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Wisconsin's Lemon Law **Observations on a Powerful** **Consumer Remedy**

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Wisconsin's Lemon Law: Observations On A Powerful Consumer Remedy

Wisconsin's Lemon Law was first enacted over thirty-five years ago, to provide consumers with better remedies than the previously "inadequate, uncertain and expensive remedies of the Uniform Commercial Code or the Magnuson-Moss Warranty Act." *Dieter v. Chrysler Corp.*, 2000 WI 45, ¶ 23, 234 Wis.2d 670, ¶ 23, 610 N.W.2d 832, ¶ 23. Prior to enactment of the Lemon Law, the only remedies for lemon purchasers were revocation of acceptance and breach of warranty under the UCC, Wis. Stat. §§ 402.602; 402.608; 402.313 and the federal Magnuson-Moss Warranty Act. 15 U.S.C. §§ 2301-2312.

The inadequacy of these pre-lemon law remedies was summarized by Justice Bablitch in *Hughes v. Chrysler Motors Corp.*, the first Wisconsin Supreme Court lemon law case:

These state and federal remedies, however, did not adequately protect the interests of the consumer in a typical lemon vehicle claim. Purchasers of defective cars had no recourse other than to repeatedly bring their cars in for repairs. *Hughes v. Chrysler Motors Corp.*, 197 Wis.2d 973, 982, 542 N.W.2d 148, 150 (1996).

More recently, the Legislature weakened the Lemon Law. Lawmakers removed the double damages provision which provided a powerful incentive for compliance (2013 Wisconsin Act 101); added additional requirements making it more difficult to file suit for heavy truck owners and consumers requesting replacement vehicles. (*Id.*). Meanwhile, consumers' ability to recover attorney fees under fee shifting statutes such as the Lemon Law were undermined. (2011 Wisconsin Act 92).

Yet, the Wisconsin Lemon Law remains a powerful, "self-enforcing consumer law that provides important rights to motor vehicle owners." *Dieter*, 2000 WI ¶ 23. It remains a useful tool for clients who experience serious problems obtaining repairs under new car warranties. This article is a basic guide to the structure of the Lemon Law and how it works.

Coverage

One of the most common questions consumers have about the Lemon Law is whether it covers used cars and whether it covers vehicles purchased in other states. It does not. The Lemon Law only applies to new motor vehicles, purchased or leased from a motor vehicle dealer in Wisconsin. Wis. Stat. §§ 218.0171(1)(b), 218.0171(1)(d). It does cover motorcycles, heavy trucks and motorhomes. It does not cover mopeds, semi-trailers, or trailers designed for use in combination with a truck or truck tractor. Wis. Stat. § 218.0171(1)(d).

Reasonable Attempt to Repair

To trigger the refund or replacement provisions, consumers must allow the manufacturer, through its authorized repair facilities, a "Reasonable Attempt to Repair." This means, prior to expiration of the warranty or within one year after first delivery, whichever is sooner:

The same nonconformity is subject to repair at least 4 times and the nonconformity continues; or

The vehicle is out of service for an aggregate of at least 30 days because of warranty nonconformities. Wis. Stat. 218.0171(1)(h).

If the vehicle does not meet the "out of service" or "four attempts to repair" criteria, Lemon Law relief may still be available. If a vehicle is presented for repair during the first year after delivery and the manufacturer fails to repair, the consumer has a valid Lemon Law claim. The Lemon Law creates an obligation to repair nonconformities occurring during the first year of ownership. *Vultaggio v. General Motors Corp.*, holds that Wis. Stat. § 218.0171(2)(a) creates an obligation of repair and that a consumer may bring suit for violation of that obligation under Wis. Stat. § 218.0171(7). See also, *Tammi v. Porsche Cars North America, Inc.*, 768 NW.2d 783, 320 Wis.2d 45 (2009); *Kletzien v. Ford Motor Co.*, 668



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F.Supp. 1225, 1228 (E.D.Wis.1987); *Vultaggio*, 145 Wis.2d 874, 890–91, 429 N.W.2d 93 (Ct.App.1988).

Nonconformity

Determining whether a condition or defect is a nonconformity can be subjective. One person's nonconformity is another person's minor annoyance or nuisance. In other cases, it is obvious, the transmission keeps going out, serious steering problems, oil leaks, stalling, failure to start and the like.

Nonconformity is "a condition or defect substantially impairing use, value or safety of a vehicle covered by an express warranty." It must be more than a minor annoyance or inconvenience. The vehicle need not be undriveable. "The nonconformity may substantially impair use, value or safety even if the vehicle is providing simple transportation." WIS-JI CIVIL 3301.

