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Squeezing the Lemon - Helping Texas Consumers with New Car Problems.

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SQUEEZING THE LEMON—HELPING TEXAS CONSUMERS WITH NEW CAR PROBLEMS

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I. INTRODUCTION

Many Texans cannot get help with legal problems involving their new automobiles. One reason is that many attorneys in general practice do not feel confident in this area of the law. This article is an

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attempt to summarize several of the legal avenues now open to Texas consumers to get relief from the high cost and extreme frustration of a lemon.[1] Attorneys will find that this work involves performing the important social function of encouraging more responsiveness from automobile manufacturers; it incidentally results in reasonable attorney's fees paid by these solvent defendants.

II. THE LEMON LAW - AN ADMINISTRATIVE REMEDY

The Texas Motor Vehicle Commission Code[2] (the "Code") was created in 1971 to, among other things, police the sale and warranty service of new motor vehicles in Texas. In 1983, the Code was amended to add the "Lemon Law,"[3] providing an administrative remedy which can be successfully pursued by a lemonized new vehicle owner with or without a lawyer. However, there are numerous hurdles for the owner to clear before obtaining relief under the law, and the relief itself is somewhat limited.

The entire Texas "lemon law" occupies only two pages in the statute books. Its procedure for obtaining statutory cancellation of the transaction is summarized in a "Notice to New Motor Vehicle Buyers," the substance of which must be posted at all dealerships and provided to all new car buyers by the dealer.[4] (Appendix A).

To make a case before the hearing examiner, a consumer must prove that the manufacturer or distributor has been unable to correct any defect which substantially impairs the use and market value of the motor vehicle after "a reasonable number of attempts."[5] If the vehicle has been in the repair shop for the same warranty repairs four times, or for a total of thirty or more days, during the shorter of the

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1. The term "lemon," according to the Oxford English Dictionary, is American slang apparently deriving from gambling machines which denoted the lemon as the indicator for "you lose"; it appeared as early as 1931 as a name used in the trade for second-hand cars of little value.

2. TEX. REV. CIV. STAT. ANN. art. 4413(36) (Vernon Supp. 1988).

3. *Id.* § 6.07. As of 1985, at least 29 states had similar statutes, known uniformly as lemon laws. *See* Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405, 1411 n.26. Several of such statutes provide for more extensive relief than does the Texas law. *See, e.g.*, CONN. GEN. STAT. ANN. § 42-179 (West Supp. 1988)(covering leased vehicles and providing for refund of finance charges and incidental damages as well as purchase price); FLA. STAT. ANN. § 681.10-1.08 (West Supp. 1988) (amended effective Jan. 1989 to establish extensive state-run arbitration program).

4. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 4.07 (Vernon Supp. 1988).

5. *Id.* § 6.07(c).

warranty term or the first year after purchase, section 6.07(d) of the statute raises a presumption that there have been a reasonable number of attempts.[6]

Although it looks simple, significant drawbacks exist to this administrative remedy. For example, the maximum relief recoverable is a refund of the purchase price minus an allowance for use.[7] A deduction for mileage will be figured on the basis of a 100,000 mile useful life of the car. A per-mile value is calculated by dividing the purchase price by 100,000. The examiner will deduct the full value for trouble-free miles and half value after the defect is complained of. Thus, if the vehicle has 20,000 miles at the time of the hearing, at least 10% of the purchase price will be deducted from the award.[8] The Code provides for an alternative remedy of replacement of the lemon with a "comparable motor vehicle,"[9] but the Commission has so far found this approach unworkable.[10]

Under the lemon law remedy, a consumer cannot obtain attorney's fees or finance charges paid, or any incidental, consequential or additional damages. Moreover, a consumer must keep and continue to pay for the problem vehicle until the hearing before the Commission in order to allow for inspection by the hearing examiner. The Commission has been hindered by a significant backlog of cases in the last few years, so that a delay of two years from complaint to hearing has been common. However, the legislature recently doubled the Commission's staff (from ten to twenty employees) and it is expected that the average delay will soon be reduced to under one year.

Attorneys representing the manufacturers and appearing before the Commission are now highly experienced and skilled in defending the lemon claim. A consumer will lose his case if: (1) he fails to submit his complaint to the Commission within six months following the earlier of the expiration of the express warranty (often 12,000 miles) or

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6. *Id.* § 6.07(d).

7. *Id.* § 6.07(c).

8. Tex. Motor Vehicle Comm'n, 16 TEX. ADMIN. CODE § 107.8 (Hart Nov. 1, 1986)(Lemon Law Rules), *amended* eff. Sept. 15, 1988.

9. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(c) (Vernon Supp. 1988).

