962 an electric hot water heater exploded in a newly constructed home and product liability litigation in Mississippi changed dramatically. *State Stove Manufacturing Company v. Hodges*, 189 So. 2d 113, 114-15 (Miss. 1966). The homeowners were awarded $10,900, which was the approximate cost of the house. *Id.* On appeal, the defendant argued the then well-established rule that a manufacturer had no liability to ultimate purchasers absent a contractual relationship. *Id.* The Mississippi Supreme Court decided to abolish this "privity of contract rule" and reasoned that the manufacturer's responsibility is not based on contract but on the fact that the manufacturer placed the product on the market for consumers with a certain "foreseeability of harm." *Id.* at 115-18. Writing on a clean slate, the Court turned to the question of what should be "the basis and theory of liability of a manufacturer to a consumer for a defective product . . ." *Id.* at 118. The Court adopted Section 402A of the Restatement of Torts (Second) as the law of products liability in Mississippi. *Id.* Twenty-seven years later the Mississippi legislature codified strict product liability by enacting the Mississippi Product Liability Act ("MPLA"). MISS. CODE §11-1-63.

Despite the availability of strict liability, nearly every Mississippi lawsuit involving a product begins with a three-headed complaint that also includes negligence and implied warranty claims. Negligence and warranty are not out of the product liability equation. Courts have drawn several clear lines with regard to where these claims overlap, coincide, and/or consume each other. This article briefly addresses the areas of overlap and offers a series of questions to ask when defending against the three-headed complaint.

**Where Do Warranty, MPLA, and Negligence Overlap, Coincide and/or Consume One Another?**

After the MPLA was adopted, defendants argued implied warranty was dead and the MPLA was the exclusive theory of liability for damages caused by a product. *Taylor v. General Motors Corp.*, No. 1:96cv179, 1996 WL 671648, at *3 (N.D. Miss. Aug. 6, 1996) (*Erie* guess that MPLA did not abrogate implied warranty claims); *Childs v. General Motors Corp.*, 73 F. Supp. 2d 669, 671 (N.D. Miss. 1999); *Hodges v. Wyeth-Ayerst Laboratories*, No. 3:00cv254, WL 33968262, at *2-3 (S.D. Miss. May 18, 2000). Fifteen years after the MPLA was enacted, the Mississippi Supreme Court settled this question in *Watson Quality Ford, Inc. v. Casanova*, leaving no doubt that implied warranty was alive and the MPLA did **not** abrogate these claims. 999 So. 2d 830, 833 (Miss. 2008).

*When are MPLA and implied warranty claims allowed to recover the same damage?* It is clear the MPLA and implied warranty claims overlap when damages are sought for personal injury. The MPLA allows recovery of "damages caused by a product", and there is no doubt that courts allow personal injury damages in MPLA lawsuits. MISS. CODE §11-1-63. Likewise, a plaintiff who proves a breach of implied warranty is permitted to recover for consequential damages that expressly include personal injury. MISS. CODE §75-2-715 (2)(b). Thus, in all cases involving personal injury, MPLA claims and implied warranty claims are both viable.

The implied warranty claim allows plaintiffs to also recover for loss of value to the product. The MPLA does not permit recovery "for commercial damage to the product itself . . ." MISS. CODE §11-1-63. Successful implied warranty claimants on the other hand, can recover "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted . . ." MISS. CODE §75-2-714 (2). Thus, for example, if a farm tractor or airplane is damaged by fire, the owner might recover the lost value of the product itself, but only if he asserts a warranty claim.

*Is negligence viable if the plaintiff also asserts an MPLA claim?* Negligence claims are generally held to be redundant when asserted along with MPLA claims. Some courts dismiss negligence pre-trial. Others hold that submitting jury instructions on MPLA design defect and negligence is redundant. *Palmer v. Volkswagen of America, Inc.*, 905 So. 2d 564, 599 (Miss. Ct. App. 2003) (*rev'd in part on other grounds,* 904 So. 2d 1077 (Miss. 2005)). The Mississippi Supreme Court has held that it was proper not to instruct a jury on negligence when the jury had already been instructed on the risk-utility test because the "risk-utility balancing test is merely a detailed version of Judge Learned Hand's negligence calculus." *Estate of Hunter v. General Motors Corp.*, 729 So. 2d 1264, 1277 (Miss. 1999) (*quoting Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176, 187 (Mich. 1984)). The *Hunter* Court reasoned that the jury should be instructed

on a "single unified theory of negligent design" and should not receive separate negligence and risk-utility instructions. *Id.* at 1278.

