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VIRGINIA'S LEMON LAW: THE BEST TREATMENT FOR CAR OWNER'S CANKER?*

The consumer advocacy movement of the late 1970's induced the Congress and the state legislatures to enact numerous consumer protection statutes. Unfortunately, several years elapsed before the public and the legislatures realized that those statutes did not protect the consumer in what is frequently the consumer's most significant personal purchase—the automobile.

While discount stores replace or refund an item which a purchaser has found defective, there is no such recourse for the man who invests thousands of dollars in an automobile that proves to be defective after he has driven it from the showroom. Responding to the inherent inequity in this situation, legislators in most states began preparing, in their 1983-84 sessions, statutes which emulate the "lemon laws" enacted in 1982 in Connecticut and California. Although lemon laws are little more than a merger of the Uniform Commercial Code's concepts of revocation and warranties,¹ coupled with some of the Magnuson-Moss Act's procedures to protect those warranties,² they specifically address the complexities of automobile sales by extending the inspection period for the consumer in his revocation and by defining a standard from which "substantial impairment" required for revocation may be inferred. They also incorporate the pre-litigation informal dispute settlement mechanisms and some of the attorneys' fees provisions of the Magnuson-Moss Act.³

Whether the lemon laws will protect consumers depends largely on the interpretation of the "impairment" clauses in these statutes. The interpretation will be influenced by court decisions predating the passage of the lemon laws. What Virginia may expect from its lemon law depends

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1. U.C.C. § 2-608 (1977). For a discussion of this and related provisions, see *infra* notes 20-40 and accompanying text.

2. Pub. L. No. 93-637, 88 Stat. 2183-93 (current version at 15 U.S.C. §§ 2301-2312 (1982)). For a discussion of this Act, see *infra* notes 41-46 and accompanying text.

3. See discussion *infra* notes 47-51 and accompanying text.

upon the relative weights given *stare decisis* and legislative intent.

I. THE SEEDS OF VIRGINIA'S LEMON LAW

On March 9, 1984, the Virginia Supreme Court decided *Gasque v. Mooers Motor Car Co.*,⁴ a suit by the purchasers of a "lemon" automobile to cancel the sale and obtain a replacement in kind or a refund of the purchase price. The suit was brought under Virginia's equivalent of section 2-608 of the Uniform Commercial Code, which permits a buyer to revoke acceptance of a purchased item "whose nonconformity substantially impairs its value to him."⁵ The court refused recovery, holding that the purchasers in this case failed to prove substantial impairment, in spite of evidence of the buyers' seven unsuccessful attempts to obtain satisfactory repairs from the dealer. The court held that the test of substantial impairment must be an objective one, and noted that the accumulation of 5,400 miles on the car before the purchasers' attempted revocation was evidence that the automobile substantially fulfilled the purpose for which the car was purchased.⁶ Alternatively, the court also found the buyers' revocation to be defective. The court defined the six months after acceptance as the reasonable time for revocation, and held that the buyer must discontinue use of the automobile subsequent to the notice of revocation. The court concluded that, even if the buyers' notice of revocation seven months after acceptance was reasonable, their continued use of the automobile after notice of revocation was wrongful against the seller.⁷

Approximately six weeks after the *Gasque* decision, the General Assembly passed Virginia's lemon law, the "Virginia Motor Vehicle Warranty Enforcement Act."⁸ Under this statute, a presumption of significant impairment is raised if, within the first year after delivery, the buyer has on four occasions sought repairs of the same major defect without success or has lost use of the car for thirty calendar days within one year for warranty repair work.⁹ The standard for proof of the impairment is subjective; that is, the impairment must be of "the use, market value, or safety of the motor vehicle to the consumer."¹⁰ The complaint must be reported to the manufacturer, its agents, or an authorized dealer within one year of the original date of delivery of the automobile to the buyer.¹¹ Moreover, continued use by the buyer is allowed at a cost to the consumer of not more than half the amount per mile allotted as a deduction for business

4. 227 Va. 154, 313 S.E.2d 384 (1984).

5. VA. CODE ANN. § 8.2-608 (1965).

6. *Gasque*, 227 Va. at 160-61, 313 S.E.2d at 389.

7. *Id.* at 161-62, 313 S.E.2d at 389.

8. VA. CODE ANN. §§ 59.1-207.9 to .14 (Cum. Supp. 1984).

9. *Id.* § 59.1-207.13.B.1 -.2.

10. *Id.* § 59.1-207.13.A (emphasis added).

11. *Id.* § 59.1-207.12.

use of a personal automobile pursuant to section 162 of the Internal Revenue Code.¹² This amount is offset against any refund of the purchase price. Before a consumer may take advantage of the lemon law in court, he must first exhaust his remedies under any properly constituted informal dispute procedure provided by the manufacturer.¹³

The contrast between consumers' rights under *Gasque* and those under the new lemon law is sharp. In *Gasque*, the court required the purchaser to show by a preponderance of the evidence that his conduct in revoking acceptance of the automobile was reasonable. The measure of reasonableness was the time elapsed from purchase to revocation and the continuance of usage after notice of revocation.¹⁴

The General Assembly, on the other hand, took a much more liberal stance regarding the consumer's rights and remedies when a defective automobile is purchased. The intent clause of Virginia's lemon law provides:

The General Assembly recognizes that a motor vehicle is a major consumer purchase, and there is no doubt that a defective motor vehicle creates a hardship for the consumer. It is the intent of the General Assembly that a good faith motor vehicle warranty complaint by a consumer should be resolved by the manufacturer, or its agent, within a specified period of time. It is further the intent of the General Assembly to provide the statutory procedures whereby a consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with the express warranty issued by the manufacturer.¹⁵

At first blush, the lemon law appears to give considerable protection to consumers. Such a conclusion, however, may be illusory. In the first place, Virginia courts may follow the *Gasque* decision, imposing a high burden of proof of nonconformity before the presumption of "significant impairment" is raised.¹⁶ Second, remedies short of litigation, which are increasingly responsive to the consumer, are available even without the lemon law.¹⁷ Finally, the statute itself may prove ineffective for all but the most blatant cases of automotive defects.¹⁸

II. JUDICIAL LEMON APPEALS

Pre-lemon law litigation seeking refunds and replacements of "lemon" automobiles has generally been based either upon the revocation and war-

12. *Id.* § 59.1-207.13.A.2.

13. *Id.* § 59.1-207.10.

14. *Gasque*, 227 Va. at 160-62, 313 S.E.2d at 389-90.

15. VA. CODE ANN. § 59.1-207.1 (Cum. Supp. 1984).

16. See discussion *infra* notes 82-90 and accompanying text.

17. There are several arbitration mechanisms currently being used in Virginia. For a discussion of one of these mechanisms, see *infra* notes 62-79 and accompanying text.

18. See discussion *infra* notes 86-97 and accompanying text.

ranty provisions in article 2 of the Uniform Commercial Code or upon the Magnuson-Moss Warranty Act.¹⁹

A. *The Uniform Commercial Code*

1. Revocation

Under section 2-608 of the Uniform Commercial Code, a buyer may revoke his acceptance of a good whose nonconformity substantially impairs its value to him, but only if he accepted it on the reasonable assumption that the nonconformity would be cured, but it has not been, or if the defect was latent or could not be discovered because of the dealer's conduct in inducing the acceptance.²⁰ The buyer must revoke acceptance within a "reasonable time" after discovery of the nonconformity, and before any substantial change in the condition of the good has taken place. In addition, he must give the seller notice before revocation. By reference, section 2-608 also prohibits the buyer upon rejection from exercising conduct of ownership and requires him to hold the goods with reasonable care until the seller removes them.²¹

The virtues of revocation are that it permits the buyer both to recover the purchase price and to be awarded incidental and consequential damages.²² The drawbacks, however, create a formidable burden for the pur-

19. For a discussion of pre-lemon law litigation, see generally Beattie, *The Connecticut Lemon Law*, 5 BRIDGEPORT L. REV. 175 (1983); Conroy, *L.B. 155: Nebraska's "Lemon Law"; Synthesizing Remedies for the Owner of a "Lemon,"* 17 CREIGHTON L. REV. 345 (1984); Herring, *Sweetening the Fate of the "Lemon" Owner: California and Connecticut Pass Legislation Dealing with Defective New Cars*, 14 TOLEDO L. REV. 341 (1983); Note, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers*, 61 WASH. U.L.Q. 1125 (1984) [hereinafter cited as Note, *Lemon Laws*]. For a less exhaustive but more pragmatic view of the pre-lemon law litigation, see Oxenham, *Automobiles and the Lemon Law*, 7 VA. B.A.J. 18 (Fall 1981); Rigg, *Lemon Laws Should Be Written to Ensure Broad Scope and Adequate Remedies*, 17 CLEARINGHOUSE REV. 302 (1983); Weiss, *Revocation of Acceptance under the U.C.C.—A Motor Vehicle Seller's Point of View*, 19 LAW NOTES 65 (Summer 1983); Woodcock, *The Lawyer v. the Lemon*, 10 BARRISTER 22 (7) (Summer 1983); Survey, *Rescission of Consumer's Purchase of Automobile Permitted upon Proof of Breach of Limited Warranty—Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 801 (1981), 12 SETON HALL L. REV. 414 (1982).

