185.00

MAGNUSON-MOSS

ACT INTRODUCTION

The Magnuson-Moss Act was enacted in 1975 "to improve the adequacy of information available to consumers, prevent deception and improve competition" with respect to consumer products issued with written warranties. 15 U.S.C. § 2302 (a) (1994). The Act was designed to protect consumers from deceptive warranty practices by establishing standards for the form and content of written warranties. Lysek v. Elmhurst Dodge, Inc., 325 Ill. App. 3d 536, 259 Ill. Dec. 454 (2001).

The Act applies to consumer products, which are tangible items of personal property "normally used for personal, family or household purposes." 15 U.S.C. § 2301 (1) (1975). The Act does not require that manufacturers give a warranty; however, if a written warranty is given, the Act "imposes certain requirements as to its contents, disclosures, and the effect of extending a written warranty." Szajna v. Gen. Motors Corp., 115 Ill. 2d 294, 312, 503 N.E.2d 760, 768 (1986). Written warranties must be designated as either "full" or "limited." 15 U.S.C. § 2304 (1976). "A warrantor giving a 'full' written warranty may not impose any limitations on the duration of an implied warranty and may not exclude or limit consequential damages for breach of a written or implied warranty." Szajna, 115 Ill. 2d at 312-13 (citing 15 U.S.C. § 2304 (1976)). Within a reasonable amount of time, a full written warranty must offer a remedy of repair, replacement or refund, at the option of the warrantor, for any defect, malfunction or failure to comply with the written warranty, without charge to the consumer. 15 U.S.C. § 2304 (a) (1); 15 U.S.C. § 2301 (10-12). Only a supplier giving a limited written warranty may disclaim or modify an implied warranty; and, the only modification allowed is that the duration of the implied warranty may be limited to the duration of the written warranty "if such limitation is conscionable and is clearly set forth." Szajna, 115 Ill. 2d at 313 (citing 15 U.S.C. § 2308 (1976)).

Introduction approved January 2007.

185.01. Statutory Provisions

At the time of the [sale] [lease] [service contract] of the [vehicle] [product] there was in force a federal statute known as the Magnuson-Moss Warranty Act. That Act provided that a consumer who is damaged by the failure of a [manufacturer] [seller] [supplier] [service contractor] [warrantor] to comply with a [written] [and/or] [implied] warranty may bring suit for [damages], [refund], [repair], or [replacement].

Instruction and Comment approved January 2007.

Comment

Pursuant to the Magnuson-Moss Act, "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief." 15 U.S.C. § 2310(d)(1) (1994). Actions for breach of an implied warranty of merchantability arise under the Act by state law. 15 U.S.C. § 2301(7) (1994). Illinois state law regarding actions for breach of an implied warranty of merchantability is stated in section 2-314 of the UCC (810 ILCS 5/2-314 (West 2002)). Under the UCC, a buyer of goods seeking purely economic damages for a breach of an implied warranty has "a potential cause of action only against his immediate seller." The Magnuson-Moss Act imposes on manufacturers the same implied warranties that state law imposes on the buyer's immediate seller. In actions where (1) a consumer filed against a manufacturer pursuant to the Magnuson-Moss Act and (2) the manufacturer has expressly warranted a product to the consumer, the plaintiff has a cause of action for breach of implied warranty under the Magnuson-Moss Act against the manufacturer. Razor v. Hyundai Motor Am., 349 Ill.App.3d 651, 285 Ill.Dec. 190, 813 N.E.2d 247 (2004) (affirmed in part, reversed in part, and remanded 222 Ill. 2d 75 (2006)), citing Mekertichian v. Mercedes-Benz U.S.A., 347 Ill.App.3d 828, 807 N.E.2d 1165 (2004), citing Szajna v. Gen. Motors Corp., 115 Ill. 2d 294, 311, 503 N.E. 2d 760, 767, 104 Ill.Dec. 898, 503 N.E.2d 760, 768 tline(1986), and Rothe v. Maloney Cadillac, Inc., 119 Ill.2d 288, 292, 518 N.E.2d 1028, 1029-30 (1988). The Magnuson-Moss Act prohibits anyone who offers a written warranty from disclaiming or modifying implied warranties. No matter how broad or narrow a written warranty is, consumers always receive the basic protection of the implied warranty of merchantability. The Act applies to sales, leases, service contracts and the sale of extended warranties after sale with the product. Lysek v. Elmhurst Dodge, Inc., 325 Ill. App. 3d 536, 259 Ill. Dec. 454 (2001); Mangold v. Nissan N. Am., Inc., 347 Ill. App. 3d 1008, 809 N.E.2d 251, 284 Ill. Dec. 129 (2004).

