LEMON LAWS: PUTTING THE SQUEEZE ON AUTOMOBILE MANUFACTURERS

American consumers spend more time shopping for an automobile than for any other consumer product.[1] This is true in part because the automobile industry makes available a large number of foreign and domestic models and a wide variety of optional equipment, permitting consumers to order automobiles tailored to their individual needs.[2] Manufacturers and dealers, however, severely limit consumers' options regarding warranty coverage on a new automobile.[3] All but one manufacturer[4] offer a standard warranty that restricts a consumer's remedy

1. FTC FINAL REPORT, WARRANTIES RULES CONSUMER BASELINE STUDY 52-54 (1979). This fact is not surprising because an automobile is the second-largest expenditure for 65% of American families; for 15% of American families it is the largest purchase. *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. Eckhardt, bill sponsor) [hereinafter cited as *Automobile Warranty and Repair Act Hearings*]. In 1981, the average-priced passenger car cost $8,710. MOTOR VEHICLE MFR'S ASS'N OF THE U.S., INC., MVMA MOTOR VEHICLE FACTS AND FIGURES '82, at 10-11, 39 (1982).

2. *See* MOTOR VEHICLE MFR'S ASS'N OF THE U.S., INC., *supra* note 1, at 38.

3. There are only two types of warranty coverage available from automobile manufacturers selling cars in the United States: American Motors Corporation's (AMC) full warranty, *see* Appendix A, and all other manufacturers' standard limited warranties, *see, e.g.,* Appendix B. Only AMC's warranty meets the minimum federal standards for full warranty coverage set out in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, 15 U.S.C. §§ 2301-2312 (1982). *See id.* § 2304; *see also infra* note 90 and accompanying text (describing the Magnuson-Moss Act's full/limited warranty dichotomy). All others offer almost identical limited warranty coverage. *See infra* notes 4, 5, 91 & 92 and accompanying text. *See generally* FTC SUMMARY REPORT, WARRANTIES RULES WARRANTY CONTENT ANALYSIS 48-50 (1979).

Most warranties provide coverage for 12 months or 12,000 miles, whichever comes first, *see, e.g.,* Appendix B; some warranties extend coverage for 24 months or 24,000 miles. Foreign car warranties offer varying combinations of time and mileage limitations. *See* FTC SUMMARY REPORT, *supra* at 20. In addition, some warranties extend coverage for up to five years or 50,000 miles on specified parts, usually the components of the power train. *See, e.g.,* Appendix B. *See generally* FTC SUMMARY REPORT, *supra,* at 19-24. All warranties exclude certain parts, such as tires, from coverage. *Id.* at 49.

4. Although AMC is the only manufacturer to offer a full warranty, *see supra* note 3, it holds only about 2% of the market for new car sales. Approximately 98% of all new cars sold in the U.S., therefore, carry the automobile manufacturer's standard limited warranty. *See* FTC SUMMARY REPORT, *supra* note 3, at 46. Because full warranties have a minimal impact on consumers' automobile warranty problems, this Note gives them only limited consideration. For a fuller analysis see generally C. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT 45-57 (1978); Brickey, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool,* 18 SANTA CLARA L. REV. 73, 78 (1978).

for manufacturing defects to repair or replacement of defective parts.[5] Many manufacturers allow consumers to purchase a service contract if they wish to extend the duration of the warranty's coverage.[6]

For most automobile purchasers, this repair or replace warranty provides adequate protection against minor defects which commonly occur in mass produced goods.[7] In most cases, the dealer can repair these defects quickly and completely. Thus, the warranty usually insures

5. The standard automobile warranty traditionally consists of five elements: an express warranty that none of the covered parts will prove defective during a specified period of time; an integration clause excluding any other express warranty; a disclaimer of all implied warranties; a clause providing that repair or replacement of any defective part is the buyer's sole remedy for any breach of warranty; and a term excluding liability for any consequential losses resulting from a breach of warranty. *See* Appendix B. *Cf.* Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties,* 55 N.C.L. REV. 835, 841 (1977) (identifying four elements of "limited repair warranty"); Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty,* 1968 WIS. L. REV. 1005, 1013-15 (enumerating risks covered by standard automobile warranty). The Uniform Commercial Code (U.C.C.) authorizes each of these provisions. *See* U.C.C. § 2-313 (creation of express warranties); *id.* §§ 2-316(1), 2-202 (exclusion of express warranties); *id.* § 2-316(2) (exclusion of implied warranties of merchantability and fitness for particular purpose); *id.* § 2-719(1) (creation of exclusive remedy for breach); *id.* § 2-719(3) (exclusion of consequential damages); Eddy, *supra* at 841-42. State and federal legislation has restricted or occasionally negated a manufacturer's ability to disclaim implied warranties and limit liability for consequential damages in sales of consumer goods. *See, e.g.,* CAL. CIV. CODE § 1792.4 (Deering 1981); D.C. CODE § 28:2-316.1(2) (Supp. 1982); KAN. STAT. ANN. § 50-639(a) (1976); ME. REV. STAT. ANN. tit. 11, § 2-316(5) (Supp. 1982); MD. COM. LAW CODE ANN. § 2-316.1 (1975 & Supp. 1982); MASS. ANN. LAWS ch. 106, § 2-316A (Michie/Law. Co-op. 1976); MISS. CODE ANN. § 75-2-719(4) (1972); VT. STAT. ANN. tit. 9A, § 2-316(5) (Supp. 1983).

While implied warranties are an important source of consumer rights against a seller, most of the "lemon laws," which are the subject of this Note, apply only if the manufacturer offers an express warranty. *See* Appendix D. This Note, therefore, will focus on consumers' rights under an express warranty, giving an explanation of implied warranties only insofar as they are relevant to lemon laws. For a fuller discussion of these warranties, see generally J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE §§ 9-6 to 9-9, 12-5 to 12-7 (2d ed. 1980); Millspaugh & Coffinberger, *Sellers' Disclaimers of Implied Warranties: The Legislatures Strike Back,* 13 U.C.C. L.J. 160, 168-70 (1980).

6. The consumer may purchase a service contract at the time the car is purchased or shortly thereafter. The service contract merely extends the duration of the manufacturer's obligation to repair defects and does not increase responsibility for replacing defective automobiles that the dealer cannot repair. *See Automobile Warranty and Repair Act Hearings, supra* note 1, at 498-99 (statement of James G. Vorhes, Vice President, General Motors Corp.).

7. *See* Goddard v. General Motors Corp., 60 Ohio St. 2d 41, 45, 396 N.E.2d 761, 764 (1979). Quality control problems are worse for automobiles, however, than for any other consumer product. While about 7% of all consumer products have warranted defects upon delivery, almost 30% of all new automobiles sold have warranted defects. Pertschuk, *Consumer Automobile Problems,* 11 U.C.C. L.J. 145, 146-47 (1979). *Cf. Automobile Warranty and Repair Act Hearings, supra* note 1, at 485 (comments of James G. Vorhes, Vice President, General Motors Corp.) (complexity of automobiles makes defects arising during production inevitable). *See generally* R. NADER, C. DITLOW & J. KINNARD, THE LEMON BOOK 15 (1970) [hereinafter cited as R. NADER].

that the buyer will have an automobile substantially free of defects soon after the sale, while it protects the dealer until he has had an opportunity to correct defects.[8] In some instances, however, the automobile suffers from serious defects that the dealer cannot remedy.[9] In other cases, the dealer resists the buyer's efforts to secure repairs under the warranty.[10] When these situations arise, the buyer may become convinced that the dealer will never completely repair the automobile

8. Beal v. General Motors Corp., 354 F. Supp. 423, 426 (D. Del. 1973). *Accord* Ford Motor Co. v. Mayes, 575 S.W.2d 480, 484 (Ky. Ct. App. 1978); Goddard v. General Motors Corp., 60 Ohio St. 41, 46, 396 N.E.2d 761, 764 (1979); Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 420, 265 N.W.2d 513, 522-23 (1978). *See generally* Eddy, *supra* note 5, at 842-44 (describing dealer's and purchaser's responsibilities for reporting and curing defects under repair or replace warranty).

In cases governed by the U.C.C., the contractually reserved exclusive remedy of repair or replacement precludes the buyer from asserting other remedies unless, under the circumstances, it fails of its essential purpose. U.C.C. § 2-719(1)(b) (1978). This remedial scheme protects the seller from liability until he has had an opportunity to attempt repairs. *See, e.g., id.* § 2-601 (buyer may reject nonconforming goods "unless otherwise agreed under the sections on contractual limitations of remedy"). *See supra* note 5 and accompanying text.

When the Magnuson-Moss Warranty Act controls, the promise to repair is a written warranty. 15 U.S.C. § 2301(6)(B) (1982). The Magnuson-Moss Act merges this remedy into the express warranty, so that the manufacturer warrants the dealer's performance as well as the automobile's. *See id.* § 2301(6)(B) (defining "written warranty" to include a promise to repair). *See also* Eddy, *supra* note 5, at 853. *But cf.* Hahn v. Ford Motor Co., 434 N.E.2d 943, 952 (Ind. App. 1982) (Magnuson-Moss Act requires warrantors to make any limitations on remedies conspicuous). The seller does not breach until he has had an adequate opportunity to repair. Hole v. General Motors Corp., 83 A.D.2d 715, 717, 442 N.Y.S.2d 638, 640 (1981). The Act requires a buyer to allow a supplier to attempt to comply with the terms of applicable warranties before bringing suit for breach. 15 U.S.C. § 2310(e) (1982).

9. The dealer's inability to remedy defects may result from several causes. In some cases the dealer may be unable to locate the defect causing the malfunction. *See, e.g.,* Ford Motor Co. v. Mayes, 575 S.W.2d 480 (Ky. Ct. App. 1978) (unusual noise and vibration in truck required several mechanics to diagnose); Massingale v. Northwest Cortez, Inc., 27 Wash. App. 749, 620 P.2d 1009 (1980) (motor home that would not start when motor was hot required several months to diagnose). In some situations, the dealer identifies and repairs defective parts, yet the automobile continues to malfunction. *See, e.g.,* Tiger Motor Co. v. McMurtry, 284 Ala. 283, 224 So. 2d 638 (1969) (after numerous repairs car still misfired, skipped, burned oil and got poor gas mileage); Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 382 A.2d 954 (1978) (paint would not ahere to automobile repainted several times). Even when the dealer has located the difficulty and cured it, other circumstances may make it foreseeable that the automobile will never be in good repair. *See, e.g.,* Bayne v. Nall Motors, Inc., 12 U.C.C. REP. SERV. (Callaghan) 1137 (Iowa 1973) (automobile's entire power train probably damaged when differential "froze" while car was in motion); Asciolla v. Manter Oldsmobile-Pontiac, Inc., 117 N.H. 85, 370 A.2d 270 (1977) (when transmission malfunctioned because automobile had been submerged, it would probably develop other defects). In all of these cases even the dealer's good faith efforts to repair could not give the buyer a defect-free automobile.

10. Many of these cases involve disputes over whether the warranty requires the dealer to repair a particular defect. *See, e.g.,* Ford Motor Co. v. Fairley, 398 So. 2d 216 (Miss. 1981) (dealer disputed whether extended warranty coverage was still in effect when buyer demanded repairs);

and attempt to return the "lemon" to the dealer.[11] The repair or replace warranty, however, can severely hamper the buyer's efforts to negotiate with the dealer or manufacturer for a refund or a replacement vehicle.[12] Indeed, the buyer often must litigate in order to receive the relief he seeks.[13] The cost of bringing suit, however, frequently exceeds

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Ehlers v. Chrysler Motor Corp., 88 S.D. 612, 226 N.W.2d 157 (1975) (dealer refused to repair because he believed buyer had changed odometer).

Proponents of statutes regulating automobile warranties often suggest that dealers raise disputes about warranty coverage in order to avoid performing unprofitable repairs. While speaking in favor of proposed federal legislation H.R. 1005, 96th Cong., 1st Sess. (1979), which would have made the full warranty provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2304 (1982), applicable to all new automobiles, FTC Chairman Michael Pertschuk explained how the automobile warranty system operates to deprive consumers of effective service.

> [T]he manufacturers have designed a warranty system primarily to control costs. Dealers complain that labor rates are too low, that flat-rate time allowances are too short, and parts mark-ups too small compared to their retail service business. As a result they feel they are underpaid to do warranty work. They also complain about arbitrary refusals to reimburse for work and long delays (up to 3 months) in receiving reimbursement. Delays in delivery of needed parts also contribute to dealer and consumer dissatisfaction with warranty service.
>
> Dealers undoubtedly contribute to the warranty system's failures, by assigning warranty work a low priority, and by being unresponsive to consumer's reasonable expectations for service and for resolving disputes.

Automobile Warranty and Repair Act Hearings, supra note 1, at 149-50. *Accord Consumer Protection in the Sale of New and Used Cars: Hearings Before the California Assembly Labor, Employment, and Consumer Affairs Comm.* 139 (1979) (statement of Noel Quintana, founder of Lemon-Aide, a consumer organization for owners of defective automobiles) (on file at *Washington University Law Quarterly*) [hereinafter cited as *California Automobile Hearings*]; Connecticut House of Representatives, Debates on Substitute House Bill No. 5729, An Act Concerning Automobile Warranties 3154 (April 20, 1982) (remarks of Rep. Zajac) (on file at *Washington University Law Quarterly*) [hereinafter cited as *Connecticut House Debates*].

11. "[A]t some point in time, it must become obvious to all people that a particular vehicle simply cannot be repaired or parts replaced so that the same is made free from defect." General Motors Corp. v. Earnest, 279 Ala. 299, 302 184 So. 2d 811, 814 (1966).

There are no statistics available on the number of "lemons" produced yearly, but one author estimates that automobile manufacturers produce more than 10,000 lemons per year. R. NADER, *supra* note 7, at 16.

12. The dealer typically insists that so long as he continues to attempt repairs free of charge he has fulfilled his obligations under the repair or replace warranty. *See supra* note 5 and accompanying text. This argument usually fails after the buyer has allowed the dealer several repair opportunities. *See, e.g.,* Beal v. General Motors Corp., 354 F. Supp. 423, 427 n.2 (D. Del. 1973); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 356 (Minn. 1977); Durant v. Palmetto Chevrolet Co., 241 S.C. 508, 514 129 S.E.2d 323, 325 (1963); Kure v. Chevrolet Motor Div., 581 P.2d 603, 608 (Wyo. 1978). Although dealers typically lose cases on this point, asserting this position can be an effective method of avoiding the expense of resolving complaints when the dealer does not believe the customer will bring suit. *See infra* notes 14, 67-68 & 172 and accompanying text.

13. An attorney giving advice to those handling warranty disputes recommends that they follow the manufacturer's complaint handling procedure because failing to do so could defeat a cause of action under the U.C.C. or the Magnuson-Moss Act. He also acknowledges that doing so

the amount recoverable.[14]

In response to the automobile owner's plight, several states recently passed "lemon laws."[15] These statutes compel automobile manufacturers to give purchasers a refund or a replacement vehicle if, after a reasonable number of attempts at repair, an automobile fails to conform to the terms of a warranty.[16] Lemon laws also specify what constitutes a presumptively reasonable number of attempts at repair.[17] A consumer

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might resolve the dispute. Oxenham, *Automobiles and the Lemon Law,* 7 VA. B.A.J. 18, 19 (1981). *Accord* R. NADER, *supra* note 7, at 26.

