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A Statutory Override of an “As Is” Sale: A 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: A Historical Appraisal and Analysis of the UCC, Magnuson-Moss, and State Lemon Laws

Richard J. Hunter, Jr.

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ABSTRACT

This Essay considers the common law view that the 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 Essay highlights provisions of the New Jersey Lemon Law, which provide specific vehicle and parts coverage, warranty protections, and buyer rights in case the automobile is deemed a lemon, arguing that other states should consider adopting similar legislation in the name of consumer protection. The Essay describes the essence of a traditional “as is” sale, and emphasizes the fact that the “as is” sale would not be operative in cases of consumer fraud by the seller.

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I. INTRODUCTION: IS YOUR NEW CAR A “LEMON”?

Rather recently, states began to side with consumers who purchase new automobiles that turn 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 Succinctly, 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 buyers of certain defective automobiles “the power to combat the inequities of the manufacturer’s limited warranty.”³

In an article in the *Journal of Law, Economics and Policy*, John Delacourt provides a number of historical perspectives, stating, “[t]hese 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.”⁴ Lemon laws have now been enacted in all fifty states.⁵ Generally, state lemon laws require

¹ Julian B. Bell III, *Ohio’s Lemon Law: Ohio Joins the Rest of the Nation in Waging War Against the Automobile Limited Warranty*, 57 U. CIN. L. REV. 1015, 1016 (1989).

² *Id.*

³ *Id.*; see generally CONN. GEN. STAT. ANN. § 42-179 (West 1982).

⁴ John T. Delacourt, *New Cars and Old Cars: An Examination of Anticompetitive Regulatory Barriers to Internet Auto Sales*, 3 J.L. ECON. & POL’Y 155, 162 (2007); see generally Mary B. Kegley & Janine S. Hiller, “Emerging” Lemon Car Laws, 24(1) AM. BUS. L.J. 87 (1986) (discussing the “early years” of lemon laws and analyzing remedies under the then thirty-three states that had adopted lemon laws to 1982).

⁵ See generally Louis J. Sirico, Jr., *Automobile Lemon Laws: An Annotated Bibliography*, 8 LOY. CONSUMER L. REP. 39 (1995-1996) (providing a list of articles that indicate this issue has been one of importance to consumers for nearly twenty years—dating back to the mid-1970s); *Lemon Law Summaries*, <http://www.carlemon.com/lemons.html> (last visited Aug. 27, 2015) (containing a summary of lemon law provisions for all fifty states); Nancy Barron, *State Lemon Laws*, 33 TRIAL 30 (1997) (discussing variances in scope of coverage among state lemon laws).

automobile manufacturers to provide the consumer with a refund of the purchase price or a replacement vehicle if, after a reasonable number of repair attempts, the number of which is determined by state legislature, the vehicle still fails to satisfy the terms of the manufacturer's warranty. Once the buyer has satisfied the statutory requirement of notifying the dealer, who in turn, has made a reasonable number of repair attempts, the burden shifts to the manufacturer to demonstrate that the vehicle is not a lemon.⁶ In many cases, disputes are settled through a variant of arbitration or mediation:

Consumer rights are now largely contingent on first using alternative dispute resolution structures, 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.⁷

The following sections of this Essay break down New Jersey's Lemon Law, which provides adequate protection to consumers in the automobile sales industry. The Essay encourages other states to adopt similar legislation, while providing a tour of the Law's various provisions in an effort to serve as a helpful reference to a buyer who has purchased a defective vehicle in the Garden State.⁸

II. THE NEW JERSEY LEMON LAW⁹

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 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 delivery, the

⁶ Elizabeth Vollmar, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers*, 61 WASH. U. L.Q. 1125, 1129-30 (1984).

⁷ Shauhin A. Talesh, *Institutional Political Sources of Legislative Change: Explaining How Private Organizations Influence the Form and Content of Consumer Protection Legislation*, 39 LAW & SOC. INQUIRY 973, 973 (2014).

⁸ N.J. STAT. ANN. §§ 56:12-19, 12-28, *repealed by* L.1988, ch. 123, § 22 (1988).

