

This article was originally published in the February 2011 issue of New Jersey Lawyer Magazine, a publication of the New Jersey State Bar Association, and is reprinted here with permission.

Lemon Car Driving You Crazy?

How the New Jersey Lemon Law Puts Drivers on the Road to Recovery

by Robert M. Silverman

While the term ‘lemon law’ is certainly familiar to the masses, many consumers and attorneys have no idea how these state statutes work, or that most require the offending car manufacturer to pay the prevailing consumer’s attorneys fees and costs. The New Jersey Lemon Law¹ is one of the strongest in the nation, and its recent expansion² will ensure drivers throughout the Garden State do not have to put up with spending more time in the repair shop than on the road. The law³ covers all passenger automobiles and motorcycles leased, purchased or registered in New Jersey, except commercial vehicles and the living facilities of motor homes.

Generally, any lemon law, including New Jersey’s, requires a finding that the ‘lemon’ has been subject to an “unreasonable number of repair attempts”⁴ for a “non-conformity” that “substantially impairs the vehicle’s use, value or safety.”⁵ What varies state to state is a lemon law’s initial coverage period,⁶ as well as the interpreted definition of the above key terms.

Even before the most recent amendments,⁷ the New Jersey Lemon Law received national accolades from the Center for Auto Safety (CAS) as the second most effective lemon law in the country.⁸ In a congratulatory letter sent to then-New Jersey Attorney General David Sampson, New Jersey was lauded for allowing consumers “to go to an attorney immediately to get rid of their lemon rather than waiting for the arbitration process.”⁹ In addition, Clarence Ditlow, CAS executive director, commended the state for providing cost-free legal representation under the law.¹⁰ If a consumer prevails by way of settlement or judgment, the manufacturer is responsible for paying all attorneys fees and costs, in addition to the client’s recovery.¹¹ Ditlow suggested requiring only one repair attempt if a defect threatens death or serious bodily injury, as a way to make the law even stronger.¹²

Expansion of Rights

A bill designed to provide additional consumer protection to New Jersey drivers, Senate Bill 454, was sponsored by Senators Barbara Buono and Nicholas P. Scutari, and signed into law last October by then-Governor Jon Corzine.¹³

Following Ditlow’s suggestion, the amended law states if a defect that could cause serious bodily injury or death occurs in the first two years or 24,000 miles, the manufacturer has only one repair attempt to fix the problem before a consumer can file a claim.¹⁴ There are similar provisions in other states’ lemon laws, including Ohio.¹⁵

The new law also expands coverage to drivers whose first reported non-conformity and request for repair occurs within the earlier of the first two years or 24,000 miles of actual consumer use.¹⁶ Previously, in order to qualify, the first repair/report needed to occur in the earlier of the first two years or 18,000 miles.¹⁷

“Drivers commute to work much farther than when the laws were enacted 18 years ago. Subsequently, consumers were finding their Lemon Law rights being limited to approximately a year of usage,” said Senator Buono in an interview on the website PolitickerNJ.com.¹⁸

In addition, the law pertains to vehicles that are in the shop 20 or more days within the earlier of the first two years or 24,000 miles, regardless of the number of repair attempts.¹⁹

Over the past 20 or so years, many New Jersey judges have broadly interpreted the Lemon Law in order to facilitate consumer protection. Some notable decisions by the court have been the adoption of “shaken confidence” as a means of proving a vehicle is substantially impaired;²⁰ a holding that a “current condition” is not necessary to prevail;²¹ and a general holding that to prove a “non-conformity” a consumer need only prove the existence of a “condition” or “symptom,” as opposed to the “manufacturing defect.”²² Although these holdings may seem minor to those who do not handle Lemon

Law cases, they are crucial at trial.

Potential Remedies

Clients see three potential recoveries as a result of filing a lemon law claim. The actual recovery is primarily based on two variables. First and foremost, how the condition at issue impairs the use, value and safety of the vehicle must be assessed. Second, the repair invoices must be reviewed to determine just how many times a client has returned to the dealership for service.

