A Statutory Override of an "As Is" sale: An Historical Appraisal and Analysis of the UCC, Magnuson-Moss, and State Lemon Laws

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A STATUTORY OVERRIDE OF AN “AS IS” SALE: AN HISTORICAL APPRAISAL AND ANALYSIS OF THE UCC, MAGNUSON-MOSS, AND STATE LEMON LAWS

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ABSTRACT

This article considers the common law view that a sale of a used car is essentially “as is,” in light of state “lemon laws” which attempt to protect the interests of used car buyers under certain circumstances. The article focuses on major provisions of the New Jersey “lemon law” which provide for specific vehicle and parts coverage, length of warranty protections, and buyer rights in case the automobile is deemed to be a “lemon,” as potential areas of concentration for further state-specific legislation. The article describes the essence of a traditional “as is” sale, and highlights the fact that the “as is” sale would not be operative in cases of consumer fraud by the seller.

INTRODUCTION: IS YOUR NEW CAR A “LEMON”?

Not too many years ago, states began to take the side of its consumers in the purchase of a new automobile which turned out to be “less than perfect” by enacting what are termed as “lemon laws.” Connecticut was the first state to pass such a lemon law in the early 1980s. The Connecticut statute “supplied the purchaser of a lemon with the first specific legislation to deal with his plight.”1 Until then, purchasers of lemons had to rely exclusively on the “restrictive” limited warranties given by the manufacturers and “the intricate technicalities imposed by the Uniform Commercial Code laws on sales”2—in short, the rule of caveat emptor most often prevailed. In 1982, Connecticut enacted a statutory "repair or replace" provision, otherwise known as a lemon law, which gave the buyers of certain defective automobiles “the power to combat the inequities of the manufacturer's limited warranty.”3

2 Id.
3 Id. See also CONN. GEN. STAT. ANN. § 42-179 (West Supp. 1988).
In an article in the *Journal of Law, Economics and Policy*, John Delacourt provides a number of historical perspectives and states: “These laws are essentially intended to bolster consumer bargaining power with manufacturers and to address concerns that manufacturers might otherwise respond inadequately, or unduly slowly, to consumer complaints regarding defective vehicles.” Lemon laws have now been enacted in all fifty states. In general, state lemon laws require automobile manufacturers to provide a refund of the purchase price or a replacement vehicle if, after a reasonable number of repair attempts as determined by individual state laws, the vehicle still fails to satisfy the terms of the manufacturer’s warranty. Once the buyer/consumer has satisfied the statutory requirement of notice to the dealer and has made a reasonable number of repair attempts, the burden shifts to the manufacturer to demonstrate that the vehicle is not a lemon. In many cases, disputes are settled through a variant of arbitration or mediation, “some created and operated by private organizations and others run by states. In particular, all fifty states allow consumers the option of having their automobile lemon law disputes resolved in dispute resolution forums funded by automobile manufacturers but operated by external third-party organizations.”

New Jersey was one of those states that enacted an automobile lemon law.

**THE NEW JERSEY LEMON LAW**

The New Jersey Lemon Law covers new passenger motor vehicles and motorcycles which are purchased, leased, or registered in the state of New Jersey. In addition, if a buyer/consumer purchased or leased a used vehicle and the odometer shows less than 24,000 miles and its purchase is within two years from the date of original purchase, the New Jersey Lemon Law applies.

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delivery, the transaction may nevertheless qualify under what is commonly known as the New Car Lemon Law.

Before a buyer/consumer can file a claim under the New Jersey Lemon Law, the buyer/consumer must give the manufacturer a final opportunity to repair the defect. (This may be seen as analogous to a seller’s right to cure under the Section 2-508 of the Uniform Commercial Code.) A letter to the manufacturer (not the dealer) must be sent by certified mail, return receipt requested, stating that the buyer/consumer may have a claim and that the buyer/consumer is giving the manufacturer “one last chance” to repair the defect.

