

The First Circuit's Lessons on the Implied Warranty of Merchantability, Foreseeability, and the Critical Differences Between Contract and Tort Claims

AcBel Polytech, Inc. v. Fairchild Semiconductor International, Inc., 928 F.3d 110 (2019)

By Keith H. Bensten, Esq., Day Pitney LLP

In *AcBel Polytech, Inc. v. Fairchild Semiconductor International, Inc.*, 928 F.3d 110 (2019), the First Circuit reversed the district court's dismissal of a manufacturer's contract-based implied warranty of merchantability claim against its supplier after a nine-day bench trial. In doing so, the First Circuit explained some key differences between contract-based and tort-based claims for breach of the implied warranty of merchantability and the role of foreseeability in those claims.

The Parties and the Product.

Fairchild Semiconductor Corporation and Fairchild Semiconductor International, Inc. (collectively, "Fairchild"), through their subsidiaries, manufactured and distributed a microcircuit voltage regulator known as the KA7805. AcBel Polytech, Inc. ("AcBel") purchased KA7805s from Fairchild's subsidiaries and used them as a component in power supply units ("PSUs") that AcBel manufactured. AcBel sold those PSUs to EMC Corporation ("EMC"), which used them as a component in data storage devices that it manufactured and sold to its customers.

The KA7805 was one of over 400 parts in AcBel's PSUs. While AcBel specifically designed its PSUs for EMC, Fairchild did not specifically design the KA7805 for AcBel. Rather, the KA7805 was a "jelly bean product" that Fairchild sold to many customers who used it for various applications.

Around 2008, Fairchild notified AcBel that it was redesigning the KA7805. The redesigned KA7805 had a smaller die, which is a miniaturized electronic circuit on which the KA7805's components are installed. Some of the internal components, including a part called the zener diode, were moved around in the redesigned or "shrunk-die KA7805" to accommodate the smaller die. Fairchild performed industry-standard testing on the shrunk-die KA7805, and no failures were reported. Fairchild began selling the shrunk-die KA7805 in early 2010. In July 2010, Fairchild stopped selling the shrunk-die KA7805 after one of its subsidiaries reported a quality incident. Fairchild then reverted back to manufacturing the large-die KA7805 but did not notify AcBel or its other customers of the change.

Before Fairchild switched back to the large-die KA7805, AcBel had purchased and installed 195,000 shrunk-die KA7805s in PSUs that it sold to EMC. In late 2010, EMC notified AcBel that thousands of the shrunk-die KA7805s had failed, causing the PSUs in EMC's data storage devices to fail as well. As a result, EMC replaced 26,000 PSUs in its customers' data storage devices. AcBel blamed the failure of its PSUs on the design of the shrunk-die KA7805s.

The District Court Litigation.

AcBel sued Fairchild on its own behalf and on behalf of EMC as its assignee asserting over a dozen causes of action including a claim for breach of the implied warranty of merchantability. The district court dismissed all of AcBel's claims on summary judgment except for AcBel's implied warranty of merchantability claim, which went to trial.

At trial, Fairchild's expert testified that a certain sequence of events must take place for the shrunk-die KA7805 to fail. Fairchild's expert could only duplicate the failures under extreme conditions caused by performing a Highly Accelerated Stress Test ("HAST"), with bias, followed by a Low Temperature Operating Life test ("LTOL"). Those tests are not standard in the industry, and Fairchild did not perform them on the shrunk-die KA7805 before it began selling them. Other evidence at trial suggested that the failures could have resulted from AcBel's soldering of the microcircuits to the PSU circuit boards.

AcBel's expert testified that AcBel's soldering was within industry standards and opined that the failures were caused by the new placement of the zener diode, which made the shrunk-die KA7805 susceptible to moisture exposure. Unlike Fairchild's expert, AcBel's expert did not perform any independent testing and did not identify a specific mechanism that caused the failures.

After a nine-day bench trial, the district court held that Fairchild did not breach of the implied warranty of merchantability and dismissed AcBel's sole claim. The district court reasoned that AcBel failed to establish that Fairchild could have discovered the alleged design defect in the shrunk-die KA7805 through reasonable testing.

The Appeal to the First Circuit.

AcBel's principal argument on appeal was that the district court erred in holding that AcBel was required to prove that the alleged design defect in the KA7805 was foreseeable through reasonable testing. The First Circuit agreed.