Several courts have dismissed these overlapping negligence claims at the summary judgment stage. *Betts v. General Motors Corp.*, No. 3:04cv169, 2008 WL 2789524, at *16 (N.D. Miss. July16, 2008) (granted summary judgment as to negligence claims that overlapped MPLA claims); *Lundy v. Conoco, Inc.*, No. 3:05cv477, 2006 WL 3300397, at *2 (S.D. Miss. Nov. 10, 2006) (regardless of the label products liability and negligence claims are both governed by the MPLA); *Walker v. George Koch Sons, Inc.*, 610 F. Supp. 2d 551, 562-63 (S.D. Miss. 2009) (negligence claims do not survive apart from MPLA claims); *Austin v. Will-Burt Co.*, 232 F. Supp. 2d 682, 691 (N.D. Miss. 2002), *aff'd*, 361 F.3d 862 (5th Cir. 2004) (granted summary judgment and held that negligence claim simply reiterated the product liability claim that the court had already rejected; thus the negligence claim was dismissed as well); *Rogers v. Elks River Safety Belt Co.*, No. 1:95cv115, 1996 WL 671316 (N.D. Miss. Sept. 20, 1996) (stating that all claims were governed by MPLA); *but see Williams v. Daimler Chrysler Corp.*, No. 4:06cv188, 2008 WL 2817097, at *3 (N.D. Miss. July18, 2008) (refusing to hold negligence claims are barred by the MPLA but recognizing that the jury should only be instructed on a "single unified theory of negligent design."), *aff'd on other grounds*, 2009 WL 414578 (5th Cir. 2009), *Childs v. General Motors Corp.*, 73 F. Supp. 2d 669, 673 (N.D. Miss. 1999) (the enactment of the MPLA did not "abrogate the long established common law theory of negligence or the statutory cause of action for breach of implied warranty.") (*quoting Taylor v. General Motors Corp.*, No. 1:96cv179, 1996 WL 671648, at *2 (N.D. Miss. Aug. 6, 1996)). Though no case provides an authoritative abrogation of common law negligence claims, the defendant should pursue dismissal of the negligence portion of the three-headed complaint.

**Does the Economic Loss Doctrine Apply?**

The economic loss rule is "[t]he principle that a plaintiff cannot sue in tort to recover for purely monetary loss . . ." BLACK'S LAW DICTIONARY 418 (7th ed. 2000). It is **not** clear how far this rule will reach to limit tort claims in Mississippi. There is no question tort theories cannot be used to recover economic losses to the product that is allegedly defective. It remains unsettled, however, as to whether a plaintiff can recover in tort for economic losses a product causes to other property. For example, if a defective fire alarm caused a building to burn, can the owner sue in tort to recover the economic value of the lost building?

The seminal case applying the economic loss doctrine is *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 871 (1986), which held that a plaintiff cannot recover in tort for the physical damage a defective product causes to the "product itself." The *East River* Court recognized that if product liability had no bounds "contract law would drown in a sea of tort." *Id.* at 866.

The first opinion addressing whether Mississippi will stand on the economic loss doctrine was *East Mississippi Electric Power Association v. Porcelain Products Co.*, 729 F. Supp. 512 (S.D. Miss. 1990). In *East Mississippi,* Judge Tom Lee dismissed the tort claims of ten electric power companies based on the economic loss doctrine. *Id.* at 513. The power companies claimed insulators used to secure power lines to poles were defective. *Id.* at 514. The companies sought recovery for a laundry list of economic damages not limited to the cost of the allegedly defective insulators. *Id.* For instance, the plaintiffs requested damages for repairs to distribution systems, costs associated with installing new insulators, loss of goodwill, damages caused by the failure of the insulators, and costs associated with delays in expansion and upgrading of existing systems. *Id.* Judge Lee, sitting in diversity, made an *Erie* guess that "Mississippi courts would embrace the rule of no recovery in tort for economic damages." *Id.* at 517. Based on this prognostication, the court dismissed the plaintiffs' negligence and strict liability claims. *Id.*

The next opinion addressing Mississippi's position on the economic loss doctrine was again an *Erie* guess from a federal court sitting in diversity. *Lee v. General Motors Corp.*, 950 F. Supp. 170 (S.D. Miss. 1996). In *Lee,* the plaintiffs alleged the removable fiberglass tops on their Chevrolet Blazers were defective and sought damages for replacing the tops, lost enjoyment of their Blazers, emotional distress, and punitive damages. *Id.* at 172. The court tracked Judge Lee's earlier opinion in *East Mississippi* and dismissed the tort claims based on the economic loss doctrine. *Id.* at 172-74.

Finally, in 1999, a Mississippi appellate court adopted the economic loss doctrine, but the court had to decide only whether tort claims could be used to recover the value of the product itself. *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 736 So. 2d 384, 388 (Miss. Ct. App. 1999). In *State Farm,* the plaintiff sought recovery for the value of a car that was destroyed when oil leaking from a seal underneath the car ignited. *Id.* at 385. The court cited Judge Lee's *East Mississippi* opinion and the United States Supreme Court's *East River* opinion and held that the tort claims could not be used to recover damages to the product itself. *Id.* at 387. The plaintiff attempted to define the oil seal as the product and the car as "other property," but the court refused to accept this definition, holding instead that the seal was an integral component of the car and component parts are not "other property." *Id.* at 388. The plaintiff in *State Farm* was attempting to force the court to define the limits of "other property," but the court expressly noted: "we simply have yet to reach this issue before." *Id.*

