PEOPLE'S LAW SCHOOL

"LEMON LAW" AND OTHER CONSUMER STATUTES RELATING TO CAR BUYER'S RIGHTS AND REMEDIES

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I. INTRODUCTION

A. Fortunately, both our state and federal legislators have recognized that consumers need protection from the "buyer beware" era of yesteryear. Today, consumers have important rights relating to almost every aspect of vehicle transactions, from purchasing, leasing and financing of vehicles, to repairs and remedies for vehicles that cannot or will not be repaired.

B. Most consumer statutes provide for fee shifting (i.e., defendants pay your fees and costs) and some statutes include statutory damage provisions (e.g., minimum damages, doubling, trebling or even punitive damages). This means that even when the claim is relatively small, consumers can afford to have legal representation.

1. The purpose of these fee-shifting statutes is two-fold: (1) protecting individual consumers by providing them with a practical means to enforce their rights; and (2) protecting the public by discouraging businesses from engaging in unfair and deceptive practices in consumer transactions.
   a. See, e.g., *Jordan v Transnational Motors*, 212 Mich App 94; 537 NW2d 471 (1995) (failure of district court to award market rate fees in Magnuson-Moss case abuse of discretion); *LaVene v Winnebago*, 266 Mich App 470 (2005).[1]

C. This presentation will take you through the process – you will learn about your rights relating to acquiring vehicles, repairing vehicles and getting relief from "lemon" vehicles.

II. BEFORE VISITING THE DEALERSHIP

A. Many potential problems can be avoided by doing some "homework" before visiting the dealership. It is harder to take advantage of a well-informed consumer.

B. Determine the price ranges for the vehicle(s) that you are interested in. Also check out fair value for any vehicle you might be trading in.

1. New cars: www.edmunds.com
2. Used cars: www.nadaguides.com, www.kbb.com

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[1] You can read many cases on line at http://www.michbar.org/opinions/-content.cfm.

C. Research potential problems with the vehicle(s) you are considering:
   1. Center for Auto Safety: www.autosafety.com
   2. National Highway Traffic Safety Administration (NHTSA): www.nhtsa.dot.gov/cars/problems/ (recalls, technical service bulletins, consumer complaints).
   3. Safety Forum: www.safetyforum.com
   4. "Lemon Check": www.carfax.com (Carfax)

D. Research interest rates and payment schedules - determine your budget and price range ahead of time (check with your own financial institution; check www.edmunds.com.)

E. Check information on dealer rebates and incentives: www.autopedia.com

F. Get your own copy of your credit report:

   1. www.freecreditreport.com
   2. www.experian.com
   3. www.equifax.com
   4. www.transunion.com

III. YOUR RIGHTS DURING THE SALES OR LEASE TRANSACTION

A. Window sticker: all new and used vehicles for sale on the dealer's lot must have a window sticker.

   1. New vehicles will have the manufacturer's sticker, showing the manufacturer's suggested retail price (MSRP), vehicle features and equipment, and other information, such as the EPA estimated gas mileage and crash test information. 15 USC 1232.
      a. For additional crash test data, see http://www.safecar.gov.

   2. Used vehicles will have a "Buyers Guide," which must tell you whether the vehicle is being sold with or without a warranty and, if with a warranty, whether the warranty is "full" or "limited," the duration and the what is covered. FTC Used Car Rule, 16 CFR 455.

B. **Never** be a "payment buyer" - negotiate on the *total price of the car*, **not** on what your monthly payment will be. This will help you to avoid a deceptive practice known as "payment packing."

1. "Payment packing" refers to the practice of adding to the base price of the vehicle with items the consumer may or may not want, such as credit life insurance, extended warranties, window etching, etc.

C. Do **not** let the dealer run a credit report on you until you are certain you are ready to buy – every inquiry has the potential to *lower* your credit score. Under the Fair Credit Reporting Act, the dealer must have a "permissible purpose" for accessing your report. Unless and until you give permission or actually apply for a loan or lease, the dealer does **not** have a permissible purpose for obtaining your report. 15 USC 1681a, *et seq*.

