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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re FORD MOTOR COMPANY IGNITION SWITCH PRODUCTS LIABILITY LITIGATION	MDL No. 1112 Civil Action No. 96-3125 (JBS)
TERI SNODGRASS, ROBERT L. BAKER, WILLIAM CARTER, KENDALL ELLIS, JILL P. FLETCHER, JUDITH SHEMNITZ, FRANK SHERRON, TAMAZ TAL, JAMES J. and KAY NAVE, LARRY W. and PAMELA GEORGE, MARGIE MAYES, and JEFFREY SWIKLINSKI, on behalf of themselves and all others similarly situated, Plaintiffs, v. FORD MOTOR COMPANY and UNITED TECHNOLOGIES AUTOMOTIVE, INC., Defendants.	Civil Action No. 96-1814 (JBS) ORIGINAL FILED MAY 14 1999 WILLIAM T. WALSH, CLERK **OPINION**

APPEARANCES:

All Counsel on the Attached Service List

SIMANDLE, District Judge:

Of all the cases assigned to this court in this Multidistrict Litigation involving claims of allegedly defective ignition switches in various models of Ford vehicles, the present Snodgrass case is the only one brought on behalf of vehicle owners who have actually experienced fires or other damage to their cars or trucks allegedly caused by the ignition switch. Other aspects of this Multidistrict Litigation have previously

been decided,[1] and the Snodgrass plaintiffs' motion for class certification is due shortly.

This matter is before the court on the motion of defendants Ford Motor Company ("Ford") and United Technologies Automotive, Inc. ("UTA") for judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c). Ford and UTA seek dismissal of the deceptive trade practices claims plaintiffs have brought under various state consumer protection statutes on the ground that plaintiffs have failed to state a claim upon which relief can be granted. Ford also seeks dismissal of plaintiffs' breach implied warranty of merchantability claims on the ground that they are untimely under the applicable statutes of limitations and its disclaimer of liability for vehicle malfunctions that occur more than 12 months or 12,000 miles after

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[1] See In re Ford Motor Co. Ignition Switch Products Liability Litigation, ___ F. Supp. 2d ___, 1999 WL 98679 (D.N.J. March 1, 1999)(denying the motions of MDL plaintiffs Atkins and Saxe for leave to amend and for remand; granting in part and denying in part the motion of MDL plaintiff Pope for leave to amend); In re Ford Motor Co. Ignition Switch Products Liability Litigation, 19 F. Supp. 2d 263 (D.N.J. 1998)(denying the motion of the Veideman MDL plaintiffs for a judgment of lack of jurisdiction and for vacatur of the court's prior rulings granting in part various motions to dismiss and denying class certification; granting the motion of the Pierce MDL plaintiffs for remand); In re Ford Motor Co. Ignition Switch Products Liability Litigation, MDL No. 1112, Master Civil Action No. 96-3125 (JBS)(D.N.J. Sept. 30, 1997)(granting in part and denying in part defendants' motion to dismiss the Veideman MDL plaintiffs' Consolidated First Amended Class Action Complaint); In re Ford Motor Co. Ignition Switch Products Liability Litigation, 174 F.R.D. 332 (D.N.J. 1997)(denying the motions of the Wilks and Veideman MDL plaintiffs for class certification).

their original retail sale. For the reasons set forth below, the court grants in part and denies in part Ford and UTA's motion for judgment on the pleadings with respect to plaintiffs' deceptive trade practices claims, and denies Ford's motion for judgment on the pleadings with respect to plaintiffs' breach of implied warranty of merchantability claims.

BACKGROUND

Plaintiffs in this putative class action ("the Snodgrass plaintiffs") are owners of Ford vehicles who seek to represent a nationwide class of people whose Ford vehicles have been damaged or destroyed by fires originating in the steering column/dash area due to an allegedly defective ignition switch manufactured by UTA. Plaintiff Teri Snodgrass is presently the lead plaintiff of this group, which is comprised of a consolidation of two separate actions originally filed in this court.[2] The first of these consolidated actions, Wilks v. Ford Motor Co., Civil Action No. 96-1814 (JBS), was commenced on April 19, 1996. The Snodgrass plaintiffs filed their Third Amended

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[2] By Order dated December 16, 1996, the court consolidated Snodgrass v. Ford Motor Co. (f/k/a Wilks v. Ford Motor Co.), Civil Action No. 96-1814 (JBS), and Arts Transportation v. Ford Motor Co. (f/k/a Andrews v. Ford Motor Co.), Civil Action No. 96-3198 (JBS) under Civil Action No 96-1814. The court refers to the plaintiffs in this specific civil action as the "Snodgrass plaintiffs" when discussing the entire group of plaintiffs in this specific in this multidistrict litigation.

Complaint on May 15, 1998.[3]

There are twelve representative plaintiffs named in the Third Amended Complaint:[4]

- Plaintiff Teri Snodgrass, a resident of Manson, Washington, purchased a used 1989 Thunderbird in Washington in October 1990. Snodgrass alleges that the vehicle was totally destroyed by a fire that originated in the steering column/dash area due to a defective ignition switch on June 9, 1996. (Third Amended Complaint at ¶ 5(a));
- Plaintiff Robert L. Baker, a resident of Newton, Massachusetts, purchased a new 1986 Aerostar in Massachusetts on August 16, 1986. Baker alleges that the vehicle was totally destroyed by a fire that originated in the steering column/dash area due to a defective ignition switch on May 9, 1993. (Id. at ¶

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[3] Ford and UTA each filed an Answer to the Third Amended Complaint on June 8, 1998 and June 9, 1998, respectively. Ford and UTA filed notice of their intent to submit the instant motion for judgment on the pleadings on December 15, 1998. The principal briefing on the motion was completed by February 2, 1999, and the court heard oral argument by telephone conference call on February 11, 1999. The parties filed a number of additional briefs and letter briefs before and after the oral argument, which the court has received and considered.

