

The Indiana Motor Vehicle Protection Act Of 1988: The Real Thing for Sweetening the Lemon or Merely a Weak Artificial Sweetener?

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When the Indiana Motor Vehicle Protection Act¹ became effective on February 29, 1988, Indiana joined approximately thirty-seven other states² which had previously adopted what are popularly known as "lemon laws." The underlying reasons for such legislation is reasonably clear. For the average person, the purchase of a new car is probably the second most important and second most expensive purchase in a lifetime, surpassed only by the purchase of a home. At the other end of the transaction, manufacturers and dealers spend millions of dollars on television, radio and print advertising for the express purpose of encouraging customers to buy their automobiles. Unfortunately, almost anyone who has merely a passing acquaintance with automobile owners is aware of the existence of "the lemon," the defective automobile which seems to have been poorly designed or badly assembled during the manufacturer's holiday party and which nothing will ever make right.³ It is equally true that no make of automobile is immune from

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1. Pub. L. No. 150-1988, 1988 Ind. Acts 1863. Section 1 is codified at IND. CODE §§ 24-5-13-1 to -24 (1988) [hereinafter Lemon Law]. Sections 2-4, which relate to the Lemon Law's non-retroactivity, the date after which the Act's mandated disclosures would be required (July 1, 1988), and the Act's effective date (the date of passage), respectively, were not codified.

2. As of 1985, some form of lemon law had been enacted in Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. See Rigg, *Lemon Laws*, 18 Clearinghouse Rev. 1146, 1148 (1985); Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 590 n.4. The Kentucky and North Carolina statutes are technically not lemon laws. See Rigg, *supra*, at 1148.

The number of states with lemon laws has apparently increased to forty-six. See N.Y. Times, July 2, 1988, § 1, at 48, col. 4.

3. Popular folklore suggests that one should resist buying a car which was assembled on a Monday, a Friday, or the day before or after a holiday, because these

“lemonitis,” although some seem to resist it more successfully than others.⁴

The crux of the problem is and always has been that once the buyer has bought a lemon, the dealer or manufacturer, for any number of reasons, is either unwilling or unable to take all the steps necessary toward giving the buyer what the dealer and the manufacturer promised: a defect free, safe and reliable automobile reasonably worth its purchase price. The comments at hearings on a proposed federal Automobile and Warranty Repair Act describe the problem succinctly:

I think there is probably no subject of more not only concern but emotional concern and irritation, frustration, aggravation

are the days of the highest employee absenteeism, thereby requiring the use of less experienced, substitute workers. Stories about empty soda pop cans and the like being found inside automobile doors are legendary. The same folklore suggests that one should resist buying a totally new model in its first year on the market because all the bugs probably have not been worked out.

4. *E.g.*, Buick (*Levinger v. General Motors Corp.*, 122 A.D.2d 419, 504 N.Y.S.2d 819 (1986)); Cadillac (*General Motors Acceptance Corp. v. Jankowitz*, 216 N.J. Super. 313, 523 A.2d 695 (1987)); Corvette (*Zoss v. Royal Chevrolet, Inc.*, 11 U.C.C. Rep. Serv. (Callaghan) 527 (Ind. Super. Ct. 1972)); Dodge (*Chrysler Motors Corp. v. Schachner*, 138 Misc. 2d 501, 525 N.Y.S.2d 127 (N.Y. Sup. Ct. 1988)); Ford (*Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 801 (1981)); Maserati (*Stuart Becker & Co. v. Steven Kessler Motor Cars, Inc.*, 135 Misc. 2d 1069, 517 N.Y.S.2d 692 (N.Y. Sup. Ct. 1987)); Pontiac (*Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977)); Renault (*Sepulveda v. American Motors Sales Corp.*, 137 Misc. 2d 543, 521 N.Y.S.2d 387 (N.Y. Civ. Ct. 1987)); Volvo (*Mountcastle v. Volvoville, USA, Inc.*, 130 Misc. 2d 97, 494 N.Y.S.2d 792 (N.Y. Sup. Ct. 1985)). The author recalls that while waiting in line to enter the New York City International Automobile Show some years ago, he saw circling the block a black Mercedes covered with large, yellow, paper lemons.

Massachusetts Department of Consumer Affairs and Business Regulation maintains a “lemon index.” The makes or manufacturers which fared the poorest were Yugo, Alfa Romeo, Jaguar, AMC-Jeep-Renault, Peugeot, and General Motors. The best on the index were Range Rover, Sterling, Honda, Mercedes, Suzuki, and Toyota. *See* U.P.I. Wire Service, BC Cycle, Regional News, April 28, 1988 (NEXIS search, “lemon law and date aft October 1, 1987” (Oct. 5, 1988) [hereinafter NEXIS search]).

Consumers Union conducts an annual survey from which it compiles and publishes frequency of repair statistics. These statistics indicate that some makes of cars require substantially fewer repairs than others and that some cars have persistent problems with respect to particular components. *See, e.g.*, *Annual Automobile Issue*, CONSUMER REPORTS, April 1988.

In 1987 alone, the National Highway Traffic Safety Administration reported that more than eight million cars and light trucks, most built in 1986 and 1987, had been recalled by manufacturers for safety related defects ranging from problems which could cause fires or accidents to failures of airbag systems. *See* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPT. OF TRANSP., SAFETY RELATED RECALL CAMPAIGNS FOR MOTOR VEHICLES AND MOTOR VEHICLE EQUIPMENT, INCLUDING TIRES, DOT HS 807-235 (1987).

and outrage than the question of the automobile that does not work.

When the consumer buys the car he thinks he is getting a car that will drive and that will service him. He thinks his warranty is going to mean that if anything goes wrong it will be fixed up well and promptly. The fact is that in all too many cases this does not happen and this business of having a car that is urgently needed for one's business and for urgent family matters, . . . having that car immobile in a society that is very mobile and where mobility is a characteristic and a requirement of everyday life is a matter of infinite frustration to over 1 million new car buyers every year.⁵

The sponsor of the bill added, in part,

The way things are set up now, it is in the manufacturer's interest to discourage warranty work because it costs the company significant amounts to do such work, and conversely it costs nothing not to do it. Thus, if a dealer has more than the "average" number of warranty jobs in a month, the company zone representative pays him a visit to find out why. If the high rate of warranty work continues, the company can refuse to reimburse part of it or can delay the reimbursement for longer than usual.

In addition, warranty work is reimbursed overall at a lower rate than non-warranty work—and at a slower rate because of the paperwork. So understandably neither dealers nor the good mechanics are any too eager to do warranty work.⁶

A former chairman of the Federal Trade Commission (FTC) has noted, "The automobile is far more prone to difficulties than any other consumer product. . . . At the Federal Trade Commission, automobile complaints far outnumber those for any other consumer product."⁷ He added that in an FTC survey, "nearly 30 percent of motor vehicles purchased had some problem covered by the warranty. Compare this to 7 percent for warranted consumer products overall."⁸

The various state legislatures have reacted to the problem by enacting remedial legislation in the form of lemon laws. These enactments

5. *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. 1 (1979) (introductory remarks of Rep. James H. Scheuer, Subcommittee Chairman).

6. *Id.* at 17 (statement of Rep. Bob Eckhardt).

7. Pertschuk, *Consumer Automobile Problems*, 11 U.C.C. L.J. 145 (1978).

8. *Id.* at 146.

have been the subject of much comment, including criticism for their respective shortcomings.⁹ Most lemon laws have a substantial number of features in common, but there are some significant differences. This Article examines the provisions of the Indiana Lemon Law with attention to whether and in what way it differs from or improves upon remedies already available in Indiana, whether the Indiana statute has dealt successfully with problems seen in other lemon laws, and whether it has created any new problems which require solution. The conclusion is that the lemon law is a good first step but that a number of problems should be addressed and resolved.

I. THE RELATIONSHIP BETWEEN THE LEMON LAW,
THE UNIFORM COMMERCIAL CODE, AND THE MAGNUSON-MOSS
FEDERAL WARRANTY ACT

At the outset, it is important to note that all rights and remedies available under prior law remain available under Indiana's Lemon Law.¹⁰ An aggrieved buyer may seek redress against a manufacturer

9. See, e.g., Goldberg, *New Mexico's "Lemon Law": Consumer Protection or Consumer Frustration?*, 16 N.M.L. REV. 251, 282 (1986) [hereinafter Goldberg] (who characterizes New Mexico's law as "much ado about nothing"); Honigman, *The New "Lemon Laws": Expanding UCC Remedies*, 17 U.C.C. L.J. 116 (1984); Napoleon, *An Annotated Bibliography of "Lemon" Law and Other Related Publications*, 4 J.L. & COM. 517 (1984); Platt, *Lemon Auto Litigation in Illinois*, 73 ILL. B.J. 504 (1985); Reitz, *What You Should Know about State "Lemon Laws,"* 34 PRAC. LAW. 83 (April 1988); Rigg, *supra* note 2 (a survey of all state lemon laws); Sklaw, *The New Jersey Lemon Law: A Bad Idea Whose Time Has Come*, 9 SETON HALL LEG. J. 137 (1985); Vogel, *supra* note 2 (a comprehensive analysis of rights under the U.C.C., the Magnuson-Moss Warranty Act, and 37 state lemon laws); Note, *A Sour Note: A Look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846 (1984) [hereinafter *A Sour Note*]; Note, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers*, 61 WASH. U.L.Q. 1125 (1983); Note, *New Jersey's "Lemon Law," A Statute Ripe for Revision: Recent Developments and a Proposal for Reform*, 19 RUTGERS L.J. 97 (1987) [hereinafter *New Jersey's "Lemon Law"*]; Comment, *Sweetening the Fate of the "Lemon" Owner: California and Connecticut Pass Legislation Dealing with Defective New Cars*, 14 U. TOL. L. REV. 341 (1983); Comment, *Virginia's Lemon Law: The Best Treatment for Car Owner's Canker?*, 19 U. RICH. L. REV. 405 (1985) [hereinafter *Virginia's Lemon Law*].

10. IND. CODE § 24-5-13-20 (1988). Most lemon laws contain a similar provision. See Rigg, *supra* note 2, at 1160-61; Vogel, *supra* note 2, at 644. Those lemon laws which restrict the availability of other remedies if lemon law rights are asserted have been the subject of criticism. See, e.g., Goldberg, *supra* note 9, at 278-79 (a consumer who seeks to enforce the lemon law is "foreclosed" from revoking acceptance under the U.C.C., N.M. STAT. ANN. § 57-16A-5 (Supp. 1987)); Platt, *supra* note 9, at 507-08 (buyers electing to proceed under the Illinois New Car Buyer Protection Act are barred from a separate cause of action under the U.C.C., ILL. ANN. STAT. ch. 121 1/2, § 1205 (Smith-Hurd Supp. 1988)).

or dealer under the Uniform Commercial Code¹¹ and the Magnuson-Moss Warranty—Federal Trade Commission Improvement (Magnuson-Moss Act) Act,¹² as well as against the manufacturer under the Lemon Law. In the course of this Article, specific comparisons between each of these statutes are made. The following is a general summary of the relief available under each of them.

A. *The Lemon Law*

The Indiana Lemon Law provides that if a motor vehicle suffers from a nonconformity and the buyer reports the nonconformity to the manufacturer or its authorized dealer within the earlier of eighteen months of the original delivery to a buyer or 18,000 miles of driving, the manufacturer must correct the nonconformity.¹³ The statute says nothing about whether the manufacturer or dealer may charge even a nominal amount for the repairs, but it is presumed that the repairs must be without charge.¹⁴

A nonconformity is any defect or condition, or combination thereof, which substantially impairs the use, market value, or safety of the automobile or which fails to conform to the manufacturer's warranty. If, after a reasonable number of attempts to make the necessary corrections, the manufacturer is unable (or unwilling) to do so, the manufacturer must tender either a full refund or provide a replacement of comparable value, the choice of refund or replacement to be made by the buyer.¹⁵ If the manufacturer fails to do so, the buyer must first pursue any non-binding informal dispute resolution procedure, if there is one, which has been certified by the state attorney general.¹⁶ If there has been no certification or if the buyer is dissatisfied with

11. IND. CODE §§ 26-1-2-201 to -2-725 (1988). Hereafter, references to the Uniform Commercial Code ("Code" or "U.C.C.") will be to the generic section numbers, e.g., § 2-608, rather than to the Indiana citation, e.g., § 26-1-2-608, unless the Indiana version of the U.C.C. differs from the 1978 Official Draft.

12. Pub. L. No. 93-637, 88 Stat. 2183 (1974) (codified at 15 U.S.C. §§ 2301 - 2310 (1982)).

13. IND. CODE § 24-5-13-8 (1988).

14. *Cf.* *State v. Ford Motor Co.*, 136 A.D.2d 154, 526 N.Y.S.2d 637 (1988); *Breasett v. Sayville Ford*, 129 Misc. 2d 1090, 495 N.Y.S.2d 626 (N.Y. Dist. Ct. 1985). In both cases, the respective courts held that a \$100 charge imposed by Ford for warranty service between 12,000 and 18,000 miles was contrary to the New York lemon law provision that any nonconformity appearing during the first 18,000 miles was to be corrected "at no charge to the consumer." N.Y. GEN. BUS. LAW § 198-a(b) (McKinney 1988). In *State v. Ford Motor Co.*, the court enjoined Ford from imposing the charge and directed that restitution be made.

15. IND. CODE §§ 24-5-13-6 to -10 (1988).

16. *Id.* § 24-5-13-19.

the informal result, the buyer may file a lawsuit to enforce his rights. If successful in the lawsuit, the buyer is entitled to recover the costs of litigation, as well as reasonable attorney's fees.¹⁷

The ultimate effect of the lemon law is to create a new, legislatively mandated, eighteen month/18,000 mile warranty against defects which substantially impair the use, value, or safety of automobiles.

B. The Uniform Commercial Code

But for the recovery of attorney's fees and the specific 18-month or 18,000 mile duration of lemon law applicability, similar relief is available under the Uniform Commercial Code. In most instances, the buyer does not realize that he has bought a lemon until after he has accepted it, thereby precluding rejection under the Code.¹⁸ The buyer's only Code remedies are either: (1) to revoke his acceptance because of defects which substantially impair the value of the car, return the car to the seller, and recover the amount paid plus appropriate damages;¹⁹ or (2) to keep the car and seek damages for breach of warranty.²⁰

The difficulty with either of these Code remedies is two-fold. First, as expressly permitted by the Code, the dealer's contract of sale almost always disclaims all warranties,²¹ thereby eliminating any basis for the buyer to claim a breach by the dealer if only the U.C.C. applies.²²

17. *Id.* § 24-5-13-22.

