When Life Gives You Lemons, Make a Lemon Law: North Carolina Adopts Automobile Warranty Legislation

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Most people know someone who knows someone who has bought a new car that turned out to be a "lemon." Horror stories abound of leaks that refuse to be plugged, cars that shake like vibrating beds, and other undiagnosed problems.¹ The North Carolina Attorney General's Office reported in 1986 that it received 1,155 written consumer complaints about new cars, most of which involved a manufacturer's inability to repair the motor vehicle so it would conform with express warranties.²

The problem of nonconformity of new vehicles with express warranties predates the enactment of state lemon laws. Before the lemon laws, the Uniform Commercial Code (UCC),³ the Magnuson-Moss Warranty Act,⁴ and certain Federal Trade Commission (FTC)⁵ regulations provided remedies. North Carolina's latest addition to protection of new car buyers is its "Act To Provide Remedies For Consumers Of New Motor Vehicles That Do Not Conform To Express Warranties."⁶ North Carolina has become the forty-second state to enact such a "lemon law."⁷


The forty-two lemon laws enacted thus far vary, but one can draw a composite. A "typical" lemon law sets out a statutory term during which a consumer must notify the manufacturer that her motor vehicle does not conform to express warranties. The nonconformity must substantially impair the use or value of the motor vehicle. A nonconformity is presumed to exist if the purchaser has to return the vehicle for repairs a certain number of times, or the vehicle spends a certain number of days in the shop during the statutory term. If a manufacturer cannot correct the nonconformity within a reasonable time, it must either replace the vehicle or refund the purchase price, less an allowance for the consumer's use. A consumer may be entitled to collateral damages such as registration fees and taxes, as well as incidental and consequential damages. Many lemon laws provide for attorney's fees. A consumer cannot invoke the lemon law until she has made use of the manufacturer's government-approved arbitration procedures. Statutes of limitation range from six months to four years. A violation of the lemon law may also qualify as a violation of state unfair trade laws.

This Note describes the protections available to new car purchasers in North Carolina before the legislature enacted the lemon law. It then compares North Carolina's lemon law to those of other states to determine how well the statute has avoided criticisms of lemon laws in other jurisdictions. The Note concludes that the North Carolina lemon law has succeeded in correcting several of these problems. However, the North Carolina lemon law does not add as much to consumer protection as car buyers might hope.

Congress enacted the Magnuson-Moss Warranty Act in 1975 to establish rules governing the contents of written warranties. The rights the Act gives to a consumer under a "full" warranty are substantial. A full warranty must provide for correction of a defect or malfunction within a reasonable period of time. If a manufacturer cannot cure the defect after a reasonable number of attempts, the consumer may choose to receive a full refund or replacement of

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9. See Coffinberger & Samuels, supra note 1, at 170-71.

the product. These provisions seem to offer consumers protection. However, because the provisions of the Magnuson-Moss Act apply to full warranties and most automobile warranties are limited warranties, the Act has been of little assistance to new car purchasers.

Federal Trade Commission protection of new car purchasers is also limited, because the Commission does not have the resources to resolve individual car warranty disputes. Instead, the FTC has established rules for manufacturer arbitration procedures pursuant to the Magnuson-Moss Act—rules which most state lemon laws require manufacturers to follow. Aside from rules concerning arbitration, one significant FTC regulation allows the purchaser of a new car to assert all claims or defenses she would have against a seller, or against a lender to whom she was referred by the seller. Thus, if a consumer stops paying installments to a lender because of a seller's breach of warranty, she has a defense whether her loan was financed by a dealer or by a bank.

The Magnuson-Moss Act and FTC regulations protected consumers to some extent prior to the enactment of lemon laws, but the most substantial protection for new car purchasers came from the Uniform Commercial Code. The UCC provides three possible courses of action for lemon buyers. A consumer may reject the automobile, sue for damages for breach of warranty, or revoke acceptance. North Carolina consumers have not used section 2-602 to any significant extent, because a buyer generally forfeits her right to reject when she accepts the automobile. Although consumers have utilized breach of warranty and revocation provisions, the cases are surprisingly few.

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11. *Id.* § 2304(a)(4). The Act does not define "reasonable number of attempts," leaving it up to the F.T.C. to promulgate regulations. *Id.*

12. See Coffinberger & Samuels, supra note 1, at 172; Goldberg, supra note 1, at 251-52; see also Eddy, Effects of the Magnuson-Moss Act Upon Consumer Product Warranties, 55 N.C.L. REV. 835 (1977) (Magnuson-Moss Act has failed to fulfill its objectives); Strasser, Magnuson-Moss Warranty Act: An Overview and Comparison With UCC Coverage, Disclaimer and Remedies in Consumer Warranties, 27 MERCER L. REV. 1111 (1976) (Magnuson-Moss Act will protect consumers in most sales of goods but it will create problems when its coverage is not identical to UCC coverage).


16. 16 C.F.R. § 433.2(a).

17. Almost all the commentaries on lemon laws contain a discussion of UCC protection. See Goldberg, supra note 1, at 254-59; Honigman, supra note 1, at 118-24; Sklaw, supra note 1, at 145-56; Vogel, supra note 1, at 593-610; Note, Virginia's Lemon Law, supra note 1, at 408-12.


19. See id. § 25-2-714.


21. See Note, A Sour Lemon, supra note 1, at 848-49; see also Vogel, supra note 1, at 606 (exclusive repair and replacement clause also prevents buyer from rejecting or revoking acceptance of defective auto).