Was the vehicle in the shop an “unreasonable number of times,”²³ and was it back to back over months or years? Was the vehicle in the shop for long periods of time? Did the problem reoccur following a last-chance repair?²⁴ These answers all provide insight into the type of recovery one can expect.

The stated remedy under the New Jersey Lemon Law is a complete repurchase of the vehicle, including taxes, tags, down-payment, trade-in, non-removable accessories, and finance charges—literally a complete refund of everything the consumer paid for the car.²⁵ A small mileage offset is deducted for the consumer’s actual use before the vehicle’s problem was first brought to an authorized dealer’s attention.²⁶ The mileage offset formula is the purchase price divided by 100,000, times the mileage at the first repair.²⁷

The vehicle is then returned to the manufacturer, and the title is supposed to be branded a lemon before resale.²⁸ The next time the vehicle is sold, the lemon history must be disclosed to the new buyer, along with the reason why the vehicle was repurchased by the manufacturer.²⁹

As an alternative remedy by way of settlement, manufacturers can also offer a vehicle swap. Although the terms of any vehicle swap are the subject of negotiation, the most common seen are manufacturer’s suggested retail price (MSRP) to MSRP swaps. In such a deal, a consumer receives full credit for the

MSRP of the ‘lemon’ as a credit toward the MSRP of any other new vehicle produced by the manufacturer.

Consumers can generally keep the same car loan, and simply exchange one title for the other as collateral, thereby keeping the exact same amount of equity in the new vehicle as they had in their lemon vehicle.

The third remedy tends to come into play when either the non-conformity is less significant or the vehicle is actually fixed after several attempts. In this scenario, the client receives monetary compensation to reflect the diminished value of the vehicle as a result of the non-conformity.³⁰

When a person buys a new vehicle, the price includes a premium for a manufacturer’s warranty ensuring non-conformities are fixed efficiently and effectively. If that does not happen, the manufacturer must be held responsible.³¹ If a consumer receives monetary compensation and keeps their vehicle, the vehicle is *not* branded a lemon in any way, and neither the claim nor the settlement show up on Internet sites, including Carfax.³²

What You Need To Succeed

When it comes to a solid Lemon Law or breach of warranty claim, service records are imperative. Each repair invoice includes pivotal ammunition to be used against the manufacturer, including mileage in and out, the number of days the car was in for service, the complaint made by the driver, and what was done to investigate and attempt to fix the issue. Invoices also include lists of components replaced, technical service bulletins referenced, and, most importantly, confirmation the repair was covered under the manufacturer’s warranty.

Unfortunately, there has been an increase in the number of repair invoices noting the dreaded “could not duplicate” or “no problem found.” Why are these terms used time and time again?

One reason may be the manufacturer cannot figure out a fix to the problem, and thus the dealer is instructed to use the phrase until a solution is found. Another factor may be the dealership itself. As the economy has tanked, so have the amount of resources dealers can use in diagnosing and fixing vehicles. Manufacturers have come down hard on the amount of time and labor they will pay for under their warranties, thus often giving service personnel little to no time to properly duplicate or diagnose an intermittent problem. There has also been a shortage of parts, and, as a result, huge delays in repairs.

Consumers can combat this by providing as much information as they can to the service advisor. If they are hearing a strange noise, where is it coming from; when does it occur; at what speeds do they normally hear it? Also, what does the noise sound like?

Drivers should keep a log pertaining to this information. The more information provided, the better. Also, if feasible, they should ask to go on a quick drive with the service advisor or manager so they can illustrate the problem and possibly help duplicate it promptly.

Lastly, when picking up the vehicle consumers should make sure the service advisor reviews the invoice with them to confirm the information provided is accurate. If the consumer has any questions or issues, he or she should ask to speak to the service manager prior to taking receipt of the car. If an invoice is wrong, the consumer should, there and then, ask for it to be corrected.

Once the consumer has invoices outlining either three repair visits for the same condition (one ineffective one for a serious safety issue) or 20 days out of service, they should seek legal assistance. An experienced Lemon Law attorney knows the case law (both reported and unreported); has access to manufacturer’s counsel to seek possible options to resolve the claim through pre-litigation

if possible; and should have experienced, certified mechanical experts to inspect the vehicle and testify as needed.

