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CALIFORNIA'S LEMON LAW — DEVELOPMENTS UNDER THE SONG-BEVERLY CONSUMER WARRANTY ACT

by Nancy Barron*

I. INTRODUCTION

Over thirty-three percent of new cars require an extensive repair within one year of purchase and more than fourteen percent experience multiple problems.¹ In 1987, manufacturers recalled more than eight million cars and light trucks for safety-related defects alone.² Far too often, however, manufacturers and dealers either ignore consumer complaints or fail to remedy the substantial automobile defects.

State lemon laws provide the primary protection for purchasers of new³ motor vehicles. Currently, forty-six states have lemon laws.⁴ In addition, purchasers of new automobiles are protected by the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act ("Magnuson-Moss Act")⁵ and the Uniform Commercial Code ("U.C.C.")⁶ California's lemon law, the Song-Beverly Consumer Warranty Act ("Song-Beverly Act" or "the Act"),⁷ is similar to lemon laws in many states.⁸ The Act gives purchasers rights they did not have at common law. In essence, the Act mandates that an automobile manufacturer repair substantial defects that cause a vehicle not to conform to the manufacturer's express warranties. If after a reasonable number of attempts the manufacturer is unable to repair the vehicle, the consumer is entitled to a replacement or a refund. If the manufacturer fails to replace or refund, the manufacturer may be liable to the consumer far beyond the value of a replacement vehicle or a refund of the purchase price. Damages available under the Act include out-of-pocket costs, incidental and consequential damages, litigation costs, attorneys fees and a civil penalty, in addition to a refund or replacement of the vehicle.⁹

This Article examines California's Song-Beverly Act, recent amendments to the Act, and case

law that has developed under the Act. This Article is intended to educate consumers and consumer law practitioners by discussing key issues that frequently arise in preparing a lemon law case. Although the focus is on the California Song-Beverly Act, the issues discussed herein are equally applicable in the context of similar lemon laws in other states. This Article also highlights the contrasting aspects of the Song-Beverly Act, the U.C.C., and the Magnuson-Moss Act. This analysis should assist practitioners to determine whether in a given situation claims should be brought under more than one of the statutes.¹⁰

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Section II of this article addresses the elements of a lemon law claim: what constitutes a "consumer good," what is a "nonconformity," when has a manufacturer had a reasonable opportunity to repair, and what is the effect of the consumer's continued use of the defective vehicle. Next, section III describes the potential recovery for consumers, including attorneys fees and a civil penalty for a manufacturer's willful failure to comply with the Act.

II. ELEMENTS OF LIABILITY UNDER THE SONG-BEVERLY CONSUMER WARRANTY ACT

A. What are consumer goods?

The Song-Beverly Act, the U.C.C., and the federal Magnuson-Moss Act require the plaintiff to establish that the vehicle is a "consumer good." The tests differ significantly, however, under the three statutes. The Song-Beverly Act and the U.C.C. define a con-

sumer good as "any new product or part thereof that is used, bought, or leased for use *primarily* for personal, family, or household purposes."¹¹ This is a *subjective* test that focuses on how the consumer actually used the product, rather than the product's common use. In contrast, the Magnuson-Moss Act defines a consumer product as "any tangible personal property which is distributed in commerce and which is *normally* used for personal, family, or household purposes."¹² This is an *objective* test that focuses on the common use of the product.¹³

Because the two tests differ, a consumer may be protected by one statute but not the other. For example, in *Crume v. Ford Motor Company*,¹⁴ the buyers of a flatbed truck brought a Magnuson-Moss Act claim. The court, applying the objective "normal use" test, held that evidence of how the buyer actually used the truck was irrelevant to whether a vehicle qualifies as a "consumer product" for purposes of the Magnuson-Moss Act. Because the plaintiff failed to present evidence of how flatbed trucks commonly are used, the court directed a verdict for Ford Motor Company. This case might have been decided differently under the Song-Beverly Act if the evidence presented established that the buyer used the flatbed truck primarily for household purposes.

Consumers typically will have little difficulty establishing that they actually used the vehicle primarily for personal or household purposes. If the vehicle is used primarily or exclusively for business purposes, however, it may not be protected by the Song-Beverly Act or the U.C.C., but may be

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protected under the Magnuson-Moss Act if the vehicle commonly is used for personal or household purposes.¹⁵ Automobiles are considered "consumer products" under the Magnuson-Moss Act,¹⁶ but the same is not true for all motor vehicles.¹⁷

B. What is a nonconformity?

The Song-Beverly Act requires that the manufacturer or its dealers "conform the vehicle to the express warranties."¹⁸ The Act's protections apply only if the alleged "nonconformity" both breaches the express warranties and substantially impairs the vehicle's use, value, or safety.¹⁹

1. Express Warranties

The Song-Beverly Act defines "express warranty"²⁰ as:

(1) A written statement . . . pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or

(2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.²¹

Unlike under the U.C.C.,²² the plaintiff need not prove that the written statement was a factor in the purchase decision.²³ However, unlike "express warranties" as defined under the U.C.C.,²⁴ the Song-Beverly Act does not apply to oral warranties.²⁵

2. Substantial Impairment

Not all defects that violate express warranties trigger Song-Beverly Act protections. The nonconformity also must "substantially impair the use, value or safety of the new motor vehicle to the buyer."²⁶ A substantial impairment of any one of the statutory trio of factors — use, value, or safety — technically is sufficient to support a Song-Beverly Act claim.

