

STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM MICHIGAN COURT OF APPEALS  
Owens, P.J., Bandstra, J.J., and Davis J.J.

KEITH GAYLE DAVIS,

Plaintiff-Appellee,

Supreme Court No. 136114

v

Court of Appeals No. 270478

FOREST RIVER, INC.  
a foreign corporation,

Lower Court No. 04-64-CP

Defendant-Appellant.

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**BRIEF OF AMICUS ATTORNEY GENERAL MICHAEL A. COX**  
**IN SUPPORT OF PLAINTIFF-APPELLEE**

Michael A. Cox  
Attorney General

B. Eric Restuccia (P49550)  
Solicitor General  
Counsel of Record

Jason R. Evans (P61567)  
Assistant Attorney General  
Attorney for Attorney General  
Michael A. Cox  
P.O. Box 30213  
(517) 335-0855

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## QUESTIONS PRESENTED FOR REVIEW

This Court's June 25, 2008 Order granting defendant Forest River's application for leave to appeal directed the parties to address<sup>1</sup>:

(1) whether the Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act, 15 USC 2301 *et seq.* (MMWA), provides for a cause of action for breach of warranty and a remedy of rescission where the plaintiff and the defendant are not in privity of contract; (2) whether Michigan law provides a cause of action for breach of warranty and a remedy of rescission where the plaintiff and the defendant are not in privity of contract; (3) whether the economic loss doctrine and the Uniform Commercial Code, MCL 440.1101 *et seq.*, apply to the plaintiff consumer's claims for breach of warranty; (4) whether, if the UCC applies, revocation of acceptance, MCL 440.2608, is available in the absence of privity, and whether the revocation-of-acceptance provisions of the UCC supplanted any former common-law action for rescission; and (5) whether, if the plaintiff is confined to the UCC, either privity or third-party beneficiary status was required for an action for breach of warranty.

The Court also invited the Attorney General to participate as amicus curiae. Attorney General Michael A. Cox accepts the Court's invitation, and files the instant amicus curiae brief addressing Issues I and III.

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<sup>1</sup> *Davis v Forest River, Inc*, 481 Mich 918; 750 NW2d 592 (2008).

## **STATEMENT OF PROCEEDINGS AND FACTS**

Amicus Curiae Attorney General for the State of Michigan adopts the statement of facts in plaintiff Keith Davis' brief on appeal.

**INTEREST OF AMICUS CURIAE ATTORNEY GENERAL  
FOR THE STATE OF MICHIGAN**

This case presents the Court with the opportunity to clarify the remedies available to consumers under the Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act (MMWA) against manufacturers of defective consumer products.<sup>2</sup>

The resolution of this appeal may significantly affect Michigan consumers' ability to enforce warranty obligations against manufacturers of defective products. Given the potential impact of this case on Michigan consumers, Michael A. Cox, the Attorney General for the State of Michigan files this amicus curiae brief in support of plaintiff Keith Davis, and urges this Court to affirm the Court of Appeals decision.

The Attorney General's position is that the MMWA allows consumers to bring suit for damages and other legal and equitable relief—including rescission—against the supplier or warrantor of a consumer product who breached a warranty obligation, regardless of whether the consumer purchased the product directly from the supplier or warrantor. Consumers should not be limited to actions against retail sellers, but should be allowed to proceed against manufacturers as well. The Court of Appeals, therefore, correctly held that Davis, the purchaser of a defective RV, was entitled to the remedy of rescission for breach of implied warranty under the MMWA against defendant Forest River, the manufacturer of the defective RV.<sup>3</sup>

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<sup>2</sup> 15 USC 2301 *et seq.*

<sup>3</sup> *Davis v Forest River, Inc*, 278 Mich App 76, 91; 748 NW2d 887 (2008).