14. The most obvious expense in bringing suit is the attorneys' fees a consumer must pay.

> The economics of private litigation makes the recovery of costs and attorneys' fees crucial remedies if private enforcement of warranties is to be a workable option for consumers. Unless a consumer can be assured of recovering these costs, the consumer is limited to recovering contract damages, generally the difference in value between the goods as warranted (defect free) and as delivered (with unremedied defects). Even where the consumer seeks a refund for a lemon, the car has some trade-in value, and the true recovery is only the difference between the purchase price and this value. Often the potentially recoverable damages are less than the likely costs of litigation.

Letter from Michael Pertschuk, FTC Chairman, to James H. Scheuer, Chairman House Subcommittee on Consumer Protection and Finance (April 27, 1979) (discussing H.R. 1005, 96th Cong., 1st Sess. (1979)), *reprinted in California Automobile Hearings, supra* note 10, at 328.

Attorneys' fees are not recoverable as an element of consequential damages in a suit under the U.C.C. Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 435, 265 N.W.2d 513, 527 (1978). The Magnuson-Moss Act allows awards of attorneys' fees. 15 U.S.C. § 2310(d)(2) (1982). Such awards are discretionary, however, and commentators suggest that attorneys are reluctant to take cases based on warranty claims if an award of fees is their only hope for payment. *See Hearings on Auto Repair Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., 2d Sess. 200 (1979) (statement of Albert H. Kramer, Director, Bureau of Consumer Protection, FTC); Miller & Kanter, *Litigation Under Magnuson-Moss: New Opportunities in Private Actions,* 13 U.C.C. L.J. 10, 27 (1980).

Another expense to the buyer is the inconvenience of not using the car during the pendency of the dispute. *See infra* notes 69-74 and accompanying text. The inefficiency of litigation as a mode of settling warranty disputes is also costly for both individuals and consumers as a group. *See* H.R. REP. NO. 1107, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7702, 7748-49; Pertschuk, *supra* note 7, at 149.

15. California and Connecticut passed the nation's first automobile lemon laws in 1982. Act of July 7, 1982, A.B. No. 1787, 1982 Cal. Stat. ch. 388 (codified at CAL. CIV. CODE § 1793.2(e) (Deering Supp. 1984)); Act of Oct. 1, 1982, Pub. Act No. 82-287, 1982 Conn. Acts 667 (codified at CONN. GEN. STAT. § 42-179 (1983)). For the text of the Connecticut statute, see Appendix C. For citations to lemon laws passed in 1983 see *infra* note 119.

16. *See* statutes cited *infra* note 119. Several states have lemon provisions applicable to all consumer products. *E.g.,* CAL. CIV. CODE §§ 1790-1797.5 (Deering 1981); KAN. STAT. ANN. §§ 50-623 to -643 (1976 & Supp. 1981); MD. COM. LAW CODE ANN. §§ 14-401 to -409 (1975 & Supp. 1982); OR. REV. STAT. § 72.8010-.8200 (1981); R.I. GEN. LAWS § 6A-2-329 (1977). Unlike automobile lemon laws, these statutes do not define a reasonable number of attempts at repair. *See infra* notes 17 & 147-48 and accompanying text. *See also* Appendix D (provisions of state lemon laws).

17. Most lemon laws state that 4 repair attempts on the same defect or 30 days out of service

satisfying these statutory prerequisites[18] can invoke this presumption to shift to the manufacturer the burden of proving that an automobile is not a lemon.[19]

This Note explores the means of recovery currently available to lemon owners. Part I shows that the Uniform Commercial Code (U.C.C.) creates barriers to the lemon owner's recovery. Part II demonstrates that the Magnuson-Moss Warranty Act does little to remove these barriers. Part III sets out the policies legislatures sought to further by passing lemon laws, and analyzes the ways that courts can implement those policies. This Note concludes that lemon laws can achieve the goals legislators envisioned if courts interpret them in a manner that is consistent with the underlying policy considerations, rather than relying on the modes of statutory analysis courts have developed under the U.C.C.

I. THE UNIFORM COMMERCIAL CODE

The U.C.C.[20] authorizes enforcement of the automobile manufac-

for repairs during the first year after delivery constitutes a presumptively reasonable number of attempts at repair. *E.g.,* CAL. CIV. CODE § 1793.2 (Deering Supp. 1983). *See infra* notes 147-48 and accompanying text. *See also* Appendix D (identifying lemon laws which incorporate this presumption).

18. The consumer must first give notice of the automobile's defects to the dealer or manufacturer. *See, e.g.,* Act of June 3, 1983, ch. 83-69, § 5(4)(b)(2), 1983 Fla. Legis. Serv. 517, 522 (West) (to be codified at FLA. STAT. ANN. § 681.104(4)(b)(2) (West)) ("It shall be the responsibility of the consumer . . . to give written notification to the manufacturer of the need for the repair of the nonconformity . . . ."); ME. REV. STAT. ANN. tit. 10, § 1163(1) (Supp. 1983-1984) (manufacturer's duty to conform a new automobile to applicable express warranties arises when "the consumer reports the nonconformity to the manufacturer, its agent or its authorized dealer . . . ."); NEB. REV. STAT. § 60-2704 (Supp. 1983) ("In no event shall the presumption in this section apply against a manufacturer unless the manufacturer has received prior written direct notification by certified mail from or on behalf of the consumer . . . ."). The consumer must, of course, allow the dealer or manufacturer a reasonable number of attempts to repair the defect. *See infra* notes 147-50 and accompanying text. When claiming entitlement to a refund or replacement, the consumer must show that a warranted defect substantially impairs the automobile. *See infra* notes 160-67 and accompanying text.

19. All lemon laws allow the manufacturer to rebut the statutory presumption that a specified standard constitutes a reasonable number of repair attempts. *See infra* notes 154-56 and accompanying text. In addition, several statutes create affirmative defenses for the manufacturer, allowing a showing that a defect resulted from the owner's abuse or neglect of the automobile, or that its defects do not substantially impair its use and value. *See infra* note 164.

20. The U.C.C., with certain local variations, regulates consumer warranties in all states except California, Kansas, Maryland, Minnesota, Oregon and Rhode Island. *See* CAL. CIV. CODE §§ 1790-1797.5 (Deering 1981 & Supp. 1983); KAN. STAT. ANN. §§ 50-623 to -643 (1976 & Supp.

turer's standard warranty as written.[21] In the event that a new automobile has defects which constitute a breach of warranty, the exclusive remedy obligates both the manufacturer and the buyer to allow the dealer to attempt to repair or replace the defective parts.[22] If the buyer complies with the warranty by allowing the dealer several attempts to correct defects,[23] yet the automobile still fails to conform to the terms

1981); MD. COM. LAW CODE ANN. §§ 14-401 to -409 (1975 & Supp. 1982); MINN. STAT. ANN. § 325G.17-.20 (1981); OR. REV. STAT. § 72.8010-.8200 (1981); R.I. GEN. LAWS § 6A-2-329 (1977).

The U.C.C.'s drafters sought to implement traditional notions of freedom of contract by creating mechanisms for enforcing the terms of a bargain as made. U.C.C. § 1-102 comment 2 (1978) ("[F]reedom of contract is a principle of the Code: 'the effect' of its provisions may be varied by 'agreement' "). The U.C.C. thus eschews consumer protection in favor of "neutrality" toward such issues.

> While certain principles set forth in the Uniform Commercial Code do tend to give the consumer greater protection than in the past, the U.C.C. is not basically directed toward consumer protection. Indeed, one of the earlier decisions made in drafting the U.C.C. was that it be "neutral" in the area of consumer protection. The validity and wisdom of this "neutrality" may well be questioned. Nevertheless, it did mean that the Code was not oriented to solving many of the major problems of consumer protection. This was left to individual states.

D. KING, C. KUENZEL, T. LAUER, N. LITTLEFIELD & B. STONE, COMMERCIAL TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 1-68 (3d ed. 1981). *See generally* R. SPEIDEL, R. SUMMERS & J. WHITE, TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW 659-61 (3d ed. 1981).

21. *See* statutes cited *supra* note 5. If the seller's promises or affirmations of fact become part of the basis of the parties' bargain, the seller bears the risk that the product does not conform to these express warranties. U.C.C. § 2-313(1)(a) (1978); *see also id.* § 2-313(b), (c) (seller creates an express warranty when description of goods becomes part of the basis of the bargain or seller uses a sample or model to induce the sale).

Absent express contractual provisions to the contrary, the U.C.C. generally allocates the risk of product failure to the seller through implied warranties of merchantability, U.C.C. § 2-314 (1978), and fitness for a particular purpose, *id.* § 2-315. The U.C.C. specifically allows the parties to a sales transaction to reallocate the risk of product failure by excluding implied warranties and oral express warranties. *See id.* §§ 2-202, 2-316. *See also supra* note 5 (describing U.C.C.'s authorization of each term of standard automobile warranty). The parties may also limit the buyer's remedies for breach of warranty. *See id.* § 2-719 (1978); Eddy, *supra* note 5, at 842-48.

Despite the U.C.C.'s explicit authorization of methods for limiting the seller's risks and liabilities, courts have provided relief to purchasers when an automobile's express warranty deprived them of a meaningful remedy. *See, e.g.,* Courtesy Ford Sales, Inc. v. Farrior, 53 Ala. App. 94, 298 So. 2d 26, *cert. denied,* 292 Ala. 718, 98 So. 2d 34 (1974); Rose v. Chrysler Motors Corp., 212 Cal. App. 2d 755, 28 Cal. Rptr. 185 (1963); Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978); Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974); Moore v. Howard Pontiac-Am., Inc., 492 S.W.2d 227 (Tenn. App. 1972).

22. *See, e.g.,* Ford Motor Co. v. Gunn, 123 Ga. App. 550, 551, 181 S.E.2d 694, 696 (1971); Clark v. International Harvester Co., 99 Idaho 326, 340, 581 P.2d 784, 798 (1978); Hole v. General Motors Corp., 83 A.D.2d 715, 716-17, 442 N.Y.S.2d 638, 640 (1981).

23. Some particularly tenacious buyers have allowed dealers many attempts to repair. *See, e.g.,* Tiger Motor Co. v. McMurtry, 284 Ala. 283, 224 So. 2d 638 (1969) (buyer allowed dealer over 30 attempts to repair); Orange Motors v. Dade County Dairies, Inc., 258 So. 2d 319 (Fla. App.)

of the warranty, the U.C.C. allows the buyer to pursue other remedies.[24] Courts consider the contractually reserved exclusive remedy to have "failed of its essential purpose,"[25] and allow the aggrieved purchaser to seek other appropriate relief.[26]

The U.C.C. offers several remedies to consumers who establish that the repair or replace remedy failed of its essential purpose.[27] Among these remedies, rejection[28] and revocation of acceptance[29] are the most

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(buyer had possession of auto only 6 out of first 197 days following delivery), *cert. denied,* 263 So. 2d 831 (Fla. 1972); Zoss v. Royal Chevrolet, Inc., 11 U.C.C. REP. SERV. (Callaghan) 527 (Ind. 1972) (during first three months after delivery automobile spent more than half its time at dealer's for repairs).

24. U.C.C. § 2-719(2) (1978). The comments to § 2-719 set forth the rationale for refusing to enforce a remedy which has become oppressive to one party:

> [I]t is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.

Id. § 2-719 comment 1.

25. *Id.* § 2-719(2).

26. *See, e.g.,* Beal v. General Motors Corp., 354 F. Supp. 423, 426 (D. Del. 1973); Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 123, 374 A.2d 144, 149 (1976); Ford Motor Co. v. Mayes, 575 S.W.2d 480, 484 (Ky. Ct. App. 1978); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 356 (Minn. 1977); Goddard v. General Motors Corp., 60 Ohio St. 2d 41, 45-56, 396 N.E.2d 761, 764 (1979); Ehlers v. Chrysler Motor Corp., 88 S.D. 612, 619, 226 N.W.2d 157, 161 (1975); Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 420, 265 N.W.2d 513, 520 (1978).

27. *See* J. WHITE & R. SUMMERS, *supra* note 5, § 8-1. If the buyer successfully rejects or revokes acceptance, he may "cover" under § 2-712 by purchasing similar goods and then seeking recovery of the difference in price between the substitute goods and those returned to the seller. Alternatively, the buyer may recover the difference between the market price for the goods returned at the time he learned of the breach and the contract price under § 2-713. These additional remedies insure that the buyer will have funds to secure goods similar to those covered by the contract. For a full discussion of these remedies, see J. WHITE & R. SUMMERS, *supra* note 5, §§ 6-3 to 6-4. Both of these remedies entitle the buyer to prove any incidental and consequential losses suffered as a result of the seller's breach. U.C.C. §§ 2-712(2), 2-713(1), 2-715 (1978). For a description of other buyer's remedies under the U.C.C. see *infra* notes 28-30 & 54.

28. The U.C.C. states that "if the goods . . . fail in any respect to conform to the contract, the buyer may . . . reject the whole." U.C.C. § 2-601 (1978). Thus, the U.C.C. incorporates the traditional "perfect tender rule" which requires a seller to tender goods that conform to each and every term of the contract in order to create any obligation for the buyer to accept. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 413 (2d ed. 1977). *See also* U.C.C. § 2-106(2) (1978) ("Goods or conduct . . . are 'conforming' . . . when they are in accordance with the obligations under the contract"). The primary limitation on the buyer's right to reject nonconforming goods is the seller's right to cure nonconforming tender. *Id.* § 2-508. The seller's right to cure creates an obligation on the buyer to at least permit the seller to inspect the goods to determine what steps must be taken to make them conform to the contract. Wilson v. Scampoli, 228 A.2d 848, 850 (D.C. Ct. App. 1967) (buyer's rejection of malfunctioning television set defeated because buyer refused to allow seller to determine if it could be repaired).

Thus, the perfect tender rule has little practical effect under the U.C.C. For an analysis of the

adequate for owners who wish to rid themselves of defective automobiles.[30] A buyer who exercises one of these remedies may cancel his contract with the dealer and recover payments toward the purchase price.[31] Because the U.C.C. focuses on preserving bargains it sets stringent standards for these remedies.[32]

A. Rejection

Zabriskie Chevrolet, Inc. v. Smith[33] illustrates the extreme circumstances which must exist before courts will allow lemon owners to recover pursuant to rejection.[34] In *Zabriskie* the Smiths' automobile lost

limitations on the buyer's right to reject nonconforming goods, see generally J. WHITE & R. SUMMERS, *supra* note 5, § 8-3; Wallach, *The Buyer's Right to Return Unsatisfactory Goods—The Uniform Commercial Code Remedies of Rejection and Revocation of Acceptance,* 20 WASHBURN L.J. 20, 23-28 (1980). For a discussion of the difficulties lemon owners face in attempting to reject new automobiles, see *infra* notes 33-49 and accompanying text.

A buyer who cannot establish that he rightfully rejected or justifiably revoked acceptance of goods may nonetheless recover monetary damages for breach of warranty. So long as the buyer gives notice of the defects to the seller, he may recover damages based on the difference between the value of the goods accepted and the value they would have had if they had been as warranted. U.C.C. §§ 2-607, 2-714 (1978). He may also recover incidental and consequential damages. *Id.* § 2-714(3).

29. *See infra* notes 50-70 and accompanying text. Like rejection, revocation of acceptance allows the buyer to return nonconforming goods to the seller. *See* U.C.C. § 2-608 (1978).

For rejection or revocation of acceptance to be procedurally effective, a buyer must seasonably notify the seller of any objections to the goods delivered. *Id.* §§ 2-602(1), 2-605(1), 2-608(2).