1. Another possible problem - identity theft. See, e.g., *Adams v Berger Chevrolet, Inc*, 2001 WL 533811 (WD Mich 2001), where a dealer employee collected credit history data and used the information to get loans fraudulently approved in the names of people with good credit for people with bad credit.

D. *Ask* about "**yield spread premium**" - the difference between the interest that the bank is charging the dealer and the interest that the dealer is charging *you*. (This can add several percentage points to your interest rate if you're not careful.)

1. It is not illegal for dealers to inflate the interest rate without telling you – it is only illegal if you ask and the dealer lies or if the dealer represents that you are getting the "best possible rate" and you are really being charged a yield spread premium without disclosure.

E. Truth in Lending Act ("TILA") – 15 USC 1601, *et seq*

1. The TILA requires that the dealer provide you with accurate disclosures of the cost of credit *before* you sign. Although dealers often try to discourage you, you have the right to take a copy of the disclosures with you and comparison shop before signing on the dotted line.

2. Penalties for violation include actual damages, statutory damages of twice the finance charge imposed on the transaction, with a minimum of $100 and a maximum of $1,000, plus recovery of costs and attorney fees. 15 USC 1640(a).

3. Claim must be brought within 1 year of signing contract.

F. Consumer Leasing Act ("CLA") – 15 USC 1661, *et seq*.

1. The CLA requires accurate disclosures identifying the leased vehicle, the amount of any payment required at delivery, the amount of payments, rent charges, liability if any at the end of the lease, warranties or guarantees, the party or parties responsible for maintenance and repairs, the amount of insurance required, penalties for early termination and how the penalties are calculated. 16 USC 1667a.

2. Penalties for violation same as for TILA. 16 USC 1667d.

3. Claim must be brought within 1 year of termination of lease.

G. Motor Vehicle Sales Finance Act - MCL 492.101, *et seq*.

1. Right to full disclosure of credit terms.

2. Prohibits acceleration clauses based on insecurity, clauses allowing repossession by breach of the peace, clauses waiving the buyer's legal rights with respect to collection practices,

3. Where dealer arranges financing, allows consumer to bring same claims and defenses against finance company as consumer has against seller. MCLA 492.114a(b).

4. Allows consumer to withhold payment unless finance company is able to show, at an evidentiary hearing, that consumer would not be deprived of adequate transportation if required to continue payments during pendency of dispute. MCLA 492.114a(e).

5. Cannot require purchase of credit life or disability insurance as a condition of granting credit.

H. Federal "Preservation of Claims" Rule, 16 CFR 433.

1. Allows consumer to assert against the finance company the same claims and defenses he or she has against seller.

I. Motor Vehicle Code

1. Dealer must provide a copy of every document you sign at the time you sign it. MCL 257.251a.

2. Dealer must have valid certificate of title in its immediate possession, MCL 247.235(1), and must show you all titles and re-assignments of titles in its possession, MCL 257.233a(3).

    a. Accurate odometer information;
    b. Vehicle history (e.g., help avoid unknowingly purchasing a salvage vehicle, prior rental vehicle, etc.);
    c. Ensure that the dealer actually has the right to sell or lease the vehicle.

3. Dealer only allowed to provide you with **1** temporary tag. MCL 257.226a(1).

4. Dealer may not allow the use of a dealer plate for more than 72 hours. MCL 257.244(8).

5. Dealer must submit your application for title within 15 days of the sale or lease. MCL 257.217(4).

6. Dealer may not represent a vehicle as being "new," a "demo," "executive," "program" vehicle, etc., unless that's really what it is. MCL 257.248a.

