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NEW REMEDIES FOR DEFECTIVE AUTOMOBILE PURCHASERS: A PROPOSAL FOR A MODEL LEMON LAW

I. INTRODUCTION

The automobile is the major consumer product purchased in America today. In 1983, Americans spent \$65.2 billion on the purchase of new automobiles.¹ For sixty-five percent of American families, the automobile is the second-most expensive item they will ever purchase (only a house is a greater expense).² For fifteen percent of American families the automobile is the most expensive item ever purchased.³ These figures indicate the importance of the automobile in our society—indeed, the car is an essential part of our lives. Due to the need for daily personal transportation, many Americans are willing to invest a substantial portion of their income in the purchase of an automobile on which they can rely. However, the high price we pay for our automobiles does not guarantee that we will be satisfied with the product.

Unfortunately, consumers have more complaints concerning new cars than any other consumer product purchased.⁴ A 1984 study determined that, in the first year of ownership, 33.6 percent of all new cars have at least one substantial problem covered by a warranty and 14.5 percent have multiple problems.⁵ Recent studies verify these findings.⁶ While manufacturer's warranties are designed to correct these problems during the war-

1. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 587 (1985).

2. AUTOMOBILE WARRANTY AND REPAIR ACT: HEARINGS ON H.R. 1005 BEFORE THE SUBCOMM. ON CONSUMER PROTECTION AND FINANCE OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96th Cong., 1st Sess. 15-16 (1979) (statement of Rep. Bill Eckhardt, bill sponsor).

3. *Id.* at 15-16.

4. Pertschuk, *Consumer Automobile Problems*, 11 U.C.C. L.J. 145 (1978) (statistics based on complaints received by the FTC).

5. Towers, *Lemon Law Legislation*, TRIAL, Dec. 1987, at 74. This study, conducted by an independent marketing firm, Market Facts of Washington, D.C., was based on a survey of 6,418 consumers.

6. The most recent study by J.D. Power & Associates (31225 LaBaya Drive, Westlake Village, CA 91362), the leading car industry analyst, found that Japanese cars suffer from 27% fewer mechanical problems than U.S. cars and that the average U.S. car has nearly two reports of mechanical defects in the first ninety days after purchase. Miller, *Why Image Counts: A Tale of Two Industries*, BUSINESS WEEK, June 8, 1987, at 138-39.

ranty period without cost to the purchaser, consumers are often dissatisfied with the warranty process.

According to consumer surveys, dissatisfaction arises from the dealer's failure to cooperate in warranting repairs, from the dealer's inability to successfully repair the defect,⁷ and from the necessity of having to return cars repeatedly before obtaining a successful repair.⁸ Purchasers of cars which prove to be "lemons"—cars subject to serious, recurring mechanical problems that render them practically useless—generally have little recourse other than repeated attempts to have the car repaired. This is because automobile manufacturers often disclaim warranties and limit remedies only to repair or replacement of defective parts.⁹ Consumer groups representing owners of chronically defective automobiles have successfully campaigned in forty-three states and the District of Columbia to expand warranty protection for automobile purchasers.¹⁰ Lemon laws, as they are

7. Comment, *A New Twist for Texas "Lemon" Owners*, 17 ST. MARY'S L.J. 155, 156 (1985) (survey conducted by *Consumer Reports* reveals dealers' failure to cooperate, and inability to successfully repair, the two most common consumer complaints).

8. *Id.* at 156.

9. Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 591. An example of the standard manufacturer's new car limited warranty in pertinent part reads:

New Vehicle Limited Warranty

Ford Motor Company warrants that your selling Dealer will repair, replace, or adjust parts, except tires in 1987 Ford Motor Company cars and light trucks, found to be defective in factory materials or workmanship made or supplied by Ford for the periods described below. Any Ford or Lincoln-Mercury dealer may perform the repairs if you have moved, are traveling or need emergency service. . . . The entire vehicle, except tires, is covered for 12 months or 12,000 miles, whichever occurs earlier . . . (At bottom of pamphlet) Ford Motor Company does not authorize any person to create for it any other obligation or liability in connection with these vehicles. **To the Extent Allowed by Law, any Implied Warranty of Merchantability or Fitness for a Particular Purpose Applicable to these Vehicles is Limited in Duration to the Duration of these Warranties. Neither Ford Motor Company nor the Selling Dealer shall be Liable for Loss of Time, Inconvenience, Commercial Loss or Consequential Damages.** (Bold print included in warranty).

Ford Motor Corp., Ford Warranty Information (1987).

10. ALASKA STAT. § 45.45.300 (1986); ARIZ. REV. STAT. ANN. § 44-1261 (1987); CAL. CIV. CODE § 1793.2 (West 1985 & Supp. 1988); COLO. REV. STAT. § 42-12-101 (1984 & Supp. 1987); CONN. GEN. STAT. ANN. § 42-179(b) (West 1987 & Supp. 1988); DEL. CODE ANN. tit. 6, § 5001 (1974 & Supp. 1988); D.C. CODE ANN. § 40-1301 (1986); FLA. STAT. § 681.101 (1966 & West Supp. 1988); HAW. REV. STAT. § 490:2-313.1 (1985); ILL. REV. STAT. ch. 121-½, para. 1201 (1987); IOWA CODE ANN. § 322E.1 (1985 & Supp. 1988); KAN. STAT. ANN. § 50-645 (1985 & Supp. 1987); KY. REV. STAT. ANN. § 367.840 (Baldwin 1986); LA. REV. STAT. ANN. § 51:1941 (West 1987 & Supp. 1988); ME. REV. STAT. ANN. tit. 10, § 1161 (1980 & Supp. 1987); MD. COM. LAW CODE ANN. § 14:1501 (1983 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 90 § 7N ½ (West 1969 & Supp. 1988); MICH. COMP. LAWS § 257.1401 (Supp. 1988); MINN. STAT. ANN. § 325F.665 (West 1987 & Supp. 1988); MISS. CODE ANN. § 63-17-151 (1973 & Supp. 1987); MO. ANN. STAT. § 407.560 (Vernon 1979 & Supp. 1988);

commonly called, create powerful new rights and remedies for consumers.

In response to the dramatic increase in consumer warranty law, in 1975 Congress passed the Magnuson-Moss Federal Warranty Act.¹¹ The goal of the Act was to facilitate private enforcement of warranty rights of consumers by creating a private right of action more generous than under the Uniform Commercial Code (U.C.C.) or other state law.¹² The Act requires manufacturers to provide full disclosure of all written warranty terms in a clear and concise manner. The Act does not apply to new car purchasers, however, because the Act covers only full warranties, and automobile manufacturers typically provide only limited warranties.¹³ Therefore, the Magnuson-Moss Act covers most consumer products except for automobiles.

To supplement the Act, many states have enacted provisions known as "lemon laws."¹⁴ These laws provide the new car buyer with several advantages over existing law, including the U.C.C. and the Magnuson-Moss Act.¹⁵ Most importantly, lemon laws are designed to assure the consumer a refund or replacement remedy where the manufacturer is unable, within a reasonable time, to remedy a substantial defect breaching an express warranty.¹⁶

MONT. CODE ANN. § 61-4-501 (1988); NEB. REV. STAT. § 60-2701 (1987); NEV. REV. STAT. § 598.751 (1986); N.H. REV. STAT. ANN. § 357-D (1986 & Supp. 1987); N.J. STAT. ANN. § 56:12-19 (West 1987 & Supp. 1988); N.M. STAT. ANN. § 57-16-7 (1987); N.Y. GEN. BUS. LAW § 198-a (McKinney 1988); N.D. CENT. CODE § 51-07-16 (1985 & Supp. 1987); OHIO REV. CODE ANN. § 1345.71 (Baldwin Supp. 1987); OKLA. STAT. tit. 51, § 901 (1987); OR. REV. STAT. § 646.315 (1985); PA. STAT. ANN. tit. 73, § 1951 (Purdon Supp. 1988); R.I. GEN. LAWS § 31-5.2-1 (1982 & Supp. 1987); S.D. CODIFIED LAWS ANN. § (19xx); TENN. CODE ANN. § 55-24-101 (1986 & Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 4413(36) (Vernon 1987 & Supp. 1988); UTAH CODE ANN. § 13-20-1 (1986); VT. STAT. ANN. tit. 9, § 4083 (1984); VA. CODE ANN. § 59.1207.9 (1987); WASH. REV. CODE ANN. § 19.118 (1986 & Supp. 1988); W. VA. CODE § 46A-6A-1 (1987); WIS. STAT. ANN. § 218.015 (West 1982 & Supp. 1987); WYO. STAT. § 40-17-101 (1987).

11. Magnuson-Moss Act—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301-12 (1982). The Magnuson-Moss Act was intended "to provide minimum disclosure standards for written consumer product warranties against defect or malfunction; to define minimum Federal content for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes." H.R. REP. NO. 1107, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7702.

12. Miller & Kanter, *Litigation Under Magnuson-Moss: New Opportunities in Private Actions*, 13 U.C.C. L.J. 10 (1980).

13. Note, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers*, 61 WASH. U.L.Q. 1125, 1143 (1984). As of 1977, only American Motors Company offered a "full" warranty; AMC's market share was somewhat less than 2% at that time. Pertschuk, *supra* note 4, at 149 n.11.

14. See *supra* note 10.

15. See *infra* notes 104-19 and accompanying text.

16. Vogel, *supra* note 9, at 592.

While most lawyers and consumer advocates agree that consumers are better off with lemon laws,¹⁷ the lemon laws themselves can be lemons. Lemon laws are often hard to enforce and the provisions are not broad enough to ensure that the remedy they were designed to provide will actually be attainable.¹⁸ Presently, a plethora of different state regulations causes difficulties for manufacturers because they must abide by regulations that vary amongst states.¹⁹ Furthermore, a lack of definitive, workable standards leaves the consumer guessing whether his claim will meet the criteria necessary to bring a claim under the lemon law.²⁰ Although several states have noted that their lemon laws are in need of revision,²¹ these states have not taken the steps necessary to correct the problems.