30. Monetary damages based on a defective automobile's decreased value, U.C.C. § 2-714 (1978), cannot compensate the owner of an automobile that has irreparable defects. *See* cases cited *supra* note 9. Theoretically the buyer may resell the defective automobile and apply its sale price and the amount recovered as damages toward the purchase of a new automobile. In this situation, however, the buyer faces the risk that prospective purchasers will not agree with the court's assessment of the automobile's value in its defective condition. Also, the price of similar automobiles may have increased since the buyer purchased the defective automobile so that he cannot afford to replace it. Recovery pursuant to rejection or revocation of acceptance places the risk of depreciation in the value of the goods on the selling dealer. *See* J. WHITE & R. SUMMERS, *supra* note 5, § 8-1. For the lemon owner who can establish a rightful rejection or justified revocation of acceptance, the U.C.C. provides reasonably complete recovery. *See also supra* note 29 (rejection and revocation of acceptance allow buyer to return nonconforming goods to seller). *But see supra* note 14 (describing nonrecoverable costs of bringing suit).

31. U.C.C. § 2-711(1) (1978).

32. "[T]he general policy of this Article . . . looks to preserving the deal wherever possible, [and] therefore insists that the seller's right to correct his tender [when the buyer rejects] be protected." *Id.* § 2-605 comment 2. *See supra* note 28 (seller's right to cure as a limitation on the buyer's ability to reject). For a fuller discussion of the standards for rejection and revocation of acceptance, see J. WHITE & R. SUMMERS, *supra* note 5, § 8-3.

33. 99 N.J. Super. 441, 240 A.2d 195 (1968).

34. For other cases in which courts allowed buyers to reject, see Lloyd v. Classic Motor

power to the transmission within a mile after leaving the dealer's showroom. The buyer immediately notified the dealer that he wished to cancel the sale and stopped payment on his check.[35] In the dealer's suit for payment, the court upheld the buyer's rejection, stating that the buyer had not accepted[36] because an adequate opportunity to inspect an automobile[37] contemplates more than a "spin around the block."[38] In addition, because it was not reasonable for the dealer to believe that the Smiths would accept an automobile that exhibited such a "remarkable" defect within so short a time, the court found that the dealer's attempt to cure the defects by replacing the transmission was ineffective.[39] The court reasoned that the malfunction had shaken the Smiths' faith in the automobile's integrity and reliability, making cure impossible.[40]

Coaches, Inc., 388 F. Supp. 785 (N.D. Ohio 1974) (purchaser of Rolls-Royce delivered with defects costing several thousand dollars to repair allowed to reject almost three weeks after delivery when automobile spent most of that time in garage); Bayne v. Nall Motors, 12 U.C.C. REP. SERV. (Callaghan) 1137 (Iowa 1973) (buyer allowed to reject where differential "froze" after 400 miles creating a risk of additional mechanical difficulties with the automobile).

35. 99 N.J. Super. at 445, 240 A.2d at 197.

36. Acceptance puts an end to the buyer's right to reject. U.C.C. § 2-607 (1978). The U.C.C. provides for three methods of accepting goods.

> Acceptance of goods occurs when the buyer
> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
> (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
> (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

Id. § 2-606(1).

Some courts find acceptance based solely on the act of taking possession of the automobile. *See, e.g.,* American Imports, Inc. v. G.E. Employees Credit Union, 37 N.C. App. 121, 124-25, 245 S.E.2d 798, 800-01 (1978); Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 123, 224 A.2d 782, 784 (1966). *See also infra* notes 41-49 and accompanying text.

37. Two of the three methods of accepting goods under the U.C.C. operate only when the buyer has had an adequate opportunity to inspect. U.C.C. § 2-606(1)(a)-(b) (1978).

The court acknowledged the difficulties in determining whether an automobile has defects: "To the layman, the complicated mechanisms of today's automobiles are a complete mystery. To have the automobile inspected by someone with sufficient expertise to disassemble the vehicle in order to discover latent defects before the contract is signed, is assuredly impossible and highly impractical." 99 N.J. Super. at 453, 240 A.2d at 202.

38. 99 N.J. Super. at 453, 240 A.2d at 202. Thus, the court found that there had been no acceptance under the applicable statute. N.J. REV. STAT. § 12A:2-606 (1962).

39. 99 N.J. Super. at 458, 240 A.2d at 205. *See* N.J. REV. STAT. § 12A:2-508 (1962). *See generally* Wallach, *supra* note 28, at 24-28 (limitations on seller's right to cure).

40. 99 N.J. Super. at 458, 240 A.2d at 205. The court found that:

B. Acceptance

A number of courts have recognized that the U.C.C.'s requirement of an adequate opportunity to inspect goods for defects[41] means that acceptance does not necessarily occur when a buyer takes possession of an automobile.[42] Other courts, however, have refused to recognize a purchaser's right to reject after an automobile is driven from the dealer's showroom.[43] Because most lemons do not begin malfunctioning as quickly, or with such severity, as did the automobile in *Zabriskie*,[44] rarely does the buyer learn of defects in time to reject.[45] In addition, the U.C.C. provides that, regardless of an opportunity to inspect, a buyer's conduct that is inconsistent with the seller's ownership of defective goods may constitute acceptance.[46] When the manufacturer's exclusive remedy precludes rejection until after the dealer has failed several times to effect repairs,[47] a buyer can seldom avoid acting

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> For a majority of people the purchase of a new car is a major investment, rationalized by the peace of mind that flows from its dependability and safety. Once their faith is shaken, the vehicle loses not only its real value in their eyes, but becomes an instrument whose integrity is substantially impaired and whose operation is fraught with apprehension.

Id.

41. *See supra* notes 36-37 and accompanying text.

42. *See, e.g.,* Lloyd v. Classic Motor Coaches, Inc., 388 F. Supp. 785, 790 (N.D. Ohio 1974); Asciolla v. Manter Oldsmobile-Pontiac, Inc., 117 N.H. 85, 88, 370 A.2d 270, 273 (1977); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 452-53 240 A.2d 195, 202 (1968).

43. *See, e.g.,* Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 376, 382 A.2d 954, 956 (1978). *See also* cases cited *infra* note 49. *But see* Bayne v. Nall Motors, 12 U.C.C. REP. SERV. (Callaghan) 1137 (Iowa 1973) (buyer allowed to reject automobile that malfunctioned four days after delivery).

44. *See* THE LEMON FILE (Consumer Press) Case Profile Nos. 0001-1 to 0160-1 (case summaries describing defect and time it appeared compiled by the Center for Auto Safety, Washington, D.C.). *See also supra* notes 33-40 and accompanying text.

45. *See* cases cited *supra* note 34. While a buyer who revokes acceptance need only notify the dealer within a reasonable time after discovery of the defect, or within a reasonable time after the defect should have been discovered, U.C.C. § 2-608(2) (1978), one who rejects must notify the dealer within a reasonable time after delivery, *id.* § 2-602(1). *See* J. WHITE & R. SUMMERS, *supra* note 5, § 8-3. The circumstances surrounding the sale of an automobile make it unlikely that a buyer will be able to discover defects. A salesman typically reassures the buyer that the car is in good condition, and that if any defects are found, the buyer need only make a list and the dealer will repair them free of charge. Thus, the buyer has little reason to make a careful inspection at the time of delivery. *See* Highsmith & Havens, *Revocation of Acceptance and the Defective Automobile: The Uniform Commercial Code to the Rescue,* 18 AM. BUS. L.J. 303, 315-16 (1980).

46. U.C.C. § 2-606(1)(c) (1978). *See supra* note 36.

47. *See supra* notes 5, 8 & 21-22. The U.C.C. specifically acknowledges the parties' right to preclude rejection as a remedy. *See* U.C.C. § 2-601 (1978) ("[U]nless otherwise agreed under the sections on contractual limitations of remedy . . . if the goods . . . fail in any respect to conform to the contract, the buyer may . . . reject the whole").

inconsistently with the seller's ownership. Because acceptance bars any demand for relief based on rejection,[48] most buyers must rely on the remedy of revocation of acceptance in order to secure a refund.[49]

C. Revocation of Acceptance

Revocation of acceptance allows a buyer to cancel a contract of sale, after acceptance when the seller's opportunity to cure has passed.[50] Because it is a drastic remedy, the U.C.C. sets strict standards for revocation of acceptance.[51] The revoking buyer has the burden of proving[52] that the automobile does not conform to the warranties in the sales contract,[53] and, further, that the nonconformities "substantially impair" the value of the automobile to the buyer.[54] By the terms of the

48. *Id.* § 2-607(2).

49. Courts often avoid an explicit finding that acceptance has occurred. Rather, they assume it has taken place in cases that can be decided on the basis of revocation of acceptance. *See, e.g.,* Hahn v. Ford Motor Co., 434 N.E.2d 943 (Ind. App. 1982); Asciolla v. Manter Oldsmobile-Pontiac, Inc., 117 N.H. 85, 370 A.2d 270 (1977); Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 382 A.2d 954 (1978).

50. U.C.C. § 2-608 (1978). *See supra* notes 28-29, 31 & 36 and accompanying text.

51. *See* U.C.C. § 2-608 (1978); *see also infra* note 52 (revoking buyer has burden of proof to establish defects).

52. *See id.* § 2-607 (burden of proof is on buyer after acceptance). In cataloging the advantages of rejection over revocation of acceptance, one commentator noted that in rejection cases the burden of proof is on the seller to establish that the tender conformed to the contract. Wallach, *supra* note 28, at 21.

In order to justify revocation of acceptance, a buyer must prove:

(1) [T]he goods are nonconforming;
(2) the nonconformity substantially impairs the value of the goods to the buyer;
(3) the buyer accepted the goods on the reasonable assumption that the nonconformity would be cured;
(4) the nonconformity could not have been seasonably cured;
(5) the buyer notified the seller of revocation;
(6) revocation occurred within a reasonable time after the buyer discovered 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; and
(7) the buyer took reasonable care of the goods for which acceptance has been revoked.

Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 353 (Minn. 1977).

53. *See* Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 351 (Minn. 1977). *See also supra* note 52.

54. *See* U.C.C. § 2-608(1) (1978). *See also* cases cited *infra* note 59 (demonstrating that courts use wide variety of standards for determining substantial impairment).

The U.C.C. also requires a revoking buyer to notify the seller of defects in the goods within a reasonable time after discovery and before any substantial change occurs in the goods that is not due to their own defects. U.C.C. § 2-608(2) (1978). This prerequisite seldom has prevented recovery by revoking buyers. *See, e.g.,* Tiger Motor Co. v. McMurtry, 284 Ala. 283, 293, 224 So. 2d 638, 647 (1969) (reasons for allowing a buyer to revoke acceptance after dealer fails to cure outweigh any prejudice dealer might suffer if forced to accept return of automobile which has logged

manufacturer's standard warranty, the buyer must show that the automobile's malfunctioning results from a defect in material or workmanship.[55] Some courts require the buyer to prove precisely what parts of the automobile contain defects and that those defects caused the malfunction.[56] Other courts hold that evidence that an automobile malfunctioned during the warranty period creates an inference that a warranted defect exists.[57] Even in these jurisdictions the lemon owner may need to adduce expert testimony to rebut evidence that a malfunction resulted from other causes.[58]

Judicial attempts to insure that automobile purchasers do not revoke acceptance on the basis of trivial or easily corrected defects have produced an array of standards for determining whether an automobile's

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substantial mileage); Zoss v. Royal Chevrolet, Inc., 11 U.C.C. REP. SERV. (Callaghan) 527, 532 (Ind. 1972) (when dealer's promises to repair delays buyer's action of revoking acceptance, dealer cannot claim lack of adequate notice of buyer's revocation).

The U.C.C. requires a revoking buyer to establish an excuse for accepting nonconforming goods. U.C.C. § 2-608(1) (1978). *See supra* note 52. This requirement also seldom precludes recovery because the standard automobile warranty itself not only assures the buyer that the automobile has no defects, but also promises that the dealer will repair any defects that do appear. *See* Appendices A & B. Comment 3 to § 2-608 sets out the reasons for allowing these assurances to excuse the buyer's failure to reject: " 'Assurances' by the seller under paragraph (b) of subsection (1) [assurances inducing failure to discover] can rest as well in the circumstances or in the contract as in the explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery." U.C.C. § 2-608 comment 3 (1978). *See supra* note 45. In addition, the complexity of the average automobile certainly justifies the buyer's acceptance of an automobile without discovery of latent defects. *See supra* note 37 and accompanying text. Thus, the buyer usually has few difficulties in justifying acceptance of a lemon. *See* Havens & Highsmith, *supra* note 45, at 315-16.

55. When the buyer alleges breach of warranty as the basis for revocation of acceptance, he must show that the goods fail to conform to the contract specifications. *See* U.C.C. §§ 2-608, 2-106 (1978). *See also* Clark v. Ford Motor Co., 46 Or. App. 521, 612 P.2d 316 (1980) (when seller disclaimed all warranties in sale of an individual identified automobile, defects did not make it nonconforming to any contract term). *But cf.* Seekings v. Jimmy GMC of Tucson, Inc., 130 Ariz. 596, 638 P.2d 210 (1981) (when seller disclaimed all warranties relief still allowed against seller on manufacturer's warranty because seller did not represent vehicle as one sold with no warranties).

56. *See* Collum v. Fred Tuch Buick, 6 Ill. App. 3d 317, 322, 285 N.E.2d 532, 536 (1972) (the doctrine of res ipsa loquitur does not apply to show that a malfunction results from a defect in material or workmanship).

57. *See* A.A.A. Exteriors, Inc. v. Don Mahurin Chevrolet & Oldsmobile, Inc., 429 N.E.2d 975, 978 (Ind. App. 1981) (proof of a malfunction, absent other causes, leads to an inference of a defect in material or workmanship).

58. *E.g.*, Bayne v. Nall Motors, Inc., 12 U.C.C. REP. SERV. (Callaghan) 1137 (Iowa 1973); Ford Motor Co. v. Mayes, 575 S.W.2d 480 (Ky. App. 1978); Champion Ford Sales, Inc. v. Levine, 49 Md. App. 547, 433 A.2d 1218 (1981); Schrimpf v. General Motors Corp., No. 81-921 (Wis. Ct. App. March 10, 1982).

defects "substantially impair" its value to the buyer.[59] In *Asciolla v. Manter Oldsmobile-Pontiac, Inc.*,[60] the New Hampshire Supreme Court articulated a reasonably coherent standard for determining whether an automobile's defects substantially impair its value to the purchaser.[61] This standard requires the fact-finder to assess the buyer's particular needs and expectations and then determine whether such a buyer could reasonably find that the automobile's defects substantially impair its value.[62] This test does not indicate, however, the weight a

59. *Compare* Koperski v. Husker Dodge, Inc., 208 Neb. 29, 41, 302 N.W.2d 655, 662 (1981) (substantial impairment not found when cost of repairs was not great) *and* Massingale v. Northwest Cortez, Inc., 27 Wash. App. 749, 752, 620 P.2d 1009, 1011 (1980) (trial courts must make determination of substantial impairment on objective basis) *with* Tiger Motor Co. v. McMurtry, 284 Ala. 283, 292, 224 So. 2d 638, 646 (1969) (each case must be examined on its merits to determine substantial impairment) *and* Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 378, 382 A.2d 954, 956 (1978) (buyer may revoke when value of car to buyer is marred by defects) *and* Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 48, 554 P.2d 349, 356 (1976) (buyer may revoke when defect shakes buyer's faith in the automobile).