## ARGUMENT

### **I. The Magnuson-Moss Warranty – Federal Trade Commission Improvement Act provides for a cause of action for breach of warranty and a remedy of rescission where the plaintiff and the defendant are not in privity of contract.**

#### **A. Privity is not required to proceed on a breach of implied or written warranty claim under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.**

The MMWA is a remedial statute and must be liberally construed to effectuate its intended goals.<sup>4</sup> “The MMWA expressly states three purposes: 'to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.'”<sup>5</sup> Specifically, the MMWA enhances consumers’ ability to enforce warranty obligations against suppliers of defective products and enlarges the remedies available to them for breaches of warranties.

The MMWA allows consumers to bring a breach of warranty action “for damages and other legal and equitable relief” against a supplier or warrantor if they fail to comply with an obligation under a written or implied warranty.<sup>6</sup> The MMWA does not limit consumers to warranty actions against retail sellers. Instead, it allows consumers to “bring suit for damages and other legal and equitable relief” against suppliers or warrantors who breach warranty obligations, regardless of whether the consumer purchased the product directly from the supplier or warrantor.<sup>7</sup>

Through its definitions of “suppliers” and “warrantors,” the MMWA clarifies that privity is not required for a breach of warranty action. Under the MMWA, “supplier” includes any

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<sup>4</sup> *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 98; 537 NW2d 471 (1995).

<sup>5</sup> *Abela v Gen Motors Corp*, 257 Mich App 513, 521-522; 669 NW2d 271 (2003), quoting *Davis v Southern Energy Homes, Inc*, 305 F3d 1268, 1272 (CA 11, 2002).

<sup>6</sup> 15 USC 2310(d)(1).

<sup>7</sup> 15 USC 2310(d)(1) and 15 USC 2301(4) and 15 USC 2301(5).

“person engaged in the business of making a consumer product directly or indirectly available to consumers.”<sup>8</sup> Further, “warrantor” includes any “supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.”<sup>9</sup> Under the MMWA, therefore, consumers<sup>10</sup> can proceed with breach of warranty actions against manufacturers who merely make a product indirectly available to consumers.

In addition to providing an action for breach of warranty without regard to privity, the MMWA prohibits manufacturers – who provide written warranties to consumers – from disclaiming implied warranties in written warranties.<sup>11</sup> If a warrantor provides a written warranty, it must also comply with implied warranties.

While the MMWA prohibits the exclusion of implied warranties in written warranties, the MMWA defers to State law in determining whether such claims exist. The MMWA defines an “implied warranty” as an “implied warranty arising under State law . . . in connection with the sale by a supplier of a consumer product.”<sup>12</sup> State law controls whether consumers may bring implied warranty claims against remote manufacturers.

In Michigan, a consumer may bring a claim against a manufacturer for breach of implied warranty.<sup>13</sup> In *Spence v Three Rivers Builders & Masonary Supply, Inc*, this Court rejected the rule requiring a purchaser to be in contractual privity with the manufacturer in order to bring suit

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<sup>8</sup> 15 USC 2301(4).

<sup>9</sup> 15 USC 2301(5).

<sup>10</sup> Under 15 USC 2301(3), a consumer includes the “buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty . . . applicable to the product, and any other person who is entitled by the terms of such warranty . . . or under applicable State law to enforce against the warrantor . . . the obligations of the warranty.”

<sup>11</sup> 15 USC 2308(a).

<sup>12</sup> 15 USC 2301(7).

<sup>13</sup> *Spence v Three Rivers Builders & Masonary Supply, Inc*, 353 Mich 120; 90 NW2d 873 (1958).

against the manufacturer under a theory of implied warranty. The *Spence* Court held that the privity requirement was unjust, unsound, out of touch with modern-day realities, and in need of abandonment.<sup>14</sup>

This Court continued its criticism of the privity requirement in *Manzoni v Detroit Coca-Cola Bottling Co.*<sup>15</sup> In *Manzoni* it referred to the privity requirement for warranty actions as an “anachronism” left over from a day when “[s]ales were little more than neighborhood trades” and products were “made under the very eyes of the person who ultimately used it.”<sup>16</sup> The Court further explained that the privity requirement was an adjustment to a setting that was mostly free of intermediaries, and much simpler than the modern world and realistically inapplicable to it.<sup>17</sup>

