UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

TROY D. WORLEY,	)	
	)	
Plaintiff,	)	Case No. 1:01CV00102
	)	
v.	)	**OPINION AND ORDER**
	)	
KIA MOTORS AMERICA, INC., ET AL.,	)	By: James P. Jones
	)	United States District Judge
	)	
Defendants.	)	

B.L. Conway, II, Conway Law Firm, P.L.L.C., Abingdon, Virginia, for Plaintiff; Richard D. Scott, Woods, Rogers & Hazlegrove, P.L.C., Roanoke, Virginia, for Defendant Kia Motors America, Inc.

In this case arising out of the purchase of an automobile, the plaintiff asserts claims under the Magnuson-Moss Warranty Act[1] (Count I),Virginia's "Lemon Law"[2] (Count II), and common law fraud (Count III). He seeks compensatory and punitive damages, as well as attorney's fees. The defendant Kia Motors America, Inc. has moved to dismiss Count III on the grounds that (1) the particulars of the alleged fraud

[1] *See* 15 U.S.C.A. §§ 2301-2312 (West 1998).

[2] *See* Va. Code Ann. §§ 59.1-207.9 to .16:1 (Michie 2001).

are insufficiently pleaded, and (2) the punitive damages sought of one million dollars exceed the $350,000 cap set forth in Virginia law.[3]

The plaintiff alleges in his complaint that he purchased a new Kia automobile, and that the vehicle has experienced "continuing problems" that have not been remedied. In Count III, he alleges that the defendants "intentionally made fraudulent misrepresentations as to the safety and condition of the vehicle . . . [and regarding its value] in order to induce its purchase by the Plaintiff."[4]

Federal Rule of Civil Procedure 9(b) imposes a heightened pleading standard in cases of fraud: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."[5] This means, at a minimum, that "the time, place, and contents of the false representations, as well as the identity of the person making the representations" must be stated.[6] The plaintiff's averments clearly do not meet this standard, although I will allow him leave to amend his complaint, if he can, in order to comply with the rule.

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[3] The defendant initially also moved to dismiss Count II, but has withdrawn that request.

[4] Compl. ¶¶ 23-24.

[5] Fed. R. Civ. P. 9(b).

[6] *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (quoting 5 Charles Alan Wright and Arthur R. Miller, *Federal Practice & Procedure: Civil* § 1297, at 590 (2d ed. 1990)).

As far as punitive damages are concerned, the amount claimed does exceed the cap imposed by Virginia law,[7] which I must apply in this state cause of action.[8] Of course, under federal procedure, the ad damnum serves no practical purpose in a contested case, but the better practice is to strike any claim for more than the amount of an applicable statutory cap.[9]

For the foregoing reasons, it is **ORDERED** as followed:

1. The Motion to Dismiss (Doc. No. 2) is granted to the extent as follows;
2. Count III of the complaint is dismissed, with leave granted to the plaintiff to file an amended complaint complying with Rule 9(b) as to Count III, provided such amended complaint is filed within 20 days of the date of entry of this order; and
3. Any claim for punitive damages as to Count III exceeding $350,000 is stricken.

ENTER: November 28, 2001

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United States District Judge

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[7] *See* Va. Code Ann. § 8.01-38.1 (Michie 2000).

[8] *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

[9] *See Paul v. Gomez*, 190 F.R.D. 402, 403 (W.D. Va. 2000).