Summary

The Consumer Affairs Committee ("Committee") of Division 2 of the D.C. Bar supports Bill 5-288, the proposed New Automobile Consumer Protection Act of 1983. The Committee offers a number of comments intended to improve the clarity and to achieve the objectives of the Act, by (1) placing the Act in the context of other consumer legislation, (2) extending the Act to cover vehicles purchased for use in business, and to motor homes and motorcycles, (3) including important implied warranties and major safety related problems within the Act, (4) providing additional protection for low income consumers and others who buy on credit, (5) providing informal dispute settlement mechanisms as a consumer option, (6) advising consumers of their rights under the new Act, (7) protecting the interests of consumers who may purchase vehicles returned as "lemons" and (8) through other recommendations.
The Honorable John Ray  
Committee on Consumer and  
Regulatory Affairs  
Council of the District of Columbia  
District Building  
14th & E Streets, N.W.  
Washington, D.C. 20004

Dear Mr. Ray:

On behalf of the Consumer Affairs Committee of the D.C. Bar, Division 2, I am writing to comment upon Bill 5-288, the "New Automobile Consumer Protection Act of 1983." 1/

The Consumer Affairs Committee (hereinafter "Committee") believes that Bill 5-288 is a much needed step forward. It clearly will extend significant assistance to certain persons who experience repeated repair problems following their purchase of a new car. Similar "lemon laws" have been enacted in at least nineteen (19) states during the last few years, and many other states have comparable bills under consideration. The need for such legislation is clear: existing laws frequently fall short in protecting the consumer who has the misfortune to purchase a lemon.

1/ The views expressed herein represent only those of the Consumer Affairs Committee of Division 2 (Antitrust, Trade Regulation and Consumer Affairs) of the District of Columbia Bar and not those of the D.C. Bar or its Board of Governors.
Bill 5-288 is a good piece of legislation. It can and should be improved. In some instances, we believe the bill is unnecessarily restrictive, and that in several places, changes can be made easily to enhance considerably the consumer benefits which the City Council seeks to provide.

THE PLACE OF BILL 5-288 IN D.C.'S STATUTORY SCHEME

The Committee believes that the provisions of Bill 5-288 should be enrolled as part of the District's separate consumer legislation, rather than as an amendment to the Uniform Commercial Code ("UCC") as now proposed. First, as Bill 5-288 applies only to the sale of new motor vehicles and not to other consumer goods, it would be inappropriate to place such specialized legislation in the middle of a general uniform act that encompasses many kinds of consumer goods other than motor vehicles. Second, placing the new law with other D.C. laws that address consumer protection issues, such as those in Chapter 38 of Title 28, puts it where it belongs. Indeed, section (f) of Bill 5-288 provides that this legislation should in no way limit a consumer's rights or remedies under D.C. law, which of course includes the UCC, so setting the bill apart from the UCC further clarifies and enhances this objective.

The Committee believes that this bill, once enacted, should be treated like other consumer protection laws now on the books. To do so, and to enhance the ability of both consumers and the D.C. Office of Consumer and Regulatory Affairs to enforce the law, the City Council should specify that a violation of this act -- e.g., a manufacturer's refusal to honor a consumer's election of refund or replacement under section (c) -- constitutes an unfair trade practice under District of Columbia law. We therefore recommend adding a new subsection, aa, to D.C. Code § 28-3904 so that D.C.'s Consumer Protection Procedures Act would then read in pertinent part:

It shall be a violation of this chapter, whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to:

aa. violate any provision of the New Automobile Consumer Protection Act.

TO WHOM AND WHAT VEHICLES SHOULD THE LAW APPLY?

1. The Committee believes that Bill 5-288 is unnecessarily restrictive when in Section (a)(1) it excludes from protection people who buy motor vehicles for use in their business.
Indeed, people who must rely on motor vehicles in their work have perhaps the greatest need for the protections afforded by this bill. It is not difficult to see why many small D.C. businesses might fail, with an ensuing loss of jobs to the community and an increased burden on the public treasury, in the event one or more key business vehicles turn out to be lemons. The reason some states have excluded vehicles used in business from their lemon laws is because they make the law part of their state's UCC, which makes a similar distinction -- but as suggested above, Bill 5-288 properly is viewed as a separate piece of consumer protection legislation, and no one needs protection more than a small businessman or businesswoman whose livelihood can be lost if they are stuck with a lemon.

