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BY JUDGE RONALD F. FRANK

LEMON LAW

Many UCC defenses once available in California have been abrogated or minimized as causes of action under prevailing warranty law

ORIGINALLY enacted more than 45 years ago, the Song-Beverly Consumer Warranty Act (SBA)[1] contains a wide array of provisions regarding the content and enforceability of warranties for consumer goods.[2] The consumer goods include, but are not limited to, motor vehicles, although most of the litigation and published decisions arise from so-called lemon law actions brought pursuant to the SBA. Thus, while many lawyers and judges may know of the SBA, its reach and application extend well beyond the lemon vehicle, making it important to understand its broader consumer warranty protections, remedies, and defenses.

The SBA is manifestly a consumer protection law liberally interpreted to broaden consumer rights and ease the consumer's proof of a warranty or statutory liability claim.[3] Many traditional defenses once available to retailers and manufacturers in warranty litigation brought under the Uniform Commercial Code (UCC) over the years have been abrogated or minimized in an action brought under the SBA. For example, long-standing warranty defenses, including notice of breach to the warrantor,[4] rejection or revocation within a reasonable time,[5] set-off for continuing use after discovery of a defect,[6] lack of reliance on the warranty,[7] and mitigation of damages,[8] have been all but eliminated by appellate decisions decided under the pro-consumer SBA.

Further, the SBA regulates the terms of written warranties, imposes obligations on the warrantor to make available facilities for the service and repair of its consumer goods, requires that manufacturers provide adequate replacement parts for repair, and requires certain content in work orders[9] and repair records, as well as reimbursement of costs incurred by a repairing dealer performing warranty work. The law also imposes specific

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remedies in litigation including mandatory reimbursement of costs, expert expenses, and attorney's fees in addition to discretionary civil penalties for a successful plaintiff.[10] While the SBA supplements rather than supersedes the provisions of the UCC, the same four-year statute of limitations applies to claims brought under either statute.[11]

Essential Elements of a SBA Claim

In a suit brought under the SBA, the essential elements of the plaintiff's prima facie case with respect to a consumer good that is not a motor vehicle are 1) plaintiff's purchase of a consumer good from or warranted by the defendant, 2) defendant's giving an express warranty covering the goods and its essential terms, 3) failure of the consumer good to perform as warranted, 4) plaintiff's delivery or tender of the defective or malfunctioning goods to the defendant's authorized service or repair facility, 5) defendant's failure to remedy the warranty-covered problem within a reasonable number of repair attempts, and 6) defendant's failure to replace the unrepaired goods or refund the purchase price less the value of its use by the consumer prior to discovering the defect.[12] The appellate courts have reviewed a number of cases involving consumer goods that are not vehicles, including, among others, pianos,[13] boats, and expensive audio and video components.

When the consumer good is a new motor vehicle—a passenger car, light truck, or SUV—vehicle-specific provisions of the SBA come into play and affect the plaintiff's prima facie elements. As set out in CACI jury instruction 3201 and Civil Code Section 1793.2(d)(2), these elements are 1) plaintiff's purchase or lease[14] of a new motor vehicle from or warranted by the defendant, 2) defendant's giving an express warranty covering the vehicle, and essential terms of the warranty, 3) a defect (or defects) in the vehicle covered by the warranty that substantially impaired its use, value, or safety to a reasonable person in the plaintiff's situation, 4) plaintiff's delivery or tender of the vehicle to the defendant or its authorized repair facility, 5) a failure by the defendant or its authorized repair facility to repair the vehicle to match the warranty after a reasonable number of opportunities to do so, and 6) defendant's failure promptly to replace or buy back the vehicle.[15]

The term "new motor vehicle" includes not only brand new vehicles first sold at retail but also used vehicles sold or leased with any of the original manufacturer's new motor vehicle warranty remaining.[16] Vehicles excluded from the reach of the SBA are vehicles purchased in private sales[17] and vehicles purchased and serviced outside of California.[18] On the other hand, while motorcycles and the portion of a motor home intended for human habitation are specifically excluded from the statutory definition of "new motor vehicle,"[19] if sold with an express warranty, these consumer goods are still within the ambit of the SBA.

