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| **IN THE MATTER OF:** | ) | |
| **William and Helen Price** | ) | **CASE NO. 1340005513** |
| **Claimant,** | ) | |
| **vs.** | ) | **HON. EDWARD A. BOBRICK (Ret.)** |
| **Reynolds Motor Company** | ) | **DECISION** |
| **Respondent.** | ) | |

TO:

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## DECISION

This dispute arises from the claimants' purchase of a one-ton Ford F-Series truck for $61,066.78. The claimants allege that the truck was unmerchantable: its brakes repeatedly failed and the dealer – Reynolds Motor Company ("Dealership") – could not repair them. The claimants proceed under breach of implied warranty and revocation of acceptance theories under the Magnuson-Moss Warranty Act. They ask for damages in the amount equal to the diminution of the truck's value – 50% - under their breach of warranty claim and, alternatively, the entire purchase price under their revocation of acceptance claim.

The Dealership moves to dismiss these claims. It seems that the claimants sued Ford Motor Company in the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, over the same purchase, and settled the case for

$41,248.63. Pursuant to that settlement, the claimants gave Ford a release covering not only Ford, but its agents and successors. The Dealership contends that it is Ford's agent for the purpose of selling automobiles and, consequently, it is covered by the release as well. Beyond that, the Dealership argues that the claimants cannot maintain Magnuson-Moss Warranty Act claims because the truck they purchased is not a consumer product as defined under the Act, and that any warranties were disclaimed in the Vehicle Retail Installment Contract.

## ANALYSIS

A motion to dismiss tests the legal sufficiency of a pleading. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). When considering a motion to dismiss the complaint, the allegations of the complaint must be assumed to be true. *Boelker v. Porsche Cars North America, Inc.*, 353 F.3d 516, 520 (7th Cir. 2003). Every factual assumption in the plaintiff's favor must be indulged. *Waypoint Aviation Services Inc. v. Sandel Avionics, Inc.*, 469 F.3d 1071, 1072 (7th Cir. 2006). The problems that the Dealership has with the claimants' complaint are factual issues the types of things that are resolved later on the basis of evidence. *Szabo*, 249 F.3d at 675. Indeed, in its reply brief, the Dealership attaches some evidence in support of its assertions. But that's a bit late to flesh out arguments that ought to have been fleshed out in the opening brief. *James v. Sheahan*, 137 F.3d 1003, 1008 (7th Cir. 1998); *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 360 (7th Cir. 1987)(A reply brief is for replying...."), and that are not, in any event, appropriate in the context of a motion to dismiss.[1] Accordingly, I must deny the Deallership's motion.

[1] There are, of course, occasions where a motion to dismiss can be converted to a motion for summary judgment if evidence extraneous to the complaint is considered, but there must be adequate notice to the opposing party. *Green v. Benden*, 281 F.3d 661, 665 (7th Cir. 2002); *Covington v. Illinois Sec. Service, Inc.*, 269 F 3d 863, 865 (7th Cir.2001). Converting a motion to dismiss to one for summary judgment in a reply, obviously, provides no notice to the opposing party whatsoever. This is especially true when the moveant refers, in its filings, to alleged facts contained in an affidavit that was provided neither to the non-moving party nor the arbitrator.

1.

**It is Unclear Whether The Vehicle At Issue Is Not A Consumer Product**

The Magnuson-Moss Warranty Act applies only to consumer products, a term the Act defines as "tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes...." 15 U.S.C. § 2301(1). The Act's implementing regulations explain it a bit further, indicating that doubts should be resolved in favor of finding a product is covered by the Act:

> The Act applies to written warranties on tangible personal property which is normally used for personal, family, or household purposes. This definition includes property which is intended to be attached to or installed in any real property without regard to whether it is so attached or installed. This means that a product is a 'consumer product' if the use of that type of product is not uncommon. The percentage of sales or the use to which a product is put by any individual buyer is not determinative. For example, products such as automobiles and typewriters which are used for both personal and commercial purposes come within the definition of consumer product. *Where it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage.*

16 CFR § 700.1(a)(emphasis added). Here, at best, the Dealership has raised some doubt as to the purpose of the truck. Given the regulation's instruction to err on the side of coverage, that is not enough to warrant dismissal of a complaint.

