

L.B. 155: NEBRASKA'S "LEMON LAW": SYNTHESIZING REMEDIES FOR THE OWNER OF A "LEMON"

INTRODUCTION

Warranties are given to protect and assure the consumer that a purchased product will be as expected. Nowhere is this reliance so great as where the purchase is of a new automobile. Financially, this type of investment is considerable, frequently the largest a consumer will make. Such an investment is not only financial, but sentimental as well. For many, the investment is a reflection of one's personality; it is a symbol of one's accomplishments. When a substantial problem with the vehicle develops and repeated visits to the repair shop do not produce satisfactory answers, the consumer becomes aware that he may be the owner of—in popular parlance—a "lemon".¹

Common sense tells us that the owner should not be compelled to keep a lemon; it is not what he bargained for and it does not meet the representations upon which he relied before purchasing the car. But the road to satisfaction is often lengthy and expensive. If the consumer is forced to litigate this problem, he is unable to use the vehicle, and yet he must continue to make his monthly payments or risk default. If the consumer cannot afford to litigate, he will often be forced into a trade-in situation, taking whatever he can get for the defective car. Neither route offers a satisfactory resolution to the problem.

In the winter of 1982-1983, the Nebraska Unicameral presented, debated and enacted the "Lemon Law"²: "An Act relating to certain motor vehicles; to define terms; to provide duties for certain motor vehicles; to provide procedures and limitations; and to declare an emergency."³ The Act may have been prompted by the frustrations of Virginia Koperski.⁴ Koperski, the owner of a new 1978 Dodge Diplomat, contended that she had a lemon when her

1. Throughout this article, the term "lemon" will be used to describe a new automobile "that proves to be unsatisfactory or undesirable." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1293 (1976).

2. Throughout the article, L.B. 155 will be referred to as the "Lemon Law." See note 1 *supra*.

3. L.B. 155, 1983 Neb. Laws 431 (preamble). L.B. 155 was passed by the Nebraska Unicameral on April 12, 1983 and approved by the Governor on April 18, 1983. The law takes effect with the 1984 model cars. NEB. REV. STAT. § 60-2709 (Supp. 1983).

4. See *Koperski v. Husker Dodge*, 208 Neb. 29, 302 N.W.2d 655 (1981).

new car vibrated at speeds over 35 m.p.h. and stalled whenever shifted into reverse.⁵ Despite repeated visits to the repair shop, the car was not fixed to her satisfaction.⁶ Yet, the Nebraska Supreme Court found that Chrysler Corporation had not breached its warranty to repair and replace defective parts.⁷

The Act may have gained impetus when Joe Putjenter retold his "lemon" experience before the Banking Committee of the Nebraska Unicameral and drew their sympathies.⁸ The Act gained momentum when Lorence Kenning, the President of the Nebraska New Car and Truck Dealers Association, addressed the Banking Committee and urged their support of the Lemon Law.⁹ Similar legislation in both Connecticut¹⁰ and California¹¹ seemed to suggest to the legislature that this added consumer protection with new car warranties was indeed an appropriate subject for legislative consideration.¹² Several senators, themselves either new car dealers or victims of lemon-type frustrations, believed in the necessity of such a proposal.¹³ The senators recognized that the au-

5. *Id.* at 34, 302 N.W.2d at 658-59.

6. *Id.* at 35-36, 302 N.W.2d at 659.

7. *Id.* at 49-50, 302 N.W.2d at 666 (The court was aware of a line of authority granting relief to the buyer of a vehicle based on a breach of the contract when the contract failed of its essential purpose. This failure may be due to the neglect of the refusal of the warrantor to make necessary repairs, within a reasonable time, to make the vehicle operable. However, the Court held the rule enunciated from those cases is inapplicable in this case). *Id.*

8. *The Lemon Law: Hearings on L.B. 155 Before the Committee on Banking, Commerce and Insurance*, 88th Leg., 1st Sess. 37-38 (1983) (testimony of Joe Putjenter) [hereinafter cited as *Nebraska Hearings*].

9. *Nebraska Hearings*, *supra* note 8, at 33-34 (testimony of Lorence Kenning, President, Nebraska New Car & Truck Dealers Association).

10. CONN. GEN. STAT. ANN. § 42-179 (West 1983).

11. CAL. CIV. CODE § 1793.2(e) (West 1983).

12. *But cf. Nebraska Hearings*, *supra* note 8, at 40-41 (testimony of Dan Besaw, Public Affairs Manager in the north central states of the Motor Vehicle Manufacturers Association, stating that the current state of the law offers several avenues for a consumer to use in attempting to resolve auto repair problems. Among those alternatives were the common law, State Uniform Commercial Code, and the Federal Magnuson-Moss Warranty Act).

13. *Legislative History of L.B. 155*, 88th Leg., 1st Sess. 259 (1983) [hereinafter cited as *Legislative History*]. At the debate, Senator Goll testified, stating, "I must tell you that having represented the major manufacturer of American-made vehicles for over 33 years, we don't have a 'lemon' very often, but when we do it is a severe traumatic experience for the consumer who owns one." Senator Morehead agreed that it was a severe problem, stating:

We, as franchised dealers, could not be advocating any more strongly the consumer's position than in our presentation of this legislation. We value our customers, we value our reputations and we resent being placed in the middleman position trying to attempt to help these customers and ourselves resolve the problems. Everyone, the public, the dealers, the manufacturers, should appreciate having clearcut and not arbitrary parameters in this matter within which we can still operate.

tomobile is a complex, highly-mechanized machine¹⁴ and that the purchase of a new automobile is a major investment for most consumers.¹⁵ Providing the owner of a lemon with a satisfactory remedy was a primary concern of the legislature.¹⁶

This article will begin with an overview of the Nebraska Lemon Law¹⁷ as enacted, with emphasis on the areas of concern raised by opposing senators. Then it will analyze the alternative remedies available to the disgruntled lemon owner and discuss the shortcomings of each approach. Finally, those deficiencies will be examined under the new law in order to determine if the legislative intent of providing the lemon owner with a precise remedy against the automobile manufacturer has been met.¹⁸

THE HISTORY OF THE ACT

Following close behind Connecticut¹⁹ and California,²⁰ the Nebraska legislators introduced a Lemon Law to implement "a system of an additional remedy, so that when a true lemon shows up

Id. at 274.

During the debate, other senators testified about personal problems with "lemons." Senator Schmit stated that "[I] have a piece of equipment which has been nationally known as a lemon This costs me ten of thousands of dollars and it is still a lemon and I am still putting up with it. . . ." *Id.* at 909. Senator Chambers indicated "[I] got a lemon. . ." and the car dealer apparently attempted "to try and intimidate me." *Id.* at 258-59.

See also *Nebraska Hearings, supra* note 8, at 53 (testimony of Senator Haberman. The Senator was responding to a statement by Bud McMullan, regional public affairs representative for GM, concerning GM's arbitration program set up through the Better Business Bureau to handle consumer problems. Senator Haberman stated, "Well, I can show you letters, sir, that practically tell me to take my problems and stick it in my left ear, from a dealer here in Lincoln, and I went through the Better Business Bureau.").

14. See Pertschuk, *Consumer Automobile Problems*, 11 U.C.C. L.J. 145, 145 (1978). See also *Stofman v. Keenan Motors*, 63 Pa. D. & C.2d 56, — (1973), reprinted in 14 U.C.C. REP. SERV. (CALLAGHAN) 1252, 1254 (1974).

15. *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441 —, 240 A.2d 195, 205 (1968) (stating that for most consumers buying a new car is a major investment. The consumer can rationalize this expenditure because he believes the car to be dependable and safe. Once this faith is shaken, the consumer views the car as an instrument whose reliability is substantially impaired and thus whose use is fraught with apprehension).

16. *Legislative History, supra* note 13, at 254-55 (testimony of Senator DeCamp, chief sponsor of LB 155; Senator DeCamp stated that it was his belief that passage of the Lemon Law would assure Nebraskans a remedy if they purchased a lemon. Additionally Senator DeCamp felt the law would send a strong signal to the manufacturers that they best produce quality vehicles or else be prepared to pay for their mistakes).

17. NEB. REV. STAT. §§ 60-2701 to -2709 (Supp. 1983).

18. *Legislative History, supra* note 13, at 1655 (testimony of Sen. Morehead).

19. CONN. GEN. STAT. ANN. § 42-179 (West 1983).

20. CAL. CIV. CODE § 1793.2(e) (West 1983).

. . . there is some system to try to protect the consumer."²¹

The Nebraska New Car and Truck Dealers Association (NNCTDA) supported the Act as providing "a direct, fair and clear legal remedy" to the consumer.²² The NNCTDA enumerated three benefits resulting from the passage of the Act. First, the Lemon Law affirms that consumers do indeed have specific rights derived from their new car warranty. Second, the new law contains reasonable guidelines defining a lemon vehicle. Third, the law gives the consumer the right to take the manufacturer who issued the warranty to court.²³

The Motor Vehicle Manufacturer's Association was not as enthusiastic about the proposed legislation. It was the Association's belief that existing remedies adequately addressed the plight of the lemon owner.²⁴ Such remedies include not only state Uniform Commercial Code relief,²⁵ federal Magnuson-Moss Warranty Act relief²⁶ and Consumer Protection Statutes,²⁷ but also, and perhaps most importantly, the manufacturer's own arbitration systems.²⁸ Before examining these traditional remedies, a study of the framework of Nebraska's new statute will be undertaken.

The statute begins with a definition of terms.²⁹ "Consumer" includes a purchaser "of a motor vehicle . . . used for personal, family, household, or business purposes."³⁰ The Nebraska legislators specifically included "business purposes" to extend the Act's coverage to agricultural trucks, deeming those vehicles to be vital to Nebraska's transportation system.³¹ The new Act defines "mo-

21. *Nebraska Hearings*, *supra* note 8, at 32.

22. *Id.* at 53.

23. *Id.* at 34 (Introduced as an exhibit in the committee hearing was a letter from Lorence Kenning, President of the NNCTDA outlining these benefits and giving the association's support to LB 155. Mr. Kenning was the speaker before the committee hearing giving this testimony (Exhibit A)).