This note concludes that current legislation is inadequate to assure a remedy to the purchaser of a defective new automobile. This note first explores the ineffectiveness of the traditional options currently available to a purchaser of a defective automobile, namely the remedies under the Uniform Commercial Code and the Magnuson-Moss Federal Warranty Act, and the problems and shortcomings of each.²² Second, the note examines the several advantages that states possess by virtue of having a lemon law.²³ Next, several defects of the current state lemon laws are discussed.²⁴ Finally, changes are suggested which, if adopted, will transform the currently inadequate lemon laws into effective weapons for both manufacturers and consumers.²⁵

II. TRADITIONAL REMEDIES AVAILABLE TO PURCHASERS OF DEFECTIVE AUTOMOBILES

The owner of a lemon tends to lose faith in his automobile and wants either a return of his purchase price or a new car.²⁶ However, the manufac-

17. NAT'L L.J., Dec. 14, 1987, at 1, col. 3.

18. *Id.*

19. *Id.* at 25, col. 1. Manufacturers vow to comply with the laws if the "kinks can be ironed out." *Id.*

20. For example, the current state statutes are vague as to the definition of nonconformity. The following cases suggest various applications of the element of nonconformity: *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117, 1122 (8th Cir. 1982) ("[B]reach of warranty and nonconformity are not entirely congruent concepts; the former being a subset of the latter."); *Atlan Indus. v. O.E.M., Inc.*, 555 F. Supp. 184, 188 (W.D. Okla. 1983) (plastic whose melting temperature failed to meet industry standards was nonconforming).

21. A few states have made significant changes to their lemon laws. The changes were geared to clarifying vague provisions in the original law and correcting problem areas that surfaced as the law was implemented. *See, e.g.*, WIS. STAT. § 218.015 (West Supp. 1987).

22. *See infra* notes 31-96 and accompanying text.

23. *See infra* notes 97-112 and accompanying text.

24. *See infra* notes 113-51 and accompanying text.

25. *See infra* notes 152-94 and accompanying text.

26. *See Rigg, Lemon Laws Should be Written to Ensure Broad Scope and Adequate*

turer, having limited the buyer's remedy to repair or replacement of defective parts through a limited warranty,²⁷ is not likely to comply with either request.²⁸ The consumer is then left with two choices: litigation,²⁹ or if lengthy litigation is too costly, absorbing the loss.³⁰ If the consumer does file a lawsuit, possible methods of recovery under the U.C.C. include a suit for breach of warranty,³¹ or a suit for revocation of acceptance.³² If a full war-

Remedies, 17 CLEARINGHOUSE REV. 302, 306 (1983). Consumers who have had repeated problems with defective cars prefer to sever the relationship with the manufacturer and therefore want a refund rather than a replacement vehicle. *Id.*

27. See *supra* note 10.

28. See *supra* note 10; See also *Venture v. Ford Motor Corp.*, 180 N.J. Super. 45, 49, 433 A.2d 801, 804 (1981) (in response to lemon owner's demand for relief, dealer advised owner that he would have to "live with this one").

29. See Comment, *supra* note 7, at 158. See also Whiteford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006, 1039. Automobile manufacturers are not overly concerned with adverse judgments because not many warranty disputes are litigated, "and it is highly unlikely many would [litigate] regardless of the attitude the manufacturer and dealers took toward warranty obligation. The expense of legal action is simply too great . . ." *Id.* at 1039.

30. See *supra* note 27. See also Eddy, *Effects of the Magnuson-Moss Act upon Consumer Product Warranties*, 55 N.C.L. REV. 835, 869-70 (1977) (consumers given "run around" become frustrated, "drop out," and bear their losses); Note, *Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms*, 52 S. CAL. L. REV. 235, 236 (1978) (it is to warrantor's advantage to delay litigation thereby making it too costly for consumers to pursue a remedy).

31. This remedy exists under three Code sections:

U.C.C. § 2-313 (1980) reads:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

U.C.C. § 2-314 (1980) reads in part:

(1) Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . .

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade . . . ; and

(b) . . . are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used.

U.C.C. § 2-315 (1980) reads:

Where the seller at the time of contracting has reason to know any particular purpose for

ranty is offered on the automobile, relief may also be available under the Magnuson-Moss Act.³³

A. Uniform Commercial Code

1. Breach of Express Warranty under U.C.C. Section 2-313

Under the U.C.C., the buyer of a defective product may sue for damages if he establishes the existence and subsequent breach of an express warranty.³⁴ Under U.C.C. Section 2-313(a), an express warranty can be created by a promise or an affirmation of fact, a sample or model, or a description of the goods, which becomes a part of the basis of the bargain.³⁵ The express warranty can be oral or written, and specific words such as "guarantee" or "warranty" are not required.³⁶

The manufacturer's standard new car express warranty warrants only certain parts and disclaims all implied warranties.³⁷ If a defective part is

which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

32. This remedy is found in U.C.C. § 2-608 (1980), which reads:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

33. Magnuson-Moss Act,—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301-12 (1982).

34. Note, *A Sour Note: A Look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846, 851 (1984).

35. U.C.C. § 2-313 (1980) defines an express warranty. For a complete definition of express warranty, see *supra* note 29. See, e.g., *AFA Corp. v. Phoenix Closures, Inc.*, 501 F. Supp. 224, 228 (N.D. Ill. 1980) (brochure containing statements and samples may constitute express warranty); *Drayton v. Jiffie Chemical Corp.*, 395 F. Supp. 1081, 1093 (N.D. Ohio 1975), *modified and aff'd*, 591 F.2d 352, 358 (6th Cir. 1978) (T.V. commercial constituted express warranty as to safety of chemical product); *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068, 1074, 445 N.E.2d 19, 23-24 (1982) (brochures may constitute express warranty); *Ford Motor Co. v. Lemieux Lumber Co.*, 418 S.W.2d 909, 911 (Tex. Civ. App. 1967) (pictorial representation in advertising brochure for truck created an express warranty).

36. *Id.*

37. The U.C.C. recognizes an implied warranty of merchantability in § 2-314, and an implied warranty of fitness for a particular purpose in § 2-315. The following provisions, taken from the 1985 New Car Limited Warranty distributed by American Honda Motor Company, are typical:

excluded from the express warranty, and if the implied warranties have

Some states have recently passed laws which give new-car buyers certain rights. Although these laws vary from state to state, they generally say that if a new car has a major defect (e.g., one that substantially affects its use, value, safety) which can't be repaired in a reasonable time (generally four attempts to repair the same problem, or out of service at various times for a total of 30 days), the owner can request a replacement or a refund. Usually the defect must occur within the first year.

Before making the request, you must explain the problem in writing to our Zone Customer Service office and give the dealer and American Honda an opportunity to resolve it. If we aren't successful, we'll ask you to submit the dispute to Auto Line for mediation or arbitration.

Of course there are other terms and conditions in these laws. We recommend you check your own state law if the need arises. Our intent is for you to be satisfied with your Honda. If you have any questions or problems, please contact your local Honda dealer first, then the Zone Customer Service office. . . .

TIME AND MILEAGE PERIOD

This warranty begins on the date the car is sold to the first retail purchaser, or the date it is first used as a demonstrator, lease, or company car, whichever comes first. The car is covered for 12 months or 12,000 miles (or a maximum of 18 months or 18,000 miles under a demonstrator warranty extension), whichever come first. The power train (described below) is covered for 24 months or 24,000 miles (whichever comes first) for the date the warranty begins.

WARRANTY COVERAGE

Honda will repair or replace, at its option, any factory-installed part that is defective in material or factory workmanship under normal use. Normal use excludes any use the Owner's Manual states is not recommended. Warranty repairs will be made free of charge for parts and labor, except for the battery, which will be adjusted on a pro-rata basis Any repaired or replaced parts are covered only for the remainder of this warranty. All parts replaced under the warranty become the property of Honda.

POWER TRAIN PARTS COVERED:

Engine: Cylinder Block, head, and Engine Seals

all internal parts. Flywheel

Value train Oil Pump

Manifolds Water Pump

Transaxle: Manual Transmission/differential, and all internal parts

Automatic transmission/differential, and all internal parts

Driveshafts and CV (constant velocity) joints.

THIS WARRANTY DOES NOT COVER:

Emission control systems (refer to emission control warranty) Tires (refer to the tire manufacturer's warranty that came with the car). If you have any problems with the tires, ask your Honda dealer for assistance.

Parts that fail due to lack of required maintenance, use of nonequivalent parts, or racing. Normal wear or deterioration of any part.

Any car registered or normally driven outside of the United States, Puerto Rico, and the U.S. Virgin Islands.

The replacement of expendable maintenance items when the replacement is not due to a defect in material or factory workmanship.

Any car on which the odometer has been altered, or on which the actual mileage cannot be determined.

Adjustments, unless made as part of a warranty repair.

Accessories

been effectively disclaimed,³⁸ the buyer has no cause of action for breach of warranty.³⁹ If a defective part is covered in the warranty, however, the manufacturer is given an opportunity to repair the problem within the terms of the warranty.⁴⁰ Arguably, the warranty is not breached provided the dealer accepts the car for attempted repair.⁴¹

The mere existence of a defect is not a breach of the warranty. When the selling dealer or the manufacturer fails to fix the defective vehicle within a reasonable time, some courts have held that the limited remedy of repair or replacement of parts has "failed of its essential purpose" under U.C.C. Section 2-719(2)⁴² and therefore constitutes a breach of warranty. In other words, if the warrantor cannot replace the parts or repair them to conform to the warranty, then the defect cannot be cured. However, the warranty does not specify how many times the seller must attempt to correct the defect before a reasonable opportunity to repair or replace has passed.⁴³

In *Koperski v. Husker Dodge, Inc.*,⁴⁴ a Nebraska court found that the alleged defects in the car did not substantially impair the vehicle's value even though the car vibrated when traveling 35 to 40 miles per hour, its motor stopped whenever the air conditioner was running, and its engine stalled whenever the transmission shifted into reverse.⁴⁵ The buyer, Koperski, alleged that the manufacturer had breached its warranty agreement with her because repeated attempts to fix her automobile were unsuccessful. She sought rescission of the contract and revocation of her acceptance of

DISCLAIMER OF CONSEQUENTIAL DAMAGES AND LIMITATIONS OF IMPLIED WARRANTIES

Honda disclaims any responsibility for loss of time or use of the parts or vehicle in which the parts are installed, transportation or any other incidental or consequential damage; any implied warranties, including the implied warranty of merchantability, are limited to the duration of this written warranty.

Some states do not allow limitations on how long an implied warranty lasts, or the exclusion or limitation of incidental or consequential damages, so the above limitations or exclusions may not apply to you.

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

American Honda Motor Company, 1985 New Car Limited Warranty.

