In The

# Supreme Court of Pennsylvania

Nos. 22, 23 & 24, EAP, 2008

**SHAMELL SAMUEL-BASSETT**, on Behalf of Herself and All Others Similarly Situated,

Plaintiff/Appellee,

v.

**KIA MOTORS AMERICA, INC.**,

Defendant/Appellant.

## BRIEF OF AMICUS CURIAE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA


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## INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States is the world's largest business federation. With a substantial membership in Pennsylvania and the other forty-nine states, the Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector of business, and in every region of the country. The Chamber thus serves as the principal voice of the American business community, and it regularly advocates the interests of its members in court on issues of national concern.

The Chamber has a profound interest in the issues presented in this appeal. Many members of the Chamber design, manufacture, or sell products, and allegations of product defects are routinely made against these products. In fact, the potential for defects to cause product malfunctions unrelated to safety exists with virtually all mechanical and electronic products, and for this reason many Chamber members issue time-limited express warranties intended to cover the expense of repair or replacement in the event such a defect-related malfunction occurs. As discussed in more detail below, the Chamber is concerned that Plaintiff's theories in this case, if accepted, would expose its members to potentially unlimited class action claims for damages on behalf of *all* product owners for every alleged "defect" which might require *some* products to be repaired or replaced under warranty.

In addition, many Chamber members design, manufacture, or sell products which by their very nature can cause personal injury, such as motor vehicles, heavy machinery, power tools, boats, lawn tractors, firearms, prescription and non-prescription drugs, and numerous other products. These Chamber members are routinely sued by plaintiffs who have been personally injured and who allege that the products were "defectively" designed. In the experience of Chamber members, it is not unusual for such claims to be brought, and for the plaintiffs occasionally to prevail, even where the product complies with on-point government regulations,

where an agency of the federal government has specifically considered and rejected the claims made by the plaintiffs, or where other juries have considered and rejected those claims. As discussed in detail below, the Chamber is concerned that, if Plaintiff's theories in this case are accepted, the type of debatable and unfounded theories of design defect that are routinely asserted today in personal injury product liability litigation will be routinely asserted in a potentially unlimited number of class action claims brought on behalf of persons who are likely never to suffer personal injury.

Whether such class action claims implicate safety concerns or not, the potential exposure to Chamber members would be enormous and would dwarf the substantial exposure these members already face in personal injury and warranty litigation. Chamber members would be likely to prevail in most of these cases if they could afford to try them, but the risk of catastrophic judgment in any *one* of these cases would require an extraordinarily expensive defense in *all* of them. Many Chamber members could not survive the financial drain of defending "bet the company" cases on a routine basis, even if they prevailed in the vast majority of those cases. Further, that same potential for a catastrophic judgment in any one of these cases would ensure that many Chamber members could not afford to take the risk of trial and would in effect be compelled to settle all of these cases, regardless of the merits of any of them. Again, however, the extraordinary expense of routinely settling countless cases, each brought on behalf of hundreds of thousands of uninjured owners, would threaten the very survival of many Chamber members.

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Chamber accepts the jurisdictional statement of appellant.

## STATEMENT OF THE ISSUES

The Chamber accepts the specific issues as stated in Appellant's brief. However, underlying the specific issues relating to class certification and entry of judgment in favor of the class is a broader, more fundamental one: Whether consumers who have properly-performing products can recover for breach of warranty on the theory that their product contains a latent, unmanifested "defect" that may have caused a malfunction in products owned by others. If, as the Chamber believes, the answer to this question is "No," the class in this case was improperly certified because the claim of each class member depends on individual proof that he or she actually experienced premature brake wear caused by the alleged defect. Moreover, judgment in favor of the class was improperly entered because the class includes numerous consumers who have never experienced premature brake wear and who therefore have no right to relief.

## STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The Chamber accepts appellant's statement of the scope and standard of review.

## STATEMENT OF THE CASE, FACTS, AND ORDER IN QUESTION

The Chamber accepts appellant's statements of the case, the facts, and order in question. However, for purposes of the argument which follows, the Chamber would like to highlight the following facts:

1. This case was submitted to the jury on two theories: breach of the implied warranty of merchantability, and breach of Kia's express limited warranty. Both theories were predicated on the allegation that the brakes on 1997-2000 Kia Sephias would wear out "prematurely," by which Plaintiff apparently means "long before the 'industry' standard of 20,000 to 25,000 miles." (Brief of Appellee at 6.)

2. The trial court instructed the jury that to prove that there was a breach of the implied warranty of merchantability, Plaintiff "must prove that all 1997-2000 Sephias had a common

defect which required repair." (Transcript 5/26/05 at 47.) The jury expressly found that Kia did *not* breach the implied warranty of merchantability, necessarily finding that there was no common "defect" that required repair, notwithstanding the possibility that some brakes on some vehicles might require replacement "prematurely." (R. 325a.)

3. The express limited warranty that accompanied the vehicle provided in relevant part that (1) Kia warranted that "your new Kia vehicle is free from defects in material and workmanship, *subject to the following terms and conditions*," (2) an authorized Kia dealer would "make necessary repairs . . . to *correct any problem* covered by the Limited Warranty," and (3) except as otherwise limited or excluded, all components of the vehicle were "covered for 36 months or 36,000 miles, whichever occurs first." (R. 33a, emphasis added.)

4. The jury found that Kia breached its express warranty "on the cars purchased by the class." (R. 325a.) However, Kia presented evidence suggesting that the majority of Kia Sephia owners required no brake repairs during the 36 month/36,000 mile warranty period and that these owners received brakes that lasted much longer than the industry average of "20 to 25,000 miles."[1] Further, there was no evidence that anyone other then Shamell Samuel-Bassett actually paid for a brake repair during the warranty period. Nevertheless, the trial court held that Kia could be held liable to the entire class for breach of the express warranty. (Transcript 5/27/05 at 7.)

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[1] For example, the evidence showed that 89% of owners of 2001 Kia Sephias never received a warranty brake repair. (R. 1452a.) As to the 11% of these owners who did receive a warranty brake repair, there was no evidence concerning how many of these owners experienced *premature* brake wear as opposed to (1) other brake problems or (2) brake wear after "20 to 25,000 miles."

5. In its 65-page opinion issued pursuant to Pa. R.A.P. 1925(a), the trial court did not explain how Kia could have breached its express warranty with respect to those owners who never experienced a brake problem during the warranty period. Instead, the trial court simply summarized at length the evidence that it believed would support a finding that the Kia's brakes were "defective." (Brief of Appellant, Appendix D, at 10-30.) The trial court did not explain how a finding that the Kia's brakes were "defective" for purposes of the express warranty claim could be reconciled with the jury's finding that the Kia's brakes were not "defective" for purposes of the implied warranty claim.

