

WEST VIRGINIA LEGISLATIVE RULES
ATTORNEY GENERAL
CHAPTER 46A-6A
SERIES Z 3

Title: Legislative rule pertaining to the establishment and qualification of third-party dispute mechanisms for the resolution of new motor vehicle warranty disputes between the consumer and the manufacturer, its agent, or its authorized dealer.

PROMULGATION HISTORY ABSTRACT

March 10, 1984	Passage of House Bill 1183 (W. Va. Code § 46A-6A-1 <u>et seq.</u>) mandating this rule under the authority of Code § 46A-6A-8.
July 18, 1984	Filed proposed legislative rule with the Secretary of State's Office.
July 18, 1984	Notice of Public Hearing.
Sept. 18, 1984	Date of Public Hearing.
Dec. 5, 1984	Filed with the Legislative Rulemaking Review Committee.
Dec. 6, 1984	Filed Notice of Agency Approved Rule.
April 13, 1985	Bill of Authorization (Senate Bill 399) approved with no amendments.
June 5, 1985	Final File with the Secretary of State's Office.
August 1, 1985	Effective Date of Legislative Rule.

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Title: Legislative rule pertaining to the establishment and qualification of third-party dispute mechanisms for the resolution of new motor vehicle warranty disputes between the consumer and the manufacturer, its agent, or its authorized dealer.

Section 1. General

~~1.1 Rule Designation--These rules are legislative.~~

^{Scope}
1.2 ~~Application~~--These rules relate to W. Va. Code § 46A-6A-1 et seq. governing the "Lenox Law".

1.3 Authority--W. Va. Code § 46A-6-103 and Code § 46A-6A-8.

1.4 Filing Date--June 5, 1985

1.5 Effective Date--August 1, 1985

Section 2. Definitions

2.1 "The Act" means the Consumer Protection-New Motor Vehicle Warranties Act, W. Va. Code § 46A-6A-1 et seq.

2.2 "Motor vehicle" means any passenger automobile sold in this State, including pickup trucks and vans subject to registration as a Class A motor vehicle under the provisions of W. Va. Code § 17A-10-1 et seq., and any self-propelled motor vehicle chassis of motor homes sold in this State subject to registration as a Class A or Class B motor vehicle under the provisions of Code 17A-10-1 et seq.

2.3 "Manufacturer's express warranty" and "warranty" mean the written warranty of the manufacturer of a new motor vehicle of its condition and fitness for use, including any terms or conditions precedent to the enforcement of obligations under that warranty.

2.4 "Manufacturer" means a person engaged in the business of manufacturing, assembling, or distributing motor vehicles, who will, under normal business conditions during the year, manufacture, assemble or distribute to dealers at least ten new motor vehicles.

2.5 "Warrantor" means any manufacturer who gives or offers to give a written warranty which incorporates an informal dispute settlement mechanism.

2.6 "Consumer" means the purchaser, other than for purposes of resale, of a new motor vehicle purchased in this State used primarily for personal, family or household purposes; a person to whom the new motor vehicle is transferred for the same purposes during the duration of an express warranty applicable to the motor vehicle and any other person entitled by the term of the warranty to enforce the obligation of the warranty.

2.7 "Mechanism" means an informal dispute settlement procedure which is incorporated into the terms of a written warranty.

2.8 "Members" mean the person or persons within a Mechanism actually deciding disputes.

2.9 "On the face of the warranty" means (1) if the warranty is a single sheet with printing on both sides of the sheet or if the warranty is comprised of more than one sheet, the page on which the warrant text begins; and (2) if the warranty is included as a part of a longer document, such as a use and care manual, the page in such document on which the warranty text begins.

Section 3. Option to Establish Informal Dispute Settlement Procedure

3.1 Establishment of Procedure--One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of these rules if:

- (1) A warrantor establishes such a procedure;
- (2) Such procedure and its implementation meet the requirements of these rules; and

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(3) A warrantor incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under the Act respecting such warranty.