[4] There were fourteen named representative plaintiffs when the Third Amended Complaint was filed. Two of them, Rose Campbell and Thomas G. Schleck, were voluntarily dismissed from the case with prejudice by Order dated October 15, 1998.

5(c));

- Plaintiff William Carter, a resident of Cincinnati, Ohio, purchased a new 1990 Mustang in Ohio on December 5, 1990. Carter alleges that the vehicle was extensively damaged by a fire that originated in the wiring harness of the ignition switch due to a defective ignition switch on June 26, 1994. (Id. at ¶ 5(d));
- Plaintiff Kendall Ellis, a resident of South Haven, Mississippi, purchased a new 1987 F-150 in Mississippi on September 4, 1987. Ellis alleges that the vehicle was extensively damaged by a fire that originated in the steering column/dash area due to a defective ignition switch on May 31, 1995. (Id. at ¶ 5(e));
- Plaintiff Jill Fletcher, a resident of Hudson, Massachusetts, purchased a used 1989 Crown Victoria in Massachusetts on October 14, 1995. Fletcher alleges that the vehicle was totally destroyed by a fire that originated in the ignition switch due to a defective ignition switch on April 17, 1996. (Id. at ¶ 5(f));
- Plaintiff Judith Shemnitz, a resident of South Easton, Massachusetts, purchased a new 1990 Tempo in Massachusetts on June 11, 1990. Shemnitz alleges that the vehicle was totally destroyed by a fire that

originated in the steering column/dash area due to a defective ignition switch on May 10, 1996. (Id. at ¶ 5(g));

- Plaintiff Frank Sherron, a resident of Kansas City, Missouri, purchased a used 1992 Ranger in Missouri on February 26, 1994. Sherron alleges that the vehicle was extensively damaged by a fire that originated in the steering column/dash area due to a defective ignition switch on April 25, 1996. (Id. at ¶ 5(h));
- Plaintiff Tamaz Tal, a resident of Regal Park, New York, purchased a used 1988 Lincoln Towncar in New York on April 29, 1993. Tal alleges that the vehicle was damaged by a fire that originated in the steering column/dash area due to a defective ignition switch one day in the fall of 1994. (Id. at ¶ 5(j));
- Plaintiffs James J. and Kay F. Nave, residents of Seward, Nebraska, purchased a used 1989 Mercury Grand Marquis on January 24, 1992. The Naves allege that the vehicle was totally destroyed by a fire that originated in the steering column/dash area due to a defective ignition switch on March 14, 1996. (Id. at ¶ 5(k));
- Plaintiffs Larry W. and Pamela George, residents of Oklahoma City, Oklahoma, purchased a used 1985 Mark VII in Oklahoma on October 6, 1995. The Georges allege

that the vehicle was totally destroyed by a fire that originated in the steering column/dash area due to a defective ignition switch on April 8, 1996. (Id. at ¶ 5(l));

- Plaintiff Margie Mayes, a resident of Grottoes, Virginia, purchased a new 1992 Mercury Cougar XR-7 in Virginia in September 1991. Mayes alleges that the vehicle was totally destroyed (and her garage, its contents and a nearby cottage substantially damaged) by a fire that originated in the steering column/dash area due to a defective ignition switch on December 13, 1994. (Id. at ¶ 5(m));
- Plaintiff Jeffrey Swiklinski, a resident of Freeport, Pennsylvania, purchased a new 1990 Escort LX in Pennsylvania on December 28, 1989. Swiklinski alleges that the vehicle was totally destroyed by a fire that originated around the steering column due to a defective ignition switch on June 21, 1995. (Id. at ¶ 5(n)).

These named plaintiffs seek to represent a broad class of owners of the following models and model years whose vehicles were destroyed or damaged by a fire caused by a defective ignition switch: Aerostar 1986-91; Bronco 1984-91; Bronco II 1984-90; Capri 1984-86; Continental 1984-87; Cougar 1984-93*;

Crown Victoria 1984-89; Escort 1984-90; E-Series 1984-93*; EXP 1984-88; Explorer 1991-93*; F-Series 1984-91; Grand Marquis 1984-89; Lincoln 1984-89; LTD 1984-86; Lynx 1984-87; Mark 1984-92; Marquis 1984-86; Mustang 1984-93*; Ranger 1984-93*; Tempo 1984-93*; Thunderbird 1984-93*; Topaz 1984-93*. (Id. at ¶ 6(a).)[5] The plaintiffs have also proposed various sub-classes of models and model years. (Id. at ¶ 6(b).)

According to the Third Amended Complaint, Ford installed the same or similar defective ignition switches manufactured and designed by UTA in each of the vehicles in the proposed class beginning in model year 1984. (Id. at ¶ 7.) The ignition switches were defectively designed and manufactured because they are susceptible to electrical short circuits which can and do cause overheating and fires, either while the vehicle is being driven or while the vehicle is parked and the engine is not running. (Id.) In August 1992, UTA began to incorporate a design change in the ignition switch that Ford and UTA developed after numerous fires had been attributed to the original ignition switch. (Id. at ¶ 8.) The redesigned ignition switches began to appear on the market in new Ford vehicles by mid-1993. (Id.) However, both Ford and UTA "knew, recklessly disregarded, or should have known" of the defective ignition switch before it was

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[5] The * signifies only that portion of the 1993 model year preceding the October production. (Third Amended Complaint at ¶ 6(a).)

first installed in the vehicles that comprise the proposed class in 1984. Indeed, Ford actually supplied retrofit ignition switches and/or replaced defective ignition switches for select purchasers of fleets of vehicles in the United States as early as 1988 and 1989. (Id. at ¶ 9.)