22. The low number of suits may result from the expense of lengthy litigation, the availability of informal dispute resolution procedures, or willingness by dealers to appease consumers in order to maintain good customer relations.
If a consumer prevails in a suit for breach of express or implied warranty under the UCC, she may recover the difference between the value of the goods accepted and their value as warranted, unless special circumstances show proximate damage of a different amount. The difficulty for new car buyers is that most automobile manufacturers limit their express warranties to repair or replacement of parts. A consumer conceivably could return her car several times for repair of essentially the same defect, and the manufacturer would not be in breach of its express warranty so long as it repeatedly replaced the defective part. If this happens, the consumer can either sue for breach of implied warranties or show that the express limited warranty has "failed of its essential purpose," in which case the consumer may invoke other UCC remedies, namely revocation of acceptance.

North Carolina car buyers have had some success in proving that a warranty fails of its essential purpose, although the case law is sparse. In *Stutts v. Green Ford, Inc.*, the North Carolina Court of Appeals found a directed verdict for the manufacturer improper when the manufacturer's repeated failure to correct an oil leak in plaintiff's truck caused an express limited warranty to fail of its essential purpose. Plaintiff was not required to give the manufacturer an unlimited number of opportunities to cure the defect. Significantly, the court upheld a provision in the warranty that precluded recovery of consequential damages.

To revoke acceptance under the UCC and thereby recover the purchase price plus incidental and consequential damages, a consumer must prove that defects in her automobile "substantially impair" the car's value to the consumer. Because automobiles manifest their defects in so many ways, no clear

24. Senator Metzenbaum has said that 99% of all new car warranties are limited warranties, but this may have been a rhetorical statistic. See Coffinberger & Samuels, supra note 1, at 172 (citing 125 CONG. REC. S11691 (daily ed. Aug. 3, 1979)).
25. This problem was noted in Vogel, supra note 1, at 591; Note, *Nebraska's "Lemon Law"*, supra note 1, at 353-54. See also Tadlock v. Snipes Motors, Inc., 34 N.C. App. 557, 239 S.E.2d 311 (1977) (consumer forfeited action against manufacturer by not attacking the validity of the warranty and not specifying a particular defective part).
27. Id. § 25-2-608.
29. Id. at 511-12, 267 S.E.2d at 924-25.
30. Id. at 512, 267 S.E.2d at 924.
31. Id. at 515-16, 267 S.E.2d at 926 (such provisions to be upheld unless unconscionable).
33. The North Carolina lemon law has adopted this subjective standard. See N.C. GEN. STAT. § 20-351.3 (1987). The state courts will probably use UCC case law to interpret the language of the lemon law. See Goldberg, supra note 1, at 271; Honigman, supra note 1, at 123.
factual test can be formulated to determine substantial impairment. However, in *Wright v. O'Neal Motors, Inc.* the North Carolina Court of Appeals established a test that took into account the consumer's subjective needs and reactions and the objective market value, reliability, safety, and usefulness of the vehicle as it is generally used. For purposes of summary judgment the court in *Wright* did not explore the subjective effect of the alleged nonconformities on plaintiff Wright. However, the court of appeals was able to determine that reasonable minds could differ on facts concerning the objective effect. Thus where doubt existed as to whether defendant's salesman had orally guaranteed the car's gas mileage, and as to the impairment in value caused by the car's twelve-day visit to defendant's garage, the trial court erred in granting summary judgment.

In earlier UCC cases, courts never reached the issue of substantial impairment because the Code provided a cause of action against a seller only; any action against a manufacturer was barred by lack of privity. The North Carolina General Assembly abolished the privity requirement when it expanded the UCC definition of "seller" to include manufacturers. Commentators have cited the need to circumvent privity requirements as a rationale for lemon laws in some states. In North Carolina, where privity is not an issue, other rationales support enactment of the lemon law.

In addition to proving substantial impairment, a consumer who wants to revoke acceptance must show that she is revoking within a reasonable time after she discovered or should have discovered the problems with her automobile. The UCC establishes no definition of a "reasonable time," which necessarily varies according to the nature of the defect. In a North Carolina case in which plaintiff drove his new car thirty thousand miles in seventeen months and then sought to revoke after he had wrecked it, the court of appeals indicated he had not revoked acceptance within a reasonable time. The court also stated that plaintiff had waived his right to revoke when he ratified the sale by continuing to

34. Note, *A Sour Note*, supra note 1, at 850.
36. *Id.* at 51-52, 291 S.E.2d at 167.
37. *Id.* at 52, 291 S.E.2d at 167.
38. *Id.* at 54, 291 S.E.2d at 168.
39. *Id.* at 55, 291 S.E.2d at 168.
40. *Id.*
41. *Id.* at 56, 291 S.E.2d at 169.
44. See *Kegley & Hiller*, supra note 1, at 96; *Vogel*, supra note 1, at 622; Note, *A Sour Note*, supra note 1, at 862.
45. N.C. GEN. STAT. § 25-2-608(2) (1986). Most courts agree that the time during which a consumer waits for a seller to make promised repairs should not count against her. Note, *A Sour Note*, supra note 1, at 850-51 n.20.
use the car after discovery of the defect.\textsuperscript{47}

Another barrier to recovery under the UCC in North Carolina has been failure by the consumer to give adequate notice of revocation to the manufacturer.\textsuperscript{48} In \textit{Poole v. Marion Buick Co.},\textsuperscript{49} for example, plaintiff's automobile experienced leaks and other defects within an eighteen-month period. The court of appeals held that leaving the car at the dealership was insufficient to constitute notice of revocation, which had to be "clear and unambiguous."\textsuperscript{50} The UCC, however, does not require \textit{written} notice.\textsuperscript{51}