38. U.C.C. § 2-316 (1980).

39. Comment, *Buyer's Remedies for a Defective Automobile: The U.C.C. Versus the Oklahoma Lemon Law*, 21 TULSA L.J. 318, 335 (1985).

40. Comment, *L.B. 155: Nebraska's "Lemon Law": Synthesizing Remedies for the Owner of a "Lemon"*, 17 CREIGHTON L. REV. 345, 353 (1984).

41. McEttrick, *Defective Motor Vehicles: The Massachusetts Lemon Law and Recent Used Car Cases under Chapter 93A*, 70 MASS. L. REV. 30, 31 (1985).

42. U.C.C. § 2-719(2) (1980).

43. Comment, *supra* note 39, at 336.

44. 208 Neb. 29, 302 N.W.2d 655 (1982).

45. *Id.* at 33, 302 N.W.2d at 658-59.

the car. The Nebraska Supreme Court held that the warranty had not failed of its essential purpose because repair work was performed on the vehicle each time it was returned for servicing.⁴⁶

The *Koperski* case illustrates the problems that a consumer faces when seeking a remedy under the U.C.C.. No set standard exists as to how many attempts the seller must be given to try to repair the problem before the limited warranty fails of its essential purpose, or as to what constitutes "substantial impairment" to let the buyer revoke his acceptance.⁴⁷

2. Revocation of Acceptance under U.C.C. Section 2-608

If the essential purpose of the automobile's limited warranty fails, U.C.C. Section 2-719(2) provides that the full range of remedies under other sections of the U.C.C. are available to the buyer.⁴⁸ One of these remedies is U.C.C. Section 2-608,⁴⁹ which governs the revocation of the buyer's acceptance.⁵⁰

If the owner of a lemon believes that his warranty has failed of its essential purpose, he will most likely seek to revoke his acceptance of the defective automobile.⁵¹ Revocation permits a buyer to receive a full refund of his automobile purchase price if certain stated events are established.⁵²

46. *Id.* at 33, 302 N.W.2d at 658.

47. Note, *supra* note 40, at 356.

48. U.C.C. § 2-719 (1980).

49. U.C.C. § 2-608 (1980). See *supra* note 29 and accompanying text.

50. *Durfee v. Rod Baxtor Imports, Inc.*, 262 N.W.2d 349, 357 (Minn. 1978). See also *Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 55, 433 A.2d 801, 810 (1981) which states:

We are dealing with a breach of an express contractual obligation. Nothing prevents us from granting an adequate remedy under state law for that breach of contract, including rescission when appropriate. Under state law the right to revoke acceptance for defects substantially impairing the value of the product (N.J.S.A. 12A:2-608) and to receive a refund of the purchase price (N.J.S.A. 12A:2-711) are rights available to a buyer against a seller in privity. Where the manufacturer gives a warranty to induce the sale it is consistent to allow the same type of remedy as against the manufacturer.

Id. See also Note, *Rescission of Consumer's Purchase of Automobile Permitted Upon Breach of Limited Warranty — Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 80 (1981), 12 SETON HALL 414, 416 (1982).

51. See, e.g., *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 118, 374 A.2d 144, 149 (1976); *Adams v. J.I. Case Co.*, 125 Ill. App. 2d 388, 403, 261 N.E.2d 1, 8 (1970); *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 483-84 (Ky. Ct. App. 1979). Courts do not always explain why the remedy fails of its essential purpose. A likely reason for this omission is that courts are using the doctrine of failure of essential purpose because they do not think the remedy limitation is fair in the first place. If the remedy limitation is unfair at the time of the contract, then it is more appropriate to find that it is unconscionable, courts have obviously found failure of essential purpose a less controversial way to accomplish the purpose. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of U.C.C. § 2-719(2)*, 65 CALIF. L. REV. 28, 58-84 (1977).

52. In order to successfully revoke acceptance, the nonconformity must substantially

Buyers who wish to recover the full purchase price of their vehicles have been more successful using the theory of revocation of acceptance than warranty theories.⁵³ Upon revocation, the purchaser is entitled to recover the purchase price⁵⁴ and any other damages arising as a result of the seller's breach.⁵⁵

The right to revoke is recognized and limited under Section 2-608 of the Code.⁵⁶ In order to revoke, the buyer must establish that the defect in the goods "substantially impairs" their value to him.⁵⁷ Whether such substantial impairment of value exists is generally a question of fact.⁵⁸ The multitude of potential factual problems prevents formulating any clear test for substantial impairment.⁵⁹

In addition to the requirement of substantial impairment, two other potential barriers might prevent revocation recovery. First, the buyer's acceptance must have been based on either the reasonable assumption that the nonconformity would be cured,⁶⁰ or the buyer must have accepted the goods without discovery of the defect and prove that his acceptance was reasonably induced by the difficulty of discovering the defect before acceptance, or by the seller's assurances.⁶¹ Second, in order to be justifiable, a revocation must occur within a reasonable time after the buyer discovers or should have discovered the grounds for it,⁶² and the revocation is not effective until the buyer notifies the seller of the revocation.⁶³ The buyer's right to revoke under Section 2-608 generally is read as applying only against the "seller" with whom the buyer has contracted, generally meaning the

impair the value of the vehicle, and the revocation must occur "within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the vehicle." U.C.C. § 2-608 (1980). Usually in the context of new car sales, before revoking, the buyer must first submit to the dealer's efforts to repair the car pursuant to the manufacturer's express warranty. Basanta, *infra* note 82 at 12.

53. Comment, *Sweetening the Fate of the "Lemon" Owner: California and Connecticut Pass Legislation Dealing with Defective New Cars*, 14 U. Tol. L. Rev. 341, 351 n.76 (1983).

54. U.C.C. § 2-711(1) (1980).

55. *Id.* Such damages include "the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (§ 2-715), but less expenses saved in consequence of the seller's breach." U.C.C. § 2-713(1).

56. U.C.C. § 2-608 (1980). See *supra* note 16 and accompanying text.

57. U.C.C. § 2-608(1) (1980). See *infra* note 70 and accompanying text.

58. See *Erling v. Homera, Inc.*, 298 N.W.2d 478, 481 (N.D. 1980); *Frontier Mobile Home Sales, Inc. v. Tringleth*, 256 Ark. 101, 103-04, 505 S.W.2d 516, 517 (1974).

59. U.C.C. § 2-608(1)(a), (b) (1980).

60. Robertson, *Rights and Obligations of Buyers with Respect to Goods in Their Possession After Rightful Rejection or Justifiable Revocation of Acceptance*, 60 IND. L.J. 663, 670 (1985).

61. *Id.*

62. U.C.C. § 2-608(2) (1980).

63. *Id.*

dealer.⁶⁴ The majority of courts have denied claims for revocation under Section 2-608 against remote manufacturers.⁶⁵

Because most dealers do not give any express warranties, and often effectively disclaim all implied warranties, the car buyer is usually precluded from revoking acceptance from the dealer on the basis of the failure of the car to conform to the manufacturer's express warranty.⁶⁶ In such a case, the buyer's only course of action may be under the manufacturer's express warranty.⁶⁷

If the buyer is able to effectively revoke, he is entitled to damages as specified under U.C.C. Section 2-711(1).⁶⁸ Thus, the buyer can cancel the contract and recover any amounts already paid. He may then either recover the additional costs for a substitute car under Section 2-712⁶⁹ or the market-contract price difference under Section 2-713.⁷⁰ The buyer may also re-

64. 4 R. ANDERSON, *UNIFORM COMMERCIAL CODE* § 2-608:101 (3d ed. 1983).

65. See *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976); *Wright v. O'Neal Motors, Inc.*, 57 N.C. App. 49, 291 S.E.2d 165, cert. denied, 306 N.C. 393, 294 S.E.2d 221 (1982); *Clark v. Ford Motor Co.*, 46 Or. App. 521, 621 P.2d 316 (1980). But see *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977); *Volkswagen of America, Inc. v. Novak*, 418 So. 2d 801 (Miss. 1982). See also Comment, *Uniform Commercial Code: Buyers of Nonconforming Goods Who Revoke Acceptance Under Section 2-608 May Recover the Purchase Price from a Remote Supplier Despite lack of Privity of Contract*, 63 MINN. L. REV. 665 (1979).

66. See, e.g., *Crume v. Ford Motor Co.*, 60 Or. App. 224, 653 P.2d 564 (1982); *Clark v. Ford Motor Co.*, 46 Or. App. 521, 612 P.2d 316 (1980). But see *Blankenship v. Northtown Ford, Inc.*, 95 Ill. App. 3d 303, 420 N.E.2d 167 (4th Dist. 1981).

67. Comment, *supra* note 53, at 346.

68. U.C.C. § 2-711(1) reads as follows:

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (§ 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid:

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (§ 2-713).

Id. See also *McEttrick*, *supra* note 41, at 31; Comment, *supra* note 39, at 329.

69. See *infra* note 70 and accompanying text.

70. U.C.C. § 2-712 and 2-713 read as follows:

§ 2-712. "Cover"; Buyer's Procurement of Substitute Goods

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution of those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§ 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

cover incidental and consequential damages under Section 2-715⁷¹ when appropriate.

Two critical issues which the U.C.C. does not resolve involve the kinds of defects that permit revocation and the issue of when revocation is neither premature nor too late.⁷² Use of the implied warranty of merchantability provision under Section 2-316(a)⁷³ does not provide an easy solution either. Deciding what is "merchantable" under Section 2-314⁷⁴ is to struggle with the same issues: "Merchantable" means "of fair average quality" and "fit for the ordinary purposes for which such good are used."⁷⁵ The above words

Id., § 2-712.

§ 2-713. Buyer's Remedies for Non-Delivery or Repudiation

(1) Subject to the provisions of this Article with respect to proof of market price (§ 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (§ 2-715) but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

Id., § 2-713.

71. U.C.C. § 2-715 reads as follows:

§ 2-715 Buyer's Incidental and Consequential Damages

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include:

(a) any loss resulting from general or particular requirement and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

Id. § 2-715. *See, e.g.,* McGrady v. Chrysler Motor Corp., 46 Ill. App. 3d 136, 360 N.E.2d 818 (1977). The standard warranty excludes consequential and incidental damages. R. BILLINGS, HANDLING AUTOMOBILE WARRANTY AND REPOSSESSION CASES § 6.8 (1984).

72. *See supra* notes 48-70.