6. The Superior Court affirmed "on the thorough and cogent Pa. R.A.P. 1925(a) opinion of the distinguished trial judge." (Brief of Appellant, Appendix E, at 2.) The Superior Court expressly rejected Kia's argument that it could not be liable to the entire class for breach of express warranty — including owners who never experienced any problems and owners who had their brakes repaired or replaced at Kia's expense under warranty — because it was "clear" that the brakes were "defective":

> Based on the evidence, it is clear that the brakes on all 1995-2001 Kia Sephias were defective. Regardless of whether an individual class member had his or her brakes repaired under warranty by Kia, all class members were entitled to have good brakes on their cars that did not require repeated trips to the dealership for replacement in order to avoid brake failure.

(*Id.* at 3.) The Superior Court inexplicably and erroneously stated that the jury "did not reach the issue of *implied* warranty;" thus, the Superior Court was unaware that the jury had actually found that the Kia Sephia was *not* "defective." (*Id.* at 4.)

## SUMMARY OF ARGUMENT

Both the trial court and the Superior Court believed that Kia could be held liable for breach of warranty to every consumer in the class based solely on proof that the product was "defective," regardless of whether the consumer actually experienced the alleged "defect." Thus,

the fundamental issue presented by this case is whether consumers who have properly-performing products can recover for breach of warranty on the theory that their product contains a latent, unmanifested "defect" that may have caused a malfunction in products owned by others. If the answer to this question is "No," the class was improperly certified and judgment was improperly entered in favor of the entire class, because the claim of each class member depends on proof that he or she actually experienced a malfunction caused by the alleged defect.

Plaintiff in this case, at this stage, is relying exclusively on breach of an alleged *express* warranty, because the jury rejected their implied warranty theory. She alleges that Kia warranted its vehicles would be "free from defects" and it breached this warranty with respect to all consumers in the class by selling a vehicle that contained "defective" brakes that *could* wear out prematurely, even if the consumers (1) never experienced "premature" brake wear or (2) experienced such wear but had their brakes replaced at no charge pursuant to Kia's warranty. The express warranty Plaintiff relies on does not exist — Kia warranted only that it would repair or replace defects when they occurred, not that the vehicle was free of all "defects." Case law from around the country, including Pennsylvania, holds with virtual unanimity that time-limited warranties like Kia's do not apply to latent defects that become manifest, if at all, only after the warranty period has expired. *See, e.g., Duquesne Light Co. v. Westinghouse Elec. Corp.,* 66 F. 3d 604, 616 (3rd Cir. 1995) (applying Pennsylvania law).

But even if Kia did warrant that the vehicle would be free from significant "defects," such an express warranty would be indistinguishable from an implied warranty of merchantability, which also warrants that a product is free of significant "defects" (i.e., "defects" that render the product unmerchantable). Thus, the warranty claim made by Plaintiff in this case based on the mere existence of a latent, unmanifested defect is analytically indistinguishable

from a virtually infinite number of warranty claims, express and implied, that could be asserted on behalf of all other owners of all other perfectly-performing products based on the mere existence of all alleged but unmanifested "defects" in those products. If even a fraction of the claims that could be brought were brought, they would overwhelm the judicial system and divert resources away from litigating the claims of injured consumers to litigating the claims of consumers who have suffered no real injury at all. Moreover, permitting such claims to be asserted on a classwide basis would ensure that the incentives to bring each and every one of these potential claims would exceed the incentives that currently exist to bring claims on behalf of consumers who have actually been injured by the alleged defects.

Not surprisingly, therefore, almost every court to have considered such claims has rejected them, whether based on express or implied warranty or other theories of recovery. Owners who use their products without incident for the product's entire useful life, or who have problems repaired under an express warranty, get exactly what they bargained for. Owners like Shamell Samuel-Bassett, who actually experience problems caused by a defect, may have a claim for their uncompensated losses, but they cannot pursue claims on behalf of owners who have experienced no actual loss.

## ARGUMENT

### I. CLASS ACTION LITIGATION ON BEHALF OF UNINJURED PRODUCT OWNERS WOULD, IF ALLOWED, OVERWHELM PENNSYLVANIA COURTS

Before turning to the legal flaws in the breach of warranty claim being asserted in this case, it is important for this Court to understand the practical implications of accepting Plaintiff's arguments. Plaintiff's express warranty claim in this case is analytically indistinguishable from warranty claims (express or implied) that could be brought on behalf of *all* uninjured owners of *all* products based on *all* alleged "defects" in those products. The almost inevitable result of

recognizing such claims and allowing them to be pursued on a classwide basis would be an explosion of "no injury" class actions that would be an extraordinary drain on private and judicial resources and benefit no one except lawyers.

### A. Plaintiff's Claim Is Analytically Indistinguishable from Claims That Could Be Brought by All Uninjured Owners of All Products Based on All Alleged but Unmanifested Defects

Plaintiff in this case is asking this Court to hold that *every* purchaser of a 1997-2001 Kia Sephia is entitled to recover for breach of warranty simply because the brakes are "defective," regardless of whether the purchaser has actually experienced a problem with the brakes and regardless of whether any such problem was repaired by Kia under the warranty. Thus, if Plaintiff is correct, *every* purchaser of *every* product covered by an express or implied warranty that the product is free from "defects" could bring actions for breach of warranty based on *every* component that ever has been — or ever could be — alleged to be "defective."

For example, the product at issue in this case happens to be a Kia Sephia, and the alleged defect happens to be a defect in the brakes. But all motor vehicle manufacturers must defend personal injury litigation involving a host of alleged defects. Exhibit A to this brief is a sampling of the product liability/personal injury cases reported on Westlaw in November 2007. This small sampling reveals that in one month alone there were decisions reported on Westlaw involving alleged brake light defects in 2004 Land Rover Discoveries, window glass defects in 2004 Chevrolet Tahoes, parking brake defects in certain 1999-2005 GM trucks and SUVs, seat belt defects in 2005 Chevrolet Tahoes, visibility defects in 2001 Ford Expeditions, emergency jack defects in 1999 Cadillac DeVilles, roof defects on 1993 Ford Explorers, and more. Indeed, for every vehicle sold in the United States, a lengthy list of design defects alleged in personal injury litigation could easily be compiled. Every one of these alleged "defects" could be the basis for claims indistinguishable from the claims being asserted in this case.

Nor are motor vehicles unique in this regard. Virtually all products can and do cause injuries. Indeed, "over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*." *Corrosion Proof Fittings v. E.P.A.*, 947 F. 2d 1201, 1223 n.23 (5th Cir. 1991). These injuries result in thousands of personal injury cases based on alleged design defects every year. In federal courts in 2006 alone, over 33,000 non-asbestos product liability cases alleging personal injury were filed.[2] This would almost certainly be dwarfed by the number of such cases filed in state courts. Indeed, as Exhibit A also shows, in just one month (November 2007) there were decisions reported in Westlaw involving defective lawn tractors (absence of no-mow-in-reverse safety feature), handguns (absence of magazine disconnect safety), pressure cookers (defective seals), basketball flooring material (holes that snagged athletic shoes), metal detectors (failed to detect metal in prison), welding rods (neurologically damaging fumes), snowmobiles (defective steering stop), and many more.