⁹ The discussion is abstracted and adapted from N.J. DIV. OF CONSUMER AFFAIRS, *New Car Lemon Law: Your Road to Relief* (revised 05/19/2011), <http://www.njconsumeraffairs.gov/News/Consumer%20Briefs/new-car-lemon-law.pdf>.

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

Before a buyer can file a claim under the New Jersey New Car Lemon Law, the buyer must give the manufacturer a final opportunity to repair the defect.¹⁰ (This may be seen as analogous to a seller's right to cure under the Section 2-508 of the Uniform Commercial Code).¹¹ A letter to the manufacturer must be sent by certified mail with a return receipt requested, stating that the buyer may have a claim and that the buyer is giving the manufacturer one last chance to repair the defect.¹²

The certified letter may be sent by the buyer only after there have been at least two repair attempts on the same defect, or where the car has been out of service for one or more defects for twenty cumulative days.¹³ 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

¹⁰ N.J. STAT. ANN. § 56:12-31 (West 1988).

¹¹ See U.C.C. § 2-508 (italics added) (“(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. (2) 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 Travaglio 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. 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.” Gregory M. Travaglio, *The UCC’s Three “R’s” Rejection, Revocation and (the Seller’s) Right to Cure*, 53 U. CIN. L. REV. 931, 939-940 (1984).

¹² *Gillette v. Toyota Motor Sales*, 980 F. Supp. 2d 660, 662 (D.N.J. 2013), appeal dismissed (June 9, 2014).

¹³ § 56:12-33.

generated.¹⁴ The certified letter must reach the manufacturer before the New Car Lemon Law's term of protection expires, which is two years from original date of delivery or 24,000 miles.¹⁵ The vehicle must meet both the writing and the time/mileage standards.

Following receipt of the certified letter, the manufacturer is then ordinarily accorded ten calendar days, to repair the vehicle.¹⁶ 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.¹⁷ The defect must still exist at the point of filing the Lemon Law application.¹⁸

The New Jersey 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, should a buyer win his or her case before the Lemon Law Unit, the manufacturer will be ordered to reacquire the vehicle and issue a refund. The refund may include, but is not limited to, the following:

- 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

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ N.J. DIV. OF CONSUMER AFFAIRS, *supra* note 9.

¹⁸ *Id.*

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:

Total Purchase Price x Mileage at First Repair Attempt

100,000

= Use Deduction

For example:

Vehicle Purchase Price	\$25,500
Mileage at first repair attempt	\$ 8,500

\$25,500 x 8,500
100,000

= \$2,167.50 (reasonable use allowance deduction)

\$25,500 – \$2,167.50 = \$23,332.50 (REFUND)

The buyer 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 can no longer avail him or herself of the Lemon Law program.

The buyer may also choose to participate in a manufacturer's arbitration or mediation program, commonly known as alternate dispute resolution (ADR). However, not all manufacturers offer an arbitration program under these circumstances. Generally, the buyer is not required to use the manufacturer's arbitration or mediation program, however buyers are encouraged to consult the particular state's program, as arbitration or mediation may be mandatory in some cases.¹⁹ A buyer that chooses to utilize an arbitration or mediation program, is still entitled to file a Lemon Law application, so long as he or she has not settled with the manufacturer. On a similar note, a buyer who is unsatisfied with the outcome of arbitration or mediation is not precluded from filing.

¹⁹ See e.g., FLA. STAT. § 681.1095 (2015); Larry M. Roth, *Trial De Novo and Evidentiary Presumptions Under the "Lemon Law": Analysis and Comment*, 24 NOVA L. REV. 407, 413-15 (1999) (outlining arbitration procedures under Florida's Lemon Law statute).

The procedure before the Lemon Law Unit mirrors an administrative procedure before an administrative law judge (ALJ). If the buyer goes through the procedure and is not satisfied with the administrative law judge's initial decision, the buyer is permitted to file an exception. An exception is a written explanation of the buyer's contention 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 days from the date stamped on the front of the judge's decision.

In the event that one or both parties are still not satisfied with the decision of the Director of Consumer Affairs, either the buyer, the manufacturer, or both can file an appeal in the Appellate Division of Superior Court within forty-five days of receiving the Director's Final Decision.

