A Primer on the Lemon Law and Magnuson-Moss

Motor Misery and Lemon(aid)

By Gary M. Victor and Ian B. Lyngklip

Other than buying a home, the purchase or lease of a vehicle represents the second most important financial investment for most families. For that average consumer, a car that doesn't work—a "lemon"—imposes significant financial and emotional burdens, jeopardizing the consumer's ability to get to and from work. Michigan law provides a number of theories that attorneys may use to assist those consumers with their defective vehicles.[1] Of these, the two most frequently used remedies arise under the Michigan Lemon Law[2] and the federal Magnuson-Moss Warranty Act.[3] Each of these statutes presents unique advantages and disadvantages which remain unfamiliar to all but a few consumer advocates. This article examines these statutory schemes and assists those attorneys unfamiliar with their provisions in pursuing the appropriate remedies available under each.

Similarities of the two statutes

Attorney fees

Both the Lemon Law and Magnuson-Moss provide for an award of attorney fees to a prevailing plaintiff.[4] However, these statutes are permissive rather than mandatory,[5] because they specify that the award of fees is to be made unless the court determines that such an award "would be inappropriate."[6] Even so, some courts have declined to award any attorney fees.[7] That said, in the vast majority of cases, attorney fees will be awarded.[8]

Recently, the Court of Appeals in *Kennedy v Robert Lee Auto Sales, Inc*[9] held that in cases such as these, attorney fees should be calculated in a manner consistent with the Michigan Supreme Court's decision in *Smith v Khouri*,[10] using a "lodestar"—reasonable hours times a reasonable hourly rate—as the beginning point in fee calculations.[11]

Binding arbitration

Both the Lemon Law and Magnuson-Moss prohibit binding arbitration.[12] Notwithstanding these statutory provisions, the Michigan Supreme Court in *Abela v General Motors Corp*[13] held that the Federal Arbitration Act[14] preempts those prohibitions and that both Lemon Law and Magnuson-Moss claims are subject to binding arbitration. Since virtually all new car warranties currently include binding arbitration provisions, Lemon Law and Magnuson-Moss cases will generally start, if not end, in arbitration. However, a defendant may waive arbitration through actions inconsistent with a reliance on arbitration, such as continuing to litigate in court.[15] Also, Magnuson-Moss requires that any arbitration provision be contained in the written warranty rather than incorporated in a separate document,[16] and the Lemon Law incorporates this requirement by reference.[17]

Differences between the two statutes

New versus used vehicles

The Lemon Law applies primarily to new purchased or leased vehicles, but can apply to a used vehicle that is still "covered by a manufacturer's express warranty at the time of the purchase or lease."[18] Magnuson-Moss, on the other hand, applies to any "consumer product,"[19] including both new and used vehicles as long as the vehicle is the subject of a written warranty.

Defect or problems covered

The Lemon Law applies only to a single defect or condition.[20] Magnuson-Moss can apply to any problem that is the subject of a written or implied warranty.

Privity or who can be sued

The concept of contractual privity—whether the parties suing have a contractual relationship—often has a bearing on who can sue who for a breach of warranty. Michigan law requires contractual privity to sue for a breach of an express warranty but not on implied warranties.[21] Both the Lemon Law and Magnuson-Moss have adopted a different approach. Under the Lemon Law, the consumer can only sue the manufacturer.[22] Even a subsequent purchaser or lessee who buys or leases while the vehicle is still covered by a manufacturer's express warranty can sue.[23]

Under Magnuson-Moss, consumers may be able to sue the manufacturer without regard to privity. This applies, for example, to "written warranties" as defined by the act.[24] Anyone who offers a written warranty is subject to suit for its violation. Magnuson-Moss's definition of "written warranty" is not coextensive with the definition of an "express warranty" under the Michigan Uniform Commercial Code (MUCC).[25] Rather, Magnuson-Moss's written warranty applies to written promises that the vehicle is defect free or that defects will be repaired or replaced.[26] Thus, even though Michigan law may require contractual privity to sue for a breach of an express warranty, a consumer may still

fast facts

The Michigan Lemon Law and the federal Magnuson-Moss Warranty Act provide *overlapping* remedies to consumers who purchase defective vehicles, which may include replacement vehicles, refunds, reimbursement of repair costs, incidental expenses, and fee shifting.

