

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JAMES NOGOSEK, individually on behalf of
himself and all other Minnesota residents and
entities similarly situated,

Plaintiff,

v.

CARRIER CORPORATION, a Delaware
corporation,

Defendant.

CIVIL ACTION NO.:

COMPLAINT — CLASS ACTION
FOR DAMAGES, INJUNCTIVE
RELIEF, AND RESTITUTION

JURY DEMAND

Plaintiff James Nogosek, on behalf of himself and all other Minnesota residents and entities similarly situated, by and through his attorneys, Heins Mills & Olson, P.L.C., Loeff Cabraser Heimann & Bernstein LLP, and Tousley Brain Stephens PLLC, as a complaint against the Defendant Carrier Corporation (“Carrier”) allege the following:

INTRODUCTION

1. This is a paradigm consumer warranty and consumer fraud class action case. For over 18 years, Carrier has manufactured, marketed and sold a critically important product – high efficiency furnaces – while concealing the material facts that such furnaces are defective and will not last their warranted and expected product lifetime.

2. Plaintiff James Nogosek brings this action on behalf of himself and all similarly situated individuals and entities in the State of Minnesota who currently own Carrier 90% high efficiency condensing furnaces manufactured after January 1, 1989, and equipped with polypropylene-laminated secondary heat exchangers (“PPL-CHXs”), and former owners of such furnaces in Minnesota whose furnaces experienced CHX failure.

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U.S. DISTRICT COURT MPLS

3. Plaintiff asserts eight causes of action on behalf of himself and all similarly situated individuals and entities in the State of Minnesota: (1) breach of express warranty; (2) breach of the implied warranty of merchantability; (3) breach of the implied warranty of fitness for a particular purpose; (4) violations of the Minnesota Consumer Fraud Act ; (5) violations of Minn. Stat. § 325G.19-.20, requiring Carrier to honor its express warranties and providing that violations constitute violations of the Minnesota Consumer Fraud Act; (6) violations of the Uniform Deceptive Trade Practices Act; (7) violations of the Minnesota Unlawful Trade Practices Act; and (8) unjust enrichment.

4. Starting on January 1, 1989, and for the purpose of reducing its costs and thereby maximizing its profits, Carrier began using polypropylene-laminated (“PPL”) mild steel for its furnaces’ secondary heat exchangers. Carrier switched to PPL-laminated steel despite the fact that the industry standard was (and still is) to use stainless steel parts to prevent corrosion.

5. Based on pre-market testing that Carrier began in 1983, Carrier knew in 1985 — three years before it began selling them — that the PPL-laminated secondary heat exchangers would not last as long as the warranted life nor as long as a secondary heat exchanger manufactured with stainless steel, the industry standard.

6. Unlike disposable goods like cameras, or even cars, Carrier’s furnaces are expected to last at least 20 years, the industry standard. In fact, contrary to all the facts known to it, Carrier expressly warrants its secondary heat exchanger to be free from defects for the life of the original purchaser, or for 20 years if the furnace is resold.

7. Carrier knew and intentionally concealed from everyone that its PPL-laminated secondary heat exchangers and the heat exchanger system are inferior and fail prematurely,

damaging components of the furnaces, causing operational problems up to and including the ultimate failure of the furnaces.

8. Upon information and belief, the failure mechanism can be described as follows: the polypropylene laminate ("PPL"), exposed to temperatures in excess of its tolerances, curls inward from, and flakes off near, the inlet valve of the secondary heat exchanger. When this happens, the PPL blocks air flow into the secondary heat exchanger. When the PPL peels and flakes off of the underlying surface, it also exposes the mild steel to acidic condensate, which causes corrosion. The resulting corrosion of the secondary heat exchanger introduces solids into the condensate that plug up the system, thereby causing condensate to back up into the fan or otherwise leak from the secondary heat exchanger, damaging other components of the furnace and causing a variety of operational problems and, ultimately, premature failure of the furnace. If the corrosion proceeds to the point of perforation of the outside wall of the secondary heat exchanger, carbon monoxide can leak from the secondary heat exchanger.