Analytically, nothing distinguishes the "defects" alleged in those cases from the "defect" alleged in this case. Thus, each and every design defect alleged to cause personal injury in each and every personal injury case involving each and every product could, if Plaintiff's position was adopted, become the basis for breach of warranty actions brought by each and every owner of each and every one of those products. But even this substantially understates the magnitude of the potential litigation, because — as this very case demonstrates — Plaintiff's *theory is not limited to "defects" that can cause personal injury.* Plaintiff here does not allege that the need to replace brakes "prematurely" creates an unreasonable safety risk, and her theory extends to any "defect" that might result in the need for any repairs to any component of the vehicle. Thus, for

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2 See *http://www.uscourts.gov/judicialfactsfigures/2006/Table404.pdf*, U.S. Courts, 2006 Judicial Facts and Figures, Table 4.4, U.S. District Courts, Civil Cases Filed by Nature of Suit, Note: (3).

example, under Plaintiff's theory, all purchasers of 2005 Chevrolet Silverados could bring an action for breach of warranty because of the potential for snow and ice to accumulate on the door hinges, even if they never experienced such snow and ice accumulation. *See Canale v. General Motors Co.*, 2007 WL 867046 (Mass. Super. 2007). All purchasers of certain properly functioning aluminum awnings could bring an action for breach of implied warranty because some awnings might collapse under accumulated ice and snow. *See Villette v. Sheldorado Aluminum Products, Inc.*, 2001 WL 881055 (N.Y. Sup. 2001). All purchasers of certain properly operating refrigerators could bring an action for breach of implied warranty because some refrigerators might cease to operate after two or three years. *Lupa v. Jock's*, 500 N.Y.S. 2d 962 (N.Y. City Ct. 1986). All purchasers of certain properly operating CB radios could bring an action for breach of implied warranty because some radios might not withstand certain shocks. *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793 (D.C. Minn. 1980). And so on for all purchasers of all properly performing doors, bricks, shingles, carpets, caskets, coats, and every other product — except, of course, those perfect products which are so well-designed they never experience any problems at all.[3] Indeed, whenever a manufacturer pays to repair a component under an express warranty that covers "defects" in the product, it will be inviting litigation on behalf of a class of all owners of products with the same components, regardless of whether any of those owners will ever actually experience a problem.

### B. Allowing Classwide "No Injury" Claims Would Encourage Claims on Behalf of Uninjured Consumers at the Expense of Injured Consumers

In short, the number of potential claims analytically indistinguishable from the ones being asserted in this case is limited only by the number of products sold and the number of

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[3] Exhibit B compiles some examples of breach of defect claims unrelated to safety made in reported cases.

"defects" that can be alleged with respect to each of those products in good faith. This would not be a concern if this Court were willing to assume that very few people would actually bring such claims. But if this Court were willing to recognize a right of recovery only on the assumption that such recovery will almost never be sought, the validity of the right itself would be suspect. In any event, however, such an assumption would almost certainly be wrong.

The real reason for bringing many class actions is "the quest for attorney's fees." *Goldberger v. Integrated Resources, Inc.*, 209 F. 3d 43, 53 (2d Cir. 2000). If this Court squarely endorses Plaintiff's claims — and, by necessary implication, a virtually infinite number of analytically identical claims — and if all of those claims can appropriately be litigated on a classwide basis, the incentives to bring those claims will exceed the incentives that currently exist to bring claims on behalf of people who actually have been injured. This is so for two powerful reasons.

First, the potential recovery on behalf of thousands or millions of uninjured consumers (and therefore the potential attorneys' fees) can be orders of magnitude greater than the potential recovery in a case involving a single individual, even one involving severe personal injuries. Second, the risk of not recovering at all on such claims, *even in cases of questionable merit,* would be substantially less than in an individual action, because of the "unwarranted or hydraulic pressure to settle." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F. 3d 154, 165 (2d Cir. 2001).

The Fifth Circuit has explained:

> Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.
>
> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of

> facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

*Castano v. American Tobacco Co.*, 84 F. 3d 734, 746 (5th Cir. 1996) (citations omitted). Indeed, an empirical study of one type of class actions (securities class actions) concluded that "there appears to be no appreciable risk of non-recovery" because "virtually all cases are settled." *Goldberger v. Integrated Resources, Inc.*, 209 F. 3d 43, 52 (2d Cir. 2000), quoting Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L.Rev. 497, 578 (1991).

These risks may be acceptable where class actions are the superior method of vindicating the legitimate rights of consumers who have suffered real economic or personal injury. In these cases, the number of potential claims is by definition limited to the number of people who have suffered real injuries. But the type of claims being asserted here have no such natural limitation. Moreover, the perverse effect of recognizing them is that courts and parties will be forced to spend enormous resources litigating claims brought on behalf of uninjured consumers — consumers who have perfectly performing products and who are therefore likely to be entirely uninterested in the litigation — while resources are drained from litigating the claims of injured consumers. Indeed, it is at least possible, and perhaps even likely, that the number of lawyers available to represent consumers who are actually experiencing problems with their products will be reduced as those lawyers are drawn to the more lucrative and less risky "no injury" class action arena.

Thus, the only people who would truly benefit from this type of litigation would be lawyers:

> If Courts were to allow cases such as this to go forward, the costs of doing business would be so burdensome and so expensive that suppliers, manufacturers,

> and most consumers would suffer greatly. The only persons that would benefit by permitting cases such as this to go forward would be the lawyers handling the case and perhaps the few consumers directly involved in the litigation. It might well be that the increased cost of doing business would cost even those consumers directly involved in the litigation more than they could recover from such litigation.

*Lee v. General Motors Corp.*, 950 F. Supp. 170, 175 (S.D. Miss. 1996).

## II. VIRTUALLY ALL COURTS REJECT WARRANTY AND OTHER CLAIMS BROUGHT ON BEHALF OF UNINJURED OWNERS OF PROPERLY FUNCTIONING PRODUCTS

The litigation explosion on behalf of uninjured consumers that the analysis above would predict has not yet materialized, but only because no state court of last resort and no federal court of appeal has held *both* that claims like those asserted here are viable *and* that they can be asserted on a classwide basis. Indeed, the vast majority of courts that have considered claims like those asserted here have rejected them for policy and legal reasons which are equally applicable in Pennsylvania. *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F. 3d 1012, 1014-15, 1017 (7th Cir. 2002) ("most states would not entertain the sort of theory that plaintiffs press," *i.e.*, claims for diminution in value of properly performing products based on the risk of future failure).

