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MOTOR VEHICLE LITIGATION:
WARRANTY AND CONSUMER PROTECTION LAW

BY

STEPHEN L. SWANN, ESQ. **
LAW OFFICES OF STEPHEN L. SWANN
1110 NORTH GLEBE ROAD
SUITE 200
ARLINGTON, VA 22201-4795

TELEPHONE 703-243-7938
TELEFAX 703-525-1009
E-MAIL lemonlaw@erols.com
Web: www.carlaws.com
www.RVlemonlaw.info
www.BOATlemonlaw.info

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. 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.

Of course, for used motor vehicles, the chances of being stuck with a defective vehicle are even greater... sometimes due to a vehicle history of salvage and repair attempts, flood damage, or unsuccessful factory repairs and "lemon laundering."

**** Commander, United States Coast Guard (Ret. 1988)**

[* *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 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 a replacement or swap), reimbursement of collateral charges (including interest expenses), and "reasonable attorney fees"... and without any depreciation!

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). 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 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 ONLY eighteen months from date of delivery to the first consumer. This is truly a "short fuse" limitations period, and one of the shortest in Virginia law.

Under prior Virginia law, for deliveries <u>before</u> July 1, 1999, the limitations period could be extended beyond eighteen months by notifying the manufacturer and engaging in good faith in its dispute resolution process. Unfortunately, many Web sites (and sometimes Virginia's consumer protection folks) have not updated their information.

The General Assembly, in its infinite wisdom (or lack thereof) with substantial assistance from the auto industry's lobbyists, 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 sometimes utilize the Better Business Bureau's AUTOLINE program (headquartered in Arlington, VA). 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. Reasonable 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 $.1875 mile (½ the IRS business use rate);

F. Repair costs, tow charges, storage fees, and maybe 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 $ 1500- 2000 will be offered by a manufacturer before filing suit); keeping an exact record of attorney hours 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 valuable. 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 $ 25-35,000, 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.)

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 delay orderig 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 computers, networks, 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 <u>not</u> 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.

The proper 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.").

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 a written warranty (such as for thirty days), or sells to the buyer an extended warranty (commonly done), under Mag-Moss it cannot lawfully 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).

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 provides 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

generally no common law entitlement to legal fees and litigation costs. Therefore, the opportunity for a major punitive damages 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 <u>un</u>intentional, 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 helpful to our clients 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, imperfects, 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, imperfects or "not first class."**

Numerous, listed "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.

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).

Effective July 1, 2004, at the urging of Virginia's used car dealer lobby, "cure offer" language was added to the Consumer Act, requiring the consumer to "beat" any settlement offer of the dealership in order to recover litigation expenses.

The statute of limitations for VCPA actions is generally two years for the date of sale; for fraud, the "knew or should have known" discovery standard applies.

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)

There is little case law in Virginia on motor vehicle fraud and the VCPA. (The limited jurisdiction of our Court of Appeals requires that trial court appeals must go directly to the Supreme Court, unfortunately.) Two recent, noteworthy decisions are *Lambert v. Downtown Garage, Inc.,* 553 S.E.2d 714 (Va. 2001) and *Wilkins v. Peninsula Motor Cars, Inc.*, 587 S.E.2d 581 (2003) (affirming $100,000 punitive damages award against new car dealer in Newport News, VA).

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.

§ 46.2-1527.3. Recovery from Fund, generally. — Except as otherwise provided in this chapter, whenever any person is awarded a final judgment in a court of competent jurisdiction in the Commonwealth for (i) any loss or damage in connection with the purchase or lease of a motor vehicle by reason of any fraud practiced on him or fraudulent representation made to him by a licensed or registered motor vehicle dealer participating in the Motor Vehicle Transaction Recovery Fund or one of a dealer's salespersons acting for the dealer or within the scope of his employment or (ii) any loss or damage by reason of the violation by a dealer or salesperson participating in the Motor Vehicle Transaction Recovery Fund of any of the provisions of this chapter in connection with the purchase of a motor vehicle on or after January 1, 1989, or the lease of a motor vehicle on or after October 1, 1998, the judgment creditor may file a verified claim with the Board, requesting payment from the Fund of the amount unpaid on the judgment. The claim shall be filed with the Board no sooner than 30 days and no later than 12 months after the judgment becomes final.

Virginia Code § 46.2-1527.3

This Fund's $4-5 million in assets - aggressively sheltered by the Dealer Board and its automobile dealer members - are 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.