While the SBA requires that the vehicle be purchased or leased primarily for consumer purposes—personal, family, or household use—amendments to the law provide that even a commercial vehicle sold to an entity with five or less vehicles registered to it still qualifies as consumer use.[20] This and other amendments to the statute demonstrate the legislature's commitment to expand remedies available to purchasers of consumer products and reduce defenses available to manufacturers who offer warranties for those products. Another example of the pro-consumer commitment to expand remedies is the addition of an implied warranty cause of action (i.e., that the consumer goods are merchantable) under the SBA.[21]

Some of the elements specific to new motor vehicle warranty claims under the SBA include the requirement that the repair problem must be a material one (one that substantially impairs the vehicle's use, value, or safety)[22] and the "lemon presumption"—a vehicle-specific way to prove that an SBA plaintiff has met the requirement to prove that a reasonable number of repair attempts or opportunities have been given to the defendant without a successful fix. Most lemon law cases brought to trial are ones in which one or both of these elements are in dispute or in which there is a dispute as to whether the defect is covered by the warranty's terms or is expressly excluded.

Other provisions of the SBA applicable only to new motor vehicles claims include those providing details for the remedy of replacement,[23] the requirement that a vehicle reacquired under the lemon law have its title "branded" so that the fact of and reasons for the buyback are disclosed to a future purchaser,[24] and detailed provisions for calculating a restitution offset for the motor vehicle owner or lessee's use of the vehicle prior to presenting the defect for repair.[25]

Substantiality Element

In SBA cases involving a new motor vehicle, the most commonly disputed issue of fact is whether the alleged repair issue meets the requirement of substantial impairment. The substantiality element[26] derives from Section 1793.22, subdivision (e), and its somewhat circular definition of the term "nonconformity" as "a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee."[27] The term "nonconformity" is "similar to what the average person would understand to be a 'defect,'"[28] which explains why the CACI committee used the simpler word in the burden of proof instruction, CACI 3201. In *Lundy v. Ford Motor Co.*, the Second District clarified that the substantiality requirement "injects an element of degree; not every impairment is sufficient to satisfy the statute."[29] "Whether the impairment is substantial is determined by an objective test, based on what a reasonable person would understand to be a defect… [but] applied, however, within the specific circumstances of the buyer."[30] The *Lundy* court, and then the CACI committee, borrowed factors from the UCC for the jury to consider in evaluating substantiality: the nature of the defects, the cost and length of time required for repair, whether past repair attempts have been successful, the degree to which the goods can be used while repairs are attempted, inconvenience to the buyer, and the availability and cost of alternative goods (i.e., loaner cars) pending repair.[31]

Whether an impairment is substantial or not is a question of fact for the jury.[32] Appellate decisions from other states under analogous lemon laws have made it clear that some repair problems are not sufficiently significant or material to justify the all-or-nothing remedy for a statutory violation—for example, a slight variation in paint color, a few millimeters' difference in gaps between body panels on different sides of the car, or squeaks or rattles.

Cases have gone to trial that involved operational noises from properly functioning components, odors the buyer found objectionable (one of the complaints in *Lundy* was an air conditioner odor), and a difference between the speed of the left front window versus the right front window when being raised or lowered at the same time. Some jurors found these complaints to meet the substantiality element, while others did not. Thus, even though the test is an objective one, it is evaluated from the standpoint of a reasonable buyer in the position and circumstances of the plaintiff. This makes summary judgment an unlikely tool in most cases. The practitioner needs to approach trial with a view toward placing the effect or impact of the malfunctioning component in context, with plaintiff's counsel focusing on any particular circumstances of the buyer or lessee that may make the defect more important or material, and with defense counsel seeking to diminish its significance in light of all other properly functioning components or systems.

Presentation and Repair Opportunity

Another frequently litigated element of the plaintiff's burden of proof is the obligation of the buyer or lessee to give the manufacturer or dealer a fair chance to fix the customer's complaint. *Oregel v. American Isuzu Motors, Inc.* refers to this as the "presentation" require-

MCLE Test No. 262

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1. The Song-Beverly Act as construed by appellate courts restricts or eliminates many UCC common law and statutory defenses previously asserted by defendants in consumer warranty cases.
True.
False.

2. When a consumer good that is the subject of a SBA case is not a new motor vehicle, a civil penalty is available for a willful violation of the law.
True.
False.

3. In a SBA case involving consumer goods other than a new motor vehicle, the plaintiff must prove that the defendant has an office in California.
True.
False.

4. In a SBA case involving a new motor vehicle, the added requirement of proof that the defect substantially impairs use, value, or safety can be proven without expert testimony.
True.
False.

