THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

EDWARD D. SOLARZ,	:	April Term, 2001
MATTHEW GINSBERG,	:	
BRENDON and KATHLEEN DOLAN	:	No. 2033
individually and on behalf of all	:	
others similarly situated,	:	Commerce Program
Plaintiffs,	:	
v.	:	Control No. 112087
	:	
DAIMLERCHRYSLER CORPORATION,	:	
Defendant.	:	

MEMORANDUM OPINION

The defendant, DaimlerChrysler Corporation ("DaimlerChrysler") filed these preliminary objections to the Amended Complaint of plaintiffs Edward D. Solarz ("Solarz"), Matthew Ginsberg ("Ginsberg"), Brendon and Kathleen Dolan ("the Dolans") and on behalf of others similarly situated. For the reasons stated below, this court both overrules and sustains the preliminary objections in part.

BACKGROUND

Between 1995 and 2000, the plaintiffs purchased minivans manufactured by DaimlerChrysler[1] from their local dealerships. Specifically, in 1995, Solarz purchased a 1996 Chrysler minivan from D'Ambrosia Dodge in Downingtown, Pennsylvania, and Ginsberg purchased a 1996 Dodge Caravan from Cherry Hill Dodge, Cherry Hill, New Jersey. Am. Complaint ¶11, 12. In 2000, the Dolans purchased a 2000 Dodge Grand Caravan Sport from Frank C. Videon Dodge in Newtown Square,

---

[1] DaimlerChrysler manufactures, assembles and sells and leases minivans under the brand names Chrysler, Dodge and Plymouth, among others. Am. Complaint ¶14.

Pennsylvania.

Soon after purchasing these vehicles, the plaintiffs discovered that all these minivans did not have a park-brake interlock. This interlock feature ensures that a vehicle will not inadvertently be moved by a person as it prevents one from shifting out of "park" unless the brake pedal is depressed. Although this interlock is a standard feature on some other minivans manufactured by competitors, DaimlerChrysler did not offer this feature on the minivans purchased by the plaintiffs.

On August 1, 2000, the Dolans' parked minivan began to roll down the street after their 1 ½ year old daughter hit the minivan's transmission from "park" into "drive". After their mechanic informed them that their minivan lacked a park brake interlock, the Dolans' sought the help of their dealership. However, they were told that the minivan could not be modified to add this park brake interlock. Despite their requests, DaimlerChrysler made no repairs to the minivan pursuant to the warranties received.

In April 2001, the plaintiffs commenced this class action against DaimlerChrysler asserting breach of implied warranties, breach of express warranty, breach of contract, breach of duty of good faith and fair dealing, and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Act ("UTPCPL").[2] In addition to awarding damages, the plaintiffs also seek injunctive relief compelling DaimlerChrysler to install the park brake interlock feature in their minivans. DaimlerChrysler timely filed these preliminary objections.

[2] The Consolidated Amended Complaint was filed on October 11, 2001.

DISCUSSION

Pennsylvania Rule of Civil Procedure [Pa.R.C.P] 1028(a)(4) allows for preliminary objections based on legal insufficiency of a pleading. When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct 2000). Preliminary objections, whose end result would be the dismissal of a cause of action, should be sustained only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazara, 746 A.2d 642, 643 (Pa.Super.Ct. 2000) (citations omitted).

I. The Doctrine of Conflict Preemption Does Not Apply Here

DaimlerChrysler argues that "conflict preemption prevents this Court from ordering DaimlerChrysler to recall and retrofit the vehicles at issue." Def's Mem. of Law at 4. The plaintiffs respond by asserting that there is "no conflict preemption" since the Motor Vehicle Safety Act ("MVSA") "specifically recognizes and preserves a Plaintiff's claims under federal and state law and under common law." Pls' Reply Mem. of Law at 12. However, both parties misconstrue the role of the doctrine of conflict preemption.

In Werner v. J. Plater-Zyberk, 2002 WL 243655 (Pa.Super 2002), our Superior Court recently discussed the doctrine of conflict preemption:

> The principle of federal preemption of state law derives from the second clause of Article VI of the Constitution, the Supremacy Clause. Shiner, 706 A.2d at 1237 (citing U.S. Const. art. VI, cl. 2). Under the Supremacy Clause, federal law is "the supreme Law of the land" and any conflicts between federal and state laws must be resolved in favor of federal law. Burgstahler v. AcroMed Corp., 670 A.2d 658, 663-64

> (Pa.Super.1995).... [S]tate law may be displaced under conflict preemption principles if the state law in question presents a conflict with federal law in one of two situations: (a) when it is physically impossible to comply with both state and the federal law, or (b) when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Orson, Inc. v. Miramax Film Corp., 189 F.3d 377, 381 (3d Cir. 1999), cert denied, 529 U.S. 1012 (2000).

Werner, 2002 WL 243655, at 8.

The court need not address the issue of preemption here as the plaintiffs have not invoked any Pennsylvania law that is in conflict with any federal law. Instead, they seek, inter alia, court imposed injunctive relief. As discussed below, the court is precluded from granting this relief, not because of the jurisdictional doctrine of preemption, but rather that of the administrative law doctrine of primary jurisdiction.

II. The Court is Not Empowered to Compel DaimlerChrysler to Install Park-Brake Locks

Throughout their Amended Complaint, the plaintiffs repeatedly ask this court to compel DaimlerChrysler to install a park-brake interlock. Am. Complaint ¶¶ 1, 8, at 35. DaimlerChrysler asserts that these requests are really requests for a recall and since the National Highway Traffic Safety Administration ("NHTSA") has primary jurisdiction in issuing recalls, this court lacks the authority to grant the relief sought by the plaintiffs. Def's Mem. of Law at 9-12. The plaintiffs argue that "[they] do not seek a recall" and therefore this court would not be doing "anything that would interfere with NHTSA's authority." Pls' Reply Mem. of Law at 8. However, this court disagrees. A fair and accurate reading of their Amended Complaint indicates that plaintiffs, in fact, request what amounts to a recall.[3]

[3] It is clear to this court that the plaintiffs' request for a "retrofit" of the minivans by DaimlerChrysler, at no cost to the plaintiffs, amounts to a recall. See Namovicz v. Cooper Tire & Rubber Co., 2001 WL 327886, at 2 n.4 (D. Md. 2001) (holding that plaintiff's request to replace all

Therefore, this court finds that this type of relief is not appropriate in this forum.

