NEW MEXICO LAW REVIEW

Volume 16
Issue 2 *Spring 1986*

Spring 1986

New Mexico's Lemon Law: Consumer Protection or Consumer Frustration

Joseph Goldberg

NEW MEXICO'S "LEMON LAW": CONSUMER PROTECTION OR CONSUMER FRUSTRATION?

JOSEPH GOLDBERG*

I. INTRODUCTION

Our society's love affair with the automobile is the stuff of legends.[1] Annually, purchasers in the United States spend in excess of one hundred thirty-two billion dollars to purchase more than eleven million new automobiles.[2] The vast majority of these new automobiles are purchased by individual consumers. For most of these individual consumers, a new automobile is the single largest consumer purchase, in dollars, other than the purchase of a house.

Given the importance of the automobile to the average consumer, both financially and strategically,[3] it is surprising that, until recently, sales law has not accorded special rules and protections to automobile purchasers.[4] Prior to 1975, the purchase and sale of an automobile was governed by general sales law. In 1975, the Magnuson-Moss warranty law[5] added some specific protections and remedies for automobile purchasers, but Magnuson-Moss has not had a major impact either on the development

*Professor, University of New Mexico School of Law. Professor Goldberg appreciates the excellent assistance of his research assistant, Roberto Ortega, in the preparation of this article. He is also grateful for the helpful comments of his colleague, Fred Hart.

1. For some inexplicable reason, automobile manufacturing has produced more than its share of "larger-than-life" figures, from Henry Ford to John Delorean to Lee Iacocca. For an interesting and firsthand look into the industry, see L. IACOCCA, IACOCCA: AN AUTOBIOGRAPHY (Bantam ed. 1985).

2. UNITED STATES DEPARTMENT OF COMMERCE, NATIONAL INCOME AND PRODUCTION ACCOUNTS DATA (Feb. 20, 1986) (describing calendar year 1985 data).

3. It is probably fair to say that the importance of an automobile takes on even added significance in the West. The vast geographic expanse of the western United States makes an automobile a virtual necessity for most individuals living there. Given the long distance between towns and cities, the automobile is the essential mode of transportation. Even for those who live in urban areas, in the western city, characterized by its geographic sprawl and lack of public transportation, an automobile is essential.

4. The common law has not had difficulty developing special protections in contract law in other situations. *See, e.g.*, Shultz, *The Special Nature of the Insurance Contract: A Few Suggestions for Further Study*, 15 LAW & CONTEMP. PROBS. 376 (1950). The UCC has also been able to accommodate special problems (or interests) with special rules or protections. *See, e.g.*, U.C.C. §§ 9-307 (buyers in the ordinary course of business); 9-312(3), (4) (purchase money security interests) (1978).

5. 15 U.S.C. §§ 2301 to 2312 (1982). The Magnuson-Moss Warranty Act, Pub. L. No. 93-637, 88 Stat. 2133 (1975), was enacted by Congress in 1975. By its provisions, the Act applies to all types of consumer warranties, not just automobiles. 15 U.S.C. § 2302(e) (1982). It clearly covers automobile warranties, however. *See generally* R. BILLINGS, JR., HANDLING AUTOMOBILE WARRANTY AND REPOSSESSION CASES ch. 7 (1984).

of the law or on the manner by which disputes in this area get resolved.[6] The past five years, however, have witnessed a discernible trend of state statutes providing specific, and presumably greater, protections for automobile purchasers.[7] In 1985, New Mexico joined this trend with the enactment by the legislature of the Motor Vehicle Quality Assurance Act[8] or what will almost certainly come to be commonly called the "lemon law."[9]

This article sets out the various provisions of New Mexico's new lemon law and explains how the law operates. In doing so, the article evaluates the new law's strengths and weaknesses from the perspective of consumer

6. *See* articles cited *infra* note 52.

7. Connecticut was the first state to adopt a lemon law. *See infra* note 10. The Connecticut law has been revised and strengthened since. *Id.* As of the beginning of the 1986 legislative season, 37 states had enacted lemon laws. They are as follows:

ALASKA STAT. ch. 101 §§ 45.45.240-.360 (Supp. 1984); ARIZ. REV. STAT. ANN. §§ 44-1261-1265 (Supp. 1984-85); CAL. CIV. CODE § 179 (West Supp. 1985); DEL. CODE ANN. tit. 6, §§ 5001-5009 (Supp. 1984); FLA. STAT. ANN. §§ 121 1/2 ¶ 1201-1208 §§ (Smith-Hurd 1985); IOWA CODE ANN. § 322E.1 (West Supp. 1985); 1985 Kan. Sess. Laws 118; LA. REV. STAT. ANN. §§ 51:1941-1946 (West Supp. 1985); ME. REV. STAT. ANN. tit. 10, §§ 1161-1165 (Supp. 1984-85); MD. COM. LAW CODE ANN. § 14-1501 (Supp. 1984); MASS. GEN. LAWS ANN. ch. 90, § 7N 1/2 (West Supp. 1985); MINN. STAT. §§ F. (SUPP.); MISS. LAWS ; MO. ANN. STAT. §§ 407.560-.579 (Vernon Supp. 1985); MONT. CODE ANN. §§ 61-4-501 to -507 (1983) and 1985 Mont. Laws 295; NEB. REV. STAT. §§ 60-2701-2709 (1984); NEV. REV. STAT. §§ 598.751-.786 (1983); N.H. REV. STAT. ANN. §§ 357-D:1-:8 (1984); N.J. STAT. ANN. §§ 56:12-19:12:28 (West Supp. 1985); N.M. STAT. ANN. §§ 57-16A-1 to -9 (Supp. 1986); N.Y. GEN BUS. LAW § 198-a (Consol. Supp. 1984-85); 1985 N.D. Sess. Laws 1378; OR. REV. STAT. §§ 646.315-.375 (1983); PA. STAT. ANN. tit. 73, §§ 1951-1963 (Purdon 1985); R.I. GEN. LAWS §§ 31-5.2-1 to -13 (Supp. 1984); TENN. CODE ANN. §§ 55-24-101 to -109 (Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 4413(36) § 6.07 (Vernon Supp. 1985); 1985 Utah Laws 29; VT. STAT. ANN. tit. 9, §§ 4170-4181 (Supp. 1984); VA. CODE §§ 59.1-207.9 to -207.9 to -207.14 (Supp. 1984); WASH. REV. CODE ANN. §§ 19.118.010-.118.070 (1983); W. VA. CODE §§ 46A-6A-1 to -9 (Supp. 1984); WIS. STAT. ANN. § 218.015 (West 1984-85); WYO. STAT. § 40-17-101 (Supp. 1985).

In addition, Congress has considered, although not passed, a bill seeking to enact a federal lemon law. H.R. 3827, 9th Cong., 1st Sess. (1983).

8. N.M. STAT. ANN. §§ 57-16A-1 to -9 (Supp. 1986).

9. The lemon laws have spawned a "cottage industry" of commentary, almost all of which play on the phrase "lemon law." The better articles addressing this new development are as follows: Vogel, *Squeezing Consumers, Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589; Sklaw, *The New Jersey Lemon Law: A Bad Idea Whose Time Has Come*, 9 SETON HALL LEGIS. J. 137 (1985); Coffinberger & Samuels, *Legislative Response to the Plight of New Car Purchasers*, 18 U.C.C. L.J. 168 (1985); Alexopoulos, *A New Twist for Texas "Lemon" Owners*, 17 ST. MARY'S L.J. 155 (1985); Ervine, *Protecting New Car Purchasers: Recent United States and English Developments Compared*, 34 INT'L & COMP. L.Q. 342 (1985); Horigman, *The New "Lemon Laws": Expanding UCC Remedies*, 17 U.C.C. L.J. 116 (1984); Comment, *A Sour Note: A Look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846 (1984); Comment, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers*, 61 WASH. U.L.Q. 1125 (1984); Comment, *Sweetening the Fate of the "Lemon" Owner: California and Connecticut Pass Legislation Dealing with Defective New Cars*, 14 TOLEDO L. REV. 341 (1983); Comment, *L.B. 155: Nebraska's "Lemon Law": Synthesizing Remedies for the Owner of a Lemon*, 17 CREIGHTON L. REV. 345 (1984); Note, *Lemon Laws Should Be Written to Ensure Broad Scope and Adequate Remedies*, 17 CLEARINGHOUSE REV. 302 (July 1983).

protection. Before focusing on the new law, however, the article provides a brief discussion of the law protecting the disappointed purchaser of automobiles prior to the new lemon law. This discussion is necessary to evaluate the extent to which the new law improves the remedies available to disappointed purchasers of lemon automobiles.

For purposes of comparing the respective protections for consumers under the prior law and the new lemon law, the following hypothetical may be helpful:

> Mrs. Gonzales purchases a brand new Buick from ACME NEW CAR SALES (ACME) in Albuquerque. The total purchase price is $11,827. She pays $3500 as a down payment and finances the remaining balance of the purchase price with First New Mexico National Bank. Within a week of delivery, the new car develops two major problems: (1) the car repeatedly stalls while the engine is idling; and (2) while the car is operating at speeds from 35 to 45 miles per hour, the engine "hesitates" or loses power. These problems cause Mrs. Gonzales serious concern about the car and her own safety in driving the car.

II. THE PRIOR LAW

Since the most widely accepted purpose of lemon laws, such as New Mexico's, is to improve the protections and remedies available to purchasers of seriously defective automobiles,[10] an examination of the preex-

10. Of course, the New Mexico legislative process does not produce detailed, substantive legislative history to which one may have recourse as an aid to determining the underlying purpose or purposes of legislation. This problem is compounded, in this specific instance, by the absence of any language in the New Mexico lemon law addressing its statutory purposes. That the purpose of the New Mexico lemon law is to improve consumer remedies is suggested, however, by the fact that the structure and much of the language of the New Mexico law is borrowed from the seminal lemon laws, enacted in Connecticut and California in 1982. *See* Act of Oct. 1, 1982, Pub. Act No. 82-287, 1982 Conn. Acts 667; CAL. CIV. CODE § 1793.2(e) (Deering Supp. 1984). The 1982 Connecticut lemon law was substantially revised and superseded in 1984. *See* 1984 Pub. Act 84-338 (codified at CONN. GEN. STATS. ANN. § 42-179 (Supp. 1984)). The 1984 amendments to the Connecticut lemon law worked substantial changes in concept and hence structure. *See* R. BILLINGS, JR., HANDLING AUTOMOBILE WARRANTY AND REPOSSESSION CASES § 4A.4 (Cum. Supp. 1985). It is the 1982 version of the Connecticut law, however, after which most other lemon laws, including New Mexico's, are modeled. The 1982 version of the Connecticut law can be found, in addition to the Connecticut session laws, as Appendix C to Comment, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers*, 61 WASH. U.L.Q. 1125 (1984).

