

Tulsa Law Review

Volume 21 | Number 2

Winter 1985

Buyer's Remedies for a Defective Automobile: The U.C.C. Versus the Oklahoma Lemon Law

Jeanne Rehberg

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Jeanne Rehberg, *Buyer's Remedies for a Defective Automobile: The U.C.C. Versus the Oklahoma Lemon Law*, 21 Tulsa L. J. 318 (1985).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol21/iss2/3>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

COMMENTS

BUYER'S REMEDIES FOR A DEFECTIVE AUTOMOBILE: THE U.C.C. VERSUS THE OKLAHOMA LEMON LAW

I. INTRODUCTION*

Americans spent \$65.2 billion on the purchase of new automobiles in 1983.¹ The average consumer expenditure per new automobile was \$10,586.² The automobile is a necessity of life; mass transportation in many areas of the country is inadequate and national policies and standards of living encourage individually-owned modes of transportation.³ Both economically and practically, the automobile is a major consumer purchase. The average buyer, however, purchases the automobile in reliance on information from the manufacturer and dealer. Even owners who plan to perform minor routine maintenance on their automobiles may not be trained to inspect them before the purchase. The intricacy of

* The author thanks Professor Martin A. Frey for reading the manuscript and offering useful suggestions.

1. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 587 (1985). This Comment will not treat remedies for a *used* automobile which is defective. Although theoretically possible, the remedies to be discussed are more difficult to justify for a defective used automobile, primarily because of the time elapsed. Rejection must occur within a reasonable time of delivery or tender, *see infra* notes 22-23, and revocation must occur before the automobile shows substantial change not due to the alleged defect, *see infra* notes 45 and 89. Suit for breach of warranty requires proof of a warranty on the used automobile and proof that the defect resulted from factory error. *See infra* note 133. The Lemon Law remedies are available for the shorter of one year from original delivery or the period of the warranty. *See infra* notes 87-89 and accompanying text.

2. Letter to Recipients of MOTOR VEHICLE FACTS AND FIGURES '84 from Motor Vehicle Mfrs. Ass'n of the U.S., Inc. (Aug. 31, 1984) (data from U.S. DEP'T OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, Table 23 *Average Transaction Price Per New Car*).

3. According to the Motor Vehicle Mfrs. Ass'n,

Private transportation continues to hold its own as the principal means for Americans to travel to work or play.

U.S. Federal Highway Administration data for 1977 show that the car, station wagon, van or pickup were used for more than 83 percent of all trips. By comparison, public transportation modes were used for just 3 percent.

Of the motor vehicle trips, nearly a third of them were related to earning a living. Family and personal business trips accounted for another third of the trips.

MOTOR VEHICLE FACTS AND FIGURES '84, at 40 (1984) (data from UNITED STATES FEDERAL HIGHWAY ADMINISTRATION 1977 PERSONAL TRANSPORTATION STUDY — (1977)).

an automobile, the difficulty of inspecting it without dismantling it, and the great potential for latent defects militate against anything but the most cursory inspection before driving away from the dealership.

The dealer and manufacturer profit from satisfied customers. Yet the latent nature of many defects makes it difficult to prove the seller's responsibility for correcting the defect. Moreover, automobile dealers are to some extent justifiably reluctant to take back a "lemon."⁴ The buyer's case against the corporate seller may be time-consuming, difficult to prove, and expensive in relation to the total value of the automobile and the potential damage award.

This Comment will discuss and evaluate the remedies available under Oklahoma law to the buyer of a lemon. Revocation of acceptance under Uniform Commercial Code (U.C.C.) section 2-608⁵ will be examined within the context of other remedies which include rejection under U.C.C. section 2-601,⁶ damages for breach of warranty under the U.C.C.,⁷ and suit for refund or replacement of the automobile under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.⁸ These options will be compared with respect to problems of proof and the adequacy of the buyer's remedy. Finally, these traditional remedies will be compared with the Oklahoma Lemon Law which now provides for refund or replacement of a defective automobile covered by an express warranty.⁹

II. TRADITIONAL REMEDIES AVAILABLE TO THE BUYER OF A DEFECTIVE AUTOMOBILE

Because an automobile is within the U.C.C. definition of "goods,"¹⁰ article 2 applies to the sale of an automobile as a "transaction in

4. R. BILLINGS, *HANDLING AUTOMOBILE WARRANTY AND REPOSSESSION CASES* § 5.1 (1984).

5. OKLA. STAT. tit. 12A, § 2-608 (1981); *see infra* text accompanying notes 45-125.

6. OKLA. STAT. tit. 12A, § 2-601 (1981); *see infra* text accompanying notes 19-44.

7. *See infra* text accompanying notes 126-36.

8. 15 U.S.C. §§ 2301-2312 (1982); *see infra* text accompanying notes 137-49.

9. The Oklahoma Legislature passed a lemon law during the first session of the 40th Legislature. Act of July 15, 1985, 1985 Okla. Sess. Law Serv. 1201-02 (West) (to be codified at OKLA. STAT. tit. 15, § 901) (effective Nov. 1, 1985). The text of the Act appears in APPENDIX A. *See infra* text accompanying notes 150-210. Two previous lemon law bills, H.R. 1502, 39th Leg., 2d Sess. (1984) and S. 140, 39th Leg., 1st Sess. (1983), had been defeated. Citations to lemon laws in force in other states appear in APPENDIX B.

10. U.C.C. § 2-105(1) (as adopted at OKLA. STAT. tit. 12A, § 2-105(1) (1981)) provides in part, "[g]oods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action."

goods."¹¹ This section will define the requirements of three remedies under article 2—rejection,¹² revocation of acceptance,¹³ damages for breach of warranty¹⁴—and remedies under the Magnuson-Moss Act.¹⁵

Resort to these statutory remedies is not automatic since remedy for nonconformity in an automobile is generally provided through the manufacturer's standard limited and exclusive warranty to repair or replace defective parts.¹⁶ Contractual exclusion of other remedies is permitted under U.C.C. section 2-719 which states in part that "the agreement may

11. OKLA. STAT. tit. 12A, § 2-102 (1981).

12. *Id.* §§ 2-601 to 2-605 (1981) (buyer's rights on improper delivery, buyer's obligations, effect of rejection).

13. *Id.* § 2-608 (1981) (circumstances permitting revocation, buyer's obligation).

14. *Id.* § 2-607 (1981) (buyer's obligation to notify seller of breach); *id.* § 2-714 (1981) (measure of damages for breach of warranty).

15. For further analysis of these traditional remedies and their relation to the lemon laws, see generally R. BILLINGS, *supra* note 4, §§ 4.1-4.22, 5.1-5.52, 6.8-6.30, 7.1-7.56; Note, *The Connecticut Lemon Law*, 5 U. BRIDGEPORT L. REV. 175 (1983); Note, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers*, 61 WASH. U.L.Q. 1125 (1984); Minnesota Development, *A Sour Note: A Look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846 (1984).

16. R. BILLINGS, *supra* note 4, §§ 6.1, 6.8. The standard warranty also excludes incidental and consequential damages, covers only certain parts, is of limited duration, and disclaims implied warranties. The U.C.C. recognizes an implied warranty of merchantability in § 2-314, OKLA. STAT. tit. 12A, § 2-314 (1981), and an implied warranty of fitness for a particular purpose in § 2-315, *id.* § 2-315 (1981). The following provisions, taken from the 1985 New Car Limited Warranty distributed by American Honda Motor Co., are typical:

Some states have recently passed laws which give new-car buyers certain rights. Although these laws vary from state to state, they generally say that if a new car has a major defect (e.g., one that substantially affects its use, value, safety) which can't be repaired in a reasonable time (generally four attempts to repair the same problem, or out of service at various times for a total of 30 days), the owner can request a replacement or a refund. Usually, the defect must occur within the first year.

Before making the request, you must explain the problem in writing to our Zone Customer Service office and give the dealer and American Honda an opportunity to resolve it. If we aren't successful, we'll ask you to submit the dispute to Auto Line for mediation or arbitration.

Of course there are other terms and conditions in these laws. We recommend you check your own state law if the need arises. Our intent is for you to be satisfied with your Honda. If you have any questions or problems, please contact your local Honda dealer first, then the Zone Customer Service office.

. . . .

Time and Mileage Period

This warranty begins on the date the car is sold to the first retail purchaser, or the date it is first used as a demonstrator, lease, or company car, whichever comes first. The car is covered for 12 months or 12,000 miles (or a maximum of 18 months or 18,000 miles under a demonstrator warranty extension), whichever comes first. The power train (described below) is covered for 24 months or 24,000 miles (whichever comes first) from the date the warranty begins.

Warranty Coverage

Honda will repair or replace, at its option, any factory-installed part that is defective in material or factory workmanship under normal use. Normal use excludes any use the Owner's Manual states is not recommended. Warranty repairs will be made free of charge for parts and labor, except for the battery, which will be adjusted on a pro-rata basis. . . . Any repaired or replaced parts are covered only for the remainder of this warranty. All parts replaced under this warranty become the property of Honda.

provide for remedies in addition to or in substitution for those provided in [article 2]."¹⁷ Under section 2-719, however, the buyer would be entitled to reject under section 2-601, to revoke under section 2-608, or to sue for breach of warranty under section 2-714 if the court finds the "exclusive or limited remedy [to repair or replace the defective parts] to fail of its essential purpose."¹⁸

Power train parts covered:

Engine: Cylinder block, head, and all internal parts.
Valve train
Manifolds

Engine seals
Flywheel
Oil pump
Water pump

Transaxle: Manual transmission/differential, and all internal parts
Automatic transmission/differential, and all internal parts.
Driveshafts and CV (constant velocity) joints.

This Warranty Does Not Cover:

Emission control systems (refer to the Emission Control Warranties. . .).

Tires (refer to the tire manufacturer's warranty that came with the car). If you have any problems with tires, ask your Honda dealer for assistance.

Parts that fail due to lack of required maintenance, use of nonequivalent parts, or racing.

Normal wear or deterioration of any part.

Any car registered or normally driven outside of the United States, Puerto Rico, and the U.S. Virgin Islands.

The replacement of expendable maintenance items when the replacement is not due to a defect in material or factory workmanship.

Any car on which the odometer has been altered, or on which the actual mileage cannot be determined.

Adjustments, unless made as part of a warranty repair.

Accessories

Disclaimer of Consequential Damages and Limitations of Implied Warranties

Honda disclaims any responsibility for loss of time or use of the parts or vehicle in which the parts are installed, transportation or any other incidental or consequential damage; any implied warranties, including the implied warranty of merchantability, are limited to the duration of this written warranty.

Some states do not allow limitations on how long an implied warranty lasts, or the exclusion or limitation of incidental or consequential damages, so the above limitations or exclusions may not apply to you.

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

17. OKLA. STAT. tit. 12A, § 2-719(1)(a) (1981).

18. *Id.* § 2-719(2) (1981).

