



University of Arkansas at Little Rock Law Review

Volume 16 | Issue 3

Article 5

1994

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Recommended Citation

Clifford P. Block, *Consumer Protection—Arkansas's New Motor Vehicle Quality Assurance Act—A Branch of Hope for Lemon Owners*, 16 U. ARK. LITTLE ROCK L. REV. 493 (1994).

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ARKANSAS'S NEW MOTOR VEHICLE QUALITY ASSURANCE ACT—A BRANCH OF HOPE FOR LEMON OWNERS

I. INTRODUCTION

Prior to the 1993 session of the Arkansas General Assembly, forty-eight states had “lemon laws” available as remedial assistance to consumers who had purchased defective new automobiles,¹ but Arkansas was not among them.² The Arkansas legislature had examined the issue previously,³ but due to the complexity of the subject, instead of passing legislation, the 78th General Assembly decided to defer the issue to allow further study by the Joint Interim Committee on Public Transportation.⁴ Because lemon laws foster the protection of consumer rights, Attorney General Winston Bryant directed his Consumer Protection Division to do an in-depth study and to draft a proposed lemon law for presentation to the Interim Committee. The Committee held several hearings on the issue in which it reviewed the draft prepared by the Attorney General’s staff. On January 6, 1993, after inclusion of a few amendments of its own,⁵ the Committee

1. Rachel O’Neal, *Lawmakers Draft Auto ‘Lemon Law’ Like 48 States Have*, ARK. DEMOCRAT GAZETTE, Sept. 24, 1992, at 1B.

2. Arkansas and South Dakota were the only two states without lemon laws. *Id.* South Dakota subsequently enacted S.D. CODIFIED LAWS ANN. §§ 32-6D-1 to -11 (Supp. 1993) on March 13, 1993 as its version of a lemon law.

3. H.R. 1467, 78th Ark. Gen. Assembly, Reg. Sess. (1991).

4. Interim Study 91-60. Issues sent to an interim committee for study are generally those issues that fail to achieve support from a consensus of legislators during the regular session. Rather than being subject to a “do not pass” vote or when further study is desired, sponsors will move that their bill be sent to interim study. Depending on the extent of interest in the issue, the issue may or may not actually be considered by a particular committee between regular sessions. If high interest is maintained, the interim committee will hold hearings to fully develop the positions of various parties. Often, entirely new draft legislation will exit the interim committee rather than the bill referred. However, the referred bill is generally the catalyst for further development of the issue.

5. Most of the recommendations of the Committee were incorporated into revised drafts prepared by the staff of the Attorney General for consideration at subsequent hearings. These recommendations were largely of a technical nature as suggested by interested parties. For example, the provision allowing the informal dispute procedure to use only one person to decide a dispute unless the consumer requests three members was incorporated at the request of representatives for one of the informal dispute resolution programs. The result was basically a compromise between that program’s process of using only one decision maker and the Attorney General’s belief that three decision makers would be more likely to issue fair and accurate decisions. However, some amendments by the Committee were of a more substantive nature. *See infra* note 67.

adopted the draft legislation prepared by the Attorney General's staff.⁶

The Committee version of the lemon law proceeded smoothly through the legislative process. Two identical bills were introduced, a Senate version⁷ and a House version.⁸ Both bills passed unanimously, were signed into law by Governor Jim Guy Tucker on March 1, 1993,⁹ and became effective on August 13, 1993.¹⁰

II. CLIMATE PRIOR TO THE NEW LEMON LAW

Prior to the enactment of the lemon law in Arkansas, the only kinds of remedial relief available to consumers were the statutory remedies of revocation of acceptance¹¹ and breach of warranty¹² under the Uniform Commercial Code.¹³ Federal remedies also existed through the Magnuson-Moss Federal Warranty Act.¹⁴ However, as shown below, these state and federal remedies failed to adequately

6. STAFF OF JOINT INTERIM COMMITTEE ON PUBLIC TRANSPORTATION OF THE 78TH ARKANSAS GENERAL ASSEMBLY, MINUTES OF MEETING, (Jan. 6, 1993).

7. S. 169, 79th Ark. Gen. Assembly, Reg. Sess. (1993) sponsored by Sen. Cliff Hoofman and the Senate Committee on Public Transportation.

8. H.R. 1233, 79th Ark. Gen. Assembly, Reg. Sess. (1993) sponsored by the House Committee on Public Transportation and spearheaded by Rep. Myra Jones.

9. 1993 Ark. Acts 285 (Senate Bill), 297 (House Bill). Both Acts read identically to each other. It is not uncommon for popular issues to originate in both chambers of the legislature and for each chamber's bill to be enacted into law.

10. The effective date of legislation without an emergency clause is ninety days after *sine die*, the official adjournment date of the legislative session. *Fulkerson v. Refunding Bd.*, 201 Ark. 957, 962, 147 S.W.2d 980, 983 (1940) (applying ARK. CONST. amend. 7).

11. ARK. CODE ANN. § 4-2-608 (Michie 1991). The buyer's rights upon revocation of acceptance are the same as if he had rejected the goods in the first place. *Id.* Generally, the buyer can return the goods and receive a return of the purchase price. *Id.* § 4-2-711(1).

12. *Id.* § 4-2-714. Generally, the remedy for breach of warranty is compensation for the difference between the value of the accepted goods at the time and place of acceptance and the value they would have had if they had been as warranted. *Id.*; see also *Smart Chevrolet Co. v. Davis*, 262 Ark. 500, 502, 558 S.W.2d 147, 148 (1977) (case remanded for proper determination of damages); *Walker Ford Sales v. Gaither*, 265 Ark. 275, 280, 578 S.W.2d 23, 26 (1979) (remanded for determination of vehicle's market value in defective condition). Incidental and consequential damages may also be recovered in proper cases. *Hanna Lumber Co. v. Neff*, 265 Ark. 462, 467, 579 S.W.2d 95, 98 (1979).

13. In 1993, the Arkansas Legislature enacted Chapter 2A to Title 4 of the Arkansas Code, which provides similar revocation of acceptance and breach of warranty remedies for consumer lease transactions. See ARK. CODE ANN. §§ 4-2A-517, -210, -519 (Michie Supp. 1993). While the new Arkansas lemon law also covers lease transactions, due to the similarity of UCC lease remedies to the remedies applicable to sales of goods, no further analysis of the UCC lease provisions will be undertaken in this article.

14. 15 U.S.C. §§ 2301-2312 (1988).

protect the interests of the consumer in the typical "lemon" vehicle claim. A brief analysis of these remedies will be helpful in understanding the new lemon law.¹⁵

III. STATE LAW UCC REMEDIES

A. Revocation of Acceptance

The traditional UCC remedies include revocation of acceptance¹⁶ and breach of warranty actions.¹⁷ In the typical revocation of acceptance scenario, the consumer has purchased an item that suffers some nonconformity¹⁸ that substantially impairs its value. To illustrate, suppose Mary wishes to purchase a dining table from her local furniture retailer. She selects the style desired and accepts the delivery by the retailer. Only when she removes the protective shipping covering does she discover that the table has a large scratch in the finish. Mary does not want this table, and, therefore, she contacts the retailer and revokes her acceptance of the table.

