THE NEW JERSEY LEMON LAW: A BAD IDEA WHOSE TIME HAS COME

*by Harvey M. Sklaw**

In any discussion of new cars everyone seems to understand what is meant by the term "lemon." The lemon is the apparently unrepairable new automobile; the shiny chrome plated monster which has turned upon its master. Not only has this monster turned upon the buyer, but the seller has washed his hands of the whole affair. This phenomena is not rare, nor is there any reason to believe that it is becoming less prevalent than it was in the past. While it is not possible to specify the number of these problem vehicles which are sold each year, the recall records ought to provide some pretty fair clues.[1] How is one to deal with this problem? If the seller or manufacturer either cannot or will not fix the car or take it back, what is the buyer to do? Primitive methods include ranting, raving and perhaps painting the vehicle a bright yellow and parking it in front of the dealership. There appear to be no records indicating the success of these methods. Alternatively, the purchaser might bring the complaint to an arbitration board. These boards, set up by the "big three" domestic automobile producers, have long been in operation. If arbitration should fail, however, what then? Until recently there remained for this purchaser only the civil law suit brought under either the Uniform Commercial Code [hereinafter cited as U.C.C.], the Magnuson-Moss Warranty Act[2] or, as in *Pavesi v.*

* Harvey M. Sklaw is a Professor of Law at Seton Hall University School of Law. He teaches both the Uniform Commercial Code and Products Liability, and has published in both areas. He has also served as a member of automobile arbitration panels.

1 From 1977 through 1980, approximately 35 million motor vehicles were recalled. N.Y. Times, Jan. 11, 1981 at 22, sec. L; *see* Honigman, *The New "Lemon Laws": Expanding U.C.C. Remedies*, 17 U.C.C.L.J. 116, 117, note 7 and accompanying text.

2 Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. §§ 57a, 57b, 57c, 2301-12 (1982) (The purpose of this Act is to make warranties against defects or malfunctions of consumer products more readily understandable and enforceable and to provide the Federal Trade Commission with a more effective means of protecting consumers); *see also* Comment, *Warranties:*

Ford Motor Company,[3] a combination of the remedies provided by these two statutes.

Such was the situation in all jurisdictions until Connecticut enacted what has come to be known as a "lemon law".[4] Unlike the Magnuson-Moss Act or the U.C.C., which deal generally with the sale of all goods, the lemon law is concerned specifically with automobiles. The purpose of this statute is clearly stated in its title: "An act permitting parties to recover costs in automobile breach of warranty actions."[5] It purports, therefore, to award particular remedies on warranties afforded to automobiles. The first lemon law reflected the will of the Connecticut Legislature and also unleashed a spate of "lemon laws" throughout the nation.[6] Following this trend, New Jersey enacted a lemon law in 1983. The New Jersey bill, as originally introduced, was accompanied by the following statement: "This bill, based upon the recently enacted Connecticut lemon law is designed to protect buyers of new automobiles when repeated attempts to have them repaired pursuant to a manufacturer's warranty are unsuccessful."[7] It seems eminently reasonable, therefore, that any examination of the New Jersey lemon law should begin with its direct predecessor, the Connecticut law.

The Connecticut law is succinct, straightforward and, until the last paragraph, unequivocal. The statute reads as follows:

AUTOMOBILE WARRANTIES [NEW]

§ 42-179. New motor vehicle warranties

(a) As used in this section * * * :

(1) "Consumer" means the purchaser, other than for purposes of resale, of a motor vehicle, any person to whom such motor vehicle is transferred during the duration of an express warranty applicable to such motor vehicle, and any other person entitled

---

Magnuson-Moss Act Seeks to Promote Enforceability and Comprehensibility of Written Warranties, 7 RUT.-CAM. L.J. 379 (1976).

[3] 155 N.J. Super. 373, 382 A.2d 954 (Ch. Div. 1978).

[4] CONN. GEN. STAT. ANN. § 42-179 (West Supp. 1984) (signed into law on June 4, 1982).

[5] 1983 Conn. Act. 351 (Reg. Sess.).

[6] By December 1984, at least thirty states had enacted lemon laws. *See* Honigman, *supra* note 1.

[7] S.1738 and S.1759, 200th Leg., 2d Sess. (1982).

by the terms of such warranty to enforce the obligations of the warranty; and

(2) "motor vehicle" means a passenger motor vehicle or a passenger and commercial motor vehicle . . . which is sold in this state.

(b) If a new motor vehicle does not conform to all applicable express warranties, [the manufacturer's express warranty] and the consumer reports the nonconformity to the manufacturer, its agent or its authorized dealer during the term of such express warranties or during the period of one year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date, the manufacturer, its agent or its authorized dealer shall make such repairs as are necessary to conform the vehicle to such express warranties, notwithstanding the fact that such repairs are made after the expiration of such term or such one-year period.

(c) If the manufacturer, or its agents or authorized dealers are unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which substantially impairs the use and value of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer shall replace the motor vehicle with a new motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the full purchase price including all collateral charges, less a reasonable allowance for the consumer's use of the vehicle. No authorized dealer shall be held liable by the manufacturer for any refunds or vehicle replacements in the absence of evidence indicating that dealership repairs have been carried out in a manner inconsistent with the manufacturer's instructions. Refunds shall be made to the consumer, and lienholder if any, as their interests may appear. A reasonable allowance for use shall be that amount directly attributable to use by the consumer prior to his first report of the nonconformity to the manufacturer, agent or dealer and during any subsequent period when the vehicle is not out of service by reason of repair. It shall be an affirmative defense to any claim under this section

(1) that an alleged nonconformity does not substantially impair such use and value, or
(2) that a nonconformity is the result of abuse, neglect or unauthorized modifications of alterations of a motor vehicle by a consumer.

