

Spring 1987

Illinois Lemon Car Buyer's Options in a Breach of Warranty Action, 20 J. Marshall L. Rev. 483 (1987)

Lisa K. Jorgenson

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Consumer Protection Law Commons](#), and the [Transportation Law Commons](#)

Recommended Citation

Lisa K. Jorgenson, Illinois Lemon Car Buyer's Options in a Breach of Warranty Action, 20 J. Marshall L. Rev. 483 (1987)

<https://repository.law.uic.edu/lawreview/vol20/iss3/5>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

ILLINOIS LEMON CAR BUYER'S OPTIONS IN A BREACH OF WARRANTY ACTION

I. INTRODUCTION

In September, 1978, Michael and Karen Blankenship bought a new Ford Bronco which carried a standard 12-month/12,000 mile warranty.¹ From September, 1978, through January, 1979, the Ford Bronco was in the dealer's possession for repairs eleven different times.² The drive shaft had fallen out or broken seven different times.³ The Bronco had a clunking noise, vibration problems and broken U-joints.⁴ It leaked oil, needed clutch adjustments and a new alternator belt, required tightening of a front shock absorber, had a bad brakeline, differential problems and a broken radio.⁵ All of these problems taken individually could be effectively cured, but when considered in total, illustrate one of the most serious consumer problems today: the lemon.⁶

For most Americans, the purchase of an automobile is one of the most significant purchases a person makes.⁷ The standard warranties which most automobile manufacturers offer may not provide adequate remedies when dealers are unable to successfully repair the multiple defects of a lemon.⁸ Consequently, there is a great need

1. *Blankenship v. Northtown Ford, Inc.*, 95 Ill. App. 3d 303, 420 N.E.2d 167 (1981). The Blankenships bought the Ford Bronco from defendant Northtown Ford (dealer) which was manufactured by defendant Ford Motor Corporation (manufacturer). *Id.*

2. *Id.* At trial, Michael testified from his own expertise corroborated by work orders as to the defects of the Ford Bronco. *Id.* The manufacturer's warranty stated that it would "repair or adjust any parts . . . found to be defective in factory materials or workmanship." *Id.* For analysis of suit against manufacturer, see *infra* text accompanying notes 93-97.

3. *Blankenship*, 95 Ill. App. 3d at 304, 420 N.E.2d at 168-69.

4. *Id.* The dealer had been made aware of the clunking noise when the Blankenships first took possession in September, 1978 which the dealer said he would check. *Id.* The problem was never cured. *Id.*

5. *Id.*

6. A "lemon" is defined as "something . . . that proves to be unsatisfactory or undesirable: DUD, FAILURE. . . ." *Johnson v. John Deere Co.*, 306 N.W.2d 231, 233 n.1 (S.D. 1981), (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1293 (1971)).

7. *Federal Trade Commission, Report on Automobile Warranties*, 3 TRADE REG. REP. (CCH) § 10,377 (1971). For millions of people, the automobile is no longer a luxury. *Id.* In most American households, the funds expended for an automobile are only surpassed by the expenditure for a home. *Id.*

8. R. BILLINGS, *HANDLING AUTOMOBILE WARRANTY AND REPOSSESSION CASES*, § 6.8 at 141 (1984) [hereinafter R. BILLINGS]. Most automobile warranties provide for an exclusive express warranty to repair or replace defective parts for a specified pe-

to protect the consumer from a manufacturer's breach of warranty.⁹

In Illinois, once the automobile warranty provisions are breached, the new car buyer has three separate bases of relief. First, the buyer may bring suit under the Uniform Commercial Code (the "Code"), as adopted in Illinois.¹⁰ The Code provides for the remedies of rejection,¹¹ revocation of acceptance,¹² or damages.¹³ Second,

riod of time. *Id.* Typically, manufacturers will exclude all implied warranties, incidental and consequential damages. *Id.* Too often, however, the exclusive remedies are not met and the cost of litigation is so high that the consumer suffers the loss. Pertschuk, *Consumer Automobile Problems*, 11 U.C.C. L.J. 145 (1978).

9. *Federal Trade Commission, Report on Automobile Warranties*, 3 TRADE REG. REP. (CCH) § 10,377 (1971). Studies have shown that the automobile industry has failed to meet its obligations under its own warranties to provide quality, defect-free cars. *Id.* The public interest requires "a meaningful, mandatory, statutory warranty" instead of the manufacturer's voluntary warranties that prove to be meaningless. *Id.*

10. ILL. REV. STAT. ch. 26, § 2-102 (1979).

11. ILL. REV. STAT. ch. 26, § 2-601 (1979). The text of section 2-601 reads in part:

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. . . .

Id. The buyer has the right to reject an automobile if it fails to conform "in any respect," no matter how minor or substantial the defect. *Id.* This right is called the perfect tender rule, but rejections may not necessarily terminate the contract for sale. *Ramirez v. Autosport*, 88 N.J. 277, 440 A.2d 1345, (1982). The buyer only has the right to reject if he has not yet accepted. *Id.*

The dealer must be given notice under section 2-602 of the Code, and given a reasonable opportunity to cure the defects of the automobile under section 2-508. *Id.* at 1348. If the dealer fails to fix the automobile within a reasonable time, the buyer may permanently reject it and cancel the contract. *Id.* at 1349.

12. ILL. REV. STAT. ch. 26, § 2-608 (1979). The text of section 2-608 reads:

(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 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.

Id. Revocation of acceptance, unlike rejection, can only be effected if the defect in the automobile is substantial. *Id.* The underlying reason that a substantial defect must exist is that acceptance has occurred and time has passed which makes it more likely the buyer caused the defect rather than the manufacturer. R. BILLINGS, *supra* note 8, § 5.19 at 104. See *Rozmus v. Thompson's Lincoln-Mercury Co.*, 209 Pa. Super. 120, 224 A.2d 782 (1966) (buyer had accepted the car when he drove it from the showroom to his home, therefore, he had no right of rejection and no grounds for revocation of acceptance because defects were not substantial).

13. ILL. REV. STAT. ch. 26, § 2-714 (1979). The text of section 2-714 reads:

(1) Where the buyer has accepted goods and given notification (subsection (3))

the buyer may elect to bring suit under the Magnuson-Moss—Federal Trade Commission Act of 1975 (the "Act").¹⁴ Third, the buyer may pursue an action under the Illinois New-Car Buyer Protection Act of 1983 (the "Lemon Law").¹⁵

The purpose of this comment is to examine the three alternatives available to the Illinois buyer of a "lemon." More specifically, each alternative will be compared in order to illustrate the respective advantages and disadvantages of each. Proposed changes will be recommended shifting the balance in favor of the consumer and providing greater consumer protection in automobile warranty cases.¹⁶

II. NEW CAR BUYER'S ACTION FOR BREACH OF WARRANTY UNDER THE CODE

Illinois has adopted the Uniform Commercial Code, Article 2 of which codifies the common law of contracts while protecting the basis of the bargain in accordance with the intent of the parties.¹⁷ The Code regulates "transactions in goods"¹⁸ with the underlying re-

of section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is 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.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

Id. Incidental damages would include such expenses as towing charges, storage charges if dealer refuses to take automobile back, insurance charges, rental charges for a substitute car, and interest charges. R. BILLINGS, *supra* note 8, § 5.49 at 129. Consequential damages include such expenses as lost wages and loss of the use of the car. *Id.*

14. 15 U.S.C. §§ 2301-2312 (1982).

15. ILL. REV. STAT. ch. 121 ½, §§ 1202-1208 (1983).

16. The buyer is at a disadvantage when the only negotiable item is the price. *Federal Trade Commission, Report on Automobile Warranties*, 3 TRADE REG. REP. (CCH) § 10,377 (1971). A sales contract of this type is really an adhesion contract in which the buyer is bound to the unilateral imposition of the terms and conditions of the seller. *Id.*

17. Schroeder, *Private Actions under the Magnuson-Moss Warranty Act*, 66 CALIF. L. REV. 1, 9 (1978).

18. ILL. REV. STAT. ch. 26, § 2-102 (1979). The Code provisions are sometimes applied to non-sale-of goods cases such as leases. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE*, § 9-6 at 346 (2d ed. 1980) [hereinafter J. WHITE & R. SUMMERS]. Several courts have applied section 2-314 of the Code by analogy and found implied warranties arising on leases. *See generally* Quality Acceptance Corp. v. Million & Albers, Inc., 367 F. Supp. 771 (D. Wyo. 1973) (implied warranty applied to lease of business machines where lessee was given option to purchase); KLPR TV, Inc. v. Visual Electronics Corp., 327 F. Supp. 315 (W.D. Ark. 1971) *aff'd in part, rev'd in part*, 465 F.2d 1382 (8th Cir. 1972) (implied warranty arose out of lease of broadcasting equipment from television equipment manufacturer); *Murphy v. McNamara*, 27 UCC Rep. Serv. 911 (Conn. 1979) (lease of a home appliance falls under the scope of Article 2 by analogy); *Redfern Meats, Inc. v. Hertz*

quirements of good faith and fair dealing.¹⁹ The Code provides for protection against a breach of warranty in certain transactions, one of which is the dealer's or manufacturer's breach of warranty of a new car.