Similarly, Mary purchases a new automobile. She has no means of knowing the internal condition of the engine. Believing that the automobile is in good condition, she accepts the vehicle and attempts to drive home. Only after being stranded along the side of the highway, due to the failure of a defective internal engine component, does she realize that her new car contains a nonconformity that justifies her refusal to accept the car as her purchase. Mary then revokes her acceptance due to the nonconformity that substantially impairs the value of the car. While these examples are simplistic, they aptly illustrate the basics of a transaction subject to revocation of acceptance.

There are two types of acceptance that are subject to revocation.¹⁹ One type is that described in the preceding example where acceptance

15. The lemon law provides a statutory merger of certain aspects of UCC remedies and Magnuson-Moss.

16. ARK. CODE ANN. § 4-2-608 (Michie 1991). For an excellent discussion on revocation of acceptance, see Vicki D. Rau, *New Remedies for Defective Automobile Purchasers: A Proposal for a Model Lemon Law*, 23 VAL. U. L. REV. 145 (1988).

17. ARK. CODE ANN. § 4-2-714 (Michie 1991).

18. Nonconformities are defined to include "not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract." *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117, 1122 (8th Cir. 1982) (quoting ARK. STAT. ANN. § 85-2-714, cmt 2 (1947)).

19. The court in *Ford Motor Credit*, 671 F.2d at 1122, interpreted Arkansas law as providing four criteria which justify revocation of acceptance. The buyer

was reasonably induced by the difficulty of discovery of a nonconformity before acceptance.²⁰ The other type of acceptance subject to revocation is the situation in which acceptance was based on the reasonable assumption that the nonconformity would be cured and that cure has not seasonably occurred.²¹

In either case, the buyer is required to give notice to the seller of his revocation,²² and the issue of the reasonableness of the notice as to form and substance is a question of fact.²³ Further, the questions of whether the goods were nonconforming and whether a revocation of acceptance was given within a reasonable time are also questions of fact.²⁴

Generally, the remedy for revocation of acceptance²⁵ is to make the buyer whole as of the date of the sale.²⁶ In order to revoke his acceptance, the buyer is not required to tender the goods at the

must establish:

(1) a nonconformity which substantially impairs the value of the goods to the buyer;

(2) [that] acceptance [occurred:]

(a) with discovery of the defect, [but] on the reasonable assumption that the nonconformity would be cured, or

(b) without discovery [when the failure to discover was] reasonably induced by the difficulty of the discovery or by seller's assurances;

(3) [that] revocation [occurred] within a reasonable time after the nonconformity was discovered or should have been discovered; and

(4) [that] revocation [occurred] before a substantial change [occurred] in the condition of the goods not caused by their own defects.

Id. (quoting approvingly from JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 8-3, at 303 (2d ed. 1980)).

20. ARK. CODE ANN. § 4-2-608(1)(b) (Michie 1991).

21. *Id.* § 4-2-608(1)(a). An example of this would be where a seller promises to repair a knocking sound in the engine of a car if the consumer will buy the automobile.

22. *Id.* § 4-2-608(2).

23. *Rogers Excavating, Inc. v. R.A. Young & Son, Inc.*, 3 Ark. App. 297, 299, 625 S.W.2d 560, 562 (1981).

24. *See Ford Motor Credit Co. v. Harper*, 671 F.2d 1117, 1124 (8th Cir. 1982); *May v. J.T.L., Inc.*, 292 Ark. 274, 278, 729 S.W.2d 417, 419 (1987); *Ozark Kenworth, Inc. v. Neidecker*, 283 Ark. 196, 200, 672 S.W.2d 899, 902 (1984); *Frontier Mobile Home Sales, Inc. v. Tringleth*, 256 Ark. 101, 103-04, 505 S.W.2d 516, 517 (1974); *Dopieralla v. Arkansas Louisiana Gas Co.*, 255 Ark. 150, 152, 499 S.W.2d 610, 611 (1973); *Gramling v. Baltz*, 253 Ark. 352, 358, 485 S.W.2d 183, 188 (1972); *O'Neal Ford, Inc. v. Early*, 13 Ark. App. 189, 192, 681 S.W.2d 414, 416 (1985); *McFall Chevrolet Co. v. Collin*, 271 Ark. 469, 471, 609 S.W.2d 118, 120 (Ark. Ct. App. 1980).

25. ARK. CODE ANN. § 4-2-608(3) (Michie 1991).

26. *Frontier Mobile Home*, 256 Ark. at 106, 505 S.W.2d at 518. However, in proper circumstances, punitive damages may be awarded if the tort of deceit is proven as part of the case. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 327, 867 S.W.2d 446, 450 (1993).

time of revocation,²⁷ but may instead retain the goods until reimbursed by the seller.²⁸ However, when the buyer does receive reimbursement,²⁹ the goods must be returned to the seller.³⁰ Even when the seller has disclaimed all warranties, revocation of acceptance is still available.³¹ It should be understood that a buyer can only revoke his acceptance if the defects existed at the time of purchase.³² For this reason, revocation of acceptance is generally not a sufficient remedy to an owner of a lemon vehicle when the problems arise after purchase.

B. Breach of Warranty Under U.C.C.

In any action by a consumer to recover for breach of an express warranty,³³ clearly there must be an actual breach of the terms of the warranty. However, automobile warranties generally only provide coverage to "repair" defects that arise.³⁴ Thus, as long as the

27. *Snow v. C.I.T. Corp.*, 278 Ark. 554, 558, 647 S.W.2d 465, 467 (1983).

28. *Id.*

29. The seller may be entitled to a reasonable offset for use of the goods, but the burden will be on the seller to establish a reasonable basis for determining a setoff. In *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117, 1125 n.10 (8th Cir. 1982) (quoting *WHITE & SUMMERS*, *supra* note 19, § 8-3).

The court stated:

[In the typical revocation of acceptance case] the goods are defective; they fail in some way to perform the function for which the buyer purchased them and if they confer a benefit at all it is a lesser benefit than the buyer expected to receive. Moreover, the buyer can argue that he received not only a smaller benefit than he expected, but he also suffered the psychic cost associated with the uncertainty about whether the goods would work and the aggravation associated with unsuccessful attempts to cure. In a typical contract suit we would not allow the buyer to recover for such psychic injuries but it is not clear that they should not be worked into the valuation scheme in this kind of case. In any event the principle is the same, namely that the buyer should pay for the benefit conferred; the difficulty arises only in valuing that benefit. Presumably, if the breaching party (the seller) is the "bad guy" the court should not be generous to him but should leave to him the burden of coming forward with credible evidence to show that he is entitled to an offset by proving the value of the benefit conferred on the buyer.