(d) It shall be presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties, if
(1) the same nonconformity has been subject to repair *four or more* times 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 original delivery of the motor vehicle to a consumer, whichever is the earlier date, but such nonconformity continues to exist, or
(2) the vehicle is out of service by reason of repair for *a cumulative total of thirty or more calendar days* during such term or during such period, whichever is the earlier date. The term of an express warranty, such one-year period and such thirty-day period shall be extended by any period of time during which repair services are not available to the consumer because of a war, invasion, strike or fire, flood or other natural disaster.

(e) Nothing in this section shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law.

(f) If a manufacturer has established an informal dispute settlement procedure which complies in all respects with the provisions of Title 16 Code of Federal Regulations Part 703,[8] as from time to time amended, the provisions of subsection (c) of this section concerning refunds or replacement shall not apply to any consumer who has not first resorted to such procedure.[9] (emphasis added).

Paragraph (a) defines consumer and motor vehicle for the purpose of the act. Paragraph (b) discusses express warranties and the manufacturer's duty to conform the automobile to these warranties within a specified period. Paragraph (c) refers to the failure of the

---

[8] Informal Dispute Settlement Procedures, 16 C.F.R. § 703.1 to -.8 (1984).
[9] CONN. GEN. STAT. ANN. § 42-179 (West. Supp. 1984).

manufacturer or agent to conform a defective vehicle and specifies the remedies available for such a breach. These remedies are the replacement of the vehicle or the return of the purchase price. Paragraph (d) specifies what is presumed to be a failure to conform—in other words, the number of times repairs are attempted for the same difficulty (four) and/or days out of service awaiting repair (thirty). Paragraph (3) is an attempt to preserve the remedies otherwise available to the consumer. The final paragraph requires the consumer to submit to an informal dispute settlement procedure set up by the manufacturer if such procedure is in compliance with federal regulations.[10] A consumer's failure to submit will bar such a person from the remedies of refund or replacement otherwise provided by paragraph (c). Thus, the question presents itself: does the final paragraph of this Act abrogate the other remedies available to the consumer? It appears that paragraph (f) conflicts directly with paragraph (e) which provides that the "lemon law" does not limit the remedies or rights available to the consumer. This inconsistency is also present in the New Jersey lemon law and will be discussed in terms of the actual value of the legislation to the lemon purchaser in New Jersey.

The New Jersey Lemon Legislation

The New Jersey lemon law was originally introduced as Senate bills 1738 and 1959.[11] These bills were introduced shortly after the enactment of the Connecticut law[12] and were signed by the governor on June 20, 1983.[13] The New Jersey statute reads as follows:

Title of Act:
An Act concerning certain automobile warranties.
§ 56:12-19. Definitions
As used in this act:

a. "Consumer" means the purchaser, other than for purposes of resale, of an automobile; a person to whom an

---

10 *See supra* note 8.

11 *Id.*

12 The Connecticut law was enacted on June 4, 1982; *see supra* note 4. The New Jersey bill was introduced September 23, 1982; *see supra* note 7.

13 "An Act concerning certain automobile warranties," 1983 N.J. Sess. Law Serv. 215 (West) (codified at N.J. STAT. ANN. §§ 56:12-19 to -28) (West Supp. 1984).

automobile is transferred during the duration of an express warranty applicable to the automobile; or any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

b. "Dealer" means a person engaged in the business of buying, selling or exchanging automobiles at retail and who has an established place of business.

c. "Manufacturer" means a person engaged in the business of manufacturing, assembling or distributing automobiles, who will, under normal business conditions during the year, manufacture, assemble or distribute to dealers at least 10 new automobiles.

d. "Manufacturer's express warranty" or "warranty" means the written warranty of the manufacturer of a new automobile of its condition and fitness for use, including any terms or conditions precedent to the enforcement of obligations under that warranty.

e. "Automobile" means any passenger automobile . . . which is registered by the Division of Motor Vehicles in the Department of Law and Public Safety, except the living facilities of motor homes.

f. "Nonconformity" means a defect or condition which substantially impairs the use, value, or safety of an automobile.

g. "Lien" means a security interest in an automobile.

h. "Lienholder" means a person with a security interest in an automobile pursuant to a lien.

§ 56:12-20. Repairs to conform new automobile to manufacturer's express warranty

If a new automobile does not conform to the manufacturer's express warranty, and the consumer reports the nonconformity to the manufacturer or its agent or dealer during the term of the warranty or during the period of one year following the date of original delivery of an automobile to the consumer, whichever is earlier, the manufacturer shall make, or arrange with its dealer or agent to make, within a reasonable period of time, all repairs necessary to conform the new automobile to the warranty, notwithstanding that the repairs or corrections are made after the expiration of the term of the warranty or the one-year period.

§ 56:12-21. Inability to conform new automobile to warranty; manufacturer's options

If the manufacturer is unable to conform the new automobile to the warranty by repairing or correcting a defect or condition which substantially impairs the use, value or safety of the new automobile to the consumer after a reasonable number of attempts, the manufacturer shall accept return of the automobile from the consumer and either:

a. Replace the automobile with a comparable new automobile and the consumer shall pay the manufacturer a reasonable allowance for his use of the automobile being returned and shall not pay, on the new replacement automobile, the taxes, preparation fees or any other charges or fees usually paid by a consumer; or

b. Refund to the consumer the full purchase price of the original automobile, including all taxes, preparation fees and any other charges or fees paid by the consumer, less a reasonable allowance for the consumer's use of the original automobile. Refunds shall be made to the consumer and lienholder, if any, as their interests appear on the records of ownership kept by the Director of the Division of Motor Vehicles.