Although *Spence* strongly rejected the privity requirement, some confusion remained regarding whether these cases had merely held that privity is not required for tort actions. In *Cova v Harley Davidson Motor Co*, the Michigan Court of Appeals cleared up any confusion left by *Spence* regarding whether the privity requirement still existed for warranty actions not based in tort by explaining that “a consumer can sue a manufacturer directly for economic loss resulting from a defect in a product attributable to the manufacturer without proving negligence.”<sup>18</sup> The Court went on to say “[i]f all our Supreme Court said in *Spence* was that a consumer can sue a manufacturer for negligence without proving privity of contract, it said nothing new at all, and *Spence*, widely regarded as one of the more important cases in this sector

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<sup>14</sup> *Spence*, 353 Mich at 134-135.

<sup>15</sup> *Manzoni v Detroit Coca-Cola Bottling Co*, 363 Mich 235; 109 NW2d 918 (1961).

<sup>16</sup> *Manzoni*, 363 Mich at 238-239.

<sup>17</sup> *Manzoni*, 363 Mich at 239-241.

<sup>18</sup> *Cova v Harley Davidson Motor Co*, 26 Mich App 602, 609; 182 NW2d 800 (1970).

of the law, is a cipher.”<sup>19</sup> Michigan's rejection of privity is not limited to tort actions, but also applies to actions based on warranty, whether express or implied.<sup>20</sup>

In *Sullivan Industries, Inc v Double Seal Glass Co*, the Court of Appeals held that it is unnecessary to establish vertical privity of contract between the purchaser and manufacturer in a breach of implied warranty action, even where the loss is purely economic.<sup>21</sup> More recently the US Court of Appeals for the Sixth Circuit in *Pack v Damon Corp*, after reviewing numerous Michigan decisions, held that privity is not required to pursue implied warranty claims in Michigan.<sup>22</sup> Because State law permits consumers to sue out-of-privity manufacturers for breach of implied warranty, consumers may also pursue implied warranty claims against remote manufacturers under the MMWA.<sup>23</sup>

**B. Consumers may obtain the equitable remedy of rescission through a warranty action under the MMWA.**

The dissent in the Court of Appeals acknowledged that plaintiff Davis was entitled to recover money damages on his breach of warranty claims against Forest River, but argued that rescission was not an appropriate remedy under the MMWA.<sup>24</sup> Forest River similarly concedes that Davis had standing to pursue an action for breach of warranty against Forest River, but argued that Davis was not entitled to the equitable remedy of rescission.<sup>25</sup> The issue, therefore, is not whether consumers may obtain relief for breach of warranty under the MMWA against an out-of-privity manufacturer, but whether they can obtain an equitable remedy under the MMWA.

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<sup>19</sup> *Cova*, 26 Mich App at 609.

<sup>20</sup> *Reid v Volkswagen of America, Inc*, 512 F2d 1294, 1298 (CA 6, 1975) (construing Michigan law and the Michigan Uniform Commercial Code).

<sup>21</sup> *Sullivan Industries, Inc v Double Seal Glass Co*, 192 Mich App 333, 342; 480 NW2d 623 (1991) citing the dissent in *Auto-Owners Ins Co v Chrysler Corp*, 129 Mich App 38, 42; 341 NW2d 223 (1983).

<sup>22</sup> *Pack v Damon Corp*, 434 F3d 810, 818 (CA 6, 2006).

<sup>23</sup> 15 USC 2301(7).

<sup>24</sup> *Davis*, 278 Mich App at 94 (Bandstra, J., dissenting).

<sup>25</sup> Appellant's Brief on Appeal, pp. 6-7, 10.