The certified letter may be sent by the buyer/consumer only after there has been at least two repair attempts for the same defect, or where the car has been out of service for one or more defects for twenty cumulative days. The defect must still exist at the time the letter is generated. In the case of a “serious safety defect,” defined as one that is “likely to cause death or serious bodily harm,” the letter can be sent after a single repair attempt—again, the defect must exist at the time the letter is generated. The certified letter must reach the manufacturer before the Lemon Law’s term of protection expires which is two years from original date of delivery or 24,000 miles. The vehicle must meet both the writing and the time/mileage standards.

Following receipt of the certified letter, the manufacturer is then ordinarily accorded 10 calendar days, to repair the vehicle. If the final repair attempt fails to correct the defect, the buyer may complete a Lemon Law application and submit it to the Lemon Law Unit, along with a copy of all the relevant supporting documents. The defect must still exist at this point of filing the Lemon Law application.

The Lemon Law does not cover defects caused by an accident, vandalism, or abuse or neglect on the part of the buyer. It also does not cover defects caused by attempts to repair or modify the vehicle by a third party or any person other than the manufacturer or an authorized dealer.

At this point, if a buyer/consumer wins his or her case before the Lemon Law Unit, the manufacturer will be ordered to reacquire the vehicle and to issue a refund. The refund may include, but is not limited to, the following:

10 U.C.C. Section 2-508, Paragraph 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 may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.” (italics added) Paragraph 2 continues: “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 a further reasonable time to substitute a conforming tender.”

Professor Travalio notes that under the common law, “The time for performance was the outside limit on the time during which a seller had a right to ‘cure.’ Subsection (2) of section 2-508, however, gives a seller a ‘further reasonable time’ beyond the time specified in the contract in which to cure, provided certain limiting conditions are met.” Gregory M. Travalio, The UCC’s Three “R’s” Rejection, Revocation and (the Seller’s) Right to Cure, 53 U. Cin. L. Rev. 931, 939 (1984). Professor Travalio continues: “One of those conditions is that a seller may only cure under section 2-508(2) when the buyer ‘rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable.’ Deciding when such ‘reasonable grounds’ exist has been the subject of a number of cases and very considerable academic commentary; nonetheless, this author believes that neither the case law nor the commentary has developed a fully adequate approach to the problem.” Id. at 939-940.
- the purchase price or leasing costs of the vehicle;
- any finance charges paid;
- reasonable attorney fees incurred in pursuing the case;
- the $50.00 Lemon Law application fee;
- the cost of any vehicle repairs;
- reasonable costs for a rental vehicle while the vehicle was out of service because of the defect;
- expert witness fees; and
- any towing costs for the vehicle.

A “reasonable allowance for vehicle use” or “use deduction” will be deducted from any refund due to the buyer. This statutory deduction equals the total purchase price multiplied by the mileage at the time the vehicle was first brought to the dealer or manufacturer for repair of the defect, divided by 100,000 miles:

\[
\text{Total Purchase Price} \times \text{Mileage at First Repair Attempt} \div 100,000
\]

= Use Deduction

For example:

<table>
<thead>
<tr>
<th>Vehicle Purchase Price</th>
<th>$25,500</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mileage at first repair attempt</td>
<td>$8,500</td>
</tr>
</tbody>
</table>

\[
25,500 \times 8,500
\div 100,000
\]

= $2,167.50 (reasonable Use allowance deduction)

\[25,500 \text{ minus } 2,167.50 = 23,332.50 \text{ REFUND}\]

The buyer/consumer may choose instead to file a private civil action in superior court in order to resolve his or her claim. However, once a civil action is filed or a decision by a court has been issued, the buyer/consumer can no longer avail him or herself of the Lemon Law program.

The buyer/consumer may also choose to participate in a manufacturer’s arbitration or mediation program, commonly known as alternate dispute resolution or ADR. However, not all manufacturers offer an arbitration program under these circumstances. The buyer/consumer is not required to use the manufacturer’s arbitration or mediation program. (It is important to consult an individual state’s program, as arbitration or mediation may be mandatory in such cases.)