7. Dealer must disclose in writing to a purchaser or lessee of a new motor vehicle, demonstrator, executive or program vehicle any damage or repairs equal to 5% of the MSRP or $750 (whichever is less), 257.233b(2).
    a. Excludes damage to glass, tires, wheels, bumpers, audio equipment, in-dash components, or components contained in the living quarters of a motor home that are not required for the operation of the motor home as a motor vehicle were damaged at any time if the damaged item has been replaced with original manufacturer's parts and material.

8. **Remedies:** Sale in violation of Motor Vehicle Code is "void and ...monies paid under the terms of such a void contract can be recovered by the purchaser." *Waldron v Drury's Van Lines, Inc*, 1 Mich App 601, 608, 137 NW2d 743, 746 (1965).

    a. The fact that the buyer has had use of the vehicle does not affect his ability to void the sale. *Roe v Flamegas Industrial*

Corp, 16 Mich App 210, 167 NW2d 835 (1969) (holding that seller not entitled to offset for buyer's use

J. **Beware of the "Arbitration Clause"** - many dealers and finance companies are now trying to force consumers to waive their right to go to court and submit to binding arbitration. *Refuse* to sign any contract or paper that contains an arbitration clause, unless you cross out the clause and initial it. If the dealer refuses to accept the deal without an arbitration clause, *go elsewhere*.

K. **There is NO 3-day "cooling off" period** - once you sign, you're probably stuck.

L. Avoid "third-party" extended warranties and service contracts – accept *only* the manufacturer's warranty or service contract for the type of vehicle you are buying (e.g., Ford ESP, GM Extra Care, etc.)

1. Common scam is for dealer to pocket the extra money for the extended warranty, rather than actually buy your warranty.

M. **The "Yo-Yo" Sale** – this is a common but, illegal, scam where the dealer has the consumer sign a finance contract and lets him leave with the vehicle, even though his credit hasn't been approved yet. Within a week or so, the consumer receives a call telling him that there was a "mistake" in the paperwork and that the consumer needs to come back to sign a new contract – one that usually means a higher payment, longer loan term or larger down payment.

1. The consumer does NOT have to return the vehicle or sign a new contract – the consumer has the right to enforce the contract as signed and make payments directly to the dealer.

2. **Equal Credit Opportunity Act ("ECOA") - 15 USC §1691**, *et al*: if the financing is not approved or, if it is approved but on less advantageous terms (e.g., need co-signer, higher interest rate), the lender must send an "adverse action notice" within 30 days of the application. Violation permits recovery of actual damages and punitive damages up to $10,000, plus costs and attorney fees. *Caveat*: If the consumer accepts the alternative offer, there is no claim under the ECOA.

IV. AVOIDING "LEMON" USED CARS

A. Nearly new vehicles with low mileage are often “rebuilt wrecks,” “flood cars,” “prior rentals (e.g., Avis, Hertz), or “recycled lemons.”
   1. *Ask* the dealer if the vehicle has ever been wrecked;
   2. *Ask* the dealer to put the explanation (e.g., demo, one-owner, etc.) and the “no prior accident” representation in writing.

B. Used cars are usually best purchased at a new vehicle dealer of the same brand name (e.g., Fords at a Ford dealer, Chevys at a Chevy dealer, etc.).

C. Common sense and visual inspection:

   1. Does the mileage make sense for the age of the vehicle (e.g., average mileage in U.S. is 12,000-15,000 miles per year).

   2. Does the appearance of the vehicle make sense for the mileage (e.g., if you have brand new tires on a 30,000 mile vehicle, or worn brake pedal, worn gas pedal, excessive carpet wear on driver side, excessive fabric wear on driver side, steering wheel surface wear, etc., this might be a clue that the mileage is not as represented).

   3. Any unusual paint characteristics (e.g., chipping, peeling, overspray, tape marks, mismatched pain, “orange peel”, etc.).

   4. Misaligned seams or body parts (e.g., hood crooked, trunk crooked, doors hard to open or close).

   5. Look in the glove box and anywhere else the prior owner might have stored paperwork (e.g., repair orders, name, address and phone number, etc.).