3.2 Effect of Establishing Procedure--If the requirements of Section 3.1 of these rules are met, then:

(1) A consumer may not commence a civil action (other than a class action commenced pursuant to Section 3.4 of these rules) unless he initially resorts to such procedure;

(2) A class of consumers may not proceed in a class action under Section 3.4 of these rules except to the extent a court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to warranty obligation) initially resort to such procedure.

3.3 Authority to Take Remedial Action--The Consumer Protection Division of the Attorney General's Office on its own initiative or upon written complaint filed by any interested person shall review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under the Act. If the Consumer Protection Division of the Attorney General's Office finds that such procedure or its implementation fails to comply with the requirements of these rules, the Consumer Protection Division of the Attorney General's Office may take appropriate remedial action under any authority it may have under any provision of law.

3.4 Class Actions--A consumer who is damaged by the failure of a manufacturer to comply with any obligation under the Act, or under a written warranty, implied warranty, or service contract, may join in a class action suit for damages and other legal and equitable relief in a court of competent jurisdiction without resort to any dispute settlement procedure.

3.5 Admissibility of a Mechanism Decision--Any decision rendered by a Mechanism pursuant to these rules is admissible into evidence in any cause of action authorized by the Act.

Section 4. Duties of Warrantor

4.1 Incorporation of Insufficient Mechanism--The warrantor shall not incorporate into the terms of a written warranty a Mechanism that fails to comply with the requirements contained in Sections 5.1 and 5.6 of these rules. This paragraph shall not prohibit a warrantor from incorporating into the terms of a written warranty the step-by-step procedure which the consumer should take in order to obtain performance under the warranty.

4.2 Disclosure of Information--The warrantor shall disclose clearly and conspicuously at least the following information on the face of the written warranty:

(1) A statement of the availability of the informal dispute settlement Mechanism;

(2) The name and address of the Mechanism, or the name and a telephone number of the Mechanism which consumers may use without charge;

(3) A statement of any requirement that a consumer resort to the Mechanism before exercising right or seeking remedies created by the Act together with a disclosure that if a consumer chooses to seek redress by pursuing rights and remedies not created by the Act, resort to the Mechanism would not be required by any provision of the Act; and

(4) A statement, if applicable, indicating where further information on the Mechanism can be found in materials accompanying the motor vehicle, as provided in Section 4.3 of these rules.

4.3 Information on Mechanisms--The warrantor shall include in the written warranty or, in a separate section of materials accompanying the motor vehicle the following information:

(1) Either (a) a form addressed to the Mechanism containing spaces requesting the information which the Mechanism may require for prompt resolution of warranty disputes; or (b) a telephone number of the Mechanisms which consumers may use without charge;

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- (2) The name and address of the Mechanism;
- (3) A brief description of Mechanism's procedures;
- (4) The time limits adhered to by the Mechanism; and
- (5) The types of information which the Mechanism may require for prompt resolution of warranty disputes.

4.4 Warrantor's Option to Encourage Redress Directly From Warrantor--The warrantor shall take steps reasonably calculated to make consumers aware of the existence of the mechanism at the time consumers experience warranty disputes. Nothing contained in Sections 4.2, 4.3 or 4.4 of these rules shall limit the warrantor's option to encourage consumers to seek redress directly from the warrantor as long as the warrantor does not expressly require consumers to seek redress directly from the warrantor. The warrantor shall proceed fairly and expeditiously to attempt to resolve all disputes submitted directly to the warrantor.

4.5 Disputes Submitted to Warrantor--Whenever a dispute is submitted directly to a warrantor, the warrantor shall, within a reasonable time, decide whether, and to what extent, it will satisfy the consumer, and inform the consumer of its decision. In its notification to the consumer of its decision, the warrantor shall include the information required in Sections 4.2 and 4.3 of these rules.

4.6 Responses to Requests for Information by Mechanism--The warrantor shall:

- (1) Respond fully and promptly to reasonable requests by the Mechanism for information relating to disputes;
- (2) Upon notification of any decision of the Mechanism that would require action on the part of the warrantor, immediately inform the Mechanism whether and to what extent the warrantor will abide by the decision; and
- (3) Perform any obligations it has agreed to.