If the buyer/consumer does make use of such a program, or the buyer/consumer is not satisfied with the outcome and

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has not agreed to a final settlement with the manufacturer, the buyer/consumer may still file a Lemon Law application.

The procedure before the Lemon Law Unit is essentially an administrative procedure before an administrative law judge (ALJ). If the buyer/consumer goes through the procedure and is not satisfied with the administrative law judge’s initial decision, the buyer/consumer is permitted to file an “exception.” An exception is a written explanation why the buyer/consumer believes that the administrative law judge’s decision should not be adopted by the Director of the Division of Consumer Affairs. The exception must be received by the Division within eight (8) days from the date stamped on the front of the judge’s decision.

If either party is still not satisfied with the decision of the Director of Consumer Affairs, either the buyer/consumer and/or the manufacturer can file an appeal in the Appellate Division of Superior Court within 45 days of receipt of the final decision of the Director.

The Lemon Law protects the buyer/consumer against a manufacturer who appeals without “good reason.” A manufacturer who files an appeal must post a bond equal to the amount awarded to the consumer/buyer at the time of the final decision, plus an extra $2,500 to cover the buyer/consumer’s potential attorney fees. The bond will be released to the buyer if the buyer/consumer wins the appeal.

At this point, the formal procedure is nearly completed. The manufacturer has 15 days from the date of receipt of the final decision of the Appellate Decision to comply. If the manufacturer fails to comply with the final decision, the manufacturer can be penalized $5,000 per day for each day it “unreasonably” fails to comply.

The system, however, is not without its critics. Attorney William C. Miller writes:

While the lemon law process is both faster and cheaper than most other forms of litigation, it is by no means user friendly. It requires you to properly put big corporations on notice in precisely the right way. It requires you to fill out meticulous forms and gather mounds of information and documents. Once you get to court, the manufacturer or dealer has a strong interest in winning the case. They will have an attorney to represent them who will look to exploit any mistake you have made. They will have experts at their disposal to scrutinize your car and find any reason why the manufacturer or dealer is not liable.\footnote{William C. Miller, \textit{Lemon Law}, \url{http://williamcmilleresq.com/practice-areas/lemon-law/}.}

\section*{USED CARS AND THE NEW JERSEY LEMON LAW: A POTENTIAL MODEL?}

All well and good for the purchaser of a new car; but what about the purchaser of a used car? It is often said (and repeated on countless TV “judge shows” like the \textit{People’s Court} or \textit{Judge Judy}) that a used car carries with it no implied warranty and is simply sold “as is.” This situation is based on an application of selected sections of the Uniform Commercial Code found in Appendix I dealing with an express warranty and
the implied warranty of merchantability. Can a state override the common law presumption of an “as is” sale?

The Used Car Lemon Law was adopted by the New Jersey Legislature. It protects consumers who purchase a used car from a New Jersey licensed car dealership— and not in a private sale. It requires:

- that a used car dealer provide a consumer with a warranty, the length of which depends on the used car's mileage; and
- that a car dealer repairs any covered defective or malfunctioning part of the used during the warranty period.

**Which Vehicles Are Covered?**

The New Jersey law covers used passenger cars, but only if they are purchased from a licensed car dealership. The law covers cars which are seven model years old or less. The purchase price of the car must be at least $3,000 and the mileage cannot be more than 100,000 miles at the time of purchase.

**Which Vehicles Are Not Covered?**

The New Jersey Used Car Lemon Law specifically excludes several categories of cars from protection.

- used cars sold for less than $3,000;
- used cars which are more than seven model years old;
- salvage vehicles;
- a used car that has more than 100,000 miles on its odometer;
- a used car that was not purchased from a car dealer, but from a private seller;
- motorcycles, off-road vehicles, motor homes, and commercial vehicles;
- leased vehicles;
- a used car that is still covered by a manufacturer's warranty;
- a used car with 60,000 or more miles where the warranty has been waived and the car is sold "as is"; the rule requires a window sticker which says "as is - no warranty."
- a used car that has been modified, abused, or not maintained by the consumer.