5. In a SBA case involving a new motor vehicle, the requirement of proof that the plaintiff presented the vehicle for repair of the substantially impairing defect(s) cannot be proven unless a component part has been replaced.
True.
False.

6. The effect of a defect on driveability does not have to be considered as evidence bearing on whether a reasonable number of repair opportunities has been established in a new motor vehicle SBA case.
True.
False.

7. The lemon presumption can be used by a plaintiff in support of the pursuit of a nonwillful civil penalty.
True.
False.

8. In a SBA trial, the cause of a consumer good defect must be proven as an essential element of the prima facie case.
True.
False.

9. A breach of the implied warranty of merchantability in a SBA action can be proven even in the absence of at least two repair attempts.
True.
False.

10. In a SBA new motor vehicle case, the buyer can recover for the emotional distress an objective, reasonable new car buyer would be expected to have when the new car turns out to be a lemon.
True.
False.

11. Insurance premium fees are recoverable as incidental damages under controlling appellate authority.
True.
False.

12. Recoverable damages in either a generic consumer goods case or in a new motor vehicle case are not limited to the purchase or lease price paid (less applicable offset), but also can include both incidental and consequential damages.
True.
False.

13. Unreasonable or unauthorized use of the consumer goods or new motor vehicle is no longer a valid affirmative defense under the SBA.
True.
False.

14. Either the 4 times or 30 downtime days in the first 18,000 miles options of the lemon presumption are raised in almost every trial of a new motor vehicle lemon law case.
True.
False.

15. The implied warranty of merchantability allows a purchaser who proves the consumer goods or new motor vehicle were not fit for the ordinary purpose for which such goods are used, even if the purchaser did not give the defendant even one oppportunity to repair.
True.
False.

16. Attorney's fees are available to a successful plaintiff in a SBA case, even if the sales or lease contract had no attorney fee provision.
True.
False.

17. The existence of a manufacturer protocol for diagnosing that type of complaint is inadmissible on the issue of whether a new car buyer plaintiff has met the presentation element of the prima facie case.
True.
False.

18. In a certified lemon arbitration program proceeding, a plaintiff at his or her election may attempt to satisfy the presentation element by proof of one or more of the three lemon presumption parameters during the first 18 months or 18,000 miles.
True.
False.

19. Since civil penalties may only be awarded for willful violations in SBA cases in which the lemon presumption does not apply, the defendant is subject to that quasi-punitive sanction in an amount up to the constitutional limit permissible in true punitive damages cases.
True.
False.

20. Lack of notice of breach of warranty directly to the manufacturer, not merely to the authorized service and repair facility, remains a viable common law defense in an action under the SBA.
True.
False

MCLE Answer Sheet #262

LEMON LAW

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4.	☐ True	☐ False
5.	☐ True	☐ False
6.	☐ True	☐ False
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12.	☐ True	☐ False
13.	☐ True	☐ False
14.	☐ True	☐ False
15.	☐ True	☐ False
16.	☐ True	☐ False
17.	☐ True	☐ False
18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

ment, i.e., the number of times the plaintiff presented the vehicle to the manufacturer or dealer for repair.[33] Section 1793.2(c) imposes a duty on the buyer to deliver defective or otherwise nonconforming goods to the manufacturer's authorized service or repair facility or to give written notice of nonconformity if delivery to the repair facility is not practicable. Appellate decisions instruct that "the only affirmative step the Act imposes on consumers is to 'permit the manufacturer a reasonable *opportunity* to repair the vehicle.'"[34]

MOTOR VEHICLE manufacturers would be well advised to train their field personnel, dealer body, and customer complaint personnel about the lemon presumption.

What constitutes a reasonable opportunity? This again is an issue for the trier of fact in most instances. CACI 3202 directs juries to consider that "each time" the consumer good or new motor vehicle "was given to" the manufacturer or its authorized repair facility "for repair counts as an opportunity to repair, even if [it/they] did not do any repair work." The jury is also instructed to consider "all the circumstances surrounding each repair visit." Circumstances may include how easy or difficult it is for the repair facility to duplicate the complaint, how much detail the plaintiff gives in assisting the diagnostic process, whether the repair facility has a protocol for gathering information needed to locate or replicate the complaint, whether plaintiff (intentionally or unintentionally) omits important information bearing on diagnosis or duplicating the problem, whether the symptom is a generic one with dozens of potential causes (e.g., rough idle quality or rattle noises when driving over bumps), and whether the manufacturer has published technical service bulletins on diagnosis and repair, among others. Only opportunities to address substantially impairing defects count towards a new motor vehicle's presentation element.[35] Expert witnesses in lemon law trials will often create a repair chronology that includes a column in which the number of repair visits or days is tabulated that may qualify for repair of substantially impairing defects. A minimum of two opportunities must be given to qualify as satisfying the presentation element,[36] unless only a single attempt at repair was possible because of a subsequent malfunction and destruction of the vehicle, or when the manufacturer refuses to attempt to repair the vehicle.[37]