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4.7 Good Faith of Warrantor--The warrantor shall act in good faith in determining whether and to what extent it will abide by a Mechanism decision.

4.8 Compliance with Reasonable Requirements--The warrantor shall comply with any reasonable requirements imposed by the Mechanism to fairly and expeditiously resolve warranty disputes.

Section 5. Minimum Requirement of the Mechanism

5.1 Mechanism Organization--

5.1.1 The Mechanism shall be funded and competently staffed at a level sufficient to ensure fair and expeditious resolution of all disputes, and shall not charge consumers any fee for use of the Mechanism.

5.1.2 The warrantor and the sponsor of the Mechanism (if other than the warrantor) shall take all steps necessary to ensure that the Mechanism and its members and staff are sufficiently insulated from the warrantor and the sponsor, so that the decisions of the members and the performance of the staff are not influenced by either the warrantor or the sponsor. Necessary steps shall include, at a minimum, committing funds in advance, basing personnel decisions solely on merit, and not assigning conflicting warrantor or sponsor duties to Mechanism staff persons.

5.1.3 The Mechanism shall impose any other reasonable requirements necessary to ensure that the members and staff act fairly and expeditiously in each dispute.

5.2 Qualification of Members--

5.2.1 No member deciding a dispute shall be (a) a party to the dispute or an employee or agent of a party other than for purposes of deciding disputes; or (b) a person who is or may become a party in any legal action, including but not limited to class actions, relating to the product or complaint in dispute or an employee or agent of such person other than for purposes of deciding disputes. For purposes of this paragraph, a person shall not be considered a "party" solely because he or she acquires or owns an interest in a party solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment.

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5.2.2. When one or two members are deciding a dispute, all shall be persons having no direct involvement in the manufacture, distribution, sale or service of any motor vehicle. When three or more members are deciding a dispute, at least two-thirds shall be persons having no direct involvement in the manufacture, distribution, sale or service of any motor vehicle. "Direct involvement" shall not include acquiring or owning an interest solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment. Nothing contained in this section shall prevent the members from consulting with any persons knowledgeable in the technical, commercial or other area relating to motor vehicles which is the subject of the dispute.

5.2.3 Members shall be persons interested in the fair and expeditious settlement of consumer disputes.

5.3 Operation of the Mechanism--

5.3.1 The Mechanism shall establish written operating procedures which shall include at least those items specified in Sections 5.3.2 through 5.3.10. Copies of the written procedures shall be made available to any person upon request.

5.3.2 Upon notification of a dispute, the Mechanism shall immediately inform both the warrantor and the consumer of receipt of the dispute.

5.3.3 The Mechanism shall investigate, gather and organize all information necessary for a fair and expeditious decision in each dispute. When any evidence gathered by or submitted to the Mechanism raises issues relating to the number of repair attempts, the length of repair periods, the possibility of unreasonable use of the product, or any other issues relevant in light of the Act (or rules thereunder), including issues relating to consequential damages, or any other remedy under the Act (or rules thereunder), the Mechanism shall investigate these issues. When information which will or may be used in the decision submitted by one party or a consultant under Section 5.2.2 of these rules or any other source tends to contradict facts submitted by the other party, the Mechanism shall clearly, accurately, and completely disclose to both parties the contradictory information (and

its source) and shall provide both parties an opportunity to explain or rebut the information and to submit additional materials. The Mechanism shall not require any information not reasonably necessary to decide the dispute.

5.3.4 If the dispute has not been settled, the Mechanism shall, as expeditiously as possible but at least within 40 days of notification of the dispute, except as provided in Section 5.3.5:

(1) Render a fair decision based on the information gathered as described in Section 5.3.3, and on any information submitted at an oral presentation which conforms to the requirements of Section 5.3.6 (a decision shall include any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, compensation for damages, and any other remedies available under the written warranty or the Act (or rules thereunder); and a decision shall state a specified reasonable time for performance);

(2) Disclose to the warrantor its decision and the reasons therefor;

(3) If the decision would require action on the part of the warrantor, determine whether and to what extent warrantor will abide by its decision; and

(4) Disclose to the consumer its decision, the reasons therefor, warrantor's intended actions (if the decision would require action on the part of the warrantor), and the information described in Section 5.3.7. For purposes of this sub-paragraph 4, a dispute shall be deemed settled when the Mechanism has ascertained from the consumer that (i) the dispute has been settled to the consumer's satisfaction; and (ii) the settlement contains a specified reasonable time for performance.