A problem with the vehicle caused by abuse, neglect, unauthorized modification or alteration cannot be a nonconformity. *Id.*

In cases involving consumer complaints about sounds, noises, creature comforts and appearance, litigation will revolve around whether the defect substantially impairs use, value or safety. In those cases, it is wise to get an expert engineer or ASE certified mechanic to diagnose the underlying and hopefully indisputably serious cause of the problem. An appraiser is often helpful, to prove the impact of the complained of phenomena on the value of the vehicle.

Manufacturer's Duty to Refund or Replace

The manufacturer's duty to refund or replace is the core of the Lemon Law's enforcement mechanism. If the nonconformity is not repaired after a reasonable attempt to repair and the consumer properly requests a replacement or refund, the manufacturer must:

Replace the motor vehicle with a comparable new motor vehicle and refund any collateral costs.

Wis. Stat. § 218.0171(2)(b)2.a.; or

Accept return of the motor vehicle and refund to the consumer and to any holder of a perfected security interest in the motor vehicle, the full purchase price plus any sales tax, finance charge, amount paid at point of sale and collateral costs, less a reasonable allowance for use. *Wis. Stat. § 218.0171(2)(b)2.b.*

Obtaining a Refund


Most consumers will be inclined to obtain a refund rather than opt for a replacement vehicle. Consumers become frustrated and exhausted by repeated problems and repair visits involving the brand new car for which they paid thousands and financed. They often don't want to see the lemon's make or model or manufacturer again. There are other practical reasons to opt for a refund. It is easier for the manufacturer to calculate and pay a refund than it is for it to locate and provide a replacement vehicle. The replacement process can take longer. If a replacement cannot be found the process can end in a refund despite the consumer's express request.

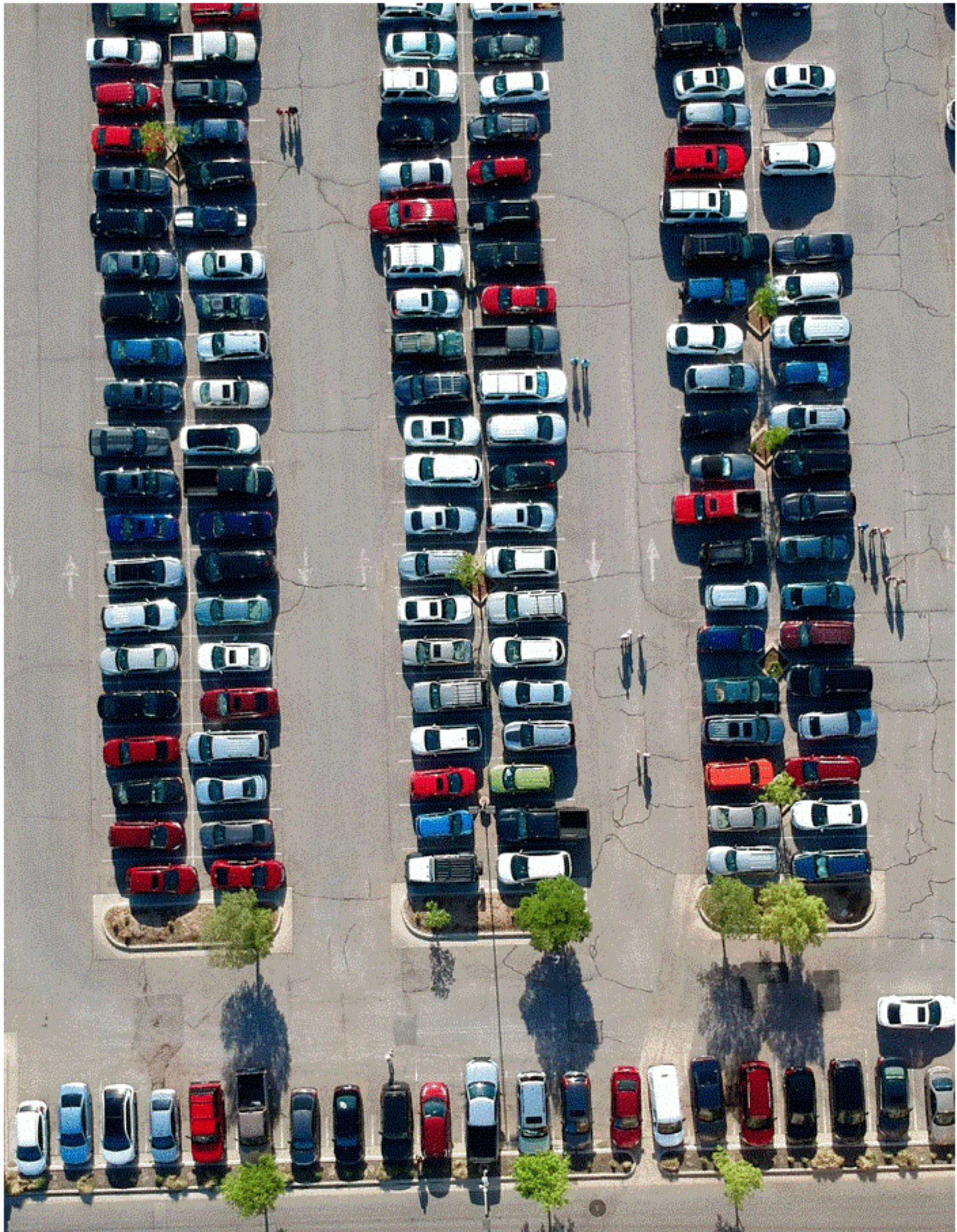
To obtain a refund, the consumer must offer to transfer title to the manufacturer and submit the information required on the Wisconsin DOT's Motor Vehicle Lemon Law Notice and Nonconformity Report form (MV2691). The manufacturer must then provide the refund within thirty days. The consumer must return the vehicle and sign over title to the manufacturer. If the vehicle is financed and the finance company or bank holds title as security, it must provide the certificate of title to the manufacturer upon satisfaction of its security interest. *Wis. Stat. § 218.0171(2)(c).*