18. *See* U.C.C. §§ 2-606, 2-607(2).

19. *See id.* §§ 2-608, 2-711.

20. *See id.* § 2-714.

21. *See id.* § 2-316.

22. *See* *Crume v. Ford Motor Co.*, 60 Or. App. 224, 653 P.2d 564 (1982). The printed purchase agreement used by an Indianapolis area Acura dealer states the following on the front, in a box to be signed by the buyer:

NO WARRANTIES - AS IS
SOLD AS IS WITH ALL FAULTS. I HEREBY PURCHASE KNOWINGLY
WITHOUT ANY WARRANTIES, EXPRESS OR IMPLIED WHATSOEVER,
BY DEALER. SEE SECTION IV ON REVERSE SIDE. AGREED

[Buyer's signature]

Section IV on the reverse side of the agreement states:

The vehicle described on front is sold "AS IS, WHERE IS." There are no warranties expressed or implied, including any implied warranty of merchantability or fitness for a particular purpose, and no obligations or liability on the part of the Dealer. The Dealer neither assumes nor authorizes any other person to assume for it any other liability in connection with such motor vehicle or chassis. There are no warranties, expressed or implied which extend beyond the description on the face hereof.

The printed form used by an Indianapolis area Pontiac-GMC-Mazda-Isuzu dealer is almost identical, even to printing the disclaimer of warranties in section IV. The forms themselves were printed by different suppliers.

Second, manufacturers in their warranty booklets disclaim or limit all warranties other than those expressly stated, limit the buyer's remedies exclusively to repair or replacement of defective parts, and limit or preclude recovery of consequential damages, all of which is also expressly authorized by the Code.²³ The limitation exclusively to repair or replacement is effective unless the limitation "fails of its essential purpose,"²⁴ an occurrence usually manifested by the dealer or manufacturer's inability or unwillingness to remedy the lemon's defects within a reasonable time.²⁵ The elements of substantial impairment for purposes of revocation of acceptance and of failure of essential purpose with respect to limited remedies are undefined by the Code and are left for judicial interpretation.

Furthermore, even if the limitation of remedies fails of its essential purpose, disclaimers or modifications of warranties may remain effective so long as the proper steps to disclaim or modify were followed initially.²⁶ Thus, there will likely be no cause of action against the dealer under the Code alone.²⁷

Because Indiana requires privity of contract between a manufacturer and a buyer in order for a buyer to recover from a remote manufacturer for economic loss caused by breach of an implied warranty, and there usually is no privity between them despite the manufacturer's express

23. See U.C.C. §§ 2-316, 2-719. But see the discussion of the effect of the Magnuson-Moss Act on the ability to disclaim implied warranties *infra* notes 31-42 and accompanying text. See also *infra* note 79.

24. See U.C.C. § 2-719(2).

25. See, e.g., *Riley v. Ford Motor Co.*, 442 F.2d 670 (5th Cir. 1971); *Roberts v. Morgensen Motors*, 135 Ariz. 162, 659 P.2d 1307 (Ariz. Ct. App. 1982); *Olmstead v. General Motors Corp.*, 500 A.2d 615 (Del. Super. Ct. 1985).

26. See *Hahn v. Ford Motor Co.*, 434 N.E.2d 943 (Ind. Ct. App. 1982); U.C.C. § 2-316 comment 2 (1978); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 12-12 (3d ed. 1988) [hereinafter "WHITE & SUMMERS"]. The comment states, in part:

This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

U.C.C. § 2-316 comment 2.

27. *But see* *General Motors Acceptance Corp. v. Jankowitz*, 216 N.J. Super. 313, 523 A.2d 695 (1987), in which the court held that by its action in transmitting the manufacturer's warranty to the buyer and in acting as the manufacturer's representative for making repairs to the buyer's car under that warranty, the dealer adopted that warranty. Further, because the Magnuson-Moss Act precludes disclaimers of implied warranties when a written warranty is given, the dealer also made an implied warranty of merchantability to the buyer.

warranty,²⁸ the buyer's recovery against the manufacturer under the Code is effectively limited to a claim of breach of the express warranty set forth in the warranty booklet. Moreover, if the matter must be litigated, the Code does not authorize an award of attorney's fees to a successful buyer unless the action was based on fraud or material misrepresentation.²⁹ Although punitive damages may be available in some situations,³⁰ automobile warranty litigation solely under the Code remains difficult, costly, and usually economically impractical in view of the time involved as compared with the probable amount of recovery.

C. *The Magnuson-Moss Act*

One of the major reasons Congress enacted the Magnuson-Moss Act in 1975 was the difficulty and expense encountered by automobile buyers who sought to obtain redress from manufacturers for loss of bargain as a result of defects which the manufacturers were unwilling or unable to remedy.³¹ The Act established a minimum federal warranty, called a "full warranty," and something less than the minimum federal warranty, called a "limited warranty."³²

A warrantor, whether manufacturer or dealer, who gives a full warranty and is unable to remedy a defect after a reasonable number of attempts must replace the product or tender a refund of the purchase

28. See, e.g., *Prairie Prod., Inc. v. Agchem Div.-Pennwalt, Corp.*, 514 N.E.2d 1299 (Ind. Ct. App. 1987); Greenberg, *Vertical Privity and Damages for Breach of Implied Warranty under the U.C.C.: It's Time for Indiana to Abandon the Citadel*, 21 IND. L. REV. 23 (1988).

29. See IND. CODE § 26-1-2-721 (1988). The section states in full: Remedies for material misrepresentation or fraud include all remedies available under [IND. CODE §§ 26-1-2-101 to -275 (1988)] for non-fraudulent breach. *In all suits based on fraud or material misrepresentation, if the plaintiff recovers judgment in any amount, he shall also be entitled to recover reasonable attorney fees which shall be entered by the court trying the suit as part of the judgment in that suit.* Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

(emphasis added) (The emphasized language, which was enacted by Act of April 21, 1975, Pub. L. No. 275, 1975 Ind. Acts 1523, constitutes an addition to the official text of U.C.C. § 2-721 which is unique to Indiana).

30. See, e.g., *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135 (Ind. 1988) (truck which had been wrecked while on dealer's lot was sold as a "new" truck); *Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977) (dealer concealed fact that repairs had not been made and told buyer to leave and not come back; car out of service forty-five days).

31. See H.R. REP. No. 1107, 93d Cong., 2d Sess. 6, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7702, 7708-09.

32. 15 U.S.C. § 2303(a) (1982).

price.³³ This is the Act's "lemon" provision. A warrantor who gives a limited warranty is not bound by the lemon provision, but the buyer may resort to any appropriate remedy under state law, which includes U.C.C. remedies.³⁴ The Act also provides that no warrantor, whether he gives a full or a limited warranty, may disclaim any implied warranties, including the implied warranty of merchantability; however, the giver of a limited warranty may limit the duration of implied warranties to the duration of the written warranty and may limit remedies to repair or replacement of defective parts. The giver of a full warranty may not limit the duration of implied warranties.³⁵

The Magnuson-Moss Act has also eliminated the privity requirement, at least as to the giver of the written warranty as defined therein,³⁶ and authorizes suit directly against the warrantor, which includes a manufacturer who gives a written warranty,³⁷ but only after the buyer has proceeded through an alternative dispute resolution proceeding for defect claims if one has been established by the warrantor.³⁸ It also authorizes an award of attorney's fees to a victorious buyer, whether the buyer recovers for breach of Magnuson-Moss warranty or for an implied warranty under state law.³⁹

The Magnuson-Moss Act has had little effect on the problems of lemon buyers because only one automobile manufacturer ever extended

33. *Id.* § 2304(a)(4).

34. *See id.* §§ 2308, 2311(b).

35. *See id.* § 2308.

36. *Id.* § 2301(6) provides:

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 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 a supplier and a buyer for purposes other than resale of such product.

(emphasis added).

Although similar to the express warranty of U.C.C. § 2-313, the Magnuson-Moss written warranty is not identical. *See Skelton v. General Motors Corp.*, 660 F.2d 311 (7th Cir.), *cert. denied*, 456 U.S. 974 (1982) (transmission substitution litigation). Therefore, a U.C.C. express warranty is not necessarily a Magnuson-Moss written warranty. *Id.*

37. *See* 15 U.S.C. § 2301(5) (1982), which defines "warrantor" as "any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

38. *See id.* § 2310(a)(3).

39. *See id.* § 2310(d).

a full warranty to its purchasers, and that manufacturer, American Motors, no longer exists.⁴⁰ All other manufacturers have given only limited warranties. Because of dissatisfaction with the effectiveness of Magnuson-Moss, a Federal Automobile Warranty and Repair Act, which would have required all automobile manufacturers to give full Magnuson-Moss warranties, was introduced in 1979 but was never enacted.⁴¹ It is against this legislative background that the states began to enact lemon laws in 1982.⁴²

II. THE PROVISIONS OF THE INDIANA LEMON LAW

A. Applicability

Indiana Lemon Law protection extends only to automobiles and small trucks⁴³ which are "sold, leased, transferred, or replaced" by a dealer in Indiana *and* registered in Indiana after February 29, 1988.⁴⁴

40. See C. REITZ, CONSUMER PRODUCT WARRANTIES UNDER FEDERAL AND STATE LAWS § 14.01 (2d ed. 1987).

41. See H.R. 1005, 96th Cong., 1st Sess. (1979); *Automobile Warranty and Repair Act: Hearings before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 1-3, 15-19 (1979) (opening remarks of Rep. James H. Scheuer, Subcommittee Chairman, and statement of Hon. Bob Eckhardt, sponsor of H.R. 1005, respectively). The remarks of Representatives Scheuer and Eckhardt are quoted, in part, *supra* notes 5-6 and accompanying text.

42. The first lemon laws were enacted in California and Connecticut. See Act approved July 7, 1982, ch. 388, 1982 Cal. Stat. 1720; An Act Concerning Automobile Warranties, 1982 Conn. Acts 667 (Reg. Sess.).

43. The definition of "motor vehicle" is

Any self-propelled vehicle that:

- (1) has a declared gross weight of less than ten thousand (10,000) pounds; . . .
- (3) is intended primarily for use and operation on public highways; and
- (4) is required to be registered or licensed before use or operation.

The term does not include conversion vans, motor homes, farm tractors, and other machines used in the actual production, harvesting, and care of farm products, road building equipment, truck tractors, road tractors, motorcycles, mopeds, snowmobiles, or vehicles designed primarily for off-road use.

IND. CODE § 24-5-13-5 (1988).

44. "This chapter applies to all motor vehicles that are sold, leased, transferred, or replaced by a dealer or manufacturer in Indiana." *Id.* § 24-5-13-1.

"As used in this chapter, 'motor vehicle' or 'vehicle' means any self-propelled vehicle that: . . . (2) is sold to a buyer in Indiana and registered in Indiana; . . ." *Id.* § 24-5-13-5.

"This Act does not apply to sales, leases, transfers, or replacements made before the effective date of this act." Indiana Motor Vehicle Protection Act, Pub. L. No. 150-1988, § 2, 1988 Ind. Acts 1863, 1868.

Other lemon laws impose similar requirements.⁴⁵ The lemon law's "term of protection" begins "on the date of original delivery . . . to a buyer" and ends either after eighteen months or after the car has been driven a total of 18,000 miles from that delivery date, whichever occurs earlier.⁴⁶ Unlike lemon laws in other states, Indiana's lemon law is not expressly limited to new automobiles.⁴⁷ It is reasonable to assume, therefore, that it includes used cars as well, thereby giving some protection to the buyer of the low-mileage used car, at least until the eighteen-month/ 18,000-mile term of protection has expired. In essence, a lemon is a lemon is a lemon, regardless of who owns it.⁴⁸

As applied to new cars, the law is clear; only new cars delivered to buyers after February 29, 1988, are within the protection of the lemon law. Application to used cars is less clear. The statute provides only that it "does not apply to sales, leases, transfers, or replacements made before" its effective date.⁴⁹ Consider the following problem: a car is sold new to the original buyer in January 1988, but resold by that buyer to another buyer six months later, when the car has only 7,000 miles on its odometer. Had the new car buyer delayed purchasing the automobile until February 29, the car would have been covered by the lemon law from the date of delivery. Based on the statutory language, while the car remained in the hands of the original January buyer, the lemon law did not apply. But it is possible to argue that the lemon law applied when the car was resold. The sale by the original buyer to the car's second owner occurred after the effective date,

45. See, e.g., CONN. GEN. STAT. § 42-179(a) (Supp. 1988) ("sold or leased in this state"); DEL. CODE ANN. tit. 6, § 5001(5) (Supp. 1986) ("registered"); FLA. STAT. ANN. § 681.102(10) (West 1988) ("sold in this state"); MD. COM. LAW CODE ANN. § 14-1501(c) (Supp. 1988) ("registered in this state"); MICH. COMP. LAWS ANN. § 257.1401(e) (West Supp. 1988) ("purchased in this state"). *But see* MASS. GEN. LAWS ANN. ch. 90, § 7N-1/2(1) (West. Supp. 1988) (merely requires that the vehicle be sold after the law's effective date).

46. IND. CODE § 24-5-13-7 (1988). The period of coverage in other states varies but most have been for twelve months or 12,000 miles, whichever is earlier. See, e.g., ALASKA STAT. § 45.45.305 (1986); ARIZ. REV. STAT. ANN. § 44-1262 (1987); COLO. REV. STAT. § 42-12-102 (1984) (earlier of term of express warranty or one year); CONN. GEN. STAT. § 42-179(b) (Supp. 1987) (earlier of two years or 18,000 miles).

47. See, e.g., CAL. CIVIL CODE § 1793.2(e)(1), (4)(B) (West Supp. 1985); CONN. GEN. STAT. § 42-179(b) (Supp. 1987); MICH. COMP. LAWS ANN. § 257.1401 (West Supp. 1988); N.Y. GEN. BUS. LAW § 198-a(b) (McKinney 1988); PA. STAT. ANN. tit. 73, § 1952 (Purdon Supp. 1988). In her extensive review of thirty-five state lemon laws, Margaret Rigg observed that lemon laws apply only to new vehicles, except that in Minnesota and Michigan, they also apply to vehicles returned under the applicable lemon law. Rigg, *supra* note 2, at 1148.