5.3.5 The Mechanism may delay the performance of its duties under Section 5.3.4 beyond the forty-day time limit;

(1) Where the period of delay is due solely to failure of a consumer to provide promptly his or her name and address, make, model and vehicle identification number of the motor vehicle involved, and a statement as to the nature of the defect or other complaint; or

(2) For a seven-day period in those cases where the consumer has made no attempt to seek redress directly from the warrantor.

5.3.6 The Mechanism may allow an oral presentation by a party to a dispute (or a party's representative) only if:

(1) Both warrantor and consumer expressly agree to the presentation;

(2) Prior to agreement, the Mechanism fully discloses to the consumer the following information: (i) that the presentation by either party will take place only if both parties so agree, but that if they agree, and one party fails to appear at the agreed upon time and place, the presentation by the other party may still be allowed; (ii) that the members will decide the dispute whether or not an oral presentation is made; (iii) the proposed date, time and place for the presentation; and (iv) a brief description of what will occur at the presentation, including, if applicable, parties' rights to bring witnesses and/or counsel; and

(3) Each party has the right to be present during the other party's oral presentation. Nothing contained in Section 5.3.6 shall preclude the Mechanism from allowing an oral presentation by one party, if the other party fails to appear at the agreed upon time and place, as long as all of the requirements of this paragraph have been satisfied.

5.3.7 The Mechanism shall inform the consumer at the time of disclosure required in Section 5.3.4 that:

(1) If he or she is dissatisfied with its decision or warrantor's intended actions, eventual performance, or legal remedies, including use of small claims court, may be pursued;

(2) The Mechanism's decision is admissible in evidence as provided in Section 3.5 of these rules; and

(3) The consumer may obtain, at reasonable cost, copies of all Mechanism records relating to the consumer's dispute.

5.3.8 If the warrantor has agreed to perform any obligations either as part of a settlement agreed to after notification to the Mechanism of the dispute or as a result of a decision under Section 5.3.4, the Mechanism shall ascertain from the consumer within ten working days of the date for performance whether performance has occurred.

5.3.9 A requirement that a consumer resort to the Mechanism prior to commencement of an action under the Act shall be satisfied 40 days after notification to the Mechanism of the dispute or when the Mechanism completes all of its duties under Section 5.3.4, whichever occurs sooner. Except that, if the Mechanism delays performance of its Section 5.3.4 duties as allowed by Section 5.3.5, the requirement that the consumer initially resort to the Mechanism shall not be satisfied until the period of delay allowed by Section 5.3.5 has ended.

5.3.10 Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall act in good faith, as provided in Section 4.7 of these rules. In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in Section 3.5 of these rules.

5.4 Recordkeeping--

5.4.1 The Mechanism shall maintain records on each dispute referred to it which shall include:

- (1) Name, address and telephone number of the consumer;
- (2) Name, address, telephone number and contact person of the warrantor;
- (3) Make, model and vehicle identification numbers of the motor vehicles;
- (4) The date of receipt of the dispute and the date of disclosure to the consumer of the decision;
- (5) All letters or other written documents submitted by either party;

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(6) All other evidence collected by the Mechanism relating to the dispute, including summaries of relevant and material portions of telephone calls and meetings between the Mechanism and any other person (including consultants described in Section 5.2.2 of these rules;

(7) A summary of any relevant and material information presented by either party at an oral presentation;

(8) The decision of the members including information as to date, time and place of meeting and the identity of members voting; or information on any other resolution;

(9) A copy of the disclosure to the parties of the decision;

(10) A statement of the warrantor's intended action(s);

(11) Copies of follow-up letters (or summaries of relevant and material portions of follow-up telephone calls) to the consumer and responses thereto; and

(12) Any other documents and communications (or summaries of relevant and material portions of oral communications) relating to the dispute.