9. Upon information and belief, this failure process begins on the first day of use, even in perfectly installed, maintained and repaired units.

10. As described herein, Carrier made false and deceptive statements regarding the nature of its defective furnaces. To this day, Carrier continues to affirmatively misrepresent and conceal from its dealers, distributors, and the public, the true nature of its furnaces and its pre-market knowledge of the fact that its furnaces fail prematurely.

11. As a result of Carrier's misconduct, Plaintiff and all others similarly situated own or owned furnaces that are defective, have already failed and/or are in the process of failing prematurely, requiring them to pay out of pocket to repair or replace the furnaces.

PARTIES

12. Plaintiff James Nogosek is an adult resident of the State of Minnesota who resides in Winona County.

13. Defendant Carrier Corporation, operating as Bryant, is the largest furnace manufacturer in the United States. It manufactured the high-efficiency condensing furnaces used by Plaintiff and the putative Class Members. Carrier Corporation is a Delaware corporation headquartered in Connecticut that does business in the State of Minnesota.

JURISDICTION

14. This is a proposed class action. Members of the proposed plaintiff's Class are residents of Minnesota, a state different from the home state of Defendant.

15. On information and belief, the aggregate claims of individual class members exceed \$5,000,000, exclusive of interest and costs. As such, jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d).

VENUE

16. Defendant, through its business of selling, marketing, and warranting its high-efficiency condensing furnaces, has established sufficient contacts in this district such that it is subject to personal jurisdiction here. Pursuant to 28 U.S.C. § 1391(c), therefore, Defendant is deemed to reside in this district.

17. Upon information and belief, Carrier has sold over 150,000 furnaces to Minnesota residents and entities since 1989. Thus, a substantial part of the events giving rise to these claims and a substantial part of the property that is the subject of this action are situated in this district. As such, venue is proper in this Court pursuant to 28 U.S.C. § 1391(a).

APPLICABLE LAW

18. Plaintiff, a Minnesota resident, seeks damages and equitable relief on behalf of himself and all other Minnesota residents and entities similarly situated under the laws of the State of Minnesota, where their claims arose. Minnesota law presumptively applies to all claims in this action, because no rational reason to do otherwise exists. First, no foreign state has an interest in having its law applied. Alternatively, should it be determined that a foreign state has an interest in having its law applied, Minnesota's interests mandate that Minnesota law be applied, despite the foreign interests. This is so for several reasons. Non-forum contacts are not of greater significance than Minnesota contacts. The application of Minnesota law advances Minnesota's governmental interests. Minnesota's interests in this action – of protecting the rights and interests of Minnesota residents against corporations doing business here and ensuring compliance with, and a forum for the vindication of rights provided under Minnesota laws – have greater significance than that of any other state. Application of Minnesota law also promotes the predictability of results, maintenance of interstate order, and simplification of the judicial task.

FACTS

A. Plaintiff Nogosek's Experience

19. Plaintiff James Nogosek purchased his Carrier furnace, Model Number 58SXC080, in June 1993.

20. In or around January 2007, Plaintiff Nogosek's furnace failed. A technician with Schneider Heating & Air Conditioning, a local Carrier dealer, inspected his furnace and found that the CHX had failed. The technician stated that the CHX had become heavily corroded because it was "poor quality."

21. In February 2007, Plaintiff Nogosek replaced his failed furnace with a new Carrier high-efficiency condensing furnace at a cost of \$2,200.

B. Carrier's High-Efficiency Furnaces are Uniformly Defective and Carrier Deliberately Concealed the True Nature of the Furnaces.

22. High-efficiency condensing (or 90%) furnaces maximize efficiency by employing a second heat exchanger to extract more heat from the furnace's hot gases through condensation. These furnaces are more expensive than non-condensing (or 80%) furnaces.

