

Handling Better Business Bureau Vehicle Claims

A CALIFORNIA ATTORNEY MAY at some time represent a client in a Better Business Bureau (BBB) arbitration for a vehicle alleged to be defective. The requirements of California Civil Code Section 1793.22, commonly called the Lemon Law, are of primary importance in this representation. When representing a client in a Lemon Law arbitration, counsel should build the case around the requirements and educate the client as much as possible regarding the legal standards of a Lemon Law arbitration. When these standards are met, the client is prepared, and the typical defenses presented by the manufacturer's representative are adequately addressed, counsel may feel more confident of a successful resolution.

The Lemon Law, formally known as the Tanner Consumer Protection Act, applies to new vehicles registered in California. A new vehicle is one primarily used for personal or household transportation; a business vehicle with a gross vehicle weight of less than 10,000 pounds (as long as the buyer/lessee does not have more than five other vehicles registered in California); the chassis, cab, and propulsion part of a motor home; dealer owned vehicles; demonstration vehicles; other vehicles sold with a new car warranty; and new purchased or leased vehicles.¹ The Lemon Law does not apply to off-road vehicles, the part of a motor home primarily used for human habitation, or vehicles that have been abused. Examples of abuse would be street or off-road racing, seriously overloading a vehicle, and avoiding necessary maintenance.

There are three critical components or elements that give rise to a rebuttable presumption a new vehicle is a lemon. These elements are time/mileage, the number of attempts to repair and the time the vehicle has been out of service, and materiality of the defect. If the consumer meets the statutory criteria of Section 1792.22, he or she is entitled to a presumption that the vehicle is defective. If the manufacturer cannot rebut the presumption, the consumer is entitled to a replacement vehicle or refund of the purchase price minus the reasonable use expense.²

Time/mileage. The statutory period of the presumption is 18 months or 18,000 miles, whichever occurs first. The time runs from the date of delivery, which is usually on the sales contract or parts order if the car was purchased with cash. If the last repair event comes toward the end of the statutory time period, the statute is satisfied if the vehicle enters the repair facility before the deadline of 18 months or 18,000 miles. The crucial date is the date the vehicle enters the repair facility.

Number of attempts to repair. There are two general categories of nonconformity.³ The first category of nonconformity is a condition that is likely to lead to death or serious bodily harm. The manufacturer or its agent, usually a dealership, has two or more opportunities to fix the vehicle. In conjunction with presenting the vehicle

for repair, if the manufacturer has conspicuously disclosed the provisions of the Lemon Law and provided a contact address, the consumer must notify the manufacturer of the need for the repair.

The second category of nonconformity is defined as service on the vehicle for the "same nonconformity" that requires four or more repairs. Like the first category of more serious or potentially fatal defects, if the manufacturer met its notice responsibility, the consumer has the responsibility to put the manufacturer on notice of the repair.

Finally, under either category, the vehicle must be out of service for a cumulative period of 30 days. This period is measured in cal-

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endar days and is not required to be consecutive.

Material defect. As Civil Code Section 1793.22(e)(1) states, the nonconformity must adversely affect the "use, value, or safety of the vehicle." The critical element of materiality is usually the most difficult to prove. Plastic body trim that is out of alignment, for example, is not material. A failed antilock braking system or failed engine clearly is.

Minor body defects, rattles, squeaks, and interior defects routinely do not qualify. However, in one case, a vehicle was presented to the dealer on numerous occasions for a squeak. At every presentation, the dealer carefully inspected, analyzed, and repaired the vehicle. One time the dealer replaced a right control arm. The next time it replaced the left control arm. On another occasion it found chafing brake lines. The vehicle was out of service for 37 days in one year. The defect was not considered material in the BBB arbitration, but when counsel brought suit, the manufacturer offered to repurchase the vehicle.⁴

The defect must be the primary reason for returning the vehicle. The squeak in the example, one should note, appeared to be only a symptom of a number of defects. Often, whether the BBB arbitrator sees the defect as material may depend upon the persuasive power of counsel. The gravity of some dangerous defects may not be obvious.