The disparity between the number of formal complaints about new cars and the number of suits finally brought under the UCC indicates that the Code has not succeeded in protecting new car purchasers in North Carolina.\textsuperscript{52} The ambiguity of such terms as "substantial impairment" and "reasonable time" makes litigation more likely and more lengthy.\textsuperscript{53} The uncertainty of outcome and the fact that recovery will not include attorney fees may make lawyers reluctant to take automobile warranty cases.\textsuperscript{54} Delay and expense may eventually cause the consumer simply to abandon a claim.\textsuperscript{55}

The remedies of the UCC, Magnuson-Moss Act, and FTC regulations protect purchases of many consumer goods, but these remedies are inadequate in the context of the sale of new automobiles. The North Carolina General Assembly has enacted the lemon law to address problems specific to new motor vehicle purchases. Like other similar laws, the purpose of the lemon law is to provide objective guidelines for defining ambiguous terms, to encourage informal settlements, and thereby to further the UCC's objective of minimizing losses by encouraging parties to resolve their differences themselves.\textsuperscript{56} To determine whether the North Carolina law achieves these objectives, one must analyze the statute.

The North Carolina statute is broader than many others in its definitions of "consumer" and "motor vehicle."\textsuperscript{57} "Consumer" includes lessees as well as

\begin{thebibliography}{99}
\bibitem{47} Id. Other states have allowed consumers to continue using their cars, thereby recognizing that most people cannot afford being without a vehicle. Honigman, \textit{supra} note 1, at 122 & n.37.
\bibitem{48} "[Revocation] is not effective until the buyer notifies the seller of it." N.C. GEN. STAT. § 25-2-608(2) (1986).
\bibitem{49} 14 N.C. App. 721, 189 S.E.2d 650 (1972).
\bibitem{50} Id. at 725, 189 S.E.2d at 653 (quoting 45 AM. JUR. Sales § 763 (1945)). The lemon law requires a consumer to notify a manufacturer directly in writing before she can invoke the replace or refund remedy. N.C. GEN. STAT. § 20-351.5(a) (1987).
\bibitem{51} In this respect the UCC is less demanding than the lemon law, which requires direct written notice to the manufacturer before a consumer may invoke the law. N.C. GEN. STAT. § 20-351.5 (1987). See \textit{infra} notes 83-87 and accompanying text.
\bibitem{52} The Attorney General's office reported 1,155 complaints in 1986. See \textit{supra} note 2 and accompanying text. In contrast, the low number of reported court cases reflects purchasers who resort to arbitration and purchasers who are appeased by dealers anxious to preserve good will.
\bibitem{53} See Honigman, \textit{supra} note 1, at 124 n.43 (UCC litigation generally takes from two to seven years).
\bibitem{54} See Kegley & Hiller, \textit{supra} note 1, at 102.
\bibitem{55} Eddy, \textit{supra} note 12, at 869-70.
\bibitem{56} See Honigman, \textit{supra} note 1, at 125.
\bibitem{57} See N.C. GEN. STAT. § 20-351.1(1), (3) (1987).
\end{thebibliography}
purchasers\textsuperscript{58} and "any other person entitled by the terms of an express warranty to enforce the obligations of that warranty."\textsuperscript{59} "Motor vehicle" incorporates the broad definition in the motor vehicle code, to include "every vehicle which is self-propelled and every vehicle designed to run upon the highway which is pulled by a self-propelled vehicle."\textsuperscript{60} Owners of warranted vehicles that are not covered by the lemon law must still resort to the UCC.\textsuperscript{61}

North Carolina's lemon law not only reinforces manufacturer warranties, but also requires that they remain in effect at least one year or twelve thousand miles.\textsuperscript{62} The law's protection lasts up to two years or twenty-four thousand miles if the warranty covers that period.\textsuperscript{63} Most states require customers to report defects in their new automobiles within one year or the period of the warranty, whichever is earlier.\textsuperscript{64} The original draft of the North Carolina bill followed the majority of states by requiring the consumer to report defects within one year or the warranty term, whichever was earlier.\textsuperscript{65} Commentators in other states have criticized the "earlier" language for not giving the consumer enough time to establish that her car is a lemon.\textsuperscript{66} Perhaps in response to this

\textsuperscript{58} Id. \textsection 20-351.1(1). Other statutes that cover lessees include LA. REV. STAT. ANN. \textsection 51:1941(2)(c) (West Cum. Supp. 1987); MINN. STAT. ANN. \textsection 325F.665(a) (West Supp. 1988); N.Y. GEN. BUS. LAW \textsection 198-a(a)(1) (McKinney Supp. 1988); TENN. CODE ANN. \textsection 55-24-201(1) (Supp. 1987).

\textsuperscript{59} N.C. GEN. STAT. \textsection 20-351.1(1) (1987). Presumably, this provision would cover donees and subsequent purchasers during the statutory warranty period, which the law defines as the greater of one year or the term of an express warranty of no more than two years or 24,000 miles. \textit{See id.} \textsection\textsection 20-351.2, 20-351.3. A few statutes cover the original purchaser only. \textit{See ILL. ANN. STAT. ch. 121 1/2, para. 1202(a) (Smith-Hurd Supp. 1987); KAN. STAT. ANN. \textsection 50-645(1) (Cum. Supp. 1986).


