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Mark Hanin

Carter Greenbaum

Jeremy Aron-Dine

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INTERPRETING THE “REASONABLE NUMBER OF REPAIR ATTEMPTS”  
STANDARD IN LEMON LAW ARBITRATIONS

Mark Hanin, Carter Greenbaum, Jeremy Aron-Dine \*

I. INTRODUCTION

In 2014, 2015, and 2016, consumers filed class-action lawsuits against Ford Motor Company alleging “inherent defects” in the design of Ford’s PowerShift transmission in the Focus and Fiesta models.<sup>1</sup> These defects reportedly cause the transmission to stall, slip, jerk, stutter, accelerate without warning, and stop too slowly. These transmission problems do not manifest until after the car has been driven many thousands of miles,<sup>2</sup> by which point the statutory period during which the consumer can institute a Lemon Law arbitration may have expired. For example, in two cases that we have arbitrated, defects did not manifest for the first time until after 10,000 and 15,000 miles, respectively. In other cases that have come before the Connecticut Department of Consumer Protection (“DCP”), the office responsible for administering Connecticut’s Lemon Law program, consumers have repaired their vehicles fewer than four times during the Lemon Law’s “applicable period.” This factual situation makes it difficult to recover under Connecticut’s Lemon Law, which was the first such statute enacted and set the standard for subsequent Lemon Laws in all forty-nine other states and the District of Columbia.

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\* Mark Hanin, J.D. Candidate Class of 2017, Yale Law School, Carter Greenbaum, J.D., Yale Law School, and Jeremy Aron-Dine, J.D. Candidate Class of 2018, Yale Law School, were Directors of the Yale Law School Hearing Officer Project in 2015, 2016, and 2017, respectively. Through the Project, students arbitrate Lemon Law cases under the auspices of the Connecticut Department of Consumer Protection’s Lemon Law Program. Many thanks to Ian Ayres for helpful critiques and to Timothy Clark and Richard Maloney from the Connecticut Department of Consumer Protection for their thoughtful advice.

<sup>1</sup> See, e.g., *Vargas v. Ford Motor Co.*, No. 2:12-cv-08388 (C.D. Cal. 2014); *Klipfel v. Ford Motor Co.*, No. 2:15-cv-02140 (C.D. Cal. 2015); *Anderson v. Ford Motor Co.*, No. 1:16-cv-01632 (N.D. Ill. 2016); see also *Clark v. Ford Motor Co.*, No. 2:15-cv-00287 (E.D. Pa. 2015) (alleging similar defects in the Ford F150).

<sup>2</sup> See, e.g., Complaint at 11-13, *Cusick v. Ford Motor Co.*, No. 2:15-cv-08831 (C.D. Cal. Nov. 12, 2015) (alleging that Cusick did not bring her vehicle in for repairs until three years after the purchase date).

Ford's PowerShift transmission scandal is only the latest in a series of problems that continue to test the ability of state Lemon Laws to provide consumers adequate recourse against manufacturers for alleged defects. In light of these challenges, DCP asked us, as arbitrators, to provide our interpretation of Connecticut's Lemon Law as it relates to consumers who do not repair their vehicles at least four times during the first two years or 24,000 miles of car ownership (the "Applicable Period").<sup>3</sup> As a threshold question, we must determine whether a consumer may *ever* recover under the Lemon Law with fewer than four repair attempts during the Applicable Period. We argue that, contrary to the assertions of many automobile manufacturers, Connecticut's Lemon Law permits cases to proceed to arbitration with fewer than four repair attempts. More controversially, we argue that, when a defect has been repaired at least once during the Applicable Period, repairs made after that period for the same defect can constitute evidence for recovery under the Lemon Law.

Our interpretation of Connecticut's Lemon Law affects dozens of other state Lemon Laws. Connecticut was the first state to pass a "Lemon Law" in 1982. Since then, all forty-nine other states and the District of Columbia have followed suit. These other states have often adopted lemon laws that mirror Connecticut's with only minor changes. For example, California and New York's Lemon Laws provide recovery for consumers who have repaired their vehicle at least four times in the first eighteen months (two years in New York) or 18,000 miles,<sup>4</sup> while Connecticut requires two years or 24,000 miles. Ohio's Lemon Law is virtually identical to Connecticut's, except that its presumption provides relief for consumers who repair their vehicle at least four times in the first year or 18,000 miles,<sup>5</sup> and it provides automatic relief for consumers who repair their vehicle at least eight times.<sup>6</sup>

In advancing our reading of Connecticut's Lemon Law, we have in mind three audiences. First, we hope to influence state agencies charged with interpreting and carrying out their respective state Lemon Laws. In particular, we urge state agencies like the Connecticut Department of Consumer Protection to consider revising their eligibility review of certain cases. Second, our discussion is aimed at arbitrators and judges across the United States who decide Lemon Law cases in the first instance. Third, our statutory analysis is aimed at courts reviewing arbitration awards in various jurisdictions. Our general view

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<sup>3</sup> CONN. GEN. STAT. § 42-179(b).