The language of § 2-608(1) indicates that the fact finder should base this determination on the buyer's subjective expectations. U.C.C. § 2-608(1) (1978). As stated in comment 2 to § 2-608:

> Revocation of acceptance is possible only where the nonconformity substantially impairs the value of the goods *to the buyer*. [T]he question is whether the nonconformity as such 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.

Id. comment 2. *See also* Highsmith & Havens, *supra* note 45, at 310 (test for substantial impairment may allow particularly careful buyer to revoke acceptance when defect would be insufficient to allow revocation by "normal" buyer); Note, *Revocation of Acceptance: The Test for Substantial Impairment,* 32 U. PITT. L. REV. 439, 447 (1971) (buyer must show tht defect substantially impairs value of goods to him by introducing objective evidence).

Despite this statutory language, courts have struggled to inject an objective element into the test. *See* Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 121, 374 A.2d 144, 148 (1976) (buyer cannot reject for trivial or easily repaired defects); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 354 (Minn. 1977) (defects not interfering with automobile's operation do not substantially impair its value); Koperski v. Husker Dodge, Inc., 208 Neb. 29, 41, 302 N.W.2d 655, 662 (1981) (defects which can be repaired for a fraction of the automobile's purchase price do not substantially impair its value); Moore v. Howard Pontiac-Am., Inc., 492 S.W.2d 227, 229 (Tenn. App. 1972) (automobile substantially impaired when repairs would cost about 25% of sale price); Reece v. Yeager Ford Sales, Inc., 155 W. Va. 453, 458-59, 184 S.E.2d 722, 729-30 (1971) (minor defects which the dealer offers to repair cannot constitute substantial impairment of value).

60. 117 N.H. 85, 370 A.2d 270 (1977).

61. 117 N.H. at 88-89, 370 A.2d at 273. Several courts have cited the *Asciolla* standard with approval. *See, e.g.,* Keen v. Modern Trailer Sales, Inc., 578 P.2d 668, 670 (Colo. App. 1978); Koperski v. Husker Dodge, Inc., 208 Neb. 29, 41-42, 302 N.W.2d 655, 662 (1981); Werner v. Montana, 117 N.H. 721, 730, 378 A.2d 1130, 1136 (1977); Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 378, 382 A.2d 954, 956 (1978).

62. This section [§ 2-608 of the U.C.C.] therefore, creates a subjective test in the sense that the needs and circumstances of the particular buyer must be examined. This determination is not, however, made by reference to the buyer's personal belief as to the

court should assign to any particular consideration.[63] Because the outcome in many cases hinges on the balance a court strikes between the objective and subjective elements of substantial impairment, a great deal of uncertainty exists in revocation of acceptance litigation.[64]

A purchaser asserting revocation of acceptance as the basis for recovery bears a formidable burden of proof.[65] Failure to prove any one of the elements of revocation of acceptance can be fatal to the buyer's claim.[66] The difficulty of establishing this claim and the expense of litigation deter consumers who have legitimate claims from bringing suit.[67] In addition, infrequent litigation gives dealers little incentive to negotiate satisfactory settlements with lemon owners.[68]

D. Using the Automobile After Rejection or Revocation

Even when the buyer properly rejects or revokes acceptance, subsequent use of the automobile can defeat any right to recovery.[69] Most courts insist that, upon rejecting or revoking acceptance, the buyer re-

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reduced value of the goods in question. The trier of fact must make an objective determination that the value of the goods to the buyer has in fact been substantially impaired.

117 N.H. at 88-89, 370 A.2d at 273.

63. This becomes apparent in examining cases which have cited the *Asciolla* standard yet arrive at divergent results in similar factual situations. *See* Koperski v. Husker Dodge, Inc., 208 Neb. 29, 41-42, 302 N.W.2d 655, 662 (1981) (court cited test in refusing to allow revocation because cost of repair was minimal); Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 378, 382 A.2d 954, 956 (1978) (court cited test in allowing revocation where paint defects marred appearance and value of automobile to owner).

64. *See* Highsmith & Havens, *supra* note 45, at 310-13; Wallach, *supra* note 28, at 32-38. *See also* Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 353 (Minn. 1977) ("[T]he language of the statute hardly provides a sensitive gauge to test the justification for any particular revocation").

65. Wallach, *supra* note 28, at 21. *See* U.C.C. § 2-607(4) (1978) (buyer must establish any breach with respect to goods accepted). *See also supra* note 52.

66. *See supra* notes 52 & 65.

67. Litigation costs may well exceed the purchase price of a lemon and the amount a consumer could hope to recover. *See supra* note 14 and accompanying text.

68. *See California Automobile Hearings, supra* note 10, at 139-40 (statement of Noel Quintana, founder of Lemon-Aide). *See also* Pertschuk, *supra* note 7, at 147 (dealers often urge consumers to "cut losses" by selling defective automobiles).

69. Under the U.C.C., one who revokes acceptance of nonconforming goods "has the same rights and duties with regard to the goods involved as if he had rejected them." U.C.C. § 2-608(3) (1978). Therefore, both consumers who reject and those who revoke acceptance of a defective automobile are bound by the U.C.C.'s provision that "after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller." *Id.* § 2-602(2)(a). Because subsequent use of the automobile is an act inconsistent with the seller's ownership of the goods, the lemon owner can defeat his recovery by reaccepting the automobile. *See supra* note 36.

turn the automobile to the dealer or store it as security against a refund.[70] A few courts, recognizing the hardship this requirement imposes on the average automobile purchaser,[71] have held that continued use after rejection or revocation of acceptance does not defeat an otherwise proper claim.[72] These courts supplement the U.C.C.'s damage measures with equitable principles[73] and compensate the dealer for the value of the continued use.[74]

E. Vertical Privity Under the U.C.C.

Normally a buyer will seek recovery against both the dealer who sold him the lemon and the manufacturer who set the terms of its warranty.[75] Most courts hold that a buyer rejecting or revoking acceptance of an automobile may recover only against the selling dealer.[76] Successfully rejecting or revoking acceptance allows a buyer to cancel his contract with a seller.[77] Courts therefore find that rejecting or revoking acceptance is inappropriate against a manufacturer that is not in privity

70. *See, e.g.,* Waltz v. Chevrolet Motor Div., 307 A.2d 815 (Del. Super. Ct. 1973); Charney v. Ocean Pontiac, Inc., 17 U.C.C. REP. SERV. (Callaghan) 982 (Mass. Dist. Ct. 1975); Ficek v. Capindale, 54 Pa. D. & C.2d 701 (1971); Grucella v. General Motors Corp., 10 Pa. D. & C.2d 65 (1956).

71. *See* Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 377, 382 A.2d 954, 956 (1978).

72. Courts allow continued use after rejection or revocation of acceptance when the auto is a necessity to the buyer. *See, e.g.,* Orange Motors v. Dade County Dairies, Inc., 258 So. 2d 319 (Fla. App.), *cert. denied,* 263 So. 2d 831 (Fla. 1972); Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 382 A.2d 954 (1978); Moore v. Howard Pontiac-Am., Inc., 492 S.W.2d 227 (Tenn. App. 1972).

73. *See* U.C.C. § 1-103 (1978) (principles of law and equity apply where not displaced by U.C.C. provisions).

74. These courts allow a set-off against the buyer's recovery for the value of the buyer's continued use. *See* cases cited *supra* note 72.

75. *See* Wallach, *supra* note 28, at 38. *See also, e.g.,* Beal v. General Motors Corp., 354 F. Supp. 423 (D. Del. 1973); Seekings v. Jimmy GMC of Tucson, Inc., 130 Ariz. 596, 638 P.2d 210 (1981); Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144 (1976); Gates v. Chrysler Corp., 397 So. 2d 1187 (Fla. App. 1981); Royal Lincoln-Mercury Sales, Inc. v. Wallace, 415 So. 2d 1024 (Miss. 1982); Welch v. Fitzgerald-Hicks Dodge, Inc., 121 N.H. 358, 430 A.2d 144 (1981); Ventura v. Ford Motor Corp., 180 N.J. Super. 45, 433 A.2d 801 (1981); Clark v. Ford Motor Co., 46 Or. App. 521, 612 P.2d 316 (1980); Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

76. *E.g.,* Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208 (6th Cir. 1974); Seekings v. Jimmy GMC of Tucson, Inc., 130 Ariz. 596, 638 P.2d 210 (1981); Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144 (1976); Volvo of Am. Corp. v. Wells, 551 S.W.2d 826 (Ky. Ct. App. 1977); Edelstein v. Toyota Motors Distrib., 176 N.J. Super. 57, 422 A.2d 101 (1980); Clark v. Ford Motor Co., 46 Or. App. 521, 612 P.2d 316 (1980); Reece v. Yeager Ford Sales, Inc., 155 W. Va. 453, 184 S.E.2d 722 (1971).

77. U.C.C. § 2-711(1) (1978).

of contract with the buyer.[78] Because the dealer, as a franchisee, does not act as the manufacturer's agent in selling the automobile,[79] claims for relief against the manufacturer pursuant to rejection or revocation of acceptance ordinarily fail[80] for lack of privity.[81]

Courts generally allow recovery for breach of an express warranty directly against the manufacturer of a defective automobile if the buyer claims only damages for its diminished value rather than a refund of its purchase price.[82] The dealer in these cases merely acts as a conduit, transmitting the express warranty from the manufacturer to the consumer.[83] Because the buyer's recovery does not result in cancellation of the contract of sale, courts relax the privity requirement.[84]

When a buyer bases rejection or revocation of acceptance on an au-

78. *See* cases cited *supra* note 76.

79. "[N]ormally dealers in new automobiles, although commonly spoken of as agents, are purchasers from the manufacturers, their only attribute as agents being to extend to purchasers from them the limited warranty of the manufacturers." RESTATEMENT (SECOND) OF AGENCY § 14J comment e.

80. *See* cases cited *supra* note 76. *Contra* Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977). In *Durfee* the Supreme Court of Minnesota held that the plaintiff could revoke acceptance against a distributor despite the absence of privity. Because the manufacturer used the automobile's warranty as a sales tool and the distributor profited indirectly from the sale to the plaintiff, the court saw no reason to block plaintiff's recovery merely because the selling dealer had gone out of business. 262 N.W.2d at 357-58.

81. Parties who have contracted with each other are said to be "in privity." There are two basic kinds of "non-privity" plaintiffs. The "vertical" non-privity plaintiff is a buyer within the distributive chain who did not buy directly from the defendant. The "horizontal" non-privity plaintiff is not a buyer within the distributive chain but one who consumes or uses or is affected by the goods.

J. WHITE & R. SUMMERS, *supra* note 5, § 11-2, at 399. The U.C.C. specifies which horizontal non-privity plaintiffs can recover. U.C.C. § 2-318 (1978) (three differing versions of statute provided). The drafters left state legislatures and courts to determine the rules for vertical privity which would apply in each state. *See id.* § 2-318 comment 2. *See also* Kassab v. Central Soya, 432 Pa. 217, 233, 246 A.2d 848, 856 (1968) (drafters of the U.C.C. sought to regulate only horizontal privity).

Because this Note explores legal relations between the parties primarily during the first year of ownership of an automobile, during which resale of the automobile is rare, the doctrines relating to horizontal privity are of little relevance.

82. *See, e.g.,* Riley v. Ford Motor Co., 442 F.2d 670 (5th Cir. 1971); Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144 (1976); Gates v. Chrysler Corp., 397 So. 2d 1187 (Fla. App. 1981); Koperski v. Husker Dodge, Inc., 208 Neb. 29, 302 N.W.2d 655 (1981); Goddard v. General Motors Corp., 60 Ohio St. 2d 41, 396 N.E.2d 761 (1979); Ehlers v. Chrysler Motor Corp., 88 S.D. 612, 226 N.W.2d 157 (1975); Reece v. Yeager Ford Sales, Inc., 155 W. Va. 453, 184 S.E.2d 722 (1971); Schrimpf v. General Motors Corp., No. 81-921 (Wis. Ct. App. March 10, 1982).

83. *See* cases cited *supra* note 82. *See generally* J. WHITE & R. SUMMERS, *supra* note 5, § 11-5.

84. *See* cases cited *supra* note 82.

tomobile's failure to conform to the terms of a manufacturer's express warranty, it seems anomalous for courts to deny these remedies because the buyer is not in privity of contract with the manufacturer.[85] The courts' reasoning on privity dictates that a single breach could support an action for damages against the manufacturer or an action for a refund of the purchase price from the dealer,[86] without regard for their relative abilities to control defects or redistribute losses.[87] Thus, the U.C.C.'s insistence on preserving the parties' bargain often places the economic loss resulting from a manufacturer's production mistakes on automobile dealers who can do little to redistribute these costs and almost nothing to prevent them.[88]

II. THE MAGNUSON-MOSS WARRANTY ACT

The Magnuson-Moss Warranty—Federal Trade Commission Im-

85. The court in Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977), relied on this anomaly and the U.C.C.'s mandate in favor of liberal administration of remedies to allow revocation against the distributor. "If plaintiff had sued Saab Scania for breach of either express warranty or implied warranty, the absence of privity would not bar the suit despite the language of the pertinent Code sections." *Id.* at 357.

Although the goods-oriented remedies of rejection and revocation of acceptance do not account for the manufacturer's receiving less than the retail price that the buyer paid to the dealer for the automobile, neither do monetary damages. In cases based on breach of warranty, courts will determine damages based on the automobile's diminution in value by comparing the automobile's value in its defective condition with its original retail price. *See, e.g.,* Riley v. Ford Motor Co., 442 F.2d 670 (5th Cir. 1971) (upon determining that automobile was worthless in its defective condition, the court could award its retail purchase price as damages for breach of warranty). Thus, differentiating between a damages award against the manufacturer and a goods-oriented remedy against the dealer on the basis of the manufacturer's receiving only the wholesale price for the automobile originally seems unwarranted.

86. Gates v. Chrysler Corp., 397 So. 2d 1187, 1189 (Fla. App. 1981) (plaintiff who establishes facts sufficient to show revocation of acceptance, also shows facts sufficient to establish breach of warranty). *See* Ventura v. Ford Motor Corp., 180 N.J. Super. 45, 64, 433 A.2d 801, 810 (1981).

87. *See generally* Preist, *A Theory of the Consumer Product Warranty,* 90 YALE L.J. 1297, 1346-51 (1981) (arguing that level of warranty coverage influences investments manufacturer will make in quality control); Schwartz, *The Manufacturer's Liability to the Purchaser of a "Lemon": A Review of the Situation in Canada after* General Motors Products of Canada, Ltd. v. Kravitz, 11 OTTAWA L. REV. 583, 584-91 (1979) (arguing that manufacturer's control over production and distribution justifies holding manufacturer liable to remote purchaser).

88. The primary reason for altering the current patterns of warranty recovery, according to one commentator, is to facilitate quality control.

> In the first place, the manufacturer and not the retailer is in most cases responsible for the existence of the defects in issue. The chronic defects that afflict the typical lemon nearly always have their origin in faulty design, manufacture, or assembly; factors under the control of the manufacturer rather than the dealer. The manufacturer rather than the dealer determines the quality of what the purchaser receives.