185.02 Magnuson-Moss Act--Issues Made by the Pleadings

[1] [The Plaintiff claims that he sustained damages as a [purchaser] [lessee] of a [vehicle] [product] [manufactured] [sold] [leased] [distributed] [supplied] [warranted] by the Defendant.]

[2] The Plaintiff further claims that the Defendant violated the Magnuson-Moss Act in that

a. [the Defendant breached a written warranty given with the vehicle [product].

Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to breach of a written warranty which have not been withdrawn or ruled out by the court and are supported by the evidence.]

b. [the Defendant breached the implied warranty of merchantability given with the [vehicle] [product].

Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to breach of the implied warranty of merchantability which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[3] The Plaintiff further claims that damages resulted in whole or in part from one or more of the alleged violations of the Act.

[4] The Defendant denies that it violated the Magnuson-Moss Act as claimed by the Plaintiff.

[5] The Defendant further denies that any of the alleged damages resulted, in whole or in part, from any violation of the Act.

[6] The Defendant further denies that the Plaintiff sustained damages (to the extent claimed).

[7] The Defendant also sets up the following affirmative defense[s]:

[Set forth in simple terms without undue emphasis or repetition those affirmative defenses to warranty enforcement in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[8] The Plaintiff denies that [summarize affirmative defense or defenses].

Instruction approved January 2007.

185.03 Magnuson-Moss Act--Burden of Proof—Breach of Written Warranty

In order for Plaintiff to recover for a breach of written warranty claim against Defendant, Plaintiff has the burden of proving each of the following propositions:

First, the existence of a defect in the [vehicle] [product] covered by the warranty;

Second, compliance with the terms of the warranty by Plaintiff;

Third, that the Plaintiff afforded Defendant a reasonable opportunity to repair the defect; and

Fourth, that Defendant, through its authorized dealer [did not repair] [was unable to repair] the [vehicle] [product] after being given a reasonable number of attempts or a reasonable amount of time; or did not offer to refund or replace within a reasonable amount of time.

Fifth, that Plaintiff sustained damages as a result of Defendant's failure to take action required by the warranty to correct the defect or malfunction or otherwise to correct the problem.

If you find from your consideration of all the evidence that each of these propositions has been proven, then your verdict should be for the Plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proven, then your verdict should be for the Defendant.

Instruction, Notes and Comment approved January 2007.

Notes on Use

This burden of proof instruction should be used where no affirmative defenses have been raised or the sole affirmative defense raised is mitigation of damages. Where mitigation of damages is raised also give IPI 185.11. This instruction should be given with IPI 21.01 which defines the phrase “burden of proof.”

This instruction conforms to the burden of proof requirements for breach of a written warranty as stated in Pearson v. DaimlerChrysler Corp., 349 Ill. App. 3d 688, 286 Ill. Dec. 173, 813 N.E.2d 230 (2004) and Razor v. Hyundai Motor Am., 349 Ill. App. 3d 651, 286 Ill. Dec. 190, 813 N.E.2d 247 (2004) (affirmed in part, reversed in part, and remanded 222 Ill. 2d 75 (2006)), which states that the plaintiff has the burden of proving a reasonable basis for damages proximately caused by defendant's breach.

In the fourth burden of proof element the phrase “or did not offer to refund or replace within a reasonable amount of time” should be included in full warranty cases, and only those limited warranty cases where the right to recover a refund or replacement of the product is provided in the warranty.