\textsuperscript{61} Purchasers of house trailers, mopeds, and vehicles weighing more than 10,000 pounds cannot make use of North Carolina's lemon law. It would appear the law does not apply to boats either, because they do not run "upon the highway." However, the statute is broad enough to cover tractors and other farm vehicles, which were excluded in the original draft of the bill. \textit{See Review Draft \textsection 20-351.1(3) (April 3, 1987).

\textsuperscript{62} N.C. GEN. STAT. \textsection 20-351.2 (1987). In theory, this provision imposes warranty obligations on manufacturers who would otherwise provide coverage for less than a year. In practice, however, almost all manufacturers warrant their cars for at least a year to attract customers.

\textsuperscript{63} Id. \textsection 20-351.3 (1987). This provision and others are explained in laypersons' terms in Raleigh News & Observer, May 27, 1987, at C1, col. 3.

\textsuperscript{64} Variations include VA. CODE ANN. \textsection 59.1-207.12 (1987) and WYO. STAT. \textsection 40-17-101(b) (Supp. 1987) (one year following date of original delivery); ILL. ANN. STAT. ch. 121 1/2, para. 1202(f) (Smith-Hurd Supp. 1987), KY. REV. STAT. \textsection 367.842(1) (1987), and OR. REV. STAT. \textsection 646.325(2) (1985) (earlier of one year or 12,000 miles); MASS. ANN. LAWS ch. 90, \textsection 7N 1/2(1) (Law Co-op. 1987) and R.I. GEN. LAWS \textsection 31-5.2-1(F) (Supp. 1987) (earlier of one year or 15,000 miles); PA. STAT. ANN. tit. 73, \textsection 1954(a) (Purdon Supp. 1987) (earlier of one year, warranty term, or 12,000 miles); MONT. CODE ANN. \textsection 61-4-501(6) (1983) and N.Y. GEN. BUS. LAW \textsection 198-a(b) (McKinney Supp. 1988) (earlier of two years or 18,000 miles); ME. REV. STAT. ANN. tit. 10, \textsection 1163(1)(B) (Supp. 1987) (earlier of two years, 18,000 miles, or warranty term); MD. COM. LAW CODE ANN. \textsection\textsection 14-1501(g)(1), -1502(b) (Supp. 1987) (earlier of 15 months or 15,000 miles); HAW. REV. STAT. \textsection 490-2-313(a) (1985) and VT. STAT. ANN. tit. 9, \textsection 4172(c) (1984) (term of warranty).

The law does not address the issue of currently popular extended warranties, which often contain a deductible. Clifford, \textit{All You Need to Know About The North Carolina Lemon Law}, N.C. B. Notes (Feb/Mar. 1988) (part one).

\textsuperscript{65} \textit{See Review Draft} \textsection 20-351.2(a) (April 3, 1987).

\textsuperscript{66} In North Carolina, a car is not presumed to be a lemon until it has undergone repair at-
criticism, the North Carolina law as passed allows the consumer to report the
defect within a year or the term of the warranty, whichever is greater. Because
the durations of most automobile warranties are at least one year, the provision
may add little to existing protection.

With its provision that a consumer must report a defect within the greater
of one year or the warranty term, a further question is whether this period in-
cludes a mileage limitation as well as a time limitation. Suppose a traveling
salesperson buys a new car with a one-year, twelve-thousand-mile warranty. She
then drives the car sixty thousand miles in ten months before discovering
and reporting a series of nonconformities. Would a court view the statutory
one-year period under the lemon law as "greater" (less restrictive) than the one-
year, twelve-thousand-mile term of the manufacturer's warranty, and so hold
the manufacturer liable for a defect occurring after the consumer has driven five
times the mileage provided in the warranty? Other states have eliminated this
ambiguity by incorporating mileage limitations into their statutory terms of
protection.

A separate section of the North Carolina lemon law states that the statute
only covers defects that occur "no later than 24 months or 24,000 miles follow-
ing original delivery." The general assembly evidently intended this provision
to protect manufacturers from the law's replacement or refund remedies when
the warranties in question are for longer terms, such as five years or fifty thou-
sand miles. However, it is unclear whether the twenty-four thousand mile cap
would apply to a case such as the one described above, in which the car is war-
ranted for less than two years or twenty-four thousand miles, but a consumer
who has driven several thousand extra miles is given the "greater" statutory
period of one year in which to report a defect.

A critical provision of the lemon law is its replacement or refund provi-
sion. Like similar provisions in other lemon laws, it borrows language from

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\text{tempts for the same defect or series of defects, or has spent a total of 20 business days in the shop within the statutory period. N.C. Gen. Stat. § 20-351.5(a)(1)-(2) (1987). For criticism of the "earlier" language, see Goldberg, supra note 1, at 267; Note, A Sour Lemon, supra note 1, at 867.}
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67. N.C. Gen. Stat. § 20-351.2 (1987). West Virginia is the only other state to take the
greater of the two time periods. See W. Va. Code § 46A-6A-3(a) (1986). The UCC requires only
that notice of a defect be given "within a reasonable time." N.C. Gen. Stat. §§ 25-2-607(3)(a),
-608(2) (1986), which might be either less than or greater than one year or the warranty period.
Commentators have criticized lemon laws because their notice requirements may bar recovery if a
consumer discovers a defect within the warranty period, but does not report it until shortly after the
warranty has expired. See Vogel, supra note 1, at 623-24.

