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## Remedies Available to the Purchaser of a Defective Used Car

Scott J. Burnham  
*University of Montana School of Law*

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## REMEDIES AVAILABLE TO THE PURCHASER OF A DEFECTIVE USED CAR

Scott J. Burnham\*

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### I. INTRODUCTION

The sale of used cars<sup>1</sup> is big business. Used car sales in the United States outnumber new car sales three to two. In 1984, consumers spent \$90.8 billion dollars on 16.8 million used cars.<sup>2</sup> They purchased about half of these cars from dealers and half from private parties.<sup>3</sup> The average price of \$5,400 makes purchase of a used car a major investment for most persons. Often the investment goes sour because of mechanical defects discovered after the sale. In most cases, the defects existed at the time the deal was made.<sup>4</sup>

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\* Associate Professor of Law, University of Montana School of Law; B.A., Williams College, 1968; J.D., New York University, 1974; L.L.M., New York University, 1981. I appreciate the support of the Cowley Endowment and the research assistance of Joe Maynard, Jr., a student at the University of Montana School of Law.

1. This article is restricted to sales to consumers, that is, purchasers for personal, family, or household purposes. It is not restricted to the sale of used automobiles, but encompasses the purchase by a consumer of any used vehicle, whether automobile, truck, or motorcycle. Because the phrase "used vehicle" does not roll trippingly from the tongue, the more familiar-sounding "used car" is employed.

2. Hertz Corp. Press Information, release dated June 24, 1985. The release also indicates that the average used car sold in 1984 was 4.5 years old and had 45,000 miles on it. Statistical information on used car sales is available from Hertz Corp., 660 Madison Ave., New York, NY 10021.

3. *Id.* This article focuses on remedies available to purchasers from dealers. Many of the remedies discussed in Parts II, III, VI, and VII are applicable to sales between private parties, but the legislation discussed in Parts IV, V, and VIII is generally applicable only to dealers.

4. Federal Trade Commission, Trade Regulation Rule Concerning the Sale of Used Motor Vehicles, Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 45,692 (1984) (Rule codified at 16 C.F.R. § 455 (1986)) [hereinafter cited as FTC Statement]. The FTC Statement is based on the Final Staff Report on the Used Motor Vehicle Industry. The Staff Report was not adopted by the Commission. The findings are based on

Sale of a "big ticket" item such as a used car has substantial legal ramifications. Nevertheless, few purchasers consult an attorney. Acting on their own, purchasers often fail to understand the legal effect of any warranty or of sale "as is." Approximately one-half of the used cars marketed by dealers are sold "as is."<sup>5</sup> Sale "as is" means that the purchaser agrees to accept the car without the warranties otherwise implied in a sales contract by state law.<sup>6</sup> By using this disclaimer of warranties, the seller shifts to the purchaser the responsibility for any mechanical defects in the car.<sup>7</sup>

Moreover, the sales abuses endemic to the industry further purchasers' misunderstanding.<sup>8</sup> The most common abuse occurs when a dealer makes oral representations regarding the mechanical condition of a car and then disclaims them in an "as is" clause in the written agreement. A dealer may compound the abuse by misrepresenting the meaning of the term "as is" or by failing to correct a purchaser's misunderstanding of it.<sup>9</sup>

Whether it disclaims implied warranties or not, a seller may make express warranties that induce the purchaser to buy the car.<sup>10</sup> If a purchaser brings an action on grounds that these representations were false, a court may find that the promises were mere sales talk, not to be taken seriously. Or it may find that the parol evidence rule prevents the purchaser from proving that the statements were part of the contract.<sup>11</sup>

information obtained in 1979.

5. *Id.* at 45,696.

6. MONT. CODE ANN. § 30-2-316(3)(a) (1985).

7. Studies conducted prior to 1979 cited in the FTC Statement, *supra* note 4, showed average repair costs of \$109 to \$235.

8. FTC Statement, *supra* note 4, 45,696-702. This observation has a long history in popular culture. It was often asked about Richard Nixon, "Would you buy a used car from this man?" A recent movie entitled *Used Cars* featured the outrageous tactics of two brothers competing in the used car business. A poll taken each year indicating the public's trust of various professions generally lists used car salespersons at the bottom, below even lawyers.

9. "The practices are pervasive and among the chief sources of complaints received by various consumer protection organizations throughout the country." FTC Statement, *supra* note 4, 45,702. It goes without saying that there are honest used car dealers. Nevertheless, as this article should make clear, current market conditions favor the dishonest dealer. A dealer who can misrepresent a car's condition or shift to a purchaser the risk of defects, gains a market advantage over a dealer who discloses a car's condition and who assumes the cost of repairs. A rational consumer shopping on the basis of apparent condition and low price will choose a dishonest dealer.

10. MONT. CODE ANN. § 30-2-313 (1985).

11. The rule, enacted in Montana at MONT. CODE ANN. § 30-2-202 (1985), provides:

FINAL WRITTEN EXPRESSION—PAROL OR EXTRINSIC EVIDENCE. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by

At common law, purchasers encountered difficulty recovering against used car dealers. The prevailing business standard, *caveat emptor*, made formidable purchasers' attempts to avoid a contract or to obtain damages.<sup>12</sup> Traditional contract doctrine, developed in an age of laissez-faire capitalism, favors sellers. Because the doctrine presupposes a free market in which both sellers and purchasers are responsible for ascertaining the facts, courts must stretch traditional concepts to allow a consumer to escape from a bad bargain.

The Uniform Commercial Code (UCC), adopted in the 1960's, provides little assistance to purchasers. Applicable to all transactions involving the sale of goods, the UCC makes few distinctions between consumers and commercial purchasers, who generally have more knowledge and more bargaining power. Furthermore, under both the common law and the UCC, the prevailing party in a lawsuit does not recover transaction costs, such as attorneys' fees, from the loser. The seller, who has greater resources, experience, and economies of scale can usually take advantage of the purchaser's weaker financial position. These factors make litigation a losing proposition for the purchaser of a used car.<sup>13</sup>

Recent legislation has begun to redress this imbalance, affording the purchaser new claims for relief. Recognizing that the equal knowledge necessary for free market conditions rarely exists in practice, these statutes attempt to approximate it, either by regulating the practices of sellers that prey on purchasers' ignorance, or by requiring disclosures. By allowing successful purchasers to recover transaction costs, the legislation rewards those who bring

evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by course of dealing or usage of trade (30-1-205) or by course of performance (30-2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

12. See, e.g., *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio St. 328, 140 N.E. 118 (1922).

13. The inhibiting effect of transaction costs are discussed in Burnham, *Contract Damages in Montana, Part I: Expectancy Damages*, 44 MONT. L. REV. 1 (1983). The tactical advantages a "repeat player" enjoys over a "one-shot player" in the litigation game are discussed in Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y. REV. 95 (1974). These factors indicate why so few of the used car complaints reported to government agencies end up in court. See Wolford, *Relief for the Motor Vehicle Purchaser*, WIS. BAR BULL., Aug. 1981, at 12; McEtrick, *Defective Motor Vehicles: The Massachusetts Lemon Law and Recent Used Car Cases Under Chapter 93A*, 70 MASS. L. REV. 30, 37 (1985).

claims in the public interest.<sup>14</sup>

This article enumerates the variety of claims for relief presently available to the purchaser of a defective used car.<sup>15</sup> It also addresses the fundamental question of whether a used car purchaser is entitled to a certain level of performance from the car. Finally, it analyzes legislation that would provide additional assistance to purchasers by requiring that used car dealers disclose defects or warrant a minimum level of performance.

## II. COMMON LAW

### A. *The Parol Evidence Rule*

In making a claim against a used car dealer, a purchaser often claims that a representation was made which was not reduced to writing. The purchaser attempts to prove either that the representation is part of the contract or that it prevented formation of the contract. To tender proof of the oral representation, however, the purchaser may have to overcome the considerable hurdle of the parol evidence rule.<sup>16</sup>

The intention of the rule is to give finality to the written agreement of the parties.<sup>17</sup> A party who claims that additional terms were not incorporated in the sales agreement may be barred from presenting proof of those terms. For example, in *Green Chevrolet Co. v. Kemp*,<sup>18</sup> the purchaser and his wife testified that the sales person had told them the car was guaranteed for a year and that if they were not satisfied they could bring it back for adjustments. The Supreme Court of Arkansas held the testimony inadmissible where the written agreement contained no such provisions.<sup>19</sup>

The rule has three significant exceptions. Parol evidence may be offered on issues of integration, interpretation, or formation.

#### 1. *Integration*

Because the rule applies only where the parties intended the

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14. The United States Supreme Court approved the policy of deputizing "private attorneys general" to carry out Congressional policy in *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968).

15. Claims for personal injury resulting from the defect are beyond the scope of this article. It deals only with damage to the defective car itself, usually the cost of repair or replacement.

16. MONT. CODE ANN. § 30-2-202 (1985), *supra* note 11.

17. E. FARNSWORTH, CONTRACTS § 7.2 (1982).

18. 241 Ark. 62, 406 S.W.2d 142 (1966).

19. *Id.* at 63, 406 S.W.2d at 143.

writing to integrate their final and complete understanding, evidence may be offered to show that the writing reflected only part of their agreement.<sup>20</sup> That is, the parties may have intended that their agreement be partly written and partly oral, with the oral part containing representations omitted from the writing. By inserting a merger clause in the writing, a seller may defeat a purchaser's attempt to prove such an intention. A merger clause states that the written agreement contains the entire understanding of the parties and that there are no other understandings, oral or written.<sup>21</sup> While the presence of a merger clause poses presumptive evidence that the agreement is integrated, a court may overlook it on grounds of bad faith, unconscionability, or, like Admiral Nelson, by turning a blind eye to it.<sup>22</sup> If a court recognizes the representation as part of the agreement, it can be enforced against the seller.

## 2. Interpretation

A litigant may always offer parol evidence to resolve a question of interpretation. For example, in *Leveridge v. Notaras*,<sup>23</sup> the written agreement contained this printed clause:

It is understood that I have examined said motor car and accept it in its present condition and agree that there are no warranties or representations, expressed or implied, not specified herein, respecting the goods hereby ordered.<sup>24</sup>

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20. Another significant exception, the admission of evidence of custom and usage, rarely applies to a consumer purchase.

21. A sample merger clause reads as follows:

MERGER CLAUSE. The seller's salesmen may have made oral statements about the merchandise described in this contract. Such statements do not constitute warranties, shall not be relied on by the buyer, and are not part of the contract for sale. The entire contract is embodied in this writing. This writing constitutes the final expression of the parties' agreement, and it is a complete and exclusive statement of the terms of that agreement.

J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 12-4 at 437 (2d ed. 1980) [hereinafter cited as WHITE & SUMMERS].

22. 1 A. CORBIN, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 128 (1964) states:

Courts have often avoided the enforcement of unconscionable provisions in long printed standardized contracts, in part by the process of "interpretation" against the party using them, and in part by the method used by Lord Nelson at Copenhagen.

12 ENCYCLOPEDIA BRITANNICA 949 (15th ed. 1977) explains the reference to Nelson's method: "The Danes resisted bravely, and Parker, fearing that Nelson was suffering unacceptable losses, hoisted the signal to disengage. Nelson disregarded it, delivering his famous quip, 'I have only one eye—I have a right to be blind sometimes.'"

23. 433 P.2d 935 (Okla. 1967).

24. *Id.* at 937.

The agreement also contained this handwritten notation:

30 day warranty  
 Repair clutch as needed  
 not to exceed \$100.00  
 Date no later than Sat.  
 Feb. 24, 1963.<sup>25</sup>

The purchaser attempted to prove that the handwritten notation evidenced an oral warranty. The seller objected that the purchaser's tender of proof was barred by a merger clause that provided:

It is agreed that no change, alteration, interlineation, or verbal agreement of any kind shall be effective to change alter or amend the printed terms of this agreement.<sup>26</sup>

The supreme court affirmed the trial court's admission of parol evidence. The handwritten notation, which apparently created a warranty, conflicted with the printed form, which denied any warranties. Therefore, parol evidence was properly admissible to interpret the document. The court found a warranty and enforced it against the seller.<sup>27</sup>

### 3. Formation

The rule does not bar evidence offered to prove that no agreement was formed, such as proof that the purchaser's assent was lacking due to fraud or mistake.<sup>28</sup> One of the elements of a contract is consent of the parties. When the consent of one party is obtained by fraud, that apparent consent is not given freely.<sup>29</sup> In that event, the party whose consent was fraudulently obtained may rescind the contract.<sup>30</sup> For example, in *Ed Fine Oldsmobile, Inc. v. Knisley*,<sup>31</sup> the parol evidence rule did not bar the purchaser from

25. *Id.*

26. *Id.*

27. *Id.* at 940-41.

28. While mistake is also grounds for avoiding a contract, there are no reported cases in which a used car purchaser successfully used the claim. It may be difficult for the purchaser to prove that the mistake was mutual and not unilateral. See RESTATEMENT (SECOND) OF CONTRACTS § 152 (1982). Furthermore, the purchaser may have assumed the risk of mistake by accepting the car "as is." See, e.g., *Lenawee County Board of Health v. Messerly*, 417 Mich. 17, 331 N.W.2d 203 (1982).

29. MONT. CODE ANN. §§ 28-2-301(1), -401(1)(c) (1985).

30. MONT. CODE ANN. § 28-2-1711(1) (1985).

31. 319 A.2d 33 (Del. Super. Ct. 1974). See also *Jeffers v. Brown Motor Co.*, 253 Ark. 1084, 490 S.W.2d 803 (1973) (error by trial court to strike purchaser's counterclaims alleging representations made by seller, even though the allegations were inconsistent with the terms of the contract); *Neil Huffman Volkswagen Corp. v. Ridolphi*, 378 So. 2d 700 (Ala. 1979)

introducing evidence that the dealer knowingly misrepresented the condition of the vehicle.

The sale of a car is a UCC transaction, subject to the expression of the parol evidence rule in the UCC.<sup>32</sup> Although the UCC does not expressly codify the fraud exception to the parol evidence rule, it preserves supplementary general principles of law and equity.<sup>33</sup> As a general principle of law, an agreement is not formed when, due to fraud, consent is not freely given.<sup>34</sup> Under the UCC, courts have continued to disregard merger clauses when fraud is alleged. For example, in *City Dodge, Inc. v. Gardner*,<sup>35</sup> the Supreme Court of Georgia held that "neither the draftsmen nor the legislature intended to erase the tort remedy for fraud and deceit with the adoption of the Uniform Commercial Code . . . ."<sup>36</sup>

### B. *Fraud*

A used car purchaser who overcomes the obstacle of the parol evidence rule and uses the seller's representations to prove common law fraud may seek damages in tort or may seek to avoid the contract. In making a claim for fraud, the plaintiff must prove the following elements: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, or ignorance of its truth, (5) the speaker's intent that it should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance upon its truth, (8) the hearer's right to rely upon it, and (9) the hearer's consequent and proximate injury.<sup>37</sup> Used car purchasers encounter the most difficulty proving that the representation is a statement of fact and proving that their reliance on the representation is reasonable.

Even a purchaser who can overcome the hurdle of the parol evidence rule may have difficulty proving that the seller made a misrepresentation of fact as opposed to opinion or sales "puffing." Whether particular language constitutes speculation, opinion, or averment of fact depends on all the attending facts and circum-

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(dealer liable in fraud for failing to disclose \$2,000 in major defects after representing car was in good condition with only minor damage).

32. MONT. CODE ANN. § 30-2-202 (1985), *supra* note 11.

33. MONT. CODE ANN. § 30-1-103 (1985). *See* Annot., 71 A.L.R.3d 1059 (1976).

34. *See supra*, note 29.

35. 232 Ga. 769, 208 S.E.2d 794 (1974).

36. *Id.* at 769, 208 S.E.2d at 797.

37. *United States v. Willard E. Fraser Co.*, 308 F. Supp. 557, 569-70 (D.C. Mont. 1970). The elements of deceit found in MONT. CODE ANN. § 27-1-712 (1985) are virtually the same as the elements of actual fraud found in MONT. CODE ANN. § 28-2-405 (1985).

stances of a case. For example, one court held that a dealer's representation that a used car was "in good condition and suitable for driving" was merely puffing and a statement of opinion.<sup>38</sup> Another held that statements that a car had never been wrecked<sup>39</sup> or had been driven a certain number of miles<sup>40</sup> were representations of fact.

The other main obstacle for purchasers is proving that their reliance was reasonable. Many courts have held that reliance upon representations, however false, is unreasonable where the purchaser had investigated, or had the means at hand to investigate the truth.<sup>41</sup> For example, in *Williams v. Rank & Sons Buick, Inc.*,<sup>42</sup> a salesman represented that the car was equipped with air conditioning. The purchaser inspected the car on the lot and took it on a test drive for about an hour and a half. The court held that the purchaser's reliance on the representation was unreasonable when he had an adequate opportunity to discover its falsity.<sup>43</sup>

### C. Negligence

In the classic case of *MacPherson v. Buick Motor Co.*,<sup>44</sup> the New York Court of Appeals held the manufacturer of an automobile liable for negligence in spite of the lack of privity between the manufacturer and the consumer. The general rule now finds expression in the RESTATEMENT (SECOND) OF TORTS:

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.<sup>45</sup>

The RESTATEMENT rule also applies "where the only harm which results from the manufacturer's failure to exercise reasonable care is to the manufactured chattel itself."<sup>46</sup>

38. *Randall v. Smith*, 136 Ga. App. 823, 222 S.E.2d 664 (1975).

39. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974).

40. *Gem City Motors, Inc. v. Minton*, 109 Ga. App. 842, 137 S.E.2d 522 (1964).

41. *Willard E. Fraser Co.*, 308 F. Supp. at 569-70.

42. 44 Wis. 2d 239, 170 N.W.2d 807 (1969).

43. *Id.* at 246-47, 170 N.W.2d at 811.

44. 217 N.Y. 382, 111 N.E. 1050 (1916).

45. RESTATEMENT (SECOND) OF TORTS § 395 (1965).

46. *Id.*, comment n.