It is quite clear that the Connecticut and California lemon laws were enacted for the purpose of expanding and strengthening the remedies available to consumer/purchasers of seriously defective automobiles. *See, e.g., id.* at 1147-48 (discussing purposes of Connecticut lemon law); Ervine, *Protecting New Car Purchasers: Recent United States and English Developments Compared*, 34 INT'L & COMP. L.Q. 342, 343-48 (1985) (discussing the purposes of the California lemon law). These underlying purposes of the Connecticut and California legislation reasonably can be imputed to the New Mexico lemon law, since the New Mexico law borrows heavily from the language and structure of the Connecticut and California laws. *See, e.g.*, 2A C. SANDS, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 52.03 (4th ed. 1973).

isting law governing the duties of manufacturers and sellers of automobiles and the remedies available to disappointed purchasers is appropriate. There were two sources of law governing these areas in New Mexico prior to the effective date of the lemon law. There being no New Mexico state law creating unique rules applicable to consumer transactions,[11] the state law covering sales of automobiles was the New Mexico version of the Uniform Commercial Code (UCC).[12] In addition to the state law in this area, there was the Magnuson-Moss Warranty Act.[13]

A. Uniform Commercial Code

A brief overview of an automobile purchaser's rights and remedies under the UCC involves two questions. First, what obligations does the UCC impose upon a seller with respect to the quality of the automobile sold? Second, what remedies are available to the buyer of the automobile, assuming the seller has not satisfied its obligations to the buyer with respect to quality?

Under the UCC, the obligations of a seller of an automobile to the purchaser with respect to the quality of the automobile are governed by the warranties of quality.[14] Under the "express" warranty provision of the UCC, the seller[15] is liable if the automobile sold does not conform to the affirmations of fact, descriptions or the promises made about the automobile by the seller and which become "part of the basis of the bargain" or fails to conform to any model employed by the seller.[16] In short, this means that the Code requires that the seller stand by its representations to the buyer about the automobile. Typically, the standard

11. A number of states have statutes establishing particular protections for consumers, which protections are greater than those provided in the Uniform Commercial Code. *See, e.g.*, MINN. STAT. §§ 325G.01-.35 (1982).

12. N.M. STAT. ANN. §§ 55-1-101 to 55-12-108 (Cum. Supp. 1985).

13. 15 U.S.C § 2301-12 (1982).

14. *See* N.M. STAT. ANN. §§ 55-2-313 to 55-2-318 (1978).

15. Certainly the dealer who sold the automobile to the consumer would be liable. It is also quite possible, under the UCC, that the manufacturer of the automobile might also be liable to the ultimate consumer for breach of both express and the implied warranties, even though the ultimate consumer did not purchase the automobile directly from the manufacturer but rather purchased the automobile through a dealer. While New Mexico has adopted the most narrow option available to deal with the privity requirements for warranty liability, N.M. STAT. ANN. § 55-2-318 (1978), the court of appeals has held in other circumstances that privity is not required for an action for breach of an implied warranty under §§ 55-2-314 and 55-2-315. Perfetti v. McGhan Medical, 99 N.M. 645, 654, 662 P.2d 646, 655 (Ct. App. 1983). While *Perfetti* deals with the privity question in the context of a personal injury action, there is reason to believe that the court would abolish privity in warranty actions involving only economic loss. The case upon which the *Perfetti* court relied most heavily involved abolition of privity in a case involving only economic loss. *See* Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976).

16. U.C.C. § 2-313(1) (1978).

manufacturer's express warranty is that the automobiles will be free of defective parts or workmanship.[17]

In addition to the express warranties, the UCC provides for implied warranties,[18] which impose quality requirements on the seller, irrespective of the affirmations, promises or descriptions expressed. The implied warranty of merchantability requires that the automobile must be "fit for its ordinary purposes" and must "pass without objection in the trade."[19] Under the UCC, therefore, a purchaser of a new automobile that turns out to be a "lemon" will likely have a remedy under an implied warranty of merchantability, unless the warranty has been effectively disclaimed.[20]

If the new automobile does not perform up to the expectations of the consumer, as protected by the warranties of quality, what remedies are available to the consumer? The point of departure in any analysis of UCC remedies lies in the recognition that the UCC, consistent with its solicitude for "freedom of contract,"[21] allows the parties to create by contract what the seller's remedies will be for breach of warranty.[22] Section 2-719(1)(a) of the Code states that an "agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price

17. *See* Comment, *A Sour Note: A look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846, 852 n.24 (1984) (quoting manufacturer's warranty). Some commentators have confused the substance of the express warranty contained in the standard manufacturer's warranty of a new automobile with the almost universal limitation on remedies also contained in the standard written warranty. Thus, one commentator, in discussing the standard written warranty, stated: "This express warranty does not promise that the automobile will perform without malfunction during the warranty term, but rather that the seller will repair any defective parts." *Id.* at 852. The commentator was mistaken. What is being warranted is that the automobile will be free of "defects . . . in factory material or workmanship." *Id.* at 852 n.24. The limited remedy provided under the standard written warranty is that the seller will repair or replace the defective part.

In addition to these "documented" express warranties, other promises, affirmations or descriptions of the automobile may create express warranties, although proof of such other warranties may be difficult in light of the Code's parol evidence rule. *See* U.C.C. § 2-202 (1978).

18. N.M. STAT. ANN. §§ 55-2-314 (implied warranty of merchantability), 55-2-315 (implied warranty of fitness for particular purposes) (1978). It is not typical for an implied warranty of fitness for particular uses to arise in a new car sale. *See* Vogel, *Squeezing the Consumer: Lemon Laws, Consumer Warranties and a Proposal for Action*, 1985 ARIZ. ST. L.J. 589, 599-600. Therefore, the discussion in the text will focus exclusively on the implied warranty of merchantability.

19. N.M. STAT. ANN. § 55-2-314(a), (c) (Supp. 1986).

20. *See id.* § 55-2-318 (b), (c). Under the Magnuson-Moss Act, once a manufacturer has given an express warranty, which of course all manufacturers do, it cannot disclaim any implied warranties. *See* 15 U.S.C. § 2302(c) (1974).

21. Dugan, *Good Faith and the Enforceability of Standardized Terms*, 22 WM. & MARY L. REV. 1, 41 (1980).

22. U.C.C. § 2-316(4) (1978), which states: "Remedies for breach of warranty can be limited in accordance with the provisions of this article. . . ."

or to repair and replacement of non-conforming goods or parts. . . ." What remedies are available to a buyer, therefore, will depend, at least initially, on the terms of the agreement between the buyer and the seller.

The standard written warranty for a new automobile does contain a contractual limitation on remedies, which limits the buyer to receiving a repair or replacement of any defective part.[23] The courts have consistently upheld this type of limitation on a buyer's remedies.[24] Unless the contractual limitation on remedies is unenforceable for some reason, new car buyers are limited to repair or replacement of the defective parts or workmanship in their new automobiles.

The ability of new car sellers to confine buyers' remedies to "repair or replacement" is not unlimited, however. The two most important limitations are (1) where the limited remedy available "fail[s] of its essential purpose"[25] or (2) where the limited remedy is determined to be "unconscionable."[26] Many courts have held that where a buyer of a new automobile offers the dealer a reasonable number of opportunities to repair the defective automobile and the dealer is unsuccessful, the contractually limited remedy has failed of its essential purpose.[27] In these circumstances, the contractual limitation of remedies is no longer effective and the buyer may seek other remedies as provided by the UCC. The question then becomes what other remedies does the UCC afford to a dissatisfied buyer.

Upon the failure of a contractual limitation of remedies, the Code remedies fall into two categories. The buyer may keep the automobile and sue the seller for damages.[28] Alternatively, the buyer may revoke his

23. *See* Comment, *A Sour Note: A Look at the Minnesota Lemon Law*, 68 Minn. L. Rev. 846, 852 (1984).

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

25. U.C.C. § 2-719(2) (1978).

26. *Id.* § 2-719(3); *see id.* § 2-302.

27. *See, e.g.*, Murray v. Holiday Rambler, Inc., 83 Wis.2d 406, 420, 265 N.W.2d 513, 520 (1978); Ford Motor Co. v. Mayes, 575 S.W.2d 480, 484 (Ky. Ct. App. 1978).

28. *See* U.C.C. § 2-714 (1978) for a description of the buyer's damages. The measure of the buyer's damages for breach of warranty is described in the code as "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. . . ." U.C.C. § 2-714(2) (1978). This measure of damages is designed to give the buyer his or her "expectation" damages. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 10-2 (2d ed. 1980). The buyer may also receive incidental and consequential damages, *see* U.C.C. § 2-715 (1978), in the event of breach of warranty. As already described, however, most new car warranties exclude incidental and consequential damages. *See supra* notes 22-24 and accompanying text. This exclusion of incidental and consequential damages will be effective (notwithstanding the failure of the repair or replacement remedy) unless the exclusion is "unconscionable." The exclusion of incidental or consequential damages for property damage or economic loss (as opposed to personal injury) is prima facie conscionable. *See* U.C.C. § 2-719(3) (1978).

or her acceptance[29] of the automobile, return the automobile to the seller[30] and thereby cancel the contract.[31] In this latter situation, the buyer will be relieved of his or her obligations to pay for the automobile, will be able to recover any payments made prior to the return of the automobile and revocation of acceptance, and may be entitled to damages.[32] Each of these remedies has legal and practical qualifications which limit the usefulness of the remedy to a disappointed purchaser of a lemon automobile.

Where the buyer has accepted the goods and has not revoked acceptance, there are several difficulties with a suit for damages as an effective remedy for a buyer of a lemon automobile. First, the measurement of

29. *See* U.C.C. § 2-608 (1978), which provides:

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

The UCC also permits a disappointed purchaser to "reject" nonconforming goods. U.C.C. § 2-602 (1978). Rejection, however, must come reasonably soon after delivery, *see id.*, and this requirement makes rejection inapplicable in most new car sales.

30. Keeping the automobile, which is consistent with "acceptance," would be inconsistent with a revocation of acceptance. This raises the difficult problem of what a consumer is to do with the automobile when the seller resists the purchaser's claim of revocation of acceptance and thereby refuses the tender of the automobile. It is not untypical for a seller to question whether the buyer may effectively revoke his or her acceptance of an automobile that the buyer claims is a lemon. This seller skepticism usually takes the form of refusing to return the buyer's downpayment and interim payments and insisting that the buyer remains bound to the sales contract and to continuing payments. May a buyer effectively revoke his or her acceptance and continue to use the automobile while the buyer and the seller resolve (typically through litigation) the effectiveness of the purported revocation of acceptance? The courts are divided on the issue. Some courts hold that use of the automobile, after notification of revocation, defeats revocation of acceptance. *See, e.g.*, Walz v. Chevrolet Motor Div., 307 A.2d 815, 816 (Del. Super. Ct. 1973). Other courts have permitted post-revocation use of the automobile, recognizing that prohibiting post-revocation use would create a substantial hardship to the buyer and thereby render the remedy ineffective. *See, e.g.*, Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 378, 382 A.2d 954, 956 (1978). *See generally* Note, *Buyer's Continued Use of Goods After Revocation of Acceptance Under the Uniform Commercial Code*, 24 WAYNE L. REV. 1371 (1978).