The First Circuit explained that, under the implied warranty of merchantability, a manufacturer impliedly warrants that its goods are fit for their ordinary purposes. Here, AcBel contended that Fairchild breached this implied warranty by selling defective shrunk-die KA7805s that were not fit for their ordinary purpose. *Id.* at 116. To prevail on its claim, AcBel had to prove that: (1) Fairchild manufactured or sold the shrunk-die KA7805; (2) a defect or unreasonably dangerous condition rendered the shrunk-die KA7805 unsuitable for its ordinary use; (3) AcBel and EMC were using the shrunk-die KA7805 in a manner that Fairchild intended or could have reasonably foreseen; and (4) the defect was the legal cause of AcBel's and EMC's injuries. *Id.* The "cornerstone" of such claims, according to the First Circuit, is the anticipation of foreseeable uses. *Id.*

(continued on next page)

The First Circuit held that the district court's error resulted in part from "conflat[ing] its analysis" of the second and third elements. *Id.* at 118. The First Circuit also stated that the specific basis for the district court's ruling was not clear. *Id.* The First Circuit nevertheless ruled that the district court erred by relying on inapplicable tort-based design defect principles. *Id.*

The district court, relying on a tort-based product design defect case, held that a "manufacturer may only be held liable for a defective design if it fails to design against the reasonably foreseeable risks attending the product's use in that setting." *Id.* (citation omitted). Applying those principles, the district court held that "to the extent moving the zener diode was a risk, there was no reasonably foreseeable risk in its design[.]" and "AcBel failed to show that any reasonable testing regimen would have revealed any such defect." *Id.* at 118-119. Relying on another tort-based product liability case, the district court concluded that Fairchild could not have discovered the shrunk-die KA7805's risk of failure through reasonable testing. *Id.* at 119. The district court reasoned that the failures could have only been replicated under extreme conditions created by running the HAST and LTOL tests, neither of which is an industry-standard test. *Id.*

Critiquing the district court's ruling, the First Circuit stated that the "link between a reasonable testing regime, which generally goes towards foreseeability, . . . and the district court's conclusion that the KA7805 was not defective or had an unreasonably dangerous condition is not totally clear." *Id.* The First Circuit held that it need not "unravel this mystery to conclude that the district court erred" because it was sufficient to hold that by "considering foreseeability by reasonable testing for its analysis of the second and third elements . . . the district court improperly commingled contract-based and tort-based theories of implied warranty." *Id.*

The First Circuit explained that AcBel was seeking economic damages only. *Id.* at 119-120. AcBel's implied warranty of merchantability claim thus sounded in contract, not tort. *Id.* Because AcBel was asserting a contract-based implied warranty of merchantability claim, the First Circuit held that "the reasonableness of the testing of the shrunk-die KA7805 was inconsequential." *Id.* at 120. According to the First Circuit, the district court should have focused instead on whether AcBel's use of the shrunk-die KA7805 was foreseeable. *Id.*

After explaining the proper role of foreseeability, the First Circuit declined to resolve AcBel's claim on the appellate record. *Id.* at 120-121. Pointing to the conflicting evidence presented on causation and the district court's inconclusive findings, the First Circuit remanded the case for retrial with direction for the district court to determine:

"whether the shrunk-die KA7805 had a defect or unreasonably dangerous condition that rendered it not suitable for the ordinary use for which it was sold; whether AcBel and EMC were using the shrunk-die KA7805 in a manner that Fairchild intended or could have reasonably foreseen; and whether a defect or unreasonably defective condition of the shrunk-die KA 7805 constituted the legal cause of AcBel's and EMC's injury." *Id.* at 121.

Lessons Learned.

The AcBel decision is instructive for the product liability bar insofar as it makes clear that a plaintiff asserting a contract-based implied warranty of merchantability claim need not prove that the alleged defect was foreseeable through reasonable testing. As AcBel explains, foreseeability in such claims relates to the use of the product, not the alleged defect in the product. The decision is also an important reminder of the essential differences between contract-based and tort-based warranty claims.

* * *

Keith Bensten is an associate at Day Pitney LLP. An experienced civil litigator, Keith represents businesses and employers in complex commercial, product liability, and employment litigation. He has represented businesses and individuals in litigation matters in federal and state courts throughout the United States.