A used car dealer may be liable to a purchaser on a negligence theory if the purchaser can show that (1) the dealer breached a duty, (2) the car was defective, and (3) the defect was the proximate cause of the injury. A used car dealer generally owes a purchaser a duty to discover and repair defects that are patent, known, or discoverable in the exercise of reasonable care.<sup>47</sup> In jurisdictions that do not impose safety standards by statute, the duty may be imposed as a matter of law.

In *Kopischke v. First Continental Corp.*,<sup>48</sup> the purchaser of a used car was severely injured when the car went out of control due to defects in the steering mechanism. The seller maintained that the purchaser's acceptance of the car "as is" barred her claim.<sup>49</sup> The Montana Supreme Court held that a used car dealer has a duty to discover and repair any defects which are patent or discoverable in the exercise of ordinary care. The duty to inspect does not necessitate dismantling the car, however. A dealer who neglects the duty to discover and repair defects is liable for personal injuries resulting from its negligent failure to inspect. The "as is" disclaimer does not relieve the dealer of this liability.

An attorney pursuing a tort claim against the seller of a defective used car must distinguish between those defects that make the product dangerous and those that merely make it inferior. The former may lead to personal injuries while the latter generally lead only to economic loss. The court did not decide in *Kopischke* whether the dealer would be responsible for economic loss, such as the cost of repair, in the absence of personal injury. The imposition of a duty to inspect and repair, however, was based on the public policy interest in ensuring that used cars are safe.<sup>50</sup> To further this interest, the law should require sellers to repair any defect affecting safety, for a seller does not know at the time of sale whether a defect will later cause injury. In a claim against a dealer for defects in a used car, the purchaser should emphasize any dangerous condition that results from the defect.

A purchaser who can demonstrate that the dealer owed the purchaser a duty may have difficulty proving that a car was defective on delivery.<sup>51</sup> The previous owner may be a source of information. Also, the dealer may have attempted to remedy the defect

47. See, e.g., *Hembree v. Southard*, 339 P.2d 771 (Okla. 1959).

48. 187 Mont. 471, 610 P.2d 668 (1980).

49. The contract provided: "All used cars are sold on an as is basis with no guarantee either express or implied except as noted above." *Id.* at 474, 610 P.2d at 670.

50. *Id.* at 491-92, 610 P.2d at 679.

51. A guide and checklist for proving that loss resulted from the sale of a defective used car is found at Annot., 31 POF2d 639, 696 (1982).

prior to sale. Because the difficulty of proving negligence was one of the factors that led to the doctrine of strict liability, a purchaser who is unable to prove negligence on the part of a manufacturer or dealer should consider a claim in strict liability in tort.<sup>52</sup>

#### D. Conclusion

When a party recovers in tort for deceit, the court generally awards compensatory damages, which restore that party to the pre-transaction position.<sup>53</sup> In addition, the court may award punitive damages when the defendant has been guilty of oppression, fraud, or malice.<sup>54</sup> When a party recovers in contract for fraud, the court generally awards rescission of the contract.<sup>55</sup>

Whether recovery is in tort or contract, the prevailing party does not recover transaction costs, the most significant of which is attorneys' fees. Under the "American Rule" each side pays its own fees, win or lose.<sup>56</sup> In litigation concerning a used car, the transaction costs can easily exceed the potential recovery, making the claim economically unreasonable.<sup>57</sup> A purchaser may resolve this problem by bringing the claim in a small claims court, where the transaction costs are lower. On the other hand, the court's ceiling on recovery may be lower than the damages. An attorney can play an important role behind the scenes by advising the client how to present the case in a professional manner. Before doing so, however, the attorney should consider the many claims for relief other than common law claims. These claims may be easier to prove and may provide for attorneys' fees.

### III. UNIFORM COMMERCIAL CODE

#### A. Introduction

When a purchaser claims that a used car does not perform as promised, the purchaser must first establish what the dealer promised. The promises, or warranties, have two sources: express warranties found in the agreement of the parties and implied warranties imposed by operation of law. A claim for breach of express warranty must demonstrate that: (1) seller made an affirmation of

52. See *infra* Part VII.B.

53. MONT. CODE ANN. § 27-1-202 (1985).

54. MONT. CODE ANN. § 27-1-221 (1985).

55. MONT. CODE ANN. § 28-2-1711(1) (1985).

56. See Comment, ". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, 46 MONT. L. REV. 119 (1985).

57. This fact probably accounts for the relative paucity of used car cases in the reporters compared to the scope of the problem.

fact or promise, (2) the goods did not comply with the warranty, (3) plaintiff's injury was caused by the defective nature of the goods, and (4) plaintiff was damaged. A claim for breach of implied warranty would simply allege that: (1) a merchant sold the goods and (2) the goods were not merchantable.<sup>58</sup>

## B. Express Warranties

### 1. *Is the Representation Part of the Contract?*

A seller creates an express warranty by making an affirmation of fact, describing the goods, or showing a sample or model as "part of the basis of the bargain."<sup>59</sup> In other words, the express warranty must be contained in the contract. To establish the existence of express warranties, therefore, a court must first determine the agreement of the parties. Purchasers alert to this problem should insist that any representations be written into the agreement.<sup>60</sup>

While express warranties contained in a written instrument signed by the parties present few problems, in many cases a purchaser will claim that the dealer made oral representations which were not reduced to writing. In contrast to the purchaser who claims fraud,<sup>61</sup> this purchaser asks the court not to avoid the contract, but to enforce the oral representations as part of the contract. The considerations examined earlier in connection with parol evidence in common law claims are equally applicable to determine whether the representations are admissible in warranty claims.<sup>62</sup>

### 2. *Do the Words Create an Express Warranty?*

After applying the parol evidence rule to determine the parties' agreement, a court may examine whether the purchaser has a claim for breach of the express warranties contained in that agreement. The UCC provides that "any affirmation of fact or promise made by the seller to the buyer . . . creates an express warranty. . . ."<sup>63</sup> As when alleging fraud,<sup>64</sup> the purchaser must prove that a seller's statement is an affirmation of fact rather than an

58. NATIONAL CONSUMER LAW CENTER, SALES OF GOODS AND SERVICES §§ 5.2, 6.2 (1982).

59. MONT. CODE ANN. § 30-2-313 (1985).

60. The failure of purchasers to protect themselves in this manner was the force behind the FTC Used Motor Vehicle Trade Regulation Rule. See *infra* Part IV.

61. See *supra* Part II.

62. See *supra* text accompanying notes 16-31.

63. MONT. CODE ANN. § 30-2-313(1)(a) (1985).

64. See *supra* text accompanying notes 38-40.

opinion.<sup>65</sup>

Whether a statement will be treated as an express warranty or as "puffing" is a question of fact that is not easily resolved. Generally, a representation which expresses the seller's opinion, belief, judgment or estimate does not constitute an express warranty.<sup>66</sup> For example, a statement that "this car gets great gas mileage" is probably an opinion, while a statement that "this car gets not less than 25 mpg in highway driving" is probably an affirmation of fact. The difference is not always readily apparent. One court found that a used car dealer's representations that the car was in "A-1 shape" and "mechanically perfect" were affirmations of fact.<sup>67</sup> Another found that the seller's representations that the car was "in good condition" and "suitable for driving" were sales "puffing."<sup>68</sup> To invoke an old chestnut, resolution of this issue depends on the facts and circumstances of each case.<sup>69</sup>

Another issue involves the extent to which an express warranty may be created by a mere description of the goods. For example, a seller markets a used car as a "1982 Buick" and effectively excludes all warranties. The seller is undoubtedly liable for breach of warranty if the goods do not conform to the description; for example, the car is in fact a 1981 Chevrolet.<sup>70</sup> The seller has also promised a car. Does the seller thereby warrant that the goods will not only conform to the literal description, "1982 Buick," but that the goods will meet a minimal standard of performance as a "car?" In short, is a seller liable for breach of an express warranty if a used car does not run?

Surprisingly few decisions discuss this issue.<sup>71</sup> In *Meyer v.*

65. MONT. CODE ANN. § 30-2-313(2) (1985) provides that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

66. *Whitaker v. Farmhand, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977). See also *Garriffa v. Taylor*, 675 P.2d 1284 (Wyo. 1984); *Parker v. Arthur Murray, Inc.*, 10 Ill. App. 1000, 295 N.E.2d 487 (1973).

67. *Wat Henry Pontiac v. Bradley*, 202 Okla. 82, 210 P.2d 348 (1949).

68. *Randall v. Smith*, 136 Ga. App. 823, 22 S.E.2d 664 (1975).

69. For example, *WHITE & SUMMERS*, *supra* note 21, § 9-3 observes that the holding in *Wat Henry* is illuminated by the fact that the purchaser bought the car to make a trip with her seven-month old child to visit her husband, who was serving in the army during World War II.

70. The hypothetical suggests the complex case of the Oldsmobiles sold with Chevrolet engines. See *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979). Claims were brought on various grounds and settled before the court made findings. In a related case, *Skelton v. General Motors Corp.*, 660 F.2d 311 (1981), the trial court held that the engine switch did not constitute a breach of implied warranty, but did constitute a deceptive warranty under *Magnuson-Moss*. *Id.* at 313 n.1. See *infra* text accompanying notes 139-42.

71. British Commonwealth cases are collected and discussed in Whincup, *Reasonable*

*Packard Cleveland Motor Co.*,<sup>72</sup> a pre-UCC case, the Ohio Supreme Court held that a "dump truck" sold with no other express warranties, does not mean "a shape of 5-ton size, but a thing fitted for practical, useful, substantial service as a dump truck." And in *Crowther v. Shannon Motor Co.*,<sup>73</sup> an English court held that the seller was responsible for repairs to an eight-year old Jaguar sold with 80,000 miles on it that broke down after 2300 miles. The appeals court approved of the reasoning of the trial judge, who had asked, "What does 'fit for the purpose' mean?" He had answered his own question, "To go as a car for a reasonable time."<sup>74</sup>

The reasoning of these cases makes sense. When sold as transportation, a car should possess the ability to perform as a car. But how much performance is the purchaser of a particular used car entitled to? This appears to be an unusually abstruse inquiry for a court to undertake.<sup>75</sup> Yet courts often seek to establish the level of performance necessary to meet the standard of "merchantability" under the implied warranty of merchantability.<sup>76</sup> By pursuing a similar inquiry when the seller markets a "car" as transportation, courts could establish a minimal level of performance in all car sales.<sup>77</sup> This inquiry would be especially pertinent when, as is usually the case, the seller excludes implied warranties, leaving the purchaser a claim only for breach of an express warranty.<sup>78</sup>

### 3. *Was the Warranty Part of the Basis of the Bargain?*

Assume that a purchaser can prove that an express warranty was made and incorporated in the agreement. To recover for breach of warranty, must the purchaser demonstrate reliance on the representation? This issue is unresolved. The UCC does not employ the term *reliance*. Instead, it asks whether the affirmation is "part of the basis of the bargain." In *Cagney v. Cohn*,<sup>79</sup> the seller told the purchaser that a motorcycle was "in good condition" and "needed no major repairs." The court held that these statements

Fitness of Cars, 38 MOD. L. REV. 660 (1975).

72. 106 Ohio St. 328, 140 N.E. 118 (1922).

73. [1975] 1 All E.R. 139 (C.A.).

74. *Id.* at 141.

75. The idea that things may be viewed in terms of their actuality and potentiality is found in Aristotle's *PHYSICS* Book II ch. 3 and *METAPHYSICS* Book IX chs. 5-9. Judges might be said to be asking how much "carness" a purchaser can expect.

76. See *infra* text accompanying notes 94-99.

77. Part VIII *infra* addresses statutory mechanisms that could be used to establish this floor, such as requiring the seller to meet state safety inspection requirements in the sale of used cars.

78. See *infra* text accompanying notes 108-22.

79. 13 U.C.C. Rep. Serv. (Callaghan) 998 (D.C. Super. Ct. 1973).

constituted express warranties.<sup>80</sup> The seller then claimed that the purchaser, who twice inspected the motorcycle and conferred with an expert, did not rely on the representations. The court held that reliance was unnecessary, citing the UCC Official Comments, which presume that any affirmation is part of the basis of the bargain, and state that "no particular reliance on such statements need be shown."<sup>81</sup> Nevertheless, some commentators suggest that a careful lawyer should allege reliance.<sup>82</sup>

Sometimes litigation raises the issue of whether statements made in an advertisement are part of the basis of the bargain. Most courts hold that statements made in an advertisement can be part of the bargain if the purchaser was aware of the advertisement.<sup>83</sup> A purchaser can make a stronger case if the purchaser can also demonstrate reliance on the statements in the advertisement.<sup>84</sup> In *Whitaker v. Farmhand, Inc.*,<sup>85</sup> the Montana Supreme Court stated:

The law appears to be well settled that a remote manufacturer without privity with the purchaser is liable for breach of warranty by advertising on radio and television, in newspapers and magazines, and in brochures made available to prospective purchasers, if the purchaser relies on them to his detriment.<sup>86</sup>

While the court viewed expansively the sources from which express warranties may arise, it may have restricted the usefulness of those warranties to purchasers by requiring reliance. The court also neglected to state whether the agreement contained a merger clause, for a purchaser could not assert warranties that were expressly excluded from the bargain.<sup>87</sup>

### C. Implied Warranties

Of the warranties implied by law,<sup>88</sup> the most significant in the

80. *Id.* at 1003.

81. *Id.* at 1005-06.

82. MONT. CODE ANN. § 30-2-313 annot. Official Comment 3 (1985), states that "no particular reliance on such statements need be shown . . ." White and Summers suggest that the purchaser show reliance. They conclude that while the cases are divided, courts are reluctant to give up the reliance requirement. WHITE & SUMMERS, *supra* note 21, § 9-4.

83. WHITE & SUMMERS, *supra* note 21, § 9-4.

84. See, e.g., *Interco, Inc. v. Randustrial Corp.*, 533 S.W.2d 257 (Mo. App. 1976). See also Palmer, *Express Warranties Arising From Advertising*, 41 J. AIR L. & COM. 497 (1975).

85. 173 Mont. 345, 567 P.2d 916 (1977).

86. *Id.* at 353, 567 P.2d at 921.

87. See *supra* text accompanying notes 20-22.

88. The warranty of title, MONT. CODE ANN. § 30-2-312 (1985), is not relevant to this article. The warranty of fitness for a particular purpose, MONT. CODE ANN. § 30-2-315 (1985), is rarely given in a used car transaction. In *Society Nat'l Bank v. Pemberton*, 63 Ohio Misc.

purchase of a used car is the warranty of merchantability.<sup>89</sup> In this section, the UCC distinguishes between commercial transactions and consumer transactions. It provides that only a merchant seller gives a warranty of merchantability. The warranty does not arise, therefore, when a purchaser buys a vehicle from a private party rather than from a dealer.<sup>90</sup>

Most litigation under the statute concerns the meaning of merchantability. Of the numerous definitions in the statute, the one most applicable to used car sales is that the goods must be "fit for the ordinary purposes for which such goods are used . . . ."<sup>91</sup> It is well-settled that a warranty of merchantability arises in the sale of used goods, although the issue is often litigated.<sup>92</sup> Applying the definition to used goods is particularly difficult, however, for the condition of each unit makes it unique. The Official Comments to the UCC state in part: "A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description."<sup>93</sup> In other words, a purchaser can not expect a used car to be as fit as a new car of the same model, nor a used car with 50,000 miles as fit as a used car of the same model with 25,000 miles.

We have again reached the point of attempting to define the level of performance a used car purchaser may expect, a discussion begun with the express warranty.<sup>94</sup> It was there propounded that when a seller markets a unit as a "car," the seller warrants that the unit will meet a minimal level of performance as an automobile, analogous to the level required by the implied warranty of merchantability.

In the absence of some other stated purpose, it seems fair to presume that the purchaser of a used car intends to use it for basic transportation. The UCC suggests that the level of performance a

26, 17 Ohio Ops. 3d 342, 409 N.E.2d 1073 (1979), the representation that a vehicle was suitable for snow plowing was treated as an express warranty.

89. MONT. CODE ANN. § 30-2-314(1) (1985) provides:

IMPLIED WARRANTY—MERCHANTABILITY—USAGE OF TRADE. (1) Unless excluded or modified (30-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

90. Cagney v. Cohn, 13 U.C.C. Rep. Serv. (Callaghan) 998, 1007 n.10 (D.C. Super. Ct. 1973). The court was careful to note that the seller's lay status did not exempt him from express warranties created under § 2-313. *Id.* at 1003.

91. MONT. CODE ANN. § 30-2-314(2)(c) (1985).

92. See Annot., 22 A.L.R.3d 1387 (1968); Whittle v. Timesavers, Inc., 614 F. Supp. 115 (W.D. Va. 1985).

93. MONT. CODE ANN. § 30-2-314 annot. Official Comment 3 (1985).

94. See *supra* text accompanying notes 70-78.

purchaser can expect may be answered by the simple adage: you get what you pay for.<sup>95</sup> Accordingly, a car sold by the ton is presumably fit only for scrap. And a car selling for half its "Blue Book"<sup>96</sup> value presumably will not perform as well as one selling for its Blue Book price. Wrestling with this issue in *Testo v. Russ Dunmire Oldsmobile, Inc.*,<sup>97</sup> the Court of Appeals of Washington stated:

The obligation appropriate to the sale of used goods is primarily directed at the operative essentials of the product. Thus, the measure of a used car's merchantability turns not so much on aesthetic items which, of necessity, must yield to age and previous use, but on its operative qualities. The price at which a merchant is willing to sell an item is an excellent index of the extent of quality warranted and the nature and scope of his obligation. To be fit for the purpose of ordinary driving, a 4-year-old automobile, selling for \$2,697 in 1973, must be in reasonably safe condition and substantially free of defects which render it inoperable. It also must be a "used car" and not a vehicle substantially modified for racing purposes and extensively used as such.<sup>98</sup>

According to this analysis of the expected level of performance of a used car, if a purchaser pays a premium price, the standard of merchantability is high, and vice-versa. The analysis, however, presupposes equal knowledge among the parties. It may therefore be applicable to deals between merchants, where each party has relatively equal knowledge, but not to deals between a knowledgeable merchant and a less knowledgeable consumer. Furthermore, it may be useful in resolving a case after the car has broken down, when a court must decide whether the purchaser assumed the risk of defects. It is less helpful at the point of purchase, when the price may not be directly related to the level of performance. In the absence of an obligation to disclose, freedom of contract surely permits a seller to exact the highest price possible, irrespective of the condition of the automobile. Similarly, rational economic behavior may lead a purchaser to shop for the lowest price, irrespective of the fact that the low price may reflect a substantially defective car.