Schwartz, *supra* note 87, at 585.

provement Act of 1975 (the Act)[89] creates few remedial obligations that a warrantor cannot avoid by offering a "limited" warranty.[90] Most automobile manufacturers, therefore, now offer limited warranties which vary from the traditional standard warranty[91] only insofar as they must to comply with the Act's disclosure requirements[92] and limitations on disclaimers of implied warranties.[93] The Act's primary benefit to lemon owners lies in its authorization of discretionary awards of attor-

89. 15 U.S.C. §§ 2301-2312 (1982). The Act supplements state and federal warranty laws, but does not displace any rights or remedies available to consumers under state or federal law. *Id.* § 2311(b)(1). Although the Act focuses primarily on protecting consumers through full disclosure of warranty terms, *see id.* § 2302, it also prohibits disclaimers of implied warranties, *id.* § 2308(a), and thus limits a warrantor's nearly absolute freedom under the U.C.C. to allocate risks of product failure to consumers. *See supra* notes 5 & 21 and accompanying text.

The Act applies only to written warranties, which differ somewhat from express warranties under the U.C.C.:

> The term "written warranty" means—
>
> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6) (1982). *Cf. supra* note 8 (promise to repair is warranty under Act, but remedy under U.C.C.).

90. While the Act sets federal minimum standards for "full warranties," 15 U.S.C. § 2304 (1982), it does not make any standard mandatory for any warrantor. *Id.* § 2302(b)(2). A warrantor who offers a limited warranty need only comply with the Act's disclosure requirements and prohibitions on disclaimers of implied warranties. In fact, the Act forbids the FTC from mandating warranty terms. *Id.* § 2302(b)(2).

The Act does require any warrantor who offers a written warranty to conspicuously label it "full" or "limited." *Id.* § 2303. Congress imposed this requirement to help consumers differentiate more readily among products on the basis of warranty coverage. Thus, competitive forces should provide an incentive for suppliers to offer full warranties. *See* Brickey, *supra* note 4, at 74-79. *But cf. id.* at 96 (little competition among suppliers on basis of warranty despite full/limited regulatory scheme of the Act).

91. FTC SUMMARY REPORT, *supra* note 3, at 48. *See, e.g.,* Appendix B. *See also* Pertschuk, *supra* note 7, at 148-49 (full warranties a rarity in automobile industry).

92. The Act authorizes the FTC to make extensive regulations governing disclosure of warranty terms. 15 U.S.C. § 2302 (1982). *See* 16 C.F.R. §§ 700.1-703.8 (1983).

93. Section 2308(a) prohibits any supplier who offers a written warranty from disclaiming any implied warranties arising under state law. 15 U.S.C. §§ 2308, 2301(7) (1982). If the supplier offers a limited warranty, however, he may limit the duration of any implied warranties to that of the written warranty. *Id.* § 2308(b).

neys' fees to successful litigants.[94]

Although the Act creates a federal cause of action for breach of a limited warranty,[95] it does not specify the measure of damages recoverable.[96] Most courts have relied on state law to determine the remedies available to consumers under the Act.[97] Thus, a lemon owner must still establish a rightful rejection[98] or justified revocation of acceptance[99] to receive a refund.[100]

The U.C.C.'s remedial scheme allows owners to recover refunds only from the dealer who sold the automobile.[101] The Act's enforcement provisions, however, apply only to suits against a person who actually makes a written warranty.[102] Because automobile dealers merely transmit a manufacturer's written warranty to purchasers, a lemon owner cannot bring suit against a dealer under the Act.[103] Thus, on its face

94. *Id.* § 2310(a)(2). *See supra* note 14. *See also* Brickey, *supra* note 4, at 80 n.41 (attorneys' fees vital to the enforcement of consumers' rights).

95. "[A] consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation . . . under a written warranty, implied warranty or service contract, may bring suit for damages and other legal and equitable relief." 15 U.S.C. § 2310(d)(1) (1982). An individual consumer usually can bring suit only in state court, however, because the Act allows suits in federal courts only when the amount in controversy exceeds $50,000. *Id.* § 2310(d)(3)(B).

The Act forbids a consumer to bring suit until the warrantor has had an opportunity "to cure his failure to comply." *Id.* § 2310(e). The Act also requires a consumer to resort to a qualified informal dispute settlement mechanism before bringing suit if the warrantor gives notice of this procedure in the written warranty. *Id.* § 2310(3). *See, e.g.,* Appendix B.

The Act empowers the FTC to determine the minimum requirements for an informal dispute settlement procedure. 15 U.S.C. § 2310(a)(2) (1982). The FTC's rule on informal dispute settlement procedures sets out exceedingly detailed requirements for a warrantor who wishes to create such a mechanism. In addition to complex staffing and recordkeeping provisions, the rule contains the basic standards for the program's operation: (1) the decisionmaker must generally reach a result within 40 days; (2) that result does not bind the consumer, but does bind the manufacturer if the consumer chooses to accept it; (3) the decisionmaker must allow a party to the dispute the opportunity to refute contradictory evidence offered by the other; (4) the manufacturer must complete any work required within 30 days; (5) invoking an informal dispute settlement mechanism tolls the statute of limitations during the mechanism's operation. 16 C.F.R. § 703.5 (1983).

96. *See* 15 U.S.C. § 2310(d)(1) (1982).

97. *See* MacKenzie v. Chrysler Corp., 607 F.2d 1162 (5th Cir. 1979); Novosel v. Northway Motor Car Corp., 460 F. Supp. 541 (N.D.N.Y. 1978). "The present 'lemon' provision of Magnuson-Moss [15 U.S.C. § 2304 (1982)] also applies only to 'full' warranties, so consumers with a lemon [automobile] must still look to state law for relief." Pertschuk, *supra* note 7, at 149.

98. *See supra* notes 28 & 33-40 and accompanying text.

99. *See supra* notes 29 & 50-74 and accompanying text.

100. *See supra* notes 28-32 and accompanying text.

101. *See supra* notes 75-81 and accompanying text.

102. 15 U.S.C. § 2310(f) (1982).

103. The Act specifies that a person designated by the warrantor to perform warranty services

the Act does not appear to improve the lemon owner's ability to recover both a refund and attorney's fees.[104] Indeed, many courts simply hold that the Act does not provide any remedy for breach of a limited warranty.[105]

Some courts, however, allow a lemon owner to join a state law claim against the dealer for a refund with a federal claim against the manufacturer for damages pursuant to breach of warranty.[106] These courts reason that because the dealer acts as the manufacturer's agent for performing warranty obligations,[107] a buyer who establishes a breach of warranty sufficient to support rejection or revocation against the dealer a fortiori establishes the same breach against the manufacturer.[108] This in turn triggers the Act's beneficial enforcement provisions, allowing the lemon owner to recover attorneys' fees from the manufacturer.[109]

A third group of courts, apparently attempting to implement the Act's policy of holding warrantors directly responsible for their representations,[110] have struggled to find a principled means of allowing a lemon owner to recover a refund as well as attorneys' fees from the

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does not become a cowarrantor. *Id.* § 2307. Thus, the Act insulates from liability automobile dealers who do not offer their own independent warranties. *See supra* notes 79 & 102 and accompanying text. *Cf.* FTC SUMMARY REPORT, *supra* note 3, at 46 (automobile dealers have not made independent written warranties since passage of the Act).

104. *See supra* notes 95-103 and accompanying text.

105. These courts generally find that the warranty terms comply with the Act's disclosure requirements and prohibitions against disclaimers of implied warranties. They then declare that the Act's enforcement provisions do not apply in these cases. *See, e.g.,* Hahn v. Ford Motor Co., 434 N.E.2d 943, 953-54 (Ind. Ct. App. 1982); Ford Motor Co. v. Mayes, 575 S.W.2d 480, 483 n.1 (Ky. Ct. App. 1978); Koperski v. Husker Dodge, Inc., 208 Neb. 29, 46, 302 N.W.2d 655, 664 (1981).

106. *See, e.g.,* Gates v. Chrysler Corp., 397 So. 2d 1187 (Fla. App. 1981); Welch v. Fitzgerald-Hicks Dodge, Inc., 121 N.H. 358, 430 A.2d 144 (1981); Ventura v. Ford Motor Co., 173 N.J. Super. 501, 414 A.2d 611 (1980), *aff'd,* 180 N.J. Super. 45, 433 A.2d 801 (1981).

107. *See supra* note 79. *See also* Appendices A & B (manufacturer will perform warranty repairs through its authorized dealer).

108. Welch v. Fitzgerald-Hicks Dodge, Inc., 121 N.H. 358, 365, 430 A.2d 144, 149 (1981) (because plaintiffs' evidence established a prima facie case under the U.C.C., it also established a prima facie case under the Act and it was error for the trial court to deny plaintiffs attorneys' fees). *Accord* Gates v. Chrysler Corp., 397 So. 2d 1187, 1189 (Fla. App. 1981).

109. *See supra* notes 94-103 and accompanying text. *See also supra* note 14 and accompanying text. One commentator suggests that plaintiffs should always join a claim for relief under the Act with a claim for rejection or revocation of acceptance, because it is then possible to recover attorneys' fees. Oxenham, *supra* note 13, at 21.

110. *See* H.R. REP. NO. 1107, 93d Cong., 2d Sess. 39, *reprinted in* 1974 U.S. CONG. & AD. NEWS 7702, 7721 (by allowing warrantor to designate a representative for performing warranty service legislators did not intend to allow warrantor to relieve himself of direct responsibilities to consumer).

manufacturer.[111] A few of these courts find that the interaction between the U.C.C. and the Act permits a lemon owner to recover a refund from the manufacturer upon revocation of acceptance against the dealer.[112] One court has declared that the Act removes vertical privity barriers in suits brought for breach of warranty,[113] thus allowing a "rescission-type" remedy against the manufacturer.[114]

While these courts provide remedies for breach of a limited warranty that the Act's enforcement provisions seemingly exclude,[115] they are commendable for their efforts to carry out the legislative intent underlying the Act.[116] Congress sought to provide consumers with an adequate means of seeking redress against suppliers who use written warranties to induce sales, but then fail to fulfill their terms.[117] Congress, however, did not include adequate remedies for consumers seek-

111. *See, e.g.,* Champion Ford Sales, Inc. v. Levine, 49 Md. App. 547, 433 A.2d 1218 (1981); Royal Lincoln-Mercury Sales, Inc. v. Wallace, 415 So. 2d 1024 (Miss. 1982); Ventura v. Ford Motor Corp., 180 N.J. Super. 45, 433 A.2d 801 (1981). *See generally* Preist, *supra* note 87, at 1348 (courts tend to give greater protection under warranties than warrantors intended to give).

112. *See, e.g.,* Royal Lincoln-Mercury Sales, Inc. v. Wallace, 415 So. 2d 1024 (Miss. 1982). In *Royal* the Mississippi Supreme Court held that the manufacturer's repair or replace warranty merged into the sales agreement. Thus, when the automobile failed to conform to the dealer's implied warranty of merchantability, the buyer could recover a refund from the manufacturer upon cancellation of the sales contract with the dealer in an action under the Act. *Id.* at 1028-29. *Cf.* Champion Ford Sales, Inc. v. Levine, 49 Md. App. 547, 433 A.2d 1218 (1981) (buyer allowed to recover refund from manufacturer with no discussion of privity problems).

113. "The Act enhances the consumer's position by allowing recovery under a warranty without regard to privity of contract between the consumer and the warrantor. . . ." Ventura v. Ford Motor Corp., 180 N.J. Super. 45, 59, 433 A.2d 801, 811 (1981).

114. "If we focus on the fact that the warranty creates a direct contractual obligation to the buyer, the reason for allowing the same remedy that is available against a direct seller becomes clear." *Id.* at 65, 433 A.2d at 812. *Cf.* Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977) (reliance on similar policy reasons to abandon vertical privity ban under U.C.C.)

Other courts have taken the route sometimes followed prior to the Act's enactment of awarding the defective vehicle's purchase price as damages for a manufacturer's breach of an express warranty. *E.g.,* Riley v. Ford Motor Co., 442 F.2d 670, 674 (5th Cir. 1971). Under the Act, this tactic enables the plaintiff to collect attorneys' fees as part of the damages. *See, e.g.,* Schrimpf v. General Motors Corp., No. 81-921 (Wis. Ct. App. March 10, 1982).

115. While the Act creates a set of remedies, including a "lemon provision," for breach of a full warranty, 15 U.S.C. § 2304(a)(4) (1982), it does not do so for limited warranties. *See supra* notes 95-97 and accompanying text. Thus, construing the Act's enforcement provisions to allow the same remedies for breach of a limited warranty as for breach of a full warranty seems to vitiate the Act's full/limited warranty dichotomy. *See supra* notes 90, 92, 95 & 96.

116. *See supra* note 110; *infra* note 117 and accompanying text.

117. *See* H.R. REP. No. 1107, 93d Cong., 2d Sess. 22-29, *reprinted in* 1974 U.S. CONG. & AD. NEWS 7702, 7705-11. *See also id.* at 1 (purpose of the Act was to make warranty terms more understandable and enforceable).

ing a refund for a defective product covered by a limited warranty.[118]

III. LEMON LAWS

Legislatures passing lemon laws[119] sought to simplify an owner's case for recovery,[120] thereby giving the owner greater bargaining power

118. *See supra* notes 95-115 and accompanying text. *See also* Pertschuk, *supra* note 7, at 148-49 (outlining inadequacies of remedies available to lemon owners under the Act).

119. Appendix C sets out the text of the Connecticut lemon law. CONN. GEN. STAT. § 42-179 (1983). The California lemon law is very similar to the Connecticut statute. *Compare* CAL. CIV. CODE § 1793.2 (Deering Supp. 1983) *with* CONN. GEN. STAT. § 42-179 (1983). Subsequently enacted lemon laws are modeled on Connecticut's. *Compare* CONN. GEN. STAT. § 42-179 (1983) *with* DEL. CODE ANN. tit. 6, §§ 5001-5009 (Supp. 1984) *and* Act of June 3, 1983, ch. 83-69, 1983 Fla. Sess. Law Serv. 517 (West) (to be codified at FLA. STAT. ANN. § 681.10-.108 (West)) *and* ME. REV. STAT. ANN. tit. 10, §§ 1161-1165 (Supp. 1983-1984) *and* Act of Oct. 3, 1983, ch. 395, 1983 Mass. Adv. Legis. Serv. 41 (Law. Co-op.) (to be codified at MASS GEN. LAWS ANN. ch. 90, § 7N½ (West)) *and* MINN. STAT. § 325F.665 (1984) *and* MONT. CODE ANN. § 61-4-501 to -505 (1983) *and* NEB. REV. STAT. §§ 60-2702 to -2709 (Supp. 1983) *and* Act of May 10, 1983, ch. 261, 1983 Nev. Stat. 610 (to be codified at NEV. REV. STAT. § 598) *and* N.H. REV. STAT. ANN. § 357-D (Supp. 1984) *and* Act of June 20, 1983, ch. 215, 1983 N.J. Sess. Law Serv. 1026 (West) (to be codified at N.J. REV. STAT. § 56:12-19 to -28 *and* N.Y. GEN. BUS LAW § 198-a (McKinney Supp. 1983) *and* Act of June 14, 1983, ch. 469, 1983 Or. Laws Adv. Sh. No. 8, 176 *and* TEX. REV. CIV. STAT. ANN. art. 4413 (36) (Vernon Supp. 1984) *and* Act of May 17, 1983, ch. 240, 1983 Wash. Legis. Serv. 2472 (West) *and* Act of Oct. 26, 1983, Act 48, 1983, Act 48, 1983 Wis. Legis. Serv. 790 (West) (to be codified at WIS. STAT. ANN. § 218.015 (West)) *and* WYO. STAT. ANN. § 40-17-101 (Supp. 1983). Appendix D displays the extent to which other have states have followed Connecticut's example.