The Dealership bases its argument for dismissal on the fact that the truck is big, and has a crew cab and a tow-hitch. Broad categories of products and assumptions regarding their use are not sufficient to dispose of the issue of whether a product is covered by the Act. *Waypoint Aviation,* 469 F.3d at 1072. Analysis must be finer than that *Id.* Even an airplane may be considered a consumer product if its principal use is personal transportation or recreation. *Id.* The issue, more often than not, is simply not one that can be resolved on a motion to dismiss. *Id.* Instead, in most cases, resolution will require an evaluation of evidence. *SeeCrume v. Ford Motor Co.,* 60 Or.App.224, 230, 653 P.2d 564, 567 (Or.App. 1982)(whether flat bed truck was consumer product was issue for the jury); *Frank v. allstate Auto Sales,* No.

60530, 1992 WL 90728 (Ohio Ct.App. 8th Dist.1992)(testimony indicated tow truck was purchased for business); *Walsh v. Ford Motor Credit Co.*, 113 Misc.2d 546, 547, 449 N.Y.S.2d 556, 557 (N.Y.Sup.Ct.1982)(plaintiff conceded in complaint that truck was purchased for business purposes); *Owens Transp. Service, Inc. v. International Truck and Engine Corp.*, 2006 WL 3545109, *3 (N.D.Ohio) (N.D. Ohio 2006)(plaintiff conceded in discovery that truck was primarily used for business).

Moreover, the claimants point out that in its advertising, Ford touts the truck as amenable to both personal and commercial uses, including "heavy-duty recreation" and "camping." It offers "comfort and refinement." Certainly, the crew-cab can accommodate a family as easily as a work crew, and the tow-hitch can be used to pull, not only equipment, but recreational vehicles, like boats, snow-mobiles, ATVs, *etc.* (Response to Motion to Dismiss, Ex. C). Then, of course, as observed by Claimants, are the wide array of accessories offered by Ford with the F-Series Trucks that have little commercial appeal or practicality, but might find great appeal among that part of the consumer market comprised of "young male(s) with excess testosterone in his system" to wit: Dual Sequential Turbocharge System, Audiophile® Sound System, DVD Entertainment system giving access to movies, games and music, chrome/platinum trim on grills, Harley Davidson trim package, and moon roof, to mention a few. (Claimants' Sur-Reply p. 2, 3) Ford's own description of its product cannot be ignored. *People ex rel. Mota v. central Sprinkler Corp.*, 174 F.Supp.2d 824, 89 (C.D.Ill. 2001). It is also not insignificant that, although the Vehicle Retail Installment Contract allows for the designation of the purchase as being for personal or commercial use, that portion of the contract is left blank. (*Motion to Dismiss*, Ex. A). In the end, this remains an open question, and one that cannot be disposed of as summarily as the Dealership might hope.

**2.**

**It Appears That The Dealership Could Not Disclaim The Warranties**

The Dealership also contends that it disclaimed all warranties in the purchase agreement. The language upon which it relies reads as follows:

> All warranties, if any, by a manufacturer or supplier other than dealer are theirs, not dealer's, and only such manufacturer or other supplier shall be liable for performance under such warranties, *unless dealer furnishes Buyer with a separate written warranty or service contract made by dealer on its own behalf.* Dealer hereby disclaims all warranties, express or implied, including any implied warranties of merchantability or fitness for a particular purpose: (A) on all goods and services sold by the dealer, and (B) on all used vehicles which are hereby sold "as is – not expressly warranted or guaranteed."

(*Motion to Dismiss,* Ex. B (emphasis added)). Here, it appears that the Dealership did furnish the claimants with a separate written service contract. (*Response to Motion to Dismiss*, Ex. A, at 1; Ex. F). So the Dealership's disclaimer argument is a non-starter.