31. U.C.C. § 2-711(1) (1978). "Cancellation" of the contract should not be confused with the pre-Code remedy of "rescission." If the buyer cancels the contract, he or she retains "any remedy for breach" of the contract. *Id.* § 2-106(4); *see also id.* § 2-711(1).

32. *See* U.C.C. §§ 2-711(1), 2-713, 2-715 (1978). A recent New Mexico case has cast some confusion over the extent of damages recoverable where the buyer revokes acceptance. *See* General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 703 P.2d 169 (1985), discussed *infra* in text accompanying notes 40, 41.

damages for breach of warranty[33] is objective: the difference between the objective value of what the buyer received and what he would have received had the automobile conformed to the warranty. This measure of damages does not compensate the buyer for any subjective loss to him or her. It is not infrequent that the objective diminishment in the value of a lemon automobile is relatively insignificant, while the subjective effect on the consumer is quite large. The consumer no longer likes the automobile, no longer has confidence in the automobile and may believe the automobile to be unsafe. None of these subjective losses is compensated under the UCC formulation of damages.

A second problem is related to the first. With damages limited to objective loss, often the amount of recoverable damages from a breach of warranty is quite small and just does not make it economically worthwhile for a buyer to undertake the significant transaction costs[34] of a lawsuit. Finally, the Code remedies do not provide for attorney's fees to the buyer if he or she prevails in the suit for damages.[35] This cost factor, of course, substantially increases the transaction costs of the lawsuit and intensifies the likelihood that few purchasers of lemon automobiles will use this remedy.

There are also some significant limitations to the usefulness of the other Code remedy, revocation of acceptance. First, the remedy is available only if the the "non-conformity substantially impairs [the automobile's] value to" the purchaser.[36] This limitation raises two problems to the disappointed purchaser of an automobile. First, the limitation obviously excludes some defects from qualifying for the remedy, even though the defects may cause a diminishment in value, but that loss is not substantial. In this respect, however, it should be noted that the "impairment of value" test is not wholly objective, but rather is subjective in the sense that the remedy is available to the purchaser if the nonconformity "substantially impairs the value of [the automobile] to him."[37]

---

33. *See supra* note 28.

34. *See* Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 20 (1970) (describing transaction costs in commercial disputes).

35. The Code doesn't prohibit awarding attorneys' fees to a prevailing plaintiff; it just doesn't explicitly allow for attorneys' fees. The Code leaves the matter to state law development. The "American Rule," *see* 1 S. SPEISER, ATTORNEY'S FEES § 12:4 (1973), which leaves attorneys' fees to the parties and does not include them as an item of costs to be awarded to a prevailing party, is the rule in New Mexico, *see* Banes Agency v. Chino, 60 N.M. 297, 302, 291 P.2d 328, 331 (1960), as it is in most jurisdictions. Since the rule is a common law rule, the question arises whether the legislative declaration of policy, in favor of awarding attorneys' fees to a prevailing purchaser of a lemon automobile who sues under the New Mexico lemon law to assert his or her rights, *see infra* notes 140-44 and accompanying text, should influence the New Mexico courts to modify their common law rule and award attorneys' fees to prevailing plaintiffs in litigation over lemon automobiles outside the lemon law.

36. U.C.C. § 2-608(1) (1978).

37. *Id.* (emphasis added). One commentator explains:

A second problem with the "substantially impairs" test is that it creates some degree of insecurity to the buyer who is contemplating exercising the revocation of acceptance remedy. The buyer does so at the risk that a factfinder, subsequently, may determine that the revocation is ineffective because the nonconformity did not "substantially impair" the value of the goods.

Another difficulty with the revocation of acceptance remedy arises from the question whether the revoking buyer may use the automobile after the notification of revocation. The law in New Mexico, in this respect, is unclear;[38] and, as discussed above,[39] the courts in other states that have considered the question have split. Therefore, in New Mexico, this causes another insecurity to the buyer contemplating revocation. If he or she uses the automobile after the notification of revocation, the buyer runs the risk that the court may ultimately decide that retention and use of the automobile is inconsistent with, and thereby nullifies, the purported revocation. On the other hand, the inability of the buyer to use the automobile while the lawsuit is pending may work a serious hardship on the buyer, making the remedy much less attractive.

Finally, in New Mexico, the Supreme Court has held that these two UCC remedies—damages for breach of warranty and revocation of acceptance—are "inconsistent" and have created some confusion over the extent to which a revoking buyer can recover damages for breach of warranty. In *General Motors Acceptance Corp. v. Anaya*,[40] the Supreme Court stated: "Once the jury found that the Anayas had proven all elements essential to establish rightful revocation of acceptance . . . the trial court properly deemed the breach of warranty theory to be extinguished."[41]

> The substantial impairment test is subjective in that the needs and circumstances of the buyer must be examined. The buyer's personal belief as to the reduced value of the automobile is not determinative. However, the trier of fact must make an objective determination that the value of the goods to the particular buyer, and not the average buyer, has in fact been substantially impaired.

R. BILLINGS, JR., HANDLING AUTOMOBILE WARRANTY AND REPOSSESSION CASES § 5.23 (1984).

38. New Mexico appears to be sympathetic to the needs of a revoking buyer to use the goods after revocation. *See* General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 703 P.2d 169 (1985); O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

39. *See supra* note 30.

40. 103 N.M. 72, 703 P.2d 169 (1985).

41. *Id.* at 74, 703 P.2d at 171. The *Anaya* decision should not be read as holding that damages may not be recovered by a buyer who revokes acceptance. N.M. STAT. ANN. § 55-2-711(1)(b) (1978) states explicitly that "in addition to recovering so much of the price as has been paid," the revoking buyer may "recover damages for nondelivery as provided in this article." Comment 1 to N.M. STAT. ANN. § 55-2-608 states explicitly that under the Code, "the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach." The court may have implicitly recognized the buyer's right to damages by affirming the trial court's award of damages. What the court may have meant by the language quoted in the text is that the measure of damages under N.M. STAT. ANN. § 55-2-714 (1978) could not be used if the goods were accepted and retained.

B. Magnuson-Moss Warranty Act

The protections and remedies available to a disappointed buyer of a lemon automobile also require examination of the Magnuson-Moss Warranty Act.[42] The legislative intent underlying the statute is to provide greater protection to purchasers of consumer goods by adopting minimum federal requirements for warranties.[43] The Act does not require sellers to give warranties. Where a written warranty is given, however, it must be conspicuously disclosed to potential purchasers prior to purchase.[44] The warranties must be labeled either as "full" or "limited."[45] In order to be able to label a warranty as "full," the warranty must meet certain minimum content standards;[46] otherwise, the warranty must be labeled as a "limited" one. The Act prohibits the manufacturer from excluding or modifying (other than duration) any implied warranties available under the UCC.[47]

The Act provides a federal cause of action for damages to any consumer injured by a violation of the Act.[48] The cause of action is directly against the person giving the warranty, typically the manufacturer in new car sales.[49] If the manufacturer creates an arbitration program, acceptable to the Federal Trade Commission, and incorporates the arbitration program into the written warranty, the purchaser must resort to that arbitration program prior to bringing suit under the Act.[50] Finally, the Act provides for the discretionary award of attorney's fees to a consumer who sues successfully under the Act.[51]

It seems fair to say that the Magnuson-Moss Federal Warranty Act has not had the effect of providing significantly greater protections or sig-

42. 15 U.S.C. §§ 2301-12 (1982). The statute is relatively complex and not a model of clarity. For a thorough discussion of the Act, the protections it affords to buyers of lemon automobiles and how the Act operates, *see, e.g.*, F. HART & W. WILLIER, UCC FORMS AND PROCEDURES ¶ 22A.01 et seq. (1985); R. BILLINGS, JR., HANDLING AUTOMOBILE WARRANTY AND REPOSSESSION CASES ch. 7 (1984); Schroeder, *Private Actions Under the Magnuson-Moss Warranty Act*, 66 CALIF. L. REV. 1 (1978).

43. 15 U.S.C. § 2302(a) (1982).

44. *Id.* §§ 2302(a), 2302(b)(1)(A).

45. *Id.* § 2303(a).

46. These standards are: (1) The manufacturer must agree to repair or replace the defective good without charge and in a reasonable period of time; (2) The warranty can exclude or limit consequential damages only by use of conspicuous language; (3) There can be no limitation on the duration of implied warranties; (4) The consumer is allowed to elect either a refund or replacement if the manufacturer cannot seasonably cure the defect; and (5) The duration of the warranty must be conspicuous. *Id.* §§ 2303(a)(1), 2304.

47. *Id.* § 2308(c).

48. *Id.* §§ 2310(d)(1), 2310(e).

49. *Id.* § 2310(f). Under the limited definition of warrantor in Magnuson-Moss, *see id.* § 2301(s), the manufacturer is inevitably the warrantor in most situations.

50. *Id.* § 2310(a)(3).

51. *Id.* § 2310(d)(2).

nificantly expanded remedies to purchasers of lemon automobiles.[52] The Act requires certain minimum content for warranties only where the manufacturer elects to have a "full" warranty. If the manufacturer elects to have a "limited" warranty, there is no minimum federal requirement with respect to the content of that warranty. Moreover, the Act contains no express remedy for breach of a "limited" warranty. The courts, therefore, have held that in Magnuson-Moss actions for breach of limited warranties, state law (inevitably the UCC) must be resorted to in order to determine whether the purchaser has a remedy and what that remedy is.[53]

In short, where the manufacturer employs a "limited" express warranty, the Magnuson-Moss Act serves only to refer the court back to the UCC for determination of the manufacturer's obligations with respect to quality and the disappointed purchaser's remedies. Moreover, since the federal act is interpreted as providing a remedy only against the manufacturer,[54] any advantages under the Act (such as the provision of attorney's fees in certain cases) are not available if the purchaser wishes to pursue his or her remedy against the dealer and not against the manufacturer.

Not surprisingly, most automobile manufacturers elect to offer only "limited" warranties and not "full" warranties.[55] As a consequence the overwhelming majority of new automobiles sold in this country are sold under a limited warranty,[56] and few claims are brought under Magnuson-Moss for defective automobiles.[57] Any promise that the Act held out to alleviate the problems of purchasers of lemon automobiles has gone largely unfulfilled.[58]

---

52. *See, e.g.*, Vogel, *Putting the Squeeze on Consumers: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 587, 610-15; Coffinberger & Samuels, *Legislative Responses to the Plight of New Car Purchasers*, 18 U.C.C. L.J. 168, 172-73 (1985); Note, *Lemon Laws: Putting The Squeeze on Automobile Manufacturers*, 61 WASH U.L.Q. 1125, 1142-44 (1984); Note, *A Sour Note: A look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846, 855-56 (1984).