The New Jersey Lemon Law protects the buyer 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 buyer at the time of the final decision, plus an extra \$2,500 to cover the buyer's potential attorney fees. The bond is released to the buyer if he or she wins the appeal.

At this point, the formal procedure is nearly complete. The manufacturer must comply with the Appellate Court's order within fifteen days of the decision. A noncompliant manufacturer may be penalized \$5,000 for each day of unreasonable failure to comply.

Although New Jersey's system aims to achieve optimal consumer protection in the automobile sales industry, the Lemon Law has garnered criticism for its lack of user-friendliness. 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.*²⁰

III. USED CARS AND THE NEW JERSEY LEMON LAW: A POTENTIAL MODEL?

All is well and good for the purchaser of a new car; but what about the purchaser of a used car? It is often said, and reiterated on countless TV shows such as *The People's Court* and *Judge Judy*, that a used car carries no implied warranty and is simply sold "as is." This notion is derived from an application of selected sections of Appendix I of the Uniform Commercial Code that deal with express warranties and the implied warranties of merchantability. Can a state override the common law presumption of an "as is" sale?

The Used Car Lemon Law, adopted by the New Jersey Legislature in 1988, affords protection to those who purchase used cars from licensed New Jersey car dealerships.²¹ Private sales fall outside the scope of this law, hence a consumer who purchases a used car in a private transaction will not be protected. New Jersey's Used Car Lemon Law mandates that a licensed used car dealer provide a buyer with a warranty upon purchasing a vehicle from the dealer's inventory. The length of the warranty depends on the mileage of the particular vehicle. The law further requires the used car dealer repair any defect or malfunction, should one occur during the warranted period.

A. Which Vehicles Are Covered?

As mentioned above, not all used cars are protected by New Jersey's Used Car Lemon Law. The law covers used passenger cars, but only those purchased in a non-private sale from a licensed car dealership.²² The law applies only to cars which are seven model years old or less.²³ Moreover, the purchase price of the car must be at least \$3,000 and the vehicle's odometer at the time of purchase may not exceed 100,000 miles.²⁴

²⁰ William C. Miller, *Lemon Law*, <http://williamcmilleresq.com/practice-areas/lemon-law/> (last visited Aug. 31, 2015).

²¹ N.J. STAT. ANN. §§ 56:12-19, 12-28, *repealed by* L.1988, ch. 123, § 22 (1988).

²² *Id.* at § 56:8-67.

²³ *Id.* at § 56:8-76.

²⁴ *Id.*

B. Which Vehicles Are Not Covered?

Vehicles falling in the following categories are expressly excluded from the New Jersey Used Car Lemon Law:

- used cars sold for \$3,000 or less²⁵
- used cars that are seven model years old or greater²⁶
- salvage vehicles²⁷
- a used car with more than 100,000 miles on its odometer²⁸
- a used car not purchased from a car dealer, but rather from a private seller²⁹
- motorcycles, off-road vehicles, motor homes, and commercial vehicles³⁰
- leased vehicles³¹
- a used car still covered by a manufacturer's warranty³²
- a used car with 60,000 or more miles where the warranty has been waived and the car is sold "as is"³³
- a used car that has been modified, abused, or ill maintained by the consumer³⁴

C. Length of the Warranty

Should a vehicle meet the requirements to qualify for protection under the Used Car Lemon Law, the car dealer must provide the buyer with a warranty.³⁵ The length of the warranty will be determined

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at § 56:8-67.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at § 56:8-70.

³³ *See id.* at § 56:8-73; *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). The rule requires a window sticker which says "as is - no warranty."

³⁴ § 56:8-71.