In creating warranties, the dealer or manufacturer guarantees to the buyer that the car will be free of certain defects.²⁰ A manufacturer can create an oral or written express warranty by an affirmation of fact, promise or description of the car, or sample or model of the car.²¹ Oral or written express warranties become part of the con-

Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975) (implied warranty applied to lease of refrigerated tractor-trailer); *Stang v. Hertz*, 83 N.M. 217, 490 P.2d 475, (N.M. App. 1971), *aff'd as to this point*, 83 N.M. 730, 497 P.2d 732 (1972) (lease of a rental car falls under the scope of Article 2 of the UCC by analogy). Not all courts are willing to extend Article 2 by analogy to leases. *J. WHITE & R. SUMMMERS, supra* note 18, § 9-6 at 346. Illinois courts have not ruled on this subject but could apply warranties to leases of automobiles by analogy. Application of the Code to leases will provide the same remedies to the lessee as a buyer will receive.

Under the Code, "goods" 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." ILL. REV. STAT. ch. 26, § 2-105 (1979). More specifically, "consumer goods" are those that are "used or bought for use primarily for personal, family or household purposes." *Id.* § 9-109. An item may be equipment to a businessperson but a consumer good to a member of a household. *Schroeder, supra* note 17, at 4. Consumer goods protected by the Code are classified according to the particular use of the goods. *Id.*

19. ILL. REV. STAT. ch. 26, § 1-203 (1979). The text of section 1-203 reads: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." *Id.* "Good faith" under the Code means "honesty in fact in the conduct or transaction occurred." *Id.* § 1-201(19). Merchants, such as automobile dealers and manufacturers, however, are held to a higher standard of good faith under the Code. *Id.* § 2-103(1)(b). In the case of a merchant, "good faith" means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.*

20. *R. BILLINGS, supra* note 8, § 6.1 at 136. Dealers and manufacturers use warranties as a sales tool to create confidence and trust in the buyer that the car purchased will be free of defects. *Id.*

21. ILL. REV. STAT. ch. 26, § 2-313 (1979). The text of section 2-313 reads:

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

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

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

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

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Id. Descriptions or samples of the automobile that the dealer gives to the buyer using a manufacturer's standard illustrated booklet have been held to create an express warranty under section 2-313 of the Code. *See Antonucci v. Stevens Dodge, Inc.*, 73

tract if they are part of the basis of the bargain.²²

A merchant seller with respect to "goods of the kind" creates an implied warranty of merchantability.²³ To be merchantable, goods

Misc. 2d 173, 340 N.Y.S. 2d 979 (1973). On the other hand, a dealer's salesman's statements telling a customer that this is the best car on the market for dependability may only be considered "puffing" or simply an opinion and not an express warranty. J. WHITE & R. SUMMERS, *supra* note 18, § 9-3 at 329. It is difficult to distinguish puffing from warranties in some cases, but the more specific the statement, either oral or written, the more likely a court will find a warranty. *Id.* Written statements as part of the contract will more likely be considered a warranty than a written statement in an advertisement. R. BILLINGS, *supra* note 8, § 6.5 at 139. Although advertising is not specifically mentioned in the Code, warranties have been found to be created through mass advertising if the buyer can prove that his choice to purchase a certain automobile was based upon the advertisement. *Id.* See generally *Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396 (Iowa 1974) (newspaper advertisement of automobile was properly admitted into evidence to prove warranties were created); *Scheuler v. Aamco Transmission, Inc.*, 1 Kan. App. 2d 525, 571 P.2d 48 (1977) (advertising of transmissions at a franchisees location and nationally were made a basis of the formation of the express warranty); *Neel v. Ford Motor Co.*, 49 Pa.D. & C.2d 243, 7 UCC Rep. Serv. 1311 (1970) (manufacturers' advertisements of pickup trucks may be found to constitute express warranties). The privity of contract barrier may be broken between the buyer and the manufacturer through warranties created by advertising. *Id.* For a discussion of privity, see *infra* notes 39-40.

22. ILL. REV. STAT. ch. 26, § 2-313 (1979). The meaning of the "basis of the bargain" is unclear. J. WHITE & R. SUMMERS, *supra* note 18, § 9-4 at 332. Under the earlier Uniform Sales Act, the buyer had to prove that he relied on the seller's statements in order for those statements to become part of the basis of the bargain. *Id.* Under the Code, however, reliance was explicitly omitted as a requirement. *Id.* Comment 3 to section 2-313 of the UCC explains:

In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.

ILL. REV. STAT. ch. 26, § 2-313 (1979). A buyer should only need to prove that the statements made by the dealer induced the buyer to purchase the car without having to prove that he relied on those statements. *Id.* However, at least one court in Illinois had decided that a showing of reliance is required to prove a "basis of the bargain." See *Stam v. Wilder Travel Trailers*, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976) (the court followed the requirement of the Uniform Sales Act and held that plaintiff did not prove reliance upon seller's statements made in an advertisement announcing a sale of 1970 travel trailers and that statement was not made a basis of the bargain when plaintiff actually purchased a 1969 model). Courts are split on whether the buyer had to rely on written statements or a seller's oral statements in order for the "affirmation of fact or promise" to become part of the "basis of the bargain." J. WHITE & R. SUMMERS, *supra* note 18, § 9-4 at 333. Compare *Cagney v. Cohn*, 13 UCC Rep. Serv. 998 (D.C. Super. Ct. 1973) (express warranty created for sale of motorcycle even though buyer did not rely on seller's representations) and *Interco, Inc. v. Randustrial Corp.*, 533 S.W.2d 257 (Mo. App. 1976) (express warranty created for sale of floor covering when buyer relied on statements made in seller's brochure) with *Hagenbuch v. Snap-On Tools, Corp.*, 339 F. Supp. 676 (D.N.H. 1972) (buyer did not rely on representations made in seller's brochure, thus, no express warranty created).

23. ILL. REV. STAT. ch. 26, § 2-314 (1979). The text of section 2-314 reads:

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

(2) Goods to be merchantable must be at least such as

must be "fit for the ordinary purposes for which such goods are used."²⁴ Thus, for a car to be merchantable, it must provide basic transportation with reasonable comfort and safety.²⁵

Once a warranty is created under the Code, the question arises whether it can be disclaimed.²⁶ Since express warranties are voluntarily given and considered part of the basis of the bargain, it is questionable whether an express warranty can ever be disclaimed.²⁷ Implied warranties of merchantability and fitness for a particular purpose, however, are often disclaimed.²⁸

(a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Id. An implied warranty of "fitness for a particular purpose" may also arise if the buyer expresses to the dealer some particular need for the automobile and expects the dealer to fulfill the need. *Id.* § 2-315. The text of section 2-315 reads:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Id. An example of fitness for a particular purpose is where the buyer conveys to the dealer the need for a pickup truck to travel not only ordinary paved roads but to constantly travel difficult terrain and to frequently haul heavy loads for long distances. The buyer must then rely on the seller's skill or judgment in selecting the appropriate truck. In doing so, the dealer has created an implied warranty of fitness for a particular purpose.

24. *Id.* § 2-314.

25. R. BILLINGS, *supra* note 8, § 6.2 at 136.

26. J. WHITE & R. SUMMERS, *supra* note 18, § 12-2 at 429.

27. *Id.* "The very idea that a seller may disclaim an express warranty may seem illogical or dishonest." *Id.* The text of section 2-316(1) of the Code on disclaimers of express warranties reads:

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

ILL. REV. STAT. ch. 26, § 2-316 (1979). Words disclaiming a statement which create an express warranty should be given no effect since both are "inherently inconsistent." J. WHITE & R. SUMMERS, *supra* note 18, § 12-2 at 430. See *Stream v. Sportscar Salon, Ltd.*, 91 Misc.2d 99, 397 N.Y.S.2d 677 (1977) (court held disclaimer of express warranties were inoperative because dealer created express warranties under a "One Year Mechanical Guarantee").