23. The condensate formed in the secondary heat exchanger is acidic, creating a highly corrosive environment. As such, most furnace manufacturers use corrosion-resistant stainless steel in the design of their secondary heat exchangers, a material more costly than ordinary carbon steel or other engineering metals. At all times relevant, Carrier was aware that most furnace manufacturers use stainless steel and was aware that the condensate inside secondary heat exchangers is extremely acidic.

24. Carrier has been manufacturing, warranting, advertising, marketing and selling 90% furnaces with secondary heat exchangers since 1988. Carrier manufactured, expressly warranted, advertised, and sold the furnaces to Minnesota residents under the brand names "Carrier," "Bryant," "Payne," and "Day & Night."

25. Carrier has known or should have known, since at least 1985, that its PPL-laminated secondary heat exchangers are defective. Upon information and belief, Carrier conducted inadequate testing on its furnaces and failed to test things that it knew or should have known would lead to premature furnace failure.

26. In an effort to reduce costs -- by one estimate achieving a savings of \$7.00 per furnace -- Carrier began as early as 1983 exploring ways to provide a lower cost material alternative to stainless steel. By 1988, Carrier began applying a polypropylene laminate to mild

steel or other less costly engineering metals, ostensibly to protect the corrosion-vulnerable material. Carrier made these design changes despite corrosion problems with its PPL-laminated secondary heat exchangers that it observed as early as 1985, three years before it brought to market the product at issue in this action.

27. Upon information and belief, both the secondary heat exchanger polypropylene liner material and the manner in which it was placed on the secondary heat exchanger failed in their intended design and purpose.

28. Upon information and belief, other parts in the heat exchanger system – including the coupling box, cold spot baffle, inlet plate, and RTV sealant – are also defective in their design and choice of material and contribute to the premature operational problems (e.g., inefficiency, leaking condensate) and ultimately, failure of the furnaces well before the lifetime period (or 20 years).

29. Upon information and belief, the failure process begins on the first day of use, even in perfectly installed, maintained and repaired units.

30. Upon information and belief, Carrier knew or should have known that its condensing furnaces would (and will continue to) prematurely fail well in advance of the promised and expected 20 year average life. In spite of that knowledge, Carrier intentionally falsely and deceptively represented that “A typical furnace is expected to last about 20 years with minimal maintenance.”

31. Upon information and belief – and based on the mechanism of failure and the data Plaintiff has uncovered evidencing extremely high failure rates – all Class members own furnaces that have already failed prematurely or are in the process of failing prematurely, and

thus are reasonably certain to suffer actual injury well in advance of the warranted and expected life of their furnaces.

32. The failure of a furnace can be more than just an inconvenience. When a furnace fails in the dead of winter – which is almost always the case given that furnaces, by their nature, are only used in cold weather – furnace owners and their families can be without heat in dangerously cold temperatures. Naturally, if a furnace fails in the dead of winter, furnace owners are forced to act quickly (and pay whatever it takes) to get the heat back on. Frequently, owners of failed furnaces lose the use of their homes until the furnace is repaired or replaced.

33. On information and belief, many Class members, like Plaintiff, after having presented their failed furnaces to Carrier, have paid out of pocket to repair or replace their furnaces, and the remaining Class members are reasonably certain to have to do so.

34. Upon information and belief, when Carrier began selling and marketing furnaces equipped with the PPL-laminated secondary heat exchanger, it knew that the PPL-laminated secondary heat exchangers did not perform as well as the stainless steel secondary heat exchangers of its competitors and that they would not last as long as Carrier's warranty or the industry standard.

35. Contrary to all the facts known to it, Carrier knowingly falsely and deceptively misrepresented that its furnaces were built to last by warranting that they were “free from defects in material and workmanship.” Carrier expressly warranted the furnaces as a whole as free from defects for at least one full year. Carrier further expressly warranted its secondary heat exchanger to be free from defects for the life of the original purchaser, or for 20 years if the furnace was resold. Carrier intended for its customers to rely on these statements and other representations made in sales brochures, owners' manuals and other materials. These statements

were affirmations of fact and were not couched as “belief” or “opinion.” Nor were these affirmations of fact “generalized statements of quality not capable of proof or disproof.” These affirmations of fact became a part of the basis for the bargain and were material to the transaction for Plaintiff and all members of the Class.