53. *See, e.g.*, MacKenzie v. Chrysler Corp., 607 F.2d 1162, 1166 (5th Cir. 1979); Feinstein v. Firestone Tire & Rubber Co., 535 F.Supp. 595, 605 n.13 (S.D.N.Y. 1982); Ventura v. Ford Motor Co., 180 N.J. Super. 45, 63, 433 A.2d 801, 810 (1981). While the scope of the remedy in actions for breach of limited warranties is left to state law, the action remains, however, one under Magnuson-Moss. Therefore, attorney's fees may be allowed to a successful plaintiff. *See, e.g.*, Volkswagen of America, Inc. v. Harrell, 431 So. 2d 156 (Ala. 1983).

54. *See* Note, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers*, 61 WASH. U.L.Q. 1125, 1144-45 (1984).

55. *See* Note, *A Sour Note: A look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846, 855 n.50 (1984) (stating that of the American manufacturers only AMC offers a "full" warranty).

56. One commentator suggests that the figure approaches ninety-nine percent of new automobiles. Coffinberger & Samuels, *Legislative Responses to the Plight of New Car Purchasers*, 18 U.C.C. L.J. 168, 172 (1985).

57. Note, *A Sour Note: A Look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846, 855 (1984).

58. *See, e.g.*, Coffinberger & Samuels, *Legislative Responses to the Plight of New Car Purchasers*, 18 U.C.C. L.J. 168, 172 (1985) (citing statistics with respect to incidence of defects in new car sales).

A brief recap of New Mexico law and the Magnuson-Moss Act, prior to the enactment of the New Mexico lemon law, reveals the following seller's obligations and purchaser's remedies with respect to the purchase and sale of new automobiles:

Express Warranties. The standard manufacturer's warranty warrants that the automobile will be free of defects in parts or workmanship. Under the UCC, this express warranty is enforceable against the dealer. Under the Magnuson-Moss Act (and probably under the UCC), the express warranty is enforceable against the manufacturer.

Implied Warranties. The implied warranty of merchantability requires that the automobile be fit for its ordinary purpose and pass without objection in the trade. Since the UCC permits sellers to disclaim this implied warranty (and invariably they do), it is likely that no implied warranty is enforceable against the dealer. Since the Magnuson-Moss Act prohibits the manufacturer from disclaiming any implied warranties, and since New Mexico case law suggests that privity may not be required for enforcement of an implied warranty, it is quite possible that in New Mexico an implied warranty of merchantability may be enforceable against the manufacturer.

Remedies. Since nearly all new automobiles are sold pursuant to "limited" warranties, Magnuson-Moss provides no distinct remedies, but rather incorporates the UCC remedies. Virtually all new automobiles are sold under express warranties that limit the buyer's remedies to repair or replacement of the defective part. Only when that remedy fails of its essential purpose (the seller fails to correct the defect after having had reasonable opportunity to do so) can the buyer pursue other remedies. In that event, the consumer may elect to keep the automobile and sue the dealer (under the UCC) or the manufacturer (under the UCC or Magnuson-Moss) for damages. If the defect is such as to substantially impair the value of the automobile to the purchaser, the purchaser may elect, alternatively, to revoke his or her acceptance and seek cancellation of the agreement to purchase the automobile and damages. If suit is brought under the Magnuson-Moss Warranty Act, a prevailing plaintiff may recover his or her attorney's fees.

Recalling the hypothetical situation described at the beginning of this discussion,[59] what remedies were available to Mrs. Gonzales prior to the enactment of the New Mexico lemon law? What can Mrs. Gonzales do? She can bring the car back to the dealer to have the problem corrected. Since, under her new car sales contract, her remedies have been limited, she must afford the dealer reasonable opportunity to correct the defect. If he cannot correct the defect after a reasonable number of opportunities,

59. *See supra* text at p. 253.

Mrs. Gonzales may then elect to keep the automobile in its continued defective condition and sue the dealer or the manufacturer for damages. Alternatively, if the defect substantially impairs the value of the car to her, she may elect to revoke her acceptance and cancel the agreement to purchase the car, in which event she may recover from the seller all payments made and any damages she may have sustained, and she will have to return the car to the seller. She may bring her lawsuit against the manufacturer under the Magnuson-Moss Act, in which event she may recover attorney's fees if she prevails.

It is clear that under the UCC, even as supplemented by the Magnuson-Moss Warranty Act, a purchaser of a lemon automobile in New Mexico, like Mrs. Gonzales, is provided with fairly limited remedies and in exercising even those limited remedies, she faces some practical obstacles. If the automobile is defective initially, she is entitled only to have the seller repair the defect. If the defect is sufficiently serious (so that it substantially impairs the value of the automobile) and if the seller cannot repair the automobile satisfactorily after a reasonable opportunity, the purchaser may revoke her acceptance and cancel the deal.

With this brief review of the prior law, it is now appropriate to see if the newly enacted lemon law fulfills its promise and provides greater protections and expanded remedies to purchasers of lemon automobiles like Mrs. Gonzales. In order to make this evaluation, it is necessary to understand the provisions of the new law. The next section will first set out the overall structure of the new law and then will turn to particular provisions and problems.

III. NEW MEXICO'S LEMON LAW

With some significant exceptions, in its basic structure and mechanics, New Mexico's lemon law follows the approach established by the original Connecticut law.[60] The law requires the manufacturer or dealer to make repairs of new automobiles that do not conform to their written express warranties. If the manufacturer or dealer cannot, after a reasonable opportunity, effect a suitable repair, the manufacturer must either replace the automobile with a suitable new one or refund the purchase price to the dissatisfied customer. The statute provides to the consumer a private cause of action to enforce the statute if the seller fails to fulfill its obligations and provides for an award of attorney's fees to a successful plaintiff. A fuller understanding of the new law requires inquiry into (1) its scope; (2) the obligations the law imposes on manufacturers and dealers

60. *See supra* note 10.

and any limitations or qualifications on these obligations; and (3) the remedies available to consumers if manufacturers or dealers do not perform those obligations.

A. Scope

The scope of the lemon law is limited. The law largely, although not exclusively, is confined to the sale of new automobiles for personal (as opposed to business) use; to breaches of written warranties; and the obligations are imposed largely, although not exclusively, on the manufacturer. Turning to the first limitation on scope, the protections of the new lemon law are afforded only to "consumers."[61] The Act defines consumer, in pertinent part, as "the purchaser, other than for purposes of resale, of a new motor vehicle. . . ."[62] By this definition, the scope of the Act is limited to sales of new automobiles.

There are two exceptions to this limitation, one more significant and one less significant. The less significant exception is that if the new automobile is sold to another consumer/purchaser during the first year after original sale, the protections of the lemon law will extend to that new consumer/purchaser, notwithstanding that he or she purchased the automobile as a used car.[63] The exception that potentially has greater significance lies in the requirement that if an automobile is returned to the manufacturer under the new lemon law because the attempts to repair have been unsuccessful, then that automobile cannot be resold in New Mexico without a full disclosure of the fact that it had been found defective and had not been successfully repaired.[64] The disclosure requirement applies whether the automobile had originally been sold in New Mexico

61. Various provisions of the Act make it clear that its protections apply to consumers only. *See* N.M. STAT. ANN. §§ 57-16A-3(B) ("refund to the consumer"), 57-16A-4(C) ("A claim by a consumer"), 57-16A-5 ("any consumer who seeks enforcement"), 57-16A-9 ("A consumer who prevails") (Supp. 1986).

62. N.M. STAT. ANN. § 57-16A-2(C) (Supp 1986).

63. The definition of "consumer" in N.M. STAT. ANN. § 57-16A-2(C) (Supp. 1986) includes "any person to whom such motor vehicle has been transferred during the duration of an express warranty applicable to the motor vehicle . . . ." *Id.* While this definition extends the protection of the Act to resales "during the duration of an express warranty," in reality, the limitation period for this purpose is one year, since a consumer cannot trigger any obligations of a dealer or manufacturer under the Act unless the consumer gives notice no later than one year after original delivery. *See id.* § 57-16A-3(A). From the definition, it seems clear that resale, during the one-year period, to a used car dealer will not extend the protections of the Act to the used car dealer. If, however, the used car dealer resells the automobile to a consumer/purchaser, still within one year after the delivery to the original purchaser of the new automobile, then the consumer/purchaser from the used car dealer can claim the protections of the Act.

64. *Id.* § 57-16A-7. This provision is one that is not borrowed from the original Connecticut lemon law. *Compare* 1982 Conn. Acts 667; *see supra* note 10 for a description of Connecticut statutory developments. While the idea is commendable and has some potential for being a benefit to consumers, the statutory section is not a model of clarity. *See infra* note 66. As a consequence, there will inevitably be areas of confusion about the application of this requirement.

and returned under the New Mexico lemon law or whether the automobile had originally been sold in another state and returned to the manufacturer under that state's lemon law.[65] The disclosure requirement is imposed explicitly on the manufacturer and inferentially is not imposed either on the manufacturer's dealer or a subsequent used car dealer.[66]

The next limitation on the scope of the lemon law is that it applies only to written warranties. The operative provision of the Act requires only that the manufacturer or dealer repair a defective automobile so that it conforms to "express warranties."[67] "Express warranty" is defined in the Act and that definition requires the warranty to be "written."[68] This definition, limited to written warranties,[69] of course, is substantially more restrictive than is the definition of express warranty in the UCC, which does not limit express warranties to written statements but rather recognizes that oral statements can form express warranties.[70] This limitation in the lemon law means that a consumer who wishes to rely on an oral warranty must pursue his or her remedy outside of the lemon law, if he or she can.[71]

65. N.M. STAT. ANN. § 57-16A-7 (Supp. 1986).

66. This failure to impose the requirement on the manufacturer's dealer or the used car dealer, together with a complete failure to express a sanction or remedy for violation of this requirement, creates some doubt as to the effectiveness of this otherwise commendable requirement. It would be reasonable for a court to imply a remedy under the law to a purchaser of the used car sold in violation of this provision of the law. A reasonable remedy would be to allow the purchaser to rescind the deal, return the automobile and recover any payments made. The effectiveness of any implied remedy, however, is seriously limited by the extremely short statute of limitations under the lemon law. *Id.* § 57-16A-8; *see infra* text accompanying notes 133-34.

67. N.M. STAT. ANN. § 57-16A-3(A) (1978), which states: "If a new motor vehicle does not conform to all applicable *express warranties* . . . the manufacturer . . . or its authorized dealer shall make such repairs as are necessary to conform the vehicle to such express warranties." (Emphasis added.)

68. *Id.* § 57-16A-2(D), which states:

> [E]xpress warranty means any *written* affirmation of the fact of promise made by a manufacturer to a consumer in connection with the sale of new motor vehicles which relates to the nature of the material or workmanship or to a specified level of performance over a specified period of time, including any terms or conditions precedent to the enforcement of obligations pursuant to the warranty.

