

THE SOUTH CAROLINA LEMON LAW: LEMON OR LEMON-AID

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In 1989, a law went into effect to help consumers with defective new cars. The law is formally known as the Enforcement of Express Warranties Act, commonly referred to as the Lemon Law, and is found in Section 56-28-10 et. seq. of the South Carolina Code of Laws 1976, as amended. This article discusses only the Act. There are other code sections which may apply to this type of case, such as S.C. Code Ann. Section 36-2-608, 711, and 714 and the Magnuson-Moss Warranty Act 15 U.S.C. Section 2301 et. seq., but these will not be discussed at this time. Additionally, the issues of fraud or unfair trade practices in the sale of a car are beyond the scope of this article.

At the time of the writing of this article, there are no cases which have interpreted this statute. Fortunately, the statute contains definitions regarding key words used in the statute. As with any statute, however, some provisions will need to be interpreted. Since this is a remedial statute, it should be construed liberally in order to effectuate its purpose.

The public policy behind the lemon law statute is to place upon the manufacturers of motor vehicles the duty to meet their obligations and responsibilities under the terms of the express warranties extended to the consumers of this state.

The first definition in the statute provides a broad identification of a "consumer". Unlike the Uniform Commercial Code, the Lemon Law specifically includes a lessor of an automobile as well as an actual purchaser. Dealers are excluded from the definition of consumer as are those people who purchase a motor vehicle which is not normally used for personal, family or household purposes. This does not mean that the consumer's particular use of the vehicle must be for personal, family or household purposes. The language used by the Lemon Law mirrors that of the Magnuson-Moss Act which has been interpreted to mean that the use of the vehicle must be examined in the light of how the public ordinarily uses that type of vehicle.

Purchasers and lessors are considered consumers under the statute provided the vehicle is subject to the manufacturer's express warranty. The statute also includes as a consumer any other person who is entitled to enforce the warranty against the manufacturer. This is extremely important as the actual lessor of a vehicle is generally a large financial institution which does not particularly care whether the vehicle is operating properly. Many lessors assign their rights to enforce the terms of the manufacturer's warranty to the lessee. Therefore, the lessee, the person actually using the vehicle, may take steps to have the manufacturer conform the automobile to the terms of the warranty.

The term "manufacturer" is defined as any person, resident or nonresident who manufactures, assembles, imports, or distributes new motor vehicles which are to be sold in the State. A dealer, even though it distributes cars, is specifically exempted from this definition by Section 56-28-80, which states that this Act should not be construed to impose any liability on a dealer. The definition also contains an important limitation. As will be discussed later, the vehicle must be sold in South Carolina in order for it to fall under the South Carolina Lemon Law.

The "manufacturer's express warranty" or "warranty" means the written warranty, so labeled, of the manufacturer of a new motor vehicle, including any terms or conditions precedent to the enforcement of obligations under that warranty. Normally, the dealer provides the consumer with the manufacturer's written warranty after the sale of the vehicle.

A "motor vehicle" is defined as every private passenger motor vehicle except motorcycles or a motor driven cycle, so long as it designed, used, and maintained for the transportation of ten or fewer persons and trucks having an empty weight of seven thousand pounds or less and a gross weight of nine thousand pounds or less. Section 56-28-10 (4) excludes the living portion of recreational vehicles and off-road vehicles from the definition of a motor vehicle.

The definition of a "motor vehicle" also requires that the particular vehicle be sold and registered in the State of South Carolina. One issue which has already arisen pertains to leased vehicles. Where is the vehicle sold when the purchasing company, the actual lessor, is outside of the state of South Carolina? What happens if the dealership is out of state but the salesman crosses the state line and has the consumer sign the lease papers in South Carolina, but the lessor who buys the car is out of state? Is that a sale within the meaning of this definition? Does the sale occur when and where the consumer signs the paperwork or is it when and where the foreign dealership sells the car to the out of state leasing company? Will a consumer be able to use this statute if he buys a car over the Internet from a dealer in another state? As our world gets smaller changes will have to be made in this statute to accommodate the free flow of commerce that is rapidly developing in our society.

