

else. I don't think that you, as jurors, in setting the standards for the law in this community, want to encourage plaintiffs such as Mr. Beier, if they get a bum vehicle, to pass it on to somebody else. That's not fair and I don't think that's a proper way to mitigate your damages.

## M.8 Sample Jury Instructions

### M.8.1 Express Warranty, Merchantability, Revocation and Magnuson-Moss Warranty Act<sup>7</sup>

#### EXPRESS WARRANTY—DEFINITION

An express warranty is a representation, statement, promise or description made in writing, orally or by any other means, by a manufacturer or seller that its product has certain characteristics or will meet certain standards.

A manufacturer or seller can create an express warranty without intending to make a warranty, or without using words such as “warranty” or “guarantee.”

[MCLA 440.2323; SJI2D 25.11 and SJI2D 140.41]

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A manufacturer or seller can create an express warranty without intending to make a warranty, or without using words such as “warranty” or “guarantee.”

As an example, a warranty may be created when the purchaser is shown or is demonstrated a model or sample of the item being purchased. Under such a situation, an express warranty that the item will conform to the model or sample, and will perform as the model or sample performs, is created.

[MCLA 440.2323; SJI2D 25.11 and SJI2D 140.41]

#### EXPRESS WARRANTY—BURDEN OF PROOF

The Plaintiff has the burden of proving that:

- a. Defendant expressly warranted the product in one or more of the ways claimed by the Plaintiff;
- b. the product did not conform to the warranty at the time of sale or within the time period covered by the warranty;
- c. Plaintiff notified Defendant of the nonconformity within a reasonable time after Plaintiff discovered or should have discovered the nonconformity;
- d. the Defendant failed to cure the nonconformity within a

<sup>7</sup> This sample pleading is adapted from a recent case by Dani Liblang, Attorney at Law, 165 North Old Woodward Avenue, Birmingham, Michigan 48009-3380. Because the pleadings are from an actual case, they are quite fact specific, and are presented solely for the purposes of demonstration. All sample pleadings must be adapted by practitioners to meet actual needs and practices. [Editor's Note: statutory and other citations have been retained as in the original.]

- e. reasonable time after receiving notice;
- e. as a result of the nonconformity, Plaintiff sustained a loss or damages.

Your verdict will be for the Plaintiff on this claim if you decide that all of these elements have been proved.

Your verdict will be for the Defendant on this claim if you find that any one or more of these elements has not been proved.

[SJI2D 140.42; SJI2D 25.12 and commentary]

#### NONCONFORMITY—DEFINITION

A nonconformity includes not only breaches of express or implied warranties, but any failure of the manufacturer to repair the vehicle within a reasonable time.

[*Ford Motor Credit v Harper*, 671 F2d 1117, 33 UCC Rep Serv 921 (8th Cir 1981); *Kelynack v Yamaha Motor Corp*, 152 Mich App 105 (1986); 440.2106(2)]

#### PROOF OF NONCONFORMITY—CIRCUMSTANTIAL EVIDENCE

Proof of a defect or nonconformity may be established by circumstantial evidence. Thus, it is not necessary that Plaintiff prove the exact cause of the problems experienced with the vehicle. Rather, Plaintiff need only present sufficient evidence from which you can reasonably infer that these problems were caused by a defect or failure to repair adequately or within a reasonable time. The burden then shifts to the Defendant to prove that the problems were due to a cause other than a defect or that the problems were adequately repaired within a reasonable time.

[*Bronson v JL Hudson Co*, 376 Mich 98 (1965)]

#### AUTHORIZED DEALER DEFENDANT'S AGENT

Defendant's authorized dealer is Defendant's agent for purposes of the sale of the vehicle, as well as for any repairs performed pursuant to Defendant's written warranty or service contract. Defendant is therefore liable for the conduct of the dealer, Avis Ford, in connection with the sale and repair of the vehicle.