The MMWA allows consumers to bring suit against suppliers and warrantors for “damages and other legal and equitable relief.”<sup>26</sup> While the MMWA permits consumers to obtain equitable relief, the MMWA neither clarifies nor restricts the equitable relief available.<sup>27</sup> Additionally, unlike the definition of implied warranties, the section of the MMWA allowing consumers to bring suit for equitable relief does not refer to State law.<sup>28</sup>

In determining what remedies are available under the MMWA, it is important to note that the MMWA “enhances the consumer’s position . . . by enlarging the remedies available to a consumer for breach of warranty.”<sup>29</sup> Further, the remedies available should be determined in light of the fact that the MMWA does not require consumers to be in contractual privity with manufacturers to proceed with breach of warranty claims against manufacturers.<sup>30</sup>

The MMWA recognizes that a manufacturer, who is obligated under a warranty, should be held liable on its warranty for the defective product it produced. Transfer of the consumer product to a retail seller before it is sold to the consumer should not extinguish the consumer’s ability to obtain relief directly from the manufacturer. Since the MMWA allows a consumer to proceed against the manufacturer for breach of warranty, without regard to privity, remedies that would be available against the retail seller should also be available in an action against the manufacturer.

Although the Court of Appeals did not cite any Michigan cases that allowed a consumer to obtain rescission against an out-of-privity manufacturer, other State courts have recognized the propriety of allowing consumers to obtain rescission or similar remedies through the MMWA

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<sup>26</sup> 15 USC 2310(d)(1).

<sup>27</sup> *Lieb v Am Motors Corp*, 538 F Supp 127 (SD NY, 1982).

<sup>28</sup> 15 USC 2310(d)(1).

<sup>29</sup> *Ventura v Ford Motor, Co*, 180 NJ Super 45, 59; 433 A2d 801 (1981).

<sup>30</sup> 15 USC 2310(d)(1).

against out-of-privity manufacturers. The Minnesota Supreme Court in *Durfee v Rod Baxter Imports, Inc*, pointed out that it was fair to hold a manufacturer liable to a consumer purchaser, even though the consumer purchaser did not purchase directly from the manufacturer because the manufacturer extended a warranty to the consumer to drive the sale of its product. According to *Durfee*:

The existence and comprehensiveness of a warranty undoubtedly are significant factors in a consumer's decision to purchase a particular [product]. [Manufacturers] evidently warrant [their products] to increase retail sales.... When the exclusive remedy found in the warranty fails of its essential purpose and when the remaining defects are substantial enough to justify revocation of acceptance, we think the buyer is entitled to look to the warrantor for relief.<sup>31</sup>

In *Shuldman v DaimlerChrysler Corp*, the Court noted “that the absence of privity does not bar application of the remedy of revocation of acceptance of a limited written warranty under the MMWA . . . [s]ince the MMWA makes a warrantor directly liable to a consumer for breach of a written warranty, it would be inconsistent with the purpose of the statute to impose a privity requirement with respect to the remedies for that breach.”<sup>32</sup> The Court concluded that, “[g]iven the remedial purposes of the MMWA,” revocation of acceptance should be available against a manufacturer.<sup>33</sup> Further, in *Ventura v Ford Motor Co*, the New Jersey Supreme Court stated that “once privity is removed as an obstacle to relief there is no reason why a purchaser cannot also elect the equitable remedy of returning the goods to the manufacturer who is a warrantor and claiming a refund of the purchase price less an allowance for use of the product.”<sup>34</sup>

The Michigan Court of Appeals has also found that revocation of acceptance could be an appropriate remedy for a breach of warranty action brought by a consumer who was not in

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<sup>31</sup> *Durfee v Rod Baxter Imports, Inc*, 262 NW2d 349, 357-358 (Minn, 1977). See also *Sheehan v Monaco Coach Corp*, 2006 US Dist LEXIS 5557, 23-24 (ED Wis, 2006).

<sup>32</sup> *Shuldman v DaimlerChrysler Corp*, 1 AD3d 343, 344-345; 768 NYS2d 214 (NY App, 2003).