The following cases illustrate how § 2-719 is used to circumvent the standard repair or replace warranty: *Conte v. Dwan Lincoln Mercury*, 172 Conn. 112, ___, 374 A.2d 144, 149 (1976) ("limited remedy . . . had failed of its essential purpose when after numerous attempts to repair, the automobile still did not operate as a new automobile should, free from defects"); *Durfee v. Rod Baxter Imports*, 262 N.W.2d 349, 356 (Minn. 1977) (footnote omitted) ("So long as the seller repairs the goods each time a defect arises, a repair-and-replace clause does not fail of its essential purpose. But if repairs are not successfully undertaken within a reasonable time, the buyer may be deprived of the benefits of the exclusive remedy."); *McCullough v. Bill Swad Chrysler-Plymouth*, 5 Ohio St. 3d 181, ___, 449 N.E.2d 1289, 1294-95 (1983) (buyer allowed to revoke acceptance where seller failed to cure under warranty); *Osburn v. Bendix Home Systems*, 613 P.2d 445, 449-50 (Okla. 1980) (buyer of leaking mobile home allowed damages under U.C.C. § 2-714(2) where manufacturer failed within reasonable time to repair or replace defective parts under warranty); *Ehlers v. Chrysler Motor Corp.*,

A. Rejection

U.C.C. section 2-601 permits a buyer to reject an automobile before acceptance if the automobile or the tender of delivery "fail[s] in any respect to conform to the contract."¹⁹ The "perfect tender rule" of classical contract law, continued in section 2-601,²⁰ bases the buyer's right to reject on *any* nonconformity.²¹

Sellers are protected from the broad right to reject. Under section 2-602(1), rejection must occur within a reasonable time after delivery or tender of the automobile,²² and the buyer must seasonably notify the seller of rejection in order for it to be effective.²³

88 S.D. 612, ___, 226 N.W.2d 157, 161 (1975) (unreasonable delay in repairing vehicle was a breach of the limited warranty causing the warranty to fail of its essential purpose).

19. OKLA. STAT. tit. 12A, § 2-601 (1981) provides:

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

Subsection (b) of § 2-601 permits the buyer to accept an automobile with knowledge of its nonconformity; this provision leaves open the buyer's option to revoke under § 2-608 after acceptance. See *infra* notes 45-125 and accompanying text.

20. *Ramirez v. Autosport*, 88 N.J. 277, ___, 440 A.2d 1345, 1349 (1982).

21. Relatively few reported automobile cases are actually decided on the rejection theory. "Revocation of acceptance is the main battleground for buyers wishing to get rid of what they believe to be a 'lemon' . . . [L]et it be remembered that rejection is a fleeting remedy, seldom handled well by either dealer or buyer." R. BILLINGS, *supra* note 4, § 5.7. For this reason, most cases defining the requirements of a § 2-601 rejection rarely result in a finding of rejection, but rather discuss rejection before deciding the buyer's remedy based on revocation of acceptance or on breach of warranty. The following cases suggest various applications of the element of nonconformity: *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117, 1122 (8th Cir. 1982) ("[B]reach of warranty and nonconformity are not entirely congruent, concepts; the former being a subset of the latter."); *Atlan Indus. v. O.E.M., Inc.*, 555 F. Supp. 184, 188 (W.D. Okla. 1983) (plastic whose melting temperature failed to meet industry standards was nonconforming); *Ramirez*, 88 N.J. at ___, 440 A.2d at 1350 (even "curable" or "insubstantial" defects, if not cured within a reasonable time, constitute nonconformity justifying rejection); *Jakowski v. Carole Chevrolet*, 180 N.J. Super. 122, ___, 433 A.2d 841, 843 (1981) ("no particular quantum of nonconformity is required where a single delivery is contemplated"). U.C.C. § 2-106(2) states that "[g]oods . . . are 'conforming' . . . when they are in accordance with the obligations under the contract." OKLA. STAT. tit. 12A, § 2-106(2) (1981).

22. OKLA. STAT. tit. 12A, § 2-602(1) (1981) provides that "[r]ejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."

23. *Id.* "Seasonably" is defined in § 1-204 as "at or within the time agreed or if no time is agreed at or within a reasonable time." OKLA. STAT. tit. 12A, § 1-204(3) (1981). "Reasonable time" after delivery or tender under § 2-513(1)(1981) has been variously defined as "usually coincidental with the period of time during which the buyer may exercise his right to inspect the goods for conformity to the contract". *Rutland Music Serv. v. Ford Motor Co.*, 138 Vt. 562, ___, 422 A.2d 248, 249 (1980). Reasonable time is dependent on the buyer's action following delivery. *CMI Corp. v. Leemar Steel Co.*, 733 F.2d 1410, 1414 (10th Cir. 1984) (fact that buyer and seller tried for four

Furthermore, under section 2-605(1)(a),²⁴ if the buyer fails to specify the defect justifying rejection, then the seller cannot exercise the right to cure granted under section 2-508.²⁵ If the buyer rejects a nonconforming automobile, the seller may supply a conforming automobile while any obligation remains to be performed under the contract, provided the seller first seasonably notified the buyer of this intention.²⁶ The repair or replace warranty²⁷ gives an express right to cure to the seller of a defective automobile, and makes it likely, moreover, that the buyer will request cure.

The seller's right to correct or replace the defective part is another protection against the buyer's right to reject arbitrarily for *any* nonconformity. The right to cure, however, does not last indefinitely.²⁸ Should the seller elect to cure but later fail to deliver a conforming automobile, the buyer would be entitled to damages under section 2-711.²⁹

The buyer who attempts to reject must not do anything inconsistent with rejection. Because the U.C.C. prohibits but does not specifically define "any exercise of ownership,"³⁰ the buyer should return the automobile to the seller if at all possible. If the buyer does not return the automobile to the seller, the buyer must hold the automobile with reasonable care until the seller removes it.³¹ While the buyer may have to exercise this degree of reasonable control, the buyer must refrain from using

months after delivery and discovery of defect to find someone to cure defective goods defeated buyer's claim of rejection within reasonable time).

24. OKLA. STAT. tit. 12A, § 2-605(1)(a) (1981).

25. *Id.* § 2-508 (1981).

26. *Id.* § 2-508(1) (1981).

27. *See supra* note 16.

28. *Conte v. Dwan Lincoln-Mercury*, 172 Conn. 112, ___, 374 A.2d 144, 149 (1976); *see also Ramirez v. Autosport*, 88 N.J. 277, ___, 440 A.2d 1345, 1349 (1982) ("further reasonable time [under § 2-508(2)] depends on the surrounding circumstances, which include the change of position by and the amount of inconvenience to the buyer[, and] the length of time needed by the seller to correct the nonconformity and his ability to salvage the goods by resale. . . .").

29. OKLA. STAT. tit. 12A, § 2-711 (1981); *see Jakowski*, 180 N.J. Super. at ___, 433 A.2d at 843-44 (buyer awarded damages for breach of contract where seller's failure to undercoat and add polymer coating was found to be failure to deliver conforming goods).

30. OKLA. STAT. tit. 12A, § 2-602(2) (1981) provides that "[s]ubject to the provisions of the two following sections on rejected goods (Sections 2-603 and 2-604), (a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller."

31. *Id.* § 2-602(2)(b) (1981) provides:

[I]f the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Section 2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. . . .

Id. § 2-711(3) (1981) provides that the buyer "has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller. . . ." *Id.* § 2-706 (1981) specifies the requirements for valid resale.

the automobile so as not to be held to have accepted it.³²

Damages awarded to the successful buyer who sues under a rejection theory may be inadequate to compensate for the defect in the automobile, the inconvenience, and the cost of the lawsuit. After rightful rejection, section 2-711(1) provides for cancellation of the contract and allows the buyer to recover "so much of the price as has been paid."³³ Section 2-711(3) uses the language of section 2-715(1)³⁴ which permits recovery of incidental damages,³⁵ but under section 2-711(3) a buyer who has possession of an automobile which has been rejected may not be able to realize *any* such incidental damages without reselling the car himself.³⁶ Ultimately, the buyer who is financing the purchase may have discovered the defect early enough to be able to reject, but too early in terms of the portion of the purchase price already paid. Even combined with incidental damages, the award may fall short of court costs and attorney fees.

The buyer who rejects in Oklahoma may be compensated for attorney fees under section 936 of title 12 of the Oklahoma Statutes which permits the court at its discretion to award attorney fees to the prevailing party in an action involving a contract for the sale of goods.³⁷ Section 936 has been successfully invoked in an action to recover the purchase price on a sale of goods and does not appear to exclude other contract actions such as rejection or revocation of acceptance.³⁸ A claim for attorney fees must be carefully documented.³⁹

Probably the most difficult element to prove in rejection of an automobile is that the buyer rejected before acceptance.⁴⁰ The lay buyer may

32. See *infra* text accompanying notes 40-44.

33. OKLA. STAT. tit. 12A, § 2-711(1) (1981).

34. *Id.* § 2-715(1) (1981) provides:

Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

35. The standard warranty excludes consequential and incidental damages. R. BILLINGS, *supra* note 4, § 6.8.

36. OKLA. STAT. tit. 12A, § 2-706 (1981) prescribes the guidelines for resale.

37. OKLA. STAT. tit. 12, § 936 (1981).

38. *Arine v. McAmis*, 603 P.2d 1130, 1132 (Okla. 1979) (buyer who rescinded contract to buy a horse was awarded attorney fees; legislature did not intend to limit coverage of § 936 to ordinary damage awards alone and § 936 is applicable to any action to "recover" under contract).

39. See, e.g., *Darrow v. Spencer*, 581 P.2d 1309, 1313-14 (Okla. 1978) (attorney fees refused in sale of goods action for failure to prove reasonableness and value of fees and failure to document attorney services).

40. OKLA. STAT. tit. 12A, § 2-606 (1981) provides:

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the

perceive that acceptance occurs when the buyer picks up the automobile.⁴¹ The U.C.C. protects the buyer from this perception with a requirement that acceptance cannot occur before a reasonable opportunity to inspect the goods.⁴² However, the fact that most reported litigation involving defective automobiles rests on either revocation of acceptance or breach of warranty and not on rejection⁴³ indicates, however, that the reasonable opportunity to inspect is not long enough to permit the discovery of latent defects which might support an attempt to reject before acceptance.⁴⁴

B. *Revocation of Acceptance*

Once the buyer has accepted and passed the opportunity to reject for any defect,⁴⁵ revocation of acceptance is possible, but is limited by more stringent requirements than rejection.⁴⁶ These requirements concern: (1) whether the buyer knew of the nonconformity at the time of accept-

goods are conforming or that he will take or retain them in spite of their non-conformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

See, e.g., CMI Corp. v. Leemar Steel Co., 733 F.2d 1410, 1414 (10th Cir. 1984); Atlan Indus. v. O.E.M., Inc., 555 F. Supp. 184, 187-88 (W.D. Okla. 1983). Under § 2-607(2) (1981) acceptance precludes rejection.

41. It is also a commonplace that automobiles depreciate suddenly upon delivery to the buyer. R. BILLINGS, *supra* note 4, § 1.28, acknowledges this depreciation. "The last thing a dealer wants to do is to take back a car. This would cause the dealer, rather than the buyer to absorb the initial, and substantial, drop in value most new cars experience after retail delivery." *Id.*

42. OKLA. STAT. tit. 12A, § 2-513 (1981) (buyer's right to inspect before payment or acceptance); *id.* § 2-606(1)(a), (b) (1981) (reasonable opportunity to inspect must precede acceptance).

43. *See supra* note 21.

44. This is explained in part by the difficulty involved in inspecting an automobile for defects which may not manifest themselves until later. Section 2-608(1)(b) (1981) acknowledges this as "difficulty of discovery [of the non-conformity]" and would seem to have been written specifically for intricate and mass-produced machines such as the automobile.

45. *See supra* notes 19-44 and accompanying text.

46. OKLA. STAT. tit. 12A, § 2-608 (1981) provides:

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

(a) on the reasonable assumption that its 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

ance; (2) the nature of the nonconformity; and (3) actions taken by the buyer and seller after the discovery of the defect.