**Length of the Warranty**

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14 See also 16 C.F.R. 455.2 (precluding the use of a simple "as is" statement in the sale of used cars by a dealer.)
If a vehicle satisfies the requirements found above, the car dealer must provide the buyer with a warranty. The length of the warranty will depend on the used car's mileage.

- If a motor vehicle has 24,000 miles or less on its odometer, the car dealer must provide the buyer with a warranty for 90 days or 3,000 miles, whichever comes first;
- If a motor vehicle has more than 24,000 miles, but less than 60,000 miles on its odometer, the car dealer must provide the buyer with a warranty of 60 days or 2,000 miles, whichever comes first;
- If a motor vehicle has between 60,000 and 100,000 miles on the odometer, the car dealer must provide the buyer with a warranty for 30 days or 1,000 miles, whichever comes first.

It is important to note that in negotiating the price for a used car, a buyer may negotiate for a warranty or waive a right to a warranty. However, in order to waive the warranty, the vehicle must have more than 60,000 miles on its odometer and the waiver must be in writing.

Which Car Parts Are Covered?

The statute contains many very detailed provisions. The New Jersey Used Car Lemon Law requires a car dealer to correct a "material defect" of a covered item of the used car if the defect occurred during the warranty period. A material defect is defined by the New Jersey Lemon Law as, "a malfunction of a used motor vehicle, subject to the warranty, which substantially impairs its use, value or safety."

The covered parts include:

- Engine: All internal lubricated parts, timing chains, gears and cover, timing belt, pulleys and cover, oil pump and gears, water pump, valve covers, oil pan, manifolds, flywheel, harmonic balancer, engine mounts, seals and gaskets, and turbo-charger housing. (Housing, engine block, and cylinder heads are covered only if they are damaged by the failure of an internal lubricated part.)
- Transmission Automatic/Transfer Case: All internal lubricated parts, torque converter, vacuum modulator, transmission mounts, seals, and gaskets.
- Transmission Manual/Transfer Case: All internal lubricated parts, transmission mounts, seals and gaskets (excluding manual clutch), pressure plate, throw-out bearings, clutch master, or slave cylinders.
- Front-Wheel Drive: All internal lubricated parts, axle shafts, constant velocity joints, front hub bearings, seals, and gaskets.
- Rear-Wheel Drive: All internal lubricated parts, propeller shafts, supports and U-joints, axle shafts and bearings, seals, and gaskets.

If the buyer suspects that the used car has a defect, the buyer must notify the dealer immediately and the buyer must bring the vehicle to the dealer. The buyer must
keep a complete record of any repair receipts and any communications with the car dealer. The buyer is responsible for paying a $50 deductible for each repair of each covered item. At this point, the buyer of the used car must allow a car dealer a "reasonable amount of time" to repair or correct the defect. A used car will be deemed a lemon only if:

- the car dealer has been unable to fix the used car after three attempts; and/or
- the car has been out of service for a total of 20 cumulative calendar days for a single problem or a series of problems. The buyer must also, after the second failed attempt to repair or after 20 cumulative calendar days has elapsed, send a letter to the car's manufacturer by certified mail notifying it of the defect and giving the manufacturer a final chance to correct the problem. In this case, the warranty of merchantability would be the vehicle for protecting the buyer.

The buyer must also be able to prove that the car's defect “substantially impairs” its use, value, or safety.

**What are the Buyer’s Rights If the Car is Indeed a Lemon?**

The following information is largely extracted and adapted from the New Jersey Division of Consumer Affairs.\textsuperscript{15} If the car dealer cannot repair the defect, the dealer must, at the option of the buyer, replace the car, if possible, or refund the full purchase price of the car (less sales taxes, title and registration fees, and a reasonable deduction for excessive wear and tear and a reasonable charge for personal use of the car).