24. See note 12 *supra*.

25. NEB. REV. STAT. (U.C.C.) §§ 2-608, -719 (Reissue 1980).

26. 15 U.S.C. §§ 2301-2312 (1982) (this act is popularly known as the Magnuson-Moss Warranty Act). See also notes 92-121 and accompanying text *infra*.

27. NEB. REV. STAT. §§ 59-1601 to -1623 (Reissue 1978) (amended 1983) (Commonly referred to as Consumer Protection Act). See also NEB. REV. STAT. §§ 87-301 to -306 (Reissue 1981) (Commonly referred to as Uniform Deceptive Trade Practices Act); notes 122-47 and accompanying text *infra*.

28. See notes 148-55 and accompanying text *infra*.

29. NEB. REV. STAT. § 60-2701 (Supp. 1983).

30. *Id.* § 60-2701(1).

31. *Legislative History*, *supra* note 13, at 265. See also CONN. GEN. STAT. ANN. § 42-179(a) (West 1983) (Consumer can be the purchaser of a passenger motor vehicle or commercial motor vehicle); *But see* CAL. CIV. CODE § 1793.2(e)(4)(B) (West 1983) (where consumer of a new motor vehicle is silent with respect to business or commercial usage). Thus the Connecticut statute, on which Nebraska's appears to be patterned, is more comprehensive in scope than California's statute.

tor vehicle" as a "new motor vehicle as defined in subdivision (7) of Section 60-1401.02."³² Thus, the coverage of the Lemon Law does not extend to the resale of used cars.

"Manufacturer's express warranty" is defined in the Lemon Law as the "written warranty."³³ This definition is the same as the one adopted for warranty protection under the federal Magnuson-Moss Warranty Act.³⁴ Under this act, this language excludes any oral representations or promises given to the consumer as a part of the new car warranty.³⁵ While a "demonstrator" car may be a sample or model which creates a basis for a bargain and, therefore, gives rise to an express warranty under the U.C.C.,³⁶ such representation apparently would not be covered by the Magnuson-Moss Act or the Lemon Law.³⁷ Thus, under the Lemon Law, only the written warranty given with the owner's new car binds the manufacturer. While the manufacturer is not prohibited from issuing a

32. NEB. REV. STAT. § 60-2701(2) (Supp. 1983). See also *id.* § 60-1401.02(6) (7).

33. NEB. REV. STAT. § 60-2701(3) (Supp. 1983) states "manufacturer's express warranty shall mean the written warranty, so labeled, of the manufacturer of a new motor vehicle."

34. 15 U.S.C. § 2301(6) (a) (1982) states:

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. . . .

35. *Id.*

36. See NEB. REV. STAT. (U.C.C.) § 2-313(c) (Reissue 1980) states:

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

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

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

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

See also *Larutan v. Magnolia Homes Mfg.*, 190 Neb. 425, 433, 209 N.W.2d 177, 182 (1973).

37. See notes 33-34 *supra*. Although the statutory language has not been interpreted regarding this topic, the statute explicitly states that it applies to written warranties.

Thus a consumer who purchases a defective vehicle after driving a demonstrator model could maintain a cause of action under NEB. REV. STAT. (U.C.C.) § 2-313 (Reissue 1980). However there are problems inherent in this approach. See notes 60-91 and accompanying text *infra*. But a consumer cannot maintain a cause of action under NEB. REV. STAT. § 60-2703 (Supp. 1983) on the basis of having an express warranty created by having driven a demonstrator. But NEB. REV. STAT. § 60-2708 (Supp. 1983) does not prevent a consumer from utilizing other remedies available.

disclaimer of the implied warranty of merchantability,³⁸ such a disclaimer will be rendered ineffective if the statutory conditions of the Lemon Law are met.³⁹

The statute imposes a duty on the manufacturer, agent or dealer to make any adjustments necessary to conform the vehicle to the terms of its express warranty.⁴⁰ Naturally, the owner must first report the defect before the duty is imposed.⁴¹ Timing is critical, as this notification must occur during the term of the express warranty or one year from the delivery date, whichever date is earlier.⁴² Once the manufacturer, agent or dealer has been notified of a problem and is unable to correct it to satisfy the express warranty, an obligation to replace the vehicle or refund the purchase price may be triggered. To obtain this relief the consumer must show: (1) the defect "substantially impairs" the use and market value of the vehicle and (2) after a reasonable number of attempts the manufacturer has been unable to correct the non-conformity.⁴³ If these two requirements are met, then:

[T]he manufacturer shall replace the motor vehicle with a comparable motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the full purchase price including all sales taxes, license fees, and registration fees and any similar governmental charges, less a reasonable allowance for the consumer's use of the vehicle.⁴⁴

The use of the phrase "substantially impairs" would seem to be adopted from the language of the Nebraska U.C.C. statutes.⁴⁵

38. *Legislative History*, *supra* note 13, at 915-16 (Senator Hoagland proposed an amendment, hoping to make this bill "one of the strongest in the country." The amendment prohibited disclaimers but was later withdrawn because the Senator did not believe that he had backing for the passage of the amendment).

39. NEB. REV. STAT. § 60-2703 (Supp. 1983). If the warranty for repair and replacement of defective parts does not yield satisfactory results, then the language of the statute is clear. The consumer must be refunded the purchase price or the defective vehicle replaced. The notion of a disclaimer appears to become irrelevant within the time frame of the statute.

40. NEB. REV. STAT. § 60-2702 (Supp. 1983).

41. *Id.*

42. *Id.*

43. *Id.* § 60-2703.

44. *Id.*

45. *Id.* (U.C.C.) § 2-608 (Reissue 1980). The statute states:

(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 non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

Under these statutes, interpretation of this term has spurred a great deal of litigation, but no bright-line rules have been established.⁴⁶ The Lemon Law is silent as to the interpretation of "substantial impairment," but does outline specific guidelines which define "reasonable number of attempts."⁴⁷

In establishing these guidelines the Lemon Law addresses a question that has plagued consumers for years: How many chances does a dealer or manufacturer get to fix a car which is violating its express warranty?⁴⁸ The new law specifically states that if either: (1) the auto has been returned four or more times for the same nonconformity;⁴⁹ or (2) the auto is out of service for forty

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

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

46. See notes 60-91 and accompanying text *infra*.

47. NEB. REV. STAT. § 60-2704 (Supp. 1983) states:

It shall be presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties, if (1) the same nonconformity has been subject to repair four or more times by the manufacturer, its agents, or authorized dealers within the express warranty term or during the period of one year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date, but such nonconformity continues to exist or (2) the vehicle is out of service by reason of repair for a cumulative total of forty or more days during such term or during such period, whichever is the earlier date. The term of an express warranty, such one-year period, and such forty day period shall be extended by any period of time during which repair services are not available to the consumer because of a war, invasion, or strike, or fire, flood, or other natural disaster. In no event shall the presumption provided in this section apply against a manufacturer unless the manufacturer has received prior written direct notification by certified mail from or on behalf of the consumer and an opportunity to cure the defect alleged.

48. See *Tiger Motor v. McMurtry*, 284 Ala. 283, —, 224 So.2d 638, 647 (1969) ("Repeated attempts at adjustment having failed, we hold the buyer McMurty revoked his acceptance of the automobile within a reasonable time."); *General Motors v. Earnest*, 279 Ala. 299, —, 184 So.2d 811, 814 (1966) ("We can agree with the appellee's contention that at some point after the purchase of a new automobile, the same should be put in good running condition. . . . This is no more than saying that at some point in time, it must become obvious to all people that a particular vehicle simply cannot be repaired or parts replaced so that the same is made free from defect."); *Conte v. Dawn Lincoln-Mercury*, 172 Conn. 112, —, 374 A.2d 144, 149 (1976) ("Under the circumstances of this case, involving an almost continuous series of negotiations and repairs, [over a fourteen month period following the sale], the delay in the notice [to revoke] did not prejudice the dealer and the delay was not unreasonable."); *Zabriskie Chevrolet v. Smith*, 99 N.J. Super. 441, —, 240 A.2d 195, 205 (1968) (statement by the Court in response to the manufacturer's argument of a right to cure the nonconforming vehicle. "It was not the intention of the Legislature that the right to 'cure' is a limitless one to be controlled only by the will of the seller."). See also Elden, *Revocation of Acceptance: Interpretation and Application*, 8 U.C.C. L.J. 14, 17-21 (1975). See notes 78-84 and accompanying text *infra*.

49. NEB. REV. STAT. § 60-2704 (Supp. 1983). See also note 47 *supra*.

days or more, then a presumption is created that a "reasonable number of attempts have been undertaken."⁵⁰ This presumption, however, will not apply against the manufacturer unless he has received prior written notification by certified mail from or on behalf of the consumer and has had an opportunity to cure the alleged defect.⁵¹

One of the strengths of the new statute is the provision creating "an informal dispute settlement procedure" to be established by the Director of Motor Vehicles.⁵² The committee studying the Lemon Law received testimony which emphasized the prevalence of manufacturer's arbitration boards already in place.⁵³ The legislators decided that if the manufacturer provided such a service to handle the consumer's problems, and if the process fell within the parameters set by the Department of Motor Vehicles, then the consumer must take advantage of the procedure before pursuing action under the Lemon Law.⁵⁴

The statute of limitations for a cause of action under the Lemon Law is either one year after the express warranty has expired or two years after the delivery date of the vehicle to the consumer, whichever is earlier.⁵⁵ The Lemon Law provides the

50. NEB. REV. STAT. § 60-2704 (Supp. 1983).

51. *Id.*

52. NEB. REV. STAT. § 60-2705 (Supp. 1983). This informal dispute settlement mechanism (IDSM) must substantially comply with those specifications outlined in 16 C.F.R. § 703 (1983) which were in existence as of February 22, 1983. The code imposes duties on the warrantor-manufacturer. Incorporating these requirements into the Lemon Law puts a burden on the manufacturer to cause the consumer-purchaser to be made aware of the IDSM, to quickly receive an answer from the manufacturer concerning its position with respect to the defective auto, to respond to decisions of the IDSM and to act to good faith. *Id.* § 703.2.