While there is practically no legislative history yet available on lemon laws passed in 1983, the Connecticut legislature kept records of its consideration of the nation's first lemon law. Also, documents are available from California to show the considerations that motivated passage of its lemon law. Given the similarity among lemon laws and the timing of their passage, it is reasonable to impute similar legislative goals to all legislatures passing lemon laws. *See* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 52.03 (4th ed. 1973) ("[T]he phraseology and language of similar legislation in other jurisdictions is deserving of special consideration not only in the interests of uniformity, but also for determining the general policy and objectives of a particular course of legislation."). Thus, the best guides currently available for interpreting lemon laws are the committee hearings and floor debates published by California and Connecticut. *See generally id.* § 52.01.

The United States House of Representatives was first to consider an automobile lemon law. *See* H.R. 1005, 96th Cong., 1st Sess. (1979). This bill would have amended the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1982), to make its remedies for breach of a full warranty applicable to all new automobile warranties. Although the bill died in committee, it was subject to extensive hearings before the Subcommittee on Consumer Protection and Finance. *Automobile Warranty and Repair Act Hearings, supra* note 1.

120. *See* S. Tanner, Statement to the California Senate Comm. on the Judiciary on A.B. 1787 5 (1982) ("[T]he clear standard proposed in this bill would offer a more effective remedy to the consumer . . . .") (on file at *Washington University Law Quarterly*) [hereinafter cited as Statement of S. Tanner]; *Hearings on House Bill 5729 Before the Connecticut General Law Comm.* 235 (March 11, 1982) ("[The bill would] release the consumer from the legal burdens and difficulties that exist when one brings suit under our present law.") (remarks of Rep. Woodcock, bill sponsor) (on file

against a dealer or manufacturer who refuses to honor warranty obligations.[121] They also sought to create a system of recovery that would counter automobile manufacturers' and dealers' reluctance to perform warranty service on new automobiles.[122] To achieve the goals estab-

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at *Washington University Law Quarterly*) [hereinafter cited as *Connecticut General Law Comm. Hearings*].

Lemon laws create a new cause of action for automobile purchasers that eliminates several of the barriers to recovery found in the U.C.C. *Connecticut General Law Comm. Hearings, supra*, at 232-36 (statement of Rep. Woodcock, bill sponsor); *Connecticut House Debates, supra* note 10, at 3161-62 (remarks of Rep. Woodcock, bill sponsor); R. Elbrecht, The California New Car Lemon Law 8 (Oct. 25, 1982) (on file at *Washington University Law Quarterly*). Like the Magnuson-Moss Warranty Act, however, lemon laws do not supplant remedies available to automobile purchasers under other state and federal laws. *E.g.,* ME. REV. STAT. ANN. tit. 10, § 1162(1) (Supp. 1983-1984)) ("Nothing in this chapter in any way limits the rights or remedies which are otherwise available to a consumer under any other law."). *See* Appendix D.

Thus, lemon laws create yet another layer of warranty law applicable to automobile warranties. Consumers in California, Minnesota and Oregon face a complex body of law because those states have general consumer warranty statutes, in addition to the U.C.C. and lemon laws specifically applicable to automobiles. *See* statues cited *supra* note 20. *See generally* Comment, *Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts,* 26 U.C.L.A. L. REV. 583 (1979).

The situation is slightly simpler in states that have no general consumer warranty law. There is, however, the same "layering" of warranty laws. For an overview of the interaction between the U.C.C. and the Magnuson-Moss Act, see generally Clark, *Lemon Aid for the Consumer: The Interaction of Warranty Law Under Article 2 of the U.C.C., Magnuson-Moss, and the FTC Holder in Due Course Rule, reprinted in* I PRACTICING LAW INSTITUTE CONSUMER CREDIT 11 (1978); Schroeder, *Private Actions Under the Magnuson-Moss Warranty Act,* 66 CALIF. L. REV. 1 (1978); Note, *Consumer Product Warranties Under the Magnuson-Moss Warranty Act and the Uniform Commercial Code,* 62 CORNELL L. REV. 738 (1977).

Appendix D demonstrates that there are several elements common to all lemon laws, despite local variations. First, they extend the manufacturer's repair obligations beyond the time limit set by the warranty if repairs during the warranty period fail to conform an automobile to the terms of the warranty. Second, they give automobile purchasers the remedies of refund or replacement of the defective automobile when a reasonable number of attempts at repair have failed. Third, they specify what constitutes a presumptively reasonable number of attempts at repair. Fourth, they allow consumers to recover directly against the manufacturer. Fifth, they apply only if the manufacturer offers an express warranty. Finally, they state that their remedies are nonexclusive.

121. *See* Statement of S. Tanner, *supra* note 120, at 5 ("[C]urrent law does not protect consumers who purchase defective automobiles, because dealers and manufacturers never admit . . . that they have a 'reasonable number' of attempts to repair it . . . ."); *Connecticut House Debates, supra* note 10, at 3161 ("The rationale behind the lemon bill has been to improve and enhance the responsiveness an [sic] accountability of automobile manufacturer [sic] to consumer complaints with defective new cars [sic].").

122. *See* Statement of S. Tanner, *supra* note 120, at 5 ("[The bill] would encourage improved quality control by manufacturers and improved repair service by dealers."); *Connecticut General Law Committee Hearings, supra* note 120, at 236 ("[I]t will provide a clear standard, which will give consumers an effective, reasonable and meaningful remedy, which will in turn, ultimately reduce costs and delays in lengthy litigation.") (remarks of Rep. Woodcock, bill sponsor). *See also Connecticut House Debates, supra* note 10, at 3154 ("[I]t will help the dealer to press the manufac-

lished by the legislatures, courts interpreting lemon laws must refer to the policies underlying these statutes rather than relying on settled interpretations of similar statutory language in the U.C.C..[123]

A. Policy Goals

The law of products liability[124] generally has confined consumers who have suffered only economic loss[125] to recovery based on breach of warranty.[126] The U.C.C. and the Magnuson-Moss Warranty Act,

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turer for consideration of this car being exchanged or for work being done.") (remarks of Rep. Zajac, committee member); *supra* note 10.

123. *See infra* notes 147-79 and accompanying text. Lemon laws illustrate an instance in which individual states sought to provide protection for consumers beyond that afforded by the "neutral" U.C.C.. *See supra* note 20.

As of the time of publication, there are no reported cases interpreting lemon laws, although cases have been filed in New York and Connecticut. Telephone interview with Evan Johnston, Assistant Director of the Center for Auto Safety (January 23, 1984) (the Center for Auto Safety compiles reports on all automobile warranty litigation based on notification from attorneys). The one year period during which the repair attempts must occur helps explain this lag. Because Connecticut's statute only became effective Oct. 1, 1982, legislators did not expect that consumers would begin bringing cases before Oct. 1, 1983. *See Connecticut House Debates, supra* note 10, at 3172 (remarks of Rep. Woodcock, bill sponsor).

124. Commentators generally identify negligence, strict liability in tort and warranty as the theories on which consumers may base a claim for damages caused by a defective product. *See* 1 R. HURSH & H. BAILY, AMERICAN LAW OF PRODUCTS LIABILITY 2D § 1:3 (2d ed. 1974). Each of these theories limits the types of recovery allowed, the parties who may be held liable, and the prerequisites a consumer must satisfy before bringing suit. *See generally* W. KIMBLE & R. LESHER, PRODUCTS LIABILITY §§ 11-22 (1979). Generally, an action based on strict liability in tort or negligence will have advantages over an action for breach of warranty for a consumer who suffers physical injury or property damage when a defective product malfunctions. *See* Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability,* 27 CASE W. RES. L. REV. 647, 648-49 (1977). Because lemon laws apply only to the economic losses suffered by the purchaser of a defective automobile, this Note will discuss negligence and strict liability only insofar as these theories highlight the policies underlying lemon laws.

125. One commentator gives the following description of the types of damages a consumer might incur:

> A successful product liability suit offers an injured individual three potential forms of recovery: (1) "personal" damages, which compensate for bodily harm; (2) "property" damages, which compensate for injury to property other than the defective product; and (3) "economic" damages, of which "direct" compensate for harm to the defective product itself and "consequential" for harm to business expectations, such as profits and good will.

Note, 54 NOTRE DAME LAW. 118, 118 (1978). For a fuller discussion of the concept of economic loss, see Edmeades, *supra* note 124, at 650-52. Lemon laws allow recovery of direct economic loss because they allow recovery for the damage defects cause to the automobile itself.

126. Note, *supra* note 125, at 118. The most widely cited case holding that consumers can recover economic losses only on a breach of warranty theory is Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). The court held that a manufacturer should not incur liability for any failure of a product to fulfill a consumer's expectations. Therefore, the court

along with state consumer warranty statutes, determine the applicable remedies.[127] When defective products cause physical injury or property damage, however, courts and legislatures have found that the consumer's interest in recovery is too important to relegate to the "intricacies of the law of sales."[128] Courts allowing recovery under alternative theories of liability have relied principally on the consumer's inability to guard against these losses by bargaining with a seller for more favorable warranty terms, and the manufacturer's superior capability for redistributing losses.[129]

Similar concerns motivated legislatures passing lemon laws.[130] They noted that a defective automobile causes economic losses beyond those associated with its decreased value[131] because Americans depend so heavily on their automobiles for transportation.[132] In addition, legisla-

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reasoned, the law should allow manufacturers to limit the risks to which they expose themselves through the terms of their warranties, if their products cause only economic loss. 63 Cal. 2d at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23 (1965). Most state courts have followed *Seely*. *See, e.g.,* Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 287 (3d Cir. 1980); Morrow v. New Moon Homes, Inc., 548 P.2d 279, 284 (Alaska 1976); Flory v. Silvercrest Indust., Inc., 130 Ariz. App. 15, 19, 633 P.2d 424, 426 (1980); Clark v. International Harvester Co., 99 Idaho 326, 334, 581 P.2d 784, 792 (1978); National Crane Corp. v. Ohio Steel Tube Co., 332 N.W.2d 39, 43 (Neb. 1983). *Contra* I.C.I. Australia Ltd. v. Elliot Overseas Co., 551 F. Supp. 265, 268 (D.N.J. 1982); Santor v. A. & M. Karagheusian, 44 N.J. 52, 66, 207 A.2d 305, 312 (1965).

127. *See supra* notes 20, 89 & 120.

128. Dean Prosser used this phrase in his classic article *The Assault upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099, 1134 (1960). The drafters of the Second Restatement of Torts soon adopted Prosser's proposal for a form of strict liability which did not depend on privity of contract and which operated despite the consumer's failure to give notice of defects or the manufacturer's disclaimer of warranties. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Courts quickly adopted this solution to their problems with warranties in personal injury cases. *E.g.,* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Garthwait v. Burgia, 153 Conn. 284, 216 A.2d 189 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965); Wights v. Staff Jennings, Inc., 241 Or. 301, 405 P.2d 624 (1965). Some states have codified § 402A. *E.g.,* S.C. CODE § 15-73-10 (1977).

129. *E.g.,* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 463-68, 150 P.2d 436, 441-44 (1944) (Traynor, J., concurring); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 379-84, 161 A.2d 69, 80-84 (1960).

130. *See Connecticut House Debates, supra* note 10, at 101-02 (consumer can only look to manufacturer to perform in accordance with the terms of warranty); *Hearings on H.B. 18 Before the Montana Business and Industry Comm.* 1 (Jan. 19, 1983) (warranties are totally voluntary statements by the manufacturer on his product) (remarks of Brinton Markel, Montana Dept. of Commerce) (on file at *Washington University Law Quarterly*).

131. *See Connecticut House Debates, supra* note 10, at 3126-35 (remarks of Rep. Woodcock, bill sponsor).

132. *Cf. California Automobile Hearings, supra* note 120, at 234 (statement of Rep. Woodcock)

tures considered evidence that the interaction of the laws governing warranties and the structure of the automobile sales industry encourages dealers and manufacturers to avoid making warranty repairs.[133] Lemon laws, therefore, represent a legislative judgment that a consumer's interest in a dependable automobile backed by an enforceable warranty is too important to relegate to the "intricacies of the law of sales."[134]

Lemon laws directly address the problems consumers face when they seek to enforce warranties on new automobiles.[135] They are founded on a recognition that consumers have no power to alter the terms of a manufacturer's warranty[136] and, therefore, impose performance obligations which exceed those a manufacturer voluntarily assumes in the standard automobile warranty.[137] Legislatures did not intend, however, to force manufacturers to provide replacements or refunds for automobiles having only minor defects or defects not covered by the

(most onerous burden for consumers deciding to litigate is ceasing use of automobile during pendency of dispute).

133. *Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., 2d Sess. 199-201 (1979) (statement of Albert H. Kramer, Director of Bureau of Consumer Protection of the Federal Trade Commission), *excerpted in California Automobile Hearings, supra* note 10, at 338; *Connecticut General Law Committee Hearings, supra* note 120, at 283-84 (remarks of Leonard Bornstein).

134. *Cf. Connecticut General Law Committee Hearings, supra* note 10, at 234-35 (remarks of Rep. Woodcock, bill sponsor) (outlining the need for lemon laws in light of consumers' difficulties in recovering under the U.C.C. and the Magnuson-Moss Act).

135. *See, e.g.,* Act of June 3, 1983, ch. 83-69, § 2, 1983 Fla. Sess. Law. Serv. 517, 518 (West) (to be codified at FLA. STAT. ANN. § 681.101 (West)) ("It is . . . the intent of the Legislature to provide the statutory procedures whereby a consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with the express warranty issued by the manufacturer."); MINN. STAT. § 325F.665 (1984) ("An Act . . . requiring the repair, refund, or replacement of new motor vehicles under certain circumstances."); Act of May 10, 1983, ch. 261, 1983 Nev. Stat. 610, 610 (to be codified at NEV. REV. STAT. § 598) ("An Act relating to motor vehicles; requiring manufacturers, their agents or their authorized dealers under specified circumstances to make repairs necessary to conform certain motor vehicles to the express warranties covering them.").

136. *See Connecticut House Debates, supra* note 10, at 3122-33 (remarks of Rep. Woodcock, bill sponsor) ("[T]he consumer cannot look to the manufacturer for any other relief, other than repairs as spelled out in the vehicle warrantee [sic].").

137. *E.g.,* ME. REV. STAT. ANN. tit. 10, § 1163(1) (Supp. 1983-84)) ("[T]he manufacturer, its agent or its authorized dealer shall make those repairs necessary to conform the vehicle to the express warranties, notwithstanding the fact that the repairs are made after the expiration of [the warranty] term or [a] one year period [after delivery]."). *See* Appendix D (notes which statutes impose similar obligations on automobile manufacturers).

manufacturer's warranty.[138] These statutes allow recovery only when an unrepaired defect seriously undermines the automobile's use or value.[139] They also allow manufacturers to avoid liability by selling an automobile "as is."[140]

Legislators sought to use a manufacturer's capability for redistributing losses on a broad scale to benefit all automobile purchasers.[141] By allowing lemon owners to demand a refund or a replacement vehicle from manufacturers after a clearly defined number of unsuccessful repair attempts,[142] the legislatures sought to encourage manufacturers to create incentives for dealers to offer better warranty service to automobile purchasers.[143]

Legislators were aware that manufacturers would pass the cost of replacing lemons on to automobile purchasers in the form of higher prices.[144] Consumers, therefore, will pay the premiums for the insurance that lemon laws give individual purchasers against losses attributable to a defective automobile.[145] Consequently, lemon laws allow

138. *See Connecticut General Law Committee Hearings, supra* note 120, at 268 (remarks of Rep. Atkins, committee member).