The Third Amended Complaint further alleges that in August 1992, the National Highway Traffic and Safety Administration ("NHTSA") initiated an investigation of reported fires caused by the defective ignition switch based on complaints of fires originating in the steering columns of 1989 Crown Victorias. (Id. at ¶ 10.) Ford allegedly persuaded NHTSA to close the investigation in November 1992 by claiming that ignition switch failures caused fires in only 2 out of every 10,000 vehicles and that the fires were caused by worn electrical contacts in vehicles with very high mileage and heavy duty cycles when Ford allegedly knew that the information it supplied NHTSA was incomplete and the that the conclusions it led NHTSA to reach were wrong. (Id.) In April 1994, NHTSA initiated an investigation of ignition switch failures in 1986-88 F-Series trucks. (Id.) As with the Crown Victoria investigation, however, Ford allegedly convinced NHTSA to close the investigation within five months by allegedly falsely claiming that the ignition switch failure rates were so law as to not justify a recall. (Id.) In both cases, Ford acknowledged that

some two dozen other models and model years of Ford vehicles, including those involved in this litigation, contained the same or a similar ignition switch as was contained in the vehicles under investigation by NHTSA. (Id.)

According to the Third Amended Complaint, NHTSA commenced an investigation of reported dashboard fires in 1990 Escorts in November 1994. (Id. at ¶ 11.) During the course of that investigation, Ford admitted that it redesigned the ignition switch in 1992 to "increase switch durability by reducing the potential for an electrical short condition." (Id.) However, Ford allegedly provided NHTSA with information about only a fraction of the incidents of ignition switch failure of which it knew or should have known. (Id.)

The Snodgrass plaintiffs further allege that on November 28, 1995, just before the Canadian Broadcasting Corporation was to air a report concerning an investigation of ignition switch-related fires in Ford vehicles sold in Canada by NHTSA's Canadian counterpart, Transport Canada, which revealed an estimated reported failure rate of 1 ignition switch-related fire per every 1,000 vehicles, Ford of Canada announced a safety recall of the following vehicles containing the same or similar ignition switches: 1989-90 Escort; 1989-91 Mustang; 1990-91 Thunderbird; 1990-91 Cougar; 1988-89 Crown Victoria; 1988-89 Grand Marquis; 1989 Lincoln Town Car; 1989-91 Aerostar; 1990

Bronco; 1990 F-Series Light Trucks. (Id. at ¶ 12.)

According to the Third Amended Complaint, in the press release announcing the safety recall, Ford of Canada stated:

> This action involves the ignition switch located in the vehicle's steering column. Under certain conditions the switch may develop a short circuit which could result in smoke and a potential for fire originating in the steering column area.

(Id.) Nevertheless, in the wake of the Canadian safety recall, Ford allegedly began a media campaign in the United States calculated to mislead the American public into believing that the same or similar ignition switches installed in vehicles sold in the United States were not defective, including press releases through its dealer network in the United States to the effect that the incidence of ignition switch-related fires in the United States was so low as to not be of any concern. (Id.)

On April 25, 1996, Ford announced a safety recall in the United States of the following vehicles: 1988-91 Aerostar; 1988-91 Bronco; 1988-93* Cougar; 1988-89 Crown Victoria; 1988-90 Escort; 1988 Explorer; 1988-91 F-Series; 1988-89 Grand Marquis; 1988-89 Lincoln Town Car; 1988-93* Mustang; 1988-93* Tempo; 1988-93* Thunderbird; 1988-93* Topaz.[6] (Id. at ¶ 13.) The safety recall, however, involved only a third of the Ford vehicles that actually contained the defective ignition switch. (Id. at ¶ 14.) Ford continued to deny that the ignition switch installed in the

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[6] The * signifies partial year only for 1993.

recalled vehicles was not defective. (Id.) Ford also claimed that the ignition switch installed in non-recalled vehicles was not the same as that installed in the recalled vehicles. (Id.) In fact, according to the Snodgrass plaintiffs, all of the ignition switches manufactured by UTA that were installed in Ford vehicles between 1983 and 1992 were defective, and many of the Ford vehicles not included in the safety recall have experienced ignition switch-related fires at a higher rate of incidence than some Ford vehicles that were recalled. (Id. at ¶ 15.)

The Snodgrass plaintiffs allege that Ford expressly warranted that their Ford vehicles were defect free at the time of their original retail sale even though Ford knew or should have known that the vehicles were not defect free because it had received thousands of complaints of ignition switch-related fires. (Id. at ¶ 16.) Plaintiffs further allege that Ford's attempt to limit the duration of the implied warranty of merchantability that accompanied each vehicle at the time of its original sale to the 12 month/12,000 mile period of its written warranty is unconscionable in light of Ford's knowledge of the defective ignition switch. (Id.) Plaintiffs contend that the applicable statutes of limitations on their claims have been tolled as a result of Ford's fraudulent concealment of the truth about the defective ignition switch. (Id. at ¶ 17.)

The Snodgrass plaintiffs propose to represent two

subclasses of owners of the Ford vehicles identified in ¶¶ 6(a) and (b) of the Third Amended Complaint. (Id. at ¶ 19.) The first proposed subclass generally consists of owners of Ford vehicles identified in ¶¶ 6(a) and (b) who allege that Ford violated the implied warranty of merchantability that accompanied their vehicles at the time of their original retail sale under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1) and/or UCC § 2-314(2)(c), as enacted in the various states. (Id. at ¶ 19(a).) The second proposed subclass generally consists of owners of Ford vehicles identified in ¶¶ 6(a) and (b) who allege that Ford violated various state deceptive trade practices statutes. (Id. at ¶ 19(b). All of the named plaintiffs in the Third Amended Complaint are members of the second proposed subclass, but plaintiffs Snodgrass, Ellis and Tal are not members of the first proposed subclass. (Id. at ¶ 21.)