Our Superior Court in In re Insurance Stacking Litigation, 754 A.2d 702 (Pa.Super. 2000) explained that the "doctrine of primary jurisdiction holds that where an agency has been established to handle a particular class of claims, the court should refrain from exercising its jurisdiction until the agency has made its determination. Hence, although the court may have subject matter jurisdiction, the court defers its jurisdiction until an agency ruling has been made." Insurance Stacking, 754 A.2d at 706. Moreover,

> [T]he doctrine of primary jurisdiction serves the following purposes: (1) the Commonwealth benefits from the agency's expertise and special experience in complex areas with which judges have little familiarity; (2) the statutory purpose and the intent of the legislature are fulfilled by honoring the powers granted to the agency by the legislature; and (3) the need to promote consistency in administrative policy is also fulfilled.

Kossman v. Public Utility Commission, 694 A.2d 1147, 1155 (Commw. Ct. 1997) (citing Elkin v. Bell Telephone Co., 491 Pa. 123, 132-33, 420 A.2d 371, 376 (1980)).

Congress intended, through the MVSA, for the Department of Transportation to have primary jurisdiction in the administering of automotive recalls. 49 U.S.C. §§ 30101, et seq. Specifically, the MVSA authorizes the Secretary of Transportation, and by delegation the NHTSA, to investigate and determine defects in motor vehicles and require manufacturers to remedy such defects through, inter alia, the issuance of recalls. 49 U.S.C. §§30118, 30120 (a)(1)(A); 49 C.F.R. §§ 501.1, 501.2. Here,

---

defective tires, was "in substance, a recall" as it requires "the same administrative acts that would be necessary to effectuate a full- scale recall."). It is impossible to accomplish what the plaintiffs request without ordering such a recall, therefore it is disingenuous of the plaintiffs to repeatedly assert that they have not asked for one. Pls' Reply Mem of Law at 7, 8, 13, 14.

the plaintiffs are asking this court to compel DaimlerChrysler to install park brake interlocks. However, this court lacks the authority to grant the injunctive relief requested as Congress has delegated the authority to order recalls to the Department of Transportation.

This court in Grant, et al v. Bridgestone Firestone Inc., et al, Sept. 2000, No. 3668 (C.P. Phila. June 12, 2001) discussed the appropriateness of requesting an autmotive recall in this forum. In Grant, the plaintiffs sought an expanded recall of allegedly defective tires beyond the scope of what was being required by the NHTSA. In denying the plaintiffs' requests, this court held that:

> While no Pennsylvania appellate court has addressed the issue specifically, courts in other jurisdictions have expressed serious reservations as to whether a court has the authority to order a recall and have refrained from doing so. See, e.g. National Women's Health Network, Inc. v. A.H. Robbins Co., 545 F.Supp. 1177, 1180 (D.Mass 1982) ("state law simply does not provide a basis for worldwide recalls"); Gregory v. Cincinnati Inc., 538 N.W. 2d 325, 334 n.30 (Mich. 1995) (product recalls "are properly the province of administrative agencies, as the federal statutes that expressly delegate recall authority to various agencies suggest"). This is especially true with regard to motor vehicle recalls. See Walsh v. Ford Motor Co., 130 F.R.D. 260, 267 (D.D.C 1990) (court refused to order recall to "avoid entanglement with a regulatory scheme designed and intended to empower principally the Department of Transportation, rather than the courts, to order and oversee motor vehicles"); Crawley v. DaimlerChrysler Corp., No. 4900, slip op. at 38 (C.P. Phila. Mar.5, 2001) ("NHTSA is the proper forum to address automobile recalls"). These cases make the Court reluctant to order the recall of the Additional Tires.

Grant, slip op. at 7-8. Similarly, to avoid entanglement with the NHTSA, this court will not compel DaimlerChrysler to install park brake interlocks.

The plaintiffs argue that the holding in Grant is "entirely distinguishable" from the present case because, unlike here, in Grant, the NHTSA had already ordered a recall. "Seeking to not interfere with an ongoing recall," argue the plaintiffs, "the court determined that it did not have the authority to extend NHTSA's recall." Pls' Reply Mem. of Law at 8. However, this reading misconstrues the court's

holding in Grant. Regardless of whether the NHTSA ordered a recall or not, this court simply lacked the authority to compel a recall when Congress had clearly delegated such authority to the Department of Transportation. Similarly, here, this court simply lacks the authority to compel DaimlerChrysler to install park-brake interlocks.

The plaintiffs also argue that "only in limited circumstances do courts surrender their own jurisdiction to NHTSA." Pls' Reply Mem. of Law at 9. In support of this contention, the Plaintiffs direct this court to In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig. No. MDL 961, 1993 WL 204116 (E.D. Pa. June 10, 1993). However, the plaintiffs overlook several distinct differences between this case and General Motors. Most importantly, the plaintiffs in General Motors were not seeking a recall. Instead, the plaintiffs in that class action were seeking, inter alia, to merely enjoin General Motors "from continuing to misstate that its trucks are safe" and further, require General Motors to provide notice to its customers that its trucks were under a pending NHTSA investigation. General Motors, 1993 WL 204116 at 1. Moreover, the General Motors court concluded that "none of the plaintiffs' claims challenge the powers of NHTSA under the Act... to seek the remedies provided by statute or regulation for alleged violations of the safety standards." Id at 6. Here, as DaimlerChrysler correctly points out, "in complete contrast, plaintiffs' claims for injunctive relief directly challenge NHTSA's power to regulate the industry and to order the notification and recall remedies provided by its regulations." Def's Reply Mem. of Law at 8. Thus, General Motors does not allow this court to compel DaimlerChrysler to install park-brake interlocks, as doing so would unnecessarily cause entanglement with the regulatory scheme of the Department of Transportation. Therefore, the cause of action for injunctive relief must be dismissed.