The fifth definition in the statute defines a "new motor vehicle". This is a private

passenger motor vehicle which has been sold to a new motor vehicle dealer by the manufacturer, which has not been used for other than demonstration purposes, and on which the original title has not been issued from the new motor vehicle dealer.

A "non-conformity" means a defect or a condition that substantially impairs the use, value, or safety of a motor vehicle. A non-conformity does not include a defect or condition that results from an accident, modification, or alteration of the motor vehicle by someone other than the manufacturer or its authorized service agent. The definition requires a consumer to prove a defect or condition that substantially impairs the use, value, or safety of the vehicle. By using the word "condition" the definition, by implication, relieves the consumer of the burden of producing an expert who can identify the exact defect in the vehicle.

The Vermont Supreme Court in Muzzy v. Chevrolet Division, General Motors Corp. held that the consumer does not have to prove an existing defect, or warranty nonconformity, to recover under the Act. Instead, the Act creates an obligation in the manufacturer to replace a motor vehicle if the manufacturer, or dealer, is unable to repair the vehicle, "after a reasonable number of attempts." Plaintiff does not have to prove the nonconformity existed at the time the case is heard. Determination of repair must be based upon a subjective or "satisfaction" standard. The primary mission is to give effect to the intent of the legislature. Remedial statutes are entitled to liberal construction in favor of those who are intended to benefit from the legislation. The manufacturer has the burden of showing that the Plaintiff is not being honest or acting in good faith. The intent of the legislation is to obligate manufacturers to provide speedy and less costly resolutions of automobile warranty problems. An objective standard would require the consumer to hire at least one expert, which would increase costs and time. Additionally, the purchaser of a new car expects, "To receive a vehicle upon whose dependability and safety he could comfortably rely." Thus, the vehicle is more than the sum of its components. It must be reliable and operate well day after day. The Lemon Law protects against the insecurity of ownership of a vehicle which is perceived to be undependable.

In dealing with brakes, the Indiana Supreme Court in General Motors Corp. v. Zirkel found that it does not take an expert to observe that brakes will not adequately stop an automobile the consumer is driving. It is not for the consumer to prove why the brakes were not working. It is sufficient for him to establish to the satisfaction of the trier of fact that they, in fact, did not function properly. Additionally, there is nothing in the "Lemon Law" statute which requires the purchaser of the automobile to present expert testimony as to the failure of the automobile to perform properly.

In Taylor v. Volvo North America Corp., the North Carolina Court found that a warranty under the UCC is any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain. The buyer must prove that the vehicle failed to conform to the express warranty. There is no statutory requirement, however, that the buyer in all cases prove the cause of the nonconformity, or identify any specific mechanical defect related to the nonconformity.

What constitutes a substantial impairment to the use, value, or safety of the motor vehicle has not been defined and should be a question of fact for the jury. The "non-conformity" definition does not specifically state whether a substantial impairment is based on a subjective impairment to the consumer or based on some objective impairment yet to be defined. In Section 56-28-40, however, the statute specifically states that whether the impairment is substantial is determined by the consumer. To keep the statute consistent, this section must be read to allow the consumer to determine what is a substantial impairment of the use, value, or safety of the motor vehicle.

What happens when the non-conformity is intermittent? When a person experiences intermittent problems and avoids using his car for long trips, the car's usefulness and value to the consumer is reduced. The issue of whether the problems constituted substantial impairment is one for the trier of fact.