In Count I of the Third Amended Complaint, plaintiffs Snodgrass, Ellis, Tal, Baker, Carter, Fletcher, Shemnitz, Sherron, Swiklinski, Nave, George and Mayes allege that Ford and UTA have violated various state deceptive trade practices statutes[7] "by selling Subclass members motor vehicles that do not

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[7] Snodgrass sues under Wash. Rev. Code § 19.86.020, which provides that "unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful." Baker, Fletcher and Shemnitz sue under Mass. Gen. Laws ch. 93A §, 2, which provides that "[u]nfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful." Ellis sues under Miss Code Ann. § 75-24-5, which prohibits "unfair or

have the 'defect free' characteristics, uses, or benefits as represented." (Third Amended Complaint at ¶ 26.)

In Count Two of the Third Amended Complaint, plaintiffs Baker, Fletcher, Shemnitz, Sherron, Carter, Nave, George, Mayes and Swiklinski allege that Ford breached the implied warranty of merchantability that accompanied each of their Ford vehicles at

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deceptive acts or practices in the conduct of any trade or commerce," including "[r]epresenting that goods . . . have . . . characteristics, uses, [or] benefits . . . that they do not have" and "[r]epresenting that goods . . . are of a particular standard, quality, or grade . . . if they are of another." Tal sues under N.Y. Gen. Bus. Law § 349(a), which provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce . . . are . . . unlawful." Sherron sues under Mo. Rev. Stat. § 407.020.1, which provides that "[t]he act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, [or] unfair practice . . . is . . . an unlawful practice." Carter sues under Ohio Rev. Code Ann. § 1345.02(a), which provides that "[n]o Supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." The Naves sue under Neb. Rev. Stat. § 59-1602, which provides that "unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful." The Georges sue under Okla. Stat. Tit. 15, § 753, which provides that " a person engages in a practice which is . . . unlawful . . . when he . . . [r]epresents, knowingly or with reason to know, that the subject of a consumer transaction is of a particular standard . . . if it is another." Mayes sues under Va. Code Ann. § 59.1-200, which provides that certain "fraudulent acts or practices committed by a supplier in connection with a consumer transaction are . . . illegal," including "[m]isrepresenting that goods . . . have certain . . . characteristics, . . . uses or benefits" and "[m]isrepresenting that goods . . . are of a particular standard, quality, [or] grade." Swiklinski sues under Pa. Stat. Ann. Title 73 § 201-2(4), which provides that "'unfair or deceptive acts or practices'" include "[r]epresenting that good or services have . . . characteristics . . . [or] benefits . . . that they do not have" or "[r]epresenting that goods are of a particular standard, quality, or grade . . . if they are of another."

the time of their original retail sale under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301(7) and 2310(d)(1) and/or UCC § 2-314(2)(c), as enacted in the various states. (Third Amended Complaint at ¶ 27.)

DISCUSSION

A. Standard on Motion for Judgment on the Pleadings

A district court will not grant a motion for judgment on the pleadings under Rule 12(c) "'unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.'" Kruzits v. Okuma Mach. Tool, Inc., 40 F.3d 52, 54 (3d Cir. 1994)(quoting Society Hill Civic Assoc. v. Harris, 632 F.2d 1045, 1054 (3d Cir. 1980)). In ruling on a Rule 12(c) motion, a district court must "view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to . . . . the non-moving party." Institute for Scientific Info., Inc. v. Gordon & Breach, Science Publishers, Inc., 931 F.2d 1002 (3d Cir.), cert. denied, 502 U.S. 909 (1991)(citing Society Hill Civic Assoc., 632 F.2d at 1054). Thus, this court "will accept as true the well-pleaded allegations of the non-movant's pleadings and reject as false all the contravening assertions in the movant's pleadings." Daley v. Haddonfield Lumber Inc., 943 F. Supp. 464, 466 (D.N.J.

1996)(citing Society Hill Civic Assoc., 632 F.2d at 1058; Snyder v. Baumecker, 708 F. Supp. 1451, 1452 n.6 (D.N.J. 1989)). However, the court need not accept as true legal conclusions couched as factual allegations, unsupported conclusions or unwarranted inferences. See Papasan v. Allain, 478 U.S. 265, 286 (1986)(court not required to accept "legal conclusion couched as a factual allegation" as true on motion to dismiss under Rule 12(b)); Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 417 (3d Cir.), cert. denied, ___ U.S. ___, 118 S. Ct., 139 L. Ed. 2d 335 (1997)(district court not required to accept "unsupported conclusions and unwarranted inferences" as true on motion to dismiss under Rule 12(b)).

B. Plaintiffs' Deceptive Trade Practices Claims

In Count I of the Third Amended Complaint, plaintiffs allege that Ford and UTA have violated various state deceptive trade practices statutes "by selling Subclass members motor vehicles that do not have the 'defect free' characteristics, uses, or benefits as represented." (Third Amended Complaint at ¶ 26.) Ford and UTA contend that they are entitled to judgment on the pleadings on this count of the Third Amended Complaint because neither the express warranty nor the implied warranty of merchantability that accompanied each Ford vehicle at the time of its original retail sale constitutes a "representation" that the

vehicle was "defect free" when sold. Ford also argues that the claims of certain named plaintiffs are inadequately pleaded or untimely.

Plaintiffs acknowledge that the "essence" of their deceptive trade practices claims is their contention that the express written warranty and the implied warranty of merchantability that accompanied each Ford vehicle at the time of its original retail sale constituted misrepresentations about the quality of the vehicles:

> These plaintiffs just rely on the written warranty that says (like all other manufacturers' written warranties) that the vehicle is defect free at the time of original retail sale -- and the associated implied warranty of merchantability that the vehicle is "fit for the ordinary purposes." UCC § 2-314(2)(c). The effect of these express and implied by law representations is that Ford has represented to each plaintiff and class member that the burned Ford vehicles had qualities, benefits, characteristics, etc. that they in fact did not have . . . . and Ford knew or should have known of the defect, based on the design itself and/or the numerous ignition fire complaints it received.