<sup>4</sup> CAL. CIV. CODE § 1793.22(b); N.Y. GEN. BUS. LAW § 198-a(b)(1).

<sup>5</sup> OHIO REV. CODE § 1345.72(a).

<sup>6</sup> *Id.* § 1345.73(A)(3).

is that DCP, some arbitrators, and a handful of courts have interpreted Lemon Law statutes too narrowly and thus precluded some eligible consumers from proceeding to arbitration and recovering under Connecticut’s Lemon Law.

Part II analyzes the “reasonable number of repair attempts” standard and argues that a single repair attempt can suffice for proceeding to arbitration. Part III turns from the number of repair attempts to their timing. It argues that repair attempts made after the Applicable Period can sometimes provide a basis for relief under Connecticut’s Lemon Law. Part IV addresses three objections to our reading of the statute.

## II. REASONABLE NUMBER OF REPAIR ATTEMPTS

Consumers who file claims for arbitration under Connecticut’s Lemon Law are not automatically entitled to make their case before an arbitrator. Instead, DCP screens requests for arbitration.<sup>7</sup> The Lemon Law provides: “The department shall determine whether the complaint should be accepted or rejected for arbitration based on whether it alleges that the manufacturer has failed to comply with section 42-179.”<sup>8</sup> Consumers may appeal DCP’s finding that their claim is ineligible for arbitration to an arbitrator.<sup>9</sup> However, arbitrators tend to follow DCP’s guidance and we could find no evidence of an arbitrator granting a claim for relief after DCP had initially denied eligibility. Given the statutorily-imposed screening process, it matters greatly what standards DCP uses to decide which claims can proceed to arbitration and which claims are turned away *ab initio*. DCP’s interpretation of the Lemon Law thus takes center stage, serving a gatekeeping function for consumers who seek relief under the Lemon Law. In this Part, we argue that consumers who have repaired their vehicle fewer than four (or two) times are nevertheless eligible for arbitration.

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<sup>7</sup> AUTOMOBILE DISPUTE SETTLEMENT PROGRAM, CT. DEP’T OF CONSUMER PROTECTION, ARBITRATOR HANDBOOK 5 (2016) [hereinafter ARBITRATOR HANDBOOK] (“The eligibility determination is made by DCP staff in the first instance.”).

<sup>8</sup> CONN. GEN. STAT. § 42-181(b) (2012).

<sup>9</sup> *Id.* § 42-179(f) (“Any consumer injured by the operation of any procedure which does not conform with procedures established by a manufacturer pursuant to subsection (b) of section 42-182 and the provisions of Title 16 Code of Federal Regulations Part 703, as in effect on October 1, 1982, may appeal any decision rendered as the result of such a procedure by requesting arbitration de novo of the dispute by an arbitrator.”); see also ARBITRATOR HANDBOOK, *supra* note 7 (“When a case is determined to be ineligible for arbitration, the consumer is notified of the reasons for ineligibility and may appeal DCP’s ruling to an arbitrator.”).

A. The "Mechanics" of the Connecticut Lemon Law

Connecticut was the first state to pass a lemon law in 1982.<sup>10</sup> By 1997, all forty-nine other states and the District of Columbia had followed Connecticut's lead.<sup>11</sup> The basic goal of Connecticut's Lemon Law is to "compel performance of any express warranties made by the manufacturer to the consumer."<sup>12</sup> It is a remedial statute, and courts overwhelmingly interpret the Act broadly to effectuate this legislative purpose.<sup>13</sup>

The Connecticut Legislature enacted the Lemon Law to supplement remedies available to consumers under the federal Magnuson-Moss Warranty Act and the Uniform Commercial Code ("UCC").<sup>14</sup> Prior to the enactment of the Lemon Law, it was difficult for consumers to obtain sufficient remedies for a variety of reasons. Chief among them was the universal practice of limiting vehicle warranties to "repair or replacement of defective parts."<sup>15</sup> Under the UCC, consumers could only recover monetary damages when a limited remedy had "failed of its essential purpose."<sup>16</sup> This standard proved too onerous for many consumers, and in response, the legislature enacted its own "reasonable repair attempts" test to help consumers obtain relief; this standard is codified as the Lemon Law in Connecticut General Statutes

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<sup>10</sup> See Act Concerning Automobile Warranties, Pub. Act No. 82-287, 1982 Conn. Acts 667 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 42-179 (2012)). A second lemon law, Lemon Law II, was enacted in 1984 establishing an independent arbitration procedure to settle disputes between consumers and manufacturers. Act Concerning New Motor Vehicle Warranties and Dispute Resolution Procedures for Defective Vehicles, Pub. Act No. 84-338, 1984 Conn. Acts 484 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 42-181 (2012)).

