



The Lemon Law Revisited

by Cary Powell Moseley

Fourteen years after the enactment of the Virginia Motor Vehicle Warranty Enforcement Act¹ (the "Act" or "lemon law"), the Virginia Supreme Court issued its first written opinion involving this consumer protection statute in *Subaru of America, Inc. v. Peters*, 256 Va. 43 (1998). While the case is a significant consumer law decision, *Peters* is important for a number of issues resolved by the Court:

- (1) "consumer[s]" of certain "used" vehicles qualify for relief (refund or replacement) under the lemon law;²
- (2) repair orders, that show the consumer plaintiff paid nothing for repairs, constitute evidence of warranty defects;³
- (3) the vehicle need not be used by the consumer solely for personal, family or household purposes; instead the critical concern is that purpose for which the vehicle is *substantially* used, and some business use will not necessarily bar the plaintiff's claim;
- (4) the use for business purposes by a prior owner does not bar a claim by the subsequent consumer plaintiff;

and

- (5) the consumer need not meet the lemon law "presumption" in order to qualify for relief.⁴

"Consumer" is defined in the Act as the (1) purchaser, other than for purposes of resale, or

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the lessee, of a motor vehicle used in substantial part for personal, family, or household purposes; (2) any person to whom such motor vehicle is transferred for the same purposes during the duration of any warranty applicable to such motor vehicle; or (3) any other person entitled by the terms of such warranty to enforce the obligations of the warranty.⁵

What damages are recoverable?

The Act provides for recovery of the purchase price and all incidental expenses and collateral charges, in addition to "[m]ileage, expenses, and reasonable loss of use" necessitated by repair attempts, less a mileage credit to the manufacturer for use by the consumer.⁶ The mileage rate "shall not exceed" one-half (1/2) of the amount allowed by the Internal Revenue Service.⁷

"Collateral charges" include any sales-related or lease-related charges including but not limited to

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Letter from the Chair

In this era of vigorous competition among lawyers and law firms for business, of constant fee pressure by insurance companies and institutional clients, of an increasing lack of civility among lawyers, and of the continuing focus on billable hours, it is understandable that many attorneys are not having a wonderful time practicing law. In previous columns, I have commented upon the public's well-known lack of esteem for our profession. The slide in lawyers' standing in the polls of public opinion undoubtedly does little to bolster our feeling of self-worth and job satisfaction. In this column, I will suggest that there are steps that we, as attorneys, can take to have more fun in the practice of law and improve our image with the public in the process.

I work at a firm which has historically represented business interests and institutional clients. Early in my career, I was fortunate to have the chance to try a lot of cases as defense counsel for our insurance clients. I loved trial work, and I enjoy it just as much today, although it seems that opportunities to try cases to a jury verdict are less and less frequent as my career continues.

In 1986, as an associate, my firm assigned a plaintiff's personal injury case to me. The case was for an 80-year-old grandmother, Thelma Smith, who was an acquaintance of one of our senior partners. Our client had broken her hip by falling in an elevator which jolted when she stepped into it. At that time, our firm rarely handled personal injury claims for plaintiffs.

The case was the most memorable and rewarding of my career. In December of 1986, just before Christmas, after much work and investigation, we obtained a substantial six-figure verdict for Mrs. Smith in Norfolk Circuit Court. We proved that the elevator had been the subject of numerous complaints and that the failure to maintain and replace a 50¢ plastic part had caused the accident. The verdict provided enough money that my client could afford to place her elderly husband, who suf-

fered from Alzheimer's Disease and who had been residing in a low-rent nursing home, into an upscale retirement facility. Mrs. Smith also moved into the facility, had her own room, and was able to see her husband on a daily basis. She lived there happily for a number of years until she passed away.

The trial judge, Leonard B. Sachs, asked me to stop by his chambers to speak with him a couple of days after the conclusion of the case. Judge Sachs complimented the victory on behalf of Mrs. Smith. He then went on to give me some advice, which I have thought of frequently over the years. Judge Sachs said that I should not use whatever talent I might have solely on behalf of wealthy clients who could afford large hourly rates. Rather, he suggested that I be open to opportunities to serve clients who needed assistance but who could not afford to pay.

Since then, I have not always done the greatest job of adhering to Judge Sachs' admonition. When I have heeded his advice, however, I have continued to have some of the most rewarding experiences of my career.

Over the years, I have occasionally provided free legal services and advice to low-income members of a local church group. Last year, I defended the director of the church's children's choir, a single mother and teacher, against a felony charge of taking indecent liberties with a male student in a class that she taught. I did not charge for my time. With the assistance of another attorney who agreed to work at 50% of his normal fee and who has more experience in the state criminal system, we obtained an acquittal for our client. At trial, we proved that the complaining student (who was nearly 18 years old) had made the allegations against our client only after being convicted of a charge brought by the teacher of physically threatening her in class. Although the time that I spent on this case did nothing to improve my compensation at year-end, the reward of helping an innocent person who could not afford to pay was signifi-

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cant. I had more fun cross-examining the complaining witness than I have had in years.