(Plaintiffs' Brief in Opposition at 19-20.) As plaintiffs see it, "[a] defect free written and fit for the ordinary purposes implied warranty means that the car will not catch on fire. If it does catch on fire, due to a defective ignition switch . . . . that is a violation." (Id. at 20.)

The express warranties that accompanied plaintiffs' Ford vehicles when they were sold to their original owners provided that Ford would repair, replace or adjust any part

(except tires) "found to be defective in factory-supplied materials or workmanship" that occurred "under normal use of the vehicle during the warranty coverage period." (Appendix to Ford's Reply Brief at Ex. 1-7.) In the court's view, these warranties do not constitute representations by Ford that the vehicles were "defect free" when sold. On the contrary, these warranties acknowledge the possibility of defects in factory-supplied materials or workmanship and promise that if such a defect manifests itself under normal use during the warranty coverage period, Ford will repair, replace or adjust the defective part at no cost to the owner of the vehicle.

In this respect, the Ford warranties at issue in this case appear to be similar to those at issue in In re General Motors Corp. Anti-Lock Brake Products Liability Litigation, 966 F. Supp. 1525 (E.D. Mo. 1997), aff'd, Briehl v. General Motors Corp., ___ F.3d ___, 1999 WL 222661 (8th Cir. April 14, 1999). Noting that "[t]he warranties merely provide that if there are any defects in material or workmanship during the warranty period, defendant will provide repair or replacement of the defective parts," the court found that "the warranties simply do not promise that the vehicles are free of defects." Id. at 1532. As a result, the court rejected the plaintiffs' contention that the express warranty promised that the vehicles were "free of defects in materials and workmanship at the time of delivery" and

dismissed the plaintiffs' breach of express warranty/breach of contract claims. Id.

Accordingly, the court finds that the express warranties that accompanied plaintiffs' Ford vehicles at the time of their original retail sale provide no basis for plaintiffs' claims under the deceptive trade practices statutes under which they have sued. The same cannot be said, however, about the implied warranty of merchantability that accompanied plaintiffs' Ford vehicles at the time of their original retail sale. The court is not prepared to hold, as a matter of law, that Ford and/or UTA cannot be held liable under the deceptive trade practices statutes under which plaintiffs have sued based upon a breach of the implied warranty of merchantability.

It is important to remember that, for purposes of this motion, the court must accept plaintiffs' well-pleaded factual allegations that their Ford vehicles contained defective ignition switches at the time of their original retail sale and that Ford and UTA knew it. Under these circumstances, the court cannot say, as a matter of law, that plaintiffs cannot recover under the deceptive trade practices statutes under which they have sued if they succeed in proving that the defective ignition switches rendered their vehicles unmerchantable.

Defendants dismiss plaintiffs' theory of liability as "bizarre" (Defendants' Reply Brief at 4-5), without engaging in

any analysis of the unfair trade practices statutes or relevant state decisional law that governs the named plaintiffs' claims, other than a brief discussion of Makuc v. American Honda Motor Co., 835 F.2d 389, 393 (1st Cir. 1987)(questioning theory that manufacturer is liable for misrepresentation under Massachusetts law whenever consumer establishes breach of implied warranty of merchantability). Notwithstanding the doubt expressed by the First Circuit in Makuc or defendants' low opinion of plaintiff's theory of liability, however, the highest state court in Massachusetts - the home state of named plaintiffs Baker, Fletcher and Shemnitz - has held that a breach of an implied warranty of merchantability constitutes a violation of Mass. Gen. Laws ch. 93A, § 2. Burnham v. Mark IV Homes, Inc., 441 N.E.2d 1027, 1031 (Mass. 1982); see also Wood v. General Motors Corp., 673 F. Supp. 1108, 1120 (D. Mass. 1987)(denying motion for summary judgment on plaintiffs' claim under Mass. Gen. Laws ch. 93A, § 2 because "a finding by the jury that General Motors breached an implied warranty of merchantability would conclusively decide that ch. 93A, § 2 was violated")(citing Burnham). Thus, under the law of Massachusetts applicable to this claim, Baker, Fletcher and Shemnitz certainly may pursue their deceptive trade practices claims based on the implied warranty of merchantability that accompanied their vehicles at the time of their original retail sale.

Furthermore, in the absence of any authority to the contrary, the court will permit the other named plaintiffs who have stated viable claims for breach of the implied warranty of merchantability and whose deceptive trade practices claims are adequately pleaded and timely to pursue their deceptive trade practices claims based on the implied warranty of merchantability that accompanied their vehicles at the time of their original retail sale. Thus, in addition to Baker, Fletcher and Shemnitz, plaintiffs Nave, George and Swiklinski may pursue deceptive trade practices claims based on the implied warranty of merchantability that accompanied their Ford vehicles at the time of their original retail sale.[8]

Plaintiffs Snodgrass, Tal and Ellis may not pursue deceptive trade practices claims based on the implied warranty of merchantability that accompanied their vehicles at the time of their original retail sale because these plaintiffs have not asserted viable claims for breach of implied warranty of merchantability. Snodgrass and Tal do not assert claims for breach of implied warranty of merchantability in the Third Amended Complaint because they purchased their Ford vehicles used in states (Washington and New York, respectively) that require vertical privity between the plaintiff consumer and the defendant

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[8] See, supra, n.7, identifying the particular deceptive trade practices statutes under which plaintiffs Nave, George and Swiklinski have sued.