The expected level of performance, then, should not be related

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95. MONT. CODE ANN. § 30-2-314 annot. Official Comment 7 (1985) makes the point more elegantly: "In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section."

96. The Blue Book is the official used car pricing guide of the National Automobile Dealers' Association.

97. 16 Wash. App. 39, 554 P.2d 349 (1976).

98. *Id.* at 43-44, 554 P.2d at 354.

to price, for there is not necessarily a direct relationship between price and quality. Price is rationally related to quality only if defects are disclosed. When defects are not disclosed, the extra cost of repairing those defects is effectively added to the price. The level of performance then, should be a function of disclosure. When disclosure is made, the level the purchaser can expect is freely bargained for. When disclosure is not made, the level the purchaser can expect is the price less the cost of repairing the defects. In this analysis, the expected level of performance would be, as the English judge put it, "to go as a car for a reasonable time."<sup>99</sup>

While purchasers may reasonably expect used cars to operate as cars, they should understand that sellers are not guarantors of continued performance. An implied warranty promises only that the goods are not defective at delivery. Unless otherwise worded, an implied warranty does not promise that the seller is responsible for future problems.<sup>100</sup> Many purchasers' cases have failed because of their inability to prove that the car was defective when purchased.<sup>101</sup>

For example, in *Rose v. Epley Motor Sales*,<sup>102</sup> three hours after purchase, the engine of a used car caught fire, destroying the car. The trial court, finding an implied warranty of fitness in the sale that was not disclaimed in writing or by the purchaser's inspection, granted rescission.<sup>103</sup> The Supreme Court of North Carolina reversed, holding that although the purchaser's testimony created an inference that the defect that caused the fire existed at the time of sale, the cause of the fire was a question of fact precluding a directed verdict.<sup>104</sup>

To prove the existence of a defect at the time of sale, a purchaser should obtain the opinion of an expert immediately after the breakdown.<sup>105</sup> It may be possible to discover the repair records

99. *Crowther*, 1 All E.R. at 141. The Attorney General's Motor Vehicle Regulations, MASS. ADMIN. CODE tit. 20, § 940 (1980), similarly provides: "All vehicles . . . must be fit to be driven safely on the roads and must remain in good running condition for a reasonable period of time."

100. For example, warranties stating that "seller warrants that this car will run well for 30 days" or "seller warrants that it will repair any powertrain components for the next 60 days," would cover problems that arise during the stated period.

101. MONT. CODE ANN. § 30-2-607(4) (1985) provides: "The burden is on the buyer to establish any breach with respect to the goods accepted." See, e.g., *Walsh v. Atamian Motors*, 10 Mass. App. Ct. 828, 406 N.E.2d 733 (1980); *Entrialgo v. Twin City Dodge, Inc.*, 368 Mass. 812, 333 N.E.2d 202 (1975).

102. 288 N.C. 53, 215 S.E.2d 573 (1975).

103. *Id.* at 60-61, 215 S.E.2d at 577-78.

104. *Id.* at 61-62, 215 S.E.2d at 578.

105. See, e.g., *Calimlim v. Foreign Car Center, Inc.*, 392 Mass. 228, 467 N.E.2d 443 (1984). Cf. *Atamian Motors, Inc.*, 10 Mass. App. Ct. 828, 406 N.E.2d 733.

or procedures of the seller.<sup>106</sup> Some jurisdictions require that the seller reveal to the purchaser the name of the previous owner.<sup>107</sup> With this information, the purchaser can establish a link between the defective car in the hands of the seller and the breakdown.

#### D. *Exclusion of Warranties*

Consideration of warranties must be tempered by the fact that the seller of a used car often disclaims the warranties.<sup>108</sup> The UCC permits a seller to disclaim warranties, either with particularity or simply by including the expression "as is" or its equivalent in the agreement.<sup>109</sup>

Only with difficulty may a seller exclude express warranties, however, for a contradiction arises when the seller both makes and disclaims express warranties. To resolve the contradiction, a court

106. *E.g.*, *Kopischke v. First Continental Corp.*, 187 Mont. 471, 610 P.2d 668 (1980).

107. *E.g.*, Wis. STAT. ANN. § 218.01(7a)(b) (West 1982).

108. A sample disclaimer reads as follows:

**EXCLUSIONS OF WARRANTIES:** The parties agree that the implied warranties of MERCHANTABILITY and fitness for a particular purpose and all other warranties, express or implied, are EXCLUDED from this transaction and shall not apply to the goods sold.

WHITE & SUMMERS, *supra* note 21, § 12-5 at 440.

109. MONT. CODE ANN. § 30-2-316 (1985) provides:

**EXCLUSION OR MODIFICATION OF WARRANTIES.**

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (30-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

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

(3) Notwithstanding subsection (2):

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty;

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him;

....

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this chapter on liquidation or limitation of damages and on contractual modification of remedy (30-2-718 and 30-2-719).

may give effect to the express warranty.<sup>110</sup> For example, if a seller markets a 1982 Buick Skylark "as is," the seller has used language ("as is") that effectively disclaims express and implied warranties. Nevertheless, the purchaser has obtained warranties that the vehicle will conform to the description ("1982 Buick Skylark") and arguably, that it will perform as a car. In *Society National Bank v. Pemberton*,<sup>111</sup> the seller told the purchaser, prior to the purchase, that the vehicle was suitable for snow plowing. The written agreement contained a disclaimer of warranties. The court held that while the disclaimer effectively excluded implied warranties, it failed to exclude an express warranty that was part of the basis of the bargain.<sup>112</sup> Similarly, in *Whitaker v. Farmhand, Inc.*,<sup>113</sup> the Montana Supreme Court stated:

Even if the Farmhand disclaimer had been made prior to the sale, such disclaimer would not have been effective to destroy the express warranties made in the brochure and by Bick [the dealer]. In 1 Anderson Uniform Commercial Code, § 2-316:28, p. 698, it is stated:

"When there is a conflict between a specific express warranty and a clause which in general language excludes all warranties, the specific warranty provision prevails."<sup>114</sup>

While the reasoning of these courts is correct on the issue of contradictory warranties, they overlook the preliminary issue of whether the written agreement contained a merger clause. If the agreement did contain a merger clause, the courts neglected to analyze whether evidence of the oral representation was admissible under the parol evidence rule.<sup>115</sup> It may be that the courts' neglect was intentional.<sup>116</sup>

Even when the seller has not disclaimed implied warranties, the purchaser's failure to examine the goods may have the effect of

110. MONT. CODE ANN. § 30-2-316(1) (1985).

111. 63 Ohio Misc. 26, 17 Ohio Ops. 3d 342, 409 N.E.2d 1073 (1979).

112. *Id.* at 29-30, 17 Ohio Ops. 3d at —, 409 N.E.2d at 1076-77.

113. 173 Mont. 345, 567 P.2d 916 (1977).

114. 173 Mont. 345, 355, 567 P.2d 916, 921-22. In *Schlenz v. John Deere Co.*, 511 F. Supp. 224, 228 (D.C. Mont. 1981), the court cited *Whitaker* in finding the seller's disclaimer of express warranties ineffective to destroy an express warranty contained in an owner's manual.

115. MONT. CODE ANN. § 30-2-316 annot. Official Comment 3 (1985) provides:

The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses.

It might be noted that the seller is protected against true allegations as well. See *supra* text accompanying notes 59-62.

116. WHITE & SUMMERS, *supra* note 21, § 2-12 at 91-95. See also *supra* note 22.

a disclaimer. The UCC provides that where a purchaser has examined the goods, there is no implied warranty with regard to defects which the purchaser ought to have noticed.<sup>117</sup> Although this provision produces the equivalent of an "as is" sale, courts seldom apply it to used car sales, for they do not expect purchasers to be capable of noticing mechanical defects.<sup>118</sup>

Although the UCC does not require the "as is" disclaimer to be conspicuous,<sup>119</sup> many courts have read in this requirement.<sup>120</sup> A court can also set aside an exclusion that appears to be unfair. The statute permitting the exclusion of warranties by expressions like "as is" contains the prefatory language "unless the circumstances indicate otherwise. . . ."<sup>121</sup> Situations in which the notice is imposed on an unwary purchaser, particularly after contrary representations are made, may supply such circumstances.<sup>122</sup>

### E. Magnuson-Moss

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Magnuson-Moss)<sup>123</sup> applies only to warrantors of consumer products.<sup>124</sup> The act makes few substantive changes in warranty law. It does not require a seller<sup>125</sup> to give a warranty, but a seller who does give a warranty must make certain disclosures.<sup>126</sup> The seller must designate the warranty as either "full" or "limited."<sup>127</sup> A warrantor who gives a full warranty may not disclaim or

117. MONT. CODE ANN. § 30-2-316(3)(b) (1985).

118. For example, in *Rose v. Epley Motor Sales*, 288 N.C. 59, 215 S.E.2d 573 (1975), the court held that a purchaser who lacked mechanical expertise was not required to discover a defect through a test drive or inspection.

119. MONT. CODE ANN. § 30-2-316(3) (1985). Cf. MONT. CODE ANN. § 30-2-316(2) (1985), which requires that the particular written disclaimer of the implied warranties of merchantability or fitness be conspicuous.

120. WHITE & SUMMERS, *supra* note 21, § 12-6 at 450.

121. MONT. CODE ANN. § 30-2-316(3)(a) (1985).

122. See, e.g., *Knipp v. Weinbaum*, 351 So. 2d 1081 (Fla. Dist. Ct. App. 1977). These circumstances are less likely to arise under the FTC Used Car Trade Regulation Rule, however, for the rule requires the seller to clearly present the disclaimer. See *infra* Part IV.

123. 15 U.S.C. § 2301 *et seq.* (1982).

124. 15 U.S.C. § 2301(1) (1982) provides:

The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

125. The statute is applicable to a "supplier," which is defined as "any person engaged in the business of making a consumer product directly or indirectly available to consumers." 15 U.S.C. § 2301(4) (1982). The term "seller" is used here in the context of the supplier of a used car.

126. 15 U.S.C. §§ 2302-04 (1982).

127. 15 U.S.C. § 2303 (1982).

limit the duration of the implied warranty of merchantability.<sup>128</sup>

While Magnuson-Moss gives consumers a federal claim for relief for breach of warranty, a warranty for purposes of the UCC may not be a warranty for purposes of Magnuson-Moss.<sup>129</sup> For example, a promise that "If for any reason you are dissatisfied with this product, you may return it for a refund of your money," is a UCC warranty but not a Magnuson-Moss warranty, for it neither promises that the goods are free of defects nor contains any time period. An oral promise that "If anything goes wrong with the car in the next 30 days, we will fix it," is a UCC warranty but not a Magnuson-Moss warranty, for it is not written. A used car seller's written promise to repair defects for 30 days on a 50-50 cost basis is a Magnuson-Moss warranty, for it promises that the car will meet a specified level of performance (no defects) over a specified period of time (30 days).

While used car sellers rarely give full warranties, they often give limited warranties such as the preceding example.<sup>130</sup> The giving of a Magnuson-Moss warranty not only triggers the act's disclosure provisions<sup>131</sup> but also bars disclaimer of the implied warranties given by state law, that is, by the UCC. The seller may, however, limit the implied warranty to the duration of a written warranty of reasonable duration.<sup>132</sup> The requirement that sellers may not disclaim implied warranties may be significant for used car purchasers. For example, no longer may a seller give a 30-day express warranty and state, "This warranty is in lieu of all other

128. 15 U.S.C. § 2304 (1982).

129. "Written warranty" is a term of art under Magnuson-Moss. 15 U.S.C. § 2301(6) (1982) 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 or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

130. See FTC Statement, *supra* note 4.

131. 15 U.S.C. §§ 2302-04 (1982). Section 2303 requires the warrantor to designate the warranty as either "full" or "limited." In order to qualify as a full warranty, the warranty must meet minimum standards set forth in § 2304. Because the warranty cited in the text requires the consumer to incur costs, the seller would have to designate it a limited warranty.

132. 15 U.S.C. § 2308 (1982).

warranties, express or implied." By law, the goods must be merchantable.

On the other hand, the limitation of duration of that implied warranty may not be meaningful. An implied warranty means that the goods are merchantable at the time of delivery. The "duration" of an implied warranty, such as 30 days, is an alien concept under the UCC. Possible interpretations of the duration requirement are that it refers to the time during which the purchaser must notify the seller of the defect, or that it operates as a presumption that the defect existed at the time of delivery.<sup>133</sup> If it refers to a statute of limitations, then the time would be unreasonably short.<sup>134</sup>

A violation of Magnuson-Moss constitutes a violation of the Federal Trade Commission (FTC) Act.<sup>135</sup> While the FTC Act does not allow private actions, a consumer could bring an action under the state Consumer Protection Act.<sup>136</sup> Furthermore, Magnuson-Moss permits consumers damaged by a violation of the act to bring private actions. The act provides:

Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—<sup>137</sup>

The statutory language permitting a consumer to recover against a seller who fails "to comply with any obligation under this title" applies to violations of Magnuson-Moss. But the recovery for failure to comply with any obligation "under a written warranty, implied warranty, or service contract" is ambiguous. Does the act permit a consumer to bring an action for breach of any written warranty, implied warranty, or service contract, or an action only for breach of an obligation imposed by the act? The former interpretation would permit a consumer to convert any UCC warranty claim into a Magnuson-Moss action. A successful consumer could thereby recover costs and attorneys' fees, which are expressly permitted in a Magnuson-Moss action<sup>138</sup> but not in a UCC action.

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133. NATIONAL CONSUMER LAW CENTER, SALES OF GOODS AND SERVICES § 26.3.1 (1982 & Supp. 1985).

134. See Schroeder, Private Actions under the Magnuson-Moss Warranty Act, 66 CALIF. L. REV. 1, 20-21 (1978).

135. 15 U.S.C. § 2310(b) (1982).

136. See *infra* Part V.

137. 15 U.S.C. § 2310(d)(1) (1982).

138. 15 U.S.C. § 2310(d)(2) (1982) provides:

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment

This problem was analyzed in *Skelton v. General Motors*.<sup>139</sup> Chevrolet represented that certain automobiles contained THM 350 transmissions; in fact, the transmissions were model THM 200. The trial court found that the representation was not a Magnuson-Moss "written warranty." Even though the statement was included in a document that contained the required Magnuson-Moss disclosures, it was merely a description of the goods. While this creates a warranty under the UCC,<sup>140</sup> Magnuson-Moss requires that a "written warranty" affirm that a product will "meet a specified level of performance over a specified period of time."<sup>141</sup> The Seventh Circuit affirmed.<sup>142</sup>

The court also held that, based on the legislative history, Magnuson-Moss did not create a private cause of action for breach of all written express warranties.<sup>143</sup> The court, however, rejected the trial court's finding that the act permitted a private cause of action when the warrantor makes "other written promises in connection with the same transaction. . . ."<sup>144</sup> The majority held<sup>145</sup> that the term "written warranty" in the damages provision of the act<sup>146</sup> must be interpreted in accordance with the term "written warranty" in the definitions.<sup>147</sup> A dissenting judge stated that the representations were incorporated in the written warranty. He concluded, "[t]he written warranty would then more fully deserve its gold filigree frame."<sup>148</sup>

a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

139. 660 F.2d 311 (7th Cir. 1981).

140. MONT. CODE ANN. § 30-2-313(b) (1985).

141. 15 U.S.C. § 2301(6) (1982).

142. *Skelton*, 660 F.2d at 316 n.7. The court stated:

The district court noted that, by this reading of [Magnuson-Moss], a representation that a "transmission would perform like a THM 350 transmission for the life of the transmission" would constitute a "written warranty," while the representation that a "transmission would perform like a THM 350 transmission" does not. The arbitrariness of this distinction is apparent, but a certain amount of arbitrariness is inevitable whenever a bright line must be drawn.

143. *Id.* at 320. *Contra* *Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 801 (1981), holding that a warranty implied by state law is a Magnuson-Moss warranty for purposes of attorneys' fees.

144. *Skelton*, 660 F.2d at 320 (citing *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1190 (N.D. Ill. 1980)).

145. *Skelton*, 660 F.2d at 323.

146. 15 U.S.C. § 2310(d)(1) (1982).

147. 15 U.S.C. § 2301(6) (1982).

148. *Skelton*, 660 F.2d at 323 (Wood, Jr., J., dissenting).

### F. Unconscionability

The UCC gives courts discretion to declare unconscionable a contract or part of a contract.<sup>149</sup> The provision purposely refrains from defining *unconscionable*, leaving application to the court analyzing the circumstances of each case. Courts most often apply the doctrine in cases where one party lacks bargaining power and the other takes advantage of superior power to exact unfair terms.<sup>150</sup> Inequality of bargaining power or unfair terms alone is insufficient for a finding of unconscionability.

Application of the doctrine may be seen in *Seekings v. Jimmy GMC of Tucson, Inc.*<sup>151</sup> The court held that although the seller of a defective mobile home enjoyed superior bargaining power, the terms it imposed on the purchaser were standard in the industry. The contract was therefore not unconscionable. If the purchaser could not get better terms elsewhere, then it appears that this seller acted fairly. This reasoning is troubling. A seller who can successfully defend itself by saying, "everybody does it" lacks incentive to offer more than minimal terms. Many courts resolve this problem by looking beyond industry standards to determine whether a term is fair. For example, in *Evans v. Graham Ford, Inc.*,<sup>152</sup> the dealer sold the purchaser a truck that had been modified. The warranty covered the truck as manufactured, but excluded the modifications. When problems developed with the modifications, the purchaser attempted to avoid the contract. The court found the disclaimer unconscionable on grounds independent of industry practice: (1) the dealer marketed the truck as a single unit, (2) the dealer knew that the truck was unfit for the purchaser's purposes, and (3) the dealer did not show any commercial necessity for the disclaimer.<sup>153</sup>

Although the statute directs courts to determine whether the

149. MONT. CODE ANN. § 30-2-302 (1985) provides:

UNCONSCIONABLE CONTRACT OR CLAUSE.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

150. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

151. 131 Ariz. 1, 638 P.2d 223 (1981).