The lemon presumption is a shortcut for plaintiff to satisfy the presentation element. It specifies that the reasonable-number-of-repair-attempts element has been established by plaintiff's proof of any of three different parameters, all within the first 18 months or 18,000 miles of the vehicle's repair history: (a) that the same serious safety defect has been subject to repair two or more times, (b) a less serious but still substantial defect has been subject to repair four or more times, or (c) any collection of substantial defects has been subject to repair for a cumulative total of more than 30 days.[38] For parameters (a) and (b), the plaintiff also must have directly notified the manufacturer and not just the authorized repair facility of the need for repair.[39] Motor vehicle manufacturers would be well advised to train their field personnel, dealer body, and customer complaint personnel about the lemon presumption, and to include language concerning the direct notification requirement in the warranty and/or owner's manual.[40]

When the facts giving rise to the lemon presumption exist, a plaintiff cannot only argue that a presumption case is a "slam dunk" case of liability but a plaintiff also will be able to argue for a double-damages civil penalty without proof of a willful violation of the law pursuant to Civil Code Section 1794(e).[41] Note that a plaintiff who declines to use an available lemon arbitration program established for use by California buyers and lessees is barred from relying on the lemon presumption.[42] Since most manufacturers now maintain qualified alternative dispute resolution (ADR) programs to deal with lemon law situations, the lemon presumption is only relevant in civil court in those rare cases in which the litigant initially resorted to the lemon ADR program but was dissatisfied with the outcome, or in cases against the handful of manufacturers who have not established a qualifying ADR program.

Covered by Warranty and Implied Warranty of Merchantibility Claims

Part of the prima facie case is proof that the repair complaint, symptom, or problem is one covered by the applicable warranty. While it is not necessary for a plaintiff to prove the cause of the defect,[43] the usual obligation of a tort plaintiff to prove causation—a causal connection between the symptom or repair complaint and the damage claimed by the plaintiff —is contained in the element of a plaintiff's burden to prove the existence of a defect covered by the warranty. Unlike in a product liability case, a lemon law plaintiff need not prove how the defect occurred or whether the malfunctioning component or system is defective in manufacture, design, or warning. The burden is thus effectively on the manufacturer to demonstrate that an exclusion from warranty coverage applies or that the repair complaint does not fit within the words of the warranty's coverage. For example, some manufacturers have written coverage guidelines as to what constitutes an acceptable blemish or discoloration in the paint finish (e.g., the "orange peel" appearance of some models) versus a misapplication of a paint layer or production line rework that the warranty covers. In addition, CACI 3220 describes the affirmative defense of unreasonable use, which essentially means the repair problem was caused by the plaintiff rather than by a warranty-covered defect.

The SBA expressly includes claims that the consumer good, including a motor vehicle, failed to meet UCC-like tests of fitness for the ordinary or particular purpose.[44] To the consumer or his or her counsel, an implied warranty of merchantability claim often provides an easier path to a successful trial verdict than a claim for breach of express warranty because there is no need to prove substantiality or reasonable number of repair opportunities.[45] The implied warranty of merchantability provides a minimum level of quality that essentially means the product is in a safe condition substantially free of defects.[46] The elements of a prima facie case under an implied warranty of merchantability claim are contained in CACI 3210. This type of warranty cannot be waived by the buyer except in an as-is sale that is highlighted in a "conspicuous writing attached to the goods."[47]

Remedies for SBA Violations

The usual remedy sought for an SBA violation is replacement of the consumer good or a refund of the purchase price in addition to incidental and consequential damages and attorney's fees.[48] Attorney fees are awardable based on actual time expended and reasonably incurred by counsel.[49] When the product is a motor vehicle, the SBA specifies that the refund amount includes finance charges, transportation costs for which the consumer was charged at the point of sale or lease, plus tax, license, registration, and other official fees.[50] Incidental damages may be covered if actually charged, are reasonable in amount, and caused by the breach of the SBA applicable to the case (CACI 3242), including repair