In order to promote the Act's remedial purpose,²⁷ state and federal courts should broadly inter-

pret "nonconformity" and "substantial impairment." A narrow interpretation would make illusory manufacturers' express written warranties by allowing manufacturers to dismiss the bulk of customer complaints as "insubstantial" or "insignificant." In *Chmill v. Friendly Ford-Mercury*,²⁸ the Wisconsin Court of Appeals broadly interpreted the term "substantial impairment" and held that a buyer does not have to show that the vehicle was inoperable or valueless. In *Chmill*, the buyers of a Ford Tempo brought a Wisconsin lemon law claim against the manufacturer and dealer for a nonconformity described as a discernible "pull" to the left. As of the final day of trial, the plaintiffs had driven the car 78,000 miles despite the pulling problem. Citing cases decided under the U.C.C., Ford argued that a car driven for 78,000

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miles, as a matter of law, could not be substantially impaired. In rejecting Ford's argument, the court noted that the U.C.C. focused solely on whether there was a substantial impairment of value,²⁹ whereas the Wisconsin lemon law looked to whether there was a substantial impairment of use, value, or safety.³⁰ The court concluded that a vehicle does not satisfy the use, value, or safety standard merely by "serv[ing] its primary purpose of providing 'simple transportation.'"³¹ Although a defect that substantially impairs a vehicle's use or safety in most cases also would substantially impair its value, this is not necessarily the case. Because "nonconformity" is defined more broadly under the Song-Beverly Act than under the commercial code, the consumer always should plead his claim under both the Act and the U.C.C.

The Act applies a subjective test in looking to whether the vehicle was substantially impaired "to the buyer."³² In each case, the plaintiff should produce clear evidence of the personal effect of the car's problems. For example, the purchaser's use of the vehicle may be hindered by unreliability. Perhaps the defect is merely a leaking hatch-back, but this may prevent the purchaser from carrying groceries, laundry, etc., because it frequently rains where the consumer lives. Usually, a long repair history itself can impair the value of the car because it is more difficult to obtain a competitive sale price for a car that has been the subject of extensive repairs.³³

Finally, if a safety problem is alleged, plaintiffs should emphasize their justifiable fears for their well-being. Safety problems such as stalling, hesitation on acceleration, and loss of power on the freeway are common problems in today's electronically controlled cars. In the case of *Ibrahim v. Ford Motor Company*, the appellate court noted:

After a harrowing experience when the Cougar died while passing over railroad tracks, plaintiff decided she had had enough....Because she was pregnant and convinced that the Cougar was unsafe to drive, plaintiff in July used all of her savings to buy another vehicle.³⁴

In California, where use of videotapes in the courtroom is common, plaintiffs' counsel have had considerable success in personalizing their cases through videotaped episodes featuring the defective vehicles.

Many different problems in new motor vehicles have been found to be "nonconformities" under lemon laws similar to the Song-Beverly Act. These range from such obvious safety defects as faulty steering to intangible problems like an annoying "shimmy"³⁵ and even a defective paint job.³⁶ The consumer should consider introducing expert testimony as to the cause of the alleged nonconformity and the long-term effect of that defect on the safety, use, and value of the

(continued on page 98)

Lemon Law

(continued from page 97)

vehicle. For example, a common complaint is abnormal engine noise. The repair dealership may claim its technician could not identify the source of the problem, and so no repair was done. Further, the dealership may claim the noise is a normal condition of the particular make and model and therefore not a "nonconformity." In fact, engine noise may well be a symptom of an engine problem and may foreshadow premature engine failure after expiration of the warranty. Similarly, a "pulling" condition or seemingly minor alignment problem in fact may be evidence of a bent frame or other transit damage to the vehicle before it was sold as new. An expert often is essential to prove that these conditions are substantial nonconformities.

C. What is a reasonable opportunity to repair?

The Song-Beverly Act provides that if the vehicle does not conform to the express warranties, the manufacturer must begin repairs "within a reasonable time"³⁷ and repair the vehicle "so as to conform to the applicable warranties."³⁸ If the manufacturer cannot repair the vehicle

to conform to the applicable express warranties after a *reasonable number of attempts*, the manufacturer *shall* either promptly replace the new motor vehicle ... or promptly make restitution to the buyer.³⁹

The buyer has the option of choosing either a replacement or a refund.⁴⁰

Before the Act defined "reasonable number of attempts," manufacturers were able to deny consumers relief indefinitely. Buyers were forced to take their cars in repeatedly for repairs, even as many as thirty times.⁴¹ Effective 1983, however, the Act was amended to define "reasonable number of attempts."⁴² The manufacturer is presumed to have had a "reasonable number of attempts" to conform the vehicle to the express warranties if, within one year from delivery to the buyer or

12,000 miles of use, whichever occurs first, either (1) the same nonconformity has been subject to repair *four or more times*, or (2) the vehicle is out of service for a cumulative total of *more than 30 calendar days*.⁴³

The buyer must notify the manufacturer of the nonconforming defects by returning the vehicle for repair or by providing written notice if returning the vehicle is impossible.⁴⁴ However, the buyer only must provide such notice if the manufacturer clearly and conspicuously disclosed the buyer's rights and responsibilities under the Act, including the buyer's responsibility of providing notice of the nonconformities.⁴⁵

Once the consumer proves that the vehicle was subject to four repair attempts or was out of service for a total of thirty days, the burden then shifts to the defendant to prove that it was not allowed a

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reasonable number of attempts to repair the automobile.⁴⁶ Because the definition of a "reasonable number of attempts" is only a presumption, this leaves open the possibility that the plaintiff may prove that less than four repair attempts or thirty days out of service constitutes a reasonable number of attempts.⁴⁷

The thirty-day limit⁴⁸ may be extended if the failure to repair the nonconformity results from conditions beyond the manufacturer's control.⁴⁹ Although the Act does not define "conditions beyond the control of the manufacturer," other state lemon laws and courts have limited the conditions to natural disasters.⁵⁰ The defendant's inability to identify or repair the nonconformity does not qualify as a circumstance beyond the control of the manufacturer.⁵¹ For example, in *Chmill*, the court rejected such an argument, reasoning that "[i]f

an acknowledged defect cannot be diagnosed . . . no matter how many times the consumer presents the vehicle for repair, the consumer is without recourse."⁵² In fact, the *Chmill* court held that merely presenting the car to the dealer constitutes a "repair attempt," even if the dealer cannot identify the defect and therefore does not actually attempt to repair the car.⁵³ In so holding, the *Chmill* court recognized that dealers might try to thwart the statutory requirements by claiming that they could not identify or repair the defect.

