



When the “lemon” is a yacht, pray for a washer-dryer

How do you convince jurors who are living paycheck to paycheck to sympathize with the yacht owner who got a “lemon”?

BY DAN NABEL

What good is an express warranty if your boat, car, or recreational vehicle breaks down each time you try to use it? Yes, you can obtain repairs under the warranty. And yes, those repairs may not cost you anything. But if the product is ultimately a lemon, does any of that matter?

This is the question our clients faced a few years ago, when their brand new Tiara 4300 Sovran yacht malfunctioned on four consecutive weekend trips to the Channel Islands. Lovingly named after the owner’s wife at the time of purchase, our clients’ new luxury vessel boasted a ground-breaking inboard propulsion system (IPS) with twin diesel engines developed by Volvo Penta of the Americas, and promised to provide numerous hours of family fun. Unfortunately for our clients, their new (and expensive) dream yacht soon performed so horribly that the wife refused to set foot on the yacht her husband named for her.

So our clients demanded a buyback.

Is the boat a lemon?

The boat manufacturer, Tiara Yachts, and the engine manufacturer, Volvo Penta, both refused. From their perspective, although the yacht experienced problems on each of its four extended voyages to the Channel Islands, the yacht performed perfectly on all of its shorter trips cruising around the harbor. More importantly, each time the yacht *did* have a problem, it was immediately repaired under warranty at no charge. Finally,

there were no “recurring” part problems. Each breakdown was caused by a different malfunctioning part that was promptly fixed or replaced.

Our clients believed the yacht was a lemon because it broke down each time they tried to take a trip to the Channel Islands (the main reason they purchased the boat). But the manufacturers believed they had responded properly by promptly complying with the express warranty. After the manufacturers rejected our clients’ demand that they buy back the boat, our clients were left with little choice but to file a lawsuit. And that’s when things got even worse for our clients.

Prior to trial, the manufacturers’ lawyers and expert witnesses took the yacht for a two hour “sea trial,” where (*of course*) the yacht performed perfectly. An even bigger problem, however, turned out to be the jury. When the potential panel of Ventura County jurors entered the court room, the judge asked, “How many of you have an *extreme* financial hardship?” After 85 percent of the room raised their hands, I thought to myself, perhaps the judge should have asked, “Who doesn’t?” Thus, on the eve of trial, our yacht-owning clients were faced with an express warranty that the manufacturers had fulfilled – and a room full of potential jurors living paycheck to paycheck.

Under warranty?

How do you persuade a group of modest-earning people in tough economic times to relate to owners of a

\$650,000 yacht that was repaired by the manufacturers at no charge whenever it had a problem, complying to the letter with the express written warranty?

Our first job was to educate the jury about the fact that the “Lemon Law,” a/k/a California’s Song-Beverly Consumer Warranty Act, doesn’t just apply to boats and cars. It applies to *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.” That includes washing machines, televisions, dishwashers, microwaves and even toasters. Almost anyone on a jury – no matter what their economic status – can relate to these items.

In our clients’ case, any potential juror with a boat or car-related problem was immediately removed from the jury by the manufacturers using peremptory challenges. But this still left several jurors who had experienced problems with smaller consumer goods – including one gentleman who had problems with his new washing machine. With these jurors empanelled, we attempted to build a group consensus during *voir dire* that if *any* consumer good continuously breaks down, the manufacturer should, at a certain point, replace it. For example, if your brand new washing machine keeps breaking down and flooding water into your residence, do you really care if it’s a different part that breaks each time, or that it is “repaired” each time under warranty? No! After your carpet (and cats) get wet three or four times in a row, you



just want your money back so you can buy a new machine that *works*.

Second, because the manufacturers in this case fully complied with their express warranties, we needed to establish the difference in the jury's mind between the express written warranties supplied by the manufacturers and the implied warranties imposed by statute. Song-Beverly provides that every consumer good sold in California must be "merchantable," *i.e.*, it must be "of the same quality as those generally acceptable in the trade" – regardless of what the express warranty provides. A manufacturer can fully comply with an express warranty, but still breach the implied warranty of merchantability by selling a substandard consumer good.

We accomplished this differentiation through our trial tactics. Any time a witness was asked about a "warranty," we ob-

jected on the grounds that the question was vague and ambiguous because it did not specify whether the warranty being referred to is the "express" or the "implied" warranty. Whether the judge sustained the objection was irrelevant. The goal was simply to remind the jury that even if the manufacturers complied with their express warranty, there is another warranty that they ultimately must consider.

This worked wonderfully for our clients. While the jury found that the manufacturers did not breach their express warranties, they also found that the manufacturers had breached the implied warranty of merchantability by selling our clients a substandard consumer good. After attorney fees, costs, and prejudgment interest, our clients prevailed with a \$1.1 million judgment.

Ironically, we had hoped to win the case by selecting a jury that owned

recreational vehicles or personal watercraft. What we didn't expect was that victory could be achieved, in large part, not by these kinds of people – but by our ability to locate one juror who, through careful questioning, told a story about his washing machine.



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