53. See *Nebraska Hearings*, *supra* note 8, at 46-47, 52-53. See also notes 149-152 and accompanying text *infra*.

54. This issue was hotly contested in the Unicameral. See *Legislative History*, *supra* note 13, at 3089-94. One posture believed the mandatory requirement allowed the manufacturer to frustrate the consumer during the forced arbitration period by delaying the process. During the period, the statute of limitations could expire, and thus the consumer would be denied access to the courts. The opposing, and winning, posture believed the IDSM's made settlement more likely and prevented consumer frustrations in lengthy litigation.

One Senator expressed the belief that the decision of the arbitrator was binding on both parties and their recourse to an advised decision is the judicial system. *Id.* at 3092. But see 16 C.F.R. § 703.5(j) (1983) which states:

Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall act in good faith, as provided in § 703.2(g) of this part. In any civil action arising out a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110(a)(3) of the Act.

16 C.F.R. § 703 (1983) was promulgated as a result of a directive found in the Magnuson-Moss Act. See 15 U.S.C. § 2310(a)(2) (1982).

55. NEB. REV. STAT. § 60-2706 (Supp. 1983).

manufacturer with two affirmative defenses. First, the manufacturer may show that the nonconformity alleged by the consumer does not substantially impair the consumer's use and the car's market value. Alternatively, the manufacturer may attempt to show that the non-conformity resulted from the consumer's own abuse or neglect.⁵⁶ However, reasonable attorney fees may be awarded to the consumer who prevails in an action under the Lemon Law.⁵⁷

TRADITIONAL APPROACHES

When the Lemon Law was initially presented, the automobile manufacturers addressed the Banking Committee to voice their opposition to the bill.⁵⁸ It was their belief that adequate remedies already existed for the owner of a "lemon" and thus the proposed legislation was unnecessary. These other remedies referred to include enforcement under: (1) the state Uniform Commercial Code, (2) the federal Magnuson-Moss Warranty Act, (3) the Nebraska Consumer Protection Statute, and (4) the manufacturer's arbitration boards.⁵⁹

Although these remedies are available, none were designed specifically for the concerns of the lemon owner. All have problems which cause the lemon owner to become discouraged in his pursuit of a legal remedy. The following discussion analyzes how these approaches apply to a lemon owner and identifies the problems inherent in each.

THE UCC SOLUTION

Most new car warranties are limited to repair or replacement of defective parts.⁶⁰ As a part of the bargain struck between the automobile manufacturer and the consumer, the consumer agrees to allow the manufacturer, or his agent, the opportunity to repair the defect. The manufacturer agrees to attempt to fix all problems brought to him within the term of the warranty. However, when the selling dealer or the manufacturer fails to fix the defective vehicle within a reasonable time, some courts have held that the lim-

56. *Id.* § 60-2703. Labeling these manufacturer's recourses as affirmative defenses casts their burden of proof on the manufacturer. This becomes important when used in conjunction with NEB. REV. STAT. § 60-2704 (Supp. 1983) of the Lemon Law, which creates a rebuttable presumption of "reasonableness." See notes 49-51 and accompanying text *supra*.

57. NEB. REV. STAT. § 60-2707 (Supp. 1983).

58. See note 12 and accompanying text *supra*.

59. See notes 60-155 and accompanying text *infra*.

60. See note 106 *infra*.

ited warranty of repair or replacement of parts has "failed of its essential purpose" under U.C.C. section 2-719(2).⁶¹ Very simply, if the warrantor cannot replace the parts or repair them to conform to the warranty, then the defect cannot be cured.

When the essential purpose of the automobile's limited warranty fails, U.C.C. section 2-719(2) provides that the full range of remedies under other sections of U.C.C. are available to the buyer.⁶² One of these remedies is U.C.C. Section 2-608,⁶³ which governs the revocation of the buyer's acceptance.⁶⁴ A recent case decided by the Nebraska Supreme Court illustrates the attempted use of this remedy by a lemon owner.

In *Koperski v. Husker Dodge, Inc.*,⁶⁵ Virginia Koperski attempted to revoke her acceptance of a new 1978 Dodge Diplomat.⁶⁶

61. NEB. REV. STAT. (U.C.C.) § 2-719(b) (Reissue 1980) states that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." See *Durfree v. Rod Baxter Imports*, 262 N.W.2d 349, 356 (Minn. 1978) which states: "An exclusive remedy fails of its essential purpose if . . . [it] deprive[s] . . . one party of the substantial value of its bargain But if repairs are not successfully taken within a reasonable time, the buyer may be deprived of the benefits of the exclusive remedy."

See also *Soo Line R. R. Co. v. Fruehauf*, 547 F.2d 1365, 1370 (8th Cir. 1977) (applying Minnesota law, seller refused to repair); *Riley v. Ford Motor Co.*, 442 F.2d 670, 673 (5th Cir. 1971) (repairs ineffective); *Beal v. General Motors*, 354 F. Supp. 423, 426 (D.Del. 1973) (failure to correct defect within a reasonable time); *Jones & McKnight v. Birdsboro*, 320 F.Supp. 39, 43-44 (N.D. Ill. 1970) (refusal to repair); *Conte v. Dwan Lincoln-Mercury*, 172 Conn. 112, —, 374 A.2d 144, 148 (1976) (numerous repair attempts did not remedy defects); *Jacobs v. Metro Chrysler-Plymouth*, 125 Ga. App. 462, —, 188 S.E.2d 250, 253 (1972) (refusal to repair). *Russo v. Hilltop Lincoln-Mercury*, 470 S.W.2d 211, 212-13 (Mo. 1972) (due to faulty wiring, car caught fire and was worthless and beyond repair); *Ehlers v. Chrysler Motor*, 88 S.D. 612, —, 226 N.W.2d 157, 161 (1975) (failure to repair for unreasonably long time); *Moore v. Howard Pontiac-American*, 492 S.W.2d 227, 229 (Tenn. 1972) (repairs ineffective); *Melby v. Hawkins Pontiac*, 13 Wash. App. 745, —, 537 P.2d 807, 810-11 (1975) (repairs unreasonably delayed).

62. NEB. REV. STAT. (U.C.C.) § 2-719(2) (Reissue 1980).

63. See note 45 *supra*.

64. *Durfee v. Rod Baxter Imports*, 262 N.W.2d 349, 357 (Minn. 1978). See also *Ventura v. Ford Motor*, 180 N.J. Super. 45 —, 433 A.2d 801, 811 (1981) which states:

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

See also; Note, *Rescission of Consumer's Purchase of Automobile Permitted Upon Proof of Breach of Limited Warranty—Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 80 (1981), 12 SETON HALL 414, 416 (1982); *Cohan & Bailey, Defective Motor Vehicles—Warranty Rights and Practical Remedies for Consumer Purchasers*, 65 MASS. L. REV. 33, 36 (1980).

65. *Koperski v. Husker Dodge*, 208 Neb. 29, 302 N.W.2d 655 (1981).

66. *Id.* at 34, 302 N.W.2d at 658.

Chrysler Corporation, the manufacturer, had provided the car with an "express limited warranty . . . to repair or replace any part or parts of the vehicle which proved defective in normal use."⁶⁷ Forty days after Koperski took delivery, the car had been in the repair shop three times for a total of twelve days.⁶⁸ Koperski's father, a truck mechanic, drove the vehicle and noted its irregular performance.⁶⁹ The vehicle often stalled when depressing the accelerator yet, other times it shot across traffic.⁷⁰ It made considerable noise and Koperski's father feared the transmission might explode.⁷¹ He returned the car to Husker Dodge and informed them that his daughter wanted a different car or else she would rescind the contract.⁷²

Each time Virginia brought her car into the repair shop, work was performed on it.⁷³ Thus, there was no breach of the manufacturer's guarantee as the car dealer was never unwilling to replace or repair defective parts.⁷⁴

The *Koperski* court acknowledged a line of authority which provided relief to the consumer when the warranty, or contract, failed of its essential purpose. Citing *Goddard v. G.M.C.*⁷⁵ the court recognized:

Although in most cases a limited remedy may be fair and reasonable, and satisfy the reasonable expectations of a new car purchaser, other courts and some commentators have generally recognized that when a seller is unable to fulfill its warranted obligation to effectively repair or replace defects in goods which are the subject matter of the sale, such as in the instant cause, the buyer is deprived of the benefits of the limited remedy and it therefore fails its essential purpose.⁷⁶

Koperski alleged that the manufacturer had breached its warranty agreement with her, as repeated attempts to fix her autom-

67. *Id.* at 32, 302 N.W.2d at 657.

68. Virginia took delivery of the auto June 15, 1978. On June 20, 1978 she returned the car and the mechanic's report showed foreign matter was taken out of the carburetor. *Id.* at 34, 302 N.W.2d at 658-59. On June 22, 1978, Virginia left the car and an entire transmission was replaced. On July 5, 1978, the car was returned to the shop at which time the radiator was removed plus replacement of a transmission cooler was accomplished. *Id.* at 34-35, 302 N.W.2d at 659.

69. *Id.* at 36, 302 N.W.2d at 659.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 34-35, 302 N.W.2d at 658-59. See also note 68 and accompanying text *supra*.

74. 208 Neb. at 47, 302 N.W.2d at 665.

75. *Goddard v. G.M.C.*, 60 Ohio St. 2d 41, 396 N.E.2d 761 (1979).

76. *Id.* at 45, 396 N.E.2d at 764.

bile were unsuccessful, and she sought rescission of the contract and revocation of her acceptance of the automobile.⁷⁷ However, the Nebraska Supreme Court held that the warranty had not failed of its essential purpose because repair work was performed on the vehicle each time it was returned for servicing. The court further held that Koperski had not properly revoked her acceptance because she had failed to show the vehicle's value had been substantially impaired.