10. *See id.*; *see also* Interview with Henri Ten Brink, Assistant Director of Enforcement, Tex. Motor Vehicle Comm'n (Sept. 1988). Reasons for this inability are that "comparable" supposedly does not mean new and a replacement vehicle with several thousand miles on it might pose additional problems. Other assistance on this portion of this article was given by Ruth Casarez, Assistant Director of Consumer Affairs, Texas Motor Vehicle Commission.

one year after delivery of the motor vehicle;[11] (2) the defect is the result of abuse, neglect, or unauthorized changes to the vehicle;[12] or (3) the defect does not substantially impair the value or use of the vehicle.[13] Additionally, if only dealers have been notified, it may be necessary that notice be sent directly to the manufacturer and an additional opportunity to cure given before the presumption in section 6.07(d) is applicable.[14]

The lemon law remedy can be pursued simultaneously with other remedies[15] and may assist a consumer in getting the fastest possible resolution of his problem. Additionally, it may complement the DTPA suit. If a consumer exhausts the administrative remedy before the Texas Motor Vehicle Commission, the lemon law expressly provides that he is entitled to use section 6.07 as the basis of a DTPA action.[16] Thus, if a consumer prevails before the Motor Vehicle Commission, and the manufacturer or distributor appeals for "trial de novo" in the district court, the consumer should be able to recover under the DTPA by satisfying the "four attempts or thirty days" presumption and obtaining a finding that the defect or condition substantially impairs the use and market value of the motor vehicle.[17] The lemon law is a cancellation remedy which appears simpler than revocation of acceptance under the Uniform Commercial Code. With no reported cases, significant questions exist as to how (or whether) this post-administrative remedy will work in practice.[18]

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11. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(h) (Vernon Supp. 1988).

12. *Id.* § 6.07(c).

13. *Id.*

14. *Id.* § 6.07(d). Section 6.07(d) provides in part: "In no event shall the presumption herein provided apply against a manufacturer or distributor unless the manufacturer or distributor has received prior direct notification in writing from or on behalf of the owner and had an opportunity to cure the alleged defect." *Id.*

15. *Id.* § 6.07(f).

16. *Id.* § 6.07(e).

17. *Id.* Section 6.07(e) provides in part: "The provisions of this section [Sec. 6.07, the Lemon Law] are available in an action against a manufacturer or distributor brought under Chapter 17, Business and Commerce Code, after the owner has exhausted the administrative provisions provided by this section. Any action brought under the provisions of this section shall be by trial de novo." *Id.*

18. For example, if the consumer prevails before the Commission and there is no appeal, is there still the right to continue suit in district court for other damages and attorney's fees under the DTPA? *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(f) (Vernon Supp. 1988). The phrase, "[t]his action does not limit the rights or remedies available to an owner under any other law," would seem to permit such DTPA action. *Id.*

III. DTPA - THE POTENT WEAPON

A. *U.C.C. Revocation of Acceptance under the DTPA*

1. Preliminaries

A logical and easy-to-prove remedy for a Texas consumer who has purchased a lemon is revocation of acceptance in accordance with section 2.608 of the Texas Business and Commerce Code.[19]

The typical case involves a new vehicle that has been returned to the dealer several times for the same defect(s). Because the defect remains uncorrected, the dealer points to the manufacturer, whose representative may be polite but equally ineffective in solving the problem. Additionally, the defect is one which substantially impairs the value of the vehicle to the consumer. The consumer then finds an attorney and asks him to cancel the deal, get (at least) the consumer's money back, relieve the consumer of his or her obligation to pay for the vehicle, and recover attorney's fees.

Plaintiff's attorney, after securing an employment agreement,[20] sends a notice letter which complies with both section 2.608[21] and section 17.505[22] of Texas Business and Commerce Code.[23] Often the

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19. TEX. BUS. & COM. CODE ANN. § 2.608 (Tex. UCC)(Vernon 1968) provides as follows:

(a) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(1) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(2) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(b) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(c) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

20. Such an employment agreement might typically include a small retainer, plus a percentage of a total recovery, or attorney's fees awarded and collected, whichever is greater, plus costs and expenses.

21. TEX. BUS. & COM. CODE ANN. § 2.608(b) (Tex. UCC)(Vernon 1968)(notice must be given to seller of any defect forming basis for revocation).

22. TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 1987)(consumer must give at least 30 days notice prior to filing suit).

23. The notice should be by certified mail, return receipt requested, and should probably be sent to the dealer, the manufacturer, and the financer (unless the financer is unrelated to the dealer or manufacturer). It should include a statement of the defects or conditions which

dealer will not respond to this letter because it is not responsible for the manufacturer's warranty problems; and the manufacturer will not respond because to do so might set a bad precedent. After thirty days have elapsed from receipt of the notice by all potential defendants, including the dealer, manufacturer, and financer (unless financed independently by the consumer), it is time to file suit against all[24] such parties.[25]

2. Elements of Proof — Revocation and the DTPA

Plaintiff must allege, prove, and obtain findings that the automobile has a "non-conformity" or defect which substantially impairs its value to him; and that the defect or defects have not been "seasonably cured," i.e., cured within a reasonable time.[26] The consumer must

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remain uncorrected after a specified number of repair attempts; and that the consumer is revoking acceptance. It should also state that suit is contemplated under the DTPA for breach of warranty, unconscionable action or course of action and any other applicable provision of the DTPA, stating additional facts if necessary for clarity. It must include "the amount of actual damages and expenses, including attorney's fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant." TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 1987). The damages and attorney's fees claimed should be supportable by evidence, keeping in mind that a jury may see the letter. Additionally, if the vehicle is being returned as part of revocation of acceptance, the financer should be cautioned not to adversely affect the consumer's credit rating, at the risk of giving rise to an additional cause of action.

24. It is probably not critical to include the dealer in a revocation of acceptance suit, since it is well established that a manufacturer can be responsible, without regard to privity, for the economic loss which results from its breach of the Uniform Commercial Code's implied warranties. Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 81 (Tex. 1977)(privity not required for liability under section 2.608 of UCC). The remote manufacturer is a "seller" within that definition under the UCC. *See* TEX. BUS. & COM. CODE ANN. § 2.103(4) (Tex. UCC)(Vernon 1968).