1. Buyer's Knowledge of the Nonconformity

Under section 2-607(1), acceptance triggers the buyer's duty to pay.⁴⁷ The buyer is assumed to have inspected the automobile and accepted it whether conforming or nonconforming.⁴⁸ If the automobile was accepted as nonconforming, the buyer may later revoke if the acceptance was based "on the reasonable assumption that the nonconformity would be seasonably cured."⁴⁹ The buyer will have to prove that, from the seller's assurance at the time of delivery or from the express limited warranty, the buyer reasonably assumed the defect would be cured.⁵⁰ If, however, the automobile was accepted as conforming, then under section 2-608(1)(b) the buyer may revoke acceptance. Section 2-608(1)(b) is particularly applicable to the case of a defective automobile because it acknowledges the potential for latent defects ("without discovery of such non-conformity"), the difficulty of adequate inspection before acceptance ("difficulty of discovery"), and the reliance of the buyer on the "seller's assurances" including the standard repair or replace warranty.⁵¹ Thus the automobile buyer's right to revoke will usually derive from section 2-608(1)(b).

Subsections (a) and (b) of section 2-608(1) are the threshold provisions for revocation of acceptance. If at acceptance the buyer's assump-

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.

As the Kansas Supreme Court held in *Johnson v. GMC, Chevrolet Motors Div.*, 233 Kan. 1044, ___, 668 P.2d 139, 142 (1983):

One who has held goods for a period of time or has by some action accepted, should have a greater burden to require a seller to accept return of the goods previously delivered to the buyer. The longer the buyer holds the goods, the greater the depreciation and if the buyer uses the goods after revocation of acceptance he will derive some benefit while using the goods.

47. OKLA. STAT. tit. 12A, § 2-607(1) (1981) states that "[t]he buyer must pay at the contract rate for any goods accepted."

48. *Id.* § 2-606(1) (1981) states that acceptance by notification to the seller requires prior opportunity to inspect. Section 2-606(1)(b) states that acceptance by failure to reject cannot occur before a reasonable opportunity to inspect. Buyers are not expected, however, to have submitted the automobile to an inspection by a mechanic. *Cf. Atlan Indus. v. O.E.M., Inc.*, 555 F. Supp. 184, 188 (W.D. Okla. 1983) ("the law does not require the buyer to perform any more tests than are common in the industry"). Moreover, even a detailed inspection might not reveal latent defects.

49. OKLA. STAT. tit. 12A, § 2-607(2) (1981).

50. OKLA. STAT. ANN. tit. 12A, § 2-608 official U.C.C. comment 3 (West 1981).

51. OKLA. STAT. tit. 12A, § 2-608(1)(b) (1981).

tions about the nonconformity of the automobile fit either 2-608(1)(a) or (b), then the buyer may attempt to revoke. The requirements for rightful revocation will be examined as interpreted in *Oberg v. Phillips*,⁵² the only reported Oklahoma case to date involving revocation of acceptance of an automobile under section 2-608,⁵³ in Oklahoma cases involving revocation of other types of goods, and in section 2-608 automobile cases from other states.

Beginning on the first day after acceptance of a new automobile, the buyer in *Oberg* began to discover numerous trivial defects⁵⁴ which the buyer reported to the seller over the next two months. After the automobile was left for repairs twelve to fifteen times, the buyer's attorney apparently gave the seller a specified time "to put the car in proper running order."⁵⁵ Approximately one month later, after the seller had failed to comply, the buyer returned the automobile and gave written notice of revocation of acceptance.⁵⁶ Three weeks later the seller informed the buyer that the automobile had been repaired, but the buyer refused to take it back⁵⁷ and filed suit to recover the purchase price under section 2-608.⁵⁸ The automobile had been out of service for repairs "no less than thirty days and parts of twelve to fifteen more."⁵⁹

52. 615 P.2d 1022 (Okla. Ct. App. 1980).

53. There are other Oklahoma cases where the buyer of a defective vehicle attempted to recover the purchase price paid. See, e.g., *Z.D. Howard Co. v. Cartwright*, 537 P.2d 345, 348 (Okla. 1975) (buyer allowed to sue for rescission and refund and for punitive damages under § 2-721 where seller fraudulently misrepresented damaged automobile as new); *L.R. Leveridge v. Notaras*, 433 P.2d 935, 942 (Okla. 1967) (automobile with defective crank shaft returned to seller; court awarded refund of price making no reference to § 2-608); *Kirk v. Leeman*, 163 Okla. 236, 239, 22 P.2d 382, 386 (1933) (refund of purchase price awarded to buyer unable to return defective automobile because seller repossessed the car by stealth); *Spaulding Mfg. Co. v. Holiday*, 32 Okla. 823, 826, 124 P. 35, 36 (1912) (unsuccessful attempt to rescind contract for purchase of buggy of inferior quality).

54. The buyer reported the following defects: driver's seat was stuck, hood was loose and misaligned, trunk leaked and was misaligned, trim on door was missing, chrome on doors was chipped, cruise control functioned improperly, there were paint runs on the body, trim was loose on rear window, glove box would not close firmly, radio picked up interference from other electrical components, dimmer switch cover was loose, motor would not run smoothly between 35 and 45 m.p.h., automobile lost or gained speed while constant pressure was applied to accelerator, automobile got only 10 m.p.g. although advertised at 15 m.p.g., automobile was hard to start and stalled once, right front fender was dented and had chipped paint, heater fan was noisy, steering wheel was improperly set, gear shift indicator did not show gear in which automobile was engaged, front windows were improperly sealed, chrome on left rear sidelight was loose. *Oberg*, 615 P.2d at 1024-25.

55. *Id.* at 1025.

56. *Id.*

57. *Id.*

58. *Id.* at 1024.

59. *Id.* at 1025.

2. The Nature of the Nonconformity: Substantial Impairment

The nonconformity giving the buyer a right to revoke acceptance under section 2-608 is not simply *any* nonconformity as in rejection under section 2-601.⁶⁰ Section 2-608 permits revocation of acceptance only where the nonconformity of a lot or a commercial unit "substantially impairs its value to [the buyer]."⁶¹ The requirement of substantial impairment "protects the seller from revocation for trivial defects"⁶² and "prevents the buyer from taking undue advantage of the seller by allowing goods to depreciate and then returning them because of asserted minor defects."⁶³

The Oklahoma Court of Appeals is in accord with other courts which have held substantial impairment to be a question of fact.⁶⁴ The test for substantial impairment under section 2-608(1) is subjective; the value *to the buyer* must be *substantially* impaired from the buyer's point of view.⁶⁵ In *Oberg* the Oklahoma Court of Appeals adopted this subjective test⁶⁶ which may be described as an objective determination of subjective factors.⁶⁷ The "needs and circumstances of the particular buyer must be examined" and not those of the "reasonable" person.⁶⁸

Although section 2-608(1) requires that substantial impairment be

60. See *supra* note 21.

61. OKLA. STAT. tit. 12A, § 2-608(1) (1981).

62. *Ramirez v. Autosport*, 88 N.J. 277, ___, 440 A.2d 1345, 1350 (1982) (dictum).

63. *Id.*

64. *Oberg*, 615 P.2d at 1024; see also *Conte v. Dwan Lincoln-Mercury*, 172 Conn. 112, ___, 374 A.2d 144, 148 (1976) (question of fact subject to the jury's determination); *Pavesi v. Ford Motor Co.*, 155 N.J. Super. 373, ___, 382 A.2d 954, 956 (1978) (court found substantial impairment as a fact); *McCullough v. Bill Swad Chrysler Plymouth*, 5 Ohio St. 3d 181, ___, 449 N.E.2d 1289, 1294 (1983) (substantial impairment "is a determination exclusively within the purview of the fact-finder"). *But see Durfee v. Rod Baxter Imports*, 262 N.W.2d 349, 354 (Minn. 1977) (on appeal court may determine substantial impairment as legal question on facts found by trial court).

65. Official U.C.C. comment 2 to OKLA. STAT. ANN. tit. 12A, § 2-608 (West 1981) states:

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

66. *Oberg*, 615 P.2d at 1024.

67. *Asciolla v. Manter Oldsmobile-Pontiac*, 117 N.H. 85, ___, 370 A.2d 270, 273 (1977) ("This determination is not, however, made by reference to the buyer's personal belief as to the reduced value of the goods in question. The trier of fact must make an *objective* determination that the value of the goods to the buyer has *in fact* been substantially impaired.") (emphasis added); see also *Jackson v. Rocky Mountain Datsun*, 39 U.C.C. Rep. Serv. (Callaghan) 885, 888 (Colo. Ct. App. 1984) ("reference must be made to the effect of the goods' nonconformities upon the particular buyer"); *McCullough*, 5 Ohio St. 3d at ___, 449 N.E.2d at 1294 (determination of substantial impairment "must be based on objective evidence of the buyer's idiosyncratic tastes and needs").

68. *Asciolla*, 117 N.H. at ___, 370 A.2d at 273 (buyer seeking revocation was a "particularly prudent and painstaking car buyer" who had previously refused a car with a repaired fender).

determined with respect to the buyer and not to the reasonable buyer,⁶⁹ the courts arguably have not set a particularly difficult standard of proof. With obvious sympathy for the buyer, the courts have accepted evidence of nonconformity annoying to any automobile owner. The buyer's attorney should be aware, however, that the U.C.C. requires specific evidence of diminished value to *that* buyer. Evidence which might fit this subjective test includes "great inconvenience and financial loss"⁷⁰ and lost wages.⁷¹

Several categories of nonconformity have been held to constitute substantial impairment. These include simple failure by the seller to repair the defective automobile⁷² and the buyer's loss of faith in the safety and integrity of the automobile.⁷³

The third category of substantial impairment, the magnitude of the nonconformity, has been a primary area of disagreement. It has been suggested that "[t]he common law concept of 'material breach' is at least a first cousin to the concept of substantial nonconformity"⁷⁴ and in a similar vein courts have held that minor defects do not constitute substantial impairment.⁷⁵ It has been held that trivial defects can contribute to substantial impairment when a "major" defect is also present.⁷⁶ Finally, some courts have interpreted substantial impairment as the cumulative effect of numerous defects.⁷⁷

The question of the magnitude of the nonconformity has been de-

69. OKLA. STAT. tit. 12A, § 2-608(1) (1981).

70. *Tiger Motor Co. v. McMurtry*, 284 Ala. 283, ___, 224 So. 2d 638 646 n.5 (1969) (automobile was in dealer's shop for repairs on 30 occasions, totaling 40 to 50 days).

71. *Jackson*, 39 U.C.C. Rep. Serv. (Callaghan) at 887 (buyer's employer became upset when buyer missed work because of defective automobile).

72. *Zoss v. Royal Chevrolet*, 11 U.C.C. Rep. Serv. (Callaghan) 527, 533 (Ind. Super. Ct. 1972) ("unsuccessful repair" gives the buyer the right to revoke acceptance).

73. See, e.g., *Asciolla*, 117 N.H. at ___, 370 A.2d at 274 ("It is the integrity of the vehicle as a whole which is the essence of the consumer's bargain."); *Pavesi*, 155 N.J. Super. at ___, 382 A.2d at 955 (recurrent paint defects marred appearance and value of new automobile); *Zabriskie Chevrolet v. Smith*, 99 N.J. Super. 441, ___, 240 A.2d 195, 205 (1968) ("For a majority of people the purchase of a new car is a major investment, rationalized by the peace of mind that flows from its dependability and safety.").

74. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 8-3, at 305 (2d ed. 1980).

75. See, e.g., *Rozmus v. Thompson's Lincoln Mercury Co.*, 209 Pa. Super. 120, ___, 224 A.2d 782, 784 (1966) (loose engine mounts which were easily corrected were not substantial impairment).

76. See, e.g., *Durfee*, 262 N.W.2d at 354 (minor defects in combination with frequent stalling constituted substantial impairment); *Stofman v. Keenan Motors*, 63 Pa. D. & C.2d 56, 58 (1973) (annoying vibrations in combination with dangerous stalling constituted substantial impairment).