28. J. WHITE & R. SUMMERS, *supra* note 18, § 12-5 at 437. Dealers and manufacturers attempt to disclaim both implied warranties of merchantability and fitness for a particular purpose. *Id.* Any attempt to exclude the implied warranty of merchantability, whether written or oral, must mention the word "merchantability." ILL. REV. STAT. ch. 26, § 2-316(2) (1979). If in writing, any disclaimer must be conspicuous. *Id.* The warranty of fitness for a particular purpose can only be made in writing

In the case of the automobile warranties, both dealers and manufacturers attempt to disclaim implied warranties.²⁹ Typically, the automobile manufacturer limits the buyer's sole remedy for breach of warranty to the repair or the replacement of defective parts.³⁰ All other express or implied warranties are disclaimed, including incidental and consequential damages.³¹ If the dealer is unable to repair or replace the defective parts, the sole remedy provided to the buyer of repair or replacement "fails of its essential purpose" under the code.³² If the buyer can prove that the remedy "fails of its essential purpose," the buyer may disregard the terms of the sales contract and is allowed alternative remedies provided for under the Code.³³ The buyer is then entitled to revoke his acceptance³⁴ of the car or within a reasonable time after delivery, reject the car.³⁵ The buyer may also sue for damages after he has accepted the non-conforming

but may use general language. *Id.*

29. J. WHITE & R. SUMMERS, *supra* note 18, § 12-5 at 437.

30. R. BILLINGS, *supra* note 8, § 6.8 at 141. Under section 2-719(1)(b) the warranty will fail as the sole remedy if the language of the warranty does not state that the remedy is exclusive. ILL. REV. STAT. ch. 26, § 2-719 (1979). See, e.g., *Williams v. Hyatt Chrysler-Plymouth, Inc.*, 48 N.C. App. 308, 269 S.E.2d 184, *petition denied* 301 N.C. 406, 273 S.E.2d 451 (1980) (limited express warranty to repair or replace defective parts was not made exclusive remedy, thus, there is a presumption that buyer may avail himself of all remedies under the Code).

31. R. BILLINGS, *supra* note 8, § 6.8 at 141. The Uniform Commercial Code will generally allow the automobile manufacturer to limit the buyer's remedies including recovery of consequential damages. ILL. REV. STAT. ch. 26, § 2-719 (1979). The text of section 2-719 reads:

(1) Subject to the provisions of subsections (2) and (3) of this Section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not.

Id. In cases arising out of personal injuries, courts have held that a dealer's or manufacturer's limitation of consequential damages is unconscionable. See *Matthews v. Ford Motor Co.*, 479 F.2d 399 (4th Cir. 1973) (exclusive remedy of repair or replacement did not bar plaintiff from recovering consequential damages when plaintiff was injured due to breach of warranty); *Walsh v. Ford Motor Co.*, 59 Misc. 2d 241, 298 N.Y.S.2d 538 (1969) (limitation of consequential damages for personal injuries is *prima facie* unconscionable for breach of warranty).

32. R. BILLINGS, *supra* note 8, § 6.27 at 155.

33. ILL. REV. STAT. ch. 26, § 2-719(2) (1979). See *supra* note 31 for Code provisions on consequential damages.

34. For a discussion of damages as remedy, see *supra* note 13.

35. For a discussion of revocation of acceptance, see *supra* note 12.

car.³⁶

Once the dealer or manufacturer breaches an express warranty, the buyer can sue whichever party gave the warranty directly to the buyer.³⁷ In the case of a breach of an implied warranty, however, a buyer has historically been able to sue only the dealer, absent a showing of personal injury or property damage.³⁸ This is due to lack of privity³⁹ between the buyer and the manufacturer.⁴⁰ The Code, in cases of direct economic loss,⁴¹ does not authorize or bar an action against a remote manufacturer, but rather, relies on common law principles.⁴² In Illinois, however, where a Magnuson-Moss written warranty has been given, the non-privity consumer is allowed to maintain an action on an implied warranty against the manufacturer.⁴³

III. NEW CAR BUYER'S ACTION FOR BREACH OF WARRANTY UNDER THE FEDERAL MAGNUSON-MOSS ACT

The Magnuson-Moss Act was enacted to encourage manufacturers of consumer goods to provide warranties and prevent warranty deception.⁴⁴ Congress found most consumer warranties were unfair and hard to understand.⁴⁵ Additionally, warrantors failed to include

36. For a discussion of the Code provision on rejection, see *supra* note 11. Also for a discussion on rejection during inspection period, see *infra* note 100.

37. J. WHITE & R. SUMMERS, *supra* note 18, § 11-7 at 410. Typically, in automobile cases, the dealer only passes on to the buyer the manufacturer's exclusive express warranty of repair or replacement. R. BILLINGS, *supra* note 8, § 5.45 at 126.

38. J. WHITE & R. SUMMERS, *supra* note 18, § 11-5 at 407.

39. Parties are "in privity" if they have contracted with each other. *Id.* § 11-2 at 399.

40. *Id.* § 11-5 at 407. The "vertical" non-privity buyer dealt with here is one who did not buy directly from the manufacturer, but instead, bought from a dealer in the distributive chain. *Id.* at 399. The doctrine of privity which requires contractual privity before a suit may be brought, is slowly being abolished. *Id.* § 11-7 at 411. The case law today is primarily in conflict over this doctrine where a buyer seeks recompense for direct economic loss. *Id.*

41. *Id.* § 11-5 at 407. Direct economic loss is considered "damages flowing directly from insufficient product value." *Id.* at 406. Most courts find that direct economic loss is the loss of bargain damages. *Id.* Some courts will determine this loss as the cost of repair or the cost of replacement. *Id.*

42. *Id.* § 11-5 at 407.

43. For an analysis of Illinois case law, see *infra* notes 108 and 112 and accompanying text.

44. 15 U.S.C. § 2303 (1982). The Act is Congress' first attempt to deal on a federal scale with consumer product warranty problems. Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case*, 44 *FORDHAM L. REV.* 273 (1975). A seller is not required to provide warranties for consumer products, but if given, the warranties must comply with the provisions in the Act. Schroeder, *supra* note 17, at 2.

45. Strasser, *Magnuson-Moss Warranty Act: An Overview and Comparison with UCC Coverage, Disclaimer, and Remedies in Consumer Warranties*, 27 *MERCER L. REV.* 1111 (1976). Congress' solution to these problems was to set up minimum federal standards, and full disclosure requirements. Schroeder, *supra* note 17, at 2.

implied warranties while refusing to honor the few warranties given.⁴⁶ The Act augmented state warranty law and was intended to discourage sellers from giving warranties and then taking them away.⁴⁷ The Act was a Congressional attempt to make consumer warranties easy to understand and provide specific and enforceable remedies.⁴⁸

The warranty provisions of the Act allow a consumer⁴⁹ to sue the warrantor⁵⁰ for breach of express and implied warranties.⁵¹ The Act covers consumer goods as long as the "normal" use of the goods is for a consumer purpose.⁵² According to the Act, the consumer may sue the seller who is a "supplier, warrantor, or service contractor" for breach of a written warranty, implied warranty, or service contract.⁵³ Subsequent purchasers also have the ability to sue if the product is still covered under the written or implied warranty.⁵⁴

The Act does not require that any written warranties be given.⁵⁵ If written warranties are given, however, they must be designated as either "full" or "limited" warranties.⁵⁶ Federal guidelines determine

For a discussion of federal standards, see *infra* note 57.

46. Denicola, *supra* note 44.

47. Basanta, *The Illinois New Car Buyer Protection Act—An Analysis and Evaluation of the Illinois Lemon Law*, 1984 S. ILL. U.L.J. 1.

48. Strasser, *supra* note 45, at 14. Congress saw a need for greater consumer product reliability. *Id.* But in today's market, a manufacturer has to cut costs and corners in every product just to be able to compete including disclaiming all product warranties. *Id.* The Act is designed to reward those manufacturers that provide comprehensive warranties by giving the manufacturer a competitive advantage. *Id.* A sales advantage should be created when the manufacturer offers a "full" warranty rather than a "limited" warranty. *Id.* This objective, however, can only be accomplished if the consumers understand the difference in warranties given and make choices based on those warranties. *Id.*

49. The term "consumer" refers to any buyer of a consumer product who may enforce the terms of the warranty against the warrantor. 15 U.S.C. § 2301(3) (1982).

50. The term "warrantor" refers to any supplier or other person who provides a written warranty or who "is or may be obligated under an implied warranty." 15 U.S.C. § 2301(5) (1982).

51. 15 U.S.C. § 2310(d)(1) (1982). A consumer may bring suit against a "supplier, warrantor, or service contractor" for breach of an express written warranty, implied warranty or service contract. *Id.* The buyer may sue for "damages and other legal and equitable relief." *Id.*

52. Schroeder, *supra* note 17, at 4. For a difference in classification of consumer goods between the Act and the Code, see *infra* notes 74-75 and 129-131 and accompanying text.

53. 15 U.S.C. 2310(d)(1) (1982).

54. 15 U.S.C. 2301(3) (1982).