25. The petition may contain alternative actions, all under the DTPA, for breach of warranty, unconscionable actions, and violation of any express warranties or violation of the "laundry list." *See* TEX. BUS. & COM. CODE ANN. § 17.50(1), (2), (3) (Vernon 1987). It should allege compliance with the notice prerequisite of section 17.505. *Id.* § 17.505. It should state that the violative conduct was the producing cause of actual damages and state the types of damages claimed. *Id.* § 17.50. If the facts allow, the conduct should be alleged to have been committed "knowingly," and claim made for the penalties and attorney's fees allowed by the DTPA. *Id.* § 17.50(b)(1). Prejudgment interest on the damages in accordance with Texas law should also be claimed. If the administrative remedy before the Motor Vehicle Commission has been exhausted, a claim may also be asserted for cancellation under that statute and the DTPA. Finally, the petition should probably state that the limitation of remedies in the manufacturer's written warranty fails of its essential purpose and is inoperative. *See* TEX. BUS. & COM. CODE ANN. § 2.719 (Tex. UCC)(Vernon 1968).

26. TEX. BUS. & COM. CODE ANN. § 1.204 (Tex. UCC)(Vernon 1968)(seasonably is defined as reasonable time under UCC).

further show that he notified[27] the seller of the revocation within a reasonable time after he discovered or should have discovered the ground for revocation, and before the automobile has materially deteriorated except by reason of its own defects.[28] These findings alone may not be sufficient to permit recovery under the DTPA,[29] although a breach of warranty seems implicit in a revocation claim. To be safe, the consumer should obtain jury findings which establish a DTPA violation, either under breach of express or implied warranty,[30] unconscionability,[31] or the laundry list.[32] One way to combine revocation of acceptance findings with DTPA findings is to submit the jury questions of whether the defendant failed to complete warranty repairs in a good and workmanlike manner and whether such failure was a producing cause of actual damages. An affirmative finding on these questions will partially support a judgment for revocation of acceptance as well as one for a DTPA violation.[33] Although the DTPA expressly authorizes "restoration of consideration"[34] as a proper alternative relief for consumers, two Texas appellate courts have refused to restore the purchase price to buyers who failed to prove the elements of revocation of acceptance, but who did show a DTPA violation.[35]

On the other hand, restoration of consideration has been consistently allowed as one element of damages where the defendant's conduct violated the DTPA "laundry list" or was unconscionable, if such conduct was found to be a producing cause of the loss of the purchase price.[36] Unconscionability, as defined in the DTPA,[37] can be seen in

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27. *Id.* § 1.201(26), (27) (notification need not be in writing but best if it is).

28. *Id.* § 2.608(b) comment 6.

29. *See* Vista Chevrolet, Inc. v. Lewis, 704 S.W.2d 363, 370 (Tex. App.—Corpus Christi 1985, no writ)(in addition to revocation of acceptance jury allowed DTPA claim based on alleged laundry list violations not revocation elements).

30. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987).

31. *Id.* §§ 17.45(5), 17.50(a)(3).

32. *Id.* §§ 17.46(b)(1)-(24), 17.50(a)(1).

33. *See* Breach of the Implied Warranty of Workmanship, Part III.B.2 of this article, *infra* notes 71-75.

34. TEX. BUS. & COM. CODE ANN. § 17.50(b)(3) (Vernon 1987).

35. David McDavid Pontiac, Inc. v. Nix, 681 S.W.2d 831, 836 (Tex. App.—Dallas 1984, writ ref'd n.r.e.)(consumer must offer to return car in order to later have consideration restored); Freeman Oldsmobile-Mazda Co. v. Pinson, 580 S.W.2d 112, 114 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.)(plaintiff must plead and prove revocation of acceptance for restoration of considerations).

36. *See* Kish v. Van Note, 692 S.W.2d 463, 466 (Tex. 1985)(plaintiff awarded greatest amount of damages possible); Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 118 (Tex. 1984)(restoration of consideration possible for DTPA violations); Woo v. Great South-

many automobile transactions with serious warranty problems and should be included as an alternative and independent cause of action in plaintiff's pleadings.

Important questions to consider at this point: Should the consumer continue to drive the car while the suit is pending? Is such use inconsistent with his claim of revocation of acceptance?

In *Vista Chevrolet, Inc. v. Lewis*,[38] the court upheld jury findings allowing revocation where the new car buyer gave notice of revocation twenty months after purchase and where the vehicle had 22,000 miles at the time of the notice and 40,000 miles at the time of trial.[39] The court noted that the buyer had a security interest in the rejected vehicle and had no obligation to return it or tender the value of the mileage under Uniform Commercial Code requirements.[40] Continued limited use of the vehicle may be the most economical course for a consumer when the vehicle is financed independently of the dealer or has been purchased outright, but a risk exists that a jury will find such use inconsistent with revocation.[41]

Perhaps a better option for the consumer is to return the car to the financer or dealer after notice. This lowers the stakes of the litigation by getting the vehicle sold and crediting the foreclosure price toward the retail installment contract, without continual depreciation of the vehicle while the litigation is pending (the revocation suit often involves a counterclaim for the unpaid balance by the financer). Before returning the car, care should be taken to allow all parties a thorough inspection of the vehicle for purposes of expert testimony before returning the car.