III. The Preliminary Objections Asserting Legal Insufficiency of All Pleadings for Lack of Manifest Damages are Overruled In Part

DaimlerChrysler alleges that the plaintiffs have made no allegations in their Amended Complaint that they have actually sustained any damages for their alleged breach of express and implied warranties, breach of contract and duty of good faith and fair dealing, and alleged violations of the UTPCPL. Def's Mem. of Law at 12. The court will address each of these claims in turn.

A. Only the Dolans Have Alleged Damages To Proceed With Their Breach of Implied Warranty Claims

In Pennsylvania, damages is an essential element of each of the plaintiffs' breach of warranty claims. See Price v. Chevrolet Motor Div. of Gen. Motors Corp., 765 A.2d 800, 809 (Pa.Super. 2000) (successful claim for breach of warranty requires damages); Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d Cir. 1992) (an implied warranty of merchantability plaintiff must establish, inter alia, "that the product malfunctioned.").

Here, only the Dolans have alleged damages from their breach of implied warranty claims. Specifically, the Dolans "have alleged manifestation of the unsafeness as a result of [Daimler]Chrysler's failure to install the park-brake interlock." Pls' Reply Mem. of Law at 14. The Dolans allege that after their 1 ½ year old daughter inadvertently shifted the gear from "park" to "drive," the Dolans' "minivan began to roll down the street toward a four way intersection, sideswiping a stop sign."Am. Complaint. ¶65. After having been informed that their minivan did not have a park-lock feature, and that there was no modification to install a park-brake interlock, the Dolans allege that "they are left with a vehicle unfit for the purpose for which it was intended, safe, reliable form of transportation." Am. Complaint ¶¶66,

68, 69. Therefore, this court can reasonably infer from the facts alleged that the Dolans' minivan malfunctioned. As such, the Dolans have sufficiently alleged damages for purposes of preliminary objections. See Thomas v. Carter-Wallace Inc., 27 Pa. D. & C. 4th 146, 149 (C.P. Monroe 1994) (citing Dambacher by Dambacher v. Mallis, 336 Pa. Super. 23, 485 A.2d 408 (1984)), aff'd, 449 Pa. Super. 711, 673 A.2d 412 (1995) (a breach of implied warranty of merchantability theory in Pennsylvania states that a merchant is "only liable for harm caused by a defect in their product.").[4]

Unlike the Dolans, Solarz and Ginsberg, however, have not alleged to have suffered similar damages. Although the Amended Complaint includes excerpts from letters of individuals discussing their damages as a result of not having a park-brake interlock, not only are these letters not from the named plaintiffs, but nowhere is it alleged that Solarz and Ginsberg suffered such damages. Am. Complaint ¶ 33, 38. Therefore, this court dismisses the breach of implied warranty claims of both Solarz and Ginsberg.

---

[4] Other courts have stated that the manifestation requirement is the majority position in the United States. In Chin v. Chrysler Corp., 182 F.R.D. 448 (D.N.J. 1998), the court stated that "[i]n most jurisdictions, the courts recognize that unless a product actually manifests the alleged defect, no cause of action for breach of express or implied warranty or fraud is actionable." 182 F.R.D. at 460 (collecting cases). See also, e.g. Briehl v. General Motors Corp., 172 F.3d 623, 628 (8th Cir. 1999) (dismissing plaintiff's breach of implied warranty claim where the plaintiffs suffered no injury); Jarman v. United Indus. Corp., 98 F.Supp. 2d 757, 768 (S.D. Miss. 2000) (a warranty claim requires that "there is actually failure in product performance," and [m]ere suspicion of a lost bargain... will not support an award of damages."); In re Air Bags Prods. Liab. Litig. 7 F. Supp. 2d 792, 805 (E.D. La. 1998) ("[T]he absence of a manifested defect precludes a cognizable claim."); Yost v. General Motors Corp., 651 F.Supp. 656 (D.N.J. 1986) (holding that damage is a necessary element of breach of warranty claim); American Suzuki Motor Corp., v. Superior Ct., 44 Cal. Rptr. 2d 526, 529 (Cal. Ct. App. 1995) (holding that, "in the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for ordinary puporse of providing transportation.").

B. Only the Dolans Have Alleged Damages to Sustain a Breach of Contract and Breach of Duty of Good Faith Action

"A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Corestates Bank v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super. 1999) (citation omitted). "While not every term of a contract must be stated in complete detail, every element must be specifically pleaded." Id. (citation omitted). The purpose of damages in breach of contract claims is to return the parties to the position they would have been in but for the breach. The Birth Center v. St. Paul's Companies Inc., 787 A.2d 376 (Pa. Super 2001).

Here, a fair reading of the Amended Complaint reveals that only the Dolans allege damages to support their breach of contract claim. Although all plaintiffs allege that they purchased and paid for minivans from DaimlerChrysler, and all of the plaintiffs allege that these minivans came with certain express warranties, only the Dolans allege damages. Am. Complaint ¶¶ 11, 12, 13, 82, 83, 84, 85. Nowhere in the Amended Complaint do Solarz or Ginsberg allege that they suffered damages resulting from the breach of contract with DaimlerChrysler. Therefore, the breach of contract claims of Solarz and Ginsberg are dismissed.