73. U.C.C. § 2-316(2) (1980) provides:

Subject to Subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

U.C.C. § 2-316(2) (1980).

74. Most litigation under the statute concerns the meaning of merchantability. Of the numerous definitions in the statute, the one most applicable is that the goods must be "fit for the ordinary purposes for which such goods are used." Burnham, *Remedies Available to the Purchaser of a Defective Used Car*, 47 MONT. L. REV. 273, 287 (1986).

75. U.C.C. § 2-314(2)(b), (c) (1980).

can only be defined through litigation.⁷⁶ The leading case where recovery of the full purchase price was permitted, *Zabriskie Chevrolet, Inc. v. Smith*,⁷⁷ demonstrates the rigorous burden generally required for the buyer to recover on a theory of revocation of acceptance. In *Zabriskie*, the court held that once the purchaser's faith in the automobile's integrity and reliability is shaken, its value to him is substantially impaired.⁷⁸ The "shaken faith" standard has become one by which many courts measure "substantial impairment" in automobile revocation cases.⁷⁹ The majority of state courts view substantial impairment in value as a subjective test, i.e., whether the value to the particular buyer was substantially impaired.⁸⁰ Comment 2 to U.C.C. Section 2-608 appears to confirm this subjective test: "[T]he question is whether the nonconformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances."⁸¹

While the U.C.C. does provide the new car buyer with some significant protections, the U.C.C. suffers from a variety of substantive deficiencies. Car manufacturers are able to disclaim warranties and limit remedies.⁸² Definitional problems, such as "failure of its essential purpose" frustrate

76. McEttrick, *supra* note 41, at 33.

77. 99 N.J. Super. 441, 240 A.2d 195 (1968).

78. *Id.* at 458, 240 A.2d at 205. In *Zabriskie*, the transmission in the plaintiff's car failed in its first trip home from the showroom. The plaintiffs notified the dealer of their revocation within 24 hours and stopped payment on their check. The plaintiffs refused to attempt further operation of the car, and the car was towed back to the dealer, who sued them for the purchase price. The plaintiffs declined the seller's offer to "cure" the defect by replacing the defective transmission with a used transmission. *Id.* at 444, 240 A.2d at 197-98.

79. See, e.g., Stamm v. Wilder Travel Trailers, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976); Asciolla v. Manter Oldsmobile-Pontiac, Inc., 117 N.H. 85, 370 A.2d 270 (1977). But see Gasque v. Mooers Motor Car Co., 227 Va. 154, 313 S.E.2d 384 (1984).

80. See Tiger Motor Co. v. McMurtry, 284 Ala. 283, 292, 224 So. 2d 638, 645 (1969) ([w]hat may cause one person great inconvenience or financial loss, may not another); Keen v. Modern Trailer Sales, 40 Colo. App. 527, 529, 578 P.2d 668, 670 (1978) (this section creates a subjective test in the sense that the requirements of the particular buyer must be examined and deferred to); Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc., 99 Idaho 675, 680, 587 P.2d 816, 820 (1978) (each case must be examined on its own merits to determine what is a substantial impairment of value to the particular buyer); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 353 (Minn. 1977). Cf. Asciolla v. Manter Oldsmobile-Pontiac, Inc., 117 N.H. 85, 89, 370 A.2d 270, 273 (1977) (interpreting 2-608 to create a subjective test that views the buyer's needs and circumstances, but then adds the twist of having the trier-of-fact objectively decide whether the value of the goods to the buyer was in fact substantially impaired).

81. U.C.C. § 2-608 comment 2 (1980). But see Koperski v. Hunter Dodge, 208 Neb. 29, 302 N.W.2d 655 (1981), where the Nebraska Supreme Court ignored both the prevailing interpretation of the patent language of the comment to § 2-608 and viewed the fact that approximately 85% of the purchase price was received upon sale of the vehicle after repossession as supportive of the trial court's opinion that there was no substantial impairment.

82. Basanta, *The Illinois New Car Buyer Protection Act — An Analysis and Evaluation of the Illinois Lemon Law*, 1984 So. ILL. L.J. 1, 14.

claims.⁸³ Revocation of acceptance is subject to many restrictions.⁸⁴ Finally, litigation expenses are often prohibitive for many consumers.⁸⁵ The Federal Magnuson-Moss Warranty Act⁸⁶ has attempted to solve these problems, but with only limited success.⁸⁷

B. The Federal Magnuson-Moss Warranty Act

The Magnuson-Moss Warranty Act-Federal Trade Commission Improvement Act,⁸⁸ passed by Congress in 1975, establishes federal minimum standards for "full" consumer product warranties.⁸⁹ The Act is remedial in nature and is primarily designed to protect consumers from deceptive warranty practices.⁹⁰ In furtherance of this goal, Congress designed the Act to meet four specific needs: (1) consumer understanding of warranties; (2) minimum warranty protection for consumers; (3) assurance of warranty performance; and (4) improved liability for defects.⁹¹

Under a full warranty,⁹² the consumer is entitled to elect either a re-

83. *Id.* In finding a failure of essential purpose, some courts state that "at some point in time, it must be obvious to all people that a particular vehicle simply cannot be repaired or parts replaced so that the same is made free from defect. *Riley v. Ford Motor Co.*, 442 F.2d 670, 673 n.5 (5th Cir. 1971) (quoting *General Motors Corp. v. Earnest*, 279 Ala. 299, 184 So. 2d 811 (1966)).

84. Basanta, *supra* note 82, at 14.

85. *Id.*

86. *Id.*

87. *Id.*

88. 15 U.S.C. § 2301-12 (1982).

89. 15 U.S.C. § 2303(a)(1) (1982), provides that a written warranty meeting the minimum standards set forth in 15 U.S.C. § 2304 "shall be conspicuously designated a 'full (statement of duration) warranty.'" All other written warranties must be designated "limited" under § 2303(a)(2). The Act does not mandate written warranties for consumer products, nor does it require full warranties. It merely requires that if a written warranty is offered, it must be designated "full" or "limited."

90. *Skelton v. General Motors Corp.*, 660 F.2d 311, 313 (7th Cir. 1981), *cert. denied*, 456 U.S. 974 (1982).

91. Swanson, *Comparative Analysis of Three Lemon Laws*, 75 ILL. B.J. 436 (1987). For a clear, concise analysis of the Act, see also Miller & Kanter, *supra* note 12, at 10.

92. See *supra* note 13 and accompanying text. In order to qualify for designation as a "full" warranty under the act, certain minimum criteria must be met as follows:

(a) In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty:

(1) such warrantor must, at a minimum, remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 2308, such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

fund or a replacement without charge if, after a reasonable number of attempts, the warrantor is unable to repair the nonconforming product.⁹³ The Act is thus a federal lemon law that protects buyers with goods having a full warranty. Though the Act does not require the manufacturer to provide a written warranty, all four major American automobile manufacturers do so.⁹⁴ However, most automobiles are purchased under a limited warranty and therefore are not subject to the Magnuson-Moss Act.⁹⁵ Therefore, a buyer with a limited warranty receives no protection under the Act and must resort to other methods such as successfully revoking acceptance,⁹⁶ or seeking a replacement under a particular state lemon law.⁹⁷

Even though the Magnuson-Moss Act was designed to give broader protection to consumers who did not meet the requirements for a claim under the U.C.C., the Act does not adequately supply new car buyers a sufficient remedy. Therefore, the benefits that the Act provides to new car purchasers are very nominal.

Despite its weaknesses, the Magnuson-Moss Act does offer potential, although not mandatory, protection to the buyer of a lemon with a limited warranty. First, the Act encourages manufacturers to offer informal dispute resolution mechanisms.⁹⁸ If the informal dispute resolution procedure meets Federal Trade Commission (F.T.C.) standards,⁹⁹ the manufacturer may include in the warranty a requirement that the consumer resort to the informal dispute resolution procedure before bringing a civil action.¹⁰⁰ Second, implied warranties may not be disclaimed or modified if the warrantor makes a written warranty or enters into a service contract with the consumer at the time of sale or ninety days thereafter.¹⁰¹ The duration of the implied warranty may only be limited to the duration of a limited warranty.¹⁰² Third, the Act provides that the court may, at its discretion, award costs and expenses, including attorney fees, to the consumer who prevails in

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be).

15 U.S.C. § 2304 (1982).

93. 15 U.S.C. § 2304(a)(4) (1978).

94. See Comment, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117 (1979).

95. Comment, *supra* note 39, at 337 n.140.

96. *Id.* at 337.

97. *Id.* at 337 n.143.

98. 15 U.S.C. § 2310(a)(1) (1982).

99. *Id.* § 2310(a)(2) (1982); 16 C.F.R. § 703.1-.8 (1984).

100. 15 U.S.C. § 2310(2), (3). The F.T.C. rules appear at 16 C.F.R. § 7043 (1985).

101. *Id.* § 2308(a) (1978).

102. *Id.* § 2308(b). Under a full warranty the duration of implied warranties may not be limited. *Id.* § 2304(a)(2).

actions under the Act or under a warranty governed by the Act.¹⁰³

III. RESPONSES TO U.C.C. AND MAGNUSON-MOSS ACT SHORTCOMINGS—STATE LEMON LAWS

A. *Operative Provisions and Similarities of Current State Lemon Laws*

In 1982, Connecticut adopted the first lemon law,¹⁰⁴ and California followed with its lemon law the same year.¹⁰⁵ These two states' statutes have served as the model for the forty-two states that have followed the trend by passing state lemon laws.

The advent of lemon law legislation has created an additional remedy for purchasers of new lemon automobiles.¹⁰⁶ Lemon laws provide the new car buyer with several important advantages over prior law, including the U.C.C. and the Magnuson-Moss Federal Warranty Act.¹⁰⁷ Most importantly, the laws are designed to assure the consumer a repair or replacement remedy when the manufacturer, through its dealers, is unable within a reasonable time to remedy a substantial defect breaching an express warranty.¹⁰⁸ Further, the laws set an objective standard to determine when a manufacturer has had a reasonable opportunity to remedy any defect (a problem area under prior law).¹⁰⁹ Finally, by encouraging the use of non-judicial dispute resolution mechanisms, lemon laws potentially allow consumers a less expensive and less time-consuming alternative to litigation in resolving problems concerning new cars.¹¹⁰

Although state-by-state variations exist, most state lemon laws share common characteristics.¹¹¹ First, lemon laws usually apply to new motor vehicles purchased for personal, family, or household purposes. Motor homes and motorcycles are generally excluded.¹¹² Second, lemon laws establish a period of statutory coverage that normally extends from the

103. *Id.* § 2310(d)(2).