Comment

The Magnuson-Moss Warranty Act creates a contractual right on the part of consumers

for the replacement of or refund of the purchase price of defective products which are covered by a full warranty. The warrantor's failure to allow the consumer to elect replacement or refund gives rise to an action at law for breach of warranty in which the consumer must prove only that a defect in the product exists which the warrantor was unable to repair after a reasonable number of attempts. Sadat v. Am. Motors Corp., 114 Ill. App. 3d 376, 70 Ill. Dec. 22, 448 N.E.2d 900 (1983). A full written warranty must offer a remedy of repair, replacement or refund, at the option of the warrantor, for any defect, malfunction or failure to comply with the written warranty, without charge to the consumer. 15 U.S.C. § 2304 (a) (1); 15 U.S.C. § 2301 (10-12). A limited written warranty may offer a remedy of repair, replacement or refund but it is not required. The Magnuson-Moss Act applies to limited warranties. A plaintiff is entitled to bring an action under the Act based on alleged breach of a limited written warranty provided by defendant. Mydlach v. DaimlerChrysler Corp., 364 Ill. App. 3d 135, 301 Ill. Dec. 164, 846 N.E.2d 126 (2006). The Act requires that every written warranty on a consumer product that costs more than $10 have a title that says the warranty is either “full” or “limited.” Lara v. Hyundai Motor Am., 331 Ill. App. 3d 53, 264 Ill. Dec. 416, 770 N.E.2d 721 (2002).

185.04 Magnuson-Moss Act--Burden of Proof--Breach of Written Warranty—Affirmative Defenses to Warranty Enforcement

In order for Plaintiff to recover for a breach of written warranty claim against Defendant, Plaintiff has the burden of proving each of the following propositions:

First, the existence of a defect in the [vehicle] [product] covered by the warranty;

Second, compliance with the terms of the warranty by Plaintiff;

Third, that the Plaintiff afforded Defendant a reasonable opportunity to repair the defect; and

Fourth, that Defendant, through its authorized dealer [did not repair] [was unable to repair] the [vehicle] [product] after being given a reasonable number of attempts or a reasonable amount of time; or did not offer to refund or replace within a reasonable amount of time.

Fifth, that Plaintiff sustained damages as a result of Defendant's failure to take action required by the warranty to correct the defect or malfunction or otherwise to correct the problem.

[In this case Defendant has asserted the affirmative defense that:

Summarize in simple form and without undue emphasis or repetition affirmative defense(s) to warranty enforcement which has not been withdrawn or ruled out by the court and is supported by the evidence.

The Defendant has the burden of proving this affirmative defense.]

If you find from your consideration of all the evidence that the propositions required of the Plaintiff have been proven and that [the Defendant's affirmative defense has not] [none of the Defendant's affirmative defenses has] been proven, then your verdict should be for the Plaintiff. If, on the other hand, you find from your consideration of all the evidence, that the propositions the Plaintiff is required to prove have not been proven, or that [any one of] the Defendant's affirmative defense[s] has been proven, then your verdict should be for the Defendant.

Instruction, Notes and Comment approved January 2007.

Notes on Use

This burden of proof instruction should only be used when affirmative defenses other than mitigation of damages are raised. Where mitigation of damages is raised give IPI 185.03 and IPI 185.11. This instruction should be given with IPI 21.01 which defines the phrase "burden of proof."

This instruction conforms to the burden of proof requirements for breach of a written warranty as stated in Pearson v. DaimlerChrysler Corp., 349 Ill. App. 3d 688, 286 Ill. Dec. 173, 813 N.E.2d 230 (2004) and Razor v. Hyundai Motor Am., 349 Ill. App. 3d 651, 286 Ill. Dec. 190, 813 N.E.2d 247 (2004) (affirmed in part, reversed in part, and remanded 222 Ill. 2d 75 (2006)),

which states that the plaintiff has the burden of proving a reasonable basis for damages proximately caused by defendant's breach.

In the fourth burden of proof element the phrase “or did not offer to refund or replace within a reasonable amount of time” should be included in full warranty cases, and only those limited warranty cases where the right to recover a refund or replacement of the product is provided in the warranty.

Comment

The Magnuson-Moss Warranty Act creates a contractual right on the part of consumers for the replacement of or refund of the purchase price of defective products which are covered by a full warranty. The warrantor's failure to allow the consumer to elect replacement or refund gives rise to an action at law for breach of warranty in which the consumer must prove only that a defect in the product exists which the warrantor was unable to repair after a reasonable number of attempts. Sadat v. Am. Motors Corp., 114 Ill. App. 3d 376, 70 Ill. Dec. 22, 448 N.E.2d 900 (1983). A full written warranty must offer a remedy of repair, replacement or refund, at the option of the warrantor, for any defect, malfunction or failure to comply with the written warranty, without charge to the consumer. 15 U.S.C. § 2304 (a) (1); 15 U.S.C. § 2301 (10). A limited written warranty may offer a remedy of repair, replacement or refund but it is not required. The Act requires that every written warranty on a consumer product that costs more than $10 have a title that says the warranty is either “full” or “limited.” Lara v. Hyundai Motor Am., 331 Ill. App. 3d 53, 264 Ill. Dec. 416, 770 N.E.2d 721 (2002).