³⁵ *Id.* at § 56:8-69.

according to the used car's mileage.³⁶ A used car with fewer than 24,000 miles will be accompanied by the earlier of a ninety day or 3,000 mile warranty.³⁷ A vehicle with greater than 24,000 miles but fewer than 60,000 will receive the earlier of a sixty day or 2,000 mile warranty.³⁸ Finally, a vehicle with a mileage ranging from 60,000 – 100,000 will be warranted for the earlier of thirty days or 1,000 miles.³⁹

Worthy of note, particularly to a New Jersey consumer likely to purchase a used car from a licensed dealer, warranties may be waived in the negotiations process provided that the vehicle's odometer reads 60,000 miles or greater and the waiver is in writing.⁴⁰

D. Which Car Parts Are Covered?

The New Jersey statute contains a number of detailed provisions. The Used Car Lemon Law places the burden on a car dealer to correct any material defects of a covered item or part of the used car as long as the defect occurred during the warranty period.⁴¹ Under the statute, a material defect is “a malfunction of a used motor vehicle, subject to the warranty, which substantially impairs its use, value or safety.”⁴²

The following items are included in the statute as parts covered by warranty:⁴³

- engine including 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);

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at § 56:8-73.

⁴¹ *Id.* at § 56:8-70.

⁴² *Id.* at § 56:8-67.

⁴³ *Id.*

- transmission automatic/transfer case including all internal lubricated parts, the torque converter, the vacuum modulator, transmission mounts, seals, and gaskets;
- transmission manual/transfer case including 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 including all internal lubricated parts, axle shafts, constant velocity joints, front hub bearings, seals, and gaskets;
- rear-wheel drive including all internal lubricated parts, propeller shafts, supports and U-joints, axle shafts and bearings, seals, and gaskets.

In the event that a buyer suspects that a used car purchased from a licensed New Jersey dealer is defective, the buyer must notify the dealer immediately and deliver the vehicle to the dealer.⁴⁴ The buyer must retain an accurate record of any repair receipts, as well as communications with the car dealer when feasible.⁴⁵ The buyer assumes responsibility for a fifty dollar deductible for each repair of each covered item.⁴⁶ Once the dealer is notified of a defective car or part thereof, and said car is delivered to the dealer, the dealer is allotted a reasonable amount of time to repair the defect.⁴⁷

Situations where vehicle defects are irreparable will often render the used car a lemon. A used car will be deemed a lemon if (1) the car dealer is unable to fix the used car after three attempts and/or (2) the car has been out of service for a total of twenty cumulative calendar days for a single problem or a series of problems.⁴⁸ To qualify as a lemon, the buyer must be able to show that the car's defect substantially impairs its use, value, or safety.⁴⁹ In the event that the vehicle cannot be repaired within twenty cumulative days during the warranty, or the dealer is unable to correct the defect by the third

⁴⁴ *Id.* at § 56:8-70.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at § 56:8-71.

⁴⁹ *Id.*

attempt, the buyer will be refunded the full purchase price of the used car less any reasonable costs for excessive wear and tear resulting from buyer's use of the vehicle.⁵⁰

E. What are the Buyer's Rights If the Car is Indeed a Lemon?

The remedies available to a buyer who purchases a used car that turns out to be a lemon are set forth by the New Jersey Division of Consumer Affairs.⁵¹ A car dealer who is unable to repair the defect, must, at the option of the buyer, replace the car when 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 as well a reasonable charge for personal use of the car).⁵²

Should a car dealer refuse to replace a defective used car, or to refund the full purchase price of the car, the buyer may be eligible for statutorily relief provided by the Used Car Lemon Law.⁵³ In such a scenario, the buyer may (1) request a Lemon Law hearing through the New Jersey Division of Consumer Affairs dispute resolution program,⁵⁴ (2) file a lawsuit in the Superior Court of New Jersey, or (3) negotiate a settlement through the dealer's informal dispute resolution program, provided the dealer has such a program.

IV. WHAT IS AN "AS IS" SALE?

Remember, however, that an "as is" sale remains an exception to UCC warranties as well as the New Jersey Used Car Lemon Law. Under the Used Car Lemon Law, an "as is" sale occurs when the dealer sells the used vehicle to the buyer without either an express or implied warranty, with the buyer bearing sole responsibility for the cost of any future repairs to the vehicle.⁵⁵ The Lemon Law Unit has

⁵⁰ *Id.*

⁵¹ N.J. DIV. OF CONSUMER AFFAIRS, USED CAR LEMON LAW: YOUR ROAD TO RELIEF 1 (2013), <https://www.carlemon.com/wp-content/uploads/2015/03/New-Jersey-Used-Car-Lemon-Law-Complaint-Form.pdf>.