§ 56:12-22. Presumption

It shall be presumed that a reasonable number of attempts have been undertaken to conform a new automobile to the manufacturer's express warranty if, within the warranty term or during the period of one year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date:

a. The same non-conformity has been subject to repair or correction four or more times by the manufacturer, its agents or its dealers and the nonconformity continues to exist; or

b. The automobile is out of service by reason of waiting for the dealer to begin or complete repair or correction of a nonconformity by the manufacturer, its agents or its dealers for a *cumulative total of more than 30 business days* since the original delivery of the motor vehicle to the consumer. This 30-day limit shall commence with the first day on which the consumer makes the automobile available to the manufacturer, its agent or dealer for service of the nonconformity. The 30-day limit

shall be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer, its agents or its dealers including war, invasion, strike, fire, flood or other natural disaster.

c. The presumption provided in this section shall not apply against a manufacturer unless the manufacturer has received prior direct written notification from or on behalf of the consumer and has had an opportunity to repair or correct the nonconformity; provided, however, that if the manufacturer does not directly attempt or arrange with its dealer or agent to repair or correct the nonconformity, the manufacturer may not defend a claim by a consumer under this act on the ground that the agent or dealer failed to properly repair or correct the nonconformity or that the repairs or corrections made by the agent or dealer caused or contributed to the nonconformity. (emphasis added).

§ 53:12-23. Allowance for use by consumer

A reasonable allowance for use shall be the total amount directly attributable to the use of the new automobile by the consumer and any previous consumer, prior to the first report of the nonconformity to the manufacturer by the consumer or any previous consumer of the new automobile and during any subsequent period when the vehicle is not out of service by reason of repair or correction of the nonconformity so reported.

§ 56:12-24. Defense

It shall be an affirmative defense to a claim under this act that the alleged nonconformity does not substantially impair the use, value, or safety of the new automobile or that the nonconformity is the result of abuse or neglect or of unauthorized modifications or alterations of the new automobile by anyone other than the manufacturer, its agent or dealer.

§ 56:12-25. Dispute settlement procedure; priority of remedies

If a manufacturer has established a qualified informal dispute settlement procedure pursuant to section 110 of Pub.L. 93-637 (15 U.S.C. § 2310) and the rules promulgated thereunder, the remedies provided by this act shall not be available to a consumer who has not first resorted to that procedure.

§ 56:12-26. Dispute settlement procedure; compliance with 15 U.S.C. § 2310

The Division of Consumer Affairs in the Department of Law and Public Safety shall periodically make known to the public as to whether or not the dispute settlement procedure of each manufacturer doing business in this State complies with procedures pursuant to section 110 of Pub.L. 93-637 (15 U.S.C. § 2310) and the rules promulgated thereunder.

§ 56:12-27. Other consumer rights or remedies for breach of warranty not impaired

Nothing in this act shall in any way limit the rights or remedies for breach of warranty otherwise available to a consumer.

§ 56:12-28. Nonliability of dealer

Nothing in this act shall be construed as imposing any liability on a dealer or creating a cause of action by a consumer against a dealer under § 56:12-21 of this act.[14]

The New Jersey statute is somewhat more complicated than the Connecticut version, and it is noteworthy that the changes and additions in the New Jersey law tend to favor the manufacturer rather than the purchaser. For example, although the presumed reasonable number of attempts at repair of the same non-conformity remains four in New Jersey,[15] the Connecticut Act prescribes a cumulative total of thirty or more calendar days during the pertinent period of time,[16] while the New Jersey Act allows thirty *business* days.[17] While the variations do not significantly mitigate the value of the New Jersey lemon law, it is questionable what actual value the legislation has for the consumer.

New Jersey Case Law Before the Lemon Law

Prior to the enactment of the lemon law, New Jersey had a fairly well developed history of judicial dealing with defective

---

[14] N.J. STAT. ANN. §§ 56:12-19 to -28 (West Supp. 1984). Senate bill number 1103, P.L. 1984, c. 135, enacted Sept. 4, 1984, expanded coverage of the lemon law to motorcycles purchased after this date. *See* N.J. STAT. ANN. §§ 56:12-19 to -28 (West Supp. 1985).

[15] *See id.* § 56:12-22; *see also* CONN. GEN. STAT. ANN. § 42-179(d)(l) (West Supp. 1984).

[16] CONN. GEN. STAT. ANN. § 42-179(d)(2) (West Supp. 1984).

[17] N.J. STAT. ANN. § 56:12-22.b. (West Supp. 1984).

motor vehicles. A review of the major decisions will reveal that the potentially salutory effect of New Jersey's lemon law is less than it would at first appear. The case of *Ventura v. Ford Motor Corp.*[18] is one example. In *Ventura* the plaintiff took delivery of an automobile on April 12, 1978, and almost immediately thereafter experienced engine hesitation and stalling problems.[19] These difficulties continued despite numerous attempts by the dealer to cure them.[20] The plaintiff testified that a Ford representative told him that there was nothing wrong with the car and that "he would have to live with this one."[21] Upon hearing this, the plaintiff attempted to return the automobile to the dealership and was forcibly removed from the premises.[22] At trial the plaintiff was granted rescission and damages representing the purchase price less allowance for the plaintiff's use of the car.[23] The plaintiff was also awarded counsel fees.[24] Thus, the plaintiff received the ultimate remedy which would be available under the current lemon law and attorney's fees which are not provided by the statute.[25] The court utilized existing statutory remedies and based its decision primarily upon U.C.C. sections 2-608,[26] 2-711[27] and the

---

18 180 N.J. Super. 45, 433 A.2d 801 (App. Div. 1981).

19 180 N.J. Super. at 52; 433 A.2d at 804.

20 180 N.J. Super. at 52; 433 A.2d at 804.

21 180 N.J. Super. at 52; 433 A.2d at 804.

22 180 N.J. Super. at 52; 433 A.2d at 804.

23 180 N.J. Super. at 63; 433 A.2d at 810.

24 180 N.J. Super. at 66-68; 433 A.2d at 812-13.