152. 2 Ohio App. 3d 435, 442 N.E.2d 777 (1981).

153. *Id.* at 438, 442 N.E.2d at 781.

contract terms were unconscionable "at the time it was made," some courts have looked at events occurring thereafter. In *La Vere v. R.M. Burritt Motors, Inc.*,<sup>154</sup> plaintiff purchased a used truck "as is." The truck travelled only three blocks before breaking down. The court noted that a contract, even if grossly unfair, cannot be set aside on equitable grounds. Nevertheless, the court found the disclaimer of warranties unconscionable, even though the circumstances that made it unconscionable—the breakdown—arose after the sale. The court stated that circumstances existing at the time of formation, including unequal knowledge, unequal bargaining power, and a contract provided by the seller contributed to its finding of unconscionability.<sup>155</sup>

The court reached a proper result in *La Vere*. While it may have reached an equitable result as a small claims court authorized by statute to do substantial justice, it could have reached the same result on established legal grounds. The court stated:

It certainly could not even be claimed by the plaintiff, that the salesman Waterbury's claimed conversation or tactics were in any way fraudulent, unconscionable or out of the ordinary for a used car salesman, with the possible exception of the alleged remark that if the plaintiff was not satisfied with the truck, he "could give it back." Such a remark even if made, is excluded by the Parole [sic] evidence rule.<sup>156</sup>

The court could have regarded the salesman's remark as a fraudulent misrepresentation that induced the sale. In this circumstance, the parol evidence rule would not bar a tender of proof. Because fraud falls within the formation exception to the parol evidence rule, the court should have allowed the purchaser to use evidence of fraud to avoid the contract.<sup>157</sup> On the other hand, the court suggested that it is common knowledge that used car salespersons often employ misleading comments and tactics. It thereby implied that the purchaser should not have relied on the representations.<sup>158</sup>

154. 112 Misc. 2d 225, 446 N.Y.S.2d 851 (Small Claims Ct. Oswego Co. 1982).

155. *Id.* at \_\_\_\_\_, 446 N.Y.S.2d at 853-54.

156. *Id.* at \_\_\_\_\_, 446 N.Y.S.2d at 852.

157. *See supra* text accompanying notes 28-36.

158. This rationale is reminiscent of the argument that an act is not unconscionable because everybody does it. *See supra* text accompanying notes 151-53. On this basis, the industry standards of behavior cannot be raised. Arguably, competition could change behavior if the market rewarded those who raise the standards. Apparently, the opposite is the case.

Moreover, if the test of reliance is whether a reasonable person would have relied, empirical evidence shows that used car purchasers *do* rely on the representations of the sellers. This may occur because the seller often misleads them as to the effect of the misrepresentation. For example, a purchaser may not believe that a car is in "A-1" condition. But if the

In that event, the purchaser may have been unable to satisfy the elements of fraud.<sup>159</sup>

The court also failed to consider a third alternative. The facts of *La Vere* support the argument that the seller created an express warranty when it sold "an automobile." The minimum level of performance thereby warranted was breached when the vehicle broke down after traversing three blocks.<sup>160</sup>

### G. Revocation of Acceptance

Under the "perfect tender" rule of the UCC,<sup>161</sup> a purchaser may reject goods which fail to conform to the contract specifications. The purchaser of a used car will rarely have the opportunity to reject the car on these grounds, however, for on delivery the car will generally appear to be as promised. Should the car later fail, it may be too late to reject.<sup>162</sup> In *Zabriskie Chevrolet, Inc. v. Smith*,<sup>163</sup> however, the court held that a purchaser had not accepted when the car ceased operating 7/10 of a mile from the dealer's place of business and the purchaser immediately stopped payment and returned the car.<sup>164</sup>

UCC section 2-608 may provide the purchaser a second opportunity to escape the deal by permitting revocation of acceptance.<sup>165</sup>

seller also states that it "will stand behind the car 100%," the purchaser may think there is little to lose. The purchaser may later discover that the disclaimer and merger clause have nullified the promise. See FTC Statement *supra* note 4 and text accompanying notes 59-62, 108-22.

159. See *supra* text accompanying notes 41-43.

160. See *supra* text accompanying notes 75-78.

161. MONT. CODE ANN. § 30-2-601 (1985).

162. MONT. CODE ANN. § 30-2-607(2) (1985).

163. 99 N.J. Super. 441, 240 A.2d 195 (1968).

164. The court also found that the warranty limiting the purchaser's remedy to repair was not effective under UCC 2-719(2), which provides that if a limited remedy fails of its essential purpose, a court may award any remedy under the UCC. *Id.* at 447, 240 A.2d at 198. Furthermore, the warranty was not effective because it was not brought to his attention or explained to him and because the disclaimer was not conspicuous. *Id.* at 447-48, 240 A.2d at 198-99.

165. MONT. CODE ANN. § 30-2-608 (1985) provides:

REVOCATION OF ACCEPTANCE IN WHOLE OR IN PART. (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it:

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

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

In many cases, revocation of acceptance affords the purchaser a more desirable remedy than breach of warranty. Generally, the remedy for breach of warranty is the difference between the value of the goods as promised and as delivered, often the cost of repair.<sup>166</sup> Revocation of acceptance, on the other hand, permits the purchaser to rescind the contract.<sup>167</sup> Purchasers who do not want the goods repaired but want to get rid of them will prefer revocation.<sup>168</sup>

Consumer purchasers rarely utilize this section, however, for it presents considerable obstacles.<sup>169</sup> The section permits revocation only if the non-conformity substantially impairs the value of the goods.<sup>170</sup> Furthermore, the purchaser must have accepted the goods either (1) on the assumption that the defect would be cured and it was not cured, or (2) without discovery of the non-conformity at the time of purchase. If the purchaser did not discover the non-conformity at the time of purchase, the non-discovery must have been due to either the difficulty of discovery or the seller's assurances of quality. The purchaser must revoke within a reasonable time after discovery and before any substantial change in the condition of the goods occurs. Most importantly, a court may deny the remedy to a purchaser who takes any steps inconsistent with revocation, such as continuing to drive the car.<sup>171</sup>

In *Bicknell v. B & S Enterprises*,<sup>172</sup> the purchaser attempted to revoke acceptance on the grounds that the contract described

It is not effective until the buyer notifies the seller of it.

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

166. MONT. CODE ANN. § 30-2-714 (1985).

167. A purchaser who obtains revocation may also obtain damages under MONT. CODE ANN. § 30-2-711 (1985).

168. This rationale brought about the enactment of "Lemon Laws." Lemon Laws, however, are generally inapplicable to used cars. See *infra* text accompanying notes 297-300.

169. For an excellent application of the elements of this statute to the sale of a new car, see Druker, *New Cars and UCC Section 2-608: Your Client Isn't Stuck With a Lemon*, 4 CLEARINGHOUSE REV. 177 (1970). See also Highsmith and Havens, *Revocation of Acceptance and the Defective Automobile: The Uniform Commercial Code to the Rescue*, 18 AM. BUS. L. J. 303 (1980).

170. Because UCC § 2-608 focuses on whether the non-conformity substantially impairs the value of the goods to the buyer, some courts have applied a subjective test rather than an objective test of substantial impairment. See, e.g., *Asciolla v. Manter Oldsmobile-Pontiac*, 117 N.H. 85, 370 A.2d 270 (1977).

171. See, e.g., *Charney v. Ocean Pontiac, Inc.*, 17 U.C.C. Rep. Serv. (Callaghan) 982 (Mass. Dist. Ct. 1975) (revocation denied after use); *Pavesi v. Ford Motor Co.*, 155 N.J. Super. 373, 382 A.2d 954 (1978) (revocation granted despite use); *Orange Motors of Coral Gables, Inc. v. Dade Co. Dairies, Inc.*, 258 So. 2d 319 (Fla. App. 1972) (revocation granted with offset for purchaser's use).

172. 160 Ga. App. 307, 287 S.E.2d 310 (1981).

the car as equipped with a radio and air conditioner; in fact, the radio and air conditioner did not function. The court held that she did not have a right to reject under UCC section 2-601, for the seller had not prevented her from inspecting the car. Nor did she have a right to revoke under UCC section 2-608, for neither the difficulty of discovery nor the dealer's assurances induced her acceptance. Although she did not allege breach of warranty, the court noted that since she purchased the vehicle "as is," the fact that the radio and air conditioner failed to function did not constitute a breach of warranty.<sup>173</sup>

Revocation was effective in *Overland Bond and Investment Corp. v. Howard*.<sup>174</sup> After finding ineffective the seller's exclusion of warranties, the court found that a used car was sold with implied warranties. The warranty was breached when the transmission fell out of the car the day after purchase and the brakes failed a week later. The purchaser gave notice of the defects by bringing the car to the seller for repair. The purchaser satisfied the other elements of revocation by showing that the defects were substantial, that the purchaser could not have initially discovered them, and that the seller assured the purchaser they would be cured.<sup>175</sup>

#### H. Conclusion

Although the UCC is not a consumer statute, courts must apply it to consumer purchases of automobiles. In applying the UCC, courts are using law that is appropriate for merchants of equal bargaining power and equal knowledge in an inappropriate setting. Running through the case law, therefore, is an unexpressed tension between the seller's right to withhold information and the purchaser's need to know. Courts often resolve this tension by paying lip service to the statutory rules on parol evidence and disclaimer of warranties, while discarding these provisions when a consumer purchaser has been harmed by the seller's failure to disclose.<sup>176</sup>

173. See *supra* text accompanying notes 108-22.

174. 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972). See also *Stream v. Sportscar Salon, Ltd.*, 91 Misc. 2d 99, 397 N.Y.S.2d 677 (N.Y.C. Civ. Ct. 1977); *Williams v. College Dodge, Inc.*, 11 U.C.C. Rep. Serv. (Callaghan) 958 (Mich. Dist. Ct. 1972).

175. *Overland*, 9 Ill. App. 3d at 360, 292 N.E.2d at 177.

176. See, e.g., *Tigar Motor Co. v. McMurtry*, 204 Ala. 283, 224 So. 2d 638 (1969) (disclaimer delivered after transaction completed); *Orange Motors of Coral Gables, Inc.*, 258 So. 2d 319 (disclaimer not conspicuous); *Williams*, 11 U.C.C. Rep. Serv. (Callaghan) 958 (disclaimer on back, not called to purchaser's attention); *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968) (disclaimer on back of contract); *Stream*, 91 Misc. 2d 99, 397 N.Y.S.2d 677 (language ineffective); *Testo v. Russ Dunmire Oldsmobile, Inc.* 16 Wash. App. 39, 554 P.2d 349 (1976) (disclaimer not negotiated).

Assume, however, that a seller effectively disclaimed all warranties. Would it be possible for a court to grant relief to the purchaser of a defective used car? Under UCC section 2-608, a court may grant revocation for a "non-conformity." Goods are non-conforming when they are not in accordance with the contractual obligations.<sup>177</sup> Does a seller have no obligations when marketing a car "as is?"<sup>178</sup>

In the classic case of *Henningsen v. Bloomfield Motors, Inc.*,<sup>179</sup> the New Jersey Supreme Court invalidated disclaimers of warranty in the sale of a new car on public policy grounds. Perhaps the time has come to recognize that similar policy considerations apply to the sale of used cars as well.

If courts recognized an express warranty in the sale of a used car equivalent to the warranty of merchantability, they would afford purchasers a minimum level of performance. The better solution would be even more straightforward. Requiring the seller to repair or disclose defects would provide both parties with the knowledge necessary for market efficiency and equity.<sup>180</sup> In *Kopischke v. First Continental Corp.*,<sup>181</sup> the court used tort principles to supplant the implied warranty of merchantability. When a defect in a used car might cause personal injury, the court placed the obligation to inspect and repair on the seller.

Unlike warranty liability, tort liability may not reach all defects, but only those that have the capacity to cause personal injury or property damage.<sup>182</sup> In *Kopischke*, for example, the court stopped short of requiring repair of those defects that caused only economic loss. That gap should be bridged.<sup>183</sup> The purchaser of a used car does not have the knowledge to determine the condition of most components that affect safety. Yet the defects may cause personal injury or economic loss. Where the defect may cause personal injury, the law requires repair. Where the defect may cause only economic loss, the law should require disclosure.<sup>184</sup> The mar-

177. MONT. CODE ANN. § 2-106(2) (1985).

178. In *Tricco v. Hynes*, 2 Nfld. & P.E.I. 53 (Nfld. 1971), purchaser bought a used car "as is." A month later, the Highway Department condemned the car as unroadworthy. Because the seller had failed to fulfill the fundamental obligations of the contract, the purchaser was permitted to revoke even though the car had been sold "as is."

179. 32 N.J. 358, 161 A.2d 69 (1960).

180. This hypothesis was subjected to empirical study in McNeil, Nevin, Trubek, and Miller, *Market Discrimination Against the Poor and the Impact of Consumer Disclosure Laws: The Used Car Industry*, 13 L. & Soc'y. Rev. 695 (1979).

181. 187 Mont. 471, 610 P.2d 668 (1980).

182. See *infra* Part VII.B.

183. Examples of corrective legislation are found *supra* Part VIII.

184. A seller may not know in advance which type of injury a defect might cause.

ket price of the car would then reflect its condition.

#### IV. FEDERAL TRADE COMMISSION

##### A. *The Used Motor Vehicle Trade Regulation Rule*

The Federal Trade Commission (FTC) adopted a Used Motor Vehicle Trade Regulation Rule in 1985.<sup>185</sup> While the FTC has actively issued rules or guidelines for numerous industries, rulemaking concerning used cars had a long and tortuous history. In 1975, Congress directed the FTC to issue rules dealing with "warranties and warranty practices in connection with the sale of used motor vehicles."<sup>186</sup> The FTC staff proposed a rule, circulated for comment in May, 1978, which mandated that dealers inspect used cars, disclose defects regarding mechanical and safety components, and disclose warranty coverage, repair cost estimates, and other information. In August, 1981, the FTC issued its final rule; the rule required that dealers disclose only warranty information and certain major defects known to the seller.

In May, 1982, pursuant to the authority of the FTC Improvements Act of 1980,<sup>187</sup> Congress vetoed the rule. In July, 1983, the Supreme Court held the legislative veto provision unconstitutional.<sup>188</sup> Nevertheless, the FTC decided to reconsider the rule. After additional study, it adopted the present rule, which eliminates the requirement that dealers disclose known defects.<sup>189</sup> The rule became effective May 9, 1985.

The rule has two parts. The first part, section 455.1,<sup>190</sup> defines

Whether the seller chooses to repair or disclose, the effect on the market price will be similar. Because *Kopischke* places squarely on the seller the risk of choosing not to repair, the prudent seller may elect to repair.

185. 16 C.F.R. § 455 (1986).

186. 15 U.S.C. § 2309(b) (1982).

187. 15 U.S.C. § 57a-1 (1982).

188. U.S. Senate v. FTC, 463 U.S. 1216 (1983); U.S. House of Representatives v. FTC, 463 U.S. 1216 (1983).

189. See 49 Fed. Reg. 45692-95 (1984). Judicial review of the original rule continues in *Miller Motor Car Corp. v. FTC*, No. 81-4144 (2d Cir. filed \_\_\_\_\_).

190. 16 C.F.R. (1986) § 455.1 provides:

**GENERAL DUTIES OF A USED VEHICLE DEALER; DEFINITIONS.**

(a) It is a deceptive act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce as 'commerce' is defined in the Federal Trade Commission Act:

- (1) To misrepresent the mechanical condition of a used vehicle;
- (2) To misrepresent the terms of any warranty offered in connection with the sale of a used vehicle; and
- (3) To represent that a used vehicle is sold with a warranty when the vehicle is sold without any warranty.

(b) It is an unfair act or practice for any used vehicle dealer, when

the general duties of a used vehicle dealer by prohibiting certain unfair or deceptive acts or practices. The rule provides that it is a deceptive act or practice for a dealer to misrepresent the mechanical condition of a car or to misrepresent the terms of a warranty.<sup>191</sup> These prohibitions derive from the FTC's study of abusive practices in the industry.<sup>192</sup> The study showed that dealers often represent that a vehicle is in perfect condition, that the dealer will repair the vehicle, or that "as is" means something other than an exclusion of warranties. The FTC rule is therefore significant for purchasers. As previously discussed, when a purchaser alleges fraud or breach of warranty, sellers often defend on grounds that the representations are inadmissible under the parol evidence rule, that they are not affirmations of fact, or that the purchaser should not have relied on them.<sup>193</sup> These defenses are not available under the rule.

The second part of the rule, sections 455.2 through 455.5,<sup>194</sup>

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that dealer sells or offers for sale a used vehicle in or affecting commerce as 'commerce' is defined in the Federal Trade Commission Act:

(1) To fail to disclose, prior to sale, that a used vehicle is sold without any warranty; and

(2) To fail to make available, prior to sale, the terms of any written warranty offered in connection with the sale of a used vehicle.

(c) The Commission has adopted this Rule in order to prevent the unfair and deceptive acts or practices defined in paragraphs (a) and (b). It is a violation of this Rule for any used vehicle dealer to fail to comply with the requirements set forth in Secs. 455.2 through 455.5 of this part. If a used vehicle dealer complies with the requirements of Secs. 455.2 through 455.5 of this part, the dealer does not violate this Rule.

191. 16 C.F.R. § 455.1(a)(1)-(2) (1986). The phrase "unfair or deceptive act or practice" is a term of art, reflecting the Federal Trade Commission Act, 15 U.S.C. § 45 (1982).

192. FTC Statement, *supra* note 4.

193. See *supra* text accompanying notes 16-19, 37-43.

194. 16 C.F.R. §§ 455.2 to 455.4 (1986) provide:

455.2. CONSUMER SALES—WINDOW FORM.

(a) *General duty.* Before you offer a used vehicle for sale to a consumer, you must prepare, fill in as applicable and display on that vehicle a "Buyers Guide" as required by this Rule.

(1) Use a side window to display the form so both sides of the form can be read, with the title "Buyers Guide" facing to the outside. You may remove a form temporarily from the window during any test drive, but you must return it as soon as the test drive is over.