⁵² § 56:8-71.

⁵³ N.J. ADMIN. CODE § 13:45A-26F.7 (2015).

⁵⁴ *See* OFF. OF CONSUMER PROTECTION, N.J. OFF. OF THE ATT'Y GEN., DIV. OF CONSUMER AFFAIRS, INSTRUCTIONS FOR COMPLETING THE APPLICATION FOR USED CAR LEMON LAW DISPUTE RESOLUTION (2014), <http://njpublicsafety.com/ca/ocp/usedcar.pdf>.

⁵⁵ § 56:8-67. It has been suggested that "as is" disclaimers are *not* subject to the requirements concerning *conspicuousness* under the UCC. *See, e.g.,* De

strongly recommended that a buyer inspect the vehicle thoroughly before entering into an “as is” purchase.”⁵⁶ As stated by David Warren, “[i]n 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.”⁵⁷ To be sure, the specter of caveat emptor continues to thrive in the used automobile sales industry. Thus, the lesson to be learned is made clear and simple—take the vehicle to your own trusted mechanic for a thorough evaluation and inspection before making the purchase.

Issues regarding the sale of used cars may also be impacted by relevant provisions of the Magnuson-Moss Warranty Act.⁵⁸ As Hester Gloston-Hilliard notes, “[t]he 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.”⁵⁹ After conducting a study on used car sales

Kalb Agresearch, Inc. v. Abbott, 391 F. Supp. 152 (N.D. Ala. 1974), *aff’d*, 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. *See* MacDonald v. Mobley, 555 S.W.2d 916 (Tex. App. 1977); *see also* J. David Reitzel, *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).

⁵⁶ *See* N.J. DIV. OF CONSUMER AFFAIRS, TIPS ON BUYING A USED CAR (2014), <http://www.njconsumeraffairs.gov/News/Consumer%20Briefs/tips-on-buying-a-used-car.pdf>.

⁵⁷ David A. Warren, *Some Help for the Uninformed Buyer*, 66 OHIO ST. L.J. 441, 454-55 (2005). This view was strongly underscored in *Pelc 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.” *Pelc*, 620 N.E.2d at 15.

⁵⁸ *See* 15 U.S.C. §§ 2301-2310 (2005); *see also* RICHARD J. HUNTER, JR. ET AL., *PRODUCTS LIABILITY* 153-57 (2012).

⁵⁹ Hester Gloston-Hilliard, *Purchases, Pitfalls, And Protections*, 33 S.U. L. REV. 227, 229 (2005) (citing MICHAEL M. GREENFIELD, *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

and warranties, the FTC concluded that deception was widespread and proposed a series of rules to regulate the practice.⁶⁰ As a result of its deliberations, the FTC promulgated the Used Motor Vehicle Trade Regulation Rule to resolve these issues.⁶¹ The rule is commonly referred to as the Federal Used Car Rule.

In an effort to protect buyers of used vehicles, the Rule sets forth the following guidelines for dealers:

- (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.⁶²

concerning potential warranty coverage. In order to accomplish this goal, the Rule provides a uniform method for disclosing warranty information on a 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 duration of coverage, the percentage of total repair costs to be paid by the dealer, and the 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.

⁶⁰ GREENFIELD, *supra* note 59, at 348.

⁶¹ See 16 C.F.R. § 455.1(b) (2015).

⁶² *Id.* at (a)-(b).

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.⁶³ 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.⁶⁴ Vehicles that are offered without an implied warranty must display "as is" in the box provided on the Buyer's Guide.⁶⁵

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.⁶⁶ The dealer is also required to provide the purchaser with a copy of the Buyer's Guide upon sale of a used car.⁶⁷ Moreover, the information contained in the Buyer's Guide must be included in the sales contract between the buyer and the dealer.⁶⁸ 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."⁶⁹

V. NO PROTECTION IN CASES OF FRAUD

The "as is" provision will not protect a dealer who has engaged in contract fraud. Used car dealers must comply with all duties and obligations relating to the formation of contracts.⁷⁰ Illustrative of this

⁶³ *Id.* at (d)(2).

⁶⁴ Gloston-Hilliard, *supra* note 59, at 229.