The *Koperski* case highlights the problems a consumer confronts when seeking a remedy under the U.C.C. The consumer must determine how many times the seller is allowed to try and fix the problem before the limited warranty fails of its essential purpose; the consumer must also determine what constitutes "substantial impairment" in order to revoke his acceptance.

FAILURE OF A WARRANTY'S ESSENTIAL PURPOSE

It is likely the owner of a lemon vehicle will return it to his dealer and give the dealer a chance to fix the defect. The problem and frustration for the owner lies in repeated trips if the repair work is not satisfactory.

The Pennsylvania court in *Stofman v. Keenan Motors, Inc.*⁷⁸ expressively painted the picture which the lemon owner confronts:

The facts present the complaint of an ever-increasing number of consumers who purchase new automobiles but who are thereafter unable to get necessary and satisfactory adjustments made on their new cars. In many cases these highly mechanized machines with so many moving parts will require careful alterations before they will run as smoothly as they should. The question we must consider is just how long the buyer must wait and how many unfulfilled promises may be made before he is entitled to revoke his acceptance of an automobile and be returned the purchase price. Our sympathies lie with those who repeatedly return their cars for repairs of service, then get them back in almost the same condition as when the complaints were originally registered. Sympathies aside, the law, ever just, provides a remedy for the situation where such a purchaser seeks to revoke his acceptance after receipt of and payment for the goods purchased.⁷⁹

The consumer may reasonably assume that, if the vehicle fails

77. *Koperski v. Husker Dodge*, 208 Neb. 29, 31, 302 N.W.2d 655, 657 (1981).

78. 63 Pa. D. & C.2d 56, —, reprinted in 14 U.C.C. REP. SERV. (CALLAGHAN) 1252 (1974).

79. *Id.* at —, 14 U.C.C. REP. SERV. (CALLAGHAN) at 1254.

to meet the warranty standards, the dealer will cure the nonconformity.⁸⁰ Consumers have reasonable expectations of quality and durability.⁸¹ When there have been numerous attempts by the seller-dealer to repair a warranted vehicle, a buyer is entitled to revoke his acceptance.⁸² A seller does not have an unlimited opportunity to cure the defect.⁸³

When a limited warranty of repair or replacement of defective parts fails of its essential purpose to produce a defect-free vehicle, continued enforcement of that warranty operates to deprive the buyer of the substantial value of his bargain.⁸⁴

REVOCATION OF ACCEPTANCE

If a lemon-owner believes his warranty has failed of its essential purpose, he will most likely seek to revoke his acceptance of the defective vehicle. In order to be successful the buyer must show: (1) a defect which substantially impairs the value of the vehicle to him; (2) acceptance of the vehicle on either the reasonable assumption a known defect would be fixed, or due to the seller's assurances that any unknown defects would be fixed; (3) notification to the seller of the revocation within a reasonable time after the defect is discovered; and (4) no substantial change in the vehi-

80. NEB. REV. STAT. (U.C.C.) § 2-608(1)(a) (Reissue 1980) allows sellers this opportunity to cure any defects. Consumers purchasing a new auto may expect minor adjustments to be necessary. Their purchase is implicitly based on an understanding that any nonconformity will be fixed by the dealer or manufacturer. *See also* Tiger Motor Co. v. McMurtry, 284 Ala. 283, —, 224 So. 2d 638, 647 (1969).

81. Pertschuk, *supra* note 14, at 146. *See also* Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960). The court stated:

Under modern conditions the ordinary layman, on responding to the importing of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has control of its construction, and to some degree on the dealer who, to the limited extent called for by the manufacturer's instructions, inspects and services it before delivery. In such a marketing milieu his remedies and those of persons who properly claimed through him should not depend "upon the intricacies of the law of sales." The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon "the demands of social justice."

Id. at —, 161 A.2d at 83.

82. Tiger Motor Co. v. McMurty, 284 Ala. 283, —, 224 So.2d 638, 647 (1969).

83. *Id.* at —, 224 So.2d at 647. *See also* Beal v. General Motors, 354 F.Supp. 423, 426 (D.Del. 1973); General Motors v. Earnest, 279 Ala. 299, —, 184 So.2d 811, 814 (1966); Orange Motors of Coral Gables v. Dade County Dairies, 258 So.2d 319, 321 (Fla. 1972); Zabriskie Chevrolet v. Smith, 99 N.J. Super. 441, —, 240 A.2d 195, 205 (1968); Elden, *Revocation of Acceptance: Interpretation and Application*; 8 U.C.C.L.J. 14, 21 (1975).

84. *See* NEB. REV. STAT. (U.C.C.) § 2-719 comment 1 (Reissue 1980).

cle has occurred that was not the result of the defects.⁸⁵

Substantial impairment in value to the buyer has been viewed by a majority of courts as a subjective test, i.e. was the value to this particular buyer substantially impaired?⁸⁶ It appears that comment 2 to U.C.C. Section 2-608 confirms this test: "[T]he question is whether the nonconformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances."⁸⁷

The Nebraska Supreme Court in defining "substantial impairment" in the *Koperski* case ignored both the prevailing interpretation of this phrase and the patent language of this comment to Section 2-608.⁸⁸ Rather, the court viewed the fact that approximately eighty-five percent of the purchase price was received upon sale of the vehicle after repossession as supportive of the trial court's opinion that there was no substantial impairment.⁸⁹

85. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW OF THE UNIFORM COMMERCIAL CODE 303 (1980).

86. See *Tiger Motor Co. v. McMurtry*, 284 Ala. 283, —, 224 So.2d 638, 645 (1969); *Keen v. Modern Trailer Sales*, 40 Colo. App. 527, —, 578 P.2d 668, 670 (1978); *Peckham v. Larsen Chevrolet-Buick-Oldsmobile*, 99 Idaho 675, —, 587 P.2d 816, 820 (1978); *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, —, 292 N.E.2d 168, 176 (1972); *McGilbray v. Scholfield Winnebago*, 221 Kan. 605, —, 561 P.2d 832, 836 (1977); *Durfee v. Rod Baxter Imports*, 262 N.W.2d 349, 353 (Minn. 1977). Compare *Asciolla v. Manter Oldsmobile-Pontiac*, 117 N.H. 85, —, 370 A.2d 270, 273 (1977) (interpreting 2-608 to create a subjective test that views the buyer's needs and circumstances, but then adds the twist of having the trier-of-fact objectively decide whether the value of the goods to the buyer was in fact substantially impaired); *Adams, Revocation of Acceptance: The Test for Substantial Impairment*, 32 U. PITT. L. REV. 439, 441 (1971); Note, *Revocation Acceptance Under U.C.C. § 2-608—Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977), 5 WM. MITCHELL L. REV. 241, 245 & n.21 (1979); J. WHITE & R. SUMMERS, *supra* note 85, at 308.

87. NEB. REV. STAT. (U.C.C.) § 2-608 comment 2 (Reissue 1980).

88. See note 86 and accompanying text *supra*. See also 2 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-608: 13 (1971) ("The test of substantial impairment is not determined by a dollar percentage appraisal but by the effect of the defect upon the intended user of the goods. . . .").

89. *Koperski v. Husker Dodge*, 208 Neb. 29, 41, 302 N.W.2d 655, 662 (1981). The burden is on the consumer-buyer to prove that there was a substantial impairment to him. J. WHITE & R. SUMMERS, *supra* note 85, at 308.

The *Koperski* case would suggest that in Nebraska: (1) vibration of the car when running at 35-40 miles per hour; (2) the motor killing when the air-conditioning was turned on; (3) the engine dying when the transmission was placed in reverse; (4) foreign matter removed from the carburetor; (5) replacement of the transmission, yet still no correction of the problems listed above; (6) a repair mechanic's opinion that the rear end of the car was likely to "go out" within six months; (7) pushing the car out of parking spaces when the car failed to go in reverse; (8) radiator work done; (9) the transmission cooler replaced; (10) a "rubbing metallic sound"; (11) sudden stopping or jerking of the car when it failed to shift gears; and (12) a great deal of noise, is not proof of substantial impairment. 208 Neb. at 34-36, 302 N.W.2d at 658-59. Agreeably a harsh result. *Id.* at 50, 302 N.W.2d at 666.

This emphasis on a monetary standard appears to ignore the subjective standard, i.e. the substantial impairment to the consumer, even though a subjective standard seems clearly indicated by the Uniform Commercial Code.⁹⁰ In addition, the objective monetary standard has been considered in other jurisdictions and rejected.⁹¹ Therefore, the definition of "substantial impairment" for Nebraska U.C.C. purposes is not only in the minority, but appears to have a questionable basis as well.

THE MAGNUSON-MOSS WARRANTY ACT

On July 4, 1975, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act became effective.⁹² This act was implemented to address four perceived needs: "the need for consumer understanding, the need for minimum warranty protection for the consumer, the need for assurance of warranty performance, and the need for better product reliability."⁹³ The act does not mandate the issuance of a warranty with a sale. However, if a written warranty is given to the consumer, the manufacturer falls within the purview of the statute.⁹⁴

90. See notes 86-88 and accompanying text *supra*. Phillips, *Revocation of Acceptance and the Consumer Buyer*, 75 COM. L.J. 354, 355 (1970).

91. *Sauers v. Tibbs*, 48 Ill.App.3d 805, —, 363 N.E.2d 444, 449 (1977) ("What is critical is not the dollar value of repairs but 'the effect of impairment has on the user'"); *Campbell v. Pollack*, 101 R.I. 223, —, 221 A.2d 615, 619 (1966) ("The words of the section are 'substantially impair its value to him * * *.' We will use these words and point out that the mathematical legerdemain of defendants is not the basis for a determination as to whether the seller's nonconformity has substantially impaired the buyer's purchase"). *But cf.* *Reece v. Yeager Ford Sales*, 155 W.Va. 461, —, 184 S.E.2d 727, 729 (1971) (The fact that the defects complained of could be corrected for \$35-\$80 prevented a claim for substantial impairment to the buyer). See generally Note, *Revocation of Acceptance: The Test for Substantial Impairment*, 32 U. PITT. L. REV. 439 (1971).