Much of the analysis in these cases can be traced to the 1982 decision in *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982). In that purported class action, the plaintiffs alleged that Firestone was liable for breach of warranty because defects in Firestone 500 tires, which Firestone had recalled, could cause blowouts, tread separations, and other failures. While "an unusual and worrying number of Firestone tires failed," most did not. *Id.* at 604. In fact, most of the tires remained failure-free for their entire useful lives. *Id.* at 601-02. Plaintiffs, nevertheless, contended that "all Firestone tires contained common defects" and that "the purchase of a defective tire, ipso facto, caused economic loss." *Id.* at 602. The court

rejected this claim, finding that class members whose tires had always performed properly "have no legally recognizable claim" for two reasons. *Id.* at 603. First, "tire owners whose tires performed to their entire satisfaction cannot demonstrate, as a matter of law, the 'fact of damage' necessary to state a claim." *Id.* at 602 (discussing plaintiffs' Magnuson Moss warranty claim). Second, such owners could not demonstrate that *their* tires were "defective" or unmerchantable:

> Tires which lived full, productive lives were, by demonstration and definition, "fit for the ordinary purposes" for which they were used; hence they were "merchantable" under U.C.C. § 2-314, and no cause of action for breach of an implied warranty can arise. This is quite basic . . . .
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> . . .
>
> The majority of the tires sold to putative class members, by doing what they were supposed to do for as long as they were supposed to do it, clearly lived up to that "minimum level of quality" which is all U.C.C. § 2-314(2)(c) requires. Thus no claim for breach of an implied warranty is maintainable in respect of such tires. Plaintiffs' bald assertion that a "common" defect which never manifests itself "ipso facto caused economic loss" and breach of implied warranty is simply not the law.

*Id.* at 602 (footnote omitted).

In the decades that followed, numerous courts reached the same conclusion: express and implied warranties are not breached where products perform properly, and owners of such products who continue to use them normally have suffered no legally cognizable damages. For example, in *In re General Motors Corp. Anti-Lock Brake Products Liab. Litig.*, 966 F. Supp. 1525 (E.D. Mo. 1997), *aff'd sub nom. Briehl v. General Motors Corp.*, 172 F. 3d 623 (8th Cir. 1999), the plaintiffs alleged that 1989-1996 GM vehicles contained a "dangerously defective anti-lock brake system" and brought an action against GM based on, among other theories, breach of express and implied warranties. 966 F. Supp at 1529. They sought to recover "economic loss caused by paying more for the vehicles than they were worth and for economic loss stemming from lost resale value." *Id.* at 1530. However, the plaintiffs did "not allege that

the defect manifested itself in their vehicles," and it "appear[ed] no plaintiff has attempted to sell his or her vehicle." Under these circumstances, the district court held, "Plaintiffs cannot go forward with such speculative claims." *Id.* The district court went further and held that dismissal was also required because plaintiffs' allegations did not show that the vehicle was "defective" or unmerchantable:

> Plaintiffs' allegations do not show that the vehicles are unmerchantable because plaintiffs have not alleged a defect that makes the vehicles unfit for the ordinary purpose of providing transportation. Plaintiffs have not alleged brake failure or that they have stopped driving their vehicles because of the defects.

*Id.* at 1533. On appeal, the Eighth Circuit affirmed, holding that the damages claimed by the plaintiffs were too speculative to support recovery. *Briehl v. General Motors Corp.*, 172 F. 3d 623, 628-29 (8th Cir. 1999).

The vast majority of other decisions are in accord. For example, in *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S. 2d 9, 11, 17 (N.Y. App. 2002), uninjured owners of various 1993-1998 vehicles manufactured by Ford, GM and DaimlerChrysler alleged that those vehicles had defective seatbacks that were "unstable and susceptible to rearward collapse in the event of a rear-end collision;" the New York appellate court held that claims based on the implied warranty of merchantability and New York's deceptive business practices act were properly dismissed for failure to plead any actual injury because there was no allegation that any seatback had failed. Similarly, in *American Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 44 Cal. Rptr. 526 (1995), uninjured owners of 1986-1994 Suzuki Samurais claimed that these vehicles had an "'inherent defect' consisting of a 'roll-over propensity';" the California Court of Appeals held that the vehicles were not unmerchantable because the "vast majority of the Samurais sold to the putative class 'did what they were supposed to do for as long as they were supposed to do

it'" and the vehicles "remained fit for their ordinary purpose." 37 Cal. App. 4th at 1298-99, 44 Cal. Rptr. at 531(quoting *Feinstein*).[4]

## III. KIA'S TIME-LIMITED EXPRESS WARRANTY CANNOT REASONABLY BE READ TO COVER UNINJURED OWNERS OF PROPERLY FUNCTIONING VEHICLES

As a theoretical matter, it may be possible to provide an express product warranty that can be breached without manifestation of an alleged defect. For example, if a product manufacturer expressly warranted that its vehicle complied with a specific safety standard, proof that the vehicle did not in fact comply with that standard might constitute a compensable breach. *Cf. Iannacchino v. Ford Motor Co.,* 888 N.E. 2d 879, 888 (Mass. 2008) (absent personal injury or property damage, plaintiff must prove that the product failed to meet a standard "legally required by and enforced by the government;" otherwise, a claim for breach of implied warranty "lacks the premise that the purchase price entitled the plaintiffs to a product that met that standard.").

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[4] *Accord, e.g., Ford Motor Co. v. Rice*, 726 So. 2d 626 (Ala. 1998) (uninjured purchasers of SUVs could not recover in fraud for an alleged rollover defect in SUVs where there was no allegation that "the vehicles in question, which have been on the road from 8 to 15 years, have provided their owners with anything but satisfactory performance"); *Wallis v. Ford Motor Co.*, 208 S.W. 3d 153 (Ark. 2005) (uninjured purchasers of SUVs could not recover in fraud or under consumer fraud statute for an alleged rollover defect where "there is no allegation in the complaint that the [SUV] has not, to date, been exactly what [plaintiff] bargained for"); *Tietsworth v. Harley Davidson, Inc.*, 677 N.W. 2d 233 (Wis. 2004) (uninjured purchasers of motorcycles could not recover in fraud for an alleged engine defect because "an allegation that a product is diminished in value because of an event or circumstance that might — or might not — occur is inherently conjectural"); *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W. 2d 556 (N.D. 2002) (uninjured purchasers of vehicles could not recover in fraud or negligence because plaintiff's claim based on "diminution in value of the vehicles caused by the alleged defect" was "simply too speculative"); *Wilson v. Style Crest Products, Inc.*, 627 S.E. 2d 733 (S.C. 2006) (uninjured purchasers of mobile home anchor tie down systems could not recover for breach of implied warranty of merchantability because "[t]here is no evidence that the anchor systems have not, to date, been exactly what the [plaintiffs] bargained for").

