

745.03 NEW MOTOR VEHICLES WARRANTIES ACT¹ ("LEMON LAW") -
MANUFACTURER UNABLE TO CONFORM NEW MOTOR VEHICLE TO EXPRESS
WARRANTY.

The (*state number*) issue reads:

"Was the defendant unable, after a reasonable number of attempts, to conform the plaintiff's new motor vehicle to the express warranty covering that vehicle?"

On this issue the burden of proof is on the plaintiff.² This means that the plaintiff must prove, by the greater weight of the evidence, six things:

First, that the (*name vehicle*) was a new motor vehicle³ at the time of its [sale] [lease].

Second, that the defendant⁴ covered the (*name vehicle*) with an express warranty.⁵

Third, that not later than 24 months or 24,000 miles⁶ following original delivery of the (*name vehicle*), the (*name vehicle*) failed to conform to the express warranty because of a [defect or condition] [series of defects or conditions].⁷

Fourth, that the nonconformity resulting from the [defect or condition] [series of defects or conditions] substantially impaired the value of the (*name vehicle*) to the plaintiff.⁸

Fifth, that the plaintiff reported the nonconformity to the [defendant] [defendant's agent] [defendant's authorized dealer] before the expiration of the warranty.⁹

Sixth, that the defendant, after a reasonable number of attempts, was unable¹⁰ to conform the (*name vehicle*) to the applicable express warranty by [repairing or correcting] [arranging for the repair or correction of] the [defect or condition] [series of defects or conditions].¹¹ (You may find, but you are not compelled to do so,¹² that a reasonable number of attempts have been undertaken to conform the (*name vehicle*) to the applicable express warranty if the plaintiff notified the defendant directly in writing of the existence of the [nonconformity] [series of nonconformities] and allowed the defendant a reasonable period, not to exceed fifteen calendar days, in which to correct the [nonconformity] [series of nonconformities], and (either)

[the same nonconformity was presented for repair to the [defendant] [defendant's agent] [defendant's authorized dealer] four¹³ or more times but the same nonconformity continued to exist] (or)

[the (*name vehicle*) was out of service to the plaintiff during or while awaiting repair of the [nonconformity] [series of nonconformities] for a cumulative total of twenty or more business days during any twelve month period of the warranty].)¹⁴

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant was unable, after a reasonable number of attempts, to conform the plaintiff's new motor vehicle to the express warranty covering that vehicle, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. *New Motor Vehicles Warranties Act*, N.C. Gen. Stat. § 20-351 *et. seq.* A civil action by a consumer is authorized by N.C. Gen. Stat. § 20-351.7. Certain procedural prerequisites (e.g., ten day prior notice to manufacturer of intent to file suit) must be met.

2. The plaintiff must be a "consumer" or, in limited cases, a lessor of a vehicle to a consumer. A consumer includes (1) any purchaser of a motor vehicle, unless the purchase is for resale, (2) any lessee of a motor vehicle or (3) any other person entitled by the terms of an express warranty to enforce the obligations of that warranty. N.C. Gen. Stat. § 20-351.1(1). *See also* N.C. Gen. Stat. § 25-2-318. A lessor of a vehicle to a consumer is given a limited right to recover a portion of the "lease price" from the manufacturer. N.C. Gen. Stat. § 20-351.3(b)(2).

3. The Act only applies to "new motor vehicles". A "motor vehicle" includes any vehicle defined in N.C. Gen. Stat. § 20-4.01 when sold or leased in North Carolina, but excludes "house trailers" and vehicles with gross vehicle weights exceeding 10,000 pounds. N.C. Gen. Stat. § 20-351.1(3). For a motor vehicle to be "new," it must be one for which "a certificate of origin, as required by N.C. Gen. Stat. § 20-52.1 or a similar requirement in another state, has never been supplied to a consumer, or which a manufacturer, its agent, or its authorized dealer states in writing is being sold as a new motor vehicle." N.C. Gen. Stat. § 20-351.1(4).

4. The defendant must be a "manufacturer," *i.e.*, a "person or corporation, resident or nonresident, who manufactures or assembles or imports or distributes new motor vehicles which are sold in the State of North Carolina." N.C. Gen. Stat. § 20-351.1(2). The *New Motor Vehicles Warranties Act* does not create a cause of action against "dealers." N.C. Gen. Stat. § 20-351.9.

5. Creation of express warranties is governed by N.C. Gen. Stat. § 25-2-313. In the event the trial judge determines that this element should be supplemented to provide further instruction on how an express warranty is created, he may instruct the jury from the following, as applicable:

[Any affirmation of fact or promise made by the defendant to the plaintiff which relates to the (*name vehicle*) and became part of the basis of the bargain created an express warranty that the (*name vehicle*) would conform to the affirmation or promise.]