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For example, if the alleged defect is that the vehicle stalls at inopportune times, it may require explanation as to why this problem adversely affects the use, value, or safety of the vehicle. The car may stall on train tracks or on a busy freeway.

Once the consumer meets the statutory criteria, the vehicle is presumed defective and the manufacturer has the burden to rebut the presumption.

The Arbitration Process

The BBB is separate from the California Department of Consumer Affairs and is a private business entity that engages in treaties and agreements with dealers and manufacturers to provide arbitration. There is no cost for the consumer. If he or she prevails, the manufacturer is bound by the award. If the consumer loses, he or she has alternatives.

In conjunction with the process of notification required under Civil Code Section 1792.22, the claimant can also request a separate BBB hearing. The claimant can handle the case by himself or herself or engage counsel. The claim can be processed in several ways. The consumer or counsel can call the BBB Auto Line at (800) 955-5100. A claim can also be processed online at <http://www.dr.bbb.org/autoline/caprocess.asp>. The BBB can also be contacted in writing at BBB Auto Line, 4200 Wilson Boulevard, Suite 800, Arlington, VA 22203-1838.

The arbitration process can involve both parties presenting their cases in person, but there are alternatives. The consumer can request to present his or her statement and evidence by phone or in writing. If the consumer appears in person, the manufacturer has the choice of appearing in person, by phone, or in writing. If the consumer chooses the phone, the manufacturer is restricted to the phone or writing. If the consumer chooses to present his or her case only in writing, the manufacturer is likewise limited to presenting its case in writing. When one of the parties does not appear in person, the BBB Arbitration Rules, which are available online, require the arbitrator to provide a speaker phone or conference call so all the parties can effectively participate in the hearing.

The consumer presents his or her case, rests, and then the manufacturer presents its case. The key to a successful resolution is how the consumer or his or her counsel presents the facts.

The Consumer's Presentation

The statutory presumption arises when the consumer or the consumer's counsel has shown the three criteria called for in Section 1793.22. They are that the new vehicle falls within the claim period; the consumer has put the manufacturer on notice and has presented

the vehicle to the manufacturer or its agent for the requisite number of times and it has been out of service for the required days; and the nonconformity adversely affects the use, value, or safety of the vehicle.

Assuming counsel has prepared the proper BBB paperwork, on the date of the arbitration, the consumer will have to show the BBB a valid driver's license, vehicle registration, and proof of insurance. It is probable the arbitrator and/or the manufacturer will want to take a test drive. For all parties, it is important to have proof of current license, vehicle ownership, and current insurance.

The first step—the statutory period—is adequately proven by presenting the arbitrator and manufacturer with copies of the sales contract to indicate the date of delivery. Photos of the odometer, repair orders, or making the vehicle available to the arbitrator can establish the mileage. This is usually the easiest element to prove.

The next element is proof of the duration and notice to the manufacturer. Copies of the repair order or orders, in chronological order, with a summary of the number of days the car was out of service will be required for the consumer to prove the time the vehicle was out of service. The consumer will also have to provide evidence that he or she put the manufacturer on notice. A copy of the letter should suffice.

The last element—showing that the nonconformity adversely affects the use, value, and safety—is often the most difficult. The consumer has purchased an expensive commodity. When the consumer discovers a defect, he or she does not want to be placated. He or she does not want to be told the manufacturer has a range in which the vehicle can be conforming.⁵ The consumer wants action. The consumer wants redress. These desires do not translate, however, into a legal requirement that a car be replaced.