(2) The capitalization, punctuation and wording of all items, headings, and text on the form must be exactly as required by this Rule. The entire form must be printed in 100% black ink on a white stock no smaller than 11 inches high by 7 ¼ inches wide in the type styles, sizes and format indicated.

When filling out the form, follow the directions in (b) through (e) of this section and § 455.4 of this part.

(b) *Warranties*—

(1) *No Implied Warranty—"As Is"/No Warranty.*

requires the dealer to provide specific disclosures on a window

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(i) If you offer the vehicle without any implied warranty, i.e., "as is", mark the box provided. If you offer the vehicle with implied warranties only, substitute the disclosure specified below, and mark the box provided. If you first offer the vehicle "as is" or with implied warranties only but then sell it with a warranty, cross out the "As Is—No Warranty" or "Implied Warranties Only" disclosure, and fill in the warranty terms in accordance with paragraph (b)(2) of this section.

(ii) If your state law limits or prohibits "as is" sales of vehicles, that state law overrides this part and this rule does not give you the right to sell "as is." In such states, the heading "As Is—No Warranty" and the paragraph immediately accompanying that phrase must be deleted from the form, and the following heading and paragraph must be substituted. If you sell vehicles in states that permit "as is" sales, but you choose to offer implied warranties only, you must also use the following disclosure instead of "As Is—No Warranty".

#### **IMPLIED WARRANTIES ONLY**

This means that the dealer does not make any specific promises to fix things that need repair when you buy the vehicle or after the time of sale. But, state law "implied warranties" may give you some rights to have the dealer take care of serious problems that were not apparent when you bought the vehicle.

(2) *Full-Limited Warranty.* If you offer the vehicle with a warranty, briefly describe the warranty terms in the space provided. This description must include the following warranty information:

(i) Whether the warranty offered is "Full" or "Limited." Mark the box next to the appropriate designation.

(ii) Which of the specific systems are covered (for example, "engine, transmission, differential"). You cannot use shorthand, such as "drive train" or "power train" for covered systems.

(iii) The duration (for example, "30 days or 1,000 miles, whichever occurs first").

(iv) The percentage of the repair cost paid by you (for example, "The dealer will pay 100% of the labor and 100% of the parts").

(v) If the vehicle is still under the manufacturer's original warranty, you may add the following paragraph below the "Full/Limited Warranty" disclosure: MANUFACTURER'S WARRANTY STILL APPLIES. The manufacturer's original warranty has not expired on the vehicle. Consult the manufacturer's warranty booklet for details as to warranty coverage, service location, etc.

If, following negotiations, you and the buyer agree to changes in the warranty coverage, mark the changes on the form, as appropriate. If you first offer the vehicle with a warranty, but then sell it without one, cross out the offered warranty and mark either the "As Is—No Warranty" box or the "Implied Warranties Only" box, as appropriate.

(3) *Service contracts.* If you make a service contract (other than a contract that is regulated in your state as the business of insurance) available on the vehicle, you must add the following

sticker. The primary disclosure informs the purchaser whether the dealer is marketing the car without a warranty ["AS IS - NO WARRANTY"] or with a warranty ["WARRANTY"]. To prevent any misunderstanding in the sales contract, the rule incorporates the window form into the contract as the terms of the warranty. Additional language in the sticker advises the purchaser of some of the pitfalls of used car sales. For example, the sticker warns that "spoken promises are difficult to enforce" and suggests that the purchaser ask to have the vehicle inspected by a mechanic. The sticker also contains a list of "some major defects that may occur

heading and paragraph below the "Full/Limited Warranty" disclosure and mark the box provided.

#### **SERVICE CONTRACT**

A service contract is available at an extra charge on this vehicle. If you buy a service contract within 90 days of the time of sale, state law "implied warranties" may give you additional rights.

(c) *Name and Address.* Put the name and address of your dealership in the space provided. If you do not have a dealership, use the name and address of your place of business (for example, your service station) or your own name and home address.

(d) *Make, Model, Model Year, VIN.* Put the vehicle's name (for example, "Chevrolet"), model (for example, "Vega"), model year, and Vehicle Identification Number (VIN) in the spaces provided. You may write the dealer stock number in the space provided or you may leave this space blank.

(e) *Complaints.* In the space provided, put the name and telephone number of the person who should be contacted if any complaints arise after sale.

#### **455.3. WINDOW FORM.**

(a) *Form given to buyer.* Give the buyer of a used vehicle sold by you the window form displayed under § 455.2 containing all of the disclosures required by the Rule and reflecting the warranty coverage agreed upon. If you prefer, you may give the buyer a copy of the original, so long as that copy accurately reflects all of the disclosures required by the Rule and the warranty coverage agreed upon.

(b) *Incorporated into contract.* The information on the final version of the window form is incorporated into the contract of sale for each used vehicle you sell to a consumer. Information on the window form overrides any contrary provisions in the contract of sale. To inform the consumer of these facts, include the following language conspicuously in each consumer contract of sale:

The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.

#### **455.4. CONTRARY STATEMENTS.**

You may not make any statements, oral or written, or take other actions which alter or contradict the disclosures required by §§ 455.2 and 455.3. You may negotiate over warranty coverage, as provided in § 455.2(b) of this part, as long as the final warranty terms are identified in the contract of sale and summarized on the copy of the window form you give to the buyer.

in used motor vehicles." Unlike earlier drafts, the rule does not require the dealer to disclose whether the particular vehicle suffers from any of the defects. It simply puts the purchaser on notice of things to look for.

### B. Remedies

If a dealer violates the rule, a purchaser has only limited remedies. Because the FTC Act contains no provision for private claims, enforcement is the responsibility of the FTC.<sup>195</sup> And since its resources are limited, the FTC can undertake only prosecutions that serve the public interest, not the interest of one injured purchaser.<sup>196</sup> Furthermore, the burden of proving a violation of the first part of the rule, which prohibits deceptive acts and practices, differs from the burden of proving a violation of the second part of the rule, requiring various disclosures. The explanation may be clarified by discussion of the FTC's rule-making authority.

When the FTC prosecutes a violation of the FTC Act, it must prove that the respondent committed an "unfair or deceptive act or practice."<sup>197</sup> Since 1962, the FTC has been issuing "trade regulation rules" that delineate specific practices it considers unfair or deceptive. If the respondent violates a rule, the FTC does not have to prove that the prohibited practice is unfair or deceptive; violation of a rule is *ipso facto* a violation of the Act.<sup>198</sup>

This distinction appears in the Used Motor Vehicle Trade Regulation Rule. The rule expressly provides that a violation of sections 455.2 through 455.5, requiring disclosure, is a violation of the rule.<sup>199</sup> Therefore, the burden on the FTC to prove that a dealer failed to make a required disclosure is straightforward: violation of the rule is a violation of the FTC Act. By negative implication, violation of section 455.1, prohibiting unfair or deceptive acts or practices, is not a violation of the rule. Violation of section 455.1 is, however, a violation of the FTC Act.<sup>200</sup> For the FTC to

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195. *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973).

196. 15 U.S.C. § 45(b) (1982).

197. 15 U.S.C. § 45(a) (1982). Similarly, if the violation were the basis of a private action under the CPA, a consumer does not have to prove that conduct proscribed by a rule is unfair or deceptive; in the absence of a rule, the consumer would have to do so.

198. The rulemaking power of the FTC was upheld in *National Petroleum Refiners Assn. v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

199. 16 C.F.R. § 455.1(c) (1986).

200. The rule is not a model of clarity. Section 455.1(c) provides: "If a used vehicle dealer complies with the requirements of §§ 455.2 through 455.5 of this part, the dealer does not violate this Rule." This statement may lead the unwary to believe there is no remedy for violation of § 455.1.

prove that a dealer misrepresented the mechanical condition of a car or the terms of a warranty, therefore, it would also have to prove that the particular misrepresentation constituted an unfair or deceptive act or practice. Proof that the misrepresentation occurred would not in itself suffice.

### C. Conclusion

The present rule is considerably weaker than earlier versions, for it does not require the dealer to disclose known defects. Instead, it prohibits certain practices and requires the dealer to clarify the contract terms, notably the meaning of sale "as is." Many disputes between dealers and purchasers arise because of alleged discrepancies between the bargain discussed orally and the written agreement. Clarification will undoubtedly prove helpful to purchasers, whether they have failed to understand or have been misled by sellers. It should prove advantageous to dealers as well. If they comply with the required disclosures, fewer misunderstandings should arise. While FTC enforcement of the rule may be limited, the rule provides assistance to purchasers who bring private actions under state law.<sup>201</sup> The ability of a purchaser to bring a private action is the subject of the next section.

## V. MONTANA CONSUMER PROTECTION ACT

The Montana Consumer Protection Act (CPA),<sup>202</sup> prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce."<sup>203</sup> Modeled after the FTC Act and known as a "Little FTC Act," the CPA provides for actions to be brought by the state, either by the Department of Commerce, the Attorney General or a County Attorney.<sup>204</sup> Most importantly, the CPA goes beyond the FTC Act by permitting a private right of action.<sup>205</sup> While

201. See *infra* Part V.

202. MONT. CODE ANN. §§ 30-14-101 to -142 (1985).

203. MONT. CODE ANN. § 30-14-103 (1985).

204. MONT. CODE ANN. §§ 30-14-111 to -115, -121 (1985).

205. MONT. CODE ANN. § 30-14-133 (1985) provides in part:

DAMAGES—NOTICE TO PUBLIC AGENCIES—ATTORNEY FEES—PRIOR JUDGMENT AS EVIDENCE. (1) Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by 30-14-103 may bring an individual but not a class action under the rules of civil procedure in the district court of the county in which the seller or lessor resides or has his principal place of business or is doing business to recover actual damages or \$200, whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained and may provide such equitable relief as it considers necessary

the CPA may prove very useful to the purchaser of a used car, a number of questions raised by the statute have not been answered.<sup>206</sup>

The CPA provides a private right of action only to a person who purchases for "personal, family, or household purposes."<sup>207</sup> A person who purchases a car for business purposes, therefore, could not bring an action under the statute. It is not clear, however, whether the act applies to private sales, such as a sale through a classified advertisement, as well as to purchases from dealers. While the act broadly defines "trade" and "commerce,"<sup>208</sup> the legislature may have intended that it be applied only where the public interest would be affected. The FTC Act, by comparison, expressly requires public interest in the proceeding as a prerequisite for FTC action.<sup>209</sup> Montana may have concurred with this view when it adopted administrative rules that apply only to dealers.<sup>210</sup>

On the other hand, in *Matthews v. Berryman*,<sup>211</sup> the defendant asked the court to apply the act to an attorney performing services for an individual, an apparently private transaction. While the court did not address the question of whether the act applied to the transaction, it found that the acts complained of were not unfair or deceptive.<sup>212</sup> Logically, this issue should not have been reached unless the act applied. Perhaps the actions of an attorney involve the public interest to a greater degree than an individual's one-time sale of a car.<sup>213</sup> It seems persuasive that public resources

or proper.

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(3) In any action brought under this section, the court may award the prevailing party reasonable attorney fees incurred in prosecuting or defending the action.

206. The CPA is patterned after the Unfair Trade Practices and Consumer Protection Law developed by the FTC in conjunction with the Committee on Suggested State Legislation of the Council of State Governments. The legislative history and the case law of other states with similar legislation is a valuable source for interpretation. See NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 1.2 (1982).

207. MONT. CODE ANN. § 30-14-133 (1985).

208. MONT. CODE ANN. § 30-14-102(6) (1985) provides:

"Trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state.

209. 15 U.S.C. § 45(b) (1982) provides for Commission action "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public. . . ."

210. MONT. ADMIN. R. § 8.78.201(4) (1981).

211. 196 Mont. 49, 637 P.2d 822 (1981).

212. *Id.* at 55, 637 P.2d at 826.

213. While a substantial number of used car sales are private, the number of complaints against dealers is proportionately greater. See FTC Statement, *supra* note 4, at

should not be expended in resolving disputes that do not involve the public interest. Therefore, the purchaser of a used car from a private seller should not be permitted to invoke the act absent a demonstration that the sale affects the public.<sup>214</sup>

If the transaction is within the scope of the CPA, a purchaser should find it easier to prove the claim than to prove a UCC or common law claim. Under the CPA, a consumer must prove that (1) the seller employed an unfair or deceptive act or practice which (2) resulted in an ascertainable loss of money or property.<sup>215</sup> Because the issue under the CPA is whether the seller engaged in the act or practice, and not whether the seller's representation was incorporated in the contract, the parol evidence rule would not bar evidence of the seller's statement. Nor would the seller's "as is" exclusion of warranties preclude an action. In *T & W Chevrolet v. Darvial*,<sup>216</sup> the court found that the seller committed an unfair or deceptive act or practice, even though the car was sold "as is."

A claim under the CPA, unlike a claim in fraud, need not allege that the seller knew the representation was false,<sup>217</sup> nor that the purchaser actually relied on it.<sup>218</sup> In *Testo v. Russ Dunmire Oldsmobile, Inc.*,<sup>219</sup> the Washington Court of Appeals held that a seller violated the Washington CPA when it sold a car that had been modified and used for racing without disclosing those facts to the purchaser. The court rejected the seller's argument that the act required an allegation of misrepresentation, holding that the seller's good faith and the purchaser's actual deception were irrelevant.<sup>220</sup>

In a case arising under the act, one of the most difficult issues is to determine whether the act or practice complained of is unfair or deceptive. To construe the "unfair or deceptive" standard, the statute expressly refers to the FTC Act and to rules promulgated by the Montana Department of Commerce.<sup>221</sup> The only FTC rule

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45,702.

214. See, e.g., *Allen v. Anderson*, 15 Wash. App. 446, 557 P.2d 24 (1976); but see *People ex rel. Scott v. Lavance*, 105 Ill. App. 3d 171, 434 N.E.2d 5 (1982).

215. *Scott v. Western Int'l Surplus Sales, Inc.*, 267 Or. 512, 517 P.2d 661 (1973) (act applied when article was not as promised even though equal in value).

216. 196 Mont. App. 287, 641 P.2d 1368 (1982). Parenthetically, *Darvial* was the plaintiff; the parties' names were reversed when the case was reported.

217. *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967).

218. *United States Retail Credit Assn. v. FTC*, 300 F.2d 212, 221 (4th Cir. 1962).

219. 16 Wash. App. 39, 554 P.2d 349 (1976).

220. *Id.* at 50-51, 554 P.2d at 357-58.

221. MONT. CODE ANN. § 30-14-104 (1985). The Montana Supreme Court has upheld this statutory scheme of delegation of authority. *Kopischke v. First Continental Corp.*, 187 Mont. 471, 610 P.2d 668 (1980); *T & W Chevrolet v. Darvial*, 196 Mont. 287, 641 P.2d 1368

directly applicable to the used car industry is the FTC Trade Regulation Rule on Sale of Used Motor Vehicles.<sup>222</sup> To satisfy the element of the CPA that the seller committed an unfair or deceptive act or practice, the purchaser could show that the seller violated the second part of the rule.<sup>223</sup> To show that the seller violated the first part of the rule,<sup>224</sup> the purchaser would also have to prove that the act or practice was deceptive.<sup>225</sup> To prove that an act or practice is unfair or deceptive, the purchaser can look beyond the Rule on Sale of Used Motor Vehicles. Acts or practices prohibited in other industries and case law may be used by analogy.<sup>226</sup>

The Department of Commerce has issued extremely detailed administrative rules concerning motor car sales.<sup>227</sup> In *T &*

(1982).

222. 16 C.F.R. § 455 (1986).

223. 16 C.F.R. §§ 455.2-.5 (1986). *See supra* text accompanying notes 194-200.

224. 16 C.F.R. § 455.1 (1986). *See supra* text accompanying notes 185-96.

225. *See supra* Part IV.

226. FTC Guides and Trade Practice Rules for various industries are found in 16 C.F.R. ch. 1 (1986).

227. MONT. ADMIN. R. § 8.78.204 (1981) provides:

**MOTOR VEHICLE SALES.** It shall be an unfair or deceptive act or practice for a motor vehicle dealer to:

(1) represent, either directly or indirectly, that any motor vehicle advertised or sold is an "executive vehicle" unless the vehicle has been used exclusively by its manufacturer, its distributor or a dealer for the commercial or personal use of the manufacturer's, subsidiary's or dealer's employees;

(2) represent either directly or indirectly that certain motor vehicles advertised or sold by the dealer are "demonstrators" or "demos" unless such vehicles have been driven by prospective customers of that or another dealership selling the vehicles;

(3) represent the previous usage or status of a motor vehicle to be something that, in fact, it was not; or make such representations unless the dealer has sufficient information to support the representation;

(4) represent the quality of care, regularity of servicing or general condition of any motor vehicle unless supportable by material fact;

(5) represent that a motor vehicle has not sustained substantial structural or skin damage unless such statement is made in good faith and unless such vehicle has been inspected by the dealer, his agent or representative to determine whether or not such vehicle has incurred such damage in the past;

(6) fail to fully and conspicuously disclose in writing at or before the consummation of sale any warranty or guarantee terms, obligations and conditions that the dealer or manufacturer has given to the buyer of the motor vehicle. If the warranty obligations are to be shared by both the dealer and the buyer then the methods of determining the percentage of monetary repair costs to be assumed by both parties shall also be disclosed. If the dealer intends to disclaim any expressed or implied warranties then he shall make such disclaimer in writing in a conspicuous manner;

(7) fail to honor his expressed warranty agreement or any warran-

*W Chevrolet*, the Montana Supreme Court affirmed the trial court's finding that a seller who represented a car with a cracked frame as "in perfect condition" and "completely gone over" violated the CPA.<sup>228</sup> The court did not cite or discuss the specific FTC decisions or administrative rules the seller violated, but noted that the seller's description of the condition of the car constituted a misrepresentation.<sup>229</sup>

No case in Montana has construed the statutory requirement of an "ascertainable loss."<sup>230</sup> A purchaser's out-of-pocket repair costs would clearly qualify, as would the purchaser's loss of the bargain when the goods as delivered were less valuable than the goods as promised. A purchaser is on shakier ground when claiming that the goods as delivered differ in description from the goods as promised but are not less valuable. In *Hinchliffe v. American Motors Corp.*,<sup>231</sup> the purchaser alleged that a car sold with four-wheel drive did not actually offer full-time four-wheel drive. Because it was a standard feature on the car, he had not paid more

ties implied by law;

(8) misrepresent warranty coverage, application period, any warranty transfer costs to the customer or conditions which are given by the dealer, factory or other party;

(9) obtain signatures from customers on contracts which are not fully completed at the time signed or which do not reflect accurately the negotiations and agreement between the customer and the dealer;

(10) require or accept a deposit from a prospective customer prior to entering into a mutually binding valid contract for the purchase and sale of a motor vehicle unless the customer is given a written receipt which states how long the dealer will hold the motor vehicle from other sale, the amount of the deposit, and clearly and conspicuously states whether the deposit is refundable or nonrefundable and upon what conditions;

(11) add to the cash price of the motor vehicle a fee for routine handling of documents and forms essential to the transfer of ownership to customers, or a fee for any other ordinary and customary business overhead expense (otherwise known as a "documentary fee") unless the fee is fully disclosed to customers in all mutually binding valid contracts concerning the motor vehicle's selling price;

(12) alter or change the odometer mileage of the motor vehicle;

(13) fail to disclose to any customers the actual year model of the motor vehicle;

(14) fail to transfer title to a vehicle as soon as is reasonably possible after sale of the vehicle to a customer;

(15) fail to disclose to a customer, in writing, at or prior to the time of sale, that taxes, if any, are due and owing on the vehicle to be sold;

(16) engage in any unfair or deceptive acts or practices.