A related question which arises during a revocation of acceptance

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western Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)(plaintiff may recover greatest damages possible).

37. TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon 1987)(unconscionability defined as act which takes advantage of lack of knowledge or results in gross disparity in value received and consideration paid).

38. 704 S.W.2d 363 (Tex. App.—Corpus Christi 1985), *rev'd in part on other grounds*, 709 S.W.2d 176 (Tex 1986).

39. *Id.* at 367.

40. *Id.* at 369-70 (section 2.711(c) of UCC provides buyer who revokes acceptance with security interest in goods and court based findings of buyer's rights on section). In fact, the plaintiff voluntarily credited her claim for reimbursement with 20 cents per mile. *Id.* The jury found $4400 as the sum of money "which would reasonably and fairly compensate defendant for the plaintiff's use and benefit of the automobile." *Id.*

41. *See* Lutz, *Section 2.608, Revocation of Acceptance of Non-Conforming Goods: The Seller's Defenses*, 13 U.C.C. L.J. 348, 349 (1981).

suit is whether the consumer should continue to make payments to the financer[42] after sending notice of revocation. Ideally, to do so is best because it eliminates the risk of a successful counterclaim by the financer if the consumer loses.[43] However, a consumer often cannot afford to pay for a non-functioning vehicle, particularly if he must "cover" with a replacement vehicle. A consumer should decide whether to proceed without making payments based on an assessment of the risks of losing the case and consequent liability on the retail installment contract held by the financer.

A return of the automobile to the financer may result in an adverse credit rating for the consumer, reflecting default, repossession, and a deficiency balance. This problem can perhaps best be forestalled in the initial notice letter in which the financer can be informed of a probable additional claim under the Texas Debt Collection Practices Act[44] if the consumer's rating is damaged unjustifiably.[45] Compensation for unjustified damages to credit rating can be a substantial addition to the consumer's recovery.[46]

3. Problems for the Plaintiff

There are several technical defenses which can be raised to the action for revocation of acceptance. If the jury fails to find that the notice of revocation was timely or finds that the consumer has continued to exact beneficial use from the vehicle where cover was available, the court may find that the remedy has been waived or barred.[47]

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42. Again, "financer" here means one connected to the dealer or manufacturer and not to the consumer. A financer under such circumstances is subject to all claims and defenses which the consumer has against the dealer or manufacturer up to the amount paid on the contract. 16 C.F.R. § 433.2 (1976)(FTC Holder-in-Due-Course Rule). If the consumer financed the vehicle independently, he will, of course, have to make the payments.

43. *See* Neily v. Arron, 724 S.W.2d 908, 914 (Tex. App.—Fort Worth 1987, no writ)(mobile home buyer denied revocation of acceptance and finance company was granted judicial foreclosure against buyer on retail installment contract).

44. TEX. REV. CIV. STAT. ANN. art. 5069-11.01 (Vernon 1987).

45. *Id.* Article 5069-11.05(g) prohibits "misrepresenting the character, extent, or amount of a debt against a consumer." Where a debtor justifiably revokes acceptance, an adverse report to a reporting agency would seem to be such a misrepresentation. The statute provides for actual damages and attorney's fees. A common law action for defamation of credit reputation may also be available.

46. *See* Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 795 (Tex. App.—Fort Worth 1986, no writ)(truck purchaser awarded $50,000 for loss of credit resulting from defendant's repossession).

47. For an excellent national survey of the ins and outs of revocation of acceptance, see

Other facts which may bar revocation are damage to the vehicle not related to the defects or failure to prove that the defects substantially impaired the value of the vehicle to the consumer.[48]

B. *Breaches of Warranties Actionable Under the DTPA*

1. Implied Warranty of Merchantability

An important alternative remedy to revocation of acceptance in the typical lemon case is the claim of breach of the implied warranty of merchantability under section 2.314 of the Texas Business and Commerce Code.[49] This cause of action addresses the basic problem of an automobile which is substandard and/or unfit for the ordinary purpose for which such vehicle is used.[50] Generally, under federal law, this warranty cannot be disclaimed in the sale of a new car.[51] The facts giving rise to the claim under the merchantability warranty are often the same as those under revocation of acceptance: The consumer keeps taking the car back for repairs and the manufacturer,

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Lutz, *Section 2.608, Revocation of Acceptance of Non-Conforming Goods: The Seller's Defenses*, 13 U.C.C. L.J. 348 (1981).

48. TEX. BUS. & COM. CODE ANN. § 2.608 (Tex. UCC)(Vernon 1968).

49. *Id.* § 2.314. Section 2.314 provides as follows:

(a) 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.

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

(1) pass without objection in the trade under the contract description; and
(2) in the case of fungible goods, are of fair average quality within the description; and
(3) are fit for the ordinary purposes for which such goods are used; and
(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(5) are adequately contained, packaged, and labeled as the agreement may require; and
(6) conform to the promises or affirmations of fact made on the container or label if any.

(c) Unless excluded or modified (Section 2.316) other implied warranties may arise from course of dealing or usage of trade.

Id.