(Emphasis added.) The statutory definition of warranty ("affirmation of the fact of promise") is awkward and confusing and departs from the corresponding language in the UCC. *See* U.C.C. § 2-313(1)(a) (1978) ("affirmation of fact *or* promise") (emphasis added). It is possible, although not likely, that in departing from the language used in the UCC the drafters of New Mexico's lemon law intended a different meaning for express warranties than that created by the analogous language in the UCC. More likely, however, the difference in language may be attributed to an undetected typographical error changing "or" to "of" or careless legislative drafting and there was no intent to alter the meaning from the corresponding language in the UCC.

69. The definition of warranty is limited in other important ways, which are discussed *infra* at text accompanying notes 72-73.

70. U.C.C. § 2-313 (1978) defines warranty, in pertinent part, to "*any* affirmation of fact or promise" (emphasis added).

71. *See infra* text accompanying notes 135-39, for consideration of whether a consumer may have waived other remedies.

The third restriction on the scope of the lemon law is that, ultimately, its requirements fall upon the manufacturer of the automobile and not the dealer. While the initial requirement to attempt repairs on a defective automobile falls both on the manufacturer and dealer,[72] if that repair obligation fails, the ultimate obligation to replace the automobile or refund the purchase price rests exclusively with the manufacturer.[73] This limitation means that when all has failed, the New Mexico consumer of a lemon automobile must look to the out-of-state manufacturer for satisfaction and not to the dealer, typically close to home, with whom he or she has dealt. While assigning ultimate responsibility to the manufacturer makes commercial sense, is consistent with commercial realities, and reflects, in most situations, who is really at fault, it makes little sense to confine the consumer to a remedy exclusively against the manufacturer. It would have been preferable if the obligation could have been enforced by the purchaser against either the manufacturer or the dealer, at the purchaser's option; if the purchaser elected to pursue his or her remedy against the dealer, the dealer could have been allowed to turn to the manufacturer for reimbursement.

B. Sellers' Obligations

If a new automobile fails to conform to the express warranty, the lemon law imposes two stages of obligations on the sellers of the automobile. First, the manufacturer or the dealer must "make such repairs as are necessary to conform the vehicle to such express warranty."[74] If the manufacturer's or dealer's attempts to repair ultimately fail, the manufacturer may be[75] required by the lemon law to replace the defective car "with a comparable motor vehicle or accept return of the motor vehicle and refund to the consumer" the purchase price[76] after certain adjustments, which will be discussed shortly.[77]

The obligation to repair is subject to two limitations. The first limitation is that the purchaser must report "the nonconformity to the manufacturer, its agent or its authorized dealer. . . ."[78] There is no requirement that this notice be characterized by any formality.[79] This requirement, therefore, is unlikely to impose much of a burden on the purchaser; it should

72. *See* N.M. STAT. ANN. § 57-16A-3(A) (Supp. 1986).

73. *See id.* at § 57-16A-3(B).

74. *Id.* § 57-16A-3(A).

75. The manufacturer's obligation to replace or refund is qualified. *See infra* text accompanying notes 86-89.

76. N.M. STAT. ANN. § 57-16A-3(B) (Supp. 1986).

77. *See infra* text accompanying notes 112-22.

78. N.M. STAT. ANN. § 57-16A-3(A) (Supp. 1986).

79. *Compare id.* § 57-16a-3(C)(2); *see infra* note 90, for a discussion of problems that may arise from a formal requirement of notice under the New Mexico lemon law.

be satisfied in most instances when the consumer complains to the dealer about the defective automobile.

The second limitation is that the notice of nonconformity must be given within the "term of such express warranties or during the period of one year following the date of original delivery of the motor vehicle to the consumer, whichever is the earlier date. . . ."[80] There are several points to notice about this limitation. First, the limitation period is the term of the express warranty or one year, whichever is the earlier date, not whichever is the later date. This creates somewhat of an anomaly. As described earlier,[81] the typical manufacturer's written warranty is one to replace or repair a defective part or workmanship. In this sense, the typical warranty tracks the seller's initial obligation under the lemon law. If the warranty term is greater than one year, however, the seller's obligation *under the warranty* is to repair a defective part at any time during the warranty period, even if the nonconformity arose in the second year of the warranty term or thereafter. *Under the lemon law,* in this same situation, the seller's obligation is limited to repairing only those nonconformities that arise in the first year of the warranty term. In short, the warranty may say that the seller must repair defective parts for two, three or more years; the lemon law, however, obligates the seller to repair only those defective parts that arise in the first year of the warranty period. This situation is bound to create at least some confusion among consumers.[82]

The second point to notice about this limitation is that even if the defect occurs within one year, there is no obligation on the seller unless notification is also given within the one year period. Assume that eleven and one half months after the consumer purchases the automobile, a defect arises. The consumer does not notify the dealer or the manufacturer for three weeks. In this situation, the seller is not obligated under the lemon law to repair the defective part, since the notification came after one year, even though the nonconformity occurred within one year.[83]

Assuming the two requirements discussed above are met, the seller's obligation to repair appears under the lemon law to be unqualified. There is no requirement that the defect reach a certain level of seriousness.[84] Finally, if the notification is given within the limitation period, the seller's obligation would appear to extend to making all necessary repairs, even

80. N.M. STAT. ANN. § 57-16A-3(A) (Supp. 1986).

81. *See supra* note 17 and accompanying text.

82. The lemon law's "election-of-remedy" provision, *id.* § 57-16A-5, however, may cause not only confusion, but some serious harm to the consumer. *See infra* text accompanying notes 135-39.

83. Whether the seller is obligated to repair under the UCC will depend upon the terms of the warranty, not upon a limitation period imposed by the Code.

84. Compare the requirement on the manufacturer's obligation to replace or refund, that the defect substantially impair the value of the automobile. N.M. STAT. ANN. § 57-16A-3(B) (Supp. 1986); *see infra* text accompanying notes 97-100.

if that repair obligation takes the seller beyond the one year limitation period.

The second level of obligation under the lemon law is the obligation on the part of the manufacturer to replace the defective motor vehicle or refund the purchase price in the event that the defect is not repaired.[85] While the manufacturer's or dealer's obligation to *repair* is reasonably unqualified, the manufacturer's obligation to *replace or refund* is encumbered by at least four qualifications:

(1) The manufacturer or dealer must have had "a reasonable number of attempts" at repair;[86]
(2) The attempts at repair must have failed to correct the defect;[87]
(3) The defect must be one that "substantially impairs the use and market value of the motor vehicle to the consumer";[88] and
(4) The consumer must have availed himself or herself of arbitration offered by the manufacturer, if that arbitration meets certain characteristics.[89]

The number of qualifications on the duty to replace or refund itself raises questions as to how effective this duty may be as a protection for consumers. In addition, three of these qualifications raise certain questions of application.

The first qualification is that the manufacturer or dealer must have had a reasonable opportunity to repair the nonconformity to the warranty. A "reasonable number of attempts to repair" is presumed[90] to have oc-

85. N.M. STAT. ANN. § 57-16A-3(B) (Supp. 1986):

> If the manufacturer or its agent or authorized dealer, after a reasonable number of attempts, is unable to conform the new motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which substantially impairs the use and the market value of the motor vehicle to the consumer, the 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 collateral charges, less a reasonable allowance for the consumer's use of the vehicle. . . .

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* § 57-16A-6; *see infra* text accompanying notes 101-08.

90. N.M. STAT. ANN. § 57-16A-3(C) (Supp. 1986). This presumption is itself qualified. Section 57-16A-3(C)(2) provides that "in no event shall the presumption herein provided apply against the manufacturer unless the manufacturer has received prior direct written notification from or on behalf of the consumer and has had an opportunity to cure the defect alleged." It should be noted that the just-quoted language contains two qualifications, either one of which may defeat the applicability of the presumption. First, the consumer must give *written* notice directly to the manufacturer. This is in addition to the notice which must be provided to the dealer (or manufacturer) under section 57-14A-3(A) in order to trigger the repair duty. It is likely that this first qualification on the presumption will cause at least some confusion. The consumer, already having given notice to the dealer, may believe that he or she has satisfied the lemon law's notice requirement and, therefore, will neglect to give notice to the manufacturer.

Second, the *manufacturer* (not just the dealer) must have had an opportunity to cure. It is unclear

curred if either the defective condition of the car was subjected to four or more unsuccessful repairs[91] or the vehicle is in the "shop" for a total of thirty or more "business days."[92] Surely no one could quarrel with the basic qualification that the manufacturer should not be required to replace or refund until it has had a reasonable opportunity to cure. The attempt, by way of the presumption, to infuse some objective and definite criteria into the indeterminate standard of "reasonable opportunity," thereby relieving some of the uncertainty, is commendable.

While the time limitations built into the presumptions create some confusion,[93] this qualification should present no unreasonable hardship on the consumer as long as the courts treat the presumptions as presumptions and not as talismans to be applied inflexibly. There may be situations where it is not reasonable to require the consumer to allow four opportunities to repair or to give the dealer thirty days in the "shop." As an example, where the defect in the automobile poses a threat to the safety of the passengers, it seems reasonable that the consumer should

how this second qualification fits with the "four or more" attempts presumption itself. The presumption requires at least four attempts at repair, but those attempts can be by the manufacturer *or* its dealer and typically it will be the dealer who attempts repair. This second qualification on the presumption requires that the manufacturer must have had an opportunity to cure. Presumably, if the "four" attempts were performed by the dealer, then in order for the presumption to apply, the manufacturer must be provided an additional attempt to cure. In short, this qualification seems to require, in most circumstances, not four but five attempts at cure before the dissatisfied consumer can have the benefit of the presumption.

91. N.M. STAT. ANN. § 57-14A-3(C)(1) (Supp. 1986). The exact language of this presumption is as follows:

> It shall be presumed that a reasonable number of attempts as mentioned in Subsection B of this section have been undertaken . . . if:
>
> (1) the same uncorrected nonconformity has been subject to repair four or more times . . . within the express warranty term or during the period of one year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date, but the nonconformity continues to exist. . . .

The time limitation in this presumption is perplexing. The limitation seems to require that the presumption not be applicable if the attempted repairs extend beyond one year or the warranty period. Thus, if the consumer discovers the defect in the tenth month after purchase of the car and has it repaired unsuccessfully three times over the next two months but does not bring the car in for the fourth repair until thirteen months after purchase, the language of the statute seems to require that the presumption not be applicable. It is hard to discern any reasonable purpose for this result. One ought not make too much of this incongruity, however. The time limitation serves only to make the presumption inapplicable. It seems likely, in the example just given and in like cases, that a court would find that the manufacturer or dealer had a "reasonable number of attempts" to cure without the benefit of the presumption.

92. *Id.* § 57-16A-3(C)(2). This branch of the presumption is subject to the time limitation period described *supra* at note 91. The language creating this branch of the presumption is slightly ambiguous. It is not clear whether the seller has up to 30 business days to cure each defect or whether this time limitation is cumulative, that is, once 30 business days is reached, regardless of how many different defects may have been involved, the presumption is triggered. The New Mexico Attorney General has adopted the latter interpretation. N.M. Attorney General, Interim Determination and Notice of Final Determination of the Attorney General Pursuant to Section 57-16A-6, NMSA, on Motor Vehicle Dispute Resolution Procedure 2 (Mar. 3, 1986).