   6. Test drive: watch out for excessive windnoise, rattles, unusual drifting or pulling.

   7. Carfax title history - www.carfax.com - although not foolproof, can sometimes alert you to problems.

   8. Examine the prior title and watch out for:

      a. Out of state titles
      b. Salvage or rebuilt titles (usually different color)
      c. Quick turnover (e.g., “Mom & Pop” dealer transfer to current dealer)
      d. Insurance companies

e. Body shops
f. Rental companies
g. Only the current dealer appearing on title (this usually means dealer "washed" the title).

V. PROTECTING YOURSELF AFTER THE SALE

A. Keep all maintenance and service receipts – *never* give up the originals.

B. Always demand a written estimate and write-up for every service visit – even if the vehicle is under warranty.

C. Help yourself to dealer personnel business cards and keep them with the paperwork.

D. Follow manufacturer's recommended maintenance schedule.

E. Complain immediately if you discover a problem.

F. Do not wait to contact a lawyer for advice – most lawyers will at least talk with you at no charge.

VI. BREACH OF WARRANTY AND "LEMON LAW" CASES

A. Lemon Law - MCLA 257.1401, *et seq*.

1. Applies only to "new" passenger cars and trucks (i.e., not motor homes, motorcycles, snowmobiles, etc.).

    a. "New" means a vehicle that is delivered while still under the manufacturer's written warranty, so a used vehicle or "demo" may still be "new" for lemon law purposes.

    b. Covers both purchased and leased vehicles.

2. A "lemon" is a vehicle that has been out of service 4 times for the same defect or condition or a vehicle that has been out of service for repairs for 30 days or more during the first year after delivery.

    a. Problem must have been reported to the manufacturer or authorized dealer within 1 year after delivery.

b. "Four times" lemon – defect or condition must be a "substantial impairment" of use or value.
   (1) *Colonial Dodge, Inc v Miller*, 420 Mich 452, 362 NW2d 704 (1984) ("substantial impairment" subject test measured from point of view of actual buyer; lack of spare tire held to be "substantial impairment").

c. "Thirty days" lemon – can be for the same or different problems; all days or parts of days count. See, *Validity, Construction and Effect of State Motor Vehicle Warranty Legislation (Lemon Laws)*, 88 A.L.R.5th 301 (2001).

3. Must provide written notice, by certified mail, return receipt requested to the manufacturer requesting a "last chance" repair before you can sue under the lemon law.
   a. Manufacturer must notify consumer "within a reasonable time" after receiving notice of a "reasonably accessible" repair facility.
   b. Once delivered to the repair facility, the vehicle must be fully repaired within 5 business days.

4. Allows for repurchase (money back) or replacement vehicle acceptable to the consumer.
   a. If opt for repurchase, manufacturer must refund all payments made under the contract, less statutory offset for use.
      (1) Offset for use formula:
      $$\frac{\text{Miles At 1st Complaint}}{100{,}000} \times \text{Purchase Price}$$
      Add: accessories installed by dealer for the manufacturer, unreimbursed towing and unreimbursed rental costs.

   b. If opt for replacement, must be a comparable vehicle *of the current model year*, that is *acceptable to the consumer*.
      (a) No provision for offset for use;
      (b) If financed, entitled to have the new vehicle substituted as collateral under the original contract (i.e., same contract, same payments and same balance due *as of the time of the substitution*).

   c. Manufacturer, if complies with the federal Magnuson-Moss Warranty rues, may require consumer to participate in non-

binding arbitration (alternative dispute resolution) before consumer allowed to bring suit.

B. Uniform Commercial Code - Art. 2 (Sales) and Art. 2A (Leases).

1. Applies to sales or leases of "goods" – so applies to all products, including cars, trucks, motor homes, trailers, snowmobiles, ATV's, boats, semi-trucks, etc.