III. COMMON ISSUES TODAY

One of the more interesting issues for "newer" car purchasers, attempting to qualify for a lemon law repurchase under the Warranty Enforcement Act, concerns the two or three year old vehicle outside the eighteen month limitations period for filing suit. Occasionally, we find that the vehicles have come out of auction and been previously owned by rental companies such as Hertz or Avis. For example, Ford Motor Company, in a Hertz-owned Jaguar case, acknowledged (finally) that our client was the *first* consumer, for whom the vehicle's delivery to her commenced the running of the eighteen months. Ford is repurchasing this three year old Jag under the lemon law.

Of course, as we all know, "used" car buyers assume the greatest risk. Here are a few examples.

A. Certified Used Car Programs

Most manufacturers aggressively market their used vehicles with promises of "certification" (*e.g.*, 127 point inspections) and additional warranty coverage (*e.g.*, additional two years or 24,000 miles). Often the weak link here is the dealership. Some dealers still sell certified vehicles to consumers who believe the vehicle has actually been

carefully inspected and never has been in an accident. When the consumer protests after discovery $1000's of dollars of unrepaired damage, the manufacturer disclaims any liability and puts the blame on the "independent" franchise dealership.

Because the certification program creates a new express warranty, Virginia UCC law implies a warranty of merchantability which can not be disclaimed by the manufacturer under Magnuson-Moss. This implied warranty arises at time of delivery – if the vehicle has a defect or malfunction (Mag-Moss terms) at that time, this powerful warranty is instantly breached. Therefore, a cause of action for breach of express and implied warranties arises against the manufacturer, in addition to any liability of the selling dealership.

B. Ebay Auction Sales

I am still amazed by unsophisticated consumers – knowing zilch or less about buying used vehicles – who have fallen into the Ebay trap. If you thought auction purchases of used cars was risky, just consider Web-promoted sales. I have a new client who bought a used Subaru via Ebay. The selling dealer is in Chicago, and the car (with diminished value of around $6000) was delivered in Virginia. The strategy – at least at the time of this paper – is to file suit in Virginia and hope for a default judgment which will be collectible in Illinois.

C. Flood and Salvage Cars

Used car dealers buy from numerous sources, including salvors. Sometimes the vehicles are still junk, and unsafe. Flood cars are also risky – can you imagine buying a $20,000 stereo system that has been submerged for 30 days? Sometimes a CARFAX report (for about $20) will identify the name of an insurance company as a previous owner, which usually indicates an insurance company repurchase.

D. Used Car Dealership Problems

Most used car dealers try to sell their wares "as is" and with no dealer warranties. Often, they delay submitting to DMV the application for registration until the financing is established and there is no risk of the deal falling through.

To sell a vehicle "as is" in Virginia, the dealership must display a Buyers Guide warning sticker at time of sale, and include in the buyers order contract special statutory "as is" language. Failure to do either can be lethal to the attempted "as is" sale. The sale of an "as is" vehicle without proper disclosure entitles the victim to rescission. See Appendix B.

A second significant issue is not uncommon for used car buyers. The dealership only has thirty days to have the vehicle registered with DMV. On the thirty-first day, ownership reverts to the dealership by operation of law if it is not registered! The consumer is then entitled to a refund of money paid. See Appendix B.

E. Odometer Problems

Sometimes used cars have odometer discrepancies. Virginia and Federal law covers odometer violations. Each has an intent to defraud element, and most dealers will argue that they did not know of the discrepancy. Some use the strategy of marking "True Mileage Unknown" on the odometer statement in anticipation of a complaint.

Rather than engage in a fight under the odometer statutes, the Consumer Protection Act may provide easier relief, including treble damages and attorney fees.

APPENDIX A **BIBLIOGRAPHY**

American Law of Warranties (Two volumes) (Clark Boardman Callaghan)

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

APPENDIX B THEORIES FOR CANCELLATION OF A CAR DEAL

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. Expiration of 30 day tags (Virginia Code, §46.2-1542.B.)

> [B.] A temporary certificate of ownership issued by a dealer to a purchaser pursuant to this section shall expire on receipt by the purchaser of a certificate of title to the vehicle issued by the Department in the name of the purchaser, but in no event shall any temporary certificate of ownership issued under this section be effective for more than thirty days from the date of its issuance. In the event that the dealer fails to produce the old certificate of title or certificate of origin to the vehicle or fails to apply for a replacement certificate of title pursuant to § 46.2-632, thereby preventing delivery to the Department or purchaser before the expiration of the temporary certificate of ownership, the purchaser's ownership of the vehicle may terminate and the purchaser shall have the right to return the vehicle to the dealer and obtain a full refund of all payments made toward the purchase of the vehicle, less any damage to the vehicle incurred while ownership was vested in the purchaser, and less a reasonable amount for use not to exceed one-half the amount allowed per mile by the Internal Revenue Service, as provided by regulation, revenue procedure, or revenue ruling promulgated pursuant to § 162 of the Internal Revenue Code, for use of a personal vehicle for business purposes.