48. With apologies to Gertrude Stein.

49. Indiana Motor Vehicle Protection Act, Pub. L. No. 150-1988, § 2, 1988 Ind. Acts 1863, 1868.

thereby placing the car within the term of protection for approximately another twelve months or 11,000 miles. This problem is caused by the failure of the statute to state that its coverage extends only to cars sold to the *original* buyer after its effective date, which appears to be what was intended. A court could interpret the lemon law as applying only to cars delivered "new" after February 29, but it is not compelled to do so. The problem will solve itself at the end of August 1989, eighteen months after the effective date. Until then, the problem remains.

The requirement of registration in Indiana seems to be aimed at the car which, although owned by an Indiana resident, is registered elsewhere as a means of avoiding the Indiana automobile excise tax. The reason for the requirement that the sale take place in Indiana is less certain. The resident of a border community who, for whatever reason, purchases a car in Kentucky, Ohio, Illinois, or Michigan receives no benefit from the lemon law as it now stands, despite being a resident of Indiana, having registered the car in Indiana, and having paid the Indiana automobile excise tax.

Similarly unprotected by the lemon law is the new resident of Indiana who moves into this state and registers a car which is perhaps only three or four months old and has been driven only a few thousand miles. Because the car was not sold to the buyer in Indiana, the Indiana Lemon Law affords that person no protection. And if the lemon law of the state where she purchased the automobile also has a registration provision similar to Indiana's, the buyer loses the protection of that state's law by moving to Indiana and registering the automobile in Indiana, as the law requires. Also, an Indiana resident who is originally protected by the lemon law loses Indiana's protection by moving to another state and registering there.

In today's mobile society, there seems to be no reason to impose what is, in effect, a burden on the interstate relocation of automobile buyers and to give manufacturers a windfall as a consequence of that mobility. Manufacturers and importers do business in all of the states. The underlying purposes of lemon laws—to give buyers safe and dependable automobiles and to induce manufacturers to improve the quality of their products and service—would be better served if the lemon law required only registration in Indiana. The manufacturer would still have the opportunity to remedy any nonconformity, and the state resident would be protected regardless of where the car was purchased.

The protected Indiana "buyer" is "any person who, for purposes other than resale or sublease, enters into an agreement or contract within Indiana for the transfer, lease, or purchase" of a covered

automobile.⁵⁰ This includes one-car drivers as well as fleet operators, consumers as well as commercial users. It also appears to include companies engaged in automobile rental or leasing, because only purchases for "resale or sublease" are excluded.⁵¹ Such companies do not "sublease" their vehicles. A "sublease" is a new lease between one who is already a lessee of the automobile and a stranger to the original lease, which is completely different from the usual automobile lease transaction.⁵² By expressly including a lessee within the definition of buyer, the Lemon Law has acknowledged that a long-term automobile lessee is in the same position as a true buyer with respect to whether or not the car is a lemon—he is the one who must patiently await action by the dealer or manufacturer to remedy problems.⁵³

An ambiguity in the statute is the meaning of the word "sold" in the requirement that the vehicle be "sold to a buyer in Indiana."⁵⁴ The word "sold" is not defined. As noted earlier, "buyer" includes a lessee,⁵⁵ but "sold" does not necessarily include "leased." It could be argued, therefore, that if a leasing company doing business in Indiana purchases its automobiles directly from the manufacturer in Detroit, registers the cars in Indiana, and leases to Indiana residents, those Indiana lessees would not be protected by the lemon law, a result contrary to the intention of the legislature in view of the definition of "buyer" as including a person who enters into a lease for an automobile. A construction of the word "sold" which is in harmony with the definition of "buyer" as including a lessee is reasonable and would seem to be required.

50. IND. CODE § 24-5-13-3 (1988).

51. *Id.* § 24-5-13-3. This protection may not have been contemplated or intended by the drafters, but there is no reason why all purchasers of lemon automobiles should not be protected. If an underlying purpose of the statute is to encourage manufacturers to produce better and safer cars, the identity of the particular buyer is irrelevant.

52. See BALLENTINE'S LAW DICTIONARY 1228 (3d ed. 1969). "Sublease. A grant by a lessee of an interest"

53. Some lemon laws do not or did not include lessees within their protection. See, e.g., PA. STAT. ANN. tit. 73, § 1952 (Purdon Supp. 1988); *Industrial Valley Bank & Trust Co. v. Howard*, 368 Pa. Super. 263, 533 A.2d 1055 (1987). Prior to recent amendments to include lessees, the New York lemon law did not do so. See N.Y. GEN. BUS. LAW § 198-a(a)(1) (McKinney 1988) ("or the lessee" inserted by 1986 N.Y. Laws 799, § 1). In those states, the lessee of a lemon has no lemon law rights against the leasing company from whom he obtains the car because a lease is not a sale under the applicable lemon law. The lessee has no rights against the manufacturer because he was not the buyer of the automobile from the dealer or manufacturer. See, e.g., *Ford Motor Credit Co. v. Sims*, 12 Kan. App. 2d 363, 743 P.2d 1012 (1987) (lemon law which defined consumer as "the original purchaser" did not apply to long-term lease).

54. IND. CODE § 24-5-13-5(2) (1988).

55. *Id.* § 24-5-13-3.

B. Defining the Lemon

Obviously, something must be seriously wrong before an automobile is a lemon and its buyer is entitled to demand a replacement or a refund. Also, in fairness, a manufacturer should have a reasonable opportunity to remedy any nonconformity before being required to take back the original automobile and either replace it or refund the purchase price. The automobile is a complex piece of machinery, and even when two cars come from the same assembly line within minutes, one may be less perfect than the other.

1. *Nonconformity*.— Most other lemon laws base the buyer's rights solely on an unremedied breach of warranty⁵⁶ and have been criticized for doing so.⁵⁷ Indiana's lemon law does not require the buyer to establish a breach of warranty in order to obtain relief, although such a breach can also trigger the buyer's lemon law rights. The Indiana statute defines the lemon as a motor vehicle suffering from an unremedied or unremediable "nonconformity"⁵⁸ and defines "nonconformity" as

any specific or generic defect or condition or any concurrent combination of defects or conditions that:

- (1) substantially impairs the use, market value, or safety of a motor vehicle; *or*
- (2) renders the motor vehicle nonconforming to the terms of an applicable manufacturer's warranty.⁵⁹

A specific defect or condition is limited to the automobile in question and, in all likelihood, is the result of poor assembly rather than flawed design. A generic defect or condition, on the other hand, would be one which is found in many automobiles of the same make and model and may be the result of either poor assembly, flawed design, or a combination of both. Use of the alternative, "defect or

56. See, e.g., CAL. CIV. CODE § 193.2 (West Supp. 1985) ("express warranty"); CONN. GEN. STAT. § 42-179(b) (Supp. 1987) ("applicable express warranties"); MASS. GEN. LAWS ANN. ch. 90, § 7N-1/2(2) (West Supp. 1988) ("applicable express or implied warranty"). But see MICH. COMP. LAWS ANN. § 257.1402 (West 1988) ("any defect or condition that impairs the use or value of the new motor vehicle to the consumer or which prevents the new motor vehicle from conforming to the manufacturer's express warranty").

57. See Vogel, *supra* note 2, at 589, 620-22; *New Jersey's "Lemon Law"*, *supra* note 9, at 120.

58. See IND. CODE § 24-5-13-8 (1988).

59. *Id.* § 24-5-13-6 (emphasis added).

condition," makes clear that the buyer need not prove a specific defect as the cause of the automobile's problem.⁶⁰

By including in the definition of nonconformity "a concurrent combination of defects or conditions," the lemon law includes the car that has many problems, none of which would, standing alone, be considered substantial but when taken together can be substantial.⁶¹ As discussed below, the use of "concurrent" may be troublesome when construed in relation to whether the manufacturer has had a reasonable opportunity to remedy the nonconformity.⁶² The word "concurrent" also indicates that the combination of defects or conditions must occur at the same time rather than consecutively,⁶³ thereby creating an ambiguity with respect to the car which suffers from many problems, none of which occur at the same time. The classic lemon is the car which has something different go wrong immediately after the current problem is cured. To exclude such cars from coverage would be to gut the lemon law and frustrate its purpose.

2. *Substantial Impairment.*—In order for the buyer to be entitled to replacement or refund, the nonconformity must be such that it "substantially impairs the use, market value, or safety of a motor vehicle."⁶⁴ The term, substantial impairment, which appears in other lemon laws as well,⁶⁵ is not defined. The U.C.C. uses the term in connection with revocation of acceptance but adds a subjective element,⁶⁶ which itself has caused some problems of interpretation and

60. Under the U.C.C., the buyer need only show, by credible evidence, that the goods do not conform to the warranty and that the nonconformity is related to materials or workmanship. Circumstantial evidence is sufficient; there need not be proof of a specific defect. *See Universal Motors, Inc. v. Waldock*, 719 P.2d 254 (Alaska 1986).

61. For a discussion of substantial impairment and of *Zoss v. Royal Chevrolet, Inc.*, 11 U.C.C. Rep. Serv. (Callaghan) 527 (Ind. Super. Ct. 1972), see *infra* notes 64-77, 104 and accompanying text.

62. *See infra* notes 103-05 and accompanying text.

63. "[C]on-cur-rent . . . , *adj.* 1. occurring or existing together or side by side" THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 305 (unabridged ed. 1971). "[C]on-sec-u-tive . . . , *adj.* 1. following one another in uninterrupted succession or order; successive:" *Id.* at 312.

64. IND. CODE § 24-5-13-6(1) (1988) (emphasis added). Similar language appears in most of the other lemon laws, although some appear to require impairment of more than a single element of use, safety or value. *See, e.g., N.M. STAT. ANN. § 57-16A-3(B)* (Supp. 1985) ("use and market value").

65. *See, e.g., ALASKA STAT. § 45.45.360(7)* (1986); *ARIZ. REV. STAT. ANN. § 44-1263A* (1987); *CONN. GEN. STAT. ANN. § 42-179(d)* (West 1987 & Supp. 1988); *MINN. STAT. ANN. § 325F.665(3)(a)* (West 1981 & Supp. 1988).

66. U.C.C. § 2-608(1): "The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him" (emphasis added).

application.⁶⁷ How much of this subjective element has entered into decisions on revocation is unclear because most cases which have allowed revocation have involved nonconformities which meet an objective test.⁶⁸ Courts and scholars agree that regardless of the degree of subjectivity involved, revocation should not be available if the claimed defect is truly trivial.⁶⁹ A case in which a court will grant revocation based on an apparently trivial nonconformity alleged to be subjectively substantial to the revoking buyer will be rare.⁷⁰ On the other hand, there is the

According to comment 2 to this section:

Revocation of acceptance is possible only where the non-conformity substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.

Id. § 2-608 comment 2.

67. See, e.g., B. CLARK & C. SMITH, *THE LAW OF PRODUCT WARRANTIES*, § 7.03[3][a] (Supp. 1986); H. GREENBERG, *RIGHTS AND REMEDIES UNDER U.C.C. ARTICLE 2*, § 21.17 (1987); WHITE & SUMMERS, *supra* note 26, at § 8-4.

68. See, e.g., *Asciolla v. Manter Oldsmobile-Pontiac, Inc.*, 117 N.H. 85, 370 A.2d 270 (1977); *Jorgensen v. Pressnall*, 274 Or. 285, 545 P.2d 1382 (1976). In *Asciolla*, one of the leading cases on this issue, the court emphasized the subjective element, stated that the "needs and circumstances of the particular buyer must be examined," *Asciolla*, 117 N.H. at ____, 370 A.2d at 272, noted that the buyer was a "particularly prudent and painstaking car buyer," *id.* at ____, 370 A.2d at 273, whose confidence in the automobile had been undermined, but also noted that "the trier of fact must make an objective determination that the value of the goods to the buyer has in fact been substantially impaired." *Id.* The car had been flooded or submerged, there was ice in the transmission, water in the trunk wells, rust throughout the underside of the car, and a split ring in the transmission. The seller offered to replace the transmission, which the court said was an insufficient remedy. These facts certainly would support a finding of substantial impairment on an objective basis. In *Jorgensen*, despite the language of the court emphasizing the buyer's personal sensitivity, the facts could support a finding of substantial impairment to any reasonable buyer on an objective basis. Although the cost of repairs to the mobile home involved were small when compared to its purchase price, the mobile home was replete with defects such as water and air leaks, gaps in walls, defective doors, cabinets and walls, etc., which the seller failed to repair properly when given an opportunity to do so. *Jorgensen*, 274 Or. at ____, 545 P.2d at 1383.

White and Summers state that "a single standard of objective 'substantial nonconformity' will cover 99.44 percent of all rejection and revocation cases." WHITE & SUMMERS, *supra* note 26, § 8-4.

69. See, e.g., *Rozmus v. Thompson's Lincoln-Mercury Co.*, 209 Pa. Super. 120, 224 A.2d 782 (1966) (loud thumping and smoking caused by two loose engine mounting bolts); *Bill McDavid Oldsmobile, Inc. v. Mulcahy*, 533 S.W.2d 160 (Tex. Civ. App. 1976) (cracked battery); Highsmith & Havens, *Revocation of Acceptance and the Defective Automobile: The Uniform Commercial Code to the Rescue*, 18 AM. BUS. L.J. 303, 311 (1980).

70. See WHITE & SUMMERS, *supra* note 26, § 8-4. One of those rarities may be

occasional case in which the nonconformity could have been construed as objectively substantial but the fact finder determined otherwise.⁷¹ Cases under both the U.C.C. and non-Indiana lemon laws may therefore be helpful if careful attention is paid to the facts.⁷²

The new lemon law does differ from the U.C.C. in one important respect on the issue of substantial impairment. Under the U.C.C., the burden of proving substantial impairment is on the buyer who attempts to revoke acceptance.⁷³ The lemon law, however, provides that "it is an affirmative defense . . . that: (1) the nonconformity, defect, or condition does not substantially impair the use, value or safety of the

Colonial Dodge, Inc. v. Miller, 420 Mich. 452, 362 N.W.2d 704 (1984), in which the court held that "the failure to include a spare tire with a new automobile can constitute a substantial impairment in the value of that automobile entitling the buyer to revoke his acceptance" *Id.* at _____, 362 N.W.2d at 705. The buyer notified the dealer about the missing tire the day after taking delivery of his new station wagon but the dealer replied that the tire was not included because of a nation-wide shortage. It became available some months later, after the buyer revoked his acceptance. In its opinion, the court emphasized the subjective element of the substantial impairment standard and noted specifically that the buyer's occupation required him to drive 150 miles per day on Detroit freeways, often in early morning hours, that "[t]he dangers attendant upon a stranded motorist are common knowledge, and [that the buyer's] fears are not unreasonable." *Id.* at 362 N.W.2d at 707.

