

MOTOR VEHICLE LITIGATION: WARRANTY AND CONSUMER PROTECTION LAW

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Warranty law in motor vehicle litigation remains somewhat of a “mystery” to many attorneys... and some judges. For most of us, exposure in law school to the Uniform Commercial Code (UCC), Article Two, was not particularly satisfying. This discussion will hopefully provide a useful overview for the practitioner asking “Where do I go next.”

I subscribe to the maxim that “if you take a case to settle, it will be tried,” and “if you take a case to try, it will be settled.” Every warranty (and consumer fraud) case (and prospective client) I believe should be evaluated presuming that within a year or so, his or her story will be told to a jury - - for a “break even” compromise for the client because auto manufacturers may not settle, and car dealers hate to settle.

I. WARRANTY LAW

A. Overview

In addition to the common law, there are three primary sources of warranty law for dealing with an attack of *lemonitis*, * not uncommon in the motor vehicle world. By some estimates, one out of ten new vehicles qualifies as a “lemon.” By another estimate published in *Automotive News*, five percent of new cars sold in the United States are repurchased by manufacturers.

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[* *LEMONITIS* n. serious, stress-induced disorder, sometimes debilitating, often evidenced by *sour* taste, and accompanied by financial, emotional, and occasionally life-threatening symptoms. Known to attack nervous systems of some purchasers of new automobiles with significant impairments to use, or market value, or safety. Complications frequently caused by disgusting attitudes of dealer service managers and manufacturer representatives. Prognosis generally favorable with early diagnosis, good documentation, toughness of character, and aggressive advocacy.]

The three “lemon”-type laws (appropriately named for the sour “taste” a defective car leaves) are the Virginia Warranty Enforcement Act; the Magnuson-Moss Warranty Act; and the Uniform Commercial Code.

**B. VIRGINIA MOTOR VEHICLE WARRANTY ENFORCEMENT ACT,
VIRGINIA CODE § 59.1-207.9 ET SEQ. (“LEMON” LAW)**

1. Introduction

The Virginia lemon law, while not perfect, is among the best in the United States. First enacted in 1984, and amended in 1987, 1988, 1990, 1995, and 1999, this statute can provide a full cash refund of a qualifying motor vehicle’s purchase price (or its replacement or swap), reimbursement of collateral charges (including interest expenses), and “reasonable attorney fees.”

Research on lemon issues frequently entails calling one of the handful of attorneys in the Commonwealth specializing in warranty litigation and in reviewing reported decisions from other jurisdictions. The Virginia Supreme Court, in June, 1998, published its first “lemon” law decision. *Subaru of America, Inc. v. Peters*, 256 Va. 43, 500 S.E.2d 803 (1998). Appendix A. This opinion reflects a major milestone in Virginia consumer law, and qualifies as a landmark decision nationally. The most significant issue in this case had to do with whether a “used” vehicle from the Hertz rental fleet could fall within the Act’s protection. The Court correctly decided that it did, and affirmed the trial court’s final judgment ordering a manufacturer’s repurchase.

2. Criteria to “Trigger” Statutory Entitlement

Although some jurisdictions have lemon laws both for “new” and “used” motor vehicles (*e.g.*, New York), Virginia law focuses on the “newer” automobile. One question arising more frequently in recent months is whether “used” vehicles fall within the Warranty Act. The *Subaru* decision, above, says “yes.” For an impaired vehicle, sold with the balance of a factory warranty and for which all procedural obstacles have been satisfied (notice, cure opportunities, statute of limitations, etc.), the “lemon” law protects the purchaser-transferee. The Warranty Enforcement Act, in avoiding terms such as “first purchaser” or “second purchaser,” adopted a three part definition of “consumer” (§ 59.1-207.11):

- a) the purchaser of “a motor vehicle;” or
- b) a transferee of this vehicle while the factory warranty remains effective; or
- c) any other person with warranty rights under the factory warranty.

Under the Act, there must be a significant impairment to use or market value or safety for a particular motor vehicle used substantially for personal, family or household purposes. A “window” of eighteen months from the vehicle’s delivery date to the consumer exists during which problems must be reported to the manufacturer (usually interpreted to exclude notice to the dealer’s service department).

Lack of proper notice is a common weakness for many prospective clients' cases. Preferred notice, from a proof perspective, is by certified letter to the factory, the address for which can be found in the warranty section of the owner's manual. Occasionally a zone representative has been involved during the eighteen month period ("warranty rights" period) in the vehicle's repair attempts; this qualifies as notice also. After notice, the manufacturer is generally entitled to another "cure" opportunity.