But a warranty, express or implied, that a product is "free from defects" is fundamentally different, particularly when it includes an express time limitation.

Virtually every product is "defective" in the sense that something can go wrong with it; this is why most products are accompanied by a limited warranty promising to repair or replace products that malfunction because of such defects. Indeed, *every* product covered by such a warranty will have a "number 1 warranty problem," along with a host of other, lesser warranty issues, all of which will be known to the manufacturer. Thus, every time a manufacturer repaired or replaced a malfunctioning product under a "free from defect" warranty it would invite a class action claim brought on behalf of all other owners whose theoretically "defective" products have not malfunctioned. *See Thiedemann v. Mercedes-Benz USA*, 872 A. 2d 783, 794 (N.J. 2005) (effect of accepting plaintiffs' argument would be to "deter[] any salutary efforts . . . to address voluntarily and responsibly defects that may arise post-sale"). Indeed, it is quite likely that Kia itself paid to repair or replace hundreds of other "defective" components on Sephia vehicles, thereby exposing itself to class action litigation exactly like this case with respect to each of those "defects."

The inescapable reality that even merchantable products can be "defective" in this sense was recognized by the courts in *Thiedemann*. In that case, warranty and other claims were made based on the potential for fuel gauges to malfunction and read full when the tank was empty. The claims were made by buyers who either had no problems with their gauges or had the gauges repaired under warranty, but who nevertheless claimed that because the gauges were defective they did not get the benefit of their bargain. The trial court, in an opinion quoted in full and with approval by the New Jersey Supreme Court, accurately summarized the true nature of such claims:

> Plaintiffs insist that they did not get what they bargained for and instead received an unsafe motor vehicle with a known fuel-reporting defect. Essentially, what plaintiffs urge here is that they are entitled to a Mercedes-Benz motor vehicle without any flaws or glitches, without any reasonably remediable problems, and without any of the ordinary tribulations of automobile ownership or lease; in other words, a perfect car unaffected by the laws of physics and common sense. Plaintiffs are not so entitled . . . .

*Id.* at 789. The New Jersey Supreme Court affirmed and reinforced the trial court's observations:

> Defects can, and do, arise with complex instrumentalities such as automobiles. The mere fact that an automobile defect arises does not establish, in and of itself, an actual and ascertainable loss to the vehicle purchaser. Indeed, the warranty provided as part of the contract of sale or lease is part of the benefit of the bargain between the parties.

*Id.* at 794.

The existence of "defects" in a product line that might become manifest in some percentage of those products and require repair under warranty is an inescapable fact of life. Adding allegations that the alleged defect creates a safety hazard would not fundamentally change the analysis. As discussed above, *all* products, including toothpicks, have features (many of which might arguably be characterized as "defects") that create safety hazards under certain circumstances. Thus, in the typical product liability case, reasonable people can and do disagree about whether such a design-related risk of harm renders a product defective or unmerchantable:

> The very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree. But because almost all agree that perfect safety cannot yet be our legal goal, design engineers simply must continue to make the best judgments that they can on the balance of trade-offs between safety, utility, and cost - the incommensurable components of "defectiveness."
>
> For [design] defect[s] . . . there probably cannot in the nature of things be a bright line separating good products from bad to guide the engineer or the judicial forum reviewing his work years hence.

David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U. Chi. L. Rev. 1, 37 (1982).

In short, some percentage of virtually every mechanical product sold (1) experiences failures and malfunctions paid for by the manufacturer under a warranty that covers "defects," and (2) causes injuries that plaintiffs' lawyers can in good faith allege were caused by a "defect." Thus, when Plaintiff in this case claims that Kia expressly warranted that the vehicle it sold was "free from defects," and that this warranty extends to uninjured owners of properly functioning products, they are really claiming that Kia promised that (1) no component in any similar vehicle owned by anyone would ever fail or malfunction because of a "defect," (2) no injury would ever occur to any purchaser under circumstances where a plaintiffs' lawyers could in good faith allege that the injury was caused by a "defect," and (3) if any such failure or injury occurred to anyone — as of course it inevitably will — Kia would "compensate" *every* owner of the vehicle for breach of these promises, even uninjured owners of perfectly performing products.

This, of course, is nonsense. No manufacturer of any product would ever consciously make such a extraordinary promise and expose itself to such unlimited liability. Indeed, if the manufacturer were willing to make such an extraordinary promise to consumers, the more logical alternative would be to simply reduce prices at the outset rather than reimbursing all of those consumers after the fact in connection with expensive class action litigation like this. Thus, even if it were true that Kia's express warranty simply promised that the vehicle would be "free from defects," the only rational interpretation of such a promise would be that Kia was promising that the vehicle would not malfunction, such that its liability for breach of the promise would be limited to those consumers who actually experienced a problem.

Indeed, if Kia in this case had expressly warranted that the brakes would not require replacement because of a defect before 20,000 to 25,000 miles, purchasers whose brakes lasted for more than 20,000 miles plainly would have no claim simply because other purchasers had to replace their brakes earlier. Plaintiff in this case is claiming that Kia implicitly made the same representation when it made an express warranty that the vehicle was "free from defects," but they offer no rational reason why this "implied express" brake wear warranty should create liability for Kia far in excess of a true express brake wear warranty.

Moreover, Kia in this case did *not* promise that its vehicles would be "free from defects." Rather, Kia promised that the vehicles would be "free from defects in material and workmanship, *subject to the following terms and conditions*." Among the "following terms and conditions" were (1) a term that repairs would be made by a dealer "to *correct any problem,*" and (2) a condition that all components of the vehicle were "covered for 36 months or 36,000 miles, whichever occurs first." (R. 33a, emphasis added.) These terms and conditions are utterly at odds with Plaintiff's contention that Kia warranted that a vehicle would be "free from defects," even defects that never become manifest in the purchaser's vehicle. *If, as Plaintiff contends, Kia's express warranty was breached the moment it sold the vehicle because of the existence of a latent defect, the 36 month/36,000 mile limitation would be completely meaningless.* Not surprisingly, therefore, "case law almost uniformly holds that time-limited warranties do not protect buyers against hidden defects — defects that may exist before, but typically are not discovered until after the expiration of the warranty period." *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F. 3d 604, 616 (3rd Cir. 1995) (applying Pennsylvania law), *quoting Canal Elec. Co. v. Westinghouse Elec. Co.*, 973 F. 2d 988, 993 (1st Cir. 1992); *accord, e.g., Clemens v. DaimlerChrysler Corp.*, 534 F. 3d 1017, 1022-1023 (9th Cir. 2008); *Walsh v.*

*Ford Motor Co.*, 588 F. Supp. 1513, 1536 (D.D.C. 1984); *Kodiak Elec. Ass'n, Inc. v. Delaval Turbine, Inc.*, 694 P. 2d 150, 157 (Alaska 1984); *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824, 830-832 (Cal. App. 2006).