Moreover, the plaintiff probably does not have to identify the source of the problem. Under the Magnuson-Moss Act, "[i]t is sufficient if . . . the evidence shows, either directly or by permissible inference, that the goods were defective in their performance or function or that they otherwise failed to conform to the warranty."⁵⁴ The consumer need only "offer credible evidence that the defect is materials or workmanship related."⁵⁵ The California courts have not determined the specificity with which the plaintiff must identify the defect, although a burden of proof similar to that required under the Magnuson-Moss Act should apply to Song-Beverly Act suits. Clearly, consumers are less able than manufacturers to identify the source of a defect. Moreover, manufacturers may, intentionally or unintentionally, tamper with the evidence while attempting to repair the vehicle or after the consumer has returned the vehicle.

D. Continued use and set-off**1. Continued Use Does Not Defeat "Lemon Law" Rights**

Prior to the enactment of the Song-Beverly Act, the issue of continued use of a consumer product was governed by the law of waiver.⁵⁶ According to this common law doctrine, the right to rescind acceptance of a consumer product may be waived if the consumer, having full knowledge of the circumstances warranting rescission, nonetheless accepted and retained the benefits of the contract.⁵⁷ The U.C.C., as interpreted by most

courts, to some extent modified the doctrine of waiver by providing that reasonable continued use of an automobile does not, as a matter of law, prevent the buyer from rescinding acceptance of the product.⁵⁸ Similarly, under the Song-Beverly Act continued use does not, as a matter of law, bar rescission.⁵⁹

By allowing the consumer to continue using the vehicle without losing her right to revoke acceptance of the vehicle, courts and legislatures recognize the unequal bargaining power between the consumer and the manufacturer. Frequently, the consumer is dependent upon having a car and financially unable to secure alternative means of transportation.⁶⁰ A contrary rule would enable manufacturers to benefit from their wrongdoing: manufacturers would have an incentive to ignore consumer claims, forcing consumers to drive defective cars at a risk to the general safety. Then, if the consumer brought a lemon law suit, the manufacturer might be able to assert the consumer's continued use as a defense to the otherwise valid claim.⁶¹ Moreover, continued use should not preclude revocation of acceptance because the consumer's continued use may not indicate that the consumer has "accepted" the vehicle. This is particularly true when the nonconformity affects only value and thus the consumer is not prevented from continued use by a safety threat or an effectively unusable vehicle.

2. Set-Off for Use of the Vehicle

The Act provides that if the manufacturer fails to repair the product to conform to the express warranties, the manufacturer must "either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to discovery of the nonconformity."⁶² Notably, the Act provides no set-off for the consumer's use of the vehicle after the nonconformity is discovered. This reflects the diminished value to the consumer of a defective vehicle.

The Act establishes the follow-

ing formula for calculating the set-off for use prior to the first repair attempt:⁶³

$$\frac{\text{vehicle price} \times \text{pre-repair miles}}{120,000}$$

For example, suppose the buyer paid \$23,652, before financing, and the vehicle had been driven 1,559 miles when the consumer first brought the vehicle in for repairs. The set-off would be:

$$\frac{23,652 \times 1,559}{120,000} = \$307.28$$

The consumer's reimbursement is reduced by the amount of the set-off or, in the case of a replacement, the consumer must pay the amount of the set-off to the manufacturer.⁶⁴ Allowing a set-off in cases of replacement may cause problems when the consumer cannot afford to pay the amount of the set-off to the manufacturer. Therefore, unlike California, many states' lemon laws do not provide for a set-off in cases of replacement.⁶⁵

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III. DAMAGES AVAILABLE UNDER THE SONG-BEVERLY ACT

A. Actual damages

The Song-Beverly Act incorporates portions of the California Commercial Code in its remedies section.⁶⁶ The Act seeks to fully compensate the aggrieved consumer by providing, when applicable, out-of-pocket, incidental, and consequential damages, as well as civil penalties, litigation expenses, and attorney's fees.⁶⁷

1. Out-of-Pocket Loss

The Song-Beverly Act entitles plaintiffs to recover actual damages.⁶⁸ Thus, a plaintiff may recover all losses resulting in the ordinary course of events, as determined in any manner that is reasonable.⁶⁹ A plaintiff's most direct loss due to a defective vehicle lies in the purchase-related expenses.