The statute creates a presumption that a vehicle is a lemon, and its owner (or lessee) has been reasonable, under certain circumstances. For example, if during the warranty rights "window" the same significant impairment has been the subject of repairs three or more times, and the problem continues, the consumer may rely on the presumption to shift the burden of proof to the manufacturer. For a safety defect, the factory only has one opportunity for repairs. When, as frequently happens, the vehicle has been out of service during the first eighteen months due to repairs for thirty days or longer - even if all complaints have been resolved - the vehicle is presumed to be a "lemon."

The statute of limitations is eighteen months from date of purchase. This is truly a "short fuse" limitations period, and one of the shortest in Virginia law. However this period may be extended, for deliveries before July 1, 1999, beyond eighteen months by notifying the manufacturer and engaging in good faith in its dispute resolution process. The consumer then has twelve months from the manufacturer's final decision in its dispute process to file suit, but probably no more than four years (UCC statute of limitation) from the purchase date to file suit.

The General Assembly, in its infinite wisdom (or lack thereof), amended the Warranty Act, effective July 1, 1999, so as to require "resort" to the manufacturer's dispute process during the first eighteen months to extend the eighteen month statute of limitations. Unfortunately, consumers unaware of these dispute programs who fail to file lawsuits within eighteen months are probably out of luck, at least under the Warranty Act. (Note that the Magnuson-Moss Warranty Act, discussed below, has a four year statute of limitations.)

An attorney's demand letter explaining the client's complaints and requesting submission of the claim to a any factory-subscribed program to which the manufacturer subscribes should be sufficient. General Motors, Honda, Toyota, and Mazda utilize the Better Business Bureau's AUTOLINE process. Ford and Chrysler have their own settlement boards. Resort to the dispute program is optional; in my experience, rarely does a manufacturer itself send a complaint to ADR after receiving a demand letter. Under the 1999 amendment, resorting to the program extends the filing period by an additional year from the decision.

Computation of damages under the Virginia lemon law for "purchased" vehicles is not particularly complicated since the statute outlines available relief. For example, counsel both for the consumer and the manufacturer should expect the latter to reimburse these amounts:

- A. The purchase price, along with fees for taxes, title, and tags, as published on the

front of the buyers order (contract) or loan application (less any rebate);

B. One hundred percent of interest charges paid for a bank or credit union loan;

C. Loss of use for shop days without a loaner vehicle (\$ 30-50 per day usually);

D. Although controversial, a portion of personal property taxes and insurance (comprehensive) (occasionally 25-50% of amounts paid is negotiated);

E. Mileage driven to and from dealerships and service departments, at \$.175 mile (½ the IRS business use rate for 2002);

F. Repair costs, tow charges, storage fees, and lost wages;

G. Litigation expenses (see Magnuson-Moss, 15 U.S.C. §2310 on this computation), including filing and service, consultant/expert charges, and other expenses (postage, copying, etc.); and

H. Attorney fees (usually \$ 1000-1500 will be paid by a manufacturer before filing suit); keeping an exact record, such as with Timeslips, is essential.

The Act also covers “leased” vehicles. Rather than receiving a refund of a purchase price, the lessee is entitled to recover all lease payments made, and a lease termination without any early termination penalty.

The manufacturer is also entitled to a mileage credit not to exceed ½ of this same IRS rate for mileage driven up to the first complaint of a significant problem - the odometer mileage at time of purchase (which can be thousands of miles) should always be subtracted in determining this credit. (This computation is an example of Virginia’s “better” lemon law; in Maryland, the manufacturer is entitled to a use credit up to fifteen percent of the vehicle’s price, which can be thousands of dollars even for a low-mileage automobile!)

3. Strategies to Avoid Specific Problems

Several thoughts from the “school” of hard knocks are offered:

A. I routinely spend between one and two hours (and sometimes more) in the initial client interview. I have the prospective client discuss the circumstances surrounding the vehicle’s sale (times, dates, witnesses, promises, etc.), the purchase and loan documents (and all discrepancies), each repair order (for which a chronology is prepared with the client’s assistance), all contacts with factory and dealer personnel, and his or her goals for representation.