68. See supra note 64.
70. "Under the bill, manufacturers and dealers would get four chances to repair a recurring
problem with a vehicle that has up to a 24 month or 24,000 mile warranty." Raleigh News &
Observer, May 27, 1987, at C1, col. 4. This article quoted the sponsor of the bill as stating, "If you
have a lemon you are going to know it before 24 months." Id. at C1, col. 5 (quoting Rep. Charles M.
Beale, D-Haywood).
71. The statute provides:

If the manufacturer is unable, after a reasonable number of attempts, to conform the motor
vehicle to any express warranty by repairing or correcting... any defect or condition or
series of defects or conditions which substantially impair the value of the motor vehicle to
the consumer, and which occurred no later than 24 months or 24,000 miles following origi-
the Magnuson-Moss Warranty Act to allow replacement or refund if a manufacturer cannot repair a defect after a reasonable number of attempts. The lemon law provides a presumption that a reasonable number of attempts have been made if the manufacturer has attempted to repair a nonconformity four times, or the vehicle is in the shop for a cumulative total of twenty business days during any twelve-month period of the warranty. Most states presume that four repair attempts or thirty calendar or business days in the shop during the statutory period constitutes a reasonable number of repair attempts; however, figures range from three repairs or fifteen business days to four repairs or forty-five calendar days. Therefore, North Carolina's statutory presumption allows a consumer to invoke the lemon law sooner than she could in many other states. Further, North Carolina does not require, as some states do, that more than one of the four repair attempts be made by the same dealer. The presumption provides more certainty than the UCC, which does not specify how long or how many attempts a seller must make to cure a defect before a warranty fails of its essential purpose.

The North Carolina lemon law is typical in that the statutory presumption that a reasonable number of repair attempts have been made will not apply unless the consumer notifies the manufacturer directly in writing of the existence of a nonconformity and allows the manufacturer one last chance to cure the defect. A virtue of the statute is that it sets a time limit in which a manufacturer may make that last attempt to cure. On the other hand, a consumer who has already returned her car for repairs four times or gone without the car for twenty business days will not want to go without it for another fifteen days while the manufacturer tries once again to fix the problem. The UCC does not require delivery of the vehicle, the manufacturer shall, at the option of the consumer, replace the vehicle with a comparable new motor vehicle or accept return of the vehicle from the consumer and [provide a] refund.

N.C. GEN. STAT. § 20-351.3 (1987).
73. N.C. GEN. STAT. § 20-351.5(a) (1987). A presumption serves only to allocate the burden of proof and can be rebutted. Only one state provides a definition of "reasonable number of attempts" rather than a presumption. See Wis. STAT. ANN. § 218.015(1)(a) (West Supp. 1987). Some state statutes trigger the presumption after only one attempt to repair if the defect involves a safety feature such as brakes or steering. See, e.g., MD. COM. LAW CODE ANN. § 14-1502(d)(3) (Supp. 1987); MINN. STAT. ANN. § 325F.665 Subd. 3(c) (West Supp. 1988); W. VA. CODE § 46A-6A-5(c) (1986).
76. See ME. REV. STAT. ANN. tit. 10, § 1163(3)(a) (Supp. 1987) (two out of four times to the same dealer); VT. STAT. ANN. tit. 9, § 4172(h) (1984 & Supp. 1987) (all three times to same dealer, unless there is a good reason to do otherwise).
77. Vogel, supra note 1, at 630.
78. Notice to the manufacturer is only required if the manufacturer has previously informed the consumer of the requirement. N.C. GEN. STAT. § 20-351.5(a) (1987). North Carolina law gives the manufacturer a maximum of 15 days to cure the nonconformity. Id.
79. Some other states leave the length of time unspecified. See, e.g., OR. REV. STAT. § 646.345(4) (1985); W. VA. CODE § 46A-6A-5(c) (1986); WYO. STAT. § 40-17-101(h) (Supp. 1987).
80. Giving the manufacturer fewer days in which to make a last attempt to cure the defect might be more reasonable. See MICH. COMP. LAWS ANN. § 9.2705(3)(b) (Supp. 1987) (five days); R.I. GEN. LAWS § 31-5.2-5 (Supp. 1987) (one week).
quire a consumer to give a manufacturer an opportunity to cure before she can revoke acceptance, and a few states do not make it a condition of their lemon law remedies.

Some commentators have criticized direct notice requirements such as the one in the North Carolina lemon law. These commentators argue that because dealers must report all repairs under warranty to manufacturers anyway, dealer reports should serve as notice to the manufacturer. Some states appear to allow this form of notice by providing for notice made "by or on behalf of" the consumer. One state expressly places the burden of notifying the manufacturer on the dealer. The direct notice requirement, although it may be a problem for consumers, is not necessarily unreasonable. Although manufacturers receive records of warranty repairs made by dealers, it would be burdensome for manufacturers to compile records of each customer's repairs to determine when a reasonable number of attempts have been made. North Carolina's notice requirement is not as strict as those of some other states, but both its notice requirement and its requirement of opportunity to cure are more strict than the provisions of the UCC.

Lemon laws generally require a manufacturer to repair or correct any "defect" or "nonconformity" in a new motor vehicle. If a manufacturer has four attempts to repair each defect, a consumer might have her car repaired a dozen times, but be unable to invoke the lemon law before statutory protection expires because no four of the repairs have been made to the same part. Some states avoid this problem by specifically defining "nonconformity." Other state statutes refer to repairing a "condition," which courts can interpret more broadly.