139. Almost all lemon laws require that the defect "substantially impair" the automobile's use, value or safety. *E.g.,* MONT. CODE ANN. § 61-4-503(1) (1983) ("If after a reasonable number of attempts the manufacturer or its agent or authorized dealer is unable, during the warranty period, to conform the new motor vehicle to any applicable express warranty by repairing or correcting any defect or condition that *substantially impairs* the use and market value or safety of the motor vehicle to the consumer . . . .") (emphasis added). *See infra* notes 164-66.

140. Statement of S. Tanner, *supra* note 120, at 4 ("If the vehicle was sold 'as is' . . . the bill would not apply."). *See* Appendix D.

141. *See infra* note 145 and accompanying text. *Cf. Connecticut House Debates, supra* note 10, at 3161 (remarks of Rep. Woodcock) ("The rationale behind the lemon bill has been to improve and enhance the responsiveness an [sic] accountability of automobile manufacturer [sic] to consumer complaints with defective new cars [sic].").

142. *Compare* cases cited *supra* note 23 (under the U.C.C. lemon owners must allow many repair attempts before seeking relief) *with* statutes cited *infra* note 148 (setting out the number of repair attempts an owner must allow before seeking relief under a lemon law).

143. *See Connecticut House Debates, supra* note 10, at 3154 (remarks of Rep. Zajac, bill cosponsor) ("[C]ertainly on that third time, going in for the fourth, the manufacturer knowing that this be [sic] the case, will definitely say to the dealer, at all prices replace that transmission or make good on it before it has to come back. . . . [I]t will force the manufacturer to give the dealer the authority to, in fact, repair it and make it shipshape and put it back on the road."). Even if manufacturers can pass on to consumers the costs which they will incur due to recovery by consumers under lemon laws, *see infra* note 144 and accompanying text, manufacturers will eventually suffer some losses in the form of reduced demand for higher priced automobiles.

144. *Cf. Connecticut General Law Committee Hearings, supra* note 120, at 267 (statement of Eugene Wagner on behalf of the Motor Vehicle Manufacturers Association) (stating that consumers must pay the price for increased warranty protection).

145. "By shifting the lemon penalty from the unlucky few consumers to the manufacturer,

purchasers to recover a refund or a replacement only if an automobile is seriously defective.[146]

B. Judicial Interpretation

Most lemon laws create a rebuttable presumption[147] that four attempts to repair a single defect, or a total of thirty days out of service due to repairs during the first year after delivery, constitutes a reasonable number of attempts to make a new motor vehicle conform to applicable warranties.[148] This presumption roughly parallels a showing under the U.C.C. that an exclusive remedy has failed of its essential purpose.[149] These statutes differ from the U.C.C. in that they allow lemon owners to demand relief without fear that a court will find that

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there is largely a transfer of risk; that is, the risk of getting a lemon is shared by all buyers, and not just imposed on the unlucky ones." *Automobile Warranty and Repair Act Hearings, supra* note 1, at 154 (statement of Michael Pertschuk, Chairman of the Federal Trade Commission).

146. *See supra* note 139.

147. After a consumer establishes the requisite number of unsuccessful repair attempts, the fact-finder must presume the manufacturer has made a reasonable number of attempts to repair the automobile. *See infra* notes 148-49 and accompanying text. In many states, the manufacturer then bears the burden of proving that the nonexistence of this presumed fact is more likely than its existence. *E.g.*, CAL. CIV. CODE § 1793.2(e)(1) (Deering Supp. 1983); CAL. EVID. CODE § 606 (Deering 1966); Act of June 3, 1983, ch. 83-69, § 5(4), 1983 Fla. Sess. Law. Serv. 517, 521 (West) (to be codified at FLA. STAT. ANN. § 681.104(4) (West); FLA. STAT. ANN. § 90.304 (West 1979); Act of May 10, 1983, ch. 261 § 4(2), 1983 Nev. Stat. 610, 611 (to be codified at NEV. REV. STAT. § 598(4)(2)); NEV. REV. STAT. § 47.180(1) (1979); Act of June 14, 1983, ch. 469, § 4, 1983 Or. Laws Adv. Sh. No. 8, 176, 177; OR. REV. STAT. § 40.120 Rule 308 (1981). In other states, the presumption in favor of the consumer exists only until the manufacturer produces some evidence to disprove the fact presumed, whereupon the burden of proving the existence of the presumed fact returns to the consumer. *E.g.*, MINN. STAT. § 325F.665 (1984); Act of June 20, 1983, ch. 215, § 4, 1983 N.J. Sess. Law Serv. 1026, 1028 (West) (to be codified at N.J. STAT. ANN. § 56:12-22 (West)); N.J. R. EVID. 13, 14. MINN. R. EVID. 301.

148. *E.g.*, TEX. REV. CIV. STAT. ANN. art. 4413 (36) § 6.07(d) (Vernon Supp. 1984) ("It shall be presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties if (1) the same nonconformity has been subject to repair four or more times . . . within the express warranty term or during the period of one year following the date of original delivery of an owner, whichever is the earlier date, but such nonconformity continues to exist; or (2) the vehicle is out of service for repairs for a cumulative total of 30 or more days during such term or during such period, whichever is the earlier date."). *See* Appendices C & D. Some lemon laws establish different standards for what constitutes a reasonable number of attempts at repair. Act of June 3, 1983, ch. 83-69 § 5(4), 1983 Fla. Sess. Law Serv. 517, 521 (West) (to be codified at FLA. STAT. ANN. § 681.104(4) (West) (3 repair attempts or 15 working days); N.Y. GEN. BUS. LAW § 198-a(d) (McKinney Supp. 1983)) (time period during which the 4 attempts or 30 days must occur extended to two years or 18,000 miles, whichever comes first).

149. *See supra* notes 24-26 and accompanying text. *Compare* U.C.C. § 2-719(2) (1978) (when circumstances cause an exclusive remedy to fail of its essential purpose all remedies provided by the U.C.C. become available) *with* CAL. CIV. CODE § 1793.2(d) (Deering 1981) (when a reason-

slow and ineffective warranty service did not deprive the buyer of the benefit of his bargain.[150]

Once the buyer establishes the required number of unsuccessful repair attempts,[151] the burden of proof[152] shifts to the manufacturer[153] to establish that, under the circumstances, the buyer reasonably should have allowed a greater number of attempts at repair.[154] A substantial number of statutory mechanisms designed to improve the buyer's ability to secure effective warranty service depend on this presumption.[155] Thus, legislative goals are best served if courts instruct juries that only exceptional circumstances can excuse failure to perform within the time allowed.[156] For instance, if a dealer's failure to perform results from an inability to diagnose the problem, or unexplainably slow deliveries of parts, courts faithful to the policies underlying lemon laws will not relieve the manufacturer of statutory liability. Delays of this order are components of the ineffective warranty service the legislatures sought to eliminate.[157] If delays result from supervening causes,[158] however, such as unavoidable equipment failures or personnel shortages, these statutes provide an excuse to the extent that these conditions interfered with the dealer's or manufacturer's timely performance of repairs.

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able number of attempts to conform an item to its express warranty fail, buyer becomes entitled to a refund or a replacement).

150. The need to assure a buyer an adequate remedy which preserves the benefit of the bargain underlies the buyer's ability under the U.C.C. to avoid the exclusive remedy set out in the manufacturer's warranty. *See supra* note 24. Buyers seldom know how long they must allow the dealer to attempt repairs under the U.C.C., since it is difficult to gauge when failure to remedy a breach of warranty will deprive the buyer of the benefit of his bargain. *See supra* note 23. Lemon laws set out a numerical standard for a reasonable number of attempts which a manufacturer can overcome only by a showing that efforts were reasonable under the circumstances. *See infra* note 154 and accompanying text.

151. *See supra* note 148 and accompanying text.

152. *See supra* note 148 and accompanying text.

153. *See supra* note 147.

154. *See* Statement of S. Tanner, *supra* note 120, at 4 ("The presumption could be overcome by a showing on the part of the warrantor that 4 attempts or 30 days were not reasonable in that particular case.").

155. *See supra* notes 141-46 and accompanying text.

156. Most lemon laws explicitly provide for extension of the warranty period and the 30 day period for causes that are clearly beyond the dealer's or manufacturer's control. *E.g.,* N.H. REV. STAT. ANN. § 357-D:6 (Supp. 1984) ("war, invasion, strike or fire, flood or other natural disaster.").

157. *Cf. Connecticut House Debates, supra* note 10, at 3179-81 (remarks of Rep. Woodcock, bill sponsor) (outlining the consequences of a dealer's failure to schedule repair attempts).

158. *Cf. supra* note 156 (setting out lemon law provision which extends warranty period for specified reasons).

To invoke the statutory presumption, a buyer must show that the manufacturer's warranty covers the claimed defects.[159] The lemon owner's ability to recover under these statutes, therefore, will often depend on whether the court requires direct evidence that the malfunction resulted from a defect in material or workmanship.[160] In balancing the interests of lemon owners and manufacturers, legislatures allowed manufacturers to limit their exposure to liability by limiting the coverage of their warranties.[161] To fulfill this legislative intent, courts must require lemon owners to introduce at least circumstantial evidence of the defect's origin by demonstrating an absence of other causes.[162] To this extent, courts should not instruct juries to infer that a warranted defect exists from the mere fact that an automobile malfunctioned during the warranty period.[163]

The statutory language indicates that a buyer seeking recovery must show that the warranted defect substantially impairs the automobile.[164] Some statutes preserve the subjective elements of the test laid down by the U.C.C., requiring that the nonconformity "substantially impair[s]

159. Almost all lemon laws operate only when an automobile fails to conform to a manufacturer's express warranty. *E.g.,* WYO. STAT. ANN. § 40-17-101 (Supp. 1983). *See* Appendix D. *But see* N.H. REV. STAT. ANN. § 357-D (Supp. 1984) (operates when a manufacturer fails to conform a new automobile to any applicable implied warranties).

160. *See supra* notes 55-57 and accompanying text.

161. *Cf.* Statement of S. Tanner, *supra* note 120, at 4 ("[T]his bill would apply only to those vehicles or parts of vehicles covered by the manufacturer's warranty.").

162. *Cf. Connecticut General Law Committee Hearings, supra* note 120, at 271 (statement of Joseph Nedrow, Regional Manager for General Motors Corporation) (outlining the difficulties in determining that a defect resulted from faulty material or workmanship).

163. *See supra* note 57 and accompanying text.

164. *See supra* notes 59-64 and accompanying text. Many lemon laws state that the manufacturer may establish as an affirmative defense that the automobile's defects do not substantially impair its use, value, or safety. *E.g.,* CONN. GEN. STAT. § 42-179(i)(c)(1) (1983); ME. REV. STAT. ANN. tit. 10, § 1164(1) (Supp. 1983-84); N.H. REV. STAT. ANN. § 357-D:5(I) (Supp. 1984); Act of June 20, 1983, ch. 215, § 6, 1983 N.J. Sess. Law Serv. 1026, 1029 (West) (to be codified at N.J. REV. STAT. § 56:12-24); N.Y. GEN. BUS. LAW § 198-a(c)(1) (McKinney Supp. 1983); Act of June 14, 1983, ch. 469 § 3(3)(a), 1983 Or. Laws Adv. Sh. No. 8, 176, 177; TEX. REV. CIV. STAT. ANN. art. 4413 (36) § 6.07(c)(1) (Vernon Supp. 1984); WYO. STAT. ANN. § 40-17-101(g)(1) (Supp. 1983). Nonetheless, it seems that the consumer should bear at least the burden of pleading that the automobile is a lemon, because the facts which would prove the magnitude of the defect are uniquely within the owner's knowledge. *See* 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2486 (Chadbourn rev. ed. 1981); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.8 (2d ed. 1977). *See also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 337, at 786 (E. Cleary 2d ed. 1972) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.").

the use and value of the motor vehicle to the consumer."[165] Other statutes, however, appear to establish a purely objective standard, allowing a refund only if the defect "substantially impairs the use, value, or safety of the new motor vehicle."[166] Whether an objective or subjective standard applies, the statutory language provides little guidance for determining the types of defects that entitle an automobile purchaser to a refund.[167]

Legislatures intended to protect manufacturers from unjustified demands for refunds or replacement vehicles by specifying standards for the types of defects which warrant cancellation of a contract of sale.[168] To effectuate these goals courts must develop coherent standards for measuring the degree to which a defect impairs an automobile.[169] If courts construe this language to allow recovery solely because an automobile's defects shake the buyer's faith in its dependability,[170] these laws will operate to impose losses on manufacturers and consumers that they were not intended to bear. On the other hand, allowing recovery only if a defect diminishes the automobile's value to a certain percentage of its purchase price[171] will undermine the legislative goal of increasing lemon owners' bargaining power in warranty disputes.[172] Consumers can rarely evaluate an automobile's diminished value in terms of dollars, so that they seldom know when they stand securely

165. *E.g.,* CONN. GEN. STAT. § 42-179(c) (1983) ("a defect or condition which substantially impairs the use and value of the motor vehicle to the consumer."). *See* Appendix D.

166. *E.g.,* CAL. CIV. CODE § 1793.2(e)(4)(A) (Deering Supp. 1983) ("nonconformity which substantially impairs the use, value, or safety of the new motor vehicle."). *See* Appendix D. Florida's statute is unique in that it requires only that the defect "impairs the use, market value, or safety of the motor vehicle to the consumer." Act of June 3, 1983, ch. 83-69 § 5(1), 1983 Fla. Sess. Law Serv. 517, 520 (West) (to be codified at FLA. STAT. ANN. § 681.104(1) (West).

167. For a discussion of judicial inability to establish precisely what constitutes substantial impairment of an automobile under the U.C.C., see *supra* notes 59-64 and accompanying text.

168. *See Connecticut House Debates, supra* note 10, at 3118 (remarks of Rep. Woodcock, bill sponsor) (although Rep. Woodcock did not want to jeopardize automobile manufacturers' economic situation, he introduced the Connecticut Lemon Law to protect those few people who end up with a lemon automobile).

169. *See Connecticut House Debates, supra* note 10, at 3154-55 (remarks of Rep. Zajac, bill cosponsor) (question of how improved warranty service will come about under the Connecticut Lemon Law cannot be resolved until judges determine what "substantial" means in each case).

170. For a discussion of the "shaken faith" doctrine, see *supra* note 40 and accompanying text.

171. For cases brought under the U.C.C. in which courts used this measure, see *supra* note 59.

172. *See Connecticut General Law Committee Hearings, supra* note 120, at 236 (statement of Rep. Woodcock, bill sponsor) ("[T]he bill . . . will strengthen the position of a Connecticut new car buyer who is forced to play the game when a manufacturer or its agents refuse to acknowledge the defects or in the alternative, request endless opportunities to repair those defects.").

within their rights in demanding a refund or a replacement vehicle. The standard that courts adopt, therefore, must comport with automobile purchasers' reasonable expectations for an automobile's performance.