In view of the dealer's failure to remedy the defect immediately, its inability to do so for several months, the "common knowledge" noted by the court, and the safety related nonconformity, one wonders if the decision could not be supported on an objective standard as well.

71. See, e.g., *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981). In *Koperski*, the car suffered from vibrations at thirty-five miles per hour, the motor died when air-conditioning was turned on, the engine died in reverse, and the transmission was repaired several times and then replaced twice. Nevertheless, the trial court, sitting without a jury, found no substantial impairment because on repossession and resale, the car sold for eighty-five percent of the purchase price. Query if the second buyer was an individual or a dealer and whether that buyer was told the history of the car prior to the purchase. Note the lemon law's requirements respecting resale of lemons by the manufacturer, discussed *infra* text accompanying notes 177-83.

In *Asciolla*, the master to whom the case had been referred applied a purely objective test and found no substantial impairment. 117 N.H. at _____, 370 A.2d at 273. Although the court reversed because the subjective element had not been considered, the language of the court indicates that it believed that the master was wrong in denying recovery on an objective basis as well.

72. *But see* Goldberg, *supra* note 9, at 270-71. The author suggests that the subjective element in the Code makes the test of substantial impairment less restrictive than under the New Mexico lemon law which has no subjective element. He implies that Code cases may be inapplicable.

73. See, e.g., *Superior Wire & Paper Prods., Ltd. v. Talcott Tool & Mach., Inc.*, 184 Conn. 10, 441 A.2d 43 (1981); *Warren v. Guttanit, Inc.*, 69 N.C. App. 103, 317 S.E.2d 5 (1984); WHITE & SUMMERS, *supra* note 26, § 8-4.

motor vehicle; . . .”⁷⁴ Thus, pursuant to the Indiana Rules of Civil Procedure which place the burden of proof of an affirmative defense on the defendant,⁷⁵ the defendant manufacturer must plead and prove to the satisfaction of the fact-finder that there is no substantial impairment.⁷⁶

For example, after the dealer or manufacturer’s fourth unsuccessful attempt to repair an expensive stereo system in the buyer’s automobile, the buyer has a *prima facie* claim under the lemon law which the manufacturer can defeat only if it can convince the fact finder that the nonconformity does not substantially impair the use or value of the automobile. If the manufacturer does not do so, or if it fails to plead the affirmative defense, the buyer is entitled to replacement of the car or a refund of the purchase price. It is highly likely that the issue of whether the nonconformity results in substantial impairment will be one of the more frequently disputed issues in lemon law litigation.⁷⁷

3. *Breach of Warranty.*—The lemon law also contains a catch-all alternative to the “substantially impairs” standard by providing that a nonconformity may be a defect or condition that “renders the motor vehicle nonconforming to the terms of an applicable manufacturer’s warranty.”⁷⁸ Most manufacturers’ warranties promise only to make repairs which occur during the warranty period and are due to defects in materials or workmanship; they do not promise that the automobile is defect free, they limit the duration of implied warranties to the length of the express warranty, and they exclude consequential damages other than for personal injury,⁷⁹ all of which is permitted by the U.C.C.

74. IND. CODE § 24-5-13-18 (1988).

75. IND. R. TR. P. 8(C): “A responsive pleading shall set forth affirmatively and carry the burden of proving: . . . any other matter constituting an avoidance, matter of abatement, or affirmative defense.” Cf. 1 W. HARVEY, INDIANA PRACTICE § 8.7 (2d ed. 1987).

76. A criticism of the Virginia lemon law which did not address the issue of burden of proof is that it apparently retains the Code requirement that the buyer sustain the burden of proving substantial impairment. See *Virginia’s “Lemon” Law*, *supra* note 9, at 423-24.

77. See, e.g., *Williams v. Chrysler Corp.*, 530 So. 2d 1214 (La. App.), *cert. denied*, 532 So.2d 133 (La. 1988), in which paint bubbled and flaked over sixty to seventy-five percent of a new car’s surface, two attempts at repainting were unsatisfactory, and the car was out of service for forty days. Chrysler argued unsuccessfully that the poor paint job did not substantially impair the value of the car because it could be touched up for \$250 and that it (Chrysler) should be given another opportunity to repaint the car.

78. IND. CODE § 24-5-13-6(2) (1988).

79. A General Motors Corp. warranty for 1987 provides, in pertinent part: General Motors Corporation will provide for repairs to the vehicle during the warranty period in accordance with the following terms, conditions and limi-

and the Magnuson-Moss Act.⁸⁰ Thus, the claim under the lemon law for nonconformity to warranty must be that the manufacturer failed to make repairs promised by the express warranty, not that the vehicle is defective.

Furthermore, Indiana decisions require that there be privity between a buyer and a remote manufacturer before the buyer has any implied warranty rights against that manufacturer.⁸¹ Therefore, even though the manufacturer may be a "merchant who deals" as required for the existence of an implied warranty of merchantability,⁸² in the usual Indiana case there will be no "applicable" implied warranty from the

tations: WHAT IS COVERED
REPAIRS COVERED

The warranty covers repairs to correct any malfunction occurring during the WARRANTY PERIOD resulting from defects in material or workmanship. Any required adjustments will be made during the BASIC COVERAGE period. New or remanufactured parts will be used.

The warranty booklet then describes what is included in the basic coverage for twelve months or 12,000 miles and in the major assembly coverage for an additional six years or 60,000 miles or three years or 36,000 miles, depending on the component involved, but in either case subject to a \$100 deductible.

BUICK, 1987 FRONT WHEEL DRIVE ELECTRA/PARK AVENUE AND RIVIERA NEW CAR WARRANTY AND OWNER ASSISTANCE INFORMATION 4 (1987).

Later in the booklet, the following appears in a box with heavy black borders:

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

General Motors does not authorize any person to create for it any other obligation or liability in connection with these cars. ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE APPLICABLE TO THIS CAR IS LIMITED IN DURATION TO THE DURATION OF THIS WRITTEN WARRANTY. THE PERFORMANCE OF REPAIRS AND NEEDED ADJUSTMENTS IS THE EXCLUSIVE REMEDY UNDER THIS WRITTEN WARRANTY OR ANY IMPLIED WARRANTY. GENERAL MOTORS SHALL NOT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES (FOR OTHER THAN INJURY TO THE PERSON) RESULTING FROM BREACH OF THIS WRITTEN WARRANTY OR ANY IMPLIED WARRANTY.

*Some states do not allow limitations on how long an implied warranty will last or the exclusion or limitation of incidental or consequential damages, so the above limitations or exclusions may not apply to you. [The reference is to text above the box which states, "This warranty does not cover any economic loss"]

Id. at 7.

80. See *supra* text accompanying notes 21-35.

81. See, e.g., *Prairie Prod., Inc. v. Agchem Div.-Pennwalt Corp.*, 514 N.E.2d 1299 (Ind. Ct. App. 1987); H. GREENBERG, *supra* note 67. This issue is discussed *supra* note 28 and accompanying text.

82. See U.C.C. § 2-314(1).

manufacturer to the buyer and therefore no lemon law nonconformity if the automobile does not meet the test of merchantability. Although the Magnuson-Moss Act has eliminated the privity requirement in actions on the federally defined written warranty, it has not eliminated the privity requirement for enforcement of implied warranties under state law. If a state law, such as that of Indiana, requires privity, the aggrieved buyer must still demonstrate privity to support the implied warranty count of the buyer's Magnuson-Moss action.⁸³ The best solution to this problem is for the Indiana courts to hold that the lemon law demonstrates a legislative desire to eliminate the judicially created privity requirement in actions by buyers against remote automobile manufacturers to enforce implied warranty liability.

• With respect to express warranties, if the manufacturer's warranty is for twelve months or 12,000 miles, whichever is shorter,⁸⁴ there can be no breach of warranty if a defect or condition manifests itself thereafter but still within the lemon law's term of protection of eighteen months or 18,000 miles. This problem is alleviated by the alternative definition of nonconformity based on a defect or condition which substantially impairs, without regard to the terms of the manufacturer's warranty.

Another ambiguity with respect to the nonconformity or failure to conform to the manufacturer's warranty is created by the absence of the requirement of substantial impairment from that definition of nonconformity. A lemon law nonconformity is one that "(1) substantially impairs the use, market value, or safety of a motor vehicle; or (2) renders the motor vehicle nonconforming to the terms of an applicable manufacturer's warranty."⁸⁵ The placement of the numbers and the use of the disjunctive "or" indicates that a nonconformity with the manufacturer's warranty possibly need not substantially impair in order for lemon law rights to arise. It seems to follow, at least if the lemon law is construed strictly according to its language, that the manufacturer's failure to remedy a nonconformity to the terms of the warranty gives rise to the buyer's right to refund or replacement, no matter how insubstantial the nonconformity might be. The provision which establishes the manufacturer's affirmative defense of lack of substantiality⁸⁶ is of no assistance because this nonconformity to war-

83. See *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 247 (2d Cir. 1986); *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513, 1524-35 (D.D.C. 1984).

84. This has been a common new car warranty with respect to the entire car, sometimes with a longer period of warranty for the drive train and against the rusting of body parts. See, e.g., *supra* note 79 (General Motors warranty provisions).

85. IND. CODE § 24-5-13-6 (1988) (emphasis added).

86. See *supra* text accompanying note 74.

ranty standard apparently does not require substantial impairment. Such a strict reading of the language seems contrary to the spirit and intent of the statute, but the language used does allow it. The drastic remedies of replacement or refund should be available only when the nonconformity to warranty is substantial.

4. *Reasonable Opportunity to Cure.*—If, during the term of protection, the unhappy buyer reports a defect or condition to a factory authorized dealer or to the manufacturer, the manufacturer, its agent, or the dealer must make the repairs necessary to correct the nonconformity.⁸⁷ In the ordinary course of events, the buyer will seek warranty service from the dealer who sold the car. If there are major or repeated problems, the dealer will usually consult a manufacturer's representative. However, dealers and manufacturers, after a number of unsuccessful attempts to remedy the problems, may exhibit some reluctance to continue their efforts.⁸⁸ The lemon law resolves this problem by giving the manufacturer and dealer only "a reasonable number of attempts" to correct the nonconformity. If they are unable to do so, the buyer is entitled to choose between a refund or a replacement.⁸⁹

The concept of a reasonable number of attempts is not new to the law. The giver of a Magnuson-Moss full warranty has a "reasonable number of attempts" to cure the nonconformity before the buyer has a right to replacement or refund.⁹⁰ The giver of a Magnuson-Moss limited warranty has no obligations with respect to replacement or refund except as provided under state law, namely, the U.C.C. As discussed earlier, under the U.C.C., the buyer may revoke her acceptance, return the car, and get her money back only after the limitation of remedies to repair or replacement of defective parts fails of its essential purpose.⁹¹ However, there is a split in authority as to whether a buyer may revoke acceptance against a remote manufacturer or may revoke only against her immediate seller because the contract being undone was only with that seller.⁹² In Indiana, a strict privity state,

87. IND. CODE § 24-5-13-8 (1988).

88. See the comments of Reps. Scheuer and Eckhardt, *supra* notes 5-6 and accompanying text.

89. IND. CODE § 24-5-13-10 (1988).

90. See 15 U.S.C. § 2304(a)(4) (1982), discussed *supra* note 12 and accompanying text.

91. See the discussion of U.C.C. §§ 2-608 and 2-719, *supra* notes 19, 24 and accompanying text.

92. Compare *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977) (permitting revocation against a remote distributor without privity) with *Gasque v. Mooers Motor Car Co.*, 227 Va. 154, 313 S.E.2d 384 (1984) (revocation available only against immediate seller); see GREENBERG, *supra* note 67, § 21.20; WHITE & SUMMERS, *supra* note 26, § 8-4, at 376-77.

it is unlikely that revocation will be available against the remote manufacturer.

Both the Code and Magnuson-Moss have left to the courts the determination of what constitutes a reasonable number of attempts. No particular number of unsuccessful attempts has been set, but "[t]he buyer of an automobile is not bound to permit the seller to tinker with the article indefinitely in the hope that it may ultimately be made to comply with the warranty."⁹³ This issue has been settled by the lemon law provision which states that a reasonable number of attempts have occurred either when "the nonconformity has been subject to repair at least four (4) times . . . , but the nonconformity continues to exist" or "the vehicle is out of service by reason of repair of any nonconformity for a cumulative total of at least thirty (30) business days, and the nonconformity continues to exist."⁹⁴

The first of these standards of "reasonable number of attempts" may be interpreted to give to the manufacturer four opportunities to correct a particular nonconformity, regardless of the nonconformity's seriousness, its effect on the vehicle's safety, or a reasonable buyer's confidence in continued use of the vehicle.⁹⁵ In effect, the lemon law has rejected the "shaken faith doctrine," a concept developed under the U.C.C. that the failure of the authorized dealer or manufacturer to cure a defect of major consequence the first time may be sufficient to trigger the buyer's right to replacement or refund.⁹⁶

93. *Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc.*, 258 So. 2d 319, 321 (Fla. Dist. Ct. App. 1972), *cert. denied*, 263 So. 2d 831 (Fla. 1972) (citing 46 AM JUR. Sales § 732; 77 C.J.S. Sales § 340); *accord* *Zoss v. Royal Chevrolet, Inc.*, 11 U.C.C. Rep. Serv. (Callaghan) 527, 532-33 (Ind. Super. Ct. 1972); *Rester v. Morrow*, 491 So. 2d 204, 210 (Miss. 1986) (stating that the cases in accord are "legion").