C. All the Plaintiffs Have Alleged Damages to Sustain Their UTPCPL Claims

Under the §201-9.2 of the UTPCPL, a person bringing a private UTPCPL claim must show an "ascertainable loss of money or property, real or personal." The UTPCPL "is to be construed liberally to effect its object of preventing unfair or deceptive practices." Commonwealth by Creamer v. Monumental Props., Inc., 459 Pa. 450, 460, 329 A.2d 812, 817 (1974) (citations omitted). See also

Brunwasser v. Trans World Airlines, Inc., 541 F.Supp. 1338, 1346-47 (W.D. Pa. 1982) (holding that the term "ascertainable loss" must be liberally construed and that "the ascertainable loss requirement of this act is designed merely to insure that individuals bringing suit have in fact been damaged by a deceptive trade practice"). Even where damages are not easily quantified or where a claim has failed to quantify the damages suffered, a UTPCPL claim does not fail as a matter of law. In re Milbourne, 108 B.R. 522, 544 (Bankr. E.D. Pa. 1989); In re Chapman, 77 B.R. 1, 6 (Bankr. E.D. Pa. 1987); In re Jungkurth, 74 B.R. 323, 335-36 (Bankr. E.D. Pa. 1987). Finally, the type of injury necessary to sustain a claim for violations of the UTPCPL is different from the type needed to sustain a claim for breach of warranties. Grant v. Bridgestone/Firestone, Inc., Sept. 2000, No. 3668, slip op. at 4-8 (C.P. Phila. Jan 10, 2002) ("Grant II") (overruling objections for failure to allege manifest injury when the UTPCPL requires only that plaintiffs sufficiently allege an ascertainable loss).

Although only the Dolans sufficiently allege manifest injury to support their breach of warranty claims, here, all the plaintiffs have alleged ascertainable losses to support their UTPCPL claims. Further, even though the plaintiffs exclude from their class claims "claims for personal injury, wrongful death, or damage to property," the plaintiffs specifically allege that "[t]he ascertainable loss includes the cost of installing the park-brake interlock in [Daimler]Chrysler minivans and/or the difference in value between minivans with the park-brake interlock device and those without it." Am. Complaint ¶¶16, 97. Therefore, this court can reasonably infer from the facts alleged that all the named plaintiffs have sufficiently alleged damages for their claims of UTPCPL violations.

DaimlerChrysler counters and argues that the plaintiffs' UTPCPL claims should be defeated because "[p]laintiffs have made no allegation of actual loss or 'real out-of-pocket costs." Def's Reply

Mem. of Law at 12. In support of this contention, DaimlerChrysler directs this court to its holding in Grant II. However, Grant II, is not to the contrary. There, the Complaint alleged "that the Plaintiffs incurred real out of pocket costs in replacing" the allegedly defective tires. Grant II, slip op. at 7. This court concluded that such an "allegation of specific losses also defeat[ed] the Defendants' legitimate arguments as to the policy considerations against allowing 'no injury' claims." Id. Here, although the injuries alleged are not as quantifiable as those in Grant II, ascertainable losses are nonetheless alleged, and therefore defeat DaimlerChrysler's concerns against allowing "no injury" claims. Furthermore, as discussed above, a UTPCPL claim does not fail as a matter of law even where damages are not easily quantified or where a claim has failed to quantify the damages suffered. In re Milbourne, 108 B.R. 522, 544 (Bankr. E.D. Pa. 1989); In re Chapman, 77 B.R. 1, 6 (Bankr. E.D. Pa. 1987); In re Jungkurth, 74 B.R. 323, 335-36 (Bankr. E.D. Pa. 1987). Therefore, having alleged ascertainable losses, all the plaintiffs' UTPCPL claims are sustainable.

IV. The Preliminary Objection Asserting Legal Insufficiency of a Pleading of Breach of Implied Warranties of Merchantability is Overruled In Part

DaimlerChrysler asserts that the plaintiffs have not pled all of the required elements of a cause of action for breach of the implied warranties. Def's Mem. of Law at 17. As already discussed above, the breach of implied warranty claims of Solarz and Ginsberg are dismissed as they have not alleged that their minivans malfunctioned. However, this court finds that the Dolans' claim for breach of implied warranty of merchantability survives a demurrer, but their claim for a breach of the implied warranty of fitness for a particular purpose does not.

A. Implied Warranty of Merchantability

To recover for a breach of implied warranty of merchantability in Pennsylvania, a plaintiff must show that the seller was a merchant as defined by the Uniform Commercial Code ("UCC") and the goods were not merchantable at the time of the sale. 13 Pa.C.S.A. §2314. [5] In Gall v. Allegheny County Health Department, 521 Pa. 68, 555 A.2d 786 (1989), the Pennsylvania Supreme Court recognized that:

> The concept of 'merchantability' does not require that the goods be the best quality ...or the best obtainable,... but it does require that they have an inherent soundness which makes them suitable for the purpose for which they are designed,... that they be free from significant defects, that they perform in the way that goods of that kind should perform ... and that they be of reasonable quality within expected variations and for the ordinary purpose for which they are used.

Id. at 75, 555 A.2d at 789-90. (citations omitted).

Here, the Dolans allege all the elements of a claim for breach of implied warranty of merchantability. They allege that under the UCC, they are "buyers," DaimlerChrysler is a "merchant"

---

[5] 13 Pa.C.S.A. § 2314 reads:

(a) Sale by merchant.--Unless excluded or modified (section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(b) Merchantability standards for goods.--Goods to be merchantable must be at least such as:

(1) pass without objection in the trade under the contract description;

(2) in the case of fungible goods, are of fair average quality within the description;

(3) are fit for the ordinary purposes for which such goods are used;

(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;

(5) are adequately contained, packaged, and labeled as the agreement may require; and

(6) conform to the promises or affirmations of fact made on the container or label if any.

(c) Course of dealing or usage of trade.--Unless excluded or modified (section 2316) other implied warranties may arise from course of dealing or usage of trade.

and "seller," and minivans are "goods." Am. Complaint ¶¶ 72, 73, 74. Further, they allege that "the minivans... are not fit for the ordinary purposes for which such goods are sold, safe reliable family transportation." Am. Complaint ¶78. Moreover, the Dolans claim that the minivans are not merchantable because "they do not pass 'without objection' in the trade under the description provided by [Daimler]Chrysler... [as] a portion of the buying public has objected to buying a minivan without the park brake interlock." Am. Complaint ¶¶78, 79. Finally, as discussed above, they also allege damages as their minivan malfunctioned. Am. Complaint ¶65.