Most lemon laws state that a defect must impair the automobile's use and value.[173] Courts can focus on this language to allow recovery only when the dealer's repair efforts have failed to produce a safe and dependable vehicle. In states adopting a subjective standard,[174] the fact-finder should also consider evidence of a buyer's particular needs to determine whether an automobile's defects prevent it from fulfilling that buyer's requirements.[175]

In addition to clarifying the legal standards for recovery under lemon laws, judicial interpretation of these statutes can decrease the lemon owner's practical difficulties in bringing suit by allowing continued use of the automobile during the pendency of a warranty dispute.[176] Presently, only two lemon laws incorporate provisions for continued use after the buyer demands a refund.[177] No statute requires that the consumer surrender the automobile or cease using it after providing notice of its nonconformities. Because these laws do not rely on

173. *E.g.*, CAL. CIV. CODE § 1793.2(e)(4)(A) (Deering Supp. 1983) ("use, value, or safety"); CONN. GEN. STAT. § 42-179(1)(c) (1983) ("use and value"); Act of June 3, 1983, ch. 85-69, § 5(1), 1983 Fla. Sess. Law Serv. 517, 520 (West) (to be codified at FLA. STAT. ANN. § 681.104(1) (West) ("use, market value, or safety"); ME. REV. STAT. ANN. tit. 10 § 1163(2) (Supp. 1983-1984) ("use and value"); MINN. STAT. § 325F.665(1)(3)(a) (1984) ("use or market value"); MONT. CODE ANN. § 61-4-503(1) (1983) ("use and market value or safety"); Act of May 10, 1983, ch. 261, § 4(1), 1983 Nev. Stat. 610, 611 (to be codified at NEV. REV. STAT. § 598(4)(1) ("use and value"); N.H. REV. STAT. ANN. § 357-D:3(I) (Supp. 1984) ("use and value"); Act of June 20, 1983, ch. 215, § 1(f), 1983 N.J. Sess. Law Serv. 1026, 1027 (West) (to be codified at N.J. REV. STAT. § 56:12-19(f)) ("use, value or safety"); Act of June 14, 1983, ch. 469, § 3(1), 1983 Or. Laws Adv. Sh. No. 8, 176, 176 ("use and market value"); TEX. REV. CIV. STAT. ANN. art. 4413(36) § 6.07(c) (Vernon Supp. 1984) ("use and market value"); Act of May 17, 1983, ch. 240, § 2(2), 1983 Wash. Legis. Serv. 2472, 2473 (West) ("use, value, or safety"); WYO. STAT. ANN. § 40-17-101(c) (Supp. 1983) ("use and fair market value"). *But see* N.Y. GEN. BUS. LAW § 198-a(c) (McKinney Supp. 1984), ("any defect or condition which substantially impairs the value of the motor vehicle to the consumer").

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

175. *Cf.* Asciolla v. Manter Oldsmobile-Pontiac, Inc., 117 N.H. 85, 88-89, 370 A.2d 270, 273 (1977) (requiring such considerations under the U.C.C.).

176. For a discussion of these difficulties see *supra* notes 71-74 and accompanying text. Legislators considering lemon laws were aware of this problem. *See Connecticut General Law Committee Hearings, supra* note 10, at 234 (statement of Rep. Woodcock, bill sponsor).

177. Act of Oct. 3, 1983, ch. 395, § 1(6), 1983 Mass. Adv. Legis. Serv. 41, 43 (Law. Co-op) (to be codified at MASS. GEN. LAWS ANN. ch. 90, § 7N½ (6) (West); Act of Oct. 26, 1983, Act 48, § 1(2)(c), 1983 Wis. Legis. Serv. 790, 791 (West) (to be codified at WIS. STAT. ANN. § 218.015(2)(c) (West).

the U.C.C.'s scheme of rejection, acceptance and revocation of acceptance,[178] it would be improper for courts to construe these statutes to impose similar obligations on a consumer who demands a refund or a replacement automobile.

IV. CONCLUSION

Legislatures had expansive goals for lemon laws. In creating a new remedy for lemon owners they sought to alleviate many systemic ills that have plagued the automobile sales industry. The statutes they enacted, however, may prove inadequate to achieve those goals because lemon laws incorporate terms and concepts that courts heretofore have interpreted within the U.C.C.'s framework of rejection, acceptance and revocation of acceptance.[179]

Decisions interpreting the U.C.C. have produced inconsistent standards for determining whether a warranted defect exists, whether it substantially impairs the value of an automobile and whether the lemon owner's actions will defeat recovery. Courts can avoid inconsistent results in factually similar cases if they consciously attempt to implement legislative goals when construing these statutes. Fulfilling legislative goals for increasing a lemon owner's bargaining power in warranty disputes and equitably redistributing economic losses requires courts to establish coherent standards. Without such standards lemon laws may ease the lemon owner's route to recovery in particular cases, but will not achieve the legislatures' larger goals for reforming the automobile warranty system.

Elizabeth E. Vollmar

178. Lemon laws merge the U.C.C.'s remedies of rejection and revocation of acceptance into a single standard that relies on the reasonableness of the repair attempts the consumer allows. Thus, the issues in litigation under lemon laws should not revolve around whether the owner accepted the automobile. For a discussion of the effect of acceptance in cases governed by the U.C.C., see *supra* notes 33-49 and accompanying text.

179. *Compare* U.C.C. § 2-608 (1978) ("The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him.") *with* ME. REV. STAT. ANN. tit. 10, § 1163(2) (Supp. 1983-84) (if the manufacturer fails to correct a defect which substantially impairs the use and value of the motor vehicle, the manufacturer shall give the consumer a refund or a replacement vehicle).

APPENDIX A

1984 AMC FULL 12-MONTH/12,000-MILE WARRANTY

1. Warranty Coverage Duration: A Strong Warranty

American Motors Corporation* warrants to the original purchaser and each subsequent owner of an AMC vehicle that the vehicle (including any replacement parts provided under this warranty) is free from defects in material and workmanship under normal use and service for the earlier of 12 months or 12,000 miles (20 000 km)** from the date of delivery or first use of the vehicle, whichever comes first.

If the vehicle becomes defective under normal use and service, any authorized AMC Dealer in the United States or Canada will, without charge and at the Dealer's place of business within a reasonable time after delivery of the vehicle to the Dealer, repair or, at AMC's option, replace with a new or Factory reconditioned part, any part found defective.

Except for other written warranties issued by AMC applicable to new AMC vehicles or parts, no other express warranty is given or authorized by AMC. AMC disclaims any implied warranty of MERCHANTABILITY or FITNESS for any period beyond the express warranty. No authorized AMC Dealer has authority to change or modify this warranty in any respect. EXCEPT AS MAY BE PROVIDED BELOW, AMC SHALL NOT BE LIABLE FOR LOSS OF USE OF VEHICLE, LOSS OF TIME, INCONVENIENCE, TOWING, RENTAL OR SUBSTITUTE TRANSPORTATION, LODGING, LOSS OF BUSINESS OR ANY OTHER INCIDENTAL OR CONSEQUENTIAL DAMAGES. SOME STATES AND PROVINCES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE EXCLUSION 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 or province to province.

APPENDIX B

1984 CHRYSLER CORPORATION'S BASIC 12 MONTH/12,000 MILE NEW VEHICLE LIMITED WARRANTY

5 YR/50,000 1984 POWERTRAIN LIMITED WARRANTY

WHAT IS COVERED

WARRANTY BEGINS
This warranty begins on the date of original retail delivery or original use, whichever occurs first

BASIC COVERAGE
The basic warranty is 12 months or 12,000 miles, whichever occurs first

WARRANTY APPLIES
This warranty is for Chrysler vehicles registered and normally operated in the United States or Canada.

COVERAGE
This warranty covers any repairs to this vehicle (except tires) which proves defective in material and workmanship in normal use

NO CHARGE
Warranty repairs (parts and labor) will be made by your Selling Dealer at no charge using new or remanufactured parts.

ADJUSTMENTS
Required adjustments will be made by your Selling Dealer during the first 3 months of the warranty period. (See "Adjustments" paragraph for details.)

WHAT IS COVERED

To the First Retail Purchaser only, upon expiration of the 12 month/12,000 mile Basic New Vehicle Limited Warranty, this powertrain warranty covers components listed below to 5 years or 50,000 miles whichever occurs first. This powertrain limited warranty is subject to a $100 deductible for each repair visit.

As used, the term First Retail Purchaser means the first legal ownership of a vehicle for use and not for resale.

To all subsequent purchasers and vehicles placed in Fleet, Police, Taxi, Limousine or Jitney service, upon expiration of the 12 month/12,000 mile Basic New Vehicle Limited Warranty, the powertrain warranty covers components listed below to 24 months or 24,000 miles, whichever occurs first. This powertrain limited warranty is subject to a $100 deductible for each repair visit.

5 YEAR/50,000 MILE COVERED COMPONENTS

ENGINE - Cylinder block and all internal parts, cylinder head assemblies, core plugs, valve covers, oil pan, timing gear drive belts and/or chains and cover, oil pump, intake and exhaust manifolds, water pump, turbocharger housings and internal parts and turbocharger wastegate actuator. Gaskets and seals for listed components.

TRANSMISSION — Transmission case and all internal parts, gaskets and seals, oil pan, torque converter with starter ring gear and flex plate, clutch housing, flywheel.

FRONT WHEEL DRIVE — Transaxle case and all internal parts, gaskets and seals, oil pan and differential cover, torque converter and drive plate with starter ring gear, clutch housing, flywheel, drive shaft assemblies, universal joints, housings and boots.

REAR WHEEL DRIVE — Drive axle housing and all internal parts, gaskets and seals, axle shafts, axle shaft bearings and seals, drive shaft assemblies, universal joints and yokes.

This warranty covers repairs made necessary due to a defect in material or workmanship. It applies to Chrysler vehicles registered and normally operated in the 50 United States, Washington, D.C. and Canada. This warranty does not limit the terms and conditions of other warranties contained in this booklet.

WHAT IS NOT COVERED
This warranty does not cover any item listed under "What Is Not Covered" in the Basic New Vehicle Limited Warranty.

OWNER'S RESPONSIBILITY
To obtain service under this warranty, take your vehicle to your selling dealer. Your cost for those repairs covered under this warranty is limited to the specified deductible for each repair visit.

THE OTHER TERMS STATED IN THE BASIC NEW VEHICLE LIMITED WARRANTY ALSO APPLY TO THIS WARRANTY.

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

THIS WARRANTY IS THE ONLY EXPRESS WARRANTY MADE BY CHRYSLER CORPORATION APPLICABLE TO THIS VEHICLE. ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE APPLICABLE TO THIS VEHICLE IS LIMITED IN DURATION TO THE DURATION OF THIS WRITTEN WARRANTY. CHRYSLER CORPORATION SHALL NOT BE LIABLE FOR CONSEQUENTIAL OR COMMERCIAL DAMAGES RESULTING FROM BREACH OF THIS WRITTEN WARRANTY.

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

CUSTOMER SATISFACTION BOARD

In the 50 United States and Washington, D.C., if a warranty dispute has not been resolved to your satisfaction you may submit the issue to a Chrysler Customer Satisfaction Board. The case must be submitted to the Customer Satisfaction Board before action under the Magnuson-Moss Warranty Act can be taken. However, this does not apply for enforcement of state created rights or other rights which exist independent from the Magnuson-Moss Warranty Act.

Additional information and the address of each Customer Satisfaction Board is contained in the Customer Satisfaction Board Brochure included in the Owner's Literature package.

APPENDIX C

CONNECTICUT LEMON LAW

(1)(a) As used in this section and section 2 of this act: (1) "Consumer" means the purchaser, other than for purposes of resale, of a motor vehicle, any person to whom such motor vehicle is transferred during the duration of an express warranty applicable to such motor vehicle, and any other person entitled by the terms of such warranty to enforce the obligations of the warranty; and (2) "motor vehicle" means a passenger motor vehicle or a passenger and commercial motor vehicle, as defined in subdivisions (35) and (36) of section 14-1, which is sold in this state.

(b) If a new motor vehicle does not conform to all applicable express warranties, and the consumer reports the nonconformity to the manufacturer, its agent or its authorized dealer during the term of such express warranties or during the period of one year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date, the manufacturer, its agent or its authorized dealer shall make such repairs as are necessary to conform the vehicle to such express warranties, notwithstanding the fact that such repairs are made after the expiration of such term or such one-year period.

(c) If the manufacturer, or its agents or authorized dealers are unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which substantially impairs the use and value of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer shall replace the motor vehicle with a new motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the full purchase price including all collateral charges, less a reasonable allowance for the consumer's use of the vehicle. Refunds shall be made to the consumer, and lienholder if any, as their interests may appear. A reasonable allowance for use shall be that amount directly attributable to use by the consumer prior to his first report of the nonconformity to the manufacturer, agent or dealer and during any subsequent period when the vehicle is not out of service by reason of repair. It shall be an affirmative defense to any claim under this act (1) that an alleged nonconformity does not substantially impair such use and value or (2) that a noncon-

formity is the result of abuse, neglect or unauthorized modifications or alterations of a motor vehicle by a consumer.

(d) It shall be presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties, if (1) the same nonconformity has been subject to repair four or more times by the manufacturer or its agents or authorized dealers within the express warranty term or during the period of one year following the date of original delivery of the motor vehicle to a consumer whichever is the earlier date, but such nonconformity continues to exist or (2) the vehicle is out of service by reason of repair for a cumulative total of thirty or more calendar days during such term or during such period, whichever is the earlier date. The term of an express warranty, such one-year period and such thirty-day period shall be extended by any period of time during which repair services are not available to the consumer because of a war, invasion, strike or fire, flood or other natural disaster.

(e) Nothing in this act shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law.

(f) If a manufacturer has established an informal dispute settlement procedure which complies in all respects with the provisions of title 16 Code of Federal Regulations Part 703, as from time to time amended, the provisions of subsection (c) of this section concerning refunds or replacement shall not apply to any consumer who has not first resorted to such procedure.

(2) In any action by the consumer against the manufacturer of a motor vehicle, or the manufacturer's agent or authorized dealer, based upon the alleged breach of an express or implied warranty made in connection with the sale of such motor vehicle, the court, in its discretion, may award to the plaintiff his costs and reasonable attorneys' fees or, if the court determines that the action was brought without any substantial justification, may award costs and reasonable attorneys' fees to the defendant.

APPENDIX D*

	Remedy nonexclusive	4 attempts to repair same defect or 30 days out of service due to repairs within first year	Applies only to breach of express warranty	Duty to repair extends beyond warranty period	Remedy against manufacturer	Attorneys fees	Informal dispute settlement required	Administrative exhaustion	Subjective	Objective
California	X	X	X		X	X	X			X
Connecticut	X	X	X	X	X	X	X		X	
Delaware	X	X	X	X	X		X		X	
Florida	X		X	X	X	X	X		X	
Maine	X	X	X	X	X		X			X
Massachusetts	X			X	X		X			X
Minnesota	X	X	X	X	X		X		X	
Montana	X	X	X	X	X		X		X	
Nebraska	X		X	X	X	X	X		X	
Nevada	X	X	X	X	X		X		X	
New Hampshire	X	X		X	X	X	X		X	
New Jersey	X	X	X	X	X		X		X	
New York	X		X	X	X	X	X			X
Oregon	X	X	X	X	X		X		X	
Texas	X	X	X	X	X			X		X
Washington	X	X	X	X	X		X			X
Wisconsin	X	X	X	X	X	X	X			X
Wyoming	X	X	X	X	X		X		X	

* As this Note went to press the text of lemon laws enacted by the legislatures of Colorado, Georgia, Hawaii, Kansas, Pennsylvania, and South Dakota remained unpublished. Citations to bill numbers available Nov. 22, 1983, Electronic Legislature Search Service (CCH).