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83. Vogel, supra note 1, at 624, 646 ("Consumers rarely know about notice requirements and often fail to comply with them.").
87. See Vogel, supra note 1, at 592. For a discussion of notice problems under the UCC, see supra notes 48-51 and accompanying text.
89. This problem is pointed out in Goldberg, supra note 1, at 270; Vogel, supra note 1, at 630-31.
90. See, e.g., LA. REV. STAT. ANN. § 51:1941(7) (West Cum. Supp. 1987) (any specific or generic defect or malfunction); MASS. ANN. LAWS ch. 90, § 7N 1/2(1) (Law. Co-op. 1987) (any specific or generic defect or malfunction, or any concurrent combination of such defects or malfunctions); R.I. GEN. LAWS § 31-5.2-1(E) (Supp. 1987) (any specific or generic defect or malfunction, or any concurrent combination of such defects or malfunctions); WIS. STAT. ANN. § 218.015(1)(f) (West Supp. 1987) (condition or defect).
than a "defect." Still other state legislatures have phrased their presumptions of a "reasonable number of attempts" to place a cap on the total number of repair attempts a manufacturer may make. North Carolina provides for repair of a defect or condition, or for "a series of defects or conditions," which should avoid the situation of a dozen repairs made to various parts.

Lemon laws require a nonconformity to impair substantially the use or value of the motor vehicle, or to impair substantially its use or value to the consumer. North Carolina takes the latter, subjective approach, which parallels the language of the UCC. The North Carolina lemon law requires the nonconformity to "substantially impair the value of the motor vehicle to the consumer." This borrowing of UCC language should allow courts to use UCC case law to interpret the lemon law. Because the lemon law does not clarify what constitutes substantial impairment to the consumer, North Carolina courts will likely apply the combined subjective-objective test of substantial impairment set forth in Wright.

By not defining substantial impairment more specifically under the lemon law, the general assembly has missed an opportunity to supplement UCC protection. Under either statute, the ambiguity may work against the consumer by encouraging litigation.

North Carolina consumers are fortunate that the lemon law gives the consumer the option to elect a refund or a replacement, rather than allowing the manufacturer to choose. Most state legislatures have provoked uncertainty

92. See, e.g., KAN. STAT. ANN. § 50-645(d) (Cum. Supp. 1986) (four attempts at one nonconformity or ten attempts at any nonconformity); MD., COM. LAW CODE ANN. § 14-1502(d)(2) (Supp. 1987) (vehicle out of service for repair of one or more nonconformities, defects or conditions for a cumulative total of 30 or more days).
93. The language "series of defects or conditions" was not in the original draft of the lemon law. See Review Draft (April 3, 1987).
97. Id. § 20-351.3.
98. Similar interpretation would make sense, because lemon law claims may be coupled with UCC claims. Honigman, supra note 1, at 123; see also Goldberg, supra note 1, at 271 (proposing use of UCC case law on "substantial impairment" even when the lemon law does not include the subjective language "to the consumer").
99. 57 N.C. App. 49, 291 S.E.2d 165 (1982); see supra text accompanying notes 36-41 (description of the test applied in Wright).
100. See Vogel, supra note 1, at 627 (uncertainty encourages litigation); Honigman, supra note 1, at 124 n.43 (lengthy litigation of revocation of acceptance discourages litigation altogether).
101. Other states' statutes that give the option to the consumer include ALASKA STAT. § 45.45.305 (1986); FLA. STAT. ANN. § 681.104(2)(a) (West Supp. 1987); KY. REV. STAT. § 367.842(2) (1987); MINN. STAT. ANN. § 325F.665(3)(a) (West Supp. 1988); MISS. CODE ANN.
by not delegating the decision to either the consumer or the manufacturer.\textsuperscript{102} A few states allow the manufacturer to decide, creating a danger that consumers may be forced to accept a replacement vehicle in which they have no confidence, from a manufacturer they no longer trust.\textsuperscript{103} The consumer’s power to choose a refund is imperative in North Carolina because the lemon law does not define “comparable motor vehicle,” and thus gives manufacturers significant discretion in choosing a replacement vehicle.\textsuperscript{104}

If a consumer elects a refund she can recover the full contract price paid for the vehicle,\textsuperscript{105} collateral charges,\textsuperscript{106} all finance charges incurred after she first reports the nonconformity,\textsuperscript{107} incidental damages,\textsuperscript{108} and consequential damages.\textsuperscript{109} From this amount the factfinder must subtract “a reasonable allowance for use” in an amount directly attributable to use by the consumer prior to her first report of the nonconformity, and during any subsequent period when the vehicle was not out of service because of repair.\textsuperscript{110}

If the North Carolina lemon law’s setoff provision had turned on this am-


\textsuperscript{103} See, e.g., COLO. REV. STAT. § 42-12-103(1) (1984 & Cum. Supp. 1986); LA. REV. STAT. ANN. § 51:1944A.(1) (West Cum. Supp. 1987) (“manufacturer shall, . . . or at its option”); MASS. ANN. LAWS ch. 90, § 7N 1/2(3) (Law. Co-op. 1987) (“at the manufacturer's option”); MICH. COMP. LAWS ANN. § 9.2705(3)(1) (Supp. 1987); MO. ANN. STAT. § 407.567(1) (Vernon Supp. 1987); see also Goldberg, supra note 1, at 273 (when a manufacturer has provided a consumer with a seriously defective automobile and has been unable to cure the defect after an extensive period in the shop, “it would not be surprising if the consumer no longer had confidence in either the automobile or the manufacturer”); Vogel, supra note 1, at 636 (the UCC does not require a buyer “to accept substitute goods from a seller after revocation of acceptance,” and a lemon law “should provide no less”).