Section 56-28-20 requires every manufacturer to provide to the Department of Consumer Affairs a written summary of all motor vehicles repurchased or replaced pursuant to the Lemon Law. This report must be provided at least once each calendar year. Additionally, the Department of Consumer Affairs may request other information subject to the chapter whenever the Administrator deems it necessary. Failure to abide by this section subjects the manufacturer to an administrative penalty not to exceed \$1000.00 for each violation. The Administrator of the Department of Consumer Affairs is responsible for imposing this discretionary fine. This section, however, does not state when a manufacturer is required to report a repurchase to the Department of Consumer Affairs. If a consumer complains of defects in a vehicle and receives money or a new vehicle, he may view the transaction as a repurchase or replacement. The manufacturer on the other hand may view this matter as a good will gesture and not as a repurchase or replacement under the statute. By taking this position the manufacturer might not notify the subsequent purchaser that the vehicle was repurchased under the statute. Thus, it will get more for the vehicle and be out less as a result of the transaction.

Section 56-28-30 imposes a duty on the manufacturer to repair a consumer's vehicle at no expense to the consumer if the vehicle does not conform to the warranty within the first twelve months or twelve thousand miles of operation of the vehicle. The statute does not require the consumer to notify the manufacturer, or its agent, during the first twelve months after the purchase or the first 12,000 miles of operation of the defect or condition. It only requires notification be given during the express warranty period. If the consumer does so, the manufacturer must repair the car for free even if the repair occurs outside the warranty period.

Some manufacturers have tried to interpret Section 56-28-30 to mean that the Lemon Law only applies to cars which have problems during the first twelve months or twelve thousand miles of operation. This is an incorrect reading of the statute. The manufacturers rely on Section 56-28-40's use of the word "term" to support their position. Section 56-28-40 states that if during the term specified in Section 56-28-30

the vehicle is not repaired, then the consumer is entitled to a refund or a repurchase. The "term" as used in Section 56-28-30 refers to the warranty term provided by the manufacturer. It does not refer to the twelve months or twelve thousand miles of operation period. If it did, the legislature could have put this language in Section 56-28-40 and prevented any confusion. Since remedial statutes should be construed liberally and because some manufacturers give three year/thirty-six thousand mile warranties, others give four year/fifty thousand mile warranties, one gives a seven year/seventy thousand mile warranty, and one even gives a warranty up to one hundred thousand miles, it makes more sense to equate the word "term" with the warranty term. This interpretation allows the statute flexibility to help the largest number of consumers.

In most cases, the person bringing the law suit has the burden of proving his case. Under the Lemon Law, if a person brings his car in for three repairs for the same problem, the burden shifts to the manufacturer to prove that a defect does not exist. Some manufacturers have taken the position that the consumer must have the same part repaired during three repair attempts within the first twelve months of purchase or the first 12,000 miles of operation before the consumer can assert his rights under the Lemon Law. This analysis is wrong for several reasons. First, the statute's "three repair" provision relates to the shifting of the burden of proof, not to the threshold criteria for bringing a claim. Second, reading the statute in this absurd manner would prevent almost every defective vehicle from being covered by this statute as the time/mileage period usually passes before a vehicle is worked on a second or third time. Lastly, such an interpretation does not follow South Carolina law that remedial statutes must be read broadly to assist consumers.

Under certain circumstances, the consumer must provide written notification of his problems. Establishment that a manufacturer had written notice of a customer's complaints might be met by virtue of the manufacturer's review of work orders. Once notice is given by a consumer to the manufacturer, the manufacturer, or its agent, must make all repairs which are necessary to conform the vehicle to the manufacturer's express warranties.

If the manufacturer, or its agent, is unable to conform the car to the express warranty by repairing or correcting the defect or condition which substantially impairs the use, market value, or safety of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer is required to replace the motor vehicle with a comparable motor vehicle, or at its option accept the return of the vehicle from the consumer, pursuant to Section 56-28-40. The manufacturer is then required to refund to the consumer the full purchase price as delivered including applicable finance charges, sales taxes, license fees, registration fees, and any other similar governmental charges, less a reasonable allowance for the consumer's use of the vehicle. A refund is made payable to the consumer and the lien holder. As a practical matter, the manufacturer is likely to issue two checks, one to the consumer and one to the lien holder.