228. *T & W Chevrolet v. Darvial*, 196 Mont. 287, 641 P.2d 1368.

229. *Id.* at 289, 641 P.2d at 1369.

230. MONT. CODE ANN. § 30-14-133 (1985).

231. 184 Conn. 607, 440 A.2d 810 (1981). The customer later lost on the merits. 192 Conn. 252, 470 A.2d 1216 (1984).

for it. On defendant's motion to dismiss, the court held that the statute required a showing of a loss. Although the consumer had not suffered damages, he had alleged a loss.<sup>232</sup>

A successful claimant under the CPA can recover the greater of actual damages or \$200. For example, if the actual damages are \$10, the court may award \$200. The court may also award exemplary damages of up to three times the actual damages, and may provide equitable relief. In *T & W Chevrolet*, the court upheld an award of exemplary damages of \$750 and rescission of the transaction.<sup>233</sup> The court cited neither legal authority for the award of rescission nor the factual basis for the exemplary damages. Presumably the statute permits rescission since it allows the court to provide "such equitable relief as it considers necessary or proper."<sup>234</sup> Apparently the trial court found actual damage in the amount of the purchase price. The Montana Supreme Court, however, found that there was no award of actual damages.<sup>235</sup> Since the statute allows exemplary damages based on actual damages, the decision indicates that the court will liberally construe and apply the CPA remedies.

Unlike a claimant under the common law or the UCC, a claimant under the CPA has an expectation of coming out ahead, particularly if the claim is small.<sup>236</sup> In addition to the other remedies, the CPA authorizes the court to award reasonable attorneys' fees to the prevailing party.<sup>237</sup> The provision may also enable the consumer to find an attorney willing to pursue the claim at no out-of-pocket cost. While a court may in theory require a losing consumer to pay the seller's attorneys' fees, it is unlikely to do so if the consumer brings the claim in good faith.<sup>238</sup> Courts vary widely in computing the amount of the fee award in consumer cases. Some courts demonstrate unwillingness to award an amount in excess of the actual recovery; most award on the basis of time expended

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232. *Hinchliffe*, 184 Conn. at 613-20, 440 A.2d at 814-17. See also *Scott*, 267 Or. 512, 517 P.2d 661.

233. 196 Mont. at 293-95, 641 P.2d at 1371-72.

234. MONT. CODE ANN. § 30-14-133 (1985).

235. 196 Mont. at 293, 641 P.2d at 1371.

236. Voltaire is said to have remarked, "I have come close to ruin twice in my life: once when I lost a lawsuit and once when I won one."

237. MONT. CODE ANN. § 30-14-133 (1985).

238. In denying fees in *LaChance v. McKown*, 649 S.W.2d 658 (Tex. Civ. App. 1983), the court articulated this standard: "For attorney's fees to be awarded to the defendants under [the CPA], the jury must find that the suit was brought in bad faith, or for the purpose of harassment, and the court must then conclude upon such findings that the suit was groundless." See also *Johnny Crews Ford, Inc. v. Llewellyn*, 353 So. 2d 607 (Fla. Dist. Ct. App. 1977) (fees awarded to merchant; standard not articulated).

even if the actual recovery is small.<sup>239</sup>

## VI. THE FEDERAL ODOMETER ACT

Tampering with odometers is a widespread problem of particular significance to consumers.<sup>240</sup> The consumer purchaser cannot detect the tampering, even with a thorough inspection. Because mileage is a significant factor in determining the condition and value of a used car, the tampering seriously skews the market.<sup>241</sup> The purchaser of a tampered car not only pays too much, but assumes the risk of mechanical failure that was not reasonably foreseeable.

The Federal Odometer Act<sup>242</sup> prohibits tampering with odometers on motor vehicles and imposes disclosure on sellers. The act makes it unlawful for any person to disconnect, reset, or alter the odometer of any vehicle. A transferor, whether dealer or private seller,<sup>243</sup> must provide a written, signed disclosure statement before the transfer is complete. The statement must certify that the odometer reading is either (1) correct, (2) correct in excess of 99,999 miles, or (3) incorrect.<sup>244</sup> A transferor who provides a false statement violates the act. The act provides for a private civil action in which the purchaser can recover the greater of three times the actual damages or \$1500,<sup>245</sup> plus costs and reasonable attorneys' fees.<sup>246</sup>

The weakness of the act is the difficulty of proof: it requires proof of the defendant's intent to defraud.<sup>247</sup> Courts are divided as to whether plaintiff must show actual knowledge or whether constructive knowledge is sufficient. That is, if a seller does not actually tamper with the odometer but should reasonably know from

239. See, e.g., *Earl v. Beaulieu*, 620 F.2d 101 (5th Cir. 1980) (Truth-in-Lending claim; judgment for \$220, attorneys' fees of \$220); *Watkins v. Roach Cadillac, Inc.*, 7 Kan. App. 8, 637 P.2d 458 (1981) (CPA claim; judgment for \$2000, attorneys' fees of \$3000); *Duncan v. Luke Johnson Ford, Inc.*, 603 S.W.2d 777 (Tex. 1980) (CPA claim; judgment for \$150, attorneys' fees of \$3500).

240. 15 U.S.C. § 1981 (1982).

241. *Id.*

242. The Federal Odometer Act, 15 U.S.C. §§ 1981-91 (1982), is part of the Motor Vehicle Information and Cost Savings Act.

243. 49 C.F.R. § 580.3 (1986).

244. 15 U.S.C. § 1984 (1982).

245. In *Delay v. Hearn Ford*, 373 F. Supp. 791 (D. S.C. 1974), a purchaser traded in his car, then repurchased it a few weeks later. He discovered that the car he traded in with 70,000 miles on it now had 49,000. In denying seller's motion for summary judgment, the court stated that this was an appropriate case for recovery of the minimum damages of \$1500, for there were no actual damages. *Id.* at 795-96.

246. 15 U.S.C. § 1989 (1982).

247. 15 U.S.C. § 1989(a) (1982) requires "intent to defraud."

the circumstances that tampering occurred, does that seller intend to deceive the purchaser when it certifies that the odometer is correct? In *Jones v. Fenton Ford, Inc.*,<sup>248</sup> the previous owner had informed the seller that the odometer was inaccurate. The seller misinformed the purchaser due to an alleged "clerical error." The court held that the act applies to sellers who recklessly disregard the truth as well as to sellers who intentionally deceive. In contrast, *Mataya v. Behm Motors, Inc.*,<sup>249</sup> held that the statute requires actual knowledge and not constructive knowledge.

The reasoning in *Jones* seems more consistent with the legislative intent expressed in the statute, which emphasizes purchasers' reliance on the information.<sup>250</sup> The Senate Report stated:

the test of "knowingly" was incorporated so that the auto dealer with expertise now would have an affirmative duty to mark 'true mileage unknown' if, in the exercise of reasonable care, *he would have reason to know* that the mileage was more than that which the odometer had recorded or which the previous owner had certified.<sup>251</sup>

In *Nieto v. Pence*,<sup>252</sup> the court adopted a standard more like that of the Senate Report, holding that intent may be inferred if the seller "reasonably should have known that a vehicle's odometer reading was incorrect." The considerable reliance by the purchaser coupled with the superior knowledge of the seller support shifting this risk to the seller.<sup>253</sup> A seller who has any doubt could escape liability under the act by refraining from certifying the reading as correct.

A purchaser might be able to circumvent the problems of

248. 427 F. Supp. 1328 (D. Conn. 1977).

249. 409 F. Supp. 65 (E.D. Wis. 1976).

250. 15 U.S.C. § 1981 (1982) provides:

FINDINGS AND PURPOSE. The Congress hereby finds that purchasers, when buying motor vehicles, rely heavily on the odometer reading as an index of the condition and value of such vehicle; that purchasers are entitled to rely on the odometer reading as an accurate reflection of the mileage actually traveled by the vehicle; that an accurate indication of the mileage traveled by a motor vehicle assists the purchaser in determining its safety and reliability; and that motor vehicles move in the current of interstate and foreign commerce or affect such commerce. It is therefore the purpose of this title to prohibit tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchasers with respect to the sale of motor vehicles having altered or reset odometers.

251. Senate Report No. 92-413, U.S. CODE CONG. & AD. NEWS (1972), 3971-72 (emphasis added).

252. 578 F.2d 640, 642 (5th Cir. 1978).

253. A broad reading of the statute is supported by *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W. Va. 1975), in which the court stated that the purpose of the act is to reward purchasers who discover tampering and bring it to the attention of the courts.

proof posed by the act by stating an additional claim for relief for odometer tampering under the state Consumer Protection Act. Under the CPA, a consumer need not prove intent. The administrative rules state that it is an unfair or deceptive act or practice for a motor vehicle dealer to "alter or change the odometer mileage of the motor vehicle."<sup>254</sup> Under this rule, the change itself, irrespective of intent, constitutes a violation. The dealer might defend on grounds that even if it sold a tampered vehicle, it did not do the tampering. This defense would run afoul of the administrative rule that makes it an unfair or deceptive act or practice for a dealer to "represent the previous usage or status of a motor vehicle to be something that, in fact, it was not."<sup>255</sup> Even if the dealer made no affirmative statement about mileage, the odometer reading is itself a representation. As between an innocent dealer and an innocent purchaser, the risk of loss should be placed on the dealer, who is in a better position to inspect or otherwise obtain information about the vehicle.

## VII. CLAIMS AGAINST THE MANUFACTURER

### A. Introduction

By definition, a used car has been sold at least once prior to the present purchase. At a minimum, the car has gone through this chain of sales: manufacturer—original dealer—original purchaser—present dealer—present purchaser. When defects arise, the present purchaser usually presses a claim against the present dealer. A claim against the dealer in warranty may fail because of disclaimers; a claim in tort may be difficult to prove.<sup>256</sup>

If the court bars a claim against the dealer, or if the dealer is not available as a defendant, the purchaser may wish to look to other parties in the chain of sales. In contract theory, the purchaser is in "privity" with only the present dealer. When suing in contract for breach of warranty, the doctrine of privity may bar the present purchaser from reaching back to others in the chain.<sup>257</sup> A purchaser may reach those parties if (1) the court recognizes a theory that dispenses with privity, or (2) they voluntarily submit to adjudication of their liability, or (3) they are compelled to adjudicate it.

254. MONT. ADMIN. R. § 8.78.204(12) (1981).

255. MONT. ADMIN. R. § 8.78.204(3) (1981).

256. See *supra* Parts II.C. and III.

257. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS §§ 97-98 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

## B. Products Liability

Purchasers may have difficulty asserting claims against previous individual owners, for implied warranties are given only by merchants and strict liability in tort is premised on enterprise liability.<sup>258</sup> Purchasers will therefore look to the manufacturer and to dealers in the sales chain as potential defendants. If the law imposed liability on a manufacturer or dealer, the absence of privity and warranty would not bar the present purchaser's claim. Purchasers have attempted to impose such liability on manufacturers and dealers in negligence, in warranty, and in strict tort liability.<sup>259</sup>

### 1. Negligence

Because a negligence claim dispenses with the privity requirement, present purchasers may bring the claim against a remote manufacturer. While a negligence claim is usually brought for personal injury, the manufacturer's negligence may expose it to liability for harm to the car itself.<sup>260</sup> In general, courts deny recovery in negligence for loss of the bargain. In *Seely v. White Motor Co.*,<sup>261</sup> Justice Traynor reasoned:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands.<sup>262</sup>

In *Wyatt v. Cadillac Motor Car Division*,<sup>263</sup> the court held that the manufacturer's duty was limited to seeing that the goods were free

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258. MONT. CODE ANN. § 30-2-314 (1985); RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965).

259. See *Streich v. Hilton-Davis, A Division of Sterling Drug, Inc.*, \_\_\_ Mont. \_\_\_, 692 P.2d 440 (1984), finding theories of warranty, negligence, and strict liability applicable to a claim against a manufacturer for damage caused by defective goods. The practical attorney will note that even if a court can be persuaded to apply these doctrines, it may not award attorneys' fees in claims based on them.

260. RESTATEMENT (SECOND) OF TORTS § 395 comment c (1965).

261. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

262. *Id.* at \_\_\_, 403 P.2d at 151, 45 Cal. Rptr. at 23.

263. 145 Cal. 2d 423, 302 P.2d 665 (1956).

from defects that might produce bodily injury or damage to other property. On the other hand, in *State ex rel. Western Seed Production Corp. v. Campbell*,<sup>264</sup> the Supreme Court of Oregon found a manufacturer liable for foreseeable economic loss. The difficulty a purchaser may have proving negligence combined with the difficulty of securing an award for economic loss makes negligence problematic for the purchaser of a used car.<sup>265</sup>

## 2. Warranty

Strict liability in warranty is a troubling concept, for warranty partakes of both contract and tort.<sup>266</sup> To impose on manufacturers warranty liability to remote purchasers, courts would have to dispense with the contract concepts of privity, notice, and disclaimers.<sup>267</sup> In *Henningsen v. Bloomfield Motors, Inc.*,<sup>268</sup> the Supreme Court of New Jersey found a manufacturer and dealer liable to the purchaser on a theory of implied warranty of safety, without privity and without negligence. The court declared the warranty disclaimers contrary to public policy. The law might have continued to develop in the direction of strict liability in warranty, were it not for the explosion of the doctrine of strict tort liability.<sup>269</sup> If contract barriers such as disclaimers block recovery, a court could eliminate these barriers rather than apply a tort theory.<sup>270</sup>

## 3. Strict Tort Liability

A claim of strict liability in tort gives purchasers the best of both worlds, for the claim does not require proof of either privity

264. 250 Or. 262, 269-70, 442 P.2d 215, 218 (1968) (citing Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases, 18 STAN. L. REV. 974, 989 (1966)).

265. Negligence claims against a dealer are discussed *supra* Part II.B. See the discussion of the negligence claim in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) in PROSSER & KEETON, *supra* note 257, § 99.

266. Warranty is "a freak hybrid born of the illicit intercourse of tort and contract." Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1126 (1960).

267. Under the UCC, a purchaser may not recover on a warranty without giving notice to the seller within a reasonable time after the breach. MONT. CODE ANN. § 30-2-607(3) (1985). See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

268. 32 N.J. 358, 161 A.2d 69 (1960).

269. PROSSER & KEETON, *supra* note 257, § 98. See also Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

270. On the use of the doctrine of unconscionability to eliminate the barriers, see *supra* Part III.F. In *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965), the court stated that strict liability in tort is "hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitation through inconsistencies with express warranties."

or negligence.<sup>271</sup> Strict liability, however, arises only "where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."<sup>272</sup> Applying the doctrine to the sale of used cars raises a number of thorny questions. Should it apply to the sale of used goods, when the product may not be defective, but merely worn out? Should it apply when the defect, even if dangerous, causes only economic loss? For example, a dealer sells a used car with 50,000 miles on it. Because of normal wear, the brakes fail. The purchaser's only loss is the cost of replacing the brakes. Should strict liability apply?

Some authorities believe that liability for mere economic loss, where the defects do not cause danger to persons, remains a proper area for contract rather than tort doctrine.<sup>273</sup> In *Russell v. Ford Motor Co.*,<sup>274</sup> the Supreme Court of Oregon allowed a purchaser to recover for economic loss where the defect did not cause personal injury but was "man endangering." The case suggests that a disappointed purchaser can not recover in strict liability but an endangered one can. Other jurisdictions, including Colorado and Montana, have applied strict liability to economic loss.<sup>275</sup> In *Hügel v. General Motors Corp.*,<sup>276</sup> purchaser's mobile home chassis suffered damage because of improper torquing. The Colorado Supreme Court expressly adopted the doctrine of strict liability set forth in RESTATEMENT (SECOND) OF TORTS section 402A, applying it to damage to the vehicle, but refusing to extend the theory to liability for commercial or business loss.

271. RESTATEMENT (SECOND) OF TORTS § 402A(2) (1965) states:

The rule stated in Subsection (1) applies although

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

272. RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965).

273. "The Uniform Commercial Code is generally regarded as the *exclusive source* for ascertaining when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to person or harm to a tangible thing other than the defective product itself." PROSSER & KEETON, *supra* note 257, § 95A at 680. See also RESTATEMENT (SECOND) OF TORTS § 101 (1965); *Cline v. Prowler Indus. of Maryland, Inc.*, 418 A.2d 968 (Del. 1980).

274. 281 Or. 587, 575 P.2d 1383 (1978).

275. See also *Santor v. Karageusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Maure v. Fordham Motor Sales, Inc.*, 98 Misc. 2d 979, 414 N.Y.S.2d 882 (Civ. Ct. N.Y. Co. 1979). In *Maure*, the court held that the purchaser of a used car may recover against the manufacturer in strict liability for loss of the vehicle. The purchaser was unable to prove negligence, but proved that the car was defective when it left the hands of the manufacturer.