25 *See generally* N.J. STAT. ANN. §§ 56:12-19 to -28 (West. Supp. 1984).

26 180 N.J. Super. at 65; 433 A.2d at 811 (citing N.J. STAT. ANN. § 12A:2-608 (West 1984)). Section 2-608 provides:

> *Revocation of Acceptance in Whole or in Part.*
>
> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them

Magnuson-Moss Warranty Act.[28] The *Ventura* court also relied upon the case of *Santor v. A&M Karagheusian*.[29] That case stands for the proposition that principles of strict liability in tort apply to economic loss as well as to personal injury.[30] Under this theory the need for privity of contract between a purchaser and a manufacturer is eliminated as a prerequisite for purchaser's claims for his loss of bargain caused by a defect in a product. Thus, in the *Ventura* case federal legislation, state legislation and New Jersey common law all operated to give to the aggrieved buyer the remedy of rescission plus damages: his best possible outcome.

In *Pavesi v. Ford Motor Company*[31] the buyer took delivery of a new car in the evening and was therefore unable to observe that

---

N.J. STAT. ANN. § 12A:2-608 (West 1984).

27 180 N.J. Super. at 65; 433 A.2d at 811 (citing N.J. STAT. ANN. §12A:2-711 (West 1984)). Section 2-711 provides:

Buyer's Remedies in General: Buyer's Security Interest in Rejected Goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (12A:2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid,

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Chapter (12A:2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this Chapter (12A:2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Chapter (12A:2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller. (12A:2-706).

N.J. STAT. ANN. § 12A:2-711 (West 1984).

28 180 N.J. Super. at 66; 433 A.2d at 812 (citing 15 U.S.C. § 2310(d)(2) (1982) (provides that a consumer who prevails in an action brought in any court under this subsection may be allowed by the court to recover attorney's fees as part of the judgment).

29 44 N.J. 52; 206 A.2d 305 (1965).

30 44 N.J. at 63; 206 A.2d at 310.

31 155 N.J. Super. 373, 382 A.2d 954 (Ch. Div. 1978).

the paint was chipped until the following day.[32] Upon discovery of the defect he immediately returned the car to the dealer and demanded a refund of his money or a new car.[33] Both demands were refused, but the buyer acquiesced to having the defect repaired.[34] Over the course of seventeen months the automobile was repainted unsatisfactorily three times.[35] Ultimately, the buyer brought an action for rescission.[36] The defendant manufacturer claimed that the plaintiff was not entitled to rescission because the buyer continued to use the motor vehicle after attempting to rescind.[37] The court rejected this argument, stating that:

> No longer is a buyer barred from the remedy of rescission because of his continued use of substantially impaired goods which are a necessity to him; all reasonable leeway is granted to the rightfully rejecting or revoking buyer. To require such a buyer to discontinue his use and suffer financial or other hardship would be contrary to the Code's rule of reasonableness and its underlying purposes and policies.[38]

The court analyzed the buyer's revocation of acceptance pursuant to U.C.C. § 2-608[39] and found that his acceptance was reasonably induced by the difficulty of discovering the unsatisfactory paint adhesion before acceptance.[40] It was recognized that under § 2-508[41] a

---

32 155 N.J. Super. at 376; 382 A.2d at 955.

33 155 N.J. Super. at 376; 382 A.2d at 955.

34 155 N.J. Super. at 376; 382 A.2d at 955. It was the firm policy of the defendant manufacturer, Ford Motor Company, to insist upon the customer's acquiescence to the repair of any defect, rather than to provide for reimbursement of the purchase price or the tender of a new automobile.

35 155 N.J. Super. at 375; 382 A.2d at 955.

36 155 N.J. Super. at 375; 382 A.2d at 955.

37 155 N.J. Super. at 376-77; 382 A.2d at 956.

38 155 N.J. Super. at 377; 382 A.2d at 956 (citing N.J. STAT. ANN. § 12A:2-604 (West 1984)); Fablok Mills v. Cocker Mach. Co., 125 N.J. Super. 251, 258; 310 A.2d 491, 494 (App. Div. 1973) (where seller was the only domestic manufacturer of a particular type of knitting machine); Uganski v. Little Grant Crane and Shovel, Inc., 35 Mich. App. 88, 192 N.W.2d 580, 589 (Ct. App. 1971) (allowing revocation of acceptance of a crane after extended use where plaintiff buyer was financially unable to purchase a substitute)).

39 N.J. STAT. ANN. § 12A:2-608 (West 1984); *see supra* note 26 for full text of this section.

40 155 N.J. Super. at 378; 382 A.2d at 956. *See* N.J. STAT. ANN. § 12A:2-608(l)(b) (West 1984).

41 N.J. STAT. ANN. § 12A:2-508 (West 1984). This section provides:

> (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the

seller has the right to cure defects in the goods upon rejection by the buyer.[42] This right to cure, however, should be limited to "trivial defects or defects easily curable" and should not be permitted in cases where, as here, the defects substantially impair the value.[43] Unfortunately, in this case, the buyer had no practical alternative except to allow the defendant dealer to attempt to satisfactorily repaint the car.[44] The court found the buyer's acquiescence to the three repaintings was under duress and unconscionable, and the plaintiff justifiably revoked his acceptance on the day after delivery.[45] The plaintiff was therefore entitled to a judgment of rescission and the return of his purchase price with interest.[46]

Nearly a decade before *Pavesi*, a New Jersey court utilized the U.C.C. in order to afford a lemon buyer his ultimate remedy. In *Zabriskie Chevrolet, Inc. v. Smith*,[47] the automobile in question did not even make it to the buyer's home before the defect appeared.[48] A defective transmission rendered the car practically undrivable.[49] The buyer stopped payment on his check and called the dealer to notify him that he had sold him a "lemon."[50] The car was immediately returned to the shop.[51] Ignoring the buyer's notice of cancellation, the seller replaced the transmission with another which was removed from a vehicle on the showroom floor.[52] The buyer refused to take the vehicle as repaired and reasserted his cancellation.[53] Thereafter, the seller kept the vehicle in storage while

---

seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have reasonable time to substitute a conforming tender.