To make the change recommended above, the Committee suggests striking from Section (a)(1) the language "normally used for personal, family or household purposes, and".

2. The Committee believes Bill 5-288 should be amended so as to apply to all vehicles sold in the District, regardless of where they may be registered. Such a change may induce some consumers from nearby Maryland and Virginia to buy vehicles from D.C. dealers, since neither of those jurisdictions yet offers its residents the protections of a lemon law. From Section (a)(2), the words "and registered" should be deleted.

3. The Committee sees little reason to exclude from the benefits of this legislation consumers who purchase motorcycles or motorhomes. These vehicles are subject to the same problems, breakdowns, and repair frustrations as cars and trucks. The bill's affirmative defense for consumer abuse, and the requirement of a substantial defect, are sufficient to ensure that inclusion of these products in the bill's coverage would not be unduly burdensome to their manufacturers or dealers. Of the 19 states that have enacted lemon laws, 12 have included motorcycles in the laws' coverage and 13 have included at least some motorhomes (or parts thereof). Many purchasers of motor homes, which can be very costly, are retired couples or families who plan to use these vehicles for extended trips and visits to relatives while saving money on living accommodations. When these vehicles break down, the cost and inconvenience to their owners is prohibitive and extraordinarily frustrating. Moreover, motor home owners need more, not less, warranty protection as there is more than one company involved in manufacturing the vehicle. (There is usually a chassis manufacturer such as Chrysler or GM as well as a body manufacturer such as Winnebago). An owner is frequently deprived of use of the vehicle while
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the manufacturers resolve who is responsible for the defect. Motorcycles also should be included because owners rely on these for basic transportation as do car owners. Indeed some of the larger motorcycles cost almost as much as a small car. Since most motorcycles sold in this country are made in Japan (only Harley-Davidson still makes motorcycles in the U.S.), failure to include these vehicles under Bill 5-288 would tend to benefit Japanese companies at the expense of District of Columbia consumers.

Therefore, the Committee recommends deleting from Section (a)(2) the following words or phrases: "passenger" and "motorcycles, motor homes and".

DEFINITION OF WARRANTY

The Committee suggests deleting from Section (a)(3) the phrase "so labeled". A court should be free to determine whether any written statements by a manufacturer constitute a "warranty", whether or not the manufacturer labels those statements as a warranty. As the bill now reads, if a manufacturer labels what is traditional warranty language by a different name, such as "Promises to Repair" or "We're Here to Help" or whatever euphemism may come into fashion, the manufacturer would escape from the requirements of this bill because it cleverly avoided labelling that language as a warranty.

IMPLIED WARRANTY

Bill 5-288 omits any mention of implied warranties. The Committee believes this would be an unfortunate oversight because of the important role which implied warranties play under existing law. Including implied warranties within the scope of a lemon law, as Massachusetts and New Hampshire have done, is a painless way to enhance the coverage of the act and to preserve the viability of the law in the event manufacturers restrict their express warranties. The Committee therefore recommends a new Section (a)(4) which would state:

"Implied warranty" means an implied warranty under District of Columbia law."

To be consistent, the fourth and fifth words in Section (a)(3) "or warranty" should be deleted and an appropriate change noted in (b) and (d) of the new act, as will be covered below.
The Committee also sees no need to include in Section (a)(3) the phrase "including any terms or conditions precedent to the enforcement of obligations under that warranty." Such language adds nothing to the act and may be confusing.

NOTICE TO MANUFACTURER

The Committee believes that the bill could more clearly and neatly resolve the question of providing notice to the manufacturer. Rather than requiring the dealer to send a letter by certified mail for each repair requested by a consumer, the law might simply provide, with complete justification, that notice to an authorized dealer or other agent constitutes notice to the manufacturer.

SECOND PURCHASERS OF VEHICLES STILL UNDER WARRANTY

Section (b) should be clarified to ensure that a consumer who purchases from the original owner a vehicle still under warranty is not denied the protection of this act. The following very minor change would do the job:

(b) If a new vehicle does not conform to all applicable express and implied warranties during the first 18,000 miles of operation or during the period of two years following the date of delivery of the motor vehicle to the original purchaser, whichever is the earlier date, the consumer [etc.]