<sup>33</sup> *Shuldman*, 1 AD3d at 345.

<sup>34</sup> *Ventura*, 180 NJ Super at 64-65.

privity with the manufacturer. In *Gauthier v Mayo*, the Court of Appeals stated that a consumer has a cause of action directly against a manufacturer for economic loss resulting from a defective product, when the defect is attributable to the manufacturer, without proving negligence and without regard to privity.<sup>35</sup> Further, the Court upheld the remedy of revocation of acceptance, stating that by awarding plaintiffs the purchase price paid and ordering the manufacturer to take possession of the defective modular home, the trial court reached a result substantially similar to the damages that would normally be awarded in this type of case.<sup>36</sup>

According to *Gauthier*, “[t]he monetary damages most frequently allowed are for loss of the bargain, e.g., the cost of the defective goods [presumably where the plaintiff has returned the goods to manufacturer, or the defective goods have no salvage value].” “Had the trial court considered this case in terms of product liability, damages awarded under the proofs might well have consisted of the purchase price paid less salvage value.”<sup>37</sup>

In *Murphy v Mallard Coach Co*, the Court similarly found that<sup>38</sup>:

[i]n general, under UCC 2-714(2), absent special circumstances, ‘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.’ However, the calculation of damages under this general rule presumes that the purchaser will retain title to the goods. Plaintiffs have made clear that they do not want the motor home since they have lost confidence in its integrity. In view of the sordid history of this matter, the “hit or miss” way defendants went about determining and fixing the plumbing defects and the ostensibly shoddy workmanship involved in reconstructing the unit after it was dismantled for repairs, we believe that plaintiffs’ sentiments in this regard are justified and that such constitutes sufficient special circumstances to warrant departure from the general rule.

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<sup>35</sup> *Gauthier v Mayo*, 77 Mich App 513, 515-516; 258 NW2d 748 (1977).

<sup>36</sup> *Gauthier*, 77 Mich App at 516.

<sup>37</sup> *Gauthier*, 77 Mich App at 516.

<sup>38</sup> *Murphy v Mallard Coach Co*, 179 AD2d 187, 194-195; 582 NYS2d 528 (NY App, 1992).

While many of the cases discussed above address revocation of acceptance, their reasoning is equally applicable to rescission. Rescission and revocation of acceptance are similar remedies that both permit a consumer to return a defective product and receive a refund. Rescission, however, is an equitable remedy that is based on the discretion of the court, whereas revocation of acceptance is a legal remedy available under the UCC.<sup>39</sup>

In addition to these cases, it is important to note that the Michigan Legislature has recognized that consumers should be allowed to return defective products to manufacturers and receive a refund of the purchase price, even if the product was not purchased from the manufacturer. Michigan's warranties on new motor vehicles act, the "Lemon Law," permits a purchaser of a motor vehicle to obtain a refund from the manufacturer of the purchase price if the motor vehicle is defective and has not been repaired after a reasonable number of attempts.<sup>40</sup> The Lemon Law does not require a consumer to obtain relief from the dealer, but allows recovery against the manufacturer.<sup>41</sup> In fact, it is the manufacturer that is required to provide the refund for the defective vehicle, not the dealer.<sup>42</sup>

Similarly, a consumer should be able to obtain rescission under the MMWA against a manufacturer, without regard to privity. Such a rule recognizes the reality that manufacturers, although they may directly sell their products to retail sellers, entice consumers to purchase their products by providing warranties. To require the consumer to seek rescission against the retail seller or dealer, who likely disclaimed warranties and had nothing to do with the manufacture of the defective product, would lead to wasteful litigation. In fact, if the consumer is able to return

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<sup>39</sup> *Henderson v Chrysler Corp*, 191 Mich App 337, 340-341; 477 NW2d 505 (1991).

<sup>40</sup> MCL 257.1401 *et seq.*, and MCL 257.1403.