<sup>11</sup> See Louis J. Sirico, Jr., *Automobile Lemon Laws: An Annotated Bibliography*, 8 LOY. CONSUMER L. REP. 39, 39 (1996).

<sup>12</sup> Marie Beattie, Note, *The Connecticut Lemon Law*, 5 U. BRIDGEPORT L. REV. 175, 191 (1984) (citing statements by Representative Woodcock).

<sup>13</sup> See ARBITRATOR HANDBOOK, *supra* note 7, at 5-6 ("[T]he Lemon Law is a 'remedial' statute which means it is to be liberally or broadly interpreted in favor of the consumer."); see also *Cagiva N. Am., Inc. v. Schenk*, 680 A.2d 964, 968 (Conn. 1996) ("The Lemon Law is a remedial statute that protects purchasers of new passenger motor vehicles."); *Dieter v. Chrysler Corp.*, 610 N.W.2d 832, 837 (Wis. 2000) (quoting *Hughes v. Chrysler Motors Corp.*, 542 N.W.2d 148, 151 (Wis. 1996)) ("Remedial statutes like the lemon law are to be construed 'with a view towards the social problem which the legislature was addressing when enacting the law.'").

<sup>14</sup> See Beattie, *supra* note 12, at 189.

<sup>15</sup> But see *id.* at 186 (discussing an exceptional case in which a consumer recovered in spite of such a limitation).

<sup>16</sup> U.C.C. § 2-719(2) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

Chapter 743b, primarily in Section 42-179 (b), (d), and (e).<sup>17</sup>

Before a case is eligible for arbitration, DCP conducts an eligibility review of the complaint. DCP’s policy is as follows: In cases with fewer than four attempts, a consumer must affirmatively allege in her request for arbitration that a reasonable number of repair attempts has been done.<sup>18</sup> The result is that some cases eligible for arbitration based on the statute might not get past the gate. Until recently, for example, cases in which many repair attempts occurred after the Applicable Period would not have proceeded to arbitration. Meanwhile, without a clear policy and coherent guidance for arbitrators, arbitrators routinely adopt an erroneous standard for a “reasonable number of repair attempts”. We argue that the case-by-case analysis performed by DCP during its eligibility review should actually be performed by arbitrators under the law.

### *B. Why Fewer Repair Attempts Are Permissible under the Lemon Law*

This Section summarizes DCP’s eligibility standards for arbitration and explains why those standards should be interpreted more broadly. Our interpretation of the statute is applicable, *mutatis mutandis*, to the standards arbitrators use to adjudicate disputes.

A consumer may recover under Connecticut’s Lemon Law program only if her vehicle has been subject to a “reasonable number of [repair] attempts.”<sup>19</sup> While the law defines certain presumptions to satisfy the requirement for a “reasonable number of repair attempts,” (i) DCP’s approach to eligibility, (ii) the Lemon Law regulations, (iii) the statutory presumptions, and (iv) the case law each interpret these definitions in a slightly different way. The result is significant ambiguity regarding what constitutes a reasonable number of repair attempts. Consumers would be best served if all parties involved in Lemon Law arbitrations converged on one consistent and clear definition.

We begin with the law itself. Subsection (d) requires consumers to establish that their vehicle has been subject to a “reasonable number of [repair] attempts,” but it does not define reasonableness explicitly. Instead, subsections (e) and (f) set out presumptions under which a consumer is entitled to relief as a matter of law. Thus, under subsection (e), if a vehicle has been subject to four or more repair attempts *and* the defect continues to exist (or if the vehicle has been out

<sup>17</sup> CONN. GEN. STAT. § 42-179 (2012).

<sup>18</sup> Here, we are addressing the subset of cases where the presumption from subsection (f) is not at issue.

<sup>19</sup> CONN. GEN. STAT. § 42-179(b) (2012).

of service by reason of repair for a cumulative total of thirty days), a consumer is entitled to an irrebuttable presumption that she has made a reasonable number of repair attempts.<sup>20</sup> Subsection (f) provides a similar presumption of reasonableness if the consumer repairs the car twice and the defect is likely to cause death or serious bodily injury.<sup>21</sup> While subsections (e) and (f) set out presumptions for meeting the "reasonable number of repair attempts" prong as a matter of law, that prong does not *require* four (or two) repair attempts in all cases. Fewer attempts may be reasonable in certain situations.