92. 15 U.S.C. § 2312 (1982). In the late 1960's, it became apparent that problems existed with automobile warranties. The Federal Trade Commission (FTC) engaged in a comprehensive survey of automobile warranties and its conclusions were rather dismal for the consumer. Poor quality, inadequate warranties, and deteriorating quality control were found to be specific problems. As a result, the FTC proposed an automobile Quality Control Act. See Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CAL. W.L. REV. 391, 393-94 (1977).

In 1974, another study was conducted to discover if any improvements had occurred. The study concluded that manufacturer's had taken little action to improve automobile warranties. The study concluded that consumer warranties were extremely complicated and confusing. Out of this the Magnuson-Moss Warranty Act was born. The Act applied to consumer warranties in general and did not address the complex issues presented by automobile warranties. *Id.* at 394-95. See also notes 107-11 and accompanying text *infra*.

93. See 119 CONG. REC. 29489-490 (1973) (remarks of Senator Dole).

94. See 15 U.S.C. § 2302(a) (1982). See also notes 100-06 and accompanying text *infra*.

The draftsmen of the Magnuson-Moss Act were cognizant of the imbalance in bargaining power between consumers and manufacturers.⁹⁵ Warranties serve as a marketing tool upon which the consumer relies.⁹⁶ As such, the consumer should not have to rely on "the intricacies of the law of sales"⁹⁷ for compliance with the warranty, but instead upon "the demands of social justice."⁹⁸ It has been suggested that this "reflects the realization that the Uniform Commercial Code has not been able to adequately protect the consumer in the area of product warranties."⁹⁹

With the balancing of the bargaining power between consumers and manufacturers as a goal, the Magnuson-Moss Act forbids disclaimers of implied warranties where the manufacturer or seller chooses to provide a written warranty.¹⁰⁰ It has been suggested that this restriction "effectively prohibits *warranty* protection from being given and taken away simultaneously."¹⁰¹

To qualify as a "full" warranty under the Magnuson-Moss Act, certain federal minimum standards must be met.¹⁰² Products with a full warranty fall within the protection of the act and allow the

95. See note 81 and accompanying text *supra*.

96. *Henningsen v. Bloomfield Motors*, 32 N.J. 358, —, 161 A.2d 69, 84 (1960).

97. *Id.* at —, 161 A.2d at 83.

98. *Id.*

99. Schmitt & Kovac, *Magnuson-Moss v. State Protective Consumer Legislation: The Validity of a Stricter State Standard of Warranty Protection*, 30 ARK. L. REV. 21, 22 (1976).

100. 15 U.S.C. § 2308 (1982) reads:

(a) Restrictions on disclaimers or modifications

No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer products if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration

For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the fact of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations

A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

101. C. RETZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT 18-19 (1978).

102. 15 U.S.C. § 2304(a) (1982). To be designated a full warranty, the following minimum standards must be met:

(1) The warrantor must agree to remedy any product that fails to conform to the warranty, within a reasonable time and at no charge to the consumer.

(2) The warrantor cannot limit the duration of any implied warranties.

(3) If the warrantor wishes to limit consequential damages he must so designate conspicuously and on the face of the warranty.

(4) The consumer is allowed to choose replacement or refund if the seller

consumer to elect to receive a refund or a replacement, without charge, of a product or part which remains defective after the warrantor has made a reasonable number of attempts to correct the problem.¹⁰³ If the federal standards for a full warranty are not met, then the warranty is "limited" in nature, and must be conspicuously designated as such.¹⁰⁴ A limited warranty thus announces to the consumer that the federal protection offered by the Act is not available to him.¹⁰⁵ Many, if not all, new car warranties are limited warranties.¹⁰⁶ Thus, a new car warranty protection generally lies outside the ambit of the Magnuson-Moss Act, so it is of no help to the lemon owner.

Another criticism of the act concerns its breadth. The federal legislation extends to any consumer product which costs more than ten dollars.¹⁰⁷ This broad scope prevents the act from estab-

cannot conform the defective product to the warranty within a reasonable time.

See also Roberts and Mann, *The Magnuson-Moss Federal Warranty Act and the Uniform Commercial Code Section 2-719; Further Reflections and Recent Developments*, 1979 ARIZ. ST. L.J. 765, 767-68.

103. 15 U.S.C. § 2304(a) (1982).

104. *Id.* § 2303(a)(2).

105. Schmitt and Kovac, *supra* note 99, at 26.

106. See *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 483 (Ky. 1978) (Ford warranty limited to repair or replacement of defective parts, excluding tires); *Durfee v. Rod Baxter Imports*, 262 N.W.2d 349, 355 n.9 (Minn. 1977) (Saab Warranty limited to repair or replacement of defective parts provided the dealer is notified of the defect within stated warranty period); *Koperski v. Husker Dodge*, 208 Neb. 29, 32, 302 N.W.2d 655, 657 (1981) (limited warranty on 1978 Dodge Diplomat under which the exclusive obligation of Chrysler was to repair or replace parts of any vehicle that proved defective in normal use).

107. 15 U.S.C. § 2303 (1982) reads:

(a) Full (statement of duration) or limited warranty

Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 3405 of this title, then it shall be conspicuously designated a "full (statement of duration) warranty".

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "limited warranty".

(c) Exemptions by Commission

In addition to exercising the authority pertaining to disclosure granted in section 2302 of this title, the Commission may by rule determine when a written warranty does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

(d) Applicability to consumer products costing more than \$10 and not designated as full warranties

The provisions of subsections (a) and (c) of this section apply only to warranties which pertain to consumer products actually costing the consumer more than \$10 and which are not designated "full (statement of duration) warranties".

lishing substantive standards to provide a bright-line test in consumer protection.¹⁰⁸ Thus, the same criticism launched at the Uniform Commercial Code for encompassing a wide range of transactions may also be directed at the Magnuson-Moss Act.¹⁰⁹ This has led some to view the act as "a disappointed work product."¹¹⁰

However, the act was not designed to create any new remedies or rights,¹¹¹ but rather to be a "veneer that must be considered in conjunction with the Code."¹¹² The act encourages manufacturers to implement informal dispute settlement mechanisms (IDSMS) to fairly and expeditiously settle consumer complaints.¹¹³ The outline for the IDSMS is promulgated in the Code of Federal Regulations¹¹⁴ under the act's directive.¹¹⁵ Use of the IDSMS, if established, is a mandatory prerequisite to bringing an action under the Magnuson-Moss Act.¹¹⁶ However, the consumer may bring an action under the U.C.C. without resorting to IDSM arbitration.¹¹⁷ The consumer is not charged a fee for availing himself of the IDSM.¹¹⁸ If the IDSM proves unsuccessful to the consumer, the state remedies may yet provide assistance.¹¹⁹ The federal legislation was not intended to supplant state law, but rather to supplement it.¹²⁰

108. See Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties*, 55 N.C.L. REV. 835, 873 (1977).

109. *Id.* at 874. The author states "[t]he Magnuson-Moss Act represents progress, in so far as it narrows the type of transaction and warranty provision to be governed. But the consideration of the Act suggests that further specificity would still be beneficial."

110. *Id.* at 877.

111. Roberts and Mann, *supra* note 102, at 765.

112. Note, *Consumer Product Warranties Under the Magnuson-Moss Warranty Act and the Uniform Commercial Code*, 62 CORNELL L. REV. 738, 740 (1977).

113. 15 U.S.C. § 2310(1) (1982). See NEB. REV. STAT. § 60-2705 (Supp. 1983) (the Lemon Law suggests that this procedure be utilized).

114. 16 C.F.R. § 703 (1983). See also note 52 and accompanying text *supra*.

115. 15 U.S.C. § 2310(2) (1982).

116. *Id.* § 2310(3).

117. See notes 60-90 and accompanying text *supra*.

118. 16 C.F.R. § 703.3(a) (1983).

119. Other available remedies include an action under the UCC. See notes 60-90 and accompanying text *supra*. An action under state Consumer Protection Statutes or state Deceptive Trade Practices Act also exists. See notes 122-47 and accompanying text *infra*. Utilization of the manufacturer's own arbitration system, which may not meet all the requirements of Magnuson-Moss may also be used. See notes 148-55 and accompanying text *supra*.

120. Smith, *supra* note 92, at 427-28. But if a state law concerns labeling or disclosure requirements, and it covers the same ground as, the Magnuson-Moss Warranty Act or is not identical to it, then the state laws are nullified. See also Comment, *Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts*, 26 UCLA L. REV. 583, 676 (1979).

Because the Magnuson-Moss Act primarily protects consumers only when they are given a full warranty and because new car warranties are generally limited, the act would appear to have little applicability for the lemon owner. However, the guidelines set for the IDSMs are important to understand as they have become an integral part of the Lemon law.¹²¹

CONSUMER PROTECTION STATUTES

Nebraska has two consumer protection statutes: the Nebraska Consumer Protection Act¹²² and the Uniform Deceptive Trade Practices Act.¹²³ Both pieces of legislation are concerned with fraudulent acts against a consumer.¹²⁴

Nebraska case law does not reveal a history of either of these consumer statutes being used to remedy the problems of a lemon owner. However, a somewhat strained interpretation of similar legislation has produced a remedy for lemon owners in other jurisdictions.

In *Ford Motor Co. v. Mayes*,¹²⁵ an appeal was taken from a judgment finding an unfair trade practice by Ford Motor Company,¹²⁶ which allegedly violated the Kentucky Consumer Protection Act.¹²⁷ In 1976, Mr. and Mrs. Mayes purchased a new Ford truck.¹²⁸ The truck carried Ford's limited warranty which guaranteed repair or replacement of defective parts for twelve months or 12,000 miles.¹²⁹ About five weeks after their purchase, the Mayes noted an unusual grinding noise and vibrations from the truck.¹³⁰ They returned the truck seven or eight times, allowing the dealer to replace or repair numerous parts.¹³¹ The district office of Ford

121. See notes 189-207 and accompanying text *infra*.

122. NEB. REV. STAT. § 59-1601 (Reissue 1978).

123. *Id.* § 87-301 (Reissue 1981).