[Any description of the (*name vehicle*) which was made part of the basis of the bargain created an express warranty that the (*name vehicle*) would conform to the warranty.]

[Any sample or model which was made part of the basis of the bargain created an express warranty that the whole of the (*name vehicle*) would conform to the sample or model.]

(It is not necessary to the creation of an express warranty that a person use formal words such as "warrant" or "guarantee" or have a specific intention to make a warranty.

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However, an affirmation merely of the value of a new motor vehicle or a statement purporting to be merely a person's opinion or commendation of a new motor vehicle does not create a warranty.)

6. The plaintiff has the burden of showing that the vehicle was within the warranty period. However, N.C. Gen. Stat. § 20-354.4 also allows the defendant an affirmative defense that odometer tampering has occurred to show that the vehicle was not within the warranty period at the time of the non-conformity. Therefore, under the statutory scheme, the defendant may choose to rebut the plaintiff's proof that the vehicle was within the warranty period because of odometer tampering, or the defendant may choose to present odometer tampering as an affirmative defense. However, if the jury answers "Yes" to the issues presented in N.C.P.I.-Civil 745.01 or N.C.P.I.-Civil 745.03, they will have found that the plaintiff has proven that the vehicle was within the warranty period. This creates the possibility of inconsistent verdicts. However, if the defense insists upon using odometer tampering as an affirmative defense, as opposed to simply rebutting the plaintiff's burden of proof, a separate issue should be presented. See N.C.P.I.-Civil 745.05.

7. N.C. Gen. Stat. § 20-351.3(a). The statute can be read as providing that the 24,000 mileage limitation commence with delivery of the vehicle to the plaintiff as opposed to 24,000 total miles on the vehicle. N.C. Gen. Stat. § 20-351.5 (1993). Analogously, N.C. Gen. Stat. § 20-351.2(b) states "[A]ny express warranty for a new motor vehicle expressed in terms of a certain number of miles shall begin to accrue from the mileage on the odometer at the date of original delivery to the consumer."

8. N.C. Gen. Stat. § 20-351.3(a). See generally *Wright v. O'Neal Motors, Inc.*, 57 N.C. App. 49, 291 S.E.2d 165, cert. denied, 306 N.C. 393, 294 S.E.2d 221 (1982) (noting that courts determining substantial impairment should take into account the consumer's subjective needs and reaction and the objective market value, reliability, safety, and usefulness of the vehicle as it is generally used). "Lemon laws require a nonconformity to impair substantially the use or value to the consumer. North Carolina takes the latter, subjective approach, which parallels the language of the UCC This borrowing of UCC language should allow courts to use UCC case law to interpret the lemon law. Because the lemon law does not clarify what constitutes substantial impairment to the consumer, North Carolina courts will likely apply the combined subjective-objective test of substantial impairment set forth in *Wright [v. O'Neal Motors, Inc.]*." Heather Newton, Note, *When Life Gives You Lemons, Make A Lemon Law: North Carolina Adopts Automotive Warranty Legislation*, 66 N.C. L. Rev. 1080, 1090 (1988) (citations omitted).

9. N.C. Gen. Stat. § 20-351.2(a).

10. N.C. Gen. Stat. § 20-351.3(b); *Buford v. General Motors Corp.*, 339 N.C. 396, 407, 451 S.E.2d 293, 299 (1994) (remedies provided by the New Motor Vehicles Act are available to consumers when a new motor vehicle "contains defects that the manufacturer cannot repair or correct"); *Taylor v. Volvo North America Corp.*, 339 N.C. 238, 247, 451 S.E.2d 618, 623 (1994) (lessee or purchaser must show that after a reasonable number of attempts to remedy the breach of warranty, "the vehicle still failed to conform").

11. "Lemon laws generally require a manufacturer to repair or correct any 'defect' or 'nonconformity' in a new motor vehicle. If a manufacturer has four attempts to repair each

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defect, a consumer might have her car repaired a dozen times, but be unable to invoke the lemon law before statutory protection expires because no four of the repairs have been made to the same part . . . North Carolina provides for repair of a defect or condition, or for 'a series of defects or conditions,' which should avoid the situation of a dozen repairs made to various parts." Newton, 66 N.C. L. Rev. at 1089-90 (citations omitted).

12. This presumption is provided by N.C. Gen. Stat. § 20-351.5.

13. N.C. Gen. Stat. § 20-351.3. North Carolina does not require, as some states do, that more than one of the four repair attempts be made by the same dealer. Newton, 66 N.C. L. Rev. at 1088 (citations omitted).

14. N.C. Gen. Stat. § 20-351.5(2).