5.4.2 The Mechanism shall maintain an index of each warrantor's dispute grouped under make and subgrouped under model.

5.4.3 The Mechanism shall maintain an index for each warrantor as will show:

(1) All disputes in which the warrantor has promised some performance (either by settlement or in response to a Mechanism decision) and has failed to comply; and

(2) All disputes in which the warrantor has refused to abide by a Mechanism decision.

5.4.4 The Mechanism shall maintain an index that will show all disputes delayed beyond 40 days.

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5.4.5 The Mechanism shall compile semiannually and maintain statistics which show the number and percent of disputes in each of the following categories:

- (1) Resolved by staff of the Mechanism and warrantor has complied;
- (2) Resolved by staff of the Mechanism, time for compliance has occurred, and warrantor has not complied;
- (3) Resolved by staff of the Mechanism and time for compliance has not yet occurred;
- (4) Decided by members and warrantor has complied;
- (5) Decided by members, time for compliance has occurred, and warrantor has not complied;
- (6) Decided by members and time for compliance has not yet occurred;
- (7) Decided by members adverse to the consumer;
- (8) No jurisdiction;
- (9) Decision delayed beyond 40 days under Section 5.3.5(1);
- (10) Decision delayed beyond 40 days under Section 5.3.5(2);
- (11) Decision delayed beyond 40 days for any other reason; and
- (12) Pending decision.

5.4.6 The Mechanism shall retain all records specified in Sections 5.4.1 through 5.4.6 for at least four years after final disposition of the dispute.

5.5 Audits--

5.5.1 The Mechanism shall have an audit conducted at least annually, to determine whether the Mechanism and its implementation are in compliance with this part. All records of the Mechanism required to be kept under Section 5.4 of these rules shall be available for audit.

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5.5.2 Each audit provided for in Section 5.5.1 shall include at a minimum the following:

(1) Evaluation of warrantors' efforts to make consumers aware of the Mechanism's existence as required in Section 4.

(2) Review of the indices maintained pursuant to Sections 5.4.2, 5.4.3, and 5.4.4 of these rules; and

(3) Analysis of a random sample of disputes handled by the Mechanism to determine the following: (i) adequacy of the Mechanism's complaint and other forms, investigation, mediation and follow-up efforts and other aspects of complaint handling; and (ii) accuracy of the Mechanism's statistical compilations under Section 5.4.5 of these rules. (For purposes of this subsection "analysis" shall include oral or written contact with the consumers involved in each of the disputes in the random sample.)

5.5.3 A report of each audit under this section shall be submitted to the Consumer Protection Division of the Attorney General's Office and shall be made available to any person at reasonable cost. The Mechanism may direct its auditor to delete names of parties to disputes and identity of motor vehicles involved from the audit report.

5.5.4 Auditors shall be selected by the Mechanism. No auditor may be involved with the Mechanism as a warrantor, sponsor or member, or employee or agent thereof, other than for purposes of the audit.

5.6 Openness of Records and Proceedings--

5.6.1 The statistical summaries specified in Section 5.4.5 of these rules shall be available to any person for inspection and copying.

5.6.2 Except as provided under Section 5.6.1 and 5.6.5, and Section 5.5.3 of these rules, all records of the Mechanism may be kept confidential or made available only on such terms and conditions, or in such form, as the Mechanism shall permit.

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5.6.3 The policy of the Mechanism with respect to records made available at the Mechanism's option shall be set out in the procedures under Section 5.3.1 of these rules; the policy shall be applied uniformly to all requests for access to or copies of such records.

5.6.4 Meetings of the members to hear and decide disputes shall be open to observers on reasonable and nondiscriminatory terms. The identity of the parties and motor vehicles involved in disputes need not be disclosed at meetings.

5.6.5 Upon request, the Mechanism shall provide to either party to a dispute: (a) access to all records relating to the dispute; and (b) copies of any records relating to the dispute at reasonable cost.

5.6.6 The Mechanism shall make available to any person upon request information relating to the qualifications of Mechanism staff and members.