

In re LONE STAR INDUSTRIES, INC., CONCRETE RAILROAD CROSS TIES LITIGATION.

776 F. Supp. 206 – D. Md. Oct. 18, 1991

ALEXANDER HARVEY, II, Senior District Judge.

These actions arise as a result of the premature cracking and deterioration of some 500,000 concrete railroad cross ties purchased from Lone Star by various railroad entities between 1983 and 1988. The concrete ties purportedly had a service life of 50 years. However, in August of 1988, National Railroad Passenger Corporation (hereinafter "Amtrak") advised Lone Star that concrete ties sold to it by Lone Star had exhibited signs of cracking and deterioration. Thereafter, Lone Star informed its other customers of the possibility of deterioration and, upon performing track inspections, these customers determined that the ties which had been sold to them were deteriorating as well.

Lone Star entered the concrete railroad tie industry in 1979... Pursuant to this assignment, Pittinger called upon the chief engineers of a number of prominent railroads, including Amtrak and CSX. In his deposition, Pittinger stated that he had told railroad executives that the concrete ties would have a 50-year service life. ... In other brochures published in 1983 and 1984, Lone Star advertised its concrete ties as having longer tie life and greater reduced maintenance than wooden ties. One brochure stated: Concrete ties are designed for a fifty-year life. Structural analysis, laboratory tests, and long-term service prove that fifty years is a realistic assumption ... [h]igh strength, prestressed, air-entrained concrete resists weather, abrasion, chemical reaction, moisture, and freezing and thawing cycles.

In June of 1988, Amtrak discovered premature cracking of the ties during routine track maintenance. Continued inspections disclosed that the cracking of the ties had resulted in a loss of prestress in some ties as evidenced by pull-in of the prestressed steel. In addition, a number of ties which had not been installed on the tracks but had remained in storage also showed signs of cracking and deterioration.

... Beginning in May of 1989, Amtrak had replaced a number of concrete ties on a "spot" replacement basis. According to Amtrak, it has determined that spot replacement is inefficient because such a large number of ties are deteriorating that the continuous inspection and grading process consumes more resources than would overall replacement of the ties. Based on this determination, Amtrak has now begun to replace each and every tie.

The contract entered into between Amtrak and Lone Star consisted of the RFQ, the Technical Provisions and a lengthy document entitled "General Provisions." Paragraph 1.4.1. of the Technical Provisions stated that the concrete ties will be used in the Northeast Corridor and "shall be suitable for service exposed in that environment." Paragraph 2.1 of the Technical Provisions addresses the performance of the concrete ties, as follows:

The intent of this specification is to obtain uniform quality, durability, and performance throughout the design service life of 50 years for concrete ties and shoulder inserts and 15 years for other components with minimum maintenance.

... Lone Star contends that it is entitled to summary judgment as to the warranty and contract claims asserted by the plaintiffs because they are time-barred under [§ 2-725 of the Uniform Commercial Code](#) (hereinafter the "U.C.C."), which has been adopted in Maryland, the District of Columbia and New York and which provides that suit must be brought within four years after a cause of action has accrued. In each jurisdiction, [§ 2-725 of the U.C.C.](#) provides as follows: ...

Plaintiffs concede that [§ 2-725](#) governs the transaction at issue. However, plaintiffs argue that the purchase agreements in this case include a warranty which explicitly applies to a future performance of the goods. As noted, Paragraph 2.1 of the Amtrak specifications stated:

The intent of this specification is to obtain uniform quality, durability, and performance throughout the design service life of 50 years for concrete ties....

Plaintiffs contend that the provision cited hereinabove created an express warranty which explicitly extended to future performance. Plaintiffs also point to statements made in Lone Star brochures and other materials touting the lower life cycle cost of concrete ties, statements which plaintiffs contend constituted an express warranty of future performance. According to plaintiffs, it makes little sense to construe representations relating to the longer life of the product and specifications relating to quality, durability and performance as warranties applicable to the condition of the product only upon delivery.

An express warranty is defined as any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain. ... For a warranty of future performance to exist under [§ 2-725](#), the terms of the warranty must unambiguously and explicitly indicate that the manufacturer is warranting the future performance of the goods for a specified period of time. [R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818 \(8th Cir.1983\)](#). The term "explicit" has been defined as "not implied merely, or conveyed by implication; distinctly stated; plain language; clear; not ambiguous; express; unequivocal." [Binkley Company v. Teledyne Mid-America Corp., 333 F.Supp. 1183 \(E.D.Mo.1971\)](#).

In [Mittasch v. Seal Lock Burial Vault, Inc., 42 A.D.2d 573, 344 N.Y.S.2d 101 \(1973\)](#), twelve years after the purchase of a casket, plaintiff brought suit when it was discovered upon exhumation that the casket had leaked. The seller had provided plaintiff with a certificate of assurance which stated that the casket would be "free from material defects or faulty workmanship and will give satisfactory service at all times." [344 N.Y.S.2d at 103](#). The Court held that the seller's statement constituted an explicit warranty of future performance. [Id. at 103](#). It has also been held that when a vendor warrants the quality of goods, such warranty is breached when tender of delivery is made, but where a vendor warrants the performance of goods, that warranty necessarily contemplates a reasonable period of performance during which the defect or failure would manifest itself. [Iowa Manufacturing Co. v. Joy Manufacturing Co., 206 Mont. 26, 669 P.2d 1057, 1060 \(1983\)](#).

Lone Star argues that the language of the specifications and the statements made in its promotional literature are similar to other representations which have been held not to be a warranty of future performance. For example, in [Jones & Laughlin Steel Corp v. Johns-Manville Sales Corp., 626 F.2d 280, 291 \(3rd Cir.1980\)](#), the seller stated in promotional materials that it could "cite many asbestos roofs that, today, are still performing satisfactorily after more than forty (40) years of exposure." The Third Circuit held that this language did not create an explicit warranty of future performance for the roof installed for the buyer. Other courts have held that similar statements are not warranties of future performance. [Tolen v. A.H. Robins, Co., 570 F.Supp. 1146 \(N.D.Ind.1983\)](#) (statement made that some women have been effectively protected by the same IUD for five years or longer); [South Burlington School Dist. v. Calcagni-Frazier-Zajchowski Architects, Inc., 138 Vt. 33, 410 A.2d 1359 \(1980\)](#) (statement made that roof would do as good a job as other material with a built-up roof of twenty years).

As discussed in Part V(b) of this Memorandum and Order, it cannot be determined on the record presently before the Court whether as a matter of law the contracts between the railroads and Lone Star included express warranties of future performance. It will be for the jury to determine whether under each contract a basis for the bargain included an express warranty. Although it is not necessary that the formal terms "warranty" or "guarantee" be used, the authorities cited herein require that under [§ 2-725](#) the claimed warranty must explicitly indicate that Lone Star was warranting the future performance of ties for a specific period of time.

On the record here, the Court cannot determine as a matter of law that Lone Star did not explicitly warrant the future performance of its concrete railroad ties. ...