104. 1982 Conn. Pub. Acts 82-287, amended by Conn. Pub. Acts 87-522. CONN. GEN. STAT. § 42-172 (West Supp. 1988).

105. CAL. CIV. CODE § 1793.2 (West Supp. 1988).

106. Basanta, *supra* note 82, at 18.

107. *See supra* note 14 and accompanying text.

108. Basanta, *supra* note 82, at 18.

109. *Id.*

110. *Id.*

111. Coffinberger & Samuels, *Legislative Responses to the Plight of New Car Purchasers*, 18 U.C.C. L.J. 168, 176 (1985).

112. Personal, family, or household use is not an unusual limiting provision for a consumer protection statute. *See, e.g.*, Truth in Lending Act, 15 U.S.C. § 1602(h) (1982). Many statutes restrict coverage of their Unfair Deceptive Acts and Practices Statutes to transactions primarily for a personal, family, or household purpose. J. SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 2.4.4 (1982).

shorter of two periods: one year from the date of delivery of the vehicle to the original purchaser or the written warranty period.¹¹³ Third, lemon laws require that the manufacturer or dealer must correct a nonconformity that arises once the consumer satisfies the burden of notifying the manufacturer or dealer of the defect.¹¹⁴

When a defect substantially impairs the value or utility of the vehicle and cannot be repaired after a reasonable number of attempts,¹¹⁵ the statutes generally specify that the manufacturer must provide either a comparable replacement or a full refund of the purchase price with only a limited setoff for the fact that the vehicle is now used.¹¹⁶ The statutes define precisely what constitutes a reasonable number of attempts by the manufacturer or dealer to repair a defective vehicle, with the most common standard being four repair attempts of the same defect,¹¹⁷ or the vehicle being out of service for a cumulative total of at least thirty days during the shorter of the first year or the duration of the express warranty.¹¹⁸ If a manufacturer's informal dispute mechanism exists, consumers may not go to court on the basis of these statutes until they have pursued it. The manufacturer's settlement mechanism is only mandatory if it complies with the provisions of the Magnuson-Moss Act.¹¹⁹

B. Problems with the Current Lemon Laws

Overall, the lemon law movement appears to be a beneficial one for consumers. However, certain aspects of state lemon laws should be im-

113. See, e.g., ILL. REV. STAT. ch. 121 ½, para. 1202(f) (1983) (12,000 mile limitation); ARK. REV. STAT. § 44-1262 (1984) (one year after date of sale).

114. Statutes which more clearly limit the consumer's rights by requiring notice of the defect within some set period have been the subject of some criticism as being potentially unrealistically restrictive. As an example, assume a car is expressly warranted as being in "good operating condition" without stating any period of duration. By its terms, this is simply a representation of the car's quality at the time of sale. It does not extend beyond that time. So long as the car conforms to such representations at the time of sale, there is not a breach of warranty for any defects that appear at any time thereafter. See, e.g., *Blade v. Sloan*, 108 Ill. App. 2d 397, 248 N.E.2d 142 (1969). A lemon law which requires notice of the defect to the seller within the duration of such an express warranty provides the consumer virtually no protection since the warranty's duration is literally momentary.

115. States vary as to what constitutes a reasonable number of attempts, with states requiring either three or four attempts to repair. NAT'L L.J., Dec. 14, 1987, at 26, col. 2.

116. *Moore v. Howard Pontiac-Am.*, 492 S.W.2d 227 (Tenn. Ct. App. 1972); *Staggs v. Herff Motor Co.*, 216 Tenn. 104, 390 S.W.2d 245 (1965).

117. *Id.*

118. *Id.*

119. Magnuson-Moss Federal Trade Commission Improvement Act, § 110(a)(3), 15 U.S.C. § 2310(1)(3) (1982). The Federal Trade Commission's regulations are set out in 16 C.F.R. § 703 (1985). Most state lemon laws contain provisions requiring the exhaustion of informal dispute mechanisms before a cause of action can be brought in state court.

proved to produce more effective laws. First, lemon laws lack uniform standards of conduct for dealers and manufacturers.¹²⁰ Second, many laws do not provide for remedies upon breach of an implied warranty.¹²¹ Third, most laws do not provide clear guidelines for informal dispute resolution.¹²² Fourth, definitions and terms used in the laws are ambiguous and left open to a myriad of interpretations by consumers, manufacturers, arbiters, and the judicial system.¹²³

1. Lack of Uniform Standards of Conduct

Generally, the consumer's main objective when dealing with a perpetually defective automobile is either to receive a refund of the purchase price or to obtain a new automobile.¹²⁴ Even though lemon laws are designed to ensure the availability of such remedies, the desired result is often not reached.¹²⁵ The cooperation of the manufacturer is necessary for the statute to work effectively.¹²⁶

The forty-four lemon laws currently in effect vary in their terms. The basic framework of the statutes, however, is the same, with each statute designed to reach the same end result—refund or replacement.¹²⁷ However, the differing operative provisions of the statutes cause difficulties for manufacturers. This results in both the manufacturer's failure to comply with the statutes, and companies and industry associations challenging a number of the laws in court.¹²⁸ States, frustrated by what they see as resistance by manufacturers to respond to lemon laws, have also filed their own legal challenges.¹²⁹ Consistency in the substantive provisions of lemon laws could help alleviate some of this friction.

Current lemon laws also vary in their substantive provisions.¹³⁰ For ex-

120. See *infra* notes 117-29 and accompanying text.

121. See *infra* notes 130-33 and accompanying text.

122. See *infra* notes 134-44 and accompanying text.

123. See *infra* notes 145-51 and accompanying text.

124. Note, *supra* note 40, at 350.

125. See Note, *supra* note 34, at 846 (despite the publicity and enthusiasm over lemon laws, most of their benefits are illusory).

126. *Id.*

127. NAT'L L.J., Dec. 14, 1987, at 25, col. 1.

128. *Id.*

129. *Id.*

130. Connecticut, which recently amended its lemon laws extensively, was the first state to pass such a statute, followed by California. While most of the state lemon laws are very similar, some differ substantially from others. The California law applies in part to consumer goods other than automobiles. Kentucky's lemon law requires the use of a dispute resolution mechanism, but unlike most, does not provide the consumer with a refund-or-replacement remedy. The Washington lemon law only provides for a refund to the consumer, not for a replacement alternative. North Carolina simply changes the Uniform Commercial Code's definition of

ample, in some states only personal vehicles are covered by the terms of the law, whereas in other states commercial vehicles are also covered.¹³¹ The maximum number of repair attempts allowed to cure the same defect is generally split between three attempts in some states and four attempts in others.¹³² The statutory period of coverage ranges from one year or 12,000 miles to the period of the express warranty.¹³³ These differences are only representative of the many variations among the different statutes.

The wide array of statutory provisions currently in effect nationwide makes it extremely difficult for automotive manufacturers to efficiently handle consumer complaints.¹³⁴ Manufacturers claim that they are willing to comply with lemon laws if they are able, through legislative enactment, to achieve some uniformity in the rules with which they must comply.¹³⁵ If this uniformity is not achieved, manufacturers claim that they are willing to support a federal lemon law, but, because there has not yet been federal enforcement of Magnuson-Moss warranty laws, states have resisted new federal laws.¹³⁶

2. Lack of Remedies for Breach of an Implied Warranty

Existing lemon laws pertain only to express warranties as defined by the U.C.C.¹³⁷—no express provisions are made for implied warranties. Most new car warranties limit a consumer's remedies to repair or replacement of

a "seller" to include any manufacturer of a self-propelled motor vehicle who makes an express warranty. This then eliminates any privity problems for the buyer. While not a true lemon law, the North Carolina Attorney General considers it to be such. See *Manufacturer's Rush to Create Dispute Resolution Mechanisms*, 2 NAT'L CONSUMER L. CENTER REP. (WARRANTIES & ODOMETERS Ed.) (NCLC) 6, 8 n.2. (Sept.-Oct. 1983). Given the number and variety of state lemon laws it would seem to be appropriate to adopt a uniform state lemon law.

131. The coverage of state lemon laws varies widely. Many are narrow in coverage, excluding motor homes, motorcycles, and other motor vehicles purchased regularly by individual consumers. See, e.g., DEL. CODE ANN. tit. 6, § 5001(5) (Supp. 1983). In contrast, some states provide very broad coverage for their lemon laws. ME. REV. STAT. ANN. tit. 10, § 1161(3) (West Supp. 1987-88). Many state lemon laws cover only "passenger cars," and by covering only passenger cars they exclude motorcycles and trucks from coverage. See, e.g., ILL. REV. STAT. ch. 95 ½, para. 1-147 (1983).

132. For an analysis of the differing provisions of state lemon laws, see NAT'L L.J., Dec. 14, 1987, at 26, col 2.

133. *Id.*

134. *Id.*

135. *Id.* at 27.

136. *Id.*

137. For the U.C.C.'s definition of express warranty, see *supra* note 30 and accompanying text. All but four states restrict their lemon law's coverage to express warranties: KAN. STAT. ANN. § 50-645 (Supp. 1987); MASS. GEN. LAWS ANN. ch. 90, § 7N ½ (West Supp. 1988); N.H. REV. STAT. ANN. § 357-D:2 (Supp. 1984); R.I. GEN. LAWS § 31-5.2-1(A) (Supp. 1987). That means the laws do not cover disclaimers of implied warranties common in automobile sales agreements.

any parts that are defective in workmanship or material.¹³⁸ If the entire car is defective, or if it is apparent that the car is not fit for the ordinary purpose of driving and there is no one part or group of parts which renders the car defective, the manufacturer has not breached any express warranty,¹³⁹ only the implied warranty of merchantability. In such an instance, the consumer is forced to seek remedies for breach of an implied warranty under the Magnuson-Moss Act of the U.C.C.. Since the consumer is precluded from proceeding under both the U.C.C. and a lemon law, the consumer may have to forego a cause of action based on implied warranties.¹⁴⁰

3. Clear Guidelines for Independent Dispute Settlement Mechanisms (IDSMS)

A key part of the current debate over state regulations is Federal Trade Commission Rule 703, a regulation enacted under Magnuson-Moss that established informal dispute settlement mechanisms.¹⁴¹ At issue is exactly when the Rule applies to lemon laws.¹⁴² At present, no mechanism exists to determine whether a given dispute settlement mechanism is in substantial compliance with Rule 703.¹⁴³ The F.T.C. has not fulfilled its obligations to audit such mechanisms as provided in the Magnuson-Moss Act.¹⁴⁴ Manufacturers have also taken the position that nothing in Rule 703, or several states' lemon laws, requires a mechanism to consider or award lemon law relief even if the consumer proves the elements of recovery.¹⁴⁵

The F.T.C. Rule creates guidelines for manufacturers and sellers of all goods valued at ten dollars or more to set up voluntary dispute resolution mechanisms, but does not specifically address lemon laws.¹⁴⁶ Under the Rule, a consumer has to use a manufacturer's dispute resolution program before he is eligible to go to court under a lemon law or Magnuson-Moss program if the manufacturer's program meets all of the rules under state law.¹⁴⁷ In some cases, if a consumer finds that the company program violates the standards, the consumer can bypass the informal resolution process and go to the state system; but in states with no certified manufacturer's program, consumers can go straight to the state system.¹⁴⁸

138. See *supra* note 10 and accompanying text.

139. Swanson, *supra* note 91, at 444.

140. *Id.* See, e.g., ILL. REV. STAT. ch. 121 ½, para. 1205 (1985).