Collateral Costs

In addition to all amounts paid at point of sale, tax title, licensing and finance charges, the consumer is entitled to collateral costs as part of the refund. "Collateral costs" are expenses incurred by a consumer in connection with repair of a nonconformity, including costs of obtaining alternative transportation. *Wis. Stat. § 218.0171(1)(a).*

Reasonable Allowance for Use

Miscalculating the reasonable allowance for use is a way manufacturers cheat consumers. The refund to the consumer is subject to a reasonable allowance for use. The maximum reasonable allowance for use formula is defined in the statute. It may not *exceed* the amount obtained by multiplying the full purchase price of the vehicle by a fraction, the denominator of which is 100,000 or, for a motorcycle, 20,000, and the numerator of which is the number of miles the vehicle was driven before the consumer first reported the nonconformity to the motor vehicle dealer. *Wis. Stat. 217.0171(2)(b)2.b.* The reasonable allowance for use is a ceiling, not a floor. *Klismet's 3 Squares, Inc. v. Navistar,* 



Inc., 2016 WI App. 42, ¶ 25, 370 Wis.2d 54, ¶ 25, 881 N.W.2d 783, ¶ 25.

Obtaining A Comparable New Motor Vehicle

Recent changes in the Lemon Law make it more cumbersome for consumers electing a comparable replacement vehicle. It is now more time consuming than obtaining a refund. If the consumer elects a comparable vehicle, the manufacturer must, within 30 days of receipt of the request, agree in writing to provide a comparable new vehicle or a full refund. The manufacturer must either provide a comparable new vehicle or refund no later than the 45th day after receiving the consumer's offer.

The manufacturer must "exercise due diligence" in locating and providing a comparable new vehicle. If it agrees to provide a comparable new vehicle, the manufacturer may provide a refund if a comparable new vehicle does not exist or cannot be delivered within the 45-day period. *Wis. Stat. § 218.0171(2)(cg)1.*

Heavy Duty Vehicles

The rules also changed for manufacturers of "heavy vehicles," defined as vehicles weighing more than 10,000 lbs. These are generally Class 3 and higher trucks, including walk-ins, box trucks, city delivery vehicles and heavy-duty pickups. Manufacturers of these trucks have been given additional time to comply with a request for a comparable truck. The manufacturer now has until the 120th day after receiving the request to either provide the comparable new vehicle or a refund. The manufacturer must "exercise due diligence" in locating and providing a comparable new vehicle. *Wis. Stat. § 218.0171(2)(cg)2.*

Leased Vehicles

Leasing vehicles is less common now. Many consumers have been getting very favorable financing arrangements on automobile loans in recent years, leading to the decline. We still see leased lemons. Rules for leased vehicles track those for purchased vehicles. But there are important differences in calculating the refund.

When providing a refund to a lessor, the manufacturer must refund to the lessor and to any finance company the current value of the written lease and refund to the consumer the amount paid under the written lease plus any sales tax and collateral costs, less a reasonable allowance for use. *Wis. Stat. § 218.0171(2)(b)3.a.*

"Current Value of the Written Lease" is defined as the total amount for which the lease obligates the consumer during the period of the lease remaining after its early termination, plus the motor vehicle dealer's early termination costs and the value of the motor vehicle at lease expiration date if the lease sets forth that value, less the motor vehicle lessor's early termination savings. *Wis. Stat. § 218.0171(2)(b)3.b.*

"Reasonable allowance for use" for leased vehicle refunds is calculated based on the total amount for which the written lease obligates the consumer. *Wis. Stat. § 218.0171(2)(b)3.c.* In lease cases, it is important to review case law relating to leased lemon vehicles. *See, Tammi*, 2009 WI 83; *Varda v. General Motors Corp.*, 2001 WI App 89, 242 Wis.2d 756, 626 N.W.2d 346.