<sup>41</sup> MCL 257.1403.

<sup>42</sup> MCL 257.1403.

the vehicle to the dealer for a refund, the dealer would then have to bring an action to seek recovery from the manufacturer through an indemnification action.

Further, contrary to the dissent in the Court of Appeals, there are limits to the number of consumers who will be entitled to rescission against out-of privity manufacturers. First, in order to prevail on an implied warranty claim, a plaintiff must prove that the product was defective when it left the manufacturer's control.<sup>43</sup> Also, in order to obtain an equitable remedy, the plaintiff must prove that there is no adequate remedy at law.<sup>44</sup> If money damages are sufficient, the plaintiff will not be entitled to equitable relief under the MMWA.

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<sup>43</sup> *Holloway v General Motors Corp, Chevrolet Div*, 399 Mich 617, 624-625; 250 NW2d 736 (1977).

<sup>44</sup> *Witt v Tourn-A-Grip Co*, 330 Mich 151, 155; 47 NW2d 57 (1951).

## **II. The Economic Loss Doctrine and the Uniform Commercial Code do not apply to a consumer’s claim for breach of warranty brought under the MMWA.**

The lower court correctly held that the economic loss doctrine does not apply to breach of warranty claims under the MMWA. The economic loss doctrine merely stands for the proposition that a consumer cannot recover contractual damages in a tort action. The economic loss doctrine is concerned with barring tort claims, not breach of warranty claims.

In *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, the Court of Appeals stated “[t]he economic loss doctrine is a judicially created doctrine that bars all tort remedies where a suit is between an aggrieved buyer and a nonperforming seller, the injury consists of damages to the goods themselves, and the only losses alleged are economic.”<sup>45</sup> The *Sullivan* Court applied the economic loss doctrine to bar a plaintiff from bringing a tort action against a remote seller, because the plaintiff could bring a breach of warranty action against the remote seller even though the loss was purely economic.<sup>46</sup>

This Court formally adopted the economic loss doctrine in *Neibarger v Universal Coops, Inc*.<sup>47</sup> In *Neibarger*, the Court concluded that the economic loss doctrine applied in Michigan, and, as a consequence, “where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC.”<sup>48</sup> The doctrine prevents a plaintiff from recovering in tort, for a harm that is fundamentally contractual, unless the plaintiff suffers an injury that is not solely economic.<sup>49</sup> As

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<sup>45</sup> *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 339; 480 NW2d 623 (1991).

<sup>46</sup> *Sullivan Industries, Inc*, 192 Mich App at 342-343.

<sup>47</sup> *Neibarger v Universal Coops, Inc*, 439 Mich 512; 486 NW2d 612 (1992).

<sup>48</sup> *Neibarger*, 439 Mich at 527-528.

<sup>49</sup> *Davis*, 278 Mich App at 90 citing *Neibarger*, 439 Mich at 520-521.

with *Sullivan*, the *Neibarger* Court limited the economic loss doctrine to circumstances in which the parties were businesses.

Michigan Courts eventually extended the economic loss doctrine beyond businesses. In *Quest Diagnostics, Inc v MCI WorldCom, Inc*, the economic loss doctrine was extended to unsophisticated, individual purchasers, but only “where: (1) the parties or others closely related to them had the opportunity to negotiate the terms of the sale of the good or product that caused the injury, and (2) their economic expectations can be satisfied by contractual remedies.”<sup>50</sup> As recognized by the Court in *Quest Diagnostics, Inc*, the doctrine does not preclude a plaintiff from obtaining relief, it just prevents a party from suing a manufacturer on a tort claim if the plaintiff could have sued the manufacturer for breach of contract.

Although Forest River claims that plaintiff Davis should be limited to recovery under Michigan’s Uniform Commercial Code (UCC) based on the economic loss doctrine, the economic loss doctrine does not apply to breach of warranty claims brought under the MMWA.<sup>51</sup> First, the economic loss doctrine is concerned with barring tort actions, not breach of warranty actions. Second, if the economic loss doctrine were interpreted to bar recovery for breach of warranty merely because the claim is brought under the MMWA, instead of the UCC, the doctrine would frustrate the MMWA’s remedial purpose and would prevent any breach of warranty claim under the MMWA.