55. Schroeder, *supra* note 17, at 2.

56. 15 U.S.C. § 2303 (1982). The text of § 2303(a) reads:

(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "full (statement of duration) warranty."

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "limited" warranty.

Id.

whether a warranty is "full" or "limited."⁵⁷ Once a written warranty has been given, whether "full" or "limited," the dealer or manufacturer cannot modify or disclaim any implied warranties arising under state law.⁵⁸ If the warranty is "limited," however, the seller may only limit the duration of the implied warranty to that of the express written warranty provided that the limitation is reasonable, conscionable, and conspicuously displayed.⁵⁹

Under the Magnuson-Moss Act, the consumer is entitled to the repair, replacement or refund of the defective part, at the warrantor's election.⁶⁰ If the product cannot be repaired after a reasonable number of attempts⁶¹ the consumer may elect either a replacement or a refund.⁶² If however, the warrantor/manufacture has estab-

57. 15 U.S.C. § 2304 (1982). To meet the Federal minimum standards for a "full" warranty a warrantor (1) must "remedy defective products without charge," (2) may not disclaim or limit any implied warranties arising under state law; and (3) must make conspicuous any disclaimers of consequential damages. *Id.* Also, if the warrantor has failed to remedy defects in the product warranted after a "reasonable number of attempts," the warrantor must allow the consumer to choose either remedy of refund of the purchase price or replacement of the complete unit. 15 U.S.C. § 2304(a)(4) (1982). For remedies under the Act, see *infra* notes 60-62 and accompanying text.

58. 15 U.S.C. § 2304(a)(2)(1982).

59. 15 U.S.C. § 2308(b)(1982).

60. 15 U.S.C. § 2301(10) (1982). The warrantor may not elect refund unless the repair or replacement of the product cannot be made or the consumer agrees to the refund.

61. The Act does not define what constitutes a reasonable number of attempts to remedy a particular type of defect. For a discussion of subjective standards, see *infra* text accompanying notes 99-103.

62. 15 U.S.C. § 2304(a)(4). The Illinois Supreme Court, however, has decided that a buyer cannot obtain an injunction to compel the manufacturer to replace the car after several failed attempts to repair, without first proving that the remedy at law is inadequate and that the buyer will suffer irreparable harm if an injunction is not granted. *Sadat v. American Motors Corp.*, 104 Ill. 2d 105, 470 N.E.2d 997 (1984). The supreme court held that because the Act did not explicitly grant consumers injunctive rights, common law equity principles must be established before the consumer will be granted the injunction. *Id.* at 116, 470 N.E.2d at 1000. In order for a buyer to prove the preconditions for equitable relief, he would "have to show that the product was unique or otherwise unobtainable, an incredible burden in a nation where most products are mass produced." Note, *Sadat v. American Motors Corporation: Limiting Consumer Remedies Under Magnuson-Moss and the New Car Buyer Protection Act*, 19 J. MARSHALL L. REV. 163, 169 (1985) The Illinois Supreme Court has effectively eliminated a remedy specifically provided for under the Act. *Id.* at 170.

The decision in *Sadat* will also have a tremendous impact on the buyer of a new car bringing suit under the Illinois Lemon Law. *Id.* at 176. The Illinois statute, with the same purpose of replacing a defective car as in the Act, must be interpreted in the same manner as the Act. *Id.* The Illinois new car buyer is now in the same position suing under the Lemon Law as the buyer suing under the Act and will be unable to obtain an injunction to force the dealer or manufacturer to replace the defective automobile. *Id.* Consequently, the Illinois Supreme Court has eliminated a remedy which the Illinois legislature intended in the Lemon Law to protect consumers not protected under the Act. For remedies under the Illinois Lemon Law, see *infra* text accompanying note 78.

lished an informal dispute resolution procedure⁶³ which meets minimum requirements set forth by the Federal Trade Commission (FTC), the buyer must submit to the procedure before bringing a civil action.⁶⁴ The successful buyer in a civil suit may be awarded litigation costs and expenses including attorneys' fees, if appropriate.⁶⁵

Under the Act, the buyer may sue only a warrantor "actually making a written affirmation of fact, promise or undertaking."⁶⁶ The buyer may sue the manufacturer for breach of express written warranties, and also sue the dealer for breach of written warranties created by a service contract.⁶⁷ Under the Act, the buyer can also sue both the manufacturer and dealer for breach of the implied warranties arising under the Code.⁶⁸

IV. NEW CAR BUYER'S ACTION FOR BREACH OF WARRANTY UNDER THE ILLINOIS LEMON LAW

The Illinois legislature believed that the car buyer was at a disadvantage when suing under either the Code or the Act.⁶⁹ Furthermore, in Illinois, there were more consumer complaints about defective cars and inadequate car repairs than any other type of consumer complaint.⁷⁰ As a result, Illinois passed the New-Car Buyer Protection Act in 1983 (the "Lemon Law").⁷¹ The Lemon Law provides specific remedies for the purchaser of a "lemon."⁷²

63. In the Act, Congress declared its intent to "encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1) (1982). See *infra* text accompanying notes 116-122.

64. 15 U.S.C. § 2310 (1982). The FTC minimum guidelines require that each program maintain an index of disputes with the status of the dispute, compile statistics semiannually showing progress of disputes, and conduct an annual audit and submit it to the FTC. 16 C.F.R. § 703.7 (1977).

65. 15 U.S.C. § 2310(d)(2) (1982). The buyer may be allowed "by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended)." *Id.* The court determines what the reasonable expenses are in connection with the litigation and if attorneys' fees are appropriate. *Id.*

66. 15 U.S.C. § 2301(3)-(b) (1982). The Act, however, fails to include the Code provisions whereby the warrantor can create a warranty from a sample or model or a description of the goods. Schroeder, *supra* note 17, at 8.

67. 15 U.S.C. § 2301 (3) (1982). A dealer who enters into a service contract with the buyer within ninety days of the time of sale may not disclaim any implied warranties arising under state law. 15 U.S.C. § 2308(a) (1982).

68. 15 U.S.C. § 2308 (1982).

69. Basanta, *supra* note 47, at 18. Many states have passed "Lemon Laws" to deal with the perceived shortcomings of the Code or the Act. *Id.*

70. *Hearings on H.B. 64 Before the Civil Practice & Procedure Subcomm. of the House Comm. on the Judiciary*, 83rd Ill. Gen. Assembly (June 27, 1983) (statement of Mr. Marovitz).

71. ILL. REV. STAT. ch. 121 ½, § 1201 (1983).

72. ILL. REV. STAT. ch. 121 ½, § 1203 (1983). See *infra* text accompanying notes

The purpose of the Lemon Law is to provide an equitable remedy for the buyer while offering a "fair procedure" for both the manufacturer and the dealer.⁷³

The Lemon Law is limited to purchasers buying cars strictly for consumer uses.⁷⁴ The Lemon Law applies only to a breach of an express warranty,⁷⁵ and has no provision for implied warranties.⁷⁶ The warranty period is 12 months or 12,000 miles, whichever occurs first.⁷⁷

If the manufacturer or dealer breaches the express warranty, the consumer will receive either a replacement car or refund of the purchase price if the defective part causes a substantial impairment of the safety, value, or the use of the car.⁷⁸ One of these remedies must be given if the car has been repaired four or more times for the same defect, and the defect still exists, or the car has been out of service for thirty or more business days.⁷⁹ The buyer must, however, bring an action within 18 months of the original delivery of the car.⁸⁰

The buyer may sue either the dealer or the manufacturer, whoever provided the express warranty to the buyer.⁸¹ However, similar to the Act, the buyer must submit to the manufacturer's "informal dispute resolution procedure" before bringing a civil action if that

78-79.

73. *Hearings on H.B. 64 Before the Civil Practice & Procedure Subcomm. of the House Comm. on the Judiciary*, 83rd Ill. Gen. Assembly (June 27, 1983) (statement of Mr. Marovitz).

74. ILL. REV. STAT. ch. 121 ½, § 1202(a) (1983). The Lemon Law defines consumer as an individual who buys a new car for "transporting himself and others, as well as their personal property, for primarily personal, household or family purposes." *Id.* The Lemon Law does not provide protection to consumers who buy for business or commercial purposes. Basanta, *supra* note 47, at 19.

75. ILL. REV. STAT. ch. 121 ½, § 1202(b) (1983). The meaning of express warranty under the Lemon Law has the same meaning as the Code. *Id.* See *supra* note 21.

76. Basanta, *supra* note 47, at 25.

77. ILL. REV. STAT. ch. 121 ½, § 1202(f) (1983).

78. *Id.* § 1203(a). The standard for substantial impairment, however, is a subjective test to be determined on a case-by-case analysis supported by the evidence. Basanta, *supra* note 47, at 30. For limitation of replacement as a remedy in Illinois, see *supra* note 62.