Indeed, Connecticut's Lemon Law explicitly contemplates situations in which a consumer can obtain relief with fewer than four (or two) repair attempts. The statute provides that "[n]o claim shall be made . . . unless at least one attempt to repair a nonconformity has been made . . . or unless such manufacturer . . . has refused to attempt to repair such nonconformity."<sup>22</sup> When the statute was enacted in 1982, the precursor to subsection (e) did not include this clause.<sup>23</sup> The legislature added it in 1989 in response to a performance audit by the Legislative Program Review and Investigations Committee ("Program Committee"). The Program Committee found that "[i]n some instances, less than four repair attempts is allowed if the problem is one for which evidence exists that no repair will bring the vehicle back into conformance."<sup>24</sup> While the Program Committee concerned itself with cases in which "evidence exists that no repair will bring the vehicle back into conformance," the text of subsection (e) is broader. By requiring "at least one [repair] attempt," the statute broadly contemplates additional, unspecified situations in which fewer than four attempts might be reasonable and thus suffice for recovery.

Not only does Connecticut's Lemon Law simply require "at least one repair attempt" to prevail on a claim, but notes accompanying the statute refer to a case in which a consumer repaired his car only once and successfully recovered.<sup>25</sup> In that case—*General Motors Corp. v. Dohmann*—the Connecticut Supreme Court held that the consumer's single repair attempt was reasonable because the evidence

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<sup>20</sup> *Id.* § 42-179(e).

<sup>21</sup> *Id.* § 42-179(f).

<sup>22</sup> *Id.* § 42-179(b).

<sup>23</sup> See *General Motors Corp. v. Dohmann*, 722 A.2d 1205, 1211 (Conn. 1998).

<sup>24</sup> LEGISLATIVE PROGRAM REVIEW & INVESTIGATIONS COMM., PERFORMANCE AUDIT OF THE CONNECTICUT LEMON LAW 20 (1989) [hereinafter PERFORMANCE AUDIT].

<sup>25</sup> See CONN. GEN. STAT. § 42-179 cmt. ("Plaintiff's attempt to replace truck's hood constituted a reasonable number of repair attempts.").

demonstrated that additional repair attempts would not have remedied the inconsistent paint job on the consumer’s truck.<sup>26</sup> *Dohmann* also held that a single repair attempt is reasonable when a manufacturer refuses to remedy a defect. The *Dohmann* court stated: “[I]t is undisputed that the defendant met the statutory prerequisite of a single repair attempt for instituting an arbitration proceeding.”<sup>27</sup> While some courts in Ohio and California have interpreted the presumptions as minimum thresholds for relief,<sup>28</sup> Connecticut’s statute and case law remain faithful to the plain meaning of the word “presumption.” Merriam-Webster defines a presumption as “a legal inference as to the existence or truth of a fact not certainly known that is drawn from the known or proved existence of some other fact.”<sup>29</sup> Thus, Connecticut *presumes* that a vehicle has been subject to a reasonable number of repair attempts when it has been subject to at least four (or two) attempts, notwithstanding the fact that a reasonable number of repair attempts may be achieved with fewer than four (or two) attempts.

It is clear that a vehicle that has been subject to four or more repair attempts within the Applicable Period has satisfied this requirement under the presumption of subsection (e). It is equally clear that if a defect is “likely to cause death or serious bodily injury,” only two repair attempts are needed within a one-year period under subsection (f). According to the Connecticut Supreme Court, if a manufacturer refuses to repair a defect or no repair is possible, then just one repair attempt is sufficient for a claim to proceed to arbitration.<sup>30</sup> These are easy cases. But when consumers repair their vehicle fewer than four

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<sup>26</sup> *Dohmann*, 722 A.2d at 1210.

<sup>27</sup> *Id.* n.8 (emphasis added). Other courts have followed suit. For example, a 2003 district-court case from Nevada cites *Dohmann* and comments approvingly: “The Court is in agreement with those decisions which hold that under some circumstances a single attempt, or no attempt at all, can be a reasonable number. If, for example, the manufacturer or dealer refuses to repair or correct, claiming there is no defect, or after a single repair takes the position that further repair would be unnecessary or unavailing, the buyer is not precluded from exercising his or her right under the lemon law because the manufacturer or dealer refuses to make further (or any) attempts.” *Milicevic v. Mercedes-Benz USA, LLC*, 256 F. Supp. 2d 1168, 1175-76 (D. Nev. 2003).

<sup>28</sup> For example, the Sixth Circuit observed in *Temple v. Fleetwood Enterprises, Inc.* that “[t]he Ohio Supreme Court has interpreted the statute that purports to establish a *presumption* of reasonableness to establish instead a *definition* of reasonableness that a consumer must meet to survive summary judgment.” *Temple v. Fleetwood Enterprises, Inc.*, 133 Fed. App’x 254, 262 (6th Cir. 2005).

<sup>29</sup> *Presumption*, MERRIAM-WEBSTER ONLINE DICTIONARY (2017), <http://www.merriam-webster.com/dictionary/presumption> (last visited Apr. 3, 2017).