The language in the warranty disclaimer simply echoes the Act itself, which provides that:

> (a) No supplier may disclaim or modify…any implied warranty to a consumer …if (1) such supplier makes any written warranty to the consumer… or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.
>
> (b) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

15 U.S.C. § 2308(a) and (c); *Priebe v. Autobarn, Ltd.,* 240 F.3d 584, 587 (7th Cir.2001). In circumstances such as this, the issue is generally whether the dealership is party to the service agreement. *See Priebe*, 240 F.3d at 587-88; *Hamilton v. O'Connor Chevrolet, Inc.*, 399 F.Supp.2d 860, 869 (N.D.Ill. 2005). Here, the agreement was signed by the "dealer or his authorized representative," (*Response to Motion to Dismiss*, Ex. F, at 1), which meant the Dealership became a party to the agreement, according to the "Additional Terms and Conditions" section of the service agreement. (*Id.* At 2). Consequently, at least for the purposes of a motion to dismiss, the Dealership's disclaimer argument fails. *Crowe v. Joliet Dodge*, 2001 WL 811655, *10 (N.D.Ill. 2001)(denying motion to dismiss based on warranty disclaimer where dealership sold plaintiff a service contract).

**The Dealership Must Prove It Is Ford's Agent For The Purposes Of The Release**

Finally, the Dealership argues that it is covered by the release the claimants executed in their litigation against Ford. The release applied to Ford's agents, and the Dealership says it is Ford's agent for the purpose of selling automobiles. The Dealership provides no evidence to support this contention and in fact, the only description it offers of its relationship to Ford is the fact that it "assigned its interest in the Contract to Ford...." (*Motion to Dismiss*, ¶ 3). That would make Ford the Dealership's successor or assignee, but not necessarily make the Dealership Ford's agent. More is needed for the Dealership to succeed on its agency/release defense – surely it has a copy of its agreement with Ford.[2] Yet, even in its reply brief – which, again, is too little too late – the Dealership provides no evidence of its legal relationship with Ford. As it stands, then, dismissal is inappropriate based on the Dealership's bald assertion of legal conclusion. *Lantz v. American Honda Motor Co., Inc.*, 2007 WL 1424614, *11 (N.D.Ill. 2007)(whether dealer was an agent of the manufacturer is a factual question); *Jones v. Fleetwood Motor Homes*, 1999 WL 999784, *2n.2 (N.D. Ill. 1999)("Being and authorized dealer does not necessarily mean that the dealer acts as an agent of the manufacturer."); *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 498, 221 Ill.Dec. 389, 675 N.E.2d 584, 592 (1996)) (determination of whether authorized dealer is agent of manufacturer requires more than assertion of legal conclusion).

That being said, the settlement with Ford, whether or not the Dealership is an agent, certainly affects one portion of this dispute: the amount of damages to which the claimants might be entitled. Under claimants' revocation of acceptance theory, they could revoke their acceptance of the truck, and receive a refund of the purchase price – or so much of the price as they have paid. Here, it appears the claimants made just three payments. The Dealership would get the vehicle back, but would also be entitled to a credit for the value the claimants received from the use of the vehicle

[2] The claimants offer as Exhibit G to their response a page from an unidentified document that might be an example of a franchise agreement Ford has with its dealerships. The agreement contains language in which Ford disavows any relationship of principal and agent between itself and the unnamed dealership. But there is no way to tell if it is authentic, or whether such language is included in the Dealership's agreement with Ford in this case.

while they had it. Under a warranty theory, damages would be the price of a replacement vehicle, minus both the present value of the allegedly defective car and the value that the plaintiff received from the use of the allegedly defective car. *See Schimmer v. Jaguar Cars, Inc.,* 384 F.ed 402, 406 (7th Cir 2004). Here, the claimants have already recouped over $41,000 from Ford in their settlement, while the cash price of the truck was $57,635.25. It would seem, then, that the claimants are approaching the full amount they can recover here. But we defer making any judgment or reaching any conclusions on the extent of damages until we first decide the preliminary issue of liability.

**CONCLUSION**

For the foregoing reasons, the Respondent's motion to dismiss is DENIED.

DATED: January 17, 2008

Edward A Bobrick

Hon. Edward A. Bobrick (Ret.)
JAMS Arbitrator