93. *See supra* note 91.

not be required to submit the car to four opportunities to repair.[94] Another example is where the automobile suffers from multiple defects. It seems unreasonable to require the owner to afford the seller a minimum of four opportunities to cure each defect, especially if they arise successively.

The second qualification on the obligation of the manufacturer to replace or refund is that the defects in the new automobile must not have been cured. This qualification is, of course, eminently sensible and is consonant with similar requirements under other states' lemon laws[95] and under the UCC.[96]

The third qualification is that the uncorrected defect or condition must be one that "substantially impairs the use and market value of the motor vehicle to the consumer."[97] This qualification on the manufacturer's replace-or-refund obligation is similar to ones found in most other lemon laws[98] as well as the qualification placed on a buyer's right to revoke acceptance under the UCC.[99] The purpose of this qualification is clear and reasonable. The obligation to replace or refund is a sufficiently onerous one and should not be imposed upon the seller for minor or incidental defects; nor should it be used to harass sellers.

The "substantial impairment" qualification, as found in the New Mexico lemon law, however, does raise at least one question of application. The language in the New Mexico statute requires that the defect substantially impair "the use and market value" of the automobile to the consumer. This language is somewhat different from the language found in section 2-608 of the UCC, imposing a similar qualification on the buyer's right to revoke. Under section 2-608, the buyer can revoke where the defect "substantially impairs its [the automobile's] value to him [the consumer]." As described earlier,[100] the "substantial impairment" test under section 2-608 has been construed to achieve a delicate balance of

94. At least one state's lemon law recognizes this safety factor. Minnesota's statute, which contains a similar presumption as found in the New Mexico statute expressly provides that if the defect results in a complete failure of the braking or steering systems, thereby constituting a safety hazard, the consumer only has to submit the car to repair once before he or she may demand replacement or refund. MINN. STAT. § 325F.665(3)(c) (Supp. 1985).

95. *See, e.g.*, N.J. STAT. ANN. §§ 56:12-21 (West Supp. 1985).

96. While the "perfect tender" rule of the UCC, *see* U.C.C. § 2-601 (1978), will allow the buyer to "reject" the goods if they are nonconforming in any way, section 2-508 allows the seller, in such instances, the opportunity to cure. Rejection, then, is ultimately limited to uncured defects. In addition, the right to "revoke acceptance," which is more analogous to the replace-or-refund remedy under the new lemon law, is clearly qualified by the requirement that the defect in the goods must remain uncured. *See id.* § 2-608.

97. N.M. STAT. ANN. § 57-16A-3(B) (Supp. 1986).

98. *See, e.g.*, MINN. STAT. § 325F.665(3)(a) (Supp. 1985); N.J. STAT. ANN. § 56:12-21 (West Supp. 1985).

99. *See* U.C.C. § 2-608 (1978).

100. *See supra* note 37 and accompanying text.

subjective and objective elements and has been the subject of some substantial judicial interpretation and application.

It is unclear that the legislature, in employing language that varies from that in the UCC, intended to adopt a different standard. It seems more desirable to construe the language as essentially adopting the standard under section 2-608 of the UCC, thereby allowing the New Mexico courts, in construing when "substantial impairment" exists, to avail themselves of the developing case law under the UCC.

If, however, the language in the New Mexico lemon law is construed as manifesting a legislative intent to depart from the standard in section 2-608, it seems clear that the new lemon law standard is more restrictive on the right of the consumer to invoke the remedy than is the qualification under the UCC. First, under the lemon law formulation, the defect must be one that substantially impairs both the *use* and *value* to the consumer, whereas the UCC requires impairment only to value. Second, the lemon law version seems to shift the balance of the test in favor of a more objective standard by requiring that the impairment be to the "market value" of the automobile. Under the UCC, the impairment was required only as to the value to the consumer.

The last qualification on the manufacturer's replace-or-refund obligation is that the consumer must have first submitted the dispute to arbitration if the seller offers a qualified arbitration plan.[101] The Magnuson-Moss Warranty Act, as well as most other states' lemon laws, has a similar qualification.[102] This qualification is somewhat controversial. Some commentators have hailed the requirement of mandatory arbitration as a significant advancement, diverting these consumer controversies from the expensive and cumbersome court process to an expedited and informal dispute resolution process.[103] Others, however, have characterized the mandatory arbitration provision as just another obstacle for the consumer to overcome before he or she can achieve justice in the courts.[104]

---

101. N.M. STAT. ANN. § 57-16A-6 (Supp. 1986), which states, in pertinent part:
> If a manufacturer has established or participates in a fair and impartial informal dispute settlement procedure which substantially complies with [the requirements for such plans under the Magnuson-Moss Warranty Act] . . . the provisions of Subsection B of Section 3 of [this lemon law] concerning refunds or replacement shall not apply to any consumer who has not first resorted to that procedure.

102. *See* 15 U.S.C. § 2310(a)(3) (1982) (Magnuson-Moss); Vogel, *Squeezing the Consumer: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 648 (describing similar requirements in other states' lemon laws).

103. *See, e.g.*, Ervine, *Protecting New Car Purchasers: Recent United States and English Developments Compared*, 34 INT'L & COMP. L.Q. 342,349-50 (1985) (commending a similar provision in California's lemon law as "sensible").

104. *See, e.g.*, Sklaw, *The New Jersey Lemon Law: A Bad Idea Whose Time Has Come*, 9 SETON HALL LEGIS. J. 137, 157-58 (1985); Vogel, *Squeezing the Consumer: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 553-56.

The dissatisfied consumer is not required to submit to arbitration unless the manufacturer offers a "fair and impartial" plan that "substantially" complies with federal standards under the Magnuson-Moss Warranty Act.[105] Under the lemon law, the New Mexico Attorney General is empowered to determine whether available automobile arbitration plans satisfy the requirements of the lemon law.[106] Presumably, the determination of the Attorney General is final in the sense that it cannot be collaterally attacked in a lawsuit under the lemon law. The Attorney General has reviewed the available manufacturers' arbitration plans and has issued an "Interim Determination" on March 3, 1986. That Interim Determination concluded that of the four available arbitration programs,[107] only one (Chrysler's) satisfies[108] the requirements of the lemon law. What this boils down to is that only purchasers of new Chrysler automobiles are required to submit their disputes to arbitration as a condition of triggering the seller's obligation to replace the defective automobile or refund the consumer's purchase price.

In addition to the qualifications on the manufacturer's obligation to replace the car or refund the consumer's purchase price, there are a number of other problems with this obligation which limit its effectiveness as a remedy for consumers of lemon automobiles. First, the New Mexico lemon law does not make it clear who has the choice of determining whether the lemon automobile should be replaced or whether a refund should be given. Some states' lemon laws explicitly place the election with the consumer;[109] some explicitly place the election with the manufacturer;[110] and others, like New Mexico's, are silent.[111]

105. N.M. STAT. ANN. § 57-16A-6 (Supp. 1986). The federal standards are found at 16 C.F.R. pt. 703 (1985).

106. N.M. STAT. ANN. § 57-16A-6 (Supp. 1986). The provision states: "The state attorney general may investigate and determine that the informal dispute settlement procedure is fair and impartial and conforms with the [federal] requirements. . . ."

107. Ford and Chrysler operate their own arbitration programs. The other manufacturers use arbitration programs operated either by the Better Business Bureau (Autoline) or the National Automobile Dealers Association (AUTOCAP). *See* New Mexico Attorney General, Interim Determination and Notice of Final Determination to the Attorney General, Pursuant to § 57-16A-6, NMSA, on Motor Vehicle Dispute Resolution Procedures 4 (Mar. 3, 1986).

108. Even Chrysler's program did not fully satisfy the New Mexico Attorney General. He proposes only "to approve conditionally" the Chrysler program. *Id.* at 5. The lemon law does not speak in terms of "conditional approval," although it seems clearly sensible that the Attorney General should have some latitude in exercising his responsibilities under the lemon law. It appears that the "conditional approval" of the Chrysler program is based on the Attorney General's desire to monitor the program in operation, since Chrysler has just recently changed its plan to remove Chrysler representatives from the arbitration panel. *Id.* The "conditional approval" is good for six months. *Id.* at 26-27.

109. *See, e.g.*, MINN. STAT. § 325F.665(3)(a) (Supp. 1985).

110. *See, e.g.*, COLO. REV. STAT. § 42-12-103(1) (1984).

111. *See, e.g.*, CAL. CIV. CODE § 1793.2(d) (Supp. 1985).

Given the choice of whom to invest with the election, it seems more appropriate to place the election with the consumer and not the manufacturer. The value of an automobile does implicate certain subjective and psychological dimensions. In order to reach the replacement or refund option, it must be remembered that (1) the manufacturer has provided the consumer with a defective automobile; (2) the defect has been quite serious or substantial; and (3) the manufacturer or dealer has demonstrated an inability to cure the substantial defect over repeated attempts occupying potentially an extensive period of time in the "shop." In these circumstances, it would not be surprising if the consumer no longer had confidence in either the automobile or the manufacturer. It does seem, therefore, particularly inappropriate to vest the decision of which remedy the consumer will have not on the consumer who is disappointed for good reason but rather on the manufacturer who has demonstrated an inability to satisfy the consumer's reasonable expectations. This seems especially so when the manufacturer can choose as one of the options to require the consumer to take another automobile from the manufacturer.

Another problem with the replace-or-refund obligation arises from what exactly the manufacturer has to refund.[112] Under the language of the

112. There are also some difficulties with the manufacturer's replacement obligation under the lemon law. N.M. STAT. ANN. § 57-16A-3 (Supp. 1986) states only that the manufacturer must replace the lemon with a "comparable motor vehicle." The statute does not define what constitutes a "comparable motor vehicle" nor does it state "comparable" to what. Some states' lemon laws address this question and require that the replacement vehicle must be satisfactory to the consumer. *See, e.g.*, CONN. GEN. STAT. ANN. § 42-179(d) (West Supp. 1985); FLA. STAT. ANN. § 681.104 (2)(a) (West Supp. 1985); VA. CODE § 59.1-207.13(A) (Supp. 1984). It is inconceivable that the obligation under New Mexico's law would be satisfied by replacing the returned car with one "comparable" to the automobile as originally delivered to the consumer or "comparable" to the automobile as turned in by the consumer, since the automobile delivered to the consumer was defective and was turned in by the consumer because it remained defective, notwithstanding repeated attempts at repair. It seems likely that to satisfy the replacement obligation, the manufacturer must tender a vehicle that conforms to the contract description, including warranties.

Quite often, by the time the consumer turns the defective car in for replacement, it will have some substantial mileage on it. May the manufacturer satisfy the replacement obligation by tendering a used automobile (such as a "demonstrator") which otherwise conforms to the contract description? The New Mexico statute does not explicitly require the replacement automobile to be "new," *compare, e.g.*, OR. REV. STAT. § 646.335(1)(a) (1983), although the language in N.M. STAT. ANN. § 57-16A-3(B) (Supp. 1986) (providing that when the manufacturer replaces the defective automobile it may take an allowance for the consumer's use of the defective automobile) suggests that the statute contemplates a new automobile as the replacement.