⁶⁵ 16 C.F.R. § 455.1(b)(1)(i).

⁶⁶ *Id.* at § 455.2(b)(1)(ii).

⁶⁷ *Id.* at § 455.3(a).

⁶⁸ *See id.* at § 455.3(b).

⁶⁹ Gloston-Hilliard, *supra* note 59, at 230 (citing 16 C.F.R. § 455.4 (2005)).

⁷⁰ ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 758 (3d ed. 2002). *See, e.g.*, 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); *Compare* Marquez v. Mercedes-Benz USA, LLC, 815 N.W.2d 314, 322 (2012) (explaining Wisconsin's particularly consumer friendly Lemon Law does not provide sanctions for consumers who bring bad-faith claims).

concept is *Morris v. Mack's Used Cars*,⁷¹ where 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." In delivering its opinion, the court noted that the parties had a duty to execute the contract in good faith,⁷² 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 otherwise impose on the transaction. The section does not appear to preclude claims on fraud or other deceptive conduct.⁷³

Professor Anzivino further elaborates on the important policy perspective in not permitting an "as is" clause to override fraudulent conduct by a 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.⁷⁴

To bring a claim for fraudulent conduct on the part of a dealer in an "as is" sale, a buyer will need to prove the basic elements of fraud.

⁷¹ 824 S.W.2d 538 (Tenn. 1992).

⁷² *Id.* at 541.

⁷³ *Id.* at 540 (citing *V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d 411, 417 (1st Cir. 1985)).

⁷⁴ Ralph C. Anzivino, *The Fraud in the Inducement Exception to the Economic Loss Doctrine*, 90 MARQ. L. REV. 922, 936-37 (2007) (footnotes omitted).

Buyer must show that (1) the dealer made a material misrepresentation, (2) the representation was false, (3) the dealer knew the representation was false or the statement was recklessly asserted without any knowledge of its truth, (4) the dealer made the false representation with the intent that it be acted on by the buyer, (5) the buyer acted in reliance on the misrepresentation, and (6) the buyer suffered injury as result.⁷⁵

Speaking specifically to New Jersey's handling of deceit in consumer transactions, 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, 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.'⁷⁶

As in a typical fraud case, the measure of damages for fraudulent actions on the part of a used car dealer in an "as is" transaction is the difference between the actual value of the vehicle and the value misrepresented by the dealer.⁷⁷

VI. CONCLUSION

It is clearly apparent that purchasing a used car may present many challenges and pitfalls. Much has changed since the rather straightforward and arguably cold-hearted days of caveat emptor, where the law protected dealers of used cars so long as no warranty protections were provided and they were sold "as is."

⁷⁵ See DAVID A. FISCHER & WILLIAM POWERS, JR., PRODUCTS LIABILITY 311 (1988); see also *DeSantis v. Wasckenhut Corp.*, 793 S.W.2d 670, 698 (Tex. 1990).

⁷⁶ William J. Diggs, *Consumer Protection in an eBay Marketplace: An Analysis of the Supreme Court of New Jersey's Radir Wheels Decision to Extend Liability Under the New Jersey Consumer Fraud Act to Individual eBay Sellers*, 40 SETON HALL L. REV. 811, 811 (2010) (citing Press Release, Governor William T. Cahill, Assembly Bill No. 2402, 1 (June 29, 1971) (on file with author)) (also citing N.J. STAT. ANN. §§ 56:8-1 to 184 (West 2001 & Supp. 2009)).

⁷⁷ See, e.g., *Obde v. Schlemeyer*, 353 P.2d 672, 676 (Wash. 1960) (containing the classic statement of the measure of damages in fraud cases).

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.

As noted by Justice Wachtler in *Jones v. Star Credit Corp.*, “[t]here 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.”⁷⁸ That time may have passed—at least with regard to used car sales. All states should join New Jersey in the movement toward an automobile sales industry that is fair and equitable to both buyers and sellers. Requiring a licensed dealer of a used automobile to provide a buyer with some basic warranty protection is a great place to start.

Oh. . . and by the way, don’t forget to take the vehicle to your own mechanic for a thorough evaluation and inspection!!!

⁷⁸ *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 264 (1969).