I am certain that many of our Section members have had similar experiences. A number of our local bar associations sponsor programs to provide legal services to underprivileged persons. For example, the Virginia Beach Bar Association administers a "C.L.A.S.S." program ("Concerned Lawyers Advocating Spousal Safety") to provide free legal representation at hearings on behalf of battered spouses seeking restraining orders against their abusive partners. Participation in programs of this nature can be extremely rewarding, while giving something back to the public.

As the largest section of the Virginia State Bar, we have many talents that we can volunteer to the public. We understand the court system. We know how to try cases. We often have contacts in the community that allow us to open doors and expedite solutions. We should all be mindful of Judge Sachs' admonition and use our talent for the public good on occasions when there is no money to pay lawyers' fees. We should be willing to accept matters that we do not typically handle, where our services can make a difference. By doing so, we will make our own careers more rewarding and, hopefully, the public will form a better opinion of our profession.

Jeffrey H. Gray, Chair
Board of Governors, Litigation Section

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sales tax, license fees, registration fees, title fees (*i.e.* all charges for "tax, title and tags" on the buyer's order), finance charges and interest, transportation charges, dealer preparation charges, charges for service contracts and charges for various options not recoverable from a third party, as well as damages specific to defective leased vehicles.⁸

"Incidental damages" include those same damages recoverable under the mysterious Uniform Commercial Code:

[i]ncidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.⁹

The successful consumer has his or her unconditional choice of vehicle replacement or refund (repurchase) and "shall recover reasonable attorney's fees, expert witness fees and court costs..."¹⁰ There is some debate about whether vehicle insurance premiums, personal property taxes and other items are recoverable under these somewhat vague definitions.

If the consumer resorts to the manufacturer's dispute resolution procedure and receives a favorable decision, the manufacturer has "forty [40] days from its receipt of the consumer's acceptance of the decision" to "comply" with the decision.¹¹ Treble damages as well as "additional attorney's fees" are available for the manufacturer's failure to comply with the award.¹²

What causes of action are involved?

Generally these cases include counts for breach of warranty¹³ and violations of the Virginia Consumer Protection Act (VCPA).¹⁴ Allegations under the VCPA are almost always met with a demurrer. Although the averments may not have to meet the particularity requirement for fraud, many judges will analyze whether the allegations

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fall under the specific "prohibited practices"¹⁵ in the "line items" in the VCPA.

Do motor vehicle dealers have lemon law liability?

Only "manufacturers,"¹⁶ defined as those who manufacture, assemble or distribute motor vehicles, have potential liability under the lemon law.

When dealer representatives make misrepresentations about the vehicle, claims may be made against the dealer for fraud, breach of warranty, violations of the Magnuson Moss Warranty Act¹⁷ as well as violations of the VCPA.

Claims may also be brought under the Automobile Repair Facilities Act.¹⁸ Repair shops violate Virginia Code § 59.1-207.4 in failing to return parts to the consumer. Repair shops violate Virginia Code § 59.1-207.5 by not providing, for each repair attempt, proper invoices (1) clearly indicating the work performed; (2) identifying the warranty work and non-warranty work; and (3) identifying those parts which were used, rebuilt or reconditioned. These violations are actionable under Virginia Code § 59.1-200 (20) of the VCPA.

Attorney's Fees

The lemon law mandates an award of attorney's fees to the successful consumer plaintiff under Virginia Code § 59.1-207.14. The Magnuson Moss Act gives the court discretion to award attorney's fees under the "lodestar" fee calculation method (hours multiplied by hourly rate):

If a consumer finally prevails in any action...he [she] may be allowed by the court to recover as part of the judgment...costs and expenses (including attorney's fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorney's fees would be inappropriate.¹⁹

Fee awards have ranged from a few thousand dollars to tens of thousands of dollars. Two of the

most prominent warranty litigators, Steve Swann²⁰ of Arlington and John Cole Gayle, Jr., of Richmond, have recovered sizable fee awards. In *Debrew, supra*, the successful consumer plaintiff obtained a jury verdict of \$53,518.00 in addition to an award of \$28,176.55 for attorney's fees and expenses.

Of the other reported cases that went to trial, *Peters, supra*, involved one of the lowest fee awards (\$13,000.00 awarded based on fee request of over \$30,000.00).²¹ However, in *Hay v. Ford Motor Company*, 35 Va. Cir. 176 (Fairfax Cir. Ct., 1994), following a jury verdict of \$28,500.00, the court entered a sizable fee award of \$30,372.00; although the award constituted less than 50% of the fee request, the award was nearly 100% of the time billed on a successful Magnuson Moss count after the court disallowed the time spent on an unsuccessful lemon law claim. *Id.*; see also *Borrasca v. American Honda Motor Co.*, 30 Va. Cir. 5 (Fairfax Cir. Ct., 1992) (awarding \$9,863.00 in expert witness fees and costs as well as \$24,390.00 of a \$38,715.00 fee request).