Id.

30. *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 53, 780 S.W.2d 574, 577 (1989).

31. *Ford Motor Credit*, 671 F.2d at 1122 n.7 (8th Cir. 1982); *O'Neal Ford, Inc. v. Early*, 13 Ark. App. 189, 192-93, 681 S.W.2d 414, 416 (1985).

32. *ARK. CODE ANN.* § 4-2-608 (Michie 1991).

33. *Id.* § 4-2-313.

34. For example, Toyota's 1994 Owner's Guide provides, "This warranty covers repairs to any part that Toyota supplies that is defective in materials or workmanship under normal use." The warranty guide provided with 1993 Cadillacs provides, "This warranty covers repairs to correct any vehicle defect related to materials or workmanship occurring during the WARRANTY PERIOD." Other manufacturer's warranties are similar to these statements.

manufacturer is making reasonable attempts to repair a defect, there is little likelihood of any successful recourse based upon breach of warranty. Likewise, if the defects consist of numerous different malfunctions, as long as reasonable attempts to repair the problems are undertaken, generally no action will lie since the terms of the warranties only require repair.³⁵

Other avenues under breach of warranty are based upon an implied warranty of fitness for a particular purpose³⁶ and an implied warranty of merchantability.³⁷ However, the seller most often, if not always, disclaims any express or implied warranties,³⁸ and the manufacturer likewise either disclaims or limits its liability.³⁹ When

35. *Ford Motor Co. v. Reid*, 250 Ark. 176, 185, 465 S.W.2d 80, 85 (1971) (finding liability not limited to repairs by terms of warranty, the court stated that if Ford Motor Company intended the repair remedy to be exclusive, it should have stated so in express language); *see also*, *Koperski v. Husker Dodge, Inc.*, 302 N.W.2d 655, 664 (Neb. 1981) (stating that "[r]epair and replacement' clauses, in the nature of those contained in Chrysler's limited warranty, have become the basic mechanism by which manufacturers limit or avoid liability in actions for breach of warranty.").

36. ARK. CODE ANN. § 4-2-315 (Michie 1991). Unless excluded or modified, an implied warranty that the goods are fit for a particular purpose exists where the seller has reason to know at the time of sale a particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish goods. *Id.*

37. *Id.* § 4-2-314. Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. To be merchantable, goods must be at least fit for the ordinary purposes for which such goods are used. Other criteria for merchantability are that goods: (1) must pass, without objection, in the trade as described in the contract; (2) when the goods are fungible, be of fair average quality according to the contract description; (3) be, within variations permitted by the contract, of equal kind, quality, and quantity between each and among all units; (4) be adequately contained, packaged, and labeled pursuant to the contract; and (5) meet the promises or affirmations of fact made on any label or container. *Id.*

38. *Id.* § 4-2-316. This section provides that, unless the circumstances indicate otherwise, all implied warranties may be excluded by expressions such as "as is," "with all faults," or "other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." *Id.*

39. General Motors, in their 1993 warranty provisions, provide for the following limitations which are typical among other manufacturers:

General Motors does not authorize any person to create for it any other obligation or liability in connection with these vehicles. ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE APPLICABLE TO THIS VEHICLE IS LIMITED IN DURATION TO THE DURATION OF THIS WRITTEN WARRANTY. PERFORMANCE OF REPAIRS AND NEEDED ADJUSTMENTS IS THE EXCLUSIVE REMEDY UNDER THIS WRITTEN WARRANTY OR ANY IMPLIED WARRANTY. GENERAL MOTORS

the limitations on the implied warranties are structured such that repairs or adjustments are the only obligation of the manufacturer, the remedies for breach are the same as that for breach of an express warranty: the consumer is entitled to the difference between the value as warranted and the value as accepted.⁴⁰ For a consumer who has purchased a vehicle plagued with problems, the remedy of difference in value is generally not sufficient.⁴¹

IV. FEDERAL REMEDIES—MAGNUSON-MOSS WARRANTY ACT

The Magnuson-Moss Warranty Act⁴² (hereinafter “Magnuson-Moss”) was passed to make available to consumers⁴³ the complete disclosure of coverage provided by a warranty⁴⁴ and to create a

SHALL NOT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES (SUCH AS, BUT NOT LIMITED TO, LOST WAGES OR VEHICLE RENTAL EXPENSES) RESULTING FROM BREACH OF THIS WRITTEN WARRANTY OR ANY IMPLIED WARRANTY.*

*Some states do not allow limitations on how long an implied warranty will last or the exclusion or limitation of incidental or consequential damages, so the above limitations or exclusions may not apply to you.

Id.

40. ARK. CODE ANN. § 4-2-714(2) (Michie 1991); *see also*, Ford Motor Credit Co. v. Harper, 671 F.2d 1117, 1121 (8th Cir. 1982) (defining the remedies available for breach of warranty). For a good analysis of remedies, see Walker Ford Sales v. Gaither, 265 Ark. 275, 578 S.W.2d 23 (1979).

41. Presumably, the consumer could have the automobile repaired at an independent facility, and after paying for the repairs at the independent facility, attempt to recover from the warrantor. However, it would be practically impossible to determine defects that may yet arise under the remaining period of warranty coverage, and it would not be feasible to bring an action for breach of warranty every time a repair must be made. Even more problematic, given the complexity of technology in today's automobiles, it is often the fact that repairs can only be accomplished by the manufacturer. To avoid these problems, the consumer either desires a new automobile or his money refunded.

42. 15 U.S.C. §§ 2301-2312 (1988).

43. “Consumer” is defined as a buyer, “other than for purposes of resale” of any consumer product. Consumer is also defined to include any other person entitled by the terms of the warranty or applicable state law to enforce the warranty. *Id.* § 2301(3). However, where a consumer product is used in a commercial business, coverage under Magnuson-Moss might not be available. *Compare* Richards v. General Motors Corp., 461 So. 2d 285 (Ala. Civ. App. 1984) (finding no error in trial court's holding that pickup truck used to haul produce from farm to market and which was deducted as a business expense on tax returns was not a consumer good within the meaning of Magnuson-Moss); *with* Business Modeling Techniques, Inc. v. General Motors Corp., 474 N.Y.S.2d 258 (1984) (holding that automobiles used only in part for business purposes were consumer products within the meaning of Magnuson-Moss).