The subject of vehicle “use” should be covered in this client interview. See the definition of “consumer” in the statute. If the client has reported business mileage, for example, of more than fifty percent to the IRS, it is important to determine “why.” (Optimistic but mistaken tax preparers and accountants can jeopardize an otherwise solid

lemon law complaint.) Expect from the manufacturer a document request for tax returns for the last three to five years when any business use is suspected. (This issue should not be a problem under Magnuson-Moss's definition of "consumer.")

Before being retained, I also discuss legal fees and litigation expenses, and the consumer-client's ultimate risk: *i.e.*, **WINNING BUT NOT WINNING ENOUGH!** (Judges and juries may be reluctant to award the successful plaintiff a full reimbursement of fees and costs sufficient to pay all litigation expenses.)

B. The demand letter package I send to the manufacturer's general counsel (and not to customer service) should comply with the doctrine of completed staff work. It should be reasonably complete, and include copies of all key documents (buyers order, loan agreement, loan amortization, repair orders, ADR decisions, notice letters by the client, etc.) I routinely attach a "draft" motion for judgment to re-enforce the client's position and show that we are serious.

C. If the manufacturer does not respond within ten working days, I routinely go ahead and file suit. A document request should be sent right away to the defendant; a subpoena duces tecum for the selling and the servicing dealership(s) is also important. Regarding this latter point, the practitioner should recognize that for each repair order copy in the client's file, there may exist numerous, supporting service department records and handwritten notes useful for investigating and successfully prosecuting the complaint.

I also send a copy of this motion for judgment, along with a short transmittal letter, to the general counsel - - the door to negotiations should never be "slammed."

D. For trial purposes, one should plan at least two days for trial (including deliberations). I tried a lemon law case against Ford several years ago which lasted five days, followed by a hearing on fees and expenses on the court's motions docket. Also, be alert to the possibility that a defense attorney may argue for a jury trial on fees and expenses - it is a good idea to move to bifurcate fees and expenses well before trial if a bench ruling sought. Manufacturers are known for having endless resources (financial and otherwise) and tenacious outside counsel billing by the hour! I routinely designate two attorney-experts on the issues of fees and expenses; however rarely is there a need to call them since an affidavit should suffice.

With discovery, depositions of your client and your consultant/expert, motions to compel, demurrers and summary judgment motions (all of which must be briefed to educate the court), I would doubt that even seasoned plaintiff's counsel could complete the process in less than 150-175 attorney hours. (Like most complicated lawsuits, several appellate issues will most probably arise in Virginia warranty litigation.)

E. Meticulous detail in time-keeping is essential to recovering all (or most) of your client's attorney fees. In my experience, the real battle often arises over fees, especially since the typical repurchase may only be worth \$ 20-25,000, while attorney time may be worth substantially more! A "lemon" case can become a disappointing *pro bono* exercise -

manufacturers and their “heavy guns” attorneys (big Virginia and D.C. firms) may try to paper you to death. Your client -- already upset about a bad car -- may become uncompromising, demanding, and vindictive.)

So you ask... “How should I charge for all this grief?” Since warranty litigation can be long and hard, I do not suggest pure contingency fee arrangements for most attorneys of modest finances and in thriving practices! Even in an early settlement, there is often very little money left for legal fees and advanced expenses after the bank’s loan is repaid -- remember that a lien-free title must be returned along with the defective vehicle.

One final point on fees: for “frivolous” lawsuits, the manufacturer is entitled to its fees also. As a practice pointer, in a “close” case and before suit is filed, the expert’s opinion whether the vehicle is significantly impaired is invaluable. For procedural issues, contact another attorney knowledgeable in warranty litigation.

F. I will not try a warranty case without an expert witness -- better lawyers may disagree. My theory is simple. Although there is rarely a “smoking gun,” and there is no requirement under lemon law to show “what” is broken and “why,” the typical juror expects someone to explain in automotive terms what the complaint is all about. For entertainment purposes, I usually have my expert present a videotape showing the vehicle and, when applicable, the specific problem. (Check your local high school or junior college for an automotive instructor interested in consumer issues - expect to pay (in advance) \$75-100 per hour for his or her services.)

Recently, defendants have been challenging more frequently the expert’s formal designation. This is the trend in Virginia law. As a minimum the filed designation should include:

- opinions why the defect or condition constitutes a significant impairment to use or market value or safety
- itemization of all the factors considered in forming the opinion
- valuation information, which will usually state fair market value without defects, diminished value on date of delivery, and sometimes current NADA values for retail and trade-in.