In fact, the Third Circuit's decision in *Duquesne* was based on a warranty virtually identical to the one in this case. 66 F. 3d at 616. There, as here, the seller warranted that the product would be "free from defects in workmanship and material." *Id.* There, as here, the buyer argued that this warranty "protects it against defects existing at the time [of delivery] but not discovered until after the warranty period." *Id.* But there, as here, the warranty imposed a time limitation on the warranty: it provided that the warranty would expire in one year. *Id.* Accordingly, the Third Circuit, applying Pennsylvania law, rejected the buyer's argument:

> [The seller] is clearly correct that the contract clauses required the defect to manifest itself within one year. . . . [T]he general rule, from which we see no reason to deviate, is that "an express warranty does not cover repairs made after the applicable time . . . ha[s] elapsed." [Citation omitted.] Thus, latent defects discovered after the term of the warranty are not actionable.

*Id.* (citations and internal quotation marks omitted), *quoting Abraham v. Volkswagen of America, Inc.*, 795 F. 2d 238, 250 (2d Cir. 1986).

The Second Circuit in *Abraham* elaborated:

> [V]irtually all product failures discovered in automobiles . . . can be attributed to a "latent defect" that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life. Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. Such knowledge is easily demonstrated by the fact that manufacturers must predict rates of failure of particular parts in order to price warranties and thus can always be said to "know" that many parts will fail after the warranty period has expired. A rule that would make failure of a part actionable based on such "knowledge" would render meaningless time/mileage limitations in warranty coverage.

*Abraham,* 795 F. 2d at 250; *see also, Dewey v. Volkswagen AG,* 558 F. Supp. 2d 505, 518-519 (D.N.J. 2008) (following *Duquesne* notwithstanding plaintiff's allegation that seller but not buyer discovered the alleged defect within the warranty period).

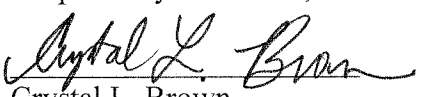
In short, those consumers who experienced no premature brake wear (or who experience premature brake wear only after the express warranty period has expired) have no claim for breach of express warranty. Certifying a class that includes these consumers — and entering judgment in favor of a class that includes these consumers — was error.

## CONCLUSION

The Chamber respectfully requests that this Court reverse the judgments of the trial court and the Superior Court. If Shamell Samuel-Bassett experienced premature break wear that Kia failed to cover pursuant to its express warranty, she may be entitled to judgment. So too may other individual members of the purported class who can make the same showing. But the certified class includes vast numbers of consumers who have not experienced premature brake wear or who did experience such brake wear but have already been compensated by Kia under warranty. Thus, the trial court erred both in certifying a class and in entering judgment in favor of that class.

DATED: January 16, 2009

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on January 16, 2009, I served upon the following persons two complete copies of the foregoing Brief of *Amicus Curiae* The Chamber of Commerce of the United States of America upon the persons in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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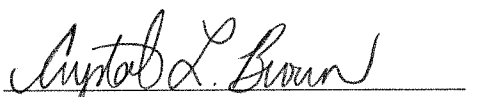

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# EXHIBIT A

## NOVEMBER 2007 COURT DECISIONS AVAILABLE ON WESTLAW REFERRING TO ALLEGATIONS OF PRODUCT DESIGN DEFECT

| Case | Allegation of Design Defect |
|---|---|
| *Townsend v. Sears, Roebuck and Co.*, --- N.E.2d ---, 2007 WL 4200826 (Ill. Nov. 29, 2007) | Defective lawn tractor that lacked no-mow-in-reverse safety feature to prevent back-over injuries |
| *Normandeau v. Hanson Equipment, Inc.*, --- P.3d ---, 2007 WL 4198394 (Utah Ct. App. Nov. 29, 2007) | Defective spring-applied, hydraulically-released parking brake system in truck |
| *Bakkie v. Union Carbide Corp.*, 2007 WL 4206739 (Cal. Ct. App. Nov. 29, 2007) (not reported) | Defective asbestos tape and rocket nozzles containing asbestos |
| *Adames v. Sheahan*, --- N.E.2d ---, 2007 WL 4232784 (Ill. Ct. App. Nov. 29, 2007) | Defective handgun that did not contain magazine disconnect safety |
| *Speed v. Giddings & Lewis, LLC*, 2007 WL 4245903 (D. Me. Nov. 29, 2007) (slip copy) | Defective control panel for spindle of boring mill |
| *Stupak v. Hoffman-La Roche, Inc.*, 2007 WL 4218982 (M.D. Fla. Nov. 29, 2007) (slip copy) | Defective prescription drug for treating acne (Acutane) that was associated with psychiatric side effects |
| *May's Distributing Co. Inc. v. Total Containment, Inc.*, --- F. Supp. 2d ---, 2007 WL 4180362 (M.D. Ala. Nov. 28, 2007) | Defective piping system for gasoline |
| *Coles v. Nyko Technologies, Inc.*, --- F.R.D. ---, 2007 WL 4246090 (C.D. Cal. Nov. 27, 2007) | Defective cooling element for video game system (Xbox 360) |
| *Romano v. Motorola, Inc.*, 2007 WL 4199781 (S.D. Fla. Nov. 26, 2007) (slip copy) | Defective "white" battery in cellular telephones |
| *Call v. Banner Metals, Inc.*, --- N.Y.S. 2d ---, 2007 WL 4144899 (N.Y. App. Div. Nov. 23, 2007) | Defective springing ramp in bakery truck |