77. See, e.g., *Jackson*, 39 U.C.C. Rep. Serv. (Callaghan) at 888 (cumulative difficulties and unsuccessful repairs were evidence of substantial impairment); *Zoss*, 11 U.C.C. Rep. Serv. (Callaghan) at 532 ("[C]umulative effect of all the non-conformities, [sic] so impaired the value of the commercial unit as to constitute a substantial impairment to the plaintiffs.").

cided by the Oklahoma Court of Appeals with a cumulative effect test. In a case such as *Oberg*, where the car was plagued with an inordinate number of trivial defects,⁷⁸ the Oklahoma court will not "search through the defects to find one it can classify as substantial to justify revocation of acceptance. The remedy should be available in a proper case even if each defect taken individually could be considered trivial."⁷⁹ The buyer in Oklahoma need only prove, according to *Oberg*, that "the cumulative effect of the defects and lack of repair . . . constitute[d] a substantial impairment of the value of the goods to the buyer within the context of section 2-608."⁸⁰

3. Buyer's and Seller's Actions After Discovery of the Defect

In determining whether the buyer's revocation of acceptance was justifiable, the courts will also look carefully at: (a) whether the buyer should have and did allow the seller to attempt to cure; (b) whether the buyer revoked within a reasonable time; and (c) whether the buyer notified the seller of the revocation. The standard of proof required here is arguably more demanding than for the determination of substantial impairment, perhaps because the courts want to encourage buyer and seller to document their activity carefully.

a. Seller's right to cure

The seller's right to cure before the buyer is allowed to revoke under section 2-608(1)(a) is certain: the buyer accepted with knowledge of a nonconformity which the buyer assumed would be "seasonably cured."⁸¹ The seller's right to cure before a revocation under section 2-608(1)(b)⁸² is in dispute. Although this section does not refer to "cure," official comment 4 to the U.C.C. states in part that "this remedy will be generally resorted to only after attempts at adjustment have failed."⁸³ Furthermore, as a practical matter, if the buyer has a warranty which covers the defect in question, the buyer will generally give the seller an opportunity to repair the defect.⁸⁴

78. *Oberg*, 615 P.2d at 1024-25; see *supra* note 54.

79. *Oberg*, 615 P.2d at 1026.

80. *Id.*

81. OKLA. STAT. tit. 12A, § 2-608(1)(a) (1981). The seller's right to cure is found in § 2-508. See *supra* notes 25-28 and accompanying text.

82. Most automobile revocations appear to be based on § 2-608(1)(b). See *supra* text accompanying note 51.

83. OKLA. STAT. ANN. 12A, § 2-608 official U.C.C. comment 4 (West 1981).

84. Most buyers could not afford the economic burden and the inconvenience of doing without

Among those courts acknowledging that the buyer should allow the seller a chance to cure, the right to cure is generally held to be for a limited time.⁸⁵ The *Oberg* decision suggests a practical safeguard: obtain an agreement in writing with the seller, specifying the time to be allowed "to put the car in proper running order."⁸⁶

b. Revocation within reasonable time

Section 2-608(2) protects the seller from revocation for defects which the buyer caused or for which the seller should bear no responsibility.⁸⁷ With timely notice, the seller can attempt to negotiate an acceptable cure or monetary settlement.⁸⁸ Both buyer and seller ought to be held responsible for avoiding the economic waste of worsening defects and depreciation.⁸⁹

The issue of reasonable time for revocation is a question of fact dependent on the circumstances.⁹⁰ Delay by the buyer in revoking has been justified by interpreting each request for repairs as a separate attempt at revocation,⁹¹ by recognition of buyer's prompt initial request for re-

an automobile while the court rules on the claim of revocation. *Pavesi v. Ford Motor Co.*, 155 N.J. Super. 373, ___, 382 A.2d 954, 956 (1978). Authorities have also recognized the limited usefulness of the seller's right to cure which may be implied under § 2-608(1)(b). The right to cure may be limited to "trivial defects or defects easily curable." *Pavesi*, 155 N.J. Super. at ___, 382 A.2d at 956. According to this view, curing substantial defects would destroy the revocation remedy, leaving only the possibility of damages for breach of warranty. *R. BILLINGS*, *supra* note 4, § 5.43. It is arguable that in the case of a grossly defective automobile any cure short of replacement would be insufficient. *Asciolla v. Manter Oldsmobile-Pontiac*, 117 N.H. 85, ___, 370 A.2d 270, 274 (1977).

85. *Tiger Motor Co. v. McMurtry*, 284 Ala. 283, ___, 224 So. 2d 638, 644 (1969) ("[A]t some point in time, it must become obvious to all people that a particular vehicle simply cannot be repaired or parts replaced so that the same is made free from defect."); *Jackson v. Rocky Mountain Datsun*, 39 U.C.C. Rep. Serv. (Callaghan) 885, 889 (Colo. Ct. App. 1984) (dealer not allowed to introduce testimony that automobile was repaired after plaintiff buyer's revocation of acceptance).

86. *Oberg*, 615 P.2d at 1025; *accord Zoss v. Royal Chevrolet*, 11 U.C.C. Rep. Serv. (Callaghan) 527, 531 (Ind. Super. Ct. 1972) (buyer and seller set "seasonable" deadline for repairs).

87. OKLA. STAT. tit. 12A, § 2-608(2) states in part, "[r]evocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the grounds for it and before any substantial change in condition of the goods which is not caused by their own defects."

88. *R. BILLINGS*, *supra* note 4, § 5.38. The author suggests a two-part test for unreasonable delay in notification: (1) Did the delay cause unreasonable consequential damages to accrue to the buyer? (2) Could the defect have been repaired had it not been allowed to worsen? *Id.*

89. *Durfee v. Rod Baxter Imports*, 262 N.W.2d 349, 352 (Minn. 1977) (court excused 6,300 miles logged "in a conservative manner" and radio aerial broken by vandals). Official U.C.C. comment 6 to Okla. Stat. Ann. tit. 12A, § 2-608 (1981) states that "worthless goods, however, need not be offered back [to the seller after revocation] and minor defects in the articles reoffered are to be disregarded."

90. *CMI Corp. v. Leemar Steel Co.*, 733 F.2d 1410, 1415 (10th Cir. 1984); *Four Sons Bakery v. Dulman*, 542 F.2d 829, 832 (10th Cir. 1976).

91. *Pavesi*, 155 N.J. Super. at ___, 382 A.2d at 956.

pairs,⁹² and by holding that the reasonable timeframe for notice of revocation does not have to include time during which the seller attempts to cure.⁹³ The buyer would be well advised, therefore, to keep a written record of requests for repairs to prove the buyer did not delay in reporting the defect and was willing to negotiate.

c. Notification of revocation

Revocation of acceptance is ineffective unless the buyer notifies the seller.⁹⁴ The U.C.C. does not specify the requirements of notification, although official comment 5 specifies the policy aims to be served by notification.⁹⁵ An attempt to negotiate a settlement has been construed as notice.⁹⁶ Although a letter need not detail the nonconformity,⁹⁷ an Oklahoma court may require written notice.⁹⁸

One commentator has suggested the following elements for an acceptable notification:

1. Notice in writing sent by registered mail;
2. List of those nonconformities constituting substantial impairment;
3. Affirmative statement of revocation;⁹⁹
4. Dispatch after buyer discovers or should have discovered the defect;¹⁰⁰
5. Copies sent to the manufacturer (and financier, if applicable).¹⁰¹

92. *Moore v. Howard Pontiac-American, Inc.*, 492 S.W.2d 227, 229-30 (Tenn. Ct. App. 1972) (notice of revocation eight months after discovery of defect not unreasonably late).

93. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117, 1124 (8th Cir. 1982) ("consumer should not be penalized for continued patience with a seller who promises or repeatedly attempts to make good a nonconforming delivery"); *Durfee*, 262 N.W.2d at 353 ("period in which seller attempts to cure the nonconformity is not part of the time in which the buyer must act [to revoke]"); *Moore*, 492 S.W.2d at 230 (delay in revocation should be balanced against time allowed seller to fulfill his obligation to repair under the contract).

94. OKLA. STAT. tit. 12A, § 2-608(2) (1981).

95. Official U.C.C. comment 5 to OKLA. STAT. ANN. tit. 12A, § 2-608 (West 1981) provides in part that the notice should be given in accordance with good faith, the prevention of surprise, and reasonable adjustment.

96. See *Pavesi*, 155 N.J. Super. at ___, 382 A.2d at 957.

97. *Jackson v. Rocky Mountain Datsun*, 39 U.C.C. Rep. Serv. 885, 890 (Colo. Ct. App. 1984) (notice need not specify nonconformities where buyer had repeatedly described them to the seller when asking for repairs).

98. *Oberg*, 615 P.2d at 1025 (buyer returned car to dealer and gave written notice of revocation).

99. R. BILLINGS, *supra* note 4, §§ 5.31, 5.11.

100. *Id.* § 5.31.

101. *Id.* §§ 5.31, 5.12.

4. Buyer's Rights and Duties After Revocation

A buyer who justifiably revokes acceptance of an automobile "has the same rights and duties with regard to the goods involved as if he had rejected them."¹⁰² An examination of these rights and duties reveals two issues: (a) return of the automobile; and (b) damages after revocation of acceptance.

a. Return of the automobile

Following a justifiable rejection or revocation of acceptance, "any exercise of ownership by the buyer . . . is wrongful as against the seller."¹⁰³ This provision and the practical reality that the buyer wants to be rid of the lemon¹⁰⁴ argue that the buyer should return the car to the seller.¹⁰⁵

The express prohibition of wrongful exercise of ownership has given rise to the often disputed issue of "continued use" in automobile revocation cases.¹⁰⁶ Use of an automobile in which a defect has been discovered may continue after discovery of the defect and while the seller is attempting cure,¹⁰⁷ or after the buyer gives the seller notice of revocation of acceptance (which under section 2-608(2) must be within a reasonable time after the discovery of the defect).¹⁰⁸ The buyer's continued use may be reasonable in the circumstances¹⁰⁹ or may be a further opportunity for the seller to cure and convince the buyer not to revoke.¹¹⁰

102. OKLA. STAT. tit. 12A, § 2-608(3) (1981).

103. *Id.* § 2-602(2)(a) (1981).

104. J. WHITE & R. SUMMERS, *supra* note 74, § 8-1 define "revocation" as a "refusal on the buyer's part to keep the goods."

105. Rights and duties of a buyer who does not return the automobile are discussed in the context of rejection. See *supra* notes 31-32 and accompanying text.

106. Compare Case Note, Ozark v. Neidecker: *A Buyer's Continued Use of Goods After Revocation of Acceptance*, 38 ARK. L. REV. 857, 867 (1985) (continued use may be reasonable depending on seller's conduct and hardship to buyer) with Note, *Postrevocation Use: An Impermissible Interpretation of the U.C.C.*, 35 CASE W. RESERVE 282, 293-97 (1984) (postrevocation use inconsistent with strict requirements and restricted remedies for revoking buyer).

107. In this sense, continued use is related to the requirement that revocation occur within a reasonable time after discovery of the defect. See *supra* notes 87-93 and accompanying text.

108. OKLA. STAT. tit. 12A, § 2-608(2) (1981).

109. The seller may have refused the buyer's offer to return the vehicle. See, e.g., Johnson v. General Motors Corp., Chevrolet Motor Div., 233 Kan. 1044, ___, 688 P.2d 139, 143 (1983) (buyer who drove an additional 14,619 miles after revoking acceptance of truck was justified by seller's refusal to accept and lack of public transportation); McCullough v. Bill Swad Chrysler Plymouth, 5 Ohio St. 3d 181, ___, 449 N.E.2d 1289, 1291 (1983) (buyer who drove automobile an additional 23,000 miles after seller gave no instructions for return was justified under the court's five-part test for reasonable continued use).