DaimlerChrysler counters by contending that the "law does not require that every good be of the 'best quality'" but "merely that goods can be used as an ordinary purchaser would expect to use them." Def's Mem. of Law at 18. Specifically, DaimlerChrysler attempts to limit the ordinary purpose for which minivans are sold to simply a means of "transportation" and not "safe reliable family transportation." Id. at 18. In support of this contention, DaimlerChrysler directs this court to "courts across the country [that] have recognized that the ordinary purpose of a vehicle is to provide transportation." Id. Although these courts cite "transportation" as an ordinary purpose for automobiles, none of these courts, however, have held that this "transportation" should not be "safe" or "reliable." For example, in Taterka v. Ford Motor Co., 271 N.W. 2d 653, 655 (Wis. 1978), the court held that "[w]here a car can provide safe, reliable transportation it is generally considered merchantable." This language in Taterka is also found in subsequent cases, which DaimlerChrysler cites. See e.g. Carlson v. General Motors Corp., 883 F.2d 287, 297 (4th Cir. 1989); In re General Motors Corp. Anti-Lock Brake Prods. Liab. Litig., 966 F.Supp. 1525, 1533 (E.D. Mo. 1997). Further, in Skelton v. General Motors Corp., 500 F.Supp. 1181, 1192 (N.D. Ill. 1980), rev'd on other other grounds, 660 F.2d 311

(7th Cir. 1981), the court explained that "[f]itness for the ordinary purpose of driving implies that the vehicle should be in a safe condition and substantially free of defects. It should be obvious that any car without an adequate transmission and proper brakes is not fit for the ordinary purpose of driving." (citation omitted). Finally, other cases DaimlerChrysler cites also discuss how cars are expected to operate safely as well as provide transportation. See e.g., Mercedes Benz of N.Am., Inc. v. Garten, 618 A.2d 233, 240 (Md. Ct. Spec. App. 1993); Tracy v. Vinton Motors Inc., 296 A.2d 269, 272.(Vt. 1972). As such, the preliminary objection is overruled.

B. Implied Warranty of Fitness for a Particular Purpose

DaimlerChrysler asserts that the plaintiffs have not alleged that they "had special needs for which they purchased their vehicles" and therefore "no implied warranty of fitness for a particular purpose arose." Def's Mem. of Law at 20-21. This court agrees.

In Pennsylvania, an implied warranty of fitness for a particular purpose is breached when a seller, on whose skill and judgment a buyer relies and who has reason to know, at the time of contracting, the particular purpose for which the goods are required, fails to provide goods that perform to the specific use contemplated by the buyer. Gall v. Allegheny County Health Department, 521 Pa. 68, 555 A.2d 786 (1989). Specifically, "[a] 'particular purpose' differs from an ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to his business." UCC §2-315, cmt 2 (1984).

Here, the plaintiffs allege that "[a]t the time of the sale of each minivan, [Daimler]Chrysler knew or should have known the particular purpose for which the minivans were being purchased, that is safe and reliable family transportation." Am. Complaint ¶75. However, "safe and reliable family

transportation" is not a particular purpose of a minivan, but rather its ordinary purpose. See Gall, 555 A.2d at 790 (a sale of water for drinking and household use does not carry with it an implied warranty of fitness for a particular purpose because there are no peculiar purposes in these otherwise, ordinary, purposes of tap water.) Nowhere in the Amended Complaint do the plaintiffs allege that the minivans purchased were being used for special or peculiar needs, other than the minivan's ordinary purpose of providing "safe and reliable family transportation." As such, this court sustains the preliminary objections to the claims of breach of implied warranty of fitness for a particular purpose of all plaintiffs.

V. The Preliminary Objections Asserting Legal Insufficiency of Count II are Overruled In Part

DaimlerChrysler argues that Count II of the plaintiff's complaint is overinclusive and legally insufficient. Def's Mem. of Law at 23. In Count II, the plaintiffs plead breach of contract, breach of duty of good faith and fair dealing, and breach of express warranty.

A. Breach of Contract

As discussed above, in Pennsylvania "[a] cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Corestates Bank v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super. 1999) (citation omitted). "While not every term of a contract must be stated in complete detail, every element must be specifically pleaded." Id. (citation omitted).Here, only the Dolans have pled a cause of action for a breach of contract. Although all plaintiffs allege that they purchased and paid for DaimlerChrysler manufactured minivans, and all of the plaintiffs allege that these minivans came with certain express warranties, only the Dolans allege damages. Am. Complaint ¶¶ 11,

12, 13, 82, 83, 84, 85. As discussed above, unlike the Dolans, nowhere in the Amended Complaint do Solarz and Ginsberg allege that their minivan malfunctioned. Since Solarz and Ginsberg have not alleged manifest damages, they have not pled all the necessary elements of a breach of contract. Therefore, this court sustains the preliminary objections as to the breach of contract claims of Solarz and Ginsberg.[6]

B. Breach of Duty of Good Faith and Fair Dealing

DaimlerChrysler also asserts that since plaintiffs have not sufficiently alleged a cause of action of breach of contract, it follows that their claims of breach of the duty of good faith and fair dealing "must also fail." Def's Mem. of Law at 25. This court agrees, but only as to the claims of Solarz and Ginsberg.