If the car dealer refuses to replace the car, or to refund the full purchase price of the used car, the buyer may be eligible for relief under the Lemon Law. The buyer can:

- Request a Lemon Law hearing through the New Jersey Division of Consumer Affairs dispute resolution program;\textsuperscript{16}
- File a lawsuit in the Superior Court of New Jersey; or
- “Try to work something out” through the dealer's informal dispute resolution program (if the dealer has such a program).

**WHAT IS AN “AS IS” SALE?**

Remember, however, that one of the exceptions under both the Uniform Commercial Code and the New Jersey Used Car Lemon Law is still an “as is” sale. Under the Used Car Lemon Law, “As Is” means that the used motor vehicle is sold by the dealer to the consumer without any warranty, either express or implied, and with the


consumer being solely responsible for the cost of any repairs to that motor vehicle.\textsuperscript{17} The Lemon Law Unit has strongly recommended that a buyer inspect the vehicle thoroughly before entering into an “as is purchase.”\textsuperscript{18} As stated by David Warren, “In many sales of used cars, the "as is" disclaimer strips the consumer of all protection because there are no express warranties offered. Although the UCC endorses this practice as sufficient to put consumers on notice that they are unprotected, it is unlikely that the average consumer knows anything about implied warranties or even what the UCC is and how it protects them.”\textsuperscript{19} The lesson is clear and simple: Because the specter of “caveat emptor” continues to loom large in the area of used auto sales, take the vehicle to your own mechanic for a thorough evaluation and inspection.

Issues regarding the sale of used cars may also be impacted by relevant provisions of the \textit{Magnuson-Moss Warranty Act}.\textsuperscript{20} Hester Gloston-Hilliard notes that “The Magnuson-Moss Warranty Act also authorized the Federal Trade Commission (FTC) to prescribe rules governing warranties and warranty practices in connection with the sale of used cars.”\textsuperscript{21} After conducting a study on used car sales and warranties, the FTC concluded that deception was widespread and proposed a series of rules to regulate the

\textsuperscript{17} It has been suggested that “as is” disclaimers are \textit{not} subject to the requirements concerning \textit{conspicuousness} under the UCC. \textit{See, e.g.}, DeKalb Agreeseach, Inc. v. Abbott, 391 F. Supp. 152, 154-55 (N.D. Ala. 1974), affirmed, 511 F.2d 1162 (5th Cir. 1975). Other courts have disagreed and have required that “as is” disclaimers be conspicuous or that conspicuousness will be a factor in determining whether an “as is” disclaimer is valid. \textit{See} MacDonald v. Mobley, 555 S.W.2d 916, 919 (Tex. Civ. App.—Austin 1977). \textit{See also} J. David Reitzel, \textit{Unconscionable Limitations of Sales Remedies}, 16(2) AM. BUS. L.J. 229 (1978) (raising the issue of the requirement of conspicuousness of any written warranty disclaimer).

\textsuperscript{18} \textit{See http://www.njconsumeraffairs.gov/brief/buyused.pdf.}

\textsuperscript{19} David A. Warren, \textit{Some Help for the Uninformed Buyer}, 66 OHIO ST. L.J. 441, 454-55 (2005). This view was strongly underscored in \textit{Pelic v. Simmons}, 620 N.E.2d 12 (Ill. Ct. App. 1993), where the Illinois appellate court stated: “Words do have meaning. ‘Sold as is’ when posted on a used car means just that; to rule otherwise would make it meaningless and create a new body of law as to what words need to be published and what words need to be said or not said in order to sell something without a warranty.” \textit{Id.} at 15.