94. IND. CODE § 24-5-13-15(a)(1),(2) (1988). Most lemon laws provide the same test for reasonable number of attempts. *But see, e.g.*, FLA. STAT. ANN. § 681.104(3)(a) (West 1985) (three attempts or fifteen business days); ME. REV. STAT. ANN. tit. 10, § 1163(3) (Supp. 1987) (same); MISS. CODE ANN. § 63-17-159(3) (Supp. 1988) (same).

95. *See Sepulveda v. American Motors Sales Corp.*, 137 Misc. 2d 543, 521 N.Y.S.2d 387 (N.Y. Civ. Ct. 1987) (Car had several minor stalling incidents before dying on expressway; one hour after repairs, the same thing happened. The court ruled that under New York lemon law, a reasonable number of attempts to repair was set at four, which had not yet occurred, and buyer failed to show that defect could not be repaired.).

96. The doctrine was first espoused in *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968), in which the buyer's brand new car exhibited serious transmission problems within less than a mile from the dealership and became inoperative shortly thereafter because of a "remarkable" transmission defect. *Id.* at 457, 240 A.2d at 204. The seller replaced the transmission with one from a car in its showroom. The buyer refused to take the car and insisted that the transaction was cancelled. The court observed that the defect could not be cured by substituting a transmission "of unknown

Under the lemon law, a buyer whose faith in the automobile has been shaken must wait until the manufacturer has failed to correct the nonconformity four times before her lemon law rights are triggered and she is entitled to a refund or replacement. If the third attempt to repair is successful, there are no lemon law rights regardless of the reasonable apprehension of the buyer as to the integrity and safety of the automobile in question. Under the U.C.C. and the shaken faith doctrine, the buyer need only demonstrate to the satisfaction of the fact finder that the seller failed to remedy the nonconformity, thereby causing the limited remedy or repair or replacement to fail of its essential purpose, and that her faith in the car is shaken, in order to revoke acceptance and obtain a refund plus damages.⁹⁷

At the very least, if the nonconformity substantially affects the safety of the automobile and the first attempt by the manufacturer or its authorized dealer to remedy the nonconformity is unsuccessful, the manufacturer should not have another three opportunities to remedy the problem. The buyer should not have to drive the unsafe automobile until after the manufacturer's fourth unsuccessful attempt. One unsuccessful attempt should be enough, as provided in the Minnesota lemon law.⁹⁸ Moreover, although most lemon laws do limit the number of repair attempts to four, there is no justification for giving the dealer and/or manufacturer more than one or two opportunities to cure a serious problem. They are the experts. Giving the manufacturer, through

lineage." The court continued:

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. at 458, 240 A.2d at 205; *accord, e.g.*, *Stridiron v. I.C., Inc.*, 578 F. Supp. 997, 1000 (D.V.I. 1984); *Sauers v. Tibbs*, 48 Ill. App. 3d 805, 363 N.E.2d 444, 448 (1977); *Champion Ford Sales, Inc. v. Levine*, 49 Md. App. 549, _____, 433 A.2d 1218, 1224 (1981); *Gappelberg v. Landrum*, 666 S.W.2d 88, 90-91 (Tex. 1984); *see, e.g.*, *Asciolla v. Manter Oldsmobile-Pontiac, Inc.* 117 N.H. 85, 370 A.2d 270 (1977).

97. *See* WHITE & SUMMERS, *supra* note 26, § 8-5.

98. MINN. STAT. ANN. § 325F.665(3)(c) (West 1988) states:

If the nonconformity results in a complete failure of the braking or steering system of the new motor vehicle and is likely to cause death or serious bodily injury if the vehicle is driven, it is presumed that a reasonable number of attempts have been undertaken to conform the vehicle to the applicable express warranties if the nonconformity has been subject to repair at least once by the manufacturer, its agents, or its authorized dealers

Connecticut's Lemon Law gives the manufacturer two opportunities to cure "if a motor vehicle has a nonconformity which results in a condition which is likely to cause death or serious bodily injury if the vehicle is driven." CONN. GEN. STAT. ANN. § 42-179(f) (West Supp. 1988). *See* Goldberg, *supra* note 9, at 269-70.

its authorized dealer, more than two opportunities to repair any substantial nonconformity provides little incentive for improvement of the quality of cars or of the service provided by dealers.⁹⁹

A further issue for judicial resolution is whether the nonconformity unsuccessfully repaired on each of the four attempts must be precisely the same nonconformity or may be less specific. For example, if the motor stopped running when the accelerator was depressed, must the evidence show that the problem was caused by the fuel system computer each of the four times, or is it sufficient to show that regardless of the specific defect, the car stopped running when the accelerator was depressed? And what if the manufacturer can show that on the first two occasions, the problem was caused by a defective fuel system computer and that on the third and fourth occasions, it was caused by improper spark plug adjustments or some other reason?¹⁰⁰ The lemon law's use of the alternative "defect *or* condition"¹⁰¹ indicates that the broader approach is intended, but just how broad an approach is not clear. Regardless of the approach, it may be necessary for the aggrieved buyer to be prepared with expert evidence that each of the problems was substantially similar to the other.

The second standard of "reasonable number of attempts" is met when the vehicle has been out of service "for a cumulative total of at least thirty (30) business days, and the nonconformity continues to exist."¹⁰² The definition of nonconformity which includes "any concurrent combination of defects or conditions"¹⁰³ indicates that this standard is likely aimed at the automobile that suffers from a series of problems, each of which may be remedied individually, but which, taken together, require more than thirty days of service. These may also be defects which, although not individually substantial, when taken

99. See Vogel, *supra* note 2, at 633-34.

100. See *Levinger v. General Motors Corp.*, 122 A.D.2d 419, 504 N.Y.S.2d 819 (1986). In this New York lemon law case, the buyer's new car suffered motor failure on five separate occasions, two of which required that it be towed in. After the fifth failure, the buyer refused to accept return of the car and demanded a refund. With respect to the buyer's motion for summary judgment, the appellate division observed that there is a statutory presumption of the manufacturer's inability to correct the defect after four unsuccessful attempts; however, it must be the same nonconformity, defect or condition. "General Motors submitted evidence . . . creating triable issues as to whether, on the various occasions when the vehicle was brought in for repair, the complaints related to the same malfunction or whether, instead, each such mechanical failure presented a different defect which was corrected in turn by the dealer." *Id.* at 421, 504 N.Y.S.2d at 822.

101. IND. CODE § 24-5-13-6 (1988) (emphasis added).

102. *Id.* § 24-5-13-15(a)(2).

103. *Id.* § 24-5-13-6.

together do indicate serious problems with the automobile and do substantially impair its value.¹⁰⁴

If the nonconformity results from a single defect or condition which keeps the vehicle out of service for thirty cumulative days or more, but which the manufacturer or dealer successfully repairs before the buyer demands the lemon law right to refund or replacement, the language of the lemon law indicates that the buyer will not be entitled to relief thereunder. It is only when the "nonconformity continues to exist" that lemon law rights are available. The buyer must assert his or her rights before the dealer or manufacturer has repaired the vehicle.¹⁰⁵

C. Disclosure Requirements

All lemon laws require that the manufacturer inform the buyer of his or her rights in some manner. Indiana's Law states:

104. See, e.g., *Zoss v. Royal Chevrolet, Inc.*, 11 U.C.C. Rep. Serv. (Callaghan) 527 (Ind. Super. Ct. 1972); *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978). In *Zoss*, the court stated:

Here many of the non-conformities were not in and of themselves substantial. However, the cumulative effect of all the non-conformities, so impaired the value of the commercial unit [a Corvette] as to constitute a substantial impairment to plaintiffs. 11 U.C.C. Rep. Serv. (Callaghan) at 532.

The nonconformities included:

"imperfections in the exterior finish including scratches, pits or pock marks; an electrical problem dealing with the door ajar light and built-in burglar alarm causing malfunction; upholstery damage caused by defendant [dealer] during repair of other matters; a front end rattle; squeaky emergency brake; bumper scratches and corrosion; extensive paint overspray on glass, transmission console and dash area; inadequate sealing at windows permitting water leakage; faulty window weather stripping; dash board rattle; luggage rack improperly installed and popping free; frayed carpeting near seat track on driver's side in front; paint peel on backs of seats and on some of the interior panels; convertible top hold down bracket missing; red paint stains on white convertible top; defective rubber weather stripping around door handles and door lock; paint overspray on exhaust pipe; water leakage through hole where rear view mirror is attached to ceiling; non-functional windshield wiper; improperly functioning coverlet for windshield wipers; rusting luggage rack; crushed front bumper support; small dents in chrome stripping; faulty engine adjustment causing wear out of spark plugs and points in three thousand miles, excessive gas consumption; and improperly manufactured rear quarter panel.

Id. at 529.

105. See *Bailey v. Ford Motor Co.*, 135 Misc. 2d 901, 516 N.Y.S.2d 887 (N.Y. Sup. Ct. 1987), in which the buyer's new pickup truck was out of service for fifty-three days, but the buyer waited until the repairs were completed before insisting on a refund under the New York Lemon Law. The court held that the lemon law did not apply because the truck had been repaired, apparently successfully. *Id.* at 904, 516 N.Y.S.2d at 809.

The manufacturer shall clearly and conspicuously disclose to the buyer, in the warranty or owner's manual, that written notification of the nonconformity is required before the buyer may be eligible for a refund or replacement of the vehicle. The manufacturer shall include with the warranty or owner's manual the name and address to which the buyer must send notification.¹⁰⁶

Should the manufacturer fail to comply, the buyer need not notify it of the claim before pursuing the lemon law remedies.¹⁰⁷

A manufacturer's disclosure which meets these lemon law requirements may not be sufficient to inform the buyer what his or her rights are and when they may be exercised.¹⁰⁸ The example quoted in the preceding footnote may satisfy the lemon law's disclosure requirements but tells the buyer nothing about when lemon law rights arise and how to pursue them. As one critic has noted, studies have shown that this type of notice included in a warranty booklet or even on a separate piece of paper, which the dealer must hand to the buyer, has been insufficient to inform buyers of their rights.¹⁰⁹ She suggests advertising in the print and electronic media to advise consumers of their rights

106. IND. CODE § 24-5-13-9(b) (1988).

107. *See id.* § 24-5-13-9(a).

108. For example, the 1988 G.M. Chevrolet, 1988 Ford/Mercury and 1988 Toyota warranty booklets each state that a dissatisfied buyer may contact the manufacturer for assistance with problems, and describe the manufacturer's arbitration programs. However, the booklets do relatively little to call the buyer's attention to the possibility of replacement of the vehicle or refund of the purchase price, the remedies available under most lemon laws which preceded the 1988 Indiana Lemon Law. *See FORD MOTOR COMPANY WARRANTY INFORMATION BOOKLET*, 1988 FORD AND MERCURY CARS AND FORD LIGHT TRUCKS 31-33; 1988 WARRANTY AND OWNER ASSISTANCE INFORMATION, GM 6/60 QUALITY COMMITMENT PLAN FOR CHEVROLET NEW CARS 16-21 [hereinafter CHEVROLET BOOKLET]; TOYOTA 1988 OWNER'S GUIDE 14-15.

The Chevrolet booklet states:

Laws in many states permit owners to obtain a replacement vehicle or a refund of the purchase price under certain circumstances. The provisions of these laws vary from state to state. To the extent allowed by state law, General Motors requires that you first provide us with written notification of any service difficulty you have experienced covered by state law so that we may have an opportunity to make any needed repairs before you are eligible for the remedies provided by these laws. In all other states, we request that you give us the written notice. Your written notification should be sent to the nearest Branch Office listed on pages 17 and 18, except Branches with toll-free (800) numbers. In that case, correspondence should be sent to the Customer Assistance Center, as listed on page 21.

CHEVROLET BOOKLET, *supra*, at 17.

109. *See Vogel, supra* note 2, at 616, 646.

in campaigns similar to those employed by government agencies with respect to other products or issues.¹¹⁰ Her point is well taken.

The publicity which accompanied the enactment of the lemon law in February 1988, may have stirred the interest of the public and the media temporarily,¹¹¹ but as time passes, that interest will shift to other issues. Buyers will forget about the lemon law until it becomes necessary to contact a TV station's consumer affairs reporter or an attorney. By that time, valuable rights may have been inadequately protected or even lost.

Another appropriate method of informing a buyer of her rights would be for a statutory amendment authorizing the attorney general to prepare a simple sticker outlining the buyer's rights and to require that it be affixed to the windshields of all new automobiles delivered to buyers in Indiana.¹¹²

D. Notice Requirements

The notice requirements of the lemon law are somewhat confusing and may mislead an unsuspecting buyer into believing that he or she has complied with those requirements when, in fact, the buyer has not. If the buyer "reports" a nonconformity to the manufacturer, its agent, or its authorized dealer, during the term of protection, the manufacturer, agent or dealer "shall make the repairs that are necessary to correct the nonconformity, even if the repairs are made after expiration of the term of protection."¹¹³ Typically, the buyer makes this report when he or she takes the car for service to the authorized dealer from which it was purchased and the buyer tells the service writer what the car is or is not doing.

In order to exercise her right to a refund or replacement after a reasonable number of opportunities to repair have passed, however, the "buyer must first notify the manufacturer of a claim under this chapter," *provided* that the manufacturer has complied with the lemon law's disclosure requirements.¹¹⁴ If the manufacturer does not disclose the required information, "the buyer is not required to notify the manufacturer of a claim" under the lemon law.¹¹⁵

110. *See id.* at 646-47.

111. One Indianapolis television station has prepared a leaflet which describes the lemon law, buyers' rights under it, and what to do in the event of a problem. *See INDIANA'S NEW CAR LEMON LAW*, WRTV, INDIANAPOLIS (1988).

112. *See New Jersey's "Lemon Law," supra* note 9, at 128.

113. IND. CODE § 24-5-13-8 (1988).

114. *Id.* § 24-5-13-9.

115. *See id.* § 24-5-13-9(a).