G. Expenses for litigating a “lemon” case are not particularly great. The expert will be paid between \$ 500-1500 in the typical lawsuit that goes (or gets close) to trial. I routinely videotape depositions for my own purposes, and do not order transcripts - poor clients can’t pay \$ 3.75 per page. I rarely depose the “bad” guys and their experts, since their testimonies are predictable: “ain’t broke but if it is, the plaintiff did it, and the plaintiff has buyer’s remorse.” (A variation on this theme exists for the defendant confronted with clear evidence of one or more defects: “misuse, abuse, and lack of maintenance.”)

H. The Warranty Act provides that a manufacturer “shall accept return” of an

impaired motor vehicle - failure to comply is the technical violation of this statute. However, if the car has been "repo'd" or "snatched," and sold at auction, there can be a problem. I advise prospective clients to do their best in avoiding repossessions - once the vehicle is gone, the evidence may have disappeared with it. I am only aware of one Virginia opinion, *Cook v. Ford Motor Company* (Fairfax Circuit Court), which held in a Ford Credit repossession that the plaintiff's inability to return the vehicle was not disqualifying. (Note that a Pennsylvania supreme court decision is *contra*.)

I. Most plaintiffs' counsel are "solos" or in small firms. (Don't the big firms always represent the "bad" guys who have all the money?) Office efficiency is critical to making any money in warranty and consumer protection litigation. Quite a bit of lawyer time can be saved with:

- improving computer literacy
- making greater use of computer fax/modem boards and scanners
- reducing unnecessary discovery and limiting depositions
- making the client a "partner" in the litigation, and requiring participation throughout the trial preparation process, especially during the three months before trial
- networking with experienced attorneys
- attending these seminars (!)

J. What results might we expect in "lemon" law litigation? Virginia's most expensive lemon cost Safari, a manufacturer of RV's, \$235,000 (*Gholson v. SMC*). The largest final judgment of which I am aware is *Debrew v. Toyota (Lexus)*, for \$84,000. The most lengthy lemon law case, I presume, was noted above, *Subaru v. Peters* (four years, with two trips to the Supreme Court.)

C. **FEDERAL MAGNUSON-MOSS WARRANTY ACT,
15 U.S.C. 2301 *ET SEQ.***

1. **Introduction**

The most significant warranty act for most consumers the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.* (Mag-Moss), effective January, 1975. This Federal legislation can be a real "sleeper" - - most defense attorneys lack familiarity with its various provisions, and there are not as many reported decisions as one might expect. I usually characterize it as an "umbrella" statute for the Uniform Commercial Code (UCC). Most substantive provisions enforceable in Mag-Moss are found in Article 2 and 2A (leases) of state law, which provides the foundation for warranty law claims.

This Federal law, like Article of the Uniform Commercial Code, applies to all "goods," such as computers, refrigerators, used cars, RV's, jet skis watercraft, etc.

Consumer lawyers often think of this act as merely a fee protection statute, since it prescribes a "lodestar" computation by the court (not jury) for fees (total hours expended times hourly rate), subject, of course, to reasonableness. In my experience, a court

understanding this Federal approach to fee awards may fully compensate the successful complainant in a breach of warranty action. As an example, in Fairfax Circuit Court in 1994 (*Hauth v. Bill Page Toyota*), a \$ 25,000 fee was awarded on a jury verdict of only \$7800. The trial judge clearly recognized the purposes of this warranty legislation, and held the defendant accountable. The Senate's legislative history for Mag-Moss reflects one of the key purposes of fee-shifting law here - - to serve as a penalty against the warrantor that refuses to honor its obligations under law.

Mag-Moss also broadens entitlement to damages for incidental and consequential losses. In light of most warrantor's attempts to disclaim consequential damages, this act limits disclaimers of consequential damages to those "conspicuous on the face of the written warranty." Arguably a manufacturer's disclaimers, buried in dozens of pages of text in the owner's or warranty manual, fail to satisfy this standard. (For the same reason, the "fine print" language on the back of the buyers order for a new or used vehicle arguably not "conspicuous.")

2. Breaches of Express and/or Implied Warranties

Essentially, the warranties arising under the UCC are available for most Mag-Moss automobile claims. The express "limited" warranty from the factory generally promises that it, through its warranty agent-dealers, will repair or replace or adjust defective components during a fixed period of time, or for an established number of odometer miles. This is typically, for example, for a period of three years or 36,000 miles, and sometimes as long as ten years or 100,000 miles.