ALLOWANCE FOR CONSUMER'S USE OF MOTOR VEHICLE

Section (c) of the bill provides that when a consumer elects a refund, he or she is charged with "a reasonable allowance" for use after the initial 12,000 miles. Such a provision is equitable in our view. It would be helpful, however, to specify an upper limit for this user's fee to minimize unnecessary haggling between a manufacturer and consumer, and at the consumer's option, to eliminate the need for adducing evidence on this point during arbitration or in court. Ten cents per mile would establish a reasonable upper limit. Indeed, it exceeds the depreciation per mile of the average passenger car (various studies place the figure between 7 and 8 cents per mile). Yet manufacturers often demand twenty cents or more per mile as a reasonable figure, so the law should be both clear and fair in this regard. The Committee, therefore, recommends
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adding to Section (c) immediately following the words "less a reasonable allowance for the consumer's use of the vehicle in excess of the first 12,000 miles of operation" this phrase: "(not to exceed ten cents per mile)". Minnesota also has established ten cents per mile as a reasonable allowance in its version of a lemon law.

VEHICLES OUT OF SERVICE FOR THIRTY DAYS

Bill 5-288 contains a troublesome ambiguity in subsections (c)(1) and (d)(2), which in part address vehicles out of service for more than thirty days. As the bill now reads, a manufacturer may argue that the presumption intended by the act for a vehicle out of service for thirty days applies only when each nonconformity, defect or condition complained of substantially impairs the value of the vehicle to the consumer. The Committee understands this is not the intent of the bill, for it is the fact that the consumer has been deprived of the use of the vehicle for so long which is important. Indeed, such a provision is the only way to afford protection to consumers who are being "nibbled to death" by repeated but relatively petty problems.

To clarify the law, section (d)(2) should employ the following language:

(d)(2). Notwithstanding subsection (c)(1) above, the vehicle is out of service by reason of repair of any nonconformity, defect or condition (whether or not such problems substantially impair value) for a cumulative total of 30 or more days during either period, whichever is the earlier date.

SAFETY RELATED DEFECTS

The Committee believes that the bill should address specifically the problems faced by consumers who experience major safety related problems with their vehicles. Consider the plight of the consumer whose brakes fail while travelling at 55 mph, or whose accelerator gets stuck, or whose engine simply cuts off while traveling for no apparent reason. If a manufacturer, its agent or dealer makes an effort to repair such major safety problems, but fails to do so, and a second similar life threatening event occurs, the owner of that vehicle should be free to invoke the section (c) options immediately. He or she should not be asked to again take their lives in
their hands by driving that vehicle. In other words, as Minnesota has recognized in its lemon law, a consumer may have to put up with at least four repair attempts for most repairs, but if the problem poses a major threat to safety, the consumer should not be forced to undergo that risk a second time to give the repair personnel yet another chance. The Committee therefore suggests inclusion of a third subsection to section (d):

(d)(3) the nonconformity, defect or condition complained of involves a major safety related problem which has been subject to repair at least once by the manufacturer, its agents or authorized dealers within the period prescribed in subsection (2) of this section (d) but the nonconformity, defect or condition continues to exist.

PROTECTION FOR CONSUMERS WHO BUY ON CREDIT

Low income and other consumers who buy new cars on credit may be effectively denied protection of the proposed law. To understand why this is so requires a brief review of how the laws in this area currently work or fail to work in assisting consumers with defective motor vehicles.

An institution which loans purchase money to a consumer takes a security interest in the vehicle, enabling it to repossess and sell the vehicle if the consumer should fail to make any regular installment payment, no matter what the reason for nonpayment. In many instances, D.C. residents who purchased vehicles have desired to withhold all or some of their installment payments because of major difficulties experienced with their vehicles -- but under the present state of the law in the District of Columbia, this would only have compounded their problems. The reason is that despite the FTC's well known "Holder in Due Course Rule" (16 C.F.C. § 433), finance companies, banks and other lenders may disregard -- with impunity -- consumers' protestations about defects in their vehicles. Indeed, such institutions routinely repossess consumers' vehicles even when they have been placed on notice of serious, recurring problems with the car. The FTC's Holder in Due Course rule only helps the consumer defend against the inevitable suit for a deficiency, following sale of the repossessed car. By this time, there is a severe blemish on the consumer's credit record because of the repossession and ironically, the poor credit rating due to loss of the new vehicle frequently prevents the consumer from obtaining the substitute transportation he or she may desperately need.
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The Committee urges the City Council to address this problem in the legislation under consideration. As it now stands, Bill 5-288 provides inadequate help to the consumer who, having just given up in despair after a manufacturer's five or six unsuccessful efforts to fix a transmission, must stop making payments to the bank because those funds are needed to obtain another car. Once the consumer stops making payments, a lender surely will repossess the consumer's car, even though it plainly is a lemon under Bill 5-288. Thus, a manufacturer may well decline to offer the relief which Bill 5-288 seeks to require in section (c) of the bill -- secure in the knowledge that the consumer's lender is going to take the car away from the consumer, will ruin his or her credit and make the consumer's financial plight such that he or she is unlikely to even think about trying to afford a lawyer willing to tackle a large manufacturer or bank. Such problems are faced in disproportionate numbers by low income residents of the District of Columbia.