20. U.C.C. § 2-608 (1977). The Virginia equivalent of this section is found at VA. CODE ANN. § 8.2-608 (1965).

21. U.C.C. § 2-602 (1977); VA. CODE ANN. § 8.2-602 (1965).

22. U.C.C. § 2-715, VA. CODE ANN. § 8.2-715 (1965). Comment 1 of this section notes that it is intended to assure reimbursement of the expenses the buyer incurs in handling goods "whose acceptance may be justifiably revoked." Paragraph 2 of the section allows the buyer to claim consequential damages resulting from breach including "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise," as well as injury to person or property as a result of any warranty breach. Because limited warranties often contain language restricting remedies and excluding consequential damages, under U.C.C. § 2-719, an action for revocation is more likely to yield consequential

chaser to overcome. These drawbacks include required degree of "substantial impairment," the amount of "cure" that must be allowed, the time elements for both cure and revocation, whether a test-drive constitutes sufficient inspection to preclude later "discovery,"²³ whether wear, tear, and mileage are evidence of "substantial change,"²⁴ the notice required, and the effect of continued use of the automobile.

The leading case where recovery of the full purchase price was permitted, *Zabriskie Chevrolet, Inc. v. Smith*,²⁵ demonstrates the rigor of proof generally required for the buyer to recover on a theory of revocation of acceptance. In *Zabriskie*, the court held that once the purchaser's faith in the automobile's integrity and reliability is shaken, its value to him is substantially impaired.²⁶ This "shaken faith" standard has since become one by which many courts measure "substantial impairment" in automobile revocation cases.²⁷

According to *Gasque*, however, shaken faith is not the correct measure of substantial impairment in Virginia; instead, substantial impairment is measured objectively according to a standard of "driveability."²⁸ The *Gasque* court also indicated that the automobile manufacturer cannot be liable under section 2-608 of the Uniform Commercial Code because the remedy of revocation lies solely against a seller.²⁹

damages than is an action under breach of warranty.

23. See, e.g., *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, ___, 302 N.W.2d 655, 658 (1981).

24. Such an argument was used by the defendant in *Zlotkowski v. Volvo of America Corp.*, No. LG1995 (Richmond, Va. Cir. Ct. Aug. 2, 1984).

25. 99 N.J. Super. 441, 240 A.2d 195 (1968).

26. *Id.* at ___, 240 A.2d at 205. In *Zabriskie*, the transmission in the plaintiff's car failed in its maiden voyage from the showroom to the purchaser's home. The Zabriskies notified the dealer of their revocation within 24 hours and stopped payment on their check. They refused to attempt further operation of the automobile, and the car was towed back to the dealer, who nonetheless sued them for the purchase price. They declined the seller's attempt to "cure" by replacing the defective transmission with a used transmission. *Id.* at ___, 340 A.2d at 197-98.

27. See, e.g., *Stamm v. Wilder Travel Trailers*, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976); *Asciolla v. Manter Oldsmobile-Pontiac, Inc.*, 117 N.H. 85, 370 A.2d 270 (1977).

28. *Gasque*, 227 Va. at 161, 313 S.E.2d at 389.

29. *Id.* at 161-62, 313 S.E.2d at 389-90. The court rejected the plaintiffs' argument that the holding revived the "archaic doctrine of privity," reasoning that privity has been abolished with regard to breach of warranty actions pursuant to VA. CODE ANN. § 8.2-318. "[T]he remedy of revocation of acceptance under Code § 8.2-608 is conceptually inapplicable to any person other than the parties to the contract of sale sought to be rescinded." *Gasque*, 227 Va. at 162-63, 313 S.E.2d at 390. Other courts, with less comprehensive anti-privity statutes, have also expressly disallowed suits regarding revocation against manufacturers because of a lack of vertical privity. See, e.g., *Seekings v. Jimmy GMC of Tucson, Inc.*, 130 Ariz. 596, ___, 638 P.2d 210, 214 (1981); *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, ___, 374 A.2d 144, 150 (1976); *Edelstein v. Toyota Motors Distrib.*, 176 N.J. Super. 57, ___, 422 A.2d 101, 104-05 (1980); *Clark v. Ford Motor Co.*, 46 Or. App. 521, ___, 612 P.2d 316, 319 (1980).

2. Breach of Warranty

Actions for breach of express warranty under section 2-313 of the Uniform Commercial Code are circumscribed by the fact that all manufacturers except American Motors Corporation offer only limited warranties, covering repair or replacement of defective parts for a limited time.³⁰ Although most buyers may be reasonably protected by the express limited warranty, it restricts the dealer's and manufacturer's obligation. Serious defects are often redressed by repeated repairs.³¹ In addition, the courts have held that the seller's warranty duties are adequately discharged by the dealer's acceptance of the car for repairs.³²

The primary limitation of most express warranties lies in their silence as to refund or full replacement as a remedy. By its exclusion, the refund or full replacement remedy is not part of the warranty. The language of the express warranty, strictly construed, renders it impossible for a buyer to successfully demand refund or replacement of the automobile under the "repair or replace parts" limitation.³³

However, the limited warranty does not preclude refund or full replacement in every case. Two courts have held that the ineffectual repair and replacement of parts caused the limited warranty to fail in its essential purpose, pursuant to section 2-719(2) of the Uniform Commercial Code, and therefore allowed all the Code remedies for breach of a full warranty to become available, including buyer revocation under section 2-608 of the Code.³⁴ In effect, the Code was used to supplement the express limited warranty with a full warranty that would include a refund or full replacement.

Reliance on the implied warranty of merchantability of section 2-314 of the Uniform Commercial Code (or more rarely, that of fitness for a particular purpose under section 2-315), is usually foreclosed by disclaimers. Adoption of the Uniform Commercial Code by virtually all states forced most dealers and manufacturers to satisfy the Code's requirements for valid disclaimers,³⁵ and courts have generally found these disclaimers

30. Note, *Lemon Laws*, *supra* note 19, at 1125 nn.3-4 & app. A.

31. The files of the Better Business Bureau contain several thousand cases where dealer attempts at cure failed to correct the problem; the major overhaul ultimately consented to by the manufacturer upon mediation (for example, replacement of a transmission or even an engine) suggests the magnitude of the repair that, in all probability, was actually needed in these cases. For a discussion of some of these cases, see *infra* notes 76-79 and accompanying text.

32. *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981).

33. U.C.C. § 2-719 justifies limited express warranties.

34. See *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 484-85 (Ky. Ct. App. 1978); *Durfee v. Rod Baxter Imports*, 262 N.W.2d 349, 356-57 (Minn. 1977).

35. Implied warranties of merchantability can be expressly disclaimed by language incorporating the word "merchantability," and if the disclaimer is in writing, as it is on most

adequate.³⁶

One additional argument related to breach of warranty appears to be supported by the Code but has not been fully developed by the courts. This argument deals with the unconscionability provisions of section 2-302. This section expressly allows a court to limit the enforceability of a contract or clause if it is unconscionable. The problem with reliance upon this section, however, is that unconscionability is defined in terms of deviation from the standards of the industry.³⁷ In the case of the automobile industry, the standards include fairly identical warranty provisions among all dealers and manufacturers. There is some case law, however, which by analogy may support an argument based upon section 2-302.³⁸

If a warranty action is successful, the measure of damages under section 2-714 of the Uniform Commercial Code is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special

automobile contracts, the disclaimer must be in "conspicuous" print—print departing in size, font, face, or color from the rest of the fine print in the contract. *See generally* U.C.C. § 2-316.