[*Eckstein v Cummins*, 41 Ohio App 2d 1, 321 NE2d 897, 16 UCC Rep 373 (1974) (dealer is manufacturer's agent for purposes of sale and warranty repair); *Vernon v Lake Motors*, 488 P2d 302, 9 UCC Rep 777 (Utah 1971) (dealer is manufacturer's agent for purposes of warranty repair); *Kure v Chevrolet Motor Div*, 581 P2d 603, 24 UCC Rep 293 (Wyo 1978) (manufacturer liable but dealer acting as its agent was not, since agent acting for a disclosed principal is not liable on the contract); *Sanco, Inc v Ford Motor Company*, 579 F Supp 893 (SD Ind 1984), *aff'd* 771 F2d 1081 (7th Cir 1985) (manufacturer is direct seller even though dealer acts as intermediary to make delivery and sign paperwork); *Richards v Goerg Boat & Motors, Inc*, 384 NE2d 1084, 25 UCC Rep 102 (Ind Ct App 1979) (manufacturer liable as direct seller where customer contacted manufacturer directly concerning sale and warranty repairs, even though sales contract and payments made through dealer)]

#### FAILURE OF ESSENTIAL PURPOSE

Where the circumstances cause exclusive or limited remedies under a written warranty to fail of their essential purpose, such that the buyer is deprived of the substantial value of the bargain, then

the limitations under the warranty are no longer effective and the buyer is entitled to all of the remedies provided by the Uniform Commercial Code.

[MCLA 440.2719(2); UCC Official Comment 1; *Kelnyack v Yamaha*, 152 Mich App 102 (1986)]

### UCC—GOOD FAITH OF MERCHANT

Michigan has adopted a set of laws known as the Uniform Commercial Code, which applies to transactions in goods, such as the vehicle that is at issue in this cause.

The Code defines a “merchant” as a party who regularly deals with goods of the kind at issue or otherwise by its business holds itself out as having knowledge or skill peculiar to the goods involved in the transaction. For purposes of this case, there is no dispute that Defendants are “merchants.”

Every contract or duty within the Code imposes an obligation of good faith in its performance or enforcement. With respect to a merchant, the term “good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

In order to prevail on their claim for breach of good faith, the Plaintiff has the burden of proving, by a preponderance of the evidence, each of the following elements:

- I. that Defendant had a duty arising under an express or implied warranty governed by the Uniform Commercial Code;
- II. that Defendant failed to act in good faith with respect to such duty;
- III. as a result of Defendant’s failure to act in good faith, the Plaintiff sustained damages.

If you find that the Plaintiff has proved each of these elements by a preponderance of the evidence, then your verdict will be for the Plaintiff on this claim. If you find that Plaintiff has failed to prove any of these elements, then your verdict will be for the Defendant on this claim.

[MCLA 440.1201(19); 440.1203; MCLA 440.2103; MCLA 440.1102(G); *KLT Industries, Inc v Eaton Corporation*, 505 F Supp 1072, 1078 (ED Mich 1981) (recognizing plaintiff’s claims for a defendant-merchant’s obligation of good faith under MCLA 440.2103(1)(b))]

### IMPLIED WARRANTY OF MERCHANTABILITY— DEFINITION

When I use the words “implied warranty of merchantability,” I mean a duty imposed by law which requires that the manufacturer or seller’s product be reasonably fit for the purposes for which such products are used, and that the product be acceptable in the trade for the product description.

[SJI2d 25.21 and SJI2d 140.43, and authority cited thereunder]

### IMPLIED WARRANTY OF MERCHANTABILITY BURDEN OF PROOF

The Plaintiff has the burden of proving the following:

- a. at the time of delivery, the product was not merchantable; and
- b. the Defendant was notified that the product was not merchantable within a reasonable time after the Plaintiff discovered or should have discovered it; and

- c. as a result of the nonmerchantability, the buyer sustained a loss or damages.

A product may be nonmerchantable at the time of delivery even though the defect does not appear until later. It is for you to determine whether the product was merchantable at the time of delivery.

Your verdict will be for the Plaintiff on this claim if you decide that all of these elements have been proved.