50. *Id.*

51. 15 U.S.C. §§ 2301-2312 (1976)(provides that seller cannot disclaim implied warranties if written warranty is provided in consumer transaction); *see also* Gates v. Chrysler Corp., 397 So. 2d 1187, 1189 (Fla. Dist. Ct. App. 1981). It is curious that a disclaimer was upheld without explanation in *Mercedes-Benz of North America, Inc. v. Dickenson*, 720 S.W.2d 844, 852 (Tex. App.—Fort Worth 1986, no writ). The Magnuson-Moss Act also provides a federal cause of action for violation of state warranties, and permits consumers to recover actual damages and attorney's fees. *See* Bixby, *Judicial Interpretation of the Magnuson-Moss Warranty Act*, 22 AM. BUS. L. J. 125, 128 (1984).

through his dealer, keeps failing to correct the defects. To establish a breach, a consumer need only provide a reasonable opportunity to cure and need not continue to return the vehicle indefinitely.[52]

It is often best to include the merchantability claim in a revocation suit as a fall-back position. If the court or jury fails to find that the defects substantially impaired the value of the vehicle to the consumer or that notice of revocation was not timely sent, revocation of acceptance will not be allowed. Yet the implied warranty of merchantability may still have been breached and actual, incidental, and consequential damages produced thereby may be awarded, as well as additional damages under the DTPA.[53]

A significant problem in warranty of merchantability suits is proof of actual damages. The usual measure of actual damages in such cases is the difference between the market value of the vehicle if it had been as contracted for and its actual market value at the time and place of delivery.[54] Providing evidence of the actual market value of a new but defective vehicle is a somewhat speculative effort and one which witnesses tend to resist.

Thus, in *Town East Ford Sales, Inc. v. Gray*,[55] although both were asked, neither the plaintiff nor his expert witness testified to a market value of the defective vehicle at the time of the sale; rather each testified that the vehicle would have had no value to him if the defects had been disclosed.[56] The court of appeals found no evidence to support the jury's substantial award as to the difference in market value.[57] An identical problem was found in *Vista Chevrolet, Inc. v. Lewis*.[58]

On the other hand, *Mercedes Benz of North America v. Dickenson*,[59] illustrates how simple proof of actual damages can be if the witnesses understand the question.[60] In *Dickenson*, the vehicle owner was held

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52. *See* Chrysler Corp. v. Roberson, 619 S.W.2d 451, 460-61 (Tex. App.—Waco 1981, no writ); Sam Montgomery Oldsmobile Co. v. Johnson, 624 S.W.2d 237, 242 (Tex. App.—Houston [1st Dist.] 1981, no writ).

53. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2)(Vernon 1987).

54. TEX. BUS. & COM. CODE ANN. § 2.714(b) (Tex. UCC)(Vernon 1968).

55. 730 S.W.2d 796 (Tex. App.—Dallas 1987, no writ).

56. Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 802-03 (Tex. App.—Dallas 1987, no writ).

57. *Id.* at 803.

58. *See* Vista Chevrolet, Inc. v. Lewis, 704 S.W.2d 363, 371 (Tex. App.—Corpus Christi 1985, no writ).

59. 720 S.W.2d 844 (Tex. App.—Fort Worth 1986, no writ).

60. *Id.* at 848-50.

competent to testify that the difference in market value between what he paid for and what he got was, in light of the defects of the vehicle, $8,500.[61] The court of appeals had no trouble honoring the time-tested rule that an owner of property can testify to its market value.[62]

The competency of an owner to testify as to difference in market value is important because finding a qualified expert is not easy. Persons actively engaged in the car sales business may be very hesitant to get involved in such a suit. Virtually no one has experience in selling new cars with known substantial defects. The manufacturer's attorney can be counted on to energetically challenge the qualifications of the witness.[63] If the consumer prevails on this claim, he can probably recover, in addition to the difference in value, incidental and consequential damages, as well as other damages under the DTPA.[64]

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61. *Id.* at 850.

62. *Id.* The court cited the recent cases of *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984) and *Vista Chevrolet*, 704 S.W.2d at 371-372. *See also* Chrysler-Plymouth City, Inc. v. Guerrero, 620 S.W.2d 700, 703 (Tex. App.—San Antonio 1981, no writ). In *Mercedes Benz of North America v. Dickenson*, the exact testimony of the owner was set out:

> On the question of damages Dickenson, as owner, was asked by his attorney:
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> Q. [MR. MILLER:] If you had known the problems that the car had on April of 1982 when you bought it, do you have an opinion as to what its reasonable *market* value would have been that date with those defects?
>
> . . . .
>
> THE WITNESS: Yes, I have an opinion.
>
> Q. (By Mr. Miller) What, in your opinion, would have been the reasonable *market* value in Tarrant County, Texas of that vehicle with those defects?
>
> . . . .
>
> A. (By the Witness) Approximately $8,500 less than what I paid for it.
>
> Q. And you paid what for it?
>
> A. $30,429 on the street.
>
> Q. So that amount, less $8,500 would be your opinion of its *market* value in a defective condition?
>
> A. Yes, sir.
>
> Q. And the defects being those that you have testified to in this case?
>
> A. Yes, sir. [Emphasis added.]

Dickensen, 720 S.W.2d at 850.

63. *See* Chrysler Corp. v. Roberson, 619 S.W.2d 451, 457 (Tex. App.—Waco 1981, no writ). The court of civil appeals upheld the trial court's allowance of the testimony of a witness who "had been involved in the sales, repairs and servicing of new and used cars at various dealerships for 30 to 35 years" and who was engaged in the business of reconditioning and selling automobiles. *Id.*; *see also* Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 802 (Tex. App.—Dallas 1987, no writ)(insurance company appraiser probably qualified to testify on question of difference in market value).