Unlike Section 36-2-608 dealing with the revocation of acceptance, this statute provides that the manufacturer receive a reasonable allowance for the consumer's use of the

vehicle. A reasonable allowance for use is defined as "that amount directly attributable to the consumer's use of the vehicle before his first report of the nonconformity to the manufacturer, agent, or dealer." Thus, neither the mileage on the car at the time of purchase nor the mileage put on the vehicle during any repair attempt should be counted against the consumer.

The statute also provides a formula to arrive at the amount of the manufacturer's off-set. This formula takes the full purchase price of the vehicle and multiplies it by a fraction having as its denominator 120,000 and as its numerator the number of miles that the vehicle traveled before the first report of the nonconformity. The number of miles on the vehicle at the time of the first report of the nonconformity may usually be found on the repair slip prepared by the repair facility. After the deduction of those miles on the vehicle at the time the consumer bought the car, the reduced figure is divided by 120,000 and then multiplied by the purchase price of the of the vehicle. This gives the amount allowed as an off-set against the consumer's refund.

The following is an example of how to apply this formula: Kirby Consumer pays \$20,000.00 to Fast Fred's Fancy Four-Doors for a new car called the Delila which is made by the Samson Motor Company. Kirby buys the Delila with 1,400 miles on the odometer and uses it as his personal car. When the odometer reaches 11,300 miles, Kirby begins having problems with the engine. When he takes the car to Fast Freddy's, it has 11,400 miles on the odometer. Assuming that the dealership is unable to repair the Delila on this and two (2) other occasions, Kirby can then make a demand on the Samson Motor Company to provide him with a comparable vehicle or repurchase the car. If the manufacturer chooses to repurchase the vehicle, the mileage on the vehicle prior to its purchase must be deducted from the mileage on the vehicle at the time the defect was first reported. Thus, Samson is allowed a credit based on the 10,000 miles driven by Kirby. ($11,400 - 1,400 = 10,000$.)

The formula for repurchasing the car thus looks something like this: \$20,000.00 minus ($\$20,000.00 \times [(11,400 - 1,400) \div 120,000]$). First, determine the mileage credit to the manufacturer (10,000). Second, divide 10,000 by 120,000. This equals .08. Then, multiply .08 by 20,000 which gives you 1600. Lastly, subtract 1600 from 20,000 and you have the amount due from the manufacturer to the consumer. In this example, the consumer is entitled to at least \$18,400 from the manufacturer as a result of the defect in the Delila.

In most cases, the consumer has also paid some finance charges to a financial institution. These interest payments are also recoverable. Finances charges are amounts paid by the consumer at the point of sale. While it is true that all interest is not paid at the inception of the sale, the consumer incurred at the point of sale an obligation to pay the finance charges directly attributable to the purchase of the vehicle.

Section 56-28-40 also provides two restrictions to a consumer's rights to a refund or a replacement. First, the consumer may not receive a refund or replacement if the

nonconformity does not substantially impair the motor vehicle's use, market value, or safety. Second, the consumer may not have a remedy under this statute if the nonconformity is as a result of abuse, neglect, or modification or alteration of the motor vehicle by the consumer.

Section 56-28-50 deals with the number of repair attempts a manufacturer is allowed before the court may presume that a vehicle is defective, thus shifting the burden to the manufacturer to show that the vehicle is not defective. Unlike the Magnuson-Moss Act, which leaves the interpretation of a reasonable number of attempts to repair a motor vehicle up to the courts, Subsection (A) states that it will be presumed that a reasonable number of attempts to repair a vehicle under the express warranty period will occur when the manufacturer or its agent is given three or more attempts to repair the same non-conformity during the express warranty term and the non-conformity continues to exist. Additionally, the manufacturer may have had a reasonable number of attempts to repair the vehicle if the vehicle has been out of service for repairs for a cumulative total of 30 or more calendar days during the express warranty. If repair services are not available because of a war, invasion, strike, fire, flood, or other natural disaster, the express warranty must be extended until the repair services are available. The "three repair attempts" provision does not prevent a person from bringing a claim after only one or two repair attempts. This provision just makes it easier for the consumer to prove his case and recover his losses.

