IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35467

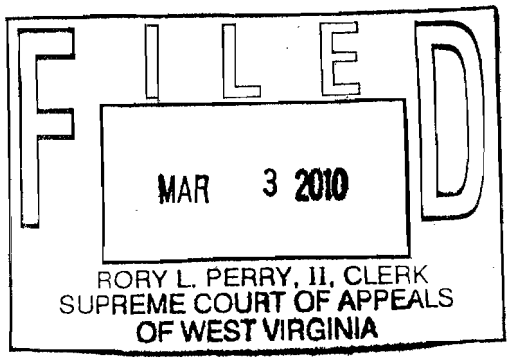
SCOTT McMAHON and KAREN JOHN, individually and on behalf of and others similarly situated,

Plaintiffs/Respondents,

v.

ADVANCE STORES COMPANY, INCORPORATED, dba Advance Auto Parts, and DONN FREE,

Defendants/Petitioners.



Circuit Court of Ohio County
Arthur M. Recht, Judge
Civil Action No. 06-C-306

AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF PETITIONERS

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INTRODUCTION

The Defense Trial Counsel of West Virginia ("DTCWV") respectfully submits this amicus brief asking the Court to uphold the validity of express warranties limited to the original purchaser in cases not involving allegations of personal injury or property damage. As explained below, the DTCWV believes that while there are a number of issues raised in the certified question, the interest in consistent application of uniform laws adopted by the several states supports the position of the petitioners here. Because those laws have generally been interpreted to permit manufacturers to limit their express warranties to original purchasers and because the statute at the heart of the question does not mandate a contrary result, DTCWV respectfully requests that the Court interpret the statutes at issue in a manner consistent with the generally-applicable rule.

STATEMENT OF INTEREST

The Defense Trial Counsel of West Virginia is an organization of over 500 attorneys who engage primarily in the defense of individuals and corporations in civil litigation in West Virginia. The Defense Trial Counsel of West Virginia is an affiliate of the Defense Research Institute ("DRI"), a nationwide organization of over 23,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. Although it does not routinely seek leave to file amicus briefs, the Defense Trial Counsel of West Virginia is interested in the issue before the Court regarding the validity of original purchaser warranties because of the DTCWV's position generally advocating to have West Virginia apply uniform laws in a similar manner and to apply such statutes in a common-sense fashion to effectuate their purpose. For example, in *State ex rel. Chemtall v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004), DTCWV submitted a brief

asking the Court to apply West Virginia's class action rules in a fashion similar to equivalent federal rules. Likewise, in *Hawkins v. Ford Motor Co.*, 211 W. Va. 487; 566 S.E.2d 624 (2002), DTCWV submitted a brief in support of a manufacturer's assertion that the plain language of West Virginia's Unfair Trade Practices Act did not apply to self-insured entities. Both positions were ultimately adopted by the Court.

The DTCWV Board of Governors has authorized the filing of an *amicus curiae* brief on behalf of the DTCWV's membership.

STATEMENT OF EXPERIENCE

Members of the DTCWV are routinely involved in cases dealing with statutes adopted by our Legislature modeled on uniform laws. The Uniform Commercial Code ("UCC") is obviously one of foremost of these and our members' experience is that all parties benefit from consistent application of such laws. West Virginia's Consumer Credit and Protection Act, West Virginia Code § 46A-1-101, *et seq.*, is based in part on the Uniform Consumer Credit Code and the National Consumer Act. *See, Clendenin Lumber & Supply Co. v. Carpenter*, 172 W.Va. 375, 305 S.E.2d 332 (1983). Our members are called on to assess these West Virginia statutes in light of similar legislation based on the same uniform laws. DTCWV believes these statutes should be applied in a manner consistent with their drafters' efforts to create a body of law that can be interpreted in a uniform – and ultimately predictable – fashion. In this case, DTCWV believes upholding the validity of original-purchaser warranties is consistent with the uniform nature of the laws under consideration.

DISCUSSION

At the outset, DTCWV notes this putative class action involves a purely commercial transaction and there is no claim of personal injury or property damage by the named plaintiffs. From DTCWV's reading of the papers filed at the petitioning stage, no party disputes that the express warranty in this action protected the consumer who originally purchased the product at issue regardless of how the product passed through the chain of distribution to reach that consumer. In other words, the warranty protected the original consumer who purchased the product, regardless of whether that consumer purchased the product:

> 1) From the manufacturer directly; or
>
> 2) From a wholesaler who purchased it from the manufacturer; or
>
> 3) From a retailer who purchased it from a wholesaler who purchased it from the manufacturer; or
>
> 4) From a retailer who purchased it from a distributor who purchased it from wholesaler who purchased it from an importer who purchased it from a manufacturer or any other combination thereof.

