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Wisconsin Lemon Law Held to Require Replacement of Defective Automobile Without Offset for Use

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WISCONSIN LEMON LAW HELD TO REQUIRE REPLACEMENT OF DEFECTIVE AUTOMOBILE WITHOUT OFFSET FOR USE

In *Chmill v. Friendly Ford-Mercury*, 144 Wis. 2d 796, 424 N.W.2d 747 (1988), the Wisconsin Court of Appeals held that an automobile dealer and manufacturer are required to replace a consumer's automobile that is substantially impaired by a "nonconformity" which cannot be repaired after reasonable attempts. The court also held that a dealer and manufacturer are not entitled to a reasonable offset for the consumer's use of the vehicle if the consumer chooses to have the vehicle replaced with a comparable new vehicle rather than a cash refund.

Background

The plaintiffs, Leonard and Ruth Chmill, purchased an automobile manufactured by the Ford Motor Company ("Ford") and sold by Friendly Ford-Mercury ("Friendly"). Friendly gave the Chmills a 12,000 mile new-car warranty. On the way home from the dealership, Mrs. Chmill noticed that the car pulled to the left. The Chmills reported the pulling problem and brought the automobile to Friendly for repairs on at least five separate occasions. All five occasions were within five months of the date of purchase and before the warranty had expired.

After numerous unsuccessful attempts to have the car repaired, the Chmills brought suit against Ford and Friendly based on, among other things, the Wisconsin Lemon Law ("Lemon Law"). Wis. Stat. § 218.015 (1982 & Supp. 1988). At trial, the Chmills testified that Friendly's service manager had advised them that the car should be either replaced or sold back because the pulling problem could not be repaired. This testimony was not challenged by the defendants. An experienced car salesman and buyer from another dealership provided further testimony that the pulling defect substantially lessened the value of the car below its original purchased price. The trial court, in rendering judgment for the Chmills, ordered the defendants to replace the automobile. The court held that the pulling defect substantially impaired the use, value and safety of the vehicle.

Wisconsin Appellate Court

The appellate court first considered whether the lower court was correct in finding that the pulling problem was a nonconformity which did not satisfy the use, value and safety standards of the Lemon Law. Section 218.015 allows a consumer to receive either a comparable replacement or a cash refund for a vehicle which has a nonconformity that cannot be repaired after at least four reasonable attempts.

The defendants relied on cases decided under the Uniform Commercial Code ("U.C.C."). They argued that because the Chmills were able to drive the car 78,000 miles, the car was not substantially impaired. The court disagreed, and distinguished cases decided under the U.C.C. from those decided under the Lemon Law. Under the U.C.C., "substantial impairments" are only those which affect the value of the commercial unit, whereas under the Lemon Law, "substantial impairments" are those which affect the use, safety and value of the unit. The fact that the vehicle met its primary purpose of transportation was not enough to conclude that it was not substantially impaired under the Lemon Law.

The court next addressed the issue of whether the Chmills made reasonable attempts to repair their car. Section 218.015(2)(b) of the Lemon Law requires that a consumer establish "after a reasonable attempt to repair the nonconformity [that the nonconformity] cannot be repaired." Under the same section, a "reasonable attempt to repair" means at least four attempts have been made to repair the same nonconformity within the period of warranty. The defendants argued that Friendly had not attempted to repair the vehicle four times within the warranty period because it could not verify the pulling defect. Because the Chmills reported the defect and presented the car to the defendants for repairs on at least five different occasions, the court held that they had sufficiently met the reasonable attempt to repair standard. In so holding, the court noted that the Lemon Law was a remedial statute which should be construed "to suppress the mischief and advance the remedy which the statute intended to afford." 424 N.W.2d at 751.