276. 190 Colo. 57, 544 P.2d 983 (1975).

In *Thompson v. Nebraska Mobile Homes Corp.*,<sup>277</sup> the Montana Supreme Court held that a strict liability action may lie when the only damage suffered is economic loss. The purchaser of a mobile home sued the manufacturer and the dealer when the ceiling sagged and the walls bowed. The trial court dismissed the claim in strict liability; the jury found for the defendants on the negligence, fraud, and breach of warranty claims. Noting that it had adopted the doctrine of strict liability in tort,<sup>278</sup> the supreme court stated, "we extend the doctrine of strict liability in tort to include those instances where the only injury suffered is to the defective product itself."<sup>279</sup>

*Thompson* illustrates the kind of situation in which a used car purchaser may have to rely on strict liability. The purchaser bought the mobile home "as is" with a short-term express warranty. The court instructed the jury that a warranty may be disclaimed, so the disclaimer may have had the effect of barring the warranty claim.<sup>280</sup> The purchaser was unable to overcome the considerable burden of proving her claims of fraud and negligence. The court explained the rationale of allowing a claim in strict liability in such circumstances:

The public remains in an unfair bargaining position as compared to the manufacturer. In the case of damage arising only out of loss of the product, this inequality in bargaining position becomes more pronounced. Warranties are easily disclaimed. Negligence is difficult, if not impossible, to prove. The consumer does not generally have large damages to attract the attention of lawyers who must handle these cases on a contingent fee. We feel that the consumer should be protected by affording a legal remedy which causes the manufacturer to bear the cost of its own defective products.<sup>281</sup>

While the court's analysis identified the responsibility of the manufacturer, the court did not address whether the strict liability claim would lie against the dealer.<sup>282</sup> Substantial authority sup-

277. 198 Mont. 461, 647 P.2d 334 (1982).

278. *Brandenburger v. Toyota Motor Sales*, 162 Mont. 506, 513 P.2d 268 (1973).

279. *Thompson*, 198 Mont. at 466, 647 P.2d at 337.

280. *Id.* at 468, 647 Mont. at 338. Interestingly, in *Hügel*, 190 Colo. at 65-66, 544 P.2d at 989-90, the court avoided the disclaimer on grounds that it was not called to the buyer's attention and independently agreed to by him.

281. *Thompson*, 198 Mont. at 466-67, 647 P.2d at 337.

282. Procedurally, the trial court had dismissed strict liability claims against the dealer and the manufacturer. The court's decision remanding the case for trial would subject both parties to liability. *Id.* at 469, 647 P.2d at 338. Strict liability was apparently imposed against the dealer in *Brandenburger*, 162 Mont. 506, 513 P.2d 268.

ports the proposition that a dealer may be subject to strict liability.<sup>283</sup>

Because *Hiigel* and *Thompson* involved new goods, the courts did not reach the issue of whether strict liability applies to the sale of used goods. A court might not hold the seller of a used car to the same strict liability as the seller of a new car, for the car may have been safe when it left the manufacturer's hands, previous owners may have modified or improperly maintained the car, the purchaser may have contemplated that the condition was defective, or the possibility of economic loss may have been allocated by contract.<sup>284</sup> In *Peterson v. Lou Bachrodt Chevrolet Co.*,<sup>285</sup> the Supreme Court of Illinois refused to apply strict liability to a used car dealer where the plaintiff made no allegation that a used car was defective when it left the manufacturer or that the dealer created the defect.<sup>286</sup> In the absence of statute or case law, the court found no public policy that imposed responsibility on used car dealers for the safety of cars sold.<sup>287</sup>

A dissenting opinion would have applied strict liability to a dealer who actively makes faulty repairs or who passively fails to inspect for the same policy reason that strict liability applies to a manufacturer: the one who places the product in the stream of

283. RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965) states in part: The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant.

See also *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Maure, Inc.*, 98 Misc. 2d 979, 414 N.Y.S.2d 882.

284. RESTATEMENT (SECOND) OF TORTS § 402A (1965) does not state whether the rule is applicable to the seller of a defective used product. In *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, 344, 322 A.2d 440, 444 (1974), the court stated:

The strict liability in tort rule is, of course, grounded in reasons of public policy . . . . It may well be that these policy reasons are not fully applicable to the seller of a used chattel—for example, the buyer cannot be said to expect the same quality and durability in a used car as in a new one and so the used car dealer should not be held to the same strict liability as the seller of new automobiles.

285. 61 Ill. 2d 17, 329 N.E.2d 785 (1975).

286. Both the majority and the dissent in *Peterson* cited *Realmuto* as holding a dealer strictly liable for a defect in a part that the dealer installed. Discussing the application of strict liability to a used car dealer, the New Jersey court stated that "[a]s far as the theory of implied warranty of merchantability is concerned, our courts have said that it is a concept synonymous with strict liability in tort in a 'defect' case." *Realmuto*, 65 N.J. at 343, 440 A.2d at 443. The court's itemization of aspects of this interplay that a trial court must consider is instructive.

287. *Peterson*, 61 Ill. 2d at 21, 329 N.E.2d at 787. In Montana, public policy has imposed a responsibility on used car dealers with respect to the safety of the cars. *Kopischke v. First Continental Corp.*, 187 Mont. 471, 610 P.2d 668 (1980).

commerce should bear the responsibility for loss.<sup>288</sup> Noting that used cars are often sold "as is" because the cost of repairs may exceed the value of the car, the opinion stated that a jury could weigh the cost of remedying the dangerous condition against the risk it created.<sup>289</sup> In other words, it may be socially advantageous for a dealer to junk a car rather than sell it in unfit condition.

Close to the reasoning of the dissent in *Peterson* is the Montana Supreme Court's decision in *Kopischke v. First Continental Corp.*<sup>290</sup> Although that decision was grounded in analysis of the seller's negligence, when synthesized with the court's reasoning in *Thompson*, it suggests that strict liability may appropriately apply to the sale of a used car. In both cases, the seller was unable to disclaim liability by using an "as is" disclaimer, as often occurs in the sale of used goods. The goal of accident prevention, articulated in *Kopischke*, is best served by imposing strict liability on the seller, who would be compelled to either cure the defects or remove the car from the market.

While the defect in *Kopischke* caused a personal injury, the defect in *Thompson* did not. Strict liability should not be used to guarantee that the level of performance of a used car equals that of a new car.<sup>291</sup> But to achieve the goal of requiring dealers to cure defects that affect safety, courts could apply it where a dangerous defect actually causes only economic loss. In *Maure v. Fordham Motor Sales, Inc.*,<sup>292</sup> a New York trial court stated that "[i]t is the policy of this state to protect purchasers of used vehicles from being sold defective vehicles." The court did not reach the issue of strict liability, for it found the dealer liable on a warranty of serviceability.<sup>293</sup> The court left the impression, however, that it would have decided against the dealer on strict liability if no other theory had been available.<sup>294</sup> Similarly, in *Thompson*, by imposing strict liability on the seller, the Montana Supreme Court served the goal of providing a purchaser with a remedy when goods do not attain a reasonable level of performance.

288. *Peterson*, 61 Ill. 2d at 22-23, 329 N.E.2d at 788 (Goldenbersh, J., dissenting).

289. *Id.* at 23, 329 N.E.2d at 788 (citing *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 126 N.E.2d 836 (1955)).

290. 187 Mont. 471, 610 P.2d 668 (1980), discussed *supra* Part II.C.

291. "The seller certainly does not undertake to provide a product that will never wear out." Prosser, *Strict Liability to the Consumer in California*, 18 *HASTINGS L.J.* 9, 54 (1966).

292. 98 Misc. 2d 979, 414 N.Y.S.2d 882 (Civ. Ct. N.Y. Co. 1979).

293. *Id.* at \_\_\_\_, 414 N.Y.S.2d at 885. On the warranty of serviceability, see *infra* notes 315-16 and accompanying text.

294. *Id.* at \_\_\_\_, 414 N.Y.S.2d at 885-86 (citing numerous sources advocating the application of strict liability to used car dealers).

### C. *Alternative Dispute Mechanisms*

The Magnuson-Moss Warranty Act of 1975 encourages sellers to establish dispute resolution mechanisms.<sup>295</sup> If a seller establishes an arbitration program that qualifies under the regulations,<sup>296</sup> the seller can require the consumer to follow the procedures before bringing a court action.

The mechanism may afford relief to the purchaser of a used car as well. Most automobile manufacturers write such a program into their new car warranties. A consumer who purchases a used car that is still covered by the new car warranty is eligible to use a mechanism that is incorporated into the warranty. Furthermore, the Montana New Motor Vehicle Warranty Act of 1985,<sup>297</sup> popularly known as the "Lemon Law," establishes a "warranty period" of two years or 18,000 miles, whichever comes first, for new cars sold after October 1, 1985.<sup>298</sup> This statutory extension of the manufacturer's warranty only extends the warranty for claims arising under the Lemon Law.<sup>299</sup>

It appears, however, that this statutory warranty does not apply to a subsequent purchaser who buys the car after the expiration of the manufacturer's warranty. The definition of "consumer" in the act includes "any person to whom the motor vehicle is transferred during the duration of an *express warranty* applicable to the motor vehicle."<sup>300</sup> If a manufacturer warrants a car for 12,000 miles, then a purchaser of the car when it has 11,000 miles obtains the benefits of the statutory extension of the manufacturer's warranty for Lemon Law purposes; a purchaser when it has 13,000 miles does not. Yet the same car would be covered by the Lemon Law to 18,000 miles had the original purchaser retained it. This seems an oversight, as the car is warranted, not the purchaser.

295. 15 U.S.C. § 2310(a)(1) (1982) provides: "Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."

296. 16 C.F.R. § 703 (1986). Because of the location of these regulations in the Code, settlement procedures are informally known as "703 mechanisms."

297. MONT. CODE ANN. §§ 61-4-501 to -533 (1985).

298. MONT. CODE ANN. § 61-4-501(6) (1985) provides: "'Warranty period' means the period ending 2 years after the date of the original delivery to the consumer of a new motor vehicle or during the first 18,000 miles of operation, whichever is earlier."

The original Montana Lemon Law, effective as to cars sold between October 1, 1983 and September 30, 1985, established as a warranty period "the term of an express agreement or the period ending 1 year" after delivery, whichever came first. Since most manufacturers offer a 12 month/12,000 mile warranty on new cars, the original law did not affect warranty duration.

299. MONT. CODE ANN. § 61-4-503 (1985).

300. MONT. CODE ANN. § 61-4-501(2) (1985) (emphasis added).

Most manufacturer's dispute resolution mechanisms go well beyond the requirements of the Lemon Law. Many manufacturers voluntarily agree to submit to mediation and arbitration disputes involving cars that are out of warranty.<sup>301</sup> Even if ineligible under the Lemon Law, therefore, the purchaser of a used car which has an expired manufacturer's warranty may still obtain relief. Unlike defects in new cars, however, defects in used cars might not be the responsibility of the manufacturer. A purchaser who pursues a claim against a manufacturer must demonstrate that the problem is attributable to the manufacturer, and not to a dealer, repair shop, previous owner, or other intervening agency.<sup>302</sup>

The purchaser has little to lose by utilizing a manufacturer's dispute resolution mechanism. The complaint may be resolved in mediation. If it goes to arbitration, the dispute will be resolved quickly and at no cost. A consumer may accept or reject the arbitrator's decision. If accepted, the decision is binding on the manufacturer. If rejected, the consumer may pursue the matter in court. In that event, the arbitrator's decision may be offered in evidence.<sup>303</sup>

#### D. *Consent Orders and Class Actions*

Owners of particular models of automobiles may be eligible for specific relief ordered by an administrative agency or court. For example, in 1983, General Motors agreed to a consent order in an action brought by the FTC involving three components in millions of cars produced between 1976 and 1983.<sup>304</sup> Purchasers of used cars containing these components are eligible for the program. The order requires that the manufacturer submit the consumer's claim to mediation and arbitration. If the parties are unable to settle the

301. It would not be worthwhile to enumerate the coverage of each manufacturer, as they are subject to change. Ford and Chrysler have established their own dispute resolution mechanisms. Other manufacturers, including General Motors and American Motors, have contracted with the Better Business Bureau (BBB) to administer their mechanism. After pursuing a claim with the manufacturer, consumers should contact the BBB to determine the eligibility of their claim under the mechanism. The nearest BBB offices are in Spokane, Denver, and Minneapolis.

302. A consumer with a grievance against a dealer or repair shop should inquire whether the dealer participates in AUTOCAP, a dealer's dispute resolution mechanism. Extensive regulations regarding repairs, maintenance, and service are found in MONT. ADMIN. R. §§ 8.78.201-.203 (1981).

303. 16 C.F.R. § 703 (1986).

304. Decision and Order, Docket No. 9145, November 16, 1983. The three specified components are (1) THM 200 automatic transmissions manufactured through April 26, 1983, (2) camshafts or lifters in 305 or 350 CID gasoline engines produced through April 26, 1983, and (3) fuel injection pumps or fuel injectors in 350 CID diesel engines produced through April 26, 1983.

claim, an arbitrator will fashion a remedy. The Better Business Bureau administers this dispute resolution program.

Unlike the consent order described above, the recent settlement of a class action suit brought against General Motors provided that the settlement would be available only to original purchasers.<sup>305</sup> Subsequent purchasers of these models are not without a remedy, however, for they may be eligible to pursue their claims under the manufacturer's dispute resolution program.<sup>306</sup> Eligibility would depend on the facts and circumstances of each case.

This section provides only examples of consent orders and class actions. A purchaser who wishes information about claims involving a particular make and model should contact the manufacturer, the FTC, the Better Business Bureau, or the state Department of Consumer Affairs.

## VIII. PROPOSED ALTERNATIVES

### A. Introduction

This article has explored some of the federal statutes that affect used car sales as well as state statutes that are more or less uniform, such as the UCC and CPA. In addition to these broad-based approaches, some jurisdictions have adopted particular statutes to address problems in the used car market.<sup>307</sup> Some states require that dealers inspect used cars and disclose known defects, an alternative which was proposed by the FTC and rejected by Congress.<sup>308</sup> Others require that dealers repair the defects, or at least those that affect safety. Others forbid disclaimers of warranty, thereby furnishing sellers an incentive to remedy defects. Finally, others use a creative combination of these approaches to create a market in which sellers and purchasers can make decisions based on more accurate information.

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305. The settlement entered September 24, 1984, involved 350 and 260 CID V-8 diesel engines in 1978, 1979, and 1980 cars and light trucks. Original purchasers should contact:

Administrator  
General Motors Litigation  
P.O. Box 614  
Garden City, NY 11530

306. A subsequent purchaser should contact the BBB for details. See *supra* note 301.

307. A number of statutes not cited here can be found in Cohan and Bailey, *Defective Motor Vehicles—Warranty Rights and Practical Remedies for Consumer Purchasers*, 65 *MASS. L. REV.* 33, 42-43 (1980).

308. See *supra* text accompanying notes 185-88.

### B. *Forbid Disclaimer of Warranties*

One of the weaknesses of the UCC is its failure to distinguish between consumer transactions and other commercial transactions. Some legislatures have remedied this weakness by forbidding the disclaimer of implied warranties in merchant sales to consumers. Under this approach, a merchant seller is required to warrant that a used car is merchantable. The level of performance a purchaser could expect from a used car would still be subject to such variables as age, mileage, and prior use. But because the warranty is mandatory, a seller has an incentive to furnish a car that complies with a minimum standard. The following statute from Massachusetts typifies this approach:

**EXCEPTION AS TO EXCLUSION OR MODIFICATION OF WARRANTIES, ETC. IN SALES OF CONSUMER GOODS.**

The provisions of section 2-316 shall not apply to sales of consumer goods, services or both. Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable.

Any language, oral or written, used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of such manufacturer's express warranties, shall be unenforceable, unless such manufacturer maintains facilities within the commonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations.

The provisions of this section may not be disclaimed or waived by agreement.<sup>309</sup>

The Massachusetts statute forbidding disclaimer of warranties is buttressed by regulations promulgated under the Consumer Protection Act<sup>310</sup> that require affirmative disclosures.<sup>311</sup> In *Calimlim v.*

309. MASS. ANN. LAWS ch. 106 § 2-316A (Law. Co-op. 1984).

310. MASS. ANN. LAWS ch. 93A (Law. Co-op. 1984).

311. McEttrick, *Defective Motor Vehicles: The Massachusetts Lemon Law and Recent Used Car Cases Under Chapter 93A*, 70 MASS. L. REV. 30, 38 (1985) states that these regulations include:

The fact that a vehicle is a used vehicle, or that the vehicle has been utilized as a demonstrator, taxi cab, police car, or rental vehicle must be disclosed. The implied warranty of merchantability must be disclosed in a written contract of sale. The right to rescind . . . for failure to pass the safety and emission inspection must be disclosed. Prohibited are attempts to limit or to imply a limitation on warranties of merchantability and fitness for a particular purpose. It is a . . . violation for a dealer to fail to inform a purchaser on request of the name and address of the prior owner of the vehicle.

*Foreign Car Center, Inc.*,<sup>312</sup> the seller marketed a used car with the required disclosures.<sup>313</sup> The trial court found that the dealer knew the car was dangerous and not in good condition at the time of sale to the purchasers: the brakes were defective and the car required over \$3000 worth of repairs. The appellate court upheld an award of damages for breach of the warranty of fitness, breach of the implied warranty of merchantability, violation of the CPA, and attorneys' fees.<sup>314</sup>

### C. *Create an Implied Warranty of Serviceability*

Other jurisdictions expressly require the dealer to warrant that the vehicle will perform according to a certain level, a warranty known as the implied warranty of serviceability. In New York, a dealer must warrant that the car ". . . is in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery." The New York statute provides:

**CERTIFICATES BY RETAIL DEALERS ON SALES OF SECOND HAND MOTOR VEHICLES.**

Upon the sale or transfer of title by a retail dealer of any second hand motor vehicle, intended for use by the buyer, his agent or representative upon the public highways, the vendor shall execute and deliver to the vendee an instrument in writing, in a form prescribed by the commissioner, in which shall be given the make, year of manufacture and identification number of the said motor vehicle, the name and address of the vendee, and the date of delivery to the vendee. Such notice shall also contain a certification that said motor vehicle complies with such requirements of this chapter as shall be specified by the commissioner and that it is in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the

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312. 392 Mass. 228, 467 N.E.2d 443 (1984).