In order to show the problem is a statutory nonconformity, counsel may have to do some research. Online research on the Highway Data Loss Institute (HDLI), the National Highway Traffic Safety Administration (NHTSA), and Google can yield information. A number of very valuable Web sites yield highly valuable information. For example, <http://www.theautochannel.com/news/recalls>, <http://www.internetautoguide.com/auto-recalls/index.html>, and <http://groups.msn.com/ToyotaOwnersUniteforResolution> are all sites worthy of bookmarks for research into how a given defect affects the use, value, or safety of a motor vehicle. The MSN group site requires the researcher to join. This takes time, but the information available is tremendous. One excerpt from the site, for example, concerns brake defects:

Please see attached file on Toyota

Camry brake problems. This file is 62 pages long from 1997-2004 Toyota Camrys. Many have resulted in accidents. My question is why are these vehicles still on the road? Why hasn't the NHTSA recalled these vehicles? If I were GM, Ford or Chrysler I would be asking the NHTSA if Toyota is exempt from recalls. Do you want your family riding or driving in these vehicles? Steering problems, brake system failures....If you or someone you know has had brake problems and Toyota denies any problems[,] have [that person] print out this file and present it to Toyota.

The author of this message provides the full report. The following is an example of the information contained therein:

Make: Toyota
Model: Camry
Year: 1998

Complaint Number: 745143

SINCE BUYING MY TOYOTA IN APRIL OF 1998, I HAVE NEEDED TO REPLACE THE BRAKES AND ROTORS 3 TIMES. I STILL CONTINUE TO HAVE SCREECHING AND GRINDING NOISES. I HAVE BEEN TOLD BY TOYOTA DEALERSHIPS THAT THIS NOISE HAS BEEN A NOTED PROBLEM. I FIND THIS TO BE UNACCEPTABLE FOR A "NEW" CAR, I BOUGHT A NEW CAR TO AVOID MAKING REPAIRS AND I HAVE MADE MORE ON THIS TOYOTA AND ITS BAD BREAKS THAN I WOULD HAVE SPENT ON KEEPING MY USED RODEO. I MEAN WITH REGULAR MAINTENANCE CHECK, OIL CHANGE, CAR PAYMENTS, \$200 BRAKE JOBS EVERY 8 TO 12 MONTHS, THIS IS RIDICULOUS. I HAVE ALSO HAD PROBLEMS WITH CLUNKING NOISES COMING FROM MY FRONT SUSPENSION, ESPECIALLY IF I GO OVER A ROUGH ROAD. FOR A COMPANY THAT HAS A REPUTATION FOR SUPERIOR CARS, THIS HAS BEEN A DISAPPOINTING FIRST BUY AS I FIND THE CAR TO HAVE A VERY, VERY POOR BRAKING SYSTEM AND SUSPENSION. FROM READING YOUR TECHNICAL BULLETINS, THERE HAS BEEN 90 REPORTED COMPLAINTS ON THE BRAKES....

Another helpful source is a skilled mechanic or a dealer. Often they will provide you with copies of the manufacturer's notices, intercompany repair messages, or recall notices.

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Applications can be completed online at www.dr.bbb.org and click on Training.

Please call 1.800.334.2406 ext. 374 or e-mail alee@cbbb.bbb.org. BBB certified arbitrators are offered an honorarium of \$100 for each completed BBB AUTO LINE case they hear.

There have been "secret" problems regarding which customers were informed only when they presented their vehicles for repair. These problems are difficult, but not impossible, to uncover. A good example from the late 1980s involved the alleged self-acceleration of the Nissan 280ZX and 300ZX. The NHTSA complaint file contained numerous claims. The first paragraph of Nissan's answering letters expresses sympathy for the person's plight and explains how this is the "first incident of this nature" concerning the model.⁶

Finally, it can be very helpful to know about cars. Sometimes the danger of a defect may not be obvious to a person who is unfamiliar with the mechanical and electrical operations of cars. The customer and counsel must consider how to present the claimed defect so that it falls within the statutory definitions. Anyone presenting a Lemon Law claim should be completely familiar with the various codes that are found on the repair orders. Often, a visit to a local dealer (even the dealer that did the work) can help decipher the codes. It is a worthwhile exercise.