42 155 N.J. Super. at 378; 382 A.2d at 956.

43 155 N.J. Super. at 378; 382 A.2d at 956.

44 155 N.J. Super. at 378; 382 A.2d at 956.

45 155 N.J. Super. at 378; 382 A.2d at 956 (citing N.J. STAT. ANN. § 12A:2-302 (West 1984)). The duress and unconscionable elements of the transaction arose due to the Ford Motor Company policy of no reimbursements. *See supra* note 34.

46 155 N.J. Super. at 379; 382 A.2d at 957.

47 99 N.J. Super. 441, 240 A.2d 195 (Law Div. 1968).

48 99 N.J. Super. at 444; 240 A.2d at 197.

49 99 N.J. Super. at 445-46; 240 A.2d at 197.

50 99 N.J. Super. at 445; 240 A.2d at 197.

51 99 N.J. Super. at 445; 240 A.2d at 197.

52 99 N.J. Super. at 446; 240 A.2d at 197.

53 99 N.J. Super. at 446; 240 A.2d at 197.

alleging that the warranty, which contained a promise to repair or replace defective parts in lieu of all other warranties expressed or implied, limited the remedies available to the buyer.[54] The court responded that this alleged limitation of warranty was insufficiently conspicuous under the requirements of § 2-316(2) of the U.C.C.[55] In support of its conclusion, the court noted that it was difficult to conceive that a buyer of a new automobile would agree to a sale which had conditions compelling the acceptance of an inoperable vehicle.[56] Thus, the conclusion was inevitable that such a condition was not conspicuously made known to the buyer.

Section 2-606 of the U.C.C. was examined in order to determine whether the acceptance of the goods had in fact occurred.[57] That section states in pertinent part:

> (1) Acceptance of goods occurs when the buyer
>
> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
>
> (b) fails to make an effective rejection (subsection (1) of 12A:2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them, or
>
> (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.[58]

In the instant case, it was found that the opportunity to inspect occurred during the buyer's ride home.[59] The court held that discovery of the non-conformity within seven-tenths of a mile was sufficiently prompt to constitute a reasonable basis for non-acceptance.[60] Alternatively, it was noted that the buyer's behavior was well within the intended meaning of § 2-608 of the U.C.C. concerning

---

54 99 N.J. Super. at 446; 240 A.2d at 197.

55 99 N.J. Super. at 447-49; 240 A.2d at 199 (citing N.J. STAT. ANN. § 12A:2-316(2) (West 1984) ("Exclusion or Modification of Warranties")).

56 99 N.J. Super. at 447; 240 A.2d at 198.

57 99 N.J. Super. at 450-451; 240 A.2d at 201 (citing N.J. STAT. ANN. § 12A:2-606 (West 1984)).

58 N.J. STAT. ANN. § 12A:2-606 (West 1984).

59 99 N.J. Super. at 452-53; 240 A.2d at 202.

60 99 N.J. Super. at 453; 240 A.2d at 202.

revocation of acceptance.[61] The court also relied upon § 2-601 of the U.C.C. which allows the buyer to reject a tender of delivery which fails in any respect to conform to the terms of the contract.[62] Finally, the court, in rejecting the dealer's argument that he had a right to cure the non-conforming delivery pursuant to § 2-508,[63] stated:

> The "cure" intended under the cited section of the Code does not, in the court's opinion, contemplate the tender of a new vehicle with a substituted transmission, not from the factory and of unknown lineage from another vehicle in plaintiff's possession. It was not the intention of the Legislature that the right to "cure" is a limitless one to be controlled only by the will of the seller. A "cure" which endeavors by substitution to tender a chattel not within the agreement or contemplation of the parties is invalid.[64]

Ultimately, the buyer was granted complete rescission pursuant to section 2-711(1) of the U.C.C.[65]

In 1982, the Supreme Court of New Jersey held that the rule of perfect tender applies to the delivery of defective automobiles.[66] That case, *Ramirez v. Autosport*, concerns the rejection of the delivery of a camper van.[67] The plaintiffs, purchasers of the van, sued for cancellation of the contract and recovery of the price paid because of non-conforming tender.[68] Ramirez contracted with the defendant for the purchase of a new camper van, and he traded his used camper van as part payment. On August 3, 1978, Mr. and Mrs. Ramirez attempted to pick up their van and discovered numerous defects including scratched paint, missing electrical and sewage hook ups and missing hubcaps.[69] Promises of repairs were made but upon the customers' return on August 14 other problems were pres-

---

61 99 N.J. Super. at 453-55; 240 A.2d at 202-03 (citing N.J. STAT. ANN. § 12A:2-608) (West 1984)). *See supra* note 26 for the full text of section 2-608.

62 99 N.J. Super. at 455; 240 A.2d at 203 (citing N.J. STAT. ANN. § 12A:2-601 (West 1984)).

63 N.J. STAT. ANN. § 12A:2-508 (West 1984).

64 99 N.J. Super. at 458; 240 A.2d at 205.

65 99 N.J. Super. at 458; 240 A.2d at 205 (citing N.J. STAT. ANN. § 12A:2-711(l) (West 1984)); *see supra* note 27 for the full text of section 2-711.

66 Ramirez v. Autosport, 88 N.J. 277, 440 A.2d 1345 (1982).

67 88 N.J. 277, 440 A.2d 1345.

68 88 N.J. at 283; 440 A.2d at 1348.