Your verdict will be for the Defendant on this claim if you decide that any one of these elements has not been proved.

[SJI2d 25.22 and SJI2d 140.45, and commentary thereunder]

## MAGNUSON-MOSS WARRANTY ACT

### Introduction

The Magnuson-Moss Warranty Act is a federal law covering consumer product ties. The Act provides for certain rights and remedies of consumers in connection with express and implied warranties and service contracts applying to consumer products.

### Elements and Burden of Proof

Under the Magnuson-Moss Warranty Act, the Plaintiff has the burden of proving, by a preponderance of the evidence, the following elements:

1. that she is a “consumer,” which is undisputed;
2. that she purchased a “consumer product” or that she is a person entitled to enforce the terms of a written warranty, implied warranty or service contract applicable to a “consumer product,” which is undisputed;
3. that the Defendant is a “warrantor” or “supplier” who made a written warranty or service contract, or is subject to the provision of an implied warranty arising under state law;
4. that any **one** or more of the following occurred:
  - (a) the Defendant failed to remedy a defect, malfunction or failure to conform to the written warranty within a reasonable time and without charge; or
  - (b) the Defendant breached an implied warranty arising under state law; or
  - (c) the Defendant failed to repair a defect, malfunction or nonconformity covered by a service contract within a reasonable time and without charge; or [15 USC 2301; 2310(d)(1)]
  - (d) the Defendant breached a duty imposed under the Uniform Code.

If the Plaintiff proves these elements, then the Defendant has violated the Magnuson-Moss Warranty Act, and your verdict will be for the Plaintiff on this claim. If the Plaintiff has failed to prove any of the required elements, then your verdict will be for the Defendant on this claim.

### CONTINUED USE OF VEHICLE

The law permits the Plaintiff to continue to use the vehicle in an effort to mitigate his damages even after he has notified Defendant of his claims. Thus, the fact that Plaintiff continued to use the vehicle is not a defense to the Plaintiff’s claims.

[*Henderson v Chrysler*, 191 Mich App 337, 477 NW2d 505 (1990); *Lorenz Supply Co v American Standard, Inc*, 100 Mich App 600, 300 NW2d 335 (1980)]

**REASONABLE TIME TO REPAIR**

The law does not allow the Defendant an unlimited time to perform repairs that are required to be performed under either a warranty or service contract. Rather, the repairs must be performed within a reasonable time. It is up to you to determine what is a reasonable time based on the facts and circumstances as you find them.

It is not a defense to the Plaintiff's claim that the Defendant tried to fix the vehicle within a reasonable time but was unable to do so. Commendable efforts alone do not relieve the Defendant of its obligation to repair under the warranty.

If you find that the Defendant was not able to repair the vehicle within a reasonable time, then you must find that the Defendant has breached the warranty and you will enter a judgment for the Plaintiff on the warranty claim. If you find that the Defendant did repair the vehicle within a reasonable time, then you must find the Defendant did not breach the warranty, and you will enter a judgment for the Defendant on the warranty claim.

[MCLA 440.2719(2); *Kelynack v Yamaha Motor Corp*, 152 Mich App 105 (1986); *Durfee v Baxter Imports*, 262 NW2d 349, 98 ALR3d 1179, 1180 (Minn 1977); *Rester v Morrow*, 491 So2d 204, 1 UCC Rep 751, 759 (Miss 1986); *Ford Motor Co v Taylor*, 60 Tenn App 271, 466 SW2d 521, cert den (1969)]

**NOTICE OF REVOCATION**

In order to give Defendants notice of her intent to revoke acceptance of the vehicle, Plaintiff must, by either words or actions, convey to the Defendants her intent to revoke the acceptance. Oral statements, letters and even the filing of the complaint in court may be considered as notice of intent to revoke.

The law requires that Plaintiff give notice of intent to revoke within a reasonable time. What is a reasonable time is for you to determine. If you find that there were promises and/or efforts to cure the alleged defects, that may prolong the time period that would be reasonable for revocation. You may consider any such promises and/or efforts in deciding what was a reasonable time for Plaintiff to have waited before revoking acceptance.