124. NEB. REV. STAT. § 59-1602 (Reissue 1978) prohibits any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." NEB. REV. STAT. § 87-302 (Reissue 1981) enumerates what constitutes deceptive trade practices for purposes of this Act.

125. 575 S.W.2d 480 (Ky. 1978).

126. *Id.* at 481-82.

127. The violation complained in the *Mayes* case involved KY. REV. STAT. ANN. § 367.170 (Baldwin 1972). This act has been updated and is currently codified at KY. REV. STAT. ANN. § 367. 170 (Baldwin 1982).

128. *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 482 (Ky. 1978).

129. *Id.* at 483.

130. *Id.* at 482.

131. *Id.* Initially, a number of minor problems were repaired after the purchase. About five weeks later the unusual noise and vibration problems prompted repairs or replacement of parts, including the clutch, transmission gears and a steering mechanism.

was consulted and likewise could not remedy the problem.¹³² After the truck was taken to a frame shop, it was discovered that the frame was bent.¹³³ The Mayes returned the truck to the dealer with written notice that they were revoking their acceptance of the vehicle.¹³⁴ The Mayes' predicated their revocation on the unconscionability of Ford's limited warranty under the Kentucky Consumer Protection Act.¹³⁵

The Kentucky Supreme Court found that the Mayes were entitled to revoke their acceptance of the defective truck.¹³⁶ The limited remedy of repair or replacement of defective parts was invalid, as it failed of its essential purpose to provide goods which conformed to the contract within a reasonable time after the defect was discovered.¹³⁷ This appears to be the usual rationale for breach of warranty under the UCC.¹³⁸ Under the UCC, once a court finds that a warranty has failed of its essential purpose, the warranty is deemed to have been breached.¹³⁹

Further analysis in the *Mayes* case was necessary because the Mayes sued under the Consumer Protection Act. In addition to concluding that the Mayes' were deprived of the benefits of their bargain by being left with a "prematurely aged truck,"¹⁴⁰ the court was also required to find that Ford Motor Company acted unconscionably.

The court found that Ford did indeed act unconscionably when it insisted that the Mayes' only remedy was to permit repeated and indefinite attempts to correct the defect.¹⁴¹ Because the defect was not readily identifiable, Ford could not guarantee that it would be remedied, thereby assuring the Mayes' of the benefit of their bargain.¹⁴² As such, this practice was unfair and, thereby, unlawful under the Kentucky Consumer Protection Act.¹⁴³

132. *Id.*

133. *Id.* One of Ford's engineers suggested that the truck might have a bent frame.

134. *Id.*

135. *Id.* at 482-83. See also KY. REV. STAT. ANN. § 367.170 (Baldwin 1982).

136. *Mayes*, 575 S.W.2d at 485.

137. *Id.* at 484.

138. See notes 78-84 and accompanying text *supra*.

139. *Id.*

140. *Mayes*, 575 S.W.2d at 485.

141. *Id.* at 486.

142. *Id.*

143. *Id.* See KY. REV. STAT. ANN. 367.170 comment (Baldwin 1982), *citing Mayes* as authority for interpretation of the act. The annotation states "[i]t is an unconscionable act under the consumer protection act for a seller to refuse to recognize a buyer's rights under the Uniform Commercial Code when the remedy allowed by the seller's limited warranty has failed."

Under a statute similar to Nebraska's Uniform Deceptive Trade Practices Act,¹⁴⁴ the New Hampshire Supreme Court was also faced with the issue of whether a warranty limited to repair or replacement of defective parts was an unfair or deceptive practice.¹⁴⁵ The court found that there was no evidence of bad faith, dishonesty, or any attempt to take advantage of the owner on the part of the automobile dealer.¹⁴⁶ Rather, the court found that the dealer made good faith attempts to conform the vehicle to the warranty. Thus, no unfair or deceptive practice was established.¹⁴⁷

144. NEB. REV. STAT. § 87-306 (Reissue 1981).

145. Welch v. Fitzgerald-Hicks Dodge, 121 N.H. 358, —, 430 A.2d 144, 147 (1981).

146. *Id.*

147. *Id.* The court stated that to recover under the New Hampshire Deceptive Trade Practices Act, the consumer was required to establish that the sellers "acted in bad faith, dishonestly, or in any way attempted to take unfair advantage" of the buyers. The buyers failed to adduce evidence demonstrating the requirements because the dealer/seller had made good faith service efforts that attempted to comply with the warranty. *Id.*

These car buyers were denied recovery under N.H. REV. STAT. ANN. § 358-A:2 (1981) which states:

I. It shall be unlawful for any person to use any method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following:

- (a) Passes off goods or services as those of another;
- (b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (c) Causes likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;
- (d) Uses deceptive representations or designations of geographic origin in connection with goods or services;
- (e) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (f) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;
- (g) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (h) Disparages the goods, services, or business of another by false or misleading representation of fact;
- (i) Advertises goods or services with intent not to sell them as advertised;
- (j) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity; or
- (k) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
- (l) Conducts going out of business sales other than the name implies, or which last more than sixty days, or which are held more than once every two years by the same owner of the business.

The Nebraska statute regarding Unfair or Deceptive Trade Practices is quite similar to the New Hampshire statute. NEB. REV. STAT. § 87-302 (Reissue 1981) states:

As these cases demonstrate, it is possible for a lemon owner to bring an action pursuant to either the Consumer Protection Act or the Unfair Trade Practices Act. However, neither statute particularly addresses the problems confronting the lemon owner and, thus, relief is available only through a tortured interpretation of the Acts.

MANUFACTURERS' ARBITRATION BOARDS

Arbitration boards are frequently utilized to settle disputes

(a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

- (1) Passes off goods or services as those of another;
 - (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
 - (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
 - (4) Uses deceptive representations or designations of geographic origin in connection with goods or services;
 - (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
 - (6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand, except that sellers may repair damage to and make adjustments on or replace parts of otherwise new goods in an effort to place such goods in compliance with factory specifications;
 - (7) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
 - (8) Disparages the goods, services, or business of another by false or misleading representation of fact;
 - (9) Advertises goods or services with intent not to sell them as advertised;
 - (10) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
 - (11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
 - (12) Uses or promotes the use of a chain distributor scheme in connection with the solicitation of business or personal investments from members of the public;
 - (13) With respect to a sale or lease to a natural person of goods or services purchased or leased primarily for personal, family, household, or agricultural purposes, uses or employs any referral or chain referral sales technique, plan, arrangement, or agreement; or
 - (14) Installs or uses an automatic dialing-announcing device without first obtaining a permit issued pursuant to sections 87-308 to 87-311.
- (b) In order to prevail in an action under sections 87-301 to 87-306, a complainant need not prove competition between the parties.
- (c) This section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this state.

Thus it would appear that a Nebraska car buyer would be unable to use the Deceptive Trade Practices Act to recover for a "lemon," assuming that Nebraska would interpret its statute in a manner similar to the New Hampshire court's interpretation.

between consumers and manufacturers. The automobile industry favors this development and the use of arbitration boards has become a widely accepted practice in the automobile industry.¹⁴⁸

In the legislative hearing before Nebraska's Banking, Commerce and Insurance Committee, manufacturer representatives from General Motors, Chrysler and Ford addressed the session.¹⁴⁹ All concurred that the "Lemon Law" was unnecessary because of the existence of the Manufacturers' Arbitration Boards, state Uniform Commercial Code relief, Federal Magnuson-Moss Warranty Act relief, and state Consumer Protection Statute relief.¹⁵⁰ For example, concerning Manufacturers' Arbitration Boards, Chrysler has a "Customer Satisfaction Board" in all fifty states to manage consumer problems,¹⁵¹ and General Motors has an arbitration program set up in both Lincoln and Omaha, Nebraska, through each city's Better Business Bureau.¹⁵²

These consumer grievance alternatives reflect the automobile industry's growing awareness of consumer expectations¹⁵³ and recognition that arbitration or dispute settlement procedures permit many consumers to resolve problems that would otherwise remain unresolved because judicial resolution would not be cost effective.¹⁵⁴ However, these systems are still in their infancy and need to be refined to adequately offer an answer to consumer frustrations.¹⁵⁵

THE EFFECT OF NEBRASKA'S LEMON LAW ON CONSUMER PROTECTION

As discussed previously, the owner of a lemon has had several options available when seeking relief for the defects in his vehicle. However, although the U.C.C., the Magnuson-Moss Act, and the Consumer Protection Statutes may provide the lemon owners re-

148. ABA Special Comm. on Alternative Dispute Resolution, *Consumer Dispute Resolution: Exploring the Alternatives*, 637-42 (1983). See also note 152 *infra*.

149. *Nebraska Hearings*, *supra* note 8, at 46-52.

150. *Id.* See also note 12 *supra*.

151. *Nebraska Hearings*, *supra* note 8, at 46.

152. *Id.* at 53. Ford did not mention their arbitration process but opposed the Lemon Law, stating that the consumer had adequate existing remedies under the Uniform "Consumer" Code and Magnuson-Moss Federal Warranty Act. *Id.* at 47.

153. *Id.* at 42 (testimony of Dan Besaw, Public Affairs Manager, indicating that "consumer satisfaction is [a] number one priority" because manufacturers are "aware that a disappointed consumer will look elsewhere.").

154. ABA Special Comm. on Alternative Dispute Resolution, *Consumer Dispute Resolution: Exploring the Alternatives*, 639 (1983).

155. *Id.* at 640. Suggestions for improving the arbitration process include limiting the amount of time to deal with disputes and better training for the arbitration board staff.

lief in some cases, these statutes were not designed specifically to deal with questions of new car warranties. Additionally, the manufacturers' arbitration boards appear to lack mandated, uniform guidelines. The following discussion will indicate changes consumers may expect when bringing an action under the new Lemon Law.