36. *See, e.g.,* Koperski v. Husker Dodge, Inc., 208 Neb. 29, ___, 302 N.W. 2d 655, 662-63 (1981); Marshall v. Murray Oldsmobile Co., 207 Va. 972, ___, 154 S.E.2d 140, 144 (1967). *But see* Henningsen v. Bloomfield Motors, Inc., 32 N.J. Super. 358, ___, 161 A.2d 69, 95 (1960) (finding the disclaimer of an implied warranty of merchantability unconscionable).

37. Before the U.C.C. was written, the case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. Super. 358, 161 A.2d 69 (1960), addressed the issue of unconscionability with regard to a warranty disclaimer in fine print. Since adoption of the Code, however, automobile manufacturers have learned to disclaim warranties successfully. *See supra* notes 35-36 and accompanying text. It is unlikely that unconscionability can be shown merely by an inequality in bargaining power. *See, e.g.,* Seekings v. Jimmy G.M.C. of Tucson, Inc., 130 Ariz. 596, 638 P.2d 210 (1981); Hahn v. Ford Motor Co., 434 N.E. 2d 943 (Ind. App. 1982); Ford Motor Co. v. Moulton, 511 S.W. 2d 690 (Tenn. 1974).

In a jurisdiction such as Kentucky, where "unconscionable" has been read liberally as "unfair," *see* Ford Motor Co. v. Mayes, 575 S.W. 2d 480 (Ky. Ct., App. 1978), an unconscionability argument has more merit.

It should be recognized, however, that comment 1 of § 2-302 outlines that "[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." In short, usage in the trade is determinative of the base standard, and only if the contract substantially departed from that standard would the court have to check that departure for unconscionability. When all the car dealers in the United States use form contracts of essentially the same terms, it would be difficult indeed to show one to be unconscionable. The mere fact that it is a form or "adhesion" contract does not place it within the purview of § 2-302.

38. In products liability cases, such arguments have succeeded. *See, e.g.,* Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, ___, 424 N.E.2d 568, 578-79 (1981) (advertisement concerning Jeep performance in rough terrain relevant to consumer's reasonable expectations and the legal issue of punitive damages); City Dodge, Inc. v. Gardner, 232 Ga. 766, ___, 208 S.E.2d 794, 797-98 (1974) (fraudulent misrepresentations vitiated the contract containing the disclaimer).

circumstances show proximate damages of a different amount."³⁹ In some instances, courts have found this figure to be the entire purchase price.⁴⁰

B. *Magnuson-Moss Warranty Act*

Recognizing the weakness of consumers' bargaining power vis-a-vis manufacturers, Congress enacted the Magnuson-Moss Warranty Act.⁴¹ The Act contains particular provisions for warranty practices in the case of automobile sales.⁴²

Under the Act, a manufacturer that provides a written warranty may not disclaim implied warranties.⁴³ The implied warranties, however, are coterminous with the typically limited written warranty in an automobile purchase.⁴⁴ These limited warranties restrict a purchaser's remedies to repair or replacement of defective parts and also restrict damages.⁴⁵ Thus, the Magnuson-Moss Act does little directly for the owners of a lemon automobile.⁴⁶

The Magnuson-Moss Act, however, does provide for attorney's fees,⁴⁷ and, when used effectively in conjunction with the Uniform Commercial Code provisions, may allow both revocation for the full purchase price and an award of attorney's fees under the Magnuson-Moss Act.⁴⁸ In addi-

39. U.C.C. § 2-714(2); VA. CODE ANN. § 8.2-714(2) (1965).

40. *Orange Motors, Inc. v. Dade County Dairies, Inc.*, 258 So. 2d 319, 321 (Fla. Dist. Ct. App. 1972); *Appleman v. Fabert Motors, Inc.*, 30 Ill. App. 2d 424, —, 174 N.E.2d 892, 897 (1961). *But cf. Performance Motors, Inc. v. Allen*, 280 N.C. 385, —, 186 S.E.2d 161, 167-68 (1972) (entire purchase price not necessarily measure of damages; case remanded for determination of actual damages).

41. Pub. L. No. 93-637, 88 Stat. 2183-2193 (current version at 15 U.S.C. §§ 2301-2312 (1982)). For general discussion of the Act, see 1974 U.S. CODE CONG. & AD. NEWS 7702, 7705-11; see also D. KING, C. KUENZEL, T. LAUER, N. LITTLEFIELD & B. STONE, *COMMERCIAL TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 1-68* (3d ed. 1981); P. SPEIDEL, R. SUMMERS & J. WHITE, *TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW 659-61* (3d ed. 1981); Rothschild, *The Magnuson-Moss Warranty Act: Does It Balance Warrantor and Consumer Interests?*, 44 GEO. WASH. L. REV. 335 (1976).

42. 15 U.S.C. §§ 2309-2310 (1982).

43. *Id.* § 2308.

44. See Note, *Lemon Laws*, *supra* note 19, at 1125 nn.3-4 & app. A.

45. 15 U.S.C. § 2304(a) (1982).

46. In *Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 801 (1981), however, the court disregarded the significant differences between limited and full warranties. It found that, under the Magnuson-Moss Warranty Act, a written warranty precludes disclaimers of an implied warranty and that any such disclaimers were therefore invalid. Consequently, the purchaser could revoke the purchase because the warranty, part of the contract obligation, had been breached by the substantial, and uncured, impairment of the car. Nonetheless, limitations of warranty and priority difficulties generally make the Act rather toothless. See Note, *Lemon Laws*, *supra* note 19, at 1142-45.

47. 15 U.S.C. § 2310(d)(2) (1982).

48. See, e.g., *Riley v. Ford Motor Co.*, 442 F.2d 670 (5th Cir. 1971); *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024 (Miss. 1982); *Champion Ford Sales, Inc. v. Le-*

tion, the Magnuson-Moss Act has resulted in the establishment of informal dispute settlement mechanisms.⁴⁹ The effectiveness of these informal dispute settlement mechanisms is easily overlooked because the procedures involve unpublished and confidential hearings before an arbitration panel.⁵⁰ The fact that virtually all the lemon laws now enacted⁵¹ incorporate the Magnuson-Moss type of informal dispute settlement mechanism underscores the important role of arbitration in this area.

III. INFORMAL DISPUTE SETTLEMENT PROCEDURES

A. *The Federal Trade Commission Regulations under the Magnuson-Moss Warranty Act*

Under the Magnuson-Moss Warranty Act, if a business or manufacturer has established an informal dispute procedure to handle consumer complaints that properly conforms to the Federal Trade Commission's requirements, a dissatisfied consumer must resort to such mechanism before seeking judicial remedies.⁵² The FTC regulations require a warrantor to disclose in its written warranty specific information regarding the informal dispute mechanism it has adopted⁵³ and also require establish-

vine, 49 Md. App. 547, 433 A.2d 1218 (1981); *Schrimpf v. General Motors Corp.*, Wis. Ct. App. No. 81-921 (March 10, 1982).

49. See 16 C.F.R. pt. 703 (1985).

50. 15 U.S.C. § 2310(a)(2) (authorizing the Federal Trade Commission rule 16 C.F.R. § 703.8(b) which permits hearings to be confidential).

51. ARIZ. REV. STAT. ANN. §§ 44-1261 to -1265 (1984); CAL. COM. CODE § 1793.2(e) (West Cum. Supp. 1984); 1984 Colo. Sess. Laws 1105, ch. 319, tit. 42, art. 12; 1984 Conn. Legis. Serv. 338 (West); DEL. CODE ANN. tit. 6, §§ 5001-5009 (Cum. Supp. 1984); FLA. STAT. ANN. § 681.10 to .108 (West Cum. Supp. 1984); 1984-85 Ill. Legis. Serv. 121.5 ¶ 1201-1208 (West); 1984 Iowa Legis. Serv. 164 (West); ME. REV. STAT. ANN. tit. 10, §§ 1161-1165 (Cum. Supp. 1984); MD. COM. LAW CODE ANN. § 14-1501 (Cum. Supp. 1984); MASS. ANN. LAWS ch. 90, § 7N½ (Cum. Supp. 1984); MINN. STAT. ANN. § 325 F. 665 (Cum. Supp. 1984); MO. ANN. STAT. §§ 407.560-579 (Vernon Supp. 1985); MONT. CODE ANN. §§ 61-4-501 to -507 (1984); NEB. REV. STAT. §§ 60-2701 to -2709 (Supp. 1983); NEV. REV. STAT. § 598.1 (198—); N.H. REV. STAT. ANN. § 357-D:1 (Repl. Vol. 1984); N.J. STAT. ANN. §§ 56:12-19 to -28 (West Cum. Supp. 1985); N.Y. GEN. BUS. LAW § 198-a (McKinney Cum. Supp. 1984); OR. REV. STAT. § 646.3 (1983); 1984 Pa. Legis. Serv. Act 28 (Purdon) (to be codified at 73 PA. CONS. STAT. ANN. §§ 2001-2014); 1984 Tenn. Pub. Act. ch. 1004, § 2124; TENN. CODE ANN. §§ 55-24-101 to -108; TEX. CIV. CODE ANN. § 6.07(a)-(i) (198—); VA. CODE ANN. §§ 59.1-207.9 to .14 (Cum. Supp. 1984); WASH. REV. CODE ANN. § 19.118.010 to .070 (Cum. Supp. 1985); W. VA. CODE ANN. § 46A-6A-1 to -9 (Supp. 1984); WIS. STAT. ANN. § 218.015 (1984 Interim Annot. Serv.); WYO. STAT. ANN. § 40-17-101 (Supp. 1984).