313. The court stated:

The motor vehicle purchase contract contained language that the vehicle was "warranted to be safe and merchantable and to pass the Massachusetts [vehicle] safety inspection program at the time of delivery" to the buyer. Moreover, it recited the following language, which is required by MASS. ADMIN. CODE tit. 940, § 5.04(2)(g) (1978): "Attention purchaser. All vehicles are warranted as a matter of state law. They must be fit to be driven safely on the roads and must remain in good running condition for a reasonable period of time. If you have significant problems with this vehicle or if it will not pass inspection, you should notify the dealer immediately. He may be required to fix the car or refund your money. This warranty is in addition to any other warranty given by the dealer."

*Id.* at \_\_\_\_, 467 N.E.2d at 444-45.

314. *Id.* at \_\_\_\_, 467 N.E.2d at 447-48. The Supreme Judicial Court disallowed a double recovery under these claims.

time of delivery.

The failure of the vendor to deliver to the vendee the certificate required by this section and delivery of a false certificate knowing the same to be false or misleading or without making an appropriate inspection to determine whether the contents of such certificate are true shall constitute a violation of this section. The delivery of a false certificate shall raise presumption that such certificate was issued without an appropriate inspection.<sup>315</sup>

In *Natale v. Martin Volkswagen, Inc.*,<sup>316</sup> the court held that the warranty of serviceability applicable to used cars went beyond the implied warranties of the UCC and could not be waived. The court awarded the plaintiff the cost of repairs in addition to the cost of the vehicle. Since the damages exceeded the amount which would compensate the plaintiff, presumably the court granted a rescission rather than damages for breach of warranty.

Similar statutes in jurisdictions that have inspection laws require that the seller prepare the vehicle to pass the inspection.<sup>317</sup> Such statutes protect both the consumer and the public. Montana does not mandate regular inspections. However, the legislature has enacted extensive safety requirements for vehicles, providing that it is a misdemeanor to drive a vehicle that does not meet the requirements.<sup>318</sup> Without mandating inspections, the state could adopt a statute placing upon dealers the burden of preparing a motor vehicle to meet the safety requirements. In a number of states, dealers who sell cars that do not meet safety requirements may lose their licenses.<sup>319</sup>

#### D. Disclaimer With Knowledge

Another approach is to allow the purchaser to disclaim implied warranties only if the purchaser has actual knowledge of defects. Under this approach, the seller's disclosure of a defect would shift to the purchaser the responsibility for curing the defect. Such

315. N. Y. VEH. & TRAF. LAW § 417 (McKinney 1970).

316. 92 Misc. 2d 1046, 402 N.Y.S.2d 156 (City Ct. of Utica 1978).

317. N. Y. VEH. & TRAF. LAW § 301(a) (McKinney 1970) provides:

PERIODIC INSPECTION OF ALL MOTOR VEHICLES

The commissioner shall require that every motor vehicle registered in this state be inspected once each year in accordance with the provisions of this article, and that every motor vehicle sold or transferred for use on the public highways of this state by a dealer licensed under section four hundred fifteen of this chapter to any person other than another such licensed dealer must be inspected and bear a valid certificate of inspection prior to delivery to the purchaser or transferee.

318. MONT. CODE ANN. § 61-9-109(1) (1985).

319. See, e.g., CONN. GEN. STAT. § 14-64 (1985); CAL. VEH. CODE § 11713(i) (1971). MONT. CODE ANN. § 61-4-101 (1985) provides for the licensing of motor vehicle dealers.

a provision would be useful at the low-price end of the market, where defects are more numerous, and could be attractive to do-it-yourself purchasers. On the other hand, the statute would not protect the public or purchasers who assumed the risk of defects but did not cure them. The disclosure, like an "as is" assumption of risk,<sup>320</sup> might not protect the seller from liability for personal injury caused by safety defects.<sup>321</sup> Therefore the statute would provide an incentive for the dealer with knowledge of defects to repair those defects and not merely to disclose them. A Kansas statute provides:

DISCLAIMER OR LIMITATION OF WARRANTIES; LIABILITIES; ATTORNEY FEES, WHEN; SECTION INAPPLICABLE TO SEED FOR PLANTING OR LIVESTOCK FOR AGRICULTURAL PURPOSES.

(a) Notwithstanding any other provisions of law, with respect to property which is the subject of or is intended to become the subject of a consumer transaction in this state, no supplier shall:

(1) Exclude, modify or otherwise attempt to limit the implied warranties of merchantability and fitness for a particular purpose; or

. . . .

(c) A supplier may limit the supplier's implied warranty of merchantability and fitness for a particular purpose with respect to a defect or defects in the property only if the supplier establishes that the consumer had knowledge of the defect or defects, which become the basis of the bargain between the parties. In neither case shall such limitation apply to liability for personal injury or property damage.

. . . .

(e) A disclaimer or limitation in violation of this section is void.<sup>322</sup>

In *Dale v. King Lincoln-Mercury, Inc.*,<sup>323</sup> the consumer purchased a used car with a 30-day express warranty. The engine failed after 50 days. The dealer had no knowledge that the engine was defective at the time of sale. The Supreme Court of Kansas held that a dealer may not, by giving the purchaser a narrow express warranty, avoid the statutory requirement that a dealer may not exclude, modify, or limit the implied warranty of merchantability. The seller did not disclose the defects to the purchaser, which would have limited the warranty under the statute. Therefore, the seller warranted that the car was fit for the ordinary

320. See *supra* text accompanying notes 44-46.

321. See *Bergstresser v. Van Hoy*, 142 Kan. 88, 45 P.2d 855 (1935).

322. KAN. STAT. ANN. § 50-639(a)(1), (c) (1983).

323. 234 Kan. 840, 676 P.2d 744 (1984).

purpose of an automobile. Because the car was relatively new, it did not meet that level of fitness when it failed after a few days.<sup>324</sup>

### E. Varying Levels of Warranty

When courts apply the implied warranty of merchantability to used car sales, they are required to ascertain a level of expected performance that is adaptable to vehicles of varying quality. Moreover, it is not until after the fact of a breakdown that they have to determine the degree of fitness to which a particular purchaser was entitled at the time of sale. That is, they must determine after the sale what a purchaser should have been promised before the sale.

Some jurisdictions have eased this difficulty by establishing a sliding scale of warranties. The extent of the warranty may be a function of the age of the car, the sale price of the car, or may be determined by the seller. Furthermore, under this system the dealer is responsible for repairs required during the warranty period. This responsibility relieves the purchaser of the burden of proving that the car was defective at the time of sale.<sup>325</sup> An Illinois statute warrants the powertrain components on a sliding scale that is a function of the age of the car:

#### RETAIL SALE OF MOTOR VEHICLES

§ 2L. Any retail sale of a motor vehicle made after January 1, 1968 to a consumer by a new motor vehicle dealer or used motor vehicle dealer within the meaning of Chapter 5 of The Illinois Vehicle Code is made subject to this Section.

(a) The dealer is liable to the purchasing consumer for the following share of the cost of the repair of Power Train components for a period of 30 days from date of delivery, unless such repairs have become necessary by abuse, negligence, or collision. The burden of establishing that a claim for repairs is not within this Section shall be on the selling dealer. The dealer's share of such repair costs is:

- (1) in the case of a motor vehicle which is not more than 2 years old, 50%;
  - (2) in the case of a motor vehicle which is 2 or more, but less than 3 years old, 25%;
  - (3) in the case of a motor vehicle which is 3 or more, but less than 4 years old, 10%; and
  - (4) in the case of a motor vehicle which is 4 or more years old, none.
- (b) Notwithstanding the foregoing, such a dealer and a

324. *Id.* at 843, 676 P.2d at 748.

325. *See supra* text accompanying notes 100-107.

purchasing consumer may negotiate a sale and purchase that is not subject to this Section if there is stamped on any purchase order, contract, agreement, or other instrument to be signed by the consumer as a part of that transaction, in at least 10-point bold type immediately above the signature line, the following:

**"THIS VEHICLE IS SOLD AS IS WITH NO WARRANTY AS TO MECHANICAL CONDITION"**<sup>326</sup>

An alternate scheme would require that used cars sold for more than a specific price be accompanied by an implied warranty of merchantability for a prescribed period of months. Because the level of fitness a purchaser can expect is a direct function of price, the purchaser's pricing decision is more rational. An Australian state statute provides that if the price of the car is over \$1000,<sup>327</sup> the dealer must repair any defect that occurs within 5000 kilometers or three months, whichever occurs first; if the price is \$500 to \$1000, 3000 kilometers or two months; if the price is under \$500, the statute does not apply.<sup>328</sup> The purchaser need not demonstrate that the car was defective at the time of sale.<sup>329</sup> The dealer's repair obligation does not apply, however, if the dealer disclosed to the purchaser the defect and the estimated cost of repair.<sup>330</sup>

A similar system might require dealers to give used cars a rating, with higher-rated cars receiving a better warranty.<sup>331</sup> The system would leave it to the dealers to determine the rating a particular car would receive. Presumably purchasers would be willing to pay more for higher-rated cars and dealers would have an incentive to repair automobiles to achieve a higher rating.

## IX. CONCLUSION

This article enumerates problems that frequently arise in the

326. ILL. ANN. STAT. ch. 121, § 262L (Smith-Hurd Supp. 1979).

327. An Australian dollar is currently worth \$.71 American. If the statute has not been amended to account for inflation, its application would be severely restricted.

328. Secondhand Motor Vehicle Act of 1971, State of South Australia § 24.

329. *Id.*

330. *Id.* at § 25.

331. Legislation proposed in California would have enacted this system:

On any used vehicle offered for sale at a price in excess of \$1000 a dealer could offer one of three 'rated' warranties. An 'A' rating warranty promises the car to be free from mechanical defects for either 120 days or the first 4000 miles driven, a 'B' rating warranty makes the same promise for 90 days or 3000 miles and a 'C' rating warranty promises 60 days or 2000 miles. A car sold with a 'D' rating would carry no warranty whatsoever and would be sold on an 'as is' basis.

J. McCALL, CONSUMER PROTECTION 74 (1977).

sale of used cars and outlines solutions that have been fashioned by courts and legislatures. The problems stem largely from the fact that the seller of a used car knows more about the condition of the car than the purchaser, but is generally not obligated to improve the condition or disclose the knowledge. Traditional contract law, based on classical economic theory, makes few allowances for the unknowledgeable purchaser. As a result, in a hard case, courts may find the facts inapplicable to the rules, find the rules inapplicable to the facts, or find tort law that supplants inapplicable contract law. While courts thereby resolve a particular case, the outcomes are collectively unfortunate in a system that relies on precedent for predictability.

Modern consumer legislation faces the problem more squarely, regulating the seller by prohibiting certain practices or by requiring certain disclaimers. There is a danger that an overly regulated market may prove inefficient for both purchasers and sellers. Before attacking the problem with additional regulation, we should look behind the body of law that has developed to discover the questions it is straining to answer.

The fundamental question appears to be: To what level of performance is the purchaser of a used car entitled?<sup>332</sup> The performance that can be expected from used cars is a function of many factors, including the make, model, year, and mileage. These factors are reflected in the price, with more desirable models and lower-mileage cars commanding a higher market price. All other factors being equal, the market price can be determined by objective criteria, as reported in industry publications, such as the Blue Book.

But all other factors are not equal, the main variant being defects in the car. Purchasers should not assume the risk of all defects existing at the time of sale. They lack the knowledge to discover the defects. And the defects may result in personal injury or substantial economic loss.

On the other hand, sellers cannot be guarantors of the condition of used cars.<sup>333</sup> Purchasers cannot expect to obtain the same performance from a used car as they would obtain from a new car.

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332. One author concludes, "a second-hand vehicle sold for use and not scrap must at the time of sale and for a reasonable time thereafter be free of any material defect making it incapable of safe and lawful use." Whincup, *Reasonable Fitness of Cars*, 38 *Mod. L. Rev.* 660, 670 (1975).

333. This statement may not apply to sellers of new cars. In *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345 (1970), the court refused to honor an "as is" clause in the sale of new vehicles, reasoning that trade custom anticipates "as is" disclaimers in the sale of used goods but not in the sale of new goods.

If the vehicle fails in some respect after the purchaser has driven it some distance, the purchaser should have no recourse when the failure is due to the deterioration of the parts over time (a fancy way of saying "used") and not due to some defect existing at the time of sale.

Sellers and purchasers distribute the risk of performance through price. They can also distribute the risk of defects through a warranty. In a sale with a warranty, the seller warrants only the condition of the car at the time of sale, not its continued performance. Therefore the purchaser must demonstrate that the breakdown occurred because of a defect present at the time of sale. Having proved that element, the purchaser has a remedy under the warranty.

Sale "as is" shifts virtually all risk to the purchaser. The FTC Used Motor Vehicle Trade Regulation Rule does not alter the distribution of risk. In fact, the rule may enhance the seller's position. By putting the purchaser on notice that oral representations are not binding and by clarifying the meaning of sale "as is," the rule may undercut a purchaser's argument that the sale was induced by fraudulent or unconscionable practices.

The shift of risk to the purchaser is appropriate where it reflects the purchaser's expectation of the level of performance of the car. That expectation is meaningful only when the purchaser has knowledge of the condition of the car. The shift of risk to the purchaser is not appropriate where the seller is in a position to know of defects but is under no obligation to affirmatively disclose that knowledge. Under current law, the seller may have no obligation to disclose the defects. Misrepresentation is fraud; failure to disclose generally is not. RESTATEMENT (SECOND) OF CONTRACTS addresses the issue of when failure to disclose is equivalent to a misrepresentation, stating cautiously:

Nevertheless, a party need not correct all mistakes of the other and is expected only to act in good faith and in accordance with reasonable standards of fair dealing, as reflected in prevailing business ethics.<sup>334</sup>

Prevailing business ethics do change, as reflected in the significant shift from *caveat emptor* to consumer protection in the last two generations.<sup>335</sup> In the area of used car sales, however, business eth-

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334. RESTATEMENT (SECOND) OF CONTRACTS § 161 comment d (1981).

335. Consider, for example, the obligations imposed on a real estate broker in California. See *Reed v. King*, 145 Cal. App. 3d, 193 Cal. Rptr. 130 (1983) (duty to disclose that murder had been committed in house); *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (affirmative duty to discover and disclose defects); Annot., 46 A.L.R. 4th

ics have been slow to change.<sup>336</sup>

The imbalance in the parties' knowledge and bargaining power generally leads to the risk being borne by the purchaser. Where a defect may lead to personal injury, courts have recognized that the shift of risk to the purchaser is not appropriate. They have imposed an obligation on used car dealers to inspect and correct safety defects. This obligation should be extended to defects that lead to economic loss as well. A defect that causes only economic loss should be corrected by the one who has the earliest opportunity to do so. The expense of inspection and correction probably outweighs the economic loss resulting from failure of the component. Most importantly, the issue of whether a defect would lead to merely economic loss or would result in personal injury should not be determined after a breakdown. The burden should be placed on the seller to correct the defects before they result in a loss.<sup>337</sup>

Alternatively, the distinction between defects affecting safety and defects resulting in economic loss could be used to determine when dealers must correct defects and when they must disclose them. If defects relate to safety, disclosure is inadequate. Purchasers should be protected against their own failure to attend to the problem. But if the defects do not relate to safety, disclosure would suffice. Purchasers would then be in a position to determine whether to correct the defects. The burden of determining the category of defect would be on the seller, who would have an incentive to repair a defect that might lead to personal injury.

Requiring sellers to disclose known defects makes both ethical and economic sense.<sup>338</sup> *Caveat emptor* is appropriate only when the assumptions of classical economic theory are present. One of those assumptions is that perfect information is available to both purchasers and sellers. Presently, purchasers are generally ignorant

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546 (1986).

336. In *Dale v. King Lincoln-Mercury, Inc.*, 234 Kan. 840, 844, 676 P.2d 744, 748 (1984), the Kansas Supreme Court stated: "The sale of used cars by dealers in Kansas is no longer governed by the maxim *caveat emptor*—let the buyer beware. The consumer protection act now places the responsibility upon the seller, not the purchaser, to determine the quality and condition of the goods."

337. See Comment, *Used Car Dealer's Duty to Disclose Major Known Defects*, 20 SAN DIEGO L. REV. 399 (1983).

338. The disclosure could be affirmatively mandated, as in the proposed but never-adopted FTC rule. See *supra* text accompanying notes 185-89. Alternatively, market forces could induce the disclosure. For example, if purchasers were not permitted to waive implied warranties, sellers might find it advantageous to remedy or disclose defects rather than pay for them later. This result would be more certain if the purchaser's remedy was enhanced by punitive damages or attorneys' fees.

about auto mechanics and rely on the representations of dealers. The market at present does not encourage dealers to disclose information to consumers. A rational purchaser, attempting comparative shopping but not knowing the condition of the cars, will choose the car with the lowest price. Therefore, if both the purchaser and the seller act rationally, the purchaser will end up with a defective car. If the information was available, purchasers would still buy used cars with defects. Knowing what they were getting, however, they would pay a lower price to assume the risks.<sup>339</sup>

Much consumer legislation, such as Truth-in-Lending and Magnuson-Moss, takes the direction of requiring or encouraging disclosure. Under this type of legislation, excessive government intervention does not regulate the market.<sup>340</sup> Instead, informed consumers can make choices.<sup>341</sup> This results in a closer approach to free market conditions rather than an overly regulated economy.

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339. If this analysis is accurate, then in the present market where some states require disclosure and others do not, rational sellers would attempt to sell the most defective units in states that do not require disclosure.

340. Nor is the government required for enforcement. Most modern consumer statutes contain provisions for attorneys' fees for successful prosecution. Attorneys are thereby deputized as "private attorneys general" to enforce through the marketplace the public policy of the state. See *supra* notes 14, 237-39 and accompanying text.

341. See S. BREYER, REGULATION AND ITS REFORM 161-64 (1982).