69 88 N.J. at 282; 440 A.2d at 1347.

ent.[70] Once again the camper was rejected.[71] On September 1 when the buyer was informed that the van was ready, he went to the showroom and was asked to wait—and wait he did—for one and one-half hours,[72] but no van was produced.[73] On October 5, Mr. and Mrs. Ramirez demanded an end to the transaction and a return of their trade-in price which, of course, was not given.[74] The New Jersey Supreme Court invoked the rule of perfect tender and found that the U.C.C. left that rule intact:

> [W]e conclude that the seller is under such a duty to make a "perfect tender" and that a buyer has the right to reject goods that do not conform to the contract.[75]

Thus, the buyers were entitled to either rescission or cancellation of the contract and were also entitled to the fair market value of their trade-in.[76]

Lemon Law: Disservice to the Consumer?

The question arises as to whether the foregoing lemon purchasers would have fared better under today's lemon law than under existing New Jersey case law, the U.C.C. and the Magnuson-Moss Act. In each of the above examples the unhappy purchaser escaped the unfavorable transaction by revocation, rescission, cancellation or a combination of these remedies. Each case raises questions concerning how the facts would be treated under the present lemon law.

The lemon law may not be applicable at all to the facts of *Zabriskie* for two reasons. First, the lemon law concerns only the contractual relations between buyers and manufacturers, and

---

70 88 N.J. at 282; 440 A.2d at 1347. Workers were still touching up the outside paint, and the dining area cushions were soaking wet because the windows had been left open.

71 88 N.J. at 282; 440 A.2d at 1347.

72 88 N.J. at 283; 440 A.2d at 1348.

73 88 N.J. at 283; 440 A.2d at 1348.

74 88 N.J. at 283; 440 A.2d at 1348.

75 88 N.J. at 283-84; 440 A.2d at 1348. Nonetheless, such a rejection does not automatically terminate the contract; a seller may still effect a cure and preclude unfair rejection and cancellation by the buyer. 88 N.J. at 290; 440 A.2d at 1349-50 (citing N.J. STAT. ANN. § 12A:2-508, Official Comment 2 (West 1984)). The court found, however, that Autosport did not effect a cure. 88 N.J. at 290; 440 A.2d at 1350.

76 88 N.J. at 287-92; 440 A.2d at 1351-53.

agents of manufacturers.[77] This legislation apparently does not concern lawsuits between buyers and dealers as separate entities as in *Zabriskie*. Second, the Act is clearly written for circumstances in which the purchaser of the automobile is forced to take possession despite any protests.[78] Smith, the buyer in *Zabriskie*, had the good fortune to discover the non- conformity in time to return the automobile and to stop payment on his check.[79] Usually the buyer relinquishes his bargaining power with the seller after having spent or committed himself to spending large sums of money. Here, however, the buyer's prompt action avoided such a situation.

Nevertheless, *Zabriskie* does raise the speculative question of whether Smith, the buyer, would have benefited from the application of the lemon law. For the reasons which follow, it appears that he would not. The New Jersey lemon law would require a purchaser in Smith's position to report the non-conformity to the manufacturer or the manufacturer's agent within a reasonable period of time and to give the manufacturer a minimium of four opportunities to make the automobile conform before the contract could be cancelled.[80] While under case law principles Smith maintained an advantage over the seller by retaining his purchase money, the lemon law would work to nullify this position of leverage. Indeed, if the lemon law had been in effect when Smith purchased the automobile he might have been held at fault for refusing to allow the manufacturer to attempt to cure the defect.[81]

Unlike Smith, the buyers in *Ventura* and *Pavesi* were originally unable to revoke acceptance on the basis of non-conforming tender because they lost their bargaining power at the completion of the sale.[82] In spite of this disadvantage, both buyers were eventually granted revocation within the scope of the U.C.C.[83]

---

77 *See* N.J. STAT. ANN. § 56:12-28 (West Supp. 1984) ("Nonliability of dealer").

78 *See* N.J. STAT. ANN. § 56:12-20 (West Supp. 1984) ("Repairs to conform new automobile to manufacturer's express warranty").

79 99 N.J. Super. at 445; 240 A.2d at 197.

80 N.J. STAT. ANN. §§ 56:12-20, 22 (West Supp. 1984).

81 N.J. STAT. ANN. § 56:12-20 (West Supp. 1984).

82 *See* Ventura *supra* notes 17-30 and accompanying text; *see* Pavesi *supra* notes 31-46 and accompanying text.

83 *See* Ventura *supra* note 22 and accompanying text; *see* Pavesi, *supra* note 46 and accompanying text.

In fact the buyer in *Ventura* was reimbursed for counsel fees,[84] a matter which is not covered by the New Jersey lemon law.[85] Presumably this omission was designed to discourage the use of counsel. Thus, it appears that if the *Ventura* and the *Pavesi* cases were to occur today the lemon law would not give those purchasers any more protection than that provided by the U.C.C., the Magnuson-Moss Act and general law and equity. Moreover, the lemon law would probably have been a major impediment to the buyer in *Zabriskie*.

Ramirez v. Autosport raises the procedural problem of determining what types of vehicles are within the scope of the lemon law. The legislation excludes from the definition of "automobile" the "living facilities of motor homes."[86] In *Ramirez*, when the buyers attempted to take delivery of a camper, they found that the paint was scratched and that other exterior parts were missing.[87] On their second visit, the buyers found that the paint was still being touched up, but found the main defect to be a rain-saturated dining area.[88] Such a defect would be considered part of the "living facilities of a motor home." Is this case within the scope of the lemon law? While the question is moot regarding the *Ramirez* case, the problem it represents is real and potentially dangerous to consumers. If a buyer believes that he is not within the parameters of the lemon law and therefore brings an action at law without conforming to the law's requirements, the buyer may discover at trial that he has lost a right to rescind. Suppose, on the other hand, a buyer believes that he is within the ambit of the lemon law and delays the filing of a petition for arbitration within the new system only to find that he is not within the scope of its coverage. Must the buyer begin anew by filing a complaint after having kept non-conforming goods for a substantial period of time? Might he now be barred from any remedy by acceptance, however unwitting? Again it is difficult to see what advantage the lemon law affords a buyer in this predicament. Clearly, the source of this problem lies in setting a legal standard

---

84 180 N.J. Super. at 66-68; 433 A.2d at 812-13.