Another problem with the replacement obligation under the New Mexico lemon law is that it does not state explicitly that the replacement is without charge to the consumer. Indeed, the statute expressly allows the manufacturer to charge the consumer at least for the consumer's use of the lemon automobile prior to turning it in for replacement. *Id.* § 57-16A-3(B). May the manufacturer impose upon the consumer other charges for replacement, such as delivery charges, changes in price, dealer preparation charges, etc.? It seems that the underlying purpose of the statute is more effectively advanced by requiring the manufacturer to replace the lemon free of any charges other than the "allowance for use" explicitly provided for in the statute.

statute, the manufacturer must "refund to the consumer the full purchase price including all collateral charges, less a reasonable allowance for the consumer's use of the automobile."[113] "Reasonable allowance" for the consumer's use of the automobile is further defined as "that amount directly attributable to use by the consumer prior to his first report of the nonconformity to the manufacturer, agent or dealer and during any subsequent period when the vehicle is not out of service by reason of repair."[114]

There are two serious difficulties with the formulation of the manufacturer's refund obligation under the New Mexico lemon law. First, the statute does not require the manufacturer to compensate the consumer for any out-of-pocket expenses the consumer may have incurred as a result of receiving a defective automobile. It is not unlikely that in addition to the considerable inconvenience and annoyance to the consumer in receiving a lemon automobile, as well as the possible danger, the consumer may also incur considerable out-of-pocket expenses. He or she may have to lease a replacement automobile for use while the lemon is in the shop repeatedly for repairs. If the car becomes inoperative on the road, there will almost inevitably be towing charges. If the car breaks down in a place not convenient to the dealer, there may also be repair charges and other expenses. Under the UCC, if the consumer revoked his or her acceptance of the automobile in these circumstances, he or she would be able to recover these out-of-pocket expenses as "incidental or consequential" damages.[115] The New Mexico lemon law clearly restricts the consumer's remedies in this regard.

In addition to restricting the remedies of the purchaser, the New Mexico statute provides to the manufacturer of the lemon automobile protections that were not clearly provided for under the prior law. The UCC[116] does not expressly allow for an offset. Some courts, applying section 1-103 of the Code,[117] have held that a manufacturer could take an offset for the revoking buyer's use of the nonconforming automobile prior to revoca-

113. *Id.* § 57-16A-3(B). This provision is similar to the provisions of most other lemon laws. *See, e.g.*, N.J. STAT. ANN. § 56:12-21(b) (West Supp. 1985).

114. N.M. STAT. ANN. § 57-16A-3(B) (Supp. 1986).

115. Under U.C.C. § 2-711 (1978), a revoking purchaser may recover damages "for non-delivery." Section 2-713 allows, in addition to other damages for nondelivery, incidental and consequential damages, as defined in section 2-715. *See* Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 638-39.

116. Similarly, the manufacturer has no right to an offset for use under the Magnuson-Moss Warranty Act. While the federal statute authorizes the Federal Trade Commission to publish regulations allowing for such an offset, see 15 U.S.C. § 2304(a)(4) (1982), the FTC has determined not to issue regulations allowing for an offset. 43 Fed. Reg. 4055, 4062 (1978).

117. U.C.C. § 1-103 (1978) provides that unless clearly displaced by a provision of the UCC, principles of law and equity apply to transactions governed by the Code.

tion.[118] Other courts have held that there is no right to an offset.[119] In New Mexico, the only case to address the question suggested that an offset might be permissible, but held that under the facts of that case no right to an offset had been proved.[120]

Other commentators have labeled similar "offset" provisions in other states' lemon laws as "highly undesirable."[121] At the very least, it does seem that the approach taken by the New Mexico lemon law with respect to the manufacturer's refund obligation is decidedly one-sided, to the detriment of the consumer. While the consumer may not recover his or her legitimate out-of-pocket expenses arising as a result of the purchase of a lemon automobile, the manufacturer has a right to the offset for any use the consumer may have made, no matter how unsatisfactory that use was.

This perceived unfairness may be mitigated by the courts. The statutory language, in providing only for "a *reasonable* allowance,"[122] leaves room for judicial interpretation that a "reasonable" allowance would take into consideration any expenses incurred by the purchaser as a result of the uncured nonconformity of the automobile. In this way, if the manufacturer were to get any offset for the use of the automobile by the consumer, that offset, itself, would be reduced by the amount of the buyer's expenses, such as renting replacement cars, towing, repairs or other expenses.

C. Consumer Remedies

Interestingly, there is no language in the New Mexico lemon law explicitly providing to the consumer a private cause of action to enforce the obligations imposed by the statute on the dealer or manufacturer. A number of other provisions, however, make it ineluctably clear that a private cause of action is available to the consumer to enforce the provisions of the statute. Thus, the statute expresses a limitation period for "actions brought to enforce [its] provisions,"[123] establishes "affirmative defenses" to "any claim" under the act,[124] provides for attorneys' fees for a prevailing plaintiff,[125] and requires that "any consumer who seeks

118. *See, e.g.*, Orange County Motors, Inc. v. Dade County Dairies, 258 So. 2d 319 (Fla App.), *cert. denied*, 263 So. 2d 831 (Fla. 1972); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 8.3, at 317 (2d ed. 1980).

119. *See, e.g.*, Ramirez v. Autosport, 88 N.J. 277, 440 A.2d 1345 (1982).

120. Gawlick v. American Builders Supply, Inc., 86 N.M. 77, 519 P.2d 313 (Ct. App. 1974).

121. *See, e.g.*, Vogel, *Squeezing the Consumer: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 641.

122. N.M. STAT. ANN. § 57-16A-3(B) (Supp. 1986) (emphasis added).

123. *Id.* § 57-16A-8.

124. *Id.* § 57-16A-4.

125. *Id.* § 57-16A-9.

enforcement of the provisions" of the lemon law is precluded from certain remedies under the UCC.[126]

While there is no realistic doubt that the consumer has a private cause of action under the lemon law, the failure to provide explicitly for a private cause of action creates some doubt as to what remedies are available to a consumer who can successfully demonstrate in a lawsuit that the manufacturer or seller has failed to meet its obligations under the statute. What does a consumer receive at the end of a successful lawsuit: an order specifically enforcing the defendant to perform its obligations under the statute? Damages? If the remedy for a violation of the lemon law is damages, what is the measurement of damages? Are damages for personal injury available? Can there be punitive damages for willful violation of the statute? These and other questions remain unanswered under the statute and therefore await judicial development. In fashioning the shape of the remedies under the New Mexico lemon law, the courts should adopt a liberal approach, approving remedies that will provide the greatest protection possible to the consumer, as this approach would be consistent with the underlying purposes of the statute.[127]

While the type of remedy available to the consumer is unspecified in the statute, there are several express provisions which may serve to diminish the effectiveness of any remedy under the statute. First, the lemon law requires the consumer to submit to an available arbitration plan, if the plan is certified by the state Attorney General as "substantially complying"[128] with the federal requirements under the Magnuson-Moss Warranty Act.[129] A provision requiring parties to a consumer dispute to submit to *binding* arbitration might be beneficial. Such a requirement for binding arbitration would serve the purpose of channeling these types of disputes from the costly and cumbersome court process to a more informal and expeditious manner of dispute resolution. Since the arbitration under all available automobile plans is not binding on either the consumer or

126. *Id.* § 57-16A-5.

127. *See supra* note 10, discussing the purposes underlying lemon laws.

128. It is curious that the statute only requires "substantial compliance" rather than complete compliance with the Magnuson-Moss standards. There is no indication what purpose is served by diluting the federal standards. Most other states' lemon laws require complete compliance, although there is a significant minority that require only substantial compliance. *See* Vogel, *Squeezing the Consumer: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 649-50. A review of the Attorney General's determination of the available plans, *see supra* notes 106-08 and accompanying text, indicates that in applying the federal standards to review the available arbitration plans, the Attorney General did not read the "substantial compliance" standard as requiring any substantial dilution of the federal requirements.

129. *See supra* notes 105-08 and accompanying text.

the manufacturer,[130] it is unlikely that the arbitration called for under automobile manufacturer arbitration plans will accomplish this purpose. Rather, given the nonbinding nature of this arbitration, the requirement to seek arbitration may be criticized as creating just another procedural obstacle to effective relief to the consumer.[131]

The adverse effects of the arbitration requirement are substantially mitigated by the Attorney General's interim determination in New Mexico that only one manufacturer's arbitration program "substantially complied" with the federal requirements.[132] Therefore, only purchasers of new Chrysler automobiles are burdened with this additional step.

A second provision in the New Mexico lemon law which will diminish the effectiveness of the remedies to the consumer is the substantially shortened limitations period for bringing actions under the statute. Under the UCC, the limitations period for bringing suit is four years.[133] Under the New Mexico lemon law, the limitations period is eighteen months after the "original delivery of the motor vehicle to a consumer" or ninety days following "final action" by an arbitration panel, if the consumer resorts to arbitration, whichever is later.[134] It is difficult to understand why a statute which is purportedly designed to increase and expand protections and remedies for the consumer would reduce by more than half the existing limitations period under the UCC. There is no evidence, in New Mexico or elsewhere, that the four-year limitations period has promoted the litigation of stale claims or otherwise fostered problems or abuses.

Moreover, an eighteen-month limitations period for these types of disputes clearly is too short. Inevitably it will have the effect of excluding legitimate claims or rushing consumers into court. Consider the application of this limitations period in a not unlikely situation under the statute. Assume that a consumer purchases a new car in the beginning of February that develops drivetrain problems in mid-December (ten and one-half

130. *See* 16 C.F.R. § 703.2(g) (1985). The regulation provides that the arbitration decision is not binding on the consumer. It further states that the manufacturer need only act in "good faith" with respect to the arbitration decision. It is difficult to understand exactly how a "good faith" standard would operate here, but it seems clear that such a standard certainly would not operate to bind the manufacturer to an adverse decision. It is doubtful in the extreme that a court would consider the refusal to follow an arbitration decision that the manufacturer disagreed with to constitute "bad faith."

131. *See* Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ ST. L.J. 589, 653-56 ("It makes little sense to require a consumer to use a procedure the manufacturer can ignore.").

132. *See supra* note 108.

