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## Don't Bother Trying to Fix It, We'll Just File Suit!

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By Patrick Reilly, Esq. of Marshall, Dennehey, Warner, Coleman & Goggin

### Key Points:

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In Pennsylvania, all claims alleging breach of warranty with respect to movable "goods" are covered by Article 2 of the Uniform Commercial Code.

- Claims for violation of the Magnuson-Moss Warranty Improvement Act and the Pennsylvania Unfair Trade Practices and Consumer Protection Law must typically still comply with the requirements of the Uniform Commercial Code prior to filing.
- Under Pennsylvania law, a buyer must provide a seller with notice of an alleged breach within a reasonable time, but there is no clear requirement that a seller be provided an opportunity to cure this breach.
- The Supreme Court of Pennsylvania had an opportunity to clear up the issue of whether a seller must be provided an opportunity to cure a breach but chose, instead, to offer "no opinion" on the topic.

Driven by fee shifting statutes, class action certifications, the potential for treble damages under the Unfair Trade Practices and Consumer Protection Law and probably countless other factors, breach of warranty claims are big business in the Commonwealth of Pennsylvania. Many customers are turning to the legal system at the first sign of trouble. For many, it seems as if a successful lawsuit, not a properly operating product, is the goal from the beginning.

In *Samuel-Bassett v. Kia Motors Am., Inc.*, 2011 Pa. LEXIS 2896 (Pa. December 2, 2011), a class action suit dealing with the brakes on certain Kia automobiles, the Supreme Court of Pennsylvania considered the question of whether these breach of warranty suits can move forward at this first sign of trouble. More specifically, the Court considered the issue of whether a purchaser of a product must provide the manufacturer or seller with an opportunity to cure an alleged breach of the warranty prior to filing suit. Unfortunately, the Supreme Court offered little guidance on this particular issue, other than to state that the law in the Commonwealth is "neither 'well-settled' nor self-evident" on this important question.

In Pennsylvania, all claims for breach of warranty relative to the sale of "goods" are governed by the Commonwealth's version of Article 2 of the Uniform Commercial Code (UCC), which is found at 13 Pa.C.S. 2101, et. seq. In addition to UCC claims for breach of warranty, consumers often file companion claims under the Magnuson-Moss Warranty Improvement Act (Magnuson-Moss), 15 U.S.C. § 8201, et. seq., and the Pennsylvania Unfair Trade Practices and Consumer Protection Law (PUTPCPL), 73 P.S. §§ 201-1 to 201-9.3.

The reason for these companion claims is clear. Magnuson-Moss provides for the possibility of fee shifting where the goods in question are consumer goods purchased for personal use, and the PUTPCPL provides for the possibility of treble damages where the seller shows reckless indifference to the consumer's issues with the product.

These elements of damage are critical to consumer plaintiffs due to the relatively modest damages typically recoverable under the UCC. The damages awardable for a breach of warranty under the UCC include solely the difference between the value of the goods as warranted and the value of the goods as delivered. In the consumer context, these damages alone are often not substantial enough to warrant the filing of suit.

However, regardless of whether the breach of warranty claims are plead as violations of the PUTPCPL or

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Magnuson-Moss, to succeed on a breach of warranty theory within the Commonwealth, a plaintiff must prove a violation of the Pennsylvania UCC. This is because Magnuson-Moss does not displace the state law remedies for consumers but simply enhances them. Moreover, while there are separate causes of action under the PUTPCPL for fraudulent, unfair or deceptive conduct, the typical breach of warranty case involving the PUTPCPL is premised on an underlying breach of an existing express.

Thus, no matter how the claim is plead, the governing law within the Commonwealth is found at 13 Pa.C.S. 2101, et. seq. While Pennsylvania's UCC explicitly requires that a buyer provide the seller with notice of an alleged breach prior to filing suit, the requirement that a buyer provide a seller with an opportunity to cure the alleged breach is not explicitly stated. To the extent that such a requirement exists, it has been read into the statute by logic and common sense.

In *Samuel-Basset*, the plaintiffs filed a class action suit against Kia, alleging that all 1995 to 2001 Kia Sephias were sold with defective front brakes. According to the plaintiffs, a design defect in the front brakes led to premature wear of the brake pads and warping of the rotors, manifesting itself in an inability to stop the vehicle, increased stopping distances, brake lockup and vibration, and a general interference with the control of the vehicle

Following a twelve-day trial, a Philadelphia jury found that Kia had breached its express warranty and awarded damages in the amount of \$600 per class member. The verdict totaled \$5,641,200.

On appeal, Kia argued that the plaintiffs had failed to prove all elements of their breach of warranty claim. Kia contended that it had not proved that each and every member of the class had provided Kia with: (1) notice of the alleged breach of warranty; and (2) an opportunity to cure the breach prior to filing suit.

The requirement that a plaintiff provide notice to the seller of a breach of warranty "within a reasonable time" is found at 13 Pa.C.S. § 2607(c)(1). While the language of the statute appears to require that each individual plaintiff provide notice of the breach, the Court in *Samuel-Basset* did not require that plaintiffs provide evidence that each and every plaintiff notified Kia of the breach. Rather, the Court found this requirement was satisfied by internal Kia memoranda reflecting awareness of an issue with the brakes during the alleged time period.

With respect to the requirement of an "opportunity to cure," stating simply that Kia had attempted to remedy the alleged defect throughout 1997-2000 production years, the Court held that the evidence of the opportunity to cure was sufficient to support the verdict. No evidence was provided that Kia was given a chance to repair the brakes on each of the vehicles within the class.

However, even though the Court found the requirement of an "opportunity to cure" had been satisfied, the Court was careful not to explicitly state that such a requirement exists under the law. Rather, the Court drew attention to the fact that the notice requirement is codified in statute. It pointed out that the requirement that a purchaser provide a seller with an opportunity to cure the defect is not found anywhere within the provisions of Pennsylvania's Article 2. Moreover, the Court went on to explicitly state that it was offering "no opinion" on whether the "opportunity to cure" requirement even exists. The Court then re-iterated that the law on this issue within the Commonwealth is neither "well-settled" nor "self-evident."

Arguably, the facts of this particular class action suit made it unnecessary for the Court to consider this important issue. Internal memoranda reflecting the existence of the defect, coupled with three years of attempted repairs, appear to have provided the Court with enough evidence to simply avoid the question of whether an individual consumer must present a vehicle for repair before filing suit for a breach of warranty. However, in doing so, the Court left unanswered a very important question of law.

In Pennsylvania, must a purchaser of non-conforming goods provide the manufacturer with an opportunity to cure the defect prior to filing suit? Following the Supreme Court's decision in *Samuel-Basset*, we still don't know.

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