44. 15 U.S.C. § 2302(a) (1988). This section lists some of the disclosures that the Federal Trade Commission may impose to be included in a written warranty. These include: (1) clear identification of the warrantor; (2) the product or parts

private action to enforce warranties on goods purchased.⁴⁵ However, the standards set forth in the act apply mostly to "full" warranties,⁴⁶ whereas warranties that do not meet the standards are to only be labeled as "limited" warranties.⁴⁷ Because automobile manufacturers generally provide only a "limited" warranty on vehicles sold, there are limited remedies under Magnuson-Moss.⁴⁸

For consumer products that are covered by a limited warranty, the manufacturer occasionally requires a consumer to first proceed through an informal dispute resolution procedure before commencing a civil action based upon a warranty dispute. When such an informal process requirement is incorporated in the terms of the written warranty, the Magnuson-Moss informal dispute settlement provisions will apply.⁴⁹ However, manufacturers of automobiles have carefully worded their warranties regarding pre-litigation dispute resolution procedures in order to avoid falling under this Magnuson-Moss provision.⁵⁰

covered; (3) responsibilities of the consumer; (4) procedures for the consumer to undertake when obtaining service under the warranty; (5) the availability and requirement of proceeding through any informal dispute settlement procedure; and (6) those authorized to perform service under the warranty. *Id.*

45. *Id.* § 2310(d).

46. *Id.* § 2303(a)(1). Written warranty that meets the federal minimum standards for warranties set forth in section 2304 is to be conspicuously designated as "full (statement of duration) warranty." *Id.*

47. *Id.* § 2303(a)(2). A warranty that does not meet the federal minimum standards of § 2304 must be conspicuously designated a "limited warranty." *Id.*

48. A manufacturer who provides a warranty that does not meet the federal minimum standards needs only to conspicuously designate it as a "limited warranty." *Id.* § 2303(a)(2). Nothing in Magnuson-Moss authorizes the imposition of requirements for durations of written warranties or requirements that a consumer product be warranted. *Id.* § 2302(b)(2).

49. *Id.* § 2310(a)(4). Magnuson-Moss delegates to the Federal Trade Commission rule-making authority for minimum requirements of an informal dispute settlement procedure. *Id.* § 2310(a)(2). The regulations address disclosure to consumers of the existence of the procedure, organizations, qualifications of members, and operation of the procedure. Criteria governing record-keeping and audits are also included. 16 C.F.R. §§ 703.1-.8 (1993).

50. A typical example of this wording is found in the 1993 General Motors warranty manuals:

We encourage you to use this program before or instead of resorting to the courts. We believe it offers advantages over courts in most jurisdictions because it is fast, free of charge, and informal (lawyers are not usually present, although you may retain one at your expense if you choose). If you wish to go to court, however, we do not require that you first file a claim with BBB AUTO LINE [BBB AUTO LINE provides informal dispute settlement procedures for General Motors] unless state law provides otherwise.** Whatever your preference may be, remember that if you are unhappy with the results of BBB AUTO LINE, you can still go to court

V. THE ARKANSAS NEW MOTOR VEHICLES QUALITY ASSURANCE ACT (LEMON LAW)

Because of the difficulties in obtaining remedial relief through these traditional remedies, all states have now enacted lemon laws that attempt to provide the benefits of these remedies, while closing some of the loopholes. The laws also attempt to better define the vague terms which exist in warranty law. For example, the Arkansas lemon law⁵¹ incorporates certain provisions of Magnuson-Moss as further defined by the regulations promulgated thereunder;⁵² moreover, the law further defines the reasonable number of attempts to repair a nonconformity⁵³ that might give rise to revocation of acceptance type relief.⁵⁴ The intent of the lemon law is to be remedial for consumers.⁵⁵

A. Coverage

The Arkansas lemon law applies to vehicles "purchased or leased" in Arkansas.⁵⁶ There are no exclusions for vehicles purchased for commercial use or by corporations; therefore, vehicles used primarily for business are also covered by the Arkansas lemon law.⁵⁷ The law does not provide coverage, however, for mopeds, motorcycles, the living facilities of motorhomes, or vehicles over 10,000 pounds gross vehicle weight rating.⁵⁸ In addition, enforcement is not limited to the original purchaser or lessee but to any other person "entitled by the terms of the warranty to enforce the obligations of the warranty."⁵⁹ Therefore, used vehicles that are still covered by the

because an arbitrator's decision is binding on GM but not on you, unless you accept it.

**Some states may require that you file a claim with BBB AUTO LINE before resorting to state-operated procedures (including court).

51. ARK. CODE ANN. §§ 4-90-401 to -417 (Michie Supp. 1993).

52. 16 C.F.R. § 703.1-.8 (1993).

53. ARK. CODE ANN. § 4-90-410 (Michie Supp. 1993).

54. *Id.* § 4-90-406(b)(1)(A)(ii). For example, acceptance type relief could include refund of the purchase price. *Id.*

55. *Id.* § 4-90-402. Part of the legislative intent is 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 warranty. . . ." *Id.*

56. *Id.* § 4-90-403(11).

57. This expands the Magnuson-Moss remedy which only applies to "consumer" products.

58. ARK. CODE ANN. § 4-90-403(11) (Michie Supp. 1993). The 10,000 pound weight exclusion does not apply to the chassis of motorhomes. Therefore, motorhomes have coverage as to the basic chassis but not to any of the living facilities. *Id.*

59. *Id.* § 4-90-403(4).

original manufacturer's warranty after being sold to subsequent purchasers are also subject to continued lemon law coverage.⁶⁰

In order to fall under the Arkansas lemon law, a vehicle must be covered under the manufacturer's original warranty.⁶¹ This stems from the fact that the lemon law is a warranty enforcement act, not an act to create a warranty on a vehicle. Under the law, the manufacturer, its agent, or authorized dealer is required to conform a vehicle to the warranty.⁶² Furthermore, the expiration of the warranty does not release the manufacturer from its obligations to make repairs to defects that came about during the coverage period of the warranty.⁶³

When examining the time period available for lemon law relief, the manufacturer's warranty period may in fact exceed⁶⁴ the lemon law's "motor vehicle quality assurance period."⁶⁵ This "assurance period" begins on the date of original delivery of the vehicle to a retail consumer and ends twenty-four months after delivery or 24,000 miles, whichever occurs last.⁶⁶ It is defined more broadly than most

60. *Id.* An interesting but unresolved issue here could arise when a new or used vehicle still under warranty is purchased outside of Arkansas but then brought into Arkansas by the purchaser. Technically, the owner will meet the definition of consumer under the lemon law; however, the vehicle will not precisely fit the definition of "motor vehicle," because that term requires that the vehicle be "purchased or leased in this state." *Id.* § 4-90-403(11). Nevertheless, this may not create a problem when submitting a claim to the informal dispute resolution program, because most of the operating procedures established by the programs for manufacturers do not condition coverage on any basis that includes location of purchase. If, however, the consumer desires to pursue court action, place of purchase might become an issue.

Also, limiting coverage only to those vehicles purchased in Arkansas would mean that a vehicle originally purchased new outside of Arkansas but subsequently sold as a used vehicle in Arkansas would be subject to coverage. Likewise, an out-of-state consumer who purchased a vehicle in Arkansas would have remedies in Arkansas under the lemon law.

61. *Id.* § 4-90-403(17). This includes both express and implied warranties if not disclaimed. *Id.* The legislative intent is to resolve good faith warranty complaints. *Id.* at § 4-90-402. "Consumers" are defined to include those who are entitled to enforce the terms of the warranty. *Id.* § 4-90-403(4).