79. ILL. REV. STAT. ch. 121 ½, § 1203(b)(1), (2) (1983). It has been suggested that setting the time frame at thirty business days for the car to be fixed is too generous to the seller and not fair to the buyer who owns a defective car. Basanta, *supra* note 47, at 53. Some commentators recommend a change to twenty business days or thirty calendar days. *Id.*

80. ILL. REV. STAT. ch. 121 ½, § 1206 (1983). This period is extended up to the number of days required for the informal dispute settlement procedure. ILL. REV. STAT. ch. 121 ½, § 1204(b) (1983). For a discussion of arbitration, see *supra* notes 63-64.

81. ILL. REV. STAT. ch. 121 ½, § 1202(b) (1983). The Lemon Law also defines seller to mean the "manufacturer of a new car, that manufacturer's agent or distributor or that manufacturer's authorized dealer." *Id.* § 1202(e). See *supra* note 37.

procedure follows the FTC's minimum guidelines for arbitration.⁸² Another requirement is that the buyer is prevented from bringing a separate cause of action under the Code if he "elects to proceed and settle" under the Lemon Law.⁸³

Although the Illinois legislature enacted the Lemon Law to protect the new car buyer beyond the protection afforded under either the Code or the Act, comparison of the statutes indicates that the Lemon Law, while broad in scope, has limitations. Furthermore, there are differences in the way each statute treats a breach of an express or implied warranty, attorneys' fees, statute of limitations, arbitration procedures and other requirements. A comparison of all three statutes will help the Illinois buyer of a lemon automobile understand the limitations and differences of each statute and determine the most advantageous course of action.

V. COMPARISON OF THE CODE, THE FEDERAL MAGNUSON-MOSS ACT, AND THE ILLINOIS LEMON LAW

State law covers every consumer warranty for consumer goods which is covered under the Act. In Illinois, every new car warranty is covered under the Act, as well as the Code and the Illinois Lemon Law. There are a number of distinctions between these three alternatives when suing for a breach of the new car warranty. The buyer's choice as to which law to sue under depends upon the type of automobile warranty given, who gave the warranty, the type of purchase made, the applicable statute of limitations, and the type of remedy desired.

A. *Express and Implied Warranties*

The Code, the Lemon Law and the Act all contain provisions for express written warranties.⁸⁴ The Code, however, is the only one of the three statutes which provides for implied warranties.⁸⁵ The Code allows for creation and limitation or modification of express⁸⁶

82. ILL. REV. STAT. ch. 121 ½, § 1204 (1983). For an informal dispute resolution procedure under the Act, see *supra* notes 63-64.

83. ILL. REV. STAT. ch. 121 ½, § 1205 (1983). The legislative intent would seem to require a narrow interpretation of this section. Basanta, *supra* note 47, at 62. The settlement language should refer to the Lemon Law's informal dispute resolution procedure. *Id.* Thus, an automobile buyer would not be barred from bringing a separate cause of action under the Code if he has not "settled the dispute to his satisfaction" through arbitration. *Id.*

84. 15 U.S.C. § 2302(a) (1982); ILL. REV. STAT. ch. 121 ½, § 1203 (1983); ILL. REV. STAT. ch. 26, § 2-313 (1979).

85. ILL. REV. STAT. ch. 26, § 2-314 (1979). See *supra* notes 23-25 and accompanying text.

86. See *supra* notes 21 and 27.

and implied warranties.⁸⁷

Alternatively, the Act states only that if written warranties are given, any implied warranties created under the Code will be enforced.⁸⁸ The Act further states that no modifications or limitations may be placed on any implied warranties arising under the Code once a written express warranty has been given.⁸⁹ This prohibition of disclaimers of implied warranties is where the Act provides the greatest degree of protection for the consumer. The manufacturer or dealer may, however, limit the duration of the implied warranty under the Act to that of the express warranty if a "limited" warranty⁹⁰ is given rather than a "full" warranty.⁹¹ The Illinois Lemon Law does not enforce any implied warranties.⁹²

Michael and Karen Blankenship⁹³ sought rescission⁹⁴ of the sales contract under section 2-314(2)(c) of the Code.⁹⁵ The Blankenships sued both the dealer and the manufacturer for breach of the implied warranty of merchantability claiming that the Ford was not fit for the ordinary purpose for which such car was to be used.⁹⁶ The court held that revocation of acceptance was appropriate because the dealer had breached the implied warranty of merchantability irrespective of the fact that the dealer had attempted to disclaim all implied warranties.⁹⁷

The Blankenships could also have brought suit under the Act if the dealer had created a written express warranty. The Act would then look to the Code for the creation of the implied warranty which, in this case, occurred when the dealer created an implied

87. See *supra* notes 23 and 28.

88. See *supra* text accompanying notes 58-59.

89. See *supra* text accompanying notes 58-59.

90. See *supra* notes 56-57 and accompanying text.

91. See *supra* notes 56-57 and accompanying text.

92. See *supra* notes 75-76 and accompanying text.

93. *Blankenship v. Northtown Ford, Inc.*, 95 Ill. App. 3d 303, 420 N.E.2d 167 (1981).

94. The Code seldom speaks of rescission. The omission of the word was intentional as stated in Comment 1 of section 2-608: "The section no longer speaks of 'rescission,' a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract." ILL. REV. STAT. ch. 26, § 2-608 (1982). The *Blankenship* court confused rescission with revocation. It is important to retain the distinction between the two terms. R. BILLINGS, *supra* note 8, § 5.3 at 89. Revocation of acceptance seeks a remedy at law generally for damages. *Id.* Rescission is an action in equity generally seeking an injunction or other appropriate remedies. *Id.* For inability of an Illinois buyer to receive an injunction under the Act and the Lemon Law when suing for replacement see *supra* note 62.

95. *Blankenship*, 95 Ill. App. 3d at 303, 420 N.E.2d at 169.

96. *Id.*

97. *Id.* at 303, 420 N.E. 2d at 170. Even though the dealer technically complied with the Code's requirements for effective disclaimers of implied warranties, the dealer would not be allowed to avoid rescission where the automobile was substantially defective in nature. *Id.*

warranty of merchantability. Because the Blankenships proved that the non-conformities substantially impaired the value of the Ford, and since the Act prohibits disclaimers of implied warranties, a suit under the Act would have reached the same result as the Blankenships' action under the Code. The Blankenships, however, could not have brought suit under the Illinois Lemon Law for breach of an implied warranty because the Lemon Law provides no protection in the case of an implied warranty.

B. *Objective vs. Subjective Standards*

The Code, the Act and the Lemon Law all have standards the courts use to determine if there has been a breach of warranty. Automobile warranties generally provide for the repair or replacement of defective parts.⁹⁸ If a defect is not fixed and the buyer chooses to sue under the Code or the Act, the standard of proof for a breach of warranty is more subjective than the objective standard incorporated into the Illinois Lemon Law. The subjective standard does not specify a time limit or number of attempted cures before an actual breach occurs. The objective standard of the Illinois Lemon Law is very precise as to duration or number of attempts to cure. Under either the Code or the Act the issue arises as to whether the dealer or manufacturer has been allowed a reasonable amount of time, or a reasonable number of attempts to cure the defect.⁹⁹ The subjective standard which the Code applies does not make clear when the buyer has the right to reject or revoke acceptance or to sue for damages.¹⁰⁰ Similarly, the Act does not define how many attempts to cure are a reasonable number, after which the buyer may bring a

98. R. BILLINGS, *supra* note 8, § 6.1 at 134-35.

99. At some point in time section 2-719(2) of the Code takes over and the remedy "fails of its essential purpose." Basanta, *supra* note 47, at 51. The buyer does not have to permit a limitless number of attempts to repair under the Code or the Act, but at what point the remedy of repair or replacement fails is not at all clear. *Id.* See also *supra* note 32. One court has held that "at some point after the purchase of a new automobile, the same should be put into good running condition, that is, the seller does not have an unlimited time for the performance of the obligation to replace and repair parts." *Riley v. Ford Motor Co.*, 442 F.2d 670, n.5 (5th Cir. 1971) (citing *General Motors Corp. v. Earnest*, 279 Ala. 299, 184 So. 2d 811 (1966)).