36. Given that Carrier was aware of the design defect in its furnaces, which results in premature failure of the furnaces, Carrier knew or should have known that its warranty was a sham and unconscionable. Moreover, Carrier’s warranty covers only the cost of the secondary heat exchanger. It specifically does not cover the much higher labor costs associated with diagnosing and replacing the defective secondary heat exchanger – costs that can range from \$500 to \$1,500. Given Carrier’s knowledge of the latent design defect which results in premature failure of its furnaces, Carrier’s warranty is woefully inadequate, fails of its essential purpose, is unconscionable, and robs Plaintiff and members of the Class of the substantial benefit of their bargain.

37. To this day, Carrier continues to affirmatively misrepresent and conceal from its dealers, distributors, and the public, the true nature of its furnaces.

38. Plaintiff Nogosek, like all Class members, would not have purchased a defective furnace (or house with a defective furnace in it), or would have negotiated a lower purchase price, if he had known that the defectively designed furnace would require repair or replacement well in advance of the expected and warranted life of the furnaces and at substantial cost.

39. Moreover, Plaintiff and Class members did not take into consideration or negotiate for the risk of carbon monoxide leaks when purchasing their homes equipped with Carrier furnaces, or when purchasing their furnaces, which is a risk that may be created upon the partial or complete failure of a Carrier furnace experiencing the common failure mode described

above. Additionally, Plaintiff and Class members did not take into consideration or negotiate for the risk of loss of use when a furnace fails in the dead of winter when purchasing their homes equipped with Carrier furnaces, or when purchasing their furnaces. Carrier had the responsibility of informing Plaintiff and Class members of those material facts, which are extraneous to the warranty. The "risk and the responsibility" thus fell outside the scope of what each of the parties contracted for, and was not interwoven with, the warranty.

40. Carrier knows or should know that homes installed with its furnaces get resold. In fact, Carrier's warranties specifically contemplate that truism, and anticipatorily warrant to future homeowners – like Plaintiff Nogosek – that the secondary heat exchangers will be free of defects for a period of 20 years. For these reasons, Carrier is estopped from denying that it owes a duty to subsequent purchasers, or from asserting lack of privity as to such purchasers, which, in any event, is not required.

41. Carrier had a duty to disclose to Plaintiff and members of the Class the latent defect in its furnaces as the fact was material to Plaintiff's and the Class members' transactions. Carrier, as the only party with knowledge of the defect, knew that Plaintiff and members of the Class were entering transactions under a mistake as to the fact of the defective design of the furnaces. The fact of the defective nature of the design was peculiarly and exclusively within Carrier's knowledge and the mistaken parties, Plaintiff and Class members, could not reasonably be expected to discover it. On account of the objective circumstances, Plaintiff and the members of the Class reasonably expected disclosure of the fact of the defect. Carrier also had a duty to disclose based on its partial statements, representations and descriptions. The facts that the furnaces are defective and that Carrier's furnaces will not last their warranted and expected life are material in that such facts would have affected the conduct of Plaintiff and class members

who would not have purchased their Carrier furnaces (or homes containing the furnaces), or would have paid less for their homes, if the concealed material facts had been disclosed.

42. As a result of Carrier's challenged conduct, Plaintiff and the proposed Class have been harmed and suffered actual damages or are reasonably certain to suffer actual harm, and will continue to be harmed and suffer actual damages, in that the furnaces have failed or are experiencing continuous and progressive premature failure, and the secondary heat exchangers and heat exchanger systems have failed and will continue to fail long before the expected and warranted life of the furnace has run, resulting in damage to other parts of the furnace, loss of use, and costly repairs or replacement.