\textsuperscript{104} See N.C. GEN. STAT. § 20-351.3 (1987).

\textsuperscript{105} The contract price includes, but is not limited to, charges for undercoating, dealer preparation and transport, installed options, and nonrefundable portions of extended warranties and service contracts. Id. § 20-351.3(1).

\textsuperscript{106} Collateral charges include, but are not limited to, sales tax, license and registration fees, and similar governmental charges. Id. 20-351.3(2).

\textsuperscript{107} Id. § 20-351.3(3).

\textsuperscript{108} Id. § 20-351.3(4). The lemon law does not define incidental damages, although the UCC in its definition includes “expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods,” expenses of covering, and other reasonable expenses incident to breach. Id. § 25-2-715(1).

\textsuperscript{109} Id. § 20-351.3(4). The lemon law does not define consequential damages, which the UCC defines as any loss resulting from general or particular needs of which the seller had knowledge at the time of contracting, and injury to person or property proximately resulting from any breach of warranty. Id. § 25-2-715(2)(a), (b). Thus, consequential damages would presumably include out-of-pocket expenses such as towing fees, car rental, and hotel expenses. Goldberg, supra note 1, at 274. Some lemon law remedies are actually narrower than UCC remedies because they do not allow recovery of consequential damages. See, e.g., FLA. STAT. ANN. § 681.102(5) (West Supp. 1987). North Carolina cases have honored limits on consequential damages in manufacturer warranties, even when the warranty has failed of its essential purpose. See Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980). Unless manufacturers are to be allowed to contract around the lemon law, courts will now have to award consequential damages, an improvement over UCC remedies for breach of warranty.

\textsuperscript{110} N.C. GEN. STAT. § 20-351.3(4) (1987). The UCC does not expressly require setoff, but North Carolina cases have allowed setoff under § 25-2-714(2). See Williams v. Hyatt Chrysler
buguous formula, it would have created uncertainty that might increase litigation. Instead, the general assembly adopted the formula of the Connecticut lemon law, which creates a presumption that a "reasonable allowance for use" equals the cash price of the vehicle multiplied by a fraction having as its denominator one hundred thousand miles and as its numerator the number of miles on the vehicle attributable to the consumer. Under this formula, a consumer who buys a ten thousand dollar automobile and reports a nonconformity after driving it one thousand miles will be entitled to a full refund less one hundred dollars. The formula appears fair to the consumer and provides needed certainty. Unlike some lemon laws, the North Carolina statute also deducts a reasonable allowance for use only from a refund, and does not require a consumer to pay the allowance out of pocket if she elects to have the car replaced.

Lemon law protection is not available to a consumer who has not first made use of a manufacturer's informal settlement procedures, to the extent those procedures conform to FTC regulations promulgated under the Magnuson-Moss Warranty Act. Arbitration provisions have provoked controversy in other


111. Comment, supra note 1, at 641. One commentator would prefer to determine setoff by reference to UCC case law. See Vogel, supra note 1, at 640. In North Carolina, where there is little case law on point, the formula the lemon law provides may be preferable.


115. "Nothing in this section shall prevent a manufacturer from requiring a consumer to utilize an informal settlement procedure prior to litigation if that procedure substantially complies [with federal regulations]." N.C. Gen. Stat. § 20-351.7 (1987). The original draft of the law included an elaborate arbitration provision which required the Attorney General to evaluate, certify, and investigate all arbitration programs. See Review Draft § 20-351.9 (April 3, 1987). The arbitration panel had a limited time to announce its decision, consumers did not have to make the car available to a manufacturer's representative for inspection more than once, and the manufacturer had to loan the consumer a car during the inspection. Id. Arbitrators were instructed to consider as damages all remedies that would be available if the claim went to court. Id. The Attorney General's Office preferred to use its resources directly, in litigation, and the drafting committee simplified the arbitration provision to its present form. See Letter from James C. Gulick, Special Deputy Attorney Gen-
states. Proponents argue that arbitration saves money. Opponents believe arbitration presents procedural hurdles that work against the consumer. Both arguments may be moot, because there is some indication that manufacturers are moving away from informal settlement procedures.

North Carolina is one of the few states whose lemon law specifically creates a governmental cause of action by the Attorney General, as well as a private cause of action by consumers. Faced with numerous consumer complaints about new car warranties, the Attorney General was a major proponent of the statute. The high profile of the Attorney General's Office should help the Office in publicizing the new law and informing consumers that legal remedies exist. The governmental cause of action should also prove significant as a bargaining tool in negotiations between the Attorney General's Office and manufacturers. In this respect the lemon law represents an improvement over the UCC, which provides no governmental cause of action.

The North Carolina lemon law allows discretionary attorney's fees to the prevailing party upon a finding of bad faith by either the manufacturer or the consumer. Consumers would fare better if they could recover attorneys' fees

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116. See, e.g., Ervine, Protecting New Car Purchasers: Recent United States and English Developments Compared, 34 INT'L. & COMP. L.Q. 342, 350 (1985) (arbitration requirement "sensible"); Note, A Sour Note, supra note 1, at 873 (arbitration may encourage settlements and increase consumer success, and is less expensive); Note, Nebraska's "Lemon Law", supra note 1, at 375.