100. The car buyer will normally be precluded from rejecting the car after taking delivery. Basanta, *supra* note 47, at 11. However, under section 2-606(1)(a) of the Code, a buyer has a right to inspect within a reasonable time unless he waives that right. ILL. REV. STAT. ch. 26, § 2-606 (1979). One court held that the drive home from the dealer's showroom constituted a test drive thus the drive home was the inspection period and rejection was allowed when the transmission failed. See *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968). But see *Rozmus v. Thompson's Lincoln-Mercury Co.*, 209 Pa. Super. 120, 224 A.2d 782 (1966) (buyer had accepted the car when he drove it from the showroom to his home, therefore, he had no right of rejection and no grounds for revocation of acceptance because defects were not substantial).

cause of action against the dealer or manufacturer.¹⁰¹

The Lemon Law, however, sets an objective standard for determining when the buyer may sue.¹⁰² Replacement or refund must be given to the buyer if the same non-conformity has been subject to repair four or more times or the car has been out of service for thirty or more business days.¹⁰³ The objective standard which the Illinois Lemon Law provides gives the automobile buyer certainty regarding how much inconvenience he will have to suffer, and how many attempted repairs will be allowed before he may gain a remedy. A similar objective standard should be incorporated into the Code and the Act in the case of automobile purchases.

The number of times that Michael and Karen Blankenships' Ford Bronco was out of service for continuing defects would certainly go beyond any reasonable number of attempts to cure.¹⁰⁴ This would not be an issue under either the Code or the Act. If the Illinois Lemon Law had been in effect and applicable, the Blankenships would have been entitled to a remedy after four repairs, rather than suffering through eleven repairs.

If, however, the Blankenships' Ford had only been out of service for twenty-five days with only two attempts to fix the drive shaft, they could not have brought suit under the Illinois Lemon Law. The question arises as to whether this situation would satisfy the reasonable number of attempts to repair required by the Code or the Act. The courts could look to the severity of the defect to determine what is reasonable under the provisions of the Code.¹⁰⁵ If, however, the requirements of the Lemon Law are met, the certainty of remedies will provide a faster and more definitive solution to the buyer who has continuous and numerous problems. This solution will not, however, be as effective as desired if the buyer is barred from suing the remote manufacturer due to lack of privity.

C. Requirement of Privity

Although the buyer may sue the dealer or manufacturer for breach of express warranties, he may be barred from suing the remote manufacturer for breach of implied warranties for economic

101. The Act only states that the consumer may elect the remedy if the warrantor breaches the warranty after a "reasonable number of attempts" to repair the car. 15 U.S.C. § 2304(a)(4) (1982).

102. The Lemon Law's objective standard prescribes when the seller has "presumptively had a reasonable opportunity to repair the car." Basanta, *supra* note 47, at 52.

103. ILL. REV. STAT. ch. 121 ½, § 1203(b)(1)-(2) (1983).

104. See *supra* text accompanying notes 1-5.

105. See *infra* text accompanying note 143.

injury due to lack of privity.¹⁰⁶ The Illinois Supreme Court recently, in *Szajna v. General Motors Corp.*,¹⁰⁷ declined to abolish the requirement of privity for actions brought under the Code in implied warranty economic-loss cases.¹⁰⁸ The court did hold, however, that where a Magnuson-Moss written warranty had been given, the non-privity consumer would be allowed to maintain an action on an implied warranty against the manufacturer.¹⁰⁹ The court stated that "under Magnuson-Moss, a warrantor, by extending a written warranty to the consumer, establishes privity between the warrantor and the consumer which, although limited in nature, is sufficient to support an implied warranty under sections 2-314 and 2-315 of the UCC."¹¹⁰ The Illinois lemon automobile buyer who received a Magnuson-Moss warranty may now bring an action for economic injury resulting from breach of an implied warranty.

The public policy basis for allowing the lemon automobile buyer to sue for economic injury resulting from breach of an implied warranty was set forth in an earlier case, *Rothe v. Maloney Cadillac, Inc.*¹¹¹ In *Rothe*, the Illinois Appellate Court for the First District, Second Division, held that the absence of privity between an automobile buyer and the remote manufacturer did not bar recovery for economic loss suffered as the result of a breach of implied warranties.¹¹² The *Rothe* court reasoned that due to public policy consider-

106. See *supra* notes 37-42 and accompanying text for analysis of privity requirement under the Code.

107. *Szajna v. General Motors Corp.*, 115 Ill.2d 294, 503 N.E.2d 760 (1986).

108. In *Szajna*, the Illinois Supreme Court adopted the rationale that if a party sues under the UCC for breach of implied warranties, "recovery for economic loss must be had within the framework of contract law [rather than tort law]." *Id.* at 304, 503 N.E.2d at 764. Since implied warranties run from the dealer to the buyer and the buyer is not left without a remedy against the dealer, the buyer will be barred from bringing an action against the remote seller under the UCC. *Id.* at 306, 503 N.E.2d at 765.

109. *Id.* at 315, 503 N.E.2d at 769.

110. *Id.* at 315-16, 503 N.E. 2d at 769.

111. *Rothe v. Maloney Cadillac, Inc.*, 142 Ill. App. 3d 937, 492 N.E.2d 497 (1986).

112. *Rothe*, 142 Ill. App. 3d at 942, 492 N.E.2d at 500. The First District Appellate Court reversed its earlier decision in *Szajna v. General Motors Corp.*, 130 Ill. App. 3d 173, 474 N.E.2d 397 (1985), *rev'd*, 115 Ill.2d 294, 503 N.E.2d 760 (1986). In *Szajna*, the appellate court stated that until the Illinois Supreme Court rules on the viability of the privity doctrine, it is not this court's decision to rule contrary to recognized law in Illinois. *Szajna*, 130 Ill. App. 3d 177, 474 N.E.2d at 400. The court held that the privity doctrine remains a requirement in actions for direct economic loss. *Id.*

One year later, the same court in *Rothe* held that the earlier case did not consider the "public policy ramifications in retaining the privity requirement." *Rothe*, 142 Ill. App. 3d at 941, 492 N.E.2d at 500. The court decided to remove privity as a bar to suit for economic loss, and in doing so, followed the Illinois Supreme Court decision in *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982). The supreme court in *Redarowicz* held that privity was not a bar to suit against a builder-realtor for breach of an implied warranty of habitability. *Id.* at 183, 441 N.E.2d at

ations and changing economic conditions, an automobile buyer should be allowed to sue the automobile manufacturer who placed the defective car into the stream of commerce.¹¹³ The court went on to state that public policy requires that consumers be protected against latent defects and products which may be unsafe and inherently dangerous.¹¹⁴ The decisions in *Szajna* and *Rothe* recognized the need to enforce implied warranties against remote automobile manufacturers who place defective automobiles into the stream of commerce regardless of traditional privity requirements.¹¹⁵

The inconvenience and economic loss which the purchaser of a lemon suffers can, as in the case of the Blankenships, be substantial. Automobile manufacturers should not be shielded from liability for this type of economic loss. The type of litigation, however, which occurred in both the *Szajna* and the *Rothe* cases, might be avoided through the use of informal dispute resolution procedures.

D. Arbitration

A major difference between the Code, the Act, and the Illinois Lemon Law lies in the provisions for arbitration. Under the Code, the buyer is not required to submit to arbitration prior to bringing a civil suit against the dealer or manufacturer.¹¹⁶ Both the Act and the Lemon Law, however, provide for informal dispute resolution procedures.¹¹⁷ These two statutes allow automobile manufacturers to establish informal dispute resolution procedures.¹¹⁸ If the procedure

330. The supreme court in *Szajna*, however, held that *Redarowicz* "created a limited extension of the implied warranty" and would not extend the holding in *Redarowicz* to the situation in *Szajna* for actions brought under the UCC. *Szajna*, 115 Ill.2d 294, 503 N.E.2d 760 (1986). Thus, the Illinois Supreme Court limited the applicability of *Redarowicz* and *Rothe* to recovery for breach of implied warranties brought under the Act against the remote manufacturer. Other jurisdictions do allow, however, a buyer to sue a remote manufacturer for direct economic loss. See generally *Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. 1967) (absence of privity between Ford Motor Company and purchaser in breach of implied warranty action is no bar to suit); *Scheuler v. Aamco Transmissions, Inc.*, 1 Kan. App. 2d 525, 571 P.2d 48 (1977) (lack of privity between purchaser and manufacturer who advertises is no bar to bringing an action against manufacturer); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965) (buyer suing remote manufacturer of truck tractor not barred by absence of privity); *Spring Motors Distributors v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985) (commercial buyer need not prove privity with manufacturer in order to be able to sue for breach of express or implied warranties).

113. *Rothe*, 142 Ill. App. 3d at 940, 492 N.E.2d at 499.

114. *Id.*

115. *Szajna*, 115 Ill. 2d 294, 503 N.E.2d 760; *Rothe*, 142 Ill. App. 3d 937, 492 N.E.2d 497.

116. The Code has no express provision for arbitration. However, the Code allows for freedom of contract such that the contracting parties may write an arbitration clause into the contract. ILL. REV. STAT. ch. 26, § 1-103(1979).

117. See *supra* notes 63-64 and 82 and accompanying text for informal dispute resolution procedure under the Act and the Lemon Law.