43. Plaintiff brings this action on behalf of himself and all similarly situated members of the proposed Class for the relief requested as to Plaintiff and Class members and to promote the public interests in the provision of truthful, non-deceptive information to the public in order to allow consumers to make informed purchasing decisions, and in protecting Plaintiff and the public from Defendant's deceptive, fraudulent and unlawful practices.

44. Defendant's material omissions and misrepresentations and other unlawful conduct set forth in this Complaint were effected through Defendant's course of business in manufacturing, warranting, advertising, marketing and selling high efficiency furnaces to Plaintiff and the public at large in Minnesota.

TOLLING

45. Because the defect is latent and because Carrier took and continues to take steps to conceal the latently defective nature of the furnaces, among other reasons, Plaintiff and members of the Class did not discover and could not have discovered their true defective nature despite reasonable and diligent investigation. Indeed, even after Class members were aware their

secondary heat exchangers had failed, or were failing, Defendant prevented them from ascertaining an inherent deficiency was the cause by asserting that the problems with Plaintiff's and Class members' furnaces were due to faulty installation, improper operation, or local conditions.

46. Moreover, reasonable and diligent investigation into the cause of the failed furnaces did not and could not reveal a factual basis for a cause of action due to Carrier's failure to disclose/concealment of the defect.

47. Any applicable statutes of limitation have thus been tolled by Carrier's knowing and active concealment and denial of the facts as alleged herein, which concealment is ongoing. Plaintiff and the Class have been kept ignorant of vital information essential to the pursuit of these claims, without any fault or lack of diligence on their part.

48. To this day, Carrier continues to commit a continuing wrong on Plaintiff, Class members and the consuming public. Carrier's conduct constitutes continuing violations of Minnesota law. Carrier continues to affirmatively misrepresent and conceal from its dealers, distributors, and the public, the true nature of its furnaces.

49. Recently, in a letter sent to all Carrier dealers, distributors and employees, Carrier makes the following affirmative misrepresentations, among others: "The secondary heat exchanger material was changed to PPL to enhance the heat exchanger's durability against corrosive flue gases 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 formed during the condensing of the flue gases."

50. Even more recently, on May 4, 2007, in response to the decision of the United States District Court for the Western District of Washington granting class certification to a class

of Washington purchasers of Carrier's high efficiency furnaces, who allege claims based on the same unlawful conduct as Plaintiff alleges herein, Carrier continued its wrongful conduct in violation of Minnesota law by continuing to affirmatively misrepresent and conceal from its dealers, distributors, and the public, the true nature of its furnaces. In a press release to the consuming public, Halsey Cook, president of Carrier's Residential and Light Commercial Systems division, represented to consumers that "[c]ontrary to the claims made by plaintiffs' lawyers, these are highly reliable products." Mr. Cook, speaking on behalf of Carrier, also represented that Carrier's "PPL heat exchangers not only exceed industry standards for corrosion, but the design improves durability against acidic condensation."

51. Defendant fraudulently concealed the existence of the defects in its high efficiency furnaces and its fraud, false pretense, false promise, misrepresentation, misleading statement, deceptive practice and material omissions in connection with the sale of its high efficiency furnaces, as well as the breach of all express and implied warranties. Plaintiff and Class had no reasonable opportunity to discover the existence of the facts fraudulently concealed by Defendant.

52. Carrier was and is under a continuous duty not to conceal but to disclose to the Plaintiff and Class the true character, quality, and nature of the furnaces. Plaintiff and Class members reasonably relied upon Carrier's knowing, affirmative, and/or active concealment. Based on the foregoing, Carrier is estopped from relying on any statutes of limitation in its defense of this action.

CLASS ACTION ALLEGATIONS

53. Plaintiff brings this lawsuit as a class action pursuant to Federal Rule of Civil Procedure 23, on behalf of a Class defined as:

54. All individuals and entities in the State of Minnesota who currently own Carrier 90% high efficiency condensing furnaces manufactured after January 1, 1989, and equipped with polypropylene-laminated secondary heat exchangers ("PPL-CHXs"), and former owners of such furnaces in Minnesota whose furnaces experienced CHX failure.

