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Litigator of the Week: The Gibson Dunn Lawyer in D.C. Who Argued to Close a Loophole in California Lemon Law During the Capitol Riots

Tom Dupree of Gibson, Dunn & Crutcher went to his office in downtown Washington, D.C., on January 6 to handle a remote argument before the California Court of Appeal.

By Ross Todd
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Like many a lawyer in the age of the Zoom hearing, **Gibson, Dunn & Crutcher** partner **Tom Dupree** decided to head into his office to take advantage of a secure, solid internet connection when handling arguments for automaker FCA US, the maker of Chrysler and Dodge vehicles in a case involving California's lemon law.

That part we're kind of getting used to. This part, not so much: Dupree's office is in downtown Washington, D.C. His argument before the Los Angeles-based Second District Court of Appeal was on the morning of January 6 West Coast time. That meant just as Dupree was getting ready to discuss the intricacies of the Song-Beverly Consumer Warranty Act with the three-judge panel, the streets outside his office window were about as far from the atmosphere of an appellate courtroom as you can get.

Those unusual circumstances make the opinion issued by the court this week finding that FCA didn't owe the full purchase option price on the car all the more impressive of a result for Dupree, our Litigator of the Week.

Who was your client and what was at stake?

My client was FCA US, which manufactures vehicles under the Chrysler and Dodge brands. This appeal involved the measure of damages under California's lemon law. The question presented was whether a consumer who leases a car that turns out to be a lemon is entitled to be paid not just the amount of his lease payments, but also the amount of the unexercised purchase option on his car. A lot was at stake given the torrent of lemon law litigation that all vehicle manufacturers have been faced with, and we were grateful that the Court of Appeal agreed with us that restitution under the lemon law does not include money the plaintiff never spent or was obligated to spend.

Who all was on your team and how did you divvy up the work?

Courtesy Photo)

Gibson, Dunn & Crutcher partner Thomas Dupree Jr.

This was a true team effort. My Gibson Dunn colleague, former Supreme Court clerk **Matt Gregory**, was instrumental in helping us think through how best to present our case and in preparing the briefing and getting me ready for argument. **Spencer Hugret** of **Gordon Rees** and **Lisa Perrochet** of **Horvitz & Levy** brought their usual keen insight and impeccable judgment to bear in helping us frame our arguments and navigate the byzantine landscape of the lemon law. **Matt Proudfoot**, of **Gates, Gonter, Guy, Proudfoot & Muench**, did a terrific job handling the case in the trial court and was a valuable resource on appeal. Our client FCA is an industry model in taking a coordinated approach to appeals and assembling the perfect team.

For folks who aren't familiar with California's Song-Beverly Consumer Warranty Act, what are some of the peculiarities of representing a defendant in one of these cases?

Where to begin? The Song-Beverly Act is California's lemon law, and it has generated a cottage industry of litigation. Take a look at the billboards when you drive down the highway–"CAR PROBLEMS? CALL THE LEMON LAW KING!" and that sort of thing. One judge in Los Angeles recently estimated that 10% of his court's docket is taken up by lemon law cases. A big part of the reason why things have spiraled out of control is that the law has been interpreted—incorrectly in my view—to allow civil penalties and attorney fee awards that vastly exceed the purchase price of the vehicle. There's a huge incentive for lemon law lawyers to spurn reasonable settlement offers and overlitigate in pursuit of a large civil penalty

and a big fee. And when you are representing a manufacturer in one of these cases, there can be coercive pressure to settle, and to abandon arguments you believe are meritorious, for fear that you could be hit with a fee award and judgment far in excess of the purchase price of the vehicle. Few manufacturers would want to run the risk of a $500,000 award in a warranty case involving a $30,000 vehicle.

The idea that a plaintiff would be entitled to not only the amount paid on the lease under California's lemon law but also the amount of the purchase option on his car seems like it would be a stretch. How was the plaintiff trying to make that argument?

It was a stretch, but strange things can happen when you enter the world of the lemon law. The plaintiff's argument was that he needed to be paid the purchase option so that he could buy the vehicle and then transfer the title to FCA so that it could be branded as a lemon. As the Court of Appeal very diplomatically pointed out, that argument fundamentally misapprehends how the lemon law works.

I hear that you handled this remote argument before the Court of Appeal from your offices in downtown D.C. on January 6. What was the scene like outside your window while you were preparing for and handling the argument? And what sorts of things were you hearing from your family and co-counsel as the argument approached?

All appellate arguments are memorable, but this one was unique. I argued remotely on video from my office in downtown Washington D.C. the afternoon of January 6. When I arrived at work very early that morning, I could tell it would be an unusual day. Many streets were cordoned off. Our garage, typically empty during the pandemic, was packed with people headed to the rally on the ellipse a few blocks away. Things started heating up in the afternoon, and I began getting worried emails from my wife and my mother, who were watching live feeds from the Capitol, asking if it might make more sense for me to head home and argue from there. My co-counsel called to make sure I was OK. As I began presenting my argument I could see crowds of people with flags and banners massing in the street outside my window as the police moved in.

How did you keep your focus on your argument?

Like in any argument, you go into the zone. The world narrows so that it's just you and the judges asking you questions and there's nothing else. I'm sure there was a bit of a ruckus right outside my window as I was arguing, but it was only when I shut my computer and exhaled that I looked out and thought, hey, now there's something you don't see every day.

What's significant here from the car company perspective in the decision from the Court of Appeal?

The Court of Appeal's ruling pours some water of rationality on the fire of lemon law litigation. The court's decision accords with the law and with common sense by denying plaintiffs the windfalls that would result if manufacturers were required to pay the purchase option on leased lemons. This case perfectly illustrates the perverse incentives the lemon law creates. Soon after the plaintiff sued, FCA offered to settle by admitting liability, paying the plaintiff his damages, as well as a civil penalty twice the amount of his damages—and his attorneys' fees to boot. But the plaintiff rejected the offer, because he wanted an even bigger civil penalty and so he took the case all the way to trial. The exhausted trial judge wrote in his opinion that the plaintiff's litigation tactics after rejecting the settlement offer were "neither necessary nor useful." Regrettably, though, these sorts of tactics are all too common when it comes to the lemon law. You see lawyers rejecting fully compensatory settlement offers and insisting on litigation. That's not good for anyone, including consumers or the increasingly burdened judiciary that has to manage all of these cases.

What's left of the case after this decision and what comes next?

While we still have some additional proceedings in the trial court, in the bigger picture I think we will see California courts continue to awaken to the serious problems the lemon law has spawned. The way the statute has been interpreted raises serious constitutional concerns, particularly with regard to awards of civil penalties and attorneys' fees. The same due process protections that govern the imposition of punitive damages govern the imposition of civil penalties under the Song-Beverly statute. And the one-way fee-shifting provision, which provides for fee awards to the prevailing plaintiff but not to the prevailing manufacturer and results in exorbitant and disproportionate awards, raises a host of concerns itself. It's not like there's a lemon law exception to the Constitution.

What will you remember most about handling this matter?

The contrast between what was happening outside my office and what was happening in the virtual courtroom. No matter how crazy things were getting in the outside world, we were engaged in a calm and measured discussion about statutory text and legislative intent. All three judges on the panel—Justices Rubin, Baker, and Kim (who wrote the opinion)—were at the top of their game. They were well prepared, totally focused, and had great questions for both sides. I love doing what I do and arguments like this are why.

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