Thus, the first **consumer** to buy the new product is the one protected by the express warranty, regardless of where in the chain of distribution she or he purchased it.

It appears undisputed as well that the express terms of the warranty at issue do not extend to those who obtain the product from the consumer who purchased it in the first place.

With those undisputed facts in mind, one can turn to the issue before the Court: whether a warranty limited to the original consumer who purchased the new product is congruent with West Virginia law. As noted, the Certified Question presented to this

Court deals with the application of one section of a statute, the Consumer Credit and Protection Act, modeled on a uniform law,

> Does W. Va. Code § 46A-6-108(a) apply to suits for breach of limited warranty by subsequent purchasers where the limited warranty involved limits its availability to original purchasers?

The Circuit Court answered this question in the affirmative. As discussed below, this result is not required by the plain language of the uniform statute. The validity of such warranty limitations has been repeatedly upheld under another uniform enactment – the Uniform Commercial Code - in cases such as this one dealing with purely commercial transactions (i.e., not involving claims for personal injury or property damage). Because this case does not involve allegations of personal injury or property damage, DTCWV submits the holdings of those courts are persuasive here.

Indeed, in our view, the better way to look at the issue is whether a "subsequent purchaser" is a "consumer" protected by the provisions of the statute at issue. Assuming as we do – and as the facts are described in the papers here – that the subsequent purchaser was not the original consumer who purchased the product, we believe the Court could reasonably exercise its discretion[1] to re-word the certified question along the following lines:

> Does W. Va. Code § 46A-6-108(a) – which applies by its terms only to "consumers" as that term is defined in the statute – extend to suits for breach of an express warranty by subsequent purchasers where the express warranty at issue limits its availability to the original consumer who purchased the product?

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[1] This Court may reformulate a certified question in order to fully address the law which is involved in the question. *Drake v. Waco Oil & Gas Co.*, 223 W. Va. 568, 571, 678 S.E.2d 301, 304 (2009).

Framed this way (or as originally posed for that matter), we believe the Court should answer the Certified Question in the negative and uphold the petitioners' position that an express warranty can be limited to original purchasers.

1. WARRANTIES LIMITED TO THE ORIGINAL CONSUMER WHO PURCHASED THE PRODUCT ARE PERMISSIBLE UNDER THE UNIFORM COMMERCIAL CODE.

Express warranties are a matter of contract. Under the Uniform Commercial Code, a party is free to set the terms of an express warranty. *Independence Apts. Assocs. v. Louisiana-Pacific Corp.*, 44 F. Supp. 2d 1120, 1123 (D.Or. 1999) ("the cases acknowledge that the seller can restrict an express warranty as it sees fit"). This argument was addressed extensively in the Petition and will not be repeated here. In this case, the express warranty expired either at "the end of the warranty period printed on your original receipt or when you sell your vehicle, whichever occurs first." There is no question the consumer who purchased the battery sold his vehicle, which terminated the express warranty by its terms. Under the Uniform Commercial Code, a seller is permitted to limit an express warranty to the original purchaser by terminating the warranty upon resale.[2] There is simply nothing in West Virginia law contrary to this precept under the Uniform Commercial Code.

[2] Of course, where a manufacturer does not limit the scope or duration of an express warranty, the UCC does not bar subsequent purchasers from enforcing the terms of the warranty.

2. WEST VIRGINIA CODE § 46A-6-108(a) DOES NOT APPLY TO SUBSEQUENT PURCHASERS WHERE THE WARRANTY BY ITS TERMS TERMINATES UPON SALE OF THE PRODUCT BECAUSE SUBSEQUENT PURCHASERS ARE NOT "CONSUMERS" WITHIN THE MEANING OF THE STATUTE.

Plaintiff is admittedly not the original purchaser of the product at issue. The statute at the center of this certified question provides:

> Notwithstanding any other provision of law to the contrary, no action by a **consumer** for breach of warranty or for negligence with respect to goods subject to a **consumer transaction** shall fail because of a lack of privity between the **consumer** and the party against whom the claim is made. An action against any person for breach of warranty or for negligence with respect to goods subject to a **consumer transaction** shall not of itself constitute a bar to the bringing of an action against another person.