55. Excluded from the Class are Defendant, any entity in which Defendant has a controlling interest or which has a controlling interest of Defendant, and Defendant's legal representatives, assigns, and successors.

56. Also excluded are the judge to whom this case is assigned and any member of the judge's immediate family.

57. Claims for personal injury are specifically excluded from the Class.

58. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Federal Rule of Civil Procedure 23.

59. Although the exact number of Class members is unknown and can only be learned through appropriate discovery, Plaintiff is informed and reasonably believes the number is great enough such that joinder is impracticable. Upon information and belief, Carrier has sold over 150,000 of furnaces to Minnesota residents and entities during the Class period. The Class is composed of a readily identifiable and self-identifying group of individuals and entities who own or owned a Carrier furnace or furnaces. Class members can be ascertained (and can ascertain their own membership in the Class) based upon their past or present ownership of a Carrier furnace or furnaces.

60. The disposition of the claims of these Class members in a single class action will provide substantial benefits to all parties and to the Court.

61. The claims of representative Plaintiff Nogosek are typical of the claims of the Class in that the representative Plaintiff, like all Class members, owns or owned a high-efficiency furnace manufactured by Carrier in which the secondary heat exchanger failed. The representative Plaintiff has been actually damaged by Defendant's misconduct in that he incurred the cost of prematurely replacing or repairing their furnaces after presenting the failed furnaces to Carrier under warranty. Likewise, all Class members have incurred, or are reasonably certain to incur, the cost of prematurely repairing or replacing their furnaces. Furthermore, the factual basis of Defendant's misconduct is common to all Class members and represents a common course of fraudulent, deliberate, and negligent misconduct resulting in actual injury to all members of the Class.

62. There are numerous questions of law and fact common to Plaintiff and the Class. Those questions predominate over any questions of law that may affect individual Class members, and include the following:

- a. Whether the furnace parts manufactured and/or used by Carrier are defectively designed and/or manufactured such that they are not suitable for their intended use;
- b. Whether Defendant knew or should have known of the inherent design and/or manufacturing defect in its high-efficiency furnaces;
- c. Whether Defendant misrepresented material facts to Plaintiff and the Class in connection with the sale of high efficiency furnaces;
- d. Whether Defendant concealed from, and/or failed to disclose to Plaintiff and the Class the inherent problems with its high-efficiency furnaces;

e. Whether any facts concealed and/or undisclosed or omitted by Defendant to Plaintiff and the Class are material facts;

f. Whether as a result of Defendant's concealment or omission of and/or failure to disclose material facts, Plaintiff and the Class acted to their detriment by purchasing high-efficiency furnaces manufactured by Defendant;

g. Whether Defendant's conduct in manufacturing, warranting, advertising, marketing and selling its high-efficiency furnaces constitutes violations of Minnesota's Consumer Fraud Act, Minn. Stat. § 325F.69, subdivision 1 (2005);

h. Whether Defendant's conduct in manufacturing, warranting, advertising, marketing and selling its high-efficiency furnaces constitutes violations of Minnesota's Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43-48;

i. Whether Defendant's conduct in manufacturing, warranting, advertising, marketing and selling its high-efficiency furnaces constitutes violations of Minnesota's Unlawful Trade Practices Act, Minn. Stat. § 325D.13;

j. Whether Defendant made an express warranty under Minn. Stat. § 325G.19 and whether Defendant violated Minn. Stat. §325G.19 by failing to honor such express warranty;

k. Whether Defendant made an express warranty under Minn. Stat. § 336.2-313 and whether Defendant breached any Minn. Stat. § 336.2-313 express warranty;

l. Whether Defendant breached the implied warranty of merchantability provided by Minn. Stat. § 336.2-314;

m. Whether Defendant breached the implied warranty of fitness for a particular purpose provided by Minn. Stat. § 336.2-315;