<sup>30</sup> *Dohmann*, 722 A2d. at 1211 n.9.



times, or some repairs take place after the Applicable Period, the law is unclear and demands a case-by-case, all-circumstances-considered approach. This case-by-case analysis should not take place at the eligibility stage, however, as is current practice. To do so would effectively take legal interpretation out of the hands of arbitrators and, ultimately, the courts.

DCP has promulgated regulations that may contribute to a misperception about the broad standard envisioned by the drafters of Connecticut's Lemon Law. Connecticut Regulation 42-181-16 requires automobile dealers to display a sign at their facilities educating consumers about their rights under the Lemon Law.<sup>31</sup> The sign mandated by the regulations should state, in capital letters, "if the same substantial defect persists with your new motor vehicle after 4 attempts to resolve it . . . you may be eligible for recourse under Connecticut law."<sup>32</sup> This formulation strongly suggests that consumers *must* repair their vehicles at least four times to be eligible for Lemon Law relief, even though subsection (f) requires only two attempts, and our interpretation only requires a single repair attempt *during the Applicable Period* for recovery under the generic standard in subsection (d). Other states have adopted these signage regulations. For example, New York's signs require dealers to notify consumers that they may be eligible for relief after repairing their vehicle four times within the first two years or 18,000 miles, notwithstanding that their law also allows consumers to obtain relief with fewer than four repair attempts.<sup>33</sup>

The signage regulations are a cause for serious concern for two reasons. First, they may mislead consumers by incorrectly stating the law. This is particularly concerning because these signs are likely the primary way consumers become educated about the Lemon Law. Second, and probably more important, the signs might confuse dealers and manufacturers about the law. Since the signs are displayed on dealer lots, the dealers and their manufacturers are plainly aware of its content. They may come to believe that the law, in fact, requires four repair attempts as a necessary condition for recovery. Indeed, manufacturers continue to argue, in arbitrations where we have presided, that the law *requires* four repair attempts. Perhaps as a result of such signs, cases that should have settled have proceeded to arbitration because manufacturers erroneously rely on the "four repair attempt" language on the signs.

DCP's eligibility review occupies a middle ground between these varying definitions. DCP performs a case-by-case analysis. In

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<sup>31</sup> CONN AGENCIES REGS. § 42-181-16 (2015).

<sup>32</sup> *Id.* (capitalization removed).

<sup>33</sup> See N.Y. GEN. BUS. LAW § 198-a(m)(2).

cases with fewer than four repair attempts, a consumer must affirmatively allege in her request for arbitration that a reasonable number of repair attempts has been satisfied.<sup>34</sup> Yet a consumer—particularly a *pro se* consumer—is not well suited to make complex legal arguments that are best left to the analysis of an arbitrator. We believe, consistent with the Connecticut Supreme Court's holding in *Dohmann*, that DCP should permit all cases with at least one repair attempt during the Applicable Period to proceed to arbitration, an approach affirmed in other jurisdictions like Texas.<sup>35</sup> At the same time, DCP should clarify its interpretation of the law regarding what constitutes a "reasonable number of repair attempts." As it stands, DCP's eligibility review requires DCP staff to interpret what constitutes a reasonable number of repair attempts in a vacuum when consumers do not qualify for one of the statutory presumptions. A better approach would allow arbitrators to make this determination according to their own competence.

DCP's case-by-case approach to eligibility runs contrary to the intent and history of the Lemon Law and Connecticut case law. Connecticut's Lemon Law was intended to create more permissive standards than the UCC's "failure of essential purpose" test. That test did not specify any number of repair attempts. Instead, courts interpreted the reasonableness or repair attempts on a case-by-case basis. Some courts developed a variety of factors to assess reasonableness, including (i) the good faith of the manufacturer, (ii) the nature of the goods, (iii) the relationship between the parties, (iv) the facts and circumstances behind the negotiation, and (v) the amount of time the vehicle has been operating correctly.<sup>36</sup> It seems contrary to the Lemon Law's

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<sup>34</sup> In response to our comments, DCP has adjusted their eligibility review to accommodate our interpretation of the law. Now, consumers with a single repair attempt during the applicable period need not affirmatively allege in their request that a reasonable number of repair attempts has been satisfied. Such consumers can proceed directly to arbitration. (This policy, however, is not stated explicitly in DCP's 2016 Arbitrator Handbook.) So far as we are aware, DCP has not changed its interpretation regarding whether repair attempts made after the applicable period can count towards the presumption that a reasonable number of repair attempts has been completed.

<sup>35</sup> The Texas courts have held that the existence of a statutory presumption of four repair attempts did not prevent the Department of Transportation from finding that fewer repair attempts constituted a "reasonable number of repair attempts." *Ford Motor Co. v. Tex. Dep't of Trans.*, 936 S.W.2d 427, 432 (Tex. App. 1996).