Purchase-related expenses include the purchase price, license and documentary fees, sales tax, and finance charges.⁷⁰

2. Incidental and Consequential Damages

In addition to actual damages, the Song-Beverly Act provides that consumers may recover reasonable incidental and consequential damages.⁷¹ Typically, incidental damages include any reasonable expenses incident to the failure to provide a product free from defects.⁷² Under the Act, the buyer has the right to compensation for money and time spent in effort to make the vehicle conform to the warranties, such as repair costs, towing charges, rental car expenses, and some insurance.⁷³ The buyer also is entitled to loss of use damages, which may be measured by the number of days the vehicle is in for repairs multiplied by the reasonable rental value of the vehicle.⁷⁴

Consequential damages include any loss suffered by plaintiffs resulting from their special needs of which the seller had reason to know.⁷⁵ This may include damages for inconvenience, aggravation, mental distress, discomfort, anxiety, depression, and pain and suffering resulting from seller's breach.⁷⁶ In *Jacobs v. Rosemount Winnebago South*, the Minnesota Supreme Court soundly reasoned that buyers need to have confidence that the vehicles they rely on for transportation are safe and dependable.⁷⁷ When the plaintiff's vehicle failed to satisfy this basic need, the plaintiff was able to recover not only actual and incidental damages, but also consequential damages for the loss of enjoyment.⁷⁸

Alternatively, an aggrieved consumer may seek redress for emotional distress under a tort theory. Violating a statutory duty often constitutes the tort of negligence at common law.⁷⁹ In California, a plaintiff may recover if the negligence causes emotional distress that is severe and satisfies certain guarantees of genuineness,⁸⁰ although the emotional distress need not be physically manifested.⁸¹ The

(continued on page 100)

Lemon Law

(continued from page 99)

plaintiff, however, must plead and prove every element of *both* the tort theory and the Song-Beverly Act claim.

B. The Civil Penalty**1. The "Willfulness" Requirement**

In 1982, the Song-Beverly Act was amended to include a civil penalty provision in addition to actual, incidental, and consequential damages. Section 1794(a) of the Act provides that if "the failure to comply was willful, the judgment may include . . . a civil penalty which shall not exceed *two times the amount of actual damages*."⁸²

In *Ibrahim v. Ford Motor Company*, the California Court of Appeals clarified the meaning of "willfulness."⁸³

The statutory concept of willfulness does not include the moral component . . . associated with the oppression, fraud, or malice required . . . for the recovery of punitive damages. . . . It amounts to nothing more than this: That the person knows what he is doing [and] intends to do what he is doing.⁸⁴

The *Ibrahim* court noted that the consumer need not prove that the manufacturer intended to injure or take advantage of the consumer, or violate the law.⁸⁵ Instead, the consumer need only show that the manufacturer intended the acts or omissions.

2. Effect of a Qualified Manufacturer's Arbitration Program

The 1987 amendments to the Song-Beverly Act encourage manufacturers to offer to consumers independent third-party arbitration programs.⁸⁶ Although for years most manufacturers have offered some form of industry-sponsored arbitration program, these programs were far from "independent" and caused widespread consumer dissatisfaction. The 1987 amendments were designed to increase the accountability and independence of manufacturers' arbi-

tration programs. Among other requirements, a manufacturer's arbitration program must meet Federal Trade Commission requirements⁸⁷ and be certified by the California State Department of Consumer Affairs in order to qualify under the Act.⁸⁸ Only a handful of arbitration programs have qualified for certification.⁸⁹

If a manufacturer has a qualified arbitration program and notifies the consumer of the program and how to use it, a consumer who has not resorted to the program cannot invoke the "reasonable number of attempts to repair" presumption in court.⁹⁰ If the consumer does participate in the arbitration program, the findings of the arbitrator are admissible in any subsequent suit⁹¹ and the consumer only may obtain a civil penalty in a subsequent lawsuit by showing that the manufacturer's violation of the Act was willful.⁹² If the manufacturer's arbitration program is not qualified

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under the Act, or if the manufacturer failed to properly notify the consumer of the arbitration program, the consumer is not obligated to participate in the arbitration program and does not have to prove willfulness to recover a civil penalty in a lawsuit.⁹³

3. Election Between the Civil Penalty and Punitive Damages

When an automobile defect results in personal injury, the injured party may have concurrent causes of action under a tort theory and the Song-Beverly Act.⁹⁴ The tort theory supports an award of punitive damages if the defendant's actions were made knowingly and were reprehensible.⁹⁵ The Act provides that a consumer may recover a civil penalty for the manufactur-

er's violation. Theoretically, the consumer should be able to recover both the civil penalty and punitive damages.

The court in *Troensgaard v. Silvercrest Industries*⁹⁶ viewed the issue as one of double recovery. The consumer complained to the manufacturer about a problem with her mobilehome. After the manufacturer inspected the mobilehome, it concealed the nature of the defect and refused to fix the problem. The consumer then brought a strict liability claim based on the manufacturer's concealment of the defect and a Song-Beverly Act claim based on the manufacturer's failure to remedy a defect. The jury awarded her \$90,000 in compensatory damages, \$55,000 in punitive damages, and \$90,000 as a statutory civil penalty. In modifying the award, the court held that the consumer could not recover both the civil penalty and punitive damages. The court reasoned that the punitive damages and the civil penalty arose out of the same set of operative facts and the manufacturer should not be punished twice for "substantially the same conduct."⁹⁷ Thus, "by seeking a 'civil penalty' . . . [the consumer] had in effect elected to waive punitive damages."⁹⁸

The same result is not necessarily true in all cases when the plaintiff pursues both a tort claim and a Song-Beverly Act claim. For example, a plaintiff might assert both that the manufacturer committed fraud in connection with the sale by representing as "new" a pre-owned or previously damaged vehicle and that the manufacturer failed to repair the vehicle to comply with the express warranties. The facts supporting the fraud claim (that the vehicle was pre-owned or previously damaged) would not be "substantially the same conduct" as the facts supporting the Song-Beverly Act claim (the manufacturer's subsequent refusal to honor the express warranties).