118. See *supra* notes 63-64 and 82.

follows the minimum guidelines established by the FTC, then the buyer must submit to arbitration before bringing suit.¹¹⁹ An Illinois automobile buyer who does not want to submit to an arbitration procedure which meets the FTC guidelines has no option except to sue under the Code. If, however, the automobile manufacturer has not established an FTC approved dispute resolution procedure, the buyer may also bring suit under the Act or the Lemon Law. For example, in the case of the Blankenships, if Ford had had an approved arbitration procedure in place, the Blankenships would have been precluded from suing under the Act or the Lemon Law without first submitting to arbitration.

Arbitration procedures may help both the buyer and the manufacturer if a favorable resolution results for both parties.¹²⁰ Neither side will incur attorneys' fees or court costs and the time to resolve the dispute generally will be less than the time required to resolve a lawsuit.¹²¹ If the buyer, however, is required to submit to arbitration, and the outcome is not favorable to the buyer, much time has been lost while the buyer remains stuck with a lemon.¹²² Furthermore, the outcome of arbitration does not bind the manufacturer, consequently the buyer may be forced to bring suit regardless of the outcome of the arbitration.¹²³

Although not binding, the outcome of the arbitration is admissible into evidence should the buyer elect to bring suit after going through the arbitration procedure.¹²⁴ Since the car manufacturer must establish and conduct informal dispute resolution procedures, an issue also arises regarding the degree of confidence a buyer can have in receiving an unbiased decision through the arbitration procedure.¹²⁵ The potential problems and conflicts involved in informal

119. See *supra* notes 63-64 and accompanying text.

120. Initially, the dealer is the key decisionmaker when a buyer brings in a new car for repair. Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 Wis. L. Rev. 1006, 1015 (1968). Manufacturers rarely get involved in the beginning except for their interest in the outcome since the manufacturer will reimburse the dealer for warranty repairs made. *Id.* at 1016. The effectiveness of an informal dispute resolution procedure depends upon the willingness of the buyer to submit to the procedure. One purpose of arbitration is to regulate manufacturer's warranty administration practices and induce them to provide an avenue for the buyer that will reduce the number of disputes going to court. *Id.* If the outcome is consistently in favor of the car owners when there are legitimate claims, more owners may be willing to submit to arbitration. *Id.* at 1077. However, drafters of proposed arbitration schemes are doubtful that the dispute settling mechanisms will be successful. *Id.*

121. R. BILLINGS, *supra* note 8, § 4.3 at 67.

122. On the other hand, if the outcome is favorable to the buyer, arbitration is generally quick, private and convenient, *Id.* § 4.3 at 68.

123. *Id.* § 4.2 at 66. The decision of the arbitration panel also establishes no precedent for future buyers of lemons. *Id.* § 4.3 at 68.

124. *Id.* § 4.2 at 67.

125. A potential conflict arises because the mediators are employed by the auto-

dispute resolution procedures should cause the buyer to carefully weigh the alternatives before submitting to arbitration. One important factor a buyer should consider before submitting to arbitration is the possibility of an award of attorneys' fees.

E. Attorneys' Fees and Costs

One significant advantage of suing under the Act is that the court may award attorneys' fees and all other costs of litigation if these expenses are deemed appropriate.¹²⁶ Neither the Code nor the Lemon Law allow the award of attorneys' fees or expenses.¹²⁷ Depending upon the cost of litigation as compared to the purchase price of the car or the cost of repairs, it may be necessary to receive attorneys' fees and expenses to make it economically feasible to bring suit. Consequently, it is more advantageous for the buyer to sue under the Act because the cost of litigation often outweighs the cost of repair or replacement.¹²⁸

F. Other Issues

The purchaser of a lemon automobile must also consider additional factors, as well as litigation expenses, when determining whether to bring action under the Code, the Act, or the Illinois Lemon Law. One factor is whether the buyer is the original or a subsequent purchaser; another is the applicable statutes of limitation. The automobile buyer must also consider whether the car was purchased for business or personal use. Under the Lemon Law the buyer will not be able to sue for a breach of warranty if the car is bought for business or commercial purposes.¹²⁹

Alternatively, under the Act, the "normal" use of the goods is determined from the viewpoint of the seller or manufacturer.¹³⁰ An

mobile manufacturer even though they are responsible for making unbiased decisions.
Id.

126. See *supra* note 65.

127. Although not a universal practice, attorneys' fees may be recoverable as incidental or consequential damages in automobile cases for revocation of acceptance under the Code. R. BILLINGS, *supra* note 8, § 5.51 at 130.

128. Whitford, *supra* note 120, at 1077. Fees are being awarded in some automobile warranty actions brought under the Act. See *Ventura v. Ford Motor Corp.*, 173 N.J. Super. 501, 414 A.2d 611, *aff'd* 180 N.J. Super. 45, 433 A.2d 801 (1981) (attorneys' fees only awarded for \$5,165); *Massingale v. Northwest Cortez, Inc.* 27 Wash. App. 749, 620 P.2d 1009 (1980) (no specific amount published but both costs and attorneys' fees awarded).

129. ILL. REV. STAT. ch. 121 ½, § 1202(a) (1983). The Code will cover any "transaction in goods." ILL. REV. STAT. ch. 26, § 2-102 (1979). See *supra* note 18.

130. Schroeder, *Private Actions under the Magnuson-Moss Warranty Act*, 66 CALIF. L. REV. 1, 4 (1978). The actual use of the product will make no difference as long as the "normal" use is for a consumer purpose. *Id.*

automobile, whether purchased for personal or business use, is "normally" used for personal transportation and should be considered a consumer good.¹³¹ Consequently, a buyer, even though purchasing a car for business, should be able to sue the dealer or manufacturer for breach of warranties under the Act.

The Code and the Act allow the original purchaser to sue for breach of warranty.¹³² Both statutes also allow subsequent purchasers to sue providing the car is still under the statutory warranty period.¹³³ The Illinois Lemon Law allows only the original purchaser to sue for a breach of the express warranty.¹³⁴

A buyer who proceeds and settles under the Lemon Law, however, is thereafter barred from bringing an action under the Code.¹³⁵ The buyer is not, however, barred from proceeding simultaneously under the Lemon Law and the Act or the Act and the Code¹³⁶ so long as the action is commenced within the allowable periods under the applicable statutes of limitation.

The statute of limitations under the Code provides that an action for breach of warranty must be commenced within 4 years after the cause of action has accrued.¹³⁷ Because there is no statute of limitation provision in the Act, respective state statutes of limitation apply.¹³⁸ Under the Illinois Lemon Law, the automobile buyer must bring action within 18 months of the date of original delivery of the car.¹³⁹ If there are major latent defects of a new car that cannot be

131. *Id.*

132. J. WHITE & R. SUMMERS *supra* note 18, § 11-2 at 400.

133. *Id.* Illinois follows Alternative A of § 2-318 of the Code which reads:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

ILL. REV. STAT. ch. 26, § 2-318 (1979). A subsequent purchaser does not fall into category A and may be found by a court to be in non-privity with the seller, therefore, would not be able to sue the seller for breach of express or implied warranties. J. WHITE & R. SUMMERS *supra* note 18, § 11-2 at 400.

The Act, on the other hand, provides that any consumer buying a consumer good may bring an action for breach of an express written warranty, an implied warranty or a service contract. 15 U.S.C. § 2310(d)(1) (1982). This provision thus allows subsequent consumer purchasers to bring an action for breach of a warranty.

134. ILL. REV. STAT. ch. 121 ½, § 1202(a) (1983). A consumer must purchase directly from the seller to be able to bring suit for a breach of any express warranty. *Id.*

135. *Id.* § 1205 (1983). See *supra* note 83.

136. 15 U.S.C. § 2311(b)(1) (1982). The text of 2311(b)(1) reads that "nothing in this section shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." *Id.*

137. ILL. REV. STAT. ch. 26, § 2-785 (1979). A cause of action accrues when the breach occurs which happens upon tender of delivery. *Id.*

138. 15 U.S.C. § 2311(b)(1) (1982).

139. ILL. REV. STAT. ch. 121 ½, § 1206 (1983). See *supra* note 80.

discovered within 18 months of the original delivery, the buyer will be barred from bringing suit under the Lemon Law.

VI. PROPOSED CHANGES TO THE CODE, THE MAGNUSON-MOSS ACT AND THE ILLINOIS LEMON LAW

The buyer who purchases a lemon may find it difficult to proceed with a cause of action against the dealer or manufacturer for breach of warranties regardless of whether he brings action under the Code, the Act or the Illinois Lemon Law. Each of these three alternatives have limitations and do not completely address the problems facing a new car buyer who has bought a lemon. The following proposed changes are suggested with the goal of making consumer remedies more specific and adequate.