In addition to the statutes mentioned above, Georgia, Hawaii, Kansas, and South Dakota have recently passed lemon laws which have not been published as of the writing of this article. Kentucky boasts strong warranty and consumer protection laws that the state legislature apparently considers sufficient to render a lemon law unnecessary. See KY. REV. STAT. ANN. §§ 367.110-990 (Baldwin 1981).

52. 15 U.S.C. § 2310(3) (1982) and the regulations promulgated pursuant thereto, 16 C.F.R., Part 703.

53. See 16 C.F.R. § 703.2 (1985). The minimum requirements, as set out in subsection (b),

ment of the arbitration mechanism along certain guidelines. If an arbitration mechanism fails to satisfy these requirements, the consumer is free of the obligation to proceed through arbitration before bringing suit in court.⁵⁴

In order for an informal dispute procedure to qualify under the regulatory scheme, the mechanism must be provided free of charge to the consumer and must be insulated from any influence by the warrantor or the sponsor.⁵⁵ The regulations also detail certain operational, record-keeping, and audit requirements which include a forty-day dispute resolution time (dated from notification of the dispute), the duty of the mechanism to investigate, gather, and organize particular information, the right of the parties to an oral presentation, and disclosure of the decision and the reasons therefor, with a specified time for performance by the manufacturer if that is part of the resolution.⁵⁶ The consumer may pursue judicial remedies if the decision or its performance is unsatisfactory.⁵⁷ The result of the informal dispute mechanism is admissible as evidence in litigation, and although the warrantor may be contractually bound by the arbitration decision, the consumer is not.⁵⁸ Statistical summaries, open to public

include:

- (1) A statement of the availability of the informal dispute settlement mechanism;
- (2) The name and address of the Mechanism, or the name and a telephone number of the Mechanism which consumers may use without charge;
- (3) A statement of any requirement that the consumer resort to the Mechanism before exercising rights or seeking remedies created by Title I of the Act; together with the disclosure that if a consumer chooses to seek redress by pursuing rights and remedies not created by Title I of the Act, resort to the Mechanism would not be required by any provision of the Act; and
- (4) A statement, if applicable, indicating where further information on the Mechanism can be found in materials accompanying the product

54. *See id.* §§ 703.3-.8.

55. *Id.* § 703.4. To assure this requirement is satisfied, the regulations mandate that, when there are three arbitrators in a panel deciding a dispute, "at least two-thirds shall be persons having no direct involvement in the manufacture, distribution, sale or service of any product." *Id.* The regulations expressly exclude stock-ownership solely for investment as a "direct involvement." If there are fewer than three arbitrators, they must all be insulated from influence.

56. *Id.* §§ 703.5-.8.

57. *Id.* §§ 703.5(d), (g), (j).

58. *Id.* §§ 703.2(f), 703.5(j). As a means of engendering goodwill and encouraging arbitration in lieu of legal action, contracts between the manufacturer and the mechanism make the arbitration binding on the manufacturer but not on the consumer. In practice, however, many critics of the informal dispute settlement procedure argue that, regardless of such representations, the consumer and the manufacturer are equally bound. When the finding is for the consumer, he usually accepts it and abandons any potential litigation. When the finding is for the manufacturer, the consumer may proceed to suit, but any adverse finding by the arbitration panel may be introduced in evidence in a trial with obviously deleterious effects. Thus, in effect consumers are "bound" by the situation, if not by the precise terms of the agreement.

inspection,⁵⁹ are required of those providing the mechanism, along with annual audits to verify compliance.⁶⁰

B. *Informal Dispute Settlement Agreements in Virginia*

There are four active arbitration mechanisms in Virginia that handle disputes between automobile owners and manufacturers,⁶¹ but none presently meets the regulatory requirements of the Act. Their failings, however, do not involve the requirements of gratuitous assistance or impartial arbitrators,⁶² but rather their inability to satisfy the forty-day resolution time. Although the time lag is not damaging to the arbitration result, it can be exceedingly harmful if the consumer elects to pursue his case in court. The Magnuson-Moss Warranty Act and its concomitant regulations, having been designed to encourage speedy arbitrations, make no provision for tolling the statute of limitations during the course of the settlement procedures.

1. A Survey of Better Business Bureau Sponsored Arbitration in Virginia

Widespread consumer dissatisfaction with General Motors' products, which generated the formation of the DDOG (Disgruntled Diesel Owner's Group, Inc.), ultimately led to a consent decree in December 1983 between the Federal Trade Commission and General Motors. The decree provided for arbitration by the Better Business Bureaus across the country of consumer complaints regarding problems with diesel engines, defective cam shafts, and THM-200 transmissions.⁶³ General Motors had previously contracted with the Better Business Bureau to arbitrate owner complaints.⁶⁴ Consequently, the Better Business Bureau has accumulated three years of experience with automobile arbitration, including "buy-

59. *Id.* §§ 703.6, 703.8.

60. *Id.* § 703.7.

61. The Chrysler Customer Satisfaction Board, the Ford Appeals Board, AUTOCAP (a voluntary program established by the Automotive Trade Association and the National Automobile Dealers Association), and the Better Business Bureau, which handles all arbitration for General Motors, Nissan, Porsche/Audi, Honda, American Motors, and Volkswagen.

62. The adequacy of insulation of the boards from the warrantors has been questioned. *See, e.g., Rigg, supra* note 19, at 309.

63. Much of the information that is contained in this section is a summary of the study of the mediation and arbitration files gathered by the Better Business Bureau in Richmond, Virginia over the past three years. This survey was made possible by special permission from the Better Business Bureau and John R. Day, Consumer Relations Manager, General Motors Corporation, Detroit, Mich. Permission was conditioned upon confidentiality with regard to the automobiles and the consumers.

64. General Motors Corp., Prohibited Trade Practices, and Affirmative Correction Actions, 16 C.F.R. 13, Proposed Consumer Agreement, 48 Fed. Reg. 20730 (May 9, 1983); Consent Order, 48 Fed. Reg. 54333 (Dec. 2, 1983).

backs" and exchanges in kind. Its experience is indicative of what one might expect from arbitration panels under the lemon law. It further suggests what type of evidence juries may find sufficient to justify the extreme remedy of a complete repurchase of the automobile by the manufacturer.

A review of the arbitration files at the Better Business Bureau in Richmond, Virginia, revealed that many car owners' complaints are resolved prior to arbitration. The primary reason for this seems to be the manufacturer's involvement. Once a consumer complains to the Better Business Bureau, the Bureau initiates mediation by sending notice to the manufacturer. At this point, the dealer becomes merely an agent of the manufacturer and all repairs are made at the manufacturer's expense. Any concern the dealer might have had with minimizing the customer's repair bill or assuring reimbursement by the manufacturer for warranty work is eliminated.⁶⁵

If, during the mediation stage, the manufacturer refuses to perform the repairs, or if he makes repairs and they fail, or if the purchaser refuses to accept repair as a remedy, then arbitration ensues. It must be noted, however, that purchasers who are uncooperative at the mediation stage may hurt their case in the eyes of the arbitrators or may not be able to take their case to court.⁶⁶

2. The Arbitration Procedures

The arbitration procedures used by the Better Business Bureau are detailed in two booklets published by the Bureau.⁶⁷ These booklets are available to both the arbitrators and the plaintiff. Except for the extended time lag between complaint and resolution, the Better Business Bureau basically adheres to and augments the informal dispute requirements set by Federal Trade Commission regulations pursuant to the Magnuson-Moss Act.⁶⁸ The Bureau collects all documents and correspon-

65. The manufacturers' procedures with regard to payment for warranty work would presumably have a direct impact upon the work done. A typical procedure for reimbursing dealers for warranty work provides for payment to dealers on a flat-rate schedule for warranty repairs and replacements. If the initial warranty work is unsuccessful for a reason other than a defective replacement part, the dealer must bear the costs of correction, despite the fact that the job is putatively covered under the manufacturer's warranty.