133. U.C.C. § 2-725(1) (1978).

134. N.M. STAT. ANN. § 57-16A-8 (Supp. 1986).

months after purchase). The lemon law requires notice to the dealer within the first year, which is given. The purchaser requests of the dealer that it repair the defect, and the dealer schedules an appointment for the third week in December. The car is returned to the purchaser, apparently fixed, but after six weeks, the problem recurs. The purchaser again notifies the dealer and demands repair and an appointment is made for the first week in March (some thirteen months after purchase) for a second attempt at repair. After three days in the shop the car is returned, again apparently fixed. The problem recurs at the end of April; the dealer again attempts a repair in May. The fourth manifestation of the same problem occurs at the end of July. The dealer this time says that it will replace the transmission, but it will take three weeks to get a new transmission from the manufacturer. This, of course, means that just satisfying the four-at-tempts-at-repair requirement under the statute has taken the parties more than eighteen months beyond original delivery of the car to the consumer. If the manufacturer, after a fourth unsuccessful attempt by the dealer to repair the car, refuses to replace or refund, the consumer cannot sue under the lemon law, since the eighteen-month limitation period bars him.

A cause of action under the statute obviously does not accrue until the manufacturer has faced an obligation to repair or replace and has failed to do so. In the hypothetical just described above, therefore, the cause of action did not even accrue within the eighteen-month limitations period. In short, the limitation period can quite conceivably bar a claim that has not accrued under the requirements of the statute.

A third provision of the New Mexico lemon law which will have the effect of substantially diminishing the effectiveness of the statute to the consumer is the "limitation of remedy" section.[135] The lemon law provides that if a consumer "seeks enforcement" of the obligations under the lemon law, then the consumer "shall be foreclosed from pursuing" the remedy of revocation of acceptance[136] under the UCC. This provision in the New

135. *Id.* § 57-16A-5.

136. *Id.* The language of this statutory election of remedies speaks in terms of foreclosing remedies under sections 2-602 through 2-608 of the UCC. Sections 2-602 through 2-608 deal only with revocation of acceptance. It is unclear whether the language in New Mexico's lemon law leaves any other remedy under the UCC available to the consumer. Can the consumer proceed under the lemon law and in addition sue for damages for breach of warranty under the UCC? On one hand, the language in the lemon law seems to evince a legislative intent to limit the election of remedies to foreclosing only revocation of acceptance. On the other hand, the language of the remedy provisions under the UCC do not fit neatly with a situation where the purchaser has returned the automobile pursuant to the lemon law. It does not seem that sections 2-711, 2-712, and 2-713 of the UCC would apply, as the remedies set forth in those sections are predicated on nondelivery, rejection, revocation or repudiation. It would seem that the "election-of-remedy" language in the lemon law precludes remedies under these sections. In addition, it does not seem that the remedies set forth in section 2-714 would apply, as those remedies are available only if the purchaser has accepted the goods, which would seem to be inconsistent with the return of the goods under the lemon law.

Mexico statute is not borrowed from the typical lemon law in other states. In fact, the overwhelming majority of lemon laws preserve the consumer's other remedies.[137]

This election of remedies has the potential for causing considerable mischief. Clearly, the revocation of acceptance remedy is the most important one under the UCC to consumers of lemon automobiles. Moreover, depending on how this provision in the lemon law is construed, the waiver of the revocation of acceptance remedy under the UCC could occur unknowingly. If the lemon law is construed to mean that the election occurs when the consumer first avails himself or herself of rights granted by the lemon law, then it is quite likely that waiver could occur unwittingly. Under this broad reading of the election of remedy provision, the consumer will have elected his or her remedy at the first time the consumer has sought repair of the automobile pursuant to the lemon law. Recalling the hypothetical situation set forth in the discussion about the short statute of limitations under the act,[138] it is conceivable that the consumer could have no remedy under the lemon law, since the limitations period had run, and also would have waived his or her revocation of acceptance remedy under the UCC pursuant to the lemon law's election of remedy provision. This would leave the consumer with only a suit for damages for breach of warranty, an insufficient remedy in many, if not most, situations.

An alternative reading of the election of remedy provision in the lemon law is that the election and waiver do not occur until the consumer actually initiates a lawsuit or arbitration under the statute. Under this reading, much of the mischief and harsh effects of the provision are mitigated, although not totally eliminated. Any election is likely to be a knowing one, arrived at with the advice of counsel. This more narrow reading of the election of remedy provision seems more consonant with the language employed by the statute. The language reads "any consumer who seeks enforcement of the provisions" of the lemon law then waives revocation of acceptance under the UCC.[139]

While the preceding three sections of the new lemon law just discussed all have the effect of substantially diminishing the effectiveness of the remedies under the statute to the consumer, there is one provision in the new lemon law which is clearly beneficial to the consumer. The provision states:

137. *See, e.g.*, COLO. REV. STAT. § 42-12-105 (1984). Only five states have provisions similar to New Mexico's, forcing the consumer to elect his or her remedies. *See* Vogel, *Squeezing the Consumer: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 644.

138. *See supra* text following note 134.

139. N.M. STAT. ANN. § 57-16A-5 (Supp. 1986).

> A consumer who prevails in an action brought to enforce the provisions of the [lemon law] shall be entitled to receive reasonable attorneys' fees and court costs from the manufacturer. If a consumer does not prevail in such an action and brings the action for frivolous reasons or in bad faith, the manufacturer shall be entitled to receive reasonable attorneys' fees and court costs from the consumer.[140]

This provision appears to make mandatory the award of attorneys' fees in favor of the successful plaintiff, while limiting any award of fees in favor of the defendant only to those situations where the lawsuit is determined to be frivolous or in bad faith. In this respect, the New Mexico statute is unlike the Magnuson-Moss Warranty Act[141] and most other lemon laws,[142] which make the award of attorneys' fees in favor of a prevailing plaintiff discretionary. The New Mexico provision is more like the attorneys' fees provision under the federal Civil Rights statutes, as interpreted by the courts.[143]

The provision of mandatory attorneys' fees to successful plaintiffs under the act goes far in putting some teeth in the remedies under New Mexico lemon law. Making the defaulting manufacturer pay the costs of the successful plaintiff's attorneys' fees acts as an economic penalty on the manufacturer, thereby creating an added inducement for compliance with the lemon law's provisions. In addition, the attorneys' fees provision substantially reduces the consumer's "transaction costs" in bringing suit,[144] thereby encouraging more consumers to exercise their rights under the new lemon law. Whether this beneficial provision, however, outweighs the other provisions discussed, which substantially diminish the value of the remedies to the consumer, is doubtful.

What protections and remedies are afforded under New Mexico's new lemon law to Mrs. Gonzales in the hypothetical posed at the beginning of this article? After giving notice to the dealer, she can demand that ACME repair the transmission in her car. If, after four attempts, ACME cannot satisfactorily repair the transmission, Mrs. Gonzales may demand of General Motors that it replace the Buick with one that is comparable to that which was originally promised to her or that it refund her purchase price and all collateral charges. In either event, General Motors will deduct from the refund or, in the event of replacement, charge Mrs. Gonzales the reasonable value to her of the use of the Buick while it was in her possession. Mrs. Gonzales, however, will not be able to recover

140. *Id.* § 57-16A-9.

141. 15 U.S.C. § 2310(d)(2) (1982).

142. *See* Vogel, *Squeezing the Consumer: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ ST. L.J. 589, 661-62.

143. 42 U.S.C. § 1988 (198); *see* Maine v. Thibideaux, 448 U.S. 1 (1980).

144. *See supra* text accompanying note 34.

from General Motors her out-of-pocket costs and expenses incurred as a result of the failure of her transmission or any other damages she may have suffered. If General Motors fails to replace the Buick or refund her money, Mrs. Gonzales can sue (although she better file suit quickly) and she may recover from General Motors the cost of her reasonable attorney's fees if she wins the lawsuit.

IV. CONCLUSION

A comparison of the pre- and post-lemon law remedies reveals that the advent of New Mexico's lemon law will do little, if anything, to improve the protections and remedies available to a purchaser of a lemon automobile. The two major obligations under the lemon law—repair of the defective automobile and replacement of the automobile or refund of the purchase price—represent no real advance over the prior law. The automobile manufacturers' express warranties (enforceable under the UCC or Magnuson-Moss) already obligate the manufacturers to repair defects in new automobiles. The revocation of acceptance remedy under the UCC is essentially the same and, indeed, may provide a bit more protection to the consumer than does the obligation on the manufacturer under the lemon law to refund the purchase price. While the lemon law also provides an optional obligation on the manufacturer to replace the defective automobile (an obligation that was not available under the prior law), it is doubtful that this optional obligation should be considered much of an advance over the prior law.[145]

With respect to remedies available to purchasers, the new lemon law is at the very best a mixed bag. On the one hand, the new statute clearly takes away some existing remedies and qualifies others, all to the detriment of consumers. Thus, the new lemon law fails to provide for damages to compensate the consumer for out-of-pocket expenses arising as a result of the defective automobile, damages that may have been available under a revocation of acceptance action under the UCC. Moreover, the combination of the extremely short statute of limitations (18 months) and the election of remedies provision will clearly work hardship on some purchasers who otherwise would have legitimate claims under the UCC.

What remedies the lemon law does provide are further encumbered. The numerous qualifications on the manufacturer's obligation to replace or refund diminish the effectiveness of that remedy. While the requirement

145. It is likely that few consumers already experienced with a lemon automobile from that manufacturer would prefer a replacement of the automobile over a refund of the purchase price. Rather, the replacement option should be more attractive to the manufacturer than it is to the purchaser. In this respect, if the option whether to replace or refund is with the manufacturer, this option does not represent an improvement of the position of the consumers over the prior law, but rather should probably be viewed as a slight deterioration of position.

of recourse to arbitration is commendable in spirit, the fact that the available arbitration is nonbinding strongly suggests that this requirement may become just another obstacle, delaying a consumer's ultimate justice in court.

Even the one provision of the new lemon law that is a definite improvement over the prior law—the provision of attorneys' fees to the prevailing plaintiff—does not constitute much of an improvement. First, under the Magnuson-Moss Act, a prevailing plaintiff could recover (at the court's discretion) attorneys' fees.[146] Therefore, even this improvement comes down to making previously discretionary attorneys' fees into mandatory attorneys' fees. While this is some improvement, it can hardly be said to balance the substantial incursions and qualifications on consumers' remedies that the other provisions of the new lemon law represent.

Lemon laws generally have faced increasing criticism as providing "little protection beyond that already available under existing law."[147] New Mexico's lemon law is yet more restrictive than the typical lemon law. In most instances, where New Mexico's lemon law departs from the provisions of the typical lemon law, the New Mexico provision is more restrictive of consumer protections or remedies.

The best that can be said about New Mexico's new lemon law is that it is much ado about nothing. It represents neither an improvement over the prior law nor a dramatic new approach to the problems faced by consumers of lemon automobiles. Moreover, in its numerous qualifications on and limitations to existing consumer protections and remedies, the new lemon law contains some potential problems for consumers. Those who look to this new law as constituting a major improvement in the rights and remedies available to purchasers of lemon automobiles are likely to be frustrated.

146. *See supra* note 53.

147. Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties and a Proposal for Reform*, 1985 ARIZ ST. L.J. 589, 674-75; see also Sklaw, *The New Jersey Lemon Law: A Bad Idea Whose Time Has Come*, 9 SETON HALL LEGIS. J. 137 (1985); Comment, *A Sour Note: A Look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846 (1984).