[MCLA 440.2608; *King v Taylor Chrysler Plymouth*, 184 Mich App 204, 211 (1990); *Norm Greshman's Things to Wear, Inc v Mercedes Benz of North America, Inc*, 558 A2d 1066 (Del 1989) (revocation permissible even after two years); *McCullough v Bill Swad Chrysler-Plymouth, Inc*, 5 Ohio St 3d 181, 449 NE2d 1289 (1983) (revocation despite 35,000 miles upheld)]

**ACCEPTANCE OF NON-CONFORMING GOODS—  
REMEDIES UNDER UNIFORM COMMERCIAL CODE****Acceptance Without Revocation (SJI 140.11 modified)**

The Plaintiff is entitled to accept goods and recover damages if the goods do not conform to the express or implied warranties, and the Defendant has been notified of the nonconformity within a reasonable time after plaintiff discovered or should have discovered the nonconformity. The Plaintiff has the burden of proving that the Defendant received the required notification.

In this case, the Plaintiff accepted the goods. Plaintiff claims that the goods did not conform to the express warranties in that [the vehicle was defective, did not have the characteristics represented, did not meet the standards represented and was not adequately repaired within a reasonable time] and/or that the [vehicle] did not conform to the implied warranty of merchantability.

You must decide whether the [vehicle] conformed to the express and implied warranties and, if not, whether the Defendant was notified within a reasonable time after Plaintiff discovered or should have discovered the nonconformity.

If you determine that the [vehicle] did not conform to the express or implied warranties and that Defendant was notified of the nonconformity within a reasonable time after Plaintiff discovered or should have discovered the nonconformity, then there has been a breach of warranty and you may award such damages as you believe Plaintiff has suffered.

If you determine that the vehicle conformed to both the express and implied warranties, or that Defendant did not receive notice of any nonconformities within a reasonable time after Plaintiff discovered or should have discovered the nonconformities, then there has not been breach of warranty and Plaintiff is not entitled to recover damages under the U.C.C.

**Acceptance with Revocation (SJI2d 140.12 modified)**

Plaintiff is entitled to revoke acceptance of the [vehicle] only if the [vehicle] does not conform to an express warranty or the implied warranty of merchantability, and the nonconformity substantially impairs the value of the [vehicle] to the Plaintiff, and if:

- a. Defendant was notified of the revocation within a reasonable time after Plaintiff discovered or should have discovered the nonconformity; and
- b. (1) the Plaintiff accepted the [vehicle] on the reasonable assumption that the nonconformity would be cured and it was not cured within a reasonable time; or  
(2) Plaintiff did not discover the nonconformity, and the Plaintiff's acceptance was reasonably induced either by difficulty of discovery before acceptance or by the Defendant's assurances.

The Plaintiff has the burden of proving that Defendant received the required notice.

If you find that Plaintiff has rightfully revoked acceptance, then Plaintiff is entitled to a repurchase of the [vehicle] in accordance with the calculations set out in the verdict form.

If you find that Plaintiff has not rightfully revoked acceptance, then Plaintiff is not entitled to a repurchase of the [vehicle].

**M.8.2 Rejection, Revocation, Merchantability, Fitness for a Particular Purpose and Disclaimer<sup>8</sup>****PLAINTIFF'S THEORIES OF RECOVERY—REJECTION****[Count One of Plaintiff's Complaint]**

Ladies and Gentlemen of the Jury, I charge you that in Count One of his complaint, Plaintiff seeks recovery under a theory of Rejection. The Plaintiff's claims under Count One are governed by the following law given to you in this charge.

<sup>8</sup> This sample jury pleading is adapted from a recent case by T. Michael Flinn, Attorney at Law, 402 Tanner St., Carrollton, GA 30117. Because the pleadings are from an actual case, they are quite fact specific, and are presented solely for the purposes of demonstration. All sample pleadings must be adapted by practitioners to meet actual needs and practices. [Editor's Note: statutory and other citations have been retained as in the original.]