The second warranty is the implied warranty of merchantability. This "automatic" warranty can not be disclaimed when an express warranty exists. Therefore, the factory remains at risk under this warranty in every "lemon" law complaint. "Merchantability" - - not well understood by bench and bar, is defined in the UCC at §8.2-314 of the Virginia Code. Simply stated, a motor vehicle is merchantable if at time of sale it is in average condition, properly labeled, and fit for ordinary, safe and reliable transportation. This criteria should be distinguished from "substantial impairment of value," for which a UCC contract rejection or revocation might be available against a selling dealership but not a remote manufacturer.

Although at least one Federal District Court judge disagrees, the test of merchantability in my opinion should not be solely "driveability." I offer an example: a used and salvaged motor vehicle incapable of passing a Virginia safety inspection, and reconstructed from two or more "chopped" automobiles of different model years, and for which there is no "rejection" sticker posted, and which cannot be safely operated at speeds above 40 mph . . . is still "driveable!" Yet, an enlightened court should, as would a jury of average intelligence and experience, find a breach of this warranty. See, *e.g.*, *Bayliner Marine Corp. v. Crow*, 509 S.E.2d 499, 503 (Va. 1999) (holding that to be merchantable, the goods must be such as would "pass without objection in the trade" and as "are fit for the ordinary purposes for which such goods are used." Virginia Code § 8.2-314(2)(a), (c). The first phrase concerns whether a "significant segment of the buying public" would object to buying the goods, while the second phrase concerns whether the goods are "reasonably

capable of performing their ordinary functions."). The *Bayliner* opinion is found at Appendix B.

3. Litigation Strategies under Magnuson-Moss

Unlike the Warranty Enforcement Act's checklist approach, damages for breach of warranty are usually based on diminution of value: "how much the consumer overpaid for shoddy merchandise," to use my language. Therefore, expert testimony may be helpful on the valuation issue, in addition to the consumer's opinion. (In Virginia, NADA pricing books are admissible.) Insurance appraisers can provide this information at trial, in addition to the testimony of the vehicle's owner (under Virginia law). As an alternative to loss of value damages, repair costs estimated from "crash books" used by body shops can serve to verify financial loss.

Vehicle use, discussed above under "lemon" law, is less restrictive under this Federal law. Business use may not be disqualifying as long as the vehicle is of a type "normally used for personal, family, or household purposes. §2301(1). While an over-the-road semi tractor-trailer rig may not fit Mag-Moss, the pick-up truck, used to transport an outside salesman's merchandise samples, even after a full tax write-off, should.

"AS IS" disclaimers, often a problem in automobile litigation, are less so under Mag-Moss. For a new car, the factory cannot disclaim implied warranties, or limit incidental and consequential damages except as permitted by the Act. (It should be noted here that in Virginia, most (maybe 100%?) new cars are sold by dealers "AS IS" and with no dealer warranties - in Maryland, new cars cannot be sold "AS IS" by dealers.)

Used car dealerships often attempt to disclaim implied warranties. However, when the selling dealership also provides an written warranty (such as for thirty days), or sells to the buyer an extended warranty (commonly done), it under Mag-Moss cannot disclaim the implied merchantability warranty. Many used car sales, in spite of dealers' best efforts, still fall within Mag-Moss protection for unwary consumers.

Lodestar legal fees have been previously addressed. Arguably, all litigation expenses - broader in scope than Virginia's statutory court "costs" - are recoverable. These, in my opinion, should include experts fees, all loss-of-use including rental expenses, court reporters, deposition charges, etc. §2310(d).

As a final note, I routinely consolidate in the first count of the motion for judgment all claims for violations of Virginia "lemon" law and Mag-Moss. If separate counts are used for lemon law and warranty breach, and the jury feels compelled to "split the baby," the client risks getting less. For example, if the jury picks lemon law over Mag-Moss, recoupment of litigation expenses including fees may be short-changed. If only a Mag-Moss count prevails, the consumer will not get the full cash repurchase available under "lemon" law. However, by combining these statutory theories in one count, the client will hopefully recover an amount closer to a reasonable "break even" figure.

Obviously, the body of law surrounding Mag-Moss is substantially larger than

either Virginia lemon, or lemon law in general. Before filing suit, I would suggest a review of the statute and recent decisions, treatises, and ALR's. An excellent starting point is in the manuals published by the National Consumer Law Center in Boston.