\textsuperscript{21} Hester Gloston-Hilliard, \textit{Purchases, Pitfalls, And Protections}, 33 S.U. L. REV. 227, 229 (2005) (citing MICHAEL M. GREENFIELD, \textit{CONSUMER TRANSACTION} 348 (4th ed. 2003) and quoting 15 U.S.C. § 2309(b) (2005)). The Federal Trade Commission promulgated the Used Car Rule in 1984 and the Rule became effective in 1985. The Used Car Rule was intended to prevent oral misrepresentations and unfair omissions of material facts by used car dealers concerning potential warranty coverage. In order to accomplish this goal, the Rule provides a uniform method for disclosing warranty information on a \textit{window sticker} called the “Buyer’s Guide.” Dealers are required to display the sticker on used cars. The Rule requires used car dealers to disclose on the Buyer’s Guide whether they are offering a used car for sale with or without a dealer's warranty. If a warranty is being offered, the sticker must contain the basic terms, including the \textit{duration} of coverage, the \textit{percentage of total repair costs} to be paid by the dealer, and the \textit{exact systems} covered by the warranty. In addition, the Rule provides that the Buyer’s Guide disclosures are to be incorporated by reference into the sales contract, and are to govern in the event of an inconsistency between the Buyer’s Guide and the sales contract between the buyer and the dealer.
practice. As a result of its deliberations, the FTC promulgated the *Used Motor Vehicle Trade Regulation Rule* to resolve these issues. The rule is more commonly known as the *Federal Used Car Rule*.

The Rule provides a listing of the general duties of a used vehicle dealer as follows:

(a) It is a deceptive act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce as commerce is defined in the Federal Trade Commission Act:

1. To misrepresent the mechanical condition of a used vehicle;
2. To misrepresent the terms of any warranty offered in connection with the sale of a used vehicle; and
3. To represent that a used vehicle is sold with a warranty when the vehicle is sold without any warranty.

(b) It is an unfair act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce as commerce is defined in the Federal Trade Commission Act:

1. To fail to disclose, prior to sale, that a used vehicle is sold without any warranty; and
2. To fail to make available, prior to sale, the terms of any written warranty offered in connection with the sale of a used vehicle.

Under the rule, a used car is defined as any vehicle that is driven more than the amount necessary in moving or road testing a new vehicle. The general duty of the dealer under the rule is to prepare and display in a conspicuous location of the vehicle a *Buyer's Guide* that informs the buyer of warranty information. Vehicles that are offered without an implied warranty must display "as is" in the box provided on the Buyer's Guide.

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22 GREENFIELD, *supra* note 21, at 348.


24 *Id.* at § 455.1(d)(2) (2005).

25 *Id.* at § 455.2(b)(1)(i) (2005).
For states that prohibit the sale of cars without an implied warranty, state law overrides the "as is" requirement, and that portion of the form is deleted or replaced with appropriate wording to avoid confusion to the buyer.\textsuperscript{26} The dealer is also required to give the purchaser the Buyer's Guide or a copy of the original when the used car is sold.\textsuperscript{27} Moreover, the information contained in the Buyer's Guide must be included in the contract of sale between the buyer and the seller.\textsuperscript{28} Again, Gloston-Hilliard notes: “The seller may not make any statements or take any actions that are contrary to the disclosure requirements, but the seller may negotiate the displayed warranty with the buyer.”\textsuperscript{29}

**NO PROTECTION IN CASES OF FRAUD**

However, the “as is” provision will not protect a dealer (or a private party) who has engaged in contract fraud. The seller of a used car must comply with “other duties and obligations relating to the formation of contracts.”\textsuperscript{30} For example, in *Morris v. Mack’s Used Cars,*\textsuperscript{31} a used car dealer was held liable for knowing concealment of the fact that a 1979 pickup truck it had sold had been reconstructed. The court rejected the defendant’s contention that the truck had been sold “as is.” It noted that the parties had a duty to execute the contract in “good faith,”\textsuperscript{32} and that *this obligation* could not be waived by a contractual disclaimer of an “as is” sale.

The words of the *Morris* court are especially telling:

> Although the Uniform Commercial Code does expressly permit disclaimers... § 2-316 refers specifically to disclaimers of implied warranties, suggesting to us that it was intended only to permit a seller to limit or modify the contractual bases of liability which the Code would

\textsuperscript{26} *Id.* at § 455.2(b)(1)(ii) (2005).