66. See 16 C.F.R. § 703.5(3)(i) (1985) (restricting a consumer from bringing suit until final resolution of arbitration, which resolution may be delayed until the consumer cooperates by providing information necessary for resolution). It should also be noted that, when a consumer is uncooperative, the manufacturers' defense of lack of maintenance by the consumer becomes more believable. See *infra* notes 73-74 and accompanying text.

67. BBB AUTOLINE, MODIFIED RULES FOR THE ARBITRATION OF AUTOMOTIVE DISPUTES (1984); BBB AUTOLINE, A NATIONAL PROGRAM OF MEDIATION/ARBITRATION FOR AUTOMOTIVE DISPUTES (1984) [hereinafter collectively cited BBB AUTOLINE publications].

68. See *supra* notes 52-60 and accompanying text.

dence, and transmits communications between the parties. It schedules an arbitration date, and each party is given a list of arbitrators' names, with biographical data, to be rank-ordered from 1 to 6. In the case of a requested buy-back, the Bureau employs a three-person panel if possible, but for lesser claims a single arbitrator must suffice. The persons with the lowest combined rankings are selected, so long as that grouping conforms with the two-thirds nonproduct-oriented membership requirement of the federal regulations.⁶⁹

The list of arbitrators is compiled by the Better Business Bureau from a group of people who volunteer to serve. The arbitrators receive some minimal training.⁷⁰ At present, the Bureau's list of arbitrators contains two persons who deal in automotive parts; these individuals are frequently chosen as arbitrators, presumably because they have expertise in automotive parts and may even compete with the manufacturer for supplying replacement parts.

Once the arbitration panel is selected, the parties must prepare their cases. If requested, the Better Business Bureau will assist the plaintiff in preparing his or her *pro se* presentation, outlining what evidence should be produced and how the evidence should be presented. The plaintiff is encouraged to prepare questions to ask the manufacturer's representative. The plaintiff is further advised to drive the defective vehicle to the hearing if possible.⁷¹

The plaintiff begins his or her presentation with an opening statement and then submits all evidence to the panel. The evidence usually consists of all the work orders, proof of title, odometer mileage (at purchase, on the various service dates, and at the present time), affidavits of passengers or mechanics other than those of the dealer or manufacturer, copies of the contract for purchase and of the warranty, and other supportive documentation.⁷² In addition, the plaintiff is free to call any witnesses. The panel and the manufacturer's representative then question the plaintiff. Thereafter, the manufacturer's representative, and sometimes the dealer as a witness, make statements and review the evidence brought by the plaintiff.

It is apparent from both file materials and personal observations at hearings that the defense typically attempts to show that the alleged de-

69. See BBB AUTOLINE publications, *supra* note 67. For a discussion of the federal regulations regarding the qualifications of an arbitration panel, see *supra* note 55.

70. The Better Business Bureau periodically seeks volunteers via a public service advertisement in the newspapers. The volunteers are interviewed and screened under the criteria of 16 C.F.R. § 703.4, subject to the mechanism's own assessment of suitability, and given a three-hour training session. The Better Business Bureau maintains a general policy of confidentiality of its files in accordance with 16 C.F.R. § 703.8(b).

71. See BBB AUTOLINE publications, *supra* note 67.

72. No rules of evidence are imposed. *Id.*

fact does not exist or that it was occasioned by improper maintenance by the plaintiff.⁷³ One recurrent assertion is that the dealer repeatedly accepted the automobile for servicing merely to quell the persistent nuisance claims of a chronic complainer. Some commentators have portrayed the manufacturer's representative as an overbearing figure who regularly appears before the arbitration panel armed with highly technical information to confuse the plaintiff and the arbitration panel,⁷⁴ but this portrait does not seem justified. For one thing, any technical information submitted by the manufacturer's representative is usually offset by the plaintiff, who has typically gained some knowledge about his or her car's defect simply by virtue of the many service calls, discussions, and consultations with outside mechanics. Furthermore, the arbitration panel becomes noticeably skeptical about ponderous technical information and may be irritated by it.

After the manufacturer's representative has made his statement, the panel and the plaintiff have the opportunity to ask questions. The plaintiff may then rebut the claim of improper maintenance by producing records, and can undermine the nuisance claim defense through his demeanor and indications of reliance on the repairs. Typically, a roundhouse discussion develops, controlled by questions and requests by the arbitrator. The plaintiff is allowed a summation, but more often than not, it has little persuasive effect. Then the panel may test-drive the car to witness personally the defective performance the plaintiff complains of.

The head of the arbitration panel terminates the meeting and may call for an immediate discussion among the panelists *in camera*. The Bureau, however, strongly urges panels not to reach a decision on the spot. Within ten days, the panel submits its notarized, jointly signed decision, which includes a statement of the reasons for its ultimate finding. Copies of the decision are transmitted to the parties and the plaintiff may accept or reject the decision. If he or she accepts, the decision is binding on the manufacturer.⁷⁵ If the plaintiff rejects the decision, he or she may proceed to litigation. In the alternative, if the plaintiff believes the decision to be clearly erroneous or if new evidence arises, he may request a rehearing.⁷⁶

73. For example, the manufacturer may offer evidence of "varnish" in the crankcase to show that the consumer failed to lubricate the car properly.

74. See Rigg, *supra* note 19, at 309.

75. Cf. 16 C.F.R. § 703.2 (f)-(h) (requiring the warrantor to perform all obligations which it has agreed to, act in good faith, and comply with reasonable requirements imposed by a qualifying mechanism).

In a case pending at the writing of this article, the manufacturer had refused to accept the decision on the ground that there was no substantial evidence for it. That problem was referred to the Office of the Council of Better Business Bureaus for legal counsel, which directed that the manufacturer is contractually bound to perform on its obligation.

76. See BBB AUTOLINE publications, *supra* note 67, for description of procedures for requesting a rehearing. In studying the Better Business Bureau files, it appears that no re-

3. The Results of Arbitration

a. Exchanges

The author's search of the files of arbitration cases, encompassing three years of records, proved more revealing for the insights it allowed into the general content and trend of arbitration decisions than for actual statistics. Three replacements were requested, and all were awarded exchanges. In the first case, the automobile suffered from a defective transmission, front end problems, electrical problems, and a persistent vibration. It had undergone sixteen repairs within eleven months. The resolution was replacement of the automobile with an identical second-hand model of similar mileage, which the manufacturer sought and arranged for. The financing bank was persuaded to transfer the collateral.⁷⁷ The other two cases were diesel automobiles with multiple visits for excessive oil consumption, failing fuel injectors, transmission problems, and other diesel-engine related difficulties. In both cases, the diesel automobile was exchanged for a three year old gas-engine model of like kind and options at a cost to the consumer of \$3,863, regarded as a set-off against usage.

b. Buy-Backs

There were twelve buy-back requests. Of those, one produced an outright repurchase by the manufacturer for the amount of the outstanding loan, including interest. The amount paid on the loan to date was considered a usage assessment. The repurchased automobile had a faulty transmission that had been overhauled four times and multiple electrical system problems; the number of repair visits reached thirty. The case was supported by affidavits of others who drove the automobile as well as that of a mechanic. The car was out of warranty by the time of the hearing. A second outright repurchase was an early case; the repurchase price was set at the blue book value of the car. The items complained of, witnessed by the arbitration panel in a test-drive, included hesitation on acceleration and stalling. The six attempts at repair had all failed. The automobile warranty period had expired before the time of the hearing.

hearing has ever occurred. In one case where a rehearing was requested, the plaintiff, complaining of a faulty transmission and defective air conditioner, advanced no new arguments or evidence. A test-drive could not confirm the problems complained of, the car had logged 47,000 miles by the time of the owner's first confirmable complaint, and the manufacturer had offered a free replacement of the air conditioner core. The rehearing was denied. In a second case that would probably have gone to a rehearing, the case was mooted by the owner's sale of his diesel truck.

77. A continuing problem of revocation, and indeed one not eased or even addressed by the lemon law, is what to do with the buyer's existing loan commitment. Although the Federal Trade Commission has a Holder in Due Course Rule for loans financed through the automobile dealer, 16 C.F.R. § 433.1 (1985) (consumer may assert the same defense against the lender as against the dealer), the non-dealer loan is unprotected.