In most instances, the Magnuson-Moss Warranty Act provides broader coverage and remedies for defective vehicles than the Lemon Law, which requires specific thresholds and notices to obtain relief. However, consumers who have met the threshold for relief under the Lemon Law will find that remedy more meaningful and likely to provide complete relief.

sue a manufacturer under Magnuson-Moss for the violation of its written warranty.[27]

As mentioned previously, Michigan does not have a privity requirement (as least as yet) to sue for implied warranties; therefore, a lack of privity will not bar a suit under Magnuson-Moss for a breach of implied warranty.[28] Furthermore, Magnuson-Moss voids any disclaimers of "implied warranties" contained in written warranties as well as those in service contracts entered into within 90 days of the sale.[29] For example, a dealer that sold a used car "as is"[30] with a service contract was subject to suit under Magnuson-Moss for a breach of implied warranty.[31] Unlike the Lemon Law, under Magnuson-Moss, the consumer has many options concerning who to sue. The consumer can sue any supplier, warrantor, or service contractor who fails to comply with the act.[32]

Notice

The Lemon Law has a fairly complicated series of notice requirements. To set the act in motion, the consumer must first notify the manufacturer or dealer of the defect or condition either while the manufacturer's express warranty is in effect or not later than one year from the date of delivery of the new vehicle to the original consumer, whichever is earlier.[33] To be able to seek a remedy, the consumer must provide the manufacturer with another notice—this one in writing, return receipt requested—either after the third repair attempt or after 25 days out of service, and give the manufacturer an additional five days to repair the defect or condition.[34]

Notice under Magnuson-Moss is much easier. Being tied to state warranty law, the only notice requirement under the MUCC[35] is that the buyer must provide notice "within a reasonable time after he discovers or should have discovered any breach."[36] For example, Michigan cases uphold notice by telephone[37] or by filing a complaint.[38]

Claim elements

Under the Lemon Law, four elements of proof are required:

(1) The plaintiff has complied with the act's notice requirements.[39]

(2) There is a single defect or condition[40] that impairs the use or value of the vehicle or prevents the vehicle from conforming to the manufacturer's express warranty.[41]

(3) The defect or condition has continued to exist.

(4) The defect or condition has not been repaired after either the manufacturer has made four attempts to repair it[42] or the vehicle was out of service for repairs for 30 or more days.[43]

Under Magnuson-Moss, the proof required depends on the theory used. Suing for a violation of a "written warranty" or "service contract"[44] requires proof of a breach of the written warranty or service contract. For example, breach of a written warranty to repair or replace will require proof that the repair or replacement was not done or was not successful. Breaches of implied warranties are tied into Michigan warranty law[45] except as modified by Magnuson-Moss as to duration—the term of any written warranty[46] and a limitation on disclaimers—which are void in the case of a written warranty or service contract.[47] Breach of the implied warranty of merchantability in Michigan[48] requires a showing that the vehicle was not "fit for the ordinary purposes for which such goods are used."[49] Usually, there would be no claim against the manufacturer for a breach of the implied warranty of fitness for a particular purpose[50] as that warranty requires that the seller knows the buyer's specific purpose and selects goods for the buyer, but a suit for a breach of that warranty might be available against the dealer.