\textsuperscript{27} *Id.* at § 455.3(a) (2005).

\textsuperscript{28} *Id.* at § 455.3(b) (2005).

\textsuperscript{29} Gloston-Hilliard, *supra* note 21, at 230 (citing *id.* § 455.4 (2005)).

\textsuperscript{30} ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 758 (3rd ed. 2002). Interestingly, there has been very little written about the obligation of the buyer/consumer in connection with compliance with the lemon law. See Eric Freedman, *Court: Buyer Must Act in Good Faith to Win Lemon Law Damages*, 82 AUTOMOTIVE NEWS 20 (2008) (stating that consumers—not just manufacturers—must act in good faith in lemon law disputes and noting that a buyer/consumer fails to act in good faith when he or she intentionally prevents the manufacturer from complying with the lemon law as found in the underlying lawsuit against Mercedes-Benz USA LLC).

\textsuperscript{31} 824 S.W.2d 538 (Tenn. 1992).

otherwise impose on the transaction. The section does not appear to preclude claims on fraud or other deceptive conduct.\textsuperscript{33}

Professor Anzivino has laid out the important policy perspective in not permitting an “as is” clause to override the fraud committed by the seller:

On the other hand, once fraud is introduced into the process, the contract clause is no longer effective. The as is clause does not protect one from a lawsuit based on one's intentional misrepresentation. The courts have clearly indicated that one's fraud supersedes the negotiated contract terms. Public policy dictates that a deceitful person cannot hide behind an as is clause in a contract. The fraud is actionable under tort law despite the contract clause negotiated between the parties. The rationale underlying the courts’ decisions is clear. The seller, not the buyer, is the party best able to understand the attendant risks in the transaction. The seller is introducing fraud into the transaction. Focusing tort liabilities on the seller is the most effective way to insure against deceitful conduct by sellers in the future. Requiring the buyer to protect himself against the seller's fraud is pressure applied at the wrong point.\textsuperscript{34}

In general, in making out a case for fraud, even in the face of an “as is” sale, a buyer would be required to prove:

1. The defendant made a material misrepresentation;
2. The representation was false;
3. The defendant knew the representation was false or the statement was recklessly asserted without any knowledge of its truth; (generally, \textit{scienter})
4. The defendant made the false representation with the intent that it be acted on by the plaintiff;
5. The plaintiff acted in reliance on the misrepresentation; and
6. The plaintiff suffered injury (damages) as a result.\textsuperscript{35}

With reference to the issue in New Jersey, William Diggs notes that:

The New Jersey Consumer Fraud Act (CFA) [of 1971] is ‘one of the strongest consumer-protection laws in the nation.’ In pertinent part, the CFA’s general antifraud provision makes unlawful ‘the act, use or employment by any person of any unconscionable commercial practice,

\textsuperscript{33} \textit{Morris}, 824 S.W.2d 538, 540 (Tenn. 1992).

\textsuperscript{34} Ralph C. Anzivino, \textit{The Fraud in the Inducement Exception to the Economic Loss Doctrine}, 90 MARQ. L. REV. 922, 936-37 (2007) (footnotes omitted), Article 4, at \url{http://scholarship.law.marquette.edu/facpub}.

deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact ... in connection with the sale or advertisement of any merchandise or real estate."  

In such a case, the measure of damages is the “difference between the actual value of the property and what the property would have been worth had the misrepresentation been true.”

**CONCLUSION**

It is now more than apparent that the purchase of a used car provides many challenges and pitfalls. Much has been changed since the rather straightforward days of *caveat emptor* in which the law protected sellers of used cars so long as no warranty protections were provided and they were sold “as is.”

The Uniform Commercial Code, Magnuson-Moss, and the application of traditional principles embedded in the concept of common law fraud have all coalesced to provide important rights to consumers in the “new age” of consumer protection.

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The Act provides:

> [T]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been mislead, deceived or damaged thereby, is declared to be an unlawful practice ... .