185.05 Magnuson-Moss Act--Burden of Proof--Breach of Implied Warranty

In order for Plaintiff to recover for a breach of implied warranty of merchantability claim against Defendant, Plaintiff has the burden of proving each of the following propositions:

First, that the problem of which Plaintiff complains existed when it left Defendant's control. The Plaintiff may prove this by showing:

a. [the problem was due to a defect or malfunction of the [vehicle] [product];] or

b. [in the absence of abnormal use or reasonable secondary causes the [vehicle] [product] failed to perform in the manner reasonably expected in light of its nature and intended function;]

Second, that the defect made the [vehicle] [product] unfit for the ordinary purpose such a [vehicle] [product] is used;

Third, that the Plaintiff notified Defendant or its authorized dealer of the defect within a reasonable amount of time after discovering it;

Fourth, that Defendant or its authorized dealer did not repair the vehicle [product] after being given a reasonable number of attempts or did not offer to refund, replace or take other remedial action within a reasonable amount of time.

Fifth, that Plaintiff sustained damages; and

Sixth, that Plaintiff's damages were proximately caused by the [vehicle] [product] being unfit for the ordinary purpose for which such [vehicles] [products] are used.

If you find from your consideration of all the evidence that each of these propositions has been proven, then your verdict should be for the Plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proven, then your verdict should be for the Defendant.

Instruction, Notes and Comment approved January 2007.

Notes on Use

This burden of proof instruction should be used where no affirmative defenses have been raised or the sole affirmative defense raised is mitigation of damages. Where mitigation of damages is raised also give IPI 185.11. This instruction should be given with IPI 21.01 which defines the phrase "burden of proof."

Comment

The first element of the burden of proof conforms to the alternative manner which plaintiff may prove a defect in implied warranty cases as held in Alvarez v. Am. Isuzu Motors, 321 Ill. App. 3d 696, 749 N.E.2d 16 (2001). Plaintiff may prove that the product was defective

and that the defect existed when it left defendant's control either through expert testimony or by excluding abnormal use and reasonable secondary causes for the problems with the product.

185.06 Magnuson-Moss Act--Burden of Proof--Breach of Implied Warranty—Affirmative Defenses

In order for Plaintiff to recover for a breach of implied warranty of merchantability claim against Defendant, Plaintiff has the burden of proving each of the following propositions:

First, that the problem of which Plaintiff complains existed when it left Defendant's control. The Plaintiff may prove this by showing:

a. [the problem was due to a defect or malfunction of the [vehicle] [product];] or

b. [in the absence of abnormal use or reasonable secondary causes the [vehicle] [product] failed to perform in the manner reasonably expected in light of its nature and intended function;]

Second, that the defect made the [vehicle] [product] unfit for the ordinary purpose such a [vehicle] [product] is used;

Third, that the Plaintiff notified Defendant or its authorized dealer of the defect within a reasonable amount of time after discovering it;

Fourth, that Defendant or its authorized dealer did not repair the [vehicle] [product] after being given a reasonable number of attempts or did not offer to refund, replace or take other remedial action within a reasonable amount of time.

Fifth, that Plaintiff sustained damages; and

Sixth, that Plaintiff's damages were proximately caused by the [vehicle] [product] being unfit for the ordinary purpose for which such [vehicles] [products] are used.

[In this case Defendant has asserted the affirmative defense that:

Summarize in simple form and without undue emphasis or repetition affirmative defense(s) to warranty enforcement which has not been withdrawn or ruled out by the court and is supported by the evidence.

The Defendant has the burden of proving this affirmative defense.]

If you find from your consideration of all the evidence that the propositions required of the Plaintiff have been proven and that [the Defendant's affirmative defense has not][none of the Defendant's affirmative defenses has] been proven, then your verdict should be for the Plaintiff. If, on the other hand, you find from your consideration of all the evidence, that the propositions the Plaintiff is required to prove have not been proven, or that [any one of] the Defendant's affirmative defense[s] has been proven, then your verdict should be for the Defendant.

Instruction, Notes and Comment approved January 2007.