62. *Id.* § 4-90-405.

63. *Id.*

64. For example, the vehicle may have a manufacturer's warranty that covers seven years or seventy thousand miles, whichever expires first. But once the vehicle has exceeded the lemon law's period of coverage of twenty-four months or twenty-four thousand miles, whichever expires last, the vehicle will still have warranty coverage, but not lemon law coverage.

65. ARK. CODE ANN. § 4-90-403(12) (Michie Supp. 1993).

66. *Id.* A typical motor vehicle warranty coverage in 1994 is for thirty-six months or 36,000 miles, whichever expires first. Therefore, once either of these conditions, months or miles, is reached, the manufacturer's warranty expires. If

time-mileage definitions such as the manufacturer's warranty. Under the lemon law, both the time and the mileage must have expired before losing coverage,⁶⁷ whereas under most time-mileage definitions, coverage is lost when exceeding the first of time or mileage.⁶⁸

The lemon law became effective on August 13, 1993, and one issue which is apparent is whether a vehicle purchased prior to the effective date of the lemon law is covered by the law's provisions. The Arkansas Attorney General's office has taken the position that a vehicle purchased prior to the effective date of the law will be covered if the vehicle is still under the manufacturer's original warranty, the vehicle is within the lemon law's "quality assurance period," and the defect giving rise to lemon status occurs after the effective date.⁶⁹

B. Defects Giving Rise To "Lemon" Status

Under the lemon law, the manufacturer is required to conform the motor vehicle to the terms of the warranty.⁷⁰ After the manufacturer has been given a reasonable number of attempts to repair one or more nonconformities and these nonconformities substantially impair the use, value, or safety of the vehicle, the failure to repair gives rise to lemon law relief.⁷¹ Such relief allows

the vehicle has 34,000 miles on it, and it has been twenty-two months since original delivery, then it will still be covered under the lemon law. It would still be within the thirty-six months or 36,000 miles, whichever expires first, limitation of the manufacturer's warranty, and it would still be within the twenty-four months or 24,000 miles, whichever expires last, limitation of the motor vehicle quality assurance period of the lemon law, because the latter (twenty-four months) has not yet expired. In conclusion, the vehicle must meet both the manufacturer's limitations and the lemon law's limitations to be subject to lemon law coverage.

67. The use of 24 months or 24,000 miles, whichever expires later, was one of the amendments adopted by the Joint Interim Committee on Public Transportation to increase the coverage of the lemon law. STAFF OF JOINT INTERIM COMMITTEE ON PUBLIC TRANSPORTATION OF THE 78TH ARKANSAS GENERAL ASSEMBLY, MINUTES OF MEETING, (Jan. 6, 1993).

68. For example, a new motor vehicle warranty may provide coverage for thirty-six months or thirty-six thousand miles, whichever expires first. When the vehicle exceeds thirty-six thousand miles, despite the fact that the vehicle has been in service for only twenty-four months, the warranty coverage will expire. Likewise, when the vehicle has been in service for over thirty-six months, the warranty coverage will expire even if the vehicle only has twenty thousand miles on it.

69. This conclusion is supported by *Laios v. Camelot AMC/Jeep, Ltd.*, 495 N.Y.S.2d 285 (N.Y. App. Div. 1985) (holding it permissible to apply lemon law to vehicles purchased before the effective date of that law). *But see* 83 Op. Att'y Gen. 7 (Nev. 1983).

70. ARK. CODE ANN. § 4-90-406(a)(2) (Michie Supp. 1993).

71. *Id.* § 4-90-406(b).

the consumer to either receive a replacement vehicle or to have the manufacturer repurchase the vehicle.⁷²

When determining the definition of "nonconformity," it must be noted that the term is necessarily broadly defined.⁷³ Given the complexity of today's automobiles, it would be virtually impossible to provide a laundry list of problems that would warrant lemon law relief. But, in addition to the requirement of a nonconformity, the nonconformity must "substantially impair"⁷⁴ the motor vehicle and not be something of minor importance.⁷⁵

The next prerequisite for lemon law relief is that the manufacturer must have been given a "reasonable number of attempts" to repair the nonconformity or nonconformities.⁷⁶ The lemon law provides a standard by which a reasonable number of attempts to repair is presumed to have occurred.⁷⁷ The presumption is rebuttable⁷⁸ and arises when a vehicle has been subject to three prior opportunities to repair the same nonconformity, but despite these opportunities, the problem has not been cured.⁷⁹ After the consumer gives notice, via certified mail, to the manufacturer of the failure to cure, the

72. *Id.* § 4-90-406(b)(1)(A)(i), (ii).

73. *Id.* § 4-90-403(13). This section provides:

'Nonconformity' means any specific or generic defect or condition or any concurrent combination of defects or conditions that:

(A) Substantially impairs the use, market value, or safety of a motor vehicle; or

(B) Renders the motor vehicle nonconforming to the terms of an applicable manufacturer's express warranty or implied warranty of merchantability. . . .

Id.

74. *Id.* § 4-90-406(b)(1)(A). What "substantially impairs" the use, value, or safety of the vehicle most likely will be a question of fact. The New Jersey Supreme Court, in determining what constitutes substantial impairment under that state's lemon law, has held that an important factor is whether the nonconformity "shakes the buyer's confidence" in the goods. *Berrie v. Toyota Motor Sales, U.S.A., Inc.*, 630 A.2d 1180, 1182 (N.J. Super. Ct. App. Div. 1993). There, the court found the test not to be purely objective, but that it may be "personalized in the sense that the facts must be examined from the viewpoint of the buyer and his circumstances, objective in the sense that the criterion is what a reasonable person in the buyer[']s position would have believed." *Id.* (quoting *G.M.A.C. v. Jankowski*, 523 A.2d 695, 706 (N.J. Super. Ct. App. Div. 1987)).

75. For example, a cigarette lighter which does not work should not be sufficient for lemon law relief. If, however, a cigarette lighter caused electrical problems, such as a risk of fire or the malfunctioning of other important electrical components, that problem would be sufficient for lemon law relief.

76. ARK. CODE ANN. § 4-90-406(b)(1)(A) (Michie Supp. 1993).

77. *Id.* § 4-90-410(a).

78. *Id.*

79. *Id.* § 4-90-406(a)(1).

manufacturer is allowed one final attempt.⁸⁰ If this final attempt to repair is not successful, the presumption takes effect.