In Pennsylvania, the duty of good faith arises under the law of contracts. Creeger Brick and Building Supply v. Mid-State Bank and Trust Co., 385 Pa. Super. 30, 35, 560 A.2d 151, 153 (1989). Section 205 of the Restatement (Second) of Contracts (1979) reads that "[e]very contract imposes each party a duty of good faith and fair dealing in its performance and its enforcement." A similar requirement has been imposed upon contracts within the UCC by 13 Pa.C.S.A. §1203. Somers v. Somers, 418 Pa.Super.131, 136, 613 A.2d 1211, 1213 (1992). The duty of "good faith" has been

[6] DaimlerChrysler argues that there is no contract between DaimlerChrysler and the plaintiffs. Specifically, DaimlerChrysler asserts that since the dealerships from which the plaintiffs purchased their minivans are not agents of DaimlerChrysler, "as a matter of law, any agreement entered into between a buyer and an independently owned and operated dealership does not impose obligations on DaimlerChrysler." Def's Mem. of Law at 24 (citation omitted). However, the court need not resolve this agency issue at this time since for purposes of preliminary objections, the plaintiffs have sufficiently pled that a contract existed between them and DaimlerChrysler. See Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct 2000)("all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true for purposes of preliminary objections.).

defined as "[h]onesty in fact in the conduct or transaction concerned." Id. (citing 13 Pa.C.S.A. §1201). Finally, this court has held that "Pennsylvania law does not allow for a separate cause of action for breach of either an express or implied duty of good faith, absent a breach of the underlying contract." Commonwealth v. BASF Corp., April 2000, No. 3127, slip op. at 23 -24. (C.P. Phila. Mar 15, 2001) (citing Engstrom v. John Nuveen & Co., 668 F.Supp. 953, 958 (E.D.Pa. 1987).

Here, only the Dolans' claim for breach of the duty of good faith and dealing survives a demurrer. All the plaintiffs allege that

> [Daimler]Chrysler knew or had reason to know that its customers, including Plaintiff and Class Members herein, believed that [Daimler]Chrysler built and sold a safe reliable family car... [Daimler]Chrysler specifically counted on the fact that customers heard its representations and warranties concerning the safety and reliability of its minivans. These promises and warranties tended to induce the customers and became part of the basis of the bargain of the minivans as consumers thought they were buying safe reliable family transportation... [Daimler]Chrysler's duties of good faith and fair dealing included obligations on its part to correct the problems caused by the failure to include the park-brake interlock.

Am. Complaint ¶¶88, 93. However, since this court has already concluded above that the breach of contract claims of Solarz and Ginsberg are dismissed, and since there exists no independent cause of action for breach of the duty of good faith and fair dealing, it follows then, that breach of the duty of good faith and dealing claims of Solarz and Ginsberg are dismissed as well.

C. Breach of Express Warranty

DaimlerChrysler also argues that the plaintiffs' breach of express warranty claims are legally insufficient. Def's Mem. of Law at 25 - 27. Under the UCC, a seller's description of the goods that becomes part of the basis of the bargain creates an express warranty that the goods will conform to that description. 13 Pa.C.S. §2-313. In general, all of the statements of the seller become part of the basis

of the bargain "unless good reason is shown to the contrary."§ 2-313, cmt 8. Finally, as in breach of implied warranty, a successful claim for breach of express warranty requires a pleading of damages. Price v. Chevrolet Motor Div. of Gen. Motors Corp., 765 A.2d 800, 809 (Pa. Super. 2000).

Here, only the Dolans' claims for breach of express warranty survive a demurrer. All the plaintiffs allege that they received warranties which "promised comprehensive coverage in the event of vehicle deficiencies." Am. Complaint ¶83. Specifically, all the plaintiffs received a "Basic Limited Warranty coverage" which described what was covered at no cost to the Plaintiffs. Am.Complaint ¶84.[7] Further, all the plaintiffs allege that these warranties became part of "the basis of the bargain" as these "consumers paid [Daimler]Chrysler in exchange for a vehicle that provided safe reliable family transportation." Am. Complaint ¶82, 88. However, as discussed above, only the Dolans sufficiently allege damages. Fatal to the claims of Solarz and Ginsberg for breach of express warranty is that they allege no manifest injury. As such, this court sustains the preliminary objection as to Solarz and Ginsberg claims.

Finally, DaimlerChrysler argues that the plaintiffs have failed to comply with Rule 1019(i) by not attaching a contract. Def's Mem. of Law at 24. Rule 1019(i) of the Pennsylvania Rules of Civil Procedure reads "[w]hen any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is

[7] Besides the "Basic Limited Warranty Coverage," the plaintiffs also allege that DaimlerChrysler created express warranties through their advertisements and internet statements. Am. Complaint ¶¶ 75, 82, 83, 87, 88. Although DaimlerChrysler argues that these are not express warranties, the court need not resolve this issue for purposes of preliminary objections. Babcock Poultry Farm, Inc. v. Shook, 204 Pa.Super.141, 203 A.2d 399, 401 (1964) (whether a statement creates an express warranty is an issue for the factfinder).

sufficient so to state, together with the reason, and to set forth the substance in writing." Here, the plaintiffs rely upon the warranty with DaimlerChrysler for their breach of contract and express warranty claims. Although the warranty was not attached to the Amended Complaint, the plaintiffs have attached the warranty to their Reply Memorandum of Law. Pl's Reply Mem. of Law, Exh. B. Thus, DaimlerChrysler's preliminary objection is overruled.

D. The Filing of the Complaint Provided Adequate Notice of Plaintiffs' Breach of Warranty Claims

DaimlerChrysler also asserts that the implied and express warranty claims fail for lack of notice. Def's Mem. of Law at 21. The plaintiffs argue that the filing of the complaint provided DaimlerChrysler with the requisite notice. Pls' Reply Mem. of Law at 25. This court agrees.

Although there is no Pennsylvania Supreme Court case on the precise issue here, this court is persuaded by the sound reasoning and holding of Bednarski v. Hideout Homes & Realty, Inc., 709 F.Supp.90 (M.D. Pa. 1988). In Bednarski, home owners commenced an action in federal court against an electrical contractor to recover damages resulting from a fire. The electrical contractor then brought a third party action against the maker of a circuit breaker box which was thought to have caused the fire. The manufacturer moved to dismiss the contractor's breach of warranty claim for failing to provide adequate notice. The court, in denying the manufacturer's motion, concluded that the contractor's third-party complaint against the manufacturer served as "notice" of breach of warranty under Pennsylvania law. Bednarski, 709 F.Supp at 94. Specifically, after an extensive analysis of the definition of "notice," the court held that "the filing of a civil complaint satisfies the requirement of providing breach of warranty notice under section 2607." Id. (relying on Yates v. Clifford Motors, Inc., 283 Pa.Super.