Maintenance checks might also be used to show that the manufacturer had an opportunity to repair a non-conformity. The Superior Court of Delaware in Calbert v. Volkswagon of America, Inc. found that service representatives record customers' complaints. A customer's signature authorizes repair, but does not necessarily indicate an agreement with the service representative's description of the complaint. It is the service representative's function to get from a customer the information necessary to diagnosis a problem. The Delaware Court also reasoned that some of the services were regular maintenance checks and the jury might have inferred that the dealers should have discovered and corrected the problem in the course of performing them.

Section 56-28-50 (B) requires the manufacturer to provide information to the consumer about the consumer's remedies. If the manufacturer, *at the time of the sale, clearly and prominently* notified the consumer that he must provide written notification to the manufacturer that the nonconformity of the vehicle still exists, the consumer may not use this statute's remedies until such notice is given. The manufacturer then has one final opportunity to repair the vehicle. The manufacturer has ten business days to inform the consumer of an appropriate repair facility to which the consumer may take his vehicle. The manufacturer then has ten business days during which to repair the vehicle. If the manufacturer is unable to repair the vehicle within the final ten-business-day period, the manufacturer must replace the vehicle or repurchase it pursuant to Section 56-28-40. The requirement for written notification is a technical requirement which may lead to some litigation. One issue is whether the consumer is given the written notification requirement at the time of the sale. Most written notification requirements are in the warranty manual supplied by the manufacturer. This

book usually sits in the glove compartment until the consumer gets home. Rarely is it even looked at before the sale is completed much less read by the consumer. Additionally, these books can be lengthy and have small type. The question then becomes does "clearly and prominently inform" mean the same as the "conspicuous disclaimer" requirement found in SC Code Ann. Section 36-2-316? To be fair to consumers, it should.

Once the consumer notifies the manufacturer that the vehicle has not been repaired under the express warranty, the manufacturer, pursuant to Section (C), then must inform the consumer of the informal dispute settlement procedure which it has established. If the manufacturer has provided this information previously, it need not do so again. In most warranty books which come with new vehicles, the manufacturer explains its arbitration process or, at least, and the steps the consumer needs to take to avail himself of this process.

Section (D) is extremely important to both the consumer and his attorney. This section allows the consumer who finally prevails in an action under this statute to recover a sum equal to the aggregate amount of costs and expenses incurred in prosecuting the consumer's case. This includes an attorney fee based on actual time spent on the case. This section appears to go further than South Carolina Rules of Civil Procedure Rule 54 dealing with costs which the court may award. Under this section, you may also receive costs which are directly attributable to the nonconformity of the motor vehicle and which were reasonably incurred by the consumer for or in connection with the commencement and prosecution of his action. Thus one should be able to recover deposition expenses and expert witness fees under this statute. The court is not required to award attorney's fees. If, in its discretion, it determines attorney's fees would be inappropriate, the court need not award them.

Section (E) may also prove important. It requires all written notification required by the Lemon Law to be sent by registered, certified, or express mail. Clearly, the idea behind this section is to make sure that the manufacturer has notice of the problem and is given a proper opportunity to repair the vehicle. The question that should be raised at trial is whether the manufacturer received notice of the consumer's complaints. If there is a dispute regarding notification, then section (E) should come in to play. If there is no dispute as to notice, then the failure to send notice by way of certified mail should not matter. At least one Federal District Court in South Carolina, however, has not followed this view but instead has placed form over substance. The Court saw fit to construe strictly this section against a consumer even though both sides agreed that written notice had been sent to and received by the manufacturer. The court found that since the written notification was not sent registered, certified, or express mail, the consumer had failed to follow the statute and therefore was not entitled to the remedies afforded by the statute.