Further, if the rule were extended to bar recovery under the federal MMWA, a similar argument could be made to bar recovery by the purchaser of a motor vehicle under Michigan’s Lemon Law. The Lemon Law, by allowing the purchaser of a motor vehicle to return a defective

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<sup>50</sup> *In Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 380; 656 NW2d 858 (2002).

<sup>51</sup> See MCL 440.1101 *et seq.*

motor vehicle to the out-of-privity manufacturer, provides a remedy that would not be available under the UCC.<sup>52</sup>

Extending the economic loss doctrine to apply to claims under the MMWA would impermissibly circumvent the protections afforded by the MMWA.<sup>53</sup> The Supremacy Clause of the United States Constitution provides Congress with the power to pre-empt State law.<sup>54</sup> Preemption occurs “when there is outright or actual conflict between federal and State law,” “where compliance with both federal and state law is in effect physically impossible,” or “where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.”<sup>55</sup>

For example, in *LaVene v Volkswagen of America, Inc*, the Court of Appeals held that State law limiting taxable costs to less than those afforded by the MMWA was preempted<sup>56</sup>:

In this case, not only has a conflict arisen between the state and federal law, but, moreover, state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. The MMWA cost-shifting provision authorizes the trial court to award plaintiffs the “aggregate amount of cost and expenses” incurred in litigating their claim, while the RJA authorizes the taxation of some costs, but not others. Accordingly, we conclude that 15 USC 2310(d)(2) preempts the RJA and authorizes the trial court to award costs that may not be taxable under the RJA.

The same result would occur if the economic loss doctrine were interpreted to preclude a plaintiff from asserting a breach of warranty action against a manufacturer under the MMWA.

The economic loss doctrine cannot stand as an obstacle to recovery under the MMWA.

The economic loss doctrine is not a bar to a claim for breach of warranty under the MMWA. While the economic loss doctrine may prevent a party from suing in tort for damages

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<sup>52</sup> MCL 257.1403.

<sup>53</sup> *Wolf v Ford Motor Co*, 829 F2d 1277, 1278-1279 (CA 4, 1987).

<sup>54</sup> US Const, art VI, § 2.

<sup>55</sup> *Duprey v Huron & Eastern Ry Co, Inc*, 237 Mich App 662, 665; 604 NW2d 702 (1999).

<sup>56</sup> *LaVene v Volkswagen of America, Inc*, 266 Mich App 470, 479, 702 NW2d 652 (2005).

that are recoverable through a breach of contract or breach of warranty claim, it does not bar a breach of warranty claim simply because that claim was brought under the MMWA instead of the UCC.

## CONCLUSION

The MMWA allows a consumer to bring a claim for breach of written warranty against a manufacturer, without regard to privity, for damages and equitable relief. While the MMWA also permits a claim for breach of implied warranty, State law controls whether such an action can be brought without regard to privity. In Michigan, a consumer may bring a breach of implied warranty claim against a manufacturer, even if privity is not present. Further, since the MMWA permits consumers to bring an action for breach of warranty against out-of-privity manufacturers and obtain equitable relief, privity should not bar a claimant under the MMWA from obtaining the appropriate equitable relief.

This Court should affirm the decision of the Court of Appeals because plaintiff Davis was entitled to bring a breach of warranty action against Forest River and seek the remedy of rescission under the MMWA.

Respectfully submitted,

Michael A. Cox  
Attorney General

B. Eric Restuccia (P49550)  
Solicitor General  
Counsel of Record

Jason R. Evans (P61567)  
Assistant Attorney General  
Attorney for Attorney General  
Michael A. Cox  
P.O. Box 30213  
(517) 335-0855

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