141. See generally Nicks, *Lemon Laws in the U.S.: More Hype than Help*, 34 J. CONSUMER POL'Y 79, 82 (1986).

142. Nicks, *Lemon Law II*, 60 WIS. B. BULL. 8, 10 (1987).

143. *Id.*

144. *Id.*

145. *Id.*

146. NAT'L L.J., Dec. 14, 1987, at 27, col 1.

147. *Id.*

148. *Id.*

Thirty-nine states incorporate Rule 703, but to make 703 more applicable to lemon laws, a common understanding of what is required as an informal dispute resolution device is needed, and the standards must apply nationwide.¹⁴⁹ In that way, state courts faced with a lemon law suit would know when a consumer must first use a mandatory arbitration program supplied by a manufacturer.¹⁵⁰ A state-by-state debate exists as to whether an independent dispute settlement mechanism is one that must be used by the consumer prior to instituting a claim in the courts.¹⁵¹

4. Clarification of Definitions and Terms

Many statutes fail to give definitions of terms used in their laws which are prone to ambiguity.¹⁵² Phrases are often used with no explanation of their meaning and no standard for their application. As a result, manufacturers, consumers, and arbiters tend to construe the words of the statutes in a manner which supports their respective positions in the suit.¹⁵³

To establish a *prima facie* case, the burden of proof is on the consumer to prove the elements necessary for relief under the lemon law.¹⁵⁴ Therefore, a consumer needs to know what obstacles he must overcome to prevail in his claim. A lack of mutual understanding between manufacturers and consumers often leaves the buyer guessing as to whether he actually has a cause of action.¹⁵⁵ For example, even when the owner of a defective car meets the general requirement of having his automobile fixed three times for the same defect, the defect is required to be one that "substantially impairs" the use, value, or safety of the vehicle.¹⁵⁶ Since a standard is not defined in the current state statutes to adjudge the meaning of substantial impairment, the state courts currently utilize a subjective standard.¹⁵⁷

Because this subjective standard is applied initially by the manufacturer-sponsored independent dispute settlement mechanism arbiters, the consumer enters the action unaware of the burden of proof that he will be forced to meet.¹⁵⁸ This lack of awareness causes many consumers to live with their lemon and to forego their possible remedies.

149. *Id.*

150. *Id.*

151. NAT'L L.J., Dec. 14, 1987, at 27, col. 1.

152. For example, terms such as substantial impairment, nonconformity, and consumer are all prone to differing definitions.

153. Comment, *supra* note 39, at 345.

154. McEttrick, *supra* note 41, at 34.

155. *Id.*

156. See *supra* note 70 and accompanying text.

157. See *supra* note 71 and accompanying text.

158. See *supra* note 149 and accompanying text.

IV. A PROPOSAL FOR A MODEL STATE LEMON LAW

This note has criticized the relief that the U.C.C., the Magnuson-Moss Act, and the current lemon laws provide for purchasers of defective automobiles. Under current state lemon laws, which were designed to fill the gaps left by the inadequacy of the U.C.C. and the Magnuson-Moss Act, the manufacturer is discouraged from complying with the statutes because of the burden in trying to act under forty-four different sets of laws. The current statutes also have defects which make recovery for consumers speculative. As a result, manufacturers have the ability to escape liability under existing lemon laws. Moreover, consumers, often discouraged by the speculative procedure, often forego remedies presently available to them. To make the statute an effective tool for defective automobile control, more definitive standards must be imposed. To achieve such a result, the state lemon laws should be amended in the following fashion to achieve their original objectives.

MODEL STATE STATUTE

Chapter ____ Motor Vehicle Warranties.

Sec. 1. This chapter applies to all motor vehicles that are sold, leased, transferred, or replaced by a dealer or manufacturer.

Sec. 2. As used in this chapter, "calendar day" means any day of the week other than a legal holiday.

Sec. 3. As used in this chapter, "buyer" means any person who, for purposes other than resale or sublease, enters into an agreement or contract within (state) for the transfer, lease, or purchase of a motor vehicle covered under a manufacturer's express or implied warranty.

Sec. 4. As used in this chapter, "manufacturer" means any person who is engaged in the business of manufacturing motor vehicles, or, in the case of motor vehicles not manufactured in the United States, any person who is engaged in the business of importing motor vehicles.¹⁵⁹

Sec. 5. As used in this chapter, "motor vehicle" or "vehicle" means any self-propelled vehicle intended primarily for use and operation on public highways and required to be registered or licensed before use or operation. The term does not include conversion vans, motor homes, farm tractors, and other machines used in the actual production, harvesting, and care of farm products, road building equipment, truck tractors, road tractors, motorcycles, mopeds, snowmobiles, or vehicles built primarily for off-road

159. It is the manufacturer and not the dealer who is responsible for providing the refund-or-replacement remedy. See, e.g., ILL. REV. STAT. ch. 121 ½ para. 1202(e) (1987).

use.¹⁶⁰

Sec. 6. As used in this chapter, "nonconformity"¹⁶¹ means any specific or generic defect or condition or any concurrent combination of defects or conditions that:

- (1) substantially impairs the use, market value, or safety of a motor vehicle;¹⁶² or
- (2) renders the motor vehicle nonconforming to the terms of an applicable manufacturer's express warranty or implied warranty of merchantability.¹⁶³

Sec. 7. As used in this chapter, "term of protection" means a period of time that:

- (1) begins:
 - (A) on the date of original delivery of a motor vehicle; or
 - (B) in the case of a replacement vehicle provided by a manufacturer to a buyer under this chapter, on the date of delivery of the replacement vehicle to the buyer; and
- (2) ends the earlier of:
 - (A) six months after the end of the express warranty period; or
 - (B) three years from original delivery of the vehicle.

Sec. 8. If a motor vehicle suffers from a nonconformity and the buyer reports the nonconformity within the term of protection to the manufacturer of the vehicle, its agent, or its authorized dealer, the manufacturer, agent, or authorized dealer shall make the repairs that are necessary to correct the nonconformity, even if the repairs are made after the expiration of the term of protection.

Sec. 9. (a) A buyer must notify the manufacturer of a claim under this chapter if the manufacturer has made the disclosure required by subsection (b).¹⁶⁴ However, if the manufacturer has not made the required disclosure, the buyer is not required to notify the manufacturer of a claim under this chapter.

160. Such a definition was derived from ILL. REV. STAT. ch. 121 ½ para. 1203(c) (1987).

161. This definition of nonconformity was suggested by Basanta, *supra* note 82, at 29.

162. *See infra* notes 190-94.

163. *See infra* notes 189-94 and accompanying text.

164. Coffinberger & Samuels, *supra* note 111, at 172.

(b) The manufacturer shall clearly and conspicuously disclose to the buyer, in the warranty or owner's manual, that written notification of the nonconformity is required before the buyer may be eligible for a refund or replacement of the vehicle. The manufacturer shall include with the warranty or owner's manual the name and address to which the buyer must send notification.

Sec. 10. If, after a reasonable number of attempts,¹⁶⁵ the manufacturer, its agent, or authorized dealer is unable to correct the nonconformity, the manufacturer shall accept the return of the vehicle from the buyer and, at the buyer's option,¹⁶⁶ either refund the amount paid by the buyer or provide a replacement vehicle of comparable value.

Sec. 11. (a) If a refund is tendered under this chapter, the refund must be the full contract price of the vehicle, including all credits and allowances for any trade-in vehicle and less a reasonable allowance for use.

(b) To determine a reasonable allowance for use, multiply:

(1) the total contract price of the vehicle; by

(2) a fraction having as its denominator one hundred thousand (100,000) and having as its numerator the number of miles that the vehicle traveled before the manufacturer's acceptance of its return.¹⁶⁷

(c) The refund must also include reimbursement for the following incidental costs:¹⁶⁸

(1) All sales tax.

(2) The unexpended portion of the registration fee and excise tax that has been prepaid for any calendar year.

(3) All finance charges actually expended.

(4) The cost of all options added by the authorized

165. See *supra* note 164 and accompanying text.

166. Vogel, *supra* note 9, at 618 n.148. Only six states explicitly state that the consumer has this choice. Four other states require that the replacement vehicle satisfy the customer. Other states give the manufacturer a choice, and even others do not clearly state who has the option. *Id.*

167. See, e.g., MINN. STAT. ANN. § 325 F.665(3)(a) (West Supp. 1988) (such a formula minimizes for the consumer the risk of controversy in connection with an exercise of rights under the lemon law and make it a more effective device.)

168. Collateral charges include taxes, registration and license fees, finance charges, and costs of options added by an authorized dealer. It also includes incidental damages incurred during periods when the car is out of service by reason of repair.

dealer.

Sec. 12. (a) If a vehicle is replaced by a manufacturer under this chapter, the manufacturer shall reimburse the buyer for any fees for the transfer of registration of any sales tax incurred by the buyer as a result of replacement.

(b) If a replaced vehicle was financed by the manufacturer, its subsidiary, or agent, the manufacturer, subsidiary, or agent may not require the buyer to enter into any refinancing agreement concerning a replacement vehicle that would create any financial obligations upon the buyer beyond those of the original financing agreement.