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| *Yanovich v. Zimmer Austin, Inc.*, 2007 WL 4163860 (6th Cir. Nov. 21, 2007) | Defective artificial knee buttons failed to ensure uniformity in strength of product |
| *Castaldi v. Land Rover North America, Inc.*, 2007 WL 4165283 (E.D.N.Y. Nov. 21, 2007) (slip copy) | Defective brake light switch and brake shift interlock system (2004 Land Rover Discovery Series II vehicle) |
| *Stroklund v. Thompson/Center Arms Co.*, 2007 WL 4191740 (D.N.D. Nov. 21, 2007) (slip copy) | Defective barrel in muzzleloader rifle made of brittle steel with insufficient bore diameter and unable to withstand normal pressures |
| *Nixon v. Norfolk Southern Corp.*, 2007 WL 4190705 (W.D. Pa. Nov. 21, 2007) (slip copy) | Defective handholds extending from exterior of railcars carrying coal |
| *O'Hara v. General Motors Corp.*, --- F. 3d ---, 2007 WL 4105758 (5th Cir. Nov. 20, 2007) | Defective tempered glass in car windows that failed to protect against passenger ejection (2004 Chevrolet Tahoe vehicle) |
| *Higgins-Barber v. Raffles Int'l*, --- N.Y.S. 2d ---, 2007 WL 4111945 (N.Y. App. Div. Nov. 20, 2007) | Defective glass shower door that fell on plaintiff |
| *Sciotti v. Saint Gobain Containers*, 2007 WL 4180737 (W.D.N.Y. Nov. 20, 2007) (slip copy) | Defective glass bottle of iced tea that broke in plaintiff's hands |
| *Tyson Foods, Inc. v. Dupps Co.*, 2007 WL 4166210 (W.D. Ark. Nov. 20, 2007) (slip copy) | Defective seals in pressure cooker for processing chickens that permitted emission of dangerous hydrogen sulfide gas |
| *Hunter v. General Motors Corp.*, 2007 WL 4100084 (Cal. Ct. App. Nov. 19, 2007) | Defective drum-in-hat parking brake system that caused misalignment of brake pads and ultimate brake failure |
| *Edwards v. Intergraph Services Co.*, --- So. 2d ---, 2007 WL 3407626 (Ala. Civ. App. Nov. 16, 2007) | Defective basketball flooring material with triangular holes that snagged athletic shoes |
| *Ex parte Duck Boo Int'l Co., Ltd.*, --- So. 2d ---, 2007 WL 3409003 (Ala. Nov. 16, 2007) | Defective seat belt that failed to protect against passenger ejection (1999 Kia Sephia automobile) |
| *Roberts v. Nasco Equipment Co.*, --- So. 2d ---, 2007 WL 3409296 (Ala. Nov. 16, 2007) | Defective forklift with falling counterweight |

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|---|---|
| *Cummings v. Sunrise Medical HHG, Inc.*, 2007 WL 4116919 (E.D. Tex. Nov. 16, 2007) (slip copy) | Defective harness system for restraining disabled child in vehicle |
| *Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, 2007 WL 4118519 (E.D.N.C. Nov. 16, 2007) (slip copy) | Defective silage bags that ruptured during normal use in cattle farming |
| *Wright v. Ford Motor Co.*, --- F. 3d ---, 2007 WL 3379997 (5th Cir. Nov. 15, 2007) | Defective rear blind spot design in truck |
| *Holland v. Hoffman-La Roche, Inc.*, 2007 WL 4042757 (N.D. Tex. Nov. 15, 2007) (slip copy) | Defective prescription drug for treating immune system disorder (CellCept) increased risk for developing other diseases |
| *Powell v. Merck & Co.*, 2007 WL 4097397 (N.D. Miss. Nov. 15, 2007) (slip copy) | Defective prescription drug for treating arthritis (Vioxx) increased other health risks |
| *Menz v. New Holland North America, Inc.*, --- F. 3d ---, 2007 WL 3355409 (8th Cir. Nov. 14, 2007) | Defective tractor without roll-over protection system to control inherent instability |
| *Magarrelle v. Garrett Electronics, Inc.*, 2007 WL 3360194 (Cal. Ct. App. Nov. 14, 2007) (not reported) | Defective metal detector that failed to detect metal weapons in prison |
| *Rosen v. Regents of University of California*, 2007 WL 3361312 (Cal. Ct. App. Nov. 14, 2007) (not reported) | Defective asbestos dental tape |
| *Johnston v. Multidata Systems Int'l Corp.*, 2007 WL 3998804 (S.D. Tex. Nov. 14, 2007) (slip copy) | Defective radiation equipment that administered excessive doses of radiation to cancer patients |
| *White v. Crown Equip. Corp.*, 2007 WL 3342798 (Ohio Ct. App. Nov. 13, 2007) (slip copy) | Defective braking system on forklift that failed to permit short stopping distances |
| *Contois v. Able Industries Inc.*, 2007 WL 3355680 (D. Conn. Nov. 13, 2007) (slip copy) | Defective asbestos-insulated wires and cables and other asbestos products used on naval ships |
| *Ward 5 Waterworks District No. 1 v. Layne Christensen Co.*, 2007 WL 3378222 (W.D. La. Nov. 13, 2007) (slip copy) | Defective water well, including pump, filtering system, and other equipment |

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|---|---|
| *Tamraz v. Lincoln Elec. Co.*, 2007 WL 3399721 (N.D. Ohio Nov. 13, 2007) (slip copy) | Defective welding rods that gave off neurologically damaging fumes |
| *Magadan v. Interlake Packaging Corp.*, 845 N.Y.S. 2d 443 (N.Y. App. Div. 2007) | Defective adjustable finger guard in book stitching machine |
| *Liberty Mut. Ins. Co. v. Zurich American Ins. Co.*, 2007 WL 3487651 (E.D. La. Nov. 13, 2007) (slip copy) | Defective low-permeable insulation with moisture-trapping exterior cladding |
| *Dambaugh v. Mylan Bertek Pharmaceuticals, Inc.*, 2007 WL 3495335 (W.D. Pa. Nov. 13, 2007) (slip copy) | Defective prescription drug |
| *Vinci v. Ford Motor Co.*, --- N.Y.S. 2d ---, 2007 WL 3342663 (N.Y. App. Div. Nov. 13, 2007) | Defective crash protection elements in vehicle (make and model year not identified) |
| *Sapp v. Niagara Mach. & Tool Works*, 845 N.Y.S. 2d 626 (N.Y. App. Div. 2007) | Defective dual palm button device with faulty wiring or conductive debris that caused punch press machine to cycle unexpectedly |
| *Gaeta v. Perrigo Pharmaceuticals Co.*, 2007 WL 3343043 (N.D. Cal. Nov. 9, 2007) (slip copy) | Defective drug (ibuprofen) that caused ibuprofen toxicity in child |
| *Wells v. Portman Equipment Co.*, 2007 WL 3326084 (6th Cir. Nov. 8, 2007) (slip copy) | Defective electric aerial lift with exposed metal notch when stability outriggers were disabled |
| *In re Vioxx Products Liability Litig.*, --- F. Supp. 2d ---, 2007 WL 3332708 (E.D. La. Nov. 8, 2007) | Defective pain medication (Vioxx) associated with increased risk of cardiovascular problems |
| *Miller v. Cottrell, Inc.*, 2007 WL 3376731 (W.D. Mo. Nov. 8, 2007) (slip copy) | Defective ratchet tie down system on rig trailer that caused sudden release of chain while securing cargo |
| *Ford Motor Co. v. Hall-Edwards*, --- So. 2d ---, 2007 WL 3274404 (Fla. Dist. Ct. App. Nov. 7, 2007) | Defective stability and handling system in vehicle |
| *Steinman v. Spinal Concepts, Inc.*, 2007 WL 4198186 (W.D.N.Y. Nov. 7, 2007) (slip copy) | Defective cervical plate and four screws that fractured after implantation |
| *Reed v. Smith & Nephew, Inc.*, 2007 WL 3357320 (W.D. Okla. Nov. 7, 2007) (slip copy) | Defective sintered coating/substrate interface in femoral implant that made it susceptible to fatigue cracking |