The interrelationship of these two notice requirements raises several issues. When must this second notice be given to the manufacturer? The reason for any notice to the manufacturer initially seems to be to enable it to apply its repair expertise to the nonconformity. But if this required written notice is not given to the manufacturer until after the authorized dealer has failed to remedy the nonconformity a fourth time, does the manufacturer still have a further opportunity to attempt a remedy before it must refund or replace?¹¹⁶ Since the Act states that four unsuccessful attempts by the manufacturer, its agent, *or* its authorized dealer constitute a reasonable number, the buyer should not be required to await a fifth unsuccessful attempt.¹¹⁷

When the dealer does warranty work pursuant to the manufacturer's written warranty, the dealer is acting as the manufacturer's agent for the purposes of that warranty work and is reimbursed for it. In the vast majority of cases, the dealer submits to the manufacturer a claim for reimbursement for work done under the manufacturer's warranty. Consequently, the manufacturer will already have a record of the automobile's problems. In addition, if the dealer is unable to remedy a particular problem or the nonconformity is unusual, the ordinary course of action is for the dealer to consult a factory representative. Under these circumstances, the requirement of an additional notice in writing seems to be redundant at best and one which a buyer may reasonably assume is not necessary because the manufacturer already knows that the car is a lemon.¹¹⁸ The purpose of this second notice should be nothing more than to advise the manufacturer of the buyer's choice between replacement and refund. If the manufacturer, through its dealer or regional representative, has knowledge of the buyer's choice, the requirement of a written notice and the notice itself seem unnecessary.

New York has eliminated this problem of double notice by requiring only that the buyer "report the nonconformity, defect or condition to the manufacturer, its agent or its authorized dealer."¹¹⁹ If the notice is given to the agent or dealer, the agent or dealer must forward notice to the manufacturer within seven days by certified mail.¹²⁰ If the agent

116. See Goldberg, *supra* note 9, at 268-69 n.90.

117. *But see, e.g.*, 1988 ACURA WARRANTIES 3, which states, in part:

Generally, before making a request for a replacement or a refund, the owner must submit a written explanation of the problem to the Acura Customer Relations office, and give the dealer *and* Acura an opportunity to solve it.

(emphasis added).

118. See Goldberg, *supra* note 9; Vogel, *supra* note 2, at 624.

119. N.Y. GEN. BUS. LAW § 198-a(b) (McKinney Supp. 1988).

120. *Id.* See *Mountcastle v. Volvoville, USA, Inc.*, 130 Misc. 2d 97, 494 N.Y.S.2d

or dealer fails to do so, that is a matter between it and the manufacturer; the buyer's rights are not affected.

There may also be a problem harmonizing the notice requirements of the lemon law with those of the U.C.C. The buyer who seeks to revoke acceptance under the U.C.C. must give notice of revocation within a reasonable time after he or she discovers or should have discovered the nonconformity.¹²¹ However, under the lemon law, the buyer's notice to the manufacturer of her election to undo the transaction and receive a refund may be given at any time during the term of protection but clearly may not be given until after the fourth unsuccessful repair attempt or thirty cumulative days in the shop. Thus, the buyer will be faced with a dilemma such as that encountered by the buyers in *Sepulveda v. American Motors Sales Corp.*,¹²² who became aware of a stalling problem almost three months before their new car died on an expressway. The dealer's attempt at repair was unsuccessful. The New York trial court held that the single unsuccessful repair did not trigger the buyers' lemon law rights and that the notice of revocation under the U.C.C. some three months after buyers became aware of the nonconformity was not given within a reasonable time. The court appropriately stated that the buyers had "a Scylla and Charybdis problem" because if they did not revoke at the very first evidence of defect which substantially impairs, they may lose their U.C.C. rights, but if they attempt to revoke too soon, they have no lemon law rights.

The appropriate solution would be for courts to hold that by enacting the lemon law, the legislature has determined that a reasonable time for notice of revocation of acceptance of a nonconforming automobile is the time within which a lemon law demand for refund must be given.

E. Alternative Dispute Resolution

The buyer of a lemon is precluded from seeking any judicial relief under the lemon law if he or she fails to resort first to any informal dispute resolution procedure established or participated in by the manufacturer; provided that "the procedure is certified by the attorney general as complying in all respects with 16 C.F.R. 703 and the buyer has received adequate written notice from the manufacturer of the

792 (N.Y. Sup. Ct. 1985), in which the court ruled that the failure of the dealer to forward notice to the manufacturer may be relevant to a claim between the manufacturer and the dealer but would not adversely affect the buyer's demand for refund from the manufacturer.

121. U.C.C. § 2-608(2).

122. 137 Misc. 2d 543, 521 N.Y.S.2d 387 (N.Y. Civ. Ct. 1987).

existence of the procedure."¹²³ The description of what notice from the manufacturer is adequate is ambiguously worded:

Adequate written notice includes the incorporation of the informal dispute settlement procedure into the terms of the written warranty *to which the motor vehicle does not conform*.¹²⁴

The reference to 16 C.F.R. 703 is to the informal dispute settlement procedures which are part of the regulations promulgated by the Federal Trade Commission pursuant to the mandate of the Magnuson-Moss Act.¹²⁵ Many lemon laws have adopted this federal standard for alternative dispute resolution procedures.¹²⁶

The emphasized portion of the lemon law language above presumes nonconformity to the written warranty, which may or may not be the case. As noted earlier, the lemon law has de-emphasized nonconformity to any warranty in favor of a defect or condition which substantially impairs use, safety or value.¹²⁷ Also, it is possible for lemon law rights to exist even after the written warranty expires, as where the problem condition of the automobile does not manifest itself until 15,000 miles, but the written warranty expired at 12,000. To avoid confusion, the reference to nonconformity to warranty should be deleted.

Moreover, the lemon law should require specifically that the notice be both conspicuous and understandable by the average buyer. Although the federal regulation requires that notice thereunder disclose the availability of the informal procedure "clearly and conspicuously . . . on the face of the written warranty,"¹²⁸ the lemon law provision may have created its own requirement by stating where the notice may be placed. Absent a specific requirement of conspicuousness, it is possible for a court to hold that as long as the notice contains the necessary information and is given to the buyer in the written warranty, it need not be conspicuous.¹²⁹

123. IND. CODE § 24-5-13-19 (1988).

124. *Id.* (emphasis added).

125. See 15 U.S.C. §§ 2309, 2310 (1982); 16 C.F.R. § 703.1 (1988).

126. See, e.g., N.J. STAT. ANN. § 56:12-25 (West 1987); Vogel, *supra* note 2, at 648-49 (all but two states have adopted the federal procedures). One major exception is Texas, which has established a state agency to hear the complaints of lemon buyers. See TEX. REV. CIV. STAT. ANN. art. 4413(36), § 3.02-.06 (Vernon 1985); Comment, *A New Twist for Texas "Lemon" Owners*, 17 ST. MARY'S L.J. 155, 173-79 (1985).

127. See *supra* notes 56-72 and accompanying text.

128. 16 C.F.R. § 703.2(1) (1988).

129. *Cf.* Hahn v. Ford Motor Co., 434 N.E.2d 943, 948 n.2 (Ind. Ct. App. 1982), in which the court observed that although the U.C.C. requires in § 2-316(2) that disclaimers of implied warranties be conspicuous, the failure of the Code to require conspicuousness in the section on limitation of remedies, § 2-719, meant that such limitations were effective even if not conspicuous.

Also, the use of the word "procedure" in the requirement that the attorney general "certify" compliance creates an ambiguity with respect to how much of the federal regulation is actually to be followed. Does this mean only the manner in which the panels are constituted and conduct their business, or does it mean every aspect of the federal informal dispute resolution regulation, including the giving of notice? And what happens if the FTC changes its regulations?

Although the FTC regulations stress that the mechanism for dispute resolution should insure fair and expeditious settlement of disputes,¹³⁰ the regulations have been attacked by some scholars as authorizing the creation of panels and procedures which are vulnerable to manufacturer influence and impose an additional, expensive barrier for buyers to overcome before they can obtain the relief to which they are entitled.¹³¹ Moreover, the FTC has apparently done little to insure compliance or fairness.¹³²

The mechanism described in the regulations is supported financially by the manufacturer; the consumer may not be charged any fee for participation.¹³³ Although all members of one or two person panels and two-thirds of three member panels are prohibited from having direct involvement with the automobile business, and no member of the panel may be a party to the dispute, the panel members may be employees of the manufacturer "for purposes of deciding disputes."¹³⁴ It is highly unlikely that manufacturers will include on the list of panelists—some of whom they pay—anyone overly antagonistic or unsympathetic to their position.¹³⁵ The training given prospective panelists has been criticized as often being minimal.¹³⁶ Moreover, unless the buyer is represented by counsel in the informal proceeding, a matter discussed below in connection with recovery of attorney's fees,¹³⁷ the inexperienced buyer will likely be opposed by a manufacturer's expert who has substantial experience in presenting the manufacturer's position. It may also be necessary for the buyer to retain an expert to

130. See 16 C.F.R. §§ 703.3(c), 703.4(c) (1988).

131. See, e.g., Sklaw, *supra* note 9, at 158; Vogel, *supra* note 2, at 648-760; *A Sour Note*, *supra* note 9, at 879; *New Jersey's "Lemon Law," supra* note 9, at 118-19.

132. See, e.g., C. REITZ, *CONSUMER PRODUCT WARRANTIES UNDER FEDERAL AND STATE LAWS* 190 (2d ed. 1987).

133. 16 C.F.R. § 703.3(a) (1988).

134. See 16 C.F.R. § 703.4 (1988). Subsection (a) states: "No member deciding a dispute shall be: (1) A party to the dispute, or an employee or agent of a party other than for purposes of deciding disputes." The likelihood of the panel member being an agent or employee of the buyer is rather remote.

135. See Vogel, *supra* note 2, at 651-52.

136. See *id.* at 652 n.311.

137. See *infra* notes 164-70 and accompanying text.

deal with the manufacturer's claims, for example, that each of the four repair attempts were not related to the same nonconformity or that each attempt, in itself, was successful.¹³⁸

The federal regulations state that a decision rendered in the informal proceeding is not legally binding but it is admissible "in any civil action arising out of a warranty obligation considered by the [panel]."¹³⁹ If the procedure only slightly favors the manufacturer, the burden placed on the buyer to convince the judicial fact-finder that the panel's decision was wrong is a heavy one indeed. Further, the admissibility of the decision and its weight are not addressed directly by the lemon law. As noted earlier, it is unclear if all of the federal procedures, including the appeal and admissibility provisions, are incorporated into the lemon law.

At the time of this writing, the Indiana Attorney General has not yet certified any manufacturer's alternative dispute resolution procedure. The experience in Connecticut, which originally required certification by the state attorney general of full compliance with the FTC regulations,¹⁴⁰ has been that none of the manufacturers' programs during the past three years have been certifiable.¹⁴¹ Consequently, the Connecticut legislature revised its lemon law to provide for an "independent arbitration procedure" created by the state department of consumer protection.¹⁴²

Similarly, some lawmakers in New Jersey, whose lemon law also requires conformity to the federal regulation,¹⁴³ have found that the

138. See *Levinger v. General Motors Corp.*, 122 A.D.2d 419, 504 N.Y.S.2d 819 (App. Div. 1986); discussed *supra* note 100.

139. 16 C.F.R. § 703.5(j) (1988).

140. See CONN. GEN. STAT. ANN. § 42-182(a) (West 1987).

141. See U.P.I. Wire Service, BC Cycle, Regional News, April 7, 1988 (NEXIS search, *supra* note 4).

142. See CONN. GEN. STAT. ANN. § 42-181(a) (West Supp. 1988):

The department of consumer protection, shall provide an independent arbitration procedure for the settlement of disputes between consumers and manufacturers of motor vehicles which do not conform to all applicable warranties under the terms of section 42-179. The commissioner shall establish one or more automobile dispute settlement panels which shall consist of three members appointed by the commissioner . . . , only one of whom may be directly involved in the manufacture, distribution, sale or service of any product. Members shall be persons interested in consumer disputes and shall serve without compensation for terms of two years at the discretion of the commissioner. In lieu of referring an arbitration dispute to a panel established under the provisions of this section, the department of consumer protection may refer an arbitration dispute to the American Arbitration Association in accordance with regulations adopted in accordance with the provisions of [an arbitration statute].

143. See N.J. STAT. ANN. § 56:12-25, -26 (West Supp. 1988).

manufacturers' procedures are ineffective, take as long as the trials they were intended to replace, and create roadblocks for consumers. Consequently, they propose to amend the law so that complaints will go to an administrative law judge rather than to arbitration.¹⁴⁴

Finally with respect to dispute resolution, the manufacturers are apparently not pleased with the various lemon laws. In April 1988, a coalition of the Motor Vehicle Manufacturers Association and the Automobile Importers Association of America submitted a proposal to the Federal Trade Commission which would establish federally administered dispute resolution guidelines in an effort, according to an industry spokesman, to "get around different states having different rules."¹⁴⁵ Other parties, such as the Attorney General of Minnesota, view the manufacturers' action as a "back door attempt to strip car buyers of the legal rights that states have given to consumers."¹⁴⁶ In view of the FTC's inability or unwillingness to police the informal dispute resolution mechanisms already established under the Magnuson-Moss Act, the latter view appears to be the more accurate.¹⁴⁷

144. See U.P.I. Wire Service, BC Cycle, Regional News, February 29, 1988 (NEXIS search, *supra* note 4).

145. The Washington Post, April 12, 1988, at C1.

146. U.P.I. Wire Service, BC Cycle, Regional News, April 12, 1988 (NEXIS search, *supra* note 4).

147. It should be noted that any attempt to strengthen the applicable alternative dispute resolution programs beyond the requirements of the FTC Magnuson-Moss regulations or action may encounter judicial opposition. In two recent cases, the United States District Court for the Southern District of New York ruled that provisions of the New York Lemon Law which added requirements beyond those established by the FTC were invalid under the supremacy clause of the U.S. Constitution because of federal pre-emption of the field.

In *Motor Vehicle Mfrs. Ass'n of the United States v. Abrams*, 1988-2 Trade Cas. (CCH) § 68,290 (S.D.N.Y. 1988), the court ruled that to the extent New York's lemon law imposed alternative dispute resolution requirements on manufacturers which were more burdensome than those imposed by the FTC regulations, the lemon law was preempted by those regulations as a matter of federal supremacy. Included in the invalid New York requirements were such things as mandatory oral hearings and binding arbitration, record keeping, additional training for the arbitrators, and a buyer's "bill of rights" to be disclosed by the manufacturer to the buyer, none of which was required by the FTC regulations.