seller on such claims. (See Third Amended Complaint at ¶ 19(a)(4).) Purchase of a used car from an intermediate owner precludes vertical privity. Similarly, Ellis does not assert a claim for breach of implied warranty of merchantability in the Third Amended Complaint because Mississippi law recognizes that prolonged usage of a vehicle without malfunction negates breach of the implied warranty of merchantability as a matter of law. See Ford Motor Co. v. Fairley, 398 So. 2d 216, 219 (Miss. 1981)(vehicle's incident-free service for approximately two years/26,000 miles precludes finding that vehicle was unmerchantable); see also Third Amended Complaint at ¶ 19(a)(6) (excluding from proposed class "purchasers in Mississippi whose Class vehicles burned after 30,000 miles). The 1987 F-150 Ellis purchased on September 4, 1987 had been driven approximately 100,000 miles by the time it was allegedly damaged by a fire originating in the steering column on May 31, 1995. (Third Amended Complaint at ¶ 5(e.) Thus, under Mississippi law, the implied warranty of merchantability that accompanied Ellis' vehicle at the time of its original retail sale expired long before the fire occurred. In the absence of any authority expressly allowing them to do so, this court will not permit these plaintiffs to circumvent the limitations their respective state legislatures and/or judiciaries have seen fit to impose on their implied warranty claims via resort to the deceptive trade

practices statutes of those states.[9]

Plaintiff Sherron's deceptive trade practices claim under Missouri law must be dismissed because he has not alleged that he purchased his Ford vehicle "primarily for personal, family, or household purposes," as required by Mo. Rev. Stat. § 407.025.1 (1997). The court will grant Sherron leave to replead his deceptive trade practices claim within twenty (20) days of the date of this ruling. If Sherron can honestly allege he purchased his Ford vehicle primarily for personal, family or household purposes, he should do so simply and straightforwardly. If he cannot, his deceptive trade practices claim will be deemed dismissed with prejudice upon expiration of the twenty days.

Plaintiff Carter's deceptive trade practices claim for damages under Ohio law is time-barred under Ohio Rev. Code Ann. § 1345.10(C), which "sets forth an absolute two-year statute of limitations for such damages actions." Sproles v. Simpson Fence Co., 649 N.E.2d 1297, 1302 (Ohio Ct. App. 1994)(declining to apply discovery rule exception in action for damages under Ohio's deceptive trade practices statute); Cypher v. Bill Swad Leasing Co., 521 N.E.2d 1142, 1144 (Ohio Ct. App. 1987)(same). Unlike

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[9] In light of this holding regarding plaintiff Ellis, the court need not address defendants' arguments that Ellis failed to make a reasonable attempt to resolve his claim informally, in accordance with Miss. Code Ann. § 75-24-15(2), that Ellis is prohibited from representing a class under Miss. Code Ann. § 75-24-15(4).

claims under many other state deceptive trade practices statutes, a claim under the Ohio statute accrues at the time of sale and cannot be extended under the doctrine of fraudulent concealment. See Sandra Benson Brantly and Beverly C. Moore, Jr., Commonality of Applicable State Law in Nationwide or Multistate Class Actions - Deceptive Trade Practices, 18 Class Action Reports 188, 213 (1995)(identifying limitations period of Ohio deceptive trade practices act as "[t]wo years from date of transaction"); see also Third Amended Complaint at ¶ 19(b)(3)(excluding from class definition persons "whose claims would be time-barred . . . . under state deceptive trade practices statutes . . . . that have repose provisions not permitting tolling of the limitations period due to fraudulent concealment" such as Ohio). Thus, although Carter's Ford vehicle was not damaged by a fire originating in the steering column until June 26, 1994, less than two years before the original Wilks class action Complaint was filed in April 1996, his deceptive trade practices claim under Ohio law accrued when he purchased his vehicle on December 5, 1990 and became time-barred two years later.[10] Therefore, plaintiff Carter's deceptive trade practices claim will be dismissed.

Plaintiff Mayes' deceptive trade practices claim under

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[10] In light of this holding, the court need not address defendants' argument that Carter is prohibited from representing a class under Ohio Rev. Code Ann. § 1345.09(B).

Viginia law is time-barred under the one-year statute of limitations period formerly contained in § 8.01-248 of the Virginia Code, which provided: "Every personal action, for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring such action has accrued." See Luddeke v. Amana Refrigeration, Inc., 387 S.E.2d 502 (Va. 1990)(affirming trial court's dismissal of claim under Virginia Consumer Protection Act as time-barred under § 8.01-248). The limitations period of § 8.01-248 was extended to two years by amendment effective July 1, 1995, but the one year limitations period continues to apply to causes of action that accrued before July 1, 1995. Michael v. Sentara Health Sys., 939 F. Supp. 1220, 1228-29 (E.D. Va. 1996). Even allowing for tolling under the doctrine of fraudulent concealment, as discussed in more detail later in this Opinion, Mayes' deceptive trade practices claim accrued when her Ford vehicle was damaged by a fire originating in the steering column on December 13, 1994 and became time-barred one year later, several months before the original Wilks class action Complaint was filed in April 1996. Therefore, plaintiff Mayes' deceptive trade practices claim will be dismissed.

Finally, the court is not persuaded by UTA's argument that plaintiffs Nave and George cannot maintain deceptive trade practice claims against an upstream component part supplier under

the deceptive trade practice statutes of Nebraska and Oklahoma, respectively.[11] The Nebraska statute declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce." Neb. Rev. Stat. § 59-1602. The statute defines "trade and commerce" as "the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska. In the court's view, these broad provisions are susceptible of an interpretation that includes upstream component part suppliers like UTA, especially when the component is included in many thousands of vehicles sold to consumers in Nebraska, and UTA has cited no Nebraska caselaw to the contrary. Similarly, the Oklahoma statute declares it unlawful to "[m]ake a false representation, knowingly or with reason to know, as to the characteristics . . . . of the subject of a consumer transaction" or to "[r]epresent, knowingly or with reason to know, that the subject of a consumer transaction is of a particular standard . . . . if it is not." 15 Okla. Stat. Ann. § 753(5) and (7). The statute defines "consumer transaction" to include the "distribution of any . . . . article . . . . for purposes that are personal, household, or business oriented." 15 Okla. Stat. Ann. § 752(2). These broad statutory provisions are also

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[11] In light of the dismissals of the claims of plaintiffs Snodgrass, Tal, Ellis and Mayes on other grounds, the court need not address UTA's argument that the deceptive trade practices statutes of Washington, New York, Mississippi and Virginia do not permit claims against upstream component part suppliers.

susceptible of an interpretation that includes upstream component parts suppliers like UTA, and UTA has cited no Oklahoma caselaw to the contrary. Whether plaintiffs' allegations of UTA's knowledge and misrepresentations are supportable in fact are questions for summary judgment practice or trial.