What If the Condition Occurs Outside of the Law?

So, what if the vehicle suffers repeat conditions under the manufacturer's warranty, but falls outside of the aforementioned Lemon Law parameters (24,000 miles/24 months), or the vehicle was purchased pre-owned with a manufacturer's warranty? Thankfully, the grandfather of the Lemon Law,³³ the federal statute known as the Magnuson Moss Warranty Act,³⁴ provides consumers with the opportunity to still go after the manufacturer.

The Magnuson Moss statute, which applies to any product costing over \$25, reinforces a consumer's right to have a warranty issue fixed in a timely manner.³⁵ If, for some reason, a problem cannot be fixed within a "reasonable number of repair attempts,"³⁶ the driver has the chance to go after the manufacturer for monetary damages reflecting the diminished value of the vehicle as a result of the malfunction.³⁷

In such a case, the consumer keeps the vehicle. Best of all for consumers, as with the Lemon Law, there is a fee-shifting provision³⁸ ensuring the legal representation is completely free. Consumers and attorneys referring client cases out to Lemon Law attorneys should be cautious if the consumer is being charged a retainer or a contingent fee. If the case is a good one, an experienced attorney will accept it with no retainer, based only on attorney fee shifting. If the case is lost, the attorney simply does not get paid.

The bottom line is, the Lemon Law does provide what can be a sweet ending to a sour situation. If used properly, drivers can find themselves on the road to recovery before they know it. ☺

Endnotes

1. N.J.S.A. 56:12-29 *et seq.*

2. L.2009, c. 324, § 2, eff. Jan. 18, 2010; L.2009, c. 128, § 2, eff. Oct. 1, 2009.

3. N.J.S.A. 56:12-29 *et seq.*

4. N.J.S.A. 56:12-32.

5. N.J.S.A. 56:12-30.

6. In New Jersey, new motor vehicles are covered for the first 24,000 miles or two years of ownership. N.J.S.A. 56:12-31.

7. L.2009, c. 324, eff. Jan. 18, 2010; L.2009, c. 128, eff. Oct. 1, 2009.

8. www.autosafety.org/new-jersey-lemon-law-state-ranking.

9. *Id.*

10. *Id.*

11. N.J.S.A. 56:12-42.

12. www.autosafety.org/new-jersey-lemon-law-state-ranking.

13. 2008 NJ S.B. 454 (NS).

14. N.J.S.A. 56:12-33(a).

15. Ohio Rev. Code Ann. 1345.71-1345.78; Ohio Admin. Code 109:4-4-01-109:4-5-06.

16. N.J.S.A. 56:12-31, N.J.S.A. 56:12-32.

17. L.1988, c. 123.

18. www.politickernj.com/jbutkowski/31171/legislature-approves-buono-lemon-law-expansion-bill.

19. N.J.S.A. 56:12-33(a)(2).

20. *Berrie v. Toyota*, 267 N.J. Super. 152, 157 (N.J. Super. 1993).

21. *DiVigenze v. Chrysler Corp.*, 345 N.J. Super. 314, 329-31 (N.J. Super. 2001).

22. *Christelles v. Nissan*, 305 N.J. Super. 222, 229 (N.J. Super. 1997).

23. N.J.S.A. 56:12-31.

24. N.J.S.A. 56:12-33(b).

25. N.J.S.A. 56:12-32.

26. N.J.S.A. 56:12-30.

27. *Id.*

28. N.J.S.A. 56:12-35.

29. *Id.*

30. N.J.S.A. 12A:2-71.

31. 15 U.S.C. 2301 *et seq.*

32. www.carfax.com.

33. N.J.S.A. 56:12-29 *et seq.*

34. 15 U.S.C. 2301 *et seq.*

35. 15 U.S.C. 2310(d).

36. *GMAC v. Jankowitz*, 216 N.J. Super. 313, 329 (N.J. Super. 1987).

37. *Id.* at 330; N.J. S.A. 12A:2-71.

38. 15 U.S.C. 2310(d).

Robert M. Silverman is a founding partner of Kimmel & Silverman, P.C., the oldest and largest Lemon Law and automotive consumer advocacy firm in New Jersey.