REINTERPRETATION OF THE UCC

The Lemon Law provides the lemon owner with the remedy of either refund of his purchase price or replacement of the lemon with a comparable vehicle.¹⁵⁶ In order to qualify for either remedy the lemon owner must meet two conditions: (1) the defect must substantially impair the use and market value of the vehicle to the owner; and (2) the owner must have permitted the manufacturer, its agents or its authorized dealers a reasonable number of attempts to cure the defect.¹⁵⁷ Although the language in the Lemon Law appears in part to parallel that of the U.C.C., the focus and intent of the new law may require a reinterpretation of these notions.

SUBSTANTIAL IMPAIRMENT: MORE THAN AN OBJECTIVE TEST

Recovery under Nebraska's Lemon Law requires a showing that the defect "substantially impairs the use and market value of the motor vehicle to the consumer."¹⁵⁸ The plain import of this phrase would appear to indicate a two-part analysis, involving the impact of the defect on both the use and the market value of the vehicle. However, because of recent Nebraska case law development, and the underlying purpose of the Lemon Law, a different interpretation could result.

As discussed above, part of the phrase "substantially impairs," as used in the Lemon Law, is also found in the U.C.C. section involving the conditions to be met before a consumer may revoke acceptance of his goods.¹⁵⁹ The U.C.C. does not include the term "market value," rather, it is concerned with the substantial impairment of use to the consumer.¹⁶⁰ Generally, the U.C.C. test is subjective, measured by the impact of the impairment or defect on the buyer.¹⁶¹ However, recent Nebraska case law has interpreted this

156. NEB. REV. STAT. § 60-2703 (Supp. 1983).

157. *Id.*

158. *Id.*

159. See notes 85-91 and accompanying text *supra*.

160. NEB. REV. STAT. (U.C.C.) § 2-608(1) (Reissue 1980).

161. See notes 86-87 and accompanying text *supra*.

phrase according to an objective standard, that is the resale price after repossession of the defective vehicle.¹⁶²

In a 1979 decision, *Countryside Mobile Homes v. Schade*,¹⁶³ the Nebraska Supreme Court was faced with the issue of whether the use of a mobile home was substantially impaired.¹⁶⁴ The facts presented included a lengthy list of defects which the owners had discovered shortly after the mobile home had been installed.¹⁶⁵ Panels were buckled; cracks around the windows and doors allowed the wind to come through the home; some doors jammed, while one could not even be locked; water from the bathtub ran onto the floor; and, after a rainstorm, the buyers discovered that water came in the mobile home.¹⁶⁶ The Schades reported these to the seller and were promised repairs.¹⁶⁷

A salesman visited the Schades and compiled an even lengthier list of defects, all of which he believed were repairable.¹⁶⁸ Several weeks passed before repairmen arrived, at which time the Schades refused to allow the work to be done as they had previously requested a new unit.¹⁶⁹ The mobile home was repossessed and was sold for \$7000 at a public auction.¹⁷⁰

The Nebraska Supreme Court found that the evidence supported the trial court's finding of substantial impairment in the value of the mobile home.¹⁷¹ The court stated: "Although *neither conclusive* nor the only evidence supporting diminution of value is the fact that the mobile home at public sale on January 16th brought \$7000. This was less than one-half its value when sold to the appellee."¹⁷² Thus, the court in *Schade* acknowledged a guideline for finding substantial impairment. However, the court also acknowledged that the guideline was not necessarily *the* determining factor in finding substantial impairment.

Two years later the Nebraska Supreme Court again had an opportunity to evaluate what constitutes substantial impairment. In *Koperski v. Husker Dodge, Inc.*,¹⁷³ discussed earlier,¹⁷⁴ the Ne-

162. See *Countryside Mobile Homes of Lincoln v. Schade*, 204 Neb. 209, 215, 281 N.W.2d 756, 759 (1979); *Koperski v. Husker Dodge*, 208 Neb. 29, 37, 302 N.W.2d 655, 660 (1981).

163. *Countryside Mobile Homes v. Schade*, 204 Neb. 209, 281 N.W.2d 756 (1979).

164. *Id.* at 215, 281 N.W.2d at 759.

165. *Id.* at 211, 281 N.W.2d at 758.

166. *Id.* at 211-12, 281 N.W.2d at 758.

167. *Id.* at 212, 281 N.W.2d at 758.

168. *Id.*

169. *Id.*

170. *Id.* at 215, 281 N.W.2d at 759.

171. *Id.*

172. *Id.*

173. 208 Neb. 29, 302 N.W.2d 655 (1981).

braska Supreme Court affirmed a trial court's opinion that the buyer of a new automobile, which was seemingly riddled with defects, had not proven that the vehicle was substantially impaired and thus the buyer was not entitled to revocation of acceptance under section 2-608 of the U.C.C.¹⁷⁵ After Koperski returned the vehicle to Husker Dodge, they put in a third transmission and thereafter, upon repossession, were able to sell the vehicle for eighty-five percent of the original purchase price.¹⁷⁶ The court relied on this evidence to affirm the trial court's finding of no substantial impairment.¹⁷⁷ In so finding, the court refused to place "their sympathies with the disappointed purchasers of the defective automobile,"¹⁷⁸ but rather appeared to elevate the *Schade* "guideline" into a determinative test for substantial impairment.

Following the decisions in *Schade* and *Koperski*, the issue becomes whether the Nebraska Supreme Court will follow this precedent when confronted with a cause of action based on the Lemon Law. The emphasis on a monetary standard is a minority position¹⁷⁹ and thus, a debatable interpretation. The legislative history of the Lemon Law makes no reference to any case law, and thus it is possible that the legislators were unaware of Nebraska's peculiar interpretation of "substantial impairment." However, they did seem to be aware of the inadequate legal remedies available to a lemon owner.¹⁸⁰ Perhaps the Lemon Law evolved as

174. See notes 65-77 and accompanying text *supra*.

175. *Koperski*, 208 Neb. at 41-42, 302 N.W.2d at 662.

176. *Id.* at 41, 302 N.W.2d at 662.

177. *Id.* at 42, 302 N.W.2d at 662.

178. Note, *Koperski v. Husker Dodge, Inc.: Revocation of Acceptance Under Section 2-608: The Test for Substantial Impairment of Value*, 15 CREIGHTON L. REV. 170, 177 (1981).

179. See notes 88-91 and accompanying text *supra*.

180. *Legislative History, supra* note 13, at 260, 267. Senator Goll stated: "This is good Legislation. This is consumer oriented. It is designed to protect those isolated situations for the guy that owns that new car and he cannot get it fixed."

Senator Beutler stated: "The bill creates a presumption that after you have done certain things, after you have sent it back for repairs four more times or after it's been out of service a certain number of days, then it creates the presumption that you have a 'lemon' on your hands."

Senator Chambers proposed an amendment to the Lemon Bill to change the words "substantially impairs" to "unreasonably impairs." *Id.* at 1172. The amendment passed, *id.* at 1173, but later the language was returned to the original words. The primary reason for the use of the language "substantially impairs" was to be uniform with other states. *Id.* at 1654, 2070. Senator Chambers said that whether the word substantially or unreasonably was used "in either instance we're talking about a person being denied the use of his or her vehicle, and the condition has not been corrected when taken back three [later changed and stands as, four] times." *Id.* at 2073.

Senator Vickers shed light on what substantial impairment means when he said, "As somebody that does a lot of my own repair work, if I can't figure out in

an attempt to ameliorate *Koperski*-type problems.

Had the intent of the legislators been to maintain an objective monetary standard, they did not need to promulgate the new law. The courts appeared to already be interpreting "substantial impairment" in this fashion.

The Lemon Law is concerned with substantial impairment in both use and market value. If "use" only meant the value upon resale of a defective automobile, as defined in *Schade* and *Koperski*, then "market value" would have no independent meaning. This author believes the language forces the court to look beyond the monetary standard and to "reach a decision that recognizes the practical reality that products requiring constant repair are essentially worthless to the consumer."¹⁸¹

REASONABLENESS UNDER THE LEMON LAW

There is a presumption that a reasonable number of attempts has been made to conform to a warranty when: (1) the same defect has been subject to repair four or more times; or (2) the defective vehicle has been out of service, because of repeated repair attempts, a total of forty or more days.¹⁸² Both of these instances

three times on the same problem what is the matter with it, then it must be a pretty serious problem that obviously needs replaced, the whole thing, whatever it is." *Id.* at 2074.

Senator Morehead reminded the legislators that "we're talking about lemons as a parameter. We're not talking about ordinary service problems. We're talking about this specific kind of problem." *Id.* at 2076.

Before the final reading of the bill, Senator Chambers alluded to the concept of substantial impairment when he said "So let's say that you have triggered the bill. You've let them keep somebody's car out of service for 40 days. The value is substantially impaired, the use of it is substantially impaired. Obviously so because they [the buyer] haven't been able to use it for 40 days." *Id.* at 2080.

See also *Legislative History of L.B. 5729*, Reg. Sess. 2747 (1982) in which the Connecticut Senator Leonhardt stated, "[T]he genius of this bill is that it really takes the commonsense notion that a consumer should be able to return a lemon. . . . It takes that concept and translates that kind of basic concept that appeals to the sense of fairness of each and everyone of us."

181. Note, *Commercial Law—Revocation of Acceptance Under U.C.C. § 2-608—Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977), 5 WM. MITCHELL L. REV. 241, 251 (1979).

182. NEB. REV. STAT. § 60-2704 (Supp. 1983) states:

It shall be presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties, if (1) the same nonconformity has been subject to repair four or more times by the manufacturer, its agents, or authorized dealers within the express warranty term or during the period of one year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date, but such nonconformity continues to exist or (2) the vehicle is out of service by reason of repair for a cumulative total of forty or more days during such term or during such period, whichever is the earlier date.