W.Va. Code § 46A-6-108(a) (emphasis added). This requires that the party asserting the protection of the statute be a "consumer" and that the underlying sale involve "a consumer transaction." Absent those two requirements, the statute does not apply. *See e.g., McLaughlin v. Chrysler Corp.*, 262 F. Supp. 2d 671 (N.D.W.Va. 2002) (party who fails to meet the statutory definition of a "consumer" not entitled to sue under West Virginia's Lemon Law); *Skilcraft Sheetmetal, Inc. v. Kentucky Machinery, Inc.*, 836 S.W.2d 907, 909 (Ky.App. 1992) (stating that an individual suing under the Kentucky Consumer Protection Act must fit within the protected class of persons defined in the statute and concluding that a subsequent purchaser may not maintain an action against a seller with whom he did not deal or who made no warranty for the benefit of the subsequent purchaser).

A "consumer" under the statute means "a natural person to whom a sale or lease is made in a consumer transaction" and a "consumer transaction" means "a sale or lease

to a natural person or persons for a personal, family, household or agricultural purpose." West Virginia Code § 46A-6-102(2). With respect to claims for breach of express warranty, nothing in the statute suggests that subsequent purchasers are "consumers" under the statute, or that subsequent purchases constitute "consumer transactions" under the statute.[3] For this reason, DTCWV believes it would be appropriate for the Court to consider exercising its discretion to reformulate the Certified Question to read:

> Does W. Va. Code § 46A-6-108(a) - which applies by its terms only to "consumers" as that term is defined in the statute – extend to suits for breach of an express warranty by subsequent purchasers where the express warranty at issue limits its availability to the original consumer who purchased the product?

DTCWV believes this question more clearly addresses the issue before the Court and that in any case, the Certified Question should be answered in the negative.[4]

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[3] In contrast, the definition of a "consumer" in the West Virginia Lemon Law specifically includes certain subsequent purchasers:

> "Consumer" means the purchaser, other than for purposes of resale, of a new motor vehicle used primarily for personal, family or household purposes, **a person to whom the new motor vehicle is transferred for the same purposes during the duration of an express warranty applicable to the motor vehicle** and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

West Virginia Code § 46A-6A-2(1) (emphasis added). Similar language is missing from the Consumer Credit and Protection Act's definition of a "consumer."

[4] This result is also supported by the language of West Virginia Code § 46A-6-106(a), which addresses actions for violations of the Consumer Credit and Protection Act. That statute provides:

> (a) Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article may bring an action in the circuit court of the county in which the seller or lessor resides or has his principal place of business or is doing business, or as provided for in sections one and two,

In addition, West Virginia Code § 46A-6-108(a) provides that lack of privity "shall not **of itself** constitute a bar to the bringing of an action against another person." W.Va.Code § 46A-6-108(a) (emphasis added) But that is not the same as saying that a warranty like the one here – limited to a time period bounded by the date shown on the sales receipt or by the length of time a person owns the vehicle, whichever comes first – is banned. If the express warranty were silent its duration or applicability, then lack of privity **"of itself"** – to use the statute's terms - would not bar a subsequent purchaser claim. But where the express warranty by its terms limits its duration – independent of the technical rules of privity – then such contractual language is consistent with the statute and it should be enforced.

CONCLUSION

Common sense application of the uniform statutes involved in this Certified Question supports the petitioners' position. Because of its interest in the consistent application of uniform laws, DTCWV asks the Court to hold that express warranties limited to the original consumer who purchased the product are valid under West Virginia law.

> article one, chapter fifty-six of this code, to recover actual damages or two hundred dollars, whichever is greater. The court may, in its discretion, provide such equitable relief as it deems necessary or proper.

Under this provision, the remedy is against the "seller" who sold the product to the consumer and sets forth where the action might be filed. When the purchaser is not the original "consumer" (the term used in W.Va.Code § 46A-6-108), the manufacturer is not the "seller" subject to suit. *See also*, *Skilcraft Sheetmetal, Inc.*, 836 S.W.2d at 909 (use of the term "seller" in statute identifying venue for action under consumer protection statute supports finding that statute does not apply to subsequent purchasers.

Dated this 3rd day of March, 2010.

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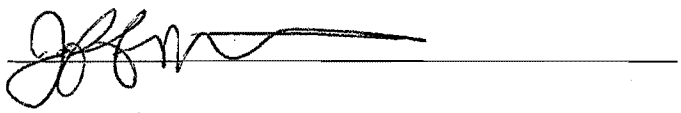
By Counsel:



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CERTIFICATE OF SERVICE

Service of the foregoing AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF PETITIONERS was had upon the parties herein by forwarding true copies thereof by United States mail, postage pre-paid, to their counsel at their last-known addresses, this 3rd day of March, 2010, as follows:

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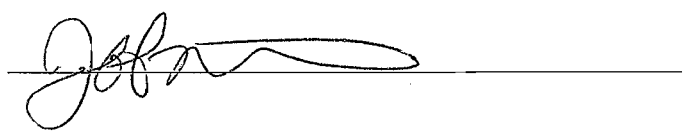

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