2. Covers express and implied warranties.
   a. "Express Warranty" – any written or oral representation, fact or promise that relates to the goods and becomes a basis of the bargain (e.g., 3-year/36,000 mile written new vehicle warranty; or oral representation, "this vehicle was thoroughly inspected and is in excellent mechanical condition"). MCL 440.2313.

   b. "Implied Warranty of Merchantability" – that the product is fit for its ordinary or foreseeable purposes and would "pass without objection in the trade for the product description" (e.g., a new car that blows an engine in less than 3,000 miles is not "reasonably fit" and would not "pass without objection"). MCL 440.2314.

   c. "Implied Warranty of Fitness for Particular Purpose" (MCL 440.2315) – requires:
      (1) that at the time of purchase or lease, the sales person has reason to know of the particular purpose (e.g., buying a new SUV to pull the family trailer); and

      (2) buyer relies on skill and judgment of the sales person to furnish suitable goods (e.g., buyer asks what size engine needed in the SUV to safely pull the trailer and relies on the salesperson's recommendation).

   d. Warranty of Title – MCL 440.2312
      (1) Cannot be disclaimed with typical "as is" language.

3. No *written* notice requirement. See, e.g., *King v Taylor Chrysler Plymouth,* 184 Mich App 204, 211, 457 NW2d 42 (1990)(no particular words or form is required to give notice; filing of the complaint is sufficient notice under the UCC).

4. No “informal dispute settlement” requirement.

5. “Substantial impairment” threshold for revocation is subjective and determined from point of view of actual customer, rather than “reasonable person.” See, e.g., *Colonial Dodge, Inc v Miller*, 420 Mich 452, 362 NW2d 704 (1984)(delivery of new vehicle without spare tire sufficient for revocation).

6. “Shaken faith” doctrine – revocation may be available for serious defects, such as engine failure, without further opportunity to cure. See, e.g., *Pifer v DaimlerChrysler,* 2003 WL 22850124 (Mich App 2003); *Head v Phillips Camper Sales & Rentals, Inc*, 234 Mich App 94, 593 NW2d 595 (1999) (no right to cure after notice of revocation given).

7. Allows consumer to mitigate by withholding further payments under contract. MCLA 440.2717 (UCC Art. 2), and MCLA 440.2958 (UCC Art. 2A).

C. Magnuson-Moss Warranty Act, 15 USC 2301, et seq.

1. Applies to all products over $25.00, new and used, as long as sold with written warranty or service contract (or warranty/service contract purchased within 90 days of sale).

2. No statutory notice requirement.

3. No “threshold” for reasonable opportunity for repair. See, e.g., *Marchionna v Ford Motor Co*, 1995 WL 476591 at*11 (ND Ill 1995) (“reasonable opportunity for repair” may be two, possibly three times).

4. May require resort to “informal dispute settlement procedure” prior to filing suit if IDSP meets MMWA regulations [15 USC 2310(a)(3)].

5. Prohibits disclaimers of implied warranties if product sold with warranty or service contract and preempts state law [15 USC 2308].

6. Allows revocation as remedy irrespective of privity of contract. See, e.g., *Hamdan v Land Rover North America, Inc*, 51 UCC Rep Serv 2d 1024, 2003 WL 21911244 (ND Ill 2003) (revocation permitted against manufacturer under MMWA).

7. Allows for recovery of costs and attorney fees at market rate. See, e.g., *Jordan v Transnational Motors*, 212 Mich App 94; 537 NW2d 471 (1995) (failure of district court to award market rate fees in Magnuson-Moss case abuse of discretion); *LaVene v Winnebago*, 266 Mich App 470, 702 NW2d 652 (2005)(MMWA preempts state law and allows for recovery of costs and fees not otherwise taxable under state law).