64. TEX. BUS. & COM. CODE ANN. § 2.715 (Tex. UCC)(Vernon 1968)(consequential and incidental damages recoverable under code); *see also* TEX. BUS. & COM. CODE ANN. § 17.50(b) (Vernon 1987)(damage provision of DTPA).

2. Breach of the Implied Warranty of Workmanship

Texas now clearly recognizes the "implied warranty that repair or modification services of existing tangible goods or property will be performed in a good and workmanlike manner."[65] "Good and workmanlike means that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."[66]

Expert testimony is not necessary to establish breach of this warranty if the failure to properly repair is within the common knowledge of laymen.[67] This implied warranty cannot be disclaimed or waived and no limitation of remedy for its breach will apply.[68] A breach committed "knowingly" will trigger the right to additional damages, including mental anguish, allowed under the DTPA.[69]

Thus, if a court finds that the dealer or the manufacturer has failed to repair the automobile in a good and workmanlike manner, which conduct was the producing cause of actual damages to the consumer, the only remaining question will be, how much damage? This newly defined cause of action may prove to be the best Texas remedy for the lemon.

3. Breach of the Express Warranty to Repair Defective Automobile

The written warranty provided with new automobiles generally states that the manufacturer agrees to repair any defect in materials or workmanship and that the performance of repairs is the exclusive remedy under the written warranty or any implied warranty. The problem with this warranty is that the limited remedy of repair, while valid on its face, is not satisfactory if the consumer has had the same ineffective repairs numerous times.[70] This limited remedy allowed by the manufacturer fails of its essential purpose when effective repairs are not performed after reasonable opportunity to do so is given.[71] If

65. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987).

66. *Id.*

67. *Id.* at 355.

68. *Id.*

69. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987); *see also* Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 116 (Tex. 1984).

70. TEX. BUS. & COM. CODE ANN. § 2.719 (Tex. UCC)(Vernon 1968).

71. *Id.*; *see also* Mercedes Benz of N. Am. v. Dickenson, 720 S.W.2d 844, 856 (Tex.

the court finds that the remedy has failed of its essential purpose, the Texas Uniform Commercial Code provides that the other remedies allowed by the U.C.C. for breach of warranty, including all damages, are available to the consumer.[72] If the limitation of remedies is found unconscionable under the U.C.C., it will be invalidated by the court.[73] The limitation of remedies clause may also be invalid because of the DTPA provision which makes unenforceable any waiver by a consumer of the DTPA's provisions.[74]

Although Texas courts have twice rejected similar theories,[75] these cases were not well reasoned.[76] In *Dickenson*, the Fort Worth Court of Appeals upheld an implicit jury finding that the limited remedy had failed of its essential purpose.[77] The court stated:

> From the buyer's standpoint, the purpose of the limited remedy is to give the buyer goods that conform to the contract within a reasonable time after the defect is discovered . . . . [T]he limited remedy fails of its essential purpose and deprives the buyer of the substantial value of the bargain when the warrantor does not correct the defect within a reasonable time.[78]

Since breach of warranty is actionable under the DTPA,[79] an alternative DTPA cause of action is available for the new car buyer. The plaintiff must allege, prove, and obtain findings that the manufacturer has breached its express warranty to correct the defects, that the conduct was the producing cause of damages, and that the limited rem-

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App.—Fort Worth 1986, no writ)(warranty fails in essential purpose if repairs not made within reasonable time).

72. TEX. BUS. & COM. CODE ANN. § 2.719(b) (Tex. UCC)(Vernon 1968).

73. *Id.* § 2.719(c).

74. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987).

75. Henderson v. Ford Motor Co., 547 S.W.2d 663, 667-69 (Tex. Civ. App.—Amarillo 1977, no writ); Lankford v. Rogers Ford Sales, Inc., 478 S.W.2d 248, 251 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).

76. *See* Note, *Failure of the Essential Purpose of a Limited Repair Remedy Under Section 2.719 of the U.C.C.*, 32 BAYLOR L. REV. 292, 293-95 (1980); Note, *UNIFORM COMMERCIAL CODE - A Limited Remedy Fails of its Essential Purpose Only in the Case of a Negligent or Willful Repudiation of the Remedy*, 51 TEX. L. REV. 383, 386 (1973). *See generally* Peterson, *Seller's Breach of Warranty to Repair or Replace Defective Goods*, 83 COM. L.J. 543 (1978).

77. Mercedes Benz of N. Am. v. Dickenson, 720 S.W.2d 844, 854 (Tex. App.—Fort Worth 1986, no writ).

78. *Id.*

79. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987)(DTPA cause of action for breach of express and implied warranties).

edy of repairs is invalid under either section 2.719 or section 17.42 of the DTPA.[80]

4. Other Warranties

Less commonly breached warranties in new car transactions are the implied warranties of title[81] and fitness for a particular purpose.[82] Oral express warranties may be successfully disclaimed in the new car contract.[83] However, there is no dearth of cases involving these warranties as actionable under the DTPA in used car transactions.[84]

C. *Other DTPA Claims*

1. Unconscionability

Several reported Texas cases include findings that the buyer of a new vehicle was the victim of an "unconscionable action or course of action" as defined by the DTPA.[85] Evidence of conduct found to sup-

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80. The question of whether the limited remedy has failed of its essential purpose has been held to be a question for the trier of fact which should be pleaded and proved by the party seeking to invalidate the limitation. Henderson v. Ford Motor Co., 547 S.W.2d 663, 669 (Tex. Civ. App.—Amarillo 1977, no writ); *see also* Riley v. Ford Motor Co., 442 F.2d 670, 673 (5th Cir. 1971). *But see* Mercedes Benz of N. Am. v. Dickenson, 720 S.W.2d 844, 854 (Tex. App.—Fort Worth 1986, no writ).