293, 423 A.2d 1262 (1980)). As such, this court is persuaded by Bednarski and holds that DaimlerChrysler received notice when the plaintiffs filed their Complaint in May 2001.

DaimlerChrysler counters by arguing that Bednarski is the minority position and that this court should follow the majority position and hold that the filing of a complaint is not sufficient notice under §2607.[8] In support of this argument, DaimlerChrysler directs this court to cases outside this jurisdiction which all held that notice must precede the filing of a complaint. See e.g., Hobbs v. General Motors Corp., 134 F.Supp.2d 1277, 1285 (M.D. Ala. 2001); Geib v.Oshkosh Truck Corp., No. CV. 940135932S, 1997 WL 576431 (Conn. Super.Ct 1997); Armco Steel Corp. v. Isaacson Structural Steel Co., 611 P.2d 507 (Alaska 1980). Further, in countering the Bednarski holding specifically, DaimlerChrysler cites to Connick v. Suzuki Motor Co., 675 N.E.2d 584 (Ill. 1997). In Connick, the plaintiffs claimed that their vehicles were unsafe as they had a tendency to roll-over. Faced with an objection based on lack of notice to the plaintiffs' breach of warranty claims, the Connick court concluded that the filing of a complaint was not sufficient to meet the statutory notice requirements. 675 N.E.2d at 590-91.

Here, DaimlerChrysler argues that the plaintiffs' reliance on Bednarski is inaccurate since the Connick court cited and interpreted Bednarski "as simply applying an exception to the notice requirement - i.e. consumer buyers *who suffer personal injury* need not provide pre-litigation notice."

---

[8] Whether there is in fact a majority and minority position on the notice requirement issue is unclear. What is clear to this court is that courts vary widely in their interpretations of the notice requirement found in the UCC. See e.g., In re Bridgestone/Firestone, Inc. Tires Products Liability Lit., 155 F.Supp.2d 1069 (S.D.Ind. 2001) (citing courts that have held that the filing of a lawsuit can satisfy the notice of breach requirement and courts that reached the opposite conclusion.)(citations omitted).

Def's Reply Mem. of Law at 16, n 5. However, DaimlerChrysler's reliance on the Connick court's interpretation of Bednarski is misplaced. Nowhere in the Bednarski opinion does the court expressly carve out an exception to the notice requirement for "consumer buyers who suffer personal injury." In fact, the holding in Bednarski, based on Pennsylvania law, is quite clear and unambiguous. The court held "[b]ased on Yates... the filing of a civil complaint satisfies the requirement of providing breach of warranty notice under section 2607." 709 F.Supp.at 94. Therefore, unpersuaded by the Illinois court in Connick, this court concludes that DaimlerChrysler received proper notice of the plaintiffs' breach of warranty claims when the plaintiffs filed their original Complaint in May 2001.

VI. The Preliminary Objections asserting Legal Insufficiency of Pleadings of Violations of UTPCPL Are Overruled

DaimlerChrysler asserts that since the plaintiffs have not adequately pled a claim for breach of a written express warranty and have not pled any misfeasance by DaimlerChrysler, they have not pled a claim for violation of §201-2(4)(xiv) of the UTPCPL. Def's Mem of Law at 28. This court disagrees.

"The purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices." Keller v. Volkswagen of America, Inc., 733 A.2d 642, 646 (Pa. Super. 1999) (citation omitted). The UTPCPL allows for recovery by "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful" by the UTPCPL.73 P.S. §201-9.2(a) In order to prevail under the UTPCPL, a plaintiff must "prove the following: 1) the defendant was engaged in unfair methods of competition and unfair or deceptive acts or practices, and 2) the transaction between

plaintiff and defendant constituted 'trade or commerce' within the meaning of the UTPCPL." Keller, 733 A.2d at 646 (relying on 73 P.S. §201-3.). Here, the plaintiffs rely upon §201-2(4)(xiv) of the UTPCPL which defines unfair methods of competition and unfair or deceptive acts or practices as "[f]ailing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made." 73 P.S. §201-2(4)(xiv). Further, "trade and commerce" is defined by the UTPCPL as "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth." 73 P.S. § 201-2(3).

Here, all the plaintiffs have alleged facts legally sufficient to survive a demurrer to their UTPCPL claims. All the plaintiffs allege that they purchased DaimlerChrysler minivans for purposes of providing family transportation. Am. Complaint ¶¶11-13, 69-71. Further, all the plaintiffs allege that an express written warranty was given to them by DaimlerChrysler. Am. Complaint ¶¶83, 84; Exh. B. While only the Dolans have alleged damages to support a breach of express warranty claim, all the plaintiffs allege ascertainable loss to support a claim under §201-2(4)(xiv) of the UTPCPL. Specifically, the plaintiffs claim that "[t]he ascertainable loss includes the cost of installing the park-brake interlock in [Daimler]Chrysler minivans and/or the difference in value between minivans with the park-brake interlock device and those without it." Am. Complaint ¶¶ 97. Further, the plaintiffs allege that DaimlerChrysler engaged in unfair methods of competition and unfair or deceptive acts or practices in that:

The [Daimler]Chrysler Basic Limited Warranty Coverage purportedly covers the cost

> of repair of anything that is... 'defective in material, workmanship, or factory preparation.' Here, Plaintiffs have alleged that the entire product, the minivan, is defective, improper and not what [Daimler]Chrysler purported to sell, due to the lack of the park-brake interlock, and that [Daimler]Chrysler was aware of the problems.
> * * * * *
> [Daimler]Chrysler failed to provide the safe and reliable vehicle it promised, and, despite knowledge of problems with the vehicle and knowledge that the park-brake interlock was standard in the industry, made repeated representations and warranties to consumer about the minivans' safety, which were false and misleading and in breach of warranty.