VII. MICHIGAN CONSUMER PROTECTION ACT

A. Applies to goods and services obtained primarily for personal, family or household use.

B. Prohibits "unfair or deceptive acts, methods or practices" in "trade or commerce."

C. No contract, privity or "transaction" required. *DirectTV, Inc v Cavanaugh*, 321 F Supp 2d 825 (ED Mich 2003) (MCPA does not require a "transaction" between the parties).

D. Allows recovery of actual damages or $250 statutory damages per violation.

E. Allows for recovery of costs and attorney fees.

F. Does not apply to conduct "specifically authorized" by law.
   1. Example: Michigan law specifically allows dealers to exceed repair estimates by 10% but, charging more than an estimate is arguably deceptive or unfair. Dealers can continue to exceed repair estimates by 10% without fear of being sued under MCPA because they are "specifically authorized" by law to do so.

G. Does not apply to certain regulated industries, such as gambling casinos and insurance companies.

1. Often does not apply to most regulated industries (e.g., insurance companies, banks).

VIII. MOTOR VEHICLE SERVICE AND REPAIR ACT - MCL 257.1331, *et seq*

A. A "motor vehicle repair facility" is a place of business engaged in performing maintenance, diagnosis, body work or repair service on a motor vehicle for compensation.

B. Prohibits repair facilities from engaging in unfair or deceptive practices.

C. Allow claims by "any" person injured as a result of faulty or negligent repair in violation of the act. See, e.g., Hengartner v Chet Swanson Auto Sales, 132 Mich App 751, 348 NW2d 15 (1994) (allowing claim by third-party who was injured as a result of facility's poor brake job without regard to privity).

D. Some key provisions:

1. Must provide written estimate and obtain customer's permission before exceeding the estimate by more than 10%.
2. Must provide written explanation of any repairs that cannot be properly completed.
3. Cannot replace parts with parts that lack merchantability or fitness.
4. Must allow you to inspect any parts that are replaced.
5. Mechanic must be properly certified for the repair to be performed.
6. May not misrepresent a material fact.
7. Must honor its warranties.
8. Prohibited from charging or threatening to charges storage fees when there is a dispute concerning the repairs.
9. Must keep records for 1 year after completion of the repairs or for at least one year after a dispute is resolved, whichever is later.

E. Allows for recovery of costs and attorney fees. See, e.g., MCL 257.1336.

F. If violation is wilful, consumer is entitled to double damages. .MCL 257.1336.

IX. State and Federal (49 USC 32701, et seq) Odometer Statutes

1. Both state and federal statutes require accurate disclosure of mileage in an odometer statement upon the sale or transfer of vehicle.
   a. Federal - 49 USC §32705(a)(1).
   b. Michigan – MCLA 257.233a(1)(a).

2. Both statutes provide for recovery of three times actual damages or $1,500, whichever is greater, plus costs and attorney fees.
   a. Federal - 49 USC §32710(a) and (b).
   b. State - MCLA 257.233a(15).

3. State statute broader – also requires disclosure of all reassigned titles in seller's possession. MCLA 257.233a(3);

4. Both state title disclosure requirement (MCLA 257.233a(3)), and federal law requiring that disclosure be made *on the title* can be used to support "Yazzie" claim – i.e., that intent to defraud can be inferred where proper disclosure would have provided information as to vehicle's true history. See, *Yazzie v Amigo Chevrolet*, 189 F Supp 2d 1245 (D NM 2001); *Owens v Samkle Automotive, Inc*, 425 F3d 1318 (11th Cir 2005).