Sec. 13. Whenever a vehicle is replaced or refunded under this chapter, the manufacturer shall reimburse the buyer for necessary towing and rental costs actually incurred as a direct result of the nonconformity.

Sec. 14. A buyer has the option of retaining the use of any vehicle returned under this chapter until the time that the buyer has been tendered a full refund or replacement vehicle of comparable value.¹⁶⁹ The use of any vehicle retained by a buyer after its return to a manufacturer under this chapter must, in cases in which a refund is tendered, be reflected in the reasonable allowance for use required by Section 11 of this chapter.

Sec. 15. A reasonable number of attempts is considered to have been undertaken to correct a nonconformity if:¹⁷⁰

(a)(1) the nonconformity has been subject to repair at least three (3)¹⁷¹ times by the manufacturer or its agents

169. A difficulty with the replacement option in most current state lemon laws is that they grant great discretion to the manufacturer in selecting the replacement vehicle. Most of the lemon laws use terms such as "comparable new motor vehicle," "new motor vehicle" or "motor vehicle of equal value." The following statutes use the term "comparable vehicle." ALASKA STAT. § 45.45.300 (1986); COLO. REV. STAT. § 42-12-103(1) (1984); HAWAII REV. STAT. § 490:2-313.1(b) (1985); IOWA CODE ANN. § 322E.1(3) (West Supp. 1987); KAN. STAT. ANN. § 50-645(2)(c) (Supp. 1987); ME. REV. STAT. ANN. tit. 10, § 1163(2) (Supp. 1987); MINN. STAT. ANN. § 325F.665(3)(a) (West Supp. 1987); MISS. CODE ANN. § 63-17-151 (Supp. 1987); NEV. REV. STAT. § 598.766.1(a) (1986); N.J. STAT. ANN. § 56:12-21(a) (West 1987); N.M. STAT. ANN. § 57-16A-3(B) (1987); N.Y. GEN. BUS. LAW § 198-1(c) (McKinney 1986); N.D. CENT. CODE § 51-07-18(1) (Supp. 1987); PA. STAT. ANN. tit. 73, § 1955 (Purdon Supp. 1988); TENN. CODE ANN. § 55-24-203(a) (Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(c) (Vernon Supp. 1985); UTAH CODE ANN. § 13-20-4 (1986); WIS. STAT. ANN. § 218.015(2)(b) (West Supp. 1987). The replacement vehicle not only has to be comparable, but it must also reasonably satisfy the customer.

170. Similar provisions can be found in Maryland, Minnesota, and West Virginia's Lemon Laws. MD. COM. LAW CODE ANN. § 14.1502(c)(i) (Supp. 1987); MINN. STAT. ANN. § 325 F.665(3)(c) (West Supp. 1988); W. VA. CODE § 46-A-6A-3(b) (1987).

171. Many states' laws only create a presumption as to a reasonable opportunity to cor-

or authorized dealers, but the nonconformity continues to exist; or

(2) the vehicle is out of service by reason of repair of any nonconformity for a cumulative total of thirty

(30) calendar¹⁷² days; or

(3) there have been five (5) or more attempts to repair any nonconformities that together substantially impair the use and value of the motor vehicle to the consumer.¹⁷³

(b) The thirty (30) calendar days in subsection (a)(2) shall be extended by any period of time during which repair services are not available as a direct result of a strike. The manufacturer, its agent, or authorized dealer shall provide or make provisions for the free use of a vehicle to any buyer whose vehicle is out of service by reason of repair during a strike.

(c) The burden is on the manufacturer to show that the reason for an extension under subsection (b) was the direct cause for the failure of the manufacturer, its agent, or authorized dealer to cure any nonconformity during the time of the event.

Sec. 16. (a) A manufacturer, its agent, or authorized dealer may not refuse to diagnose or repair any vehicle for the purpose of avoiding liability under this chapter.

(b) A manufacturer, its agent, or authorized dealer shall provide a buyer with a written repair order each time the buyer's vehicle is brought in for examination or repair. The repair order must indicate all work performed on the vehicle including examination of the vehicle, parts, and labor.

Sec. 17. If a motor vehicle has been returned to the manufacturer under either this chapter or by judgment, decree, arbitration award, settle-

ment nonconformities, and the manufacturer can seek to show that the number of repair attempts or days out of service, although in excess of the statutory specifications, are not unreasonable. Since this creates uncertainty and possible conflict, the proposed lemon law conclusively specifies a reasonable number of repair attempts instead of simply creating a presumption.

172. Allowing thirty calendar days out of service to be the statutory standard is more equitable to the consumer than allowing thirty business days to be the statutory standard, which is too generous to the seller. National Law Center, *supra* note 89, at 1154.

173. See *infra* notes 192-94 and accompanying text.

ment agreement, or voluntary agreement in (state) or any state, the motor vehicle may not be resold in (state) unless:¹⁷⁴

- (1) The manufacturer provides the same express warranty the manufacturer provided to the original purchaser, except that the term of the warranty need only last for twelve thousand (12,000) miles or twelve (12) months after the date of resale; and
- (2) the manufacturer provides a written disclosure, signed by the buyer, indicating that the vehicle was returned to the manufacturer because of a nonconformity not cured within a reasonable time as provided by (state) law.

Sec. 18. It is an affirmative defense to any claim under this chapter that:

- (1) the nonconformity, defect, or condition does not substantially impair the use, value, or safety of the motor vehicle; and
- (2) the nonconformity, defect, or condition is the result of abuse, neglect or unauthorized modification or alteration of the motor vehicle by the buyer.

Sec. 19. This chapter does not apply to any buyer who has not first resorted to an informal proceeding established by a manufacturer or in which a manufacturer participates if:¹⁷⁵

- (1) the procedure is certified by the attorney general as complying in all respects with C.F.R. 703;¹⁷⁶ and

174. Some states provide by statute or regulation for the precise content of this notice. CONN. GEN. STAT. ANN. § 42-179(g) (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 90, § 7N½ (5) (West Supp. 1984-85); MINN. STAT. ANN. § 325F.665(5)(a)(1) (West Supp. 1988). The Minnesota statute requires as a condition to resale that the manufacturer expressly warrant the returned car for twelve months or 12,000 miles.

175. Almost all states' lemon laws provide that if a manufacturer sets up an informal dispute resolution mechanism that conforms to the federal regulations for such mechanism, the consumer must resort to those arbitration boards before qualifying for the provisions of the lemon law in a court action. *See, e.g.,* CAL. CIV. CODE § 1793.2(e)(3) (West Supp. 1988); ILL. REV. STAT. ch. 121-½ para. 1204(a) (1983); MINN. STAT. ANN. 325 F. 665 (West Supp. 1988) (requires only that IDSM "substantially comply" with FTC's regulations). *But see* N.C. GEN. STAT. § 25-2-103(1)(d) (1986). Besides Texas, North Carolina is the only state not to provide for use of an IDSM sponsored by the manufacturer. *Id.* § 25-2-103(1)(d). North Carolina's lemon law, however, is not a "true" lemon law in that it merely changes the U.C.C. definition of "seller" to include a manufacturer of a motor vehicle who makes an express warranty, thereby eliminating privity problems for the buyer. *Id.* § 25-2-103(1)(d).

176. For the IDSM procedure to qualify under the regulatory scheme, the mechanism must be provided free of charge to the consumer and must be insulated from any influence by the warrantor. The minimum requirements, as set out in subsection (b), include:

(2) the buyer has received adequate written notice from the manufacturer of the existence of the procedure. Adequate written notice includes the incorporation of the informal dispute settlement procedure into the terms of the written warranty to which the motor vehicle does not conform.

Sec. 20. This chapter does not limit the rights or remedies that are otherwise available to a buyer under any applicable provisions of law.¹⁷⁷

Sec. 21. A buyer may bring a civil action to enforce this chapter in any circuit or superior court.

Sec. 22. A buyer who prevails in any action brought under this chapter is entitled to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses, including attorney's fees¹⁷⁸ based on ac-

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- (1) a statement of the availability of the IDSM;
 - (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 the consumer resort to the Mechanism before exercising rights or seeking remedies created by Title I of the Act, together with the disclosure that if a consumer chooses to seek redress by pursuing rights and remedies not created by Title I of 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 manuals accompanying the product.

16 C.F.R. § 703.3(b) (1988).

177. As a means of promoting goodwill and encouraging arbitration in lieu of legal action, contracts between the manufacturer and the mechanism make the arbitration binding on the manufacturer but not on the consumer. To allow an adverse finding of the arbitration panel to be introduced into evidence will have adverse affects to the consumer, thus in effect "binding" the consumer to the situation, if not by the precise terms of the agreement. *See, e.g., TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07* (Vernon Supp. 1988) (provides purchaser using provisions of § 6.07 with trial de novo after exhaustion of administrative remedies in action only against manufacturer or distributor, not dealer); *see also Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(c)* (Vernon Supp. 1988) (if manner of review authorized is by trial de novo, court "may not admit in evidence the fact of prior agency action or the nature of that action").

178. Allowing recovery for attorney fees and double damages when the consumer prevails will encourage the manufacturers to settle before litigation when the consumer has a bona fide lemon law claim. There are several policy interests behind the recovery of attorney fees and double damages. First, the recovery of attorney fees encourages injured consumers to bring legal actions to enforce their rights under the lemon law statutes. Often the amount of pecuniary loss is small compared with the cost of litigation. Thus, the recovery must be large enough to give consumers an incentive to bring suit. The award of attorney fees encourages attorneys to pursue consumers' claims where the anticipated monetary recovery would not justify the expense of legal action.

Second, the consumer who sues under the statute acts as a "private attorney general" to enforce the consumers' rights set forth in the statutes. Thus, the consumer not only enforces his or her individual rights, but the aggregate effect of individual suits enforces the public's rights.

tual time expended by the attorney, determined by the court to have been reasonably incurred by the buyer for or in connection with the commencement and prosecution of the action.

Sec. 23. (a) An action brought under this chapter must be commenced within two (2)¹⁷⁹ years following the date the buyer first reports the nonconformity to the manufacturer, its agent, or authorized dealer.