117. See, e.g., Goldberg, supra note 1, at 276-77 (arbitration presents a procedural obstacle because the Magnuson-Moss Act states it cannot bind the other party); Platt, Lemon Auto Legislation in Illinois, 73 ILL. B.J. 504, 508 (1985) ("Arbitration is an unsatisfactory remedy because of the factfinding process. A complete record is not kept; the rules of evidence do not apply; discovery and compulsory cross-examination do not exist and witnesses are seldom, if ever, placed under oath. . . . Furthermore, arbitrators are under no duty to state the reasons for their decision."); Sklaw, supra note 1, at 157-58 (arbitration ineffective, because by that point consumer is hostile); Vogel, supra note 1, at 648-60 (consumer will still pay attorney fees, decisions are often delayed, and "admission of [a] decision into evidence could create an unfair hurdle for a consumer who received an unfavorable decision from the [resolution] mechanism"); Note, A Sour Note, supra note 1, at 875 (arbitrators do not generally award consequential damages).

118. Letter, supra note 115. Chrysler and General Motors do not require arbitration, but Ford does. Clifford, supra note 64, at n.9.


121. The Attorney General's office would have liked a stronger law that would provide a cause of action against dealers as well as manufacturers, but was thwarted by Senator Anthony E. Rand, D-Cumberland. Raleigh News & Observer, June 10, 1987, at 8A, col. 1.

122. Interview with Donald Clifford, Aubrey L. Brooks Professor of Law, University of North Carolina School of Law (September 29, 1987).

123. Attorneys' fees are awarded if "the manufacturer unreasonably failed or refused to fully resolve the matter," or "the party instituting the action knew, or should have known, the action was frivolous or malicious." N.C. GEN. STAT. § 20-351.8(3) (1987).
as a matter of course, as consumers may do in many other states, regardless of whether the manufacturer has misbehaved. Recovery of attorneys' fees under the statute may make lawyers more willing to take automobile warranty cases, which are otherwise unattractive because of the risk of not being paid even if the consumer prevails. Further, more consumers may bring suit if they know they are likely to recover legal fees. The advantage of the provision for attorneys' fees, and the provision which allows treble damages if a manufacturer unreasonably refuses to comply with the law, is that both sections threaten manufacturers with punitive damages, which are unavailable under the UCC.

The North Carolina lemon law does not contain a statute of limitations. Commentators have criticized other lemon laws because their statutes of limitations are too short. North Carolina courts may adopt the four-year statute of limitations of the UCC. Adopting the UCC statute of limitations would appear to make sense because "[i]f the claims are not stale under the U.C.C. they are not likely to be stale under the lemon law." Alternatively, the State may adopt the three-year statute of limitation under section 1-52(2), which applies to "a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it." The North Carolina General Assembly's failure to address the issue of retrospective application raises the question whether the law would protect a consumer who had purchased her car before October 1, 1987, when the law went into effect, but whose warranty has not yet expired. Such a consumer would


125. Kegley & Hiller, supra note 1, at 102; Vogel, supra note 1, at 660-61.

126. Goldberg, supra note 1, at 280.

127. "The amount fixed by the verdict shall be trebled upon a finding that the manufacturer unreasonably refused to comply [with the law]." N.C. GEN. STAT. § 20-351.8(2) (1987).


129. Other statutes of limitations range from six months after the warranty expires or 18 months after delivery, FLA. STAT. ANN. § 681.104(5)(a) (West Supp. 1987), to four years, N.Y. GEN. BUS. LAWS § 198-a(3) (McKinney Supp. 1988).

130. Goldberg, supra note 1, at 277 ("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 U.C.C."); Vogel, supra note 1, at 664-66.


132. Vogel, supra note 1, at 665.

133. N.C. GEN. STAT. § 1-52(2) (1987); see also Clifford, All You Need to Know About the N.C. Lemon Law, N.C. B. Notes 12 (Apr./May 1988) (part two) (section 1-52(2) seems more pertinent than the UCC statute of limitations in North Carolina).

134. Other states have eliminated this ambiguity by adopting express provisions that limit the law's applicability. See, e.g., MICH. COMP. LAWS ANN. § 9.2705(9) (Supp. 1987) (cars sold to original consumer on or after effective date of Act); R.I. GEN. LAWS § 31-5.2-1(D) (Supp. 1987) (cars
most likely be unable to recover under the lemon law because the warrantor would have had no notice of the law’s application when it entered into the contract. At least one Attorney General ruling has stated that lemon laws should be applied prospectively “to avoid a construction . . . which would call into question the constitutionality of [the lemon law].”

Although the general assembly could have taken greater advantage of the lemon law to supplement the existing UCC protection by defining ambiguous terms and omitting provisions that restrict UCC remedies, the lemon law should prove to be valuable to North Carolina consumers. As a latecomer to the game of lemon law enactment, North Carolina has learned from other states’ mistakes. The statute’s broad application will protect consumers of almost any new motor vehicle sold under warranty, not just purchasers of family automobiles. Its presumption of “reasonable” number of repair attempts will allow consumers to seek redress sooner than they could in most other states. Giving the power to elect a refund to the consumer rather than to the manufacturer increases the lemon law’s effectiveness as consumer legislation. Short statutes of limitations have emasculated other lemon laws, but North Carolina consumers will have ample time to discover and document defects before filing a claim. Punitive damages and a governmental cause of action should allow the North Carolina law to avoid enforcement difficulties encountered in other jurisdictions. Compared with other lemon laws, North Carolina’s should prove to be one of the most effective.

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sold or replaced by manufacturer after effective date of this chapter); VT. STAT. ANN. tit. 9, § 4179 (1984) (vehicle beginning with model year following July 1, 1984); W. VA. CODE § 46A-6A-3(a) (1986) (cars purchased on or after January 1, 1984).