The Manufacturer's Presentation

The manufacturer's representative may present his or her case by phone or in person. A local service manager or mechanic may also be present as a live witness. At the hearing, the manufacturer's representative may examine the local service manager or mechanic. The client's attorney must assume that the representative and witness are very well prepared.

Depending on the relationship among the consumer, the dealership, and its employees, the service manager or mechanic may be friendly and willing to talk to counsel before the hearing. At this stage of the proceeding, the witness is not usually represented by counsel, so there is no ethical violation to talk to the witness. A conversation at this time can be crucial. If counsel carefully probes and actively listens, he or she can glean a great deal of information. Counsel can sense whether this witness will be hostile. Counsel can also ask the witness about his or her feeling as to whether there is a real problem with the car or if the heart of the problem is nothing more than one customer's dissatisfaction. If the former scenario seems more likely, probe for some facts. If the latter does, try to determine the basis for the opinion: What does this or that repair code mean? How many other vehicles has the witness worked on with the same or similar problem? What was done while the vehicle was in the shop? Frequently, the witness will give valuable information that can be helpful in the hearing. Do not make the witness become recalcitrant by being too aggressive. Counsel should also consider the ramifications of what happens

after the arbitration. If counsel takes an aggressive stance against the witness and the consumer loses the arbitration, where will he or she get the vehicle serviced?

The consumer should understand that whether appearing by phone or in person, the manufacturer's representative will be polished and professional at the arbitration. The representative has the technical expertise of a large corporation at his or her disposal and can muster statistics, copies of all repair orders, and a number of persuasive stories. The consumer and counsel will need some help to offset this technological asymmetry. First, counsel should usually not attempt to go head-to-head with the manufacturer's representative, who, as a practical matter, is an expert with unlimited resources. The consumer's attorney also should be prepared for the manufacturer's representative to shower the arbitrator with statistical data such as, "The manufacturer has assembled 1,234,587 models of this vehicle in 17 countries in the world. This vehicle has been badged as X in North America, Y in South America, and Z in Europe. There have been no recalls and no governmental actions against any of the badged vehicles."

Most of this information will be irrelevant to the particular case at hand; however, the statistical display is very influential. In essence, the manufacturer is attempting with this argument to make the car's failings statistically insignificant. The consumer's attorney should not try to win a numbers-quoting contest with a manufacturer's representative. Instead, the facts concerning the particular car in question, whether or not they are part of a larger pattern, may be what ultimately matters under the law.

Another tactic that manufacturer's representatives sometimes rely on, especially if the vehicle is not top of the line, is to imply that if the consumer had purchased the top-of-the-line model, he or she would not have had the alleged problems. It is common for the manufacturer to take the position that if the consumer had purchased a more expensive model, it would have had better construction, insulation, or electronics. The consumer's attorney can call attention to the obvious flaw in this argument.

It is likely the arbitrator has previously dealt with the manufacturer's representative and anticipates dealing with him or her in the future. It is common for the arbitrator to show deference to the manufacturer's representative. The consumer's counsel should therefore be prepared to object and to be overruled. The consumer's counsel may ask the representative how any of the statistics presented or comments offered are relevant, for example, but should be prepared for a response to the effect that the cumulative

information all goes to show what a great vehicle the consumer has purchased.

The manufacturer's representative will then call his or her witness—typically, the service manager or mechanic. The representative will introduce the work orders. His or her job is to show how diligently the dealer worked on the vehicle and that the problems were normal. This is why it is important for the consumer to have read and understood all the repair orders, including the repair codes.