The presumption also arises when the vehicle has been subject to one prior opportunity to repair a nonconformity that is likely to cause death or serious bodily injury.⁸¹ After notice by certified mail to the manufacturer from the consumer that the defect exists and has not been cured despite an opportunity to repair, the manufacturer is given one last opportunity to cure the defect. Failure to cure on this final attempt gives effect to the presumption.⁸²

Two other situations give rise to the presumption that a reasonable number of attempts to repair has occurred. First, if the vehicle has been out of service for a cumulative total of thirty calendar days during the motor vehicle quality assurance period, the presumption is established.⁸³ The thirty days may be extended for certain specified reasons such as war, invasion, strike, fire, flood, or natural disaster,⁸⁴ but the burden is on the manufacturer to show that the specified reason was the direct cause for the failure to cure the nonconformity.⁸⁵

The last presumption arises when the vehicle has been subject to five or more attempts, on separately occurring occasions,⁸⁶ to repair any nonconformities that together substantially impair the use and value of the motor vehicle.⁸⁷ The purpose of this section is to award relief for vehicles that seem to be plagued with varying problems. Typically, in this scenario, the individual problems are cured when taken to the dealership, yet the vehicle continues to be troubled with subsequent differing defects.

C. Remedies

When a vehicle has been determined to be a lemon under the Arkansas New Motor Vehicle Quality Assurance Act, the consumer⁸⁸

80. *Id.* § 4-90-410(a)(1) (referring back to § 4-90-406(a)). That referenced section sets forth the actual number of attempts to repair that give rise to the presumptions.

81. *Id.* § 4-90-406(a)(1).

82. *Id.* § 4-90-406(b)(1)(A).

83. *Id.* § 4-90-410(a)(2). What is defined as constituting a day is not clear in the statute. "Calendar day" is defined as "any day of the week other than a legal holiday." *Id.* at § 4-90-403(1). Whether an "over-night" stay is required or whether a partial day would satisfy the requirement is also unclear.

84. *Id.* § 4-90-410(b).

85. *Id.* § 4-90-410(c).

86. At the request of manufacturers, the legislature added the separately occurring occasions provision to alleviate fears that a consumer may bring his automobile in for repair of five different nonconformities that had occurred at the same time and then be entitled to lemon law relief. This position is based upon the assumption that, unlike numerous defects occurring over a span of time, simultaneous defects generally do not burden consumers to a degree warranting lemon law relief.

87. ARK. CODE ANN. § 4-90-410(a)(3) (Michie Supp. 1993).

88. The consumer may also include the lessee and lessor. In the case of a lease

is entitled to either a replacement vehicle or a refund of the purchase price, plus payment for all collateral⁸⁹ and incidental⁹⁰ charges.⁹¹ However, the consumer will be responsible for a reasonable offset for use.⁹² This offset is calculated by a formula set forth in the lemon law where the life of the vehicle is pro-rated over 120,000 miles.⁹³ When calculating the mileage, however, the consumer is to be assessed only for the mileage accumulated up to the time the consumer first delivers the vehicle to the manufacturer, its agent, or authorized dealer for correction of the nonconformity.⁹⁴ The consumer will also be responsible for any physical damage the vehicle has sustained while under the consumer's ownership.⁹⁵

The lemon law provides the consumer with an unconditional right to choose a refund instead of a replacement vehicle.⁹⁶ If the manufacturer and the consumer agree to replace the vehicle, the manufacturer that has financed the purchase of the vehicle, either directly or through one of its subsidiaries or agents, cannot require or impose upon the consumer a financial obligation greater than the original financing agreement.⁹⁷ In addition, the replacement vehicle must be "identical or reasonably equivalent" to the vehicle being replaced as the vehicle being replaced existed at the time of the original acquisition.⁹⁸ Accordingly, the replacement vehicle should not be a used vehicle of like kind and quality but rather a new

vehicle, a formula is provided in the act for distribution of refund proceeds between the lessee and the lessor. *Id.* § 4-90-407(2). In addition, the lease contract is to be terminated without penalty to the consumer for early termination. *Id.* § 4-90-407(b).

89. *Id.* § 4-90-403(2). "Collateral charges" are those charges to a consumer incurred as a result of the vehicle's acquisition which include, but are not limited to, "manufacturer-installed or agent-installed items, earned finance charges, sales taxes, title charges, and charges for extended warranties provided by the manufacturer, its subsidiary, or agent. . . ." *Id.*

90. *Id.* § 4-90-403(5). "Incidental charges" are "those reasonable costs incurred by the consumer, including, but not limited to, towing charges and the costs of obtaining alternative transportation which are directly caused by the nonconformity or nonconformities which are the subject of the claim, but shall not include loss of use, loss of income, or personal injury claims. . . ." *Id.*

91. *Id.* § 4-90-406(b)(1)(B).

92. *Id.* § 4-90-406(b)(1)(A)(ii).

93. *Id.* § 4-90-406(b)(3). For example, a consumer who has driven the vehicle for 20,000 miles has utilized one-sixth of the vehicle's value, which is prorated over 120,000 miles (20,000 ÷ 120,000). If the purchase price of the vehicle was \$18,000, then one-sixth of \$18,000 would be \$3,000. The consumer would be charged \$3,000 as his reasonable offset for use.

94. *Id.*

95. *Id.* § 4-90-406(b)(1)(A)(ii).

96. *Id.* § 4-90-406(b)(2)(A).

97. *Id.* § 4-90-407(c).

98. *Id.* § 4-90-403(16).

vehicle, with the consumer being charged a reasonable offset for use and any applicable offset for physical damage.⁹⁹ Thus, after receiving payment from the consumer for the offsets, the manufacturer, its subsidiary, or agent, cannot require a higher financial obligation either in payment amounts or total principal when replacing the vehicle.

Whether a refund or a replacement is desired, the consumer has a right to retain the vehicle for use until the refund or replacement is tendered.¹⁰⁰ Since the formula for determining the amount to be charged the consumer as an offset for use only calculates mileage up to the point of first return for repairs of the specific nonconformity, the consumer cannot be charged for use while awaiting tender of the refund or replacement.¹⁰¹

D. Procedural Steps For Relief

The consumer generally has two different types of notification that he must make when proceeding under the lemon law. First, in giving the manufacturer a final attempt to repair a nonconformity (after three attempts to repair, or one attempt if the nonconformity is likely to cause death or serious bodily injury), the consumer must give written notification, by certified or registered mail, to the manufacturer of the need to repair the nonconformity.¹⁰² However, no such notice is required when the reasonable number of attempts to repair arises from the vehicle being thirty days or more out of service or subject to five or more separately occurring nonconformities.¹⁰³

The second notice required of the consumer arises when making a claim for relief under the lemon law. In order to recover under

99. *Id.* § 4-90-406(b)(1)(A)(i).

100. *Id.* § 4-90-409.

101. *Id.* § 4-90-406(b)(3). The retention of the vehicle while awaiting tender of the refund or replacement is similar to the U.C.C. security interest retention available under revocation of acceptance. *See* *Snow v. C.I.T. Corp.*, 278 Ark. 554, 558, 647 S.W.2d 465, 467 (1983). However, whereas revocation of acceptance under the U.C.C. results in the consumer being subject to charge for continued use after revocation, the lemon law limits the usage charge only up to the point of the first attempt to repair the vehicle. ARK. CODE ANN. § 4-90-406(b)(3) (Michie Supp. 1993).