The solution to this dilemma is not difficult from a technical, drafting standpoint or as a matter of administrative procedure. Lenders who are secured parties under the D.C. Code would be prohibited from repossessing or selling those vehicles as to which a consumer has demonstrated, prima facie, that the vehicle in question has a defect or condition which substantially impairs the value of the vehicle to the consumer after a reasonable number of attempts at repair. A quick, preliminary hearing before an impartial but knowledgeable decision maker would serve admirably the interests of all parties involved. Administrative costs would be insignificant if the City Council assigns this responsibility to the one entity already prepared to handle it: D.C.'s Office of Consumer and Regulatory Affairs.

If the hearing officer decides the consumer has made a prima facie case, the consumer would be relieved of making further payments (or payments might be made in escrow) pending a final resolution of the question. This would have the salutary effect of making the lender pressure the manufacturer to honor the consumer's options for refund or replacement and, in any event, would facilitate serious settlement negotiations at an early date. If the consumer fails to make a prima facie case, monthly installment payments would continue with virtually no prejudice to the lender, until a final decision on the merits.

Consistent with this approach, lenders should be precluded from reporting as delinquent a consumer who is disputing his obligation to make payments on a lemon vehicle, pending the
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initial determination by the hearing officer in the D.C. Office of Consumer and Regulatory Affairs.

The Consumer Affairs Committee would be pleased to work with the City Council and its staff to draft appropriate statutory language.

SUBSTITUTION OF REPLACEMENT VEHICLE AS COLLATERAL

The Committee believes Bill 5-288 leaves open important questions about what will happen to consumers who purchased a new vehicle on credit, and who elect under section (c) to have the manufacturer replace that vehicle with a comparable one. Ordinarily, a consumer must pay any lienholders in full before transferring title. This may work real hardships on some consumers. A consumer who borrowed funds during a period of low rates would be hurt if required to pay off that favorable loan and take out another during a period where rates may be higher. Or, if the consumer has experienced any credit problems while owning the new car (possibly because of the problems brought on by defects in the car), the consumer may be unable to obtain the credit needed to finance the replacement vehicle which a manufacturer must provide. The Committee therefore recommends adoption of the following provision:

As to contracts executed following the effective date of this legislation, any consumer, at his option, may substitute the comparable motor vehicle provided by a manufacturer pursuant to section (c) as security for funds advanced by a lender and secured by the vehicle to be replaced. A lender who advanced funds secured by the replaced vehicle may not accelerate payments where the consumer seasonably complies with the lender's request that the replacement vehicle provided by the manufacturer be substituted as security for the first vehicle.

ENFORCEMENT OF CONSUMER'S OPTION FOR REFUND OR REPLACEMENT

Although section (c) of Bill 5-288 clearly intends to give consumers the right to elect replacement or refund in certain circumstances, the bill fails to provide with equal clarity that a Court may grant such relief over the objection of a manufacturer. In the case of Sadat v. American Motors Corporation, 114 Ill. App. 3d 376, 448 N.E. 2d 900 (1983),
one court addressing similar problems held that it lacked authority to so order. There is, arguably, a similar technical reading of Bill 5-288 which would defeat the intention of the act in this regard. To eliminate this concern, the Committee urges the City Council to clarify this point. One way to clarify the bill would be by inserting appropriate language in section (f):

(f) Consumers shall be entitled upon proper proof to specific enforcement of the rights and remedies provided herein without showing irreparable harm or an inadequate remedy at law. Nothing in this section shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law.