Significant fees were recovered in a number of cases that did not go to trial and did not involve extensive discovery or in some cases any discovery. See *Varisce v. Ford Motor Company*, 13 Cir. LC2073 (Richmond Cir. Ct., 1998) (awarding \$7,425.00 based on request of \$11,025.00); *Iuorno v. Ford Motor Company*, 13 Cir. LB691a (Richmond Cir. Ct., 1996) (awarding \$6,380.00 of \$12,140.00 request); *Morris v. Ford Motor Company*, 13 Cir. LC26791 (Richmond Cir. Ct., 1998) (awarding \$4,050.00 of request of \$5,850.00).

In consumer protection cases such as this, the monetary value of the case is typically low. If the courts focus only on the dollar value and result of the case when awarding attorney fees, the remedial purposes of the statutes in question will be thwarted. Simply put, if attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients. Thus, practically speaking, the door to the courtroom will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved. Such a situation would be indeed ironic: it is but precisely those with

ordinary consumer complaints and those who cannot afford their attorney fees for whom these remedial acts are intended.²²

In *Hauth v. Bill Page Toyota*, Law No. 132543 (Fairfax Cir. Ct., 1995), the court, awarding a full lodestar fee, stated on the record that Magnuson Moss (and its lodestar fee method)

was designed to level the playing field, by allowing the plaintiff to collect attorney's fees and costs from the losing party. Without that provision a car dealer could, and regularly did, thumb their nose at persons who had bought lemons, because everybody knew that no attorney could afford to take a case and work it to the level that the defendant could afford to work it...So the theory is, then, that the wronged party ought not to have to pay attorney's fees and costs. The losing party ought to have to pay...And I find the 152 hours to be reasonable. I think that the careful counsel these days will investigate all avenues of recovery, and the client shouldn't be penalized if some of those are not able to be proved.

The same reasoning applies to the state lemon law cases: if full fees are not awarded in lemon law actions, manufacturers may continue to "thumb their noses" at consumers. While "fee-shifting statutes are not intended to replicate the fee an attorney could earn through a private fee arrangement with his [or her] client,"²³ it is the consumer who suffers when courts refuse to enter a reasonable fee award.

Some of the Virginia decisions have analyzed which services rendered should be payable,²⁴ why certain fees are "reasonable" or "unreasonable" and how the "lodestar" method is utilized. Other courts have provided little reasoning or analysis for the calculation of an appropriate fee award.

Must the consumer have possession of the vehicle in order to recover?

While this question has not yet been addressed by the Virginia Supreme Court, numerous Circuit opinions have determined that the consumer need not have possession of the vehicle to qualify for relief. *Cook v. Ford Motor Company*, 24 Va. Cir. 377 (Fairfax Cir. Ct., 1991) (Act does not require possession as a condition precedent to recovery); *Niday v. Mitsubishi*, (unpublished opinion)

(Roanoke Cir. Ct., June 11, 1997) (citing *Cook* and holding that the "statute allows damages separate and apart from replacement or refund" and thus possession by the consumer is not required). This result makes sense, particularly where the "repossession" (or "dispossession") is preceded or even occasioned by the manufacturer's failure to fulfill its statutory obligations under the lemon law.²⁵

The Statute of Limitations

The statute of limitations for breach of warranty is generally four (4) years from the date of tender of delivery of the vehicle.²⁶ However, under the lemon law, the limitations period is eighteen (18) months "following the date of original delivery of the motor vehicle to the consumer" although this period may be extended as follows:

any consumer whose good faith attempts to settle the dispute have not resulted in the satisfactory correction or repair of the nonconformity, replacement of the motor vehicle or refund to the consumer...shall have twelve months from the date of the final action taken by the manufacturer in its dispute settlement procedure or within the lemon law rights period, whichever is longer, to file an action in the proper court, provided the consumer has rejected the manufacturer's final action.²⁷

The 18-month "lemon law rights period" is the "period during which the consumer can report any nonconformity to the manufacturer and pursue any rights provided for under this chapter."²⁸

The lemon law rights period "shall be extended if the manufacturer has been notified but the nonconformity has not been effectively repaired by the manufacturer, or its agent, by the expiration of the lemon law rights period."²⁹

In *Robertson v. Ford Motor Company*, 19 Cir. L147140 (Fairfax Co. Cir. Ct., 1996), the Court acknowledged that

there are two ways in which the Lemon Law rights period may be extended, as set out in §59.1-207.13 of the Code. One way to toll the period is to provide "notification" to the manufacturer of the need for correction or repair of the alleged nonconformity within eighteen months after the delivery of the vehicle.

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