81. TEX. BUS. & COM. CODE ANN. § 2.312(a) (Tex. UCC)(Vernon 1968).

82. *Id.* § 2.315.

83. The Magnuson-Moss Act, 15 U.S.C. §§ 2301-2312 (1976), permits disclaimer of these warranties. However, in *Mercedes Benz of North America v. Dickenson*, the court held such disclaimer language inoperative under U.C.C. principles. Mercedes Benz of N. Am. v. Dickenson, 720 S.W.2d 844, 852 (Tex. App.—Fort Worth 1986, no writ).

84. *See, e.g.*, Horta v. Tennison, 671 S.W.2d 720, 723 (Tex. App.—Houston [1st Dist.] 1984, no writ)(DTPA provides remedy for breach of warranty of title); Saenz Motors v. Big H Auto Auction, Inc., 653 S.W.2d 521, 523-25 (Tex. App.—Corpus Christi 1983)(breach of warranty of title actionable under DTPA), *aff'd*, 665 S.W.2d 756 (Tex. 1984); *see also* Chrysler-Plymouth City v. Guerrero, 620 S.W.2d 700, 704-05 (Tex. App.—San Antonio 1981, no writ); Valley Datsun v. Martinez, 578 S.W.2d 485, 490 (Tex. Civ. App.—Corpus Christi 1979, no writ). Both of these cases involve false statements by used car salesmen to the effect that the vehicle was in excellent condition, and both of which held such statements to be express warranties which were breached in violation of the DTPA.

85. *See* Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 802 (Tex. App.—Dallas 1987, no writ); Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 117 (Tex. 1984); *see also* TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon 1987). Section 17.45(5) provides:

> "Unconscionable action or course of action" means an act or practice which, to a person's detriment: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

Id.

port a finding of unconscionable action includes the refusal to rescind the purchase after repeated unsuccessful attempts to repair substantial defects[86]; the failure to perform any repair work at all on repeated visits for warranty service[87]; the failure to refund the purchase price in accordance with a money-back guarantee[88]; the failure to communicate known common problems with the type of new vehicle sold to the plaintiff[89]; the practice of having a customer return repeatedly for service rather than acknowledging a problem is irreparable[90]; and the failure of the manufacturer to provide proper replacement parts in connection with the repairs to the car.[91] Unconscionability is thus another key allegation in a lemon case, one that may avoid the technical pitfalls of the U.C.C. causes of action, and one that permits recovery of the wide range of DTPA damages without limitation.

2. Laundry List Violations

The twenty-three prohibited practices of the DTPA laundry list[92] do not easily fit the typical new car lemon situation and few cases have been decided involving such violations. The most commonly used provision is section 17.46(b)(7) which includes as a deceptive act representations "that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another."[93] Many breaches of express warranty will also constitute violations of this section, again without the technical defenses arguable in warranty cases.

3. Damages Recoverable

As discussed, a consumer may recover damages for the purchase

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86. *Town East Ford Sales,* 730 S.W.2d at 807.

87. *Id.*

88. *Luna,* 667 S.W.2d at 117.

89. *Id.*

90. *Id.*

91. Mercedes Benz of N. Am. v. Dickenson, 720 S.W.2d 844, 847 (Tex. App.—Fort Worth 1986, no writ).

92. TEX. BUS. & COM. CODE ANN. § 17.46(b)(1)-(23) (Vernon 1987).

93. *Id.* § 17.46(b)(7); *see also Mercedes Benz,* 720 S.W.2d at 847 (defendant violated section 17.46(5) and (7) by making false representations that car of certain grade). A similar provision, also commonly used, is section 17.46(b)(5), which provides "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not." TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Vernon 1987).

price if revocation of acceptance is proved,[94] or for the "difference in value" measure of the Uniform Commercial Code for breach of warranty.[95] A consumer may probably also recover incidental and consequential damages.[96] Other damages recoverable in DTPA actions include damages for personal injuries[97]; for injury to credit reputation[98]; for loss of time[99]; for lost profits[100]; for finance charges[101]; and for mental anguish if the defendant's conduct, in violation of the DTPA, was committed "knowingly," or caused physical injury.[102] It should also be noted that prejudgment interest on actual damages may be recovered.[103]

Additionally, the fact finder may award the discretionary DTPA penalty of up to twice the actual damages if defendant's conduct was committed knowingly. If defendant's violations were not committed knowingly, a consumer will still recover the automatic DTPA penalty,[104] which is enhanced in suits involving car dealers and

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94. *See* Vista Chevrolet, Inc. v. Lewis, 704 S.W.2d 363, 369-70 (Tex. App.—Corpus Christi 1985, no writ)(court allowed recovery of "deferred payment price," which included unearned interest, less 20 cents per mile).

95. *See* text, *supra*, and accompanying footnotes 53 through 62.

