

The Legal Intelligencer

Pa. High Court to Hear Kia Class Action Appeal

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07-15-2008

The Pennsylvania Supreme Court will consider four issues of first impression in a high profile class action case over allegedly faulty brakes that could have a major impact on Pennsylvania class action law.

The *Samuel-Bassett v. Kia Motors America Inc.* case involves a \$5.6 million Philadelphia Court of Common Pleas class action verdict awarded to owners of Kia sedans with allegedly faulty braking systems and \$4.13 million in attorney fees. Both the verdict and the attorney fees have been upheld by the Pennsylvania Superior Court.

The issues of first impression, as stated by Kia Motors America and adopted by the Supreme Court in two separate allocatur orders issued Friday, are:

- whether the fact-specific claim that the class representative's brake express warranty was breached can be certified and tried on a class-wide basis;
- whether Kia's due process rights were violated when trial court Judge Mark I. Bernstein entered judgment for the class without requiring individual proof of the breach of the class members' express limited warranty contracts;
- whether the trial court's award of a \$1 million risk multiplier to attorney fees violated U.S. Supreme Court precedent and if Pennsylvania courts must follow U.S. Supreme Court precedent about federal fee shifting statutes;
- whether an attorney fee can be awarded under the federal Magnuson-Moss Warranty Act (MMWA) - which requires that fee awards be entered as part of the judgment - when final judgment was entered at the trial court level before the fee award is entered.

At the trial level, a total of \$5,641,200, or \$600 apiece, was awarded to 9,402 class members whose 1995 to 2001 Kia Sephias had brakes that allegedly were prone to wear and tear and often needed replacement approximately every few thousand miles because the brakes failed to dissipate heat properly, according to court papers.

The Superior Court panel of Judges Richard B. Klein, John T. Bender and Susan Peikes Gantman said in its nonprecedential opinion last fall that class representative Shamell Samuel-Bassett's total cost for brake repairs during the warranty was \$596.16, and it was reasonable to multiply \$600 for the 9,402 class members to reach the verdict of \$5,641,200.

Kia's appellate counsel in Pennsylvania, a team of attorneys from the Lamb McErlane

firm in West Chester, argued in their petition for allowance of appeal on the merits of the case that class-wide proof of violation of an express warranty is impossible because express warranties can only be "breached under the specific factual circumstances and events unique to a particular vehicle and a specific customer."

According to court papers, Kia argued that the proof of the breach of the class representative Shamell Samuel-Bassett's individual express limited warranty can't be extrapolated as the evidence of proof of the breach of the other class members' warranty contracts.

Kia argued that the only class-wide evidence was its warranty claims records, and the records showed that it honored its warranties by paying for repairs. Kia also argued that the Superior Court panel made its decision in the case as if the case was within the context of an implied warranty case, not an express warranty case.

"There are some pretty important issues here," William H. Lamb of Lamb McErlane said in a joint interview with co-counsel James C. Sargent Jr., also of Lamb McErlane. "And Kia's position is very simple. It has always tried to take care of its customers."

"If the existing decisions are permitted to stand, they are an open invitation to plaintiffs attorneys to sue on breach of express warranty claims in Pennsylvania, knowing that they only need prove breach as to a single named plaintiff to obtain a multi-million dollar verdict as to everyone who has purchased a product, where every payment by the manufacturer under warranty may be used as proof that a wrong has occurred and not, as in the truth, that the warranty has been honored," Kia's appellate brief said.

The plaintiffs' reply brief on the merits of the case reported that Pennsylvania courts have "distinguished themselves by rejecting sweetheart settlements coveted by corporate defendants and accepted by accommodating plaintiffs attorneys" like the \$62,925 settlement paid to consumers who purchased Sephias in the 47 states besides Florida, New Jersey and Pennsylvania where the plaintiffs attorneys are litigating parallel class actions against Kia.

Plaintiffs attorney Michael D. Donovan of Donovan Searles said his co-counsel and he believe that all of the issues of "first impression" raised by Kia have either been waived or are of no consequence. Plaintiffs co-counsel include Alan Feldman of Feldman Shepherd Wohlgernter Tanner Weinstock & Dodig and James A. Francis of Francis & Mailman.

Donovan said this case is a model for how the class action device can rectify a mass-marketed product that harms a lot of people in small dollar amounts. The Kia case involves \$600 compensation, and individual cases each would involve \$300 filing fees, he pointed out.

"What lawyer is going to pursue a \$600 case? And here you needed experts to prove that there was a defect," Donovan said. "Really the decision in this case will ... determine if the class action is something only for rich investors or is suitable for when even the 'midtrodden' suffer losses."

According to the plaintiffs' brief, the MMWA provides for express warranty class actions, so Kia's argument that breach of express warranty claims can't be certified as a class action fails.

Proof that Kia's brake warranty was breached was "uniform, common and overwhelming" because at trial plaintiffs attorneys proved that Kia sold cars with defective brakes, that Kia had promised customers a product free of defects and Kia's engineers knew the Sephia brakes couldn't last longer than 9,000 miles, Donovan said.

The jury entered a verdict for the class, not just for Samuel-Bassett, the plaintiffs' brief argued, so Bernstein did not mold the verdict to apply to other class members; instead Bernstein only molded the verdict by multiplying the \$600 damages by the number of stipulated class members after opt-outs.

Kia also waived any claim of error on appeal because it failed to object to the trial court's action of molding the verdict, the plaintiffs' brief said.

Donovan said Kia is unclear if it's claiming a violation of its procedural due process or substantive due process rights. If it's a procedural due process claim, Donovan argued that Kia had both notice and an opportunity to be heard about the allegedly defective brakes. If it's a substantive due process claim, Donovan said, the case involves compensatory damages, not punitive damages, and Kia had an opportunity to present all of its defenses at both the trial and appellate level.

On the fee issues, Kia argues in court papers that a plain reading of the MMWA doesn't permit entry of an award of attorney fees after judgment in a case that has already been entered and does not permit an award of fees on a risk multiplier.

Bernstein determined the attorney award in the Kia case was reached from a base of \$3 million calculated from the prevailing market rate and a 1.375 multiplier reflecting the higher risks from a contingent fee case than hourly fee cases, *The Legal* previously reported.

The plaintiffs argued in court papers that under U.S. and Pennsylvania Supreme Court precedent attorney fees are not disposed of by a judgment, and that under Pennsylvania Rule of Civil Procedure 1716 a lodestar base fee is allowed to account for the risks of contingency fees.

The Donovan, Feldman and Mailman team had one victory and one loss last month against Kia with parallel class actions in other states. A New Jersey jury found that 8,000 to 8,400 class members who own Kia Sephias are each owed \$750 because of defective braking systems.

A third class action in Florida had its class certification reversed in June by the Florida Third District Court of Appeal because the court found that individual questions of fact predominate over common questions of fact in the case. The court's order allows Kia to include the Florida decision in a post-submission communication.