C. Attorneys' fees are mandatory to a prevailing plaintiff

The Song-Beverly Act mandates an award of costs and attorneys

fees to the prevailing plaintiff.⁹⁹ If the plaintiff prevails in the lemon law claim, the plaintiff "shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees . . ." ¹⁰⁰ The fees must be "reasonably incurred" and based upon actual time expended.¹⁰¹ However, the judge has broad discretion to determine the extent that the fees were "reasonably" incurred.¹⁰²

In consumer litigation, there is always the likelihood that attorneys' fees based on actual time attorneys fees expended will *exceed* the damages award. After all, the consumer generally will be suing a large manufacturer for a relatively small amount of money, unless the consumer sues to recover for personal injuries or the suit is brought as a class action.¹⁰³ Corporate defendants are well aware of ways to increase legal fees by discovery battles and other means. A California Marin County Superior Court Judge recently commented wryly in open court that Ford Motor Company has a papermill going, with "automatons" running it.¹⁰⁴ A rule that limited the amount of recoverable attorneys fees to the amount of actual damages would result in stonewalling by manufacturers.¹⁰⁵

In enacting a similar attorneys fees provision in the Magnuson-Moss Act, Congress anticipated corporate defense tactics that force consumer counsel to expend considerable time and money on warranty cases, resulting in attorneys fees in excess of damages awarded. As Senator Magnuson noted,

an attorney's fee . . . based upon actual time expended rather than being tied to any percentage of the recovery . . . make[s] the pursuit of consumer rights involving inexpensive consumer products economically feasible.¹⁰⁶

Therefore, plaintiffs can recover "reasonable" attorneys fees even in excess of the amount of direct, incidental, and consequential damages recovered.

IV. CONCLUSION

California's Song-Beverly Act,

like most states' lemon laws, provides to new car buyers protection far beyond warranty remedies at common law. In order to avail themselves of these protections, consumers must be familiar with their rights and the procedures for obtaining relief. If consumers are prepared to assert their statutory rights and prove their cases, lemon laws can go a long way toward giving full relief to aggrieved consumers and pressuring the manufacturers to honor their warranties.

The Song-Beverly Act protects most consumers who purchase new cars that are defective. To trigger the Act's protections, the defect must be substantial and must violate the manufacturer's express written warranties. If the defect violates an oral warranty, the consumer may have to join a U.C.C. or Magnuson-Moss Act claim in order to obtain relief.

If a consumer complains of a substantial defect that violates the

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manufacturer's express warranties, the manufacturer is allowed a "reasonable number of attempts" to fix the defect. Under recent case law, California courts will presume the manufacturer had a reasonable number of attempts if the defect is not fixed in four attempts or if the vehicle is out of service for a cumulative total of thirty or more days. As the Wisconsin courts have interpreted their lemon law, presenting the vehicle for repair constitutes a repair attempt, whether or not the manufacturer attempts to fix the defect or can even identify the problem. This rule properly puts the onus on the manufacturer to discover and remedy the defect, rather than sticking the consumer with an irremediable "lemon." In order to prove that the manufacturer had a reasonable number of attempts, the consumer should

thoroughly document the vehicle's repair history.

The manufacturer is entitled to a set-off for the consumer's use of the vehicle before the first repair attempt. However, the manufacturer is not entitled to a set-off for the consumer's use of the vehicle between repair attempts, nor does that use necessarily defeat the lemon law claim. This provision in the lemon law recognizes that consumers may have no alternative than to drive a defective vehicle, and that a defect may be substantial although not totally debilitating.

Lemon laws seek to fully compensate aggrieved consumers, and make valid lemon law claims viable, by providing for actual, incidental, and consequential damages, as well as mandatory attorneys fees for the prevailing consumer. Moreover, the California lemon law provides a civil penalty to encourage manufacturers to promptly address consumers' complaints. If a manufacturer has an arbitration program that qualifies under the Act, the consumer must prove that the manufacturer's failure to comply with the Act was willful in order to recover a civil penalty. In addition, if the manufacturer's arbitration program qualifies under the Act, the consumer must resort to the program before taking advantage of the "reasonable number of attempts" presumption in court. If a manufacturer's arbitration program does not qualify under the Act, the consumer need not prove that the violation was willful.

The California lemon law and recent decisions interpreting the lemon law have given new car purchasers significant rights. By knowing the law and preparing to enforce their rights, consumers can ensure they get the vehicle the manufacturer promised and not a "lemon."

ENDNOTES

1. Lawrence A. Towers, *Lemon Law Litigation: Screening and Preparing Plaintiff's Case*, TRIAL (Dec. 1987) (citing FED. TRADE COMMISSION, WARRANTIES, RULES, CONSUMER FOLLOW-UP: EVALUATION 63 (July 1984)).
2. H. Greenberg, *The Indiana Motor Vehicle Protection Act of 1988: the*

(continued on page 102)

Lemon Law

(continued from page 101)