Accrual of Lemon Law Claim

A lemon law action must be commenced within 36 months of first delivery of the motor vehicle to the consumer. A successful claim entitles the consumer to recovery of pecuniary loss, costs, disbursements, reasonable attorney fees and equitable relief. *Wis. Stat. § 218.0171(7)(a).*

Practice Pointers

Use the DOT Form. It is important to use the Wisconsin DOT's Motor Vehicle Lemon Law Notice and Nonconformity Report form (MV2691) to request a refund or replacement. If the form is not used, the manufacturer may request additional information and delay refund or replacement. *Wis. Stat. 218.0171(8)(c).* It is never a good idea to give manufacturers a chance to delay relief while you your client is stuck with a defective, potentially unsafe vehicle, likely making interest payments the whole time.

Check for a Certified ADR Procedure. If a DOT certified informal settlement procedure exists for the manufacturer, the consumer may not file suit until availing himself or herself of that procedure. *Wis. Stat., § 218.0171(3).* You can find out if there is such a certified procedure by calling the DOT's Dealer Section.

"Out of Service" Does Not Mean "In The Shop." *Vultaggio* defines "out of service" favorably for consumers. "Out of Service" includes those periods when the vehicle is not capable of rendering service as warranted, even though the vehicle may still be in possession of and driven by the consumer. *Vultaggio*, 145 Wis.2d 874, 429 N.W.2d 874 (Ct. App. 1988).

Comparable Means Similar. “Comparable new vehicle” means a similar model with similar features such as engine, transmission, brakes, seat upholstery and accessories. *Dussault v. Chrysler Corp.*, 229 Wis.2d 296, 600 N.W.2d 6 (Ct. App. 1999).

Releases Not Required to Resolve Lemon Law Claim. Manufacturers may try to get your clients to sign a release, pay for damage beyond “normal wear and tear” or sign other documents, such as a condition report, to obtain a replacement or refund. Don’t fall for it. *Chariton v. Saturn Corp.*, 2000 WI App 148, 238 Wis. 2d 27, 615 N.W.2d 209; *Herzberg v. Ford Motor Co.*, 2001 WI App 65, 242 Wis.2d 316, 626 N.W.2d 67.

Personal Injuries Not Recoverable In Lemon Law Claim. A consumer is not precluded from filing a personal injury claim with a lemon law claim, but a consumer cannot recover personal injury damages pursuant to the Lemon Law. *Gosse v. Navistar Intern. Transp. Corp.*, 2000 WI App 8, 232 Wis.2d 163, 605 N.W.2d 896.

Don’t Forget the Magnusson-Moss Act. The Magnusson-Moss Act is one of the inadequate, uncertain and expensive remedies of the pre-Lemon Law era. But Magnusson-Moss can still be the basis for suit if a Lemon Law claim is nonexistent or debatable. It is a good idea to plead Magnusson-Moss as an alternative claim in most cases. Look at it as a safety valve. However, Magnusson-Moss does not apply to commercial vehicles. See, 15 U.S.C.A. § 2301; WIS JI-CIVIL 3310.

Beware of Big Trucks. Big truck cases are more complex, have special rules and are often highly contested. The stakes are higher. When taking in a big truck case, a careful review of the law and evidence is a necessity.

Lemon Law Jury Instructions Are A Helpful Resource. The jury instructions are a good synopsis of the law and helpful in evaluating, planning and litigating these claims. See, WIS JI-CIVIL 3300-3304.

Conclusion

Enforcement of new car warranties is crucial tool in protecting consumers’ rights and improving vehicle quality, reliability and safety. As Wisconsin’s Lemon Law turns 35, it remains a strong and vital weapon in our consumer protection arsenal. Hopefully, this is an interesting and helpful guide to Wisconsin’s Lemon Law.

About the Author

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Attorney Polich is Chair of the Dane County Bar Association’s Law for the Public Committee. He is a past Chair of the Wisconsin Association for Justice Program Committee and is currently a Member of that organization’s Board of Directors. Attorney Polich is a member of the Board of the Wisconsin Justice Initiative, working to make the legal system fair and equitable to all members of our community.

Among Attorney Polich’s noteworthy client results are a 2018 wrongful death settlement in a Federal Tort Claim of \$2.3 million. He was also the lead attorney in a series of cases resulting in a total recovery of over \$4.6 million for a group of credit unions victimized by fraud and professional negligence.

Attorney Polich is a 1998 graduate of the University of Wisconsin-Madison Law School, where he received the Leon Feingold Public Interest Student Award and was a member of the Moot Court Board. Polich is a frequent lecturer at continuing legal education seminars.

In his spare time, Attorney Polich enjoys the outdoors, including running and cross-country skiing. He also enjoys reading, traveling and attending theater and music performances. 