And in *General Motors Corp. v. Abrams*, No. 86 Civ. 9193 (S.D.N.Y. Jan. 19, 1989) (1989 U.S. Dist. LEXIS 506), the court declared that a consent decree between General Motors and the FTC pursuant to which G.M. agreed "to implement a nationwide third-party arbitration program to settle complaints of individual owners relating to powertrain components" superseded the New York Lemon Law's alternative dispute resolution requirements. *General Motors Corp.*, 1989 U.S. Dist. LEXIS 506 at p. 5 (quoting *In re General Motors Corp.*, 102 F.T.C. 1741, 1761 (1983)). Among the lemon law requirements to which G.M. objected were that the alternative dispute resolution proceeding must be

F. The Lemon Buyer's Recovery.

1. *Refund or Replacement.*—The heart of the lemon law is that if the manufacturer is unable or unwilling to correct the nonconformity after a reasonable number of attempts, the buyer may return the car to the manufacturer and demand either a refund of the purchase price or a replacement of comparable value, a demand with which the manufacturer must comply within thirty days.¹⁴⁸ The Indiana lemon law has resolved some problems existing under other state lemon laws by specifying that a refund must be the full contract price, including the value of any trade-in, as well as incidental expenses such as sales tax, unexpended portions of prepaid fees and taxes, expended finance charges, and the cost of any dealer-installed optional equipment.¹⁴⁹

However, the Act contains no provision for the recovery of any consequential damages other than towing or car rental costs,¹⁵⁰ such as for time missed from work or lodging expenses in the event of a

conducted by arbitrators trained and familiar with the lemon law and that the lemon law remedies of replacement or refund be made available in the arbitration proceeding is appropriate. G.M. had agreed to proceedings sponsored by the Council of Better Business Bureaus, described by an officer of B.B.B. as follows:

Having heard the parties, the arbitrators "are then free to make common sense adjudications based on their own sense of fairness." . . . "They are not taught the various state laws which would apply if the disputes they were hearing had been brought in court. In fact, while the arbitrators are told that they may allow parties to present the substantive law from the state where they are sitting or even from other states, they are specifically instructed that they are not to apply any particular law, but instead are to do what they personally believe is right."

Id. at 22 (quoting affidavit Dean W. Determan, General Counsel and Vice President, Mediation/Arbitration Div., B.B.B.).

At the present time, the Indiana Lemon Law requires only that the attorney general certify compliance with the FTC regulations. However, if these decisions are correct, FTC approval preempts that certification. Moreover, if Indiana follows the course of New York in attempting to remedy the problems perceived in programs which adhere solely to the FTC requirements, that attempt may be in serious jeopardy. The alternatives available seem to be either enforcement of the Indiana Lemon Law in the courts or establishment of a state run alternative dispute resolution system for lemon law cases. *See Bourdreaux v. Ford Motor Co.*, No. 88-CC-0864 (La. Nov. 14, 1988) (1988 La. LEXIS 2003, p. 13).

148. IND. CODE § 24-5-13-10 (1988).

149. *Id.* § 24-5-13-11(a), (c). This alleviates the type of problem which arose in *Haddad v. Commissioner of Revenue*, 25 Mass. App. Ct. 917, 515 N.E.2d 1204 (1987), in which, under the then applicable Massachusetts Lemon Law, the manufacturer did not include in the refund the sales tax on the buyer's new Corvette. The buyer bought a replacement automobile, paid sales tax on it, and sought to recover the sales tax on the Corvette from the state. The appellate court affirmed the decision of the tax board against the buyer. Had the Massachusetts Lemon Law included a return of sales tax paid, the issue would not have arisen.

150. *See* IND. CODE § 24-5-13-13 (1988).

breakdown away from home, which may be available under the Code as consequential damages,¹⁵¹ or for punitive damages, which may be available if the dealer or manufacturer has acted improperly toward the buyer in handling the buyer's complaints.¹⁵²

If the aggrieved buyer elects to receive a replacement of "comparable value" rather than a refund, there is nothing in the lemon law to indicate what comparable value means, that is, whether it means a new car identical to the lemon (which may also be a lemon because of a generic condition), a new car similar to the lemon but with different equipment if an identical car is not available, or a used non-lemon in the same condition and with the same mileage as the returned lemon.¹⁵³ The Magnuson-Moss Act, which mandates refund or replacement of a lemon under a full warranty,¹⁵⁴ defines replacement as "furnishing a *new* consumer product which is identical or reasonably equivalent to the warranted consumer product."¹⁵⁵ Some state lemon laws also require that the replacement be new.¹⁵⁶ The protection of the lemon buyer would best be served if the replacement were required to be a new car, less an allowance for use of the lemon, as discussed in the next paragraph. However, the statutory formula for that use speaks only of refunds.

Until the manufacturer has complied with the buyer's demand for refund or replacement, the buyer may continue to use the lemon, although the manufacturer is entitled to deduct from any refund a credit for that use.¹⁵⁷ This resolves a problem under the U.C.C. as to whether the continued use of goods after revocation of acceptance nullifies the revocation.¹⁵⁸

151. See U.C.C. § 2-715.

152. See *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135 (Ind. 1988); *Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977). In *Bud Wolf*, punitive damages were awarded when the dealer sold as a "new" truck one which had been wrecked while on the dealer's new car lot, but did not disclose the damage to the buyer. 519 N.E.2d at 136. In *Hibschman*, because of multiple and recurring defects, the buyer lost use of his new car for forty-five days and was told that repairs had been made when they had not been. The dealer told the buyer, "I would rather you would just leave and not come back. We are going to have to write you off as a bad customer." 266 Ind. at 315-16, 362 N.E.2d at 847.

153. See Rigg, *supra* note 2, at 1155.

154. 15 U.S.C. § 2304(a)(4) (1982).

155. *Id.* § 2301(11) (emphasis added).

156. See, e.g., CONN. GEN. STAT. ANN. § 42-179(d) (West Supp. 1988) ("new motor vehicle acceptable to the consumer"); DEL. CODE ANN. tit. 6, § 5003(a) (1986) ("comparable new automobile"); MO. ANN. STAT. § 407.567(1) (Vernon 1988) ("comparable new vehicle acceptable to the consumer"); N.J. STAT. ANN. § 56:12-21a (West Supp. 1988) ("comparable new automobile").

157. IND. CODE § 24-5-13-11(a), -14 (1988).

158. See, e.g., H. GREENBERG, *supra* note 67, § 21.21; G. WALLACH, THE LAW OF

The lemon law eliminates another problem faced by courts under the U.C.C. by establishing a formula for computing the amount attributable to use following a demand for refund: the number of miles driven before the manufacturer's acceptance of the return divided by 100,000 times the total contract price.¹⁵⁹ Thus, if a lemon has been driven 5,000 miles and cost \$15,000, the manufacturer may deduct \$750 from the amount of the refund.¹⁶⁰ The establishment of this formula avoids the difficulty of determining the use value of a lemon, with its accompanying frustrations, and negates arguments by manufacturers, *e.g.*, that the use value should be the amount allowed by the I.R.S. to be deducted from one's income tax, or approximately twenty-one cents per mile.¹⁶¹

One troubling issue with respect to continued use after making a claim of substantial impairment is the possibility that a court may conclude that the impairment was not substantial because the buyer continued to drive the car.¹⁶² Such a ruling would be contrary to the intent of the lemon law. Frequently, the buyer has no choice but to use the lemon rather than buy a new car. Addition of a provision which states that after notice to the manufacturer of an election between replacement or refund, continued use shall not be considered by the court in determining substantial impairment, would safeguard against such a ruling.¹⁶³

SALES UNDER THE UNIFORM COMMERCIAL CODE § 9.02[4][c] (1981); WHITE & SUMMERS, *supra* note 26, § 8-4. *Compare, e.g.*, *Gigandet v. Third Nat'l Bank*, 333 So.2d 557 (Ala. 1976) and *Charney v. Ocean Pontiac, Inc.*, 56 Mass. App. Dec. 104 (1975) (use nullified revocation) with *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976) and *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*, 5 Ohio St. 3d 181, 449 N.E.2d 1289 (1983) (continued use justified; revocation effective).

159. IND. CODE § 24-5-13-11(b) (1988).

160. $5,000/100,000 \times 15,000 = 750$.

161. *See* FLA. STAT. ANN. § 681.104(2)(a) (West Supp. 1985); 1985 Miss. Laws 224, § 5(1). The Florida and Mississippi statutes permit an offset of twenty cents per mile. Virginia sets no specific allowance but does provide that it shall not exceed one-half of the amount allowed by the I.R.S. VA. CODE § 59.1-207.13 (Supp. 1984).

162. *See* *Gasque v. Mooers Motor Car Co.*, 227 Va. 154, 313 S.E.2d 384 (1984), which held, in part, that the buyer's use of his new car for 5,400 miles was evidence against substantial impairment despite seven unsuccessful repair attempts. *Cf.* *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981), in which the court ruled that despite the numerous, serious defects in the automobile, the fact that it was resold by the repossessor for eighty-five percent of its purchase price supported the finding that the defects did not substantially impair its value under § 2-608 of the U.C.C. *See supra* note 66.

163. *See* *Virginia's Lemon Law*, *supra* note 9, at 424, in which the author comments on the failure of Virginia's lemon law to address the issue and on *Gasque v. Mooers Motor Car Co.*, 227 Va. 154, 313 S.E.2d 384 (1984).

2. *Attorney's Fees.*—The lemon law directs that the successful buyer's recovery of costs and expenses include attorney's fees—an item not mentioned in the U.C.C. and only available at the discretion of the court under Magnuson-Moss. Both the lemon law and Magnuson-Moss base the award of attorney's fees on time actually expended by the attorney and determined by the court to be reasonable, but the lemon law states that the buyer "is entitled to recover," a matter of right, whereas Magnuson-Moss provides that the buyer "may be allowed by the court to recover," which makes the recovery under Magnuson-Moss discretionary.¹⁶⁴

Unfortunately, the provision for recovery of attorney's fees does not go far enough to give the aggrieved buyer the protection he or she truly needs. In pursuing lemon law rights, the buyer may require the services of an attorney in dealing with the manufacturer or dealer, especially in the informal dispute resolution proceeding. Undoubtedly, based on statistics alone, the manufacturer will have gone through many such proceedings.¹⁶⁵ The unrepresented buyer will be opposed by an expert, probably an attorney, with much experience in handling lemon claims. Unless the buyer has an attorney to represent him or her and to prepare necessary written submissions or to make an oral presentation, the informal procedure, no matter how fair and impartial it seems on its face, favors the manufacturer. Nevertheless, the language of the lemon law mandates an award of attorney's fees only if the buyer has succeeded in a court action. The statute distinguishes between "procedures" and "actions"¹⁶⁶ and authorizes the award of fees only to the buyer who "prevails" in an "action."¹⁶⁷ The time limit for bringing an action is tolled while the procedure is pending.¹⁶⁸ The successful buyer should be entitled to recover attorney's fees accrued from the date of the demand for refund or replacement, and the informal dispute resolution panel, if there is one, should be directed by the statute to award attorney's fees if the buyer's claim is meritorious.

Moreover, the statute directs the award of fees "reasonably incurred by the buyer for or in connection with the commencement and pros-

164. Compare IND. CODE § 24-5-13-22 (1988) with 15 U.S.C. § 110(d)(2) (1982). See Pertschuk, *Consumer Automobile Problems*, 11 U.C.C. L.J. 145, 148 (1978).

165. In the first twenty months of lemon law applicability in Massachusetts, arbitration proceedings awarded \$3.2 million to unhappy buyers. See U.P.I. Wire Service, BC Cycle, Regional News, April 28, 1988 (NEXIS search, *supra* note 4). In New York, 1,384 cases went to arbitration in 1987. See U.P.I. Wire Service, AM Cycle, Regional News, March 21, 1988 (NEXIS search, *supra* note 4). See *supra* notes 4-8 and accompanying text.

166. Compare IND. CODE § 24-5-13-19 (1988), with *id.* §§ 24-5-13-21, -23.

167. See *id.* § 24-5-13-22.

168. *Id.* § 24-5-13-23(b).

ecution of the action.”¹⁶⁹ If this language is read narrowly, the court may exclude from the calculation the time spent in preparing for and participating in the informal dispute resolution procedure. The better reading would be to include all fees and costs incurred prior to the filing of suit as being incurred “in connection with the commencement.” A consumer attorney in Connecticut suggests that the award of a refund plus attorney’s fees and costs is not enough to motivate manufacturers to avoid litigation or to improve vehicle quality, but adds that a provision specifically authorizing punitive damages would go far toward achieving those goals.¹⁷⁰

3. *Time Limitations.*—The buyer’s action against the manufacturer must be brought “within two (2) years following the date the buyer first reports the nonconformity to the manufacturer, its agent, or authorized dealer.”¹⁷¹ This provision can result in buyer confusion. If the claim is based on a single nonconformity which the manufacturer has failed to remedy after four attempts, the two-year period begins to run from the first complaint about that particular nonconformity, which can be in the first week of ownership without regard to the date of the fourth unsuccessful attempt. The fourth attempt may even take place after expiration of the eighteen-month/18,000-mile term of protection.¹⁷² A buyer whose lemon undergoes four engine replacements at six-month intervals beginning the second week of ownership will have just under six months remaining after the last replacement to bring suit.

If the claim is based on a series of nonconformities which require thirty days or more in the shop, the period begins to run when the first complaint for warranty work is made to the dealer, usually, but not necessarily, quite early in the ownership period. If complaint is made within the first week, as in many of the reported cases,¹⁷³ the lemon law claim will be barred approximately two years after the buyer took delivery or six months after the end of the term of protection. A more equitable provision would be to start the running of time from the event which triggers lemon law rights, either the fourth unsuccessful attempt or the thirtieth day of shop time.

169. *Id.* § 24-5-13-22.

170. See Note, *The Connecticut Lemon Law*, 5 U. BRIDGEPORT L. REV. 175, 201 (1983).

171. IND. CODE § 24-5-13-23(a) (1988).

172. See *id.* § 24-5-13-8 (requiring the dealer to make repairs of a nonconformity reported to the dealer or manufacturer within the term of protection “even if the repairs are made after expiration of the term of protection”).

173. See, e.g., *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968); *Rozmus v. Thompson’s Lincoln-Mercury, Inc.*, 209 Pa. Super. 120, 224 A.2d 782 (1966).