102. ARK. CODE ANN. § 4-90-406(a)(1) (Michie Supp. 1993).

103. When a presumption arises from failure to make required repairs, the notice by the consumer for a final attempt to repair is required. *Id.* § 4-90-410(a)(1) (making reference to § 4-90-406(a)). However, the presumptions arising from five separately occurring nonconformities or thirty days out of service do not have any requirement of a final attempt to repair. *Id.* § 4-90-419(a)(2), (3).

the lemon law, the consumer is required to notify the manufacturer of his claim.¹⁰⁴ However, if the manufacturer has not disclosed to the consumer at the time of purchase or lease a statement of the consumer's rights and obligations under the lemon law,¹⁰⁵ then this second notice requirement is waived.¹⁰⁶ Generally, this notification will be no obstacle since most claims are required to first proceed through the informal dispute resolution program, which is in an agency relationship with the manufacturer.¹⁰⁷ The informal dispute resolution program is required to give notice to the manufacturer when a claim has been filed.¹⁰⁸ Therefore, the notice to the manufacturer will be automatic in most cases.

Before being entitled to court-enforced remedies, it is important to note that the consumer must first bring the claim through an informal dispute resolution procedure¹⁰⁹ in which every manufacturer of vehicles subject to the lemon law must operate or participate.¹¹⁰ Notwithstanding this requirement of participation in an informal dispute resolution program,¹¹¹ the manufacturer may unilaterally waive the prerequisite of a consumer first proceeding through the informal process prior to going to court.¹¹² When a consumer does proceed through the informal process, he cannot be charged any costs for utilization of the informal dispute resolution procedure.¹¹³

104. *Id.* § 4-90-404(a)(1).

105. *Id.* § 4-90-404(a)(2), (b)(1). The required disclosure to be utilized by the manufacturer is in the form of a booklet prepared by the Office of the Attorney General. *Id.* § 4-90-404(b)(2). The booklet, *A Consumer's Guide to the Arkansas New Motor Vehicle Quality Assurance Act*, must be provided at the time of purchase or lease of every new vehicle covered by the lemon law. *Id.* § 4-90-404(b)(1).

106. *Id.* § 4-90-404(a)(2).

107. *Id.* § 4-90-414(a)(1).

108. *Id.* § 4-90-414(b)(1) (incorporating 16 C.F.R. §§ 703.1-.8 (1993)).

109. ARK. CODE ANN. § 4-90-414(a)(2) (Michie Supp. 1993).

110. *Id.* § 4-90-414(a)(1). The informal dispute procedure must be certified by the Consumer Protection Division of the Office of Attorney General as meeting lemon law requirements. *Id.* § 4-90-414(b).

111. As of the date of this writing, two manufacturers operate their own programs. Ford Motor Company has established the Dispute Settlement Board as its program. Similarly, Chrysler Corporation has established the Customer Arbitration Board. Porsche and Subaru are participating in the Autosolve program operated by the American Automobile Association. General Motors and other manufacturers are participating in the Autoline program operated by the Council of Better Business Bureaus, Inc.

112. ARK. CODE ANN. § 4-90-414(a)(2) (Michie Supp. 1993). General Motors waived the requirement in their 1993 manuals. However, the waiver does not exist in the 1994 manuals.

113. *Id.* § 4-90-414(b)(6).

The actual format of the hearing process permits the consumer or his attorney¹¹⁴ to be present at the hearing and to make an oral presentation.¹¹⁵ It also allows the consumer to have an independent expert of his own choosing at the hearing to contest any assertion by the manufacturer that the vehicle conforms to specifications.¹¹⁶

Also with respect to the hearing format, the lemon law provides the consumer the option of either a one-member panel or a three-member panel to hear his case.¹¹⁷ The actual selection of the members of the panel is governed by Magnuson-Moss guidelines,¹¹⁸ and those members, who are approved by the Attorney General,¹¹⁹ are preselected by the informal dispute resolution program. The decision reached by the panel is binding on the manufacturer but not on the consumer.¹²⁰ In addition, the manufacturer has no avenue to appeal the decision.

It is important to realize that when proceeding either through the informal process or through court action, the presumptions of "reasonable opportunity to repair" are rebuttable.¹²¹ Thus, the burden is shifted to the manufacturer to show that it did not have a reasonable opportunity to repair the defect. In addition, the manufacturer also has available certain affirmative defenses,¹²² one of which is that the nonconformity does not substantially impair the use, value, or safety of the motor vehicle.¹²³ When asserting or contesting the substantial impairment defense, the case law in Arkansas regarding nonconformities and revocation of acceptance will most

114. *Id.* § 4-90-414(b)(7).

115. *Id.* § 4-90-414(b)(4)(A). The lemon law, while allowing attorney's fees to be recovered on successful court action, has no specific provision for the reimbursement of attorney's fees if the consumer is successful in pursuing a claim through the informal dispute resolution process.

116. *Id.* § 4-90-414(b)(5). However, the consumer is required to bear the costs for his own expert. *Id.* In addition to the consumer's technical expert, if the members of the informal dispute resolution procedure feel that they need an independent investigator of their own, the lemon law requires that this investigator be selected from a pool of at least four persons who are appointed annually by the informal dispute resolution program. *Id.* § 4-90-414(c)(1)(C). These appointments must be approved by the Attorney General. *Id.*

117. *Id.* § 4-90-414(c)(1)(B).

118. *Id.* § 4-90-414(b)(1). A panel member must be a person who is interested in fair and expeditious settlements of disputes and cannot be a party to the dispute nor an employee or agent of any party except for purposes of deciding the dispute. 16 C.F.R. § 703.4 (1993).

119. ARK. CODE ANN. § 4-90-414(c)(1)(A) (Michie Supp. 1993).

120. *Id.* § 4-90-415.

121. *Id.* § 4-90-410(a).

122. *Id.* § 4-90-413.

123. *Id.* § 4-90-413(1).

likely come into analysis. The question of substantial impairment is a question of fact, and when asserting this affirmative defense, the burden is on the manufacturer to show the absence of substantial impairment.

If a consumer is not satisfied with the results of the informal dispute resolution process, he can proceed with his claim in court.¹²⁴ However, the decision reached in the informal process will be admissible as evidence in the civil action.¹²⁵ Another concern regarding civil court action is that the statute of limitations under the lemon law is shorter than the U.C.C.'s period of four years.¹²⁶ Under the lemon law, the suit must be brought within two years of the date of first reporting the nonconformity¹²⁷ or, if the informal process has been used, two years following initiation of an action through the informal dispute process.¹²⁸

In addition to a consumer's suit for damages, court ordered enforcement under the lemon law is available to the Attorney General. Violations of the provisions of the lemon law, such as the failure of a manufacturer to operate or participate in an informal dispute resolution program or failure to provide the required disclosures to consumers, are defined as *per se* violations of the Deceptive Trade Practices Act.¹²⁹ While Arkansas law is not totally clear, it appears that in addition to state enforcement, private remedies under the Deceptive Trade Practices Act may also be available.¹³⁰

124. *Id.* § 4-90-415(a).