Finally, the court considered the defendants' contention that they were entitled to a reasonable offset for the Chmills' use of the car. Section 218.015(2)(b) gives the consumer the option of having the defective vehicle replaced with a comparable new vehicle or receiving a refund less a "reasonable allowance" for use of the vehicle. The defendants claimed this language meant that there is an offset for use whenever a consumer demands a replacement or a cash refund. The court rejected this argument, holding that the Lemon Law allows an offset only when consumers choose the refund option. The court also rejected the defendants' argument that if an offset is allowed only when consumers opt for a refund, then consumers will never choose the refund option. A consumer might wish a refund if the defect is immediately apparent or if the consumer is sufficiently dissatisfied to want to purchase a different type of vehicle.

Regarding the defendants' argument that the Chmills would receive a windfall if they were given a new car without an offset for their use of the old car, the court held that it was not unreasonable to allow the Chmills to receive a new car without an offset for use. The Chmills used the vehicle they purchased from Friendly because Friendly had been unable to repair the defect. Moreover, the Chmills had been required to litigate their claim for over a year and had necessarily used the car during this period.

Finally, the court noted that the Lemon Law provides that the court may award costs, disbursements, and reasonable attorneys' fees, including attorneys' fees for essential appellate work. The court concluded that on remand the trial court should determine reasonable attorneys' fees to award to the Chmills for their appeal. Such an award was necessary to fully enforce the Chmills' rights under the Lemon Law.

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ILLINOIS APPELLATE COURT HOLDS THAT A MARKETING PLAN NEED NOT MEET FEDERAL TRADE COMMISSION CRITERIA TO QUALIFY AS A PYRAMID SALES SCHEME

In *People ex rel. Hartigan v. Unimax Inc.*, 168 Ill. App. 3d 718, 523 N.E.2d 26 (1st Dist. 1988), the Illinois Appellate Court for the First District concluded that headhunting fees, inventory loading, and endless chains are not required to prove the existence of an illegal pyramid sales scheme.

Background

Unimax, Inc. ("Unimax"), an Illinois corporation, engaged in two separate activities: Unimax Buyers' Service and Unimax Matrix. Unimax Buyers' Service members, or "subscribers," completed an application and paid initial, monthly, and annual fees for the opportunity to purchase products and services at a discount. Subscribers were not obligated to make any purchases and could withdraw from the service at any time and obtain a refund of their unused fees.

Members of Unimax Matrix, or "marketers," signed an "Independent Marketer's Agreement" and were given training in selling memberships in the Unimax Buyers' Service. Unimax required marketers to recruit at least three new subscribers, and to keep themselves and their subscribers up to date on fee payments. Marketers earned monthly commissions on the fees paid by the subscribers they sponsored. They also received commissions on subscription fees from subscribers in their "down-line" organization. Commission rates increased according to the number of "down-line" subscribers, ranging from 1%, or $1.08/month, for the first down-line level (three subscribers), to 6% plus a 5% bonus, or $77,944.68/month, for the ninth level (19,683 subscribers).

Subscribers could become marketers merely by signing the marketer's agreement, but individuals who wished to become marketers without being subscribers were required to pay a "set-up" charge of $52. Although not required to do so, all 10,874 subscribers had signed marketers' agreements. Approximately 1000 of these signatories were active marketers.

Procedural History

The State of Illinois ("State") brought suit against Unimax and its president, Tim Dern, under the Illinois Consumer Fraud and Deceptive Business Practices Act, ("the Act"). Ill. Rev. Stat. ch. 121 1/2, §§ 261-272 (1987). The State alleged that Unimax's marketing plan was a "pyramid sales scheme" and a "chain referral sales technique" in violation of the Act. The State sought appointment of a receiver and asked the court to enjoin the defendants from selling memberships. Further, the State asked that Unimax provide an accounting, that it be forced to disgorge all profits, and that it be assessed $50,000.

Unimax argued that its operations were neither a pyramid sales scheme nor a chain referral sales technique as prohibited by the Act. Section 1(g) of the Act defines a "pyramid sales scheme" as one in which a person pays money in exchange for the opportunity to receive a benefit primarily "based upon the inducement of additional persons" to participate in the same plan or operation. Unimax claimed that the tra-

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