As noted by Justice Wachtler in *Jones v. Star Credit Corp.*: “There was a time when the shield of caveat emptor would protect the most unscrupulous in the marketplace -- a time when the law, in granting parties unbridled latitude to make their own contracts, allowed exploitive and callous practices which shocked the conscience of both legislative bodies and the courts.”\(^{38}\) That time may have passed—at least with regard to used car sales and all states should now require the commercial seller of a used automobile to provide the buyer with some basic warranty protection.

The New Jersey law is an important first step in balancing the rights of consumers with the practicalities of selling a used car in the marketplace by providing some level of warranty protection for those who purchase used cars.

Oh… and by the way, *take the vehicle to your own mechanic for a thorough evaluation and inspection!!!*

**APPENDIX I**

§ 2-313. Express Warranties by Affirmation, Promise, Description, Sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

§ 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with

respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promise or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

39 The implied warranty of merchantability applies to all sellers in the chain of distribution, as long as the seller is a "merchant with respect to goods of that kind." Express warranties apply to non-merchants and merchants alike. Merchant is defined in Section 2-104(1).

40 For a discussion of the elements of merchantability, see FISCHER & POWERS, JR., supra note 35, at 332-46.

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

APPENDIX II – A WEB SEARCH OF STATE SITES

ALABAMA: alabamalemonlaw.org
ALASKA: www.law.state.ak.us/department/civil/consumer/lemonlaw.html
ARIZONA: www.lemonlawaz.com
ARKANSAS: arkansaslemonlaw.org
CALIFORNIA: http://oag.ca.gov/consumers/general/lemon
COLORADO: coloradolemonlaw.org/index.html
CONNECTICUT: jud.ct.gov/lawlib/Law/lemon.htm
DELAWARE: delawarelemonlaw.org
FLORIDA: myfloridalegal.com/lemonlaw
GEORGIA: www.georgiaconsumerlawyer.com/lemon-laws
HAWAII: hawaiilemonlaw.org

ILLINOIS: www.illinoisattorneygeneral.gov/consumers/lemonlaw.html

INDIANA: www.carcomplaints.com/lemon_law/indiana.shtml

IOWA: iowalemonlaw.org

KANSAS: kansaslemonlaw.org


LOUISIANA: louisianalemonlaw.org

MAINE: mainelemonlaw.org

MARYLAND: www.oag.state.md.us/consumer/lemon.htm


MICHIGAN: www.michiganlemon.com


MISSISSIPPI: yourlemonlawrights.com/MS_Lemon_Law

MISSOURI: missourilemonlaw.org


NEW HAMPSHIRE: doj.nh.gov/consumer/sourcebook/lemon-law.htm

NEW JERSEY: www.state.nj.us/lps/ca/ocp/lembroc.pdf


NORTH CAROLINA: www.ncdoj.gov/Consumer/Automobiles/Lemon-Law.aspx
NORTH DAKOTA:  http://www.ag.nd.gov/brochures/FactSheet/LemonLaw.pdf

OHIO:    www.carlemon.com/lemon/OH_LemonGuide.html


OREGON:    www.doj.state.or.us/consumer/Pages/lemon_law.aspx

PENNSYLVANIA:  www.dmv.state.pa.us/pdotforms/fact_sheets/fs-lemon.pdf

RHODE ISLAND:  rhodeislandlemonlaw.org

SOUTH CAROLINA:  http://www.consumer.sc.gov/faqs/Pages/lemonlaw.aspx

SOUTH DAKOTA:  southdakotalemonlaw.org.

TENNESSEE:  www.tn.gov/attorneygeneral/cpro/lemonlaw.html

TEXAS:  txdmv.gov/motorists/consumer-protection/lemon-law

UTAH:  utahlemonlaw.org

VERMONT:  http://dmv.vermont.gov/safety/laws/lemonlaw


WEST VIRGINIA:  westvirginialemmonlaw.org

WISCONSIN:  lemonlaw-wisconsin.com/pages/lemonlaw1.html


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