(b) When the buyer has commenced an informal dispute settlement procedure described in Section 19 of this chapter, the two (2) year period specified in subsection (a) is tolled during the time the informal dispute settlement procedure is being conducted.¹⁸⁰

V. AN ANALYSIS OF THE PROPOSED MODEL STATE LEMON LAW

In general, the proposed model lemon law will provide the new car buyer with several important advantages over existing law, including the U.C.C. and the Magnuson-Moss Act. Most importantly, the law is designed to assure the consumer a refund or replacement remedy where the manufacturer is unable, within a reasonable time, to remedy a substantial defect breaching an express or implied warranty.¹⁸¹ Further, the proposed model statute establishes objective standards to determine when a manufacturer has had a reasonable opportunity to remedy any defect, a problem area under existing law.¹⁸² Finally, by encouraging the use of non-judicial dispute resolution mechanisms, the proposed law potentially allows consumers a less expensive and less time-consuming alternative to litigation in resolving problems concerning new cars.¹⁸³

Third, consumer suits have the effect of deterring impermissible conduct by manufacturers because, if they violate the statutes, they will be subject to costs, including attorney fees. Nicks, *supra* note 142, at 48.

179. See, e.g., OHIO REV. CODE ANN. § 1345.72 (Baldwin Supp. 1987). If the motor vehicle has been returned under the provisions of the statute, whether as a result of legal action or of an informal dispute settlement proceeding, the vehicle may not be resold in the state unless the manufacturer provides the same express warranty offered to the original purchaser for a term of twelve months or 12,000 miles, whichever is earlier, and the manufacturer provides to the consumer a document stating that the vehicle was returned to the manufacturer as a "lemon." *Id.*

180. This provision, which is followed in six states, prevents a statute of limitations from running before a decision is rendered by the dispute mechanism. FLA. STAT. ANN. § 681.104(5)(a) (West Supp. 1988); ILL. ANN. STAT. ch. 121 ½, para. 1204, § 4(b) (Smith-Hurd 1988); 1985 MISS. LAWS 224, § 6; MO. ANN. STAT. § 407.573(3) (Vernon Supp. 1988); N.M. STAT. ANN. § 57-16-7 (1987); W. VA. CODE § 46A-6A-8(c) (1986).

181. See *supra* note 117 and accompanying text.

182. See *supra* notes 149-51 and accompanying text.

183. See *supra* notes 134-44 and accompanying text.

A. Adopting a Uniform Standard of Conduct

The manufacturer's compliance with lemon laws can be encouraged by providing manufacturers with a uniform set of substantive provisions to follow.¹⁸⁴ At present, the manufacturer's liability to the consumer varies depending upon the state in which the automobile was purchased.¹⁸⁵ A car purchased in one state will be covered by that state's lemon law statute, but the same car purchased in another state will not be covered by a lemon law statute.¹⁸⁶ This lack of uniformity also appears in the areas of number of repair attempts allowed and defects which constitute "substantial impairment." As a result, a heavy burden is placed upon manufacturers who attempt to comply with the various substantive provisions of the lemon laws.

Requiring states to adopt uniform operative provisions for their individual lemon law statutes will encourage the manufacturers to comply with the laws.¹⁸⁷ This will provide new car buyers with fewer disputes, less litigation, and ultimately less frustration. Once uniform standards are established, manufacturers will no longer have the excuse of trying to figure out what the law is in a particular jurisdiction or trying to determine what the law requires.¹⁸⁸ Once a manufacturer is confronted with a lemon law claim, the application of the statute will be the same in all states and there should be no delay in resolving the problem.

Application of definite guidelines from the F.T.C. for independent dispute settlement mechanisms will also promote manufacturer compliance with lemon laws.¹⁸⁹ Under the proposed system, every state court with a lemon law will know if an arbitration program by a manufacturer is the type of program a consumer is required to use first. Once the F.T.C. sets minimum standards for the IDSM's, the state courts will be bound to utilize the system before they can entertain a claim brought before them.¹⁹⁰

Many manufacturers currently take the position that nothing in Rule 703 requires arbiters under the IDSM to consider or award lemon law relief even if the consumer proves the elements of recovery.¹⁹¹ The situation thus resulting is that, as a prerequisite to court actions, consumers are forced to

184. NAT'L L.J., Dec. 14, 1987, at 27, col. 1.

185. *Id.* at 26.

186. *Id.*

187. Presently, manufacturers do not always comply with state lemon laws. Arbiters are not informed of the provisions of the lemon law statutes and are not informed of the necessity of applying the lemon law standards. Therefore, time is wasted and litigation unnecessarily ensues. *Id.*

188. *Id.*

189. *Id.*

190. Vogel, *supra* note 9, at 614. For a detailed discussion of independent dispute settlement mechanism, see *supra* notes 89-91 and accompanying text.

191. Note, *supra* note 53, at 362.

participate in dispute settlement procedures in which the relief sought is not available. Also, arbiters are often unaware of the lemon laws and fail to apply them.¹⁹²

Requiring the IDSMS to meet F.T.C. standards would require arbiters to apply the lemon laws and the consumers to first resort to that procedure. Since ninety percent of all claims going through arbitration result in a settlement, this is a definite advantage for consumers.¹⁹³ Uniform standards will also force manufacturers to be more conscientious when making decisions regarding defective cars. The standards at the arbitration level will be more consistent for cars with actual non-conforming defects. Manufacturers will not be able to randomly dismiss claims at this level because if a claim is wrongfully dismissed and the consumer is forced into litigation and wins, double damages¹⁹⁴ and reasonable attorney fees¹⁹⁵ are awarded to the consumer.

B. Allowing Recovery for Breach of an Implied Warranty

Nonconformity, as defined in Section 6 of the model statute, means a new car's failure to conform to all express or implied warranties which the failure of substantially impairs the use, market value, or safety of the car to the consumer. Such a definition is an improvement over current state laws. Current statutes do not generally cover breach of implied warranties in their statutes.¹⁹⁶ Therefore, no guarantee exists that the car will be fit for the ordinary purpose of driving or will be merchantable. A new car may be repaired for different defects during the applicable period substantially more than four times and not come within the limitations of the statute. Without the same defect occurring four times, under current state statutes, substantial impairment does not exist.

The term "substantial impairment" presents much difficulty in the lemon laws of many states both because of its broad definition and because of the need to use a subjective test in determining whether substantial impairment has resulted.¹⁹⁷ For purposes of the model state statute, substantial impairment will be measured by a more objective standard. Under the model statute, the buyer must introduce "objective evidence" to demon-

192. *Id.* at 363.

193. *Id.*

194. *See supra* note 171 and accompanying text.

195. *Id.*

196. *See supra* note 114. Lemon laws generally limit their coverage to the express warranty of the manufacturer. Only Kansas, Massachusetts, New Hampshire and Rhode Island extend coverage to both express and implied warranties. 1985 Kan. Sess. Laws 118 § 1(c); MASS. GEN. LAWS ANN. ch. 90, § 7N½(2) (West Supp. 1988); N.Y. REV. STAT. ANN. § 357-D (1984); R.I. GEN. LAWS § 31-5.2-1(A) (Supp. 1988).

197. Basanta, *supra* note 82, at 29-30.

strate that the value to him was actually impaired.¹⁹⁸ By setting guidelines as to what type of defects constitutes substantial impairment, the statute will be more effective than current statutes.

Unlike the majority of existing lemon laws, under the model statute the buyer can demonstrate substantial impairment by proving that the cumulative effect of the five defects and the manufacturer's or dealer's inability to repair constitutes a substantial impairment of the value of the goods to the buyer.¹⁹⁹ The nonconformity may include a cluster or combination of defects rather than only one defect occurring several times.²⁰⁰ This is crucial because lemon automobiles often have multiple defects. Sometimes individual defects alone do not substantially impair the use, value, or safety of the car, but when such defects are taken together, they may constitute a substantial impairment.²⁰¹

C. Clear-Cut Definitions and Statutory Language

As with most statutes, the definitional section of a lemon law is crucial in determining its scope and coverage. In many ways, the definitions are the key to the usefulness of the law as a protective device. Including the definition of all of the terms used in the statute eliminates any uncertainty on the part of the manufacturers, courts, and consumers in applying the statute. As a result, decisions of the arbitrators should ultimately be more predictable and reliable, and consumers will have more insight into whether they have a lemon law claim.

VI. CONCLUSION

The proposed Model State Lemon Law is a response to inadequacies in the present legal protections offered to new car buyers, particularly the inadequacies in the Uniform Commercial Code and Magnuson-Moss Warranty Act. The law is intended to supplement these laws and to attempt to correct specific problems encountered by new car buyers in relation to them.

The lemon law would make significant improvements over existing law. The consumer's right under the lemon law to receive a refund of the

198. A major defect in most states' lemon laws is that they fail to give a definition of "substantial impairment," leaving a consumer guessing as to whether he has a cause of action. State courts impose different standards as to what constitutes substantial impairment, so the manufacturer is often left guessing also. For a discussion as to distinct categories of nonconformity which have been held to constitute substantial impairment see Comment, *supra* note 39, at 329.

199. U.C.C. § 2-608 (1980).

200. See *supra* notes 130-33.

201. *Id.*

purchase price or a replacement vehicle if the manufacturer is unable, within a reasonable time, to remedy any substantial breach of an express warranty, is of particular importance. The purchaser is then assured of the opportunity to rid himself of the car and either receive a refund or a replacement car. The lemon law simplifies and strengthens the refund-or-replacement remedy by setting objective criteria for determining when a manufacturer has had a reasonable opportunity to remedy any defect. By encouraging the creation and use of non-judicial dispute resolution mechanism, the lemon law also may provide consumers with a less expensive and less time-consuming alternative to litigation when they are faced with a defective new car.

Several other aspects of the proposed Model State Lemon Law also improve upon other state lemon laws. First, uniform standards of conduct enable the manufacturer to comply more fully with the terms of the lemon law. Second, the standard for proving substantial impairment is objective. Third, implied warranties of merchantability are included in the lemon law, so if a consumer has a vehicle with a number of trivial defects which alone do not constitute substantial impairment he can combine the defects together and thus prove a substantial impairment of the vehicle. Fourth, guidelines for the independent dispute settlement mechanism inspire consumer confidence and manufacturer support of such programs. Finally, precise definition of all terms used in the statute eliminates the ambiguity existing in current state lemon laws.

With the suggested changes in the current state lemon law statutes, the proposed model state lemon law would be an improvement over the remedies currently available to purchasers of defective new automobiles. These changes would vitalize the model statute, making it an effective weapon in the consumer's fight to own a defect-free automobile.

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