110. See, e.g., Zoss v. Royal Chevrolet, 11 U.C.C. Rep. Serv. (Callaghan) 527, 533 (Ind. Super. Ct. 1972).

Ideally, the buyer should request instructions for return of the automobile.¹¹¹ The following suggestions have been offered:

1. Remove all personal belongings;
2. Offer the certificate of title and keys to the dealer in the presence of a witness;
3. Return license plates and registration to the state if required by law;
4. Record the odometer reading and take photos to document the condition in which the car was left.¹¹²

In the alternative, the buyer should either store the automobile and cease to use it¹¹³ or resell or trade it. Regardless of the alternative selected, the buyer must keep careful documentation.¹¹⁴

b. Damages after revocation of acceptance

According to the U.C.C., the buyer who justifiably revokes acceptance is entitled to the same recovery as the buyer who rejects before acceptance.¹¹⁵ The buyer does not gain monetarily by revoking acceptance instead of rejecting. The buyer has gained time since revocation is generally allowed later than rejection. In addition, the buyer may gain some satisfaction from the fact that the seller has to absorb the depreciation of the automobile, which will be greater after revocation than after rejection.

The court may mitigate the amount of depreciation the seller has to absorb by subtracting from the buyer's damages an "offset" for the value of the buyer's use of the automobile.¹¹⁶ The award of an offset to the seller is based on judicial application of equitable principles and not on any U.C.C. provisions.¹¹⁷

111. See, e.g., OKLA. STAT. tit. 12A, § 2-603 (1981) (requiring that a merchant buyer under certain circumstances request instructions for disposal of the goods). Practically speaking, the prudent buyer will discuss return of the vehicle with the seller.

112. R. BILLINGS, *supra* note 4, § 5.32.

113. *Id.*

114. *Id.* § 5.33.

115. See *supra* notes 33-39 and accompanying text. Where the full price has not yet been paid, the buyer may recover only the down payment and any installments made on the full price. *Evans v. Graham Ford*, 2 Ohio App. 3d 435, ___, 442 N.E.2d 777, 781 (1981). The buyer's damages are measured as his restitution interest, restoring him to pre-contract status. *Ramirez v. Autosport*, 88 N.J. 277, ___, 440 A.2d 1345, 1351 (1982) (describing damages for rejection). The *Oberg* court was silent on the issue of damages.

116. See *supra* notes 106-10 and accompanying text.

117. *Pavesi v. Ford Motor Co.*, 155 N.J. Super. 373, ___, 382 A.2d 954, 957 (1978) (offset based on theories of return of consideration after part performance and buyer as bailee for seller); see also *McCullough*, 5 Ohio St. 3d at ___, 449 N.E.2d at 1294 (buyer's reasonable continued use entitles seller to offset).

It has been held that the seller must ask for an offset.¹¹⁸ The measure of the offset has varied; it has been awarded for the value of a substitute automobile loaned to the buyer¹¹⁹ and it has been based on the value and condition of the particular lemon being revoked¹²⁰ or on the "established rate of lease vehicle depreciation."¹²¹

In addition to the purchase price less a possible offset, the buyer who has revoked, like the buyer who has rejected, may receive damages for "cover"¹²² and for incidental and consequential expenses¹²³ and attorney fees.¹²⁴ The buyer who revokes acceptance also may sue for breach of warranty.¹²⁵

C. *Breach of Warranty*

Once acceptance has occurred and the opportunity to reject has passed, the buyer, who must now retain the defective automobile, may consider suit for breach of warranty.¹²⁶ The standard new car express warranty warrants only certain parts and disclaims implied warranties.¹²⁷ If the defective part is excluded from the express warranty and if all implied warranties have been effectively disclaimed,¹²⁸ the buyer has no cause of action for breach of warranty.

If the defective part is warranted, however, the buyer still must circumvent the exclusive and limited remedy to repair or replace the defective part. Section 2-719(2) would allow the buyer to sue for breach

118. See, e.g., *Durfee v. Rod Baxter Imports*, 262 N.W.2d 349, 353 (Minn. 1977). But see *McCullough*, 5 Ohio St. 3d at ___, 449 N.E.2d at 1295 (Holmes, J., dissenting in part) ("trial court should take judicial notice of the fair market value of the use of such an automobile").

119. See *Jackson*, 39 U.C.C. Rep. Serv. at 887.

120. See *Moore v. Howard Pontiac-American, Inc.* 492 S.W.2d 227, 230 (Tenn. Ct. App. 1972).

121. See *Johnson v. GMC, Chevrolet Motors Div.*, 233 Kan. 1044, ___, 668 P.2d 139, 145 (1983).

122. OKLA. STAT. tit. 12A, § 2-711(1)(a) (1981). R. BILLINGS, *supra* note 4, § 5.5, states that in the case of a buyer revoking acceptance of an automobile, "cover" might include the expense of securing a rental or a replacement.

123. OKLA. STAT. tit. 12A, § 2-715 (1981). R. BILLINGS, *supra* note 4, § 5.49, suggests that incidentals may include towing, repairs done outside of the warranty, storage if the dealer refused the return of the car, rental car, insurance, and interest on the loan. The author includes as consequential damages loss of use and lost wages. *Id.*

124. It should be remembered that under Oklahoma law the court may award attorney fees in actions involving contracts for the sale of goods. OKLA. STAT. tit. 12, § 936 (1981); see *supra* notes 37-39 and accompanying text.

125. OKLA. STAT. ANN. tit. 12A, § 2-608 official U.C.C. comment 1 (West 1981) provides, "the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach." In fact, however, the buyer who has revoked no longer has a warranty on which to sue because the buyer no longer has the automobile.

126. Strict liability in tort and negligence as the basis for a products liability suit are beyond the scope of this Comment.

127. See *supra* note 16 and accompanying text.

128. OKLA. STAT. tit. 12A, § 2-316(2), (3) (1981).

where the exclusive and limited remedy has failed of its essential purpose.¹²⁹ The number of repair attempts may be the determining factor.¹³⁰

Since the remedy under the standard warranty is for repair or replacement of defective parts, the mere existence of a defect is not a breach of the warranty. Breach of this warranty occurs only when the seller has refused, has unsuccessfully attempted, or has taken an unreasonable time to repair or replace the defective part.¹³¹ If the seller has not had a reasonable opportunity to repair or replace, the warranty has not been breached.¹³² Furthermore, the warranty does not specify how many times the seller may attempt to correct the defect before a reasonable opportunity to repair or replace has passed. Even having established a cause of action for breach of warranty, however, the buyer still faces the obstacles of a difficult lawsuit.¹³³

The successful party in a breach of warranty suit is entitled to "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, unless special circumstances show proximate damages of a different amount."¹³⁴ Incidental and consequential damages are also allowed.¹³⁵ In a successful suit for breach of express or implied warranty, attorney fees are available under section 939 of title 12 of the Oklahoma Statutes.¹³⁶ Circumstances will determine whether keeping the car and receiving damages for breach of warranty will more adequately compensate the buyer than receiving a refund of the purchase price after rejection. However, if the automobile is beyond repair, the portion of the

129. See *supra* note 18 and accompanying text.

130. See *supra* note 18.

131. R. BILLINGS, *supra* note 4, § 7.35.

132. See *supra* notes 28-29 and accompanying text.

133. R. BILLINGS, *supra* note 4, §§ 7.47, 7.50, lists the following elements to be proved in a breach of warranty action:

- (1) the existence of a defect in the operation of a vehicle,
- (2) that the defect resulted from factory material or workmanship (present at the time of sale),
- (3) that the plaintiff presented the vehicle to the dealer with a request that the defect be repaired (satisfying the notice requirement), and
- (4) the dealer failed or refused to repair or replace the defective parts, and
- (5) proximate cause.

134. OKLA. STAT. tit. 12, § 2-714(2) (1981).

135. *Id.* § 2-714(3) (1981).

136. OKLA. STAT. tit. 12A, § 939 (1981); see, e.g., *Osburn v. Bendix Home Sys.*, 613 P.2d 445, 452 (Okla. 1980) (buyer of mobile home allowed additional costs under § 939 upon successful appeal for breach of warranty); *Hardesty v. Andro Corp.-Webster Div.*, 555 P.2d 1030, 1036 (Okla. 1976) (specific mention of breach of express warranty in § 939 does not indicate that § 939 prohibits attorney fees for breach of implied warranty).

award covering the actual breach will not be sufficient to compensate the buyer, who will probably have to purchase another car but may not realize much on the trade-in of the lemon.

D. *Magnuson-Moss Act*

1. Refund or Replacement

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act¹³⁷ sets federal minimum standards for “full” consumer product warranties.¹³⁸ Under a full warranty the consumer must be permitted to elect either a refund or a replacement without charge if, after a reasonable number of attempts, the warrantor is unable to repair the nonconforming product.¹³⁹ The Act is thus a federal lemon law for buyers with a full warranty. Most automobiles, however, are purchased under limited warranty.¹⁴⁰ Therefore, a buyer with a limited warranty seeking a refund must successfully reject¹⁴¹ or revoke acceptance¹⁴² under applicable state law, and a buyer with a limited warranty may seek a replacement only if the state has a lemon law.¹⁴³

2. Arbitration, Disclaimer of Implied Warranties, Attorney Fees

The Magnuson-Moss Act does offer potential protection to the buyer of a lemon with a limited warranty. First, the Act encourages warrantors to offer fair and expeditious informal dispute resolution.¹⁴⁴ If the warrantor’s dispute resolution procedure meets Federal Trade Commission standards, then the warrantor may include in the warranty a requirement that the consumer resort to the dispute resolution procedure

137. 15 U.S.C. §§ 2301-2312 (1982). The Magnuson-Moss Act was intended “to provide minimum disclosure standards for written consumer product warranties against defect or malfunction; to define minimum Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes.” H.R. REP. NO. 1107, 93d Cong., 2d Sess., (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7702.

138. 15 U.S.C. § 2303(a)(1) (1982) provides that a written warranty meeting the minimum standards set forth in § 2304 “shall be conspicuously designated a ‘full (statement of duration) warranty.’” All other written warranties must be designated “limited” under § 2303(a)(2). The Act does not mandate written warranties for consumer products, nor does it require full warranties. It merely requires that if a written warranty is offered, it must be designated “full” or “limited.”

139. *Id.* § 2304(a)(4).

140. Note, WASH. U.L.Q., *supra* note 15, at 1143. As of 1977, only American Motors Co. offered a “full” warranty; AMC’s market share was somewhat less than 2% at that time. Pertschuk, *Consumer Automobile Problems*, 11 U.C.C. L.J. 145, 149 n.11 (1978).

141. See *supra* notes 19-44 and accompanying text.

142. See *supra* notes 45-125 and accompanying text.

143. See *infra* notes 150-210 and accompanying text.

144. 15 U.S.C. § 2310(1) (1982).

before bringing a civil action.¹⁴⁵

Second, implied warranties may not be disclaimed or modified if the warrantor makes a written warranty or enters into a service contract with the consumer.¹⁴⁶ The warrantor may only limit the duration of the implied warranty to the duration of a limited warranty.¹⁴⁷ These implied warranty provisions may be useful where recovery is not possible under the express warranty.