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expenses paid by the consumer, as well as towing and rental costs. It is still an open question as to whether insurance premiums actually paid by the consumer are recoverable as incidental damages. If the buyer elects a replacement remedy, the manufacturer cannot be required to offer a replacement (for example, when the model is no longer made). However, if a replacement vehicle is sought it must be substantially the same as the subject vehicle, carrying the same warranties as the original product. The only amount the consumer is required to contribute to a refund or replacement is the dollar amount attributable to use of the consumer good before it was first delivered for repair, and in the case of a new motor vehicle delivered for repair ,of the problem that gave rise to the substantially impairing defect warranting the remedy. The law contains a formula for calculating the amount or offset.[51] Loss of use damages typically are not recoverable,[52] although loss of use factors into whether the defect is a substantially impairing one. Emotional distress damages are not recoverable.[53]

In a significant expansion from a common law UCC claim, the SBA also permits the successful plaintiff in breach of express warranty claims to recover a quasipunitive double-damages civil penalty for willful violations of the law. However, no civil penalty is available for a claim based solely on breach of an implied warranty.[54] Regarding new motor vehicles, a civil penalty is also available for a violation that is not willful when the circumstances of the lemon presumption are met and the manufacture fails to promptly pay restitution or offer a replacement after written notice of the need for repair. In this context, "willful" means the defendant acted intentionally, akin to the Penal Code definition.[55] "A decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision."[56] No willful civil penalty can be awarded if the defendant reasonably and in good faith believed that it had complied with its statutory obligations.[57] Among other factors the jury may consider in making a willful finding are whether the manufacturer had a written policy on the requirement to repair or replace if the parameters of the law were met,[58] whether the defendant honestly and reasonably believed the warranty did not cover the repair complaint, that it was not a substantially impairing problem, that the plaintiff did not permit a reasonable number of repair opportunities,[59] or whether the defendant's offer of a replace or refund remedy was prompt.[60]

Although the Song-Beverly Consumer Warranty Act has long been on the books, it has been amended numerous times to broaden its consumer protection policy, expand the classes of vehicles to which the lemon law applies, lessen the types of defenses that can asserted, and change the statutory text in response to appellate decisions. Appellate decisions have helped to clarify many of the issues developed during the course of hundreds of trials under the law applying the statute to specific facts. ■

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[1] Civ. Code §§1790-1795.8.

[2] "'Consumer goods' means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. 'Consumer goods' shall include new and used assistive devices sold at retail." Civ. Code §1791(a).

[3] Reveles v. Toyota by the Bay, 57 Cal. App. 4th 1139, 1158 (1997), *disapproved on another ground in* Gavaldon v. DaimlerChrysler Corp., 32 Cal. 4th 1246, 1259 (2004).

[4] Com. Code §§2313, 2607(3); *see* CACI No. 1243. In Krotin v. Porsche Cars North America, Inc., 38 Cal. App. 4th 294, 300-302 (1995), the Second District held that notification requirements from the UCC do not apply in an express warranty claim brought under the SBA, and in Mexia v. Rinker Boat Co., Inc., 174 Cal. App. 4th 1297, 1307-09 (2009), the same holding was applied to a breach of implied warranty claim under the SBA.

[5] Com. Code §§2602, 2608; Gavaldon, 32 Cal. 4th at 1263.

[6] Jiagbogu v. Mercedes-Benz USA, LLC, 118 Cal. App. 4th 1235, 1242-44 (2004). An equitable offset may still be available for deliberate vandalism by the buyer or insurance subrogation. *Id.* at 1244.

[7] Ibrahim v. Ford Motor Co., 214 Cal. App. 3d 878, 890-91 (1989).

[8] Luthaker v. General Motors LLC, 181 Cal. App. 4th 1041, 1053 (2010).

[9] §1793.1(a)(2) requires the work order to include a verbatim statement of mandatory language informing the consumer of her or his basic rights under the SBA, including the right to have the product serviced or repaired during the warranty period, an extension of the warranty period for the number of days the product is out of the buyer's hands for warranty work, and the rules for extending the warranty period if the defect arises before the warranty expires but has not yet been fixed.

[10] National R.V., Inc. v. Foreman, 34 Cal. App. 4th 1072, 1080 (1995).