Following the *State Farm* decision, federal courts sitting in diversity have continued to deal with the economic loss doctrine and define, with *Erie* guesses, the reach of the economic loss

doctrine as it relates to claims for "other property." In *Mississippi Chemical Corporation v. Dresser-Rand Company*, 287 F.3d 359, 364 n.3 (5th Cir. 2002), the plaintiff suffered over $4 million in lost profits because of an allegedly defective gas compressor train. The trial court dismissed the tort claims under the economic loss doctrine and allowed the jury to consider only warranty. *Id.* However, in *Shular Contracting, Inc. v. Bayou Concrete, LLC*, No. 1:09cv206, 2010 WL 2802158, at *2 (S.D. Miss. July 14,2010), the economic loss doctrine did not preclude a plaintiff's tort claims for defective concrete. *Id.* The plaintiff claimed the concrete had too much air that caused it to be too weak. *Id.* Because the concrete was weak, it had to be replaced after it dried causing economic damages to electrical and plumbing components. *Id.* Construing the electrical and plumbing components as "other property," the court refused to apply the economic loss doctrine. *Id.*

Time will only tell how far Mississippi's economic loss doctrine will reach with regard to "other property." Based on the foregoing cases it is apparent the inquiry is highly fact-specific to the product, the allegations, and damages.

**Does Your Label Disclaim or Limit Warranty Recovery?**

The Mississippi Legislature has enacted various provisions making it difficult - but not impossible - to disclaim warranties or limit damages in consumer transactions. As a general rule, a seller cannot waive implied warranties in sales to *consumers* of *consumer* goods. MISS. CODE §11-7-18 (2010) (prior to July 1, 2010, the terms consumer and consumer goods were absent from this statute). A consumer is "an individual who enters into a transaction primarily for personal, family, or household purposes." MISS. CODE §75-1-201 (b)(11). A "consumer good" is a good that is "used or bought for use primarily for personal, family, or household purposes." MISS. CODE §75-9-102 (a)(23).

With a limited exception, for old high-mileage motor vehicles, Mississippi Code section 75-2-315.1 (1) provides that a "seller of consumer goods" cannot "exclude or modify any implied warranties of merchantability and fitness for a particular purpose" and cannot "exclude or modify the consumer's remedies for breach of those warranties." *Id.* Proper statutory interpretation would hold that if a seller of consumer goods cannot exclude an implied warranty of fitness or merchantability, a seller of non-consumer (or commercial) goods **can** make such exclusion. The maxim of *expressio unius est exclusio alterius* acknowledges that "items not mentioned are excluded by deliberate choice, not inadvertence." *USF&G Ins. Co of Miss. v. Walls*, 911 So. 2d 463, 466 (Miss. 2005). The careful practitioner should promptly assess all warranty and damage disclaimers and formulate a discovery plan to gather all necessary information and possibly file dispositive motions.

**Are the Implied Warranty Claims Barred by the Statute of Limitations?**

To the extent warranty and MPLA claims overlap, you must be mindful that the statutes of limitation are different for each claim and begin to run at different times. MPLA claims are governed by the general three-year statute of limitations and the cause of action accrues at the time the product causes injury. MISS. CODE §11-1-63. However, a cause of action for breach of implied or express warranty "must be commenced within six (6) years after the cause of action has accrued . . . [a] cause of action accrues when the breach occurs" and "[a] breach of warranty occurs when tender of delivery is made." MISS. CODE §75-2-725. The Mississippi Supreme Court has applied this statute to bar warranty claims in product liability actions against manufacturers if suit is filed against the manufacturer more than six years following delivery of the product to the consumer. *Estate of Hunter v. Gen. Motors Corp.*, 729 So. 2d 1264, 1277 (Miss. 1999) (warranty claim untimely when asserted more than six years after the car was purchased from the manufacturer); *Forbes v. General Motors Corp.*, 993 So. 2d 822, 824 (Miss. 2008) (warranty claim untimely when plaintiff purchased vehicle in either 1991 or 1992; the airbag failed to deploy in 1997; and plaintiff brought suit in 2000).

Older products are the biggest beneficiaries of the statute of limitations for warranty claims. For instance, when an accident occurs with personal injury on an eleven-year-old tractor, no warranty claim can exist because the limitations period ran before the accident occurred. On the other hand, the warranty statute of limitations could benefit a plaintiff who fails to bring his personal injury lawsuit within three years of his injury as long as the product is less than three years old at the time of the incident. For example, if a product is delivered and the accident occurs within a month of delivery, the plaintiff could conceivably wait four or five years before bringing his lawsuit for personal injury, but he would be limited to a warranty claim. The tort claims would die three years from the date of injury.

**Summary**

Privity died in Mississippi in 1966 when strict product liability was born. Since this dramatic change, courts and litigants have struggled to define the limits of each of these claims. Implied warranty and the MPLA clearly overlap in the personal injury area. Depending on how far the courts allow the economic loss doctrine to limit tort claims, the MPLA and warranty may also both be used to recover "other property" damaged by a product. Because MPLA includes the negligence analysis, a negligence claim may be disposed of pretrial if MPLA is also alleged. When implied warranty is viable, be sure to raise your UCC defenses and do not forget those defenses when you propound discovery or depose the plaintiff. Hopefully this article will help the next time your client is served with the three headed complaint. ■