Third, the Act provides that the court at its discretion may award costs and expenses, including attorney fees, to the consumer who prevails in an action under the Act or under a warranty governed by the Act.¹⁴⁸ A significant benefit to consumers in some states, this provision adds little more than the stamp of federal approval to the successful consumer's request for attorney fees in Oklahoma where statute already supports such a claim.¹⁴⁹

III. THE OKLAHOMA LEMON LAW

A. *Description of the Law*

In July, 1985, the Oklahoma Legislature joined the thirty-five other states¹⁵⁰ which have passed automobile "lemon laws."¹⁵¹ The Oklahoma Lemon Law is drafted more broadly than lemon laws in some states, but is more restrictive than the U.C.C. and the Magnuson-Moss Act.¹⁵²

The remedies under the Oklahoma Law are available to any "consumer," defined as a purchaser of a motor vehicle not bought for resale, any person to whom the vehicle is transferred during the period of the express warranty, and any other person protected by the warranty.¹⁵³ "Motor vehicles" covered by the law are any motor-driven vehicles re-

145. *Id.* § 2310(2), (3). The F.T.C. rules appear at 16 C.F.R. § 703 (1985).

146. 15 U.S.C. § 2308(a).

147. *Id.* § 2308(b). Under a full warranty the duration of implied warranties may not be limited. *Id.* § 2304(a)(2).

148. *Id.* § 2310(d)(2).

149. OKLA. STAT. tit. 12, §§ 936, 939 (1981); *see supra* notes 37-39 and accompanying text.

150. *See* APPENDIX B. For comparison of state lemon law provisions, *see A Twist of Lemon*, 50 CONSUMER REP. 192, 193 (1985); Honigman, *The New "Lemon Laws": Expanding UCC Remedies*, 17 U.C.C. L.J. 116, 128 (1984).

151. Act of July 15, 1985, 1985 Okla. Sess. Law Serv. 1201-02 (West) (to be codified at Okla. Stat. tit. 12A, § 901) (effective Nov. 1, 1985) (hereinafter cited as Okla. Lemon Law). *See* APPENDIX A.

152. Rigg, *Lemon Laws*, 18 CLEARINGHOUSE REV. 1147 (1985), catalogs the variations in common lemon law provisions from state to state. The Oklahoma Lemon Law is broader than some laws which, for example, may specifically exclude commercial buyers, *id.* at 1149, or may exclude all but passenger cars, *id.* at 1148.

153. Okla. Lemon Law § 1(A)(1).

quired to be registered under the Motor Vehicle License and Registration Act.¹⁵⁴ Motorcycles, motorized bikes, and trucks are covered.¹⁵⁵ "Motor-driven vehicles" which are not required to be registered in Oklahoma, such as "self-propelled or motor-driven cycles, known and commonly referred to as 'minibikes' and other similar trade names,"¹⁵⁶ including "'golf carts,' 'go-karts' and other motor vehicles which are manufactured principally for use off the streets and highways,"¹⁵⁷ are not covered by the Lemon Law. The Lemon Law expressly excludes "the living facilities of motor homes,"¹⁵⁸ this exclusion would appear to cover recreational vehicles and travel trailers.¹⁵⁹ Also expressly excluded is any vehicle "above ten thousand (10,000) pounds gross vehicle weight."¹⁶⁰

The Lemon Law gives the consumer two distinct rights. The first is an affirmative right to have the vehicle repaired under any applicable express warranty.¹⁶¹ The consumer must report the nonconformity directly to the manufacturer, its agent, or its authorized dealer in writing within the period of the express warranty or within one year of the original delivery of the vehicle to a consumer, whichever is earlier.¹⁶² The repairs may be made after the notification period has expired.¹⁶³

The second right granted consumers is the "replace or refund" remedy typically identified with lemon laws.¹⁶⁴ Under this provision, the consumer is entitled to a replacement vehicle or a refund after a failure to conform the vehicle to any express warranty "by repairing or correcting any defect or condition which substantially impairs the use and value of the motor vehicle to the consumer after a reasonable number of attempts."¹⁶⁵ A "reasonable number of attempts" shall be presumed if four or more unsuccessful attempts have been made to repair the same nonconformity within the warranty term or within one year after original

154. *Id.* § 1(A)(2). The Motor Vehicle License and Registration Act appears at OKLA. STAT. tit. 47, § 22 (1981).

155. *Id.* §§ 22.1(2), 22.1(16), 22.1(17), 22.5-2, 22.1(32) (1981).

156. OKLA. STAT. tit. 47, § 22.5-1(A) (1981).

157. *Id.* § 22.5-1(C) (1981).

158. Okla. Lemon Law § 1(A)(2).

159. OKLA. STAT. tit. 47, § 22.1(25), (31) (1981). The drafting of the Lemon Law is ambiguous on this point. The "living facilities of motor homes" may be construed to define motor homes as living facilities or to mean only the portion of the vehicle which serves as "housing," in which case the vehicular portion (engine, drive train, driver's cab, etc.) would be covered by the Lemon Law.

160. Okla. Lemon Law § 1(A)(2).

161. *Id.* § 1(B).

162. *Id.*

163. *Id.*

164. *Id.* § 1(C).

165. *Id.*

delivery date, whichever is earlier, or if the vehicle has been out of service during this same limited period for a cumulative forty-five or more calendar days.¹⁶⁶

Affirmative defenses against the replace or refund remedy include: (1) the nonconformity was not a substantial impairment of use and value of the vehicle; and (2) the consumer's own abuse, neglect, or unauthorized modifications or alterations caused the nonconformity.¹⁶⁷ The consumer must also send prior direct written notification to the manufacturer and allow the manufacturer an opportunity to cure the nonconformity.¹⁶⁸ In addition, the consumer must first submit to the manufacturer's informal dispute settlement procedure if it complies with the federal standards for such procedures.¹⁶⁹ Should the consumer lose under the Lemon Law, remedy is still available for breach of warranty or after revocation of acceptance since the Lemon Law does not limit rights under any other law.¹⁷⁰

B. *The Lemon Law and Traditional Remedies Compared*

Although there are indications that consumers are invoking lemon law remedies,¹⁷¹ there is not yet a significant body of reported cases to be studied.¹⁷² It is possible, however, to predict certain difficult issues in a

166. *Id.* § 1(D).

167. *Id.* § 1(C).

168. *Id.*

169. *Id.* § 1(F). 16 C.F.R. § 703 (1985) specifies the federal standards for informal dispute resolution procedures as authorized at 15 U.S.C. § 2310(2) (Magnuson-Moss Act). See *supra* notes 144-45 and accompanying text. According to CONSUMER REP., no arbitration program has been certified by the F.T.C. under 16 C.F.R. § 703. *A Twist of Lemon*, *supra* note 150, at 192. The Connecticut Lemon Law requires the state Department of Consumer Protection to establish an arbitration panel to which consumers may resort if the manufacturer does not have a dispute settlement procedure in compliance with the F.T.C. rules. CONN. GEN. STAT. ANN. § 42-181(a), (b) (West Supp. 1985). Section 42-182 provides for state certification of a manufacturer's dispute settlement procedures. The Connecticut Lemon Law as amended in 1984 is worthy of consideration in that it now attempts to answer questions arising under less detailed lemon laws.

170. Okla. Lemon Law, § 1(E).

171. See, e.g., Spivak, *Lemon Laws Trigger More Buybacks*, AUTOMOTIVE NEWS, July 16, 1984, at 3, 61. (Rep. John Woodcock, III, Conn., is aware of "at least 150" people who have received new cars or refunds since Oct. 1, 1982" under Connecticut Lemon Law which was the first in the nation to be passed).

172. The author found three reported decisions and four attorney general opinions—one each from Florida, Massachusetts, Nevada, and Tennessee. The Connecticut Superior Court in *Wilson v. Cent. Sports, Inc.*, 40 Conn. Supp. 156, ___, 483 A.2d 625, 626 (Conn. Super. Ct. 1984) held that for purposes of the Connecticut Lemon Law "motor vehicles" includes motorcycles and that the buyer could sue under the Lemon Law, since he had to return the motorcycle three times for repairs and these repairs resulted in the motorcycle being inoperative for more than four months.

Fla. Op. Att'y Gen. No. 85-32 (Apr. 23, 1985) (available Sept. 10, 1985, on LEXIS, States library, FLA file) held that the informal dispute resolution panel operating under the Florida Lemon Law is not limited to determining whether the vehicle conforms to the express warranty but may

lemon law suit. For this purpose, the Oklahoma law will be compared with the traditional remedies discussed in Part II.

The lemon laws have been passed to address consumer problems with respect to a particular product, the automobile. The laws are therefore written in terms that are at once better defined and more restrictive than laws applying to sales in general or to consumer problems in general.

The first notable restriction in the Oklahoma Law is that a merchant buyer appears to be excluded from the definition of "consumer." This is in accord with the Magnuson-Moss Act and similar consumer legislation.¹⁷³ A merchant buyer may resort to the U.C.C., which defines buyer as "a person who buys or contracts to buy goods."¹⁷⁴ Although a merchant buyer is not covered by the Lemon Law, the definition of consumer does appear broad enough to include commercial buyers not intending to resell, and transferees under the original warranty, which may include lessees, donees, and other recipients.¹⁷⁵ The type of goods pro-

offer the buyer a remedy. Since the panel's decision binds only the manufacturer and does not prevent the buyer from filing a formal action, the replacement or repurchase remedy is always potentially available even though the dispute resolution panel may choose not to offer this remedy. *Id.*

The Massachusetts and Nevada opinions interpret the effective date provisions in order to determine the scope of the lemon laws of those states. Mass Op. Att'y Gen. No. 83/84-6 (Apr. 5, 1984) (available Sept. 10, 1985, on LEXIS, States library, MASS file) (Massachusetts Lemon law applies to vehicles delivered after effective date of the law even if ordered prior to effective date); Nev. Op. Att'y Gen. No. 83-7 (July 14, 1983) (available Sept. 10, 1985, on LEXIS, States library, NEV file) (Nevada Lemon Law applies only to vehicles sold on or after the effective date of the law).

Tenn. Op. Att'y Gen. No. 84-265 (Sept. 21, 1984) (available Sept. 10, 1985, on LEXIS, States library, TENN file) held that the election of remedies provision in the Tennessee Lemon Law operates to bar the buyer from other remedies once the buyer files a formal action seeking replacement or refund and not when the buyer simply seeks repairs or submits to arbitration under the warranty and the Lemon Law. The opinion further held that the Tennessee Lemon Law "may apply to 'used' (in the sense of 'previously owned') motor vehicles in certain circumstances" because "consumer" is defined as "any person to whom such motor vehicle is transferred . . . during the duration of an express warranty," and "any other person entitled by the terms of such warranty" to enforce its obligations." *Id.*

The New York Lemon Law for new vehicles, N.Y. GEN. BUS. LAW § 198-a (McKinney Supp. 1984-85), was discussed in dictum by a New York Civil Court. *Barco Auto Leasing v. PSI Cosmetics*, 125 Misc. 2d 68, 70, 478 N.Y.S.2d 505, 508 (N.Y. Civ. Ct. 1984) (§ 198-a does not apply to "lemon leases," to automobiles purchased by "corporate entities," or to "transactions affected for business purposes"). New York also has a Lemon Law for used vehicles. N.Y. GEN. BUS. LAW § 198-b (McKinney Supp. 1984-85). A reasonable opportunity to repair is presumed after three attempts or fifteen days out of service. *Id.* § 198-b(2). Under this Lemon Law, the condition of the used vehicle when last returned to the dealer for repairs, and not the condition of the automobile at the time of the trial, determines whether failure to repair was a substantial impairment of the vehicle's value. *Bouchard v. Savoca*, ___ Misc. 2d ___, ___, 493 N.Y.S.2d 417, 418 (Albany Sup. Ct. 1985) (buyer granted summary judgment for purchase price and attorney fees for used automobile in "superior condition" by the time of the trial).

173. 15 U.S.C. § 2301(3) (1982).

174. OKLA. STAT. tit. 12A, § 2-103(1)(a) (1981).

175. Basanta, *The Illinois New Car Buyer Protection Act—An Analysis and Evaluation of the*

ected is limited under the Lemon Law not only to motor vehicles, which is the intent of the lemon laws, but also to specific classes of vehicles.¹⁷⁶ No specific vehicles would be excluded under the Magnuson-Moss Act or under the U.C.C.