Section 56-28-60 puts further limitations on the consumer's ability to use the Lemon Law. If the manufacturer has established an informal dispute settlement procedure, which would include consumer-industry appeals, arbitration, or mediation panels or

boards, whose decisions are binding on the manufacturer, the consumer must first participate in the informal dispute settlement procedure before demanding that the manufacturer refund his money or replace his vehicle provided in section 56-28-40. If the manufacturer continues to refuse to follow the Lemon Law requirements, the consumer may sue to enforce his rights. Suit must be commenced within three years from the original delivery of the vehicle to the consumer. (See Section 56-28-70.) If a consumer has to sue, his attorney should also consider an Unfair Trade Practices Act claim for failure to follow the law. In Cintron v. Tony Royal Quality Used Cars, Inc., the New York Court of Appeals stated that when the court finds a defendant has violated the public policy of the state, with respect to the sale of a car, in that, the defendant sold a defective vehicle and violated various sections of the law, in relation thereto, the question presented was whether punitive damages could be awarded in that case. The court allowed the award of punitive damages because the defendant's actions were in total disregard of public policy of the state and constituted such conduct which was morally culpable, actuated by evil and reprehensible motives as to amount to gross, wanton and willful fraud.

Section 56-28-80 deals with a dealership's liability for a defective car with respect to the manufacturer. The manufacturer is not allowed to charge the dealer for any costs it incurs in repurchasing or replacing a vehicle unless there is evidence that the repairs done by the dealership were performed in a manner substantially inconsistent with the manufacturer's published instructions.

Under section 56-28-90, the Department of Consumer Affairs may establish a state arbitration board to review matters involving manufacturers that have not created an informal dispute settlement procedure. In these cases, the cost of the board must be borne by the manufacturer of the vehicle purchased or leased by the consumer.

Under section 56-28-100, before a manufacturer may resell, reassign, or retransfer a vehicle which has been repurchased in this state, it must (1) notify the Department of Consumer Affairs within 30 calendar days, in writing, of the vehicle identification number of the motor vehicle, the reason that the vehicle was repurchased, and state that all necessary repairs have been made to the vehicle. (2) The manufacturer must provide a written warranty to the subsequent retail purchaser covering the vehicle for twelve months or 12,000 miles. The warranty must expressly include the component related to the manufacturer's decision to repurchase the vehicle. (3) Lastly, the manufacturer must disclose to any dealer or other wholesaler that the manufacturer had to repurchase the vehicle under the Lemon Law or another provision of law relating to motor vehicle warranties.

Finally, section 56-28-110 requires each seller of the vehicle to notify each subsequent purchaser that the vehicle had to be repurchased under the Lemon Law or another provision of law relating to motor vehicle warranties. Violation of the statute may subject a seller to a penalty of up to five hundred dollars per car. This penalty would be imposed by the Department of Consumer Affairs. The word "Seller" is not found in the statute while the term "motor vehicle dealer" is. By implication, the Legislature meant

the word "Seller" to include private individuals as well as a motor vehicle dealer. Thus, a private individual should give any subsequent purchaser the same notification he received from the manufacturer concerning the defective condition of the vehicle. Otherwise, he, too, may be subject to the administrative penalties imposed by this section.

Obviously, there are other causes of action that could be asserted at the same time the consumer sues under the lemon law. These other claims may also allow the consumer to recover other damages he may have. For example, in some cases, the car is too unsafe to drive or will not run at all. Returning the automobile for the purchase price and collateral charges, as well as an award of damages for loss of use does not constitute a double recovery.

CONCLUSION

The South Carolina Lemon Law is far from a consumer's panacea. It is, however, a major step forward from the remedies provided by the UCC. Rarely, though, does a manufacturer immediately follow the provisions of the Lemon Law. The manufacturer and the dealer will work very hard to keep the consumer in the automobile, even if this means turning a blind eye to obvious problems with the vehicle. An attorney often must communicate with the manufacturer and participate in the arbitration process before the manufacturer will follow the statute. If all else fails, the consumer should file suit under Section 56-28-10 et seq. and he should include an Unfair Trade Practices Act claim for failure to follow the law.

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