Notes on Use

This burden of proof instruction should only be used when affirmative defenses other than mitigation of damages are raised. Where mitigation of damages is raised give IPI 185.03 and IPI 185.11 This instruction should be given with IPI 21.01 which defines the phrase "burden of proof."

Comment

The first element of the burden of proof conforms to the alternate manner by which plaintiff may prove a defect in implied warranty cases as held in Alvarez v. Am. Isuzu Motors, 321 Ill. App. 3d 696, 749 N.E.2d 16 (2001). Plaintiff may prove that the product was defective and that the defect existed when it left defendant's control either through expert testimony, or by excluding abnormal use and reasonable secondary causes for the problems with the product.

185.07 Magnuson-Moss Act--Written Warranty--Definition

A written warranty is a writing provided by the supplier to a lessee or purchaser setting out the promises and obligations of the supplier.

Instruction, Notes and Comment approved January 2007.

Notes on Use

This instruction should be given without reference to the fact that the written affirmation must "become part of the bargain between the supplier and a buyer for purposes other than resale of the product." 15 U.S.C. § 2301(6). In the vast majority of cases, whether the warranty is a part of the basis of the buyer's decision to buy the product will not be an issue. Nonetheless, in cases where there is an issue as to whether the warranty became a part of the basis of the buyer's decision to buy the product, this element should be added to the Plaintiff's burden of proof.

Comment

Magnuson-Moss broadly defines written warranty as "any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product." 15 U.S.C. § 2301(6)(B) (1982).

The Magnuson-Moss Act requires the Federal Trade Commission to enact a regulation requiring that the terms of any written warranty on a consumer product be made available to the consumer or prospective consumer prior to the sale of the product to him. 15 U.S.C. § 2302(b)(1)(A). In the case of a limitation of liability withheld from a car buyer until after the purchase contract has been signed, where the car buyer never saw the clause nor is there any basis for concluding that the car buyer could have seen the clause, before entering into the sale contract, the limitation of liability is ineffective. A limitation of liability given to the buyer after he makes the contract is ineffective. Razor v. Hyundai Motor Am., 222 Ill. 2d 75, 305 Ill. Dec. 15, 854 N.E.2d 607 (2006).

A dealer who agrees, in a dealer's sales contract, to promptly perform and fulfill all terms and conditions of the owner's service policy has given a written warranty within the meaning of Magnuson-Moss. Rothe v. Maloney Cadillac, Inc., 142 Ill. App. 3d 937, 492 N.E.2d 497 (1986).

A "New Car Get Ready" form, which was completed by a new car dealer and which stated that the dealer prepared the auto for delivery and provided a "Rusty Jones" treatment did not constitute a "written warranty" within the meaning of the Act. Lytle v. Roto Lincoln Mercury & Subaru, Inc., 167 Ill. App. 3d 508, 516, 521 N.E.2d 201, 205 (1988).

185.08 Magnuson-Moss Act--Implied Warranty--Definition

An implied warranty of merchantability is a warranty which is implied in law and generally not reduced to writing. It is an implied promise that the [vehicle] [product] is fit for the ordinary purpose for which such [vehicles] [products] are used.

Instruction and Notes approved January 2007.

Notes on Use

This instruction should be given without any additional language if the plaintiff's claim is that the vehicle was not fit for the ordinary purpose. If the plaintiff has a different implied warranty claim, this instruction should be modified to reflect what is alleged. See generally 810 ILCS 5/2-314(2)(a) though (f).

185.09 Magnuson-Moss Act--Measure of Damages--Breach of Warranty

If you decide for the Plaintiff on [his] [her] claim for breach of warranty, you must fix the amount of money which will reasonably compensate the Plaintiff for damages naturally arising from the breach. In calculating Plaintiff's damages, you should determine that sum of money that will put the Plaintiff in as good a position as [he] [she] would have been in if both Plaintiff and Defendant had performed all of their promises under the contract.

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted.

Whether any of these elements of damages has been proven by the evidence is for you to determine.

Instruction, Notes and Comment approved January 2007.

Notes on Use

Where the product is the subject matter of a lease use IPI 185.10.

Where a Defendant has shown some "diminished value" an additional, separate instruction should be used, including a burden of proof instruction on "diminished value."

Where special circumstances show proximate damages of a different amount, and/or expenses saved in consequence of the lessor's breach of warranty, an additional instruction should be used.