<sup>36</sup> See *Riegel Power Corp. v. Voith Hydro*, 888 F.2d 1043, 1045 (4th Cir. 1989); *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.* 843 F. Supp. 1027, 1044 (D.S.C. 1993); *Connecticut Printers, Inc. v. Baker Perkins PMC, Ltd.*, Civ. No. H-86-1507, 1989 WL 107391, at \*3 n. 4 (D. Conn. 1989). See generally 67A Am. Jur.

purpose to enforce a rule more onerous than the standard it was meant to replace. Taken together, these cases indicate a desire to avoid “ruling” a standard that applies differently based on circumstances.<sup>37</sup> DCP’s current approach takes this important case-by-case decision out of the hands of arbitrators and does nothing to clarify ambiguous law for the arbitrators in future hearings, for consumers with defective cars, or for the manufacturers and dealers who must abide by the law.

In sum, we believe that the role of DCP review should be largely ministerial. All claims with at least one repair attempt should proceed. DCP should certainly provide guidance that certain claims are unlikely to succeed at arbitration, but it should permit all claims with at least one repair attempt during the Applicable Period to proceed.

### III. TIMING OF REPAIR ATTEMPTS

This Part addresses the timing of repair attempts for recovery under Connecticut’s Lemon Law. The statute’s key temporal conceit, as noted above, is the “Applicable Period,” defined as “the period of two years following the date of original delivery of the motor vehicle to a consumer or during the period of the first twenty-four thousand miles of operation, whichever period ends first.”<sup>38</sup> The central question is as follows: If at least one repair attempt is performed within the Applicable Period, may repair attempts for the same defect that occur *after* the Applicable Period count toward establishing that a “reasonable number of attempts” have been performed? We argue for an answer in the affirmative.

With respect to the statute’s text, it is instructive to compare subsections (e) and (f) with subsection (d). Subsections (e) and (f), which define the presumptions, explicitly introduce time limits for repairs. Subsection (e) uses the phrase “applicable period,” while subsection (f) imposes a stricter timeframe. Rather than mandating a two-year period for eligible repairs, it fixes a one-year period within which two failed repair attempts must have taken place to trigger the presumption:

[I]t shall be presumed that a reasonable number of

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2d Sales § 813 (2017); Howard Foss, *When to Apply the Doctrine of Failure of Essential Purpose to an Exclusion of Consequential Damages*, 25 DUQ. L. REV. 551 (1979).

<sup>37</sup> See e.g., *Earl M. Jorgensen Co. v. Mark Const., Inc.*, 540 P.2d 978, 987 (Haw. 1975) (advocating for a totality-of-the-circumstances test).

<sup>38</sup> CONN. GEN. STAT. § 42-179(b).

attempts have been undertaken . . . if the nonconformity has been subject to repair at least twice by the manufacturer or its agents or authorized dealers within the express warranty term or *during the period of one year following the date of the original delivery of the motor vehicle* to a consumer, whichever period ends first, but such nonconformity continues to exist.<sup>39</sup>

While subsections (e) and (f) specify time limits within which repair attempts must be made for the two presumptions to kick in, subsection (d) makes no mention of the Applicable Period or any temporal restrictions. It simply sets forth the default “reasonable number of [repair] attempts” standard. Subsection (d)’s silence on timing, when read alongside the clear temporal rules in subsections (e) and (f), should cause us to think twice before requiring *all* repairs to occur during the Applicable Period. Such a requirement has no direct textual support in the statute. Further, if this requirement is justified by pointing to the time limits in subsections (e) and (f), this move would improperly and needlessly conflate the rules for two special presumptions with the generic recovery standard in subsection (d).<sup>40</sup>

Unlike Connecticut, some states require all repair attempts to occur during the Applicable Period in order to qualify for the generic recovery standard in subsection (d) (as well as the presumptions under subsections (e) and (f)). For example, the corresponding clause to Connecticut’s subsection (d) in Virginia’s Lemon Law requires a “reasonable number of repair attempts during the lemon law rights period.”<sup>41</sup> If Connecticut’s lemon law statute truly required *all* relevant repair attempts to occur during the statutory period, as does Virginia’s law, it would have said so. Yet it does not. And subsection (d)’s silence on temporal matters is instructive for our purposes.

In our view, the only temporal requirement for recovery under the generic subsection (d) standard is found in subsection (b). As discussed in Part II, subsection (b) states that, as a threshold matter, at least one repair attempt must be made in the Applicable Period for

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<sup>39</sup> Although we will not develop this point here, we read subsections (e) and (f) to say that evidence that a nonconformity *continues to exist* can be introduced from a time after the applicable period. It is only the unsuccessful repair attempts themselves (whether two or four) that must be completed during the applicable period for the presumptions to kick in.

<sup>40</sup> See *supra* Part II.