In summary, the court grants in part and denies in part defendants' motion for judgment on the pleadings with respect to plaintiff's unfair trade practices claims. The court grants defendants' motion and dismisses plaintiffs' claims to the extent they are based on the express warranties that accompanied each Ford vehicle at the time of its original retail sale. The court also grants defendants' motion and dismisses the claims of named plaintiffs Snodgrass, Ellis, Tal, Sherron, Carter and Mayes to the extent they are based on the implied warranty of merchantability that accompanied their Ford vehicles at the time of their original retail sales. Each of these dismissals is with prejudice except as to Sherron, who is granted leave to replead his claim based on the implied warranty of merchantability within twenty days of the date of this ruling to allege that he purchased his Ford vehicle primarily for personal, family or household use. The court denies defendants' motion with respect to plaintiffs Baker, Fletcher, Shemnitz, Nave, George and Swiklinski, whose deceptive trade practices claims may go forward.

C. Plaintiffs' Implied Warranty of Merchantability Claims

In Count Two of the Third Amended Complaint, plaintiffs Baker, Fletcher, Shemnitz, Sherron, Carter, Nave, George, Mayes and Swiklinski allege that Ford breached the implied warranty of merchantability that accompanied each of their Ford vehicles at the time of their original retail sale under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301(7) and 2310(d)(1) and/or UCC § 2-314(2)(c), as enacted in the various states. (Third Amended Complaint at ¶ 27.) Ford moves for judgment on the pleadings on these claims, arguing that they are untimely under the applicable statutes of limitations and under its express disclaimer of liability for vehicle malfunctions occurring after more than 12 months or 12,000 miles from the time of original retail sale. In response, plaintiffs argue that (1) the applicable statutes of limitations were tolled until April 25, 1996 under the doctrine of fraudulent concealment, and (2) that Ford's disclaimer of liability after 12 months or 12,000 is unenforceable because it is unconscionable.

1. Fraudulent Concealment

Under UCC § 2-725(1) as adopted in the various states, claims for breach of the implied warranty of merchantability that accompanies a vehicle at the time of its original retail sale must be brought within six years after the initial retail sale or

delivery of a vehicle to its original owner in Mississippi, within five years in Oklahoma, and within four years in the remainder of the states involved in this litigation. Ford argues that each named plaintiff's breach of implied warranty claim must be dismissed because each named plaintiff's claim became time-barred under the applicable version of UCC § 2-725(1) before the original Wilks class action Complaint was filed on April 19, 1996. In response, plaintiffs argue that the statutes of limitations were tolled through April 25, 1996, when Ford announced the safety recall in the United States, due to Ford's fraudulent concealment of the facts regarding the defective ignition switch.

Three elements must be pleaded and proved in order to establish fraudulent concealment: (1) wrongful concealment by the party raising the statute of limitations defense, resulting in (2) plaintiff's failure to discover the operative facts forming the basis of his cause of action during the limitations period (3) despite the exercise of due diligence. Walsh v. Ford Motor Co., 588 F. Supp. 1513, 1522 (D.D.C. 1984), as amended, 592 F. Supp. 1359 (D.D.C. 1984) and 612 F. Supp. 983 (D.D.C. 1985). In Walsh, a case involving an alleged defect in the transmissions of certain Ford vehicles manufactured between 1976 and 1980 that caused the vehicles to unexpectedly shift from park to reverse, the court found that those plaintiffs who purchased their Ford

vehicles more than four years before the original class action complaint was filed on August 21, 1981 could not establish the third element of fraudulent concealment because NHTSA had begun an investigation of "park to reverse" incidents in October 1977. Id. at 1523. (Id.) On reconsideration of that decision, however, the court modified its ruling to permit those plaintiffs who did not experience a "park to reverse" incidents until after the commencement of the NHTSA investigation in October 1977 to pursue their breach of implied warranty claims, recognizing that those plaintiffs could not possibly have discovered the existence of their causes of actions against Ford before October 1977. Walsh v. Ford Motor Co., 616 F. Supp. 1170, 1171 (D.D.C. 1985).

For purposes of this motion, we must accept plaintiffs' well pleaded factual allegations that Ford knew or should have known about the defective ignition switch from the time it first began to install the ignition switch in new Ford vehicles in 1984 and that Ford acknowledged the defect by replacing or supplying retrofit ignition switches for certain fleet customers in 1988 and 1989 due to a number of ignition switch-related fires. (Third Amended Complaint at ¶ 9.) In the court's view, these allegations are sufficient to establish the first element of fraudulent concealment. Guided by Walsh, the court also finds that plaintiffs did not and could not possibly have discovered the existence of their causes of action against Ford until NHTSA

initiated its initial investigation of ignition-switch related fires in August 1992, satisfying the second and third elements of fraudulent concealment. Accordingly, the court holds that the applicable statutes of limitations were tolled under the doctrine of fraudulent concealment until NHTSA initiated its initial investigation of ignition switch-related fires in August 1992 -- less than four years before the original Wilks class action Complaint was filed on April 19, 1996 -- and, therefore, denies Ford's motion for judgment on the pleadings on plaintiffs' implied warranty claims on the grounds that plaintiffs' claims are time-barred.