| | |
|---|---|
| *Guerrero v. General Motors Corp.*, 2007 WL 3313201 (E.D. Cal. Nov. 6, 2007) (slip copy) | Defective seat belt that locked in place (2005 Chevrolet Tahoe vehicle) |
| *Holtzman v. General Motors Corp.*, 2007 WL 4098913 (Mass. Super. Ct. Nov. 6, 2007) | Defective jacks for emergency tire changes that regularly failed in use, would not survive a roll-off, had open clevises, narrow channels, and light-gauge steel weakened by weight-reducing holes, and a design that failed to consider forces experienced in real-world conditions (1999 Cadillac DeVille Concours vehicle) |
| *In re Seroquel Products Liability Litig.*, 2007 WL 4117201 (M.D. Fla. Nov. 6, 2007) (slip copy) | Defective prescription drug (Seroquel) that increased risk of developing hyperglycemic conditions |
| *Wells v. Thompson Newspaper Holdings, Inc.*, 2007 WL 3306608 (S.D. Ohio Nov. 5, 2007) (slip copy) | Defective lithographic printing press lacked guard at "nip point" where ink form roller and plate cylinder come together |
| *Giannini v. Ford Motor Co.*, 2007 WL 3253731 (D. Conn. Nov. 2, 2007) (slip copy) | Defective braking system and seat belt (vehicle make and model year not identified in opinion) |
| *Dunton v. Arctic Cat, Inc.*, 2007 WL 3275145 (D. Me. Nov. 2, 2007) (slip copy) | Defective steering stop on snowmobile that locked skis at an extreme angle, causing it to spin uncontrollably |
| *Woodard v. Fort Motor Co.*, 2007 WL 4125519 (N.D. Ga. Nov. 2, 2007) (slip copy) | Defective vehicle roof with insufficient crush resistance (1993 Ford Explorer vehicle) |
| *In re Pirelli Tire, L.L.C.*, --- S.W. 3d ---, 2007 WL 3230166 (Tex. Nov. 2, 2007) | Defective tire (Pirelli tire; unidentified model year GMC pickup vehicle) |

**EXHIBIT B**

SAMPLE CASES WITH ALLEGATIONS OF "DEFECT"
CAUSING ONLY ECONOMIC DAMAGE

| Case | Product | Alleged Defect/Non-Conformity |
|---|---|---|
| *Suminski v. Maine Appliance Warehouse, Inc.*, 602 A.2d 1173 (Me. 1992) | Television set | The set began to turn off by itself, although the picture would come on when the plaintiff turned the set off and on |
| *Mindell v. Raleigh Rug Co.*, 1974 WL 21750, 14 UCC Rep.Serv. 1124 (Mass.Housing.Ct. June 17, 1974) | Linoleum tile | Discoloration (yellowing condition) |
| *Baker v. Burlington Coat Factory Warehouse*, 175 Misc.2d 951, 673 N.Y.S. 2d 281 (N.Y.City Ct. 1998) | Coat | "Fake Fur" coat shedded |
| *Moss v. Batesville Casket Co., Inc.*, 935 So. 2d 393 (Miss. 2006) | Caskets | Upon exhumation two and a half years after burial, visible cracks and separation were found in n the casket, and, as the casket was removed, it began to dismantle |
| *Fishbein v. Corel Corp.*, 1996 WL 895317, *3, 29 Pa. D. & C.4th 289 (Pa.Com.Pl. 1996) | Graphic design computer software | Failed to perform as expected |
| *Villette v. Sheldorado Aluminum Products, Inc.*, 2001 WL 881055, 45 UCC Rep.Serv.2d 470 (N.Y.Sup. 2001) | Aluminum awning | Collapsed on car because of accumulation of snow |
| *Hollingsworth v. Queen Carpet, Inc.*, 827 S.W.2d 306 (Tenn. Ct. App. 1991) | Carpet | Top part of the carpet would start to unravel and continue to unravel from the backing |
| *Frantz v. Cantrell*, 711 N.E.2d 856 (Ind. Ct. App. 1999) | Asphalt roof shingles | Shingles curl up in cold weather |
| *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793 (D.C.Minn. 1980) | Citizen Band radio units | Failure to withstand "normal" levels of shock and vibration |

| | | |
|---|---|---|
| *Zeidman v. Moyer,* 1976 WL 23616, 19 UCC Rep.Serv. 476 (Pa.Com.Pl 1976) | Bricks | The bricks became raised or lowered from the surface of the patio and walkway, crumbled, cracked or became pitted |
| *Gregory v. Atrium Door and Window Co.*, 415 S.E.2d 574 (N.C. Ct. App. 1992) | Doors in home | Doors did not function properly from the time of installation and that some of the doors were deteriorating |
| *Lupa v. Jock's*, 131 Misc.2d 536, 500 N.Y.S. 2d 962 (N.Y.City Ct. 1986) | Refrigerator | The refrigerator ceased to function within 2 1/2 years after purchase |
| *Carey v. Select Comfort Corp.*, No. 27CV 04-015451, 2006 WL 871619 (Minn. Dist. Ct. Jan. 30, 2006) | Bed | Select Comfort beds are uniquely susceptible to mold formation |
| *Paquette v. Deere and Co.*, 168 Vt. 258, 259, 719 A.2d 410, 411 (Vt. 1998) | Motor Home | Electrical problems that could result in engine stalling and partial brake failure |
| *Northern Ins. Co. of New York v. Baltimore Business Communications, Inc.*, 68 Fed.Appx. 414, *416, 2003 WL 21404703, 1 (4th Cir. 2003) | Cell Phones | Cell phones emit dangerous levels of radiation |
| *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal.App.4th 908, 912, 107 Cal.Rptr.2d 761, 764 (Cal. Ct. App.2001) | Concrete slab foundations under homes | Concrete slab foundations under their homes are "inherently defective" because they were constructed with Fibermesh, a polypropylene product, instead of welded wire mesh |
| *Sanitarios Lamosa, S.A. de C.V. v. DBHL, Inc.*, No. Civ.A. H-04-22973, 2005 WL 2405923 (S.D.Tex. 2005) | Polypropylene ballcocks in toilets | Polypropylene ballcocks in toilets experienced cracking at a significantly increased rate |
| *Kingsford Fastener, Inc. v. Koki*, No. 00 C 7395, 2002 WL 992610 (N.D.Ill. May 15, 2002) | Nails and nail gun | The Hitachi nail did not work with Hitachi nail guns (although all of Hitachi's competitor's nails did work) |