II. CONSUMER FRAUD

A. OVERVIEW

In Virginia, there are three "types" of actionable fraud: deceit, constructive fraud, and consumer misrepresentation. In my experience, alleging deceit and constructive fraud provide marginal relief for the consumer - rare is the judge that will permit exemplary damages to go to the jury in the typical auto dealer case. (I have suspected for quite some time that Virginia law schools do not offer Torts I!) Perhaps more importantly, there is no common law entitlement to legal fees and litigation costs. Therefore, the opportunity for a major punitive award would be required to justify all the aggravation that flows from a fraud count seeking punitive damages.

For most consumer cases, therefore, the Virginia Consumer Protection Act (VCPA) usually provides a better opportunity for recovering from a devastating automobile transaction. The starting point is simple: **READ THE STATUTE CLOSELY** (and frequently). Every time I review this act, I am delighted to find something new.

B. VIRGINIA CONSUMER PROTECTION ACT

Statutory fraud in Virginia is codified at §59.1-198 *et seq.* Under this act, misrepresentations, false promises, and deceptive practices, even if unintentional, are wrongful. The standard of proof is "preponderance," and "reasonable fees and costs" may be awarded. Proof of common law deceit elements is substantially eliminated: damages are statutory; intent is not required; and there probably is no requirement for reliance. Merely observing a deceptive practice should be sufficient to win! (Responding to an advertisement for a "good deal" buy on a new car which never existed is a violation of the act, for which minimum damages should be awarded.)

One "killer" provision that arises in many used car cases requires full disclosure of problems prior to sale. The Consumer Act is violated by

[7.] Advertising or offering for sale goods which are used, secondhand, repossessed, defective, blemished, deteriorated, or reconditioned, or which are "seconds," irregulars, imperfections, or "not first class," without clearly and unequivocally indicating in the advertisement or offer for sale that the goods are used, secondhand, repossessed, defective, blemished, deteriorated, reconditioned, or are "seconds," irregulars, imperfections or "not first class."

Thirty-two "fraudulent acts or practices (§59.1-200) committed by a supplier in connection with a consumer transaction" are declared unlawful. These include violations of the Health Spa, Home Solicitation Sales, Warranty Adjustment, Extended Service Contract, and Automobile Repair acts. The availability of the "catch all" provision,

“[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction,” should at least get the case to the jury.

A significant amendment became effective July 1, 1995. Now, upon proof of a VCPA violation by a supplier, a consumer is entitled to actual damages or \$ 500, whichever is greater. But it gets better... for willful violations, the victim is entitled to treble actual damages, or \$ 1000 (whichever is greater).

Most Consumer Act complaints relate to vehicle sales by new and used car dealers - used car problems far exceed new car grievances. Dozens of devices are used by unscrupulous (and other) dealerships to steal money in a car transaction; to name a few:

- miscalculating the total price of the vehicle, its taxes (using wrong sales tax percentage), all options, etc.**

- representing on the Federally-required Buyers Guide (window sticker) that the vehicle is sold WITH WARRANTY (and not marking the "AS IS" block), so as to reflect an existing factory warranty, when in fact the dealer is selling it "AS IS" and with no dealer warranty**

- selling a vehicle with known but undisclosed mechanical defects or major body damage and concealed repairs, no title**

- selling extended warranties that are ineffective, and may not start until two weeks after the transaction (to avoid a pre-existing defect claim); of for which the proceeds are "pocketed" by the dealer and the warranty is never recorded**

- lying about any aspect of the transaction ("this car has a new turbo, timing chain, and exhaust system....")**

- "swallowing" the downpayment or trade-in's value by not giving the buyer appropriate credits on the buyers order**

- for a lease, selling the vehicle to the leasing company for thousands of dollars more (for dealer profit) than the selling price available to the consumer, without disclosing to the consumer that the lease payment is now inflated to reflect the greater selling price**

- representing that a car is in fact "new" when in fact it is clearly not new under Virginia law (§46.2-1501) (e.g., a car previously sold and returned, or used as a "demo" or for dealer transportation or business)**

I have tried in Fairfax Circuit Court a VCPA case against a large Virginia dealership which sold a new Mitsubishi without disclosing numerous paint defects and "blemishes" (a Consumer Act term); and after the deal was rescinded and the vehicle returned, failed to honor its promise to refund a \$ 2000 downpayment (at least until after a lawsuit was filed). *Aleman v. Stohlman's Tysons Corner, Inc.* (Law No. 151351, tried February 19-20, 1997). The jury found liability for the paint defects but rejected arguments that the dealer's conduct was willful; however, it found willfulness for its violation of the settlement agreement.