Remedies and setoffs

The Lemon Law provides that when the car is indeed a "lemon,"[51] the manufacturer has 30 days within which to provide a comparable replacement vehicle or refund the purchase or lease price.[52] If the consumer elects a refund, there is a specific mileage setoff formula.[53] The setoff equals the price of the new vehicle (say $30,000) multiplied by a fraction equal to the miles before first report of the defect (say 1,000) plus miles over 25,000 (say 10,000) divided by 100,000. The resulting calculation would be $30,000 × 11,000 ÷ 100,000 or $30,000 × .11 for a setoff of $3,300.

On the other hand, Magnuson-Moss provides for a refund to the consumer in the case of a "full" warranty;[54] but that section is functionally a nullity with regard to vehicles, as they are universally sold with limited warranties—most likely as a result of the passage of Magnuson-Moss. However, the consumer may be able to obtain a refund when the remedy in a manufacturer's limited warranty fails "of its essential purpose."[55] Generally, the principal remedy for a breach of implied warranty under Magnuson-Moss is a suit for "damages and other legal and equitable relief."[56] Those damages would usually be measured under the MUCC's remedy for a breach of warranty under § 440.2714(2), which would be the difference between the value of the vehicle at the time and place of acceptance and the value it would have had if it had been as warranted.

The real dilemma for a consumer with a defective vehicle is that damages under the MUCC assumes the consumer will retain possession of the vehicle when he or she really wants to get rid of it and get his or her money back. This remedy would not generally be available under Magnuson-Moss for a breach of implied warranty absent special circumstances. The Michigan Supreme Court in an order in *Davis v Forest River, Inc*,[57] a very convoluted case,[58] allowed for a refund for a breach of implied warranty when "circumstances have irreparably, and reasonably, damaged the plaintiff's confidence in the integrity of this vehicle…"[59] There was no mention of a setoff. In *Davis*, the vehicle was out of service for 219 days in the first year, indicating that a refund under Magnuson-Moss will be rare indeed.

Conclusion

The Lemon Law and Magnuson-Moss became the preferred theories to seek redress for clients with defective vehicles, primarily because they provide for awards of attorney fees. Arguably, that benefit was somewhat moderated by the Michigan Supreme Court's holding in *Abela v General Motors Corp*[60] that both causes of action are subject to binding arbitration. Of the two approaches, Magnuson-Moss provides significant advantages on the issues of the defect(s) covered, privity—or who can be sued—the ease of notice, the proof required, and potential setoffs. Despite the many hoops that the legislature has created for counsel to jump through to obtain a remedy under the Lemon Law, it has the advantage of enabling the client to obtain either a comparable vehicle or a refund.[61] Under Magnuson-Moss, on the other hand, the remedy will usually be limited to damages. When confronted with a client who seeks help regarding a defective vehicle, all the factors discussed here should be examined to determine a suitable course of action. The best piece of advice, however, is to consult attorneys with extensive experience in dealing with these complicated cases. ■

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ENDNOTES

1. See Liblang, *A Practice Guide to New Car Warranty Cases*, 78 Mich B J 288 (1999).
2. MCL 257.1401 *et seq.*
3. 15 USC 2301 *et seq.*
4. MCL 257.1407(2) under the Lemon Law and 15 USC 2310(d)(2) under Magnuson-Moss.
5. *Id.* The statutes use "may" rather than "shall."
6. *Id.*