The remedies for breach of warranty apply under the Lemon Law only to consumers holding an express warranty.¹⁷⁷ Neither the Magnuson-Moss Act¹⁷⁸ nor the U.C.C.¹⁷⁹ makes such a limitation. It also is arguable that rejection and revocation of acceptance may be invoked by a buyer not holding any warranty at all.¹⁸⁰

The time limit for notifying the manufacturer of the nonconformity is limited under the Lemon Law to one year from the original delivery of the automobile or to the warranty period if it is shorter.¹⁸¹ Thus, a consumer holding a warranty of longer than one year is penalized. A subsequent buyer to whom a warranty is transferred has even less than one year.¹⁸² The U.C.C. requires notification of nonconformity or revocation of acceptance "within a reasonable time" of discovery of the defect.¹⁸³ The consumer may submit proof under the U.C.C. that delay of more than one year was justified; there is apparently no leeway under the Lemon Law.

The Lemon Law expressly makes the manufacturer, its agent, or authorized dealer responsible for any remedies awarded.¹⁸⁴ The inclusion of the manufacturer in this provision appears to be a victory for the consumer who has traditionally confronted the problem of privity when suing a manufacturer for breach of warranty under the U.C.C., which uses the term "seller" instead of "manufacturer."¹⁸⁵ In fact, however, Oklahoma courts have already removed the privity barrier between the

Illinois Lemon Law, 1984 S. ILL. U.L.J. 1, 19-25, suggests that the broad definition of "consumer" in the Massachusetts and Connecticut Lemon Laws (to which the Oklahoma definition is almost identical) would extend coverage to a wide range of plaintiffs.

176. See *supra* text accompanying notes 154-60.

177. Okla. Lemon Law § 1(B).

178. 15 U.S.C. § 2310(d)(1) (1982).

179. Implied warranties are recognized under OKLA. STAT. tit. 12A, §§ 2-314 and 2-315 (1981).

180. See *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117, 1122 (8th Cir. 1982) (breach of warranty is a subset of nonconformity).

181. Okla. Lemon Law, § 1(B).

182. *Id.* The one-year limit for notification runs from the date of original delivery to the original consumer. *Id.*

183. OKLA. STAT. tit. 12A, §§ 2-607(3)(a), 2-608(2) (1981).

184. Okla. Lemon Law § 1(B), (C).

185. See, e.g., *Hardesty v. Andro Corp.-Webster Div.*, 555 P.2d 1030 (Okla. 1976) (owner-contractor of apartment complex not allowed to sue for breach of express or implied warranty by manufacturer of defective air conditioning chiller unit).

buyer and the manufacturer in cases involving economic loss.¹⁸⁶ By recognizing in the Lemon Law the manufacturer's liability for breach of warranty, the Oklahoma Legislature arguably is following the lead of the judiciary.

The Lemon Law does affirmatively state the consumer's right to have the obligations of the warranty met.¹⁸⁷ However, its use of the

186. The Oklahoma Supreme Court abrogated the privity requirement in economic loss cases based on breach of implied warranty in *Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849, 852 (1979). In *Old Albany*, the buyer, as the "ultimate purchaser . . . in the 'vertical' chain of distribution," was allowed to sue the manufacturer of defective carpet for breach of implied warranty. It is helpful to note, as the court did, that the issue in *Old Albany* was not judicial extension of horizontal privity under U.C.C. § 2-318 (Okla. Stat. tit. 12A, § 2-318 (1981)) as the buyer in *Hardesty* had claimed, 555 P.2d at 1034, but vertical privity. According to official U.C.C. comment 3 to § 2-318 (Okla. Stat. Ann. tit. 12A, § 2-318 official U.C.C. comment 3 (West 1963)), the Code adopted a "neutral" position with respect to vertical privity, thus permitting judicial and legislative expansion.

Decisions after *Old Albany* have held that vertical privity is no barrier to suit for breach of implied warranty, *see, e.g.*, *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458 (Okla. 1980) (buyer of used combine sued dealer and manufacturer, jointly termed "seller" by the court, for breach of implied warranty), and for breach of express warranty, *see, e.g.*, *Sullivan v. Wilco Seed Co.*, 691 P.2d 899, 901 (Okla. 1984) (buyer sued producer of defective peanut seed for breach of implied and express warranties); *Elden v. Simmons*, 631 P.2d 739, 742 (Okla. 1981) ("requirement of vertical privity as a prerequisite to suit on an implied or express warranty, both under the Uniform Commercial Code and outside the Code, is, given today's market structure, an antiquated notion."); *Osburn v. Bendix Home Systems, Inc.*, 613 P.2d 445, 449 n.9 (Okla. 1980) (buyer of defective motor home recovered from manufacturer for breach of manufacturer's express warranty "to the original retail purchaser that each new mobile home . . . shall be free from any substantial defects in material or workmanship").

It is arguable that no privity problem existed in *Osburn* since the buyer held an express warranty directly from the manufacturer. *Cf. Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1263 (10th Cir. 1984). In holding that *Old Albany* and *Elden* allowed the buyer in *Patty Precision* to sue the manufacturer of a defective tool machine on express and implied warranties, the court of appeals did not address the hypothetical case where a buyer sues a manufacturer who has neither made an express warranty nor authorized the distributor's express warranty. Such a case would seem to be based upon an implied warranty between manufacturer and buyer. It is unclear whether the court of appeals intended to contradict the *Elden* abrogation of the privity requirement for implied warranty actions.

Inasmuch as virtually all buyers of defective new automobiles receive express warranties conspicuously displaying the manufacturer's name, privity should not be in question. The buyer, relying on implied warranties (for example, covering parts excluded from the express warranty) should, however, be aware that the Tenth Circuit has not reconciled its comments in *Patty Precision* with earlier Oklahoma decisions abrogating the privity requirement for suits under implied warranties.

Revocation of acceptance actions applying Oklahoma law have involved buyers and sellers and have not raised the issue of whether lack of privity should bar an action for revocation. *See CMI Corp. v. Leemar Steel Co.*, 733 F.2d 1410, 1413 (10th Cir. 1984) (action by buyer against seller who also had manufactured the nonconforming oil pump counterweight inserts); *Atlan Indus., Inc. v. O.E.M., Inc.*, 555 F. Supp. 184, 186 (W.D. Okla. 1983) (buyer recovered from supplier of nonconforming reground plastic); *Oberg v. Phillips*, 615 P.2d 1022, 1023 (Okla. Ct. App. 1980) (buyer sued dealer who sold nonconforming automobile). Although the issue has not been heard in Oklahoma, by analogy to the warranty from which the revocation action will most often arise, *see supra* notes 83-84 and accompanying text, privity should not be a barrier to revocation.

187. Okla. Lemon Law, § 1(B).

terms "such repairs as are necessary"¹⁸⁸ and "by repairing or correcting"¹⁸⁹ may allow the manufacturer to avoid the complete replacement of a defective part which would be required under the contractual repair or replace warranty.

The statutory refund or replacement option for an automobile under a limited warranty certainly is a broader remedy than the U.C.C. remedy of refund only¹⁹⁰ or the Magnuson-Moss refund or replacement remedy available only under a full warranty.¹⁹¹ The Lemon Law refund is specifically defined to include, in addition to the price, taxes, license, registration fees and similar governmental fees¹⁹² which under the U.C.C. would have to be argued as incidental or consequential damages. Oklahoma courts may face certain difficulties in interpreting the seemingly generous remedies offered by the Lemon Law. First, it is not clear whether the manufacturer or the consumer makes the choice between replacement and refund. It has also been suggested that since the most obvious construction of the law would allow an offset to the manufacturer only when the buyer receives a refund, then the manufacturer will never offer a replacement, if the remedy is at the manufacturer's option.¹⁹³ The Minnesota Lemon Law, by contrast, specifies that the choice of remedy is "at the consumer's option."¹⁹⁴ Second, the Oklahoma Lemon Law imprecisely defines the replacement vehicle as "new."¹⁹⁵ Other states have narrowed the definition of a replacement with such terms as "acceptable to the consumer"¹⁹⁶ and "comparable."¹⁹⁷

When the lemon is returned to the manufacturer and the buyer receives a new replacement vehicle, the lemon becomes a defective used automobile. If the Oklahoma Lemon Law is to be a thoroughly effective consumer protection statute, the Law should require that subsequent buyers of used lemons be alerted that these vehicles are defective. The Oklahoma Law makes no such provision.¹⁹⁸

188. *Id.*

189. *Id.* § 1(C).

190. OKLA. STAT. tit. 12A, § 2-711(1) (1981).

191. 15 U.S.C. § 2304(a)(4) (1982).

192. Okla. Lemon Law § 1(C). A further useful clause provides that the award be made to the consumer and the lienholder according to their interests. *Id.*

193. Ervine, *Protecting New Car Purchasers: Recent United States and English Developments Compared*, 34 INT'L & COMP. L.Q. 342, 351 (1985).

194. MINN. STAT. ANN. § 325F.665(3)(a) (West Supp. 1985).

195. Okla. Lemon Law § 1(C).

196. CONN. GEN. STAT. ANN. § 42-179(d) (West Supp. 1985).

197. MINN. STAT. ANN. § 325F.665(3)(a) (West Supp. 1985). Rigg, *supra* note 152, at 1154-55, suggests that even these attempts at precision leave interpretation to the courts.

198. The Connecticut Lemon Law, for example, requires "clear and conspicuous written disclo-

The buyer's right to "continued use," which has been frequently disputed under the U.C.C., is acknowledged and defined under the Lemon Law.¹⁹⁹ Although it defines the time period for which the manufacturer may demand an offset,²⁰⁰ the Lemon Law stops short of setting a formula for calculating the offset.²⁰¹

Procedurally, the Lemon Law is simpler in that it avoids the question of whether the buyer had knowledge of the nonconformity and assurance that it would be cured before revoking. In other procedural aspects, the Lemon Law refund or replace remedy is both equal to the U.C.C. remedy of revocation and potentially more restrictive. The Lemon Law remedy is available where a nonconformity "substantially impairs the use and value of the motor vehicle to the consumer. . . ." ²⁰² The proof problems inherent in the U.C.C. issue of substantial impairment²⁰³ are, therefore, going to arise under the Lemon Law. Furthermore, the courts are likely to interpret the phrase "to the consumer" to require the more demanding subjective standard of the U.C.C. for proof of substantial impairment.²⁰⁴ Several commentators have suggested that a lemon law such as that adopted by Oklahoma which makes lack of substantial impairment an affirmative defense²⁰⁵ reduces the buyer's prima facie case to a showing of nonconformity after reasonable repair attempts.²⁰⁶ It is possible under the influence of revocation of acceptance cases that the courts will continue to require the buyer to prove substantial impairment.²⁰⁷

sure of the fact that such motor vehicle was so returned prior to resale." CONN. GEN. STAT. ANN. § 42-179(f) (West Supp. 1985).

199. Okla. Lemon Law § 1(C). "Continued use" is prior to "the first written report of the nonconformity . . . and during any subsequent period when the vehicle is not out of service by reason of repair." *Id.*

200. *Id.*

201. The Connecticut Lemon Law specifies the following formula: "reasonable allowance for use shall be that amount obtained by multiplying the total contract price of the vehicle by a fraction having as its denominator one hundred thousand and having as its numerator the number of miles that the vehicle traveled prior to the manufacturer's acceptance of its return." CONN. GEN. STAT. ANN. § 42-179(d) (West Supp. 1985). Other methods include a certain amount per mile and a percentage of the purchase price. Rigg, *supra* note 152, at 1156.