[11] Comm. Code §2725; Krieger v. Nick Alexander Imports, Inc., 234 Cal. App. 4th 205, 213-24 (1991). The discovery rule of Section 2725(2) also applies to claims under the SBA, such that a cause of action under the SBA accrues not on the date of sale, but rather when the plaintiff discovers or should have discovered that the warrantor or its authorized repair facility was unable to fix the warranty-covered defects after a reasonable number of repair opportunities. *Id.* at 218.

[12] *See* CACI No. 3200; Civ. Code §1793.2(d).

[13] Music Acceptance Corp. v. Lofing, 32 Cal. App. 4th 610 (1995).

[14] Civ. Code §1795.4 specifies that the SBA applies to leased vehicles, not merely those purchased. Further, a leasing plaintiff still has standing to bring a SBA action even if she or he has returned the vehicle at the expiration of the term of the lease, because the civil remedy sections, including §1794(a), give standing to any person damaged by a violation of the statute's provisions without requiring that the plaintiff have retained possession of the vehicle. The legislature may not have fully considered the implications of including leased vehicles in the remedy provisions of the law, but trial courts have usually found appropriate adjustments to CACI when needed.

[15] CACI No. 3201; Civ. Code §1793.2(d)(2).

[16] Civ. Code §1793.22(e)(2).

[17] Dagher v. Ford Motor Co., 238 Cal. App. 4th 905 (2015).

[18] Cummins, Inc. v. Superior Ct., 36 Cal. 4th 478 (2005).

[19] Civ. Code §1793.22(e)(2). Examples of a motor home case implicating the human habitation or coach portion are Troensegaard v. Silvercrest Industries, Inc., 175 Cal. App. 3d 218 (1985) and National RV, Inc. v. Foreman, 34 Cal. App. 4th 1072 (1995).

[20] Civ. Code §1793.22(e)(2).

[21] *Id.* §1792.

[22] *Id.* §1793.2(e)(1).

[23] *See Id.* §1793.2(d)(2). The replacement vehicle must come with the same warranties that accompanied the replaced vehicle, it must be "substantially identical" to the replaced vehicle, and the manufacturer must pay for sales tax, license fees, registration and other official fees, plus repair, towing and rental vehicle costs actually incurred by the buyer. *Id.* §1793.2(d)(2)(A).

[24] *Id.* §§1793.23, 1793.24.

[25] *Id.* §1793.2(d)(2)(C).

[26] Some appellate courts have referred to the requirement that plaintiff prove the existence of a defect that substantially impairs use, value, or safety as the "nonconformity" element. *See, e.g.,* Oregel v. American Isuzu Motors, Inc., 90 Cal. App. 4th 1094, 1101 (2001). The word "nonconformity" is a vestigial reference to a time when written warranties promised that vehicles or other consumer goods be free of all defects, so the existence of a defect meant the vehicle or consumer good did not conform to the promise of the warranty. Motor vehicle manufacturers long ago changed the language of their warranties from promising a vehicle "free of defects" to ones promising to make repairs or replacements of components found to be defective in material or workmanship. The CACI elements for the plaintiff's burden of proof include the phrase "match the warranty," which is an effort to avoid use of the cumbersome statutory phrase "conform to the warranty." Many practitioners request the trial judge to modify that language to make the required proof that of "fix the defect" which would then conform to the promise of the modern warranty's language.

[27] It might be preferable to define "nonconformity" in the same way as the administrative regulations do for certified lemon arbitration programs, i.e., "any defect, malfunction, or failure to conform to the written warranty." 16 Cal. Code Regs. §3396 (l).

[28] Schreidel v. American Honda Motor Co., 34 Cal. App. 4th 1242, 1249 (1995).

[29] Lundy v. Ford Motor Co., 87 Cal. App. 4th 472, 478 (2001).

[30] *Id.* at 478.

[31] *See* CACI No. 3203.

[32] Schreidel, 34 Cal. App. 4th at 1250.

[33] Oregel v. American Isuzu Motors, Inc., 90 Cal. App. 4th 1094, 1101 (2001).

[34] Oregel, 90 Cal. App. 4th at 1103 (emphasis in original); *see* Krotin v. Porsche Cars N. Am., Inc., 38 Cal. App. 4th 294, 302-03 (1995).

[35] *See* CACI No. 3202, last clause, which makes this point clear.

[36] Silvio v. Ford Motor Co., 109 Cal. App. 4th 1205, 1208 (2003).