The judge surprised plaintiff's counsel by sending the fees issue to the jury at the conclusion of the two day trial. The jury awarded fees for only seventeen hours of attorney time, or about fifteen percent of the fee requested! (A motion to set aside this shockingly "unreasonable" fee award was denied.) To avoid jury deliberations on "reasonable" legal fees, counsel in *Gholson v. SMC* (Fairfax Circuit Court Law No. 183561, 2000) successfully argued that there was no Constitutional right to trial by jury for fee determinations, essentially equitable in nature. See *Stanardsville Vol. Fire. Co. v. Berry*, 229 Va. 578, 583 (1985) (recognizing that the Constitutional right to trial by jury is inapplicable to proceedings in which there was no right to jury trial when the Constitution was adopted).

There is little case law in Virginia on motor vehicle fraud and the VCPA. A recent decision is *Lambert v. Downtown Garage, Inc.*, 553 S.E.2d 714 (Va. 2001). Appendix C.

In some cases, it is prudent to review the Transaction Recovery Fund before filing suit. A good example is where there is a great likelihood that the dealership may close its doors to avoid paying a judgment.

The Recovery Fund statute is published at Virginia Code, §46.2-1527.1. This Fund - in my experience aggressively protected by DMV before the Dealer Board took over - is available for uncollectible fraud-based judgments. Presumably, this would include VCPA judgments for fraudulent conduct and deceptive practices. The first step is filing a lawsuit; service is required on the Board. The maximum recovery is \$ 20,000. I suggest that the language in the court's final order adopt the exact language required by this statute, to avoid a confrontation with the Fund's managers later.

Devastating to consumers with small-value cases is the Board's current position denying awards from the Fund for court-ordered legal fees. This issue has been argued in *Morgan v. Motor Vehicle Dealer Board* before the Virginia Court of Appeals. A decision is expected late summer of 2002.

APPENDIX D BIBLIOGRAPHY

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**Billings, Roger D., Handling Automobile Warranty and Repossession Cases,
2nd Ed. (Clark Boardman Callaghan)**

**Consumer Law for Virginia Practitioners (Virginia CLE)
(and particularly Section IV, "Lemon Law" and Warranty Actions,
by John C. Gayle, Esq., Richmond)**

**Handbook: Virginia Consumer Protection Act of 1977
(Virginia Office of Attorney General, 1993)**

**National Consumer Law Center, 18 Tremont Street, Boston, MA 02108-2336
(Tel. No. 617-523-8089): Manuals available include -**

Sales of Goods and Services

Odometer Law

Unfair and Deceptive Acts and Practices

Repossessions and Foreclosures

1. **Fraud in the inducement of a contract (equitable remedy)**
2. **Mutual mistake of fact (equitable remedy)**
3. **Uniform Commercial Code, Article Two:**
 - A. **Rejection of nonconforming goods ("Perfect Tender" Rule)**
 - B. **Revocation of acceptance**
 - C. **Failure of Warranty's Essential Purpose**
4. **UCC "special circumstances" damages**
Twin Lakes Manufacturing Company v. Coffey, 81 S.E.2d 864 (Va. 1981)
5. **Expiration of 30 day tags (Virginia Code, §46.2-1542.B.)**
6. **"As is" sale (Virginia Code, §46.2-1529.1.C.): Buyer entitled to full refund of all payments for rescission within thirty days of used car, when dealer fails to display Buyers Guide or provide statutory "as is" language in buyers order**
7. **Rescission of new car purchase for damage exceeding 3% of MSRP (Virginia Code, §46.2-1571)**
8. **Rescission for failure of dealer-arranged financing when vehicle returned within twenty-four hours of written or oral notice of credit denial (Virginia Code, §46.2-1530.A.12)**
9. **Virginia "lemon" law repurchase by manufacturer**
10. **Failure of manufacturer's "limitations" in express warranty, converting "limited" warranty to "full" warranty under Magnuson-Moss Warranty Act (see *Envirotech Corporation v. Halco Engineering, Inc.*, 364 S.E.2d 234 (1988))**