MANDATORY USE OF INFORMAL DISPUTE SETTLEMENT PROCEDURE

The Consumer Affairs Committee has serious reservations about section (g) of Bill 5-288, which provides that consumers may not take advantage of the section (c) provisions concerning refunds or replacement unless they resort to Informal Dispute Settlement Procedure mechanisms that meet FTC requirements. The Committee believes the little data available thus far provides an insufficient basis for conditioning the benefits of Bill 5-288 on use of an informal arbitration procedure. Indeed, if anything, experience seems to indicate that the individual consumer is no match for an experienced, trained manufacturer's representative who may have more than twenty to thirty years of experience and who confounds the lay people sitting on the panel with technical jargon. Moreover, manufacturers may draw upon unlimited legal resources in presenting their cases before an arbiter or panel. Consumers rarely are in a position to pay for legal or other assistance (such as independent mechanics) to assist in their presentations. Although Bill 5-288 simplifies the consumer's job in proving his or her case, it is quite likely there will be a number of times when there are disputes, for example, whether the same defect or condition has been involved in four repair attempts or whether there are major safety defects. At a minimum, therefore, the Committee believes that Bill 5-288 should provide that the consumer who prevails in arbitration is entitled to reasonable legal fees and expenses reasonably incurred in presenting his or her case within the Informal Dispute Settlement Procedure. A fair contest at this level (which such provisions would make more likely) is especially important.
because under FTC rules, the decision of the arbiter is admissible in any subsequent court case, and may well influence greatly any jury asked to review the same facts.

The Committee urges the City Council to make use of the Informal Dispute Settlement Procedure an option which the consumer is free to pursue or to bypass. One important reason is that under the FTC rules presently in force, arbiters may not award consumers consequential damages, such as loss of income due to lengthy repair efforts, hotel or car rental bills incurred when a car breaks down out of town, and so on. Since consequential damages in many cases represent a tremendous loss to the consumer, a subsequent lawsuit may be necessary anyway and Bill 5-288, providing for mandatory arbitration where consumers want to take advantage of the section (c) options, simply adds another layer of delay and expense. However, since arbitration may be an attractive route for some consumers, the Committee believes it should remain in the bill -- but as something the consumer is free to elect.

The Committee perceives a significant degree of public mistrust in those arbitration programs which are established by the auto manufacturers, even those which pass muster at the FTC. Public interest groups frequently have challenged the impartiality and objectivity of the panels and cite statistics which bring into question whether these programs really advance the interests of consumers. The Committee urges the City Council to consider establishing an alternative dispute resolution mechanism run by the agency best positioned to deliver the desired services, with the greatest likelihood of complete impartiality: D.C.'s Office of Consumer and Regulatory Affairs. Indeed, Texas has established a similar state run program despite the difficulties of serving a huge population spread out over many thousands of miles.

Additional benefits can be expected from such an arrangement, because it has been clear for some time that the D.C. government is fighting a losing battle in an effort to assist its citizens with complaints about motor vehicle problems. Complaints about automobiles always rank first or second among all consumer complaints. Beefing up the capacity of the new D.C. Office of Consumer and Regulatory Affairs to address and mediate these problems would be a major step in the right direction.

DISCLOSURE OF LEMON LAW RIGHTS

The Committee believes that motor vehicle dealers in the District of Columbia should be required to provide each
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established in the new bill. A number of states, including Minnesota, Florida and Massachusetts, have similar provisions.

PROTECTION FROM USED LEMONS

The proposed legislation does not address adequately the problems faced by purchasers of used motor vehicles which are "lemons." The D.C. Council has already extended to such purchasers the benefit of implied warranties by prohibiting the sale of used motor vehicles "as is." However, the significant number of consumers in the District who purchase used motor vehicles have been provided no set procedures for dealing with "lemons." It would be especially unfortunate if the dealer who is required to accept the return of a new motor vehicle under the proposed legislation could turn around and sell that same vehicle used, without disclosing the vehicle's repair history, thus burdening a purchaser who may have no clear right to a refund after a reasonable number of repair attempts have been made. The Council is urged to turn to the problems faced by used car buyers in greater detail after passage of the proposed legislation.

At a minimum, however, the Committee urges that the following language be added as section (1) to Bill 5-288.

"No motor vehicle dealer may dispose of a vehicle returned to it because of unsuccessful efforts to repair without first firmly attaching to the window of the vehicle a sticker which advises prospective purchasers of the repair history of the vehicle. It shall be a misdemeanor for any person other than a subsequent purchaser who obtains title to the vehicle, to remove this sticker."

Sincerely,

[Signature]

David A. Koplow
Chairperson
Consumer Affairs Committee

Mark Steinbach
Evan Johnson
David Medine
Ronald Landsman