[37] *See* Bishop v. Hyundai Motor America, 44 Cal. App. 4th 750 (1996); Gomez v. Volkswagen of America, Inc., 169 Cal. App. 3d 921 (1985).

[38] Civ. Code §1792.22(b); CACI No. 3203.

[39] The direct notification requirement only applies if the manufacturer has conspicuously disclosed the direct notification requirement in the written warranty or owner's manual. Civ. Code §1792.22(b)(3).

[40] The language in the first two lemon presumption

parameters concerning notice made directly to the manufacturer are applicable only if "the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual," the terms of the lemon presumption including the requirement that the buyer must notify the manufacturer, not merely its dealership, directly. *See* CIV. CODE §1793.22(b)(3).

[41] The lemon presumption is a rebuttable one, such as by proof that one more repair attempt would have resulted in the vehicle being fixed, or that some of the repair visits should not be counted as reasonable opportunities such as where the plaintiff is contriving repair visits by visiting different dealerships without mentioning previous visits where the problem could not be replicated in the shop. The lemon presumption is spelled out in CACI 3203; it should not be given if the plaintiff objects to it because the presumption is for the plaintiff's benefit. *See* Jiagbogu v. Mercedes-Benz USA, LLC, 118 Cal. App. 4th 1235, 1245 (2004).

[42] CIV. CODE §1793.22(c).

[43] Oregel v. American Isuzu Motors, Inc., 90 Cal. App. 4th 1094, 1102 n.8 (2001).

[44] CIV. CODE §1791.1 gives four nonexclusive definitions of "merchantable", any or all of which may be relied upon by the plaintiff depending on the facts of a particular case. The implied warranty of fitness for a particular purpose is outlined in CIV. CODE §1792.1.

[45] Mocek v. Alfa Leisure, 114 Cal. App. 4th 402 (2003).

[46] American Suzuki Motor Corp. v. Superior Ct., 37 Cal. App. 4th 1291(1995); Isip v. Mercedes-Benz USA, LLC, 155 Cal. App. 4th 19 (2007); Brand v. Hyundai Motor Am., 226 Cal. App. 4th 1538 (2014).

[47] CIV. CODE §1792.4(a); *see id.* §1792.2.

[48] *Id.* §§1793.2(d)(2)(A) and (B). §1794(b) states that the measure of damages shall include the rights of replacement or reimbursement, plus the UCC measures of damages in COM. CODE §§2711 to 2713 applicable to goods as to which the buyer has justifiably revoked acceptance, and where the buyer has accepted the goods, the buyer may recover the cost of repair as well as the measures of damages in COM. CODE §§2714 and 2715. Reasonable attorney's fees are determined by the court pursuant to §1794(d), in a posttrial motion.

[49] CIV. CODE §1794(d); *see* Levy v. Toyota Motor Sales, U.S.A., Inc., 4 Cal. App. 4th 807 (1992).

[50] See CACI No. 3241.

[51] CIV. CODE §1793.2(d)(2)(C) details the mileage usage offset, a formula predicated on an assumed 120,000 mile useful life of a motor vehicle as the denominator and the numerator is the miles driven before the plaintiff first presented the vehicle to an authorized service and repair facility for repair of the substantially-impairing defect or collection of defects that gave rise to the claim. The resulting fraction is multiplied by the recoverable purchase price of the vehicle. In cases involving a leased vehicle, some trial courts have instructed the jury on a smaller denominator based on the contractual maximum miles under the lease, which would increase the size of the offset and reduce the recoverable net damages; other trial courts use the statutory formula.

[52] Bishop v. Hyundai Motor America, 44 Cal. App. 4th 750, 754-758 (1996).

[53] Kwan v. Mercedes-Benz of North America, Inc., 23 Cal. App. 4th 174, 187-92 (1996).

[54] CIV. CODE §1794(c).

[55] *See* Ibrahim v. Ford Motor Co., 214 Cal. App. 3d 878, 894 (1989).

[56] Kwan, 23 Cal. App. 4th at 186.

[57] *See* CACI No. 3244, which is based in large part on Kwan *supra* note 53.

[58] Jensen v. BMW of N. Am., Inc., 35 Cal. App. 4th 112, 136 (1995).

[59] Kwan, 23 Cal. App. 4th at 185.

[60] Luthaker v. General Motors LLC, 181 Cal. App. 4th 1041, 1051 (2010).