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Ford's Flare for Fighting Fees

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Since its enactment in 1987, Ohio's Lemon Law has provided that consumers "shall" recover reasonable attorney's fees when they have retained legal representation to help resolve their claims (R.C. 1345.75). These cases are often resolved with minimal time and correspondingly modest attorney's fees. Sadly, even with clear statutory language¹, one of the largest factors that increases attorney fees... is what can become a Kafkaesque fight over attorney fees.

Ford's counsel, in particular, has increasingly taken the position that attorney fees are not recoverable. In the case of *Pilz v. Ford Motor Co.*, 5th Dist. No. 2006CA00337, 2007-Ohio-2611, Ford argued that the consumer was not entitled to recover attorney fees as the case had not been formally submitted to its brand-new alternative dispute resolution mechanism ("ADR"). The court rode along with Ford in that case. Now, just six years later, and without any changes to the statute, Ford has pulled a U-turn, asserting that *because* a case has proceeded through ADR, attorney fees are now precluded.

This heads-we-win, tails-you-lose approach seeks to hold consumers to the requirements of the statute where it suits Ford (i.e. consumers might lose no matter how the ADR step proceeds) while absolving the manufacturer of its many obligations under the statute; first and foremost stepping up and remedying consumers stuck with lemons.

Essentially, Ford's position is that because an ADR mechanism exists before entering the court system, consumers do not need to have an attorney representing them pre-suit. Therefore, they should not be responsible for any attorney fees in this portion of a case, regardless of the outcome. If a consumer hires an attorney at this pre-suit stage, that consumer should do so at his or her own expense. All of this willfully ignores the reality of many cases; that Ford has denied them a lemon remedy at every step along the way; many consumers have already turned to an attorney for help; the ADR process may prove too difficult for many consumers to navigate alone; and as the ADR proceedings can later be used against the consumer in certain circumstances, an attorney ought to be present to protect their interests.

In our experience, Ford stands apart from the other manufacturers in its enthusiasm for fighting lemon claims. In another Stark County case, Ford litigated an obvious lemon for years, and once it eventually and unsurprisingly lost (the claim was actually quite straightforward), it disputed the necessity of all the time the consumer's attorneys had been forced to expend. This resulted in a scathing trial court opinion, later affirmed by the Fifth District, calling them to account to for their duplicity. As the trial court stated:

The goal of the Lemon Law is to prevent exactly what has occurred in this case. A major automobile manufacturer sells a defective vehicle to a consumer. When it becomes clear after numerous attempts to repair the vehicle, that it is a defective vehicle, the manufacturer should make the owner whole immediately. Here Ford did not step forward. They instead forced the plaintiff to retain counsel, file a suit and participate in significant litigation expense and time to finally force Ford into submitting to the Lemon Law claim. The conduct of Ford Motor Company in this case is exactly why the Lemon Law permits the recovery of legal fees on behalf of a successful litigant. The goal of the Lemon Law is to make the consumer whole, to put the consumer back where he would have been prior to purchasing the defective motor vehicle. If Ford chooses to force the Plaintiff to fully and thoroughly litigate their claim, then Plaintiff should be entitled to receive a complete and full reasonable fee in this matter.

See *Fortner v. Ford Motor Co.*, Stark C.P. No. 1996-CV-01106 (April 28, 1997), affirmed in *Fortner v. Ford Motor Co.*, (Feb. 9, 1998), 5th Dist. No. 1997CA00177, unreported, 1998 WL 172862.

Ford's current stance raises a number of concerns:

1) If their position is that attorney fees can only be awarded for post-suit representation, this obviously has the perverse result of discouraging efforts to resolve these claims outside of court.

2) If Ford maintains that attorney fees may not be awarded for any pre-suit work, while acknowledging that the statute requires parties to go through ADR before suit, it is misconstruing the statute to state that consumers will have to bear their own legal costs until the case has advanced far enough along to suit Ford. Such an interpretation handily dispenses of many legitimate lemon claims from folks who cannot afford to incur this extra cost.

3) Further, Ford is effectively guaranteeing that the consumer will always be, in the words of the statute, "dissatisfied with the decision," if he or she is being refused reasonable attorney fees at that stage, yet know that they "shall be entitled to recover reasonable attorney's fees and all court costs" if the case proceeds to court.

4) There are a number of compelling reasons why consumers may desire representation at the ADR stage. Unrepresented consumers often enter the ADR process with trepidation, as they are unfamiliar with the process and can be uncomfortable advocating their position or confronting the manufacturer. Further, the ADR decision itself can be introduced as evidence in any future court proceeding. It thus behooves a consumer to have an attorney present at this stage. Sometimes the arbitrator in these hearings is not particularly well-versed on the lemon law, and a consumer should not be expected to educate the arbitrator on a legal issue that comes up mid-hearing without representation.

So, to review: Consumers are required, by lemon law statute, to go through a manufacturer's informal dispute resolution mechanism before they can file suit. The lemon law statute clearly provides for attorney fees as part of a consumer's lemon law remedies. Ford demands that consumers comply with the ADR provision of the law pre-suit, yet it balks at being required to follow that same law itself and pay attorney fees as set forth in the statute. According to Ford, the Lemon Law statute has pre-suit requirements that a consumer must abide by, but they are exempt from abiding by the statute's requirements pre-suit themselves.

Lemon law claims should be (and usually are) straightforward affairs. The law was designed to be simple and to have "teeth" that all manufacturers should understand. *Royster v. Toyota Motor Sales, U.S.A., Inc.* (2001), 92 Ohio St.3d 327, 331. Unfortunately with Ford, beware that a seemingly straightforward Sunday drive can be riddled with detours and delays. Buckle up: make sure you have documented numerous efforts to resolve the case at every milepost. This evidence becomes a valuable roadmap for the Court in navigating the parties' fee arguments.

ⁱ The operative statutory language is as follows:

1345.75 Civil action for loss. (Effective 9-15-1999)

(A) Any consumer may bring a civil action in a court of common pleas or other court of competent jurisdiction against any manufacturer if the manufacturer fails to comply with section 1345.72 of the Revised Code and, in addition to the relief to which the consumer is entitled under that section, shall be entitled to recover reasonable attorney's fees and all court costs.

1345.77 Establishment and qualification of informal dispute resolution mechanism. (Effective 10-22-1987)

(B) If a qualified informal dispute resolution mechanism exists and the consumer receives timely notification, in writing, of the availability of the mechanism with a description of its operation and effect, the cause of action under section 1345.75 of the Revised Code may not be asserted by the consumer until after the consumer has initially resorted to the informal dispute resolution mechanism. If such a mechanism does not exist, if the consumer is dissatisfied with the decision produced by the mechanism, or if the manufacturer, its agent, or its authorized dealer fails to promptly fulfill the terms determined by the mechanism, the consumer may assert a cause of action under section 1345.75 of the Revised Code.