202. Okla. Lemon Law § 1(C).

203. See *supra* notes 60-80 and accompanying text.

204. See *supra* notes 64-71 and accompanying text.

205. Okla. Lemon Law, § 1(C).

206. McEttrick, *Defective Motor Vehicles: The Massachusetts Lemon Laws and Recent Used Car Cases Under Chapter 93A*, 70 MASS. L.R. 30, 34 (1985); Note, U. BRIDGEPORT L. REV., *supra* note 15, at 194; Comment, "Lemon Laws" in Ohio Turn Sour for the Dealer, 13 CAP. U.L. REV. 609, 639 (1984).

207. Facts relevant to proving substantial impairment by a subjective standard "are uniquely within the owner's knowledge." Note, WASH. U.L.Q., *supra* note 15, at 1155, n.164.

The Lemon Law is more restrictive in that its definition of "reasonable number of attempts,"²⁰⁸ while admittedly a more objective standard than that of "seasonable" cure under the U.C.C.,²⁰⁹ does not offer the margin for particular fact patterns that the U.C.C. does. Furthermore, the Oklahoma Lemon Law requires that the four repair attempts apply to the same nonconformity and the forty-five days out-of-service requirement is longer than the requirement in most other lemon laws.²¹⁰

IV. CONCLUSION

Fortunately, the Oklahoma Lemon Law does not preclude damages under a breach of warranty action or a refund after revocation of acceptance. For while attempting to guarantee a generous remedy to the automobile buyer, the Lemon Law as it now reads may deny to the consumer some of the flexibility inherent in the U.C.C. In *Oberg* the Oklahoma Court of Appeals has already shown itself to be sympathetic to the consumer who shows adequate proof under the U.C.C. Under the Lemon Law, the Oklahoma Court of Appeals might have ruled against *Oberg*. Because *Oberg's* automobile had numerous defects instead of a single nonconformity, the forty-five days out of service requirement would have applied. The opinion states that *Oberg's* automobile was out of service between thirty and forty-five days. The Court of Appeals would have been required to deny recovery under the Oklahoma Lemon Law to a consumer whose car had over twenty defects and had been out of service for repairs for at least thirty days.

Nonetheless, the Oklahoma Lemon Law does hold the potential of a replacement vehicle for the buyer holding a *limited* warranty, a remedy not available under the U.C.C. or the Magnuson—Moss Act. In addition, the requirement that consumers submit to arbitration may improve communication between buyers and manufacturers and help some buyers to avoid litigation.

Several amendments, suggested by recent changes in the Connecticut Lemon Law, would make the Oklahoma Lemon Law a strong consumer protection statute. The time limits should be changed to the period of the warranty or one year, whichever is *longer*, so that a transferee is protected for the full period of a warranty lasting longer than one year. The choice between a refund and a replacement vehicle should be

208. Okla. Lemon Law § 1(D).

209. See *supra* note 85 and accompanying text.

210. Okla. Lemon Law § 1(D); see Honigman, *supra* note 150, at 128.

at the consumer's option. The new vehicle should be comparable to the vehicle returned, and the standard for proving substantial impairment and for resolving any dispute about the quality of the replacement vehicle should be objective. The requirement of an objective standard could be achieved by removing the qualifier "to the consumer" after the phrase "substantially impairs the use and value of the motor vehicle" in subsection two (c). Consumers and manufacturers both will benefit from this less stringent objective standard of proof. The forty-five days out of service requirement should be reduced to thirty days. Finally, the Legislature should mandate certification of manufacturers' dispute resolution procedures in order to inspire consumer confidence in and manufacturer support of such programs.

Jeanne Rehberg

APPENDIX A
OKLAHOMA LEMON LAW
CONTRACTS—MOTOR VEHICLES—REPAIRS
UNDER WARRANTIES

CHAPTER 279⁹

S.B.No. 1

AN ACT RELATING TO CONTRACTS; DEFINING TERMS; REQUIRING MOTOR VEHICLE MANUFACTURER, AGENT OR DEALER TO MAKE REPAIRS UNDER WARRANTIES; REQUIRING MANUFACTURER TO REPLACE MOTOR VEHICLE OR REFUND FULL PURCHASE PRICE UNDER CERTAIN CIRCUMSTANCES; ALLOWING FOR CONSUMER USE WHEN DETERMINING AMOUNT; DEFINING REASONABLE ALLOWANCE FOR USE; PROVIDING FOR AFFIRMATIVE DEFENSES; ESTABLISHING PRESUMPTION OF CONFORMITY TO WARRANTIES; PROVIDING FOR NO LIMITATION ON OTHER RIGHTS OR REMEDIES AVAILABLE TO CONSUMER; REQUIRING DISPUTE SETTLEMENT PROCEDURES IN CERTAIN CIRCUMSTANCES; PROVIDING FOR CODIFICATION; AND PROVIDING AN EFFECTIVE DATE.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1.⁹ NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 901 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. As used in this act:

1. "Consumer" means the purchaser, other than for purposes of resale, of a motor vehicle, any person to whom such motor vehicle is transferred during the duration of an express warranty applicable to such motor vehicle, and any other person entitled by the terms of such warranty to enforce the obligations of the warranty; and

2. "Motor vehicle" means any motor-driven vehicle required to be registered under the Motor Vehicle License and Registration Act, Sections 22 et seq. of Title 47 of the Oklahoma Statutes, excluding vehicles above ten thousand (10,000) pounds gross vehicle weight and the living facilities of motor homes.

B. For the purposes of this act, if a new motor vehicle does not conform to all applicable express warranties, and the consumer reports

9. 15 O.S. Supp. 1985, § 901.

the nonconformity, directly in writing, to the manufacturer, its agent or its authorized dealer during the term of such express warranties or during the period of one (1) year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date, the manufacturer, its agent or its authorized dealer shall make such repairs as are necessary to conform the vehicle to such express warranties, notwithstanding the fact that such repairs are made after the expiration of such term or such one-year period.

C. If the manufacturer, or its agents or authorized dealers are unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which substantially impairs the use and value of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer shall replace the motor vehicle with a new motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the full purchase price including all taxes, license, registration fees and all similar governmental fees, excluding interest, less a reasonable allowance for the consumer's use of the vehicle. Refunds shall be made to the consumer, and lienholder if any, as their interests may appear. A reasonable allowance for use shall be that amount directly attributable to use by the consumer prior to his first written 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. It shall be an affirmative defense to any claim under this act (1) that an alleged nonconformity does not substantially impair such use and value or (2) that a nonconformity is the result of abuse, neglect or unauthorized modifications or alterations of a motor vehicle. In no event shall the presumption described in this subsection apply against a 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.

D. It shall be presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties, if (1) the same nonconformity has been subject to repair four or more times by the manufacturer or its agents or authorized dealers within the express warranty term or during the period of one (1) year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date, but such nonconformity continues to exist or (2) the vehicle is out of service by reason of repair for a cumulative total of forty-five (45) or more calendar days during such term or

during such period, whichever is the earlier date. The term of an express warranty, such one-year period and such forty-five-day period shall be extended by any period of time during which repair services are not available to the consumer because of a war, invasion, strike or fire, flood or other natural disaster.

E. Nothing in this act shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law.

F. If a manufacturer has established an informal dispute settlement procedure which complies in all respects with the provisions of Title 16, Code of Federal Regulations, Part 703, as from time to time amended, the provisions of subsection C of this section concerning refunds or replacement shall not apply to any consumer who has not first resorted to such procedure.

SECTION 2.¹⁰ This act shall become effective November 1, 1985.

Approved July 22, 1985.

10. 15 O.S. Supp. 1985, § 901 note.

APPENDIX B

STATE LEMON LAWS

Alaska	ALASKA STAT. §§ 45.45.300 to .360 (Supp. 1984)
Arizona	ARIZ. REV. STAT. ANN. §§ 44-1261 to -1265 (Supp. 1984-85)
California	CAL. CIV. CODE § 1793.2 (West 1985)
Colorado	COLO. REV. STAT. §§ 42-12-101 to -107 (1984)
Connecticut	CONN. GEN. STAT. ANN. §§ 42-179 to -184 (West Supp. 1985)
Delaware	DEL. CODE ANN. tit. 6, §§ 5001-5009 (Supp. 1984)
Florida	FLA. STAT. ANN. §§ 681.10-.108 (West Supp. 1985)
Hawaii	HAWAII REV. STAT. § 437-3.5 (Supp. 1984)
Illinois	ILL. ANN. STAT. ch. 121½, §§ 1201-1208 (Smith-Hurd Supp. 1985)
Iowa	IOWA CODE ANN. § 322E.1 (West Supp. 1985)
Kansas	Act of April 23, 1985, ch. 39, 1985 Kan. Sess. Laws 257
Louisiana	LA. REV. STAT. ANN. §§ 51.1941-1946 (West Supp. 1985)
Maine	ME. REV. STAT. ANN. tit. 10, §§ 1161-1165 (Supp. 1984-85)
Maryland	MD. COM. LAW CODE ANN. § 14-1501 (Supp. 1985) (amended 1985)
Massachusetts	MASS. GEN. LAWS ANN. ch. 90, § 7N½ (West Supp. 1985)
Minnesota	MINN. STAT. ANN. § 325F.665 (West Supp. 1985)
Mississippi	MISS. CODE ANN. §§ 63-17-151 to 63-17-165 (Supp. 1985)
Missouri	MO. ANN. STAT. §§ 407.560 to .579 (Vernon Supp. 1985)
Montana	MONT. CODE ANN. §§ 61-4-501 to -507 (1983)
Nebraska	NEB. REV. STAT. §§ 60-2701 to -2709 (1984)
Nevada	NEV. REV. STAT. §§ 598.751-.786 (1983)
New Hampshire	N.H. REV. STAT. ANN. § 357-D (1984)
New Jersey	N.J. STAT. ANN. §§ 56.12-19 to .12-28 (West Supp. 1985)
New York	N.Y. GEN. BUS. LAW § 198-a (McKinney Supp. 1984-85)
Oregon	OR. REV. STAT. §§ 646.315-.375 (1983)
Pennsylvania	PA. STAT. ANN. tit. 73, §§ 1951-1963 (Purdon Supp. 1985)
Rhode Island	R.I. GEN. LAWS §§ 31-5.2-1 to 31-5.2-13 (Supp. 1984)
Tennessee	TENN. CODE ANN. §§ 55-24-101 to -24-109 (Supp. 1984)
Texas	TEX. REV. CIV. STAT. ANN. art. 4413(36) § 6.07 (Vernon Supp. 1985) (held constitutional in <i>Chrysler Corp. v. Tex. Motor Vehicle Comm'n</i> , 755 F.2d 1192, <i>reh'g denied</i> , 761 F.2d 695 (5th Cir. 1985))
Vermont	VT. STAT. ANN. tit. 9, §§ 4170-4181 (1984)
Virginia	VA. CODE §§ 59.1-207.7 to -207.14 (Supp. 1985)
Washington	WASH. REV. CODE ANN. §§ 19.118.010-.118.070 (Supp. 1985-86)
West Virginia	W. VA. CODE §§ 46A-6A-1 to -6A-9 (Supp. 1985)
Wisconsin	WIS. STAT. ANN. § 218.015 (West Supp. 1985)
Wyoming	WYO. STAT. 1 § 40-17-101 (Supp. 1985)

Two other states have addressed aspects of the lemon problem without enacting the typical refund or replace provision:

- Kentucky KY. REV. STAT. §§ 367.860-870 (Supp. 1984) (provides dispute resolution system)
- North Carolina N.C. GEN. STAT. § 25-2-103(1)(d) (Supp. 1983) (ends problem of privity under the U.C.C. by including "manufacturer of self-propelled motor vehicles" in definition of "seller")