Another problem with the two-year period is that it is inconsistent with the four-year limitation established by the U.C.C.¹⁷⁴ Although the Code period of limitation on a warranty action begins to run from the date of delivery, if the express warranty extends the seller's obligation, it may also extend the limitation period.¹⁷⁵ The recipient of a one year warranty may have four years from the date the nonconformity is or should have been discovered, which could be the last week of the warranty period, thereby giving her almost five years from the date of delivery and four years from the date of complaint. One saving feature of the Lemon law is that if the buyer commences an approved informal dispute resolution procedure, the two year period is tolled during the time that procedure is pending.¹⁷⁶

G. Restrictions on Resale of Lemons

The lemon law provides that if a vehicle has been returned to the manufacturer under its provisions or any other judgment, award or agreement in Indiana or elsewhere, the manufacturer must disclose "that the vehicle was returned . . . because of a nonconformity not cured within a reasonable time as required by Indiana law" and must provide the same warranty as provided to the original buyer for a term of at least twelve months or 12,000 miles.¹⁷⁷ It is not clear whether the twelve months/12,000 miles of protection is merely express warranty protection, failure of which must be remedied pursuant to the U.C.C., or lemon law protection, which may be remedied under the lemon law with refund or replacement as the ultimate solution.

Should the manufacturer not give the additional warranty and disclose that the car was a returned lemon, "the motor vehicle may not be resold in Indiana . . ." ¹⁷⁸ The lemon law does not state what happens if a manufacturer fails to comply with this mandate. It is reasonable to assume that an aggrieved second buyer of a lemon could undo the transaction, get her money back, and recover consequential and possibly punitive damages. Unfortunately, the experience in other

174. See U.C.C. § 2-725.

175. U.C.C. § 2-725(2) provides:

A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

176. IND. CODE § 24-5-13-23(b) (1988).

177. *Id.* § 24-5-13-17.

178. *Id.*

states with respect to lemon resales has been mixed, and some state attorneys general have been required to pursue manufacturers who have failed to comply with the requirement that a subsequent buyer be told of the car's history.¹⁷⁹

The means and the language by which the prior history of the car must be disclosed is not specified. If this information is buried in a warranty book or contained on the front or back of a long agreement of sale, its import is not likely to be brought home to a prospective buyer. One critic has suggested the use of a sticker on the car itself,¹⁸⁰ a suggestion which has much to commend it. Some buyers may be unwilling to purchase, at any price, a car known to be a reconstituted lemon.¹⁸¹ Others may be willing to buy the car at a substantially reduced price or perhaps at the prevailing market price for similar used cars because of the additional warranty protection mandated by the lemon law. But the character and prior history of the car must be disclosed clearly and so it can be understood.

In view of the past history of manufacturers with respect to lemon resales, however, without some provision by which the state can verify

179. See, e.g., N.Y. Times, Sept. 30, 1988, at B2, col. 1, in which it was reported that 400 lemons repurchased by Chrysler Corp. had been resold to buyers without informing them of the lemons' histories and without reporting the repurchases to the state division of motor vehicles, as required by the New York lemon law. See N.Y. GEN. BUS. LAW § 198-a(c)(2)(McKinney 1985). Describing Chrysler's conduct as "one of the more flagrant violations of law I've ever seen," Attorney General Abrams obtained a settlement pursuant to which Chrysler would either buy back the cars or pay to each buyer \$1,000, give a further twelve-month/12,000-mile warranty, and pay for any prior repairs. The total cost could reach \$2,000,000.

In Connecticut, the state and General Motors reached an agreement which resolved a complaint that G.M. was reselling lemons without informing buyers of the cars' past records. Part of the agreement was that G.M. would report to the Connecticut Department of Motor Vehicles the vehicle identification numbers and all other pertinent information about returned lemons. Similar agreements were expected with Ford, Toyota, and other manufacturers. See U.P.I. Wire Service, Regional News, BC Cycle, July 6, 1988 (NEXIS search, *supra* note 4). In 1987, Connecticut amended its lemon law to add a requirement that the manufacturer who accepts the return of a motor vehicle due to nonconformity or defect must notify the department of motor vehicles and provide relevant information. See CONN. GEN. STAT. ANN. § 42-179(g) (West Supp. 1988).

Connecticut was also required to file suit against Chrysler Corp. and Ford Motor Co. for allegedly failing to provide the required information to the department of motor vehicles. See U.P.I. Wire Service, Regional News, BC Cycle, March 2, 1988 (NEXIS search, *supra* note 4).

180. See Vogel, *supra* note 2, at 643.

181. In the N.Y. Times story discussed above, see *supra* note 179, after the manufacturer offered to take back a particular buyer's lemon, the buyer took it to an authorized dealer who resold it four months later. A manufacturer's representative acknowledged that the car had not been repaired between the time of the return and the time of the resale.

and enforce compliance, the simple direction that buyers be informed of a lemon's prior history may well prove to be totally ineffective. Both Connecticut and New York provide that in addition to notifying the buyer, the manufacturer must also report specific information to the department of motor vehicles.¹⁸² In addition, New York requires in another statute that the following language, in ten point, capital type, be given to the buyer and be printed conspicuously on the car's title:

IMPORTANT: THIS VEHICLE WAS RETURNED TO THE MANUFACTURER OR DEALER BECAUSE IT DID NOT CONFORM TO ITS WARRANTY AND THE DEFECT OR CONDITION WAS NOT FIXED WITHIN A REASONABLE TIME AS PROVIDED BY NEW YORK LAW.¹⁸³

Short of requiring the manufacturer or dealer to paste a large, yellow lemon on the windshield of the returned automobile before resale, requirements such as these should be incorporated into the Indiana lemon law.

H. Inducements to and Sanctions Against the Manufacturer

Other than permitting a buyer to go directly to court in order to obtain a refund or replacement and prohibiting the resale of reconstituted lemons, the lemon law contains no sanctions against a manufacturer who fails to comply with its requirements or sanctions which would induce such compliance. The remedy of a refund or replacement, while somewhat annoying to a manufacturer, is certainly not of sufficient weight to induce a manufacturer not to delay giving relief to the lemon buyer. The award of attorney's fees under Magnuson-Moss and punitive damages in appropriate cases under Indiana law have done little to affect the conduct of manufacturers over the past decade or so. In the 1989 model year, some manufacturers appear to be offering warranties of longer duration, but a warranty is truly only as good as the willingness of the manufacturer to stand behind it if the car is a lemon. That willingness, in past years, has been questionable at best. Otherwise, there would have been no incentive for legislatures to enact lemon laws.

Other states have met this problem in various ways. Some authorize an award of treble damages against a manufacturer who fails to comply

182. See CONN. GEN. STAT. ANN. § 42-179(g) (West Supp. 1988); N.Y. GEN. BUS. LAW § 198-a(c)(2) (McKinney 1985).

183. N.Y. VEH. AND TRAF. LAW § 417-a (McKinney Supp. 1988).

with the remedies mandated by the applicable lemon law.¹⁸⁴ Others provide that the manufacturer's failure to comply with the lemon law shall constitute an unfair or deceptive trade practice.¹⁸⁵ The Minnesota state attorney general brought suit to prevent further sale of Mazda and Isuzu vehicles in his state because the two companies failed to comply with the Minnesota lemon law requirement relating to informal dispute resolution procedures.¹⁸⁶ The two companies subsequently agreed to comply.¹⁸⁷

With nothing more to prod manufacturers into compliance than already existing remedies, enactment of the lemon law could prove to have been nothing more than an empty gesture.

The lemon law creates no rights against and imposes no obligations upon the dealer, whether asserted by the buyer or the manufacturer.¹⁸⁸ Any claim the buyer may have against the dealer must be brought under the U.C.C. and the Magnuson-Moss Act. Therefore, in asserting his or her rights against both the dealer and the manufacturer, the buyer must take great care to satisfy the requirements of each statute with respect to such matters as notice, time limitations, and so forth. Failure to pay close attention to the different requirements may easily result in a loss of otherwise available rights.

Whether the manufacturer has a claim against the dealer for the dealer's inadequate repair work is irrelevant to the buyer's lemon law claim. The resolution of any problems which the manufacturer has with the manner in which the dealer performs its warranty service obligations will be based on the terms of the franchise agreement between the manufacturer and the dealer, not on the lemon law.

184. See, e.g., IDAHO CODE § 48-908 (Supp. 1988) (treble the full purchase price including collateral charges less an allowance for use if the buyer successfully pursues a court action because the manufacturer refused to replace or refund); MINN. STAT. ANN. § 325F.665 (West Supp. 1988) ("three times the actual damages sustained, together with costs and disbursements, including reasonable attorney's fees" if either party, in bad faith, asserts a frivolous claim or defense); VA. CODE § 59.1-207.16 (Supp. 1988) (if the buyer must sue because the manufacturer fails to comply with the arbitration award, the court may triple the value of the award, plus award equitable relief and attorney's fees).

185. See, e.g., CONN. GEN. STAT. ANN. § 42-184 (West 1987) (violation of the provisions of the lemon law "shall be deemed an unfair or deceptive trade practice"); ME. REV. STAT. ANN. tit. 10, § 1166 (Supp. 1987) (violation of lemon law "shall be considered prima facie evidence of an unfair or deceptive trade practice").

186. See U.P.I. Wire Service, BC Cycle, Regional News, April 1, 1988 (NEXIS search, *supra* note 4).

187. See *id.*, July 13, 1988.

188. IND. CODE § 24-5-13-24 (1988):

Nothing in this chapter imposes any liability on a dealer or creates a cause of action by a consumer against a dealer, and a manufacturer may not, directly or indirectly, expose any franchised dealer to liability under this chapter.

III. CONCLUSION

If all the lemon law achieves is to make the public more aware of automobile buyers' rights and to give buyers an added incentive to insist on receiving what manufacturers promise—safe, reliable, defect free automobiles—then enactment of the lemon law will have achieved some of its goals. The reports from other jurisdictions indicate that some of those goals have been achieved.¹⁸⁹ Nevertheless, legislators in a number of states have concluded that their respective lemon laws have not been working well enough and should be made tougher.¹⁹⁰

Indiana's lemon law has dealt with some of the problems of other state lemon laws, but standing alone, it gives to buyers few rights which they did not already have, in some form, under the combined forces of the Uniform Commercial Code and the Magnuson-Moss Act. It does attempt to clarify those rights and to put them in one place so that the procedures to be followed and the relief available to aggrieved lemon owners are reasonably straightforward and understandable. The problems and ambiguities discussed in the body of this article will have to be dealt with by the courts and, in some instances, by the legislature as well.

Whether the lemon law will prove to be a success depends in large part both on the effectiveness of any alternative dispute resolution mechanism ultimately approved by the attorney general, and on whether the courts interpret the law liberally, in accord with the spirit in which it was enacted, or restrictively, so as to limit, rather than expand, buyers' rights. Despite its shortcomings, the lemon law is a step in the direction of giving automobile buyers an offensive weapon with which to attack large manufacturers who hide behind stone walls of non-cooperation and delay. Whether the lemon law will prove to be the real thing for sweetening the lemon or merely a weak imitation sweetener remains to be seen. The likelihood is that time will prove it to be the real thing, but not yet effective enough to eliminate all of the sour aftertaste.

189. The N.Y. Attorney General has reported that manufacturers have paid out \$15.5 million under the New York Lemon Law and that of the 1,384 cases which went to mandatory arbitration, 921 resulted in decisions favoring the buyers. An additional 275 were settled without arbitration. U.P.I. Wire Service, AM Cycle, Regional News, March 21, 1988 (NEXIS search, *supra* note 4). During the first twenty months of a lemon law in Massachusetts, service from dealers improved and manufacturers refunded \$3.2 million to car buyers. See U.P.I. Wire Service, BC Cycle, Regional News, April 28, 1988 (NEXIS search, *supra* note 4).

190. See U.P.I. Wire Service, BC Cycle, Regional News, May 16, 1988 (NEXIS search, *supra* note 4) (N.J. senate passes amendments to make N.J. lemon law strongest in the country); *id.*, AM Cycle, Feb. 4, 1988 (Florida's attorney general announced proposal stiffening lemon law to which consumer groups, dealers and manufacturers agreed).

Several steps should be taken by the legislature to strengthen the Indiana lemon law:

1. Clarify the requirement of nonconformity to reflect that replacement or refund is only available if the problem is substantial, whether the nonconformity is a defect or condition which impairs or is a failure to conform to warranty.

2. Impose penalties on manufacturers who fail to comply with the requirements of the lemon law with respect to initial repairs and final replacement or refund.

3. Require manufacturers to disclose to buyers, in conspicuous, easy to understand language, their rights under the lemon law and impose penalties on manufacturers who fail to do so.

4. Impose severe penalties on manufacturers who expressly or impliedly permit dealers to resell returned lemons without disclosing their prior histories to prospective buyers in conspicuous, easy to understand language.

5. Require that all manufacturers' disclosures be stated in plain English on a tag conspicuously attached to the vehicle's windshield and removable only by the buyer.

6. Impose penalties on any party who asserts a claim or defense in bad faith.

7. Change coverage to include all vehicles registered in Indiana after the effective date of the lemon law, whether or not the vehicle was purchased in Indiana.

8. Reduce the number of unsuccessful attempts to repair a single nonconformity to either two or three and reduce the number of unsuccessful attempts to repair a safety-related nonconformity to one or two.

9. Clarify the thirty-days-out-of-service requirement to state that the cumulation of time will be calculated for any combination of nonconformities requiring service.

10. Clarify and redraft the notice requirements to impose upon the servicing dealer the obligation to notify the manufacturer of both the vehicle's problems and of the election of the buyer between refund or replacement.

11. Provide for recovery of attorney's fees by a buyer who is successful in an alternative dispute resolution proceeding as well as in litigation.

12. Provide that a cause of action under the lemon law accrues on the thirtieth day of service for nonconformities within the term of protection or upon the fourth unsuccessful attempt to repair a nonconformity.

13. Finally, if one of the reasons for the lemon law is to give the buyer relief in an informal setting without the expense and delay

of litigation, the lemon law should require manufacturers to establish certifiable dispute resolution mechanisms. They already have some mechanisms in place because of the Magnuson-Moss Act. Those mechanisms need only be refined to comply with federal regulations. Should they fail to do so, perhaps the legislature should establish a state-run system, as has been done in a number of other jurisdictions.