If the manufacturer's witness dismisses the seriousness of the problem, cross-examination should concentrate on how the defect diminished the vehicle's use, value, and safety as viewed by a reasonable person or the general public. Counsel may even ask the witness if he or she would take the vehicle on a busy highway with his or her family. This may make the allegation of defect or poor repair personal. The witness may become so defensive that he or she becomes adversarial. In the process, the witness may inadvertently compromise his or her credibility and objectivity.

Preparing the Client

Many consumers are emotional when it concerns their vehicles. This emotional relationship can play havoc with their objectivity. Counsel's best tactic is to thoroughly educate the client about the Lemon Law. Counsel should explain what the presumption in Civil Code Section 1793.22 means and take time to fully inform the client how important it is to show that the defect is material. Once the client understands the factual and legal requirements, counsel must outline the plan to gather the necessary evidence.

Most owners do not maintain complete vehicle service records. It is not a good idea to rely on the consumer's recollection regarding the number of times the vehicle was presented for repair or how long it was kept in the shop. Consequently, it is absolutely necessary to get copies of all work orders. An attorney should not even consider filing for a BBB arbitration until he or she has a complete history of the allegedly defective vehicle. Counsel must assume that the manufacturer will have all relevant documents.

Next, counsel should educate the client on the arbitration process. It can be confusing to someone who has never participated in an arbitration. It can be productive to do some role-playing. The BBB arbitration generally adheres to the traditional arbitration mode of question and answer.

First, both parties are given an opportunity to present an opening statement. Second, the consumer presents his or her case-in-chief with witnesses, evidence, and exhibits. It is prudent to make sufficient copies of any exhibits. Usually four copies are sufficient: one each for the witness, counsel, other party,

and arbitrator. That way, all can follow the testimony without the distraction of passing a document around the room. Third, the manufacturer is given the opportunity to cross-examine the witness. Fourth, when the consumer finishes his or her case, the manufacturer presents its defense. Finally, when both sides rest, the arbitrator will give them the opportunity to give a closing argument.

In the closing statement counsel for the consumer client may reiterate the statutory elements, then specifically connect the testimony and evidence to each element to show that the burden of proof has been met. The effectiveness of this last step of the arbitration process is a function of prearbitration preparation. It is a usual tactic for the manufacturer's representative to restate the statistics and information showing how the model of vehicle that the defective one came from is the greatest ever made. This is not relevant, but the arbitrator often allows it without comment. The manufacturer's representative will usually close by trying to show the consumer did not prove the case. It is predictable the defense will focus on the defect, trying to show it was not material, because the other elements are generally easier to establish.

Unless very gifted, the consumer is not likely to be able to compete on the same technical level as the manufacturer's representative. It is also unlikely the arbitrator can work at that heightened technical level either. It is incumbent upon the consumer or counsel to make the case simple, straightforward, and within the Lemon Law criteria.

Materiality of the alleged defect is the Achilles heel of the typical Lemon Law case, and building a solid foundation of materiality is the most crucial part of a Lemon Law arbitration. Although the BBB arbitration is a helpful forum for the consumer, it requires adequate evidentiary showing. The BBB is a business funded by businesses, and it is not prone to distributing the assets of its participants without an adequate showing. ■

¹ See CIV. CODE §1793.22(e)(2).

² Civil Code §1793.2(d)(2)(C) provides the statutory formula. The variables may be any significant modifications (sound system, new tires, or mechanical repairs or upgrades). The manufacturer will also credit license, title, registration, and sales and use tax.

³ Civil Code §1793.22(e)(1) defines "nonconformity" as what substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee. This is also referred to as a "material defect."

⁴ Griffey v. Chevrolet, GM offer Mar. 18, 2005 Service Request/File Number 1-239874049 (VIN-1G1JH52FX47172523) (2005).

⁵ See UNIFORM COMMERCIAL CODE §2314(2)(d), warranty of merchantability. To be merchantable, "goods" may "run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved."

⁶ See NHTSA Investigation PE85-08 and 85-029, 1976-87 280Z & 300Z Recall, 87V-090.