- Real Thing for Sweetening the Lemon or Merely a Weak Artificial Sweetener?*, 22 IND. L. REV. 57, 58 n.4 (1989) (citing NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, SAFETY RELATED RECALL CAMPAIGNS FOR MOTOR VEHICLES AND MOTOR VEHICLE EQUIPMENT, INCLUDING TIRES, DOT HS 807-235 (1987)).
3. The Song-Beverly Act, like most lemon laws, applies only to new vehicles. See, e.g., CAL. CIV. CODE §1793.2(e)(4)(B) (West 1990); but see VA. CODE §59.1-207.11 (1990). See generally Y. ROSMARIN AND J. SHELDON, SALES OF GOODS AND SERVICES, 521-522 (National Consumer Law Center, Consumer Credit and Legal Practice Series 2d Ed. 1989) (listing and analyzing state lemon laws covering used cars) (hereinafter "SALES OF GOODS AND SERVICES").
 4. See, e.g., ALASKA STAT., §§45.45.300-.360 (1990); ARIZ. REV. STAT. ANN. §§44-1261 to 1265 (1989); CONN. GEN. STAT. ANN. §§42-179 to 186 (West Supp. 1990); ILL. REV. STAT. ch. 121 1/2, paras. 1201-1208 (Smith-Hurd 1990); MINN. STAT. ANN. §325F.665 (1989). See generally SALES OF GOODS AND SERVICES, *supra* note 3, Appendix I, at 727-740.
 5. 15 U.S.C. §§2301-2312 (1988) (originally enacted as Act of Jan. 4, 1975, Pub. L. No. 93-637, 88 Stat. 2183). The Magnuson-Moss Warranty Act looks to applicable state law for remedies. Therefore, this discussion does not focus on its separate provisions except for important distinctions such as the definition of "consumer goods." See, *infra* notes 11 to 17 and accompanying text.
 6. See, e.g., CAL. COM. CODE §§2100-2800 (West 1964 & Supp. 1990). See generally, Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 Wis. L. REV. 1405, 1411 (1985). Louisiana is the only state that has not adopted the U.C.C.
 7. CAL. CIV. CODE §§1790-1797.5.
 8. For an excellent comparative analysis of the state lemon law statutes, state commercial codes and the federal Magnuson-Moss Act, see Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589 (1985).
 9. CAL. CIV. CODE §1794 (incorporating CAL. COM. CODE §§2711-2715).
 10. As under most lemon laws, the Song-Beverly Act provides protection in addition to the U.C.C. and the Magnuson-Moss Act, and consumers can sue under any one or all of the statutes. See, e.g., CAL. CIV. CODE §1790.4; but see ILL. REV. STAT. ch. 121, para. 1205(5).
 11. CAL. CIV. CODE §1791(a) (emphasis added); U.C.C. §9-109 (1990) ("consumer good" is a product "used or bought for use primarily for personal, family or household purposes"). See generally, Annotation, *Secured Transactions: What Constitutes "Consumer Goods" Under U.C.C. §9-109(1)*, 77 A.L.R. 3d 1225 (1977 & Supp. 1989).
 12. 15 U.S.C. §2301(1) (emphasis added).
 13. *Id.*; 16 C.F.R. §700.1(a) (1990) ("A product is a consumer product if the use of that type is not uncommon. The percentage of sales or the use to which a product is put by any individual buyer is not determinative.... Where it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage.").
 14. *Crume v. Ford Motor Co.*, 60 Or. App. 224, 653 P.2d 564 (1982).
 15. See *Najran Co. for Gen. Contracting and Trading v. Fleetwood Enter., Inc.*, 659 F. Supp. 1081 (S.D. Ga. 1986); *Business Modeling Techniques v. Gen. Motors Corp.*, 474 N.Y.S.2d 258, 123 Misc.2d 605 (Sup. Ct. 1984).
 16. 16 C.F.R. §700.1(a). See *Business Modeling Techniques*, 474 N.Y.S.2d at 261.
 17. See *Walsh v. Ford Motor Credit Co.*, 449 N.Y.S.2d 556, 113 Misc.2d 546 (Sup. Ct. 1982) (tractor-trailer not covered).
 18. CAL. CIV. CODE §1793.2(d)(1).
 19. See CAL. CIV. CODE §§1793.2(d)(1) and (4)(A). Compare IND. CODE §24-5-13-6 (1990) (Defect must "substantially impair[] the . . . motor vehicle, or render[] the motor vehicle nonconforming to the terms of a applicable manufacturer's warranty") (emphasis added).
 20. A manufacturer's express warranty typically uses language similar to this: This warranty covers repairs to correct any defect in material or workmanship of the vehicle occurring during the warranty period. This language is taken from the 1990 General Motors Corporation New Car Limited Warranty, which appears in full in R. NADER & C. DITLOW, THE LEMON BOOK (1980).
 21. CAL. CIV. CODE §1791.2(a).
 22. CAL. COM. CODE §2313. See *Keith v. Buchanan*, 173 Cal. App. 3d 13, 220 Cal. Rptr. 392, 397-98 (1985).
 23. *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878, 263 Cal. Rptr. 64, 71 (1989).
 24. U.C.C. §2-313(1)(a); see generally, Annotation, *What Constitutes "Affirmation of Fact" Giving Rise to Express Warranty under U.C.C. §2-313(1)(a)*, 94 A.L.R. 3d 729 (1979 & Supp. 1990); Annotation, *Affirmations or Representations Made After the Sale is Closed as Basis of Warranty under U.C.C. §2-313(1)(a)*, 47 A.L.R. 4th 200 (1986 & Supp. 1989).
 25. Comment, *Consumer Warranty law in California under the Commercial Code and the Song-Beverly and Magnuson-Moss Acts*, 26 UCLA L. REV. 583, 628 (1978-79).
 26. CAL. CIV. CODE §1793.2(d)(4)(A) (emphasis added).
 27. Remedial legislation must be construed liberally to promote its purposes. See *Ford Dealers Ass'n. v. Dep't of Motor Vehicles*, 32 Cal. 3d 347, 356, 185 Cal. Rptr. 453, 650 P.2d 328 (1982) (citing *Cal. State Restaurant Ass'n. v. Whitlow*, 58 Cal. App. 3d 340, 347, 129 Cal. Rptr. 824 (1976)).
 28. *Chmill v. Friendly Ford-Mercury of Janesville, Inc.*, 144 Wis. 2d 796, 424 N.W.2d 747 (1988).
 29. *Id.*, at 750 (citing U.C.C. §2-608(1)). See generally, Annotation, *What Constitutes "Substantial Impairment" Entitling Buyer to Revoke his Acceptance of Goods under U.C.C. §2-608(1)*, 98 A.L.R. 3d 1183 (1980 & Supp. 1989).
 30. Wis. STAT. §218.-015(l)(f) (1987-88) ("nonconformity" means a "condition or defect which substantially impairs the use, value or safety of a motor vehicle.").
 31. *Chmill*, 424 N.W.2d at 750-51.
 32. CAL. CIV. CODE §1793.2(d)(4). Compare TEX. REV. CIV. STAT. art. 4413(36), §6.07(c) (Supp. 1990).
 33. The owner, as a lay witness, is competent to testify to the value (and loss of value) of personal property she owns, and that testimony is sufficient to support a judgment in that value. *Schroeder v. Auto Driveaway*, 11 Cal. 3d 908, 921, 114 Cal. Rptr. 622, 630, 533 P.2d 662 (1974).
 34. *Ibrahim V. Ford Motor Co.*, 214 Cal. App. 3d 878, 263 Cal. Rptr. 64, 66 (1989).
 35. *Welch v. Fitzgerald-Hicks Dodge, Inc.*, 121 N.H. 358, 430 A.2d 144 (1981).
 36. *Williams v. Chrysler Corp.*, 530 So. 2d 1214 (La. Ct. App. 1988).
 37. CAL. CIV. CODE §1793.2(b).
 38. *Id.*
 39. *Id.*, at §1793.2(d)(1) (emphasis added).
 40. *Id.*, at §1793.2(d)(2). Compare COLO. REV. STAT. §42-12-103(1) (1990) (manufacturer's choice).
 41. See *Tiger Motor Co. v. McMurty*, 284 Ala. 283, 224 So. 2d 638 (1969).
 42. 1982 Cal. Stat. c. 388, p. 1720, §1.
 43. CAL. CIV. CODE §1793.2(e)(1); See *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878, 263 Cal. Rptr. 64, 66-71 (1989).
 44. CAL. CIV. CODE §1793.2(c). For purposes of the notice requirement, the authorized dealer is the agent of the manufacturer.
 45. *Id.*, at §1793.2(c)(1).
 46. *Ibrahim*, 263 Cal. Rptr. at 71.
 47. *Id.* at 68.
 48. Under some lemon laws, this 30 day limitation is measured according to the days the vehicle is unusable,