125. 16 C.F.R. § 703.5(j) as incorporated by ARK. CODE ANN. § 4-90-414(b)(1) (Michie Supp. 1993).

126. ARK. CODE ANN. § 4-2-725(1) (Michie 1991). The U.C.C. statute of limitations begins to run when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. *Id.*

127. ARK. CODE ANN. § 4-90-416(a) (Michie Supp. 1993).

128. *Id.* § 4-90-416(b).

129. *Id.* § 4-90-417. The Deceptive Trade Practices Act is codified at ARK. CODE ANN. §§ 4-88-101 to -207 (Michie 1991 & Supp. 1993). The Attorney General may seek injunctive relief, restitution for consumers, and civil penalties. *Id.* § 4-88-113.

130. There is little case law in Arkansas on the issue of whether there are private enforcement rights under the Deceptive Trade Practices Act. However, the supreme court has strongly hinted in dicta that sound authority exists for the proposition that statutes designed to protect the public from deceptive marketing and advertising practices imply a right of enforcement by civil action by persons injured by their breach. *See Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 397, 653 S.W.2d 128, 134 (1983) (finding that violation of consumer protection statute may be used as evidence of negligence in tort action). Even more indicative that a private cause of action exists under the Deceptive Trade Practices Act is a 1993 amendment adding provisions for enhanced penalties when elderly or disabled persons are victimized. ARK. CODE ANN. § 4-88-201 (Michie Supp. 1993). The enhanced penalties amendment provides a private enforcement remedy for elderly or disabled victims. *Id.* § 4-88-204.

VI. CONCLUSION

To revisit the earlier example of Mary and her purchase of a defective automobile,¹³¹ she may wish to pursue the matter through the lemon law process. Let us assume that she has taken her car back to the dealer for repairs, and after three attempts to repair,¹³² the problem with the vehicle continues to exist. Her next step would be to send a letter to the manufacturer, via certified mail, affording it one last chance to repair her car.¹³³

The manufacturer may or may not respond to this letter. Mary should receive a notice providing a time and place for the final repair opportunity by the manufacturer. However, sometimes the manufacturer does not respond at all. If no response is received by Mary, or if the vehicle is not repaired in a timely fashion¹³⁴ after she has notified the manufacturer of its last opportunity to repair, Mary has established her presumption of owning a lemon.¹³⁵ She should then demand either a refund or replacement vehicle. In actual practice, this demand is advanced by proceeding into arbitration through the informal dispute process.

Hopefully, the process will be as effective for Mary as it has been for other consumers, as indicated in preliminary reports. Of the five initial cases heard by the Better Business Bureau¹³⁶ on behalf of the manufacturers they represent, only one case resulted in failure to award a refund of the purchase price. In that case, the existence of the defect could not be found.¹³⁷ If these early reports are

131. See *supra* p. 495.

132. See ARK. CODE ANN. § 4-90-406 (Michie Supp. 1993) (providing other methods in which defects may give rise to "lemon" status).

133. Not all presumptions giving rise to lemon status require giving the manufacturer a final attempt to repair. *Id.* § 4-90-410(a)(2), (3).

134. Within ten days after receipt of the notification by the consumer, the manufacturer is required to notify and provide the consumer with an opportunity to have the vehicle repaired at a reasonably accessible repair facility. *Id.* § 4-90-406(a)(2). After the consumer delivers the vehicle to the designated repair facility, the manufacturer has ten days to conform the vehicle to the warranty. *Id.* If the manufacturer fails to notify and provide the consumer with the opportunity to have the vehicle repaired at a reasonably accessible repair facility or fails to perform the repairs within the allotted time periods, then the manufacturer is not entitled to a final attempt to cure the nonconformity. *Id.* § 4-90-406(a)(3).

135. It is assumed for purposes of this example that the defect substantially impairs the use, value, or safety of her vehicle. See *id.* § 4-90-403(13).

136. Letter from Alan L. Cohen, Senior Attorney, Council of Better Business Bureaus, Inc., to Clifford P. Block, Investigator, Consumer Protection Division, Arkansas Office of Attorney General (Dec. 23, 1993).

137. *Id.*

representative of future benefits, the results of the Arkansas lemon law look promising to Mary and others like her.¹³⁸

However, if Mary is not satisfied with the results from the informal process, she then has the option of bringing a civil action.¹³⁹ In addition, she should not limit her claim to lemon law relief but should include other remedies available to her, such as actions of breach of warranty and revocation of acceptance.¹⁴⁰ However, if she should prevail on more than one of the causes of action, it is imperative that calculation of damages be based upon the proper election of remedies since Mary cannot receive double or triple recovery.¹⁴¹

Often the manufacturer may resolve the matter prior to arbitration by repurchasing the vehicle when it is apparent that the consumer will have a successful case. Whether repurchased as a result of voluntary agreement, arbitration, or court judgment, the nonconforming vehicle may not be resold in Arkansas unless the manufacturer provides a minimum express warranty.¹⁴² Further, the manufacturer must provide a written disclosure to the subsequent buyer that the vehicle was repurchased as a nonconforming vehicle.¹⁴³

The Arkansas lemon law contains new procedures and standards that will undoubtedly be subjected to clarification through future judicial analysis. Certain aspects may be examined in relation to existing legal doctrine in Arkansas, and, while lemon laws of the other states vary greatly, there is a developing base of case law in other jurisdictions that may prove to be helpful when interpreting provisions of Arkansas law that are similar to those of other states. In conclusion, it appears that the Arkansas New Motor Vehicle

138. The 1992 lemon law awards in Texas reflect that 15% of the formal complaints filed were awarded relief of either repurchase or replacement. However, other complaints may have been resolved through the informal complaint process. TEXAS DEP'T OF TRANS., MOTOR VEHICLE LEMON LAW ANNUAL REPORT (1992). Similarly, Florida's results for 1992 reflect that 20.4% of complaints filed resulted in refunds or replacement vehicles. FLORIDA LEMON LAW ARBITRATION PROGRAM, ANNUAL REPORT (1992).

139. ARK. CODE ANN. § 4-90-415(a) (Michie Supp. 1993).

140. The lemon law does not limit other remedies available to a consumer. *Id.* § 4-90-415(b).

141. *Thomas Auto Co. v. Craft*, 297 Ark. 492, 497-98, 763 S.W.2d 651, 654 (1989).

142. ARK. CODE ANN. § 4-90-412(1) (Michie Supp. 1993). A minimum warranty must be provided with coverage at least equal to the original express warranty on the vehicle for a period of twelve months or twelve thousand miles, whichever expires first. *Id.*

143. *Id.* § 4-90-412(2).

Quality Assurance Act is a branch of hope for consumers who have unknowingly picked a "lemon."

Clifford P. Block