<sup>41</sup> VA. CODE ANN. § 59.1-207.13 (West 2011).

every nonconformity that a consumer alleges.<sup>42</sup> The final clause of subsection (b) offers some limited support for our reading. It requires manufacturers to make repairs to conform the vehicle to their express warranties, “notwithstanding the fact that such repairs are made after the expiration of the applicable period.”<sup>43</sup> We shall call this the Notwithstanding Clause. At minimum, the Notwithstanding Clause demonstrates that legislators were concerned with defects that continued to manifest after the Applicable Period. On the one hand, the Notwithstanding Clause might simply give consumers additional rights to repairs under their express warranties, since it does not explicitly refer to the “reasonable number of [repair] attempts” standard in subsection (d). On the other hand, this Notwithstanding Clause could mean that post-applicable-period repairs for the same nonconformity can count as evidence that a reasonable number of repair attempts has been completed. The combination of the Notwithstanding Clause and the absence of temporal limits in subsection (d), which discusses the reasonable number of repair attempts standard, makes the second reading more likely than the alternate reading DCP currently employs.

Support for the relevance of the Notwithstanding Clause to subsection (d)’s standard for recovery also comes from the Lemon Law’s purpose. The Lemon Law is a remedial statute that should be construed in the consumer’s favor. It would be an odd result indeed if the Lemon Law simultaneously required manufacturers to correct defects even after the Applicable Period—per the Notwithstanding Clause—while wholly ignoring the manufacturer’s failure(s) to correct those defects for purposes of meeting the “reasonable number of [repair] attempts” standard. This reading, while not foreclosed by the text, fits poorly within the statute’s purpose.

The DCP Arbitration Handbook also interprets the “reasonable number of repair attempts” prong of the Lemon Law narrowly. The Handbook was developed in response to the Program Committee’s desire for uniformity in arbitral decisions. It represents DCP’s authoritative interpretation of the law in the form of guidance. According to the Handbook, a consumer must make a reasonable number of repair attempts “within the applicable time period.”<sup>44</sup> This timing requirement misreads the statute and imposes an excessively demanding benchmark both for eligibility and recovery. There is reason to doubt that *all* repair attempts must be completed within the Applicable Period.

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<sup>42</sup> See *supra* Part II.

<sup>43</sup> CONN. GEN. STAT. § 42-179(b).

<sup>44</sup> ARBITRATOR HANDBOOK, *supra* note 7, at 7.

## IV. OBJECTIONS

We now consider several objections to our interpretation of the Connecticut Lemon Law’s minimal requirements for recovery.

*A. Statutory Purpose*

Our account of temporal restrictions on repair attempts in Part III might seem to cut against the statute’s focus on *new* motor vehicles. By reading the permissible timeframe for repairs to include post-applicable-period repairs, our interpretation might, in effect, extend the Lemon Law program to cover defects for *older* vehicles.

This first worry is tempered by the statute’s fundamental requirement that a nonconformity “substantially impair the use, safety, or value of a motor vehicle.” This requirement operates as a check against the unrestrained use of the Lemon Law to cover older vehicles. The longer a consumer owns and operates her vehicle, the less likely it will be that an alleged defect *substantially* impairs the vehicle’s use, value, or safety. For example, a consumer who seeks relief under the Lemon Law with 90,000 miles on her vehicle is very unlikely to meet the “substantial impairment” test, even if she satisfies the “reasonable repair attempts” prong. The few successful cases where post-applicable-period repairs will count toward the reasonable number of attempts will be cases in which there is a genuine, substantial manufacturing defect of the type that the Lemon Law is intended to address. Ford’s PowerShift transmission glitch serves as an excellent example of such an impairment. Additionally, a consumer who has driven her vehicle for 90,000 miles will be assessed a steep reasonable-use deduction. Even if she prevails in the arbitration, she will only be able to obtain a refund of 25% of the purchase value. Since the statute does not provide interest, the value of her refund will be further reduced as the number of years since the purchase increases. Finally, recall that relief is only available if at least one repair attempt for every alleged nonconformity is performed within the Applicable Period, tethering relief to defects arising in new vehicles.

*B. Legislative History*

Our interpretation may also appear to be inconsistent with some legislative materials related to Connecticut’s Lemon Law. For example, in 1989 the Legislative Program Review and Investigations Committee completed a performance audit and published its recom-

mendations for changes to the Lemon Law program.<sup>45</sup> This report summarized the repair attempt requirement as follows:

Reasonable number of attempts is: (1) same nonconformity repaired four or more times within warranty period and problem continues; (2) vehicle out of service for repair 30 or more days within warranty period; or (3) vehicle has a nonconformity likely to cause death or serious injury if driven and two repair attempts have been made during first year after original delivery and nonconformity continues.<sup>46</sup>

Here, the report appears to accept the requirements for a presumption as constitutive of what qualifies as a reasonable number of repairs, and it assumes that DCP will only approve a case for arbitration when one of these requirements has been met.