Comment

Under the Uniform Commercial Code, the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. 810 Ill. Comp. Stat. Ann. 5/2-714(2) (2000). While it is not necessary that damages for breach of warranty be calculated with mathematical precision, basic contract theory requires that damages be proved with reasonable certainty, and precludes damages based on conjecture or speculation. In proving damages, the burden is on a plaintiff to establish a reasonable basis for computing damages. Damages may be proven in any reasonable manner. Razor v. Hyundai Motor Am., 222 Ill. 2d 75, 305 Ill. Dec. 15, 854 N.E.2d 607 (2006).

185.10 Magnuson-Moss Act--Measure of Damages--Breach of Warranty--Leases

If you decide for the Plaintiff on [his] [her] claim for breach of warranty, you must fix the amount of money which will reasonably compensate the Plaintiff for damages naturally arising from the breach. In calculating Plaintiff's damages, you should determine that sum of money that will put the Plaintiff in as good a position as [he] [she] would have been in if both Plaintiff and Defendant had performed all of their promises under the contract.

The measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods [product] accepted and the value if they [it] had been as warranted for the lease term.

Whether any of these elements of damages has been proven by the evidence is for you to determine.

Instruction, Notes and Comment approved January 2007.

Notes on Use

Where a Defendant has shown some "diminished value" an additional, separate instruction should be used, including a burden of proof instruction on "diminished value."

Where special circumstances show proximate damages of a different amount, and/or expenses saved in consequence of the lessor's breach of warranty, additional instructions should be used.

Comment

Where the product is the subject matter of a lease, 810 ILCS 5/2A-519(4) provides: "Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty." The official comments state: "The measure in essence is the present value of the difference between the value of the goods accepted and of the goods if they had been as warranted." While it is not necessary that damages for breach of warranty be calculated with mathematical precision, basic contract theory requires that damages be proved with reasonable certainty, and precludes damages based on conjecture or speculation. In proving damages, the burden is on a plaintiff to establish a reasonable basis for computing damages. Damages may be proven in any reasonable manner. Razor v. Hyundai Motor Am., 222 Ill. 2d 75, 305 Ill. Dec. 15, 854 N.E.2d 607 (2006).

185.11 Magnuson-Moss Act--Affirmative Defense--Mitigation of Damages

In fixing the amount of money which will reasonably and fairly compensate the Plaintiff, you must consider that a person who has been damaged by a breach of warranty must exercise ordinary care to minimize existing damages and to prevent further damage. Damages caused by a failure to exercise such care cannot be recovered. The Defendant has the burden of proof to show the Plaintiff failed to minimize existing damage and prevent further damage.

Instruction and Notes approved January 2007.

Notes on Use

This instruction should be used if the Defendant has pleaded the affirmative defense of failure to mitigate damages. This instruction should be given with IPI 21.01 which defines the phrase "burden of proof."

185.12 Magnuson-Moss Act--Incidental and Consequential Damages

You may also award incidental or consequential damages if the Plaintiff proves that [he] [she] is entitled to recover these damages.

Incidental damages resulting from the Defendant's breach include any reasonable expense proximately caused by the breach.

Consequential damages resulting from a Defendant's breach include any loss resulting from general or particular requirements and needs of which the Defendant had reason to know at or before the time the [vehicle][product] left Defendant's control which could not be prevented by the Plaintiff.

Instruction and Comment approved January 2007.

Comment

A warrantor may not exclude or limit consequential damages for breach of any full written or implied warranty on a product, unless such exclusion or limitation conspicuously appears on the face of the warranty. 15 U.S.C. § 2304(3). The Magnuson-Moss Warranty Act, itself, does not determine the enforceability of a consequential damages disclaimer. To determine the enforceability of a consequential damages disclaimer in a limited warranty, a reviewing court looks to state law. 810 Ill. Comp. Stat. Ann. 5/2-719(3) (2000) is part of the Uniform Commercial Code and permits a seller to limit or exclude consequential damages unless to do so would be unconscionable. A determination of whether a contractual clause is unconscionable is a matter of law, to be decided by the court. 810 Ill. Comp. Stat. Ann. 5/2-302(1) (2000); Razor v. Hyundai Motor Am., 222 Ill. 2d 75, 305 Ill. Dec. 15, 854 N.E.2d 607 (2006).