X. HELPFUL CASES

A. You do not have to show the specific cause of the problem - you need only show that the vehicle is not working as it should be and that it is not your fault.
   a. *Garmo v General Motors Corporation*, 45 Mich App 703, 207 NW2d 146 (1973); *General Motors Corporation v Zirkel*, 613 NE2d 30, 31 (Ind 1993); *Sothoron v West*, 180 Md 539, 26 A2d 16 (1942); *Hacket v Perron*, 119 NH 419, 402 A2d 193 (1979). "[I]t hardly takes an expert to observe that the brakes will not adequately stop the automobile he is driving. It was not for the appellees to prove why the brakes were not working. It was sufficient

for them to establish to the satisfaction of the trier of fact that they in fact did not function properly." *Zirkel, supra*, 613 NE2d at 31.

b. *Snider v Thibodeau*, 42 Mich App 708, 202 NW2d 727 (1972) (once plaintiff proves product did not function properly, burden shifts to defendants to negate their responsibility for the failure).

B. The fact that the dealer does nothing during a repair visit is not an excuse.

1. A vehicle is "subject to repair" for purposes of the lemon law when it is taken to the dealer for diagnosis of a problem, even when the dealer is unable to diagnose or fix the problem and says "no problem found" or "unable to duplicate concern." See*, Chmill v Friendly Ford-Mercury*, 144 Wisc 2d 796, 424 NW2d 747, 751 (1988); *Calbert v Volkswagen*, 1991 WL 215669 (Del Sup Ct 1991); *Ibrahim v Ford Motor Co*., 214 Cal App 3d 878 (1989); *DaimlerChrysler v Williams*, 2000 Tex App LEXIS 4138 (June 22, 2000), all holding that where the vehicle is presented for repairs but the dealer does not perform repairs, the visit nevertheless counts for purposes of lemon law statutes. See, also, *Validity, Construction and Effect of State Motor Vehicle Warranty Legislation (Lemon Laws)*, 88 A.L.R.5th 301 (2001).

C. Continued use does not necessarily defeat a claim for revocation.

1. Buyer may continue to use vehicle in order to mitigate damages. *Henderson v Chrysler*, 191 Mich App 337, 477 NW2d 505 (1990).

2. But, see, *Computer Network, Inc v AM General Corp*, 265 Mich App 309 (2005) (continued use in commercial lease case defeated revocation claim where there were no extraordinary circumstances justifying lessee's continued use).

D. Attorney fees are *not* required to be proportional to the amount of damages.

1. Failing to award market rate attorney fees because the amount in controversy is small is an abuse of discretion because it defeats the purpose of the fee-shifting provisions of the Magnuson-Moss Warranty Act and the Michigan Consumer Protection Act. *Jordan v Transnational Motors, Inc,* 212 Mich App 94, 537 NW2d 471, 473 (1995); *Lavene v Volkwsagen of America, Inc*, 266 Mich App 470, 702 NW2d 652 (2005) ("These cost-or- fee-shifting provisions are essential to legal redress in public interest or consumer cases in which the monetary value of the case is often meager.").

E. Actual litigation costs *are* recoverable under Magnuson-Moss Warranty Act even where the costs would not be otherwise taxable under state statutes governing taxable costs.

1. MMWA preempts state law and allows recovery of litigation costs not otherwise recoverable under state law. *Lavene v Volkwsagen of America, Inc*, 266 Mich App 470, 702 NW2d 652 (2005).

APPENDIX

KEY CASES:

I. **UCC:**

A. **Colonial Dodge v Miller, 420 Mich 452, 262 NW2d 704 (1984)**: lack of spare tire can be "substantial impairment justifying revocation under UCC; "substantial impairment" is subject test to be measured from point of view of actual buyer.

B. **Kelynack v Yamaha Motor Co, 152 Mich App 105; 394 NW2d 17 (1986)**: substantial nature of defect (motorcycle engine failure within first three months of ownership) and/or delay in effecting repairs can be "substantial impairment justifying revocation; attorney fees recoverable as element of consequential damages.

C. **King v Taylor Chrysler Plymouth, 184 Mich App 204, 457 NW2d 42(1990)**: filing of complaint sufficient "notice" under MCLA 440.2608 (UCC revocation).

D. **Head v Phillips Camper Sales and Rental Inc, 234 Mich App 94, 593 NW2d 595, 37 UCC Rep Serv 2d 1033 (1999)**: revocation under UCC occurs extra-judicially; seller has no right to cure once buyer has revoked.