One buy-back request ensued after nine repair trips and seventeen days of lost service after only 4,500 miles of driving. The arbitration resulted in reimbursement for the owner's car rentals during service periods, a major overhaul by the manufacturer, a loaned car during the cure period, and a new-car warranty on all new parts at the completion of the service.

Three diesel automobile owners requested buy-backs or new engines. One of the cars had had two engine replacements after 30,000 miles; the panel decided to reimburse the owner \$3,530 for the two engine replacements (the second was performing satisfactorily at 89,000 miles when the case was brought). The second case involved a defective automobile which had been driven 40,000 miles. The arbitration resulted in full reimbursement for the engine replacement, at which point the owner sold the automobile. The third case involved a diesel engine with 44,000 miles, which the panel determined should be bought back at the blue book value of \$3,750. The owner refused the decision, but on later mediation agreed to the manufacturer's free replacement of the engine.

Another diesel owner requested a buy-back at 10,300 miles after multiple visits for recurrent problems. Nothing major had yet failed, but the plaintiff argued that the automobile was unreliable and unsuitable for the purposes for which it was purchased. The panel negotiated a compromise with the manufacturer to extend the warranty on all the complained of parts to 48,000 miles or forty-eight months.

In one case pending as of the writing of this article, the owner's car suffered from multiple defects that involved no single major problem but created a lack of confidence in the automobile. After eight or nine visits to the dealer, she submitted her case to the Better Business Bureau. The panel determined that she must attempt mediation. During the manufacturer's attempts at cure, she would be loaned an automobile, and upon the completion of the work, she would have an opportunity to test the car, as would a member of the panel, to determine if the problems remained and whether the arbitration should be re-opened. From the evidence presented, the automobile may qualify as a lemon under the lemon law. The ultimate resolution, if the consumer remains dissatisfied and the panel agrees, could establish whether "significant impairment" can be created by many minor difficulties.⁷⁸

Two cases of multiple non-major problems were completely denied. In one case, the car proved to be defective shortly after the adverse decision, and the manufacturer accepted responsibility to repair. The second case, in which the plaintiff complained of shaking and rattling after 12,000 miles, involved a car which was second-hand when acquired from a clearing house and had in the meantime been in an accident. Upon a test-drive, the arbitration panel decided the car was not defective.

78. See *infra* notes 101-103 and accompanying text.

Perhaps the most remarkable buy-back case was a diesel automobile, purchased second-hand at 66,000 miles, which had had an engine replacement at 89,000 miles. At 114,000 miles, the plaintiff requested a buy-back, based largely on the fact that the car had been a lemon to its first owner, a fact known by the dealer who subsequently went out of business, but not revealed to the customer, and that the manufacturer should therefore take responsibility. The arbitrator awarded the owner half the cost of the second engine, or \$875. The rationale was that, during mediation, the manufacturer had indicated a willingness to assume half the cost of the engine, although that offer was based upon the manufacturer's misunderstanding that the engine replacement had occurred at 67,000 miles.

c. Major Repair Requests

Twenty-five cases involved requests for major cures, such as engine or transmission replacements. Of those, eleven were denied on the basis of several theories: the consumer's mistaken apprehension of what is the normal performance of a small car; evidence that the owner failed to maintain the car; sufficient mileage on the car to preclude manufacturer liability; and a finding by the panel on test-drive that the complaint was not valid. In the remaining fourteen cases, the panel reimbursed the owner for the repair in full or on a pro rata basis. Most of the automobiles involved in cure requests were well beyond the warranty period. Nonetheless, the panel allowed recovery, basing its result on items such as the "consumer's reliance on the owner's manual that the transmission required no maintenance but fluid checks up to 100,000 miles" or that "[b]etween the consumer and the manufacturer, the manufacturer should bear the burden of repairs for a defective product if such product was put in the stream of commerce with such defects."

It appears that over the past three years, panels have been amassing their own lemon case law with increasing liberality to the consumer while the courts have held to rigid definitions of warranties and substantial impairments sufficient for revocation.⁷⁹ The "driveability" criterion the court enunciated in *Gasque* holds no sway in arbitration. Given the outcomes of recent arbitration cases, the aggrieved Fiat owner in *Gasque* would have been accorded some relief in arbitration, although it may not

79. It appears that recent cases brought to litigation in Virginia are being settled with results similar to those obtained in mediation or arbitration. *See, e.g., Zlotkowski v. Volvo of America Corp.*, No. LG 1005 (Richmond, Va. Cir. Ct. Aug. 2, 1984) (case settled out of court for substantially the purchase price less a usage offset). *But see Ryder v. Chrysler Corp.*, Law No. 9994 (Prince William County Cir. Ct. 1982) (jury awarded consumer substantially purchase price less a usage offset). For a discussion of the results of lemon law litigation in other states, see generally CENTER FOR AUTO SAFETY, THE LEMON FILE (looseleaf service initiated in 1982) (available from the Center for Auto Safety, 2001 S St., N.W., Washington, D.C. 20009).

have been a full repurchase.

C. Recommendations: Maximizing the Efficacy of Informal Dispute Settlement Procedures

The survey of the Better Business Bureau arbitration cases reveals that the decisions are affected by the conduct of the plaintiffs. In spite of the time and effort the Better Business Bureau expends in assisting the plaintiff in bringing a case, and although almost every file contained detailed evidence of mechanic's work orders and other papers, the plaintiff's conduct at the hearings appeared to influence the results substantially. The complainant is encouraged to write down his or her statements in advance and to outline the presentation of evidence. Unfortunately, most aggrieved lemon owners are visibly hostile to the manufacturer's representative and the dealer at the hearing. As a result, the facts get confused by emotion or, as is sometimes the case, the plaintiffs get caught in their own inconsistencies. Overdefensiveness against the manufacturer's representative militates against a complainant, as well.

Arbitration should be the point at which the harmed consumer can most successfully be redressed for his or her grievances. To attain that goal, however, the plaintiff is well advised to consult counsel in advance for assistance and guidance. The lawyer, with relatively little time or effort, can help the plaintiff assemble his case, prepare his statement, and rehearse his questions and answers.⁸⁰ Since most of the decisions go in favor of the consumer, even when the award is not enough and judicial action is thereafter sought, a favorable decision can constitute supportive evidence in later litigation;⁸¹ therefore, it is advantageous for the case to be effectively presented at the arbitration level.

At the same time, it is advisable that the attorney not become involved in the actual hearing, unless the client cannot maintain any equanimity. Although an attorney may more effectively present the plaintiff's case, a well-coached case brought by the consumer on his own appears to be far more convincing to the legally unsophisticated panels.

The demeanor of the plaintiff in presenting his or her case also appears to have a dramatic effect upon the outcome of the arbitration. Comments in the files surveyed indicated that, whenever the plaintiff gave the impression of being a chronic complainer, the panel tended to disregard the number of returns for repairs and instead tended to believe the claims of the manufacturer that the dealer was merely attempting to soothe a nui-

80. The most effective presentations by consumers which this author witnessed showed strong evidence of legal assistance.

81. See 15 U.S.C. § 2310(9)(3) (1982) ("In any civil action arising out of a warranty obligation and relating to a matter considered in . . . [an informal dispute] procedure, any decisions in such a procedure shall be admissible in evidence.").

sance complainer by taking the car for repairs that were not necessary. If the plaintiff had sloppy records, the panel tended to give more credence to the manufacturer's arguments that the problems with the car were brought about by inadequate maintenance or even consumer abuse.

IV. THE EFFECT OF VIRGINIA'S LEMON LAW

Virginia's lemon law allows a consumer to have a defective automobile replaced or repurchased by the manufacturer if "a defect or condition which significantly impairs the use, market value, or safety of the motor vehicle to the consumer" is not corrected after a reasonable number of attempts.⁸² A consumer is presumed to have made a reasonable number of attempts at repair if a single defect is subject to repair at least four times within one year without success, or if the car is out of service for a total of thirty or more calendar days.⁸³

The statute, however, does not define "significant impairment." Although the statute suggests the standard is a subjective one—a significant impairment "to the consumer"⁸⁴—in light of *Gasque v. Mooers Motor Car Co.*⁸⁵ this standard may be interpreted to be more strict and objective than the statutory language indicates.

A. *Flaws in the Lemon Law*

In *Gasque*, the court equated substantial impairment with "driveability." Driveability was objectively measured by the number of miles the defective car was driven after notice of revocation was given.⁸⁶ The operative language of the lemon law essentially mirrors the language of revocation of section 2-608.⁸⁷ In light of this fact, the precedents established in *Gasque* will be highly persuasive, if not controlling, in judicial interpretation of the lemon law.