5. "As is" sale (Virginia Code, §46.2-1529.1.B.&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

> [B.] A dealer may sell a used motor vehicle at retail "AS IS" and exclude all warranties only if the dealer provides the buyer, prior to sale, a separate written disclosure as to the effect of an "AS IS" sale. The written disclosure shall be conspicuous and contained on the front of the buyer's order and printed in not less than bold, ten-point type and signed by the buyer: "I understand that this vehicle is being sold 'AS IS' with all faults and is not covered by any dealer warranty. I understand that the dealer is not required to make any repairs after I buy this vehicle. I will have to pay for any repairs this vehicle will need." A fully completed Buyer's Guide, as required by federal law, shall be signed and dated by the buyer and incorporated as part of the buyer's order.

[C.] Failure to provide the applicable disclosure required by subsection A or B of this section shall be punishable by a civil penalty of no more than $1,000. Any such civil penalty shall be paid into the general fund of the state treasury. Furthermore, if the applicable disclosure required by subsection A or B of this section is not provided as required in this section, the buyer may cancel the sale within thirty days. In this case, the buyer shall have the right to return the vehicle to the dealer and obtain a full refund of all payments made toward the purchase of the vehicle, less any damage to the vehicle incurred while ownership was vested in the purchaser, and less a reasonable amount for the use not to exceed one-half the amount allowed per mile by the Internal Revenue Service, as provided by regulation, revenue procedure, or revenue ruling promulgated pursuant to § 162 of the Internal Revenue Code, for use of a personal vehicle for business purposes. Notice of the provisions of this subsection shall be included as part of every disclosure made under subsection A or B of this section. (1995, c. 849.)

6. Rescission of new car purchase for damage exceeding 3% of MSRP (Virginia Code, §46.2-1571)

[E.] If the manufacturer or distributor refuses or fails to authorize correction of such damage within ten days after receipt of notification, or if the dealer rejects the vehicle because damage exceeds the three percent rule, ownership of the new motor vehicle shall revert to the manufacturer or distributor, and the new motor vehicle dealer shall have no obligation, financial or otherwise, with respect to such motor vehicle. Should either the manufacturer, distributor, or the dealer elect to correct the damage or any other damage exceeding the three percent rule, full disclosure shall be made by the dealer in writing to the buyer and an acknowledgement by the buyer is required. If there is less than three percent damage, no disclosure is required, provided the damage has been corrected. Predelivery mechanical work shall not require a disclosure. Failure to disclose any corrected damage within the knowledge of the selling dealer to a new motor vehicle in excess of the three percent rule shall constitute grounds for revocation of the buyer order, provided that, within thirty days of purchase, the motor vehicle is returned to the dealer with an accompanying written notice of the grounds for revocation. In case of revocation pursuant to this section, the dealer shall accept the vehicle and refund any payments made to the dealer in connection with the transaction, less a reasonable allowance for the consumer's use of the vehicle as defined in § 59.1-207.11

7. 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):

[12.] For sales involving dealer-arranged financing, the following notice, printed in bold type no less than 10-point: "THIS SALE IS CONDITIONED UPON APPROVAL OF YOUR PROPOSED RETAIL INSTALLMENT SALE CONTRACT AS SUBMITTED TO OR THROUGH THE DEALER. IF THAT PROPOSED RETAIL INSTALLMENT SALE CONTRACT IS NOT APPROVED UNDER THE TERMS AGREED TO WITH THE DEALER, YOU MAY CANCEL THIS SALE AND ANY DOWN PAYMENT AND/OR

TRADE-IN YOU SUBMITTED WILL BE RETURNED TO YOU, PROVIDED THAT ANY VEHICLE DELIVERED TO YOU BY THE DEALER PURSUANT TO THIS AGREEMENT IS RETURNED TO THE DEALER IN THE SAME CONDITION AS DELIVERED TO YOU, NORMAL WEAR AND TEAR EXCEPTED, WITHIN 24 HOURS OF WRITTEN OR ORAL NOTICE TO YOU OF THE CREDIT DENIAL."

8. Virginia "lemon" law repurchase by manufacturer

9. 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))