- rather than merely the days the vehicle actually is in the repair shop. See *Vutaggio v. General Motors Corp.*, 145 Wis. 2d 874, 429 N.W.2d 93 (Ct. App. 1988).
49. CAL. CIV. CODE §1793.2(b).
 50. CONN. GEN. STAT. ANN. §42-179(e) ("war, invasion, strike, or fire, flood, or other natural disaster").
 51. *Chmill v. Friendly Ford-Mercury of Janesville, Inc.*, 144 Wisc. 2d 796, 424 N.W. 2d 747, 751 (1988).
 52. *Id.*
 53. *Id.*
 54. *Universal Motors v. Waldock*, 719 P.2d 254, 259 (Alaska 1986) (quoting *Osburn v. Bendix Home Sys., Inc.*, 613 P.2d 445 (Okla. 1980)).
 55. *Waldock*, 719 P.2d at 259.
 56. *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878, 863 Cal. Rptr. 64, 75 (1989) (citing *Neet v. Holmes*, 25 Cal. 2d 447, 154 P.2d 854 (1944)).
 57. *Neet v. Holmes*, 25 Cal. 2d 447, 458, 154 P.2d 854.
 58. See, e.g., *Ozark Kenworth, Inc. v. Neirdecker*, 283 Ark. 196, 672 S.W.2d 899 (1984); see also Annotation, *Use of Goods by Buyer as Constituting Acceptance Under U.C.C. §2-606(1)(c)*, 67 A.L.R.3d 363 (1975 & Supp. 1989).
 59. *Ibrahim*, 263 Cal. Rptr. at 76.
 60. *Id.*
 61. B. CLARK & C. SMITH, LAW OF PRODUCT WARRANTIES, §7.03[3][e] at 7-31 (1984 & Supp. 1988). See U.C.C. §2-606.
 62. CAL. CIV. CODE §1793.2(d)(1) (emphasis added).
 63. *Id.*, at §1793.2(d)(2)(C). No set-off is available under the Magnuson-Moss Act. 43 Fed. Reg. 4055, 4062 (1978).
 64. CAL. CIV. CODE §1793.2(d)(2)(C).
 65. See generally, SALES OF GOODS AND SERVICES, *supra* note 3, at 517 and 727-40.
 66. CAL. CIV. CODE §§1794(b)(1) and (2) (incorporating CAL. COM. CODE §§2711-2715).
 67. *Id.*, at §1794.
 68. *Id.*, at §1794(b)(1) (incorporating CAL. COM. CODE §2715).
 69. *Id.*
 70. *Id.*, at §1793.2(d)(2)(A) and (B). The Act does not expressly provide for the recovery of finance charges. But see LEGAL SERVICES UNIT, CAL. DEPT OF CONSUMER AFFAIRS, LEGAL GUIDE W-5, CALIFORNIA'S NEW CAR WARRANTY LAW: HOW IT HELPS BUYERS AND LESSEES 3 (July 1990). Because financing charges frequently are a part of the price paid by consumers, however, the charges should be considered out-of-pocket expenses. Some lemon laws expressly provide for recovery of financing charges. See, e.g., CONN. GEN. STAT. §42-179(d) (1989).
 71. CAL. CIV. CODE §1794(b)(2) (incorporating CAL. COM. CODE §§2711, 2712 and 2715).
 72. See CAL. COM. CODE §2715(1).
 73. CAL. CIV. CODE §§1793.2(A)-(B) & 1794(b).
 74. See U.C.C. §2-715(1).
 75. CAL. COM. CODE §2715(2)(c).
 76. See *Young v. Bank of Am.*, 141 Cal. App. 3d 108, 190 Cal. Rptr. 122, 126 (1983)(willful violation of the Song-Beverly Credit Card Act of 1971, CAL. CIV. CODE §§1747-1748.5); *Lycos v. Gray Mobile Home Sales*, 76 Mich. App. 165, 256 N.W.2d 63 (1977); *Jacobs v. Rosemont Winnebago South*, 310 N.W.2d 71 (Minn. 1981).
 77. *Jacobs*, 310 N.W.2d at 79.
 78. *Id.*
 79. See, e.g., *Young*, 141 Cal. Rptr. 122.
 80. *Pintor v. Ong*, 211 Cal. App. 3d 837, 259 Cal. Rptr. 577, 579 (1989) (citing *Young v. Bank of America*, 141 Cal. App. 3d 127, 190 Cal. Rptr. 122 (1983)).
 81. *Mollen v. Kaiser Foundation Hosp.*, 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813 (1980).
 82. CAL. CIV. CODE §1793.2(e)(1).
 83. *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878, 863 Cal. Rptr. 64 (1989).
 84. *Id.*, at 73-74.
 85. *Id.*, at 74 n. 13. The court's interpretation was consistent with a long line of case law similarly interpreting "willful" in other contexts. See, e.g., *Hale v. Moran*, 22 Cal. 3d 388, 396, 149 Cal. Rptr. 375, 584 P.2d 512 (1978).