This is exactly the interpretation of the Lemon Law that we criticized in Parts II and III. As we have argued, it is unsupported by the statutory text in its current form, which makes the above-stated criteria sufficient but not necessary to establish a reasonable number of repair attempts. While the legislature made a number of statutory changes based on the Program Committee's recommendations, it left subsection (d) unaltered. We are ultimately bound by the text of the statute as enacted, not as described in a Program Committee report that postdates the statute's enactment.

### *C. Uptick in Frivolous Claims*

A third potential problem is that a more flexible interpretation of the "repair attempts" standard could lead to an increase in the number of frivolous claims brought by consumers. Bright-line rules tend to promote settling disputes before arbitration, while a standard incentivizes consumers and manufacturers to roll the dice on an arbitrator's judgment. However, our recommendations suggest that DCP should issue firm guidance on its interpretation of the "reasonable number of repair attempts" prong of the Lemon Law. We would also urge DCP to adopt a bright-line "one repair attempt" rule for eligibility. Taken together, we actually expect the number of arbitrations to drop. Once manufacturers attain adequate clarity on the authoritative interpretation of the law, they will be more likely to settle cases before reaching arbitration. This means, in turn, that consumers can obtain relief with fewer than four repair attempts *without* having to expend time and effort on arbitration.

Second, even under our interpretation of the statute, there are

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<sup>45</sup> See PERFORMANCE AUDIT, *supra* note 24.

<sup>46</sup> *Id.* at 5.

mechanisms to discourage frivolous claims. While DCP should not treat failure to meet the requirements for a presumption as an absolute bar to participation in the arbitration program, it can still advise consumers that, if they are clearly ineligible for a presumption, it will be more difficult to prove their case. In the most egregious frivolous cases, arbitrators can order consumers to pay some portion of the manufacturer's costs for the arbitration.

## V. CONCLUSION

The text, purpose, and case law relating to Connecticut's Lemon Law support our interpretation of the statute. The text clearly contemplates the possibility that a consumer can prevail on a Lemon Law claim with fewer than four (or two) repair attempts. The statute's broad remedial purpose bolsters this interpretation. Moreover, several cases, including one from the Connecticut Supreme Court, approve awards in favor of consumers with fewer than four (or two) repair attempts. The bottom line is that consumers can prevail on a Lemon Law claim under subsections (b) and (d) without relying on the presumptions in subsections (e) and (f).

Based on our interpretation of Connecticut's Lemon Law, we recommend that DCP introduce the following changes:

1. Amend the Arbitrator Handbook
  - a. Clarify that fewer than four repair attempts can justify relief under subsection (d) of the Lemon Law.
  - b. Explain that repair attempts postdating the Applicable Period cannot count towards the presumptions in subsections (e) and (f). However, such repairs may count toward the default requirement of a "reasonable number of [repair] attempts" in subsection (d), so long as at least one repair occurs in the Applicable Period.
  - c. Suggest factors that arbitrators should consider when determining "reasonable number of repair attempts."
2. Amend the Lemon Law Regulations
  - a. Require that the sign that dealers must display state that consumers only need a reasonable number of repair attempts to recover. It should say that, "if the same substantial defect persists with your new motor vehicle after 1, 2, or 4 attempt(s) to repair it (depending on the circumstances\*). . . you may be eligible for recourse under Connecticut Law."



3. Clarify DCP's Threshold Eligibility Standard
  - a. Permit all cases to proceed to arbitration with at least one repair attempt during the Applicable Period.<sup>47</sup>
4. Amend the Consumer's Request for Arbitration
  - a. Presently, consumers are not informed that they must provide a rationale as to why fewer than four repair attempts are reasonable under the circumstances in their request for arbitration. If DCP wishes to maintain this requirement, it should amend the application to clarify that consumers must set out a brief affirmative argument for their case if they are not entitled to a presumption. We encourage DCP to provide a sample argument or eliminate this requirement.

Further, repair attempts postdating the Applicable Period can be introduced as evidence that a reasonable number of repair attempts has been completed. The text of Connecticut's Lemon Law does not foreclose this possibility. The statute only requires one repair attempt during the Applicable Period to be *eligible* for arbitration. Of course, for the reasons set forth in Section IV.A, a consumer is unlikely to prevail in cases in which repairs are attempted long after the Applicable Period. Nevertheless, such claims should not be dismissed at the eligibility stage, because truly meritorious claims might well be denied. State agencies charged with administering their Lemon Law programs, like Connecticut's DCP, should review and authoritatively interpret their own statute to give clear guidance to consumers, manufacturers, and arbitrators on these important matters.

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<sup>47</sup> See *supra* note 27 and accompanying text.