96. TEX. BUS. & COM. CODE ANN. § 2.719 (Tex. UCC)(Vernon 1968). Incidental and consequential damages are usually excluded by the terms of the written new car warranty, and it is probably best to obtain an additional finding that the limited remedy of repairs has failed of its essential purpose in order to open the door to such damages. *See id.* § 2.719(b). Section 2.719(b) provides in pertinent part: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title." *Id.* The burden of requiring pleadings and special issues on the failure of the warranty's essential purpose is on the seller, not the buyer. *See* Mercedes Benz of N. Am. v. Dickenson, 720 S.W.2d 844, 854 (Tex. App.—Fort Worth 1986, no writ).

97. TEX. BUS. & COM. CODE ANN. § 2.715(b)(2) (Tex. UCC)(Vernon 1968); *see also* Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 464-65 (Tex. 1980)(personal injury damages recoverable in warranty action).

98. Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 790-91 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.)(warranty action plaintiff may recover damages for credit injury), *on motion for reh.*, 711 S.W.2d 145 (Tex. App.—Fort Worth 1986).

99. Village Mobile Homes, Inc. v. Porter, 716 S.W.2d 543, 550 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

100. Superior Trucks, Inc. v. Allen, 664 S.W.2d 136, 149 (Tex. App.—Houston [1st Dist.] 1983, no writ); Head & Guild Equip. Co. v. Bond, 470 S.W.2d 909, 912 (Tex. Civ. App.—Beaumont 1971, no writ); *see also Metro Ford Truck Sales*, 709 S.W.2d at 793.

101. Chrysler Corp. v. Schuenemann, 618 S.W.2d 799, 807 (Tex. App.—Houston [1st Dist.] 1981, no writ).

102. *See* Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 117 (Tex. 1984).

103. *See* Precision Homes, Inc. v. Cooper, 671 S.W.2d 924, 930 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

104. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1)(Vernon 1987).

manufacturers.[105]

IV. CONCLUSION

The Texas consumer saddled with a defective new automobile is no longer without recourse. There are at least six ways to squeeze compensation out of a lemon, all of which involve the use of the DTPA, either singly or in combination with other statutes. These remedies overlap each other to some extent. For example, the finding that a manufacturer has failed to correct the defects within a reasonable time after notice supports at least the theories of revocation of acceptance, of breach of the implied warranties of merchantability and workmanship, of the express warranty to repair defects, and of unconscionability. As these remedies become even more clearly defined by the courts, manufacturers may find it economical to promptly repair or replace the problem vehicle, giving the consumer adequate relief for the sour position in which he was placed.

105. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.06(b) (Vernon 1979). This section adjusts the automatic DTPA penalty by the National Consumer Price Index for all motor vehicle "licensees" as defined by section 6.06(b). *Id.* As of October, 1988, the automatic penalty in suits against car dealers or manufacturers is twice the first $1,612 of actual damages. The above calculations are based on Bureau of Labor Statistics.

APPENDIX A[106]

NOTICE TO NEW MOTOR VEHICLE BUYERS

THE TEXAS "LEMON LAW" (§ 6.07, Art. 4413(36), R.C.S.), WAS ENACTED BY THE TEXAS LEGISLATURE TO AID OWNERS OF NEW MOTOR VEHICLES IN ENFORCING MANUFACTURERS' WARRANTY OBLIGATIONS. OWNERS OF SUCH VEHICLES MAY BE ENTITLED TO A REFUND OF THE PURCHASE PRICE OR THE REPLACEMENT OF THEIR VEHICLES IF THE FOLLOWING CONDITIONS ARE MET:

1. THE VEHICLE HAS BEEN THE SUBJECT OF REPAIR BY AN AUTHORIZED DEALER 4 OR MORE TIMES FOR THE SAME DEFECT, OR HAS BEEN OUT OF SERVICE FOR REPAIR WORK FOR A TOTAL OF 30 DAYS OR MORE DURING THE FIRST YEAR FOLLOWING ORIGINAL DELIVERY OF THE VEHICLE OR THE WARRANTY TERM, WHICHEVER IS EARLIER;
2. THE DEFECT SUBSTANTIALLY IMPAIRS THE USE AND MARKET VALUE OF THE VEHICLE;
3. THE MANUFACTURER OR DISTRIBUTOR HAS RECEIVED WRITTEN NOTICE OF THE DEFECT AND HAS HAD AN OPPORTUNITY TO CURE THE DEFECT; AND
4. A COMPLAINT IN WRITING HAS BEEN FILED WITH THE TEXAS MOTOR VEHICLE COMMISSION, AT THE ADDRESS SHOWN ABOVE, NOT LATER THAN 6 MONTHS FOLLOWING EITHER THE EXPIRATION OF THE WARRANTY TERM OR ONE YEAR AFTER THE ORIGINAL DELIVERY DATE OF THE VEHICLE, WHICHEVER IS EARLIER.

IF, AFTER A HEARING ON THE COMPLAINT, THE COMMISSION FINDS THAT THE REQUIREMENTS OF THE LEMON LAW ARE SATISFIED, IT MAY ORDER THE MANUFACTURER OR DISTRIBUTOR TO REPLACE THE VEHICLE OR REFUND ITS PURCHASE PRICE LESS A REASONABLE ALLOWANCE FOR THE USE OF THE VEHICLE.

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106. This notice is provided by the Texas Motor Vehicle Commission, P.O. Box 2293, Austin, Texas 78768.