A. *The Code*

One proposed change under the Code would provide for the award of attorneys' fees and costs of litigation in the case of consumer products.¹⁴⁰ Traditionally, attorneys' fees are not recoverable in contract actions.¹⁴¹ Because the cost of litigation often exceeds the cost of the product, or the cost to repair the product, legal action cannot be pursued.¹⁴² The expenses of litigation actually end up protecting automobile manufacturers and dealers who have the resources to litigate the matter. Thus, by providing for attorneys' fees, the Code will allow relief to consumers who could not otherwise afford to seek relief.

Second, under the Code, the dealer's or manufacturer's right to repair a defective automobile¹⁴³ should be limited, based upon the severity of the defect. For example, a dealer should be given several attempts to cure a broken radio. On the other hand, however, the dealer should have only one attempt to repair or replace a defective brake or steering system which potentially may endanger the lives of the driver and passengers of the automobile. This approach would force dealers to fix a potentially dangerous situation immediately while allowing dealers more latitude in repairing minor problems which do not present a safety problem.

140. See *supra* note 127.

141. R. BILLINGS, *supra* note 8, § 5.51 at 130.

142. See *supra* notes 127-128 and accompanying text.

143. The seller must be given a "reasonable time to substitute a conforming tender" after buyer makes a rejection. ILL. REV. STAT. ch. 26, § 2-508 (1979). See *supra* note 99.

B. Magnuson-Moss Act

While the Code should be modified to limit a dealer's right to repair a defective automobile to protect the safety of the consumer, the Act should provide a more comprehensive explanation of "full" and "limited" warranties to prevent consumer deception.¹⁴⁴ Currently, the Act allows a warrantor to label his warranty as a full warranty, while simultaneously disclaiming liability for consequential damages.¹⁴⁵ Furthermore, while the Act does not require that any express written warranty be provided, potential liability for implied warranties under state law discourages retailers from making written warranties.¹⁴⁶ This defeats one of the purposes of the Act: to prohibit disclaimers of implied warranties.¹⁴⁷ The Act should require an express written warranty with some minimum remedy available to the buyers.

The Act should also require automobile manufacturers to establish FTC approved informal dispute resolution procedures.¹⁴⁸ This requirement would reduce the amount of litigation involving lemon automobiles, while attempting to fairly resolve the dispute. Because the automobile manufacturer establishes and administers the procedure, and since the buyer generally has inherently unequal bargaining power, the result of arbitration should be binding at the buyer's choice.¹⁴⁹ This requirement should also be incorporated into the Lemon Law.

C. Illinois Lemon Law

The Lemon Law should adopt the changes proposed for the Act regarding alternative dispute resolution procedures. The Lemon Law should also revise its statutory warranty period of 12 months or 12,000 miles and the 18 months statute of limitations.¹⁵⁰ Many car

144. Roberts, *The Magnuson-Moss Federal Warranty Act and Failure of its Essential Purpose*, *Uniform Commercial Code* 2-719(2), 33 BUS. LAW. 1845, 49 (1978). Misleading labeling may not allow a consumer to make an informed decision when comparing alternative products. *Id.*

145. 15 U.S.C. § 2304(a)(3) (1982). Roberts, *supra* note 144, at 49. The ability to disclaim liability is limited by section 2-719 of the Code which disallows any disclaimer of consequential damages for personal injuries. *Id.*

146. Dealers and retailers can circumvent liability for implied warranties simply by not offering any written express warranties. *Id.* at 1848.

147. Schroeder, *supra* note 17, at 2.

148. Most automobile manufacturers have established informal dispute resolution procedures but not all of them are FTC approved. R. BILLINGS § 4.2 at 67. One way to make the procedure more effective and get buyers to use the procedure is to have the manufacturers publish in the owner's manual the availability of arbitration and how the system works. Whitford, *supra* note 120, at 1080.

149. See *supra* note 125 and accompanying text.

150. The buyer's rights end at 12 months or 12,000 miles even though most car warranties today extend well beyond this statutory warranty period. R. BILLINGS, §

manufacturers today provide a five year or 50,000 mile warranty period.¹⁵¹ The Lemon Law does not allow for enforcement of these extended warranties after the statutory limitation of 12 months or 12,000 miles has elapsed. Furthermore, any cause of action brought under the Lemon Law must be brought within 18 months of the date of the original delivery of the automobile to the consumer.¹⁵² The purpose of the Lemon Law is to provide consumer protection with specific and adequate remedies during the manufacturer's warranty period.¹⁵³ This objective, however, will be defeated if the statutory warranty period and the statute of limitations does not trace the warranty period given by the manufacturers. Buyers will be barred from bringing a cause of action for breach of express warranties after the statutory warranty period and statute of limitations periods even though the manufacturer's warranty period is still in effect.

Currently, the Lemon Law provides protection for only cars. Because motorcycles and pickup trucks are used primarily for the same purpose as cars, personal transportation, the Lemon Law should also protect purchasers of new motorcycles and pickup trucks.¹⁵⁴ The definition of consumer under the Lemon Law specifically relates to the purpose of "transporting himself and others."¹⁵⁵ If motorcycles and pickup trucks are included within the scope of the Lemon Law, this definition and purpose will be fulfilled.

Finally, the Illinois Lemon Law should not bar a separate cause of action under the Code if the buyer proceeds and settles under the Lemon Law.¹⁵⁶ The Code and the Act have no such limitations on the buyer.¹⁵⁷ The buyer should not be forced into an election of remedies.¹⁵⁸ If the buyer proceeds and settles¹⁵⁹ for less than his full economic losses, he should not be precluded from full compensation

6.1 at 135. The buyer's rights are thus limited and a successful claim may be precluded under the Lemon Law if a latent defect is discovered but the buyer failed to bring an action within the statutory warranty period. Basanta, *supra* note 47, at 39.

151. R. BILLINGS, *supra* note 8, § 6.1 at 135.

152. ILL. REV. STAT. ch. 121 ½, § 1206 (1983).

153. See *supra* notes 69-73 and accompanying text.

154. The Lemon Law excludes motor homes, mini-motor homes, van campers, motorcycles and pickup trucks. Basanta, *supra* note 47, at 27-28. Many of these vehicles are purchased by consumers for personal use and should be protected under the same law that protects car buyers. *Id.* at 28.

155. ILL. REV. STAT. ch. 121 ½, § 1202(a) (1983). See *supra* note 74 and accompanying text.

156. See *supra* note 83.

157. See *supra* note 136.

158. Basanta, *supra* note 47, at 62. See *supra* note 83. The buyer should be aware that alternative remedies are available under other theories as well, such as recovery based on a theory of strict tort liability or for deceit and fraud. J. WHITE & R. SUMMERS, *supra* note 18, 9-1 at 326.

159. ILL. REV. STAT. ch. 121 ½, § 1205 (1983).

under other laws.¹⁶⁰ The rationale supporting the Lemon Law's election of remedies is unclear and this limitation should be removed.

VII. CONCLUSION

An Illinois buyer of a lemon automobile has three avenues for remedy: the Code, the Act, and the Illinois Lemon Law. Each of these avenues presents different limitations and restrictions. Consequently, the best course of action is determined only after careful consideration of the individual facts and circumstances.

Due to the great number of consumer complaints regarding defective automobiles and inadequate repairs, as well as the inherently superior bargaining position of the manufacturers and dealers, several changes are warranted in each of the statutes. First, the buyer of a lemon should not be precluded from suing the manufacturer due to lack of privity. The manufacturer who sends a lemon into the stream of commerce should be accountable to the consumer who ends up with the lemon. Second, the informal dispute resolution procedures provided for in the Act and the Illinois Lemon Law should be made binding at the discretion of the buyer. Finally, the applicable statutes of limitations should be extended to trace the commonly available 5 year or 50,000 mile warranties. This will increase the effectiveness of the statutory provisions, protect the buyer from latent defects, and conform with the purposes of the statutes.

To increase the buyer's chances of full recovery of his economic losses from ownership of a lemon which is still covered under the manufacturer's warranty, he must avail himself of all the available statutory causes of action. Generally, the Illinois buyer of a lemon automobile should, in his complaint, plead breach of express and implied warranties under the Code. Where possible, the buyer should include copies of any express warranties, and manufacturers' advertisements which might create an express warranty. The complaint should state specifically how many times the automobile has been out of service for the same, or different, defects. The buyer should also plead, in the alternative, breach of express and implied warranties under the Act. A request for an award of attorneys' fees and costs should be included in the complaint. Finally, the buyer should plead non-compliance with the Illinois Lemon Law, stating that the buyer has a right to elect refund of the purchase price or replacement of the automobile. The buyer, having made these

160. See *supra* note 83.

pleadings, will have covered all of the available statutory causes of action.

Lisa K. Jorgenson