In addition to the strict standard of "driveability," the *Gasque* court places the burden on the buyer to prove substantial impairment.⁸⁸ Although the lemon law raises a presumption that there have been a "reasonable number of attempts at repair," it does not shift the burden of proof on the issue of significant impairment.⁸⁹ Thus, even if the automo-

82. VA. CODE ANN. § 59.1-207.13 (Cum. Supp. 1984).

83. *Id.* § 59.1-207.13.B.

84. *Id.* § 59.1-207.13

85. 227 Va. 154, 313 S.E.2d 384 (1984). For a discussion of this case, see *supra* notes 4-7 and accompanying text.

86. *Gasque*, 229 Va. at 161, 313 S.E.2d at 389.

87. Compare VA. CODE ANN. § 59.1-207.13 (Cum. Supp. 1984) with U.C.C. § 2-608.

88. See *Gasque*, 227 Va. at 161, 313 S.E.2d at 389.

89. See VA. CODE ANN. § 59.1-207.13 (requiring that a reasonable number of attempts at a cure must be sought and defining what is a "reasonable number of attempts;" no definition

bile owner has satisfied the statutory requirement for reasonable number of attempts at repair, unless he or she can prove by a preponderance of the evidence that the car is not "driveable," it is unlikely that the replace or repurchase provisions of the lemon law will apply.

Another shortcoming of the lemon law is its failure to address the applicability of the standard defenses used by manufacturers. The affirmative defense of nuisance may be adduced by the owner's failure to take the automobile to an authorized dealer's mechanic. Attempts at self-remediation may also connote nuisance or even abuse.⁹⁰ In addition, since the purchaser has the burden of proof on the issue of significant impairment, the manufacturer's arguments that the automobile was not in fact impaired can be quite convincing and devastating to the plaintiff's case.

The lemon law also fails to address the effect of the continued use of the automobile during arbitration or litigation. The *Gasque* court regarded the continued use of the automobile as evidence of its driveability. In addition, it found that continued use after attempted revocation was wrongful against the seller.⁹¹ The lemon law, however, specifically recognizes that the purchase of an automobile is a major consumer purchase;⁹² as a major investment, as well as an absolute necessity for most people, it is neither immediately relinquishable nor easily replaceable. The suggestion that revocation demands cessation of the use of an automobile during the many years of a court battle is unrealistic. The General Assembly seemingly recognized this fact by providing for an offset against the refund of the full purchase price if the consumer continues to drive the automobile.⁹³ Even with the language and perceived intent of the lemon law, however, courts may interpret the usage allowance to encompass only that use occurring between purchase and actual notice of revocation; continued use after revocation may still be viewed as evidence that the car is not significantly impaired and may be viewed as wrongful against the manufacturer.

A final problem worthy of note is that the lemon law limits its remedies only to breach of express warranties. Thus, a consumer's only remedy for breach of an implied warranty, arising either because of the provisions of the Magnuson-Moss Warranty Act⁹⁴ or because it has not been properly

given for "significant impairment.")

90. For example, if the purchaser does his own oil changes, lubrications, or tune-ups, that fact can be used against him. The corner garage is similarly implicated, as is use of nonfactory replacement parts. Although such restrictions are statutorily proscribed by the Federal Trade Commission regulations pursuant to the Magnuson-Moss Act, 16 C.F.R. § 700.10(c) (1984), the manufacturer's representative will bring up nondealer work as a defense.

91. *Gasque*, 227 Va. at 162, 313 S.E.2d at 390.

92. See VA. CODE ANN. § 59.1-207.10 (Cum. Supp. 1984) (statement of legislative intent).

93. *Id.* § 59.1-207.13.A.2.

94. 15 U.S.C. § 2308(a)(1982) (precluding manufacturer from disclaiming implied warranties if written warranty is provided).

disclaimed,⁹⁵ is damages. In addition, the Virginia courts expressly preclude the remedy of revocation against the manufacturer because of their narrow view of privity.⁹⁶ As the lemon law is currently worded, consumers in Virginia do not have the protection which states such as Kentucky, Minnesota and New Jersey provided for their citizens even in the absence of lemon laws.⁹⁷

B. Recommendation: Strengthening Virginia's Lemon Law

1. Exploitation of Current Law

Although the General Assembly did not affirm any caselaw as part of its enactment, the statute tracks the Connecticut lemon law nearly in its entirety.⁹⁸ According to the accepted tenets of statutory construction, there is an implication that the legislative intent as well as the underlying and ensuing case law of the borrowed act were adopted by the General Assembly.⁹⁹ Consequently, the legislative history of Connecticut's lemon law should be incorporated into Virginia law. Further evidence that the General Assembly intended to adopt Connecticut's legislative history is the fact that the Virginia legislators also scrutinized but rejected California's legislation and the proposed legislation for the District of Columbia.

Probably the most influential effect of the lemon law will be not on the courts but upon the arbitration panels. The Better Business Bureau, for

95. See U.C.C. § 2-316 (outlining requirements for disclaiming warranties).

96. See *Gasque*, 227 Va. at 162-63, 313 S.E.2d at 390.

97. See *supra* note 34 and accompanying text. See also *Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 801 (1981).

98. Compare VA. CODE ANN. §§ 59.1-207.9 to -207.13 (Cum. Supp. 1984) with 1984 Conn. Legis. Serv. 338 (West). The statutes do differ slightly. These differences include the addition that the motor vehicle must be for "personal, family, or household purposes," a phrase taken from the Magnuson-Moss Act, 15 U.S.C. § 2301 (1) (1982), a limitation on the types of vehicles to which the law applies, an amendment of the Connecticut law's language, "substantially impairs the use and value," to the less exclusive disjunctive, "significantly impairs the use, market value or safety" (to which Connecticut's law has now been amended). The Virginia bill also, at the "Governor's recommendation," was amended from an applicable time period "during the term of the express warranty or one year following the date of original delivery of the motor vehicle to a consumer, whichever is later" to "during the period of one year following the date of original delivery of the motor vehicle to the consumer." The Virginia act provided a specific usage offset and added a notice requirement.

99. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 52.01-52.03 (4th ed. 1973 & Supp. 1984) (citing *Parramore v. Taylor*, 11 Gratt. 220 (Va. 1854); *General Acc. Fire & Life Ins. Corp. v. Cohen*, 203 Va. 810, 127 S.E.2d 399 (1962)); *Hoffer Bros. v. Smith*, 148 Va. 220, 138 S.E. 474 (1927); E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 234 (1940). *But see* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES at 131-36 (1975). Despite a somewhat different view, Dickerson nevertheless concludes that "[i]n resolving an evenly poised uncertainty it seems appropriate, in the absence of more persuasive considerations, for the court to serve the general interest in uniformity by emulating the decisions of other courts that are addressed to the same statutory text." *Id.* at 136.

example, intends to instruct its panels about the provisions of the lemon law. Heretofore, the Better Business Bureau has instructed its panels that consumer satisfaction should probably not be "complete." Under the lemon law, however, this instruction may be eliminated because the law outlines what relief should be afforded. The statute expressly allows a complete refund, including financing interest, with a reduction only for actual usage.¹⁰⁰ Past arbitration panels have arrived at divergent results regarding the appropriate remedy in the event of a defect.¹⁰¹ This statutorily authorized remedy, coupled with the readiness with which arbitration panels are likely to find harm, may well result in more repurchases and exchanges for lemon car owners.

2. Future Amendments

Certain provisions should be added to Virginia's lemon law to provide more meaningful protection for consumers. First, the law must be more explicit and comprehensive in its definitions. Although it is impossible to define "significant impairment," the impairment of safety should not be subject to interpretation. A vehicle with, for example, defective brakes that cannot be repaired, unpredictable acceleration, excessive vibrations that render it uncontrollable in emergencies, or randomly occurring stalls, is an unsafe vehicle and should be defined as significantly impaired *per se*. With regard to some defects, four attempts at cure may impose an unreasonable threat to the driver and to the public at large, and should not be required after the first major attempt to repair has failed. Furthermore, an automobile that has been out of service for thirty days within a year should be considered significantly impaired in use to its owner; there should be no need for the court to find that "significant impairment" persists.