E. **Purofied Down Products Corp v Royal Down Products, Inc, 87 FRD 685, 29 UCC Rep Serv 1523 (WD Mich 1980); Detroit and Northern Savings & Loan Association v Woodworth, 54 Mich App 517, 221 NW2d 190, 221 NW2d 190 (1974)**: buyer who withholds payment to mitigate damages pursuant to MCLA 440.2717 is not in default and seller/credit has no right to repossession.

F. **Henderson v Chrysler Corporation, 191 Mich App 337, 477 NW2d 505 (1991)**: no UCC revocation against remote manufacturer, but revocation under other statutes allowed; buyer may either sell vehicle or continue to uses vehicle during pendency of case in order to mitigate damages without waiving right of revocation.

G. **Pifer v DaimlerChrysler, et al, 2003 WL 22850124 (Mich App 2003), unpub'd**: UCC revocation against remote manufacturer permitted where manufacturer indemnifies and defends dealer; approved "shaken faith" jury instruction, i.e., where defect is so serious as to reasonably shake the consumer's faith, consumer is entitled to revoke without providing opportunity to cure.

II. Lemon Law

A. **Ayer v Ford Motor Co, 200 Mich App 337, 503 NW2d 767 (1993):** summary disposition under Lemon Law; absent exceptions enumerated in statute, presumption of prima facie lemon "unrebuttable."

B. **Engel v Ford Motor Company, Wayne County (MI) Circuit Court Case No. 96-605353-CK (March 11, 1997, Hon. Amy Hathaway)**: compliance with technical notice requirements of lemon law not required where evidence that manufacturer had actual notice; Magnuson-Moss supercedes lemon law with respect to offset for use (i.e., there is no offset for use under Magnuson-Moss) (copy attached as Appendix B).

III. Consumer Protection Act

A. **Mikos v Chrysler Corporation, 158 Mich App 781; 404 NW2d 783 (1987)**: breach of implied warranty of merchantability is a "failure to provide promised benefit" within meaning of Michigan Consumer Protection Act, MCLA 445.903(y), entitling successful plaintiff to recovery of costs and attorney fees.

B. **Jordan v Transnational Motors, 212 Mich App 94, 537 NW2d 471 (1995)**: in awarding attorney fees under Magnuson-Moss and MCPA, court must consider remedial purpose of statutes; failure to award market rate attorney fees held to be abuse of discretion; appellate attorney fees also recoverable.

IV. Magnuson-Moss Warranty Act

A. **Lavene v Volkwsagen of America, Inc, 266 Mich App 470, 702 NW2d 652 (2005):** MMWA preempts state law and allows recovery of litigation costs not otherwise recoverable under RJA.

SAMPLE “LAST CHANCE” LETTER UNDER MICHIGAN LEMON LAW

<date>

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

<Name and Address of Manufacturer>

Re: Customers: <your name>
Vehicle : <year, make and model>
VIN No. : < >
Delivery Date: < >
Selling Dealer: < >

Dear Sir or Madam:

I am writing pursuant to MCLA 257.1401, *et seq*, to request a final repair attempt. [If applicable: The vehicle is currently in for service at <name and address of dealership>.]

Your records should reflect that the vehicle has been in the dealer on at least <# of times> occasions for repair attempts involving the <describe problems>. The vehicle has also been out of service for approximately <#> days for repairs involving the foregoing problems, as well as <describe every other problem the vehicle has been in for>.

Under MCLA 257.1403(3)(b), I am requesting that you notify me within five (5) business days of a reasonably accessible repair facility where I am to deliver the vehicle for repairs. I am then requesting that all of the above problems be fully repaired within five (5) business days of delivery of the vehicle to the repair facility.

Thank you for your time and consideration.

Very truly yours,
<your name>

cc: <dealer, finance co>