7. See, e.g., *Hibbs v Jeep Corp*, 665 SW2d 792 (Mo App, 1984).
8. See, e.g., *Lavene v Winnebago Indus*, 266 Mich App 470; 702 NW2d 652 (2005); *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204; 457 NW2d 42 (1990).
9. *Kennedy v Robert Lee Auto Sales, Inc*, 313 Mich App 277; 882 NW2d 563 (2015); see Victor, *The Court of Appeals holds that the* Smith v Khouri *"Lodestar" Should be Used in the Calculation of Attorney Fees in Michigan Consumer Protection Act and Magnuson-Moss Cases*, 20 Consumer Law Newsletter 9–13 (February 2016).
10. *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008); see Victor, Smith v Khouri, *The Supreme Court Adopts a Modified Lodestar Likely to Produce Lower Fee Awards*, 13 Consumer Law Newsletter 5–9 (August 2009).
11. *Kennedy*, 313 Mich App at 300–301.
12. MCL 257.1405(c) under the Lemon Law and under Magnuson-Moss, 15 USC 2310(a) and 16 CRF 703(5)(j) the regulation enacted pursuant to the act.
13. *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004).
14. 9 USC 1 *et seq.*
15. See, e.g., *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346; 581 NW2d 781 (1998); *Northwest Mich Constr Inc v Stroud*, 185 Mich App 649; 462 NW2d 804 (1990).
16. 15 USC 2302; 16 CRF 701(3)(a); see also *Harnden v Ford Motor Co*, 408 F Supp 2d 300 (ED Mich, 2004).
17. MCL 257.1405(a).
18. MCL 257.1401(a)(*iv*)(g).
19. 15 USC 2301(1).
20. See *Hines v Volkswagon, Inc*, 265 Mich App 432, 441; 695 NW2d 84 (2005).
21. See *Montgomery v Kraft Foods Global Inc*, 822 F3d 304, 309 (CA 6, 2016); see also *Farley v Country Coach, Inc*, 403 Fed Appx 973, 977 (CA 6, 2010).
22. MCL 257.1403(1).
23. MCL 257.1401(a)(*iv*)(g).
24. 15 USC 2301(6)(B).
25. MCL 440.2313.
26. 15 USC 2301(6)(A) and (B).
27. See *Computer Network, Inc v AM General Corp*, 265 Mich App 309, 320–321; 696 NW2d 49 (2005); see also *Schechner v Whirlpool Corp*, 237 F Supp 3d 601 (ED Mich, 2017).
28. It should be noted that under Magnuson-Moss, implied warranty cases where there is no privity would generally be brought under the implied warranty of merchantability—MCL 440.2314—as opposed to the implied warranty of fitness for a particular purpose—MCL 440.2315—since the latter requires communication between the buyer and seller.
29. 15 USC 2308(a); see also *Computer Network*, 265 Mich App at 316 (2005).
30. MCL 440.2316(3)(a).
31. *Ismeal v Goodman Toyota*, 106 NC App 421; 417 SE2d 290 (1992).
32. 15 USC 2310(d)(1).
33. MCL 257.1402.
34. MCL 257.1403(5)(a) and (5)(b).
35. MCL 440.1101 *et seq.*
36. MCL 440.2607(3).
37. *Colonial Dodge, Inc v Miller*, 116 Mich App 78, 82; 322 NW2d 549 (1982) (interpreting reasonable notice for the purposes of revocation of acceptance).
38. *King*, 184 Mich App 204.
39. MCL 257.1402 and MCL 257.1403(5).
40. See *Hines*, 265 Mich App at 441.
41. MCL 257.1402.
42. MCL 257.1403(5)(a).
43. MCL 257.1403(5)(b).
44. 15 USC 2301(6) and (8).
45. 15 USC 2301(7).
46. 15 USC 2308(b).
47. 15 USC 2308(a).
48. MCL 440.2134.
49. MCL 440.2314(2)(c).
50. MCL 440.2315.
51. See *Claim elements* section of this article.
52. MCL 257.1403(1)(a) and (b).
53. MCL 257.1403(2).
54. 15 USC 2304(4).
55. MCL 440.2719(2); see *Ventura v Ford Motor Corp*, 180 NJ Super 45; 433 A2d 801 (1981).
56. 15 USC 2310(d)(1).
57. *Davis v Forest River, Inc*, 485 Mich 941; 774 NW2d 327 (2009).
58. See Victor, Davis v Forest River—*The Supreme Court Provides a Small Consumer With Little Precedential Value*, 14 Consumer Law Newsletter 8 (2010).
59. *Davis*, 485 Mich 941.
60. *Abela*, 469 Mich 603.
61. MCL 257.1403.