Pls' Reply Mem. of Law at 28 (citing Am. Complaint ¶84), 34 (citing Am. Complaint ¶63). Finally, the plaintiffs assert that the sale of these minivans was trade and commerce pursuant to the UTPCPL. Am. Complaint ¶¶14, 15, 25-64. As such, this court holds that all the elements of a UTPCPL claim have been sufficiently alleged by all the plaintiffs.

DaimlerChrysler counters and asserts that the plaintiffs cannot base their UTPCPL claims on claims of nonfeasance. Def's Mem. of Law at 28. In support of this contention, DaimlerChrysler directs this court to several cases where courts held that failure to pay insurance benefits to an insured, characterized by these courts as "nonfeasance", is not actionable under the UTPCPL. See e.g., Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 307 (3d Cir. 1995); Smith v. Zarnick, 47 Pa. D. & C. 4th 353, 361 (C.P. Butler 2000); Gordon v. Pennsylvania Blue Shield, 378 Pa. Super. 256, 548 A.2d 600 (Pa Super Ct. 1998); Tenos v. State Farm Ins. Co., 716 A.2d 626 (Pa. Super. 1998). While all these cases discuss the valid difference between misfeasance and nonfeasance, they are not dispositive of the fact that the plaintiffs here have sufficiently alleged misfeasance. Specifically, the plaintiffs claim that the express warranty given by DaimlerChrysler covered "the cost of repair of anything that is... 'defective in material, workmanship, or factory preparation." Pls' Reply Mem.of Law

at 27 (citing Am. Complaint Exh. B.). Further, the plaintiffs allege that DaimlerChrysler violated §201-2(4)(xiv) of the UTPCPL when, by improperly refusing to repair their minivans pursuant to the express warranties, DaimlerChrysler "failed to comply with the terms of any written... warranty." Am. Complaint ¶¶96 (quoting §201-2(4)(xiv) of the UTPCPL). Unlike the plaintiffs in cases cited by DaimlerChrysler, the plaintiffs here have specifically alleged an improper performance of a contractual obligation under the express warranty. Therefore, this court holds that the plaintiffs have sufficiently alleged misfeasance for purposes of the UTPCPL.

VII. Portions of the Amended Complaint are Neither Scandalous Nor Impertinent

Under Pa.R.C.P. 1028(a)(2), a party may object to a pleading's inclusion of "scandalous and impertinent matter." "Scandalous and impertinent matter" is defined as "allegations... immaterial and inappropriate to the proof of the cause of action." Common Cause/Pa. v. Commonwealth, 710 A.2d 108, 115 (Pa.Commw.Ct. 1998) (citing Department of Envtl. Resources v. Peggs Run Coal Co., 55 Pa. Commw. 312, 423 A.2d 765 (1980)). Pennsylvania courts have been restrained in striking scandalous and impertinent pleadings, however:

> [T]here is some authority for the proposition that, even if the pleading of damages was impertinent matter, that matter need not be stricken but may be treated as "mere surplusage" and ignored... Furthermore, the right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice.

Commonwealth, Dept. of Envtl. Resources v. Hartford Accident & Indem. Co., 40 Pa. Commw. 133, 137-38, 396 A.2d 885, 888 (1979) (citations omitted).

DaimlerChrysler contends that the plaintiffs' inclusions of paragraphs 28-44, 61-62 and 65-67 in their Amended Complaint are scandalous and impertinent. Specifically, DaimlerChrysler argues that

these paragraphs are "immaterial", "inappropriate to the proof of plaintiffs' causes of action" and "unnecessarily prejudicial." Def's Mem. of Law at 32; Def's Reply Mem. of Law at 26. However, DaimlerChrysler has failed to affirmatively demonstrate how the inclusion of these paragraphs prejudices it in any way. Accordingly, the Court may not strike the paragraphs.

CONCLUSION

For the reasons stated above, the Court overrules and sustains the preliminary objections in part.

BY THE COURT:

_____

JOHN W. HERRON, J.

DATE: March 13, 2002

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

EDWARD D. SOLARZ,	:	April Term, 2001
MATTHEW GINSBERG,	:	
BRENDON and KATHLEEN DOLAN	:	No. 2033
individually and on behalf of all	:	
others similarly situated,	:	Commerce Program
Plaintiffs,	:	
v.	:	Control No. 112087
	:	
DAIMLERCHRYSLER CORPORATION,	:	
Defendant.	:	

ORDER

AND NOW, this 13th day of March, 2002, upon consideration of the preliminary objections of the defendant DaimlerChrysler Corporation ("DaimlerChrysler") to the Amended Complaint of the plaintiffs Edward D. Solarz ("Solarz"), Matthew Ginsberg ("Ginsberg"), Brendon and Kathleen Dolan ("the Dolans") and on behalf of all others similarly situated, all the responses thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The plaintiffs' request for injunctive relief is DENIED;

2. The preliminary objections asserting legal insufficiency in pleadings of breach of implied warranties, breach of express warranty, breach of contract, breach of duty of good faith and fair

dealing by Solarz and Ginsberg are SUSTAINED;

3. The preliminary objections asserting legal insufficiency in pleadings of breach of implied warranty of merchantability, breach of express warranty, breach of contract, breach of duty of good faith and fair dealing by the Dolans are OVERRULED;

4. The preliminary objections asserting legal insufficiency of a pleading of breach of implied warranty of fitness for a particular purpose by the Dolans is SUSTAINED;

5. The preliminary objections asserting legal insufficiency of a pleading of violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Act ("UTPCPL") by all the plaintiffs is OVERRULED;

6. The preliminary objection asserting inclusion of scandalous or impertinent matter in the Amended Complaint is OVERRULED;

7. The defendant shall answer the Amended Complaint within twenty (20) days after the entry of this Order.

BY THE COURT:

_____

JOHN W. HERRON, J.