 86. CAL. CIV. CODE §§1793.2(e)(2) and (3).
 87. *Id.*, at §1793.2(e)(3)(A) (incorporating 16 C.F.R. §703 (1987)).
 88. *Id.*, at §1793.2(e)(3)(I) (incorporating CAL BUS. & PROF. CODE §9889.70).
 89. The following arbitration programs have been certified: American Automobile Assoc. for Toyota; Ford's Consumer Appeals Board; and the Better Business Bureau for Ford, VW/Audi, and Maserati. Letter dated Sept. 5, 1990, to Nancy Barron from Candis Cohen, Arbitration Review Program Mgr., Cal. Dept. of Consumer Affairs (copy on file at the *Loyola Consumer Law Reporter* office).
 90. CAL. CIV. CODE §1793.2(e)(2). Within thirty days of the arbitrator's decision, the manufacturer must comply with an award in favor of the consumer. *Id.*, at §1793.2(e)(3)(C). A manufacturer's failure to comply with the decision re-triggers the consumer's right to assert the presumption in a subsequent lawsuit. *Id.*, at §1793.2(e)(2).
 91. *Id.*
 92. *Id.*, at §1794(e)(2).
 93. *Id.*, at §1794(e)(1); see generally, LEGAL SERVICES UNIT, CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS, LEGAL GUIDE W-7, CONSUMER AFFAIRS' ARBITRATION REVIEW PROGRAM ADOPTS WARRANTY ARBITRATION CERTIFICATION REGULATIONS 2 (July 1990).
 94. *Troensgaard v. Silvercrest Indus.*, 175 Cal. App. 3d 228, 220 Cal. Rptr. 712 (1985).
 95. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174, Cal. Rptr. 348 (1981).
 96. 175 Cal. App. 3d 228, 220 Cal. Rptr. 712.
 97. *Id.*, 220 Cal. Rptr. at 717.
 98. *Id.*, at 718.
 99. CAL. CIV. CODE §1794(d). There is no reciprocal attorneys fee award to the prevailing defendant. *Id.*
 100. *Id.*, at §1794(d) (emphasis added). Cf. Magnuson-Moss Act, §110(d)(2), 15 U.S.C. §2310(d)(2) (award of attorneys fees is *discretionary*).
 101. CAL. CIV. CODE §1794(d). In some cases, the fee award may be greater than actual attorneys fees incurred. This is intended to encourage those attorneys who work on a contingent fee basis to represent lemon law plaintiffs. See *Chrysler Corp. v. Weinstein*, 522 So. 2d 894 (Fla. Dist. Ct. App. 1988).
 102. In determining the reasonableness of fees, most courts consider the following factors: (1) time and labor expended; (2) novelty and difficulty of the issues; (3) skill required to perform the legal services rendered; (4) customary fee for similar work; (5) whether the fee is fixed or contingent (higher awards allowed in contingent fee cases due to risk); (6) experience, reputation, and ability of the attorneys. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 201-6(B) (1981).
 103. Where the litigation serves the general public's interest, the plaintiff may be entitled to recover more than the actual attorneys fees incurred. California courts have upheld fee multipliers in other types of public interest litigation. See, e.g., *San Bernardino Valley Audubon Soc'y v. County of San Bernardino*, 155 Cal. App. 3d 738, 202 Cal. Rptr. 423 (1984) (a multiplier of 1.4 affirmed in an environmental suit). Although California has not addressed the issue, other courts have upheld fee multipliers in lemon law cases. See *Chrysler v. Weinstein*, 522 So. 2d 894 (Fla. Dist. Ct. App. 1988).
 104. *Laguetta v. Marin Peugeot-Subaru*, Marin County (Cal.) Superior Court, Case No. 136893 (1990).
 105. See *Chrysler*, 522 So.2d 894.
 106. SEN. REP. No. 151, 93rd Cong., 1st Sess. (1973) at 23-24. See also, *Drouin v. Fleetwood Enter.*, 163 Cal. App. 3d 468, 493, 209 Cal. Rptr. 623 (1985).