

**3303 LEMON LAW CLAIM: OUT OF SERVICE WARRANTY
NONCONFORMITY (Warranty on or after March 1, 2014)**

Question 3 asks whether (plaintiff)'s vehicle was "out of service" for an aggregate of at least 30 calendar days because of any nonconformities (within the term of the warranty) (within one year after delivery).

To answer question 3 "yes," you must find that (plaintiff) notified the manufacturer or any authorized dealer of a (the) nonconformity (ies) and gave the manufacturer or dealer an opportunity to repair the condition or defect. "Out of service," with respect to a motor vehicle, means that the vehicle is unable to be used by the consumer for the vehicle's intended purpose as a result of:

1. The vehicle is in the possession of the manufacturer, motor vehicle lessor, or any of the manufacturer's authorized motor vehicle dealers for the purpose of performing or attempting repairs to correct a nonconformity; or

2. The vehicle is in the possession of (plaintiff) and the vehicle has a nonconformity that substantially affects the use or safety of the vehicle and that has been subject to an attempt to repair on at least 2 occasions.

COMMENT

This instruction and comment were originally approved in 1999. The comment was updated in 2014 and 2016. The committee revised this instruction in 2014 following the enactment of 2013 Wisconsin Act 10 which is first effective for motor vehicles for which the express warranty commences on March 1, 2014. See Wis. Stats. § 218.0171(1)(g).

The prior version of this instruction which applies to motor vehicles for which the express warranty predates March 1, 2014 is reproduced at the end of this comment.

The Legislative Council's memo to 2013 Wisconsin Act 101 explains changes in the act to existing Lemon Law provisions, including the following:

- Retains the 30-day time period for refunds elected by the consumer, but creates a 45-day time period for comparable new motor vehicles and 120-day time period for comparable new heavy-duty vehicles. The Act defines "heavy-duty vehicle" as any motor vehicle having a gross vehicle weight rating or actual gross weight of more than 10,000 pounds.
- Requires a consumer to complete a form prescribed by the Department of Transportation (DOT) to report a nonconformity for repair or to elect a comparable new motor vehicle or refund. If the consumer does not provide all information on the form, the time period for a manufacturer to act in providing a comparable new motor vehicle or refund may not begin until the consumer provides additional information.
- Provides that, if the consumer elects a comparable new motor vehicle, no later than 30 days after receiving the DOT form, the manufacturer must agree, in writing, to provide the consumer with the comparable new motor vehicle or refund of the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale, and collateral costs.
- Provides that an action in court must be commenced within 36 months after first delivery of the motor vehicle to a consumer.
- Removes the requirement to award twice the amount of any pecuniary loss in an action in court.
- Provides that if a court finds that any party has failed to reasonably cooperate with another party's efforts to comply with obligations under the "lemon law" that hinders the other party's ability to comply with or seek recovery, the court may extend any deadlines; reduce any damages, attorney fees, or costs that may be awarded; strike pleadings; or enter default judgment against the offending party.
- Creates a definition for "out of service," which is used in the definition of "reasonable attempt to repair" under current law. In the Act, "out of service," with respect to a motor vehicle, means that the vehicle cannot be used by the consumer for the vehicle's intended purpose as a result of any of the following:
 - The vehicle is in the possession of the manufacturer, motor vehicle lessor, or any of the manufacturer's authorized motor vehicle dealers for the purpose of performing or attempting repairs to correct a nonconformity.
 - The vehicle is in the possession of the consumer and the vehicle has a nonconformity that substantially affects the use or safety of the vehicle if the nonconformity has been subject to an attempt to repair on at least two occasions.

Flexibility for Repairs. For the modification of this instruction in a case where the consumer took the vehicle to a "repair facility acting on the manufacturer's behalf," see Burzlaff v. Thoroughbred Motorsports, Inc., 758 F.3d 841 (Seventh Circ., 2014). The court held that Wis. Stat. § 218.0171 (2) (a) does not say that the vehicle is available for repair only if it is actually taken to the manufacturer or an authorized dealer. The Lemon Law protects consumers who go to a repair facility authorized by the manufacturer whether the facility is a manufacturer's authorized motor vehicle dealer or not. Burzlaff v. Thoroughbred Motorsports, Inc., *supra*.

For claims involving a warranty before March 1, 2014, the following instruction applies:

**3303 LEMON LAW CLAIM: OUT OF SERVICE WARRANTY
NONCONFORMITY (Warranty Before March 1, 2014)**

Question 3 asks whether (plaintiff)'s vehicle was "out of service" for an aggregate of at least 30 calendar days because of any nonconformities (within the term of the warranty) (within one year after delivery).

To answer question 3 "yes," you must find that (plaintiff) notified the manufacturer or any authorized dealer of a (the) nonconformity (ies) and gave the manufacturer or dealer an opportunity to repair the condition or defect. If repairs are not made and (plaintiff) thereafter continued to give them an opportunity to repair the nonconformity (ies), the 30-day clock starts running from the date of that initial failed repair opportunity. As long as there exists notice and opportunity to repair with respect to a nonconformity, the 30-day clock runs.

"Out of service" is not limited to only those periods in which the vehicle is unavailable to (plaintiff). "Out of service" includes those periods when the vehicle is not capable of rendering service as warranted due to a nonconformity, even though the vehicle may be in the possession of the consumer and may still be driven in spite of the nonconformity.