2. Unconscionability

Under the Magnuson-Moss Warranty Act, manufacturers are permitted to limit implied warranties to the duration of a written warranty of "reasonable" duration so long as the limitation is "conscionable" and set forth in "clear and unmistakable language" that is "prominently displayed" on the face of the written warranty. 15 U.S.C. § 2308(b). Ford exercised its right under this section to limit the implied warranty of merchantability that accompanied plaintiffs Ford vehicles at the time of their original retail sale to the 12 month/12,000 mile duration of the express warranty that accompanied each vehicle at the time of its original retail sale.

A majority of states have adopted UCC § 2-302, which provides for the striking of unconscionable clauses in sales contracts. In this case, plaintiffs contend that the durational limitation Ford has imposed on the implied warranty of merchantability that accompanied their vehicles at the time of their original retail sale is unenforceable because it is unconscionable under 15 U.S.C. § 2308(b) and UCC § 2-302, as enacted in the various states.

"Unconscionability" is a question of law to be decided by the court, but unconscionability "should but rarely be determined on the bare-bones pleadings -- that is, with no opportunity for the parties to present relevant evidence of the circumstances surrounding the original consummation of their contractual relationship." Carlson v. General Motors Corp., 883 F.2d 287, 292 (4th Cir. 1989), cert. denied sub nom. Alston v. General Motors Corp., 495 U.S. 904 (1990), and cert denied, 495 U.S. 910 (1990). Thus, the Fourth Circuit held in Carlson that the district court "erred by ruling, solely on the basis of the pleadings, that GM's durational limitations on any and all implied warranties were both 'reasonable' and 'conscionable' as a matter of law." Id. at 293. The court noted that the district court would be equipped to make such determinations "only after plaintiffs have had an opportunity -- whether in connection with a motion for summary judgment or at trial -- to present evidence

that, for example, they had no 'meaningful choice' but to accept the limited warranties, or that the durational limitations 'unreasonably' favored the defendants." Id.

Guided by Carlson, this court is unable at this juncture to determine, as a matter of law, whether or not Ford's durational limitation of the implied warranty of merchantability that accompanied plaintiff's Ford vehicles at the time of their original retail sale was unconscionable. The court need not make such a determination to decide the present motion, however. For purposes of this motion, the court must accept plaintiffs' well-pleaded factual allegations that the ignition switches installed in plaintiffs' Ford vehicles at the time of their original retail sale were defective and that Ford knew it. Under such circumstances, Ford's durational limitation would be unconscionable. As the court in Carlson observed:

> When a manufacturer is aware that its product is inherently defective, but the buyer has no notice of [or] ability to detect the problem, there is perforce a substantial disparity in the parties' relative bargaining power. In such a case, the presumption is that the buyer's acceptance of limitations on his contractual remedies -- including or course any warranty disclaimers -- was neither "knowing" nor "voluntary,", thereby rendering such limitations unconscionable and ineffective.

Carlson, 883 F.2d at 296 (citations omitted). Accordingly, the court rejects Ford's attempt to enforce the durational limitation on the implied warranty of merchantability that accompanied plaintiffs' Ford vehicles at the time of their original retail

sale as a matter of law and denies Ford's motion for judgment on the pleadings on plaintiffs' breach of implied warranty claims.

CONCLUSION

For these reasons, the court grants in part and denies in part defendants' motion for judgment on the pleadings on plaintiffs' deceptive trade practices claims, and denies Ford's motion for judgment on the pleadings on plaintiffs' breach of implied warranty of merchantability claims. The accompanying Order is entered.

Jerome B. Simandle

JEROME B. SIMANDLE
U.S. District Judge

Dated: May 14, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re FORD MOTOR COMPANY IGNITION SWITCH PRODUCTS LIABILITY LITIGATION	MDL No. 1112 Civil Action No. 96-3125 (JBS)
TERI SNODGRASS, ROBERT L. BAKER, WILLIAM CARTER, KENDALL ELLIS, JILL P. FLETCHER, JUDITH SHEMNITZ, FRANK SHERRON, TAMAZ TAL, JAMES J. and KAY NAVE, LARRY W. and PAMELA GEORGE, MARGIE MAYES, and JEFFREY SWIKLINSKI, on behalf of themselves and all others similarly situated, Plaintiffs, v. FORD MOTOR COMPANY and UNITED TECHNOLOGIES AUTOMOTIVE, INC., Defendants.	Civil Action No. 96-1814 (JBS) ORIGINAL FILED MAY 14 1999 WILLIAM T. WALSH, CLERK **ORDER**

THIS MATTER having come before the court on the motion of defendants Ford Motor Company ("Ford") and United Technologies Automotive, Inc. ("UTA") for judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c), and the court having considered the submissions of the parties and having heard argument from counsel on February 11, 1999 , and for the reasons expressed in the accompanying Opinion;

IT IS on this 14th day of May, 1999, hereby ORDERED as follows:

1. Ford and UTA's motion for judgment on the pleadings on

plaintiffs' deceptive trade practices claims (Count I) is GRANTED IN PART AND DENIED IN PART. The court grants defendants' motion and dismisses plaintiffs' claims to the extent they are based on the express warranties that accompanied each Ford vehicle at the time of its original retail sale. The court also grants defendants' motion and dismisses the claims of plaintiffs Snodgrass, Ellis, Tal, Sherron, Carter and Mayes to the extent they are based on the implied warranty of merchantability that accompanied their Ford vehicles at the time of their original retail sales. Each of these dismissals is with prejudice except as to Sherron, who is granted leave to replead his claim based on the implied warranty of merchantability within twenty (20) days of the date of this ruling to allege that he purchased his Ford vehicle primarily for personal, family or household use. Sherron's claim will be deemed dismissed with prejudice if he does not replead within twenty days. The court denies defendants' motion with respect to the implied warranty of merchantability-based claims of plaintiffs Baker, Fletcher, Shemnitz, Nave, George and Swiklinski.

2. Ford's motion for judgment on the pleadings on plaintiffs' breach of implied warranty of merchantability claims (Count II) is DENIED.

Jerome B. Simandle

JEROME B. SIMANDLE
U.S. District Judge

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