The problem of privity should be addressed by incorporating the Uniform Commercial Code's provisions for implied warranties of merchantability, as well as express warranties, within the language of the statute itself. Inasmuch as the arbitration panels, even with regard to older automobiles, have found warranties implied by servicing statements in the owner's manual, it is clear that reasonable expectations, which the statute is designed to fulfill, should be served by the explicit inclusion of all Uniform Commercial Code warranties within the statute.

The statute should not be limited to vehicles used in households. Although this limitation is borrowed from the Magnuson-Moss Act, the statute should be broadened to include vehicles used in businesses of certain characteristics. Small businesses are no more equipped to absorb the costs of a defective vehicle than is the individual consumer.

100. See VA. CODE ANN. § 59.1-207.13.A.

101. See *supra* notes 77-78 and accompanying text.

More general defects of the statute as written have been addressed in the statutes of sister states and include the following: Extending protection of the lemon law to second purchasers within the warranty period;¹⁰² reduced notice requirements that involve reporting only to the dealer (who, for the consumer, is the agent of the manufacturer);¹⁰³ inclusion of attorney's fees in the damages paid, whether at the arbitration level or at the court level or, preferably, at both, so that the consumer has a power more equivalent to that of the manufacturer's representative;¹⁰⁴ prohibit-

102. *See, e.g.*, 1984 Pa. Legis. Serv., Act 28, § 10 (Purdon) (to be codified as 73 PA. CONS. STAT. ANN. § 2010):

Resale of returned motor vehicle.

(a) Vehicles may not be resold.—If a motor vehicle has been returned under the provisions of this act or a similar statute of another state, it may not be resold in this State unless:

(1) *The manufacturer provides the same express warranty it provided to the original purchaser, except that the term of the warranty need only last for 12,000 miles or 12 months after the date or resale, whichever is earlier.*

(2) The manufacturer provides the consumer with a written statement on a separate piece of paper, in ten point all capital in substantially the following form:

"IMPORTANT: THIS VEHICLE WAS RETURNED TO THE MANUFACTURER BECAUSE IT DID NOT CONFORM TO THE MANUFACTURER'S EXPRESS WARRANTY AND THE NONCONFORMITY WAS NOT CURED WITHIN A REASONABLE TIME AS PROVIDED BY PENNSYLVANIA LAW."

The provisions of this section apply to the resold motor vehicle for the full term of the warranty required under this subsection.

(b) Returned vehicles not to be resold.—Notwithstanding the provisions of subsection (a), if a new motor vehicle has been returned under the provisions of this act or a similar statute of another state because of a nonconformity resulting in a complete failure of the braking or steering system of the motor vehicle likely to cause death or serious bodily injury if the vehicle was driven, the motor vehicle may not be resold in this Commonwealth.

(Emphasis added)

103. *See, e.g.*, WIS. STAT. ANN. § 218.015 (2) (Interim Annot. Serv. 1984):

(a) If a new motor vehicle does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer or any of its authorized motor vehicle dealers and makes the motor vehicle available for repair before the expiration of the warranty or one year after first delivery of the motor vehicle to a consumer, whichever is sooner, the nonconformity shall be required.

(b) If after a reasonable attempt to repair the nonconformity cannot be repaired, the manufacturer shall, at the direction of the consumer, either replace the motor vehicle with a comparable new motor vehicle or accept return of the motor vehicle and refund the full purchase price plus any amounts paid by the consumer at the point of sale and all collateral costs associated with the repair of the nonconformity less a reasonable allowance for use to the consumer and any holder of a perfected security interest in the motor vehicle, as their interests may appear.

(Emphasis added)

104. *See, e.g.*, W. VA. CODE § 46-6A-4 (Supp. 1984):

(a) If the nonconformity results in substantial impairment to the use or market value of the new motor vehicle and the manufacturer has not replaced the new motor vehicle pursuant to the provisions of section three [§ 46A-6A-3] of this article, or if

ing resale of a lemon that has been repurchased;¹⁰⁵ establishment of state arbitration mechanisms under the aegis of the Department of Consumer Affairs to avoid the possibility of bias, especially in manufacturer-established dispute settlement mechanisms;¹⁰⁶ extension beyond the warranty period for major impairments that may not reveal themselves within the first year;¹⁰⁷ and, very importantly, some means beyond the Holder in Due Course rule's protection given to consumers who received financing through the dealer,¹⁰⁸ to protect independently financing consumers from credit liability when they wish to renounce ownership of the automobile (which is the collateral for the loan), but continue to have an obligation under the loan. The statutory provisions to accomplish these objectives, which are all fully within the intent of the statute to assure fulfillment of reasonable consumer expectations, are beyond the scope of this comment but can be found distributed throughout the statutes of many other states, including Connecticut, California, Florida, Minnesota, New York, Massachusetts, Texas, and the District of Columbia as proposed.¹⁰⁹

the nonconformity exists after a reasonable number of attempts to conform the new motor vehicle to the applicable express warranties, the consumer shall have a cause of action against the manufacturer in the circuit court of any county having venue.

(b) In any action under this section, the consumer may be awarded all or any portion of the following:

....

(4) Reasonable attorney fees.

(Emphasis added)

105. See, e.g., *supra* note 102.

106. See, e.g., Pub. Act. No. 84-338; Conn. Legis. Serv. (West 1984).

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1.(a) The department of consumer protection, [sic] provide an independent arbitration procedure for the settlement of disputes between consumers and manufacturers of motor vehicles which do not conform to all applicable warranties under the terms of section 42-179 of the general statutes, as amended by section 1 of public act 83-351, public act 83-458 and section 3 of this act. The commissioner shall establish one or more automobile dispute settlement panels which shall consist of three members appointed by the commissioner of consumer protection, only one of whom may be directly involved in the manufacture, distribution, sale or service of any product. Members shall be persons interested in consumer disputes and shall serve without compensation for terms of two years at the discretion of the commissioner.

107. E.g., the THM-200 transmission and the defective diesel engines in early model years of General Motors products did not ordinarily reveal their deficiencies within the first year. However, the representations by the manufacturer that these were "good" for 100,000 miles lulled the purchaser into sense of security that rightfully should create an extended warranty period. The diesels generally lasted up to 50,000 miles, but usually only with repeated repairs, before they "blew up."

108. 16 C.F.R. § 433 (1984).

109. Consumer Affairs Committee of Division 2 (Antitrust, Trade Regulation and Consumer Affairs) of the District of Columbia Bar, *Comments on Bill 5-288, the Proposed "New Automobile Consumer Protection Act of 1983."* This document may be obtained from the Center for Auto Safety, 2001 S Street, N.W., Washington, D. C. 20009.

V. CONCLUSION

The lemon law of Virginia, as enacted, in the light of the most recent Supreme Court of Virginia decision of *Gasque*, may have a negligible effect, and certainly an unpredictable one, on litigation in the courts to rescind purchases of defective automobiles. Indeed, in terms of what has been accomplished quietly at the arbitration level, the lemon law may represent a step backward when used in the courts. Its greatest immediate influence will be on the arbitration panels, freeing them to make more consumer-oriented decisions than they have heretofore felt free to render, and in that way, the statute may justify its intent on enactment. Therefore, it is recommended that awareness within the legal community of the arbitration mechanism be enhanced and clients actively assisted in taking their cases to arbitration. If, however, the particular arbitration mechanism deviates substantially from the Federal Trade Commission regulations and is known to produce weighted decisions, the attorney should assist the client in avoiding those mechanisms on the grounds of their failure to adhere to the mandatory regulations, and should instead initiate a court action. Nevertheless, court litigation should probably be limited to the most blatant examples of lemons until persuasive precedents in arbitration and in the courts of other states have accumulated. The synergistic lemon, where multiple systems fail but do not actually preclude driveability, is more likely to be redressed in the informal dispute settlement mechanism. Assurance of the judicial utility of the statute rests on refining the law and adding provisions for subtle manufacturing defects, such as the frame that is not quite "true," the transmission or engine that prematurely fails, although it has exceeded the warranty period, the fuel-injection computer that has a malfunction not discernible by the well-intentioned dealer's mechanic, or the electrical system that has a short or an improper resistor that cannot be located. Finally, true protection of the consumer can accrue only through statutory inclusion of special definitions as well as provisions in areas not yet addressed by the General Assembly. The investment to the consumer in his purchase of an automobile is vastly greater than that in his purchase of a battery-operated watch. Nonetheless, he can receive a refund or replacement for the negligible acquisition yet not for that for which he placed his credit on the line. The lemon law is a beginning but its necessary usefulness at a judicial level in Virginia may not surpass the arbitration presently in effect until its gaps of interpretation are legislatively filled.

Carol S. Nance