85 *See generally* N.J. STAT. ANN. §§ 56:12-19 to -28 (West Supp. 1984).

86 N.J. STAT. ANN. § 56:12-19(e) (West Supp. 1984).

87 88 N.J. at 282; 440 A.2d at 1347; *see also supra* note 69 and accompanying text.

88 88 N.J. at 282; 440 A.2d at 1347 (the camper windows had been left open).

of contract performance for one product to the exclusion of all other products.

Another difficulty regarding the remedies available under the lemon law is the issue of whether the rule of perfect tender survived the passage of this statute. As evidenced by Justice Pollock's decision in *Ramirez*, the perfect tender rule was alive and well for automobiles in 1982.[89] That decision held in pertinent part:

> One New Jersey case, *Gindy Mfg. Corp. v. Cardinale Trucking Corp.* suggests that, because some defects can be cured, they do not justify rejection. (§ 2-601 contains the perfect tender rule). Nonetheless, we conclude that the perfect tender rule is preserved to the extent of permitting a buyer to reject goods for any defects. Because of the sellers right to cure, rejection does not terminate the contract. Accordingly we disapprove the suggestion in *Gindy* that curable defects do not justify rejection.[90] (citations omitted).

Although the lemon law provides that "[n]othing in this Act shall in any way limit the rights or remedies for breach of warranty otherwise available to a consumer,"[91] can this statute be read as having retained the rule of perfect tender? Two factors militate against such an interpretation. First, such a construction would appear to conflict with the *quid pro quo* philosophy of lemon laws. In other words, these laws seem to be based upon the proposition that if the consumer will refrain from bringing a law suit, the manufacturer will attempt to make the necessary repairs. Second, a comparison of parallel sections of the Connecticut law reveals that the New Jersey law severely restricts the rights of the lemon purchaser. The Connecticut law provides:

> [n]othing in this section shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law.[92]

---

89 88 N.J. at 287; 440 A.2d at 1350.

90 88 N.J. at 287; 440 A.2d at 1350. The court cited Adams v. Tremontin, 42 N.J. Super. 313, 325, 126 A.2d 358, 364 (App. Div. 1956) with approval. The buyer in Adams described her automobile as a "non-vegetative member of the citrus family-euphemistic long hand for what the trade bluntly calls a 'lemon' ". *Id.* But the court noted the decision in Sudol v. Rudy Papa Motors, 175 N.J. Super. 238, 240-41, 417 A.2d 1133, 1134 (Passaic County Ct. 1980).

91 N.J. STAT. ANN. § 56:12-27 (West Supp. 1984).

92 CONN. GEN. STAT. ANN. § 42-179(e) (West Supp. 1984).

The New Jersey section reads:

> [n]othing in this Act shall in any way limit the rights or remedies *for breach of warranty* otherwise available to the consumer.[93] (emphasis added).

The addition of the words "for breach of warranty" is not mere surplusage. By inserting this language the New Jersey Legislature apparently gave away the consumer's right to immediate cancellation of the contract upon the delivery of a non-conforming automobile. In fact, should the New Jersey consumer eschew the lemon law as a source of remedy, he or she will be barred from the remedy of cancellation. The consumer's sole remedies will be those arising from breaches of warranty.

The U.C.C. sets forth the buyer's remedies for breach of warranty in § 2:714(l) and (2) which provide:

> **Buyer's Damages for Breach in Regard to Accepted Goods.**
>
> (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (c) In a proper case any incidental and consequential damages under the next section may also be recovered.[94]

Absent from this section are the remedies of revocation, cancellation and return of monies. Thus, these remedies may not be available to the lemon purchaser. It is difficult to believe that the creation of this limitation was the intention of the drafters, yet the language does not even appear to be equivocal.

The Presumption of Defect and the Arbitration Prerequisite

The lemon law apparently creates a new category of consumers, those who purchase automobiles. If a consumer is tendered a non-conforming automobile, the New Jersey statute entitles

---

[93] N.J. STAT. ANN. § 56:12-27 (West Supp. 1984).
[94] N.J. STAT. ANN. § 12A:2-714 (West 1984).

him or her to return the automobile for repair.[95] If the manufacturer attempts the same repair four times and fails to accomplish it or if the manufacturer takes a total of more than thirty business days to make adequate repairs, the consumer shall then be entitled to the presumption that the automobile is in fact defective.[96] When this presumption arises, the manufacturer shall have a duty to replace the automobile with a comparable new automobile or to refund the full purchase price. Note, however, that in most cases these remedies are not available unless the consumer first attempts to resolve the dispute through arbitration.[97] By virtue of this so-called consumer protection legislation, lemon purchasers are precluded from directly seeking the remedies normally available under the U.C.C. In comparison, the buyers of other defective consumer products are entitled to either reject the goods upon non-conforming delivery or to revoke acceptance if delivery is accepted and a non-conformity is subsequently discovered.[98]

This is not New Jersey's first flirtation with mandatory arbitration, and the flaws in such proceedings can be seen in the area of medical malpractice. New Jersey Rule 4:21 requires that in medical malpractice actions against a physician, the claim must be submitted to a panel consisting of a trial judge, a physician and an attorney.[99] The rule also provides that any unanimous panel finding will be admissible at trial.[100] This mandatory arbitration procedure was criticized by a committee formed by the Chief Justice. The committee traduced the arbitration panels because:

> (a) There is no sworn testimony on the record; (b) The opinion of the doctor-panelist, because of his expertise carries a disproportionate weight in the panel's determination; and (c) practically speaking, it is virtually impossible to overcome the impact on a jury when they are told that an "expert" panel has

---

95 N.J. STAT. ANN. § 56:12-20 (West 1984) ("Repairs to conform new automobile to manufacturer's express warranty").

96 N.J. STAT. ANN. § 56:12-2 (West 1984) ("Presumption").

97 N.J. STAT. ANN. § 56:12-25 (West 1984) ("Dispute settlement procedure; priority of remedies").

98 N.J. STAT. ANN. § 12A:2-601 (West 1984) ("Buyer's rights on improper delivery").

99 N.J. CIV. P. R. 4:21-4.

100 N.J. CIV. P. R. 4:21-6(e).

> made a unanimous finding in favor of one of the parties and that this finding is evidence for, but is not binding on, the jury.[101]

The lemon law's mandatory arbitration procedure is also riddled with imperfections. The testimony consists of records kept by the buyer and seller. In this situation, a potential for error exists, especially given that a buyer generally has no expectation of appearing before an arbitration panel when his automobile shows its first signs of trouble. In addition, although there is no equivalent to the doctor-panelist on the lemon law panel, there are testifying on the manufacturer's side individuals who have automobile expertise, while the purchaser is not likely to have mechanical acumen. The most egregious problem with a mandatory arbitration proceeding is that it denies a purchaser his historical right to a jury trial. An arbitration panel may become jaded from repeated stories of automobile failure and begin to draw comparisons between the complaints of lemon purchasers. Indeed, under this system the buyer inexorably loses the jury's just rendering of a decision on the basis of the seller's representations compared to the performance of the product sold. Furthermore, even if the dispute eventually arrives before a jury, the findings of the panel may so skew the thoughts of the jury that the buyer still loses the protections afforded by an objective and unjaded group of peers. The problem with mandatory arbitration extends beyond the procedural difficulties and involves the remedies offered by the lemon law. The consumer's faith certainly extends beyond the individual car to the automobile company and dealer. When the lemon law is utilized, the purchaser has undoubtedly been frustrated by his association with the dealer and manufacturer for a substantial period of time. In spite of this, the lemon law compels the relationship to continue through arbitration.

If the findings of an automobile arbitration panel support the contentions of the consumer, rescission may be ordered.[102] Even so, the lemon law provides that the manufacturer may determine whether to replace the automobile with a comparable new automo-

---

101 REPORT OF THE CHIEF JUSTICE'S COMMITTEE ON THE RULES GOVERNING MEDICAL MALPRACTICE ACTIONS, January, 1983.

102 N.J. STAT. ANN. § 56:12-25 (West 1984) ("Dispute settlement procedure; priority of remedies").

bile or to refund the full purchase price.[103] Thus, even the "successful" consumer may be forced to accept an automobile made by a manufacturer in whom the purchaser has lost all confidence. This "shaken faith" effect was noted by the court in *Zabriskie*:

> For a majority of people the purchase of a new car is a major investment rationalized by the piece of mind that flows from its dependability and safety. Once their faith is shaken the vehicle not only loses its real value in their eyes but becomes an instrument whose integrity is substantially impaired and whose operation is fraught with apprehension.[104]

The mandatory arbitration system for new automobile purchase disputes is largely unworkable because of its disadvantages to the consumer. An essential ingredient of successful arbitration is the consent of the affected parties. Commercial arbitration flourishes because the parties wish to avoid the "blood letting" of the courthouse and hope to continue mutually advantageous business relations. These elements of consent do not exist in the case of a frustrated lemon purchaser. To be sure, by the time a lemon buyer gets to an arbitration panel, hostility may be unavoidable and any future business relations between the parties may have become practically impossible.

Conclusion

The stated objective of the New Jersey lemon law is "to protect buyers of new automobiles when repeated attempts to have them repaired pursuant to a manufacturer's warranty are unsuccessful."[105] The law will hopefully encourage manufacturers to improve the quality of their products. Regrettably, the lemon law seems to fail on both counts.

As discussed, the law sets forth a number of procedural hurdles that are disadvantageous to the consumer. Under existing case law and the rule of perfect tender, an aggrieved buyer could seek a remedy immediately upon discovering a defect in the automobile. The purchaser might also have been entitled to consequential damages, incidental damages and attorney's fees. These

---

103 N.J. STAT. ANN. § 56:12-21 (West 1984) ("Inability to conform new automobile to warranty; manufacturer's options").

104 99 N.J. Super. at 458; 240 A.2d at 205.

105 S.1738 and S.1759, 200th Leg., 2d Sess. (1982); *see supra* note 7 and accompanying text.

rights have been exchanged for a so-called presumption of defectiveness if certain prerequisites are met. By limiting the rule of perfect tender and requiring the consumer to acquiesce to attempts at repair, the Legislature seems to be saying that the consumer has no legitimate right to have a new car conform to his expectations. Indeed, auto manufacturers, like the defendant in *Ventura* are able to say to the lemon buyer with no apparent shame: "you'll have to live with this one."[106] Even if the consumer manages to rid himself of a lemon the remedy of rescission or replacement will be at the discretion of the manufacturer.

The manufacturer's worst scenario is having to supply a new car to the buyer. The buyer, however, is required to pay the manufacturer a reasonable allowance for the use of the lemon, notwithstanding the fact that this period may have been fraught with uncertainty and dissatisfaction. Furthermore, the buyer must absorb all consequential or incidental costs such as car rental fees and cab fares.

New Jersey automobile purchasers have clearly fared better without the lemon law. In short, one regrets to say that with the best of intentions by its sponsors the lemon law is simply a bad idea whose time has come.

---

106 *See* 180 N.J. Super. at 52; 433 A.2d at 804; *and see* text of note 21.