Id.

presume that the consumer has been patient in his demands, but that the time for curing the defect has expired. The presumption shifts the burden to the manufacturer to prove that the vehicle is not a lemon, as inferred.¹⁸³

Before the consumer may sue under the Lemon Law, he must notify the manufacturer by certified mail that a defect exists.¹⁸⁴ Unless this stringent notice requirement is complied with, the presumption of reasonableness raised by the statute will not be activated.¹⁸⁵ After receiving the required notice, the manufacturer is allowed an opportunity to cure the alleged defect.¹⁸⁶ The statute does not indicate at what point in the chain of repair attempts this notice must be furnished.¹⁸⁷

Circumstances may exist in which the consumer is unable or unwilling to take the steps necessary under the Lemon Law to raise the presumption that his automobile is a lemon. Neverthe-

183. Connecticut enacted the first lemon law and CONN. GEN. STAT. ANN. § 42-179 (West 1983) reads:

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

Senator Mustone stated that this changes the present law because "the consumer would be able to go to court and the burden would be on the manufacturer to show that the car was not a lemon." See *Legislative History of L.B. 5729*, Reg. Sess. 2741-42 (1982).

The Nebraska Law is similar to the Connecticut statute and it too appears to shift the burden to the manufacturer. See note 182 *supra*.

184. The notification must be received from or on the behalf of the consumer. NEB. REV. STAT. § 60-2704 (Supp. 1983).

185. *Id.*

186. *Id.* This condition seems to be consistent with the overall purpose of the statute. It attempts to provide fair treatment for the manufacturer, dealer, and consumer. See *Legislative History, supra* note 13, at 1655.

187. Letter from Nebraska Dept. of Justice to Senator Ernest Chambers (April 4, 1983) (discussing L.B. 155 which is currently codified at NEB. REV. STAT. §§ 60-2701 to -2709 (Supp. 1983)). Notice may be given after four repair attempts have been made, in which case the manufacturer would get another chance to fix the defect and, if unsuccessful, then the presumption is in force. See NEB. REV. STAT. § 60-2704 (Supp. 1983). Apparently notice of the defect could be sent any time after the consumer attempted repairs but if the manufacturer has established or agrees to participate in a dispute settlement mechanism, then the consumer must first go through this procedure before attempting to sue under the Lemon Law. See *id.* 60-2705.

less, the consumer can still sue under the Lemon Law by himself bearing the burden of proving that the defect substantially impairs the use and market value of the vehicle after a reasonable number of attempts at repair have failed.¹⁸⁸ This type of situation would undoubtedly arise in cases where the defect was so major as to require only one attempt at repair in order to meet the Lemon Law's reasonableness standard.

STAYING OUT OF COURT—THE TRUE LEMON AID

The Magnuson-Moss Act¹⁸⁹ required the Federal Trade Commission to devise standards for informal dispute settlement mechanisms (IDSM).¹⁹⁰ As previously discussed, the Magnuson-Moss Act itself offers little help to the lemon owner.¹⁹¹ However, the Lemon Law adopted the arbitration standards established by the Magnuson-Moss Act to serve as the framework for manufacturer arbitration programs.¹⁹²

If the manufacturer has an arbitration system which complies with federal guidelines for informal dispute settlement, and that system has been approved by the Nebraska Department of Motor Vehicles, then the Lemon Law requires the owner of a lemon vehicle to resort to such a procedure before he initiates judicial action for replacement or refund.¹⁹³ The federal standards require a quick resolution of the dispute,¹⁹⁴ and that there be no charge to the consumer for the use of this procedure.¹⁹⁵

When the IDSM board is notified of the dispute, it immediately informs the warrantor-manufacturer of the claim and notifies the consumer that it is pursuing the matter.¹⁹⁶ The board investigates the claims and gathers all information necessary for a decision. This information may include evidence of the number of repair at-

188. NEB. REV. STAT. § 60-2703 (Supp. 1983). The consumer might be required to utilize this approach when the car is repaired several times for different defects or if the car has only been out of service for twenty or thirty days. Both of these situations might be deemed by courts to substantially impair the automobile's value after a reasonable number of attempts at repair have been made. *See also* Letter from Nebraska Dept. of Justice to Senator Ernest Chambers (April 4, 1983) (discussing L.B. 155 which is currently codified at NEB. REV. STAT. §§ 60-2701 to -2709 (Supp. 1983)).

189. 15 U.S.C. §§ 2301-2312 (1982).

190. *Id.* § 2310(a)(2).

191. *See* notes 102-10 and accompanying text *supra*.

192. NEB. REV. STAT. § 60-2705 (Supp. 1983).

193. *Id.*

194. 16 C.F.R. § 703.5(d) (1983). A decision in most disputes is to be rendered within 40 days of notification of the dispute. *Id.*

195. *Id.* § 703.3(a).

196. *Id.* § 703.5(b).

tempts, the length of the out of service time, the possibility of abuse to the vehicle by the consumer and any other relevant issues.¹⁹⁷ Disclosure of the board findings is given to both parties who are then allowed an opportunity to refute any information and to submit additional materials.¹⁹⁸

Within forty days, the IDSM board must render a decision and provide the remedies which it deems appropriate.¹⁹⁹ Although the decision of the IDSM board is not legally enforceable against either party, it is admissible as evidence in a subsequent civil action arising out of the warranty obligation.²⁰⁰

If the consumer does participate in the IDSM but is dissatisfied with the results received, he is free to pursue legal remedies.²⁰¹ If the consumer's participation in the IDSM has caused the statute of limitations to run, he should be given additional time to bring his claim. Although this issue is not addressed in the statute, such a waiver of the limitations period was the express intent of the legislators²⁰² and was supported in a letter written by the Nebraska Department of Justice.²⁰³

197. *Id.* § 703.5(c).

198. *Id.*

199. *Id.* § 703.5(d)(1). *Compare* with the usual length of time required in litigation of similar cases. *Conte v. Dwan Lincoln-Mercury*, 172 Conn. 112, —, 374 A.2d 144, 146 (1976) (six years); *Johannsen v. Minnesota Valley Ford Tractor Co.*, 304 N.W.2d 654, 656 (Minn. 1981) (almost four years); *Durfee v. Rod Baxter Imports*, 262 N.W.2d 349, 351 (Minn. 1977) (three years); *Koperski v. Husker Dodge*, 208 Neb. 29, 34, 302 N.W.2d 655, 658 (1981) (over two years); *Zabriskie Chevrolet v. Smith*, 99 N.J. Super 441, —, 240 A.2d 195, 197 (1968) (one year lapse); *Moore v. Howard Pontiac-American*, 492 S.W.2d 227, 228 (Tenn. 1972) (almost two years).

200. 16 C.F.R. § 703.f(j) (1983).

201. *Id.* § 703.5(g)(1).

202. *See Legislative History, supra* note 13, at 2691-92. (Testimony of Sen. Johnson) stating:

Now if there is a conflict between the manufacturer's mechanism and the consumer's right to go to Court, what will happen very simply is, (a) the wise consumer will go to Court withstanding the conflict so there is no question at all about the issue or, (b) if the wise consumer is foolish and goes to Court after the statute of limitations has expired his lawyer will simply argue or her lawyer will simply argue, hey, I got locked in on an informal dispute resolution mechanism and they put me out of time and, in fact, you have to interpret the statute as tolling the statute of limitations while we are involved with that formal dispute mechanism system.

203. Letter from Nebraska Dept. of Justice to Senator Ernest Chambers (April 4, 1983) states:

Additionally, we do not believe a statute of limitations problem would be created on account of the requirement that a consumer first resort to an informal settlement mechanism, if available. It is not necessary to consider the question of magnitude since we are of the opinion that the statute of limitations would not run during the time the consumer was resorting to the mandatory informal settlement procedures.

The letter also refers to *Lincoln Joint Stock Land Bank v. Barnes*, 143 Neb. 58, 65, 8 N.W.2d 545, 551, *cert. denied*, 320 U.S. 781 (1943) which states:

By making recovery under the Lemon Law contingent on use of certified IDSMs, the legislators expressed their hope that a satisfactory resolution of the problem could ordinarily be arrived at without the expense of litigation.²⁰⁴ If so, the consumer has surely benefitted both financially and emotionally.

Alternatively, if the manufacturer does not offer an IDSM which has been certified by the Nebraska Department of Motor Vehicles,²⁰⁵ then the consumer may proceed directly to court, invoking the presumption that his automobile is a lemon²⁰⁶ or electing to prove his behavior was reasonable in light of the situation.²⁰⁷

CONCLUSION

Implicit in the Lemon Law is the understanding that a warranty limited to repairs and replacement of defective parts cannot escape the scope of the statute. If repairs and replacement of defective parts do not result in a vehicle free of defects, then the consumer may be entitled to a comparable vehicle or a refund of his purchase price. Whether there is a disclaimer of the implied warranty of merchantability appears irrelevant. Repair and replacement of defective parts may protect the dealer or manufacturer only until the point where the defect is substantial and a reasonable number of attempts have been undertaken and failed. At that point, the consumer is protected.

Nebraska's Lemon Law does not offer original solutions for the owner of a lemon. What it does do is focus on and synthesize parts of alternative remedies into one law. Although arbitration is a key element of the relief afforded by the law, litigation will undoubtedly be required in some situations as IDSMs are not required under the Lemon Law. The message sent to the courts by the legislature announces that consumer lemon owners are specifically

Statutes of limitations are statutes of repose and they are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the right to proceed. But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. The appellee having been restrained from proceeding further by a paramount authority, the period thereof should not be considered in computing the time for the statute of limitations to run and therefore none of its rights have been barred thereby.

204. See *Legislative History supra* note 13, at 2689 (testimony of Sen. DeCamp).

205. NEB. REV. STAT. § 60-2705 (Supp. 1983) states that if a manufacturer has established a certified IDSM then the consumer must first avail himself of its procedure before the remedies of NEB. REV. STAT. § 60-2705 (Supp. 1983) of refund of purchase price or replacement by a comparable vehicle can be applied.

206. See notes 182-87 and accompanying text *supra*.

207. See note 188 and accompanying text *supra*.

protected. Guidelines in the statute will provide the court with objective data on which to base their decision.

The remedy, whether received from an arbitration board or from the courts, is specific: the manufacturer shall either replace the defective vehicle or refund the purchase price. Thus, within this narrow area of concern, new car warranties, the goal is met of providing a system which protects the consumer.

Susan M. Conroy—'84